2002

The War on Terrorism and Civil Liberties

Jules Lobel
University of PIttsburgh School of Law, jll4@pitt.edu

THE WAR ON TERRORISM AND CIVIL LIBERTIES

Jules Lobel

I. INTRODUCTION

Throughout American history, we have grappled with the problem of balancing liberty versus security in times of war or national emergency. During the Civil War, Lincoln questioned whether a republic must "of necessity[,] be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence."[1] Often repeated is the Roman Maxim first coined by Cicero "Silent leges inter arma," which has been broadly interpreted to mean "the power of law is suspended during war."[2] Chief Justice Rehnquist recently reformulated Cicero's phrase, noting that the law is not quite silent during war—but speaks with "a somewhat different voice."[3] He could have added that during wartime, law's voice has often been so muted as to be almost inaudible. Rehnquist quotes Roosevelt's wartime Attorney General Francis Biddle: "The Constitution has not greatly bothered any wartime President."[4] Or, as Oliver Cromwell pithily put it, "[n]ecessity hath no law."[5]

Our history is littered with sordid examples of the Constitution's silence during war or perceived national emergency. The first war with a European power after the Constitution's ratification—the undeclared war with France in the late 1790s—led Congress to enact the Alien and Sedition Acts of 1798 authorizing the President to deport enemy aliens as well as any alien the President judged to be "dangerous to the peace and safety of the United States."[6] In addition, the Sedition Act made it a criminal offense to print "any false, scandalous and malicious writing . . . against the government of the

---

1. 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGE & PAPERS OF THE PRESIDENTS 23 (1898) (President Lincoln's Message to Congress, July 4, 1861).

2. *See, e.g.*, Jeff Bleich, Kelly Klaus & Deborah Pearlstein, *When War Comes to the Court: The True Limits of Our Freedoms May Soon Be Revealed*, OR. ST. B. BULL., Nov. 2001, at 21, 21.

3. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 225 (1998).

4. *Id.* at 191.

5. Max Radin, *Martial Law and the State of Siege*, 30 CAL. L. REV. 634, 640 (1942) (quoting Oliver Cromwell).

6. Alien Act, 1 Stat. 570 (1798); The Alien Enemies Act, 1 Stat. 577 (1978); The Sedition Act, 1 Stat. 596 (1798).

United States."[7] Lincoln's incursion on civil liberties during the Civil War were numerous, most notably his suspension of the writ of habeas corpus.[8] The Wilson Administration prosecuted and convicted hundreds of Americans for their criticism of World War I and the draft, including the socialist leader and presidential candidate Eugene Debs.[9] Many of those prosecutions were undertaken pursuant to the Espionage Act of 1917, which "authorized the government to confiscate property, wiretap, search and seize private property, censure writings, open mail and restrict the right of assembly."[10] Near the end of the war, Attorney General Gregory utilized unpaid volunteers from the American Protective League—an organization that grew to include 250,000 members and acted without police powers—to root out disloyalty through arrests, searches and seizures, tapping phones and conducting what were termed "slacker raids" to root out draft dodgers.[11] Even if no law existed to punish a person's "disloyal acts," the authorities often prosecuted for other infractions.[12] After the war ended, the detonation of an anarchist terrorist bomb near his house led Attorney General A. Mitchell Palmer to launch the "Palmer" raid, in which 6,000 aliens were arrested without probable cause. Although no one was ever convicted of any crime, 500 immigrants were eventually deported for their political beliefs.

World War II again led to deprivations of civil liberties, the most serious of which was the internment of approximately 110,000 Japanese American citizens. After that war ended, the government's fight against the new enemy—Soviet Communism—resulted in the imprisonment and harassment of thousands of Americans for being communist or communist sympathizers.

The Supreme Court has generally acquiesced in these violations of civil liberties during war or emergency—at least until after the war or perceived emergency was over. Federal judges convicted dozens of people for violating the Sedition Act, all of whom were pardoned by Jefferson after he assumed

---

7. The Sedition Act, 1 Stat. 596 (1798).

8. *See generally* REHNQUIST, *supra* note 3.

9. Debs v. United States, 249 U.S. 211 (1919); *see also* Frohwerk v. United States, 249 U.S. 204 (1919) (upholding Frohwerk's conviction for conspiracy to publish an anti-war pamphlet) and Schenck v. United States, 249 U.S. 47 (1919) (affirming Schenck's conviction for sending anti-war literature via U.S. mail and holding that the Espionage Act of 1917 did not violate the First Amendment).

10. William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 22 (2000).

11. *Id.* at 23. In New York, over a three day period, "tens of thousands of men, most of whom simply were not carrying their draft cards, were rounded up and temporarily incarcerated." *Id.* at n.159.

12. G.J.A. O'TOOLE, HONORABLE TREACHERY: A HISTORY OF U.S. INTELLIGENCE, ESPIONAGE AND COVERT ACTION FROM THE AMERICAN REVOLUTION TO THE CIA 277 (1991). One person, for example, was sentenced to 90 days imprisonment for calling the President a "damned fool."

the presidency.[13] The Supreme Court unanimously affirmed the Debs conviction for criticizing the draft, and the convictions of other Espionage Act violators during World War I.[14] Justice Black, one of the most ardent defenders of the Bill of Rights ever to sit on the Supreme Court, wrote the Court's opinion affirming Korematsu's conviction for disobeying his internment order during World War II, a decision concurred in by such civil libertarians as William O'Douglass, Felix Frankfurter and Harlan Stone.[15] The court also affirmed the convictions of Communists and upheld other anti-communist measures during the Red Scare of the late 1940s and early 1950s; the court adopted a more rights protective jurisprudence only after the Communist Party had been virtually destroyed in the late 1950s and early 1960s.

While most of these measures later came to be considered mistakes after the war or emergency had passed, that lesson seems not to have prevented their repetition. Nor have the courts proven to be a bulwark for defending civil liberties in troubled times.

We once more are at war and are again being asked to balance liberty and national security in wartime. President Bush has stated, "[w]e believe in democracy and rule of law and the Constitution. But we're under attack."[16] President Bush, Attorney General Ashcroft and other governmental leaders have argued that in war, "the Constitution does not give foreign enemies rights,"[17] conveniently forgetting that the enemy in this war is amorphous and that our constitutional rights are important precisely to ensure that the Executive Branch is not the sole prosecutor, judge and jury of who is and is not an enemy terrorist. Administration officials have urged Americans to rally around the President in this time of war, with Attorney General Ashcroft

---

13. *See* GARY R. WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 135-40 (1999).

14. Debs v. United States, 249 U.S. 211 (1919); *see also* Frohwerk v. United States, 249 U.S. 204 (1919) (upholding Frohwerk's conviction for conspiracy to publish an anti-war pamphlet) and Schenck v. United States, 249 U.S. 47 (1919) (affirming Schenck's conviction for sending anti-war literature via U.S. mail and holding that the Espionage Act of 1917 did not violate the First Amendment).

15. Korematsu v. United States, 323 U.S. 214 (1944).

16. President George W. Bush, Remarks by the President and Prime Minister Kjell Magne Bondevik of Norway in Photo Opportunity (Dec. 5, 2001) transcript, *available at* http://www.whitehouse.gov/news/releases/2001/12/20011205-11.html.

17. *Panel I of a Senate Judiciary Committee Hearing: Preserving Freedoms While Defending Against Terrorism*, FEDERAL NEWS SERVICE, Dec. 4, 2001 (comments of Senator Session). Attorney General Ashcroft stated that "foreign terrorists who commit war crimes against the United States . . . are not entitled to and do not deserve the protection of the American Constitution." *Nightline* (ABC television broadcast, Nov. 14, 2001).

arguing that those who criticize the government give aid to our enemies and Press Secretary Ari Fleischer stating that Americans "should watch what we say and what we do."[18] Dissidents have been subjected to increased harassment by government officials, private institutions and groups.[19]

Since September 11 there has been a dramatic, and in some respects unprecedented, expansion of Executive power, unchecked by the judiciary or Congress, increasing government secrecy (the government is aggressively asserting its privacy interest at the same time undermining the privacy rights of its citizens), and attacks on the most vulnerable members of society—immigrants. The government has instituted a level of unfairness in the treatment of alleged offenders, that is seen only in wartime and justified only as being a wartime measure. The catastrophic nature of the World Trade Center and Pentagon attacks has led many liberal law commentators such as Harvard Law Professor Laurence Tribe to acquiesce in many of these departures from traditional American notions of fairness, reasoning that the enormity of the danger justifies restrictive, emergency measures.[20] Justice O'Connor was proven prescient when she noted after viewing Ground Zero, "[w]e're likely to experience more restrictions on our personal freedom than has ever been the case in our country."[21]

II. A CRITIQUE OF THE WARTIME PARADIGM: THE CONTRADICTION OF PERMANENT EMERGENCY

The war/emergency balancing metaphor is subject to several critiques. First, as Professor David Cole and Professor Ronald Dworkin have argued, by reserving the most draconian measures for aliens suspected of some connection to terrorism, we are not balancing fairly. We are not deciding upon how to weigh *our* liberties against *our* security, but instead are balancing *others'* liberties for *our* security.[22] Most Americans would never consent to

---

18. Press Secretary Ari Fleischer, Press Briefing at the James S. Brady Briefing Room (Oct. 1, 2001) transcript, *available at* http://www.whitehouse.gov/news/releases/2001/10/200111001-4.html.

19. *See generally* Matthew Rothschild, *The New McCarthyism*, THE PROGRESSIVE, Jan. 1, 2002, at 18.

20. Laurence H. Tribe, *Trial by Fury*, THE NEW REPUBLIC, Dec. 10, 2001, at 20 (arguing that it may be right, in normal times to allow a hundred guilty defendants to go free rather than convict an innocent one, but we must reconsider that arithmetic when one of the guilty may blow up the rest of Manhattan).

21. Linda Greenhouse, *In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

22. Ronald Dworkin, *The Threat to Patriotism*, N.Y. REVIEW OF BOOKS, Feb. 28, 2002, at 41; *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct*

a rule that permitted the police to incarcerate them for months because of mere suspicions of a terrorist connection, nor would they consent to be tried in secret trials. Nor would they trade their liberty for security if it meant that they could be detained for months without trial on some trivial charge such as not wearing a seat belt while the FBI investigates whether they are terrorists. Hundreds of resident aliens have indeed been subjected to such practices after September 11. Rather than balancing, what is at issue instead is the fundamental fairness that the Constitution guarantees to the people—a word held to include resident aliens—when the government imposes the criminal justice system upon them.

A second critique of the war/emergency balancing metaphor is that it obscures the crucial question of whether the goal is long term or short term security. The mythical balanced scale, (I prefer the see-saw image) assumes that all the weights marked security are on one side of the scale and the weights denoted liberty on the other. But some measures which may have some short term security value at the cost of some quantum of liberty actually reduce security over the long term. Indeed, it is arguable that many of the Bush Administration's responses to terrorism have just that effect. For example, questioning 5,000 residents of Arab descent about possible terrorist plots may yield some information helpful to national security, although even that is dubious, but in the long term it alienates the very community from which the FBI or CIA can recruit informants to wage the long term fight against terrorism. Similarly, refusing to accord captured Taliban fighters Prisoner of War (POW) status may result in some short term security gain—again dubious—but at the cost of fraying the multinational coalition so critical to long term security.

This essay focuses on a third critique of the war/emergency paradigm: one that derives from the paradigm's own basic assumptions. The notion that necessity hath no law, or that the laws fall silent during war times, assumes that war or emergency is a distinct event, and when over, society will revert back to normalcy. The Constitution's framers assumed that peace would be the normal state of affairs for the new Republic: war or other emergency crisis would be aberrational.[23] And so it was with our early wars in the nineteenth century.

Terrorism (USA PATRIOT Act) Act of 2001: Hearing on H.R. 3162 Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee, 107th Cong. (2001) (statement of Professor David Cole).

23. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1389-91 (1989).

The twentieth century challenged the constitutional assumption of war and peace, emergency and non-emergency as discrete spheres in which peacetime/non-emergency would be the norm. The United States' first war of the twenty-first century threatens to obliterate those constitutional distinctions. The most dangerous aspect of the current war on terrorism is its potential permanence and continued expansion.

III. THE TWENTIETH CENTURY AND THE PERMANENT CRISIS

World War I brought with it the "concept of a continuing war with an internal enemy composed of civilians who could no longer be trusted, even in peacetime."[24] The end of that war led some officials such as the Director of Washington's Military Intelligence Division (MID) to conclude that groups such as MID should be disbanded. Nonetheless, the MID was continued, and both military surveillance and FBI surveillance on thousands of individuals under vague terms like "subversion" and the investigation of potential crimes continued and expanded during the 1920s and 1930s.[25]

The Cold War against Communism that commenced after World War II dramatically accelerated the evisceration of the constitutional assumption that war and emergency were short, temporary exceptional departures from the normal rule of law. Emergency rule became permanent. Executive power became virtually boundless. The specter of Communism undergirding the Cold War was posed as an ongoing, continual threat to our very survival.[26] As Professor Gerhard Casper argued, this sense of emergency "fosters . . . a mentality which suggests that we live in a garrison state . . . we are in a state of alertness at all times. There is no such thing as normal times anymore."[27]

Every challenge to United States hegemony anywhere in the world began to be perceived as a threat to national security. Those perceived threats to United States power generated a profound sense of permanent crisis, leading

---

24. JOAN M. JEVSEN, ARMY SURVEILLANCE IN AMERICA 1775-1980, at 178 (1991).

25. *See* Banks & Bowman, *supra* note 10, at 24-27; S. REP. NO. 94-755, at 24 (1976) [hereinafter *Church Committee*].

26. *See, e.g.*, DEAN ACHESON, THIS VAST EXTERNAL REALM 19 (1973) in which the former Secretary of State argued that our national survival was facing a grave danger from communism. President Kennedy also utilized the survival imagery in his Inaugural Address, when he asserted that "we shall pay any price, bear any burden, meet any hardship . . . to assure the survival and success of liberty." TO TURN THE TIDE 6-7 (John W. Gardner ed., 1962) (quoting President Kennedy's Inaugural Address Jan. 20, 1961).

27. *Constitutional Questions Concerning Emergency Powers: Hearings Before the Senate Spec. Comm. on the Termination of the Nat'l Emergency*, 93rd Cong., 1st Sess. 83 (1973) (statement of Professor G. Casper) [hereinafter *National Emergency Hearings*].

many individuals such as Senator William Fullbright to argue that "the price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past."[28]

The National Emergency that President Truman declared on December 16, 1950, in response to the developing Korean conflict remained in effect for almost twenty-five years.[29] That emergency proclamation triggered extraordinary presidential power to

> seize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and, in many other ways, manage every aspect of the lives of all American citizens.[30]

Faced with this deeply held sense of indefinite crisis, Congress enacted hundreds of statutes providing the Executive Branch with broad emergency power. By the 1970s, some 470 such statutes existed, delegating power to the Executive over virtually every facet of American life.[31] Some of the legislation contained positively draconian provisions. For example, the Internal Security Act of 1950 authorized the President to detain all persons whom the government had a "reasonable ground" to believe "probably" would commit or conspire to commit acts of espionage or sabotage.[32] While the detained person was entitled to an administrative hearing and appeal, the Act did not provide for trial before an Article III court, nor for the confrontation

---

28. J. William Fullbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 CORNELL L.Q. 1, 7 (1961). *See also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 163-64 (1973).

29. Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

30. S. REP. NO. 93-1170, at 2 (1974).

31. *See* S. REP. NO. 93-1170, at 2-3 (1974).

32. Internal Security Act of 1950, Pub. L. No. 81-831, § 103, 64 Stat. 987, 1021 (1950) (repealed in 1971). ROBERT J. GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT 322-24 (1978). Congress appropriated $775,000 in 1952 to set up six detention camps in Arizona, Florida, Pennsylvania, Oklahoma and California. *Id.* at 324. The emergency detention provision of the Internal Security Act was drawn up with the aid of ACLU attorneys and supported by Senate liberals such as Hubert Humphrey, Wayne Morse and Paul Douglas. *Id.* at 366. Indeed, the Act, as represssive and dangerous as it might seem in retrospect, caused concern to the FBI, which had been maintaining a list of persons to arrest under a more flexible Justice Department plan that could be invoked in a time of 'threatened invasion" against "dangerous persons," a practice which continued after passage of the Act. Although the ISA was finally repealed in 1971, forms of emergency detention aided FEMA plan. BEN BRADLEE, JR., GUTS AND GLORY: THE RISE AND FALL OF OLIVER NORTH 132 (1988) (A draft of an Executive Order proposed by FEMA plan is said to have contained a provision for "alien control" and "detention of enemy aliens."); *see also* United States v. Salerno, 481 U.S. 739, 748 (1987) (dictum on constitutionality of aliens' internment during wartime).

and cross-examination of adverse witnesses. Moreover, in most of the emergency legislation, vague terms[33] triggered executive power for unspecified lengths of time.

The judiciary was extremely deferential. The *Curtiss-Wright* court's dicta about the President's "plenary and exclusive power" over matters connected with foreign affairs[34] lent legitimacy to the doctrine of inherent and unilateral executive power to conduct foreign affairs. Furthermore, the court's wartime detention rulings adopted an extremely deferential "reasonableness" standard of review, concluding merely that the court could not "reject as unfounded" the military's claim of necessity.[35] Many lower federal courts simply refused to review the validity of actions taken during a national security emergency.[36] To the extent that the courts reviewed the exercise of emergency powers, they read Congress' delegations broadly and upheld executive authority.[37]

Even the bright spot in judicial restriction of executive emergency power—*Youngstown Sheet and Tube Co. v. Sawyer*[38]—had the effect of muddying the line between emergency and non-emergency power. Although advocates of congressional authority look to *Youngstown*'s invalidation of the President's seizure of the steel mills as the basis for imposing limits on

---

33. See *National Emergency Hearings*, *supra* note 27, at 256 (statement of Mr. Miller).

34. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

35. Korematsu v. United States, 323 U.S. 214, 218-19 (1944); Hirabayashi v. United States, 320 U.S. 81, 95 (1943) (holding that the standard is whether the government has "reasonable ground for believing that the threat is real"). *But cf.* Duncan v. Kahanamoku, 327 U.S. 304, 336 (1946) (Stone, J., concurring) ("But executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency.").

36. *See, e.g.*, Sardino v. Fed. Reserve Bank of N.Y., 361 F.2d 106, 109 (2d Cir. 1966); United States v. Yoshida Int'l Inc., 526 F.2d 560, 579, 581 n.32 (C.C.P.A. 1975) (stating that the court will not review presidential judgment that a national emergency exists, although it will review whether the President's acts are within statutory authority); Beacon Prod. Corp. v. Reagan, 633 F. Supp. 1191, 1194-95 (D. Mass. 1986), *aff'd*, 814 F.2d 1 (1st Cir. 1987) (deciding whether a national emergency as defined by statute existed with respect to Nicaragua in 1984 presents a non-justiciable political question); *see also* Perpich v. United States Dep't of Def., 66 F. Supp. 1319 (D. Minn. 1987), *reh'g en banc granted*, 880 F.2d 11, 30 (8th Cir. 1989) (finding the determination of existence of national emergency involves "central political question"). *See generally* CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 256-64 (1989) (discussing judicial reluctance to adjudicate cases involving Executive emergency powers since 1918).

37. *Yoshida*, 526 F.2d at 573.

38. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

executive authority,[39] the decision contains the seeds for an expansion of the President's emergency power. The legal realist perspective of the concurrences of Justice Jackson and Justice Frankfurter, rather than the formalism of Justice Black's majority opinion, now dominates the national security establishment's view of the Constitution.[40] By emphasizing fluid constitutional arrangements between Congress and the President instead of the fixed liberal dichotomies bounding executive power, the legal realist approach to the Constitution and foreign affairs has effectively supported the extension of executive emergency authority.[41] The Burger and Rehnquist courts have subsequently utilized *Youngstown* to uphold broad assertions of executive power.[42]

Not until the 1970s, after the disaster in Vietnam and the Watergate scandal, did Congress move to terminate the ongoing national emergency that had existed since 1950 and to control executive emergency powers. The Church Committee and a host of other congressional committees detailed the

---

39. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1282-85, 1309 (1988) (stating that *Youngstown* assumes dialogue and general consensus between Congress and the President about substantive foreign policy ends); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1119-20 (1985) (arguing *Youngstown* requires congressional approval of executive action in violation of international law); Michael J. Glennon, *The War Power Resolution: Sad Record, Dismal Promise*, 17 LOY. L.A. L. REV. 657, 661 (1984) (arguing that *Youngstown* supports the War Powers Resolution).

40. *See* Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Non-Judicial Model*, 43 U. CHI. L. REV. 463, 465-66 (1976). *See also* Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 212, 221 (1945) (arguing against mechanical or formalistic view of Constitution); Eugene V. Rostow, *Response to "A More Effective System" for Foreign Relations: The Constitutional Framework*, 61 VA. L. REV. 797, 798 (1975); Zbigniew Brzezinski, *Forging a Bipartisan and Strategic Approach to Foreign Affairs*, 43 U. MIAMI L. REV. 5, 6 (1988) (President Carter's National Security Adviser argues, "the Constitution does not hand down clear cut guidelines for the process of shaping national security policy[,]" leaving legislative and executive powers "blended" in an "inevitably . . . fluid" relationship).

41. For example, Secretary of State Williams Rogers opposed the War Powers Resolution as unconstitutional, because "it would attempt to fix in detail, or 'freeze' the allocation of power between the President and Congress." S. REP. NO. 93-220, at 18 (1973). *See also* Edwin Meese III, *Constitutional Fidelity and Foreign Affairs*, 43 U. MIAMI L. REV. 223, 224 (1988) (arguing that ambiguity regarding limits and congressional versus executive authority makes struggle to define these limits "more political than constitutional"). Advocates of a forceful assertation of United States power abroad have also eschewed the strict, formal rules restraining the use of force contained in the U.N. Charter in favor of a more fluid, "realistic" perspective. As Ambassador Jeane Kirkpatrick argued in defending the United States invasion of Grenada, "[t]he prohibitions against the use of force in the UN Charter are contextual, not absolute." Ved P. Nanda, *The United States Armed Intervention in Grenada-Impact on World Order*, 14 CAL. W. INT'L L.J. 395, 418 (1984).

42. Dames & Moore v. Regan, 453 U.S. 654, 668 (1981).

innumerable abuses that had been committed under the guise of emergency or war authority.[43] These committees criticized the ongoing, virtually permanent emergency, which like Old Man River in the musical *Showboat*, kept on rolling along.[44] Congress enacted a number of reform statutes—the War Powers Resolution in 1973,[45] the National Emergencies Act in 1976, which terminated all emergency authority based on the past presidential declarations of emergency,[46] and the International Emergency Economic Powers Act.[47] Post Watergate presidents have unfortunately sought to evade the structures of these statutes limiting executive authority, and neither Congress nor the courts have vigorously enforced them.

The end of the Cold War did lead to some relaxation of the feeling of perpetual crisis that had pervaded post World War II America. The 1990s witnessed the United States defending against various threats—Saddam Hussein, drugs, illegal immigrants, terrorists, rogue states, human rights abusing dictators—but without the overriding sense of fear and national crisis of the prior four decades. The awful, devastating attacks on September 11 wrought a new, legitimate sense of fear and danger. Terrorism replaced Communism as the overriding evil propelling America's relations with the world.

The post September 11 war against terrorism has taken on frighteningly similar aspects to the Cold War against Communism. The Bush Administration states that we will again be involved in a long-term, virtually permanent war.[48] The war against terrorism threatens to form a backdrop to an increasing garrison state authority evoking the shadowy war that forms the background to George Orwell's novel, *1984*.[49] This new, low level, but

---

43. S. REP. NO. 94-755 (1976); H. REP. NO. 95-459 (1977), S. REP. NO. 94-1168 (1976).

44. OSCAR HAMMERSTEIN II, *Ol' Man River*, *in* SHOWBOAT (1927).

45. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

46. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601 (1994)).

47. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. Supp. V §§ 1701 (1994)).

48. As Defense Secretary Donald H. Rumsfeld stated, the war against terrorism will be "a marathon . . . not a sprint." Defense Secretary Donald H. Rumsfeld, Department of Defense News Briefing (Sept. 20, 2001) transcript, *available at* http://www.defenselink.mil/news/Sep2001/t092001_t920ruma.html. See also Rumsfeld's statement that, "This is not something that begins with a significant event or ends with a significant event. It is something that will involve a sustained effort over a good period of time." Defense Secretary Donald H. Rumsfeld, Department of Defense Briefing (Sept. 25, 2001) transcript, *available at* http://www.defenselink.mil/news/Sep2001/t09252001_t095sd.html.

49. GEORGE ORWELL, 1984 (Harcourt, Brace 1949).

always prevalent "warm" war, has the potential to lead us back to the worst abuses of the Cold War.

There is, of course, no end in sight to the war against terrorism, and as the Bush Administration has defined the war, it is difficult to even foresee an end. First, it is unclear who the terrorist enemy is. As former C.I.A. Director R. James Woolsey pointed out immediately after the September 11 attacks, "It is clear now, as it was on December 7, 1941, that the United States is at war. The question is: with whom?"[50] That question remains unanswered. While we clearly are at war with the Taliban and Al Qaeda, that military action is only the opening salvo in a broader war against the new evil. Various government officials have pointed out that their objective is not merely to destroy the perpetrators, aiders and abettors of the September 11 attacks, which is all Congress has authorized, but "more broadly to go after terrorism wherever we find it in the world."[51] Under the rubric of defeating terrorism, the Administration has sent troops to the Philippines, and Indonesia, and is contemplating a commitment of forces and monies to Georgia and Columbia. New military outposts for the extrusion of American power will be established throughout the world, most prominently for the moment in Central Asia.[52] International terrorism, like domestic murder will probably never be totally eliminated: it thus can justify continued emergency restrictions. Moreover, the Administration has now expanded the war on terrorism to include rogue states such as Iraq, Iran, North Korea and unnamed others—denoted the "axis of evil."[53] Every insurgency around the globe can potentially be linked to international terrorism, as they formerly were associated with Soviet Communism—and states such as Cuba which have no connection to international terrorism, but are obstacles to U.S. policy, may also be so defined.

As with the Cold War, the new war on terror will probably not involve massive pitched battles, but a continuous "lukewarm" war involving an ongoing low level of hostilities and covert operations. The war against terrorism has been defined in the same terms as the war against Communism—between good and evil, freedom versus barbarism, and the

---

50. David Von Drehle, *World War, Cold War Won. Now, the Gray War*, WASH. POST, Sept. 12, 2001, at A9.

51. Robert S. Dudney, *Verbatim Special*, AIR FORCE MAG., Nov. 2001, at 42 (quoting Colin Powell, State Dep't Briefing, 9-12-01).

52. Bruce Cumings, *Reflections on "Containment,"* THE NATION, Mar. 4, 2002, at 19.

53. David Shribman, *State of the Nation Address*, BOSTON GLOBE, Jan. 30, 2002, at A1.

"fight of the free world against the forces of darkness."[54] This war on terror threatens, under the guise of wartime, emergency regulations, to return our society to the garrison state mentality of the Cold War, with its tragic and long term consequences for civil liberties. Indeed, we have already traveled a significant distance down that road.

IV. THE CURRENT ASSAULT ON CIVIL LIBERTIES

Since September 11, the Bush Administration has utilized two broad mechanisms to curtail civil liberties and restore practices reminiscent of the Cold War. The first has been the invocation of executive authority, utilizing the President's powers as commander-in-chief or inherent executive emergency power. Second, the Administration secured Congress's passage of the USA PATRIOT Act, which provides for detention of suspected terrorists, defines terrorism vaguely and broadly, and accords the Executive Branch expanded surveillance power to fight terrorism.

A. Executive Emergency Power

The government has detained over 1,200, mostly Muslim, aliens in connection with its ongoing investigation into the September 11 attacks. Most of these were held for at least several months in jail; many are still being held.[55] Only one of these detainees has thus far been charged with any offense related to the terrorist attacks of September 11.[56] A handful are being held as material witnesses.[57] The rest of the over 1,200 detainees were either not charged with any violation, charged with minor immigration offenses for which they normally would not have been jailed, or charged with violations of federal law unconnected to terrorism such as lying to the FBI.[58]

---

54. Herb Keinon, *Sharon Declares Day of Mourning*, JERUSALEM POST, Sept. 12, 2001, at I.

55. Amnesty International, *United States of America Amnesty International's Concerns Regarding Post September 11 Detentions in the USA* (Mar. 2002), *available at* http://www.aiusa.org/usacrisis/9.11.detentions2.pdf ("By mid-February, 327 people picked up in the post 9.11 sweeps were reported to be still in INS custody."). *Cf.* Reuters, *Hundreds of Arabs Still Detained in U.S. Jails* (Mar. 13, 2002), *available at* http://www.reuters.com/printerfriendly.jhtml?type=search&StoryID=696703 (on file with the University of Pittsburgh Law Review) (Arab American Institute Chairman James Zogby believes that 327 detainees are from original detentions just after September 11, but that the real number of detainees as of March was as high as 2,000).

56. *See, e.g.*, Amy Goldstein, *"I Want to Go Home"; Detainee Tony Oulai Awaits End of 4-Month Legal Limbo*, WASH. POST., Jan. 26, 2002, at A1.

57. *Id.*

58. *See* Amnesty International, *supra* note 55.

Many of these detainees have been held in solitary confinement in which they are kept in their cells 23 hours a day. They are held virtually incommunicado, being allowed one call a week. Some were shifted from prison to prison to avoid their lawyers, family or friends from contacting them.[59] The government has refused to release the names of those detained, a policy the Attorney General justified by stating that "[w]hen the United States is at war I will not share valuable intelligence with our enemies."[60]

Many of the detainees obviously had nothing to do with the September 11 attacks or international terrorism and were detained on the flimsiest of evidence. A Yemeni man was arrested after accompanying his American wife to her military base in Kentucky because his wife was wearing a hejab (the head scarf that many Muslim women wear), they were noticed speaking a foreign language—French—and they had in their suitcase box cutters which they had both used in their work.[61] He was held almost two months without any evidence ever being presented against him. His wife, who had also been detained, accepted an honorable discharge from the Army.[62]

Other similarly harrowing stories of detention based on no evidence have emerged.[63] Indeed the Justice Department has continued to indefinitely detain at least 87 aliens picked up on visa violations who have been given departure orders and simply want to be deported.[64] However, the government is waiting, sometimes months, for the FBI to complete background checks to clear them.[65] Some of these detainees are being held pursuant to the government's "mosaic" theory, which argues that the investigation into international terrorism is "akin to the construction of a mosaic and the involvement of any one suspect cannot be ruled out until the entire picture is understood."[66]

While the recently enacted USA PATRIOT Act provides the Attorney General with authority to detain a non-citizen for as long as seven days without being charged with a crime upon certification that he has "reasonable

---

59. *See, e.g.*, Goldstein, *supra* note 56. See generally Amnesty International, *supra* note 55, on conditions of detention.

60. Hanna Rosin, *Groups Find Way to Get Names of INS Detainees; Presentations on Rights Planned in NJ Facilities*, WASH. POST, Jan. 31, 2002, at A16.

61. *See* Ali al-Maqtari, Testimony Before the Senate Judiciary Committee (Dec. 4, 2001), *available at* http://judiciary.senate.gov/te120401F-al-Maqtari.htm (on file with author).

62. *Id.*

63. Amy Goldstein, *No Evidence in Pilot's Case; West African Still Held as Material Witness in Attack Probe*, WASH. POST, Feb. 2, 2002, at A20.

64. *See* Christopher Drew & Judith Miller, *Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. TIMES, Feb. 18, 2002, at A1.

65. *Id.*

66. Goldstein, *supra* note 56.

grounds to believe" that a non-citizen is engaged in terrorist activities or other activities that threaten national security, the government is apparently not relying on that Act for its authority to detain over 1,000 non-citizens. Instead, it has relied on an extraordinary emergency interim regulation announced by the Attorney General on September 17, 2001.[67]

The interim emergency regulation permits the INS in times of "emergency or extraordinary circumstances" to detain an alien, whom it has reason to believe is indefinitely in violation of a law, "for a reasonable period of time" while it investigates the detainee.[68] While this regulation is in conflict with the later enacted PATRIOT Act, which only provides for detention for seven days without some charge being filed against the detainee, the Bush Administration has not repealed it. Indeed, many detainees were held for many weeks prior to being charged with any violation whatsoever.[69]

The detention of more than a thousand non-citizens for months has been aided by another emergency regulation promulgated by the Attorney General. Ordinarily a person detained on immigration charges receives a hearing before an immigration judge in which the judge decides whether to release the alien on bond.[70] If the judge decides to grant bond then the person is released unless the INS can convince the Board of Immigration Appeals—the appellate review body within the INS—to stay the granting of bond.[71] Pursuant to an interim rule issued by the Department of Justice on October 26, 2001, the INS now obtains an automatic stay of bond pending appeal, which de facto keeps the alien detained for at least another year pending the disposition of the appeal.[72] Of course, for most INS judges, the Attorney General's submission of an affidavit stating that national security—based on the mosaic theory of investigation requiring that the alien be detained—suffices to deny the bond. But those few judges who nonetheless have decided to grant bond have seen their bond decisions automatically stayed by virtue of the new emergency regulation.

Moreover, pursuant to another emergency regulation, the INS trials of those detained in connection with the terrorism investigation are conducted in

---

67. Interim Rule with Request for Comment, 66 Fed. Reg. 48334-35 (Sept. 17, 2001) (to be codified at 8 C.F.R. § 287).

68. *Id.* at 48334.

69. Amnesty International, *supra* note 55, at 11 ("In 36 out of 718 cases, the individuals were charged 28 days or more after their arrest.").

70. *See* Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. 54910 (Oct. 31, 2001).

71. *Id.*

72. *Id.*

secret with only the alien and his or her lawyer allowed to attend.[73] Nor are their cases "listed on any public docket,'[74] and the Justice Department will not confirm or deny whether such cases are even scheduled for a hearing.[75]

In essence, what the government has undertaken is a policy of preventive detention, using either mere suspicion or minor violations to hold aliens. For example, a 21-year-old Egyptian man, Wael Abdel Rahman Kishk, was convicted in February 2002 of lying to the FBI about his plans to study aviation.[76] The government, which had already held him in a harsh form of solitary confinement, sought a long prison sentence for Kishk even though it agreed that there was no allegation or evidence that he was in any way connected to terrorism.[77] District Court Judge Sifton rejected the prosecution's request stating, "[i]t will not do to prosecute people for a minor crime, . . . and then ask us to punish them based on some suspicion that they may have committed some more serious offense."[78] Through a myriad of mechanisms, the government is detaining people under harsh conditions on the mere suspicion that they may commit a crime, rather than any evidence that they have done so or will do so.[79]

The Justice Department also imposed new emergency restrictions that did not go through the usual procedures providing for extensive public comment. These restrictions permit the Justice Department to monitor confidential attorney-client conversations in any case in which the Attorney General finds that there is a "reasonable suspicion" to believe that a federal prisoner "may use communications with attorneys or their agents to further or facilitate acts

---

73. This policy was set forth in a memorandum from Chief Immigration Judge Michael J. Creppy (Sept. 21, 2001), *see* Amnesty International, *supra* note 55, at 7.

74. JAMES X. DEMPSEY & DAVID COLE, TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 149 (2d ed. 2002).

75. Amnesty International, *supra* note 55, at 7 ("This restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing.").

76. William Glaberson, *Judge Rejects Long Prison Term for Arab Caught in Terror Sweep*, N.Y. TIMES, Feb. 16, 2002, at A8.

77. *Id. See also* Katherine E. Finkelstein, *Sept. 11 Shadow Lingers as Egyptian's Trial Begins*, N.Y. TIMES, Jan. 14, 2002, at A9.

78. Glaberson, *supra* note 76.

79. *See, e.g.*, Mark Fineman et al., *Alleged "Trainer" of Sept. 11 Attackers is Granted Bail; Terrorism: Britain Frees Algerian Pilot after U.S. Fails to Produce Concrete Evidence Against Him*, L.A. TIMES, Feb. 13, 2002, at A1 (suggesting U.S. law enforcement officials have made detaining individuals to prevent another attack their top priority, paying less attention to evidence gathering techniques used to build a criminal case); Goldstein, *supra* note 56 (detailing how an African was being detained for months where his only violation was of an FAA regulatory rule, which an FAA spokesman says is "not something that you put somebody in custody for").

of violence or terrorism."[80] Current law already accords the Justice Department authority to record attorney-client conversations where it believes the attorney is facilitating a crime; however, the Department must first obtain a warrant from a judge based on a showing of probable cause.[81] Under the new regulation, the Justice Department can itself determine when to monitor these conversations, based on a virtually standardless "reasonable suspicion," without being subject to any judicial review.[82]

In another, little known emergency regulation promulgated at the same time as the new attorney-client monitoring provision, the Justice Department is now allowed to hold an inmate incommunicado in solitary confinement for a year, which may be extended indefinitely where the head of an intelligence agency certifies that "there is a danger that the inmate will disclose classified information . . . [that would] pose a threat to the national security."[83] A number of leftist prisoners, such as seventy-seven year old peace activist Philip Berrigan, were placed in solitary confinement after the September 11 attacks, leading some to believe that the Justice Department's regulation has nothing to do with fighting terrorism but rather with penalizing radical dissent.[84]

Moreover, the Bush Administration has used the September 11 attacks as a national security justification for increasing government secrecy. Subsequent to those attacks, Attorney General Ashcroft issued a new policy that reversed the Clinton Administration's position of disclosing information pursuant to Freedom of Information Act (FOIA) requests unless it was "reasonably foreseeable that disclosure would be harmful."[85] The Ashcroft policy instead instructs federal agencies to withhold information whenever an

---

80. National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062-63 (Oct. 30, 2001) (to be codified at 28 C.F.R. § 501.3(d)).

81. *See* United States v. Harrelson, 754 F.2d 1153, 1168-69 (5th Cir. 1985). *See generally* Nadine Strossen, *Testimony of Nadine Strossen, President of the American Civil Liberties Union, Before Congressman John Conyers' Forum on Nat'l Security and the Constitution available at* http:/www.aclu.org/congress/l012402a.html.

82. Since the new regulation requires that notice be provided to the individual whose conversations are being monitored, it is unlikely to yield any information about terrorist acts but will only have the effect of interfering with the attorney-client relationship.

83. National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55065 (Oct. 30, 2001) (to be codified at 28 C.F.R. § 501.2(c)). The old regulation limited the period of time to 120 days, which could be extended.

84. *See* Anne-Marie Cusac, *You're in the Hole: A Crackdown on Dissident Prisoners*, THE PROGRESSIVE, Dec. 2001, at 31.

85. Strossen, *supra* note 81.

argument could be made that there is a "sound legal basis" for doing so.[86] Under this standard the government has denied a request for the CIA's budget for 1947, even though the 1997 and 1998 CIA budgets have been declassified and are public.[87] Similarly, an Executive Order issued November 1, 2001, gives the President the right to assert executive privilege to veto requests to open presidential records, including those where a former president wants his records released. This Executive Order violates the Presidential Records Act passed by Congress in 1978.

This secrecy issue is merely one subset of a broader push by the Bush Administration "to draw a line in a different spot than previously has been drawn in the separation of powers."[88] Bush opposed Congress granting statutory authority to Homeland Security Director Tom Ridge, thus allowing Ridge to refuse congressional requests to testify. He at first ordered that sensitive intelligence briefings be limited to only eight members of Congress, in violation of current law, before backing down under congressional pressure. Bush has invoked presidential authority to sidestep a law requiring the Executive Branch to provide Congress with written notice of U.S. intelligence activities.[89] In sum, the Administration has not only elevated government privacy while it dilutes the privacy of its citizens, it has used the anti-terrorism security rationale to extend its power vis-a-vis Congress.[90] The current emergency and war against terrorism has been thus used to justify a permanent expansion of executive power and secrecy.

The Bush Administration has also openly resorted to racial profiling. In a November 9, 2001 directive, the Attorney General ordered the FBI and other law enforcement to conduct interviews of at least 5,000 non-citizen men who had come from countries where terrorist activities are known or believed to occur. Questions inquired into these men's political beliefs and those of their families and friends. This policy is not merely constitutionally suspect but has been criticized as counterproductive by former high FBI officials, including William Webster, in that it is unlikely to succeed in ferreting out any valuable information. One former high official has termed this technique, "[t]he Perry

---

86. *Id.*

87. *See* David Rosenbaum, *When Government Doesn't Tell*, N.Y. TIMES, Feb. 3, 2002, § 4, at 1.

88. Dana Milbank, *In War, Its Power to the President; In Aftermath of Attacks, Bush White House Claims Authority Rivaling FDR's*, WASH. POST, Nov. 20, 2001, at A1 (quoting David Walker, Director of the GAO).

89. Heidi Przybyla, *Bush to Ignore Rule on Written Notices of Intelligence*, BLOOMBERG NEWS, Dec. 28, 2001.

90. Anne E. Kornblut, *Bush's Stance on Secrecy Draws a Number of Critics: Papers, Pretzel Cited as Instances Lacking Disclosure*, BOSTON GLOBE, Feb. 11, 2002, at A3.

Mason School of Law Enforcement, where you get them in there and they confess."[91] In addition to these racially based interrogations, the Justice Department has also decided to speed up deportations of 6,000 people who are in violation of their immigration status, based solely on national or ethnic origin—in essence resorting to selective prosecution. These Justice Department actions have encouraged other governmental and private racial or ethnic profiling of Arabs, Muslims or South Asians.[92]

Perhaps the best example of purported emergency action which threatens to indefinitely transform civil liberties is President Bush's November 13, 2001 "Military Order" permitting indefinite detention of any non-citizen accused of terrorism, and trial of such defendants by a military tribunal with limited due process protections and no judicial review.[93] The order announced that any non-U.S. citizen that the President declared a suspected terrorist, or believed "knowingly harbored" a terrorist could be tried before a military commission rather that an ordinary criminal court.[94] The order contained no definition of international terrorism and was so broad as to be potentially applicable to Columbian drug lords, revolutionaries, PLO fighters, IRA members, or foreign members of anti-globalization groups.

This order immediately came under intense criticism from civil libertarians and many conservatives such as columnist William Safire and Representative Bob Barr of Georgia. The government backtracked and announced that the rules it actually promulgated would respond to the criticism and incorporate more protections than the order facially provides.

Nonetheless, the increased protection likely to be provided in the rules eventually set forth are unlikely to alter the fact that the November 13 Military Order encapsulates the core of the current war on terrorism: the Executive Branch is carrying out an indefinite war against an ill-defined and amorphous enemy in which it claims the unilateral prerogative to define "terrorists" or those who "harbor" terrorists, and treat them under wartime rules and not accord them the ordinary protections of the criminal justice system. Congress has not provided the President with such power. It has not declared war, and its authorization for the use of force against those who committed or aided and abetted the September 11 attacks pointedly refused to grant the President the

---

91. Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism; Detention of Suspects Not Effective, They Say*, WASH. POST, Nov. 28, 2001, at A1.

92. Strossen, *supra* note 81.

93. Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833-57836 (Nov. 16, 2001).

94. *Id.*

additional authority to use force to go after "international terrorism," which the Bush Administration had originally sought.[95]

The defense of the military tribunals is premised on terrorism as essentially a new form of war—an ongoing war, without a clear beginning or end, conducted by enemies who are not entitled to protection under either the laws of war or the laws of peace. Therefore, the government has unilaterally refused to accord either the Taliban or Al Qaeda detainees held on Guantanamo POW status, has refused international demands that these detainees status ought to be determined by a competent international tribunal, and has asserted the right to hold them indefinitely.[96] What the war on terrorism fundamentally eviscerates—as demonstrated by the President's military order and the government's treatment of the Guantanamo detainees—is any dividing line between war and peace. The war against terrorism takes place in the interstices between a state of war and peace. But are we as a nation really prepared to permit, for the indefinite future, the president to define the suspected terrorists as individuals in any one of "dozens of countries—including the United States"[97] and prosecute them in a manner inconsistent with the values we hold as a nation?

B. USA PATRIOT Act

On October 25, 2001, Congress enacted the USA PATRIOT Act ("Act"). The process by which the Act became law reflects the crisis environment pervading the country after September 11. The Senate passed the Act with only one dissenting vote, while in the House, a compromise bill that had broad bipartisan support and which the Judiciary Committee had unanimously voted out of committee was scrapped literally overnight in favor of a new bill supported by the leadership. The House voted overwhelmingly the next day to adopt the massive new bill with some members complaining that they had not even gotten a complete copy of what they were voting on.

The Act threatens to resurrect many of the abuses reminiscent of the Cold War. For example, in 1991 Congress repealed the much criticized provision

---

95. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

96. *See, e.g.*, Letter from the Inter-American Commission on Human Rights (Mar. 13, 2002) (*available at* www.oas.org) (on file with author) (adopting pre-cautionary measures to require the U.S. to submit detainee status to a decision by a complete international tribunal).

97. *See* Secretary of Defense Donald H. Rumsfeld, Testimony Before the Senate Armed Forces Committee "Military Commissions" (Dec. 12, 2001) (transcript on file with the University of Pittsburgh Law Review).

of the McCarran-Walter Act which permitted the government to deny entry to any immigrant because their speech or writings supported Communism.[98] Section 411 of the Act resurrects this provision but substitutes terrorism for Communism.[99] The government can bar entry to non-citizens whom the Secretary of State determines make "public endorsement of acts of terrorist activity" or who use their "position of prominence within any country to endorse or espouse terrorist activity" where such speech undermines United States anti-terrorism efforts. Similarly Section 411 of the Act vastly expands the class of immigrants that can be removed on terrorism grounds, just as communist immigrants were removed in the 1950s.[100] Section 411 defines terrorist activity to encompass any crime that involves the use of a weapon or dangerous device other than for mere personal monetary gain.[101] Similarly, the term engage in terrorist activity has also been expanded to include providing material support to a "terrorist organization" even when that organization has legitimate political and humanitarian ends and the non-citizen seeks only to support those lawful ends.[102] Thus, an alien who supports a day care center run by the IRA can be deported for terrorism. And as already mentioned, Section 412 of the Act gives the Attorney General the authority to effectively detain indefinitely an alien who has been charged with a criminal or immigration violation when he determines that the non-citizen is engaged in terrorist activities or other activities that threaten national security.[103]

The Act also revives another practice that characterized the Cold War which allows intelligence agencies to circumvent the Fourth Amendment and potentially resume domestic spying on domestic groups under the guise of collecting foreign intelligence. In 1975, a special Senate Committee, the "Church Committee," found that the FBI had conducted a broad campaign of surveillance on disruptive political groups that were not engaged in illegal conduct.[104] One of the important abuses that the Church Committee reported was that intelligence agencies had infringed upon privacy interests through the

98. *See* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995).

99. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272, 345 (2001) [hereinafter *USA PATRIOT Act*].

100. *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

101. *USA PATRIOT Act*, *supra* note 99, at § 411(a) (amending 8 U.S.C. § 1182(a)(3)).

102. *See* Nancy Chang, *The USA PATRIOT Act: What's So Patriotic About Trampling on the Bill of Rights, Center for Constitutional Rights*, Nov. 2001, *available at* http://www.ccr-ny.org/whatsnew/usa_patriot_act.asp.

103. *USA PATRIOT Act*, *supra* note 99, at § 412(a).

104. *Church Committee*, *supra* note 25.

Executive Branch's use of electronic surveillance and other intelligence collection techniques for national security purposes.[105] The Church Committee recommended that all electronic surveillance for intelligence purposes within the United States be restricted to FBI monitoring, undertaken pursuant to a judicial warrant.[106] The eventual result was the enactment of a compromise statute, the Foreign Intelligence Surveillance Act (FISA) in 1978.[107] FISA creates an exception to the general rule that wiretapping is permitted only when there is probable cause to believe a crime has been committed and a judge signs a warrant. The FISA permitted wiretapping to be carried out to gather foreign intelligence without a showing of probable cause where a special secret court, the Foreign Intelligence Surveillance Court, approved such wiretapping.[108] Critics have accused that court of being no more than a rubber stamp for the intelligence agencies, and in its 22-year history it has authorized over 13,000 wiretaps without apparently ever denying a request.[109]

Nevertheless, the FISA did contain a critical restriction to ensure that foreign intelligence gathering was limited to situations where "*the* purpose of the surveillance is to obtain foreign intelligence information."[110] While that language suggests the *sole* purpose of the wiretapping must be for gathering foreign intelligence, some courts required only that the surveillance be conducted "primarily" for foreign intelligence reasons.[111]

---

105. *Id.* at 151-53, 169-70, 183-92, 198-202, 290. The Executive Branch utilized approximately 7,000 warrantless wiretaps and 2,200 microphone installations between 1940 and the mid-1960s in investigations concerning foreign intelligence agents and Communist Party leaders, as well as major criminal activities. *See Electronic Surveillance Within the United States for Foreign Intelligence Purposes: Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Comm. on Intelligence*, 94th Cong., 2d Sess. at 25 (1976) (statement by Attorney General Levi). *See* Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793 (1989).

106. *Church Committee*, *supra* note 25, at 299, 302, 327-28.

107. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.* (1978).

108. *Id.* at §§ 1804(a)(7)(B), 1823(a)(7)(B).

109. *See* Michael Ratner, *Moving Toward a Police State (Or Have We Arrived?) Secret Military Tribunals, Mass Arrests and Disappearances, Wiretapping & Torture, Counter Punch*, Nov. 20, 2001, *available at* http://www.counterpunch.org/ratner5.html. *See also* Cinquegrana, *supra* note 105, at 814-15 (stating that no government request for electronic surveillance has been denied by the court during its first ten years).

110. 50 U.S.C. § 1804(a)(7)(B) (1978) (emphasis added).

111. See United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980); United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984). *See generally* CONGRESSIONAL RESEARCH SERVICE, TERRORISM: SECTION BY SECTION ANALYSIS OF THE USA PATRIOT ACT 14, 15 n.6.

Section 218 of the USA PATRIOT Act amends the statute to permit wiretaps under FISA's lax standards even if the primary purpose of the surveillance is criminal investigation, as long as the gathering of foreign intelligence is "a significant purpose" of the surveillance.[112] This allows law enforcement to circumvent the Fourth Amendment and could lead to the resumption of domestic spying on government enemies under the guise of combating terrorism. Indeed, even prior to the Act, there is evidence that police forces were using anti-terrorism to justify spying on purely lawful domestic legal and political groups.[113] What Section 218 and other provisions of the Act clearly do is encourage "a closer working relationship between criminal and intelligence investigators than has previously been the case."[114] In doing so, the Act muddles the line between foreign intelligence gathering and domestic law enforcement that led so pervasively to abuses during the Cold War. Not only does the Act permit warrantless wiretaps where foreign intelligence gathering is not the primary object of surveillance, it also allows for increased sharing between criminal and intelligence operations.[115] While all these measures have arguable justifications as counter-terrorism measures, they open the door to a resurgence of domestic spying on political groups by the FBI and CIA.

The Executive Branch's justification for what hitherto was perceived by courts to be unconstitutional is the wartime authority of the President. In a letter sent to key Senators while Congress was deliberating over the USA PATRIOT Act, Assistant Attorney General Daniel J. Bryant of DOJ's Office of Legislative Affairs argued:

> As Commander-in-Chief, *the President must be able to use whatever means necessary to prevent attacks upon the United States*; this power, by implication, includes the authority to collect information necessary to its effective exercise.... The government's interest has changed from merely conducting foreign intelligence surveillance to counter intelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself. The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others.... Here, for Fourth Amendment purposes, the right to self-defense is not that of an individual, but that of the nation and

---

112. *USA PATRIOT Act*, *supra* note 99, at § 218 (amending 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B)).

113. *Denver Police Files Raise Rights Concerns*, N.Y. TIMES, Mar. 14, 2002, at A25; Sean Kelly, *Cities Share Protester Files, Police Departments Call Practice Proactive*, DENVER POST, Mar. 13, 2002, at A1.

114. *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 111, at 14.

115. *USA PATRIOT Act*, *supra* note 99, at § 203.

> its citizens. . . . *If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.*[116]

Therefore, as long as the war on terrorism continues, the Executive Branch's argument would justify warrantless searches.

Congress also reacted to the emergency by granting the Administration its long-standing wish list of enhanced surveillance tools, along with little or no judicial or congressional oversight.[117] Congress gave the Executive Branch authority to disregard the Fourth Amendment's "common law" knock and announce principle for searches, and instead engage in "sneak and peek searches," or covert searches of a person's home or office that are conducted without notifying the person until after the search has been completed.[118] The Act permits the government to spy on web surfing by innocent Americans by merely asserting to a judge that the spying could lead to information that is relevant to an ongoing criminal investigation. The person spied on does not have to be the target of the investigation. The court must grant the application which requires no subsequent report to either the court or the spied upon individual.[119]

Finally, the Act creates a number of new, often vaguely defined crimes. One of the most dangerous to domestic dissenters is the new crime of "domestic terrorism." Section 802 defines domestic terrorism as those "acts dangerous to human life that are a violation of the criminal laws," if they "appear to be intended . . . to influence the policy of a government by intimidation or coercion" and if they "occur primarily within the territorial jurisdiction of the United States."[120] Under this definition, the anti-globalization demonstrators against the World Trade Organization in Seattle, could be subject to prosecution as "domestic terrorists." Another provision of the Act makes it a crime for a person to fail to notify the FBI if he or she has "reasonable grounds to believe" that someone is about to commit a terrorist offense, a definition so vague as to render innocent Americans subject to prosecution if they have a connection to a person who turns out to be a terrorist.

---

116. Chang, *supra* note 102, at 2.

117. *Id.*

118. *USA PATRIOT Act*, *supra* note 99, at § 213 (amending 18 U.S.C. § 3103a).

119. See Electronic Frontier Foundation, *EFF Analysis of the Provisions of the USA Patriot Act that Relate to Online Activities* (Oct. 31, 2001), *available at* http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.html.

120. *USA PATRIOT Act*, *supra* note 99, at § 802 (amending 18 U.S.C. § 2331).

The good news about the USA PATRIOT Act is that Congress wisely included a sunset clause providing that some, but not all of the Act's provisions will expire on December 31, 2005.[121] However, most of the Act, including the provisions involving immigrants, new crimes, and some of the new expanded surveillance powers such as the "sneak and peek" searches are not included in the sunset provision. Moreover, it is unclear how Congress will review how several of these key provisions have been implemented, since some of them are implemented by a secret court, there are no reporting requirements to Congress, and in many cases, no reporting requirements even to a judge. Most fundamentally, if by December 2005 we are still engaged in "warfare" against terrorism, as we are very likely to be, the pressure upon Congress will be immense to continue these provisions into the future. To use Justice Jackson's metaphor, the question will be whether the sunset will devolve into a hazy twilight zone, where executive emergency powers are believed needed to protect against the harkening forces of darkness.

CONCLUSION

The response to the September 11 attacks threatens to place our nation in a permanent war footing. The war on terrorism is now being extended to justify actions that have little, if anything, to do with responding to Al Qaeda or other terrorist organizations. The enunciation of a new doctrine permitting pre-emptive strikes against other countries has been justified by the new post September 11 environment, which Bush Administration officials claim no longer allows us the luxury of waiting until threats become imminent or eventuate. Similarly, the threat of war against Iraq has also been tied to the ongoing war against terrorism. The war against terrorism thus seems likely to justify continued, ongoing, American military intervention abroad, just as the struggle against Communism performed that function during the Cold War.

Domestically, the September 11 attacks create the possibility that the Government will revive the permanent state of emergency that existed for most of the cold war era. Only if we constantly remember the excesses and violations of civil rights and liberties that stemmed from the cold war invocation of national emergency, will we be able to avoid repeating those errors in responding to the threat posed by terrorism.

---

121. *USA PATRIOT Act*, *supra* note 99, at § 224.