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Papers from the March 2003 Counter-Terrorism & Civil Liberties Conference

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Preface

This issue contains the articles developed from papers presented at the Conference on Counter-Terrorism & Civil Liberties. The impetus for holding the conference can be traced back to the fall of the year 2000. It was at this time that several instructors in the Criminal Justice Department believed that it would be an intriguing challenge to put together an international symposium on corrections. In the initial planning stage of this event, we examined the University's calendar to find a date that would not conflict with other events. We chose as the beginning date of the Symposium a date we considered rather unassuming, not a holiday, not an anniversary date for any particular historical event. As far as we could determine, we selected a date for which no one had prepared an event that might interfere with the beginning day of our symposium. We chose the date of September 11, 2001.

On the morning of September 11, 2001, five minutes before the scheduled beginning time of that Symposium, I first started hearing the reports of those incomprehensible events. Instead of canceling the Symposium, for which many people had invested much time and energy, we decided to continue. Once the extent of the destruction of the terrorist attacks was determined, many of the conversations among the participants at the symposium turned to considering the possible reactions and counter-terrorism measures of the U.S. and other countries. The participants adopted the spirit of one of the international experts, who prefaced her prepared remarks to the audience by saying that the gathering of Americans and Internationals at the September 11 Symposium, is about "exactly the opposite of the terrorist attacks … that displayed a total disregard for human lives and humane treatment." This gathering, she continued, "is about finding common denominators for humane treatment that will sustain, instead of destroy, the ethical standards of us as a society."

It is within this spirit of the international pursuit of those ethical and just standards that will sustain, not just the American society, but our international society, that the Institute of Justice & International Studies was created with the support of Central Missouri State University. It is within this spirit that the Conference on Counter-Terrorism & Civil Liberties was organized.

Americans are aware the U.S. is not the first country to experience terrorist attacks and threats. Other countries have profound experience dealing with the impact of responses to terrorism on civil liberties. The U.S. prior to September 11, 2001, certainly experienced large-scale domestic terrorism, as in the 1995 bombing of the Murrah Federal Building in Oklahoma City. Prior to September 11, 2001, the U.S. had also experienced the effects of terrorist attacks in international settings, with the suicide attack of the USS Cole in Yemen and the bombings of US embassies in Africa. The terrorist attacks of September 11, 2001, in addition to the human and physical destruction, destroyed any remaining illusion that the U.S. could escape the kind of terrorist attacks that have plagued many other countries on its own soil.

Today we see ourselves caught in the conflict between two kinds of warnings. The first warning given to us long ago by one of this country's founding fathers, Benjamin Franklin, who wrote that those who would trade liberty for security deserve neither liberty nor security. The second warning was given by the IRA to British Prime Minister Margaret Thatcher in 1984 after a failed attempt to assassinate her. In a statement following this assassination attempt, the IRA informed the Prime Minister that "Today we were unlucky, but remember, we only have to be lucky once. You will have to be lucky always."

How do we resolve the dilemma posed by these warnings? This Conference sought to examine the impact upon civil liberties of the counter-terrorism responses of the international community, and the United States in particular, to September 11 by exploring their impact upon civil liberties. The need for examining these issues is clearly widely felt. The Conference included

papers and presentations from individuals from four continents in addition to those from across the entire U.S.

Among the invited speakers to the Conference who also provided articles for this issue were **Nadine Strossen**, President of the ACLU, and **David O'Brien**, the Spicer Professor of Political Science at the University of Virginia. Other invited speakers included **Ali Wardak**, born in Afghanistan and presently teaching criminology at the University of Glamorgan. Three individuals with connections to the FBI made presentations to the Conference: **Kevin Steck** has been employed with the FBI since 1984 and today serves as the Chief Division Counsel of the Kansas City FBI Field Office, **Deborah Stafford** has dedicated 18 years to counter-terrorism, which include being the first Chief of the Osama Bin Laden unit at FBI headquarters, and **Dennis Anderson** (presently a member of the CMSU Criminal Justice faculty) who, based upon his 29 years of service to the FBI, presented a history of FBI counter-terrorism practices. **Alice Greife** Dean of Central's College of Applied Sciences and Technology and **Bonnie Martin**, Project Manager and Bioterrorism Emergency Response Planner for the Kansas City Health Department, jointly made a presentation on response planning to bioterrorism. **W. Ronald Olin**, Chief of Police in Lawrence, Kansas, spoke on counter-terrorism planning at the local police department level. **Richard Holden**, chair of Central's Criminal Justice Department presented on his knowledge of domestic U.S. terrorism. **John Smead**, on the faculty of the Communications Department at Central, presented on Hollywood's attempts to balance counter-terrorism and civil liberties**.**

Whatever success the Conference had in examining these issues is due, of course, to the papers and invited speakers. However, more importantly it could not have been even accomplished without the hard work of those involved in the labors required for the organizing and development of this event. Central Missouri State University should be proud of the resources it has to enable this institution to host a successful academic conference. Beyond the superb physical space of the campus, the personnel of this institution were able to showcase their skills and talents in the hosting of this conference. My enduring gratitude goes to faculty members of the three academic departments involved in the development of the Conference: Political Science/Geography, Safety Science, and Criminal Justice. Most importantly, one cannot say enough about the students who actively participated and devoted generous amounts of time and energy to this conference. Central should be very proud of these unflaggingly hard-working individuals.

Donald H. Wallace, 2003

Introduction To This Issue

This issue of the Journal of the Institute of Justice & International Studies is a collection of several of the Conference papers and presentations. The articles are arranged in three groupings.

The first group of articles provides various overviews and theoretical perspectives for examining the effects of counter-terrorism policies on civil liberties. In the first article **Nadine Strossen** provides an exhaustive overview of the recent counter-terrorism measures and the activities of the nation's largest organization devoted to the protection of civil liberties. **David O'Brien** in his

article provides a historical perspective of the reactions of the U.S. judiciary in earlier times of crises this country has experienced. **Michael Penrod** provides an overview that could function as an introduction for the conference itself, citing the conflicting expectations placed upon professional public administrators in the aftermath of September 11 he examines the implications of these events for the training of public administrators at institutions such as CMSU. **Tobias T. Gibson, Juan Gabriel Gómez-Albarello,** and **Frances B. Henderson** find that recent counter-terrorism measures demonstrate a failing in the basic foundations of democracy and offer suggestions of how democracy can replace the military in governing the United States. **Arthur Jipson** examines through a content analysis of the literature of the extreme political right and left-wing in the United States the differing perspectives on the long-term consequences on social, political, and civil rights in American society.

The second group of essays examines U. S. domestic counter-terrorism policies and their impact on civil liberties. In his article **James Staab** evaluates the constitutionality of the Bush Administration's order allowing for military trials of aliens suspected of or connected with terrorist acts against the U.S. A number of papers focus on specific aspects of recently enacted counter-terrorism legislation. In his broad overview of the USA PATRIOT Act **Tom Rossler** provides an evaluation of the closely tied issues of the potential effectiveness of this legislation's changes in the relationship between intelligence and law enforcement and the impact it will have on civil liberties. In her article, **Anna Oller** examines the impact of two pieces of counter-terrorism legislation, the USA Patriot Act of 2001 and the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, upon academic research and teaching in the biological sciences. Co-authors **Dino Bozonelos** and **Galen Stocking** discuss the enhanced ability derived from the Cyber Security Enhancement Act of 2002 for government agencies to put pressure on Internet Service Providers. **Scott White** in his article observes the concerns swirling through America's libraries due to the increased surveillance authority provided federal law enforcement by the USA PATRIOT Act.

A third grouping of articles involves various international and cultural dimensions regarding the issues of the impact of counter-terrorism measures. **Andrew Hayne** examines counter-terrorism efforts in various forms as they have evolved in Australia, particularly in regard to the impact upon the privacy rights of Australians. **Keshav Bhattarai** and **Gunanidhi Nyaupane** delineate the history and the present day impacts of the counter-terrorism measures their native country of Nepal has had to employ. By focusing on the counter-terrorism measures used by the Russian officials in the October 2002 terrorist attack in a Moscow theater, **Georgi Popov** examines the international legal regime that regulates the use of chemical weapons. **Tseggai Isaac** provides a historical overview of fundamentalist Islam and sees a challenge in the call for modification of its evangelizing quest in such a way that its adherents will not feel compelled to seek extralegal means to achieve its goals. **Hans Offerdal** uses his international perspective to critique U.S. counter-terrorism measures and their impact upon the international image that the U.S. has long enjoyed as a beacon of human rights. Lastly, **Hansje Plagman** in her article examines the legality of the counter-terrorism measures of the U.S. in the context of international law, focusing on their comparison to the internationally recognized norms of the right to life and the prohibition of torture.

The on-line version of this issue of the Journal (located at http://www.cmsu.edu/cjinst) contains additional articles. Abstracts of these on-line articles follow the full-length articles appearing in this print version.

It has been both a pleasure and a challenging educational experience to edit this issue of the Journal. Each of these articles adds considerably to our knowledge of the innumerable issues involved in the aftermath of September 11, 2001, and the challenge that counter-terrorism measures present to all who value liberty. My hope is that the reader will come away with a greater understanding, if

not appreciation, for the concerns raised in these articles.

Donald H. Wallace, 2003.

About the Authors

Dino Bozonelos is a part-time faculty member at California State University, San Bernardino (CSUSB) and Victor Valley Community College. As a graduate of the National Security Studies Program at CSUSB, he has continued research in Islamic politics and terrorist movements. Professor Bozonelos has made a number of conference presentations from the American University in Cairo, Egypt to the U.S. Military. He speaks Greek, Spanish, and English and is currently learning Arabic and Serbo-Croatian.

Tobias T. Gibson received his B.A. (with high honors) from Indiana University in political science and history. He is currently a Ph.D. candidate in political science at Washington University in St. Louis. His primary area of interest is American politics, with a focus on the judicial and executive branches.

Juan Gabriel Gómez-Albarello is a lawyer and graduate student in political science at Washington University in St. Louis. He worked for Francisco Rojas, an indigenous representative of the Colombian Constitutional Assembly (1991) and for the United Nations Commission on the Truth for El Salvador (1992-93). He was also researcher at the Institute of Political Studies at the National University, in Colombia (1995-99).

Andrew Hayne is currently a graduate student in the Faculty of Law, University of Sydney, studying for a Master of International Law. Andrew has a background in public administration and policy analysis, including areas such as privacy, information and broadcasting. This experience includes five years in a research position in the Graduate School of Management, University of Western Sydney, as well as policy and regulatory positions with the Australian federal government. He has presented at a number of international conferences, predominately in the area of public administration, and his co-edited volume Essays in Economic Globalization, Transnational Policies and Vulnerability, was published by IOS Publishers in 1999. In 2002, Andrew was involved in formulating a response from the Australian Federal Privacy Commissioner to counter-terrorism initiatives in that country, including the Commissioner's submission to a Senate inquiry into draft legislation.

Frances B. Henderson earned her B.A. from Syracuse University in International Relations and a M.A. from Cornell University in Africana Studies. She is currently ABD at Washington University in St. Louis and specializes in African politics, women's movements and political theory.

Tseggai Isaac is an Associate Professor of Political Science at the University of Missouri –Rolla. He earned his undergraduate degree from Olivet Nazarene University in Kankakee, Illinois and his graduate degree from the University of Missouri-Columbia with specialization in Public Policy and Political Economy specializing in the Horn of Africa and the Middle East. He has written book reviews, book chapters, and encyclopedia entries on topics about Eritrea and Ethiopia. He is a native of Eritrea, Northeast Africa.

Art Jipson is an assistant professor of sociology and an affiliate of the criminal justice studies program at the University of Dayton. He received his Baccalaureate from the University of Minnesota (1988) and his MA (1991) and PhD. (1995) from Bowling Green State University. He teaches collective behavior, sociological

theory, sociology of extremism, criminology, comparative criminal justice, white-collar crime, and corrections. His research interests include white racial extremism, hate and bias crime, collective and deviant behavior, Internet communities, white-collar and corporate crime, popular music and the recording industry, humanist and Internet pedagogy, and roadside memorials. He has published articles in the American Journal of Criminal Justice, Journal of Criminal Justice Education, Research in Political Sociology, The Justice Professional, and The International Review of Law, Computers and Technology. Jipson also co-edited a special issue of Sociological Focus with Paul Becker (May 2000 33: 2) on white racial extremism.

Keshav Bhattarai was Born and raised in Nepal's Arghakhanchi district. He earned his Bachelor of Science (Biology), BA (Economics), and B. L (Bachelor of Law) degrees from Tribhuvan University, Kathmandu. He earned an Associate of Indian Forest College (AIFC) degree from Indian Forest College, Dehradun, India and M. Sc. degree in Natural Resource Management from Edinburgh University, Scotland, UK. He also has two years training in aeronautical radio maintenance and communication from International Civil Aviation Organization. Keshav earned a Ph.D. in Geography from Indiana University, Bloomington, Indiana in 2001. Keshav worked as forest officer in Nepal for 14 years. Currently, he is an Associate Professor of Geography at Central Missouri State University. His specialty areas are the applications of remote sensing and Geographic Information Systems (GIS) in social sciences and Land Use and Land Cover Changes.

Gunanidhi Nyaupane comes from the Arghakhanchi district of Nepal. Currently, Gunanidhi is Associate Professor and Campus Chief of Nepal Law Campus, Kathmandu, Nepal. He earned an ML (Master of Law) from the University of Delhi, India, an MA (Master of Political Science) and a DL (Diploma of law) from Tribhuvan University, Kathmandu, Nepal. He is an advocate (Attorney) in Nepal's Supreme Court. Gunanidhi served as a Chairperson of the Commercial Law Instruction Committee of the Nepal Law Campus from 1996 to 2002. He was an elected General Secretary of the Nepal University Teachers Association from 1999 to 2001. Gunanidhi is an author of two books--Property Law and Procedural Law in Nepal. He has over 100 articles published in Nepali and English languages in different Journals in Nepal. Gunanidhi has completed several research projects in Nepal including the Assessment of the Functioning of the Court System in Nepal, 1995, Land Information Systems in Nepal, 1999, and Baseline Survey of the Pilot Courts in Siraha, Chitawan, Kaski, and Kapilvastu districts of Nepal, 2002.

David M. O'Brien is Spicer Professor at the University of Virginia. He has been a Visiting Fellow at the Russell Sage Foundation, a Judicial Fellow at the Supreme Court of the United States, Fulbright Lecturer in Constitutional Studies at Oxford University, Fulbright Researcher in Japan, and held the Chair for Senior Scholars at the University of Bologna. Among his publications are Storm Center: The Supreme Court in American Politics 6th ed. (Norton 2003), a two-volume casebook, Constitutional Law and Politics 5th ed. (Norton, 2003), and an annual Supreme Court Watch (Norton). His most recent work is Animal Sacrifice and Religious Freedom: Church of Lukumi Babalu Aye v. City of Hialeah.

Hans Egil Offerdal is a Norwegian scholar, and the former co-ordinator and special adviser of the Comparative Research Programme on Poverty (CROP) 1996-2001. From 1999-2002 he was a visiting scholar in the Department of Communication, ITESM-CEM, where he currently is researcher in theology and in communication. Offerdal holds a Candidatus Magisterii degree in Christianity and in Science of Religion, from the University of Bergen (UiB), Norway, and in 1994 he obtained the title Candidatus Philologiae in Christianity from UiB, with a research thesis about Monseñor Romero. He acted as an invited observer to the Millennium Peace Summit of Religious and Spiritual leaders at the United Nations

in 2000. Offerdal is a frequent guest lecturer at universities world-wide, and serves as a member of the international editorial board of "Razón y Palabra", and at the international board of editors for Genocide Studies. He is currently working on a book about Archbishop Romero.

Anna Oller is an Assistant Professor of Biology at Central Missouri State University. Her undergraduate degree is in medical technology, of which she is board-certified. She received her Ph.D. from South Dakota State University in 2000 in Microbiology and Molecular Biology. Her research interests include forensic odontology, antibiotic resistance mechanisms, and microbial genetics.

Michael Penrod teaches in the Crisis and Disaster Management bachelors degree program at Central Missouri State University. His interests include intergovernmental relations and the role of public administrators in the post-September 11 environment. He is active in emergency management as a firefighter/emergency medical technician with the Warrensburg, Missouri, Fire Department. He holds a Ph.D. from Kansas State University and a Masters in Public Administration for Eastern Washington University.

Hansje Plagman studied law at the University of Maastricht (The Netherlands), where she graduated in 2002 with a specialization in international and human rights law. During her studies she worked as a research-assistant at the European Institute for Public Administration (EIPA), the Faculty of Law, International Law Department and as an intern at the Inter-American Institute of Human Rights (San José, Costa Rica). Currently she is working at a law firm in the Netherlands where she specializes in refugee law. As of September 2003 she will be participating in the one-year European Masters' programme on 'Human Rights and Democratisation' (Venice, Italy).

Georgi Popov is currently a laboratory director. He earned his PhD in Chemistry from the National Scientific Board, Sofia, Bulgaria, and a Master of Nuclear Engineering from Defense University, V. Tarnovo, Bulgaria. He is also a graduate of the Army Command and General Staff College, Ft. Leavenworth, KS with a Master of Science in Military Art and Science. While serving as a Major in the Bulgarian Army, Dr. Popov was a Chemical (NBC Protection) officer. He was previously employed by the Defense Research Institute in Bulgaria, which involved decontamination solutions for Hazardous Materials and Chemical Biological Warfare Agents, protective clothing, international project for new gas masks development, and destruction of chemical warfare agents. Dr. Popov has 12 years of experience and completed several international environmental health and safety projects. He has been awarded with the United Nations Golden Medal for his participation in the UN mission in Cambodia.

Thomas Rossler is currently completing degree requirements for a Master of Arts degree in Criminal Justice at Wichita State University. He previously served as a Graduate Teaching Assistant and Graduate Staff Assistant at Wichita State University, and taught English as a Second Language at the University of Wisconsin-Marinette. Mr. Rossler holds a Bachelor of Arts degree from Alma College (Michigan) with a double major in Economics and Political Science. His research interests include counterterrorism, counterintelligence, and the evolving counterterrorism role of law enforcement.

James Staab, Associate Professor of Political Science, Central Missouri State University, received his B.A. from Roanoke College, his J.D. from Richmond University, and his Ph.D. from the University of Virginia. His primary field of

interest is public law, broadly defined, including constitutional law, civil rights and liberties, judicial politics, and jurisprudence. He has co-authored an article on Supreme Court Justice Levi Woodbury, authored an article on Supreme Court Justice Antonin Scalia, and written a chapter for the upcoming book Leaders of the Pack: Polls and Case Studies of Great Supreme Court Justices (2003), titled "Benjamin Nathan Cardozo: Striking a Balance Between Stability and Progress." Most recently, he accepted an offer to have his article “Conservative Activism on the Rehnquist Court: Federal Preemption is No Longer a Liberal Issue” published with Roger Williams University Law Review.

Galen Stocking is a National Security Studies graduate student at California State University, San Bernardino (CSUSB) focusing on the Middle East and Terrorism, specifically cyber-terrorism. In his tenure at CSUSB, he has earned a B.S. in Computer Science, participated in the National Model United Nations competition, West Coast Regional Model Arab League Competition, and student government. He has studied French, Arabic, and Turkish; most recently at Gazi University’s Turkish language program in Ankara, Turkey.

Nadine Strossen, Professor of Law at New York Law School, has written, lectured, and practiced extensively in the areas of constitutional law, civil liberties, and international human rights. Since 1991, she has served as President of the American Civil Liberties Union, the first woman to head the nation's largest and oldest civil liberties organization. (Because the ACLU Presidency is a non-paid, volunteer post, Strossen continues in her faculty position as well.) Since becoming ACLU President, Strossen has made more than 200 public presentations per year before diverse audiences, including on approximately 500 campuses and in many foreign countries. Strossen's writings have been published in many scholarly and general interest publications (approximately 250 published works). Strossen graduated Phi Beta Kappa from Harvard College (1972) and magna cum laude from Harvard Law School (1975), where she was an editor of the Harvard Law Review. Before becoming a law professor, she practiced law for nine years in Minneapolis (her hometown) and New York City.

Scott White is Access Services Coordinator/Acting Systems Librarian, at LaGuardia Community College, CUNY. He has held similar positions at New York University and Long Island University, Brooklyn campus. Scott is currently a Criminal Justice Ph.D. student at the CUNY Graduate Center, studying at John Jay College.

PRESERVING SAFETY AND FREEDOM POST 9-11

Address by Nadine Strossen, President of the ACLU To the Counter-Terrorism and Civil Liberties Conference, CMSU, March 19, 2003•

I want to commend the conference organizers for entitling it "Counter-Terrorism and Civil Liberties" and I emphasize the "and" not "versus" civil liberties. As the ACLU has proclaimed since September 11, 2001, we can and should be both safe and free. It would be tragic if we let the terrorists terrorize us into abandoning the very values they have attacked. As our Constitution decrees in its opening words, its preamble, "We the People," adopted that Constitution precisely for these mutually reinforcing purposes to "provide for the common defense" and "to secure the blessings of liberty to ourselves and our posterity." I think it so significant that the Constitution uses that word "secure" and a concept of security in referring to liberty. This is not a zero sum game. Cutbacks on our freedoms do not necessarily guarantee gains to our safety and conversely there are measures that can enhance our safety without cutting back on our freedom.

Unfortunately too many measures that are now touted as countering terrorism are in fact the worst of both worlds: they do demonstrably decrease freedom, but they do not demonstrably increase safety. Worse yet, some of these measures may well be counterproductive in terms of national security, so they are being critiqued not only by civil libertarians but also by national security and law enforcement experts. Moreover, the ACLU's allies in fighting the unjustified measures span the entire political and ideological spectrums including prominent elected officials of both major parties and an unprecedentally broad and diverse coalition of leading citizens groups from the most liberal to the most conservative. I stress that because it underscores that what we are defending are indeed core, traditional, American values that are enshrined in our Constitution. Summed up in plain English these Constitutional principles require only what is just demanded by good old fashioned common sense, namely that we've got to look behind the label of any vaunted security measure to ensure that it really maximizes national security with minimal cost to civil liberty.

For those of you who are students of constitutional law you know that it's just the plain language version of the constitutional strict scrutiny test, right? Does it really maximize such a compelling government interest as national security in a way that is narrowly tailored as least restrictive possible on civil liberties? Under this constitutional and common sense analysis many post 9-11 measures are justified. They do effectively enhance safety with minimal costs to liberty. That's true for instance of some new aviation security measures, which I am very familiar with and fond of many of them, such as fortifying cockpit doors, using sky marshals on flights, and not allowing you to check luggage without getting on the plane yourself.

In contrast, though, too many post 9-11 measures only make us less free without making us more safe. For an excellent overview of these I commend an ACLU report whose title says it all. The title is, "Insatiable Appetite: The Government's Unceasing Demands for New and Unnecessary Powers After September 11th." Unfortunately consistent with that title we constantly have to update the report. The Government's appetite for unneeded new powers is apparently insatiable. In the past few weeks we've been learning about yet another ominous plan to expand these powers still further in a draft law whose official name is the "Domestic Security Enhancement Act," but which as many of you know, has been nicknamed "Patriot II." In other words the sequel to the first massive post 9-11 law, which was called the "U.S.A Patriot Act."

"Patriot II" to me sounds like the name of a sequel to a horror movie and it is indeed the sequel to a horrible move, if I may say so. And not just me, let me quote many of the other critics of this move. Interestingly enough, the first is somebody who has been the harshest and most persistent critic of government overreaching, in particular executive branch overreaching, since September 11th. And that very significantly is William Safire who is a veteran of the Nixon administration. The administration which gave rise to the term "The Imperial Presidency," and yet for Safire who you mostly know as a syndicated columnist for the New York Times, even for him this administration, this executive branch has gone too far. And of the many measures that he has criticized he was first out of the box in criticizing "Patriot II," but he's in very good company. Even such a conservative newspaper as the New York Sun condemned this draconian law as "a catalogue of authoritarianism that runs counter to the basic tenets of modern democracy." To cite just one example, it would expressly authorize secret arrests for the very first time in United States history. That is literally the kind of disappearances that we saw (rather did not see, more correctly) during Argentina's so-called "dirty war."

The Justice Department had been drafting this new law in secret over the past several months but had not released it to the public or even to key members of Congress. After it was leaked last month, experts

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• This transcribed version of Nadine Strossen's speech to the Counter-Terrorism & Civil Liberties Conference, March 19, 2003 is printed here by permission of Ms. Strossen. Ms. Strossen has not reviewed this transcription, all responsibility for the transcription lies with Donald H. Wallace.

concurred that the administration likely planned to introduce the law after we were at war with Iraq or in another acute crisis akin to the immediate post 9-11 aftermath in which "Patriot I" was rushed through Congress in record time with almost no hearings or debate. Indeed, when most members of Congress admitted that they did not even have the time to read this massive new law before voting on it. So these measures not only violate basic individual freedoms they also violate core aspects of our democratic structure of government. In particular, the essential checks and balances, congressional deliberation, and oversight of executive branch action.

Just the day before yesterday, on Monday, the ACLU joined with an unusually broad coalition of citizen organizations. We sent a letter to every single member of Congress urging them not be stampeded again. Not to do with Patriot II what they did with Patriot I and not to just rubber stamp it, in effect, in the currently mounting crisis atmosphere with war looming and also with higher and higher terrorism alerts. Our strange bedfellows coalition ranged from such ultra-liberal groups as Common Cause, the National Lawyer's Guild, People for the American Way, to such ultra-conservative groups as the American Conservative Union, Americans for Tax Reform, Gun Owners of America. The coalition also extends to many religious groups including the American Baptist Churches U.S.A, the Presbyterian Church U.S.A, and the Commission on Social Action of Reformed Judaism.

I'd like to read just one key passage from this broad coalition's letter to Congress. And I've named just a few. There are dozens and dozens of organizations and the sign-on list continues. Here's what we all said in part.

> "Like all Americans we are deeply concerned by the continuing terrorist threats against our country and like a growing number of Americans of every political persuasion, we are also worried that Patriot II would be the wrong remedy for the ongoing problem. The bill contains a multitude of new and sweeping law enforcement and intelligence gathering powers many of which are not related to terrorism, that would severely dilute or undermine many basic constitutional rights, as well as disturb our unique system of checks and balances. We encourage you to oppose such legislation or any other legislation unnecessarily expanding the powers the government has already obtained in the U.S.A Patriot Act. Instead we recommend that you ask the administration to provide Congress and the public with more information about its use of the powers already granted in the U.S.A Patriot Act."

For the ACLU section-by-section analysis of this large and dangerous new measure, as well as details about the many other post 9-11 excesses, please visit our award winning website at www.aclu.org. I have in fact gotten many compliments about it from people, journalists, scholars, and activists, all across the political spectrum. Most importantly this site explains how you can add your voice and your skills to our campaign to keep our country both safe and free.

In my limited time, I'd like to list just a few more examples of the government's unjustified post 9-11 power grabs. The ominously but accurately named "Total Information Awareness Program." I mean this Orwellian name sounds like something that a civil libertarian would have concocted to raise people's fears, but in fact it is the name that the government itself gave to this program, all too accurately: "Total Information Awareness." Even such a pro-government pundit as John McLaughlin for, in his words, "creating an American Gestapo" has condemned this. Secret military tribunals, which have been denounced even by such a conservative national security hawk as N.Y. Times columnist William Safire who called them "kangaroo courts." Giving the President what he called "dictatorial power." We've seen secret arrests, secret evidence, secret trials and secret deportations, which many judges have decried, in the ACLU's successful lawsuits against such procedures, as "odious to a democracy." New FBI guidelines that allow agents to spy on all of us without even any suspicion of any wrongdoing, just on the basis of our political or religious beliefs which even conservative Republican James Sensenbrenner deplored as "going back to the bad old days when the FBI was spying on people like Martin Luther King." The TIPS program that came to light last summer, which will turn all of us into spies against each other, was promptly condemned by then-majority leader Dick Armey, the conservative Texas Republican as "reminiscent of Soviet Russia," and the exercise of unilateral presidential power to imprison an American citizen indefinitely without trial, without charge and without access to counsel. All of this without meaningful judicial review, which even former CIA director James Woolsley condemned as "something we would expect in Afghanistan under the Taliban not in our own beloved country."

Now with such mounting unwarranted assaults on our rights we are living in unprecedented and dangerous times, dangerous not only to our nation's physical security but equally dangerous to the heart and soul of our nation, our highest ideals of liberty and justice for all. To be sure, these ideals have never been matched by reality. Before September 11, though, we had been making significant progress on many important fronts. For example, there was a growing consensus around the country and again across the ideological spectrum against racial profiling. We even had pledges, commitments to eliminate it from both George W. Bush, during his presidential campaign and John Ashcroft, during hearings on his confirmation to become attorney general. Yet since 9-11 both Bush and Ashcroft and others have constantly targeted certain people. Not because of what they do but because of who they are, namely young Muslim men from certain countries. People in these groups have faced all manner of discriminatory harassing invasions of their

freedom and basic human dignity including repeated mass registrations that will take place yet again the day after tomorrow and also including prolonged incarceration. This profiling violates individual rights, of course, since it substitutes discriminatory stereotypes and guilt by association for individualized suspicion.

So it's not surprising that civil libertarians have criticized it on principled grounds, but you might be surprised that counterterrorism experts also have criticized this profiling on pragmatic grounds, on national security grounds. This concern was raised for instance by a group of senior U.S. intelligence specialists in a memo sent to law enforcement agencies worldwide shortly after September 11. The memo warns that looking for someone that fits a demographic profile is just not as useful as looking for someone who acts suspiciously. Indeed the memo even suggested that over-reliance on profiles might be one of the reasons for our government's tragic failure to prevent the September 11 attacks. According to these officials, "any profile based on personal characteristics draws an investigator's attention toward too many innocent people and away from too many dangerous ones." Most recently, U.S. intelligence agencies have expressed mounting concern that future terrorist attacks may well involve Al Qaida members from Asia or Africa expressly to elude the ethnic profiles that they know U.S. personnel have been using. Now while young Muslim and Arabic men have been discriminatorily forced to disproportionately sacrifice their freedoms for our safety all of us are significantly less free than we were on 9-11-01 without corresponding gain to our safety.

The government can now spy on the most personal transactions and communications of each and every one of you --and I mean you literally, no matter who you are--essentially whenever it wants with only the most minimal judicial oversight. And you will never know for instance that the government has your library records or your medical records or your financial records or your web surfing records. Since the Patriot Act bars whoever gives your data to the government from telling you that it has done so.

To add insult to injury all of these assaults on our rights have been strongly criticized by law enforcement and security experts who maintain that they are dangerous diversions from the real problems that caused the 9-11 catastrophe and the real solutions to those problems that could give us some real protection against terrorism. One prime example here is veteran FBI agent Coleen Rowley who has been widely hailed, including by FBI director Robert Mueller and many members of Congress on both sides of the aisle. Thanks to her courageous whistle-blowing letter to FBI director Mueller last spring we know that the cause of the 9-11 disaster was not that the government lacked power to investigate or disrupt potential terrorist threats, rather the problem was that FBI officials did not effectively analyze and act on the massive information they already had under their already enormous powers. If you haven't yet done so I urge you to read Coleen Rowley's historic letter.[1] Time Magazine has posted most of it online calling it the "bomb shell letter" and naming her along with two other corporate whistle blowers as the Person of the Year. The letter underscores that there was no justification for the sweeping new surveillance powers in the U.S.A Patriot Act and other post 9-11 measures.

And, by the way, I should emphasize that that description "sweeping new powers" does not come from me. That was the term that was used by Attorney General John Ashcroft who was the main protagonist in favor of the law. Here's how Time Magazine paraphrased that very important conclusion about the lack of a need for sweeping new powers as it was discussing Coleen Rowley's bombshell letter. In very strong language Time Magazine wrote

> "Like no other document to emerge from the firestorm over the mistakes and missed signals that led to September 11, the Rowley memo cast a searing light into the depths of government ineptitude. Not lack of power, mind you, ineptitude. In Washington where the FBI and CIA may be criticized but are allowed to clean up their own messes as they see fit, the memo sent shudders through the establishment because it
> came from within. Her letter amounts to a colossal indictment of our chief law enforcement agency. It raises serious doubts about whether the FBI is capable of protecting the public and whether it deserves the public's trust."

Now significantly at the very same moment that Agent Rowley was testifying before Congress last spring, President Bush suddenly held a nationally televised speech in which he first called for the new Department of Homeland Security, thus doing a complete about face. Until then he had staunchly opposed this huge new agency. Iowa's Republican Senator Charles Grassley blasted this move as a deliberate attempt to draw attention away from Agent Rowley's devastating disclosures. After he reviewed Coleen Rowley's letters, Senator Grassley condemned the government's missteps in extremely harsh terms. For example, here's something he said and I know from having read her letter many times that he's paraphrasing something in her letter. But Senator Grassley said, "I don't blame FBI agents in Minnesota for wondering if there were unwitting collaborators of Osama bin Laden sitting around at FBI headquarters." Now that's an extremely strong criticism, but I want to underscore what the source of it is. That does not come from me. That does not come from the ACLU. It doesn't even come from Senator Grassley. That comes from field agents. Veteran, experienced field agents of the FBI itself. In other words, hands-on experts who are fully familiar

[1] http://www.time.com/time/covers/1101020603/memo.html

both with the Bureau and with our counter-intelligence challenges.

Similarly withering critiques were made from the opposite end of the political spectrum by the Pulitzer Prize winning New York Times columnist Maureen Dowd. Now she wrote with her characteristic irony:

> "With the most daring reorganization of government in half a century, George W. Bush hopes to protect something he holds dear: himself. After weeks of scalding revelations about … warnings prefiguring the 9/11 attacks that were ignored by the U.S. government, the president created the Department of Political Security. Or, as the White House calls it for public consumption, the Department of Homeland Security. [In an effort to] knock … Coleen Rowley off front pages, … the minimalist Texan who had sneered about the larded federal bureaucracy all through his presidential campaign stepped before the cameras to slather on a little more lard. … [All that same day] Special Agent Rowley and [FBI Director] Mueller [had been making it clear in Senate] testimony … that there is no point in creating a huge new department of dysfunction to gather more intelligence on terrorists when counterterrorism agents don't even bother to read, analyze and disseminate the torrent of intelligence they already [have]."[2]

Now I'm stressing these Rowley revelations because the administration has been too successful in its diversionary tactics, burying the bureaucratic blunders and continuing to scapegoat instead civil liberties, personal privacy. Since these tactics ignore the real causes of the catastrophe, they are doubly dangerous, endangering our security as well as our liberty. That very point was made by Coleen Rowley herself in another letter to FBI chief Robert Mueller just last month, a couple of weeks ago. Agent Rowley's recent letter concluded that too many post 9-11 measures have sacrificed both security and liberty merely for "PR"--public relations and political purposes. For instance she cited the emphasis on high profile criminal prosecutions against Zacarias Moussaoui and Richard Reid as opposed to low profile but high impact interrogation of them for counterintelligence purposes, to help protect us against future attacks.

Likewise, she stressed that the vast majority of the 1,000 plus persons "detained," and that was in quotes because they were in prison, but "detained" was the word that's used. In the wake of 9-11 the vast majority didn't even have any information about terrorism let alone any involvement with it. Instead, most of them were charged with violating immigration laws such as overstaying their visas, and mind you, I do not condone any violation of any law whether it's an immigrant who was out of compliance with immigration regulations or whether it is the Attorney General of the United States who is out of compliance with the U.S. Constitution. I condemn both of them equally, but one has to ask whether the punishment is proportionate to the crime here, or "pre-crime," since the detained individuals were in prison long before they were even charged even with any visa violation.

As you listen to the pertinent portion of her latest letter, please bear in mind that Coleen Rowley is a respected life-long FBI official, politically conservative and tough on crime and surely not a card-carrying civil libertarian. And I'm sure, I know, from reading her letter that she and I do disagree on many key points; therefore I think it is very striking how much we agree on. From her very different perspective she makes many of the same kinds of critiques of the post 9-11 excesses that the ACLU has been making. She wrote:

> "After 9-11 FBI headquarters encouraged more and more detentions for what seemed to be essentially PR purposes. Field offices were required to report daily the number of detentions in order to supply grist for statements on our progress in fighting terrorism. The balance between individual civil liberties and the need for effective investigation is hard to maintain even during so called normal times but from what I have observed particular vigilance may be required to head off undue pressure now to detain or round up the usual suspects--those of Arabic origin."

These criticisms by Coleen Rowley have been loudly and repeatedly echoed by among others Senator Arlen Specter, Republican from Pennsylvania who has an extensive law enforcement background having served as Philadelphia's district attorney. These criticisms also were endorsed last week by the conservative columnist Robert Novak, just last week. I do want to emphasize that by repeating these criticisms of somebody within the FBI who is in turn quoting other agents within the FBI, I certainly do not mean to malign the many brave men and women who are literally putting their lives on the line to protect our security. Indeed as you can probably tell, Coleen Rowley herself is a personal heroine of mine. But what I am very concerned about is her concerns that the dedicated agents in the field are being thwarted by bureaucratic considerations, by public relations considerations, and by political considerations that are coming from headquarters and from Washington D.C. political leadership.

I'd like to note now just one more of the many law enforcement and national security experts who have been highly critical of many post 9-11 measures as unjustifiably and unnecessarily infringing on our freedom. I'm referring to Bob Barr, who just ended his term as a member of Congress from Georgia and who is now working for the ACLU's Safe and Free Campaign as a paid consultant. Barr, a conservative Republican, is a former U.S. attorney and former CIA official, with a solid tough on crime record. But along

[2] Dowd, Maureen (June 9, 2002, Sunday, Late Edition). Dept. of Political Security. The New York Times, (Section 4, p. 15).

with many traditional conservatives, he has long been an ally of the ACLU and other privacy experts in wanting to strictly minimize government intrusion into and surveillance over private aspects of our lives. Many people find that counter-intuitive because they have a stereotype of civil libertarians as being liberal. In fact though, civil libertarianism, limiting government's roles in our lives resonates very much with classical conservatism as much as it does with classical liberalism. So Barr is somebody that we have in fact long worked with on these privacy issues. The same is true until recently with the House majority leader Dick Armey who is also in the process, now that he left Congress, of consulting with the ACLU on a paid basis on these post 9-11 Safe and Free issues. One thing that was very interesting was that Barr was one of the most outspoken resistors in Congress when John Ashcroft first tried to stampede Congress into passing the U.S.A Patriot Act. He initially tried to get it passed, literally with no debate; he almost succeeded. And one of the people who led the resistance for a long time was Bob Barr, specifically relying on his knowledge as a former U.S. attorney and CIA official. He said right after September 11 and right after Ashcroft initially tried to ram through U.S.A Patriot Act:

> "The Department of Justice has sought many of these authorities on numerous other occasions, has been unsuccessful in obtaining them, and now seeks to take advantage of what is obviously an emergency situation."

And you see the reason for the concern that the same strategy is what was being laid in place with respect to Patriot II. Have that on the shelf; don't introduce it until after we have yet another ratcheted-up panic, an understandable concern in time of war--heaven forbid another terrorist attack--then the same sequence would be expected with respect to Patriot II. So we're now trying to forestall all that.

Overreaching as the U.S. Patriot Act was it was of course only the beginning of the government's arrogation of pervasive, invasive new powers since September 11. There are many other examples that I could mention. Let me just mention one that I think is particularly interesting because of the widespread opposition it engendered, and that was the Attorney General's guidelines for investigation that will allow again infiltration and surveillance of political and religious meetings. The kinds of spying that did go on during the civil rights movement and anti-Vietnam war movement, and led to guidelines that checked that kind of invasion not only in privacy but also of 1st Amendment protected activities. Interestingly enough, the many critics of these new guidelines include even leaders of the so-called religious right organizations that have campaigned so hard for John Ashcroft to become Attorney General because they agreed with his positions on issues including abortion and gay rights. But when it comes to these issues they are very concerned. Let me quote, for example, the president of the Family Research Council, Ken Connor. He says, "it is important that we religious conservatives maintain a high degree of vigilance. We need to ask ourselves, how would our groups feel under these new rules?"

And I must say, every time that I'm in Missouri I guess I have to thank the people of this dear state for sharing John Ashcroft with us. The ACLU did a report shortly after the anniversary of 9-11 where we're kind of doing a historical overview of what had happened with government over-reaching since then and we traced it back to World War I which was the time when our organization was founded out of a series of very similar national crises, including terrorist attacks, bombs by anarchists all over the country, leading to the very same kinds of civil liberties violations. There are very uncanny parallels with the Palmer Raids: Mitchell Palmer, John Ashcroft. One thing I had not known about was Mitchell Palmer and John Ashcroft were both men who had been defeated in their attempt to be elected to the United States Senate. And, only after they were defeated in their senate races were they then appointed attorney general. Now, I have to stress that the ACLU is always non-partisan. We never endorse or oppose anybody for any office and believe me, when Janet Reno was attorney general and Bill Clinton was president and we had on their watch what was then the most horrendous terrorist attack on American soil, namely the Oklahoma City bombing, they reacted predictably very much the same way that Ashcroft and Bush reacted by passing what became the 1996 Anti-Terrorism law that vastly reduced many cherished civil liberties, including habeas corpus. And, interestingly enough, the very broad left/right Republican/Democrat coalition that we immediately were able to re-energize after September 11, had initially been put together after the Oklahoma City bombings and we were working with folks such as Barr and Armey and gun owners' rights organizations and trying to resist what was mostly enacted as the 1996 Anti-Terrorism law and the few portions of it that we managed to stave off were among those that had been put on the shelf and then brought forward as the new Patriot Act.

All over the country I'm happy to say, as I've already indicated, quoting people like Ken Connor from the Family Research Council and many others, many people, not just leaders of organizations, but citizens are speaking up to challenge the government's unjustified over-reaching measures with a very positive impact. We've seen an extremely active and diverse grassroots movement that has spurred local governments all over the country to adopt resolutions, calling for the repeal of the excessive provisions in U.S.A Patriot Act. And, I'm sorry I did not look up whether Warrensburg is one of those communities. Does anybody here know? Not yet? I hope you have a movement going. You know, at last count, which I last looked at last week and it's probably increased since then, last week it was 60 cities have passed these resolutions. In the most diverse kinds of communities those that are stereotypically conservative, those that are quintessentially liberal and the communities, the population of the communities that are represented by the

governments that have passed these resolutions are over six million now.

The ACLU is making it a real priority to work with community organizations all over the country to get these passed. For the first time in our history we have put a lot of money and a lot of resources into hiring a squadron of field organizers that work with local community groups all over the country, and we have in addition to the general field organizing efforts, we also have experts who are dealing specifically with the most targeted communities all over the country, namely the Muslim, Arab, and South Asian communities.

In addition to this grassroots organizing and our work in the legislative arena, we've also brought dozens of lawsuits to defend rights that have been threatened in the counter-terrorism campaign, challenging everything from suppression of the right to peaceful protest, to discrimination on the basis of religion, national origin and citizenship, to violation of religious freedom, to denial of access to information about vital government policies. On the whole, the courts are being more supportive of civil liberties than I would have expected, in contrast to past national security crises.

And I'd like to cite in my waning time just one example of government strategy that so far we are encountering extremely successfully in the courts. And that is the unprecedented shroud of secrecy that the government has thrown over every aspect of its post 9-11 investigation, including by the government's own count more than 1,200 individuals who were detained, incarcerated, imprisoned, in secret, some for many months in solitary confinement and apparently incommunicado. Many of them held on secret evidence and then subjected to secret deportation hearings from which everybody is automatically excluded.

As you know, the lawsuits challenging these various forms of government secrecy have been mostly successful and have led to very stirring pronouncements. I think the most famous pronouncement was one that was widely quoted from the 6th Circuit Court of Appeals striking down the blanket secrecy over deportation hearings and in a stirring opinion by Judge Damon Keith he said, "Democracy dies behind closed doors." Significantly, it looks as if that is going to be the first issue that goes to the United States Supreme Court to give it an opportunity to weigh in on this very challenging issue that is the overarching theme of your conference. How can we both counter terrorism and maintain civil liberties? The ACLU filed a brief asking the Supreme Court to consider that issue, just two weeks ago. Given that there is now a split between two circuit courts, I do predict that the Supreme Court will hear that case. We obviously are cautiously optimistic about how we would fare in the United States Supreme Court, which, although it has not been the world's best court for civil liberties, has been generally good on 1st Amendment issues, and with justices across the ideological spectrum from Antonin Scalia and Clarence Thomas at one end to Ruth Bader Ginsburg and John Paul Stevens at the other end, all being generally very supportive of the peoples' right to information, especially about public affairs. Even such a pro-government justice as William H. Rehnquist, I think we have a very strong argument to make to him because he, to his credit, has been a very staunch champion of judicial independence, jealously guarding the power of the courts. Some would say the Court has too much power, not to mention a certain case from two years ago now. But that is something that would make somebody like Rehnquist bristle when you see the secrecy orders that are coming only from the executive branch of the government doing an end-run around the usual judicial review and the usual judicial prerogative to say that, in a particular case, the particular evidence is so highly sensitive that a portion of that case should be closed. Taking that power away from the courts might be something that would make even a pro-government conservative such as Rehnquist bristle.

So, I have been cautiously optimistic, but as I was coming here I got reports, including in a conversation with the Washington Post reporter as I was driving here, that Justice Scalia just got two free speech awards, interestingly enough, in Ohio, and he gave a speech that was picked up by the Associated Press in which he very strongly stressed that in times of war and a national security crisis that constitutional rights should be reduced to an absolute minimum and that what we are enjoying now is far more than the minimum, and he pledged himself to ensure that it was only the minimum that was protected. So, that was unfortunately a worrying straw in the wind.

But, I am at the end now and I have to end with something positive. That great philosopher Woody Allen was coming to the end of a talk and he said, "You know, I really want to end with something positive, but I can't think of anything positive to say. Would you settle for two negatives?" I really do have something positive. I am going to end with some stirring words that I found from some Supreme Court opinions over time from past national security crises, which I hope will inspire our current justices in our current crisis. These other cases come from times when we were also struggling to preserve national security and some courageous justices reminded us that our nation was dedicated to securing liberty, again that language from the preamble. At the very same time that it was facing its first and greatest struggle for sheer survival, namely during the Revolutionary War period, was when we dedicated ourselves to securing liberty, not only the national defense. These excerpts come from cases that span more than a century and three diverse national security crises.

First, during the Civil War, the Supreme Court declared:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any

of its provisions can be suspended during any of the great exigencies of government.[3]

And during the Great Depression, the Court said:

> The Constitution was adopted in a period of grave emergency**.** Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.[4]

And finally, during the Cold War, the Court issued a warning that applies fully to the looming hot war we're all now facing. And I'll end with these words:

> It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile.[5]

Thank you very much.

[3] *Ex Parte Milligan*, 71 U.S. 2, 121 (1866).
[4] *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934).
[5] *United States v. Robel*, 389 U.S. 258, 264 (1966).

REFLECTIONS ON COURTS AND CIVIL LIBERTIES IN TIMES OF CRISIS

David M. O'Brien*

A 2002 *Newsday* cartoon by Walt Handelsman depicted Attorney General John Ashcroft at a press conference responding to the question, "Why have we arrested a U.S. citizen and questioned him without his attorney . . . Branded him an enemy combatant, held him in jail indefinitely . . . And completely suspended his constitutional rights?" Attorney General Ashcroft replied simply, "To protect what America stands for . . . ."[1]

That cartoon captures the legal, political, and historical dilemma of preserving civil liberties during times of crisis and wartime. In the aftermath of the terrorist attacks of 9/11/01 the trade off between liberty and security obviously looms larger. The attack on the World Trade Center and the Pentagon has been compared to Japan's attack on Pearl Harbor in terms of the devastation and loss of life. Other than the Civil War, almost 150 years ago, the country has not had direct experience with war on its shores with war. Not since the War of 1812 have hostile forces set foot on our soil.

Insulated by two great oceans, the country has been spared direct confrontations with wars that ravaged Europe and other parts of the world. Perhaps precisely because of that isolation, threats to national security have tended to be exaggerated and civil liberties sacrificed. As Justice William J. Brennan, Jr. observed: "The sudden national fervor causes people to exaggerate the security risks posed by allowing individuals to exercise their civil liberties and to become willing `temporarily' to sacrifice liberties as part of the war effort."[2]

The uncertainties and insecurities after 9/11 led some commentators to immediately dismiss concerns with civil liberties as exaggerated. Shortly after 9/11, one of Justice Brennan's former law clerks, Seventh Circuit Court of Appeals Judge Richard A. Posner dismissed as "profoundly mistaken" concerns that national security measures would erode civil liberties.[3] In his view, the balance between liberty and national security must be struck pragmatically, not dogmatically, depending on changing circumstances that bring new challenges to national security.

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There is no denying that the Founding Fathers of the Constitution doubted the effectiveness of parchment barriers during times of national crisis. James Madison and Alexander Hamilton agreed that the national government enjoys extraordinary power when responding to threats to national security. "It is vain to oppose constitutional barriers to the impulse of self-preservation," Madison cautioned in *Federalist* No. 41.

In *Federalist* No. 23, Hamilton was even more emphatic. The powers marshaled for national defense "ought to exist without limitation," he argued:

> "[B]ecause it is impossible to foresee or to define the extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."

Recall, too, that the ink was barely dry on the First Amendment and the Bill of Rights, when on the verge of war with France the Alien and Sedition Acts of 1798 were enacted. The Alien Act empowered the President to expel any alien deemed dangerous and to arrest all subjects of warring nations as alien enemies. The Sedition Act made it unlawful to "write, print, utter or publish . . . any false, scandalous and malicious writing . . . against" the government or to bring it "into contempt or disrepute."

The Sedition Act led to at least 25 arrests, 15 indictments, and ten convictions. All of them were Jeffersonian-Republican opponents of the Federalists, who were then in power. Thomas Jefferson, a renowned "strict constructionist," railed against the acts. In the Kentucky Resolutions of 1798, he argued that, "In questions of power then let no more be heard of confidence in man, but bind him down by the

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[1] Tribune Media Services, reprinted in James M Burns, Jack Peltason, Thomas Cronin, David Magleby, David M. O'Brien, and Paul Light, *Government by the People* (Upper Saddle River, N.J.: Prentice-Hall, 20th ed., 2004), p. 445.

[2] William J. Brennan, Jr., "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises," Speech given at Hebrew University, Jerusalem, Israel (December 22, 1987), available from the Brennan Center for Justice, New York University School of Law.

[3] Richard A. Posner, "Security Versus Liberty," 288 *The Atlantic Monthy* (December 2001), 46-48.

chains of the Constitution." Yet, Jefferson later took a broad view of the government's power to respond to national emergencies. In his words:

> A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger are of higher obligation.[4]

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The dilemma of preserving liberty and the rule of law along with ensuring national security was given, perhaps, its classical formulation by President Abraham Lincoln. At the outset of the Civil War, he took extraordinary measures—calling up state militias, spending unappropriated funds, and blockading Southern ports—without constitutional or congressional authorization. Lincoln later defended his actions as essential to saving the Union, and thereby, paradoxically, preserving the Constitution. As Lincoln explained:

> I [understood] my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? . . . I felt that measures, otherwise unconstitutional might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.[5]

In *The Prize Cases*,[6] the Supreme Court upheld Lincoln's declaring the Southern states in rebellion and ordering blockades of their ports after the outbreak of the Civil War. When the constitutionality of those orders was challenged, the Court affirmed the President's power. Writing for the Court, Justice Robert Grier observed:

> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decision and acts of the Political Department of the government to which this power was intrusted.

However, four justices dissented in *The Prize Cases*. Justice Samuel Nelson, along with Chief Justice Roger B. Taney and Justices John Catron and Nathan Clifford, denounced Lincoln's actions for waging "a personal war against those in rebellion." They compared Lincoln to the King of Great Britain at the time of the American Revolution in order to underscore that, unlike King George the III, under the Constitution the President has no "such power . . . until Congress assembled and acted."

Even more stirring for defenders of civil rights and liberties during wartime remains the ruling and reasoning in *Ex parte Milligan.*[7] Although *Milligan* was notably handed down after the conclusion of the Civil War, the Court declared unconstitutional Lincoln's orders suspending the writ of *habeas corpus* and for trying all persons suspected of disloyalty by military commissions. Somewhere between 20,000 and 30,000 people were arrested and detained by the military, without charges, on the suspicion of disloyalty. Many were never tried and those that were went before military tribunals, rather than civilian courts.

Writing for the Court in *Milligan*, Justice David Davis, a Lincoln appointee, spoke eloquently of "the birthright of every American citizen when charged with crime, to be tried and punished according to law." Adherence to the rule of law was paramount, as Justice Davis made clear in boldly declaring: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Admittedly, in the view of some at the time (and some today) the ruling in *Milligan* was mistaken and fanciful. Judge Posner, for one, presses the point: "Lincoln's unconstitutional acts during the Civil War show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation."[8]

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World War I brought another curbing of civil liberties, particularly for immigrants and those of East European and Russian descent. Charles Evans Hughes, a former justice and future chief justice but at the time New York's governor, captured the view then held by many: "The power to wage war is the

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[4] Thomas Jefferson, Letter to J.B. Colvin, in Andrew A. Lipscomb, ed., *The Writings of Thomas Jefferson*, Vol. 12 (Washington, D.C.: The Thomas Jefferson Memorial Association, 1903), 418.
[5] John Nicolay and John Hays, eds., *The Complete Works of Abraham Lincoln*, Vol. 10 (New York: Francis D. Tandy, 1894), 65-68.
[6] *The Prize Cases*, 67 U.S. 935 (1863).
[7] *Ex parte Milligan*, 71 U.S. 2 (1866).
[8] Posner, "Security Versus Civil Liberties," supra.

power wage war successfully. . . . That is, there are constantly new applications of unchanged powers. . . . So, also, we have a *fighting* Constitution."[9]

During World War I the Senate considered a bill that would have turned the entire country into a military zone. The bill would have made it a crime to publish any thing endangering national security, with trials before military tribunals, and convictions punishable by death. Instead, President Woodrow Wilson persuaded Congress to enact the less extreme Espionage Act of 1917, making it a crime to interfere with military recruitment and war efforts. As amended in 1918, the Espionage Act made it a crime to use any "disloyal, profane, scurrilous, or abusive" language about the government, the Constitution, the flag, and the military, or to use any language that brought them "into contempt, scorn, contumely, or disrepute."

Approximately 2,000 individuals were prosecuted under the Espionage Act, including many for stating religious objections to the war and advocating draft resistance. The wartime patriotic fervor and the scale of the prosecutions led Roger Baldwin to organize in 1917 the Civil Liberties Bureau of the American Union Against Militarism. In 1920 it was reorganized as the American Civil Liberties Union (ACLU). Without exaggeration, the ACLU courageously and almost single-handedly advanced the modern conception of civil rights and liberties, even in wartime.[10]

By the time appeals of convictions under the Espionage Act reached the Court, World War I was over. But the "Red Scare" remained and most of the convictions were upheld. In *Schenck v. United States,*[11] Justice Oliver Wendell Holmes proposed his now famous "clear and present danger" test for protecting speech. Yet, he upheld the conviction for subversive speech and emasculated the "clear and present danger" test's use during wartime by observing: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight."

When an appeal of another conviction under the Espionage Act reached the Court, in *Abrams v. United States*,[12] Justices Holmes and Louis D. Brandeis dissented and attempted to buttress the "clear and present danger" test's protection for free speech. Still, they distinguished between rights in wartime and peacetime, even though defending greater protection for at least the freedom of speech during wartime. In their words: "The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same."

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The Supreme Court went even farther in legitimating the curtailment of civil liberties during World War II. *Korematsu v. United States*[13] upheld the exclusion and internment in "relocation camps" of approximately 120,000 Japanese-Americans, without regard for evidence of their disloyalty or threat to the country. Inspiring bitter dissents from Justices Owen Roberts, Frank Murphy, and Robert Jackson, the opinion for the Court was delivered by none other than a leading liberal and champion of civil liberties, Justice Hugo L. Black. Without apology, he had no doubt that civil liberties have a different status in wartime than in peacetime. In Justice Black's words:

> [W]e are not unmindful of the hardships imposed . . . upon a large group of American citizens. . . . But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or less measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic government institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

To be sure, on the same day *Korematsu* was handed down, the Court ruled in *Ex parte Endo*[14] that, although the evacuation of Japanese-Americans was permissible, the detention of loyal Japanese-Americans was unconstitutional. There, Justice William O. Douglas emphasized:

> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort

[9] Charles Evans Hughes, "War Powers under the Constitution," 62 *American Bar Association Reports* (1917), 238.
[10] See, generally, Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990).
[11] *Schenck v. United States*, 249 U.S. 47 (1919).
[12] *Abrams v. United States*, 250 U.S. 616 (1919). See, generally, Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (New York: Viking, 1987).
[13] *Korematsu v. United States*, 323 U.S. 214 (1944). See, generally, Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (New York: Oxford University Press, 1983).
[14] *Ex parte Endo*, 323 U.S. 283 (1944).

against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Still, neither Justice Black nor Douglas ever regretted the ruling in *Korematsu*. Indeed, thirty years after that decision Justice Douglas explained:

> The decisions were extreme and went to the verge of wartime power: and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. . . . But those making plans for defense of the Nation had no such knowledge and were planning for the worst.[15]

The internment of Japanese-Americans was, nonetheless, unquestionably a "grave injustice." As a 1980 Commission on Wartime Relocation and Internment of Civilians ultimately concluded, the internment of Japanese-Americans was "not justified by military necessity" and reflected "race prejudice, war hysteria and a failure of political leadership."[16] As a result, in 1988 President Ronald Reagan signed legislation into law providing reparations for those who were interned.

During World War II the Court also approved President Franklin D. Roosevelt's order to use military tribunals to try German saboteurs, one of whom was notably a naturalized U.S. citizen. The "Nazi Saboteurs" were captured in the United States and charged with planning to sabotage bridges and utility plants. In *Ex parte Quirin*,[17] the Court unanimously ruled that the President has the "power . . . to carry into effect . . . all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war."

Writing for the Court in *Quirin*, Chief Justice Harlan Fiske Stone underscored that the power to wage war includes the authority "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." Nor did the chief justice distinguish between U.S. citizens and non-citizens; both were wartime belligerents and to be treated as such. As Chief Justice Stone put it, "citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful."[18]

Subsequently, though, the Court reaffirmed the distinction between citizens and non-citizens with respect to access to U.S. courts. In *Johnson v. Eisentrager*,[19] the Court held that federal courts had no jurisdiction over *habeas corpus* petitions filed by German nationals who were captured and held in China by U.S. military forces at the end of World War II. (On this basis the Bush administration rebuffed challenges to holding indefinitely captured Taliban and al Qaeda fighters in Guantanamo Bay, Cuba; in 2003 the Court of Appeals for the District of Columbia Circuit agreed that the detainees had no legal rights to seek judicial review of their detentions.[20])

Following World War II, the Court also stepped back to reaffirm the rights of citizenship in ruling that citizens may not be subject to court-martial or denied the guarantees in the Bill of Rights. Although the Court held that the government may not abridge these rights of U.S. citizenship, the decision was tortuous, involving vote switching and ultimately a change in the composition of the bench. In short, in spite of the result affirming the rights of citizenship, the ruling was highly controversial within the Court and leaves much to be desired in terms of the Court's defense of civil liberties.

The "cases of the Murdering Wives," as Justice Felix Frankfurter referred to them, *Reid v. Covert*[21] and *Kinsella v. Krueger*,[22] involved women who allegedly killed their husbands while stationed abroad in the military. They challenged the constitutionality of a treaty that subjected civilians living abroad with military personnel to courts-martial under the Uniform Code of Military Justice, which does not extend the same guarantees as the Bill of Rights. Chief Justice Earl Warren initially assigned the opinions, but Justice Stanley Reed changed his vote. The balance on the Court shifted and, with a bare majority voting to permit the courts-martial of civilians, the opinion was reassigned to Justice Tom Clark.[23] The very next year, though, Justice Sherman Minton retired and Justice Brennan took his seat on the bench. When the justices reconsidered the matter in *Reid v. Covert*,[24] they reversed their earlier decision and enforced the guarantees of the Bill of Rights in ruling that those fundamental rights of citizenship may not be abrogated by treaties.

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[15] *Defunis v. Odegarrd*, 416 U.S. 312 (1974), at 339 n. 20 (Douglas, dis. op.).
[16] Quoted in Brennan, supra note 1.
[17] *Ex parte Quirin*, 317 U.S. 1 (1942). For a concise examination of the case and the Court's decision, see David J. Danelski, "The Saboteur's Case," *1996 Journal of Supreme Court History* (1996), 61-82.
[18] Id., at 37.
[19] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
[20] See, e.g., Neely Tucker, "Detainees Are Denied Access to U.S. Courts," *The Washington Post* (March 12, 2003), A1.
[21] *Reid v. Covert*, 351 U.S. 487 (1956).
[22] *Kinsella v. Krueger*, 351 U.S. 470 (1956).
[23] The background of the case is further discussed in David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: 1st edition, 1986), 243-244.
[24] *Reid v. Covert*, 354 U.S. 1 (1957).

During the depth of the Cold War in the 1950s and early 1960s the Court again did not seriously question the wartime hysteria and prosecution of individuals considered "subversive" or disloyal. Notably, the Court upheld the convictions of leaders of the Communist Party under the Smith Act of 1940.[25] The Smith Act made it a crime to become a member of any organization or "to organize any society . . . advocat[ing] . . . the overthrow or destruction of any government of the United States by force or violence," and "to print . . . any written or printed material advocating . . . the . . . propriety" of overthrowing and destroying the government. Subsequently, Congress enacted, among other laws, the Internal Security Act of 1950 and the Communist Control Act of 1954, aimed at flushing out communists and others belonging to organizations deemed "subversive."

The insecurities, hysteria, and fear of communism during the Cold War also led to congressional "witch hunts." The House Un-American Activities Committee (HUAC), which was not abolished until 1974, and the Senate Permanent Investigations Subcommittee, chaired by Wisconsin's Senator Joseph R. McCarthy, subpoenaed hundreds of individuals in and out of government to testify about alleged communist activities.[26]

In response to challenges to these anti-communist prosecutions and congressional investigations, the Court ruled that witnesses may refuse to answer vague or irrelevant questions and that congressional committees' inquiries may not go beyond their authorizing resolutions.[27] Still, at least initially, the Court remained reluctant to check Congress or the executive branch.[28] In *Dennis v. United States,*[29] the majority affirmed the convictions of leaders of the Communist Party and proved incapable or unwilling to independently assess the factual basis for allegations that the party was actively conspiring to overthrow the government, in contrast to merely teaching and advocating Marxist-Leninist doctrines. Only two justices dissented in *Dennis*. Justice Douglas sharply criticized the majority for upholding the convictions based solely on an evidentiary record of their advocacy of doctrines found in books available in public libraries. Justice Black appealed to calmer minds and times, observing:

> Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

It was not until the mid-1960s that a majority on the Court finally rose to defend civil rights and liberties against the sweeping legislative investigations of so-called "subversive organizations" and restrictions enacted due to the passions of Cold War paranoia.[30] In one of those cases Chief Justice Earl Warren took the occasion to address the dilemma of preserving the Constitution and the country during wartime. *United States v. Robel* struck down a section of the Internal Security Act that made it unlawful for a member of a communist-action organization to work in a defense facility. With only two justices dissenting, the Court invalidated the provision for sweeping too broadly, "too indiscriminately," and "literally establish[ing] guilt by association." Writing for the Court, Chief Justice Warren paused to reflect on the tension in balancing individual liberty and national security. Moreover, he drew a conclusion in striking contrast to that drawn a hundred years earlier by Lincoln. As Chief Justice Warren explained:[31]

> "[N]ational defense" cannot be deemed an end in itself. . . . Implicit in the term . . . is the notion of defending those values and ideas which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

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The dilemma of preserving civil liberties in wartime now appears more pressing in the aftermath of the terrorist attacks of 9/11. Almost immediately President George W. Bush declared war against al Qaeda forces and international terrorism. Less than two months later, he signed into law the sweeping and controversial (though passed by Congress without public hearings or extended debate) 342-page USA PATRIOT Act of 2001 or, more precisely, United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.[32] Among the most important provisions of the

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[25] Smith Act of 1940, 54 Stat. 671 (1940). See *Dennis v. United States*, 341 U.S. 494 (1951).

[26] See Walter Goodman, *The Committee: The Extraordinary Career of the House Committee on Un-American Activities* (New York: Farrar, Straus & Giroux, 1968).

[27] See, e.g., *United States v. Rumely,* 345 U.S. 41 (1953); *Watkins v. United States*, 354 U.S. 178 (1957); *Deutch v. United States*, 367 U.S. 456 (1961); and *Gojack v. United States*, 384 U.S. 702 (1966).

[28] See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959).

[29] *Dennis v. United States,* 341 U.S. 494 (1951).

[30] See, e.g., *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *American Committee for Protection of Foreign Born v. Subversive Activities Control Board (SACB)*, 380 U.S. 503 (1965); and *United States v. Robel*, 389 U.S. 258 (1967).

[31] *United States v. Robel*, 389 U.S. 258 (1967).

[32] For the text and other information on the USA PATRIOT Act go to http://personalinfomediary.com/USAPATRIOTACT_Text.htm. See also Charles Doyle, *The USA PATRIOT Act: A Legal*

law are authorizations for expanded surveillance by law enforcement agencies, greater cooperation among federal agencies, the detention of immigrants, the seizure of the assets of terrorist organizations, and the creation of new crimes and penalties.

The USA PATRIOT Act, for example, expands surveillance powers in the following ways:

*Permits federal law enforcement agencies to use pen registers and trap and trace orders for electronic communications, including e-mail;

*Permits "roving" wiretaps or court orders for surveillance of identified individuals without requiring the identification of a particular communications device, when a court finds that the target of the surveillance is likely to thwart identification; and

*Broadens court-ordered access to any tangible item, rather than only business records, in the possession of lodging, car rental, and locker rental businesses.

Among the most controversial provisions is Section 412, authorizing the detention of suspect terrorists and supporters of terrorists. The provision authorizes the attorney general to detain alien terrorist suspects for up to seven days, if there are reasonable grounds to believe that they pose a threat to national security or are deportable on grounds of terrorism, espionage, sabotage, or sedition. Within the seven days, the attorney general must either initiate removal or criminal proceedings, or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security.

The law also created new federal crimes and enhanced penalties for terrorist attacks on mass transportation facilities, biological weapons offenses, harboring and supporting terrorists, fraudulent charitable solicitation, and misconduct associated with money laundering.

The USA PATRIOT Act, to be sure, did not go as far as the Bush administration initially wanted. That was due to opposition in Congress from both conservative libertarian Republicans and liberal Democrats, as well as from groups like the ACLU; though in the Senate only Democratic Senator Russell Feingold voted against passage of the final bill.[33] Moreover, the administration was forced to abandon some other highly controversial proposed policies, like the Department of Justice's (DoJ) proposed Operation TIPS—a Terrorist and Information Prevention System. TIPS had aimed to create a "national system for reporting suspicious and potentially terrorist-related activity" involving "millions of American workers who, in the daily course of their work are in a unique position to see potentially unusual or suspicious activity in public places," according to the DoJ.[34]

Nevertheless, many provisions of the USA PATRIOT Act and the administration's interpretation of the law and policy changes remain controversial and challenged in the courts. The American Bar Association, for instance, has been sharply critical of Attorney General Ashcroft's decision to allow the monitoring of conversations between lawyers and their clients if the DoJ or Federal Bureau of Investigation (FBI) has a "reasonable suspicion" the client is linked to terrorism.[35] No less controversially, under the USA PATRIOT Act the administration has authorized law enforcement agencies to conduct surveillance of public meetings and places, including mosques, thereby reviving practices curtailed in the early 1970s that had been used against civil rights and Vietnam war protesters.[36] Colleges and universities are contesting requests, as authorized under the USA PATRIOT Act, to provide private information on foreign students to the FBI.[37] Likewise, Arab-American and Muslim groups have filed several lawsuits challenging the mass detention of over 1,000 immigrants from Middle Eastern countries.[38]

These and other issues are likely to remain in litigation and without definitive resolution for years. Federal courts have already handed down conflicting decisions on some matters. Challenges to the Immigration and Naturalization Services' (INS) adoption of secret deportation hearings for immigrants, for example, has resulted in conflict judicial rulings. The U.S. Court of Appeals for the Sixth Circuit held that there is a First Amendment right of access to the proceedings, whereas the Third Circuit appellate court ruled contrariwise.[39] Notably, in a 2001 ruling, in *Zadvydas v. Davis*,[40] the Supreme Court

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Analysis: A Legal Analysis, CRS Report RL31377 (Washington, D.C.: Congressional Research Service, American Law Division, 15 April 2002).

[33] For further analysis, see Michael T. McCarthy, "USA PATRIOT Act," 39 *Harvard Journal on Legislation* 435 (2002).

[34] Quoted in Dan Eggan, "Proposal to Enlist Citizen Spies Was Doomed From Start," *The Washington Post* A11 (24 November 2002). The administration, however, has pressed ahead with other new and controversial surveillance policies like the Defense Department's Defense Advanced Research Projects Agency's (DARPA) Total Information Awareness (TIA) program. See Information Awareness Office, DARPA website at http://darpa.mil/iao/index.htm.

[35] See Helen Dewar, "Senator Leahy, ABA Protest Ashcroft's Monitoring Order," *The Washington Post* A11 (10 November 2001); and George Lardner, Jr., "U.S. Will Monitor Calls to Lawyers," *The Washington Post* A1 (29 November 2001).

[36] See Michael Powell, "Domestic Spying Pressed, *The Washington Post* A1 (29 November 2002).

[37] See Dan Eggan, "FBI Seeks Data on Foreign Students," *The Washington Post* A1 (25 December 2002).

[38] See Reuters, "Arab, Muslim Groups Sue INS, Ashcroft Over Detentions," *The Washington Post* A13 (25 December 2002); and Associated Press, "PATRIOT Act Called Threat to Democracy: Muslim American Leaders Say Law Violates Civil Liberties," *The Washington Post* A9 (22 December 2002).

[39] See Adam Liptak, "In Tense Times, A Court Insists on Open Doors," *The New York Times* WK 3 (1 September 2002); Charles Lane, "Court Calls for Open Detainee Hearings," *The Washington Post* A1 (27 August 2002); and compare Adam Liptak and Robert Hanley, "U.S. Court Allows Secret Deportation Hearings," *International Hearld Tribune* A5 (10 October 2002).

acknowledged that detained immigrants are entitled to the protection of due process of law. In that case, the Court held that immigrants may not be held indefinitely under a deportation order when countries refuse to take them back, as provided under the Illegal Immigration Reform and Immigration Responsibility Act of 1996.

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One controversial matter central to the Bush administration's war against terrorism that does appear to have been largely resolved (and resolved in a disturbing way for some defenders of civil liberties[41]), namely, the breaking down of the "walls" separating domestic criminal law enforcement and foreign intelligence, thereby encouraging the cooperation of agencies like the CIA, INS, and the Central Intelligence Agency (CIA). The USA PATRIOT Act removed restrictions on information sharing and foreign intelligence gathering. Specifically, Section 203 requires the attorney general to disclose to the director of the CIA "foreign intelligence" obtained from a federal criminal investigation, including wiretaps and grand jury hearings. The CIA may also share information it obtains with domestic law enforcement agencies.

Critics charge that the broad language of the act's disclosure requirement permits the DoJ to give the CIA *all* information related to a foreigner or to any U.S. citizen's contacts with a foreign government or organization, not merely data pertaining to international terrorism. Moreover, the act does not establish any standards or safeguards for restricting the disclosure of "foreign intelligence information." Therefore, critics also contend that the intelligence community may collect information about individuals who have committed no crimes, but who are involved in lawful protests of American foreign policies.

Furthermore, the USA PATRIOT Act changed the Federal Intelligence Surveillance Act of 1978, which created a special FIS court to approve wiretaps and to ensure that "the sole purpose" of domestic intelligence gathering was obtaining foreign intelligence information. Section 218 of the USA PATRIOT Act, however, changed the law so the DoJ need only show that the collection of foreign intelligence information has "a significant purpose," instead of being "the sole purpose" of an investigation.

Based on those new provisions in March 2002, Attorney General Ashcroft announced new guidelines allowing federal prosecutors to consult with law enforcement agents conducting foreign intelligence surveillance. Those guidelines were in turn challenged as a possible violation of the Fourth Amendment and for permitting the use of special FIS wiretaps for investigating and prosecuting ordinary criminals, and not just spies and terrorists.

In May 2002, the U.S. Foreign Intelligence Surveillance Court unanimously rejected Attorney General Ashcroft's proposed new guidelines. For the first time in the history of the court, it also released a published opinion.[42] Emphasizing the special and intrusive nature of FIS Act surveillance, the seven judges on the court maintained that the "walls" prohibiting criminal prosecutors from conducting investigations of suspected foreign spies and terrorists should not be torn down and that the DoJ's proposed changes were not "reasonably designed."

However, the DoJ subsequently and successfully appealed that decision to a special three-judge court of appeals, as authorized by the FIS Act and whose judges are assigned from other federal appellate courts by the chief justice of the Supreme Court. On November 18, 2002, the FIS appellate court reversed and upheld the DoJ's proposed guidelines.[43] In doing so, the appellate court stressed that the USA PATRIOT Act aimed to eliminate "walls" between the foreign intelligence and domestic law enforcement agencies, and reasoned: "Effective counterintelligence, as we have learned, requires the whole-hearted cooperation of all the government's personnel who can be brought to the task. A standard which punishes such cooperation could well be thought dangerous to national security."

As a result, federal criminal prosecutors may now use information against U.S. citizens obtained from wiretaps authorized by the FIS court, based on less than probable cause and more searching surveillance than previously or as permitted under traditional wiretaps. The cooperation that the FIS appellate court legitimated appears destined to grow with the creation in 2003 of the new Department of Homeland Security.

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Thus far in the war against international terrorism, it seems fair to say, most citizens have not been greatly burdened. They have largely faced inconveniences and confronted delays and more scrutiny of luggage at airport check-ins. However, Arab-Americans have come under wide-spread suspicion and discrimination in some communities. Some have also had their liberties restricted—restricted severely

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[40] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

[41] See American Civil Liberties Union, "In First-Ever, Secret Appeals Court Allows Expanded Government Spying on U.S. Citizens," Press Release (18 November 2002), available at http://www.aclu.org/cyber-Liberties.cfm?1d+11332&c+58.

[42] *In re: All Matters Submitted to the Foreign Intelligence Surveillance Court,* No. Multiple 02-429-F. Supp. 2d C (U.S. Foreign Intel. Surv. Ct., 17 May 2002).

[43] *In re: Sealed Case* (U.S. Foreign Intelligence Surveillance Court of Review No. 02-001 and 02-002), 18 November 2002, available at http://www.cadc.uscourts.gov/common/newsroom/02001.pdf.

and improperly in some cases.

For one, Mohamed Atriss, an Arab-American and business man who sold false identification cards to hundreds of illegal immigrants, including it turned out two of the 9/11 hijackers, spent six months in jail based on secret evidence presented to a state court judge in his absence and that of his attorney. Notably, federal authorities sharply criticized the Patterson, New Jersey county sheriff and local prosecutor for charging and holding him, since they exhaustively interrogated him after the 9/11 attacks. But, county officials persisted, claiming he had connections to terrorists, though they declined to explain why they considered Atriss dangerous or a threat. It now appears to have been a case of circumstantial evidence, prosecutorial zeal for the sake of publicity, overt discrimination, paranoia born of crisis times, or some combination. For, after six months in jail, twenty-six of the twenty-seven charges were dropped and Atriss agreed to plea guilty to one felony count of selling false documents in exchange for a sentence of one year on probation.[44]

The rights of citizenship in times of crisis and wartime are likely to remain a source of continuing controversy. That is not only because of new security measures and the experiences of Arab-Americans like Atriss. The designation and treatment of citizens as "enemy combatants" also puts the matter into bold relief. How the controversy over designating citizens "enemy combatants" has thus far played out also provides some further indication of the role of courts in defending civil rights and liberties in wartime, more generally.

In the immediate aftermath of 9/11 President Bush issued an order, as Commander-in-Chief of the armed forces, authorizing the indefinite detention of captured foreign terrorists and directing their trial by special secret military tribunals, without the possibility of appeal. His order invited controversy because the detainees are not treated as prisoners of war according to international law. Under the Third Geneva Convention of 1949, prisoners of war are entitled to an independent and impartial trial, the assistance of counsel, and the right of appeal.[45]

Even more controversial is the treatment of U.S. citizens alleged to have ties to al Qaeda or other terrorist groups.[46] In light *Ex parte Quirin* and *Reid v. Covert*, John Walker Lindh, the young American captured fighting with the Taliban in Afghanistan, was accorded counsel and tried in court, though his case was eventually resolved by a plea bargain and he is serving a twenty-year prison term.

Only two other citizens have so far been declared "enemy combatants," though several others have been detained as "material witnesses."[47] Initially, the DoJ took the position that courts had no jurisdiction to review the basis for detaining citizens as "enemy combatants." But, along with some other controversial post-9/11 positions, the Bush administration has been forced to retreat somewhat. In other words, the administration initially appeared to completely deny judicial review and to exclude the courts entirely from the matter.

One of the two, the so-called "dirty bomber," Jose Padilla or Abdullah al-Muhajir, as he become known after his conversion to Islam, was detained after deplaning from a flight from Zurich, Switzerland, in Chicago's O'Hare airport. He was initially held as a "material witness" for allegedly meeting with al Qaeda officials in Pakistan and conspiring to detonate a radioactive bomb in the United States. Padilla was later moved to New York and taken into military custody. He was then designated an "enemy combatant" and moved to a Navy brig in Charleston, South Carolina.

As an "enemy combatant," Padilla is held without specific charges, access to a lawyer, and other guarantees of due process. As with other post-9/11 detainees, lawyers challenged the administration's practice and denial of judicial review. In light of *Quirin*, few questioned the government's authority to hold him. Instead, at contention is the administration's position denying Padilla access to a lawyer and the opportunity to contest the basis for his detention in a court of law. As Morton H. Halperin, director of the Washington, D.C. office of the Open Society Institute, explained: "[The government is] entitled to hold him on the grounds that he is in fact at war with the U. S., but there has to be an opportunity for him to contest those facts."[48]

To be sure, the administration's position that "enemy combatants" may be denied the due process otherwise accorded citizens was not without its defenders.[49] Like the administration, they draw on *Quirin* and more recent rulings by Chief Justice William H. Rehnquist, as well as on his extra-judicial historical analysis of civil liberties in wartime.[50] Writing for the Court in *United States v. Salerno,*[51] for instance,

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[44] See Dale Russakoff, "Arab American Held on Secret Evidence Released," *The Washington Post* A2 (5 Feburary, 2003; and Dale Russakoff, "N.J. Secrecy Rule Keeps Arab American in Jail and in the Dark," *The New York Times* A1 (3 January 2003).

[45] See Geneva Convention Relative to the Treatment of Prisoners of War, Art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[46] For a further discussion see, e.g., Dan Eggan and Susan Schmidt, "Suspected Al Qaeda Operative Held as `Enemy Combatant,'" *The Washington Post* (June 11, 2002), A1; and Laurence H. Tribe, "Citizens, Combatants, and the Constitution," *The New York Times* (June 16, 2002), WK 13.

[47] See Steve Fainaru and Margot Williams, "Material Witness Law Has Many in Limbo," *The Washington Post* A1 (24 November 2002).

[48] Quoted in Charles Lane, "In Terror War, 2nd Track for Suspects: Those Designated `Combatants' Lose Legal Protections," *The Washington Post* A1 (1 December 2002). See also Adam Liptak, Neil A. Lewis, and Benjamin Weiser, "After Sept. 11, a Legal Battle on the Limits of Civil Liberty," *The New York Times* A1 (4 August 2002).

[49] See, e.g., Robert F. Turner, "No Due Process for Enemy Combatants," *The Wall Street Journal* A11 (26 August 2002).

[50] See William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Knopf, 1998).

Chief Justice Rehnquist held that the pretrial detention for more than two years, without bail, of an accused organized crime leader was "regulatory, not penal," and thus not a violation of due process. In his words: "We have repeatedly held that the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." In *dictum* referring to times of "war or insurrection," the chief justice added that "the government may detain individuals whom the government believes to be dangerous."

In December 2002, however, federal district court Judge Michael B. Mukasey held that Padilla had a right to consult with an attorney and to offer evidence contesting the government's allegations about his association with al Qaeda and that he poses a continuing danger to national security.[52] Judge Mukasey did not question the President's "power to detain unlawful combatants," noting that "it matters not that Padilla is a United States citizen captured on United States soil." He also ruled that the government need meet only a minimum standard of proof—need merely to present "some evidence"—to justify the detention. Nevertheless, Judge Mukasey affirmed that "Padilla does have the right to present facts" in holding: "The most convenient way for him to go about that, and the way most useful to the court, is to present them through counsel."

Other federal courts have likewise refused to be entirely excluded from the process of detaining a third U.S. citizen, Yaser Esam Hamdi, as an "enemy combatant." Hamdi appears a nominal or virtual U.S. citizen. He was born in Baton Rouge, Louisiana, but moved as a young child to his parents' homeland in Saudi Arabia, where he was raised. He eventually went to Afghanistan, where he was captured fighting alongside the Taliban by the Northern Alliance forces and turned over to the U.S. military. Hamdi was initially taken to Guantanamo Bay. But, once his U.S. citizenship was discovered, he was designated an "enemy combatant" and moved to a brig in Norfolk, Virginia.

Hamdi and his father challenged his detention, interrogation, and denial of legal representation as a violation of his citizenship rights as guaranteed by the Fifth and the Fourteenth Amendments. Before the government could respond, federal district court Judge Robert G. Doumar appointed a public defender and ordered the government to allow Hamdi to consult with the attorney.

On appeal, the Court of Appeals for the Fourth Circuit reversed Judge Doumar's order granting counsel immediate access to Hamdi.[53] The court, however, also rejected the position "that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[54] Instead, the court sanctioned a limited, deferential judicial review of Hamdi's status and remanded the case to the district court.

Following the remand, at a hearing Judge Doumar expressed concerns about Hamdi's rights as a citizen, questioned the government's basic contentions about its war effort, and directed the government to file a response to Hamdi's petition for a writ of *habeas corpus*. The government in turn filed a motion to dismiss and a response, including a two-page, nine-paragraph affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, detailing only the most rudimentary facts of Hamdi's capture and detention.

Judge Doumar was not satisfied and picked the Mobbs declaration apart "piece by piece." Ultimately, he held that the affidavit fell short of supporting Hamdi's detention. Judge Doumar ordered the government to turn over, among other things, copies of Hamdi's statements to interrogators and any notes taken of their interrogations of him. When the government then challenged the production of those materials, Judge Doumar certified for the Fourth Circuit's review the following question: "Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?"[55]

Back in the Fourth Circuit, Chief Judge J. Harvie Wilkinson relied on *Quirin* in reaffirming the appellate court's earlier ruling in Hamdi's case that courts should show "great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs."[56] Chief Judge Wilkinson now concluded that Hamdi could not challenge the Mobbs declaration, and that the declaration was a sufficient basis to justify his incarceration as an "enemy combatant." As in *Quirin*, he also held that "the fact that [Hamdi] is a citizen does not affect the legality of his detention as an enemy combatant."

Although reaffirming the judiciary's deference to the President in times of crisis and war,[57] Chief Judge Wilkinson carefully and appropriately drew the line at the complete exclusion or abdication of the

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[51] *United States v. Salerno*, 481 U.S. 739 (1987).
[52] See Benjamin Weiser, "Judge Says Man Can Meet With Lawyer to Challenge Detention as Enemy Plotter," *The New York Times* A23 (5 December 2002).

[53] *Hamdi v. Rumsfeld,* 296 F.3d 278 (4th Cir. 2002) (*Hamdi II*).
[54] Id., at 283.
[55] For further discussion, see Tom Jackman, "U.S. Defies Judge on Enemy Combatant," *The Washington Post* A1 (7 August 2002); and Tom Jackman, " "Judge Skewers U.S. Curbs on Detainee," *The Washington Post* A10 (14 August 2002).
[56] *Hamdi v. Rumsfeld,* 316 F.3d 450 (4th Cir. 2003), quoting *Hamdi II*, 296 F.3d at 281.
[57] See, more generally, Clinton Rossiter, with an introduction by Richard P. Longaker, *The Supreme Court and the Commander in Chief* (Ithaca: Cornell University Press, 1976).

judiciary's role and responsibility in enforcing the rule of law, defending individual rights, and exercising of judicial review. In his words: "The nation has fought since its founding for liberty without security rings hollow and for security without which liberty cannot thrive. . . . Judicial review does not disappear during wartime . . . but the review . . . is a highly deferential one."

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In conclusion, in historical perspective, the record of the judiciary, and in particular the Supreme Court, in defending civil rights and liberties during war time remains mixed. Yet, the judiciary has not relinquished (nor should relinquish) independent, albeit deferential, judicial review. At the same time, history underscores that the defense of civil rights and liberties during wartime passions and uncertainties requires the vigilance of not just the judiciary but of all citizens. For as Justice Robert H. Jackson, dissenting in *Korematsu*, wisely cautioned: "The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."

HAVE OUR EXPECTATIONS FOR GOVERNMENT AND PUBLIC ADMINISTRATORS CHANGED IN THE AFTERMATH OF SEPTEMBER 11 2001?

Michael R. Penrod*

In this essay I will explore the impact of the forces behind September 11, 2001, on civil liberties in the United States. My analysis rests on the assumption that Americans have very high expectations for all levels of government. To paraphrase the United States Constitution: we expect our government to insure our domestic tranquility while also providing for our common defense. At the same time we expect government to protect our civil liberties as enumerated and implied in the Bill of Rights. And, we expect government to do all this, and more, in an effective and efficient manner while being open and accountable to the people for actions taken in their name. (1) To most Americans the government, regardless of the level, is all the individuals, both elected and appointed, who carry out the public's business.

One of the major themes in American history focuses on our continual national struggle to balance the extremes implied in these expectations. In the process of seeking that balance we also further define (or depending upon your point of view obscure) the role of those charged with carrying out the people's business. The forces that produced September 11 seem to have exacerbated that search for balance and further obfuscated the role of public employees.

According to the popular wisdom, the attacks and their aftermath shattered our sense of domestic tranquility. Acutely aware of our vulnerability, both individually and collectively, Americans made a deliberate decision to trade civil liberty for security. We authorized government employees to monitor our behavior in intrusive ways that would not have been tolerated prior to September 11, 2002. We allowed this with the expectation that these government employees would judiciously use the information obtained to effectively and efficiently provide for our common defense. The desired outcome of this apparent trading of personal freedom for security: no more September 11s.

We have yet to determine if that outcome will be achieved. The reality of what we have done is never the less clear-we have created incredible cognitive dissonance for public employees at all levels of government. The conflict between the fundamental national values of personal freedom and societal safety is now at the core of what many public administrators do every day.

I agree with the premise that since September 11, 2001 American society has attempted to strike something of a Faustian bargain trading freedom, at least the freedom of some individuals in the society, for the safety of the entire society. I disagree with the notion that this is a unique event in American history. From the earliest days of the republic we have in times of crisis been quick to trade the civil liberties of segments of the society for the safety of the entire society. In retrospect we always regret these actions.

Some of the more egregious events to which I refer include (but are not limited to) the use of bills of attainder to suppress dissent during the revolutionary period; the Alien and Sedition Acts used to control foreign nationals and domestic dissent during the quasi-war with France in the 1790's; the wholesale suspension of civil liberties, both formal and informal, by Lincoln and his generals during the Civil War; the Red Scare of the nineteen teens and nineteen twenties; the internment of the Japanese-Americans during World war II; the second Red Scare of the late 1940's and 1950's; and of course the more recent abuses of the Cold War and Vietnam periods.

Arguably, in many of the examples I have sited the threat to nationality stability and survival was more apparent than real. Arguably, the post-9-11 threat to nationality stability and survival is more apparent than real. But, in at least one instance I have cited, the Civil War, the threat was very real. There were numerous times when, had events unfolded only slightly differently, the outcome of the war would have been different. And, I do not know if the selective suppression of civil liberties by Lincoln and his generals did anything to insure a Northern victory, but I do know that I am glad the outcome occurred as it did.

As a society, when we have looked back on the events chronicled above we have, with the benefit of 20-20 hindsight, regretted our actions. We find that we behaved in ways fundamentally incompatible with our national values frequently doing bad things to innocent people and scaring ourselves when we think about how intolerant we have been in defense of freedom. Even now there is evidence that we are uneasy with our response to September 11. Municipal governments, in small numbers, are forbidding their employees to cooperate with the federal government in enforcing the USA Patriot Act, so far our most egregious response to the attacks in New York and Washington D.C. (5)

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Such decisions basically flow from elected governing bodies and require action by paid government employees. This is in the tradition created by Woodrow Wilson in his seminal 1887 essay; "The Study of Administration." Wilson saw the setting of public policy as within the purview of elected bodies (i.e., congress, state legislature, and city council). He saw the carrying out of that policy as within the purview of the professional administrator, and the two functions were not to be mixed or vested in the same person or people. (6)

What Wilson did not foresee, or choose to ignore, was the possibility that different governing bodies would create diametrically opposed policy. He offers no guidance for the public administrator who, in this post 9-11 world may have to decide which law to break. It is these public officials, both elected and appointed, who bear the responsibility to provide for our common defense, insure our domestic tranquility and protect our civil liberties.

Since about 1900 in the United States we have seen the increasing professionalization of our public work force. Political patronage is largely gone. Government employees are expected to have relevant professional credentials to do the work they are brought in to do.

With professionalization have come subtle shifts in role. Wilson's administrator who left policy to the politicians has become a politician. This individual is now expected to take an active role in the policy process advocating for the interests of all the people. (7). At the same time the public employee is still expected to discharge his/her duties effectively and efficiently, and to be accountable to all the people for everything done in their name.

What I am suggesting is that in our post-9-11 world there is no consensus on what is in the best interest of all the people; especially when it comes to balancing the maintenance of domestic tranquility and insuring for the common defense with the preservation of civil liberties.

What has emerged, as evidenced by the USA Patriot Act and at least some of the reaction to it, is a policy designed to keep us either free or safe, but not both.

Public employees, most of whom entered the profession out of a desire to make the world a better place, now find themselves torn between polar opposites. Do they pursue policies that address the very real domestic security concerns in this country, but if adopted may make us less free? Or, do they pursue policies that protect and preserve our freedom, but that may allow terrorists to circulate freely among us? And, that would seem to make another 9-11 inevitable.

Ideally, we should expect our public employees to shepherd a national search for consensus on these issues. They cannot, indeed should not, lead the

debate. However, public employees can work with the citizenry helping to inform opinion and prod discussion (as an aside, what will likely happen is that many in the public sector will come to appreciate the wisdom behind Wilson's advocacy of the politics/administration dichotomy).

At the present time I do not think we, as a nation, possess the political will to engage in this necessary search for consensus. It is in no small measure the responsibility of the public administration profession to take the lead in creating that national will. This has to happen through a process of education, advocacy, training, luck, and a belief that one is in the public service to do good (8).

This commitment to doing good is the theoretical reason for being of American public administration. It is a clear and consistent theme that can be traced back to the profession's roots in the "Progressive" political movement (9). Insuring that this commitment to doing good continues to be the core value in American public administration is key to insuring moderation in our societal response to 9/11.

Education is the primary mechanism that supports maintenance of this professional orientation. Virtually all of our public administrators, both elected and appointed, are educated at the nations colleges and universities especially in regional comprehensive institutions. This includes not just students in traditional public administration programs. It also includes social workers, police officers, community planners, fire fighters, emergency managers, teachers, recreation managers, information management specialists, human resource managers, code enforcers, etc., etc. Aside from the appropriate technical/professional training the university has an obligation to insure breadth and diversity.

This happens in a variety of ways. Regional universities usually strive to provide a broad liberal arts education. Students must understand the traditions and values of our society (both the good and the bad). They must understand how these traditions and values have changed overtime and what they mean today. And, they must understand the enormous responsibilities of a citizen in a democratic state.

How do we impact all this?

a) We maintain a vigorous, diverse and high quality general education program.
b) We seek faculty who represent varying intellectual traditions within disciplines (academic departments where everyone thinks alike serves no one).
c) We encourage a campus climate of tolerance, even for points of view we do not like.
d) We cross our fingers and hope.

Is our national existence really threatened by the events of September 11, 2001 and their aftermath? I do not know, and neither does anyone else. What I do know is this: we are probably more capable, indeed more likely, to do permanent damage to this country than any thing of which an enemy is capable.

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3. Merstich, I. (2003) Freedom Under Siege. *Military History Quarterly 15* (2) 48-49.
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5. Montgomery, R. (December 9, 2002) Public resists Big Bother approach to terror fight. *The Kansas City Star*. A1 and A6.
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THE ABSENCE OF THE SACRED: DEMOCRACY IN THE AGE OF MILITARISM

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To what degree can the United States still claim to be a democracy? Since the terrorist attacks on the United States, the government has taken issue with several of the civil liberties that were once considered God-given rights and sacred within the contexts of the United States. First amendment rights, such as freedom of speech and association have been curtailed at alarming rates. Furthermore, fourth amendment rights dealing with arrest and confinement have been blurred, if not completely ignored in several instances. It is these rights, among others, that form the lynchpin of the democratic society which American troops are currently being deployed to "protect".

This paper argues that the curtailment of these freedoms, coupled with the increased power of the military has served to further erode democracy in the United States as opposed to protecting it. Using a discussion of political theorists and their articulations of the "sacredness" of individual liberties, we build a case that argues that if restrictions on individual rights are to be made for the sake of protecting the greater good, the decision about which rights are to be curtailed must be made through a deliberative process and in a deliberative setting. Congress, we argue is the minimal deliberative setting, and our paper asserts that the military has, during this time of crisis, effectively bypassed this setting. After establishing the importance of deliberation about which rights, if any, are to be restricted, we seek to elucidate the ways in which the military has usurped the power of elected branches, both the executive and legislative branches, and replaced the deliberative power of the governing bodies. Subsequently, several of the fundamental tenets of democracy, including the importance of deliberation and the right to trials, are quickly receding into the background with little public outcry.

Kohn (2002) has argued that control of the military have been wrested from the hands of civilian overseers, fundamentally diminishing democracy. This paper takes this assertion as a point of departure. The works of political theorists, such as Habermas and Rawls lay the groundwork for the importance of free speech, democratic deliberation, and articulation of demands and desires through both the executive and legislative elected bodies. We continue by highlighting the ways in which the professional military has historically usurped the power of elected officials during times of crisis and beyond, and to elucidate the ways in which the military is currently using its might to influence policy-making, building and maintaining a military state, in which civil liberties are curtailed. In our discussion, we note that the reactions to attacks of September 11 provide only the most recent example in the military's long history of undermining civil liberties. Finally, we provide some means by which the democracy can be replaced in the United States. At this point we turn to an in-depth theoretical examination of the importance of deliberation and the civil liberties currently being curtailed.

Terrorism and Democratic Theory

What does democratic theory say in regards to terrorism? Are the propositions that follow from democratic theory applicable to the practice of containing and defeating it? Or, should democratic theory be revised in order to find better standards to evaluate the policies currently enacted to fight against it? Admittedly, beyond some generic answer, in democratic theory there are no straightforward responses to how to deal with terrorism. One cannot find a systematic treatment of this issue. Furthermore, there are several democratic theories from which to draw. We deal with these two problems in the following fashion. First, we try to explain the reason for that lacuna and the way to cope with it and, second, we assert a criterion to evaluate competing theories.

Why does democratic theory lack a systematic treatment of terrorism and what we can do about it?

One of the reasons why one cannot find such systematic treatment lies in the fact that, although democratic theorists have stressed the connection between democracy and the exercise of freedoms, the matter has almost always been posed in negative terms. Since the functioning and quality of democratic procedures depend on the exercise of civil liberties, such as the freedom of speech, reunion, association and so on, it is the guarantee of these rights, not their limitation, that comes to the forefront. Without

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denying the value of rights as limits to external interference, this mode of thinking loses sight of an entire set of situations where rights are mutually interdependent.[1]

The proper way of dealing with the problems that interdependence pose does not entail a reduction of rights in terms of utility magnitudes, but instead requires a deontological analysis sensitive to consequences. Although human rights have *per se* an intrinsic value, one can take into account the consequences of the fulfilling (or not fulfilling) of some of them in order to achieve a state of the world where certain basic human capabilities can be more or less realized. Thus, the burden of proof is put in two scales. One has to prove, first, that the pondering balance of the rights at stake is correct and, second, that the actions chosen are the most adequate means to achieve the normative desirable outcome, i.e. to provide an account of causal or consequential links. Put it even more simply, in situations of mutual interdependence, to the light of resulting consequences of either choice, one can engage in rights fulfillment trade-offs that obey to a basic rule of proportionality: "As much a principle is not fulfilled, as much has to be the fulfillment importance of the other" (Alexy, 2002). This marginalist language seems the one that best fits into circumstances of moral conflict that characterizes situations such as the current one where terrorism overburdens citizens' freedoms.

What would democratic theorists say about terrorism if we made them discourse about it?

If we turn to democratic theory in search of candidates to serve as evaluating criteria of policies against terrorism, what can we find? Broadly speaking, there are two sets of democratic theories: communitarian and procedural. The divergent responses to terrorism that one may extract from each set spring from different interpretations of what democracy entails as well as what democracy presupposes to function. Before sketching some basic outlines and what follows from each democratic theory in regards to how to deal with terrorism, we advance here the criterion according to which we evaluate them. We think that the appropriate measuring stick of those democratic theories lies in their ability to detect and solve, if found, discrepancies between the values we claim to adhere to and the practices those values inform (Walzer, 1988).

Communitarian Theories Of Democracy

Communitarian theories hold that democracy cannot work properly unless embedded in a web of shared beliefs and values and in a network of "complementary associations" that activate solidarity and participation in public life (Etzioni, 1996). Although communitarians reject the potential authoritarian overtones of their approach, they have upheld policies that impose burdens to individual privacy to restrict crime and misdemeanors (Etzioni, 1999). Thus, the communitarian endorsement of some of the policies enacted in reaction to recent terrorist attacks comes as no surprise. In Amitai Etzioni's (2002) terms, "These safety measures are core elements of what protects the public and reassures it."

The most fundamental criticism made to the communitarian view of democracy and democratic freedoms is that modern societies are characterized by a widespread disagreement regarding what constitutes a "good" society. The plural conceptions of the good, in John Rawls' (1993) terms, makes it impossible to agree upon the basic structure of society on the premises of comprehensive doctrines.[2] What follows from this criticism is the rejection of policies grounded on the need to protect a supposed community from the attacks that can be perpetrated in the shadow of unlimited liberties. Anti-terrorism measures derive their authority from the need to preserve the institutional framework of a complex and heterogeneous society, not from the attempt to restore an idealized and non-existent homogeneous community. Thus, measures intended to combat terrorism under the assumption of fostering an alignment of societal values, for instance limitations to freedom of speech, should be examined critically. They do not represent a progression in terms of overcoming terrorism but a regression to an authoritarian regime.

Procedural theories of democracy

The core of procedural democratic theories lies in a postulated link between individual capacities, democratic legitimacy, and social order. Its point of departure is a "conception of ourselves as free and equal moral persons" (Baynes, 1992), that implies that we have the capacity to take an ideal role position, i.e. to consider the normative validity claims from an impartial standpoint, and provide reasons that make a decision justifiable to the eyes of those affected by it in the context of public deliberation. This idea is then connected to another according to which "outcomes are democratically legitimated if and only if

[1] A situation of this sort is one where "The only way of stopping the violation of a very important liberty of one person by another may be for a third person to violate another, some less important liberty of a fourth." (Sen, 1982).

[2] In Jürgen Habermas' (1996a and 1996b) terms, communitarians miss the fundamental distinction between questions of identity and of autonomy that one is forced to make in modern societies. Indeed, where the force of sacred common traditions became dissolved or is absent, one has to distinguish between what is appropriate, *good* according to one's own form of life and what is *right* in terms that take into account the equal interest of all.

they could be the object of a free and reasoned agreement among equals" (Cohen, 1989). In turn, it is also claimed that the cohesion of a society where individuals enjoy a high degree of autonomy in their private sphere only can be sustained if, at the same time, those individuals are able to redeem communicatively the validity of external, legal constraints of their private autonomy. This exercise of public autonomy, in Habermas' (1996) terms, or in Rawls' (1993), this public use of reason, is required to maintain the institutional framework within which individuals with differing values and interests can coordinate their actions, cooperate, and compete peacefully.

The question remains, however, how far can democratic deliberation go in terms of limiting liberties in order to contain and defeat terrorism? The answer in this case largely depends on whether or not one sees liberties as having priority over democratic deliberation. The matter here revolves around the normative status of such liberties. The interpretation of liberties, in Dworkin's (1977) terms, as *trump cards* follows straightforward from a theory, such as Rawls's, that gives liberties a priority over any other political principles. An alternative view directs one's attention to how much space there is to effect rights fulfillment trade-offs in the context of public deliberation.

In Rawls' theory, an alleged priority of liberties over democratic deliberation portrays them as landmarks that circumscribe and protect the deliberative arena. Such delimitation may be carried out in conformity with the idea that no social goals and no consequential analysis can trump the restricting power of individual rights over governmental action. This alleged priority of liberties over democratic deliberation can be squared with a reasoning that proceeds deductively, treating rights as premises and, consequently, subordinates the value of democratic decisions to mere conclusions that are either accepted or rejected. Without claiming that there is always space for rights fulfillment trade-offs, the problem with a view that treats rights as trump cards and entrenches itself in a deductive kind of reasoning is twofold; on one hand, it reduces the scope of public deliberation and, on the other, it makes little, if no room at all, for necessary trade-offs. In contraposition to such a restricting view, an implication of the equiprimordial character of democracy and rights, of their tied and mutual existence, as advocated by Habermas, is to open up the deliberative process to a creative concretization of civil liberties that copes with terrorist threats allowing normative balances and becoming sensitive to consequentialist analysis.

From this intricate discussion one can extract some preliminary criteria that help us evaluate the righteousness of policies that can be used to prevent terrorism. Perhaps the most fundamental conclusion is the assertion that the fulfillment of individual rights must be brought in to deliberative settings, even in the context of terrorist attacks. In the context of rights fulfillment interdependence, the need to make normative judgments sensitive to consequential analysis underscores the role that citizens affected should play in public discourses aimed at achieving compromises regarding limitation to rights. Such participation has both an intrinsic as well as an instrumental value. At the policy decision making and the implementation levels, deliberation can increase the effectiveness of governmental measures, reducing the costs of social cooperation, encouraging cooperation, and increasing authorities' legitimacy. Procedural democratic theory does not relieve us of the burden to engage ourselves in public discourses aimed at reaching an agreement regarding how to contain terrorism and preserve as much as possible civil liberties. Having said this, not as theorists, but as participants of a public discourse, we deem it proper to advance some minimal criteria to evaluate anti-terrorist policies.

Three propositions concerning the defense of freedom and democracy from terrorism

The first criterion refers to the relationship between anti-terrorist policies and the ends those policies must serve. The evaluation of all policies should be anchored in the principle that *no anti-terrorist policy shall be implemented if it makes the full exercise of freedom and the citizens' confidence in themselves and trust in their government impossible in time of future peace*. Notice that this principle is a mere paraphrase of the rationale of the laws applicable to war, as stated two hundred years ago by Immanuel Kant.[3] Although the war on terrorism is in many regards different from conventional wars, one can judge the rationale of the measures taken to fight against it in analogous terms as those employed to judge the rightness of the means used at war. The point to underscore here is that the end pursued imposes restrictions on the type of means that can be used. In other words, anti-terrorist policies must not annihilate the freedom and the democracy they are intended to serve.

All anti-terrorist measures should pass a test about their probable consequences regarding not only the defeat of terrorism, but also the future exercise of freedoms and functioning of democracy. Policies based on public deception, curtailment of discussion, and excessive official discretion to restrict citizens' rights are policies whose end would be a demoralized society where citizens had lost confidence in discussion and deliberation, in the exercise of their freedoms, and in their ability to hold accountable public officials. In light of those undesirable consequences, such policies should be rejected. Democracies, based on deliberation by free and equal persons, cannot afford to use lies and unrestricted

[3] In "To Perpetual Peace", Kant ([1795 2001) wrote: "No state at war with another shall permit such acts of warfare as must make mutual confidence impossible in time of future peace: such as the employment of assassins, of prisoners, the violation of articles of surrender, the instigation of treason in the state against which it is making war, etc."

violence against their enemies.

The second criterion concerns the justification of limitations to the exercise of some freedoms in order to defeat terrorism. Deliberative assemblies concerned about enacting anti-terrorist policies must engage in a careful analysis of the fitness of a given policy to respond to actual and present terrorist threats. There may arise situations where the fulfillment of rights is interdependent and to impose a burden on the exercise of some freedoms may be rendered necessary. The difficulty of making these decisions emerges from the lack of a common metric to ponder the value of the rights at stake, making rights incommensurable. There are tricky ways to escape from incommensurability. One is to deny the importance of one of the values at stake. Another is to avoid taking a stance on the matter. A deliberative assembly should resist any of those postures and try to find a minimum of consistency across choices made to fight against terrorism.

The third and final criterion concerns the importance of using international law as a guideline in regards to limitations to freedoms in times "of public emergency which threatens the life of the nation." The International Human Rights Law and the International Humanitarian Law crystallize the long learning experience of humanity regarding the need to restrain governmental discretion even in extreme situations such as external wars and internal conflicts. The bitter lessons of the First and Second World Wars led nations to endorse a set of institutions that protect human dignity against different sorts of dangers. Arbitrary use of governmental discretion is one such danger. This is why both the International Human Rights Law and the International Humanitarian Law specify a minimal set of rights that cannot be restricted even in the most extreme circumstances.[4] This specification cannot be interpreted to justify restrictions rights not included in that set. On the contrary, the need to safeguard others rights becomes apparent whenever they are necessary for the exercise of the any of the rights aforementioned above.

Our discussion of democratic political theorists highlights the centrality of deliberation to the process of formulating and deciding how to defend freedom and democracy from terrorism. As we have shown, anti-terrorism measures derive their authority from the need to preserve the institutional framework of a complex and heterogeneous society, not from the attempt to restore an idealized and non-existent homogeneous community. We now turn to the task of providing the empirical support for the argument that the deliberative process has been severely eroded by the loss of civilian control over the military. We argue that the military has historically circumvented the power of Congress and the president because of the competing interests of the elected branches. These competing interests and the lack of deliberation by elected officials about the centrality of the protection of rights, has resulted in an extension of the military's use of its surveillance capabilities, as well as the military's intervention on the public order. Our investigation of the military reveals that the military has led to the systematic infringement on civil liberties and deliberation.

Military and Democracy

The military has used several means to limit the ability and effectiveness of deliberation within Congress. Smith (1988) provides illustrative examples of the U.S. military's efforts to influence arguments in Congressional debate and budgetary considerations. The Air Force was able to decentralize the production of the B-1 bomber to forty-eight states (180). One could argue that it was an effort to "spread the wealth" among the states. However, Thomas Downey (D-NY) noted that this was Rockwell's effort "to prevent what they called '[political] turbulence'…. Translated, *turbulence* meant canceling the contract" (as quoted in Smith, *ibid*.).

More dramatically, after a series of votes against military issues, an Air Force general and colonel paid a visit to Senator David Pryor (D-AR), and attempted to convince him to vote in favor of the construction of the C-17 transport plane. They offered to build it in Little Rock, but were rebuked. The general then pulled out a sheet on which the military had documented his Senate votes, and began to list the instances in which the senator had voted against defense spending (Smith, 186-187; Dunlap 1994, 375). Thus, not only does the military use indirect methods of influence, it also lobbies and confronts, threatens, and intimidates elected representatives regarding their positions on defense. Clearly, this subverts the democratic ideal in the United States of civilian control of the military. Indeed, the military has attempted to reverse the relationship of control. Perhaps more importantly, it is subversive of the democratic requirement of free information and debate. If the military regularly employs such measures as intimidation of Congress members, these representatives and senators cannot freely speak their views on the military issues at hand[5]. Without such information, the free debate of elected officials is

[4] That set includes the right to life; the prohibition of torture or cruel, inhuman, or degrading punishment, or of medical or scientific experimentation without consent; the prohibition of slavery, slavery-trade and servitude; the prohibition of imprisonment because of inability to fulfill a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law; and the freedom of thought, conscience and religion (see the 1966 International Covenant on Civil and Political Rights, article 4).

[5] Indeed, these are regular tactics. According to Finer (1988), "… the American governmental system and its tradition of publicity *forces* the military not only to speak out but to establish relationships with political forces.

nonexistent.

Additionally, the organizational structure of the military has led to a lack of information necessary for a fully informed debate in Congress. In the wake of the Vietnam War, Congress streamlined the military leadership of the Joint Chiefs of Staff (JCS). The Chairman of the JCS became the official spokesman for that group, in effect limiting the influence and power of dissent of the various chiefs other than the chairman. The most evident case of the Chairman of the JCS dominating the military policy and (overtly) political space was Colin Powell. Famously, in two public forums Powell was able to subvert the policy proposals of the commander-in-chief (Karsten 1997; Johnson and Metz 1995; Kohn 2002, 19). In *Foreign Affairs* he defined what he felt the future military landscape should like and in the *New York Times* he publicly rebuked Clinton's attempts to allow homosexuals into the military.

Some commentators are concerned about the military's resistance to civilian command in both social and operational spheres. Desch (1996) notes the military resisted the Clinton push for involvement in the Balkans. He further notes the military's resistance to civilian efforts to allow more women into combat roles and to allow homosexuals into the armed forces (22-23). It might be argued that the military was unresponsive to Clinton because he had a history of draft dodging and protesting against war, and that with a presidential changing of the guard, the military will again submit to the commander-in-chief. However, the military publicly rebuking a sitting administration is not limited to only Clinton, or even in times of peace. More recently, there have been reports of officers engaged in battle in Iraq publicly questioning the wisdom of the war plan as conceived by Secretary of Defense Donald Rumsfeld (Levins: 2003).

By applying principle-agency theory to the elected branches and the military, one can see the civilian leadership is continuing to lose the ability to effectively oversee the military. Principle-agency problem is that one party, the principle, hires another party, the agent, to work on his behalf. However, the principle faces two problems, adverse selection and moral hazard, in making the selection of the agent. Adverse selection refers to situations in which the type of agent is not observable. Moral hazard refers to unobservable actions by the agent. Generally, the problem is solved by the principle specifying the necessary incentive structure to ensure that the agent acts on the principle's behalf.

Unfortunately, the civilian overseers of the military have little to no ability to offer an incentive structure to the armed services to ensure compliance of the principal's wishes. The classic problem of principle-agency is solved when the single principle offers the right incentive structure. The structure of the federal government does not allow a single principle to oversee the agent. Instead, the president and Congress have oversight of the military.

The classic principle-agency problem deals with congressional oversight of bureaucratic agencies with agencies strictly within the legislative branch and under the "control" of one committee (Weingast and Moran 1983). However, there are multiple committees who have at least marginal control over the military. In theory, the military serves multiple masters, but the truth is none can genuinely oversee it. Morris (2000) provides a vivid example of the ability of the agent to use multiple principles to its advantage, virtually assuring the agent of near autonomy (see also Lewis 1980). We argue that the military is able to act as it wishes due to the conflicting powers and goals of each principal.

Our research shows that the problem of oversight has increased in the wake of September 11, 2001. After September 11, the military increasingly testified before Congress, which might lead one to believe that congressional oversight increased. While true numerically, the number of committees in which top members of the military were asked to testify increased, adding further problems to the task of effective oversight. In the seven months preceding the attacks, only two Senate committees had heard from the military. The two additional committees became involved in oversight of the military following September 11 while the Commerce, Science and Transportation and the Armed Services committees were already active in military oversight.

The most active committee both before and after the attacks was the Armed Services committee. Before September 11[6], the military (a member of the JCS, a CINC, or an individual who had reached the rank of general or admiral) testified in twenty-four of fifty sessions[7] before the Armed Services committee, or in forty-eight percent of sessions the preceded the terrorist attacks on the United States. However, after the attacks the amount of testimony increased to thirty five of the fifty-eight (over sixty percent) sessions between September 12, 2001 and December 31, 2002.

These data lead us to two conclusions. First, in a continued reversal of the normative goal, the military probably has increased its own influence before Congress in much the same way as it has historically. Second, the increased congressional "oversight" of the military has further led to an increased confusion in solving the principle-agency problem. In short, the Senate's reaction toward the military after the attacks of September 11 only increased the possibility of the military acting on its own

[6] In 2001, preceding the attacks.

[7] The fifty sessions is taken from the total, excluding nominations and sessions that were closed and witness lists were unavailable.

outside the purview of Congress.

The problem of principle-agency has not only expanded with actions taken by the legislature. The Bush administration is allowing the military to become active in areas where it was not allowed authority, increasing the inability of the executive branch to effectively monitor the actions of the military. If the history of the military's defiance of civilian control described above is an example, the military is increasingly empowered to act as it wishes. The reaction of the civilian government to the terrorism of September 11 leads us to the conclusion that the federal elected branches that are charged with handling the military have taken inappropriate actions that have further weakened their power in reining in the military.

It is possible to argue that the fundamental tenets of democracy remain intact if the military does not influence the people's debates and ability to govern themselves. As the military is able to undermine deliberation within the elected bodies of government, this fundamentally calls into question the ability of the people to govern themselves. As the role of Congress in the debates regarding military policy is undermined by the military, at least in this matter the role of the people to self-govern has also been sabotaged.

Not content to undermine democracy in elected deliberative bodies, however, the military has in recent history played a role of domestic surveillance and law enforcement. In the late 1960s the military intelligence units devoted much time and effort to surveilling domestic antiwar groups (Marchetti and Marks 1974: 91; 230). Army intelligence investigated 100,000 Americans during the Vietnam War (Dunlap 2000: 213).

Military surveillance was not limited to peace efforts. The assassination of Martin Luther King, Jr. led the military to monitor his funeral and the Poor People's March and Resurrection City in Washington, D.C. The 1968 Democratic and Republican national conventions were observed by military intelligence personnel (Donner 1981, 305). Even when the civilian leadership attempted to cancel the domestic surveillance by the military, the top brass refused. The military initially denied the existence of files on civilians. When it became clear that files did exist, and the civilian defense officials ordered them to be destroyed, the military complied… only after duplicates had been made (ibid., 317).

Domestic military operations have begun again *en force*. The Pentagon has been busy attempting to provide civilian law enforcement (so it says) with "Total Information Awareness". This program, directed by John Poindexter of Iran-Contra infamy, is housed in the Pentagon in Defense Advanced Research Projects Agency (DARPA). This program will attempt to collect information such as credit card purchases, car rentals, official records, and airline tickets in an effort to monitor purchases and travel habits of all individuals within the U.S., citizen or not. As Clyde Wayne Crews of the Cato Institute points out, the Fourth Amendment explicitly prohibits "unreasonable searches", including the type described and envisioned by Poindexter and DARPA.[8]

The military has also intruded into the public order, until recently using the "War on Drugs" as support (Desch 1999; Graham 1995; Schmitt 1992). The "War on Drugs" should not be understood merely as sending troops and equipment to foreign locals, for the military is also engaged domestically. In the 1990's, the military began to use U-2 spy planes for domestic surveillance (Bovard 1994, 201) and the headquarters of the North American Aerospace Defense Command (NORAD) began to track planes that suspected of drug transporting (ibid.; see also Schmitt 1993). This domestic activity is rather benign compared to other actions of the military. In 1990, National Guard and active-duty Army soldiers were part of a widespread search and destroy mission of marijuana plants in Garberville, CA (Bovard 202; Bishop). The rise of the domestic use of the military is particularly tied to the National Defense Authorization Act of 1993, which allowed these troops to engage in areas that were once the spheres of the local law enforcement agencies.9

Although Congress passed the Posse Comitatus Act (1878), prohibiting the use of the military in enforcement in domestic civil laws, this law was (again) ignored during the "War on Terrorism." In October, 2002, nine people were killed and two more wounded in the Washington, D.C. area by the "DC Sniper". Several police forces combined efforts in an attempt to stop and apprehend the killer(s). The reaction of the federal government was swift as well. On October 15 Defense Secretary Rumsfeld announced that military material and personal would be used to track the killers after another attack, based in part on the fear that this might be another "terrorist" action.[10] On its surface, this seems to be an

[8] On February 11, 2003 Congress acted to suspend TIA for 90 days, but only regarding U.S. citizens.

[9] One could argue that the National Guard is not the same as active-duty troops. This is certainly true. Two rebuttals are evident, however. First, note that this Act came on the heels of the success of using active-duty troops and after the military had already redefined its own mission. Second, the National Guard has a place in the Pentagon. It is one of ten areas that are represented in the JCS by a commander-in-chief (CINC). This was the position that Colin Powell held before he was elevated to the chairmanship.

[10] Attorney General John Ashcroft announced that the federal government would explore the option of charging the men under the anti-terrorist statutes enacted in the wake of the original attacks.

excellent example of civilian oversight of military action. However, there are several problems to the U.S. democracy with the military being in these efforts.

First, the above mentioned Posse Comitatus Act remains on the books and explicitly restricts the military from enforcement of civil law. Therefore, despite the "best efforts" of the civilian leadership from violating the Act by limiting the military's role to operating equipment and providing potential targets for the civilian law enforcement agencies (Starr 2002; Addicott 2002), it is likely that these actions did indeed violate the Act.

Whether or not the military's action in pursuit of the DC snipers violated the Posse Comitatus Act is debatable (see Grossman 2002). The question then becomes: What effect will this action have on the future of law enforcement? If the historical context given above is any indication, then the people of the US have much to fear.

Additionally, the military oversees the detention for individuals that the government does not feel it has the evidence to convict of crimes. The government, and the military, would have one believe that the only individuals held in the military system are foreign "enemy combatants". However, there are at least two exceptions to this claim, both of whom are U.S. citizens currently being deprived of their Sixth Amendment right to a fair and speedy trial. Moreover, as suicide attempts mount at Guantanamo Bay, Cuba, reports of the military handlers engaging in torture of those being held are surfacing. This would seem to violate the eighth amendment protections that were intended to be extended to foreign individuals as well as citizens. Moreover, the Washington Post and other news sources have recently reported that prisoners are being tortured at the Bagram airbase in Afghanistan (Priest and Gellman 2002).

In short, due to the inability of either the president or Congress to effectively oversee the military, the armed services are able to act for their benefit rather than in accordance with civilian principals. This is especially true when competing against one another for influence, as has occurred in the wake of September 11. In turn, the civil liberties of American citizens and non-citizens are in peril to an extent that few understand.

Conclusion

September 11, 2001 ushered in a new historical moment for citizens of the United States. This moment is marked by a debate, or lack of any debate about the ways in which the rights that are a fundamental part of this democracy are being trod upon. We have argued the importance of the deliberation process to the act of formulating and deciding anti-terrorism policies. These policies are of particular significance because the level of fear, determination and militarization inspired by September 11th has led to guidelines and procedures designed to protect against terror. However, the reality is that this new militarism, manifest in increased governmental surveillance, the curtailing of freedom of speech and association, is actually eroding democratic values and institutions.

The problem of the inability of civilian oversight on the military is a serious one. We depend on our elected officials' ability to represent us in the deliberative process. In most cases, this process occurs within the hallowed halls of Congress. It is here that deliberation about what limitations and restrictions if any should be placed on our individual liberties for the sake of protecting the country. Instead the military, even before September 11, eschews Congressional and presidential orders and subsequently diminishes the possible role that citizens have in the deliberative process that is occurring around the issue of anti-terror policies. In this sense, there is a real danger that even in the absence of a set of rights and liberties that we all agree upon are sacred, our right to disagree is now non-existent.

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THE POST-SEPTEMBER 11TH ERA: INTERPRETATIONS OF SECURITY AND CIVIL LIBERTIES IN THE POLITICAL MARGINS OF THE LEFT AND RIGHT

Art Jipson*

You have probably heard and may have used the word *terrorism* often since September 11, 2001.[1] If you have, then you had an image in your mind when you discussed it. Other people have used the word, and they also project their own meanings into the term *terrorism.* This creates a problem. Nobody has been able to produce an exact definition of the subject since September 11, 2001. As a result, terrorism, extremism, domestic terrorism, fundamentalism, white supremacy among related terms means different things to different people. And sloppy definitions can lead to sloppy social policy. To make matters worse, the nature and immediacy of terrorism has not only changed over the course of history but dramatically since September 11, 2001. Most readers are familiar with the notion that violent behavior at one point in time may be called terrorism, while the same type of action may be deemed war, liberation, fun, or crime at another time. Furthermore, spirituality, religion, and faith have come to play an important part of the forms of terrorism of the past few years. This makes defining terrorism critical to understanding the perceptions of civil liberties.

Most literature on the issue of civil liberties examine the mainstream concern with civil liberties as practiced by domestic extremism organizations such as the Ku Klux Klan, Aryan Nations, World Church of the Creator, White Aryan Resistance, and other white racial extremist groups (Jipson and Becker 1999, 2001). These concerns have focused on the troubling free speech and assembly rights of extremist groups. Civil libertarians have vociferously argued in support of constitutional rights for these disquieting members of our community (Dees 1991; Dershowitz 1976, 1992, 1994a, 1994b; Hentoff 1988, 1993; Miller 2002). Another trend in the discussion of civil liberties has examined how civil liberties have been constructed during periods of social upheaval – such as the red scares of 1919 – or the denial of constitution rights during wartime, illustrated through the denial of rights through internments and intense questioning of subjects (Brown 1999; Contosta and Muccigrosso 1988; Leuchtenberg 1993; Muccigrosso 2001; Murray 1964; Walter 1992). This work expands this literature by examining differing perspectives on terrorism in the post-September 11, 2001 American context.

Defining Terrorism

The idea of terrorism enters our homes through television, cable, radio, and the Internet; it has become unavoidable in newspapers and magazines; is frequently now a part of popular music; and touches our lives directly through increased security at airports. Most Americans do not seem to worry about defining terrorism when they experience it indirectly. They simply feel fear when they see the violence terrorism produces. For many people, the event itself is what defines terrorism. For example, if a bomb destroys a plane, it is frequently called *terrorism,* but when military forces shoot down a civilian airliner, it is often defined as an unfortunate mistake. The United States may launch a preemptive military attack at a suspected terrorist headquarters and claim it is defending national security interests (as President George W. Bush has argued is a new part of American foreign policy). Yet, the American government may condemn another nation for doing the same thing in another part of the world. Dual standards and contradictions lead to confusion any time the term *terrorism* is used. Part of this confusion is tied to the political ideologies and beliefs of those who are doing the defining. What about those on the periphery of social policy construction?

The term *terrorism* has spawned heated debate among individuals, organizations, and social movements of the left and right-wing. Instead of agreeing on the definition of terrorism, commentators, authors, social scientists, policymakers, lawyers, and security specialists often argue about the meaning of the term. These debates are frequently more a function of advocacy of a particular partisan perspective than an objective analysis of what constitutes terrorism. According to Cooper (1978), there is a problem with defining terrorism. We can agree that terrorism is a problem, but we cannot agree on the exact meaning. This concern, however, is frequently more a matter of partisan arguments than assisting the victims of terrorism. As a university law enforcement officer once told me, "A victim of crime does not care about jurisdiction, they just want help" (Jipson 1999). I would similarly contend that: A victim does

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[1] See Denzin 2003 for an analysis of the consequences of 9/11 on American culture.

not care about which definition of terrorism is the most correct; they just want help. Unfortunately, this does not help allocate resources or decide on appropriate policy or law enforcement action.

There are several legitimate reasons for confusion. First, terrorism is difficult to define because it has an emotional pejorative connotation. A person is politically and socially degraded when labeled a terrorist, and the same thing happens when an organization is called a terrorist group. Deviance defines boundaries of "acceptable" social grouping by specifying what is *outside* that grouping. By labeling a group as a terrorist or extremist group, one defines what is normal (Erickson 1966). Routine criminal activities assume greater social and political importance when they are described as terrorism, and political movements can be hampered when their followers are believed to be extremists. Policy action is then taken when these movements are defined as terrorists. The position of sociological labeling theory is that the definition of the situation matters more than the actual behavior. *The label will thus be effective even if it is wrong.*

Further confusion arises when people intertwine the terms extremism, terror and terrorism *haphazardly*. The object of military force, for example, is to strike terror into the heart of the enemy, and systematic terror has been a basic weapon in conflicts throughout history. Some people argue that there is no difference between military force and terrorism. If you think that anything that creates terror is terrorism, the scope of potential definitions becomes limitless. The question that is useful for us here is simply: who establishes the definition and what do they hope to accomplish with that definition? As W. I. Thomas said: *"If a situation is defined as real, it is real in its consequences"* (1966). Secondary deviance patterns form through the application of social definitions, regardless of whether they are true. Secondary deviance is deviance that occurs as a result of a previously applied social definition and cannot be ignored because it does interfere with the individual's normal routine. In a secondary deviance situation it is quite possible for one's entire life to become organized around the label; one is defined first as a deviant (or criminal, or ex-con, or gay, or terrorist) and only later as something else (Thomas 1966).

Martha Crenshaw (1983) says terrorism cannot be defined unless the act, target, and possibility of success are analyzed. Under this approach, freedom fighters use legitimate military methods to attack legitimate political targets. Their actions are further legitimized when they have some possibility of winning the conflict. Crenshaw also suggests revolutionary violence should not be confused with terrorism. To Crenshaw, terrorism means socially and politically unacceptable violence aimed at an innocent target to achieve a psychological effect; such analytical distinctions have helped make Crenshaw a leading authority on terrorism, but two problems still remain. Whoever has the political power to define "legitimacy" has the power to define terrorism. In addition, the analytical definition has not moved far from a simple definition that is entirely based around the concerns of elites.

One of the primary reasons terrorism is difficult to define is that the meaning changes within social and historical contexts. This is not to merely suggest that "one person's terrorist is another person's freedom fighter," but it does suggest the meaning fluctuates and is based on context. Change in the meaning occurs because extremism is not easily understood without a systematic analysis. Like crime, it is socially defined, and the meaning changes as the definition of the situation changes based on new events (Thomas 1966).

The most widely used definition in criminal justice, military, and security circles is a rather simple view fostered by Crenshaw (1983), Dershowitz (2002a), Jenkins and his colleagues (1981, 1984, 1985) and Laqueur (1987, 2000) contend that terrorism is the illegitimate use of force to achieve political goals. Jenkins drafted his definition from his consulting work with security clients. He calls terrorism the use or threatened use of force designed to bring about a political change. In a definition close to Crenshaw (1983) and Jenkins et al (1981, 1984, 1985), Laqueur and Roberts (1987: 72) contend that terrorism is the illegitimate use of force to achieve a political objective by *targeting innocents*. They add that attempts to move beyond a simple definition are useless because the term is so imprecise and controversial. Volumes can be written on the exact definition of terrorism, but endless semantic debate will not add to our understanding of it. In his more recent work, Laqueur (2000) consistently promote a simple definition, arguing that meanings and definitions fluctuate over time as societies change.

Scholars freely admit problems with the attempt to construct definitions of terrorism.[2] Neither limits the topic nor creates a simple definition related to specific acts of terrorism. Simple definitions also leave academicians, policymakers, and social scientists frustrated as exceptions, contradictions, and philosophical problems mount. In short, simplicity does not solve the definition problem.

Laqueur argues that it is necessary to live with the problems and weaknesses of the simple definition because terrorism will always mean different things to diverse people. With this in mind terrorism becomes a form of religious, political, or criminal violence using extreme tactics to change behavior through the use of force to create a climate of fear that creates or suppresses societal change. This simple approach does not solve the problems of definition, but it allows us to move beyond endless debates about who is or is not a terrorist. It does, however, allow for social policy.

[2] For example, it is important to note that Laqueur spends more time considering extremism, as a separate problem from terrorism while other scholars do not make such a neat separation in their work.

But definitions hardly stop with pragmatic policy concerns. Many countries have created policy by outlawing terrorism and aggressively targeting extremism (e.g., Germany, Russia, Spain, and the United Kingdom to name a few). Prior to September 11, 2001, the United States examined the idea of a legal definition of terrorism that could focus and mobilize anti-terrorism efforts (Department of Justice December 2001 oversight reports, Laqueuer 2000; Jenkins 1981, 1984). The utility of legal definitions is that it establishes specific actions that can be used to prevent terrorist activities and eliminate violent networks. However, legal definitions are extremely limited because they do not account for the culture that promotes terrorism. More importantly, they can be misapplied to groups or individuals who, although they raise the ire of their government, are not terrorists. Violence is the result of complex social factors that range beyond narrow legal limitations, thus contributing to the original definitional problem of terrorism. Remember that according to labeling theory the definition of the situation matters more than the actual behavior. Violence is the result of complex social factors that range beyond narrow legal limitations and foreign policy restrictions no matter how well intended. Political violence occurs during the struggle for legitimacy. For example, American patriots fought the British before the United States government was recognized. While these patriots were well intentioned and honorable, they were extremists in their cause.[3]

Definitions of terrorism contain internal limitations and contradictions. Under the legal guidelines of the United States, for example, some groups can be labeled as terrorists; while other groups engaged in the same activities may be described as legitimate revolutionaries because it serves the interests of policy makers. In addition, governments friendly to the United States in various countries have committed numerous atrocities in the name of anti-communism, pro-business policies, and counter-terrorism (Diamond 1995; Laqeuer 2000). Ultimately, legal definitions are shortsighted because they do not capture controversial perceptions and limitations.

Methodology

With these definitional problems in mind, I collected data on interpretations on governmental anti-terrorism efforts in the United States. In this research project, I used the *constant comparative method* (see Glaser and Strauss 1967). This allowed me to conduct data collection, analysis and interpretation of websites, policy and position papers, newspaper and newsmagazine transcripts, and review field notes simultaneously. This strategy was used in a comparative analysis of (1) the analysis of left- and right-wing writings on Bush administrations policies written since the terrorists attacks since September 11, 2001, (2) of relevant American legislation (especially the *U.S. Patriot Act*, *Homeland Defense Act,* and *The Domestic Security Enhancement Act*), and (3) of specific and general discussion of civil liberties. One of the strengths of the constant comparative method is that it facilitates the construction and refinement of conceptual categories - "theorizing the data" - through the process of discovery, using a limited number of cases (Glaser and Strauss 1967; Lofland and Lofland 1984; Marshall and Rossman 1989; Ragin 1987; Strauss 1987; Whyte 1984). Its goal is to yield "deep," "rich," or "thick" description (Geertz, 1973) within which conceptual categories of processes and relationships might be developed and their properties formalized. Within this "case-oriented, comparative framework" (Ragin 1987), several different qualitative analysis methods were used, including the analysis of written interviews with policy makers, editorials activists on the left and right, and content analysis of descriptions of public response to legislation and executive orders. These methods are superbly suited to the nature of the project, and the wide variety of topics explored with varying political ideology.

The primary content analysis was based on thirty websites of the political right and left in American politics (see appendix A) in the hope of capturing the most current partisan perceptions on the Bush administration anti-terrorist policies. The information pertaining to anti-terrorism efforts and civil liberties were analyzed for emergent themes of discourse. In addition, thirty-two books written by commentators and scholars of the left and right were examined for their position on anti-terrorism and civil liberties. Furthermore, numerous, newsletters, dispatches, and articles from writers, commentators, lobbyists, and policy-makers of the left and right of the American political spectrum were reviewed for consistency of pattern and theme. My research background in analyzing the statements and policies of different organizations in American extremism has been until recently focused on white racial extremism, anti-Semitism, and domestic terrorism (see Jipson and Becker 1999; Jipson and Becker 2001; Becker, Jipson, and Katz 2001).

Atlas-Ti qualitative analysis software was used to code emergent themes and perspectives based on simple conceptual categories of mainstream, extreme right and extreme left. While these categories do not reflect a sophisticated coding scheme, they do represent an accurate attempt to discuss the perspective of political and social actors on the margins of American political discourse. Mainstream was defined as a broad range of political, social, and economic attitudes that are shared by the majority of American

[3] Because American patriots did not use accepted means of debate at the time and resorted to the use of violence, they were extremists and terrorists from the perspective of the British Crown.

citizens. These ideas include a view of government as a problem solver of political dilemmas whether through protracted or minimal involvement. This category includes the moderate centers of the Democratic and Republican parties.

The category of the extreme right was defined as political actors and groups that espouse an extreme libertarian perspective on political, social, and economic matters. Placement in this category is based on a strident view of government as a perpetual problem and irritant in the lives of Americans. Those in this category interpret the constitution through a lens of original author's intent and strive to limit federal power and authority over local constituencies. The radio talk show host and author Michael Savage, The Cato Institute, and the Patriot Movement are examples of actors in this category.

The final conceptual category used in this research is the extreme political left. The organizations and actors who comprise this category are focused on eliminating what is believed to be systems of environmental, class, racial, sexual, and other oppressions in modern society that generate inequality. Whether it is the proper role of government, social movements, social networks, or individuals to press for social change, those in this category rally around concepts and discourse focused on the idea of social justice widely defined (e.g., environmental, animal, sexual, globally networked systems of economic production, etc).

I hope that in analyzing well-known and controversial political positions, we can better understand the intersection of private, public, and social movement activism based on perceptions of preventing terrorism. Knowing some of the factors that are related to political attitudes and debate should assist in understanding and dealing with controversial public policies. Another significant aspect to the present study is an attempt to conceptualize the dichotomy between public and private consequences of social policy by examining a moment in which they dramatically intersect. Given the enormity of past events in New York City and Washington, D.C. on September 11, 2001, efforts at nation building in Afghanistan, and the consequences of the war in Iraq, a more complete understanding of how collective and personal politics relate to terrorism can only assist our ability to counsel those who are affected by changes to civil rights and liberties.

Development of Civil Liberties

Civil rights are social and political rights that a nation's citizens enjoy. The term is broader than "political rights," which may refer only to voting and civic participation rights. In the United States civil rights are usually thought of in terms of the specific rights guaranteed in the federal Constitution such as: freedom of religion, of speech, and of the press, and the rights to due process of law and to equal protection under the law. Civil liberties in the American context question the basic rules for the operation of the federal government, civil and criminal courts, policing and criminal procedure, and the criminal justice system. These rules are established to protect the rights of the accused as well as serve the purpose of guiding the criminal justice process in an adversarial criminal justice system. Consistent rules provide predictability to the legal process and legitimate the government's effort to maintain a stable social and criminal justice system. Questions abound about where the emphasis should be placed are frequently based on whether civil rights should be tied to crime control or due process and the rights of individuals.[4]

Civil Liberties Since 9/11

The *U.S. Patriot Act* (2001) was passed six weeks after September 11, 2001. This legislation has shifted the assumed balance between individual liberty and security in the United States. Under the Patriot Act, criminal procedure and police powers were broadly enlarged past recent Supreme Court decisions that have established the "Good Faith" interpretations of the Exclusionary rule. The power of law enforcement to detain and investigate has grown vast. More recently legislation unveiled on February 7, 2003, has been proposed to deepen and broaden the *Patriot Act*, known as the *Domestic Security Enhancement Act* (or DSA). As originally proposed, the DSA removes the five year sunset provisions for the Patriot Act and gives the Attorney General the authority to deport any foreigner who is deemed dangerous to the national security of the United States, regardless of their immigration status. It also gives the federal government the power to bypass courts and grand juries to conduct surveillance without a warrant from a judge and further empowers intelligent courts. The key provisions of the DSA escalate the investigative powers of law enforcement.

The Patriot Act and the proposed *Domestic Security Enhancement Act* shift the balance away from civil liberties and toward the power of the government to maintain security. This is an observation made by respected actors on both the political left and right in this country. For example, the position of the ACLU:

[4] It is beyond the scope of this work to examine the factors that produced historic and long over due changes in the nature of civil liberties in America.

> The draft "Domestic Security Enhancement Act" contains a multitude of new and sweeping law enforcement and intelligence gathering powers – many of which are not related to terrorism – that would severely undermine basic constitutional rights and checks and balances. If adopted, the bill would diminish personal privacy by removing important checks on government surveillance authority, reduce the accountability of government to the public by increasing official secrecy and expand on the definition of "terrorism" in a manner that threatens the constitutionally protected rights of Americans.

This interpretation is also shared among actors of the right. Consistent with other conservative and right-wing commentators, Robert Levy (2002b) contends that the combined effect of the *Patriot Act* and other legislation and executive orders is to undermine cherished constitutional protections:

> Ordinarily, advance judicial authorization of executive actions, followed by judicial review to assure that officials haven't misbehaved, shields us from excessive concentrations of power in a single branch of government. Under the Patriot Act, however, the executive branch has overwhelming if not exclusive power. Judicial checks and balances are conspicuously absent.

Interpretations of Civil Liberties: Is there No Center?

The development of civil liberties in the United States progressed hand-in-hand with various social movements that sought to expand protections to people of color and other minorities. How does the political left and right compare with regards to civil liberties in the United States since September 11, 2001?

The Extreme Left

The left-wing literature is dominated by a lack of consistency. The social and political left is concerned by issue and identity politics. This literature examines the interconnections of recent decisions of the Supreme Court, modifications in law enforcement efforts both before and after September 11th, 2001, The U.S. Patriot Act, recent changes in the senate following Trent Lott's controversial comments, the investigation and public scrutiny of Stephen Hatfill, and the nature and means of detaining Afghan Combatants (see Chang and Zinn 2002; Cole, Dempsey, and Goldberg 2002; Palast 2003; Vidal 2002a, 2002b).

The Extreme Right

These groups have stated in their journals, magazines, radio programs, and literature that the American government is involved in a vast conspiracy to deprive citizens of basic civil liberties. The right-wing is dominated by various trends: Religious (especially conservative Catholic and evangelical-fundamentalist Protestant), libertarian, and extreme anti-federal government positions. The Cato Institute's position would be an example of the anti-federal government view. The extreme right-wing is a label I am using to describe various types of absolutist beliefs and political organizing around the concepts of individual freedom, such as religious liberty, political liberty, freedom of speech, right of self-defense, and others. It is also used as a general term for the sum of specific liberties. Fundamental is personal liberty, the freedom of a person to come and go as he or she pleases without unwarranted restraint. Those who subscribe to the principles of extreme individual liberty, limited government (although frequently exempting the military and criminal justice system), the power of free market correctives, and the precise enforcement of law--call themselves by a variety of terms, including conservative, libertarian, classical liberal, and neo-liberal. These terms are imprecise which is why I have used the umbrella term right-wing in this work.

The rightwing movement started in the 1930s as a response to changes in public policy resulting from the New Deal (Diamond 1995; Leuchtenberg 1993; Muccigrosso 2001). Political leadership within the extreme right has been full of internal conflicts and contradictions from its inception. The libertarian right discovered with the Goldwater candidacy and the George Wallace insurgency in the 1960s that it could build an electoral base in the South. The 1970s saw the growth of the religious right in politics, use of computer mass mailing technologies, the involvement of corporate business interests, funding from tax-exempt right-wing foundations, wealthy industrialists, and think tanks, as well as the contributions of popular right-wing intellectuals (e.g., William F. Buckley). Some have argued that the movement culminated in the short-lived 1994 congressional republican revolution orchestrated by Newt Gingrich and the impeachment of President Clinton. The movement has remained fractured in various, if effective, strands since (Muccigrosso 2001).

Two Extremes: One View

Surprisingly, many on the extreme right and left were equally concerned about attacks on civil rights. The idea that all right-wing activists support the agenda of the Bush administration is not accurate.

Astonishingly, commentators from the fifteen right-wing websites were all concerned about the erosion of civil liberties as were writers from the left-wing websites. This statement from Ted Galen Carpenter, the president for defense and foreign policy studies at the Cato Institute, illustrates the convergence of concern that the Bush administration is overly restricting individual liberty:

Civil libertarians are justifiably alarmed at such an ominous shadow over the constitutional rights of all Americans. But there is another aspect that has received less attention even though it is equally alarming. It is a truism that civil liberties have suffered in most of America's wars. But in all of those earlier episodes there was a certainty that the conflict would end someday. A peace treaty would be signed, or the enemy country would either surrender or be conquered. In other words, America would someday return to normal and civil liberties would be restored and repaired (Carpenter 2002).

In a discussion of anti-terrorism initiatives, the left-liberal Center for Democracy and Technology (CDT, 2001) discussed similar concerns about an anti-terrorism package that dismantles many privacy protections that Americans had until that time enjoyed (CDT Policy Post 2001). In the analysis of the CDT, many of the provisions of the Patriot Act were not strictly limited to terrorism investigations, but apply to all criminal or intelligence investigations. These provisions are seen to:

> Allow government agents to collect undefined new information about Web browsing and e-mail without meaningful judicial review;
>
> Allow Internet Service Providers, universities, network administrators to authorize surveillance of "computer trespassers" without a judicial order;
>
> Override existing state and federal privacy laws, allowing FBI to compel disclosure of any kind of records, including sensitive medical, educational and library borrowing records, upon the mere claim that they are connected with an intelligence investigation;
>
> Allow law enforcement agencies to search homes and offices without notifying the owner for days or weeks after, not only in terrorism cases, but in all cases - the so-called "sneak and peek" authority;
>
> Allow FBI to share with the CIA information collected in the name of a grand jury, thereby giving the CIA the domestic subpoena powers it was never supposed to have.

This analysis by the CDT clearly views the government effort to remove civil rights regulations that limit law enforcement power to investigate suspected terrorists with concern. This apprehension with the scope of government intrusion is not limited to the political left. In a discussion of the TIPS program (Terrorism Information and Prevention System launched in the summer of 2002), Robert Levy writing in the *National Review* (2002a) suggests that the government is going overboard in increasing its investigative powers:

> The administration's motives may indeed be pure. But the law of unintended consequences is apt to prevail. We will soon have meter readers entering our homes, supposedly to do what we expect them to do, then [sic] rummaging around our private residences only to file a report with the Justice Department about anything they deem questionable. If police officers wanted to do the same thing, they'd have to convince a judge or magistrate that there was probable cause to issue a search warrant. TIPS may not raise Fourth Amendment concerns, but it comes pretty close.

Several writers and website developers among the left were weary of a vindictive witch-hunt to enforce the goals of the federal government. In an oft-quoted statement by the ACLU:

> As a result of the USA Patriot Act, a librarian can now be arrested for informing any library patron that government is investigating his or her reading habits. It is unknown whether the Attorney General considers reading books about the Founding Fathers, the Civil Rights movement or democracy in America to be a red flag for his investigators but you might want to watch out.

Both commentators on the left and right of the political spectrum in the United States commented on concerns that the administration's efforts against civil liberties which resulted from September 11, 2001 and the resulting war on terrorism would result in a permanent state of war where individual liberties would be overly restricted. Again, according to Carpenter (2002):

> The war against terrorism is different. Because the struggle is against a shadowy network of adversaries rather than a nation state, it is virtually impossible even to speculate when it might end. President Bush's initial comment that it might last "a year or two" was long ago consigned to the discard pile. Indeed, it is not clear how victory itself would be defined…. *That is a guaranteed blueprint for perpetual war*.

This view is shared among actors on the left of the political spectrum, according to the American Civil Liberties Union:

> The draft "Domestic Security Enhancement Act" contains a multitude of new and sweeping law enforcement and intelligence gathering powers -- many of which are not related to terrorism -- that would severely undermine basic constitutional rights and checks and balances. If adopted, the bill would diminish personal privacy by removing important checks on government surveillance authority, reduce the accountability of government to the public by increasing official secrecy and expand on the definition of "terrorism" in a manner that threatens the constitutionally protected rights of Americans.

And that the modification of civil rights in the war against terrorism would result in a never-ending state of war:

> Nor would the mere prolonged absence of attacks on American targets be definitive evidence of victory. How long a period of quiescence would be enough? A year? Five years? Ten years? The reality is that no president would want to risk proclaiming victory in the war on terrorism only to have another terrorist attack occur on his watch (Carpenter 2002).

And activists across the political spectrum agree that this perpetual war with the concomitant abrogation of civil rights is not only an issue of balance but harmful to the long term health of civil society:

> Whatever constitutional rights are taken from us (or that we choose to relinquish) will not be restored after a few years. In all likelihood, they will be gone forever.

We therefore need to ask whether we want to give not only the current president but also his unknown successors in the decades to come the awesome power that President Bush has claimed (Carpenter 2002).

During the U.S. military campaign in Afghanistan, Osama bin Laden said: "I tell you, freedom and human rights in America are doomed.... The U.S. government will lead the American people in and the West in general into an unbearable hell and a choking life." If the new push for surveillance of ordinary Americans succeeds, Bin Laden may be proved right. These measures do not just target terrorists. They target American liberty (Twight 2002).

Conclusions

While creating definitive definitions of terrorism and extremism is problematic, the attempt to deal with them is assumed to not be problematic (Jenkins 1981, 1984). However, as this work contends the labeling of political social action is equally dependent upon who is doing the labeling. The sociologist Howard Becker uses the term moral entrepreneurs to refer to those individuals who construct rules for the good of someone else. For Becker (1963), *deviance does not exist except as it is defined by "labelers" who can make the label stick*. While this is a useful theoretical construct in explaining a great deal of human social behavior, once again we have a theoretical model where the individual is portrayed as a *reactor to social labels*. Under this kind of approach, the individual has no free will concerning the application of the label. Becker calls a person who is involved in the passing of rules to be enforced for the good of someone else, a moral entrepreneur. There are actually two types of moral entrepreneurs: those who actually get the rules passed and those who try to enforce them. They establish what is appropriate and good behavior.

Neither the left- or right-wing see themselves as moral entrepreneurs, but they are involved in activities that are clearly crafted to establish the boundaries of accepted political discourse and action. What is fascinating in the case of a content analysis of the right and left on the issue of anti-terrorism efforts is that they both believe, from very different postulates, that recent anti-terrorist legislation as exemplified by *The U.S. Patriot Act* and *Domestic Security Enhancement Act* weakens the civil and personal liberties of Americans. While it is unlikely that the left and the right will join together in a coalition to repeal anti-terrorist legislation, both are voices heard in the critical choir calling for repeal of these anti-terrorism efforts of the federal government.

What this analysis demonstrates is that the concern with civil liberties is not a solitary concern of one political perspective over another. No political "side" in the United States has cornered the market on concerns individual and collective liberties. Furthermore, although the right and left utilize different assumptions and postulates about human and social behavior, namely individual rights and equality respectively, partisans from both sides are concerned about the growth in unchecked governmental powers of investigation, detention, and surveillance.

Appendix A

LEFT-WING	RIGHT-WING
http://pnews.org/ Gollum	**http://www.cato.org/** The Cato Institute
http://www.buzzflash.com/ BuzzFlash	**http://www.nationalreview.com/** The National Review Online
http://www.aclu.org/ American Civil Liberties Union	**http://www.amren.com/** American Renaissance
http://www.eff.org/ Electronic Frontier Foundation	**http://www.paulreveresociety.com/** Paul Revere Society
http://www.truthout.org/index.htm Truthout	**http://www.conservative.org/** American Conservative Union
http://www.almartinraw.com/ Al Martin Raw	**http://www.aei.org/** American Enterprise Institute
http://www.yellowtimes.org Yellow Times	**http://www.frontpagemag.com/** FrontPage Magazine
http://www.smokedot.org/ Smokedot	**http://www.genxright.com/index.html** Generation X Rightwing
http://www.alternet.org/ Alternet	**http://www.federalist.com/** The Federalist
http://www.commondreams.org/ Common Dreams	**http://www.jbs.org/** The John Birch Society
http://www.amnesty.org/ Amnesty International	**http://www.heritage.org/** The Heritage Foundation
http://www.ccr-ny.org/v2/home.asp Center for Constitutional Rights	**http://www.newsmax.com/** NewsMax.Com
http://www.cdt.org/ Center for Democracy & Technology	**http://www.radical-conservative.org/** Radical Conservative.Org
http://consortiumnews.com/ Consortium News.Com	**http://www.johnlocke.org/** John Locke Foundation

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"WITH THE STROKE OF A PEN": PRESIDENT BUSH CANNOT UNILATERALLY ESTABLISH MILITARY COMMISSIONS

James B. Staab*

On November 13, 2001, President George W. Bush issued an executive order allowing for the trial before U.S. military commissions of non-citizens who are either members of Al Qaeda, have engaged in international terrorism adversely affecting the United States, or have knowingly harbored such terrorists.[1] There is nothing new about military commissions. Historically, they have been used during the Revolutionary War, War of 1812, Mexican War, Civil War, and World War II. And in cases in which military commissions have been legally challenged, the courts have rejected some of the claims. For example, the Supreme Court has upheld military commissions for non-citizens captured overseas where the crimes committed took place outside of the territorial borders of the United States,[2] it has allowed military commissions for civilians who are captured in the theater of war where civilian tribunals are closed,[3] and it has permitted the use of military commissions to try so-called "unlawful combatants" (whether citizens or not) when the civil courts are open and fully operational.[4] What makes the Bush executive order unique is that it was issued without a declaration of war or specific congressional authorization. Drawing upon earlier uses of the military tribunals, I argue in this paper that the Bush administration's order allowing for military trials of aliens suspected of or connected with terrorist acts against the United States is an unconstitutional violation of separation of powers.[5]

President Bush's Executive Order

Following the September 11, 2001 savage and brutal attacks on the World Trade Center in New York City and on the Pentagon outside of Washington, D.C., where over 3,000 people were killed, President Bush issued a military order authorizing (for the first time since World War II) the establishment of military commissions. The President described the terrorist acts as creating a state of "armed conflict" and a "national emergency," and the order sets forth general guidelines for the conduct of military commissions, which can later be modified by the Secretary of Defense. According to the order, military commissions can be established in cases involving three different classes of individuals, all of whom must be non-citizens: (1) former or present members of Al Qaeda, (2) individuals who have engaged in, aided or abetted, or conspired to commit, acts of international terrorism that have caused or threatened to cause injury to the United States, or (3) persons who have knowingly harbored one or more individuals described in (1) or (2).[6] The number of individuals potentially implicated by this military order is enormous. It includes any suspect of terrorist activities against the United States before or after September 11, 2001. It does not matter whether the non-citizen suspect is a visitor or a long-term resident of the United States, and, according to Supreme Court precedent,[7] the Bush administration could, if it so chooses, extend the reach of its order to cover U.S. citizens. Finally, the standard of proof to be charged is simply whether the President has "reason to believe" that the suspect fits one of the categories mentioned above. Since September 11, 2001, approximately 1,200 terrorist suspects have been detained by the United States government, and currently 680 non-citizen terrorist suspects (representing at least 42 different countries) are being held incommunicado at Camp X-Ray, the U.S. military base in Guantanamo Bay, Cuba, for possible trial before military commission.

One of the things that make military commissions so controversial is that some or all of the constitutional guarantees required to be followed in civilian courts can be dispensed with. President

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[1] Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001).

[2] See, e.g., *In re Yamashita*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[3] See, e.g., *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868).

[4] *Ex parte Quirin*, 317 U.S. 1 (1942).

[5] For two excellent articles making similar arguments, see Neal K. Katyal and Laurence H. Tribe, "Waging War, Deciding Guilt: Trying the Military Tribunals," *Yale Law Journal* 111 (2002): 1259; Jonathan Turley, "Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy," *George Washington Law Review* 70 (2002): 649.

[6] 66 F.R. 57833, Section 2(a)(1).

[7] See *Ex parte Quirin*, 317 U.S. 1 (1942) (military commissions can be used to try "unlawful combatants" whether or not they are U.S. citizens). See also *Colepaugh v. Looney*, 235 F.2d 429 (1956) (upholding the military trial of an unlawful combatant, who was a U.S. citizen, for crimes committed during World War II).

Bush's executive order is no exception. According to the military order, three to seven individuals,[8] plus alternates, must serve as the judges for the trials, all of whom shall be commissioned officers of the United States armed forces, thereby depriving the defendant of the right to a civilian judge or jury of one's peers under Article III of the Constitution and the Sixth Amendment. In addition to the loss of that right, the original order denied the defendant the right to a grand jury indictment under the Fifth Amendment, gave the presiding officer of the commission (or a majority of its members) considerable discretion over the admissibility of evidence,[9] authorized the Secretary of Defense to establish the burden of proof in such trials, which presumably could be set at a something less than proof beyond a reasonable doubt, allowed non-unanimous (two-thirds) verdicts in all criminal cases, including capital cases, denied the accused the right to retain the services of a civilian attorney, did not mention the rights against self-incrimination and double jeopardy, and allowed the hearings to be closed from public view, thereby jeopardizing a free press and the public's right to know.[10] Finally, and perhaps most controversially, the executive order denied the accused the right of habeas corpus, lodging final review of the commission's findings with the President or the Secretary of Defense as his designee.[11]

Due to extensive criticism from the American Bar Association, the American Civil Liberties Union, and various other interest groups, the initial regulations have been modified. Pursuant to an order issued by Secretary of Defense Donald H. Rumsfeld,[12] the defendant must now be found guilty beyond a reasonable doubt and verdicts in capital cases must be unanimous. The revised order allows for a limited right of counsel, protects the accused from self-incrimination and double jeopardy, establishes a three-judge military panel to review the commission's verdict,[13] and requires that trials (to the extent possible) be open.[14] However, the fact remains that military trials are not civilian trials. If such trials are to be convened,[15] the defendant will be denied a grand jury proceeding as well as an Article III judge or civilian jury to decide his or her guilt or innocence, the normal rules of evidence will not be followed (e.g., hearsay evidence can be used), the defendant's right to counsel[16] and to confront witnesses[17] are not adequately protected, a two-thirds verdict suffices for almost all criminal convictions, and there is no

[8] In capital cases, the panel must consist of seven judges.

[9] Under the order, in order for evidence to be admitted it must simply have "probative value to a reasonable person."

[10] The order permits military commissions to sit "at any time and any place" and expressly authorizes "closure" of the proceedings to public scrutiny.

[11] One aspect of President Bush's military order that is flatly unconstitutional is the denial of habeas corpus review by federal courts. The order states that "military tribunals shall have exclusive jurisdiction with respect to offenses" committed by the individuals to whom the military order applies, and that those individuals "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in … any court of the United States…." 66 F.R. 57833, Section 7(b)(1) (2). This provision is a broader version of the one that President Franklin Roosevelt included in his 1942 proclamation setting up the commission that tried the Nazi saboteurs. Proclamation 2561, "Denying Certain Enemies Access to the Courts of the United States," filed July 3, 1942, 7 F.R. 5101 (July 7, 1942). The order's attempt to deny habeas corpus review, however, conflicts with several Supreme Court decisions, including *Ex parte Milligan*, 71 U.S. 2 (1866), where the justices ruled that only Congress could suspend the writ of habeas corpus, and *Ex parte Quirin*, 317 U.S. 1 (1942), where the Court bent over backwards to deny that FDR's executive order had such an effect, concluding, in the face of clear language to the contrary, that "neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." Ibid., at 25.

[12] Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," (March 21, 2002), available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

[13] According to the revised order, a three-judge panel must review the findings of the military commission, the members of which shall be military officers, including civilian commissioned officers, and at least one of whom must have prior judicial experience.

[14] The order provides five grounds for closure of the proceedings: (1) protection of classified information, (2) information protected by law or rule from unauthorized disclosure, (3) the physical safety of participants in commission proceedings, including prospective witnesses, (4) intelligence and law enforcement sources, and (5) other national security interests. Department of Defense Military Commission Order No. 1, 6B(3).

[15] A year and a half after the original order allowing for trial by military commission of non-citizen terrorist suspects, the Department of Defense has issued a draft order identifying the charges under which someone can be tried by military commission. See Military Commission Instruction, "Crimes and Elements for Trials by Military Commission" (February 28, 2003), available at http://defenselink.mil/news/Feb2003/d20030228dmci.pdf. The Bush administration's 2003 budget also includes funding requests for the construction of facilities to house military commissions at Guantanamo Bay, and it is beginning to identify those individuals who will serve as the chief prosecutor and defense counsel for the trials. See Vanessa Blum, "Defense Dept. Readies Teams for Terror Trials," *The Recorder*, April 18, 2003.

[16] While the accused does have a right to obtain the services of a civilian defense counsel, he or she must be able to pay for those services. Cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent criminal defendants in civilian cases must be afforded counsel). Moreover, the order places severe restrictions on the sort of documents the civilian defense counsel can have access to, limiting, for example, access to classified or national security documents. Finally, the accused's civilian defense attorney can be disciplined by the commission's presiding officer and is expressly warned against unreasonable delays of the proceedings, thus jeopardizing the civilian defense attorney's independence and ability to defend his or her client zealously.

[17] The accused has the right to confront witnesses during the trial, unless to protect the safety of witnesses some other method of receiving testimony or evidence is adopted. For example, the order allows, in the discretion of the presiding officer, "testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms." Department of Defense Military Commission Order No. 1, 6D(2)(d). All of these alternative means of receiving testimony or evidence call into question the type of face-to-face encounter contemplated by the Constitution's confrontation clause.

guarantee that the trial (or any portion of it) will be open. Finally, even though some executive branch officials have claimed otherwise,[18] the defendant (at least according to the express language of the order[19]) does not have a right to appeal the final ruling of the President or the Secretary of Defense to an Article III court.

The Authority for Establishing Military Commissions

President Bush has relied upon several different sources of authority for his order establishing military commissions. The order itself cites both constitutional and statutory sources: Article II's Commander in Chief Clause, the Use of Force Joint Resolution passed by Congress on September 18, 2001,[20] and two sections of the Uniform Code of Military Justice--10 U.S.C. Sections 821 and 836--which deal with the jurisdiction and trial procedures of military commissions. The Bush administration has also relied upon Supreme Court precedents dating back to World War II, particularly *Ex parte Quirin*[21] and *Johnson v. Eisentrager*,[22] to support its creation of military tribunals.[23] Finally, several executive branch officials[24] and academics[25] have offered various policy arguments for why it is necessary to have military tribunals, including the need to safeguard sensitive intelligence information, to protect the participants of the trials (judges, jurors, witnesses, and attorneys) from acts of revenge by terrorist groups, to ensure swift "justice" without having to be too scrupulous about evidentiary rules and due process constitutional guarantees, and to prevent a circus atmosphere during the trials, where defendants could espouse anti-American views and recruit other terrorists to their organizations. None of these sources of authority or policy arguments, however, support the President's unilateral creation of military tribunals. By placing all three functions of government—legislative, executive, and judicial—in the same hands, President Bush's military order violates what James Madison described as one of the principal "auxiliary precautions" against tyrannical government: separation of powers.[26] Without explicit congressional authorization, the President cannot "with the stroke of the pen"[27] convene military commissions.

Separation of Powers

In *Federalist* 51, James Madison described the doctrine of separation of powers as one of the chief bulwarks against tyrannical government.[28] Referring to Montesquieu, whom he called the great "oracle" of this modern invention in political science, Madison wrote:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.... The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.[29]

The doctrine of separation of powers is one of the Founders' most important inventions. Without it, the Bill of Rights would be meaningless or a dead letter.[30] By separating the powers of government and giving elected or appointed officials incentives to protect their own interests, no one branch of

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[18] White House Counsel Alberto Gonzales has interpreted President Bush's executive order as preserving habeas corpus review of a military commission's lawfulness in federal courts for "anyone arrested, detained or tried in the United States…." Alberto R. Gonzales, "Martial Justice, Full and Fair," *N.Y. Times*, Nov. 30, 2001, at A27. Note, however, that this interpretation does not include habeas corpus review for non-citizens who are captured and detained extra-territorially, which has some support in the Supreme Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[19] The revised order still assumes that final appellate review rests with the President or the Secretary of Defense as his designee.

[20] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[21] 317 U.S. 1 (1942).

[22] 339 U.S. 763 (1950).

[23] In one statement defending the establishment of military commissions, President Bush stated: "I would remind those who don't understand the decision I made that Franklin Roosevelt made the same decision in World War II. Those were extraordinary times, as well." Mike Allen, "Bush Defends Order for Military Tribunals," *Washington Post*, Nov. 20, 2001, at A14.

[24] See, e.g., Gonzales, *supra* note 18.

[25] See, e.g., Ruth Wedgwood, "The Case for Military Tribunals," *Wall Street Journal*, Dec. 3, 2001 and "Al Qaeda, Terrorism, and Military Commissions," *The American Journal of International Law* 96 (2002): 328; Robert Bork, "Having Their Day in (a Military) Court: How Best to Prosecute Terrorists," *National Review*, December 17, 2001; Abraham D. Sofaer and Paul R. Williams, "Doing Justice During Wartime: Why Military Tribunals Make Sense," *Policy Review* (Feb.-March 2002): 3-14; Charles Krauthammer, "In Defense of Secret Tribunals," *Time*, November 26, 2001, p. 104.

[26] James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, Isaac Kramnick, ed. (New York: Penguin Books, 1987), p. 320.

[27] Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, N.J.: Princeton University Press, 2001).

[28] *The Federalist Papers*, *supra* note 26, at 320.

[29] Ibid., at 303.

[30] See, e.g., Antonin Scalia, Remarks at a Panel Discussion on Separation of Powers, Washington D.C. (Videotape of C-SPAN Broadcast, November 15, 1988)

government can become too powerful. Assuming a properly functioning separation-of-powers system, the United States can be said to have a government of laws, not men. The unilateral establishment of military commissions, however, casts doubt on this Madisonian system of balanced government. The President, not Congress, has legislated their existence. The President determines who will be prosecuted by the commissions, and has usurped the prerogatives of the judicial branch by depriving it of the authority to review the jurisdiction and actions of the commissions. In short, three distinct powers of government are brought together under one person: the President. He is the chief lawmaker, law enforcer, and law interpreter of military commissions.

A useful and widely-accepted analysis for determining whether the President has gone beyond his constitutional powers under the U.S. tri-partite system of government can be found in *Youngstown Sheet & Tube Co. v. Sawyer*.[31] There the Supreme Court ruled 6-3 that President Harry S. Truman exceeded his authority under Article II when he seized the steel industries to avert a strike during the Cold War. Justice Hugo Black, for the majority, found the President's executive order unconstitutional because seizing the mills was " a job for the Nation's lawmakers."[32] Utilizing a formalistic interpretation of separation of powers, Black determined that the President's legislative powers were limited to recommending and vetoing bills passed by Congress, and rejected an undefined residuum of inherent presidential power under Article II. He had no doubt, however, that if Congress had attempted to seize the steel industries, it could have done so.

In an important concurring opinion, Justice Robert Jackson suggested a sliding scale analysis for determining the scope of presidential power under the Constitution. First, the President's powers are at their highest when he acts pursuant to an express or implied authorization from Congress. Second, the President slides into a constitutional gray area when there is neither explicit congressional authorization nor disapproval for his actions, which Jackson referred to as a "zone of twilight." Finally, the President's use of power is at its lowest ebb when he takes actions incompatible with the expressed or implied will of Congress. In the case at hand, Justice Jackson found that President Truman's actions fell into the third category, because Congress expressly declined to confer authority on the President to seize private industries under the Taft-Hartley Act of 1947.

Applying Justice Jackson's three-part analysis to President Bush's executive order calling for military commissions, into which category does it fall? The Bush administration claims that it had express congressional authorization when it promulgated its military order on November 13, 2001, and cites three statutory provisions for support of this proposition. First, it relies upon the Use of Force Resolution passed by Congress on September 18, 2001, which states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[33]

If one examines the express language of this resolution, however, it is easy to see how it does not authorize the President's actions. The resolution talks about the use of "all necessary and appropriate force" to prevent any future acts of terrorism, and makes no mention of "military commissions." Moreover, the Use of Force Resolution is prospective in nature by attempting to prevent future acts of terrorism, whereas, as noted earlier, the Bush executive order includes terrorist acts committed *before* September 11, 2001. Finally, as Timothy H. Edgar has pointed out, several "[m]embers of the House and Senate Judiciary Committees who voted for the resolution, of both parties, have expressed strong reservations about the President's unilateral decision, including Senator Arlen Specter (R-PA), [then] Senate Judiciary Committee Chairman Patrick Leahy (D-VT), Representative Bob Barr (R-GA), and Ranking [House] Member John Conyers (D-MI)."[34] Senator Leahy's criticism of President Bush's military order is particularly revealing. Leahy worked closely with Department of Justice officials in drafting the U.S.A. Patriot Act, the new anti-terrorism bill, and at no time during their extensive negotiations did the subject of military commissions ever come up.[35] Consequently, many members of Congress felt blind-sided when the administration unexpectedly announced its plan to establish military commissions on November 13, 2001. While it is always difficult to discern congressional intent after the

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[31] 343 U.S. 579 (1952).
[32] Ibid., at 587.
[33] Pub. L. No. 107-40, 115 Stat. 224, Section 2(a).
[34] Timothy H. Edgar, "President Bush's Order Establishing Military Trials in Terrorism Cases," November 29, 2001, available at http://www.aclu.org/congress/1112901b.html
[35] During the Senate Judiciary Committee's hearings on the Bush military order, Senator Leahy queried why the administration had not consulted with Congress before announcing its plan and voiced concerns that other countries would perceive the call for military commissions as an attempt by the U.S. to obtain some sort of "victor's justice." Jerry Seper, "Leahy Challenges Bush on Military Tribunals, *The Washington Times*, November 16, 2001, p. A1.

passage of a bill or joint resolution, it is highly unlikely that a majority of the members of Congress supported the establishment of military commissions when they voted for the Use of Force Resolution only one week after the September 11 terrorist attacks.

The Bush administration also cites Sections 821 and 836 of the Military Code of Justice for support of its plan for military commissions. But neither of these provisions authorizes the President's unilateral establishment of military commissions. Section 821 simply provides that expansion of courts-martial jurisdiction does not preempt "military commissions … of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war" can be tried by such commissions.[36] Similarly, Section 836 allows the President to prescribe pre-trial, trial, and post-trial procedures for military commissions.[37] All that these provisions make clear, however, is that military commissions may as a general proposition be established. They do not specify under what circumstances they can be created or by what institution. It should also be noted that even though an earlier version of Section 821[38] was cited by the *Quirin* Court to support President Franklin Delano Roosevelt's establishment of military commissions during World War II, the Stone Court justices also relied upon two congressional statutes specifically authorizing the creation of military commissions for the types of charges alleged in that case.[39] By contrast, no such specific statutory authorization can be cited by the Bush administration to support its unilateral creation of military commissions.

Even if Congress did not impliedly or expressly authorize the President to establish military commissions, did it deny him such authority? A case can be made that it did. Under Section 412 of the U.S.A. Patriot Act,[40] non-citizens suspected of terrorism must be charged with a crime or grounds of removal from the country within seven days of being detained, and the Act expressly permits judicial review of the detention by habeas corpus.[41] The 680 individuals who have been held at Guantanamo Bay since 9/11 have not been charged with any crimes and the executive order attempts to take away the right of habeas corpus. Under these circumstances, a plausible argument could be made that the President's order (or at least parts of it) goes against explicit congressional authority. But even if this is not the case, and Congress did not explicitly deny presidential authority to establish military commissions, President Bush's executive order clearly places us within Justice Jackson's twilight zone, where the constitutionality of the President's actions are uncertain because Congress neither granted nor denied presidential authority to establish military commissions.[42] Thus, in order to determine whether the President's actions are lawful we must examine more closely the specific constitutional authority he relies upon as well as the circumstances under which it is invoked.

President's Claim of Authority

Commander in Chief

The principal constitutional ground on which President Bush rests his authority for the establishment of military commissions is the Commander-in-Chief Clause of Article II.[43] Strong executivists since Alexander Hamilton have relied upon this provision as well as others[44] to claim that the President has broad "inherent," "implied," or "emergency" powers under the Constitution. Military commissions entangle the political branches in the classic foreign affairs struggle between Congress's authority to declare war and the President's role as Commander in Chief. As William Winthrop pointed out, "[t]he [military] commission is simply an instrumentality for the more efficient execution of the war

[36] Section 821 states in full: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. Section 821.

[37] Section 836 provides: "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. Section 836.

[38] Article 15 of the Articles of War.

[39] Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy, and Article 82 of the Articles of War, defining the offense of spying.

[40] 107 Pub. L. 56, 115 Stat. 272 (2001).

[41] See Edgar, *supra* note34.

[42] Some language used in *Madsen v. Kinsella*, 343 U.S. 341 (1952) suggests that "in the absence of attempts by Congress to limit the President's power," the President has the constitutional authority to create military commissions. But the Court also noted that the context in which this could happen was "in time of war," which has been interpreted in other decisions to be a formally declared war. See, e.g., *Zamora v. Woodson*, 19 C.M.A. 403 (1970) (holding that the term "in time of war" means "a war formally declared by Congress").

[43] "The President shall be Commander in Chief of the Army and Navy of the United States…." U.S. Const. Article II, Section 2.

[44] The other constitutional provisions typically cited for an expansive view of executive power are the Vesting Clause (Article II, Section 1) and the Take Care Clause (Article II, Section 3).

powers…."[45] By definition, military commissions presuppose a state of military government or martial law. Without war or armed rebellion, they could not come into existence.

Undeniably, the President has broad authority in the area of foreign affairs. As the Court recognized in *U.S. v. Curtiss-Wright Export Corp*.,[46] the President is "the sole organ of the federal government in the field of international relations." There the Court upheld a joint resolution by Congress delegating broad presidential authority to penalize companies that sold arms to either of the warring parties involved in the armed conflict in the Chaco Boreal region of South America. The decision was all the more remarkable in that only one year earlier the Court overturned two congressional delegations of presidential authority in the area of domestic relations.[47] There are also sound reasons for not interpreting the President's powers under Article II too stringently. As Chief Justice John Marshall warned: "A constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[48] In fact, by applying a broad interpretation to Article II's enumerated powers, the courts have found several important implied or inherent powers belonging to the President.[49] Even with these observations in mind, however, the President's authority in foreign affairs is not unlimited. While the history of presidential power has been one of aggrandizement, Congress is still a critical player in the area of foreign policy.

As a matter of textual exegesis, Congress has more power than the President under the Constitution to establish military commissions. In addition to its authority to declare war, Congress has the power to "provide for the common Defence and general Welfare of the United States" (Article I, Section 8, Clause 1), "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations" (Article I, Section 8, Clause 10), "To raise and support Armies" (Article I, Section 8, Clause 12), "To provide and maintain a Navy" (Article I, Section 8, Clause 13), "To Make Rules for the Government and Regulation of the land and naval Forces" (Article I, Section 8, Clause 14), and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (Article I, Section 8, Clause 18). Pursuant to its authority under Article I, Section 8, Clause 14, Congress has established an elaborate system of courts-martial for the military, and based on its authority under Article I, Section 8, Clause 10, it has been able to create military commissions during wartime. Thus, Congress's authority to create military commissions cannot be seriously doubted. When circumstances require it, Congress can provide for trial and punishment by military commission without a civilian jury. By contrast, the President does not have the same amount of textual support for unilaterally establishing military commissions. His chief textual support is the Commander-in-Chief Clause.

The Commander-in-Chief Clause gives the President the authority to direct the armed forces. The President, in consultation with his advisors, is responsible for military strategy and the supervision of his troops during wartime. Even if a broad construction of the Commander-in-Chief provision were to be employed, it does not support the unilateral establishment of military commissions. Broadly construed, the Commander-in-Chief Clause would allow the President to defend the country if Congress is out of session, or to detain prisoners during times of actual hostilities. But it would stretch the provision beyond recognition if it were to allow the unilateral establishment of military commissions by the President. The establishment of military commissions implicates all three powers of government: legislative, executive, and judicial. Under the Bush order, however, the executive branch defines what offenses are triable by military commission (a legislative function), it prosecutes the offenders (an executive function), and then it serves as the final arbiter of whether or not

[45] William Winthrop, *Military Law and Precedents* , 2d ed. (Washington Government Printing Office, 1920), p. 831.
[46] 299 U.S. 304, 320 (1936).
[47] See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating Section 9(c)--the "hot oil" provision—of the National Industrial Recovery Act of 1933); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (repealing the "codes of fair competition" provisions of the National Industrial Recovery Act of 1933).
[48] *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).
[49] Some of these implied or inherent powers include the right of removal, civil immunity from lawsuits, executive privilege, and international agreements.

the offenses have been committed (a judicial function). What is more, the commissioned officers that serve as the judges for these tribunals are not insulated from influence under Article III, but rather can be removed by the Secretary of Defense or his designee for good cause. The unilateral establishment of military commissions by the President violates Madison's separation of powers system. In order for military commissions to be established under our Constitution, congressional authorization is necessary.

The requirement that there be congressional authorization before military commissions can be established is consistent with previous uses of such tribunals. On all prior occasions in which military commissions have been used, Congress has either declared war or conferred specific statutory authorization. As Chief Justice William H. Rehnquist has recently demonstrated,[50] presidents have more power to restrict civil liberties during declared wars. Defenders of the President argue, however, that a declaration of war is not possible under present circumstances, since the enemy is a terrorist group and not a state actor. Here the Bush administration does have support in the *Prize Cases*,[51] where the justices recognized that a state of war could exist without a formal declaration of war. However, the institution that must recognize such a de facto state of war is Congress, not the President, and it has not chosen to do so. While it might be true that the U.S. cannot declare war on a terrorist organization such as Al Qaeda, Congress must still authorize the use of military commissions. Unlike Presidents Lincoln and Truman, who did try to get congressional authorization for their emergency military actions, the Bush administration has not attempted to get congressional support for its use of military commissions.

Right of Prerogative

Sometimes presidents will couple their textual claim of authority with an argument based on public necessity or self-preservation, which is the case with the Bush military order.[52] The basic idea here is that civil liberties are meaningless if the life of the country is endangered. John Locke defined such emergency power (which he called more broadly "the right of prerogative") as the executive's "power to act according to discretion for the public good, without the prescription of law and sometimes even against it."[53] Historically, presidents have been able to assume emergency powers where, based on the nature of the crisis and the exigent circumstances, they have not been able to consult with Congress and had to take quick, decisive action. President Lincoln provides the classic example. During the Civil War, Lincoln took many actions[54] that he knew were unconstitutional at the time, but later justified them on the grounds that they were necessary to preserve the Union. In his memorable words:

> Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the nation.[55]

Claims of emergency power must be closely scrutinized, however, since they have no textual support and conflict with democratic principles. Assuming that the President has some sort of emergency power, did the 9/11 terrorist attacks against the United States justify the President's order calling for the establishment of military commissions? The Bush administration can garner little support from President Lincoln's actions during the Civil War. The conditions under which Lincoln assumed extra-constitutional powers were markedly different. By the time he came into office, seven states had already seceded from the Union, and his actions were a response to what Edward S. Corwin has called a "total war"—a war "in which there was a real danger that America might lose its Constitution and its way of life."[56] The terrorist attacks of 9/11, while enormous and horrific in scope, both in terms of the number of

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[50] See, e.g., William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 218 (New York: Alfred A. Knopf, 1998) ("Without question the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war—the *Schenck* and *Hirabayashi* opinions make this clear").

[51] 67 U.S. 935 (1863).

[52] 66 F.R. 57833, Section 1(g) ("Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.")

[53] Locke, *The Second Treatise of Government*, ed. Thomas P. Peardon (Indianapolis: Bobbs-Merrill Education Publishing, 1952), p. 92.

[54] These actions included a blockade of Southern ports, raising a large force of volunteers, increasing the size of the Army and Navy, and declaring a suspension of the writ of habeas corpus.

[55] "Abraham Lincoln's Letter to Albert G. Hodges," in *The Evolving Presidency: Addresses, Cases, Essays, Letters, Reports, Resolutions, Transcripts, and Other Landmark Documents, 1787-1998*, ed. Michael Nelson (Washington, D.C., CQ Press, 1999), 70-74.

[56] Katyal and Tribe, *supra* note 5, at 1272 (citing Edward S. Corwin, *Total War and the Constitution* (1947)). It is important to recall that Lincoln himself was rebuffed in some of his uses of emergency powers. See, e.g. *Ex parte Milligan* (overturning a death sentence by a military commission when civilian courts were open).

fatalities[57]and the amount of property damage, do not justify the unilateral establishment of military commissions. At no time was martial law ever declared in New York City or in Washington, D.C. and, but for a short time, the federal courts in both locations remained open. Moreover, the President's claim of emergency power is less persuasive since Congress was never prevented from conducting its business.

In evaluating a President's claim of emergency power it is also important to consider the scope and nature of the proposed actions. In this regard, President Bush's military order should give us pause. None other than Bob Barr (R-GA), a conservative member of the House, and a former U.S. attorney and CIA analyst, said "[t]he scope of [President Bush's] executive order takes your breath away."[58] As noted earlier, the Bush order subjects to trial by military commission any non-citizen suspect of terrorist activities where the President has "reason to believe" the individual committed some offense. It does not matter how long the non-citizen has resided in the United States, and the order, based on a past Supreme Court opinion dealing with enemy combatants,[59] could be expanded to include U.S. citizens. Moreover, there is no set time limit on how long military commissions can be used, which means they could be around indefinitely, for what President is going to declare that the war on terrorism is over? In short, the order is much too broad in scope for any claim of emergency power to be convincing. While I may agree with those who say that the gravity of the terrorist attacks on September 11, 2001 amounted to something akin to a quasi war, the institution that must recognize such a state of affairs is Congress, and it is only Congress that can authorize the use of military commissions as an appropriate instrument of that undeclared war.

Supreme Court Precedents

Ex Parte Quirin

The Bush administration also relies upon Supreme Court precedents to support its order calling for military commissions, particularly two cases handed down during and immediately after World War II: *Ex parte Quirin*[60] and *Johnson v. Eisentrager*.[61] *Ex parte Quirin* presents an important exception to the Court's early decision involving military commissions, *Ex parte Milligan*.[62] In that case, decided immediately after the Civil War, the Court held that military tribunals could not be used to try non-military defendants if the civilian courts were open. Lambdin P. Milligan, an Indiana resident with Copperhead sympathies, was charged during the war with conspiring to raid state and federal arsenals in several northern states in order to obtain weapons and release confederate prisoners. After being sentenced to death by a military tribunal acting under authority of a presidential order suspending the writ of habeas corpus, the Court ruled that Milligan was denied a right to a jury trial since the civilian courts in Indiana were open at the time. "The Constitution of the United States," Justice David Davis eloquently wrote, "is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[63] The Court rejected the contention that the emergency created by war justified using military commissions in areas not within a theater of operations, and held that trying a citizen who was not a member of the armed forces before such a tribunal, rather than in a civilian federal court authorized by Congress, in an area in which the courts were open and satisfactorily administering criminal justice, violated both the Sixth Amendment's guarantee of a speedy and public trial before an impartial jury and the Fifth Amendment's requirement that all prosecutions not involving members of the military be initiated by grand jury indictment.[64]

In *Ex parte Quirin*,[65] the decision that the Bush administration relies upon, the Court made an important exception to *Milligan*. There the Court, in an 8-0 decision,[66] upheld a military commission's authority to try eight Nazi saboteurs captured in the United States (including two U.S. citizens) during World War II, even though the civil courts were open. In reaching this decision, Chief Justice Harlan Fiske Stone, the author of the Court's opinion, reasoned that "unlawful combatants" who are caught in civilian clothes, and plotting to spy on and destroy U.S. military installations, could be tried by military

[57]The 3,000 people killed during the 9/11 terrorist attacks exceeded the number of individuals (2,403) who were killed when Japan attacked Pearl Harbor on December 7, 1941.
[58] Mark Helm and Dave Eggert, "Legal Experts Raise Eyebrows at Military Tribunals: Constitutional Debate Begins," *San Antonio Express-News*, December 21, 2001, p. 20A.
[59] *Ex parte Quirin*, 317 U.S. 1 (1942).
[60] 317 U.S. 1 (1942).
[61] 339 U.S. 763 (1950).
[62] 71 U.S. 2 (1866).
[63] Ibid., at 120.
[64] See also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (holding that a military commission established in Hawaii after the bombing of Pearl Harbor was unconstitutional since the imposition of martial law was extended for too long).
[65] 317 U.S. 1 (1942).
[66] Justice Frank Murphy recused himself from the case, because he joined the Army Reserve as a Lieutenant Colonel in 1942.

tribunals:

> By universal agreement and practice, the law of war draws a distinction between…those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[67]

The Court distinguished *Milligan* by noting that Lambdin Milligan was not an enemy belligerent, because he had not been "part of or associated with the armed forces of the enemy."[68] Even though *Quirin* does represent an important exception to *Milligan*, a crucial basis for the Court's decision upholding the use of military tribunals was that Congress had declared war. Throughout the Court's opinion, Chief Justice Stone repeatedly referred to the Articles of War and how they "authorized" or "conferred power upon" the President to create military tribunals. In fact, the Court explicitly declined "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation."[69] President Bush's executive order differs from *Quirin* in this important respect. Without a declaration of war (or some other explicit statutory authorization), the President does not have the unilateral authority to create military tribunals.

Moreover, there are compelling reasons why *Quirin* should be limited to its unique facts. Many believe that the decision was cobbled together to justify a result reached prematurely by the Court.[70] Regardless of whether the eight Nazi saboteurs were unlawful combatants, the civilian courts were open at the time. *Milligan* provides a strong presumption in favor of trial by jury when the civilian courts are open and fully operational. Referring to trial by jury as the "vital principle, underlying the whole administration of criminal justice," and that which protects "the citizen against oppression and wrong," Justice Davis stressed the importance of the jurisdictional issue at the outset of his opinion:

> No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.[71]

Furthermore, even though it is true that a distinction is made in the law between lawful and unlawful combatants—i.e., the former are accorded prisoner of war status, while the latter are not and can be tried and punished by military commission—this distinction should not be pressed too far. In reviewing the habeas petitions of only seven defendants, [72] the *Quirin* Court emphasized the limited nature of its holding. The Bush order, by contrast, applies to any non-citizen terrorist suspect whose acts adversely affect U.S. interests. Additionally, the *Quirin* justices did not have much difficulty concluding that the seven Nazi defendants could be tried as "unlawful enemy combatants,"[73] while the Bush order makes no distinction between lawful and unlawful belligerents. Even though some of the 680 detainees at Guantanamo Bay might be triable as unlawful combatants (e.g., they conspired with the 9/11 hijackers), the vast majority surely cannot be. The Bush administration has said that it will only prosecute unlawful combatants, but the order does not make this clear.

Privately, several of the justices also expressed reservations about how *Quirin* was decided. For the first time in twenty-two years, the Court heard the case in special session, allowing nine hours of oral argument over two days from July 29-30, 1942. Justice William O. Douglas, traveling from the West Coast, missed the first day of oral argument. The Court initially lacked jurisdiction in the case, but by the time it issued its short per curiam opinion on July 31, "the Court's jurisdiction caught up with [it] just at the finish line."[74] A full-dress opinion was filed three months later on October 29, 1942, after six of the

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[67] 317 U.S. at 31.
[68] Ibid., at 45.
[69] Ibid., at 29.
[70] See, e.g., David J. Danelski, "The Saboteur's Case," *Journal of Supreme Court History,* 1 (1996): 61-82; Michal R. Belknap, "The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case," *Military Law Review*, 89 (1980): 59; Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Lawrence, KS: University Press of Kansas, 2003); G. Edward White, "Felix Frankfurter's 'Soliloquy in *Ex parte Quirin*: Nazi Sabotage & Constitutional Conundrums," *Green Bag* 2d. 5 (2002): 423; Turley, *supra* note 5.
[71] *Ex parte Milligan*, 71 U.S. at 118-119.
[72] George John Dasch, one of the U.S. citizens, and the person mostly responsible for revealing the sabotage mission to the F.B.I., did not join the habeas corpus petition for tactical reasons.
[73] The defendants received sabotage training in Brandenburg, Germany; they traveled to the U.S. in German submarines; they carried with them maps and explosives to destroy transportation lines and aluminum plants in the U.S.; and upon entry into the country they took off their military uniforms.
[74] Robert Cushman, "*Ex Parte Quirin et al*.—The Nazi Saboteur Case," *Cornell Law Quarterly* 28 (1942): 54, 58. There were two possible avenues of jurisdiction for the Supreme Court: a writ of habeas corpus or a petition for certiorari. The Court could take the case by writ of habeas corpus if there were special circumstances for doing so (which several of the justices,

defendants had already been executed. Chief Justice Stone described the project of writing the opinion as "a mortification of the flesh,"[75] and Justice Douglas said it was "unfortunate the Court took the case,"[76] stating in an unpublished interview: "Our experience with [the Saboteurs' Case] indicated … to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds … is made, sometimes those grounds crumble."[77] Surprisingly, even Justice Felix Frankfurter, who participated in several ex parte meetings with executive branch officials during the development of the case, and wrote an astonishing memo during the opinion-writing process urging his colleagues to unanimously rule against the defendants' petitions,[78] declared years later that *Quirin* "[is] not a happy precedent."[79]

A final reason for limiting *Quirin* to its unique facts is that politics (not military necessity) was the governing principle for trying the eight Nazi spies by military commission. Secret tribunals allowed FDR's administration to cover up several mistakes it had made, including the FBI's treating as a prank the initial attempt by one of the Nazi spies to turn himself in, and the Coast Guard waiting twelve hours before reporting the landing of one of the submarines off the coast of Long Island. FBI Director J. Edgar Hoover, who won a medal of honor for his efforts in capturing the Nazis, never disclosed that two of the Nazi spies turned themselves in and were instrumental in helping his agency locate the others. The other politically expedient reason for using military commissions was that civilian courts could not punish the defendants as severely as the administration wanted. Because the sabotage plan blew up right from the beginning, the most time the defendants would have spent in prison was two years. President Roosevelt, however, wanted death sentences in the cases, and told U.S. Attorney General Francis Biddle, "I won't hand them up … I won't hand them over to any United States marshal armed with a writ of *habeas corpus*. Understand?"[80] In short, there are compelling reasons to be wary of the use of military commissions. Factors other than simple military necessity lurk behind orders justifying their existence, providing powerful arguments for enforcing the separation-of-powers principle strictly in this area.

Johnson v. Eisentrager

The other World War II case relied upon by the Bush administration is *Johnson v. Eisentrager*.[81] There, in a 6-3 decision, the Court ruled that non-resident, alien enemy combatants who are tried extraterritorially by military commission do not have a right of habeas corpus. In that case, twenty-one German nationals were tried and punished by a military commission convened in China for aiding the Japanese after Germany had unconditionally surrendered to the United States. Justice Robert Jackson, the author of the Court's opinion, found "no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."[82] To hold otherwise, Jackson reasoned, would jeopardize the war effort because it would require the transportation of the trial's participants to the United States, and would diminish the prestige of military commanders by requiring them to appear before civilian courts where they must account for their actions, thereby diverting their "efforts and attention from the military offensive abroad to the legal defensive at home."[83] Jackson distinguished earlier cases like *Quirin* and *In re Yamashita*,[84] where the habeas petitions of unlawful combatants were at least reviewed by federal courts, on the grounds that in the former case the defendants were captured in the U.S., while in *Yamashita* the trials took place in the Philippines where the U.S. had sovereign authority.

It is important to note, however, that the *Eisentrager* Court upheld the use of military commissions *after* a formal declaration of war by Congress, making the Bush executive order readily distinguishable. It should also be recalled that Justice Jackson, who authored *Eisentrager*, warned in the Steel Seizure case about unilateral actions by the President as Commander in Chief in the name of

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particularly Justice Felix Frankfurter, doubted), or it could take the case by writ of certiorari from the D.C. Court of Appeals before judgment. However, the case had not yet been appealed to the Court of Appeals. In order to resolve what appeared to be a lack of jurisdiction, the justices suggested to the attorneys during the first day of oral argument that they file an appeal to the D.C. Court of Appeals, which happened on the morning of July 31st, so that the Court would be able to grant certiorari and render an opinion before judgment by the appellate court. See Boris I. Bittker, "The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment By the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction," *Constitutional Commentary* 14 (1997): 431.

[75] Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: The Viking Press, 1956), p. 659.

[76] William O. Douglas, *The Court Years 1939-1975: An Autobiography of William O. Douglas* (New York: Vintage Books, 1980), p. 138.

[77] Danelski, *supra* note 70, at 80.

[78] See Turley, *supra* note 5; G. Edward White, *supra* note 70; Michal Belknap, "Frankfurter and the Nazi Saboteurs," *Yearbook 1982: Supreme Court Historical Society* (1982): 66-71.

[79] Ibid., at 80.

[80] Ibid., at 68.

[81] 339 U.S. 763 (1950).

[82] Ibid., at 768.

[83] Ibid., at 778-779.

[84] 327 U.S. 1 (1946).

national security:

> Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.[85]

Moreover, Justice Hugo Black's *Eisentrager* dissent raises a number of interesting arguments. First, Black challenged the majority's conclusion that the location where an alien combatant is captured is determinative as to whether they can challenge a military commission's authority by habeas corpus proceedings. According to Black, such a distinction cannot be found in the Court's precedents. In fact, the *Quirin* Court broadly held that status as an alien enemy combatant does not foreclose a legal challenge to the jurisdiction of a military commission by writ of habeas corpus, and the justices did not limit their holding to whether the defendants are captured, tried and imprisoned in the United States. Second, Black regarded the majority's analysis as both unsound and "dangerous." As for the former, Black could find no reason in the law to deprive individuals of the privilege of habeas corpus solely because they are convicted and imprisoned overseas. In his view, any person, including an enemy alien, deprived of his
liberty by the U.S. government falls under its territorial jurisdiction. While he did not go so far as to say that alien combatants captured overseas have all the constitutional rights of U.S. citizens, he thought that at a minimum they have a right to habeas corpus. Black also regarded the majority's analysis as "dangerous," because it would allow the executive branch too much discretion in choosing where to try and imprison non-citizen enemy combatants. As he put it:

> Does a prisoner's right to test legality of a sentence then depend on where the Government chooses to imprison him? Certainly the *Quirin* and *Yamashita* opinions lend no support to that conclusion, for in upholding jurisdiction they place no reliance whatever on territorial location. The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations.[86]

As a consequence of *Quirin* and *Eisentrager*, the Bush order raises several thorny equal protection issues. *Quirin* allows both non-citizen *and* citizen enemy combatants to be tried by military commission; yet, the Bush order only applies to non-citizen enemy combatants. Thus, John Walker Lindh, a U.S. citizen fighting for the Taliban, with possible connections to Al Qaeda, has been treated differently than non-citizens allegedly associated with the same or similar terrorist organizations.[87] Following *Eisentrager*, the Bush administration is also treating resident and non-resident alien enemy combatants differently. If non-citizen combatants are captured in the United States, they are allowed to file habeas petitions in federal court,[88] whereas non-citizen combatants captured outside of the United States are not allowed to do so.[89] While the Supreme Court has not extended many constitutional rights to alien non-residents,[90] the Bush administration's different treatment of terrorist defendants based on their citizenship status is suspect. In order to be consistent, the administration must either try both U.S. citizen and non-citizen enemy combatants by military commission (as in *Quirin*), or allow non-citizen, resident belligerent suspects the right to a jury trial. In any event, even accepting the *Eisentrager* decision, President Bush does not have congressional authorization for his unilateral call for military commissions.

Policy Arguments

The Bush administration has also raised a number of policy arguments for why military commissions

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[85] *Youngstown Sheet & Tube Co., v. Sawyer*, 343 U.S. 579, 642 (Jackson, J., concurring).
[86] 339 U.S. at 795 (Black, J., dissenting).
[87] See *United States v. John Phillip Walker Lindh*, 227 F. Supp. 2d 565 (E.D. VA 2002); see also *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D. N.Y. 2002) (U.S. citizen detained without trial as "dirty bomber" suspect); *Hamdi v. Rumsfeld*, 316 F.3d. 450 (4th Cir. 2003) (U.S. citizen who fought for Taliban in Afghanistan being detained without trial).
[88] *U.S. v. Zacarias Moussaoui*, 205 F.R.D. 183 (E.D. VA 2002) (French citizen of Moroccan descent is being tried in federal district court as a conspirator in the 9/11 attacks).
[89] See, e.g. *Odah v. United States*, 321 F. 3d 1134 (D.C. Court of Appeals 2003) (suspected non-citizen enemy combatants captured overseas have no right to writ of habeas corpus); see also *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2002) (interest group lacked next-friend standing to assert claims on behalf of Guantanamo Bay detainees), cert. denied by Supreme Court in *Coalition of Clergy v. Bush*, 123 S. Ct. 2073 (2003).
[90] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (the Fourth Amendment does not apply extraterritorially).

are necessary to try non-citizen terrorist suspects, all of which stem from the basic premise that civilian courts are not competent to hear terrorist cases. For example, Ruth Wedgwood, a professor of international law at Johns Hopkins University and an informal advisor to the Bush administration, cites three reasons for why federal courts should not be used to try the 9/11 terrorists: (1) they would not be able to protect sensitive intelligence information, (2) they would not be able to ensure the safety of the trial participants, and (3) they would be too particular about evidentiary rules and thereby exclude probative evidence during the trials.[91] But these claims are either unsubstantiated or wrongheaded. Federal courts have tried international terrorists before and they have done an excellent job. With respect to Professor Wedgwood's particular claims, a federal statute does exist that deals precisely with classified information, and it allows sensitive national security information to be heard ex parte or to be viewed in camera.[92] Moreover, the government has at its disposal the ability to protect all of the trial's participants (judges, juries, witnesses, and attorneys) if it is deemed necessary, and a federal judge could impose a gag order if a suspect or witness becomes too unruly during the trial. As for the desire to make it easier to admit evidence during the trials, the response is: at what cost? The Bush order allows for the admissibility of evidence if it has "probative value to a reasonable person." Thus, hearsay testimony and physical evidence without a clear chain of custody is admissible at trial. Under such a permissive standard, what's to ensure the authenticity of the evidence? As John Turley has correctly observed, "[t]he practical benefit of the current military tribunals appear to be their outcome-determinative rules for the prosecution."[93]

The backhanded criticism of the judicial branch by the advocates of President Bush's military order is also deeply troubling. We have perhaps the finest judicial branch in the world. Many who serve on the federal bench hail from the nation's finest law schools and have vast training and experience in the law. Armed with the power of judicial review and life tenure, U.S. federal judges play an important role in our separation of powers system. As Alexander Hamilton pointed out in *Federalist* 78, federal judges are the "faithful guardians of the Constitution"[94] and the chief bulwarks of the people's liberties. Why do defenders of the President's order perceive that commissioned military officers will do a better job of adjudicating terrorist suspects? Many will frankly say that they will ensure more convictions. But more is at stake here than the number of terrorist convictions that the U.S. government can obtain. A fundamental tenet of our judicial system is that defendants are cloaked with the presumption of innocence. If it is convictions that we are after, moreover, there is little worry that federal judges will be biased or too lenient. The concern about potential bias by federal judges, which was raised and rejected in *Milligan*, is not even present in cases involving the terrorist attacks against the United States, and since over half of the judges presently staffing the federal judiciary were appointed by conservative administrations, it is unlikely that unwarranted leniency will be shown to the defendants in these cases.

Conclusion

President Bush might be correct in referring to the attacks against the U.S. on September 11, 2001 as creating a "national emergency," and for all intents and purposes, the U.S. might be in a de facto war against terrorism, but in order for the President to convene military tribunals congressional authorization is necessary. During a national emergency, the President is not completely helpless. He can use the nation's armed forces to defend the country and he can capture and detain terrorist suspects. But in order for the President to convene military commissions, and thereby deny the Sixth Amendment right to a jury trial as well as so many other rights under the Constitution, congressional consent is necessary. The Use of Force Resolution passed by Congress on September 18, 2001 does not authorize the use of military commissions, nor do the two provisions of the Military Code of Justice (Sections 821 and 836) relied upon by the administration. All that the latter two provisions contemplate is the jurisdiction and trial procedures of military commissions; they do not authorize their use in particular situations. Moreover, the President's reliance on Article II's Commander-in-Chief Clause and his claims of inherent "emergency power" are unavailing.

Much is at stake in the controversy over the establishment of military commissions. In the "war on terrorism" it is important that we lead by example. A cardinal principle of our Constitution is the doctrine of separation of powers. By placing all three powers of government in the same hands, military commissions violate Madison's balanced system of government. Under certain circumstances (i.e., military government or a state of martial law), Congress can authorize the use of military commissions. Yet, since 9/11 the nation's lawmakers have not chosen to do so. The Founders broke from their immediate past by creating a strong unitary executive, but they also took precautions against having too

[91] Wedgwood, *supra* note 25.
[92] The Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980).
[93] Turley, *supra* note 5, at 746.
[94] *The Federalist* (No. 78), *supra* note 26, at 441.

powerful of an executive. In the Declaration of Independence, Thomas Jefferson warned against having "the military independent of, and superior to, the civil power."[95] The use of military commissions continues the trend toward what one constitutional scholar has aptly called "the military pocket republic."[96] This is a trend that all Americans should be concerned about.

[95] *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York: Penguin Books, 1975), p. 237.
[96] Jonathan Turley, "The Military Pocket Republic," *Northwestern University Law Review* 97 (2002): 1.

A NEW MISSION AND NEW CHALLENGES: LAW ENFORCEMENT AND INTELLIGENCE AFTER THE USA PATRIOT ACT

Thomas Rossler*

The terrorist attacks of September 11, 2001, represent a watershed moment for the American system of justice. The commission of terrorist acts on American soil is virtually unprecedented and brings a new challenge for our justice system (Ting, 2002). The new mission, detecting, apprehending, and prosecuting terrorist actors, differs vastly from traditional models of American criminal justice. The changing focus brings new challenges, new requirements and a new perspective on what the United States must pursue as a counterterrorism agenda.

A great deal of legislative effort has been expended in the wake of September 11 to close holes in domestic security. The centerpiece of these efforts is the USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism). The USA PATRIOT Act provides a number of changes for the current legal environment, most notably loosening search warrant and wiretap requirements. The USA Patriot Act goes beyond procedural aspects, however, as it includes measures designed to foster cooperation and information flow between the divergent intelligence and law enforcement communities. The new rules of the playing field provide for sharing of information, including previously off-limits grand jury information as well as explicit encouragement of collaboration between intelligence and law enforcement agencies. The changes in mandate and restrictions mean that intelligence and law enforcement agencies will redefine their mission and scope as well as the means of pursuing domestic counterterrorism efforts.

Certain standards for the new interaction are known. The expanding relationship between law enforcement and intelligence must meet the goal of terrorism prevention, "in which a violent act by a known or suspected terrorist group or individual(s) with the means and a proven propensity for violence is successfully interdicted through investigative activity" (Vohryzek-Bolden, Olsen-Rayner, and Whamond, 2001 p.228). The new framework must also maintain a healthy respect for the civil liberties of the subjects of surveillance and investigation and the American public in general.

The challenge is to develop a coherent, workable framework where little structure currently exists. The USA PATRIOT Act represents a step in this direction with a number of key provisions aimed at developing and nurturing close cooperation between law enforcement and intelligence agencies. These changes must be analyzed in the context of counterterrorism needs and the potential effect on society as a whole. The evaluation criteria are exceptionally demanding, but the post-September 11 world demands that counterterrorism efforts meet the emerging threat and prevail, while maintaining freedoms that are an essential part of American democracy.

Context and Background

There is a healthy distrust within the United States of close working relationships between the law enforcement and intelligence communities (Beale and Felman, 2002). This desire for separation of the two functions is rooted in apprehension about the creation of a "secret police" and was a large part of the prohibition of domestic police activities by the Central Intelligence Agency (Doyle, 2002; Hitz, 2002). The National Security Act of 1947 prohibits the CIA from exercising "police, subpoena, law enforcement, and internal security functions" (Koh, 2002). Law enforcement agencies have been publicly castigated for actions that encroached on civil liberties especially during the Vietnam War period (Doyle, 2002; Olmstead, 1996). A notable example is the FBI's COINTELPRO (counterintelligence program) which observed and attempted to discredit dissident groups including the Socialist Workers' Party, Ku Klux Klan, civil rights groups, and women's liberation groups (Olmstead, 1996). More recently, the FBI has faced criticism over its CARNIVORE program, a tracking and monitoring system for e-mail messages (Schwartz, 2001; Sloan, 2001; Stellin, 2002). The intelligence community has engaged in covert activities that have raised serious questions about questionable means. The high-profile missteps include CHAOS, an operation infiltrating and monitoring student dissident groups and more recently, illegal arms trades and covert actions during the Iran-Contra affair (Hitz, 2002; Woodward, 1987). These excesses led to the development of an oversight scheme for intelligence that included permanent congressional committees (Olmstead, 1996).

The need for cooperation between law enforcement agencies and the intelligence community has been deemed necessary with the emergence of terrorism as a viable domestic security threat. The September

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11 attacks are an extreme manifestation of what Hoffman (2001) sees as an erosion of the distinction between international and domestic terrorism. The terrorism battle is no longer fought in the nether regions of the world, or in areas already torn by conflict, but has been brought home to the American landscape, and has shattered the prior sense of domestic security. Counterterrorism efforts must respond to an undefined, transnational threat in a manner that is sufficiently broad to encompass a wide range of tactics, while maintaining the capability to protect specific targets (Enders and Sandler, 2001; Smith and Thomas, 2001). Heymann (1998) identifies two types of terrorism prevention:

- *Targeted Prevention*: intelligence enables government agencies to:
  1) Identify time and/or place of an attack
  2) Identify individuals planning a terrorist act

- *Untargeted Prevention*: More general preventive measures designed to block terrorist organizations' access to materials, movement or information, or in the long-term, reduce the pool of recruits and their desire for action. Examples include:
  1) Monitoring/regulation of explosives sales.
  2) Increased scrutiny of border crossings
  3) Limiting access to potential target sites.

(Heymann, 1998 p.80-83)

Intelligence-law enforcement cooperation could fall into either category of prevention. The key for both types of prevention is information. Pre-emptive strikes need solid intelligence gathering and dissemination to guide action (Johnson, 2000).

The development of a relationship between law enforcement agencies and the intelligence community is a meshing of separate entities with largely separate goals and means. Typically, a foreign intelligence investigation is aimed at foreign persons and their work on behalf of another country (Doyle, 2002). The intelligence perspective is offensive in nature, focused on achieving strategic objectives, rather than the nebulous criminal justice concepts of deterrence and punishment (Chiarella and Newton, 1997; Heymann, 1998). The Cold War and an emphasis on strategic military information locked intelligence community attention on the Soviet Union until the late 1980's, when the emphasis shifted to include narcotics trafficking and terrorism (Doyle, 2002; Hitz, 2002; Holden-Rhodes, 1997).

Law enforcement has traditionally operated locally with a focus on arrest, prosecution and imprisonment (Carter, 2001; Heymann, 1998). This approach is largely reactive, pursuing perpetrators after an unlawful act has occurred and assisting in prosecution under the existing legal structure, a decidedly post facto method (Carter, 2001; Chiarella and Newton, 1997; Doyle, 2002; Heymann, 1998; Hitz, 2002). The law enforcement perspective targets the actor as a criminal, to be threatened with imprisonment in an effort to deter deviant activity (Heymann, 1998).

A final distinction between law enforcement and intelligence lies in the legal differences between criminal information gathering and information collection for intelligence purposes (Henderson, 2002). Criminal surveillance has been covered by statutes including Title III of the Omnibus Crime Control and Safe Streets Act of 1968, amended by the Electronic Communication Privacy Act of 1986 and the Communication Assistance for Law Enforcement Act of 1994 (Young, 2001). Intelligence agencies have been restricted and guided by the National Security Act of 1947, the Foreign Intelligence Surveillance Act of 1978, and the Intelligence Oversight Act of 1980 (Olmstead, 1996).

USA Patriot Act

The USA Patriot Act is a unique piece of legislation covering an immense range of topics. Signed into law by President Bush on October 26, 2001, the USA PATRIOT Act specifically addresses law enforcement-intelligence cooperation in four key sections, Title II Section 203, discussing information sharing including grand jury testimony, Title V Section 504 which addresses information sharing and consultation, Title VII Section 703 which covers funding and Title IX Section 908 dealing with skill development (USA Patriot Act, 2001).

The first section of the USA PATRIOT Act is broad authorization for intelligence-law enforcement cooperation. Title II section 203 provides authority for law enforcement, investigators, and attorneys to share grand jury information with federal law enforcement, intelligence, protective, immigration, national defense, and national security representatives. Section 203 also provides for the exchange of information obtained from physical searches and electronic surveillance (USA PATRIOT Act, 2001).

Title V Section 504 of the USA PATRIOT Act addresses sharing of information and consultation between law enforcement and intelligence agencies (USA PATRIOT Act, 2001). This provision provides for intelligence-law enforcement consultation in the course of a terrorism investigation (USA PATRIOT Act, 2001). Section 504 authorizes communication linkages between agencies to facilitate foreign intelligence information exchange about terrorist activities.

The third PATRIOT Act provision that addresses law enforcement-intelligence cooperation is technically oriented, providing funds and authorization to develop regional information sharing systems. This section is the foundation for building an information exchange infrastructure that can be used by law enforcement and intelligence agencies. Title VII Section 703 provides 50 million dollars for fiscal year 2002 and 100 million dollars in fiscal year 2003 to develop the information sharing capability (USA PATRIOT Act, 2001).

Title IX Section 905 is a mandate for the Attorney General and federal law enforcement to disclose information to the Director of Central Intelligence (USA PATRIOT Act, 2001). The disclosure is required for the fruits of criminal investigations, if those findings have foreign intelligence implications (USA PATRIOT Act, 2001).

The need for translation of foreign intelligence information is the focus of Title IX Section 907 (USA PATRIOT Act, 2001). This section requires a report by February 1, 2002, on developing and instituting a translation center to serve the foreign language needs of the intelligence community (USA PATRIOT Act, 2001). The translation center would centralize translation of foreign intelligence (USA PATRIOT Act, 2001).

Title IX Section 908 of the USA PATRIOT Act directly addresses one of the failures of the pre 9/11 era, namely confusion within the Federal Bureau of Investigation regarding the requirements for a FISA warrant (Schmidt, 2002). This section may be the most defined aspect of the USA PATRIOT Act . Section 908 addresses problems that arose in the Zacarias Moussaoui case when FBI attorneys misread the requirements for foreign intelligence search warrants causing critical delays in the investigation. The provisions in Section 908 aim at improving the knowledge level of law enforcement and intelligence officials when dealing with foreign intelligence information.

Law Enforcement after the USA PATRIOT Act

The impact of the USA PATRIOT Act will be felt strongly within the law enforcement community. The attacks of September 11, 2001 changed dramatically the role and mission of law enforcement. The law enforcement community has taken on a new task in the post- September 11 era, the prevention of terrorist attacks on American soil. The new mission also brings a new challenge, as law enforcement officers must become adept at dealing with foreign intelligence information, sources, and guidelines.

The first challenge for law enforcement in assuming a counterterrorism role is a paradigm shift. Law enforcement tends to focus on post facto responses to criminal activity, rather than aggressively seeking prevention of harmful acts (Carter, 2001; Chiarella and Newton, 1997; Doyle, 2002; Heymann, 1998; Hitz, 2002). The traditional law enforcement focus must expand to include a proactive stance oriented toward prevention and preemption. Shifts in focus will take time, as philosophy and training must adjust to a new mission, expanding what law enforcement must observe and report. Awareness of a terrorist threat increases the number of activities that must be investigated. Large scale purchases of fertilizer or flight students uninterested in learning landing procedures are examples of actions that must be scrutinized in the context of a terrorist threat.

The shift in perspective also means the law enforcement community must adjust its mission. The current goals of law enforcement activity, arrest and prosecution, may not be directly applicable when dealing with terrorism. Much of terrorism prevention is outside the traditional criminal justice system. The untargeted prevention that Heymann (1998) describes includes activities such as limiting access to potential targets or increased scrutiny at border crossings, which could prevent terrorist actions without resulting in arrest or prosecution.

Law enforcement will also be faced with new demands. Educated and skilled personnel will be a necessity. Agencies must attract applicants skilled in languages and information technology who are also able to develop and apply new knowledge. The law enforcement community will also be forced to expand counterterrorism training and retraining programs. The shifting, dynamic nature of terrorism dictates that agencies continually adjust skills and competencies to counter changes in terrorist threats. Retraining programs will be necessary as the sources and sponsors of terrorism shift, and new languages and cultures must be understood and applied. The provisions of Title IX Section 908 of the USA PATRIOT Act will aid in these training requirements, by mandating specialized training for law enforcement personnel who may deal with foreign intelligence information.

Intelligence after the USA PATRIOT Act

The USA PATRIOT Act is both problematic and a potential boon for the intelligence community. The use of grand jury information and broader capabilities in working with law enforcement expands the ability of intelligence agencies to gather, analyze and utilize information. At the same time, a reorientation will be required to expand analysis of the synergy between domestic and international terrorist groups and their activities within the United States. Intelligence agencies will now be in the position of gathering information about groups and individuals involved in terrorist activities and sharing this information with

domestic law enforcement, to provide context and linkages. Intelligence agencies will be required to provide information that is pre-emptive, but also of sufficient quality and legality to sustain criminal prosecution (Berkowitz, 2003). These standards require careful collection and rigorous evaluation of information, as the standards for search and arrest warrants are much more stringent than the needs of military and policy planners (Berkowitz, 2003). Possible application of information to criminal prosecution will also preclude the use of illegal means for obtaining information and force agencies to diligently assess the credibility of sources.

The intelligence community will also be forced to relinquish some of the secrecy that has been a hallmark of spy craft (Johnson, 2000). This will mean changes in an intelligence culture that has imposed strict limits on information and compartmentalized access (Commission on Protecting and Reducing Government Secrecy, 1997). Sharing of information and sources may be a difficult habit for the intelligence community to embrace, but is essential to developing a cooperative framework. Distrust and a tendency to withhold information are not conducive to a healthy collaborative scheme. These habits may prove troublesome, however, as they are deeply ingrained in the culture of the intelligence community (Commission on Protecting and Reducing Government Secrecy, 1997; Johnson, 2000).

Finally, the intelligence community will face the added burden of addressing a negative public perception as it moves into a larger role domestically. The conception of the intelligence community as a "rogue elephant" has been cited by numerous authors to describe what they see as a raging beast that must be retrained to ensure the preservation of individual rights (see Hansen, 2002; Hitz, 2002). The perception that the intelligence community has a high percentage of rogue actors has also been fed by the popular media, including films such as *Enemy of the State* which portray corrupt intelligence operatives who will stop at nothing (Sloan, 2001). This perception may be difficult to change, at least in the short-term, but professionalism and demonstrated respect for civil liberties comprise a strong start.

Civil Liberties

The USA Patriot Act has touched off a firestorm of controversy in the civil liberties arena. The most important consideration when examining the civil liberties implications of intelligence-law enforcement collaboration is the potential for abuse of surveillance and investigatory powers to invade personal privacy. The individual impact of the USA PATRIOT Act has been debated at length, but the influence of law enforcement-intelligence cooperation is a largely neglected topic. The establishment of a collaborative scheme could pose some risk to individual rights, and is worth exploring.

The most publicized aspect of intelligence-law enforcement information-sharing may be the authorization provided by Title II Section 203 for sharing grand jury information (USA PATRIOT Act, 2001). The grand jury has a long tradition of secrecy (Beale and Felman, 2002). Potential harm to individuals could arise from a number of different areas. One particularly troubling outcome could be a chilling effect on the willingness of terrorism witnesses to testify (Beale and Felman, 2002). The negative impact could occur through two specific avenues, fear of retaliation, and fear of loss of reputation (Beale and Felman, 2002).

Fear of retaliation is a concept that might be dismissed as paranoid, but the possibility for retaliatory violence is not limited to revenge acts by terrorist organizations. The possibility that testimony of grand jury witnesses could be released to other nations by American intelligence services is a dicey proposition for those with families in their homeland (Beale and Felman, 2002). The possibility of retaliation or intimidation of loved ones increases when considering nations such as Saudi Arabia which may provide support to terrorist groups while maintaining close ties to the United States.

The release of grand jury information may also have a negative impact on the reputations of those investigated, but later cleared (Beale and Felman, 2002). This aspect of exposure is troubling, because it could mean harm for the public reputation of an individual who is not involved in wrongdoing (particularly in the event of leaks to the media), and in the extreme could bring continued scrutiny from law enforcement. The damage of being labeled as a "usual suspect" is that unwarranted scrutiny could return with future terrorist investigations.

The more general civil liberties issue is the perception and scope of surveillance of American citizens. Domestic intelligence gathering is an extremely unpopular concept that carries connotations of the secret police arms of oppressive regimes (Doyle, 2002). The collection of information on American citizens is troubling because it represents a shift in the balance of power between government and the people. Even the perception of a police state is a backwards step for the democratic process. Terrorists seeking a negative impact on American society will achieve victory one hundredfold if the rights of Americans are a casualty of the war on terror. The preservation of individual liberties requires a check on the power of domestic intelligence gathering to regulate its exercise.

The most promising guard for civil liberties may lie in the current regulatory scheme. The current framework is addressed in Title II Section 215 of the USA PATRIOT Act , which amends the Foreign Intelligence Surveillance Act and reaffirms the necessity of application for a foreign intelligence warrant from a neutral federal magistrate (USA PATRIOT Act, 2001).This section also requires the Attorney General

to inform the House and Senate Intelligence Committees and the Judiciary Committees of the number and types of such requests (USA PATRIOT Act, 2001). This broadens the existing regulatory framework encompassing both Congress and the judiciary to include information sharing between law enforcement and intelligence. The presence of an oversight scheme is not a guarantee, however, that agencies will operate in accordance with regulations and legal guidelines. The illegal covert actions of the Iran-Contra affair occurred well after intelligence oversight was established.

Further oversight is provided through the USA PATRIOT Act itself. Title X Section 1001 directs the Inspector General of the Department of Justice to appoint an official to "review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice" (USA PATRIOT Act, 2001). This official will also report to the Congress on abuses that are reported (USA PATRIOT Act, 2001).

The ultimate key for protection of civil liberties is vigilance. In the case of the USA PATRIOT Act , this vigilance must be exercised by a wide range of actors, particularly Congress, the courts, the media, agencies themselves, and the American public. Each of these arenas bears a responsibility for maintaining civil liberties in the face of expanded law enforcement intelligence cooperation. Congress bears responsibility for crafting legislation defining the nature and extent of law enforcement-intelligence cooperation. The courts must delineate and apply the boundaries of collaboration. The media is needed to scrutinize the actions of agencies and their representatives. Law enforcement and intelligence agencies bear the burden of policing their ranks and upholding the highest standards of integrity and respect for individual rights among their employees. Finally, the public must remain cognizant of the issues involved in domestic intelligence gathering and assert public opinion in support of oversight. Continued observation and review of the system by these stakeholders is the best safeguard for civil liberties.

Unresolved Issues

The USA PATRIOT Act covers an enormous number of topics, ranging from money laundering to the parole of convicted terrorists (USA PATRIOT Act, 2001). The sections of the act dealing with law enforcement-intelligence cooperation are largely general and provide few details about the framework needed for information sharing and collaboration. The broad scope of the act and its provisions leave a number of critical issues unresolved.

The first factor that affects intelligence-law enforcement cooperation is very difficult to quantify. It may also be extremely difficult to address. This problem is the nature of interaction between agencies, and the accompanying rivalries and territoriality that may develop when agencies are forced to cooperate. The nature and quality of cooperation between law enforcement and intelligence agencies hinges largely on the personalities and politics involved, and is a dynamic concept, as working relationships develop, grow, or deteriorate.

The second important issue is commitment, in terms of both intangible public support, as well as budgetary sustenance. Public commitment may become a problem as the shock and horror of September 11 recede. In a certain macabre sense the death and destruction of the attacks is a galvanizing force, drawing together public support for pursuit of counterterrorism objectives. The passage of time may weaken resolve, and allow the development of a more critical viewpoint. Without a sense of national emergency, taxpayers and lawmakers may grow wary of law enforcement-intelligence cooperation in terms of cost as well as the potential for abuse. The manner in which domestic counterterrorism plays in the media and public consciousness also has implications for commitment. Perceptions of counterterrorism efforts are strong factors in terms of will and commitment. Ironically, the extreme secrecy needed to protect information sources and informants may mean that the public is ill-informed about the effectiveness of information sharing, and that the only knowledge many will have of intelligence-law enforcement collaboration are spectacular failures.

Financial support for collaboration is a zero sum game. Quite simply, if the resources for developing and maintaining strong cooperation and a solid technical framework are inadequate, the quality and quantity of collaboration will also fail to meet acceptable standards. It is not uncommon for the mission of a government agency to outstrip its means, but in the area of counterterrorism cooperation, the resources needed are vital and variations in funding will mean variations in quality of domestic security.

The development of a close, working relationship between intelligence and law enforcement will require a hefty financial commitment. The President's Homeland Security Plan earmarks 700 million dollars for intelligence gathering and information sharing between agencies (Bush, 2002). Currently, the fiscal year 2004 budget has 37 million dollars earmarked for law enforcement-intelligence information systems, out of a 722 million dollar outlay for counterterrorism information technology as a whole (Bush, 2002). The fiscal year 2003 budget for homeland security distributes two percent of overall spending for information sharing and IT purposes (Bush, 2002). Additionally, Title VII Section 703 of the USA PATRIOT Act provides 100 million dollars for fiscal year 2003 to aid in developing and implementing regional information sharing systems (USA PATRIOT Act, 2001). Budgetary allocations provided for the addition of 300 FBI agents in counterterrorism activities and distributed funds to the Defense Department and Intelligence Community for homeland security,

although the effect of this funding on intelligence-law enforcement cooperation is negligible, as most of the money goes to projects like air protection over Washington D.C. (Bush, 2002). This budget must be maintained and augmented for collaborative success. The USA Patriot Act does not address the future of funding, however, so funding allocation remains at the mercy of budget negotiations. The current appropriations are the foundation for a cooperative framework, but significant levels of future funding are necessary for collaboration and information sharing to continue.

Another important roadblock to effective cooperation is technical. Technology must be in place to ensure smooth information flow between agencies (Hansen, 2002). The House-Senate Joint Inquiry into the September 11 attacks noted that the FBI had been hindered by "outdated and insufficient technical systems and the absence of a central counterterrorism database" (Joint Inquiry, 2002 p. 7). Outdated and incompatible computer systems present a significant obstacle to law enforcement-intelligence cooperation. Information must flow in a continuous pipeline rather than a tepid flow of unconnected bits of flotsam and jetsam. The mass of data entering the system daily must be analyzed and winnowed to provide useful facts; information systems must be robust and provide consistency and reliability while dealing with a flood of information (Hansen, 2002; Sloan, 2001). The existence of INTELINK, an intranet system linking intelligence organizations (based on existing government and commercial systems) is a possible stop-gap measure, but dedicated information systems will probably be needed (Joint Inquiry, 2002; Martin, 1999). The support structure for storing, organizing and retrieving intelligence must be maintained and enhanced to keep pace with technological innovation and the changing needs of counterterrorism efforts.

The ill-defined role of law enforcement may prove problematic in countering terrorism. White (2003) describes as underdeveloped the role of state and local law enforcement in overall counterterrorism strategy, but this analysis neglects the ambiguity surrounding the federal law enforcement role in counterterrorism, especially in terms of resource allocation. The use of law enforcement agencies to track terrorist suspects may stretch already thin agencies to the breaking point. The larger issue is whether it is the criminal investigation or the counterterrorism role that should take priority. The FBI, while vilified for its failings prior to September 11, was asked to juggle a myriad of responsibilities that rivaled and sometimes eclipsed their counterterrorism role. As Francis Poteat, president of the Association of Former Intelligence Officers stated bluntly, "the FBI had more than they could handle" (Hansen, 2002). Kenneth Williams, a Phoenix FBI agent investigating terrorist connections to flight schools in the months before the September 11 attacks was reassigned in the middle of his investigation to pursue a high priority arson case (Yardley and Thomas, 2002). One of the September 11 hijackers was enrolled in an Arizona flight school at the time Williams was reassigned (Yardley and Thomas, 2002). The situation may not be improved with the passage of time. Department of Justice Inspector General Glenn Fine testified that a post- September 11 audit of FBI counterterrorism efforts found that translations of foreign language materials for drug investigations were still given priority over translations for counterterrorism purposes (Fine, 2002). Some strides have been made in this area, as the FBI has shifted its focus to the counterterrorism and counterintelligence realm, but the primacy of these new roles must be determined and maintained (Hansen, 2002).

The law enforcement role in a cooperative scheme must be defined and developed to eliminate confusion. Are law enforcement agencies merely the eyes and ears of the street (essentially human collectors of intelligence)? Are they full partners in a collaborative counterterrorism framework? Definition of the law enforcement role will allow greater efficiency and effectiveness, as personnel and resources are assigned to maximize counterterrorism efforts. Fundamental decisions must be made about the focus and mission of agencies, particularly at the federal level.

Goals and standards are an important consideration with law enforcement-intelligence cooperation, especially in terms of information sharing. Counterterrorism efforts need conclusions based on strong analysis of raw information (Berkowitz, 2002). Goals for terrorism information collection and processing must be established--particularly in terms of ranking of information (high or low priority) and the volume of daily intelligence circulation. Dissemination protocols (which agencies get information first and how the order of distribution is determined) are also essential, as well as security standards for maintaining the secrecy of sensitive materials. The classification and distribution of information must be structured to ensure that intelligence reaches end users in a timely, efficient manner.

The final uncertainty with law enforcement-intelligence cooperation is with its legality. The true test of the USA PATRIOT Act and its counterterrorism toolbox will lie in the courts. Until the scope and mechanics of PATRIOT Act provisions are subjected to judicial scrutiny, much of their impact will be softened. Agencies may be hesitant to aggressively pursue cooperation and share grand jury information if their techniques may be overturned in the future, negating the fruits of investigation. Intelligence-law enforcement cooperation will be little enhanced if subsequent court rulings strike down or restrict methods of gathering and sharing information. This consideration may be the most important future limitation on the effectiveness and scope of law enforcement-intelligence collaboration. The courts will decide the ultimate fate of the USA PATRIOT Act and provide a check on expanded surveillance powers and cooperation.

The Future

The future is the ultimate proving ground for the effectiveness of law enforcement-intelligence cooperation. Collaborative efforts will be judged against a scorecard that measures success as the prevention or pre-emption of terrorist acts. Final judgment of the USA PATRIOT Act and its provisions encouraging law enforcement-intelligence cooperation will come with the passage of time.

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IMPACTS OF COUNTER-TERRORISM LEGISLATION ON CIVIL LIBERTIES IN THE SCIENCES

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This paper focuses on recent United States legislative actions taken since the September 11, 2001, terrorist acts and the subsequent impacts on individual and group civil liberties. This paper emphasizes the scientific (biology, chemistry, etc.) teaching, research, and overall public health consequences of these new laws.

Two major legislative acts, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 and the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (8), were recently implemented by the United States in response to the September 11, 2001, terrorist attacks. These laws impact civil liberties in teaching and research both positively and negatively in academia. This paper is meant to be informative and thought-provoking from a scientific perspective.

Overview of Legislation

USA PATRIOT Act

The USA PATRIOT Act of 2001 was signed into law approximately one month after the airline hijackings and destruction of the World Trade Center towers and partial destruction of the Pentagon. This law places limits on persons who may work directly with or within a laboratory (academic, hospitals, private foundation) that possesses items considered restricted. Restricted agents are generally considered microorganisms (bacteria, fungi, viruses), toxins, chemicals, or genetically altered nucleic acid sequences that could serve as potential terrorist weapons. Fugitives, drug offenders, mentally incapacitated, and dishonorably discharged veterans cannot handle restricted agents in any institution receiving federal monies (7, 8). Most people would concur that the persons listed above should be closely supervised if they work in any type of laboratory, let alone a laboratory that works with pathogenic microbes, or manufactures a toxic chemical. This restriction protects the population as a whole from persons who may cause harm. Thus, the government restricts civil liberties for a few persons to protect the general population. In addition, persons from certain nations (at this time the list includes Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria) cannot have any contact with a restricted agent, since their native country is deemed to be linked to propagating terrorism (3). University systems normally receive federal monies in some capacity, so academia must abide by these regulations in their hiring practices.

Public Health Security and Bioterrorism Preparedness Act

The Public Health Security and Bioterrorism Preparedness Act of 2002 further regulates academic activities by requiring institutions to comply with new restraints. This act provides a list of agents that are now restricted unless the institution is approved to handle the agent by the Department of Health and Human Services (DHHS), which is discussed in another section of the Act. Institutions must register with the DHHS if they plan to work with a restricted agent. Within the registration process, the institution must designate which restricted agent(s) will be used, explain why the agent needs to be employed in the particular research, and designate persons involved in the activity. Each person asking for authorization must fill out a separate form, their involvement in the project must be specified, and a background check is performed. Since the regulating agency is attempting to keep authorized persons to a minimum, only a certain number of authorized persons will receive approval by the DHHS. However, no "magic number" of approved authorized persons has been released to the institutions.

Implemented security measures by the institution are essential for approval by the DHHS. Each research facility must document how an agent will be stored (freezers or liquid nitrogen), monitored (computerized fingerprint access), and secured (locks on freezer door). General laboratory security (new entry locks) must also be addressed. Documentation regarding how the agent would be tracked if it were lost, stolen, or released into the environment must be approved by DHHS and stored on site. The authorized persons involved in the project are required to receive proper training from the institution which includes storage, clean-up, disposal, and standard operating procedures. All other persons who enter the restricted area must be recorded for future reference. The number of authorized visitors, custodial crews, and students are to be kept at a minimum. Visitors must wear badges, have a current address on file with the institution, and must be escorted around the containment area (7, 8). Since tax dollars fund the research and the

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institution handling the agents, restricting the number of visitors infringes upon the public's knowledge of what their money is funding. This is not a new provision, as the Centers for Disease Control and military installations have limited entrance into containment areas for years, but it does limit the public's civil liberties more than in the past. Another consequence of limiting visitors is the impact on student recruitment. If prospective students cannot visit a laboratory, this may be detrimental to student recruitment at a time where budget constraints make every student extremely valuable. This may also hinder the quality of students enrolling in courses at research institutions because the better students are normally more inquisitive and motivated in learning new techniques. If the student cannot experience the laboratory environment, the student may transfer to another educational facility that does not work with a restricted agent, but does allow the student to experience new techniques with faculty members.

Other policies include accounting for every specimen received into the laboratory, to ensure no agents were stolen. Policies documenting handling of received and transferred specimens (one area for packing and unpacking shipments) are required. Transfer or shipping of agents safely will be dealt with according to institutional policies to minimize the risk of vial breakage during shipment (breakage could result in contamination of airplanes, trucks, mail facilities, or mail-handling employees). Emergency response plans (personnel evacuation of an area) must be in place and practiced similar to a fire drill. Finally, reporting protocols of any incidents, injuries (this includes illness), and security breaches must be in place.

Besides physical security of the agent, computer system security must also be addressed by the research or housing institution. The government is in the process of developing a database to track individuals and university systems that harbor restricted agents. However, the law does not specify how the government will protect this valuable database from terrorist networks. Ironically, the laws do not specify who would have access to the governmental database. Will the government allow persons to be employed from the restricted list (fugitives, select nations) for computer security measures, simply because the person is technically not working with a restricted agent?

Approval of the institution rests solely on the DHHS, which possesses the authority to disapprove of institutions working with restricted agents. The most surprising part of the act is that there is no judicial review if an institution or person is denied approval. Limited administrative review or appeals processes exist. Thus, if the DHHS does not believe a person or institution should be approved to work with an agent for any reason, the institution can be denied approval, with no appeals. Therein lies the problem of checks and balances. The new laws have a limited number of judicial reviews, and many sections do not contain any review.

The new security measures seem to be reasonable since they protect the research and public. However, the burden of educating the authorized personnel rests with the institution and not DHHS. Thus, if a security measure was breached and an organism leaked into a water stream, the institution and authorized persons would be held liable, rather than the approving agency. The liability issue is not really new, since liability has rested with the institution in the past, but historically, the DHHS did not provide oversight of security measures. Once again the government, even though it is dictating control measures and implementation, does not take responsibility for training.

The two acts provide criminal penalties for not abiding by the new regulations. Persons convicted can receive fines and imprisonment for up to ten years (7, 8). The regulations were challenged in January 2003 when a professor in Texas allegedly destroyed 30 vials of the plague and reported them as missing (2). The vials containing the agents are normally small (1.5 ml or smaller microcentrifuge tubes, about 35 mm tall) and the labeling is also very small, so it is feasible that the vials could easily have been accidentally destroyed. He was released on $100,000 bond and required to wear a monitoring device. The university changed the locks on his laboratory and barred him from campus. He has not yet gone to trial as of this writing (1, 2). Since this case is one of the first alleged violations since the new laws went into effect, this case is surely meant to serve as an example for other researchers. The idea that a prominent and respected professor, who was the director of the infectious disease unit, allegedly filed a false report about the destroyed cultures impacts other researchers and legislator's perceptions of scientists as a whole. If legislators and the general public harbor a distrust of scientists, then future laws could potentially infringe further on future civil liberties in the sciences due to a couple of isolated cases.

Restricted Agents

Historically, several incidences of biological and chemical terrorism have occurred, causing illness and death to many people. In previous wars, dead people were placed in water streams to contaminate them and make the people downstream sick. In 1995 the Japanese group Aum Shinrikyo used diluted sarin in a subway system, in which 12 people died and 5000 were injured (6, 9). In the United States, the Bhagwan Shree Rajneesh placed *Salmonella* in salad bars in Oregon and caused 750 people to become ill (11). Iraq was also found to have used biological weapons in past military encounters (12). Recently, genetically engineered anthrax spores successfully contaminated letters sent through the mail, which caused cutaneous anthrax and pneumonia, which killed several people. This incident created mass hysteria over any white

powder (4).

The mass hysteria created a backlog of samples that people thought needed testing for anthrax spores. This included dumpsters filled with sheet rock, boxes set outside in the wind, bags that contained flour or baby powder, and other innocuous items. Out of all the samples received, very few (approximately 1:100) legitimately required testing. The testing is expensive, and takes several days to receive results. Unnecessary sampling wasted police officer's time by requiring them to collect samples, contain possibly contaminated areas, and transport samples to testing facilities. The officer's time could have been used more efficiently elsewhere, such as solving high priority cases. The testing center's staff could have been performing far more important forensic and patient investigations. The contaminated mail caused the postal service to irradiate mail for the safety of the public, which is still performed on mail going into the Washington, D.C. areas (5). These occurrences strengthened the United States government's commitment to preventing further terrorism in the United States.

The media also contributed to the over-reactive assumptions the public perceived. Most television airings contained major errors about the anthrax microbe and its characteristics. For example, anthrax is a common disease in animals, and veterinarians and farmers contract it through skin wounds. One airing viewed said the microbe was completely rare and never found naturally. Another CNN broadcast reporter asked if 100 or 50 years was the last time someone had acquired anthrax (10). In reality, the CDC reports approximately five cases every year in the United States. The media interviewed scientists and aired the part the editors and directors felt most relevant. In their translation, much of the information was grossly distorted due to lack of expertise in the area.

Agents (organisms, toxins, chemicals, and genetically altered nucleic acid segments) selected by the DHHS had to meet several criteria in order to be included on the restricted agent list. One criterion was that humans had to be adversely affected by the agent, such as becoming severely ill, disabled, or dead. The common cold would not fit into this category since most people can still perform their work duties. Another criterion was that the agent must be easily spread (contagious) between persons. If only a few people become ill, then preventative measures would not be needed. Another criterion was the availability of treatments or preventative medicines for the specific disease (7). A vaccine exists for smallpox, but what if the agent was genetically engineered so the vaccine was not effective? The DHHS also considered the susceptibility of children and immunocompromised persons (e.g. those infected with Human Immunodeficiency Virus or cancer patients receiving treatments), although this was a minor consideration (7). The majority of agents selected causes human deaths, are easily spread among a susceptible population, and are not prevented or treated by current vaccines or drugs. The listing of restricted agents according to the most recent amendments can be found in Table 1 (7).

The agent listing is justified for the most part. Some of the bacteria like *Bacillus anthracis*, *Yersinia pestis*, and *Brucella abortis* already have antibiotics and vaccines available for treatment, plus they are found in external environments or on animals. If these pathogenic agents were used in a bioweapons manner, antibiotics and vaccines most likely would not help. Bacteria and fungi grow on human skin and in our intestines as normal flora, so humans harbor potentially pathogenic and genetically altered bacteria every day without even realizing it. Every time a person takes an antibiotic, s/he is genetically altering bacteria since the resistant bacteria are naturally selected from the population. The next time a person takes the same antibiotic, more resistant bacteria are propagated. Further, most (90%) organisms are not even culturable, and yet they can cause disease. What about the nation that cultures microbes the rest of world has yet to discover, and no treatments exist?

Currently over 14 viruses, 12 bacteria, two fungi, and 12 toxins constitute the selected agents listing. The United States Department of Agriculture (USDA) has a separate listing for agents that affect plants and animals. The majority of organism strains that do not produce toxins were not listed. The viruses included in the listing cause very severe diseases, many of them are native to tropical areas, and not normally found in the United States. Bacteria and fungi are normally found in the environment, and one major threat is genetic engineering of these microbes into uncontrollable diseases. The toxins listed can cause major health threats in very minute quantities. Since many toxins are not detectable until exposure occurs, these pose a greater potential threat to the nation.

Viruses	**Bacteria**	**Toxins**
Crimean Congo Haemorrhagic fever	*Rickettsia prowazekii*	Abrin
Ebola	*Rickettsia rickettsia*	Conotoxins
Herpes B	*Yersinia pestis*	Diacetoxyscirpenol
Lassa Fever	*Bacillus anthracis*	Ricin
Marburg	*Brucella abortus*	Saxitoxin
Monkeypox	*Brucella melitensis*	Tetrodotoxin
South American Haemorrhagic fevers	*Brucella suis*	Shiga-like toxin
Tick-borne Encephalitis	*Burkholderia mallei*	Botulism
Variola Major and Minor	*Burkholderia pseudomallei*	*Clostridium perfringens* epsilon toxin
Eastern Equine Encephalitis	*Clostridium (toxin producing strains)*	Shiga toxin
Nipah and Hendra	*Coxiella burnetii*	*Staphylococcus* enterotoxins
Rift Valley	*Francisella tularensis*	T-2
Venezuelan Equine Encephalitis		
	Fungi	
	Coccidioides posadasii	
	Coccidioides immitis	

Table 1. A listing of the restricted agents according to the Department of Health and Human Services.

Hospitals and clinics are exempt from the listing since they use the agents in diagnosis or treatment (7). The new anti-wrinkle injections, which are a diluted botulism toxin, are found on the restricted list, but since the injections are used as a treatment for wrinkles, they are considered exempt. Hospital laboratories must also pass proficiency tests, which often utilize a restricted microbe to ensure quality control. Thus, hospitals can keep the agent for 90 days before it must be destroyed. This is under the assumption that proficiency tests are due at stated intervals for accreditation purposes, and the answer supplied by the laboratory was correct. Vaccine manufacturers are also exempt since they must be able to grow or manipulate the agent in order to provide a vaccine product (7). One example of this is for the bacterium *Brucella* because it is used in a vaccine for livestock.

Since many of the bacteria and fungi are found in soil, culturing them by accident for another project is possible. This issue is a major concern for smaller institutions since soil and water are often used in research projects employing environmental studies to determine water quality. If an agent is cultured and identified, it must be properly destroyed within a week by autoclaving, which sterilizes items, or other appropriate means. The organism can also be given to the Centers for Disease Control to be destroyed if the institution does not have the proper equipment for destruction. In either instance, the institution must report the finding and destruction of the agent to the DHHS.

Teaching Impacts

Diversity in academic classrooms is encouraged by educational institutions. However, the new laws restrict an instructor from providing information that could be used in any terroristic manner to a student from the restricted nations list. Instructors usually do not know the nationality of each student nor will the instructor ask about the student's ancestry, since many institutions consider the information to be confidential. Legislation now makes providing knowledge of how to make biological weapons to students punishable with fines and jail time if any student would engage in any terroristic act using lecture or laboratory knowledge provided by a particular course. If a student could have gathered the information through a class to make a weapon, the instructor can be held personally liable for any damages, as well as criminal punishment by fines and imprisonment. The legislation does not take into consideration that a student can easily acquire the information through alternative sources, such as the internet. However, if information from a particular internet site is used in the production of weapons, the web master is not held personally liable. Likewise, if a textbook provides the information, the publisher is not held liable.

Legislation thus prohibits the usage of certain microorganisms in a microbiology laboratory, as well as certain chemicals in chemistry laboratories, unless properly authorized. Many of the microbes and other organisms like termites are easily found outside in the environment. The USDA listing now restricts

universities from receiving termites for basic biological laboratories, although one can go outside to a wood pile and find them. Basic molecular biology techniques can be applied on a small or large scale to produce biological agents capable of causing diseases more deadly than those that currently exist. Molecular techniques are used routinely in laboratories to genetically manipulate organisms. Without these new, common techniques, the human genome would not have been sequenced, and new antibiotics and vaccines would not be developed. However, not every agent needs special equipment to be dangerous. Once cultured, mutations can be easily generated by chemicals or ultraviolet light (sunlight would work), but certain microbes' cell properties will require expensive equipment in order to make them highly contagious or virulent. Each microbial strain contains a unique cellular make-up (personality), just like each person.

Thus, certain biotechnology methodologies will not be taught due to liability concerns. The government is hampering academic freedom in classrooms, as well as limiting the education that persons from other nations can receive. This impedes the education of all students, many of whom will be pursuing graduate degrees. These students will not be as knowledgeable, and hence less competitive, when applying to graduate schools because some basic information cannot be taught. Graduate schools will still expect students to know the basic material, and thus will not accept students from certain institutions.

Research Impacts

If a research institution (academic, hospital, private) wishes to perform research utilizing one of the restricted agents, the institution must apply for approval with the DHHS, have specialized safety equipment, follow the new (2002) regulations and undergo periodic, unannounced inspections. Registration encompasses filling out a form for preliminary approval. This form was finally released to the institutions on February 24, 2003 and was due back by March 12, 2003 to the DHHS. The institution must also provide a containment and restricted area, and effective clean-up procedures in case of a spill. Once approval is granted, the approval is specific to the project approved. An institution cannot work on side projects using the same organism unless it has also been approved. Using an organism for several related projects is a common practice in the sciences since it enhances creativity for finding results for several problems at one time. When one or two persons possess expertise on a particular research issue, it is beneficial to let them work on several projects related to their expertise for as long as possible to obtain results. The expertise of the projects often changes due to post-doctoral positions that last for a couple of years, because a grant is normally funded for one to three years. Thus, the "experts" move to another institution and work on a different project after two to three years. Personnel stability decreases the amount of funding and persons needed for a particular project since many questions can be answered at one time, rather than individually, and drugs are discovered more quickly. Thus, individual project compliance with DHHS regulations may be more detrimental for future drug development.

Due to potential counter-terrorism needs, research will now be awarded millions of dollars to develop new antitoxins, antibiotics, and generalized countermeasures against the agents previously mentioned. Institutions engaged in counter-terrorism research will also have priority over other governmentally-supported research results. Further, this means that if a drug is developed by one institution, another institution working on similar research will be privy to the results, whereas the rest of academia would be left out, even if the laboratory receives government funding that does not entail countermeasure production. This also pertains to DNA sequences and any other product developments. This legislation inhibits the research capabilities of many institutions, and will ultimately inhibit prompt publication of results. This cascading effect will affect all research projects in the future because many pieces of information can apply to many other organisms and projects. This inhibits research creativity and efficiency of other drug development research (7).

Human Health Impacts

With the governmental support of counter-terrorism research, accelerated approval of possible counter-measures has emerged (7). Counter-measures refer to antibiotics, antitoxins, vaccines, or other means to protect a population from one of the restricted agents if it were used in a terroristic capacity. One important change is that the Food and Drug Administration (FDA) may approve a drug in only a few months, instead of years. A current example of this is the pressure on the FDA to approve heart and atherosclerosis (and other diseases) drugs much faster than in the past, without analyzing all of the results of human trials. The public has seen an explosion of drugs being approved, recalled within a couple of years, and ultimately removed from the drug market due to devastating side effects. This has also lead to numerous lawsuits by victims and their families.

Along with the counter-measure accelerated approval, the legislation allows for approval of using the drug on a population based solely from animal trials if the disease is truly horrific, such as with Ebola Hemorrhagic Virus (7). Thus, minimal or even no human clinical trials will be needed for approval of certain counter-measures. Every project should contain a high monetary stipend for human subjects so a

few people would "volunteer" for a new drug or vaccine. A few human trials that provide scientific knowledge of a few side effects, is much more beneficial to humanity than a completely unknown "antidote". Further, the new legislation provides for liability protection to the manufacturers, so if someone gets ill or dies, the family cannot sue the company. Finally, since vaccines are usually not profitable ventures for companies, the government is providing tax incentives to companies willing to manufacture the drugs and vaccines used in counter-measures (7).

Conclusions

The terrorist acts in 2001 caused public outcry so two major legislative laws were created to prevent future acts. The USA PATRIOT act placed limitations on persons who could be employed in laboratories working with restricted agents. The Bioterrorism Preparedness Act required institutions to employ appropriate security measures in order to be approved to work with selected agents the DHHS placed on a "restricted" list. Positive outcomes of the laws include greater security for research institutions using potentially dangerous microbes and agents. Therefore, it should be more difficult for the general public to acquire these agents. Negative civil liberty outcomes include less academic and research freedom, fewer new drugs being developed, and the possible use of approved counter-measures (vaccines, antitoxins, antibiotics) on untested populations. Do these acts really protect society as a whole more than in the past, or do they merely make society feel more protected?

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THE EFFECTS OF COUNTER-TERRORISM ON CYBERSPACE: A CASE STUDY OF AZZAM.COM

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The desire for security in cyberspace has led to a number of initiatives, lawsuits, and debates over the years. The newest and latest proposal is the Cyber Security Enhancement Act of 2002, enacted as Section 225 of the Homeland Security Act of 2002. Section 225 strengthens the USA-PATRIOT Act of 2001 and allows more flexibility for government agencies to put pressure on Internet Service Providers (ISPs). However, despite this upgrade new cyberpolicing tactics will fail to deter and stop terrorist activity on the web. The Cyber Security Enhancement Act and other measures ignore the dramatically distributed nature of cyberspace, a concept embedded in the initial design of the Internet and confirmed by *Reno vs. ACLU*. Consequently, the path to this failure will be paved with infringements on American civil liberties. In order for the government to successfully fight the war on terrorism on the Internet, it must ignore rights extended to cyberspace.

The July 2002 shutdown of website Azzam.com illustrates the unintended consequences current counter-terrorism policies have for online civil liberties. Since its initial closure, Azzam.com, a 'pro-Jihad' website, has reappeared and disappeared again several times. The publishers of Azzam.com claim that their First Amendment right to exercise free speech is being trampled on. The United States government counters that it has the right to pressure ISPs into terminating service for such websites because the pro-terrorist nature of some of the material published on Azzam.com is viewed as a threat. Under the USA-PATRIOT Act of 2002, the United States government insists it has an obligation to diminish the ability of terrorists to launch attacks. At what point, however, does this action move out of the realm of national security and into the depths of censorship?

This question cannot be explored without an examination of the online rights of the individual. Once a citizen's online rights have been established, it is only appropriate to examine the United States Government's responses. One such response, The National Strategy to Secure Cyberspace is an attempt to balance the need for cyber security and citizen's rights. It calls for voluntary interaction between federal, state, and local government agencies and the private sector. By volunteering to shut down suspected terrorist websites, the ISPs help the government counter potential acts of terrorism and not infringe on civil liberties. However, the constantly changing nature of cyber security makes such a voluntary system inadequate.

Once again, using the closure of Azzam.com, national policy and reality conflict in the *National Strategy to Secure Cyberspace*. Under the *Strategy*, any action taken against Azzam.com would be done at the discretion of their Internet Service Provider (ISP). Indeed after the July 2002 closure, Azzam.com's ISP replaced its webpage with one that simply stated that the website was closed for "Terms of Service (TOS) violations." Once Azzam.com moved to a different ISP, the government's counter-terrorism efforts were forced to restart the campaign of voluntary pressure. Such a cycle will continue in most online counter-terrorism efforts. Consequently, some American citizens will lose their online rights in the name of national security.

Rights in Cyberspace

The idea that American citizens have rights in cyberspace (cyberights) remains a contentious issue. No U.S. legislation exists that explicitly defines the full extent of cyberights. In addition, the Internet lacks an international regime to set and enforce guidelines. Despite these drawbacks, the individual does enjoy some rights on the Internet. The first of these rights is embedded in a norm of neutrality. This fundamental attribute of the telecommunications industry gives the Internet its unabridged freedom and unique character. Additionally, in Reno v. ACLU, the Supreme Court extends the First Amendment right of freedom of speech to sponsors of web pages. The ruling negates the Communication Decency Act (CDA) of 1996, and curtails government action on the web. The instant uploading of news and data on the Internet through web portals also eliminates the power of prior restraint. The government simply cannot keep up with the information

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highway to regulate items it deems hazardous. Finally, the amorphous nature of Internet precludes any attempt by the U.S. government to effectively intervene. In the zero sum game of sovereignty, the web's transnational nature transfers power from the government to the people through increased personal freedom. In sum, while no bill of cyberights exists, the belief that American citizens maintain rights on the web remains strong.

When the Internet first became available to the public in the early 1990s, telephone lines supplied the physical means for communication. Consequently, the debate on cyberights begins with what Lawrence Lessig calls the "norm of neutrality," or premise that the Internet is a neutral, accessible medium for all. This lack of central control originated with the Title II of the Communications Act of 1934. Title II called for unrestricted access to telecommunication services, including telephone lines. Since then, Congress and the Courts have consistently upheld this notion. The first instance occurred in 1968. The Carterfone decision by the Federal Communications Commission (FCC) stopped AT&T's practice of charging for coupling devices, allowing other companies to offer services relatively cheap on AT&T lines. In addition, the breakup of AT&T in the 1980s into the numerous Baby Bells destroyed the idea that one company could hold a monopoly on line service. This furthered the idea of neutrality by lowering phone costs and multiplying outlets. Finally, the 1996 Federal Communications Act ensured that the Baby Bells would remain neutral on the usage of their lines. This action enshrined the "norm of neutrality" for all telecommunications, including Internet use involving telephone lines.[1]

This quest for neutrality gives the Internet its unique nature. However, the Internet does not work in a vacuum. It requires a common foundation among users. For instance, almost all Internet traffic is transmitted through the use of a Transmission Control Protocol/Internetwork Protocol (TCP/IP). This allows for a smooth error-free flow of data between machines in the form of information packets. Franda argues that commonalities like TCP/IP make governance in cyberspace possible. He contends that an international regime will evolve that regulates action on the web. He envisions the Internet Corporation for Assigned Names and Numbers (ICANN), created in 1998, as that new consortium. However, ICANN operates without an international treaty and can only serve the interests of those involved.[2] The exponential growth of Internet usage and webpages make it difficult for any one organization to control all content.

The second foundation for cyberights involved the landmark case *Reno v ACLU*. In *Reno v ACLU*, the Supreme Court extended the First Amendment right to freedom of speech to the Internet. The case began when the American Civil Liberties Union (ACLU) filed a lawsuit in the Eastern Pennsylvania District Court. The ACLU claimed that the CDA violated the First Amendment right to freedom of speech. The CDA, part of the Telecommunications Act of 1996, limited the use of pornography on the Internet. Congress designed this act to stop the explosion of child exploitation on the web by regulating the pornography industry itself.[3] The most controversial provision provided that a person shall be fined and imprisoned for up to two years if found guilty of:

> …using any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication[4]

The Supreme Court ruled that the "'indecent transmission' and 'patently offensive display' provisions abridge "the freedom of speech" protected by the First Amendment."[5] The Court decided that the CDA had overstepped its boundaries in suppressing large amounts of pornographic material to adults. Even though the aim of the CDA centered on protecting the child from online exploitation, the act abridged the average viewer's constitutional rights to see legitimate material. Likewise, the CDA targeted pornographic sites because of their content. However, the Court ruled that the government lacks jurisdiction in restraining content. The Justices in effect held that content defined freedom of speech.

The third facet of cyberights involves the speed in which information is uploaded onto the Internet. The publishing of data on millions of webpages weakens the federal "power of prior restraint." The Supreme Court establishes in *Near v Minnesota* that the government reserves the right to censor information it deems

[1] Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, (New York: Vintage Books, 2002), 149, 155, 167, 178-179.
[2] Marcus Franda, *Governing the Internet: The Emergence of an International Regime*, (Boulder, CO: Lynne Rienner Publications, 2001), 51-76.
[3] "Title V: The Communication Decency Act of 1996," *The Telecommunications Act of 1996*, Pub. L. 104-104, 110 Stat. 56
[4] Ibid.
[5] Janet Reno, Attorney General of the United States, et al., Appellants v American Civil Liberties Union et al, 521 US 844, 887 (1996).

matters of national security.[6] Consequently, the U.S. government can ask the Courts to block the publication of sensitive material, especially in times of war.[7] However, once the information has been printed the government loses the right to ask the publisher to recall it or suppress further publication.

This important right came under review in *New York Times v United States*. Also known as the Pentagon Papers case, a disgruntled Pentagon employee leaked a series of papers criticizing U.S. policy during the Vietnam Conflict. Once the editors at the New York Times authenticated the information, they published the first of a series of articles. The federal government filed papers to enjoin the New York Times from publishing further information. The Supreme Court ruled that once an article has been published the government loses the right to prior restraint.[8] With the advent of the Internet and instant exchanges of information, the "power of prior restraint" becomes irrelevant. Once the data is uploaded onto a website that can be accessed by a U.S. citizen, the federal government cannot ask the publisher to stop the spread of that information.[9]

Finally, the amorphous nature of cyberspace itself adds to the confusion and plays havoc on the traditional notions of sovereignty. The modern international system is based on the concept of national sovereignty. Each country retains the ability to conduct its own affairs without interference from other nations.[10] However, the Internet ignores borders. A student in Canada can converse with a friend in Japan and buy products from Brazil all at the same time. Where does jurisdiction over this student's activities start and end? The debate on whether or not territorial sovereignty extends into cyberspace remains heated, with many arguing for and against regulation of the Internet.

On one side, Jack Goldsmith, a professor or law at the University of Chicago, argues that the current ad hoc provisions made through international commerce can apply to cyberspace as well. The regulation of extraterritorial activities by a host nation can be extended to the Internet. This would establish a temporary system until international harmonization can occur.[11] On the other side, David Johnson and David Post contend that all local authorities on the Internet must oppose any regulation. They postulate that the "Net equivalent of the First Amendment" is resistance to the restriction of online transactions.[12] In addition, they point to Article 19 of the UN Covenant on Civil and Political Rights, which guarantees the freedom of expression.

In reality, control in the Internet rests not with the nation-state, but with the individual networks. Boundaries in cyberspace tend to form at the junction of administrative systems and ISPs. America Online polices its members and keeps its area of cyberspace secure for its users. Likewise, eBay will track sales made on its websites, compile a database of items auctioned and charge its appropriate fees.[13] In addition, rules for commerce on the Internet do and must follow international norms. However, the use of ad hoc agreements in the economic sphere, as advocated by Goldsmith, cannot apply to non-commercial websites. Pages that provide news, links to research materials, pictures, or other non-sale items do not fit into Goldsmith's paradigm. Similarly, the temptation to resist any sort of regulation by Johnson and Post represents an extreme. Profit-drive companies allocate space on the Internet. Free market ideology insists that they will inherently instill order in an attempt to reduce waste and maximize shareholder interest. Consequently, the power to enforce regulations on the Internet remains outside the realm of traditional state sovereignty.

Cyberpolicing

The prerogative of the federal government to defend itself and American society is a well-established concept. First, the United States Constitution requires Congress to provide for the common defense and general welfare of the country.[14] In addition, numerous court cases upheld the notion that the safety of American citizens at home or abroad is the primary function of government. In the landmark case *Schenk v United States*, the Supreme Court ruled that the security of the community is paramount to an individual's freedom of speech. The Justices claimed the government has a duty to protect society against "incitements to acts of violence and the 'overthrow by force of orderly government.' The constitutional guaranty of free speech does not protect a man from an injunction against uttering words that may have all the effect of force."[15] Consequently, this type of support has emboldened the Bush Administration in the post-September 11th era to new levels of protection.

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[6] Near v Minnesota, 283 US 697, 716 (1931).
[7] Ibid. "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any 'constitutional right.'"
[8] New York v United States, 403 U.S. 713 (1971).
[9] Lawrence Lessig, *Code and Other Laws of Cyberspace*, (New York: Basic Books, 1998), 170.
[10] UN Charter, Chapter I, Article 2.
[11] Jack L. Goldsmith, "Against Cyberanarchy," *University of Chicago Law Review* 65 (1998)
[12] David R. Johnson and David G. Post, "Law And Borders: The Rise of Law in Cyberspace" *Stanford Law Review* 48 (1996): 1367, 1369-76.
[13] Stuart Biegel, *Beyond Our Control: Confronting the Limits of Our Legal System on the Age of* Cyberspace, (Cambridge, MA: The MIT Press, 2001), 113-115
[14] United States Constitution, Article I, Section 8.
[15] Gompers v. Buck "Stove & Range Co., 221 U.S. 418, 439." Schenck v United States, supra. (1919)

The federal government took a number of dramatic legal steps in response to the catastrophe of September 11th. These included the enactment of several new laws and executive policy actions designed to curtail or eliminate terrorist activity. These new laws and actions include: The *USA PATRIOT Act* of 2001, the *Homeland Security Act* of 2002, the *National Strategy to Secure Cyberspace*, and *Executive Order 13224*. In the Bush Administration's *National Strategy for Homeland Security*, the President asserts, "Terrorists wish to attack us and exploit our vulnerabilities because of the freedoms we hold dear." These vulnerabilities include the freedom of speech and the freedom of movement within the United States. Through the synergy of these actions, the Bush administration believes it can effectively counter terrorist activity on the Internet.

The USA PATRIOT Act represents the first step in the federal government's plan for counterterrorism. Enacted mere months after September 11, the Act breaks down barriers between domestic and foreign intelligence agencies.[16] In regards to cyberspace, Section 814 provides for the deterrence and prevention of cyberterrorism. The Act imposes stiff fines and up to ten years of imprisonment for those convicted of cyberterrorism. In addition, Section 814 expands the international scope of federal power. Federal authorities can target "computers located outside the United States that [are] used in a manner that affects interstate or foreign commerce or communication of the United States.''[17] Consequently, if foreign computers advocate the disruption of interstate or foreign commerce through terrorism, under this section the federal government could sanction them. However, the law is unclear on how the government would exercise this power outside its territorial boundaries.

The USA PATRIOT Act also expands the power of federal surveillance. The act allows for the interception of electronic communications, giving the Bush administration the right to search the millions of emails sent through the Internet for terrorist activity. However, the section may come into conflict with the National Security Act (NSA) of 1947. The NSA Act prohibits the CIA or the National Security Agency from monitoring any domestic origin communications. However, the Act specifically requests that the Office of the Attorney General have access to any such technology it deems necessary. This action potentially violates the extended First Amendment rights extended to cyberspace. If the federal government reserves the right to scan all domestic electronic communication, then freedom of speech, which in turns means the freedom to dissent, could be severely curtailed.[18]

The next piece in the legislation on cybersecurity is *Executive Order 13224*. Signed in 2001, the Order strikes at the financial foundation of transnational terrorist networks. It targets an extensive number of terrorist groups from all continents, including sponsors of Azzam.com. Specifically, Section I, Article d, Paragraph i allows the Department of Treasury to deny any or all financial services to terrorist groups. In regards to cyberspace, the Department, in consultation with the Attorney General can prosecute people that "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of terrorism." In conjunction with other countries, the Department establishes an electronic trail and then shuts down the financial networks.[19]

This tactic led to the February 26, 2003 arrest of Sami Omar Al-Hussayn, a University of Idaho doctoral student. The federal government believes that Al-Hussayn worked for the Islamic Assembly of North America (IANA), a suspected terrorist financing organization. The IANA operated through a variety of websites that praised suicide bombings and advocated violence. In addition, the FBI claimed that Al-Hussayn funneled money through theses sites to various terrorist sleeper cells in North America. However, as the federal government acknowledged, Al-Hussayn's close links with the Saudi regime put him in a unique situation. The IANA coordinated the actions of Islamic groups through North America in the propagation of Salafi doctrine. Salafi, or specifically Wahhabi, doctrine advocates a stricter vision of Islam. The dawah itself does not necessarily promote violence.[20] Al-Hussayn may be guilty by association through his similar religious affiliation with that of the September 11th terrorists rather than through a nexus of terrorist financing.[21]

The next important cog in the new antiterrorism framework is the *Homeland Security Act* of 2002, and more specifically Subtitle C: Information Security. This major section mandates that the Secretary of Homeland Security create an effective system for the sharing of sensitive data. In addition, the Secretary must stay in compliance with the Privacy Act of 1974, assuring that these information collection practices and networks respect privacy protections. In turn, Section 223 asks that private industry work with the Department in warnings

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[16] Dino Bozonelos, "Obstacles to Interagency Cooperation," presentation at *2002 Social Science Research Conference*, California State University, San Bernardino.
[17] USA PATRIOT Act, H.R. 3162, (October 24, 2001), 292-297.
[18] Ibid.
[19] Executive Order 13224: Blocking Property and Prohibiting Transactions With Persons Who Commit, or Threaten to Commit, or Support Terrorism.
[20] Dawah means religious doctrine or calling in Arabic.
[21] Art Moore, "Suspect Linked to bin Laden, Iraq," *WorldNetDaily.com*, (February 27, 2003). Available at: http://worldnetdaily.com/news/article.asp?ARTICLE_ID=31278.

and analysis of terrorist threats. Finally, the Act incorporates the *Cyber Security Enhancement Act* of 2002.[22]

The *Cyber Security Enhancement Act* of 2002, Section 225 of the *Homeland Security Act* of 2002, provides stiff penalties for those convicted of cyberterrorism. It directs the Sentencing Commission to take into account "whether the violation was intended to or had the effect of creating a threat to public health or safety, or injury to any person."[23] In addition, the act increases Internet and telephone eavesdropping by the police without a court order. It also permits ISPs to disclose information about subscribers to police. Finally, information that businesses give to the Department related to critical infrastructure will not be subject to the Freedom of Information Act. That could possibly include details on security holes in applications, virus research, or operating system vulnerabilities.[24] However, a group comprised of the National Association of Criminal Defense Lawyers, the Electronic Frontier Foundation and the Sentencing Project criticizes the Act. The majority of cybercrimes committed since the original National Computer Fraud and Abuse Act of 1986 has been white collar and unrelated to terrorism, with only one conviction on safety violations. Consequently, the harsher penalties will fail to have the effect the framers of the Act wanted.[25]

The *National Strategy to Secure Cyberspace* defines the Bush Administration's plans for countering terrorist activity on the Internet. Released in February 2003, the plan outlines five priorities: A national response system, threat and vulnerability reduction program, security awareness and training program, securing governments' cyberspace, and national security and international security cyberspace security cooperation. The Bush Administration articulates these priorities through the recognition that the federal government does not have the manpower or resources to regulate cyberspace alone. Instead, the *Strategy* calls for the implementation of a volunteer private-public partnership throughout its priority implementation schemes. These schemes particularly include: The establishment of a response architecture; an improved information sharing mechanism between government and private industry; both under Priority 1: A National Cyberspace Security Response System; and the creation of educational programs that "empower all Americans…to secure their own parts of cyberspace," as described under Priority 3: A National Cyberspace Security Awareness and Training Program.[26]

This establishment of a system of voluntary partnership is evident in cyberpolicing activities. The repeated shutdowns of Azzam.com were not facilitated through federal injunctions, but through pressure borne upon ISPs to ensure their services were not misused. Although this approach toward fulfilling the government's duty to protect cyberspace was not entirely successful in removing any Azzam.com content from the Internet, it kept that content available directly through the Azzam.com Uniform Resource Locator (URL) from the public. The government attained this objective without any warrants, arrests, or lawsuits; instead, federal agencies simply urged ISPs to voluntarily comply with federal goals.

Case Study: Azzam.com

Azzam.com began as a Muslim news agency to cover the insurrection of Chechen rebels against Russia. In cooperation with qoqaz.net, waaqiah.com and several other extremist Muslim-oriented websites, the proprietors of Azzam.com gained a reputation for reporting body counts and operations the Western media ignored. Since most of their stories were unconfirmed, Western intelligence officials failed to take Azzam.com's writers seriously until after September 11, 2001.

When Western officials inquired into the content on Azzam.com, they discovered that Azzam.com had begun publishing calls for *Jihad* against the West. In fact, the website's owners dedicated an entire section to stories, articles and speeches encouraging visitors to take up arms against the West in support of the *Lesser Jihad*.[27] In this manner, Azzam.com claimed to be speaking for the entire Muslim *ummah*, or community. Finally, books published by Azzam.com doubled as manuals on how to become a *mujahideen*, or freedom fighter. It encouraged readers to travel to Afghanistan to train with Osama bin Laden and al-Qaeda.

One of the most disconcerting sections of the website, at least from a Western perspective, was the "Jihad Stories" section. It provided short biographies of various *mujahideen* killed while fighting for Jihad in Afghanistan, Bosnia, Chechnya, Palestine, and the Philippines. The stories were overly romantic, like the tale

[22] Homeland Security Act of 2002, H.R. 5005, (November 19, 2002).
[23] Ibid., Section 225: The Cyber Security Enhancement Act of 2002.
[24] Declan McCullagh, "How Homeland Security Impacts Tech," *ZDNETI*, (November 20, 2002); Available at http://zdnet.com.com/2100-1105-966552.html
[25] Robert Lemos, "Lawyers: Give Hackers a Break," *ZDNET*, (February 21, 2003); Available at http://zdnet.com.com/2100-1105-985407.html
[26] National Strategy to Secure Cyberspace (February 2003), 12
[27] The Lesser Jihad involves the struggle to defend the religion against outside forces, which is entirely separate from the Greater Jihad, the inner struggle between man and God. Melissa Elliot Griffith and Salma Abugidieri, "Conversations with Salma Abugidieri: To Live the Greater Jihad," *Family Proces* Vol. 41, Issue 1 (Spring 2002): 4-10.

of Abu Thabit Al-Muhajir, killed while fighting in Bosnia on September 10, 1995:

> In the first few minutes of Operation Badr, he was shot twice but did not make a single noise in pain. He carried on fighting, until he was shot by a third bullet through the heart. Without making any expressions of pain, he turned around to his brothers behind him, smiled, and said: '*My brothers, I have been hit,'* then closed his eyes, to be followed by his soul. [emphasis original][28]

This propaganda became an important consideration in a call to arms. Guilt, pride, and a sense of the need to right the wrongs of the world's injustices, made religious extremism as intoxicating as communism, ultra-nationalism, or fascism. The people behind Azzam.com learned this lesson well, sprinkling their site with tales of heroism.

A few days before the terrorist attacks of September 11th, the North Texas Joint Terrorism Task Force, working in cooperation with the Federal Bureau of Investigation (FBI), raided Azzam.com's Internet Service Provider (ISP), Infocom. The federal government suspected the ISP owners were funneling money to terrorist organizations, and on December 18, 2002, the Justice Department convicted seven people on this charge.[29] In light of these events, Azzam Publications searched for a new location for their website, running through a number of hosting companies. As a hosting company became aware of the content on their servers, they often shut the website down, and the proprietors of Azzam.com were forced to find a new ISP. Each changeover resulted in downtime of up to several days as the new Domain Name Service (DNS) information propagated itself throughout the Internet's lookup services. Although no connection existed between the raid on Infocom and Azzam.com, the case proved to be a precursor of future events.

On July 10, 2002, Jack Kelley of the USA Today reported an increased concern by U.S. Intelligence officials that members of Al Qaeda corresponded and conspired through modern communication and encryption methods.[30] Called steganography by the intelligence community, this claim became a focal point of media and intelligence scrutiny. Steganography, a Greek term meaning secret writing, involves the transmission of messages inside an otherwise innocent medium. This usually involves hiding communiqués in the extra space of uncompressed, or loosely compressed, digital images. Several software packages on the market allow for an almost unperceivable alteration of the image.[31]

Well-hidden steganographic messages are nearly impossible to accurately detect. Many images contain enough extra space that a steganographic addition makes little to no difference in the final image size. Additionally, nearly every steganography program employs a different algorithm to hide their message. Finally, most steganographic programs encrypt the message before encoding it in the image. Steganography detection tools often view encrypted messages as nothing more than random noise. Most detection programs, therefore, simply analyze an image by comparing it to the algorithms of known steganographic programs. The obvious caveat then arises that an outdated detection program ignored the newest steganographic programs.[32]

Declan McCullagh, a respected technology journalist, runs a website called politech.bot that focuses on online security and privacy issues. McCullagh writes pieces for news sources as diverse as Internet news magazine wired.com, having once headed their Washington bureau from 1998 to 2002, to the Wall Street Journal.[33] On his website, McCullagh posts links to news stories and comments on new trends in Internet security related issues. On July 10, 2002,
McCullagh tested Kelley's assertions on steganography. He asked his readers to examine the images on Azzam.com and determine the existence of steganographic images. [34] The results of McCullagh's challenge favored Azzam.com, showing a few possible detectable steganographic messages, although is was unclear whether these images actually contained messages. [35] The troubles for Azzam.com, however, were just beginning.

Soon after the conclusion of this one-day challenge, Azzam.com's ISP shut them down again, replacing their website with a plain white page that simply said "This website has been shut down for Terms of Service (TOS) violations" in stark and simple black letters. Azzam.com found another ISP, but the federal government still pursued them. Over the next few months, their website shifted from server to server throughout the United States and Canada. However, their efforts were continuously thwarted by various

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[28] Available at: "http://web.archive.org/web/20010818054325/ http://azzam.com/html/storiesabuthabitmuhajir.htm"
[29] United States Department of Justice Press Release, "Senior Leader of HAMAS and Texas Computer Company Indicted for Conspiracy to Violate U.S. Ban of Financial Dealings with Terrorists," *USDOJ* (December 18, 2002); Available at http://www.usdoj.gov/opa/pr/2002/December/02_crm_734.htm
[30] Jack Kelley, "Militants Wire Web with Links to Jihad." (July 10, 2002) USA Today.
[31] Neil F. Johnson and Sushil Jajodia, "Exploring Steganography: Seeing the Unseen," *IEEE Computer* (1998): 26-34.
[32] James Ballard, Joseph Hornik, Douglas McKenzie, "Technological Facilitation of Terrorism," *American Behavioral Scientist*, Vol. 45, No. 6 (February 2002), 994-998.
[33] Available at: "http://www.mccullagh.org/about/bio.html"
[34] Available at: "http://www.politechbot.com/p-03735.html"
[35] Available at: "http://www.politechbot.com/p-03747.html"

government agencies and concerned citizens.[36] Frustrated, the proprietors of Azzam.com opted to send their press releases and daily news reports to a sister site, the British waaqiah.com, foregoing their own, American address. Despite this measure, on March 1, 2003, waaqiah.com became inaccessible to the public at large as well. Consequently, the WHOIS entry for Azzam.com points to an IP that is unresponsive to ping or traceroute requests.[37]

Although government pressure has closed down these websites, their legacy lives on. The search engine Google.com saves a copy of each website it indexes, and offers that copy to any user as the "cached" copy of the website. This cached copy remains online, often indefinitely, despite the status of the website. For what it's worth, Google removed the cached copy of Azzam.com.[38] However, it has not eliminated its cache of waaqiah.com, making Azzam.com's content still available to those who look hard enough.[39]

Whereas Google only caches the most recent version of the website, other places like Archive.org, stores recurring copies with the intent of ensuring that all content ever placed on the Internet does not "disappear into the past."[40] Several different versions of Azzam.com exist on Archive.org's "Internet Wayback Machine," most from 2000 and 2001.[41] Despite some technical problems, most of these versions are available to anyone who simply searches for them.

In fact, Azzam Publications brought up this point after closure of their website. In a November 20, 2001 "Farewell Statement," written in the expectation that their site would be shut down again, Azzam.com publishers called upon their readers to copy their website and mirror it elsewhere:

> We have written these few words in expectation of our site being closed yet again. Therefore, we advise all the Muslims to save a copy of this page and ponder about what it says lest our site is closed and we are not able to say it again. We also advise the Muslims to copy, translate into other languages if necessary and distribute this message all over the Internet.[42]

A spokesman for Azzam.com also told the Wall Street Journal that "one cannot shut down the Internet."[43]

Conclusion

In conclusion, to effectively fight the War on Terrorism on the Internet, the federal government will ignore certain cyberights. However, the nature of the Internet itself will prevent the Bush administration from successful cyberpolicing. As the case study of Azzam.com shows, suppressed content from banned websites requires little effort to resurface. It can equally appear elsewhere in an accessible manner. Sometimes this happens through traditional means, such as the simple re-posting of the information by fans or like-minded individuals. Occasionally, it is facilitated by philanthropists, like those behind archive.org, who believe in the power of retaining all the information of a culture, or a corporate entity like google.com.

The United States government has provided a legal basis for any counter-terrorism measures through the *USA Patriot Act*, *Executive Order 13224,* the *Homeland Security Act*, and the *National Strategy to Secure Cyberspace*. Furthermore, the federal government has an obligation to protect its citizens. According to these criteria, the United States government should protect its national security through a vigorous effort that includes cyberpolicing. In reality, successful governmental control of a communications network as de-centralized and transnational as the Internet is strictly an illusion.

The Internet has become home to a wealth of constantly fluctuating content, some of it inflammatory, anti-American rhetoric. Therefore, it is in the best interests of the government to target the most threatening information. Once the federal government determined that Azzam.com met this criterion, it acted accordingly. However, the action violated the First Amendment rights of the publishers. Per se, the pressure borne upon ISPs to restrict Azzam.com is understandable within the new antiterror guidelines. The censorship of Azzam.com represents the conflict between cyberights and cyberpolicing.

The ramifications of these actions are disconcerting. The federal government, along with its state and

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[36] Jonathon R. Galt keeps a website that lists websites he believes are connected to terrorist activities, fundraising or philosophy. He urges his visitors to contact the ISP hosting these terrorist affiliated sites. Available at: http://uk.geocities.com/johnathanrgalt/ Last Accessed March 1, 2003.

[37] Ping and traceroute searches conducted February 1, 2003.

[38] Wheeler, Ben. "Reckless.gov" The Columbia Daily Spectator, 30 October 2001.

[39] Clicking on the link for Azzam.com's cached copy results in a blank page. Available at: http://216.239.33.100/search?q=cache:Vl71eB1qSTEC:azzam.com/+%22azzam.com%22&hl=en&ie=UTF-8. Accessed March 1, 2003.

[40] "About the Internet Archive." Available at: "http://www.archive.org/about/about.php"

[41] Available at: "http://www.archive.org"

[42] Azzam Publications, "Farewell Message from Azzam Publications." November 20, 2001. Available at: "http://66.96.205.195/~azzam/html/articleworldwarthree.htm"

[43] Wheeler, Ben. "Reckless.gov" The Columbia Daily Spectator, 30 October 2001.

local counterparts, must avoid becoming overzealous in their cyberpolicing activities. In contrast, the voluntary measures proposed by the Bush Administration in its *Strategy to Secure Cyberspace*, while admirable, are insufficient. A balance must be struck between the cyberights of the individual and the cyberpolicing responsibilities of the government. Such a balance will only be possible through a long process of trial and error that includes the active participation of private, commercial, and government interests.

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USA PATRIOT ACT AND LIBRARIES

Scott White*

Throughout its history, whenever the United States has fought a war, it has taken measures that compromise civil rights. On May 28, 2002, in a speech to the New York County Lawyer's Association debating the USA PATRIOT Act, Representative Jerrold Nadler included the 1798 Alien Sedition Act, the 1917 espionage act and Palmer raids, Japanese internment camps and the domestic counter intelligence programs (COINTELPRO) of the 1960s as examples of these measures. While each law or program had some political utility at the time and were enacted, they each have become embarrassing incidents in United States history. In some of these cases, reparations and apologies were necessary. Nadler indicated that the [USA PATRIOT Act] allows for detention for minor visa violations, expanded use of government surveillance, physical searches and wire taps of anybody, not just suspected terrorists, and expands the ability of government intelligence agencies to conduct secret searches (Adas, 2002).

The PATRIOT Act was enacted after the events of September 11th, 2001, when over 3,000 people were killed in the worst terrorist attacks to take place on United States soil. As details emerged about how the attacks were planned and executed, it became clear to investigators that the perpetrators of the crimes used and exploited the ordinary freedoms afforded Americans to help plan the attacks. We have since learned that the hijackers traveled freely about the country, attended American schools (the alleged mastermind of the attacks, Khalid Shaikh Mohammed, attended school in North Carolina), were here legally in most cases, although some resided here illegally, and easily circumvented airport security at several locations. The hijackers spoke to each other through various communication means, and left a money trail that can be traced around the world. They studied planes and airport security, learned to fly and used this knowledge to kill innocent people.

The wounds of that day were still raw, when, on October 11th, 2001, the USA PATRIOT Act was passed in the Senate, and the next day in the House of Representatives. On October 26th, 2001, President Bush signed the bill into law. He remarked:

> This legislation is essential not only to pursuing and punishing terrorists, but also preventing more atrocities in the hands of the evil ones. This Government will enforce the law with all the urgency of a nation at war. The elected branches of our Government and both political parties are united in our resolve to find and stop and punish those who would do harm to the American people (Bush, 2001).

The passage of the bill was a bipartisan effort, the likes of which are rarely seen in Washington, D.C. in this political era. House bill HR 2975, also known as the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001 passed by a vote of 337 to 79 (Rodriguez, 2001). Senator Russell Feingold, the lone dissenter in the Senate (D-WI) later remarked, "few had even read the summaries, let alone the fine print (Minow, 2002)." The vote was held while many lawmakers were denied access to their offices because of the Anthrax scare (Minow, 2002).

The PATRIOT Act, however, disturbs the balance among the three branches of national government, with the Executive Branch and the Justice Department gaining broad powers to pursue terrorists at the expense of protections afforded individuals under the Constitution. While the changes the Act brings to surveillance and information gathering strategies of law enforcement entities are not supposed to be used on American citizens, the language and the intent of the Act have been scrutinized and questioned by legal scholars as being broad and vague. There is fear that facets of the law will be made permanent and be used for all types of investigations and not just those focusing on terrorism. In this paper I will present an analysis of the USA PATRIOT Act and its effect on American libraries, the imbalance it causes in governmental power and the potential limit to civil liberties. In conclusion, I will discuss the need for lawmakers to take stock of a calamitous situation, such as the terrorist attacks of September 11, 2001, and respond appropriately, without chipping away at principles that are the bedrock of American society.

The FBI and Libraries

There is a history of FBI surveillance in libraries. Using libraries to spy on suspect individuals is not a new practice, dating to J. Edgar Hoover's early reign as FBI Director. In 1942, controversy surrounded the depositing of papers belonging to Boris Brasol, a former diplomat and author who was

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suspected to have ties to Fascist parties in Italy and Germany. Brasol had donated his papers to the Library of Congress with a stipulation that they not be released to the public until 1953. Hoover demanded access to the papers, but was denied by the Librarian of Congress at the time, Archibald MacLeish. (Stielow, 1993). Hoover had actually worked for the Library of Congress from 1913-1917, and he developed ideas about use of information in surveillance during those years. Hoover often conducted surveillance illegally, relying on secret files and illegal wiretaps to obtain information about individuals deemed "suspicious" by the FBI.

MacLeish denied the request to see Brasol's papers. He adhered to the issue of privacy, fearing that if he acquiesced to this request, other potential donors would hesitate because of fear of possible harm. Hoover dropped the matter, but continued to press for information gathering strategies that would root out potential foreign agents (Stielow, 1993). The House Un-American Activities Committees conducted in the 1950s, led by Senator Eugene McCarthy and Roy Cohn, are probably the most famous examples of government intelligence gathering and spying that denied individuals' civil liberties. The "Red Scare" made its way to libraries as books discussing communism were banned in several localities.

In the late 1970s, the FBI instituted the "Library Awareness Program", designed to identify Soviet spies in research libraries. The program tried to gauge who was accessing what was considered public, but sensitive material. As one author describes it, agents flashed badges and asked about activity of library users who were from Eastern Europe. Investigators wanted to know what books these users had checked out, their database search histories and reference questions. The FBI, however, did not have the legal authority to obtain this information by these methods and the activities of agents resulted in Congressional Hearings in 1988. As a result, the FBI was forced to release records detailing their surveillance activities in libraries under the Freedom of Information Act (Minow, 2002).

USA PATRIOT ACT & Libraries

In response to the Library Awareness Program, states across the country enacted patron privacy laws aimed at protecting the records of library users (Pike, 2002). Such laws protected information concerning what books individuals had checked out, and maintained the status of anonymity as sacrosanct, especially in public libraries, for fear that those who most needed information would be the least likely to seek it if they had to reveal the nature of their requests. Persons who are investigating illnesses and legal matters and want to maintain their secrecy, investigators tracking the movements of individuals, or bill collectors using reverse directories to collect information on the whereabouts of scofflaws are all examples of individuals who may wish to maintain their privacy when accessing a public library.

FBI agents' conduct during the Library Awareness Program gave rise to patron privacy laws. In an ironic twist, it was these privacy laws that the hijackers of September 11th exploited when conducting their business in preparation for their murderous plans. Immediately after the attacks of September 11, 2001, information gathered about the activities of the hijackers indicated that they used public libraries to access web sites and e-mail, book airline tickets and communicate with each other (Babson, et al., 2001). Within hours of the attacks, investigators were using the Internet as a resource to see if there were any traces left by the suspects. One week after the attacks, on September 18th, the FBI obtained a search warrant from a federal grand jury to force two libraries in Broward County, Florida to hand over computer use records (Puzzanghera, J., 2001). It was believed, and has since been confirmed, that several of the hijackers used the libraries for computer access.

The USA PATRIOT Act is meant to assist investigations by simplifying procedures for surveillance. The power of the information culled from library computers in ensuing investigations of hijacker activity proved immense. Copies of files left on hard drives used to communicate or download encrypted instructions could yield information about where the hijackers had been, what other computers were involved in the communication protocols and possibly the identity of other conspirators. Copies of e-mails, web sites visited, downloaded documents, etc., are stored in various places on a computer's hard drive, and are easily recoverable (Puzzanghera, 2002). As the PATRIOT Act was crafted, it is easy to see why libraries received special mention in the final version of the bill. At the time, investigators were in the midst of recovering and evaluating an enormous amount of material retrieved from computers used in public libraries.

A provision of the PATRIOT Act includes the enhanced surveillance of libraries. FBI agents can:

- obtain a search warrant for "any tangible thing", including books, records, papers, floppy disks, data tapes and computers with hard drives.
- force libraries to hand over circulation records, user information records and Internet use logs
- limit the demonstration of "probable cause" and require that the investigated library not reveal the FBI visit. (Smith, 2002)

The last point is especially troublesome, because agents have little responsibility in explaining why the records they are seeking are important when they are applying for a warrant if they indicate that the material is sought to support a terrorist investigation. This is a very low legal standard (Smith, 2002). Investigators can more easily obtain library use records and Internet logs because they do not have to obtain subpoenas to support a criminal investigation. The use of search warrants provides investigators with immediate access to materials sought (Hockmeier, 2002). The latitude afforded agents considering surveillance in libraries is wide. The broad powers handed investigators to conduct this type of surveillance, however, seem limitless. The legal standard proving that the surveillance is necessary has effectively been removed from the process investigators must follow to obtain information.

Librarians' response to the passage of the PATRIOT Act was tepid. Immediately concerns over patron privacy forced libraries to review their functions and policies, especially with regard to anonymous Internet use. Librarians at the Florida locations used by the terrorists were appalled that their libraries were used to commit criminal acts. Libraries in other municipalities discussed their Internet access policies, and sought to ensure that criminals would not be able to use their institutions to conduct business. Joseph Keenan, director of the Elizabeth Public Library in New Jersey, writes in an opinion piece published in the New York Times:

> Taking off my library director's hat, and putting on my hat as a concerned resident of Elizabeth, I don't want ever to have to explain to my neighbors that a crime was committed at the Elizabeth Public Library using one of our computers and that we have no idea who did it. Public libraries have a civic and moral responsibility to see that their Internet computers are not used anonymously in crimes against others. Use one of our computers to break the law, and you might very well get caught. I wouldn't have it any other way (Keenan, 2002).

Mr. Keenan's stance, however, is controversial for librarians because of the potential limits to privacy individuals are exposed to when forced to identify themselves as users on public computer terminals. Libraries reside at the heart of American ideals. The free exchange and access to information provided by libraries in America is a notion that supports the democratic nature of our society. This freedom of speech and expression is limited when someone is forced to abide by rules that expose them to potential harm because they do not have privacy. This freedom, of course, is not meant for terrorists or criminals, but limiting that freedom can have deleterious effects on others in society. Loss of a job, contraction of a disease with negative social stigma, abuse, divorce and financial problems related to bankruptcy are all items that some might want to keep secret. Having to sign in and then search web sites about their concerns thinking that someone might find out could actually deter people from seeking information. In some case, the lack of information could cause great harm.

There is also a distrust of investigative practices in libraries because of the problematic history of past transgressions by government investigations. Librarians are suspicious of the FBI because of the experiences during the Library Awareness Program. It is appropriate for library professionals to question the law because they were subject to illegal surveillance in the past. This distrust could actually hurt future cooperation of librarians and information gathering efforts related to investigations. At the 2003 American Library Association (ALA) Midwinter meeting, resolutions were passed by the Council of the American Library Association, an elected, representative body of librarians in America. One of the resolutions reads:

> RESOLVED, that the American Library Association encourages all librarians, library administrators, library governing bodies, and library advocates to educate their users, staff, and communities about the process for compliance with the USA PATRIOT Act and other related measures and about the dangers to individual privacy and the confidentiality of library records resulting from those measures; (Resolution, 2003).

To the average individual, this probably does not mean much. For the most part, most library users are not concerned with their anonymity. For a terrorist who uses clandestine methods of operation, a brochure discussing how the PATRIOT Act works and what libraries are doing to protect their users could be very interesting. The point here is that the more clandestine and exclusionary the government becomes when investigating suspected terrorists, the more suspect people will become. Access to information could become even more difficult for investigators because they have sacrificed the cooperation of people who house and store that information.

On December 11, 2002, librarians held a teleconference discussing the PATRIOT Act and its ramifications for patron privacy. Some librarians suggested defiance of the Act, although the moderators indicated forcefully that in no way should librarians impede the execution of law. One idea that kept recurring, however, was that the fewer records libraries kept, the less information the government could obtain as a result of a search (Clymer, 2002). Is this not counterintuitive to what the government had in mind when the legislation was created and passed? A library in Delray Beach, Florida that was investigated because one of the hijackers had accessed public computers there has since changed its

policies governing storage of use information. An Internet management system now clears the caches of computers immediately, and erases log-on information after 24 hours (Privacy and Security, 2003). At the University of California, Berkeley, an institution that had requests made to provide information about users immediately after September 11th, library staff destroy Internet sign in sheets every day and erase information from computer servers daily. According to a Berkeley librarian, "We're not being actively anti-government. We're trying to protect people's privacy. We're trying to provide something we have always promised our patrons – that they could use the library in comfort, safety and security (Privacy and Security, 2003)." For the most part, this is the collective refrain discussed amongst librarians in regard to the PATRIOT Act. The sentiment expressed above is one that is prevalent throughout the professional literature, published commentaries and opinion pieces concerning the Act, as well as the dialogue that librarians have when they discuss the Act with each other. Of course, if the information is no longer there, this does not help investigators obtain information more easily, as was the original intent of the Act.

One of the keys to information gathering is not just to evaluate the information in the context it has been acquired, but in the context that it has been requested. Looking at the raw data from search engines, or seeing what books or web sites a library user has viewed tells an investigator little about the nature of the research unless there is awareness of the research assignment or project itself, especially in university environments. Using the Internet to track individuals changes the practice of the spying because it is ubiquitous as far as information gathering tools are concerned. For example, technology that allows users to customize their home pages, save search histories and maintain a set of active links can provide a great deal of information about an individual and their information seeking habits. Without understanding the context of the research, one can draw a myriad of possibilities about the intent of information seekers in an Internet search environment. The secret nature of the investigations conducted under broad surveillance rules afforded by the USA PATRIOT Act further erodes the ability of investigators to gather information that is factual and reliable, and erodes the right to privacy of United States citizens. Without understanding what search strategies were employed to obtain electronic information, it is impossible to know the intent of the searcher. This does not seem to be a concern of investigative or intelligence gathering communities. More effective communication with library professionals will produce more useable, reliable information to help in preventive investigations in the future. As noted above, the relationship right now is strained because government authority is viewed as heavy handed and exclusionary.

Tilting the Balance of Power

Another possible ramification of the USA PATRIOT Act is that it provides broad, unchecked powers to one branch of the government and weakens the system of checks and balances currently employed by government agencies. Stephen Schulhofer, a noted legal scholar, does not think the line between security and liberty has to be changed to better serve security. There may even be a greater need for systems of checks and balances as the investigative power of the government expands because of potential abuses (Schulhofer, 2002). Without judicial oversight to evaluate surveillance requests, this power could be abused by investigative agencies. Formation of secret courts to hear secret evidence to deport someone secretly creates constitutional problems of adherence and interpretation. Schulhofer further argues that the federal executive branch has gained powers that are not limited to combating terrorism. Little attention has been paid to many of the new statutes in terms of their bearing on cases other than terrorism, the supervisory control, judicial oversight, and public scrutiny that were all taken for granted until September 11th (Schulhofer, 2002).

It is reasonable to assume that the passage of the USA Patriot Act was meant to curb the activity of a group of people trying to harm innocent Americans. As indicated in the introduction of this paper, the hijackers did not use extraordinary means to plan and commit this crime. It can be argued that they exploited the freedom and openness of our society, which now needs to be a little more closed. We cannot reasonably expect to maintain surveillance over potential terrorist suspects without suffering limits to rights to privacy as a society. The devastation of the rubble left behind, the continuous plumes of smoke and the countless days spent by politicians attending funerals of their constituents all certainly had an effect on the decisions of lawmakers to vote for such measures to counter terrorism. Add into this the anthrax scare, which forced lawmakers onto outside lawns and terraces to conduct business, and in many cases forcing them home, and there exists a combustible mix of emotion, determination and power.

Even in this emotionally charged climate, the actions of the Justice Department in pressuring Congress to pass laws that were considered too intrusive in earlier debates over how to effectively counter terrorist threats are self-serving (New Anti-Terrorism, 2002). If policymakers respond to future terrorist attacks similarly to the way they responded to September 11th, then it will further erode the systems of checks and balances and concentrate power in the executive branch by providing unchecked powers to the

Justice Department (Lynch, 2002). The failures of intelligence agencies, the Immigration and Naturalization Service, airport security and other organizational mishaps that contributed to the successful terrorist attacks on September 11th combine to create difficult questions concerning where the breakdowns occurred and how they could be addressed. It is the mix of all of these events that leads to change in the way the government conducts business. As an example, we can study the recent passage of the Homeland Security Bill as a way elected officials attempt to deal with past failures. However, we have had over one year to debate the merits of a massive overhaul of government, as opposed to two weeks to review the ramifications of implementation of a comprehensive counter-terrorism bill.

Conclusion

Senator Russel Feingold, in a speech delivered on October 25, 2001, a day before the signing of the USA PATRIOT Act into law:

> Of course, there is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country that allowed the police to search your home at any time for any reason; if we lived in a country that allowed the government to open your mail, eavesdrop on your phone conversations, or intercept your email communications; if we lived in a country that allowed the government to hold people in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, then the government would no doubt discover and arrest more terrorists. But that probably would not be a country in which we would want to live. And that would not be a country for which we could, in good conscience, ask our young people to fight and die. In short, that would not be America. Preserving our freedom is one of the main reasons that we are now engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people. (Feingold, 2001)

Norman Siegel claims he never understood how Americans tolerated something as deplorable as the internment of Japanese Americans during World War II, but realizes now that such atrocities occur when good people remain silent. The next generation will ask us when discussing the Patriot act, "How could this happen? What did you do?" (Adas, 2002).

It is difficult to disagree with the concept of laws intended to stop terrorists. We do not want any more innocent people to be injured or killed because of the megalomaniacal leanings of a handful of individuals. The balance of a reasoned response is imperative when considering legislation that could effectively erode constitutional principles. Timothy Lynch believes that policymakers should refrain from rushing into quick fix legislation when the next terrorist act occurs, because otherwise we run the risk of destroying the Constitution. Legislators should pause and deliberate four issues before enacting laws or policies. There should be an evaluation of accountability when legislation is proposed. Before considering that Americans enjoy too much liberty, freedom of movement and privacy, how the government is wielding the power it currently has to initiate surveillance, collating information gathered through investigative tactics and synthesizing that information should be evaluated (Lynch, 2002).

As the brief historical outline notes above, there is a history of civil rights abuse during times of conflict. History must inform future policy. The government should enact policy that is realistic within the confines of the constitution. In a free society, police maintain law and order and react to citizen complaints, or work with them to solve crimes. It is difficult to prevent street crime. How do we propose to prevent terrorism (Lynch, 2002)?

Finally, legislators must deliberate liberty. The idea of America is based on freedom. If this were to be eroded because of the legislative limiting of our civil rights, then as Senator Feingold stated in his address, we would not want to live in that country. Lynch thinks it is clear that Americans have a stark choice. Odds are there will be another terrorist attack. We can either retain our freedom, or make ourselves safer by enacting legislation that might keep potential terrorists suspects under tighter control, as well as the rest of us.

The PATRIOT Act has engendered fierce opposition in America's libraries. Observing Bob Barr, former conservative congressman from Georgia, argue the same points as the American Civil Liberties Union, is a momentous occasion. Several municipalities have passed local legislation that indicates their displeasure with the contents of the Patriot Act. The outcry against the potential introduction of Patriot Act II, or "Son of Patriot", has been loud, strong and sustained. Orrin Hatch has introduced legislation to make the first Patriot Act permanent.

Amidst the hue and cry surrounding the legislation, Bernard Sanders, an independent congressman from Vermont, introduced the Freedom to Read Protection Act (H.R.1157) on March 6, 2003. The intent of the act is to amend the FISA law so that bookstores and libraries are exempt from the changes in legislation that the Patriot Act has wrought. This is an important bill because it addresses a particular concern members of the general public have concerning the USA PATRIOT Act. People's ability to obtain and read materials, gather information, and make judgments about their lives with that information is a necessary part of a democratic society. His bill is not unreasonable. There have been

many successful terrorist attacks carried out throughout the world since September 11, 2001. It may be that security measures taken by the government have thwarted other attempts to do harm to Americans in our country. Mr. Sanders' bill, however, recognizes that even in the face of fear, and even in an environment where the toughest security measures are necessary, there are still sacrosanct areas where the government does not tread without resistance. The freedom to read, without fear of reprisal, is one of them.

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COUNTER-TERRORISM IN AUSTRALIA: THE IDENTITY IMPERATIVE

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This paper will discuss aspects of counter-terrorism in Australia in the aftermath of 11 September 2001 and the Bali bombings of October 12 2002. The paper expresses an unease that the rhetoric of counter terrorism can be too easily exploited such as to create a false legitimacy for initiatives that would otherwise lack justification, and may potentially threaten civil liberties. The security environment for many countries, including Australia, has become emotionally and politically charged, with potential critics less willing to challenge proposals made in the cause of 'counter-terrorism'. Such an environment discourages dissent and results in a void where robust social discourse should be welcomed, instead leading to the opportunistic implementation of that which would otherwise be largely unacceptable or unnecessary. This paper describes this opportunistic space as it may apply to a number of putative counter-terrorism initiatives which have the potential to undermine individuals' rights to privacy. Counter-terrorism poses particular challenges to this right by its risk in assuming that a secure society is largely contingent on the imperative for individuals to prove who they are and that they are not "up to no good", creating the conditions for potentially invasive proof of identity ("PoI") regimes. The paper explores the notion of 'function creep' as it may apply to the emergence of a centralised national identification system in Australia, a notion traditionally opposed by the community. Adjunct to this issue is the emergence of biometric technologies that offer a seductive (though arguably inaccurate) aura of infallibility, and are being pursued enthusiastically by governments throughout the world, including in Australia. If the function creep thesis is accepted, we need to consider whether these counter-terrorism inspired PoI initiatives will lead to ongoing state monitoring and surveillance, currently unacceptable in all but the most totalitarian of states.

Background

Historically in post-white settlement Australia, political stability, economic prosperity and geo-political isolation from global tensions have conspired to create a sense that terrorist acts were remote and improbable – simply put, Australians lived in 'the lucky country'[1] and it followed that they were not, and would never be, the targets of terrorism. Dutton, writing in 1980, described this collective understanding:

> Australians can be thankful for many good things. Australia has no terrorists, no civil wars; you are not liable to receive an explosive parcel through the post or be bombed in a restaurant.[2]

Where terrorism occurred, it tended to be discrete and focused:[3] a scattering of bombings in the 1970s related to ethnic tensions in the former Yugoslavia; the 1978 bombing of the Hilton Hotel in Sydney (targeted to assassinate the Indian Prime Minister); the 1980 assassination of the Turkish consul-general in Sydney; and a bombing campaign against Justices of the Family Court in the 1990s.[4] Notwithstanding these relatively isolated attacks however, a sense of security prevailed.

The terrorist attacks of 'September 11' though, as throughout the world, placed terrorism firmly on the political and social agenda. Etched into the collective memory, not least as a result of 24 hour live news broadcasts that ran on network and public broadcasters in the days following , these attacks made national security a pressing issue in the following October's federal election. Perhaps not surprisingly, the incumbent conservative government was returned to power as the electorate chose to maintain the status quo in the face of crisis and reactive, but self-protecting, homeland policies. That the government was able, to forge a political link between terrorism and its hardline stance on denying entry to asylum-seekers, in particular from the Middle East and Afghanistan, was also a major factor in its electoral success. Returned to power, and citing its obligations

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under, *inter alia*, United National Security Council resolution 1373, the government set about reviewing and amending legislative powers to deal with terrorism. On 18 December 2001, and arguing that a "profound shift in the international security environment has meant that Australia's profile as a terrorist target has risen and our interests abroad face a higher level of terrorist threat", the Attorney-general, Daryl Williams, announced a "…series of measures to strengthen Australia's counter terrorism capabilities".[5] The legislative measures comprised 6 bills, which proved contentious in both the parliament and in the broader community. This paper will not address these bills and the resulting legislation in detail, focusing instead on the contemporaneous non-legislative counter-terrorism responses. As 2002 began, concerns emerged about whether Australia and its direct interests were at risk of terrorist attack, particularly as a consequence of its contribution to the international coalition in Afghanistan and its vocal support of US foreign policy generally. Arguably of more significance, in this regard, was the 1999 deployment of Australian military forces to peace-making/keeping duties in East Timor, an act perceived by some extremist Islamists as that of a 'crusading' nation against an Islamic (though secular) state. These concerns were exacerbated by the February 2002 arrests by Singaporean police of 13 alleged members of a then little-known Islamic terrorist group *Jemaah Islamiyah*, believed to operate under the *Al-qaeda* umbrella, in connection with alleged plans to bomb the Australian, US and British diplomatic posts in that country. On October 12 2002, many of these security concerns were realised. Individuals allegedly belonging to *Jemaah Islamiyah* exploded two bombs in the nightclub district of the Indonesian resort island of Bali, long popular with young Australian tourists. Of the 198 fatalities, 88 were Australians. For the domestic media, the implications of this attack were clear – terrorism was alternatively "on our doorstep", or had "reached our home".[6] For a nation already on alert after 11 September 2001, the bombings highlighted what the Defence Minister, Senator Robert Hill, described as "…an arc of militant Islamic influence, albeit at the margins of society, stretch[ing] across the region".[7] The Prime Minister told the parliament that "For the rest of Australian history, 12 October 2002 will be counted as a day on which evil struck" and that it "…is a reminder that …Australia can scarcely imagine that it can be in any way immune from such horrible attacks."[8]

The nation entered the Christmas holiday period of 2001 under the uncertainty of government terrorists warnings pointing to the possibility of attacks on Australian soil[9] and Prime Ministerial advice (perhaps only marginally useful) to beware of "suspicious people".[10]

Proof Of Identity: Reconciling A Personal Life With A Secure Society

In the aftermath of September 11 and the Bali bombings, it can be argued that a theme has emerged in public administration discourse advocating a greater emphasis on state monitoring and surveillance. It is implicit to the rhetoric of counter-terrorism that security necessitates that individuals be willing to yield to ever more rigorous forms of PoI, such as to prove who they are (or who they are not), and that they are not "up to no good". This paper focuses on the potential challenges raised by two manifestations of PoI – centralised mandatory national identification schemes; and identification and authentication systems based on biometric technology. Each of these responses to PoI concerns have the potential to undermine the right of individuals to, as Cooley expressed it, "be let alone"[11] and to have their privacy, an "aspect of human dignity",[12] maintained and respected by the state. Prior to 11 September, some had already argued that the "terrain" of privacy would be where many ethical and public policy decisions would be explored in the coming few decades. [13] It would seem that the alleged new imperatives to scrutinise the citizenry have only added to this debate. With suggestions of some form of national identification scheme being advocated as necessary in the current risk environment, and the emergence of potentially invasive biometric technology, civil libertarians could be forgiven for experiencing a sense of *deju vu*, as privacy advocates in particular are forced to revisit past battles, and perhaps more importantly take positions for new debates, where the risks and benefits of powerful new technologies remain unclear.

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National identity schemes - 'Your papers, please'

As is the case in many nations, including Japan, the US, UK, New Zealand and Canada, Australia does not have a formal national identification card. The last proposal for such a card emerged in the mid-1980s, in response to concerns regarding social security fraud and tax evasion. The proposal, which would have resulted in the so-called *Australia Card*, was eventually dropped by the federal government in the face of political and community opposition. This opposition revealed a discomfort amongst the Australian population with such a proposal, partly on the grounds that it could pre-empt what the Canadian Privacy Commissioner describes as "a society in which the police can stop anyone on the street and demand, 'Your papers, please.'"[14]

"Function creeping" toward a national ID scheme?

The National Exchange of Vehicle and Driver Information System (NEVDIS),[15] an association of Australian and New Zealand motor vehicle licensing agencies, functions as a conduit through which state road and transport registration agencies can exchange drivers' licence details, this has been described as "a rich source of personal information".[16] NEVDIS has variously been described by state agencies as promoting "national uniformity of registration and licensing rules,"[17] or aiming "to reduce licence fraud, vehicle theft and vehicle fraud",[18] while a third state agency explains its purpose as "provid[ing] a platform for extracts of all state and territory databases to facilitate the exchange of information and the transfer of vehicle registration and drivers' licences between states".[19] Others have argued that NEVDIS "effectively turns our driver's licence into an ID card".[20] This latter view is unsettling given Australians' rejection to the notion of a national ID card system, and as many Australians are probably unaware that such a centralised exchange already exists.

Advocates of the so-called "function creep" thesis argue that, particularly in the context of digitised information, a resource or tool that may seem innocuous in its original form, becomes subject to convenient "value adding" such that it incrementally is used for purposes beyond, sometimes far beyond, those originally intended. Essentially, the "function creep" theory assumes that governments and business implement few systems whose initial functions are manifestly privacy-invasive. NEVDIS appears, and may indeed remain, a relatively benign system serving a useful public purpose. It is, however, the potential linkages and intrusiveness of such a system which raises the concerns of privacy and civil liberties advocates. NEVDIS, with its online, real-time high-quality data set and multiple access points, would seem a prime candidate for function creep. A 2001 review of the system has led to the emergence of "NEVDIS 2", designed to increase the operational effectiveness of the system and its core data set.[21] The potential surely exists for NEVDIS to incorporate the collection and storage of photographic images, as well as for increased linkage to other databases, such as those established for law enforcement purposes, like CRIMTRAC, the federal clearing house of personal information on fingerprints and DNA, as well as:

- apprehended and domestic violence orders;
- court notices/orders;
- missing persons;
- criminal histories;
- charged persons;
- persons of interest;
- facial features/images (mugshots);
- firearms register; and

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[21] http://www.austroads.com.au/Communique.html.

- vehicles of interest and driver information.[22]

Other functions for the NEVDIS database have been proposed in recent years, some of which do not stray too far from the original purpose of the database. One state government proposed that "NEVDIS 2" include records of 'defect notices, notations, payment of penalties', an extension not inconsistent perhaps with the original functions of "NEVDIS 1". Other proposals though, seem to add considerably to the functions of the database,[23] including one to permit private sector access by Australia's largest credit reporting bureau.[24] It is telling that when it was initially conceived, the then project manager for NEVDIS noted that "[o]ther organisations like the Vehicle Manufacturers or the Federal Department of Transport may require to connect in at some later time",[25] and that the system was designed to permit such future expansion. Few Australians would be aware of the broad range of uses for which their personal information could be accessed, and were they aware, there would be little they could do about it (other than to elect not to lawfully drive a car). Thus, it may be that the future of a national identification card in Australia will be advanced by stealth (or sheer accident), rather than through the expected and democratic process of governments developing and consulting upon federal legislation or policy. The unanticipated outcome could become a centralised identification system equally as intrusive, though less blatant, as the forms of identification commonly associated with authoritarian states. To many opponents, the legitimacy of such proposals on counter terrorism grounds remain unproven, with many often highlighting the failure of national ID cards to prevent terrorist bombings in, for example, Spain, France and Italy.[26] Further, it remains unclear whether such proposals could have prevented September 11, or whether other measures may have been possible which were not dependent on expanding surveillance and monitoring powers in regard to the community generally[27] – for example, improved analysis of intelligence that is already received.[28] Similar criticism pointing to lack of inter-agency coordination and co-operation emerged in Australia after the Bali bombings.[29] In addition, it is difficult to imagine how an Australian national ID card would or could have prevented Bali – despite the rhetoric, that island is not 'home' in the sense of being Australian territory. Accordingly, while pressures emerge globally, post-11 September 2001, for increased use of national identification cards or similar schemes in nations where they have previously been resisted,[30] it is unclear what their value would be in the putative "war against terror", or what consequences may stem from such mandatory centralised automated identification systems. For Australia, that such a system may evolve almost unnoticed, particularly when more deliberate and transparent systems have been opposed in the recent past, should be a cause for concern.

Biometric Identification Systems

In Australia, the biometric identification debate is largely a muted one, with only modest attention being given to, for example, airport trials of face-recognition technology,[31] a particularly unproven information gathering technology, and biometric identifiers in passports.[32] Broadly encompassing any technology that uses unique physical features of an individual so as to identify or authenticate that individual, examples of biometric technology include (at the most rudimentary) fingerprinting, face recognition technology, iris scanning, retina scanner, hand print geometry, voice recognition and, at the most speculative end of the technological continuum, behaviour recognition.[33]

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[22] http://www.crimtrac.gov.au/operational.htm

[23] Including for example, on proposal for the database to become a national organ donors' register (see, http://www.parliament.qld.gov.au/comdocs/legalrev/MinisterialResponses/Report16.pdf).

[24] Colley, A (2002) 'National fraud database may be linked to RTA records' *ZDNet Australia* 8 July [available at http://www.zdnet.com.au/newstech/security/story/0,2000024985,20266516,00.htm]

[25] http://www-8.ibm.com/services/nz/success/nevdis.html

[26] Scheeres, J (2002), 'ID Cards Are *de Rigueur* Worldwide', 9 July, *Wired News*, available at http://www.wired.com/news/conflict/0,2100,47073,00.html

[27] *The Economist* (2002a), 'Could September 11th have been prevented?', June 6 (available from Proquest)

[28] *The Economist* (2002b), 'It gets worse: Intelligence failures', 8 June, (available from Proquest); Dettmer, J (2002), 'CIA, FBI find plenty of blame to go around', Insight on the News, July 1-8, Vol 18, p.47.

[29] Walker F (2002) 'Our spies furious over Bali lapse' *The Sun-Herald* 20 October [available at www.smh.com.au]; Wilkinson, M and Seccombe, M (2002) 'Intelligence failings - We'll hit you: pre-Bali alert' *Sydney Morning Herald* 16 November [available at www.smh.com.au].

[30] For a discussion of global trends, see, http://www.epic.org/privacy/id_cards/. Proposals for a national identification card have been debated stridently in the UK. See, for example, For discussion, see, for example, http://news.bbc.co.uk/2/hi/uk_news/politics/2931664.stm; http://news.bbc.co.uk/2/hi/uk_news/2491101.stm; and http://www.homeoffice.gov.uk/docs/chapter1.pdf.

[31] O'Rouke J (2002) "Passengers secretly filmed in anti-terror trial" *The Sun-Herald* January 3 [available at http://www.smh.com.au/articles/2003/01/04/1041566268528.html];

[32] Mills K (2003) "Biometric passport launched" *The Australian IT* January 24 [available at http://australianit.news.com.au/articles/0,7204,5883452%5E15321%5E%5Enbv%5E,00.html]

[33] See, for example, http://www.biometrics.org/html/introduction.html.

Such systems may be highly intrusive and pose significant risks of mis-use, racial or other form of group profiling and discrimination and an over-reliance stemming from a (false) presumption of system infallibility.[34] Further, the potential is great for digitised biometric data to be employed in forming detailed data trails on individuals, thus creating both the temptation to ever expand surveillance regimes, as well as provide a rich and potentially commercially valuable source of personal information to both the public and private sectors. As with any valuable commodity, the risks of mis-use and crime, for example, through the unauthorised 'hacking' into databases, is likely to increase. The Australian Customs Service's *Smartgate* initiative is a passenger/crew processing system based on face recognition technology, chosen by the service despite its acknowledgement that it was "not the most accurate"[35] form of biometric technology. Initially tested on QANTAS flight crews, the aim is to reduce passenger processing times by allowing a face reader to compare a passenger's features with his or her passport photo. Following the QANTAS aircrew trials, the Customs and Justice Minister explained that "we have not had any problems with it in relation to faults", [36] although it is unclear what problems were experienced if the 'relation to faults' qualification is removed. Not all the potential 'clients' of biometric technology in the airline industry concur – QANTAS baggage handlers at Melbourne airport threatened to strike if finger scanning was introduced, arguing that it represented an 'unnecessary technology'.[37] As roll outs continued of the *SmartGate* technology, the initiative faced an embarrassing set back in February this year, when two Japanese visitors, apparently largely as an academic exercise, effectively fooled *Smartgate* by swapping passports – the system subsequently misidentified each by returning 'false positive' results. The Customs Minister was subsequently quoted as explaining that the two had deliberately tried to fool the system,[38] presumably unlike as would be the case for 'real' criminals? More problematic still, and arguably a greater infringement of civil rights given its indiscriminately covert nature[39] and poor track record of successful implementation, is the use of so-called 'face in the crowd' technology, in which a camera randomly scans groups of people, seeking to match faces to those in databases of 'persons of interests' (so undertaking 'many to many' comparisons). Intended, according to Customs, to "…identif[y] …terrorists travelling under false identities",[40] trials of this technology have "not proved encouraging".[41] Despite the broad impression in the community that such technologies are infallible (and thus easily lend themselves to being over-relied upon),[42] it seems that while the technology remains possibly of some promise, there is work to do. Some experts are less optimistic that this assessment, with one describing face recognition technology in particular as "atrociously bad' while the head of Australia's largest security firm has argued that biometrics will 'categorically not' prove a viable solution to proof of identity concerns. [43] A University of Canberra honours student further illustrated the fragility of the technology by engineering false positive results in commercially available biometric security systems, noting that "nothing was unhackable".[44] The debate over biometrics should not just be one of technical feasibility though. Presumably, where resources are dedicated to it, the technology would continue to improve. There is a question of technological determinism here, with perhaps greater attention needed toward asking not *can* we employ biometric effectively, but *should* we and what actually constitutes *effectiveness*? Questions should be asked regarding what is the "problem" biometric technology will solve? How will it solve it and what are the risks or alternatives? For example, the Head of the New South Wales state police fraud squad recently summed up the concerns of many regarding the expansion of biometrics:

> 'Once someone acquires your fingerprint and finds a way to use it, what do you do? You can't ask the bank to issue a new finger.'

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[34] For a more substantial discussion of the potential privacy implications of biometric identification, see http://faculty.ed.umuc.edu/~meinkej/inss690/oliver/Oliver-690.htm; http://www.epic.org/privacy/biometrics/ ; and http://www.privacy.gov.au/news/speeches/sp80notes.doc; http://www.privacy.org/pi/reports/biometric.html.

[35] Lowe, S (2003) 'Passengers to face up to airport security' *Sydney Morning Herald* 29 January [available from www.smh.com.au].

[36] Mills, K (2003) 'Airports boost biometric systems' 29 January [available at www.australianit.com.au]

[37] Mackenzie, K (2003) 'Qantas cools biometric plan' 3 February {available at www.australianit.com.au]

[38] Dearne, K (2003) 'Face recognition fails test' *The Australian* IT Section 27 February [available at http://australianit.news.com.au/]

[39] Rupley, S (2002), 'A little bioprivacy please', *PC Magazine*, 1 July (available from Proquest).

[40] Norman, J (2002) 'Faceprints won't fly' 18 June [available at http://australianit.news.com.au/]

[41] Goodsir D (2003) 'Airlines forced to give up passenger details' *Sydney Morning Herald* 3 March [available at www.smh.com.au/articles/2003/03/02/1046540074056.html]

[42] Norman, J (2002) 'Faceprints won't fly' 18 June [available at http://australianit.news.com.au/]

[43] Dearne, K (2003) 'Facial recognition 'atrociously bad'' *The Australian* IT Section 4 February [available at http://australianit.news.com.au/]

[44] Jackson, C (2002) 'Security system gets thumbs down from honours student' *The Canberra Times* 13 June; See also http://www.anu.edu.au/mac/reporter/volume/33/09/leads/thumb.html

It is possible that new technologies could offer effective, non-intrusive and secure forms of proof of identity,[45] however it does not appear that that day has yet arrived. Nor would it appear that concerns regarding biometrics as a privacy invasive technology have been fully acknowledged, let alone addressed. In the current environment, such questions seem to be given scant attention, subsumed instead to utopian promises of guaranteed secure (that is, controlled) societies.

Conclusion

The response to the threat of terrorism in Australia has posed challenges for civil liberties. The rhetoric of 'counter-terrorism' is a powerful one, and it is arguable that many policy makers are pursuing initiatives under the false guise of protecting society from terrorism. It is necessary for society to monitor and question such initiatives, particularly where they may signal the restart of hostilities in battles presumed to have been long since fought and won, such as national identification schemes. Such initiatives, seemingly offer little genuine security, and lack the accountability and exposure to public debate that are necessary in pluralist democracies. Technologies such as biometric identifiers may provide real benefits to society, for example in response to global increases in identity fraud and theft, though they invariably also raise real risks which require that they be implemented carefully and only after genuine consideration, in an environment that is open to debate and critical discourse. As Australian High Court Justice Kirby observed in the immediate aftermath of 11 September 2001:

> Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause.[46]

The Australian experience is telling, though perhaps not unique, amongst liberal democracies. The Canadian Privacy Commissioner, who had advocated the need for greater security even at the cost of privacy post-September 11, recently argued that his government is going too far:

> The Government is, quite simply, using September 11 as an excuse for new collections and uses of personal information about all of us Canadians that cannot be justified by the requirements of anti-terrorism and that, indeed, have no place in a free and democratic society.[47]

For now though, governments would seem to recognise that communities are willing to sacrifice liberties for greater perceived security. For many, 'safety' has become an immediate necessity, and they demand tangible evidence of such. Alternatively, civil liberties are vague, abstract luxuries. Thompson suggested in 1938 that the ordinary man, if asked what was meant by civil liberties "might say that he did not know and did not much care".[48] In the face of deadly threat, real or imagined (or indeed manufactured), Thompson's view is likely to be as valid today.

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[45] http://www.privacy.gov.au/news/speeches/sp80notes.htm

[46] Kirby M (2001) 'Australian Law after September 11' paper presented at the *32nd Annual Legal Convention*, 11 October [available at http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_after11sep01.htm]

[47] Bronskill, J (2003) 'Our rights are under assault, privacy czar warns' The *Ottawa Citizen* 3 March; Radwanski, G (2003) *News Release*, 29 January [available at http://privcom.gc.ca/media/nr-c/2003/02_05_b_030129_e.asp]

[48] Thompson W H (1938) *Civil Liberties* London: Left Book Club at 7.

TERRORISM, COUNTER-TERRORISM AND CIVIL LIBERTIES: A REVIEW FROM GLOBAL AND REGIONAL PERSPECTIVES

Keshav Bhattarai and Gunanidhi Nyaupane*

Although most recently the United States became a primary target of terrorists (U.S. Department of State, 2001), the landlocked South Asian country of Nepal (Figure 1), similar to the size of Arkansas in the U.S., suffers no less from the Maoist insurgency than any other state in the world. The Communist Party of Nepal-Maoist (CPN-Maoist) has been waging a 'people's war' since February 13, 1996, to establish a communist republic to replace the constitutional monarchy (Thapa, 2002:77). Maoists first submitted a three-pronged list of 40 demands to the government before they started their violent activities. Of these demands, nine were related to the issues of nationalism, 16 to the public well-being, and the rest to the living conditions of the Nepalese people. Maoists argued that these demands were raised during the pro-democracy movement in 1990, but were never given consideration once the constitutional monarchical multi-party democracy was achieved in Nepal after the overthrow of the 30-year old *Panchayat* system and its executive monarch. The 235-year old Nepal--once declared a zone of peace by the late Majesty King Birendra in 1975—has now turned into a Maoist battleground with no sign of the fighting ending anytime soon.

The Maoists' insurgency first started from the five contiguous districts of western Nepal (Figure 2), and then it spread throughout the country beyond the controlling limits of the government. During their organizational expansion, Maoists killed security personnel, civilians, and especially, the cadres of the Nepali Congress Party, and self-categorized such activities as peoples' actions against those seen as class enemies, informers, spies, and enemies of the society (Thapa, 2002). Maoists also destroyed critical infrastructure such as drinking water, telecommunication and television towers, hydroelectricity generators, bridges, and buildings, and have deprived thousands of people of basic facilities. In July 2001, a cease-fire was declared between the Maoists and the government and people were hopeful to have peace in the country, but it was disrupted as Maoists walked out from the peace talks without any negotiation and committed all sorts of atrocities. In November 2001, a statewide emergency was declared, and the Maoist Party and its sister organizations were labeled as terrorists and red corner notices were issued along with money bounties on the heads of the selected Maoist leaders for their arrest or assassination. The government extended the emergency for the second time in May 2002 to contain the Maoists' atrocities. During the two emergency periods, each of six months duration covering a period between November 2001 and August 2002, large numbers of civilians, security personnel, civil officials, and Maoists were killed. Of the total losses of over 7,000 lives, Maoists killed many civilians, especially, the cadres of the Nepali Congress Party and security personnel while the security forces extra-judicially killed civilians in the name of Maoist terrorists.

In the aftermath of September 11, 2001, Nepal has been sucked into the strategic vortex of the United States-led global war against terrorism (*Frontline*, February 14, 2002). In December 2001, the U.S. Embassy in Kathmandu initiated the process of listing Nepal in the federal "terrorist" sanctions lists, and every month a fresh crop of U.S. military trainers was brought into the country. A five-year anti-terrorism assistance agreement was signed to institutionalize this arrangement. His Majesty's Government of Nepal (HMG) acquired new automatic weapons such as M16 guns from the U.S. and the Belgian Minimax from Belgium, versatile helicopters and substantive infusions of military aid from India and Britain. Political analysts claim that this international aid will help Nepal to compel the Maoists to come to the negotiation table; however, the underground Nepal Maoists' leaders shrugged off these military challenges and claimed that all imported sophisticated arms will ultimately come under the control of their red army (Bhattarai, 2003; *Frontline*, February 14, 2002).

In January 2003, Maoists declared a cease-fire for the second time and came to the negotiation table. The government withdrew the terrorist label from the Maoist Party and its sister organizations along with the Interpol red corner notices and bounties fixed on the heads of the Maoist leaders. Since January 2003, so far two rounds of peace talks were held between the Maoists and the government. A putative agreement of the second meeting to limit the Royal Nepal Army's (RNA) movement within a five-kilometer radius from the barracks has sparked controversy. The government refutes that this was not agreed to, but Maoists claim that it was agreed during the second peace talk meeting and should be implemented without delay. This has created confusion, and the third round of the peace talks is in limbo

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at the time of this writing. People who have faced armed robbery, killings, looting, and damaging of the infrastructure by the Maoists during the first phase of negotiation are looking at this second phase of cease-fire very cautiously, suspecting it as a strategy of buying time for the Maoists. Despite the declaration of the cease-fire, violent activities are occurring throughout the country and civil liberties have been seriously abridged. Amidst these controversies, the Maoist insurgency is becoming a significant problem for Nepal and the main item of discussion agenda in Nepalese politics.

This paper situates Nepal's insurgency within the theoretical framework of global terrorism and succinctly presents various events that have abridged civil liberties since the Maoists people's war began in 1996. This paper first defines terrorism, civil liberties, and reviews their historical root causes at global, regional, and national levels with specific examples from Nepal. The final section of this paper summarizes the events and suggests future research options.

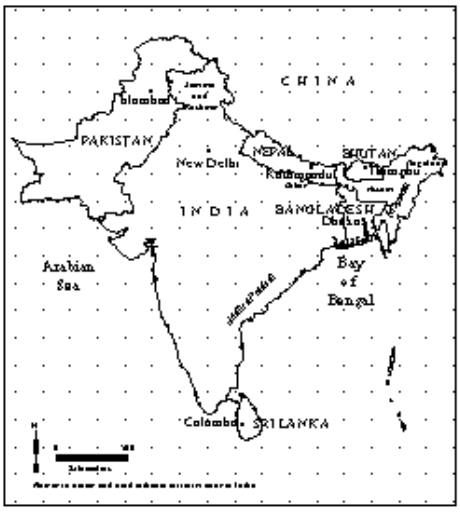

Figure 1: South Asia

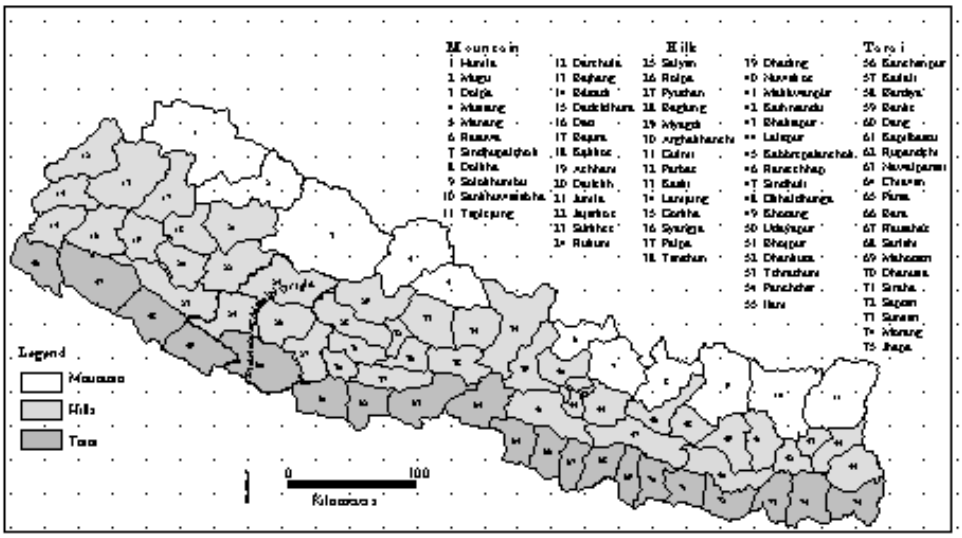

Figure 2 : Physiographic Regions and Administrative Districts of Nepal

I. Theoretical Underpinning

Terms such as terrorism, insurgency, guerrilla warfare, and rebellions are commonly used in news media to indicate different natures of violent activities. These violent activities range from suicidal jihad, as in the case of the Middle East, to killings of civilians and government officials, as in many Asian countries. No matter what type of a violent activity, terrorist atrocity largely undermines civil liberties.

Many legal documents define terrorism as an organized system of intimidation with violent behavior designed to generate fear in a community to accomplish the interests of certain individuals or groups, whether acting for or in opposition.[1] The definition of terrorism is unclear, especially as the UN's

1373 resolution indicates a dual meaning of terrorism because one country's terrorist can be another country's freedom fighter and vice versa. Since the goals of terrorist activities differ, leftist, rightist, and centrist political organizations use violent activities in various ways to accomplish their objectives. Nationalists, ethnic groups, revolutionaries, or religious fundamentalists, and armies and secret police of governments use some sorts of activities to achieve their objectives[1] that could be considered terrorism by other groups. Rapoport (1984) and Hoffmann (1998) define terrorism as an act of politics of those who assume that all other channels of political engagement fail to achieve certain goals without intimidating or terrorizing the government and its authorities. "A political geography approach to terrorism explores the spatial manifestations of power that intertwine to cause contexts of action and reaction, and the means to commit terrorism and enact counter-terrorism" (Flint, 2003: 161). Counter-terrorism requires territorial and strategic policy of one particular country to offer a theoretical framework or justification for devising foreign policy (Mamadouh, 1999) to contain terrorism. In the wake of the September 11 attack, geographers have begun to focus upon terrorism as a particular form of politics and conflicts (Cutter, Richardson, & Wilbank, 2003 cited in Flint, 2003) that occur at different levels. Geographers have the responsibility to offer geographical imaginations that investigate not only the specificities of a place that can provoke terrorism, but also vertical and horizontal linkages that implicate us all in the causes and consequences of terrorism (Gregory, 1994). Therefore, geographers explore the historical root causes of terrorism to understand the vertical and horizontal linkages of terrorism before making any recommendations for counter-terrorism and for the protection of civil liberties.

II. Global Terrorism and Its Historical Root Causes

The 20th century has witnessed great changes in the use and practice of terrorism, which became the hallmark for both rightist and leftist political movements (Galeano, 2001; Theoharis, 2003; Starr, 2002; Zinn, 2002). Technological advances such as automatic weapons and electrical explosives gave terrorists a new mobility and lethality.

With the recent development of communication technology, terrorism has had significant impacts on the civic society (Bush, 2001). Media hype brings events directly into millions of homes and exposes viewers to the terrorists' demands, grievances, or political goals, thereby making people aware of the terrorist threats. Media exposures of terrorists' killings of innocent civilians raise hatred and intimidation in a society that possibly encourages some people to join terrorist groups, while others might leave their homes in search of safer locations.

The United States has always responded boldly in favor of counter-terrorism, but had never declared it as an act of war before September 11, 2001. The U.S. has implemented successful operations to control terrorism; however, a few actions have been criticized on political ideological grounds, such as the action of U.S. with the French in Indochina, for example (Zinn, 2002).[2] Likewise, the U.S. involvements in the 1950s in overthrowing the governments of Iran and Guatemala, sending military troops into the Dominican Republic, and helping Suharto of Indonesia in the 1960s were also criticized on an ideological basis.[3,4] Similarly, the U.S.'s help to the counterrevolutionary force, the Contras--"freedom fighters,"--during the Reagan's era was also not free of criticism (Jauvert, 1998; Zinn, 2002).

The involvement of the former Soviet Union in the name of liberating nationalists in Afghanistan in the 1960s, supporting several terrorist groups with weapons and modern training, has drawn serious criticism. The action of the former U.S.S.R. in Afghanistan became too violent after the Western democracies extended their support to the religious freedom fighters as a policy of communist containment,[1] for example, support to the *Mujahideens* against the U.S.S.R. This strategy provoked a devastating war in Afghanistan for ten years (Jauvert, 1998). Once the western democratic forces pulled out, the religious fundamentalists took power in Afghanistan. Muslims fundamentalists took this success against the communist superpower--the former Soviet Union--as a precedent and the wish of the mighty Allah. Osama bin Laden--one of the leaders of the *Mujahideens* became a terrorist hero, and his terrorist network has been trying to establish a long-term conflict of civilization between the West and Muslims. Long before the incidence of September 11, Samuel P. Hungtington, in an article "The Clash of Civilization" in 1993, wrote, "...we are entering a phase of history in which the principal conflicts of global politics will occur between nations and groups of different civilizations, the clash of civilizations will be the battle lines of the future." Similar to Huntington's view, the terrorist hero Osama bin Laden is

[1] http://www.terrorismfiles.org/encyclopaedia/terrorism.html. Retrieved on June 01 & 08 2003
[2] http://www.mindfully.org/Reform/2002/US-Peaceful-Nation.htm
[3] During Suharto's time in Indonesia thousands of people were killed in Jakarta. Likewise, in East Timor operation in 1975, where the US was also involved, ended with several thousands deaths.
[4] http://www.mindfully.org/Reform/2002/US-Peaceful-Nation.htm

trying to justify his terrorist activities as a battle between the Muslim and the Western world and attempting to mislead the Muslim communities.

III. U.S. Role in Counter-Terrorism After September 11

After September 11, most Muslims and the Arab world have backed the U.S. in its vow to fight against international terrorism. Many countries joined with President Bush's reaffirmed policy of counter-terrorism, accepting the philosophy that a civilized world can never accept the killing of innocent people in the name of any grievances or grudge. President Bush's extraordinary commitments on September 20, 2001—"you are either with us or with the terrorists," the United States would make no distinction between those who planned and carried out the attack and countries that harbored the terrorists"--have changed the equation in the international counter-terrorism. George Bush said in interviews with the *Washington Post* on October 11, 2001, (published on October 12), --we will not only seek out and bring to justice individual terrorists who came to harm to people, to murder people– we will also bring to justice the host governments that sponsor them, that house them and feed them…one of the surest weapons that we have against terrorism is to show the world the true strength of character and kindness of the American people."

The UN Security Council on September 28th, 2001, unanimously passed a resolution--1373--making it mandatory for member states to actively engage in counter-terrorism. A monitoring committee chaired by the UK, setup to see whether or not member states are complying with the UN resolution, observed that over a hundred countries filed their reports before the allocated time period (UN Report, 2001). Virtually all countries joined the counter-terrorism efforts of the U.S., including those previously suspected as terrorists' sympathizers. Nelson Mandela while condemning September 11's attack said that the events, with such cold-blooded efficiency executed in the heart of the most powerful nation in the world, reminded all that the world stands exposed to a terrorism that confounds because of its utter and ultimate lack of respect for law and convention (*Washington Post*, November 14, 2001). Such global momentum has not only given new direction to global counter-terrorism but it also brought new views to the South Asian equations and has indirectly helped in bringing India and Pakistan together (SAAG, 2003). Even the tiny landlocked Himalayan Kingdom of Nepal expressed its deep commitments on the U.S. -led counter-terrorism policy (*Frontline*, February 14, 2002). Below is an excerpt of a letter dated September 12, 2001, from Nepalese King Gyanendra to U.S. President George Bush:

> We are shocked to learn of the horrific acts of terrorism resulting in the incalculable loss of innocent lives and damage to property in the soil of the United States of America. Such cowardly acts violate all international norms and human dignity. They must be condemned as crimes against humanity and the perpetrators brought to justice. As a nation, which has always been a strong advocate of peace, Nepal believes that all countries must join hands in combating and eliminating terrorism from the world. The Government and people of Nepal join us in conveying to your Excellency and through you, to the affected families along with the Government and people of the United States of America our heartfelt condolence and sympathies in this hour of great tragedy.

These expressions demonstrate that not only the U.S. but also other world countries are very much concerned about growing global terrorism. It is essential for countries to form a global network of counter-terrorism. Of the world regions, recently South Asia has been facing a series of terrorist threats where a lion share of the annual budget is funneled to counter these threats at the cost of development needs.

IV. Terrorism in South Asia

Since the 1970s, the South Asian region is experiencing arms proliferation crises linked with sectarian violence, organized crime, and political agitation (SAAG, 2003).[5] The governments of Sri Lanka, India, Pakistan, Nepal, and Bangladesh have been facing these crises. Until the early 1990s, India and Pakistan were both suppliers as well as end-users of small arms; Sri Lanka was an end-user, while Bangladesh and Nepal were transit routes (IANSA, 2001). Since 2000, such a scenario has been changed with Nepal and Bangladesh now joining the category of end-users. The war in Afghanistan and weapons received in India and Pakistan from superpowers has had devastating effects in this region (IANSA,

[5] http://www.saag.org/ Retrieved on June 29, 2003

2001). Political analysts argue that large numbers of weapons that were available from Cambodia might have found their way into Sri Lanka and northeastern India. Because of the arms proliferation, the terrorist outfit network in South Asia has posed formidable challenges, killing prominent figures, and destabilizing democratically elected governments (IANSA, 2001).

The U.S. State Department describes South Asia as the hub of transnational terrorism accounting for 75 percent of future global terror (*www.state.gov*). At present, the South Asian region remains a focal point for terrorism possibly because of the shift of terrorists from the Middle East. Political pundits suspect that the U.S. 's action in Iraq might have led to the shift of some terrorist groups--such as Natzersit Socialist Party of Syria, Syrian Nationalist Party, Lebanese Communist Party, and Baath Party of Lebanon--to South Asia.

Terrorism in South Asia is growing rapidly, making it difficult to control as many terrorist groups receive secret patronage from powerful states (IANSA, 2001). These terrorist groups are destabilizing governments of many smaller states, debilitating these states' abilities to bring the perpetrators to justice without strong mutual regional cooperation. During the Cold War, when India was aligned with the Soviet Union, India backed the Liberation of Tiger of Tamil Elam (LTTE) in Sri Lanka and the U.S. backed Pakistan to help Afghan freedom fighters. Eventually, the crises in Sri Lanka and Afghanistan became out of control in these small states. Founded in 1976, the LTTE widely publicized the causes for establishing an independent Tamil state in Sri Lanka. First it received support from India and later it successfully established several frontal organizations, for example, World Tamil Association (WTA), World Tamil Movement (WTM), and the Federation of Associations of Canadian Tamils (FACT), to name a few. The LTTE has over 10,000 armed combatants and 6,000 core-trained fighters.[2,5] Recently, attempts have been made to bring the LTTE into the political main stream, but the end results are yet to be seen. Like Sri Lanka, India also suffers from a number of terrorist groups. These include the United Liberation Front and National Democratic Front of Bodoland, both in Assam, the National Socialist Council of Nagaland and the Isaac-Muivah faction in Nagaland; the United Nationalist Liberation Front in Manipur; the All Tripura Tiger Force and National Liberation Force of Tripura in Tripura State, and Maoists in Bihar and Andhrapradesh (Figure 1). There are more than a dozen religious and secular terrorist groups resorting to suicide terrorism in the name of Islamic revolution or simply for freedom of their homelands in India. The terrorist tag is linked with 11 insurgent groups operating in the Indian state of Kashmir. These include Hizbul Mujahideen, Al-Badr, Jamiat-ul-Mujahideen, Lashkar-e-Toiba, Harkat-ul-Jihad Islami, Harkat-ul-Ansar and Harkat-ul-Mujahideen, Jaish-e-Mohammadi, Tehreek Jihad-e-Islami, Muslim Janbaaz Force, and Al-Jihad Force. Most of the terrorist groups wage war against the government forces, using sophisticated weapons (IANSA, 2001). These terrorist groups also extend their activities into Nepal. As a result, the peaceful country--once declared a zone of peace--has suffered from terrorist activities, with increasing violence since 1996.

V. Terrorism in Nepal

Throughout the history, Nepal has seen various phases of insurgencies associated with major political parties. The Nepalese government and politicians have accused neighboring countries of sheltering and coddling terrorist rebels and indirectly helping them in expanding their wider networks. Terrorists operating in Nepal are expanding their networks up to Myanmar through India, Pakistan, and Afghanistan, making their spatial links from hills to the sea (IANSA, 2001). Although the South Asian Association for Regional Cooperation (SAARC) pleads for the regional cooperation for counter-terrorism, the SAARC member countries such as India and Pakistan often point fingers at each other for the growth of regional terrorism instead of having mutual cooperation in counter-terrorism (*The Hindu*, June 09, 2003).

Historical records indicate that terrorist activities in Nepal first originated in India. Within the past half century, Nepal has seen nearly half a dozen insurgencies all originating from India except for a Khampa insurgency of the 1970s that was based along the Tibetan border. In 1960, the Nepali Congress Party launched a movement against the royal coup that overthrew its elected multi-party based government and killed several hundred Nepali Congress cadres by the military, burying some of them alive. In 1968, the Nepali Congress Party organized another unsuccessful armed struggle for the establishment of a democratic government, but it was squelched by the military (Pramananda, 1982). In retaliation of the government's oppressive actions, the formerly banned Nepali Congress Party hijacked a Twin Otter plane in 1974, diverting it from its Biratnagar to Kathmandu route to the bordering Indian city of Forbesgunj and decamped with $ 0.7 million government money it was carrying. In 1973, the Communist Party of Nepal, Marxist Leninist (CPN-ML) launched a "class struggle," killing some landlords in eastern Nepal. In 1985, a group led by Ram Raja Prasad Singh set off a series of bomb blasts

in some of Kathmandu's key centers. Nepal experienced a second plane hijack with Indian Airlines Flight IC814 en route from Kathmandu to New Delhi by the Harkat-ul Mujahideen activists on Christmas Eve of 1999.

Since 1996, the Maoist insurgency has been seriously challenging the Nepalese law and order situation. The Maoist insurgency began in Nepal after the coalition government led by Sher Bahadur Deuba of the Nepali Congress neglected the 40-point demands put forth by the Communist Party of Nepal (CPN) United People's Front (UPF), which later became Nepal's Maoist Party. The Maoists claimed that these demands, related to the issues of nationalism, public well being, and the living conditions of the Nepalese people, were raised during the pro-democracy movement in 1990. According to the Maoist party, these demands were raised continuously for five years since the formation of the first elected government of the Nepali Congress in 1991, but the successive governments, instead of addressing these demands, imprisoned thousands of Maoist cadres on false charges and extra-judicially killed many of them in police custody. Angry Maoists started hiding in the forests of western Nepal and started insurgency activities against the government. Maoists selectively targeted the cadres of the Nepali Congress Party and security personnel and killed those who opposed the Maoist ideology. As these incidents repeatedly occurred in Nepal, the Agence France-Presse (AFP) put Nepal among a 10-country region--Bangladesh, Bhutan, India, Indonesia, Maldives, Myanmar, North Korea, Sri Lanka, Thailand, and Nepal--in Asia where 28 people die violently every hour and around 600-1,100 people visit hospitals for injuries incurred by violence. The same report revealed that a total of 317,000 people were killed in these countries in 2000 alone (*The Kathmandu Post*, November 16, 2002). Records reveal that terrorist activities have deprived thousands of people of their civil liberties. Geographers often review the history to understand terrorist activities and how they influence civil liberties.

VI. Civil Liberties: An Historical Antecedent

Throughout human history, perceived national security threats provided the political rationale for governments to scale back civil liberties (Cole, 2001) and to overstep their boundaries at the expense of public freedom.[6] Although civil rights are clearly defined in government documents of a country, these rights are often abridged, especially, during the national crises. For example, during World War I, in the U.S., the Wilson Administration organized an "American Protective League," composed of 250,000 citizens who opened letters, wiretapped phones, and conducted vigilante actions, including raids on German newspapers (Cole, 2001). During the late 1940's and early 1950's, the McCarthy Era, Congress enacted the Smith Act, which punished speech and activities associated with Communism. During the Civil War, President Lincoln suspended the writ of habeas corpus, when even innocent people were wrongly held without any legal remedy. After the Pearl Harbor attack in 1941, 120,000 Japanese-Americans were put in "concentration camps." Theoharis and Theoharis (2003) discussed the status of civil liberties, civil rights, and civil dissent of the Cold War era providing vital and critical insight into post-1945 politics. They explained America's stance on civil liberties since 1945 in a series of collections. Kinfer (2001) and Theoharis and Theoharis (2003) argued that the September 11 attacks brought a situation where many governments of the world have encroached upon civil liberties[7] (IPSA, 1997; IANSA, 2001).

Like the world countries, the 235-year old Nepali kingdom has seen ups-and-downs in civil liberties. From 1846 to 1950, there were no civil rights for the general public. Ruler-specific and caste-specific discriminatory laws were made based on the verbal statements of the rulers, which enabled upper castes--elites--to enjoy full civil liberties while the lower castes were deprived of such privileges. During the short-lived democracy between the 1950s and 1960s, civil liberties did not receive proper attention. After the royal coup in 1960 that overthrew the multi-party-based democratically elected government, killing hundreds of Nepali Congress cadres in a military crusade, civil rights were very much limited until the popular movement of 1990, when a new constitution was drafted and implemented. The Nepali Constitution of 1990 under Part III, Articles 11 through 23 and the Civil Rights Act of 1955 have guaranteed fundamental rights, including the right of criminal justice. Article 88 of the same constitution provides remedies against interference with civil rights. In addition, Nepal has ratified the Universal Declaration of Human Rights (UDHR) Bills and International Covenant on Civil and Political Rights (ICCPR) that guarantee freedom of expression. Despite freedoms guaranteed by the country's constitution

[6] http://www.firstmonday2002.com/history.cfm. Retrieved on June 03, 2003
[7] http://www.geocities.com/nion_cleveland/civillibertiesspeechann.html, Retrieved on June 03, 2003

and International Human Rights Instruments, there still are some legal provisions such as the Public Security Act, State Offence Act, Crime and Punishment Act, and Arms and Ammunitions Act (amended) which are sometimes misused to harass journalists and media workers.

The Nepali Constitution of 1990 recognizes the press as the fourth organ of the state and guarantees the freedoms of press and expression. It also provides the right to information including fundamental human rights. The press law based on the 1990 constitution has been enacted. However, during the emergency periods in 2001 and 2002, the government arbitrarily closed newspapers carrying pro-Maoist news, arrested journalists, and deprived journalists from news collection and publication. Maoists abducted, detained, and killed many journalists, civil servants, and members of the public who opposed Maoist ideology, and denied manpower and financial support to the Maoists (*Space Time Daily*, Sept. 14, 2002). As a result of these activities, even after the establishment of democracy in 1990, civil societies are required to compromise their civil liberties (Baral & Rose, 1995; Brown, 1996; Gautam, 1990). Nepal's judiciary system, responsible for the safeguard of civil liberties, also has become very infamous, where judges are bribed to influence court decisions (*www.state.gov*). Additionally, the tendency of the Nepali government tilting to one side to cling to power also has abridged civil liberties (Baral, 1977).

On October 4, 2002, the constitutional monarch went beyond the constitutional norms, sacked the elected Prime Minister, and took control over the executive powers. Since then, the monarchy has arbitrarily appointed the country's Prime Minister twice. Attempts have been made to restore the democratic process in the name of peace talks with the Maoists. During the process of peace talks with the Maoists, HMG/N was reported to have limited the mobility of the Royal Nepal Army (RNA) to a radius of five kilometers from the barracks to facilitate the free movement of Maoist cadres. According to the Maoist leaders, who are also the members of the peace talks, the limitation of the RNA movement to a five-kilometer radius from the barracks was done with the tacit approval of the king (*The Kathmandu Post*, June 09, 2002 quoting a senior Maoist leader); however, the then- government minister and a member of the same peace talks team, Narayan Singh Pun, refuted the Maoists' claim (*The Kathmandu Post*, June 10, 2003). Whatever the reality is, the limitation of the RNA within a narrow limit might expose the country to foreign aggression, and the end result would be that not only Nepalese citizens will lose their civil liberties, but also the national identity would be endangered by external interference. Moreover, limiting the RNA will allow terrorist groups to conduct weapon training in mass, coerce people to associate with their organization, and conduct various atrocities. On one hand, the government has been very incompetent in protecting civil liberties in many aspects, while on the other hand, Maoists have been abridging civil liberties either by forcing people to accept Maoist ideology or face a death penalty, or by destroying development infrastructure such as bridges, hydroelectricity, and educational institutions. As a result, there have been serious compromises between constitutional rights and civil liberties in Nepal. Since 1996, over 7, 000 people have been killed in the Maoist violence in Nepal; the government extra-judicially killed many people in the name of quelling the Maoists terrorism while Maoists killed thousands of people who refused to accept the Maoist ideology. At present the government in Nepal is confined within the capital and a few official buildings of district headquarters. All the peripheral areas of the country are under the Maoists' control. In reality, since October 4, 2002 the Nepalese people are under two rules--the republic of Maoism and a semi-constitutional monarch.

VII. Maoism and Escalating Atrocities

Maoists penetrated into the rural communities with social programs to control drug use, alcohol, gambling, prostitution, oppression against lower castes, discrimination against the lower castes and gender, skewed control of resources by the elites, high interest rates on loaned money, corvee labor, police atrocities, and government officials' corruption. These programs, along with some educational training in the rural areas by many intellectual Maoist cadres including the famous scholar Dr. Babu Ram Bhattarai, made the Maoist party very popular among the lower castes and underprivileged groups who, in the past, were denied rights both by the elites and government. In the remote areas of Nepal, where the government was least involved in public welfare, Maoists brought about several public awareness programs against the existing traditional unscientific religious and cultural practices. They organized several public meetings highlighting the country's sociopolitical situations, making people aware of possible government corruption and oppressive actions against lower class people.

Maoists first chose those police stations that were involved in public atrocities and selectively slaughtered hundreds of poorly equipped policemen in remote police stations, when the Royal Nepal Army (RNA) was standing by at close quarters. With no support from the RNA, the Nepal police force suffered heavy casualties from the Maoists. Hoping to improve police performance in maintaining

security, the RNA provided training to use modern weapons to over 1,000 police personnel in 1999. The government formed a National Security Council according to the Article 118 of Part XX of the Nepal's 1990 constitution and constituted a para-military--the Armed Police Force-- which would eventually have the strength of 25,000 personnel. Despite all these efforts, Maoists succeed in killing the Armed Police Chief and his wife including a bodyguard on January 26, 2003. Maoists skillfully maneuvered all the political parties turn-by-turn, following the principle of divide-and-rule.

Politicians, especially the leaders of the Nepali Congress Party, blamed the royal palace for coddling Maoists. Although these claims are hard to justify, politicians argue that since the royal palace controls the RNA, the unwillingness of the RNA to be involved in quelling Maoists at the beginning, for example, the case of Holleri of Rolpa district, is a conspiracy of the royal palace to undermine the capabilities of the political parties. These political parties also blamed the royal palace for attempting to scale back the democratic freedoms achieved in 1990 to the regressive model of the 1960s, when the monarch enjoyed full executive power. Other observers, however, disagree with this argument and blame politicians for dragging the constitutional monarchy into controversy in order to hide their mistakes and the widely institutionalized corruption during their rule from 1991 to 2001. There are good reasons for blaming political parties because they seldom have had fixed opinions about the Maoists' approach. Some political parties have romanticized Maoist violence as an expression of the real aspirations of the people and called the Maoist movement a 'people's war.' These political parties as soon as they were out of power combined their political strategies with the Maoists, while the same parties called the Maoists terrorists once they are put in power. However, Maoists have been successful in maneuvering not only the political parties of the multi-party systems, but have also skillfully garnered support from the ex-rulers of the Panchayat era, 1960-1990 and have extended their organization from rural to urban centers.

Several controversies have surfaced in Nepal as to who is derailing civil liberties. Some agendas of the Maoists are similar to those of the ex-rulers of the Panchayat era. The ex-rulers of the Panchayat era are attempting to bring the constitutional monarchy into active politics, while the Maoists are fighting to abolish the constitutional monarchy. The constitution of 1990 limits the executive power of the king. The Maoists are in favor of abolishing the 1990 constitution, and the ex-rulers who are loyal to the king, too are in favor of amending or abolishing the 1990 constitution. This common agenda of the Maoists and king's loyalists is similar to that of the 1960s when the then-king after overthrowing the elected government of the Nepali Congress Party, selectively picked up people leaning toward the Communist ideology in several key positions. The then king did so for two reasons, first, to undermine the organizations of the democratic forces, and second, to weaken and shatter the forces of the Nepal Communist Parties. After the 1960s movement, the Communist leaders became much closer to the king than the Congress Party's leaders.

Many political leaders--loyal to the king--who were ousted from the 1990 revolution became involved in providing financial support and vital government information to the Maoists with a hope of taking revenge on the political forces displacing them from the power. The role of the ex-rulers who are loyal to the king also became instrumental in strengthening the position of the Maoists. Maoists are becoming stronger day-by-day with no real resistance on the part of the state and its agencies, especially after the king took over the executive power on October 4, 2002. Maoists are much more capable of disrupting and paralyzing civil life nationwide than any other political forces of Nepal.

There are countless incidents when people are deprived of their civil rights in a triangular race between the Maoists, royal palace, and political parties. Many rural people suffering from the Maoist atrocities are migrating to urban centers both for safety and employment. The website *www.kantipuronline.com* June 9, 2003, presents a case of over 150,000 rural girls between the ages of 15 and 27, who are forced to work in night clubs in Kathmandu and unwillingly accept jobs that have social stigma. In an interview with 'Maiti Nepal'—a non-governmental organization, some of these girls have expressed helplessness about being compelled to be involved in such undesired activities because of the displacement of their families from own livelihoods due to increasing Maoist atrocities. There is no effective government in Nepal outside the Kathmandu Valley. Whatever counter-terrorism efforts are made, these efforts are localized within the capital city and at some district headquarters.

VIII. Impacts of Counter-Terrorism Efforts on Civil Liberties

On November 26, 2001, the king, on the recommendation of the Council of Ministers, declared a state of emergency throughout the country for six months in accordance with Article 115 of the 1990 constitution. The House of Representative (HR) immediately ratified emergency rule by over 2/3 majority (required constitutional majority) to deploy the Royal Nepal Army (RNA) to quell the Maoist insurgency.

Since the RNA took control of security, the RNA has taken the fight far away from Kathmandu and into the Maoist stronghold hill areas.

During the period of emergency, many civil rights were suspended. These suspensions include Articles 13 (Press and Publication Right), Article 15 (the right against preventive detention), Articles 16 (Right to Information), Articles 17 and 22 (Right to Property and Privacy) and Article 23 (Constitutional Rights), except the right to file habeas corpus. Along with these curtailments of civil rights, Nepal's Information Ministry issued a detailed set of guidelines for the media covering the Maoist war. These guidelines forbid any criticism of the government or of the armed forces and effectively prevented fair coverage of the conflict.

The government's emergency operation came under severe criticism from various sectors. However, the then Prime Minister recommended extension of the imposition of the emergency for the second time from May 22 through August 2002 despite mounting political opposition. Fearing a defeat in a vote in the House of Representatives (HR) to ratify the second phase of the emergency, on May 23, 2002, the then-Prime Minister recommended to the king the dissolution of the HR, three years before the duration of the HR and against the consent of his own party. Earlier, the late King Birendra sought advice from political parties when the dissolution of the HR was presented to him. The late king sought suggestions from political parties because he observed an ugly political reaction once the HR was dissolved prematurely on the recommendation of the Prime Minister of the majority in 1994. Though by constitution the monarch is required to follow the recommendation of the elected Prime Minister, the late king set a precedent of seeking opinions from the major political parties to avert a negative political reaction, especially when the dissolution of the HR is recommended in a whimsical manner to cling to the power and much before the final duration of the HR. But the present king immediately dissolved the HR without seeking advice from political parties and declared a new election when the country has not been able to conduct a fresh election due to Maoist terror. Several politicians claim that the king wanted to overtake the power by exposing the weaknesses and political infightings of the politicians in the multi-party rule as opposed to the party-less rule of 1960-1990; thus, he was seeking this opportunity to dissolve the HR, but other politicians say that the constitutional king has no option other than following the recommendation of the Prime Minister of the majority. The first group of politicians has had opportunities to advocate their theory--the king became engaged in active politics--after the incident of October 4, 2002. The exposure of the constitutional monarch through news media and participation in various public functions in the name of civic reception also provided additional impetus to the politicians of the first school.

After the dissolution of the parliament, the situation became too critical while the security forces were indirectly controlling the overall state power. Although the emergency pushed the Maoists to remote corners, it brought about several unwanted incidents in Nepal. During that period many journalists were jailed and many newspapers were closed (FNJ--Federation of Nepalese Journalists," 2002). Journalists were tortured in prison and one of the editors of the Maoist mouthpieces--Janadesh and Janadisha--Krishna Sen--was killed while in jail.8 The FNJ announced a series of protests from July 11 to August 2, 2002, for the reinstatement of press freedom that was suspended during the emergency period. Over these political rows, the Nepali Congress Party split into two factions. One faction of the Nepali Congress Party petitioned for the reinstatement of the Parliament, but the Nepalese Supreme Court rejected this and directed the government to hold an election on November 13, 2002. At the same time the second phase of emergency came to an end in August 2002 and the king promulgated the Terrorist and Destructive Activities (Control and Punishment) Ordinance 2002 to quell Maoist terrorism. Since then the country's law and order situation has only deteriorated, the then-Prime Minister again recommended to the king to postpone the election by one year.

On the charge of being incompetent to conduct the election, on October 4, 2002, the king sacked the elected Prime Minister and assumed all executive powers, not provisioned in the constitution of 1990. Since then the king has arbitrarily appointed the Prime Minister twice. Political parties are blaming the monarch for crossing the constitutional limit and arbitrarily appointing the country's Prime Minister. Since then the major political parties have been on the streets in protest, urging the king to correct these constitutional errors. The king is not listening to the agitating political parties. Some argue that the king is really worried about the deteriorated law and order conditions of the country; therefore, the king desires to improve the country's situation before he hands over the power to the politicians. The other politicians are not ready to agree with this view and question the role of the constitutional king, who in the view of the political parties is actively involved in day-to-day politics either by granting interviews to newspaper

[8] Center for Human Rights and Democratic Studies (CEHURDES), Kathmandu, www.cehurdes.org.np.

challenging the approaches of the political parties to solve the current crises or by organizing public gatherings in the name of civic reception. As these debates were going on and the major political parties came to the streets urging the king to correct his constitutional mistakes, on January 29, 2003, the Maoists declared a cease-fire for the second time, burying all the past differences. This step of the Maoists made the king a little more popular. As in the 1960s, royalists are terming the king's act of sacking the elected Prime Minister and taking over executive powers as timely, far-sighted, patriotic, and supportive of the well-being of the people.

Once the king took over the executive power, many journalists and Maoist leaders were granted amnesty. The government has withdrawn the terrorist label from the Maoist party and its sister organizations, and also has withdrawn bounties that had been put on the heads of the Maoist leaders. The government and Maoists have held two rounds of peace talks. In the second round of the peace talks, the government is said to have limited the Royal Nepal Army (RNA) to within a five-kilometer radius from the barracks. Since this was criticized from all corners, the government could not save face. As a result, the third phase of peace talks is in limbo at this writing. To avoid this controversial issue, the king's first appointed Prime Minister resigned, but the king re-appointed another loyalist in the post of the Prime Minister. Although other political parties having the largest number of members in the dissolved House of Representative (HR) jointly recommended the name of the majority leader for the post of the Prime Minister, the king refused to accept the parties' nominee. Political pundits smell foreign interference in the appointment of the Prime Minister for the second time.

Nepal's civil liberties conditions are in limbo. Politics could take an alarming turn in Nepal at this time. Democratic norms have been violated first by the political parties and second by the constitutional monarch. The Maoists want a republic, but a combination of social, national, and international factors have sapped their momentum. There is no transparency in the functioning of the government. In theory, the three forces in Nepali politics--the king, mainstream political parties, and Maoists--are demanding transparency and better accountability from one and all to score points while they themselves are forgetting to do the same voluntarily (Dhakal, 2003). The major political parties have demanded that the royal palace activities should be transparent, including the king's property, but opinions of the political leaders are divided on this issue. The 21st century monarch has publicly appealed for a corruption-free society and greater public accountability, but the royal family ignores its own promises to make its own property public despite mounting public pressure. The Maoists have a different story, who demand transparency from others but never say a word about how much they looted from public banks and how much they amassed in extortion and donations. The transparency issue has been a blaming game for these three forces in Nepal but they never adhere to their own principles. Unless proper transparent practices are adopted in Nepal, civil liberties will always be in jeopardy. Without a well-defined transparency in the working styles of the civilian ministries, administrators, Royal Nepal Army and Police, civil liberties will always be in limbo in Nepal.

Conclusion

Nepal's current instable political conditions and increasing terrorist activities have jeopardized civil liberties. Although civil liberties are often scaled back during a time of a country's crisis anywhere in the world, the case of Nepal is a little different due to its ethnocentric and caste-based traditions. The historical legacy of discriminating against the lower castes and the dominance of the elite groups in the power sharing has added fuel to Nepal's political instability. The majority of the people belonging to the poor masses enjoy few or no civil liberties despite being guaranteed by the constitution of 1990. These conditions not only have provided fertile grounds for corruption and discrimination against the poor, but also the most favorable environment for the Maoists to expand their organizations against the government. By ensuring freedom of speech and press, the 1990 constitution provided space for minority groups to voice their dissent, grievances and aspirations, but the reality has been different. Maoists have tapped manpower belonging to the lower classes and have been able to make their presence felt in varying degrees in 68 of the total of 75 districts and in 165 of the 205 parliamentary constituencies. Although the government claims that many Maoists surrendered to the Royal Nepal Army (RNA) during the emergency period, the exact cadre strength of the Maoist insurgents is not known, hence their possible impact on civil liberties is unknown. As a result of the struggle between the Maoists and government, civil liberties are in a dilemma.

Increasing terrorism in Nepal since 1996 has jeopardized the normal life of people in exercising their rights, cultural, political, and economic freedoms. However, some groups have been using the Maoist campaign opportunistically to justify crackdowns and abuses against their opponents. Terrorist activities are harmful to the nation, civil liberties, and for the overall development of a country. They

should be quelled by the government while respecting human values and dignity, abiding by the norms of the rule of law. However, Human Right Reports 2002 indicate that such norms are hardly followed by the government forces in Nepal and all blame for civil casualties is put on the heads of the Maoists despite the government's extra-judicial killings during the emergency periods of 2001 and 2002. State media is one-sided and the opposition groups have few opportunities to justify their views. After the declaration of the cease-fire by the Maoists on January 29, 2003, the government removed the Maoists from the list of terrorist organizations and erased the reward fixed on the heads of certain Maoist leaders. The government has also notified the international community, including INTERPOL to nullify the red corner notices issued against some Maoist leaders. Maoists are now considered political forces, but not terrorists. Since the cease-fire, Maoists and the government have had two phases of peace talks. Although the outcomes of the first meeting were appreciated from many corners, the second meeting showed the cowardly nature of the government, where the Maoists seems to be on the winning side to limit the movement of the Royal Nepal Army (RNA) within a five-kilometer radius from the barracks.

Maoist negotiators claim this approach of limiting the RNA's movement is after tacit approval from the king; however, government negotiators denied this. Political pundits supporting the active role of the monarch argue that the government does not lose anything by granting concessions to the Maoists, because the Maoists could be contained at any time as they are not supported by any international community. These royalists see the role of the major political parties, especially the Nepali Congress, as the main obstacle to the active monarchy in Nepal.

At present the major political parties are on the streets opposing the king's October 4, 2002, move, but the government is blaming agitating political parties for derailing the Maoist and government peace-talk process. Politicians loyal to the king admire the king's attitude of providing concessions to the Maoists as the right approach needed to undermine the role of the political parties. The same group further complains that the agitations launched by the political parties have only strengthened the Maoists' stand, and the government has to grant several concessions to the Maoists. Whatever the arguments are, the agitating political parties have no role in the negotiation with the Maoists.

Every Nepali hopes for the long lasting peace that will respect constitutional rights and civil liberties in the country. However, the current dilemma is that the Maoists have demanded the replacement of the 1990 constitution in favor of a republic. Surprisingly, however, the king's loyalists are also tuning in to the Maoists' voice. Agitating politicians are arguing that the two military forces, the RNA and the Maoist militia, are coming together to abolish the 1990 constitution and the achievements of the 1990's popular movements that limited the power of the executive king and brought multi-party democracy to Nepal. A group of independent observers argue that the Maoists are hoping to limit the royal regressive influences through the new constitution, whereas the royalists are hoping to bring back the active monarchial rule by the abolition of the 1990 constitution. The royalists are attempting to use the 1960's model used by the late King Mahendra to abolish the multi-party democracy and establish an active monarchial party-less rule, but the present world politics have seen several successful progressive models where regressive political models have proved defective and obsolete in safeguarding civil liberties.

The agitating political parties are fighting for the effective implementation of the 1990 constitution along with the achievements of the 1990's popular movement but with a little modification in the constitution to keep the RNA under the elected government and to make the royal palace's activities transparent to make Nepal's democracy more public, accountable, and stable. The royal palace flatly rejects this approach. Nepal's political situation is still fluid, and civil rights are in a partial coffin. Since 1996, Maoists have reaped advantages from the fragile political situation. The king's decision to take over executive power on October 4, 2002, by sacking the elected Prime Minister has again provided another opportunity for the Maoists to strengthen their organization. All major political parties are against active monarchial rule in the 21st century, but the king continues to ignore them. Political pundits see this situation as far more complex than a simple dichotomy between the king and democrats. Political parties do not support the Maoist demands to abolition the constitutional monarchy. Nepal's constitutional monarch would be a symbol for an independent modern state. Because of the patriotic king of the past, Nepal never became a colony of any power despite the whole Indian sub-continent being colonized until 1947 by Great Britain. The 21st century monarch is surrounded by royalists who see personal advantages if the king retains all executive power. These royalists provide a posture that the king is the only symbol of unity the country but once they are out of power, they often align with ultra-leftists and threaten the existence of the monarchial institutions, they did so in the past and will repeat this in the future, but the king is surrounded by these forces and enjoys flattery from them, many of whom have no broad public support.

In terms of civil liberties and quelling insurgency, Nepal faces two large hurdles—to save the country from the regressive forces and address the Maoist threats. Nepal's mainstream political parties are

trying to reassert themselves in the context of the current Palace-Maoist face-off. Their tactical maneuvers to counter regressive forces face high challenges. Maoists have expanded their political profile rapidly and have moved beyond their strongholds to urban areas. Maoists claim that their presence in remote areas where there are no roads and electricity is very effective, and it is time for them to strengthen their positions in the urban areas, including the Kathmandu Valley and over the entire country. Nepal has to see how civil liberties prosper in this divided political environment with a constitutional monarch reluctant to follow the constitutional norms and Maoists dreaming to make a republic of Nepal. It is a great challenge for Nepal to protect civil liberties when the government military forces might be misguided to activate the 1960s regressive model. This might push the country several decades back, and the Nepalese people will have to struggle again to restore democracy and civil liberties. If there will be a revolution at this time, Nepal will lose its symbol of unity--the constitutional monarch--and the country might have to survive several decades' struggle before it can actually be freed from a remotely controlled colonial syndrome while civil liberties are in crisis.

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INTERNATIONAL NETWORK & THE NEW NATIONAL SECURITY STRATEGY: LEGAL CONCERNS IN THE USE OF CHEMICAL AGENTS FOR COUNTER-TERRORISM

Georgi Popov*

It is very easy to limit the civil liberties. You just have to convince the population that there is an external threat for the country.--Göebels

The world after September 2001 hardly reminds us of the world in 1939 (the beginning of the World War II) when everyone lived with the impression it was the end of the civilization. However, the focus today has shifted from the total war to global war on terror. The new world order or how some would describe it the new world "disorder" forced politicians to seek different decisions to catch up with the new realities. The latest terrorist activities proved that the Cold War strategies are not useful any more. Today the world is not simply divided in two opposing powers. The world leaders realized that they have to find and fight unknown enemies. It became clear that military power is not enough to fight terrorism and the continuous escalation and lack of adequate measures could lead the world to a different confrontational spiral. Further more, the war on terror requires interagency and international coordination.

This paper will analyze some of the difficulties that emerge when chemical agents are employed for domestic crisis management operations. Some problems with dual use and commercial off-the-shelf products are being discussed. Governmental response and some limitations are reviewed briefly.

Discussion

For more than a year after the September 11 attacks there was no major terrorist attack in the leading world countries. With the exception of the crisis in a Moscow theatre the terrorist activities were carried out in less developed countries or international waters. Such countries are traditionally unstable because of the long lasting multiethnic, religious, or multinational conflicts. On the other hand, this creates instability in certain regions in the world. This brings the focus to the reasons underlying international terrorism and the ways to find adequate measures against it.

The war on terror nowadays is facing a different challenge i.e. the different dimensions, and interpretations of the laws. The level of protection and defense measures in case of a terrorist attack or external threat should comply with national and international laws and regulations. There are two major strategies on how to prevent future terrorist attacks. The USA, Great Britain, and Australia are supporting the preventive use of military forces outside their territories including some measures against the leaders of the countries supporting terrorism. There are good reasons to believe that the war on terror could be used as a good excuse or cover to achieve other goals in international relations. This would explain the reluctance of the other countries to support force projection policy and preemptive strategies. They are prioritizing a different strategy to fight the terrorist organizations under the strict respect of the international laws and United Nations resolutions.

In some instances governments are forced to walk on a very thin rope in order to solve a specific complex emergency situation and obey the international and national laws at the same time. The October 2002 terrorist attack in Moscow Theater was a typical example of such a delicate situation.

Russian Methods For Crisis

On October 23, 2002, during the evening "Nort-Ost" performance at a Moscow theater, some 50 Chechen terrorists equipped with firearms as well as large quantities of explosives suddenly seized the building and the 800 people inside. The terrorists threatened to kill everyone inside unless Russia ended the war in Chechnya. There were women among the terrorists and they were considered the most armed and dangerous. They had four pounds of C4 explosive tied to their waists. Although the Chechen

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militants agreed to release some of the hostages during the first couple of days, negotiations with the Russian authorities eventually failed [3,4,5]. Even allowing for the fact that Moscow authorities were faced with a desperate situation, some have argued that the Russian operation was conducted with inadequate attention to the safety of innocent civilians. But whether or not the use of an incapacitating gas violated the Chemical Weapons Convention (CWC) is much more difficult to discern [1]. The Special Forces who carried out the operation, used an unknown gas in the theatre, and have resorted to the standard Soviet approach - when asked awkward questions: say nothing, even if, as in this case, lives could be lost. The gas was intended to incapacitate the hostage-takers and prevent them from triggering explosives strapped to their waists and rigged around the theatre.

Following the resolution of the hostage crisis, much has also been made of the theater incident with respect to the CWC. There are two sides of the coin: first, did this action violate international law, and second, does possession of the agent used in this desperate situation suggest that the Russians have been secretly pursuing chemical weapons in a manner which could be considered in breach of the CWC? There are *gray* areas in the way these gases could be used and some countries may be exploiting this to be able to develop chemical weapons without violating international law.

1. International Laws and Conventions

The main internationally accepted principles concerning the use of chemicals for military and non military operations are discussed in CWC, which Russia ratified in 1997. Russian officials initially refused to identify the gas used to end the hostage crisis in a Moscow theatre in October. All but one of the 117 hostages killed in the siege died from the gas. Russia's Health Minister Yuri Shevchenko a few days later said the gas used in the raid was based on the anesthetic Fentanyl. Shortly after Russian forces used the gas to end the hostage crisis, experts attempted to narrow down the possibilities, judging from the physical properties of the gas and the symptoms it elicited from its victims. Thomas Zilker, a toxicology professor at Munich University Clinic in Germany who examined the bodies of two Germans who were in the theater and were victims of the gas, said it likely contained several substances.

2. What Were the Possible Options and Substances?

2.1. BZ (3-quinuclidinyl benzilate)

BZ is an invisible and odorless gas that causes disorientation and loss of motor control. It was developed in American military labs in the 1950s and was used by the U.S. in Vietnam. Yugoslavian troops also used the gas in Bosnia and Kosovo.

BZ affects nerve cell receptors in the brain, blocking signals between the muscles and the central nervous system [2]. The CWC does not specifically ban its use, but the gas is considered a calmative agent and causes unpredictable behavior, delusions, and hallucinations after prolonged exposure. The unpredictable nature of the gas led the U.S. to abandon it for military purposes. Reports that the gas looked like smoke, irritated nasal passages and affected the hostages almost immediately have led some to discount BZ as a candidate for the mysterious gas. BZ is not an irritant and it takes about an hour to start working. It was reported that the gas worked immediately, which suggests that it was not based on BZ. However, doctors in Moscow were reportedly treating patients with the drug physostigmine, which is what would be used to treat exposure to BZ.

2.2. Fentanyl

After the crisis ended, Pentagon officials said the gas used in the hostage crisis was an opiate. The German scientists who tested the bodies of the two German hostages said that they believed the gas used was based on Fentanyl and gave additional support to the Pentagon suggestion. The Germans tested blood samples from the two bodies and found evidence of opiate exposure, as well as traces of halothane, a gas also used as an anesthetic [6]. They also pointed out that Russian medics were giving Naxalone to the gassing victims, a drug used to treat patients who have overdosed on opiates. Since Russian officials refused to identify what gas the Special Forces used, it is possible that Russian doctors could have treated victims for both BZ-type gas and Fentanyl.

After their findings were released, Shevchenko announced that the gas was *indeed* based on Fentanyl. Fentanyl drugs are synthetic anesthetics, chemically related to opiates such as morphine. This group of chemicals can kill pain and cause unconsciousness, but it can also shut down breathing and circulation, leading to coma or death. The U.S. National Institute of Justice has done research into using Fentanyl drugs as non-lethal weapons, although the research involved delivering the drug in a dart, not as a gas.

One of the problems with using Fentanyl drugs as non-lethal weapons is that the dose that will kill and the dose that will simply incapacitate can be very similar. Alfentanyl, for example, has a dose safety margin of 4:1, meaning the lethal dose is just four times higher than the dose that will knock a

person out. Research has led to Fentanyl drugs with slightly higher safely margins.

Some experts have ruled out any anesthetic normally used in medicine. They say the anesthetic gas would have to have been developed exclusively for military use. Professor Zilker said it was "strongly indicated" that the two German survivors had consumed an unknown quantity of a synthetic narcotic with chlorinated hydrocarbons, including fentanyl. More detailed examination of the chemical structure of Fentanyl and similar substances would reveal NO presence of chlorine in the molecule (see fig.1 below). So, what else was added to the gas?

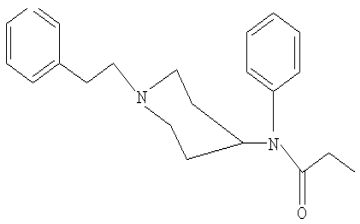

Fig. 1. Fentanyl

The third option was:

2.3. Nerve gas

The German scientists ruled out a nerve gas, as it would have left traces in the victims' bodies, which they had been unable to find. They also believed that the gas was probably something that the Russians had developed for themselves, but it is very difficult to find information because of Russian "mystery-mongering". Russian officials were maintaining the mystery, although a top aide of President Putin insisted that the purpose of the raid "was not to kill everyone," and so the use of sarin or any other poison gas can be ruled out.

The key element in the investigation would be to determine exactly if fentanyl-based substances are lethal or non-lethal agents. It should be mentioned that fentanyl is not listed in any of the CWC Schedules. Because of its rapid onset and short duration (15 to 30 minutes) of analgesia, fentanyl can be legally considered a Riot Control Agents (RCA) according to the definitions in the CWC. However, some additional terms in the CWC could be relevant. The overall requirement of the Convention is that each State Party which declares any possession of Scheduled agents has a parallel requirement with respect to RCAs. In accordance with the terms of CWC Article III 1(e), within 30 days of the Convention entering into force, each State Party has to specify, "the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number, if assigned, of each chemical it holds for riot control purposes. This declaration shall be updated not later than 30 days after any change becomes effective."

It means that if we consider that fentanyl was utilized as a riot control agent for law enforcement purposes, it should have been declared by Russia. Another question is whether the Russians were in fact in strict compliance with the CWC or were walking on the sharp edge because of time constraints.

In this case, however, not only is it apparent that the use of the opiate gas was not prohibited given the circumstances, the decision to do so appears in the end to have been morally justified from the perspective of the Russians and the international community. Further more, the Russian officials believed it to be the most humane solution to a volatile hostage situation.

II. International Network and Dual Use Products

While we are considering whether the counter terrorism actions would comply with international law, the terrorists are using illegal actions and substances for their actions. It is believed that for the last couple of years some terrorist organizations are actively trying to acquire Weapons for Mass Destruction (WMD). Furthermore, they are exploring the possibilities to utilize commercial off-the-shelf and a combination of ready to use products. In this regard, a couple of cases and investigations during the last few years should be mentioned.

1. Toxic chemicals: Easy to acquire

Another interesting antiterrorist operation related to toxic chemicals was held in Italy. On February 20, 2002, Italian police arrested four Moroccan nationals for allegedly plotting a chemical

terrorist attack on the U.S. Embassy in Rome. The suspects were detained with approximately nine pounds of a cyanide compound (potassium ferrocyanide $K_4Fe(CN)_6$). According to media reports, none of the suspects has a credible explanation for the maps of the US Embassy and chemicals in his possession. Later on, the Italian police discovered a hole dug into an underground passageway next to the U.S. Embassy.

2. Dual Use chemicals

In December 2002 the police in Italy seized 50 metric tons of industrial chemicals bound for Libya, on suspicion that they might be used to make weapons of mass destruction. The chemical, identified as morphaline, is used in resins and solvents, but is also on a United Nations blacklist of materials as it could be used to produce chemical weapons. The chemicals were found aboard a ship in December 2002 in the northern port of Genoa and police became suspicious of the cargo because it was split between three containers. The accompanying documents of the cargo indicated that the chemicals had been produced in Germany and dispatched by a Belgian company.

3. The Threat from Ricin: British experience

In the beginning of January 2003 British police arrested six men suspected of producing ricin in their apartment in London. All of them were believed to be Arabs from Algeria and other North African countries. [7] The British officials indicated that at least one of them had attended an al-Qa`ida training camp in Afghanistan, whereas others appear to have received terrorist training in Chechnya. The major concern in the ricin role as a poison it is not just its highly toxic effects in humans, but also because of the wide availability of its source material, the castor plant. Furthermore, the techniques for manufacturing ricin are reasonably well known, and have often been described in the open literature [8,9,10]. Ricin, is listed in Schedule 1 of the Chemical Weapons Convention along with nerve agents, blister agents, and Saxitoxin. The Biological and Toxin Weapons Convention (BTWC) also prohibit it as a toxin weapon.

III. "Peaceful" use of RCA: Legal Concerns In The Use Of Chemical Agents For Counter-Terrorism

Unfortunately, there are many cases when the governments had to use some toxic chemicals against their own population. It should be mentioned that the US government made the tough decision to use RCA during the 1992 Los Angeles riots and the government raid near Waco, Texas, in 1993.

The Waco, TX case was extremely difficult to resolve without the use of proper tactics and special chemical agents. In this case, I believe that, if the fentanyl based substances were utilized, the number of the victims would have been significantly lower. At 6:02 a.m. on April 19, 1993, following a 51-day standoff, FBI agents in military tanks advanced from siege lines around the Branch Davidian compound and fired volleys of CS gas inside the buildings to immobilize the heavily armed occupants.

The wooden structures were filled with the gas over the next six hours before the building erupted into flames, leaving more than 80 people dead, including all of the children. Before giving the order to advance, Attorney General Reno said she was assured by military experts that CS gas would cause no serious harm or permanent damage to the children of the besieged cult members.

However, it became clear that medical literature and manufacturers' warnings available at that time rejected that conclusion. CS gas is potentially so hazardous when applied in confined spaces so that California prison guards are cautioned against using it in the cells of uncontrollable inmates. A Sherman Oaks company suspended sales of CS to the Israeli government in 1988 at the same time Amnesty International linked the gas to the deaths of Palestinians in homes and other buildings in the occupied territories.

It seems that the government authorities underestimated the situation, because the adults were able to withstand CS exposure by wearing gas masks (the Branch Davidian compound was well stocked with military equipment), but no masks were available to properly fit children. Although, the official cause of death for the children was not determined, the smoke inhalation was a leading possibility.

In meetings with military experts, Reno was reassured that the plan to drive out the Branch Davidians with gradual applications of CS gas was safe. They referred to cases of children who had completely recovered within hours of being exposed to CS with no long-term effects. It seems that the military advisors did not take into account the fact that building should be considered an enclosed space. Further more, the danger of applying CS in enclosed spaces is spelled out in an array of medical literature government documents, health and safety databases, and manufacturers' reports, including the Army's guidelines on civil disturbances [11,12,13,14,15]. Army Field Manual FM 19-15, published in 1985, warns that CS "is not to be used in buildings, near hospitals or in areas where lingering contamination could cause

problems." [13]

CS is considered a riot control agent and it is not prohibited for Law Enforcement purposes. It is not listed in any of the Schedules of the CWC [1]. On the other hand, the definition of the RCA states that the physical effects should "disappear within a short time following termination of exposure". Unfortunately, it is not mentioned how long the exposure could be. I believe that the concentration of the gas in the house during the attack was much higher than IDLH. Given the large quantities of CS pumped into the building, it would have been very difficult for children to have walked out to safety, as envisioned by the FBI plan, some experts say. Despite the criticism, the Justice Department has held firm that the use of the CS was appropriate [12].

Conclusion

In order to continue the war on terror the U.S. administration had to introduce the preemptive use of military force and control of the information strategy. It is the opinion of the administration, that it is the only way to limit and control the terrorist actions against the homeland and the American citizens abroad. Unfortunately, in this process the Americans may end up losing their democracy and limit their civil liberties. Another key element of the strategy is the "export" of the democratic values. By doing so, the strategists are hoping to somehow limit the terrorism. In my opinion, it will be just the opposite: the terrorists would not accept democracy, because they hate it.

Unfortunately, the terrorists will always be one step ahead of the government antiterrorism measures. Similar to many other things, the terrorist acts are in conjunction with the government's response. It could be described as a repetitive cycle: terrorist action – government counteraction; another terrorist act – different government response or structural reorganizations. It is even more difficult and complicated situation with the legal concerns. While the governments are obliged to follow the laws and the regulations, the terrorist network is acting against the international laws and the conventions. The main challenge in the future war on terror will be to find the right balance and limits in order to save democracy and civil liberties while effectively combating terrorism.

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POLITICAL CULTURE: WHAT INSPIRES AND WHAT DESPAIRS TERRORISM

Tseggai Isaac *

Scholars on terrorism often argue that terrorists commit their acts to redress grievances committed against their societies or their values. In the post-World War II decades, we were told that "unfulfilled expectations" cause rebelliousness in individuals. Colonial rule and its aftermath were targeted as to cause Third World miseries resulting in coups, countercoups, clandestine terrorist acts, and a host of political upheaval that caused many Third World states political and economic setbacks. In the 1960s and the 1970s the driving force for terrorist inspiration was the state of Israel's robust sense of survival against the hopelessness of the Palestinians. The Iranian Revolution of 1979 added a new dimension to the Palestinian cause. Muslim religious leaders hoisted the banner of Islam and declared to the world that neither liberal democracy nor Marxist socialism holds political promise to Muslims. The Palestinians being, in large measure, part of the Muslim world, can only hope to free themselves if they open up their hearts to the dictates of fundamental Islam. By the same token, their fellow coreligionists in the Muslim world must partake of the Islamic spiritual reawakening by exercising some of the traditional tools of Islamic evangelization, such as Jihad, assassinations, and self-killing in the service of Allah. The challenge, therefore, is to call for modification of the Islamic quest in such a way that its adherents will not feel compelled to seek extralegal means to achieve their goals. At the same time, the modification should instill in Muslim citizens that the liberal values that are deeply identified with American political culture are indispensable to their adherents.

Confronting terrorism and ensuring domestic safety has become the watch word for political stability and community safety today. Not only in the United States of America, but also all over the world terrorists with little sense of tolerance are bombing and shooting at civilians killing by the dozens. The long arm of clandestine violence directed at civilians for the purpose of communicating political demands has reached the United States in September 11, 2002, erstwhile safe from direct foreign attack of such gargantuan magnitude. Even though there were numerous cases where terrorist acts could have been perpetrated in the United States, there has never been such a catastrophic devastation directed at American society before September 11. There are several reasons why the United States was immune to terrorism before September 11.

The first reason is based on institutional balance between the principle of majority rule and minority rights enshrined in American Constitution. Piecemeal adjustments of social status and political positions of minorities served as pressure valves for reducing the destructive energies and tensions that could have exploded into terrorist violence. Genuine liberalism never countenanced social hierarchy and status maintenance.

A second reason for the reduced level of terrorist act was the absence of ideological groups outside the mainstream dogma of liberalism. The right to assemble, petition the government, recall unsavory public officials from office, most of all, the right to vote and run for political office in combination with the constitutional provisions to fetter the state from exercising totalitarian control over the lives of its citizens allowed the citizen to think of himself as a master of his own political affairs instead of having to fit into a straight jacket of political and religious laws. Similarly, the "wall of separation" placed between state and religion removed the state from controlling the citizens' conscience and from taming him to the oppressive conformities of state or church dogmas. Such absence of restriction on all forms of dogmas and beliefs resulted in the absence of agitation on the basis of religious or political grievances.

A third reason is to be found in the willingness of American society to accommodate conflicting political views and permit them to thrive even at the cost of displacing traditional beliefs, values, life-styles, and cultural habits.. This third reason carries serious implications relative to the type of terrorism that is in vogue today – terrorist acts that have declared their demand to displace the conventional political culture of Western liberalism and replace them with new Islamic tenets. As far as fundamentalist Muslims are concerned, "their perception of democracy makes its application a direct violation of God's sovereignty" (Sidhamed, Abdel Selam and Etheshami, A. 1996: 21). Quranic messages earnestly cast to elicit a heightened sense of selfless dedication among the faithful motivate Muslims to explore all means and methods to extol Islam above all other faiths (Watt, Montgomery W. 1968: 30). One of the strongest motivating tools for Muslims is the call for perpetual strife to dominate and supersede any beliefs and dogmas with which Islam comes in contact. An Islamic community that does not adhere to this mission is

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considered by Mohammad's teachings as a failed community of believers. The obligation of the faithful is to awaken and revive dormant communities, and commission each believer to expand the faith "by all means necessary."[1]

The following is an elaboration on the reasons for American immunity from terrorism. The work will spell out the parameters of liberal political culture and compare it to Islamic political culture. Liberalism as practiced in the United States and other Western countries is a dynamic political system that reached its goals of extending universal rights in slow and deliberative steps. Such avenues preempted the need for agitation and reduced the passions for tempestuous politics or angry terrorist acts. Additional measures that a liberal state provides the citizen is open avenues to redress injustices and to bend backward to accommodate and expand individual liberty, equality, and justice. Individualism is an aspect of liberalism whereas communitarian constraints are an aberration and hindrance to universal freedom.

Most important are the contextual inspirations that animate liberalism and religious radicalism, such as fundamentalist religious groups. In this case, liberalism's flexibility and adoptability will be compared with the rigidities and a sense of timelessness that Islam ascribes to itself. This work will provide an analysis of traditional or "normative"[2] Islam by noting that Islam, in addition to being a religious belief is also a way of life and a political ideology. As such it does not accept reconciliation or coexistence with other religions, ways of life or ideological affirmations. Instead Islam and its true believers aspire for the arrival of the caliphate state dedicated to the universality of Islamic laws and championing with a mighty force and stringent authority to usher Islamic supremacy of the world (Weatherby, Joseph N. 2003:298).

It is not infrequent for fundamentalist groups from the Islamic faith to express their yearning for the dawn of a caliphate state as that which had existed in the early 10th century. To that end, Islam pursues a goal that is decidedly anti-consensus, anti-democratic, and anti-individual freedom. The Islamic state, Muslims believe, is an all sufficient state. The individual believer being a member of the *umma* (Islamic community) must submit to its rules and creed from which he has no right or individual freedom to disassemble. Once you are inducted to the umma, you cannot go out; neither can you reaffirm your right to choose an alternative faith in the same manner that you came to join the Muslim faith. Individualism in Islam is disloyalty to Islam (Eaton, Le Gai C. 1985:191-2).[3]

Defining Terrorism

In order to give credence to the generalizations already made, it is important that we define terrorism. Instead of venturing into the nuanced controversies of the term, here it will suffice to give a definition of terrorism that clearly describes its contemporary ethos. The controversies of defining terrorism deal with the apparent reticence of the Western media in condemning state terrorism and their readiness in attributing all acts of wickedness to non-Western acts of violence conducted under the pretext of fighting injustice. In this paper we limit the term to its lowest common denominator by defining terrorism as a clandestine political act of violence carried out by organized groups, directed against civilians and their representative institutions with aim of promoting acceptance for their ideology or political interests. This definition is not congruent with the descriptions given of state terrorism which invariably is an act of war or retaliatory measure taken by states in order to suppress insurrections. States conduct wars; regardless of their methods, they do not carry terrorist acts, because doing so would debase their institutional standard and demote the state they lead to a rogue and outlaw state. In general this definition recognizes that terrorists are cognizant of their military and institutional inadequacies resort to acts of terror. However, we must differentiate between two types of terrorists, namely secular and religious terrorists.

Secular terrorists, such as the American revolutionaries, the Chinese Revolutionaries, Menachem Begin's Irgun, the Stern Gang, and the Bolsheviks were motivated by political and ideological demands. They abhorred the incumbent political systems and wanted to institute egalitarian replacement.

Secular terrorists' objective was secular and political and the level of their dogma was not inspired by any religious or heavenly edict. Religious terrorism such as that of the Irish Republicans, the Hindus in India and the Muslim fundamentalists in the Middle East on the other hand pursues its activities inspired by spiritual scriptures goals. They are adamantly convinced of the infallibility of their beliefs that

[1] The quote here is the legendary theme of Malcolm X. He adopted the slogan after his conversion to Islam which suggests, like many of his fellow countrymen, they felt compelled to exercise the faith in its authenticity – irreconcilable, uncompromising, daring and at times deadly. His death and subsequent terrorist acts by Black Muslims in California suggests that they were living the faith as they believed it must be practiced.

[2] Montgomery Watt uses this term to point out that the authentic Islam is that which had existed during the first four caliphs, Bakr, Umar, Uthman and Ali. They are collectively known the "guided ones." (Watt, p. 36).

[3] Eaton's work is a refutation to the perceptions or misperceptions expressed by what he calls "Occidentalists." In this work, he plays his show by using terms as "profane," "agnostics" and "unbelievers" as common "blindness" of non- Muslims. As he does so, it is instructive to observe that his points of departure from Christianity are in fact the principles of Christianity attributed to Islam. In other words, he uses Christian values, attributes them to Islam and unabashedly tells us that they are principles that Christianity lacks and Islam possesses. Eaton, Le Gai Charles, *Islam and the Destiny of Man*. State University of New York, New York, NY: 1985. This volume is instructive in the scope of its polemical audacity, particularly Chapter 8.

they consider it blasphemy not to see their faith at the pinnacle of political and social positions. This paper is concerned about religious terrorism as pursued by Muslims in order to fight and defeat liberalism and to do so by spreading clandestine acts of deadly violence against civilians in order to hasten the fall of liberalism. Having given the definition of terrorism, we now ask as to why terrorism is used as a political tool to gain political or ideological recognition. Terrorists use violence because their goals are not accepted as legitimate and because they do not have other means of access to the seat of power to advance their goals.

Liberalism as an Antidote to Terrorism

It is not for the universality of its justice that America was immune to terrorist acts until September 11, 2002. It is in spite of its bitter injustices that the country did not experience acts of terrorism. Injustice in the United States prevailed ever since the American Constitution rationed freedom by putting the three-fifth compromise as part of the allocation of values and resources. Subsequent textual modifications of state and federal laws faced the arduous task of equalizing justice and safeguarding democratic principles in its authentic liberalist genre as Locke, Hobbes, Rousseau, Jefferson, and Hamilton envisioned its true and idealist aims. Even though, along the way, those who were victims of injustice, such as women and minorities, suffered their agonies and repeatedly sought redress, in the final analysis, the Constitution's long range vision of extending democracy by peaceful means triumphed. The reasons for the preemption of violence and deliberation of slow, but sure, justice is to be found in the political culture of liberalism.

Divine Rights and Political Changes

Liberal ideologies such as that of Great Britain and the United States have their fountainhead in the defiance and rebellion of the masses against absolutism that saw itself as having divine rights to rule and write the rules of ruling and succession. In other words, at the time when many liberal policies were demanded by citizens, they were realized as a result of rebellious masses that defied plenipotentiaries and were not willing to submit to absolutism and monarchism. The character and princely authorities demanded absolute submission on the basis that they were ordained by God to have deserved unquestioning obeisance. Monarchs were considered representatives of God on earth, and that obedience to the kings and queens was tantamount to obedience to God. The Church agreed and provided legitimacy and textual justification by preaching submission to those in authority. The legitimating texts were to be found in both Old and New Testaments, but most often invoked injunction was that of St. Paul's commandments when he said:

> Let every soul be subject unto the higher powers. For there is no power but on God: the powers that be are ordained by God. Whosoever therefore resisteth the power resisteth the ordinance of God: and they that resist shall receive to themselves damnation. For rulers are not terrors to good works, but to the evil. (Romans 13:1-3).

This is one of the original injunctions that established the duality of spiritual and political demands. It commands believers to submit themselves and give priority to the judgment of those who possess authority over their own conscience. For centuries, European citizens observed this cardinal law as their Christian duty to God, kings and country. However, over the decades, a slow undoing of absolutism and divine rights started. Eventually these reforms, innovations and interpretations brought about the liberation of the European citizen from the grip of ecclesiastical and princely dictates. Fredric L. Cheyette described the phenomenon as follows:

> Christianity and the remains of classical learning reached everywhere, touching the poor and illiterate, as well as kings and prelates. To villagers, these two influences eventually provided the lever for prying a modicum of independence from their lords (Cheyette, Fredric L. 1968:9).

What is instructive in Cheyette's observation is the capacity of Christianity to serve as a liberating force as well as a spiritual sustenance for the believer's soul. In that it can encourage and equip the citizen to exercise independent thinking while empowering him with freedom of thought and act is a unique quality. This quality is the nexus where liberalism, enlightenment, and innovation of thoughts and acts meet to permit man to push forward in refining and modifying civilization. Liberalism has its roots in the teachings of the Gospels and the general precepts of the Old Testament where free will, freedom of choice, and individual accountability are enshrined.

Barrington Moore makes similar but a more pointed observation in his study of revolutions in England, France and Russia. Moore's masterful study of revolutions and violence is instructive not in the static nature of European political and ecclesiastical dogmas, but in their inevitabilities to changes under the weight of liberal forces. Moore observing the 14th century political transformation of England to secular liberalism stated "A modern and secular society was slowly pushing its way up through the

vigorous and much tangled overgrowth of the feudal and ecclesiastical order (Moore, Barrington, 1968: 4). Such a gradual change took place not as a result of the revolutionary climate, terrorism and civil wars that flared up in the 15th and the 16th century England, but in spite of them and in direct negation of their hindrances to peaceful change that they had become. Moore further noted "Both the capitalist principle and that of parliamentary democracy are directly antithetical to the ones they superseded and in large measure overcame during the Civil War [1648]: divinely supported authority in politics, and production for the use rather than for individual profit in economics" (p.20).

Great Britain's retreat from monarchism and ecclesiastical dominance and embrace of liberal democracy came about by peaceful agitation, consensus, and reforms. These enlightened moves that served to transform Great Britain as well as pave the way for other countries, most of all to its colonial offspring in North America. The transformation inspired reason and objective expectations in the thinking of citizens who became acculturated to make their demands expecting to see results. This is what political scientists call efficacy – an ultimate sense of political worth and citizenship thereby preempting the lusts of terrorist demands.

Obsolescence of Terrorism

The seeds of liberal political culture were thus planted and, even though there were interruptions and dysfunctions along the way, gradually germinated to breed a series of cataclysmic changes. Enlightenment dawned and it ignited creeping revolution of liberal thoughts. Among these momentous events that had roots in the concept of natural rights and rights of man were the liberalist revolutions led by farsighted vanguards among which are American revolutionaries of 1776 and the radical populists of the French Revolution. Some of their outcomes are the 1791 First Amendment Rights of the American Constitution. In Britain it was the inauguration of the 1832 and 1868 Reform Acts that fulfilled some of the promises. These two acts expanded male franchise and went a long way in eliminating property as a prerequisite for voting and citizenship rights. The liberation process continued in the United States with the addition of the post-Civil War Second Bill of Rights.[4] The 13th, the 14th, and the 15th Amendments were promulgated by the US Congress to abolish slavery, confer full citizenship, and extend full franchise.

Charles O. George summarized this phenomenon by describing the effects of the English Revolution as follows:

> The English Revolution completed the religious and humanistic rhetoric of liberty and justice begun in the tension-ridden Europe of the fourteenth century. The ideals which lifted the hearts and strengthened the arms of millions in revolt since Cromwell rode with the Levellers were fired in the genius of the English Renaissance by men who struggled for all the freedoms of which the European imagination has proven capable. The dynamic secular dogmas which move our world - democracy, socialism, and libertarianism- were given imperishable form and life by Cromwell's England (George, Charles O. 1962:70).

The above statement, even though Eurocentric in tone, can be stretched a bit more to apply it to non-European states such as pre-Islamic Egypt, Ethiopia, and Byzantine. Before Islam obliterated their Christian geniuses, they held signs of liberal innovation in their own right and in their own time. And the irony of their early liberal awakening may be found in the birth pangs of 10th century revolutions that begot still-born freedoms. The theological debates on the question of Church and state as well as the divinity of Christ weakened the established institutions allowing Islam to take advantage and occupy the vacated space (Trimingham, J. Spencer1965). The Byzantine Empire was erased by the might of fervent Islam as was the Christian institutions in Egypt and Asia Minor.

Whatever remained of its early life, the Church hierarchy was circumvented from political moralization and settled down to becoming the nominal guardian over the soul of the believer. Unfettered political adventurism on the part of the citizen expanded the scope of his thinking. The individual can now think for himself and seek political guidance by exercising his native faculties. This political inspiration, flowing from the fount-head of Christian teachings, flooded Western societies with the quest of enlightenment. The clarion call for freedom, liberty, equality and justice aroused passions for revolutionary uprisings culminating in the successive victories through the means of plebiscite politics. Liberalism as a political culture was enshrined as a practical politics bringing together competing ideas to thrive as they tested each others' worth in the market place of ideas without the overbearing preponderance of church and state.

The explosive entry of communism posed a brief threat to liberalism, but it also proved to us that it may have failed because it lacked the edifying experiences that molded and solidified the credentials of liberalism. Likewise, fascism expired to ashes in the violent fires it ignited. It sought to exert its might by

[4] Justice Thurgood Marshall's term for the 13th, 14th, and 15th post Civil War amendments. In Levine, Herbert M. Point Counter Point: Readings in American Government, N.Y.: St. Martin's Press, 1998:5-9.

dogmatizing and adulterating the tolerant principles of Christianity and opting for *exclusionary dominance*.

Historical records show that the liberal "temper" and its penchant to push the envelope further to radical innovations was replicated in North America. The American Church in the early 1700s experienced problems of decentralization and accountability of the believers' political and religious ideals. The inherent quest for freedom was too intense to tame.

> The clergy often administered their congregations with difficulty. Anglican and several German sects maintained close ties to mother churches across the Atlantic, whereas other denominations attempted to centralize authority. However, most efforts to tighten organization and discipline were ineffective. ... Despite compromises and innovations, most church leaders saw creeping religious apathy when they surveyed their towns (Nash et al, 1998: 129).

The precepts of liberty were too strong to submit to the taming powers of Christianity and church. That is another nexus where the tenets of liberalism begin and where the principles of natural rights start.

Liberation from the grip of monarchs was spearheaded by reformers, revolutionaries, and through legislative ultimatums such as the Magna Carta. The character and direction of the changes had two characteristics. First they had a universal goal in mind as they were launched. They were not parochial or exclusionary. Second, they aimed at liberating the citizens and according him individualism by noting the "law of nature" endorsed the rights of man. This meant total liberation of the citizen as a master of himself and slave to no one.

The universality of liberalism advanced the view that civil authority rested on hands of citizens. Citizens coming together in harmonious interactions could decide to put in place the political structure, function, and outcome of their institutions. In order to reach this political purpose, citizens would have to design a blueprint for the form and charter of their government. Subsequently, constitutions and legal customs emerged laying the foundations of secular governments.

Liberalism springing from the scriptural foundations of Christianity, allowed the citizens to pursue their interests by peaceful means. It may have gone through phases of revolutions, civil wars, institutional corruption, and glaring injustices such as colonialism and slavery. Yet in the final analysis, the essential rules of sustaining freedom, inclusion, and equality triumphed. Terrorism as a path for liberty became counterproductive and less appealing. In such events where acts of terrorism may have been practiced in liberal states, its purveyors were anti-freedom movements who had foresworn the rights of man and subscribed to the perversion of racial supremacy under authoritarian oppression and delusions of world domination of the type preached and attempted by the Fascists who ignited the Second World War.

Political Culture of Institutional[5] Islam

In similar pattern as the liberal ideology forced its birth from the Judeo-Christian[6] tenets of free will and individual choice, the totalitarian bent of orthodox Islam as reflected in the aspirations of Muslim fundamentalists can be traced to the principles of the Islamic creed as spelled out in the Qur'an and the Hadith. These two sources of Islamic inspirations are the holy edicts of the faith. In their authentic pronouncements, they communicate strict guidelines for the establishment of an Islamic state that has the preponderant dominion over the will of the individual as a member of the *umma,* community of believers.

The true believer is one who embraces a totalitarian Islamic state. As measures of his dedication and devotion to its rise, the true believer struggles with all of his being to work for the recovery of the first Islamic state that has existed at the time of Prophet Mohammed and his immediate successors, Abu Baker and Umar. In the quote below, Bernard Lewis captured the theological dogma and political essence of Islam. He stated:

> In the classical Islamic view, to which many Muslims are beginning to return, the world and all mankind are divided into two: the House of Islam, where the Muslim law and faith prevail, and the rest, known as the House of Unbelief or the House of War, which it is the duty of Muslims ultimately to bring to Islam. But the greater part of the world is still outside Islam, and the faith of Islam has been undermined and the law of Islam has been abrogated. The obligation of holy war therefore begins at home and continues abroad, against the same infidel enemy. (Lewis, Bernard, 1992:174).

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[5] The term "Institutional Islam" is used here to refer to the authentic tradition of Prophet Mohammed's teachings in their totality as offered in the Qur'an unmolested by modifications and translations. See Bernard Lewis, Islam and the Arab World, New York, NY: Alfred and Knopf, 1976:9-24; David George in Abdel Salam Sidhamed and Anoushiravan Ehteshami, Islamic Fundamentalism, Boulder, Col.: 1996: Westview Press, 1996: 71-90.

[6] The term "Judeo-Christian" is used here for lack of a strait forward concept that would describe the evolutionary process and sources of inspiration for the political culture that recognizes the rights of man as well as all the attendant rights of citizenship. It is not meant to communicate religious chauvinism.

The dichotomous world-view inherent in the "House of Islam" is also the entrenched cultural consciousness that serves as a motivator and inspirational boost for the believer to ever be vigilant even to the point of death, for the believer of Islam is not afraid of death for the cause of Islam.

The Islamic state and its religious culture as well as political and military methods as it was founded by the Prophet and nurtured by Abu Bakr and Umar is the orthodox or "normative" Islam that Muslims must yearn in order to demonstrate their dedication, devotion, and authentic loyalty to the faith, the Prophet and Allah (Lewis, Bernard 1976; Watt, 1969).

The Values and Beliefs of Islam

Muslims believe that the Qur'an is a divine recitation that was communicated to Mohammed from God over a span of many years in the Prophet's life. It contains utterances, vision statements, and spiritual inspirations said to have come to Mohammed from God through the Angel Gabriel. Muslims place ultimate authority and unquestioned devotion to the Qur'an and the messages contained therein are incontrovertible and final truth. The essence of the recitations is that they call for godly life on this earth. Doing good, being honest, a dedicated life to God, and a life given to the will of God in complete submission to God's will. The Qur'an contains fragments of the Old Testament episodes, but tends to overshadow Old Testament facts with the spasm of visions and subsequent recitations of the Prophet. The overriding message of the Prophet undiluted by second hand modifications asserts that Islam was born to replace Christianity and other faiths that had existed before it and that Mohammed is the last Prophet of God. All other forms of religious and political beliefs and practices are void and false. Orthodox Islam, therefore, must parallel the guidelines of the Qur'an. Any doctrine that attempts to deviate from this "truth" is deemed heresy and, as far as fundamentalist Muslims are concerned, the only Muslim states today that have approached the orthodoxy of the true Islam are those of Iran and Sudan as they were instituted between 1979 and 1984.

Whereas in liberal states and societies constitutions lay the groundwork for structuring and empowering governments, in Islam it is the Qur'an, the Muslim holy book, that lays down the rules of governing societies. The Sharia, a body of legal commandments and rules, are guidelines for governing the life of the believer. They are also the means and ends of governments. The methods for governing the community's behavior in relations to its members and to the other world are spelled out in this body of laws with clear anticipation that they will be observed by all true believers (Kennedy, H. 1986:33-49).

Duncan Macdonald observes that in Europe the church and the state exchanged domination of the citizens' lives and eventually the state divorced itself from its affiliation with the state. In Islam, the pattern is all together different. He stated:

> But in Muslim countries, Church and State are one indissolubly, and until the very essence of Islam passes away, that unity cannot be relaxed. The law of the land too, is, in theory, the law of the [mosque] (Macdonald, Duncan B. 1903: 3-4).

The *Sunna* is another body of Islamic custom enumerating Mohammed's sayings, instructions, habits, and his overall deportment as remembered by his followers and recorded in the *hadith.* As described by Muslims, the body of religious edicts recorded in these works governs the *Umma,* the believer, and the political institutions that must be governed by the Islamic Laws, the Sharia. Outside these edicts, there is no law but that which was given by Mohammed, and there is no God, but the God that is declared in the context of Mohammed's teachings (Watt, Montgomery W. 1968: 20-26).

Over the centuries, Muslim scholars seem to have conflict between wanting to preserve the authenticity of Mohammed's teachings or modify them to fit the times. This dilemma spawned cataclysmic episodes nearly in all of Islamic history. In a uniform sense of indefatigable conviction, regardless of dogma or not, Muslims define their identity by reinforcing their dedication to the faith and considering it treasonous to abnegate its texts. Death, both physical and spiritual, awaits those who depart from the faith, the umma and its textual injunctions.

According to Bernard Lewis, "Islam is not merely a system of belief and worship, a compartment of life, so to speak, distinct from other compartments which are the concern of non-religious authorities administering non-religious laws. It is rather the whole life, and its rules include civil, criminal, and even what we would call constitutional law" (Lewis, Bernard, 1993:4).

After the Prophet's death, Abu Bakr enforced what he said were the Prophet's wishes. Hugh Kennedy describes the pledges and the promises that the Prophet instructed. Kennedy noted "The Prophet had punished those who broke their alliances with him and had forced them to surrender to his authority, and his Caliph was going to follow in the same tradition" (Kennedy, p. 54). Hence, Abu Bakr, the first successor Caliph, preoccupied himself with a formal implementation of what he said the Prophet aspired and instructed. His successor, Caliph Umar, carried the torch with added charisma and furious dogma giving Islam its future path that he said Mohammed wanted to tread. Islam as a totalitarian system of politics and as unabashedly dogmatic faith flamed over the Middle East and North Africa destroying in its

wake all other faiths and political systems in a blaze of a violent revolution.[7]

These two caliphs took to heart the first ferment of Islamic zeal under the Prophet's oracles and presided over the first stage of Islamic revolution. Under Bakr's rule, and subsequently under the overawing onslaught of Umar, Islam institutionalized dogmatism and intolerance of other faiths. Its disciples and military men marched forward determined to uproot other faiths and replace political orders that had preceded it in those lands they invaded and conquered. Today, the inspirational foundation of the Islamic political culture is the anticipation of the believers to witness the early state of affairs that launched Islam to a world empire of faith and politics.

Muslims yearn for a dispensation that mirrors the Prophet's days. They also believe that this hunger and thirst can only be realized by a revival of faith that endorses political activism and projects military and political power. From their ranks, the Wahabis and the fundamentalist groups who have been carrying out terrorist acts see themselves as the first martyrs towards that goal (Schwartz, Stephen, 2002). They both are puritanical in their belief and "insist that the only course open for true Muslims is to revert to a literal observance of the injunctions of the Qur'an" (Farah, Caesar E. 1968:15). The patterns of their dogma are based on their belief that Islam is a religion with a universal mission, and that it is a timeless faith in its orthodoxy and practical application.

The Ideals of Islam

Islam, in the mind of its adherents is different that the Islam of its observers, particularly Western observers. The maximum expectation that Westerners have of Islam is for Muslims to practice democratic methods of governing. Multiparty politics, free media, individualism, and separation of religion and politics are what Westerners expect of politically modernized Islam. Muslims have different mindsets and different expectations of Islam. Muslims hold to the view that true Islam is one that extols the Qur'an as a governing text as well as a guide for individual life within the confines and watchful eye of the community of believers. Becoming modern, endorsing multiparty politics and freedom of expression, and introducing new thought and methods that would supersede or even complement the Qur'an are heresies. Essentially Muslims have specific ideals about Islam and the most authentic of them are those that go back to the era of their Prophet and attempt to emulate his goals, methods, and struggles. They deeply believe that Islam is timeless, universal, and an incontrovertible word of Allah (God).

Timeless Islam

The political culture of Islam is governed by stern qualities and rigid rules. Flexibility, compromise, reform, modification of traditional thoughts, doctrinal consensus, tolerance of other faiths, individual autonomy and individual freedom are antithetical to the teachings of Islam (Spuler, Bertold 1965:25). Islam means submission, giving up, surrender, acquiescence, and being accounted for in the fold of the community of believers, the *Umma*. Oliver Roy defined the concept of Umma to its purposeful end. He stated:

> The ideal Islamic society is defined as *umma*, an egalitarian community of believers. The political concept that expresses *umma* for Islamists is thus *tawhid* 'oneness,' the negation both of social class and of national, ethnic, or tribal division. All differentiation is inherently a negation of *umma* (Roy, Oliver, 1994:71).

Roy continues to point out that any political or religious thought that attempts to negate or adjust the umma's methods or practices is considered a path to *fitna*, a schism which the community finds intolerable and a threat to community solidarity that must be confronted with all of the vigor that the community can muster.[8] A concatenation of theological traditions, political and military experiences woven together to create an approximate picture of the Prophet's visions and teachings govern the Islamic political culture. Since Islam, in the belief of orthodox Muslims is timeless, it is also a universal faith that must be propagated at all cost by the "faithful."

Universal Islam

Mohammed labored with might and superhuman energy to propagate Islam and to make it a

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[7] Muslims will give justifications for the ferocity with which Islam was pushed down the throat of Christians in Saudi Arabia, Egypt, Syria, Iraq, the Byzantine and the adjacent regions. Invariably, the justification is that Islam was better for the populations of the region given, they say, that the faiths and political establishments of the day were riddled with corruption and their citizens fared better with Islam (Kennedy, H. 1986:66; Eaton, Charles Le Gai, 1985: Chapter 10). Eaton's text is a polemic laden with contempt against Christianity. Its merit is that it is instructive in that it reflects the traditional Islamic points of view in considering other faiths as inferior to Islam. He develops the term "Occidentalism" as a code word to emphasize his views that Western Christianity is a decaying system of "materialism".

[8] The Prophet was adamant about community solidarity. He exhorted and demanded total allegiance to each member of the *umma* and complete ostracization of non-members. *The Constitution of Medina,* in Watt, Montgomery W., Islamic Political Thought, Edinburgh Paperbacks, 1968: 130-134.

universal faith. Within a short time, the faith enveloped all of Arabia and was knocking at the gates of the Byzantine Empire in all of Asia Minor and North Africa. His vision was briefly interrupted when he died.

As soon as Mohammed died, the pressing agenda for the umma was enthroning Mohammed's successor. The process of selection exhausted Islam's sense community and plunged the believers into bitter and deadly rivalry. The intensity of the division split the faith into the Shia and the Sunnis (Kennedy, Hugh 1986: 50-81).

The first successor, Abu Bakr ruled for two years. He set the pace for Islamic imperialism taking his orders from the last departing words of Mohammed. His primary task within his short rule was to consolidate the faith by waging war of apostasy known as the *Ridda* wars, religious wars aimed at prevention backsliding from the faith. These wars of *Ridda* also enforced forced conversion to Islam in Syria and Arabia.

After Abu Bakr died, his designated successor, Caliph Umar took the helm and ruled with might and fury. Umar was a fearless zealot of commanding personality, and unparalleled organizational acumen. He revived the faith and expanded its writs in North Africa razing down and ransacking the ancient Christian realms. He destroyed their cathedrals, and built mosques right in the same locations. He did the same to the Holy Land, Persia, Iraq and Syria. Umar was also an expositor of the Qur'an and many of the customs such as veiling of women, prohibition of alcohol was instituted by him. He set terms of survival for Christians in his Pact of Umar guaranteeing Christians and Jews safety as long as they pay survival taxes and as long as they refrain from preaching to Muslims, building and rehabilitating churches, or conducting religious ceremonies out in the open. He declared Islam as a universal faith and those remnants of other faiths within his realm were allowed to survive, but not thrive He was assassinated by a Christian slave from Persia in 644. His successor Caliph Uthman, an ally of the Prophet's favorite widow, Aisha, was of lackluster quality. He lacked the dodged determination of Bakr and the flamboyance and leadership aura of Umar. He was also assassinated in 656 and succeeded by the Prophet's cousin and son-in-law, Ali bin AbiTalib. Ali exhibited fervent zeal to match his heritage. He was not diplomatic; neither was he astute politician in the deadly intrigues of his time. Ali's reign brought bitter civil war within the umma. The Umayyad Dynasty from Mecca that included Aisha supported a caliph named Mu'awiyah and wanted to challenge Ali's legitimacy. Their conspiracy climaxed in the assassination of Ali in 661. Ali today is the patron caliph of the Shiites whose anger over their caliph's assassination has not died down even today. Thus Islam from its early beginning was in the heat of violent civil war conflagrations that entailed the violent death of three of its four founding caliphs.

The Shiites and Sunnis themselves are divided into a dizzying array of tenets, sects, customs, and organizational methods (McDonald, Duncan B. 1903). What they all share is their common adherence to the basics of Qur'anic laws, their common political culture. "Mohammad's deeds and conduct are viewed as absolute standards, prophetic significance is ascribed to his commands, and efforts are made to regulate everything as he would have done (Spuler, Bertold 1969:17). Muslims believe the Qur'an according to its authentic recitations should be sacrosanct and immune from the defilement of interpreters who themselves can be corrupted by human failings. The political culture of Islam internalizes in the mind of the believer that his faith is superior to other religions.

> For Muslims, Christianity was an abrogated religion, which its followers absurdly insisted on retaining, instead of accepting God's final word. They could be tolerated if they submitted. If they did not, they were to be fought until they were overcome and either accept the truth of the Muslim faith or submit to the authority of the Muslim state (Lewis, Bernard, 1993:7).

The faith and the dictates of the Qur'an are fixed and sealed never to be modified, scrutinized, or innovated upon. The Qur'anic law that demands the amputation of the thief's hand is an immutable text and it cannot be changed or questioned. However, the application of the law can vary depending on the circumstances and places. Fundamental reform or modification of the law is forbidden, but the method and the degree of application of the law can vary. In this case, there is no structured rule of application, precedence, constitutional symmetry, and constitutional uniformity. There is a uniform text, but not a uniform application of the text (Lewis, Bernard, 1976:32). According to Hassan al Turabi, the pseudo-imam of the Sudan before he was imprisoned by the Sudanese government in 2001:

> The Sharia itself is not one standard code observed worldwide in a monolithic way. It is applied in a decentralized way according to varying local conditions. Different Muslim communities have different schools of law" (Hassan al Turabi, 1994).

Over the centuries, numerous scholars, and Islamic groups had introduced movements with conflicting goals and theological explications with the aim of modernizing the message (Taylor, Alan R. 1988:ch. 4). In the large amounts of debates that ensued nearly all of them settled to a situation of agreeing to disagree. In general, the forces for maintaining traditional Islam, in as much as it is authentic as it was first recited and recorded, seem to always have the upper hand. There is an apparent fear that innovation of the teachings could open up floodgates for wider reforms thereby invalidating the initial

messages of Mohammed. Such fear has lead to a deadlock with respect to doctrinal modifications in large part, because Islam does not allow it or tolerates it.

> Islam had begun as a purifying religion based on Mohammed's rejection of false gods and distorted values. Awareness of this aspect was heightened at a time when many had come to regard the Middle East as polluted by Western secular culture. The West was identified as antireligious and antisocial, contemptuous of the morel principles essential to the preservation of virtuous community. The cult of the individual, manifested in the decadence of its atomistic youth culture, was in direct defiance of the traditional Islamic view of society, which had always been based on interlocking family relationships and the idea of ordered *umma* (Taylor, p51).

The source of this deadlock with respect to innovation and the proclivities of the political culture for its rigid dogmatism is also based on the belief that Islam is the final word of Allah.

Islam as a Terminal Seal of God

Islam, according to the traditionalists and fundamentalists, is the end of all previous prophesies. It is the necessary and sufficient condition for fulfilling the will of Allah. This view finds expression in the claim that the faith is tolerant, inclusive, and universal. However, these attributes apply only with regard to those who accept Islam as their faith.

Islam sees itself as a religion of brotherhood of all peoples who endorse the faith. The believer is a citizen of no state; he or she is a citizen of the Islamic community. Even though Islam allows diversity of religious practices, it never tolerates for its members to hold or promote points of views that attempt to introduce new interpretations that shed some light to some contradictions.[9] Only theories that can reinforce the orthodoxy to resemble to its traditional spirit and form are deemed acceptable within the Islamic interpretation. A generalized view of the Islamic message, the believer, and the Umma show that Islam is a self-reassured final faith with a superiority right to all other faiths that had come before it. It sees itself as incontrovertible truth sufficiently equipped with timeless tenets. This self-assurance is to be reinforced by the Imams, Qura'nic expositors, who must guard its integrity and authenticity.

Alan Taylor describes the visions and aspirations of Islam in its quest for dominant status relative to other faiths. He said:

> The *umma* seeks to enlighten its adversaries, though it cannot compromise with them. Ideally, victory should be followed by the conversion of the vanquished. Conquered monotheists who chose to remain Christian, Jewish, or Zoroastrian could do so, but as *dhimmis* (protected subjects) with lower status and higher tax responsibilities. The few who rejected any monotheistic commitments were either enslaved or executed (Taylor, Alan R. 1988: 16, emphasis in original).

The above quote carries the central elements of Islamic political culture confirming that submission to Islam is an eternal goal. Community pressure to promote the faith to non-Muslims is subscribed as an eternal duty of the *umma*. For instance based on the imperatives of maintaining community solidarity, apostasy or conversion to other faiths is a capital crime. Muslim clerics and scholars will employ intense energy to recruit believers from other faiths, but they will protest vehemently when other faiths attempt to recruit Muslims to join other faiths (Watt, Montgomery 1968:51).

As the 21st century starts, the sense of defensive zealotry that had inflamed passions among Christians in the past centuries has subsided in the Christian realm. In the Islamic countries, religious fervency extravagantly financed with petrodollar and inspired by the blindly rigid policies of Wahabism[10] rages with intense hatred against Christian apostasy. Muslims consider it their duty and obligation to carry out evangelizing campaigns using multifaceted methods including charity, coercion, and political pressures as is currently in vogue in such countries as Sudan, Egypt, Britain, France, and the United States. The characteristic openness of liberalism that permits all ideas and beliefs to compete in the market place of ideas is conducive to Islam, a faith that does not allow its followers to endorse any of the values of liberalism.[11]

From the above cursory analysis, we note that Islam has a sense of supremacy and doctrinal

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[9] Over the centuries, Muslim jurists and theologians have continued to debate different theses derived from the Qur'an and the Hadiths only to settle into disagreements and factional positions. All subscribe to the deeply held belief that Islam is incomparable to other faiths, and that it must not be subordinated nor settle into parity to conciliatory consensus with other faiths. Macdonald, Duncan B. Muslim Theology, Jurisprudence and Constitutional Theory, Charles Scribner's Sons, New York: NY. 1903: 65-72

[10] Schwartz, Stephen, The Two Faces of Islam: the House of Sa'ud from Tradition to Terror. Doubleday, New York, NY: 2002). Schwartz is strident on Wahabism and its ills. His analysis suffers from the superiority complex often exhibited by Muslims in thinking that Islam is a superior faith if it were not for fundamentalists and Wahabis. Its variant, secular or modernized Islam, is presented as possessing qualities lacked by Christianity.

[11] In 1994, Lois Farrakhan demanded that Sudanese Christians convert to Islam, failing that to refrain from acts that are not Islamic in their purpose and aim such as eating pork a staple culturally detested. The overall implication of his message was a call for their conversion to Islam.

completeness. It sees itself above and beyond any laws and constitutions that any human being or community can create. Constitutional issues such as the Bill of Rights or the First Amendment Rights that are recorded in the constitutions of liberal states are not acceptable to Islam. Freedoms of speech, freedom of assembly outside those authorized by the umma, and freedom of worship, and of freedom of proselytizing are severely restricted, if not totally condemned.

The Methods of Islam

Over the centuries, Islam has utilized spiritual and practical methods to advance the Islamic political culture and faith. Some of the methods for spreading Islam have religious bases to rationalizing their fulfillment. Others seemed to have been mundane and earthly with cleverly framed political goals. We mention here two religious methods and two secular methods that the Prophet employed to propagate Islam. Two of the religiously approved methods employed by the Prophet himself are *Razzia* and *Jihad*. The secular methods are pragmatism and passive conspiracy.

Pragmatism

Pragmatism was refined into an effective tool of spreading Islam long before William James or John Dewey preached pragmatism as an aspect of American political culture. Mohammed himself practiced convenient reasons to change his words of promise in contracts he made with his hosts at Medina where he was given a shelter after he had been driven out by his fellow towns' people in Mecca (Andrea, Tor, 1960: 173-191; Kennedy, Hugh 1986:50-58); Taylor, Allen R. 1988:16). Whatever acts of exhortation or punishment that he shared or inflicted on those whom he targeted as enemies of Islam, he applied elastic rules of what he said was God's law. Edward Gibbon noticed this and described the convenient interpretation of God's will by Mohammed as follows:

> Instead of a perpetual and perfect measure of the divine will, the fragments of the Koran were produced at the discretion of Mohamet; each revelation is suited to the emergencies of his policy and passion; and all contradiction is removed by the saving maxim that any text of Scripture is abrogated or modified by any subsequent passage." Gibbons, Edward. Volume 4: (No Year of Publication): p. 345.

Intuitive pragmatism as an essential technique of survival served Mohammed well He was able to use it effectively for maximizing his influence by manipulation of events and situations. Rather ironic, the time when the Prophet was earnest about his preaching, between 622- 625, and at the beginning of Islam's founding, was the period when he used earthly methods as an effective instrument for gaining acceptance. In addition to pragmatism and practical politics, the Prophet relied on strong-arm tactics to subdue and subjugate his adversaries. As he rampaged and raided, he told his followers that the exercises of power, as well as practical pragmatism were divinely sanctioned means for advancing Allah's orders. These combination of political and religious justifications served Islam well in its forward march.

Passive Conspiracy

When the Prophet started his preaching, he attracted anger and hatred from his townsfolk in the city of Mecca. His preaching was against their beliefs and, as his determination persisted, they were not going to tolerate him. They chased him out of town and forced him to flee with his followers to Medina. This flight is known in Islam as *Hijrah*, and those who fled with the Prophet were known as the *Muhajirun.*

After much wonderings and near-miss escapes, Mohammed and his followers settled to a life of refuge in Medina. Quickly, Mohammed and the people of Medina agreed to the Medina Covenant. This treaty set the tone for community behavior and laid the groundwork of Islamic governance. In other worlds, the core of Islamic law with respect to Muslims and other faiths was constructed at this time. This treaty was also to become the bedrock, and the common denominator of all Islamic persuasions, regardless of their factional differences in terms of all administrative and political methods. Subsequent Islamic attitudes, values and methods were germinated in the rules and precedents that Mohammed laid down at Medina and the subsequent edicts that he enunciated with respect to worship, the rules governing believer's conduct, rules and reasons for war, methods of war, and most critically, how Muslims must deal with non-Muslims.[12] Of course, the Qur'an and the Sharia are the primary instructions of life to governments and believers leading the faithful as to how to conduct their lives and to refrain from any act that could deviate from the "right path" of Islam (Macdonald, Duncan B 1903: 10-25; Kennedy, Hugh 1986:40-49). The Covenant did not sit well with the Jewish and Christian population of Medina. Soon resentments, division and hostilities between Mohammed's helpers and those who did not accept his teaching simmered to a boil.

[12] The Prophet's teachings, visions, legal verdicts, prescription for believers' and his own life styles were formed mostly at Medina.

Those who welcomed him were known as the *ansars* or helpers. Even though their contract stipulated that he was to respect their interests and their lives, eventually, Mohammed and his *Muhajirun,* particularly Umar, were engaged in passive conspiracy to undermine the Medinites. They watched and waited as the disagreements between clans, tribes, and religious affiliations escalated and boiled to violence, quite a few of them encouraged by Mohammed and his followers. Eventually, Mohammed and the Muhajirun found pretexts to abandon their promise and they demanded the whole town to accept Islam. Failing that, Mohammed and his entourage exonerated themselves for acts of persecution by saying that those Medinites that rejected his teaching were responsible for the atrocities and harsh measures that was to be meted against them. The earnest spirit of cooperation and mutual understanding that the *Muhajirun* and Mohammed built with the Medinites and a segment of the ansars died down, superseded by the legitimacy that Mohammed earned in the surrounding territories. The ansars were in a position to feel they have neither the right nor the might to ascertain their sense of independence or protect their political status after the Prophet's death. Some of those who resisted to the teachings of Mohammed were massacred and a few of their remnants forced to a life of exile in Syria.

On many similar instances where the Prophet perceived that cooperation with non-Muslims was essential for his survival he committed himself to abiding by his contracts. However, nearly all of the treaties, and contracts that Mohammed agreed upon with his adversaries were observed by him only provisionally to the chagrin of his interlocutors. The moment he realized that he has gained strategic advantage from such binding treaties or contracts, he never hesitated to turn around and renege on the agreements. He proceeded to ruthlessly enforce his will by bloodshed and terror against those who refused to submit to his will. At times he employed punishing atrocities against Jews and Christians by claiming to have been directed to do so by divine orders from God. His successors, particularly Caliph Umar, intensified the zeal. It was difficult for Mohammed and his successors to see that the Jews and Christians in Arabia, North Africa, Persia, Syria and Yemen also relied on divine inspirations to reject the Islamic teachings.

Holy War?

By today's standards, there is nothing holy about war. Even the war mongers who speak of "just war" do so as an easy excuse to conduct violence. The notion of *jihad* internalizes such a predicament. Invariably, war is an expression of power conducted against an adversary with an intention of inflicting defeat and humiliation. Islam quickly mastered the acquisition of power and used jihad as an instrument for expansion of the faith.

The type of power that the band of believers exercised under the direction of Mohammed was decisive, ruthless, and far reaching in the relentless persecution of umma's enemies. The most efficient methods for spreading fear and dread among non-believers were *razzia* and *jihad*. *Razzia* was a method of war that was used to defend, sustain and propagate the faith. Razzia in actuality can also be translated to mean guerrilla warfare with the aim of plundering and raiding unsuspecting communities and confiscating their properties, residences and sending them to exile (Watt, Montgomery W. 1968:14-30). The most significant aspect of razzia was that it involved clandestine attack and raid of unsuspecting civilian merchants, farmers, villages, and market centers and expropriating their properties and enslaving whoever is alive after the attack. The raid was frequently used and its consequences justified by the Prophet as an acceptable element of Jihad. Jihad, on the other hand, was a method of spreading the Islamic faith and political culture by means of open warfare against non-Muslims. It was also a personal commitment on the part of the believer to stay in spiritual awakening, to strive to promote the faith and to be a better Muslim by observing all Islamic injunctions. Jihad is a struggle for spiritual purity in the ways of Islam and a personal determination to contribute by way of life and limbs to the spread of Islam through wars, insurrections, proselytizing, coercion and inducements (Lewis, Bernard, 1976; 1989; Sidhamed, A. S. and Ehteshami, A. 1996: 28-32).[13]

Between the time of Mohammed's initial encounters with his revelations and his return in 622 to Mecca to avenge his earlier persecution, he and his followers began their mission by mixing religious work with military adventures. They progressed to higher level of religio-political missions and made their living by confiscating the properties of those who refused their call to accept Islam. Rampaging villages and trading posts of those non-Muslims and emptying them of their inhabitants or sending them off to exile in distant places was acceptable to Mohammed. Those who submitted to his teachings and the political rules he constructed were accepted in his fold as second class members of the umma. Plundering and ransacking passive and unsuspecting communities and forcing them into situations where they must choose between accepting Mohammed's teachings or face the cruelties of atrocious punishments marked

[13] Most scholars, particularly of the Western genre, are patronizing to the extent of glossing over Islam's internal proclivities for exclusion and its inherent practices of intolerance. Their justification invariably is that Islam like Christianity does not differ in its political ends. Christianity is just as intolerant or as violent as Islam may be, they argue. They leave out the contrasting scriptural injunctions of the two faiths. Examples of this type of work are Farah Caesar E. Islam: Beliefs and Observances, Barron's Educational Series, Inc., New York, 1968; Kennedy, Hugh, *The Prophet and the Age of the Caliphates*, Longman, London, 1996; Watt, Montgomery W. Islamic Political Thought, Edinburgh University Press, Edinburgh, Britain, 1968.

the rise and prosperity of Mohammed and his followers. Most effective for accomplishing this task was the use of jihad.

In recent years, the term *Jihad* has been given a point of view that connotes holy straggle for maintaining spiritual vigil (Lewis, Bernard 1993:9)[14]. However, in its authentic form when Mohammed invoked the word *jihad*, it was used as a call to arms. Jihad was part of the "five pillars of faith" before it generated emotional controversies that stigmatized the faith as endorsing violence. It was dropped, but its functional usefulness was openly tolerated by Muslims in the mosque sanctuaries reminding the faithful to spread the faith through struggles that included wars.

As Mohammed preached the oneness of God, he also used God as a source of direction as he conducted his numerous wars. When Mohammed and his followers wanted food to eat and water to drink, they did not call upon God to provide them with manna from heaver and water from the rock. They employed guerrilla tactics against innocent traders and inflicted debilitating fatalities. It was more dreadful and a source of perpetual fear and insecurity to be a neighbor of the umma.

By combining spiritual fervency with military and guerrilla warfare, Mohammed set the wide parameters under which the community of Islam can define matters of peace and war and matters of diplomacy and hostility. From a historical context in the nomadic Middle East and North Africa, ultimatums for surrender of faith and deprivation of personal right, raids and unprovoked wars of aggression might sound benign in their consequences. From the nomadic and Arabian points of view of the time, such activities then have the equivalent impact of enslavement (Segal, Ronald 2001).

Even though the Prophet invoked God's will in prosecuting his *jihad* and frequent raids against his adversaries, the distressing effects and the sweeping nature of the assault on the victims were difficult to reconcile with conventional religious or spiritual values. The practice of *razzia,* raids and plunders of non-Muslim civilian and Jewish communities casts uncomplimentary image of Islam. This practices today are the sources of inspiration for Islamic terrorists and for theocratic governments as that of Iran Saudi Arabia and Sudan. Such activities and other social and political mores that were sanctioned in early Islam have become shackles on the heels of Islam fettering the faith to its classical orthodoxy preventing it from becoming timely and forward looking.

An added result that is significant in the history of Islam is that the level of tolerance that were shown to Islam and its adherents over the centuries were rarely reciprocated and the treaties with Christians and Jews honored in the same spirit as the Christian duty that Christians felt obliged to honor (Watt, ch.2). The divine visions and inspirations that Mohammed said he had received from Allah served as justification for frequent wars wholesale massacre, exiles, forced conversions, and discriminatory laws (Spuler, B.:17; Kennedy, Hugh 1986:36-48). They also, almost in all of their totality, served to shock in the level of the dreadful horror they entailed in the hearts and spirit of their victims. For the Jews and Christians of Arabia, Mohammed's divine visions and revelations contradicted the mercifulness of the God and the gentle peacefulness of Christ who demanded double measures of kindness to others. And whatever virtues might have been exhibited in Mohammed's courts were those that he borrowed from Judaism and Christianity and chose to apply them as long as they fit the pragmatic aspects of his designs.

Religious activists in Secular Clothing

Another effective method that gave Islam distinct success in its advances was its method of evangelization. The duty of spreading Islam falls on the shoulder of each believer. A time tested method and an integral component to those described above was the practice of *dhimma*. The term is used to identify reference to two types of believers, those who are Muslims who are in the process of colonizing a territory and those Christians or Jews who refused to get converted to Islam for the time being and hence were willing to pay poll-taxes as insurance for protection by the Islamic order. Even though scholars of Islam declare that Christians and Jews were a protected class, because they were "people of the book", in reality, Mohammed could not accept that other believes should flourish while Islam was there as the ultimate faith he believed was needed by all humanity (Kennedy, H. 1986: 50-81). Non-Muslims were pagans or infidels. And pagans in Arabia or anywhere else "had no choice but to embrace 'Islam or the sword'; that is to say, if a group was not prepared to accept Islam, it had either to fight the Muslims or leave the regions controlled by them" (Watt, Montgomery W. 1968: 51).

Another functional feature of *dhimma* is when a small community of Muslims settles into an area where the majority of the population is non-Muslim. As such, the Muslim enclave recognizes itself as a *dhimma* and engages, as an auxiliary part of the worship practices by the "faithful", in surreptitious preaching with a specific aim of spreading and defending the faith. It is described as "accidental manner" of settlement for the purpose of gaining a foothold on a territory that is targeted for harvesting converts. In the Byzantine period, "The community drove a short spread into a weak spot of the Byzantine Empire" which grew into "ultimate victory" that can be "attributed to the monolithic unity imposed by Mohammad" (Martin, Malachi 1969:155).

[14] Lewis's states that the Arabic word for jihad "literarily means striving in the path of God." The phrase *sabil Allah* actually means "the cause of Allah", not "in the path of Allah" as Professor Lewis affirms.

The flexibility and provisional interpretation that Muslims give to the Qur'an permit the faithful to have wide latitude of evangelical action. This was an efficient way for the faith to grow as a religious belief and as a political system. The growth being imperceptible and clever in its subtlety can overtake any other status quo faith within the targeted community until Islam has achieved undisputed proportion of believers among the population for making political demands. Trimingham aptly describes the 7th century process of the destruction of Christianity in Africa as follows:

> Christian Africa was abandoned to its faith. Egypt remained a Christian country for a long time with *Muslims as the dominant ruling minority*, but through the machinery of the state, the church was slowly strangled and more of her peoples were absorbed into the new religion until in the course of time Egypt became a Muslim state with the Christians the subject minority they remain to this day" (Trimingham, J. Spencer, 1965: 42, *emphasis added*).

Further in southern Egypt and Sudan, the Christian kingdoms of Aswan, Nobatian, and Aldoa were subjected to the same fate. Islam in its most dogmatic fervency waged relentless assault until they could not match the fury and fire of its zealotry and fanaticism. Trimingham noted this and stated, "These kingdoms defended their independence and their faith for many centuries until finally they were destroyed and Christianity was so completely erased from the lives of the Sudanese that not a trace remains" (Trimingham, 43).

Freedom, Religion, and Violence

All religions have used their own dogma to expand their teachings and to increase their membership. Christianity and Islam have variously shown heated zeal in advancing and/or defending their faith. They have also waged intense wars against each other with the aim of global dominance. Christianity has surrendered its evangelistic zeal and the notion that Christians in the West could be mobilized as Christian soldiers to defend the faith is rather remote and senseless. On the other hand, Muslims, when they find occasions to do so, imply that their work of evangelization is not over, and that their task is an eternal obligation to convert the non-Muslims until Islam is established as a timeless and universal faith. This is the eternal commission that the Prophet vested to his followers to spread the word with pragmatism and the liberal use of the sword in the name of Allah. That commission still prevails in the backwaters of Africa and Asia as those who view Islam as the universal religion are wantonly exercising violence that include torching, assassinations, mass executions, selective starvation and forced conversion to Islam. In the open societies such as the United States, the pragmatic patterns so aptly refined by Mohammed at the beginning of his mission are widely evident as modern day *dhimmis* in London, New Jersey, Houston, and New York are energetically lobbying and inducing legislators, councilmen, senators, and governors to start accommodating Islam. They have been served notice that Islam has arrived in the West, its dhimmas are ready and the open fields of the open societies are ripe for the harvest.

The jihad aspect of Islam is a daily occurrence in the Third World from where the Western media had opted out in recounting the horrors of Islam inspired atrocities until the horrors of September 11, 2001. The genocide in Sudan went on and on for more than twenty years as Muslim clerics and personal workers systematically used the Qur'an to justify the crimes. In countries such as Egypt today, building permits for Christian worship places requires a long waiting period while for mosques they are offered in an instant. In Saudi Arabia today reading the Bible in the privacy of one's home can land a person in jail and deportation. In 2000, Ethiopian, Philippines and Eritrean Christians caught reading the Bible as a group had to face protracted jail time and were summarily deported with only the sweat-soiled shirts on their backs.

Violence against "infidels' also is liberally used in the dark corners of the world. In Nigeria, Pakistan, the Philippines, Sudan, Egypt, Indonesia, and the Middle East, Muslims feeling the empowerment of their scriptural interpretations are carrying acts of terrorism and justifying it as religious duties. True, these acts are often dismissed as acts of "fundamentalists" or fringe groups. However, realities speak for themselves. In Sudan, a country hailed by many Muslims as an example of dedication to the Mohammad's teachings, systemic genocide of non-Muslims, wholesale bombings by napalm loaded planes, amputations, enslaving goes on. Muslims in Sudan feel neither remorse nor compaction, because their political culture so saturated with the enthusiasm they had for their faith, has absolved them not to sympathize with unbelievers. Iran has practically purged its soil of Christians and other faiths in the last twenty years taking advantage of Western reticence to its cantankerous and bullying tactics.

In Mauritania, the Muslim elites, like their coreligionists in Sudan, consider the non-Muslim Africans as expendable sub humans. Next to Sudan, Mauritania Muslims have inflicted some of the most inhumane acts of genocidal violence against their fellow citizens simply because they are blacks and non-Muslims.

September 11, 2001 will be remembered the first time Islamic terrorists carried out a gigantic

terrorist act in a single moment never seen in the history of the world. It was a rude awakening and a violent entry to the United States. It will also be remembered the first time a United States President openly praised Islam, legitimated its foothold in the United States soil thereby inaugurating its commencement. This gesture ought to be celebrated as a lesson in tolerance worthy of emulating by all faiths and ideologies including Islam. The problem remains that Muslims have not done much to ally fears, skepticism and hostility that they cannot help but generate by their failure to look hard at their political culture and religious tenets. A few years before September 11, all the Muslims who stood with the President George W. Bush as he was extolling Islam, were calling for passive jihad in the Western world and active jihad in the Third World (*The Wall Street Journal*, June 11, 2003).

Conclusion

Diagnostic analysis of ideology, faith, and global affairs with intellectual integrity and scholarly cathedral is a critical need as we study issues of civil liberties, terrorism and individual and collective rights. Global peace and regional stability proliferate when the hurdles that subvert their emergence are faced squarely with intellectual fortitude. This article is written with these essential points in mind. It attempts to be direct in analyzing Islam in its historical, political, and military methods and victories.

At its start, the faith exploded in Arabia and swept the globe with phenomenal energy and valor. Its custodian and apostle, Prophet Mohammed, set the ground-rules for its future path and his successors, Bakr, Umar and Uthman, gave initial modification of its initial dynamism and its textual features. Those ancient features have stayed to this day fixed in their orthodoxy, but in need of a second look within the context of human progress and development. Reason dictates that Islam be scrutinized so that it can fulfill the hopes that it promises to man. The methods and the means that it uses to communicate those hopes are waiting for men and women who can identify the adoptive elements of the Islamic text and craft guidelines that enhance peace, tolerance, equality and justice, particularly within the *dar el Islam*, the household of peace. Most essential and instructive is that the analysis of Islam and appraising its victories and defeats would have been useful if Muslims were to shoulder their responsibility about their religion squarely and come to terms with its ills and find means to cure it. Innovation and modification of textual statements of yesteryears cry for a second look by Muslims of today.

All innovations do not indicate foolishness. Innovation can revitalize a faith, focus its purpose, and boost its endeavors. Constructive innovations communicated with the earnest spirit also strengthen the believers. So far Islam is in a state of suspension. From the time it allowed itself to be diverted by the civil war of 656 that resulted in the death of the saintly Ali, the Prophet's beloved nephew, to this day, Muslim theologians have made little progress in acclimating the faith to the successive centuries that it has crossed. They have vacillated and rationalized with respect to the repeated cruelties done in the name of Islam, even when those deeds may have served to paint an unsavory picture of the faith. They find themselves too wise not to innovate, and too foolish to have endorsed many of the methods that must have been meant to be updated and innovated. The Prophet always innovated; there are no reasons why his disciples today should not.

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X-RAYING HUMAN RIGHTS: VALUES AND TRADITION UNDER FIRE

Hans Egil Offerdal*

"Who asks: right or left when the question is:do you stand among the murderers or the victims, among the judges or the judged?"
-Jens Bjørneboe[1]

THE TWO AMERICAN TRADITIONS

When going to primary and secondary school in Norway, I was always fascinated by American[2] history. At the time, the idea of America always presented itself as a notion and a place of liberty and justice. This was the country where the good guys prevailed over the bad and thereby nourishing the possibility for a humanitarian future filled with peace and love. Martin Luther King's words "I Have a Dream", John F. Kennedy's "ask not what your country can do for you--ask what you can do for your country" as well as Lincoln's "Those who deny freedom to others, deserve it not for themselves; and, under a just God, can not long retain it." represented the quintessence of America as I understood it.

Looking upon America today, I see arrogance, greed, a smirk, abuse of power, "trigger-happy" politicians, violations and a nation with presidents and generals that think they are "on a mission from God" - just like the Blues Brothers. The evident difference between George W. Bush and his band on one hand, and Jake and Ellwod on the other is, of course, that the Blues Brothers' idea and mission looks much more like the old American libertarian tradition I knew from my days in school. There was something decent and proper about what they were doing. It had a flavour of American justice at a time when power-hungry politicians and big business had not perverted such an expression.

I think one can divide the idea, image, and perception of America into, at least, two major trends: the America we (especially non-Americans) all love, and the America we despise; the nice America vs. the cruel America - the America of Abraham Lincoln, Jimmy Carter, and Bob Dole as opposed to the America of Joseph McCarthy, Donald Rumsfeld, and John Ashcroft.

The America "we" love

When Thomas Jefferson, together with Benjamin Franklin and John Adams among others, endorsed the 'The unanimous Declaration of the thirteen United States of America' (Declaration of Independence) on July 4th 1776, they put down principles for the nation in the best tradition of a libertarian human rights history. One should remember that an important inspiration for the Founding Fathers, as well as historical explanation of the formation of America, is attributed to the fact that many of the people arriving to America were, in one way or another, escaping from oppressive and corrupt regimes in Europe. The immigrants looked upon America as a land of opportunities while promoting liberty and freedom from (state) oppression as essential ideas. The most famous paragraph of the 'Declaration of Independence' ought to be interpreted in this light.

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness -- That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to

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[1] Jens Bjørneboe: From "Epigraph to *We who loved America*" (1970), *Samlede Essays: Politikk*, Oslo: PAX 1996, p.42. ©1970, 1976 by Pax Forlag A/S. English translation ©1990 by Esther Greenleaf Mürer. As found at <http://home.att.net/~emurer/texts/poems2.htm#epigraph>

[2] When using the expression 'America', I refer, incorrectly, to the United States of America, and not to the rest of the American continent like Central- and South America as well as the West Indies.

them shall seem most likely to effect their Safety and Happiness.[3]

Here we find the basic principles behind "the America that we love." This version of America stands for equality, unalienable rights that are spelled out as life, liberty, and the pursuit of happiness. Further, the justification for, and task of, the government is to protect and safeguard these rights. In the moment the government does not do so, the people have the right (perhaps duty?) to remove such a government, i.e. make a revolution in order to defend these fundamental principles on which America is founded.

In fact, protection from an abusive government and injustice (negatively expressed) or the right to life, liberty and happiness (positively expressed), led the politicians and activists in the early history of America to establish written guarantees in order to secure freedom. In the Resolution of the First Congress submitting what is known as the 'Bill of Rights' (the first 10 amendments added to the Constitution in 1791) it is stated that several States have:

> expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added…[4]

This was done in order to extend "the ground of public confidence in the Government." So, what we see here is that the 'Bill of Rights' underlines, first of all, the idea of liberty. Moreover, other fundamentals outlined in the 1791 document are religious freedom, freedom of speech, freedom of the press, the right of an impartial trial, and freedom of assembly. Again, remember the history of oppressive kings and governments in Europe as a context for highlighting such guarantees.

In sum, we can say that the 'Declaration of Independence' and 'The Bill of Rights' are the utmost expressions of the principle of freedom that so many of us love and cherish, because for us this is what America is about. This is "liberty in law" as Willie Nelson sings.[5] These principles are representative for the soul of 'the nice America". This is the essence of America. When you sit on the edge of the Grand Canyon, looking at the sunset, you kind of understand what life, liberty and happiness signifies.

These principles have given the world so much. Everything from the abolitionists to Charlie Chaplin (who later would become a victim to "the cruel America"), from focus on human rights as represented by President Carter to the idea of community, humanism, and solidarity found in the old-fashioned American movie "It's a Wonderful Life" (1946) with James Stewart. This is the conception of America conceived as a nation with class (understood as elegance and quality, perhaps best represented by former Senator Bob Dole) and honour. This is a place where justice is human and has absolutely nothing to do with revenge. Further, this is the America Richard Boyle (played by James Woods in the Oliver Stone movie "Salvador") accepts when saying:

> I believe in America. I believe that we stand for something. For a constitution. For human rights, not just for a few people but for everybody on this planet.[6]

There is a cardinal observation to be made from this quote and that is that human rights are for all people in this world. Consequently, the principles promoted by the Founding Fathers through the Declaration of Independence and the Bill of Rights, should be interpreted as universal principles, meaning when we are addressing life, liberty and happiness, we want that for all people, not just the rich, or the white, or those with power. It does not only refer to U.S. citizens, but to everybody regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" as it is stated in the Universal Declaration of Human Rights. Hence, we are dealing with some intrinsic cosmic rights here. The "nice America" seeks these rights for all, not only Americans, and that might be the main reason for why people all over the world, like me, are so fascinated with this version of America, in theory and in practice. So, what happened to me, who used to love America, and what happened to America itself?

The America we despise **("It's that Ashcroft, stupid!")**

When did this state of being despised start? It is hard to say. I think there is a historical moment, to which I will return to a little bit later, of importance but exactly who launched and/or what initiated "the cruel America" is certainly a matter for a large discussion. The important thing is that at some point in history the spirit and the values brought forward by the Founding Fathers were put aside.

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[3] "Action of Second Continental Congress, July 4, 1776 The unanimous Declaration of the thirteen United States of America" (The Declaration of Independence) as found at Library of Congress' THOMAS World Wide Web system. < http://memory.loc.gov/const/declar.html>

[4] "THE BILL OF RIGHTS Amendments 1-10 of the Constitution" as found at Library of Congress' THOMAS World Wide Web system. <http://lcweb2.loc.gov:8081/const/bor.html>

[5] From the lyrics of "America the Beautiful" performed by Willie Nelson. The lyrics were originally written by Katharine Lee Bates in 1893. See <http://www.congregationalist.org/Dec_01/Bates.html>

[6] From the Oliver Stone movie *Salvador* (1986). Screenplay by Oliver Stone and Richard Boyle. Hemdale Film Corporation.

Maybe it started at the beginning of the 20th century when Roger Baldwin and Crystal Eastman found it necessary to create the American Civil Liberties Union (ACLU). Continuing the tone from the Declaration of Independence and the Bill of Rights, ACLU states that it is working to:

> defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States.[7]

Certainly, the early 1920s were not a good time for being in opposition to the U.S. government, or being a leader of, say, the Communist Labour Party as journalist John Reed experienced. Step by step various representatives of the "cruel America" come in a long line: Joseph McCarthy, John Edgar Hoover (who was personally involved in the decision by U.S. Attorney General James McGranery to ban Chaplin from the U.S.), Henry A. Kissinger , General Alexander Haig (who as U.S. Secretary of State under Reagan suggested that four U.S. nuns murdered in El Salvador 1980, actually were killed when trying "to run a roadblock" and participated in "an exchange of [gun]fire"[8]) and John Ashcroft (fostering the so-called USA Patriot Acts I & II), just to mention a few notable personalities.

In addition we can list historical 'incidents' like the Korean War (Harry Truman), the Vietnam War (mainly Lyndon B. Johnson, Richard Nixon, i.e. Henry Kissinger), the killing of Chile's democratically elected president Salvador Allende during a U.S. sponsored military coup in 1973 which installed Augusto Pinochet and a military junta ruling Chile until 1990 (again Kissinger), the support of military actions and endless human rights violations (rape, torture, killings etc.) in Nicaragua and El Salvador from 1979-1992 (Jeanne Kirkpatrick and Admiral Poindexter among others), as well as the more recent warfare against Afghanistan and Iraq (Condoleezza Rice).

All the above was done with various pretexts like fighting anti-communism, preserving America and "our way of life" (President George W. Bush), and, the most famous of them all: national security interests. It seems that all these operations, not to mention the people and ideology behind this behaviour which is said to be done in the name of America, is just a (very good) example of the opposite. This, because they are working directly against the notion, traditions values and spirit carried forward by the "Americans we love". The current Bush administration is one eloquent example of the "cruel America" that is detested by many around the world. When demonstrations take place, especially in Europe, it is "the cruel America" that is being protested.

When talking about freedom and human rights it is obvious that George W. Bush's wish of 'exporting' his specific understanding of freedom and liberty to the rest of the world is a grave distortion of freedom, rights, and liberty as promoted by the Founding Fathers. Take Bush' words:

> Freedom is exported every day, as we ship goods and products that improve the lives of millions of people. Free trade brings greater political and personal freedom.[9]

The fundamental problem with Bush's vision is that he wants to recreate the world in *His* image, and consequently he is betraying the fundamental principle of liberty and happiness because he forgets that liberty is not something that can be imposed, it has to be freely chosen. This is certainly an interesting discussion when it comes to the so-called liberation of Iraq as well as the decision (taken by the U.S.) that democracy has to wait in Iraq - at least for the time being. The "cruel America" is demonstrating its terrifying face.

Sadly, in most of the literature in the field, the difference between the "nice America" and the "cruel America" is not addressed in depth. It is more analysed in a "them against us" framework. One clear illustration of this is the famous article, later book, "The Clash of Civilizations?" by Samuel Huntington. It is a transparent example of a "them vs. us" paranoia. Written in 1993 (as a coincidence shortly after the first Gulf war!), Islam was painted on the wall as the great Satan, and surprise, surprise, 10 years later the Muslim

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[7] Taken from "Freedom is Why We're Here." ACLU position paper, The American Civil Liberties Union, Fall 1999 as found at < http://www.aclu.org/Files/OpenFile.cfm?id=10740>

[8] "In 1981 Secretary of State Alexander Haig testified before congressional committees about the murder of three American nuns and a Catholic lay worker in El Salvador. The four women had been raped and shot at close range, and there was clear evidence that the crime had been committed by soldiers of the Salvadoran government. Before the House Foreign Affairs Committee, Secretary Haig said:

> I'd like to suggest to you that some of the investigations would lead one to believe that perhaps the vehicle the nuns were riding in may have tried to run a roadblock, or may accidentally have been perceived to have been doing so, and there'd been an exchange of fire and then perhaps those who inflicted the casualties sought to cover it up. And this could have been at a very low level of both competence and motivation in the context of the issue itself. But the facts on this are not clear enough for anyone to draw a definitive conclusion.",

taken from William D. Lutz: "Language, Appearance, and Reality: Doublespeak in 1984" as found at < http://students.faulkner.edu/depts/sbs/readings/an1301/double.htm>

[9] President George W. Bush. "Address of the President to the Joint Session of Congress", February 27, 2001

world is generally perceived as such in the White House and in the U.S. State Department. (When was the last time the U.S. waged war against a Christian country or bombed a capitalist (dictatorship) "back to the stone age"?) The psychology of Huntington's article is nothing but a confirmation of "if you know what to look for, you will find it sooner or later" (for some reason this principle does not, yet, apply to weapons of mass destruction). After Islam was declared the enemy in Huntington's article, it functioned as a self-fulfilling prophecy - Islam became the enemy.

A more sober effort to understand the world was undertaken by Benjamin Barber is in work *Jihad vs. McWorld: How Globalism and Tribalism Are Reshaping the World*. A very good analysis. However, it is also tainted by the "us and them" basis for interpretation.

The scholar that, perhaps, has understood this best, yet with his particular view on things since he basically claims that Europe does not understand the U.S., but, and here is the importance of his contribution, neither does the U.S. understand Europe, is scholar Robert Kagan. In his article "Power and Weakness", he concludes that:

> If the United States could move past the anxiety engendered by this inaccurate sense of constraint, it could begin to show more understanding for the sensibilities of others, a little generosity of spirit. It could pay its respects to multilateralism and the rule of law and try to build some international political capital for those moments when multilateralism is impossible and unilateral action unavoidable. It could, in short, take more care to show what the founders called a "decent respect for the opinion of mankind."[10]

It is interesting to note here that Kagan called upon the rule of law and quoted the Declaration of Independence. It seems that he has grasped the fact that there is an arrogant "cruel America" (although he does not use that expression) which is disliked in the rest of the world.

One observation is important here. Kagan also touched upon the mechanism of fear. After the 11th of September 2001 a very common question in the U.S. was "Why do they[11] hate us so much?" I think the question was another example of how distorted the opinion leaders of this version of America are. From my perspective, it would be much more interesting to ask "Why are they (the rest of the world) so afraid of us?" The logic of this way of seeing it is that all the so-called (blind) terrorism performed against the U.S. abroad, and now after September 11, at home does not come from hate, but from fear. When people are afraid, when they feel that they are trapped in a corner, then they perform violent actions. This is not so much a calculated hate, as actions of despair and people that are really scared of a certain version of America. It is not absolutely sure that the whole world wants McWorld, but with the present regime in Washington, it does not seem that the world has any option. Maybe Fukuyama was right after all?

During the modern history of America hardly anybody represented the "cruel America" better than the figure of John Edgar Hoover, former director of the FBI. He was the most powerful man in Washington for almost 50 years and feared both by the civil population and presidents alike. What Hoover did was to construct a police state actively working against the spirit of the Founding Fathers. Yet, in our days the current Attorney General of the United States, John Ashcroft, makes Hoover look like an amateur in comparison. Being a very effective manager, Ashcroft has pushed for increased government control of private citizens in America, most notably expressed in the so-called "Patriot Act" (in itself an interesting name) and the work with its successor, "USA Patriot II". His argument for doing what he does is to uphold "our freedoms and in defending the liberty of generations to come."[12]

There is also a democratic problem (not to be discussed in detail here) to be mentioned with what Ashcroft & Co. are doing. As pointed out by Nancy V. Baker[13] there has been an "increased centralization of power in the White House"
after September 11th 2001, "much of it orchestrated by Ashcroft".[14] More and more legal power has been transferred to the White House, making the U.S. Congress and civilian courts marginal, and constructing a situation of unilateral power. The Justice Department (headed by Ashcroft) has changed from being a "traditional law enforcement mission" into a "defensive" operation. Effectively, law enforcement officers "are now classified as national security officers". Military tribunals, headed by the President, are being set up, civilians are being held in military custody and the attorney-client privilege is under attack (c.f. the case launched by the U.S. government against attorney Lynne Stewart), people can be arrested for no special

[10] Robert Kagan: "Power and weakness", *Policy Review*, Washington; Jun/Jul 2002, Issue:113, pp. 3-28.
[11] The subject "they" was never specified, but it could contain everything from Muslims, to Arabs, or anyone who was not a firm supporter of Bush or the current U.S. (foreign) policy.
[12] Opening Remarks of Attorney General John Ashcroft Justice Department Terrorism Roundtable Washington, D.C. June 4, 2003 <http://www.usdoj.gov/ag/speeches/2003/060403terrorismroundtableremarks.htm>
[13] Nancy V. Baker: "*The Law*: The Impact of Antiterrorism Policies on Separation of Powers: Assessing John Ashcroft´s Role", *Presidential Studies Quarterly*, 32, No.4, December 2002, pp.765-778.
[14] *Id*. at pp.775.

reason, secret surveillance even without probably justification is permitted, and the possibility to jail non-citizen merely on suspicion is now legal. What one previously could take for granted in America, i.e. the protection from a "power-hungry" government (the rationale per se for the Founding Fathers), is now gone, all in the name of freedom! So, the logic is that Ashcroft is taking away traditional liberties (listed in the Constitution and Bill of Rights) in order to defend them. Understanding this calls for a major illogical operation. The amazing--as well as really scary--thing is that Ashcroft is doing all this legally, giving us some reason to go back in history to find similar processes tested on a society.

In her classical work, *The Origins of Totalitarianism*, dealing with two historical totalitarian regimes, Hannah Arendt points out that totalitarian governments often derives from a situation of crisis. Further, and this is the important point here, totalitarian regimes work under a logic where positive law is traced back to the laws of Nature or of History.[15] As Arendt observes

> it [totalitarian rule] is quite prepared to sacrifice everybody's vital immediate interests to the execution of what it assumes to be the law of History or the law of Nature.[16]

It would be an understatement to say that this is a very targeted comment to the current use of law (by Ashcroft) in the U.S. Further, the wish for exporting the U.S. version of freedom to the rest of the world (a messianic task adopted by George W. Bush), can be found most clearly in Bush' concept "American internationalism." It is found the first time in the President's Address to the Joint Session of Congress (28.02.02), and later in the September 17th 2002 document "The National Security Strategy of the United States of America." It is difficult to say what exactly the expression means, but it is clear that "our values" and "our national interests" are key. In a new, global world, such statements are not exactly democratic. The recent actions in Afghanistan and Iraq, as well as the long list mentioned previously, can give us a practical example of "American internationalism", i.e. world dominance. Moreover, when one holds this pattern to the analysis provided by Arendt of totalitarian regimes, it gets really scary. She wrote:

> What is decisive is that totalitarian regimes really conduct their foreign policy on the consistent assumption that they will eventually achieve this ultimate goal [a global empire], and never lose sight of it no matter how distant it might appear or how seriously its "ideal" demands may conflict with the necessities of the moment. They therefore consider no country as foreign, but, on the contrary, every country as their potential territory.[17]

Would it be too far fetched to suggest that this also is an excellent analysis of the current situation? Just think about where the U.S. has placed the Al Qaeda and Taliban "prisoners" they have taken.

Evaluating what Ashcroft is really doing, as well as opening a possibility for a historical comparison, I find it useful to quote from a letter that Daniel Berrigan, S.J., sent to FBI Director Hoover in 1971. Daniel Berrigan and Hoover had a long personal conflict due to Berrigan's continuous protest against the Vietnam War. In a letter from prison, warning against what Berrigan saw as the creation of a police state as well as the attack on civil (and human) rights, he wrote:

> What the nature of that office has become under your guiding genius continues to intrigue many. It even offers me a kind of chilling comfort to reflect that being a prisoner in America today is a way of anticipating the America of, say, 1984. **You and others are even now creating that America**. In prison **our civil and human rights are suspended**. Our mail is censored, public speech is cut off, access to family and friends is restricted, dissent summarily (some would say brutally) dealt with. We prisoners are in fact (I am a veritable Quixote in pursuit of positive thinking) the subject of an important paramedical experiment. We today, America tomorrow! **Authorities are persuaded that the amputation of a human rights is of benefit to delinquents**; so they proceed to put saw and axe to the body social. Better a healthy basket case than a sound troublemaker! **Or again, if a delinquent is rehabilitated by cutting back his dignity, can not society be reformed by a like radical surgery?** Crutches and prostitutes will then be no embarrassment to anyone; a gimp will join a limping society. **Dissent will be a dim memory of early heroes and their happening, America will have created her final revolution against all revolution, including her own**.[18]

It would be difficult to find a more targeted analysis, and evaluation, of what John Ashcroft is up to in our time, effectively amputating human rights and due process in America, whatever it takes. As he puts it: "We

[15] Hannah Arendt: *The Origins of Totalitarianism*, New York:Harcourt, Brace Jovanovich, 1973, p.462.
[16] *Id.* at pp.462-463.
[17] *Supra* at pp.462-415.
[18] Daniel Berrigan: *America is Hard to Find*, New York: Doubleday & Company, 1972, p.122. (Emphasis added)

will, in the President's words, defend freedom -- and justice -- no matter what the cost."[19] The history after 9-11 could not be a better proof of his words, but it is hardly the America the world wants to see and cherish.

So, to sum up, when talking about America it makes sense (at least from an outsider's perspective) to differ between the two types of America, the good guys (the ones we love) and the bad guys (the ones we despise). Now, that leads us to take a closer look of what we are so afraid.

Before and after America

Many people, as well as scholars, have, recently, started to interpret the American psyche in the framework of the horrible tragedy of September 11th 2001. I think this is a grave error, both for arriving at an internal comprehension of what is going on, as well as in order to grasp what America is trying to do in the world. I said previously that I did not know exactly when all the bad things started.

Well, allow me to suggest that it started on the morning of August 6th 1945, when America, lead by President Harry S. Truman, dropped "Little Boy" on the city of Hiroshima, Japan. With this incident, immediately killing between 70,000 and 80,000 human beings, America became the first – and only – country in the world to use a nuclear bomb in war. (Just to underline its power, the U.S. Airforce gave another bomb as a present to the city of Nagasaki, Japan, but this time "only" killing about 40,000 people immediately.)

Now, there are several implications here. As mentioned, America is the only country which has ever used a nuclear bomb in war. Indisputably this puts the official discourse about weapons of mass destruction in an interesting light. The

objectives targeted were overall civilian installations, cities - not military installations. In other words, it would not be an exaggeration to talk about a massacre of innocent people, or in other words, an enormous terrorist act. In comparison to Hiroshima and Nagasaki, any terrorist operation in recent history must be said to be relatively small, but of course tragic for those affected by it . Thus, the use of the nuclear bombs in August 1945 still stands to be one of the worst terrorist acts in human history, and the United States of America undertook it. Again, the discourse regarding the fear of use of WMD by other countries as well as pre-emptive strikes gets another dimension. With the bomb, America had proven that not only did it have the bomb, it was fully capable and willing to use it to secure its own interests. In the moment the bomb exploded, I think the radiation reached the heads of politicians in America whom, in the choice between Washington and Oppenheimer, opted for the latter because it was a way to world dominance and world control. Since that August morning in 1945, the history of America went downhill. The spirit and intention of the Founding Fathers were set aside, life, liberty and happiness was not longer the issue. It was all about power. America was lost, and today it is very, very hard to find.

AMERICA, HUMAN RIGHTS AND CAMP X-RAY

With regard to the discussion put forward in this article, it is of special interest to notice that the 'Bill of Rights' clearly states that "No person shall be…be deprived of life, liberty, or property, without due process of law"[20] as well as the guarantee that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.[21]

As argued previously the laws, values and the traditional "nice America" have now (legally) been set aside. There is no longer the right to a public trial or an impartial jury. The legal process has died, and getting a lawyer is a distant fantasy. Now, it has to be said that this (still) is not true for all crimes, only for crimes related to possible terrorism.

The problematic issue here is, of course, that it is the same government which has now taken the path towards absolutism ("No nation can be neutral in this conflict"), also is the same government that defines what constitutes terrorism, anti-American (i.e. unpatriotic) activities or behaviour that might pose a threat to "national security interests". One disturbing example of the values and traditions lost, as well as the arrogance

[19] Prepared Remarks of Attorney General John Ashcroft, Islamic Group Indictment/SAMs, April 9, 2002 < http://www.usdoj.gov/ag/speeches/2002/040902agpreparedremarksislamicgroupindictments.htm>

[20] "THE BILL OF RIGHTS Amendments 5 of the Constitution" as found at Library of Congress' THOMAS World Wide Web system. <http://lcweb2.loc.gov:8081/const/bor.html>

[21] "THE BILL OF RIGHTS Amendments 6 of the Constitution" as found at Library of Congress' THOMAS World Wide Web system. <http://lcweb2.loc.gov:8081/const/bor.html>

and abuse of power entered into, is the situation with hundreds of "prisoners" held at a U.S. military base at Cuba by the U.S. government. Let us forget for a while the irony of the U.S. having a military base in the last "communist" country on the face of the planet. That only serves the purpose of detaining possible terrorists and soldiers (read "unlawful combatants"), without bringing them into the country, letting someone else run the risk of having "dangerous people" as neighbours. I refrain from making further comment on such a "gentleman's" action.

The point I want to make here, is to use the reality that hundreds of people are being held without trial or any possibility for proper defence as a concrete illustration of the fact that the values and tradition from the Founding Fathers are under strong fire, if not being totally eradicated. Human rights and freedom have become phrases without meaning. The only place they still play somewhat of a function is in the official discourse used to manipulate the general population. "Those who deny freedom to others, deserve it not for themselves" said Lincoln. Sadly, it does not seem that this is of importance anymore at least not when looking upon the situation at Guantanamo.

In January 2002 media reported that (enemy) soldiers captured in Afghanistan by the U.S. military were sent to Cuba, to the American Naval base at the island. What first shocked the world beyond belief were the reports that these "prisoners" were treated inhumanely. Photos (taken by the U.S. Navy!) can still be found on the internet[22] where one can see prisoners allegedly being mistreated. According to the British Guardian:

> The pictures show the prisoners, manacled hand and foot, kneeling before their guards, and wearing blacked-out goggles over their eyes and masks over their mouths and noses.[23]

Needless to say that the reaction in most of the world was that America now has passed the line for what a civilised nation could do. The commentaries from officials, NGOs, and private persons were very strong. In stark contrast to U.S. media, the British press went ballistic. Probably the most outspoken was *The Daily Mirror*. Over the whole of its front-page Monday January 21st 2001, Mirror published a picture of the prisoners, accompanied by the question "What the hell are you doing in OUR name Mr. Blair?"[24] On January 24th the headline of the Mirror was "STOP IT", and on February 4th Mirror asked "WHAT IS NEXT TONY..ELECTRODES?" Even one of America's closest allies, British foreign secretary Jack Straw, reacted strongly. For many, these pictures and the whole Camp X-Ray became a turning point. The "cruel America" had again shown its true face. It did not improve the situation that the White House and Department of Defence (DOD) clearly did not understand that with this they had effectively passed a line. They were being looked upon as barbarians by the rest of the world. Every time Ari Fleischer, Donald Rumsfeld or George W. Bush attempted to calm down the situation, it only got worse. It was a lot of unrest when the Secretary of Defence said that "the prisoners should not expect [a] 'country club'".[25]

Rumsfeld said that these persons were "unlawful combatants", not prisoners of war, and consequently they were not protected under the Geneva Convention a fact disputed by leading human rights groups and experts on international law. Jamie Fellner, director of the New York based Human Rights Watch summed up the reaction to the treatment given to these POW's by the U.S. government in the most accurate manner stating:

> The United States would never house members of its armed forces in chain-link cages, nor would it accept such treatment for any of its soldiers captured by enemy forces. Such conditions are simply unacceptable for anyone, much less people entitled to be treated as POWs.[26]

This is the core of what this paper is about: the attack on human dignity and human rights, or as I like to express it, the "right to be human", by the U.S. government in the aftermath of Sept. 11th 2001, exemplified by the situation at Camp X-Ray. One must be allowed to ask if universal, ethical (and moral) principles of treating human beings in such a manner is in accordance with both the official political discourse and the liberal, democratic tradition in the U.S.

It seems that the justice imposed by the U.S. differs radically from the rest of the world's concept of

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[22] See for example picture gallery at the website of British newspaper The Guardian < http://www.guardian.co.uk/gall/0,8542,636900,00.html>, or the "Inside Camp X-Ray" provided by BBC Online < http://news.bbc.co.uk/hi/english/static/in_depth/americas/2002/inside_camp_xray/default.stm>

[23] Nicholas Watt, Richard Norton-Taylor and Oliver Burkeman: "Camp X-Ray row threatens first British split with US", The Guardian, January 21st 2002 <http://www.guardian.co.uk/afghanistan/story/0,1284,636790,00.html>

[24] Frontpages of The Daily Mirror can be found at < http://www.mirror.co.uk/frontpages/>

[25] Nicholas Watt, Richard Norton-Taylor and Oliver Burkeman: "Camp X-Ray row threatens first British split with US", The Guardian, January 21st 2002 <http://www.guardian.co.uk/afghanistan/story/0,1284,636790,00.html>

[26] Jamie Fellner: "U.S. Must Take the High Road With Prisoners of War", January 16th, 2002 < http://hrw.org/editorials/2002/us_011602.htm#author>

justice. Under President Bush justice has been reduced to a cowboy cliché such as "Wanted: Dead or Alive". In its eagerness to persecute the guilty ones it has become its own worst enemy. In the battle against "tyranny and death" President Bush claims that U.S. citizens:

> stand for a different choice, made long ago, on the day of our founding. We affirm it again today. We choose freedom and the dignity of every life.[27]

When looking at what Camp X-Ray signalise, the words from the American President in January of 2002 becomes pathetic, meaningless and empty. 'Actions speak louder than words' it is often said. Regrettably, the history of the "cruel America", not to mention what has happened in the U.S. since George W. Bush and his band took office, is a grim testimony and example of what many people are afraid. By holding prisoners at Camp X-Ray, the U.S. is violating international human rights and humanitarian law. Enormous pressure has recently driven the Bush administration to recognise the Geneva Conventions, but it took more than a year and it was not until the U.S. realised the risk of the Iraqi government to pull the same trick on U.S. soldiers in Iraq that it modified its position. This brought about a change in politics, however, not of principle.

In May 2003 about 600 people are still (illegally) held, without charges, at Camp X-Ray. There are Taliban soldiers, possible members of Al Qaeda, as well as civilians who might have been brought to the camp "by a mistake". The camp has changed its name from Camp X-Ray to Camp Delta and some of the prisoners have been released. However, the majority is still in prison without due process. Is this the way the war against terrorism should be fought?

Human Dignity for human beings, i.e. the "right to be human"

By "x-raying" the practice and discourse of the "cruel America", one discovers that human rights effectively are not for everybody. It is only for those who are recognised by the current administration in Washington. As I have commented elsewhere:

> The ruling paradigm in the rich, western world is that human rights are not something one has as such, it is a right (value) that is being given to you, and which you earn.[28]

America is gone! Those who claim to protect "our way of life" are in fact betraying the soul of America and are spitting on the tradition and the values of the Founding Fathers. It is clearly stated that "that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights". So when Rumsfeld and his ilk, or Ashcroft pull their various tricks in order to impose new rules depending on the (political) needs of the moment, while letting people earn their rights, they are removing America from its origin and towards a totalitarian regime. The current administration is not only failing its obligation to the Founding Fathers and the constitution, it is failing its obligations as decent human beings.

The problem we are faced with as far as this is concerned, has been pointed out by Simone Weil, saying: "A right which goes unrecognised by anybody is not worth very much,"[29] (c.f. the argument over the Geneva Convention). According to her thinking, a right is something you have as a member of a community, while an obligation is a duty one has as a human being. "A man left alone in the universe would have no rights whatever, but he would have obligations."[30] Weil stated in her discussion that:

> Rights are always found to be related to certain conditions. Obligations alone remain independent of conditions. They belong to a realm situated above all conditions, because it is situated above this world…The object of any obligation, in the realm of human affairs, is always the human beings as such. There exists an obligation towards every human being for the sole reason that he or she is a human being, without any other condition requiring to be fulfilled, and even without any recognition of such obligation on the part of the individual concerned.[31]

So, if America is going to teach the rest of the world about human rights and human dignity, it should try to secure a human life, worthy of the name, for all. It should give everybody the "right to be human". That is the biggest challenge right now. America was founded on values such as equality and the **unalienable rights**, of life, liberty, and the pursuit of happiness. Camp X-Ray does not promote such an image of America.

In the words of Jamie Fellner: "President George W. Bush has repeatedly said that the war against

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[27] George W. Bush: "The President's State of the Union Address 2002" < http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>

[28] Hans Egil Offerdal: "Restoring Human Dignity in a Sick World: Some selected Inter-Faith Perspectives on Social Justice and Health". Paper presented at the Royal Institute for Inter-Faith Studies' conference, "Health and Social Justice," Amman, 1-3 October 2002.

[29] Simone Weil: *The Need For Roots. Prelude to a Declaration of Duties towards Mankind*. Preface by T.S. Eliot. Translated by A.F. Wills. London and New York: Routledge, 1997, p.3.

[30] *Id.*

[31] *Supra* at pp.3-4.

terrorism is a war of values. At Guantánamo, that war is being lost."[32]

[32] Jamie Fellner: "Double Standards", March 31st, 2003. < http://hrw.org/editorials/2003/us033103.htm>

THE STATUS OF THE RIGHT TO LIFE AND THE PROHIBITION OF TORTURE UNDER INTERNATIONAL LAW: ITS IMPLICATIONS FOR THE UNITED STATES

Hansje Plagman•

Since the September 11th attacks the US has been focusing on counter-terrorism measures and on the internal (legal) order without paying much attention to international rules that might apply to it. The US is not only bound to its own national laws, whether on federal or State level, the US forms part of the international legal order as well. This means that the US also has to respect certain international rules, those it has agreed upon by signing and ratifying treaties and those that might apply to it through international customary law and *jus cogens*. The following paper focuses on the non-derogable right to life and the prohibition of torture as included in the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the American Convention of Human Rights (ACHR) and their status under international law. An examination is made of the applicability of these rules in the US and the implications for the legality of certain counter-terrorism measures that have been taken in response to the September 11th attacks.[1]

1. Introduction

When declaring a state of emergency[2] the State can set aside many rights included in treaties such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the American Convention of Human Rights (ACHR). In the insecure times of public emergency non-derogable human rights are, in addition to the rules of humanitarian law in the Geneva Conventions,[3] one of the few rights that can still protect the individual from abuse of power (e.g. violation of the individual's human rights) by the State.

The ICCPR is the main treaty on international level that contains the full range of civil and political rights. On the regional level there are in this respect three important treaties, the ECHR, the ACHR and the African Charter on Human and Peoples' Rights (ACHPR). Whereas the ICCPR, the ECHR and the ACHR all include a derogation article, the ACHPR does not.[4] These derogation articles, article 4 of the ICCPR, article 15 of the ECHR and article 27 of the ACHR, give States parties the possibility to derogate from their obligations under the particular convention in times of public emergency. Although human rights lawyers in general prefer to emphasise that all human rights are equal, I will take as a starting point that in a legal sense non-derogable human rights by their very nature have a special status.

There are four rights equally non-derogable to the ICCPR, the ECHR and the ACHR: the right to life, freedom from torture, freedom from slavery and freedom from retroactive criminal liability. Some academic writers have suggested that the recognition of four 'common' non-derogable rights in an international treaty and two regional treaties means that they belong to the norms of j*us cogens.*[5] However important this notion

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[1] This article is based on my master's thesis, at the Law faculty of the University of Maastricht (The Netherlands), on the four common non-derogable human rights under the International Covenant on Civil and Political Rights (ICCPR), the European Convention of Human Rights (ECHR) and the American Convention on Human Rights (ACHR) and their status under international law. In writing this article I received great help and advice from Eva Rieter, researcher at the Law Faculty of the University of Maastricht (The Netherlands), expert in the field of the death penalty and interim measures by international tribunals and supervising bodies to international treaties.

[2] A public emergency could arise in case of a political crisis such as an (internal) armed conflict, internal unrest, grave threats to public order or subversion, or a natural disaster or economic crisis.

[3] Geneva Conventions, entry into force 12 August 1949 and its Additional Protocols I and II, entry into force 8 June 1977. See for a thorough study of the rules applicable during States of emergency under international humanitarian and human rights law in relation to the hostilities in Afghanistan: Robert Goldman and Brian Tittemore, *Unprivileged combatants and the hostilities in Afghanistan: their status and rights under international humanitarian and human rights law*, December 2002, www.asil.org/taskforce/goldman.pdf.

[4] The Convention Against Torture does include a derogation article, however, since this is a one issue- treaty and not a general human rights treaty I will not further address this article.

[5] For example: Jaime Oraá, *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1992, p. 69. R. Abi-Saab, *Human Rights and Humanitarian Law in Internal Conflicts*, in: D. Warner (ed.), *Human Rights and Humanitarian Law, the quest for Universality*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1997, p. 120. Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, Pinter Publisher, London 1989, p. 147. Stephen P. Marks, *Principles and Norms of Human Rights Applicable in Emergency Situations:*

is, no clear analysis has been made as to how they are defined as norms of *jus cogens* and whether they fulfil the prerequisites of its definition. That the four common non-derogable rights belong to treaty law is clear, but do they also belong to customary international law and to the limited category of rules of *jus cogens*? In other words, what is the status of the four common non-derogable rights under international law? In this paper these questions will be examined in relation to two of the four non-derogable rights, namely the right to life and the right to freedom from torture (or the prohibition of torture).

One might wonder what the relevance of this research is. In international law a State is only be bound by treaties it has signed and ratified. This means, *a contrario*, that a State that did not sign and ratify a treaty will not be bound by it. This is different with rules of international customary law or rules of *jus cogens*. These rules in general apply to all States. In other words, a State can be bound to respect these rules even without explicitly accepting the rule, for example by signing or ratifying a treaty. This might even mean that these rights, like non-derogable rights, must also be respected during a state of emergency. This would be the case if it would be established that the non-derogable right to life and the prohibition of torture do not only belong to treaty law but also to international customary law, or even to the norms of *jus cogens*.[6]

When examining the status of the non-derogable right to life and the prohibition of torture under international law, the common features of under the ICCPR, the ECHR and the ACHR will be looked at. Furthermore, an examination will be made whether these rights amount to customary international law and to the rules of *jus cogens*. In the second part of this article will address the rules that as a consequence are applicable to the United States of America (US). The US has ratified the ICCPR and it has signed the ACHR.[7] Since the ECHR is only applicable to European countries the US is not bound by it. Within the scope of this article I will discuss the articles concerning the right to life and the prohibition of torture within the ICCPR and whether they are applicable to the US in full. Moreover, I will examine the applicability of those rules to the US as customary international law or rules of *jus cogens*. The conclusion will refer to some specific examples that demonstrate the implications of my findings on the US in relation to its battle against terrorism.

2. The Status of the Right to Life and the Prohibition of Torture under international law

After an examination of the right to life and the prohibition of torture under the ICCPR, ACHR and ECHR, their status under international law will be addressed, in other words the question whether they amount to rules of customary international law or *jus cogens*.

2.1 Common Features of the Right to Life and Freedom from Torture under the ICCPR, ACHR and ECHR

2.1.1 The Right to life

The monitoring bodies and/ or Courts of the three treaties agree that the right to life is an elementary right. The Human Rights Committee has emphasised that the right to life 'is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation'. The Council of Europe has stipulated that the right to life is 'one of the most obvious basic human rights.' The Inter-American Commission of Human Rights has established that the right to life is, next to the right to physical integrity, the most elementary human right.[8]

The ICCPR and the ACHR start by establishing that every person has a right to life.[9] The ECHR does not contain a similar provision but it is implied in the words 'everyone's right to life shall be protected'.[10] That the right to life must be protected by law is undisputedly contained in all three provisions.[11] It obliges States to adopt criminal law provisions that prohibit the arbitrary taking of life. Furthermore, agreement is found on the provision that 'no one shall be arbitrarily deprived of his life", thereby not only obligating States

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Underdevelopment Catastrophes and Armed Conflict, in: Karel Vasak and Philip Alston (eds.), *The International Dimension of Human Rights*, Vol. I, Greenwood Press, Westport, 1082, pp. 201-202. Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, HRQ, 1989, p. 114. T. Meron, *On a Hierarchy of International Human Rights*, The American Journal of International Law, Vol. 80, 1986, p. 11.

[6] See in this respect: J. Oraá, *The protection of Human Rights in Emergency Situations under Customary International Law*, in: Guy S. Goodwin, Stefan Talmon (eds.), *The reality of International Law, Essays in honour of Ian Brownlie*, Clarendon Press, Oxford, 1999, p. 414.

[7] By signing the treaty the US has committed itself to not act contrary to the ACHR. This is contained in Article 18 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, entry into force, 27 January 1980, Art. 18.

[8] See: CCPR General Comment 6, The Right to Life, 30/04/82; See references in: D. Gomien, *Short guide to the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 1998, p. 9; Case 10.287 (El Salvador), IACHR Annual Report 1992-1993.

[9] "Every Human being has the inherent right to life", Art. 6(1) first sentence ICCPR; "Every person has the right to have his life respected", Art.4 (1) first sentence ACHR.

[10] Art 2(1) first sentence ECHR.

[11] Art. 6(1) second sentence ICCPR, Art. 2(1) first sentence ECHR, Art. 4(1) second sentence ACHR.

to refrain from the arbitrary taking of life but also to take positive measures to protect the right to life.[12] *A contrario* the non-arbitrary taking of life is allowed under the ICCPR, the ECHR and ACHR. States that have not ratified specific treaties or protocols abolishing the death penalty are still allowed to impose the death penalty under certain conditions.[13] However, the European Court on Human Rights has acknowledged that in Europe the death penalty has been abolished.[14]

In other words the right to life is a very fundamental right under all three treaties. Moreover, under all three treaties it is understood that the right to life is a right for everyone that must be protected. However, only the arbitrary taking of life is prohibited by the treaties.

2.1.2 Freedom from Torture

Under international law the prohibition of torture, or the right to physical integrity, has a special status. It is not only non-derogable in the ICCPR, ECHR and ACHR, it is also ensured without any restriction whatsoever.[15] Moreover, specialised treaties have been created both on the international and the regional level in order to battle the worldwide practice of torture.[16] The 'unconditional recognition' of the prohibition of torture 'by the present community of States justifies the view that torture is prohibited by general international law.'[17] In the *Furundzija* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY or Yugoslavia tribunal) holds that the definition of torture in article 1(1) of the 1984 Torture Convention must be regarded as authoritative.[18] It provides:

> "[T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or with the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions."[19]

Even though article 1(1) of the Torture Convention gives a clear definition of torture, its wording is quite controversial and in comparison to the articles contained in the ICCPR, ECHR and ICCPR quite narrow. It limits the scope of violators of the prohibition of torture to "public officials", whilst the articles containing the prohibition of torture expand to a larger group of perpetrators. Furthermore article 1(1) of the Torture Convention excludes "lawful sanctions" from the category falling under torture, thereby permitting States to impose corporal punishment on persons when their laws allow them to do so.

The first sentence of Art. 7 ICCPR, Art. 3 ECHR and Art. 5(2) first sentence ACHR state that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This prohibition relates both to physical pain and mental suffering. None of the monitoring bodies make a clear distinction between the different concepts. However, in hierarchical terms torture is considered the most serious violation, followed by, respectively, cruel and inhuman treatment, and degrading treatment or punishment.

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[12] Art. 6(1) last sentence ICCPR, Art. 2(1) second sentence ECHR, Art. 4(1) last sentence ACHR.

[13] "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force (…) This penalty can only be carried out pursuant to a final judgement rendered by a competent court.", Art. 6(2) ICCPR; "In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime."; Art. 4(2) ACHR. See for a more in depth analysis of the death penalty and the death row phenomenon and their consistency with international law: Eva Rieter, *ICCPR Case Law on Detention, the Prohibition of Cruel Treatment and some Issues Pertaining to the Death Row Phenomenon*, Journal Of the Institute Of Justice and International Studies, Papers from the September 2001 International Corrections Symposium, Institute of Justice and International Studies Central Missouri State University, No. 1, 2002, http://www.cmsu.edu/cj/journal.htm.

[14] ECHR, Case of Öcalan v. Turkey, 12 March 2003, Appl. no. 46221/99, paras. 55-59.

[15] It has amongst others been included in Art. 5 of the UDHR, Art. 3 of the four Geneva Conventions, Art. 7 of the ICCPR, Art. 3 of the ECHR, Art. 5 of the ACHR and Art. 5 of the ACHPR.

[16] States have created the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), entry into force on 26 June 1987 (130 States Parties); the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, entry into force on 1 February 1987 (41 States Parties) and the Inter-American Convention to Prevent and Punish Torture, entry into force on 9 December 1985 (16 States Parties).

[17] Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl/Strasbourg/Arlington, 1993, p. 126.

[18] It gives several reasons why the definition of article 1(1) should be seen as an authoritative one. It stipulates that in case-law of the of the Rwanda Tribunal (*Akayesu* case) and in the *Delalic* case (of the ICTFY) it has been regarded as such. Moreover, the definition laid down in the Torture Convention, 'spells out all the necessary elements implicit in international rules on the matter. Furthermore, the definition 'to a very large extent coincides with that contained in the United Nations Declaration on Torture of 9 December 1975. '(A) substantially similar definition can be found in the Inter-American Convention' (articles 2 and 3). '(T)he same definition has been applied by the United Nations Special Rapporteur and is in line with the definition suggested or acted upon by such international bodies as the European Court of Human Rights and the Human Rights Committee'. *Prosecutor* v. *Anto Furundzija* (Furundzija case), Judgment of 10 December 1998, ICTFY Trial Chamber, §§ 159/160.

[19] Article 1(1) of the Torture Convention, 1984.

Torture involves the intentional infliction of severe pain or suffering. Cruel and inhuman treatment concerns the causing of intense physical and mental suffering. Degrading treatment mainly entails (severe) humiliation of the victim.

2.2 Customary International Law

From article 38 of the Statute of the International Court of Justice it follows that custom is the 'evidence of a general practice accepted as law'. In other words custom consists of two elements, the 'general practice' of a State and 'the conviction that such practice reflects, or amounts to law (*opinio iuris*)'.[20] State practice consists of 'what States do and say'. The practice of States must be consistent[21] and time is needed for a rule to become a customary rule. Since a single precedent is not enough for the emergence of a customary rule, there must be a degree of repetition over a period of time.[22] To become an international customary rule there must be a practice by more than one State, in other words a 'general practice' should exist. 'General practice' does not require the unanimous practice of all States or other international subjects, it should reflect wide acceptance among the States particularly involved. From this follows that a State, if it does not persistently object to the practice,[23]. *Opinio iuris* is the subjective element of custom or the so-called psychological factor. It is the belief of a State that it has to behave in a certain way because it is under a legal obligation to do so. However, as it is not easy to establish *opinio iuris* it can be derived 'indirectly from the actual behaviour of States'.[24] It is this factor which turns the State practice into a customary rule.

When looking the numbers of ratifications, it can be said that there is a wide acceptance among States of the human rights included in the ICCPR, ECHR and ACHR. The ICCPR, as an international treaty has been ratified by 149 States.[25] The regional treaties also enjoy large acceptance of its rights. The ECHR has been ratified by 44 States[26] and 23 States have ratified the ACHR.[27] In my opinion, these numbers of ratification reflect a 'general practice' amongst States at least in the sense of what they 'say'. According to Ramcharan it is clear that the right to life is a norm of international customary law as the right has been included not only in the three treaties (the ICCPR, the ECHR and the ACHR) but also in Art. 3 of the Universal Declaration and Art. 4 of the African Charter on Human and Peoples' Rights.[28] In this respect the prohibition of torture stands even stronger, as several specialised treaties and treaty provisions have been adopted in order to guarantee its protection.[29]

No State or government will say or believe that it is under a certain obligation to torture or deprive (its) people of their right to life (maybe with the exception of the death penalty). On the contrary, generally it is the belief of States that they are under an obligation to prevent torture and threats to life. Both the right to life and the prohibition of torture may be seen as rules of customary international law.[30]

As established earlier customary rules are legally binding upon all States,[31] the right to life and the prohibition of torture are also legally binding upon the States that did not ratify the ICCPR, ECHR or ACHR. However, it is not clear whether these rights also must be respected during states of emergency. In other

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[20] ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua, *Nicaragua* v. *United States of America*, 27 June 1986, paras. 183-186.

[21] Evidence of such State practice can be found in the official publications of States, pronouncements of government spokesmen, or sometimes in the writings of international lawyers, judgments, treaties, resolutions of the General Assembly of the UN.

[22] However, if there is no practice contrary to a rule of customary law, a small amount of practice is sufficient.

[23] According to Cassese, in current international law the rule of the persistent objector is slowly losing its character, as the world community is more and more willing to impose certain international rules on States without their consent. Antonio Cassese, *International Law*, Oxford University Press, New York, 2001, pp. 123/124.

[24] In other words official statements are not necessarily required, '*opinio iuris* may be gathered from acts or omissions'. Examples of *opinio iuris* can be found in international rules of conduct, like the usage of ships to sail under the flag of the country where the ship has been registered. Peter Malanczuk*, Akehurst's Modern Introduction to International Law, Routledge*, London, 1997, p. 44.

[25] Based on information from the website of the UN High Commissioner for Human Rights, http://www.unhchr.ch, last checked at 26/6/2003.

[26] Many States have ratified both the ICCPR and the ECHR. Based on information from the website of the Council of Europe, http://www.coe.int, last checked at 26/6/2003.

[27] Many States have ratified both the ICCPR and the ACHR. Based on information on the website of the Inter-American Commission on Human Rights, http://www.cidh.oas.org , last checked at 26/6/2003.

[28] B.G. Ramcharan (ed.), *The Right to Life in International Law*, Martinus Nijhoff Publishers, 1985, p. 3. Chowdhury holds the same with regard to the right to life and the prohibition of torture. Chowdhury, supra note 5, pp. 156 and 189. See also: M. Boot*, Nullum Crimen sine lege and the Subject Matter Jurisdiction of the International Criminal Court*, School of Human Rights Research Series, Vol. 12, Intersentia, Antwerpen/Oxford/New York, 2001, p. 23; Joan F. Hartman, *Derogation from Human Rights treaties in Public Emergencies*, Harvard International Law Journal, Vol. 22, No. 1, 1981, p. 15.

[29] The prohibition of Torture has amongst others been included in Art. 5 of the UDHR, Art. 3 of the four Geneva Conventions, Art. 7 of the ICCPR, Art. 3 of the ECHR, Art. 5 of the ACHR and Art. 5 of the ACHPR and in the specific torture conventions: UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), entry into force on 26 June 1987 (132 States parties); the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, entry into force on 1 February 1987 (44 States parties) and the Inter-American Convention to Prevent and Punish Torture, entry into force on 9 December 1985 (16 States parties).

[30] This is also evident by the establishment of the UN Special Rapporteur on Torture and the UN Special Rapporteur on Summary and Arbitrary Executions by the UN Member States. The establishment of a Special Rapporteur is a political decision of States. In other words, by establishing these specific Special Rapporteurs, States are expressing both State practice and *opinio iuris*.

[31] Except for the State that objected persistently from the beginning of the emergence of the rule.

words, whereas the rights have the status of non-derogable rights under the three treaties, this is not self-evident under customary international law. First it should be established whether the non-derogation clause itself belongs to customary international law. According to Oraá the 'principle of non-derogability' has 'already emerged as a principle of customary international law'.[32] Moreover, the Report of the Meeting of Experts on Rights not Subject to Derogations During States of Emergency and Exceptional Circumstances convincingly argues that the jurisprudence of the ICJ identifies as a minimum 'the four rights which are non-derogable under the International Covenant, the European Convention and the American Convention also are non-derogable under customary law.'[33]

2.3 Jus Cogens

As mentioned in the introduction several writers have named the four common non-derogable rights as examples of *jus cogens*,[34] This section analyses whether this assumption is correct as to the right to life and to the prohibition of torture.

Article 53 of the Vienna Convention on the Law of Treaties establishes the standards for the creation of a norm of *jus cogens*.[35] First it must be shown that the peremptory norm belongs to general international law.[36] Secondly, a prerequisite is the acceptance of that rule as a peremptory rule by the international community of States as a whole.[37] According to the chairman of the Drafting Committee of the Vienna Convention, Mr. Ago, 'as a whole' does not mean that a rule of *jus cogens* must be universally accepted and recognised. It would be enough if a very large majority did so.[38]

As previously established the right to life and the prohibition of torture belong to general international law since they are codified in international treaty law and in international customary law. The ICCPR, ECHR and ACHR have been ratified by a large number of States. Moreover, the right to life and the prohibition torture form part of international customary law as well. Based on these facts one could say that these non-derogable rights find acceptance by the international community of States as a whole. However in order to become a norm of *jus cogens* the rule must be accepted by the international community of States as a 'peremptory rule'. In other words, a very fundamental 'norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' As to the non-derogability further analysis is not really needed. The rights discussed here are non-derogable, e.g. rights that can never be suspended, not even in a time of public emergency. But are these rights also rights with an imperative character?

As seen above, the right to life is considered a very elementary right. Its 'imperative character' is 'adequately supported in international practice.'[39] Ramcharan cites in this respect a Special Rapporteur of the United Nations Commission on Human Rights who has emphasised that: 'The right to life is (…) a fundamental right in any society, irrespective of its degree of development or the type of culture which characterizes it, since this right forms part of *jus cogens* in international human rights law.'[40]

The prohibition of torture enjoys wide acceptance among States. This has been expressed in the adoption of specific treaty provisions and specialised treaties. In the *Furundzija* the Yugoslavia Tribunal stated that the prohibition of torture has evolved into a norm of *jus cogens*. It based its views on several cases and documents. So far the dictum of the Yugoslavia tribunal has had one follow-up; the European Court has referred and subscribed to it in the *Al-Adsani* v. *The United Kingdom* case.[41] Moreover, in its General

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[32] Jaime Oraá, supra note 5, pp. 433-437.

[33] They find support for this in the Questiaux Report (E/CN.4/Sub.2.1982/15), the Siracusa Principles (On the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, International Law Association, May 1984), the Paris Minimum standards (of Human Rights norms in a State of Emergency, International Law Association, 1984), the Turku Declaration on Minimum Humanitarian Standards and the Draft Code of Crimes against Peace and Security of Mankind (E/CN.4/1995) and the doctrine of the ICJ. *Report of the Meeting of Experts on Rights not subject to Derogation during States of Emergency, Geneva*, 17-19 May 1995, in: *Non-derogable rights in States of Emergency*, D. Prémont (ed.), Association of International Consultants of Human Rights, Etablissements Emile Bruylant, Brussels, 1996.

[34] For example: Jaime Oraá, supra note 5, p. 69. R. Abi-Saab, supra note5, p. 120. Subrata Roy Chowdhury, supra note 5, p. 147. Stephen P. Marks, supra note 5, pp. 201-202. Joan F. Hartman, supra note 5, p. 114. T. Meron, supra note 5, p. 11.

[35] Art. 53 states: '(A) peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

[36] Some writers consider general international law to consist solely of rules of customary international law. In my opinion general international law entails a larger scale of international norms. I support the definition given by Malanczuk, who states that: *"'General international law' refers to rules and principles that are applicable to a large number of states, on the basis of either customary international law or multilateral treaties."* See: Peter Malanczuk, supra note 24, p.2.

[37] Malcolm N. Shaw, *International Law*, Fourth Edition, Cambridge University Press, Cambridge, 1997 p. 97.

[38] See references in: Antonio Cassese, supra note 23, p. 140; See also: Gennady M. Danilenko, International Jus Cogens: Issues of Law-Making, European Journal of International Law, Vol. 2, No. 1, 1999; Maurizio Ragazzi, The Concept of International Obligations Erga Omnes, Clarendon Press, Oxford, 1997.

[39] B.G. Ramcharan (ed.), supra note 28, p. 14.

[40] B.G. Ramcharan (ed.), supra note 28, pp.14-15.

[41] *Prosecutor* v. *Anto Furundzija* (*Furundzija* case), Judgment of 10 December 1998, ICTFY Trial Chamber, §§ 153-157. *Al-Adsani* v. *The United Kingdom*, Judgment of 21 November 2001, A.35763/97, § 30.

Comment on Article 4 the Human Rights Committee has stated that the right to life and the prohibition of torture are fundamental rights with a peremptory nature.[42] Thereby labelling these rights rules of *jus cogens*.

The importance of the right to life and the prohibition of torture in the treaty systems is underscored by reference to Art. 27 ACHR, that the procedural rights necessary to guarantee these rights are non-derogable, as well as by the interpretation of the Inter-American Court of Human Rights and the Human Rights Committee.[43] More recently the Inter-American Commission of Human Rights, operating on the basis of the American Declaration of the Rights and Duties of Man, as part of the Charter of the Organisation of American States, has confirmed this in its report on terrorism and human rights.[44]

Though there still might rise some discussion about the imperative character of both rights, in my opinion both the right to life and the prohibition of torture amount to rules of *jus cogens*.

The recognition of the right to life and the prohibition of torture as rights belonging to *jus cogens* does not only have the effect of making them binding upon States which are not bound by any of the three treaties, it also means that no derogation is permitted by any State not even during the times of a public emergency. Moreover the rules 'can be modified only by a subsequent norm of general international law having the same character'[45] and any treaty (or customary rule) that conflicts with the right to life and the prohibition of torture will be void.[46]

3. Rules that Apply to the US as Well

Since the September 11th attacks the US has been focusing on counter-terrorism measures and on the internal (legal) order without paying much attention to international rules that might apply to it. Nevertheless, the US is not only bound by its own national laws, whether on federal or State level, it forms part of the international legal order as well. This means that the US also has to respect certain international rules, those rules it has agreed upon by signing and ratifying treaties and those rules that might apply to it through international customary law and *jus cogens*. Of the aforementioned general human rights treaties examined, the US has only ratified the ICCPR. I will therefore focus on the rights therein included. I will look at the specific wording of the Covenant as to the right to life and the prohibition of torture and the possible reservations the US has made to these rights. Furthermore I will address the implications for the US of the non-derogable right to life and the prohibition of torture as rules of international customary law and *jus cogens*.

3.1 Treaty Law (ICCPR)

3.1.1 The Right to Life

The Human Rights Committee supervising the ICCPR has emphasised that the right to life 'is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation'.[47] In addition to the specific duties under the article States have, in the first place, the 'supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life', as they all constitute a great threat to the right to life.[48] States parties should also take specific and effective measures to prevent the disappearance of individuals.[49]

Article 6(1) starts with stating that: "Every human being has the inherent right to life." This notion should not be understood in a restrictive manner and 'the protection of this right requires that States adopt

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[42] CCPR General Comment 21, on article 4, 24/06/01, par. 11. In its recent report on terrorism and human rights the Inter-American Commission has also confirmed that the prohibition of torture is a rule of *jus cogens*. Inter-American Commission on Human Rights, Report on terrorism and human rights, 22 October 2002, OEA/Ser.L/V/II.116, Doc. 5 rev.1 corr., www.cidh.oas.org, par. 216.

[43] The Inter-American Court has emphasised the importance of the respect for procedural rights, also during states of emergency, in relation to the right to life and the prohibition of torture in two Advisory Opinions. Adv. Op OC-8/87, 30 January 1987, *Habeus Corpus* in Emergency Situations and Adv. Op. OC-9/87, 6 October 1987, Judicial Guarantees in States of Emergency. The Human Rights Committee did so in its General Comment 29 on article 4. CCPR General Comment 29, States of Emergency (article 4), 24/06/01, paras. 15 and 16.

[44] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 October 2002, OEA/SER.L/ V/II.116, Doc. 5 rev. 1 corr., www.cidh.oas.org, paras. 13-15, 18-20, 22, 28, 94-95, 117, 208 and 217-261.

[45] Art. 53 Vienna Convention, supra note 7.

[46] Art. 53 Vienna Convention, supra note 7.

[47] CCPR General Comment 6, the right to life (art. 6), 30/04/82, § 1.

[48] For this reason, every effort made by a State in order to avert 'the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.' CCPR General Comment 6, ibid., § 2. In its General Comment 14, the Human Rights Committee went a step further. It held that the 'designing, testing, manufacturing, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. CCPR General Comment 14, the right to life and Nuclear Weapons, 02/11/84, §§ 4 and 6.

[49] As disappearances have become 'all too frequent and leads too often to arbitrary deprivation of life', States should 'establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.' CCPR General Comment 6, supra note 47, § 3.

positive measures.'[50]
The second sentence of article 6(1) provides that the right to life 'shall be protected by law.' This sentence was included in order to emphasise the duty of States to protect life. Article 6(1) requires a minimum of prohibitive norms under criminal law. States parties should take measures 'not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.'[51] Moreover, the deprivation of life by the authorities of the State is a matter of 'utmost gravity'. It is necessary that the law strictly controls and limits 'the circumstances in which a person may be deprived of his life by such authorities.'[52] Still, the obligation to protect the right to life by law gives broad discretion to the national legislature.[53]

The third sentence of Art. 6(1) states: "No one shall be arbitrarily deprived of his life." It aims at the protection of life against interference by State organs. It is of great importance to know what is meant by 'arbitrarily'. Apparently, a State is allowed to deprive someone of his life in a non-arbitrary manner. The UN Commission on Human Rights[54] has taken the position that the term 'arbitrarily' both means 'illegally' and 'unjustly'.[55] To illustrate this, the cases of permissible deprivation of the right to life as stated in article 2(2) of the ECHR[56] cannot be seen as 'arbitrary'. Examples given of arbitrary deprivation of life are genocide, death by torture, excessive use of force and disappearances.[57]

In its General Comment the Human Rights Committee held that even though States are not obliged under article 6 to 'abolish the death penalty totally', they do have an obligation to 'limit its use and, in particular, to abolish it for other than the "most serious crimes".'[58] It furthermore stipulated that abolition of the death penalty is desirable and that 'all measures of abolition should be considered as progress in the enjoyment of the right to life'.[59] The expression "most serious crimes", as in Art. 6(2), 'must be read restrictively to mean that the death penalty should be a quite exceptional measure.'[60] There are no clear examples of what these 'most serious crimes are'. However, it has been established that the death penalty cannot be imposed for robbery and crimes of an economic nature.[61] Article 6(2) emphasises that the death penalty can only be imposed in 'accordance with the law in force at the time of the commission of the crime' and that it cannot be imposed contrary to the provisions of the ICCPR. This means that a law imposing the death penalty has to be consistent with the rule of law as expressed by the ICCPR in its entirety.[62] Article 6(5)

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[50] According to the Human Rights Committee it would be 'desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.' CCPR General Comment 6, supra note 47, § 5.

[51] CCPR General Comment 6, supra note 47, § 3.

[52] CCPR General Comment 6, supra note 47, § 3. See furthermore: *Baboeram* v. *Surinam*, Communications Nos. 146 and 148-154/1983, GAOR, A/40/40, Report HRC, § 14.3; *Guerrero* v. *Colombia*, Communication No. R.11/45, GAOR, A/37/40, Report HRC, § 13.1. In relation to this, in cases of disappearances or *incommunicado* detention (detention without any contact with the outside world) the State Party has the burden of proof. Which means that it has to prove to the Committee that it did everything in its power to prevent the breach of the right to life and, moreover that the breach is assumed to exist unless proven otherwise. See in this respect: Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Martinus Nijhof Publishers, The Hague/Boston/London, 1998, pp. 398-401.

[53] "A violation of the duty of protection flowing from Art. 6(1) can be assumed only when State legislation is lacking altogether or when it is manifestly insufficient as measured against the actual threat." Nowak, supra note 17, p. 106.

[54] The United Nations Commission on Human Rights is composed of 53 States, which meet once a year. Commission on Human Rights procedures and mechanisms are mandated to examine, monitor and publicly report either on human rights situations in specific countries or territories (known as country mechanisms or mandates) or on major phenomena of human rights violations worldwide (known as thematic mechanisms or mandates). These procedures and mechanisms are collectively referred to as the Special Procedures of the Commission on Human Rights. Website of the UN High Commissioner for Human Rights, http://www.unhchr.ch/html/menu2/2/chrintro.htm .

[55] Reproduction of UN document A/2929, § 3, The *drafting history of article 6 of the International Covenant on Civil and Political Rights*, in: B.G. Ramcharan (ed.), supra note 28, p. 43.

[56] Namely: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person unlawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[57] These examples are not exhaustive, as the protection of the right to life must not be interpreted narrowly. Nowak, supra note 17, p. 111. See also: Reproduction of UN document A/2929, § 2, *The drafting history of article 6 of the International Covenant on Civil and Political Rights*, in: B.G. Ramcharan (ed.), supra note 28, p. 43.

[58] "Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes". CCPR General Comment 6, supra note 47, § 6.

[59] CCPR General Comment 6, supra note 47, § 6. However, all States that have ratified the Second Optional Protocol to the ICCPR (currently 49), aiming at the abolition of the death penalty, are under the obligation not to execute anyone who has been sentenced to death and to, furthermore, abolish the death penalty. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, entry into force on 11 July 1991.

[60] CCPR General Comment 6, supra note 47, § 7.

[61] See the examples in: Anna-Lena Svensson-McCarthy, supra note 52, p. 404.

[62] From this follows that the procedural guarantees prescribed in the Covenant must be observed, 'including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.' The importance of these 'procedural guarantees' is also emphasised in the last sentence of Art. 6(2). It states that the death penalty can only be carried out 'pursuant to a final judgement rendered by a competent court'. Article 6(2) ICCPR, last sentence. The Human Rights Committee noted, moreover, that these (procedural) rights are applicable in addition to the particular right to seek pardon or commutation of the sentence contained in Art. 6(4). CCPR General Comment 6, supra note 47, § 7. Article 6(4) holds that: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." Pardon means that an enforceable penalty is voided in full. Commutation means the substitution of a penalty with a lighter penalty. Amnesty in general means the protection from (further) legal prosecution and punishment. The first sentence opens the possibility to people on death row to seek pardon or commutation. In order to do that, the execution of the penalty must be postponed until the proper conclusion of the procedures. The second sentence is addressed towards the (national) legislature. The possibility to grant and/or apply for amnesty, pardon and commutation

lays down that the "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."[63] In other words, a person, younger than 18 years old, who commits a crime that can be punished with the death penalty may not be sentenced to death.

This rule applies also if the execution would take place once he is 18 or older.[64] As to pregnant women, when sentenced to death the penalty will not be carried out until the birth of the child.[65] In paragraph 6 of Art. 6 it is, furthermore, emphasised that the article may not be interpreted or invoked in order 'to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.' From this it can be concluded that the reintroduction of the death penalty is incompatible with the Covenant.[66] Moreover, the imposition of the death penalty may not conflict with the UN Convention on the Prevention and Punishment of the Crime of Genocide.[67]

RESERVATION TO THE RIGHT TO LIFE

Upon ratification of the ICCPR in 1992, the US has made several reservations one of which concerns the right to life:

> "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age."[68]

According to Art. 19 of the Vienna Convention on the Law of Treaties, States are only allowed to make reservations to a treaty as long as the treaty does not prohibit the reservation and as long as it is compatible with the object and purpose of the treaty.[69] The ICCPR does not include a specific article on reservations, therefore the rule applies that the reservations made by States parties should be compatible with the object and purpose of the treaty.[70] Whether the US reservation to the right to life is compatible with the object and purpose of the ICCPR is questionable.

The reservation addresses the Art. 6(5) clause in which it is held that the death penalty "(…) shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." By its reservation the US claims the right to impose the death penalty on minors. The broad wording of the reservation makes it possible for the US not only to execute 16 or 17 year olds but also younger adolescents or even children.[71] Lijnzaad holds that since Art. 6(5) is a non-derogable right, reservations to that provision 'must be assumed to be contrary to the object and purpose of the Covenant.'[72]

In its reservation the US also reserves itself the right to include capital punishment under 'future laws'. In the light of international developments over the last decades this is another problematic aspect to the reservation, both because it is a very vague statement and other States parties do not know what the US commits itself to[73] and because there is a worldwide tendency to abolish the death penalty.[74] Especially now a

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must be created. Nowak, supra note 17, p. 121.

[63] Before its adoption, this paragraph led to discussion on whether or not other groups of persons, like the mentally handicapped or the aged, should also be included. See: Nowak, supra note 17, p. 120.

[64] Although non-derogable, the United States reserved the right to 'impose capital punishment on any person (other than a pregnant woman)'. See infra note 68 and accompanying text.

[65] Although the opinions are divided on this topic, Nowak holds that this paragraph aims only at the protection of the unborn child and not to that of its mother. Nowak, supra note 17, p. 122.

[66] Nowak, supra note 17, p. 115.

[67] This was included in Art. 6 (2) to 'prevent a policy of genocide from being practised by way of "legal" (in the sense of judicially imposed) sentences to death.' Art. 6(3), moreover, prohibits the deprivation of life when constituting the crime of genocide. It furthermore stipulates that nothing in article 6 'shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.' Nowak, supra note 17, p. 115. See also: Eva Rieter, supra note 13.

[68] Information taken from the treaty bodies database on the website of the UN High Commissioner for Human Rights: www.unhchr.ch. See also: The UN international Covenant on Civil and Political Rights, U.S. Reservations, Understandings, and Declarations, George Washington University, Washington D.C., http://www.gwu.edu/~jaysmith/Usres_ICCPR.html.

[69] Vienna Convention, supra note 7, Art. 19.

[70] In its General Comment no. 24 the Human Rights Committee has declared itself competent to determine the admissibility of reservations. CCPR General Comment 24(52), 2/11/1994. See also in this respect: Konstantin Korkelia, *New Challenges tot the Regime of Reservations under the International Covenant on Civil and Political Rights*, EJIL, No. 13, 2002, pp. 437-477.

[71] See in this respect: Cees Flinterman, Eva Rieter, *Nederland en de Amerikaanse Voorbehouden bij het Internationale Verdrag Inzake Burger- en Politieke Rechten*, NJCM-bulletin, no. 17-8, 1992, pp. 961-970. Lisa A. Blythe, *They Dropped the Ball: The Failure of the Nevada Supreme Court to Consider the Impact of the ICCPR's Ban on Capital Punishment for Juvenile Offenders in Domingues v. State*, Dickinson Journal of International Law, Vol. 18:2, 2000, pp.391-409.

[72] Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties; Ratify and Ruin?*, Martinus Nijhoff Publishers, Dordrecht (The Netherlands), 1995, pp. 189 and 204-205.

[73] Many States, 11, formally objected to the reservation. The 11 States objecting to the reservation were Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden. See: the treaty bodies database of the website of the UN High Commissioner for Human Rights, www.unhchr.ch, last checked 27/6/03.

great number of States have ratified the second protocol to the ICCPR on the abolishment of the death penalty, this aspect of the reservation cannot be seen as in conformity with the 'spirit' of the treaty. Some writers even speak of the development of a norm of customary law where it involves the abolishment of capital punishment and the development of an international norm of *jus cogens* where it involves imposition of capital punishment on minors.[75]

In my opinion the above said means that the reservation is incompatible with the ICCPR. According to the Human Rights Committee this consequently means that the US has to act in conformity with Art. 6(5) 'without benefit of the reservation.'[76] This means that even if we would assume that the US due to the war against terrorism finds itself in a state of emergency, Art. 6 still applies to it and should be respected at full.

3.1.2 The Right to Freedom from Torture

Article 7 of the ICCPR does not only prohibit torture, inhuman and degrading punishment and treatment but also cruel treatment and punishment. The Human Rights Committee has held that the aim of the article is to 'protect both the dignity and the physical and mental integrity of the individual.' It stated, furthermore, that there are no circumstances that justify or excuse a violation of Art. 7, nor may the perpetrator invoke the fact that the violation was based on an order from a superior officer or authority.[77] In relation to this the Committee said that: "Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment."[78]

Under Art. 7 States have a duty to 'afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7'.[79] For the implementation of article 7 it is not sufficient to, solely, prohibit such treatment or punishment or to make it a crime.[80] The Human Rights Committee emphasised that with regard to violations of Art. 7, domestic law must recognise the right to lodge complaints, which will be investigated 'promptly' and 'impartially' by competent authorities.[81] Moreover States are not allowed to 'deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[82]

The first sentence of Art. 7 provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This prohibition refers 'not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.' It furthermore extends to corporal punishment.[83] The Committee pointed out that it is not necessary to draw sharp distinctions between the various categories laid

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[74] According to Amnesty International more than half of the countries in the world have abolished the death penalty in law or practice (112 Countries). A large number of States have abolished the death penalty for all crimes (76 States), 15 States have abolished the death penalty for other crimes and 21 States have abolished the death penalty in practice (*de facto* moratorium on the death penalty). Moreover, four important international treaties provide for the abolition of the death penalty. These are: the Second Optional Protocol to the ICCPR (ratified by 49 States, signed by 7 States), the Protocol to the ACHR (ratified by 8 States, signed by 1 State), Protocol No. 6 to the ECHR (ratified by 41 States, signed by 3 States) and Protocol No. 13 to the ECHR (ratified by 5 States, signed by 34 States). See the library on the international website of Amnesty International: AI INDEX: April 2003 ACT 50/003/2003 and March 2003 ACT 50/001/ 2003, www.amnesty.org/library, last checked 27/6/03. See also: Margaret de Merieux, *Reservations to the International Covenant on Civil and Political Rights: Their Substantive and Constitutive Significance*, Revue de Droit International, No. 72, 1994, p. 118. Liesbeth Lijnzaad, supra note 72, p. 205. Cees Flinterman, supra note 71, p. 964. For more information on the death penalty see also: www.deathpenalty.org.

[75] Amnesty International states in its report on 'Children and the Death Penalty', that since 1990 it has documented executions in seven countries: the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the USA and Yemen. The report further states that: *"At least two of these countries, Pakistan and Yemen, have since changed their laws to exclude the practice. The country which has carried out the greatest number of known executions is the USA."* In other words, the US is not only one of the few countries that imposes the death penalty on juvenile offenders, it imposes the death penalty on juveniles more often than other countries. Since there are only three States left that impose the death penalty on juveniles, one could say that the general practice is not to do so. Moreover, Amnesty International holds that: *"The use of the death penalty against child offenders is prohibited under leading international instruments of worldwide or regional scope relating to human rights and the conduct of armed hostilities ("international humanitarian Law")."* This means that we certainly can speak of a rule of customary international law and probably also of a rule of *jus cogens* where it concerns the prohibition of the imposition of the death penalty on juvenile offenders. See: Amnesty International, Report on*: Children and the Death Penalty; Executions worldwide since 1990*, 25 September 2002, www.amnesty.org/library; Cees Flinterman, Eva Rieter, supra note 71, p. 964.

[76] Supra note 70.

[77] CCPR General Comment 20, replaces general comment 7, on the prohibition of torture and cruel treatment or punishment (Art. 7), 10/03/92, § 3.

[78] CCPR General Comment 20, ibid., § 13.

[79] According to the Committee this is 'the duty of the State party whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.' CCPR General comment 20, supra note 77, § 2.

[80] States parties should 'inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction. CCPR General comment 20, supra note 77, § 8.

[81] CCPR General comment 20, supra note 77, § 14.

[82] The Committee said this in connection with the granting of amnesty in respect of acts of torture. It held that: "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future." CCPR General comment 20, supra note 77, § 15.

[83] '(I)ncluding excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure'. The Committee emphasises in this respect 'that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.' CCPR General comment 20, supra note 77, § 5.

down in the article when considering whether it has been violated.[84] However, in order to give a clear definition I will refer to the different categories below.[85]

The word 'torture' refers equally to physical and mental torture. As the Covenant does not contain a definition of torture, the definition of Art. 1(1) of the UN Torture Convention can be used to interpret its meaning.[86] However, even though its definition seems to be clearer, it is much narrower than the definitions included in the ICCPR, ECHR and ACHR.[87] Cruel and inhuman treatment lack the essential features of torture like intent, fulfilment of a certain purpose and/or the intensity of severe pain. They rather involve the imposing of a certain minimum of pain or suffering. It is, however, difficult to establish the level of the severity of suffering inflicted.[88] Degrading treatment involves the humiliation of the victim, rather than the severity of suffering imposed, 'regardless of whether this is in the eyes of others or those of the victim himself or herself.' [89] 'Since all punishment contains an element of humiliation and perhaps also inhumanity, an additional element of reprehensibility must also be present in order to qualify it as a violation' of the prohibition of cruel, inhuman or degrading punishment. It is 'insufficient that punishment is extraordinary, although this may be indicative'.[90]

In the second sentence of Art. 7 it is stated: "In particular, no one shall be subjected without his free consent to medical or scientific experimentation." This clause must be read in the light of the atrocities of the Second World War.[91]

One of the situations in which people are very vulnerable to be subjected to torture or cruel, inhuman or degrading treatment or punishment is in the course of their imprisonment. In this respect the Human Rights Committee has given special attention to the imprisonment and treatment of prisoners.[92] Moreover, it has given special attention to the death penalty and the extradition, expulsion or *refoulement* of persons.[93]

RESERVATION TO THE PROHIBITION OF TORTURE

As to the prohibition of torture the US has made the following reservation:
"The US considers itself bound by Article 7 to the extend that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eight

[84] CCPR General comment 20, supra note 77, §§ 2 and 4. However, one could say, when classifying the different categories, that 'this runs from "mere" degrading treatment or punishment, to that which is inhuman and cruel, up to torture as the most reprehensible form.' Nowak, supra note 17, pp. 128-129. See for analysis of the case law of the Committee relating to the prohibition of torture and humane conditions of detention: Eva Rieter, supra note 13.

[85] "Only in a few cases has the Committee expressly qualified specific treatment as degrading, inhuman, cruel or as torture. In most cases it was satisfied with a simple determination of a violation of Art. 7." "Since nearly all cases involved mistreatment during detention, it usually found a violation of Art. 10 as well, without making a clear distinction between the two provisions." Nowak, supra note 17, pp. 134-135.

[86] "Torture is understood as acts of *acts of public officials* that *intentionally* inflict *severe* physical or mental *pain* or suffering in order to fulfil a certain *purpose*, such as the extortion of information or confession or the punishment, intimidation or discrimination of a person." However, the Committee has recognised in its first General Comment on Art. 7 that torture can also be committed by 'persons acting outside or without any official authority.' Nowak, supra note 17, pp.128-129. CCPR General Comment 7, on the prohibition of torture and cruel treatment or punishment (Art. 7), 30/05/82.

[87] See par. 2.1.2.

[88] "If one person intentionally mistreats another person without thereby pursuing some purpose (e.g. pure sadistically) then this is not torture but rather cruel treatment. The imposition of severe pain for the sole reason of discrimination is, however, torture." Nowak, supra note 17, pp. 128-131.

[89] Nowak, supra note 17, p. 133.

[90] Nowak, supra note 17, pp. 133-134.

[91] The Committee called in its General Comment upon the States Parties to give more attention to this provision. It observed, moreover, 'that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment.' It insisted that these persons 'should not be subjected to any medical or scientific experimentation that may be detrimental to their health'. CCPR General comment 20, supra note 77, §7. However, medical or scientific experimentation is allowed in the case a person does give his/her consent or when it does not amount to torture or to cruel, inhuman or degrading treatment or punishment. Nowak, supra note 17, pp. 139-140.

[92] In a large number of cases where Art. 7 is violated it involves (political) prisoners. For this reason the Committee has laid special emphasis in its General Comment on the protection of imprisoned persons from violations of Art.7. It noticed in this respect that: "The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"." Furthermore, States must take some explicit measures to protect prisoners. In this respect the law must 'prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.' In order to prevent violations of Art. 7 States must give appropriate instruction and training to 'enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment'. Regarding the circumstances of imprisonment itself the Human Rights Committee stipulated that states should provide for provisions against *incommunicado* detention. In order to prevent *incommunicado* detention 'prompt and regular access' should be given to doctors, lawyers and family members. The Committee notes, moreover, that 'prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.' CCPR General comment 20, supra note 77. See also: Eva Rieter, supra note 13.

[93] With regard to the death penalty it referred to its General Comment on the Right to life, stipulating that 'it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.' As to the extradition, expulsion or *refoulement* (the removal of persons to another jurisdiction) of persons the Committee held that those persons who, upon return to another country, are likely to be exposed to torture or cruel, inhuman or degrading treatment or punishment must not be exposed to this danger. Different from the the UN Torture Convention, in the ICCPR a 'threat' does not need to originate from 'public authorities' but they relate to a lack of protection against threats by armed opposition groups as well. 'CCPR General Comment 20, supra note 77, §§ 6 and 9. Nowak, supra note 17, p. 137.

and/or Fourteenth Amendments to the Constitution of the United States." [94]

With this reservation the US makes the statement that it will abide by the ICCPR as long as the treaty is compatible with the US Constitution. Although at first sight this might seem logical, it is 'not done' under international law. When ratifying a treaty a State should bring its laws and practice in conformity with the treaty, not the other way around.[95] The US justifies its reservation by explaining that certain developments under the ICCPR as regards article 7 would lead to inconsistencies under its own national or federal laws and/ or practices. Moreover, at the time the US made the reservation it was afraid that the Human Rights Committee would take a similar approach as the European Court in declaring the death row phenomenon as an expression of cruel and inhuman treatment. Which it indirectly did. The Human Rights Committee has held that the imposition of capital punishment should not only be in conformity with Art. 6, but must also be carried out 'in such a way as to cause the least possible physical and mental suffering'.[96] Moreover, it held that prolonged judicial proceedings in cases concerning capital punishment may lead to a violation of Art. 7. As to extradition, expulsion and refoulement it has held that States parties 'must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment'.[97]

The position of the US regarding Art. 7 is not compatible with the object and purpose of the convention.[98] This means that the US should abide by the wording of Art. 7 'without benefit of the reservation'. Even if we would assume that the US, due to the war against terrorism, finds itself in a state of emergency, Art. 7 still applies to it and should also be respected to the full.

3.2. Customary Law

As seen above both the right to life and the prohibition of torture are rules of customary international law. In other words, these rights must be respected by all States. It can be doubted whether these rights under international customary law also must be respected during a state of emergency. In addressing this problem I have found that it is quite probable that the non-derogability rule has the status of customary international law as well. In other words, the right to life and the prohibition of torture may well be equally non-derogable rights under customary international law.

Regarding the application of these customary rules to the US another problem arises. As addressed earlier, rules of (international) customary law are not applicable to States that have persistently objected to the rule. This in the case the objection was made manifest during the process of the rule's emergence. A persistent objector has to object openly (and over a longer period of time) to the emergence of a certain customary rule. Solely filing reservations, understandings and declarations upon ratification of a treaty in which a certain rule is included, that even if this rule is still emerging as a rule of customary international law, is not sufficient. A State that fails to object persistently prior to the time that the rule finally crystallizes cannot claim exemption from it. Moreover, when remaining silent a State is understood to agree to the emerging customary international rule and consequently it is bound by the (emerging) rule of customary international law.[99] In this respect it is doubtful whether the US might call itself a persistent objector with regard to the customary international rules concerning the right to life and the prohibition of torture.

In addition, according to Cassese, in current international law the rule of the persistent objector is slowly losing its character, as the world community is more and more willing to impose certain international rules on States without their consent.[100] By this he is saying that even though a State has persistently objected to a rule of customary international law, it might still be bound by it.

3.3 Jus Cogens

According to the analysis made above both the right to life and the prohibition of torture are norms of *jus cogens*. The Human Rights Committee has affirmed this view.[101] The recognition of the right to life and the prohibition of torture as rights belonging to *jus cogens* does not only have the effect of making them binding upon States that are not bound by any of the three treaties, it also means *inter alia* that no derogation

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[94] Information taken from the treaty bodies database on the website of the UN High Commissioner for Human Rights: www.unhchr.ch. The UN international Covenant on Civil and Political Rights, U.S. Reservations, Understandings, and Declarations, George Washington University, Washington D.C., http://www.gwu.edu/~jaysmith/Usres_ICCPR.html.

[95] Quite a number of States parties to the ICCPR, 9, have made an objection to this reservation by the US. The 9 States objecting to the reservation were Denmark, Finland, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden. See: the treaty bodies database of the website of the UN High Commissioner for Human Rights, www.unhchr.ch, last checked 27/6/03.

[96] CCPR General Comment 7, on the prohibition of torture and cruel treatment or punishment (Art. 7), 30/05/82. See also: Margaret de Merieux, supra note 74, p. 119.

[97] CCPR General Comment 7, on the prohibition of torture and cruel treatment or punishment (Art. 7), 30/05/82. See also: Margaret de Merieux, supra note 74, p. 119.

[98] Margaret de Merieux, supra note 74, p. 118. Liesbeth Lijnzaad, supra note 72, p. 205. Cees Flinterman, Eva Rieter, supra note 71, p. 964.

[99] See in this respect: Malcolm N. Shaw, supra note 37; Peter Malanczuk, supra note 24.

[100] Antonio Cassese, supra note 23, pp. 123/124.

[101] CCPR General Comment 29, supra note 43, par. 216.

is permitted by any State, not even during the times of a public emergency. Moreover, the rules 'can be modified only by a subsequent norm of general international law having the same character' and any treaty (or customary rule) that conflicts with these provisions will be void.[102]

This far, however, international tribunals have not yet addressed the issue extensively. Only in relation to torture there are two international supporting the above theoretical approach. In the *Furundzija* case and in the *Al Adsani v. United Kingdom* case, the Yugoslavia tribunal and the European Court of Human Rights respectively have found that the prohibition of torture is a rule of *jus cogens*.[103] In my view these interpretations will have more follow-up in the future by other international tribunals. In any case the above tribunals clearly confirmed that the prohibition of torture is norm of *jus cogens*.

4. The Legality of US Counter-Terrorism Measures

In the above it has been argued that even if we would assume that the US, due to the war against terrorism finds itself in a state of emergency, Art. 6 and 7 ICCPR still apply to it and should be respected to the full. Moreover, the US should respect the right to life and the prohibition of torture as customary international rules, since it is doubtful whether the US could call itself a persistent objector with regard to these rules.

In other words the US should respect both the right to life and the prohibition of torture, even if it finds itself in a state of emergency and also when combating terrorism and terrorists. It is questionable whether certain counter-terrorism practices of the US are compatible with international law in general, the right to life and the prohibition of torture as examined above more specifically.

MILITARY ORDER

In its combat against terrorism the US has adopted several measures. One of those is the November 13, 2001, Military Order on The Detention, Treatment, and Trial of Certain Non-Citizens In the War Against Terrorism on the basis of which military commissions can be created (hereinafter the (Military) Order).[104] The grave acts of terrorism, the Order affirms, have given rise to an extraordinary emergency, which necessitates the detention and trial of the terrorists for violations of the laws of war and other applicable laws by military tribunals.[105] This Order applies only to non-US citizens and covers any individual who:

(i) is or was a member of the organisation known as al Qaeda;
(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy;
(iii) has knowingly harboured one or more individuals described in paragraph (i) and (ii).[106]

The convicted individual 'shall not be privileged to seek any remedy or maintain any proceeding … in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.'[107] When found guilty of an offence under the Order Individuals can be sentenced to life imprisonment or death.

In addition to the Order, in March 2002 the rules of procedure were issued for trials by the Military Commissions.[108] Even though these rules give the individuals subjected to it more procedural guarantees than the Order, they are still feeble as regards due process rights. The following issues may be regarded as problematic: [109]

- The individuals subjected to the Military Commission are denied the right to judicial review of detention,

[102] Art. 53 Vienna Convention, supra note 7.
[103] *Prosecutor* v. *Anto Furundzija* (Furundzija case), Judgment of 10 December 1998, ICTFY Trial Chamber; *Al-Adsani* v. *The United Kingdom*, Judgment of 21 November 2001, A.35763/97.
[104] Military Order of November 13, 2001, 66, no. 222, Fed. Reg. 57,833.
[105] Military Order of November 13, ibid.; Ramatullah Khan, *The U.S. Military Tribunals to try Terrorists*, Zeitschrift für Auslandisches Offentliches Recht und Volkerecht, Vol. 62, issue 1-2, 2002, pp. 293-316.
[106] Military Order of November 13, supra note 104, subsection 2(a) (1).
[107] Military Order of November 13, supra note 104, subsection 7(b) (2).
[108] U.S. Department of Defence (D.O.D.), Military Comm'n Order No. 1, March 21 2002, http://www.defenselink.mil/news/mar2002/d20020321ord.pdf
[109] See in this respect: Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, Michigan Journal of International Law, Vol. 23, Spring 2002, pp. 679-690.

since one is not allowed to take proceedings before a court in order to determine the lawfulness of one's detention and to order the release of the person if detention is not lawful.

- The individuals subjected to the Military Commission are denied the right to review by a competent independent and impartial court. Under the Military Order and rules of procedure no such right of appeal is made possible.

- The individuals subjected to the Military Commission are denied the right to trial before a regularly constituted, competent, independent and impartial tribunal established by law. The Military Commissions shall consist of three to seven members, all of who must be military officers, and only one of who (the presiding officer) shall be a lawyer. There is no procedure for challenging a member of the Commission and except for the sentence to death, there is only a two third majority needed for conviction and sentencing of persons brought before the Commission.

- The individuals subjected to the Military Commission, are denied the rights to fair procedure and rules of evidence. Under the rules of procedure hearsay and unsworn written statements are admitted, and other evidence that would not be admissible in regular US courts are admitted as well. At the same time the accused is denied the right of confrontation or examination of the witnesses that have testified against him.

- The individuals subjected to the Military Commission are denied the right to counsel and effective representation. The right to choose one's own counsel is restricted. Moreover, when the defendant does not accept the defence counsel (a JAG officer) assigned to him, but a civilian defence counsel, he risks remaining without counsel under certain circumstances. A civilian defence counsel may be precluded from closed Commission proceedings and may be denied access to information.

As discussed in paragraph 2.3, according to Art. 27 ACHR, the Inter-American Court of Human Rights and the Human Rights Committee the procedural rights necessary to guarantee the right to life and the prohibition of torture are non-derogable as well.[110] In its report on terrorism and human rights the Inter-American Commission of Human Rights underscores this view.[111] The Military Order and the rules of procedure are not compatible with due process rights such as those laid down in Art. 14 ICCPR.[112] Article 14 ICCPR lays down procedural rights that should be respected in any legal procedure. When bearing in mind that those Military Commissions can impose the death penalty, this leads to a violation of the right to life under Art. 6 ICCPR and under customary international law.

In its General Comment 6 the Human Rights Committee has held that the procedural guarantees prescribed in the Covenant must be observed, 'including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.'[113] The importance of these 'procedural guarantees' is also emphasised in the last sentence of Art. 6(2). It states that the death penalty can only be carried out 'pursuant to a final judgement rendered by a competent court'.[114]

Moreover, the Inter-American Commission holds in its report on terrorism and human rights that:

"Fundamental principles of due process and fair trial applicable at all times also entail the right to be tried by a competent, independent and impartial tribunal as defined under applicable international

[110] The Inter-American Court has emphasised the importance of the respect for procedural rights, also during states of emergency, in relation to the right to life and the prohibition of torture in two Advisory Opinions. Adv. Op OC-8/87, 30 January 1987, *Habeus Corpus* in Emergency Situations and Adv. Op. OC-9/87, 6 October 1987, Judicial Guarantees in States of Emergency. The Human Rights Commission did so in its General Comment 29 on article 4. CCPR General Comment 29, supra note 43, paras. 15 and 16.

[111] Inter-American Commission on Human Rights, supra note 44, paras. 13-15, 18-20, 22, 28, 94-95, 117, 208 and 217-261.

[112] The UN Special Rapporteur on the independence of judges and lawyers has expressed his concern about the setting up of military tribunals to try those subject to the Military Order and stressed, with regard to the implications of the Order on the rule of law, that it sends the wrong signals, not only in the US, but around the world. UN Special Rapporteur on the independence of judges and lawyers, Order strikes at core of principles of rule of law, According to Dato' Param Cumaraswamy, UN Press Release, 16 november 2001, www.unhchr.ch.

[113] CCPR General Comment 6, supra note 47, § 7. GC 27:

[114] CCPR General Comment 6, supra note 47, § 7. The Human Rights Committee noted, moreover, that these (procedural) rights are applicable in addition to the particular right to seek pardon or commutation of the sentence contained in Art. 6(4); Amnesty, pardon or commutation of the sentence of death may be granted in all cases." The possibility to grant and/or apply for amnesty, pardon and commutation must be created; Moreover, Article 6(4) holds that: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence; CCPR General Comment 6, supra note 47, § 7. Pardon means that an enforceable penalty is voided in full. Commutation means the substitution of a penalty with a lighter penalty. Amnesty in general means the protection from (further) legal prosecution and punishment. As to the first sentence grants people on death row the chance to seek pardon or commutation. In order to do that, the execution of the penalty must be postponed until the proper conclusion of the procedures. The second sentence is addressed towards the (national) legislature. Nowak, supra note 17, p. 121.

human rights or humanitarian law. This requirement generally prohibits the use of *ad hoc*, special or military tribunals or commissions to try civilians for terrorist-related or other crimes."[115] (underlining added)

The Inter-American Commission also states that certain limited aspects of the right to a fair trial may be legitimately suspended during a state of emergency. However, '[s]uch measures may never be justified … where they may compromise a defendants non-derogable due process protections, including the right to prepare a defense and to be tried by a competent, impartial and independent tribunal.'[116]

Furthermore, the Inter-American Commission holds in its report that irrespective whether the death penalty is imposed during peace time or armed conflict situations, States must ensure that their legislative provisions comply with certain conditions, that the proceedings comply with strict procedural requirements and 'are subject to rigorous control by fundamental judicial guarantees.'[117] Therefore it can be held that if a military commission would sentence a person to death without guaranteeing this person all due process rights as laid down in Art. 14 ICCPR, it acts in violation of Art. 6 ICCPR. By this it would not only violate the right to life under the treaty, but also under customary international law.

GUANTANAMO BAY PRISONERS

Similar problems arise as regards the treatment of the Guantanamo Bay prisoners and planned prosecution and trials concerning these prisoners. The US has labelled the detainees at Guantanamo Bay 'unlawful' or 'unprivileged' combatants, thereby denying them the prisoner of war status under which they would find protection by the Geneva Conventions.[118] Moreover, it has denied that the prisoners fall under US jurisdiction. On 14 February 2002 a US District Judge held that no Federal District Court has jurisdiction over the Guantanamo Bay prisoners, because although the US has jurisdiction over the naval base, under the lease agreement with Cuba, the sovereignty over Guantanamo Bay remains with Cuba.[119] The UN Special Rapporteur on the independence of the judges and lawyers in a recent statement expressed his concerns about the judgment. He emphasised that it could set a 'dangerous precedent'.[120] In my view the ruling is questionable. Even though the Guantanamo Bay naval base is situated at Cuban territory, it is under effective control of the US. One could very well argue that since it is under effective control of the US, it also falls under its jurisdiction. Therefore, in my opinion, other than the US claims, it is not necessary to create a special tribunal to try detainees at the Guantanamo base. Nevertheless, even in the case the US would not have jurisdiction over the Guantanamo Bay prisoners it still would have to respect (customary) international humanitarian and human rights norms.[121] There is no doubt that rules of international customary law like the Geneva Conventions, the above examined right to life and prohibition of torture and rules of *jus cogens* should still be respected.

However, a clear analysis of the status of the prisoners in order to determine the international rules applicable would be very welcome. The Inter-American Commission on Human Rights has emphasized repeatedly that States have human rights obligations vis-à-vis any person under their jurisdiction and control. In a pending case about the detainees at Guantanamo it has confirmed this. It requested the US to take urgent measures to have the legal status of the detainees determined by a competent tribunal.[122] Equally, the Human Rights Committee has considered that what is important, is the relationship between the State and the individual victim. In other words, it is the jurisdiction over a person that counts, rather than only the territory or the formal territorial sovereignty. It has pointed out 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[123] Scholars and ngos have also commented on these issues.[124] Amnesty international, for example, urges the US

[115] Inter-American Commission on Human Rights, supra note 44, par. 18 (Executive Summary).
[116] Inter-American Commission on Human Rights, supra note 44, par. 20 (Executive Summary).
[117] Inter-American Commission on Human Rights, supra note 44, paras. 22 (Executive Summary), 94-96 and 244-253.
[118] See for example: Robert Goldman and Brian Tittemore, supra note 3, pp. 1 and 2 (Introduction).
[119] *Coalition of Clergy et. al.* v *George Walker Bush*, Order dismissing petition for writ of *habeus corpus* and first amended petition for writ of *habeus corpus*, US District Court, Central District of California, Case No. CV 02-570 AHM (JTLx), 21 February 2002.
[120] UN Special Rapporteur on the independence of judges and lawyers, *US Court Decision on Guantanamo Detainees has Serious Implications for rule of law, says UN Rights Exper*t, UN Press Release, 12 March 2003, www.unhchr.ch.
[121] Robert Goldman and Brian Tittemore, supra note 3. See also in this respect the report of the UN Commission on Human Rights on fundamental standards of Humanity. Commission on Human Rights*, Promotion and Protection of Human Rights, Fundamental standards of humanity*, E/CN.4/2002/103, 20 December 2001.
[122] See Precautionary measures of the Inter-American Commission, 12 March 2002 (published in 23(1-4) Human Rights Law Journal 13 (2002)). See also: Inter-American Commission on Human Rights, supra note 44, par. 202.
[123] See Celiberti de Casagiero v. Uruguay, 29 July 1981, CCPR/C/13/D/56/1979 and Saldia de Lopez v. Uruguay, 29 July 1981, CCPR/C/13/D/52/1979.
[124] See e.g. Dinah Shelton, *The legal status of the detainees at Guantanomo Bay: innovative elements in the decision of the Inter-American Commission on Human rights of 12 March 2002*, 23(1-4) Human Rights Law Journal 13 (2002), pp. 13-16; Amnesty International, *United States of America: Memorandum to the US government on the rights of people in US custody in Afghanistan*

to 'put its stated commitment to the Inter-American system into practice' and comply with the precautionary measures issued by the Commission.[125]

Since the detention of the prisoners at Guantanamo Bay there have been reports and rumours about the treatment of the prisoners. According to the Inter-American Commissions the detainees should at least be kept in facilities that respect minimum physical attributes as regards hygiene and health and amongst others are to have suitable bedding, access to sanitary conveniences and should have adequate water, food, clothing and necessary medical attention. Detainees who are subject to disciplinary or penal sanctions must be treated humanely at all times and may never be subjected to torture or inhumane treatment. Moreover, all methods of interrogation that may constitute torture or other cruel, inhuman or degrading treatment are strictly prohibited.[126] The more secrecy, the greater the danger that guards and other surveilling personnel will cross the line and subject prisoners to torture or to cruel, inhuman or degrading treatment or punishment. In its report on the rights of people in custody in Afghanistan and Guantanamo Bay Amnesty International expresses, amongst others, its concern about: the transfer and holding by the US of people that might amount to cruel, inhuman or degrading treatment; lack of information surrounding the circumstances of the various detentions; the refusal to inform people in US custody of all their rights; the refusal to grant people in custody access to legal counsel; refusal to grant

people in custody access to the courts to challenge the lawfulness of their detention; failure to facilitate promptly communications with or grant access to family members; undermining due process and extradition protections in cases of people taken into custody outside Afghanistan and transferred to Guantanamo Bay; the threat that the US selects foreign nationals for trial before military commissions.[127] Moreover, problems arise as regards the 'presumption of innocence'. By not granting the prisoners several due process rights and by keeping them away from the world, an atmosphere is created where the prisoners are guilty of terrorism even before their trials have taken place. It is important in this respect to bear in mind that the Guantanamo Bay prisoners are persons that are only suspected of terrorism.

Since there is little information about Guantanamo Bay and its prisoners it is hard to find out what is really happening there. Moreover, several international organisations and tribunals have warned about the legality of the detention, treatment, prosecution and trials planned concerning the prisoners.[128] Certain due process rights must be guaranteed as to these prisoners. Not respecting those rights might lead to a violation of the prohibition of torture and when imposing the death penalty the right to life. The UN Working Group on Arbitrary Detention recently established that both the case of persons detained in prisons on US territory and those detained at Guantanamo Bay, in relation to its struggle against terrorism, amount to arbitrary detention.[129] Apart from international organisations and ngos, one of the US's allies, the United Kingdom, is placed in a difficult position with regard to the trials planned concerning the Guantanamo Bay detainees. According to the Financial Times the US has planned trials for 6 detainees, two of which turn out to be British citizens. The UK Foreign Office has said it planned to raise its objections at the 'highest level'. Moreover, the Foreign Minister Baroness Symons said the government would pursue a 'very vigorous' discussion with the US to satisfy its concerns that the procedures might not guarantee a fair trial.[130]

5. Conclusion

In the above analysis it has been established that both the right to life and the prohibition of torture

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and Guantanamo Bay, AI Index AMR 51/053/2002, www.amnesty.org; Complaint of FIDH to the UN Working Group on Arbitrary Detention, 22 January 2002, www.fidh.org. See with regard to the latter: Commission on Human Rights, *Report of the UN High Commissioner for Human Rights and follow-up to the World Conference on Human Rights*, E/CN.4/2003/NGO/247.

[125] Amnesty International, Ibid.

[126] Inter-American Commission on Human Rights, supra note 44, paras. 201-216.

[127] Amnesty International, supra note 124.

[128] Inter-American Commission on Human Rights, supra note 44; Commission on Human Rights, Report of the UN High *Commissioner for Human Rights and follow-up to the World Conference on Human Rights*, E/CN.4/2003/NGO/247. On 18 September 2002 the UN Special Rapporteur on the Independence of Judges and Lawyers together with the UN Special Rapporteur on Torture and the UN Special Rapporteur on the Human Rights of Migrants sent a detailed joint communication regarding the detention of many individuals, particularly non-US citizens, since 11 September 2001 to the US. The US did not respond to the communication. See: Report of the UN Special Rapporteur on the Independence of Judges and Lawyers*, Civil and Political Rights, including the question of: independence of the judiciary, administration of justice, impunity*, E/CN.4/2003/65/Add.1, 25 February 2003, paras. 246 and 250.

[129] UN Working Group on Arbitrary Detention, *Civil and Political Rights, including the Question of Torture and Detention*, E/CN.4/2003/8. Reference taken from: Commission on Human Rights, *Report of the UN High Commissioner for Human Rights and follow-up to the World Conference on Human Rights*, E/CN.4/2003/NGO/247.

[130] Jimmy Burns and Hugh Williamson, *UK to confront US over secret terror tribunals*, Financial Times, Saturday 5 July/ Sunday 6 July 2003, p.1. See also in the same newspaper: Jean Eaglesham and Jimmy Burns*, Guantanamo move puts Blair on Back foot*, ibid, p. 3.

amount to rules of customary international law. It was also found that these rights are norms of *jus cogens.* The recognition of the right to life and the prohibition of torture as rights belonging to *jus cogens* does not only have the effect of making them binding upon States which are not bound by the ICCPR, ECHR or ACHR, it also means that no derogation is permitted by any State, not even during the times of a public emergency.

In the analysis of the rules that apply to the US it was noted that even though the US has made reservations to both the right to life and the prohibition of torture as contained in the ICCPR, it should act in conformity with the articles without the benefit of the reservation, since both reservations are incompatible with the object and purpose of the treaty. In other words both Art. 6 ICCPR and Art. 7 ICCPR should be respected to the full, even if we would assume that the US due to the war against terrorism finds itself in a state of emergency. Furthermore, it was held that it is doubtful whether the US might call itself a persistent objector with regard to the customary international rules concerning the right to life and the prohibition of torture and, since both the right to life and the prohibition of torture are norms of *jus cogens*, they should be respected by all States at all times.

In addressing the Military Order and the rules of procedure, it was established that the creation of Military Commissions and possible trials before these Commissions are not compatible with due process rights such as those laid down in Art. 14 ICCPR. As a consequence, if a Military Commission would sentence a person to death without guaranteeing this person all due process rights as laid down in Art. 14 ICCPR, it would act in violation of Art. 6 ICCPR. By this it would not only violate the right to life under the treaty, but also under customary international law.

With regard to the Guantanamo Bay prisoners it was held that even though the Guantanamo Bay naval base is situated at Cuban territory, it is under effective control of the US. Moreover, one could argue that since it is under effective control of the US, it also falls under its jurisdiction and that since it falls under its jurisdiction it is not necessary to create a special tribunal to try detainees at the Guantanamo base. But, even in the case the US would not have jurisdiction over the Guantanamo Bay prisoners it still would have to respect (customary) international humanitarian and human rights norms.

Several international organisations and tribunals have warned about the legality of the detention, treatment, prosecution and trials planned concerning the prisoners at Guantanamo Bay. They emphasise that certain due process rights must be guaranteed as to these prisoners. Not respecting those rights might lead to a violation of the prohibition of torture and when imposing the death penalty the right to life. Moreover, the UN Working Group on Arbitrary Detention recently established in relation to the US struggle against terrorism, that both the case of persons detained in prisons on US territory and those detained at Guantanamo Bay amount to arbitrary detention.

Now that it appears that the US has planned for the trials of six detainees of the Guantanamo naval base, it should reconsider the legal framework it has created to try the prisoners and should make sure that all due process rights are guaranteed in the course of the trials. If the US decides not to do so, it acts in violation not only with international (humanitarian) law, but also with customary international law. Moreover, the US risks creating a “bad name” in the field of human rights and to loose its credibility to other States, both allies and enemies. Even though terrorism must be fought in all possible ways, it should not be fought at all costs.

ABSTRACTS OF THE ADDITIONAL ARTICLES THAT APPEAR IN THE FULL-LENGTH ON-LINE VERSION OF THIS ISSUE: http://www/cmsu.edu/cjinst

The International Criminal Court: Domestic Status and Concerns

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The Treaty of Rome establishing an International Criminal Court (ICC) was concluded in July of 1998 and was adopted by a vote of 120 to 7, with the United States among those casting a "nay" ballot, which would seem surprising at first glance, given the historical American commitment in the field of human rights. The Rome treaty was reached after intense and sometimes contentious negotiations that, while addressing many of the concerns voiced by American negotiators, left critical shortcomings in other areas viewed as fundamental to an American understanding of both jurisprudence and the role of the ICC relative to the United Nations and world affairs. After expressing American misgivings concerning the Rome treaty, President Clinton made the United States a signatory to it, indicating his belief that the ICC had the potential to prove a deterrent to the worst of human rights abuses, but declined to send it to the Senate for ratification. Senate ratification of the treaty is unlikely in its present form, however, given the opposition of the Bush administration - based in part on features included in the treaty, and possible adverse effects on American foreign policy not addressed within the treaty. Among the more serious American objections are those dealing with the authority of the ICC relative to the United Nations Security Council, jurisdiction over non-party nationals, prosecutorial accountability and the tandem consideration of prosecutorial abuse by way of politically motivated charges, as well as provisions dealing with procedural safeguards for defendants found in the United States Constitution but lacking in the Rome treaty. The purpose of this research paper will be to provide an overview of the process by which the Rome Treaty was created, and an examination of the most prominent American objections, and the outlook for American participation going forward.

Civil Liberties in the Age of Terrorism

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The in conducting this research is to make people realize that while they may not be willing to give up their freedoms and civil rights guaranteed to them under the U.S. constitution, they are willing to sacrifice their freedoms in certain ways without realizing what is taking place and has ten place throughout history. However, lacking our obvious ability to maintain peace and equality in times of crisis, my hope is that we have learned from our past mistakes. We are now facing terrorist threats that frighten most Americans. Have we learned as leaders and as Americans how to flesh out the real threats from perceived threats? Have we learned it is important to maintain our civil liberties for all our fellow human beings even in times of crisis facing our nation? Santayana's statement "Those who cannot remember the past are condemned to repeat it? May soon be realized, again, if we allow our leaders to act irresponsibly with our civil rights and our emotions in times of crises once again.

USA PATRIOT Act and the War on Terrorism

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This paper addresses the PATRIOT Act, one of the most recent pieces of legislation passed by the U.S. to counter terrorism. The ten sections of the PATRIOT Act will be discussed, along with important issues raised by its passage. Additionally, the Act will be assessed using two important criteria: prevention and punishment.

"Patriotism" And "War"--New Contexts And Meanings

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Since the terrorist attacks of September 11, 2001 our civil liberties have been threatened in numerous ways. Perhaps the most blatant of these threats comes from the egregiously misnamed "USA Patriot Act." This Act, signed into law by President George W. Bush in October of 2001, poses significant threats to individuals' civil liberties in the areas of freedom of speech, freedom of political association, privacy, and rights of due process—especially pertaining to non-citizens. This paper examines how the allowances of the USA Patriot Act stand up to what has been known as "patriotism" in the historic sense. What has it meant historically to be a patriot, and has this definition changed in our post-September 11th world? If so, what *should* it mean now? We'll start our examination by looking at the version of patriotism espoused by our nation's founders—in particular that of Thomas Jefferson. President Bush has declared that we are engaged in a war on terrorism, and because of that war, we must be willing to suspend some of our civil liberties in order to ensure domestic security and survival. But is this truly the case? This paper follows the thread of patriotism through times of war—the Civil War, both World Wars and Vietnam. What has it meant to be a patriot during wartime? Is our current "war on terrorism" like these other combative wars, or is it more like the ideological "'war' on drugs" or the "'war' on poverty"? Has technology changed in such a significant way that the prosecution of war now demands the suspension of individual rights to meet the needs of a wartime society in this day and age? Can the machinery of war be put into motion, and war be both waged and won without imperiling our rights as citizens?

Suspension Of Habeas Corpus

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Article I Section 9 of the Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." President Bush's Executive Order of November 13, 2001 suggests that individuals may be detained indefinitely without formal charges being proffered. This paper describes the history of the Writ of Habeas Corpus through analysis of relevant Court decisions and other historical documents and considers previous episodes in American History when the Writ was suspended. Application of these relevant Constitutional and historical precedents to the current situation suggests that the Executive Order of November 13, 2001 and subsequent activity in implementing this order is an unconstitutional exercise of Executive power.

THE INTERNATIONAL CRIMINAL COURT: DOMESTIC STATUS AND CONCERNS

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The Treaty of Rome establishing an International Criminal Court (ICC) was concluded in July of 1998 and was adopted by a vote of 120 to 7, with the United States among those casting a "nay" ballot, that would seem surprising at first glance, given the historical American commitment in the field of human rights. The Rome treaty was reached after intense and sometimes contentious negotiations that, while addressing many of the concerns voiced by American negotiators, left critical shortcomings in other areas viewed as fundamental to an American understanding of both jurisprudence and the role of the ICC relative to the United Nations and world affairs.

After expressing American misgivings concerning the Rome treaty, President Clinton made the United States a signatory to it, indicating his belief that the ICC had the potential to prove a deterrent to the worst of human rights abuses, but declined to send it to the Senate for ratification. Senate ratification of the treaty is unlikely in its present form, however, given the opposition of the Bush administration - based in part on features included in the treaty, and possible adverse effects on American foreign policy not addressed within the treaty.

Among the more serious American objections are those dealing with the authority of the ICC relative to the United Nations Security Council, jurisdiction over non-party nationals, prosecutorial accountability and the tandem consideration of prosecutorial abuse by way of politically motivated charges, as well as provisions dealing with procedural safeguards for defendants found in the United States Constitution but lacking in the Rome treaty.

The purpose of this research paper will be to provide an overview of the process by which the Rome Treaty was created, and an examination of the most prominent American objections, and the outlook for American participation going forward.

The Road to Rome

The idea of a criminal court with jurisdiction on an international basis is not entirely new, and is seen by many as the descendant of an evolutionary process having among its 20th century antecedents the formulation and administration of the International Military Tribunals of Nuremberg and Tokyo, continuing through the formation of the United Nations (UN) itself and the administration of the ad hoc International Criminal Tribunals for Yugoslavia and Rwanda (the ICTY and ICTR) as administered under its auspices. Thus has the formation of a permanent International Criminal Court (ICC) been viewed as the next logical step on the course of the journey undertaken by the family of nations as it seeks a harmonious mechanism for conflict resolution.

The desire for the establishment of the ICC was indicated by the International Law Commission when it submitted a draft treaty to the UN General Assembly in 1994, that was eventually taken up at a UN sponsored conference in Rome concluded during July of 1998. The conference included representatives of governments and non-governmental organizations from around the world, including the United States, and on July 17, a treaty commonly referred to as the "Rome Statute" was adopted by a vote of 120 to 7, with 21 nations abstaining.

The United States was found numbered among the minority in opposition, voting in league with such notorious abusers of human rights as the governments of Iraq, China, and Libya. The American and Israeli governments were the only democracies to vote against the Rome agreement. Controversy and speculation immediately began to swirl concerning the reasoning behind the American position, (the reasons for the Israeli rejection are beyond the scope of this paper, but at least some of their reasoning parallels that of our own government relative to prosecutions grounded in a political, or anti-Semitic basis) and President Clinton did not sign the treaty until December 31, 2000, the last possible date for becoming a signatory. In his statement that date on the subject, the President voiced his "strong support for international accountability," adding that a "properly constituted and structured court" would have the potential to deter the worst of human rights abuses. The President (2000), said however, that in its *current form*, he would not send the treaty to the Senate for consideration, nor urge President-elect Bush to do so, until what the President termed “fundamental concerns” were addressed.

Conservative Domestic Reaction.

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Senator Jesse Helms, (R-NC) then chairman of the Senate Foreign Relations committee, was not pleased with the decision to make the United States a treaty signatory. Reflective of qualms in more conservative American quarters concerning the ICC, he remarked in a press release of December 31, 2000, that the decision was "as outrageous as it is inexplicable" that between the adoption of the Rome treaty and the time of President Clinton's signature, "...nothing ... has changed ... to justify U. S. signature... . This decision will not stand."

General Colin Powell, Secretary of State designate, indicated in his confirmation testimony before the Senate Foreign Relations Committee on January 18, 2001 that one should not linger "standing on tippy-toes waiting for...any movement toward ratification of the treaty." Pressed further, he stated the Bush administration "...will be opposed to the International Criminal Court."

Treaty Features, ICC jurisprudence, American Objections

As the issue currently stands, the United States Senate has not considered the treaty, with questions as to authority, substance, procedure, and jurisprudence remaining unresolved, at least to American satisfaction.

The United States has not objected per se to the idea of an International Criminal Court, but does have several significant objections to the Rome Statute as presently configured. These objections are tied to the treaty language relative to the ICC structure and potential application of jurisprudence, and are seen as being fundamentally at odds with traditional notions of American jurisprudence, hence our discussion of the criticisms will of necessity be somewhat tied to treaty features.

It may be inferred from a reading of the treaty that Article 12 grants the ICC jurisdiction automatically for three categories of crimes; genocide, war crimes, and crimes against humanity, while Article 13 provides that referrals initiating such jurisdiction may be triggered by any of three entities; the prosecutor acting in his *independent* capacity, a state party *to* the treaty, or the Security Council of the UN. Since "the devil is in the details", we must make a closer examination of these provisions to ascertain their specific objectionable qualities.

Potential Prosecutorial Abuse

The idea of a prosecutor, being an "independent organ of the court" under Article 42, and therefore unaccountable to the Security Council, is of grave concern in that such a prosecutor - if hostile to U. S. interests - has the potential to abuse his discretion to initiate an investigation and become, in Wedgewoods words, (2001) "a self propelled auditor of American military operations." Wedgewood is not alone in this concern, as Rubin also notes (2001) that there is no check on prosecutorial judgment as to initiating an investigation, adding that a prosecutor might be tempted to in essence forum shop for a judge with a similar political viewpoint to authorize further investigations. Given the far flung nature of American military and peacekeeping missions, some undertaken in areas not hospitable to an American presence, the potential for prosecutorial abuse and the attendant risk of the ill advised politicization of justice comes into sharper focus, summed up by Judge Robert Bork in the case of *Tel-Oren v. Libyan Arab Republic* (1984) wherein he wrote in a concurring opinion cautioning courts not to adopt a role for themselves that "would raise substantial problems of judicial interference with nonjudicial functions, such as the conduct of foreign relations."

Jurisdiction over Non-Party Nationals

The basic positivist tenant of international law is that it is based on treaty, that is, binding as a contract between nations that *consent to its provisions,* as pointed up by Casey and Rivkin (1999) The treaty establishing the ICC departs from this precept in that citizens of any nation may be tried before the ICC if the nation where the crimes were alleged to have taken place has made ratification of the treaty, leading some to conclude that the ICC would have "universal jurisdiction". Casey and Rivkin maintain (1999) that "universal jurisdiction" is a narrow legal idea pertaining only to the slave trade and piracy, crimes committed in international waters and therefore beyond the legal jurisdiction of any state. Thus, any subjection of non-party nationals to the jurisdiction of the ICC would be seen to be violative of the UN Charter, provisions of which guarantee the sovereignty and equality of nations, and by extenuation their judicial systems.

Seen in this light, the American insistence that its soldiers or policy makers not be subject to a non-consensual jurisdictional scheme becomes more understandable, and the idea that the motive of at least some of the participants at the conference voting to reject amendments affording such a protection was to restrain American foreign policy and military power becomes clear, Lietzau noting (2001) at the time final votes were taken defeating American jurisdictional proposals, delegates burst into cheering that seemed more celebratory of American defeat than in adoption of the treaty, the text of which in Article 120 forbids reservations, a clause seemingly directed at the United States Senate, whose role it is to ratify treaties.

A Diminished Security Council Role

Wedgewood notes (2001) that the United States is of the view that the ICC should function along the consensual lines of a treaty organization "while respecting Security Council authority to refer any matters

affecting international peace and security to the courts jurisdiction.", and that under the UN Charter, the permanent members of the Council must concur in any enforcement decision. That other countries have taken the view that the ICC and state's parties have an equal claim to the jurisdiction allocated to Security Council authority is seen by the United States as an unlawful assumption of that authority, and a diminution of the UN Charter, most specifically a severe reduction of the value of veto power vested in the five Permanent Members. As one of the Permanent Members of the Security Council, the United States takes an unsympathetic view of the potential loss of its authority, as under Article 16 of the Rome Treaty an affirmative Security Council vote would be required to halt judicial proceedings, a pronounced shift of power away from the Council to the ICC. Lietzau observes (2001) that although some view such an advent as desirable in that the ICC would be free of political bonds, it would conversely free it of political accountability.

Objections in Light of Domestic Constitutional Principles

Although the ICC treaty makes provision under Articles 17-19 for "complementarity" jurisdiction with reference to domestic courts, that is, the understanding that the ICC would not replace those courts unless trial procedures were unavailable or ineffective, Dempsey notes (1998) that a nation that wished to avoid having its members punished for war crimes would need only to pursue one of two avenues - organizing a trial or enacting a law that would guarantee an acquittal. But in such an eventuality, the ICC would be confronted with a dilemma. If such a ploy were allowed to stand, the crime would go unpunished, and the ICC would be exposed to the world community as largely irrelevant. Yet if allowed to decide what is or is not an "effective" judicial system, the ICC would hold a de facto judicial review power over domestic courts, and the idea of "complementarity" would be a dead letter.

In any circumstance, the ICC will set precedent by virtue of any decision it renders concerning what it regards as either an "effective" or "ineffective" trial. In this way it will indirectly force states' judicial systems to bend to those precedents, or run the chance of having those systems declared incompetent to render a just verdict. Thus, the ICC would bring about a change in the source of lawmaking at least respective to democratically elected governments, that would diminish traditional views of state sovereignty, especially American.

The Bill of Rights and the ICC

The ICC is based upon the civil law "inquisitorial" model, used by most European nations, as opposed to the common law "adversarial" model used in the United States. Configured as such, a panel of judges (some of whom might harbor animosity toward the United States) would weigh evidence and decide the issue of guilt, there being no provision for a trial by jury. Casey and Rivkin pointedly contrast (1999) the continental approach with the protections afforded Americans in light of provisions for a jury trial guaranteed two times in the Constitution - first in Article III, Section 2, and again in the Sixth Amendment.

The expected trial procedures of the ICC, if analogous to that of the ICTY, are fairly viewed as not being as protective of other defendant's rights found in the Sixth Amendment, such as the right to confront witnesses, and the right of an accused to have a compulsory process to obtain witnesses in his own behalf. Referring to the former, Dempsey (1998) quotes Nick Kostich, one of the attorneys who represented Dusko Tadic before the ICTY, as saying his client "is not being given the right to confront his accusers", and that the defense "has not been presented with the names of witnesses", and remarking on the latter, Dempsey notes (1998) that the ICTY did not make a provision for such a right.

Casey and Rivkin note (1999) that although a prohibition against "double jeopardy" has been in place in English and American law since the 17th and 18th centuries respectively, no such proscription exists to curb the ICC, which may declare the procedures of a domestic trial "ineffective", assert its jurisdiction, and compel a subsequent prosecution; nor check its prosecutor, who may appeal an acquittal, as has been the practice of the prosecutor for the ICTY, who has appealed all acquittals.

Although no person is in favor of "war crimes" or "crimes against humanity", Bolton argues (1999) that their definitions under the Rome Treaty are ambiguous to the extent that language in their definitions could arguably be used to imply the United States was guilty of such prohibited conduct during the Second World War in the bombing of German cities and dropping atomic bombs on Japan.

Such ambiguity led the United States Supreme Court, (the Court) in *Jordan v. De George*, (1951) to state, regarding the "Void for vagueness" doctrine:

> The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process law.

That a prosecution based on an unsettled or diaphanous legal proscription would withstand American judicial review is unlikely, given the doctrine of Stare Decisis.

The Milligan Doctrine, Domestic Jurisdiction, and the ICC

If the United States were to ratify the Rome Treaty, such action would yield to the ICC jurisdiction concerning offenses committed within American territory. Such a practice would be presumptively illegal in light of the reasoning the Court embraced in *Ex Parte Milligan*, (1866), a case arising from the War Between the States involving the trial of Indiana civilian Lamdin Milligan by a military tribunal of the United States. Mr. Milligan appealed his conviction on the several charges to the Court, whose members unanimously reversed the conviction, holding "every trial involves the exercise of judicial power", that the Constitution protected the people "equally in war and peace," and "covers with the shield of its protection *all* classes of men, at *all* times, and under *all* circumstances." [Emphasis mine] The Court held that a military tribunal was not under Article III "part of the judicial power of the country", hence its verdict was invalid. Given that the ICC is in not a part of the judicial power of the country under Article III, any conviction visited upon an American whose crime was committed within American territory would most probably be viewed as unconstitutional today.

The Balsys Doctrine, non-domestic jurisdiction, and the ICC

Were the United States to ratify to the Rome Treaty, it would of necessity be a full participant in the jurisdictional structure and administrative apparatus of the ICC, therefore any prosecution initiated by the ICC would be as much on behalf of the United States as any other party, as Casey and Rivkin note. (1999)

Although the Court has not directly examined the issue, its holding in *United States v. Balsys*, (1998) would suggest that the American government is proscribed from participating in a criminal trial unless American constitutional protections were afforded the accused, and because the ICC does not guarantee the protections enumerated in the Bill of Rights, it is also arguable from that standpoint the United States could not be a participant in the ICC, or ratify the Rome Treaty as it now stands.

Issues of Supremacy: The Treaty of Rome vs. The Constitution

Dempsey quotes (1998) Thomas Jefferson in an 1803 letter to Wilson Nicholas, making argument for the supremacy of the Constitution over treaty-made law, stating:

> Our particular security is in possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution.

Case law tends to give support to Jefferson's reasoning. In *Doe v. Braden*, (1850) the Court held that lower courts may hold void or disregard a treaty provision if it would be violative of the Constitution. In *Reid v. Covert*, (1957) the Court held that it "regularly and uniformly recognized the supremacy of the Constitution over a treaty", and in addition:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights - let alone alien to our entire constitutional history and tradition - to construe Article VI [treaties] as permitting the United States to exercise power under an International agreement without observing Constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V [Amendment process].

In an even more recent decision, *Boos v. Barry,* (1988) the Court held that provisions of international agreements and rules of international law were subject to the Bill of Rights and could not be given a legal effect that would run contrary to Bill of Rights provisions.

Dempsey argues (1998) that any ICC judgment against an American citizen would likely be held unconstitutional, since the Rome Treaty as presently constructed would give a legal effect to provisions in the treaty that are incompatible with the Bill of Rights, such as the lack of Fifth, Sixth, (and by extension Fourteenth) Amendment protections as discussed above.

Quo Vadis?

Assuming that overarching American objections to the Treaty of Rome - jurisdiction, politicized prosecution, vacuity of statutes, and due process concerns - are valid, it is most probable that no effort to ratify the treaty in its current configuration will be made by the Bush administration.

Wedgwood notes (2001) that some may be pleased that the United States has not joined the ICC, in order for European nations in particular to make an effort at "going it alone", unconvinced that American influence or support is necessary nowadays to ensure the success of global security tasks. However, if former Secretary of State Madeline Albright is correct in her contention that the United States is the "indispensable nation" even if relative only to logistical, intelligence, fiscal, or military capacity, the Europeans may find a need for American involvement. Although the United States currently stands in opposition to the Treaty of Rome as presently configured, Goldsmith (2000) suggests that American opposition to the treaty should not be viewed in the same light as the opposition of the Chinese or Iranian governments, in that American support for the ICTY and ICTR would indicate that its support for an international tribunal is not altogether lacking.

Given the historical American leadership and commitment in the field of human rights worldwide, the United States should abandon international efforts at accountability on a global scale only if attempts to adjust the objectionable features of the ICC come to no fruition, and its acceptance would entail abandonment of the legal principles enshrined in the longest standing constitutional republic in the world.

Should American objections be addressed in future treaty negotiations, a brighter day may perhaps dawn on the field of human rights enforcement. Time alone will tell.

Counter Terrorism and Civil Liberties

In the aftermath of the terrorist attacks of September 11th upon the United States, some have suggested, as did Mary Robinson, former United Nations High Commissioner for Human rights, in a speech to the U.S. institute of Peace in Washington on October 17, 2001, the ICC as a potential venue for the trial of those accused of complicity in those, or similar future, attacks. Advocates of such an approach find the ICC a suitable fora for adjudication of such acts in that they arguably fall under the penumbra of "crimes against humanity" over which the ICC has jurisdiction under Article 7.

However, an unlikely coalition may arise in opposition to such a stratagem. Civil libertarians traditionally on the more liberal end of the political spectrum and concerned with what they view as a trend toward erosion of fundamental constitutional liberties by the domestic government that typically manifests itself in criminal cases dealing with Fifth, Sixth, and Fourteenth Amendment issues, among others, relative to the rights of an accused, may find themselves acting in league with their more conservative brethren on the opposite end of the spectrum, who although not generally sharing fears of such a trend, nonetheless fear involvement in an ICC where Sixth Amendment protections are greatly circumscribed, or absent as in the Fifth Amendment proscription upon double jeopardy, as well as the fears grounded in an involvement in what Washington would have termed an "entangling foreign alliance".

Epilogue

On May 6, 2002, the United States declared its intention to United Nations Secretary General Koffi Annan that it would neither become a party to the Rome Statute, nor admit of any legal obligation resulting from President Clinton's signature to the instrument, as per a notification written by Undersecretary of State for Arms Control and International Security John Bolton.

The ICC began operations as of July 1, 2002, with the ratification of the Rome Statute by the 60th state party. When it begins to hear cases sometime later this year (2003) after administrative tasks such as staffing and other procedural issues are finalized, it will do so without American participation.

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CIVIL RIGHTS IN THE AGE OF TERRORISM

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I first thought of doing this research paper after a lecture by Judge George Singal, United States District Judge. Judge Singal mentioned that the federal judges discussed civil liberties in the age of terrorism at their October 2002 conference. I contacted Judge Singal's office and I was told there were no notes or any written information to review on this conference. All of a sudden resources presented themselves to me as I paid more attention to the issues and information surrounding me. There was a bookstore in Hallowell with signs in the window referring to civil liberties; a live television broadcast on CSPAN discussing the Patriot Act and Homeland Security and how it will affect law enforcement, the CIA, FBI, and other agencies needing to share intelligence; a fax from a friend on jurisprudence of civil liberties; ACLU, Findlaw, US Patriot Act websites; and a mailing I received from the National Riffle Association urging me to join and sign a petition urging Congress to support my Second Amendment right to bear arms under the U.S. Constitution. I had no idea going into this research how controversial a subject I had chosen. In just four days in late 2002 I managed to collect 102 surveys reflecting the opinions of peers from the University of Maine, co-workers, my daughter's junior high school classmates, family members, friends, and friends of friends.

The surveys were given at random to anyone I could get to fill one out. People called to ask if they could fill out the survey because they wanted their opinions calculated in the mix, and people asked for a copy of the results of my survey. The survey took on a life of its own.

There was one document in particular that I found to be the most persuasive material I read during my research of civil liberties. It was a speech published by the Brennan Center for Justice. Initially when beginning this project, my thoughts were to give up some of my rights for my family, my country's safety, and me if it meant locating terrorists and bring them to justice. I feared that law enforcement, the CIA and FBI agencies cannot properly do their jobs if they do not have the tools and freedom to hold suspects against their will and without due process while they investigate possible terrorists or suspects. Originally my thoughts were to allow law enforcement to search without a warrant, detain people if they have to, charge people for what they say and do against this country, conduct racial profiling, deprive people of their freedom of religion, right to notice of charge, right to counsel, right to prompt preliminary hearing, make the burden of proof be on the suspect instead of the prosecution, guilty until proven innocent!

Justice Brennan's 1987 speech still holds true today, maybe more now than before. His speech included the history of our nation's battles and balances between civil liberties and national security during times of crises. Justice Brennan said that former judges have ignored civil liberties and that looking back on the history of how we handle civil liberties in times of crisis, tampering with civil rights was not effective and it was unnecessary for achieving the goals sought by the United States in the name of security. Justice Brennan Jr. states, "The struggle to establish civil liberties against the backdrop of these security threats, while difficult, promises to build bulwarks of liberty that can endure the fears and frenzy of sudden danger—bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile."(2)

During peacetime civil liberties are adamantly guarded. However, during times of crisis and war the United States has a "long history of failing to preserve civil liberties when it perceived its national security threatened." (2) After each security crises ended, the United States has regretted ignoring civil liberties and determined it was unnecessary to have done so. The United States has also proven time and time again that we are unable to prevent ourselves from repeating this error when the next crisis comes along. Will we abrogate our civil liberties again in the age of terrorism for fear of our safety and the lack of knowledge or exaggerated safety concerns portrayed by our government? People can be too willing to "temporarily" sacrifice liberties as part of a war effort. However, my survey shows while people are willing to give up civil liberties to others, they are not necessarily willing to give them up for themselves.

Justice Brennan felt "the inexperience of decisionmakers in dealing with wartime security claims makes them reluctant to question the factual bases underlying asserted security threats." (2) Even the decisionmakers who do question security threats lack the expertise to figure out the true security risks from the exaggerated ones.

In 1798 the United States enacted the Alien and Sedition Act. This empowered the President to expel any alien he felt was dangerous and gave the President the power to arrest people of warring foreign nationals as alien enemies. The Act made it unlawful to "write, print, utter or publish . . . any false, scandalous and malicious writing" (2) against the United States Government, Congress, or the President with the intent to bring them . . . "into contempt or disrepute."(5) When the threat of war was over, it was clear that violating our civil liberties had not paid off. The war was over before any of the cases ever went to trial. In most cases the charges were dropped due to civil liberties violations.

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The Civil War of 1861 – 1865 provided the next test for civil liberties at times of crises. President Lincoln took measures that infringed upon civil liberties again. The most outlandish was the suspension of the writ of habeas corpus. This caused 20 – 30,000 persons to be arrested and detained in military custody without charges because these people were suspected of being dangerous, or disloyal to the United States. They remained in custody, some never receiving a trial. Those who had trials had military trials that lacked safeguards they would have obtained in a civilian criminal court. The deprivation of civil liberties had strong public support. After the Civil War, civil liberties were once again restored. Charles Warren's aspiration was that the Constitution is a law for rulers and people, "equally in war and in peace. It provides for protection of all classes of men, at all times, and under all circumstances." (6)

World War I brought about the Espionage Act of 1917, which made it a crime, "during a time of war, to make false statements with the intent to interfere with the success of U.S. military forces or military recruiting."(2) It also was a crime to utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the United States Government, Constitution, flag, or its military forces. Once again, none of the cases where people charged under the Espionage Act went to the Supreme Court until after the war was over. Justice Holmes stated, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight"(7), even though the "clear and present danger" test for protecting speech has not been proven. Justice Brennan's views differ from this statement in that he is for maintaining civil liberties at all times and would disagree that that we must endure the violation of civil liberties, "so long as men fight".

In World War II the Supreme Court upheld curfews and evacuations of 120,000 people of Japanese ancestry because the military could not distinguish the loyal from the disloyal Japanese people and it was felt by the majority of U. S. citizens that they posed a significant threat of sabotage. In 1980 Congress reviewed all the evidence and concluded that this was a "grave injustice that was not justified by military necessity but rather was prompted by race prejudice, war hysteria and a failure of political leadership."(2) Again, this decision came too late to prevent civil liberties at wartime from being trampled on.

Now that we are once again facing violations of our civil liberties due to the threat of terrorism, the American Civil Liberties Union (ACLU) is stepping up to the plate to defend our civil liberties through its website, through television advertisements and through court proceedings to safeguard American values of freedom by opposing Attorney General Ashcroft's actions against the United States Constitution. The ACLU filed a brief on behalf of an American-born Taliban, indefinitely incarcerated without counsel or access to the courts. "There is no legal or constitutional basis for allowing the government to detain someone indefinitely without charges or a trial."(8) The ACLU is also involved in attempting to roll back policies of the USA Patriot Act that suppress American liberty. The ACLU states, "We can be safe and free."(8) The ACLU sites the most troubling provisions of the USA Patriot Act as:

- Allowing for indefinite detention of non-citizens who are not terrorists on minor visa violations if they cannot be deported.
- Minimizing judicial supervision of federal telephone and Internet surveillance.
- Expanding the ability of the government to conduct secret searches.
- Giving the Attorney General and Secretary of State the power to designate domestic groups as terrorist organizations and deport any non-citizen who belongs to them.
- Granting FBI broad access to sensitive business records about individuals without having to show evidence of a crime.
- Leading to large-scale investigations of American citizens for "intelligence" purposes.

These points from the ACLU brings me next to my survey. It appears that by the results of my survey, we believe we have constitutional rights as we have always known. Perhaps there are many who have not read the USA Patriot Act. My survey was issued to a random group of people from all walks of life, from age 15 and up, law enforcement, students, low education levels to high education levels. The results of this survey follow.

The following is a two-page survey entitled **Civil Liberties in the Age of Terrorism Survey** that I created. There were **102** respondents involved in this survey. The demographics and results follow:

11 Criminal Justice Student
2 Career in Corrections
3 Professor
48 Have children

17 Career in Law Enforcement
24 College Student
College - **11** Full-time, **10** Part-time
13 – Full Time High School

Age:

13 15 – 18	**8** 19 – 24	**6** 25-30	**17** 31- 35	**18** 36 – 40	**8** 41- 45
9 46- 50	**12** 51- 55	**6** 56- 60	**0** 61 – 65	**2** 66 – 75	**0** 76+

Education: Grade Completed: **4** 10th, **8** 11th, **20** 12th, **7** 13, **27** 14, **15** 15,

11 16, 9 17+ years of education
College Degree: 51 Yes 51 No

College Degree: 27 – Associates Degree, 8 Bachelor's Degree, 6 Masters Degree, 1 PHD, 9?

Name of Degree:

6 Accounting
3 Business Administration/Management
3 Liberal Arts
1 Biology
14 Criminal Justice/Law
3 Education
2 Environmental Science
4 Human/Social Services
1 Engineering
1 Fisheries & Aquaculture
1 Law School
1 PHD
3 Science
1 Speech Pathology
1 Wildlife Management

Employment:
91 Employed 11 Unemployed

Did you feel safe flying before September 11, 2001?
65 Yes 13 No 24 Somewhat

Explain:

Yes
2 Plane safety concerns/human error
7 Love to fly/ safer than driving
4 Never worried about terrorism
1 Felt safe, but nervous
1 Assumed terrorist attacks unlikely
1 Felt as safe as possible at 33,000 feet confined in a plane

No
1 Never been on a plane
3 Poor security/maintenance
5 Don't like to fly

Somewhat
10 Plane safety concerns/human error
1 Nervous Flying
1 Don't like heights
1 Lack of experience flying
2 Have never flown
2 Felt somewhat safe
2 Don't like to fly

How do you feel about flying now?

Extremely Unsafe	Very Unsafe	Somewhat Safe	Very Safe	Extremely Safe	Don't Know/ Not Sure
6	6	56	17	9	7

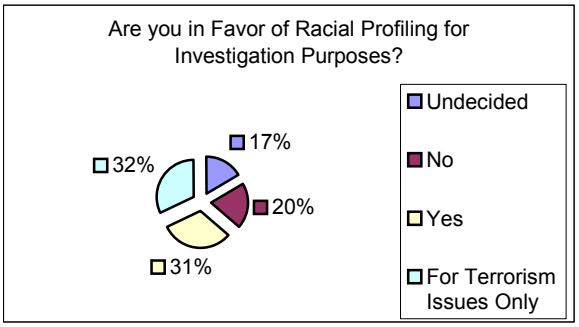
Explain:
1 None of the above, Don't fly
2 Afraid of heights
2 Odds of happening again are slim
1 Terrorists can get through loopholes
7 Security not qualified/don't trust
4 Don't like flying
2 Haven't flown since 9/11
1 No fear of flying
1 Don't trust anyone
8 Poor aircraft maint./Human error
1 More concerns due to financial instability
2 Apprehensive

4-More aware/cautious
1 More afraid of being searched
4 Need more security
3 Safe, anything can happen
2 Need more restrictions
3 Have better security
1 – Have faith in our government
1 Feel safe
1 Most airports are in large cities
1 Safe but wonder what if . . .
1 Still too easy for someone determined to harm others
1 No real change
1 Chance of being hurt greater on the ground
1 Impossible to stop all crime.

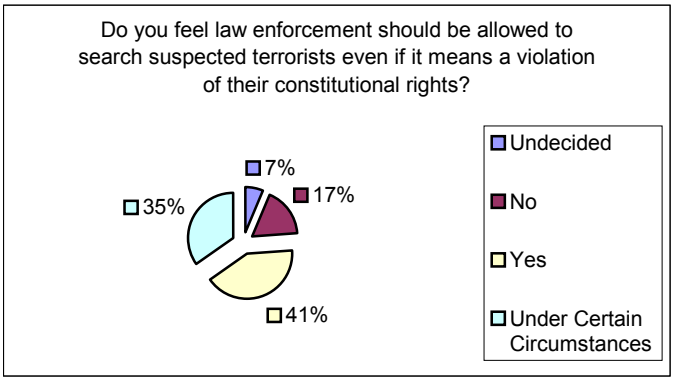
How do you feel about current security at airports?

60 Welcome the changes
12 Don't feel any safer
2 Prefer less security due to long waiting lines
2 Annoyed by the changes
10 Feel safer
16 Undecided

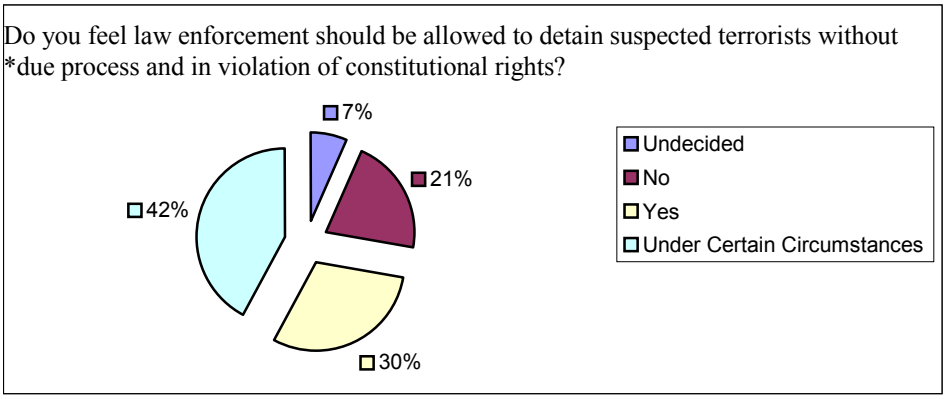
Are you in favor of racial profiling for investigation purposes?
32 Yes 20 No 33 For Terrorism Issues only 17 Undecided



Do you feel law enforcement should be allowed to search suspected terrorists even if it means a violation of their constitutional rights?
38 Yes 16 No 32 Under certain circumstances 6 Undecided



Do you feel law enforcement should be allowed to detain suspected terrorists without *due process and in violation of constitutional rights?
27 Yes 19 No 38 Under certain circumstances 6 Undecided



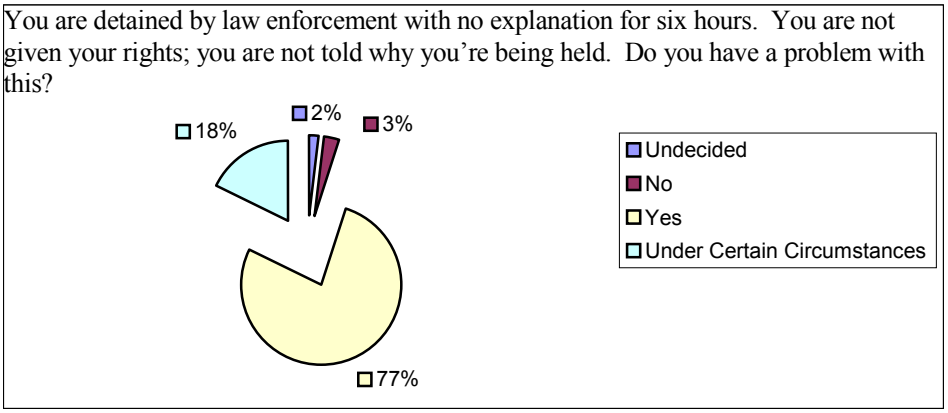
Comment: Yes, they already can.

Which of the following freedoms are you willing to give up for yours and your family's safety:

8 Equal privileges
11 Freedom of press and speech
22 Freedom of unreasonable search and seizure
9 Protection against self-incrimination
11 Right to speedy and public trial
9 Right to confront the witnesses
7 Cruel and unusual punishment
2 Deprived of life, liberty, or property without due process of law
9 Freedom of religion
15 Protection against double jeopardy
10 Right to prompt preliminary hearing
6 Right to notice of charge
4 Right to counsel
6 Burden of proof (burden of proof in a criminal action rests upon the prosecution.)

Comment: None because by giving up these freedoms there are no guarantees that my family or I would be safer without them.

You are detained by law enforcement with no explanation for six hours. You are not given your rights; you are not told why you're being held. Do you have a problem with this?
79 Yes 3 No 18 Under certain circumstances 2 Undecided



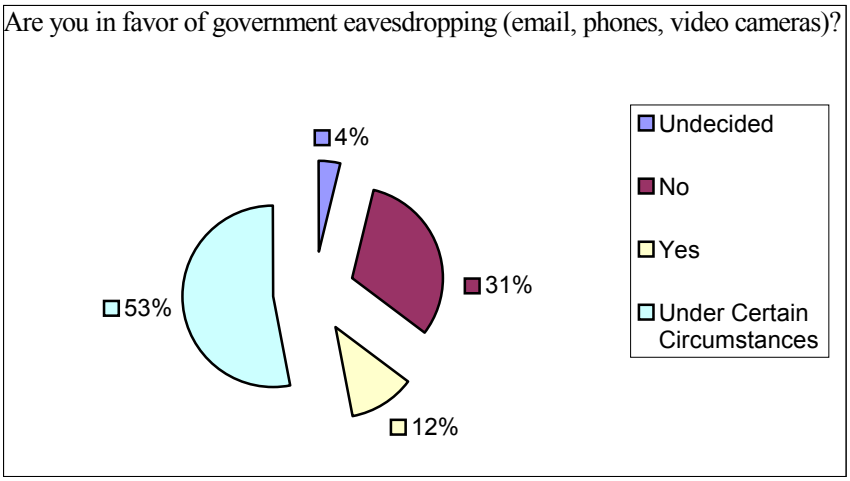
Why?
Yes
25 Entitled to my rights which should not be infringed upon
1 – I think law enforcement should be able for forgo due process with illegal alien suspects in any crime committed in the U.S. Our citizens who travel abroad are not offered due process if they are suspects in the commission of a crime);
23 There is no reason NOT to tell the suspect why they are being held / want to be told why
1 Why would this be helpful, or a good thing?
1 Ethically wrong and against the law
1 Due process!
1 I am willing to give up some of my rights but not the notice of charge
1 It's called kidnapping
1 I do not feel visiting aliens should have constitutional rights
1 You must be kidding, I can't imagine anyone not having a problem with this

1 This is an attribute of a police state. If we limit our liberties in the name of security, we will lose our liberty and not gain security
1 Too broad a power. Provides too much authority without accountability
2 Law enforcement's attitude and abuse of their authority
1 I don't like cops.

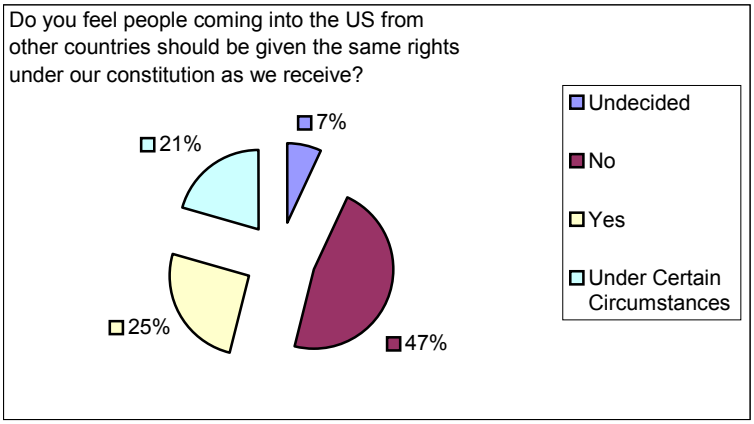
No
1 Happens all the time at borders
1 If it helps prevent terrorist attacks, I'm all for it
1 I have faith in the system

Undecided
1 Unclear question

Are you in favor of government eavesdropping (email, phones, video cameras)?
12 Yes **32** No **54** Under certain circumstances **4** Undecided

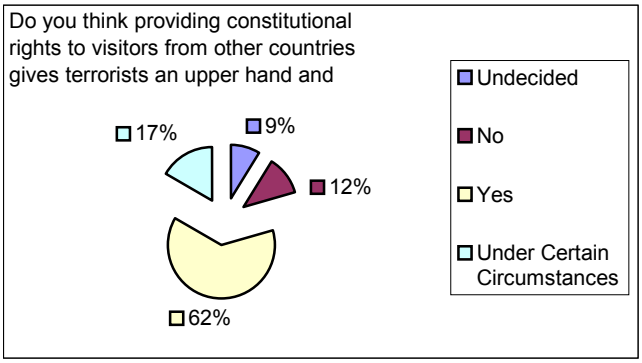


Do you feel people coming into the US from other countries should be given the same rights under our constitution as we receive?
26 Yes **48** No **21** Under certain circumstances **7** Undecided



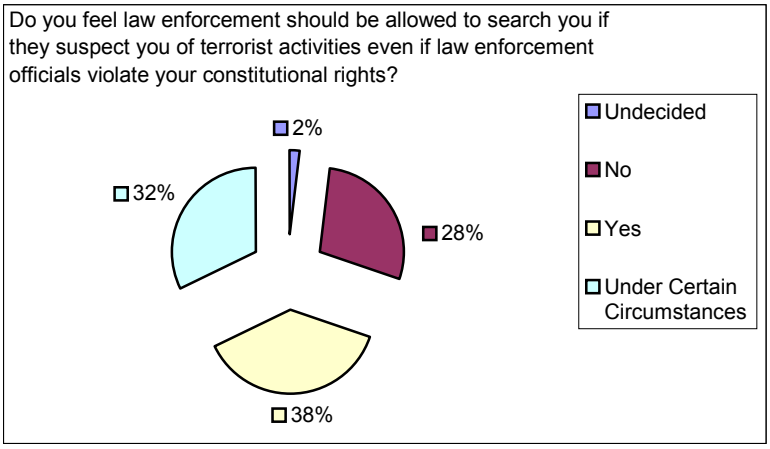
Comments:
3 Not until they gain citizenship; **1** Need more security; **1** Yes, that's the law; **1** I think there are too many foreigners coming in. "**America is Closed**".

Do you think providing constitutional rights to visitors from other countries gives terrorists an upper hand and ammunition against our country?
64 Yes **12** No **17** Under certain circumstances **9** Undecided

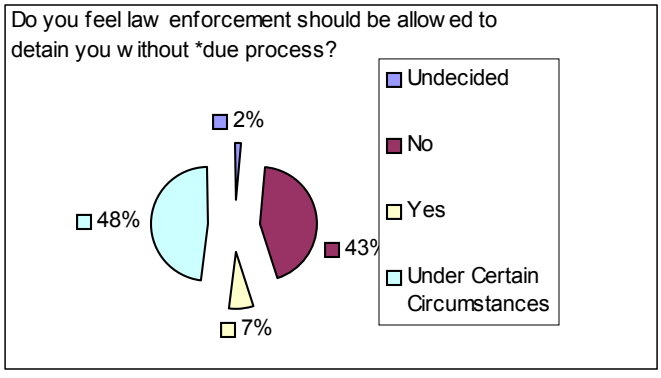


Comments:
1 Perhaps in individual cases in the short term but not in the long term. Our system will prevail only if we adhere to its strengths vigorously;
1 – Yes. If Constitutional rights are provided to all people visiting from other countries. I don't feel it's an either or proposition. While we may not be able to safety provide Constitutional rights for all foreign nationals across the board we should treat them without discrimination.

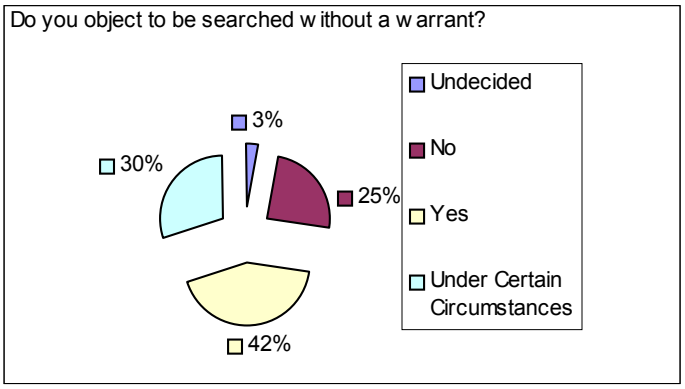
Do you feel law enforcement should be allowed to search you if they suspect you of terrorist activities even if law enforcement officials violate your constitutional rights?
38 Yes 29 No 33 Under certain circumstances 2 Undecided



Do you feel law enforcement should be allowed to detain you without *due process?
7 Yes 44 No 49 Under certain circumstances 2 Undecided



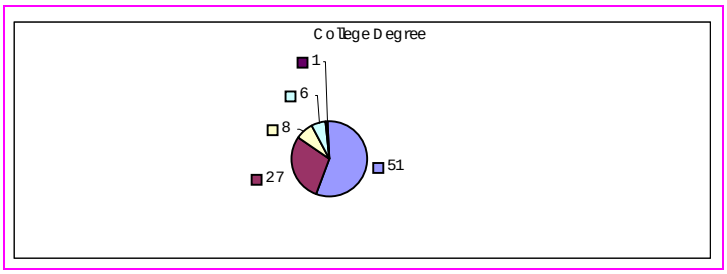
Do you object to be searched without a warrant?
43 Yes 25 No 31 Under certain circumstances 3 Undecided



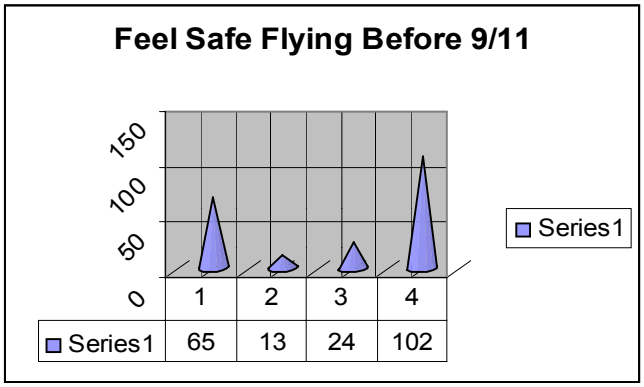
Comment:

If there's a good reason to believe someone is going to do harm to others the law should be able to stop and search – not hurt, but search.

In attempting to make sense of the survey, my interpretation of the results is that people are not willing to give up their constitutional rights and due process but are more willing perhaps to give away others' constitutional rights in certain circumstances. Although some answers within the survey had pretty strong comments in defense of their civil liberties, the numbers do not reflect this position. As you will see very few people are willing to give up their "freedoms" in exchange for safety. However, my interpretation of the results leaves me to believe they are willing to give up certain rights for others by the way they answered the individual questions.

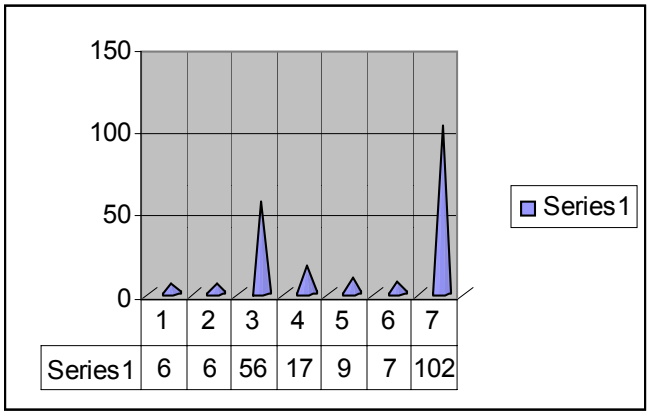


Fifty percent of those who responded to the survey have a college degree; Twenty-four percent an associates degree, 4% a bachelors degree; 1% a Masters degree and less than 1 percent a PHD.



Out of 102 people, 65 felt safe flying before September 11, 2001, 13 did not feel safe, 24 felt somewhat safe.

After September 11, 2001 – 6 felt extremely unsafe, 6 felt very unsafe, 56 felt somewhat safe, 17 felt very safe, 9 extremely safe, 7 don't know/not sure. 82 feel at least somewhat safe after 9/11 as opposed to 89 who felt at least somewhat safe before September 11th.



The average of those who felt safe before September 11, 2001 is about the same as those who still feel safe flying.

While people were not willing to give up their freedoms for safety, 65 out of 102 people had no problem with racial profiling, 33 of which are all right with racial profiling for terrorism issues only.

Again, while people were not willing to give up their freedom of unreasonable search and seizure, only 22 were willing to give up this freedom; 70 people are okay with searching suspected terrorists even if it means a violation of their constitutional rights, 32 under certain circumstances and 6 undecided.

While the survey says only twenty-two people are willing to give up any of their freedoms, at least 65 of these same people felt law enforcement should be allowed to detain suspected terrorists without due process and in violation of constitutional rights at least under "certain circumstances."

Just under half of those surveyed, forty-eight, feel that alien visitors should not be given U.S. Constitutional rights and twenty-one under certain circumstances, while 7 are undecided, but they want **their freedoms** saved.

Eighty-six surveyed are in favor of government eavesdropping at least under certain circumstances, while 4 are undecided.

Eighty-one people think providing constitutional rights to visitors from other countries gives terrorists an upper hand and ammunition against our country while 9 are undecided. Only twelve people don't feel this gives terrorists and upper hand.

And my favorite: You are detained by law enforcement with no explanation for six hours. You are not given your rights, you are not told why you're being held. Do you have a problem with this?

79 Yes 3 No 18 Under certain circumstances 2 Undecided

The reason this is my favorite is while 79 (out of 102) surveyed have a problem with this scenario and 18 have a problem with it under certain circumstances, **this situation is happening right now under the disguise of the USA Patriot Act and at United States borders!** Some of those surveyed included comments indicating that I was out to lunch to even ask this question.

My goal and hope in conducting this research is to make people realize that while they may not be willing to give up their freedoms and civil rights guaranteed to them under the US Constitution, they are willing to sacrifice their freedoms in certain ways without realizing what is taking place and has taken place throughout history. However, lacking our obvious ability to maintain peace and equality in times of crisis, my hope is that we have learned from our past mistakes. We are now facing terrorist threats that frighten most Americans. Have we learned as leaders and as Americans how to flush out the real threats from perceived threats? Have we learned it is important to maintain our civil liberties for all our fellow human beings even in times of crisis facing our nation? Santayana's statement "Those who cannot remember the past are condemned to repeat it" may soon be realized, again, if we allow our leaders to act irresponsibly with our civil rights and our emotions in times of crises once again. As spoken in Justice Brennan's speech at the Law School of Hebrew University, Jerusalem, Israel:

> "The struggle to establish civil liberties against the backdrop of these security threats, while difficult, promises to build bulwarks of liberty that can endure the fears and frenzy of sudden danger-bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile . . .For in this crucible of danger lies the opportunity to forge a worldwide jurisprudence of civil liberties that can withstand the turbulences of war and crisis. In this way, adversity may yet be the handmaiden liberty."[2]

Please think of the big picture and how it affects all of us before being so eager to give up your rights in times of crises for your perceived safety!

References

(1) Survey written and analyzed by Lisa Cote, December 2002.
(2) Speech delivered by Justice William J. Brennan, Jr., A Quest to Develop Jurisprudence of Civil Liberties in Times of Security Crises, December 22, 1987, Law School of Hebrew University, Jerusalem, Israel.
(3) USA Patriot Act as Passed by Congress – H.R. 3162 (October 25, 2001).
(4) News.findlaw.com/cnn/doc5/terrorism/usal_bakri091302cmp.pdf.
(5) Stat.570 (198).
(6) 71 U.S. at 120-121.
(7) 249 U.S. 47 (1919).
(8) http://www.aclu.com

USA PATRIOT ACT AND THE WAR ON TERRORISM

Adam Dulin*

The word "terrorism" is rooted in the French Revolution.[1] A period when state initiated terror tactics were employed to gain control of French society.[2] Terrorism can be described as the use of violence in order to achieve a psychological effect in a target audience.[3] Despite the seeming simplicity of this definition, there is no single definition of terrorism used by law enforcement agencies in the United States.[4] Moreover, terrorism policy differs from nation to nation, as do the definitions of what constitutes terrorism.

Fighting terrorism within a democratic society presents interesting challenges. There is a perennial balance between the level of security and the sustentation of civil rights. Accordingly, the U.S. must strike a balance between Constitutional rights and the necessity for strong legislation to fight terrorism, both inside and outside of the U.S.[5]

This paper will address the USA PATRIOT Act, one of the most recent pieces of legislation passed by the U.S. to counter terrorism. The ten sections of the USA PATRIOT Act will be discussed, along with important issues raised by its passage. Additionally, the Act will be assessed using two criteria: prevention and punishment.

The USA PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism[6], known as the USA PATRIOT Act, was passed in response to the terrorist attacks of September 11, 2001. The Act consists of ten titles that provide a wide array of new or enhanced powers to law enforcement and intelligence officers, including modification of immigration laws, increased powers of intelligence sharing, and fewer jurisdictional constraints when executing law enforcement tasks. The titles of the USA PATRIOT Act, as well as changes effected by the new law, will be discussed in this section.

Title I – Enhancing Domestic Security Against Terrorism

One of the key provisions of Title I is the establishment of a counterterrorism fund to aid the Justice Department in fighting terrorism. Funds are allocated for repairing facilities that have been destroyed by terrorist acts, terrorism threat assessments and prevention, and investigating terrorism, including rewards for information. This money may also be used for the overseas detention of persons accused of terrorism in violation of U.S. law.[7]

Section 102 of Title I recognizes the patriotism of all Americans, regardless of race or nationality. This section serves to condemn any attacks against Arab Americans, Muslims, as well as people with South Asian ancestry. The remainder of Title I expands funding, beginning with section 103; this funding builds on previous counterterrorism legislation, specifically the Antiterrorism and Effective Death Penalty Act (AEDPA).[8] Section 811 of the AEDPA created the FBI's Technical Support Center. Additionally, section 103 provides the FBI with $200 million for fiscal years 2002, 2003, and 2004.

Section 104 of Title I amends the Posse Comitatus Act[9], which previously banned military intervention in executing civilian law. Under Section 104, the military is now obliged to intervene in emergencies relating to biological, chemical, and nuclear weapons. This section amends 18 U.S.C. 2332e to include other weapons of mass destruction, as well.

The USA PATRIOT Act provides for the establishment of a nationwide network of electronic crime task forces. Section 105 of Title I places this responsibility in the hands of the Director of the United States Secret Service. The new task forces are modeled after the New York Electronic Crimes Task Force.

The final section of Title I increase Presidential power to combat terrorism when faced by an aggressive country or national. Under the International Emergency Economic Powers Act[10] (IEEPA), the

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[1] Elizabeth Chadwick, Terrorism and the law: historical contexts, contemporary dilemmas, and the end(s) of democracy, 26 Crime, Law & Social Change 329, 330 (1997).
[2] Id.
[3] Hoffman, *supra* note 1 at 420.
[4] William E. Dyson, Terrorism an Investigator's Handbook. (Anderson Publishing 2001).
[5] Philip B. Heymann, *Civil liberties and human rights in the aftermath of September 11*, 25 Harv. J.L. & Pub. Pol'y 441 (2002).
[6] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Pub. L. 107-56 (2001) [hereinafter PATRIOT Act]
[7] PATRIOT Act § 101
[8] Supra note 17
[9] The Posse Comitatus Act, 18 USC 1385
[10] 50 U.S.C. 1701 et seq.

President can, for example, seize the foreign assets of a country or national that is threatening the economic, foreign, or domestic well-being of the U.S. Section 106 amends the IEEPA, allowing the President to seize the property of a nation or national responsible for aggression towards the U.S. This section also permits the government to submit, in secret, any classified information upon which an IEEPA decision has been based, if it is subject to judicial review.

Title II – Enhanced Surveillance Procedures

Title II of the USA PATRIOT Act was developed from Title III of the Omnibus Crime Control and Safe Streets Act of 1968[11] with the addition of several new terrorism offenses, including chemical weapons, international terrorist acts, and material support for terrorists.[12] This title also provides greater freedom for law enforcement to share intelligence[13], facilitation in hiring translators[14], and extended FISA court orders.[15]

Some of the key amendments in this section include the issuance of a multi-jurisdictional warrant for electronic surveillance.[16] The title also amends the Trade Sanctions and Export Enhancement Act of 2000.[17] Under this amendment, the President has greater authority to ban the export of materials that may facilitate in the design, development, or production of weapons of mass destruction.[18]

Other key provisions of this title include the ability of grand juries to share intelligence and counterintelligence materials with law enforcement.[19] Also, voice mail and email are treated the same under this title.[20] Finally, communications service providers can execute FISA court orders, which are now easier to obtain for intelligence purposes[21]. In other words, cable and cell phone companies can be compelled to assist in the execution of a warrant.

Title III – Enhanced Surveillance Procedures

The popular name for this title is the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001. Title III of the USA PATRIOT Act provides for increased reporting, cooperation, security measures, offenses, and jurisdiction. In particular, financial institutions are forced to take further security measures to help combat money laundering.[22] For example, financial institutions, such as banks and securities brokers, must establish policies to detect money laundering. Additionally, correspondent accounts with foreign shell banks are prohibited.

The Secretary of the Treasury receives a number of new powers in this Title. Specifically, the Secretary can impose special measures internationally, where money laundering is occurring.[23] The Secretary is also able to prescribe regulations for client identification when new accounts are opened.[24] Additionally, the Secretary can refer suspicious activities to U.S. intelligence agencies for intelligence related activities.[25]

A key change is the establishment of the Financial Crimes Enforcement Network (FinCEN) from an administrative bureau of the Treasury Department to a statutory bureau of the Treasury Department.[26] FinCEN is charged with establishing a financial crimes communications center in order to furnish law enforcement with intelligence to combat money-related crimes. FinCEN will also maintain a government-wide computer service, whereby agencies can access and report information on financial crimes.[27]

Title III increases counterfeiting offenses. The Act includes counterfeiting analog, digital, and electronic images that are used for making false currency.[28] Counterfeiting penalties have also been increased. For example, the penalty for possessing foreign counterfeit money has been raised from 1 year to 20 years.[29]

Title IV – Protecting the Border

Title IV of the USA PATRIOT Act is designed to protect the northern border, tighten immigration provisions, and preserve the immigrant benefits of September 11th victims. More salient features of this title include the allotment of funds to triple Border Patrol personnel, Customs Service, and INS in each state that shares a border with Canada.[30] The Attorney General and other appropriate agency heads have been directed

[11] 18 U.S.C. 2510 et seq.
[12] PATRIOT Act § 201
[13] PATRIOT Act § 203
[14] PATRIOT Act § 205
[15] PATRIOT Act § 207
[16] PATRIOT ACT § 220 amends 18 U.S.C. 2703(a)
[17] The Trade Sanctions and Export Enhancement Act of 2000 P.L. 106-387, 114 Stat. 1549A-67 (2000)
[18] PATRIOT Act § 221
[19] PATRIOT Act § 203
[20] PATRIOT Act § 209
[21] PATRIOT Act § 211
[22] See for example PATRIOT Act § 312
[23] PATRIOT Act § 311
[24] PATRIOT Act § 326
[25] PATRIOT Act § 358
[26] PATRIOT Act § 361
[27] PATRIOT Act § 362
[28] PATRIOT Act § 374
[29] PATRIOT Act § 375
[30] PATRIOT Act § 402

to study the feasibility of enhancing the FBI's Integrated Automated Fingerprint Identification System (IAFIS) to screen applicants before they enter the country.[31]

The title may prohibit an individual's entrance into the U.S. for espousing terrorist activity, being the wife or child of an inadmissible alien, or associating with a terrorist organization.[32] Earlier definitions related to terrorism are also redefined.[33] Prior to the USA PATRIOT Act, engaging in terrorist activity spanned from providing material support to solicitation.[34] However, the term "terrorist organization" was not clear under prior law.[35] Under Title IV, the definition of engaging in terrorist activity now includes recruiting. Terrorist organizations include those listed in the Immigration and Nationality Act and in the *Federal Register*.[36]

Title IV also modifies immigration law to provide relief to victims and family members of September 11. In short, the title provides benefits for immigrants who experienced problems (late applications, deceased relatives, injury etc.) as a result of September 11.[37] Immigrant benefits in this title include extension of deadlines,[38] temporary administration relief,[39] and permanent resident status to aliens, if their spouse or parent was going to receive permanent resident status but did not as a result of September 11.[40]

Title V – Removing Obstacles to Investigating Terrorism

Title V provides for greater rewards to combat terrorism. The Attorney General is vested with the power to pay rewards in any amount to combat terrorism.[41] This new power of the AG is in sharp contrast to prior law limiting the amount of individual rewards to $500,000.[42] The Secretary of State's previous $5 million reward cap is also removed.[43]

Particularly important to Title V is a provision expanding the crimes for which the Attorney General can collect DNA samples. DNA samples can be taken from federal prisoners convicted of terrorism[44], conspiracy to commit terrorism,[45] or violent crimes.[46]

Other important provisions of Title V include increased cooperation between intelligence and police officers under FISA court orders.[47] The title also expands the jurisdiction of the Secret Service to include computer fraud cases involving any fraud or criminal activity against a financial institution insured by the federal government.[48] Under prior law, the Secret Service was limited to credit and debit cards and false identification computer crimes.[49]

Title VI – Providing for Victims of Terrorism, Public Safety Officers, and Their Families

Title VI seeks to provide aid to families of public safety officers who have been injured or killed in a terrorist attack, including rescue and recovery efforts after the attacks of September 11.[50] The title removes caps on the amount of benefits that can be paid and also removes disqualifications that were present in prior law.[51] For example, before the USA PATRIOT Act, if a peace officer was found to be grossly negligent, that person was disqualified from receiving benefits.[52]

Amendments to the Victims of Crime Act of 1984[53] are made in Title VI. The Act authorizes the Crime Victims Fund to receive gifts from private individuals.[54] Title VI also increases the amount of money that discretionary grants can receive from the fund.[55] Additionally, the State Department establishes a $50 million emergency reserve to effectively respond to terrorist attacks and to compensate victims of terrorism.[56]

Title VII – Increased Information Sharing for Critical Infrastructure Protection

Under prior legal standards, the Office of Justice Programs was authorized to make grants and work

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[31] PATRIOT Act § 405
[32] PATRIOT Act § 411
[33] Id.
[34] 8 U.S.C. 1182 (a)(3)(B)(iii)(2000)
[35] Prior law included at the least terrorist groups under Immigration and Nationality Act (8 U.S.C. 1189, § 219)
[36] *Supra* note 50.
[37] See generally PATRIOT Act (IV)(C) §§ 421-428
[38] PATRIOT Act § 422
[39] PATRIOT Act § 425
[40] PATRIOT Act § 421
[41] PATRIOT Act § 501
[42] 18 U.S.C. 3071-3077
[43] PATRIOT Act § 502
[44] See 18 U.S.C. 2332b(g)(5)(B)
[45] PATRIOT Act § 503
[46] Id.
[47] PATRIOT Act § 504
[48] PATRIOT Act § 506
[49] 18 U.S.C. 3056 (b)(3)(2000)
[50] PATRIOT Act § 612
[51] PATRIOT Act § 611
[52] 42 U.S.C. 3796a
[53] Victims of Crime Act of 1984 42 U.S.C. 10601 et seq. (CHECK THIS FOR ACCURACY)
[54] PATRIOT Act § 621
[55] Id.
[56] Id.

with law enforcement to combat crime spanning multiple jurisdictions.[57] Title VII aims to establish a secure information sharing system to combat multi-jurisdictional terrorist activities. To this end, it appropriates $50 million for fiscal year 2002 and $100 million for fiscal year 2003.[58]

Title VIII – Strengthening the Criminal Laws Against Terrorism

Title VIII changes a number of laws, increases offenses, modifies the definition of terrorism and increases jurisdiction in U.S. crimes committed abroad. The title broadens more mass transit offenses to federal crimes, carrying with them harsher penalties.[59] Additionally, providing material support to terrorist groups is expanded to include expert advice or assistance.[60]

The definitions of international and domestic terrorism are changed in Title VIII. International terrorism has been modified to include acts intended to effect change in a government through mass destruction, kidnapping, or assassination.[61] Domestic terrorism is now defined as those acts dangerous to human life committed within the U.S., and intended to effect change in a civilian population through intimidation or coercion, or to change the conduct of a government through mass destruction, kidnapping, or assassination.[62]

The federal crime of terrorism[63] is also modified in Title VIII. A number of lesser offenses are dropped from the federal definition, including simple assault, bomb scares, and malicious mischief.[64] Furthermore, several new offenses are added to the federal definition. These include crimes involving biological weapons, cybercrime, mass transit attacks by terrorists, and various violent crimes committed while onboard an aircraft.[65]

To hinder terrorist financing, Title VIII adds to the list of property that is subject to civil forfeiture. Specifically, property belonging to an individual who is planning or committing terrorist acts against the U.S. is subject to forfeiture.[66] Also, property that is acquired for the furtherance of terrorist acts against Americans, or property that is useful for such acts, is subject to forfeiture.[67]

Cyberterrorism is targeted in Title VIII for additional deterrence and prevention measures. The penalty for purposely damaging a federally protected computer has been raised from a maximum of five years to ten years in prison.[68] Moreover, the title provides an additional offense that may constitute cyberterrorism – damage to a computer system used by a government agency for administration of justice, national security, or defense.[69]

Existing federal law pertaining to the use of biological weapons[70] is enhanced by Title VIII; two more offenses are added to existing law. The possession of any quantity of a biological agent or toxin that cannot be justified has been outlawed. Also, an offense has been enacted that prohibits certain individuals (felons, illegal aliens, fugitives etc.) from possessing biological agents and toxins.[71]

Title VIII also clarifies the issue of international jurisdiction. United States jurisdiction includes areas overseas used by the American government to include places of business and residences.[72] Jurisdiction for American agencies will be effective in cases where crimes have been committed against Americans and American property.[73] This provision of Title VIII will not override previously existing treaties, obligations, or the Military Extraterritorial Jurisdiction Act.[74]

Title IX – Improved Intelligence

Title IX provides greater cooperation between law enforcement and intelligence agencies and the dissemination of information gathered during a criminal investigation. The Attorney General is charged with developing guidelines for the dissemination of such information.[75] Also, information relating to international terrorist activities has been included in the foreign intelligence category.[76]

To further facilitate the performance of duties by intelligence agencies, Title IX allows delayed reports to Congress on intelligence-related matters.[77] The formation of a national virtual translation center is

[57] 42 U.S.C. 3796h
[58] PATRIOT Act § 701
[59] PATRIOT Act § 801
[60] PATRIOT Act § 805
[61] PATRIOT Act § 802
[62] § 802 modifies 18 U.S.C. 2331(5)
[63] *Supra* note 62
[64] PATRIOT Act § 808
[65] Id.
[66] PATRIOT Act § 806
[67] Id.
[68] PATRIOT Act § 814
[69] *Supra* note 86
[70] 18 U.S.C. 175
[71] PATRIOT Act § 817
[72] PATRIOT Act § 804
[73] Id.
[74] 18 U.S.C. 3261
[75] PATRIOT Act § 905
[76] PATRIOT Act § 902
[77] PATRIOT Act § 904

also promoted in Title IX. The Director of Central Intelligence and the Director of the FBI will run the center jointly.[78]

Title X – Miscellaneous

Title X contains various miscellaneous provisions, such as Congressional recognition that violence against Sikh-Americans is deplorable and should be condemned.[79] The title also calls for independent oversight of the FBI.[80] Furthermore, FISA is amended to clarify that surveillance orders can be issued to obtain information from computer trespassers.[81]

The title appropriates $25 million for fiscal years 2003-2007 to find grants for the prevention of terrorism and anti-terrorism training.[82] Amendments are also made to prior legislation[83] to determine commercial vehicle operator fitness. Operators of commercial vehicles must show that they do not pose a security threat.[84]

Additional funding under Title X includes $250 million through 2007 for the Crime Identification Technology Act.[85] The Department of Defense receives $20 million in 2002 for its Defense Threat Reduction Agency.

Issues with the USA PATRIOT Act

Refugees

The INS has relied on a broad definition of terrorism to prevent terrorists from entering the U.S. The definitions for engaging in terrorist activity include planning, providing material support, and soliciting funds and/or membership. The sweeping definitions used to determine if a person participates in terrorist activities have caused disparate results.[86] In one case, Brian Desmond Pearson, an acknowledged member of the Irish Republican Army (IRA), was deemed applicable for asylum, even though Pearson was convicted in 1977 of crimes in connection to two bombings in Northern Ireland.[87]

The USA PATRIOT Act adds to the list of activities that fall within the category "terrorist activity."[88] For example, a terrorist activity may now include the use of any weapon, not just those listed in previous law. This could have the effect of prohibiting entrance to individuals who are not terrorists and who have not participated in terrorist activity. This can be viewed as an improvement on prior law but certain downfalls are evident.[89] The use of "any weapon" must be accompanied by the intent to endanger the safety of others.[90] Applied in a broad manner, an individual who hurled stones at the police during a political demonstration could have committed a terrorist act.

Additionally, within the new confines of the USA PATRIOT Act, an individual who provides material support to terrorist organizations does not have to know that the support was for a terrorist organization.[91] There are two exceptions to this rule: (1) if the support was given to a group not recognized by the U.S. as a foreign terrorist organization (FTO) or, (2) if the Secretary of State and the Attorney General determine that the support does not apply.[92] It is possible that individuals who innocently and legitimately donate to Muslim charities will be cited for giving support to terrorist groups. One such charity is the Holy Land Foundation for Relief and Development, accused of funding the Palestinian terrorist group Hamas.[93]

Grand Juries

The USA PATRIOT Act has changed the scope of grand jury secrecy for intelligence and counterintelligence.[94] Under the Act, any number of federal agencies can use grand jury information in the performance of official duties. The new scope of grand jury secrecy can be viewed as an improvement on the federal government's ability to combat terrorism, but it also raises several serious issues.[95]

Grand juries enjoy significant powers that are not shared by law enforcement agencies. The federal grand jury is able to compel the disclosure of information from persons during an investigation or hold the

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[78] PATRIOT Act § 907
[79] PATRIOT Act § 1002
[80] PATRIOT Act § 1001
[81] PATRIOT Act § 1003
[82] PATRIOT Act § 1005
[83] 49 U.S.C. 5103a
[84] PATRIOT Act § 1012
[85] P.L. 105-251, 112 Stat. 1871 (1998), 42 U.S.C. 14601
[86] Germain, *supra* note 105 at 507
[87] Id. at 513.
[88] PATRIOT Act § 411(a)(1)(F)
[89] Germain, *supra* note 105 at 513
[90] INA § 212(a)(3)(B)(iii)(V)(b)
[91] Germain, supra note 105 at 519
[92] Id.
[93] Rudolph Lehrer, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 Tul. J. Int'l & Comp. L. 333 (2002).
[94] PATRIOT Act § 203
[95] Sara Sun Beale & James E. Felman, *Responses to the September 11 attacks: the consequences of enlisting federal grand juries in the war on terrorism: assessing the USA PATRIOT Act's changes to grand jury secrecy*, 25 Harv. J.L. & Pub. Pol'y 699 (2002).

person in contempt for failing to cooperate. Federal agencies such as the FBI or ATF do not have this power over individuals during an investigation.[96] Secrecy in grand jury investigations helps to ensure that witnesses are not hesitant in coming forward with information, that witnesses are open and frank in their testimony, that those who may be indicted do not flee, and that persons who are accused of a crime but later exonerated do not have a marred reputation.[97]

The Supreme Court has addressed the significance of grand jury secrecy. In United States v. Sells Engineering[98] the Court interpreted the procedural rules pertaining to grand jury secrecy[99] as prohibiting the disclosure of grand jury proceedings to government attorneys for use in civil litigation without a particularized need. In this case, the Court also affirmed the notion that using information obtained during a grand jury investigation other than for purposes of criminal prosecution threatens the integrity of the grand jury.[100] Allowing government agencies access to grand jury information undermines procedural safeguards.[101] In a sense, government agencies could use grand juries as a tool to sidestep their own procedural limitations.

The USA PATRIOT Act changes the limitations on grand jury secrecy in a number of ways. First of all, past exceptions to secrecy have stressed that a particularized need must be present.[102] This is currently not the case with intelligence and counterintelligence materials. Also, the courts do not hold a supervisory role over the dissemination of grand jury information pertaining to intelligence or counterintelligence. Instead, the court is notified of any disclosure within a reasonable period of time.[103]

However, one of the key issues with the USA PATRIOT Act is the lack of judicial supervision over the disclosure of grand jury information.[104] Judicial overview of grand jury disclosures would ensure that information fell within the scope of new exceptions and that it was used in the proper manner. It would also protect the reputation of the grand jury and ensure the effectiveness and ability of the grand jury to perform investigations.[105]

Civil Rights

New provisions of the USA PATRIOT Act that provide for wiretapping and intelligence investigations have been described as too broad and dangerous to civil rights.[106] Specifically, Title III of the Act amends FISA, granting government the power to apply surveillance measures on aliens and U.S. citizens. These surveillance measures can now be used during the course of an investigation when foreign intelligence is a significant purpose.[107]

Originally, FISA searches were limited to foreign intelligence investigations.[108] Now, with the USA PATRIOT Act, FISA searches can be conducted more easily during the course of a criminal investigation and without probable cause. The amendment to FISA contained in the USA PATRIOT Act increases the possibility that a person's Fourth Amendment rights will be violated.[109]

Another issue with the USA PATRIOT Act is that standards of probable cause are not tailored to the evidence being gathered during an investigation. The definition of pen register and trap and trace devices now include communications from email and web surfing,[110] which provides far more revealing information. The content of email and web surfing would normally require a higher standard of probable cause but is now included in a category of probable cause that is not properly tailored to the evidence sought.[111]

The USA PATRIOT Act also loosens judicial oversight in securing court orders.[112] Law enforcement and intelligence officers can obtain a blanket warrant that does not specify the person or place to be searched, and it may be used nationwide or internationally.[113] Ultimately, this limits a judge's ability to ensure that court orders are being used properly and that a person's rights remain intact.[114]

Assessment of the USA PATRIOT Act

Prevention

One of the most salient objectives of the USA PATRIOT Act is to increase the investigative powers

[96] Id.
[97] Id. at 700.
[98] United States v. Sells Engineering 463 U.S. 418 (1983)
[99] Fed. R. Crim. P. 6(e)
[100] Supra note 122 at 432
[101] Id. at 433.
[102] Id. at 418.
[103] PATRIOT Act § 203(a)
[104] Beale & Felman *supra* note 119 at 702
[105] Beale & Felman *supra* note 119 at 706
[106] Jennifer C. Evans, *Hijacking civil liberties: the USA PATRIOT Act of 2001*. 33 Loy. U. Chi. L.J. 933 (2002).
[107] PATRIOT ACT § 218
[108] 50 U.S.C. 1803(a)
[109] Evans, *supra* note 131
[110] PATRIOT Act § 214
[111] Evans, *supra* note 131 at 944
[112] PATRIOT Act § 216
[113] PATRIOT Act § 219
[114] Evans, *supra* note 131 at 947

of law enforcement. First, law enforcement can employ single jurisdiction warrants when subjects are likely to evade identification.[115] Second, pen register and trap and trace devices can be used for email and other content based communications.[116] Furthermore, intelligence agencies enjoy fewer restrictions when gathering records pertaining to national security.[117] These provisions may increase the effectiveness of intelligence operations and help in thwarting future terrorist attacks.

The USA PATRIOT Act also increases the ability to detain terrorist suspects. Specifically, Section 412 of the Act authorizes the Attorney General to detain alien terrorist suspects for up to seven days. After criminal proceedings have been initiated, it is possible for a terrorist suspect to be held for a period of years. Actions made by the Attorney General with respect to Section 412 are subject to review under writs of habeas corpus. Interestingly, this section of the Act appears to be superseded by President Bush's Military Order of November 13, 2001. This order allows the Secretary of Defense to detain alien terrorist suspects unconditionally.[118]

Beyond this, the USA PATRIOT Act increases the ability of the president to impose unilateral trade sanctions on products potentially useful in the commission of terrorism.[119] The President can impose sanctions on materials that may facilitate the development and/or production of weapons to be used by terrorist groups. This is an improvement on the President's original powers set forth in the Trade Sanctions Reform and Export Enhancement Act of 2000.[120]

Of course, there are some important security concerns. Section 411 of the USA PATRIOT Act uses definitions of terrorist organizations originally set forth in the Immigration and Nationality Act.[121] The USA PATRIOT Act also includes organizations identified by the Secretary of State in the *Federal Register*. Despite this new addition, there is still an opening for groups that have not been identified by the Secretary of State. Subsequently, individuals with aims of supporting terrorist organizations not designated as such by the U.S. may still be free to promote terrorism within U.S. borders.

Punishment

One of the strongest areas of the USA PATRIOT Act is the provision allowing for increased capacity to punish individuals for acts of terrorism. Title VIII of the Act is dedicated to strengthening laws against terrorism. This includes new and revised offenses, as well as the added capacity to punish.

Section 801 allows for punishments up to and including life imprisonment for terrorist attacks against interstate mass transit systems. Section 805 of the act adds expert advice or assistance to the list of activities that may constitute material support of terrorism. A more serious and potentially powerful weapon of law enforcement is contained in section 806. In this section, a forfeiture of property is allowed if it belongs to a terrorist or is acquired, maintained, or useful in committing acts of terrorism.

Section 810 of the Act raises the penalties for terrorism. This may include acts of terrorism or terrorist conspiracies. For example, a person providing material support to a terrorist organization can be imprisoned for a maximum of fifteen years or life if any deaths occur as a result of the support. Prior law only allowed for a prison term of ten years.[122]

Another important provision of Title VIII is the establishment of equal sanctions for terrorist conspiracy and the underlying offenses in certain cases.[123] This can include an armed killing inside of a federal building, destruction of communications facilities, derailing a train, and much more. For example, if a person conspires to destroy a communications facility, that person can be imprisoned for ten years.[124]

Conclusion

The USA PATRIOT Act has been met with substantial criticism. Indeed, the United States has been accused of causing "an erosion of individual freedoms, private property rights, limited government and the rule of law."[125] However, sunset provisions are contained in the USA PATRIOT Act to terminate certain provisions. For example, nationwide service of search warrants and the expanded ability to monitor U.S. citizens will be terminated after December 31, 2005.[126]

Different criteria under which the USA PATRIOT Act has been examined show the potential effectiveness of this new piece of legislation. Provisions allowing for increased punishment of terrorists appear to be the strongest elements contained in the Act. Considering recent historical events in the U.S., this strength of the Act may reflect the prevailing public sentiment towards punishment of individuals responsible

[115] PATRIOT Act § 219
[116] PATRIOT Act § 214
[117] See for example PATRIOT Act §§ 203, 206, 207, 211, 215 & 218
[118] 66 Fed. Reg. 57833, 57834 (Nov. 16, 2001)
[119] PATRIOT Act § 221
[120] Title X of Pub. L. 106-387, 114 Stat. 1549A-67 (2000)
[121] 8 U.S.C. 1189
[122] 18 U.S.C. 2339A
[123] PATRIOT Act § 811
[124] 18 U.S.C. 1362
[125] Anne Rathbone & Charles K. Rowley, *Terrorism*, 111 Public Choice 9, 11 (2002).
[126] PATRIOT Act § 224

for widely acknowledged atrocious acts.

Important to note in the USA PATRIOT Act is the reinforcing quality contained in certain provisions that warrant improvement. For example, the ability of certain unknown terrorist groups to raise funds in the U.S. remains a possibility with the new legislation. However, increased personnel and funding for the Border Patrol can counteract this potential weakness.

The USA PATRIOT Act does little to address the topic of critical infrastructure protection. Particularly, the Act does not address issues such as the protection of the U.S. water supply or the nation's energy systems. However, a reinforcing quality can be seen between the USA PATRIOT Act and other recent legislation. A strong relationship between the Act and the more recent Homeland Security Act[127] can be seen. The Homeland Security Act addresses the nation's critical infrastructure and complements the potential effectiveness of the USA PATRIOT Act.

[127] HR 5710, the Homeland Security Act of 2002

"PATRIOTISM" AND "WAR"-NEW CONTEXTS AND MEANINGS

Ayn Embar-Seddon*

Since the terrorist attacks of September 11, 2001 our civil liberties have been threatened in numerous ways. Perhaps the most blatant of these threats comes from the egregiously misnamed "USA Patriot Act" This Act, signed into law by President George W. Bush in October of 2001, poses significant threats to individuals' civil liberties in the areas of freedom of speech, freedom of political association, privacy, and rights of due process—especially pertaining to non-citizens. This paper examines how the connotations of the USA Patriot Act stand up to what has been known as "patriotism" in the historic sense. What has it meant historically to be a patriot, and has this definition changed in our post-September 11th world? If so, what *should* it mean now? We'll start our examination by looking at the version of patriotism espoused by our nation's founders—in particular that of Thomas Jefferson. President Bush has declared that we are engaged in a "War on Terrorism", and because of that war, we must be willing to suspend some of our civil liberties in order to ensure domestic security and survival. But is this truly the case? This paper follows the thread of patriotism through times of war—the Revolutionary War, the Civil War, both World Wars and Vietnam. What has it meant to be a patriot during wartime? Is our current "War on Terrorism" like these other combative wars, or is it more like the ideological "War on Drugs" or the "War on Poverty"? Has technology changed in such a significant way that the prosecution of war now demands the suspension of individual rights to meet the needs of a wartime society in this day and age? Can the machinery of war be put into motion, and war be both waged and won without imperiling our rights as citizens?

On September 11, 2001, a national tragedy occurred. The United States was attacked by four sets of terrorists, acting in conjunction, who hijacked four jet airlines and crashed them into a field near Pittsburgh, one side of the Pentagon, and the World Trade Towers in New York City. This is a fact that we all know, because we all lived through that horrific day and the stunned days afterward, trying to come to terms with what had happened. As our terror and shock wore off, a cry went up around the nation that we, the United States, the government, must do something. Since this attack was unprecedented in its magnitude---there had been other terror attacks on United States soil, remember the first attempt on the World Trade Towers, early in the 1990s---there was no easy and ready response.

By the time I found out, a phone call interrupted a late breakfast, one Tower had already collapsed. I phoned my parents in Pittsburgh. I think my father's response was typical of many in the nation. At first disbelief ("get out, you're joking"), then shock and horror, then he said: "Well this is it, we're at war." (F. Seddon, personal communication, September 11, 2001.

Shortly after the attacks, President Bush declared a "War on Terrorism", within months we were engaged in a conflict in Afghanistan. In March of 2003, the week during which this paper was originally presented, we were engaged in a conflict in Iraq. These two conflicts are undeclared wars, because Congress has not formally declared war since World War II. But even in an undeclared war, there are new tools to defeat the enemy. They are the traditional war tools: better bombs, better missiles, and better guidance systems. The "War on Terrorism", however, is not a traditional war, a combat war, a "hot" war. It requires different tools. One such tool is the USA Patriot Act (Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act). As its name states, this piece of legislation is intended to enable the United States to fight terrorism. The War on Terrorism has also been given a new cabinet department---the Department of Homeland Security.

The following questions are addressed in this paper:

1. What is war and what sorts of wars has the United States engaged in?
2. What sort of war is the War on Terrorism?
3. What does it mean to be a patriot, especially during war or an emergency?
4. Why do we need a new tool, a different approach, to fight terrorism?
5. Will the USA Patriot Act actually make the United States safer, or is it just a clever wordplay designed to make citizens feel that giving up civil liberties is somehow patriotic?

What is "War"?

There are at least four different types of wars that the United States has engaged in at different times. These include: "hot" wars, "cold" wars, "undeclared" wars, and "ideological" wars. A hot war is when there is actual fighting between warring parties. Only Congress has the power to declare these wars and it has not done so in over 60 years.

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Unlike hot wars, cold wars consist of conflict using means short of armed warfare. When cold war is mentioned, most individuals think in particular of "The Cold War", a euphemism for the conflict between the United States (representing capitalism) and the Soviet Union (representing communism).

Even though the United States has not been involved in a declared war since World War II, American soldiers have died in combat all over the world in undeclared wars. These "undeclared wars" have gone by a variety of names: "sending advisors", "police action", and "conflict". These terms seem little more than word games, of the kind engaged in George Orwell's *1984*—a form of double speak. There is actual fighting between warring parties—this is a war. Calling Vietnam, for example, a "police action" is a clever and political way to get around having to declare a war. This sort of word game, refusing to call a "war" a "war", is a dangerous thing to do with language. Language affects the way people think and feel and act. Does it make it any less of a war if we call it a "police action"? Are there fewer dead civilians if we call it "collateral damage"? These sorts of word games only serve to pervert language and erode trust in the political leaders that engage in them.

There is another sort of "war", an "Ideological War". In the ideological war, there is not armed conflict; it is a purely political sort of war, in which the name "war" has been borrowed to allow certain political maneuvers such as acquiring large amounts of funding and passing legislation. Ideological wars have included the "War on Crime", the "War on Poverty", and the "War on Drugs". The "War on Crime" was Franklin D. Roosevelt's invention and along with his packing plan and other New Deal initiatives were designed to invest the federal government with new powers and authority. The War on Crime also gave J. Edgar Hoover the impetus to build the monolithic FBI. With the cooperation of the newspapers, that focused on crime stories (especially concerning John Dillinger and Al Capone) creating a fear of crime much greater than the "crime wave" itself, the FBI was granted greater and greater powers. (Walker, 1999)

The "War on Poverty" was declared by President Lyndon B. Johnson in his State of the Union address on January 8, 1964. His motives for declaring this war were assuredly instrumental. Perhaps he was anxious to leave his mark as President. Perhaps he wanted to distract attention from the unpopular "Vietnam Conflict". When Johnson declared a "War on Poverty" he called attention to the plight of the poor in the United States. Money was directed toward poverty issues. Almost 40 years later, this ideological war has not yet been won. There is still a wide (some would say widening) gap between rich and poor. (Greenbaum, 2000)

Perhaps the best-known ideological war has been the "War on Drugs". This was conceived of during 1968 Nixon election campaign when the Republicans wanted an issue that they could take a stand against Johnson on. Since that time, every President has continued the effort to fight drugs, much to the detriment of the criminal justice system and the pockets of the American taxpayer. Like all ideological wars, the "War on Drugs" has been expensive and the outcomes dubious. (Walker, 1999)

There are a number of reasons for the general failure of ideological wars. First, ideological wars have tried to address very complex social problems. Although it sounds politically good to be trying to eradicate poverty or drug abuse or crime, it appeals to the voters, ideological wars are largely political rhetoric. Because ideological wars involve complex social problems, the problem, whether it be "crime" or "poverty" or "drugs" remains nebulous and ill defined. Interventions, although they may receive considerable funding are often ill-planned. Outcomes are rarely clearly envisioned.

What Sort of War is the "War on Terrorism"?

Among the four types of wars that have been discussed; hot wars, cold wars, undeclared wars, and ideological wars, which type is the "War on Terrorism"? The "War on Terrorism" is not a hot war like World War II, in which we are engaging in an armed conflict with another nation. However, the War on Terrorism could amount to a series of small wars, or conflicts, consisting of the conflict in Afghanistan and Iraq and future conflicts against other terrorist-supporting nations. These conflicts might, in the future, be referred to as the "Terrorism Wars". Perhaps the "War on Terrorism" is more of a cold war? Certainly there have been cold war elements to this conflict, but, like a hot war, without a particular nation to fight against, it is difficult to conduct a cold war. It seems contradictory to state that the "War on Terrorism" is an undeclared war, since the President has specifically declared a "War on Terrorism" in more than one speech, although the conflicts with Afghanistan and Iraq were undeclared wars.

The single biggest difficulty in trying to fit the "War on Terrorism" into any of the previous categories is that those sorts of wars depend upon fighting a nation. The "War on Terrorism", unfortunately for anyone who thought we were going to win this war, has all the earmarks of an ideological war. It is ill-defined, responses and interventions have been knee-jerk and ill-planned, and the outcome has not been explicated, except for the vague and unlikely: "eradicate terrorism."

The New Weapon to Fight Terrorism

The enemy that threatens the lives and freedoms of Americans, United States leaders say, is terrorism and terrorists, but the enemy may be far more dangerous than any terrorist. While terrorism is a very real

threat, the "War on Terrorism" possibly poses a far greater threat to both the freedom of individuals and the freedom of the nation. Perhaps the greatest risk, so far, is posed by the USA Patriot Act. There was no debate before passage, and with the name "USA Patriot Act", and it being presented just six weeks after the horrific attacks of 9/11, it would have been almost impossible to vote against it---why it would have been unpatriotic! And it is no simple coincidence that this struggle has been dubbed the "War on Terrorism" because wars have traditionally called for sacrifices, specifically in the area of civil liberties. The USA Patriot Act calls for significant curtailment in the areas of freedom of speech, freedom of political association, due process (especially pertaining to non citizens), and privacy (The USA PATRIOT Act).

Freedom of Speech

Wartime does not exempt the government from the First Amendment. It is through the vehicle of the First Amendment that political rights are secure. As this paper has outlined, however, there is significant precedent for limiting free speech during what are considered to be "times of emergency". The justification for limiting free speech during wartime is out of fear of what might happen, that citizens might rebel (for example in the Civil War), or not support the war (as was feared during the unpopular World War I). Although this fear of what might happen was, during World War I considered to be sufficient to allow suppression of speech, changes in constitutional law now state otherwise, and fear of what "might" happen is no longer a sufficient reason to suppress speech. (Klotter, Kanovitz & Kanovitz, 2002)

At no time are all types of speech protected. As far as modern constitutional law is concerned, there are three types of speech. The first type, normal speech, receives full constitutional protection. The second is speech that receives no protection. This includes threat speech, incitement to riot, fighting words, speech advocating violence that invites imminent action. In-between these two is speech that receives limited protection, including profane and commercial speech. (Klotter, Kanovitz & Kanovitz, 2002)

When the Patriot Act targets free speech, it also targets freedom. Without the ability to voice legitimate governmental dissent, to have political discourse, the government ceases to be controlled by the people.

Freedom of Political Association

The Patriot Act also seeks to limit freedom of political association by designating certain groups as "terrorist organizations" or "supporters of terrorists" (a designation that can be given to any organization, or individual, that has donated money to a charity that has been put on the list of charities that aid terrorists). The process of designation is quite nebulous and many organizations are being blacklisted simply because of ties to Islam. Many unsuspecting Muslims may be targeted because donating to charity is part of their religion. If any organization they have contributed to seems suspicious, they will, in turn, risk having aided a "suspected terrorist organization". And the list of suspected organizations changes frequently. (The USA PATRIOT Act,)

Rights of Due Process

The Patriot Act seeks to severely limit the rights of due process, especially of non-citizens. Since 9/11, the United States government has detained many non-citizens, ostensibly in connection with the terrorist attacks, but since only one individual has been charged, there really is no way of knowing. These individuals have been held, without being charged, without access to an attorney. What it seems to come down to is that non-citizens, especially middle-easterners, can now be held in jail for an indefinite period of time for no reason. (The USA PATRIOT Act).

Right to Privacy

Finally, the Patriot Act gives the government very broad surveillance powers, including the tracking of e-mail, wire, and telecommunications, allowing sneak-and-peak searches, making it easier to obtain a warrant without probable cause, making it easier to obtain personal records. (The USA PATRIOT Act).

It could be argued that advances in technology have made it necessary to grant the government broader surveillance powers. E-mail and the web have changed communication greatly, making it easier for everyone to communicate, terrorist and non-terrorist alike. Terrorists, like anyone else are also able to use the web to communicate, recruit, and disseminate information. Encrypted messages can be embedded into web pages. This is difficult for law enforcement to fight. There are restrictions on encryption, but that is not enough. The computer, while not a weapon in the same way a bomb is a weapon, is a tool that terrorists can use to further their ends (Embar-Seddon, 2002). E-mail addresses, while traceable, can be easily obtained, used, and then abandoned and the next address used in the same manner, making it difficult for law enforcement to track. Cellular phone cloning (using the ID of some unsuspecting person's cell phone) and tumbling (the ability to switch the ID of the cell phone after every call if necessary, making it impossible to trace) make it very difficult to track cell calls, the same way that traditional telephone communications can be tracked. It is certainly reasonable to assume that as technology advances, crime-fighting techniques also have to advance. In the Patriot Act, these surveillance difficulties have been addressed by attaching the warrant to the person, not the device. In other words, it is now possible to get a warrant to listen-in on all the

communications of a single person, whether that individual is using several cell phones, several e-mail address, etc. All of the cell phones, e-mail addresses, hard drives of a suspected terrorist can be "watched" with one warrant, rather than having to get a warrant for each device. This does not seem to be an unreasonable way to adjust to the advances of technology. However, the ability of the government to enter residences without notifying the owner and to conduct surveillance without notification in not reasonable (Dempsey, 2002).

History of Civil Liberties During Times of War and Perceived Emergency

It is easy to be critical of the Bush administration and call into question its record on civil liberties. Looked at from an historical perspective, however, the actions of the current administration do not seem terribly off the mark. There can be no doubt that on September 11, 2001, and the days that followed the United States faced a crisis of seemingly extreme proportions. The magnitude of that crisis as of right now, however, is very debatable. Does that crisis extend through today and into the future, or is the magnitude of the crisis being exaggerated in order to allow the continuance of crisis mode operation? As the historical record is reviewed, the parallels to the current "War on Terrorism" are apparent.

During time of war, there is considerable historical precedent for a lessening of civil liberties. In some cases, this was justified. There have also been times when a perceived threat led to the lessening of civil liberties. In these cases, the lessening of civil liberties was not justified and did not serve to protect the people but rather served to keep the powerful in power. (Murphy, 1972; Walker, 1999)

During the Revolutionary period, at the birth of the United States, Washington, Jefferson, the Adamses, and many others believed that there was no room for dissent. Being a patriot meant backing the Revolution completely, there could be no serious differences of political opinion. (Levy, 1963) Although these men certainly believed that individuals in the new government and citizens did not need to agree on every aspect of legislation, everyone needed to support the Revolution, or, at least, do nothing to thwart that Revolution, including speaking out against it. Murphy (1972) notes that it was during this time that "Americans struggled to define their rights in a unique and direct way. The Sons of Liberty, in dealing with those who too freely expressed hostility to the American cause, did not hesitate to use spontaneous strong-armed methods." (p. 12)

It would be a mistake to think that early citizens expected the absolute Freedom of Speech as suggested in the Bill of Rights. There were a variety of laws at the state level that explicitly regulated freedom of expression and these were accepted, generally without question. There were also the proscriptions directed at seditious libel which was used to limit criticism of the government, again, accepted, generally without question. (Murphy, 1972). Murphy states (1972):

> Americans drew the line when the value of freedom of expression seemed outweighed by the danger to more essential values. The fundamental sanctity of the family, the essentially Christian establishment, and of the Union were shielded from expression which might undermine them. (p. 15)

The abuse of censorship in order to maintain the status quo was seen in slave states, where there were numerous laws banning speech, press and discussion around the issue of abolition. Yet, it seems that those who were wealthy and in power believed that they were protecting themselves and their livelihoods and that their censorship was in response to a dangerous emergency. President Jackson also demanded censorship of abolition literature at the federal level, although his legislation did not pass. (Murphy, 1972)

Thomas Jefferson, arguably one of the greatest Presidents, has been remembered for being a paragon of democracy, yet the early years of the United States were a time when the Union was perhaps the more threatened than at any other time during history. Jefferson knew of the dangers that the country faced during these early years, from both internal and external forces and, when necessary, he exaggerated them for his own purposes. Although Jefferson is remembered for the libertarian ideals that he spoke and wrote of frequently, his record regarding civil liberties is quite checkered. (Levy, 1963). Levy (1963) states:

> Jefferson at one time or another supported loyalty oaths; countenanced internment camps for political suspects; drafted a bill of attainder; urged prosecutions for seditious libel; trampled on the Fourth Amendment; condoned military despotism; used the Army to enforce laws in time of peace; censored reading; chose professors for their political opinions; and endorsed the doctrine that the means, however odious, were justified by the ends." (p. 18)

The next great threat to the stability and continued existence of the Union was during the Civil War. Abraham Lincoln, remembered historically for advancing civil rights by the freeing of the slaves, also suspended civil liberties at times when he deemed necessary. At the outset of the Civil War, while Congress was not in session, Abraham Lincoln suspended the writ of habeas corpus on at least a half-dozen occasions, although he never ordered a general suspension, but suspended the writ at specific times and places (Halbert, 1962). Lincoln's administration also made in excess of 13,000 arbitrary arrests (Neely, 2000).

Around 1900 there was another wave of repression of civil liberties when those in power perceived a threat. This time anarchist groups were targeted. This was especially the case after the French President and

then President McKinley were both assassinated. In 1903, Congress enacted an immigration act targeted specifically at certain aliens, those who were alien anarchists, from entry into the United States. This legislation and the Immigration Commission Report of 1911 tied fear of radicalism and immigrants together, saying, in other words, that immigrants, at least certain types of immigrants, are dangerous. (Murphy, 1972)

World War I was second only to the Vietnam War in terms of unpopularity. The abuses regarding Freedom of Speech were so dramatic, that the American Civil Liberties Union was created. One positive outcome of this repression was that for the first time in history Americans had to really take a look at the meaning behind the Bill of Rights. President Wilson firmly believed that during a time of war the suspension of civil liberties was appropriate and, at the outset of the war, the majority of the population agreed with him. (Walker, 1999) Wilson and his Congress used governmental suppression as a means of social control as security became a much greater concern than freedom (Murphy, 1972).

Pacifists, such as Jane Addams, found themselves ostracized and branded as anti-American for speaking out against the war (Deegan, 1988). Their rejection of war as the answer was viewed as unpatriotic. President Theodore Roosevelt fanned the flames of distrust of foreigners. He recommended that pacifists and disloyal Americans should be disenfranchised and interned. (Walker, 1999) "Anti-German hysteria went to absurd lengths. . . Sauerkraut became "liberty cabbage". Hamburgers were renamed "liberty burgers." (Walker, 1999, p. 15)

The Espionage Act of 1917 made it a crime to try to dissuade men from entering the services. The Sedition act of 1918 outlawed speech against the government and was reminiscent of the Alien and Sedition Act of 1798. (Walker, 1999) This legislation was also used to prevent those who disagreed with the war from speaking out.

These types of laws limited much more than merely speaking out against the war and in fact were used to quench dissent for decades. Schultz & Schultz (1989) point out:

> Between 1917 and 1921, two-thirds of the states enacted sedition laws that made criminal those utterances, writings, and associations that were presumed to advance violence as a way of effecting political or social change. In fact, these statutes were vaguely written, loosely construed, and used to chill expression of radical ideas and inhibit the organization of unions and, much later, the civil rights movement." (p.65).

World War II was a very popular war and there was little dissent. President Roosevelt and his cabinet pledged to uphold the constitutional freedoms of everyone in the United States and they publicly urged everyone to do the same. In October of 1939, the American Civil Liberties Union held a conference to discuss the upcoming war and the possibility that civil rights violations might occur. The Attorney General, Frank Murphy, served as keynote speaker and he stressed the fact that an emergency did not void the Bill of Rights. Even with all these assurances, Roosevelt's administration is guilty of perhaps the greatest violation of civil liberties in the history of the United States when he made the decision to relocate 120,000 Japanese-Americans. At the most basic level, the ACLU questioned the limits of governmental power during a time of war. (Walker, 1999)

Although the Cold War and the McCarthy era began in March of 1947, when President Harry Truman pledged to fight Communism wherever it was found on the globe, efforts to track and weed-out Communists from every aspect of American society began during the 1930's. The driving force behind the Cold War was a belief that Communism represented a profound threat to the American way of life and that the United States should prevent its spread. The Soviet Union, of course, saw its goal, as the opposite, to spread Communism across the globe. (Walker, 1999)

Vietnam was the most unpopular conflict in United States history. Although there were ample civil liberty abuses and misuse of government power, there was also significant resistance. This resistance came from protesters, the ACLU, and the public in general. (Walker, 1999)

Conclusion

The Patriot Act is asking us to give up many freedoms for a little bit of security, and even that it cannot guarantee us. As has been examined, during wartime, or time of severe crisis or threat, certain actions are justified and accepted that during normal times would not be accepted. There have been times of legitimate and serious threat in the history of the United States, but these times have been few and far between. It has been far more frequent that individuals in political power have exaggerated smaller threats in order to be able to curb legitimate dissent.

The common responses to threat have been: curtailment of civil liberties, suspicion of foreigners, combat, curtailment of trade, restrictions on travel (both U.S. citizens traveling to certain countries and foreigners traveling to the U.S.). These actions have had varying degrees of success in curtailing threats, from none to significant, depending upon the circumstances. These responses have also been invoked against perceived threat. Many presidents, throughout the history of the United States, have exaggerated threat in order to achieve political ends. This can pose a grave danger, especially in a free society, that we will over-react to a threat and resort to giving up freedoms in exchange for a false sense of security. People do not want

to feel threatened, and fear must not drive policy decisions. More importantly, politicians should refrain from increasing levels of fear for political ends. It has been very easy for both the media and politicians to prey upon the public's general fear of terrorism. For the media it brings increased ratings. For politicians, it brings compliance. There is great difficulty in determining what a legitimate threat is and, above that, how best to respond. The curtailment of civil liberties, throughout the history of our country has never helped to keep either individuals or the nation safer.

> The country needs to be safer but not at the expense of America's civil liberties. Any action that the United States government wants to take to ensure the safety of the country needs to encompass a judicial review in concert with a select panel consisting of a cross-section of citizens. We must not allow the price of our safety to be driven by fearful over-reactions which negate that which stands as the lynchpin of our constitution but rather our actions to fight terrorism must be carefully thought out and executed with the deliberate purpose of upholding justice for all. (A. Pass, personal communication, March 10, 2002).

In other words, we do not need the USA PATRIOT Act.

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SUSPENSION OF HABEAS CORPUS

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Article I Section 9 of the Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." President Bush's Executive Order of November 13, 2001 suggests that individuals may be detained indefinitely without formal charges being proffered. This paper describes the history of the Writ of Habeas Corpus through analysis of relevant Court decisions and other historical documents and considers previous episodes in American History when the Writ was suspended. Application of these relevant Constitutional and historical precedents to the current situation suggests that the Executive Order of November 13,2001 and subsequent activity implementing this order is an unconstitutional exercise of Executive power.

The Writ of Habeas Corpus is a Writ employed to bring a person before a court. (Black's Law Dictionary). The most frequent reason that the writ is employed, and the most important form of the writ for this analysis, is the Writ of Habeas Corpus Ad Subjiciendum – a procedure which directs a person or institution that is detaining a person to bring that person before a court in order to ensure that the party's confinement is not illegal. (French at 32) The Writ originated under English law, and Blackstone considered it to be the bulwark of the British Constitution. (Blackstone)

The Framers of the U.S. Constitution regarded it as sacred enough to include a clause in Article I, Section 9 of the Constitution, which provides that, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." (U.S. Constitution) In Federalist Number 84, Alexander Hamilton suggested that the habeas corpus guarantee and the other restrictions on Congressional action (i.e. ex post facto laws) in Article I, are "perhaps greater securities to liberty than any it contains." He continued by observing that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." (Id) He concludes this section by quoting Blackstone as follows:

To bereave a man of life [says he,] or by violence, to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. (Id)

U.S. Historical Experience with Suspension Of The Writ Of Habeas Corpus

Thomas Jefferson

Early in American history, it was assumed that the power to suspend habeas corpus was vested solely in Congress. (Ivey) There were several reasons for this belief. (Id) Under English law, Parliament enjoyed the exclusive right to suspend habeas corpus (Id). Also, early drafts of the Habeas Corpus clause at the Constitutional convention suggested that Congress was to be the exclusive holder of the suspension power. (Id) Finally, the power to suspend habeas corpus is contained in Article I of the Constitution, which deals only with Congressional powers and never mentions the Executive branch (Id).

President Thomas Jefferson wanted to suspend Habeas Corpus in dealing with the Aaron Burr conspiracy. (Id) He did not take unilateral action in suspending the writ, choosing instead to present a bill to Congress seeking to suspend Habeas Corpus for a period of three months. The Senate passed the President's proposal, but the House of Representatives rejected it, and President Jefferson took no further action to implement the Habeas Corpus suspension. (Id)

Abraham Lincoln

President Lincoln took unilateral executive action to suspend the writ of Habeas Corpus as he issued a directive to General Winfield Scott on April 27, 1861. (French at 4) In a special address to Congress on July 4, 1861, President Lincoln acknowledged that as executive he did not generally have the authority to suspend habeas corpus (Id at 5). During this address, he requested that Congress ratify his actions (Id). On August 6, 1861, Congress retroactively approved "all the acts, proclamations, and orders of the President, respecting the Army and Navy of the United States." (Id at 5) On March 3, 1863, Congress passed the Habeas Corpus Act, which provided that President Lincoln had the power to suspend habeas corpus whenever he determined that public safety required suspension, (Id at 6). However, this Act contemplated only a limited, temporary suspension of the writ, and it was not designed to apply to limitless detention of U.S. citizens for alleged

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offenses not involving war crimes.

Franklin Delano Roosevelt

Japan attacked Pearl Harbor on December 7, 1941. In 1942, eight German saboteurs landed on American soil, changed into civilian clothes, and set out in secret to destroy American military factories (French at 7). Soon after, President Roosevelt issued Executive Order 2561, which established military tribunals for certain specified classes of offenders and offenses, and which also contained language prohibiting anyone tried under the order "access to the courts". President Roosevelt's military tribunals were held to be constitutional because they were authorized in the Articles of War passed by Congress. However, the section of the Order limiting access to the courts was viewed as an attempt to suspend the Writ of Habeas Corpus. (Ivey, p.11) This section of the Order was later held to be unconstitutional in the Ex Parte Quirin decision discussed infra.

Relevant Court Decisions

Ex Parte Merryman

The first judicial opinion to address the issue of whether a President could unilaterally suspend habeas corpus was Ex Parte Merryman. A resident of Baltimore, John Merryman, had been taken from his home at 2:00 a.m. and confined at Fort McHenry without a warrant. He filed a writ of Habeas Corpus, and the Court addressed the legality of President Lincoln's suspension of Habeas Corpus without Congressional approval. Justice Taney prefaced his analysis by expressing shock at being called on to decide the question:
"For I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion and that it was admitted on all hands, that the privileges of the writ could not be suspended, except by an act of Congress."

Justice Taney's opinion discussed the constitutional language and philosophy and considered relevant historical precedent. President Jefferson did not claim unilateral power to suspend habeas corpus in handling the Burr controversy. (Ivey) Relevant language on habeas corpus suspension is contained in Article I which deals with Congressional powers. (Id) Finally, the Framers had expressed a desire for limited executive power. According to Justice Taney's rationale, if the Framers had intended for President's to have the power to suspend habeas corpus, they would have clearly stated so in the Constitution (Id). Because the President had no authority to suspend habeas corpus, Justice Taney ordered the Writ to issue. (Id)

Ex Parte Milligan

On October 5, 1864, a U.S. citizen named Lamdin Milligan was arrested by military officers. He was charged with membership in the Sons of Liberty and various other suspicious activities during the Civil War. He was placed on trial before a military tribunal, which found him guilty and sentenced him to death (Ivey). He filed a petition for a Writ of Habeas Corpus and the Supreme Court considered the issues. Unlike Merryman, the Milligan decision focused on the validity of an executive suspension of habeas corpus with specific authorization from Congress, and also, upon the difference between "the privilege of the writ" and the writ itself. The Court ruled that the President, acting upon specific authorization from Congress, could suspend "the privilege of the writ". However, the Court distinguished, "the privilege of the writ" from the writ paper itself. (Id) The writ itself is a suit, and the denial by a District Court is reviewable by the Supreme Court. (Id) The Court ultimately determined that the military tribunal had no jurisdiction over Milligan, and the Court released him from military custody. (Id)

Ex Parte Quirin

In 1942, eight German citizens were taken into custody in New York and Chicago. All eight had entered the United States aboard submarines at different loading points. (Ivey) They were dressed in civilian clothes when captured (Id). They were charged with numerous violations of the Articles of War, and were tried and convicted by the Military Tribunals that President Roosevelt created. The eight convicted German saboteurs filed writs of Habeas Corpus and the case reached the Supreme Court. Most of the Quirin decision concerned Presidential authority for creating military tribunals to try war crimes. Generally, the decision can be seen as broadening the President's authority to create military tribunals if Congress has formally declared war. However, the Court also addressed the validity of President Roosevelt's attempt to unilaterally suspend the Writ of Habeas Corpus. The Court adhered to the aforementioned precedent and refused to allow the President to unilaterally suspend the Writ of Habeas Corpus. The Court stated that neither the text of the Executive Order or the enemy alien status of the defendants could prevent them from filing Habeas Corpus petitions to challenge certain jurisdictional issues, including the Constitutionality of the Tribunal and the issue of whether the President's Order applied to them.

Current Executive Branch Actions In The War On Terror

On September 11, 2001, the United States was attacked by organized terrorists who commandeered commercial aircraft and flew the aircraft into both World Trade Center towers and the Pentagon. On September 18, 2001, the 107th United States Congress passed Senate Joint Resolution 23, entitled, "Authorization for Use of Military Force". On November 13, 2001, President Bush issued an Executive Order entitled, "Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism". The substance of the Order purports to establish Military Tribunals, and in Section 7(b),(2), states as follows:

> (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international Tribunal.

Although the Order allows the establishment of Military Tribunals, as of this date, none have been formally organized. Many captured terrorists are being detained at Guantanamo Bay, Cuba. The Guantanamo Bay detainees were captured overseas and most are being detained as "unlawful combatants". (Mariner, p1) Additionally, five other individuals have been individually captured and the government's handling of their cases is relevant to the current analysis. Jose Padilla is a U.S. citizen who was captured on U.S. soil and suspected to have plotted to build and detonate a radiological "dirty bomb". Yaser Hamdi is a U.S. citizen who was captured abroad and is not yet charged with any crime. Both Hamdi and Padilla are being detained at military facilities without formal charges being filed. Zacarias Moussaoui is facing federal charges for his role as the alleged 20th hijacker. Richard Reid, the alleged shoe bomber, is also facing federal charges. Moussaoui and Reid are not U.S. Citizens. John Walker Lindh, a U.S. Citizen, was prosecuted in the Article III Courts and is serving time at a Federal facility.

Legality Of The Current Executive Branch Activities

Congress has not formally declared war in the aftermath of 9/11/01. The Authorization for Use of United States Armed Forces is very brief and authorizes the President to use "all necessary and appropriate force" against those involved in the World Trade Center attacks. Congress has not taken formal action to suspend the Privilege of the Writ of Habeas Corpus, and has not ratified any of President Bush's actions in doing so. It is submitted that the section of President Bush's Executive Order which denies individuals subject to the order the "privilege" of a court remedy or proceeding is an unconstitutional exercise of Executive authority. Even if the Military Tribunals were properly established or are later ratified by the Congress, there is limited Habeas Corpus review available from the decisions of the Tribunal under the Quirin decision.

As earlier discussed, there are two U.S. citizens being detained by the military on U.S. soil without benefit of formal charges. Both cases are now advancing through various stages of appeal. Yaser Hamdi is a U.S. citizen who was captured on foreign soil. He has filed a Writ of Habeas Corpus to challenge his continued detention. One of the main contentions in his briefs are that his continued detention without formal charges violates 18 USC Section 4001(a), the legislative repeal of the Emergency Detention Act.

The Emergency Detention Act was a part of the United States Code for 21 years. Although it was never invoked to detain U.S. citizens without charges, (Vlodeck) it was repealed in 1971 over concern among American citizens that it would become an instrument for detaining those with unpopular views. (Id) The pertinent language in Section 4001(a) provides that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress". (Id)

In Hamdi v. Rumsfeld, the 4th Circuit Court of Appeals considered Hamdi's constitutional and statutory claims against the expansive Government claim of permissible War Powers under Article II of the Constitution. Hamdi's main argument is that his continued detention violated 18 USC Section 4001(a). The Government argued that the Congressional authorization for use of force authorized his continued detention, and that 4001(a) applied only to civilian based detention. The 4th Circuit adapted both of these positions in its opinion. (Hamdi v. Rumsfeld 02-7338)

After determining that Hamdi's detention did not violate any existing statutory provisions, the Court considered whether his detention was constitutionally authorized. The 4th Circuit determined that his detention was authorized as part of the President's War Powers under Article II. Next, the Court considered whether Hamdi's detention was justified in his particular case. The Government submitted the affidavit of a military operative-Michael Mobbs in response to Hamdi's filing. Hamdi sought discovery in order to contest the factual allegations in his affidavit. The Court determined that the Mobbs affidavit was sufficient on its face to justify continued detention. He was not allowed the opportunity to engage in discovery on the issue or to present competing evidence.

The Padilla case provides some interesting contrast to Hamdi. Padilla was captured by US Domestic authorities. The decision in Hamdi was partially premised on the practical difficulties with forcing military authorities to contest decisions on capture halfway around the world. Additionally, the Padilla case will be venued in a more moderate circuit than the conservative 4th Circuit.

The factual and legal differences between the Hamdi and Padilla cases create a potential for Supreme Court review. Such review would likely encompass the meaning of Section 4001(a), the proper scope of Executive Power under Article II, and the extent of discovery available in a habeas corpus filing. In Youngstown Sheet and Tube Co. v. Sawyer, the Supreme Court considered the scope of the emergency powers of the President. Justice Jackson's concurring opinion suggested that Presidential Powers can be divided into three zones of authority. The first or highest zone of Presidential power exists when the President acts with an express or implied grant of authority from Congress. The intermediate zone of Presidential authority concerns issues where Congress has not given or denied power-the so-called "twilight zone of authority"(Ivey). The third or low ebb of Presidential authority concerns issues where the President acts contrary to the express or implied will of Congress (Ivey). Although the Government will likely argue that the current situation falls under Zones 1 or 2, it is submitted that it rests more appropriately in Zone 3, the low ebb of Presidential authority. Continued detention of Padilla and Hamdi violates 18 US Code Section 4001(a). There was no specific prior authorization for this procedure by the U.S. Congress. Detention of US Citizens is prohibited unless authorized by an act of Congress.

Conclusion

Based upon the relevant historical and Supreme Court precedent, it is submitted that current Executive branch policies in implementing the war on terror amount to an unconstitutional exercise of executive power. It is further submitted that Supreme Court review of these issues is necessary and likely.

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TIPS (Terrorism Information and Prevention System) PROGRAM ATTACKS CIVIL RIGHTS GUARANTEED UNDER THE CONSTITUTIONAL BILL OF RIGHTS

Harry Lesner*

Conflicts of war force government and people to change. The United States of America declared war on violent terrorist groups, after being attacked on September 11, 2001, when terrorists from the Al Qaeda group hijacked four commercial planes and flew them on suicide missions. Everyone aboard the four planes was killed, while the ground targets suffered significant damage. After declaring war on the terrorists, the executive branch of the government asked for additional powers to fight the terrorist threat confronting the country. Congress met this request by passing the Patriot Act Bill that gave the executive branch much more power and authority. Citizens, congressional members and civil rights groups challenged the new laws as unconstitutional that they violated the protections of the Bill of Rights. In January 2002, President George W. Bush's administration proposed the Terrorists Information and Prevention System (TIPS) program as a tool that would help in the fight against terrorism, however civil libertarians claim this program violates citizens' civil rights. The TIPS program presented the internal battle going on between the U.S. government (executive branch) and the U.S. citizens. At the same time, the U.S. government was executing an external war against the terrorists. The TIPS program presents challenges to constitutional law in a post 9/11 society.

USA Responds to 9/11

The United States responded to the 9/11 terrorist attacks by declaring war on the terrorists, and developing new laws and programs to protect the country. Our immediate response to the terrorist attack was to increase airport security (FAA). Since the terrorists used airplanes as flying bombs, airports and airplanes became the initial focus of concern for security in the United States (FAA). All airplanes both commercial and private were grounded by 12:00 p.m. on September 11, 2001. Military planes controlled the skies over the United States protecting it from further assault (Madigan). Airports were immediately shut down and would not reopen with flights until September 14, 2001 (Flights). New security restrictions at airports included: a total ban on knives, curbside and off-airport check-ins were eliminated, increased use of federal air marshals, more officers on duty at airports, increased physical checks on passengers, only ticketed passengers allowed past metal detectors, and airport security screeners were required to meet higher standards (FAA). National Guard troops carrying M16s added an additional measure of new security at airports. Border crossing security was tightened in the hope of keeping terrorists out of the country. Citizens were asked to watch and to report any possible terrorist activity. This was the fist hint of a TIPS program.

Office of Homeland Security

On October 8, 2001, President Bush established the Office of Homeland Security via Executive Order 13228. The President described the purposes of the office as to "lead, oversee, and coordinate a comprehensive national strategy to safeguard our country against terrorism and respond to any attacks that may come" (U.S Executive). In conjunction with the Office of Homeland Security, the President pressured Congress for new laws deemed necessary to fight the terrorist threat. President Bush acknowledged that the Office of Homeland Security was a short-term solution (Relyea). He presented the Department of Homeland Security as a long-term solution to give the government a coordinated and effective response to terrorist threats (Relyea). Creating a new department in the United States government is a major legislative task. President Bush therefore focused his efforts on passage of The Patriot Act Bill.

The Patriot Act Bill

On October 26, 2001, in an effort to show their support for the fight against terrorism the 107th Congress of the United States passed the Patriot Act Bill (H.R. 2975). The Patriot Act Bill title states, "To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes" (H.R 2975). This new law gave significant new powers to the

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executive branch of the government and called for the development of a Department of Homeland Security. President Bush pushed the Patriot Act Bill through Congress suggesting that anyone against the bill was not a patriot (Friedberg). A patriot by definition is someone who loves, supports, and defends his or her country. Congressional members were pressured to vote for the bill rather than be labeled unpatriotic (Friedberg). Details of the Patriot Act Bill are now causing serious concerns in reference to civil rights (Libraries). The belief is that this bill seriously jeopardizes our civil liberties (Rosenfeld).

> The New York Law Journal summarized the Patriot Act: The USA Patriot Act offers the executive a wide array of enhanced surveillance powers, including the ability to conduct covert searches, obtain sensitive personal records, track e-mail and Internet usage, and evade the Fourth Amendment's probable cause requirement, coupled with the ability to exercise these powers with minimal judicial and Congressional oversight (Chang).

The Patriot Act is impressive in that it made changes to over fifteen different statutes. American citizens have yet to fully realize the impact of the new laws that will affect schools and students, libraries, bookstores and media, financial records, telephone taps, internet use, and surveillance through the TIPS program (Demmer). The TIPS program was first identified in detail as part of the original Homeland Security Act Bill (Justice; U.S. Summary).

Department of Homeland Security

The Homeland Security Act Bill was submitted to the House of Representatives June 24, 2002 (U.S. H.R.5005). Enactment of this bill created the Department of Homeland Security. Tom Ridge was appointed by the White House to head the Office of Homeland Security and was projected to be in charge of the Department of Homeland Security, once it passed Congress (U.S. Message). Homeland Security chief Tom Ridge announced that on July 16, 2002, that the TIPS program was to start in 10 American cities in August 2002. The TIPS program, as sponsored by President Bush under the Citizen Corps, was designed to enable the public to participate directly in homeland security (U.S. Operation). At the outset of the program, the Department of Justice planned to engage the postal and utility industries to participate because their workers maintain regular public routes in the communities they serve, putting them in a unique position to recognize potentially dangerous activity along transportation routes and in public places (U.S. Operation). The TIPS program would allow private citizens, postal, and utility workers who have access to people's residence, to report suspicious activity.

The American Civil Liberties Union criticized this program as Americans spying on Americans (Stop). The ACLU was concerned about a government that would recruit a million letter carriers, utility workers and others whose jobs allow them access to private residences into a contingent of organized government informants (Stop). In essence this would allow the government to search people's residences without a warrant:

> The Washington Post editorialized against the program: Americans should not be subjecting themselves to law enforcement scrutiny merely by having cable lines installed, mail delivered, or meters read. Police cannot routinely enter people's houses without either permission or a warrant. They should not be using utility workers to conduct surveillance they could not lawfully conduct themselves (Stop).

The TIPS program has been described as citizens spying on citizens; this is typically found in a dictatorial society not a free society (ICNA). In a dictatorial society, spying is used to identify those who do not agree with the government (ICNA). In a free society freedom of speech and the press allow for disagreement and thereby generate change in the government. The TIPS program is the result of legislative action by the United States in response to the 9/11 attacks (U.S. Operation). The executive branch of our government was pressuring the legislative branch to relinquish one of our basic constitutional rights as a requirement for fighting the war against terrorism. Congressional members began to question the amount of executive power needed to protect the citizens from terrorist vs. the amount of civil rights relinquished to executive authority (Demmer). Concern that the TIPS program might be misused, prompted research to identify if and how government agents could violate citizens civil rights.

Violations of Civil Rights by Government Agents

On Friday, September 20, 2002, three Muslim men while driving on Florida Interstate 75 were stopped and detained by authorities for 17 hours, after police received a tip that the men might be plotting a terrorist attack on Miami (Ross). The highway was shut down while the men and their vehicle were searched (Ross). The three Muslim men had stopped to eat in a Shoney's restaurant in Calhoun, Georgia. A woman

by the name of Eunice Stone was also in this restaurant and reportedly overheard the Muslim men discussing terrorist plans (Ross). Being a responsible citizen she notified authorities of her fears. Since nothing of a suspicious nature was found in the search, authorities released the Muslim men (Ross). The three men, Ayman Gheith (27), Kambiz Butt (25) and Omer Choudhary (23) American citizens and medical students were driving to Miami to continue their medical studies at a south Miami hospital (Friedberg). In an interview on the CNN show "Larry King Live" the men condemned 9/11 attacks and denied any conversation about terrorist activities (Ross).

Eunice Stone told the Atlanta Journal-Constitution "I am not a racist, and I am not ignorant I was just trying to do what's best" (Ross). Police took Stone's tip seriously and investigated the men and their car finding nothing. This gives credibility to their innocence. Kambiz Butt said he believes Eunice Stone was attempting to be "a patriot for America" (Ross). This is one example of how United States agents responded to a conversation overheard and interpreted in a restaurant. The TIPS program would have citizens reporting unusual activity by other citizens. This interpretative example demonstrates the problem in allowing citizens to spy and report on citizens. Multiply this example by millions of citizens and you have potential for major civil rights violations. In this case the government was not at fault for civil rights violations as in the previous two cases. Government agents have violated citizens rights in all three examples, the present concern is how these agents will use the TIPS program if given the opportunity.

TIPS (Terrorist Information and Prevention System) Program

In January 2002, operation TIPS program was announced for the stated purpose of creating a national information sharing system for specific industry groups to report suspicious, publicly observable activity that could be related to terrorism (U.S. Operation). It was to be an expansion of a current government program that allows truckers and ship captains to report dangerous conditions along their routes (U.S. Operation). The TIPS program was planned to have a centralized telephone hotline and web-based reporting system that automatically and immediately routes tips to appropriate federal, state and local law enforcement nationwide (U.S. Operation). Industries interested in participating would be given printed materials on how to contact the reporting center, and would in turn provide information and any training to their workers (U.S. Operation).

In July 2002, Attorney General John Ashcroft told the Senate Judiciary Committee that operation TIPS is being developed by the Justice Department and is set to get under way (Holland). He further expressed that the program would ask millions of Americans to report suspicious activity (Holland). The TIPS program would now allow private citizens, postal, and utility workers to report suspicious activity observed in private residence as well as public places. It was at this time that the American Civil Liberties Union criticized this program as Americans spying on Americans (Stop). The ACLU was concerned about a government that would recruit a million letter carriers, utility workers and others whose jobs allow them access to private residences into a contingent of organized government informants (Stop). On July 16, 2002, Homeland Security chief Tom Ridge in an interview with radio reporters said "The last thing we want is Americans spying on Americans" (Ridge). He also reported that the TIPS program was to begin in August 2002, in 10 cities. However, on August 9, 2002, Justice Department officials announced revised plans for the TIPS program (Eggen). The program would involve only truckers, dockworkers, bus drivers, and others who are in positions to monitor places and events that are obviously public (Eggen). Deborah Daniels, assistant attorney general for the Office of Justice Programs said, "People have very legitimate concerns about the privacy and sanctity of the home" (Eggen). The Justice Department changed the TIPS program because of several factors. First, civil rights groups headed by the ACLU made the public and Congress aware of the dangers in this program (Rights). In July 2002, the ACLU started a campaign against the TIPS program identifying it as Americans spying on Americans. This campaign brought the TIPS program to the attention of the public, and Congressional members. Secondly, the TIPS program as outlined also lost support in Congress (Eggen). The House of Representatives dropped the TIPS program from the Homeland Security Bill before passing the bill on to the Senate (U.S. Summary). The third factor was the program never had public support (Eggen). Towns and Cities across the country passed proclamations that they would not support the TIPS program if selected by the Justice Department.

Although the TIPS program has been dropped from the Homeland Security Bill it is still supported through the White House Citizen Corps. On October 10, 2002, the Transportation Security Administration announced it is setting up a hot line for private pilots to report suspicious or unusual behavior in an effort to prevent terrorists from using planes as weapons (Small). This program appears to be an extension of the TIPS program. Rachel King, a ACLU legislative counsel said, "While any program that pits neighbor against neighbor is a problem, at first glance this particular initiative does not appear to pose the same threat to basic freedom as Operation TIPS" (Small). Expectation is the primary difference between the two programs. People expect privacy in their own residence, however they do not expect the same privacy in public places

and are therefore tolerant of observation for unusual behavior.

Summary

There is concern that the Patriot Act Bill and Homeland Security Bill may seriously jeopardize American civil rights. The Patriot Act Bill contains provisions that change 15 different statutes. Many of these changes have not been identified as to the specific application, and therefore a final position could not be taken. However, the TIPS program is an obvious violation of American civil rights protected under the Fourth Amendment in the Bill of Rights. This program as originally applied would have resulted in the government allowing utility workers to spy on Americans in their homes.

Citizens spying on citizens and reporting them to government agencies is typical of dictatorial society (ISNA). Historically citizens spying on citizens were found in societies such as Nazi Germany as well as in Stalin-era Russia (Buber). The TIPS program as presented by the Department of Justice was reprehensible and not acceptable to a free society. In an interview with an Arab person, he expressed America as "bad government, good people" (Bichri). In the USA this invasion of privacy is not allowed without due warrant. The executive branch of the government was only focused on protecting the country and had lost sight on how they had become the enemy attacking our Constitutional civil rights. In October 2002, the Senate Judiciary Committee exposed FBI warrant violations (Source). FBI agents had illegally videotaped suspects, intercepted e-mails without court permission, and recorded wrong phone conversations during terrorist investigations (Source). U.S. Representative William D. Delahunt, (D-Mass.) expressed the seriousness of the violations when he stated, "The level of incompetence here is egregious" (Source). Here is proof that in our government we have to have a system of checks and balances to correct for civil rights violations.

Conclusion

When the executive branch of the government has over-stepped its authority in attacking Americans civil rights the legislative and judicial branches forced corrective action. The House of Representatives supported the author's opinion by removing the TIPS program from the Homeland Security Bill. Further support against this program came from the ACLU, other civil rights groups and congressional persons. All of this pressure for change forced the Justice Department to announce in August 2002, that the TIPS program was undergoing revision. The program would involve only truckers, dockworkers, bus drivers and others who are in positions to monitor places and events that are obviously public. The change in attitude by the Justice Department was best expressed by Deborah Daniels, assistant attorney general for the Office of Justice Programs, "People have very legitimate concerns about the privacy and sanctity of the home" (Eggen). Our system of government has changed the TIPS program to one more acceptable by our society. The original TIPS program would not have worked in our free society; therefore the revised program is more likely to be successful. Concern for civil rights is a constant battle as reflected by the ACLU and other civil rights groups. I would like to express a special thanks to the ACLU for all that it has done for American civil liberties.

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PRESERVING A CULTURE OF LIBERTY: AMERICAN HOMELAND DEFENSE AND THE EFFECTIVE PROSECUTION OF THE WAR AGAINST TERRORISM

C. Dale Walton

For any democratic polity that is suffering a high level of terrorist pressure, there is a powerful temptation to turn inward and focus chiefly on defense. Very costly terrorist attacks such as those launched by al Queda on 11 September 2001 create a high level of anxiety in the population; individuals feel unsafe, and *visible* government action to enhance public safety is demanded. In such a political environment, enhancing the powers of law enforcement is likely to appear both responsible and politically profitable and this, in turn, is likely to place pressure on civil liberties. However, there is little reason to believe that enhancing police powers and reorganizing homeland security will significantly alleviate the specific terrorist threat facing the United States if defensive measures are not paired with assertive foreign policy measures.[1]

There are many reasons for this, but they ultimately flow from the character of the terrorist threat itself. The Islamist threat to the United States—unlike, for example, the threat that Bolshevik terrorists presented to the Russian Empire—is essentially external and must be defeated primarily through the use of the military and international intelligence assets of the United States. It is, in short, *a foreign policy problem with a domestic security aspect, rather than the reverse*.[2] To envision the challenge presented by Islamist terror groups as primarily one of "defense" would be self-defeating. Rather, the goal of the United States must be to maintain the initiative with an assertive *offensive* policy. This, in turn, requires a bold strategy of dismantling terrorist networks while punishing, and in some cases overthrowing, the governments that sponsor terrorists.

In essence, although the chief American *objective* of the War on Terror is the protection of the homeland, the *theater of political-military decision is elsewhere*. Now that the Taliban no longer rules Afghanistan, there is no one single country that is the main geographical center of gravity for the war against al Queda. However, although it is true that al Queda terrorists have operated (and presumably continue to operate) in the United States and several European countries, the intellectual and human center of gravity of the organization clearly is in the Islamic countries of Eurasia. Al Queda cells in Europe and the United States are, for the reasons enunciated below, operating in a fundamentally hostile environment—they are dangerous, but are themselves perennially at risk. To undermine al Queda and other Islamist terrorist groups, it is necessary to attack both terror networks in the countries where they are most deeply entrenched and to corrode the links between terrorists and their state sponsors.

The Difficulties of Defense

Defeating terrorist threats to the United States by defending all major potential terrorist targets is so impractical as to be effectively impossible. The United States is probably the most target-rich society on earth, and most facilities that a terrorist would find at least moderately inviting have little or no protection. It is true that high-profile targets which are obviously symbolic of American political and military power such as the White House and the Pentagon are well-defended (although, as 11 September 2001 shockingly demonstrated, not altogether invulnerable), but there is a large potential "B-list" of facilities such as airports, stadiums, large hotels and casinos, subway and train stations, power plants, and petroleum refineries that are not as well guarded, and a seemingly endless "C-list" of shopping malls, post offices, and other businesses and government facilities that have little or no protection.

It would be completely unrealistic to expect that medium and minor targets can ever be placed beyond danger because terrorists can take advantage of what the great nineteenth century Prussian strategist Gen. Karl von Clausewitz described as the concentration of force at the decisive point.[3] (Although

[1] This article will only address the threat that Islamist terrorists, particularly those associated with the al Queda network, present to the United States. There of course are other potential terrorist threats to the United States, but for the foreseeable future Islamist groups clearly will present the most acute terrorist threat to the United States. The article was originally presented as a paper at the Counterterrorism and Civil Liberties Conference hosted by The Institute of Justice and International Studies at Central Missouri State University, 18-20 March 2003, but it has been updated to include discussion of more recent political events.

[2] It should be noted that this view is rejected by some American leaders and commentators. See, for instance, Gary Hart, "A Detour from the War on Terrorism," *Washington Post* online ed., 9 March 2003, accessed at <www.washingtonpost.com>.

[3] "The best strategy is always *to be very strong*; first in general, and then at the decisive point. Apart from the effort needed to create military strength, which does not always emanate from the general, there is no higher and simpler law of strategy than that of *keeping one's forces concentrated*. No force should ever be detached from the main body unless the need is definite and *urgent*. Carl von Clausewitz, edited and trans. by Michael Howard and Peter Paret, *On*

Clausewitz for the most part focused on conventional military operations in *On War*, many of his ideas have a broader applicability.) Compared to the US federal government, any terrorist group can only muster a very meager amount of military force. This point was amply demonstrated in Afghanistan, where Taliban-al Queda forces were able to muster thousands of gunmen in the defense of territory that they knew well and controlled politically but were nonetheless defeated by anti-Taliban Afghans who were assisted by very small numbers of Americans operating far from the geographical center of American power. By contrast, any al Queda cell operating today in the United States would be opposed by the enormous military and law enforcement power of the US federal government (as well as state and local authorities). However, if authorities do not know precisely where or when terrorists will strike, they will generally be unable to bring sufficient force to bear in the right place at the right time to defeat an attack. In this regard, the United States faces a classic problem—the terrorists are weak but can strike anywhere, while the government is strong but does not (indeed, cannot) muster the forces necessary to defend everywhere simultaneously.

Attacking the Problem at its Core

Washington does, however, enjoy some significant advantages over its foes. Notably, it likely does not face a threat that terrorists who are killed or captured in the United States can be readily replaced by new recruits. As recent successes against terrorist cells in New York and Oregon indicate, under current conditions it is difficult for terrorist organizations to maintain a self-replicating network in the United States. Infiltrating and supporting terrorists into the American homeland requires time and the expenditure of capital and, more importantly, recruitment of American-born terrorists is a hazardous enterprise. The low level of support for terrorist groups in the general population and the high level of law enforcement resources that are now dedicated to anti-terrorism combine to present considerable risks to terrorist recruiters.

In essence, anti-American terrorism is a geographically external threat—it should be expected that many terrorists, like the 11 September 2001 hijackers, will travel from elsewhere to the United States to carry out their attacks. Moreover, the greatest number of those American citizens and resident aliens who are potential recruits are unlikely to integrate themselves into terror groups without the assistance of foreign nationals. It of course is vital that terrorist recruitment within the United States be definitively disrupted and the North American side of Islamist terrorist networks be dismantled, both to prevent future attacks and to prevent the transfer of funds to terrorists.[4]

American borders, however, are quite porous and it *is* rather easy for terrorists and terrorist sympathizers to infiltrate themselves into American society. As a practical matter, it is impossible to tightly seal the borders of the United States; if a terrorist is not apprehended when entering the country, it is a fairly simple matter for he or she to disappear into American society. No border control program, however well designed, can change this fact—it is simply one of the hazards of living in an open society.

The disruption of terrorist activities within the United States is essentially a law enforcement and homeland security issue, and it is clear that the American government is enjoying some success in its efforts in this area. Moreover, European states are undertaking similar efforts in their own countries. However, if the terrorist threat to the United States is to decline precipitously, Washington must attack the networks at their center of gravity in Eurasia. The core of the terrorist organizations that threaten the United States is located in the Islamic countries—the North American operations are merely "branch offices," and so long as these groups are healthy in the center, they will continue to export terrorists to the United States. To maximize the safety of Americans, terrorists must be neutralized *before* they enter the United States.

Beyond this, and as noted above, the link between terrorists and their state sponsors must be broken. Islamist terrorist groups are not truly fully independent—they rely on governments (or, in some cases, elements within governments) for intelligence, training, weapons, and a friendly operating environment. This support is generally covert, but it is nonetheless real—and in the shadowy world of state-terrorist interaction peculiar relationships often form. Hence, it is entirely possible for a secularist government to cooperate with al Queda or other Islamists.[5] In order to seriously injure the terrorist networks that threaten Americans, it is necessary that states be persuaded that the risks which accompany such support are excessive.

Many observers confuse the question of whether it is desirable that the United States be liked by foreign persons and governments with the matter of whether it will be a target of terrorism. In fact, the link between the two issues is tenuous at best. Antipathy does not necessarily translate arithmetically into terrorism. Rather, an essential component to the decision to undertake terrorism is the belief in its utility for obtaining strategic goals. Many potential gunmen will be discouraged from embarking on a "terrorism career" if they believe that, regardless of their own efforts, their cause will almost certainly fail. Even more importantly, the great majority of states likely will be deterred from supporting terrorism against the United

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War (Princeton, NJ: Princeton University Press, 1984; trans. originally published in 1976), 204. Emphasis in original.

[4] On the alleged transfer of funds to terrorists through the Al Farooq Mosque in New York City see Andy Newman and Daryl Khan, "Brooklyn Mosque Becomes Terror Icon," *New York Times* online ed., 9 March 2003, accessed at <www.nytimes.com>.

[5] See, for example, Thom Shanker and David Johnston, "C.I.A. Warning of Terror Risk to American Troops in Iraq," *New York Times* online ed., 8 March 2003.

States if they believe that such support will result in severe punishment.

The two characteristics that determine the effectiveness of deterrence threats are their credibility (the perceived likelihood that the threat will actually be carried through) and the severity of the threatened punishment.[6] Pre-September 11, 2001, the United States had evinced little willingness to inflict serious punishment on the state sponsors of terrorism. Although Washington publicly identifies some of these state sponsors, in the past it has rarely inflicted substantial punishment on such countries, and never effected regime change as a punishment for terrorist sponsorship.

The United States government now twice reversed that precedent, successfully unseating of the Taliban government in Afghanistan and the Baath regime in Iraq. The two cases are somewhat different, as the links between al Queda and the Taliban were the key reason for the war in Afghanistan, while Iraq's terrorist connections presumably were not the sole (or even the primary) reason for the removal of the Hussein regime. In any case, however, future regime changes should aid efforts to deter state sponsorship of terror because they would demonstrate an American readiness to eliminate enemy governments. This would increase the credibility of Washington's deterrence threats, and regime change is obviously a very severe punishment—it is the metaphorical (and sometimes the literal) equivalent of the "death penalty" for a political leader. Operation Iraqi Freedom will encourage other states such as Syria and Iran to reconsider their own connections to terrorists and to anti-American activities generally because Washington has demonstrated a willingness to inflict grievous punishment on roguish enemy states.

The Temptations of Defense

Even if it were possible to win the War on Terrorism through the use of an essentially inward-oriented, defensive strategy, the United States would not be able to do so without undermining key civil liberties and, importantly, undermining the culture of liberty and replacing it with a "surveillance society." It is important to understand that does not mean that the United States would become a police state in the traditional sense. There is every reason to believe that citizens would continue to enjoy general civil liberties—newspapers would not be censored, individuals would still enjoy freedom of religion, and so forth. Nonetheless, a defensively-oriented strategy inevitably would be immensely corrosive to liberty, as there is only one logical path that it could take—the ever-more intense surveillance of Americans and the gathering of ever more data about their lives and activities. To be at all effective, a defensively-oriented strategy would require the United States to completely overthrow the concept of privacy as it is currently understood.

In the twentieth century, it was difficult even for totalitarian societies to pervasively observe their citizens, and oppressive regimes generally had to rely heavily on informers and other forms of indirect (and unreliable) monitoring. As technology has improved, however, it becomes progressively less necessary for governments to rely on such crude methods if they merely wish to *observe* the citizenry, because an array of technologies make it possible to passively watch the population without doing anything overt.[7] The possibility of ever-improving surveillance raises critical questions about the proper balance between respect for privacy and the need to prevent terrorist attacks against the United States.

There has been concern in recent months about potentially pervasive surveillance programs such as the Total Information Awareness (TIA) project supported by the Defense Department through the Defense Advanced Research Projects Agency (DARPA). It is prudent to treat the often breathless reporting on TIA with caution,[8] but regardless of how the TIA program itself develops, in the present threat environment those who support its supposed goal—the ongoing gathering of *comprehensive* information about every American—enjoy considerable political momentum and it is likely that programs that greatly enhance government knowledge of the daily activities of citizens are likely to be implemented.

If the American government actually were to enjoy total awareness of information,[9] every credit card

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[6] For a general discussion of deterrence theory see Keith B. Payne and C. Dale Walton, "Deterrence in the Post-Cold War World," in John Baylis, James Wirtz, Eliot Cohen, and Colin S. Gray, *Strategy in the Contemporary World: An Introduction to Strategic Studies* (New York: Oxford University Press, 2002), 161-82.

[7] Of course, truly in-depth investigation of an individual's activities generally involves traditional investigative techniques such the questioning of associates, but this is only necessary *after* the that person has been "tagged" as being suspicious.

[8] On the controversy surrounding the TIA program see, for example, Kathleen T. Rhem, "DoD Research Project Necessary Adjunct to War on Terror," American Forces Press Service, 20 June 2002, accessed at <http://www.defenselink.mil>; Jim Garamone, "Rumsfeld Says Don't Sweat DARPA Info Awareness Experiment," 18 November 2002, American Forces Information News Service; Audrey Hudson, "Funds in Doubt for Pentagon's Cyber-Spy Plan," *Washington Times* online ed., 6 February 2003, accessed at <www.washtimes.com>; Adam Clymer, "Pentagon Forms 2 Panels to Allay Fears on Spying," *New York Times* online ed., 8 February 2003; and William Safire, "Privacy Invasion Curtailed," *New York Times* online ed., 13 February 2003.

[9] Of course, there presumably would still be ways to at least partially escape the net of information-gathering, but they will be difficult and most average people *would not bother to do so*. For example, today individuals can purchase disposable mobile phones and communicate without owning a non-disposable mobile phone or a traditional "land line." The use of disposable mobile phones can enhance personal privacy by making government or non-government surveillance very difficult, but exclusive use of such phones is expansive and involves numerous inconveniences. Therefore, few American citizens (aside perhaps from professional criminals) rely strictly on disposable cell phones for their telecommunications needs, as the financial and convenience costs of doing so are prohibitive.

transaction, email message, telephone call, web site visited, book checked out of a library, and airplane flight could become a data point that would be examined in the investigation of suspicious individuals. In order to have this information at hand for the investigation of potential terrorists, however, it would be necessary that that the government gather such information on all Americans. This does *not* mean that government agencies would have to ability to examine information on individuals at will—most likely, law enforcement personnel would need to obtain a court order to examine information on a specific individual.[10] However, the mere existence of a database with "total" information on the activities of all Americans raises many unsettling questions.

No matter how strong a defensive structure is, it is always possible to reinforce and expand it. With literal fortifications, the danger is that one will waste scarce resources, receiving little return on investment. With the "virtual" fortifications of twenty-first century computerized information gathering, the problem is more insidious: more information is always desirable. If the use of facial recognition technology to identify potential terrorists at, for example, a major sporting event is "good," the use of such technology on random citizens walking down the street is "better," and the pervasive use of this technology in every public place is "best." The threat that the United States (and other Western countries) faces is that of creeping "half-Orwellianism." Orwell's *1984* brilliantly portrayed the character of totalitarian government, but the United States surely will never become such a society. It is, however, possible that it could become one in which passive surveillance is ubiquitous but is not paired with police state brutality—a much less disturbing prospect than Orwell's vision but one that nonetheless does raise serious questions concerning privacy.

If the United States does not, in relatively short order, dramatically reduce the level of threat from terrorism, ever-greater surveillance and the continuing expansion of federal police power is almost inevitable. Americans understand that the terrorist threat which they face is extraordinarily severe and that is some key respects it is growing progressively worse, rather than better—notably, access to weapons of mass destruction (WMD) is spreading. Given the threat of tens of thousands or, even more horrifyingly, millions of American deaths, even pervasive passive government surveillance and other extraordinary measures begins to appear palatable. When faced with a serious possibility of national disaster, citizens are, for justifiable reasons, likely to regard civil liberties and privacy concerns as secondary to homeland defense.

While it is entirely reasonable and appropriate that Americans are willing to judiciously expand the ability of the federal government to undertake surveillance of terrorist suspects, it would be imprudent to allow progressively greater US government surveillance to treat a symptom (terrorist activity in the United States) while allowing the disease (terrorist groups and their state sponsors) to thrive unchecked in Eurasia. Indeed, if the disease is treated appropriately, it likely will be possible to stop, and perhaps even reverse, any erosion of civil liberties and privacy protections because the imminent threat to the American citizenry will be much less severe.

An offensively-oriented perspective to fighting the terrorist threat to the United States is inherently quite different from the aforementioned defensive perspective and has much less serious ramifications for American civil liberties. In the defensive realm, US government authorities generally struggle among themselves, as those officials whose place a particularly high value on public safety seek to expand the powers of the government against those who place a priority on the protection of civil liberties. The only limits on those who seek to expand the powers of government are public opinion and the intransigence of political and judicial opposition.

International military operations, however, are limited by the realities of world politics. The United States faces all manner of constraints—international organizations, non-governmental organizations, essentially unfriendly powers, and outright enemies all seek to impact the American policy decisionmaking process. Indeed, as the vocal disagreements between the United States and "Old Europe" on military action against Iraqi recently demonstrated, even Washington's formal allies may seek to modify (if not undermine) its foreign policy. In short, there are systemic constraints on the foreign policy of any state, including superpowers, but this does not mean that the international side of the American anti-terror effort is less important than is homeland defense. While it is easier to undertake homeland defense measures because the only limits on American action are self-imposed (budgetary, constitutional/judicial, and so forth), ultimately victory against al Queda and similar terrorist groups can only be achieved through vigorous military efforts.

A Dubious Argument: Vigorous Action as a "Recruiting Tool"

[10] However, given the progress that may occur in the artificial intelligence field in coming decades, it may be possible for computers to perform many of the analytic tasks that heretofore have been reserved to humans, thus making TIA all the more powerful and raising interesting new civil liberties questions. For example, a machine intelligence might be allowed access to information that human law enforcement agents could only examine by court order. Yet if the computer analyst discovered disturbing patterns and informed its human operators, might those patterns then be used as a basis for a court order, thus allowing law enforcement agencies to "look at information without looking?" Some of the intriguing questions concerning the future development of artificial intelligence are explored in George B. Dyson, *Darwin Among the Machines: The Evolution of Global Intelligence* (Reading, MA: Perseus Books, 1997); Ray Kurzweil, *The Age of Spiritual Machines: When Computers Exceed Human Intelligence* (New York: Viking, 1999) and David D. Nolte, *Mind at Light Speed: A New Kind of Intelligence* (New York: The Free Press, 2001).

In the months before Operation Iraqi Freedom many commentators argued that American action against the Iraqi Baath Party would incite greater hatred of the United States in the Islamic world and might, therefore, be counterproductive in the War on Terrorism. This was not the first time this objection was raised in the Western media—the same complaint was made concerning American action against the Taliban in Afghanistan. Moreover, one can be confident that this criticism will resurface in the future because it is a generic one that can be used to argue against virtually any military operation launched against Islamist terrorists or their state sponsors.

There is, however, little solid evidence that concern about "Islamic backlash" are well-founded. Although some recruits from Western Europe did make their way to Afghanistan to fight with al Queda in the early days of Operation Enduring Freedom and, similarly, a substantial number of individuals from various countries entered Iraq with the intent to commit terrorist acts against US forces, it certainly does not appear that great numbers of young Muslims are joining terrorist groups *because* those organizations are being attacked by the United States.

Moreover, one can ask why, if direct military action against terrorists and their state sponsors inevitably increases the number of terrorists, American defense of Muslim populations and interests in the past has not translated into a lower level of terrorist activity. Yet there appear to be few, if any, cases of Islamist terrorists observing American involvement with Bosnia-Herzegovina and Kosovo or other initiatives and deciding that Washington is benevolent and that it would be unjust to attack the United States. Indeed, the very idea seems slightly absurd, because the antipathy that Islamists have toward the United States results from their religio-ideological worldview and therefore *is largely independent of the actions of the American government*. They do not dislike the United States merely because of what it does; rather they find its very character as a highly secularized Western superpower unsavory. In short, Islamists cannot be convinced to like—or even tolerate—the United States because to do so would be utterly inconsistent with their religio-ideological predisposition.

In this regard, the decline of certain radical, secular twentieth century "total" ideologies such as fascism in its National Socialism and Italian variants is perhaps notable. Although these secular ideological systems of course were very different in their actual beliefs from any form of Islamism, the fact that military defeat in the Second World War led directly to the delegitimization of their state ideologies in the eyes of almost all their erstwhile followers is intriguing. Allied victory in the Second World War did not breed tens of millions of new fascists who would go on to fight an endless guerrilla war against occupation troops or undertake terrorist attacks against targets in the United States and elsewhere.[11] Given this result, it is reasonable to ask if inflicting military defeats on Islamists might in fact similarly delegitimize that ideology rather than resulting in radicalization of formerly moderate Muslims and thus result in the "drying up" of the terrorist recruitment pool.

There is no guarantee that a series of military and counterterrorist victories will critically undermine Islamism—there are obvious differences between universalist, utopian Islamism and secular total ideologies. Because the former is not solely tied to a specific state or nationality, it is not easily isolated—it lacks the clear center of gravity represented by an enemy capital such as Berlin or Rome. Moreover, Islamism is able to associate itself with a religion with a long history, a stark contrast to revolutionary ideologies that announced the rejection of the past and the establishment of a new social and political order.[12]

Islamists seek to follow a religio-ideological path that they believe was unwisely abandoned by "apostate" Muslims, a course that in turn will lead to reassertion of Islamic civilization and a new golden age of Muslim power.[13] (Regardless of how factually accurate the Islamist representation of Islamic history actually is, Islamists certainly *believe* that their vision of Islamic theology and history is correct and that Muslims who do not subscribe to their vision are in error.) Thus, while Islamism is utopian, it is not a wholly new vision that requires its adherents to utterly abandon their old culture and beliefs.[14] This fact potentially makes Islamism powerfully attractive, as it allows adherents to cherish those aspects of their religion and national traditions which they hold dear while rejecting those aspects of the modernity that they find

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[11] Angelo Codevilla makes a compelling point when he argues: "Where did all the Nazis go? Where are all those Communists who so recently made up a movement with roots and branches in every corner of the world?…Human causes are embodied by human institutions. With they them flourish, with them they die." "War at Last?" *Claremont Review of Books* 3/1 (Winter 2002): 8-9.

[12] On this theme, see C. Dale Walton, "Catastrophic Errors: Totalitarian Ideology in the Twentieth Century," *Comparative Strategy* 21 (April-June 2002): 115-19.

[13] Notable recent works that describe Islamism in various forms include Roland Jacquard, trans. by George Holoch, *In the Name of Osama bin Laden: Global Terrorism and the bin Laden Brotherhood*, rev. ed. (Durham and London: Duke University Press, 2002); Daniel Pipes, *Militant Islam Reaches America* (New York: W.W. Norton, 2002); Ahmed Rashid, *Taliban: Militant Islam, Oil, and Fundamentalism in Central Asia* (New Haven, CT and London: Yale Nota Bene, 2001); and Idem., *Jihad: The Rise of Militant Islam in Central Asia* (New Haven, CT and London: Yale University Press, 2002).

[14] It would in fact be more accurate to speak of "Islamisms" in the same sense that Gregor refers to "Fascisms" to illustruate that several distinct ideological systems are placed into one very general category because they share certain commonalities. See *The Faces of Janus,* 166-84. The Islamism of, for example, the government of Iran is very dissimilar theologically from that of Osama bin Laden.

offensive. Moreover, Islamism—like other total ideologies—comes complete with a cast of cardboard villains who can be blamed for all the problems in the world: Americans, "Zionists," Muslim apostates, Western imperialists, and so forth.

The aforementioned characteristics of Islamism can make it easy to confuse that modern religious-ideological system with traditional Islam,[15] and this problem is enhanced by the skepticism and dislike many individuals in the Muslim world have toward the West in general and the United States and Israel in particular. Many Muslims who are not themselves Islamists—indeed, who may even disdain or fear Islamism—nonetheless are apt to see an American attack on any Islamic country as an attack on Islam *per se*. Certainly that was the case with the war against the Taliban, and the effort to oust Saddam Hussein—hence the aforementioned argument against attacking states that sponsor terrorism because such action will allegedly encourage terrorist recruitment.

Yet it is far from certain that attacks on terror-supporting states will increase the popularity of Islamism over the long term. Indeed, there are some compelling reasons to believe that a series of military defeats will in fact damage the credibility of Islamism.[16] After 11 September 2001, supporters of Osama bin Laden loudly proclaimed that their success in destroying the Twin Towers and damaging the Pentagon was evidence of divine assistance and of al Queda's momentum toward achieving its political goals, but such claims cut both ways. Islamists could not easily explain a long series of military defeats, as that would seem to indicate divine disregard to pleas for assistance against their "Crusader" enemies.[17]

More importantly, it should be remembered that Islamists are actively attempting to shape the international environment. Although the musings of Osama bin Laden may seem otherworldly, Islamists in fact have very specific political goals.[18] Their program certainly is utopian, but this makes it no less real—Islamists want to create a world that they find intellectually comfortable, and that requires, among other things, the downfall of the secular American superpower. If terrorism obviously becomes a counterproductive strategy, even very radicalized individuals may modify their strategy vis-à-vis the United States. Thus, a seeming paradox emerges: while active counterterrorism, including regime change as appropriate, may increase (at least temporarily) the level of anti-Americanism in the Islamic world, it likely would result in fewer terrorist incidents over the long term because it will force both terrorists and their state sponsors to reconsider previously functional strategies.[19] American action in Afghanistan, Iraq, Georgia, the Philippines, and elsewhere forms a mosaic that may have the overall effect of discouraging individual Islamists from believing that terrorism is an effective strategy against the United States.

Undermining both state support of terrorism and the belief by individuals in the efficacy of terrorism *may* diminish the credibility of Islamism as a ideology. It is difficult to say with certainty that this will be the case, as the factors that result in personal affiliation with a given set of ideas are immensely complex.[20] Moreover, much of the Islamic world is undergoing rapid change and it is impossible to predict how attitudes toward modernity, the West, the role of religion in society, and so forth will develop in the future.[21] It would be highly desirable if Islamism declined rapidly credibility and popularity. However, even if it proves to have considerable "staying power," the United States (and the West in general) can cope with the ideology so long as terrorism is kept to an absolute minimum and terrorist groups are unable to launch effective WMD attacks

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[15] Roger Scrunton nicely describes the distinction between Islam and Islamism: "It would be the greatest injustice to confuse Islam, as a pious way of life, with contemporary Islamism, which is an example of what [Edmund] Burke, writing of the French Revolutionaries, called an 'armed doctrine'—in other words a belligerent ideology bent on eradicating all opposition to its claims." *The West and the Rest: Globalization and the Terrrorist Threat* (Wilmington, DE: Intercollegiate Studies Institute, 2002), 109.

[16] Victor Davis Hanson compellingly argues that al Queda may have made a critical strategic error when it executed the 11 September 2001 attacks. See "Dates in Infamy: December 7 and September 11" in *An Autumn of War: What America Learned from September 11 and the War on Terrorism* (New York: Anchor, 2002), 168-72.

[17] Notably, when the space shuttle *Columbia* exploded during its reentry into the earth's atmosphere in February 2003, some Islamists interpreted this event as having a supernatural aspect. *Columbia* of course was an American craft and its crew included Israel's first astronaut, as well as an American astronaut who was born in India, facts which were incorporated into this "divine vengeance" interpretation. See Philip Johnston, "Hamza Banned from Preaching Hate at Mosque," *Daily Telegraph* online ed., 5 February 2003, accessed at <www.telegraph.co.uk>.

[18] See Yonah Alexander and Michael S. Swetman, *Usama bin Laden's* al-Qaida*: Profile of a Terrorist Network* (Ardsley, NY: Transnational, 2001), 2.

[19] Bernard Lewis has written a number of interesting analyses of Islamic anger at the United States and the West in the general, including "The Roots of Muslim Rage," originally published in *The Atlantic* (September 1990), accessed at <http://www.theatlantic.com/issues/90sep/rage.htm>; "Targeted by a History of Hatred," *Washington Post* online ed., 10 September 2002; and *What Went Wrong? The Clash Between Islam and Modernity in the Middle East* (New York: Perennial, 2003).

[20] Pan-Arabism, for example, is an idea that at one point had immense ideological power in the Middle East, but—after the failure of the Pan-Arabists to deliver prosperity and Arab unity—it has slowly withered. Conversely, over the decades the political status of the Palestinians has come to be seen by tens of millions of Arabs as a critical issue, even though for most non-Palestinian Arabs the creation of a legally sovereign state out of today's Palestinian Authority would have little direct impact on their lives.

[21] Certainly, if a successful and Western-oriented Iraqi democracy can be created out of the ashes of Hussein's Baathist regime, Iraq could be a powerful example to people in many countries that would both demonstrate that the United States is in fact a friend to Islamic peoples and that an Arab democracy is possible.

against the West . This requires that the link between Islamist terrorists and their state sponsors and enablers be severed whenever possible.

Conclusion

Although Islamist terrorist groups present a grave threat to the United States, there are sound reasons to believe that Washington can cope successfully with the strategic challenge that terrorists present if it continues to reject the false economy offered by an essentially defensive strategic posture. Although vigorous military action against terrorists and the regimes that support terrorism presents great risks, only an active, offense-oriented policy can alter the current unacceptable status quo. Thus, although it appears safer and more moderate, a defensively-oriented approach to Washington's terrorist problem is in fact far riskier over the long term because it cannot address the international conditions that place the American homeland at risk.

Effective action abroad in turn would reduce greatly the pressure on domestic civil liberties. At present, the risk of a truly devastating terrorist attack against the United States is very acute. This fact inevitably places pressure on civil liberties, and if Washington cannot reduce the international threat level over the long term, the investigative powers granted to domestic law enforcement agencies almost surely will be greatly enhanced. Thus, part of the price of an essentially defensive and homeland security-oriented posture is an almost certain erosion of civil liberties and privacy rights. If, however, the United States significantly lowers the international threat environment by greatly damaging international Islamist terrorist networks and decreasing rogue state assistance to terrorists, it may be able to advance fundamental American foreign policy interests and protect the US homeland while successfully guarding civil liberties at home.