



UNC
SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF
INTERNATIONAL LAW AND
COMMERCIAL REGULATION

Volume 28 | Number 1

Article 1

Fall 2002

The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001

Emanuel Gross

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

Recommended Citation

Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C.J. INT'L L. & COM. REG. 1 (2002).

Available at: <http://scholarship.law.unc.edu/ncilj/vol28/iss1/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001

Cover Page Footnote

International Law; Commercial Law; Law

Articles

The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001.

Professor Emanuel Gross^{1*}

Introduction

On September 11, 2001, foreign terrorist forces operating within the American heartland subjected the United States to a massive and barbaric attack. How did it happen that the United States was surprised by this attack? How could the large number of people who participated in the suicide operation move freely about in the United States and spend years planning and training for this operation without the intelligence services finding out? These questions immediately raised the presumption that the immigration, intelligence, and security authorities were insufficiently equipped to deal with a terrorist threat because of constitutional restrictions, and therefore, constitutional solutions had to be found that could create a new balance between human rights and the security needs of the American nation.

This view led to the enactment of the “USA PATRIOT Act,” (“Patriot Act”).² The Patriot Act empowered and equipped the authorities with the legal means to better observe the conduct of individuals through sophisticated surveillance devices, including monitoring, tracking, searching a suspect’s computer movements,

* All translations from Hebrew sources are provided by and attributable to the author. Each such translation is indicated in the corresponding notes.

¹ Professor, member of the Faculty of Law, Haifa University. Thanks are due to my research assistant Ms. Karin Meridor, whose diligence and dedicated work enabled this article. Thanks are due to the Hakiria Hacademit, Kiriat Huno, Israel for the financial support of this research.

² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amendments to various sections of U.S.C.) [hereinafter USA PATRIOT Act].

and eavesdropping on communications with other computer users.³

The Patriot Act also equipped authorities with special powers to search and investigate aliens seeking to enter the United States, special powers to arrest persons suspected of being terrorists, and special deportation procedures.⁴ The Patriot Act limits the principle of judicial supervision almost to the point of elimination so that security agencies and law enforcement can perform expanded functions. Such functions are intended to be pursued as speedily as possible, without being delayed by court proceedings, which the Act implies offer nothing but unnecessary impediments.

This is why, immediately upon the enactment of the legislation, the American Civil Liberties Union (ACLU) felt it necessary to explain to the country that:

At first glance . . . the Act signed into law by President Bush appears to only mean to give law enforcement officials the necessary tools to find terrorists and prevent future attacks. But in reality, the USA Patriot Act continues an alarming trend known as court-stripping -- removing authority from the judiciary -- in time of crisis. . . . As it has done in times of past tragedy, the government responded by passing legislation that reduces or eliminates the process of judicial review and erodes our civil liberties.⁵

There is no doubt that the attack of September 11, 2001 caught the United States by complete surprise, similar to the surprise produced by the Japanese attack on Pearl Harbor. Did the immediate reaction of the United States limiting or potentially violating human rights meet the tests laid down by the Constitution? Were they sufficiently proportional? Is there not a danger that the authorities have been given an overly broad permit to scrutinize the lives of citizens under the pretext of security needs? Is there not a danger that this will lead to powers that are even more excessive? Today, the Patriot Act deals with persons suspected of terrorism; tomorrow the persons targeted might be

³ *Id.* at §§ 201-202.

⁴ *Id.* at §§ 401-418.

⁵ Press Release, American Civil Liberties Union, at <http://www.aclu.org/features/fl10101b.html> (Nov. 11, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

political opponents!

It is difficult to find a consensus in the United States supporting the legislation of the Patriot Act, notwithstanding its description as the "USA PATRIOT Act." While the war being waged by the United States against terror has created unity, the legislative measures provided by the Patriot Act and the concomitant dangers they pose to democracy – the symbol of the United States – have impaired this unity and have led to fear and anxiety being voiced.⁶ Critics understand that creating a balance between national security, democracy, and human rights is a difficult task, but the speed with which the reassessment of this balance was performed is extremely worrying. Congress took action without a proper debate on the Patriot Act's ramifications and without providing the American public with an opportunity to voice its opinion, despite the enormous impact of the Patriot Act on the daily lives of all American citizens. The balance drawn is faulty because overwhelming weight has been given to security needs, leaving human rights far behind:

Our nation is rightfully in both shock and mourning from the events of September 11th, but the principles of rigorous debate and thoughtful legislative process should not be forsaken in this time of crisis. When fundamental individual liberties are at stake, our process of public discourse is all the more important. After all, that is what democracy is all about.⁷

The United States's reaction has a dual dimension. First, it has increased internal oversight procedures by creating a new balance between human rights and security needs. Secondly, it seeks to combat terrorism abroad by armed means and other devices.

This article examines both the internal and the external dimensions of the United States's response in its war against terror. The internal dimension of the article will examine the violations of human rights justified on grounds of national security in light of recent American legislation. In this context, it shall compare the American position to the experiences of other

⁶ *See id.* *See also, e.g.,* Ronald Weich, American Civil Liberties Union, *Upsetting Checks and Balances: Congressional Hostility to the Courts in Times of Crisis* (2001), (describing various concerns for the erosion of civil liberties) *available at* <http://www.aclu.org/safeandfree/index.html> (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁷ DAILY RECORD, Nov. 19, 2001, at 1B.

democracies such as Israel and Britain, which have also been struggling against terrorism. The external dimension of the article shall consider whether the United States's operation in Afghanistan can be considered an act of self-defense or whether it is a punitive operation.

Part One will examine the new legislation adopted by the United States in the aftermath of the September 11 attacks. Part Two will analyze the scope of the protection given to human rights in the United States prior to the enactment of the Patriot Act. Part Three will present the stringent protection given in the past to human rights prior to the uncovering of the brutal phenomenon of international terrorism. Part Four will examine the constitutional measures available in similar cases in Britain and Israel. The question of whether the United States's response in the internal sphere is appropriate to achieve the goal of national security is discussed in Part Five. The external dimension and the question of whether the Afghan operation is indeed an act of self-defense, as a matter of international law, are discussed in Part Six. Part Six also draws a comparison with Israel's response to Palestinian terrorism. Finally, Part Seven sums up the debate and looks to the future.

I. The New Legislation in the United States

As the Bush administration's urgent quest for new anti-terrorism laws bogged down in the last days of September, lawmakers from both parties expressed concern that the hastily prepared package could greatly expand police powers at the expense of privacy and other civil liberties.⁸

During the course of October 2001, the United States enacted the "USA PATRIOT Act,"⁹ which was designed to provide security and law enforcement agencies with tools to fight terrorism. This Part will describe the main provisions of the law aimed at easing the investigative authorities' task of locating and capturing terrorists, along with the repercussions these measures will have for human rights in the United States.

⁸ *UM Panel Eyes Our Loss of Liberties*, 27 THE MONT. LAWYER No. 2, Oct. 2001, at 23.

⁹ USA PATRIOT Act, *supra* note 2 (subtitled as "An Act [t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.").

First, it should be pointed out that the Patriot Act creates a new definition for the term “domestic terrorism”¹⁰ that casts doubt on the existence of any distinction whatsoever between an ordinary criminal offense and an act of terrorism.¹¹ Thus, all the additional powers granted by the Patriot Act to security and law enforcement agencies may be implemented in investigations unrelated to terrorism. Consequently, there is a fear of overreaching. The definition may also embrace people who are involved in political protests and will accordingly be subject to violations of their constitutional rights, notwithstanding that their acts are not of the terrorist nature upon which the Patriot Act has set its sights.¹²

Second, as we shall see below, the Patriot Act significantly alters the court system’s supervision of the executive in its investigation of routine criminal matters unconnected to terrorism.¹³ We shall now turn to an examination of the principal constitutional rights that have been impaired by the Patriot Act: freedom of association, the right to privacy, and the right to due process.

A. The violation of freedom of association

The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹⁴

The inevitable consequence of broadening the definition of terrorist activity in the Patriot Act is to impair freedom of association and freedom of expression. The Patriot Act defines domestic terrorism as an act which:

(A) involve[s] acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B)

¹⁰ *Id.* at § 802 (amending 18 U.S.C. § 2331).

¹¹ *Id.* at § 201. Because of the overly broad definition in section 802 of what can constitute terrorist activity, expanded search powers in section 201 could be employed against individuals and organizations expressing political dissent unrelated to terrorism.

¹² *Id.*

¹³ *The New Normalcy*, 166 N.J.L.J. 354 (2001).

¹⁴ U.S. CONST. amend. I.

appear[s] to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur[s] primarily within the territorial jurisdiction of the United States.¹⁵

Such a broad and vague definition threatens to transform conduct that, in the past, was thought to reflect a person's freedom of expression or freedom of association designed to influence government policy into a terrorist act. An essential condition of a democratic regime is that it enables legitimate political opposition to the regime.¹⁶ Section 802 of the Patriot Act fails to meet this condition.

The Patriot Act further erodes freedom of association in section 806, which deals with the assets of a terrorist organization.¹⁷ Notwithstanding the provisions of the First Amendment that confer upon an individual a right to support all legal activities or to assemble in a group of the individual's choosing, the Patriot Act enables the Federal Bureau of Investigation (FBI) to investigate any person having connections with a terrorist organization without first proving that that person knowingly supports terrorist activities or that he was reasonably aware that the group supports terrorism.¹⁸

The prohibition against supporting a group is a violation of freedom of association, since without that support, freedom of association cannot be realized: the right to associate is not effective without the right to financially support one's chosen group.¹⁹

The combination of these provisions seriously impairs freedom of association because what determines support for a terrorist organization depends on the definition of a terrorist organization.

¹⁵ USA PATRIOT Act, *supra* note 2, at §802.

¹⁶ Iain Cameron, *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. Second Report: "Freedom and Security Under the Law"*, 48 MOD. L. REV. 201, 204 (1985).

¹⁷ USA PATRIOT Act, *supra* note 2, at § 806 (amending 18 U.S.C. 981(a)(1)).

¹⁸ See *supra* note 10.

¹⁹ David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 248 (1999).

We have seen that the Patriot Act provides a very broad definition.²⁰ As a result, many organizations may find themselves defined as terrorist organizations, and many people supporting them may find themselves in breach of the law.

B. The violation of the right to privacy

The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²¹

Comments made prior to the passage of the Patriot Act are now even more apt. The Patriot Act, “[g]rants the FBI access to a wide range of personal, educational, medical and financial records without requiring evidence of a crime and without judicial review based on a very low standard that does not require probable cause of a crime or even relevancy to an ongoing terrorism investigation.”²²

Thus, for example, section 213 fulfills an aspiration long suspected of enforcement agencies—to carry out a search without having to first notify the person whose property is being searched.²³ In other words, agents may enter a house or office armed with a search warrant while the occupant is away, carry out a search of the property, take photographs, explore his electronic communication equipment, and only notify the occupant that a search had taken place at a later date. It should be noted that the court will only allow notification of the search to be delayed if: “the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result.”²⁴

An additional tool of questionable constitutionality provided to law enforcement agencies by the Patriot Act is the relaxation of

²⁰ See *supra* note 10.

²¹ U.S. CONST. amend. IV.

²² *Supra* note 10, at § 802.

²³ See USA PATRIOT Act, *supra* note 2, at § 213 (amending 18 U.S.C. § 3103(a)).

²⁴ *Id.* at § 213(b)(1).

the Fourth Amendment requirement to describe a particular place to be searched.²⁵ A judge can now issue a warrant to search property and targets that may move outside the local jurisdiction before the warrant can be executed.²⁶

There is no doubt that the process described above, searching without notification, profoundly erodes the provisions of the Constitution intended to protect the citizen against unreasonable searches.²⁷ The absence of significant restrictions on the general search process could give authorities great discretion, not subjected to scrutiny by a judicial officer, regarding what, when, and where to search. The individual, unaware of the invasion, would be unable to protest against the search. This result significantly undermines core protections against unreasonable search and seizure under the Fourth Amendment.

The violation of the right to privacy continues in numerous provisions of the Act. Sections 201 through 202 authorize the use of surveillance, wire tapping, and eavesdropping measures with respect to operations allegedly connected to terrorism.²⁸ Section 203 enables the disclosure of sensitive information relating to American citizens and wire tapping by secret service agents without any judicial supervision justifying such disclosures.²⁹

Pursuant to warrants, section 209 enables the seizure of data messages stored in electronic communication devices, including unread email, as well as the interception of stored data such as voice messages.³⁰

Sections 210 and 211 enable law enforcement agencies to subpoena records for the purpose of investigation without judicial scrutiny.³¹ Law enforcement agencies may subpoena a great deal of information from computer servers and Internet providers

²⁵ See *id.* at § 219 (amending FED. R. CRIM. P. 41(a)).

²⁶ *Id.*

²⁷ See *e.g.*, *Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (requiring judicial review for the lawfulness and reasonableness of searches by law enforcement).

²⁸ USA PATRIOT Act, *supra* note 2, at § 201 (amending 18 U.S.C. 2516); § 202 (amending 18 U.S.C. 2516).

²⁹ *Id.* at § 203(a)(1) (amending FED. R. CRIM. P. 6(e)(3)(C), giving authority to share criminal investigative information).

³⁰ *Id.* at § 209 (amending 18 U.S.C. 2510).

³¹ *Id.* at § 210 (amending 18 U.S.C. 2703(c)(2)); § 211 (amending 47 U.S.C. 551).

regarding session times and duration, the address of the subscriber, means and source of payment, and details of the subscriber.

Section 212 enables the Internet provider to divulge electronic communications without a warrant and without being asked in cases of immediate danger of death or serious physical injury.³² In such cases, the provider has a defense against a subscriber's claim for breach of the duty of secrecy between the provider and subscriber.³³

Section 217 enables the interception of computer information obtained by trespass without requiring a court warrant.³⁴

Sections 214 and 216 deal with surveillance orders that are intended to trace incoming or outgoing calls.³⁵ The court must grant such an order if the search may provide information relevant to a crime.³⁶ The court has technical discretion over the manner of submitting the application, but it has no substantive discretion over the standard of certainty needed to prove that such a warrant will indeed lead to information of the alleged crime.³⁷ In other words, the court is not required to maintain the more stringent standard demanded in the past. Section 214 extends the class of cases in which an order may be sought to protect against international terrorism or clandestine intelligence activities.³⁸ Section 216 authorizes the installation and use of tracing devices in new forms of electronic communications in addition to the historic application to telephone lines.³⁹

An additional invasion of privacy may be found in the statutory provisions that enable the agencies to investigate bank accounts in order to fight international money laundering.⁴⁰ Banks

³² *Id.* at § 212 (amending 18 U.S.C. §§ 2702, 2703).

³³ See generally *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, (C.D. Cal. 2002); *In re Pharmatrak, Inc. Privacy Litigation*, 2002 U.S. Dist. WL 1880387 (D. Mass. Aug. 13, 2002).

³⁴ USA PATRIOT Act, *supra* note 2, at § 217 (amending 18 U.S.C. 2510).

³⁵ *Id.* at § 214 (amending 50 U.S.C. § 1842 (Foreign Intelligence Service Act of 1978)); § 216 (amending 18 U.S.C. §§ 3121-3124, 3127).

³⁶ *Id.*

³⁷ See *id.*

³⁸ *Id.*

³⁹ *Id.* at § 216.

⁴⁰ *Id.* at § § 301-330.

are now also required to report suspect banking transactions.⁴¹ Section 358 authorizes the Federal Bureau of Investigation and other law enforcement agencies to obtain sensitive and personal information without judicial supervision.⁴²

One accepted view holds that the investigation of bank accounts and the surveillance of transactions, in themselves, are not efficient tools in the fight against terrorism:

Part of the problem is that money-laundering laws force banks to spy on everybody, and this generates more than 10 million reports every year. This means that law enforcement is forced to look for a needle in a haystack. . . . Lawmakers just voted to make the haystack bigger by approving a measure with more stringent requirements on American banks. . . . Rushing to enact laws that have tough-sounding titles but provide no additional tools to combat terrorism is a mistake.⁴³

The principal difficulty in these provisions is the absence of judicial scrutiny: “[u]nder many of these provisions the judge exercises no review function whatsoever. The court must issue an order granting access to sensitive information upon mere certification by a government official. The Patriot Act reflects a distrust of the judiciary as an independent safeguard against abuse of executive authority.”⁴⁴

Additionally, the Patriot Act impairs the right to due process of law. The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to

⁴¹ *Id.* at § 351 (amending 31 U.S.C. 5318); § 359 (amending 31 U.S.C. 5312, 5318, 5330).

⁴² *Id.* at § 358.

⁴³ Veronique de Rugy, *Privacy Punished, Not Terrorism*, at <http://www.cato.org/dailys/10-26-01.html> (Oct. 26, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁴⁴ Ronald Weich, *Upsetting Checks and Balances - Congressional Hostility Toward the Courts in Times of Crisis*, 3 (Oct. 2001), at <http://www.aclu.org/congress/courtstripping.pdf> (on file with the North Carolina Journal of International Law and Commercial Regulation).

be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.⁴⁵

However, where suspect aliens are found in the territory of the United States, section 412⁴⁶ of the Patriot Act authorizes their detention for a period of seven days with the certification of the Attorney General. This period of detention may be extended for additional periods of up to six months if the release of the alien will threaten the national security of the United States, the safety of the community, or of any person.⁴⁷ The Attorney General must review the certification every six months, and on the basis of his sole discretion, a person may be held indefinitely without access to judicial review.⁴⁸

The right to judicial process is impaired in two ways: (1) detention without judicial review and (2) the Attorney General may detain the alien without "probable cause" if: "[h]e has reasonable grounds to believe that the non-citizen is engaged in any activity that endangers the national security of the United States."⁴⁹ The Patriot Act confers upon the Attorney General a vast power to impair the most fundamental right of a person: his freedom.

The fact that the right to appeal a conviction, the right to *habeus corpus*, is restricted is a gross infringement of due process to which the suspect is entitled prior to being deprived of his liberty. "The final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals."⁵⁰

In the view of the Attorney General, these provisions "are vital to preventing, disrupting or delaying new attacks. It is difficult for

⁴⁵ U.S. CONST. amend. V. The Fourteenth Amendment to the Constitution is also concerned with the right to due process. U.S. CONST. amend. XIV § 1.

⁴⁶ USA PATRIOT Act, *supra* note 2, at § 412.

⁴⁷ *Id.* at § 412(a)(6).

⁴⁸ *Id.* at § 412(a)(7).

⁴⁹ *See supra* note 46, at § 412.

⁵⁰ *Id.* at § 412(b)(3).

a person in jail or under detention to murder innocent people or to aid or abet in terrorism.”⁵¹

C. Infringement of the right to properly defend oneself and be represented by an attorney

The Sixth Amendment of the Constitution provides that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”⁵²

The Fourth Amendment states that every citizen shall be protected against “unreasonable searches and seizures.”⁵³ On October 31, 2001, the Attorney General decided to allow the monitoring of communications between the accused and his attorney in cases where it was feared that the accused might try to pass information through his attorney to persons on the outside; information which might endanger national security or which might lead to violence and terrorism.⁵⁴ The order violating the privilege between an attorney and his client has been justified in case law. According to case law, there is no privilege or protection for communications between attorneys and clients that might lead to the commission of illegal acts.⁵⁵

In the opinion of the Attorney General, the monitoring of communications does not violate the Sixth Amendment to the Constitution because a balance exists between the right of the accused to the fair advice of counsel and the government’s interest in foiling future terrorist activities and violence.⁵⁶ The attorney and his client must be informed prior to the monitoring, and the monitoring must be conducted by professional teams.⁵⁷ The information obtained may not be revealed without the

⁵¹ Richard L Berke et al., *Bush’s New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at A1 (quoting Attorney Gen. John Ashcroft).

⁵² U.S. CONST. amend. VI.

⁵³ *Id.* at amend. IV.

⁵⁴ Bureau of Prisons Regulation, 66 Fed. Reg. 211, 55061 (Oct. 31, 2001).

⁵⁵ *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975). “It is beyond dispute that the attorney-client privilege does not extend to communications regarding an intended crime.” *Id.*

⁵⁶ Bureau of Prisons Regulation, 66 Fed. Reg. 211, 55061, 211, 55064 (Oct. 31, 2001).

⁵⁷ *Id.*

authorization of a federal court:

[T]he procedures established in this new rule are designed to ensure that defendants' Sixth Amendment rights are scrupulously protected. The circumstances in which monitoring will be permitted are defined narrowly and in a way that reflects a very important law enforcement interest: the prevention of acts of violence or terrorism. The monitoring is not surreptitious; on the contrary, the defendant and his or her attorney are required to be given notice of the government's listening activities. The rule requires that privileged information not be retained by the government monitors and that, apart from disclosures necessary to thwart an imminent act of violence or terrorism, any disclosures to investigators or prosecutors must be approved by a federal judge.⁵⁸

Notifying an attorney prior to his meeting with his or her client that his discussions will be monitored will undoubtedly prevent the transfer of any information between the suspect and the attorney. One cannot ignore the violation of the rights of the accused ensuing from the Attorney General's discretionary decision allowing the monitoring of attorneys with their clients. The Attorney General will authorize such monitoring if there is probable cause to believe that the detainee will use the connection with his attorney to facilitate the commission of further terrorist acts.

While the release of monitored information requires court authorization, the initial monitoring order does not require such authorization.⁵⁹ Authorization is not mandated because a court would likely not authorize monitoring merely on the basis of "reasonable suspicion" without proof of "probable cause."⁶⁰

This decision is intended as a new device that will aid the fight against terrorism. Prior to the enactment of the Patriot Act, a similar decision was in effect.⁶¹ Today, the Patriot Act, which confers broad ranging powers upon the Attorney General, provides that official with even more extensive, unconstrained power. The

⁵⁸ *Id.*

⁵⁹ William Glaberson, *Experts Divided on New Anti-Terror Policy that Scuttles Lawyer-Client Confidentiality*, N.Y. TIMES, Nov.13, 2001, at B7.

⁶⁰ *Id.*

⁶¹ See *infra* notes 76-78 and accompanying text.

Attorney General may exploit this power in order to extend the period of time in which monitoring may be performed from a period of 120 days to a period of one year.⁶²

One may ask why constitutional defenses must be sacrificed at a time when the existing legal system has already put in place security measures to deal with attorneys who collaborate with terrorist suspects including obtaining a warrant authorizing monitoring. There is a strong sense that "Attorney General John Ashcroft is essentially trying to bypass an already-available option of getting a court order to do wiretaps or searches, even of lawyers when evidence warrants."⁶³

D. The establishment of military tribunals to try foreign terrorists

The Patriot Act itself does not contain provisions regarding special proceedings for aliens.⁶⁴ Supplementary provisions in this regard are provided in a special Presidential Order: "Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."⁶⁵

A trial before a military tribunal is a trial without a jury.⁶⁶ The Presidential Order explains that the procedure will not be conducted in accordance with the rules of evidence and rules of criminal procedure followed in the federal courts.⁶⁷ In other words, the military tribunals lack the protection afforded in the federal courts.

The terrorist attack against the United States on September 11, 2001 threatened the freedoms of the nation in a concrete manner.

⁶² Bureau of Prisons Regulation, 66 Fed. Reg. 211, 55061, 211, 55063 (Oct. 31, 2001).

⁶³ Kevin Murphy, *Civil Rights Advocates Promise to Fight Ashcroft on Eavesdropping Order*, KNIGHT-RIDDER/TRIBUNE NEWS SERVICE, Nov. 9, 2001.

⁶⁴ However, the Anti-Terrorism and Effective Death Penalty Act provided special trial procedures for aliens. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No.104-132, 110 U.S.C.A.N. 1248 (1996).

⁶⁵ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. R. 57833 (Nov. 16, 2001).

⁶⁶ *Id.* at § 1(f).

⁶⁷ *Id.*

The United States must be careful to ensure that its anti-terrorist legislation will not threaten these freedoms even more. The fear that human rights will be unjustifiably and unnecessarily violated is strengthened by the fact that the legislation is not directed solely at terrorist acts in their narrow sense, but rather at all acts of violence.⁶⁸ The United States has again proved, as it did in 1996, that in times of emergency and crisis, democracy does not succeed in preserving its values, and human rights are violated in the name of safeguarding national security.

We shall now turn to the 1996 Act which, like the Patriot Act, was the outcome of the claim that law enforcement agencies had insufficient means available to them to fight terrorism and that the courts were hindering the protection of American citizens.

II. Anti-Terrorist Legislation Prior to the Patriot Act

A. *The United States Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)*⁶⁹

On its face, the Patriot Act may seem almost identical to the AEDPA of 1996. Both were enacted as a result of terrorist attacks against the United States. The distinction between them does not lie in the quality of their respective provisions but in the degree to which they impair human rights. The terrorist attacks of September 11, 2001 in New York and Washington took many more lives than the 1995 terrorist attack on Oklahoma City. The Patriot Act is more far reaching than the AEDPA in terms of the powers granted to the enforcement, security and intelligence agencies, and the extent to which they violate human rights:

The 1996 anti-terrorism bill is a direct antecedent of the recent USA-Patriot Act. In response to the 1995 bombing of the federal office building in Oklahoma City, President Clinton, much as President Bush did after the September 11 attacks, called on Congress to grant him new tools to conduct surveillance and detain suspicious individuals. Unlike the USA-Patriot Act, the Antiterrorism and Effective Death Penalty Act of 1996 was the product of a full year of congressional deliberation before it was enacted. But like this year's anti-

⁶⁸ USA PATRIOT Act, *supra* note 2, at §802.

⁶⁹ See *supra* note 64.

terrorism bill, the 1996 bill granted the government new powers while insulating certain enforcement actions - notably death sentences - from meaningful oversight by federal judges.⁷⁰

Even before 1996, there were laws in effect that were intended to fight terrorism that endangered human rights. The Anti Terrorism Act of 1987 (ATA)⁷¹ was enacted following attacks by the Palestine Liberation Organization (PLO) against American citizens. The Act primarily infringed upon the rights protected by the First Amendment to the Constitution - the right to freedom of expression and freedom of association: "[t]he ATA made it unlawful for anyone whose purpose [it was] to further the interests of the PLO to receive anything of value except information from the PLO, expend funds from the PLO, or establish an office at the behest of the PLO."⁷²

In the case of *Mendelsohn v. Meese*, the petitioner argued that the ATA was unconstitutional because it infringed upon First Amendment rights. The Court held that the ATA could stop the operations of the PLO in the United States. However, the court narrowed the application of the ATA by further holding that it did not prohibit the establishment of a PLO informational office as long as the organization did not supply any money to, or assume control of, the office within the United States.⁷³ However, the legislation up to 1996 was, in the opinion of President Clinton: "a confusing patchwork of measures."⁷⁴ The AEDPA, like the Patriot Act, would supply: "new power for the FBI to check credit, hotel and travel records of suspected terrorists, broader federal wiretap authority, 1000 new law enforcement employees to monitor terrorist threats, and a requirement that explosives be 'tagged' to make them easier to trace."⁷⁵

⁷⁰ Ronald Weich, *Response to the Enactment of the Patriot Act*, at <http://www.aclu.org/news/2001/n110101d.html> (Nov. 1, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁷¹ Anti-Terrorism Act of 1987, 22 U.S.C. 5201, 5201-5203 (1988).

⁷² Ned Greenberg, *Mendelsohn v. Meese: A First Amendment Challenge to the Anti-Terrorism Act of 1987*, 39 AM. U.L. REV. 355, 355 (1990).

⁷³ *Mendelsohn v. Meese*, 695 F.Supp.1474, 1490 (S.D.N.Y. 1988).

⁷⁴ *Key Provisions of Counterterrorism Act*, GANNETT NEWS SERVICE, Apr. 20, 1995.

⁷⁵ David Wise, *Terrorism: With Rail Travel, Must Freedom be Curbed?*, L.A. TIMES, Oct. 15, 1995, at M1.

*B. Constitutional Rights Infringed Upon By the AEDPA*⁷⁶

*1. Infringement of the right to privacy.*⁷⁷

A number of provisions of the AEDPA extend the authorization given to investigative and law enforcement agencies to conduct wiretapping and tapping of other electronic means of communication, infiltration of bank accounts, and monitoring of credit card transactions in order to keep track of travel and hotels used by the suspects. All these measures require a court warrant. For example, a government agent may require providers of telephones and other means of communication to preserve evidence and information about customers who are suspected of offenses against the AEDPA for a period of ninety days until a court order is issued.⁷⁸

*2. Infringement of freedom of expression.*⁷⁹

The AEDPA enables the President to act against individuals who express support for the political views of an organization included in the list of terrorist organizations.

*3. Infringement of freedom of association.*⁸⁰

The AEDPA prohibits participation in an organization that assists or supports terrorism, without referring to the purpose of the individual who participates in the activities. The purpose may be to support legal activities undertaken by the organization. The Act does not define the term “participation,” and its provisions are broadly framed and vague:

[T]his bill targets mere knowing participation in a “paramilitary organization” — regardless of whether the person participated only in the organization’s legal activities. . . . [The bill] is unconstitutionally over broad and vague. The bill defines “paramilitary organization” in a circular sense by referring to “paramilitary structure” without ever defining “paramilitary. . . .” The bill does not define the broad phrase “to oppose the authority of the United States or of any State. . . .” The bill does

⁷⁶ Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No.104-132, 110 U.S.C.C.A.N. 1248 (1996).

⁷⁷ *Id.* at § 731.

⁷⁸ *Id.* at § 804.

⁷⁹ *See id.* at § 300.

⁸⁰ *Id.* at § 301-303.

not define "participation."⁸¹

Before the provisions restricting freedom of association were due to enter into effect, the Secretary of State was supposed to prepare a list of organizations deemed to be terrorist organizations. Indeed, on October 2, 1997, Secretary of State Madeleine Albright presented a list of thirty such organizations.⁸² The AEDPA prohibited any association with the terrorist organizations, including humanitarian support⁸³ such as providing food, shelter, and education.⁸⁴ Though humanitarian relief was denied on the grounds that any contribution to an organization so committed to terrorist activities would serve only to strengthen it, the Ninth Circuit Court of Appeals has held that: "targeting individuals because of activities such as fundraising is impermissible unless the government can show that the group members had the specific intent to pursue illegal group goals."⁸⁵

4. *Infringement of due process.*

The AEDPA has severely infringed the rights of immigrants. Beyond the criminal sanctions to which every citizen is subject, foreigners legally residing in the United States, who are suspected of supporting a terrorist organization, may find themselves undergoing an expedited deportation process as may immigrants who are involved in criminal activities.⁸⁶ The deportation process is conducted by special courts set up by the AEDPA. These courts simplify the deportation process by authorizing the production of

⁸¹ *Nature and Threat of Violent Anti-Government Groups in America: Hearing Before the House Comm. on the Judiciary*, 104th Cong. 1st Sess. 164, 166 (Nov. 2, 1995) (prepared statement of Gregory T. Nojeim, Legislative Counsel, American Civil Liberties Union).

⁸² Abu Sayyaf, *Terrorist Organizations*, POST-STANDARD (Syracuse), Nov. 26, 1997, at B6; Press Release, United States Information Agency, Designation of Foreign Terrorist Organizations, M2 (Oct. 9, 1997).

⁸³ *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1204-05 (C.D. Cal. 1998).

⁸⁴ *Controversy Dogs People's Mojahedin*, WASH. TIMES, Apr. 22, 1998, § A at A15, available at <http://www.washtimes.com>.

⁸⁵ *American Arab Anti-Discrimination Committee v. Reno*, 119 F. 3d 1367, 1376 (1997).

⁸⁶ Roberta Smith, *America Tries to Come to Terms with Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249, 268-269 (1997).

privileged evidence⁸⁷ and evidence obtained unlawfully by the government.⁸⁸

The special process is initiated on the basis of an application submitted by the Attorney General on the grounds that "ordinary" process might endanger national security. The judge in the special court examines the application *ex parte* and *in camera*, and orders a special hearing if: "there is probable cause to believe that the alien . . . is an alien terrorist . . . present in the United States; and removal under Title II would pose a risk to the national security of the United States."⁸⁹

There is no doubt that this is a severe violation of the right to due process, which may lead to unjustified and faulty decision-making. These provisions of the AEDPA are in complete opposition to the case law prior to the Act which states that: "aliens within the United States enjoy the protection of the First Amendment."⁹⁰

5. *Infringement of the right to habeas corpus.*⁹¹

Violations arise because the AEDPA limits the amount of time in which the right to *habeas corpus* may be implemented to one year.⁹² When a death sentence has been issued, this period is reduced to six months.⁹³ The grounds on which a prisoner may appeal a court decision preventing him from implementing his right to *habeas corpus* have also been limited.⁹⁴

It is possible to classify the violations caused by the anti-terrorist legislation prior to 2001 into four groups: (1) violations of freedom of expression; (2) violations of freedom of association;

⁸⁷ See 8 U.S.C. § 1534(e)(1)(A) (2000).

⁸⁸ See *id.* at § 1534(e)(1)(B) ("An alien subject to removal under this subchapter shall not be entitled to suppress evidence that the alien alleges was unlawfully obtained. . . .")

⁸⁹ Anti-Terrorism and Effective Death Penalty Act § 503(c)(2)(A)(B).

⁹⁰ *Rafeedie v. I.N.S.*, 795 F. Supp. 13, 22 (D.D.C. 1992) (holding the government's attempt to use secret evidence to exclude the alien unconstitutional).

⁹¹ Habeas corpus is a writ used by prisoners to "test the legality of the detention or imprisonment" and is "guaranteed by U.S. Const. Art. I, § 9, and by state constitutions." BLACK'S LAW DICTIONARY 709-710 (6th ed. 1990).

⁹² Anti-Terrorism and Effective Death Penalty Act § 101(d)(1).

⁹³ *Id.* at § 2263(a).

⁹⁴ *Id.* at § 102-103 (amending 28 U.S.C. § 2253 (2002) and FED. R. APP. P. 22).

(3) violations of due process; and (4) violations of the right to privacy. All of these violations may affect innocent citizens.⁹⁵

This law substitutes “guilt by association” for actual evidence of criminal wrongdoing. It allows government to monitor and prosecute expressive and associational activities that are at the heart of the First Amendment. It allows citizens to be imprisoned, and non-citizens to be summarily deported, because of their support for the lawful, humanitarian activities of any group that the Secretary of State might label as ‘terrorist’— even if they did not know of the group’s allegedly terrorist activities, let alone support them. Moreover, non-citizens, including long-term legal residents, can be deported in kangaroo-court-like proceedings. These proceedings are closed to the accused non-citizens and their lawyers, and are based on secret evidence that they cannot see or respond to. *In short, the new anti terrorism legislation does not make us more safe but only less free.*⁹⁶

At the same time, then-President William Clinton was explaining the AEDPA legislation in the following way: “[s]o let us honor those who lost their lives by resolving to hold fast against the forces of violence and division, by never allowing them to shake our resolve or break our spirit, to frighten us into sacrificing our sacred freedoms or surrendering a drop of precious American liberty.”⁹⁷ A large number of the statutory provisions designed to suppress terrorist activities caused injury and undermined the “sacred freedoms” that America so wished to protect from terrorist threats.

Following the terrorist attack on Oklahoma City, intense rage was felt in American society, which demanded legislation of this kind. After the storm passed and calm was restored, Americans began to understand the draconian repercussions for constitutional rights presented by such legislation: “[w]hile many Americans want to live in a safe environment without having to worry about the threat of terrorism, they also want to maintain their basic constitutional freedoms. Balancing these concerns will not be an

⁹⁵ Nadine Strossen, *Criticisms of Federal Counter-Terrorism Laws*, 20 HARV. J.L. & PUB. POL’Y 531, 538–39 (1997).

⁹⁶ *Id.* at 539 (emphasis added).

⁹⁷ William J. Clinton, *Remarks on Signing the Anti-Terrorism and Effective Death Penalty Act of 1996, Address on the South Lawn of the White House* (Apr. 24, 1996), in 32 WKLY COMP. PRES. DOC. 717, 718 (Apr. 29, 1996).

easy task.”⁹⁸

Apparently, the United States failed to balance these concerns in 2001. Once again, the anger of the majority of Americans took control over the contents of the legislation: “[t]he worst part of the USA Patriot Act is that its provisions are unlikely to draw the ire of the average American. As in past times of crisis, the minority is the most likely target of government excess. It is this reality that makes the bill’s court-stripping provisions so potentially harmful.”⁹⁹

This article shall now turn to an examination of the scope of human rights violations produced by the anti-terrorist legislation of 1996 and 2001 and compare them with the protection afforded to these rights prior to that legislation.

III. The Basic Position of Human Rights in the United States and the Scope of the Protection Afforded to Them Prior to the Anti-Terrorist Legislation

As noted, the scope of the protection given to human rights in the United States is eroded by the Patriot Act. Most of its provisions are similar in nature to the provisions of the AEDPA. The two Acts must be examined as one unit, the elements of which complement each other. The Patriot Act intensifies the harm caused by the AEDPA to human rights and in two areas even creates new classes of violations: one regarding the extent of the protection given to the right to privacy and the other regarding the extent of the protection given to liberty.

In the following pages, this paper shall examine the scope of the protection afforded to human rights in the United States prior to the 1996 shift that occurred by virtue of the AEDPA and continued five years later by the Patriot Act. This article shall also consider the points at which the Patriot Act is more severe in its treatment of those rights than the AEDPA.

⁹⁸ Roberta Smith, *America Tries to Come to Terms With Terrorism: the United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response*, 5 CARDOZO J. INT’L & COMP. L. 249, 278 (1997).

⁹⁹ Laura W. Murphy, Press Release, ACLU, *New Anti-Terrorism Law Once Again Undermines Role of Judiciary* (Nov. 1, 2001), at www.aclu.org/news/2001/n110101c.html (on file with the North Carolina Journal of International Law and Commercial Regulation).

A. *The Right to Association*

We have seen how the AEDPA and the Patriot Act violate rights protected by the First Amendment of the Constitution: the right of association and the right of freedom of expression.

The scope of the protection given to these rights was extremely broad, and any violation was treated suspiciously by the courts. As these rights were at the core of political rights, restricting them was regarded as inconceivable:

[T]he [Supreme] Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. In these cases it has been established that guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further illegal aims.¹⁰⁰

B. *The Right to Freedom of Expression*

The standard applied in the United States in relation to the violation of the freedom of expression is the test of clear and imminent danger,¹⁰¹ which allows the suppression of speech only when it poses a grave, clearly identifiable, and imminent danger to society.¹⁰² The test allows the government to criminalize speech once it is clear that the speech threatens imminent harm to the nation.¹⁰³

Notwithstanding the broad scope of judicial protection given to this right, the courts have admitted that the right is not absolute. There may be circumstances in which the restriction on the freedom of expression will be justified in the name of national interest and security:

¹⁰⁰ Healy v. James, 408 U.S. 169, 185-86 (1972).

¹⁰¹ Whitney v. California, 274 U.S. 357, 378-79 (1927).

¹⁰² Tom Hentoff, *Speech, Harm, and Self-Government: Understanding the Ambit of Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1455 (1991) (stating that the test requires harmful consequences of speech to be "imminent" and "grave").

¹⁰³ See *id.*

The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. . . . From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.¹⁰⁴

“Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. . . . The First Amendment does not protect violence.”¹⁰⁵ The Supreme Court has also held that “the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of illegal force except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁰⁶

Nonetheless, only in very limited cases was it possible to restrict freedom of expression. It certainly was not possible to impose a general restriction to the effect that any support for the political views of a terrorist organization was a criminal offense as follows from the Patriot Act and the AEDPA. In order to achieve such a result it was necessary to meet a number of requirements:

[I]t is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁰⁷

It is, of course, possible to argue that because of the changed circumstances and the spread of terrorism, the test of clear and imminent danger is no longer appropriate. The First Amendment of the Constitution must arguably be interpreted afresh in such a

¹⁰⁴ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992).

¹⁰⁵ *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).

¹⁰⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁰⁷ *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 663 (1994) (quoting *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)).

way as to permit the violation of protected rights even when the danger is not imminent and cannot be clearly identified. The rationale is that the interest in national security is an important interest worthy of protection, and restricting speech that supports terrorist organizations is a measure which is compatible with this objective. In such a case, the benefit derived from the restriction outweighs the damage it causes. However, is the anti-terrorist legislation excessively restrictive bearing in mind the scope of the protection given to the right to freedom of expression prior to 1996? This article shall attempt to answer this question below.

C. *The Right to Habeas Corpus*

Earlier, we saw the statutory restrictions on *habeas corpus* in terms of the time period provided for exercising that right. Prior to that legislation, such restrictions were not allowed: “[h]abeas corpus provides a remedy . . . without limit of time.”¹⁰⁸

The sole restriction on a prisoner’s right to appeal against a court decision to deprive him of his right to *habeas corpus* was that he had to show “probable cause [which] requires [the] petitioner to make a substantial showing of the denial of [a] federal right.”¹⁰⁹

Today, as noted, the circumstances in which it is possible to restrict *habeas corpus* are extremely broad, and the right of appeal has been dramatically circumscribed.

D. *Violation of the Rights of the Accused including the Right to Due Process*

We have seen the injury caused by legislation that allows a person to be convicted by a special process on the basis of irrefutable secret evidence:

To lock up any human being based on secret evidence is to deny him the most basic component of due-process—a meaningful opportunity to defend oneself. It is simply impossible to defend against secret evidence: How do you prove that you are not a member of a terrorist organization, where there is no evidence to

¹⁰⁸ United States v. Smith, 331 U.S. 469, 475 (1946).

¹⁰⁹ Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (quoting Stewart v. Beto, 454 F.2d 268, 270 (5th Cir. 1971) (quoting Harris v. Ellis, 204 F.2d 685, 686 (5th Cir. 1953)).

refute and the organization hasn't even been named?¹¹⁰

The judicial process created by the AEDPA, the Patriot Act, and the Presidential Order issued in the aftermath of the terrorist attacks of September 11, 2001 authorizing the trial of aliens in military tribunals using secret evidence, are all contrary to the unequivocal rulings of the Supreme Court that in a criminal proceeding, a verdict may not be based on secret evidence: "[t]he Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."¹¹¹

In other words, the government must refrain from invoking its privilege in relation to investigative material. The fact that the prosecution might be precluded from using this material as evidence will not affect the interests of the accused. The accused is interested in seeing *all* the material and exercising his own discretion as to which evidence may be useful to him in his defense.

Likewise, the Patriot Act enables a person to be detained for up to seven days without any judicial process whatsoever, subject only to the authorization of the Attorney General who may extend that detention for up to half a year¹¹² in complete opposition to the Fifth¹¹³ and Fourteenth Amendments to the Constitution.¹¹⁴

The dangers arising out of this provision are threefold. First, as we have seen, there is apparently no longer any need for probable cause in order to detain a person.¹¹⁵ Second, there is no judicial examination prior to carrying out the detention; the detention is ordered without a warrant and only upon the authorization of the Attorney General. Third, and most serious, is

¹¹⁰ Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825, 2848 (2001) (quoting David Cole, *INS Terrorizes Arabs in the U.S.*, *Legal Times*, May 18, 1998, at 167).

¹¹¹ *United States v. Reynolds*, 345 U.S. 1, 12 (1952).

¹¹² Immigration and Nationality Act of 2000 § 236A, 8 U.S.C. 1101, amended by Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. § 412(a)(1)–(a)(6) (2001).

¹¹³ U.S. CONST. amend. V.

¹¹⁴ U.S. CONST. amend. XIV, § 1.

¹¹⁵ Immigration and Nationality Act of 2000 § 236A.

the fact that there is no genuine judicial review shortly after the detention—contrary to the well-known rulings interpreting the Constitution in this area.

The Fourth Amendment to the Constitution does not prohibit detention; it prohibits unreasonable detention.¹¹⁶ The inevitable question is what is unreasonable detention? Who will determine what is reasonable? Detention without a warrant is not necessarily an unreasonable detention. American law recognizes the reasonableness of a detention if the police officer detaining the person has probable cause to believe that an offense has been committed and that the person to be arrested committed it.¹¹⁷

However, the Patriot Act refers to suspicion, and suspicion cannot constitute probable cause.¹¹⁸ To justify detention without a warrant, there must be evidence known to the police officer carrying out the detention which reasonably supports the suspicion that an offense has been committed and that there is legal justification for taking the person into custody.¹¹⁹ The evidence need not give rise to a degree of certainty which is beyond any reasonable doubt, but at the least, it must cause a reasonable person in the shoes of the police officer to believe that an offense was committed. The fact that the Patriot Act waives this requirement and does away with the line separating bare suspicion from reasonable suspicion amounting to probable cause is a significant exception to the general rule as to what is a reasonable detention. Indeed, the number of detentions in the United States following September 11, 2001, shows that the exception is in the process of becoming the rule. Without the Patriot Act, this process would be regarded as an unreasonable detention, and it is unclear whether the Patriot Act is entitled to defy the requirement of probable cause. This is because “[t]he [Fourth Amendment] does draw the line against warrantless arrests made without ‘probable cause.’ The standard for arrest is ‘probable cause,’ and it is one that the legislature itself may not override.”¹²⁰

Legal logic would demand that if a statute waives the

¹¹⁶ U.S. CONST. amend. IV.

¹¹⁷ *United States v. Santana*, 427 U.S. 38, 42 (1976).

¹¹⁸ *Henry v. United States*, 361 U.S. 98, 100, 104 (1959).

¹¹⁹ *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

¹²⁰ BERNARD SCHWARTZ, CONSTITUTIONAL LAW 242 (1972).

requirement for an arrest warrant and the need for probable cause in order to carry out the arrest, the statute should at least demand that the detainee be brought before a judge immediately upon being taken into custody to allow a judge to consider the legality of the arrest. In cases of an arrest made without a warrant but upon probable cause, the law compels immediate judicial review of the arrest. The absence of probable cause only strengthens the need for such review: “[t]he next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined.”¹²¹

The Patriot Act, however, enables the authorities to wait seven days before arraigning the detainee, and with the authorization of the Attorney General, the authorities can wait for an additional six months, renewable over an unlimited period of time.¹²² This is completely contrary to *Gerstein v. Pugh*,¹²³ which stands for the principle that the right to judicial review of the legality of detention is a constitutional right:

[*Gerstein*] holds that the Fourth and Fourteenth Amendments require a timely judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest. A state procedure is invalid when it provides that a person arrested and charged by information may be jailed or subjected to other restraints pending trial without opportunity for a judicial probable cause determination.¹²⁴

The Patriot Act expressly opposes this principle, and thereby severely harms an individual’s right to liberty. Such harm may continue for a lengthy period of time, and in the absence of appropriate judicial review, there is a grave danger that it will be unearthed as a mistake only after many years have elapsed.

In addition to this harm, the Patriot Act erodes the scope of the protection given to the rights of the accused. The well-known principles concerning the rights of an accused, particularly his right to due process prior to being deprived of his liberty were first developed during the tenure of Chief Justice Warren:

¹²¹ *Mallory v. United States*, 354 U.S. 449, 454 (1957).

¹²² USA PATRIOT Act, *supra* note 2, at § 412.

¹²³ 420 U.S. 103 (1975).

¹²⁴ SCHWARTZ, *supra* note 120, at 246–47.

Given the almost total lack of concern by state courts for rights of the accused prior to the 1950s, one can see that the Warren Court, in breathing life back into the Fourth, Fifth and Sixth Amendments, tried to create a set of rigid prophylactic rules which, if followed by police and prosecutors, would meet the basic requirements of the Constitution.¹²⁵

The Warren Court was responsible for the major cases protecting the majority of the rights of the accused: the right to an attorney, appointed by the State in the case of indigence;¹²⁶ the right to remain silent;¹²⁷ the right to be informed that all statements can be used against a suspect; and the right to be informed that a suspect is under no compulsion to speak.¹²⁸

Although the Patriot Act does not expressly repudiate these rights, the indirect impact of the Patriot Act is likely to be that most of these rights will be void of effect. When a person knows that he may be detained for an unlimited period of time without any judicial process whatsoever, can he take advantage of the right to remain silent? Is he not subject to pressure to speak and divulge information? The Patriot Act also has ramifications regarding the protection afforded by the Constitution against self-incrimination. In 1993, the Supreme Court emphasized that: "[i]n protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'"¹²⁹

After the enactment of the Patriot Act, the Attorney General issued a decision enabling the monitoring of communications between attorneys and suspects.¹³⁰ Does this decision make the right to meet with counsel a dead letter? The operative result of this decision may be draconian in terms of the constitutional right to proper representation; it is difficult to imagine that an attorney would be willing to represent a defendant knowing that all of their communications were being taped. Steven Kimelman, formerly a

¹²⁵ MELVIN L. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 994 (Oxford University Press 2002).

¹²⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that, at least in all felony prosecutions, an indigent defendant must be appointed counsel).

¹²⁷ *Griffin v. California*, 380 U.S. 609 (1965).

¹²⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹²⁹ *Withrow v. Williams*, 507 U.S. 680, 691 (1993).

¹³⁰ Bureau of Prisons Regulation, 66 Fed. Reg. 211, 55061 (Oct. 31, 2001).

federal prosecutor and now a criminal defense lawyer, explains:

No criminal defense lawyer can provide adequate assistance of counsel if the attorney and his or her client know the adversary (the Justice Department) is monitoring every word that they say or write to each other. There is ample judicial precedent for this proposition, and every practicing lawyer knows it's just that simple. I seriously doubt whether an attorney could even ethically undertake to represent someone with these restrictions in place.¹³¹

E. Protection Against Unreasonable Search

A distinction must be drawn between two scenarios: one, where a search is conducted outside the borders of the United States; the other, where a search is conducted within the United States.

Regarding the first scenario, notwithstanding that it is generally thought that if the search is conducted by a United States government agent then it will be generally subject to the Fourth Amendment,¹³² the U.S. Supreme Court found that: "[t]he Fourth Amendment was not relevant in evaluating the legality of a United States-directed search in Mexico of a Mexican citizen's residence who had no substantial voluntary attachment to the United States, despite the fact that he was being prosecuted in our courts."¹³³

One must ask whether an American citizen residing outside the borders of the United States is not also entitled to the protection of the Fourth Amendment. While there is an objective difficulty in obtaining a search warrant from a judge, since citizens residing outside the country are not subject to the court's jurisdiction, Executive Order 12,333 empowers the Attorney General to authorize activities against a citizen located abroad,¹³⁴ on condition that "there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power."¹³⁵

¹³¹ Steven Kimelman, *Protecting Privilege*, NAT'L L.J., December 3, 2001, at A21.

¹³² Ronald J. Sievert, *Meeting the Twenty First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 HOUS. L. REV. 1421, 1431-32 (2000).

¹³³ *Id.* at 1432.

¹³⁴ Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

¹³⁵ *Id.* at 59,951.

The accepted approach by the courts is that even a citizen located abroad is entitled to the protection of the Constitution: "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide . . . should not be stripped away just because he happens to be in another land."¹³⁶

In the second scenario, where the search is conducted within the territory of the United States and all constitutional protections apply, the violation of rights protected by the Fourth Amendment must meet the requirements of probable cause, which shall be discussed below in connection with the infringement on a person's right to privacy when his or her home is searched.

F. The Violation of the Right to Privacy

Many of the provisions of the Patriot Act sanction an infringement of privacy by means of monitoring and wire-tapping. These practices are carried out without satisfying once-applicable requirements. While it is still necessary to obtain a warrant in order to conduct a search, the court has been deprived of its substantive discretion and has been left with only its formal discretion: "[m]any provisions of the USA-PATRIOT Act limit judicial review of law enforcement activities altogether, or create the illusion of judicial review while transforming judges into mere rubber stamps."¹³⁷

By the 1980s, investigative and law enforcement agencies did not require warrants if the purpose of monitoring was to gather foreign intelligence: "[i]n such cases, the government has the greatest need for speed, stealth, and secrecy, and the surveillance in such cases is most likely to call into play difficult and subtle judgments about foreign and military affairs."¹³⁸ However, the Patriot Act expands this authority by removing the distinction between monitoring for investigative purposes and monitoring for the purpose of gathering foreign intelligence. The result is that:

Under the new law only a 'significant purpose,' as opposed to 'the purpose' of the investigation is needed to sidestep the warrant requirement. Law enforcement can now wiretap a

¹³⁶ Reid v. Covert, 354 U.S. 1, 6 (1957).

¹³⁷ Weich, *supra* note 6.

¹³⁸ United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980).

United States citizen, without a criminal warrant, when the primary purpose of the wiretap is for criminal investigation. This fundamental shift poses a serious threat to our constitutionally protected privacy rights and alters the checks and balances critical to our governmental structure.¹³⁹

The absence of effective judicial review may lead to activities that seriously and unnecessarily infringe on an individual's privacy rights. When the investigative authorities are allowed to engage in monitoring without probable cause, they thereby risk an improper exercise of power. This is completely contrary to the principle of protection afforded by the Fourth Amendment prior to the enactment of the Patriot Act:

In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness . . . in determining whether a particular inspection is reasonable — and thus in determining whether there is probable cause to issue a warrant for that inspection — the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.¹⁴⁰

It is possible that in the current state of affairs, where terrorist attacks endanger the safety of the public, a more flexible examination will be conducted as to the existence of probable cause, and it will not be necessary to meet the high standard required for other criminal offenses. This approach might be acceptable to the courts: "[i]t may be that Congress, for example, would judge that the application and affidavit showing probable cause [for security surveillance] need not follow the exact requirements of section 2518 [Title III for criminal cases], but should allege other circumstances more appropriate to domestic security cases. . . ."¹⁴¹ However, this relaxation of standards cannot turn the requirement for probable cause, which appears in the Fourth Amendment, into an empty phrase. It should be necessary to prove some circumstances that give rise to fears about national security and public safety, prior to the court allowing an order to be issued that will infringe on the privacy of a person in a

¹³⁹ DAILY RECORD, Nov. 19, 2001, at 1B.

¹⁴⁰ *Camera v. Mun. Court.*, 387 U.S. 523, 534-35 (1967).

¹⁴¹ *United States v. United States Dist. Court*, 407 U.S. 297, 323 (1972).

severe and perhaps unnecessary way. When Congress enacted the Foreign Intelligence Surveillance Act (FISA),¹⁴² many criticized the Act as unconstitutional. Although the Act required a court order to monitor an American citizen or an alien resident, it did not require probable cause in the same way as, for example, Title III of the Omnibus Crime Control and Safe Streets Act. Title III states that the government's standard of proof is a "[s]trict standard of probable cause to believe that a particular crime is being committed by a specific individual using an identified phone or location."¹⁴³

Instead, the FISA is satisfied with the existence of facts that comprise probable cause for believing that: "[t]he target of the electronic surveillance is a foreign power or an agent of a foreign power," and must certify "that the purpose of the surveillance is to obtain foreign intelligence information. . . ." ¹⁴⁴

Despite the low standard of proof required, the Court has confirmed that where surveillance is needed for the purpose of protecting national security, there is no need for the same level of probable cause required by Title III.¹⁴⁵

Judicial review of government actions should also be required when the actions concern national security, if only because of the fear that such actions might infringe on an individual's right to privacy based merely on an assertion of national security. However, the court may expose other concealed motives and "[t]he Supreme Court, in *United States v. United States District Court*, held that the Government did not have unlimited power to conduct national security wiretaps and that it would be required in most circumstances to obtain the issuance of a warrant by the judiciary before utilizing this surveillance technique."¹⁴⁶

The central question is what level of suspicion must the court

¹⁴² 50 U.S.C. § 1801 (1994).

¹⁴³ 18 U.S.C. § 2510 (1994 & Supp. IV 1999).

¹⁴⁴ *United States v. Cavanagh*, 807 F.2d 787, 789 (9th Cir. 1987).

¹⁴⁵ "The governmental interests in gathering foreign intelligence are of paramount importance to national security, and may differ substantially from those presented in the normal criminal investigation." *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987).

¹⁴⁶ Sievert, *supra* note 132, at 1436 (citing *United States v. United States Dist. Court*, 407 U.S. 297, 323-24 (1972)).

demand of the government in order to allow it, for example, to engage in wiretaps? Many years before the enactment of the Patriot Act, voices were heard to the effect that in national security cases, it was sufficient to prove a lower level of suspicion than that needed in relation to ordinary criminal offenses.¹⁴⁷ However, what is the level of suspicion, and what degree of probable cause is needed, when the offense is terrorism which threatens national security? Is the test reasonable suspicion which may be interpreted in accordance with the circumstances of each case? The Ninth Circuit held that: “[r]easonableness, not probable cause, is undoubtedly the touchstone of the Fourth Amendment.”¹⁴⁸ Or, is the test a higher level of suspicion? A higher level of suspicion would require “substantial evidence that would convince a reasonable man that a crime is about to be committed and that the defendant is the one who will commit it.”¹⁴⁹

When these questions arise against the background of international terrorism, it is difficult to obtain the information necessary to meet the strict standard of probable cause.¹⁵⁰ Terrorism involves a network that covers the world, and it is not always possible to point to the specific person who intends to commit a specific act. Does this problem justify demanding a degree of suspicion, which is reasonable in the circumstances of the case, *i.e.*, circumstances involving terrorism so that any suspicion would be a reasonable suspicion?

The Patriot Act reflects a willingness to be satisfied with any level of suspicion since one may presume that the legislature would not adopt empty language.¹⁵¹ The purpose of the legislation was to supply law enforcement agencies with tools to assist them in their fight against terrorism. This view was based on the presumption that the measures available prior to the enactment of the Act did not enable the proper and effective handling of the dangers that took their toll on September 11, 2001. If this is the

¹⁴⁷ See *supra* note 142 and accompanying text.

¹⁴⁸ *United States v. Barona*, 56 F.3d 1087, 1092 n. 1 (9th Cir. 1995).

¹⁴⁹ *Texas v. Brown*, 460 U.S. 730, 742 (1983) (“[P]robable cause . . . requires that the facts available to the officer would warrant a man of reasonable caution in the belief . . .”).

¹⁵⁰ See *Pelton*, 835 F.2d at 1075.

¹⁵¹ See *Barona*, 56 F.3d at 1092.

case, the purpose of the legislation was certainly not to restate the stringent requirements of probable cause, as this already had been deprived of effect with regard to terrorism offenses.¹⁵² The inescapable conclusion is that the statutory purpose was to further reduce the standard of suspicion needed to any suspicion *per se*. In the aftermath of September 11, any suspicion was reasonable suspicion, and it already has been said that reasonableness lies at the heart of the Fourth Amendment.¹⁵³ Hints of this may be found in reference to the powers of the Attorney General, where the Act uses the expression: "reasonable ground to believe."¹⁵⁴ From this language, many critics of the Patriot Act have concluded that the level of suspicion needed is significantly different from traditional probable cause, thereby severely impairing the proper balance between human rights and national security. Thus, for example:

[F]or Lawrence S. Lustberg, President of the Association of Criminal Defense Lawyers of New Jersey, the law tips the scales against civil liberties, effectively playing into the hands of terrorists bent on derailing democratic systems. 'There are general tests of reasonableness or balancing tests for wiretaps. When that balancing act is changed, terrorism has won,' he said.

¹⁵⁵

The result is that the Patriot Act, which requires a court order authorizing the infringement of the protected constitutional rights of a person and in particular the right to privacy and the right not to be searched, is satisfied with a magistrate's order or the order of a FISA judge. Prior to the Patriot Act, the order was also given without proof of probable cause.¹⁵⁶ Today, on the assumption that the Patriot Act is intended to modify and not to preserve the existing situation, these orders will be given on the basis of an even lower degree of suspicion. This is a difficult outcome and a grave violation of human rights, particularly in light of the fact

¹⁵² See *Pelton*, 835 F.2d at 1075.

¹⁵³ See *Barona*, 56 F.3d at 1092.

¹⁵⁴ USA PATRIOT Act, *supra* note 2, at § 412 (amending the Immigration and Nationality Act, 8 U.S.C.S. 1101 (2002)).

¹⁵⁵ Maria Vogel-Short, *A Collision Course? Public Safety vs. Civil Liberties*, NEW JERSEY LAWYER, Nov. 5, 2001, at 1.

¹⁵⁶ In the year 2000, out of one thousand applications for a wiretap order, only one application was rejected. *Id.* (citing report from the Center for Democracy and Technology).

that the erosion of the right to privacy that took place in 1996 in the AEDPA is deepened further in the Patriot Act. Despite President Clinton's proposal that a single wiretap authorization be instituted, the AEDPA, "allowed roving wiretaps of suspected terrorists instead of requiring a new court order for each new wiretap location."¹⁵⁷

Even though the AEDPA rejected Clinton's proposal,¹⁵⁸ the Patriot Act provided that:

[R]oving wiretaps no longer have to be obtained within specific jurisdictions. A single wiretap authorization can be used for the targeted individual. The law increases law enforcement's ability to tap a person's home, business and cell phone - even the phone of someone that person is visiting, all within a single application to a Foreign Intelligence Surveillance Act judge or a U.S. magistrate.¹⁵⁹

Even though it was known prior to the Patriot Act that a police officer or other competent investigative officer was required to be equipped with a specific warrant to conduct a search, the Court already held by a majority opinion¹⁶⁰ in 1947 that in cases where police officers entered into an apartment with a valid warrant with the intention of searching for a particular type of evidence, and found different evidence, they could use that material in order to charge the suspect with another offense. The minority judges argued that the doctrine violated the intent of the Fourth Amendment and, in essence, gave police a roving warrant.¹⁶¹ This minority opinion became law a year later,¹⁶² and a specific search warrant was required. There is no doubt that the Patriot Act is an innovation which has more severe consequences for human rights than the AEDPA.

This article shall now turn to a comparative look at the anti-

¹⁵⁷ See Smith, *supra* note 86, at 259-78 (review of the bill through to the final draft).

¹⁵⁸ Lawrence M. O'Rourke, *Anti-Terrorism Bill on President's Desk*, SACRAMENTO BEE, Apr. 19, 1996, at A1.

¹⁵⁹ Vogel-Short, *supra* note 155, at 1; see also USA PATRIOT Act, *supra* note 2, at § 219 (referring to single jurisdiction search warrants for terrorism).

¹⁶⁰ Harris v. United States, 331 U.S. 145, 155 (1947).

¹⁶¹ See *id.* at 156.

¹⁶² Johnson v. United States, 333 U.S. 10, 13-17 (1948).

terrorist legislation in Britain and Israel; thereafter it will examine whether, in light of human rights violations authorized by the Patriot Act, the new balance introduced is proper.

IV. A Comparative Look: Britain and Israel Contending with Terrorism

A. Britain

There are those who argue that the U.S. anti-terrorist legislation, commencing in 1996 with the AEDPA, has imitated legislative models introduced in Britain to combat terrorism.¹⁶³ Indeed, a review of the laws in Britain brings to the fore multiple similarities with the AEDPA and the Patriot Act.¹⁶⁴ In section A, this article will discuss Britain's legislative methods of coping with terrorism, the extent of the harm to human rights ensuing from this legislation, and the great similarity between the practices adopted in Britain to cope with terrorism and the measures introduced by the AEDPA and the Patriot Act.

Prior to specifying the various statutes and the extent to which they harm human rights, we must recall the central difference between the United States and Britain. Until 1998, British law was not subject to a supreme constitution or bill of rights. Despite the absence of these formal documents, prior to 1998, the British government was committed to refraining from harming human rights and civil liberties by virtue of the European Convention on Human Rights, which Britain joined in consequence of pressure exerted on it by the European Court of Human Rights.¹⁶⁵ In 1998, Britain formally incorporated the Convention into its domestic law, and since then the Convention is treated as a bill of rights in Britain.¹⁶⁶ The Convention entrenches the duty of a State to guarantee and protect a citizen's right to life,¹⁶⁷ as well as other

¹⁶³ Gregory C. Clark, *History Repeating Itself: The Devolution of Recent British and American Antiterrorist Legislation*, 27 *FORDHAM URB. L.J.* 247, 273-274 (1999).

¹⁶⁴ *See id.*

¹⁶⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 *U.N.T.S.* 221 [hereinafter *European Convention*].

¹⁶⁶ Kevin Dooley Kent, *Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act 1998 Be Reconciled With Its Human Rights Act?*, 33 *VAND. J. TRANSNAT'L L.* 221, 225 (2000).

¹⁶⁷ Article 2 of the Convention provides:

human rights, infringements of which are prohibited by the Convention.¹⁶⁸ All this is subject to one exception: Article 15 of the Convention states that in time of war or other times of emergency that threaten the life of the nation, measures may be used which violate human rights.¹⁶⁹ All this is subject to scrutiny in accordance with the Convention. In practice, the rights protected by the Convention were also respected as a matter of English common law, including the right to privacy and family life,¹⁷⁰ freedom of expression,¹⁷¹ freedom of movement,¹⁷² the right to individual freedom and protection against arbitrary detention,¹⁷³

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

European Convention, *supra* note 165, at 224.

¹⁶⁸ Personal freedom is guaranteed in article five. Freedom of movement is expressly granted in protocol four, article two. Respect for family life is protected under article eight. Freedom of expression is in article ten and due process is protected in article six. European Convention, *supra* note 165, at 226.

¹⁶⁹ Article 15 provides:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligation under international law. (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3, 4 (paragraph 1) and 7 shall be made under this provision. (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

European Convention, *supra* note 165, at 233.

¹⁷⁰ *Entick v. Carrington*, 95 Eng. Rep. 807, 817-18 (1765).

¹⁷¹ *R. v. Secretary of State for the Home Dep't Ex p. Brind*, 2 W.L.R. 588, 594 (1991).

¹⁷² *Magna Carta*, 1215, ch. 42.

¹⁷³ *Christie v. Leachinsky*, [1947] 1 App. Cas. 573, 587, 591, 600.

and the right to a fair trial.¹⁷⁴

The United Kingdom Prevention of Terrorism Act (PTA) was the first act providing the executive branch with tools having a significant impact on human rights with the intention of dealing in a more efficient manner with terrorism. The PTA outlawed two organizations, the Irish Republican Army (IRA) and the Irish National Liberation Army (INLA), and granted broad powers of arrest, detention, and deportation against suspected terrorists. According to human rights organizations, these powers were ineffective but had the manifest outcome of violating human rights. Of all the detentions carried out, 95 percent of the detainees were found to be innocent, and the government failed to prove that the remaining 5 percent would not have been arrested save for the means offered by the PTA.¹⁷⁵

The most prominent similarity between the PTA and the Patriot Act is the provision enabling a terrorist suspect to be held in detention for up to seven days without bringing him before a judge. In November 1988, the European Court of Human Rights held that this provision was in breach of the European Convention on Human Rights. Preceding the 1984 provision was a 1974 provision,¹⁷⁶ which enabled a person to be detained for up to forty-eight hours. Detention could be extended for an additional five days without judicial review only upon an order to that effect being issued by the government. In the 1988 case, four residents of Northern Ireland were held for periods ranging from four to sixteen days without being brought before a judge. All four were released without charges being brought. The decision relied on the fact that Britain had signed the European Convention on Human Rights.¹⁷⁷

In 1989, Britain amended the statutory provisions within the framework of the PTA.¹⁷⁸ The latter Act has a variety of

¹⁷⁴ The term commonly used for this in English law is "natural justice" or "procedural fairness." See also *Council for Service Unions v. Minister for the Civil Service* 3 All E. R. 935 (1984).

¹⁷⁵ Caleb M. Pilgram, *Terrorism in National and International Law*, 8 DICK. J. INT'L L. 147, 190 (1990).

¹⁷⁶ Prevention of Terrorism (Temporary Provisions) Act, 1974, ch. 56, 7.

¹⁷⁷ Karen De Young, *European Court Rules Against British Law; Anti-Terrorism Measure Said to Violate Rights*, WASH. POST, Nov. 30, 1988, at A25.

¹⁷⁸ Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4.

significant provisions that empower the Secretary of State to issue exclusion orders against persons believed to be connected with terrorism; prohibits financial assistance for terrorism; and allows a police officer to arrest without a warrant a person whom the officer reasonably suspects of being associated with the commission, preparation, or instigation of terrorist acts. The PTA also criminalizes failure to disclose to the police information that may prevent acts of terrorism or may aid in the apprehension, prosecution, or conviction of a terrorist offense.¹⁷⁹

Like the main criticism directed toward American anti-terrorist legislation, the primary criticism of the British Act focused on the absence of judicial review and the severe harm that might thereby be caused to human rights:

Critics also contend that the Secretary of State's right to issue exclusion orders, without court review, against British citizens and non-citizens from being in or entering the United Kingdom, is a violation of civil rights. Exclusion orders deprive certain people of the right to move freely around the United Kingdom and to live where they please. The evidence against them is not tested in a court of law nor made known to the person excluded and it is possible that some of it may be inaccurate.¹⁸⁰

Contrary to the Patriot Act, which itself includes provisions infringing on privacy, and authorizes eavesdropping and monitoring, the equivalent British provisions appear in a separate statute—the Interception of Communication Act of 1985.¹⁸¹ Until 1985, eavesdropping had been prohibited by English law. The Act provides that eavesdropping is a criminal offense unless it is carried out under an order issued by the Secretary of State. Such an order will be given in the following circumstances: “(a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime; or (c) for the purpose of safeguarding the economic well-being of the United Kingdom.”¹⁸²

In 1996, following a new terrorist attack by the IRA, the British government initiated new legislation - the Northern Ireland

¹⁷⁹ Graham Zellik, *Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties*, 31 WM. & MARY L. REV. 773, 812-17 (1990).

¹⁸⁰ Smith, *supra* note 86, at 279-80.

¹⁸¹ Interception of Communication Act of 1985, ch. 56.

¹⁸² *Id.*, § 2(2).

Emergency Provisions Act, 1973 (EPA), containing most of the provisions of the earlier legislation mentioned above but conferring some new powers on the security forces to enable them to deal with Northern Ireland terrorism. The combination of provisions of the two Acts creates a harsh picture of violations of human rights. The EPA grants the police and security forces broad powers of search, arrest, and detention which can be carried out without court orders and without the need for reasonable suspicion.¹⁸³ The PTA supplements the EPA in the sense that it grants broad powers to the police to investigate terrorist offenses. It is sufficient for the police officer to have a reasonable suspicion that a person supports terrorist activities to empower the officer to arrest that person without a warrant, notwithstanding that this person is under no suspicion whatsoever of actually having committed a particular crime. Despite these broad powers, confessions will not be admissible in court if evidence is brought that the confessions were obtained as a result of torture, degrading treatment, violence or threat of violence.¹⁸⁴

Beyond the violation of civil liberties and the right to privacy resulting from the powers of arrest and interrogation granted by the Acts, the statutes violate additional rights. One blatant infringement is of the right to freedom of association. The EPA outlaws ten organizations,¹⁸⁵ and the PTA outlaws an additional

¹⁸³ According to the Act, both a police officer and a soldier are empowered to: 1) enter and search buildings, other than a dwelling house and seize any munitions or radio transmitters and receivers found therein; 2) stop and search persons in public places and seize any munitions or radio transmitters and receivers; 3) enter a non-dwelling building to search for and seize explosives; 4) stop and search persons in public places and seize explosives; 5) enter any premises to search for detained persons; 6) stop and question persons anywhere to ascertain identity, movements or knowledge of terrorist incidents; and, 7) enter any premises in the course of operations for preservation of peace or maintenance of order. Northern Ireland (Emergency Provisions) Act 1996, ch. 22, §§ 17-24 (Eng.).

¹⁸⁴ Northern Ireland (Emergency Provisions) Act 1996, ch. 22, § 12(2)(b) (Eng.).

¹⁸⁵ Organizations proscribed by the EPA are the Irish Republican Army, Red Hand Commandos, Cumann na mBan, Fianna Na mBan, Saor Eire, Ulster Freedom Fighters, Ulster Volunteer Force, Irish National Liberation Army, Irish People's Liberation Organization, and the Ulster Defense Force. Northern Ireland (Emergency Provisions) Act 1996, ch. 22 § 30(2) sched. 2 (Eng.). *See also* Northern Ireland (Emergency Provisions) Act 1996, ch. 22 § 30(4) sched. 2 (Eng.) (the Secretary of State may add or remove organizations from this list).

two.¹⁸⁶ The EPA specifies the ramifications of outlawing an organization for freedom of association, as follows:

When an organization is listed, it becomes illegal for any person to: (a) belong to the organization, (b) solicit support for the organization, (c) solicit membership or carry out orders of the organization, (d) address any meeting of three or more persons knowing that the meeting is to: i) support a proscribed organization, ii) further the activities of proscribed organization, or iii) be addressed by a member of a proscribed organization.¹⁸⁷

One outcome of this restriction on freedom of association is that it also restricts freedom of expression: “[t]he media has been prohibited from broadcasting words spoken by representatives of proscribed organizations, or any statements supporting proscribed organizations.”¹⁸⁸ The EPA and the PTA expressly prohibit members of the public from wearing emblems or writing articles that create reasonable grounds for believing that the person concerned is a member of or supports the organization which has been outlawed.¹⁸⁹

Any support, including financial support, for terrorist acts or for organizations that have been outlawed is illegal. The EPA authorizes the attachment of all revenues linked to terrorist activities.¹⁹⁰ Like the Patriot Act, the PTA also discharges banks from liability for breaches of the duty of confidentiality and encourages them to divulge information regarding assets suspected of being used for terrorist activities.¹⁹¹

The last in this series of anti-terrorist legislation is the Criminal Justice Terrorism and Conspiracy Act of 1998 (CJTCA). Resembling the context in which the Patriot Act was enacted, this statute was enacted in record time against the background of a

¹⁸⁶ The IRA and INLA were organizations outlawed by the 1984 Act. Prevention of Terrorism (Temporary Provisions) Act 1989, ch. 4, § 1, sched. 1 (Eng.).

¹⁸⁷ Northern Ireland (Emergency Provisions) Act 1996, ch. 22, § 30(1)(a)-(d), sched. 2 (Eng.).

¹⁸⁸ Matthew H. James, *Keeping the Peace-British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 DICK. J. INT'L. 405, 422-23 (1997).

¹⁸⁹ Northern Ireland (Emergency Provisions) Act 1996, c. 22 §§ 31 (a)(b), 32(1), 35, sched. 2 (Eng.).

¹⁹⁰ James, *supra* note 188, at 426.

¹⁹¹ *Id.* at 425.

bombing spree launched against Britain by a Northern Ireland group that claimed the lives of twenty-nine people, followed shortly afterwards by the attack on the U.S. Embassies in Kenya and Tanzania. Also playing a part in the enactment of the CJTCA was world pressure which claimed that Britain was providing a safe haven for the planning of terrorist attacks.¹⁹²

British anti-terrorist legislation is contrary to a number of provisions of the European Convention on Human Rights. The most patent variances are found in the CJTCA, which ironically was enacted at the same time that Britain adopted the European Convention of Human Rights into its domestic law.¹⁹³ The British courts cannot nullify legislation solely for being contrary to the Convention, but they must always give preference to a construction that is consistent with the Convention as opposed to one that is not.¹⁹⁴ Under the CJTCA, it is possible to convict persons suspected of involvement in terrorist organizations, a modification which is apparently contrary to Article 6 of the Convention, which establishes a right to due process.¹⁹⁵

¹⁹² Kent, *supra* note 166, at 227.

¹⁹³ See Human Rights Act 1998, ch. 42 (Eng.).

¹⁹⁴ *Id.* at § 3.

¹⁹⁵ Article 6 provides:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (2) Everyone charged with a criminal offense shall be presumed innocent until proved guilty. (3) Everyone charged with a criminal offense has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defense; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required; (d) to examine or have examined witnesses on his behalf under the same condition as witnesses against him; (e) have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Human Rights Act 1998, ch. 42, Article 6, sched. 1 (Eng.).

First, the CJTCA violates the right to freedom of association and prohibits membership of organizations that are listed by the Secretary of State.¹⁹⁶ The CJTCA prohibits “conspiracy to commit terrorist offenses” but does not define precisely what these terms mean, thereby leading to the possibility of an unnecessary infringement of the right to freedom of association. Articles ten and eleven of the European Convention enable a State to restrict the exercise of the right to freedom of association when such restrictions are necessary in a democratic State to protect national security, territorial independence, or public safety. However, any restriction of these rights must be made as narrow as possible, use the least drastic measures, and be effective for the least possible amount of time.

In order to convict a person of membership in an organization listed by the Secretary of State, the CJTCA authorizes a police officer to testify that: “[i]n his opinion, the accused . . . belongs to an organization which is specified, or . . . belonged at a particular time to an [organization] which was then specified.”¹⁹⁷ Such testimony is admissible and is evidence of the content of the statement, although a person cannot be convicted solely on the basis of such police testimony.¹⁹⁸ The CJTCA thus turns a police officer into an expert witness who is authorized not only to testify to the facts in his possession but also to give his interpretation and opinion on those facts.

The CJTCA is even more far-reaching in its provisions infringing the right of an accused to maintain silence. In order to establish whether the accused belongs to a listed organization, a jury may draw negative conclusions from the silence of the accused during interrogation.¹⁹⁹ This silence during interrogation

¹⁹⁶ Criminal Justice (Terrorism and Conspiracy) Act 1998, c. 40, § 1 (1) (Eng.).

¹⁹⁷ *Id.* at § 1 (2).

¹⁹⁸ *Id.* at § 1 (3).

¹⁹⁹ *Id.* at § 1 (4):

[T]he jury may draw adverse inferences where: (a) at any time before being charged with the offense the accused, on being questioned under caution by a constable, failed to mention a fact which is material to the offense and which he could reasonably be expected to mention, and (b) before being questioned he was permitted to consult a solicitor.”. *See also* Criminal Justice (Terrorism and Conspiracy) Act 1998, c. 40, § 1 (5) (Eng.) (an inference may be drawn where: “(a) on being charged with an offense or informed by a constable that he might

may occur in two circumstances: first, where the suspect is interrogated prior to being charged and prior to being allowed to see a lawyer, and second, after being charged or after the suspect has been informed by a police officer that he would probably be charged and he was interrogated after being allowed to see a lawyer. In these cases; however, the accused may not be convicted solely by reason of his silence.²⁰⁰

Article 6 of the Convention does not expressly provide for a suspect's right to silence; however, the European Court of Human Rights has extrapolated this right from Article 6: "[t]he right to remain silent under police questioning and the privilege against self-incrimination are generally [recognized] international standards that lie at the heart of the notion of fair procedure under Article 6."²⁰¹

Subject to one reservation, it follows that using the silence of a suspect against him is a flagrant breach of article six. As the European Court has also agreed, the right to silence is not absolute. A review of British legislation and case law on this issue shows that conclusions may only be drawn from the silence of the accused when the prosecution has proven a *prima facie* case against the accused, which is defined as:

a case which is strong enough to go to a jury, *i.e.*, a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond a reasonable doubt . . . that each of the essential elements of the offense is proved.²⁰²

As noted, the CJTCA itself does not allow a conviction to be based solely on the silence of the accused. It requires that the accused be allowed to exercise his right to meet an attorney prior to being interrogated, thereby enabling the attorney to advise and caution him that his silence may also be used against him apart

be prosecuted the accused failed to mention a fact which is material to the offense and which he could reasonably be expected to mention, and (b) before being charged or informed he was permitted to consult a solicitor.

Id.

²⁰⁰ Criminal Justice (Terrorism and Conspiracy) Act 1998, c. 40, § 1 (6) (b) (Eng.).

²⁰¹ Murray v. United Kingdom, 22 Eur. Ct. H.R. 29, 60 (1996).

²⁰² Murray v. Director of Public Prosecutions, 97 Crim. App. R. 151, 154 (U.K. 1992).

from the additional evidence held by the prosecution. In my opinion, this fact neutralizes the fears arising from the breach of article six of the Convention. However, it is not clear as to what may amount to a *prima facie* case for the purposes of the CJTCA, if one assumes that the definition previously set forth may be revised in view of the evolving reality of fear of terrorism becoming a central component of national life. In that reality, a breach of article six is not impossible.

A separate breach of the right of the accused to a fair procedure and fair trial under Article 6 of the Convention is reflected in the fact that, under the CJTCA, the prosecution is authorized to make use of secret evidence, and thereby infringing the right of the accused to effectively cross-examine witnesses and disturbing the balance of power between the prosecution and the defense.²⁰³

Prior to the enactment of the CJTCA, British law required the disclosure to the accused of all relevant information which might have an influence on the defense or be connected to the circumstances of the case.²⁰⁴ However, in certain circumstances where the disclosure of the evidence would be contrary to the public interest, for example, where disclosure of the evidence would reveal the source of the police information thereby endangering the life of the informant or causing him to cease operating as an informant, secret evidence could be used.²⁰⁵

The CJTCA allows an impression to be obtained from the testimony of a police officer for the purpose of gaining a conviction, thus the right to a fair trial is severely infringed in those cases where the opinion is based on secret evidence. Fear of such a result is heightened in light of the Attorney General's guidelines defining "sensitive material" which need not be disclosed should such disclosure be contrary to the public interest.²⁰⁶ One example of this is where the material deals with a matter

²⁰³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

²⁰⁴ Attorney General's Guidelines Disclosure of Information to the Defense in Cases to be Tried on Indictment, 74 Crim. App. R. 302, 302 (U.K. 1982) [hereinafter Attorney General's Guidelines].

²⁰⁵ See *R. v. Hennessey*, 68 Crim. App. R. 419, 425 (1978).

²⁰⁶ A statement contains sensitive material if:

(a) it deals with matters of national security; or it is by, or discloses the identity

of national security. Clearly, this will be the primary material in a case concerning terrorist offenses and therefore the use of secret evidence in CJTCA trials will be routine. The Attorney General requires a balance to be drawn between the level of sensitivity of the material and the extent to which this material is likely to assist the defense of the accused. In close cases, the material must be disclosed.²⁰⁷ British case law in this regard indicates that the courts do not have a problem with secret evidence where it is designed to protect the identity of a police informant unless exposure of his identity is likely to assist the accused to prove his innocence or prevent a miscarriage of justice.²⁰⁸

Where a police officer gives an opinion that the accused is a member of a terrorist organization on the basis of secret evidence or on the basis of information supplied by intelligence sources which cannot be revealed, and that opinion may support a conviction, the danger of a miscarriage of justice is great. Yet, the public interest demands that secrecy be maintained. The likelihood of the accused succeeding in proving that his interest in exposing the intelligence source overrides the interest in protecting the source and the public interest in general is extremely low:

[I]n many of these situations it is likely that the balance may favor non-disclosure. This is due to the nature of prosecutions for terrorists offenses. They often involve information flowing from highly confidential intelligence sources. . . . Also there will be a great need to keep the identities of informers confidential due to the reputation of certain paramilitary and terrorist organizations of exacting revenge on informers.²⁰⁹

In the light of the circumstances in which the statute was

of, a member of the Security Services who would be of no further use to those Services once his identity became known. (b) [i]t is by, or discloses the identity of, a witness and there are reasons for fearing that disclosure of his identity would put him or his family in danger. (c) [i]t is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity become known. (d) [i]t contains details which, if they become known, might facilitate the commission of other offenses. . . or it discloses some unusual form of surveillance or method of detecting crime.

Attorney General's Guidelines, *supra* note 204, at 303.

²⁰⁷ *Id.* at 304.

²⁰⁸ *R. v. Keane*, 99 Crim. App. R. 1 (U.K. 1994).

²⁰⁹ *Kent*, *supra* note 166, at 243-244.

enacted, the spread of international terrorism and the real threat it poses to the nations of the free world, there is a genuine danger that the use of secret evidence to prove guilt will become routine. Consequently, the rights of the accused under article six of the Convention may be severely infringed, even in cases where in retrospect it is clear that the authorities could have refrained from such an infringement and enabled the accused to exercise his right to a fair and proper trial.

As noted, the court does not have the power to nullify the CJTCA, notwithstanding that its provisions conflict with the Convention. However, the court is able to give a restrictive interpretation to the provisions of the CJTCA. Such an approach is vital not only in order to enable the accused to exercise his right to a fair trial in the prevailing circumstances, but also in order to thwart the terrorists' aspiration to undermine the democratic values cherished by the free world.

It may be argued that the provisions of the CJTCA are not as draconian as is asserted here and that a thorough examination of each provision separately may lead to the conclusion that the legislature drew the proper balance between national security and public safety and the rights of the accused, as it is not possible to convict the accused solely on the basis of his silence or solely upon the opinion testimony of a police officer.

Such an argument must be rejected. First, the CJTCA does not state what will be the effect of a situation in which the silence of the accused joins the police officer's opinion that the accused is a member of a terrorist organization. In such a case neither the silence of the accused nor the opinion of the police officer stands alone. Is it possible to convict on the basis of their cumulative weight alone?

Theoretically, such a construction is allowed by the language of the CJTCA; however, the result would be another flagrant violation of article six. A reading of the provision concerning sole reliance on the police officer's opinion does not negate the fear of a breach of article six; the opposite is true. A careful reading of the section in the light of the terrorist situation serves to strengthen the fear. In many cases the opinion of a police officer may be a central (albeit, not the only) factor on which a conviction is based, notwithstanding the violation of the principle of equality between the parties and the right to cross-examine, which itself is

undermined by the fact that the defense cannot cross-examine the officer as to the sources upon which he has relied in forming his opinion. The fear is further strengthened in cases where the officer may have relied on sources which are not necessarily credible.

The CJTCA reiterates the provisions of the PTA²¹⁰ regarding the possibility of detaining a suspect for up to seven days without bringing him before a judge. In the first 48 hours, the detained suspect has no right to an attorney or to telephone calls. This opens the door to the application of enormous psychological pressure against the suspect to answer the questions of the interrogators and violates the right of silence of the accused – a violation which may lead to his conviction in what is not a fair trial.

Accordingly, it is the function of the court to give meaning to the silence of the Act in relation to the integration of the evidence. The court must require direct evidence in addition to the silence of the accused and/or the opinion of the police officer, which together will establish a *prima facie* case.

The courts must be prepared to look behind the bland assertion and test the evidence on which it is based. Frankly, if the police are not able or prepared to produce that evidence, it seems to me that the mere statement is worth nothing and the innocent may be wrongly convicted.²¹¹

It is interesting to note that the supporters of the CJTCA have justified their support with the argument that the Act has successfully balanced the rights of the accused against national security, because the accused has not been deprived of his right to meet with an attorney. Home Secretary Jack Straw explained that the measures offered by the CJTCA are “tightly focused and proportionate measures which contain safeguards for suspects.”²¹²

This assertion is not precise, because even if the accused meets with an attorney who explains to him that he has a right to remain silent but that such silence may be used against him in accordance

²¹⁰ Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4, § 14(4)–(5) (Eng.).

²¹¹ Donald Findlay, *Cut Crime, Not Corners*, SCOTLAND ON SUNDAY, Sept. 6, 1998, at 15.

²¹² Geoffrey Bindman, et al., *Recognising Rights — A Look at the Progress of the Human Rights Bill and Analysis of the Impact of the Government's Rushed Terrorism Legislation*, L. SOC'Y GAZ., Sept. 9, 1998, at 25.

with the provisions of the Act, such an explanation is a complex one involving difficult legal issues (for example, what is a material fact which if not mentioned will allow his silence to be used against him?). It has been explained that “[t]his will mean not only that it will be impossible for solicitors to advise their clients adequately, but that once they have been consulted the clients themselves will be expected to understand and apply complex legal principles. Their failure to do so will have dire consequences.”²¹³

In the British context, perhaps what is even more interesting is what has happened to the right to a fair trial in the aftermath of the terrorist attacks against the United States on September 11, 2001. Britain declared a state of emergency on the ground that the September attacks were a threat to the entire nation and that therefore, in accordance with article fifteen of the Convention (which enables protected rights to be violated in times of emergency or times of war), Britain could breach article five of the Convention²¹⁴ prohibiting detention without trial and permitting

²¹³ *Id.*

²¹⁴ Article 5 provides:

Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. (3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. (4) Everyone who is deprived

the detention of aliens suspected of terrorism without a trial, in the vein of the provisions of the Patriot Act.²¹⁵

The combination of a declaration of this type and the provisions of the CJTCA undermines the justification found by the supporters of the CJTCA, and this could have serious repercussions for the rights of the accused. Such a combination is likely, *de facto*, to eradicate them altogether.

In the aftermath of September 11, 2001, Britain, in the process of enacting the Anti-Terror Bill,²¹⁶ incorporated both the authority to detain terrorist suspects and to suspend their right to a fair trial, as well as numerous provisions enabling the infringement of the right to privacy, similar to the provisions in the Patriot Act. The Act will grant the police force powers of surveillance and allow it to tap telephones and email, as well as obtain a variety of documents in the possession of the individual.

Terrorism in Britain, as in the United States, has led to legislation that is the product of hysteria. This legislation brings terrorism closer to victory in that it significantly erodes democratic values. Its main disadvantage and the point used most to sharply criticize the legislation is the lack of a connection between the measures supplied by the legislation to the investigative authorities and the statutory purpose of preventing and eradicating terrorist attacks:

The CJTCA is also unlikely to aid in the apprehension of terrorists or to deter potential terrorists from committing offenses. . . . In the long run, all that the CJTCA may accomplish is an increase [in] the number of terrorist convictions and, given the evidentiary burdens that face these

of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. (5) Everyone who has been victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221, 225-28.

²¹⁵ Richard Ford & Melissa Kite: "Indefinite Internment for Terrorist Suspects", *N.Y.T.*, Nov 12, 2001, at A1 ("The suspects will be held for six months in a high-security jail after which their case will be reviewed by the special Immigration Appeals Commission, headed by a High Court Judge. Further reviews will be held every six months").

²¹⁶ Anti-Terrorism, Crime and Security Act, 2001, ch. 24 (Eng.).

suspects, a corresponding increase in the number of innocent people falsely convicted.²¹⁷

In fact, the Act shows a different connection between detention measures and the possibility of undermining the peace process between Britain and Ireland. This is the reason for the reluctance of the police to make use of the powers granted by the Act.²¹⁸ Even if this was not the purpose of the CJTCA, it is certainly the result. Is this the right response to terrorism? I think not!

B. Israel

Since its establishment, the State of Israel has been the victim of repeated attacks by a variety of terrorist organizations. In recent years, the wave of terror has increased, and terrorist attacks have become a matter of routine. On September 11, 2001, the United States found itself under terrorist attacks which were particularly horrendous in terms of the number of casualties. Almost every week, Israel finds itself subjected to attacks that are carried out in a manner similar to that perpetrated in the United States, *i.e.*, by suicide bombers. The U.S. legislation is the outcome of the state of national emergency in which the United States found itself following the 11th of September. Since its establishment in 1948, Israel has been in a continuous state of emergency.²¹⁹ Accordingly, it is interesting to draw a comparison between the manner in which Israel has coped with the phenomenon of terrorism within the country and the manner in which the United States has coped, as reflected in the Patriot Act.

Israel, unlike the United States, does not have a constitution. However, in 1992, two central laws were enacted: Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation; this legislation has been termed a "constitutional revolution" in Israel,²²⁰ and it is generally regarded as Israel's

²¹⁷ Kent, *supra* note 166, at 271.

²¹⁸ See Chris McLaughlin & Ted Oliver, "Why Are the Omagh Bombers Still Free One Year On? Arrests Might Upset the IRA," *MAIL ON SUNDAY*, Aug. 8, 1999, at 12.

²¹⁹ The source of the declaration of the state of emergency is Section 9 of the Law and Administration Ordinance - 1948. This section has been replaced by *ISR. CONST.* (Basic Law: The Government, 1999) §§ 49, 50, which allow the Knesset or the government to declare a state of emergency for a period of a year, with the possibility of extending it annually.

²²⁰ C.A. 6821/93, *United Mizrahi Bank Ltd. v. Migdal Coop. Vill.*, 49(4) P.D. 221,

constitution from which the constitutional rights are derived which shall be discussed below. It is important to note that these laws are not constitutive, in the sense of creating human rights in Israel. Israeli case law gave effect to human rights in the earliest days of the State.²²¹ But, to a large extent, it can be said that these Basic Laws raise the normative standard of human rights to a constitutional standard, and from now on, the normative source of human rights in Israel is constitutional and clear and can no longer be held in doubt.

The primary change affected by these laws, a change that is absent from the U.S. Constitution, is found in the establishment of a fundamental balancing formula, known as the "limitation clause." This formula limits the constitutional power of the Knesset in Israel and prohibits the enactment of a law that infringes basic rights unless it meets three criteria:²²² (a) it accords with the values of the State of Israel as a Jewish and democratic State; (b) the law is enacted for a proper purpose; and (c) the statutory infringement of basic rights does not exceed what is necessary, *i.e.*, it is proportional.

In this section, the article shall examine the influence of terrorism on such rights in Israel as freedom of expression, the right to privacy, freedom from having one's home or property searched, the liberty of a person, and the right to a fair trial. In cases where this paper concludes that human rights are violated, it shall examine whether this violation meets the fundamental balancing test, namely, the limitation clause.

1. Freedom of Expression:

As discussed earlier, in the United States, prior to the anti-terrorist legislation that infringed the principle of freedom of

265 (author's translation).

²²¹ H.C. 73/53 "Kol-Ha'am" et al. v. Minister of the Interior, 7 P.D. 871 (author's translation); H.C. 98/69 Bergman v. Minister of Finance 23(1) P.D. 693 (author's translation).

²²² ISR. CONST. (Basic Law: Human Dignity and Freedom, 1999), § 8:

Infringement of rights: Rights under this Basic Law must not be infringed, except by a Law that complies with the ethical values of the State of Israel, which has a valid purpose, and to an extent that does not exceed necessity, or under an aforesaid Law by virtue of an explicit authorization in it.

Id.

expression, the case law refused to allow such a violation unless a clear and imminent danger to national security or public safety was proved.²²³ In contrast, in Israel the test for violating freedom of expression is the test of near certainty,²²⁴ which, in fact, is the basis on which the constitutional status of freedom of expression is founded. This test holds that freedom of expression will only retreat in the face of national security where two cumulative conditions are met:²²⁵ (a) where, without the imposition of the restriction, there is a near certainty that national security and public safety will be harmed; and (b) where the harm is grave, serious, and severe. *Prima facie*, this test provides less protection to freedom of expression than the test of clear and imminent danger applied in the United States. Ironically, the United States took a far-reaching approach protecting freedom of expression in dealing with prior restraint. American case law established a presumption that every prior restraint is unconstitutional,²²⁶ whereas in Israel the courts continue to abide by the test of near certainty. This was also the case in relation to speech already uttered. In the United States, criminal liability could attach only when the speech was seditious and might cause an imminent breach of the law.²²⁷ The requirement of imminence in the United States thus theoretically protects freedom of expression to a greater extent than the requirement of near certainty in Israel.²²⁸

However, in practice, implementation of the test of near certainty in Israel has led to a similar result as that achieved in the United States. Moreover, in my opinion, in times of crisis and emergency, the extent of the protection given to freedom of expression in Israel is significantly greater than the extent of the protection given to freedom of expression in the United States, as we have seen from the anti-terrorist legislation commencing in

²²³ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²²⁴ For an extensive discussion of the elements of this test, see P. Lahav, "On Freedom of Expression in the Case Law of the Supreme Court," 7 MISHPATIM 375 (1977) (author's translation).

²²⁵ H.C. 73/53 "Kol-Ha'am" et al. v. Minister of the Interior, 7 P.D. 871, 891-92 (author's translation).

²²⁶ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

²²⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²²⁸ A. Barak, "The Tradition of Freedom of Expression in Israel and its Problems," 27 MISHPATIM 223, 232-33 (1997) (author's translation).

1996.

In Israel, the status of freedom of expression as a “supra-right,” the “essence of democracy,” did not transform it into an absolute right.²²⁹ Like all constitutional rights, it is relative. The scope of the protection given to freedom of expression is undoubtedly much broader than the scope of the protection given to freedom of expression in the United States following the terrorist attack of September 11, 2001.

The guidelines for limiting expression are determined in accordance with the relative social importance of values and principles. These principles often clash with the freedom of expression. In the clash between freedom of expression and the values of society as a whole, such as the maintenance of public peace and safety, freedom of expression is still given priority over national security. Israel is repeatedly subjected to terrorist attacks, and the dangers and likelihood of terrorist attacks have risen, leading to the great importance of national security to society. Giving priority to freedom of expression requires very comprehensive protection. Thus, for example, it has been held that freedom of expression also includes opinions which are dangerous, irritating, and racist.²³⁰ The only harm which may be considered is harm which is real, material, severe, and dangerous, bearing in mind the likelihood of it occurring.²³¹

The case which most clearly illustrates Israel’s fight against terrorism with “one arm tied behind its back”²³² and its obstinate refusal to let the hysteria resulting from terrorist attacks and the phrase “national security” infringe upon the democratic values cherished by Israel, is the *Jabarin* case.²³³ Notwithstanding that the judgment was given after the eruption of the *Intifada* of 2000,²³⁴ *i.e.*, in circumstances where the fear for national security and

²²⁹ Cr./Ap. 255/68 State of Israel v. Ben Moshe, 22(2) P.D. 427, 435 (author’s translation).

²³⁰ H.C. 399/85 Kahana et al v. Managing Committee of the Broadcasting Authority et al, 41(3) P.D. 255, 281 (author’s translation).

²³¹ *Id.*

²³² HC 5100/94 The Public Committee against Torture in Israel et al v. The Government of Israel et al, 53(4) P.D. 817, 842 (author’s translation).

²³³ Cr. F.H. 8613/96 Jabarin v. State of Israel, 54(5) P.D. 193 (author’s translation).

²³⁴ The decision in the Further Hearing discussed here, was delivered on November 11, 2000. The *Intifada* erupted more than a month prior to the decision. *Id.*

public safety was high, the scope of the protection afforded by Israel to freedom of expression was not compromised.²³⁵

The only law in Israel that is entitled "prevention of terrorism" is the Prevention of Terrorism Ordinance – 1948 (Ordinance).²³⁶ The judgment in *Jabarin* deals with the interpretation that should be given to Section 4(a) of the Ordinance, which provides as follows:

A person who – (a) publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence . . . shall be guilty of an offense and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one thousand pounds or to both such penalties.²³⁷

Mr. Jabarin was a journalist from Um-al-Fahem who published an article expressing support and encouragement for private persons throwing stones and Molotov cocktails.²³⁸ There is no doubt that throwing stones and Molotov cocktails are acts of violence that may endanger human life; however, because the balance that was required in this case was among freedom of expression, national security, and public safety, the majority opinion tended towards an interpretation which gave protection to freedom of expression and removed Jabarin's article from the scope of the offense under Section 4 of the Ordinance.²³⁹

The majority opinion held that the Ordinance had been enacted

²³⁵ *Id.*

²³⁶ The Prevention of Terrorism Ordinance, No. 33 (1948), <http://www.mfa.gov.il/mfa/go.asp?MFAH07tu0> [hereinafter the Ordinance] (on file with the North Carolina Journal of International Law and Commercial Regulation).

²³⁷ *Id.* at § 4.

²³⁸ Following is a passage from the article as cited in the judgment:

The full truth - I tell you, my friends, that every time I said 'Ahoy' and threw a stone, I was overcome with the feeling that victory was calling to us: 'continue to throw, be more patient, contribute and be more stubborn, and I shall be the dawn that you have awaited so long.' I shall not deny, my friends, that every time I shout 'Ahoy' and throw a Molotov Cocktail, I feel that I am wrapped in splendor and glory, I feel that I have found my identity and that I am taking part in the defense of this identity; that I am a man fit to live a life of dignity. This feeling gives me a sense of being uplifted.

Cr. F.H. 8613/96 *Jabarin v. State of Israel*, 54(5) P.D. 193 (author's translation).

²³⁹ *Id.* (author's translation).

in order to fight against terrorist organizations, and a terrorist organization is defined in the Ordinance as a group of people and not as individuals.²⁴⁰ The Ordinance, therefore, only applies to situations in which terrorist organizations are involved.²⁴¹ It does not apply to violent activities of any type which have no connection to such organizations.²⁴² The Ordinance is concerned only with organized terror and not with acts of violence performed by individuals.²⁴³ The fact that the Ordinance severely infringes freedom of expression caused the majority opinion to confine the construction of section 4 to inciting a terrorist organization to commit a violent act.²⁴⁴ Notwithstanding that section 4(a) of the Ordinance itself does not attribute the praise, encouragement, and support for acts of violence to acts committed only by terrorist organizations, the majority opinion still refused to regard the prohibition set out in section 4(a) of the Ordinance as something derived from the nature of the violent activity.²⁴⁵ The majority refused to hold that the prohibition to publish is derived from the terrorist nature of the violent activity and not from its attribution to a terrorist organization, that the prohibition applies also to the publication of praise, encouragement, and support for acts of violence, even if these acts are performed by individuals, or members of a group, who are not identified as members of a terrorist organization.²⁴⁶

Despite the dangers arising from Jabarin's published article encouraging acts of violence such as throwing stones and Molotov cocktails, the article did not contain any statements intended to praise the acts of violence of terrorist organizations. This fact meant that the article could not be said to support a terrorist organization, and therefore section 4(a) of the Ordinance was not applicable to it.

²⁴⁰ *Supra* note 236. Section 1 of the Ordinance defines a terrorist organization as "a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence." *Id.* (author's translation).

²⁴¹ Cr. F.H. 8613/96 *Jabarin v. State of Israel*, 54(5) P.D. 193 (author's translation).

²⁴² *Id.* (author's translation).

²⁴³ *Id.* at 207 (author's translation).

²⁴⁴ *Id.* at 203-04 (author's translation).

²⁴⁵ Cr. F.H. 8613/96 *Jabarin v. State of Israel*, 54(5) P.D. 193 (author's translation).

²⁴⁶ *Id.* (author's translation).

This judgment was given at a time when events showed that the threats posed by individuals were no less real and concrete than the threats posed by organized groups. Could a similar outcome be achieved in the United States where the threat posed by individuals was clearly manifested in the events of September 11, 2001? There can be no doubt that the answer to this is in the negative.

I would like to mention here that it is not my desire to justify the judgment in *Jabarin*. I merely wish to point out that Israel has been struck by terrorism for longer and more frequently than the United States. But, in contrast to the United States, Israel has not become hysterical and has not turned to constitutional measures available to it, in turn severely harming human rights. On the contrary, Israel continues to respect these rights in the knowledge that democracy is only truly tested in times of crisis and emergency.

I tend to concur with the minority opinion in the *Jabarin* case.²⁴⁷ This is a middle approach which takes the path between the majority view in the judgment, which confers, in my view, overly broad protection upon freedom of expression, and the severe harm caused by the AEDPA and the Patriot Act to this freedom. The two extreme positions on either side of the middle way are polar opposites reacting to a similar reality in different geographical areas, a security situation made shaky by terrorist attacks.

The changed situation of terrorism in Israel, where the anticipated threat no longer comes only from terrorist organizations but also from individual terrorists, must form the basis for the construction of section 4(a) of the Ordinance. More precisely, in contrast to the position currently accepted in the United States, I do not believe that the prohibition should be expanded to embrace encouraging all acts of violence which may lead to the death of a person.²⁴⁸ At the same time, in my opinion, the prohibition should not be restricted in such a way as to apply only to the encouragement of acts of violence of a terrorist organization as such. The proper construction, in my view, is that which includes within the prohibition of publications which

²⁴⁷ See *id.* (author's translation).

²⁴⁸ *Id.* (author's translation).

encourage acts of violence of the type which is characteristic of terrorist activities, an interpretation which the Supreme Court of Israel accepted in the past in the *Rabbi Elba* case.²⁴⁹

The law must be given a modern construction that is compatible with changing circumstances.²⁵⁰ In the past, the focus was on the activities of terrorist organizations, whereas today: "the phenomenon of terrorism has ceased being solely the product of the activities of the terrorist organizations, and the share of individuals, who imitate the members of the organizations but act on their own, has reached significant proportions."²⁵¹

The dangers inherent to terrorist acts performed by individuals who do not act on behalf of an organization are no less severe than the dangers ensuing from the activities of terrorist organizations. Accordingly, a prohibition must be imposed on encouraging publications which offer the individual terrorist the support necessary in order to carry out terrorist acts.

"The purpose of the prohibition is to prevent the existence of activities of a terrorist nature, whatever the identity of the person who carries it out."²⁵² The fact that the outcome of the *Jabarin* judgment is dangerous for national security and public safety, and an outcome which is likely to leave the prosecution without tools for dealing with the phenomenon of incitement to violence, gave rise to the need to enact a law for the prevention of incitement to violence. Immediately after the delivery of the judgment in the *Jabarin* case, the Israeli government proposed to amend the Penal Law²⁵³ in such a manner that the offense of incitement to racism would be changed to the offense of incitement to violence and racism.²⁵⁴ The proposal suggests applying the test of "objective

²⁴⁹ Cr./Ap 2831/95 Rabbi Ido Elba v. State of Israel, 50(5) P.D. 221 (author's translation).

²⁵⁰ Aharon Barak, *Interpretation of Law*, 2 STATUTORY INTERPRETATION 264 (1993) (author's translation).

²⁵¹ *Jabarin*, 54(5) P.D. 193 at 215 (author's translation).

²⁵² *Id.*

²⁵³ Draft Bill amending the Penal Law, no. 58 (1999) [hereinafter Draft Bill].

²⁵⁴ *Id.* The proposal is as follows: Adding Section 144 D 2: Incitement to violence, Section 144 D 2(a): A person who does one of the following shall be liable to a term of 5 years imprisonment (1) publishes a call for an act of violence; (2) publishes a statement which may incite to violence, including praise, support or encouragement for an act of violence. *Id.* (author's translation).

dangerousness" to the expression, to refrain from a probability test (also known as a near certainty test), and to examine the dangerousness of the particular publication on the basis of its content and the circumstances in which it was published. This proposal has not yet been adopted.

2. *The Right to Privacy: The possibility of monitoring where there is a danger to national security*

In Israel, the right to privacy is entrenched in two normative provisions. The first, section 7 of Basic Law: Human Dignity and Freedom, has a supra-legal constitutional status.²⁵⁵ Section 7(d) states that there shall be no violation of the confidentiality of conversation, or of the writings or records of a person.²⁵⁶ The second provision in the Protection of Privacy Law – 1981 has an ordinary legal status.²⁵⁷ Section 2(2) defines eavesdropping which is not authorized by statute as a violation of privacy.²⁵⁸ Contrary to the United States, which has as an integral part of its anti-terrorist legislation provisions authorizing security agencies to monitor communications between persons, and thereby violate their privacy; Israel enacted a separate law in 1979 directed primarily at

²⁵⁵ See ISR. CONST. (Basic Law: Human Dignity and Freedom, 1999), *supra* note 222.

²⁵⁶ *Id.* at § 7 (d).

²⁵⁷ The Protection of Privacy Law, 1981, 35 L.S.I. 136 (1980–81).

²⁵⁸ *Id.* at §2. Section 2 of the Protection of Privacy Law – 1981 provides:

Infringement of privacy is any of the following: (1) spying or trailing a person in a manner likely to harass him, or any other harassment; (2) listening-in prohibited under any law; (3) photographing a person while he is in the private domain; (4) publishing a person's photograph under such circumstances that the publication is likely to humiliate him or bring him into contempt; (5) copying or using, without permission from the addressee or writer, the contents of a letter or any other writing not intended for publication, unless the writing is of historical value or fifteen years have passed since the time of writing; (6) using a person's name, appellation, picture or voice for profit; (7) infringing a duty of secrecy laid down by law in respect of a person's private affairs; (8) infringing a duty of secrecy laid down by law in respect of a person's private affairs; (9) using, or passing on to another, information on a person's private affairs otherwise than for the purpose for which it was given; (10) publishing or passing on anything obtained by way of an infringement of privacy under paragraphs (1) to (7) or (9); (11) publishing any matter relating to a person's intimate life, state of health or conduct in the private domain.

Id.

secret monitoring.²⁵⁹ Chapter 2 of the Secret Monitoring Law deals with secret monitoring for purposes of State security. Under this law, unlike the situation in the United States in relation to monitoring for purposes of security, there is no need for a court order and it suffices to obtain authorization from the Prime Minister or Minister of Defense and supervision by the Attorney General.²⁶⁰ The permit to monitor must be specific and in writing.²⁶¹ In other words, it is necessary to indicate the identity of the person whose conversations may be monitored, the place and type of such conversations, and the period of validity of the permit, which must not exceed three months. In urgent cases, there is no need for a permit from the Minister of Defense or Prime Minister.²⁶² The head of a security authority, such as the Intelligence Branch of the IDF or the General Secret Service, may, in cases where they are satisfied that State security requires secret monitoring to be carried out without delay and that it is not possible to obtain a permit in time, authorize such monitoring themselves for a period not exceeding forty-eight hours. They must also notify the Minister of Defense or Prime Minister to such effect, and the Minister may cancel or amend the permit.

The purpose of this law is to draw a balance between the violation of the right of the individual ensuing from permits given under the law, and legitimate considerations of society such as security, which justify infringing the privacy of the individual. The absence of a requirement for a judicial order, which enables the privacy of an individual to be invaded without the decision of a neutral and independent judicial body is a defect which can be rectified. So long as it is clear to the decision-makers that the balance which they are required to draw requires them to exercise particular caution so as not to exercise their powers except in cases of real need, and that they must attempt to limit the scope of the permit in so far as possible, the fear that the privacy of an individual will be unnecessarily infringed is significantly reduced. In particular, it is reduced compared to the acute fear in the case of American citizens that their privacy will be unnecessarily

²⁵⁹ The Secret Monitoring Law, 1979, 33 L.S.I. 141 (1978-79).

²⁶⁰ *Id.* at § 4.

²⁶¹ *Id.*

²⁶² *Id.* at § 5 (a).

infringed, despite the judicial warrant, by reason of the absence of a requirement to prove a real need for the monitoring in order to obtain the warrant.

Indeed, the measures provided by the law to the security authorities are not free from criticism. Despite the fact that the law was enacted prior to Basic Law: Human Dignity and Freedom and accordingly cannot be nullified,²⁶³ it is likely that if the law were to be examined on a constitutional level, the Israeli Supreme Court would hold that it would have to be constricted in the manner suggested here, namely, that the powers should not be exercised except in cases of real necessity.²⁶⁴

3. *Monitoring communications between suspect and attorney and preventing meetings between suspect and attorney*

A decision issued by the U.S. Attorney General enables the monitoring of communications between an attorney and his client and severely infringes on the privilege that applies to such communications.²⁶⁵ Israel first considered the possibility of an attorney's involvement in an offense endangering State security in 1979.²⁶⁶ A conversation between an attorney and his client is a privileged communication²⁶⁷ and may be monitored only with the permission of a judge.²⁶⁸ In urgent cases, the head of a security authority²⁶⁹ may issue such a permit and immediately thereafter notify the Minister of Defense of the same in writing. The Attorney General may cancel the permit.²⁷⁰

²⁶³ Basic Law: Human Dignity and Freedom, *supra* note 178, § 10, at 11 (stating that "[t]his Basic Law shall not affect the validity of any law in force prior to the commencement of this Basic Law").

²⁶⁴ See Cr. F/H 2316/95 Gneimat v. State of Israel, 49(4) P.D. 589, 653 (regarding the possibility of an infringement by a law falling within the "Validity of Laws" provisions) (author's translation).

²⁶⁵ See *supra* notes 54–63 and accompanying text.

²⁶⁶ See generally Secret Monitoring Law, 1979, 33 L.S.I. 141 (1978–1979).

²⁶⁷ Evidence Ordinance (New Version) § 48, 1971, 2 L.S.I. 198, 209 (1968–1972).

²⁶⁸ Secret Monitoring Law, *supra* note 259, § 6(a), at 143.

²⁶⁹ The head of a security authority refers to the General Security Service or the General Staff of the Israel Defence Forces. *Id.* § 1, at 141.

²⁷⁰ *Id.* § 5(a)–(b), at 142–43.

The privilege between an attorney and his client applies to conversations for the purpose of proper legal services given to the client but does not apply to statements made in order to further an improper purpose, such as the commission of a crime.²⁷¹ However, the Supreme Court of Israel does not permit the installation of recording equipment nor the monitoring of the offices of lawyers, even where there is evidence to suspect that illegal activities are being conducted within the office. The reason for this rule is the impracticability of separating privileged statements from non-privileged statements.²⁷²

The infringement of the right to proper representation in Israel is more far reaching than in the United States. In Israel, the law permits a meeting between an attorney and a detainee suspected of a security offense to be postponed for up to twenty-one days,²⁷³ even though the right to meet one's attorney is a basic right, which is derived from the right of an individual to personal liberty.²⁷⁴

As a rule, a detainee is allowed to meet with his attorney without delay;²⁷⁵ however, in relation to security offenses, the exception which allows the postponement of the meeting on grounds relating to the good of the investigation is broadened.²⁷⁶ In the circumstances set out in the law relating to the subversion of the investigation or public safety,²⁷⁷ the person responsible for the meeting has the power to postpone it for ten days without court authorization.²⁷⁸ In order to extend this period, the person responsible must apply to the President of the District Court, and the latter is entitled to extend the period so that the cumulative

²⁷¹ Cr./Ap. 670/80 Abuhazeira v. State of Israel, 75(3) P.D. 681, 692 (author's translation).

²⁷² Appeal under Secret Monitoring Law 1/81 State of Israel v. Anon, 76(1) P.D. 614, 615-616 (author's translation). See A. Stein, *Eavesdropping and Secret Electronic Monitoring*, 14 MISHPATIM 527, 547-48 (1985) (author's translation).

²⁷³ See Criminal Procedure (Enforcement Powers - Arrests 1996), § 35 (author's translation).

²⁷⁴ H.C. 3412/91 Sufian v. Commander of IDF Forces in the Gaza Strip, 47(2) P.D. 843 (author's translation).

²⁷⁵ Criminal Procedure (Enforcement Powers - Arrests 1996), § 34(b) (author's translation).

²⁷⁶ *Id.* at § 34(d) (author's translation).

²⁷⁷ *Id.* at § 35(a) (author's translation).

²⁷⁸ *Id.* (author's translation).

period does not exceed twenty-one days.²⁷⁹

If the meeting is postponed, notification of the delay must be given to the detainee. The detainee is entitled to appeal first to the District Court and thereafter to the Supreme Court.²⁸⁰

An additional provision which infringes on the rights of the detainee is the provision which enables delay of notification to relatives or a lawyer that a person suspected of security offenses has been detained.²⁸¹ Notification may be delayed upon authorization by a judge of the District Court if he is satisfied that the good of the investigation requires the secret detention.²⁸² The delay is for a period of forty-eight hours and may be extended for up to fifteen days.²⁸³

The violation of the rights of a person detained for security offenses is a severe violation, but one that satisfies the conditions of the limitation clause. The violation is compatible with the values of the State of Israel as a democratic State. However, it is wrong "for human rights to become a tool to negate State and public safety."²⁸⁴ When a democracy is under a threat that security offenses will be committed against its citizens and against the State as a whole, the State must protect itself against this threat. The purpose of the violation is proper because the protection of public safety and State security is what drives the provisions infringing the rights of the detainee. The measure is also proportional – there is a rational connection between the measure and the purpose. The purpose is to foil the subversion of investigative proceedings or defend human life, and the measure may only be applied where there are grounds for suspecting that if the meeting is not prevented or the notification not made, such subversion will take place. The measure is the least drastic one available. The law confines the nature of the offenses and the period of time in which the measures are taken and enables the court to scrutinize that need. The benefit arising from the violation

²⁷⁹ *Id.* at § 35(d) (author's translation).

²⁸⁰ *Id.* at § 35(e) (author's translation).

²⁸¹ *Id.* at § 36 (author's translation).

²⁸² *Id.* (author's translation).

²⁸³ *Id.* (author's translation).

²⁸⁴ F Cr./H 7048/97 Anon. v. Minister of Defense, 54(1) P.D. 721, 743 (author's translation).

exceeds the damage caused by it. The right of the detainee to meet with his attorney is not eliminated completely but is kept in abeyance for a maximum period of twenty-one days.²⁸⁵ At the end of this period, the detainee will be allowed to meet with his attorney and obtain representation. Despite the severe injury to the rights of the suspect, the injury is proportional in light of the benefits to the investigation which is likely to expose the terrorist partners of the detainee or prevent harm to human life. This benefit undoubtedly exceeds the damage described above.

4. *The Right to Privacy: Liberty Not to Be Searched*

The rule in Israel is that a warrant is required in order to conduct a search.²⁸⁶ The judge has discretion whether or not to issue the warrant and will issue it only in accordance with the criteria set out in the law.²⁸⁷ The law is satisfied with grounds for belief and does not require reasonable grounds.²⁸⁸ This fact may lead to the conclusion that in Israel, like in the United States, the discretion exercised by the judge is not substantive but purely technical.

The search warrant must be detailed and describe the articles

²⁸⁵ It should be noted that the need to satisfy the test of proportionality is strengthened in view of the Criminal Procedure (Enforcement Powers - Arrests) (Delay of Meeting Between a Security Detainee and his Attorney - Regulations - 1997) (author's translation). Initially it is possible to delay the meeting for six days only, thereafter only a "person in charge" as defined in the Regulations may delay it for an additional four days. See *id.* at para. 2 (author's translation).

²⁸⁶ Criminal Procedure (Arrest and Searches) Ordinance (New Version) § 23, 1969, 2 L.S.I. 30, 35 (1968-1972) [hereinafter Criminal Procedure Ordinance].

²⁸⁷ *Id.* § 23 provides:

A Judge may issue a warrant to search any house or place, if - (1) a search of the house or place is necessary to secure the production of any article for the purpose of any investigation, trial or other proceeding; (2) the Judge has reason to believe that the house or place is used for the deposit or sale of a stolen article, or that there is kept or deposited therein any article by means of or in respect of which an offense has been committed or which has been used, or is intended to be used, for any illegal purpose; (3) the Judge has reason to believe that a person is confined in the house or place in such circumstances that the confinement constitutes an offence.

Id.

²⁸⁸ *Id.*

which the warrant states may be seized.²⁸⁹ However, if the person conducting the search finds an article which is not mentioned on the warrant and has reasonable grounds for believing that an offense has been committed or is about to be committed in respect of it, he is entitled to seize the article and bring it before the judge who issued the warrant in order for the latter to decide, as he sees fit, what should be done with the article.²⁹⁰ In the United States under the Patriot Act, the warrant may be general, and so there is no need to bring before the judge any articles that have been seized but are not mentioned in the warrant.²⁹¹

In Israel, it is also possible to conduct searches without a search warrant. A warrant is not needed in defined cases where a police officer has grounds to believe that a crime is underway, recently committed therein, or that a person in the place is seeking the help of the police and there are grounds for believing an offense is being committed, the occupier thereof calls the police for assistance or the police officer is pursuing a person escaping from the legal custody or evading arrest.²⁹²

Whether the search is being conducted under a warrant or not, the search must be conducted before two witnesses who are not police officers, unless a judge permits the search to be conducted without witnesses, the occupant of the house himself requests a search without witnesses, or the circumstances and urgency of the case do not allow a search before two witnesses.²⁹³

In the case of security offenses concerning the transfer of information to an enemy or espionage, where the security of the State requires immediate action, a senior police officer or Inspector-General of Police may give a written permit to search in relation to that offense. This permit is a substitute for a judicial warrant and is subject to the condition that he is retroactively authorized by a judge within three days of the day of the permit.²⁹⁴

²⁸⁹ *Id.* § 24(b) at 35–36.

²⁹⁰ *Id.*

²⁹¹ *See supra* notes 21–44 and accompanying text.

²⁹² Criminal Procedure Ordinance, *supra* note 286, § 25, at 36.

²⁹³ *Id.* at § 24(b).

²⁹⁴ Penal Law § 126, 1977, Special Volume L.S.I. 1, 43 (1977). Most recently, Israel empowered the GSS to conduct searches in private places without the knowledge of the owner if security needs justify the search. In such cases there is no need for a

A military commander of the rank of major and above in considering offenses of espionage, transferring information to the enemy, and entering into a military area, may issue a written order for a soldier to conduct a search of the body or belongings of a person, when there is no possibility of a police officer doing so, and he is of the opinion that national security requires immediate action. No searches under this power may be conducted within the home of a person, and this permit also must be retroactively authorized by a judge within three days.²⁹⁵

Many other laws deal with the conduct of searches empowering persons who are not police officers to search the property or body of a person. For example, the captain of an aircraft who has reasonable grounds for believing that a person is about to perform a dangerous act or is likely to endanger the safety of the aircraft or passengers in it, may take reasonable safety measures including searching the aircraft or passengers.²⁹⁶ Prior to

warrant. See GSS Act, § 10 (2002) (author's translation).

²⁹⁵ Penal Law of 1977, § 127.

²⁹⁶ Section 4 of the Air Navigation (Offenses and Jurisdiction) Law of 1971 provides a commander the power to take safety measures:

(a) if the commander of an aircraft has reasonable grounds to believe that a person has committed, or is about to commit, on board an aircraft an act which may or does jeopardise the safety of the aircraft or of persons or property therein or good order or discipline on board, he may take such reasonable safety measures, including restraint and search, as in his opinion are necessary to protect the safety of the aircraft or of the persons or property therein or to maintain good order or discipline on board or to enable him to disembark such person in accordance with Section 8 or 9. (b) The power vested in the commander of an aircraft by subsection (a) shall also be exercisable if he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft an act which in the opinion of the commander is an offense under any law existing in the state of registration.

Air Navigation (Offenses and Jurisdiction) Law § 4, 25 L.S.I. 55, 57 (1970-1971). See also *The Implementation of the Interim Agreement Concerning the West Bank and Gaza Strip (Jurisdictional Powers and Other Provisions)*, § 11 (1996) (author's translation), which confers powers of search upon an "examiner."

(b) An examiner is entitled, for the maintenance of public safety and in order to uncover offenses, to conduct a search in the property or vehicle of a person who enters Israel from an area or departs Israel for an area. (c) A police officer, or an examiner who has been granted the powers of a police officer in accordance with Section 4 of the Ordinance, and also an examiner who is under their supervision at the check point, are entitled for the maintenance of public safety and in order to uncover offenses, to conduct a search, as provided in Section 22

boarding an aircraft and prior to entering an airport, security officers have power to conduct searches of the property and body of a person. The search may take place despite the refusal of the person, and that person may be prevented from entering or leaving the airport or aircraft.²⁹⁷

In 1996, Israel enacted a special law regulating the conditions

of the Ordinance, on the body of a person who enters Israel from an area or departs Israel for an area; a search on the body of a person shall only be conducted by a person of the same gender. (d) Where a person has refused to meet the demands of an examiner under subsection (a) or to the conduct of a search under subsections (b) or (c), the examiner is entitled to prevent that person from passing through the check point. (e) The powers of a police officer for the purpose of seizing property revealed in consequence of a search under this part, shall also be available to a soldier who has been granted the powers of police officer under Section 4 of the Ordinance and the provisions of Part 4 of the Ordinance shall apply to the article seized, with the appropriate changes.

²⁹⁷ The Air Navigation (Safety of Civil Aviation) Law, Part 3 § 9, 1997 (author's translation) provides:

(a) All those listed in Section 10 are entitled to conduct a search – (1) on the body of a person as provided in Section 22 of the Criminal Procedure (Arrest and Searches) Ordinance [New Version] – 1969, or in a vehicle in consequence of the person or vehicle entering the airport, the landing area or aviation facility or in consequence of them staying there; (2) on the body of a person as provided in Section 22 of the Criminal Procedure (Arrest and Searches) Ordinance [New Version] – 1969 prior to boarding an aircraft, in consequence of his staying in an aircraft or soon after disembarking therefrom; (c) in other cargo and goods prior to being brought into the airport, the landing area or aviation facility, prior to being put on board an aircraft, soon after being disembarked from an aircraft, or in consequence of being located in all these; (3) in an aircraft in consequence of its entry into the airport, the landing area or while it is located there – if the search is required, in his opinion, in order to preserve the public safety or if he suspects that the person is unlawfully carrying a weapon or explosives or that in the vehicle, aircraft, the cargo or other goods weapons or explosives are present unlawfully. (b) All those listed in Section 10 are entitled to ask of a person located in an airport, the landing area or aviation facility to identify himself. (c) Where a person has refused to have a search conducted on his body, in the cargo or other goods in the circumstances set out in subsection (a) by a competent person, or has refused to identify himself as provided in subsection (b), the person authorized to conduct the search or demand the identification, without derogating from his authority to conduct the search despite the refusal, is entitled – (1) to prevent that person from entering the airport, the landing area, the aviation facility or aircraft or his departure from these places, or the entry of the cargo or other goods to them or their removal from them, as appropriate; 10. The persons entitled to conduct a search (a) those entitled to conduct a search as provided in Section 9: (1) a security official; (2) a police officer; (3) a soldier; (4) a member of the Civil Defense Force.

for searching the body of a suspect.²⁹⁸ No search of the body of a person may be conducted save in accordance with this law. The law requires the consent of the suspect prior to the search being carried out. In the absence of consent from the suspect to the search, written authorization must be obtained for the search from a police officer. The law is aware of the fact that the search infringes upon the dignity and privacy of an individual and therefore prohibits the conduct of a search in public unless there is a near certainty of danger to the public.²⁹⁹ Internal searches (*i.e.*, blood tests or gynecological tests) to which the suspect has not given his or her consent are subject to the authorization of the court. Only after the court has heard the suspect and his attorney, *in camera*, and is satisfied that all the conditions set out in the law for the conduct of the search have been met, that there is no other way which is less injurious to obtain the evidence, and that the need to obtain the evidence is greater than the harm to the suspect, will the court grant an order permitting an internal search.³⁰⁰

Prior to the enactment of this law, a general provision in the law authorized the carrying out of a search of the body or belongings of a person under arrest.³⁰¹ The courts interpreted this provision as subject to the right of a person *per se* to dignity and privacy, and held that even if the person being searched had given his consent,

this still does not mean that everything is allowed. The fact that reference is to basic rights, a violation of human dignity and privacy, necessitates, even when the search is consented to, to

²⁹⁸ Criminal Procedure (Enforcement Powers – Searches on the Body of a Suspect) Law, 1996 (author's translation).

²⁹⁹ *See id.* at § 3(e) (author's translation).

³⁰⁰ *See id.* at § 8 (author's translation).

³⁰¹ Section 22 of the Criminal Procedure (Arrest and Searches) Ordinance (New Version) of 1969 was amended by the Criminal Procedure (Enforcement Powers – Searches on the Body of a Suspect) Law, 1996 (author's translation). Section 22 of the Criminal Procedure (Arrest and Searches) Ordinance (New Version) of 1969 provided:

[A] police officer who has arrested a person, with or without a warrant, or has received an arrested person from the person who arrested him may search or cause to be searched the effects of the arrested person, and that person, and place into safe custody everything found with him.

Criminal Procedure (Arrest and Searches) Ordinance (New Version) § 24(b), 1969, 2 L.S.I. New Version 30, 36 (1972).

preserve a reasonable level of fairness in order not to degrade the person in whose body the search is conducted, and his privacy, when this is not required and is not vital for the purpose of the search.³⁰²

In circumstances where there is no consent and the search leads to humiliation and shame, it has been held that:

this humiliation and shame are only permitted when they are intended for a proper purpose, when there is a suspicion of a crime which must be prevented or uncovered, and it must not exceed what is necessary: all in accordance with the circumstances of each case – such as the purpose of conducting this search, the nature of the offense of which he is suspected, the existence of an emergency, the justification for conducting the search, the manner of the search, the place of the search and the like. . . .³⁰³

5. *Secret Evidence:*

In Britain, it is possible to make use of secret evidence in order to convict a terrorist. This is also the case in the United States under the Presidential Order concerning the trial of terrorists in military tribunals. In Israel, secret evidence is prohibited: secret evidence may not be adduced *ex parte* – in the absence of the accused. Evidence which is brought before the court cannot be secret and therefore, as we shall see, when it desires to conceal evidence, the authorities turn to administrative detention as the solution.

6. *Administrative Detention – Preventive Detention:*

The Patriot Act enables the detention of aliens for up to seven days without bringing them before a judge. The Attorney General has power to extend this period for additional periods of six months, without limitation in practice. This power bears the characteristics of an administrative detention.³⁰⁴ It is a detention in

³⁰² C.A. 2145/92, *State of Israel v. Guetta*, 46(5) P.D. 278, 289 (author's translation).

³⁰³ *Id.* (author's translation).

³⁰⁴ For an extensive discussion of administrative detentions, see Emanuel Gross, *Human Rights, Terrorism, and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L. 721 (2002).

which a person is held without trial for the purpose of preventing him from committing future offenses, and there is no time restriction on such detention.³⁰⁵ In Israel, the Emergency Powers (Detention) Law – 1979³⁰⁶ granted the Minister of Defense a similar, although not identical, power to that of the Attorney General granted by the Patriot Act. As previously explained, Israel has been the subject of terrorist attacks since its establishment.³⁰⁷ In times of emergency, the law gives the Minister of Defense power to issue a detention order if he has reasonable grounds for believing that reasons of national security or public safety require the same.³⁰⁸ The period of validity of the detention order may not exceed six months, but the Minister may extend the order from time to time for additional periods of six months, for reasons of security.³⁰⁹ In my opinion, the significant difference between the Patriot Act and the Israeli law concerns the issue of judicial review. Contrary to the position in the United States where the power of the Attorney General is not subject to judicial review, the power of the Minister of Defense in Israel is subject to routine scrutiny. First, a person arrested under this law must be brought before a judge within forty-eight hours of the day of his detention.³¹⁰ If a judge authorized the detention, the law requires the President of the District Court to reconsider the matter of the detention every three months.³¹¹ Moreover, the law enables a detainee to appeal the decision of the President of the District Court before the Supreme Court.³¹² No such provision exists in the Patriot Act.

It should be noted that today, contrary to the practice in the past, the Israeli Supreme Court tends to intervene more in security

³⁰⁵ Ruth Gavison & Miriam Gur-Aryeh, *Administrative Detention*, 3 CIVILIAN RIGHTS 1, 4 (1982) (author's translation).

³⁰⁶ Emergency Powers (Detention) Law, 1979, 33 L.S.I. 89 (1978–1979).

³⁰⁷ According to Sections 49–50 of Basic Law: The Government, the declaration of the state of emergency must be renewed every year. ISR. CONST. (Basic Law: The Government, 1999) §§ 49, 50.

³⁰⁸ Emergency Powers (Detention) Law of 1979, § 2(a).

³⁰⁹ *Id.* at § 2(b).

³¹⁰ *Id.* at § 4(a).

³¹¹ *Id.* at § 5.

³¹² *Id.* at § 7.

decisions and in the content of decisions relating to administrative detentions.³¹³ A clear example of this tendency may be seen in the decision given in April 2000 concerning Lebanese detainees, where it was decided that the State of Israel could not hold the Lebanese petitioners in administrative detention, in accordance with the Emergency Powers Law, since they were being held as bargaining tools for the release of the Israeli navigator Ron Arad, and they themselves posed no real danger to national or public safety.³¹⁴

Notwithstanding the criticism directed at administrative detentions carried out in Israel, I believe that the fact that, in Israel, no steps are taken to prevent the judicial review of the detention of a person, even in times of emergency, allows Israel to pass the test of democracy in times of crisis with greater success than the United States. Following the judgment in the case of the Lebanese detainees, legislative initiatives were adopted which will allow the detention of members of enemy forces who are not prisoners of war.³¹⁵ The law will embrace all those who do not fall within the paradigms of the various conventions and take part in enemy actions or belong to the enemy forces.³¹⁶

³¹³ Admin.Det./Appeal 2/86, *Anon. v. Minister of Defense*, 51(2) P.D. 508 (author's translation).

³¹⁴ *Id.* (author's translation).

³¹⁵ Detention of Members of Enemy Forces Who Are Not Entitled to the Status of Prisoners of War Bill – 2000, Bill No. 2830, published Jun. 14, 2002. In the case of the Lebanese detainees, it was held that they were not civilians who had been taken as hostages nor were they lawful combatants under the rules of international law; therefore, they were not prisoners of war. There was no doubt however that they belonged to the forces of the enemy; therefore, the title of the proposed law is the detention of members of enemy forces who are not entitled to the status of prisoners of war. *Id.* (author's translation).

³¹⁶ Draft Bill, *supra* note 253 at § 2. Defines the phrase, "a member of an enemy force who is not a prisoner of war," as follows:

a person who is a member of the enemy force or a person who takes part in the hostile activities of a force as aforesaid, whether directly or indirectly, in relation to whom the conditions set out in Sections 1, 2 and 3 of the Schedule to the Fourth Hague Convention of 1907 Relative to the Laws and Practices of War on Land or Section 4 of the Third Geneva Convention of 12 August 1949 Relative to the Treatment of Prisoners of War, do not apply and who is therefore not entitled to the status of a prisoner of war.

Id. (author's translation).

The proposed law is similar in spirit to the existing Detention Law in Israel although in addition to the Minister of Defense, it empowers the Chief of the General Staff to issue an order for the detention of a person that the Chief of Staff believes to be a member of an enemy force who is not a prisoner of war. The period of detention is limited and will cease at the date on which the Minister of Defense gives notice of the cessation of hostile activities between the State of Israel and the enemy force with which the detained person is affiliated.³¹⁷ The proposed law also suggests restricting the scope of judicial review. It will no longer be necessary to confirm the order within forty-eight hours, but only after twenty-one days from the date of the issue of the order.³¹⁸ The Chief of Staff shall conduct a routine scrutiny of the detention every six months and will consider whether there are humanitarian reasons justifying the release of the detainee. The decision of the Chief of Staff may be appealed to the District Court.³¹⁹

Between the publication of this proposal and the time of writing this article, no actual bill has been drafted with good reason. In my opinion, restricting judicial review will cause the law to be flawed from a constitutional point of view. A period of twenty-one days without judicial review is not proportional and will not satisfy the fundamental balancing test, the limitation clause. Cases may arise in which a person is held in detention, the most oppressive of the possible violations to his human rights, for twenty-one days, without cause, until the court rectifies the error.

Israel should not fall into the trap for democracy set by

³¹⁷ Section 3 of the Bill provides:

(a) Where the Chief of the General Staff has grounds to believe that a person held by the authorities is a member of the enemy forces who is not a prisoner of war, he may, by order under his hand, direct that such person be detained in a place to be determined. (b) An order issued under subsection (a) shall be valid up to the date on which the Minister of Defense shall give notice, by a certificate signed by him, of the cessation of hostile activities between the State of Israel and the enemy force with which the detainee is affiliated or in the activities of which the detainee took part, or up to an earlier date of which he shall notify the Chief of the General Staff.

Id. (author's translation).

³¹⁸ *Id.* at § 4 (author's translation).

³¹⁹ *Id.* at § 6 (author's translation).

emergencies, the trap into which the United States has fallen. Effective and fair judicial review is not only one of the basic rights of the legal system, but it is also essential to the preservation of human rights and liberties.³²⁰ This is the reason why in Israel, as opposed to the United States, restricting access to the courts is not possible even in times of emergency. While the U.S. Constitution vests the U.S. President with the power to restrict access to the courts, in the Israeli Basic Law, the Government prohibits such a measure.³²¹

Israel is in a constant state of emergency; therefore, it is appropriate for the broad and dangerous powers held by the government to promulgate regulations which supersede any law³²² to be balanced by a provision prohibiting the restriction of access to the courts. However, has not terrorism placed the United States in a similar constant state of emergency in which the provisions of the Patriot Act modify earlier legislation and at the same time significantly restrict access to the courts?

Security is a precondition of existence. This is so in every State, however enlightened, and the Patriot Act has proven this. We would have expected that if in the United States the situation was such as to lead to the grave legislation which was actually enacted, then, *a fortiori*, this would be the case in the State of Israel. The existential danger in Israel is greater and more concrete than it is in the United States. In Israel, the danger is not only to the national existence, but also to concrete existence. The Holocaust which befell the Jewish people demonstrates the danger. The terrorism which sheds our blood brings it to mind every day. There is no doubt that national security in Israel, more

³²⁰ Avinoam Sharon, *Administrative Detention: Boundaries of Power and Scope of Review*, 13 *LAW & ARMY* 205, 207 (1999) (author's translation).

³²¹ See *ISR. CONST. (Basic Law: The Government, 1999) § 50(d)* (stating that "[e]mergency regulations cannot prevent appeal to the Courts, cannot prescribe penalties retroactively and cannot permit abuses of human dignity.").

³²² See *ISR. CONST. (Basic Law: The Government, 1999) §50* which states:

(a) During a state of emergency the Government may make emergency regulations in order to protect the State, public security and vital supplies and services; emergency regulations shall be submitted to the Knesset Defense and Foreign Affairs Committee as soon as possible after they were made. . . . (c) Emergency regulations can change any Law, temporarily suspend its effect or set conditions for it, and also to impose or to increase taxes or other obligatory payments, all as long as there is no contrary provision in the Law.

so than in other countries, should enjoy a preferential status.³²³

Despite the special conditions of the State of Israel which could have provided the basis for an extreme approach – tending to give the security interest absolute preference over other interests – and for taking a low tone approach towards the need to draw a balance between them, I have tried to show in the above examples that Israel is far removed from the path of extremism which is insensitive to human rights, notwithstanding the burden of an emergency of the type which descended on the United States following the attack on September 11, 2001.

V. Is the Response of the United States Appropriate to Achieve the Goal of National Security?

Human rights are not absolute rights, and it is possible to infringe them in order to preserve national security and the safety of the public.³²⁴ “Democracy need not commit suicide in order to prove that it exists.”³²⁵ Moreover, the security of the State, the nation, and its citizens is an important public interest which stands at the heart of the basic values of a democratic State. Without the personal safety of each citizen and without ensuring national security, it is not possible to guarantee the real implementation of human rights: “without order there is no liberty.”³²⁶

There are circumstances in which a balance must be drawn between human rights and the public interest. In this balance the superior value of national security may supersede inferior values such as the liberty of the individual, his right to privacy, and to a fair trial. However, this superiority will only be brought into the calculation if the requirements of the balancing formula regarding the likelihood of harm to the value having preference, and the extent of the harm thereto, are satisfied.³²⁷ Thus, for example, in

³²³ I. Zamir, *Human Rights and National Security*, 19 MISHPATIM 17, 18 (1989) (author's translation).

³²⁴ See Cr. Applic. 537/95 Gneimat v. State of Israel, 49(3) P.D. 355, 417 (author's translation).

³²⁵ Election Appeals [E.A.] 2, 3/84 Neiman v. Chairman of the Central Elections Committee of the Elections to the Eleventh Knesset, 39(2) P.D. 225, 315 (author's translation).

³²⁶ See H.C. 14/86 Laor v. Film & Theatre Supervisory Board, 41(1) P.D. 421, 433 (author's translation).

³²⁷ H.C. 2481/93 Dayan v. Superintendent Yehuda Wilk and 5 others, 48(2) P.D.

Israel the public interest in security overrides freedom of movement outside the borders of the State, provided that there is an honest and serious fear that security would be harmed if the right to leave the country were to be exercised.³²⁸

It is difficult to establish a uniform formula; the formula varies in accordance with the status of the values and the relationship between them. However, some formula, test, or balance of principles must be set which will reflect the general legal norm and at its core, the constitutional principle which will apply to the entire class of similar cases.³²⁹

The phenomenon of terrorism is not a new one in the United States. However, its appearance on September 11, 2001 exposed the extent of the dangers inherent in it and required the United States to respond to it in a variety of ways. Apart from the military response, the United States turned to legislation which, on one hand, breached the previous balances between human rights and national security, and on the other hand, failed to establish any new fundamental balancing test between the clashing principles. Is this response proper?

The answer to this is in the negative. The U.S. Constitution does not contain any fundamental balancing test; in contrast to Israel, the U.S. Constitution does not establish any guidelines for a constitutional examination of the violations of human rights. The primary danger arising from the absence of a fundamental balancing test is expressed by the situation that developed in the United States. At the moment of truth – at the difficult hour of heightened enmity caused by the wave of terror – the majority of citizens exerted heavy and influential pressure on the government, which represents the majority. The government responded by enacting legislation which infringed human rights and turned the exceptions – which in the past could be accepted – into the rule, and the rule into the exception. The Patriot Act creates an even more dangerous and difficult result. The absence of a fundamental balancing test in the U.S. Constitution has led the courts to create

456, 472–73 (author's translation).

³²⁸ H.C. 448/85 Adv. Kamal Dahar et al v. Rabbi Itzhak Peretz, 40(2) P.D. 701, 707 (author's translation).

³²⁹ See T. Alexander Aleinikoff, *Constitutional Law in The Age of Balancing*, 96 YALE L. J. 943, 948 (1987).

tests for violations of human rights and guidelines which distinguish between the purpose of the norm violating the basic rights on one hand, and the proportionality of the harm on the other hand. American case law has developed a doctrine of levels of scrutiny which is based on the level of importance of the social values underlying the right.³³⁰ The Patriot Act, which denies almost all judicial review, neutralizes the courts' function of enforcing the U.S. Constitution, and prevents citizens from properly defending their rights:

The anti-terrorism legislation recently signed into law by President Bush appears to only be a means to give law enforcement officials the necessary tools to find terrorists and prevent future attacks. But in reality, the USA Patriot Act continues an alarming trend known as court-stripping-removing authority from the judiciary in times of crisis. . . . As it has done in times of past tragedy, the government responded by passing legislation that reduces or eliminates the process of judicial review and erodes our civil liberties. . . . In treating the judiciary as an inconvenient obstacle to executive action rather than an essential instrument of accountability, the recently passed USA Patriot Act builds on the dubious precedent Congress set five years ago [the AEDPA] when it enacted a trilogy of laws that, in various ways, deprive federal courts of their traditional authority to enforce the Constitution of the United States.³³¹

Moreover, as the Patriot Act is the product of the outcry of the majority, and thereby injures the minority, the federal court, whose function it is to prevent such injury and restrain the tyranny of the majority, is prevented from fulfilling that task:

As in past times of crisis the minority is the most likely target of government excess. It is this reality that makes bill's court-stripping provisions so potentially harmful. The courts exist specifically to give voice to the minority and were created because the Framers were well aware of the ease in which an unpopular group or viewpoint could find itself muzzled and

³³⁰ See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

³³¹ American Civil Liberties Union, *Terrorism and Civil Liberties: New Anti-Terrorism Law Continues Dangerous Trend of Stripping Federal Judiciary of Authority* (Nov. 1, 2001), at <http://www.aclu.org/news/2001/n110101a.html> (on file with the North Carolina Journal of International Law and Commercial Regulation).

persecuted by the majority.³³²

The danger increases by virtue of the Patriot Act's silence regarding a fundamental balancing test in relation to infringement of rights. This silence may lead to the conclusion that the Act is satisfied with an *ad hoc* balancing test. An *ad hoc* balancing test is a dangerous one which entails paternalistic, fortuitous standards that cannot be evaluated in advance in terms of their direction and nature.³³³ In an *ad hoc* test, it will be possible in the name of State security to override other values such as individual liberty and privacy even when the degree of certainty of harm to national security is low. Is this reasonable?

The extent of the interference and infringement of human rights must be examined against the interest in the name of which we infringe the rights. The more important the interest, the more likely that the infringement will be permitted: "[t]his balancing of the public's safety needs against the guaranties of individual liberty dominates our constitutional law cases, with the degree of the intrusion constantly being weighed against the magnitude of the state interest that led to the intrusion."³³⁴

State security is an important and significant interest; however, "security is not a magic word and does not obtain preference in every case and in all circumstances whatsoever and is not equal at every level of security and the harm to it."³³⁵ Indeed, the interpretation given by the case law on the U.S. Constitution positions the Constitution as itself limiting the protection of such rights as the right to due process in circumstances where there is a danger to the public.³³⁶ Accordingly, the Supreme Court allowed a confession of a suspect to be used even though he had not been informed of all his *Miranda* rights by reason of the "public safety"

³³² American Civil Liberties Union, *New Anti-Terrorism Law Once Again Undermines Role of Judiciary: Statement of Laura W. Murphy, Director ACLU Washington National Office* (Nov. 1, 2001), at <http://www.aclu.org/news/2001/n110101c.html> (on file with the North Carolina Journal of International Law and Commercial Regulation).

³³³ F.H. 9/77 *Israel Electricity Co. Ltd. v. "Ha'aretz" Newspaper*, 32(3) P.D. 337, 361 (author's translation).

³³⁴ Sievert, *supra* note 132, 1461.

³³⁵ H.C. 4541/94 *Alice Miller v. Minister of Defense and 31 others*, 49(4) P.D. 94, 122 (author's translation).

³³⁶ See U.S. CONST. amend. X.

exception of the Fifth Amendment.³³⁷ Likewise, the Court permitted limitations to be placed on freedom of expression for the purpose of protecting national security.³³⁸ However, these examples cannot provide a basis for justifying the Patriot Act.

On one hand, the restrictions and harm to constitutional human rights authorized by the Court prior to the anti-terrorist legislation are not the same as the restrictions imposed by the Patriot Act. In the past, it was possible to infringe rights when the danger to national security and public safety was a real and imminent danger; these were cases where it was clear that if, for example, freedom of expression would not be infringed, the national safety would be harmed immediately.³³⁹ The Patriot Act, however, imposes restrictions in a routine fashion, not only in cases where the danger is clear and imminent, but also in cases where it is not clear at all that there is a danger, or there is only a suspicion that there is a danger. In such cases the level of suspicion as to the existence of the danger is not high, and there is no knowledge whatsoever regarding the immediacy of the danger and its extent.

On the other hand, the United States has a difficult history which testifies to the fact that in times of emergency and crisis, precisely at the time when democracy is tested, there is a tendency to violate human rights unnecessarily, a violation which is not rectified by the courts but which is on occasion actually given effect, starting with *Korematsu*³⁴⁰ and ending with the Patriot Act. In both cases, the connection between the measure taken and the

³³⁷ *New York v. Quarles*, 467 U.S. 649, 655-58 (1984). In this case, the police had pursued an armed suspect into a grocery store and found him inside without the weapon. After the suspect was formally arrested, but before being advised of his Miranda rights, a police officer asked him where the gun was located. The Court found that the suspect's answer, and the subsequently discovered weapon, could be admitted as evidence against the defendant based on a "public safety" exception to the Fifth Amendment protections.

³³⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

³³⁹ *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (recognizing that restrictions on the press are appropriate to prevent, among other things, publication of military positions during wartime).

³⁴⁰ *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (declaring that compulsory exclusion of large groups of citizens from their homes is proper only under circumstances of "direct emergency and peril" and must be "commensurate with the threatened danger"). What of the connection between sending these people to internment camps and the threatened danger? Should the gravity of the threat be sufficient to negate the need for proof of a connection between the internment and the threat?

purpose was remote. *Korematsu* involved a nation in the throes of hysteria that refused to recognize this and convinced itself that the connection was a close one, thereby unnecessarily violating human rights. Perhaps only in hindsight was the nation able to acknowledge the blindness which had affected it regarding the absence of a nexus between the cruel measures which it adopted against citizens who posed no threat whatsoever and the reason for which these measures were taken. Accordingly, it would have been right if the Patriot Act would have prevented such mistakes from being repeated:

The detention of Japanese-Americans in World War II, and the Vietnam era's unauthorized wiretaps and FBI 'black bag jobs' should have taught all of us by now: You don't take away our constitutional liberties in order to defend us from foreign and domestic enemies who seek to do the same thing.³⁴¹

There is no doubt that the threat posed to national security by terrorist organizations is a real and serious threat, but this threat is directed concurrently at both the range of democratic values and the freedoms cherished by the nation. Accordingly, the war waged by a democratic State against terrorism is difficult, which causes the State to face an even more difficult task, one with which a totalitarian State need not contend – the duty to refrain from infringing democratic values and the freedoms of the individual:

Liberal democracies face a unique challenge in maintaining the security of the State. Put very simply, that challenge is to secure democracy against both its internal and external enemies, without destroying democracy in the process. Authoritarian and totalitarian States do not have to face this challenge. In such countries there is no need to ensure that security agencies, whose techniques inevitably involve a great deal of secrecy, be accountable to an elected legislature. Nor is there a requirement in such States that all of their security measures be authorized or provided for by law and that none of their officials is above the law. Only liberal democratic States are expected to make sure that the investigation of subversive activity does not interfere with the freedoms of political dissent and association which are essential ingredients of a free society.³⁴²

³⁴¹ Steven Kimelmen, *Protecting Privilege*, NAT. L. J., Dec. 3, 2001, at A21.

³⁴² COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE, FREEDOM AND SECURITY UNDER THE LAW, 2nd Rep. Vol. I,

The requirement that the government take action against the phenomenon of terrorism is a legitimate and proper demand. It is the duty of the government to defend the citizens of the State, but this must be done in accordance with the democratic values and not in opposition to them. Accordingly, there are those who believe that if the government action will infringe democratic values, it would be better to refrain from acting: "[t]here is a real legitimate need for protection (of freedoms). . . . Actions could do more harm to our society than not taking action."³⁴³

Actions should be taken which minimize the violation of human rights, yet achieve the purpose of the legislation. It seems that the anti-terrorist legislation of the United States did aim to minimize the violation of human rights, but instead sought to protect national security and the lives of American citizens, whatever the price to democracy.

Lessons may be learned from the history of the United States in terms of its conduct during times of national emergency, lessons which the present Congress should have borne in mind when enacting the Patriot Act, so as not to fail the test yet again. Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU), has explained the two primary lessons taught by history but which were not absorbed by the government:

First, we know that conscription of opinion often goes hand in hand with conscription of soldiers. During World War I and World War II, soldiers were not the only ones conscripted; public opinion and the First Amendment were also conscripted as the government attempted to squelch free expression and dissent.

Sadly, we are finding similar efforts to conscript the First Amendment in service of "War Against Terrorism." ACLU offices across the country have begun receiving complaints of books, magazines, and other materials that are being pulled from bookstores and libraries because they are viewed as contrary to or critical of the national interest. In colleges and universities, we are receiving complaints of efforts to limit academic freedom and quell dissent and debate. And on October 11, we saw troubling efforts to conscript public opinion when the White

p.43 (Aug. 1981).

³⁴³ *UM Panel Eyes Our Loss of Liberties*, MONT. LAWYER, Oct. 2001, at 23.

House requested that broadcast media outlets edit or decline to show any video tapes of Osama bin Laden. No evidence of secret messages or coding was provided in the White House request, and in any case, the tapes were broadcast worldwide and were available on-line. Yet, the White House endeavored to conscript public opinion and information in the name of the "War Against Terrorism."

The free exchange of ideas, open debate and peaceful dissent are even more important during periods of national crisis. . . . Second, crises tend to encourage gross violations of due process. Following World War I, strikes in our nation's cities terrified millions of Americans, who saw law and order collapsing. In June of 1918, the country was shaken by a series of politically motivated bombings, including an explosion at the home of Attorney General A. Mitchell Palmer. What ensued was one of the worst violations of civil liberties in American History. During raids in November and January, law enforcement officials swooped down on suspected radicals in thirty-three cities, arresting 6,000 people, most of them immigrants. The raids involved wholesale abuses of the law: arrests without a warrant, unreasonable searches and seizure, wanton destruction of property, physical brutality, and prolonged detention.

While the initial reaction to the raids was favorable, the tide of public opinion soon changed. Prominent lawyers like Felix Frankfurter raised concerns that the abuses "struck at the foundation of American free institutions, and brought the name of our country into disrepute."³⁴⁴

Does the Patriot Act not bring the nation into "disrepute"? The answer to this is in the affirmative. The Patriot Act returns us to the past, to cases where the government – the executive authority – confers upon itself multiple powers which are too numerous for times of crisis and which may well be regretted by future generations.

In the past, when the United States infringed the rights of the individual, the response was later seen to have been an exaggerated reaction to the frightening situation: "[a]fter the immediate danger passed, it was recognized that the government had already possessed ample powers to address the threats at hand;

³⁴⁴ ACLU, *supra* note 331.

the new tools were unnecessary at best and dangerous at worst."³⁴⁵

When dealing with the dangers posed by terrorism, it is not known when the danger will pass, if at all, but national security is not a magical phrase. It cannot enable us to imprison thousands of people within the United States, without there being a more than low-level certainty that these people indeed threaten the security of the State. Nonetheless, how can the danger posed by terrorism influence the balance between national security and human rights from a constitutional point of view? In this connection it is possible to adopt the constitutional test applied by the State of Israel known as the limitation clause. The central principle in this test is the principle of proportionality.³⁴⁶ The threat of terrorist attacks is a threat accompanied by great danger and damage. Therefore, the condition of harm compatible with the extent of the threat is a condition met by the Patriot Act: "[w]hen we are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."³⁴⁷

However, in relation to other conditions, joining this condition, the Patriot Act fails, for example, in making the measure compatible with the goal. Following the terrorist attacks of September 11, 2001, the United States argued that it would have been possible to prevent the attack had law enforcement, security, and investigative agencies possessed the necessary tools. Yet, the outcome of the legislation gives rise to the impression that at the time of enacting it, Congress did not ask itself the following question: "How did September 11th evade our intelligence services? What powers do law enforcement agencies now have? And, how can these existing powers be used more effectively to combat terrorism?"³⁴⁸ Had Congress asked itself these questions,

³⁴⁵ *Id.*

³⁴⁶ It should be noted, the principle of proportionality is the central principle in the balancing tests the U.S. courts created in order to defend constitutional rights. For example, in *Mathews v. Eldridge* 424 U.S. 319 (1976), the Court created a balancing test which is relevant to the right to due process. But those tests are different from Israel's limitation clause. In Israel, the balancing test is relevant to all the constitutional rights, but it is created by the legislature. Moreover, the principle of proportionality is not exclusive. An important principle is whether a proper purpose exists. See *infra* notes 349-68 and accompanying text.

³⁴⁷ *Korematsu v. United States*, 323 U.S. 214, 219-20 (1944).

³⁴⁸ ACLU, *supra* note 331.

it is likely that it would have reached a different conclusion to that reached in the Patriot Act. Why is this so?

Even before the enactment of the Patriot Act and the 1996 Act, voices were heard in the FBI to the effect that there was no need for additional powers to be granted to the FBI in order to fight terrorists effectively: “[t]he FBI Guidelines already give federal law-enforcement officials ample authority to monitor and deter planned criminal activities, including those associated with terrorism. These guidelines already permit infiltration, surveillance, and other investigative techniques whenever there is ‘a reasonable indication’ that criminal or violent activity is being planned.”³⁴⁹

The FBI has the authority to search and investigate even those individuals who obey the law, on the basis of a “reasonable indication” without need for “probable cause,” in what is a serious violation of the rights protected by the Fourth Amendment.

The explanation for the difference in the level of suspicion needed in order to launch an investigation and conduct searches is found in the change which has taken place in the guiding principles and in the moderation of the threshold conditions by the Attorney General. On April 5, 1976, then-Attorney General Edward Levi presented the FBI with two demands which had to be met:³⁵⁰ (a) no investigation could be conducted solely on the basis of an unpopular expression where there was no danger of violence; and (b) the measures available to the FBI in order to undermine the structures of organizations suspected of terrorism had to be subject to the First Amendment and, therefore, would not be implemented in every case.³⁵¹ “the main thing in my opinion is that the purpose of the investigation must be the detection of unlawful conduct and not merely the monitoring of disfavored or troublesome activities and surely not of unpopular views.”³⁵²

³⁴⁹ Thomas C. Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201 (1996).

³⁵⁰ THE ATTY. GENERAL'S GUIDELINES ON DOM. SEC. INVESTIGATIONS, *reprinted in* FBI STATUTORY CHARTER: HEARINGS ON S. 1612 BEFORE THE SENATE COMM. ON THE JUDICIARY, 95th Cong. 2d Sess., pt.1, 18-26 (1978).

³⁵¹ “All investigations undertaken through these guidelines shall be designed and conducted so as not to limit the full exercise of rights protected by the Constitution and laws of the United States.” *Id.* at 20.

³⁵² *FBI Oversight, 1976: Hearings before the Subcomm. on Civil and Constitutional*

As a result of the growth and spread of the phenomenon of terrorism and violence in the United States, it was decided that these guidelines had to be changed in order to allow proper protection to be given to the safety of the public.

On March 3, 1983, then-Attorney General William French Smith established new guidelines with the aim of augmenting the investigative measures available to the FBI.³⁵³ While the earlier standards required precise facts to be established to launch an investigation, Smith was content to require a reasonable indication as the legal standard for the opening of a full investigation. In order to balance this low-level standard with the concomitant violation of human rights, Smith, like his predecessor, agreed that no investigation would be launched solely on the basis of activities protected by the First Amendment to the Constitution.

In a judgment delivered in 1984, the Supreme Court gave its assent to the low threshold of "reasonable indication" for the opening of an investigation, and held that:

The FBI need not wait till the bombs begin to go off, or even till the bomb factory is found. . . It has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes: it is not obliged to wear blinders until it may be too late for prevention.³⁵⁴

Prior to the legislation of 1996 and 2001, there were those who believed that the FBI needed further changes to be made to the 1983 guidelines, and that they should be given additional tools within the new framework. The FBI however, was not a party to the request for changes: "[t]he fact is that as the world becomes increasingly complicated we need to examine our tools to determine whether they are adequate. However, new threats need not always prompt new procedures, and our opinion is that we do

Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 2, pt. 3, at 258 (1976).

³⁵³ THE ATTY. GENERAL'S GUIDELINES ON GEN. CRIMES, RACKETEERING ENTERPRISE AND DOM. SEC./TERRORISM INVESTIGATIONS, reprinted in ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC SEC. INVESTIGATIONS, HEARINGS BEFORE THE SUBCOMM. ON SEC. AND TERRORISM OF THE HOUSE COMM. ON THE JUDICIARY, 98th Cong., 1st Sess. 47-65 (1983).

³⁵⁴ *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1015 (7th Cir. 1984).

not need new procedures now."³⁵⁵

Prior to the Patriot Act, the FBI was obliged to examine the extent of the threat, the likelihood of it occurring, and the imminence of the danger. The FBI was required to take into account the danger to privacy and freedom of expression which would be directly infringed upon by the launching of the investigation.³⁵⁶ Only if the examination of these factors led to the conclusion that the standard of reasonable indication had been met could a court be asked to order a search in accordance with the Fourth Amendment to the Constitution.

Then-Secretary of State Madeleine Albright stated that the purpose of the legislation of 1996 was as follows:

Our goal is to make the United States fully a no-support-for-terrorism zone. Our message to anyone who comes into our country intending to raise money for a terrorist organization is you risk going to jail. And our message to anyone who is a part of a terrorist organization and who wants to enter the United States is you are not welcome here.³⁵⁷

The purpose is admirable; however, the measures enacted by the United States are not compatible with that purpose. Did anyone doubt that prior to 1996 the United States was a country which opposes terrorism? Did the members of terrorist organizations ever contemplate, prior to the legislation, that the United States would welcome them? Of course not. The means made available by the law did not serve the purpose; rather, they violated human rights. The less draconian means in use prior to the enactment of the AEDPA and the Patriot Act conformed to the goal of fighting terrorism and infringed human rights to a much lesser extent.

Clearly illustrating the fact that the measures provided by the AEDPA and the Patriot Act do not conform to the goal of suppressing terrorism is the case of Lorraine Paris, whose return to New York from her honeymoon was delayed by reason of an

³⁵⁵ Howard M. Shapiro, *Domestic and International Terrorism: Terrorism in a Democratic Society*, 1 J. NAT'L SEC. L. 95, 100 (1997).

³⁵⁶ See *FBI Statutory Charter: Hearings Before the Comm. on the Judiciary United States S., 95th Cong.* 20-26 (1978).

³⁵⁷ Clark, *supra* note 163, at 248.

earlier conviction from the late 1970s for possessing marijuana.³⁵⁸ In other words, her freedom of movement and right to enter the United States was restricted on the basis of a conviction which had no real connection to terrorism in respect of which the AEDPA was enacted.

In his article, Gregory Clark explains the incompatibility between the measures supplied by the AEDPA, as part of the U.S. response, and the goal of eradicating terrorism:

One unfortunately typical response to terrorism focuses on eliminating the threat by relocating or isolating it. . . . [D]eportation in America . . . attempt[s] to remove dangerous factors from society. This strategy can never succeed because moving a volatile element does not defuse its destructive power, but merely transplants it. Exclusion of a suspect between states or from a country entirely, arbitrarily deprives liberty, free travel, access to family and nothing else. Further, partial action towards individuals loosely associated with terrorist groups often tends to tighten their binds to the organization, forcing people underground and "increas[ing] recruitment into the deeply clandestine armed groups, which excaerbate terrorism." By excluding or deporting a suspected terrorist, a nation often pushes an individual out of its bed and into the arms of her devoted terrorist brethren. The United States would be better advised to zealously prosecute the people with clear and unequivocal ties to the violent activities of a terrorist enclave.³⁵⁹

Legislation is a central and important tool in the hands of nations, including the United States, in the fight against terrorism. However, "[u]nless it is carefully crafted — with an abundance of checks and balances against the possibility of overzealous enforcement — we may one day look back and wonder whether the terrorists actually achieved their goal of undermining American society."³⁶⁰

As noted, contending with the phenomenon of terrorism as an

³⁵⁸ Antonio C. Campo, *New Anti-Terrorism Law Harsh to Immigrants*, FILIPINO REP., Aug. 8, 1996, at 20.

³⁵⁹ Clark, *supra* note 163, at 273–74 (alteration in original) (footnotes omitted).

³⁶⁰ *Terrorism in the United States: The Nature and Extent of the Threat and Possible Legislative Responses: Hearings Before the Comm. on the Judiciary United States S.*, 104th Cong. 127 (1995) (statement of Robert Kupperman, Senior Advisor, Center for Strategic and International Studies).

unidentified, international enemy by means of legislation is difficult but possible. The emphasis must be on exercising the greatest possible caution when engaging in ancillary violations of human rights. What balance is proper, and when should such an infringement be allowed?

The proper balance should be based on the relative weight of the right being violated — dependent on the elements underlying the right — on one hand, and the degree of importance of the clashing interest — to achieve which the right has violated — on the other. National security is an important interest, and its realization is no less important. However, the relative weight of the violated rights is generally just as important. Accordingly, it is necessary to shape the balancing test in a manner similar to the fundamental balancing test applied in Israel — the limitation clause.³⁶¹ Under this test, every measure supplied by U.S. law to security authorities that violates human rights must meet three conditions.³⁶² The test must accord with the democratic values of the United States, it must be for a proper purpose, and it must satisfy the test of proportionality.³⁶³ There must be a rational connection between the measure adopted and the purpose. It must be the least drastic measure in the sense that there be no other measure which can achieve the objective and infringe the right to a lesser extent, and the benefit derived from infringing the right must exceed the damage ensuing from the violation.

It should be pointed out that this balancing test is not foreign to American case law. As previously discussed, prior to the enactment of the anti-terrorist legislation, it was not possible to infringe the right of freedom of expression, save for a proper purpose which was foreign to the political interests of the government and on condition that the limitation on the right was proportional. In other words, the legislation could not exceed what was necessary.³⁶⁴

The most important component of this test is the requirement that all elements of the test of proportionality be met. Satisfying this requirement will prevent an unnecessary violation of human

³⁶¹ ISR. CONST. (Basic Law: Human Dignity and Freedom 1992), § 8.

³⁶² *See id.*

³⁶³ *See id.*

³⁶⁴ *See supra* notes 101–07 and accompanying text.

rights on the assumption that the courts will insist on exposing the real purpose motivating the enforcement and security agencies of the United States to use the measures that the Patriot Act allows them. If the purpose is indeed protecting national security, the court must require concrete intelligence information that there is a danger to national security. If such information exists, then there is a rational connection between the measure adopted and national security. However, the danger inherent in conferring on the enforcement agencies powers which violate human rights lies in the fact that these measures may be used for racist and discriminatory reasons (as the broadest powers are directed towards aliens). In such cases, there is no rational connection between the measures adopted and the purpose; therefore, the importance of exposing the concealed motive underlying the authorities' activities increases. In cases where it is not possible to turn to the courts, and the Attorney General is authorized to permit a measure, the responsibility for scrutinizing the rational connection between the measure and its purpose must be imposed on the Attorney General, as must all the other elements of the fundamental balancing test.

After a rational connection has been found between the measure and the purpose, it is necessary to examine — prior to exercising the power — whether it is possible to achieve the purpose by means which are less drastic than the means afforded by the Patriot Act. For example, instead of arriving without notice at the home of a person and searching his property, is it possible to notify the person prior to conducting the search and still achieve the desired objective?

Finally, it is necessary to consider whether the benefit ensuing from the violation of the right exceeds the damage caused by it. This third element of the test of proportionality will always exist if the first two elements are present; it will supplement the test and close the circle, which may not be at the forefront of the considerations of the authorizing person.

VI. The External Aspect: Fighting Terrorism By Armed Means

A. Is the United States action against Afghanistan an act of self-defense or a punitive measure?

The internal dimension of the United States's response — the new legislation having the declared purpose of providing the security and investigative authorities with measures to fight terrorism — was not the sole response to the attack launched on September 11, 2001. An external response impacting the entire world found expression in U.S. President George Bush's declaration of "War Against Terrorism."

Wars are prohibited according to rules of international law. An armed attack is only possible within the framework of self-defense. In this part, this article shall examine whether the American response, which took the form of a stubborn and wide ranging armed attack on Afghanistan, conforms with the rules of international law and whether the action is indeed one of self-defense; or whether, on the contrary, the act was intended purely to punish the perpetrators of the terrorist attack — Osama Bin Laden and his followers.

Following the appalling attack against New York and Washington, the President of the United States spoke to the nation and explained:

On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars - but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war - but not at the center of a great city on a peaceful morning. Americans have known surprise attacks - but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack. . . . Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. . . . This is not however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and

freedom.”³⁶⁵

It is difficult to ignore the strong sense of anger, rage, and the desire for revenge emerging from the words of President Bush. From a moral point of view, the contents of this speech can be identified, yet from the point of view of the legal and statutory rules enabling the initiation of an armed attack, there is not that level of certainty as to the justification for such a war. It should be recalled that this war is not an ordinary one. It is a war which has an enemy, but an enemy without an address. A war against terror lacks the traditional character of a war where it is possible to identify the parties on the basis of clear geographical factors. The training camps of Bin Laden in Afghanistan are not the only enemy. The terrorist organizations have established cells in almost every country. The United Nations Charter is the fundamental source for the prohibition against war. Article 2(3) of the United Nations Charter provides that “[a]ll [m]embers shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”³⁶⁶

In effect, the United Nations Charter entrenches and adds to the basic principles which developed as a matter of customary international law following the Hague Peace Conferences.³⁶⁷ The United Nations Charter prohibits the use of war for the entire international community. Thus, Article 2(4) prohibits the use of force against “any state” not only against a Member State.³⁶⁸

The United Nations Charter creates a legal structure prohibiting the use or threat of force with a central exception that enables the use of force for the purpose of self-defense under Article 51 of the Charter.³⁶⁹ This Article uses the language of the

³⁶⁵ President George W. Bush, Address to a Joint Session of Congress and the American People (Sep. 20, 2001), available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html. President Bush’s speech before Congress on September 20, 2001 declared that America had found its mission: “freedom and fear are at war.” *Id.* (on file with the North Carolina Journal of International Law and Commercial Regulation).

³⁶⁶ U.N. CHARTER art. 2, para. 3.

³⁶⁷ See Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 187 Consol. T.S. 410, as amended, Oct. 18, 1907, 36 Stat. 2199, 205 Consol. T.S. 233.

³⁶⁸ U.N. CHARTER art. 2, para. 4.

³⁶⁹ U.N. CHARTER art. 51. Article 51 provides:

right to self-defense against armed attack, whereas customary international law is concerned with self-defense against acts of aggression. The term "armed attack" is narrower than the term "aggression," and accordingly, this article shall first examine whether the attack of September 11, 2001 was an armed attack against the United States that conferred upon the United States the right to self-defense.

The term "armed attack" is not defined in the Charter, and it has been the subject of two interpretive approaches in legal literature. The *narrow approach* holds that the right to self-defense only arises after the occurrence of an armed attack or, at the least, where there is a high and real likelihood of such an occurrence. An armed attack is a form of aggression; however, while threats and declarations alone are sufficient to establish aggression, they are insufficient to comprise an armed attack. The attack must be carried out with weapons. It must consist of the use of actual physical force against a State for that the State to have the right to engage in self-defense. Accordingly, pre-emptive war is not permitted under Article 51, even though it is permitted by customary international law.³⁷⁰ Under this approach, the right to self-defense should not be exercised in order to punish an attacking State in the absence of a continuing threat.³⁷¹

Do terrorist activities amount to an "armed attack"? The judgment of the International Court of Justice in the case of *Nicaragua v. United States of America* stated, in effect, that terrorist acts do not amount to an "armed attack."³⁷² Despite the

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

³⁷⁰ YORAM DINSTEIN, *THE LAWS OF WAR 65-72* (Tel Aviv University Press 1983) (author's translation).

³⁷¹ Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L. J. 145, 162 (2000).

³⁷² *Id.* at 158.

U.N. Security Council consistently adhering in most of its decisions to the narrow approach by condemning actions taken in self-defense by the State "under attack,"³⁷³ the Security Council took a different course in its decision following the terrorist attack on the United States on September 11, 2001.³⁷⁴ It identified a right to self-defense in connection with an act of terror.³⁷⁵

The *broad approach* explains that in the light of the special language used by the Charter — "nothing . . . shall impair the inherent right of . . . self-defense."³⁷⁶ The intention is to preserve the right to self-defense as acknowledged in customary international law.³⁷⁷ The interpretation given to "inherent right" is the use of force for the purpose of self-defense in accordance with the requirements established by the *Caroline Doctrine* which provided the basis for the interpretation of the term "aggression" in customary international law.³⁷⁸ Forming that doctrine, then-U.S. Secretary of State, Daniel Webster, presented the circumstances required for an action to be justified as self-defense: "show a necessity of self-defence [sic], instant, overwhelming,

³⁷³ See, e.g., SCOR Res. 573, U.N. SCOR, 40th Sess., 2615th mtg. at 23, U.N. Doc. S/PV.2615 (1985). This resolution rejected Israel's claim that it had acted in self-defense in relation to an operation carried out in 1985 against the headquarters of the PLO near Tunis. *Id.* The resolution condemned the act of aggression perpetrated by the State of Israel. *Id.*

³⁷⁴ SCOR Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

³⁷⁵ See Said Mahmoudi, *Comment on Fox Addendum*, at <http://www.asil.org/insights/insigh77.htm#comment3> (Sep. 21, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation). Professor Mahmoudi stated:

The Security Council is now obviously faced with a situation that profoundly differs from the situation in 1985 when Palestinian groups carried out individual attacks on Israeli targets, normally with limited casualties. That is why the members of the Security Council, in their resolution 1368 (2001), in contradistinction to Resolution 573 (1985), unanimously recognize the right of each State to individual and collective self-defense in situations like the present one in the U.S.

Id.

³⁷⁶ U.N. CHARTER, art. 51

³⁷⁷ James P. Terry, *Countering State-Sponsored Terrorism: A Law-Policy Analysis*, 36 NAVAL L. REV. 159, 170 (1986).

³⁷⁸ Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L. J. 569, 578 (1995).

leaving no choice of means, and no moment for deliberation."³⁷⁹

There is no doubt that adopting the narrow interpretation of the right to self-defense would give terrorists an enormous advantage in their war against democracy.³⁸⁰ Threats and declarations of future aggression are insufficient to establish an armed attack under the narrow interpretation, but are sufficient to give rise to a right to self-defense as a matter of customary international law.³⁸¹

Most scholars agree that the term "armed attack" entails a serious attack, which is not one-time, against the territory of a State or its citizens as such. Such an attack would only justify the use of force on grounds of self-defense if all attempts at peaceful resolution have been exhausted.³⁸² This approach may also be seen in the interpretation given by the United States to the term "self-defense." The United States has raised three possibilities of self-defense: (1) self-defense in the face of the real use of force or hostile actions; (2) self-defense as a preventive action in the face of immediate activities where it is anticipated that force will be used; and (3) self-defense in the face of a persistent threat.³⁸³

Such an interpretation reflects a balance between the broad and narrow interpretations. The first alternative concerns the situation of an actual attack which falls within the narrow definition given to armed attacks. The second situation expands the definition to situations where the attacks have not yet actually taken place but in which there is an expectation that they will occur. The third situation is compatible with the broader interpretation, whereby

³⁷⁹ *Id.* at 577. It is necessary that the threat be existential, or at the least real and tangible. Necessity – the response is needed in order to defend against the threat. The response must be proportional to the threat, restricted by the need for self-defense and clearly left within its framework. The response may not be unreasonable. The response of self-defense is the last and not the first option. First, all other means that do not require the use of force must be exhausted. At the least, it must be shown that an effort was made to resolve the dispute in such a manner. *See id.*

³⁸⁰ Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93 (1989).

³⁸¹ Yoram Dinstein, *THE LAWS OF WAR 68–69* (Tel Aviv University Press, 1983) (author's translation).

³⁸² Robert J. Beck & Anthony C. Arend, *Don't Tread on Us: International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L. J. 153, 201 (1994).

³⁸³ Jami Melissa Jackson, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669, 683 (1999).

the armed attack also embraces situations where the attack has not yet occurred, but where there is a persistent and continuing (as opposed to one-time) threat of the occurrence of an armed attack. It is clear that the terrorist attack against the United States was an armed attack. Yet, self-defense is not and cannot be a punitive action.

Killing a person as part of a retaliatory or punitive action is unlawful, whereas killing him as part of a pre-emptive action of self-defense is lawful, albeit subject to a number of restrictions.³⁸⁴ Was the United States's action in Afghanistan pre-emptive and protected under the canopy of self-defense, or was it a retaliatory action?

In answering this question, caution must be exercised to not confuse the moral justification for exercising the right to self-defense and the legal justification for exercising that right. It is difficult to question the moral justification for exercising the right to self-defense against terrorist organizations. In the same way as it is inconceivable to ask a man not to defend himself against a danger to his life, it is also inconceivable to prevent a State from implementing that right. Indeed, it is the State's duty to defend itself and its citizens against anticipated attacks, even if these are launched by bodies which are not States.³⁸⁵ When the lives of citizens are threatened by terrorist attacks and no alternative to force is available which will effectively eradicate terrorism, there is moral justification, under the theory of self-defense, to permit the State to defend itself against the terrorist organizations. For example, Professor Schachter believes that injury to civilians in a foreign State comprises an armed attack within the meaning of Article 51 of the Charter and gives rise to the right of self-defense.³⁸⁶

Additionally, Professor Coll contends that it would be a mistake to interpret Article 51 as absolutely prohibiting a military reaction to terror. Coll states, "[s]elf-defense consists essentially

³⁸⁴ Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 329 (1991).

³⁸⁵ Assa Casher, *MILITARY ETHICS* 37-38 (Tel Aviv: Ministry of Defense Press 1996) (author's translation).

³⁸⁶ Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309, 312 (1989).

of measures necessary to protect the State and its people from outside armed attack in all its conventional and non-conventional forms, including terrorism."³⁸⁷

From this it follows that terrorist attacks against innocent civilians justify an act of self-defense. The decision of the U.N. Security Council on September 13, 2001, two days after the attacks, identifies the right of every State to self-defense against such acts of terror.³⁸⁸ It would seem that the Security Council acknowledges the need to equate acts of terror (at least those acts that cause massive loss of life) with an armed attack within the meaning of Article 51 of the Charter.

As noted, moral reasons cannot justify exercising the right to self-defense against terrorist organizations. Instead, the right of self-defense must conform to the rules of international law. Accordingly, the idea of making use of armed forces to attack terrorist organizations located in foreign countries must be made compatible with Article 2(4) of the Charter.³⁸⁹ Member States must refrain from threatening or making use of force against the territorial integrity or political independence of any State or act in any other way which is incompatible with the purposes of the United Nations.

First, the State which plans to make use of force must ensure that the objectives being targeted for attack pose a terrorist threat. This threat must be one that it is assumed will occur and that the State in which the terrorists are located is not able or willing to cope with it. The level of proof needed is not beyond any reasonable doubt, but clear and convincing evidence must be presented, as it is possible that innocent people will be killed, and therefore, it would not be moral to take such a large risk without

³⁸⁷ Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 297, 307 (1987).

³⁸⁸ S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001):

The Security Council . . . Recognizing the inherent right of individual or collective self-defense in accordance with the Charter . . . *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security.

Id.

³⁸⁹ U.N. Charter art. 2, para. 4.

being certain that the planned target is appropriate and that the threat is real and serious.³⁹⁰ In the *Nicaragua* case, mentioned above, the court pointed to the minimum conditions required in order to enable a military response against a terrorist attack, including the requirements of evidence.³⁹¹ The court mandated "that the nation carefully evaluate the evidence to ensure a high degree of certainty that it has identified those responsible for an attack and that more attacks are imminent. . . ."³⁹²

Secondly, the use of power must be limited to one purpose only — the need to remove the terrorist threat. So long as the State does not support the organization, no action should be taken against its facilities and military camps. Third, the use of force must be proportional to the size of the threat; the use of force must be restrained. Fourth, the threat need not be imminent in accordance with the requirement in Article 51 of the U.N. Charter, but it must be likely that the threat will indeed be realized.³⁹³ Fifth, force may not be used unless all non-violent means have been exhausted, or it is clear that the threat is about to be realized prior to the conclusion of efforts to resolve the dispute by peaceful means.³⁹⁴ The latter requirement — to exhaust peaceful measures — is the most important and problematic of the requirements where the enemy is a terrorist organization.

Self-defense is an exception to the theory whereby disputes are resolved by the normative structures of the rule of law: within the State — by the authorities responsible for the enforcement of the law between States; on the international level — in accordance with the Charter. The latter offers a mechanism to resolve disputes peacefully with the help of the Security Council of the U.N. — unless there is an imminent existential threat which requires immediate defensive action. Even in such a case, notification of the action must be given to the Security Council and it will

³⁹⁰ Emanuel Gross, *Human Rights in Administrative Proceedings: A Quest for an Appropriate Evidentiary Standard*, 31 CAL. W. INT'L L. J. 215 (2001).

³⁹¹ Jules Lobel, *Colloquy: The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 547 (1999).

³⁹² *Id.*

³⁹³ Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, YALE J. INT'L L. 609, 648–49 (1992).

³⁹⁴ Gregory M. Travalio, *Terrorism, International Law and the Use of Military Force*, 18 WIS. INT'L L. J. 145, 171–73 (2000).

examine if it is indeed indispensable. The requirement that disputes which provide grounds for war first be resolved by means of negotiations is compatible with the Charter and international law. The State of Israel, for example, acted in this way with the Palestinian Authority prior to engaging in military actions required to defend its citizens.³⁹⁵

The United States took the same course following the attack on September 11, 2001. The President of the United States demanded that the Taliban government close terrorist training camps and extradite terrorist leaders to the United States. Only after a wait of more than two weeks in which these demands were not met did President Bush declare: "Now the Taliban will pay a price."³⁹⁶

In his speech to the nation about the military response against Afghanistan, the President emphasized that the targets were military targets of the Taliban government and the terrorist organizations being sheltered by it. The action would be taken solely for the purpose of removing the threat. The United States was interested in harming the terrorists, not the Afghan population:

We're a peaceful nation. Yet, as we have learned, so suddenly and so tragically, there can be no Peace in a world of sudden terror. In the face of today's new threat, the only way to pursue peace is to pursue those who threaten it. . . . By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate their evil plans. . . . Our military action is also designed to clear the way for sustained, comprehensive and relentless operations to drive them out and bring them to Justice. At the same time, the oppressed people of Afghanistan will know the generosity of America and our allies. As we strike military targets, we will also drop food, medicine and supplies to the starving and suffering men and women and children of Afghanistan. . . . We're a peaceful nation. Yet as we have

³⁹⁵ Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-defense. Is this Legitimate? - Human Rights Versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L & COMP. L. J. (forthcoming) (manuscript on file with Temple International and Comparative Law Journal).

³⁹⁶ *Bush Speaks to the Nation*, S.F. CHRON., Oct. 7, 2001, at <http://sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2001/10/07/bushtranscript.DTL> (on file with the North Carolina Journal of International Law and Commercial Regulation).

learned so suddenly and so tragically, there can be no peace in a world of sudden terror. In the face of today's new threat, the only way to pursue peace is to pursue those who threaten it.³⁹⁷

Does the United States meet the remaining conditions which justify its acts actions as self-defense? Even if we assume that the United States had clear and convincing evidence that terrorists were located within the territory of Afghanistan and that the State was unable to deal with them, did the United States have clear and convincing evidence that these terrorists posed a real threat so that there was a real likelihood that the threat would be realized in the shape of additional terrorist attacks?

The use of force in this war was not confined to eliminating the terrorist threat, even if this was the original intention. On many occasions, we heard reports of serious harm to innocent civilians in population centers, a result which leads to the conclusion that the exercise of force was not sufficiently restrained as required by the rules of international law.³⁹⁸

The attack against Afghanistan was justified in several respects. Indeed, the end result shows that many terrorists, Bin Laden's agents, were indeed located inside the territorial borders of Afghanistan. It is also not certain that the United States could have refrained from injuring civilians (however, did it do everything possible not to injure those civilians?) since one of the known characteristics of a terrorist organization is that it finds shelter in population centers in order to exploit the fact that the State is subject to the rules of war which prohibit injury to civilians.

³⁹⁷ *Id.*

³⁹⁸ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted on June 8, 1977, 16 I.L.M. 1391 (entered into force Dec. 7, 1979) [hereinafter Protocol 1]. Article 48 of the Protocol 1 requires that a distinction be made between combatants and civilians, and between military targets and civilian targets. *Id.* Article 57 of Protocol 1 provides that these persons must (i) do everything feasible to verify that the objectives to be attacked are military objectives and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions with a view to avoiding, and in any event to minimizing, damage to civilian objects; (iii) refrain from indiscriminate attacks. *Id.* An attack must be cancelled or suspended if it becomes apparent that the objective is not a military one. *Id.* Effective advance warning must be given of attacks that may affect the civilian population, unless circumstances exist that make advance warning not possible. *Id.*

The problem identified here is that of the lawfulness of the action in terms of the laws of war. It is not certain that the United States response is compatible with the requirements, even the most moderate, allowing the exercise of the right to self-defense. If the United States had information that the extradition of Bin Laden and his followers would prevent additional attacks, and without his extradition he would continue to control the terrorist network and damage the United States in the future, refusal to extradite him would have justified the exercise of the right to self-defense with the use of force. However, if the United States did not possess such information, and Bin Laden's extradition was demanded only in order to punish him and not out of a fear of future attacks, then by going to war against Afghanistan, the United States established a new category justifying the exercise of the right to self-defense, a category whereby an armed attack is a possible response to the failure to extradite a wanted terrorist.

Drawing a comparison with Israel in this regard, circumstances have shown that the failure to extradite wanted persons has led to continued suicide attacks within the territory of Israel, serious injury to innocent civilians as well as the assassination of a political figure, Minister Rehavam Ze'evi. Israel's demand that the wanted terrorists be extradited had a dual objective. The first was to place the terrorists on trial. The second was to thereby prevent additional terrorist attacks. This dual objective is what justifies the targeted elimination policy adopted by Israel against the terrorists within the Palestinian Authority.

Does the United States seek to achieve the same dual objective in its war against Afghanistan? Does the demand to extradite Bin Laden follow from the dual need to bring him to justice and thereby prevent additional terrorist attacks? Perhaps in the history books to be written in many years time, when it will be possible to reveal all the information, we shall know the answer to this question.

Conclusion

In 1987, Justice William Brennan of the U.S. Supreme Court gave a lecture in Jerusalem on human rights in times of security crises in the United States.³⁹⁹ In his view, the history of the United

³⁹⁹ William Brennan, *The Quest To Develop A Jurisprudence of Civil Liberties In*

States has shown that human rights have been repeatedly infringed upon in times of emergency, not by reason of calculated actions, but as a result of panic and paranoia. Each time, after the crisis had passed, it became clear that there had been no justification for violating civil rights. In his opinion, the history of the United States in this connection "teaches that the predicted threat to national security, which leads to the victimization of human rights in times of crises, is often exaggerated and unfounded factually."⁴⁰⁰

This article which examined the basic situation of human rights in the United States and the sharp shift in the scope of the protection given to these rights following the 1996 enactment of the AEDPA, and the further erosion which took place in 2001 with the enactment of the Patriot Act, provides further support for the comments of Justice Brennan. The two acts lead to further infringements of human rights as a result of a paranoid fear of terrorism.

In contrast, it has been demonstrated that Israel, which is subject to persistent terrorist threats to its security, has not let paranoia result in security interests being given real preference over human rights. Possibly, in the past, it could have been argued that a comparison between the United States and Britain on one hand and Israel on the other was unfair, "precisely because the security threat to Israel is a permanent threat means that Israel must be cautious in relation to human rights more than other nations."⁴⁰¹

However, today, the development of international terrorism has placed the world under a permanent threat. The powers conferred by the Patriot Act are not limited to special times of emergency. The Act is active and prospective in the sense that it has immediate and future effect in the light of the reaction to terrorism as a permanent threat, and not as a temporary or passing threat which requires the use of powers which are limited in time and which are confined to emergencies.

Times Of Security Crises, Sh. Shetreet (ed.), NATIONAL SECURITY AND FREE SPEECH (Kluwer, 1989) (author's translation).

⁴⁰⁰ *Id.*

⁴⁰¹ I. Zamir, *Human Rights and National Security*, 19 MISHPATIM 17, 23 (1989) (author's translation).

We have pointed to the fact that paranoia has struck the United States in an internal legislative aspect and an external aspect, in its war in Afghanistan. There the United States launched itself with the greatest possible speed into an armed struggle against the terrorists in Afghanistan. The United States declared its motive to be self-defense, but it is not at all certain that the real purpose was not punitive. In the future, we may come to the conclusion that "the United States is concerned with military showmanship which has only increased the cycle of hatred"⁴⁰² and is far from bringing about the real and absolute eradication of even one terrorist movement.

I can only hope that the comments made by the Deputy President of the Supreme Court of Israel, Haim Cohn will fall on attentive ears:

What distinguishes the State's fight from the fight of its enemies: the former fights and complies with the law, and the latter fights and breaches the law. The moral strength and the material justification for the authorities' fight are completely dependent on preserving the laws of the State: by waiving this strength and this justification for its war, the authorities serve the objectives of the enemy. The moral weapon is not less important than any other weapon and perhaps supercedes it – and there is no more efficient weapon than the rule of law. All those who need to know – should know that the rule of law in Israel will never yield to its enemies.⁴⁰³

⁴⁰² Yossi Deskel, *Way of the Mind, not the Might*, HA'ARETZ, July 11, 2001, at 2B (author's translation).

⁴⁰³ H.C. 320/80 Kawasma v. Minister of Defense, 35(3) P.D. 113, 132 (author's translation).

