

Land of the Free?: Diminishing Civil Liberties in the U.S.A. after September 11th, 2001

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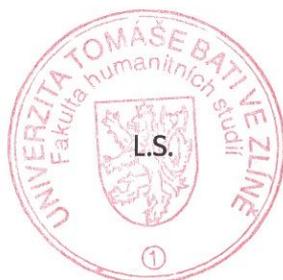
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ABSTRAKT

Tato bakalářská práce prozkoumává obtížnou domácí situaci ve Spojených státech, která nastala jako důsledek vládních opatření po teroristických útocích 11. září 2001. Vláda tehdy přijala řadu nových přístupů a legislativních opatření pro boj s terorismem. Tyto snahy však vedly k nečekaným následkům, mezi než patří oslabení občanských svobod. Hlavním cílem této práce je poukázat na jisté aspekty této nové federální politiky, jež měla dopad na občanské svobody občanů Spojených států, a která se zdají být v rozporu s Americkou Ústavou a Americkou listinou práv. Objektivně předkládá několik odlišných názorů ohledně vládních činů, které ovlivnily, v dobrém či ve zlém, veřejný život ve Spojených státech.

Klíčová slova: Spojené státy, Občanské svobody v Americe, bezpečnost, Ústava Spojených států amerických, americká listina práv, americká vláda, 11. září 2001, USA PATRIOT Act, veřejný život, občané, soukromí, rasová profilace, sledování, odposlech, vyšetřování, zadržení, George W. Bush, John Ashcroft, "Válka proti terorismu", muslimové.

ABSTRACT

This thesis explores the difficult domestic situation in the United States that resulted from the federal government's responses to the terrorist attacks on 11 September 2001. The government at that time implemented a series of new approaches and legislations to deal with terrorism. However, these efforts led to unexpected consequences, among them the diminishment of civil liberties. The main priority of this thesis is to point out certain aspects of these new federal policies that had an impact on the civil liberties of U.S. citizens and that seem to run contrary to the U.S. Constitution and the U.S. Bill of Rights. It objectively presents several opposing opinions regarding government actions that have influenced, for good and for bad, public life in the U.S.A.

Keywords: United States, U.S. civil liberties, security, the Constitution of the United States of America, the Bill of Rights, American government, 11 September 2001, the USA PATRIOT Act, public life, citizens, privacy, racial profiling, surveillance, wiretapping, investigation, detention, "War on Terror", George W. Bush, John Ashcroft, Muslims.

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I also cannot forget to give a special due credit to one great person – to my grandfather. I have and I always will respect and admire you. Thank you, grandpa, for always believing in me, giving me strength and hope.

Motto:

“For, in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children's future. And we are all mortal.”

John Fitzgerald Kennedy ~ June 10, 1963

“For everything there is a season, and a time and purpose for every matter under heaven.”
Ecclesiastes 3:1

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INTRODUCTION

After the terrorist attacks on 11 September, eyes worldwide gazed at the United States in anxious and restless expectation. They were not long kept waiting. In a chaotic atmosphere and turmoil, the U.S. government, still clearing away the dust and debris, decided to quickly respond to imminent threat by cutting unleashing the President's executive powers in order to preserve national security.

The government swiftly came up with new policies, which resonated in the political sphere, under the umbrella of the now well-known "War on Terror" agenda. New legislations were created along with several new approaches for how to deal with an extremely dangerous and unconventional threat. A month after the attacks, Congress passed a new law known as the Patriot Act – a complex law authorizing significant changes and expansions of federal powers of investigation, intelligence and executive procedures. The purpose was also to enable law enforcement officials to work more effectively and briskly.

These changes, however, had an important and potentially dangerous side effect. They made certain old rules less strict and particular approvals easier to obtain. Given the fact that many of these changes were instituted as a quick response, there was very little time to go through and check them all. Thus there happened to be quite a lot of gaps or broad or vague descriptions within newly implemented procedures.

All in all, the government's steps led, bit by bit, to domestic upheaval. The lives of many people and their constitutional guarantees were directly touched, and many more were covertly in danger of potential governmental or intelligence agencies' abuse or misjudgment.

While most Americans welcomed these changes and initially accepted them, seeking security for themselves and their families and believing in the resolute government's promises to keep them safe, some of them very soon came to realize that perhaps something of even more value than their security was in danger. As the real issue unfolded, Americans found out that the impact of the terrorist attacks on the U.S. nation was not confined to New York City, Washington D.C., or a field in Pennsylvania, but instead stretched nationwide. Some basic civil liberties were suddenly in danger and abridged.

Such federal actions against civil liberties however faced strong opposition from civil libertarian groups, advocates of the Constitution, lawyers and even members of government. People started to feel and see that certain provisions of the Patriot Act

contradict or violate the Constitution, that racial profiling should be taken off the table as an option for dealing with terrorism and that the current means to secure the nation might not be effective in the long term.

The question that hung in the air came to be whether or not the rights taken away are ever going to be returned. History teaches us that it is usually much more difficult to give back than to take away, and even if the steps taken after 9/11 are for “the greater good”, the step backwards in terms of freedom could be harder to overcome than one might think.

For this reason, the loss of civil liberties has implied and still implies a significant milestone in the U.S. government’s approach to contemporary domestic policies and its impact on the personal lives of many citizens and people living in or coming to the United States. Civil liberties should be protected along with the national security rather than displaced and left on the altar of “temporal” sacrifice. There needs to be a balance.

Altogether, the consequences of the government’s decisions and the problem of decreased civil liberties in the USA are worth exploring in detail. This thesis tries to document the difficult situation in which the U.S. has found itself. It also points out certain major influences and actions of the U.S. government that led to security-based measures and provisions in immediate response to the 11 September terrorist attacks. It argues that a shadow was cast over American civil liberties that in hindsight seems counterproductive.

Finally, it documents the long term effects on ordinary public lives and the resulting backlash; all for the purpose of suggesting that Americans purchased security, albeit for too high a price, namely the sacrifice of civil liberties that made being American so special and unique.

1 HISTORY OF CIVIL LIBERTIES IN THE USA

“O! say does that star-spangled banner yet wave

O'er the land of the free and the home of the brave?”

-The Star-Spangled Banner, national anthem of the USA

The United States of America has long considered itself the land of freedom and opportunity. Such freedoms which were originally extended only to white men, have been universal since 1965 and have become not only a dominant feature of the American way of but a key component of American pride and bravado.

However, nations and their component parts are not stagnant. They are living and evolving, and they are a product of constant adaptation to new things, new struggles, new public demands and a “product of continuous effort.”¹

“Land of the free” the song says. As true as it may seem to a naked eye, a closer look reveals that the U.S. has had to struggle many times in its over two century long, coming-of-age existence to develop its sense for solidarity, acceptance and recognition. Civil liberties, in particular, had to deal with forces of history, where they collided with national emergency, leaving some of the rights and freedoms that are so important for this country behind. Thus the rights and liberties of American people have not always been as they are known now.²

The following chapters briefly examine the history of the development of civil liberties in the United States and consequently the major problems it has faced. This background knowledge is necessary in order to understand and objectively assess the events and reactions that happened in America after 11 September 2001.

The clash between perilous times and maintaining a democratic society with flourishing rights, liberties and prosperities seems to be a recurring theme throughout the history of the United States. After all, it is codified in one of the most sacred documents of American history, the Declaration of Independence, that liberty is an “unalienable right.” And yet, in several instances, Americans have been alienated from their rights.³

¹Alan Brinkley, “A Familiar Story: Lessons from Past Assaults on Freedoms,” in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone and Greg Anrig, Jr. (New York: PublicAffairs, 2003), 23-46.

²Brinkley, “A Familiar Story: Lessons from Past Assaults on Freedoms,” 23-46.

³The Declaration of Independence.

1.1 The Apple in American Eye

In 1787 in Philadelphia, the United States Constitution was adopted and on its bases, a new government was framed. It defines three governmental branches of government – the Congress as a legislative body, the judicial system lead by the Supreme Court and an executive branch with the President as its head. The main purpose of the Constitution is to provide the government with certain powers and to explain how the government should work in general.⁴

To the U.S. Constitution are attached Amendments, each of which serves to ensure, secure or provide particular freedoms and rights. They were carefully crafted throughout the history of the United States. These Amendments ensure certain rights in any circumstances to all citizens and serve to protect the citizenry from any abuses that could be potentially carried out by the government or any of its branches.⁵

The first ten amendments are in fact covered under a single document called the Bill of Rights. This bill and its amendments represent perhaps the most important key element for the American democratic system and the American way of life. It establishes major principles upon which the citizens should be treated, ostensibly to prevent any actions that could lead to possible violations of life or liberty. In sum, it limits the government's powers which may be used against its people.

1.2 Civil Liberties in Times of Calamity

As previously mentioned, the Constitution and its amendments should guarantee certain liberties to all Americans. However it has not always been respected. In fact, it has been violated or ignored on several occasions. As historian Alan Brinkley notes, such violations were “inflicted on both enslaved and free African Americans, Native Americans, Mexicans, Chinese, and many other groups of immigrants, and the routine limitations of the right of women, the abridgements of civil liberties were severe and routine.”⁶

Brinkley further continues to provide particular examples that “local governments routinely banned books, censored newspapers, and otherwise policed ‘heretical’ or

⁴The U.S. National Archives and Records Administration, “A More Perfect Union: The Creation of the U.S. Constitution,” http://www.archives.gov/exhibits/charters/constitution_history.html (accessed April 15, 2010).

⁵Ibid.

⁶Brinkley, “A Familiar Story: Lessons from Past Assaults on Freedoms,” 23-46.

‘blasphemous’ speech.” Clearly these are perfect examples of the government’s violations of the Bill of Rights, namely its First Amendment with its right for free speech clause.⁷

People at that time, however, showed only little perception of the rights and liberties that were bestowed upon them and thus “there was little pressure on any level of government to work vigorously to defend them.” The following are other examples in American history where civil liberties have been overlooked.⁸

1.2.1 Alien and Sedition Acts & Espionage Act

In 1798, America led/entered the so called “quasi-war” with France. Meantime, the government proposed The Alien and Sedition Acts, which were “designed to strengthen the government’s authority to deal arbitrarily with aliens and dissenters.”⁹

This was mainly aimed at those who tried to undermine the government or at those who threaten to seed disloyalty to the administration. Such controversy was among the first in American history where government limited some of the civil liberties and embraced an aggressive tactic.¹⁰

During World War I, Woodrow Wilson’s administration wanted to intimidate, suppress or punish those who showed hostile or unfriendly attitude towards the fact that government had been intervening in the war. To do so, the government came up with two Acts: the Espionage Act of 1917 and another Sedition Act later in 1918. The Espionage Act’s purpose was to “among other things ... to ban all ‘seditious’ materials from the mails” that were deemed to express any disobedience to the government’s behavior.¹¹

The Sedition Act of 1918 supported the Espionage Act from the previous year. Under this act, it was illegal for a person to express “any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the uniform of the Army or Navy.” In other words, people who tried to show any dissent with government’s doing were arrested and imprisoned for questioning. The largest proportion of the prisoners consisted of members or sympathizers of Socialist party.¹²

⁷Ibid.

⁸Ibid.

⁹Ibid.

¹⁰Our Documents, “Alien and Sedition Acts (1798),” Our Documents, <http://www.ourdocuments.gov/doc.php?flash=true&doc=16> (accessed April 15, 2010).

¹¹Brinkley, “A Familiar Story: Lessons from Past Assaults on Freedoms,” 23-46.

¹²Brinkley, “A Familiar Story: Lessons from Past Assaults on Freedoms,” 23-46.

Moreover, an organization of volunteers was formed in order to help the government to establish proper respect. American Protective League (APL) consisted of people who devoted their job, among other things, to pay attention to any suspicious behavior of other ordinary people and to inform the authorities in such cases.¹³

In these instances, the government used its powers to influence the everyday life of people who were, by any measures, suddenly suspects or subjects to a watchful eye.

1.2.2 Lincoln and Writ of Habeas Corpus

During the American Civil War in the 19th century, some basic Constitutional rights were suppressed by the federal government. President Lincoln, ignoring even justice's ruling, authorized several interceptions into civil liberties by suspending a writ of habeas corpus (a constitutional guarantee) on a federal level. He allowed head of the military to arrest "anyone between Washington and Philadelphia suspected of subversive acts or speech," and also any "persons who discouraged enlistments or engaged in disloyal practices," thus causing subsequent large-scale detentions under martial law.¹⁴

1.2.3 Jim Crow Laws

After the Civil War until late middle of the 20th century, several new laws were enacted. Legislations were predominantly targeting African-Americans since the laws were highly discriminatory and based on racial segregation that had been so frequent in the 19th and in most of the 20th century. Such federal laws have been known as "Jim Crow laws." Under these laws, civil rights as well as civil liberties of a particular group of Americans were suspended.¹⁵

The laws consisted of severe restrictions of attendance of African-American population at public places or in public facilities. Two well-known cases were namely important and marked the infamous era under these laws. First was a case in 1896 of Homer Plessy who (though being "seventh-eighths white") violated the law by taking a

¹³Ibid.

¹⁴American Patriot Network, "Did President Lincoln suspend the U.S. Constitution?" American Patriot Network, http://www.civil-liberties.com/pages/did_lincoln.htm (accessed May 6, 2010); Douglas Harper, "Habeas Corpus," Online Etymology Dictionary, <http://www.etymonline.com/cw/habeas.htm> (accessed May 6, 2010).

¹⁵Britannica - The Online Encyclopedia, "Jim Crow law," Britannica - The Online Encyclopedia, <http://www.britannica.com/EBchecked/topic/303897/Jim-Crow-law> (accessed May 6, 2010); Spartacus

white-only railroad car. Second case was represented by African-American woman Rosa Parks, who sat on a bus in a section reserved for whites. Luckily, in 1964, President Johnson, pushed Congress and it ultimately passed Civil Rights Act, making racial discrimination in public places illegal.¹⁶

1.2.4 Palmer Raids

Another example of the federal government putting certain people under a watchful eye and misusing powers was the sweeping policy of Attorney General A. Mitchell Palmer in 1920.

In said year, some radicals attempted to bomb Palmer's house. As a response, Palmer set in motion a series of investigative actions "on suspected radical centers all over the country." The result was over 6000 people being arrested. However, only a few of them were real radicals. This federal intervention hence became known as the Palmer Raids. The problem of these raids was not only the large number of innocent people it victimized and the sparse evidence of any radical material it uncovered. It was the fact that most of the accused were held for a long period of time, and they were usually not allowed to see their families, were denied lawyers or even mistreated and the proportion consisted predominantly of those with unwanted political associations. More than 500 of the detainees were innocently deported on mere basis of "routine immigration violations." Moreover, the government was very secretive about their names and most judicial prosecutions and trials were closed to the public.¹⁷

The impact on civil liberties in this era is perhaps one of the most striking examples in the history of the USA. As Brinkley stated:

Educational, "Jim Crow Laws," Spartacus Educational, <http://www.spartacus.schoolnet.co.uk/USAjimcrow.htm> (accessed May 6, 2010).

¹⁶Oracle Education Foundation, "Rosa Parks," Oracle Education Foundation, http://library.thinkquest.org/J0112391/rosa_parks.htm (accessed May 6, 2010); Spartacus Educational, "Homer Plessey Case," Spartacus Educational, <http://www.spartacus.schoolnet.co.uk/USAplessey.htm> (accessed May 6, 2010); Britannica - The Online Encyclopedia, "Jim Crow law," Britannica - The Online Encyclopedia, <http://www.britannica.com/EBchecked/topic/303897/Jim-Crow-law> (accessed May 6, 2010); Spartacus Educational, "Jim Crow Laws," Spartacus Educational, <http://www.spartacus.schoolnet.co.uk/USAjimcrow.htm> (accessed May 6, 2010).

¹⁷Brinkley, "A Familiar Story: Lessons from Past Assaults on Freedoms," 23-46; David Cole, "The Ashcroft Raids," in *It's a Free Country: Personal Freedom in America after September 11*, ed. Danny Goldberg, Victor Goldberg and Robert Greenwald (New York City, NY: Nation Books, 2003), 13-19.

It permitted the persecution of German Americans who posed no threat to security. It produced a wide-ranging legal assault on men and women based on nothing but their presumed beliefs. And it routinely suspended such ordinary rights as freedom of speech, freedom of association and freedom from arbitrary arrest.¹⁸

Interestingly, the 1917 and 1918 Acts and the Palmer Raids and their restrictions on civil liberties helped people to value and desire to protect the particular freedoms marked in the Constitution. Thus, perhaps for the very first time in the history of the nation, people were strongly aware of the fundamental value of the Bill of Rights. All this was soon followed by initiative actions to defend it.¹⁹

Some dissenters and advocates of civil liberties also were judges. For example, Justice Louis Brandeis supported the idea of free speech protection and showed his disapproval with the Court's decision (about suppressing particular kinds of speech which some feared were dangerous) by saying:

It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it. ... The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. ... Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.²⁰

1.2.5 Japanese Internment Camps during WW II

After the horrible attack on Pearl Harbor, certain communities became the target of a quick government response to the present fear of further attacks on American soil or other actions that could harm American people, particularly along the Pacific Coast. Japanese Americans in California who were suspected of "conspiring with the Japanese government to facilitate such attacks."²¹

Strong and reckless racism appeared in those days, and official speeches further undermined the position of Japanese-Americans. Brinkley cites the commander of the Army on the West Coast, John L. DeWitt, who stated that "the Japanese race is an enemy

¹⁸Brinkley, "A Familiar Story: Lessons from Past Assaults on Freedoms," 23-46.

¹⁹Ibid.; In 1917, the National Civil Liberties Bureau was created, which was later renamed to American Civil Liberties Union (ACLU). Its efforts to defend civil liberties in the USA are well-known and the ACLU is extremely important especially after September 11th.

²⁰Brinkley, "A Familiar Story: Lessons from Past Assaults on Freedoms," 23-46.

race”. Induced by fear and racism, the administration persuaded to relocate over 100,000 Japanese Americans to internment camps inland.²²

Such extreme racial profiling had never been seen before. The action was later questioned by the U.S. Supreme Court in May 1943. The main purpose of the inquiry was to determine its constitutionality. Court concluded: “consistent with its historic reluctance to challenge wartime government on constitutional issues ... In a 6-3 decision ... that the internment policy was constitutional simply because the military claimed it was necessary.”²³

1.2.6 Approaching the 21st Century

The treatment of civil liberties in the aftermath of 11 September 2001 was to a large degree also influenced by contemporary issues prior to the attacks.

As the 20th century was slowly coming to an end, many officials felt in some sense that the civil liberties had become far too used as a shield for civil libertarians when interfering with governmental decision making on many occasions, even despite the fact that the government only tried to protect its people or to deal with crime. Nevertheless, law enforcement still had to do its job. It was allowed to use its powers to perform random searches, and in many cases it used racial profiling in “their efforts to fight crime.”²⁴

1.3 Lessons from the Past

The development of a nation is a fluid process replete with change and adaptation. However, the key elements – rights and liberties- that make the American nation so prosperous and proud, given via the Constitution, should not be abridged, restricted or violated. But in several instances, they were.

Such events put the situation of the U.S. civil liberties after September 11th into objective perspective with regard to their past development and challenges. These examples also demonstrate an inclination by the federal government to ignore civil liberties in times of national emergency.

²¹Brinkley, “A Familiar Story: Lessons from Past Assaults on Freedoms,” 23-46.

²²Ibid.

²³Ibid.

²⁴Brinkley, “A Familiar Story: Lessons from Past Assaults on Freedoms,” 23-46.

Although it is a government's responsibility to do its best for its people, even if it means implement policies that could partially affect freedom for a time, it is also important to remain calm and reasonable in those decisions and to balance the need for security with the maintenance of civil liberties.

The problem of developing safe and sound agenda when nation faces danger is described by Brinkley as follows:

Some alteration in our understanding of rights is appropriate and necessary in dangerous times, as even the most ardent civil libertarians tend to admit. But the history of civil liberties in times of emergency suggests that governments seldom react to crises carefully or judiciously They pursue preexisting agendas in the name of national security. They target unpopular or vulnerable groups in the population less because there is clear evidence of danger than because there is little political cost.²⁵

While looking at more recent problems, he concludes with regard to nowadays situation and suggests and warns that:

It is government's role to see beyond the understandably passionate feelings of the public and frame a reasoned response to the dangers we face: not to defend all civil liberties reflexively, certainly, but to give them considerable weight in choosing how to balance the competing demands of freedom and order. And it is up to those organizations and individuals who care about civil liberties and who are committed to continuing the more than two centuries of struggle to legitimize and strengthen their place in American life, to insist that our leaders do just that.²⁶

Thus the final reaction should come from the public and the real burden of careful protection of liberties lies in vigilant people's hands. And the words from Brinkley, with respect to his evaluation of the historical challenges of civil liberties, point that it is never wise to stop paying attention to rights and liberties:

[T]he lesson is that society's definition of civil liberties is fluid and constantly changing; that new situations create new threats, for which prior experiences are often poor preparations, and the public support protecting basic freedoms is highly contingent and can evaporate quickly.²⁷

²⁵Brinkley, "A Familiar Story: Lessons from Past Assaults on Freedoms," 23-46.

²⁶Ibid.

²⁷Brinkley, "A Familiar Story: Lessons from Past Assaults on Freedoms," 23-46.

Luckily, some lessons learned from the past are also positive in a way that there have been two sides - those who tried to implement certain policies on the expense of particular liberties and those who had started and had continued to watch over government's steps and who had tried to protect the liberties when necessary.

2 SEPTEMBER 11TH, 2001 AND ITS CONSEQUENCES

Since the main reason for the government's actions and the consequent changes in the field of civil liberties were caused and marked by one historical day, the next chapter describes the tragic events of the terrorist attacks of 9/11 and the immediate steps taken by the government.

2.1 Overview of the Events

On 11 September 2001, the United States suffered a great loss. Two hijacked passengers' planes, one after another, crashed into The World Trade Center's Twin Towers in New York City. Then another airplane hit the Pentagon in Washington D.C. A fourth plane sent to destroy other key building in Washington D.C. crashed instead in a field in Pennsylvania, thanks to the brave crew and passengers who tried to overcome the hijackers.

These were the series of terrorist attacks that were conducted by al-Qaeda in their attempt to destabilize and cripple the U.S. nation. Nearly 3000 innocent civilians were killed and countless more were injured. Many more were left heart-broken, or in fear. The attacks left the country temporarily paralyzed by fear, anger and mourning.

The TV news throughout the world was instantly full of commentaries, camera views and reactions with detailed depictions of the tragic and horrid events. Not only did America feel unsafe at that time. The sense of danger spread to many nations and large cities across the globe. Many older Americans, in particular, recalled Pearl Harbor in 1941.²⁸

George. W. Bush was quickly informed about the catastrophe when he was visiting an elementary school in Florida. It was not an easy task for him to handle, being so shortly in office, however even with some confusion and falter, he did soon manage to take the reins of the nation firmly and decisively.²⁹

Sadness and hate rose in the hearts of many citizens as they tried to condemn all Muslims or Arab-looking people in the country and started to oppress them. They showed them distinctive behavior or even hostility. Some Muslims or Arab looking people were injured, some of them, unfortunately, even killed in brutal attacks. The government,

²⁸Vladimíra Dvořáková, "*Spojené státy americké - Společnost a politika*," (Praha: Libri, 2002), 277-287.

²⁹Dvořáková, "*Spojené státy americké - Společnost a politika*," 277-287.

however, stood up for those innocent middle-easterners and Islamic people and encouraged all Americans to remain calm and moral.³⁰

Other actions were soon to follow. The government set in motion an investigation of the events, its causes, and even questioned other authorities why they were not aware of such attacks before they had happened. Many officials complained about the lack of information they were able to gather at that time and also about the slow or insufficient cooperation between intelligence agencies. Moreover, a further danger lingered in the air as the terrorists could attack at any moment with even more power or with more brutal force or means, such as with weapons of mass destruction or chemical weapons. This all had to be dealt with before other lives of people would be lost in another attack.³¹

2.2 The Government's Steps and a New Form of War

“America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world. And no one will keep that light from shining.”

–G .W. Bush, his address to the nation after 9/11

“An eye for an eye only ends up making the whole world blind.”

-Mohandas Gandhi

Soon after the September 11th attacks, the U.S. government came up with quite a strong reaction which marked an important milestone. President Bush in his speech addressed to the nation directly and resolutely condemned the attacks and assured citizens that they will be taken care of, saying that “our first priority is to get help to those who have been injured and to take every precaution to protect our citizens at home and around the world from further attacks.”³²

President Bush also made it clear that evil dwelling anywhere will be found and dealt with, stating: “The search is underway for those who are behind these evil acts. I've directed the full resources for our intelligence and law enforcement communities to find

³⁰Ibid.

³¹Ibid.

³²George W. Bush, “Address to the Nation,” transcript, Thomson Reuters business, <http://news.findlaw.com/hdocs/docs/gwbush/bushadrs091101.html> (accessed May 5, 2010).

those responsible and bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them.”³³

The U.S. Congress provided the president with new necessary and complex, perhaps far too extensive, powers. This process is described by international human rights lawyer Michael Ratner:

[T]he U.S. Congress on September 14, 2001, in a resolution titled “Authorization for Use of United States Military Force,” gave the president unbridled power to go to war. He was authorized to attack any nation, organization, or person involved in any way in the September 11 attacks, whether directly or by harboring others involved in those attacks. No nation, organization, or person was named; the decision about who was guilty was left solely up to the president.³⁴

What followed were dramatic escalations in fights against terrorism. Afghanistan became the main target of bombings and assaults and a new threat was to be uprooted anywhere.

The latter fact led to a new type of strategy that came to be labeled as the “War on Terror.” Under this agenda, the government vigorously tried to establish secured borders, prosecute those alleged to be responsible for the attacks or who apparently had anything to do with them. More importantly, the government’s responses and its continual reminders of the imminent danger created an atmosphere of constant fear among the general public. Newspaper headlines and TV reports only helped to strengthen this notion.

The problem of the president’s enhanced powers lay among other things in his own determination and in the identification of “enemy combatants,” enemies of the nation towards whom such special powers could be potentially used.³⁵

But by entering this kind of war, a war in which prior measures were deemed insufficient, the government had to rely and focus on a new and more specific range of legislation in order to fight it. It was, after all, a new war requiring a new approach and new methods.

³³George W. Bush, “Address to the Nation,” Thomson Reuters business, <http://news.findlaw.com/hdocs/docs/gwbush/bushadrs091101.html> (accessed May 5, 2010).

³⁴Michael Ratner, “Is This a Dark Age for Fundamental Legal Protection?” in *It’s a Free Country: Personal Freedom in America after September 11*, ed. Danny Goldberg, Victor Goldberg and Robert Greenwald (New York City, NY: Nation Books, 2003), 199-220.

³⁵Dvořáková, “*Spojené státy americké - Společnost a politika*,” 277-287.

Executive powers were enhanced by a newly formed law named the Patriot Act. The Office of Homeland Security and Homeland Security Council were created and further investigations and security measures were underway. The president also announced his determination to protect the people while maintaining other important values as well: “None of us will ever forget this day, yet we go forward to defend freedom and all that is good and just in our world.”³⁶

The more important outcome of “the centralization of power within the Oval Office” had many further unpleasant consequences for the civil liberties. The President was able to use his powers under the shroud of current wartime to allow his executive branch to come up with new measurements that partially took certain valuable liberties away. While many of those actions de facto collided with the Constitution, the President fully operated under his devout commitment, as law and politic researcher Nancy V. Baker cites John Ashcroft, that: “President Bush insists that our responses to evil respect the Constitution and value the freedoms of justice the Constitution guaranteed.”³⁷

To which extent were this statement and those responses flawed is now further explored in the following chapter. Ultimately, to conclude this overview of the first appearances of administration’s suspicious steps towards civil liberties in “times of war” after 9/11, an evaluation of the concern about the temporality of the extensions of powers and the potential impact on civil liberties in long perspective, is provided by Baker: “Liberties are gaping holes in the security fabric; they must be sealed off permanently if the nation is to be safe. The demands of a war on terrorism also undercut the likelihood that liberties can be reasserted, because a war without end will never produce the peace of mind necessary to reflect on what we have lost.”³⁸

It is important to note this fact since the American domestic war without a specific enemy is rather against “age-old methods of violence and terror” where an end is not happening any time soon. Thus the losses and abridgements of the liberties would

³⁶Ibid.; George W. Bush, “Address to the Nation,” Thomson Reuters business, <http://news.findlaw.com/hdocs/docs/gwbush/bushadrs091101.html> (accessed May 5, 2010).

³⁷Nancy V. Baker, “National Security versus Civil Liberties,” *Presidential Studies Quarterly* 33, no. 3 (September 2003): 547-567, <http://www.jstor.org/stable/27552513> (accessed November 11, 2009).

³⁸Baker, “National Security versus Civil Liberties,” 547-567.

significantly influence the private lives of many people for a long time without the assurance if it is ever going to be better and legally right.³⁹

³⁹Baker, "National Security versus Civil Liberties," 547-567.

3 DIMINISHING CIVIL LIBERTIES

“Civil liberty is only natural liberty, modified and secured by the sanctions of civil society. It is not a thing, in its own nature, precarious and dependent on human will and caprice; but it is conformable to the constitution of man, as well as necessary to the well-being of society.” – A. Hamilton

It is a common concept in history that in times of need or emergency, typically during times of war, certain values such as security surpass others. It is a common sense to see the way things like public view or opinion may shift according to new principles and possible threats. Also the government’s reactions and interactions may vary in times of peace and in times of danger. So do the schemes, operations and agendas which must be produced in these times.

The turn of the 21st century brought a new sense of such danger, which was gradually shifting from open operations and war tactics on a field to more covert and cunning plotting, i.e. secret terrorist operations all over the world. Moreover, the uncertainty from where it may happen and by whom it may be carried out began to be a sudden heavy burden on the executive branch’s shoulders that had to be dealt with in order to fully preserve national security and to sustain freedom society.

Government and public had to quickly accommodate to a new way of doing things. The clash between what has to be done and what must be simultaneously protected comes in an era in which air flights are no longer as safe as they used to be and with the perception that the intimidating threat may dwell everywhere, even in close neighborhoods, at work or on a street. It comes in an era of globalization and interconnection where the means of performing a crime or terrorism act are perilously wide.

This fact is important in attempting to comprehend the actions, consequences and fallouts in the turbulent and anxious atmosphere after September 11th. Sacrifices at certain levels had to be made to allow more fluent and perhaps more effective ways of dealing with terror to be created. However, the issue that slowly but steadily started to appear after the new legislative opportunities had settled was the question whether it is necessary to impose reactions in tune with the well-known axiom that desperate times call for desperate measures.

Considering, however, that the sacrifices were done in a form of either more or less obvious impacts on civil liberties and freedoms, something of a great value to American

society, the government's responses seem to be strange and striking. And given the fact that its proposals and steps created a collateral damage of some kind, the increasing questions about whether or not all of what had been done in favor of security was necessary or inevitable seem to be quite natural.

The main topic of this thesis – the repercussions of certain measures approved by the U.S. government and their impact on civil liberties – is now to be further explored in following parts of this chapter.

3.1 Civil Liberties and Civil Rights: What Are They?

The exact definition of the term civil liberties might be quite confused with another term: civil rights. They both, quite often, seem to be used interchangeably and in most cases their meanings may overlap.

This thesis deals with particular civil liberties in the USA. Thus, to be able to talk about civil liberties in any context, it is necessary to explain the meaning and what this term actually covers and give the idea why it is so important. Generally, as described by Sheila Kennedy (professor of Public and Environmental Affairs), civil liberties

are rights that individuals have against government. Citizens of the new United States refused to ratify the Constitution unless a Bill of Rights was added, specifically protecting them against official infringements of their “inalienable rights.” Among our civil liberties are the right to free expression, the right to worship (or not) as we choose, and the right to be free from unreasonable searches and seizures.⁴⁰

Another definition explains civil liberties as

certain rights given to the people under the First amendment to the constitution which includes freedom of speech, expression, press, assemble, worship, right to vote, right to equality in public places without any interference or restriction from the government. They are given to treat all the people equally under the law and make them enjoy rights of speech, protection, enjoyment and liberty.⁴¹

⁴⁰Sheila Seuss Kennedy, “Difference between civil rights and civil liberties,” A Commonplace Book, http://www.commonplacebook.com/current_events/politics/difference_betw.shtm (accessed April 15, 2010).

⁴¹Legal Explanations, “Civil Liberties,” Legal-Explanations.com, <http://www.legal-explanations.com/definitions/civil-liberties.htm> (accessed April 15, 2010).

Such liberties are also, among many others, “the right to be free from unreasonable searches of your home” and the right to a fair court trial.⁴²

Finally, the distinction between civil rights and civil liberties may be further explained by following definition:

[C]ivil liberties generally refers more specifically to the protection of the individual's rights to form and express his or her own preferences or convictions and to act freely upon them in the private sphere without undue or intrusive interference by the government, while the term civil rights emphasizes more specifically the individual's rights as a citizen to participate freely and equally in politics and public affairs in order actively to promote his/her preferred public policy alternatives through lobbying policy-makers and/or through personal participation in the electoral process.⁴³

In sum, civil liberties are particular rights, given by the Constitution and the Bill of Rights to the people in America as a form of protection, whereas civil rights are such rights which people have when going about their everyday lives.

3.2 The Beginning of Loss

The main problem came during the creation of new laws to provide better security and more effective means to assure it. Many of these laws or their parts were, however, in clear contradiction with freedom, let alone the Constitution.

Nonetheless, safety and security are also important personal values. These are values for which people are willing to sacrifice something else in order to preserve it. Once someone's life or his or her family's is at stake, people tend to tolerate, to some degree, necessary measures to provide and maintain that particular security. Even when preserving it would mean to suppress some of their freedoms for some time. As Ratner puts it: “...as long as people feel unsafe and subject to attack, they will accept severe restrictions upon

⁴²FindLaw, “‘Civil Rights’ vs. ‘Civil Liberties’,” Thomson Reuters business, <http://public.findlaw.com/civil-rights/civil-rights-basics/civil-rights-vs-liberties.html> (accessed April 15, 2010).

⁴³A Glossary of Political Economy Terms, “Civil rights, civil liberties,” Dr. Paul M. Johnson, http://www.auburn.edu/~johnspm/gloss/civil_rights_civil_liberties (accessed April 15, 2010).

their liberties and those of others, hoping that limits on their rights will somehow keep them safe.”⁴⁴

This thesis does not cover the U.S. foreign policies. However, it is interesting to see a different point and a possible approach to contribute to the U.S. government’s attempts to create a more secure nation without harassing the public lives in the country itself. In light of this, Ratner points out an interesting way of making America safer. He argues that changes in domestic policy are not enough and may not suffice because the threat does not linger on American soil only, but predominantly in foreign countries. Thus, he says, “If the U.S. government truly wants its people to be safer and wants terrorist threats to diminish, fundamental changes in its foreign policies will be necessary.” He elaborates this thought by suggesting that America could make more enemies with its harsh foreign actions that it develops on a large scale and thus perhaps contribute to other possible attacks in the future: “The United States’ actions in the Middle East ... continue to anger people and fertilize the ground where terrorists of the future will take root.” Thus the political attempts to develop a domestic strategy might not be sufficiently useful in the long run.⁴⁵

There was, however, little to do about the situation in the beginning. For months to come after September 11th, it was difficult to raise any objections or arguments about the new government’s decisions. People who would do so would be considered supporters of terrorism. They were, in fact, discouraged to dissent or to oppose in the first place by a clear statement by attorney general John Ashcroft when he said: “To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists-for they erode our national unity and diminish our resolve...” Such statement did indeed stir some fear or unwillingness into minds of those who would try to see the government’s steps as harsh or unnecessary.⁴⁶

Therefore, it is clear that many libertarians remained silent until the Patriot Act became valid and its contradictions and influences on ordinary life were apparent.

Doubts about the government’s haste in imposing the Patriot Act, in particular, were seen even in the Congress. Many members and representatives expressed their concern

⁴⁴Michael Ratner, “Is This a Dark Age for Fundamental Legal Protection?” 199-220.

⁴⁵Ibid.

⁴⁶Baker, “National Security versus Civil Liberties,” 547-567; Michael Ratner, “Is This a Dark Age for Fundamental Legal Protection?” 199-220; Tom Curry, “For his foes, Ashcroft became symbol of lost liberties,” msnbc.com, November 9, 2004, <http://www.msnbc.msn.com/id/6447305/> (accessed May 7, 2010).

about the Act mainly because they had not had the opportunity to examine it and go through it all (over 300 pages) in sufficient time. There were some strong arguments about accepting the law and even some dissenters, but ultimately the law was approved.

The main purpose of the following chapter is to familiarize with perhaps one of the most controversial law ever to be implemented in the U.S. and to describe its purposes, its main aims, but more importantly its unprecedented side effects on civil liberties and rights of many Americans.

3.3 Civil Liberties under the USA PATRIOT Act

“Must a government of necessity be too strong for the liberties of its own people or too weak to maintain its own existence?”

-Abraham Lincoln, Message to Congress

The U.S.A. PATRIOT Act (mentioned almost exclusively as ‘the Patriot Act’ or ‘the PATRIOT Act’) is an acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.” This extensive act was created soon after the terrorist attacks of 9/11 and the Congress passed it quickly, after only little debate (many members did not even have the time to read it), and the President signed it on 26 October 2001.⁴⁷

The law came in an era where current measures and abilities of the executive branch were deemed insufficient to deal with new forms of terrorist operations or too weak to prevent them from happening on U.S. soil again. Attorney General John Ashcroft introduced the Act (with a term that seems to be really vague and could be an umbrella for many things) as a “package of ‘tools’ urgently needed to combat terrorism.”⁴⁸

Its main purpose was to enhance the powers of intelligence agencies, to speed up their cooperation and provide necessary adjustments to already existing laws or provisions. Through a broad variety of improved surveillance or investigation methods, law

⁴⁷The New York Times Company, “Revising the Patriot Act,” *New York Times*, April 10, 2005, http://www.nytimes.com/2005/04/10/opinion/10sun1.html?_r=1&scp=39&sq=patriot+act&st=nyt (accessed April 15, 2010); The complete text of the Patriot Act is available at various web sites, for example see at <http://epic.org/privacy/terrorism/hr3162.html>

⁴⁸Jim McGee, *Washington Post*, November 4, 2001, quoted in Jon B. Gould, “Playing with Fire: The Civil Liberties Implications of September 11th,” *Public Administration Review* 62, Special Issue: Democratic

enforcement was given new possibilities for dealing with terrorism or how or gathering intelligence.⁴⁹

Although most of the provisions guaranteed by the Act were not bad in nature and they certainly could serve for the good purpose and for establishing more effective intelligence operations, some of them became subjects of controversy. However well-meant the Act was, it backlashed in a form of “side effects” which had a particular impact on American personal lives and civil liberties. In several controversial provisions, it gave the government’s agencies and officials abilities not only to use them in apparent terrorist cases, but also in “common” criminal investigations or in possible interceptions that include ordinary citizen’s lives.

Thus while the aim and purpose of the Act itself is clear and valid, i.e. to widen, enhance and speed up the actions among federal government and its institutions, in particular the Federal Bureau of Investigation (FBI), it, on the other hand puts certain values at stake. Such values are no less important for Americans than security. Some of the Act’s provisions deny people particular basic rights and liberties, let alone the fact that it sometimes left them with very little to do for their defense. Its certain essential parts even violate the Constitution.

The task to balance security and liberty is, as the US history shows, very ancient. The process of keeping the balance, however, tends to collide and obstruct with government’s uneasy, short-sighted or too fast decision making. It is no different a case in post 9/11 era. The government had to focus on proper maintaining and strengthening of fragile security. The point was simple – to protect the America and the Americans and to prevent any other disastrous catastrophes from happening again. However, the government should still be responsible for all processes that keep the nation in one piece at once. The administration should especially responsible for its executive and law enforcement groups who manage and seek for vigilance. Otherwise, as Owens helps to sum it up, “it [the vigilance] may, if

Governance in the Aftermath of September 11, 2001 (September 2002): 74-79,
<http://www.jstor.org/stable/3110174> (accessed November 11, 2009).

⁴⁹U.S. Department of Justice, “What is the Patriot Act,” Department of Justice,
http://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf (accessed April 15, 2010).

unchecked, lead to an extremism that incapacitates a government, preventing it from carrying out even its most necessary and legitimate purposes.”⁵⁰

Following parts of this chapter try to point out that the government, by enacting the Patriot Act and other useful tools and methods, definitely created a hole in some standard procedures and obligatory checks and balances. Consequently, a wave of distrust arose from wide range of libertarian groups and organizations or other defendants of the liberties. Inadvertently or not, the impacts on civil liberties were broad and the arguments that some civil liberties had been diminishing were quite right.

3.3.1 Detentions and “Enemy Combatant”

During the government’s strike against potential terrorists, its law enforcement officials, under the Patriot Act’s newly implemented powers, imprisoned large amount of suspects. These suspects were usually denied certain key Constitutional rights such as due process, right to counsel, right for a speedy trial and probable cause requirement. Particularly, the situation of the U.S. citizens Padilla and Hamdi only underlined other cases in which people, “presumed to be national security threat or material witnesses of such threat,” faced seemingly indefinite (i.e. very long – ranging from few days to hundreds of days) detention and custody without proper charges and often in poor conditions.⁵¹

The President’s new power to designate (based on his own decision) a person to be an “enemy combatant” were also responsible for the prolonged detention without charges thus seemed to threaten basic rights. When persons were labeled as enemy combatants, they no longer fall under standard criminal justice processes, lacked judicial oversight and were restricted the right to petition for a writ of habeas corpus – an inmate’s right to be “brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody” – and a very precious part of the U.S. Constitution.⁵²

Jose Padilla, a U.S. citizen, was arrested, under witness warrant, at O’Hare Airport after officials found out that he might be connected to an attempt to make a terrorist strike

⁵⁰Mackubin T. Owens, “Lincoln and Civil Liberties: War, Prudence, and Republican Government,” John M. Ashbrook Center for Public Affairs, <http://www.ashbrook.org/publicat/oped/owens/02/lincoln.html> (accessed March 29, 2010).

⁵¹Baker, “National Security versus Civil Liberties,” 547-567.

⁵²Ibid.; The 'Lectric Law Library, “Habeas Corpus,” <http://www.lectlaw.com/def/h001.htm> (accessed April 5, 2010).

via the use of a “dirty bomb.” He was moved into jail, without court’s justification, and “kept in solitary confinement, forbidden to see his lawyer, his family, or any other outside person.” In his case, President Bush advocated the detention announcing that Padilla represents a serious national threat and thus must be secluded from public in order to prevent him to aid his fellow terrorists. Moreover, as *New York Times* columnist Anthony Lewis argues in his article: “Detaining him without trial obviated having to disclose sources of intelligence that the government might want to keep hidden.” There is no doubt that potential terrorists cannot be allowed to roam free or have an even slightest possibility to contact their accomplices. It is the lack of the important judicial engagement and oversight and the ignorance of the certain guarantees in these matters, however, that inflict a wound on the Constitution’s bedrocks and civil liberties and which may show American freedom’s vulnerable side.⁵³

Hamdi, captured on the battlefield in Afghanistan, was imprisoned, without trial and held incommunicado, without charges for what seemed to be an indefinite detention. Though being an American citizen, he was deprived some basic the rights citizens have. In this case, however, the problem of stripping of certain rights seems to be, to some extent, justifiable since even the Framers of the Constitution could not predict the massive danger of terrorist attacks done by only single individual when they were creating the document. Thus while civil liberties, in presented cases, were abridged, this may be balanced by the preventive efforts of the officials to increase security.⁵⁴

Considering, however, that court’s cases may further serve as precedents, there is another problem that is described by Lewis, citing *Washington Post*, and pointing at the fact that judges must be aware that “the doctrine they are creating could be used against people other than the ones whose cases they are currently seeing.”⁵⁵

In 2001, government also showed that it could fail in investigation procedures. Abdallah Higazy, an Egyptian student, was arrested and jailed for more than a month after the September attacks when officials learned from a guard working in a hotel where he stayed that a radio had been found in his room. The student, under “threats against his

⁵³Anthony Lewis, “Security and Liberty: Preserving the Values of Freedom,” in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone and Greg Anrig, Jr. (New York: PublicAffairs, 2003), 47-73; Baker, “National Security versus Civil Liberties,” 547-567.

⁵⁴Lewis, “Security and Liberty: Preserving the Values of Freedom,” 47-73.

⁵⁵*Ibid.*

family,” falsely confessed. Later, however, when a pilot came and said officials that the radio was his, and when the guard admitted that he made up the story, they released him. Higazy challenged this government’s tactic, filed a lawsuit and (much later) in 2009 won.⁵⁶

3.3.2 Secret Warrantless Searches

Under some of the Patriot Act’s provisions, officials had the power to search homes and possessions without prior warrant being demanded at court from a judge. Standard protocols require law enforcement agents to seek a warrant in order to conduct a search into someone’s home as a part of their investigation. The act, however, weakened these rules thus making it possible to search a person’s home without prior notice as well as without judicial awareness. Though the warrant still had to be acquired at a judge, it could happen long time after the officials had actually conducted the search leaving the person completely unaware that something might have happened and that officials were in their house. This particular doing is a clear violation of the Fourth Amendment’s clause which gives “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure,” and significantly invades privacy. Since there might not be any prior judicial approval, there is therefore no oversight over the “unreasonable” clause.⁵⁷

3.3.3 Wiretapping and the Collection of Records

One of the Patriot Act provisions’ functions were that some of them allowed the government’s officials the use of much easier methods and benevolent approach when gathering certain data while bypassing otherwise strict rules. The President and his administration deemed privacy to be “luxury” which may serve for the terrorist network to plan their future attacks. Security agencies received broader and expanded powers to access the means to collect that information with very limited judicial oversight. Under these new broaden powers, intelligence and counterterrorism agencies could use wiretaps more broadly to spy on potential terrorist suspects. However, by weakening the crucial judicial

⁵⁶Benjamin Weiser, “9/11 Wrongful Accusation Suit Settled,” *New York Times*, September 24, 2009, <http://www.nytimes.com/2009/09/25/nyregion/25higazy.html> (accessed May 5, 2010); Lewis, “Security and Liberty: Preserving the Values of Freedom,” 47-73.

⁵⁷Kathleen M. Sullivan, “Under a Watchful Eye: Incursions on Personal Privacy,” in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone and Greg Anrig, Jr. (New York: PublicAffairs, 2003), 128-146.

control over these activities, the government has the possibility to conduct these spyings and wiretaps on ordinary, law-abiding Americans as well.⁵⁸

In 1978, the Foreign Intelligence Surveillance Act (FISA) was passed and it "...for the first time, permitted the use of domestic wiretaps for intelligence-gathering activities." To ensure the safety of guaranteed rights and to prevent a potential abuse that could be used in "ordinary law enforcement," a secret court (FISC) was created to restrict and narrow the possibilities for the official to use these activities and as a general oversight over these matters and decisions. Mainly, it required the judicial oversight, showing a "probable cause," and allowed the wiretaps to be used for the purpose of foreign intelligence exclusively.⁵⁹

In the need (that was stressed by the government on many occasions) of more flexibility and appropriate coordination between the government's officials however, these rules were significantly weakened by the administration after 11 September. Generally, since the creation of the Patriot Act, wiretaps could be used on much more benevolent basis with the possibility to use them even in ordinary criminal cases, thereby allowing an ongoing investigation to target innocent Americans without legal warrant. Wiretap demands also lacked the proper judicial information about the particular cases thus prohibiting it to exercise proper law-following rules' oversight, violated the "probable clause" requirement of the Constitution. All of these degradations of standard rulings opened a much greater probability for the government to err.⁶⁰

Furthermore, federal agents were granted "roving wiretap" authority. This meant that a single wiretap order might be applied to all phones and computers in one's possession. Before the Patriot Act, federal agents had to have one order for each different device they wanted to track. The government supported these expanded powers on the basis that

⁵⁸The New York Times Company, "We Can't Tell You," *New York Times*, April 3, 2010, <http://www.nytimes.com/2010/04/04/opinion/04sun1.html?scp=2&sq=&st=nyt> (accessed April 20, 2010); CATO Institute, "Electronic Surveillance," CATO Institute, <http://www.cato.org/pubs/handbook/hb111/hb111-28.pdf> (accessed April 29, 2010).

⁵⁹CATO Institute, "Electronic Surveillance," CATO Institute, <http://www.cato.org/pubs/handbook/hb111/hb111-28.pdf> (accessed April 29, 2010); Baker, "National Security versus Civil Liberties," 547-567.

⁶⁰Sullivan, "Under a Watchful Eye: Incursions on Personal Privacy," 128-146; Stephen J. Schulhofer, "No Checks, No Balances: Discarding Bedrock Constitutional Principles," in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone and Greg Anrig, Jr. (New York: PublicAffairs, 2003), 74-99; CATO Institute, "Electronic Surveillance," CATO Institute, <http://www.cato.org/pubs/handbook/hb111/hb111-28.pdf> (accessed April 29, 2010).

terrorists are “accustomed to switching phones and other devices to evade detection and that the time saved by roving order can be crucial.”⁶¹

Moreover, in 2008, the National Security Agency’s electronic surveillance powers were enhanced by Congress that passed FISA Amendments Act. This legislation posed serious disrespect to civil liberties of Americans, particularly the First and Fourth Amendments provided by the Constitution, since it changed the current procedures in wiretapping.⁶²

A CATO paper discusses this FISA Act, summarizing that it

allows the government to intercept the international calls of Americans without individualized warrant. The government need only submit a “certification” to the FISA court describing the general parameters of an eavesdropping program. And the government can begin wiretapping immediately, [wait for the judicial review process] for as long as four months.⁶³

Though the exact extent of the usage of wiretapping and data mining is not known, several cases served as evidence of the gap in the system. Newspapers covered several programs in which the use of warrantless wiretapping took place. They showed a security agency’s access to voice and data traffic of AT&T (telecommunication service provider) through San Francisco hub, collecting information via use of “equipment capable of monitoring a large quantity of e-mail messages, Internet phone calls, and other Internet traffic.” That information was gathered based on several, very vague, criteria such as keywords, addresses or locations. It was not clear, however, whether such operations were aimed at international communication or even domestic traffic.⁶⁴

Such a case represented the highly risky and suspicious government’s operations. Security agencies learned that they require indeed broad, sophisticated and flexible methods to uncover terrorist planning or communications. Nonetheless, surveillances must be practiced under legal judicial approvals in order to maintain proper oversight over

⁶¹Sullivan, “Under a Watchful Eye: Incursions on Personal Privacy,” 128-146.

⁶²The New York Times Company, “Spying, Civil Liberties and the Courts,” *New York Times*, April 15, 2010, <http://www.nytimes.com/2010/04/16/opinion/16fri2.html> (accessed May 2, 2010).

⁶³CATO Institute, “Electronic Surveillance,” CATO Institute, <http://www.cato.org/pubs/handbook/hb111/hb111-28.pdf> (accessed April 29, 2010).

⁶⁴Ibid.; John Markoff and Scott Shane, “Documents Show Link Between AT&T and Agency in Eavesdropping Case,” *New York Times*, April 13, 2006, http://www.nytimes.com/2006/04/13/us/nationalspecial3/13nsa.html?_r=1 (accessed May 5, 2010).

citizen's privacies. It is also a question if these large scale information gatherings actually really helped the intelligence and security agencies that were already overwhelmed by the incoming data.⁶⁵

Americans, unsurprisingly, seemed to have two distinctive opinions about these particular changes in authorities' powers. First group welcomed these enhancements since they felt that "law-abiding citizens should have nothing to hide." That might be true, however many cases in which even the innocent "law-abiding" citizens were incorrectly targeted supports an argument of the Second group. Rather a minority, these people felt the need to protect the rights and civil liberties along with the need to express worries. Law professor Stephen J. Schulhofer stands up for second group of people when arguing that "sacrificing any of our pre-9/11 privacy rights will simply make us less free without making us more secure and will amount to destroying our freedom in order to defend it."⁶⁶

The newly implemented system after 11 September surely wanted to help the security agencies to do their job more effectively. The difficult side of this problem, it seems, is that the laws and provisions ignored the standards of checks and balances, supervision of responsible judicial authorities while also casting doubts over the government's intentions. The erosion of certain rights or the making of fragile gaps in the system may also have further negative impacts while creating "only a false sense of comfort." Moreover, it is alarming that the scope of the wiretapping investigations may include large amount of innocent people and their privacies.⁶⁷

Finally, the necessity of enhancement of intelligence powers through both the Patriot Act and FISA changes is arguable since the officials had already had some highly effective powers and methods how to look for suspects, investigate and intervene in matters of crime and terrorism even prior to the 11 September legislation changes.⁶⁸

⁶⁵CATO Institute, "Electronic Surveillance," CATO Institute, <http://www.cato.org/pubs/handbook/hb111/hb111-28.pdf> (accessed April 29, 2010).

⁶⁶Schulhofer, "No Checks, No Balances: Discarding Bedrock Constitutional Principles," 74-99.

⁶⁷Ann Beeson, "On the Home Front: A Lawyer's Struggle to Defend Rights After 9/11," in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone and Greg Anrig, Jr. (New York: PublicAffairs, 2003), 295-312; Schulhofer, "No Checks, No Balances: Discarding Bedrock Constitutional Principles," 74-99.

⁶⁸Dahlia Lithwick and Julia Turner, "A Guide to the Patriot Act, Part 2," Washington Post.Newsweek Interactive Co. LLC, <http://www.slate.com/id/2088106/> (accessed April 28, 2010); CATO Institute, "Electronic Surveillance," CATO Institute, <http://www.cato.org/pubs/handbook/hb111/hb111-28.pdf> (accessed April 29, 2010).

3.3.4 National Security Letters and the “Gag-Order”

Part of the Patriot Act made it easier for FBI to access materials and documents (in various places) that may be of a high value for its intelligence purposes and investigations. The law enforcement officials could practice surveillance programs and collect almost any kind of personal records based on their own decision. Agents did not have to target specific suspects or directly terrorists, their proposal simply only have to relate to counterterrorism efforts. One of the provisions of the Patriot Act deals with expanded opportunities to gather necessary information. It is called the National Security Letters (NSLs).⁶⁹

The ACLU’s explanation of the NSLs says that it is a provision that “expanded the FBI’s authority to demand personal customer records from Internet Service Providers, financial institutions and credit companies without prior court approval.”⁷⁰

Prior to the Patriot Act, the NSLs could be used for investigations concerning spies or terrorists only. The post September 11th Act, however, removed some of the rules that oversaw the use of the NSL hence it could be used to obtain information practically from and about anyone without a judge’s permission while evoking large concerns about possible abuse. The FBI agents use these documents in extensive quantities each year.⁷¹

A “gag order” is a provision usually issued along with the NSL. Its purpose is to prohibit “anyone who receives an NSL from disclosing even the mere fact that the FBI has sought information.” They, however, still do have the right to have an attorney and to discuss the issue together.⁷²

These people must remain silent at all circumstances and must be careful so that no detail about what information was demanded leaks. Otherwise they would be charged and

⁶⁹Greenberg and Co., “The USA Patriot Act: How It Impacts You,” http://www.greenbergandco.com/reading-The_Patriot_Act.html (accessed May 2, 2010).

⁷⁰American Civil Liberties Union, “National Security Letters,” American Civil Liberties Union and the ACLU Foundation, http://www.aclu.org/national-security_technology-and-liberty/national-security-letters (accessed May 2, 2010).

⁷¹American Civil Liberties Union, “Challenge to National Security Letter Authority,” American Civil Liberties Union and the ACLU Foundation, <http://www.aclu.org/national-security/challenge-national-security-letter-authority> (accessed May 2, 2010); Gregory T. Nojeim, “Will Congress Stop Abuse of National Security Letters?” The American Constitution Society for Law and Policy, <http://www.acslaw.org/node/15122> (accessed May 2, 2010); Charlie Savage, “Battle Looms Over the Patriot Act,” *New York Times*, September 19, 2009, http://www.nytimes.com/2009/09/20/us/politics/20patriot.html?_r=1 (accessed April 15, 2010).

⁷²Ronald B. Standler, “National Security Letters: Unconstitutional Demands by U.S. Government,” Ronald B. Standler, <http://www.rbs2.com/NSL.pdf> (accessed May 2, 2010); American Civil Liberties Union, “Challenge to National Security Letter Authority,” American Civil Liberties Union and the ACLU Foundation, <http://www.aclu.org/national-security/challenge-national-security-letter-authority> (accessed May 2, 2010).

prosecuted. Such strict rule and abridgement of a free speech is contradictory to the First Amendment of the Constitution and left many people vulnerable to potential FBI's abuses of this provision. Considering the First Amendment, the gag order also violates its guaranteed right "to petition the Government for redress of grievances" as well as it prohibits "the recipient from obtaining judicial review of the reasonableness of the NSL, which is one of the legal requirements for the validity of administrative subpoenas," thus extremely limiting the possibility to defend against it. The gag order may last for a very long time and sometimes leaves a door open for more governmental information digging.⁷³

A particular example of the use of the letters was an anonymous's submission in *Washington Post*, 2007. His name could not be published because he was still at that time under gag order. This author described what it is like to receive the NSL with gag order. The author, as a businessperson, received a national security letter in order to provide some "sensitive information" about this person's client. The information was demanded, the author says, without "indication that a judge reviewed or approved the letter, and it turned out that none had," and given the gag order, it was unable to inform the client that he or she is investigated either. The author refused to give the information away and contacted some lawyers from ACLU instead to challenge the constitutionality of the NSL.⁷⁴

Moreover, the published article showed a great deal of concern as well as disapproval with what is actually possible to happen. "Under criminal prosecution," the author must conceal any information from anyone and must pay attention to any slip of words. Subsequently, the author points at a fact that even the Congress did not have the right information about the demands by national security letters and by its usage, explaining that: "Even though the NSL statute requires the director of the FBI to fully inform members of the House and Senate about all requests issued under the statute, the FBI significantly underrepresented the number of NSL requests [from years 2003 to 2005]." The author concludes with feelings about these overall procedures saying:

⁷³Ronald B. Standler, "National Security Letters: Unconstitutional Demands by U.S. Government," Ronald B. Standler, <http://www.rbs2.com/NSL.pdf> (accessed May 2, 2010)

⁷⁴The Washington Post Company, "My National Security Letter Gag Order," *Washington Post*, March 23, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/22/AR2007032201882.html> (accessed April 15, 2010).

I recognize that there may sometimes be a need for secrecy in certain national security investigations. But I've been under a broad gag order for three years, and other NSL recipients have been silenced for even longer. At some point – a point we passed long ago – the secrecy itself becomes a threat to our democracy. ... I believe ... that the secrecy surrounding the government's use [of the NSL] is unwarranted and dangerous.⁷⁵

The need of the gag order is clear - to prevent the potential (terrorist or criminal) suspect from knowing that an investigation might be going on. However, the use of this gag order seems to be able to target wide scope of Americans who are not engaged in any of those activities. Additionally, the exchange of the collected data by various parties compromises privacy. The shroud of secrecy and the contradictions to the Constitution, moreover, threaten the very purposes of the free country and its ideology.

3.4 Civil Liberties after 9/11 through a Different Point of View

The problem of the post-September era, the Patriot Act and its provision is not a one sided matter. The main reason to propose and to implement the Patriot Act in the first place was (hopefully) not the need to spy upon ordinary citizens, to conduct secret searches in innocent people's houses or to abuse any sensitive data the security agencies acquire. The provisions were created to make Americans more secure to that they could indulge in their privacies, public lives and generally in civil liberties. Civil liberties were, doubtlessly, partially sacrificed or limited, thereby government could use the little 'space' for its intelligence to do its job with less restrictions that would otherwise prevent it from detecting terrorism suspects or effective investigations.⁷⁶

In the light of history, many people were, quite rightfully, afraid that curtailments of rights of specific or small number of people would lead to further large-scale abuses of powers upon ordinary Americans or to serve as precedents. Realizing, however, that had the authorities had the powers (they later acquired and which help them in better cooperation, communication and investigation procedures) prior to the 9/11 attacks, much could have been different. As Stuart Taylor Jr. argues in his article, the enhancement of the

⁷⁵The Washington Post Company, "My National Security Letter Gag Order," *Washington Post*, March 23, 2007 (accessed April 15, 2010).

⁷⁶Stuart Taylor Jr., "Rights, Liberties, and Security: Recalibrating the Balance after September 11," *The Brooklyn Review* 21, no. 1 (Winter 2003): 25-31, <http://www.jstor.org/stable/20081086> (accessed November 11, 2009).

government's powers could only be a return to an old era in 20th century, when officials had the powers they needed to combat potential threat.⁷⁷

Taylor suggests that the potentially vital investigative powers had been quite restricted thus the government could not use its full potential to prevent and deal with the terrorism groups. Taylor evaluates the poor situation and thus the necessity to enhance investigative powers by saying: "Stalked in our homeland by the deadliest terrorists in history, we are armed with investigative powers calibrated largely for dealing with drug dealers, bank robbers, burglars, and ordinary murderers. ... [not aware] how dangerous our world has become or how ill-prepared our legal regime is to meet the new dangers." This does not mean to use the extensive powers on ordinary Americans. It suggests that those powers should be predominantly used, carefully, to prevent any terrorism plotting and future attacks. Taylor, for example, points at the fact that the intelligence was lacking necessary tools when it was facing one of the alleged terrorist companions, Zacarias Moussaoui (who had been arrested prior to the attacks). Thus showing that no matter how well-prepared or informed the agencies are, it is of no use in a legal system full of objections and delays.⁷⁸

Concerning the detentions of many people, usually without charges or proven guilt, Taylor sees them as a matter of "preventive detention" that the Bush administration correctly operated in order to prevent any possible terrorist to execute their potentially even more dangerous and devastating attacks. The same applies for the "enemy combatant" case where the government, though having luxuriously free hand in determining the labeled person, brought many suspects to more strict or effective means of investigation. In times of great danger, Taylor says, the required evidence and probabilities should not hinder the necessary investigative operations. Law professor Alan Dershowitz also noted that each country facing difficult times and in need to preserve security has come up with preventive methods aimed at those "who are thought to be dangerous but who might not be convictable under the conventional crime law."⁷⁹

⁷⁷Taylor, "Rights, Liberties, and Security: Recalibrating the Balance after September 11," 25-31.

⁷⁸Ibid.; Heather Mac Donald, "In Defense of the Patriot Act," *Washington Post*, August 24, 2003, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A34482-2003Aug22> (accessed May 2, 2010).

⁷⁹Heather Mac Donald, "In Defense of the Patriot Act," *Washington Post*, August 24, 2003, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A34482-2003Aug22> (accessed May 2, 2010); Lewis, "Security and Liberty: Preserving the Values of Freedom," 47-73.

Everything, however, should be approached with moderation. The civil liberties as well as the possibilities that the government may err and bring innocent people under “unconventional laws” must be respected and borne in mind. It is also worth mentioning that authorities were successful in prevention of 131 terrorist attacks from 1981 to 2001 using different methods and approach without harassing civil liberties. Thus it leaves a question whether the extension of powers after 9/11 was as necessary as the government tried to say.⁸⁰

Quite sober thought of Taylor concludes this part. Worth presenting, with respect and appreciation to the civil liberties as well as to need for new measures to deal with new threat, are his words: “The question is not whether we should increase governmental power to meet such dangers. The question is how much.” Hopefully, the cost for the increase will not be too high for the civil liberties and for the free, democratic American society.⁸¹

3.4.1 Different Opinions about the PATRIOT Act

Although many voices and libertarian groups were predominantly criticizing the Act and its provision mainly based on the weaknesses it creates into broad area of law procedures, there were, of course, those who stood up for the Act and advocated its purposes. An ACLU article presents opinions of the latter group to help this thesis to bring more objective views.

Tom Ridge (former Homeland Security Secretary), for example said: “The tools of the Patriot Act are vital to our ability to prevent terrorist attacks. ... the authorities of the Patriot Act exist to protect the very liberties that our Founders established in the Constitution. By protecting our freedoms, our civil liberties are enhanced, not diminished.” James Jay Carafano and Paul Rosenzweig (Senior Research Fellow and Senior Legal Fellow respectively) wrote in 2005:

To date, as the Department of Justice Inspector General has reported, there has not been one single instance of abuse of the powers granted in the [U.S.A. PATRIOT Act]. Safeguarding the civil liberties of American citizens is vitally important, as important during war as during periods of peace. Yet so, too, is preserving our

⁸⁰Baker, “National Security versus Civil Liberties,” 547-567.

⁸¹Taylor, “Rights, Liberties, and Security: Recalibrating the Balance after September 11,” 25-31.

security. The Patriot Act preserves both. Hysterical criticisms that the act was unnecessary and is a threat to a healthy civil society have proven unfounded...⁸²

Though being an advocate of civil liberties, former U.S. Congressman Bob Barr objectively states that: “Many of the [Act's] provisions are non-controversial and have had a positive impact on the government’s ability to fight acts of terrorism. However, there are a number of provisions that raise serious questions of constitutionality ...” He had in mind the Fourth Amendment’s violations regarding the many cases in which the government has sought private and sensitive information as a part of its “anti-terrorism or foreign intelligence investigation.”⁸³

Representatives of the ACLU wrote in 2001 that the Patriot Act

gives the Attorney General and federal law enforcement unnecessary and permanent new powers to violate civil liberties that go far beyond the stated goal of fighting international terrorism. These new and unchecked powers could be used against American citizens who are not under criminal investigation, immigrants who are here within our borders legally, and also against those whose First Amendment activities are deemed to be threats to national security by the Attorney General.⁸⁴

Despite this, they admitted that they support some of Patriot Act’s provisions. They, however, did not mention which particular ones.

As turbulent as the talks may be, it is still the evidence that assess the situation from the best perspective. And so far, the instances are that the civil liberties have been put under serious pressure despite the government’s statements that they were not.⁸⁵

3.5 Heightened Awareness

“You must not lose faith in humanity. Humanity is an ocean; if a few drops of the ocean are dirty, the ocean does not become dirty.”

-Mohandas K. Gandhi

⁸²ACLU ProCon.org, “Does the USA PATRIOT Act diminish civil liberties?” ACLU ProCon.org, <http://aclu.procon.org/view.answers.php?questionID=000716> (accessed April 15, 2010).

⁸³Ibid.

⁸⁴Ibid.

⁸⁵Lewis, “Security and Liberty: Preserving the Values of Freedom,” 47-73.

While many people could argue that the influence of September 11th on public view of Islam religion, Arab and Muslim people (as well as other ethnic minorities who are close to them) has not been something worth considering because it has not changed too much and that the actual perception of this matter (i.e. pointing at violations of those people's rights and liberties) should be less exaggerated, there is, however, much evidence that proves otherwise. It demonstrates the fact that the unfortunate day in the U.S. history marked not only a change in domestic policies, not only increased the fear and worldwide notion of an ever-present possibility of terrorist threats, but also had a huge impact on some of the most fundamental principles of U.S. society, that being religious belief and personal freedom. Especially the way people are now more than ever perceived based on their faith and religion or the color of their skin (the color of people coming from Middle Eastern countries). While it could be said that people had been somehow 'judged' even before 11 September, the turn of the 21st century cast certain people under a much more suspicious light. Therefore it left open doors for various actions that affected the liberties of this part of American population.

Oppressions that occurred and prejudices held in the hearts and minds of many Americans, however, cannot be justified and treated so lightly, and the means by which people are considered as something hostile and dangerous should find a much more reasonable and rational way instead; as should the discriminatory policy of racial profiling of those who seem to be dangerous for the nation or whose possible religious background may pose a threat. Fear has been present and no one could prevent people and the government from relying on security. However, it is up to each and everybody to which degree one allows her or him to spoil the reasonable judgment and objective approach by which they might disturb the rights of others, say groups of people who are likely to be labeled as 'hostile', or even worse. The line is thin in this matter, as it is in almost everything else that deals with the standards of life, freedom and personal values of people all over the world. Therefore the line between security and discrimination must be walked with very careful and firm steps, something what not only the U.S. executive powers but common people as well seemed to fail to do.

Denial of personal rights and civil liberties occurred in large numbers in United States after 11 September and sadly for American Arabs and Muslims (as well as, generally, for other people who look Mideastern) it brought a sharper look, biased focus and tendency for more sensible awareness of a "few" people in society. Not to mention the fact that it was

part of these people who have been subjects of ‘special treatment’ (e.g. long detentions, violation of due processes, custody, profiling, etc.), even though it has never been publicly and openly admitted and even though these people were not responsible nor had, in most cases, actually anything to do with 9/11 attacks.

Although even this is not certain, the implications of precautions and provisions of legislative power may be temporal for majority; but for these people they rather seem to be permanent, for they are, unlike other people, easily distinguished. Be it by Mideastern appearance, language, or a place of worship.

Following chapters focus on the US government’s treatment of people who were considered to be connected with those responsible for the 9/11 attacks (i.e. terrorists), be it on the basis of religion (i.e. Islam), ethnic background or color of their skin and what it meant for the U.S. society and those people’s position in it and their rights and liberties.

3.5.1 Position of Islam, Arabs and Muslims in the U.S. After 11 September 2001

Although the issue of Islam, Arabs and Muslims in America had been quite a sensitive theme long before the events of September 2001, this day marked an era in which these people and this problem was perceived with different, often confused, misinformed and biased eyes. Their long tradition in America, as well as their effort to integrate themselves into the society more and more, suddenly received an unpredicted blow. They immediately became subjects of more sensitive awareness of neighbors, colleagues, bosses, the general public and the government alike and were labeled as suspects of other possible hostile activity on U.S. soil. This led to increased hate among (not only) American people and to many brutal, violent and even murderous crimes towards Arabs and Muslims and those who looked like them in days following September 11th in quantity that had never been seen before.⁸⁶

At first the government recognized the need to protect this group of people in a very sensitive atmosphere after the attacks. President Bush’s administration came up with

⁸⁶Louise Cainkar, “No Longer Invisible: Arab and Muslim Exclusion after September 11,” *Middle East Report*, no. 224 (Autumn, 2002): 22-29, <http://www.jstor.org/stable/1559419> (accessed November 30, 2009); Karen Leonard, “American Muslims, before and after September 11, 2001,” *Economic and Political Weekly* 37, no. 24 (Jun. 15-21, 2002): 2293-2297+2299-2302, <http://www.jstor.org/stable/4412237> (accessed November 30, 2009); Hodan Hassan, “Braving the Storm: American Muslims and 9/11,” in *It’s a Free Country: Personal Freedom in America after September 11*, ed. Danny Goldberg, Victor Goldberg and Robert Greenwald (New York City, NY: Nation Books, 2003), 321-323.

announcements which condemned any discriminatory acts condemned and discouraged further violence. President Bush himself visited representatives of the Muslim community and tried to settle the emotionally tense public relationships. Nonetheless, this moment's respite was shortly after that followed by quite contrastive fallouts as the new administration's response took place.⁸⁷

Moreover, the negative presentations of media, news and reports did not help Arab and Muslim's population either, while the knowledge of Islam remained very vague. National fear of dark-skinned people was enhanced by the wrong perception and general misunderstanding of them and what happened and which people were actually involved in the attacks. All this together led to the public's general held belief (wrong since at that time 1.5 million of Arabs in the US were Christian) in the U.S. that every person recognized as being from Mideast was immediately perceived as a potential Muslim terrorist, thus leaving free space for discrimination and unpleasant behavior.⁸⁸

For example former Reagan speechwriter, Peggy Noonan, wrote in her column:

In the past month I have evolved ... to watchful potential warrior. And I gather that is going on with pretty much everyone else, and I'm glad of it. I was relieved at the story of the plane passengers a few weeks ago who refused to board if some Mideastern looking guys were allowed to board. I was encouraged just last night when an esteemed journalist told me of a story she'd been told: Two Mideastern-looking gentlemen, seated together on a plane, were eyeballed by a U.S. air marshal who was aboard. The air marshal told the men they were not going to sit together on this flight. They protested. The marshal said, move or you're not on this flight. They moved. Plane took off.⁸⁹

Special security checks at the airports and clearances of those who seemed suspicious (either by name or appearance) were just some of the examples of new agenda of increased protection at a very precious cost - if not civil liberties than definitely civil dignity. But, it

⁸⁷Dvořáková, "Spojené státy americké - Společnost a politika," 277-287; Salah D. Hassan, "Arabs, Race and the Post-September 11 National Security State," *Middle East Report*, no. 224 (Autumn 2002): 16-21, <http://www.jstor.org/stable/1559418> (accessed December 15, 2009).

⁸⁸Mervat F. Hatem, "Racial Profiling in the Pursuit of Arabs and Muslims in the U.S.," in *It's a Free Country: Personal Freedom in America after September 11*, ed. Danny Goldberg, Victor Goldberg and Robert Greenwald (New York City, NY: Nation Books, 2003), 313-320; Cainkar, "No Longer Invisible," 22-29.

⁸⁹Peggy Noonan, "Under the Circumstances, we must be wary of young Arab men," *Wall Street Journal*, October 19, 2001, <http://www.opinionjournal.com/columnists/pnoonan/?id=95001349> (accessed December 2, 2009).

is generally known that war takes desperate measures and according to John Ashcroft's words: "we are at war now" and the war, whatever was meant by this statement, was unfortunately present. And as Peggy Noonan concluded in her column: "... under very special circumstances--and these are special circumstances--you sometimes have to sacrifice ... drop your burly pride a little and try to understand and be accepting and accommodating and generous-spirited."⁹⁰

A problem within the general public might be that it succumbed to stereotyping. Many stories have occurred since September 11th. Many of them contain similar themes as those of people put off a bus when their country of origin was found out, unwillingness to accept such people among 'normal' citizens, or overreactions on airports and other public places where once some Mideasterner is spotted, praying or acting 'suspiciously', their whereabouts and description are quickly given to the nearest responsible person and oppressing actions are usually taken.⁹¹

However, other problems soon followed as the government decided to implement stronger and stricter actions in order to provide national security, whereby unfortunately affecting many innocent people and citizens. And the government's short-sighted influence had tremendous impact. This came in the form of, for example, a wide combination of various restrictions, oppressions, denials of due processes, unprecedented interrogations and other effects based on discrimination such as profiling.⁹²

The fact that the Arab and Muslim community and their civil liberties were in a social decline was even more worsen by regular critics and activists whose opinions and engagements in matters of national protection and anti-Islamic view. Those people were coming up with such ideas that closely resembled such unfriendly recommendations and suggestions as that Muslims are not welcomed and should leave. These bold statements did not pay attention to the community member's point of view and their continuous effort to distinguish themselves from those responsible for the attacks. Yet many speeches from the

⁹⁰Cainkar, "No Longer Invisible: Arab and Muslim Exclusion after September 11," 22-29; John Ashcroft, *Washington Post*, November 15, 2001; Peggy Noonan, "Under the Circumstances, we must be wary of young Arab men," *Wall Street Journal*. October 19, 2001, <http://www.opinionjournal.com/columnists/pnoonan/?id=95001349> (accessed December 2, 2009).

⁹¹Rick Hampson, "Fear 'as bad as after 9/11'," *USA TODAY*, December 2, 2006, http://www.usatoday.com/news/nation/2006-12-12-arab-americans-cover_x.htm (accessed December 2, 2009).

⁹²Cainkar, "No Longer Invisible: Arab and Muslim Exclusion after September 11," 22-29.

ranks of Muslim community showed compassion and respect for those who died, either in the buildings or those involved, as well as expressing their distance from the events. Desperate voices, condemning the attacks along with the attackers who were part of the radical spectrum, tried to suggest that not all of Arabs and Muslims in the US are dangerous murderers and terrorists and that they do not follow the same radical patterns of Islam as those “over there” (meaning in Mideast). Besides this, they also attempted to explain what their belief is, what they truly are, and to draw public’s attention towards educated persons and scholars representing their community who are less likely to be subjects of disbelief.⁹³

Some of them, however, willingly chose to exclude themselves from the society in order to be safe from public hate. This effort was done partially by dropping their Mideast visage, taking less desired jobs or even by “changing their names from Muhammad to Mike and Farouq to Fred and by organizing their social relations around non-Arabs.”⁹⁴

However, despite the public fears and disrespectful opinions about the Muslims, an interesting fact happened in the first days and weeks after September 11. When a survey by Kathleen Moore aimed at the question whether or not Americans are willing to limit civil liberties of groups of people (asked first about the willingness to limit liberties of American people in general and then those of Muslims) was published, the outcome showed that people did not feel the need to restrict the rights or liberties of Muslims. Rather the opposite – people felt that such restrictions would be wrong and that such stereotypes should not be used. Another polls, on the other hand, showed a “widespread support for antiterrorism safeguards directed at Arab and Muslim Americans.”⁹⁵

The public view seemed to be quite confused. On one hand people were publicly harassing stereotyped Mideasterners and on the other people expressing their empathy in one survey while supporting profiling in another one. Quite often, based on the U.S. history, what Americans felt, thought or wanted was in strong contrast with their behavior or with their perception of freedom and liberty. And a government trying to protect some

⁹³Ibid.; Leonard, “American Muslims, before and after September 11, 2001,” 2293-2297+2299-2302.

⁹⁴Cainkar, “No Longer Invisible: Arab and Muslim Exclusion after September 11,” 22-29.

⁹⁵Christopher Edley, Jr., “The New American Dilemma: Racial Profiling Post-9/11,” in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone and Greg Anrig, Jr. (New York: PublicAffairs, 2003), 170-192; Kathleen Moore, “A Part of US or Apart from US?: Post-September 11 Attitudes toward Muslims and Civil Liberties,” *Middle East Report*, no. 224 (Autumn 2002): 32-35, <http://www.jstor.org/stable/1559421> (accessed November 11, 2009).

people, while suppressing and violating the rights and liberties of others, is definitely not making a good policy or proper behavior.

3.5.2 Racial Profiling

While having a strong support of Arab Americans in his presidential campaign in 2000, George W. Bush and his post-September administration turned a spiked back on them. Regarding the middle-eastern communities, the outcome of the Patriot Act and its provisions, along with other law changes aimed mostly at Arabs, ‘helped’ to set huge biases.⁹⁶

It is important to know that the measures and policies taken were to “target millions of innocent people on the basis of their religion, country of birth or ethnicity in response to the actions of tiny number.” Those measures consisted of profiling, airport checks but also fingerprinting and registering of people from certain Arab and Muslims countries. Add increased (and often with biased or irrelevant purpose) numbers of detentions, violations of due processes, security clearance, interviews with ‘persons’, visa checks and the high deportation of immigrant (steps largely focused on Arabs and Mideast population while government tried to deny any speculations about racial profiling), and local police departments’ participation in searches for possible suspects or Arab citizens thus “placing them in the position of monitoring persons they are supposed to protect.”⁹⁷

The racial profiling could be explained by many definitions, but to understand its principle, Christopher Edley’s article gives a fine example, citing legislation by Representative John Conyers, Jr., of Michigan. It presents, though originally much broadly, the racial profiling as “the practice of a law enforcement agent relying, *to any degree*, on race, ethnicity, or national origin in selecting which individuals to subject to routine investigatory activities.” It is an unfair treatment that undermines the targeted community’s position in society and also leads to discrimination as well as biased stereotyping.⁹⁸

Several objections, implemented by the government and the INS in 2002, were aimed at the immigrants coming into the U.S. and consisted of the duty that would “mostly affect those from Muslim and Middle Eastern countries.” As John Ashcroft announced, these measures would be aimed at “foreign visitors who may present an elevated national

⁹⁶Cainkar, “No Longer Invisible: Arab and Muslim Exclusion after September 11,” 22-29.

⁹⁷Ibid.

security risk. And it will provide a vital line of defense in the war against terrorism.” These visitors would have to register, to be fingerprinted and photographed in order to stay. Such a system was perceived as highly selective and quite criticized and a well pointed comment was stated by Carl Baron, an immigration attorney and researchers at the University of Texas who said: “Just on the basis of where a person is coming from the government is going to subject them to these measures. You’re going to see fewer Middle Easterners willing to come to the United States, and I wonder if that isn’t the real agenda.”⁹⁹

The core of the racial profiling agenda predominantly targeted the Arab-American communities. It assumed that the most dangerous suspects reside within Muslim and Arab-American communities. During the government’s investigations after 11 September, most of those people were therefore randomly picked, arrested, detained or interrogated based only on some minor charges or violations simply because they were the “primary suspects of terrorism.” Cases in which Middle Easterners were arrested due to their problems with visas or minor violations of immigration rules were on daily basis. Majority of these individuals had little to do with the actual terrorism or had not even a slight connection to it. Nevertheless, thousands of detained individuals were planned to be deported and others were usually suffering from prolonged detention, without charges, and usually facing severe maltreatment. Moreover, their cases were often “under a veil of secrecy surrounding the entire proceedings,” also with restricted access to attorneys and closed hearings.¹⁰⁰

The problem of detentions and proceedings expanded. One of the series of Attorney General John Ashcroft’s steps after September 11 was also aimed at “non-citizens, whether permanent residents, students, temporary workers or tourists.” The main objective of more than 1300 arrests was to investigate their possible connection to terrorist web, however almost none of them were proven guilty. The striking fact, again, was that they were

⁹⁸Edley, “The New American Dilemma: Racial Profiling Post-9/11,” 170-192.

⁹⁹Hassan, “Arabs, Race and the Post-September 11 National Security State,” 16-21; Carl Baron, *Chicago Tribune*, August 16, 2002, quoted in Cainkar, “No Longer Invisible: Arab and Muslim Exclusion after September 11,” 22-29; Cainkar, “No Longer Invisible: Arab and Muslim Exclusion after September 11,” 22-29.

¹⁰⁰Hassan, “Arabs, Race and the Post-September 11 National Security State,” 16-21; Mohammed Sohail, “How Muslims Have Been Hurt by Governmental Action Since 9/11,” in *It’s a Free Country: Personal Freedom in America after September 11*, ed. Danny Goldberg, Victor Goldberg and Robert Greenwald (New York City, NY: Nation Books, 2003), 305-312; Hatem, “Racial Profiling in the Pursuit of Arabs and Muslims in the U.S.,” 313-320.

usually held for longer time than it is proper without charges and that they mainly consisted of people from middle-eastern countries.¹⁰¹

Later in November, Ashcroft announced that more deep investigations will take place, approximately with about 5000 people, “mostly from the Middle East, who were in the United States on temporary visas.” This signaled high sensitivity among civil libertarians because it was very obvious example of racial profiling. However these investigations seemed to be ineffective because “little, if any, information was learned.”¹⁰²

Some investigations, again by Ashcroft’s order, were subjects to a wiretap between attorneys and their clients. This was done because the government was suspicious that the client may use his attorney as a medium to put forward information for dangerous organization. Such wiretappings were able to be allowed without the legal authority of a court and without the “probable cause” requirement which is stated by the Fourth Amendment and “is normally required in criminal investigations.”¹⁰³

Much of these actions came as results of the government’s consideration that such cases represent a security risk. By doing so, however, the civil liberties, namely the right for a due process, ‘innocence until proven guilty’ (which in Muslim cases seemed to rather transform into ‘guilty until proven innocent’) fair procedures or proper treatment, of this group of people were seriously put into jeopardy.¹⁰⁴

¹⁰¹Ratner, “Is This a Dark Age for Fundamental Legal Protection?” 199-220.

¹⁰²Ibid.

¹⁰³Ibid., 215.

¹⁰⁴Sohail, “How Muslims Have Been Hurt by Governmental Action Since 9/11,” 305-312; Baker, “National Security versus Civil Liberties,” 547-567.

4 CIVIL LIBERTIES AND PERSONAL RIGHTS IN CONTEMPORARY LIFE

The consequences of the governmental policies have been accompanying the U.S. public for almost a decade now. Some things have changed while some remain the same. The important thing is that the influence of the changes after 9/11 that had an impact on civil liberties is still perfectly visible. This chapter deals with contemporary situation, both governmental and public alike. It covers the most common issues concerning the everyday lives of Americans along with those traveling to the U.S. and who are today subjects to the U.S. newly established measures. Finally, it suggests future development on the field of civil liberties.

4.1 New Administration's Approach

In September 2009, as several provisions of the U.S.A. Patriot Act were closing to their sunset date, Congress was preparing to extend them. During those times, ranks of civil libertarians called for more responsible approach in extending the controversial law's parts that expanded the powers of the FBI in various investigative procedures connected to counterterrorism. Civil liberties advocates and some lawmakers had been long requesting a careful revision of the Act since its provision had had an impact on the rights and liberties of ordinary, law-abiding, Americans. *New York Times'* article gives account of Democrat Suzanne E. Spaulding who stated that the new powers of authorities after 11 September had ignored "important safeguards," and that there was a "great likelihood at a minimum of the government mistakenly intruding into the privacy of innocent Americans, and at worst having a greater capability of abusing these authorities."¹⁰⁵

Republican Kenneth L. Wainsetin, on the other hand, was concerned in his statement that the restrictions of the law would go too far thus crippling the authorities' crucial abilities to combat threat. He also pointed at the Congress' "oversight of national security tools" that should control and prevent any potentially dangerous anomalies in laws.

Generally, most of the advocates of the Patriot Act did not want any restrictions to the

¹⁰⁵Charlie Savage, "Battle Looms Over the Patriot Act," *New York Times*, September 19, 2009, http://www.nytimes.com/2009/09/20/us/politics/20patriot.html?_r=1 (accessed April 15, 2010).

law that would “undermine the effectiveness of these important authorities [i.e. those dealing with surveillances and investigations].”¹⁰⁶

The usage of the provisions has been a usual topic of libertarian’s discussions practically all those years since the act has been implemented. The FBI director Robert S. Mueller informed the Senate Judiciary Committee that a particular Patriot Act provision’s powers, i.e. seizing of “business’s customer records, a diary or a computer” that are relevant in terrorism investigations, were used over 250 times between years 2005 and 2009. The “lone wolf” provision, he said, has never been used, yet they wanted the provision to be extended.¹⁰⁷

Many of the senators wanted to embrace the opportunity to fix the gaps in the law, however they faced strong opposition from conservatives. One of them, Republican Christopher S. Bond, expressed his objections and said: “Our terror fighters need the tools and legal authorities to track terror suspects quickly, before they strike. Unfortunately, [the attempts to weaken the law] would render our critical warning system useless by unraveling the bipartisan FISA provisions Congress passed last year [2008].”¹⁰⁸

The renewal of the Patriot Act took place in 2010. At the end of the February, President Obama signed a one-year extension of some provisions of the Patriot Act. He signed the extension after the Senate and the House’s passed the decisions that three of the sections will continue to be valid for another year.

These sections

authorize court-approved roving wiretaps that permit surveillance on multiple phones; allow court-approved seizure of records and property in anti-terrorism operations; permit surveillance against a so-called lone wolf, a non-U.S. citizen engaged in terrorism who may not be part of a recognized terrorist group.¹⁰⁹

Sadly, “restrictions and greater scrutiny on the government’s authority to spy on Americans and seize their records” were not approved and defended. This may only imply

¹⁰⁶Savage, “Battle Looms Over the Patriot Act,” September 19, 2009.

¹⁰⁷Ibid.

¹⁰⁸Ibid.

¹⁰⁹Mindspark Interactive Network, Inc., “Obama signs one-year extension of Patriot Act,” MyWay, <http://apnews.myway.com/article/20100228/D9E4T02G0.html> (accessed March 1, 2010).

a fact that even today's administration relies on the controversial act's provisions and embraces them.¹¹⁰

4.2 Airports under Pressure

Well-crafted as they may be, the security measures have sometimes proven to lack necessary awareness or have not succeeded in prevention. One such case is definitely a failed plane bombing in Detroit on Christmas Day in 2009. On this day, a Nigerian man, flying from Yemen, attempted to blow up an airplane, using an explosive hidden in his underwear. Although he was on a very broad list of over 500,000 suspects at the time of the attempt, he was never brought into closer and tighter intelligence investigation. One administration official described the problem, saying that: "there was insufficient information available on the subject at that time to include him in the TSDB [Terrorist Screening Data Base] or its 'no fly' or 'selectee' lists." Thus it leaves a question whether or not the current measures are even effective and lead to more secure environment while some of the liberties have been diminishing.¹¹¹

Not only did this perilous event show "exposed gaps in the government's ability to identify potential threats," it also may have proven the inability of preventing *all* terrorist attempts however strict and sensitive security systems may be used. Terrorists seem to find a very cunning way of carrying out their plans with the use of dangerous tools hidden in parts of the body where most measures cannot find them.¹¹²

This terrorist attempt to destroy a plane led, in short, to twofold examples of new influential approaches made at airports that touched the civil liberties field.

4.2.1 Improved Body Scanners

Early calls for the implementation of new "whole-body imaging" scanners capable of detecting "objects beneath a person's clothes" were made by many government officials,

¹¹⁰Mindspark Interactive Network, Inc., "Obama signs one-year extension of Patriot Act," (accessed March 1, 2010).

¹¹¹Dan Eggen, Karen DeYoung, and Spencer S. Hsu, "Plane suspect was listed in terror database after father alerted U.S. official," *Washington Post*, December 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/25/AR2009122501355.html> (accessed April 22, 2010).

¹¹²Spencer S. Hsu, "Cautious praise for travel screening change," *Washington Post*, April 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/02/AR2010040204600.html> (accessed May 6, 2010); Dan Eggen, Karen DeYoung, and Spencer S. Hsu, "Plane suspect was listed in terror database after father alerted U.S. official," *Washington Post*, December 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/25/AR2009122501355.html> (accessed April 22, 2010).

among them former homeland security secretary Michael Chertoff. Initially, these calls faced a resistance from Congress and privacy advocates due to obvious concerns that these scanners would too much intrude into people's privacies. Later on, however, they came to fruition through the development and introduction of such scanners.¹¹³

While others soon became implemented at other airports, the first full-body scanner was introduced at the O'Hare International Airport in Chicago. This scanner virtually strips a person from their clothes. It, on one hand, provides more security when officials are able to detect any hidden dangerous tools or explosives thus preventing terrorists to endanger the flight and passengers. Civil libertarians expressed their complaints about the way it intrudes on person's privacy. Airport authorities respected these opinions by assuring that they have "taken such concerns into account," and other official tried to calm the public indignation saying that: "We want to make sure the person with the passenger doesn't see the image and the person who sees the image doesn't see the passenger." The passengers may refuse to go through the scanner, but would then be subjects to "a more intense but traditional pat down," the article says.¹¹⁴

This particular example is quite striking and alarming. The technological advancement is convenient and if used correctly may successfully help to combat potential threat in other areas. However, it significantly intrudes on lives and privacy as no other instruments can. The exposure of the entire human body might be correctly condemned as a step in the wrong direction. While the necessity to discover and detect dangerous devices seems to be relevantly advocated, there could be other, far less intrusive, perspectives and procedures that could assure these dangerous devices are found. Hopefully, such privacy-openers will not be implemented on a large scale and the right to have a dignity is not going to suffer unexpected seizure.

¹¹³Dan Eggen, Karen DeYoung, and Spencer S. Hsu, "Plane suspect was listed in terror database after father alerted U.S. official," *Washington Post*, December 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/25/AR2009122501355.html> (accessed April 22, 2010).

¹¹⁴Michael Tarm, "Full-body scanner debuts at O'Hare airport," Yahoo! <http://finance.yahoo.com/news/Fullbody-scanner-debuts-at-apf-436251877.html?x=0&.v=1> (accessed April 15, 2010).

4.2.2 Countries of High Interest

At first, the government came up with a policy that “singled out U.S.-bound passengers from or traveling through fourteen countries for secondary searches, including pat-downs and added baggage checks.” These countries represent so called “state sponsors of terrorism” - Cuba, Syria, Iran and Sudan – and other countries of special interest to the government which were Afghanistan, Algeria, Lebanon, Libya, Iraq, Nigeria, Pakistan, Saudi Arabia, Somalia and Yemen. Passengers traveling from these countries fall under special treatment. This meant, in general, “full body pat-down and physical inspection of property.”¹¹⁵

Early in 2010, these activities raised voices of concern again from many civil liberties groups and other advocates of privacy. They saw this hastily developed policy that is based on nationality to be more or less an act of profiling and largely discriminatory. Later, however, these groups praised the Obama administration for a change in the methods and patterns for choosing the right people.

They, to some extent, succeeded when Homeland Security official announced that further decisions on who to choose for screening and special inspections will be “based on matches with intelligence, including physical descriptions or travel patterns,” thus no longer based predominantly on nationality as a main factor but on greater and more objective and valid evidence instead.¹¹⁶

However, there was still a cloud of uncertainty over which specific organization will be responsible for the procedures and over the much more sensitive issue of the usage of personal information that is being acquired during such intelligence activities. It also made some people worried about the transparency of undergoing procedures. A conclusion in a *Washington Post* article in April, 2010 may calm some of these concerns by giving an example of a Congressional initiative to stop a possible abuse of personal data, saying that:

¹¹⁵S. Hsu, “Cautious praise for travel screening change,” *Washington Post*, April 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/02/AR2010040204600.html> (accessed May 6, 2010); Carol D. Leonnig, “Stepped-up screening targets fliers from 'terror-prone' lands,” *Washington Post*, January 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/03/AR2010010301784.html?nav=emailpage> (accessed May 6, 2010).

¹¹⁶S. Hsu, “Cautious praise for travel screening change,” *Washington Post*, April 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/02/AR2010040204600.html> (accessed May 6, 2010).

Based on privacy and civil liberties concerns, Congress has closely tracked two initiatives, TSA's Secure Flight screening program and CBP's Automated Targeting System. Congress has limited controversial practices such as engaging in predictive "data mining" -- or sifting through databases to search for potential security threats.¹¹⁷

Although these affirmations may satisfy those who guard civil liberties, common people airport officials might still be looking down on travelers from particular countries and deprive them, if not of civil liberties than at least of dignity or a sense of equality.

4.3 Digital Age and the Respect for Personal Data

"This is a critical question for privacy in the 21st century. If the courts do side with the government, that means that everywhere we go, in the real world and online, will be an open book to the government unprotected by the Fourth Amendment."

--Kevin Bankston, attorney, Electronic Frontier Foundation

In this globalized world, the use of the Internet has extended widely. But according to the government, so has the ability of potential suspects to use the Internet as a device of secret plotting and dangerous communication. Hence the government has tried to collect some sensitive and possibly valid data and information from this network for the purposes of preventive operations or further investigation. Yet there should be some rules met in order to collect these data and records from particular providers. Such rules are represented by the Fourth Amendment.¹¹⁸

A case where the Department of Justice went far off its boundaries happened in let 2009 and had consequences in April of 2010. On December 3, 2009, Yahoo provider was requested for large amount of information and personal data in e-mails and messages by Justice Department. Upon this request, without Justice Department's search warrant and 'probable clause', Yahoo agreed to provide some of the data "but refused to turn over e-mail that had been previously viewed, accessed, or downloaded and was less than 181 days

¹¹⁷S. Hsu, "Cautious praise for travel screening change," *Washington Post*, April 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/02/AR2010040204600.html> (accessed May 6, 2010).

¹¹⁸U.S. Constitution, amend. 4.

old.” The Justice Department stepped in and filed a brief where it stated that no warrant is needed for such data.¹¹⁹

An alliance of some companies, such as Google, or the Electronic Frontier Foundation, stood up for Yahoo and defended. They firmly advocated the privacy and the data of those users whose information would fall under the broad request saying that even such data “enjoy a reasonable expectation of privacy that is protected by the U.S. Constitution,” and, challenging the judge, that the Department is bound to the Fourth Amendment and thus “[should first] obtain a search warrant based on probable cause before searching and seizing e-mails without prior notice to the account holder.” They were largely dissatisfied with the approach which obviously tried to overlook the Fourth Amendment when trying to demand private data without meeting proper rules. Yahoo stated that its “users have a reasonable expectation of privacy in their e-mails” and also pointed at the fact that numbers of documents that were demanded were irrelevant to the Justice Department’s investigation and that they also “could include documents protected by the attorney-client privilege.” The Justice Department in the end, under the circumstances, abandoned its request apparently also to avoid going public with this case since it was likely that the Department would lose.¹²⁰

Presented Department of Justice’s attempt was another example of the slight possibility of abuse of the very wide range of powers it has at its disposal through the flawed legislations which could have potentially touched the privacy of large amount of people. Additionally, this case also showed the contrast with prior Obama’s effort “to strengthen privacy protections for the digital age,” thereby leaving some concerns about the civil liberties and privacy under contemporary administration.¹²¹

With respect to the civil liberties of ordinary Americans who are not criminals or have not been a part of national security threat, a constitutional challenge was filed in 2008, as the *New York Times* wrote, “on behalf of human rights, labor, legal, and news media

¹¹⁹Declan McCullagh, “Google backs Yahoo in privacy fight with DOJ,” CBS Interactive, April 13, 2010, http://news.cnet.com/8301-13578_3-20002423-38.html (April 22, 2010).

¹²⁰Declan McCullagh, “Google backs Yahoo in privacy fight with DOJ,” CBS Interactive, April 13, 2010, http://news.cnet.com/8301-13578_3-20002423-38.html (accessed May 6, 2010); Declan McCullagh, “DOJ abandons warrantless attempt to read Yahoo email,” CBS Interactive, April 16, 2010 http://news.cnet.com/8301-13578_3-20002722-38.html?tag=mncol;txt (accessed May 6, 2010).

¹²¹Declan McCullagh, “DOJ abandons warrantless attempt to read Yahoo email,” CBS Interactive, April 16, 2010, http://news.cnet.com/8301-13578_3-20002722-38.html?tag=mncol;txt (accessed May 6, 2010).

organizations whose work requires sensitive telephone and e-mail communication with people abroad.” Their main concern was the easily acquired ability of security agencies to ‘spy’ on ordinary Americans without a warrant (through FISA Amendment Act in 2008). They also highlighted the “judiciary’s essential role in enforcing limits on the government’s power and acting as a check against abusive conduct.” However, they failed since the Obama’s administration and federal court trial judge dismissed the case in 2009, stating that the groups did not have required evidence that they were actually subjects to spying. That, of course, would be quite difficult to prove, as the *New York Times* also hints saying: “any attempt to prove spying would likely be met by a flimsy claim of state secrecy.”¹²²

Despite the Obama’s presidential candidate promises that he would “reverse Mr. Bush’s many abuses of power,” his administration seems to be quite behind keeping it in matters of secret wiretapping. Luckily, there have been some efforts from judges. In 2010, an article of the *New York Times* showed an attempt of San Francisco Judge Vaugh Walker’s dissent with the administration’s advocacy of warrantless wiretaps that went around the “secrecy argument.” Judge Walker announced that “when the government failed to get a warrant to wiretap, it broke the law.” The ruling revealed another Bush’s and consequently even Obama’s administration wrongdoing when they both tried to stop a lawsuit coming from Al Haramain Islamic charity in Oregon. The complicated situation is now presented by citation of *New York Times*:

The group was subjected to warrantless surveillance and then declared a sponsor of terrorism in 2004. When the lawsuit was filed in 2006, the government argued that the charity and two lawyers who worked with it could not sue unless they knew the charity was being wiretapped. They could not know that because the wiretapping was secret. If they somehow found out, they could not prove the wiretapping was warrantless, because that was also a secret. The plaintiffs first tried to build their case on a classified document they were given by mistake. When that document was suppressed, they showed from public records that they were subject to illegal surveillance. The government said that those should be suppressed, too. The lawyers argued that the only basis for a suit would be if the

¹²²The New York Times Company, “Spying, Civil Liberties and the Courts,” *New York Times*, April 15, 2010, <http://www.nytimes.com/2010/04/16/opinion/16fri2.html> (accessed May 2, 2010).

government admitted it had no warrant. And it would not admit that, because that was a secret.¹²³

Such federal actions serve as evidence of the government's attempts to put its doing under secrecy and it seriously undermines the government's authority in exercising powers.

4.4 Look to the Future

"The question is whether American's commitment to freedom will prove as resilient in an endless conflict with terrorism."

-Anthony Lewis in 'War on Our Freedoms'

The future possibilities and other implementations of intrusive means or covert searches in people's lives and privacies pose a significant concern for many Americans as the development of more and more sophisticated methods unravels. Law enforcements comply with their duties to carry out necessary security procedures, however, by more and more identity exposing means. The government still tries to follow thin threads of valuable information among public and dig in their privacies through the Patriot Act's or other law's provisions. Perhaps the people are still, bit by bit, stripped not only of their clothes at the airport, but of their liberties, pure private lives and in some cases of their dignity.

Hopefully, safer and freer country will be ensured simultaneously. With some more efforts, the administration and law enforcements may find some other, perhaps even more effective, way of determining suspects, in precaution, and seize the privacy and civil liberties intrusion techniques. But, so far, as the Obama's administration seems to follow the same track as the previous one, more controversial cases, court challenges and temperament discussions are likely to take place.

Considering also the fact that the terrorists were aimed at the core principles and values of American society, liberty and privacy might have been the targets of their efforts as well. Thereby it should be the duty of the nation to embrace free and responsible

¹²³The New York Times Company, "We Can't Tell You," *New York Times*, April 3, 2010, <http://www.nytimes.com/2010/04/04/opinion/04sun1.html?scp=2&sq=&st=nyt> (accessed April 20, 2010).

approaches to ensure that the “enemies of freedom” who “committed an act of war against our [the US] country” were not successful.¹²⁴

¹²⁴Cable News Network, “Transcript of President Bush's address,” CNN.com
<http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/> (accessed May 6, 2010).

CONCLUSION

Civil liberties and national security are indeed sensitive topics to deal with. They both require careful approach in order to sustain a proper balance. However, in times of emergency or under imminent threat, this balance seems to fade away and to be difficult to keep.

While the justifications for the partial impairing of particular liberties to avoid further dangers may be to some extent valid, it is, on the other hand, too risky and short-sighted to swiftly implement new policies to deal with such dangers. The vindications are too often defended with stubbornness even when there are visible flaws in their advocacy.

September 11th brought a relatively newborn danger of terrorist attacks under a magnifying glass. Many innocent people died that day and many more were directly influenced by the attacks for days to come and some perhaps for the rest of their lives. Either by the loss of their relatives, stirring fears or consequent backlash from government's responses to the events, the lives of many were suddenly not the same. And the world has changed. Enemies and battlefields have changed as well as the usual responses to them.

Much was at stake after 9/11 in America. In general, human lives as well as the democratic ideology of a free country, which the U.S.A. was deemed to be, became a much more fragile commodity. And the values of free people and their nation underwent dramatic change in the domestic politic sphere. Newly implemented laws, modifications of other laws, and certain provisions made a line between security and liberty. Although none of these two is clearly superior, neither of them could function without the other in a stable, freedom-dependant society. Security requires free and aware public eyes. Liberty needs security to ensure it is left intact and away from harm's way.

The voices from both sides of the barricade were right. The U.S.A. as well as the rest of the world entered a new century under shroud of a new fear and a new form of 'war'. It tried to create new, perhaps more effective ways and strategies to protect and to preserve itself. Nonetheless, it is also true that it should not have led to the overlooking of basic and common rights and liberties, let alone well-crafted and over two centuries protected documents which guarantee those freedoms.

Government, its branches, officials and law enforcement groups definitely tried to do their best to protect their people and the nation itself. They, however, failed to show restraints in exercising their powers and their subtle or large-scale abridgements of civil

liberties were and still are alarming. The abridgements of civil liberties, intrusions, often secret, into lives of many people are frightful evidence that something went terribly wrong on the government's executive side. Rights of all people should be protected, not trampled or overlooked. This faulty experience of the last decade may perhaps be a good example for future decision makers as well as for the people.

After all, it is both important thing and a wise thought to keep everything in moderation and balance as much as possible. Otherwise, the results may prove the historical notion of government's misjudgments that while making a secure nation, it is also simultaneously making it less free. Moreover, it might have proved more effective and safer to let go of stereotypes, ideological differences, biased fears or emotive responses.

What might be even more important is the fact that this is not only a problem of this yet short era. The consequences, as seen at many places throughout the nation now, indicate a new attempt to provide and oversee security and measures to conduct it while leaving personal freedoms and privacies quite exposed. To avoid or ignore the risks of such exposures in favor of people's security is not an option. It is not a possibility in a long term perspective since terrorists unfortunately find a way to bypass any measures and to adapt quickly. Hence, whatever measures are embraced, they will not suffice forever and the need for more effective and less liberty blunting ones must be the government's first priority.

Ultimately, the calming fact should not be supported by statements that *once* a sufficient and complex security is maintained and the threat would be more or less eradicated, *then* the liberty would be retaken. It should rather be a careful and honest and continual affirmation that civil liberties are protected *while* security is being maintained along with everything that American society holds so dear. After all, the terrorists were aimed not only at strategic buildings but also at U.S. essential ideological principles. And as long as liberty is among those American most fundamental values, the people deserve to remain brave, secure and free.

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