

**The Balance between American Civil Liberties and Security
Objectives**

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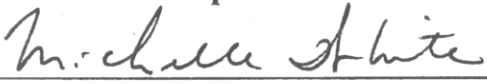
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I. Introduction: Civil Liberties and Security

At the core of the American identity is a deeply-imbedded belief that certain freedoms are almost sacred; at the very least, most Americans would champion the liberties provided by their Constitution. And many veterans of this country's wars fought simply to defend American freedoms. It would seem to follow, then, that Americans would not stand for the diminution of their constitutionally guaranteed civil liberties. However, this is exactly what has happened historically when the domestic security of the United States has been threatened. In the name of furnishing American citizens with more physical protection, the federal government has compromised citizens' liberties on a number of occasions. This has occurred during the past year, since the September 11 attacks on New York City and Washington, D.C.

This paper asserts that the Bush administration and Congress have taken action since the 9-11 attacks to diminish the level of civil liberties guaranteed in America. This has been done in the name of providing greater security for the American people. Limiting civil liberties during war or other crises does have historical precedence; here the legality and morality of such action is questioned. This ultimately violates the American spirit of "unalienable rights," offends the Constitution, and serves the American people a great injustice.

Of the actions taken during the last year, particularly offensive is the USA PATRIOT Act, which extends surveillance powers, decreases individual rights, increases the powers of the Executive branch, and limits the powers of the Legislative

and Judicial branches to review the Executive's decisions. This paper examines, as a case study, the circumstances surrounding the USA PATRIOT Act's passage and analyzes the ways in which it legislates the violation of civil liberties in America. It identifies how the limiting of liberties has come to be an accepted way of coping with security threats and underscores why this practice violates democratic ideals and should not be tolerated in a free society.

The paper begins with an examination of the history of civil liberties during war or other domestic crises in the United States. In general, the historical evidence indicates that the federal government has been granted broad and extended powers in the name of providing a better defense for the United States, in spite of the fact that most of the actions taken to restrict liberties become, later, sources of regret and embarrassment for the government. Moreover, there is no clear evidence that the restriction of liberties actually provides greater security. This history of offenses then relates to the current state of civil liberties in the United States; the historical basis for diminishing civil liberties has contributed to the Bush administration's ability to pursue greater restriction of liberties than ever before in the United States. Focusing particularly on the USA PATRIOT Act, it is then possible to examine the results of this legislation in terms of what it has actually done to the protection of liberties in the United States and how it will continue to affect them. Looking at policies stemming from the Act, this paper makes some predictions about the future of liberties in the United States, particularly as the courts begin to rule on the constitutionality of post 9-11 legislation.

There are two fundamental problems with curbing democratic civil liberties during crises. First, certain civil liberties are guaranteed by the Constitution. Security is a concern in the document, but it places a greater focus on liberties. American citizens are given freedom of speech, protection from unwarranted searches and seizures, and shelter from unreasonable incarceration, among many other specifically enumerated rights. The Constitution is comparatively quiet on the subjects of defense and security. In the way of security, it provides for the maintenance of an army and ways to fund such an army, and specifies instances during which some rights of citizens may be temporarily restricted by Congress (S. 103-6 1992). In the balancing of liberties and security, the founding fathers would have argued in favor of liberty. They built the nation around certain inviolable rights. The other problem with favoring security over liberties is that there is little compelling information indicating that many of the measures either taken in the past or those being taken by the current administration significantly diminish our threat of attack. Even if proof was offered that diminishing civil liberties improves domestic security, can a free society stand for a “big-brother”-style of governing, with citizens’ moves being monitored and their actions censored, all in the name of protecting people from themselves?

None of this is said to minimize the seriousness of threats to the security of the United States. Abraham Lincoln posed the question, "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" when arguing for the suspension of certain liberties during the Civil War (Rehnquist

1999, 1). War and civil unrest place tremendous strain on a government. But there are many possible sources of protection such as diplomacy or a well-armed defense system. In the case of insurrection or revolt from within, the Constitution has provided for the President calling up a militia. However, many methods of protection require advance planning, diplomatic deftness, and the ability and willingness to cooperate with other groups or nations; these are all tactics and skills in which every nation shows deficiency at some times, and the United States is no exception. Instead, other provisions for security have been made “at home” when domestic security has been challenged: restricting movement, increasing surveillance, “wire-tapping,” trying citizens without benefit of a jury, and suspending the writ of habeas corpus. The practices that provide the readiest defense for a country under attack, particularly domestic attack or threat from within, are not necessarily those best suited to either safeguarding civil liberties or behaving according to democratic standards.

At the heart of this paper is an exploration of the tensions that arise when the interest of protecting the civil liberties of the citizens of the United States conflicts with the mandate to protect the physical security of these same citizens. As Bruce Jentleson explains in *American Foreign Policy: The Dynamics of Choice in the 21st Century*: “[A] major recurring foreign policy politics debate has been over the tension between the demands and exigencies of safeguarding the nation's security, and the guarantees of individual rights and civil liberties ensconced in the Bill of Rights” (Jentleson 2000, 91). There are two sides to the issue: On the one hand, people like

James Madison and Thomas Jefferson championed the rule and protection of the Constitution and the liberties entrenched within the document. On the other hand, men like James Hamilton and Abraham Lincoln maintained that if the Union is not preserved and protected, there is no context within which liberties may be preserved (Rehnquist 1999). This paper finds that, while the preservation of the Union is, of course, necessary, it can both be preserved and protected without sacrificing the values that lie at its very heart. It is not necessary to destroy citizens' liberties in order to provide for the country's defense.

A. The Historical Legacy of War in the United States

An historical overview of war and other crises in United States history indicates that there is a tendency to restrict civil liberties in an effort to ensure greater safety during times of war or other crises when the physical security of the United States is threatened. Several factors weigh into the situations where rights are reduced, and some of these are discussed below. At least some of the reasoning behind the restricting of rights can be traced to the legal, systemic, and political causes and effects of war in the United States; however, it is not necessary for the United States to be at war officially in order for civil liberties to be affected. Sometimes it is enough for the country simply to be experiencing some sort of crisis.

Historical evidence indicates when making a comparison of some different crises in the United States that, just after a serious threat emerges, a “rally around the flag effect” occurs (Snow and Brown 2000). This means, in effect, that public opinion is propelled in such a manner, often out of fear and anger, that the public unites behind one or several government officials, usually the President. This unity lends almost unquestioning support for government plans and can serve to silence dissenting opinions so that sometimes it is relatively easy for the government to pass undemocratic measures. These measures are often taken by some sort of joint action between Congress and the President. When these initial measures later come before the Supreme Court, if the nation is still at war or the crisis still exists, the Court will usually rule in favor of the actions taken by the other two government branches. It is typically not until after a distance of some time that the public regrets the actions

taken to restrict liberties, but this usually does happen eventually. In spite of this later regret, this pattern continues to repeat itself.

This section begins with a discussion of the legal environment in America that provides for the country's protection and at the same time protects civil liberties. It looks at several trends in history that have allowed for the diminution of civil liberties during war or crises and examines a few specific historical cases. Indeed, there is nothing extraordinary about these cases. The paper examines these instances because of certain similarities with the events of September 11 and the particular rights that were restricted; there are many other cases, which hold relevance as well. But in none of the below cases, and in none of the research for this paper, was there any indication that at any time in United States' history the reduction of civil liberties resulted in greater security. Preventative incarcerations have failed to yield spies or criminals within society; individuals held without a writ of *habeas corpus* have later proved their innocence; mass arrests have resulted in embarrassment when it has later come to light the number of innocent bystanders who were arrested along with the guilty. And yet today, the same argument is used that has been used since the beginning of American history: sometimes liberties have to be sacrificed in order to protect citizens. In actuality, this sacrifice is unnecessary. Restricting civil liberties has not improved security in the past; it will not do so in the future.

Legal Issues: How does the United States go to war? Technically, the country is only "officially" at war with a declaration from Congress. Article I, Section 8 of the Constitution authorizes Congress to "have Power . . . to declare War" (S. 103-6

1992). But the United States has fought many "wars," or at least engaged in warlike conduct, without any official declaration from Congress. In fact, "of the more than two-hundred instances in which U.S. armed forces have been used abroad [in the last two centuries], only five have been sanctioned by formal declarations of war:" the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II (Snow and Brown 2000, 175).

Other, "unofficial" wars have included the Korean War, the Vietnam War, the Gulf War, Kosovo, Somalia, and countless other skirmishes in which the United States has used force. Where does the legal authorization for using this type of force come from? Even as the Constitution gives Congress the authority to declare war, it makes the President the commander-and-chief of the armed forces. Thus, American presidents have been given at least some basic power with which to order combative operations. Additionally, Congress has authorized military force through legislation without officially declaring a war, as it did with the Gulf of Tonkin resolution in 1964, in Lebanon in 1983, and in the Persian Gulf in 1991 (Snow and Brown 2000).

The Constitution does not provide a clear prescription for the treatment of rights during war, although it does authorize the restriction of some rights under some circumstances. For example, in Article I, Section 9, we find "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (S. 103-6 1992). Therefore, the case may be made that there are many instances when it is appropriate to suspend this right. But the words "rebellion" and "invasion," in fact, serve to limit the Constitution's

applicability; the language does not specifically mention war. When the United States is at war with another country that has not attacked the United States, and no citizens are actively rebelling, the authority does not exist to suspend the writ of *habeas corpus* for people simply because they are suspected of being enemy supporters. Then, too, from this rule's inclusion in Article I, we may infer that only Congress has the authority to suspend *habeas corpus*. However, as we see below, presidents have assumed this prerogative for themselves.

The American System: The United States' three branches of government serve to check and balance one another, ensuring that individuals' rights are protected, no one branch becomes too powerful, and democracy is preserved. The character of the American political system is a product of these inter-branch checks and balances. This paper is not meant to address all of the intricacies of the American political system, but there are a few elements that both result from the interactions of the three powers and affect the treatment of civil liberties in the United States. Actually, to be more specific, the effects of war on civil liberties are often felt through the filter (or, sometimes, amplifier) of the three-branch system. When facing a threat, the President is usually the first to react; being able to respond as an individual gives him greater mobility than the legislative branch. Congress will then respond to his actions, statements, or requests. They might provide funding or officially condemn an attack. Throughout a crisis, the President and Congress together provide the nation's response. The President can promise one sort of action or assert a particular stance, but he must have backing from Congress in order to mobilize most prolonged military

actions or to fund most operations. Stateside, Congress must lend its support for many domestic security measures the President may seek to take. Later it is likely that at least some of these measures will come before the Supreme Court. Then the Judicial Branch must rule on the measures' legality, and set the final precedent for future action.

The Increasing Power of the President: The Constitution gives Congress the official power to declare war. Because it is not otherwise specified, this includes war, both abroad and at home. Additionally, because of its power over the purse, Congress may either appropriate funds or refuse to appropriate them for the waging of war. These powers were intended as a check on the executive branch to ensure that wars were not fought simply because of the personal interests of the President (S. 103-6 1992). However, increasingly the President has been able to fight wars or engage in war-like behavior with little or no approval from Congress. There are a variety of factors that have contributed to this phenomenon.

Times of war do lend special power and authority to the Executive, as the need emerges for one decision maker, one spokesman, who can represent a unified front to enemies or hostile powers. Alexander Hamilton first clarified this position in The Federalist Papers #70 when he stated, "Energy in the Executive provides 'decision, activity, secrecy and dispatch'" (Hamilton 70). He can make decisions quickly and respond to emergencies. This unified front he can convey does become important when an entire country's resources and efforts are to be poured into defeating that one enemy (Jentleson 2000). However, times of war also greatly alter

the balance of power inherent in the Constitution. Without its checks and balances, what is in place to stop the President's grip on power from spiraling out of control as American policy becomes more and more simply the policy of one person? The founding fathers created this balance in part to prevent tyranny in the system they created. And if public opinion is, in fact, in favor of the wishes of the executive, do we enter a time when the Constitution becomes subservient to the ebb and flow of American public opinion?

Donald Snow and Eugene Brown attribute the president's growing powers to "an assortment of informal sources of presidential influence" (2000, 100). Among these informal powers, international diplomacy, shaping public opinion, and presidential doctrines, they list the president's singularity as the key reason he is able to garner such an increasing share of the power; and the factor that gives him an edge over Congress: "he is a single, universally known leader, whereas the Congress is inherently a rather faceless corporate body comprised of 535 members" (2000, 127). During the past century, the United States has encountered increasing numbers of situations where it has been necessary for quick decisions to be made, and the president is often best-suited to make those decisions. Presidents have come to embrace a role as head of the country in times of crisis, rather than as head of one branch of the three branches sharing equal power. For example, when the Japanese invaded Pearl Harbor, a decision was needed immediately—a president can order that action, and Congress and the Supreme Court can back up the action later.

This increased power has several effects on the executive branch as a whole. First, it becomes necessary to have more and stronger executive branch departments and agencies. This, argues Jentleson, has created the ‘national security state’ (2000, 24). The workings of the executive branch also become dangerously autonomous and are checked less and less by the other branches. Executive Orders can take on the same role as laws from Congress—but without much oversight. These increased powers have allowed presidents to abridge Americans’ liberties.

The increasing power of several of the agencies within the executive branch further asserts the growing power of the executive and increases the size of the national security state. During the Cold War, the Department of Defense, the State Department, and the various intelligence agencies all underwent fundamental changes in their structure and role, and each of these departments within the executive branch of government grew in strength and autonomy, further increasing the strength of the executive branch and its ability to act independently from the other branches of government. Also, the role of the President’s advisors from within these agencies cannot be underestimated in terms of their effects on the makings of American policy (Jentleson 2000). For example, what would the Nixon administration have been without the counsel of Henry Kissinger? Cabinet officials must have Senate confirmation, which lends some oversight to the President’s advisory staff, however he is also influenced by non-confirmed actors and other advisors who do not have to receive Senate approval.

The power of the executive branch of government, combined with other factors, has served to increase the power of the President. This is especially pronounced during times of crisis. As we see below, when this one individual is granted powers beyond the scope of his Constitutional mandate, he steps outside of the original framework of checks and balances provided by the Constitution. And his power, unchecked, can reach a point where it allows the violation of the country's civil liberties.

B. Incidental History

Lincoln, the Civil War, and Rights in the Union: Lincoln's response to the attack on Fort Sumter in 1861, when the United States' Congress was at recess, is a good example of how a United States President reacted, unchecked by Congress, during a time of crisis. Decisions about the country and the conflict had to be made, even if legislative consultation was not possible. This instance also affords us a chance to see the repercussions of attacks that come from within society, rather than from external sources.

Article I, Section 9 of the Constitution gives Congress authority over the writ of habeas corpus: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it" (S. 103-6 1992). At the outbreak of the Civil War, Congress was not in session, and President Lincoln feared internal insurrection. Clinton Rossiter classifies the period of time between the fall of Fort Sumter and July 4, 1861 as "the most interesting single episode in the history of constitutional dictatorship." Rossiter adds, "The simple fact that one man was the government of the United States in the most critical period in all its 165 years, and that he acted on no precedent and under no restraint makes this the paragon of all democratic, constitutional dictatorships" (1948, 200).

Lincoln's interpretation of his role as President was that it was his personal responsibility to secure the Union's future. Of Lincoln's address to Congress explaining his actions in 1861, Rossiter says,

There was something greater than the Constitution, without which that charter had no meaning—the Union . . . He had little concern for the institution from which his actions were to take; he meant only to act—a President, as Commander in Chief, as the man whose duty it was to secure the faithful execution of the laws and as the sole possessor of the indefinite grant of executive power in Article II of the Constitution [Rossiter 1948, 375].

On April 15, 1861, Lincoln issued an executive proclamation, calling for a civilian militia and setting the day for an emergency session of Congress to convene in July. Rossiter supposes that the President did not immediately ask Congress to convene because he hoped to avoid the possibility of a divided Congress confusing the issue by simply handling it himself. And he did manage the entire beginning of the war by himself. The Constitution clearly gives Congress (not the President) the authority to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” (S. 103-6 1992, Article I, Section 9). Not only did he call the militia—he enlarged the army and navy, appropriated funds for the measures, directed federal treasury funds to private citizens without legislative authority, and offered loans on the credit of the US. All of these activities are legally under the jurisdiction of Congress (S. 103-6 1992 and Rossiter 1948).

Lincoln took further steps, which abridged American rights. He issued a proclamation on April 27 effectively suspending the writ of habeas corpus “in the face of the almost unanimous opinion that the constitutional clause regulating the suspension of the writ of habeas corpus was directed to Congress alone, and that the President did not share in this power of suspension” (Rossiter 1948, 227). Finally, President Lincoln authorized special civil and military agencies to arrest and detain in

military custody any individuals “who were represented to him as being or about to engage in disloyal and treasonable practices” (Rossiter 1948, 228). As a result, he effectively halted much of the country’s freedom of movement.

It is here in the course of United States history that we see the coinage of the term “War Powers” (Rossiter 1948, 228). When Congress met in July, President Lincoln gave an explanation for all that had transpired, claiming authorization under the emergency powers of the Constitution. This marked the first point in American history for such a claim to be laid to the Constitution: that it did contain certain war powers. Congress sanctioned “all the acts, proclamations, and orders of the President respecting the army and navy of the United States and calling out or relating to the militia or volunteers from the Unites States” (Ibid 230). Further, the Supreme Court ruled in one of the Prize Cases (in 1862) that

A civil war exists, and may be prosecuted on the same footing as if those opposing the government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that Courts cannot be kept open . . . [and] . . . All persons residing within the territory occupied by the hostile party in this contest [the Civil war] are liable to be treated as enemies, though not foreigners. [67 U.S. 635]

It was not until some time later that historians would note the broad allowances that had been given to the President, much broader than what a more conservative reading of the Constitution would indicate.

World War II and Japanese-Americans: Public opinion, escalated by fear, provided the government with much of the incentive and reasoning required to

relocate and imprison Japanese Americans during World War II. Racism and hostile actions toward Japanese-Americans was not uncommon when the Japanese attacked Pearl Harbor, and the attack did nothing to improve their popularity. Espionage from within the ranks of Japanese -Americans was suspected and the loyalty of citizens questioned. After the attack on Pearl Harbor, the threat of war in the Pacific loomed large for Americans on the West Coast, especially in California. Americans feared that more attacks were in the future and that these attacks might hit the contiguous United States the next time. Spurred by fears from the general populace, a call for relocation of Japanese-Americans went out among political elites in California, including Governor Culbert Olson, Attorney General Earl Warren, and Los Angeles Mayor Fletcher Bouron. “Earl Warren . . . was a consultant on the Order. He wrote: ‘We believe that when we are dealing with the Caucasian race we have methods that will test the loyalty of them . . . But when dealing with the Japanese we are in an entirely different field and we cannot form any opinion that we believe to be sound’” (47 S.D.L. Rev. 85). On February 11, 1942, Secretary of War Henry Stimson acquired approval from President Roosevelt in the form of Executive Order 9066 for the removal of Japanese Americans from the West Coast. This was to include, not only those who had been born in Japan and emigrated to the United States, but also Japanese-American citizens of the United States, who had been born in the country and were afforded full citizenship status. Stimson later recalled:

. . . the War Department ordered the evacuation of more than 100,000 persons of Japanese origin from strategic areas on the west coast . . . [this was] eventually approved by the Supreme Court as a legitimate exercise of the war powers of the President. What critics ignored was the situation that led up to

the evacuation. Japanese raids on the West Coast seemed not only possible but probable in the first months of the war, and it was quite impossible to be sure that the raiders would not receive important help from individuals of Japanese origin. [Rehnquist 1991, 190]

The basic line of reasoning was that the maintenance of domestic security required the imprisonment of at least some of the Japanese Americans: the ones who were spies, and, not knowing who they were, it was safest to just go ahead and imprison all people of Japanese heritage. Security loomed as more important than the rights of citizens.

Later the Supreme Court supported these actions, and it was not until President Reagan was in the White House that full responsibility was taken for the incarcerations of the Japanese-Americans and an official apology was issued. In the *Korematsu* (1945) opinion, this reasoning followed when ruling in favor of the government:

Distinctions between citizens solely because of their ancestry are . . . odious to a free people whose institutions are founded upon the doctrine of equality . . . these considerations would be controlling . . . were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas . . . to cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue . . . [Korematsu v. U.S. 1945]

The *Korematsu* decision stands today. The precedent set by the treatment of Japanese Americans during World War II allows for the preventative detention of citizens.

Vietnam and Washington's Mayday Protests: There were an array of civil rights abuses during the Vietnam conflict; however, for our purposes here we will look at a few days of protest in Washington, D.C. during 1970 and the arrests that

ensued. The Vietnam War, generally, is extremely difficult to categorize in terms of political or legal issues, however, elements of the Mayday protests provide valuable data for this study.

In May of 1970, war protestors organized protests intended to “tie up Washington traffic, paralyze the city, and confront American leaders . . .” (DeBenedetti 1990, 385). Law enforcement officials, who were being directed by President Nixon via Deputy Attorney General Richard Kleindienst were ready for the protests with military blockades and live ammunition. During the protests over 7,000 people were arrested. The arrests were more than simply arbitrary; federal workers, shoppers, and other bystanders were rounded up and taken into police custody (Ibid).

The way law enforcement and the army handled the protesters reminded many of an undeclared martial law. A Nixon aide called their response a “military attack,” and a *Newsweek* reporter said that the troops patrolling the streets “seemed more appropriate to Saigon in wartime than Washington” (Wells 1994, 305). According to Tom Wells in *The War Within*, “Martial law might not have been declared, but it was in effect” (Wells 1994, 503). Washington’s Chief of Police, Jerry Wilson, in collaboration with the Justice Department, “dispensed with [the police department’s] standard arrest procedures, not bothering even to charge the protestors with any offense; on field arrest forms, under ‘arresting officer,’ they belatedly filled in the names and badge numbers of seven officers ‘on a rotating basis’ (Wells 1994, 503). Moreover, again according to Wells, “Officials acted to ‘keep those arrested out of circulation’ for at least twelve hours; consequently ‘extreme delays’ marked their

processing” (1994, 503). The rights of those incarcerated were hardly respected; after there was no more room in city jails, protestors were finally crammed into RFK Stadium, where they were forced to stay for hours with no food or bathrooms. Dr. Benjamin Spock, who was one of the detained, remarked that “Calling this a concentration camp would be a very apt description” (Wells 1994, 504).

Essentially the protestors—and the other people who were unlucky enough to walk in the proximity of the area—were denied due process and illegally detained. Though this particular case never went before the Supreme Court, the U.S. District Court in Washington, D.C. awarded damages to the ACLU in 1981 on behalf of the antiwar demonstrators and others who were detained in the stadium because, the court ruled, they were falsely arrested and imprisoned and denied free speech (Kiernan 1981).

Reflective of the divided public opinion toward the Vietnam War, Michal Belknap states that

Cases involving the Vietnam War offer little support for the generalizations of either friend or foe. In these cases the Court exhibited little of the activism and eagerness to usurp the policy-making role of the political branches for which critics have faulted it [and which it showed on most other issues]. Nor did Warren and his colleagues display in litigation spawned by antiwar protest the commitment to defending and enhancing individual rights that endeared them to liberals. [1981 1]

Today most scholars would accept that there were wide abuses of civil liberties during the Vietnam War as protests grew in power; in this case, the rights to freedom of movement and due process were denied and thousands were imprisoned without warrant or charge.

An overview of some domestic crises in the United States indicates that there is definitely a tendency to restrict civil liberties in the name of providing greater security. Generally these measures are enacted by the President, Congress gives its approval, and the Supreme Court either endorses the measures or refuses to rule on them. It is not until later that the abuses are widely criticized. Granted, hindsight is 20/20, and in retrospect it is comparatively easy to pinpoint cases where abuses have taken place unnecessarily. However, the pattern produced by these historical examples indicates that it is not necessary to wait until later in history to regret unnecessary or unconstitutional action; civil liberties must be upheld, even during war or crises.

II. The Initial Response to Attack: The USA PATRIOT Act, A Case Study

Since the September 11, 2001 terrorist incidences in New York City and Washington, D.C., American domestic security has been challenged in a different manner than at any other point in the country's history. Prior to the attacks, who would have thought it conceivable that the most militarily powerful country on earth could be brought to a standstill by 21 men, 4 airplanes, and a few box cutters? This incident mocked the country's security paradigm. Just prior to September 11, the focus of the Bush administration, the FBI, and the CIA had been on nuclear and ballistic missiles, creating a missile defense shield, and scrapping the ABM treaty. It shocked everyone when the terrorists attacked America in the manner that they did.

This section analyzes actions taken by the Bush administration in the aftermath of the September 11 attacks. The United States had not been attacked on its own soil since the War of 1812 and never before in this devastating manner. The way the situation would be handled would surely set an example for future occurrences of this nature. In particular, this section focuses on the USA PATRIOT Act (H.R. 3162 2001) and the circumstances surrounding its passage. In order for the Act to pass at all, much less in the manner and amount of time that it did, special circumstances were required. It was easier to pass the legislation because of extended executive powers, a frightened American public demanding action, and a Congress united by the passions created by the terrorist enemies. There are several particular challenges to civil liberties in the USA PATRIOT Act. It gives the Executive Branch extended

and unchecked powers, increases surveillance capabilities, and outlines an array of new criminal offenses for which individuals may be incarcerated indefinitely.

As outlined above, the United States government has allowed these types of breaches of civil liberties in the past. However, allowing the Constitution to be undermined in any fashion establishes unfortunate precedent, since it creates tolerance for this manner of behavior in the future. In reference to increased surveillance of Americans, some would argue that only those guilty of crimes will be caught committing them; therefore, to protest these violations makes one seem, not only unpatriotic, but also fearful of search and, thus, guilty. But the American system has historically prided itself on protecting the rights of everyone, including those accused of crimes. So-called “preventative” measures, detaining those most likely to be terrorists, searching homes where terrorist activity might be going on, and other similarly undemocratic behavior stands contrary to the very ideals upon which the US system was founded. In the days following the terrorist attacks of September 11, President Bush claimed that one of the key elements in American society the terrorists were attacking was American freedom. Many claim that, if that was the case, then they were successful, as through the last year, we have seen many of our fundamental rights take a backseat to our government's pursuit of terrorists.

The environment created by public fear and a desire to respond immediately to the September 11 attacks contributed greatly to the swift passage of the USA PATRIOT Act and the shoddy treatment of civil liberties during the start of the “war on terrorism.” Why are people so willing to surrender their rights in times of crisis?

In “Flying the Flag and Surrendering Liberty,” Timothy Verceletti makes the connection between a frightened public and its willingness to surrender some liberties: "fear is the underlying emotion that links symbolic patriotism and intolerance of civil liberties" (2002). This was an obvious factor in the events following the September 11 attacks. It does appear that, in many instances, the government was given permission to diminish the American people's rights by the majority of the public who were willing to tolerate a reduction in liberties. Herbert McClosky and Alida Brill assert that,

It is a mark of patriotism in its more zealous forms that its adherents are hypersensitive to questions of social order and national security. They are inclined to perceive serious dangers both from within and from without, from domestic as well as foreign 'enemies.' Partly because of these fears, they tend to error on the side of intolerance, rather than tolerance, to check dissenters and to forestall or crush assaults (real or imagined) upon the venerated nation and its institutions--or at least the institutions they cherish. [1983, 325]

Perhaps some of these feelings underscore Secretary of Defense Donald Rumsfeld rhetoric when he says,

This is not a law enforcement action. It is war. We seek to defeat or destroy our terrorist enemies, so they cannot harm Americans. When coalition forces storm a Taliban compound or an al-Qaeda safe house, they cannot first ask for a search warrant . . . Their objective is to stop the terrorists and prevent them from continuing to threaten our country . . . The US military is doing this in Afghanistan . . . But the terrorists who threaten us are not only in Afghanistan. They operate in dozens of countries—including the United States . . . the President has made it clear that we will hunt them down wherever they hide. [Rumsfeld 2001]

When officials can make effective appeals to patriotic sentiments, it is often easier, especially in times of crisis, to use such appeals to manipulate a frightened or angry

public. And the American people were both frightened and angry after the 9-11 attacks. There was a great deal of uncertainty in the air; no one knew when or how another attack might come. The United States seemed so unprepared for the blow it received, and the attack had come from such a comparatively weak source, that there was a heightened sense of vulnerability. These sentiments are reflected in public opinion polls and in the public's nearly unquestioning support of the Bush administration and Congress.

The Gallup approval rating for President Bush stood at 51% at the beginning of September, 2001 (www.pollingreport.com). Immediately following the September 11 attacks, according to the Gallup News Service, "the rally effect for President George W. Bush was evidenced by a jump of almost 40 points . . ." (Moore 2002). His approval shot rating shot up to 86% and peaked in late September at 90%, "the highest approval rating recorded for any president by the Gallup Organization," which has been conducting such polls since Franklin D. Roosevelt was in the White House. Polls showed that, not only did the American public approve of Bush, they also approved of the decisions he was making. According to the same Gallup poll, trust in the government to "do what is right" jumped from 43% in mid-summer 2001 to over 60% immediately after the September 11 attacks (Moore 2002). The effect of this public support for the President cannot be ignored. Such support for the President makes it politically difficult for Congress to question the President's decisions or policies.

A. President Bush

The USA PATRIOT Act would not have been passed without President Bush's strong support. It was, in fact, written and passed in direct response to his appeals to Congress for decisive action (Bush September 20, 2001). The manner in which the President initially reacted to the attacks of September 11 echoes the responses of American Presidents before him. The country was thrown into a crisis situation, and he reacted quickly and in a forceful manner in order to deal decisively with the attacks and demonstrate to the parties responsible for the attacks the resolve with which they would be fought. Again, the tendency of American Presidents in situations such as these is to act decisively, not necessarily democratically.

President Bush's initial approach to the attacks of September 11 began with a clarity of mission, which served to emphasize his determination in responding to the attacks and the intensity with which he planned to react. He made his resolve apparent even from his first speech on September 11, 2001, when he announced, "Make no mistake: the United States will hunt down and punish those responsible for these cowardly acts . . . The resolve of our great nation is being tested. But make no mistake: we will show the world that we will pass this test" (Bush September 11, 2001). Al Qaeda was quickly identified as the perpetrator in the attacks and the Taliban, its "chief governmental protector," was told to either to cooperate or risk becoming a target as well. The demands for cooperation were specific and clear (Leman 2002). On September 20, 2001, President Bush addressed a joint session of Congress, during which he both thanked Congress for its previous support and asked

for continued and increased support, including "the additional tools [law enforcement] needs to track down terror here at home" (Bush September 20, 2001). Charged with the mission to pass legislation to help "bring our enemies to justice, or bring justice to our enemies," Congress went back to its chambers to quickly write and pass the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) (H.R. 3162 2001).

At this time President Bush also began to make direct appeals to Americans'; he appealed to their pride in the nation's freedom by linking the new war to a battle for ideals: "America was targeted for attack because we're the brightest beacon for freedom in the world" (Bush September 11, 2001). "[W]e are a nation awakened to danger and called to defend freedom . . . [E]nemies of freedom committed an act of war against our country" (Bush September 20, 2001). By deeming this an attack on freedom, the President elevated the stakes of the battles that were to come; we were not simply fighting for land, money, or oil, we were defending our fundamental beliefs. Throughout this period of time, President Bush's approval rating continued to maintain its unprecedented highs; by the end of October 2001, it still stood at 88% (www.pollingreport.com).

Bush undertook a series of steps designed to find the terrorists, defeat their plans, and prevent future attacks by cutting into not only their manpower supply, but their intelligence capabilities and finances as well. The USA PATRIOT Act provided the key part of this plan. Propelled by overwhelming public support, the aggressive

measures detailed in the Act were proposed and implemented in the name of prevention and deterrence. These measures began simply with searches at airports and increased security at many public events and places where large numbers of people would be gathered. From this starting point, the measures taken by the federal government have escalated in the name of protecting American security, growing more intrusive along the way.

The official name for the war on terrorism is "Operation Enduring Freedom," "[From] [Bush's] very first speeches following the horrifying events of September 11, President Bush has maintained that the terrorists attacked us because they hate our freedoms" (Cole 2002, 91). But, as David Cole continues to point out, ". . . one year later, it appears that the greatest threat to our freedoms is posed not by the terrorists themselves but by our own government's response" (Cole 2002, 91). The attacks established a patriotic basis around which the country could rally: "The moral light of patriotism, along with its meaning, has been cast in drastically different hues: in terms of a sense of duty and service to the state, the uncritical support of government programs and policies, and the veneration of the nation as an absolute value" (DeBenedetti 2002). All of this sentiment weighed heavily on the decisions of Congress as the USA PATRIOT Act came before them.

B. USA PATRIOT Act

Civil liberties advocates point out a number of problematic elements in the USA PATRIOT Act. Specifically, it not only grants the executive branch a great extension of powers, but at the same time it limits the oversight of the use of these powers by Congress and the Judiciary. It allows for greater permissiveness in the way of surveillance of individuals, including American citizens, than ever before, while making it easier to obtain search warrants, and possible to obtain them without giving the searched party notice until after the search has been conducted. In general, the Act neatly sidesteps many of the constitutional safeguards of our liberties and provides little recourse for those unfairly searched, needlessly detained, and falsely accused.

The Problematic Passage of the Act: There are many problems with the USA PATRIOT Act. It was hastily written and discussed only briefly even in committee. Then, both on the House and the Senate floors, it was barely debated and passed with no amendment. Representative Barney Frank, a democrat from Massachusetts, and Senator Robert Byrd, a democrat from West Virginia, have both been particularly vocal in their criticism of the manner in which the Act was passed and continue to be critical of its content. Representative Frank expressed his concern, saying:

Mr. Speaker, I do not know how I am going to vote on this bill yet because I have a notion that a bill of this weight, I ought to read it.

What I want to talk about now is my deep disappointment in the procedure. The gentleman from Wisconsin (Mr. Sensenbrenner), the chairman of the committee, has fought hard for a fair chance for the Members to look at things; but on the whole, his efforts have not been honored.

We now, for the second time, are debating on the floor a bill of very profound significance for the constitutional structure and security of our country. In neither case has any Member been allowed to offer a single amendment. At no point in the debate in this very profound set of issues have we had a procedure whereby the most democratic institution in our government, the House of Representatives, engages in democracy.

Who decided that to defend democracy we had to degrade it? Who decided that the very openness and participation and debate and weighing of issues, who decided that was a defect at a time of crisis? This is a chance for us to show the world that democracy is a source of strength, that with our military strength and our determination and our unity of purpose goes a continued respect for the profound way in which a democracy functions.

This bill, ironically, which has been given all of these high-flying acronyms, it is the PATRIOT Bill, it is the USA bill, it is the stand up and sing the Star Spangled Banner bill, has been debated in the most undemocratic way possible, and it is not worthy of this institution. [*Congressional Record* October 11, 2002]

But in an effort to appear unified, every effort to avoid dissent from the floor in both the House and the Senate was made, and the bill passed unamended. Representative Conyers (D-Mich) reacted, saying "a legislative body that does not debate is being railroaded whether they know it or not"(*Congressional Record* October 16, 2002).

Senator Robert Byrd (D-WVA) has also been critical of the Act from its passage, and continues to vocalize his dislike for its specific disregard of liberties.

Speaking on the Senate floor in early October 2001, he commented that

Our responsibility as senators is to carefully consider and fully debate major policy matters, to air all sides of the issue, to act only after full deliberation . . . Yes, we want to respond quickly to urgent needs, but a speedy response should not be used as an excuse to trample full and free debate [Radmacher 2001].

The USA PATRIOT Act was thus passed even in a rather undemocratic manner. However, its real attacks upon civil liberties come in the details of its legislation.

Increased Powers of the Executive: The Executive Branch, particularly the office of the Attorney General, is given greatly extended power under the USA PATRIOT Act. The Act “enhances the executives’ ability to conduct surveillance and gather intelligence, places an array of new tools at the disposal of the prosecution, including new crimes, enhanced penalties, and longer statutes of limitations . . .” (Chang 2001). Specifically, Title II of the Act, which is entitled “Enhanced Surveillance Procedures,” grants broad new surveillance powers. It authorizes law enforcement to “intercept wire, oral, and electronic communications relating to terrorism” (H.R. 3162 2001). Effectively, this gives law enforcement the right to tap telephone wires randomly and access the email of anyone suspected of having used chemical weapons or ever planning on using them (H.R. 3162 2001, Sec. 201). Many sections are vaguely worded, leaving much room for interpretation, as well as room to prosecute people for a wide variety of offenses. Title II expands the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(c)(2)(B)) to give the FBI the authority to conduct physical searches, then postpone notifying the searched party until 120 days after the search has been conducted (H.R. 3162 2001, Sec. 207). Additionally, the act expands subpoena and surveillance powers are expanded; section 2703 requires providers of electronic communication service [such as America Online] to “disclose a record or other information pertaining to a subscriber . . . to a government entity” (H.R. 3162 2001, Sec. 207) It provides little protection to

the subscriber of such a service in the way of protecting him from unreasonable or random searches. Section 213 delays “notice of the execution of a warrant if there is reasonable belief that letting the searched party know of the warrant may obscure the investigation” (H.R. 3162 2002, Sec. 213). Nancy Chang, Senior Litigation Attorney for the American Civil Liberties Union, comments that “When notice of a search is delayed, one is foreclosed from pointing out deficiencies in the warrant to the officer executing it, and from monitoring whether the search is being conducted in accordance with the warrant” (Chang 2001). All of these new powers mark extensive trespasses on American civil liberties. To reiterate, when this act passed, complete with all of these new powers, most members of Congress did not even get to read the entire 345-page-long document.

A New Arsenal of Crimes: As part of these extended powers, the office of the Attorney General receives a whole new arsenal of crimes under which it may prosecute. For example, an individual may be prosecuted simply for “[engaging] in terrorist activity” (H.R. 3162 2001, Sec. 411). Essentially, it is rather easy to be guilty of this crime. Any person who provides money, shelter, or other help to a terrorist or someone involved in a terrorist organization may be found to be guilty if the government can provide any kind of evidence that this person should have had reasonable knowledge that the person they were helping was a terrorist. Even before making such a determination, the Attorney General may incarcerate individuals who could have engaged in terrorist activity. Section 236 dismisses the need to provide a writ of habeas corpus, unless the proper paperwork is provided by the detained to the

Attorney General and he approves it. He only considers these appeals biannually, and his decisions are only reviewed by Congress annually. No judicial review of the Attorney General's decisions is provided unless he grants permission (H.R. 3162 2001, Sec. 236(B)(1)). Is it any wonder, then, that since the September 11 attacks over 2,000 potential "criminals" under the new legislation have been rounded up? At this point, only 4 have officially been charged with the above crimes; some have been released, but around 1,100 have either been deported or are being held in a state of preventative detention. Additionally, the government is under no obligation to either provide them with legal counsel, so far, or to release information to family members about their status. Essentially, the investigation of whether or not many of the detained have aided terrorists is still pending, so they remain incarcerated. (Faineru and Williams 2002)

Some potentially interesting interpretations of the Constitution have already been proposed in reference to this legislation. Assistant Attorney General Daniel J. Bryant, with reference to fourth-amendment rights, said

As Commander-in-Chief, the president must be able to use whatever means necessary to prevent attacks upon the United States . . . 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 . . . Here, for fourth amendment purposes, the right to self-defense is not that of an individual, but that of the nation and 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. [Chang 2001, italics the author's]

This is an interesting interpretation that raises the valid consideration that the United States faces a very real danger from terrorists. But Bryant is incorrect in his interpretation of the fourth amendment; such an interpretation poses serious threats to our constitutionally guaranteed freedoms. This interpretation may be related to the United States' historical experiences with violence within American borders. Bryant's argument follows along the same lines of Justice Warren, who, during his involvement with the Japanese-American internment, argued that the defense of the homeland United States was more important than the protection of those interred. This later proved to be a source of embarrassment for the country, and President Reagan issued an official apology in 1986. The United States stands to face the same type of embarrassment in the future if it permits the interpretation advocated by Bryant above. The act stands to endanger civil liberties protections in other ways. A discussion of these follows.

C. Results of the USA PATRIOT Act

Several other civil liberties offenses result from the USA PATRIOT Act and the decisions of the government that have proceeded from the same reasoning underlying its passage. In the following section this paper discusses some elements of the Office of Homeland Security, because they stand to have some of the longest-lasting detrimental effects on American civil liberties. But here some of the more immediate effects of the action taken directly from the USA PATRIOT Act are discussed. Legally, the United States treads into somewhat murky waters with the legal rights of many of the people it is dealing with. Specifically, below this paper discusses the treatment of different groups of noncitizens who are on American soil and criticize the treatment they have received and continue to receive. The Constitution guarantees many rights, but it does not necessarily extend those rights to people simply because they are on United States' soil. So while, from a strict constitutional basis, denying certain liberties to foreigners in America is not problematic, it does produce problems for American citizens in other countries. When American citizens are on foreign soil, the United States expects many of the same liberties they enjoy at home will be respected by other governments. How can we deny noncitizens in our country rights and then expect protection of our citizens who are abroad?

Detainees: The international fighting in the war on terrorism was brought home, literally, when people captured in Afghanistan fighting for the Taliban were brought to a special detention center on the United States military base in

Guantanamo Bay, Cuba. Many international groups, including the Red Cross and Amnesty International, argue that capturing these individuals in battle and bringing them to the U.S. confers upon them “prisoner of war” status under the Geneva Convention (American Civil Liberties Union 2002). However, the United States has refused to offer them this designation. Regardless of their status, members of the international public continue to question the United States about the detention of the Taliban fighters for its harshness and, many would argue, disregard of basic guarantees of human freedoms.

The two biggest problems with the detainee policy on the U.S. Guantanamo base in Cuba are that, first, it stands to potentially endanger any American captured by a foreign power we are fighting. If the United States does not honor the conventions of war, it cannot ask others to do so. It is one thing to deny basic rights of these men to trial or counsel when they are held outside of U.S. domestic land proper. But it has been proposed that other captives could be kept on bases inside the United States, where treatment of the kind the detainees are currently receiving in Cuba would be a clear violation of due process. Second, the detainment policy does not always affect just foreign fighters; American citizens have been captured along with the Taliban fighters and brought them back to the United States. Their legal status is murky, to say the least, at this point. Currently even they are all not receiving legal counsel, which denies American citizens a very fundamental right.

Requests have come from Germany, some British politicians, and the international Red Cross to give the prisoners, who are being held at Guantanamo Bay,

the designation of prisoners of war, which would "give them rights under the Geneva Conventions." However, these rights would include furnishing them trials and counsel, concessions the United States is not ready to grant. It continues to "[give] them the legally murky designation of 'unlawful combatants,'" instead of granting the full Prisoner of War status (American Civil Liberties Union 2002). Some would argue that the United States cannot confer the detainees Prisoner of War status because they are not citizens of a country that signed the Geneva Accords; they, therefore, do not receive the benefits of its conventions. But many of the detainees are citizens of Afghanistan and other signatory countries. Even though they fought for Al Qaeda, these men did not revoke their citizenship, and thus still deserve protection under the Geneva Convention.

Such status would confer upon the detainees several rights. According to Amnesty International's resolution on the Guantanamo Bay detainees:

Under the Third Geneva Convention, any dispute about their status must be determined by a 'competent tribunal' (which necessarily must fully respect the right to a fair trial). Despite claiming to fully support the Geneva Conventions, the US Government has refused to grant prisoner of war status to any of the people in its custody in Guantanamo Bay, or submit the question of each person's status to a competent tribunal to resolve the doubts about their status that plainly exist. [Amnesty International 2002]

Second, there is concern about the treatment of the prisoners who are being held: photographs released in January of the men being held in shackles did not help those who defend the treatment of the detainees. Other criticism of the treatment of these men includes complaints that they have been denied due process, access to legal counsel and the courts, and communication with family members. They also might

be held indefinitely "without charge or trial, or continued detention after acquittal, or [denied] repatriation that may threaten the principle of non-refoulement" (Amnesty International 2002). Again, this is potentially most dangerous for Americans fighting for the United States in other countries. If we do not protect the rights of our enemies, we can not expect our enemies to protect our rights.

Secretary of Defense, Donald Rumsfeld, defended the United States' position in late January of 2002, saying

The treatment of the detainees in Guantanamo Bay is proper, it's humane, it's appropriate, and it is fully consistent with international conventions. No detainee has been harmed. The numerous articles, statements, questions, allegations and breathless reports on television are undoubtedly by people who are either uninformed, misinformed, or poorly informed [Mintz and Graham 2002].

And it is not as though the detainees are just anybody picked up by the US and held without reason (they were caught actively battling the United States): ". . . the detainees are 'committed terrorists' according to Rumsfeld: 'we are keeping them off the street and out of the airlines and out of nuclear power plants and out of ports across this country and across other countries, and it seems to me a perfectly reasonable thing to do'"(Mintz and Graham 2002). However, the reasonability of keeping the detainees under the circumstances in which they are currently being held does not necessarily resonate with the international public. And as the United States continues to expand the extent of its war on terrorism, it needs as much support from the international public as it can garner.

The cases of John Walker Lindh and Yaser Hamdi pose interesting legal questions for the American legal system in this time. Both men were rounded up with

Taliban fighters in Afghanistan. John Walker Lindh was immediately transferred to American soil; however, no one discovered Hamdi's citizenship until after he had first been sent to Guantanamo. The treatment of these two men emphasizes the fact that it is not only the rights of noncitizens the United States is denying.

John Walker Lindh was the first of these two men to be captured: his capture raised a number of legal questions for the United States. First, should he be charged with treason? Was the evidence there, as well as the two corroborating witnesses required, to convict him of this accusation? Eventually the Justice Department answered this question to the negative, and Lindh was simply charged, under the new USA PATRIOT Act regulations, with the crime of engaging in terrorist activity. This charge is not difficult to prove, certainly much easier than the charge of treason. Along the path to the Justice Department's eventual victory, it set a new precedent for the systematic denial of several basic rights to a U.S. citizen. Lindh waived his right to counsel, but there is speculation that this was in response to unfair questioning tactics. He was to have received a jury trial, but ended up plea-bargaining. Yaser Hamdi has not even had the same protection as John Walker Lindh (Shora 2002).

The Hamdi case has received decidedly less attention than the Lindh case. Yaser Hamdi is an American citizen who was seized in Afghanistan, sent to Guantanamo, and is now in Virginia, being held as an enemy combatant. He was born in Louisiana and raised in Saudi Arabia. Hamdi's lawyer, Virginia Federal prosecutor, Frank Dunham, has been prevented from meeting with his client from the beginning of his incarceration. In some shocking language, in a Bush administration

brief filed in early July, they claimed that ‘Courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such’ (Rosen 2002, 2). Preventing judicial review removes citizens’ rights to a fair trial. Does this behavior not entirely remove judicial oversight from these types of cases, leaving the executive relatively unchecked by another branch of government?

After the passage of the USA PATRIOT Act, other measures were proposed, which also stood to endanger American civil liberties. Though they have not been used to date, the administration has never backed down on its assertion that it has the right to use, for example, military tribunals.

Military Tribunals: President Bush announced in October that he intended to conduct secret military tribunals for those suspected of being in alliance with the terrorists, and that others guilty of terrorist-related crimes could face the same tribunals. These secret courts were to include the trials, not only of aggressors captured actively fighting the United States in Afghanistan, but of suspected terrorists found within the United States as well. This would have applied to the same individuals who were detained under the new USA PATRIOT Act regulations for “reasonable” suspicion of terrorism. The reasonable suspicion is relatively easy to prove. The argument followed that, in order to prevent intelligence information from slipping out, these trials needed to be secret. At the time this plan was announced, opposition to the tribunals was lukewarm at best; 60% of Americans supported the use of tribunals to “try noncitizens charged with terrorism” (Moore 2002). In the end, enough opposition to this proposal was mustered that the President decided not to use

tribunals after all. However, this opposition came, not from the public at large, but from the Pentagon. This office understood the potential ramifications of holding such trials for American citizens in other countries, and it was their opposition that stopped military tribunals from being employed (Goldsmith and Sunstein 2002).

Military tribunals in the United States are not without precedent: "During World War II, German saboteurs were tried secretly that way [without the ordinary legal constraints of American justice] and those convicted were hanged 30 days later" (Layco 2001, 92). However, these saboteurs also met the strict requirements under the Geneva convention for trying people in this manner. They were actively planning attack and sabotage of cities within American borders. Clear proof does not exist for most of the individuals President Bush proposed to try in this manner.

The USA PATRIOT Act has endangered civil liberties in America in a number of ways, although the number of Americans who have actually been affected is small. This should be no reason to ignore the Act's offenses. Another property of American liberties is that they are guaranteed for everyone, including criminals, radicals, and other segments of the population who hold views that do not jive with that of the majority.

III. Greater Policy Implications: the Office of Homeland Security

The administration has promised that the war on terrorism is a new kind of war. Never before has the United States declared war on an asymmetrical threat, an enemy that has no common nationality, ethnicity, or government. The goals of the new war are unprecedented as well: the United States wants to eradicate all terrorism. In order to fight the war on terrorism, the government has created measures to address the new threat; the USA PATRIOT Act and the Department of Homeland Security are two examples. Above, this paper addressed the civil liberties abuses contained in the USA PATRIOT Act. The following section provides a brief discussion of the Department of Homeland Security. President Bush signed the bill officially establishing this department on November 25, 2002. While the Department of Homeland Security does not pose exactly the same threat to civil liberties as does the USA PATRIOT Act, it does add one damaging element: by establishing an entire federal department whose aim is essentially to fight terrorism, the war on terrorism becomes a permanent feature in American policies. This is dangerous because it commits American resources and personnel for an indefinite period of time to uncertain (and possibly unattainable) goals.

A permanent state of war is bound to change America's laws, systems, and policies. It is already possible to see these changes taking place. The USA PATRIOT Act is an example of one such change in America's laws as the new legislation of the USA PATRIOT Act becomes imbedded into America's departmental systems with the creation of the Department of Homeland Security.

The Department of Homeland Security legislation, like the USA PATRIOT Act, both increases Executive Branch power and gives the government and law enforcement agencies greater surveillance capabilities. The aim of this paper is not to criticize every detail of the Department of Homeland security; the DHS addresses a very real threat and attempts to update some of the outdated bureaucracy of America's federal government and provide better coordination between governmental agencies responsible for protecting homeland security. This analysis does, however, criticize the overall effects of the new Department, which in effect makes the war on terrorism a permanent fixture in American society as long as there are groups in the world hostile toward America. Additionally, the Department is "new" in its name and purpose only; there is nothing original about its structure or function. One might have hoped that the administration and Congress would have taken the opportunity to craft an innovative response to the terrorist threat the country is facing; the Department of Homeland Security is just another federal bureaucracy.

Though the DHS does not give the Executive Branch control over any agencies it did not supervise before, it does allow the President more control over a large part of the United States bureaucracy. The President claims this control is necessary in order to "put the right people in the right place at the right time in the defense of our country" (Bush November 25, 2002). At the heart of its purpose, the DHS is simply intended to coordinate the activities of more than twenty agencies, which have been scattered under other executive branch departments. So many difficulties arose after September 11 with coordinating the efforts of the many

governmental personnel and agencies whose duties somehow related to homeland security that the Bush administration made restructuring the federal government a priority. A description of the new department follows, along with a discussion of the impact of its impact upon on civil liberties in America.

In June 2002, President Bush unveiled his plans for the Department of Homeland Security. The new department proposed the “most extensive reorganization of the federal government since the 1940’s” (Bush June 6, 2001).

According to the White House,

This . . . is the first National Strategy for Homeland Security. The purpose of the Strategy is to mobilize and organize our Nation to secure the US homeland from terrorist attacks . . . The National Strategy for Homeland Security will help to prepare our Nation for the work ahead in several ways. [White House 2001]

The new department recognizes six mission areas: “intelligence and warning, border and transportation security, domestic counterterrorism, protecting critical infrastructure, defending against catastrophic terrorism, and emergency preparedness and response”(White House 2001). It seeks to make many organizational and structural changes to both the federal and state governments and tries to coordinate and manage the efforts of first responders during attacks. The department strives to “enable critical information sharing . . . [and] . . . streamline information sharing among intelligence and law enforcement agencies” (White House 2002). The new department controls areas formerly the responsibility of Federal Emergency Management Association and the Immigration and Naturalization Service, for example. The control of several other offices or agencies from within the federal

government, such as the Coast Guard, the Customs Department, the Central Intelligence Agency, and the Federal Bureau of Investigation is being passed to the DHS.

When legislators debated the legislation creating the DHS, they did not completely ignore questions of personal liberties, as they had done with the passage of the USA PATRIOT Act. The House majority leader, Dick Armey (R-TX) asked in July,

. . .what will it take to defend freedom under such circumstances? As the greatest, most free Nation the world has ever known, how do we protect our citizens and our culture from the forces who hate us? Do we lock up our doors and bar the windows? Are we perhaps in danger of sacrificing our liberty in the name of security? [*Congressional Record* July 25, 2002].

He answered himself by promising that defending civil liberties was just as much a priority of the Department of Homeland Security bill as was security. However, in its final form, the Department of Homeland Security contributes more to security than it does civil liberties.

The most problematic part of creating this new governmental department is that it is not set up to address homeland security generally; it was created in reaction to September 11. While the country's response to that day did reveal much about the gaps in the United States' security and the federal governments' inability to effectively address many of the problems with an attack of that nature, other threats to the domestic security of the United States are a distinct possibility. However, the DHS does not go far enough to address other threats the country may be facing. It deals strictly with the shortcomings revealed by the September 11 attacks. Therefore,

the department is not a permanent answer to the many varieties of homeland security threats the United States confronts. It answers the question of how the United States should have confronted the September 11 attacks. Additionally, the establishment of this new department forever makes the goal of fighting terrorism a part of the country's security framework. What if Osama bin Laden was killed and Al Qaeda ceased to exist? Would the United States need to find a sort of "substitute" enemy toward which its homeland security efforts could be aimed? Could North Korea potentially play this role in the near future?

Another criticism of the DHS is its failure to provide a system for dealing with the "new" threat of terrorism that is ground-breaking. Representative Nancy Pelosi (D-California) commented that

As for the Department itself, it is a 1950's version of the bureaucracy. I had hoped that we could set up a Department that would be lean and agile and of the future, that would maximize the use of technology, that would capitalize on the spirit of innovation and new technologies. But, sadly, it does not [*Congressional Record* November 25, 2002].

The DHS merely takes the Immigration and Naturalization Service, the Customs Service, the Transportation Security Administration, the Animal and Plant Health Inspection Service, and many other governmental agencies and groups and puts them in a different hierarchy than they were in before 9-11. While the department attempts to unify the country's efforts to address affronts to the country's security, it does not go far enough in creating new systems to confront the new threat of terrorism. The real test of the department will be its ability to halt any future attacks on the United States. The American people do not see a great deal of promise in the

Department of Homeland Security at this point: only 30% think that it will make the United States safer from terrorism, while 39% think that it will just increase Washington bureaucracy (www.pollingreport.com).

IV. Conclusion: The Future for Civil Liberties and Security

What will the post 9-11 world hold in terms of civil liberties and security? How will the two goals of protecting constitutional guarantees and providing physical security, reconcile their different objectives with one another in the face of confronting terrorism? There often appears to be a fundamental conflict between protecting civil liberties and ensuring the protection of the American people. This turns out not to be the case: it is possible, indeed, imperative, to provide security without sacrificing the liberties guaranteed by the Constitution. What is the future for civil liberties in the United States? How do the current security objectives of the war on terrorism stand to affect American civil liberties?

This paper outlined some of the specific ways in which American citizens have been denied their constitutional rights during the past year. However, the battle for civil liberties is not over, so to speak. The institutional and political checks of the American system serve to assert their control over excessive assertion of executive powers. In two years President Bush will be up for election, and that will be a huge test of how his policies and reforms are being received. In the near future, the Supreme Court should begin hearing legislation enacted by the government in the past year. Either of these factors could serve to right some of the wrongs of the past year.

A discussion of these potential checks follows. However it is necessary to point out that, while these checks do exist, by making the war on terrorism such a permanent part of American policies with the creation of the DHS, it is likely that

many of these checks have been effectively avoided. But even the permanency of the battle with terrorism may yet be subverted.

A. The Effects of Public Opinion

American public opinion matters, of course, because it reflects how the electorate is likely to vote. During the past year, this factor has contributed to the amount of support Congress has given the President. The effect of opposing some presidential plans, in fact, can be highly detrimental to a politician when the President's approval rating continues at a record high level, as does President Bush's. Take for example Max Cleland, who was defeated in Georgia's 2002 United States Senate race. Senator Cleland's defeat essentially boiled down to his opposition to the President's Department of Homeland Security and his opponent, Saxby Chambliss's accusations that he was undermining the fight against terrorism (Schieffer 2002).

So for the time being, the President can probably rest assured that public opinion is on his side. According to Gallup Poll reports, his rating is still high; in late November 2002 it stood at 65% (www.pollingreport.com). More specifically, according to a CBS News Poll taken in September 2002, 71% of Americans approve of the way George W. Bush is handling the campaign against terrorism (Ibid).

However, this unity is not evident when related to other polling issues, particularly the war in Iraq. Although 70% of Americans approve of taking military action against Iraq (up from 64% in late October), this approval drops to 51% if military action in Iraq would result in substantial military casualties for the United

States and 48% if it would mean that the United States would be involved in the war for months or years (www.pollingreport.com).

The biggest looming factor that potentially endangers President Bush's support is the failing economy. Economic conditions continue to be poor in the United States; the U.S. central bank's federal funds rate stands at a forty-year low of 1.25 percent, national employment is 6%, and the Dow Jones industrial average and the Nasdaq continue to regularly dip because of crises in corporations. As the war on terrorism becomes a part of life to which individuals are more accustomed, the economy is going to become more of a focus. Even now, according to *The Harris Poll*, 35% of Americans list the economy as the issue most important for the government to address, while only 26% list terrorism. So if the economy continues to perform poorly, Americans will begin to expect that to be the administration's main focus, not the war on terrorism or a war in Iraq. It will do Bush well to remember lessons from his father's administration; Bush, Sr. won his war in Iraq, but lost the election and the presidency ultimately because he failed to improve economic conditions while he was in office.

B. The Judiciary

At this point in the “war on terror,” the actions taken by government officials are being challenged in the court system. Historically, courts have supported measures taken by the President and Congress in crisis situations. For example, the Supreme Court ruled in favor of the measures taken by President Lincoln during the first 11 weeks of the Civil War in the decisions on the Prize cases, and the Supreme Court also legitimized the decision of Roosevelt to relocate and incarcerate over 100,000 Japanese Americans in *Korematsu, 1945*. However, the Supreme Court has the opportunity in deciding the cases it hears to regain some of the ground lost through measures taken by the other two branches of government. According to Greenhouse, this kind of activism would be in line with the character of the current Supreme Court:

The justices are invalidating federal laws at double the rate of the ‘activist’ Warren Court, curbing Congressional authority, and propounding novel theories for the states from the reach of federal law . . . ‘This is a court that says that judges are better able than the P.G.A. to define the essence of golf . . . This is a court that decided a presidential election.’ . . . How the Supreme Court will rule on the various terrorism-related controversies now making their way to its docket is, of course, unknown. But there is little doubt that the climate it has created has empowered judges to defend judicial prerogatives. [Greenhouse 2002]

But even if certain factors indicate that this Supreme Court will take a more active role in deciding these cases, unfortunately, this probably will not happen. If this Court follows in the footsteps of prior courts, it will endorse the measures taken to restrict our liberties. In late November, a federal court approved over 60 cases of wire taps being employed under the new USA PATRIOT Act regulations. If the

Court chooses to hear any other cases which will probably be ready for its docket the next time it permits review, it is probable that it will also rule in favor of the government.

How do the electorate and the judiciary stand to contribute to the battle for civil liberties in the United States? Unfortunately, nothing discussed above is likely to stop the liberties abuses in the USA PATRIOT Act as long as the war on terrorism is a part of everyday American politics and the American public continues to be confronted with it constantly in newspapers and on television. At least, at no other point in United States history have civil liberties concerns been favored over security; we should not expect that they will now.

This is frustrating, because the United States Constitution has been set up so that it is not necessary to diminish civil liberties during times of war. It is, in fact, possible to both protect the physical security of the United States and provide the full extent of civil liberties contained in the Constitution; it is just easier to sacrifice liberties in the name of providing security. But civil liberties abuses do not even convincingly provide more ample security: of all the historical cases above, as well as many others, where the American government sacrificed civil liberties in the name of security, there is little evidence that preventative incarcerations or denying an individual access to legal counsel root out enemy forces within the United States or in any other way convincingly provided the country with a greater assurance of security.

Why, then, does the United States continue to limit its citizens' civil liberties when confronted with war or crisis? It has become so imbedded in American

expectations about the appropriate way in which to deal with crises or war that people expect their liberties to diminish when the country is at war. This is evidenced by the fact that during the history of the United States, this has been a regular occurrence. But it does not need to be the normal way the United States confront war. Instead, the United States government and people should embrace the Constitution and its craftsmanship, which provides alternative methods with which to confront crises and use these methods instead of immediately resorting to diminishing civil liberties. If not, we further endanger American civil liberties. Representative Dick Armev told the National Press Club, "I believe these blessings of liberty are at peril in America today" (Armev December 6, 2002). It is imperative that the United States government live up to its constitutional mandates and work to protect American liberties.

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