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Anti-Terrorism Legislation: A Constitutional Problem

Justin Jory

Has side-stepping the Constitution made our nation more secure? The new anti-terrorism legislation has done little to ensure national security and much to compromise our nation's standards.

After the Oklahoma City bombing in 1995 and attacks of 11 September 2001 the necessity of dealing with the issue of terrorism dramatically shifted in the national agenda. Prior to these events, the war on terrorism had taken a back seat to domestic issues such as health care, education, and the economy. Oklahoma City magnified the importance of fighting terrorism, but September 11 solidified the war on terrorism as item number one on the agenda. Both Oklahoma City and September 11 encouraged new legislation to help federal agencies fight terrorism. The knee-jerk reaction of the legislative and executive branches on both occasions was to give federal agencies more power and streamline law enforcement and intelligence procedures. After the anti-terrorism legislation was passed, many difficult cases surfaced, questioning the constitutionality of federal agencies' actions authorized under the new legislation. These cases serve as glaring examples of the inconsistency between the recent anti-terrorism legislation and the Constitution. The inconsistency is, in our desire to find justice and security we may be sacrificing our own constitutional rights. Has sidestepping the Constitution made our nation more secure? The new anti-terrorism legislation has done little to ensure national security.

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security and much to compromise our nation's standards. This paper will identify the issues of this growing constitutional problem and recommend a possible solution by recounting the historical events that preceded the anti-terrorism legislation; summarizing the new legislation enacted and the changes it produced in American law; referring to cases that exemplify the inconsistency between anti-terrorism legislation and the Constitution; and proposing that the solution to fighting terrorism is not found by compromising our nation's standards, but by improving our nation's efforts.

The History of Anti-Terrorism Legislation

Over the last forty years, the United States has become a prime target for terrorism and numerous terrorist groups have attacked the United States. Among the terrorist attacks, three motivated a legislative response by the United States. In 1983, 243 U.S. servicemen were killed in the bombing of Marine barracks in Beirut. After the attack, Congress passed a "long arm" statute that makes it a crime to threaten, detain, seize, injure, or kill an American citizen abroad. This was the first time that a terrorist attack inspired legislation, but it would not be the last.

Before the 1990s, terrorist attacks generally occurred overseas, where the threat of terror seemed distant to Americans. On 19 April 1995 when a truck full of explosives destroyed the Oklahoma City Federal Building, the threat of terror no longer seemed distant or unthreatening. After the Oklahoma City bombing, American citizens and politicians were moved to combat the threat of terrorism through drastic legislation. Immediately following this attack, President Clinton signed a controversial statute called the "Anti-Terrorism and Effective Death Penalty Act of 1996" (AEDPA).¹ The opening line of AEDPA states, "An Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for

other purposes." This allows the government to freeze the assets of any organization that the secretary of state designates as terrorist. "This law bars giving almost anything—money, lodging, training, and ‘personnel’—to anybody designated as terrorist by the U.S. secretary of state." This law also restricts the right for prisoners’ opportunities for federal review of their convictions or conditions of their detention. Additionally, this law rigidly restricts federal habeas corpus petitions. Furthermore, Clinton signed the “Illegal Immigration Reform and Immigrant Responsibility Act of 1996” (IIRIRA) which “provided for automatic deportation for longtime residents who had been convicted of crimes, even if the conviction was long ago.”

Five years after AEDPA and IIRIRA were passed, Americans would see the threat of terrorism become unimaginably magnified. On 11 September 2001, when every American sat glued to CNN, watching planes crash into the World Trade Towers and the Pentagon, fear and insecurity flooded every heart. Over 3,000 dead and thousands more injured—this was doubtless the most terrible terrorist attack of modern history. While issues such as the economy, health care, and education had previously occupied the front pages, suddenly there was a dramatic shift in agenda. The president was no longer promising jobs and education, but national security and justice. A change was necessary. It was tragically obvious that the current system was incapable of preventing the threat that lay hidden within our own borders. A new Office of Homeland Security was created, more men were employed to hunt down terrorist networks, and new legislation was enacted. On 26 October 2001 the USA Patriot Act of 2001 was overwhelmingly passed by Congress and signed into law by President George W. Bush.

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2 Public Law, 104–32.
3 Seth Rosenfeld, “Prosecutors pull out all stops to indict the 6; Anti-terrorism laws, Civil war-era statute used,” San Francisco Chronicle, 5 October 2002, sec. A, 13.
The USA Patriot Act is the latest step in a continuing legislative trend to provide federal law enforcement agencies with new tools to fight terrorism. The opening line of the USA Patriot Act reads, "An Act to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." This law was seen as an expansion of AEDPA by granting federal authorities expanded surveillance and intelligence powers:

The Act dramatically expands the authority of federal agencies to conduct wiretapping and other electronic surveillance while simultaneously curtailing judicial oversight. Additionally, the Act augments and increases the authority of the Attorney General to detain and deport non-citizens who are certified as a danger to national security or who belong to certified terrorist organizations, with only minimal provision for judicial review.

These newly passed laws are an expression of the government's commitment to providing national security as its top priority. "The government just can't afford to let crime on the scale [committed by] Al Qaeda to ever happen again."

**The Controversy**

The drive to prevent future terror attacks inspired legislators to pass the new anti-terrorism legislation. Yet, most legislators would concede that new legislation is almost always accompanied by unforeseeable consequences. By granting new powers and freedoms to federal law enforcement agencies, the legislation has severely restricted the civil liberties of the people and the authority of the judicial branch.

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6 *Public Law*, 107–56.
The legislation finds itself challenging the time-honored principles of the Fourth and Fifth Amendments to the Constitution, and habeas jurisdiction of the judicial branch. Several cases have been brought before the courts that reveal the legal controversy between anti-terrorism legislation and the procedural safeguards the Constitution ensures. The Fourth Amendment protects people by requiring that the government receive authorization from the appropriate judiciary before it can perform a search and seizure. The USA Patriot Act allows "enhanced surveillance procedures," and there is a provision allowing considerable delay in the notice of the execution of a warrant for search and seizure. This provision has resulted in judicially unauthorized raids on the homes of Muslim U.S. citizens, where government agents have broken through doors, claiming to have knocked, and conducted searches without producing warrants.10

The Fifth Amendment states, "No person shall be . . . deprived of life, liberty, or property without due process of law."11 There is a provision in the Immigration and Nationality Act that countenances the use of confidential information. Subchapter V of the INA establishes special procedures that govern the treatment of purported "alien terrorists."12 According to that subchapter, the INS is authorized to present to immigration judges "any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information."13 In the case of Hany Mahmoud Kiareldeen v. Reno and Immigration and Naturalization Service, the District Court ruled that INS use of secretive evidence violated the petitioner’s Fifth

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9 USA Patriot Act, sec. 201-25; provision 213.
10 Scott Alexander, "Inalienable Rights: Muslims in the U.S. since September 11th," Journal of Islamic Law and Culture 7 (2002): 116-17. In Alexander’s article, he notes that such a search happened to the leaders of the International Institute for Islamic Thought (IIIT) and their families in Herndon, Virginia, in March of 2002.
11 U.S. Constitution, amend. 5.
12 8 U.S.C. 1531 et seq.
Amendment rights, even though they were authorized under federal statute. On 15 November, 2000, another petition was granted by a district court where an alleged terrorist organization was designated as terrorist in compliance with the AEDPA statute; yet, the Court ruled that the designation violated the petitioners' Fifth Amendment rights of due process.

Another constitutional issue raised by the anti-terrorism legislation is that of habeas jurisdiction of federal courts. The privilege of habeas corpus protects against wrongful incarceration by ensuring that the terms of one's detention will be subject to judicial review. The Suspension Clause of the Constitution ensures that habeas corpus will not be suspended except in case of rebellion or invasion. The anti-terrorism statutes of AEDPA and IIRIRA contain provisions that state, "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." In Kiareldeen v. Reno, the petitioners cite Sandoval v. Reno, a case in which the Court decided that these statutes did not expressly refer to the court's jurisdiction; therefore, they concluded that the court's jurisdiction was preserved. Presiding Judge William Walls later noted:

14 In his opinion, Judge Walls explained, "There, the government's reliance on secret evidence violates the due process protections that the Constitution directs must be extended to all persons within the United States, citizens and resident aliens alike. The INS procedures patently failed the Mathews test of constitutional sufficiency. And the court finds this failure to be sufficient basis to grant the petitioner's writ of habeas corpus and direct his release from custody" (William Walls, United States District Judge, Hany Mahmoud Kiareldeen v. Janet Reno and Immigration and Naturalization Service).

15 Sentelle, Circuit Judge: "Two organizations, the National Council of Resistance of Iran and the People's Mojahedin of Iran, petition for review of the Secretary's designation of the two as constituting a 'foreign terrorist organization' under the Anti-Terrorism and Effective Death Penalty Act of 1996, raising both statutory and constitutional arguments. While we determine that the designation was in compliance with the statute, we further determine that the designation does violate the due process rights of the petitioners under the Fifth Amendment, and we therefore remand the case for further proceedings consistent with this opinion" (National Council of Resistance of Iran v. Department of State).

16 8 U.S.C. 1252(g).
Its decision avoided the serious constitutional problem which would surface if it were to conclude that IIRIRA revoked habeas jurisdiction as well as review under the Administrative Procedures Act: The Court observed that the Suspension Clause of the Constitution would be violated if statutory provisions such as IIRIRA were construed to preclude all review of executive detention.  

The court is subtly responding to the anti-terrorism legislation by saying that if these statutes truly mean to revoke habeas jurisdiction, then we have a serious constitutional problem. Many would argue that such individuals are aliens, not citizens; thus not entitled to constitutional rights. In response to this argument, Judge Walls writes, “This argument ignores the axiomatic, constitutional premise that aliens, once legally admitted into the United States, are entitled to the shelter of the Constitution.” The Constitution clearly protects aliens who are admitted legally, and therefore, if legislators did mean to revoke habeas jurisdiction of federal courts (as the statute states), then we do have a serious constitutional problem.

The Solution

A recent article in The National Law Journal addresses the issue of the constitutionality and effectiveness of the recent anti-terrorism legislation: “The danger that lies ahead for both security and liberty is that our leaders and police agencies will propose, our legislatures will adopt and our courts will sanction severe limitations on civil liberties with no appreciable increase in security.” As demonstrated, anti-terrorism legislation has severely infringed upon the promised civil liberties of the Constitution, but the article raises another interesting question: even if we, as a people, are willing to sacrifice our civil liberties, will the legislation actually prevent terrorism? The proposed solution offered by federal law enforcement

Walls, Kiaraleeën v. Reno and Immigration and Naturalization Service, 7.

Ibid., 21.

agencies since 1996 has been, "bend the rules and we'll prevent terrorism." Clearly, September 11 was a demonstration of how this approach has failed. Admittedly, we do not know what planned terrorist attacks may have been prevented, but we do know that the most terrible attack in history was not. After the confessed intelligence failure, officials continue to propose the same solution, "bend the rules some more and we'll prevent terrorism."20 With increased powers, our federal law enforcement agencies run the risk of becoming a coercive and oppressive force that answers to no one. It is uncertain whether these measures will provide national security or create more enemies. A recent article in the Journal of Islamic Law and Culture states:

The American body politic needs to awaken to the fact that if any segment of our society can help us bridge our severe gaps of credibility, understanding, and cooperation with the over 1 billion Muslims living in the world today, it is the U.S. Muslim community, well over 5 million strong and a microcosm of that vast ethnic and cultural diversity that comprises the Dar al-Islam. If, however, we let fear govern the treatment of the Muslim community in the U.S., we will compound the tragedy of September 11th with yet another.21

We do not need to make American Muslims our enemies; we need to maintain them as our allies. We are not more secure by refusing "potential terrorists" their rights to due process, or restricting habeas jurisdiction. We are more secure as a nation by adhering to the time-tested rights promised by our Constitution. As Judge Walls writes in his opinion on Kiarldeen v. Reno, "the government's claimed interest [the unarguably weighty one of national security] in detaining the petitioner cannot be said to outweigh the petitioner's interest in returning to freedom."22

20 Ibid.
21 Alexander, 119.
22 Walls, 36–37.
We do not need to compromise our constitutional standards in order to ensure national security. Many new measures are proving effective safeguards in preventing terrorist acts, such as increased coordination between federal agencies and stricter airport security, but giving federal agencies intelligence and enforcement powers without being subject to judicial review is a dangerous experiment. We do not need to change the rules of the game; we need to improve the way we play. The anti-terrorism legislation needs to be amended and aligned with our constitutional standards. We must ensure all people, citizens and aliens alike, due process of law and the right to judicial review of the terms of one’s detention. By ensuring these civil liberties and continuing to increase and improve our intelligence and security efforts we will ensure the national security our country desires. If we deny U.S. Muslims their constitutional rights, alienating them with unlawful searches, surveillance, and detention, we run the risk of compounding the terrorist problem. The solution to our problem is to increase our intelligence efforts and security methods while protecting the civil liberties of Americans Muslims so they can become our greatest ally in fighting the war on terrorism.