CIVIL LIBERTIES AND HUMAN RIGHTS IN THE AFTERMATH OF SEPTEMBER 11

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I. INTRODUCTION

The focus of concern about the tension between liberty and security in dealing with terrorism has centered on the anti-terrorism bills and the resulting USA PATRIOT Act.[1] But, the issues presented by the statute—involving privacy of space and communications and the reputational risks that arise with a broader sharing of information—are not as important as those within the discretion of the executive branch, before as well as after September 11. A number of these questions are of major importance and are likely to escape careful attention.

The issues of discretion involve matters of life or death, torture, detention without trial, trial without juries, and basic freedoms to dissent. These discretionary determinations also raise issues of profiling that cut deeply into notions of equal citizenship and equal protection. Most of these questions involve the human rights of citizens of other countries, but some involve Americans as well.

The critical tradeoffs forced on those living in the United States by the events of September 11 are not those pitting the rights of Americans to be free of intrusive investigative steps against the needs of national security. They are:

- The privacy rights that are involved in the collection and use of information from a wide variety of sources versus the privacy rights compromised by intrusive techniques.

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1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

- The costs in terms of privacy and efficiency of investigating all possible suspects versus the discriminatory effects of focusing investigation on groups characterized by ethnic characteristics.
- Internal security measures versus law enforcement measures and the use of intelligence agencies versus the use of law enforcement agencies.
- The difficulty of trials in the United States versus assassination abroad or military tribunals (which are spared the difficulties of open proof and an independent fact-finder).
- Greatly increasing the level of intrusiveness of investigative activity in the United States versus encouraging other nations to increase the intrusiveness of their own investigations.

So the focus of this Essay, therefore, is not on new statutory powers but on the more consequential refocusing of powers long available to U.S. law enforcement and intelligence agencies. It is about the tactical interplay of rules for U.S. citizens with rules for non-citizens. The risks to American civil liberties—and to the human rights of others—result from the efforts we will make to increase our security (and our freedom from fear) in any of three ways—prevention, consequence management, and punishment.

Prevention. We must try to increase our security against major terrorist attacks by some mix of the following ways to prevent attack in the first place: (1) learning of a terrorist group's plans in advance, monitoring its efforts, and frustrating those efforts; or (2) denying all those who do not pass some test of loyalty access to likely targets or to the resources needed to attack those targets; (3) combining the first two by discovering who to track by monitoring efforts to obtain access to targets and dangerous resources; or, finally, (4) detaining, without criminal convictions, those who are more likely to support an act of terrorism.

Consequence Management. To the extent we fail to prevent a terrorist attack, we must be prepared to minimize its harmful consequences. If we are talking about massive attacks of terrorism such as those on September 11 or like those that might follow from use of biological or nuclear weapons, that requires planning to make available emergency powers that are

not generally granted to law enforcement, military, or intelligence agents—a grant that carries with it grave dangers.

Punishment. Finally, if we have failed to prevent a massive terrorist attack, we will want to retaliate against the terrorist group, its leaders, and any state that supported it. This, too, raises large and difficult issues of human rights.

In this Essay, I first identify the most significant risks to political and personal freedoms of Americans and others within the United States from efforts to prevent, to minimize the harmful consequences of what is not prevented, and to punish terrorists. Then I turn to the set of human rights issues that involve the risks to the lives, rights, and liberties of those not living in the United States. This is a project rich enough without attempting in each case to resolve with some finality what are sometimes very difficult choices among reasonably disputable options. To take that step would require assessing the ability of various governmental intrusions to create safety and the availability of alternatives less dangerous to our traditions.

II. DANGERS TO THE CIVIL LIBERTIES OF U.S. CITIZENS AND OTHERS WITHIN THE UNITED STATES

A. The Risks to Privacy and Liberty Associated with Efforts to Prevent a Massive Terrorist Attack

The safest and surest way of preventing a terrorist attack is to monitor effectively every individual or group who may possibly be planning such an attack. But the result of that, besides an immense expenditure of investigative resources, is to expose large numbers of individuals and groups who have no violent intentions to monitoring because of some small chance that the government may have overlooked the danger of the group or individual. How costly that is depends, in part, on how coercive or intrusive the monitoring is. But it will all be intrusive. Even the administration's efforts to interview, without arresting, thousands of visiting aliens[2] are, because of the vast discretionary powers of the Immigration and

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2. *See* Amy Goldstein, *A Deliberate Strategy of Disruption; Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASH. POST, Nov. 4, 2001, at A1.

Naturalization Service, inevitably coercive: few non-citizens will feel free to refuse to answer questions.[3]

Other steps have more serious consequences. The use of informants, which the law does not limit,[4] even without searches (secret or otherwise) or electronic surveillance, is always likely to create a substantial inhibition of democratic political activity. When the Department of Justice mistakenly suspected the Committee in Solidarity with the People of El Salvador (CISPES) of supporting Salvadorian terrorists, the United States Senate described the resulting danger to democratic values in this way:

> The American people have the right to disagree with the policies of their government, to support unpopular political causes, and to associate with others in the peaceful expression of those views, without fear of investigation by the FBI or any other government agency. As Justice Lewis Powell wrote in the *Keith* case, "The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power."
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> Unjustified investigations of political expression and dissent can have a debilitating effect upon our political system. When people see that this can happen, they become wary of associating with groups that disagree with the government and more wary of what they say and write. The impact is to undermine the effectiveness of popular self-government. If the people are inhibited in expressing their views, a nation's government becomes increasingly divorced from the will of its citizens.[5]

To avoid that inhibition of speech, recent Attorneys General have required a reasonable suspicion of planning violence or acting on behalf of a foreign power or group to further international terrorism before authorizing any intelligence gathering to prevent terrorism.[6] The classified standards for

3. *See* ROBERT JAMES MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS, § 1.26, at 12, § 1.33, at 14 (2001).

4. *See* Hoffa v. United States, 385 U.S. 293, 87 (1966).

5. SENATE SELECT COMM. ON INTELLIGENCE, THE FBI AND CISPES, S. REP. NO. 101-46, at 102 (1989) (quoting United States v. U.S. Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 314 (1972)).

6. *Cf.* OFFICE OF THE ATTORNEY GENERAL, GUIDELINES FOR FBI FOREIGN INTELLIGENCE COLLECTION AND FOREIGN COUNTERINTELLIGENCE INVESTIGATIONS (redacted version); *see generally* OFFICE OF THE ATTORNEY GENERAL, GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY AND TERRORISM INVESTIGATIONS; Federal News Service, *Weekly Briefing with Janet Reno* (Oct. 28, 1999); *Hearing on Terrorism Before the Subcomm. on Crime of the House*

opening an investigation of international terrorism are said to follow closely the definition of a foreign party or agent in the Foreign Intelligence Surveillance Act.[7] True, the required predicate is somewhat elastic. In times of great danger it will be stretched in the direction of monitoring whatever groups vocally support a state or group engaged in terrorism. Such speech is about the only open sign that someone is more likely than others to engage in terrorist activities, even though it is a weak sign. But even this protection—requiring reasonable suspicion of actually planning political violence—may not survive the events of September 11.

The second way to prevent a terrorist attack on a particular target in a particular way is to deny some people (those who pose a greater risk or at least cannot be established to be safe) access to the target or to the resources needed to attack that target. The precautions we have imposed since September 11 before an individual can take a commercial flight are a vivid example of denying unrestricted access to the resources (the plane and the fuel tank) that could be used to attack a target (skyscrapers like the World Trade Center buildings.)[8]

New problems of civil liberties and equal protection quickly emerge with this alternative for prevention. Either whole, overbroad ethnic categories are flatly denied access to targets or resources or more detailed information must be developed about either the members of those groups (also a form of discrimination) or about a far wider category of individuals—if not the 280 million or more living within the United States, [9] perhaps the category of the 20 million or so non-citizens.[10] Consider each of these in turn.

If the problem is suicide bombers, we know that close to one hundred percent of that category come from one of two groups—Tamil terrorists (Tamil separatists attacking the

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Comm. on the Judiciary, 102nd Cong. (1995) (statement of George Terwilliger III, Deputy Attorney General).

7. *See* PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY 150 (2000).

8. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

9. Population Div., U.S. Census Bureau, *Population Briefing National Population Estimates for July 1, 2001* (Dec. 27, 2001), http://eire.census.gov/popest/data/national/popbriefing.php.

10. U.S. Census Bureau, *Foreign-Born Population in the United States* (Jan. 2001), http://www.census.gov/prod/2000pubs/p20-534.pdf.

government of Sri Lanka who have not used terrorism against the United States) or Arab and fundamentalist Muslim terrorists.[11] Combined, these groups constitute a very small percentage of foreign nationals residing in the Unites States. Either denying these groups access to targets or particular resources or developing more-than-normal information about their members before granting access can be accomplished with only a small fraction of one percent of the costs to law enforcement and only a small fraction of one percent of the costs of inconvenience to individuals that would be required if the measures were applied to the entire population. Alternatively, at the same or lesser costs, a vastly better focused and thus more intensive investigation could be carried out by concentrating on these groups. These consequences are true even if the odds are very high that any particular visiting Arab, Muslim fundamentalist, or Tamil is one hundred percent loyal to the United States and one hundred percent opposed to terrorism.

In short, for the reasons that I have described, it makes sense in terms of prevention to concentrate only on limited ethnic categories even if you know that the number of false positives—the number of innocent members subjected to investigation or denial of access—will vastly exceed the number of legitimate suspects. But there is a frightening long-term cost. Every member of the class denied access or subjected to special investigation before being granted access will be made to feel less than a full citizen of the United States or less than a fully wanted visitor and that message will be conveyed to all other citizens of that country. That has been the experience with Catholics in Northern Ireland and Arabs in Israel.[12]

The obvious alternative is to use the capacity of high-powered computers to check all the individuals in a far larger

11. Yoram Schweitzer, Suicide Terrorism: Development and Characteristics, Lecture Presented at the International Conference on Countering Suicide Terrorism tbl. 1 (Apr. 21, 2000) (transcript available at http://www.ict.org.il/articles/articledet.cfm?articleid=112).

12. *See* David Bonner, *United Kingdom: The United Kingdom Response to Terrorism, in* WESTERN RESPONSES TO TERRORISM 184 (Alex P. Schmid and Ronald D. Crelinsten eds., 1993); *see also* Noemi Gal-Or, *Countering Terrorism in Israel, in* THE DEADLY SIN OF TERRORISM: ITS EFFECT ON DEMOCRACY AND CIVIL LIBERTY 144-45 (David A. Charters ed., 1994).

group equally before granting access to targets or resources that could be used to attack. That requires a reliable way to identify the individual who seeks access, an adequate and reliable fund of intelligence information to identify dangerous people, and an ability to match the two quickly and without great inconvenience. We now lack all three capacities needed for this form of prevention, but the civil liberties costs will be great if we develop those capacities. Should this approach be pursued, every individual will have to anticipate: (1) a greater likelihood of a larger file of information on him being kept by the government (combining information from a number of agencies); (2) that the government will check this fund of information on more occasions than it has in the past; (3) that the possibility of separating oneself from one's own recorded personal history will be less because of the loss of anonymity; and (4) that the very system of checking an individual's identity against recorded files may be designed to make new records of the individual's activities. These, too, are serious civil liberties consequences.

I have noted that we now lack the capacities needed for this intelligence-based strategy. But without having complete or even substantial files to match with the identity of individuals seeking access to targets or resources, keeping records of those who are seeking such access may, without more, be useful. Some combinations of activities or even omissions, when identified by intelligence agencies, can provide the suspicion necessary to monitor the individual and his immediate associates. Fermenters are used for making beer and also for making an anthrax weapon. Notice that someone who has no legitimate beer-brewing capacity has bought a fermenter may warrant beginning the first stages of an investigation. But that, too, requires collecting new information and combining it in newly revealing ways, matters that will reduce the privacy of many.

In creating new files for preventive purposes, we will be changing the traditional balance between law enforcement and internal security and the cultures associated with each. Almost every other nation in the world has an internal security agency that is separate from its law enforcement agency, freed from many civil liberties' constraints, and charged with providing the information the government needs (or the chief executive

wants) for policy and political decisions, as well as prevention of dangerous situations. The United States has not taken that direction, instead giving only the Federal Bureau of Investigation an internal intelligence function and, even then, narrowing that responsibility to where it has been almost entirely focused on counter-espionage activities.[13] That reluctance to engage in domestic intelligence gathering has changed and will continue to change.

Finally, we can try to prevent a terrorist attack, especially at a time when we have received some warning, by detaining aliens illegally in the United States or removable for cause (or on the basis of the new detention power claimed in President Bush's "military order")[14] who are in some way associated with those who have been identified in connection with prior terrorist events. To whatever extent the number detained is adequate to create a significant chance of interference with the terrorist plan, the tactic will be effective. In each case, the government would be acting within its ordinary powers to deal with the aliens who may be removable, although not for the immigration purposes that explain granting the power to detain an alien illegally in the United States (or someone needed for testimony at a later trial).

This final prevention strategy—detention of suspects—was also used extensively by the British in Northern Ireland and by Israel.[15] The detention may be for purposes of interrogation pending trial or simply to incapacitate those individuals for a sustained period of time. The decision of the Attorney General, at least occasionally, to deny detainees private access even to lawyers is a further effort to incapacitate the group.[16] Similar tactics were used by the West German government in the 1970's in an effort to reduce terrorism by the leftist terrorist group, the Red Army Faction, many of whose leaders were

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13. *Cf.* FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, ENSURING PUBLIC SAFETY AND NATIONAL SECURITY UNDER THE RULE OF LAW: A REPORT TO THE AMERICAN PEOPLE ON THE WORK OF THE FBI 1993-1998 (1999).

14. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 3, 66 Fed. Reg. 57,833, 57,834-35 (Nov. 13, 2001) [hereinafter Military Order].

15. *See* Bonner, *supra* note 12, at 182-83; *see also* Gal-Or, *supra* note 12, at 154.

16. *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division).

already in prison.[17]

The detention strategy itself may be deeply flawed. The British found that they had detained largely the wrong people.[18] There was, after all, no requirement of probable cause, let alone proof beyond a reasonable doubt. Such detentions have sometimes proved effective, but they have always had the effect of alienating a much larger group than were originally sympathetic to the terrorists.[19] The additional step of denying private access to lawyers proved the cause of major disruption in Germany, with large numbers of those concerned with civil liberties withdrawing support from government measures against terrorists.[20]

But my subject is not effectiveness; it is effect on civil liberties. While non-citizens—both resident aliens and visitors from other countries and even illegal entrants—are entitled to the familiar constitutional protections given to crime suspects by the Bill of Rights,[21] they remain subject to arrest, detention, and questioning for any violation of the immigration laws that can lead to removal from the United States (what we used to call deportation). When held simply for removal, non-citizens do not have a right to be furnished a lawyer at state expense,[22] and their failure to speak can be used against them.[23]

This combination of governmental authorities gives immense power to the Immigration and Naturalization Service, even over those legally within the United States. The powers over the many who are not legally in the United States are far greater still. They are automatically subject to arrest pending removal proceedings.[24] Release pending departure can be

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17. *See* Kurt Groenewold, *The German Federal Republic's Response and Civil Liberties*, *in* WESTERN RESPONSES TO TERRORISM, *supra* note 12, at 136, 144.

18. The British first detained members of the traditional IRA when the violence was led and executed by the younger Provisional Irish Republican Army. *Cf.* Bonner, *supra* note 12, at 174-75.

19. *See generally* CHRISTOPHER HEWITT, THE EFFECTIVENESS OF ANTI-TERRORISM POLICIES (1984).

20. *See* Groenewold, *supra* note 17, at 145-46.

21. U.S. CONST. amends. I-X.

22. *See* Aquilera-Enriquez v. INS, 519 F.2d 565, 569 (6th Cir. 1975) (holding that the petitioner's due process rights were not violated by the absence of counsel at his deportation hearings).

23. *See* Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) (explaining that a proceeding to enforce immigration law is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments).

24. *See* 8 U.S.C. § 1226(a) (1994).

denied.[25] Detention of many months is a result generally available to the government.[26]

B. Consequence Management and Emergency (or Wartime) Powers

The capacities for consequence management that are needed for more traditional forms of terrorism—relatively limited rescue and health resources and the ability to deal with psychological and political consequences by, among other things, strong leadership—are far from adequate for dealing with the after-effects of a major terrorist attack such as that of September 11, let alone after the use of a possible weapon of mass destruction. The heart of the problem of consequence management in these situations is preparation: getting into place the committed physical and human resources, skills and advance training, plans, understandings as to cooperation across functional and jurisdictional lines, and legal authority that we would want if and when a plausible threat or actual use took place. Such preparation requires imagining a variety of terrorist scenarios and the needs that each presents for resources, training, and authority.

In terms of civil liberties, the critical question involves legal powers. What authority to quarantine or move people, to command resources or destroy property, to search without probable cause for extremely dangerous weapons, etc., should be made available for times of grave danger? Such exceptionally broad authority to regulate, prohibit, search, arrest, and more is dangerous to the normal functioning of a democracy but may be necessary in extraordinary circumstances. That means it has to be designed to protect

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25. *See* 8 U.S.C. § 1231(a)(6) (1994) (allowing an inadmissible alien determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal to be held beyond the removal period).

26. In light of these consequences it is worth exploring a less drastic alternative for disrupting the activities of possible terrorists. Using "activity" categories, rather than nationality, we might attempt to greatly increase arrest for those crimes that Al Qaeda terrorists have relied upon, such as using or providing others with false identification papers or stealing credit cards and passports. This possibility, suggested by Steven Huggard, a distinguished federal prosecutor, would correspond to New York's "broken windows" policing. A much higher percentage of those detained for such crimes might well prove to be dangerous and/or willing to provide information than those detained as illegal aliens. Furthermore, this technique would not discriminate on the basis of national origin or citizenship.

against misuse in ordinary times, as well as to be available in extraordinary times.

For new legal powers to deal with the consequences of major terrorist events, we must devise ways to be sure that extraordinary powers are only available in extraordinary instances and that those extraordinary circumstances are determined to exist wholly by bodies that do not empower themselves by this determination. Perhaps, for example, a court should have to approve a president's personal determination that a thousand or more lives are at risk in a particular situation where he seeks emergency powers. Perhaps the legislature should be able to revoke that decision. It may be desirable to limit the powers to a relatively short period of time, as was done in the USA PATRIOT Act.[27]

C. Punishment

The United States has criminal statutes that apply to terrorists attacking Americans abroad. It has a statute, the Classified Information Procedures Act, [28] which allows the use of classified materials without unnecessarily compromising secrets. It has a witness protection program to protect endangered witnesses and a variety of devices to protect jurors. We have, and have exercised, the capacity to bring terrorists back from the other side of the world for trial in the United States.[29] With this array, the United States has been able to prosecute the terrorists responsible for bombing the World Trade Center and our embassies in Kenya and Tanzania, spies for the Soviet Union, Mafia chieftains, and drug lords.[30] I know of no additional difficulty in trying dangerous terrorists, although getting convincing evidence against those sponsoring terrorism has proved difficult, both in the case of the hijacking of the *Achille Lauro* and in the trial for blowing up Pan Am 103 over Lockerbie, Scotland.[31] The U.S. withdrew its request for arrest and extradition of Abu Abbas for leading the hijackers of

27. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 296.

28. 18 U.S.C. app. 3 §§ 1-16 (1994).

29. *See* HEYMANN, *supra* note 7, at 61-63.

30. Consider, for example, the trials of Aldrich Ames, John Gotti, and Manuel Noriega.

31. *See* HEYMANN, *supra* note 7, at 25-26.

the *Achille Lauro*.[32] No charges were brought against Muammar Qadhafi, although those tried for the Lockerbie explosion were agents of his government.[33]

On November 13, 2001 President Bush signed an order allowing him to direct the trial, in military courts, with penalties up to death, of any individual who is not a United States citizen for activities, even within the United States, that the President determines involve international terrorism or harboring international terrorists.[34] The normal rules of evidence in criminal cases are not to apply; the trial can be secret; the members of the military panel need only decide by two-thirds as opposed to a unanimous verdict; and there is to be no civilian judicial review of the decision, rather review only by the President or the Secretary of Defense.[35] Without any showing of necessity, the assertion of power to punish even resident aliens after an irregular military trial for actions taken within the borders of the United States shows a foolhardy disdain for American pride in, and foreign admiration of, the fairness of our courts.

The British "Diplock Courts" are perhaps the most famous of the special anti-terrorism courts in operation.[36] The "Diplock Courts" are used for the trial of specified offenses such as murder, weapons offenses, and bombings.[37] The courts are presided over by a single judge.[38] The trials are public; defendants have legal representation and can cross-examine witnesses.[39] The standard for conviction remains guilt beyond a reasonable doubt, and defendants have a right to appeal guilty verdicts.[40]Although they are a far less serious departure from normal criminal trial procedures than the Bush Administration's initiatives, the "Diplock Courts" still have become a cause célèbre in Northern Ireland and have generated

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32. *See id.* at 32.
33. *See id.* at 75.
34. Military Order, *supra* note 14.
35. *See DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (statement of Philip B. Heymann, James Barr Ames Professor of Law, Harvard Law School).
36. *See* HEYMANN, *supra* note 7, at 121.
37. *Id.* at 122.
38. *Id.*
39. *Id.*
40. *Id.*

substantial sympathy for the terrorist cause.[41]

III. DANGERS TO THE RIGHTS AND LIBERTIES OF NON-CITIZENS ABROAD FROM U.S. EFFORTS TO PREVENT ATTACKS

The Charter of the United Nations and the Geneva Conventions with their protocols limit the occasions on which a nation may make war, define the protection a state must give civilian populations, and specify treatment to which captured enemy forces are entitled.[42] The applicability of these rules to terrorism and what they require of us (especially the question of our responsibility for the behavior of forces we support or have empowered) are obviously of major importance.[43]

Not addressed, although equally important, is a fundamental choice we will face for years between our safety and the rights of citizens of other nations to their liberties. In fact, we can reduce the danger to Americans at the cost of reducing the liberties and rights of others.

There are potentially effective measures for gathering information that may be critical to prevention or punishment which we, nonetheless, would regard as improper to apply to U.S. citizens and to others legitimately in the United States. We have, and will maintain, strict limits on interrogation, protective requirements for searches or electronic surveillance, and strong protections against any seizure of an individual without probable cause and any subsequent detention that goes beyond a very limited period of minutes. Torture will not return to the United States. But these protections are often not available in anything like the same measure in states where terrorists are likely to seek haven. Those countries' internal

41. *See id.* at 121-22.

42. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 69-71 (1996).

43. The self-defense standards set out by the Charter of the United Nations for when a state can use military force against another state are undefined as to their applicability to attacks by secret agents of another country (state-supported terrorism). They do not specify what level of support for terrorist groups makes a state responsible as an aggressor, opening up the possibility of self-defense. They do not specify what degree of certainty the responder must have and to whom, if anyone, it must demonstrate the evidence for its actions in self-defense. They do not specify whether secretly obtained evidence, such as by intelligence agencies, must be revealed in some measure before retaliating. The rules as to necessity and proportionality of response and as to permissible damage to civilian populations from bombing, present major issues, as does the question of a state's responsibility for preventing war crimes by allied, sub-state forces.

structure and police apparati are likely to be far less constrained if activated by the CIA on behalf of America.

The United States can reap the benefits of these activities, forbidden by international human rights conventions, when the activities are directed at an individual abroad planning terrorism against the United States. And investigation at that stage, where a terrorist group is likely to be operating the facilities necessary for recruiting, training, and financing attacks on the United States, is also likely to look more promising than discovering small cells temporarily in the United States.

Thus, the most serious questions of human rights will arise not here, but abroad, if we attempt to export the counter-terrorism costs of extensive searches, electronic surveillance, coercive interrogation, and limitations on association, detention, and speech. Each of these measures, controlled or forbidden by the United States Constitution,[44] are likely to be promising ways of obtaining needed information about terrorists' plans and of otherwise preventing terrorist initiatives.

Even when American intelligence, law enforcement, or national security officials are deeply involved in requesting an action, non-Americans living abroad do not enjoy the protections of U.S. law.[45] The only protections that are applicable to aliens abroad, besides whatever is given in the constitution or laws of the nation where they are residing, are the human rights guaranteed by the United Nations' Universal Declaration of Human Rights[46] and the International Covenant on Civil and Political Rights.[47] Together they forbid each of the

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44. *See* U.S. CONST. amends. I, IV, V.

45. Even the rules for U.S. agents acting abroad are hardly constraining unless the suspect is an American. Individuals illegally seized can be tried in the United States. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). Evidence from places illegally searched can be admitted in U.S. courts. *See id.* Violence accompanying questioning abroad may escape the Miranda rules. *See* Harbury v. Deutch, 233 F.3d 596, 603 (D.C. Cir. 2000).

While the major difference in protections depends on whether the individual is within the United States or abroad, U.S. citizens are generally protected abroad both diplomatically, from the activities of foreign governments, and by American law from the activities of U.S. agents.

46. *See Universal Declaration of Human Rights*, G.A. Res. 217A(III), 3rd Sess., at 71, U.N. Doc. A/810 (1948).

47. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171, U.N. Doc A/6316

activities listed above, even when carried out by the government of the suspect himself.

Our moral and legal responsibility for violations of human rights that are intended, at least in significant part, to protect us depends upon two issues. First, what forms of inquiry become requests for violation of conventions to which we have adhered? Second, to what extent does encouragement become irrelevant when it is likely that the human rights, perhaps of the same people, would be ignored by the state where they reside anyway? There is a continuum of U.S. actions relevant to the first question. At one extreme, hoping to elicit information about terrorist events, we could threaten, as we did with a suspect in the bombing of Khobar Towers barracks in Saudi Arabia, to send suspects who are in our hands to another country where they will be treated far less carefully[48]—or we could send him abroad for interrogation. At the other extreme would be actions by a nation friendly to the United States, which were not motivated by a desire to protect the United States. In between, there are any number of violations of "protected" human rights by foreign police and intelligence agencies, including many in which the CIA will know of the capture of individuals and may make known to the international security apparatus of a foreign nation exactly what it would like to know.

IV. CONCLUSION

No one can decide persuasively how much fear and how much anger is sensible and decent for a proud people to feel in the aftermath of September 11. What we can say is that steps taken in response to fear should be well-calculated to reduce the danger; that the steps taken in response to anger should be directed at the right people; and that the value Americans place on courage and decency should be considered alongside fear and anger.

No one can speak for all Americans in deciding the trade-offs between equal protection of the laws, privacy, and fearless exercise of democratic freedoms. What we can do is demand that the trade-off between ethnic profiling and keeping more

(1966).

48. *See* John Lancaster & David A.Vise, *Khobar Probe Figure Facing Deportation; U.S. Officials Press Saudi to Cooperate*, WASH. POST, Oct. 5, 1999, at A10.

and more useable files and between either of these and radically reducing rights of non-citizens within the United States be addressed frankly and with the recognition that powerful and legitimate concerns will be at risk whichever way we go.

Similarly, there is something imponderable about comparing, on the one hand, the dangers of a presidential assertion of power to bypass the courts and use of the military to detain, sentence, and execute non-citizens with, on the other hand, the risk that otherwise very dangerous individuals will be left among us or treasured secrets will have to be revealed at trial. What we can do is make sure we assess accurately the capacity of our courts to deal with these risks and not take the easy road of surrendering some of our most basic liberties to any president's unshared power.

To all these immeasurables we would have to add the tradeoff between the safety of Americans and the liberty of those abroad in the face of regimes doing, or pretending to do, our bidding. What we must do is to assure that no one assumes that the American people would willingly buy a small amount of increased safety in exchange for the torture, detention, or imprisonment of many innocents abroad.

In sum, the gravest danger to civil liberties and human rights emerging in the aftermath of September 11 is that leaders will think we are without courage; without concern for non-citizens within the United States; indifferent to the welfare of citizens repressed by despotic governments; prepared to accept without question unequal treatment based on ethnicity; and unable or unwilling to see that there will and must be trade-offs even among our own freedoms and to share in considering them carefully.

An American people treated with respect for our traditions and values and encouraged to once again justify that respect will be left with very hard choices. That is inevitable. But it will be able to make these important choices proudly and intelligently.