

Civil Liberties Issues in the Aftermath of the September 11th Terrorist Attacks

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Abstract

The U.S. Congress passed the USA Patriot Act in the aftermath of the September 11th terrorist attacks of 2001. This act, like some of the similar legislations in the history enacted during an emergency period, became an important and effective instrument for government to deal with dissents. It also has the potential to severely curtail civil liberties cherished by the American people. While advocates of civil liberties raise doubt on the constitutionality of the USA Patriot Act and remind American citizens the unfortunate and unnecessary curtailment of these privileges in the past, the Bush administration seems to be determined in its effort to overlook the issues surrounding civil liberties in its campaign against terrorism. Judging from the cases that reach the Supreme Court in the aftermath of September 11, we reluctantly agree with Chief Justice William Rehnquist's claim that "[t]he laws [on civil liberties] will thus not be silent in time of war, but they will speak with somewhat different voice."

Key Words: USA Patriot Act, civil liberties, September 11th terrorist attacks

There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security. . . . After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along (Brennan, 1987).

I. Background

Justice William J. Brennan's remarks seem to have fallen on deaf ears because the abrogation of civil liberties is once again a controversial issue. Less than two months after the tragic September 11th terrorist attacks on World Trade Center and Pentagon, on October 26, 2001 (Grunwald, 2001; Schememann, 2001), the U.S. Congress passed and President Bush signed a new anti-terrorism bill deemed the so-called USA Patriot Act. The official title of this act was rather long, and reflected the mood at the time of its enactment—Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, known by the acronym USA PATRIOT.¹

The first thing one notices about this bill is that the document of 131 single-spaced pages was too long for some legislators to have a serious reading of it before it came to the floor for a vote (Palmer, 2001). In addition to the length of the bill, the deliberative process of the Congress also raised some eyebrows. Its final version was reached through closed-door negotiations without input from a conference committee, a committee report or a final hearing (Levy, 2001). Another factor that served to disrupt the reading of the bill was the anthrax scare that caused both legislative houses to be closed for a time and during which

¹ The text of this act is available at <http://www.epic.org/privacy/terrorism/hr3162.html>, October 24, 2001, retrieved on June 7, 2002.

congressional staffers were not able to access the related information. Of course, very few legislators would question the executive branch in the immediate aftermath of a tragedy the scale of September 11th and it was simply too “difficult to launch a frontal challenge to a popular president before the practical results of his policies are known” (Palmer & Bettelheim, 2001).

With this kind of haste and the atmosphere of patriotism, it is no wonder that few dared to cast a negative vote (Morahan, 2002). The USA Patriot Act passed the Senate with a vote of 98 to 1 with the lone objection coming from the Democratic Senator from Wisconsin, Russ Feingold. There was stronger opposition in the House, but it still passed with a vote of 357 to 66 (Levy, 2001). On October 26, just one day after the bill passed Congress, President Bush signed it into law thus making it Public Law 107-56, effective only one month and a half after the terrorist attacks of September 11.

The USA Patriot Act includes provisions relating to criminal laws, the transportation of hazardous materials, money laundering and counterfeiting, investigations and information sharing, federal grants, victim rights, immigration, and domestic security. This act specifically creates several new crimes like attacking mass transportation systems, expands prohibitions involving the possession of biological agents and toxins, and lifts the statute of limitations on prosecuting some terrorist crimes. It also requires background checks for licenses to transport hazardous materials, expands money-laundering laws and promotes information sharing and the coordination of intelligence. In order to prevent foreign terrorists from taking advantage of U.S. immigration policies, this act stipulates that the government can broaden the grounds for denying alien admission to the U.S. based on their involvement with terrorism (“Summary of Federal ‘USA Patriot Act,’” 2001).

Some Americans might consider this act an “appropriate” measure taken to deal with foreign nationals and terrorists. Indeed, looking at the name of the act and most of its provisions, it seems such an observation is not incorrect. However, taking a closer look

at this act, it appears to have violated the First, Fourth, Fifth, Sixth and Eighth Amendments of the constitution (Mitrano, 2002), particularly in that it grants the executive branch unprecedented, and largely unchecked, surveillance powers, and permits law enforcement agencies to circumvent the Fourth Amendment's requirement of "probable cause" when conducting wiretaps and searches. It also allows for the sharing of information between criminal and intelligence operations and thus opens the door to the possibility of CIA domestic spying operations.

Some possible violations of civil liberties may include the following: 1) the detention and deportation of people engaging in innocent associational activity, 2) the expansion of law enforcement "Sneak and Peek" warrants, 3) the circumvention of privacy protections afforded in criminal cases, 4) the setting of limitations on judicial oversight of telephone and Internet surveillance, and 5) the indefinite detention of immigrants who are not terrorists. In short, the civil liberties provided in the Bill of Rights might be seriously threatened and compromised by this act.²

In addition to the passage of the PATRIOT Act, on November 13, 2001, President Bush, in his capacity as Commander-in-Chief, authorized the establishment of a military tribunal to try those who provide assistance to terrorists.³ This would relax evidentiary rules and diminish defendant rights. Of grave concern for many observers, has been the detention of hundreds of "enemy combatants" in Guantánomo Bay in Cuba during the period following the September 11th terrorist attacks. These prisoners have not been charged nor prosecuted and they are being held simply so that the FBI can extract useful anti-terrorist information from them. While almost all of these

² It has been called the Constitution Shredding Act by J. Van Bergen (2002).

³ The president's authority to use military tribunals instead of the federal court system to try those who assisted in the terrorist attacks is itself controversial. It will be a worthwhile topic for a paper of its own but will not be covered and discussed here.

held prisoners are not U.S. citizens, they still should be entitled the due process of law, and should be considered prisoners of war and enjoy the rights accorded them in the Geneva Convention relative to the treatment as such. However, since the War on Terrorism is not fought against any one nation-state, they have not been granted that status.

It seems that a tension of “tragic dimensions” exists between democratic values and responses to terrorism. When faced with serious terrorist threats, the United States as a democratic country must “maintain and protect life, the liberties necessary to a vibrant democracy, and the unity of the society, the loss of which can turn a healthy and diverse nation into a serious divided and violent one” (Heymann, 1998: xvii). However, the crisis also highlights the question of whether violation of fundamental democratic values is justified in the name of survival of the democracy itself. The government’s ability to act decisively against the terrorist threat with swiftness and secrecy tends to lead to the contraction of individual freedoms and liberties. Thus, a debate on the tradeoff between liberties and security has taken shape in the U.S. In addition to journalistic accounts and opinion pages (Krim, 2001; Lewis, 2001; Rosen, 2001), numerous academic articles have appeared on this subject (Broomies, 2002; Dinh, 2002; Downs & Kinnunen, 2003; Galloway, 2002; Heymann, 2002; Lewis, 2003; Lobel, 2002). Many law journals have organized symposiums⁴ and important books (Chang & Zinn, 2002; Freeman, 2003; International Bar Association, 2003) have been published on this controversial issue.

Outside the civil liberties community in the United States,

⁴ To name just a few, “Symposium: The Long Shadow of *Korematsu*,” *Boston College Law Review*, 40, 1 (December 1998); “Law and War and the War on Terrorism,” *Harvard Journal of Law & Public Policy*, 25, 2 (Spring 2002); “Symposium,” *Indiana Law Review*, 36, 2 (2003); “Symposium Issue on Post-September 11 Legal Topics,” *University of Pittsburgh Law Review*, 63, 4 (Summer 2002); “Symposium Issue: Civil Liberties in a Time of Terror,” *Wisconsin Law Review*, 2003, 2 (2003).

ordinary American citizens seem to accept this law as “patriotic” and do not question its constitutionality. Many students of American politics may feel strange that a country with such a long history of personal freedom and civil liberty can enact such a law without strong opposition from its people. However, if one examined the history of the American people at war, it is clear that Americans are willing to accept abrogation of their personal freedoms and civil rights during wartime. Still, if we considered this as an emergency situation, how much of the emergency powers should be normalized? In other words, this anti-terrorist act is a direct response to the September 11th terrorist attacks and we should presumably expect this emergency period to come to an end some time in the future. Any deviation from the pre-911 legal norms on civil liberties should be temporary in nature. If not, how much of the USA Patriot Act should be considered normal and acceptable? How much, even in times of emergency, has actually violated individual civil rights and civil liberties? Are there concrete cases of violation and how should we deal with these violations? These are just some of the implications on civil liberties issues raised in the aftermath of 911 that we will try to discuss. I will first introduce the definition and scope of civil liberties, followed by a discussion of the measures taken in the U.S. history during times of war or conflict. Finally, I will look at how civil liberties have been affected so far by examining few prominent cases.

II. Definition of Civil Liberties

Protection of civil rights and civil liberties has been an outstanding American value since the 1960s even though some form of it can be traced back to the founding of the Republic. Protection of civil rights implies the protection of citizens against discrimination by other citizens or groups in society and the protection of civil liberties refers to the protection of individuals from government action. In the aftermath of the September 11th

terrorist attacks, with the passing of the USA Patriot Act, the protection of both civil rights and civil liberties has been somewhat compromised. There have been reports that Americans of Middle Eastern and South Asian descent have been targets of reprisals (Pierre, 2002). Some of them have suffered discrimination at work, and these should certainly be considered civil rights cases (Fears, 2002).

This same group of people have also experienced discrimination by the government. They have been subject to unwarranted searches and invasions of privacy. Their rights to the freedom of religion and freedom of assembly have been jeopardized. However, it is not only this group of Americans that have been inconvenienced in their lives after September 11. Government actions on intelligence gathering, and racial profiling (Krebs, 2002; McGuire, 2002; McLaughlin, 2002) have intruded into every U.S. citizen's private life. Thus, these cases should be considered violations of civil liberties.

We can find similar actions taking place in the U.S. throughout its history. However, the latest compromise comes at a time when America has shown a greater commitment to such protection than at any preceding time. As legislation against discrimination by other groups in the society has been codified in the U.S. Constitution and no change has been made or could possibly be made now, I will not look into cases of individuals being discriminated by other members of the society. Instead, this paper is only concerned with government actions against individuals, i.e., the violations or compromising of civil liberties during a time of emergency.

III. Scope and Issues of Civil Liberties

Civil liberties issues include the freedom of speech, the freedom of religion, the freedom of assembly, the freedom of the press, protection against unreasonable search and seizures, double

jeopardy, excessive bail, cruel and unusual punishment, self-incrimination, and the right to due process, the right to speedy trial, the right to counsel, the right to trial by jury, and the right to privacy. All these can be found in the first ten constitutional amendments known as the Bill of Rights.

A. Freedom of Speech

U.S. courts define freedom of speech not by what constitute this category but by what not constitute protected speech. These include libelous speech, obscene speech, seditious incitement, or fighting words (Peltason, 1994: 199) with only obscene speech not relevant to current civil liberties concerns. The essential element of libel deals with “actual malice” in the defaming of public officials or public figures. Seditious speech refers to speech that advocates “the use of force as a political tactic or as a means to overthrow the government” (Peltason, 1994: 207). Fighting words refer to offensive or insulting languages used toward persons in public places. So far we haven’t seen individuals detained simply because of their speech. However with patriotic fervor still running high in the country, this remains a concern.

B. Freedom of Religion

Freedom of religion includes two aspects: the non-establishment clause and the free exercise clause. The former forbids governmental support for religion and does not apply in our situation today. The latter refers to the protection of one’s right to practice and is more relevant because the September 11th terrorist attacks put the Islamic religion in the center of public debate. Since most of the terrorists claimed to commit their atrocities in the name of Allah, many people have tended to equate Islam with terrorism. Such a simplistic view, while being condemned by most political and religious leaders, can easily find receptive ears. To those believers, this distortion might hamper the

free exercise of their faith. Muslims might encounter discrimination and suffer humiliation in practicing their faith. Others might suffer inconvenience or intrusion into their privacy simply by being Muslim or coming from an Islamic country. The announcement by the Justice Department to have male students, workers or visitors from five Islamic countries (Sudan, Libya, Iraq, Iran and Syria) fingerprinted and photographed is an example of the latter (Sheridan, 2002).

C. Freedom of Assembly

The First Amendment clause on freedom of assembly stipulates that the government shall make no law abridging “the right of the people peaceably to assemble.” There is no worry that such a right would be taken away from the American people even at a time when the U.S. is fighting the War on Terrorism. However, minority groups with Arabic or Muslim ties might find the post-911 atmosphere quite hostile to their peaceable assembly. Racial profiling (discussed later) may also discourage association with their own groups.

D. Freedom of the Press

Freedom of the press has been assumed in America since the beginning of the 21st century. So far, in the war against terrorism, this fundamental right has been compromised. Major networks such as ABC, CBS, NBC, Fox and CNN have all been asked by the Defense Department to not broadcast unedited statements by bin Laden and his followers (Holt, 2002). However, as a mature democracy with a long history of freedom of the press, it is believed that the United States would overcome the fever of nationalism and allow the press to maintain its tradition of neutrality and objectivity.

E. Fourth Amendment

The Fourth Amendment of the U.S. Constitution stipulates that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Even though the “people” here generally refers to U.S. citizens, the Court has assumed that the Amendment also protect aliens in the U.S. (Peltason, 1994: 250). The most debatable issue on this Amendment resides in what constitutes “unreasonable” nature and “probable cause” of search and seizure (Galloway, 2002). In addition to possible controversies stated above, high-tech searches through electronic devices, including access to the Internet, also raises questions about a person’s feeling of “security.” Many of the provisions in the USA Patriot Act, if executed, are likely to lead to a challenge in the constitutionality of the act.

F. Fifth Amendment

The relevant provisions here include the indictment of a crime by a Grand Jury, and the prohibition of double jeopardy and self-incrimination. So far, prosecutors have circumvented this clause by putting detainees before military courts. Persons subject to trial before military courts are not entitled to a Grand Jury. The issue here is that these persons receiving military tribunals should be military personnel, not civilians. The detention of American citizens in the aftermath of September 11 has mainly been of civilians. Thus, the circumvention would be deplored as due process has not been followed.

G. Sixth Amendment

Under this amendment, the accused is entitled to a speedy

and public jury trial with assistance by counsel. However, the constitutional right to a speedy trial actually starts from the time a person is formally charged, not from the time of arrest.⁵ Thus, the government can detain a suspect without formally charging the person and thereby justify the delay of a speedy trial.

H. Eighth Amendment

The excessive bail and excessive fines clauses may be relevant to those who have been detained as suspects of terrorist activities. Regarding the infliction of “cruel and unusual punishment,” the trauma caused by the September 11th terrorist attacks has rendered this part of the Eighth Amendment almost inapplicable to our discussion.

I. Right to Privacy

Although the right to privacy is not specified in the Bill of Rights, this particular right has been developed and drawn from the First Amendment, the Third Amendment, the Fourth Amendment and the Ninth Amendment. Even though it has been used more famously to justify the legalization of abortion in that a woman’s choice is a private matter, the right to privacy has been more relevant in criminal cases in recent years. The right to privacy means that an individual’s domain should not be invaded and this domain includes an individual’s residence, personal information and his belongings, including those he carries and those at his workplace or other sites.

As the right to privacy of an individual at home is covered in the discussion on illegal search, the central concerns here deal with personal information. Thus, the so-called racial profiling, a scheme to track individuals in order to deal effectively with terrorism, has been a controversial issue.

⁵ *Doggett v. United States*, 505 U.S. 647 (1992).

J. Fourteenth Amendment and Equal Protection

Even though the “equal protection” clause of the Fourteenth Amendment aims at actions taken by state governments, it does not mean that one cannot apply the same type of protection at the national level. “It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”⁶

If this were held true, racial profiling would be unconstitutional. Racial profiling refers to “government activity directed at a suspect or group of suspects because of their race, whether intentional or because of the disproportionate numbers of contacts based upon other pre-textual reasons” (Siggins, 2002). In its effort to fight terrorism, we might even go so far as to say that the racial profiling strategy also includes religious profiling, as adherent to Islam have been targeted as well.

Traditionally, the threat to and violation of civil liberties are found at the state and local level, as these governments are endowed with the responsibility for the administration of justice. The federal government is seen as a guarantor of civil liberties. Thus, the Fourteen Amendment provides the basis for the incorporation of the Bill of Rights at the state and local level, and people who suffer discrimination at this level can appeal to the Federal Government for relief. With the passing of the USA Patriot Act and the establishment of the Homeland Security Department, the Federal government now can be a violator instead of guarantor of an individual’s civil liberties.

IV. Measures Taken in Times of War and Emergency

In the history of the United States, the country has a great deal of experience with war and little experience with concerns about homeland security. The War of 1812, the Mexican War, and the

⁶ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Spanish American War were three 19th century wars fought by the Americans against a foreign nation. In the War of 1812, there was indeed dissent against the war which led to the Hartford Convention of 1814-1815, but the U.S. government did not enact any measures to curtail freedom of speech or freedom of assembly. The Mexican War and the Spanish American War were fought with a strong nationalist sentiment and under the flag of manifest destiny. The controversial issue of the Mexican War was the expansion of the slave states and that of the Spanish American War concerned imperialism. Both wars were hotly debated and criticized within political circles, but the controversies were not deeply rooted at the societal level. The American Civil War was the other major war of the 19th century. This war witnessed the curtailment of civil liberties when President Lincoln suspended the writ of *habeas corpus*, which I will elaborate later.

During the 20th century, the major wars that the U.S. was involved in that had a significant impact on civil liberties include World War I, World War II, the Korean War, the Vietnam War and the Persian Gulf War. There were also some American military overseas interventions that were short-lived or not significant and thus did not constitute war or emergency.

Even when there was no declared war, the government sometimes felt that foreigners or foreign ideologies might represent threats to the security of the country and responded by enacting laws to deal with these threats. One prominent example of this phenomenon is the Red Scare of the 1920s and the McCarthyism of the 1950s. The earliest example however is one that is not very familiar to most of us in Taiwan—the Alien and Sedition Acts passed during America's undeclared war against France two hundred years ago. I should begin with an examination of these acts.

A. The Alien and Sedition Acts of 1798 by John Adams

In his farewell address to the nation, George Washington warned about the danger of the young United States getting entangled in conflicts of intrigue in Europe. He did not make this warning without basis. In the early 1790s, the revolutionary government of France tried to solicit the support of the United States for its war against Great Britain. President Washington maintained a position of neutrality, but supporters of the French cause such as the Democratic-Republican societies sprouted in many major cities in the United States. John Adams, a Federalist who succeeded George Washington to become the second president of the republic, felt increasingly threatened by the rising power of the Democratic Republicans of whom his vice president, Thomas Jefferson, was the leader. He found that French immigrants were active in the Jeffersonian opposition and moved to curb the flow of aliens into the United States. What happened was the passage of a series of acts intended to curb this flow and to prevent the growth of the Democratic Republican Party. These acts include the Naturalization Act, the Alien Enemies Act, the Alien Friends Act, and the Sedition Act. Together these laws, passed in 1798, were called the Alien and Sedition Acts (Lawson, 1952; Miller, 1951; Smith, 1956).

(A) The Naturalization Act

This act extended the residency requirement for citizenship from five to fourteen years, making it more difficult for new immigrants to become naturalized U.S. citizens. It was designed to deny supporters of the Democratic Republican easily obtainable voting rights.

(B) The Alien Enemies Act

This act empowered the president in time of war to arrest, imprison, or banish the subjects of any hostile nation without

specifying charges against them or providing any opportunity for appeal. This act has remained a permanent part of American wartime policy. Most post-September 11th cases involving the violation of non-citizens' civil liberties belong to this category. It calls into question the "due process of law" and the protection of the rights of the accused provided by the Fourth and Sixth Amendments.

(C) The Alien Friends Act

This act gave the president almost unlimited authority to deport any alien he deemed "dangerous to the peace and safety" to national security. It accorded the alien no right to a hearing and no right to present evidence on his own behalf. Some of the aliens detained by the US in the War on Terrorism are not from "hostile" nations and should be exempt from this act should it still exist today.

(D) The Sedition Act

This act made it a high misdemeanor, punishable by fine and imprisonment, for anyone, citizen or alien, to conspire in opposition to "any measure or measures of the government" or to aid "any insurrection, riot, unlawful assembly, or combination." Fines and imprisonment were provided as well for persons who "write, print, utter, or publish . . . any false, scandalous and malicious writing" bringing the government Congress, or the president into disrepute. This is where the First Amendment rights of freedom of speech and freedom of the press come into question.

The first three of these acts were aimed at immigrants, whom the Federalist government suspected as being Republican sympathizers. Since war was never formally declared, the Alien Enemies Act was not implemented. Even though Adams never used the authority given to him by the Alien Friends Act, the terms of the act allowed the government to proceed with the registration of all foreigners (a step taken also by the Bush administration in the War on Terrorism) and prompted many French immigrants to

leave the country.

The Sedition Act sought to control both citizens and aliens. Under the Sedition Act, there were fifteen indictments and ten prosecutions of printers and editors who were considered sympathetic to the Democratic Republican cause. However, the first one to be prosecuted was a Congressman of Irish origin who attacked Adams in print. Matthew Lyon, a Republican from Vermont claimed that Adams' "every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."⁷ After Lyon was convicted and sentenced to prison, he became a martyr for the Anti-Federalist cause and was re-elected to Congress from prison.

The constitutionality of these acts was never determined in the courts. It was the voters who made that decision when they voted the Federalists out of power in the presidential election of 1800. The victor, Thomas Jefferson, pardoned every person prosecuted under the Sedition Act and appropriated funds to reimburse those who had been subjected to fines. Still, the Supreme Court would not miss any opportunity in the intervening years to remind the Americans that the Sedition Act of 1798 has been judged unconstitutional in the "court of history."⁸

B. Suspension of the Writ of *Habeas Corpus* by Lincoln

Most students of American History or civil liberties are familiar with President Lincoln's suspension of the writ of *habeas corpus* i.e., the prevention of individuals from being held without trial during the Civil War. However, what is less clear is that

⁷ J. F. McLaughlin, *Matthew Lyon, the Hampden of Congress: A Biography* (New York: Wynkoop Hallenbeck Crawford Co., 1900), p. 344, quoted by Maskel (2002), note 12.

⁸ *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

Lincoln's target area at first was not the entire country but only those who lived in the border regions (Neely, 1991: 4). Thus the suspension started with Maryland in 1861 and gradually moved nationwide in 1863. During this time, between fifteen and twenty thousand U.S. citizens were arrested on suspicion of disloyal acts.

Lincoln's decision to suspend was not groundless, as the antiwar movement in the North turned into protests against the draft and culminated in a riot in New York City in 1863. The constitutionality of Lincoln's action was never determined by the court. Even though the Supreme Court was presented a case challenging Lincoln's suspension of the writ of *habeas corpus*, it refused to review this case, in which a peace Democrat from Ohio was sentenced in 1863 to jail for the rest of the war by a military commission when he denounced the suspension of *habeas corpus* and proposed an armistice.

C. Sedition Acts during World War I

With the outbreak of World War I and the split of American public opinion towards European countries, a strong anti-German sentiment surfaced in the U.S. Some Americans' hatred of Germans or anything related to Germany was demonstrated in countless incidents. Examples of these include the forcing of German Americans to kiss the flag or recite the Pledge of Allegiance; the lynching of German-born young man, the removing of German books from the library, the changing of German names, and the banning of music composed by contemporary Germans, among others.

The U.S. Congress passed a series of laws in 1917 and 1918 after the country's declaration of war and its entry into the European war front. These acts included the following:

(A) Espionage Act

This act sentenced those who aided the enemy, refused services or created problems such as insubordination, disloyalty

and mutiny or refusal of duty in the military to prison for up to 20 years or a fine of up to \$10,000 or both. It also authorized the postmaster general to prohibit mail on any matter he thought advocated treason or forcible resistance to U.S. laws. The magazines *American Socialist* and *the Masses* were banned from the mail under this act.

(B) Trading with the Enemy Act

This act aimed at cutting off German Americans' commercial ties with Germany and prevented them from assisting their or their ancestors' land of birth.

(C) Sedition Act

The Sedition Act offered even more severe punishment than the Espionage Act by imposing heavy penalties on anyone convicted of using "disloyal profane, scurrilous, or abusive language" about the government, the Constitution, the flag or the military. Some fifteen hundred pacifists, socialists and others who spoke out against the war were arrested. The most famous of these arrestees was a man named Eugene V. Debs who was sentenced to ten years but continued in his campaign for the presidential election of 1920.

In all, more than two thousand people were prosecuted under the Espionage Act between June 1917 and June 1920 and over one thousand of those were convicted (Rehnquist, 1998: 183). The Supreme Court upheld the Espionage Act when the act was "violated" by Charles T. Schenck, general secretary of the Socialist Party who oversaw the party's circulation of thousands of leaflets attacking the draft. In this case, *Schenck v. United States*⁹ Justice Oliver Wendell Holmes, Jr. introduced the famous admonition against "shouting fire in a theater" and offered his "clear and present danger test." Justice Holmes however, moved away from this position himself later that year when he appealed for tolerance

⁹ 249 U.S. 47 (1919)

in the case of *Abrams v. United States*¹⁰ when antiwar activists were convicted of criticizing U.S. involvement in World War I, encouraging resistance and urging workers not to produce war materials. Justice Holmes again was one of the two dissenters in the famous case of *Giltow v. New York*,¹¹ in which state laws based on the Sedition Act were upheld.

D. The Red Scare after World War I

The line between wartime suppression of dissent and the postwar Red Scare is not easily drawn. With the Russian Revolution, the anti-German sentiment during the war turned to anti-Bolshevism after it. The labor strikes of 1919 caused concern that communists were behind the radicalization of American workers. In January 1920, the U.S. Attorney General, A. Mitchell Palmer obviously took this sentiment as the green light to take action against the radical workers as he sent government agents to break into meeting halls and homes without search warrants and arrested thousands of suspects with near two hundred and fifty of them being deported later.

E. Alien Registration Act of 1940

Alien Registration Act, better known as the Smith Act, was enacted by the U.S. Congress in 1940 after World War II broke out and made it unlawful to advocate the overthrow of the U.S. government by force or violence or to join any organization that did so. This act was upheld by the Supreme Court in *Dennis v. United States*¹² when it described the Communist Party as a “highly organized conspiracy” and narrowed the scope of freedom of speech guaranteed by the First Amendment when it contended

¹⁰ 250 U.S. 616 (1919)

¹¹ 268 U.S. 652 (1925)

¹² 341 U.S. 494 (1951)

that Congress had the power to curtail this freedom when its members concluded that national security demanded such restriction. The result was the conviction and jailing of American citizens for their rhetoric, not for acts of violence or espionage.

F. Japanese Internment during World War II

Japanese internment represents perhaps the single most blatant violation of civil liberties in American history. On February 19, 1942, President Roosevelt issued an executive order¹³ to put more than 110,000 people of Japanese origin (more than 2/3 were native U.S. citizens) in internment camps located in Western states. This action was taken despite earlier reports by the special representative of the State Department Curtis B. Munson who found no threat by Japanese to U.S. national security. In fact, Munson observed that Japanese American had been dedicated to assimilation and were very patriotic in wanting to serve the war effort. Despite this report and the advice of the Federal Bureau of Investigation (FBI) and the Office of Naval Intelligence, Roosevelt went with the internment plan in the name of “protecting” the Japanese Americans. These Japanese Americans, some of them second or third generation citizens were rounded up and put in the camps for more than three years until the end of the war (Irons, 1984; Irons, 1989; United States Commission on Wartime Relocation and Internment of Civilians, 1983; Yamamoto, Chon, Izumi, Kang, & Wu, 2001).

In order to prove their loyalty to America, young Japanese American men volunteered for military service and the most decorated unit in the European theater was the 442nd Infantry Combat Team which was made up entirely of second generation Japanese Americans. Still, when the war ended, many lost their homes as their properties were confiscated or sold.

The Supreme Court was not much help in protecting the civil

¹³ Executive Order No 9066, 7 Fed. Reg. 1407 (1942).

liberties of these citizens as it upheld the government's policy of internment in *Hirabayashi v. United States*¹⁴ and approved of the removal of second generation Japanese American from the West Coast in *Korematsu v. United States*.¹⁵ In the former, the court said that "residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of different ancestry;" in the latter, the court simply felt that removal was justified for the sake of preventing "espionage and sabotage."

The American government finally acknowledged the wrongdoing some forty years later in 1983, when a federal judge ruled that the detainees had been victims of "unsubstantiated facts, distortions and misrepresentations of at least one military commander whose views were affected by racism."¹⁶ In 1988, President Reagan signed the Civil Liberties Act into law which provided each surviving former prisoner \$20,000 and a presidential letter of apology.¹⁷

Japanese internment was such a controversial experience, especially for ethnic minorities, that those who are concerned with the curtailment of civil liberties in post-911 America often use it as a case of reference (Braber, 2002; Hashimoto, 1996; Lin, 2003). Not surprisingly, this reference generates some academic debates as well (Grossman, 1997; Herzog, 2002; Tushnet, 2003).

G. McCarthyism in the 1950s

When Senator Joseph McCarthy began his attack on communist infiltration in the State Department in 1950,

¹⁴ 320 U.S. 81 (1943)

¹⁵ 323 U.S. 214 (1944)

¹⁶ Transcript from proceeding of "Motion to Vacate Conviction and Dismiss Indictment of Fred T. Korematsu before the Honorable Marilyn Hall Patel," United State District Court of the Northern District of California, San Francisco, California, November 10, 1983, at p. 37.

¹⁷ By 1998, the total payout was \$1.6 billion, paid to 80,000 claimants. See Barkan (2000: 30-31).

anti-communism hysteria evolved with the passing of the Internal Security Act of 1950. This act made it unlawful to “contribute to the establishment...of a totalitarian dictatorship” and required members of “Communist-front” organizations to register with the government and prohibited them from holding defense jobs or traveling abroad.

However, before the enactment of the Internal Security Act and the hysteria of McCarthyism in 1950, anti-communist sentiments were already prevalent in America. President Truman himself was a staunch anti-communist who allowed the civil liberties of suspected Communist sympathizers in the media and academic world to be infringed upon. Senator Richard Nixon, as a member of the House Committee on Un-American Activities, led the investigation into charges of a State Department official being a Communist Party member and a spy in the 1930s. He also charged that his opponent “constantly voted” the Moscow line (Caute, 1978: 27).

During the early years of the Eisenhower administration, anti-communist sentiment reached its peak with the enactment of the Communist Control Act of 1954 that in effect made membership in the Communist Party illegal.¹⁸ President Eisenhower even suspended the security clearance of J. Robert Oppenheimer, the celebrated physicist who had earlier directed the Manhattan project for atomic bomb research during World War II on the grounds not of disloyalty to his country nor threat to national security, but for his not being candid about the details of a 1943 conversation with a friend about Soviet interest in the atomic bomb.

All these accusations and violations of civil liberties in the name of anti-communism led to the designation of this historical period as the “Era of McCarthyism.” Other similar attempts to infringe upon civil liberties have been called “McCarthyism,” including the post-911 activities by the U.S. government and private institutions (Cole, 2003; Rothschild, 2002).

¹⁸ 68 Stat. 775, 50 U.S.C. & 841.

H. The Vietnam War Era

Antiwar sentiments are nothing new to America. They were present during the Civil War, World War I, World War II and of course the Vietnam War as well. In addition to traditional antiwar groups made of pacifists and antiwar religious groups, the antiwar movement in the 1960s had many adherents in universities and sometimes even in high schools. Protests in the late 1960s and early 1970s by tens of thousands of students were common scenes in the United States. Some of these students wore black arm bands, burned their draft cards and American flags to protest the war.

The Supreme Court approached these forms of freedom of speech with mixed rulings. In *Tinker v. Des Moines School District*,¹⁹ the wearing of the black arm bands was allowed because its quiet and non-disruptive nature made it “closely akin to ‘pure speech’.” In *United States v. O’Brien*,²⁰ however, the Supreme Court held that a federal statute aiming at the preserving draft cards did not unconstitutionally abridge free speech. The act of burning a draft card, in its opinion is not “symbolic speech” protected by the First Amendment of the U.S. Constitution. In *Street v. New York*,²¹ a conviction for flag burning was set aside by the Supreme Court in 1969 because the punishment was directed not only for acts against the flag but for words as well.

Compared to previous infringement upon civil liberties, the Vietnam era witnessed less pro-active government enactment of laws but more reactive measures when it responded to the antiwar movement. When the Supreme Court made flag burning a freedom of speech protected by the First Amendment in *United States v. Eichman*,²² it ended more than two decades

¹⁹ 393 U.S. 503 (1969).

²⁰ 391 U.S. 367 (1968).

²¹ 394 U.S. 576 (1969).

²² 496 U.S. 310 (1990).

of debate on this issue.

V. Cases of Violation of Civil Liberties in the War on Terrorism

There are numerous cases of real or possible violation of civil liberties at all levels of U.S. government in the aftermath of the September 11th terrorist attacks. They have been faithfully documented by civil liberties advocates such as the ACLU. Below are just some of the most infamous cases that have caught national attention. The trials of Zacarias Moussaoui and John Walker Lindh are not cases of the violation of civil liberties, rather they are put forward for the purpose of contrast with other cases.

A. Guantánamo Bay Detainees

More than 600 men were seized during the U.S. military operations against al Qaeda and the Taliban in Afghanistan. They have been detained in U.S. naval base at Guantánamo Cuba, and were declared illegal combatants with no right to lawyers, hearings or charges (Frankel, 2002). Most of these are people of Islamic background or/and of South Asian and Middle Eastern origin. There are also 20 Europeans in the camp (Tzortzis, 2004).

A group of human rights lawyers will plead before the U.S. Court of Appeals of the District of Columbia Circuit on behalf of more than a dozen of these foreign nationals for a writ of *habeas corpus*. From a legal standpoint, if they are innocent, these foreign nationals should be released immediately; in other words, these suspects are entitled to a speedy trial and should not be held indefinitely (Richey, April 9, 2002). Guantánamo Bay is an ideal place for detention. It is not “officially” U.S. territory and thus does not need to observe the same kind of judicial constraints.

B. Global Relief Foundation and Rabih Haddad

This Illinois-based Muslim charity organization was designated a terrorist group by the U.S. Treasury Department in October 2002 (Mintz, 2002). This designation was based on allegations that the Global Relief Foundation, received funding from a financier of al Qaeda and its leader Rabih Haddad, a Lebanese national, once worked for Makhtab al-Khidamat, a group created by Osama bin Laden in the 1980s to help recruit guerillas to fight the Soviet invasion of Afghanistan. The Global Relief Foundation however was of a different nature, as it was created during the massacre of Muslims in Bosnia in 1992, to provide humanitarian aid to needy Muslims around the world.

After arresting Haddad and putting him in jail in December 2001, the Treasury Department's latest action meant that anyone who donated money to Global Relief could be charged as a felon. The ironic twist of this was the U.S. government once supported Makhtab al-Khidamat in its fighting in Afghanistan. The government alleged that the foundation in its publication has pleaded for Muslims to donate funds for jihad, a provision of the Koran. This raises the question of whether a religious believer should faithfully adhere to the teaching and text of his faith. The holding of Haddad was also of a dubious nature in the beginning, when he was charged with overstaying his visa (Eggen & Lyderson, 2002). Indefinite holding someone to develop a more serious charge later has also proven controversial ("Fairness Still the Standard," 2002).

C. Jose Padilla

Jose Padilla, also known as Abdullah al-Muhajir, is a 31-year-old U.S. citizen of Puerto Rican origin alleged to have discussed the possibility of exploding dirty bomb in the U.S. with al Qaeda (Profile: Jose Padilla, 2002). He was arrested in May 2002 when he arrived in Chicago from Pakistan and was later classified as

enemy combatant.

The arrest of Padilla and his subsequent classification as an enemy combatant raised some eyebrows. After he was arrested in Chicago, Padilla was brought to New York as a material witness.²³ However, as the prosecutors worried that Padilla would refuse to cooperate with authorities, and feared that he would invoke his Fifth Amendment right and refuse to testify—a move that could have forced the government to release Padilla or grant him immunity from prosecution—President Bush signed a presidential declaration that Padilla was an “enemy combatant” (Fainaru, 2002). Once the classification was made, Padilla was not entitled to constitutional protection and could be held by the military indefinitely (“Lawyer: Dirty Bomb Suspect’s Right Violated,” 2002). However, there is still debate on whether Padilla, as a U.S. citizen, can be classified as an enemy combatant (Pitts-Kiefer, 2003).

D. Yaser Esam Hamdi

Yaser Esam Hamdi is a U.S. citizen held as an enemy combatant in a military jail. Hamdi was born in the U.S. and raised in Saudi Arabia. He was captured by the Northern Alliance forces in Afghanistan while serving with the Taliban (Richey, September 26, 2002). However, limited documents and no charges were provided by the Justice Departments, as its position is that “anyone it labels as enemy combatant has no rights and, furthermore, that the courts have no power to intervene” (Schorr, 2002).

Hamdi was first sent to Guantánamo Bay and then on discovering his citizenship, transferred to a military prison in Virginia and then to a naval brig in South Carolina. Like Padilla, Hamdi has been held incommunicado and was not provided with a counsel (Jett, 2002). The federal public defenders made efforts to

²³ This refers to a person believed to hold information critical to a criminal proceeding.

meet with him but were unsuccessful until 2004. He was not even entitled to the rights accorded to prisoners of war (Jackman, 2002). The biggest irony is that Hamdi, as a U.S. citizen, has been given less rights than those of foreign nationals.

E. Zacarias Moussaoui

So far, Zacarias Moussaoui is the only person charged as a September 11 conspirator. A French citizen of Moroccan origin, Moussaoui was arrested in Minnesota three weeks before the September 11th terrorist attacks and was believed to be the “twentieth hijacker” (“America’s First Accused,” 2001). His trial has been delayed until next year because of the “volume and complexity of evidence” (Moussaoui Trial Postponed, 2002) against him. Moussaoui has decided to act as his own lawyer but the court was still appointed a team of lawyers to assist him. These lawyers also supported the delay as the trial has been moved now to June 2003 (“Judge Delays Moussaoui’s Trial,” 2002).

Zacarias Moussaoui is said to have met with Khalid Sheik Mohammed, believed to be al Qaeda’s director of operations. Moussaoui acknowledged that he is a member of al Qaeda but denied participation in the September 11th terrorist attacks (Schmidt, 2002). No matter what would be the outcome of the trial next year, Moussaoui, as a non-American citizen determined to defend himself, has at least been given the right to counsel. The right to a speedy and public trial has also been acknowledged in his case.

F. John Walker Lindh

As an American citizen fighting with the Taliban, John Walker Lindh was believed to have received training from al Qaeda. Raised by an Irish Catholic father, Lindh came from an upper-middle class background in California and converted to Islam as a teenager at the age of sixteen (Profile: John Walker

Lindh, 2002; Bowers, 2002). He later went to Yemen and Pakistan before traveling to Afghanistan and fighting against his own countrymen. He shocked the nation when he was captured because he is not of Arabic ethnicity and his family has no links with the Middle East or South Asia.

John Walker Lindh was allowed access to counsel and eventually pleaded guilty for his role in Afghanistan. He acknowledged that he made a mistake in joining the Taliban and apologized for providing services to this regime. Mr. Lindh received a 20-year prison term for good behavior and his willingness to cooperate with the American authority ("I Made a Mistake by Joining the Taliban," 2002). Unlike other cases, where the suspect or the detainee was not granted necessary due process, Lindh at least enjoyed counsel and a speedy trial even though he was convicted. Does this treatment reflect the fact that Lindh is not a typical anti-American terrorist of Middle Eastern origin?

VI. Judicial Decisions of the Cases

Of these six notable cases, Lindh's case has already come to a close. The other one that is no longer pending is the Haddad case. After months of legal battles, Rabih Haddad was deported to Lebanon without being charged with any crime ("John Ashcroft's War on Immigrants Continues," 2003). Zacarias Moussouai has been indicted for more than two years and is scheduled to go on trial in April 2004, after the legal battle for access to detained al-Qaeda suspects finally came to an end (Markon, 2004). Moussaoui, the only suspect charged in the United States in connection with the September 11th terrorist attacks, will be tried in a criminal court.

Jose Padilla and Yaser Esam Hamdi, the two American citizens suspected of assisting terrorists have been labeled "enemy combatants" but have never been formally charged. In 2004, the Supreme Court reviewed the two consolidated cases of *Hamdi v.*

Rumsfeld (03-6696) and *Rumsfeld v. Padilla* (03-1027) to decide whether President Bush has the unilateral authority to define U.S. citizens as “enemy combatants” and detain them indefinitely without charges (Lane, 2004). The Supreme Court also heard the case involving the indefinite detention of al Qaeda and Taliban suspects at Guantánamo Bay, Cuba to decide whether “military detainees held overseas should get a hearing to justify their detention” (Richey, April 20, 2004). The decision back in November 2003 prompted the release of a few dozen prisoners (Tzortzis, 2004). In June 2004, the Supreme Court made its view on the habeas petition known to the people and government of the U.S. as well as to those of the world.

A. *Rumsfeld v. Padilla*

In *Rumsfeld v. Padilla*, the Supreme Court addressed the question of who is the proper respondent to a *habeas corpus* filed by Padilla’s attorney. Padilla was arrested in Chicago and incarcerated in New York. Later he was moved to South Carolina. The five to four slim majority ruled that Padilla’s attorney should sue the warden of the brig in South Carolina instead of Rumsfeld even though it was the latter’s designation of “enemy combatant” that got Padilla arrested in the first place. Writing for the majority, the Chief Justice cited an old precedent that held the proper defendant in a *habeas corpus* proceeding is “the jailer” or “some person who has the immediate custody of the party detained” and that the proceeding must be brought where the jailor is to be found.

The high court overlooked the issues such as why Padilla was never charged and why was he not provided an attorney when interrogated (Cassell, 2004). It did not address the issue of whether Padilla’s detention is unconstitutional. Instead, the Court avoided answering the question of detention but ordered that the case be remanded and dismissed.

Since the Court did not deny Padilla the right to sue the

proper authority, it seemed that at least civil liberties of the “enemy combatants” have been preserved. The minority opinion written by John Paul Stevens however, criticized the majority because its decision may prompt the government to move the detainees to a “conservative” district sympathetic to government’s position.

B. *Hamdi v. Rumsfeld*

In *Hamdi v. Rumsfeld*, the case was initially brought by Hamdi’s father as a procedural petition demanding the jailing authority to justify in court the detention of his son. The army responded to the petition with a nine-paragraph memorandum signed by a minor Defense Department official, declaring that Hamdi was with the Taliban when he was captured. The elder Hamdi then filed another petition asking the government to release Hamdi or produce sufficient evidence to support the claim.

A Virginia federal district court agreed with senior Hamdi that the memorandum itself was insufficient to justify the detention. The decision was reversed by the Fourth Circuit Court of Appeals when it declared that the President as commander in chief has the constitutional power to declare any person captured in any theater of military operations to be an enemy combatant.

When the case reached the Supreme Court, the high court reversed the Fourth Circuit and remanded the case to the district court for further action. The plurality opinion written by Justice O’Connor held that the President does have the power to detain captured enemy forces until the end of hostilities. The constitutional question was not whether Congress had authorized the President to detain enemy combatants, but whether the President’s exercise of that power to detain American citizens without serious judicial review violates the Constitution’s Fifth Amendment, which says that no person may be deprived of liberty without “due process of law.”

O’Connor again demonstrated her role as a balancer in the

high court when she wrote that the constitutional question be resolved by balancing the grave harm that would be done to a person who is erroneously and indefinitely imprisoned against the danger to national security and the burden placed on the military forces by allowing prisoners to claim judicial review for their detentions. In this she found that both the Virginia district court and the Fourth Circuit Court went too far in either extreme. The proper balance, she said, required that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and must have a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.” Therefore, she claimed that Hamdi “unquestionably has the right of access to counsel in connection with” any further proceedings.

C. Rasul v. Bush

The Bush administration assumed that the detention camp holding approximately 600 detainees at Guantánamo Bay in Cuba is outside the jurisdiction of any federal court of the U.S. and thus no right of “*habeas corpus*” in the “respective jurisdiction” may apply. Two Australian and twelve Kuwaiti citizens nevertheless did file *habeas corpus* petitions in the federal district court of the District of Columbia seeking release from custody, access to a lawyer, freedom from interrogation, and other forms of relief.

The six to three majority led by Justice Stevens held that “respective jurisdiction” means the jurisdiction not where the prisoners are detained but where the officials responsible for their detention may be found. When the government holds prisoners in foreign territory under its effective and permanent control but not within the jurisdiction of any federal court (like Guantánamo Bay), a *habeas corpus* petition may be brought in a federal court in the United States which has jurisdiction over the President, i.e., the federal district court of the District of Columbia. Therefore, the majority held that detainees who are not citizens could petition for

habeas corpus in federal courts so long as they were in areas under effective and permanent control of the U.S.

On the surface, the decisions made in these three cases appear to be a triumph for civil liberties advocate. In *Rumsfeld v. Padilla*, Padilla has to start from the beginning by bringing a suit against the warden where he is in custody. But what would happen if the government continued to move him again and again to avoid addressing his detention? Thus, in not deciding the case, the Court actually sanctioned the continuation of Padilla's detention by the government, without being charged for years to come.

In *Hamdi v. Rumsfeld*, the Congress gave the President the authority to detain anyone fighting with al Qaeda or the Taliban when it voted for war in Afghanistan. Since Hamdi was supposedly captured in Afghanistan, he could be held without being charged with a crime as long as the U.S. is fighting in Afghanistan (a war that does not seem to be coming to an end), but at least he gets a lawyer and can file a petition for a writ of *habeas corpus* challenging his detention. However, the burden of the proof is not on the government, but is on Hamdi to prove the latter's charge against him to be wrong. In other words, he is given due process for a trial in which it would be difficult to win.

Regarding the Guantánamo detainees, they have indeed been given the right to file a writ of *habeas corpus* challenging their detention. The court was silent on what trial courts will do with the petitions however.

VII. Conclusion

The most salient issues in the violation of civil liberties in the aftermath of the September 11th terrorist attacks include the rights of the accused (access to counsel, right to speedy and public trial, etc.), racial, ethnic and religious profiling (equal protection), and the right to privacy. In addition, government actions and legislations tend to have a negative impact on freedom of religion,

freedom of speech, and freedom of assembly.

So far, there seems to be no concerted effort by government to violate civil liberties on the scale of the Japanese internment during World War II. This does not mean that those who are concerned with civil liberties issues can take consolation in the absence of gross violation of such rights against one particular group. Racial or religious profiling may have resulted in individual relinquishing associations with their own racial group or reluctance in professing their faith, thus, indirectly contributing to the violation of these people's First Amendment rights (Cole, 2003: 1).

One particular issue worthy of our concern is that some of the historical violations of civil liberties ultimately came to an end when the war time conditions were over. For example, the Alien Sedition Acts were no longer applicable when Thomas Jefferson became president in 1801; the suspension of *habeas corpus* by President Lincoln twice during the Civil War expired after the spring of 1865 when the North defeated the South. The emergency acts during World War I and World War II all became inapplicable once the war was over; the interned Japanese Americans were released and allowed to leave the camp after Japan surrendered in 1945; even the prolonged conflict in Vietnam came to an end in 1975 when that country eventually fell to the communists. What about the current War on Terrorism?

When is this campaign going to end? It did not end with the collapse of the Taliban regime in Afghanistan. Likewise, the capture of Osama bin Laden might not be sufficient for this campaign. Even with the military action taken to defeat and remove Saddam Hussein of Iraq, it is unlikely that the War on Terrorism will come to an end anytime soon. As to the fight against al Qaeda, how many of its leaders need to be captured before the U.S. government decides to return to normalcy? In other words, will the temporary "wartime" restrictions of civil liberties become permanent? Put another way, will emergency measures become normalized?

It is still too early to predict how and when the War on

Terrorism will come to an end. The establishment of the Homeland Security Department and the passage of the Homeland Security Act are signs that some of the measures taken to fight terrorism, including those with racial overtones or invasion of privacy, will be institutionalized (Chaddock, 2002). National security is paramount to the survival of a country and can be such an overwhelming concern that it would compromise civil liberties. However, without closure in sight, these institutionalized measures need to be weighted against the value of civil liberties that the U.S. was founded on. The real threat of terrorism then is, "not that democracies would fail to defend themselves, but rather that they would (and did) do so far too well and, in so doing, [become] less democratic" (Charter, 1994).

Nearly two hundred and fifty years ago, Benjamin Franklin wrote: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." In the days since September 11, many American civil liberties groups, notably the American Civil Liberties Union (ACLU), the Lawyers Committee for Human Rights, the American-Arab Anti-Discrimination Committee (ADC), the Center for Constitutional Rights, and Human Rights First, have fought the government's civil liberties policies. Former Attorney General John Ashcroft has challenged the patriotism of these groups who have opposed the Bush administration's policies on the curtailment of civil liberties with highly emotional rhetoric:

To those who pit Americans against immigrants and citizens against noncitizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. (Davis, 2004:8)

In spite of these critical comments by Ashcroft, the efforts of the ACLU and the like might have prevented more violation of civil liberties. Still, many citizens and non-citizens have been deprived

of their civil liberties and have suffered substantial losses. Lost liberty is a reality, not a phantom. It is up to the court now to take a stand on the thorny issue of liberty versus security. So far the rulings have not been very promising.

In his *All the Laws But One: Civil Liberties in Wartime* published three years before the events of September 11th, U.S. Chief Justice William Rehnquist's closing words appear to be prophetic of the ongoing legal battles over civil liberties:

[T]here is every reason to think that the historic trend against the least justified of the curtailments of civil liberties in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with somewhat different voice. (Rehnquist, 1998: 224-225)

Four years have passed since the terrorist attacks of September 11. The verdict seems to confirm Rehnquist's claim that laws do speak with a somewhat different voice. Still, the efforts of activist groups should not be completely dismissed, evidenced by the limited scope of violation during this time.

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九一一恐怖攻擊後美國公民自由的相關爭議

嚴震生

摘 要

在九一一恐怖攻擊後，美國國會立刻通過了美國愛國法。如同美國歷史中所有在緊急時期所通過的任何法律，它成為政府對付異己的重要工具。此外，這個法案也有可能對美國人所最珍惜的公民自由權利作出限制。公民自由權利倡議者對此法案是否有可能和憲法牴觸，提出質疑，並不斷提醒美國公民過去歷史中政府對此自由權利所作的諸多不幸且是不必要的限制。不過，布希政府似乎下定決心要有效地對恐怖主義進行聖戰，因而故意忽略與公民自由權利有關的議題。若是由九一一後美國最高法院所審理的幾個案件來看，已故的美國前首席大法官所宣稱「和公民自由權利相關的法律，在戰時並不會噤聲不言，但它們所發出的聲音倒是會與平常不同。」

關鍵詞：美國愛國法、公民自由權利、九一一恐怖攻擊、緊急時期