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THE SPIRIT OF THE PATRIOT ACT:
A HERMENEUTIC ANALYSIS OF PATRIOTISM AS ARGUMENT
DURING HOUSE JUDICIARY COMMITTEE DEBATE

A DISSERTATION

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By

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A DISSERTATION APPROVED FOR THE
DEPARTMENT OF COMMUNICATION

BY

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Dr. Todd Sandel

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Dr. David Mair

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say in this very limited space, is that they made achieving higher education as easy at is possibly can be. They raised me in an environment in which education is highly valued and attainable. They support me through thick and thin—in whatever ways they can. Their love is unconditional. The same could be said about my brother, sister-in-law, and niece: Todd, Amanda, and Gracie Doty—as well as my extended family. Some people have to overcome overwhelming odds to achieve their educational goals-- I am not one of those people. I can not imagine being in this position without the support of my parents and the rest of my family.

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Part I: Getting Started

Abstract

The purpose of this project is to explore the symbolic meaning of "patriot" by bracketing the way in which it is negotiated during the policymaking process utilized to authorize, oversight, and reauthorize the Patriot Act. Narrowing the purpose a bit further, I should specify that what I am looking for is the way in which participants in the deliberative process describe their own credibility as patriots, the credibility of other participants in the debate, the credibility of people outside the debate who have a bearing on the way in which the war on terror is engaged, and the way in which this discussion about patriotism speaks to the credibility of the deliberative process itself. In other words, to use Aristotelian terms, I am viewing the debate over patriotism as primarily a matter of ethos—as distinguished from logos (e.g. legal extrapolation of the law) and pathos (e.g. appeals to fear, anger, or sadness). This is not to say that appeals to ethos, logos and pathos can necessarily be separate from each other. In fact, it is nearly impossible to discuss the presence of ethos without also considering logos and pathos, but from my vantage point, I hone descriptive efforts toward the way in which all the various appeals converge to frame the meaning of what it means to be credible as a "patriot."

Chapter 1

Introduction

During the very early stages of this project, after deciding that the Patriot Act would be the focus but not knowing how that focus would take shape, I was talking to a lawyer friend of mine about the idea and momentarily became a bit discouraged. His reaction to learning about the initial brainstorming process was, "The Patriot Act? Isn't that mostly just symbolic?" Admittedly, I became a bit defensive and responded by saying, "well no…section 213 does x; section 215 does y…and the Patriot Act allows the Justice Department to wage the war on terror from a preventative standpoint rather than the traditional perspective of prosecuting a perpetrator after a crime has been committed." My friend replied that he did not know much about it and so we discussed for a little while longer.

After parting ways, I began to think about how significant the Patriot Act would be as the topic of a dissertation if my friend was correct and it is "mostly just symbolic." I suppose this sort of questioning is probably representative of what many communication scholars run into at some point in time: the challenge of explaining the importance of the study of rhetoric to somebody who is not already a serious student of it. The serious students know that rhetoric ideally "tests ideas…assists advocacy…distributes power…discovers facts…shapes knowledge" and "builds community" (Herrick, 2005, p. iii). But, people who do not study communication for a living may have never had the opportunity or desire to learn about such things because in contemporary popular culture, "rhetoric" is a derogatory term used by people who want to accuse others of being "all talk and no action." For the person who has no interest in reading Aristotle, her exposure

to the word "rhetoric" most likely comes from hearing a politician accusing an opponent of espousing "mere rhetoric" (Herrick, 2005). With only that framework in mind, it is very easy to see how people can overlook the fact that talk is action. Whether one is speaking the truth about what she intends to do or whether she is lying, the communicative act is real. Whether a word is a "good" word or a "bad" word, it is meaning-full.

Over the years of formulating and reformulating the focus of this particular project, it has become quite clear that there may never be a better chance to examine the influence that one word can have, than through a study of the word "patriot" in post 9/11 America. Though debates over patriotism have of course happened throughout American history—especially during times of national crisis, never before has it been etched so explicitly into the fabric of public policy. Looking back at past (in) famous legislative responses to national crisis, not one comes to mind, other than the Patriot Act, connoting anything other than either the action it initiates, or the name of a person associated with the action. From the Anti-terrorism and Death Penalty Act of 1996, to COINTELPRO (Counterintelligence Program) operated primarily in the 1960s, to the National Security Act of 1947, to the Japanese internment camps of 1941, to the Smith Act of 1940, to the Palmer Raids of 1919, to the Espionage Act of 1917, and all the way back to the Alien and Sedition Act of 1798, the Patriot Act is the first governmental action intentioned to protect the homeland, whether enacted legislatively or via executive order, that covertly draws symbolically from its title to expand the rhetorical function above and beyond the action it proposes.

Murray Edelman (1964), in his book, *The Symbolic Uses of Politics,* helps explain the magnitude of the symbolic power of the title of the Patriot Act by distinguishing

between “referential symbols” and “condensation symbols.” The former (referential symbols) are “economical ways of referring to the objective elements in objects or situations: the elements identified in the same way by different people” (p. 6). The “Anti-terrorism and Death Penalty Act of 1996” for instance is a referential symbol because it simply describes the action it initiates. The Patriot Act by contrast transcends referential symbolism to become a “condensation symbol” for not only the implementation of the Patriot Act, but for the Bush Administration’s entire strategy for the “war on terror.” Edelman (1964) explains that, “condensation symbols evoke the emotions associated with the situation. They condense into one symbolic event, sign, or act patriotic pride, anxieties, remembrances of past glories or humiliations, promises of future greatness: some one of these or all of them” (p. 6). The unique way in which patriotism is crafted as argument through the titling of the USA PATRIOT Act, leaves very little question that its title is a condensation symbol as per Edelman’s definition.

Standing for (U)niting and (S)trengthening (A)merica by (P)roviding (A)ppropriate (T)ools (R)equired to (I)ntercept and (O)bstruct (T)errorism Act of 2001, the title anachronistically constructs the discursive space surrounding the act such that the legal adaptations contained therein embody what it means to be a patriot. Barney Frank (D-MA), a Representative who did in fact vote for the initial authorization of the act in October of 2001, explains how the title instantly became such a dichotomous influence during public debate:

> Finally, while on the subject of the power of words, I want also to express my disagreement with the decision to construct an awkward title for this bill so that it yields the acronym “PATRIOT.” Only my strong commitment to freedom of expression in general keeps me from filing legislation to ban the use of acronyms in general in legislative work. But I think that the use of this particular one is especially unfortunate. The outburst of very vocal patriotism on the part of virtually all of us that has been part of our national response to the September 11

> mass murders is a source of pride to me and others. It is entirely legitimate for those of us who are proud of America to reaffirm our patriotism at a time when enemies of freedom attack us. But invoking the word PATRIOT in the context of this bill gives the unfortunate impression that those who disagree with it are not patriots. I voted for the bill, and I am pleased with the work that we did collectively to provide for enhanced law enforcement powers in a way that I believe is consistent with American liberty and privacy. But I fully respect those who disagree with our work, and I wish we had not chosen a title for the bill that in any way reflects on their good faith in expressing that disagreement. (Provide Appropriate Tools, 2001, p. 433)

This observation from an insider to the debate at the time of its authorization, one who agreed with the legal merits of the act, yet questioned the ethics behind the symbolism utilized to generate support for it, provides insight into why the debate over the Patriot Act has become so divisive. Essentially, the Patriot Act sets up the criteria that those who support it are patriotic and those who are against it are not.

The purpose of this project is to explore the symbolic meaning of "patriot" by bracketing the way in which it is negotiated during the policymaking process utilized to authorize, oversight, and reauthorize the Patriot Act. Narrowing the purpose a bit further, I should specify that what I am looking for is the way in which participants in the deliberative process describe their own credibility as patriots, the credibility of other participants in the debate, the credibility of people outside the debate who have a bearing on the way in which the war on terror is engaged, and the way in which this discussion about patriotism speaks to the credibility of the deliberative process itself. In other words, to use Aristotelian terms, I am viewing the debate over patriotism as primarily a matter of ethos—as distinguished from logos (e.g. legal extrapolation of the law) and pathos (e.g. appeals to fear, anger, or sadness). This is not to say that appeals to ethos, logos and pathos can necessarily be separate from each other. In fact, it is nearly impossible to discuss the presence of ethos without also considering logos and pathos, but from my

vantage point, I hone descriptive efforts toward the way in which all the various appeals converge to frame the meaning of what it means to be credible as a "patriot."

The Horizons of Patriotism

Merle Curti (1968) in the *Roots of American Loyalty* provides a working definition of patriotism, while at the same time leading us to anticipate the ambiguity inherent to the word: "though it has meant many things and been put to various, even contradictory uses," patriotism "may nevertheless be defined as love of country, pride in it, and readiness to make sacrifices for what is considered its best interest" (p. xiii-xiv). Qualifying the attempt at denotation, Curti (1968) goes on to articulate that, "What one man deems the best interests of the country…another declares to be mere class or sectional, rather than national, interest" (p. xiii-xiv). In other words, people often agree that loving one's country is a prerequisite to being a patriot; what is not so easily agreed upon are the ways in which it is appropriate to demonstrate love for one's country. Throughout the course of this project, I will not pretend to be able to resolve that ambiguity with any degree of certainty. Doing so would be to privilege the way I express my own love of country over those whose expressions are different. This is the sort of labeling that led to the divisiveness over the Patriot Act in the first place. But what I can and will do, as a prerequisite to analysis of the data, is to describe various expressions of patriotism that help us to form the "horizons" of the phenomenon being intuited. The horizons of patriotism at this juncture in the project are important because they preview a sense for the various meanings of patriotism—meanings that are likely to be negotiated as a part of the debate over the Patriot Act.

Gadamer (1960/2003) explains that the "concept of horizon…is the range of vision that includes everything that can be seen from a particular vantage point" (p. 302).

It is part of the lexicon of the hermeneutic method (interpretation)—a rigorous way of accessing the world that acknowledges the subjectivity involved with all research. Rather than providing a sterile instrument to measure the nature of reality such as a survey or coding schemata, the interpretive method focuses on the researcher as the instrument. In other words, it has less to say about the way in which data is collected and more to say about the attitude of the person doing the data collection and analysis. Hermeneutics helps frame the types of questions asked, helps the researcher to view the world as being subjective in nature, and helps to provide a philosophical perspective valuing that subjectivity. In fact, the hermeneutic method views "subjectivity" as being more real, or empirical, than "objectivity," thus illustrating the nature of humankind as being subjective. We are all different—and to pretend as if the world could be "objectively" reduced to an operationalization within a very small margin of error is to display a false sense of empiricism.

The role of "horizons" during hermeneutic analysis is to prevent one's subjective epistemology from sinking to the depressing depths of the postmodern performative contradiction—the notion that the only truth is that there is no truth. The horizons of an object of consciousness frame that object as real—"significant" and "valid," even though (or especially because) it is "subjective;" whereas without the horizons of consciousness, no thing is real—life has no meaning—reality is subject-less. The debate bridging subjectivity with reality has been going on for centuries and it was Isocrates, around 700 B.C.E., who helped to begin distinguishing between subjectivity of thinking and absolute relativism/nihilism when he was writing *Against the Sophists* and *Antidosis***.** Through these works, Isocrates introduced the *philosophia of paidea*, which has no literal Greek-to-English translation, but essentially means the synthesis of education and culture. This

concept became the cornerstone of the western liberal arts tradition and influenced Aristotle's distinction between the scientific syllogism and the rhetorical enthymeme during the discovery and explication of probability. A philosophy of rhetoric was expressed by which rational thought and experience coalesce into a reasonable decision making paradigm, helping one to make informed judgments about the inherent intricacies and ambiguities of living in a world of difference. In the lexicon of hermeneutics, it is the "horizon" which recognizes that though there may not be a precise, agreed upon, picture perfect and "objective" operationalization of an object in consciousness, there are circles of understanding that create the possibility of effective communication. Through discourse with each other, we are able to describe the horizons and thus, understand each other more or less (more discussion of the hermeneutic method comes in Chapter 3). This study seeks to understand the horizons of post 9/11 patriotism by way of analyzing the legislative debate over the Patriot Act, but prior to the data analysis, it seems useful to preview the horizons of patriotism from a theoretical perspective.

Dimensional Accrual Theory

Building upon the work of Jean Gebser (1949/1985 trans), Kramer (1997) posits a theory of communication helping us to understand the horizons of patriotic consciousness. The theory is "dimensional accrual/dissociation," which "suggests that as dimensional awareness accrues, so too dissociation increases" (p. xiii). The most significant contribution of the theory is that it illuminates Gebser's (1949/1985 trans) structures of consciousness in such a way that his seminal work can be applied more readily to contemporary everyday communication as a tool for cultural analysis.

Gebser's work is the result of observations pertaining to patterns of the ways in which the perception of reality for entire civilizations tends to mutate over time in

relation to the technological understanding (and mastery) of space and time. For instance, the discovery of time itself drastically changed consciousness. Being able to measure time incrementally provides symbolic distance between human awareness and the archaic origin of consciousness—a drastic transition in the way people think. Critical to Gebser's perspective is the notion that healthy mutations of consciousness integrate what has come before. Otherwise, the pattern of thinking is a "deficient" mode of the new structure of awareness. Illustrating a deficient mode of time-consciousness is the debate over the environmental ethic. Many in that debate argue that through efforts to master time and space technologically, we have lost touch with our origin—the earth itself. Some in that debate argue a back-to-nature solution, which essentially involves the unlearning of who we are. Whereas others argue that we cannot unlearn who we are—we must press forward, not backward—but that we must do so in a way that integrates what has come before us.

Kramer's (1997) contribution is that dimension accrual/dissociation theory takes Gebser's observations about the mutations of consciousness and describes them in such a way that the link between those modes of awareness and expression becomes more vivid. He provides a vocabulary with which to apply Gebser's work more specifically to "communication." In fact, his theory views culture as communication (also see Edward Hall, 1977). Accordingly, it "can be used to explain any social behavior/communication including other theoretical artifacts, even the bewildering array of other conflicting theories of communication (from rhetoric to information theory and deconstruction) that now populate the modern academy" (p. xiii). Dimensional accrual/dissociation explains that there are essentially four "types of expressivity" manifest in consciousness, as we know it: magic/idolic, mythic/symbolic, perspectival/signalic and an integral style, the

last of which has only begun to be discovered. These four types of expressivity directly emanate from our origin of consciousness, the archaic structure, and are available to us by the way in which the origin has mutated into the magic, mythic, and mental structures, not to mention that in the last few decades, the beginning signs of an integral structure has begun to enter our awareness (Gebser, 1985 trans).

This theoretical perspective is useful to this study of patriotism given the effort here to more fully understand patriotism as a cultural phenomenon. From authorization, to implementation, to reauthorization of the Patriot Act, the discourse concerning the nature of patriotism changes. Thus to go into analysis with a static, unchanging operationalization of patriotism would be of little use. Dimensional accrual theory provides a means to see the horizons of patriotism, while recognizing that those horizons remain in flux over time from person to person within the debate. Illustrating the way in which the theory becomes a point of entry to analysis, let us briefly turn to the speech act of flag burning as an example.

Once a flag is burned and enters our awareness, that action becomes available for observation and discussion. The language utilized to discuss the act can tell us a great deal about the sort of awareness the individual using that language has toward the act. Some may consider flag burning an act of patriotism depending upon the context, whereas others may instantly label flag burning an act of treason. If an individual instantly labels flag burning as treasonous, without pause for consideration, she is likely demonstrating a magic-mythic expression of consciousness. Such an expression denotes no separation between the flag and America itself. The flag is America, not symbolic of it; thus when the flag is burning, America—the country is literally burning. There is no spatial distance between the flag and what it is symbolic of. The expression is two-

dimensional, reflecting the duality of mythic awareness framing things in terms of light and dark, heaven and hell, right and wrong, and etc. Recognizing middle ground, the earmark of rational thought, requires a third dimension of awareness. Rational thinking pauses and considers the circumstances under which flag burning could be considered a patriotic action. It is possible that a person burns a flag because she believes it to be important that other Americans see her committing the ultimate democratic act of dissent and questioning of government. This rational awareness of flag burning recognizes that the flag is merely a symbol of the United States, not the country itself. Furthermore, rational perspective also recognizes that symbols can have different, ambiguously construed meanings depending upon context. Under some circumstances, the act of flag burning could very well be seen as the most patriotic action one could take.

This is not to say that rational thought always leads to the conclusion that flag burning is patriotic. A rational thought process could ultimately conclude that the speech act is unpatriotic; however, to deny that rational thought process altogether reflects pre-rational presumptions, thus denying the importance of reasoning and critical thought entirely. The quest to define and categorize actions as being either good or evil, and nothing in between, reflects the two-dimensional nature of mythic consciousness, creating the rhetorical conditions under which someone can be either100% right or 100% wrong. Whereas to be able to see middle ground or nuance, requires the three-dimensional perspective of rational thought. From a more rational (i.e. less magical-mythical) perspective, flag burning could in fact be considered a patriotic speech act. By pausing and considering the symbolic distance between the flag and country, expression demonstrates the three-dimensional depth needed for a more rational mode of awareness.

Of course this is a very hypothetical, simplified, and truncated analysis of flag burning as expression. It is merely intended to foreground the way in which communication about patriotism is common to the political landscape in the United States. Fortunately, there are thorough studies of patriotism also helping to foreground the horizons of patriotism. One study in particular seems to support the theorizing done in relation to this hypothetical flag-burning example: Maurizio Viroli's (1995) book, *For Love of Country: An Essay on Patriotism and Nationalism*. He helps us to see the horizons of the debate over patriotism by distinguishing between "religious" and "political" forms of patriotism.

Religious Patriotism

Prior to Antiquity and even after the dawn of rational thought, love of country spawned more from a religious, magic-mythic patriotism rather than from a political one. "The word 'country' signified *terra patria* (land of the fathers)" which was "a sacred soil inhabited by gods and ancestors and sanctified by worship" (Viroli, 1995, p. 18). The land encompassing country was magical and the power connecting humans to that space was religious. According to pre-rational patriotism, "man" must love his country "as he loves his religion, and obey it as he obeys his gods. He must give himself to it entirely. It is a demanding love that admits no distinctions, no conditions. He must love his country, whether it is glorious or little-known, prosperous or unfortunate. He must love it for its generosity, and also for its severity" (Viroli, 1995, p. 19). Religious patriotism is very passive in the sense that it demands faith and adherence and thus no independent thinking by a country's citizenry, but at the same time, it is quite energetic in that it demands much fervor behind that faith and adherence.

In fact, as Viroli (1995) continues to explain, patriotism is often confused as nationalism due to patriotism's religious origins. In both academic scholarship and in "common language," patriotism and nationalism are erroneously used as synonyms (p. 1). The confusion between the two ensues according to Viroli despite his observation that the differences are great: patriotism means "love of country" whereas nationalism means "loyalty to the nation" (Viroli, 1995, p. 1). Or as Ernest Gellner (1983) defines nationalism in his book *Nations and Nationalism,* it is "primarily a political principle, which holds that the political and the national unit should be congruent" (p. 1). Dietz (1989) (quoted in Viroli, 1995) explains the significance of the confusion between patriotism and nationalism as it pertains to our understanding of history:

> The blurring of patriotism into nationalism, or even the acknowledgement of nationalism as a 'species' of patriotism reveals that we have literally lost touch with history, with a very real past in which real patriots held to a particular set of political principles and their associated practices—to a conception of citizenship that bears scant resemblance to modern nationalism. (p. 191)

According to this analysis, nationalistic tendencies encourage one to support the direction her country takes, whether right or wrong, without question, much like the religious form of patriotism; whereas rational-political patriotic tendencies encourage one to love the country and to do whatever is necessary to protect the best interests of the country, even if it means disagreeing with the direction it is taking.

Political Patriotism

Though some may not agree with this distinction between patriotism and nationalism (see Anderson, 1991), there is very little question that different people have used the word "patriotism" differently at different times in the history of the world. Furthermore, it is also clear that religious patriotism does not reflect the tenets from which American democracy was born. We only need to look at a few of the quotations

provided to us by some of the progenitors of the country to realize that political patriots will turn a critical eye toward every move leaders make. For example, Thomas Jefferson has said, “Dissent is the highest form of patriotism.” Benjamin Franklin said, “It is the responsibility of every citizen to question authority.” George Washington said, “Government is not reason. Government is not eloquence. It is force. And, like fire, it is a dangerous servant and a fearful master.” Other American leaders have reiterated the patriotic sentiment of the “founding fathers.” Teddy Roosevelt, for instance, said, “To announce that there must be no criticism of the President, or that we are to stand by the President, right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American public.” According to the perspective of many of the country’s most famous leaders—including its founders—being a patriot is not always safe or conservative; in fact, history tells us that being a patriot can be quite risky as one puts her reputation, and in some cases, her life at risk while serving the welfare of the country.

The shift in thinking about patriotism is the result of a shift in thinking about civilization. As rationality begins to be layered onto the magic-mythic-religious patriotic perspective, its cultural-historical meaning changes. This foundation of American patriotism was handed down to us through the mythos of Antiquity. Before continuing with this line of thinking, I must be careful not to glamorize the ancient Greek culture. There is indeed much scholarly controversy surrounding the inception of Antiquity as a model of Western culture (see Bernal, 1987) as well as a general consensus that there were severe limitations as to who could be a “citizen.” Citizenry was decided along predominately ethnic, gendered, and socioeconomic lines of homogeneity. To be a participative member of society, one had to, by and large, be a male aristocrat. There were undoubtedly extreme forms of sexism and racism limiting who could be a citizen

(Welch, 1996; Glenn, 1997; Atwill, 1998). However, despite the shortcomings of Greek culture and the controversy surrounding our knowledge of the way it actually was, what we do claim to know still serves as the mythos behind the rhetorical ideal of civic engagement—it is the foregrounding of political patriotism in the West.

Rhetorical principles from Athens and the Roman extensions of those principles "transmitted to modernity a political patriotism based on the identification of *patria* with *respublica*, common liberty, common good" (Viroli, 1995, p. 19). Rationality imparted to humanity the sense that humans are separate from the land in which they live. According to political patriotism, country is no longer merely land or space magically bestowed upon us to be worshipped, but rather, country is comprised of people with agency and the perspective to think independently. The ability to preserve that agency through politics became the hallmark of rational patriotism. Glover (1927) reflects upon the relationship between citizen and city:

> In Athens more than in any other place I have read of, or so far have visited, there is what we may call an equation between city and citizen. The citizen is the city; *L'etat, c'est moi*, each one of them can say. He does not break the laws; because he makes the laws; they are the expression of his own will; they suit him admirably. They suit him only too well, growls the contemporary critic; they fit him like a glove (p. 62).

Free speech was the ultimate ideal handed down from the Greeks to the founders of American democracy. Charles Freeman (1999) explains that, "The key ideological concept of Athenian democracy, the right of every citizen to participate in government and to speak his mind freely both in Assembly debates and in private, became an easily understood and jealously guarded ideal" (p. 224). The idealized system in Athens encouraged participation by its citizens through limiting the length of public office to one year, holding 501 member juries for trials, selecting the members of those juries through lottery, and many other official aspects of the society to get the masses involved with the

process of policymaking. Every citizen had not only the privilege, but also the obligation, to participate in the political system of Athens.

Despite the ideal version espoused by Athenian democracy, we know that democracy in Athens was not perfect (nor is any form of democracy)—it was developing as the core principles were being constructed. As Stone (1989) points out, perhaps there is no more *apropos* story illustrating the lack of perfection in Athenian democracy than the trial and death of Socrates—a person who did not advocate for democracy, but a person who is certainly part of the mythos behind the way in which democracy came about. As the lore goes, Socrates was the prototype of a freethinking philosopher in Antiquity. However, his freethinking spirit crossed the line according to an Athenian court and he was sentenced to death for supposedly corrupting the youth and undermining the religious base of society.

Stone (1989) argues though that Socrates had many opportunities to easily escape the fate of death. In the *Apology* (1992 trans./circa. app. 399 B.C.E.) for instance, he had the opportunity to admit fault for his teachings and avoid such a harsh punishment. Rather than doing so, he courageously defended his teachings and made a counter-criticism of the belief system of his accusers. In the *Crito* (1992 trans./circa. app. 399 B.C.E.), we find another instance when he quite possibly could have escaped the death penalty. His friend, for whom the dialogue is named, comes to visit Socrates in the jail cell after learning of the ease with which he could navigate Socrates' escape through bribery of public officials. Crito begged Socrates to leave the prison for his own sake, the sake of his students, and the sake of his children. However, Socrates felt the loftier goal was to die a martyr for his cause. Indeed he was correct given his status as a founder of Western thought. Socrates is known as a true patriot because he gave his life willingly for

the exercise of free speech. In fact, many think that if he had just made free speech a more explicit component of his argument, that he could have escaped death while also defending the morality of his teachings. Multiple people have written alternative apologies of Socrates—claiming to know what he should have said in his own apology. Among these people include Plato and Xenophon. Libanius though, is the one who most adamantly claimed that if Socrates had mentioned free speech as being critical to a democracy that the jurors would have listened and let him off with a much lighter sentence (Stone, 1989). Socrates was not interested in a lighter sentence. His legacy was greater through death than through life—he made the ultimate patriotic sacrifice. As Dietz (1989) mentioned above, "real patriots…held to a particular set of political principles … [and] conception of citizenship."

Importance of this Study

I have to acknowledge that this study began for very personal reasons. When 9/11 happened, I was sad, scared, angry and generally speaking, in a state of shock. I learned a lot about myself and one of the things that stuck with me was the sense of confusion felt over the meaning of patriotism—particularly expressions of patriotism in the college classroom. On the one hand, I felt a sense of duty to lead critical discussions in the classroom over at least a couple of different topics: a) understanding how people could hate our country so much that they would give their lives to cause so much terror and b) critiquing the Bush Administration's response to 9/11. I also understood that many of the students in my class would have a difficult time with those types of discussions. Many seemed to feel obligated to unify behind our President over the war on terror—as did over 90% of the rest of the American population (Gallup, 2001). This made me a little skeptical about becoming too critical too soon because I identified with their need for

healing and furthermore, I had to ask myself what the point would be of leading those types of discussions if students would be offended and tuned them out? There was much internal tension over how to balance the complex role of being a patriotic American with that of a college teacher. While we did end up having some of those types of conversations that I wanted to have, those conversations never seemed to reach their full potential and to this day, I wonder if I let my country down in light of that.

More so than at any other time in my life, a realization set in that my own "autopilot" notion of patriotism lacked depth and confidence. Definite existential angst existed over how to be a good patriot; thus, I turned to phenomenological inquiry to help absolve the lack of understanding. Richard Zaner (1970) explains how the "uncommonness of common sense" (p. 41) is a way to phenomenology:

> The disengagement and reflective apprehension of what you have until now been unaware of effects a crucial shift. Suddenly you are shocked into an awareness of *yourself*: 'And going beyond,' you 'come back through those eyes / And find those eyes your own.' That is, the jolt of the uncommon, emerging in the midst of the common, awakens that in you of which until now you were not aware, and by so doing affects a subtle shift in you and a change in the world itself. You now see it, for the first time, really. (p. 47)

The awareness of myself that I have been "shocked into" left me with no other option than to study patriotism, in some shape or form, as my dissertation. It is of particular importance because patriotism—or any other form of relational glue akin to patriotism (such as nationalism for instance)—has the power to bond societies together, and perhaps even entire civilizations, but it also has the power to tear them apart. Thus, a greater understanding of patriotism in and of itself is reason enough to justify this study. However, as the project gained more focus, a few other justifications developed for its

importance. Justifications for this study are related, but in my mind, they each demonstrate unique reasons to value the research conducted in this study.

A Unique Study of the Patriot Act

The first justification to mention is that surprisingly, the symbolism of the Patriot Act has been given very little attention in the literature. Studies I have discovered dealing specifically with the Patriot Act may make some reference to the symbolism of the act, but then go on to provide their own legal extrapolations about how the act changes the balance between safety and liberty. Very little attention is given to the way the actual participants in the debate negotiate the meaning of patriotism. For example, Etzioni (2004) hints at the type of analysis I conduct here but treats the symbolism as a secondary matter. He asks a very important question through the title of his book, *How Patriotic is the Patriot Act?* His answer to the question begins with acknowledgment that "any reasonable deliberation about our national security is the recognition that we face two profound commitments: protecting our homeland and safeguarding our rights" (p. 1). According to the author, this discussion in the post 9/11 world has become "exceedingly divisive" (p. 2) given the way in which the language often utilized describes safety and liberty as being democratic values inherently at competition against each other. An either/or dichotomy frequently becomes the polarizing framework from which interlocutors approach the discussion. The author even goes as far too briefly exemplify the rhetoric he describes from the context of the legislative process in much the same way as I do here. For instance, on one side of the debate, Etzioni quotes Patrick Leahy as saying "We don't protect ourselves by bending or even shredding our Constitution" (2004, p. 2). Then to demonstrate the rhetoric coming from the other side of the debate, Etzioni quotes a speech by the former Attorney General John Ashcroft, during testimony

before the Senate Judiciary Committee on Terrorism on December 6, 2001. Ashcroft is quoted as saying: “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” (Etzioni, 2004, pp. 2-3). Interestingly though, Etzioni cuts this quotation off a bit short considering that in the following sentences, Ashcroft continues to describe the critics of the Patriot Act as being unpatriotic: “They give ammunition to America’s enemies, and pause to America’s friends. They encourage people of good will to remain silent in the face of evil” (Ashcroft, 2001, December 6).

This observation about what Etzioni (2004) excluded from is not intended to take away from the work that he did. It is simply intended to illustrate that while he may speak to the symbolism of the Patriot Act, his analysis of that symbolism is truncated because quite simply, that is not his purpose. The purpose of his book is “an examination of each part of the act on its own merit (or demerit)” (2004, p. 3). The purpose is an important one, but does not include systematically analyzing the symbolism of the word “patriot.” Calling attention to the symbolism of the title and the divisiveness surrounding it serves primarily as a segue into a legal analysis.

Etzioni (2004) is certainly not the only author discovered to hint at the symbolism of the Patriot Act and provide commentary on the legislative process. Foerstel (2004) for instance illustrates some of the language used during the authorization of the debate that was so critical in passing the act through Congress, but then his focus diverts to the legal effects of the act upon libraries. Authors such as O’Harrow (2005) even goes as far to personally interview some of the participants in the debate and asks them about what happened behind the scenes to cause such a rushed authorization process, but once again, the symbolism of the process is only of secondary importance. Other studies allude to the

way in which the Patriot Act was rushed through Congress without demonstrating the language utilized to accomplish that task (e.g. Chang, 2002; Cole & Dempsey, 2002). Interestingly, James Dempsey—one of the authors cited—was a witness in one of the hearings analyzed during analysis, but his focus on the symbolism is only secondary to providing his own legal interpretation.

Thus, the present study makes a unique contribution to our understanding of the Patriot Act. It examines the legislative process governing it, from start to finish, with an eye toward discerning the meaning of patriotism. While we certainly learn a few things about the law itself—that knowledge directly emanates from the people who participated in the deliberative process. To my knowledge, no other study attempts this task.

Focus on the Legislative Process

Aside from contributing to a general body of knowledge related to the Patriot Act, this study also contributes to the field of communication by way of adding to the study of argumentation and the legislative process. Theodore Sheckels (2000) describes the need in the field for more studies of legislative argument:

> Political communication scholars understandably devote much time to studying the conduct of elections, for they are a fascinating topic. And, in many cases, it is a fascination with the high-profile campaigns that has led many scholars to choose to do their work in political communication. However, there are other areas of political communication that now demand attention. One of these is the debating that occurs in legislatures— the U.S. Senate and the U.S. House of Representatives or those in the various states. At least part of this particular communication arena's demand on scholarly attention is tied to the fact (yes, the fact) that it has been largely ignored by the communication discipline. (p. xiii)

Especially in the modern era of politics when it is so easy to access transcripts of public debate, why is it that so few communication scholars have studied the process of policymaking?

Part of the reasoning comes from the literature itself (which is reviewed in some detail in Chapter 2). In fact, the very first article ever found in the communication literature dealing with Congressional debate (Fitzpatrick, 1941) provides a very cynical argument claiming that Congressional debate is not worth studying because the arguments made in that context are simply political tropes. Some of the other earlier studies that actually did focus on Congressional debate ignored the specific language utilized by the participants in the debate because it is difficult to sift through the organizational flow (Cain, 1954; Braden, 1960). These authors point out that because the debates are not organized like an academic competitive debate, they are difficult to follow, and this is their justification for not focusing more on the specific language used. They simply provide a synopsis of their debates of interest rather than actually focusing on the language used by participants.

The mindset begins to shift with the linguistic turn in rhetorical criticism and some tremendous progress was made theoretically and methodologically in terms of studying congressional debate. Some excellent work was done in the field but as Sheckels (2000) claims, the importance of studying the legislative process is not reflected by the amount of attention provided. These claims and others will receive much more attention in Chapter 2.

Citizens Need to Be Informed

It is surprising to this author that legislative argument is not better covered within communication studies, given how important it is for members of a democratic society to be informed about what happens within the Halls of Congress. Thousands of years ago, Aristotle discussed the importance of becoming knowledgeable about legislation:

> For the security of the state it is necessary to observe all these things ('Political Topics Useful in Deliberative Rhetoric,' see 1.4.1-11) but not least to be

> knowledgeable about legislation; for the safety of the city is in its laws, so it is necessary to know how many forms of constitution there are and what is conducive to each and by what each is naturally prone to be corrupted, both forces characteristic of that constitution and those that are opposed to it. (1991, p. 54-55, see 1.4.12)

Policymakers, regardless of the public cynicism associated with the function of their jobs make the world go round and more scholarly attention should be devoted to understanding the language they use and the way in which it interacts with our everyday ways of knowing the world around us. In fact, some of the arguments in the literature review expound upon Aristotle's idea, claiming the value of studying congressional debate is based on the democratic ideal that legislators are both representatives of the public and educators of the public at the same time (Cain, 1955).

Especially given the way in which information seems to be trivialized in today's media driven society, an increased focus on studying the legislative process would seem beneficial. Herman and Chomsky (2002) for instance describe the declining variety in the mass media. They point out that between the years 1983 and 2002, the media firms controlling the country's source of news declined from approximately 50 major companies to nine transnational conglomerates. These developments according to the authors "have seriously weakened the 'public sphere,' which refers to the array of places and forums in which matters important to a democratic community are debated and information relevant to intelligent citizen participation is provided" (p. xviii). Of course, Herman and Chomsky are only contributing to the argument advanced by Habermas (1962/1998) 40 years earlier in his book, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. But if we are ever going to reverse the trend, part of the effort has to include going straight to the source of our laws, rather than waiting for Fox news to provide us with the sound-bites. Not only would the

public become more educated in general, but a renewed focus on the legislative process would encourage policymakers toward actual debate knowing that the entire debate will become a focus rather than those one or two moments that make the nightly news.

With the Patriot Act in particular though, there seems to be some consensus that the media has the tendency to distort the facts. At least this claim is acknowledged by participants in the debate from both sides of the political aisle: the majority side (e.g. Ashcroft, Dinh, and others throughout the process) as well as the minority side (e.g. Orrin Kerr, a minority witness; see Antiterrorism Investigations, 2003). Furthermore, participants in the debate itself are not found to be wholeheartedly defending the way in which the media presents the Patriot Act. Based upon my interpretation, it seems almost a consensus throughout the debate that the media has not provided accurate information related to the Patriot Act.

Contribution to Historical Understanding

Quite related to the previous justifications is the fact that meaningful evaluation of our country's leadership is not possible until after the fact. Many examinations of the Patriot Act from a wide variety of perspectives must be undertaken in order to provide rigorous interpretation of the debate with the hope that future deliberative processes may be improved. My primary purpose is not necessarily to provide an evaluation; it is to interpret the horizons so that subsequent evaluations may be better informed by rigorous analysis.

Needless to say, the debate over the Patriot Act is a truly significant event in history. John Conyers (D MA) was aware of its place in history and acknowledges it while welcoming Attorney General John Ashcroft to an implementation hearing on June 5, 2003:

> It is in that spirit that we come together, Attorney General Ashcroft, hoping that we can do our job. We are marching into history. This is not only being examined in great detail right now, but it is going to be examined, as we all know, in far more detail after it is over. And we want to acquit ourselves as honorably as we can under these circumstances. (p. 3)

If we are unfortunate enough to ever be in a national crisis of this magnitude again, as we were after 9/11, perhaps we can learn from the deliberative process surrounding the Patriot Act. A focus on the symbolic shaping of the nature of patriotism is an important perspective to consider.

Chapter Preview

With an overview of the project and justifications for it, the study commences. Part I includes this introduction, the literature review and a chapter offering more detail about methodology.

In addition to expanding on the themes already alluded to here, there are some other critical pieces to be reviewed in Chapter 2 that influence the purpose, scope and method of the present study. The first is by Schuetz (1986) who theoretically conceptualizes the legislative process as beginning in the realm of the public sphere moving into the technical sphere of debate on Capitol Hill. The second article standing out as being highly influential of methodology is Levasseur (2005) who examines the use of "public opinion" as argument during multiple years worth of legislative debate over the federal budget. He begins by identifying public opinion as argument and then thematizes the various ways in which it is used. Additionally, he utilizes descriptive statistics to show the extent to which public opinion is utilized as argument in proportion to all pages of text analyzed. This article in particular helps focus the methodology used here through demonstration of pattern analysis of argument.

Chapter 3 continues by detailing the methodology of the present study further. While Levasseur, Schuetz, and others are heavily influential of the methodology, and in many ways, emulated, the analysis here expands to consider patriotism not only as argument in one legislative process, but also as an object of "historically effected consciousness" (Gadamer, 2003). As Chapter 3 explains, the method is hermeneutics, which in this case, means juxtaposing the meanings behind the various uses of patriotism in the debate over the Patriot Act with a phenomenological meaning of patriotism. The overarching purpose is to access the horizons of patriotism as an object of human understanding in the post 9/11 world. This opportunity must be taken.

During times of peace and prosperity (such as before 9-11-01), patriotism is more or less latent. At least for me and I suspect many other people, relationship to country is put on "autopilot"—it is taken for granted. During times of crisis such as 9/11 however, threads of patriotism become transparent and the opportunity for *Verstehen*, or understanding, is more accessible to the observer confronted with the task of "decentering the self with all of one's prejudgments" (Kramer, manuscript, p. 6). As Etzioni (1997) suggests, patriotism is often misunderstood as being something it is really not. So this study is an exploration of this issue—the use of a condensation symbol, specifically the titling of the Patriot Act.

Chapter 3 also considers the way in which the data is selected. For pragmatic reasons, analysis will not attempt to analyze every single debate over the Patriot Act. Some decisions had to be made about what would be included as part of the analysis and Chapter 3 discusses the way in which those decisions were made.

Part II of this project begins the data analysis by focusing on the authorization stage of the Patriot Act. Chapter 4 puts the Patriot Act into the context of the broader war

on terror by examining the discourse surrounding the war as provided by President Bush and others. The President articulates his ideal of post 9/11 patriotism, which more than 90% of respondents agreed with (Gallup, 2001)—the espousal of patriotism which influences the debate over the Patriot Act throughout the process. Bush's story remained constant. In Part II, that sense of patriotism condenses the public sphere into a sense of magical agreement—conformity; whereas later in the project, that same patriotism causes division. Chapter 5 analyzes the very first debate as part of the data set entitled, *Administration's Draft Anti-Terrorism Act of 2001*, and conducted in front of the Full Judiciary Committee of the House of Representatives. Chapter 6 examines the markup of the antiterrorism legislation also in the Full Judiciary Committee.

Part III continues analysis of the data by transitioning to what I am referring to as the implementation stage of oversight. Chapter 7 provides context to part III with an update on what has happened in the war on terror since the Patriot Act was authorized, paying special attention to what has happened to public opinion. A lot of time has passed since the last hearing over the Patriot Act and the magical sense of patriotism begins to lose its magic. The public is beginning to become critical of the President and the war on terror and the debate over the Patriot Act proves to be a very significant part of that transition. Chapter 8 examines a hearing before the Subcommittee on the Constitution—part of the Judiciary Committee, which occurs on May 20, 2003. It is the first hearing involving the Judiciary Committee since the act was authorized. Chapter 9 examines the full committee corollary of that initial hearing on June 5, 2003. Attorney General John Ashcroft is the only witness at this hearing.

Part IV continues by transitioning into the reauthorization stage of the debate. Chapter 10 provides some context to this stage by describing again, the changes that

occur between one stage to the next. Criticism of the Bush Administration, the Patriot Act, and John Ashcroft in particular has really gained momentum at this point. Ashcroft attempts to reverse the flow of this momentum by reaching out to the public through an "educational outreach initiative" concerning the Patriot Act. It does not work. Ashcroft resigns; Alberto Gonzales takes his place and a new ethos develops around the Patriot Act. A number of hearings are planned for the reauthorization stage of the Patriot Act—more than can be accounted for in this analysis; most occur at the subcommittee level. So part IV analyzes the very beginning of this stage of debate and the very ending of it, focusing on the full committee hearings. Chapter 11 examines the hearing on April 6, 2005, at which Alberto Gonzales is the only witness. In this debate, we see some signs that perhaps, the nature of the deliberations over patriotism is changing in the direction of more collaboration. Chapter 12 examines the second to last hearing in this stage of debate occurring on June 8, 2005, at which James Comey, the Deputy Attorney General is the only witness. This hearing was originally scheduled as the last hearing in the process—it caps off a series of nine hearings that occurred at the subcommittee level. Analysis reveals that the level of cooperation promised through analysis of the 4/6/05 debate comes to fruition. But then, as uncovered in Chapter 13, that collaboration experiences a major meltdown. Minority members of the House push for one final hearing to pursue topics that they felt did not get enough attention. The hearing occurred but it provides an auspicious ending to the public deliberations over the Patriot Act.

Part V is the conclusion. Chapter 14 summarizes the way in which the discussion over the nature of patriotism changes from beginning to end in this deliberative process as well as the contributions made by this study. Chapter 15 ends the project by discussing limitations of the study and direction for future investigation.

Chapter 2:

Review of Literature

After reading the first three paragraphs of the earliest article found on the study of congressional debate, written by John Fitzpatrick (1941) in the *Quarterly Journal of Speech,* I must admit that I was discouraged at the possibility of finding much guidance from the literature as to how to begin this project. The thesis of the article is that "there is little, if any, debating done on the floor of the Senate or of the House" (p. 251). While "it is true that there is much talking on the floor of both houses," Fitzpatrick writes, there is not much debate to speak of (p. 251). Pointing out that many speeches found in the *Congressional Record* were not actually spoken, but merely inserted into the record by the authors for the benefit of those constituents who might actually take interest in reading them, Fitzpatrick downplays the importance of studying those speeches. From this central theme of the article, the author makes two primary points about the legislative process: 1) not a single legislator changes a vote due to speeches heard on the floor of congress and 2) the party "whips" predetermine which side will prevail, and commit themselves to ensuring that their prophecy comes true by "threatening political pressure back home, and by various other forms of politically sanctioned blackmail" (p. 252). Thus Fitzpatrick determines that floor debate is useless, a very cynical view to be confronted with while attempting to identify a means with which to study congressional debate.

Despite the cynicism of this original article, a small number of scholars still pursued study of debate, although not without their own recognition of a cynical view. Chester (1945) for instance, who does in fact attribute Senate debate with being able to impact public opinion in an article concerning selective service legislation leading up to

World War II, helps explain why many scholars shy away from the study of congressional debate. Chester claims the general public has grown suspicious of its purposive ness: "Senate debate, a feature of the American government which our people once respected greatly, has sunk to a low level in popular esteem. Many present day observers relegate legislative debate to the political junk pile as time wasting, ineffective, and inferior" (p. 407). Waldo Braden (1960), in his overview of the "Senate Debate on the League of Nations," points out that often times, badly needed deliberative debate over significant legislation morphs into a sophistic appeal to constituents for greater ethos: "A senator may make a two-hour speech on a sub-issue, never taking the trouble to relate his remarks to questions at hand. Even when he is fortunate enough to have interested listeners on the floor or in the gallery, he may ignore them in his eagerness to get something into the *Record* which he can mail to his constituents" (p. 273). Furthermore, when an issue is hotly contested, policymakers are often accused of utilizing tropes "to confuse, to delay and to dissipate" argumentation rather than "to clarify or even to persuade" (p. 273).

Thus study of debate has been discouraged due to the observation that a critic often "loses himself in argument, questions, cross questions, impromptu speeches, irrelevant remarks, and parliamentary counterplay. And after an attempt to reduce a debate covering months to some manageable form for study, the critic finds himself troubled, confused, and frustrated by the complexity of the verbosity" (Braden, 1960, p. 273). Hence, relatively few scholars have seen much value in closely examining congressional debate. As late as the year 2000, Theodore Sheckels refers to congressional debate as a "neglected subject" of academic inquiry mainly due to perceptions that the

"long-windedness and repetition" (p. 1) have caused many scholars to shy away from its study.

Why Study Congressional Debate?

With so much cynicism directed toward the study of Congressional debate, it is hard to believe that anybody has pursued research that takes legislative argument seriously. Fortunately though, some people have and we owe thanks to two scholars in particular: Ralph Micken (1951; 1952) and Earl Cain (1954; 1955), who together articulate the earliest justifications for studying the legislative process, carve out a methodology for doing so, and provide examples of that methodology in practice. Earl Cain in particular is responsible for articulating the importance of study, as well as articulating the specifics of a methodology.

Cain's (1954) article entitled, "A Method for Rhetorical Analysis of Congressional Debate," found in *Western Speech*, begins with a story that draws attention to and preempts the cynicism outlined above. He refers to the early portions of Senate debate over President Roosevelt's attempt to repeal an arms embargo, and then quotes a *Newsweek* (1939) article that describes the level of interest, or lack thereof, in this particular debate: the debaters "made a desperate effort to entertain the thinning gallery…Interest had fallen to such an ebb that only twenty-four colleagues were on hand to hear Thomas and fourteen to listen to Downey. At one point exactly six senators were in their seats" (p. 29; quoted in Cain, 1954, p. 91). Cain (1954) ends the first paragraph of this article by acknowledging that, "These disparaging comments on Senate debate are scarcely encouraging to the critic who would select congressional debate for significant rhetorical analysis" (p. 91). In the next paragraph though, Cain (1954) responds to the cynicism and begins making the case for a study of congressional debate:

> There is reason to believe, however, that debates in Congress can be a fruitful source for rhetorical criticism. Studies which have been made in this area have shown that congressional speaking does occupy an important part in American public address; that the objections commonly leveled against this kind of research are not necessarily insurmountable, and that there is a valid method for significant rhetorical reporting and analysis of congressional debate. (p. 91)

And so the dual purpose of the 1954 article was to answer the cynicism by providing reasons why studying congressional debate is important and to outline a method for doing so. The second goal, pertaining to methodology, is important and will be entertained shortly. But prior to addressing methodological considerations, the need exists to delve further into the justification for studying congressional debate at all. Two primary reasons are given that help explain why studies of congressional debate are useful: 1) debate does influence policymakers; and 2) debate interacts with the public sphere through both a reflection of public attitudes and a shaping of those attitudes at the same time.

Influence on Policymakers

Cain's first point illustrating the significance of studying congressional debate is a response to the argument that the discourse has no impact on the decision making process. "Actual studies of congressional debates however, tend to disprove the preceding objection" (p. 92), he argues. Citation of Ralph Micken's (1951) study of strategy in the debate over the League of Nations is Cain's first piece of evidence. Micken (1951) summarizes the strategies utilized by both sides in this debate: "the anti-League leadership practiced social control through the medium of the debate, in an effort to change a prevailing attitude among the people, while the men favoring the League attempted to intensify the prevailing attitude or to maintain it" (p. 50). The hope of the "negative side" (Micken imposes the terms of academic debate upon the context of congressional debate) "sought to delay a decision until the public could be 'educated' away from the idea of a league such as Mr. Wilson proposed" (p. 53). Given the results of

the decision, as well as the debating methods themselves according to Micken (1951), the anti-League side won, and this conclusion stands as evidence that debate strategy can and does influence the outcome of policymaking decisions. We cannot know for sure whether the participants in the debate were actually swayed ideologically by argumentation, but the rhetorical tactic of stalling long enough for public opinion to be able to influence the ultimate decision made proved successful. Ultimately, for the political reason of pleasing constituents—if for no other, the negative side won the debate.

Next, Cain turns to his own previous study (1950, unpublished dissertation) over the neutrality debates occurring around the same time as the League of Nations debate, emphasizing the idea that, "individual speeches were effective in influencing the voting on the issue" (p. 92). In particular, a speech by William Borah that opened the debate in 1939 empowered the ethos of the isolationists. *Newsweek* (1939) explains: "Isolationists were quick to boast that Borah's oration had won them half a dozen more votes" (p. 29; quoted in Cain, 1954, p. 92-93). Furthermore, the influenced voters "were followed with interest by the general public" (p. 93), establishing a link between Cain's first counterargument and the second, which will be taken up shortly. But before proceeding, I want to highlight one additional observation pertaining to the argument being made in this sub-section and that is by turning back to Fitzpatrick's (1941) article, the origin of cynicism in the literature pertaining to the study of congressional debate. Immediately after discrediting the function of "floor" debate in the House and the Senate by arguing that members of congress do not change their minds during debate and that party whips control the voting, Fitzpatrick does recognize that policymakers are influenced during committee hearings that precede the floor debate. He asks, "Where was the decision made?" and answers, "In the committee room. And that is where legislation is lost or

won. It is in the committee rooms before committees that we find the speeches of persuasion" (p. 252). So to the extent that committee hearings are very much a part of the legislative process, it is very difficult, especially in retrospect of reading the rest of the literature that follows, to take Fitzpatrick's discouragement to heart. Even according to the biggest cynic of congressional debate found in this literature review, congressional debate is important from the standpoint that at least committee hearings do show the potential to influence the decision making of congress people.

However, in light of the purpose of the present study, the influence on policy makers pales in comparison to the justification for continuing found in the next section. The way in which congressional debate interacts with the public sphere is perhaps the most significant rationale for the study of patriotism as argument in the legislative process.

Interaction with the Public

In a 1955 article, "Is Senate Debate Significant?" Cain continues to provide justification for study of congressional debate, arguing "Any criticism of Congress which assumes constructive form should be encouraged," because "the reckless and destructive assumptions that Congress has outlived its usefulness as a representative body indicate a superficial knowledge of the values in Senate discussion and action" (p. 11). Even more poignantly, Cain quotes Charles Beard (1942), who states "We cannot kill off Congress without committing suicide as a democratic nation" (p. 529; quoted in Cain, 1955, p. 11). The reason for Cain's conviction is found through his reference to James Bryce, a former British ambassador to America, whose book entitled, *The American Commonwealth* (1888) has become a major influence on American political philosophy. Bryce explains that "public opinion is shaped by a mutual interaction between the public and its leaders"

and with respect to the function of congress, Bryce suggests that the "debates are at once a reflection of public attitudes and are also a force shaping public opinion" (Cain, 1955, p. 11). In other words, congressional debate is more than just leaders deciding policy—it is ideally a catalyst for consubstantiation with the general public, discussion and critical thinking.

Due to the inherent complexities of representative democracy, the general purpose of congressional debate is somewhat circular with respect to the public sphere. On one hand, congresspersons are elected to represent the voices of their constituency, but on the other hand, they are also in the role of educating their constituents and helping to form opinions. And although influence on public opinion is indirect, congressional debate ideally functions in such a way as to give the public enough time to reflect upon central premises underlying many sides of debate and then idealistically, to help the public crystallize opinions. This is in fact the stated purpose of the anti-league senators cited above in the Micken (1951) study, whose strategy it was to stall the debate on the League of Nations long enough to "educate" the public fully of the implications to entering such an international relationship. And while Micken (1951) calls it an argumentative "strategy," many theorists of representative democracy, such as James Bryce, would call it one of the ultimate functions that legislators fulfill. Deliberative debate's significance to the public then, according to Micken, is to provide impetus and framework for critical thought, but more importantly, to provide enough time for the collective American consciousness to reflect upon that framework, regardless of how simplistic and unstructured it may or may not be.

Approaching the Study of Congressional Debate

So, for the purposes of this study, it is critical to recognize and bracket the rather ubiquitous relationship existing between representative leadership and the "public." Having briefly done so, I assert that studying congressional debate in the context of post 9/11 should be able to tell us more about communication than simply the argumentative strategies employed by the interlocutors participating in the actual discussion. Especially when considering the historical context from which this study emerges and the powerful symbolism invoked through the title of the Patriot Act, analysis of debate over its merits should tell us something about a more general sense of post 9/11 patriotic consciousness. Symbolically, the interlocutors in the debate negotiate the ethos of what it means to be a patriot and simultaneously educate the public of their conclusions.

So with justifications for studying congressional debate articulated as they emerge in the earliest literature on the subject, despite how few studies that have been inspired by those justifications, we should turn to the way in which they have been conducted as well as the results they have produced. While the methodology pursued in this dissertation does not necessarily replicate any of the applied methodologies discussed in the literature review precisely, there are overlapping goals and discursive constructs that do emerge, as well as methodological procedures, which help to narrow the scope of inquiry and frame a focus on congressional debate that poignantly speaks to the broader purpose of intuiting post 9/11 patriotic consciousness. One study in particular (Schuetz, 1986) discusses the overlays and functions of the legislative process that help to further demonstrate a connection between the actual debate occurring in the halls of congress and the average level of consciousness/the public sphere. Furthermore, another study in particular, the most recent study found on the subject (Levasseur, 2005), provides a great deal of guidance in terms of a specific strategy for analyzing patterns of legislative

argumentation as manifestations of patriotic ethos, leading to a more complete interpretation of post 9/11 patriotic consciousness. There are also several other studies influential to the goals and contributions of the present study that deserve attention prior to discussing methodology in Chapter 3.

The Early Studies Ignore Language

The earliest attention paid to congressional debate by communication scholars emerges from the tenets of "neo-Aristotelian criticism" as described by Herbert Wichelns (1925), a paradigm which limits the critic to three clearly defined tasks: reconstruction of the context of speechmaking, analysis of speech according to Aristotelian notions of ethos, pathos and logos, and then an assessment of the immediate effects on the audience (Foss, 1996). Donald Bryant (1958) discusses the impact neo-Aristotelian criticism, and Wicheln's article in particular, has had upon the history of rhetorical criticism, claiming that it "set the pattern and determined the direction of rhetorical criticism for more than a quarter of a century and has had a greater and more continuous influence upon the development of the scholarship of rhetoric and public address than any other single work published in this century" (p. 5). Although I would not classify the earliest studies of congressional debate as "Neo-Aristotelian Criticism" precisely, the norms of the traditional form of rhetorical methodology were certainly influential to the early study of congressional debate in the communication discipline. While no studies were found utilizing ethos, logos and pathos specifically as units of analysis, the earliest studies presume to reconstruct the context of debate and assess the immediate effects of argument on the immediate audience—congress.

The Impact of Neo-Aristotelian Criticism

Cain's (1954) previously mentioned article clearly emerges from the traditional, neo-classical mode of criticism. The primary questions to be answered by the critic according to Cain are: 1) "What speeches or speakers were effective in the total pattern of the debate;" and 2) "Who or what changed the opinions of senators?" (p. 93). According to Cain, these questions call for a biographical sketch of the major players in the debate as well as a discovery of major lines of argumentation and supporting evidence, and from this analysis, an inference can be drawn about the effects of oratory upon the audience, which Cain does recognize as being very difficult to accomplish. The steps suggested to attempt the inference of effects include: 1) reading the debates carefully to determine content and context (time consumed by the whole debate, principal speakers, critical arguments posited, final voting results, etc.); 2) creating a digest for each speech, identifying what arguments are given by each speaker; 3) discovering what arguments are utilized repeatedly throughout the course of the debate; 4) identifying a pattern of argumentation according to who agrees with what points; and 5) discerning "contemporary comment and reaction to the debate" by paying careful attention to newspapers and magazines (p. 94).

According to this traditional form of criticism, individual speeches "must be considered as a whole, in the framework of the history of the period. This is the value of studies in public address," according to Cain (1955, p. 93). But perhaps what is most telling about the traditional methodology is what is left out of analysis. Cain (1955) instructs that, "The critic should not attempt to deal in detail with the rhetoric of individual speeches" (Cain, 1955, p. 93). In other words, the specific language, or the vehicle through which the message is conveyed, is not a significant emphasis for early rhetorical analysis of congressional debate. The content is summarized and analyzed but

the form through which the content is presented goes largely ignored. This norm of early rhetorical criticism of congressional debate is illustrated by Ralph Micken's analysis of the League of Nations Debate. Micken's (1951) previously mentioned study is an overview of strategy by both sides of the debate on the League of Nations. The focus of this research becomes why the anti-league side won and it was because they were able to stall long enough to "educate" the public about the dangerous precedent of entering such an international agreement. The effects of the discourse are expounded upon by considering a generalized overview of argument.

A year later, complementing the 1951 article, Micken (1952) published another piece that also considers the debate over the League of Nations; except in this article, argument is not analyzed fully. Rather, background on certain participants in the debate is provided. Essentially, it gives a biographical sketch of the western senators critical to the debate: William Borah, Hiram Johnson, Thomas Walsh and Key Pittman. The second article treats historical context as a separate issue from the actual arguments presented in the debate. Through consideration of both articles as a whole, Micken puts on display the strong influence that the neo-Aristotelian method had upon studies of rhetoric: he (1952) writes about the historical context (separate from actual treatment of the arguments), overviews the arguments without considering the actual language utilized to present them (1951), and assesses the effects of those arguments on the receivers (1951).

In 1960, Waldo Braden also analyzes the debate over the League of Nations, reiterating the conclusions that Micken (1951, 1952) reports by claiming the primary strategy was to delay a decision on the matter because "they needed time to 'educate' the public and to start 'backfires' on wavering senators" (p. 279). And in the process of doing so, Braden, in one succinct article, demonstrates the impact that neo-Aristotelianism had

upon the discipline of rhetorical criticism. He begins by discussing "The Occasion" and classifies the debate into four phases. Then "The Audience" is analyzed and classifies the senators into four groups based upon their degree of agreement and disagreement with the idea of America entering the league. Next, Braden presents the "Strategies Compared," an overview of the significant lines of argumentation presented by pro-leaguers and anti-leaguers. And finally, in the summary, Braden addresses the question of, "why did the Senate reject the League of Nations?" (p. 281) and ends the article with a discussion of why the anti-league arguments had more impact than the pro-league arguments. While Braden's article is quite interesting and informative, a significant weakness is the inattention to the actual language used by the participants in the debate as they formed their arguments. Instead, Braden, consistent with the scholars mentioned to this point, simply *summarizes* the arguments presented, and while I am sure much justice is done to an overview of the debates analyzed, I cannot help but think that some meaning is lost by not displaying the actual language more throughout analysis. In Braden's (1960) article for instance, one lengthy quotation is provided which quotes Pat Harrison, a senator from Mississippi during a Senate speech on July 21, 1919. The rest of the quoted language includes either catch phrases used, most of which were stated by President Wilson who would have never participated in the actual discussion on the Senate floor, or are lengthier quotations of secondhand reports of debate from newspapers.

Why Ignore Language?

The observation that actual language is ignored in the earliest studies of congressional debate is not by any means a stretch, or for that matter, even a keen observation. That was part of the methodology as stated by Cain (1954) (see discussion

above). The question to consider is why did studies stay away from the actual language of the debates? The answer to this question lies in the difficulty of sifting through entire debates to identify critical portions of specific language for analysis because so often, they do lack structure due to the longwinded-ness of the speakers. The very beginning of this literature review explains how arduous this task is and how few critics chose to study congressional debate at all, and here it is understood that this same reluctance is why none of the few early critics who did choose to study debate found it necessary to take on the task of analyzing the specific language and how it generates meaning as text. Braden (1960) reiterates the difficulty:

> One of the frustrating problems about studying congressional debating is that the participants seldom behave like college debaters and seldom follow the procedures outlined in textbooks on argumentation and debate. There is no simple affirmative and no simple negative. Instead the debates are often multisided. Apparently the speakers have never heard of stock issues or standard analysis. (p. 239)

The lack of academic structure in congressional debating makes it challenging to analyze, and so it seems that one strategy utilized to ease the burden is to impose the competitive debate structure upon it, which is what studies previously cited have done. By discussing the debate in terms of "the affirmative strategy" and the "strategy of the negative" (Chester, 1945, p. 408), or the pro-league side and the anti-league side (Micken, 1951 & 1952), critics have imposed a crystallization of the positions of those who affirm or negate the proposed legislation in question. Much like a critic charged with the task of evaluating an academic competitive debate round, the initial scholars of congressional debate have created a flow chart of sorts so that the affirmative arguments and the negative arguments emerge in a clear division of ground. While this flow chart may make congressional debate more manageable as a subject of study, the criticism remains that without significant display and reference to the actual language used by key participants

in the debate, much context and hence meaning is lost to the mere reflections of the critic. Of course scholarship involves the reflections of the critic but if the actual data being analyzed is not presented so that readers may also make their own reflections, then the intersubjective validity of writing, reading and critical thinking is largely mitigated.

The Linguistic Turn in Rhetorical Criticism

During the 1950s and 1960s, rhetorical criticism experienced a gradual paradigm shift whereby the limitations of what was called "neo-Aristotelian" criticism became apparent to the discipline of Communication Studies; so much so, that it became inferior and taboo to even approach the study of rhetoric from such a perspective. Brian McGee (2000) points out that anybody who wishes to be published as a rhetorical critic will not write from the traditional perspective of criticism. The limitations, some of which have already been stated, are many. Most notably, they are that 1) the actual language of discourse goes largely ignored and 2) the effects of rhetoric upon the audience cannot be ascertained unless one actually asks the audience members individually; so, the study of effects became relegated to the social scientists, leaving rhetoricians with the primary goals of studying language to uncover meaning through analysis of text. At the heart of this shift in paradigm was Kenneth Burke—a revolutionary academic thinker who "demonstrates mastery of concepts from numerous disciplines, including philosophy, literature, linguistics, sociology, and economics. His primary perspective, however, could be considered a rhetorical one. His object of study is the communicative medium itself—language—and he seeks to discover its nature, its ends, and what it does to us" (Foss, Foss, and Trapp, 1991, p. 169). Rather than myopically focusing on who agrees with what in a discursive context from a historical perspective, Burke shifts the focus to the power of words via symbolic action. From this shift in thinking comes a plethora of

rhetorical theories that help lay the foundation of contemporary criticism: Consubstantiation (identification), the Pentad, and Pollution-Purification-Redemption; which are but a few of Burke's theories contributing to what he calls "logology," or the "effort to discover how language works" (Foss, Foss, and Trapp, 1991, p. 188).

Other very important critics helping to shape the contemporary landscape of rhetorical criticism are Walter Fisher, who is most known for his narrative theory of rhetoric (1987), and Ernest Bormann, who is most known for his contribution of fantasy theme analysis/symbolic convergence (1972; 1985; and others). These two authors have of course had major influences on the direction of contemporary rhetorical criticism. They, like Burke, are not so much interested in the outcome and effects of rhetoric, but rather the way in which the words that make up the text of a rhetorical artifact work symbolically through an effort to achieve persuasion. For instance, Fisher's narrative theory considers the way in which all language has a storytelling quality to it, and further that, depending upon the make-up of the intended audience, storytelling is more persuasive than that what he calls the "rational world paradigm" of persuasion. Bormann also expounds on the power of language and the way in which symbol using has the potential to create a sense of familiarity, excitement, and thusly "convergence" amongst a group of people striving toward accomplishing a goal together—they create their own fantasy which drives group cohesion and satisfaction.

Fisher and Bormann, from among others, played integral roles in shaping the contemporary study of rhetoric. The primary importance of mentioning these two particular authors here is the fact that they both wrote critical pieces contributing to the literature on congressional debating while at the same time, demonstrating the early stage of the shift to a more contemporary focus for rhetorical studies: language strategies.

However, it is absolutely necessary to keep a couple of ideas in mind as we overview the work of Bormann and Fisher in the context of congressional debating. The first idea to keep in mind is that for both authors, the work reviewed here represents some of their earliest scholarly publications, and so, if remnants of neo-Aristotelianism are discovered, we can certainly understand why that is the case. The linguistic turn is a gradual shift in emphasis, one that had only begun as Bormann and Fisher were writing the articles reviewed here. The second point to keep in mind is that the context of congressional debating is different than many other contexts of rhetoric considering that at the end of the debate, the audience is surveyed in the form of a vote. Congress people are asked to vote "aye" or "nay" (they also have the option of abstaining) at the end of the discussion signaling their agreement or disagreement with the proposition being discussed. So, the "effects" of the rhetoric are a given before rhetorical analysis even begins; although even given this formal assessment of the effects, great difficulty lies in determining what caused a particular congress person to vote a particular way. Thus, the significance of bringing up these two points—disclaimers of sorts, is that Bormann and Fisher may very well bring up "effects" in their analyses and may very well portray other qualities of neo-Aristotelianism as well; however, it is important to recognize that their primary foci shifts from a historical overview of argumentation found in previously mentioned analyses of congressional debate to a focus on language strategy.

A Civil War Study / Walter Fisher

Between Bormann and Fisher, it is Fisher (1966) who makes the point of focusing on language strategy especially clear in his *Speech Monographs* article entitled, "The Failure of Compromise in 1860-1861: A Rhetorical View," in which he analyzes the congressional debating leading up to the Civil War. He points out that other analyses of

this debate conducted by historians neglect "a highly significant factor in the failure of compromise, the rhetorical factor" (p. 366). Past study of the compromise debate points "to particular men, factions, or events, but ignores the *process* (original emphasis) of compromise as a persuasive interaction among these power elements; it considers compromise from a political as contrasted with a rhetorical point of view" (p. 366). Now, Fisher is clearly not talking specifically about the studies previously mentioned in this literature review; he is talking about people who claim to be historians of the Civil War debate, not scholars of communication. However, the observation is noteworthy and speaks to accomplishments of the linguistic turn in rhetorical criticism because again, the previously reviewed studies focus on the historical events of who took sides with whom and for the most part, ignored the process of rhetoric—the language involved with the symbolic construction of meaning.

A paragraph later in the article, Fisher becomes much more specific about how he analyzes the process of compromise when he announces that his study:

> …focuses on the interaction of the attitudes and arguments of the rival factions in respect to the crucial issues in the debate, and it involves the use of the enthymeme, a concept encompassing the persuasive nature of deductive arguments and the distinction between rhetoric as the art of practical discourse and dialectic as the art of theoretical discussion as its critical tools. (p. 366)

By using the enthymeme, Fisher focuses on the logical process of the compromise and breaks down the proposal into its premises and conclusions. The claim of Crittenden, a southern democratic senator leading the charge in defense of slavery, was "that slavery be permitted in the territories" (p. 370); which is broken down further into the major premise, the minor premise and the conclusion. The major premise is that, "The Constitution guarantees the right of citizens to take their property into any and all of the states and territories of the Union" (p. 370). The minor premise is that, "Slaves are

property" (p. 370). And the conclusion is that "therefore: Slaves may be taken into any and all of the states and territories of the Union" (p. 370). So, Fisher focuses on the logos of the compromise as a persuasive appeal. He does not ignore other appeals to ethos and pathos as important components to the overall failure of compromise, but his focus is on the logical structuring of the argument presented by the Southern Democrats and the response of the Northern Republicans, who essentially attacked the minor premise—the idea that slaves were not property.

Fisher's article represents a marked difference from the approach of the earliest studies of congressional debate. Rather than only providing historical context, an overview of arguments, and inferences as to who agrees with what arguments, Fisher turns attention to the process of argumentation—and specifically, the appeal to logos and why the two sides of the debate could not agree to the proposed compromise and hence, why the two sides went to war against one another. However, while Fisher does direct attention to the process of rhetoric in the context of congressional debating, and makes this point especially clear, he, like previously reviewed literature, does not display the actual language of debate throughout the reporting of analysis.

But before becoming too critical of Fisher for not fully presenting the data in detail, recognition should be made of the justification Fisher has for merely paraphrasing the debate. He has a better excuse for doing so than the difficulty of sifting through the verbosity of the senators, and it was because he did not have a precisely transcribed record from which to draw data, and so it was virtually impossible for him to accurately display the data to the readers of his article. Keeping records of congressional debate is another topic that Earl Cain takes up in his (1962) article entitled, "Obstacles to Early Congressional Reporting" in the *Southern Speech Journal*. He explains: "Detailed

reporting of congressional debate is now casually accepted, but for more than eighty years of deliberations from 1789 to 1873, Congress was reluctant to establish a system for accurate publication of its debates" (p. 239).

During this timeframe, the reportage of congressional debate was a contentious issue. Many congress people felt that having the public eye on them would prohibit them from discussing all available policy options due to the pressures of public opinion as well as the matter of threatened national security through disclosure of secrets. Many members of Congress simply did not want their immediate reactions to the arguments of others to become permanent fixtures in American history; they felt as if they should be given more time to reflect upon and prepare statements that would become a matter of public record. Many members of Congress simply felt as if the public would not be interested in what goes on during policymaking sessions. Furthermore, since there was no such thing as *Congressional Record* at the time, there was no place else to publish the reports than in the newspapers such as the *New York Times*, and in light of all the other reasons for not publishing, this was simply not practical. So until 1873, all that exists in terms of records of public debate are summaries by the few reporters who were able to make it into the sessions (Cain, 1962). As much as these reporters should be commended for their contributions, it still goes without saying that analysis of congressional debating prior to 1873, which would obviously include Fisher's (1966) analysis of the failure of compromise leading up to the Civil War, is not nearly as accurate as the analyses post 1873 and beyond as technology allowed transcription to become easier and more precise.

A Civil Rights Study / Ernest Bormann

Bormann's (1962) article, "The Southern Senators' Filibuster on Civil Rights: Speechmaking as Parliamentary Strategem," also provides an example of rhetorical

studies shifting more toward a focus on language strategy, as opposed to a neo-Aristotelian—historical and paraphrased overview of argumentation. Although he does begin by briefly placing the debate "within the broader political framework" (p. 183), the focus quickly shifts to "the way the southern senators used speechmaking as a parliamentary strategem" and how this feature of rhetoric "furnishes an intricate lesson in parliamentary tactics and legislative politics" (p. 183). Perhaps the most significant point to make about Bormann's article for the purpose of this literature review is the way in which he puts on display the actual language of the debate. Rather than only paraphrasing arguments, he introduces the arguments made and then identifies an example from the transcribed text of the debate to demonstrate, thereby giving the reader a chance to judge for herself. He quotes *The Congressional Record* at least six different times throughout the course of a relatively short (11 page) article.

To begin the article though, attention is directed toward historical and political context. Bormann explains that, "The second session of the eighty-sixth congress convened in January of 1960 with the election of the coming November furnishing background of deliberations" (p. 183). Even though then current Vice-President Nixon felt confident of his selection as the Republican nominee, results of the previous 1958 election cast doubts on his chances of being elected over the Democratic nominee, despite the fact that "the Democrats had no clear-cut strong candidate for the party's nomination: Senator Humphrey was too liberal; Senator Kennedy was a Catholic; Senator Johnson was from the South; Governor Stevenson had been twice defeated" (p. 184). Bormann (1962) explains that, "In this atmosphere the great electoral vote of the urban-industrial states of the North and West became pivotal. The Negro vote in these states assumed crucial importance. The Congress was in a mood for civil rights legislation" (p.

184). So, the pre-text of the debate is that the pro-civil rights bloc consisting of "Republican regulars" led by Senator Dirksen, the "Democratic moderates" led by Senator Lyndon Johnson, and a "coalition of Republicans and Democrats" who were "representing the urban-industrial states of the North and West" (p. 184), was supporting the civil rights legislation proposed by the Eisenhower Administration which spelled out the right to vote and called for integration of public schools while at the same time, attempting to gain momentum for the upcoming presidential election. The opposition bloc, consisting of "eighteen senators from the old Confederacy" who were "veterans of Congress" and "held important committee chairmanships" (p. 184), on the other hand, had to defend their ideological ground while trying not to offend a whole race of people.

In addition to the challenge of not offending African Americans during presentation of arguments by the opposition, the fact that that the pro-civil rights bloc had an overwhelming majority of senators on its side from the beginning also presented an obstacle to the goals of the opposition. Thus, the only rhetorical strategy that had any hope of success was the filibuster; however, even this strategy initially seemed to be only a far-fetched hope of the opposition given that the majority had enough support for cloture in the Senate. Bormann (1962) articulates the difficult rhetorical challenge confronting the opposition bloc: "To stop the Senate from voting required only that the southerners keep talking; to keep talking without irritating the civil rights majority to the point where they would vote for cloture was a more delicate task" (p. 186). However, the opposition got an opening when the proposition made the tactical mistake of introducing the civil rights legislation as an amendment to the Stella School District bill. This tactic created an opening for the filibuster to be seen as a rhetorical strategy that had the chance of success because it irritated enough of the pro-civil rights bloc to the point that they

would entertain the notion of oppositional strategy. Bormann (1962) cites Senator Wayne Morse, a vocal supporter of the civil rights legislation, to illustrate the extent to which this tactical mistake tilted the ground of the debate in favor of the opposition. Morse, a member of the pro civil rights bloc, advised his colleagues: "I do not believe we ought to follow a course of action of which it can be said that whatever we pass, we passed it only after we stooped to indirection, subterfuge, and sharp practices" (*The Congressional Record*, vol. 106, p. 2280, quoted in Bormann, 1962, p. 186). But because the leaders of civil rights bill ignored this advice, an opening was created for the voice of the opposition to be heard in the form of a filibuster. As long as the opposition bloc could keep making intelligent arguments, the quorum would not be called, and the minority would be allowed to keep talking.

This unique context of the southern senators' rhetoric and how it impacted the function of the filibuster within the forum of congressional debate is what attracted Bormann (1962) to the topic. The filibuster of 1960 changed the image of the filibuster and its role in the policymaking forum. As Bormann points out, "This was not Huey Long reading from the woman's underwear section of a mail order catalogue" (p. 187). The opposition to the civil rights bill was under constant threat of a quorum call, but had just enough empathy from the majority to be able to say what they needed to say, without having the luxury of being able to talk simply to waste time. The minority had to make every argument of every speech count or risk being voted off the podium; as Bormann suggests though, they were up to the challenge: "The southern senators in systematic fashion defended their position on civil rights with impressive support"(p. 187) and thus avoided annoying the majority to the point of cloture. The arguments presented, while not agreed to necessarily by the majority, made enough logistic sense to keep listening. In

fact, there was only one senator—Senator Eastland, who opposed the right to vote; the bulk of the argumentation persuaded the civil rights bloc to take heed.

According to Bormann (1962), logical argumentation presented by the opposition fell along four lines of reasoning: legal, constitutional, practical and moral. On the legal front, the argument was made that there was already action available to parties denied the right to vote. On the constitutional front, the argument was made that the proposed legislation "called for action clearly beyond the powers delegated by the Constitution of the federal government" (Bormann, 1962, p. 188). On the practical front, the argument was made that the proposed legislation was ahead of its time and that enacting it would cause race riots. And on the moral front was the reverse discrimination argument. Bormann concludes that these lines of argumentation were commonsensical enough to enough members of the majority party that the filibuster was allowed to continue. The logically effective arguments made by the opposition, according to Bormann, dealt with the inherency of the problem and the workability of the solution; much of his article is spent examining those arguments because they were most influential to the continuance of the filibuster, given that sound, logical arguments had to exist in the minds of the majority party for the filibuster to even be allowed to continue.

Despite the overall positive assessment of the opposition's argumentative strategy, Bormann does suggest that there was one weak logical connection in the southern argument—a question of fact asserting that the warrant for the debate does not exist to begin with. In other words, the opposition argued that the harm of the status quo is not significant enough to warrant action. Or specifically, the "contention that the voting referee proposal was not needed because Negroes were not being denied the vote in the South" (p. 187) is the one faulty argument given by the opposition according to Bormann.

However, the reader needs not rely solely on Bormann's interpretation; rather, he provides evidence of analysis through display of the actual language being analyzed by referring specifically to a quotation by Senator Talmadge, who says: "In Georgia, Mr. President, all qualified citizens –regardless of their race, color, creed or sex—are freely exercising their right to vote" (*The Congressional Record*, vol. 106, p. 2639; quoted in Bormann, 1962, p. 188). Bormann provides the argument and then assesses that "speaker after speaker came forward" (p. 187-188) to reiterate the same argument.

Although a given to contemporary theorists, direct quotation as presentation of data was new in the study of congressional debate. Through Bormann's article, we see a new trend emerge whereby the reader is able to see the data for herself so she can draw her own conclusions as to the nature of a given argument and decide for herself as to whether an argument is either logical or illogical; she is no longer confined by mere paraphrase, summary and third party translation. Data concerning the pattern of argument being considered is before the reader and is more invitational of intersubjective validity testing whereby the reader is a participant in the study of argument as well as a reader of it. Validity is determined through qualitative awareness of the object of investigation, including agreement and disagreement over how the object has come to be understood. Whereas with only mere summary, paraphrase, and other category assignments given to the data by a researcher, the reader is forced to completely rely on somebody else's system of logic as the one accurate, operational definition of what is being studied.

Rejection of Nixon's Supreme Court Nominees

Throughout the Bormann and Fisher studies, we see the trend beginning to change from a Neo-Aristotelian approach to studying congressional debate to a more

contemporary approach whereby language becomes the focus. The change in trend is represented by authors paying more attention to the details of particular arguments made in debate along with direct quotation of interlocutors making those arguments; whereas the original analyses of congressional debate described political context and barely scratched the depth of argumentation, deferring instead to surface level overview. The changing trend continues to be seen in the next article, "The Defeats of Judges Haynsworth and Carswell: Rejection of Supreme Court Nominees," written by Richard Vatz and Theodore Windt, Jr. (1974).

Vatz and Windt, Jr. (1974) begin their article by describing the political climate leading up to the two failed Supreme Court nominations standing as the topic of the article. The political atmosphere at the time was inundated with concern over how the upcoming presidential election would affect the makeup of the highest court in the land. Giving us a sense of the political context, Vatz and Windt, Jr. (1974) quote Richard Nixon's acceptance speech of his party's nomination as their candidate in 1968. Nixon said, "Let us always respect our courts and those who serve on them. But let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces and we must act to restore that balance" (p. 477). Nixon is of course referencing the Warren Court which "had been the eye in the hurricane of juridicial and social controversy" for "decisions involving desegregation, Bible reading and prayers in public schools, and the rights of those accused of criminal acts" (p. 477). In short, the Warren Court "had perplexed and angered many citizens" (p. 477); thus Nixon was determined to shift the court away from its liberal leanings through appointments of "strict constructionists" (p. 477). In fact, this was a major campaign promise made by Nixon prior to being elected.

During Nixon's inaugural year as President, he received the opportunity to fulfill his campaign promise by virtue of the fact that two seats on the Supreme Court became vacant. The appointment process was seemingly a clear path for Nixon considering all the contextual factors working in his favor: 1) public opinion sided with his criticism of the Warren Court; 2) only one nominee in the twentieth century was not confirmed by the Senate because of the longstanding adherence to the idea that the President had the right to appoint people whose beliefs are consistent with his/hers; and 3) Nixon was in what is known as the "honeymoon period" (p. 477) of his Presidency—the time in which Senators usually avoid "head-to-head confrontations" due to acknowledgement of how difficult it is for a new President to hire a staff and get off to a running start as leader of the free world. Yet, despite the rhetorical situation being to Nixon's liking, two of his nominees failed to be confirmed as appointments and thus took two additional nominations to fill the vacant spots on the highest court in the land.

Thus, the importance of the Vatz and Windt, Jr. (1974) study is that it analyzes the effectiveness of argumentation leading to success in a very difficult rhetorical situation. In much the same way as the Bormann (1962) piece, the significance of studying congressional debate is learning about argumentative strategy from rhetoric in the policymaking arena that was successful at overcoming what initially seemed to be insurmountable barriers. Also like Bormann, authors put on display the actual language of debate so that readers may draw from their own observations when drawing conclusions about the accuracy of the categorization of argumentation, as well as the assessment of its effects.

Conceptualizing the Legislative Process

During review of studies previously mentioned in this chapter, attention has been directed by the work of the authors to case studies of congressional debate. Whether the debate over the League of Nations, the Civil War debate, the Civil Rights debate, or the debate over Supreme Court nominations, focus has been on particular actors in particular contexts of debate. It was not until I came across Janice Schuetz's (1986) article, "Overlays of Argument in Legislative Process," published in the *Journal of the American Forensic Association*, was work found that focused on classifying particular attributes of argument unique to the forum of congressional debate. The purpose of the article "is to isolate several different overlays of legislative argumentation and show how these overlays work as distinctive species according to their function, form, language and audience" (Schuetz, 1986, p. 223). The norms of legislative argument and the ways in which they manifest during the entire complex process of policymaking is the object of study. Essentially, according to Schuetz (1986), the legislative process is not confined to the public argument from Capitol Hill like what we all see on C-SPAN. Policymaking argumentation spans across public and private spheres of discourse. The most successful arguments are the ones that build thematic consistency from one sphere of discourse to another, as attributes of argumentation are adapted to fit various audiences. During debate over the Patriot Act, patriotism itself became the line of argumentation establishing thematic consistency across spheres of discourse.

Schuetz's article describes the layers of communication involved with argument in the legislative process and thus demands in-depth attention. In part one of the article, attributes of political argumentation are discussed. These attributes include function, form, language, and audience. In part two, attention is directed toward the public and private overlays of legislative argument. The public overlay includes constituent based

communication, public hearings, and floor debate; while the private overlay includes internal staff conversations, interaction with lobbyists, and closed door House to Senate conferences. Part three considers the strategic norms of corroboration and congruence necessary for linking the overlays of argumentation.

Attributes of Political Argumentation

Schuetz (1986) defines political argumentation as "a transactional process in which persons participate in political decisions by advancing claims, respond to competing claims, and seek the adherence of others to the claims they present" (p. 223). As such, argumentation is defined quite broadly and "does not delineate the different species of argument that emerge in legislative decisions" (p. 224); doing so according to Schuetz, requires first examining the essential attributes of political argumentation.

Function

According to the classical ideals of deliberative rhetoric espoused by Aristotle, policymaking determines future actions related to protecting the homeland, war, the economy, the justice system, etc. However, Schuetz (1986) points out that political discourse rarely functions ideally—alluding to the fact that politics contains more gamesmanship than idealists would like to believe. There is more bound up in the rhetoric of politicians than simply what direction the country should take and why. "Because much political argument is symbolic and partisan, arguers often justify their actions as good political decisions when, in fact, they propose policies merely to appease other politicians or to satisfy their own ambitions" (p. 224). The observation is made that there are at least two functions of political discourse, the overt function and the covert function; although it should be noted that, "these dual functions often appear in a single argument" (p. 224).

The overt function represents the ideal of political argumentation; it "determines the public nature of claims, the interests or values used as justifications, and choices of the primary target audiences" (p. 224). In the case of the debate over the Patriot Act, the overt function of argumentation by proponents is that we should adopt the act because it is critical to protecting our homeland from future terrorist attacks. The claim is made and the warrant is provided, and this encompasses the overt function of political argumentation. However, also very much at play in the debate over the Patriot Act is the covert function of political argumentation. Here, Schuetz refers to Murray Edelman (1964) whose book, *The Symbolic Uses of Politics*, describes the covert function of political argumentation as the attempt "to quiet resentments and doubts about particular political acts, reaffirm belief in the fundamental rationality and democratic character of the system, and thus fix conforming habits of future behavior" (p. 17). In the case of debate over the Patriot Act, the covert function of argumentation is fulfilled by the inference already discussed in previous chapters: those who are for the act are true patriots and those who are against the act are clearly not. The covert function of patriotism in this case "serves to dull the critical faculties rather than to arouse them" (Edelman, 1964, p. 18). Because determining the function of a political argument requires examining the language utilized in making the argument, language is considered an important attribute of political argumentation.

Language

To begin the brief section on language, Schuetz (1986) reiterates an observation made earlier in this literature review that surprisingly, "relatively little emphasis is placed on the role of language in argumentative discourse" despite the fact that "the role of language is central to political arguments" (p. 225). As mentioned in the previous section

on function as an attribute of political argumentation, an argument may fulfill an overt function and a covert function at the same time, but making this sort of classification requires that one actually consider the language of the person doing the arguing—something that again, did not happen in the earliest studies of congressional debate. Citing Edelman (1977b), Schuetz (1986) tell us that, "language achieves a dual purpose by revealing meaning relevant to the public interests while simultaneously concealing meaning pertinent to the partisan interests" (p. 225).

Another reason Schuetz (1986) gives for why language is an important attribute of congressional debate repeats an observation made earlier in this chapter pertaining to the relationship between congressional debate and the public sphere. A significant purpose of making congressional debate an activity open to the public is for education's sake. Through attention paid to the legislative process, ideally, the public becomes informed of how the laws around them are being made and why. Earl Cain and Ralph Micken (cited earlier) help make this point in the section entitled "Why Study Congressional Debate?" The forum does not only involve the policymaking participants but also the constituents represented by those people. Schuetz (1986) explains Doris Graber's (1976) conclusion about politics and the public sphere:

> The average person understands the world of politics 'vicariously' through the words of politicians and the media. Specifically, the words of political leaders tell citizens about the past, present, and future policy, supply the public 'with reasons and values,' inform them about attitudes and reasoning of their political leaders, and outline the public consequences of adherence to or rejection of policies. (p. 225)

In order for any insight to be gained pertaining to the relationship between congressional debate and the "average person,' close attention must be paid to the actual language of the debate.

Form

The next important attribute to consider according to Schuetz (1986) is recognition of the fact that political argumentation occurs through various forms. Form is an essential attribute of argumentation that cannot be overlooked, particularly in a study such as this one in which a relationship between legislative argument and the public is being examined. Robert Heath (1979) explains: "Whether by individuals, society at large, or change in circumstances, the growth of thought through constant contact with reality and the growth and change of ideology in a culture are inseparable from form. As individuals and society change, so do the perspectives thereby creating new equations among ideas" (p. 394). Heath is expounding here on Kenneth Burke's notion of form, the same notion that Schuetz references in her article, and points out that "this conception of form emphasizes the enduring link between form and substance" (p. 394). As Burke (1925) himself says, "form is the creation of an appetite in the mind of the auditor, and the adequate satisfying of that appetite" (p. 35). So, to consider the way in which patriotism manifests as argument in the debate over the Patriot Act, attention to form is necessary.

Burke (1972; 1973) articulates three major forms and one minor form. The major forms include progressive, repetitive and conventional. The minor forms include "metaphor, paradox, disclosure, reversal, contraction, expansion, bathos, apostrophe, series, and chiamus" (Burke, 1976, p. 63). Some understanding of the major forms is necessary for this project. To begin, progressive form is broken down further into two types: syllogistic progression and qualitative progression. During syllogistic progression, the rhetor takes the audience step by step through the sequence of premises, spelling out the relationships between variables. "To go from A to E through stages B, C, and D is to obtain such form. We call it syllogistic because, given certain things, certain things must

follow, the premises forcing the conclusion" (Burke, 1966, p. 54). Qualitative progressions on the other hand, according to Burke (1931; rpt. 1968), "are qualitative rather than syllogistic as they lack the pronounced anticipatory nature of the syllogistic progression. We are prepared less to demand a certain qualitative progression than to recognize its rightness after the event" (pp. 124-5).

The second major type of form, according to Burke (1931; rpt. 1968), is repetitive which is "the consistent maintaining of a principle under new guises. It is restatement of the same thing in different ways" (p. 125). The third major type of form is conventional, or "categorical expectancy" as Burke (1931; rpt. 1968) puts it. Different contexts of communication generate different commonly accepted ways of forming the message. Burke (1931; rpt. 1968) explains that "even before opening a novel," the reader looks "forward to an opening passage which will proclaim itself an opening" (p. 126-7). As the previous quotation suggests though, the extent to which a particular form is effective very much depends upon the audience exposed to the message, another important attribute of political argumentation.

Audience

Schuetz (1986) explains how difficult it is to keep track of all the diverse audiences associated with legislative argument:

> Identifying audiences of legislative argument is difficult because arguers, public interests, and contexts change many times during the process of making legislative decisions. At times, the audience may be a single constituent or lobbyist, whereas in other cases, audiences include designated committees, political colleagues, or the public. For this reason, arguers select evidence and rationales designed for the target audiences whose assent they seek. (p. 227)

While one form of argument may be compelling in a particular context, it may be completely ineffective in another. This is what Walter Fisher (1984) tells us when discussing the narrative paradigm of human communication, claiming that some

audiences are more swayed by a storytelling form of argument rather than the "rational world paradigm." Context generally dictates a particular form emphasized; e.g. prose interpretation involves a greater proportion of qualitative progression whereas academic debate generally involves a greater proportion of syllogistic progression. The same is true for argumentation in the legislative process—when talking to the "public," the expectation is that politicians will argue more through storytelling than the line by line syllogistic reasoning expected when making an argument in front of colleagues in Congress. Expectations are relative though as critics reviewed earlier suggest that even on Capitol Hill, senators and representatives are more interested in appealing to the masses than in engaging in rational-critical debate.

According to Schuetz's (1986) article there are essentially three target audiences that arguers in the legislative process attempt to reach. The first audience includes the elected officials who participate directly in the policymaking process. Lloyd Bitzer (1981) refers to this group as the "assigned function" audience and believes them to be well prepared for the task of policymaking because they are knowledgeable about the problems dealt with through legislation and are familiar with the argumentative forms utilized in the debating of issues (p. 246). "Such audiences," according to Schuetz (1986), "respond to others' political arguments according to standards embodied in the mutually agreed rules and procedures where the vote and rule of the majority are the basis for decisions" (p. 227). The second target audience includes the constituents, the people whom are being served by the arguers. Bitzer (1981) refers to this group as laypersons that "set forth their positions out of their own self interest and demand adequate services, fair taxes, honest public programs, and human institutions" (Schuetz, 1986, p. 227). As such, this audience typically only considers arguments for policies that favor their

particular lot in life and only accepts the evidence that supports those positions. The third target audience is the mass media audience. Citing Furay (1977, p. 4-5), Schuetz explains this audience has the "grass roots mind," which "perceives political arguments not according to the rules or principles of rational decision making but according to the image of the source, to shared attitudes such as optimism, efficiency, and patriotism that are embodied in claims, and to their perceived liking for the candidates" (p. 227). Further, the media prefers stories that involve controversy without a lot of technical argumentation backed by a lot of evidence.

"Overlays of Legislative Argumentation"

In this section of Schuetz's article is found what is perhaps the most influential analysis helping to conceptualize the framework of the context of communication standing as the focal point for the current study. The way in which the legislative process concerning the Patriot Act plays out over the longevity of its existence is quite complex. The enormity of the process is nearly incomprehensible given the way in which it overlaps with other major actions taken in the "war on terror," such as the creation of the Homeland Security Department and detention centers overseas like Guantanamo Bay and Abu Ghraib. It is not so easy to compartmentalize the aspects of the "War on Terror." At the heart of this complexity lies the fact that this particular war identifies a method of attack as its enemy as opposed to previous wars fought by the United States in which actual groups of people were identified as enemies. The war is not the "War against Al Quaeda;" it is the "War on Terror." Furthermore, from inside this war is found multiple subsets of war—"The War in Afghanistan" and "The War in Iraq" standing as two of the biggest. These wars blur together in the public sphere and ambiguously merge into one big war. Thus, it is hard to find a case in which the Patriot Act is being discussed without mention of the other parts of the war, and vice versa. So, conceptualizing and narrowing what is actually being examined in this project has thusly been a very difficult task.

Also contributing to the difficulty of the task is the fact that "within the field of politics, several distinct genres of argumentation exist" such as political campaigns and legislative decisions for which function, form, language, and audience all show up differently (Schuetz, 1986, p. 228). Obviously, discussion of post 9/11 patriotism and the Patriot Act seeps into many genres of communication. It was key to the 2004 re-election of George W. Bush and as many people have said, key to Bush's entire presidency (Dean,

2004; Suskind, 2004; to name but a couple of sources here). The pattern in which patriotism manifests in the post 9/11 public sphere, "is indistinct and blurred, resembling the picture that an observer might see when several different transparencies are projected simultaneously on one screen" (Schuetz, 1986, p. 228). Thus, in order for a "clearer picture" to emerge, observers must "look at one overlay at a time and perceive its separate and distinct parts" (Schuetz, 1986, p. 228). This justifies the notion of looking toward one particular overhead of patriotism—the legislative process concerning the Patriot Act.

Within that particular legislative process even, there are many overlays of argumentation. "Among the many overlays in a legislative process are both private and public arguments" (Schuetz, 1986, p. 229). The private arguments occur behind closed doors in contexts typically not open to public investigation; these arguments occur between the policymakers and staff members, lobbyists, negotiations in committees, etc. The public arguments on the other hand, are open to public scrutiny and in fact, are made easily available to the public in the form of transcription—public speeches, testimony in *Congressional Record*, published reports etc. The main source of data for this analysis of patriotism is public argument; however the private overlay is not left completely alone thanks to insiders (and former insiders) of government providing their perspectives. Such sources of information include Paul O'Neill (in Suskind, 2004), former U.S. Treasury Secretary under Bush, John Dean (2004), Former Counsel to President Richard Nixon, and various congress people who admit to pressuring and being pressured by the pull of patriotism in the aftermath of 9/11 (in various exclusive interviews with journalists like O'Harrow, Jr., 2005). In fact, due to the secrecy of the Bush Administration (Dean, 2004), much of the analysis of the initial legislative engagement with the Patriot Act is

almost exclusively based on private overlays of argument because such little public attention was devoted to it. The extent to which the act was rushed through the legislative process prevented much public discussion (O'Harrow Jr., 2004; Foerstel, 2004; and others). This observation is explored in more detail later in this project. But for now, attention has been called to the fact that while most analysis here focuses on public overlays of argumentation, it does, in second-hand ways, access the reportage of private overlays—especially in the beginning of the process when the public overlays were, by design, quite limited. In Chapter 3 on methodology, the overlays of argument to be analyzed are outlined. For now, we continue with the review of literature.

"Strategic Norms Linking Overlays"

The fact that there are so many overlays of argument affecting the outcome of almost every piece of legislation that goes through Congress, it is no wonder that so few people have taken on the task of studying the process. The differences in function, form, language and audience between overlays of argument and even within one overlay of argument are enormous. Fortunately though, Schuetz (1986) has provided some guidance in terms of managing the task at hand. "Since legislative argumentation often continues on one bill for weeks, months and sometimes even years, it is a major challenge to fit their arguments with those made by other arguers" (p. 233). Rather than a researcher feeling obligated to study each and every word spoken by all legislators involved with the decision making process, it is more prudent to discover if there are norms that link one overlay to another. For the legislation that is successful at getting passed, strategic norms can be found. So, in this section, the norms provided by Schuetz are discussed and brief explanations concerning the way in which these principles conceptualize patriotism as a

strategic norm linking the overlays of argument in the debate over the Patriot Act are provided.

Corroboration

Schuetz (1986) explains that the first strategic norm, corroboration, "occurs when arguments of constituents, witnesses, and legislators presented in one overlay repeat or reinforce the evidence, rationales, and/or claims of arguments presented in different overlays" (p. 233). Thus, we get the "talking points" of political discourse. Any successful campaign, push for legislation, or defense of legislation has to have a consistent message to be successful, pointing to a fact of modern political life that the best campaign is the most organized campaign (Francis, 2004). Each debate participant arguing for a particular position must be sure and corroborate the message of other arguers who have the same goal in mind. "In this way, arguments develop some degree of reliability and accuracy and thereby contribute to a common rationale for changing or refraining from changing laws" (Schuetz, 1986, p. 233). In the debate over the Patriot Act, patriotism is a significant argument providing corroboration to the side of the proponents.

Congruence

Schuetz (1986) tells us "congruence is a second norm that attaches the arguments and arguers of one species to another into the web of a legislative decision" (p. 233). Helping explain the norm, two aspects associated with it are discussed. For the first aspect, Zarefsky (1981) is cited and "he recommends that public policy arguments be evaluated according to their congruence with audiences, that is, the 'judgments of audiences' and 'history.' When arguments fit with the 'underlying assumptions' and relate to the 'historical experiences' of audiences, they enjoin a strong rationale for the

claims presented" (Schuetz, 1986, p. 233; see also Zarefsky, 1981, pp. 88-89). In the case of the Patriot Act, patriotism itself seems to be a significant point of congruence existing between the various overlays of argument. The historical experience of an audience overcome with a sense of urgency fits the message well that immediate action must be taken to defend the country from terrorism and further, any true patriot would make whatever sacrifices necessary to ensure that it happens.

Studies From the Last Decade

Despite such an interesting and important context of communication to study, at least according to the level of depth involved with the articles that have been covered here, it is necessary to note that still not much breadth has been devoted to the subject of congressional debating. Even after the publication of Schuetz's article in 1986, not much attention has been given the topic of Congressional debate.

"Special Issue: Argumentation and the U.S. Senate"

Because study of congressional debate in the 1990s is limited, but not absent, I am able to appropriate the title of a 1995 issue of *Argumentation and Advocacy* as the title of the current section. This special issue "examines the practices of argumentation in the United States Senate. The three essays are largely concerned with the Senate as a forum where arguments are made within the cultural practices, norms, and constraints of place" (Kane, 1995, p. 57). The introduction to the special issue, written by Thomas Kane, sets up the collection of studies as one that examines the norms of Senate discourse, which evolve slowly in a unique manner, by focusing on when those norms are violated and the price that must be paid. For instance, Senator Rick Santorum's (R-PA) speech against President Clinton's budget plan on December 15, 1995 is cited as an example of when customs were violated. Using terms such as "bald-faced untruths," "systematic

disinformation campaigns," as well as "revisionist history" (S18718-18721), Santorum proceeded to tear down Clinton and his budget plan. The language used by Santorum created quite a stir in the Senate because it violated the norm of respect that is to be afforded all members.

Following the speech, many others stood up to talk from both sides of the aisle—some agreed with Santorum's stance against the budget plan, but no one appreciated the language he used to describe Clinton. Senator Barbara Boxer (D-CA) for instance, who undoubtedly did disagree with Santorum's stance, spoke directly after Santorum reminded him of "the sanctity of this institution" and asked him to review his remarks in the *Congressional Record* so that "he will understand the difference between making a point in a way that is disrespectful and making a point in a way that is respectful" (S18721). Senator Robert Bennett (R-UT) who agreed with Santorum on the issue, completely disagreed with his use of language. He said, "I will not use words like 'lie.' I will not use 'despicable' and 'disgraceful.' I came over here a little bit angry, but I will not use the word 'anger'" (S18722). The scolding of Santorum did not end on that either, for some time to come afterward, various Senators stood up in defense of the Senate chambers as an institution that should be protected from such ad hominem attacks. So attention is drawn to the institution of the Senate "where even newer members such as Boxer and Bennett will argue a sense of the appropriate, believing that the meaning of the Senate transcends the political issues of the moment" (Kane, 1995, p. 58). Hence, the entire 1995 special issue of *Argumentation and Advocacy* is devoted to the study of forum in the U.S. Senate.

The first article in the special issue is "Carol Moseley-Braun's Day to Talk About Race: A Study of Forum in the United States Senate," by John Butler (1995). This article

speaks to the rhetorical norms of the Senate by focusing on a day in which the norms were broken, and perhaps changed, according to the author. Different exchanges in two different venues for legislative argument are involved in this analysis, but there is one catalyst for both exchanges—Carol Mosely-Braun (D-IL), a new member of the Senate. In both instances, the message delivered by Mosely-Braun entailed emotional outrage over the history of racism. In the first instance, her message was not well understood nor particularly well received; the second message however, a sequel to the first according to Butler (1995), was overwhelmingly successful and led to an outpouring of personal narratives from Senators on both sides of the aisle pertaining to how far America had yet to go in the struggle to eliminate lines of discrimination in society. Butler (1995) explains the impact that Moseley-Braun's "day to talk about race" had upon the Senate forum: "For certain, those who study the Senate as a place where rhetoric operates will no longer be able to avoid the significance of interruptions such as Moseley-Braun's. The ever increasing multicultural characteristics of our society will force the political forums of tomorrow to face the sensitivities of diverse backgrounds" (p. 73).

The second article in the 1995 special issue, "Arlen Specter and the Construction of Adversarial Discourse: Selective Representation in the Clarence Thomas-Anita Hill Hearings," also examines the forum of the U.S. Senate through focus on a rhetorical artifact standing outside of the norm. The hearing in front of the Senate Judiciary Committee was over whether or not to confirm Clarence Thomas as a nomination to the Supreme Court. Famously, the crux of the debate over Thomas's confirmation had to do with the sexual harassment accusations lodged against him by Professor Anita Hill. The accusations led to intense questioning of Hill's credibility as a witness and created a courtroom like rhetorical context in the halls of Congress. Armstrong (1995), the author

of the article, points out that the adversarial hearing confused the norms of presumption typically involved with a policymaking decision with that of a courtroom in which guilt or innocence is being decided. This confusion put Professor Hill at a unique disadvantage according to the norms of U.S. Senate proceedings. She was being questioned as if a witness in a trial in which the attorneys completely control the flow of discussion, and to make matters worse for Professor Hill, she had no lawyers to make objections about the flow of discussion or even a judge to intervene on her behalf. Also contributing to this rhetorical context in which the ground was skewed is the fact that the key interrogator, Senator Arlen Specter (R-PA), was a prosecutor prior to being elected to the Senate. Hence, the purpose emerges for Armstrong (1995) who analyzes the way in which Specter utilized "argument through selective representation" (subject heading: p. 76) as a strategy to undermine Hill's credibility. The implications for Specter were negative, as the public perceived him as having been hostile toward the witness and hence, almost lost his seat on the Senate during the next election cycle.

The third article in the special issue is entitled, "American Political Mythology and the Senate Filibuster." Murphy (1995) examines "the history of the filibuster with a particular eye toward the ways in which the discourse surrounding the attempts to eliminate the filibuster exemplify certain fundamental contradictions in the American political mythology" (p. 90). The mythologies under investigation are *Democracy* and *The Constitution*. The rhetorically mythic nature of these stories, according to Murphy, are told in such ways that they can be both "contradictory" and/or "collaborative" depending on whom is telling them and for what purpose (p. 92). To demonstrate the claim, Murphy (1995) identifies three different scenarios in American history related to the development of the filibuster, and more generally, the discussion over the

philosophical tenets of a direct democracy versus a representative democracy. Through the rhetoric found related to the Federalist papers, the cloture debate of 1917, to the debate of 1995 over whether to liberalize the cloture rules of the Senate, Murphy compares and contrasts the ways in which the previously mentioned mythologies are utilized as rhetorical strategies for both complementary as well as contradictory goals.

The Bakhtinian Paradigm of Legislative Argument

The next piece to be reviewed is a book entitled, *When Congress Debates A Bakhtinian Paradigm*, and is written by Theodore Sheckels (2000). The book is important to this literature review in a number of ways. Perhaps of most significance is the fact that it was the very first piece discovered by this author and was integral as a bibliographic reference to make becoming familiar with the seminal work a relatively easy task. In the book, Sheckels (2000) contributes to understanding of past studies by being extremely critical of them. He argues:

> Critics assume that, once you get to the core of the debate, you will find a clash that can be accurately rendered in bipolar terms…the problem with the bipolar paradigm is that it superimposes a structure on the debate. That structure privileges elements in the debate that readily fit it; however, the structure marginalizes or ignores elements that do not. (pp. 5- 6)

Sheckels makes this observation and then applies the criticism to many of the studies already mentioned here, making note that the only study for which the criticism does not apply is his own previous study, "The Rhetorical Use of Double-Voiced Discourse and Feminine Style: The U.S. Senate Debate over the Impact of Tailhook '91," in a 1997 issue of *Southern Communication Journal*.

Although I disagree with the way in which the criticism by Sheckels is offered and especially with the way in which the alternative to the critique is justified, it nevertheless becomes a meaningful catalyst of thought over the congressional debating

literature. The structure of the book begins with an outstanding critical review of the Congressional debating literature, many studies of which have been reviewed here as well. Next, the author proposes an alternative to the "bipolar paradigm" of studying congressional debate and presents an overview of the work of Mikhail Bakhtin, discussing the way in which it is appropriated for congressional debate. Then, each remaining chapter re-visits individual pieces from the literature, criticizes them specifically as having artificially polarized debate, and re-works them through the lens of the Bakhtinian paradigm. Through attention to "double-voiced discourse" and "carnivelesque energy" (p. 33), two Bakhtinian concepts appropriated by Sheckels, understanding of the "inter-voices" underlying the debates is claimed and artificial polarization is avoided.

My reaction to this book is mostly critical. While I must disclaim that a) I'm far from being a Bakhtin scholar and b) the attempt to become one at this juncture would only distract from the larger purpose of this project, there would however be a significant gap in the literature review without giving Sheckels' approach some consideration. The reasoning behind this is that one, readers should know why the Bakhtinian paradigm—as developed through the only book-length treatment of congressional debate—is not integral to the present study, and two, coming back and re-visiting the paradigm in more detail is something I would like to do in a later project. But for now, there are some underlying assumptions about the Bakhtinian paradigm that just do not add up, particularly in context of studying congressional debate.

The first observation is that debate <u>is</u> a polarizing context for communication, by function and definition. Policy is formulated, reformulated and then voted upon. It is passed, rejected, and/or or stalled through various rhetorical tactics. At the end of the day,

policymakers must vote either aye or nay, or abstain from the vote altogether. Of course there are an infinite number of reasons as to why any one particular policymaker decides the way she does and of course, an infinite number of voices affect that decision, but to claim that somehow the Bakhtinian paradigm escapes the limitation of seeing debate as a non-polar communicative phenomenon obfuscates the truth of the function of debate. In the preface of Sheckels (2000) book, he writes:

> Rather than giving primacy to an oppositional construct, a scholar (using the Bakhtinian paradigm) would explore all of the voices that comprise the debate's polyphony, including both the many speakers themselves and the voices they sound by citing, quoting, using the famous words of, telling constituents' stories, and inventing the words someone or some group might utter (p. xiv).

None of the authors previously mentioned, based upon my close reading of their work, seem to oversimplify debate in the way that Sheckels would have us believe. Yes, they do acknowledge the polarizing nature of debate, but they do not pretend that all who oppose a particular policy do so for the same reasons and likewise, that all who propose do so for the same reasons. In fact, most of the articles go to great lengths, within the limitation of space, to identify the various different reasons why Congress people voted the way they did.

My second observation about Sheckels' approach is that the postmodern tendencies displayed through his presentation of the Bakhtinian paradigm seem to deconstruct knowledge rather than construct it. While I do agree with one notion embedded in Sheckels' argument, the idea that the specific language of the speakers being studied needs more attention, especially in the earliest studies of congressional debate, I ultimately find fault with the idea that previous scholars were <u>wrong</u> because they did not consider the "polyphony" of the debate. The difference is that my critique of the literature is not that the scholars were "wrong," in their analysis, and completely

misunderstood what was going on, but that they would have been more accurate by showing us the data they were analyzing, i.e., the language of policymakers, and give readers a greater chance to participate in the analysis. My critique is based on having an empirical notion of reality whereby when a person says something, it is really she who is saying it; her language is real data that can be interpreted as having real meaning in the present. Whereas Sheckels' critique smacks more of postmodernism whereby the language a person uses is not really her language, but somebody else's—a product of socially constructed reality. The author takes symbolic interaction to the nth degree and deconstructs knowledge rather than constructing it. The symbolic construction of meaning according to George H. Mead (1934), views self as a dichotomy between the "I" and various other "me's." The "me's" comprise the surrounding world from which an individual's worldview derives and the "I" mediates those points of reality into a unique, individual self (Doty, 1999). By hyper-emphasizing the "me's" in his construction of self, Sheckels neglects the "I," and thus strips agency away from the individuals as "their" language is being examined.

A third point of criticism to make here is one that has been made earlier toward contemporary rhetorical criticism—and that is in Sheckels' analysis, there seems to be the risk of "cookie cutter" criticism involved. Explanation of this criticism seems self-explanatory when Sheckels (2000), in the preface to his book, explains that, "Using a Bakhtinian paradigm, a scholar would also look for the use of double-voiced discourse and the eruption of carnivalesque energy, especially when these serve to subvert the established order" (p. xiv). Is it possible to find these concepts in every artifact one examines? I would say that if one looks hard enough for these concepts, they will easily be found during analysis of the object, and while this does not mean the concepts are not

useful and interesting lenses from which to explore artifacts, it is to say that Sheckels does not escape bipolar thinking as he claims. The Bakhtinian paradigm is not a-conceptual—it does not rise above the polarity of rational thinking. Sheckels' analysis is in fact theory driven, rather than data driven, and because he attempts to hide this fact, his work falls into the performatively contradictory nature of postmodern thinking—the idea that every theory is wrong except for mine, which is succinctly that the nature of reality is that there is no reality—a reality that cannot be proven wrong.

Clearly, Sheckels' book is highly significant to this literature review. It was amongst the first studies found on the topic of congressional debate; it was the only study found that devoted book-length treatment to the subject, and thus, it was a tremendous bibliographic reference. Further, given that much of the book opened itself to critique from my perspective, it unwittingly became a tremendous catalyst to thinking about how to approach the study of congressional debate. Interaction with Sheckels' approach proved fruitful toward the development of my own paradigm of approaching debate over the Patriot Act. The criticisms raised are meant as questions to hopefully pursue at a later time; for, I am quite interested in learning more about the Bakhtinian paradigm. For now however, the Bakhtinian paradigm has provided another vantage point of studying congressional debate from which to juxtapose the one developed here—a hermeneutic phenomenological one—which hopefully provides the discursive space necessary to move "off the beaten path of antimodernism," an integration of modern and postmodern perspectives, rather than a proclamation that one is inherently superior over the other.

Public Policy Argument in the Budget Process

The final piece to review here is critical for this author in his search to integrate the necessarily amorphous hermeneutic-phenomenological analysis of patriotism with a

patterned analysis of its use as argument in the Patriot Act. Levasseur (2005) is methodologically up to something very similar in, "The Role of Public Opinion in Policy Argument: An Examination of Public Opinion Rhetoric in the Federal Budget Process," found in *Argumentation and Advocacy*. The author begins the article by defining "public opinion" generally and then continues by analyzing the budget process over a three-year period. This is perhaps the one study found that seems to provide a model of sorts to help answer the questions posed in the present study. While Levasseur does not claim to do hermeneutic analysis, he is essentially alluding to the eidetic nature of public opinion and its function as part of the democratic process in the first part of his article. Even if he had been interested in bringing hermeneutics into the study though, he would not have had the space to carry it through; for it demands an extraordinary amount of description, questioning, and revision—the likes of which is not possible in a 15-page article. However, he does do an exceptional job of briefly describing the horizons of public opinion prior to examining just how it is utilized as argument in the budget process.

After examining 40 Presidential speeches focusing on the budget (comprising 183 pages of text), House and Senate Committee hearings with the Office of Management and Budget (OMB) director as the primary witness (comprising 282 pages of text), and House and Senate floor debates (comprising 266 pages of text), Levasseur (2005) was able to identify patterns pertaining to the way in which public opinion is utilized as legislative argument in the debate over the budget. His findings are that 1) public opinion is actually not quantitatively used a great deal in the budget process; and 2) when it is used, it is often used in contradictory ways. One pattern is that politicians sometimes try to claim that they have identified "what the public wants" (p. 155). Another pattern is that politicians "shun the popular approach" (p. 157) and assert themselves as independent

and strong leaders not swayed by the bandwagon. A third pattern identified is called "justification before public opinion" (p. 158) and occurs when a politician uses public opinion as a litmus test of sorts when attempting to convince other policymakers to vote a certain way. A fourth and final pattern identified by Levasseur (2005) is what he calls "the misled public" (p. 159), suggesting that politicians often play upon a sense of the "public's general disinterest in politics" (p. 159) as a rhetorical advantage, giving them the opportunity to claim that if only the public knew what a particular plan would do their daily lives, then there is no way they would support it.

Summary

In much the same way as Levasseur (2005) identifies patterns by which public opinion rhetoric is utilized as argument during the budget process, I identify patterns by which patriotic ethos is utilized as argument during the legislative process concerning the Patriot Act. Levasseur's study, as well as the current approach, both benefit from past studies of congressional debate in many important ways. One benefit gained through the literature review is recognition of the fact that utilizing a close textual analysis of debate transcriptions as methodological lens will not reveal the effects of the language of the debate. Attempting to learn this demands a survey approach whereby subjects exposed to the rhetoric self-report the attitude change effected by the independent variable. It is my contention, though, that the survey approach for this particular study would not be very fruitful considering the in-flux meaning of patriotism—the independent variable. Furthermore, the interaction effects associated with the other variables influencing the decision-making process such as various political allegiances, isolating the effects of one particular independent variable seems impossible without moving the study into the laboratory, thereby constructing an artificial, sterile context for communication. At this

point though, the focus changes because the patriotism being studied is not “post 9/11 patriotism,” it is laboratory produced patriotism and can not accurately mimic the way in which the meaning of patriotic feeling changes so dramatically during the course of historically effected patriotic consciousness.

Chapter 3:

Methodology

While "rhetorical criticism," argument analysis more generally, and the history of methodologies used to study congressional debate reviewed in Chapter 2 are certainly influential of the goals of the present study, I refrain from using the term "rhetorical criticism" *per se* to describe it. The pursuit of understanding is not limited to the way in which patriotism, as observed through a "unit of analysis," influences one rhetorical situation. Inquiry also puts patriotism on display as an object of "historically effected consciousness" (Gadamer, 2003). Therefore, the method is a hermeneutic analysis of text through continuous reference to context. This involves not only identifying the use of patriotism as argument, but also, for each instance in which it does manifest in such a way during the debate, asking the question, what form of patriotism is being expressed? The various meanings of patriotism as they arise through the course of post 9/11 discourse are compared to the horizons established in Chapter 1. The Patriot Act is a symbolic manifestation of post 9/11 culture and interpreting the way in which it is discussed within the text of the legislative process becomes a focused way in which to access its "horizons" (see Chapter 1 for explanation of horizon) as part of the post 9/11 world. Studying congressional debate in particular is especially important when considering that the legislature is the last chain in the link of communication connecting the "public" to the bureaucracy of government.

Hermeneutics

The similarities between rhetorical criticism and hermeneutics are more obvious than the differences given that rhetorical criticism examines language and language is "the medium of hermeneutic experience" (Gadamer, title of Chapter 1, in part two of

Truth and Method). But by considering the notion of historicality, rhetorical criticism and hermeneutics can be more easily juxtaposed. The understanding conveyed through the ontological awareness at the core of what is perhaps the most imminent overarching goal of the hermeneutic "method," is emphasis on the idea that history cannot be reconstructed as the original. Gadamer (1960/2003) explains: "Reconstructing the original circumstances, like all restoration, is a futile undertaking in view of the historicity of our being. What is reconstructed, a life brought back from the lost past, is not the original. In its continuance in an estranged state it acquires only a derivative, cultural existence" (p. 167). Thus, according to hermeneutics, history is not considered to be "context" preceding the actual analysis of data; it is very much a part of the data—leading to what Gadamer calls an "analysis of historically-effected consciousness." This sort of analysis sets hermeneutics apart from methods of rhetorical criticism; this analysis looks beyond the foci of rhetorical criticism and at the same time, it may certainly include them as part of the investigation.

During the origins of the discipline of hermeneutics, the purpose was literal interpretation of ancient scripture, whether through translation from language to language, performance of a text through music or plays, or analytic explanation (Kramer, manuscript, p. 3). Through contributions of Dilthey, Schleiermacher, Husserl, Heidegger, Gadamer, and others however, the method has evolved to mean, "interpreting the meaning of a text through continual reference to its context…and can be applied to any situation in which one wants to 'recover' historical meaning" (Lindlof, 1995. p. 31). The level of description involved in analyzing "historically effected consciousness" is distinguished from a history chapter. In many works considered to be rhetorical criticism is found a chapter on "Historical Context," which implies that having a sense of

historicality is a prerequisite to the presentation of data—the text—and subsequent analysis; context becomes "background information" for the reader. Hermeneutics on the other hand, views context and text as interdependent. Recognizing this distinction is necessary for at least two reasons: 1) it encourages participants in this communication, both author and readers, to consider each other as much a part of the study as the subjects themselves; and related, 2) it provides deference to the phenomenological deduction that history does not comprise a stagnant set of facts, dates and ideologies but rather, a living context in which understanding happens.

The Data Set

In the "war on terror," the world is the battlefield, which makes analysis of post 9/11 historically effected consciousness a task with no foreseeable ending point. Though I originally began with eyes wide open, excited to read every transcript of Congressional debate, it did not take long to realize some minimization would be necessary for pragmatic reasons.

The decision-making calculus is simple. I began by deciding to analyze the debate in the House of Representatives and to exclude the Senate debate from the data set. The reasoning is also simple: the debate is more robust from the beginning of the process (during authorization) in the House of Representatives[1]. So quite simply, the House of Representatives debate was chosen because it offers more data related to the earliest part of the debate.

[1] As chapter 4 will explain in greater detail, the Senate decided overwhelmingly to forego markup of the bill once it went through a very short-lived Committee hearing. Despite protests by one Senator—Russ Feingold (D WI), the Senate had very little to do with shaping the drafting of the bill that would be authorized, at least little influence that could be detected from a public perspective.

A second decision-making parameter set was to focus on the debate in the Judiciary Committee. This again, was a logical limitation to set because this committee is where 90% of the debate about the Patriot Act occurs. But another reason also exists, and it is the same reason why most of the debate occurs in the Judiciary Committee: the entire purpose of that committee is to debate the constitutionality of laws adopted by Congress. This committee governs the area of greatest dispute relating to the negotiation of patriotism.

A third parameter was set to make sure that the entire chronology of the legislative process over the Patriot Act is represented in the data. That is after all, the focus of analysis—to see how the negotiation of patriotism changes over time. Thus, the debate is divided into three temporal phases: phase one occurs in the immediate aftermath of 9/11 when the Patriot Act was first implemented with a sunset clause placed on the most controversial provisions, and set to expire in December of 2005 unless reauthorized by Congress. Phase two occurs between the time the act was initially implemented and when the congressional hearings over reauthorization began in the summer of 2005. Phase three spans from the time the reauthorization process began to its ending point at which the final decision over the reauthorized version of the Patriot Act was decided in March 2006. Each phase of debate provides data for analysis—giving us the opportunity to see how patriotism functions as argument throughout the duration of the legislative process.

A fourth parameter was set to make sure each phase of the debate is represented by more than one hearing. Doing so provides greater context and a measure of reliability to analysis. A pattern of argumentation that shows up between two separate debates is quite simply more meaningful than an argument that may show up in only one debate.

The literature review speaks to the way in which the patterning of argumentation is critical to analysis, particularly Schuetz's (1986) discussion of "congruence" and "corroboration" of arguments. Essentially, the more an argument is repeated throughout the course of debate, the more it is likely to stand out and influence the "public sphere" of discourse. This parameter of data selection is where some decisions actually required a little more thought, at least once getting to the reauthorization stage of analysis. For authorization and implementation, it was actually very easy—there were only two debates in each phase that met the previously mentioned parameters.

In the authorization stage, the following debates are the representative data: 1) *Administration's Draft Anti-Terrorism Act of 2001: Hearing before the Committee on the Judiciary House of Representatives*, that occurred on September 24, 2001; and 2) *Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001: Report of the Committee on the Judiciary House of Representatives to accompany H.R. 2975 together with additional views*, which occurred on October 3, 2001—this is the markup session of the Committee following up the September 24th hearing.

In the implementation stage, the following debates are the representative data: 1) *Anti-terrorism investigations and the fourth amendment after September 11, 2001: Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives*, that occurred on May 20, 2003; and 2) *United States Department of Justice: Hearing before the Committee on the Judiciary House of Representatives,* that occurred on June 5, 2003.

In the reauthorization stage, more thought was required in selecting the representative data. The reason more thought was required is really a significant observation to make in and of itself; basically, there were actually enough debates in the

phase to force a choice as opposed to the previous debates, which required selecting all the available data in order to meet the previously mentioned selection criteria. After mentioning the hearings chosen, the selection process will be explained: 1) *USA PATRIOT Act: A Review for the purpose of reauthorization: Hearing before the Committee on the Judiciary House of Representatives*, which occurred on April 6, 2005; and 2) *Reauthorization of the USA PATRIOT Act: Hearing before the Committee on the Judiciary House of Representatives*, which occurred on June 8, 2005.

Even though more thought was required in selecting these hearings as the data, it still was not complicated. All of the provisions set to sunset during the authorization stage were about to expire in December of 2005; so, they demanded some attention. In all there were 12 hearings to choose from in the reauthorization stage. The two selected were chosen for two primary reasons. The first is that one of the debates occurred at the very beginning and one at the very end of the reauthorization stage, thus covering the entire chronology of the stage. They essentially provide the introduction and the conclusion to the reauthorization stage. The second reason is that they were both full Committee hearings, whereas the nine hearings in between the two chosen were subcommittee hearings. This in and of itself adds some measure of internal validity to the data selection process considering that five of the six total debates at this point in data selection are full committee hearings[2].

Another justification for selecting the full committee hearings is the fact that they draw the Justice Department witnesses who are more toward the top of the organization's

[2] The only subcommittee hearing chosen out of the entire data set was done so simply because there were no other full committee hearings in the implementation stage to choose from (aside from the one already in the data pool). Not selecting it would mean violating the very important parameter of having multiple debates as representative of each phase.

hierarchy. Based upon John Ashcroft's (United States Department of Justice, 2003) testimony in the implementation stage, the top of the hierarchy provides the symbolic leadership, whereas people lower in the hierarchy are likely to have more technical expertise. In the first hearing selected, Alberto Gonzales, the newly confirmed Attorney General testifies, and in the second hearing selected, the Deputy Attorney General, John Comey is the Justice Department witness. Thus, by selecting the full committee hearings, we get to hear from two people who are arguably the symbolic leaders of this stage of debate.

Before transitioning out of the reauthorization stage, one final note should be made, and it relates to a third hearing that is partially analyzed as part of the context of the stage. It was not originally scheduled as part of reauthorization, but as Chapter 13 explains, the minority party was able to add an extra day to the reauthorization debate—it is a continuance of the June 8, 2005 hearing. The title is: *Reauthorization of the USA PATRIOT Act (continued): Hearing before the Committee on the Judiciary House of Representatives*, and occurred on June 10, 2005. It should be noted that all the witnesses were minority witnesses but none of their testimony makes it into analysis. Only the way in which the debate begins and ends is analyzed. It is part of analysis only for the way in which it provides context to the very end of the public deliberative process.

Speaking of context, it is also definitely worth mentioning that a lot of speeches outside of the deliberative process, delivered by President Bush and John Ashcroft are analyzed at various points. There really is no method selection process involved with those other than to say that I read most of their speeches around the times in which the ones cited are cited. The speeches mentioned in analysis are the ones that provide the best context for the debates standing as the official data set; in other words, they help to shape

the meaning of patriotism negotiated in the deliberative process. Schuetz (1986), cited in the literature review, helps to explain why this context is so important. She argues that the policymaking process weaves in and out of the Halls of Congress and that the most effective arguments are the ones that develop congruence and collaboration moving back and forth. Thus, the very first chapter in each part of this project is devoted to explaining the context behind the debate.

One last parameter pertaining to the data selection process is again, a very simple one but one worth mentioning. While reading and analyzing the debates, I skipped through the parts of the debate "inserted for the record." The justification is that if the words were not actually spoken, then no one in the public watching the debate live in person or on CSPAN would have had the chance to absorb the message. Thus, removing those insertions from the data pool provides another reasonable way to make the data more manageable.

Analysis of Data

In Chapter 2 is found a summary of over fifty years worth of congressional debate studies, beginning with Cain's (1954) original method of rhetorical criticism and ending with Levasseur's (2005) adaptation of a patterned analysis of argument found in Miles and Huberman (1994). After carefully reading these articles and the many others found summarized in the previous chapter, I have decided that not a whole lot has changed. Essentially, the most important component of analysis is to read the debates very carefully. In Cain's (1954) case, he summarized entire debates and assessed the effects that the quintessential arguments had upon the audience. In Levasseur's (2005) case, he identified various ways in which "public opinion" is utilized in argument.

In the current project, goals include a) summarizing the quintessential arguments that contribute to the negotiation of patriotism; and b) displaying the language utilized to do so in order to provide readers with the opportunity to make their own interpretation. Analysis involves the following steps:

1) Reading the transcripts of debate (on line PDF format) thoroughly so that general understanding of content is obtained;

2) Reading the transcripts a second time and coding them: for those familiar with "cutting cards" as part of the process for writing debate blocks, this essentially amounts to "tagging" (coding) every argument made in each debate. The tag lines were typed into a word document in pseudo outline form.

3) The tag lines standing out as ethos related arguments were typed in bold face so that they stood out against the other arguments. Furthermore, the text of the transcripts for which those particular taglines were written were cut and pasted over into the word document.

4) At this point, after all the debates were analyzed, all of the bold faced tag lines with demonstration were read again. At this point, categories were formed around the bold faced tag lines tending to repeat over and over again and/or tag lines that struck me as being representative of the horizons of patriotism discussed in Chapter 1.

5) Finally, after forming the categories on a tabulation sheet, the exemplars standing out as being most representative of the categories were chosen for demonstration via the presentation of data chapters. Hence, those selections serve as the exemplars behind my interpretation of the debate over the nature of patriotism.

Validity

Recognizing that a hermeneutic, or interpretive, analysis involves "subjectivity" does not mean that it is less real or empirical than one that only involves "objectivity." In fact, it is more "real" than approaching the study of patriotism through any other methodological perspective because it recognizes the imprecise, unpredictable nature of human communication. Viroli (1997) explains why historical interpretation is the most *apropos* for a study of patriotism:

> Instead of aiming at forging scientific definitions of the nature of patriotism, we should aim at understanding what scholars, agitators, poets, and prophets have meant when they spoke of love of country. We need historical interpretation rather than scientific theories, to uncover and understand the meaning of the themes, metaphors, allusions, exhortations, and invectives that the language of patriotism has been crafting over the centuries to sustain or repeal, damper, inflame, or rekindle a rich and colourful universe of passions. (pp. 4-5)

It is absolutely mandatory though, for a hermeneutician to remember that historical "interpretation" is not merely providing an opinion. As Heidegger writes In *Being and Time*: "our first, last, and constant task in interpreting is never to allow our fore-having, fore-sight, and fore-conception to be presented to us by fancies and popular conceptions, but rather to make the scientific theme secure by working out these fore-structures in

terms of the things themselves" (p. 153). The hermeneutician becomes a guide through the development of understanding an object, paving a way for a reader to develop her own understanding, one that benefits from, improves upon and undoubtedly criticizes this one. Such analysis demands a fusion of interpretation, understanding and application (Gadamer, 1960/2003), which in short, summarizes the philosophical approach being attempted.

The Bracketing of Biases

Gadamer (1960/2003) provides ample reason to consider hermeneutics as a rigorous, scholarly, and valid methodology by conceptualizing it as a philosophical perspective that influences the attitude and preparation of the researcher when identifying the appropriate research questions to be asked, more so than it influences the mode of data collection. If a good research question is asked, then the data should speak for itself. Looking at the history of the hermeneutic-phenomenological tradition, from Hegel, to Merleau-Ponty, Sartre and the existentialists, to Husserl, Heidegger and Gadamer, there is not a singular understanding to be had; not one of the seminal authors from the tradition truly see eye-to-eye with another (Spiegelberg, 1971). And, the fact that they do not see things in an identical way is illustrative of what is at the core of effective communication according to Gadamer's notion of hermeneutics (1960/2003), and that is a "fusion" of difference. During this fusion of difference, communicators must realize that there is no such thing as neutrality—we all have a history that we cannot escape, no matter how hard we may try; however, what we can and must do, is become aware of our biases, bracket them, and make them a part of inquiry. Throughout the entire, ongoing task of finding focus for this project, the biggest challenge has in fact been the bracketing of my own preconceptions and prejudgments.

Political Bias

First, political bias stood in the way of intuiting—a problem that should have been anticipated when deciding upon such a politically charged topic. In a nutshell, my initial phase of dissertation analysis basically amounted to a bunch of Bush-bashing and it took my adviser, Eric Kramer, pointing out in feedback to a very early draft, that a dissertation style of description is much different than an opinion editorial, to realize the extent to which political bias was standing in the way of rigorous interpretation. This realization serves as a bracket to readers (as well as myself), that opinions and judgments cannot be unlearned during the course of scholarship, but they can become part of what it is that is being studied. By picking a topic that is so politically charged from across the entire spectrum of politics, the task of bracketing becomes all the more challenging, but rewarding in terms of insight gained, as it is being accomplished. During my initial attempts at approaching this topic, I found it very difficult to stay away from questions such as; which notions of patriotism are good? And which notions of patriotism are bad? While these are important questions, answering them demands a value judgment, the type of which is not appropriate in the scholarly context of writing a dissertation.

Theoretical Bias

Resolution to political bias was sought, and the resolution itself nearly turned into another serious, more latent bias—a theoretical/methodological one—by hiding behind the mythos of "neutrality" created through pre-established and pre-ordained theoretical and/or methodological paradigms. My instinct was to turn to contemporary rhetorical criticism—specifically a "narrative criticism" (see Foss, 1996) of the Bush Administration's war on terror. According to Walter Fisher's (1987) narrative paradigm, a storytelling mode of discourse is more persuasive to a lay audience, i.e. the general

public, than is the "rational world paradigm" of argumentation. And in the war on terror, according to Bush's story, the terrorists are the bad guys, while the U.S. military, FBI, CIA, allies of these government agencies, first responders to terrorist attacks, and members of the general public who rushed to save victims of 9/11 are the heroes. But after getting into this mode of analysis, it became clear that the reporting of the data could have also gone in the direction of a "pentadic criticism" (Burke, 1966), a "fantasy theme criticism" (Bormann, 1972), or a variety of other methods of rhetorical criticism as described by Sonja Foss (1996). Quite honestly, it just felt too easy to categorize the discourse of patriotism in such a way— I was assembling what has been called a "cookie-cutter criticism" (McGee, 1999), which implies that by looking for something hard enough, it will be found. The debate over the Patriot Act is simply too recent and complex to be categorized in such a way, given that its implications for consciousness have only begun to be discovered.

Another alternative theoretical approach was sought and it became my hypothesis that "groupthink" (Janis, 1977) had occurred in the debate over the Patriot Act and perhaps other post 9/11 decisions in the so-called "war on terrorism," such as the decision to go to war against Iraq. The thinking was that I could mask political bias by falling back on a theory that had been scientifically deduced, making it easy to weed out the political bias with good social science. I was prepared to review the groupthink literature, utilize a coding schemata determining whether groupthink occurred or not (see Schroder, Driver, and Streufert, 1967; Tetlock, 1979), and then move on to another project. While that may very well have produced useful and interesting knowledge, as well as making the dissertation process move much more quickly, the simplification of a communication phenomenon bottled up in the formula of one theory, regardless of how well tested that

theory may or may not be, seemed incomplete as per my true curiosities and expectations for learning during the process of writing a dissertation.

Intersubjective Validity

All too often, there is a tendency in communication research to be caught up in variable-izing communication for the purpose of predicting and controlling what is standard and normal, so much so that a deeper meaning of the object itself is lost to the language of significance testing and correction formulas (Kramer, unpublished manuscript). In stark contrast, the hermeneutic-phenomenological tradition suggests that scholarship should begin with the object itself; in fact, phenomenology has been referred to in some circles as the "pre-science" (Spiegelberg, 1971). It "expresses a revolt against an approach to philosophy that takes its point of departure from crystallized beliefs and theories handed down by a tradition which only too often perpetuates preconceptions and prejudgments" (Spiegelberg, 1971, p. 656). This mode of investigation begins with an intuition of the world, not a hypothesis or hunch about the essence of an object, but direct experience. Inquiry proceeds from knowledge of a phenomenon specific to one's own awareness, and investigation then becomes more systematic through the bracketing of prejudices and presuppositions of the senses during rigorous interpretation. This type of inquiry demands persistence and patience during an effort to expound upon historically effected consciousness of which the researcher is at once a participant and an observer at the same time. Put differently, the object of investigation is not the only "thing" on display but ways of knowing that "thing" also become part of the investigation.
While the "scientific method" has a built-in tendency to ignore history and opinions through its inductive methodological structures in an effort to provide for repeatable results that are verifiable through further study, the hermeneutic pursuit attempts to

provide for an exploration of meaning through interpretive analysis in recognition of the fact that the researcher's ontological views of the world, as well as epistemological assumptions, are already a part of an inescapable history of what is being studied. So, rather than denying that researchers have opinions and a presupposed way of viewing the world, the hermeneutic-phenomenological tradition brackets unique, individual perspectives as a part of the inquiry itself. This process provides a measure of "objectivity" (not neutrality) through acceptance of different worldviews as real and empirical and through integration of those varying worldviews during analysis. Intersubjectivity is built into the lexicon of the hermeneutic method, making it perfectly *apropos* for the study of patriotism. The validity is evaluated between an internal (or ideally external) dialogue between author and reader. If the reader is able to feel confident that she more or less understands my horizons of patriotism based upon the data available alongside of the interpretation, then my study is valid even though no two interpretations will be exactly the same.

Chapter 4:

The War on Terror

Summarizing what Schuetz (1986) points out pertaining to the legislative process, we understand that deliberative debate is not limited to the discourse occurring solely in the Rayburn House Office building on Capitol Hill. Threads of discourse, regardless of where they originate, run through the various overlays of argument and if successful, those threads achieve a cohesive, unified statement pertaining to the advocacy of a particular policy. In the case of the Patriot Act, because of the powerful imagery created through the condensation symbol, the importance of recognizing the various overlays of argument rings especially true. As Chapter 3 suggests, this makes hermeneutic analysis so very appropriate for the current study as the text, or the data set, serves as the organizing principle behind which this study finds a meaningful beginning and ending point, but also recognizing that the text is irrelevant without continuous reference to context (Gadamer, 1963/2003). Context in this case involves recognizing that the Department of Justice's use of patriotism as argument emanates from higher up the chain of command than the Attorney General. In fact, it originated with the President of the United States and began to develop almost immediately after 9/11 in the public sphere; the patriot as symbol was formulated by President Bush and then etched more concretely into American consciousness by the legislative process governing the Patriot Act.

President Bush Addresses the Nation

Shortly after the 9/11 attacks, with the country and world confused about what had been seen live on television, and replayed over and over again, President Bush boarded Air Force One and hit the skies, maximizing efforts to protect his life in the face of impending attacks on the country. During a layover at Barksdale Air Force Base in

Louisiana, President Bush addressed the American people to reassure them of a few different things: first of all, that the federal government was expending too much of its available resources to help local authorities deal with the aftermath of the attacks; secondly, that "the United States will hunt down and punish those responsible for these cowardly acts;" thirdly, that he has been communicating with Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, the national security team, his cabinet, Congress, and other world leaders, to do everything necessary to prevent further attack; and fourthly that "we have taken the necessary security precautions to continue the functions of your government" (Bush, 2001, September 11).

The War Begins

One day later, on September 12, immediately following a meeting with the national security team in the Cabinet Room of the White House, the "war on terror" was declared. President Bush begins his remarks to the press corps: "I have just completed a meeting with my national security team, and we have received the latest intelligence updates. The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war" (Bush, 2001, September 12). Then, the President demands the call for unity of the country: "This will require our country to unite in steadfast determination and resolve. Freedom and democracy are under attack" (Bush, 2001, September 12). Bush points out that this is a different kind of enemy than we have ever faced before because they prey on the innocent, and run for cover. "We will rally the world," he says, and "we will win….we will not allow this enemy to win the war by changing our way of life or restricting our freedoms" (Bush, 2001, September 12). Again, Bush refers to the situation as being a war. Bush ends this

speech with yet another call for unity and initiates the either/or dichotomy that would very quickly become so integral to the symbol of patriot. He says "I want to thank the members of Congress for their unity and support. America is united. The freedom-loving nations of the world stand by our side. This will be a monumental struggle of good versus evil. But good will prevail" (Bush, 2001, September 12). By using the "good versus evil" imagery and suggesting that the good will automatically unify behind his leadership, the ground work is laid for his (in)famous, "you're either with us or against us" in the war on terror proclamation discussed below. As the remarks to the press come to a close, it is interesting to hear a news reporter attempt to ask if the president is making an official declaration of war; unfortunately though, the clip ends and we do not get to hear the end of the question (Bush, 2001, September 12).

A couple of days later, on September 14, 2001, President Bush made his presence known at Ground Zero, standing on top of a pile of rubble that once was part of the World Trade Center, to try and raise the spirits of the people working there, as well as the spirits of the rest of the country. It was there when the display of fervent patriotism became fully a part of his message behind what would soon be presented as a plan for the "war on terror." The following represents the speech in its entirety as transcribed by Office of Press Secretary and posted to the official White House web site.

> CROWD: U.S.A.! U.S.A.!
> THE PRESIDENT: Thank you all. I want you all to know…
> Q Can't hear you.
> THE PRESIDENT: I can't talk any louder. (Laughter.) I want you all to know that America today—that America today is on bended knee in prayer for the people whose lives were lost here, for the workers who work here, for the families who mourn. This nation stands with the good people of New York City, and New Jersey and Connecticut, as we mourn the loss of thousands of our citizens.
> Q I can't hear you.

> THE PRESIDENT: I can hear you. (Applause.) I can hear you. The rest of the world hears you. (Applause.) And the people who knocked these buildings down will hear all of us soon. (Applause.)
> CROWD: U.S.A.! U.S.A.!
> THE PRESIDENT: The nation sends its love and compassion to everybody who is here. Thank you for your hard work. Thank you for making the nation proud. And may God bless America. (Applause.)
> CROWD: U.S.A.! U.S.A.!
> (The President waves small American flag.) (Applause.) (Bush, 2001, September 14)

The text of the speech itself is of course interesting in and of itself, but what is most interesting is something that cannot be accurately captured in text—only by watching the clip of the speech, and that is the way in which Bush was immediately present at the point of attack, three days following the event, and the way in which he is seemingly acting spontaneously and naturally with the audience. Not to mention the displays of patriotism, which are captured in the transcription of the speech, are impossible to overlook. Another interesting remark not captured in the text of the transcript is a voice in the background heard over the president—an interruption—screaming "God Bless America" (Bush, 2001, September 14) during the last paragraph of the speech, beginning at the point where Bush says, "The nation sends its love and compassion…("God Bless America")…to everybody who is here" (Bush, 2001, September 14). Then Bush's speech ends with, "And may God bless America" (Bush, 2001, September 14) The nonverbal of Bush waving the little American flag ends the transcription and the accompanying clip on the White House web site.

The All- or- Nothing Dichotomy

On September 20, after building momentum for the war on terror, President Bush began to provide a specific plan during the *Address to a Joint Session of Congress and the American People*. Prior to 9/11, this speech was scheduled as the "State of the Union" address but the rhetorical function shifted. In deference to the healing process, President Bush articulated a somewhat altered purpose to his speech. He opened by saying, "In the normal course of events, Presidents come to this chamber to report on the state of the Union. Tonight, no such report is needed. It has already been delivered by the American people" (Bush, 2001, September 20). President Bush specifically refers to Todd Beamer, who helped bring down the fourth hijacked airplane headed to the White House, as an example of how strong and brave Americans are—and what patriots do.

Then, the President begins to provide more understanding of what happened to American consciousness on September 11 as well as what the country's role is in combating the enemies. He says, "Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done" (Bush, 2001, September 20). So, in nine long days and sleepless nights, according to Bush, Americans had had the time to emotionally process the catastrophe and move to resolution of the problem—the "War on Terror" which "will not end until every terrorist group of global reach has been found, stopped and defeated" (Bush, 2001, September 20). Bush described the response as involving "far more than instant retaliation and isolated strikes" (Bush, 2001, September 20), warning that "Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include

dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest" (Bush, 2001, September 20).

In the same paragraph, Bush made the (in)famous statement that succinctly characterizes the war on terror, giving all people across the globe an ultimatum: "We will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists." (Bush, 2001, September 20). It is at this point in Bush's speech where the lines have been drawn and resolution to the problem begins. He says to the rest of the world that he has the solutions; he knows how to fight the war on terror, and he has the power to win the war whether you agree with him on how to do it or not. Either you support these solutions, or you may very well become an enemy of the United States. One's ethos, or credibility as being loyal to America very much depends upon the extent to which she supports Bush's "war on terror."

Economic Patriotism

President Bush of course addressed the nation many times in the aftermath of 9/11, and every speech delivered contributes to his notion of patriotism. Thus far though, during every speech analyzed, he has described the patriotism of those immediately involved in the war on terror: police officers, firefighters, rescuers, military members and etc. So, what about those who are not directly involved with the war, such as myself; how can I show patriotism? On September 16 for Mr. Bush begins to answer that question. He opens the speech by saying, "Today, millions of Americans mourned and prayed, and tomorrow we go back to work. Today, people from all walks of life gave thanks for the

heroes; they mourn the dead; they ask for God's god graces on the families who mourn, and tomorrow the good people of America go back to their shops, their fields, American factories, and go back to work" (Bush, 2001, September 16). Here, he makes note of the patriotic heroes of 9/11, those who died in 9/11, and then infers upon the rest of "the good people…from all walks of life" (Bush, 2001, September 16) that they can show loyalty to their nation by going back to work. This notion of patriotism detaches the lay people from the democratic process of fighting terror and delegates their patriotic roles as simply trying to go back to life as usual. A couple of paragraphs later, Bush reinforces the notion of economic duty to nation. He proclaims: "I have faith in our military. And we have got a job to do-just like the farmers and ranchers and business owners and factory workers have a job to do. My administration has a job to do, and we're going to do it. We will rid the world of the evil-doers. We will call together freedom loving people to fight terrorism" (Bush, 2001, September 16). In this segment, he suggests that the job of the people is just like his own and as equally as important—but distinctly separate and detached—patriotism is shown by participation in the assembly line that it is the U.S. economy. In other words, loyalty to country is conflated to a sense of economic patriotism, with each person playing its own unique and separate part but unaware of how the parts fit together—a theme taken up more thoroughly in Doty (in press).

During remarks to airline employees at O'Hare airport in Chicago, on September 27, 2001, President Bush again illustrates this particular notion of patriotism. First, he recognizes airline employees as patriots who fight terror by going back to work and serving consumers:

> And we must stand against terror by going back to work. Everybody here who showed up for work, at this important industry, is making a clear statement that

> terrorism will not stand, that the evildoers will not be able to terrorize America and our work force and our people. (Applause.)
> America understands—America understands that these have been incredibly tense days for the people who work in the airline industry—difficult times for stewardesses and captains and baggage handlers and people who are running the desks. America knows that, and we appreciate –we appreciate your steadfast willingness to fight terror in your own way. You stand against terror by flying the airplanes, and by maintaining them. You stand against terror by loading a bag or serving a passenger. And by doing so, you're expressing a firm national commitment that's so important, that we will not surrender our freedom to travel; that we will not surrender our freedoms in America; that while you may think you have struck our soul, you haven't touched it; that we are too strong a nation to be carried down by terrorist activity. (Applause.)

And in the next segment of the speech, Bush calls upon consumers to do their part as well by telling them to "Get on Board":

> When they struck, they wanted to create an atmosphere of fear. And one of the great goals of this nation's war is to restore public confidence in the airline industry. It's to tell the traveling public: Get on board. Do your business around the country. Fly and enjoy America's great destination spots. Get down to Disney World in Florida. Take your families and enjoy life, the way we want it to be enjoyed. (Bush, 2001, Sept. 27)

In this speech, we can discern what it is that the administration expected of the public in response to terror, and that is to simply not be terrorized. While certainly well intentioned, and arguably effective at unifying, the point is made that the citizenry needs to play its role as dissociated consumers. Retreating to the protectionist isolation of accumulating goods became an act of sacrifice and service to and defense of the value system of America. The response says: "put your faith and your money into the system. Don't worry about things, enjoy life, work hard, but leave this terrorism thing up to me." This is a hallmark of the consumer mindset, putting faith in the market, an unassuming pillar of strength and stability.

Introducing the USA PATRIOT Act

The war on terror is of course being fought on many fronts: the war in Afghanistan, the war in Iraq, the establishment of the Homeland Security Department, the creation of the Director of National Intelligence position as a cabinet level official, etc. But nowhere is the persuasive appeal of patriotism more explicitly portrayed than through the symbolism of the Patriot Act. As Chapter 1 argues based upon the analysis of Murray Edelman (1964), the title moves beyond referential description to become a condensation symbol due to the way in which it embodies not only the action taken by government through that particular piece of legislation, but also the way in which it defines the attitude of a country as one that has formed a consensus about future action. The symbol condenses the emotions of a nation and manipulates those emotions to forge agreement.

Ashcroft's Call to Action

Less than 24 hours after the 9/11 attack on the country began, at around the same time that Bush was declaring war on terror, the Department of Justice began its plan for defense by focusing its energy on easing the restrictions placed on the capacities of the intelligence community by Foreign Intelligence Surveillance Act (FISA) of 1978. Viet Dinh, the Assistant Attorney General under John Ashcroft, led the charge in formulating legislation that would streamline the process by which law enforcement agencies, the FBI and the CIA gather and share intelligence—as well as other updates of law to assist in the prevention and prosecution of terrorism. Dinh began a meeting with approximately six policy analysts and lawyers, the small group that would eventually be the architects for landmark legislation, by describing a conversation he had had with Attorney General John Ashcroft: "The charge [from Ashcroft] was very, very clear: 'all that is necessary

for law enforcement, within the bounds of the Constitution, to discharge the obligation to fight this war against terror" (O'Harrow, 2005, p. 150).

On September 17, during a press briefing, Attorney General Ashcroft verified publicly the intense rush placed on adopting counter-terrorism legislation: "we will be working diligently over the next day or maybe two to finalize this comprehensive proposal, and we will call upon the Congress of the United States to enact these important antiterrorism measures this week" (Ashcroft, 2001, September 17). After delivering this call to action in the public sphere of discourse, Ashcroft specifically asked for two different drafts of antiterrorism measures to be crafted behind closed doors. Senator Patrick Leahy (D-VT) was charged with crafting a Senate version of the anti-terrorism legislation and Dinh, was assigned to craft the DOJ version. From that basis, notes were to be compared and a final draft was to be compiled and sent through Congress (O'Harrow, 2005).

Behind Closed Doors Negotiation

Although "Senator Leahy wanted to follow a more deliberative process (through congress) in considering major changes to America's civil liberties" (Foerstel, 2004, p. 47), he agreed to communicate directly with the executive branch over the bill's central components due to intense public and DOJ pressure. Senator Jon Kyl (R-AZ) articulates an attitude that seems to have dominated the process by which the very initial drafting of the anti-terrorism measure took place, declaring, "Our constituents are calling this a war on terrorism. In wars, you don't fight by a Marquis of Queensberry rules" (see Foerstel, 2004, p. 72). So, by September 19, the two versions of the bill were ready and a meeting was called which included White House Counsel Alberto Gonzales along with Ashcroft

and Dinh representing the Justice Department, a senate delegation led by Leahy, Orrin Hatch (R-UT), and Richard Shelby (R-AL), and a House Delegation led by Richard Armey (R-TX) and John Conyers (D-MI). Based upon immediate comparison of the legislative drafts, there were many similarities and differences existing between the two versions of proposed legislation. Herbert Foerstel, who is currently on the board of the National Security Archive as well as the Freedom to Read Foundation, provides comparative analysis of the bills:

> Both bills updated pen register and 'trap and trace' laws, extending them to e-mail and the Internet, and they strengthened wiretap laws as well. But Dinh's bill went much farther, modifying the FISA law to authorize domestic surveillance whenever foreign intelligence is 'a' purpose of an investigation, rather than 'the' purpose. It also permitted the unrestricted sharing of grand jury and eavesdropping information throughout the government and encouraged Internet providers to tap e-mail 'voluntarily.' It even called for the indefinite detention of any noncitizen the attorney general has reason to believe might further or facilitate acts of terrorism. (Foerstel, 2004, p. 48).

Based upon the differences, Leahy reported that, "There were a lot of people in the room, both Republican and Democrat, who were not about to give the unfettered power the attorney general wanted" and that "we did not want the terrorists to win by having basic protections taken away from us" (O'Harrow, 2002, p. 18). "Even Richard Armey, one of the more conservative members of Congress, expressed concern" (Foerstel, 2004, p. 48). So, negotiation continued in a public forum of debate.

Summary

It goes without saying that 9/11 left America and parts of the rest of the world in a state of shock and fear. The country needed healing and it was the difficult job of President Bush to provide that healing. He had to attempt to make sense of something that was senseless. This task according to Rowland (1990) is the rhetorical function of myth. Commonly a myth is often thought of as something that is inherently untrue—a

crazy figment of imagination. However, the more truthful a myth is, the more impact it has upon consciousness. The reason the story of God is so powerful for instance, is because it is "true." As Joseph Campbell (1972) notes, myths do not have to be historically true (this does not mean they cannot be) but they must convey "facts of the mind." The audience should be able to relate to the story without a great deal of thought (pp. 10-11). In Bush's story of the war on terror, he described in words what had happened when most of us were speechless. The story identified the villains and the heroes. It also quickly identified a resolution to the problem. In the minds of many Americans, Bush added perspective to an event that previously had none.

Chapter 5:

Legislative Debate Begins

Given the extremity of the rhetorical situation, Bush's message related to 9/11 and the war on terror worked. During the immediate aftermath of 9/11, the country unified around the Bush Administration and supported it unconditionally. According to the Gallup Poll, Bush's approval rating was 90% on September 21-22, 2001. Right around that same time (on September 19, 2001), Humphrey Taylor, Chairman of the Harris Poll, provided integrated analysis of the major polls, which includes the Harris, Gallup, ABC News/Washington Post, New York Times/CBS, and The Los Angeles Times polls. Taylor reported: "The initial public reaction has been to rally around the President, the Congress, mayor Giuliani of New York and our national leaders. The President's approval ratings are in the stratosphere. For the time being, the overwhelming majority of Americans are likely to support the initial steps taken by the President and his advisors, whatever those are (The Harris Poll #46, 9/19/01). The public began the healing process, and Bush was seen as the healer. Gebser (1949/1985) describes the process of healing as a powerful act of unity whereby "individuality is obliterated in the magic realm (of the grotto or cavern)" (p. 163). Healing is magical; it makes individual difference and expression disappear for the cohesion of the group. The "individual loses his individuality and is united with everything… differentiation is unknown" (p. 163).

This state of the national consciousness was the backdrop behind which the legislative process authorizing the Patriot Act began. On September 24th, 2001, the House Judiciary Committee met with witnesses from the Department of Justice to question them over the drafting of the legislation that would later become the Patriot Act. Interestingly though, it was not called the Patriot Act at this juncture; it was simply known as the

Mobilization Against Terrorism Act of 2001—very much a referential symbol describing the action it embodied. The title would not change to the USA PATRIOT Act until after this hearing, but prior to the markup of the bill and the vote in front of the full House of Representatives. The witnesses present at this hearing are John Ashcroft, Attorney General of the United States, Mr. Larry Thompson, Deputy Attorney General, Mr. Michael Chertoff, Assistant Attorney General, and Viet Dinh, Assistant Attorney General for Legal Policy.

Opening Statements

Sensenbrenner

Chairman Sensenbrenner calls the house to order. As to be expected, he begins by paying homage to the disaster on 9/11, to those who died and to those who still had faint hopes of finding loved ones alive underneath the rubble. He points out that he has visited the sites and talked to many of those people. Then, he quickly gets to the point by explaining that through discussions with Ashcroft over the bill, he has become convinced that it needs to be passed expeditiously, claiming our homeland depends upon it:

> Today this Committee will hear from the Attorney General of the United States regarding the need for us to expeditiously pass legislation to give the Department of Justice and our intelligence community needed prime fighting tools. From my conversations with the Attorney General and other law enforcement officials, I believe that there is an unquestionable need for such legislation. In fact, I am convinced that our homeland security depends upon it. (Administration's Draft, 2001, p. 1)

"Consequently…." Sensenbrenner says, "I have been working with Ranking Member Conyers to come to an agreement on a bipartisan bill" (Administration's Draft, 2001, p. 1). "To that end," he continues, "majority and minority Committee staff have been working tirelessly to draft such a bill, and I am hopeful that agreement is near" (Administration's Draft, 2001, p. 1). So the urgency of the bill is argued and furthermore,

the assertion that agreement over the bill by both sides of the aisle is immanent through the claim of bipartisanship—an important argument establishing a sense of unity and agreement.

Next, Sensenbrenner claims that we cannot sacrifice the Constitution in adopting the bill, suggesting that the bill does preserve the freedom of innocent Americans. The Constitution is utilized as a source of ethos behind the idea that the bill will not in any way sacrifice liberty. In the very next paragraph of text though, the Constitution is used differently—to argue for the idea that safety needs to be defended, and further, that the Constitution calls for the country to unify around the defense of our country and support of the Patriot Act:

> I think it also is important to keep in mind that the Preamble to the Constitution states that that document was ordained, 'to establish justice, ensure domestic tranquility, provide for the common defense and to promote the general welfare and to secure the blessings of liberty.' Let me tell you on September 11, our common defense was penetrated, and America's tranquility, welfare and liberty were ruthlessly attacked. I urge the Members of this Committee to stand united together in recognition of the important purpose we must serve in preventing future terrorist attacks and prosecuting those who have already attacked us. (Administration's Draft, 2001, p. 2)

Sensenbrenner ends his statement by addressing the concern over civil liberties, but does so by making a direct appeal to those who may be having reservations: "I also urge Members who have reservations about the Administration's proposal to listen closely to the Attorney General and to carefully examine the legislation that is subsequently introduced. I truly believe you will find it fair and balanced and designed to meet critical law enforcement needs (Administration's Draft, 2001, p. 2). In other words, all that people who have reservations about the bill need to do is listen to Ashcroft and those doubts would fade away. Then, he again references how real and deadly the terrorist threat is, claims that "we must do our part to eliminate this threat before another

devastating day like September 11, 2001" (Administration's Draft, 2001, p. 2) and turns the floor over to Ashcroft.

It is rather interesting though that Ashcroft is the next to speak; generally in a proceeding like this, the ranking minority member John Conyers would deliver his opening statement but for some unknown reason, Conyers was late to the proceeding. So, Sensenbrenner asks consent to submit his statement for the record and continue with Ashcroft. He also points out that due to another pressing obligation, Ashcroft can only stay until 3:00. The hearing did not start until 2:02. This point about the hearing may seem menial but it plays into the debate significantly in the grand scheme of things by contributing to the perception, which becomes more noticeable in debate during the implementation stage, that Ashcroft is generally unavailable to oversight.

Ashcroft

Ashcroft begins his testimony by thanking the chairman for the opportunity to discuss "America's response to the criminal act of war perpetrated on the United States of America on September 11" (Administration's Draft, 2001, pp. 3-4). It is important to the entire argument of patriotic ethos to establish the idea that the United States is in a war—a point carried through from Bush's very early reaction on September 12th—though recognizing that it is still not clear as to whether an official declaration of war has been made. Immediately after the mention of war, Ashcroft applies the pressure to pass the Patriot Act very quickly:

> Mr. Chairman and Members of the Committee, the American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts. The danger that darkened the United States of America and the civilized world on September 11 did not pass with the atrocities committed that day. They require that we provide law enforcement with the tools necessary to identify, dismantle, disrupt and punish terrorist organizations before they strike again. (Administration's Draft, 2001, p. 4)

Time is of the essence. We must prepare to defend ourselves because the atrocities like we saw on 9/11 can happen at any moment. The rhetoric of fear is used to apply pressure to pass the law very quickly because fortunately, if passed, it can provide law enforcement with the tools needed to disrupt the terrorist organizations. Ashcroft continues to utilize the rhetoric of fear by discussing the ethos of the terrorists, another important line of argumentation that seems to carry throughout much of the debate. He points out that they are intelligent, highly organized, and well funded:

> The highly coordinated attacks of September 11 make it clear that terrorism is the activity of expertly organized, highly coordinated and well-financed organizations and networks. These organizations operate across borders to advance their ideological agendas. They benefit from the shelter and protection of like-minded regimes. They are undeterred by the threat of criminal sanctions, and they are willing to sacrifice the lives of their members in order to take the lives of innocent citizens of free nations. (Administration's Draft, 2001, p. 4)

At this time, Ashcroft relates the rhetoric of fear to another important argument that becomes a mantra for the Department of Justice throughout the entire legislative process, and that is very simply pointing out that this is a new kind of war, a turning point in American history. Ashcroft describes the change:

> This new terrorist threat to Americans on our soil is a turning point in American history. It's a new challenge for law enforcement. Our fight against terrorism is not merely or primarily a criminal justice endeavor. It is defense of our Nation and its citizens. We cannot wait for terrorists to strike to begin investigations and to take action. The death tolls are too high, the consequences too great. We must prevent first. We must prosecute second. (Administration's Draft, 2001, pp. 4 -5)

The role of the department is changing from serving primarily a prosecutorial function to serving a crime-prevention function. Terrorism has become the top priority of the Justice Department according to Ashcroft, but he notes, "As we do in each and every law enforcement mission we undertake, we are conducting this effort with the total commitment to protect the rights and privacy of all Americans and the constitutional protections we hold dear" (Administration's Draft, 2001, p. 5). An appeal to history is

utilized to back up his claim, arguing, “In the past when American law enforcement confronted challenges to our safety and security from espionage, drug trafficking and organized crime, we’ve met those challenges in ways that preserve our fundamental freedoms and civil liberties” (Administration’s Draft, 2001, p. 5).

This appeal to history leads into an argument that I think is interesting, and it seems to come through at several points throughout the legislative process and that is very simply a statement that says “trust us,” we are Americans and we do not know prejudice: “This Justice Department will never waiver in its defense of the Constitution nor relent in our defense of civil rights. The American spirit that rose from the rubble in New York knows no prejudice and defies division by race, ethnicity or religion” (Administration’s Draft, 2001, p. 5). The last sentence of that argument leads into a direct appeal to patriotism, which is not referenced with great frequency throughout the course of debate, but is definitely present.

Ashcroft goes on to describe the American spirit as one that will unite us and bring us out of the dark: “The spirit which binds us and the values that define us will light Americans’ path from this darkness” (Administration’s Draft, 2001, p. 5). The light/dark metaphor has proven quite powerful over the course of human existence. Its mythic power derives from such stories as Plato’s allegory of the cave, the Bible’s portrayal of the prince of darkness being fought off by the beacon of light, and many, many other stories shaping our consciousness. In this case, the metaphor is being utilized to unify and forge agreement over the soon-to-be Patriot Act.

In the very next sentence, Ashcroft defines the roles of the executive branch and the legislative branch, Justice Department members are the torch carriers, ready and willing to light up the night, while the legislative branch merely needs to set them loose

to fulfill their destiny: “At the Department of Justice, we are charged with defending American’s lives and liberties, and we are asked to wage war against terrorism within our own borders. Today we seek to enlist your assistance, for we seek new laws against America’s enemies, foreign and domestic” (Administration’s Draft, 2001, p. 5). As is the case with opening statements typically, and lines of questioning for that matter, the pattern typically begins with appeals to ethos, like we have just observed here, as well as pathos, and then the logos of the argumentation is saved for last.

Ashcroft breaks the proposed legislation down by summarizing the “five broad objectives” (Administration’s Draft, 2001, p. 5), ones that reemerge again and again as the debate over the Patriot Act progresses: 1) laws must be updated to reflect changing technology; 2) “terrorism” must be granted a higher priority within the criminal justice system considering that organized crime and drug crime are prosecuted more vigorously than are crimes of terrorism; 3) border security must be enhanced to prevent terrorists from freely entering the United States; 4) government must be able to seize, in addition to tracking and freezing, the money trail of terrorist organizations; and 5) the families of the victims of 9/11 must be granted emergency relief.

Finally, Ashcroft ends his opening statement with a direct appeal to patriotism:

> Now it falls to us in the name of freedom and those who cherish it to ensure our Nation’s capacity to defend ourselves from terrorists. Today I urge the Congress—I call upon the Congress to act, to strengthen our ability to fight this evil wherever it exists, and to ensure that the line between the civil and the savage, so brightly drawn on September 11, is never crossed again. (Administration’s Draft, 2001, p. 8)

The statement ends by claiming freedom and the nation’s capacity to defend itself from terrorism depend upon passage of the antiterrorism measure. Furthermore, the light metaphor is again used, and used in such a way that reinforces President Bush’s either/or dichotomy in the war on terror, by claiming a distinct line has been drawn between “the

civil and the savage." The roles are also defined very clearly once again—the executive branch has the answers for the war on terror and it is just up to the legislative branch to give them the green light; Ashcroft urges them to do so in the name of freedom, not to mention as unquestioning patriots.

Conyers

After Ashcroft finishes, John Conyers, the ranking minority member of the committee makes his first appearance on the transcript. After being recognized and engaging in some procedural bickering with Sensenbrenner, bickering which relates to the fact that Ashcroft can only stay for 58 minutes of the hearing, Conyers begins his opening statement by thanking the witnesses for being here today and professing that, "myself and the Chairman of this Committee, Mr. Jim Sensenbrenner, have been working very closely together…As a matter of fact, different Members on both sides of this Committee, Democrats and Republicans, have been working over the weekend, as our staffs have, and as we know you have as well" (Administration's Draft, 2001, p. 13). Conyers recognizes the importance of bipartisan cooperation in the matter and this becomes a highly significant ethos related argument that resonates throughout the debate. Ashcroft immediately reciprocates the camaraderie: "We are grateful for that, and we are aware of the time that our staff has spent with yours, and we appreciate the cooperative relationship" (Administration's Draft, 2001, p. 13). Conyers then expresses appreciation for Ashcroft and emphasizes it by making a personal guarantee that, "there is not a Member on this Committee that is not pressed and committed to urgently produce the kinds of additional legislation that is needed for this country and particularly for the Office of the Attorney General to prosecute the tremendously important mission that is confronting you at this moment" (Administration's Draft, 2001, p. 13). Continuing with

the spirit of cooperation, Conyers references that the patriotic unity and cooperative spirit enveloping the nation is a positive development…**BUT**…then eases into the fact that the purpose of this hearing is to provide review:

> We're coming to grips with the tragic events that have occurred since September 11. The country appears more unified than ever to confront the problem that we're presented here in the United States in the year 2001. But today we're here to review the Attorney General's emergency request for new authorities to combat terrorism… (Administration's Draft, 2001, p. 13)

The form of this argument is an important one to note as it acknowledges the importance of unity and cooperation during the legislative process but at the same time, asserts that unity and cooperation do not necessarily translate into agreement and instant approval. This illustrates a subtle but significant way in which critics of Ashcroft challenge his notion of patriotism; more analysis of this argument comes later in this chapter.

The opening statement continues by acknowledging bipartisan cooperation between Mr. Richard Gephardt, the Minority Leader of the House and the Speaker of the House, Mr. Hastert. Then, Conyers leads into a very similar argument but spells it out even more clearly. He begins to chain the point together by initially pointing to a consensus forming on many of the important provisions of the act:

> First of all, there has been a great deal of consensus forming around a number of the provisions in your proposal that you've presented to us recently. As a matter of fact, I can state that we on this side of the aisle, 16 of us in number, have agreed to ironically 16 of the provisions within your proposal, 16 of them. They're before our drafting Committee, being put into a bill as we speak. (Administration's Draft, 2001, p. 13)

"Now, we're working hard. We're willing to burn the midnight oil…" says Conyers, "**BUT** (emphasis mine) it's hard for me to understand how if the proposal offered by our friend, the Chairman from this Committee, Mr. Sensenbrenner—how we will be able to employ a 10 a.m. markup on a proposal that has never been explained before the Members" (Administration's Draft, 2001, p. 13). Conyers makes an attempt to cooperate

as much as he can, but in order for members in the House to do their jobs, they need time…much longer than Ashcroft is willing to wait. Immediately, Conyers frames his argument a bit differently again pointing out that it is a bipartisan argument:

> In other words, we're at close agreement, Mr. Ashcroft, but we've got to see the writing, and we've made some small changes, but I think that there are Members on both sides of this Committee, Democrats and Republicans alike, who are prepared to move on 16 of these proposals incorporated in the draft of ideas that you've presented us with, and I hope that we'll be able to do that. It would expedite everything that we're doing quite rapidly. But I think that you must also take into cognizance that there are a number of provisions in your measure that give us constitutional trouble. (Administration's Draft, 2001, pp. 13-14).

At the very end of this paragraph of text, criticism begins to pick up steam a little bit—after slowly and carefully building up to it through acknowledgement of cooperation, bipartisanship, and even the belief that consensus has been reached on many issues.

He continues this argument by referencing A.C.L.U. witnesses and other university organization witnesses whom would follow Ashcroft (though after looking and looking, I can not find where any minority witnesses testified until the implementation stage of debate). Conyers points to indefinite detention as one issue in particular that critics are concerned with and prefaces the criticism with an appeal to Ashcroft's patriotism—tough on terrorists—and then a **BUT**…the same pattern of argument alluded to above: "We've got to get these guys, but indefinite detention has not been allowed by the courts up 'til now. So we know, without too much other discussion, that we may have some problems here on this issue" (Administration's Draft, 2001, p. 14).

Then as Conyers concludes his opening statement, he is more frank when talking about the proposed change to wiretapping laws:

> Permitting information for illegal wiretaps performed abroad against United States citizens to be used in the Federal courts, as the Administration proposals—proposes, is—well, some have said it's unconstitutional on its face. Let me be more polite. We're deeply troubled. We're deeply troubled by it. And there are at least a half dozen other sections that I don't even know how I'm going to go on

> them until I've discussed it with the distinguished Members of this Committee and witnesses that we will be calling forward. (Administration's Draft, 2001, p.14)

In a very straightforward way, he argues that while some of the proposed legislative change can be agreed to without debate, there are a few provisions that are troubling and need discussion. In closing, Conyers even alludes to the fact that critics are willing to expedite the normal process to get the policy passed as soon as possible: "So what I want to assure you is that at the same time that we want to rearm you with the tools that you need, and know that at the same time you're conducting the fight already, you can't wait for this legislation, I want to assure you that this Committee is doing everything that it can possibly do to expedite that happening" (Administration's Draft, 2001, p. 14)

BUT...it has to be slowed down a little:

> Now, know that the United States Senate has already indicated that they may be weeks away from a resolution. I'm not trying to slow you down, but there's no point in us trying to mark up a measure that we agree on tomorrow morning if it hasn't come from the printer, and we already know that the U.S. Senate Judiciary Committee under the esteemed Chairman Leahy has already indicated that they're talking about weeks. (Administration's Draft, 2001, p. 14)

Conyers stresses that he himself is not personally or intentionally trying to slow Ashcroft down—it is just how responsible policymaking gets done, even when that process is being expedited; it can not happen overnight. He alludes to the fact that the same has been said about the process in the Senate as well. Conyers ends his opening statement with a gesture of friendship and cooperation—an expression that we want to do things your way within reason: "So this is a discussion between friends of how we get all this together and move forward in the manner that you've described to us. And I thank you for your kind attention" (Administration's Draft, 2001, p. 14).

<u>Ashcroft Responds To Conyers: "Trust Us…Deliberation is Bad"</u>

Immediately after Conyers' opening statement, Ashcroft is given the chance to respond. He begins by expressing how cooperative he has been in inviting members from the majority and the minority to the closed- door meetings:

> I do want to recognize the fact that over the course of the last maybe 10 days, I've been working with individuals from the Minority Leader of the House to the Committee Chairman in the Senate. We've had lots of time together. The Ranking Member and I have spent time together. The Chairman and I have spent time together. We've invited the leadership of Committees of both Houses to confer with us about this measure, and we—we believe that this is a measure that should—that is the result of collaborative effort and work, and so there is reason for us to have substantial agreements. (Administration's Draft, 2001, p. 14)

He says at the end of this statement that because of this collaboration, there is substantial ground for agreement. As far as the disagreements are concerned though, Ashcroft essentially says that America is just going to have to trust that the Department of Justice is taking the necessary precautions to ensure that the controversial provisions are not being taken too far: "In regard to the areas where there are disagreements, I must say that we are confident that we have carefully considered those, that they are merited not only by the circumstances, but that they pass constitutional muster, and that they will serve America well" (Administration's Draft, 2001, p. 14).

Then, Ashcroft's true feelings on the matter of public deliberation are spelled out with more detail:

> I would just indicate that in regard to the pace of things, I think this is a time for leadership. I think we would be ill-advised to find a reason that someone else might be slowing down and indicate that we didn't understand the urgency that was appropriate to the ability to protect the American people. It's our position at the Justice Department and the position of this Administration that we need to unleash every possible tool in the fight against terrorism and to do so promptly, because our awareness indicates that we are vulnerable and this, our vulnerability, is elevated as long as we don't have the tools we need to have. (Administration's Draft, 2001, p. 15)

Referring to the speed of the process, he makes two very important points. First of all, in a time such as this, we need leadership to take charge and make the tough decisions by

themselves. Secondly, slowing down the process with public deliberation is "ill-advised" and makes us more vulnerable to attack.

Questions Begin

As the opening statements suggest, there is no question among those charged with leading the country that legislation needs to be passed to update existing law; where the legislative battle is brewing is over the process to be utilized. How much influence would the legislative branch have on the process? On one side—the executive branch's side, a push is made for deference to leadership, an appeal to trust them during this time of crisis not to overstep their bounds, and to minimize discussion as much as possible so that the Department of Justice can go about its business of becoming a crime prevention agency over and above their traditional role of being a prosecutorial agency. On another side of the debate, the minority side as represented by John Conyers, deference is given to leadership during this time of crisis. Some leeway in the process is granted given that many of the provisions are not controversial by consensus; however, as Conyers points out, to skip the deliberative process, as Ashcroft would like, would mean that the legislative branch is not doing its job. That would be dangerous according to the minority leader because there are a few very troubling provisions in the proposed legislation.

During the transition from opening statements to questions from members, Chairman Sensenbrenner summarizes the crux of the debate while addressing both Ashcroft and Conyers directly. While addressing Ashcroft, he seemingly argues in favor of Conyers by claiming while he does foresee an expedited process over many of the provisions, and that the process should not be done away with:

> Mr. Attorney General, let me say that I am very strongly opposed to breaking this bill apart into several pieces. There are some easy provisions in your submission, and there are some difficult provisions. I think when we get the information, we should make a decision on the difficult provisions and let the Committee

> procedure in the House of Representatives work its will. (Administration's Draft, 2001, p. 15)

But then he also lets Conyers know that his appeal to keep pace with the Senate (as proposed by Conyers) will not work because he is independent minded. Very simply he says, "Let me also state that I have never been guided by how fast or how slow the Senate wants to work…" and Furthermore, "…sometimes they (the Senate) have much more difficulty making up their mind than we do" (Administration's Draft, 2001, p. 15). So, Sensenbrenner sets the tone that he wants to see the normal process, as expedited as it may be, run its course; at the same time though, he asserts himself as a strong, independent leader who will not be influenced by outside pressure.

The first person to ask questions, Mr. Gekas (a majority member), does not directly address the debate over ethos but instead asks a fairly uncontroversial question beckoning the Attorney General to clarify the President's recent executive order pertaining to the seizure of assets and how that policy gets worked into the current bill. The question asks if people, who in good faith, contributed to a charity that funneled money to terrorist organizations could be accused of terrorism. Ashcroft says no…and questions continue (Administration's Draft, 2001).

Don't Take Questions Personally

Barney Frank (D MA) is the second questioner and he immediately chimes in on the debate over ethos and the state of the democratic process. It is interesting to note that he calls this "the procedural point" as distinguished from the "substantive points" he makes a bit later in his line of questioning. He first reassures the Attorney General that everyone knows he is giving his best effort, and then goes on to say that responding to 9/11 is a tough job that no one wants to do and that no one should do alone:

> General, on one the procedural point, you submitted legislation, I guess, last week, which represented your best effort. And no one's good will is in question here. We're all trying very hard to do jobs that, frankly, none of us feel fairly adequate to do. This is a terrible task that none of us ever contemplated having to do when we got here, and we're doing our best. And I think it's a time when the collective wisdom is very likely to be better by far than what any one of us could do. I certainly benefited from that. (Administration's Draft, 2001, p. 16)

Frank explicitly tells Ashcroft that criticism should not be taken personally and that collective wisdom is going to produce better results than if one person tries to do it all. He goes on to say that previous collaboration between the majority and the minority has improved the bill, "while diminishing some of the concerns we would have had, and we've been able to do that by working together between Thursday and today…." Pointing out that "Another week would make it do even better" (Administration's Draft, 2001, p. 16). He asks for more time to collaborate, and again reinforces the idea that criticism should not be taken personally, collaboration is the way to go: "It's no criticism of your work product to know that no one can excogitate the perfect bill here, and working together helped. We've already been able to make some improvements and enhance the area of agreement" (Administration's Draft, 2001, p. 16). Finally, Frank begs Ashcroft for more time to collaborate before rushing into markup: "I would ask urgently for another week to be able to do more of that rather than have us rush to a premature markup tomorrow" (Administration's Draft, 2001, pp. 16-17). Then, Frank moves onto "a couple of substantive questions" (Administration's Draft, 2001, p. 17) related to surveillance and asset forfeitures.

He begins the line of questioning by referring the audience to the smear campaign lodged against Martin Luther King by J. Edgar Hoover and the FBI Ashcroft's answer to Frank's line of questioning was very brief. In 2-3 sentences, Ashcroft recognizes that status quo safeguards for a wrongful asset seizure should remain in place and

acknowledges that the leakage of personal information about the subject of investigation is unlawful. He did not address the first part of the questioning concerning the procedural issue of needing more time to ask questions. Frank's time expired and it was the majority's turn to ask questions.

All or Nothing

The third questioner is Howard Coble (R NC) and he begins rather inconspicuously; he does not really address the ethos related debate. Instead, he asks a couple of substantive questions. One question had to do with why characterizing certain computer crimes are classified as acts of terrorism under the new law. The second question asked about a hypothetical scenario concerning whether 9/11 would have happened if the new tools Ashcroft was asking for were in place at that time. Ashcroft answers the first question by simply pointing out that, computer crimes can cause serious damage to the infrastructure and kill people, so they should be taken very seriously. Following, an important ethos related argument begins to develop. Coble announces that he knew that and that he just wanted it on record to clarify the matter: "Yeah. I wanted that on the record, General, because some folks might think that was too far-reached. I just wanted it on the record" (Administration's Draft, 2001, p. 18). At this point, the underlying message of ethos comes forth. Of course it is impossible to know exactly to whom Coble is referring when he says, "some folks." My interpretation is that the phrase is intended to include anybody who questions the DOJ's proposal for change to computer surveillance laws—in other words, anybody who questions the proposal in any way just does not understand the magnitude of the threat by terrorists. This claim plays into the either/or dichotomy—there is a distinct line existing between good and evil—you either

support the administration's attempt to combat terrorism or at best, you just do not understand it; at worst—you are yourself a terrorist. There is no middle ground.

Admittedly, this interpretation of Coble's argument does demand some reading between the lines and probably never would have made the final cut of dissertation analysis without having the benefit of reading Ashcroft's immediate reply:

> Well, you and I obviously are on the same page. We understand that these kinds of crimes can threaten the lives and well-being of multitudes of individuals, and they are far above the garden variety crime of—and I don't mean to say there's something easy about car theft or personal assault, but when you get into threatening systems and structure and infrastructure, it's substantial. (Administration's Draft, 2001, pp. 18-19)

This seems to confirm the way in which the all-or-nothing dichotomy is built into the Administration's rhetorical response to terrorism. Those who agree with the department's response understand the threat and value "the lives and well-being of multitudes of individuals;" whereas those who question proposed changes are not on the same page and do not understand what is going on. This completely disregards the middle ground that seems to be taken by many critics (at least the critics in this particular policymaking arena)—the notion that most, if not all, of the provisions the Department of Justice are asking for are necessary, as long as there are more checks built into the system of accountability. The all-or-nothing dichotomy does not allow for such a criticism to be taken seriously. It says to the interlocutors in this debate and the public paying attention to the debate: "accept this proposal as-is or don't accept it all."

A Challenge to Ashcroft's Patriotism

Shortly after injecting the all-or-nothing ultimatum into the debate, a reminder is provided that Ashcroft has to leave as indicated earlier in the debate. Despite the voicing of concern by Conyers, he did leave as promised, though not before he praised the ethos

of his assistants who, according to Ashcroft, probably have more technical expertise on the matters than he does.

The debate continues through the questioning of Thompson and Chertoff. But rather than continuing to analyze the debate in chronological fashion, it seems more prudent here to shift gears a bit by beginning to thematize the various ways in which the competing notions of patriotism are carried through during the remainder of the hearing. We recognize that Ashcroft, the Justice Department's leader, put forth his ideal patriotism and now it is left to his cohorts to defend that ideal. From analysis of Ashcroft's opening statement above, and his answers to a few questions, some significant themes emerge. We learn that the deliberative process needs to move along expeditiously, because the terrorists are evil and crafty, and because the country needs to unify around this bill out of what Ashcroft presents as a rather obvious sense of patriotic duty. As Ashcroft begins to entertain questions, we learn that questions in general are bad because they slow passage of this bill and thereby make the country more vulnerable to attack. We are also persuaded that we should defer to the country's leadership during times of crisis and trust the Department of Justice. Passage of their proposal is an all-or-nothing issue: it is complete and perfect. It is the patriotic thing to do.

However, we also recognize that there are critics, on both sides of the aisle, who wish to alter the notion of patriotism by buying more time for careful debate and negotiation. The critics have been very careful about how this notion of patriotism is challenged; they have to be sensitive because of the rhetorical situation, not to mention panic and fear on the ground. The careful way in which they have broached the topic has been to 1) acknowledge that they fully support the goals of the proposed legislation—just not all of the finer details by which the goals are carried out; and 2) praise Ashcroft and

the job he has done—suggesting that criticism should not be taken personally and that questions are only meant to be constructive in a spirit of collaboration. But clearly, more than anything else, critics of the Justice Department want to buy more time so that the act can receive some thoughtful legislative review. That is the patriotic thing to do. Thus, the crux of the debate is staged: do patriots defer to leadership in times of crisis by refraining from asking questions, or do they ask questions?

Negotiating the All-or-Nothing Dichotomy

There is plenty of evidence to suggest that Ashcroft's message of patriotism was quite compelling, aside from the facts that a) he more or less got the Patriot Act bill that he wanted at the end of this stage of debate and b) his message of patriotism ran parallel to the President of the United States who had a record setting 90% approval rating. Aside from those contextual matters, further evidence comes through interpretation of the debate itself. One of the first observations made about the pattern of critics' argumentation, and this is noted much earlier in the chapter, is the way in which many critics appear to feel obligated to rhetorically nestle themselves inside of Ashcroft's patriotism, before suggesting a subtle adaptation of it.

As discussed earlier and made evident while analyzing Conyers's opening statement, a fairly common form for the introduction of criticism is to begin by almost granting Ashcroft's notion of patriotism as true, and then slowly moving away from it. The form is essentially: I am strong on terror and/or I do show support to the government's leaders and/or I do support many of the provisions of the act…**BUT**...I do wish to express a concern. Many members of the House throughout this phase of debate display this form when posing questions or making criticisms of any kind. In all, criticism is introduced this way 16 times during the course of this hearing by 10 different members

of the committee—seven members of the minority party (Conyers, Frank, Nadler, Scott, Lofgren, Jackson-Lee, and Waters) and three members of the majority (Goodlatte, Chabot, and Bachus). Zoe Lofgren (D CA) provides perhaps one of the more illuminating exemplars of this form of argument. She actually repeats it twice. In the first instance, she acknowledges some things that could get passed expeditiously before suggesting there is a problem, and in the second instance, she states that she does not want to get into a debate:

> Now, frankly, looking at this draft, I think there are some things here that all of us agree about and that we could do very quickly. I think there are some areas that with some further working we might quickly come to an agreement. And I think there are some areas that have serious flaws. And without getting into a debate, I do have a very strong concern, Mr. Dinh—and I didn't have a chance to talk about this over the weekend—but the—that the indefinite detention is a real issue, because there is no time line during which the deportation proceedings must be undertaken. And so the effect really, I mean, and the Court's been very clear, and even recently in terms of those who cannot be deported because of persecution or failure of the origin country to accept the deportee, that you can't keep someone in indefinite detention and be constitutional. So we are going to need to work through those issues. (Administration's Draft, 2001, p. 30)

Lofgren's comment about "avoiding getting into a debate" is certainly puzzling. If a hearing before the Full Judiciary Committee of the House of Representatives is not a time for debate, when is? She is doing her best to express concerns and seems to feel the pressure of conformity-as-patriotism. Furthermore, the argument is a sensible and strategic counterargument. In an indirect way, Lofgren is counteracting the all-or-nothing dichotomy posed by Ashcroft's vision of unification. By first saying that she does not stand in the way and that she in fact agrees with much of the proposal, and then suggesting that there may be problems with it, she makes criticism seem more "patriotic" according to the rhetorical situation.

Spencer Bachus (R AL) provides another illuminating example of this phenomenon within the argumentation from the other side of the aisle; he is a Republican

and thus a majority member of the committee. Here, he specifically refers to some of the main ideas within Ashcroft's proposal and acknowledges how useful they are:

> First of all, the Attorney General said that really the purpose of this legislation is to, number one, take care of new technology; in other words, update our statutes because of modern technology. And we all understand where you have mobile phones, e-mails, computer activities, you need to be able to track those people and their activities. And I think we all agree that we need to update antiquated statutes. He also said that this is to confront the uniqueness of the terrorist threats that we have today. Well, I mean I'm going to accept that, having accepted those things, we all understand that and I think support it. (Administration's Draft, 2001, p. 39)

In this case, Bachus makes specific reference to the all-or-nothing dichotomy created through the rhetoric of unification. He points out that he can agree with many ideas of the proposal…**BUT**…have disagreement with some parts. Bachus then proceeds to argue that one of the provisions in the proposal violates the 4th amendment and engages Chertoff on the issue.

While noticing this form of argumentation may seem like a menial observation to make, it is actually very important to note when paying attention to the pressure debaters were under due to patriotism as argument. Before anybody can question the proposed policy, it appears prerequisite that they first explicitly justify their credibility as patriots, or at least as people, who will not stand in the way of the patriots, regardless of the constitutionality of the proposal. While this form of argument may come across as a defensive argumentative stance, and it did to this interpreter initially, there is an embedded offensive strategy to it—and that seems to be to slowly build toward the goal of espousing a different notion of patriotism. The function is to counter the all-or-nothing dichotomy built into Ashcroft's patriotism. When critics explicitly point out that disagreement with one provision of the act does not translate into complete rejection of the whole thing, the all-or-nothing vision of unity is countered and arguments against the

act are more easily acceptable as patriotic. They attempt to preempt an attack on their own patriotism, while also setting the stage to begin to alter the administration's notion of patriotism.

We Need More Debate!!!

Using an exemplar from Mr. Bachus at the end of the previous section provides for a nice segues into the section describing the extent to which critics attempt to reformulate the construction of patriotism within the debate. Mr. Bachus, after easing into some of his frustration over the bill, begins to show some of his true frustrations while arguing with Chertoff over the 4th amendment issue previously mentioned. During the interaction, Bachus asserts that the department is in the position of being able to pick which evidence is disclosed and when. Chertoff is attempting to provide an example of how the Justice Department protects the 4th amendment and is interrupted by Bachus. The brief exchange follows:

> Mr. CHERTOFF. Well, let me give you a real practical example of something that happened. There was an investigation involving——
> Mr. BACHUS. No. And let me say this. I know you can always take an example where this is called for, but, you know, the fourth amendment says we don't search someone's house until they're given notice. Otherwise—— (Administration's Draft, 2001, p. 40)

At this point, it should be noted that the argument in which the DOJ manipulates the disclosure of evidence occurs a great deal more during the implementation phase of oversight—the 2003 debates. There is no precedent at this point for changes to the tools at the Justice Department's disposal. Nonetheless, this little bit of dialogue offers an example of one way in which critics attempt to alter the flow of the rhetorical construction of patriotism in this debate. When we get to the implementation phase, we will see it much more frequently, and arguably, to more effect.

Other instances exist though during the present debate in which people are obviously (some more obvious than others) attempting to amend a notion of patriotism through their own offensive line of argumentation. During 11 instances for examples, five different minority members (Frank, Nadler, Scott, Jackson-Lee, and Waters) and one majority member (Barr), begged for more time to debate the issue. Frank for example, immediately after complimenting Ashcroft on a fine job and letting him know that criticism is not personal and that better legislation will come through cooperation, argues a sense of urgency behind the need for more time to cooperate over the markup of the bill: "I would ask urgently for another week to be able to do more of that rather than have us rush to a premature markup tomorrow" (Administration's Draft, 2001, p. 16-17). In another example, Robert Scott (D VA), a minority member, more directly attacks the ethos of the Justice Department, when he argues that rushing the process and passing bad legislation, like what is happening, is letting the terrorists win: "I too want to express my frustration about the time limitations. The terrorists could not undermine our freedoms, but as we consider this legislation that might be exactly what we're doing" (Administration's Draft, 2001, p. 26-27). Clearly, this runs directly in opposition to Ashcroft's notion of patriotism.

In one or two instances, a direct notion of patriotism is even discovered. Maxine Waters (D CA) argues, alongside of the we-are-being cooperative preemption, that we cannot let the current national mood of unity prevent us from having a long, philosophical debate over what needs to happen to protect safety while balancing liberty:

> And I'm hopeful that because of this mood that we're in, and we have to be in, that we are not placed in the situation where we are being asked to do things that normally we would have a long debate on and a tremendous fight, just based on where we're coming from philosophically. Civil libertarians are afraid of being rushed on this kind of legislation. And many of us feel very strongly about the Constitution. And while we have been very cooperative and we have bent over

> backwards, we're going to draw the line. We have to draw the line. And we cannot be rushed into allowing this tragic moment that we're in at this time to cause us to support violation of privacy and the Constitution. (Administration's Draft, 2001, p. 38)

Then she argues that there is no reason to ask the questions she has because there is simply not enough time for them to be answered: "I'm not going to ask you any particular questions because I don't think you can answer them at this point. It's just too much. And the way we've been doing this today does not lend itself to the kind of work that could get us serious results" (Administration's Draft, 2001, p. 38). Waters does call the department's ethos into question over the way in which they are carrying out the deliberative process.

Even though Waters, Bachus and others do suggest change in the current course of the democratic process, and hence patriotism, it should be noted that these arguments have been prefaced by a nod to Ashcroft's patriotism. The previously mentioned deliberators in this section of analysis are also found to have begun their lines of argumentation with an, "I don't want to stand in the way…**BUT**…" argument. The way in which they attempt to slip this reformulation of patriotism in is strategic; it speaks to the pressure they were under and the way in which they responded to the pressure—preempting an attack on their own patriotism, while also trying to get their criticisms across. Sheila Jackson Lee (D TX) provides an example of the way in which this reformulation is made. She begins, after thanking Sensenbrenner for recognition, by pointing out that there is not enough time for questions, and references the debate over legislation after the Oklahoma City bombing as an example; then the warrant of her argument is made very casually:

> Thank you very much, Mr. Chairman. It is obvious by the extended questioning of the Members that this is not enough time, though I do want to thank the gentlemen, thank General Ashcroft, who I wish could have stayed, and thank the

> deputy Attorney General, Mr. Thompson, as well. My opening remarks will simply be I ask that you take a message back. I believe some four or five years ago, when we entered into this process, in 1996 I believe, we had four days of markup. I would ask that the message be taken back that there are many of us who want to do the right thing. We want to do it collaboratively. We want to do it in a bipartisan way that respects the rule of law. (Administration's Draft, 2001, p. 33)

After asking that the message "be taken back that there are many of us who want to do the right thing," she defines what the right thing is: collaboration, bipartisan debate, and in such a way that "respects the rule of law," asserting that not having enough time for questions, her original premise, is the cause for potential constitutional trouble.

There is one notable exception to the way in which critics approach the reformulation of patriotism, and this exception comes, interestingly enough, from a majority member of the committee, Bob Barr (R GA). Though it must be noted that while he was elected to the House as a member of the Republican party, his true political affiliation is to the Libertarian party—a party which claims to think like a Republican when it comes to economic issues, but like a Democrat when it comes to issues of civil liberties. The party members state they are essentially opposed to big government in any way. Regardless, Barr is listed as a majority member, and was one of the most vocal, direct critics of the witnesses in this debate.

Barr accuses the Department of Justice of taking advantage of 9/11 to gain powers that they had been seeking for a long time. He begins by expressing concern over the provisions of the act that have nothing to do with terrorism and then attacks the ethos of the DOJ officials (of which only Dinh and Thompson were present at the time of his questioning):

> Does it have anything to do with the fact that the Department has sought many of these authorities on numerous other occasions, has been unsuccessful in obtaining them, and now seeks to take advantage of what is obviously an emergency situation to obtain authorities that it has been unable to obtain previously, even though the government cannot tell us in the Congress, with any degree of

> certainty or with any specific examples, that had these authorities been available to the government prior to September 11, they have some confidence that these events could have been prevented. (Administration's Draft, 2001, p. 32)

Then, Barr utilizes the credibility of bipartisanship to extend the argument that the definition of terrorism according to the proposal is not exclusive enough. Following, he attacks the witnesses' credibility again by accusing them of speaking in generalities and not providing enough time for questions:

> I really would appreciate something more than just generalities, if you all could. Why it is necessary, without proper hearings, without due deliberation and input, to dramatically change provisions of U.S. criminal law and criminal procedure across the board simply to attack the problem of terrorism, and why would the Department not agree to simply address those provisions that do relate to terrorism, which we can all agree on—there are some gaps in the government's current arsenal to fight terrorism—but allow us somewhat more deliberative process to address these other fundamental concerns and across-the-board changes. (Administration's Draft, 2001, p. 33)

So, it is interesting to note just how distinct Barr's participation in the process is from the general pattern of participation by other members. Rather than acknowledging the administration's rhetorical construction of patriotism, and maneuvering around it, he directly attacks that notion head on, by going after the ethos of those who espouse it, in an effort to construct his own patriotic ethos. He is the only one of the critics in this debate who did not enter into his line of argumentation through a, "I really agree with most of what you have to say…**BUT**…" approach.

The Justice Department Retorts

In the grand scheme of things, readers need to know that according to the researcher's interpretation, this current stage of debate is not overly contentious—at least compared to what is to come during later stages of the process. Yet, recognizing that Ashcroft's patriotism was questioned to some extent, and also recognizing that Ashcroft left after less than an hour of deliberation, his cohorts from the Justice Department were

left to extend his arguments while answering questions from the members of the committee.

"You can trust us"

A significant line of argumentation that emerges from Ashcroft's testimony above is a simple declaration that "you can trust us," and that it is okay—in fact necessary to defer to our leadership ability. This argument appears seven times throughout the course of this hearing and is made at some point by all three witnesses provided by the Justice Department. In this next example, Chertoff is responding to the criticism lodged by Barr, which is described in more detail above. The criticism is essentially a fourfold argument, creating a direct attack on ethos: 1) officials are taking advantage of the actual disaster and the subsequent rhetorical situation to gain power that they have craved for a long time; 2) the definition of terrorism in the bill is not exclusive enough to distinguish from other crimes; 3) that officials do not have the time to answer questions directly and thus, are 4) speaking in generalities rather than directly answering specific points of inquiries. Chertoff immediately responds to Barr's criticism: "I'm—I don't think I'm going to have the time to address each one of those items. But I do want to try to address some of them and talk generally. I think the Department was very careful when we put this together not to engage in the temptation to treat it as a laundry list of all the things we wished we could have" (Administration's Draft, 2001, p. 33).

The response is interesting for a number of reasons, the first of which is the fact that within the answer, he grants Barr's fourth argument claiming that witnesses are speaking in generalities. He states that during the first two sentences of his response. But the second reason why it is interesting is that after acknowledging the very general nature of his reply, he simply declares that they were "very careful when we put this together

not to engage in the temptation to treat it as a laundry list of all the things we wished we could have" (Administration's Draft, 2001, p. 33), as if that is all we would need to accept it. Chertoff makes a statement about the state of mind of the authors of the act—something that cannot be verified one way or the other from the perspective of a logos-based argument. We simply have to take his word for it that this is true. In all, this argument was used a total of seven times during the course of this hearing by all three Justice Department witnesses.

The Benefit of the Doubt

Continuing with the previous response to Barr's argumentation, Chertoff goes on to say, "That's not to say that {the provisions} don't have relevance in some instances to other kinds of crime. But they're, all of them, related quite specifically to what we need to do to be more effective fighting terrorism" (Administration's Draft, 2001, p. 33). So, he does speak to the logos of the argument and attempts to very generally explain the relevance standard required for what some call blurring the line between criminal investigations and terrorism investigations. Then, he claims to specifically "address some of the issues that you've raised, Congressman" (Administration's Draft, 2001, p. 33). He says, "You've talked about the need to share FISA information, foreign intelligence surveillance information. Well, by definition, that involves national security information, either terrorism or espionage, and I think we can all agree that those are critical threats to the United States. What we're trying to do is, as Mr. Thompson said, is make sure one hand knows what the other—" (Administration's Draft, 2001, p. 33). He gets interrupted by Barr who asks for further clarification and unfortunately, his time runs out before getting into any type of discussion that might actually clarify the issue. But, the response given by Chertoff speaks to the administration's use of ethos. He addresses Barr's question very generally by simply saying that terrorism and espionage are both very dangerous crimes, and then he says, "I think" everyone in this debate can agree to that. By saying "I think," the implication is made that he is not quite positive that Barr can agree; yet, he gives him the benefit of the doubt.

The benefit of the doubt argument becomes an integral part of the Justice Department's construction of patriotic ethos. Although I have only detected it one time in this particular debate, it does show up later during the markup debate presented in

Chapter 6. It is to be sure a very subtle way of claiming that critics are either really, really confused, or that they support the cause of terrorism. It contributes to the overall construction of patriotic ethos by finding another way to frame the all-or-nothing-dichotomy. In the quotation above, Chertoff equates agreeing with the idea that terrorism is dangerous with agreeing that the administration's policies are necessary. Chertoff has delivered a non-sequitar argument, i.e. even if the premises are factually correct, they do not lead to the conclusions drawn. There is no room for, according to the administration's view of patriotism, agreeing with the fact that terrorism is dangerous but at the same time, thinking that the policy proposal needs more work. To question the potential infringement of civil liberties is unpatriotic—or at least less patriotic than not questioning.

All-or-Nothing

As the core of the entire Bush Administration's call to unity, the all-or-nothing argument is pervasive during the defense of the Patriot Act. It shows up at least five different times by one member of the majority party in the House (Coble) and two different witnesses from the Justice Department: Ashcroft and Thompson (as well as a related benefit-of-the doubt argument just demonstrated in Chertoff's discourse). The exemplars from Coble and Ashcroft have already been alluded to earlier in this chapter. So now, we'll turn our attention to Thompson's discourse, and doing so perhaps most vividly demonstrates how the dichotomy manifests in the debate—both the current hearing but also down the road as the deliberative process gets more contentious. In the current example, Thompson is responding to an argument that was introduced earlier by Scott, a minority member. As explained previously, Scott did begin the line of questioning by first arguing that more time is needed for debate, but also acknowledging

that agreement about many of the provisions would likely be easily reached. After qualifying the ethos related arguments, Scott makes a logos based criticism suggesting that there is not enough distinction between terrorism and general crime in the bill and that because of this, the law blurs the line between terrorists and other criminals.

Thompson's response ignores the question entirely, opting to generalize about the importance of enacting the Patriot Act:

> Congressman, the ability of the Intelligence Community to share information with law enforcement authorities and vice versa is critical to our fight against terrorism. The situation is the left hand has to know what the right hand is doing. This is a problem with respect to our foreign intelligence investigations. This is a problem that has really plagued some of our cases that the Department of Justice has. (Administration's Draft, 2001, p. 27)

This answer clearly does not address the question Scott asks and jumps to the sweeping generalization, the all-or-nothing dichotomous assertion, about the ethos of critics in general. He is implying that questioning the law is a signal that the questioner wants to maintain the "wall" between intelligence agencies and law enforcement officials.

Critics are Impulsive

While not quantitatively impressive in this stage of debate, the "critics are impulsive" argument does enter the discourse and is worth noting especially because of the way in which it becomes quite pervasive as part of the debate during later stages. In the following, Chertoff and Thompson were both responding to a line of questioning posed by Bob Goodlatte (R VA) who incidentally began his line of questioning by saying, "I strongly support this legislation, with some concerns that some elements of it need some fine-tuning, and I'd like to address some of those" (Administration's Draft, 2001,p. 25). He is defending his ethos by supporting the legislation up front—making it very clear that he will not stand in the way of it being passed. He is a good patriot. **But…**then he goes on to ask questions of clarification about the pen register and trap and

trace devices. He points out that with pen registers and the monitoring of phone calls, only phone numbers appear, whereas with the monitoring of e-mail messages, much more information would be more readily available in the subject line of an e-mail than in a telephone number. Goodlatte asks about how the new law would address this gray area. Thompson begins answering but then turns it over to Chertoff, who answers with a logical explanation that the protection would occur in the same way in which privacy is protected during pen register monitoring of phone calls. The subject line is not recorded, and the content of an e-mail message is ignored unless there is enough suspicion to get a search warrant. Goodlatte then asks one last question, one pertaining to the difficulty in distinguishing between terrorism and crime in general. Chertoff responds:

> Again, Congressman, I understand the impulse behind that. But let me say that often when you commence a criminal investigation, it doesn't come labeled terrorist or nonterrorist. In fact, this provision, and a number of the provisions really address inconsistencies in the law where under one type of technology we are able to do one thing, but emerging technology has created a gap in the law. There's no change in the privacy protection substantively. We're trying to just even the playing field. (Administration's Draft, 2001, p. 26)

Chertoff calls the importance of limiting terrorism legislation to specific instances of terrorism, as distinguished from "crime," an "impulse." Impulses do not derive from rationality but rather from a gut, visceral reaction. His language choice here definitely conveys a point about the ethos of critics—they do not think rationally. We will see during later stages of the debate, the accusation of thinking impulsively devolves to the accusation of thinking hysterically.

After the subtle attack on Goodlatte's ethos, Chertoff goes on to explain that distinguishing terrorism from criminal activity is not important:

> As to those types of issues, there's no reason to limit it to terrorist activities. And, in fact, it will often be the case that terrorist groups engage in other kinds of criminal activities to finance or support their terrorism. So I think if we're going to be comprehensive and make sure we are not merely locking the barn door for

> the last horse, but we're locking the barn door for the next horse, we have to address some of these technological gaps right now. (Administration's Draft, 2001, p. 26)

And on that note, analysis of the 9/24/01 hearing comes to a close, giving us the first glimpse at the way in which Bush's message of patriotism has worked its way into the policymaking arena.

Summary

We have seen the way in which the major lines of argumentation related to ethos were set up during the opening statements; we have seen the types of questions/argumentation posed to the majority witnesses in relation to ethos, and we have considered the responses to those criticisms. Very clearly, even prior to the existence of the title, "USA PATRIOT Act," the meaning of patriotism as argument can be discerned. John Ashcroft began the debate with the argument that any public deliberation about the act is bad; it is a dangerous waste of time—action must be taken immediately to preserve safety. When critics argue that there must be more debate, Ashcroft and supporters respond by framing the Patriot Act as an all-or- nothing, now-or-never issue. They also frame themselves as trustworthy and capable—ready for this new authority without any need for public debate. Additionally, the argument is asserted that critics are either impulsive and misguided at best, or traitors at worst.

Chapter 6:

Markup and Passage of the Patriot Act

As analysis from this chapter progresses, it appears that for a while the critics in the House of Representatives may have struck a balance with the Justice Department concerning the need to debate the Patriot Act. The spirit of cooperation appears high in the 10/03/01 markup session. The simple fact that they had a markup at all involves far more deliberation than was occurring in the Senate. There, negotiation was being conducted almost solely behind closed doors. We are very fortunate to have the journalistic reporting of people such as O'Harrow (2002) and Foerstel (2004) to help fill the analytical gaps. Their access to the insiders of the debate, as well as their in-depth interviewing helps connect the dots of the legislative process.

Talk Won't Solve Terrorism: The Senate Caved

Late in September, Jim Dempsey, the Executive Director of the Center for Democracy and Technology, was invited by Beryl Howell, a senior advisor on Leahy's staff, to another meeting between the Justice Department and legislative representatives so that the decision making process could be influenced by an expert who is a third party, much like the common practice at official legislative hearings[3] (Foerstel, 2004). Though it is important to note that no witnesses invited by minority members were allowed to testify at any point during the authorization stage of the process. When the DOJ officials arrived at this meeting, "they were livid" over Dempsey's presence. According to Dempsey, "They explicitly said, 'we don't think outsiders should be here, and we won't talk unless they leave the room'" (O'Harrow, 2002, p. 18). Ultimately Dempsey was

[3] Dempsey would become a witness in the legislative proceedings during both the implementation stage (this testimony is data for this project) and the reauthorization stage (this testimony did not make the data pool).

allowed to remain in the room as long as he did not say anything. The Justice Department officials made their presentation and promptly left without taking questions. A few days later, another meeting was held between Howell and Timothy Flanigan, White House Deputy Counsel, to discuss wording in Leahy's bill, and Leahy was convinced that some compromise had been reached which provided an increased level of judicial review prior to the sharing of information between the intelligence community and law enforcement agencies.

But on October 2, during another closed-door meeting, "Ashcroft quickly made it clear that he would no longer abide by the agreements negotiated with Flanigan" (Foerstel, 2004, p. 48). Leahy was angry and told Ashcroft so. He said, "'John, when I make an agreement, I make an agreement. I can't believe you're going back on your commitment'" (O'Harrow, 2002, p. 26). Following the meeting, Ashcroft held a press conference at which he proclaimed "I've asked the Congress very clearly for additional tools to reduce the risk of further incidents. And I believe it is time for us to understand that tools can reduce the risk of terrorism; talk won't" (Ashcroft, 2001, October 2). Obviously, Ashcroft was not interested in deliberating about the legislation—he wanted immediate action, voicing open resentment toward talk.

At that point, Leahy "was deeply distressed by the collapse of the deal. He felt the administration was intent on steamrolling over him" (O'Harrow, 2002, p. 26). But Leahy could not see that there was anything else he could do. After surveying members of Congress, he realized there was no way the Senate could put up a fight: "He would have to rely on the House to fight that battle with the administration" (O'Harrow, 2002, p. 27). When it came time for the Senate to markup the bill, Leahy's fears proved to be true. Both he and Daschle realized that the Justice Department was going to get exactly what

they wanted out of the bill regardless of the fight they put up; thus, they felt it was necessary for the Democrats to go along. The only member to stand against the process was Russell Feingold. Despite intense pressure from Daschle, Feingold felt obligated to resist the administration rather than put up a fight. His concern was that the legislation did not contain adequate civil liberty safeguards.

Despite his effort, his own party shut down every amendment proposed; leaders of both Republicans and Democrats desired unanimous consent. On October 11, 2001, after learning that the bill would probably not even be made available for markup, Feingold stood up on the Senate floor and made the following remarks, hoping to inspire debate:

> If we lived in a country where the police were allowed to search your home at any time for any reason; if we lived in a country where the government was entitled to open your mail, eavesdrop on your phone conversations, or intercept our e-mail communications…based on mere suspicion that they were up to no good, the government would probably discover and arrest more terrorists….But that would not be a country in which we would want to live…Preserving our freedom is the reason we are now engaged in this new war on terrorism. We will lose that war without a shot being fired if we sacrifice the liberties of the American people in the belief that by doing so we will stop the terrorists. (p. S10570)

Feingold then attempted to submit one last amendment. In response, Majority Leader Tom Daschle (D-SD) replied, "We have a job to do. The clock is ticking. The work needs to get done…I hope my colleagues will join me tonight in tabling this amendment and tabling every other amendment that is offered, should he choose to offer them tonight. Let's move on and finish this bill" (p. S10575). Ashcroft and those who supported the rushed process got their way, and no markup whatsoever occurred in the Senate over the Patriot Act. Ultimately, the Justice Department's draft legislation passed the Senate Committee 96-1—Feingold was the only person to vote "nay."

The House Committee Markup on 10/3/01

Despite the absence of debate in the Senate, some momentum seemed to be generated in the House to have deliberation—though everyone recognized the importance of expediting the process, taking care of the most pressing difficulties, and ensuring more careful review later on down the line. Following the 9/24//01 hearing, DOJ staff members went back to work on a draft to put before the Judiciary Committee for mark-up on 10/3/01. As will be seen, the proceeding was amicable, for the most part. Most members of the House, including the more vocal critics such as Bob Barr from the 9/24/01 hearing, seem to concur that the process that had transpired was a good one under the circumstances. Everyone agreed that something needed to be done rather quickly to update the existing laws; most felt that there was agreement over the proposed ways in which those changes should be implemented, and now, they felt that they had scored a legislative victory by extending the deliberative process for a couple of weeks rather than a couple of days so that some of the more controversial provisions could have adequate legislative review. The result of that process is that most members felt comfortable with what had transpired given that the sunset provisions mandating they conduct a more thorough review at a later time (The original sunset provisions were set to expire after two years; however, the final product of the bill had them expire after four years instead).

Though there were some amendments proposed and passed—they were non-controversial ones. Most of the controversial amendments were withdrawn by those proposing them, under the auspices of cooperation, unity and the promise of coming back to them at a later time. For the amendments that were proposed and not withdrawn, the process for rejecting them is short and sweet—and in many cases, the Justice Department's notion of patriotism is used to do so. From the vantage point of this project,

given the unusual level of harmony and agreement during the markup, it seems that analysis should be brief, so as to parallel the discourse being analyzed.

The Title Changes: PATRIOT as Symbol

Despite the amicability, there are definitely some very interesting parts of the discourse: the way in which the agreement carries through the course of the markup, the procedure of the markup itself, and a few cases of disagreement. But perhaps the most interesting part of the debate is something that does not even get mentioned until after the markup is over—an afterthought to the debate itself, and it has to do with recognizing the symbolism of the title. As we recall, the original title of the bill, from the 9/24/01 hearing was the *Mobilization Against Terrorism Act of 2001*. The title was referential in the sense that it described the actions intended within the text of the bill. But entering the markup session, the title had been switched to the USA PATRIOT Act (see Chapter 1).

The following quote is also provided in full here because it is noteworthy as the first clue emerging from this legislative process that set this study in motion. The quote comes from Barney Frank (D MA) who does vote for the authorization of the act but regrets the way in which it was carefully titled. He begins to express regret by drawing attention to the "subject of the power of words," and he says that, "I want also to express my disagreement with the decision to construct an awkward title for this bill so that it yields the acronym 'PATRIOT'" (Provide Appropriate Tools, 2001, p. 433). He goes on to say that there has been an outpouring of patriotism on the part of virtually every member of this legislative body, which is a very appropriate thing to do during a time of crisis. But "invoking the word PATRIOT in the context of this bill gives the unfortunate impression that those who disagree with it are not patriots" (Provide Appropriate Tools, 2001, p. 433). He states he voted for the proposal and he is proud of the policy change

found therein because he does believe there is a proper balance of liberty contained in the legislation; however, he also feels uncomfortable knowing that to say otherwise would, by definition, label one as unpatriotic. He concludes by saying, "I wish we had not chosen a title for the bill that in any way reflects on their good faith in expressing that disagreement" (Provide Appropriate Tools, 2001, p. 433).

Opening Statements

Sensenbrenner

Chairman Sensenbrenner opens the session by announcing that it would be "a little bit different than the procedure that we have utilized in the past… because it is important that the Committee report this bill out today" (Provide Appropriate Tools, 2001, p. 289). In fact, he goes further in warning the members that, "it is also the Chair's intention to keep the Committee in session until we have a final vote on reporting the bill out" (Provide Appropriate Tools, 2001, p. 289). In order to accomplish this, many of the normal procedures generally utilized to stimulate debate and discussion are minimized. One of the changes includes limiting opening statements to himself and Minority Leader Conyers; all others who wish to make an opening statement are advised to submit it for the record.

Sensenbrenner then calls the house to order and begins his statement by acknowledging the ethos of the terrorists:

> On September 11th, not only our Nation but our entire way of life was attacked. From the moment that the first plane smashed into the North Twin Tower, our lives were changed forever. The sordid acts of the 19 men and the elaborate network of organizations that support their cause have opened our eyes to the clear and present danger that threatens our great country. Now that our blinders have been removed, the question is how we will act to help prevent future attacks. (Provide Appropriate Tools, 2001, p. 289)

The terrorists changed our lives forever. They "opened our eyes" to the danger they pose to the country. But our "blinders" have been removed and now we have to ask ourselves what we can do to protect our country. That is we have met today says Sensenbrenner, "with one purpose in mind, to provide law enforcement with important additional tools to help prevent this sort of catastrophe from ever happening on U.S. soil again" (Provide Appropriate Tools, 2001, p. 289). Then, he proceeds to define what a true patriot is:

> A true patriot is one who loves, supports and defends his or her country. In the days and weeks following this horrific act, it has become clear to the world that the United States is a nation of patriots who through the selfless act of the New York firefighters and rescue workers, the heroism of the passengers on Flight 93, the charitable donations of our citizens' blood and money and the proud display of our most enduring symbol of freedom, the American flag. The united efforts of this country are reflected in the bipartisan efforts of this bill, which I was pleased to introduce with the Ranking Member, Mr. Conyers, along with the cosponsorship of 18 bipartisan Members of this Committee. (Provide Appropriate Tools, 2001, p. 289)

Because a true patriot "loves, supports and defends his or her country,' he/she will support this bill because the "united efforts of this country are reflected in the bipartisan efforts" of passing it. Passing the bill is placed upon a patriotic pedestal right beside the firefighters who raced into buildings that were doomed, the passengers aboard Flight 93 who prevented a fourth attacking airplane from hitting its target, the charity of the country's citizens, and all of this is represented through the symbolism of the American flag. Not voting for the bill **TODAY** means violating all of those principles according to not only the rhetoric of the title of the act but also according to the way in which Sensenbrenner opens the markup session by referencing that very symbolism. Continuing, Sensenbrenner reports, "the bill represents the essence of compromise," meaning that "the left is not completely happy with this bill, and neither is the right, but certainly does not represent the Justice Department's wish list. I think it means we have got it just about right" (Provide Appropriate Tools, 2001, p. 289). This legislation is

important because the rules of the war on terror are "vastly different than the wars this country has fought in the past" (Provide Appropriate Tools, 2001, p. 289). We do not know who the enemy is and because of that, we have to approach the safety of our country in a much different way than we ever have. This bill, according to Sensenbrenner helps us to develop "new weapons" for a "new kind of war" (Provide Appropriate Tools, 2001, p. 290). He then reiterates that it "is required that we take action today," because we need new weapons; he also reinforces that this legislation is bipartisan.

After a long ethos based introduction, Sensenbrenner gets into the logos of the message. It is essentially the same talking points Ashcroft gave in the opening statement of his testimony during the 9/24/01 hearing, and in fact, Sensenbrenner references that speech. So, I will avoid repetition here by going over those points again. One point that does stand out though as being a bit different than what Ashcroft describes earlier, or that anyone else does for that matter is an attempt to turn the civil rights arguments back on the critics who make them:

> Of equal importance, the bill will not do anything to take away the freedoms of innocent citizens. Of course, we all recognize that the fourth amendment to the Constitution prevents the government from conducting unreasonable searches and seizures, and that is why the Patriot Act will not change the United States Constitution or the rights guaranteed to citizens of this country under the Bill of Rights. Of course, the first civil right of every American is to be free of domestic terrorism, and this bill ensures that right by strengthening our Nation's law enforcement for the protection of all Americans and to ensure domestic tranquility. (Provide Appropriate Tools, 2001, p. 290)

Now we of course know the first amendment to the Constitution as stated in the Bill of Rights is actually the freedom of religion, press and speech. It is the second amendment that calls for a well-regulated militia to protect the security of Americans. It seems to me that Sensenbrenner reverses the order here a bit in his statement, almost (and quite nonchalantly) recognizing a tradeoff between safety and civil liberties but claiming that

during a crisis, safety should come first—a much different tone than anything we have been exposed to up to this point in the debate. The tone change is subtle, and probably, without a close textual reading of the debate, went unnoticed. Furthermore, the tone is quite temporary occurring only during this one part of one speech. But, in juxtaposition to the phenomenological interpretation of patriotism in Chapter 1, this notion whether intentional or otherwise, is more patriotic from a rational-critical perspective than the one predominately taken by the Bush Administration in the post 9/11 era—the magic-mythic mode suggesting that we put all our trust in them because they have it figured out.

Sensenbrenner then closes his opening statement by suggesting that the process has worked—"we have produced the means to address many of the shortcomings of current law, and to improve our law enforcement ability to eradicate the terrorism from our borders while preserving the civil liberties of our citizens" (Provide Appropriate Tools, 2001, p. 291). He thanks his staff and the minority staff for their hard work and collaboration. He also thanks the Bush Administration "for making Justice Department officials available to brief Members of this committee at almost any time and place" (Provide Appropriate Tools, 2001, p. 291). Finally, he once again urges members of the committee "to support this delicate compromise legislation…I believe there is an unquestionable need for this bill. In fact, I am convinced our homeland security depends upon it" (Provide Appropriate Tools, 2001, p. 291).

Conyers

Mr. Conyers begins his opening statement by acknowledging that, "In my tenure on the Committee, I have not experienced the degree of cooperation between the majority and minority that has been displayed over the last two weeks on a bill as complex and as possibly contentious as this." Though "there is still work to be done," according to

Conyers, “we are off to a good start” (Provide Appropriate Tools, 2001, p. 291). A special thanks is then given to Sensenbrenner for preserving a regular order on passing the legislation explaining “It is well known that many prefer that the Administration proposal be taken directly to the floor, but I believe that in the national interest order is preserved, and we reach a better result by taking the additional time required to go through this Committee” (Provide Appropriate Tools, 2001, p. 291). This is a tough task he argues and claims that naturally there will be well intentioned “conflicting interests and inclinations” during this time of tragedy; deciding the right way to go is a difficult task. On the one hand, “My friends in law enforcement tell me that they can be trusted not to abuse the sweeping new powers that they have requested, and I love to believe my friends in law enforcement,” but on the other hand, history has proven that putting this level of trust in the government’s leaders is an unwise thing to do “regardless of what political party might have been in charge” (Provide Appropriate Tools, 2001, p. 291). He briefly references infamous events that occurred during the Civil War, World War I, World War II, the Korean War, and the Vietnam War to illustrate his point. In the same vein here as in times past, “there have also been anguish(ed), sometimes strident cries, for a rush to judgment. Let us get this out fast” say some, and we recognize the need for an expedited process, but “at the same time, the Founding Fathers did not intend the Congress to be a passive part of government, especially in times of crisis when the Bill of Rights may be threatened. So as much as I want to help John Ashcroft do his job as effectively as possible, it would be irresponsible to give him a blank check” (Provide Appropriate Tools, 2001, p. 291).

Conyers points out though that on the other hand, his friends representing civil liberties groups claim, “there is no need to broaden the wiretap and surveillance laws”

(Provide Appropriate Tools, 2001, p. 291), which he just can not agree with. Conyers does believe that the laws need to be updated, but notes that part of the updating process should make sure that we do not "treat immigrants as our enemies" (Provide Appropriate Tools, 2001, p. 291) because diversity is the cornerstone of America and that certain parts of the Justice Department's initial proposal included provisions, such as indefinite detention, that would indeed threaten the diversity we cherish. Additionally, according to Conyers, the legislation should also include a new office for the Justice Department that would oversee all civil liberties abuses and that greater penalties should be imposed upon those members of law enforcement or intelligence gathering agencies who commit such abuses.

In closing, Conyers asks, "Is this a perfect bill?" The answer is no, "but it does represent a marked improvement over the Administration's initial proposal" (Provide Appropriate Tools, 2001, p. 292) There are things that we still need to work on in the future, and we will, but we have reached a point where "it is imperative that as we hold this markup and move on to the floor, we continue to work together in good faith and seek common ground. Our Nation deserves no less…" (Provide Appropriate Tools, 2001, p. 292). Conyers ends with a direct reference to patriotic unity, one that is compromised but not passive.

Proposing Amendments: Evidence of Unification

Conyers and Sensenbrenner both indicated they had struck a proper balance allowing them to move the bill through committee **TODAY** and onto the floor for a vote while also providing enough checks on the bill's enforcement for the time being; another part of their duty for which they seem to feel proud is that the legislation they have drafted together mandates that they come back in the near future to continue deliberating

over, at a minimum, the most controversial provisions of the bill. This was mandated through the sunset provision of some of the bill's most controversial provisions. It is interesting that the sunset was only discussed one time during the 9/24/01 hearings, by Chris Cannon (R UT), yet the promise of future collaboration on the bill is so much a part of the patriotic duty as espoused through the bipartisan efforts of the House Judiciary Committee. I can only surmise that the notion of sunsetting certain provisions was primarily negotiated behind the scenes. It is interesting to note though that the Senate was not able to get a sunset into their draft of the bill, and the fact that there was a sunset at all rests solely on the efforts of the House. It is also interesting to note that the House was going for a two-year sunset; whereas the sunset that made it into the final draft of the Patriot Act was a four-year sunset. The sunset though, is indeed an important part of the patriotic discourse coming from the House Judiciary Committee, it recognizes that an expedited process is necessary due to the national crisis at hand, but it also guarantees that whatever may be glossed over and/or missed during the course of the expedited process will be given proper review at a later time.

Nonetheless, the critical arguments coming from the Chairman of the Judiciary Committee and the Ranking Member seem to form a cohesive message of patriotic ethos. The key components of that message are: 1) we should feel proud that we have done our job as a check on the executive branch—**the deliberative process has worked**; 2) we have done so in an unprecedented **collaborative** sort of way; 3) we must continue to collaborate and compromise **TODAY** so that we can get something approved; and 4) we should take comfort in compromise because our level of unity and commitment will solve any discrepancies through **future deliberation**. These four components of the message of ethos coming from the opening statements set the tone for the rest of the day, making for

a process that is relatively quick and easy. Most seem to buy into this message and back away from amendments that do not seem to have a clear-cut majority opinion behind them; the ones who resist by pushing forward with their more controversial opinions are basically brushed aside. Then, there are some amendments that are not controversial and are accepted through expedited process. So, the strategy for analyzing the way in which amendment proposals in this committee markup are dealt with deliberatively are to thematize the way in which they fit into the mold of the opening statements.

Non-Controversial Amendments

At the very beginning of the amendment proposal stage of the markup hearing, we see the theme of unification emerge. Rick Boucher (D VA) was the first to offer an amendment. He joins with Bob Goodlatte (R VA) and Chris Cannon (R UT) to do so. The amendment, according to Boucher, "would merely ensure that nothing in the act imposes a mandate on communications service providers to redesign or modify their equipment, their facilities, their services, their features of system configuration in order to comply with the mandates of this act" (Provide Appropriate Tools, 2001, p. 293). Boucher argues the Department of Justice never intended for this happen and that the amendment just clarifies. As he was about to finish making the pitch, he was interrupted by Sensenbrenner; Boucher yielded by saying, "this is noncontroversial, and I would be pleased to yield to the gentleman" (Provide Appropriate Tools, 2001, p. 293) Sensenbrenner agreed 100% with Boucher about the change being noncontroversial and he simply wanted to expedite the process by saying: "I thank the gentleman for yielding. This is a constructive provision to the bill and it says the bill will not impose any technological obligation on any provider of wire electronic communications service. That is not the intent of the bill, and I think that this clarifies this" (Provide Appropriate Tools,

2001, p. 294). Conyers quickly jumps in and says, “I would like the gentleman from Virginia to know that I think this is a constructive addition to the bill” (Provide Appropriate Tools, 2001, p. 294). Boucher thanks both of them for their support. Goodlatte, a co-sponsor of the amendment speaks up in support of it and then Sensenbrenner calls for a quick vote, the ayes have it and the markup proceeds.

The theme of the day is cooperation, agreement and the expedition of the process. The mode of discourse is designed for speed. Another interesting example of a noncontroversial amendment comes a bit later in the debate when Mr. Frank proposes an amendment that has to do with enhanced surveillance, and he clarifies his ethos right off the bat by saying, “I am a supporter of enhanced surveillance authority properly used…” **BUT…** we need to “put in the right due process provisions” (Provide Appropriate Tools, 2001, p. 310). His amendment has to do with what happens if surveillance information is inappropriately released and suggests that there be something in the law specifying the type of legal recourse available, i.e. that it is a civil violation open to litigation. He justifies by turning to past abuses, “the problem comes when the human beings, often politically motivated by either party who are in charge, will in some cases use this and will use embarrassing information. Embarrassing information was released about Martin Luther King” (Provide Appropriate Tools, 2001, p. 311) for example. He goes on to say that there is probably is not anybody who has nothing embarrassing about them that they would not want to be made public. If there is, he says jokingly, then “that person has my sympathy. That kind of is a dull life to live” (Provide Appropriate Tools, 2001, p. 311). Specifically, toward the end of his speech, he specifies a $10,000 statutory minimum if the complainant can show damages.

Sensenbrenner immediately accepts the amendment: “We are prepared to accept this amendment…” he says, “I think the gentleman’s points are very well taken” (Provide Appropriate Tools, 2001, p. 312). Mr. Conyers humorously acknowledges his agreement as well, while asking a question of clarification: “I thank the gentleman for the yielding and I would not want to disparage those who may be more virtuous than some of us on the Committee. But are lawyers compensated for this proposal, Mr. Frank?” (Provide Appropriate Tools, 2001, p. 312). The answer from Frank is “yes,” if the lawsuit is won. Jerrold Nadler (D NY) also acknowledges acceptance by saying, “I am glad to hear that this amendment is being accepted…” (Provide Appropriate Tools, 2001, p. 312) but I just have one small request for a couple of tiny changes in terminology. Those changes are agreed to. Zoe Lofgren (D CA) makes a similar appeal…and Frank says, “I apologize. It was certainly my intention…” (Provide Appropriate Tools, 2001, p. 312) to make those items evident in the drafting of the amendment. Let us be sure and clarify. So, the amendment passes without any controversy and a lot of outward displays of cooperation and unity.

A similar discussion happens at the beginning of the debate over title II as well. Henry Hyde (R IL) introduces a money laundering amendment as a cumulative effort of himself, Mr. Ballenger, and Mr. Lantos, all from the International Relations Committee. The amendment states that anyone who has ever been involved with money laundering, and tries to enter the country, is automatically denied access. Frank supports the amendment and says that this idea has been left out of the process so far and that maybe the bill does not quite do enough. He suggests that the Administration’s bill addresses the issue and that maybe we should take a look at what it does as well. Sensenbrenner raises the question of whether it is in the jurisdiction of this committee, but then a couple of

other people speak up and say that they have been communicating with INS officials about it and that there is agreement due to the fact that the bill seeks to limit terrorist financing. Jackson Lee chimes in and says that she supports the amendment but thinks we should be cautious about making the standards for inadmissibility too high. Lofgren praises the bill but points out that the technology is not where it needs to be to truly enforce it, but she suggests that discussion here may generate support for it. Sensenbrenner then tries to bring the call for a vote forward but Bachus chimes in with support of the bill, but suggesting that there needs to be better coordination between law enforcement and the INS. Scott asks if there is a means for somebody who is on the list in error if there is an opportunity to be rectify the error. Hyde answers yes, there is. Finally, Frank speaks up and says he supports the bill but that he would like to see more checks in the process for people who are denied access to the country.

Sensenbrenner calls for a vote and the amendment is passed easily. There was some good discussion over the issue. Several people even stepped forward and, notwithstanding the fact that each speaker first voiced support for the amendment, and also voiced concerns about how to improve it for the future. No speaker expressed interest in improving it in the present. The amendment was passed without altering it in any way, or making any sort of official revision of it. Expediting the process was the priority—surpassing the need to protect innocent people from the bill's provisions.

Another example of unifying without controversy comes at the end of debate over title II when Sensenbrenner and Conyers offer a managers' amendment, designed to expedite the process and move things along quickly based upon agreement prior to the official markup session. It should be noted that a similar sort of manager's amendment was attempted at the end of title I debate that did not work so well—with Sensenbrenner

and Waters attacking each other's credibility. However, the second manager's amendment went much more expeditiously than the first. Conyers begins by saying, "Ladies and gentlemen of the Committee, I want to thank the Chairman, both our staffs and you for considering seven additional proposals that will shorten our work for this evening considerably" (Provide Appropriate Tools, 2001, p. 380). Then he summarizes the seven amendments: 1) "a provision worked out between ourselves and the Department of Justice to craft an amendment to the bill's extraterritoriality provision to ensure that it contains safeguards passed by this Committee last year" (Provide Appropriate Tools, 2001, p. 380); 2) an adjustment to the survivor benefits for the family of public officers lost in the line of duty (from $100,000 to $250,000 per family); 3) the Keller amendment to study the feasibility of the law enforcement agencies sharing terrorist information with airlines; 4) Barr's amendment to limit Justice Department decision making to high ranking officials; 5) Barr's amendment to distinguish between police officers and private security guards; 6) the Canon amendment which would allow victims of terrorism to collect money from states that sponsor terrorism; and 7) the Nadler-Jackson amendment that would require the Attorney General to justify indefinite detention every six months for each person detained.

Conyers ends by saying "I implore your considered support" (Provide Appropriate Tools, 2001,p. 381). Sensenbrenner adds his encouragement for support and again reminds the members that the managers' amendment is an effort to expedite the process: "Reclaiming my time, let me say that is as a result of a bipartisan effort that has been worked out by the staffs on both sides. One of the purposes of this is to shorten the time that we are all here, and I would urge the Members to speedily adopt this amendment and yield back the balance of my time" (Provide Appropriate Tools, 2001, p.

380). Their pleas for an expedited process worked and all seven components of the managers' amendment were passed virtually unscathed. Though, I should note one minor disagreement that ended up not affecting the vote, or slowing down the process much. Robert Scott (D VA) asks Mr. Canon a question about one of the amendments and did not get a favorable response. So, Scott reports for the record that, "to save time, I would just announce that if a separate vote were taken, I would oppose this particular amendment" (Provide Appropriate Tools, 2001,p. 381). He did not explain why; nor did he suggest he would put forward any other type of argument that might slow the process down—he just wanted that said for the record. Aside from that Jackson-Lee asks a couple of questions for clarification that are answered quickly and then a vote is called for and the amendment passes without objection.

Withdrawal of Amendments

Perhaps the largest typology of discourse in this markup debate is one that struck me as the most odd. The phenomenon of withdrawing amendments, before a vote can even be taken was highly prevalent. The first example of this is the second amendment discussed overall, but which never gets officially offered. It is one that attempts to clarify further the issue brought up in the first amendment overall as introduced by Boucher—the one that was overwhelmingly accepted in a unified fashion and specified that non content information was to be excluded from trap and trace device searches of the internet. Goodlatte, who was also a cosponsor of the previously mentioned amendment passed without objection, delves deeper into the issue by bringing up the question of how "content" is defined. While the logos of the question is certainly interesting, what stands out most about the discussion from the vantage point of this study is the way in which he

brings the issue up without actually offering the amendment up for a debate and a vote. He simply wants the report language on record for future reference:

> Mr. Chairman, I have an amendment at the desk, which, based upon conversations with you and with Chairman Smith, I do not intend to offer, but I want to reach an understanding with the Chair as to how he intends to approach this problem. The amendment deals with the issue of defining what is content when you move pen register and trap and trace legislation on to the Internet. (Provide Appropriate Tools, 2001, p. 294)

A bit later in his amendment introduction, after briefly explaining more about why the definition of content needs to be addressed, he mentions the fact that agreement on the amendment was not attainable prior to the markup, helping to explain why he is actually refraining from offering it, but also specifying why he is bringing it up at all:

> We have attempted to work on language. We do have language that we have shown to other Members of the Committee that we have not yet reached agreement on, but it would be very helpful if there were report language included within that made clear that this legislation does not include content and gave some definition of what that content is. (Provide Appropriate Tools, 2001, p. 295).

Sensenbrenner responds to the non-proposed amendment by pointing out that Goodlatte is simply trying to clarify the intent of what the Justice Department currently has toward current legislation. He suggests that we will work on clarifying the language before the bill goes to the floor for final approval: "The gentleman states what the intent of the legislation is precisely, and that is that the pen register and trap and trace provisions are not to get into content of these types of electronic communications but merely where they have come from and where they go to" (Provide Appropriate Tools, 2001,p. 295). Then, Sensenbrenner confirms the process to be used by which the language will be clarified. It seems to be the process Goodlatte is going for and will occur away from the public's view between the markup hearing today and the time it goes to the floor of the house for final approval: "We will work on getting appropriate report language in the Committee report and further work with the gentleman as well as with the Justice Department as this

legislation moves through the process just to make sure that there is not an expansive definition of content" (Provide Appropriate Tools, 2001,p. 295). Lofgren clarifies that this is not a controversy by spelling out in more detail the process that is occurring behind the scenes:

> Just briefly. I thank the gentleman for yielding. I am glad that this is going to be addressed in the report. I think it is worth stating also that in the discussions that we had at a staff level, and Members as well, with the Justice Department and the White House, they made it very clear that they agreed with this, and this is not an argument. It is just a clarification, and I think that is important for the public to know, and I thank the gentleman for yielding. (Provide Appropriate Tools, 2001, p. 295)

Her comment is especially interesting because of the way in which she addresses the public specifically and says, "this is not an argument...just clarification." There is no breakage of unity…we have it all under control. Lamar Smith (R TX) speaks ups with an additional voice for cooperation behind the scenes: "I do appreciate your consulting with me earlier about your amendments and the intent behind those amendments," but he also wants to clarify that while he is in agreement with the report language, that the language does not go against current law: "I just want to make clear that while I think report language is acceptable, I want to make sure that the report language does not in any way indicate that we are rolling back current law. I think you agree with that" (Provide Appropriate Tools, 2001, p. 295). Finally, Boucher once again voices support for taking care of this matter behind the scenes; again cooperation is the theme of this dialogue in terms of the ethos involved: "I think the gentleman has raised a very important concern, and I want to thank Chairman Sensenbrenner for agreeing to work with us as we address this concern between now and the time this measure reaches the floor" (Provide Appropriate Tools, 2001, p. 295).

Ms. Waters, a minority member, provides us with yet another example of how members of the House worked together to prevent as much controversy as possible during this debate. She introduces an amendment about forum shopping, suggesting that the nationwide search warrant provision of the act allows for a prosecutor to go and seek out any judge for a search warrant on any alleged criminal act regardless of the jurisdiction in which the suspicious activity allegedly occurred. There are a few pages of discussion devoted to clarifying exactly what Ms. Waters is suggesting and comparing that to the language of the current proposal. At some point the discussion leads toward the conclusion that Ms. Waters's concern is addressed in the intent of the bill and that perhaps, if anything, the bill just needs some clarification. That is the same point that Mr. Delahunt, also a minority member, makes. The discussion leads to an agreement that Ms. Waters will withdraw the amendment if the issue can be taken care of through a manager's amendment. The following dialogue demonstrates how the agreement transpires:

> Mr. DELAHUNT. I think it is the intention here that the government is seeking to stay in one place, if you will, where the offense allegedly occurred rather than doing exactly what you are saying, traveling all over the country because of the speed with which these terrorist groups now operate. So, in other words, if an offense was committed in Los Angeles, that the Federal District Court in Los Angeles would provide the venue for an application for a search warrant.
> Ms. WATERS. Right.
> Mr. DELAHUNT. That search warrant, once approved, could be executed in New York or Boston or anywhere. Is that what the gentlelady——
> Ms. WATERS. That is absolutely true. That is exactly what we are trying to do. If you are suggesting that that is what the bill intends to do and if you are suggesting for the Chair that they will clean it up in the manager's amendment, then the job is done. (Provide Appropriate Tools, 2001, p. 303)

Mr. Frank then brings up a question about how the law changing a federal statute would affect the state's authority in the area. Sensenbrenner says that the manager's amendment being drafted at that exact moment should address Mr. Frank's question. In the same

statement, Sensenbrenner asks Waters to withdraw the amendment, but then re-offer it again later if her concerns are not addressed. Waters accepts, points out that she is not trying change anything significant and the debate is expedited. The following dialogue demonstrates what took place:

> Chairman SENSENBRENNER. We are drafting an addition to the manager's amendment that I think hits this point. It is presently being Xeroxed off, so I would like to ask the forbearance of the Committee. Perhaps if the gentlewoman would withdraw her amendment without prejudice to reoffering it if she doesn't like what is in the manager's amendment.
> Ms. WATERS. I have no problems with that, Mr. Chairman. Okay.
> Mr. FRANK. Mr. Chairman—I am sorry. I will yield to the gentlewoman.
> Ms. WATERS. If what you are suggesting to me is that we both understand what we are trying to do and that you are not opposed to it—I am certainly not trying to do anything other than get it in the proper jurisdiction of significant activity—then I have no problems with withdrawing it and having you work on it and clean it up.
> Chairman SENSENBRENNER. The amendment is withdrawn, at least temporarily. Are there further amendments? (Provide Appropriate Tools, 2001, p. 303)

Adam Schiff (D CA) and Mr. Scott both continue to ask questions about ambiguities in the bill and at this point, Sensenbrenner is clearly ready to move forward in the debate. He replies that, "If the gentleman would yield, I think the change to the manager's amendment addresses these concerns" so, "If we can go on to something else and then come back to this when everybody sees what the language that is being proposed will do, I think we can expedite the business of the Committee." Then, without hesitation, he asks, "Are there further amendments" (Provide Appropriate Tools, 2001, p. 304)?

Remembering Sensenbrenner's opening statement, we are reminded that reporting the bill out today is the number one goal; thus the process must be expedited. Members of the Committee are encouraged to withdraw their amendments and save them for another time. In fact, when they do withdraw amendments they are hailed as patriots, at least that is the way it appears after Howard Berman (D CA) agreed to withdraw an amendment for a later time and then Conyers, the leader of Berman's party in this Committee praised

Berman saying, "I hold my high compliment and praise for you" (Provide Appropriate Tools, 2001, p. 316). Expediting the process like this demonstrates great faith in the system and the way in which the system has been applied during these deliberations. Most members of this committee do seem to be proud of their leadership and what they have done for their country. Furthermore, they also seem to have faith that the collaboration will continue into the future. William Delahunt (D MA) explains just prior to discussing an amendment that he has no intention of putting to the test of a vote:

> Thank you, Mr. Chairman. I intend to withdraw this amendment in recognition of the effort in terms of the consensus that has been developed between yourself and the Ranking Member and Members of the Committee to report out a bill that reflects a thoughtful consensus. Before I describe the amendment, however, which as I said I won't press, but I think it is important to raise a concern that I have and I know that others share. Let me commend you, Mr. Chairman, and the Ranking Member for having followed regular order. We have had time to deliberate, to review, to assimilate and analyze, and as a result, we have a vastly improved product that was presented to us two weeks ago. I think this happens to be a very good moment in the history of this particular Committee and a good moment for the Nation, because clearly this is a far superior product than what was initially presented. (Provide Appropriate Tools, 2001, p. 321)

Here, Delahunt, before even alluding to the subject matter of his amendment, tells us that he has no intent of pressing simply because he wants to help the Committee leaders "report out a bill that reflects a thoughtful consensus" (Provide Appropriate Tools, 2001,p. 321). In the same speech though, he commends the leaders "for having followed regular order" (Provide Appropriate Tools, 2001, p. 321)[4], and because of that, he feels comfortable tabling his concern for another time. Then, he goes on to say what a great moment this is for this Committee and for the nation because the legislators were able to

[4] Having studied the legislative process a great deal, what is transpiring does not appear to be "regular order." If it is, then it really needs to be reexamined. I would also note that there is some interesting discussion going on about Delahunt's amendment. But it was all a formality, which supposedly would be used as an impetus for later negotiation.

improve a product for which there was so much pressure to accept the initial draft as final.

Quick Rejection of Amendments

While there was a tremendous amount of agreement, and some clear signs that the agreement was negotiated before the markup even started, not everything was conducted in such a fashion. There was some disagreement, though not a great deal, and the way in which disagreement is negotiated during this markup is noteworthy. Most of the disagreement was handled in the same way the agreement was handled—through an expedited process. In this section, we look at how quickly most of the disagreement was discarded. It was rejected very quickly. In each of these exemplars, the critic who proposed the amendment was given one turn to present the gist of it, and then Sensenbrenner responded, a quick vote was taken and the process moved forward. There was no dialectic—they were open and shut cases.

One of these examples occurred at the end of debate over title I after the managers' amendment was passed. Lofgren proposes that a sunset is added to title II, much like in title I. She begins by thanking everyone, and acknowledging that everyone and their staffs have worked hard to make this a successful process in a short period of time. Then she introduces the amendment in a fashion that analysts of this debate and those who read those analyses have grown accustomed to seeing, the "I support the bill…**BUT**…let us make it better" appeal to patriotism type of arguments:

> This bill does make some changes that we are prepared to make. I am a cosponsor of the bill. And part of the fail-safe, if you will, is that we have put sunset provisions in title I. Now that doesn't mean that we are going to let these provisions go away, but it is going to force the Congress to review how it is worked and to see if there are problems and to fix the problems if we discover them. I think all of us feel good about that mechanism to make us really look at this if something turns out in a way that is unanticipated. We don't need a sunset clause in order to do that, but I think it is probably useful to make us do it. And,

> therefore, this amendment would put the same sunset clause on title II as was in place in title I with the exception of 206, which is the protection of the northern border provisions that obviously doesn't need the same kind of review. (Provide Appropriate Tools, 2001, p. 385)

In other words, according to Lofgren, we do not need a sunset, but "it will help us with the discipline we need to review this section of the act" (Provide Appropriate Tools, 2001, p. 385). Sensenbrenner disagrees. He points out there are drastic differences between title I and title II. Then he references President Bush as a source of ethos. He argues that title II should be made permanent, "because as the President has said, we are in this for the long haul…terrorism is not going away" (Provide Appropriate Tools, 2001, p. 386). He calls for a vote and immediately, discussion ends.

Another example of the open and shut debate occurred over what ended up being section 802 of the Patriot Act, word for word. The argument was over the definition of "domestic terrorism":

> The term 'domestic terrorism' means activities that- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States. (USA PATRIOT Act, 2001, 115 STAT 375)

During committee markup, Congressman Scott (D VA) argued that the term was quite vague and attempted to amend it by striking "appear to be intended" and inserting "are intended" (Provide Appropriate Tools, 2001, p. 422). He argued, in patriotic fashion that this "will tighten up the definition of domestic terrorism in the bill. All of us are intent on preventing terrorism and providing law enforcement the tools they need to do their work. **(BUT)** My concern is that this bill's present definition of domestic terrorism is too broad and unclear and would include activities that few of us would define as domestic

terrorism" (Provide Appropriate Tools, 2001, p. 422). Continuing, he points out that the wording adopted into legislation would allow "Someone to be accused of an act of domestic terrorism based on appearances or effects without the traditional intent required" (Provide Appropriate Tools, 2001, p. 422). Furthermore, that the act will:

> …kick in the bill's provisions for a single jurisdiction search warrant, seizing of assets, sharing of grand jury information. And those who are prosecuted under the 'appear to be intended or to have the effect' definition of domestic terrorism is subject to application of the RICO statute, elimination of statute of limitations, use of enhanced penalties without proving intent. (Provide Appropriate Tools, 2001, p. 422)

Mr. Scott concludes his argument: "This amendment would make certain that only those individuals who had the traditional means to do a terrorist act are investigated and prosecuted as terrorists, not the protestor at an abortion, not the student protestor who is sitting out in the dean's office" (Provide Appropriate Tools, 2001, p. 422).

In response to Congressman Scott's proposed amendment, Chairman Sensenbrenner recognizes himself in opposition and begins with a brief appeal to logos, arguing that "The language in this bill is based upon the current law definition of international terrorism, which is included in 18 U.S.C. 2331, with a significant exception, and that is that the violent act is more precisely defined so as to exclude from the definition of domestic terrorism student protest. That is excluded" (Provide Appropriate Tools, 2001,p. 422). After this, Sensenbrenner, in a more generic appeal to patriotism, accuses Congressman Scott of standing in the way of the war on terror, and rather than encouraging discussion of Mr. Scott's objection, he brushes it aside and sets up an implicit formula by which the objection is, by definition, either completely uninformed or a traitorous action:

> What the amendment of the gentleman from Virginia proposes to do is to require a tougher standard of proof for domestic terrorism than for international terrorism. So if the people who crashed the plane into the Pentagon and the World Trade

> Center were home grown terrorists rather than those who came from overseas and lived, the prosecutors would have had a much tougher standard of proof, and I don't think that is really what he want because terrorism is terrorism and the people who die and are maimed, or dead or who have been maimed. (Provide Appropriate Tools, 2001, pp. 422-423)

Sensenbrenner gives Scott the benefit of the doubt by saying, "I don't think that is really what he want(s)," as if Sensenbrenner's response were somehow the obvious truth handed down from the heavens and that he was simply a bipartisan, unassuming, and apolitical messenger. In no way was criticism of the wording of the definition of domestic terrorism ever considered to be a credible argument that a true patriot would make. The all-or-nothing argument was imposed. Immediately afterward, Mr. Sensenbrenner asks that the amendment be rejected and yields his time back to the chairman (himself) calling for a vote: "The question is on the Scott amendment No. 6. Those in favor will signify by saying aye. Opposed, no. The noes appear to have it. The noes have it. The amendment is not agreed to" (p. 422-423).

A Bit of Controversy

Meaningful Debate

This debate, again, is remarkable because of the unprecedented amount of agreement. Even most of those who do still want to see change to the bill withdraw their amendments for the sake of unity and expediting the process. The withdrawal of amendments called for more discussion over the issues than actually proposing amendments. The previous example of actual controversy had very little to do with meaningful debate; there were two ships passing in the night with no real clash of ideas, just a bit of snippiness over what seemed to be some personal animosity. There are two examples of amendments proposed in such a way that actually sparked some semblance of meaningful debate. By meaningful debate, I mean there was dialectic—some back and

forth which involved negotiation and then ultimately, a vote that seemed to be fairly close.

In the first exemplar, we find unabated opposition to an amendment that actually led to a meaningful discussion over checking the Attorney General's authority. The expedited process was called into question and debate ensued. Mr. Nadler, a minority member, offers an amendment to prevent the American government from telling foreign governments that certain individuals are seeking asylum during the process of trying to figure out if that person is a terrorist or not. The justification, which Nadler expounds upon during the course of this analysis, is simply that it protects the person who applies for asylum but is rejected and has to go back to the country from which she came was protesting against. Some foreign governments have been known to hunt down the family of asylum seekers and do harm to them. Mr. Gekas, a majority member, strongly opposes the amendment because he claims it would prevent the Attorney General from doing his job. Mr. Frank, a minority member, defends the amendment and interestingly even questions whether Gekas himself has a true problem with the amendment: "I would implore my friend from Pennsylvania to look at this. I don't think he has a problem with this amendment" (Provide Appropriate Tools, 2001, p. 361). Then he goes on to explain that the amendment is only designed to prevent people from getting hurt after they are denied entrance and that the task of determining if someone is a terrorist or not is in no way affected by the amendment.

Gekas's true reasoning behind opposition comes out, and it seems that maybe Frank was onto something when he suggested that Gekas did not have a specific problem with the amendment. Gekas reports that he is simply "bound a little bit by the thrust of the Administration's offer here on the proposed bill that the Attorney General should

have …" and then his response is interrupted by Frank who argues that "binding yourself to somebody else's thrust is not always a good idea" (Provide Appropriate Tools, 2001, p. 362). For the first time in the markup debate, the pressure applied by the Attorney General to rush through his proposal is questioned. Frank goes on to explain why the Committee should question the Administration in this process, but prefaces it with the idea that this does not mean we are not cooperating with them:

> The gentleman from Pennsylvania would say—and we are working with the Administration, but it is not a good idea to say that until the Administration signs off on something we can't accept it. My guess is I don't think they anticipated this. They were, I think, interested in making sure they got all the information they needed. I don't believe that this Administration feels that it is important for them to be able to tell a host government from which someone is applying for asylum that that person is applying for asylum. (Provide Appropriate Tools, 2001, p. 362)

Mr. Gekas replies by suggesting that we should trust the Attorney General and give him the benefit of the doubt to make that type of discretion as needed:

> All I am trying to do here is to give the benefit of the doubt to the Attorney General where this Nadler amendment prevents him from disclosing that the alien is an applicant for asylum. I am giving the Attorney General the benefit of the doubt to make that judgment in his discretion. That is what I am upholding here, and that is why I asked the Members to vote no on this amendment. (Provide Appropriate Tools, 2001, p. 363)

Then Nadler rejoins the debate to respond to Gekas, and the original justification behind the amendment is expounded upon in more detail through historical example:

> Mr. Chairman and Members of the Committee, certain things ought to be protected. In the 1960s, Simas Kudirka, a Lithuanian seaman, defected from the Soviet Union in the port of New York or Boston, and because of rather shameful actions by our government, he was handed back to the Soviet Union. And I think he died in the gulag, as a result of which a future Secretary of State, Henry Kissinger, said we would never do that again. What this amendment attempts to do is very analogous to that situation. (Provide Appropriate Tools, 2001, pp. 363-364)

Nadler then utilizes the historical narrative to tie it to the current situation. He implies that while we might trust the current Attorney General, "You cannot always trust every future Attorney General or Deputy Attorney General or consul to make the right decision" (Provide Appropriate Tools, 2001, p. 364). Then, he clarifies the amendment one last time: "What this says is, get whatever information you need to make the decisions with respect to political asylum, but don't tell the Soviet Union, don't tell the Ayatollahs who from their country is seeking to defect to the United States so they can arrange the murder or torture of his relatives. That doesn't make sense" (Provide Appropriate Tools, 2001, p. 363-364). Jackson Lee helps solidify the argument by putting into a "we want to give the kind of investigatory needs that the Attorney General has. **BUT** (emphasis is mine) let me defer you to" legal code suggesting that he already has that need met through "emergency powers" (p. 364). Ultimately, the amendment is amended, but then it passes through a vote. From my interpretation this is one of only two examples of meaningful debate that occurred throughout the entire markup session. This judgment is based on the observation that argument seemed to change the tide of the debate. There was no evidence that members of this committee had made up their mind previously. There was an attempt to get the amendment rejected, but alas, the critics of the bill had their ideas pushed forward, seemingly on the power of their own argumentation.

Shutting Down Debate

There is another example that almost fits into the category of meaningful debate, and perhaps with reinterpretation, it very well could. But, it seems more accurate to this analyst to place it in the category of an attempt to shut down debate. Yet, at the same time, we must recognize there was some value to the dialogue, even though the person

who tried to shut the debate down, Chairman Sensenbrenner, got his way in the end. The amendment comes from Anthony Weiner (D NY) who proposes that the Justice Department step up the collection of information on non-immigrant foreign visitors such as exchange students, but before Weiner can justify his amendment, Mr. Smith announces that he has a point of order. So, Weiner goes on to justify his amendment anyway, probably anticipating a debate to occur after he was finished. He claims that the amendment is needed because the government loses track of student visa holders once they finish their degrees, or drop out of school, or whatever the circumstances are under which they leave their university. In fact, according to Weiner, Hani Hanjour, one of the attackers believed to be on board the flight that hit the Pentagon was in the country on a student visa. In the middle of Weiner's presentation, Sensenbrenner interrupts him to expedite the process: "This amendment is a winner," says Sensenbrenner, "and I would urge the Committee to adopt it and would urge the gentleman from Texas to withdraw his reservation. If he makes a point of order, it will be overruled" (Provide Appropriate Tools, 2001, p. 389). Now, we must recognize that a point of order is not a substantive disagreement with a proposal; it is an argument that questions the democratic process used to make legislation. In this case though, we do not even get to know what Smith's objection is, because he withdrew it immediately. Sensenbrenner liked the substance of the amendment and was intent on expediting the democratic process. Weiner, not wanting to prolong the discussion any longer than he has to, says, "Well, Weiner can spot a winner, so he yields back the balance of his time" (Provide Appropriate Tools, 2001, p. 389). He ends his argument right in the middle of what he was talking about before Sensenbrenner's interruption.

Despite Sensenbrenner's attempt to push this amendment through with administrative bullying, questions were still raised about the amendment and some interesting dialogue occurred that actually made this a close vote in the end. Lofgren asks a fairly non-controversial question about funding; it is answered and then Frank speaks up. He asks if this policy would be directed toward students coming from a particular country. Weiner answers the question but then Sensenbrenner clarifies: "That means that if you have a student from Afghanistan who is anti-Taliban, the Attorney General can impose a lower fee, but if you have a pro-Taliban student, the Attorney General can sock it to him" (Provide Appropriate Tools, 2001, p. 391). Mr. Frank, who actually in a show of confusion because he thought the amendment had been accepted already, says, "I think I probably would have voted against this if I hadn't not been paying attention…but I would hope that at least we would make a record of what the Chairman had said and that it would be in the report that there is no automatic imputation of the sins of the government to the student" (Provide Appropriate Tools, 2001, p. 391). Sensenbrenner clarifies that the amendment had not actually been passed yet, and so Frank does have the chance to oppose after all. He further explains that, "we are talking about students who are coming from governments that are unattractive governments and requiring the student to speak out against it, it could be a problem… what this does is it gives discretion to the Attorney General to visit the sins of the government on the students (Provide Appropriate Tools, 2001, p. 391). A bit more discussion ensues and then a vote is taken, and this is interestingly perhaps the most closely contested vote all day. An oral vote is taken and it is determined by Sensenbrenner that the amendment is rejected, but a roll call vote is called for, and based upon that, the amendment passes.

A Clash of Egos

This next example starts off like so many of the other proposed amendments did, with shows of collaboration and unity. In fact, when I came to this exemplar during the writing process, I originally began writing about it as being a demonstration of unified acceptance of a non-controversial amendment—the very first category mentioned in this section. However, it did not take long to realize that the dialogue was leading to what is, without doubt, the most contentious part of the markup. The clash over ethos came at the end of debate over title I when Sensenbrenner and Conyers present the managers' amendments. These types of amendments are ideal for expediting the process because they had been agreed to before the markup even began and were suggested to the Committee leaders by a variety of people: Mr. Hyde—the former chairman of the committee, Ms. Waters, and Mr. Berman. Mr. Conyers introduces the amendments with a nod to Sensenbrenner for providing such meaningful bipartisan collaboration, and points out that that is why the proposed changes were able to gain such widespread acceptance: "Thank you, Mr. Chairman. With reference to the manager's amendment, I want to begin by thanking you for including a number of Members' suggestions from our side that are involved in the manager's amendment, and I think that argues for wide support on the Committee for it" (Provide Appropriate Tools, 2001, p. 342).

The amendments have to do with a variety of topics: 1) the terrorist organization designation process, 2) language to prevent forum shopping (this was motivated by an example discussed above in which Ms. Waters withdraws one of her amendments because of the assurance that Sensenbrenner would incorporate it into a manager's amendment), 3) the requirement that Internet Service Providers had to be provided written notification when given roving wiretap orders, and 4) the allocation of research and development money for biometric identification at points of entry. But the topics of

the amendments are not nearly as interesting as the way in which they ended up being debated in terms of clashing perspectives of ethos. The questioning starts off with unity, much like the way in which Conyers began the managers' amendments. Mr. Frank praises the way in which the majority leader and minority leader have worked so well together, "both substantively and procedurally." He explains further by saying, "I realize not everybody is going to be for this bill and there are going to be differences and…there are some amendments I would like to see, but if you go back to where we were a few weeks ago when we got the package and some people were expecting it done very rapidly, I think the procedure and the substance both held up very well" (Provide Appropriate Tools, 2001, p. 342). But then, he pays special tribute to Conyers's leadership saying:

> …as a Member of the minority, I want to particularly express what I think many of us on our side feel toward our Ranking Member. This is a very difficult issue. It is a particularly difficult issue for him in a lot of ways, and his role in this has really been a model of responsibility, and even those who still have some disagreements on it I think now are much more on point, I think join me in expressing their very deep admiration for the leadership he has shown along with you, Mr. Chairman. (Provide Appropriate Tools, 2001, p. 343)

At the end of Frank's complimentary discourse toward Conyers, and Sensenbrenner for that matter, a few more exchanges of pleasantries occur and I am more convinced than ever that this is going to be a case of easy acceptance.

A few questions begin to get asked, though they are about minor things that do not substantially affect the intent of the legislation. For instance, Berman asks a question about some wording that could inadvertently allow someone to tap a phone without ever going to court. To that, Sensenbrenner says, "I think the gentleman makes a good point. We will take a look at it between now and going to the floor" (Provide Appropriate Tools, 2001, p. 343). Conyers praises Berman for raising the point and says the work that

he and his staff have done on the issue will help "get some of the rough edges off of it, and I will join the Chairman in that undertaking" (Provide Appropriate Tools, 2001, p. 344). So, the process is being expedited smoothly… no problems. Then Mr. Scott asks a question about some of the wording in the bill; Mr. Smith explains and the confusion seems to go away, but they agreed that they would continue to look at it after the markup and before it goes to the floor. Still, there are no stumbling blocks toward getting these manager's amendments passed.

Then, Mr. Nadler seeks recognition and that is when Sensenbrenner begins to get irritated. He tries to lay a guilt trip on members for asking questions, asking, "Is the preference of the Committee to stay here until 2:00 o'clock in the morning or not?" Then he points out that, "This is a manager's amendment, which presumably was agreed to, before recognizing Mr. Nadler who just wants "to clarify the point of this amendment" (Provide Appropriate Tools, 2001, p. 345); the point is clarified and the debate proceeds. Bob Barr (R GA) asks a question about the grammar of one of the amendments, making the point that "it is lacking a couple of commas" (Provide Appropriate Tools, 2001, p. 346). Mr. Weiner asks a question of clarification, has it answered very briefly and easily and then it is Ms. Waters's turn.

Ms. Waters proposes an amendment to the manager's amendment that would exclude memorandums between the Justice Department and the CIA; this would absolve the department of reporting drug trafficking. She explains why this is necessary by using the Iran Contra affair as an example and questions the ethos of intelligence agencies for past discrepancies. Then Sensenbrenner recognizes himself for a response, and this is when it gets a little heated. He begins very briefly with a logos based response claiming that this is a matter of oversight, which is "what this committee should be doing," as

opposed to something statutory. But then, he begins to attack Waters's ethos. He accuses her of not being aware of what is going on in the world, and claims that he does:

> I don't know if the gentlewoman from California heard about the speech that British Prime Minister Blair gave yesterday to the Labor Party Annual Conference somewhere in the United Kingdom. I watched part of it on CNN, and one of the things the Prime Minister Blair said is that 90 percent of the heroin that is sold on the streets of Great Britain is furnished by Osama bin Laden's al Qaeda organization, and the Brits who are buying heroin on the street are helping Osama bin Laden's terrorist activity. (Provide Appropriate Tools, 2001, p. 348)

Therefore, her amendment would only hurt the pattern of communication existing between law enforcement agencies concerning the drug trade's relationship to terrorism. According to Sensenbrenner, what "the gentlewoman's amendment says is that there can't be a memorandum of understanding between law enforcement agencies to deal with this question. And not only is the heroin that the——" (p. 348). Ms. Waters interrupts him by proclaiming that "that is not true, Mr. Chairman" (p. 348). And just in case his previous remarks were interpreted as not being an attack on ethos, he reiterates them in a bit different way that is a bit more accusatory: "I have the floor. This is what the Prime Minister of Great Britain had to say to his party's annual conference. And he said—and I saw it on TV and others could have seen it on TV—that anybody who bought heroin in Great Britain had a good chance of helping finance what the bin Laden organization was doing" (Provide Appropriate Tools, 2001, p. 348).

Sensenbrenner's response seems to break up the flow of collaboration, unity and good will. First of all, it seems like he is taking something he saw on CNN as irrefutable evidence and then overgeneralizing it to make the claim that, "What the gentlewoman's amendment does is hamstring the ability of law enforcement to be able to enter into memorandums of understanding to deal with this issue" (Provide Appropriate Tools, 2001, p. 348). I am not sure how that makes good syllogistic sense and Waters tries to

address that below. But, that is beside the point being made here, which is the identification of the way in which Sensenbrenner goes after Waters's ethos—suggesting that she should have been watching CNN, and implying that she is lazy for not doing so.

Ms. Waters asks again, "Will the gentleman yield? Because he is misrepresenting what my amendment does" (Provide Appropriate Tools, 2001, p. 349). Sensenbrenner replies, "No, I will not yield. I could have got the amendment on a point of order on nongermaneness. I would urge the Members to vote against the amendment and yield back the balance of my time" (Provide Appropriate Tools, 2001, p. 349). Waters tries to get her point across: "Mr. Chairman, that is patently unfair. You have misrepresented what my amendment does" (Provide Appropriate Tools, 2001, p. 349). Sensenbrenner ignores her entirely and recognizes Conyers, who interjects to try and bring this heated discussion to a conclusion; he does so by reminding Waters, "without going to the efficacy of the Waters' amendment," "that a manager's amendment is purportedly agreed to by the Committee. And if we are to open it up to many very excellent proposals that could be offered, we have just voided the whole reason for having a manager's amendment" (Provide Appropriate Tools, 2001, p. 349). Conyers continues by explaining the reason he makes that point and that is that "we currently have asked staffs to begin preparing a second manager's amendment to expedite the process which we will vent through to all of the Members that, where there is concurrence, we can move ahead more quickly" (Provide Appropriate Tools, 2001, p. 349). Conyers then requests that the gentlelady withdraw her amendment and reserve her criticism for some other "appropriate place in our procedure to deal with it" (p. 349). He concludes his remarks by urging "the Members not to assume that there is some reason to reopen the manager's amendment. Because I concede quickly that there are many other modifications that we

could make, but the whole idea is to get this package through so we can get to other amendments" (Provide Appropriate Tools, 2001, p. 349).

Waters draws the line and says that she will withdraw it but not "until it is clarified, until my amendment is defined and understood." Continuing, she argues, "There is no way of misunderstanding what this amendment does. This amendment simply says that you cannot have law enforcement agencies agreeing that they are not going to report drug trafficking. Now the Chairman misrepresented what this amendment does." After a brief interruption, she declares, "I will not withdraw it as long as the Chairman is misrepresenting what it is. This is designed to do exactly what the Prime Minister and others were talking about" (Provide Appropriate Tools, 2001, p. 349). Conyers interjects again by thanking "the gentlelady for making clear the terms under which she would require a withdrawal" and urging "the Chairman to proffer the necessary statement that would allow us to withdraw this so that we could move forward (Provide Appropriate Tools, 2001, p. 349). The following exchange is how the dispute ends:

> Chairman SENSENBRENNER. Gentleman yield? So proffered.
> Mr. CONYERS. With pleasure.
> Ms. WATERS. I am sorry. I didn't hear you.
> Mr. CONYERS. It was directed to the Chairman.
> Ms. WATERS. Did he say something?
> Mr. CONYERS. Not yet—he did——
> Chairman SENSENBRENNER. I said, so proffered.
> Mr. CONYERS.—in interpretation, he apologized profusely for his misunderstanding and total misinterpretation of this one-sentence amendment.
> Ms. WATERS. I accept the stingy apology.
> Chairman SENSENBRENNER. The amendment is withdrawn.
> The question is on the manager's amendment. Those in favor will signify by saying aye. Opposed, no. The ayes appear to have it. The ayes have it. The manager's amendment is agreed to. (Provide Appropriate Tools, 2001, pp. 349-350)

The most contentious part of the markup ends with Sensenbrenner proffering a very short-lived acknowledgment that he misrepresented Waters's amendment, Conyers making light of the discussion, and Waters accepting the apology, although clearly not completely satisfied with it. Sensenbrenner calls for a vote over the managers amendments; they pass and debate over title I comes to an end. Once debate over title II begins, the tone shifts back to one of collaboration and compromise and the focus once again turns back to expediting the process.

The Justice Department Bypasses the Process

With a couple of notable exceptions, the 10/3/01 markup of the bill overwhelmingly exemplified unity and agreement. The members of the Judiciary Committee clearly felt confident in their work. The bill was not perfect in their eyes, but they did the best job they could, under the circumstances. They slowed the process and attempted to add some safeguards for civil liberties and more importantly, they ensured that the act would be reviewed in good time with the addition of sunset provisions. Qualitatively, we discern this level of unification by simply examining the discourse. Quantitatively, we triangulate those results very simply by looking at the vote: it was unanimous. The bill passed through the Judiciary Committee on a 36-0 vote. The legislative process had worked: a bipartisan approval of legislation was obtained.

It is not until we get to the full House vote that we discover the major controversy of not only this phase of the debate, but also the one that would plague the legislation throughout the rest of the process—beyond even the point at which it is finally reauthorized in 2006. The controversy is the fact that the Justice Department completely bypassed what little, expedited legislative process existed during the formulation of the Patriot Act. Taking a quick look at the Full House Vote over the bill, we get the sense

that the Bush Administration completely ignored the will of the House Judiciary Committee. Interestingly, both sides of the controversy—those who support and those who oppose the bill in the full House Report draw attention to the poor process used to assemble the final draft of the legislation. Sensenbrenner, for instance, a supporter of the final draft, begins to explain how the process was bypassed by the Justice Department:

> Mr. Speaker, I would like to say a little bit about the road this legislation has traveled on the way to the floor today. The road was relatively short, but certainly not without its twists and turns. Along the way, the legislation has been the subject of intense negotiation between House Republicans and Democrats, the administration, Members from the other body, and our leaders here in the House. After a 36 to nothing markup in the House Committee on the Judiciary last week and the introduction of a bipartisan antiterrorism bill in the other body, we were faced with trying to reconcile two different bipartisan bills, one of which garnered stronger support by the administration. (Providing for Consideration, 2001, p. H6759)

He describes the legislative process as short, with a few twists and turns in the House, because it did attempt to impose its will on the process. However, as Sensenbrenner notes, the administration supported a version of the bill that was not subjected to any debate whatsoever—the Senate version of the bill. So basically, the one that was brought before the House for a final vote reverted to the version that had never received any legislative review whatsoever. Regardless, Sensenbrenner is still willing to support the bill for the sake of unity. He explains that, "However," despite the short process used to adopt the act, "our goal remains clear, to quickly come to agreement on legislation that will provide our law enforcement and intelligence officials with new tools necessary to more effectively battle terrorism and other crimes " (Providing for Consideration, 2001, H6759).

Ms. Waters though, has a slightly different opinion about the course of action needed. She opposes the bill and the entire means by which the Administration has gone about pushing it through Congress:

> Mr. Speaker, I rise in strong opposition to this bill. This is a Senate bill that was voted out at 3 a.m. this morning. This bill is quite different than the bill passed by the House Committee on the Judiciary. Under the rules of the House, the Committee on the Judiciary's bill should have been heard on this floor and the differences between this bill and the House bill should have been worked out in a conference committee. (Providing for Consideration, 2001, p. H6762)

She points out that House members have had no time whatsoever to review the bill before them. It is nothing like the one passed through the House Judiciary Committee, which according to Waters, is a violation of the rules of the House. They are currently voting on a bill that would be taken to conference with the Senate bill for compromise—but it is in no way a reflection of what they talked about. Waters explains how the Attorney General has completely bypassed the bipartisan cooperation of the House Judiciary Committee:

> Mr. Speaker, we had a bipartisan bill, and John Ashcroft destroyed it. The Attorney General has fired the first partisan shot since September 11. Mr. Speaker, both Democrats and Republicans worked hard to come up with a bipartisan bill. Attorney General John Ashcroft undermined the work of the Republican committee chairman, the gentleman from Wisconsin (Mr. SENSENBRENNER), and the Democratic ranking member, the gentleman from Michigan. (Providing for Consideration, 2001, p. H6762)

Waters goes on to say that she even overlooked many worries that she had about the bill passed through the House Judiciary Committee for the sake of unity and compromise. She also acknowledges that many Republicans compromised as well: ”Mr. Speaker, I serve on the Committee on the Judiciary. I consented to some policies I did not particularly care for. For the good of the House I compromised. Some of the Republicans on that committee compromised also. We had a bipartisan bill” (Providing for Consideration, 2001, p. H6762-H6763).

Waters closes her argument by claiming, "the bill before us today is a faulty and irresponsible piece of legislation that undermines our civil liberties and disregards the Constitution of the United States of America" and that "this bill takes advantage of the trust that we have placed in this administration…this Attorney General is using this unfortunate situation to extract extraordinary powers to be used beyond dealing with terrorism, laws that he will place into the regular criminal justice system" (Providing for Consideration, 2001, p. H6763). Finally, Waters wraps it up by quoting a famous American patriot, Patrick Henry, who said "'Give me liberty or give me death.' I say the same today. Vote 'no' on this bill" (Providing for Consideration, 2001, p. H6763).

Remarks throughout the House vote mirrored the ones provided by Sensenbrenner and Waters. Many thought the process was not very good, but most felt that did not outweigh the need to pass a bill very quickly. Given the final vote, it is clear that most just wanted to pass the act and move on. The final vote was recorded as 337-79 in favor of the House draft of the act. The process was ignored and afterward, Conyers issued a statement to the press. In it, he boldly attacks the ethos of Attorney General John Ashcroft:

> Because he didn't get everything he wanted, the Attorney General pulled the old bait and switch. In the dark of night in backrooms of the Capitol, a new bill was written by the Administration and placed on the House floor. Not one Member of Congress had read it when it came up for a vote. We have read it now and it would do grave damage to our Constitution. (Conyers, 2001, October 15)

This sentiment would fester for a year and a half, until the next time the House Judiciary Committee would have the opportunity to question Ashcroft about the implementation of the bill during a public hearing.

Summary of the Authorization Stage of Debate

Analysis of ethos related arguments during the debate over authorization of the Patriot Act reveals various and distinct notions of patriotism. On one hand, we find members of the Bush administration claiming that asking questions is bad, that we should trust the government and defer to their leadership, that the Patriot Act is an all-or-nothing issue (as is Bush's entire war on terror), that criticism is impulsive, and that bypassing the will of the House of Representatives is appropriate under the circumstances. On the other hand, we find critics from both sides of the political aisle arguing that while an expedited process is necessary, more debate above and beyond what the administration wants is needed; i.e. the process needs to slow down if only just a little bit. Throughout much of the authorization debate, there seems to be a great deal of compromise and negotiation between the differing notions of patriotism, at least until the very end. Critics go to great lengths to comfort the architects of the act, pointing out that there is overwhelming agreement over many of the key provisions. There is no apparent effort made to stall the bipartisan legislation by quibbling over details—that, according to a contingent of interlocutors, can and should be done at a later time. Yet despite the unity, a few limitations are needed through deliberation for critics to be satisfied with that decision-making paradigm. At the end of the authorization phase though, we find that the Bush Administration would simply not allow for most of those limitations. They pushed their Senate backed version of the legislation forward in a manner that, at least according to many members of the House, was rather manipulative. The Bush Administration's message of unity and agreement was critical to accomplishing their legislative goals and it was quite effective given how easily their version of the antiterrorism legislation was passed through Congress. There were simply not enough people willing to stand up to the Administration's message of patriotism.

Chapter 7

Time Changes Everything

Before moving on to analysis of the next round of debate over the Patriot Act, attention to context is needed given how much time passes between the end of the authorization stage and the beginning of the oversight stage in the House Judiciary Committee. Authorization ended on October 26, 2001 when President Bush signed the Patriot Act into law and then it is not discussed again in the public forum of the House Judiciary Committee until May 20, 2003. Needless to say, a great deal happened to patriotism phenomenologically speaking during that time. Its ethos from an argumentative perspective shifted from framing criticism of the President as intolerable to one that is tolerable. As this chapter progresses, public opinion is utilized as evidence for this claim, and it is an important claim because public opinion is in fact at the core of determining how much power the Commander in Chief has while leading the country. As the literature review indicates, the will of the people and legislative debate do go hand in hand—if only in an indirect fashion. The ideal relationship between legislator and the general public is to carry out the will of the people while at the same time, educating the people as to what is going on in the world. If the will of the people is behind the President 90%, there is not a whole lot the legislature can realistically do to slow the President down. But at a lower approval rating, theoretically, the legislature has more discursive space to be critical of Bush's ethos—and change the tone and tide.

In the beginning of the war on terror, the cohesive post 9/11 message of unity was wildly successful; the administration managed to capture the hearts and minds of nearly all Americans. According to Gebser (1949/1985) it was a magical healing process. As time passed though, that level of support began to taper off, largely due to the

catastrophic failure of the war in Iraq. This point is significant to this study given that the implementation stage of the debate over the Patriot Act during a substantial decline in the President's approval rating—right after the "end of hostilities" statement made by Bush on May 1, 2003. The hearings examined in this chapter happened on May 20 and June 8 of the same year; it is no surprise that the discourse reveals quite a politically polarizing debate over the nature of patriotism, especially considering the way in which the authorization debate in the House ended. However, before analyzing the debates proper, context is needed to help explain how the tone of 90% unity shifted to one influenced more by a tone of rational-critical debate.

Loyalty to the Government Always

In Chapter 4, we learn from President Bush who the patriots are in the post 9/11 world: the emergency personnel who put their lives at risk during the catastrophe, the members of the public who sacrificed their own safety to help others in need, the heroes of Flight 93 who brought the 4th attacking airplane down before reaching its target, the rescue workers looking to save victims after the attacks were over, members of the government who led the fight against terrorism, members of Congress who supported those leaders, and the men and women of the armed forces who were ready and able to carry out the war against terrorists. Also in Chapter 4, we learned about Bush's prescription for the rest of us who were wondering how we could be patriots. According to him, we could "go back to work." "Get on board." We could show our patriotism economically. We could do anything that did not involve asking questions, or criticizing the Administration's decisions.

We heard this message loud and clear. We did "get on board" to play our part. Bush's agenda went virtually unquestioned for many months following the attacks. To

illustrate the political powers entrusted to the President after 9/11, we turn to some political polls. Prior to 9/11, on September 10, Bush had an approval rating of around 55% and it was declining (President Bush's Approval Ratings, 2005) according to a Washington Post-ABC News poll. But on September 11, that number instantly jumped to above 85%, and then on October 7, the day the war in Afghanistan began, approval rating jumped to over 90%. These numbers are reinforced by a previously cited September 21 Gallup poll (see Chapter 1), which shows the approval rating at 90% following Bush's "State of the Union Address" on September 19.

Bush's popularity rating was made possible by the rhetorical situation he was in, but it was still up to his Administration to take advantage of that situation, which it did to great effect. The rhetorical situation generated *kairos*, the opportune moment, to become assertive and tell us that under his leadership, we will make it through the crisis. He used words to describe what had happened when most of us were speechless. He provided order when there was no order, and people listened to him. He used words to provide a mythic understanding of the war on terror; this in turn, produced a magical adherence to that understanding. Much of the mythical power of Bush's rhetoric derived from the way in which patriotism was built into the overarching post 9/11 message of safety and security. Bush's mythmaking manipulated the rhetorical situation to foster the sense that criticism was intolerable from the perspective of a truly patriotic American.

Pressure on Dissenters

Very few people dared question the Bush Administration in the war on terror. There are undoubtedly a plethora of reasons. Perhaps many people were in such a state of shock that questioning was just not possible. Perhaps many people felt like they needed time for peace and quiet to heal from the wounds of 9/11. Perhaps many people felt the fear of isolation that would occur if they did stand up and question the Bush Administration. According to Irving Janis's (1972) theory of "groupthink," this possibility is very likely. Although Janis's theory was developed in relation to a small group problem-solving context, the idea seems to be very applicable at the societal level, given the presence of the pressure on dissenters. Examples of the pressure applied by the Bush Administration, occurring even outside of the legislative process abound.

> The first example here involves looking at the Administration's response to a comment made by Bill Maher, popular host of the talk show *Politically Incorrect*, made during a show shortly after the war in Afghanistan began. Maher stated, "We have been the cowards, lobbing cruise missiles from two thousand miles away…Staying in the airplane when it hits the building—say what you want about that, it's not cowardly" (Chang, 2002, p. 94). Soon after, there were multiple responses from the Administration admonishing Maher for his remarks, including Ari Fleischer, the White House Press Secretary who vehemently scolded the talk show host, claiming that Americans "'need to watch what they say,' and that 'this is not a time for remarks like that'" (as quoted in Chang, 2002, p. 94). While there is no expectation that Fleischer would agree with Maher's opinion, or that he should publicly refrain from objecting to it, the means by which he holistically attacked Maher's character and status as a patriotic American was a bit extreme.
>
> Another example involves a country music star, Natalie Maines of the Dixie Chicks. An AP article from cbsnews.com on March 14, 2003 reports that, "The Dixie Chicks are drawing criticism from country music fans for remarks singer Natalie Maines made about President George W. Bush during a recent performance in London. Maines told the audience earlier this week 'Just so you know, we're ashamed the president of the United States is from Texas.'" These remarks triggered an outcry from the public as "Angry phone calls flooded Nashville radio station WKDF-FM on Thursday, some demanding a boycott of the Texas trio's music" (Dixie Chicks slammed for Bush gibe, 2003). In response to the outcry, the band attempted to clarify in a statement expressing that while traveling and performing overseas for an extended period of time, "the anti-

> American sentiment that has unfolded here is astounding. While we support our troops, there is nothing more frightening than the notion of going to war with Iraq and the prospect of all the innocent lives that will be lost" (Dixie Chicks slammed for Bush gibe, 2003). Clarifying further, Maines, in a separate statement on her own, said, "I feel the president is ignoring the opinion of many in the U.S. and alienating the rest of the world. My comments were made in frustration, and one of the privileges of being an American is you are free to voice your own point of view" (Dixie Chicks slammed for Bush gibe, 2003). Apparently though, a lot of people did not agree with her given that concerts were cancelled by many venues and that many radio stations refused to play the Dixie Chick's music. Active, overt effort was applied toward silencing the voice of Natalie Maines and ruining her career.
>
> Another example involves Tim Robbins (2003, April 15), a celebrity actor, who along with his spouse Susan Sarandon, a famous actress, describes the personal ramifications of questioning President Bush's war in Afghanistan. During a speech to the National Press Club on April 15, 2003, he describes what they have actually gone through because they voiced dissent:
>
> Susan and I have been listed as traitors, as supporters of Saddam, and various other epithets by the Aussie gossip rags masquerading as newspapers, and by their fair and balanced electronic media cousins, 19th Century Fox. (Laughter.) Apologies to Gore Vidal. (Applause.) Two weeks ago, the United Way canceled Susan's appearance at a conference on women's leadership. And both of us last week were told that both we and the First Amendment were not welcome at the Baseball Hall of Fame. (para. 5)
>
> Robbins (2003, April 15) goes on to mention example after example of discriminatory actions taken against him and his family, including a history teacher who told an 11-year old nephew that "Susan Sarandon is endangering the troops by her opposition to the war" and "another teacher in a different school" who asks a niece "if we are coming to the school play," followed by saying "they're not welcome here" (para. 3).
>
> Another notable exemplar includes examining the comment of Rod Paige, the

Secretary of Education under George W. Bush, who accused the teacher's union of being a terrorist organization during a private White House meeting with the nation's governors on February 23, 2004, because its members criticized Bush's "No Child Left Behind Act." Alex Wohl, an American Federation of Teachers spokesperson, points out that, "Secretary Paige's statement is indicative of the way this administration and this secretary paint with a broad brush and attack anybody that disagrees with them…There has to be room for disagreement, but this administration tends to simply attack the

messenger instead of discussing the message" (Dillon & Jeanschemo, 2004). Representative Betty McCollum (D MN) describes Paige's remarks as "neo-McCarthyism at its worst" (Dillon & Jeanschemo, 2004).

Immediately after the meeting during which the comments were made in an AP interview, Paige apologized and explained that what he said was "a bad joke; it was an inappropriate choice of words" (Toppo, 2004, p. A04). However, the sincerity of his apology became questionable later that day, in an official press release, when he says that the comment "was an inappropriate choice of words to describe the obstructionist scare tactics the NEA's Washington lobbyists have employed against *No Child Left Behind's* historic education reforms." Describing intense disagreement as an "obstructionist scare tactic" is simply a bit more politically correct (albeit not much more) strategy of questioning the motivation of those who disagree with status quo policymaking. Furthermore, given Paige's history of treating dissenters as evildoers, his apology seems even more difficult to interpret as sincere. "In early January, in discussing the Brown v. Board of Education desegregation case, Dr. Paige compared critics of the new education law to 'those who fought Brown,' suggesting the critics were racists…And on Jan. 28, he compared those who oppose educational choice, the movement that includes everything from vouchers to charter schools, to 'the French at the United Nations, promising to veto any resolution on Iraq, regardless of what it says'" (Dillon & Jeanschemo, 2004).

The Return of Rational Critical Debate

The freeze on rational-critical debate in the public sphere did not last forever, though it may have seemed like it to some. As we can observe from any major poll, President Bush's approval rating went through a slow but steady decline from over 90% just after 9/11 to about 60% in January of 2003, indicating that the public was slowly

accepting the idea of criticizing the Bush Administration. There are a number of events that woke the public sphere from its malaise. Richard Clarke (2004), former head of counterterrorism in the Bush Administration, largely attributes the 9/11 Commission's report published in December of 2002 (Joint Inquiry Into Intelligence Community, 2002), as well as the family members of the victims for applying the pressure needed to establish the commission. Other events also contributed greatly to the thawing of the freeze on criticism: the Abu Ghraib prison scandal which fully broke to the public in April of 2004, Michael Moore's film, *Fahrenheit 9/11,* released in 2004, the Presidential campaign culminating in November of 2004, and other events to be sure that mark significant shifts back to a climate of patriotic criticism of our Commander in Chief. Yet, no doubt about it, the biggest catalyst to the decline of the President's approval rating, the one around which all others revolve, is the mismanagement of the war in Iraq.

The War in Iraq

The war in Iraq began March 20, 2003. In the month leading up to the beginning of the war, it is interesting to notice a dramatic rise in Bush's approval rating from 60% on February 25, 2003 to roughly 70% on the starting date of the war; then afterward it continued to climb to more than 75%. It did level off to around 70% before Bush's "end of hostilities" announcement on May 1, 2003. However, at the end of June, 2003, the approval rating plummeted from just under 70% to just under 60%--a full 10 percentage points in less than two weeks (President Bush's Approval Ratings, 2005). This plummeting resulted from recognition by the public that while Bush had claimed "mission accomplished," violence in Iraq was only getting worse; thus, more Americans began to question his judgment and strategy for the war on terror. Interestingly, just prior to the big decline of approval in June of 2003, the next round of debate over the Patriot

Act occurred. This time, unity displayed through the public discourse was not the modus operandi. Debate was very heated. Critics were angry over the way in which the Bush Administration pushed their antiterrorism bill through Congress.

Patriot Act Criticisms

Several events specifically related to the Patriot Act point to the growing concern over Bush's war on terror during the lead up to oversight in the House Judiciary Committee. Perhaps the most telling evidence is the legislative effort to amend the Patriot Act. Several efforts were made, both before and after the House Judiciary Oversight of 2003, attempting to significantly alter the impact of the Patriot Act. Prior to the oversight hearings, Representative Bernie Sanders (I-VT), who introduced the Freedom to Read Protection Act on March 6th of 2003, made a significant effort. In an interview with Herbert Foerstel (2004) on May 29th, 2003, Joel Barkin, Sanders's press secretary, makes an interesting point about the increased level of support for changing the Patriot Act since its adoption in October of 2001. He reports that, "Right now, our bill has 105 co-sponsors. As you probably know, 66 House members originally voted against the USA Patriot Act, so our co-sponsors are already twice the number that voted against the Patriot Act. That, in and of itself, is an interesting point" (p. 161). That certainly is interesting and speaks to the growing concern in the public over the Patriot Act leading up to the House Judiciary Oversight Hearings. The Senate version of the same legislation was introduced by Barbra Boxer (D-CA) on May 23, 2003, three days after the House Judiciary Committee Oversight hearings began.

So clearly, there was some critical momentum building up to the debates serving as the data set for this chapter of analysis. But it should also be noted that critical momentum continued to build at a faster pace after the two House Judiciary Oversight

Hearings that will be analyzed shortly. On July 30, 2003, for instance, Russell Feingold, the one Senator who voted against the original authorization of the Patriot Act, introduced the *Library Personal Records Privacy Act*, which was intended to modify (not repeal) parts of section 215. A day later, Senators Lisa Markowski (R-AK) and Ron Wyden (D-OR) sponsored the bipartisan *Protecting the Rights of Individuals Act*, which also attempted to modify section 215. By August 13, 2003, "more than 140 cities and counties, in addition to state legislatures in Alaska, Hawaii, and Vermont, have passed resolutions against the Patriot Act, some of them imposing restrictions on compliance." Interestingly, "Supporters of these resolutions cover the entire political spectrum" (Forestel, 2004, p. 169). Then, in September of 2003, perhaps the boldest attempt to legislate change to the Patriot Act occurred in the House. Representatives Dennis Kucinich (D-OH) and Representative Ron Paul (R-TX) proposed the *Benjamin Franklin True Patriot Act*, which would have repealed sections 213, 214, 215, 216, 218, 411, 412, 505, 507, 508, and 802 of the Patriot Act. Furthermore, it would have repealed section 214 and 871 of the Homeland Security Act (Foerstel, 2004). Then in October of 2003, perhaps the most recognized attempt at legislation was introduced. Interestingly, architects of this proposal also used a condensation symbol to generate support. It is called the SAFE Act, standing for the **S**ecurity **a**nd **F**reedom **E**nsured Act. Larry Craig (R-ID) and Richard Durbin (D-IL) proposed it to modestly amend some of the Patriot Act provisions such as the "lone wolf" provision, the "sneak and peek" provision, as well as the definition of domestic terrorism.

Summary

May 2003 was an important turning point for the health of the public sphere; for the first time since 9/11, the general public began to question Bush's strategy for the war

on terror. Not only did the war in Iraq come under fire, so did the Patriot Act as well as the Homeland Security Act. Even though there was not enough criticism or sway of public opinion to effect significant policy changes in any arena of the war—nor would there be for a long time to come, a significant shift concerning the permissibility of criticism is detectable. Persuasion theorists stress that any rational attitude change takes time. During May 2003, it seems that criticism of the Bush Administration became more prominent and acceptable according to analysis of public opinion. Debate in the 5/20/03 hearing before the Subcommittee on the Constitution and the 6/5/03 Full Committee Hearing demonstrates this changing nature of discourse. It is the lens from which the symbolic meaning of patriotism is negotiated.

Chapter 8

Oversight Begins

The hearing before the Subcommittee on the Constitution on 5/20/03 is the first oversight hearing in the Judiciary Committee of the House of Representatives. Other forms of oversight had occurred: classified hearings, written questions and responses, and even one public hearing in the Financial Services Committee. But this is the first public oversight hearing of the act that deals with the balance between safety and liberty. In particular, the hearing deals with the 4th amendment of the Constitution. According to Steve Chabot (R-OH), chair of the Subcommittee on the Constitution, in his opening statement, "the hearing will consider where and when the federal government can go to search the addressing information of electronic communications, library records, and public settings in order to prevent terrorist attacks" (Antiterrorism Investigations, 2003, p. 1).

Jerrold Nadler (D-NY) is the ranking minority member on the committee. There is one majority witness, Viet Dinh, the Assistant Attorney General at the Office of Legal Policy in the Justice Department. The other three witnesses are from the minority side—the very first time in the entire process that the House Judiciary Committee has had the opportunity to hear from minority witnesses. They are: James Dempsey, the Executive Director of the Center for Democracy and Technology; Orin Kerr, Associate Law Professor at George Washington University Law School; and Paul Rosenzweig, a Senior Legal Research Fellow at the Center for Legal and Judicial Studies at the Heritage Foundation.

Opening Statements

Chabot

From the very beginning of this debate, I get the sense that the presumption of ethos has shifted such that proponents of the way in which the act originally passed, now have to defend their ethos of caring about civil liberties whereas during authorization, the critics were the ones having to be defensive of their ethos—they had to prove that they were strong on terror. Chabot introduces the topic of the hearing by stating that he and fellow members have been careful to protect the balance of civil liberties while fighting terrorism:

> During the debate over the PATRIOT Act in the House, many of us in congress, including myself, raised concerns about infringing on the civil liberties of the American people and, therefore, supported protective measures, such as the sunset. As we move forward in the process of providing the strong measures that are necessary to combat terrorism, we must also keep in mind the importance of protecting civil liberties Americans hold dear. (Antiterrorism Investigations, 2003, p. 1)

Chabot seems to be proud of the legislative process utilized to adopt the act and wants to keep moving forward with the same level of diligence when it comes to protecting safety, while at the same time, also protecting civil liberties.

After introducing the majority's ethos in the debate, Chabot previews the major issues to be addressed: 1) the protection of content privacy when monitoring email addresses; 2) standards for accessing business records—specifically library records, and 3) FBI monitoring of public gatherings. Then, he ends his opening statement with another defense of the oversight process:

> When Congress was debating the USA PATRIOT Act, which would give law enforcement new tools to combat terrorism, we promised to conduct vigilant oversight over the implementation of these laws. This hearing today is a continuation of this important oversight, and we look forward to hearing from our witnesses here this afternoon. (Antiterrorism Investigations, 2003, p. 3)

He says that oversight has been working and that this hearing is merely an extension of that oversight process.

Nadler

As promised, critics of the process utilized to authorize the act waste no time in attacking the ethos of proponents. Nadler begins his opening statement by saying, "Today, we review the USA PATRIOT Act, legislation that was rushed into law in a manner that was, to say the least, not conducive to careful and thoughtful consideration" (p. 3). He alludes to the "unusual" level of cooperation this Committee adhered to in drafting bipartisan legislation: "While the Members of our Committee worked cooperatively to forge legislation that won unanimous and bipartisan support—something rather unusual on this Committee…carefully considering the balancing between privacy considerations and national security" (Antiterrorism Investigations, 2003, p. 3). Unfortunately, though, according to Nadler, the legislation that was ultimately signed into law bore little resemblance to the one we reported" (p. 3). He continues to argue, "That legislation was drafted in secret over a weekend by representatives of the Department of Justice and the House leadership, was brought to the floor with no one having an opportunity to see it in advance" (Antiterrorism Investigations, 2003, p. 3). Then, Nadler gets fired up and refers to the process as a "shameful procedure," pointing out that government leaders used fear and patriotism to avoid delay:

> Members had to vote on a multi-hundred page bill, with no one having had a chance to even read the bill, except for staffs. The bill was available an hour in advance. People had to vote based on summaries. This was shameful procedure to deal with legislation of such vital import and impact on our very liberties. When people said that we would have an opportunity to vet the legislation, to send it out to law schools and civil liberty unions and other groups that are interested for their comments, we were told that the ideas in this legislation had been around for a long time. True. Lots of ideas have been around for a long time. It doesn't make them good ideas. It also wasn't clear which ideas had gotten into the bill, the extent to which those ideas have gotten into the bill, the form those ideas had

> gotten into the bill. We were voting on the basic summaries. And we were told we didn't have time to consider the legislation properly because, if it were delayed by several days, lives could be lost. (Antiterrorism Investigations, 2003, p. 3)

Nadler continues to state the grievance by referring to the beginnings of the legislative process as hysteria and claiming that now we need to go back and do the job with a more critical eye: "With this kind of hysteria, the bill was passed almost sight unseen by the House, unfortunately. Now we are under—we are going to do the kind of oversight that we really should have done before voting on the bill" (Antiterrorism Investigations, 2003, p. 3). Continuing with that thought, he argues that criticism is bipartisan and worthy of consideration:

> And it's about time we are. There were and have been bipartisan concerns that powers extended under the rubric of fighting terrorism, in fact allow Federal agencies to reach well beyond the war on terrorism to target the privacy and fundamental liberties of average law-abiding Americans. Our witnesses today provide extensive evidence that the concerns of those who oppose this law as well as those who voted for it despite their misgivings have been borne out. (Antiterrorism Investigations, 2003, pp. 3-4)

The witnesses he mentions, the first minority witnesses to go before the committee, lend support to his point—criticism is not hysteria. There are real reasons to be concerned.

Moving on, Nadler makes an argument that becomes a new point of contention—one that could only come up by virtue of having implemented the act and seeing it in progress. Since passage, according to Nadler, the Administration has been overly secretive—making it very difficult for the Committee to do its oversight job:

> Of even greater concern is the extent to which this Administration's penchant for excessive secrecy has thwarted the Members of this Committee in the discharge of our constitutional duty to provide oversight of those activities within our jurisdiction and to monitor the strengths and weaknesses of the law and its implementation. I would hope that the Administration would be more responsive to congressional requests for specific rather than general information. ''We can't tell you'' or, in effect, "it's none of your business" are not adequate or acceptable answers to a congressional Committee seeking to exercise its legitimate oversight functions. (Antiterrorism Investigations, 2003, p. 4)

This argument is a noteworthy one; it shows up a lot during this round of debate and marks a significant shift in discourse from the authorization stage to the oversight stage of debate. It is one that is made over and over again as the hearing continues.

In the next argument from Nadler, we find a familiar form for making a claim in the debate. It is the, "I want to be tough on terror…but…" argument. Here though, Nadler seems to use it a bit more offensively as opposed to the authorization stage when it was used in a rather defensive manner. He says:

> Mr. Chairman, no one needs to instruct me about the dangers of terrorism or the need to fight it effectively. My District has been the target of repeated terrorist attacks, not only the September 11 attack on the World Trade Center, but on several occasions prior to that terrible day. Even now, there isn't a single New Yorker who's not acutely aware that when—not if—future acts of terror are attempted against this country, it will likely be our homes, our workplaces, our families, our neighbors, and our friends who will be at the top of the terrorist lists. No community has a greater stake in a successful war on terrorism than mine. And yet, the—my constituents are consistently among the most outspoken defenders of individual rights in this war on terrorism. They do this not because they're indifferent to their own safety, but because they understand that the choice between liberty and safety is too often a false one. (Antiterrorism Investigations, 2003, p. 4)

Also interesting in this quotation is the example as demonstration utilized. Nadler uses the example of public opinion from his own district—the target of a 9/11 terrorist attack to illustrate his point. He explains that his constituents are certainly aware of the effects of terrorism; yet it is they, the ones hit hardest by the attacks who are most vociferous about ensuring the protection of individual rights—they understand that fighting the war on terror is not an all-or-nothing issue.

Nadler begins to wrap up his opening statement by referring again to the notion that the Patriot Act was originally legislated in hysteria and now is the time to go back and take "a sober look": "So Mr. Chairman, I look forward to the testimony of our panel. Liberty and security must not be partisan issues. They represent the fundamental

underpinnings of the American way of life. We legislated in hysteria in October of 2001. We have done this before in times of crisis. It is now time for a sober second look" (Antiterrorism Investigations, 2003, p. 4).

In closing, Nadler thanks Chabot for holding the hearing and expresses hope that "we will be able to work together to provide consistent and effective oversight of this pressing and timely issue" and that "we can pass into law any necessary amendments that we find to be necessary as a result of these hearings." Particularly, Nadler points out that he is "interested in how the Administration can justify the kind of intrusive oversight, shall we say, of what people read in libraries that is included in this act" (Antiterrorism Investigations, 2003, pp. 4-5).

Following Nadler, Chabot asks if anyone else wishes to make an opening statement before getting to the witnesses. Mr. Watt (D-NC), a minority member, speaks up very briefly to emphasize the importance of having more hearings:

> I really can't think of a subject that cries out for a hearing more than the issue that's before us today. And I hope that this will be the first hearing and prelude to a full Committee hearing on this issue. And I hope, beyond that, that the Members of this House will use the information that is being submitted at this hearing and subsequent hearings to inform themselves better about how to strike an appropriate balance in these difficult times, and make sure that the constitutional imperatives are safeguarded. I thank the Chairman for convening the hearing. I hope he will encourage the full Committee chair, as we have been doing, to have a follow-up hearing about the same issue. Thank you. Yield back. (Antiterrorism Investigations, 2003, p. 5)

There is obviously a sense of urgency behind his message. Afterward, Chabot moves on to introduce the witnesses.

<u>Dinh</u>

Viet Dinh, one of the chief architects of the Patriot Act, is the only majority witness at the hearing on this day. He begins his opening statement very generically by thanking the committee but then, he quickly launches into the reasoning behind why he is

so eager to be there: “Thank you very much, Mr. Chairman. I thank you and the Ranking Member for having this meeting and for having me here. There has been much confusion, misinformation, and indeed sometimes disinformation about the events after September 11 or activities thereon, and I appreciate the opportunity to clear up some of the confusion” (Antiterrorism Investigations, 2003, p. 6). According to Dinh, in the very opening words of his testimony, criticism is based upon faulty information, whether accidental or otherwise, and that he is here to clear it up for us. The proclamation is very Platonic in nature. Dinh positions himself as the all-knowing philosopher-king who has access to the perfect form; thus all he needs is the opportunity to speak to the masses so that clarification can be achieved.

Then, Dinh attempts to establish his own ethos as being cooperative and open about the way in which the act has been implemented:

> I fully share Mr. Nadler’s call for more public accountability and congressional information. That is why the department has been cooperating with this Committee and the full Committee on the questions on—with respect to oversight. In that respect, I call the Members’ attention to the 60-page submission that we submitted last week containing information regarding our activities, about which I hope to have an opportunity to elucidate during this hearing. (Antiterrorism Investigations, 2003, p. 6)

Obviously, Dinh is responding to the attack on the Department’s ethos—the one claiming that they have been overly secretive about operations. He welcomes oversight and claims that the Justice Department has been submitting information all along—information that details the specifics of Patriot Act enforcement.

In the next sequence of arguments, Dinh claims the Patriot Act is the answer to our problems. He sets this up by first, reverting back to an argument that we have become familiar with from the authorization stage of debate—the rhetoric of fear. He draws from

a quotation by a terrorist who failed to assassinate British Prime Minister Margaret Thatcher during an attack in 1984:

> Mr. Chairman, when the IRA failed in an attempt to assassinate British Prime Minister Margaret Thatcher in 1984, a spokesman said, 'Today we were unlucky. But remember, we only have to be lucky once. You will have to be lucky always.' That simple statement underscored the momentous task facing the Government after 9/11 (Antiterrorism Investigations, 2003, p. 6).

This quotation reminds us that we will forever need to be afraid of terrorists.

Dinh continues with this line of thinking by introducing resolution to the problem: the Patriot Act. Accordingly, it has prevented more attacks on U.S. soil since 9/11. As the quotation refers to, events such as the train bombing in Morocco as well as a terrorist attack in Saudi Arabia had just occurred, but none had happened in the U.S. because of the Patriot Act:

> Even as events in Saudi Arabia and Morocco this past week remind us that the terrorist threat is real and constant, we do take some comfort that terrorists have not successfully attacked the American homeland since September 11. In our judgment, the successful effort in preventing another catastrophic attack on the American homeland in the past 20 months would have been much more difficult, if not outright impossible, without the tools that Congress has authorized, in particular, the tools in the USA PATRIOT Act. These authorities have substantially enhanced our ability to investigate, prosecute, and most important, to prevent terrorist attacks. (Antiterrorism Investigations, 2003, p. 6)

The line of argumentation ends with another argument that is not new to the discourse and that is the declaration to trust us…we have been doing all of this without bending the Constitution in any way. We are perfect:

> In doing so, we are constantly mindful of the legal and constitutional limits to governmental authority. We have safeguarded the constitutional rights and civil liberties of law-abiding Americans, just as we have protected them from the threat of terror. We have achieved these twin objectives by implementing common-sense reforms and utilizing the tools that Congress has provided. (Antiterrorism Investigations, 2003, p. 6)

Following a long ethos-based introduction, Dinh transitions into a series of logos based arguments.

He argues that first, section 218 has removed the artificial "wall" existing between law enforcement agencies and intelligence gathering agencies—the one supposedly created by FISA in an effort to prevent intelligence gathering agencies from spying on people who are U.S. citizens. Dinh claims that getting rid of this wall through the Patriot Act has led to the capture of Al Arian, a Palestinian jihadist. Secondly, Dinh argues that section 216 of the Patriot Act updated laws to take into account emerging forms of technology; this according to Dinh, allowed information to be gathered about Danny Pearl's killers. Danny Pearl is an American journalist who was kidnapped and executed by jihadists. In the middle of the logos based appeal, Dinh inserts another "you can trust us" argument, claiming that, "Again, Congress armed law enforcement with this powerful weapon without sacrificing the constitutional rights and civil liberties of law-abiding citizens" (Antiterrorism Investigations, 2003, p. 7). Then, the third logos based argument is made. Dinh claims that the Patriot Act has decentralized Attorney General authorities by empowering field agents to use more common sense in the field rather than being overly restricted by a set of uniform rules that prevent creativity and independent thinking.

Dinh ends his statement by pointing out that the terrorists are the greatest threats to Americans; i.e., he uses the rhetoric of fear once again:

> Mr. Chairman, the greatest present threat to the American people comes from the terrorists who seek to destroy our way of life. The men and women of law enforcement, instead, seek to protect that way of life and secure our liberty. The Department will continue to do everything in our power, with your help, to incapacitate the terrorists and to liberate the activities of law-abiding Americans. I thank you very much. (Antiterrorism Investigations, 2003, pp. 7-8)

It is interesting the way Dinh tells this narrative. He defines himself and his colleagues at the Justice Department as the heroes in the narrative who "will continue to do everything in our power" to win the war on terror. In the middle of telling the story, he says that we need "your help" to continue the fight. In other words, Congress is in the role of assisting the Bush Administration, giving them the tools they need, without getting in the way. Patriotism demonstrated by Congress in Dinh's narrative, means for members to become a passive stamp of approval for whatever the Bush Administration needs. This is the theme that has been developing throughout Dinh's entire opening statement. Looking back we find Dinh saying that, "Congress armed" us with these tools…that we are winning the war on terror "utilizing the tools that Congress has provided…,," that another attack would have occurred "without the tools that Congress has authorized." These quotations come directly from Dinh's opening statement and all formulate a narrative in which the Justice Department officials are the action heroes, in contrast to the Congress members who play the supporting cast. They are passive, docile actors who know and appreciate their roles as bystanders.

Minority Witnesses

To begin analysis of the minority witnesses' opening statements, let me just say how shocked I was by how restrained their testimony seemed. These witnesses, Kerr and Dempsey in particular, are cited to a great extent throughout much of the Patriot Act literature. The literature I read in which they are cited, provides a rather scathing, political attack on the Patriot Act and its architects. Most notably, Foerstel's (2004) book is titled, *Refuge of a Scoundrel: The Patriot Act in Libraries*. On the cover of the book is a picture of John Ashcroft delivering some sort of a public address; i.e. Ashcroft is the scoundrel according to the book. Another project from which I gained a great deal of

background from is Nancy Chang's (2002), *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties*. On the cover of that book, we find an ominous black and white picture of individuals from the waste down who appear to be dressed in law enforcement uniforms. One of the individuals looks to have riot gear on. They are lined up shoulder-to-shoulder as if they are blocking an entrance to some place. Clearly, these books were packaged to sell copies and are politically driven, and this is not to say that there is not truth in them or that they are not backed by good evidence and analysis, but it is to say that criticism may have been exaggerated a bit for the purpose of selling books, detracting a bit from their value as scholarly criticism. Nonetheless, because Kerr and Dempsey are cited to such a great extent throughout these books, and others to be sure who portray a similar sort of ethos, I was expecting them to extend that sort of ethos during their congressional testimony. However, they caught me off guard by being more restrained in their commentary, and at times, even complimentary of the Justice Department. There was not a great deal of ethos related arguments in the testimony—most of it was logos-based. But even when argumentation did cross over into the area of speaker credibility, criticism was quite restrained. In fact, some of their testimony was actually rather complimentary of the Patriot Act.

The complimentary portions of their testimonies in relation to the Patriot Act, must be prefaced by noting their criticism of laws existing prior to 9/11. Both witnesses refer to pre-Patriot Act laws as esoteric; they were not particularly useful for the fight against terrorism, nor were they all that useful for protecting against civil liberties abuses. This is why, according to Kerr in particular, that it has become such a difficult task for Congress to find a balance between too much power and not enough. While neither Kerr

nor Dempsey are satisfied with the Patriot Act as-is, they do acknowledge that in many ways, it is an improvement over the status quo.

For instance, Kerr articulates that section 216, a clarification of a 1986 pen register law, is a very positive change in the direction of civil rights protection. He said that before section 216 existed, there were no standards and that systems such as Carnivore went unchecked. Accordingly, the law is on its way to striking the right balance—but does need some more work. Dempsey offers another example by discussing the most controversial provision of the act—section 215, also known as the Library Provision. He makes the point that libraries have never been "law free" zones (Antiterrorism Investigations, 2003, p. 14) and dispels an argument made by some critics that the library should be a safe haven where people can go and do whatever they wish from any computer terminal in the library.

After dispelling a "conspiracy theory" type argument common to Patriot Act discourse, Kerr does suggest that there needs to be more limitations of searches to specific individuals based upon specific knowledge of illegal activity, rather than a blanket search of records which 215 seems to permit. This is a pattern of argument that permeates much of the minority witness testimony—they find that much of the Patriot Act makes some commonsense changes to antiterrorism policy. However, they are not convinced there are enough checks and balances in place. In the next exemplar, Kerr again acknowledges that many criticisms of the Patriot Act are myth, and blames the press for not reporting on the laws accurately:

> Yet another challenge in this area is that the press has often had a hard time explaining what these very complicated laws do, so oftentimes the newspapers will say the law's doing one thing, when in reality the stories have gotten it slightly off, still posing very difficult challenges for the Congress to find that balance in a way that reflects what the laws are actually doing, often requiring a

> great deal of scrutiny of very difficult statutory texts that can go on for many pages. (Antiterrorism Investigations, 2003, p. 22)

Here, Kerr agrees with a point made by Dinh earlier and one that would remain a part of the Justice Department's defense of the Patriot Act, and that is that much of the controversy is due to public confusion—not the substance of it. Again though, as he does above, Kerr argues that despite confusion, more checks and balances are needed. It is not, as Dinh would have us believe, simply a matter of explaining more thoroughly, as Dinh would have us believe above.

While discussing the minority witnesses' opening statements, we cannot forget about Paul Rosenzweig who has some important points to make as well. The first point he makes is very much an ethos related argument. He justifies the necessity of listening to criticism and points to the fact that there are people on both sides of the political aisle begging the Justice Department to do so. He begins his point with an attempt at humor. Referencing earlier in the hearing when Nadler quotes Rosenzwieg for his own argument during his opening statement, Rosenzwieg makes a joke about the irony of him and Nadler agreeing on anything:

> Mr. ROSENZWEIG. Thank you, Mr. Chairman. And thank you very much for the opportunity to be here. It's pleasing to hear one's words quoted back at one, although I confess, Mr. Nadler, that if I go back and tell them that you've quoted me, they're going to wonder what's up back at the Heritage Foundation as well. But——

At this point, Nadler interrupts Rosenzwieg briefly to acknowledge the point and return the friendly banter: "You never know what conspiracies are afoot on this Committee" (Antiterrorism Investigations, 2003, p. 27).Then Rosenzweig uses the humorous moment to make an important argument. He says:

> But what I think that that demonstrates, actually, is that this is an issue where those who are traditionally skeptical of Big Government because of its ability to

> invade people's social privacy, and those who are—who come from my tradition of skepticism about Big Government as an engine for economic and—change, tend to find a little bit more common ground. (Antiterrorism Investigations, 2003, p. 27)

The argument is that because people across the political spectrum are calling for more checks and balances on the Patriot Act, the demand is there for the Justice Department to take criticisms more seriously. The criticisms are bipartisan, and that according to Rosenzwieg, should lend them greater credibility.

Immediately after this appeal to bipartisanship, Rosenzweig makes it a point to recognize that there does not necessarily need to be wholesale change in the Patriot Act—perhaps only some minor tweaking. He argues that the Patriot Act is not anywhere close to being the greatest constitutional challenge occurring since 9/11 and claims that the blanket stoppage of cars while looking for the D.C. sniper is. Continuing to identify with the Justice Department's argumentative ground, he goes further to argue that the Patriot Act should expand its powers even further than it already does in its regulation of the Internet, pointing out that there is no regulation of it at the present time.

At the end of his statement, Rosenzweig summarizes his stance on the balance between safety and liberty in the post 9/11 world:

> For my part, I think ultimately the question that this Committee has to face in addressing the guidelines and, frankly, in addressing all of these concerns, is whether or not we should maintain a high set of standards knowing that in doing so we may miss some investigative opportunities, important investigative opportunities that might protect the American public; or lower those standards, accepting that there may be some abuse, and hope and expect that congressional oversight, of the form that my colleagues on the panel have already talked about, will protect those. As a strong backer of congressional oversight and a believer in it, I hope that the latter is sufficient. (Antiterrorism Investigations, 2003, p. 28)

He essentially says that we should err on the side of safety, which is very surprising to me given his leadership of the Heritage Foundation—a governmental watchdog organization.

I fully expected him to favor liberty more—even if it lessened the value of safety. But he did not—he stressed safety and even acknowledges that at times, this balance may blur the line for civil liberties protection. But because this is justified due to the threat of terrorism, he stresses the need for greater Congressional oversight to provide balance. The issue of oversight is, in the minds of critics, where the debate lies. The issue is not whether the government should have more power or not in the 9/11 world, it is a matter of how we are going to keep that power in check—if we are going to keep it in check.

The issue of oversight leads into the final point to make about the minority witnesses' testimonies and that is the way in which they pick up on the issue of how forthcoming the Justice Department has been with matters relating to oversight. This is an issue where again, I was expecting more direct attacks on the ethos of the Justice Department—much like during Nadler's opening statement, but they never came. In fact, only one of the minority witnesses mentioned that topic—James Dempsey, and even he steps around the issue a bit—implying some doubt about the intentions of the Justice Department, but a far cry from the very vocal criticism by Nadler described earlier. Dempsey brings the issue up very casually by making it clear that the process of oversight is just beginning:

> Thank you, Mr. Chairman. Good afternoon, Mr. Nadler, Members of the Subcommittee. Thank you for giving us the opportunity to testify today at this very important hearing. We commend Members of this Subcommittee and Chairman Sensenbrenner and Mr. Conyers for the oversight that you have been pursuing into the application of the PATRIOT Act. This hearing is clearly just one step in that process. (Antiterrorism Investigations, 2003, pp. 13-14)

So he acknowledges the oversight currently being done, but lets everyone know that this is only one small part of the needed process—he expects more in the future.

Dempsey then makes another slight criticism of the Justice Department's role in the oversight process, by implying that information provided has not been very timely: "I

think that the answers to the questions that were submitted by the Justice Department—we just received them today, 69 pages—are another step" (Antiterrorism Investigations, 2003, p. 14). He acknowledges that the Justice Department is providing answers, but perhaps too slowly—i.e., "we just received them today."

In the next sentence, he extends beyond questioning the timeliness of the answers to also question the clarity: "I'll say that in quickly looking at some of those, I have to say that some of them were not entirely clear answers and they raise additional questions, which, naturally, this Subcommittee and the full Committee will have to follow up on" (Antiterrorism Investigations, 2003, p. 14). Even as he questions the clarity of Justice Department answers, Dempsey is careful to not cross the line of accusing the Justice Department of being intentionally manipulative about the way it is conducting business. He says it is a natural process for there to be confusion and the for confusion to bring more questions. The key is that he expects the process to improve with more questions.

Questioning Witnesses: The Debate Over Secrecy

Given the way in which the topic of secrecy was discussed in opening statements, it should come as no surprise that it becomes the most critical point once the questioning of witnesses begins. Together, Dinh and Chabot answer the charge of secrecy by arguing that the deliberative process is working well because they have been cooperative in sharing information and because they have been willing to criticize their own work. This sort of argument occurs a total of seven times throughout the debate, but is only made by Chabot and Dinh. No other participant in the debate makes the claim that the deliberative process has been effective. Whereas the counterclaim, that the process has not been effective due to the Justice Department being unwilling to share information, bypassing the process, and answering questions in a vague way, was made a total of 14 times by

four different participants, all from the minority side: Nadler, Dempsey, Schiff, and Scott. As questions begin, the debate begins to find even more focus around the themes previously alluded to in the opening statements.

That's Classified Information

Following the opening statements, Chabot begins questioning by asking how long the government is required to maintain records for Carnivore and then how courts and/or the legislative body would review those records? Dinh answers that section 216 requires the department to retain information and give it to the courts within 30 days for a review. The first question and answer was a straightforward, logos based dialectic about the way in which the law works. However, during the answer to the second question asked by Chabot to Dinh, a new ethos based argument unique to the oversight round of debate emerges. Chabot asks how many times library records have been accessed under the Patriot Act, and whether the request for those records was made specific to one person, or if it was accessed based upon a blanket sweep of information? Dinh responds that specifics to that question cannot be provided because it is classified information due to it being in the context of a national security investigation:

> Mr. Chairman, section 215 of the USA PATRIOT Act requires the Department of Justice to submit semi-annual reports to this Committee and also to the House Intelligence Committee and the Senate counterparts on the number of times and the manner in which that section was used in total. We have made those reports. Unfortunately, they—because they occur in the context of a national-security investigation, that information is classified. (Antiterrorism Investigations, 2003, 38)

Dinh does reveal though, that an informal survey discovered that about 50 library contacts were made, but that the official use of FISA cannot be released. Afterward, Chabot moves on to another question, but, perhaps the most contentious of the answers

given during the course of this round of debate is out on the table, and it is used repeatedly by the Justice Department. Critics also question it repeatedly.

In fact, Nadler is the next questioner and he picks up where Chabot left off. The question he ultimately asks is, how does the number of times libraries are visited impact national security? But, it is also interesting to observe the way he leads up to the question. He makes the point that critics are not asking for specific information that would tip anybody off to anything. Critics just want to know how often a law is being used:

> Attorney General Dinh, I was interested to hear you say a few minutes ago that the number of times that libraries have been visited was classified information. The Department claims the mere fact as to whether the Department has used various authority granted in the PATRIOT Act is classified. The question is not when, where, how, or against whom. Is it your position that you can't even tell the Committee whether you have actually used the particular authority granted in the act? You can't tell us—I mean, the libraries know whether they've been visited. How does it help the national security—why should it be classified how many libraries have been visited or even which—well, which—how many libraries have been visited? How do you suggest we evaluate the authority we have given you if you can't even tell us whether you've used that authority, how often you've used it? (Antiterrorism Investigations, 2003, p. 40)

Dinh tries to answer the question, but seems to simply repeat himself. The answer is very simply that is in a "national-security context." Nadler probes deeper and the answer changes to it is "pursuant to Executive Order 12333"—Dinh defers to a higher authority rather than answer the question of why. Nadler continues to press Dinh for an answer to why that information is classified. The most specific answer Dinh can give though is that:

> The reason is fairly straightforward. The amount of activity as well as specific number of authorities used give an insight as to patterns of intelligence and terrorist activities that is known to the United States. If you will recall that FISA controls not only terrorists, but also spies. And so our ability to know what spy networks are there, what terrorist networks are there, the number of those networks—— (Antiterrorism Investigations, 2003, p. 40)

After continued discussion, Nadler still does not understand why the information needs to be classified (nor do I). So, he asks Dempsey to comment.

That's Sophistry

Interestingly, Dempsey claims that the information being discussed is actually not classified. In fact, he says it is published and available for public consumption. He argues though that the information could and should be more specific; it is reported upon in such a vague way, that it makes oversight very difficult—like comparing "apples and oranges." The claim is essentially that the Department picks and chooses how to count their information, and how to release their information, so that any information that is released makes them seem conservative in their usage of the Patriot Act. The only answer is for the government to be more open with their information:

> The number of FISAs is actually published and known, and we watch how it goes up and down from year to year. I think that the information that is published could be more detailed than that. Right now, there's a broad statement of the number of FISA applications that were granted. I think in the case of the—going even down as specific as the number of times that section 215 has been used in a library—I happen to think that number's relatively small—I don't think that tells anybody anything. Because in fact, even in the case of terrorism investigations, the Government can be going in with subpoenas, criminal subpoenas. And so you—already you've got almost an apples-and-oranges question in terms of anybody trying to predict where the Government is or to try to evade Government surveillance. I think overall some of these numbers can be made publicly available. I think it would greatly help the subcommittee. (Antiterrorism Investigations, 2003, pp. 40-41)

The type of response Dempsey provides here, in answer to Dinh's deferment to secrecy, hints at the way in which this sort of argumentation extends throughout the entire debate. However not all forms of this argument are as reserved as Dempsey. As was noted above when analyzing Dempsey's opening statement, he is very reserved in the way in which he addresses the ethos of the Justice Department. His comments are very cerebral. If he experienced any anger whatsoever toward the majority witness, it was tempered by the way in which he put forth his argumentation.

Not all participants in the debate are so reserved about responding to governmental secrecy—especially Nadler, the ranking minority member on this subcommittee. While positing a similar sort of rebuttal to Dinh's ethos, Nadler's tone gets quite antagonistic. The example occurs at the very end of the debate; the normal process has ended—all members of the committee had been given the chance to ask questions, and then Nadler asks for additional time—Chabot gives it to him. Nadler wants to talk about the Hamdi and Padilla cases. In doing so, he ends up accusing the Bush Administration of a tyrannical abuse of power:

> I'm getting confused here. You were discussing the Administration's position in the Hamdi and Padilla cases. And the fact is—the fact is that the Administration took the position, and if you look at your brief you'll see it, that when the President or the Department of Defense has designated an American citizen or anyone else an enemy combatant, the courts have no jurisdiction, no jurisdiction, to question that designation. The courts have not agreed with that, but that's the Administration's position. And that's a claim of power, a claim that habeas corpus doesn't exist, that nothing exists, that the President in that decision is all-powerful, that nobody, until that brief, had made in an English-speaking jurisdiction—before Magna Carta. And I would point out that this country rebelled against Great Britain for tyrannical assertions far less grievous than that. My question, however, is on a different—and that's the record, if you look at the brief of the Justice Department. There's no question. In saying that habeas corpus exists, it only exists because the court didn't agree with the Administration. (Antiterrorism Investigations, 2003, p. 52)

Nadler is claiming that the executive branch is attempting to become "all powerful" by advocating the Patriot Act. Furthermore, through historical analogy, Nadler suggests that critics may very well be justified in revolting violently against the government. He points out that the American Revolution occurred over reasons that are "far less grievous" than the change in habeas corpus resulting from the Patriot Act. The ethos of "patriot" is established as not only a critic—but also as one who is willing to violently revolt against the government when it is necessary.

Then Nadler poses the question that he spent a great deal of effort leading up to, and that deals with the way in which the Patriot Act applies FISA standards to crimes in the United States, asking how that does not violate the 4th amendment by a de facto suspension of habeas corpus. As Dinh begins to answer the question though, a great deal of animosity and flaring temper becomes transparent given the interruptions seen in the dialogue:

> Mr. DINH. You ask a very good question. I would like to discuss that in detail—
> Mr. NADLER. And—excuse me, let me just say—and how can we do that constitutionally and say the crimes can be—criminal investigations, even if there's some foreign intelligence thing, can be governed by a less-than-Fourth-Amendment standard? Whatever you decide the Fourth Amendment means, how can you say it's governed by less than the Fourth Amendment?
> Mr. DINH. I completely understand. With respect, Mr. Congressman, I am advised that in the Hamdi case, we did not move to dismiss the habeas petition, but simply argued that the designation was conclusive, consistent with Ex Parte Qurin. In Padilla, we did make a——
> Mr. NADLER. And—excuse me—and if—go ahead.
> Mr. DINH. In Padilla, we did make a motion to dismiss for lack of personal jurisdiction because we thought that Mr. Padilla, who was being held in South Carolina, venue was in South Carolina.
> Mr. NADLER. Well, forget the venue. But even your first thing, if you say the court lacks jurisdiction, then there can be no habeas.
> Mr. DINH. No, sir, we did not move to dismiss on lack of jurisdiction. We argued that under the law, Ex Parte Qurin in particular, the designation as enemy combatant is conclusive upon the——
> Mr. NADLER. Excuse me, the designation is conclusive; therefore there is no habeas corpus or anything else. The designation——
> Mr. DINH. No, here's——
> Mr. NADLER. Wait a minute. The designation is con—if you say the designation is conclusive, and once that designation is conclusive, then there is no right to habeas corpus, correct? (Antiterrorism Investigations, 2003, p. 53)

Finally then, at the end of this bit of dialogue, we come to the end point of the analysis in this section and that is where Nadler accuses Dinh of "sophistry":

> Mr. DINH. We are in agreement in all but characterization. Habeas petition exists, he can present all his arguments legal and factual. It just so happens that under the law, his habeas argument is not worth very much. The habeas petition would be dismissed not for want of jurisdiction, but for want of substance.
> Mr. NADLER. I find that, frankly—what's the word I'm looking

for?—sophistry. (Antiterrorism Investigations, 2003, p. 53)

There is a fine line between an ad hominem fallacy and a legitimate argument in this case. If the accusation is true, then perhaps it is not a fallacy, but either way, Nadler's version of the rebuttal comes across as less restrained than Dempsey's; his temper is clearly flaring—for better or worse.

Evidence of a Contradictory Ethos?

Before the reader decides if the previously mentioned example demonstrates "sophistry" or not, awareness of more context surrounding the topic of discussion should be revealed. Honestly, given the context, it is any wonder that the Hamdi and Padilla cases were discussed at all, much less in as much detail as Nadler and Dinh were discussing them? Note that we are out of chronological order at this stage of analysis, but earlier in the debate, Dinh stated those specific cases were off limits as topics of discussion due to the fact that they are still under review. This response comes about when Mr. Scott, a minority member, asks Dinh if the Secretary of Defense designates a person as "a guilty foreign terrorist" (Antiterrorism Investigations, 2003, p. 43) does that mean they should not have access to judicial review? Dinh's answer is, "Mr. Congressman, as you know, those cases, both in the 4th Circuit with Yaser Hamdi and the 2nd Circuit with Jose Padilla, are currently under litigation, so I'm somewhat limited in my ability to answer" (Antiterrorism Investigations, 2003, p. 43). So again, the veil of secrecy is utilized to keep information out of the hands of critics. Though this time, the justification is a bit different than in earlier examples. Here, the justification is that a court case is still under review as opposed to the national security justification.

Regardless of the justification though, there is some evidence that perhaps Dinh's response is a result of his own picking and choosing, not of some clear-cut legal barrier

that he simply could not overcome. The first observation supporting this assertion is that Scott's question in no way asks Dinh to comment on the Hamdi or Padilla cases. The question is a generic one asking Dinh to provide his interpretation of the law. Dinh himself introduces the court cases as a reason not answer Scott's question. A second observation is that a few pages later in the debate, after other topics of questioning are discussed, the Hamdi and Padilla cases come up again, only this time, it is Mr. Feeney, a majority member, who brings them up (specifically mentioning the cases in his question) in a question of clarification—meaning that he is simply giving Dinh the opportunity to argue that individuals involved in the case were not stripped of any constitutional rights—the very issue for which the courts are deciding in the present. Dinh is more than happy to discuss the cases in this context:

> Mr. FEENEY. Thank you, Mr. Chairman. Mr. Dinh, in the first place, the two individuals that you were just being—the cases that you were being asked about a little bit earlier with the—with respect to the Department of Defense designation, were those U.S. citizens that were so designated?
> Mr. DINH. Both, sir. Mr. Hamdi was a U.S. citizen who was captured on the battlefield in Afghanistan. Mr. Jose Padilla is a U.S. citizen who was captured in the Chicago O'Hare Airport, and our evidence indicates—and this was made in an affidavit submitted in court—indicates that he came to the airport with the intention of detonating a dirty bomb in the vicinity.
> Mr. FEENEY. I appreciate that. I'm also interested in whether or not there's anything in the PATRIOT Act or any other aspect of Federal law that would permit any of the Executive Branch offices to designate an individual U.S. citizen in such a way that that individual would lose any of their otherwise protected freedoms under the Constitution or the Bill of Rights.
> Mr. DINH. No, sir, nothing in the laws or specifically in the United States—or in the USA PATRIOT Act. As our pleadings make clear, the President was acting under his authority, his executive authority as commander in chief.
> Mr. FEENEY. And there are exceptions under article I, section in terms of suspending habeas corpus, is that right? I think invasion of the public safety and domestic rebellion, or——
> Mr. DINH. Yes, sir, you are absolutely correct. And those are the provisions that President Lincoln relied upon in order to suspend habeas corpus and declare martial law during the Civil War. And this is in answer to Mr. Scott's earlier question, that the President obviously has not made such a determination nor does he have intent, present intent to do so.

> Mr. FEENEY. Well, even if we are under a current rebellion or invasion of the public safety, other than habeas corpus, I'm not aware of any other rights that any U.S. citizen may be forced to forfeit as a consequence of such a designation.
> Mr. DINH. Nor am I, sir, just the great writ of habeas corpus is the specific suspension clause. (Antiterrorism Investigations, 2003, pp. 49-50)

So, had Feeney not given Dinh the opportunity to clarify the constitutional rights issue, or if Dinh had truly felt that the cases were off limits as a topic of discussion, it is likely that the exchange between Nadler and Dinh at the end of the debate—the one analyzed a few pages ago, would have not occurred. Remember that the exchange between Feeney and Dinh occurs after the exchange between Scott and Dinh—the one in which Dinh refused to comment about the cases. Furthermore, the Feeney-Dinh exchange occurs at the very end of the normal proceedings for the debate, which is why Nadler had to ask Chabot for additional time in order to get his line of questioning in at all.

After Nadler asks for additional time to ask questions, and gets it, a couple of other people make the same request—Scott being one of them. At this point, with the Hamdi and Padilla floodgate opened, Scott gets his opportunity to question Dinh over the matter after all. Rather than accusing Dinh specifically of sophistry, he tries to provide his own evidence of it by reading Dinh's own language back to the Committee—suggesting that he had contradicted himself from an earlier proceeding:

> Thank you, Mr. Chairman. I just wanted to make a quick statement before I asked a question, and that is to quote language out of—quote some language for Mr. Dinh. 'It is well settled that the military has the authority to capture and detain individuals who it has determined are enemy combatants. Such combatants, moreover, have no right of access to counsel to challenge their detention. The courts have an extremely narrow role in challenging the military judgment to detain an individual as an enemy combatant. A court's inquiry should come to an end once the military has shown that it has determined that the detainee is an enemy combatant. The court may not second guess the military's enemy combatant determination. At the very most, given the separation of constitutional powers in this unique area, a court should only require the military to point to some evidence supporting its determination. Either way, no evidentiary hearing is required to dispose of a habeas petition in this military context.' (Antiterrorism Investigations, 2003, p. 56-57)

Dinh's whole argument is that the writ of habeas corpus still exists for enemy combatants—meaning that they still have access to the courts once their status is determined as such. Scott reads his own language back to him, which seems to suggest otherwise. Dinh responds by claiming that he never contradicted himself and refers Scott to the sentence in his own previous statement that comes before the part of the quote Scott reads:

> Thank you very much, Congressman. I fully agree with what you've read, and there again, we agree. On what the Government argued, I would like to read the portion that immediately precedes that. It says very clearly that 'the writ of habeas corpus remains available to individuals, such as Hamdi, who are detained as enemy combatants to challenge the legality of their detention.' As I have answered Mr. Nadler's question, our position is that the writ of habeas corpus remains open. But as you have read in our portion of the brief, we believe that the law governing such habeas corpus in the case of enemy combatants is highly limited and the Judiciary gives substantial deference to the Executive. (Antiterrorism Investigations, 2003, p. 57)

In chronological order, this is essentially how the debate comes to an end. However, according to the present order of analysis, the exemplar merely wraps up the case of the critics. Their primary argument is that the Justice Department is too secretive—to the point of not being able to provide for effective oversight.

It seems to me that the way in which the Hamdi and Padilla cases are introduced as topics in this debate suggests evidence of contradiction on Dinh's part—notwithstanding the claim of substantive contradiction over the writ of habeas corpus—just procedural evidence that Dinh seems to pick and choose issues that can be discussed based upon the extent to which they will potentially further his own agenda along. In the very first instance of the Hamdi and Padilla court cases being brought up, Dinh suggested that they were off limits as topics of discussion. However, in the second case, when the questioner brought up the court cases during an effort to provide Dinh the opportunity to

clarify his own agenda and Dinh did not object. He was happy to discuss details of the case. It is difficult then, to view this evidence as anything other than Dinh portraying some sense of a contradictory ethos regarding the use of secrecy during public discourse.

Regardless of whether readers decide there is contradiction or not, the fact that the "that's classified" rebuttal is made repeatedly throughout the debate is significant in and of itself. Dinh uses it a total of six different times in response to various questions.

The Debate over the Sunset

Statistically speaking, the sunset provision of the Patriot Act is not debated a great deal in the implementation stage of debate. But it is given some attention, and because it plays such an important role throughout the process as a whole, it deserves analysis.

William Jenkins (R TN) brings up the issue of the sunset. He claims that the sunset provisions should relieve the fear that critics have and make us feel more comfortable about the situation:

> Another thing that nobody has mentioned here is the permanency of these provisions. Nobody has mentioned that with respect to, not all, but some of …these, there is a definite life to these provisions. It's, under the statute, what, four years for most? And does that not—is—does not, that not lessen the threat that some people fear? (Antiterrorism Investigations, 2003, p. 42).

Jenkins then gives the witnesses a chance to respond.

Dempsey is the first to do so and begins by acknowledging the premise of Jenkins's argument, recognizing that the sunset is an important component of the act: "Congressman, I think that the sunset provision was in fact an important provision of the PATRIOT Act. I think that this hearing is part of the process of Congress deciding whether to reauthorize those provisions or whether to reauthorize them subject to better checks and balances" (Antiterrorism Investigations, 2003, p. 42). Moving on though, Dempsey is able to effectively provide a counterargument to the connection between the

premises and the conclusion drawn by Jenkins. Dempsey argues that the problems with the Patriot Act extend well beyond the sunsetted provisions, and in fact, extend well beyond the act itself, a part of the debate that becomes more and more vital as the debate progresses, especially when moving on to the reauthorization phase:

> I think, though, that a number of the things that we're talking about today and a number of the issues of concern to this Subcommittee do not arise under the PATRIOT Act and are not subject to the sunset. So the Subcommittee and the Congress is going to have to look at those as well. I think the FBI guidelines is one of those. I think the use of FISA, Foreign Intelligence Surveillance Act, information in criminal cases, that provision, I think, does not sunset, and that is an issue that will remain, that needs to be addressed. I think the pen register authority and what that should be needs to be addressed. The use of data mining technology is taking place, really, outside of the PATRIOT Act, and standards and guidelines need to be established before that is implemented. So the sunset, I think, is a symbol of Congress's responsibility. But mere up or down on the sunset doesn't, doesn't end the debate. (Antiterrorism Investigations, 2003, pp. 42-43)

According to Dempsey, the sunset is an important symbolic part of Congress's responsibility, but it should not be relied upon solely to ensure meaningful debate. That would be a false sense of security.

Rosenzwieg also responds to Jenkins's question. He wholeheartedly agrees that the sunset provisions are important as well, without refuting the conclusion drawn by Jenkins as Dempsey does:

> I'm a firm believer in the sunset provisions in this and other laws that relate to civil liberties, because to my mind, the fundamental check on executive excess which may or may not arise, but in preventing it, is the continued conscientious, nonpartisan engagement of Congress in oversight. And the sunset provisions are a way of ensuring that the institutional barriers that live in this institution that prevent activity sometime are overcome, in a sense binding yourselves to detailed, thoughtful oversight because of the impending sunset deadline. I think it's a great idea. (Antiterrorism Investigations, 2003, p. 43)

Obviously, the sunset provisions are important components of the debate over the Patriot Act. As far as the symbolism of the sunset goes, that is the biggest influence the House of Representatives was able to impress upon the debate over patriotism. The idea that there

was a patriotic obligation to seriously revisit the most controversial parts of the Patriot Act again at the end of four years would not have come to fruition without the House of Representatives fighting for them during the authorization stage. The Senate was not prepared to fight for them, and the Justice Department certainly did not want them. The sunset becomes a major focal point of deliberation in the next round of debate. In the debate currently being analyzed, there is only one other mention of the sunset.

Mr. Feeney, a majority member, is the only person in the current debate to express disagreement with the premise that the sunset is effective. Feeney argues, to Mr. Rosenzweig in particular, that although he can identify with the reasoning behind endorsing the sunsets, he ultimately thinks that it is a naïve position to take because it creates much more bureaucracy than is necessary:

> Well, thank you. And finally, Mr. Rosenzweig, I think a lot of the panel members and the Members have voiced support for the notion that we've got some 4-year sunset provisions on a lot of the applications. Maybe because I'm familiar with the Heritage's philosophy and tend to endorse it on most issues, maybe my experience at the State level may be relevant, because I used to believe I was for sunsetting every part of the chapter and code in the statute book. But what I found was that every interested party and group in the world, when they were aware that that sunset was coming up, and we were able on a routine basis to turn about three pages of the statutes into 203 pages by the time we were done sunsetting provisions. So we may get what we asked for on this one. (Antiterrorism Investigations, 2003, p. 50)

Rosenzweig agrees that it would be silly to sunset every law, but because the Patriot Act in particular deals with such a "vital issue," sunsets are necessary:

> I would not support sunsetting every provision of every law, for precisely the same reasons that you've just alluded to, that it gives us the opportunity for a big Christmas tree to be grown in the midst of Congress. In the context, however, of this vital issue, the balance between civil liberty and national security, one that I think is, frankly, the most important legal issue, domestic legal issue facing this Congress this year—more important than Medicare, more important than Social Security. The importance of getting it right and the importance of keeping Congress engaged is, in my judgment, sufficiently great that artificial mechanisms like the sunset are, I think, to be used cautiously, judiciously. Also, to be candid, I

> think on this type of provision, there's pretty unlikely there are going to be a lot of Christmas trees. (Antiterrorism Investigations, 2003, pp. 50-51)

Though not much detail is provided through these last two exemplars, the groundwork is being laid for an extensive debate over the sunset during reauthorization. It is a critical issue to the negotiation of patriotism.

Summary

To summarize: the debate is getting more divisive. Critics are very angry about the way in which the authorization phase of the debate ended. They are angry with the Justice Department for pulling the bait-and-switch at the very end of authorization, but they are also angry with themselves for letting it happen. In Nadler's opening statement, he says "we legislated in hysteria" and now it is time to go back and do the legislative job correctly. After accepting some blame for the legislative failure though, he turns the eye on the Justice Department accusing them of being manipulative through the way in which the final draft was passed through the House vote.

These ethos-related attacks should come as no surprise to anyone who has followed this debate, given the way in which the authorization phase ended. The past is not the only topic of criticism though, considering that a new line of argumentation is made against the ethos of the Justice Department based upon the present: accusations of new transgressions pertaining to the way in which the act has been implemented. According to Nadler and other critics, the Department has not been forthright about the disclosure of information, claiming that the missing information is critical for them to conduct effective oversight. Dinh and his supporters stick to their guns. They never admit to any mistakes; they maintain that they have a perfect record when it comes to balancing safety with civil rights.

The other significant part of this debate, as it relates to the negotiation of patriotism, is the debate over the sunset. While it is not very thorough at this stage, a preview is provided of the debate to come during reauthorization.

Chapter 9

Two Ships Passing in the Night

The hearing on June 5, 2003 is entitled, *The United States Department of Justice*; the purpose of the hearing is general oversight of the department—not necessarily limited to the Patriot Act. It is interesting to note though that out of four and one-half hours of testimony, only six non-Patriot Act questions were brought up. The single witness at this hearing was John Ashcroft. Controversy provides context for the hearing; it had been brewing over the act since the day it was rushed through the House and originally authorized. While the conflict is certainly transparent during the April hearing with Viet Dinh, John Ashcroft is the figurehead leader of the Justice Department—he is the one most responsible for invoking the patriotic symbolism. So needless to say, in this hearing, the attacks upon ethos are rampant: criticism of Ashcroft's ethos is in full swing, and likewise, criticism of the critics' ethos is in full swing as well.

In light of this context, there is one point to make here, before diving into the presentation of data. The point is (ethno)methodological in nature because it reflects upon the way in which the instrument of analysis (my self) is changing and adapting to the task of analysis. This point needs to be bracketed and made known to the reader as part of the intersubjective nature of the hermeneutic method—and that is, to put it simply, categorization is getting much more complex as the debate moves along from phase to phase. In the very beginning of the debate, during the authorization phase, there was so much unity, agreement, and cooperation expressed through discourse that creating categories for the data was relatively easy compared to the present chapter. There was not a whole lot of complexity because there was not a whole lot of disagreement, and what little disagreement did occur, was easy to identify because it "stuck out like a sore

thumb." At the current stage of debate though, readers should be aware that defining categories of ethos related arguments demands a much more difficult and time consuming effort on my part. As emotionally charged and divisive as the debate over patriotism is becoming, it is becoming more and more the case that logos and ethos are bleeding into one another, making it more and more difficult to tease apart. This difficulty was alluded to in the previous debate (the April, 2003 subcommittee hearing with Viet Dinh and minority witnesses), but the tension intensifies during the hearing with Ashcroft.

The reasons why this hearing with Ashcroft is a critical turning point in the difficulty of analysis is two-fold. One reason is quite simply that it is longer and more drawn out with more participants. At the end of the debate Sensenbrenner reports that 26 different witnesses asked tough questions of Ashcroft. That according to him, is a sign that the process is working. While Sensenbrenner's claim about the success of the process may or may not be true, it is definitely a sign that the process is getting more difficult to analyze. To be sure, more people are asking more penetrating questions than at any time prior in the legislative process. Another reason for the complexity, one that is definitely related to the first, is the fact that Ashcroft is the symbolic leader heading up the charge of patriotism. Those most critical of Ashcroft are so because of the fact that they feel their input on the Patriot Act has been overlooked, and more generally, that the democratic process is being bypassed altogether—in the name of patriotism. Those most supportive of Ashcroft view the same process as being an effective—appropriate to the situation—patriotic one. So, given the way in which the debate is framed, there is no middle ground—no room for compromise, and this lends itself to highly polarized, partisan debate evidenced by the facts that a) there is very little criticism of Ashcroft made by Republicans—only two minor hints of criticism of Ashcroft's ethos; and b)

there is virtually no praise whatsoever of Ashcroft made by Democrats—notwithstanding the obligatory "thank you's" at the beginning of a questioning period.

This debate typifies the sort of debate that makes "two ships passing in the night" an *apropos* metaphor for bad academic debate. There is no clash of any substance—the information is simply not available for that to happen. Ultimately, as analysis progresses into the next stage of debate, we find that Ashcroft gets the blame for that being the case. He eventually resigns his post as the Attorney General in November of 2004, and did so due to the divisiveness over the Patriot Act and other issues (King, 2004). While the issue of Ashcroft's resignation will receive greater attention later in analysis, the point is made here to illustrate the observation that the either/or dichotomy—the hallmark of the Bush Administration's war on terror—has lost its magical appeal. At one point it was a source of unity and cooperation; at this juncture in the debate, it is fully transparent as a divisive influence.

Opening Statements

Sensenbrenner

Chairman James Sensenbrenner opens the oversight hearing on the Department of Justice by describing the importance of the organization:

> The Department of Justice is one of the world's most important agencies and the world's premiere law enforcement organization. With an annual budget exceeding 20 billion and a workforce of over 100,000 employees, the Department is an institution whose mission and values reflect the American people's commitment to fairness and justice (United States Department of Justice, 2003, p. 1).

So not only does the Justice Department have an important law enforcement function according to Sensenbrenner, but symbolically, it represents American values. Furthermore, Sensenbrenner reports that, "The importance of the Department has only increased since the tragic events of September 11. On that day, America was struck by an

adversary united only by its hatred of the values America represents" (United States Department of Justice, 2003, p. 1).

After discussing the importance of the Justice Department, Sensenbrenner describes the way in which the Judiciary Committee assisted the Justice Department in the war on terror: "In the wake of these attacks the Judiciary Committee has acted with bipartisan dispatch to provide the Department with the resources to effectively assess, detect, prevent and punish those who threaten our security" (United States Department of Justice, 2003, p. 1). Following description of the role of the Judiciary Committee as having acted with "bipartisan dispatch," Sensenbrenner describes his own personal role in leading that charge from the beginning of the process: "When you last testified before the Committee, Mr. Attorney General, I expressed strong support for equipping law enforcement to meet emerging threats, while reiterating my commitment to preserving the civil rights and liberties that distinguish us as Americans" (United States Department of Justice, 2003, p. 1). He goes on to say, "I was pleased to introduce and lead Congressional passage of the PATRIOT Act, which has strengthened America's security by providing law enforcement with a range of tools to fight and win the war against terrorism" (United States Department of Justice, 2003, p. 1). Sensenbrenner then argues that the process has been working and defends his argument by mentioning an example of a couple of members of a terrorist sleeper cell who were convicted as a result of the Patriot Act.

In the next segment of text, Sensenbrenner describes a "fundamental shift" in the ethos of the Justice Department: "In a relatively short period the Justice Department and FBI have made impressive gains toward assessing and preventing terrorist attacks before they occur. This fundamental shift in focus is only beginning to pay long-term dividends

for the security of all Americans" (United States Department of Justice, 2003, p. 1). This shift in focus becomes a very, very important part of defining the ethos of the Justice Department. Not only is it a pragmatic shift in operations, but also, as we have seen in previous debate and as we will see in later testimony, the shift symbolically reconfigures accountability to the American public. Traditionally, the Justice Department's role has been primarily to prosecute criminal behavior; now, the role changes to one that prevents it—this shift means that they are now responsible for protecting the national security of Americans. They are now more able to legitimately use "national security" as a justification for secrecy, much like the military, whereas prior to the shift, this justification was not quite as readily available.

As Sensenbrenner reiterates, he is a supporter of the shift; yet he does claim that from the beginning of the process, he has been critical and will continue to be critical into the future:

> However, as I stressed during legislative consideration of the PATRIOT Act, my support for this legislation is neither perpetual nor unconditional. I believe the Department and Congress must be vigilant toward short-term gains which ultimately may cause long-term harm to the spirit of liberty and equality which animate the American character. We must maintain the fundamental commitment to ensure the protection of Americans while defending the beliefs that make us Americans. (United States Department of Justice, 2003, pp. 1-2)

So in principle, Sensenbrenner—a supporter of Ashcroft, agrees with the opponents of Ashcroft in that there does need to be oversight.

Having established that oversight, very generally speaking, is important to all involved, the difference in opinion is whether the concurrent level of oversight is effective. According to Sensenbrenner, it most definitely has been: "To my mind, the purpose of the PATRIOT Act is to secure our liberties, not to undermine them. In order to ensure the proper application of the PATRIOT Act, the Committee has closely overseen

its implementation" (United States Department of Justice, 2003, p. 2). He explains further what he means by effective oversight:

> On May 13 of this year, I was pleased to receive extensive responses to comprehensive questions which I jointly submitted to the Department with Ranking Member Conyers. These responses and testimony received at today's hearing will better enable Congress to continue to provide support and guidance that strengthens our collective ability to meet and defeat emerging threats (United States Department of Justice, 2003, p. 2).

Sensenbrenner continues to explain: "To further advance these goals <of oversight>, several Subcommittees of this Committee have conducted oversight hearings which have examined the operation and priorities of the Department" (United States Department of Justice, 2003, p. 2).[5] He argues further that he has been the driving force behind supporting the Justice Department, and checking it at the same time:

> As Chairman of the Committee, I have continued to help provide the Department with the legislative resources to carry out its crucial mandates. At the same time, this Committee has worked to ensure that the Department's structure, management and the priorities are tailored to best promote the purposes for which it was established (United States Department of Justice, 2003, p. 2).

Sensenbrenner ends his opening statement by painting a rosy picture of the level of cooperation that is occurring between the executive and legislative branches of government:

> Last year, Congress authorized the Department of Justice for the first time in over 20 years, a legislative accomplishment which reaffirmed our constitutional obligation to maintain an active and continuing role in organizing the priorities and overseeing the operations of the executive branch. By working in concert to identify solutions to the growing challenges faced by Federal law enforcement,

[5] As I have noted earlier, by my count, there has only been one subcommittee hearing focused on the balance between safety and liberty—the only other hearing that I know of, which dealt with the Patriot Act, was in the Financial Services Subcommittee and their discussion was focused on whether or not the Patriot Act was adequate to the task of cutting off funding to terrorist organizations—an important hearing of course but not necessarily the type of oversight which Sensenbrenner is portraying. Whether or not my count of the total number of oversight hearings is correct, and whether or not my assessment of the hearings not analyzed in this project is accurate, I am certain that Sensenbrenner's claim of "several hearings" is an exaggeration.

> Congress and the Administration are better able to provide for the safety and security of all Americans. (United States Department of Justice, 2003, p. 2)

Conyers

Given the press release cited in Chapter 4, provided by Conyers after the authorization of the act was completed, I expected him to go after Ashcroft's ethos rather aggressively, in a very explicit manner. Though he does make it clear that he was not happy with the way things have gone in the past, he seems to be very cordial about his protests—certainly much more so than during the aforementioned press release. To begin, he thanks Ashcroft for coming today, but then suggests that maybe it has been too long since he has appeared before the committee: "Chairman Sensenbrenner and I want to welcome, as we all do, the Attorney General of the United States, a person very familiar with the legislative process, and we gather here today after missing your presence for a while…" (United States Department of Justice, 2003, p. 2). The purpose according to Conyers, it is two-fold: "The first, of course, is to support the Department of Justice and the several agencies that work underneath it. The second is to oversight the Department of Justice" (United States Department of Justice, 2003, p. 2). Conyers and Sensenbrenner agree on the purpose of the hearing process. They just do not agree on the level of success it has had.

Illustrating the point, Conyers suggests that the process devoted to oversight thus far, has not been very fulfilling. He does so by looking to the future for a better process: "I am very pleased to suggest that with Chairman Sensenbrenner and yourself, we are looking at a longer-range way to examine all these functions that are under your Department's jurisdiction" (United States Department of Justice, 2003, p. 2). Then he explains what why it is important to look to the future in terms of oversight and that is because the current process is not adequate:

> In other words, it has been my view and the Chairman's that we could have a great little blast here today, but that it would be far more purposeful if we were to have several meetings in which we break down the subject matter, because every Member here is doing what they feel is important, with these kind of time constraints, even though you have given generously of yourself today, frequently don't serve as useful a purpose. And I am happy that your initial reaction to this proposal has been favorable. I hope that it can happen. (United States Department of Justice, 2003, pp. 2-3)

Here, Conyers lets Ashcroft know in a nice way that he has not been impressed with the amount of oversight available to the Committee, but acknowledges Ashcroft's "initial reaction" for an increased level of oversight in the future[6]. In the next segment of Conyers's speech, he articulates further, the importance of having more oversight, claiming that it is the responsibility of the legislative branch to prevent the country from approaching the war with a "no holds barred" attitude—a natural "national inclination" during such a time:

> And when you are engaged in war, there is always the national inclination to let's go get them any way we can, no holds barred. Well, we are a Nation of laws and not men. And it is in that arena that this Committee, of all the Committees in the Congress, has the jurisdiction over constitutional questions, the Department of Justice itself, the FBI, immigration, the laws that control the entire Nation. (United States Department of Justice, 2003, p. 3)

Conyers continues by acknowledging that there definitely needs to be change in anti-terrorism law, pointing to a great deal of controversy over the way in which the Department has approached the change: "All of these things are up for reexamination, and it is no secret that there has been a lot of questions and controversy about the way some of the things have been done in the Department" (United States Department of Justice, 2003, p. 3).

[6] It is interesting though that the type of oversight Conyers describes does not occur until a couple of years later when Congress is considering reauthorization of the sunset provisions.

Though there is promise of cooperation in the future, according to Conyers, the hearing scheduled today is almost a joke because there is no way all of our questions can even be asked, much less answered: "And so you have given me a very encouraging signal that we can go about this from your point of view and ours to responsibly categorize all of these different subject matters. I mean, to have one person come here and talk about A to Z and anything in between is a bit of a task for anyone" (United States Department of Justice, 2003, p. 3).

Conyers ends by re-emphasizing the sense of urgency for oversight, pointing out that the "spirit" of cooperation is the reason everyone is here today and furthermore, that the Congress's place in history depends upon how well they work together:

> It is in that spirit that we come together, Attorney General Ashcroft, hoping that we can do our job. We are marching into history. This is not only being examined in great detail right now, but it is going to be examined, as we all know, in far more detail after it is over. And we want to acquit ourselves as honorably as we can under these circumstances. And so I am very happy to welcome you here this morning. (United States Department of Justice, 2003, p. 3)

Conyers finishes and then Sensenbrenner begins to introduce Ashcroft, the day's only witness.

Ashcroft

The introduction of Ashcroft begins with what could be interpreted as something of a scolding, though the language is not direct enough to make quite that bold of a claim. Sensenbrenner encourages the people in this process to engage in open, public debate rather than through "sound bites" in the media, implying that maybe debate has not been that open in the past:

> And, you know, let me say that I think it is to the benefit of everybody to deal with these issues publicly rather than through dueling press releases, sound bites and the like, because we are dealing with very sensitive issues that involve complex issues of law and ultimately the security of the American people. And I think we all want to deal with this issue, these issues, in a bipartisan way. And I

> can tell you, Mr. Attorney General, that this will give the Justice Department perhaps a better opportunity to present its side of the argument than what might have been going on in the past. (United States Department of Justice, 2003, pp. 3-4)

While at first, the reminder seems like a general warning to everyone, the fact that he addresses Ashcroft specifically at the end and tells him that public debate would be a better way for him to provide his point of view "than what might have been going on in the past," leads me to believe that it was a criticism against Ashcroft specifically. Regardless of the potential of there being slight criticism proffered by Sensenbrenner during the transition, his introduction of Ashcroft ends on a positive note:

> It is my honor and privilege today to introduce Attorney General John Ashcroft. General Ashcroft was sworn in as the Nation's 79th Attorney General on February 1, 2001. His tenure has been marked by national circumstances faced by few, if any, of his predecessors. He is regarded by both supporters and detractors as a strong advocate for law enforcement and has taken steps to focus the Department's investigative and enforcement priorities since the attacks on September 11. (United States Department of Justice, 2003, p. 4)

According to Sensenbrenner, Ashcroft has had the toughest job out of any other Attorney General preceding him. Furthermore, he has a reputation for being "a strong advocate for law enforcement" by both his "supporters and detractors." With that introduction, Ashcroft is sworn in and is given the opportunity to make his opening statement.

It is noteworthy that Ashcroft does not begin his statement by saying that he is eager to work with Congress on ways to improve the workings of the Department of Justice; instead, he begins with a similar type of proclamation made by Dinh in the first hearing of this phase and that is that he simply needs the chance to explain, and that would make all criticism disappear:

> Chairman Sensenbrenner, thank you very much. And Ranking Member Congressman Conyers, thank you very much. I am grateful for the opportunity not only to appear before you today, but for the time we spent together a few minutes prior to this hearing talking about the capacity and the opportunity of the Justice

> Department to clearly explain the way in which we seek to secure the rights and liberties of the people of the United States of America. (United States Department of Justice, 2003, p. 4)

Continuing, he uses another familiar argument—the rhetoric of fear, to build up his case. He quotes the 1998 fatwah issued by the al Qaeda's top leaders—the one that supposedly led to events that started the war on terror:

> I come before this Committee having not forgotten the promise made to those stolen from us by terrorism's ideology of hate. The roots of this murderous ideology can be found in the 1998 fatwah issued by al Qaeda's founders, Osama bin Laden and Ayman al- Zawahiri, declaring war on American civilians, the international Islamic front for jihad. In it they wrote, ''The judgment to kill Americans and their allies, both civilian and military, is the individual duty of every Muslim able to do so and in any country where it is possible.'' I continue to quote: ''We in the name of God call on every Muslim who believes in God and desires to be rewarded to follow God's order to kill Americans and to plunder their wealth wherever and whenever they find it.'' (United States Department of Justice, 2003, p. 4)

Certainly, the quotation is scary to read and significant in and of itself. But what is perhaps more interesting from the standpoint of the focus of this analysis is the way in which Ashcroft introduces it. He says, "I come before this Committee having not forgotten the…murderous ideology" of the terrorists. He gives the impression that some people in the debate have forgotten—and that he is taking it upon himself to remind them of what happened on 9/11.

After presenting the problem, Ashcroft begins describing the solution. He acknowledges the leader of the solution, President Bush, as proposing a strong, patient means by which the terrorists will face justice. Also noticeable in the next quotation is another fear appeal and a reminder that people suffered on 9/11: "On September 11, bloodthirsty terrorists answered bin Laden's call for killing. Twenty months ago President Bush pledged that al Qaeda and the terrorist network would not escape the patient justice of the United States, for we would remember the victims of terrorism"

(United States Department of Justice, 2003, pp. 4-5). Other heroes serving as part of the solution are mentioned—the brave members of the military who have vowed to carry out Bush's war on terror:

> Today brave men and women in uniform abroad and at home answer our President's call for justice. Sworn to defend the Constitution and our liberties, and motivated by the memories of September 11, they live each day by a code of honor, of duty and of country, and they know that they must die preserving the promise— that they may die preserving the promise that terrorism will not reach this land of liberty again, for we are a Nation locked in a deadly war with the evil of terrorism. (United States Department of Justice, 2003, p. 5)

Ashcroft continues to go on and on reminding the audience that people have suffered on 9/11, again, acting as if he is the lone voice left who remembers them.

As the speech continues, Ashcroft gets more specific by mentioning specific names of people who have died. For instance, he says:

> We will not forget…that in Afghanistan on the dusty road to Kandahar, Army Sergeant Orlando Morales was killed on reconnaissance patrol 70 in a town called Geresk. He leaves behind a wife and a 17-month-old daughter. Sergeant Morales was in Afghanistan fighting to destroy the Taliban regime, terrorist operatives and their training camps. His sacrifice was not in vain (United States Department of Justice, 2003, p. 5).

Ashcroft continues to name names and provide personal stories to support his cause: "We will not forget that in the battles in Iraq, Marine Lance Corporal David Fribley of Warsaw, Indiana, was killed near Nasiriyah by Iraqi soldiers who pretended to surrender, but then opened fire. Lance Corporal Fibley made the ultimate sacrifice to free the Iraqi people and to eliminate a key sponsor of terror" (United States Department of Justice, 2003, p. 5).

In the next statement, Ashcroft takes a break from naming names to remind us that true Americans do not shy away from danger, almost implying that untrue Americans might: "We must not forget that this great fight for freedom did not end in Kabul. It will not end along the banks of the Tigris and Euphrates. The fight continues here on

America's streets, off our shores and in the skies above. Americans do not shy away from danger or turn away from threats to liberty" (United States Department of Justice, 2003, p. 5). But then, he gets back to providing examples of who the heroes are:

> On September 11 we saw our Nation's finest ideals in action: Firefighters and police officers who rushed to, not from, the World Trade Center. We saw Americans embrace duty, face danger, and sacrifice their lives for their fellow citizens and for freedom. On that tragic day, 343 firefighters and 71 police officers died in the line of duty. (United States Department of Justice, 2003, p. 5)

Ashcroft is clearly going to great lengths to freshen the intense emotions of 9/11 to get us sad, angry, and in a mood to want vengeance—an appeal to pathos that was so effective during the authorization stage of the act. In his opening statement alone, Ashcroft uses the rhetoric of remember-the-fallen heroes eight times including the next example, in which he specifically uses the word "patriot":

> As we weigh the constitutional methods we will use to defend innocent Americans from terrorism, we must not forget the names that unite us in our cause: Cherone Gunn, Ronald Scott Owens, Ronhester Santiago, Timothy Saunders, Lakiba Nicole Palmer. These are some of the brave men and women of the USS Cole who were murdered by al Qaeda in 2000. A week ago when I met with the families of those who died on the Cole, they pleaded with me not to forget them or those who died. I am committed to those families and those **patriots** (emphasis mine) not being forgotten. (United States Department of Justice, 2003, p. 8)

In this quote, it is interesting that he turns these people's pleas to not forget their dead family members into support for his version of the Patriot Act.[7]

Ashcroft continues his opening statement by talking about specific details of the lives of some of those people he just mentioned, such as the names of daughters, plans for

[7] A bit later in analysis, we find a critic of Ashcroft, Jerrold Nadler (D NY) responding to this sort of ethos by using the ethos of family members of those who died in the World Trade Center as support for an argument in favor more restrictions on the act in the direction of increased civil rights.

after military service etc and then argues that all of these names are reminders that we are at war with ruthless enemies, which we must be able to outthink:

> The names that I have recalled today all bear silent, painful witness to the fact that the United States is a Nation at war. We must never forget that we are in a war to preserve life and liberty. We must not forget that our enemies are ruthless fanatics and seek to murder innocent women and children, men, to achieve their twisted goals. We must not forget that in the struggle between the forces of freedom and the ideology of hate, our challenge in this war against terrorism is to adapt, to anticipate, to outthink, outmaneuver our enemies while honoring our Constitution. (United States Department of Justice, 2003, pp. 8-9)

Ashcroft is obviously using the rhetoric of fear again to generate support for his Patriot Act, which he uses a total of five times during his opening statement, and a total of nine times throughout his entire testimony.

I will display one more of these fear appeals, and then move on to other areas of analysis. This one is particularly fear-inspiring because like in previous quotations, it incorporates direct quotations from terrorists; it also includes an appeal to the ultimate fear: weapons of mass destruction:

> We must be vigilant. We must be unrelenting. We must not forget that al Qaeda's primary terrorist target is the United States of America. Even though recent attacks were overseas, the terror network is committed to killing innocent Americans, including women and children, by the thousands or even the millions if they can. Nasser al-Fahd is a prominent extremist Saudi cleric known to have significant connections to al Qaeda operatives who seek his religious justification and his support for terrorist operations. Just last month he issued a new fatwah entitled 'The Legal Status of Using Weapons of Mass Destruction Against Infidels.' This fatwah lays out, last month, his religious arguments for the use of weapons of mass destruction against Americans, including women and children. Let me quote. He puts it this way, and I am quoting now, of course, translated: 'Anyone who considers America's aggressions against Muslims and their lands during the past decades will conclude that striking her is permissible.' Al-Fahd asserts, and I am quoting again, 'The weapons of mass destruction will kill any of the infidels on whom they fall regardless of whether they are fighters, women or children. They will destroy and burn the land. The arguments for the permissibility are many.' I quote further: 'If a bomb that killed 10 million of them and burned as much of their land as they have burned Muslims' land were dropped on them, it would be permissible. (United States Department of Justice, 2003, pp. 7-8)

The rhetoric of fear is of course not a new argument. It was used a great deal in the authorization phase of debate, but now it seems to be used to greater effect because of the fact that another 9/11 style attack has not occurred to this point. In other words, with the Patriot Act, we can feel safe once again—as long as the crazy critics do not take it away from us.

Ashcroft and those who support him can make the argument, and do so a total of nine times, that the Patriot Act has directly prevented other attacks. One example of this argument occurs in Ashcroft's opening statement. It is a rather drawn out argument where he gives some statistics building up to the main point. He begins by pointing out that "alleged terrorist cells in Buffalo, Seattle, Portland, Detroit were arrested, along with more than 100 other individuals who were convicted or pled guilty to Federal crimes as a result of our post-September 11 terrorism investigations" (pp. 6-7). Ashcroft claims that "we are shutting down the terrorist financial infrastructure…and building a long-term counterterrorism capacity" because of the Patriot Act. But, "most important," according to Ashcroft, "no major terror attack has occurred on American soil since September 11" (United States Department of Justice, 2003, p. 7).

Though we can feel more safe because of the Patriot Act, Ashcroft does not want us to become too comfortable because according to him, our success only makes the terrorists more desperate for an attack:

> Let me be clear. Al Qaeda is diminished, but not destroyed. Defeat after defeat has made the terrorists desperate to strike again. Bombings in Tel Aviv, Israel, Bali, Indonesia, Casablanca, Morocco, and Riyadh, Saudi Arabia are bitter reminders that the cold-blooded network of terror will continue to use the horror of their heinous acts to achieve their fanatical ends. Innocent American and Saudi citizens died in the Riyadh compounds last month at the hands of al Qaeda. (United States Department of Justice, 2003, p. 7)

The intense threat Americans are still faced with by terrorism is reinforced.

Afterward, a direct connection is made to the ethos of the people involved in the present debate. This is accomplished by bringing in the all-or-nothing dichotomy instigated by Bush at the very beginning of the war on terror. I would make a couple of notes though about the argument before displaying the exemplar. One note is that the false dichotomy was not noticeably present during the previous hearing with Viet Dinh; it is Ashcroft who brings it back to the table under the framework of formal, public debate. Another note is that still—to this point in the debate, I cannot recall one single argument made by anybody involved with the legislative process articulating any kind of a desire that provisions of the Patriot Act are not necessary. Recalling analysis of the hearing with Dinh and the minority witnesses, my interpretation included a great deal of surprise at how subdued the minority witnesses' responses were. Their response to virtually every provision of the act is that it is necessary and useful for winning the war on terror. The criticism is very simply that there needs to be more sharing of information so that oversight is more effective. Some rewording is suggested for certain provisions of the Patriot Act, as well as for some legal precedent that is being modified by the Patriot Act, but NO ONE, to the best of my interpretation, suggests that the act is not necessary.

Even the more antagonistic critics such as Nadler believe that anti-terrorism legislation similar to what is found in the Patriot Act is necessary. Keep this in mind when reading this next quotation by Ashcroft:

> Despite the terrorist threats to America, there are some, both in Congress and across the country, who suggest that we should not have a USA PATRIOT Act. Others who supported the act 20 months ago now express doubts about the necessity of some of the act's components. Let me state my view as clearly as possible. Our ability to prevent another catastrophic attack on American soil would be more difficult, if not impossible, without the PATRIOT Act. It has been the key weapon used across America in successful counterterrorist operations to protect innocent Americans from the deadly plans of terrorists. (United States Department of Justice, 2003, p. 8)

Ashcroft completely ignores the complexity of the debate and jumps straight into an all-or-nothing assumption that those who criticize his act do not see a need for legislation at all. While his statement may be applicable to some "conspiracy theorist" critics outside of the debate, I have not seen one actual participant in the legislative debate display the attitude that we should not have anti-terrorism legislation resembling the Patriot Act. Ashcroft groups all critics into the same category, and symbolically labels them as unpatriotic.

In the next segment of the transcript, after spelling out the group of unpatriotic individuals (his critics), Ashcroft continues to define who the patriots are. We know from above, that members of the military, the heroes of 9/11, those who were killed in 9/11 and their family members are all patriots. But at the end of the speech, he also defines other groups of people as patriots as well. First and foremost, the members of the Department of Justice are patriots according to Ashcroft:

> The United States Department of Justice has been called to defend America. We accept that charge. We fight in the tradition of all great American struggles with resolve, with defiance and honor. We fight to secure victory over the evil in our midst. We fight to uphold the liberties and the ideals that define a free and brave people. Every day the Justice Department is working tirelessly, taking this war to the hideouts and havens of our enemies so that this never again touches the hearts and homes of America. (United States Department of Justice, 2003, p. 9)

Furthermore, those who support the Justice Department are patriots. For instance, those in Congress who gave Ashcroft the "constitutional weapons" are patriots: "I thank you for this opportunity to testify today. I thank you for the constitutional weapons that you have provided that make the war against those who fight freedom a war whose conflict will be resolved in victory" (United States Department of Justice, 2003, p. 9). Additionally, those Americans who have "faith" in Ashcroft's cause are also patriots: "And I thank the American people for their support and their faith in the justice of our

cause" (United States Department of Justice, 2003, p. 9). At this juncture, Ashcroft brings his opening statement to a close and opens the floor to questions.

Before moving to the next section of analysis, we must recognize the docile, passive nature of Ashcroft's patriotism. Patriots put faith in the Justice Department and provide it with the "constitutional weapons" it needs to fight the enemies.

Arguments of the Critics

We Are All Still Outraged by 9/11

Maxine Waters (D CA) responds to Ashcroft's all-or-nothing dichotomy by reminding him that everyone is outraged by 9/11 and that no one has forgotten about those who died: "I first want to say that we all were shocked and still are outraged by what happened on 9/11. We, too, denounce terrorism in any form" (United States Department of Justice, 2003, p. 13). When she says we "TOO" are all mad, she substantiates the claim that Ashcroft at least made some people believe that he was questioning their sense of patriotism through the all-or-nothing dichotomy. Only someone who was not loyal to the country could not be mad, not want to prevent terrorism, and/or not remember the heroes of 9/11. In many ways, this response is very similar to the "I want to prevent terror…but…"ethos that was so prevalent during the authorization stage except here, the argument becomes more offensive in tone—Waters seems indignant that she even feels the need to clarify her anger over 9/11.

Another member of the committee, Howard Berman (D CA), also feels obligated to defend his ethos as a patriotic American who wants to fight hard in the war on terror. He reports that Congress has demonstrated bi-partisan support for a whole list of things proposed by the Justice Department—things that are needed to become a crime

prevention agency rather than a criminal prosecution one…**but**… the list of "institutional failures" provided by the Inspector General is troubling. His testimony follows:

> Look, I think the Congress has demonstrated on a bipartisan basis our commitment to join you and the Administration in this battle against what you described accurately as a fanatical and ruthless enemy while at the same time, using your words, honoring the Constitution and respecting the rule of law. We have authorized two military campaigns in the use of force, we have passed the PATRIOT Act, we have appropriated money, we have done the most massive reorganization of the executive branch premised on the need to be more effective, not simply at prosecuting, but at preventing terrorism. I appreciate your response to the Chairman in the context of the consultations with the Congress and even your comments with respect to the Inspector General. I mean, what concerns me, when the Inspector General provides a list of institutional failures at DOJ, prolonged detentions without charges; a policy referred to as hold until cleared that led to average detentions of 80 days, but sometimes up to 200 days; a policy of obstruction of access to counsel, and an unwritten policy of denying bond for all aliens, a policy not restricted to suspected terrorists; some of that is very troubling. (United States Department of Justice, 2003, pp. 17-18)

From the very beginning of his statement, when he begins by saying, "Look…" annoyance is detected. He is trying to set the record straight and does go on to detail the things that the current critics have signed on to; he then says…**but**…and sets the record straight about the egregious alleged offenses that they can not overlook. The form of the argument certainly takes on the "I support fighting terrorism…**but**…" ethos of the authorization stage, but close analysis of the content of the message suggests a different tone behind it.

Six different minority members in this debate formulate arguments in a similar fashion. The debaters who use the argument form are Waters, Berman, Nadler, Meehan, Sanchez, and Schiff. While they still seem to find the need to justify their credibility as patriots, resentment has developed over this being the case.

Not Enough Oversight—Lack of Cooperation

As mentioned in the introduction to this particular debate, and as a theme running throughout the entire analysis, critics of Ashcroft have real problems with the democratic

process utilized to oversight the Patriot Act and are very vocal about that issue. The Justice Department, according to some critics, has simply not been very cooperative with the legislative branch of government. Conyers, in his opening statement, puts forth this underlying argument and it is extended eight different times throughout the course of this debate, once by a majority member—Sensenbrenner ironically enough and then by various minority members: Conyers, Jackson Lee, Schiff, and Watt. It is interesting that Sensenbrenner, after praising the way in which the process has worked so well during his opening statement, begins with this type of criticism. He accuses Ashcroft and the Justice Department of not cooperating with Congress over the alteration of the Levy guidelines, an issue brought up in the previous debate with Viet Dinh:

> Mr. Attorney General, last May during the Memorial Day recess of Congress, you revised the Justice Department investigative guidelines that were first promulgated by Attorney General Levy during the Ford administration after extensive consultation with the Congress and updated by his successors. To what extent did the Department of Justice consult Congress before issuing the revised guidelines in August of last year? And what justified departing from the tradition of consulting Congress? Do you think further revisions are necessary, and if further revisions are planned, do you intend to return to the spirit of cooperation which typified the earlier revisions? (United States Department of Justice, 2003, p. 10)

Although the argument does not deal with oversight of the Patriot Act directly, it does very much speak to the ethos being negotiated by debate over the Patriot Act. In fact, Ashcroft's response to this question, which is displayed below under the heading, "The Spirit of the Patriot Act," provides a rhetorical link between the symbolism of the Patriot Act and practically every single action taken by the Justice Department since 9/11.

Melvin Watt (D NC) is the next person to make the lack of cooperation/oversight argument, and applies it specifically to enactment of the Patriot Act. He claims that the current hearing is "long overdue," which is unfortunate because the oversight process is the key to putting the public at ease:

> Thank you, Mr. Chairman. Thank you, Attorney General, for being here. I know you have been very busy, but I think this hearing is long overdue, because I think the American people want to see the creative tension that you are talking about here and have the sense that this Committee and Congress, in general, is involved in trying to help define what the appropriate balance is between protecting ourselves and safeguarding individual and group rights. And this setting helps to, I think, set the American people at ease, and I want to thank the Chairman and Ranking Member for facilitating this. (United States Department of Justice, 2003, p. 32)

Toward the end of this statement, he does submit that the current hearing helps to put the public at ease, but following, he also goes on to say that he would have to wait about expressing some of his "global concerns…until the next opportunity when the Chairman and Ranking Member and yourself work out a process for going into greater detail" (United States Department of Justice, 2003, p. 32). Sheila Jackson Lee (D TX) is the next critic to bring up the lack of oversight and in doing so, gets a bit more personal with her attack against Ashcroft.

> Thank you very much, Mr. Chairman. Mr. Attorney General, it has been too long, but we welcome you back. All of us experienced the righteous indignation that you have so eloquently expressed in your testimony today post-9/11, during 9/11, and continuously as we support the war on terrorism. But my fear is that we may go to the point of changing the culture of America, the first amendment protections, the fourth amendment protections. So frankly, I believe we owe a debt of gratitude to Glenn Fine, the Inspector General of the United States Department of Justice, for several reasons. Let me quickly cite these and raise some questions of my concern. (United States Department of Justice, 2003, p. 50)

Jackson Lee begins in a rather subdued way—in much the same manner as Watt and Conyers stated similar arguments earlier. She begins by simply saying that, "it has been too long." However, she quickly gets more personal in her attack by accusing Ashcroft of "righteous indignation.[8]"

[8] The latter part of the quote demonstrates another line of argumentation to be analyzed a bit later in analysis dealing with the debate over Glenn Fine's ethos—the Inspector General who had just released a scathing report of the Department of Justice's treatment of illegal immigrants detained for an indefinite period of time following 9/11.

An exemplar from Adam Schiff (D CA) ends demonstration of this line of argumentation. Here he refers to the last hearing where he "raised the possibility of having a classified hearing so that we could not only have the opportunity we already have to review the classified information…but ask questions and get timely responses, and I just would like to make a further request that we have the opportunity to do that" (United States Department of Justice, 2003, p. 62). So, without getting personal whatsoever, Schiff expresses disappointment in the lack of opportunity to have questions answered in a "timely" manner.

The "Culture of Concealment"

So the initial line of argumentation is simply that there has not been appropriate opportunities for oversight; extending upon that, additional argumentation is provided claiming that even during the few opportunities available for questions, not enough information is released by the Justice Department to ask meaningful ones—officials are not being forthright in terms of the evidence disclosed to Congress in a public forum. Several different critics made this argument a great deal in the previous debate with Dinh; here, William Delahunt (D MA) aggressively extends it in the current debate. He begins by saying, "Now today, the reality is that many Americans are increasingly uneasy about some of these measures…" (United States Department of Justice, 2003, p. 23) and mentions section 215 (the Library provision), the Carnivore program, the TIPS program for informants, and the Total Information Awareness Project as examples.

While these programs are in and of themselves, according to Delahunt, cause for fear, the real fear comes from the appearance that the government is not disclosing the way in which these programs are being implemented:

> It appears that the Government or the American people feel that the Government is intent on prying into every nook and cranny of people's private lives while, at the same time, doing all it can to block access to Government information that would inform the American people as to what is being done in their name (United States Department of Justice, 2003, p. 23).

Delahunt then explains the impact of the policy of non-disclosure: "As Judge Keith wrote in the *Detroit Free Press* v. *Ashcroft*, and I am quoting now, ''Democracies die behind closed doors. When Government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation'' (United States Department of Justice, 2003, p. 22).

After making the implication that the Administration is letting democracy die, Delahunt reiterates the cause of that death: "the Department of Justice has persisted at withholding information from the courts, congressional Committees, and the public. It has made novel and sweeping claims of executive privilege and, I submit not to protect the national security, but to shield officials from embarrassing revelations" (United States Department of Justice, 2003, p. 23). The government is "obsessed with secrecy…a culture of concealment" (United States Department of Justice, 2003, p. 23), Delahunt concludes.

The Power Grab Argument

So after establishing that officials have found a means around oversight, the groundwork is laid to expand upon the implications of unfettered power—essentially, according to critics, government officials can do whatever they please from within the culture of concealment. Jarrold Nadler (D NY) argues that the Bush Administration has shielded itself off from oversight so much so that "some bureaucrat" within the Department could imprison virtually anybody she wanted to in the name of national

security. He then contextualizes his argument historically through a reference to the Magna Carta (similar to a quote from Nadler in the previous debate):

> The Justice Department claims in briefs before the fourth circuit and other courts that the President has the untrammeled power to designate anybody, any American citizen as an enemy combatant, and that the courts lack the jurisdiction to question his determination. That would give the President the power on his say-so or really, on the say-so of some bureaucrat, because he doesn't do the investigation, to imprison any American or anybody else forever with no legal process, no due process, not even a writ of habeas corpus. That is the claim of executive power that except for Mr. Mugabe, nobody in English-speaking jurisdiction has made since before Magna Carta. (United States Department of Justice, 2003, p. 26)

A bit later in the debate, Jackson Lee reports that indefinite detention by the Justice Department occurred despite being advised it is unconstitutional:

> Clearly, the Supreme Court has said that you have to charge a detained person within 48 hours and holding someone longer than that without a charge presumptively violates the Constitution, and no court has ever said that it is okay for someone to be held for weeks or months without charge, and there is no distinction as to whether or not this is a citizen, illegal alien, or otherwise. I would also say that Department officials were advised that holding detainees in this manner violated the fourth amendment. They were on notice. (United States Department of Justice, 2003, p. 50)

Then several pages later in the transcript, Schiff adds another little twist to the argument that deserves attention.

He utilizes his ethos as a former assistant U.S. Attorney to make the power abuse argument. Schiff begins by arguing that because there is no significant distinction between a criminal and a terrorist, according to the Justice Department, it can pick and choose the easiest route to prosecute a terrorist depending upon the level of evidence attained: "if the evidence isn't sufficient to prove in a court beyond a reasonable doubt, then we will treat them as an unlawful enemy combatant, so the lesser the quantum of evidence will mean that they are characterized in a way that you never get put to the proof in court" (United States Department of Justice, 2003, p. 63). Then Schiff claims

that as somebody who used to be in a similar position to Ashcroft, he would not want that kind of power: “I was an assistant U.S. Attorney for six years. I wouldn’t want the unbridled discretion to designate an American as an enemy and lock them up without judicial review. Why not go to court and have someone review the work of the Justice Department?” (United States Department of Justice, 2003, p. 63). So, Schiff adds a bit more credibility to the power grab line of argumentation by asserting his ethos as a former member of the Justice Department.

In all, the direct accusation that the Administration has intentionally abused its power—whether it be through detaining individuals illegally or concealing the evidence that would lead to oversight, was made by critics a total of 12 times by five different individuals (all were minority members of the House): Waters, Nadler, Jackson-Lee, Delahunt and Schiff.

The Defense of Ashcroft

From the very beginning, during the authorization phase, the entire ethos behind the Department’s message has been that we must fear the terrorists and that we have to fight the war against terrorists beginning right now—we do not have time to talk, but do not worry according to officials, because “you can trust us.” Though it may sound like a broken record, the “you can trust us” argument has to be a part of the Department of Justice’s argument for credibility, in order for their message to be successful. Given the way in which the act was passed, and all the leeway needed to make the necessary changes going on in the department, they have to try and argue that they are trustworthy and will do good by the new authorities they have been granted—this is the thrust of Ashcroft’s argument for ethos.

So the simple fact that they make this argument continuously throughout the debate is not surprising, and frankly, not terribly interesting—it is to be expected. But it is interesting and challenging to observe and analyze the various ways in which the attempt is made to extend the argument during this phase of the debate. Ashcroft's defense of the Justice Department's ethos gets more and more complicated as critics begin to ask more and more questions.

The level of complexity rises. As Delahunt points out, the Committee was overwhelmed at the time in which the Patriot Act was passed. They knew some change was needed so they went ahead and enacted the Patriot Act without asking a whole lot of questions. The authorization phase was a simple process. But the sunset of the Patriot Act provisions would ensure that the tough questions do get asked:

> Mr. Attorney General, you last appeared before this Committee some 18 months ago and asked us to enact the PATRIOT Act. At that time we were all struggling to absorb the magnitude of the assault on the country and the loss of innocent lives. Now, those are tough circumstances in which to find the proper balance between national security and the freedoms and the values which define us as a people. That is why the Committee insisted that the PATRIOT Act include a provision to sunset many of the new powers granted to the Government to conduct covert surveillance. (United States Department of Justice, 2003, p. 22)

Clearly, given the nature of the argumentation by the critics here, and the questions asked of Mr. Ashcroft, the time has come to begin asking those questions. Ashcroft's response to those questions is quite complicated, but very interesting to say the least.

The "Spirit" of the Patriot Act

The most interesting defense of ethos by Ashcroft, one that would set the tone for much of his argumentation throughout the rest of his testimony, is offered to the audience during the very initial line of questioning conducted by Sensenbrenner. Sensenbrenner's question, which was analyzed above, pertains to the revision of the Levy guidelines and asks Ashcroft why his Department did not cooperate with Congress and consult with

members prior to making the changes. Ashcroft argues, among other things, that he thought the alterations to the Levy guidelines were appropriate because of the "spirit" of the way in which the Patriot Act was passed:

> Following September 11, the Department consulted very extensively with this Committee and Members of the Congress about the PATRIOT Act. I remember within days after September 11, I think by the next Sunday, we all met together, numbers of us, and we worked very closely on that. In terms of the change in the guidelines which govern the internal operation of the Justice Department, the consultation was not substantial or significant. Perhaps I came to the conclusion that extending those guidelines in the same spirit as the PATRIOT Act had been extended was something that would be appropriate and would meet with the approval of the Congress. But I must say that we did not have extensive consultations about this exercise of executive responsibility to define the way in which the executive branch would conduct investigations. (United States Department of Justice, 2003, p. 11)

Ashcroft's response provides a rhetorical link between the Patriot Act and virtually every other anti-terrorism action taken by the Department of Justice in the post 9/11 world and verifies the accuracy of the rhetorical framework from which this project began as discussed in the introduction.

The way in which the acronym of PATRIOT is used as the title of antiterrorism legislation transcends beyond the level of "referential symbolism" (Edelman, 1964) because of the way in which it moves beyond a simple description of the actions taken. When the title of the act shifted from the *Mobilization Against Terrorism Act of 2001*, to the USA PATRIOT Act, the entire value system of the Bush Administration in relation to the war on terror became bottled up in one phrase. The word PATRIOT becomes a "condensation symbol" (Edelman, 1964) for the entire war on terror and is largely responsible for the way in which the act was rushed through Congress. Thus, when Ashcroft refers to the "spirit" of the Patriot Act applied to other contexts, he clearly indicates that he feels he has the green light to do whatever he deems necessary. The

implications of the power of PATRIOT as symbol would be impossible to deny after reading this exemplar.

Later on in the debate, during the reauthorization stage, the symbolic implications become even more concrete when critics end up grouping arguments against a wide variety of Bush policies under the rubric of debating the Patriot Act. The reason is because there was no other way to voice dissent—the debate over the Patriot Act became a smokescreen for an entire array of Bush policies such as the torture of enemy combatants, the NSA domestic spying program, and etc. No oversight whatsoever was occurring over those policies proper; thus critics attempt to bring attention to them through the Patriot Act[9].

The Patriot Act has Prevented Further Attacks

Much of Ashcroft's strategy in this hearing is to extend the original "spirit" of the Patriot Act by reminding us of how urgent a need there is for it. Much of this strategy depends upon an argument very familiar to those who are following this debate closely: fear the terrorists because they are evil, crafty, and now desperate for another attack, as Ashcroft reminds us in his opening statement. However, this reminder is not something that is forgotten as the debate progresses. In all, the "fear the terrorists" argument, in its original authorization form is made a total of nine times by Ashcroft specifically during the course of the debate.

In the debate, fear the terrorists is extended in a form unique to the implementation stage of oversight. The unique form of the argument is that Ashcroft and

[9] However, that they expand the scope of the Patriot Act debate to the various other topics is ultimately what brings the debate to an abrupt halt. Sensenbrenner gets angry over the extra-topical discussion and shuts critics down. This then leads to the attempt at filibuster championed by Russell Feingold in the Senate, which does lead to the debate being extended past the original sunset date and gaining more time to debate the act.

the Patriot Act have been successful in preventing further attacks. Perhaps the best exemplar comes from John Hostettler (R IN):

> I thank the Chairman. General Ashcroft, thank you for being here and thank you for your service to our country. I believe that the Office of Inspector General report does a grave disservice to yourself and all of the other dedicated Justice Department employees who work tirelessly to protect us from another devastating terrorist attack in the days immediately following 9/11. While the report pays lip service to the incredible stresses that you as well as the men and women of the Justice Department faced and the responsibility that all of you bore for thousands of American lives, it attacks your response to the terrorist strikes even after we have learned the stunning success of your efforts. There has not been another major terrorist attack on American soil since 9/11. The credit belongs largely to you and the Department. I am not sure that we would be in the same situation if you had been constrained by the inconsistencies brought out by the Office of Inspector General. (United States Department of Justice, 2003, p. 30)

Not only does Hostettler paint Ashcroft and the entire Department of Justice as the patriots who saved the day, but he also paints the Inspector General, as well as the other critics he represents, practically as terrorists who are intentionally standing in the way of Ashcroft's saving of the world.

We will come back and examine the ethos of the Inspector General in detail later. The focus now is upon Ashcroft's ethos and another great exemplar comes from Howard Coble (R NC):

> I recently heard a speaker who is nationally recognized as a highly regarded writer, and in his speech he said it is miraculous that we have not been attacked subsequent to 9/11. He furthermore said one of the persons to be credited for that is John Ashcroft. Now I know you have been beneficiary of criticism, Mr. Attorney General, so I have just laced that criticism with a glowing compliment. (United States Department of Justice, 2003, p. 36)

The fact that another terrorist attack had not been successful since 9/11 and the idea that Ashcroft and the Patriot Act had something to do with it is obviously an enhancement of Ashcroft's ethos, but it also reinforces the "fear the terrorists" argument with an emphasized sense of urgency. In all, the argument that Ashcroft and/or the Patriot Act

have prevented another terrorist attack occurs 10 times and is made by seven different majority debaters: Ashcroft, Hostettler, Coble, Forbes, Chabot and Flake.

We Consult (even though we're perfect)

Leading up to this exemplar, Ashcroft had just stated that he altered the Levy guidelines in line with the "spirit" of the Patriot Act. Here, he promises the misunderstanding on that issue was an honest mistake because he appreciates consultation:

> I believe that there is value in consultation, and I would look forward to consulting with Members of this Committee about guideline adjustments in the future, because I think we can do a good job when we work together. And I—and any assumptions that I might have made that presumed that the kind of ideas of extending the guidelines to extend them in the same way that we had worked collaboratively to extend the law in the PATRIOT Act may have been one that presumed in a way that overestimated our previous consultation. (United States Department of Justice, 2003, p. 11)

This response is surprising. I am not accustomed to hearing Ashcroft admitting any kind of fault whatsoever. To the best of my interpretation and recollection, this exemplar marks the first time during the course of the entire process where he, or any of his colleagues for that matter, do so. Afterward, he finishes his response to the question about the lack of cooperation by again, admitting there was not substantial collaboration, then saying that he looks forward to future collaboration on the issue.

He ends this argument by again admitting a mistake and promising that he views consultation as beneficial:

> So I would say this: That the consultation was not substantial. I would look forward in further changes to guidelines regarding the conduct of the Department to improving those guidelines in the way that I could best do so, and I think including consultations would be helpful to an end product which was of value to the American people (United States Department of Justice, 2003, p. 11).

Again, for Ashcroft to admit fault is an anomaly during analysis. On every other issue, even while promising more cooperation with third parties, he vehemently defends the Department of Justice as having acted in perfect accordance with the Constitution.

In the following response to a line of argumentation by Maxine Waters represents a more typical response from Ashcroft. Waters, by referencing the Inspector General's report, has just claimed that the way in which the indefinite detention of immigrants took place in the immediate aftermath of 9/11 was unconstitutional. Ashcroft denies any mistakes whatsoever in the process:

> The last point I would make, and I'm sorry that my answer has been a little disjointed on this, in all of the conduct of the activities of the Justice Department, we have not violated the law, and we will not violate the law. We will uphold the law. If there are ways for us to improve the way in which we uphold the law, we are interested in doing so and will work together with the Inspector General to do that as we have in time after time, but, you know, previously criticized us because we don't hold people that went out and committed crimes, whether it was the serial murder in Texas, or whether it was the other situations where individuals were not detained. In this case, we simply said that given the nature of this activity, terrorism, given the circumstances in the country, given the fact that illegals ordered for deportation are not entitled to be released, we did not release them. (United States Department of Justice, 2003, p. 16)

In this response, he promises that his department did not break the law and that they would never break the law; however, at the same time, they are always willing to collaborate on how to do an even better job in the future.

A bit later, in a response to Berman on the same issue, he claims the same thing. He says that they carried out the entire process in a lawful manner. He goes on to say that though, that in the future, he would like to see the process carried out more quickly, but sticks by his ethos that they did everything perfectly under the circumstances:

> Given the fact that these were a category of individuals associated with this investigation, we felt that before we released a person in this setting, we should have clearance, and so we asked the FBI to help clear these individuals. God forbid if we ever have to do this again, we hope that we can clear people more quickly. We would like to clear people as quickly as possible. There is no interest whatsoever that the United States of America has in holding innocent people. Absolutely none. It is costly. It takes up resources. It makes it difficult for us to do what we need to do with other people who are threats. But we felt in the aftermath of that event, with the idea that even from the general population that 85 percent abscond and just take off if they are let out and don't show up for their

> deportation, can't be found, we ought to be more cautious in this setting, given the circumstance, and frankly, that is a caution which I think was well taken. Can we do a better job? I would hope that we will also continue to do a better job in everything we do. And our effort in that respect is something that we will continue to try and improve. (United States Department of Justice, 2003, pp. 19-20)

In this statement, not only do we see an exemplar of the category being analyzed, but we also see why Ashcroft's ethos is so difficult to analyze. On the one hand, he acknowledges that in this instance, his department valued safety over liberty when he says, "God forbid if we ever have to do this again…" Do what again? If everything was done according to the letter of the law and no rights were violated whatsoever, then what is there for God to forbid? He finishes the sentence by saying "…we hope that we can clear people more quickly" (United States Department of Justice, 2003, p. 19). However, in the next paragraph, he states that his department made the perfect decision under the circumstances. Then at the very end of this statement, he asks, "Can we do a better job?" which almost sounds as if he is going to admit some sort inadequacy, but then he defers to a very generic answer of, "I would hop that we will also continue to do a better job in everything we do" (United States Department of Justice, 2003, p. 20). So, reinterpreting the answer…it is "no…we did a perfect job, but, since I am trying to convince the audience that I am a cooperative fellow, I'll acknowledge that we are always trying to do a better job—in a generic sense—in everything that we do" (the quotation marks indicate this is my re-interpretation of what Ashcroft said).

Hopefully, the complexity of interpreting Ashcroft's ethos is better understood as a result of this line of argumentation. He says, "Sure, I am willing to cooperate…but to be honest, there is really no need for it, we have it all under control" (again, this quotation is my interpretation of Ashcroft's ethos, not his own words). But it illustrates why he was not an effective Attorney General. He claims perfection when perfection is not even

possible under the circumstances. The entire Bush Administration sees themselves from their own myopic lenses—they are perfect—they managed to find a perfect balance between safety and liberty, when nobody else in the history of crisis in America has ever managed to do so. Ultimately this is what led to Ashcroft's resignation. Alberto Gonzales stepped in and admitted mistakes. He also re-defined what it means to be a patriot (whether he believes the re-definition or not is another issue).

We Need Leeway for National Security

Also a part of the ethos arguments related to 9/11 is the idea that protecting national security is such a hard job that the Justice Department needs to protect its independence by not releasing certain information about what it is up to. This message was a significant part of Dinh's message in the previous debate and is extended here by Ashcroft. As a premise to the argument, Ashcroft establishes that in order to protect national security, the Justice Department has had to undergo a sea-change about the way it goes about its business; it has had to think more like a crime prevention agency rather than a prosecutorial agency:

> Well, first of all, let me just say that the entire effort of the Department of Justice has undergone a significant evolution from the idea that we somehow existed so that we could prosecute crimes that had been committed, and in that sense we waited 'til a crime was committed and then sought to prosecute, to find a way to prevent a crime from being committed. We came to the conclusion rather quickly at 9/11 that waiting for a crime to be committed and then prosecuting was an inadequate way to protect the American people when the perpetrators of the crime extinguish themselves purposely in the commission of the crime, and when they extinguish the lives of 3,000 people in the commission of the crime, the potential for prosecution is not a very rewarding potential. So we had to make a shift in the way we thought about things. So being reactive, waiting for a crime to be committed, or waiting for there to be evidence of the commission of a crime didn't seem to us to be an appropriate way to protect the American people. (United States Department of Justice, 2003, pp. 11-12)

So, they have a very tough job to do. The whole face of homeland security is shifting. Along with major structural changes such as the Homeland Security Department being created, the Justice Department also has to change its function—they have to be crime-stoppers now as opposed to their previous role of crime prosecutors—very much in the same vein as the CIA except obviously in the context of domestic issues.

In order to accomplish this shift in mindset, they need to be able to maintain a level of secrecy so that terrorists do not come to know their methods and strategies for prevention. This means not disclosing some of their information for the purpose of national security—much the same argument Dinh makes in May, 2003. In the following exemplar, Ashcroft is responding to Delahunt's previously mentioned accusation of creating a "culture of concealment: "Let me just make some remarks. First of all, the rationale for not releasing anything is the national interest. There are lots of times, especially in international intelligence, security matters, when we don't release things because it is not in the national interest to do so" (United States Department of Justice, 2003, p. 23). So, the argument continues; the Justice Department's ability to protect national security hinges upon their ability to keep certain things secret. Ashcroft makes this argument a total of four times during the course of the debate.

Don't Worry…We Don't Stand For Abuse

The reason to trust the Justice Department, according to Ashcroft, is because "we do not stand for abuse" (United States Department of Justice, 2003, p. 15); "we have not violated the law, and we will not violate the law…we will uphold the law" (United States Department of Justice, 2003, p. 16). Furthermore, when abuses occur, "we will investigate those cases" (United States Department of Justice, 2003, p. 15). It is interesting though, that investigation is internal to the Department, conducted by either

the Civil Rights Division or the Inspector General. The following exemplar is actually a continuation of the quotes provided above that delves a little bit deeper into the way in which the Justice Department checks itself for abuse. The example again goes back to the accusation lodged by the Inspector General the illegal immigrant roundup and indefinite detention was against the law. In the same report, the Inspector claimed that physical abuse had occurred during the timeframe. Ashcroft is responding to the claims of physical abuse:

> We do not stand for abuse, and we will investigate those cases. There are 18 cases that were brought to our attention. Fourteen of those cases have been investigated. The investigation is ongoing, although in 14 of those cases the Civil Rights Division has indicated that it did not find adequate predicate to bring criminal charges in those cases. The other four are going to be continued to be investigated. We don't tolerate violence in our prisons, generally. We don't tolerate violence in holding individuals. That's not a policy of the Department, and in those situations we'll seek to correct those situations. (United States Department of Justice, 2003, p. 15)

So, when the Inspector General, who is employed under the Justice Department makes a claim that abuse has occurred, the case is sent to the Civil Rights Division (also of the Justice Department) who investigates the claims and decides if criminal prosecution should be pursued. In the previous example we see that in most (if not all) cases, it is decided that no member of the Department did anything wrong. Furthermore, the person's ethos that even suggested these abuses might have occurred—the Inspector General, was attacked, almost to the point of being accused of siding with the terrorists (this argument is analyzed later in this chapter). While I certainly do not want to jump to conclusions and assume that abuses were committed, I would very much like to see an independent, third party check on the potential for abuse—as would all critics discussed in this project.

In the next example, we again gain insight into the internal way in which the Department of Justice checks its own abuse. This quotation goes back to the argument over the change in the Levy guidelines, which essentially allows any non-uniformed Justice Department agents walk into any event—religious or otherwise—as an undercover informant without probable cause or any level of reasonable suspicion required. The guidelines were written up originally because of the abuses that occurred with COINTELPRO—a FBI program that began in 1956 "to suppress political association" (Chang, 2002, p. 29) and did not end until 1976. As mentioned earlier, Ashcroft altered these guidelines, in the "spirit" of the Patriot Act, to essentially make them null and void. But do not worry… says Ashcroft, who describes the internal mechanism by which agents ensure abuse does not occur:

> So those are the basic—that's the frame of reference. We have authorized people to do things that are not reactive after a crime has been committed, but are proactive to keep a crime from being committed. FBI agents are not authorized to go anyplace that a local policeman can't go, or the highway patrolman can't go, or the constable or sheriff or sheriff's deputy can't go, or any member of the public can't go. We've allowed FBI agents to go where the public can go on the same terms and conditions as the public when it comes to seeking to thwart terrorism, and we've asked that no records be kept regarding those visits unless they are records relating to the commission of a crime. Now, it seems to me that's the right safeguard and balance necessitated by the fact that we must move from reaction and prosecution into a situation of anticipation and prevention when the lives of Americans are at stake in terrorism. (United States Department of Justice, 2003, p. 12)

In this defense, we also see the reference to the whole scale change happening within the Department. Essentially, each agent is responsible to herself for not committing abuse according to the guidelines. If no illegal activity is occurring, then no record is kept of the content of what was discussed at a particular gathering.

In the following exemplar, Ashcroft and Hostettler (R IN) continue to build up the Department's ethos when it comes to protecting civil liberties. Together, they make the

argument that while making national security decisions, the Justice Department considers all the facts and is very conservative on the side of civil liberties. This particular exemplar is doubly interesting because they apply a percentage to the scenario to come up with an equation demonstrating just how conservative they are. The beginning of Hofstettler's line of argumentation was actually analyzed above when he was found to be praising Ashcroft for preventing another terrorist attack post 9/11. Also in his line of argumentation is a critique of the Inspector General's ethos, which is a category of analysis to come later; having awareness of the critique though is integral to understanding what is happening in the current exemplar.

Hofstettler begins a question to Ashcroft by criticizing the Inspector General claiming he had two different reports that were contradictory of each other. Accordingly, in one report, the Inspector General claims that immigrants should have been released earlier than were during the initial post 9/11 round-up; in the second report, the Inspector General said that 87% of released illegal immigrants ignore deportation orders. After arguing the two reports contradicted each other, Hofstettler referred to a point in the debate at which Ashcroft referred to the second one in a way that reflected 85% rather than 87%. At that point, based upon a 2% error, Ashcroft is portrayed as someone who is conservative to err on the side of civil rights:

> You were being conservative earlier when you said 85 percent absconded. And that is all right with me personally for you to be conservative, but it was actually 87 percent had absconded, according to the IG. Yet this week's Inspector General report spends much of its time ruing over the fact that the illegal aliens who were detained as part of the terrorism investigation didn't get an opportunity to be bonded out. (United States Department of Justice, 2003, p. 31)

Ashcroft responds by first explaining the decision making calculus, arguing that the expediency to which people could be cleared in that case had to be weighed against safety, especially considering that New York was still "smoldering:"

> Obviously, in an ideal world, we would like to be able to have cleared people instantly. We would like to know any time someone is charged in the very shortest period of time, whether innocent or guilty, or whether they were associated with terrorism or not. And I have some sympathy for the Inspector General's desire to have us do a quicker job. I think all of us in the ideal world would like jobs done more quickly. But as I mentioned earlier, much of this focused in the New York community, and you have to remember what the situation was in New York when this was happening, was still smoldering. The FBI was operating out of a parking garage following alot of leads and uncertain about what might happen next, not only what happened last. And in addition to those individuals who had been detained, there were a lot of other individuals that were individuals about whom we had serious questions and we, on a daily basis, get information about the potential of attacks. (United States Department of Justice, 2003, p. 31)

In actuality, this quotation would be a better fit in the previous section—but it sets the next quotation up so nicely; so, I will keep it here. Ashcroft proclaims that he was doubly conservative—erring on the side of civil liberties, but not forgetting about the value of safety:

> So I think we just had to balance the risk. The risk of sending people back into the culture with, according to the statistics of the previous report, 94 percent of one cohort and 87 percent of the other. I did use—I was doubly conservative. I knocked it all back to 87 and I subtracted 2. You would think I was negotiating to buy something, driving the price down. But that risk, 85 percent, you know, is a very high level of risk, and so we process these individuals as fast as we can. I hope we can do better. (United States Department of Justice, 2003, pp. 31-32)

The argument that the Justice Department is careful when it comes to civil rights is made a great deal in one form or the other, whether it is that "we are conservative with civil rights," "we won't stand for civil rights abuses," or "we are currently investigating a civil rights investigation," the argument is made a great deal throughout the course of this debate. This argument combined with the one mentioned above demonstrating the way in which the Department claims to value consultation, forms the "you can trust us" stance in this phase of debate. It is made 24 times during the course of the debate, mostly by

Ashcroft, but as we have seen a couple of majority members have affirmed his claim: Hofstettler and Chabot.

The Perfect Balance??

Ashcroft could have done wonders for his own ethos if he had just admitted that 9/11 forced the country to make tough decisions and that because humans are not perfect, some mistakes may have been made; i.e. we erred on the side of safety…now, let us see how we can improve in the future and make a law that everyone thinks is necessary, a little bit better. However, with very few exceptions, he maintained that his department has been perfect since 9/11.

In the following exemplar, which is a response to a question posed by Maxine Waters, Ashcroft argues that the Department of Justice made decisions in the aftermath of 9/11 based upon national security interests. The question concerns the indefinite detention of illegal aliens and references the Inspector General's report stating the actions taken by the DOJ were illegal. Here is Ashcroft's response:

> Let me just say this: That all of the individuals, the subjects of that report, were in the United States illegally. The policy of the Department, for which we do not apologize, was that until individuals apprehended who were here illegally, who have no—don't have a right to bail or bond, who are here illegally, before we would release them prior to their deportation, we wanted to have them cleared. We believe that's the right policy to protect the American people.
> You've got to remember the FBI in New York, for example, at that time was working out of a parking garage because we assigned so many people to New York to try to solve those problems. We made interest judgments about the best national security interests of the United States when we couldn't prosecute—some individuals we did prosecute. Other individuals who couldn't be prosecuted, we simply had to say we'd better deport these people with the clear understanding they are never to come back to the United States. (United States Department of Justice, 2003, p. 15)

Ashcroft acknowledges that they had to make a decision to detain immigrants indefinitely in the interest of national security. He says that he does apologize for that decision even though there was no evidence whatsoever that they had done anything wrong, other than

being in the United States. According to law, it is of course lawful to deport illegal immigrants out of the country, but what is not lawful, according to the Inspector General's report, is to detain them indefinitely while trying to scrounge up some evidence of terrorist activity. It is a cut-and-dried case that mistakes were made during this time, but Ashcroft will not likely ever admit it. Alberto Gonzales, the person who would later replace Ashcroft as the Attorney General, acknowledges that the policy was misguided and because of that, he gains more respect and cooperation from his critics.

In the next exemplar, we find the all-or-nothing tone embedded within the national security argument. Mark Green (R WI) asks Ashcroft a very general question about the library provision, just to give Ashcroft the opportunity to clarify any misunderstandings critics may have. Ashcroft begins the response by noting that the Justice Department has always investigated suspected criminals' use of the library and that in fact, the infamous Unabomber was captured due to a library investigation[10]. Then he makes the comparison that the same standards of criminal investigation ought to be applied to terrorism and argues that "most Americans" would agree that counterterrorism intelligence is important:

> Now, for foreign intelligence, should we be able to use tools in foreign intelligence that we use in other criminal proceedings? I think most Americans say hey, look, intelligence relating to counterterrorism is very important. We ought to be able to do that. So the PATRIOT Act authorized some very limited things regarding libraries (United States Department of Justice, 2003, p. 20).

Underlying this response is the accusation that critics of the library provision are somehow against the idea of counterterrorism intelligence in general.

[10] Later in the debate, Nadler clarifies Ashcroft's claim about the Unabomber and the library provision. He points out that the Unabomber was caught because his own brother reported him and that the use of the library was not investigated until enough evidence was gathered for a search warrant (p. 26); whereas the Patriot Act decreases the standard of evidence needed and some say the wording is vague enough to the point of allowing general sweeps of the library.

In the next exemplar, Ashcroft almost acknowledges that there may actually be a tradeoff between safety and liberty. The response begins with Watt questioning Ashcroft about the Neighborhood Watch Program in which the Justice Department began "asking neighborhood groups to report on people who were either 'unfamiliar' or 'suspicious' or 'not normal' (United States Department of Justice, 2003, p. 33). He tells Ashcroft that a lot of his constituents are uneasy about that sort of request from the Justice Department and asks for a response. Ashcroft explains the purpose of the program and explains how good judgment by the people can lead to the arrests of terrorists:

> In terms of the Neighborhood Watch, generally, asking American citizens to be alert, we just ask them to use their judgment. Frankly, people using good judgment on the airplane when the shoe bomber was there saved the lives of many, many people. And people using good judgment in the settings—a sheriff's deputy using good judgment in Washington State helped us detect a cell which—an alleged cell in Portland. (United States Department of Justice, 2003, p. 35)

Then, Ashcroft goes on to describe that some innocent people being investigated is a "cost of doing business," an understandable tradeoff:

> So that's really what we're talking about. You see people who are working with precursors or that might be the potential for bomb making, and frankly, there have been cases where you always get some reports that are—that lead you to things that were innocent but looked guilty. But we don't prosecute those. We don't charge those. And that's one of the costs of doing business. We remember the story of a woman who overheard some people who may have been trying to pull a joke on her talking about making a bomb or conducting terrorist activities. Frankly, we think people should report that. The stakes of not reporting it are too high. (United States Department of Justice, 2003, pp. 35-36)

Here is the one example, out of the entire transcript, in which it seems as though Ashcroft may be acknowledging a tradeoff between safety and civil liberties—even though that tradeoff is not very clearly expressed. Again though, if Ashcroft had attempted more of this type of compromise, he may have been more effective as an Attorney General.

In the next exemplar, again, there are parts of the discourse in which it seems as though Ashcroft and his supporter are acknowledging an inherent tradeoff between safety and liberty, and maybe they are in some indirect way, but looking closer, we find the real reason the issue is brought up in the first place is to help paint a picture of the Justice Department as a protector of civil rights. In other words, the exemplar is not a clear indication that Ashcroft is admitting any sort of inadequacy. In fact, looking further into the example, we find that it turns into an opportunity for Ashcroft to explain that he is perfect. The argument developed is that the internal checks the Department places on civil liberties should make the rest of us feel secure knowing that democracy is being preserved.

It is Steve Chabot (R OH) who introduces Ashcroft with the opportunity to address the balance of safety and liberty by bringing up some problems with police abuse in the city of Cincinnati. He is praising the Justice Department, and Ralph Boyd in particular, the person in charge of the Civil Rights Division within the department, for their cooperation in resolving matters of civil liberties.

> Attorney General, for being here this morning and this afternoon, and I want to thank you for the job and the service that you've been doing for our country and that you'll continue to do. I also want to thank you and your Department for your willingness to work with my city, with the City of Cincinnati and the Police Department recently, especially to iron out the issues that arose from the police patterns and practices agreement. As you know, we have had some difficult times in the city in the last couple of years. And whereas we absolutely have to protect the civil rights of every person in our community, at the same time we do not want to handcuff the Police Department and make it tougher for them to do their job. And they, after all, are the folks that are principally responsible for protecting the law abiding citizens in our community. And I want to especially thank Ralph Boyd, the head of your Civil Rights Division, for his leadership on this important matter, especially recently, when he went out of his way to work with our police and with the leaders of Cincinnati to resolve an issue which had come up. And I'm hopeful that the City of Cincinnati and the Police Department and the Department of Justice can continue to cooperate and work together to heal our city. (United States Department of Justice, 2003, p. 46)

Chabot goes on to say: "And whereas we absolutely have to protect the civil rights of every person in our community, at the same time we do not want to handcuff the Police Department and make it tougher for them to do their job" (United States Department of Justice, 2003, p. 46). This takes on the form of the "I want to be tough on terror…but…" except is works in the opposite direction. It says: "I want to protect civil rights…but…"

Incidentally, this is not the first time during the debate for which this type of argument shows up. Earlier in the debate, Ashcroft himself says, "We should be careful and we should be restrained, but we should also know that we, in our care and restraint, have to be realistic" (United States Department of Justice, 2003, p. 24). This quotation clearly spells out an ethos of wanting to err on the side of safety but placing faith in the Justice Department for making sure things do not get too far out of hand.

But back to the response Ashcroft provides Chabot. It is interesting and leads into the next category of argument when he begins by spelling out that civil rights abuses are important matters:

> Well, this is a matter of great concern to us. We think that the right relationship between police and citizens is very important. We take very seriously any abuses, obviously, and we think that the approach taken in Cincinnati should be a model. And for this reason we immediately went to work with all the parties in Cincinnati to achieve a settlement that we could work together to improve things. That's the way we ought to do things. (United States Department of Justice, 2003, p. 46)

The abuse in Cincinnati was so important that we took immediate action, according to Ashcroft, and the parties in Cincinnati of course cooperated with us on improvement. The argument continues though in an effort to demonstrate that the Justice Department has things under control. Ashcroft calls that police abuse "a little glitch in the system" (United States Department of Justice, 2003, p. 47) that was easily fixed because the Justice Department can adapt to change:

> We had a little glitch in the system and we got everybody back together and worked it out again. And when we can work together to make—to respect the rights of American citizens and to make sure we have the right approach to law enforcement and the use of force, that is what we consider a win-win situation. So we are very pleased. (United States Department of Justice, 2003, p. 47)

Ashcroft then makes a little analogy to illustrate what he is talking about. Police brutality is but a little wind that causes a little change in direction, and because we are in control, "course correction" is easily fixed:

> If you take off in an airplane from Cincinnati and come to Washington, somewhere along the way the wind will change and there has to be a little course correction. You have the right destination, but you have to make some course corrections to get here. I think the effort in Cincinnati needed a little fine-tuning, a little course correction. I am very glad that Ralph was able to go out and others cooperated. We made the course correction, and we are still going to the right destination. I am very pleased. And thank you for your cooperation, your help. It takes everyone in the community to work together for us to improve the circumstances, and thank you very much. (United States Department of Justice, 2003, pp. 46-47)

The ethos put forth in this statement is that everything is okay—we are doing a good job. The key to the resolution of the problem is that the Justice Department was in charge the whole time. We have balanced civil liberties, we will balance civil liberties, but we need the authority to make those decisions on our own for the safety of the nation…but do not worry, you can trust us. The claim that the Justice Department has to make tough decisions in order to protect national security is made 15 different times, mostly by Ashcroft, but Mr. Chabot chimes in once in this regard as well.

The Deliberative Process is Working

In light of all the attention to controversy over the deliberative process present in this debate, it should definitely be noted that a plethora of people involved feel that the process has been splendid. The views articulated in this section contribute to the "you can trust us" perception that the Justice Department and supporters are trying to put forth.

Amidst the accusations that the Department has not been forthright, as well as the ones stating that the Congress acted out of hysteria when the act was passed, the argument is simply made that both Ashcroft and the Committee have done their jobs.

Ashcroft has Done His Job

Steve King (R IA) provides us with a great example to begin demonstration of this category. He compliments Ashcroft and says the way in which he prepared for this hearing is inspiring; it demonstrates the way in which he has idealized the deliberative process since he first began study of civics:

> Thank you, Mr. Chairman. Mr. Attorney General, I want to thank you for coming here to testify today and I want to thank you particularly for the effort you have put into the preparation and the demonstration of the command of all of these issues that you have delivered today. That is how I envisioned it as I studied civics as a young man (United States Department of Justice, 2003, p. 48).

Bob Goodlatte (R VA) takes the praise a step further by saying that Ashcroft has brought integrity BACK to the office, implying it was not there prior to the Bush presidency: "Thank you, Mr. Chairman. General Ashcroft, welcome, and thank you for the dedication and integrity that you have brought to our Nation's chief law enforcement position. It is very refreshing" (United States Department of Justice, 2003, p. 24). Jeff Flake (R AL) welcomes Ashcroft and says, "Mr. Attorney General, I just want to say how much we all appreciate the difficult balancing act you have in this regard, particularly with the PATRIOT Act" (United States Department of Justice, 2003, p. 60).

The examples could continue. Obviously, there are people who are very happy with not only the way in which Ashcroft has protected America, but also the way in which he has fulfilled his democratic duty of submitting his activity to oversight by Congress. Ashcroft is praised in this way a total of seven times during the course of this debate; not surprisingly, all of them came from majority members: Flake, Chabot,

Sensenbrenner, Goodlatte, Forbes and King. The defense of Ashcroft's integrity in general, and his commitment to the deliberative process also contributes to the "you can trust us" ethos.

The Committee has Done its Job

Another defense of the ethos of the process comes from Sensenbrenner, who understandably has an individual interest as well as a communal interest, in demonstrating that the process has been an effective one—especially from the perspective of the Judiciary Committee. He makes this appeal at the very beginning of the hearing during his opening statement, as well as at the very end of the hearing as he concludes. Since we have already seen a close textual analysis of his opening where he says that he is a critic and that the whole Committee has been given the opportunity to be critical, let us examine his concluding remarks at this juncture:

> Now, I know that you feel like coming before us is like appearing before the inquisition. And I think that, given the wide ranging nature of the questions, all of which are legitimate—and I have added it up, and 26 Members of the Committee did avail themselves of time to ask questions of you directly. I think this shows that the system is working, and I would like to express my appreciation to your staff whom I am certain have been spending countless hours of putting together the material on that real thick binder that is in front of you so that you can be properly prepared to answer the questions. (United States Department of Justice, 2003, pp. 67-68)

This is how the hearing ends. Sensenbrenner is proud. Based upon a statistical quality control mechanism, he concludes that the system is working. Because 26 members asked questions, then obviously, the deliberative process is an effective one.

Ashcroft's Consubstantiation

In *A Rhetoric of Motives,* Kenneth Burke (1969 rpt.) explains consubstantiation, or identification, as a powerful means to persuasion. Simply put, if one can demonstrate that they share a likeness with somebody else then they can consciously or

subconsciously become more believable. For instance, if a "Dead Head" (a die hard fan of the musical band, *The Grateful Dead*) is listening to somebody else deliver a persuasive message and during the course of delivering that message, the arguer discloses that she is also a "Dead Head," she is likely to become that much more likable to the audience member, even if it is at a subconscious level—contributing to the extent to which her persuasive message has a chance of being effective. During the course of this debate, Ashcroft overtly utilizes consubstantiation a number of times to become more believable to the audience.

I used to Be in Congress

The identification strategy utilized most by Ashcroft is the announcement that he used to be a member of Congress. The following exemplar overlaps with a previous category and is a good one to demonstrate the point. Here Ashcroft is responding to the criticism of Delahunt—the criticism that Ashcroft has created a "culture of concealment" within the Justice Department. Ashcroft had just made the point that he finds it amusing anyone would accuse him of secretly trying to change the law, because that would violate his principles. He then uses consubstantiation to emphasize that he will "do his best to assist Congress":

> I used to be a Member of this Congress; I enjoyed the opportunity of casting votes. I miss it sometimes. And I would do my best to assist the Congress. And when it adapts the laws to reflect the need to confront the evolving threat against the safety and security of the American people, that it does so in ways that will be effective. That is what my job is as Attorney General. And to the extent that I can do that, I am going to do it, and I can pledge to you today that that is the way in which we will operate in terms of changes to the law. That is the constitutional way. (United States Department of Justice, 2003, p. 24)

In all, Ashcroft makes this appeal to the audience five times. Bob Goodlatte (R VA), acknowledges Ashcroft's ethos a page later in the transcript of the debate, by referring to Ashcroft's experience as a Senator:

> Let me ask about one other area that is of great interest to myself and to you, I believe. When you were Senator Ashcroft, you joined with me on the Senate side in pushing forward legislation which assured that American citizens would be secure in the use of their computers by promoting the use of strong encryption, getting an ancient Government policy reversed which has assured privacy, has assured the ability of individuals to fight crime, and for U.S. software and hardware companies to be able to be competitive in the world market in offering their products. (United States Department of Justice, 2003, p. 25)

Goodlatte enhances Ashcroft's effort at consubstantiation while also portraying Ashcroft as a leader who is very sympathetic to privacy.

I'm a Religious Man

The next category of consubstantiation only reveals one exemplar, but it is an interesting one and deserves attention. Steve King (R IA) is questioning Ashcroft about the Levy guidelines alterations and suggests that maybe there should be a quota on the amount of times the FBI can go into a mosque because of the risk of violating the freedom of religion. Ashcroft responds saying that since no law is specifically aimed at Muslims that there is no problem with the changed guidelines. In the middle of his response, he uses his participation in the Assembly of God church as a hypothetical scenario:

> Now, it is possible to, I believe, have an individual's rights infringed because a group has been infringed, and we observe that in the history of our country, and we are sensitive to that and don't want that to be the case. If a law would say that—I happen to be a participant in the Assembly of God Church—no one can vote who is a member of the Assembly of God Church, that would be a law which is directed at a group that deprived me of a right. So I am sensitive to the fact that sometimes discrimination against a group infringes the right of an individual, so it is in that context that I understand these rights. (United States Department of Justice, 2003, p. 49)

He is identifying with people who are allegedly at risk for abuse. Because he shares religiosity with Muslims, he knows how important the freedom of religion is and would never allow the Justice Department to commit religious profiling.

Attacks on the Ethos of Critics

Aside from just building their own ethos back up, Ashcroft and his supporters also go on the offensive. They attack the ethos of critics and portray them in a way such that they have no business criticizing the Attorney General. The following exemplar by J. Randy Forbes (R VA) demonstrates a general attitude taken toward critics. Initially, he thanks Ashcroft and praises him for his patience in putting up with the vacant shots being taken at him: "Mr. Attorney General, thank you for your patience and for being here" (United States Department of Justice, 2003, p. 52). While at this point, my interpretation may seem like a stretch, after reading the next paragraph of transcription, it may make a little more sense:

> The older I get, the more my wife and children point out to me that I am not perfect and have a lot of imperfections, and I know the longer you are in this office, you realize that you are not perfect and your Department is not perfect, but I just want to thank you, on behalf of my constituents and so many individuals that I see, for the work that you have done. The irony is, and I hope you convey that to the people in your Department, the irony is that the individuals who should be thanking you the most do not even realize it because they haven't become victims because of the work of the Department and what you have done. (United States Department of Justice, 2003, p. 52)

This quotation overlaps with another category—the one claiming that Ashcroft has prevented another attack. It also overlaps in a contradictory way, with Ashcroft's own claim that he is perfect. But the exemplar also introduces a new type of argument—an attack upon the ethos of the critics. Forbes claims that critics, for whatever reason, are just not bright enough to realize what a wonderful job Ashcroft is doing. If critics had been victims of an attack, according to Forbes, then they would obviously have a greater appreciation for the job of the Justice Department.

It is interesting to note that a bit earlier in the debate, Martin Meehan (D MA) utilized the ethos of the victims in a bit different way—in fact, quite opposite to that of

Forbes. He begins his argument by telling the audience stories about a few of the people from his own district in Massachusetts who died on 9/11. Then, as the following segment indicates, he works it into a plea made specifically by a family member of one of the victims who urges the Congress to ensure civil liberties:

> And I think of Alexander Filipov, who was 70 years old, from Concord, Massachusetts, on United Flight 175, and his wife Loretta, and their three children. And Loretta Filipov was at my house the last time I saw her and she looked me in the eye and she said you know, Marty, there isn't a day that doesn't go by that I don't think of my husband and miss him, nor do my children. And she said, "But you're my Congressman and you have a responsibility to balance the loss of these innocent victims with making sure we maintain the freedoms and the values that makes this country great.'' And she said, ''I'm going to rely on you to balance that in your role." (United States Department of Justice, 2003, pp. 41-42)

Even the people directly affected by the 9/11 attacks are divided over how best to conduct the war on terror. Some want a no-holds-barred, get-them-at-all-costs approach—and some, like the woman quoted here, want a more rational, restrained approach to fighting terror.

The Inspector General

In the previous section, Forbes demonstrates criticism of critics in general, but it is important to note that criticism of critics' ethos gets much more specific. As already mentioned multiple times throughout the course of this chapter, the Inspector General—Glenn Fine, who issued a scathing report of the Department of Justice over its treatment of immigrants in the immediate aftermath of 9/11, had his ethos severely attacked during this debate. Hostettler (R IN) initiates the attack in the same quotation provided above in the section devoted to the argument that Ashcroft prevented another attack; so, additional context could be referenced above, but the following represents the observation made here specifically:

> I thank the Chairman. General Ashcroft, thank you for being here and thank you for your service to our country. I believe that the Office of Inspector General

> report does a grave disservice to yourself and all of the other dedicated Justice Department employees who work tirelessly to protect us from another devastating terrorist attack in the days immediately following 9/11. While the report pays lip service to the incredible stresses that you as well as the men and women of the Justice Department faced and the responsibility that all of you bore for thousands of American lives, it attacks your response to the terrorist strikes even after we have learned the stunning success of your efforts. (United States Department of Justice, 2003, p. 30)

The claim that he Inspector General has "done a great disservice" to those who are working hard to defend our nation could be construed to imply that Glenn Fine is aiding the terrorists. The possibility of that interpretation being accurate becomes even more plausible when considering the next attack upon his ethos. Hostettler accuses Fine of being more concerned about illegal aliens than a terrorist attack because he wants to place deadlines on agents as a limit for how long immigrants can be held without a charge:

> The Inspector General recommends that the FBI impose deadlines on agents to complete background investigations, and that point is important, because even the Inspector General recognizes that the Department is acting within statute as well as Supreme Court precedent when it comes to your detention of these illegal aliens. It appears to me that the Office of Inspector General is more concerned about the inconvenience suffered by illegal aliens who are being detained than about ensuring that not one alien terrorist is released on to our streets. (United States Department of Justice, 2003, p. 30)

The natural conclusion Hofstettler draws then, is that Fine must "be suffering from short term memory lapse":

> It follows that it seems that the IG may be suffering from short-term memory lapse. Just this February, the IG issued a report that found that the Immigration and Naturalization Service, which was previously in the Department, only succeeded in removing 13 percent of nondetained aliens in removal proceedings after they were ordered removed (United States Department of Justice, 2003, pp. 30-31).

He is of course now referring to the supposed contradiction between two different reports made by Fine (this context is provided above in the section related to the argument that Ashcroft prevented another attack). Then after referencing the contradiction again, he

begins to praise Ashcroft for being conservative when it comes to balancing civil liberties.

Ashcroft responds to the attack on the Inspector General's ethos. While he is much more restrained than Hofstettler, there seems to be a bit of condescension in his remarks. This may be a duplicate exemplar, as it also demonstrates Ashcroft's commitment to cooperation and protecting national security. Nonetheless, it is important to see again because of the way in which we can detect a sense of indignation over Glenn Fine's report:

> Obviously, in an ideal world, we would like to be able to have cleared people instantly. We would like to know any time someone is charged in the very shortest period of time, whether innocent or guilty, or whether they were associated with terrorism or not. And I have some sympathy for the Inspector General's desire to have us do a quicker job. I think all of us in the ideal world would like jobs done more quickly. But as I mentioned earlier, much of this focused in the New York community, and you have to remember what the situation was in New York when this was happening, was still smoldering. The FBI was operating out of a parking garage following alot of leads and uncertain about what might happen next, not only what happened last. And in addition to those individuals who had been detained, there were a lot of other individuals that were individuals about whom we had serious questions and we, on a daily basis, get information about the potential of attacks. (United States Department of Justice, 2003, p. 31)

When Ashcroft begins by saying, "in an ideal world…" he implies that the Inspector General is naïve about the risk to national security. Furthermore, when he says, "I have some sympathy…" for the Inspector's request that we do a better job, he implies that the request does not have much prima facie value. When one has sympathy for someone, the implication is that the person feels sorry for the other person. In this case, Ashcroft says that he has sympathy for the report, implying it is so laughable that most people would not take it very seriously. Furthermore, he qualifies his level of sympathy by saying "some sympathy;" in other words, it is difficult to muster up a great deal of sympathy

because it is almost too laughable—but Ashcroft managed to find some value in a report that is seemingly useless on its face. Ashcroft reifies my interpretation again, immediately after ensuring the audience that he is "doubly conservative" when it comes to civil rights, and along side of the claim that "we did not violate the law:"

> But we did not violate the law, and we will—frankly, I like to view the report of the Inspector General, in spite of the fact that there is tension between this report and the previous report—the previous report criticizing us for not being able to deport people and this report criticizing us for holding people. Yes, there is tension there, but I like to view these as what can we learn from this that will help us improve our operation. And frankly, that is what we are going to do. (United States Department of Justice, 2003, p. 32)

The way I am reading this quotation, from within the context in which it is stated, Ashcroft is essentially agreeing with Hofstettler that Fine is a moron, but instead of dwelling on it, Ashcroft is going to take the higher ground and try to learn from the implicit contradiction between the two reports.

Later in the debate, Sheila Jackson Lee (D TX) comes to the defense of the Inspector General. The following quotation also overlaps with an exemplar from earlier in the debate, but it provides important context to the defense of Fine's ethos:

> Thank you very much, Mr. Chairman. Mr. Attorney General, it has been too long, but we welcome you back. All of us experienced the righteous indignation that you have so eloquently expressed in your testimony today post-9/11, during 9/11, and continuously as we support the war on terrorism. But my fear is that we may go to the point of changing the culture of America, the first amendment protections, the fourth amendment protections. So frankly, I believe we owe a debt of gratitude to Glenn Fine, the Inspector General of the United States Department of Justice, for several reasons. Let me quickly cite these and raise some questions of my concern. (United States Department of Justice, 2003, p. 50)

According to Jackson Lee, we owe "a debt of gratitude" to Fine for having the courage to come out as a critic of the Justice Department. Even later in the debate, Linda Sanchez (D CA) also affirms Fine's ethos, a bit less directly, when she describes some of the doubts she has had about the Patriot Act. She says, "Sadly, my concerns and questions only seem

to have been validated by the report from the Office of the Inspector General. His report calls into question detention conditions and practices, among other things" (United States Department of Justice, 2003, p. 54). Though she does not go out of her way to express thanks to Fine, the way Jackson Lee does, she does acknowledge that she has faith in his critical report.

Critics in Congress

The attacks upon the ethos of the critics in Congress are subtle and demand careful reading and scrutiny to be able to see that their ethos is being attacked. For instance, in Ashcroft's opening statement, after reminding the Congress of all the people who suffered because of 9/11, he says, "Despite the terrorist threats to America, there are some, both in Congress and across the country, who suggest that we should not have a USA PATRIOT Act. Others who supported the act 20 months ago now express doubts about the necessity of some of the act's components" (United States Department of Justice, 2003, p. 8). The all-or-nothing dichotomy as stated here, and as a general principle of Ashcroft's ethos, generates an inherent critique of anyone's ethos that opposes his actions in any way. In the following example, we see a similar sort of inference made—calling into question the intelligence of anyone in Congress who disagrees. Goodlatte (R VA) provides Ashcroft with an opportunity to make this appeal with a question about encryption laws—laws that Ashcroft helped pass as a Senator:

> Let me ask about one other area that is of great interest to myself and to you, I believe. When you were Senator Ashcroft, you joined with me on the Senate side in pushing forward legislation which assured that American citizens would be secure in the use of their computers by promoting the use of strong encryption, getting an ancient Government policy reversed which has assured privacy, has assured the ability of individuals to fight crime, and for U.S. software and hardware companies to be able to be competitive in the world market in offering their products. (United States Department of Justice, 2003, p. 25)

Obviously, this overlaps with the consubstantiation effort establishing Ashcroft's ethos as a former Senator. It also functions as a "you can trust" argument uncovered in the previous debate with Dinh—the one in which it is claimed that there are bureaucratic structures external to the Patriot Act protecting Americans from civil liberties abuse. After describing the encryption laws, Goodlatte goes on to pose the question to Ashcroft and it is a question that clarifies the idea that the Patriot Act does not alter the past encryption laws designed to protect people's privacy on the Internet.

Ashcroft responds by saying that he wishes everyone were as smart as Goodlatte when it comes to the "computer world": "Let me just say how grateful I am that there are people with your understanding of the computer world in the Congress who guide and shape intelligently the way in which this world is dealt with governmentally, and we hope that voices that have that kind of intelligent approach speak into this Administration as well as the Congress" (United States Department of Justice, 2003, p. 25). In other words, people who do not see things the same in which Ashcroft and Goodlatte do just do not understand. But thank goodness, according to Ashcroft, that somebody in Congress does so that hopefully, the truth can be explained to all those who doubt it. At the end of the statement, he refers to the hope that intelligence can be spoken into both the Administration and Congress, but by placing the quotation into the context of the rest of the debate, it is clear that the Administration already has the one true understanding in Ashcroft's opinion, as does anyone else who happens to believe the truth.

The Courts

The court system also becomes a focus of criticism by Ashcroft during his testimony. An essential point that the Justice Department tries to make is that they do not amend law substantially through the Patriot Act. The Department claims that they could

and should have had the same amount of authority to do what they are currently doing prior to the Patriot Act. A main theme of argumentation repeated throughout the process is that they have had the same sort of authorities in relation to the mafia, drug dealers and other criminals for a long time, and in some cases, they have been able to gain the same type of authority to investigate terrorism suspects, but not in other cases. The reason for this lack of consistency, according to the Bush Administration, is because some courts are not interpreting the law correctly and that the primary reason for the Patriot Act, is to clarify the law for the courts so that there is more national unity over how to respond to terrorism.

The following exemplar best illustrates the attitude of the Bush Administration toward the courts who disagree with their interpretation of the law. It actually references a continuing problem with the courts post-Patriot Act, demonstrating that the Administration is still not quite happy with some of the courts. Mark Green (R WI) begins by asking Ashcroft about weaknesses in the current law, as it exists even after the Patriot Act was passed. Ashcroft explains that an effective strategy in the war on terror has been to charge people with material support, pointing out that a number of courts have agreed with that interpretation of the law:

> One of the charges that has been effective in the war against terror has been to charge people with material support for terrorism, that they have become a part of the terrorist operation in supporting it. We think that going and joining the operation is providing material support. A number of courts have agreed with that, that it is material support. (United States Department of Justice, 2003, p. 20)

Unfortunately though, according to Ashcroft, some courts are still not on board with the war on terror:

> There are some courts, though, that say going and taking training and joining up with the operation does not mean that you are helping the operation. Well, our view is that that could be clarified. We had individuals, I am sorry to say, in the United States of America who after September 11, went to get terrorist training.

> We had individuals in the United States of America who after September 11, left the United States of America in an attempt to go and fight against our own Armed Forces in Afghanistan. It is hard to imagine. It is. I think it is hard to imagine for anyone on the Committee. I mean there are differences between some of us on this Committee and in this room, but I don't think there are any differences in that respect. (United States Department of Justice, 2003, p. 20).

Therefore, Ashcroft argues that "we need for the law to make it clear that it is just as much a conspiracy to aid and assist a terrorist, to join them for fighting purposes, as it is to carry them a lunch or to provide them with a weapon" (United States Department of Justice, 2003, p. 20).

Debating Public Opinion

It is interesting to note the way in which interlocutors in this debate attempt to use public opinion as backing behind their arguments. During the course of analysis, we have seen both Ashcroft supporters and critics utilize the ethos of people who have been directly affected by 9/11 as support for arguments, and we have also seen references to what Americans in general want to see happen in terms of the way in which the war on terror is fought. The theme of public opinion as argument is analyzed more thoroughly by Levasseur (2005) in the context of the federal budget process—one of the more critical pieces reviewed in Chapter 2. He found public opinion to be utilized in much the same way there—politicians presume to know what Americans want and accordingly, that knowledge gives them greater credibility in making their appeals during the policymaking process. In this debate, it is an interesting irony to me to note that according to my count, public opinion is utilized equally amongst the camp of Ashcroft supporters and Ashcroft detractors. Both sides claim public opinion as support for their arguments five times. Statistically speaking, it is not an overwhelming number, but given the way in which the change in public opinion over the Patriot Act becomes such a large part of the Bush Administration's campaign after this debate is over, observing it as a

category within the confines of this debate seems important. In fact, it was not long after this phase of debate when Ashcroft went on his infamous public tour in defense of the Patriot Act. This public tour becomes a focus of analysis at the beginning of the next chapter; here though, we pay attention to the way in which the current debate stages that tour. The primary strategy is that Ashcroft and supporters try to undercut the credibility of the critics…again!!!

Critics are Confused…We Just Need to Explain

Bob Goodlatte (R VA) typifies the government's attitude toward the growing anti-Patriot Act public sentiment described at the beginning of the chapter, and demonstrated throughout by various members of Congress. In fact, in the following question, Goodlatte makes specific reference to the increasing number referendums on the Patriot Act that communities are making at the local level. In his question to Ashcroft, he describes these referendums as being the result of mass confusion, and asks Ashcroft what the Justice Department can do to correct the confusion:

> The gentleman from Wisconsin noted the confusion and concern that the U.S. PATRIOT Act has engendered in many quarters. In fact, as you may know, a number of cities have passed resolutions or other measures that ban their employees from cooperating with Federal authorities that are attempting to utilize powers granted by the law. What, if anything, can and will the Department do to correct these misunderstandings and to assure cooperation from these municipalities, and have you encountered any specific instances where employees of any of these cities have refused to cooperate with the Department? (United States Department of Justice, 2003, p. 24)

Ashcroft response is that they must simply do a better job of explaining the Patriot Act to participants. Obviously, those who are critical of it simply do not truly understand it because they have not received correct information about it:

> Well, first of all, I think information is the friend of the American people, and that is one of the values that the Chairman recited to me and Ranking Member Conyers recited, that when we discuss the law, and we can take some of the myths away from the law, we can show the American people how the law is framed,

> how the rights of individuals are protected and safeguarded in the law. We will work with State and local authorities very aggressively on PATRIOT Act issues and other issues to help them understand why doing what we are doing is in the national interest, including the local interest. And I would just have to say this, that the overwhelming, vastly overwhelming response of State and local authorities has been excellent. (United States Department of Justice, 2003, p. 25)

Critics have bought in to the myths about the act and do not understand the way in which it actually protects civil liberties. They do not understand that it is implemented for the sake of the national interest—another contribution to the all-or-nothing ethos of the Patriot Act; those who oppose it for any reason simply do not understand that national security is at stake and that something must be done. So, Ashcroft claims to take it upon himself, and other members of the Justice Department, to correct the myths about the Patriot Act.

The Press Leads to "Disinformation"

An argument introduced in the earlier debate by Viet Dinh, one that even Paul Rosenzwieg—a minority witness from that debate acknowledged as true, is that often times, the press does not report precisely on the implementation of the Patriot Act. In the following example, Ashcroft takes it a step further, much like Dinh does, to imply that all information from the press is "disinformation:"

> Now, there has been a lot of disinformation about it, and there was a suggestion at one time by a newspaper, for example, it got a lot of coverage in the Hartford Courant, that alleged that the FBI had installed software on the computers of the Hartford Public Library that lets agents track a person's use of Internet and e-mail messages, and the article even said that an individual's library use could be surveilled even if they weren't suspected of being a terrorist. Well, as a matter of fact, the FBI obtained a single search warrant to copy the hard drive of a specific computer that had been used to hack into a business computer system in California for criminal purposes. That is totally different than the FISA situation. No software was installed on that computer. The Hartford Courant has retracted the story in full, but these problems persist. (United States Department of Justice, 2003, p. 22)

According to the argument, one mistake by one newspaper is cause to call all criticism of the Patriot Act in the press, "disinformation." In fact, later in the debate, Ashcroft comes back to this one example, to again imply that the press cannot be trusted and that their disinformation is the cause of all cynicism in the public sphere of discourse. In the following example, he is talking specifically about local law enforcement officials who might have potentially read an article like the one found in the *Hartford Courant* :

> And we recently apprehended an individual who had been the subject of a many-year manhunt, not too far from your district, he was in the neighboring State, local law enforcement. When the Portland cell was first, the alleged Portland cell was first discovered, it came as a result of a tip-off by a deputy sheriff who noticed people involved in training activities, and it was in a neighboring State. So an alert went out to an aggressive team of people interested in the security of the United States, including local law enforcement. They are our best friends. And I think as they understand the truth of what the PATRIOT Act is; you know, they might have read the Hartford Courant article which they subsequently withdrew. But you know what they say, you are charged with the offense that is on the front page and the retraction goes in the classified ads. They might not have read the classified ads yet, but we need to make sure that message gets out. (United States Department of Justice, 2003, p. 25)

This quotation is interesting for a number of different reasons. For one thing, it overlaps with the national security discussion from earlier. It buys into the all-or- nothing argument by referring to an "aggressive team of people interested in the security of the United States," implying there are some people who are not interested in the security of the United States. But for another thing, Ashcroft brings up the one Hartford Courant article again that was retracted and implies that if the local law enforcement officials had read that one article, the scenario of stopping terrorists in this case may not have turned out as well as it did. Fortunately, they understood though, and the Portland Cell was disrupted.

The next example turns attention away from the one *Hartford Courant* article and onto another newspaper—the *Washington Post*. Getting to the credibility of the article

itself demands some build up to the argument. Jerrold Nadler (D NY) cites an article from the *Washington Post* talking about the Moussaui trial that was going on around the same time as the hearing was. The argument states that the government is violating the 6th amendment because Moussaui was not allowed to bring witnesses forward. He is being tried, according to the argument Nadler is developing, in a criminal court with the standards of a military tribunal being applied as the measure of due process. In other words, Nadler, by citing the article, claims that Moussaui could be put to death without due process. Wrapping up the argument, Nadler cites the *Post* again to claim that the Government is in the position of being able to pick and choose the way in which people are prosecuted in the war on terror based upon the best way to get the desired outcome, not necessarily on a consistent standard of justice. This then leads into a question posed to Ashcroft about the scope of the power of government in relation to holding people without a trial, or due process of any kind:

> The Post then says, alternatively, the Government could drop the case against Mr. Moussaoui and either hold him as an enemy combatant or try him before a military tribunal. In other words, what the Post is saying is that if it is inconvenient for the Government because of contrary considerations to allow a defendant to have the benefit of a witness who might say he is not guilty, then the Government can try that defendant in a military tribunal and not have the benefit of that witness, so you can put to death somebody who might be innocent for lack of the testimony of someone who would establish innocence, or you could hold him as an enemy combatant forever and not bother with a trial. So my question is, are you claiming the power to hold people forever without benefit of trial, without benefit of due process, without benefit of habeas corpus, just because you say he is an enemy combatant, and are you claiming the power in the American courts to say because it is inconvenient or not even—more than inconvenient, very damaging to the Government, we won't bother with the sixth amendment right to produce a witness who may show a court that the defendant is, in fact, innocent. (United States Department of Justice, 2003, p.27)

Ashcroft responds to the question by citing Article II of the Constitution and then the Qurin case in the Supreme Court, which happened at the end of World War II, to explain that the President has the authority to designate people as enemy combatants. He says at a

certain point, the struggle against terrorism becomes a military matter, not a criminal one. So Nadler and Ashcroft debate over that for a little bit, and in doing so, Ashcroft accuses the article Nadler cites as being superficial, even though he admits he has not even read it. He refers to the superficial argument as being "common in this discourse:"

> So I find some of the arguments that are common in this discourse to be rather superficial. I know that you were quoting a newspaper and I don't want to make comments about their article without reading their article, but there are considerations which are at the secondary and tertiary level of analysis that relate to the national interest, and those, thankfully, those items come into play when the decisions are being made about these issues, whether or not they come into play when the articles are being written. And I think the national interest of the United States is worth defending in this setting, and we have to be able to understand that we want to be able to extradite from foreign soil individuals who have inflicted great injury against the United States and in order to do that, a number of our foreign counterparts are going to demand that they have Article III judicial process and not enemy combatant or military tribunal standing. (United States Department of Justice, 2003, pp. 29-30)

Here again, criticisms of the Justice Department—whatever they might be, just do not take into account the national security of the United States. The all-or-nothing dichotomy is thrust into the Justice Department's ethos again. Any suggestion that there may be better ways to preserve the balance of liberty in the war on terror is automatically a "superficial" argument that reflects a lack of understanding about the war on terror.

Later in the debate, Martin Meehan (D MA) joins the debate over the ethos of the press and points out that the *Wall Street Journal*, a newspaper known for leaning more to the right than to the left on the political spectrum, published a story on questionable practices of the FBI:

> And there was an article written recently, not in the Washington Post, not even in the Hartford Courant, but that left wing publication known as the Wall Street Journal on May 22 carried a story on massive increases in data collection and text mining by the FBI and local police. And the article reported the FBI violent gang and terrorist organization file had been expanding rapidly since 2002. This database now includes all subjects of FBI domestic terrorist investigations,

> including such groups as anarchists, black extremists, animal rights extremists. (United States Department of Justice, 2003, p. 42)

Interestingly, in this argument, Meehan references the previous mentions of the *Hartford Courant* and the *Washington Post*, to make his point about the *Wall Street Journal*, and seemingly, about the credibility of the press in general. Furthermore, he makes the point in a rather sarcastic way by referring to the Wall Street Journal as being known as "a left wing publication."

Local Law Enforcement Officials

Another important line of argumentation related to the debate over public opinion is the debate over local law enforcement officials. Even though they obviously play a more substantial role in the war on terror than the layperson, they must change their local practices to adhere to the change in federal policies. Furthermore, they are very much a part of the growing anti-Patriot Act sentiment in the public sphere, spearheading the locality-based legislation rejecting some of the Patriot Act provisions. This issue comes up a number of times during the course of the legislative process.

First and foremost, it is interesting to note that this issue brought about criticism of the Justice Department from a majority member of Congress—something that happened only two, maybe three times during the course of this particular debate.

> This morning I met with a university president from Arizona who noted that one of his students has actually been arrested recently for suspected terrorism. Apparently they approached the FBI, the university administration, and asked if they could help or if they could get some information and wondering if they might be able to provide needed information to the FBI and felt that they were given kind of the cold shoulder. What is the policy of the Justice Department in terms of cooperating with local, not just law enforcement officials, but other administrators who may have information that would be helpful? (United States Department of Justice, 2003, p. 61)

Obviously, Flake is not being very aggressive in his questioning. He simply points out that somebody in the local community, a university president, was given a cold shoulder

to the offer of helping with a terrorism investigation, and this leads to the question of explaining the policy the Justice Department follows as far as cooperating with law enforcement officials and others local officials. Ashcroft responds:

> Our policy is to take the help where we can get it within the framework of the law and the Constitution, and if we are not doing that, we are not doing as good a job as we ought to be in helping protect the American people. If you don't mind helping me understand more completely the situation which you have described, I would like to make sure that we don't allow any failure to cooperate to prejudice the security of our people. (United States Department of Justice, 2003, p. 62)

So, he acknowledges that maybe a mistake was made and he asks for help in fixing the problem…again, an anomaly in analysis[11].

In the next example, which actually occurred chronologically ahead of the previous one, a minority member implies that the Justice Department has damaged the relationship with local law enforcement agencies. Furthermore, the question does not directly interact with the Patriot Act, like many of the other questions throughout the hearing do, but it has to do with the broader war on terror and is certainly within the scope of the hearing. Linda Sanchez (D CA) brings up the State Criminal Alien Assistance Program (SCAAP) guidelines initiated by the Justice Department. The guidelines elicit help from local authorities in apprehending criminal aliens and offers reimbursement to the local authorities when they are able to do so. According to her argument, the policy penalizes local authorities when they apprehend aliens that are not criminals and in turn, alienates the locals against the Justice Department. She cites a letter from the National Immigration Forum, which was submitted for the record to help make

[11] I find it interesting that the only other time he admits a mistake may have been made is very early in the debate when Sensenbrenner asks him about changing the Levy guidelines without consulting Congress. That is the only other time I have come across in which Ashcroft acknowledges that something may not have been carried out perfectly by the Justice Department. It is not a coincidence I am sure that in both instances, it was a majority member asking the question.

her argument. In that letter, there are a plethora of oppositional statements from state and local law enforcement officials:

> And this document includes 14 pages of quotes from police departments, sheriffs' offices, police associations and others, all expressing opposition to local law enforcement having to enforce immigration law. In addition, local law enforcement officers join with counterterrorism experts and Federal intelligence agents in emphasizing that identifying high-risk subjects that may pose a threat to national security begins with positive relationships between law enforcement and the community. (United States Department of Justice, 2003, p. 55)

Sanchez asks a number of other questions and notes that due to the short time constraints, she did not expect Ashcroft would be able to answer all of her questions today, but that she hopes he will get back to her through written correspondence. She was right, Ashcroft did not provide much of an answer to her question over the SCAAP program. He noted her concern, acknowledged that border-states had a more difficult time with that program than non border-states, and moved on with his testimony.

The relationship between the Justice Department and local communities has obviously become a huge part of the debate over the Patriot Act and the war on terror. While only one other participant in this debate brings up the criticism of the deteriorating relationship between local law enforcement agencies and the Justice Department, the issue is obviously becoming a huge part of the debate given that hundreds of communities have passed referendums on the Patriot Act, and the fact that shortly after this hearing, Ashcroft makes plans to go on his infamous public tour in defense of the act.

Ashcroft, though, does not wait for his public tour to address his growing public relations problem. In fact, he begins to preview the theme of his public tour in this debate. The best way to begin to illustrate is to go back to a previous exemplar, one of the ones used to illustrate the critics are confused argument made above. Ashcroft says that "information is the friend of the American people…we can take some of the myths away

from the law, we can show the American people how the law is framed…" etc (United States Department of Justice, 2003,p. 25). At the end of the quotation, Ashcroft says:

> We will work with State and local authorities very aggressively on PATRIOT Act issues and other issues to help them understand why doing what we are doing is in the national interest, including the local interest. And I would just have to say this, that the overwhelming, vastly overwhelming response of State and local authorities has been excellent (United States Department of Justice, 2003, p. 25).

He seems to give many state and local authorities credit for understanding when many other Americans cannot. Then he demonstrates how cooperative local law enforcement agencies have been and provides the example, also mentioned above, in which a tip from local law enforcement allowed the Justice Department to disrupt a terror cell in Portland. Ashcroft reports:

> They are our best friends. And I think as they understand the truth of what the PATRIOT Act is; you know, they might have read the Hartford Courant article which they subsequently withdrew. But you know what they say, you are charged with the offense that is on the front page and the retraction goes in the classified ads. They might not have read the classified ads yet, but we need to make sure that message gets out. (United States Department of Justice, 2003, p. 25)

They understand the Patriot Act despite efforts by the press to provide disinformation on the issue. The bottom line, according to Ashcroft, is that the Justice Department does not need to change a thing—it only needs to educate the public.

Librarians

One final category of argument that deserves attention in this analysis is the tension existing between the American Library Association and the Patriot Act. Section 215 of the Patriot Act, or the "Library Provision," as it has come to be known, is one of the most infamous aspects of the debate. Foerstel (2004) focuses an entire book on this struggle—the way in which librarians have tried to protect the privacy of the patrons and the way in which the government has responded to those efforts. In the current debate so far, in various other examples, we have seen discussion over the value of the provision. At one point in the debate though, discussion shifts from the value of the law itself to the ethos of the librarians who have tried to thwart some of the perceived intrusiveness of the Patriot Act. Mark Green (R WI) is the one who brings up the question of the ethos of the librarians. He asks Ashcroft if they have been obstructing anti-terrorism efforts:

> A question with regard to the libraries. A lot of libraries have made a practice of destroying computer records and other records in defiance of the PATRIOT Act. They are saying that they don't agree with it, therefore, we will make it more difficult for the Justice Department to come in and actually search those records. To your knowledge, has any investigation been stymied? Has the Justice Department sought information that was then denied by any of the libraries? (United States Department of Justice, 2003, p. 61)

Unfortunately, Ashcroft gets a little confused—he had lost his place in his notes and is unable to respond to the question. He apologizes and says it has been a long day. This is certainly understandable, as it was 4.5 hours into his testimony at that point. It is unfortunate though, as I would like to read his answer to the question.

Summary of the Implementation Stage

During the oversight stage of debate, the tone of dialogue shifted from one of cooperation and unity, to polarizing disunity. Critics of Ashcroft, predominately minority members of the House, accuse Ashcroft, the Department of Justice, and the entire Bush

Administration of abusing their expanded powers, withholding information from the oversight process, and generally being unavailable to the deliberative process. On the other hand, Ashcroft and his proponents consisting of other Justice Department witnesses and majority members of the House, accuse the critics of being confused about the Patriot Act, paranoid about the balance of civil liberties, and of being in the way of the war on terror—contributing to the all-or-nothing ethos proposed by the Bush Administration at the very beginning of the war on terror. In the case of the Patriot Act, the all-or-nothing dichotomy came out as, "anybody who opposes, in any way, the Justice Department's ideal anti-terrorism legislation must not recognize the importance of fighting terrorism in the post 9/11 world." Critics though, again and again, attempted to remind Administration officials that they by and large agree with the premises underlying the legislation; the criticism is simply that there needs to be more oversight of its implementation—it needs to be more transparent to the legislature and, when appropriate, the general public. To put it lightly, the ships are passing in the night.

Chapter 10

Ashcroft's Last Stand

The result of the growing tension from the Implementation stage of debate is that the House of Representatives, as a legislative body, finally built enough momentum to try and limit the power of the Executive branch granted by the Patriot Act. Immediately following the hearings analyzed in part II, a bipartisan group of members took action. On July 22, 2003, the "Otter Amendment," named after its sponsor, C.L. Otter (R ID) was passed in the House. The amendment was an addendum to the Commerce, Justice and State Departments funding bill, and specified that, "none of the funds…could be used to execute 'sneak and peak' warrants" (EPIC v. Department of Justice, 2005) authorized under section 213 of the Patriot Act. Interestingly, the amendment "passed by an extraordinary margin of 309 to 118, with 113 Republicans voting in favor" (Dauenhauer, 2003). Also interesting is that the "House vote was preceded by a unanimous vote in the Senate last week to deny funding for the domestic cyber-surveillance system known as the Terrorism Information Awareness (TIA) project—recently renamed from 'Total Information Awareness'" (Dauenhauer, 2003). According to Laura Murphy, Director of the Washington legislative office of the American Civil Liberties Union, "Congress is beginning to respond to what regular Americans have been saying at backyard barbecues and across their kitchen tables for months now: we can—and must—be both safe and free" (Dauenhauer, 2003). Recognizing that many view the ACLU as a biased, partisan and political voice, we turn to another source to back the claim that public sentiment toward the Patriot Act has shifted as a result of the 2003 legislative debate. Toni Locy, a reporter for *USA Today*, writes, "The administration faces a public relations challenge. Now that the panic over 9/11 has largely subsided, some Americans worry as much about

forfeiting cherished rights as they do about terrorism" (Patriot Act blurred in the public mind, 2004).

The USA PATRIOT Act Outreach Initiative

As we recall from the legislative debate itself, according the Justice Department and proponents, public criticism is simply the result of disinformation and hence, confusion on the part of critics. So, in response to the Otter Amendment and the public dissent accompanying it, the Justice Department led by Ashcroft began an outreach initiative to educate the public on the ways in which the Patriot Act is crucial to protecting national security.

The "Guy A. Lewis Memorandum" to United States Attorneys

Thanks to the *Electronic Privacy Information Center* (EPIC) through a Freedom of Information Act battle, we are able to examine the origins of the outreach initiative (EPIC v. Department of Justice, 2005)—a memorandum sent out to "All United States Attorneys" (Guy A. Lewis Memorandum, 2003, p. 1) via electronic mail by the Department of Justice. The actions required of the U.S. Attorneys are to:

> 1) Call and/or meet with Congressional Representatives in your district as you deem appropriate to discuss the USA PATRIOT Act and Otter Amendment by August 29, 2003; 2) Conduct community meetings in your district to discuss the USA PATRIOT Act in August/September; 3) Report back to EOUSA on meetings and contacts by September 3, 2003. (Guy A. Lewis Memorandum, 2003, p.1)

Then the memo provides the background from which U.S. Attorneys are to approach their educational outreach effort. Accordingly, the Patriot Act has "enhanced our ability to prevent, investigate, and prosecute acts of terrorism." Furthermore, "While the results have been important, the USA PATRIOT Act provided for only modest, incremental changes in the law; in many instances simply taking existing legal principles and adjusting them to meet the challenges posed by a global terrorism network" (Guy A.

Lewis Memorandum, 2003, p. 1-2). Originally, according to the memo, "Congress recognized the necessity of the USA PATRIOT Act to help fight the war on terrorism when it enacted the Act by an overwhelming majority with the support of members from across the political spectrum" (Guy A. Lewis Memorandum, 2003, p. 2). Unfortunately though, according to the memo, "The USA PATRIOT Act's positive effects, however, have been diminished by negative attacks and proposed Congressional Amendments designed to limit its scope" (Guy A. Lewis Memorandum, 2003, p. 2). Thus, "The purpose of the initiative described in this memorandum is to continue to educate the public concerning the Act's effectiveness in protecting our nation against terrorists" (Guy A. Lewis Memorandum, 2003, p. 2).

After the background section of the memo comes to a close, the document goes into more detail about the initiative itself. Accordingly, the section begins:

> The Attorney General is requesting the assistance of all United States Attorneys (USAs) to educate the public regarding the USA PATRIOT Act. USAs are on the front lines in the war on terrorism, are using the tools contained in the PATRIOT Act, and therefore are in the best position to deliver the message that the USA PATRIOT Act plays an essential role in fighting the war on terrorism, and deserves the support of every American. (Guy A. Lewis Memorandum, 2003, p. 2)

Then the memo alerts all U.S. Attorneys that they have the discretion to approach the task as they see fit according to the specific needs of their communities. Following, the announcement is made that,

> On August 19, 2003, the Attorney General will 'kick-off' the initiative in Washington, D.C., by announcing a strategy in support of the USA PATRIOT Act. This 'kick-off' will begin a 16-state, 18 city PATRIOT Act tour ending on September 9, 2003. At each location, the Attorney General will speak to a selected group of law enforcement and public officials and will also meet with the local media" (Guy A. Lewis Memorandum, 2003, p. 2).

The head of the Justice Department was leading the public defense of the Patriot Act.

Critics are Hysterical

The very initial speech given on the tour, to the American Enterprise Institute in Washington, D.C. reveals nothing too out of the ordinary or especially interesting as per Ashcroft's standard line of argumentation in defense of the Patriot Act. He begins with a fear appeal using an example that had just occurred the morning of the speech of a terrorist attack occurring in Baghdad that killed 13 people and injured a lot more—upwards of 120 other people. From this example the ethos of the terrorists is constructed in typical fashion:

> This morning's attack again confirms that the worldwide terrorist threat is real and imminent. Our enemies continue to pursue ways to murder the innocent and the peaceful. They seek to kill us abroad and at home. But we will not be deterred from our responsibility to preserve American life and liberty, nor our duty to build a safer, more secure world. (Ashcroft, 2003, Aug 19, p. 1)

At this point, Ashcroft makes the connection from the attack in Baghdad to 9/11 stating, "Nearly two years have now passed since American ground was hollowed by the blood of innocents" (Ashcroft, 2003, Aug 19). Then he adds a mythic appeal to American history, by adding the three attack sites of 9/11 to "a familiar list of monuments to American freedom…places like Bunker Hill, Antietam, the Argonne, Iwo Jima, and Normandy Beach" (Ashcroft, 2003, Aug 19, p. 1).

Moving on to the resolution of the problem, Ashcroft continues the appeal to mythos by referencing Abraham Lincoln who in 1863 "stood on the hallowed ground of freedom at Gettysburg and expressed the sense of resolution familiar to anyone who has looked into the void at Ground Zero, surveyed the wreckage of the Pentagon, or seen the gash in the earth left by Flight 93" (Ashcroft, 2003, Aug 19, p.1). The resolution, according to Ashcroft who quotes Lincoln this time, involves being "dedicated to the unfinished work which they who fought here have thus far so nobly advanced" (Ashcroft,

2003, Aug 19, pp. 1-2). The "they" in this quote refers to those who already started fighting back in the war on terror: the passengers of flight 93, the firefighters, the police officers, and all the "unknown heroes," who acted courageously on September 11, 2001. Their "spirit" according to Ashcroft, "is the measure of hope we take from that terrible day" (Ashcroft, 2003, Aug 19, p. 2). The "cause for which these men and women gave the last full measure of devotion…has become the cause of our time" (Ashcroft, 2003, Aug 19). Their cause, according to Ashcroft, "has transformed the mission of the Justice Department" (Ashcroft, 2003, Aug 19, p. 2); in fact, it has created a new "ethos of justice:"

> Where a culture of law enforcement inhibition prevented communication and coordination, we have built a new ethos of justice, one rooted in cooperation, nurtured by coordination, and focused on a single, overarching goal: the prevention of terrorist attacks. All of this has been done within the safeguards of our Constitution and its guarantees of protection for American freedom. (Ashcroft, 2003, Aug 19, p. 2)

The rest of the speech is spent explaining how the new ethos of justice has been successful, beginning by appropriating a quote from Winston Churchill who, in 1941, "appealed to the United States for help in defending freedom from Nazism with the phrase, 'Give us the tools and we will finish the job.' In the days after September 11, we appealed to Congress for help in defending freedom from terrorism with the same refrain: 'Give us the tools and we will finish the job'" (Ashcroft, 2003, Aug 19, p. 2). From that point on, example after example is given explaining how the Patriot Act has prevented terrorist attacks, allowed the capture of terrorists, and etc. Ashcroft summarizes the success by saying, "Two years later, the evidence is clear: If we knew then what we know now, we would have passed the Patriot Act six months before September 11th rather than six weeks after the attacks" (Ashcroft, 2003, Aug 19, p. 3). In other words, the Patriot Act, in Ashcroft's mind, would have prevented 9/11.

Since the speech is not officially a part of the data set, I will not dwell on every detail of it. The point to bring away from it though is that much to my surprise, given the context from which the education initiative arose, the ethos of the critics was not called into question. The speech focused on the ethos of the terrorists and the successes of the Patriot Act; there was no mention of those who had just initiated an amendment to moot out a provision of the Patriot Act.

That restraint would not last forever though. The next speech I looked at as part of Ashcroft's public tour occurred in New York City on September 9, 2003—two days before the anniversary of 9/11. The speech was very much the same as the initial one, just a bit of reorganization; in fact many paragraphs are word for word nearly identical to the August 19th speech. One difference that stood out to me though is the way in which attacks on the critics' ethos began to creep into Ashcroft's presentation. The following quotation occurs toward the end of the speech, after setting up the fear appeals and providing examples demonstrating how great the Patriot Act is. He begins to wrap his speech up by saying, "Only two years have passed…yet some Americans may have forgotten how we felt that day. And it was only yesterday that the 343rd firefighter to die in the World Trade Center attack was buried" (Ashcroft, 2003, Sept. 9, p. 5). This was the one line in the whole speech that spoke to the ethos of the critics, but it does so in a rather uniquely aggressive sort of way. In the second hearing examined in the oversight stage of debate, we certainly find Ashcroft making the inference that his critics have forgotten about the pain and suffering of 9/11, but here, he comes out and expresses it directly.

In the next speech I looked at as part of the Patriot Act tour, Ashcroft's criticism of the critics' ethos becomes more a primary purpose of his presentation. The speech occurred on September 15, 2003 and was given to the National Restaurant Association in

Washington, D.C. He begins the speech by saying: "The genius of our system of government is that in America, we believe that it is the people who grant the government its powers. We believe that it is the people's values that should be imposed on Washington—not Washington's values on the people" (Ashcroft, 2003, Sept. 15, p. 1). Then having established the importance of the "people" in the democratic process generally, he praises the ethos of the people he is presently speaking to: "Your willingness to visit this city is a valuable reminder of the patriotism and entrepreneurship that make this nation great. These are the values that should sustain our hearts and inform our actions in these perilous times" (Ashcroft, 2003, Sept. 15, p. 1). Here, he conjures up the image of economic patriotism and how that should be the spirit of patriotism that drives this country forward during such "perilous times." After doing so, he begins to make the argument that the critics in Washington are detracting from that spirit of patriotism: "Of course, Washington is often known as a town filled with debates where people lose sight of the issues most important to the citizens. Your visits and your voices remind this city of the values of the people-the values that are truly important" (Ashcroft, 2003, Sept. 15, p. 1). Then comes the ad hominem attack; Ashcroft says, "Unfortunately, at this moment, Washington is involved in a debate where hysteria threatens to obscure the most important issues" (Ashcroft, 2003, Sept. 15, p. 1). The bottom line is finally put on display: critics of Ashcroft are hysterical. He explains further what he is talking about:

> If you were to listen to some in Washington, you might believe the hysteria behind this claim: "Your local library has been surrounded by the FBI." Agents are working round-the-clock. Like the X-Files, they are dressed in raincoats, dark suits, and sporting sunglasses. They stop patrons and librarians and interrogate everyone like Joe Friday. In a dull monotone they ask every person exiting the library, "Why were you at the library? What were you reading? Did you see anything suspicious?" (Ashcroft, 2003, Sept. 15, p. 1)

Ashcroft concludes the particular attack by noting, "According to these breathless reports and baseless hysteria, some have convinced the American Library Association that under the bipartisan Patriot Act, the FBI is not fighting terrorism. Instead, agents are checking how far you have gotten on the latest Tom Clancy novel" (Ashcroft, 2003, Sept. 15, p. 1).

Ashcroft not only displays indignation and arrogance toward his critics, but he completely overlooks the real debate that is happening in the legislature. The real debate in the legislature simply asks Ashcroft to disclose more information so that the public can be sure abuses are not taking place. Furthermore, the provision that was actually revised by Congress according to the Otter amendment—the one which sparked the whole outreach initiative in the first place, had nothing to do with libraries—it placed limits on section 213—the delayed notice search warrant. We should also keep in mind that the amendment did not eliminate delayed notice search warrants; it simply created higher evidentiary standards for utilizing them. But that is a moot point in the context of the outreach initiative that took place because Ashcroft never even addresses the Otter amendment in any of his speeches on the tour (at least any that I found). Instead, Ashcroft lumps all critics of his Patriot Act into one category and characterizes them as hysterical. He frames owners of restaurants as being more patriotic than members of Congress who are working hard to help find the right balance between safety and liberty in the war on terror. Why? Because according to the tenets of economic patriotism, true patriots get out of the way, go about their business of playing their parts in the economy, while the true heroes (members of the Executive branch of government) go after the bad guys.

Ashcroft continues to spend time answering the accusation that the whole purpose of the Patriot Act is to find out what Americans are reading. He says, "The hysteria is ridiculous. Our job is not" (Ashcroft, 2003, Sept. 15, p. 1). Furthermore, he says, "It

would be a tragedy if the hysteria surrounding certain aspects of our war against terror were to obscure the important evidence that the Department of Justice has protected the lives and liberties of the citizenry, and not just in the very real world of anti-terrorism" (Ashcroft, 2003, Sept. 15, p. 1). Then interestingly, he spends much of the rest of his speech on this occasion discussing the drop in the general crime rate—crimes that have absolutely nothing to do with terrorism.

Three days later, speaking to a group of law enforcement officers in Memphis, Tennessee, Ashcroft's construction of the ethos of the critics gets even more obnoxious and arrogant. He begins this speech by saying that the Justice Department has successfully changed its mission to meet the threats of terrorism, and that the people before him on this day "have brought new meaning to sacrifice and new depth to duty" (Ashcroft, 2003, Sept. 18, p. 1). He says, "we are committed to a new strategy, a strategy as serious as the threats we face; a strategy grounded in reality, measured by results, and accountable to the people of the United States of America" (Ashcroft, 2003, Sept. 15, p. 1). As soon as he says that his strategy is "grounded in reality," the anticipation of the attack on the critics' ethos builds because when there is a strategy distinguished by the statement that it is "grounded in reality," there has to be one that is not grounded in reality. The anticipation is accurate. The very next sentence of Ashcroft's speech gets back to accusations of hysteria by the critics: "That said, if you listen to some of the rhetoric coming out of Washington recently you might have a, shall we say, less serious view of what we're up to. You might, for instance, believe the hysteria behind this claim: 'Your local public library is under siege by the FBI'" (Ashcroft, 2003, Sept. 15, p. 1). Again he puts words into the mouths of critics and lumps them all together in one big category of conspiracy theorists, completely overlooking the rational criticisms made

during the actual legislative process. The lumping continues in the next sentence when he compares critics' ideas to an episode of the X-Files:

> If you were to pay too much attention to some in Washington you might conjure up harrowing images of agents working around the clock. Like in the X-Files, they are raincoated, dark suited, and sporting sunglasses. But unlike the X-Files, their subjects aren't treacherous space aliens but readers and librarians. And no one escapes their grinding interrogation. In a dull Joe Friday monotone, they ask: 'Why were you at the library? What were you reading? Did you see anything suspicious? Just the facts, ma'am. Just the facts." (Ashcroft, 2003, Sept. 15, p. 1)

So, Ashcroft utilizes much of the same language as he did in the previous speech but gets even more antagonistic by comparing the critics' ideas to an X-Files episode; he generalizes past the arguments being made in the context of the real, meaningful debate being attempted in Congress—at least the debate analyzed in this project coming from the Judiciary Committee of the House of Representatives.

Negative Reactions: Anti-Lobbying Accusations

At this stage in the public sphere debate over the war on terrorism, rational-critical discourse is back in full force. The days are gone when the public, led by its congressional representatives, are guided by shock, fear and disbelief so much so that they are willing to go along with executive leadership decisions—regardless of what they entail. Alongside the legislative efforts at curbing executive power, President Bush's approval rating is still on a steady decline; by September of 2003, it had fallen to below 55% (President Bush's Approval ratings, 2005). Along with the decline of Bush's approval ratings, Ashcroft was also losing popularity. On a USA TODAY/CNN/Gallup Poll there is a question that asks Americans, "Do you have a favorable or unfavorable opinion of Attorney General John Ashcroft?" Between the beginning of February 2003 and the end of September, the "favorable" rating fell from 58% to 49% and the "unfavorable" rose from 24% to 31%. (USA TODAY/CNN/Gallup Poll Results).

Furthermore, the number of communities passing legislation as a referendum on the Patriot Act is also rising at this point. Foerstel (2004) tells us that by the middle of August 2003, "more than 140 cities and counties, in addition to state legislatures in Alaska, Hawaii, and Vermont, have passed resolutions against the Patriot Act" (p. 169).

In the face of the growing public relations problem, it seems as though Ashcroft is attempting to turn back the flow of public opinion; in effect, he is making one last mythic attempt to conjure up the magical unity so prevalent in the wake of 9/11. Much of the bombastic rhetoric toward his critics found in speeches from his public tour resonates with some of his original rhetoric in defense of authorizing the act to begin with. Recall a quotation from Ashcroft's testimony before the Senate Judiciary Committee on December 6, 2001, cited in Chapter 1:

> We need honest, reasoned debate; not fearmongering. To those who pit Americans against immigrants, and citizens against non-citizens; 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. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil. (DOJ Oversight)

It is obvious at this point in the debate that Ashcroft is not interested in "reasoned debate," and that it is he who is engaged in "fearmongering." Undoubtedly he has critics outside of Congress (and perhaps even some inside of Congress) who have also engaged in fearmongering as well, but the legislative debate to this point in the Patriot Act legislative process has, according to thorough, rigorous analysis, proven to involve a great deal of reasoned debate. Ashcroft simply chooses to ignore it and pass it off as "hysteria" because his image of the one, true post 9/11 patriotism is absolute deferment to the branch of leadership he is a part of—an image of patriotism that was shared by 90% of Americans in the aftermath of 9/11.

The “educational outreach initiative” in August and September of 2003 is a last ditch effort to bring that magical unity back into existence. Unfortunately for Ashcroft, his appeal to fear failed him; not only did it not solve his public relations crisis—it worsened it. It is likely that too many people shared the views of Representative Bernard Sanders (I VT), who reacts to Ashcroft’s educational outreach effort/public tour with disgust. Sanders, in a press release on August 21, 2003 describes the growing anxiety over Ashcroft’s veil of secrecy and describes the public tour as a guise for meetings in front of chosen audiences—a chance for scripted advertisements. Sanders explains:

> Over 150 cities and towns representing some 18 million people, three state legislatures and 44 state library associations have all passed resolutions expressing their concerns about the Patriot Act. Organizations from across the political spectrum - from the right to the left and everywhere in between—have joined together against the Patriot Act and for protecting American civil liberties. Attorney General Ashcroft is clearly on the defensive and said he would hold public hearings on the Patriot Act nationwide. Now we find out that's not true. Instead of holding real public meetings, he's holding closed meetings with selected audiences where he gives scripted remarks for the television cameras. It's time for Attorney General Ashcroft to stop hiding and to meet with the American people. (Sanders Challenges Ashcroft to Hold Open Public Meetings on Patriot Act, 2003, August 21)

Sanders concludes this particular press release by accusing Ashcroft of avoiding any public scrutiny whatsoever:

> It is a bit ironic that Attorney General Ashcroft is using closed meetings to try to build public support for a law that expands secret court proceedings. That's the way the Ashcroft Department of Justice likes to operate - without any public scrutiny or accountability. That's just wrong. If he supports the sweeping new powers for federal agents in the Patriot Act then he should be prepared to defend that position in the court of public opinion. (Sanders Challenges Ashcroft to Hold Open Public Meetings on Patriot Act, 2003, August 21)

On the same day, John Conyers also releases a press release and in it is contained the text of a letter he wrote to John Ashcroft. The letter was in response to the memorandum issued by the Justice Department to all U.S. Attorneys asking them to also take part in the educational outreach initiative. This is the first sign that anybody outside of the Justice

Department knew anything about the memorandum. Conyers addresses Mr. Attorney General and writes:

> I am writing because of my concern that your national tour along with recent public relations efforts by your United States Attorneys to stem criticism of and generate support for the USA PATRIOT Act, the U.S. Department of Justice's enforcement of that law, and proposed extensions of that Act violate not only prohibitions on propaganda efforts by the Executive Branch but also the Anti-Lobbying Act. In my judgment, it would be a far better use of taxpayer funds if you were to work with the Congress to rationalize and curtail the existing authorities you have, rather than to travel around the country defending your actions. (Conyers Criticizes Ashcroft's Public Relations Campaign, 2003, August 21)

We of course know that Ashcroft did not end the public relations campaign despite the accusation of violating the Anti-Lobbying Act.

In fact, the Justice Department had anticipated that this accusation would come and had warned the U.S. Attorneys as recipients of the letters about how to avoid the charges. Toward the end of the USA PATRIOT Act Outreach Initiative (Guy A. Lewis Memorandum, 2003, August 14) memo issued by Guy Lewis, there was a section entitled, "Note Important Ethical Information Before You Make Any Congressional Contacts" (Guy A. Lewis Memorandum, 2003, p. 3). The section begins by saying "Before you make any congressional contacts, please review this important information in order to comply with the Anti-Lobbying Act" (Guy A. Lewis Memorandum, 2003, p. 3). It goes on to say, "As the presidentially-appointed United States Attorney, you are authorized to make these requested congressional contacts to educate the congressional representatives in your district on the PATRIOT Act, and the Otter Amendment and their impact on law enforcement efforts to fight terrorism" (Guy A. Lewis Memorandum, 2003, p. 3). Then it specifies that, "You are authorized to make this contact through a personal visit and/or a personal telephone call. No one else in your office, even at your

request, is authorized to make these congressional contacts" (Guy A. Lewis Memorandum, 2003, p. 3).

Ashcroft Resigns

Conyers did go ahead and press the Justice Department about the potential Anti-Lobbying violation. In a letter to Glenn Fine, the Inspector General, he requested that the allegation be investigated. According to a Fox News report, "Conyers based his request on a Government Accountability Office report that showed Ashcroft's tour and a pro-Patriot Act Internet site had cost more than $208,000 and also had involved activities by 80 of the 93 U.S. Attorneys" (Persky, 2004). Fine did investigate the tour and reported back that, "Neither the Anti-Lobbying Act nor the appropriations provision prohibited the attorney general and the U.S. attorneys from making public speeches conveying DOJ's view regarding the merits of the Patriot Act and discussing the DOJ's use of the law's provisions" (Persky, 2004).

Despite the fact that Ashcroft and the Justice Department were cleared of any legal accountability, they were still held accountable by the public. According to a Washington Post article, the anti-Patriot Act campaign kept growing. On February 4, 2004, "New York City, site of the country's most horrific terrorist attack, Wednesday became the latest in a long list of cities and towns that have formally opposed the expanded investigatory powers granted to law enforcement agencies under the USA Patriot Act" (Garcia, 2004, Feb. 5, p. A11). To be exact, there were 246 of these "municipalities and counties and three states that have passed legislation in opposition to the Patriot Act" (p. A11). Additionally, according to the previously cited USA TODAY/CNN/Gallup Poll results (2004, Feb. 25), Ashcroft had dropped to a 42% favorable rating and a 36% unfavorable rating.

Amidst the continuing decline of popularity, Ashcroft resigned his position as the Attorney General of the United States on November 9, 2004 (King, 2004). In his handwritten resignation letter, Ashcroft recognizes a need for new leadership of the Department of Justice:

> The demands of justice are both rewarding and depleting. I take great personal satisfaction in the record which has been developed. The objective of securing the safety of Americans from crime and terror has been achieved. The rule of law has been strengthened and upheld in the courts. Yet, I believe that the Department of Justice would be well served by new leadership and fresh inspiration. I believe that my energies and talents should be directed toward other challenging horizons. (Text of Attorney General John Ashcroft's resignation letter, 2004, November 9)

Then, he makes his request to resign official by saying, "Therefore, I humbly state my desire to resign from the office of United States Attorney General" (Ashcroft, 2004, November 9). That next day, on November 10th 2004, President Bush nominates Alberto Gonzales to be Ashcroft's successor.

Gonzales is Confirmed

The confirmation of Alberto Gonzales was contentious to say the least. In fact, the congressional hearings over the matter could probably serve as the subject of another dissertation topic. Nonetheless, because his confirmation relates to the current topic, it demands a modicum of attention here. To begin, the vote to confirm Gonzales was 60-36 in the Senate—all the rejection votes came from Democrats. Though, according to an Associated Press article on February 3, 2005, "The 'no' votes were the second most ever lodged against a successful nominee for attorney general;" the only vote that was any closer was ironically John Ashcroft whose Senate confirmation count was 58-42 (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2003, February 3). By and large, the controversy over Gonzales stems from the fact that he is an insider to the Bush presidency. Serving as Bush's legal counsel in the White

House and before that as Governor of Texas, it was feared that Gonzales was too close to Bush philosophically and personally to be willing to say "no" to the President when necessary. Charles Schumer (D NY) in fact is cited as saying this verbatim: "He was so circumspect in his answers, so unwilling to leave a micron of space between his views and the president's, that I now have real doubts whether he can perform the job of attorney general" (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2005, February 3). Schumer reiterates: "In short, Judge Gonzales still seems to see himself as counsel to the president, not attorney general, the chief law enforcement officer of the land" (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2005, February 3).

A more specific example from which critics base their opinions of Gonzales comes from a line of questioning over the Abu Ghraib prison abuse story. During the hearing, Gonzales was continually asked about the justification of torture in the war on terror and the pictures of abuse at the Abu Ghraib prison. Though he claimed to be "sickened and outraged by those photos," he refused to answer questions about whether he thought criminal activity had taken place, "citing ongoing prosecutions" as the reason (Gonzales faces tough questions at hearing: Dems grill attorney general nominee on torture, 2005, January 6). In response, Joseph Biden (D DE) "accused Gonzales of hiding behind a 'straw man' to avoid answering questions" (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2003, February 3). More poignantly, Biden said, "That's malarkey…You are obliged to comment. That's your judgment we're looking at. …We're looking for candor" (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2003, February 3).

Another example, along the same lines as the Abu Ghraib line of argumentation, that deserves mention is a controversial January 2002 memo from the Department of Justice office that was addressed to Gonzales (legal counsel to the President at the time). "In that memo, the Justice Department argued the terrorism fight 'renders obsolete [the Geneva Conventions'] strict limitations on questioning of enemy prisoners and renders quaint some of its provisions" (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2003, February 3). Additionally, "then-Assistant Attorney General Jay Bybee wrote, 'we conclude that torture as defined…covers only extreme acts'" and furthermore, that "U.S. law defined 'severe' pain as that 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death'" (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2003, February 3). Patrick Leahy (D VT) asked Gonzales "if he agreed with that position at the time," and "Gonzales answered: 'I don't recall today whether or not I was in agreement with all of the analysis. But I don't have a disagreement with the conclusions then reached by the department'" (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2003, February 3).

Hope for More Cooperation??

The rather vague response by Gonzales to questions about the torture memo typifies the reasoning behind complaints lodged against him during the confirmation hearing. He was accused of not being forthcoming, of generalizing past the content of specific questions, and generally just being too much of an insider to the Bush Administration to stand strong as an independent agency. In other words, Democrats viewed his ethos as being too much like his predecessor John Ashcroft. However, toward

the end of the hearing, we get some sense that maybe his ethos in context of policymaking debate may differ a little from Ashcroft. Gonzales was asked a general question about whether he has made any mistakes in conducting the war on terror. Gonzales responded, "I will be the first to admit I am not perfect and I make mistakes." Leahy "then exclaimed, 'Glory hallelujah, you're the first on in the administration that's said that" (Senate confirms Gonzales for attorney general: Memo on torture fails to derail nomination, 2003, February 3). So, this leads to some anticipation that the debate over the Patriot Act could shift gears a little bit in terms of the way patriotism is negotiated during the legislative process concerning reauthorization.

Summary

The purpose of this chapter is to provide context for the final stage of legislative debate—the reauthorization of the Patriot Act. It describes an enormous turning point in the debate. For the first time, legislators actually took a stand to curb the powers sought by the Justice Department in the form of the "Otter Amendment." Even though that amendment did not derive from the Judiciary Committee, it still symbolized the growing distrust of the Executive branch and the Justice Department in particular. More and more, public opinion was creating the discursive space for criticism; patriotism was for many, political once again. The magical unity of the 9/11 religious patriotism had lost much of its power. In response, Ashcroft stayed the course. He was not about to back down, He made one last effort to conjure up the magic once again. He accused critics of not just run of the mill paranoia, but downright craziness—the hallucinogenic kind. He grouped all criticism together in one category, making no effort whatsoever to distinguish between legitimate criticism and exaggeration; he generalized past the critics by accusing them of watching too much "24" and other popular stories that convey a particular kind of reality

to the general public about the FBI. He refuses to accept any criticism whatsoever; from his perspective, he is God-like.

Well, his mythmaking had lost much of its impact. His popularity was sliding; he took much of the blame for the growing distrust of the government. Public opinion indicated that more and more people were beginning to take at least some of the criticisms made against the Patriot Act seriously. In the midst of that public relations disaster—the fallout from the "Patriot Act Tour, Ashcroft resigned and Gonzales took the helm of the Justice Department. Many critics were afraid that the new Attorney General would not be much of an improvement over Ashcroft and thus the debate over his confirmation at the hearing was quite contentious. Gonzales was perceived as being too close to the President, given that he was Bush's legal counsel for years—even prior to getting to the White House. Despite the contention, some signs did emerge that perhaps he would be a little more willing to cooperate: his admission that he was not perfect was acknowledged by the minority leader of the Senate, Patrick Leahy as being a big first step toward developing a more cooperative atmosphere. Gonzalez's confirmation though was the second closest vote ever in the history of America over the confirmation of an Attorney General who was not rejected. The only vote that was any closer was John Ashcroft's confirmation. From within this context, the final stage of debate over the Patriot Act begins.

Chapter 11

A New Leader, A New Promise of Patriotism

The debate over the Patriot Act does indeed shift gears moving into the reauthorization stage of debate. The sheer quantity of debate is the first indication that things had changed. In the first stage of debate, analyzed in Chapters 4-6, there was not much debate to speak of. Most of the negotiations occurred behind closed doors and what little did occur in a public forum entailed a great deal of agreement and unity. The agreement was that updated antiterrorism legislation was needed so badly and so quickly that the real debate over the balance between safety and liberty would have to come later, and the sunsets would ensure that it happened. In retrospect though, evidence suggests that the critics of Ashcroft assumed the real debate would have happened much sooner than it did however, especially after the way in which the authorization ended with so many people being disgruntled with the Justice Department. Many members of Congress indicate that they expected the robust debate to occur during the implementation stage of oversight. However, the expected quality of debate does not seem to have occurred given that much of the criticism during that stage was aimed at the deliberative process itself: claims that a) there were not enough opportunities for public debate; b) the Justice Department was not transparent enough about the implementation of the Patriot Act so that meaningful questions could be asked; and c) the observance of the all-or-nothing dichotomy and the way in which it stood in the way of questions being answered in a meaningful way.

Given the rhetoric of Ashcroft's public tour, the momentum was building toward a very similar framework for discourse as seen previously. He accused critics of having forgotten about the tragic impact of 9/11 and of generally standing in the way of the

patriots who were on the front lines of the war on terror. Furthermore, as observed from the controversy surrounding the confirmation of Alberto Gonzales—Ashcroft's replacement, it did not seem as if critics had a great deal of hope at first that the deliberative process would improve even with change in leadership, at least not until the very end when his admission to not being perfect provided a subtle hint that maybe there was some potential. The possibility existed for Gonzales to be more cooperative.

Opening Statements

Sensenbrenner

Chairman Sensenbrenner (R WI) calls the committee to order and introduces the purpose of the debate by first drawing attention to the death and destruction that occurred on 9/11: "On September 11, 2001, 19 terrorists turned four planes into guided missiles that killed more than 3,000 innocent men, women, and children, caused approximately $100 billion in economic losses, and triggered U.S. military action in Afghanistan" (USA PATRIOT Act, 2005, p. 1). Then, he describes the purpose of the Patriot Act and why Congress passed it in the first place:

> In response to the failure of the Nation's law enforcement and intelligence communities to discover and prevent these attacks, Congress passed the USA PATRIOT Act. The objective of this bill was to modernize both Federal law enforcement and intelligence investigative tools and to ensure that the information collected was shared between the law enforcement and intelligence communities. (USA PATRIOT Act, 2005, p. 1)

Not only does the Patriot Act modernize investigative tools and information sharing practices utilized by Federal law enforcement agencies, but through the act, Congress created effective oversight mechanisms to ensure civil liberties violations would not occur:

> The PATRIOT Act is an important part of the overall framework to protect our Nation. In passing the PATRIOT Act, Congress established standards and oversight for the use of the Act's provision. For example, section 1001 of the

> PATRIOT Act requires the Inspector General of the Department of Justice to determine and report to Congress civil liberties violations. I would note that this includes any violations of civil liberties by DOJ, not just those alleged to have occurred under the provisions of the PATRIOT Act. (USA PATRIOT Act, 2005, p. 1)

This quotation is very important because it references a very formal, legal connection between the Patriot Act and other Justice Department activities. Section 1001 requires that the Inspector General investigate any alleged civil liberties violations and report them to Congress—not just violations related to the Patriot Act. At the end of this phase of debate, this connection becomes a major source of controversy as Justice Department critics try to expand the debate based partly on section 1001 and proponents, mainly Sensenbrenner himself, try to narrow the debate in an effort to bring discussion to a close. Ironically, debate over this section ends up being a headache for Sensenbrenner, but for now, it serves as evidence of successful deliberation over the Patriot Act. Sensenbrenner wraps up this argument pertaining to section 1001 to a close by noting, "To date, the Inspector General has issued six reports and not found a single example of a civil liberties violation relating to authority granted under the PATRIOT Act" (USA PATRIOT Act, 2005, p. 1).

He then discusses another aspect of the Patriot Act that has major influence upon ethos in this debate—the sunset provisions. He initially describes those provisions as being a positive influence upon the debate by saying, "To further address concerns that enhanced law enforcement tools could lead to civil liberties violations, Congress included a sunset provision for 16 sections of the PATRIOT Act" (USA PATRIOT Act, 2005, p. 1). But then, he makes it very clear that he does not wish to see any of those provisions actually expire: "These 16 sections, set to expire this year on December 31, are aimed at updating investigative tools and improving information sharing and go to the very heart

of our Nation's response to a changed world in which terrorists plot to destroy our very way of life" (USA PATRIOT Act, 2005, pp. 1-2). What is not clear in this quotation, or anywhere else during the course of this hearing for that matter is whether Sensenbrenner agrees with the idea of extending these provisions into the future with an additional sunset, or whether he wishes to make them permanent? This seems to be the issue with regard to the sunset in this debate. No one, to my knowledge, indicates that they would like to see any of the 16 provisions expire. Many wish to see them passed with another sunset attached to them as well as perhaps additional standards of oversight. Interestingly, the desire to pass them again with a sunset is backed by bipartisan support. A total of five people express this view: three majority members (Lungren, Ghomert, and Flake) and two minority members (Lofgren and Delahunt). Only two people overtly express a desire to see these provisions be made permanent and they are both on the majority side of the debate: Gonzales and King (a majority member of the House). The topic of sunsets will be addressed again and again throughout the course of analysis of this phase of debate and later with more attention devoted to the actual discourse of the debate pertaining to the topic. It comes up at this juncture the due to the curiosity I felt in wanting to know what Chairman Sensenbrenner's stance is on the issue. Later in the debate, Sensenbrenner demonstrates that he was definitely very much in favor of the sunsets to begin with, when he says to Gonzales, "as you know, I was instrumental in putting the sunset into the PATRIOT Act because I felt that the Congress should have a chance to have the opportunity to review the effectiveness of the Act's provisions as well as a tool to do oversight over the Department of Justice" (USA PATRIOT Act, 2005, p. 48). But then, he proceeds to ask Gonzales what he thinks about the need for sunsets in the future, and does not tell us exactly what he himself thinks about that possibility.

Unfortunately, closely reading the entire transcript of this hearing does not reveal how Sensenbrenner feels about continuing the sunsets as part of the reauthorized Patriot Act. However, he leaves no ambiguity whatsoever on his view of the provisions themselves, regardless of his stance on future sunsets. As shown, he has alluded to the "fear the terrorists" appeal already during his opening statement—an argument that had been reserved more for Ashcroft in previous debates, but here Sensenbrenner takes it upon himself to remind the audience that the terrorists are quite capable of causing destruction and that the Intelligence Community needs every possible tool at its disposal. In the following exemplar, he is transitioning from his discussion of the sunsets and suggests that if the 16 provisions do expire that law enforcement and intelligence agencies will be restricted again:

> As we learned from the 9/11 attacks, procedures needed to be streamlined for law enforcement and the Intelligence Community to react in real time. In this war on terrorism, we are racing against the clock. Terrorist cells operate throughout the world, including within our own borders, and actively plan attacks against U.S. citizens. Law enforcement and the Intelligence Community must be able to quickly protect the public from future attacks. (USA PATRIOT Act, 2005, p. 2)

He works the fear appeal into the claim that reauthorizing the expiring provisions of the Patriot Act is the most important task Congress has for the entire year.

Sensenbrenner brings his opening statement to a close by describing the upcoming hearing schedule and describes it as "ambitious;' one that will ensure that safety and liberty in balance with one another:

> Accordingly, the Committee plans an ambitious hearing and oversight schedule beginning with today's full Committee hearing with Attorney General Alberto Gonzales. After this hearing, the Committee will hold eight Subcommittee hearings through April and May on the PATRIOT Act provisions that are set to expire on December 31. Finally, I anticipate the Deputy Attorney General and the Inspector General will testify before the full Committee soon after the Subcommittee hearings are completed. These hearings reflect this Committee's continued commitment to monitor the implementation of anti-terrorism

> legislation, to conduct active oversight over the Department of Justice, and to ensure that law enforcement has the tools necessary to fight and to win the war on terrorism and to fight crime in general. (USA PATRIOT Act, 2005, p. 2)

At this point, Sensenbrenner congratulates Gonzales on his very recent confirmation, tells him that he looks forward to his testimony, and turns the floor over to John Conyers (D MI).

Conyers

The ranking member of the minority party immediately begins his opening statement by calling into question the patriotic ethos constructed by Ashcroft for those who question the Patriot Act. Conyers announces that he resents the accusation of being sympathetic to terrorists simply because he wants changes to the Patriot Act:

> As we begin our review of the PATRIOT Act, let me start at this very important point. Those who oppose the passage of any parts of the PATRIOT Act, want changes, who question its utility, who are concerned about the Government's demand for new and unnecessary powers after September 11 are not those who do that because they have any sympathy with terrorists or those that support them. I personally resent on the part of all Americans any one, particularly in the Government, that takes that point of view. (USA PATRIOT Act, 2005, p. 2)

He goes into more detail regarding the patriotic duty of Congress and the Judiciary Committee in particular:

> In the Congress and in the Judiciary Committee, that's even more important because we make the laws. We pass the laws. These are our responsibilities. This is what we took the oath for. So we have a historic and legitimate concern regarding the misuse and the abuse of Government power, any Government power, but particularly coming from the Department of Justice, not only under the PATRIOT Act, but under the entire array of authority unilaterally assumed in many instances by the Administration since September 11. (USA PATRIOT Act, 2005, pp. 2-3)

Essentially, according to Conyers, if Ashcroft's portrayal of what it means to be a patriot is correct, then Congress cannot do the job for which it took the oath—to check government abuse—and not just over the Patriot Act, but over all "unilaterally assumed" authorities taken by the Bush Administration since 9/11. Conyers exemplifies the

types of abuses to which he refers by listing off some of the actions he describes: “the mistreatment of detainees, the condoning of torture, the designation of enemy combatants, the immigration sweeps, hundreds of them, the excessive collection of personnel data, the closing of immigration proceedings, the unchecked military tribunals, and the abuse of our material witness statutes” (USA PATRIOT Act, 2005, p. 3). Essentially, according to Conyers, the Justice Department has resorted to racial profiling:

> When our own Government detains and verbally and physically abuses thousands of immigrants for unknown and unspecified reasons with no time limits, targets tens of thousands of Arab Americans for intensive interrogation, I, sir, see a Department of Justice that has institutionalized racial and ethnic profiling without the benefit of a single terrorism conviction. (USA PATRIOT Act, 2005, p. 3)

Not only is racially profiling an affront to liberty but it has not even led to any greater degree of safety by virtue of obtaining “a single terrorism conviction.” Conyers continues to justify criticism by the Congress and others by claiming that through unilateral action, the President has ignored the Constitutional principle of separation of powers:

> When our President takes upon himself to label United States citizens as enemy combatants without a trial, without charges, without access to the outside world, I see an executive branch that has placed itself in the constitutionally untenable position of prosecutor, judge, and jury, and is ignoring, to my shock and dismay, the principles of the separation of powers. (USA PATRIOT Act, 2005, p. 3)

This not only undermines our democratic notion of freedom but in doing so, it also makes us less safe in the process:

> When our Justice Department condones the torture of prisoners at home and abroad, authorizes the monitoring of mosques and religious sites without any indication of criminal activity, I see a course of conduct that makes our citizens less safe, not more safe, and undermines our role as a beacon of democracy and freedom in the world. (USA PATRIOT Act, 2005, p. 3)

Conyers provides a specific example of Brandon Mayfield, a completely innocent citizen who was harassed by the FBI; furthermore, in this case according to Conyers, the harassment was a direct result of Patriot Act application.

Conyers begins to close the opening statement by once again, directly attacking Ashcroft's notion of patriotism. Conyers refers specifically to "your (Gonzales's) predecessor" in making the argument:

> In the past, your predecessor has stated that those who would criticize this Administration are aiding the terrorists and giving ammunition to America's enemies and chastise us as searching for phantoms of lost liberty. Well, I'm here to say that these incidents are not phantoms, thousands of them. They involve real people with real families whose civil liberties have been abused in the war on terror. (USA PATRIOT Act, 2005, p. 3)

Interestingly, Conyers directly references testimony given by Ashcroft from the very beginning of the debate over the war on terror. This testimony is quoted in Chapter 1 of this project as well as above in this chapter toward the end of the section entitled, "Negative Reactions: Anti-Lobbying Accusations." Despite having plenty of other ammunition to choose from in demonstrating his point—such as language from the most recent round of speeches given by Ashcroft during his public tour, Conyers chooses to reference language from four and one- half years prior. He makes the point that Ashcroft has been using patriotism as a manipulative rhetorical symbol from day one of this debate—the accusations of having "phantoms of lost liberty," "aiding the terrorists," and "giving ammunition to America's enemies" have set the tone for the entire debate over the Patriot Act and the entire public sphere of discourse surrounding the Bush Administration's war on terror.

After attacking the Bush Administration's notion of patriotism in reference to Ashcroft's rhetoric, Conyers describes his own patriotic ethos:

> This Member will not be bullied or intimidated or rushed into backing down from my legislative and oversight responsibilities. Many of us remember a time when the powers of the FBI and the CIA were horribly abused. We know what it means to face racial profiling and religious persecution. Many of us know that our Nation has too frequently overreacted to threats of violence in the past by clamping down on legitimate protests and law-abiding citizens and immigrants. (USA PATRIOT Act, 2005, pp. 3-4)

A patriot according to Conyers will not back down to executive pressure on dissenters—a patriot loves her country too much to shy away from oversight responsibilities, and history proves that doing so is in the best interest of the country.

The opening statement comes to a close with the form of argument that became so familiar to us during the initial phase of debate—the "want to fight terror…but…" form of argument:

> To me, the lessons of September 11 are that if we allow law enforcement to do their work free of political interference, if we give them adequate resources and modern technologies, we can protect our citizens without intruding on our liberties. We all fight terrorism, but we want to work with you to fight it the right way, consistent with our Constitution and in a manner that serves as a model for the rest of the world. (USA PATRIOT Act, 2005, p. 4)

Given the context of this statement though, the tone is different than the way in which the form of argument has been used in the past, especially the way in which it was used during the authorization stage. It indicates a more offensive tone, as opposed to the defensive tone uncovered during the authorization phase. In the initial phase of debate, this form of argument was used to try and fit in with Ashcroft's ideal patriotism while tweaking it ever so slightly. Here though, Conyers is trying to completely re-define the Bush Administration's agree- at-all-costs notion of patriotism.

Gonzales

Following Sensenbrenner's opening statement, a number of people submitted their own opening statements and third party testimonies for the record and then it was time for Gonzales to give his opening statement. Sensenbrenner introduces him and swears him in. Gonzales begins by reminding the audience about the collaborative and bipartisan way in which the Patriot Act was originally authorized. He also asserts that the process was effective at finding a balance between safety and liberty:

> Following the attacks of September 11, the Administration and Congress came together to prevent another tragedy from happening again. One result of our collaboration was the USA PATRIOT Act, which was passed by Congress with overwhelming bipartisan support after carefully balancing security and civil liberties. (USA PATRIOT Act, 2005, p. 33)

Because of the collaboration and bipartisanship, the law has been very successful at helping the Government carry out the war on terror: "And since then, this law has been integral to the Government's prosecution of the war on terrorism. We have dismantled terrorist cells, disrupted terrorist plots, and captured terrorists before they could strike" (USA PATRIOT Act, 2005, pp. 33-34).

Then, through a fear appeal, Gonzales reminds the audience that terrorists are still a "grave threat;" letting the sunsetted provisions expire would be relinquishing the best tools in the war on terror:

> Many of the most important authorities in the Act are scheduled to expire on December 31 of this year. I believe it is important that they remain available. Al-Qaeda and other terrorist groups still pose a grave threat to the security of the American people and now is not the time to relinquish some of our most effective tools in the fight. (USA PATRIOT Act, 2005, p. 34)

In this quotation, there is an implication that there are a lot of people involved in the debate who do not see a need for the types of legal updates provided for in the sunsetted provisions of the Patriot Act—an integral part of the way in which the all-or-nothing dichotomy was constructed in earlier phases by Ashcroft.

Gonzales continues to build upon the all-or-nothing ethos of the Bush Administration's notion of patriotism. In the following quotation, we find Gonzales claiming to be open to suggestions of clarification, but implying that any substantive changes in the Patriot Act would be tantamount to weakening the government in the war on terror—something he just cannot support:

> As Congress considers whether to renew these provisions, I am open to suggestions for clarifying and strengthening the Act and I look forward to meeting

> with those both inside and outside of Congress who have expressed concern about some of these provisions. But let me be clear that I cannot support any proposal that would undermine our ability to combat terrorism effectively. (USA PATRIOT Act, 2005, p. 34)

Next, he extends the argument that critics are hysterical—though perhaps in a more subtle way than his predecessor. He begins by giving critics the benefit of the doubt—recognizing that "all of us" have the objective of protecting the security of the nation, but continues by inferring that perhaps critics in this debate are irrational:

> All of us continue to have the same objective, ensuring the security of the American people while preserving our civil liberties. I, therefore, hope that we would consider reauthorization in a calm and thoughtful manner and with the understanding that while the tools of the PATRIOT Act are important, they are not extraordinary. Many of these authorities to deal with terrorists have long been available to prosecutors to deal with ordinary criminals, and actions under the Act often must occur with the approval of a Federal judge. Our dialogue should be based on these facts rather than exaggeration. (USA PATRIOT Act, 2005, p. 34)

Though the claim is subtler than Ashcroft's accusation of "hysteria," the same implication still seems to be present. He implies that critics are making a huge deal over a policy that does not alter the status quo very dramatically—which by definition fits the notion of "hysteria."

To this point in Gonzales's opening statement, the text of his testimony reads very similar to that of Ashcroft. The arguments build toward the all-or-nothing dichotomy so characteristic of the Bush Administration's war on terror. Gonzales's tone is about to change a little bit though. Immediately after implying that the critics of the Justice Department make their arguments in an irrational manner, he tries to show them that he will do a better job of helping them see the truth. Under his leadership, the implementation of the Patriot Act will be done in a more transparent fashion than under Ashcroft's leadership. In a show of good faith, he announces that he is about to disclose some information that had previously been classified: "And because I believe that this

discussion must be conducted in an open and honest fashion, I will begin my testimony today by presenting this Committee with relatively new information recently declassified about the use of certain PATRIOT Act provisions" (USA PATRIOT Act, 2005, p. 34).

He proceeds to disclose some statistics related to the way in which some of the controversial provisions of the Patriot Act have been utilized. For instance, he tells us that section 215 (the infamous "library provision") has only been used 35 times and none of those applications sought library, book store, medical, or gun records; they have only used 215 to obtain drivers license and credit card records[12]. Gonzales then draws the conclusion that "some of the concerns expressed about section 215 have been based on inaccurate fears about its use" (p. 35), going back to the notion that critics' fears are irrational but sort of acknowledging that the irrational criticism may be due to not having enough information. But now, with the knowledge that section 215 has only been used 35 times, the fear should go away.

Another way in which he attempts to shape his ethos in a way that appears more flexible than Ashcroft is the notion that he is open to amendments; however, only amendments that clarify the Patriot Act—not ones that would change it substantively. In the same sentence as the one above where he argues that many criticisms are based on "inaccurate fears of its use" (USA PATRIOT Act, 2005, p. 35), he proceeds to acknowledge that, "other criticisms have apparently been based on possible ambiguity in the law" (USA PATRIOT Act, 2005, p. 35). According to Gonzales, even though there is

[12] Though it should be noted here that library records have been obtained in other ways aside from enforcing 215. In fact, as Foerstel (2004) and others have documented, often times, librarians have begrudgingly volunteered library records out of fear that 215 would be enforced. Assistant Attorney General Comey speaks to this in more detail during the debate on 6/8/05.

no real potential for abuse of the Patriot Act, he is willing to support amendments clarifying the law:

> The Department has already stated in litigation that the recipient of a section 215 order may consult with an attorney and may challenge that order in court. The Department has also stated that the Government may seek and a court may require only the production of records that are relevant to a national security investigation, a standard similar to the relevant standard that applied to grand jury subpoenas in criminal cases. The text of section 215, however, is not as clear as it could be in these respects. The Department, therefore, is willing to support amendments to section 215 to clarify these points. (USA PATRIOT Act, 2005, p. 35)

So essentially, Gonzales declares the Patriot Act to be in perfect shape substantively, but if amendments can clarify the perfection further, then he is on board. He implies that the only way to change 215 substantively would be to raise the standard for obtaining records from a relevance standard to a probable cause and since 215 is used as only a preliminary mode of investigation, and change would render it a "dead letter" (USA PATRIOT Act, 2005, p. 35). He brackets out the possibility of changing it in any other way.

Continuing to disclose recently declassified information, Gonzales moves on to talk about section 206, the roving wiretap provision. He points out that in the pre-Patriot Act world, roving wiretaps were already applied to criminal investigations and that now in the post-Patriot Act world, they are also applied to FISA investigations as well. However, any fears of abuse should be put to rest according to Gonzales because "as of March 30, this provision had been used 49 times" (p. 35); furthermore, "section 206 contains ample safeguards to protect the privacy of innocent Americans" (USA PATRIOT Act, 2005, p. 35) given that a warrant for a wiretap cannot transfer from target to target; in order to spy on any person, permission must be obtained from a court. Gonzales then moves on to disclose information about another controversial provision of the Patriot Act—section 213, the delayed notice search warrants. He says, "The

Department uses this tool only when necessary" (USA PATRIOT Act, 2005, p. 36) and then exemplifies:

> For instance, from enactment of the PATRIOT Act through January 31 of this year, the Department used section 213 to request approximately 155 delayed notice search warrants, which have been issued in terrorism, drug, murder, and other criminal investigations. We estimate that this number represents less than one-fifth of 1 percent of all search warrants obtained by the Department during this time. In other words, in more than 499 of 500 cases, the Department provides immediate notice of the search. In appropriate cases, however, delayed notice search warrants are necessary, because if terrorists or other criminals are prematurely tipped off that they are under investigation, they may destroy evidence, harm witnesses, or flee prosecution. (USA PATRIOT Act, 2005, p. 36)

With this statistical analysis of how conservative and careful the Justice Department is with new authorities granted under the Patriot Act, Gonzales begins to wrap up his opening statement.

He ends by first, suggesting that the new information that he has declassified and shared since taking over the reigns of the Justice Department should "demystify" the confusion surrounding the Patriot Act: "I hope that this information will demystify these essential national security tools, eliminate some of the confusion surrounding their use, and enrich the debate about the Department's counterterrorism efforts" (USA PATRIOT Act, 2005, p. 36). Furthermore, he conveys his ethos as one that encourages open dialogue and collaboration: "I look forward to working with the Committee closely in the weeks ahead, listening to your concerns, and joining together again to protect the security of the American people" (USA PATRIOT Act, 2005, p. 37). However, we cannot forget that he will only support changes clarifying the existing statute—not any that substantively change the Patriot Act, because their process of invention (the first canon of classical rhetoric) has been perfect; the only changes that may be needed are superficial changes to help clarify the ideals of the Justice Department.

The Case of the Critics

As in previous full committee hearings, the arguments extended throughout the debate do not stray too far from the case laid out by Conyers in the opening statement. In fact, much of the argumentation coming from the critics is very much the same as what was presented in previous debates. The central theme is that the Justice Department, specifically under Ashcroft's leadership, has not been transparent enough about implementation of the Patriot Act for critics to ask the most meaningful of questions. Despite the fact that the central theme does not change much, the application of that theme gets more specific. The story behind the theme becomes clearer and the response of Gonzales to the story allows some progress to be made in the debate, whereas with Ashcroft in charge, it seemed as if wheels were spinning without any traction whatsoever—the proverbial ships were passing in the night.

Questioning The Spirit of the Patriot Act

Perhaps the argument standing out as most important to me while reading Conyers' opening statement, at least in terms of the way in which the meaning of patriotism is negotiated, is the way in which he defends the democratic tradition of criticism—especially during the deliberative process, as being a patriotic duty. To be sure, this theme has emerged in previous stages of this debate, but here, the argument is crystallized and Ashcroft's exact language is called into question by Conyers. Specifically, the infamous "phantoms of lost liberty" and "giving aid to America's enemies," coming from the very beginning of the authorization stage of debate is mentioned by Conyers, who makes the point that Ashcroft created the spirit of the Patriot Act as one that magically goes along with whatever the executive branch sees fit with the war on terror. This spirit was extended in the implementation stage of debate, where we

find Ashcroft specifically referring to it as "the spirit of the Patriot Act" in defense of the unilateral decision to alter the Levy guidelines so that FBI agents could randomly go into Mosques and any other place open to the public, in street clothes, to spy on the general public.

It is important to note that in previous debates, the argument that the government abused power has certainly been made, and made quite vociferously, but it had not been personally directed at Ashcroft. In fact, at various points throughout previous analysis, we find critics telling Ashcroft that "you have done a good job," "don't take these criticisms personally," and "no one can do this by himself." But now, after Ashcroft's public tour when he tries to conjure and reinvigorate that spirit of magical unity/the visceral instinct, suggesting that criticism is unpatriotic, critics seem to make a personal and emotional connection between the Patriot Act and John Ashcroft. Enough time had lapsed to where the need for criticism was no longer tempered by the need for national healing. Especially since Ashcroft resigned in the midst of controversy surrounding his public tour, and his popularity according to public opinion had plummeted the way it did, the time was ripe for critics to not just question the Patriot Act, but also the "spirit of the Patriot Act;" i.e. the condensation symbol constructed around the anachronistic title and the people who constructed the web of meaning embedded within it.

To exemplify, Sheila Jackson Lee (D TX) takes a more cynical view than Conyers. She expresses to Gonzales that her cynicism is not personally directed toward him and that she likes him and his family, but then claims that perhaps the time has passed the point at which the democratic spirit of disagreement can be reclaimed. She argues that the "tone" of the debate over the Patriot Act has "done us in:"

> I say that because we seemingly have conceded to losing our rights because of the horrific act of 9/11. I think we are consistent in this Congress and in this Judiciary

> Committee to acknowledge, and I think you have acknowledged it, General, along with the President, that our highest responsibility is to secure the Nation and to secure the people of the United States. I don't step away from that responsibility. I would argue, however, that the tone in which we have proceeded in the legislative initiatives have really done us in…(USA PATRIOT Act, 2005, p. 63)

Noteworthy is the fact that she utilizes a "I want to secure the safety of America…but…" form of argument; yet obviously, the "…but…" condition is strategically offensive in nature as opposed to the way in which the form was utilized at the beginning of the debate over the Patriot Act. The condition to which Jackson Lee refers is described in the past tense, whereas the condition standing as the object of the "but" during the authorization stage is in the future tense. The form of the argument shifts from a polite suggestion that "we have to be careful" to a more offensive attack on the ethos of the Patriot Act that says, "we have been done in."

Perhaps more noteworthy is the fact that the failed condition Jackson Lee speaks of is not limited toward the legal precedent of the Patriot Act, but the "tone" created by it—the tone that has been carried through during this particular debate, the debate over Iraq, the debate over the NSA spying program, and the rest of the debates pertinent to the war on terror. To illustrate, Jackson Lee finishes her previously quoted sentence by tying the tone of the Patriot Act to the debate over immigration:

> …and I say that because your beloved Texas now seems to be under the eye of the new Minutemen, Minutewomen. Border watchers have eyes on Texas. So because we have either created this atmosphere of fear, because we have either not done our job, we have not protected civil liberties, we have not enforced laws that we already have dealing with border security, we now have men taking up arms and placing themselves on the border, even to the extent that Border Patrol agents have said it may be a dangerous condition. So I'm concerned about the tone. (USA PATRIOT Act, 2005, pp. 63-64)

Jackson Lee then links the tone of the Patriot Act to another important debate going on in the war on terror—the Guantanamo Bay detention center and the authority assumed by the Bush Administration of labeling a person as enemy combatant:

> It is the tone that has been created, and frankly, I don't believe that the PATRIOT Act provisions really have made us safer. I hope that we will vet them at a very high standard as to the standard of how they have denied our civil liberties, how they've created an atmosphere for Guantanamo Bay, and I do not criticize the military that is doing their job. I do criticize the existence of Guantanamo Bay for no reason. I criticize the existence of a determination of enemy combatant, which seemingly has no basis in law. (USA PATRIOT Act, 2005, p. 64)

It is important to recognize that what Conyers and Jackson Lee argue here is not entirely new. They feed the power abuse argument that has been a growing part of the deliberative process; what is a new evolution in their argumentation is the way in which they seem to recognize the full extent of the symbolic power of PATRIOTism. While obviously they have some problems with the legal precedent of the Patriot Act, and wish to see executive authorities checked more rigorously, it seems as though some are coming to the realization that the change in the legal precedent established through the Patriot Act pales in comparison to the way in which the national mood, or the tone has changed.

It is almost as if Conyers and Jackson Lee are recognizing the Patriot Act as a smokescreen, or a deliberative decoy from what else that is going on in the Bush Administration, at least in terms of the war on terror. In the next exemplar, Melvin Watt (D NC) is questioning Gonzales about a very important component of the critics' perspective on the Patriot Act and that is the idea of a review mechanism independent of the Justice Department. He claims that while Congress supports the idea, the Administration has stood in the way of this board having subpoena power, and further, the President has not funded it. Thus, according to Watt, the review board idea is rather impotent. In this context, he claims, "You've superimposed this intelligence reform stuff on top of the PATRIOT Act" (USA PATRIOT Act, 2005, p. 73) and then asks the Attorney General if he "thinks it's important to have a Privacy Review Board" (USA PATRIOT Act, 2005, p. 73). Gonzales and Watt go on to debate the quality of support

given the idea of the review board by President Bush, a very important point to note as it exemplifies the idea that most (if not all) critics have not rejected the legal updates implemented by the Patriot Act (this topic is addressed more specifically in the next section of analysis); they, for the most part, simply want a stronger review mechanism for the extended power of the executive branch.

Now, as the debate has gone on for over four years, it seems as though critics are recognizing that the legal change implemented by the Patriot Act, in and of itself, is not necessarily the biggest concern—the biggest concern is the way in which the powerful symbolism of the Patriot Act has set a "tone" for the entire war on terror such that the Bush Administration can "superimpose" anything it wants on top of the Patriot Act. In Chapter 9, we find Ashcroft referring to this phenomenon as the "spirit of the Patriot Act," while justifying the alterations to the Levy guidelines without consultation with Congress. During reauthorization, critics are linking this "spirit of the Patriot Act" to the ambiguous enemy combatant labeling authority, the perceived justification for the torture of terrorists, and a host of other policies, such as the NSA spying program for instance, that were also implemented unilaterally by the Executive branch. The symbolism of patriotism evoked through the Patriot Act is being treated as one of the most, if not the most important topics of this legislative process.

It's Not the Law *Per Se*…

By bracketing the symbolism of the Patriot Act, i.e., the "spirit" of the Patriot Act, participants in this debate make great strides toward clarifying a line of argumentation that seems to be a significant cause of the breakdown in communication between Ashcroft proponents and critics. The symbolism of the act has finally been bracketed as something separate from the legal changes found therein. The symbolism is the link

between the Patriot Act and every other Bush Administration policy in the war on terror. After gaining the perspective of hindsight, critics are more able to articulate the problems with the "tone" set by the Patriot Act—they seem to realize that the biggest problem with the Patriot Act is not necessarily the legal changes found therein but the tone set for the nation—the creation of the discursive space that allows for other war on terror policies to be implemented with zero consultation with Congress. This distinction is important to understanding the debate over the Patriot Act—it recognizes the importance of the act as a symbolic phenomenon—one that has no material existence like the legal provisions contained therein do.

Exemplifying this distinction, Jerrold Nadler, one of the debate's more outspoken critics, discloses that his biggest problem is not the Patriot Act *per se*, but the Presidential Administration enforcing it. To use his exact words, he says: "Mr. Attorney General, my basic problem with all of this is that the Administration, the current Administration that's enforcing the PATRIOT Act seems to have no sense of limits and no sense of due process whatsoever when dealing with real or alleged terrorism cases" (USA PATRIOT Act, 2005, p. 59). He then cites a couple of non-Patriot Act issues to illustrate his point. First of all, he cites the previously mentioned torture memo. Nadler says, "I will cite, for instance, the memo that you wrote justifying torture, which I am sure you won't characterize as such, but I will" (USA PATRIOT Act, 2005, p. 59). Secondly, he also references the previously mentioned enemy combatant status example and calls that a form of tyranny, making historical reference to the Magna Carta:

> Number two, the whole doctrine of the enemy combatants that Mr. Schiff talked about in which the President has claimed the power to point his finger at any American citizen—or non-citizen—but any American citizen and say, you are an enemy combatant because I say so on the basis of secret information which I won't reveal to you or anyone else, and by that declaration, I have the power to throw you in jail forever with no due process, no hearing, no evidence, no

> nothing. Nobody, to my knowledge, no executive in an English-speaking country has made such a claim of tyrannical power since before Magna Carta, and yet—and the Justice Department under your predecessor had the nerve to say to the Federal courts that they didn't have the jurisdiction to even question the fact or the authority of the President. (USA PATRIOT Act, 2005, p. 59)

While he has made this reference to the Magna Carta before, he provides greater clarification this time that the fundamental problem is not the Patriot Act *per se*, but the symbolic stamp of approval generated by the spirit of the Patriot Act. The debate over patriotism is changing. An important part of the change is to recognize the way in which the debaters themselves are developing clarity over the important distinction between the symbolism of the Patriot Act and the alterations to legal precedent found therein.

Problems with the Deliberative Process

In the following quotation from Nadler, a continuation of the previously mentioned line of argumentation, he begins to describe his thoughts on the Patriot Act proper, whereas in the previous quotation, he was talking about other policies tangentially linked to the Patriot Act. Even here though, Nadeler does not point to one provision of the act as a legal problem. In fact, he says liberty and safety may very well be in balance under the Patriot Act. His biggest concern is the legislative process used to authorize and oversight the act:

> Third, you stated in your opening statement that the PATRIOT Act was well considered and well balanced. Well, maybe it's balanced and maybe not, but it certainly wasn't well considered. If you recall how it passed here, this Committee considered in detail a PATRIOT Act, considered for four days, voted on amendments, marked it up, unanimously reported the bill on a Thursday, I believe. Over the weekend, the leadership of the House together with the Administration took the well-considered bill, which I thought was balanced, and threw it in the garbage, wrote over the weekend an entirely new bill, presented this 200-and-some-odd-page bill to the House with two copies available, one for the Democrats, one for the Republicans, warm to the touch at 10 in the morning. We started the debate at 11 and voted on it at 1 and nobody had a chance to read it. So it's certainly not well considered. It may be well balanced, but certainly not well considered. (USA PATRIOT Act, 2005, pp. 59-60)

That the Patriot Act was rushed too quickly through Congress in the first place is an argument that we have heard since at least the end of the authorization stage of debate, if not even before that. It is made at least three times in this debate from three different people, all minority members: Mr. Berman and Ms. Jackson Lee in addition to Nadler. Nadler's quotation though provides a concise summary of the extent to which the Patriot Act was rushed through the legislative process. It leads me to think that maybe the Patriot Act, from a constitutional standpoint, might not be that bad, and that it is the spirit of the Patriot Act driving the controversy.

A related argument, also one very familiar to this analysis, is the observation that the Bush Administration has not been forthright with the disclosure of information necessary to the process of checks and balances. Adam Schiff (D CA) is the first person in this debate to mention this as a criticism:

> At the same time, efforts that I've made to learn information from the Justice Department and the Defense Department about our Government's own policies of when we treat someone as an enemy combatant or when we treat them as a criminal defendant—when we treat them as a defendant with all of the rights that attach to that, when we treat them as an enemy combatant with none of the due process that attaches to that, I have been unable to get really any meaningful information, even in classified form. When you gave a speech to the ABA a year or two ago, it was the most information I had ever heard about how we were deciding when to treat someone as an enemy combatant. More information than you gave publicly was denied me in classified form. That cannot persist. (USA PATRIOT Act, 2005, p. 53)

There are a few different interesting things about this quotation relevant to this analysis. One is that, like above, the Patriot Act is not the specific target of criticism—the enemy combatant policy is. But secondly, in making the argument that information was denied, he seems to be suggesting that perhaps Gonzalez's leadership of the Department of Justice will be more transparent than Ashcroft's. In Chapter 12, we find out that this was indeed the impression.

Schiff is of course not the only person to make this sort of criticism. Some other names, also familiar to this analysis also speak up about the matter. William Delahunt (D MA) uses one of his favorite phrases to describe the Bush Administration (again, not focusing arguments on the Patriot Act *per se*—but in reference to a dramatic increase in the extent to which papers are classified) when he refers to the "culture of concealment" (USA PATRIOT Act, 2005, p. 76). Anthony Weiner (D NY) makes a similar sort of argument—but directly referencing the Patriot Act when he refers to the "cloak of secrecy that has dominated the discussion over the last four years" (USA PATRIOT Act, 2005, p. 78). We will be examining this quotation in full, more thoroughly at the end of this chapter. It actually serves as a nice summary of the critics' case. But readers should know now that in it, he speaks directly to the idea that critics probably would not have a problem with the Patriot Act if the government were just more transparent about the way it was implemented.

Others chimed in with this sort of analysis as well. In all, I count this argument made 13 different times in this debate by mostly minority members: Delahunt, Weiner, Schiff, and Lofgren, but interestingly, I found one majority member who also makes the argument—Louie Gohmert (R TX). We have not heard Gohmert's name come up in the debate before because he was not sworn in until January of 2005, approximately three months before this stage of the debate even began. His line of questioning is important however, because he reminds the audience that criticism of the process is not limited to only the minority side of the aisle (even though that is how it may seem at times):

> Also, there's obviously been a lot of concern about the sharing of information, and as you've heard from both sides of the aisle, nobody's meaning this personal to you, but apparently, there was a precedent back in the early 1970s that had a counsel that was abusive enough he had one FBI file, went to prison for it. And then I hear tell there's even been a White House Administration so corrupt they might have even had 1,000 FBI files and didn't have an Attorney General with the

> wherefore to go ahead and prosecute such a terrible abuse. So you can understand why there'd be some concerns about those things if it's true that you could really have that kind of abuse at the highest levels. I'm not concerned about you or this good President, but you never know. You can have a President like that. (USA PATRIOT Act, 2005, p. 65)

He makes an historical reference to justify why there should be concern from both sides of the aisle. He also depersonalizes the criticism and assures Gonzales that the criticism is not lodged at the current Administration but at the potential for abuse that may occur down the line with a precedent set for not sharing information. Most importantly from this quotation however, is the notion that Democrats are not the only ones critical of the Bush Administration. Though Gohmert is the only majority member in this debate who questions the symbolic patriotism of the Patriot Act, he is not the only majority member to ask serious questions of the Patriot Act. In fact, during opening testimony, Chairman Sensenbrenner himself poses what I think are critical ideas to consider in terms of implementing the Patriot Act. Perhaps the most telling evidence though of the growing bipartisan criticism comes from analysis of context leading up to this debate and noting that the infamous Otter Amendment originated from a Republican. Furthermore, the SAFE Act has had bipartisan sponsorship etc.

Before bringing this section to a close and moving onto the next, analysis concerning the problems with the deliberative process would be remiss without mentioning that the entire blame for a poor process is not placed on the Bush Administration. As we have seen in previous debates, members of Congress have placed some of the blame for a poor process on itself, claiming that as a legislative body, they have not asked enough questions. Schiff expounds on this argument by saying:

> I find it odd that there aren't more voices in the Congress raising this issue, that aren't demanding that Congress act to set limits on the detention of Americans, to set due process for the detainees at Guantanamo. Of course, all this thing, not done for the terrorism suspects but done for all the rest of us, to protect our civil

> liberties and our due process. I find it very odd there have been so few voices in the Congress on this issue… (USA PATRIOT Act, 2005, p. 53)

John Conyers also speaks to the issue in his opening statement when he professes that he will not back down from his (patriotic) duty of criticism. In making this statement, he implies that some members of Congress have.

It's Not All-or-Nothing

The biggest obstacle to meaningful debate over the Patriot Act has been Ashcroft's generalization that the Patriot Act is an all-or-nothing issue; anybody who questions the Patriot Act is searching for "phantoms of lost liberty." Critics have responded to this false dichotomy in a variety of ways—it is embedded within almost every theme of every argument they make; perhaps the most direct way in which they have responded though has been through the "we want to fight terror…but…" form of argument found during every phase of the debate thus far. Also in answering the all-or-nothing dichotomy, critics have made it very clear that there is a "consensus" laws need to be updated in the ways that the Justice Department proposes—they just want to make sure there are substantial checks on authority. As Chapter 5 notes, the argument began in very much a defensive tone. Critics at that point, seemed to be just as concerned (if not more so) with establishing common ground between themselves and Ashcroft proponents as (than) they were with playing the role of critics. They bought into the unity of the message of the Patriot Act. However, as Ashcroft continues to dichotomize the debate from phase to phase, the argument changes tone. As Chapters 8 and 9 indicate, the form of argument becomes more offensive in nature. Critics use the form of argument in such a way that they are not defending their own ethos as much as they are attacking the ethos of Ashcroft proponents.

The form of argument continues in the reauthorization stage, and it gets even more specific. Now that some specific proposals had been proposed by some of the critics—such as the ones discussed earlier in Chapter 10, critics can demonstrate through specific policy proposals that they do see eye to eye with the Justice Department on the necessity of fighting terror, and even the means with which to do so. In leading up to discussion of one such proposal, Howard Berman (D CA) claims that most members of Congress feel that all of the sunsetted provisions should be extended with some refining:

> The PATRIOT Act sunset provisions you've discussed, I frankly think most Members of Congress have come or will come to the conclusion that many of these sunsetted provisions should be—perhaps all of them should be continued, perhaps refined. Mr. Chairman, I would hope this review, though, would also take into account a number of unilateral actions—Mr. Schiff certainly brought up one in the context of the enemy combatants issue—that we should be considering that weren't part of the PATRIOT Act but were developed in response to September 11 and in our effort to fight a more effective war on terror. (USA PATRIOT Act, 2005, p. 56)

Justice Department critics do agree in principle with the logistics of the Patriot Act. Berman gets even more specific in the next quotation when he mentions the Civil Liberties Restoration Act as a policy proposal that he supports:

> Today, Mr. Delahunt and I are introducing a law we call the Civil Liberties Restoration Act. It doesn't repeal any part of the PATRIOT Act. It doesn't impede in any way the ability of agencies to share information. Our goal is simply to ensure there are appropriate checks and balances on a number of PATRIOT provisions as well as an opportunity for Congress to address some of the unilateral policy decisions that I just mentioned. They're all drafted, we think, in a way that tries to achieve the balance that you and others have talked about. I would hope at some point you might have a chance to take a look at some of the proposals contained in that legislation. (USA PATRIOT Act, 2005, p. 56)

Here, he spells out very specifically that neither he, nor Delahunt—two of Ashcroft's most vocal critics throughout the entire deliberative process, wish to "repeal any part of the PATRIOT Act…our goal is simply to ensure there are appropriate checks and balances" (USA PATRIOT Act, 2005, p. 56).

A Good Summary of the Critics' Case

As promised earlier, we come back to a speech delivered by Anthony Weiner (D NY). He provides a good summary of the position of many of the critics. I doubt that every critic would agree, but certainly, based upon my analysis, Weiner wraps up the gist of the criticism of the Justice Department's implementation of the Patriot Act. In many ways, his summary also becomes a meta-analysis of why the deliberative process has not been substantially effective to this point—an analysis that I would have to agree with due to my own careful analysis of the debate from the beginning.

He begins by noting the idea that the primary strategy behind the war on terror, and the Patriot Act in particular, is for the government to assume greater authority so that terrorists can be stopped. In asking for this, government officials are inherently asking for a greater level of trust than before:

> I hope you recognize by this point in the hearings, both in the other body and here, what the fundamental problem is that you face with Congress now, is that, in essence, what the PATRIOT Act reflected was a desire on the part of the Administration of greater authority, and you essentially said to Members of Congress like myself, trust us that we're going to use it wisely, that we're going to use it with discretion, we're going to use it with restraint. (USA PATRIOT Act, 2005, p. 78)

In the next segment of the speech, Weiner goes on to say that most people were/are supportive of this notion, given the level of threat we were exposed to. However, in order for that trust to work, the implementation would have to be transparent. That it has not been is where the Justice Department, according to Weiner, has lost support:

> And where you've lost so many of us, including people like myself who have been eager, as a New Yorker and someone who considers himself as a moderate on law enforcement things, is this cloak of secrecy that has dominated the discussion over the last four years. Obviously, a rise in FISA activity and yet there's less information than there has perhaps ever been. Reports of secret arrests and detentions without charges. What it does is it makes us, who were happy

> about a sunset, completely unwilling to say either, first of all, extend them, or even further, to eliminate the sunset altogether. (USA PATRIOT Act, 2005, p. 78)

In the next segment, Weiner specifies that in order for support to be regained, basically all that has to happen is for more information to be obtained. He even speaks for Delahunt and Schiff while saying this—two people who have been the most vocal critics during the deliberative process. He also references people from the other side of the aisle:

> So that what Members like myself and Mr. Delahunt and Mr. Schiff and folks on the other side of the aisle are speaking to is this notion that you made a compact. Give us more authority and entrust us to use it wisely. In order for that compact to be successful, in order to get us to say, okay, we agree four years later that that has been the case, there has to be more information. (USA PATRIOT Act, 2005, p. 78)

Weiner then summarizes the implications of the lack of information for the debate. He claims that it causes exaggerations on both sides of the debate; some proponents exaggerate the benefits and some critics exaggerate the intrusions to privacy:

> And what has this attitude on the part of the Justice Department brought? Well, it's brought on one side you saying, well, people are creating phantoms of lost liberty, and I think some on the left have said, well, there's enormous intrusions on our lives. Only with more full disclosure to Congress, only with a more full debate that goes on between you and the American public is this going to happen. And frankly, that hasn't happened. You have exaggerated its value. I believe many on the left have exaggerated the harm it's caused. (USA PATRIOT Act, 2005, p. 78)

The only way to stop the exaggeration, according to Weiner, is for more information to be disclosed. In the next portion of Weiner's speech, he claims the problems with the Patriot Act are easy to fix—it is simply a matter of the Justice Department cooperating more with Congress. If there was some fundamental problem with the goals of the act or the significant provisions of the act itself, then this would not be the case. However, cooperation has not occurred and this has let many people in Congress down, and

according to the polling information cited toward the beginning of this chapter, the lack of cooperation has let many in the general public down as well. Weiner says:

> But fundamentally, you've lost the trust of so many in this Congress. When people like myself and Paul Wellstone of blessed memory vote for the PATRIOT Act, it is because fundamentally we believe it's important to make things safe and we trust those in positions of power to enforce it wisely, and I think you've let us down. You've let us down because you've let us down in ways that are fundamental and easy to fix. When Congress asks for cooperation, as Mr. Delahunt says, your first reflex shouldn't be no. (USA PATRIOT Act, 2005, p. 78)

In the final segment of Weiner's speech to be displayed here, he urges to the Department of Justice to "talk more freely" and that that would in and of itself would help resolve the controversy:

> When there's questions about secret arrests and detentions, you know, frankly, if your concern is about reinforcing the idea that the Justice Department is operating prudently, talk more freely. Have a frank discussion about what's going on in the world. We should not wait until the day of a Senate hearing to find out that there are 35 instances that section 215 was used and 155 times that the sneak-and-peek provisions were used under the PATRIOT Act. It is that level of information that, frankly, I think might have even helped your side of the argument if they had been released more steadily over the course of the last four years. So that, I would argue, is your problem. (USA PATRIOT Act, 2005, p. 78)

Interestingly, he cites information that Gonzales gave in his opening testimony—the statistics related to the use of the "library provision" and the "sneak-and-peek provision" and claims that had that type of information been disclosed over the course of the last four years, it would have helped their side of the argument.

The Response of the Justice Department

The tone of the Justice Department in this stage of debate, under Gonzales's leadership is markedly different. For sure, there are some of the lingering effects of Ashcroft's tone—mostly by way of some majority members of the House who are vehement supporters of Ashcroft. We will briefly consider some of that discourse at the

end of this chapter. But the most important observation to make about the response of the Justice Department is the difference in tone Gonzales brings to the discourse and the way in which minority members of the House recognize the change.

A Different Tone

From the very beginning of the hearing, as Gonzales gave his opening statement, we had already noticed some difference. For one thing, Gonzales disclosed some information about a few of the controversial provisions that had until recently been classified. This disclosure, according to Gonzales, should "demystify" much of the confusion over the act. To some extent, it seems as though he is correct. For another thing, Gonzales claimed that he was ready to cooperate and make amendments to improve the Patriot Act's effectiveness. However, it was noted that the amendments he would be amenable to are limited to amendments that further clarify the Justice Department's current intent. Nonetheless, a marked difference in tone from Ashcroft is noted as Gonzales begins his testimony. The difference continues to be noticed as Gonzales goes on to answer questions from Committee members.

We Made Mistakes

Anybody who has read at least a paragraph of this work to this point, or who followed the debate over the Patriot Act to any extent when it was happening knows that Ashcroft is not eager to admit mistakes. Even in the face of the Inspector General's report, a report that originated from inside the Justice Department, offering scathing criticism of the way in which the Justice Department handled the detention of illegal immigrants, Ashcroft maintained that perfect adherence to the Constitution was achieved. Thus the following quotation, when Gonzales acknowledges that mistakes were made, denotes a different tone coming from the Justice Department. Gonzales is responding to an accusation made my Adam Schiff, which is analyzed earlier, claiming that the Justice Department has been too secretive about the war on terror. Gonzales addresses that part of Schiff's concern:

> You're right. We waited too long, in my judgment, to respond, to explain to the American people what we're doing and why, and it was one of the things that I mentioned in that speech you referred to, is that we waited. We waited a long time because of concerns that we didn't want to say anything that might help the enemy, might jeopardize something that we're doing. But we finally acknowledged that we were hurting ourselves, that the American people and the Congress really needed to know what we were doing and why, and that was—I'm delighted to know about your speech, because I did, I think, talk a lot about the process that we used in designating someone as an enemy combatant or having them go through the criminal justice system. (USA PATRIOT Act, 2005, p. 54)

He points out that they kept information secret because they wanted to make sure it would not hinder their efforts to protect security, but at the same time that it was a mistake to wait as long as they did to make certain information available to Congress and to the public. It ended up hurting their cause in the long run according to Gonzales.

In the next exemplar, Gonzales is answering a line of questioning from Mr. Berman, who asks Gonzales to react to the issue of immigration as it pertains to the aforementioned Civil Liberties Restoration Act. Gonzales admits to not knowing too much about immigration, but Berman asks for his opinion anyway and Gonzales responds: "Well, I think that there were mistakes made, quite frankly, and I think if you look at the IG report about the detentions of immigrants, there were some mistakes made. We've worked very, very hard—the Department has worked hard to try and address and respond to the recommendations made by the IG" (USA PATRIOT Act, 2005, p. 57). Here, Gonzales refers specifically to the Inspector General's report and acknowledges that there were mistakes made with the detention of illegal immigrants following 9/11, and that based upon the Inspector General's report, the Justice Department was attempting to correct those flaws.

Remembering back to Chapter 9 when the Inspector General's report was brought up to Ashcroft, he scoffed at the report by saying it was full of contradictions and hence was not credible; furthermore, one of Ashcroft's supporters practically accused the

Inspector of being a terrorist for even coming forward with the report—a much, much different reaction than Gonzales. Now, it should definitely be noted that a couple of turns later in the debate, Steve King (R IA) asks if the Inspector General had reported any civil rights abuses pertaining specifically to the Patriot Act. Gonzales replies that he has asked the Inspector several times and the response has been "no"—the mistakes were not Patriot Act related. Nonetheless, the acknowledgment that any mistakes have been made at all, as well as the acknowledgment of the credibility of the Inspector General's report, is a marked shift away from Ashcroft's rhetoric.

Another exemplar in which Gonzales admits mistakes have been made occurs when he is responding to a bipartisan line of criticism coming from Spencer Bachus (R AL) and Chris Van Hollen (D MD) concerning flaws in the terrorist watch list. Bachus begins by claiming the watch list is overly broad:

> You know, I guess what aggravates this, when we hear, and you've got questions about this, when we hear that people that are on the Terrorist Watch List can purchase guns and then you get a guy that when he was 18 years old had a disorderly conduct thing and he can't work at his job, it raises all kinds of questions. And I know that what I've been told is the list is overly broad and it has a lot of inaccuracies in it, but, you know, it's being used every day when people try to move around this country. (USA PATRIOT Act, 2005, p. 81)

Van Hollen jumps in and notes a contradiction in the terrorist watch list by citing a GAO report pointing out that terror suspects can be detained at airports but then can turn around and buy 20 semiautomatic guns at the gun shop. He asks Gonzales if that makes any sense. Gonzales replies that they have to enforce the laws. Van Hollen implies that Gonzales did not quite answer the question, so he repeats it. At that point, Gonzales agrees that we do not want terrorists with weapons. Van Hollen then asks one last important question: what mechanism is in place for people who are wrongfully placed on

the list to appeal the decision? Gonzales responds by saying he is not sure and that he would have to get back with that information.

Van Hollen uses the rest of his time by summarizing the arguments related to the terrorist watch list and then Gonzales takes the last word by acknowledging that while the terrorist watch list is an important tool, mistakes have been made and more work is needed to improve the process: "I think the Watch List has been a valuable tool. I think it has been helpful in dealing with a terrorist threat. Obviously, there have been mistakes that have been made, but I look forward to working with you" (USA PATRIOT Act, 2005, p. 83)

Patriots Question Authority

After analyzing Gonzales's opening statement in which he discloses previously classified information that had been the source of controversy for much of the duration of this debate, as well as the handful of times during questioning in which he admits that the Justice Department has made mistakes in the war on terror, it became quite clear to me that he is attempting to change the image of the Justice Department away from the one espoused by Ashcroft—characterized by such phrases as "the culture of concealment" and "a cloak of secrecy." This indeed speaks to the nature of what it means to be a patriot from within the political system of democracy. As our country's founders indicate, at least by way of their quotations cited in Chapter 1, a democracy has to be transparent so that patriots can question authority. In this particular debate, William Delahunt (D MA) speaks to this notion in the context of a post 9/11 public sphere grounded in democracy—recognizing that it is a "balancing act":

> I think it's critical in a viable democracy to emphasize that the concerns of a citizen to their privacy are absolutely essential, and at the same time that as much transparency as possible is important in terms of the confidence of the American

> people in its Government, in the integrity of its Government. It's a balancing act, and I understand that. (USA PATRIOT Act, 2005, p. 76)

When Gonzales admits the Justice Department made a mistake in withholding information, he recognizes that the standard of transparency had swung too far in the direction of secrecy.

His admission of this goes a long ways toward transforming a notion of what it means to be a patriot. Yet, in the following exemplar, he addresses this notion more directly. He defines the word patriot as someone who questions authority: "I think this country was founded by people concerned about the exercise of power in our home country and I think it is appropriate to always—to question and to examine the exercise of power by the Government, and so I welcome—that's why I welcome this debate" (USA PATRIOT Act, 2005, p. 57). It probably goes without saying that this understanding of what a patriot does, is a far cry from Ashcroft's statement that the critics only comfort the terrorists by creating phantoms of lost liberty, and that now is not the time for questions.

It makes sense that Gonzales would be charged with the task of changing the image of the Justice Department. As analysis of context from Chapter 10 indicates, the image needed to be changed because of the way in which it was impacting the overall image of the Bush Administration. Ashcroft's popularity was declining, as was Bush's approval rating. So, Gonzales tries to change the image and by many accounts, he was successful. Thus, we turn to the analysis supplied by some of the critics, who at this point, seem to acknowledge subtle change in the Department's willingness to cooperate over the Patriot Act. Though it should be noted that their praise of Gonzales is still rather tentative—they do not seem to have completely made up their minds.

The first exemplar of this recognition comes from Howard Berman (D CA) who makes a direct comparison between Gonzales and Ashcroft: "Thank you very much, Mr. Chairman, and thank you, Mr. Attorney General, for being here and for at least conveying the impression that you sometimes hear and even understand the questions we ask. That's already an improvement over your predecessor" (USA PATRIOT Act, 2005, p. 56). So Berman is not ready yet to call Gonzales a bastion of democracy; in fact, after re-reading this quotation in the context in which it was provided, it comes across as perhaps a little snide in the sense that he is not giving Gonzales a great deal of credit—only recognizing that he is an improvement over Ashcroft. But that he makes the recognition is important to the analysis of patriotism as argument.

Another exemplar of this category comes from Delahunt, a very outspoken critic of the Justice Department. In fact, recalling from previous debates, he coined phrases such as "the culture of concealment" and "democracies die behind closed doors" to describe the Justice Department under Ashcroft. The first of two quotations makes a direct comparison between the discursive practices of the Justice Department under Ashcroft and those under Gonzales:

> To segue the gentleman from Arizona, Mr. Flake, you referenced you have confidence in Congress to exercise its oversight responsibilities and functions in our constitutional order, but I share the same concern that my colleague to my left, Mr. Schiff, articulated earlier to you about the lack of cooperation during the course of the past four years in terms of providing that information to Members of Congress so that we can exercise our oversight. So I would suggest that when we talk about sunsets, sunsets have played a very, I think, important role because now we seem to be engaged hopefully in a new way. (USA PATRIOT Act, 2005, p. 75)

Here, Delahunt references the sunsets that are about to expire as being integral to the different type of engagement going on in this debate as opposed to what has been going

on in previous debates[13]. A paragraph or two later, he specifically calls attention to the language Gonzales uses: "So I really hope that we are moving, and I listened to your words and I respect those words, but I hope we're moving in a different direction in terms of the relationship between this branch, this Committee, and the Department of Justice" (USA PATRIOT Act, 2005, p. 76).

Remnants of Ashcroft's Patriotism

As mentioned above, there are themes of patriotism present in this debate leftover from Ashcroft's leadership. Given the new tone of the Justice Department just described, the remnants of Ashcroft's patriotism have less impact—or at least an altered impact, but they are present and need to be addressed.

All-Or-Nothing

Iterations of Ashcroft's all-or-nothing ethos are present in the debate, though certainly not as prevalent as when Ashcroft was leading the charge. However, to not mention the presence would be to not give an accurate interpretation. In fact, in looking back to the very beginning of the debate, the all-or nothing dichotomy is constructed prior to the point at which any of the changes to ethos are noticeable.

In Gonzales's opening statement, we find the point at which he utilizes the rhetoric of fear to remind the audience that, "Al-Qaeda and other terrorist groups still pose a grave threat to the security of the American people and now is not the time to relinquish some of our most effective tools in the fight" (USA PATRIOT Act, 2005, p. 34). In the very next paragraph, Gonzales claims that he is open to suggestions, but then says, "But let me be clear that I cannot support any proposal that would undermine our ability to combat terrorism effectively" (USA PATRIOT Act, 2005, p. 34) This sort of

[13] The sunsets as stimuli to the debate over patriotism become a particular focus of analysis later.

response fails to recognize that there are other proposals claiming to offer the same tools as the Patriot Act, but with greater safeguards for liberty. In fact, as the interpretation of the critics' case above reveals, there is virtually no one in this debate who thinks that the provisions of the Patriot Act are not useful in terms of fighting terror. However, Gonzales seems to group all other proposals for substantive change to the Patriot Act, into the category of undermining "our ability to combat terrorism effectively" (USA PATRIOT Act, 2005, p. 34). Gonzales believes that the only responsible reform of the Patriot Act would be clarification of the standards already existing within it.

In the next exemplar, we find a majority member of the House, Daniel Lungren (R CA), making reference to a speech by Gonzales given outside of the legislative process, in which Gonzales warns Congress that the Patriot Act is the only way to go. Lungren says: "Mr. Attorney General, you have said here and you've said before, and I'll quote an article in the New York Times that quotes you as warning Congress that we cannot afford to assume the quiet of the day will mean peace for tomorrow and the terrorist threat will not expire, even if parts of the PATRIOT Act are allowed to" (USA PATRIOT Act, 2005, p. 51). Implicit in this quote within a quote is the notion that those who would consider not reauthorizing the sunsetted provisions do not believe the terrorist threat has gone away; i.e. there is no other way to approach the war on terror other than the Patriot Act.

The Critics are Confused

Along with the new tone of the Justice Department comes a lessened attack on the ethos of the critics. Though, it is certainly present throughout the debate. The extension of the all-or-nothing dichotomy suggested by Gonzales is an attack on their ethos, but aside from that, there are no accusations of hysteria or paranoia made by Gonzales

specifically. All he says along these lines are that there is a lot of bad information out there and that any constitutional problems do not come from the Patriot Act, but from other sections of the law associated with the Patriot Act:

> And as I travel around the country and I've encouraged other officials within the Department of Justice to go out and try to solicit examples of where real abuses or misuses of the PATRIOT Act have occurred, there's a lot of misinformation, a lot of disinformation out there. Some people believe that because certain provisions may have been struck down, that means that the PATRIOT Act was somehow found unconstitutional, and we discovered that, no, it related to a provision that was passed by the Congress years before the PATRIOT Act. (USA PATRIOT Act, 2005, pp. 58-59)

Interestingly, Gonzales's description here is actually, in a sense, defending the ethos of the critics from a more visceral, ad homonym attack upon them. He is addressing an argument posed by Steve King (R IA) who, had just accused the critics of demagoguery:

> Would you care to expand on that? I guess the question comes to me is why do I continually hear the stories about civil liberties being violated—and I'd expand my question a little more in that I'm inclined to support eliminating the sunset on the PATRIOT Act for the very reason of the demagoguery that I hear about the abuse of the PATRIOT Act and not finding evidence of it. (USA PATRIOT Act, 2005, p. 58)

So, Gonzales here is actually defending the critics in a sense by backing down from the accusation of demagoguery and deferring confusion to a lack of good information.

We've Been Conservative…Trust Us

Gonzales, like his predecessor, utilizes the "we are always careful" argument quite a bit in this debate; in fact, I count it nine times. But unlike his predecessor, he provides his questioners with at least some reason to believe him given the different tone that seems to be present. In the following exemplar, Gonzales is actually discussing the ethos of the Justice Department prior to the Patriot Act. He is responding to a question from Jeff Flake (R AZ) who asks Gonzales about the infamous "wall" existing between the law enforcement community and intelligence officials prior to the enactment of the

Patriot Act. He argues that that barrier to communication was not concretely a legal one but rather a cultural phenomenon. In other words, the Patriot Act did not change legal precedent much; it simply clarified legal precedent for the war on terror (an argument made a few different times during the debate).

Gonzales replies by acknowledging that the wall was more of a cultural phenomenon than a legal one. The wall was artificially constructed because the Justice Department is always very conservative when it comes to protecting civil liberties:

> Well, there certainly was a culture that existed. Rightly or wrongly, I think people wanted to be very, very careful because people in—most people in Government really do—are concerned about doing the right thing and not doing things that in any way infringe upon the civil liberties of ordinary Americans. And so, you know, I certainly wouldn't characterize it, I mean, as a—I think people were just doing what they thought was the right thing to do. (USA PATRIOT Act, 2005, p. 74)

Certainly, there are other places where Gonzales talks about how the Justice Department is careful when it comes to civil rights and how the President is very serious about them as well. Since this theme is one that has been investigated thoroughly in previous analysis, we will move on to other themes—leaving this one knowing that it is still present, but perhaps more believable given the perception of the new tone of the debate encouraged by Gonzales.

The Process Has Worked

The claim that the deliberative process has worked is another theme that has been a part of the Justice Department's message throughout much of the debate. Because it has been analyzed in previous chapters, I hesitate to expend too much energy on it here, but analysis would be incomplete without acknowledging its presence. Sensenbrenner, as the Chair of the Judiciary Committee, obviously has an interest in arguing for the success of the deliberative process. He does so in his opening statement analyzed earlier.

Gonzales too, argues for the success of the process. Even though he acknowledges that mistakes have been made in the way in which information has been disclosed, he does not mean that he questions the overall vitality of the deliberation-as-democratic process. In fact, he seems to think very highly of it in the grand scheme of things. For instance, in the following quotation, Gonzales had just finished describing the level of misinformation related to the Patriot Act (a previously analyzed exemplar). He says that in reality, the record of the Justice Department is very good and attributes some of that success to the job Congress did in finding a good balance between safety and liberty: "I think that, again, I think the record of the Department is a very good one regarding the use of the PATRIOT Act. I think that the record also reflects that Congress probably was effective in achieving a good balance between protection of civil liberties and protection of this country" (USA PATRIOT Act, 2005, p. 59).

The Debate Over the Sunset

The debate over the sunset of the controversial provisions is perhaps the most important part of the debate. As previous analysis recognizes, critics generally support most, if not all, of the fundamental ideas behind the Patriot Act; they simply would like to see more checks on its implementation. Since the sunsets are the biggest check on implementation and are the reasons why the Patriot Act is finally being debated with some deliberative rigor, they become an important focal point of analysis. They are significant horizons to the way in which patriot as symbol is negotiated. According to people from both sides of the political aisle who speak up about the sunsets in this debate, the patriotic thing to do is keep them in place. Those who support making the provisions permanent are by far in the minority. Of the seven people to comment directly about the potential of future sunsets in the reauthorized version, five support keeping them in the

future. Interestingly, three of them are Republicans (Lungren, Ghomert, and Flake) and two of them are Democrats (Lofgren and Delahunt). The only two people in this debate to reject the idea of future sunsets are Gonzales and Steve King (R IA).

The first time the sunset comes up is very early in the debate while Sensenbrenner is asking questions to Gonzales. He points out that he was instrumental in adding the sunset to the Patriot Act and then asks Gonzales if he thinks it should be repealed:

> Attorney General Gonzales, as you know, I was instrumental in putting the sunset into the PATRIOT Act because I felt that the Congress should have a chance to have the opportunity to review the effectiveness of the Act's provisions as well as use that as a tool to do oversight over the Department of Justice. Do you believe that the sunset should be completely repealed, or do you think that there should be another sunset put in, and if so, how far in the future do you think we should force another review? (USA PATRIOT Act, 2005, p. 48)

Sensenbrenner is obviously proud of his role in enacting the sunset originally, but as noted earlier, it is frustratingly unclear as to whether he supports the sunset into the future. He never makes this clear throughout the course of this debate.

In answering Sensenbrenner's question, Gonzales articulates that he would definitely like to see the provisions made permanent. He explains that the Patriot Act has a success record and that Congress should be able to trust the Justice Department with the new authorities:

> Mr. Chairman, it was my understanding that the sunset provisions were included in the Act because of concerns about whether or not the Congress had achieved the right balance between protecting our country and securing our civil liberties. We've now had a period of time to evaluate how these provisions work, how the Department has used these provisions. I think it's a strong record of success. I think the Act has been effective. I think the Department has acted responsibly. I think there is sufficient information for the Congress to make a determination that, in fact, these provisions should be made permanent. (USA PATRIOT Act, 2005, p. 48)

Furthermore, Gonzales adds that "as a matter of reality," Congress does not need the sunset to do its job of oversight:

> As a matter of reality, we all understand that the Congress at any time, the next year or the year after, could at any time evaluate whether or not certain provisions should be discontinued, and so even if the decision were made to remove the sunsets, that would not, in my judgment, in any way affect the ability or the right or the authority of Congress to examine and reexamine the way that these authorities are working and the way that the Department is using these authorities. (USA PATRIOT Act, 2005, p. 48)

Gonzales's point is made that the sunset is not necessary—there is no real need for it, but what strikes me is that he does not make an argument that the sunsets are in and of themselves a bad thing. In other words his arguments are all defensive in nature.

A few pages later in the transcript, Steve King (R IA) provides some offense to the justification for getting rid of the sunset provisions; however, the argument is not very rational in nature—it seems to be out of spite to the critics who are, according to King, "demagogues." The following quotation is utilized as an exemplar earlier in this analysis but part of it warrants a second look while discussing the debate over the sunsets[14]: "I'm inclined to support eliminating the sunset on the PATRIOT Act for the very reason of the demagoguery that I hear about the abuse of the PATRIOT Act and not finding evidence of it" (USA PATRIOT Act, 2005, p. 58). We know from previous analysis, that in this instance, Gonzales disagreed with King and steered away from the justification of spite due to demagoguery. Nonetheless no real justification for why the sunsets are bad and hinder the Justice Department's war on terror is offered.

It is not until Chapter 12 that we find a good reason provided for future sunsets. There, James Comey, Deputy Attorney General refers to the notion of the Patriot Act as cultural change—and argues that because the Patriot Act changed the culture of the relationship existing between law enforcement agencies and the intelligence community, such that they can more openly share information with each other. Thus, the argument for

[14] To gain more context behind this quote, readers should refer back to the section entitled, "Critics are not Demagogues…They're just confused."

getting rid of the sunsets is that cultural change cannot be fully embedded as long as critical parts of the act are provisional. Keep in mind though that this argument is not articulated in this particular debate. In fact, we actually find some evidence that Gonzales may have begun to back down from his insistence on the sunsets being repealed.

This evidence comes during an answer to a question by a majority member of the House, Jeff Flake (R AZ). Very briefly, Flake provides a reason for continuing with the sunsets, claiming that they are in fact necessary for meaningful debate, and then asks Gonzales again what he thinks about them: "Very quickly, before my time runs out, let me just be clear about the Justice Department's preference or position, I guess, on sunsets. I want to commend the Chairman for insisting on the sunset. I think to the extent that we've been careful and circumspect, it's largely as a result of the sunset provision" (USA PATRIOT Act, 2005, p. 74). Aside from articulating the notion that the sunset is the reason why Congress has performed effective oversight, he also says something very interesting about Sensenbrenner. He points out that Sensenbrenner insisted on the sunset and that he was instrumental in having the sunset in the first place—something that was noted during Sensenbrenner's opening statement. Then, after arguing for the continuance of the sunset, Flake asks Gonzales, "Are you saying that the Justice Department wants to do away with the sunset provision?"

Gonzales's response is quite interesting in that at the very beginning of the answer, Gonzales claims to be unsure about the necessity of the sunsets. Further, his only argument to justify that sunsets should not be a part of the reauthorized Patriot Act is strategically speaking, rather defensive in nature. He simply claims that he trusts Congress to do its job with or without the sunset:

> I don't know whether or not the sunsets are necessary. I fully trust Congress to perform its oversight functions. I hope Congress doesn't need the sunset

> provisions in order to perform its oversight functions. The sunsets were put in there initially because of the fact that people were concerned that decisions had been reached quickly about the bill. We now have a history of three-and-a-half years, and so my view is that Congress has all the authority it needs to perform the oversight necessary in the way that this Department exercises the authorities under the PATRIOT Act. (USA PATRIOT Act, 2005, p. 75)

Earlier in the debate, when responding to a similar question by Sensenbrenner, he makes a definite claim that he would like to see the provisions made permanent. Later in the debate, after hearing the reasons for extending it, he claims that he does not "know whether or not the sunsets are necessary."

Before ending this chapter, it is necessary to more clearly spell out the reasons for continuing with the sunset—the reason given by participants in this debate from both sides of the aisle. Zoe Lofgren (D CA) Lofgren articulates well, the specific importance of the continued sunsets:

> Thank you, Mr. Chairman, and I am glad that we are having this hearing. I have felt for the past several years that we should have had some oversight in a formal sense in the Committee. And I think back to those days after 9/11 and the Committee really did work closely together, and I remember over the weekend in this very room personally being here and working on the drafts before the Committee with Viet Din and others who were—and we had a unanimous vote, I believe, out of this Committee. Key to that was a sunset to make sure that we hadn't made a mistake, and I think I'm going to want a continued sunset just so it forces the Committee to review how this is going. (USA PATRIOT Act, 2005, p. 66)

According to Lofgren, no meaningful debate whatsoever would have occurred if not for the sunset; thus, he supports it for the future.

Summary

The debate is finally making progress. The Justice Department changed its tone and in turn, the critics acknowledged the change, but not before taking a few parting shots at Ashcroft. Conyers, at the very beginning of the debate, calls into question the entire spirit of the Patriot Act by quoting Ashcroft's "phantom of lost liberties" quotation

from December of 2001. That quote set the tone for the entire debate under his watch, and finally, critics are able to come out from underneath it. Others in the debate also took parting shots at Ashcroft and compared Gonzales's Department very favorably to Ashcroft's department. Memos and other forms of oversight had occurred prior to this hearing, and members of the Committee seem to recognize that Gonzales is more willing to cooperate and that generally speaking, the deliberative process is improving.

Gonzales continues making the effort to change the Justice Department's image. He acknowledges that mistakes have been made (though he is careful to specify that those mistakes are not Patriot Act related). He also makes it clear that he is open to amendments (but then is careful to specify amendments of clarification—not necessarily substantive change). He also releases additional new information about the way in which a couple of the controversial provisions have been utilized. Finally, Gonzales makes a very direct statement about the nature of patriotism: he says that true patriots question authority—a hallmark of political patriotism.

Chapter 12

We are Really Debating Now

During the 4/6/05 hearing, discourse from both the new Attorney General Alberto Gonzales as well as from some of the most vociferous critics in this debate thus far, leads to the anticipation that the deliberative process was improving thanks in part to the new tone of the Justice Department, one that recognizes the legitimacy of the questions coming from critics—an important change in tone for the deliberative process. It should be noted again that between the hearings on 4/6/05 and 6/8/05, nine different subcommittee hearings occurred in the Subcommittee on Crime, Terrorism, and Homeland Security and that for methodological reasons of practicality, this discourse is left out of analysis. Nonetheless, the 6/8/05 debate shows clear evidence that the anticipation of more meaningful debate comes to fruition.

Opening Statements

Sensenbrenner

Chairman Sensenbrenner begins his opening statement by thanking James Comey for coming today as well as by thanking Mr. Coble (R NC) and Mr. Scott (D VA) the chairman and ranking member of the Subcommittee on Crime, Terrorism, and Homeland Security. According to Sensenbrenner, the nine hearings held in that subcommittee were quite effective at informing Congress and the public about the Patriot Act:

> I would also like to thank Chairman Coble, Ranking Member Scott, and other Members of the Subcommittee on Crime, Terrorism, and Homeland Security, for holding nine of the 11 hearings on the PATRIOT Act. These hearings have been beneficial in informing Congress and the public about many aspects of the PATRIOT Act, and also demonstrate this Committee's continued commitment to taking our oversight responsibility seriously. (Reauthorization of the USA PATRIOT Act, 2005, p. 1)

More specifically, Sensenbrenner claims that through the hearings, we learned that the Patriot Act is beneficial due to the way in which it tore down the wall between law enforcement and the intelligence community and how it updated laws to match the technology utilized by terrorists.

In the next portion of the Sensenbrenner's speech, we find remnants of the all-or-nothing dichotomy. He states that critics have no real basis for criticisms—that they are all hypothetical complaints and then implies that those same critics want to refuse law enforcement "vital anti-terrorism tools:"

> In reviewing the authorities of this act, it is crucial to focus on the facts, and not on hypothetical scenarios. In a post-9/11 world, it would be irresponsible to refuse to provide our law enforcement authorities with vital anti-terrorism tools based solely on the possibility that somewhere at some time someone might abuse the law. Unfortunately, all Government powers have the potential to be abused; which is why Congress provides penalties for such abuse. Additionally, Congress, the courts, and the executive branch have created several protections against abuse before, during, and after the enactment of the PATRIOT Act. Rather than base the decision on whether to reauthorize the PATRIOT Act on scenarios on how it might be abused, I think it is more constructive to focus our review on how the PATRIOT Act has actually been used. (Reauthorization of the USA PATRIOT Act, 2005, p. 1)

The facts that have been uncovered according to Sensenbrenner have accomplished three overarching goals demonstrating success of the Patriot Act.

The first goal accomplished that Sensenbrenner speaks of is the clarification offered through the hearings concerning the infamous "library provision:"

> I am pleased that these hearings have also been effective in dispelling public misconceptions about the PATRIOT Act. For instance, the Attorney General informed us that section 215, dubbed ''the library provision,'' has never been used to obtain business records from a library or bookstore. However, the hearings have also demonstrated the danger of carving out safe harbors or exemptions that terrorists could exploit. As U.S. Attorney Wainstein testified, the 9/11 terrorists used computers in public libraries to check on their travel arrangements for the day of the attack. (Reauthorization of the USA PATRIOT Act, 2005, p. 2)

Here, he invokes the idea that all criticism of section 215 is due to "public misconceptions" and then utilizes the rhetoric of fear to justify its need.

The second goal accomplished in the previous hearings, according to Sensenbrenner, also involves the Justice Department having the opportunity to explain away misconceptions about the Patriot Act—specifically involving the probable cause standard in relation to surveillance:

> These hearings also corrected the erroneous claim that probable cause was no longer necessary when law enforcement sought court approval for surveillance orders. Probable cause is needed in both a criminal case or an intelligence case. For a criminal case, there must be probable cause that a crime has been or is about to be committed, and for an intelligence case, there must be probable cause that the target of the surveillance is an agent of a foreign power. These probable cause standards existed before the PATRIOT Act, and remain unchanged. (Reauthorization of the USA PATRIOT Act, 2005, p. 2)

Finally, the third goal accomplished by the previous nine hearings is that they provided the Justice Department to explain the way in which the Patriot Act provides necessary checks and balances on due process, including notification to suspected terrorists, reporting to Congress, and providing the ability to challenge Justice Department actions in court: "The hearings also provided the Members and the Department of Justice the opportunity to discuss the adequacy of notice to suspected terrorists and criminals, the need for reporting to Congress, and the ability to challenge the intelligence authorities in court" (Reauthorization of the USA PATRIOT Act, 2005, p. 2).

Finally, after establishing that the deliberative process has been successful thus far, Sensenbrenner announces the purpose of the current hearing: "The hearing today will provide Members the opportunity to address any issues that remain open and allow the Deputy Attorney General to address any concerns that were raised during the previous hearings" (Reauthorization of the USA PATRIOT Act, 2005, p. 2). Having said that, Mr. Conyers is recognized for his opening statement. However, for some unknown reason,

Conyers elects not to give an oral statement and simply inserts his opening statement into the record; thus, it is eliminated from analysis. This is rather disappointing to me simply because thus far during interpretation, the opening statements have served the purpose well of previewing the key arguments that would be extended throughout the debate. In academic competitive debate terms, they have served as effective constructive speeches. Unfortunately, in this debate, the critics were not represented through a constructive speech.

Comey

Comey's opening statement begins by extending the new patriotism espoused by Attorney General Gonzales in a very direct way. He articulates his belief that people should question the authority of the Government and be very skeptical of it:

> I believe that people should question authority; that people should be skeptical of Government power; people should demand answers about how the Government is using its power. Our country, I was taught, was founded by people who had a big problem with Government power and worried about Government power, and so divided our powers and then added a Bill of Rights to make sure that some of their concerns were set out in writing. I think it's incumbent upon the Government to explain how it's using power, how its tools have been important, how they matter, and to respond especially to the oversight of the legislative branch. I think citizens should question authority, and should demand the details about how the Government is using its power. (Reauthorization of the USA PATRIOT Act, 2005, p. 4)

Then, after defining criticism of government as a patriotic duty, Comey goes to even greater lengths to symbolically separate the new leadership of the Justice Department under Gonzales from the way in which it was lead under Ashcroft. Comey admits there was a time when he did not ever think the Patriot Act would receive the proper debate that it deserved—largely because the information was not available to engage the debate:

> I worried very much a year ago that we were never going to find the space in American life to have a debate, a real informed discussion about the PATRIOT Act. Instead, where we had found ourselves was people on both sides of the issue exchanging bumper stickers; people standing around at a barbecue or a cocktail

> party and talking about all manner of things, and someone saying, ‘‘Isn’t the PATRIOT Act evil?’’ and people would nod and then go on talking about whether the Nationals were going to be a real baseball team or current events of some sort, and that we were missing a discussion from both sides, a demand for the details and a supplying of the details. (Reauthorization of the USA PATRIOT Act, 2005, pp. 4-5)

Though I can agree with much of Comey’s synopsis of the debate, I would have to point out fault with the last sentence when he claims that there was not “a demand for the details” (Reauthorization of the USA PATRIOT Act, 2005, p. 5). I think very clearly, after interpreting the debate from the beginning, there has been a persistent demand for details. Perhaps not enough people were demanding details, or perhaps just not the right people were demanding details, but throughout the debate, we find critics who demand details and complain of not receiving them. Despite the one glaring inaccuracy however, his synopsis of the debate is correct when he says the deliberative process governing the authorization and implementation of the Patriot Act has not been effective.

He is happy to report though that the most recent round of debate governing the reauthorization of the act has reassured him that the democratic process is working:

> I worried very much about that. I needn’t have worried. Thanks largely to the work of this Committee and to your colleagues in the Senate, we have had, as you said, Mr. Chairman, a robust discussion and debate about these tools over the last months. And I think the American people understand them better. I think all of us have had an opportunity to demand details and respond to the questions. (Reauthorization of the USA PATRIOT Act, 2005, p. 5)

In the spirit of continuing the process, Comey looks forward to answering more questions, especially questions that demand the details. Then he introduces a phrase that becomes sort of a buzz phrase at various points throughout this round of debate. He argues that the “angel is in the details,” and claims that as details about the implementation of the Patriot Act become more available, the effectiveness of the act becomes more transparent:

> I look forward to answering any and all questions, especially those about the details. I believe that the angel of the PATRIOT Act is in those details. The angel is in demonstrating that these are tools that make a difference in the life of this country and in our ability to protect people in this country. I think the angel is also in the details that demonstrate to folks that the PATRIOT Act is chock full of oversight, in a lot of ways that regular criminal procedure is not; full of the involvement of Federal judges, full of the involvement of the Inspector General, full of the involvement of this Committee and other Committees in Congress to conduct rigorous oversight in response to our reporting about what we're doing. (Reauthorization of the USA PATRIOT Act, 2005, p. 5)

He begins to wrap up his opening statement by providing the bottom line—his belief that not only should the sunsetted provisions be reauthorized but also that they should be made permanent:

> The bottom line, I believe, is that the PATRIOT Act is smart; it's ordinary in a lot of respects; it's certainly constitutional. We ought to make permanent the provisions that have meant so much to the people that I represent: the men and women in law enforcement and in the intelligence community fighting the fight against terrorism and crimes of all sorts. (Reauthorization of the USA PATRIOT Act, 2005, p. 5)

Finally, Comey ends by again, separating his ethos (as part of the new Justice Department under Gonzales) from Ashcroft's, by claiming that he will try to answer questions rather than talking past them: "So I thank you for this opportunity. I look forward to a robust discussion and debate. And I will try my best to answer any and all questions, and not talk past a question, but respond directly. So thank you, Mr. Chairman" (Reauthorization of the USA PATRIOT Act, 2005, p. 5)

The Case of the Critics

After a couple of non-penetrating questions of clarification from Sensenbrenner as the first questioner, it is Conyer's turn and we can begin to piece together the arguments that he might of emphasized had he chosen to provide an oral opening statement. During his line of questioning, he brings up three main arguments. First of all, he mentions that some questions submitted to the Department of Justice several weeks ago have still not

received any response. Secondly, he references an argument that began to surface recently—during the debate with Gonzales, pertaining to the idea that the "spirit of the Patriot Act" links it to so many other Executive Branch activities that have gone unquestioned. Thirdly, he alludes to the "murky circumstances" (Reauthorization of the USA PATRIOT Act, 2005, p. 22) under which the act was initially authorized.

The first and third of these arguments posed by Conyers are remnants of the debate that occurred during the implementation stage of debate. They were cornerstones of the critics' arguments; their overall claim was that they could not debate the Patriot Act effectively because they could not obtain any meaningful information about its implementation. In general, the Justice Department under Ashcroft's leadership did not value Congress's input. However, in the first debate analyzed in this chapter, with Gonzales as the witness, the anticipation of a new attitude of cooperation and information disclosure is noticeable. Based upon the way in which the current debate transpires and reflects upon the nine subcommittee hearings previously mentioned, it seems that the anticipation came to fruition, and that debate is more effective at uncovering the real controversy underlying the Patriot Act. So, the analysis of the case of the critics here is divided into two main sections. First of all, I examine how critics acknowledge an increased level of cooperation coming from the new leadership and how that acknowledgment leads to more transparent, rational debate. Then secondly, I examine the true underlying controversy exposed due to the new tone of cooperation—the controversy over the symbolism of the Patriot Act.

The Deliberative Process Has Improved

The accusation that the Justice Department does not value consultation, for the most part, fades away as an issue of the past. Statistically speaking, the number of

arguments leading to that conclusion is relatively low compared to past debates. But also, a close textual analysis of the content of those arguments reveals that even when they are made, they are made in such a way that does not necessarily question the good will, or the ethos, of the current Justice Department; they are made in such a way that acknowledges a deliberative process in transition to greater quality. When putting the remnants of the old criticism into perspective of the other arguments related to acknowledging the new level of cooperation, it becomes rather clear that the level of cooperation by the Justice Department has increased noticeably.

Criticism Reflects a More Collaborative Tone

To begin to break down what seems to be a rather complicated turning point in the debate, it seems necessary to illustrate that even though there may be remnants of old criticisms, such as a lack of cooperation, these criticisms reflect a more collaborative tone than in previous stages of debate. Conyers reminds us that the process is still not perfect at the very beginning of his turn to question Comey by mentioning an instance in which he did not receive answers to important questions:

> Several weeks ago, Mr. Deputy Attorney General, Members of the Committee have submitted questions to the Department of Justice, and we've not had any response. And if you could help expedite a response to those questions—they are all in the record of the some-11 hearings that have been held—we would be grateful. (Reauthorization of the USA PATRIOT Act, 2005, p. 22)

Conyers is obviously displeased about not having questions answered, but nowhere in this argument is found an accusation that the lack of information is the result of the Justice Department being manipulative. In the previous stage of debate, the lack of information argument was embedded inside a much more totalizing critique that the Justice Department is not forthcoming, and is withholding information intentionally for manipulative reasons. In this case though, Conyers seems to recognize that the answers

are coming; he expresses confidence that receiving the answers is just a matter of Comey expediting the response—it is an honest mistake.

In the next exemplar, a similar request is made with a similar sort of tone. Zoe Lofgren (D CA) is referencing a question about section 218 which she posed specifically to Gonzales during the first hearing of this stage of debate. She points out that Gonzales could not answer the question on the spot, and further that she never got an answer after the hearing was over:

> Let me ask another question. And it goes back to our need to review the whole situation, not just what is being sunsetted. I guess in a way it goes back to the earlier comment about oversight and how much time and effort is being put into answering the questions that Congress has posed. And I assure you, I don't question that you are putting in a considerable amount of time. But after the Attorney General, Mr. Gonzales, appeared before the Committee, I had two questions that he was not able to answer on the spot. One had to do with section 218, how many prosecutions for non-terrorism-related crimes had been a result of this section, and then further, about the material witness section, under 3144 of 18 U.S. Code, how many individuals actually ended up testifying before a grand jury. I never—he wasn't able to answer it on the spot, which I can understand. I never got the answer afterwards. Do you know the answer today? And if not, will you promise to get me the answer? (Reauthorization of the USA PATRIOT Act, 2005, pp. 38-39)

Lofgren is obviously displeased that the answer to her question has not been provided, but at the same time, she makes it clear that she is not questioning the good will of the Justice Department. For instance, before even making the argument, she preempts any notion that she is questioning the effort of government officials by acknowledging that they "are putting in a considerable amount of time" (Reauthorization of the USA PATRIOT Act, 2005, p. 38). Furthermore, after making the argument, she explicitly states that she "can understand" why it was not possible to provide the answer "on the spot" and goes on to express confidence in Comey's ability to follow up on the question.

Comey responds by saying he does not know the answer due to the fact that the data has not been collected yet; however, he promises that it is being collected presently

and that the Department will supply it as soon as it becomes available: “I don’t know the answer, and I will promise to get you the answer. And I can do that with some confidence, because I know it’s being worked on very hard. They’re collecting—we’re going out to the field to collect the information so that we can supply it” (Reauthorization of the USA PATRIOT Act, 2005, p. 39). Obviously, Comey’s promise in and of itself is not enough evidence to substantiate the claim that cooperation is increasing, nor is the observation about the changed tone in which the criticism is lodged. But, if we consider these observations with the fact that these two exemplars are the only ones found in the entire debate where people complain of not having questions answered, along with the categories of analysis to come, the picture of increased cooperation begins to be painted.

The other lack of cooperation claim lodged by Conyers during his line of questioning is the reminder of the way in which the bill was initially passed: “And I don’t want to take you into ancient history, but I think you know the rather murky circumstances of which the original bill this Committee passed was substituted for a bill that came from the Department of Justice to the Rules Committee the night before it came to the floor” (Reauthorization of the USA PATRIOT Act, 2005, p. 22).

Obviously, this is a major complaint lodged by Conyers against the deliberative process. But by the way in which Conyers refers to it as “ancient history,” he seems to be letting it go by the wayside— a point that should not be forgotten but also, a point of separation between the Ashcroft Justice Department and the one led by Gonzales. This seems to ring especially true since Comey himself, during his opening statement, acknowledges how poor the deliberative process had generally been prior to the reauthorization stage. Furthermore, Comey seems to recognize the history of bad deliberation again in response to the current argument being made by Conyers. After

making the previously quoted argument, describing the way in which the act was initially authorized, Conyers asks Comey, if he was aware of how everything happened. In response, Comey says he was not directly aware of it because he was not a part of the Justice Department at the time, but that he had heard about it through "press accounts" (Reauthorization of the USA PATRIOT Act, 2005, p. 22).

Even William Delahunt (D MA), one of the more antagonistic critics in this debate praises the current Justice Department for its collaboration:

> I happened to catch your reference to congressional oversight as being a check, if you will, on behavior of the executive branch. And I agree with that. And I know you're sincere in that comment. And I also want to acknowledge that there has been very good input from the Department of Justice during the hearings by the Crime Subcommittee on the reauthorization. And I should commend the Chair for directing Chairman Coble in conducting those hearings. I think it's been very fruitful. (Reauthorization of the USA PATRIOT Act, 2005, p. 51)

To end the exemplar here would be a little misleading though. Delahunt is not ready to forgive and forget for past grievances—he remains skeptical of the executive branch in general:

> And I think that there's the potential for some consensus on some of the substantive issues. But I've said this publicly at these hearings, and let me just repeat it once more. I think there's a natural disinclination on the part of the executive—and I'm not referring specifically to the Department of Justice, but to all executive agencies—to cooperate on an ad hoc basis, when it suits their particular agenda, with Congress. I look back four years now, when we were in the process of passing the PATRIOT Act. And as you well know, it came out of this Committee with a 36-to-nothing, unanimous vote; which was extraordinary. It subsequently was changed, to the chagrin of some of us. But I keep hearing the comment from witnesses and from others saying that, "We have to make this permanent." (Reauthorization of the USA PATRIOT Act, 2005, p. 51)

Though he remains very critical, Delahunt is careful to note that he is not referring critical comments specifically to the current Justice Department. The past is the source of his continued skepticism. The present is the source of a rejuvenated optimism.

A Direct Comparison to Ashcroft

Arguments verifying the observation that the process is improving occur when critics in the debate make direct comparisons to Ashcroft. At the end of the hearing, perhaps what is the most interesting example of this argument occurs. Sensenbrenner agrees with Delahunt's assessment of the deliberative process and makes a very direct comparison to Ashcroft to illustrate his point:

> Mr. Comey, thank you very much for coming here and for your testimony. I would like to echo the words of Mr. Delahunt. I believe that in the last year and a half the Justice Department has been much more forthcoming on the PATRIOT Act and on other issues than in the two and a half years prior to that. And this Chair has both publicly and privately expressed to former Attorney General John Ashcroft that an ''I've got a secret'' attitude on legitimate oversight that does not involve classified information is self-defeating. I would like to salute both you and Attorney General Gonzales. I think that there has been a change in attitude that has been particularly marked in the hearings that we've had on this. You help your cause by coming up here and answering questions in the way that you did, and the way that your boss did a couple of months ago. And I hope that continues. (Reauthorization of the USA PATRIOT Act, 2005, p. 52)

To be honest, I do not recall an instance in which Sensenbrenner admonishes Ashcroft in such a way as he does here. He has been found to disagree with Ashcroft over very few substantive issues, such as the importance of the original sunsets, but questioning Ashcroft's ethos like this in the past is something that comes out of the blue. In fact, my analysis finds Sensenbrenner praising the deliberative process from start to finish. Nonetheless, the fact that he is admonishing Ashcroft's ethos of secrecy in this moment, which is toward the end of the reauthorization stage of debate, is significant. The fact that he and Delahunt (two people who have been in direct disagreement with each other throughout much of the debate) can agree with each other over any aspect of the current nature of the deliberative process, speaks volumes about the extent to which that process seems to have improved during the reauthorization stage of debate.

The next exemplar is also interesting because of the way in which Robert Scott (D VA) gets Comey to comment specifically on the rhetoric of Ashcroft and the way in which it had the effect of chilling public debate. Scott begins the line of questioning by referring to a generic statement made by Comey during his opening statement pertaining to the necessity of open debate; then he compares Comey's statement to a direct quotation made infamous by Ashcroft:

> You mentioned in your opening remarks that there is certain language that is not helpful in promoting an honest dialogue about this legislation. Would that include language such as, ''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''? (Reauthorization of the USA PATRIOT Act, 2005, p. 29)

Comey's response is of course very politically correct; yet, at the same time, it is not at all unclear what he meant in his opening statement:

> I may be a short-timer, Mr. Scott, but I would prefer not to focus on anybody's words in particular. Any words that chill aggressive questioning of Government authority I think are not helpful. As I said in my opening, I think people should demand to know—all points of the political spectrum. I think Republicans should have as big a problem with Government power as Democrats. (Reauthorization of the USA PATRIOT Act, 2005, p. 29)

Scott does not want to let Comey get away from the question without a specific connection established between Comey's attitude and Ashcroft's. So, Scott simply asks, "You recognize the words?" and Comey responds, "I've heard them before, yes, sir" (Reauthorization of the USA PATRIOT Act, 2005, p. 29). So, without having to come out and directly say it, it becomes evident that the answer to Scott's question is an implied "yes…Ashcroft did chill public debate" and that everyone should question the power of Government.

Cool Down the Rhetoric

The following exemplar demonstrates an effort by a minority member of the Committee who has been a very vocal critic of the Justice Department to respond to the notable change in attitude by the Justice Department by attempting to strike a symbolic compromise. Zoe Lofgren (D CA) acknowledges the validity of a claim made by Comey during his opening statement—where he said that some people do need to "cool down the rhetoric" (Reauthorization of the USA PATRIOT Act, 2005, p. 37), pointing out this advice applies to people on both sides of the aisle:

> Thank you, Mr. Chairman. And thank you, Mr. Comey. I, to some extent, agree with the comments that we need to cool down the rhetoric on the PATRIOT Act. I think we're here, and it's important that we're here, to review the details not just of the sunsetting provisions of the act, but all of the act. And yet, having said that, there are people in the country that everything they don't like they believe is because of the PATRIOT Act. And I constantly challenge, ''Where in the act is this misbehavior?'' There's things I don't like, too, but it's not all in the PATRIOT Act. At the same time, I think it's a terrible mistake to criticize those, or to question the patriotism of those who are legitimately engaging in oversight to make sure if we have preserved the balance between our civil liberties and our need to have vigorous law enforcement; which is what we're doing here today. (Reauthorization of the USA PATRIOT Act, 2005, p. 37)

In light of her calling attention to the inflamed rhetoric, and asking people from all sides of the debate to "cool down," it is worth noting that again, people from all sides of the debate have done so to a great extent—thanks largely to the new attitude portrayed by the change in the Justice Department.

There are exceptions to this cooling down effort though. From the left, the example comes from Jerrold Nadler (D NY). Recalling from the last stage of the debate, Nadler accused the Bush Administration of being tyrannical. In the current debate, he refers to their new powers as arbitrary and "un-American:"

> Thank you, Mr. Chairman. General, first of all, before I ask my questions, let me say I want to associate myself with the comments of the gentleman from California, Mr. Berman. It seems to me that what he was driving at, the need for specificity in some of these with some of these tools, really defines the difference between due process and arbitrary power. And much of what we're doing, or what

> we're dealing with, is very high risk of the use of arbitrary power; which is un-American, our tradition. And that's what we're getting at. (Reauthorization of the USA PATRIOT Act, 2005, p. 33)

The remarks made by Berman, to which Nadler refers, are examined below; however, readers should know that while the content of the association Nadler tries to establish may be related, the style is not. Berman does not call anybody in this debate un-American. Nadler's antagonistic comment here is the only such one coming from the left side of the political aisle.

From the right side of the aisle, we have a couple of comments from Louie Gohmert (R TX) and one from Comey. In Ghomert's case, he begins with what seems like an appeal to do just what Lofgren was calling for earlier—to "cool down the rhetoric;" but in actuality, he just wants to take a couple of partisan shots at liberals. He begins his statement by noting his offense at individuals who have described Guantanamo Bay and Abu Ghraib prison camps as being like gulags—which is fair enough, but then he goes to describe those people as having "their head up an earthen or biological hole" (Reauthorization of the USA PATRIOT Act, 2005, p. 39), which would seem to inflame the rhetoric:

> First of all, I want to address something that was brought up earlier very quickly. And that is the so-called abuse or torture some people referred to, whether at Abu Ghraib or Guantanamo. And I'm deeply offended when I hear that individuals indicate that Abu Ghraib was some type of gulag. They need to go back and read the accounts of what happened to our fly-boys in the Pacific in World War II, when they had internal organs removed to be cannibalized by their captors; or had holes drilled in the head while their brain was probed while they were alive, to see what parts responded to what probing; to have bones repeatedly broken; to be handcuffed from behind and be hung by the wrists. These people that think that we are running gulags either have their head up an earthen or biological hole somewhere. I'm concerned. (Reauthorization of the USA PATRIOT Act, 2005, p. 39)

Then a second comment by Gohmert also caught my attention as being rather extraneous and inflammatory. He indicts the ethos of a former President who advocated the closing of Guantanamo Bay by accusing him of not protecting American soil when in the position of needing to; in other words, the President to which he refers is not very patriotic:

> But anyway, also to read in a local tabloid today that a former President believes we should close Guantanamo, when perhaps he didn't protect the country when we had American soil attacked and our own people taken hostage and nothing meaningful was done for over a year to ever try to get them out, I have to take that with a grain of salt. (Reauthorization of the USA PATRIOT Act, 2005, p. 39)

Gohmert does not specifically name the President he is referring to. Based upon the context of the quotation, it sounded like maybe it was Jimmy Carter. To firm that context up, I did a little research to try and figure out to whom he was referring and it was indeed Carter. Interestingly though, in the same news source I learned that, I also learned that a couple of weeks after this hearing, Bill Clinton also called for the closing (Clinton urges Guantanamo Closing, 2005, June 20). Ironically, the same article also gave examples of those who have called Guantanamo a gulag. Democratic Senator Dick Durbin "compared interrogation practices at the prison to those used under Hitler and Stalin" (Clinton urges Guantanamo Closing, 2005, June 20) and "Amnesty International has branded it 'the gulag of our times'" (Clinton urges Guantanamo Closing, 2005, June 20).

So, we note that inflammatory rhetoric has come from all sides of the war on terror debate—probably an observation that could go without saying, but since it comes up specifically as part of the data, it is worth noting. The only other comments I noticed as being potentially inflammatory come under the category of "critics do not understand the Patriot Act"—a category to be discussed in more detail later. Even though that category, in and of it self, is not what I would call inflammatory, some of the ways in

which it is made in this debate are. For instance, Comey calls skeptics in the public "bobble dolls" (Reauthorization of the USA PATRIOT Act, 2005, p. 44) who are willing to go along with whatever they hear. But, since this category is given more attention later in analysis while the case of the Justice Department is being made, we will wait until then to explore further. The big picture observation to come away with in this section is that not only does the rhetoric in general seem to be "cooling down" to a third party observer (notwithstanding some notable exceptions), but the participants in the debate are themselves drawing attention to the "cooling down" period.

There are Still Issues, Despite Progress

The critics do go to great lengths here to credit the Justice Department for changing its tone in such a way that makes debate more meaningful. However, that does not mean that their concerns have gone away. In fact, due to the heightened sense of transparency, their issues have come more to the forefront. As uncovered during the previous debate, one result of the increased transparency of the Justice Department in terms of fighting the war on terror is that critics are able to see that the Patriot Act in a vacuum may be the least of their domestic worries. A much more general issue that came to light during the implementation stage of debate is the license assumed by the Justice Department to do what it felt necessary to protect the safety of Americans. They assumed an inherent trust was instilled in them (to be fair, a lot of people did instill trust in them), to act on their ideas quickly without the need to waste time by checking with policymakers first. Since the terrorists had the ability to act quickly and decisively, unilateral decision making was the way to go, and to use Ashcroft's own words cited in Chapter 9, it was "the spirit of the Patriot Act" allowing the Executive Branch to do so. The Patriot Act seems to have become a symbolic decoy of sorts—a magnet of attention

drawing so much political controversy that perhaps other executive branch policies slipped by under the radar. Thus, critics in this debate attempt to draw those other policies into the debate over the Patriot Act.

Furthermore, aside from the "spirit of the Patriot Act" being a symbolic connection to other war on terror policies, there may yet be more direct, legal connections. The Justice Department has acknowledged that they have made mistakes. As we will see once we get down to the point in analysis where their case is made, they divert blame away from the Patriot Act and onto other issues. Critics are not completely convinced of the validity of this diversion, but at the same time, they also have a difficult time in either explaining the connection or in verifying that the diversion is logically sound. The reason for this difficulty is the fact that there is still a lot of confusion over what exactly the Patriot Act does. In fact, once we get down to the point in this analysis where the Justice Department makes its case, it seems as though they use this confusion to their advantage.

So in response to this confusion, part of the case of the critics is to say that even if the Patriot Act—in a vacuum, does perfectly balance the tension between safety and liberty as is, there still needs to be a great deal more discussion to understand how and why that is the case. The Patriot Act is massive; it intersects with and alters so many different parts of the criminal code, that according to the case of the critics, this round of hearings in which the Justice Department has finally begun to open up a little toward the questions raised, should represent the beginning of the debate over the Patriot Act—not the end.

The Scope of the Debate is too Narrow

The biggest part of the critics' case against the Patriot Act is that the scope of the debate is too narrow. Conyers makes this point very clear early on during the questioning of Comey:

> Now, let's be frank about this subject that we're on. We've had lots of hearings, but here is the problem. We haven't been discussing much more than the expiring provisions in the PATRIOT Act. Which is fair enough: we've got to make sure we want to keep them, or we want to let them go. There have been a few added, but let me review with you the matters that have not come before the Committee at this point: The torture and abuse of detainees, Abu Ghraib, Guantanamo, and other places; The outsourcing of torture; that is, rendition, sending people to countries where we know torture is a standard activity; The practice of closed immigration hearings; The indefinite detention of thousands of people who responded to the Department of Justice and then end up being kept and held without notification to their families or without them being able to contact a lawyer; The racial profiling of many of the more than 30 countries with Middle Eastern origins; And, the use of FISA authorities on non-terrorism cases. Now, what we are trying to do here—and we're in the process of deciding this within the Committee—is whether we're going to just review mostly the provisions that are expiring, or whether we're going to have an opportunity to look at the whole PATRIOT Act. (Reauthorization of the USA PATRIOT Act, 2005, p. 22)

Conyers claims that the "whole" Patriot Act needs debate—not just the sunset provisions that were the foci of this round of reauthorization hearings, other non-sunsetted provisions that did not necessarily receive a great deal of attention in these hearings, and generally, the ethos of the Justice Department and the relationship it has with the United States Congress. All of these things should be considered, according to Conyers, when deciding whether or not to reauthorize the expiring provisions of the Patriot Act.

A few pages later in the transcript, Howard Berman (D CA), the next minority member to have a turn to ask questions, puts forth a similar argument:

> General Comey, as I mentioned to you in my office, I have a number of concerns about actions that aren't part of the PATRIOT Act, but relate to unilateral actions taken by the Administration on issues that fall squarely within the jurisdiction of this Committee; even though in these areas we haven't at this point offered input. (Reauthorization of the USA PATRIOT Act, 2005, p. 25)

Berman provides examples of a few different policies related to immigration including the detention of non-citizens without notice of charges (i.e., the issue that has been discussed as part of the infamous Inspector General's report) and the "blanket closure" of immigration proceedings as a result of the "Creppy Memo" (Reauthorization of the USA PATRIOT Act, 2005, p. 25). Essentially, the Justice Department has instituted a "one size fits all" (Reauthorization of the USA PATRIOT Act, 2005, p. 25) policy according to Berman, and has done so without consulting the Judiciary Committee. Even though he defines these criticisms as "concerns about actions that aren't part of the PATRIOT Act" (Reauthorization of the USA PATRIOT Act, 2005, p. 25), Berman argues they do deserve attention while considering reauthorization because the Patriot Act embodies the ethos of unilateral action assumed by the Administration.

Berman continues his argument by pointing out that he has raised these issues before during a previous hearing, and that Attorney General Gonzales had even recognized mistakes were made; however, despite that acknowledgment, no real solutions have been taken seriously. Berman exemplifies by bringing up the Civil Liberties Restoration Act (C.L.R.A) as a solution that would not take away authorities granted by the Patriot Act. As he gets into a description of what the C.L.R.A. accomplishes, a direct, more legalistic connection between the "spirit" of the Patriot Act and many of these "outside the Patriot Act" issues becomes more clear:

> First, on the issue of notice of charges to detained non-citizens, we provided in section 412 of the PATRIOT Act a way for you to hold aliens suspected of involvement in terrorism for up to six months without approval of a judge, subject only to issuance of a writ of habeas corpus, as long as they were given notice of the charges against them within seven days. As far as we've been told, that power has never been used. And instead, it was circumvented in favor of a policy put in place before the PATRIOT Act that allows people to be held for indeterminate periods of time with no notice of charges. Our bill would leave section 412 undisturbed, but replace the policy the Department put in place with a requirement that a notice to appear be served on every non-citizen within 48 hours

> of his arrest or detention, and that those held for more than 48 hours be brought before an immigration judge within 72 hours of arrest. You'd still have the 412 authority to hold for up to seven days, and then to keep in detention in cases of suspected terrorism, espionage, and other provisions set forth in 412. (Reauthorization of the USA PATRIOT Act, 2005, p. 26)

It is very interesting that Mr. Berman, through an effort to criticize the ethos of the Justice Department—i.e. the unilateral decision making authority claimed via the spirit of the Patriot Act, is actually defending a provision of the Patriot Act to do so. He suggests that there is an appropriate mechanism in section 412 to balance civil liberties with safety; however, the Justice Department has found the wiggle room to circumvent that mechanism. Thus, Berman argues that the C.L.R.A. proposal should be adopted because it amends laws enacted prior to the Patriot Act so that the section 412-civil liberty protection mechanism would have meaning.

There are a couple of other important exemplars illustrating the extent to which critics attempt to connect the Patriot Act to other domestic war on terror policies. One of them has already been presented earlier in analysis—in the section entitled "Criticism Reflects A More Collaborative Tone." In introducing her claim that she asked questions of Gonzales in April of 2006, which still have not been answered as of June, 2006, Zoe Lofgren prefaces the importance of the question by saying, "And it goes back to our need to review the whole situation, not just what is being sunsetted" (Reauthorization of the USA PATRIOT Act, 2005, p. 38).

In another exemplar, Delahunt makes the connection between the limited scope of the debate and the need for continued sunsets on the provisions to be reauthorized. Analysis of the debate over the continued sunsets is being reserved as a topic in and of itself for the end of this chapter. We will definitely come back and take a very close look at that exemplar later. The importance of mentioning it here though, as well as the

Lofgren exemplar, is that what is at stake in the debate over the Patriot Act is not just the legal provisions found therein—which is not to say that the legal provisions are excused from scrutiny though. It just broadens the scope of what does need to come under scrutiny: the nonsummative implications of the Patriot Act upon every law in the legal code. This speaks to how obtuse the Patriot Act is and how difficult it is to assess the final results in the balancing act between safety and liberty—a task that demands more time than it was afforded.

Given the various uncertainties over the Patriot Act debate, the one argument standing out, as the thrust of the critics' case is that the debate needs more debate; i.e., the legislative process is too limited in scope. This argument, along with the ensuing debate over the sunset provisions, provides evidence of the recognition of the fact that the meaning of patriot being negotiated within the halls of Congress bleeds into every other debate in the war on terror. The debate is about the ethos of the Justice Department, the Bush Administration in general, and the ethos of the critics of the Bush Administration.

Perception is Real

Connected to the notion that the scope of the Patriot Act debate is too narrow in scope, is the notion that given how ubiquitously dense the act is, there is no way to evaluate its effectiveness in the time allotted. This again is an argument garnering more attention in the analysis below concerning the debate over the sunset. The idea is that regardless of how much the Patriot Act truly does protrude legally into the lives of American citizens, the perception created by and through the act is real and important. The fact that it has created so much anxiety, which has been intensified, if not created, by the "culture of concealment" (Delahunt's words used multiple times during the course of

the legislative process), illustrates just how important it is to generate more debate over the Patriot Act

Zoe Lofgren (D CA) speaks to the symbolic implications of rigorous oversight. To do so, she must first address legal implications revolving around section 215—the "library provision." The argument calls into the question the significance of the claim made earlier in the debate by Comey who said that the Justice Department has only utilized the provision 35 times and never to obtain library records. Lofgren's claim is essentially that the logic of the Justice Department's thinking is a little off considering that if it is not utilized to obtain library records, then there is no real security related reason to have the law in the first place. She then makes a cost-benefit-analysis and weighs the lack of a security-related benefit against the disadvantage of the public anxiety caused by the provision:

> Along those lines, I want to go back to section 215. In your testimony, you state that the FISA court has issued 35 orders, but that none were issued to a library. At the same time, you say if we exempt or change 215 relative to libraries, you know, it's the end of the world. The roof will fall in; terrorists will make libraries safe havens. And I guess I'm skeptical of that. And I'm wondering if there isn't some intermediate provision that would assist with the anxiety that is afoot in the land. People are afraid that their reading habits are going to be interfered with. Their first amendment rights are in fact being chilled today, because of what people think is happening, even if it's not happening. (Reauthorization of the USA PATRIOT Act, 2005, pp. 37-38)

This gets to the heart of the symbolic importance of oversight, debate and amendment, claiming that regardless of the actual legal ramifications of the Patriot Act, its perception is causing first amendment rights to be "chilled." Given that the provision is not used much—and never in a library search, Lofgren expresses a lack of understanding over why it absolutely cannot be amended in any way.

Comey responds by addressing the public's perception and claiming that the Patriot Act does not need to be amended; the public's understanding is what needs to be

fixed: “Something is broken, but I think—and I may be impossibly naive—but I think it’s people’s understanding of 215, and not 215. And if what’s broken is their understanding, I’m going to work till I have no more breath to try and fix that; rather than change 215 just because folks don’t understand it” (Reauthorization of the USA PATRIOT Act, 2005, p. 38). This argument—criticism of public’s perception, is taken up more directly later in analysis. In fact, we find Comey calling critics “bobble dolls” for being critical.

But sticking to the analysis of this section, Comey continuing to address the warrant of Lofgren’s argument—the idea that if a particular application of the Patriot Act does not get used to protect safety, then there is no real need for it in the first place. Comey acknowledges that the suggested change would not be a terrible hit on the Justice Department’s ability to protect safety; however, it would send the perception to a “bad guy” that the library is a safe-haven: “I don’t know why we would do that, though, because that would—I don’t think the sky would fall, but you would create a sanctuary in those particular places. Because a bad guy would know, “That’s a place I can go” (Reauthorization of the USA PATRIOT Act, 2005, p. 38). So, Comey is quite aware of the symbolic meaning—in fact, it is very much a part of the strategy in the war on terror.

The Justice Department’s New Ethos

Extending the New Patriotism

Without question, the new Justice Department under Gonzales has a different working relationship with Congress than under Ashcroft. They have sent a different message and critics acknowledge the new message. Even though critics obviously feel that there is a long way to go and that they have only recently chipped away at some of the ice, some progress is being made toward making the Justice Department transparent. Patriotism in the public sphere is shifting away from the notion of trust the government at

all cost—a magically unified sense of loyalty to the nation, to a more political one; i.e. a patriotism grounded in the values of being critical of government and holding officials accountable. Comey continues to extend this message forward.

Looking back at the very beginning of Comey's opening statement, the very first thing he mentions is the idea that patriotism means questioning the authority of government. This is an attempt, similar to that of Gonzales, to establish a different ethos than Ashcroft's Justice Department. It worked, at least up to this point of the reauthorization stage of debate, given that even the critics (including minority and majority members) recognize a better tone, and a willingness to disclose Patriot Act information. A few critics have even drawn very specific comparisons between the new patriotism and the old Ashcroft patriotism—one of chilling debate.

Comey spells out this new notion of patriotism again in a response to a question by Trent Franks (R AZ). Franks asks Comey what he perceives to be the greatest weakness in the Patriot Act. Comey provides the response that the biggest weakness would be if in the future, people stop checking the authority of the government. However, he spends a great deal of time leading up to the answer, and while leading up to the answer, he more specifically articulates the new notion of patriotism:

> That's a great question, Congressman. To start with the premise, I agree with you completely. I said this to Senator Craig in the Senate. I don't think it came out the way I meant it. I said to him, ''You shouldn't trust me.'' I mean, I didn't mean that. I mean, you should, and I trust me, and I like the people who lead the Justice Department and the Executive Branch now. But I meant that, when I say we are a country of laws, not men, we can't devise the systems based on who's in the office; because you could have other people there. But second, good people make mistakes when under great pressure. I mean, if, God forbid, there's another attack in this country, there will be tremendous pressure from the American people to respond to it. And we need these laws and this oversight in place. I think the greatest risk is that—to pick on something Congressman Lungren said—that oversight won't mean anything; that gradually the culture will drift to a point where people doing this work understand that nobody in Congress reads the reports, and so just, you know, send them up there; that there's no real check. We

> need a check on our power. I do. And I need to know that someone is going to look at what I do. It helps me. It helps me when I'm tired not to make a mistake. It helps me when I'm overeager sometimes not to make a mistake.
> So if there's a risk, I think the PATRIOT Act is chock-full of what we need: judges, inspector general, and oversight. But if the culture of that drifts and five years from now it's sort of a myth, or 10 years from now nobody even looks, you could have problems. Because it happens. We have a history of it happening. (Reauthorization of the USA PATRIOT Act, 2005, p. 50)

Comey goes into some detail about the importance of rational patriotism. He points out that the government needs to have their authorities checked for a number of different reasons. For one thing, it is possible that untrustworthy people could take office some day. Even though the people in office now are trustworthy, it is always possible for that to change. Secondly, according to Comey, even good people make mistakes. He acknowledges that he gets tired and even overeager at times; however, knowing that somebody is going to examine his work makes him slow down so that he can be sure and do his work well. Ultimately though, the answer to Franks' question is that there is no weakness in the Patriot Act; it provides plenty of opportunity for checks of authority. The potential problem may be that if someday, the culture changes and those responsible for oversight according to the Patriot Act do not do their jobs.

Another exemplar comes from Howard Coble (R NC) who at one point refers back to Comey's opening statement and acknowledges that patriotism means holding government accountable: "Mr. Comey, you are indeed correct when you said earlier that governmental authority should be challenged and questioned. We have provided many forums for that. Our Subcommittees had nine hearings, as you probably know" (Reauthorization of the USA PATRIOT Act, 2005, p. 25). Coble confirms that government authority should be checked. He then suggests that the hearings held over the course of the last couple of months have done the job.

We've Made Mistakes…

Another component of the new patriotism is the willingness on the part of the Justice Department to simply admit that its members are not perfect, the laws are not perfect, and that they make mistakes. This is integral to the notion that government needs to have authority checked. It inspires confidence that checking the authority is meaningful. In the previous debate with Gonzales, he admits that the Justice Department has made mistakes. The biggest mistake according to Gonzales was simply not disclosing enough information about the implementation of the Patriot Act in a timely fashion. Doing so, according to him, would have cleared up a lot of the presumed problems in the first place. In this debate, Comey acknowledges a similar sort of mistake—noted earlier during the section of analysis directly comparing the ethos of the Gonzales led Justice Department to the one led by Ashcroft. He, in not so certain terms, acknowledges that Ashcroft's rhetoric had a chilling effect on criticism.

Other mistakes are admitted to by Comey in this debate as well. Early on, Comey is responding to a line of questioning by Conyers—one examined earlier in this analysis. Toward the end of his turn to ask questions, Conyers begins bringing up some examples of mistakes made in the war on terror so that he can ask Comey to respond. Issues brought up include: the Abu Ghraib abuses and the Brandon Mayfield case (an example of an instance in which someone was held due to misidentification). Conyers then asks Comey if he can assure us that no one else is being held under those circumstances. Comey replies by first setting the record straight, claiming that no one is currently being held due to misidentification: "Thank you, Mr. Chairman. Mr. Conyers, starting with the last one, I am not aware of anyone who's being held anywhere in the Federal criminal justice system based on a case of mistaken identity. If I were to learn of that, I wouldn't

be here today. I'd be working to try and fix that" (Reauthorization of the USA PATRIOT Act, 2005, p. 24). Having said that, he goes on to acknowledge that mistakes have been made in the past. For instance, Comey acknowledges that the Mayfield case was a mistake: "You're correct; Mr. Mayfield was held, by order of a court, on application of the Government, for two weeks, as I recall, as a material witness, based on a mistake" (Reauthorization of the USA PATRIOT Act, 2005, p. 24). He also acknowledges that there appears to be illegal activity in the Abu Ghraib scenario as well, but that the Justice Department has no jurisdiction over that—it is a Department of Defense responsibility and they are dealing with it.

A few pages later in the transcript, Comey is responding by questions from Howard Berman (D CA). The dialogue elicits a series of exemplars demonstrating the extent to which the new leadership of the Justice Department is attempting to change the ethos from that of the old leadership. Context for these exemplars comes earlier while the case of the critics is being displayed. Berman is making the argument that the scope of the debate is too narrow. In fact, as mentioned earlier, here he provides what is perhaps the best explanation coming from the critics as to why the scope of the debate is too narrow. Recall that Berman actually defends section 412 of the Patriot Act as having better due process mechanisms than the policy actually utilized by government officials. His claim is that officials are able to circumvent 412 by falling back on a law existing prior to the Patriot Act. In effect, the Justice Department is able to apply a one-size-fits-all standard to illegal immigrants when according to Berman, each case should be looked at individually. One example of the way in which this one-size-fits-all policy is applied, is the blanket closure of immigration proceedings.

Comey's response to Berman begins with deference to the idea that the issue is difficult to debate here because it falls outside of the Patriot Act (this argument is given more specific attention later in analysis). He does say though that he can address parts of Berman's question. The way in which he begins to do so is very interesting. At the very beginning of the quotation, he preempts his answer by saying, "maybe revealing that I am a short-timer…" and then goes on to make the argument. By saying this, he indicates that the party line has changed under Gonzales. As he continues his point, he agrees with Berman that the blanket closure of immigration proceedings is not a sound policy—however, he also promises that the proceedings are now done on a case-by-case basis:

> Maybe revealing that I am a short-timer, I never liked the blanket closure of immigration proceedings, because it's a one-size-fits-all approach. And if our lawyers can demonstrate that it ought to be sealed, we'll get that from the judge and so I think—and that's where we are now. We proceed on a case-by-case basis. To say all of a certain class must be closed, frankly, is not smart, and makes us take a hit that we don't need to take. I mean, if we can demonstrate it, let's demonstrate it. If we can't, let's have it be an open hearing. (Reauthorization of the USA PATRIOT Act, 2005, p. 27)

Comey clarifies further that "there are no immigrants who are arrested on immigration charges who are held without notice of their charges" and furthermore, "there is a requirement that they brought before an immigration judge to have an application—opportunity to apply for bond and to have notice of the charges" (Reauthorization of the USA PATRIOT Act, 2005, p. 27).

At this point, Berman asks Comey specifically about the infamous Inspector General's report on the investigations of Justice Department procedures after 9/11. Unlike Ashcroft who to the bitter end of his term in office defended the indefinite detention of illegal immigrants as constitutional, Comey refers to it as a "screwup:"

> Well, the Inspector General found in the practice in the months after September 11th that there were a whole bunch of people who were sort of held until cleared, and that was a screwup; that that was not consistent with what the policies and

> procedures that the regulatory regime lays out are. (Reauthorization of the USA PATRIOT Act, 2005, p. 27)

Comey continues to explain that being held in a "limbo state" was inappropriate. However, he does say that the due process policies in place are actually very good; they were just not followed at the time. So, the rules cannot be blamed—only the people who did not follow them:

> My understanding of what the regulatory regime is is that you have to have—it's sort of—there's a lot of due process—I was frankly surprised when I tried to educate myself on it—that people have an opportunity to appear promptly before a judge, to apply for bond, to obtain counsel if they wish, to contact family members, and that the problems that the IG found were that procedures were not followed, and that people were held in kind of a limbo state that was inappropriate; that they were not given notice of why they were held, they didn't have a reasonable opportunity to contact counsel or family members. And those are things that were the subject of the IG's report. But I'm not sure the procedures are broken. (Reauthorization of the USA PATRIOT Act, 2005, p. 27)

Here again, like Gonzales did in the April hearing, Comey presents a tone that is much different than Ashcroft's in this debate. Even though we must keep in mind that neither Gonzales nor Comey have admitted to any flaws in the Patriot Act specifically (all mistakes acknowledged technically fall outside the Patriot Act—at least according to the way the dialogue plays out), that they acknowledge the Justice Department is not perfect and that mistakes have been made is a new development to this stage of debate.

<u>We Agree to Amendments (of clarification)</u>

One of the first arguments in Gonzales's opening statement analyzed in Chapter 11 that exemplifies a change in patriotic tone was his claim of being willing to listen and to be open to suggestions. However, after reading and re-reading his testimony, it seems that maybe he is only open to suggestions that clarified the Patriot Act—not ones that altered it substantively. Though percentage-wise, not a major part of Comey's testimony, it is present in the current debate and thus, deserves mention.

In the first exemplar, Comey is responding to Nadler about section 505—the National Security Letter (N.S.L.s) provision which amends the law so that field agents can administer N.S.L.'s whereas prior to the Patriot Act, only an Assistant Attorney General or above could do so. Comey begins the question by citing a New York District court case, *Doe v. Ashcroft*, claiming that National Security Letters under the Patriot Act are unconstitutional because there is no judicial review and the gag order is indefinite. The Justice Department's position is that they do not see N.S.L.'s that way nor do they enforce them that way. So, Nadler asks Comey if he would work with the committee to draft legislation specifying that a recipient of an N.S.L. has the right to challenge as well as amending the law so that there is a 90-day limit on a gag order with the possibility of extending it to 180 days. Comey replies:

> We will work with you on all of that. I know there is legislation that's pending to address some of those. I don't think we've taken a position on it. But a lot of it is smart and reasonable. I don't have that same feeling about the 90-day/120-day. Given the nature of the people that we're dealing with in intelligence investigations, I think the balance has to be struck in favor of indefinite. (Reauthorization of the USA PATRIOT Act, 2005, p. 35)

He essentially says that when it comes to amendments, we will be happy to clarify our already existing standards but changing the substance of the Patriot Act is not an option; the gag order needs to remain indefinite.

In the next exemplar, Comey responds to an argument by Debbie Wasserman Schultz (D FL) who has an issue with section 215—the "library provision." She begins by expressing the source of her concern, which comes from listening to her constituents[15]:

[15] This quotation is noteworthy because a) public opinion as ethos has been an important part of the discourse and b) even in this stage of the debate, some critics still feel like they have to justify their credibility by preempting arguments with, "I support much of what is in the Patriot Act…but…" form of argumentation—the first of only two times it is utilized during this debate. I wonder if Wasserman-Schultz being a brand new

> And I agree with the gentlewoman from California when she talks about the balance that we need to strike. I strongly support much of the provisions in the PATRIOT Act. This is the most disturbing provision. It's the provision that I hear the most about, unsolicited, when I'm not even talking about the PATRIOT Act at home. At town hall meetings people bring up their concern about the library provision. (Reauthorization of the USA PATRIOT Act, 2005, pp. 41-42)

After disclosing the source of her concern comes from town hall meetings, she states specifically the issue which is that the FBI has too much power given that they do not have to show proof that the subject of an investigation is an agent of a foreign power—the standard for investigation is merely "suspicion."

Comey's response is that agents have to show the standard that Wasserman Schultz describes and that the Justice Department has always understood it in such a way. However, he acknowledges that it is not very clear in the act. So, the Department supports an amendment in this instance: "Right. They have to show—and we've always understood the statute to say this, but it's not explicit, so it's one of the things that we would support adding—that the records sought are relevant to a foreign intelligence or foreign counterterrorism investigation" (Reauthorization of the USA PATRIOT Act, 2005, p. 42).

Defending the Patriot Act: New Arguments Emerge

The post Ashcroft Justice Department recognizes that putting forth a cooperative ethos, as opposed to Ashcroft's arrogant, go-it-alone ethos is the way to proceed through the reauthorization hearings. The way in which Gonzalez kicked off the new approach during the first hearing of this stage of debate seems to have been successful, and given the feedback from critics in this debate, so too do the subcommittee hearings. Thus, Comey makes it a point to extend that same cooperative ethos here. But of course, in

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congressperson had anything to do with her feeling the need to defend her patriotism in this way?

doing so, he does not give away the position of the Justice Department. Comey explains that they want and need for the Patriot Act to remain in tact and unchanged. A couple of arguments that are built into the fabric of the message will not be over analyze here except to the extent that they may overlap with some of the newer—reauthorization based arguments. They are: a) fear the terrorists, and b) the process is working—especially now that there is new leadership in the Justice Department. Aside from these arguments that have been prevalent since the very beginning of the debate, some newer arguments emerge here in the reauthorization stage.

Don't Blame the Patriot Act…It's Nothing New

It is interesting that after assuming responsibility for making a mistake in the Mayfield case, Comey comes back to that example later in the debate and points out that the mistake was not Patriot act related:

> The Mayfield case from Oregon was mentioned earlier, where the fellow was arrested as a material witness and held for two weeks based on a mistaken identification of his fingerprint from a bag in a van near the Madrid bombings. But that's not the PATRIOT Act. I mean, he was detained under the material witness provision, which has been a part of the criminal code for many, many years. (Reauthorization of the USA PATRIOT Act, 2005, p. 49)

This is a strategy that Justice Department members get very good at over the course of the debate—diverting blame for mistakes away from the Patriot Act and on to something that is not being debated. It is some other legal component that is to blame for anything wrong with implementation of the Patriot Act. The act is intricately put together such that it is only indirectly involved with this particular mistake in the sense that it helped lead to the scenario in which another law kicked in and caused a mistake to be made.

In this particular case, section 213 of the Patriot Act—the delayed notification provision was invoked to investigate Mayfield, which in turn, led to his detention as a material witness. Thus technically, according to Comey's argument, the violation is not

directly the result of the Patriot Act. Blame is diverted. The Patriot Act becomes insulated from criticism. In this particular case, the Patriot Act is actually doubly insulated from criticism given that earlier in the debate, section 213 had already been explained away in a similar fashion. Bob Goodlatte (R VA) asks a question to Comey giving him the opportunity to clarify confusion over 213. He prefaces his question with an indictment of critics (an argument we will come back to and analyze specifically later) by saying that, "Some have used section 213 and other provisions of the PATRIOT Act to scare the public, claiming that this is a new authority that allows law enforcement to enter your house and secretly search it" (Reauthorization of the USA PATRIOT Act, 2005, p. 32). He then asks if section 213 is "a new authority, or a codification of existing court decisions?" (Reauthorization of the USA PATRIOT Act, 2005, p. 32). Comey responds that it is not new and that he had been using that authority for a long time prior to the Patriot Act. Section 213 of the Patriot Act simply codifies the pre-existing authority.

The same thing is said in the next exemplar, except it goes into more detail about the explanation of the way in which section 213 codifies existing law for those interested in reading about it. Comey is responding to a similar sort of question from Lamar Smith (R TX) who gives Comey the opportunity to clarify section 213 (and indict the ethos of the ACLU at the same time):

> Okay, thank you, Mr. Comey. My next question deals with a television advertisement that has been run by the ACLU, that claims that section 213 of the USA PATRIOT Act allows law enforcement to search out homes ''without notifying us;'' implying that this provision gave Federal law enforcement the authority to conduct searches without ever providing notice to the individual whose property is searched. Is this an accurate description of section 213? (Reauthorization of the USA PATRIOT Act, 2005, p. 28)

Comey responds:

> No, sir, it is not. And it's one that I've spent a lot of time talking to folks about, and it's driven me a bit crazy.

> We have had for years—decades—delayed-notice search warrants in this country. That's what we in law enforcement call them, because it's accurate. You don't—there's never a circumstance when you're doing a criminal search that you never have to tell that the search was conducted. What was the circumstance before the PATRIOT Act is that in a limited set of circumstances—I would estimate probably 50 times a year in the whole country—a judge would give you permission, based on a written showing of probable cause and a written warrant, to conduct a search and simply delay—not get rid of, but delay telling the bad guys that you were there; to save lives, to preserve evidence, to protect witnesses. The PATRIOT Act simply enshrined that in black-letter law so we have the same standard across the country, and gave judges the ability to set periods of time that they believe reasonable, based on their knowledge of the facts, to delay notice. It will be given.
> I have personally used—and I won't take the time here—but I've personally used delayed-notice search warrants many times, and I think that in the process we've saved lives, in my career as a prosecutor. And if we lost that tool, anybody who understands it—and I think people at all points understand it—would realize we were less safe. (Reauthorization of the USA PATRIOT Act, 2005, p. 29)

A big part of the defense of the Patriot Act by the Justice Department is that it does not introduce anything new as far as governmental authority is concerned. The legislation simply codifies existing law and streamlines it so that it is easier to use and updated to account for modernizing technologies.

A Convenient Misunderstanding

Given the way in which the Patriot Act is insulated from criticism, it becomes rather easy for the Justice Department to say to critics that, "well, you may have a good point about problem X but because it is not directly Patriot Act related, it is difficult to debate the issue in these proceedings." Comey demonstrates the way in which this argument is utilized in response to a line of questioning that has been examined quite extensively thus far, and that is the one from Mr. Berman concerning the connection between the Patriot Act, immigration issues, and the C.L.R.A. proposal. The following quotation is actually the very initial response from Comey to Berman.

As a reminder for what Berman is arguing, he is essentially defending section 412 of the Patriot Act claiming that it has fairly effective civil liberty protection mechanisms.

His criticism is that the Justice Department circumvents 412 by falling back on pre-Patriot Act legal provisions. Comey begins his response to this argument by saying that a lot of people confuse a lot of issues with the Patriot Act:

> Thank you, Mr. Berman. And as you said, these are not PATRIOT Act issues, per se; which is one of the challenges we have in dealing with the PATRIOT Act. Folks sort of—you know they're not, and I know they're not, but people tend to lump them together. But they're important issues, nonetheless. (Reauthorization of the USA PATRIOT Act, 2005, p. 27)

Berman acknowledges the confusion by saying, "And I take your point about the confusion out there as to what is or isn't. It's quite widespread" (Reauthorization of the USA PATRIOT Act, 2005, p. 27). Then Comey proceeds to use that as an excuse to get out of a debate over immigration: "Yes, big challenge. And I pretend to know a lot about a lot of things. The one I will not pretend to know a lot about is immigration laws. I think I confess to you." (Reauthorization of the USA PATRIOT Act, 2005, p. 27). Comey does proceed to briefly comment on a couple of Berman's issues, but not very thoroughly. It never gets covered thoroughly because it is technically, not a Patriot Act issue.

This section of analysis is short because Comey himself does not use it very much. In fact, I'm not sure it would have struck me as being terribly significant without having had the opportunity to look ahead to the hearing on 6/10/05—where Sensenbrenner utilizes this very argument as a reason to prematurely end the hearing. As we will see, Sensenbrenner accuses critics of breaking the rules of the legislature by being non-topical in their argumentation. He claims that since the purpose of the hearings is to reauthorize the Patriot Act, and that critics are talking about non-topical issues such as immigration, de-facto torture policies, and other important post 9/11 civil liberty issues, that he has the right and obligation to end the hearing from an administrative perspective.

So, while maybe not a huge issue in the debate with Comey, the argument analyzed in this section, ultimately leads to the controversial breakdown of a discussion that had finally found some rational-critical momentum. Part of the breakdown could be blamed on Sensenbrenner's impatience and inherent loyalty to the Bush Administration, but also, some of the blame could also be placed on the critics for not better explaining the ideas that immigration is a Patriot Act issue, the material witness statute is a Patriot Act issue, and that other "non Patriot Act issues" are Patriot Act issues. So often in this debate critics have let this convenient misunderstanding stand in the way of even more meaningful debate by not doing a better job of connecting the dots.

Looking back at the case of the critics, we find so many exemplars of the critics themselves introducing an argument as "not a Patriot Act issue…but an important one." In fact, Berman's analysis of section 412—analysis that has been a major catalyst of analysis throughout much of this chapter, is the best explanation of the connection between "non-Patriot Act" issues and the Patriot Act. However, even in this instance, Berman lets Comey get away with this convenient misunderstanding.

How is it that one can debate the Patriot Act without also debating all those other issues? The Patriot Act has the nonsummative effect of making those other laws on the books prior to the Patriot Act easier to apply to a wider range of people. This connection is made concrete in section 218 in which "the wall" between intelligence agencies and law enforcement agencies is figuratively torn down; thus the standards that used to only apply to those who were suspected of having committed a crime, now apply to those individuals who are suspected of being "agents of a foreign power." It is much easier for a prosecutor in the Justice Department to convince a judge that a person who needs to be investigated is an agent of a foreign power than it is to supply enough evidence to

convince a judge that a person has probably committed a crime. Thus, because of the way the Foreign Intelligence Surveillance Act is amended through the Patriot Act, every part of the federal criminal code now has a different meaning and should be a part of the debate over the Patriot Act. This discussion is given more detail during a hearing that is actually not a part of this analysis—demonstrating a major weakness of this study. Section 218 is the topic of a Crime, Terrorism, and Homeland Security Subcommittee hearing on April 28, 2005 entitled "Oversight Hearing-Section 218 of the USA PATRIOT Act-If it Expires will the "Wall" Return?" Perhaps close analysis of that debate might reveal a better explanation of this phenomenon of nonsummativity. But whether that additional analysis of the subcommittee hearings would or would not help clear up the misunderstanding (the legal connection between the Patriot Act and other Justice Department activities), it definitely needs to be made more clear in front of the Full Committee—for the sake of better debate.

There is only one instance in which the relationship between section 218 and other parts of the Patriot Act is brought up in this debate like it needs to be. Robert Scott (D VA) initiates an important discussion between himself and Comey on the topic:

> On roving wiretaps, when you have gotten probable cause, not that a crime has been committed, but the probable cause that the target is an agent of a foreign government—which means you can get the wiretap without probable cause of any crime, just that you're trying to get intelligence information which may not be criminal, just, you know, information on a trade deal, something, no crime as a predicate—and then you expand this as a roving wiretap, is it important that you ascertain before you start listening in that the target is actually in the location where you've placed the bug? (Reauthorization of the USA PATRIOT Act, 2005, p. 30)

Comey's response is one that has become commonplace to this debate and that is essentially, we should fear the terrorists and err on the side of safety:

> It may be important as a practical matter, because we don't want to waste time. But in intelligence investigations, given the nature of the people we're following

> and surveilling, both with spies and terrorists who are trained to look for us and to be very careful, I'm troubled by an ascertainment requirement; which would require us, as you said, Mr. Scott, as we do in the criminal context, to know that the target is the one on the phone or the target is the one near the bug. (Reauthorization of the USA PATRIOT Act, 2005, p. 30)

Scott responds and the discussion continues. This is an important discussion to read because it sort of gets at uncovering the source of the misunderstanding—the impasse if you will between those who think the scope of the debate should be expanded and those who are comfortable with the scope of the present debate. The discussion continues and Scott explains how by amending FISA, the lines blur between a criminal investigation and a foreign intelligence investigation. According to Scott's analysis, it becomes possible to conduct a criminal investigation without probable cause:

> Mr. SCOTT. Well, I say this because we've heard from witnesses before, like the Attorney General, that some of these—you know, we reduced the standard from the purpose of the wiretap being foreign intelligence to a significant purpose, which invites the question: If it wasn't the purpose, what was the purpose? And the answer, of course, is you're running a criminal investigation without probable cause. Now, since you're running a criminal investigation, isn't it important that the people you're listening in are actually targets of the wiretap? I mean, you could put these all over town where the target may be using the phone. If he leaves, shouldn't you stop listening?
> Mr. COMEY. Well, you'd like to, because you don't want to waste the time, but the way——
> Mr. SCOTT. Well, no, no. No, you're not wasting time. You're listening in to people you wanted to listen in to. I mean, because you're running the criminal investigation under the auspices of this less strict standard of foreign intelligence. Should you be able to take advantage of the criminal investigation with the lower standard by listening in, when the target isn't even there? (Reauthorization of the USA PATRIOT Act, 2005, p. 30)

At this point, the discussion overlaps with another category of analysis to be examined shortly; Comey responds to Scott's question by portraying an ethos of being tough on civil liberties:

> Mr. COMEY. Well, first of all, you'd better not, if you work for me, be conducting an investigation to obtain criminal information using FISA unless the following is true: Significant purpose, as you said, Mr. Scott, is to obtain foreign intelligence. And if there is an additional purpose to obtain criminal information,

> it's only criminal information related to foreign intelligence crimes, terrorism crimes or espionage crimes. That's what the FISA court of review has told us is the law, and so we'd better—we are following the law. (Reauthorization of the USA PATRIOT Act, 2005, p. 30)

In this quotation, Comey also falls back on FISA law and the way it protects civil liberties. As the discussion continues, Scott points out the law changed under the Patriot Act: and Comey seems to generalize past that point:

> Mr. SCOTT. Well, we changed the law under the PATRIOT Act.
> Mr. COMEY. Well, I've heard that said, but the court of appeals that governs this has said you may only collect information of foreign intelligence crimes if that's an additional purpose to the collection of foreign intelligence. (Reauthorization of the USA PATRIOT Act, 2005, pp. 30-31)

In the next segment of the discussion, as Comey continues his response, explanation of the civil liberty checks in response to the way in which FISA laws were changed due to the Patriot Act is attempted but gets cut off very short due to time restraints. Comey continues with the previous turn:

> But the ascertainment—the way we collect intelligence information, we strike a balance. Because of the nature of the target, we stand off a little bit more. We collect, and don't necessarily review real-time what's being collected. And we account for that with the rules that govern the storage and dissemination of that information. And that's a balance that's been struck to recognize that criminal investigations are different, and I think it's a reasonable one. When you drill down and look at the way we follow spies and follow terrorists, it would make it much more difficult to operate intelligence investigations if the agents were required to ascertain in every circumstance that the target is there at the bug or there on this particular phone.
> Mr. SCOTT. Could you——
> Mr. COMEY. Rather than collecting and minimizing it later, and strictly controlling what you do with U.S. person information. I'm sorry, sir.
> Chairman SENSENBRENNER. The gentleman's time has expired. (Reauthorization of the USA PATRIOT Act, 2005, p. 31)

The way in which the direction of the conversation turned, Comey made it seem as if the only check on civil liberties depends upon the judgment made by FBI field agents at the point of investigation. Whether this is accurate or not, that is the way it comes across during this short discussion.

The answer is "we stand off a little bit…" and that is the way in which the blurring of the lines between foreign intelligence investigations and criminal investigations is accounted for, at least according to this particular discussion pertaining to the relationship between section 218 of the Patriot Act and every other part of the criminal code. So, it would seem that the expansion of the debate is justified. Unfortunately, as we will soon uncover by briefly looking at the 6/10/05 debate, Sensenbrenner prevents the expansion from happening.

"The Angel is in the Details"…Critics are "Bobble Dolls"

Under the assumption that there is a concrete distinction between the Patriot Act and other war on terror policies, including the criminal code, it is very easy for Justice Department officials to testify that, "you see, there have not been any civil liberty violations as a result of the Patriot Act…all the mistakes that have been made are due to misapplication of other laws." At this point in analysis, the debate comes back full circle to the way in which it started—by Comey saying, the "angel is in the details."

In the following exemplar, Comey is responding to a question from Tom Feeney (R FL). It is important to note that as we get to the purpose of the following exemplar, and Feeney asks Comey the question which we are focusing on, he had just finished up a defense of why the sunset on the controversial provisions need to be a part of the reauthorized Patriot Act. We will get to that debate within the debate later in analysis. The argument to pay attention to in this section begins by Feeney arguing that there are so many myths about the Patriot Act and that so many people blame a lot of things on the Patriot Act based upon these myths; then he works into a question that asks Comey to identify a way to educate people about the reality of the Patriot Act:

> But having said that, the PATRIOT Act is subject to a lot of myths out there. And if you had—you know, when I get accosted on the street, just like, you know, my

> Subcommittee Chairman mentioned, people blame all sorts of ills that they experience, whether it's at airports, or discomfort, on the PATRIOT Act, which of course have nothing to do with the PATRIOT Act. If you had 30 seconds or a minute to explain the difference between the PATRIOT Act reality versus myth to the American people, how would you convince us that much of what it has been blamed for is simply not related to or the fault of the PATRIOT Act itself? (Reauthorization of the USA PATRIOT Act, 2005, pp. 43-44)

Comey's answer to Feeney's question is to ask those critics for details. He states that critics of the Patriot Act are "bobble dolls" who will go along with anything that is suggested to them. So, his strategy is ask them for the details, and when they cannot provide the specifics, they are left with no other option than to trust the details provided by the Justice Department. According to Comey, "there's an angel in those details" (Reauthorization of the USA PATRIOT Act, 2005, p. 44):

> Thank you, Congressman. The first thing I would do is urge folks, all walks of life, who have concerns about the PATRIOT Act to demand the details. Always, always, always ask. When someone says, ''The PATRIOT Act is evil,'' say, ''What do you mean, specifically? What part of it? And how is that different from what they can do in a criminal investigation? And so you're saying the PATRIOT Act does what?'' The reason that's so important is it has become a vessel into which people pour concerns about all manner of stuff that has nothing to do with the PATRIOT Act. And I think if everybody demands the answer—doesn't just shake their head like one of those bobble dolls when someone says, ''Isn't the PATRIOT Act evil?''—they will find out that the stuff people are talking about either is not in it, or what's in it is reasonable, ordinary, and smart. Because it's mostly taking what we can do to track drug dealers and thugs, and give those tools to people tracking spies and terrorist. And then, something breathtaking; which is the destruction of the wall, the separation between counterterrorism intelligence and counterterrorism criminal.
>
> And if folks will simply demand the details, as hard as it can be, I think at the end of the day they're going to see there's an angel in those details. (Reauthorization of the USA PATRIOT Act, 2005, p. 44)

The problem is of course that the details have not been examined yet; an appropriate amount of debate has not been afforded the details. Even the policymakers, many of whom are lawyers, have had a very difficult time analyzing the details because of how obtuse the Patriot Act is. Furthermore, it is only quite recently relative to this stage of the debate, that critics have received any semblance of cooperation from the Justice

Department in the release of details. Even further, when the critics do want to examine details about the relationship between immigration for instance, and the Patriot Act, they are not given a full opportunity. The response from the Justice Department is that, "that is not really a Patriot Act issue; thus, I can't really speak to it." So, to say that the case of the critics is merely at a beginning point is an understatement. They need more time, more cooperation, and more discussion before being able to provide an effective evaluation of the Patriot Act. This is something that everybody (debate participants from both sides of the aisle) agrees to during the debate over the sunset provisions—everybody that is except for the Justice Department witnesses.

At this point, with only a precursory understanding of the way in which the Patriot Act interacts with other parts of the legal code, the task of providing the details and molding them for the purpose of reauthorization is left up to the Justice Department. I doubt it is any coincidence that the details favor the notion that the Patriot Act is perfect. The following exemplar is a continuation of an argument displayed above. Comey is responding to Trent Franks (R AZ) who makes the argument that so much myth has been built up behind the idea that the Patriot Act is intrusive and asks if any evidence exists substantiating that claim. As shown earlier, Comey points out that the Mayfield mistake was not a Patriot Act violation but a problem with the material witness provision; then he reports that there are no violations whatsoever related to the Patriot Act: "But under the PATRIOT Act, I'm very confident in saying there have been no abuses found; none documented. Plenty alleged, but most of it turns out to be stuff that, again, has nothing to do with the PATRIOT Act" (Reauthorization of the USA PATRIOT Act, 2005, p. 49). Comey gives an example of the kind of crazy complaints that come in about the Patriot Act: "We had a lady call in and say there was a line across the top of her television

screen, and she thought that had something to do with the PATRIOT Act. And you know, we get a lot of stuff like that. And it all goes to the Inspector General, and he has to decide what to do with it" (Reauthorization of the USA PATRIOT Act, 2005, p. 49). The implication of the example is that this level of paranoia is the closest anybody can come to pinning down a problem with the Patriot Act. Accordingly then, this example is much closer to pinning down a problem than the illegal detention of immigrants documented in the Inspector General's report because obviously, that has nothing to do with the Patriot Act either.

In the next exemplar, Comey is responding to J. Randy Forbes (R VA) who brings section 213 up again and asks for clarification that it does receive judicial review. But before doing so, he thanks Comey for the way in which he has explained the myths about the Patriot Act and also indicts the ethos of the critics by referring to all the misinformation that is out there—some of which is intentional:

> Mr. Comey, I want to thank you not just for your substantive knowledge of the PATRIOT Act, but for the articulate way that you've been able to explain to us some of the myths that we have been hearing about it. Piggybacking on what Congressman Feeney said, I've seen few measures that have had more misinformation than the PATRIOT Act; some of that unintentional, much of it intentional. So I thank you for clearing some of that up. (Reauthorization of the USA PATRIOT Act, 2005, p. 46)

Comey begins clarifying section 213 by reminding the audience that it is a codification of a law from 40 years ago and says that it is only used if one of five conditions is present. Those conditions have to do with whether or not providing prior notice of a search warrant can jeopardize safety. Then, he assures us that the tool is not used a lot and that the Justice Department is very careful about when it is used:

> And it's a tool that, as before the PATRIOT Act, we don't use much. As I said, I think we use it about 50 times a year—once for each State, once a year. We use it when it really, really matters; when people are going to get killed, bad guys are

> going to flee, people are going to get hurt. If we have to tell them that we were the ones who went into the drug house and took their drugs—instead of having them think it was stolen by rival drug dealers—if we tell them we went in, they're going to know who the informant was, and they're all going to flee. (Reauthorization of the USA PATRIOT Act, 2005, p. 47)

We have seen this argument over and over again throughout the course of the debate. The Justice Department assures us that they are careful about implementation of the Patriot Act. In this round of debate though, they have a bit more evidence to back their claims up. They have begun to release some statistics about the way in which the act is utilized. While critics do acknowledge that this is an encouraging sign, it is sill rather curious that all statistics released support the stance of the Justice Department and all statistics or examples that offer some opposition are explained away as not being the fault of the Patriot Act.

The Debate over the Sunset

Comey and other Justice Department officials are correct in saying that there is not a whole lot that is brand new about the Patriot Act; it does however tweak so many other parts of the legal code that to fully examine the details would require years and years of rigorous debate amongst people whose professional lives are devoted to understanding the twists and turns the act injects into the legal code. The effect of the Patriot Act is again, nonsummative, meaning that the whole is greater than the sum of its parts. To try and suggest that there is an appropriate ending point to the discussion over its merits might be the worst possible way to conclude the reauthorization hearings—something that virtually everyone in this debate seems to recognize except Comey. In this case in particular, it seems that based upon the bipartisan support for continuing the sunsets, there is one way to guarantee discussion over the Patriot Act remains robust. Comey is the only one to suggest otherwise.

Comey's Argument Against Sunsets

During the first hearing of this reauthorization stage, we learn that Attorney General Gonzales wanted to see the Patriot Act reauthorized without a continued sunset on 12 of the more controversial provisions from the act: 201, 202, 204, 206, 207, 209, 212, 214, 215, 217, 218, and 220. Under the original Patriot Act, these sections would "cease to have effect on December 31, 2005" (USA PATRIOT Act, 2001, 115 STAT. 295). Supporters of continuing the sunset who vocalized their opinions (three Republicans and two Democrats) argued that the sunsets encourage necessary oversight. Gonzales, in response, pointed out that Congress could and should conduct effective oversight without needing the provisions. However, what he did not articulate during the course of the hearing is a good reason to get rid of the sunsets. In other words, the question not answered is, what is the harm in having them? Furthermore, after being presented with good arguments for keeping them, Gonzales admitted that the sunsets would not necessarily be a terrible thing, but that his preference would still be to get rid of them.

Comey came to the current hearing ready to provide an answer to the question of, what is the harm in keeping the sunset? Along with extending Gonzales's claim that Congress should not need sunsets to conduct effective oversight, he also argues that not making the provisions permanent prevents a complete cultural change in the Justice Department—a shift to a culture of information sharing not present pre-Patriot Act. The most complete explanation of Comey's opinion comes when answering questions from Lamar Smith (R TX). Without expressing his own opinion on the sunsets, he simply states that many people think they are necessary—especially for section 218 and asks

Comey what he thinks about the sunset. Comey replies, and for the first time in front of the full Judiciary Committee explains why continuing the sunsets would be a bad idea:

> It would, in my opinion, be a very bad idea to continue the sunsets, generally, but particularly with 218. Because what 218 does is foster cultural change, which—all of us work in big institutions—is enormously difficult in big institutions. And I worry very much that if we hung out there the prospect that the destruction of the ''wall'' might be reversed, we will never get people to embrace the idea that we need to have everybody communicating, sharing information in the counterterrorism realm. We've made great progress. Somebody who went to Mars in the summer of '01 would not recognize our counterterrorism operation today. But we need to do better. And 218 is what has given us the space to knit together everybody who matters in counterterrorism. And if people thought— sort of like living in a house you think someone might come and kick you out of: You're going to maybe not unpack your stuff, because you might get kicked out. And I don't want people to think they're going to get kicked out of 218. (Reauthorization of the USA PATRIOT Act, 2005, p. 28)

Afterward, Smith asks for clarification to see if Comey is against sunsets entirely. Comey responds that he is against any sunsets because they send a discouraging message of impermanence to the people working at the Justice Department. He does extend an argument Gonzales makes though, that there should still be rigorous oversight without the sunsets; in fact, he makes this point more vehemently than Gonzales did:

> I do. I think the answer, though, is rigorous oversight. I think we ought to be dragged up here and drilled and asked, ''How are you using this power? Why does it matter?'' on a regular basis. I don't think we need sunsets to do that, for you to scrub how we're conducting ourselves. And I support that. But the sunsets send a message that there's no permanence to these important tools, and that undercuts the ability to get the bureaucracy to embrace them and to understand they're part of our arsenal. (Reauthorization of the USA PATRIOT Act, 2005, p. 28)

The emphasis on needing rigorous oversight reiterates the attempt to change the patriotic ethos of the Justice Department. At the same time, it also reinforces the argument for getting rid of the sunsets. Comey makes a much more specific appeal for getting rid of the sunsets than Gonzales did during the 4/6/05. He also comes across as very adamant about his opinion toward the sunset. Interestingly, Comey—like Gonzales, backs down

just a little from his sense of urgency later in his testimony after Daniel Lungren (R CA) presents a case for keeping the sunsets. It is also interesting too when Comey offers up different reasons for getting rid of the sunsets—aside from or in addition to the one he has already offered. But, let us examine the reasons provided for supporting the sunsets first.

Supporting the Continued Sunsets

The fact that Comey is the only person involved in this debate who expresses support for getting rid of the sunsets is quite eye opening. In the previous debate, Gonzales and only one other majority member of Congress expressed such support. Most people who spoke up about the issue supported continuing the sunsets. This is even more the case in this debate: five different people expressed support for continuing the sunset—four majority members (Lungren, Gohmert, Feeney, and Franks) and one minority member (Delahunt). No one else spoke up about the issue directly. But based upon this evidence, it is hard to understand how limited of an influence that sunsets have in the reauthorized version of the act.

Daniel Lungren (R CA) is the first to express support for the sunsets in this debate. In his response, he speaks to the idea of "culture change" mentioned by Comey by pointing out that the Congress needs a culture change of its own and that having the sunsets in place is the only way to instill that change:

> Having said that, there is this concern about the PATRIOT Act; whether it's real or imagined, whether it's perception or reality. And for that reason, I lean toward putting sunsets in this legislation; not because, Mr. Comey, I want to upset the cultural change that's trying to take place in the Justice Department. But I point to a cultural change that's needed in the Congress. I think we're doing a tremendous job of oversight here, I think this Committee is. And I think that we have had good cooperation with the Department of Justice. But oversight has not been the strong suit of Congresses in the past. And I wonder whether we would be as vigorous if we didn't have the obligation of this. And some of us have a feeling that not only is it something necessary to effect the cultural change on the executive branch, but also the legislative branch. (Reauthorization of the USA PATRIOT Act, 2005, pp. 35-36)

He highlights both the symbolic and pragmatic (assuming the symbolism and pragmatism can be truly separated in this case) importance of maintaining the sunsets. As a pragmatic concern, Lungren doubts the ability of Congress to provide oversight to the act without the sunsets, pointing out that the only reason the Patriot Act has had rigorous oversight as

of late is due to the provisions set to expire at the end of December, 2005. As a symbolic concern, Lungren notes the lack of clarity still existing over the Patriot Act. "There is concern…whether it's real or imagined, whether it's perception or reality" (Reauthorization of the USA PATRIOT Act, 2005, p. 35) according to Lungren; so even if the Patriot Act is perfect as it currently is, for symbolic reasons, there needs to be continued rigorous debate and the sunsets are the only tools available to ensure that happens. Following the Congressional culture change argument, Lungren asks Comey if he thinks that sunsetting provisions, and names 215 as a specific reference point, would be a big interference with what the Department is currently doing and plans to do in the future.

In response to this question Comey changes his tone and his justification for getting rid of the sunsets. He first admits that future sunsets would not be a "disaster," and at the same time compliments Chairman Sensenbrenner for providing "remarkable oversight" (Reauthorization of the USA PATRIOT Act, 2005, p. 36): "The honest answer is I don't think it would be a disaster. But here's another reason why I don't think it makes sense. And I'm not in any position to talk about oversight, except that, as I said to the Chairman, we have seen, I think, remarkable oversight, as you noted, here" (Reauthorization of the USA PATRIOT Act, 2005, p. 36). As kind of an interesting side note, Sensenbrenner interjects to infer a criticism of Ashcroft's leadership—overlapping with a category of argument analyzed above. Sensenbrenner says: "The Chair thanks you for that comment. I think some of your predecessors in your office would not have done so" (Reauthorization of the USA PATRIOT Act, 2005, p. 36). Then after admitting the original adamancy over getting rid of the sunset may have been a bit of an exaggeration, Comey explains that the level of oversight conducted during the reauthorization stage of

debate is simply too much of a drain on the resources of the Justice Department. He explains that the current round of hearings is important but that he hopes this level of oversight is "rare:"

> Well, the one thing I can tell you, though—and it's hard for me to put this into words without seeming small in my remarks—but we have devoted huge resources and time to this, as we should. But we have hundreds—''hundreds'' is fair—of people working on what we've done over the last six months, and spending countless hours collecting information, responding, meeting. That's an enormous drain. And it should be. But I hope it's a rare drain, and that we use it to establish that the base line is sound; that what Congress did in September—after September 11th was sound, and that what we can do going forward is rolling, and not in a way that makes everybody and his brother in the Department of Justice work on the effort. We live in a bit of a myth, and that is that we have limitless resources. We don't. And it is a major challenge for us to do this. And we're happy to do it, because it ought to be done. I just—to be very frank, and I won't be here, it would be really hard to do this three years from now, or another two years from now, when we can substitute for it something that I think is as effective, which is rigorous oversight. (Reauthorization of the USA PATRIOT Act, 2005, p. 36)

Lungren immediately raises the obvious question about whether there would even be rigorous oversight if it weren't required. He argues further that since it is so important to reauthorize the Patriot Act, it is worth the time and the energy necessary to provide rigorous oversight:

> Well, it sort of begs the question of whether we would have rigorous oversight…if we didn't have this requirement. And you have talked about the tremendous number of hours that have been put into it, precisely because the Department thinks it's important to have this reauthorized. And precisely because many of us think it's important to have it reauthorized, we are spending the time to do that. (Reauthorization of the USA PATRIOT Act, 2005,p. 36)

A few pages later in the transcript, Louie Gohmert (R TX) speaks up about the sunsets and supports the view that they should be continued.

Gohmert begins his defense of the sunsets by first of all, telling Comey that he is trusted implicitly. However, he does notice some loopholes in certain provisions naming 215 specifically that could be abused in the future. Then, if I am reading his statement

correctly, he takes a partisan shot at liberals by suggesting the best chances of the Patriot Act being abused would be if a liberal were to take office and become convinced that a right-wing conspiracy existed and was out to undermine the Executive Branch. Under those circumstances, according to Gohmert, the Patriot Act would likely be abused by the Justice Department. To put this argument into context, we also have to remember a couple of arguments made earlier by Gohmert that precede this one chronologically; they are exemplified under the section entitled *Cool Down the Rhetoric*. In both exemplars, Gohmert is berating liberals; so, he is basically continuing his rant here. Nonetheless, he still argues that the sunsets need to continue:

> Hypothetically, if you had a President, an Attorney General, or DOJ top officials, that believed, perhaps hypothetically, there was some right-wing conspiracy out there to undermine or hurt the Presidency, and that they may be involved in clandestine intelligence activities, it just seems like the potential is there for using this in ways that it was not intended by an abusive President or an AG.
> You might hypothetically even have a DOJ that's so callous that they may just find a friendly judge—and we know some judges are more friendly to one Administration than another—find a friendly judge that wasn't supposed to hear a case, just to go get an order to kidnap a child at gunpoint from people that are holding them. I mean, those kind of things might actually happen. So I'm concerned about removing the sunset review. You won't be there next time. But just so that there is that kind of attention. You foresee that possibility, if you're not there, there is somebody that could abuse their position? (Reauthorization of the USA PATRIOT Act, 2005, p. 40)

The last exemplar to demonstrate here is an interesting dialogue between Delahunt and Comey occurring at the very end of the hearing. The dialogue is an appropriate way to end the hearing and an appropriate way to begin to bring this chapter to a close. It presents a more rational—less asinine way of talking about the sunsets.

Delahunt, after acknowledging an increased level of cooperation on the part of the Justice Department, claims that to make the Patriot Act permanent would be a mistake because it is the only way to guarantee cooperation with the Executive branch:

> After, I think, eight or nine hearings by the Crime Subcommittee, I am now convinced that that would be a mistake, to make it permanent. In fact, I would go so far as to insist, or at least make an effort to have a sunset attached to the PATRIOT Act, and maybe to other pieces of legislation that come before this Committee for its considerations. Because it does really secure the cooperation of the Executive—in this case, the Department of Justice—to be much more forthcoming and to be much more cooperative. (Reauthorization of the USA PATRIOT Act, 2005, p. 51)

Following the argument, Delahunt asks for Comey's response. He replies that he can understand where Delahunt is coming from but then provides the same answers as above: 1) sunsets make it more difficult to change the culture and 2) the Congress has the ability to provide rigorous oversight without the Patriot Act:

> It's not an unreasonable thing to say. The reason I would urge that we not do that is a number of things. I think, as I said earlier, that especially with some of these tools, if you sunset them again we will never be able to get people to completely buy that the world has changed, particularly on information sharing. We're trying to change a culture, which is like turning a battleship. And if people think, ''Well, Congress might just take away the tug boats, then why are we all going to work to turn that battleship?'' That's one worry. The second is, I think the tools are in there. And maybe, you know, I overestimate the ability of oversight to get it done, but I don't think so. I mean, I think that, with the power of the purse and the power of legislation, this Committee and the others have the ability to haul us up here and demand to know what we're doing. And if we're not giving you the information, to have some consequences for that. I think that's a far better way to proceed. (Reauthorization of the USA PATRIOT Act, 2005, p. 51)

Delahunt disagrees with Comey by reminding him of the serious lack of cooperation on the part of the Justice Department in the past, and not just in dealing with the Patriot Act, but with all the other issues—many of which have been mentioned during the course of this debate. Delahunt claims that the sunsets are the only leverage Congress has had for oversight:

> Let me reclaim my time. Because I really want to let you know that I disagree with you. Okay? And it's been the experience, I believe, of this Committee in a variety of different areas, not just the PATRIOT Act itself, but where the lack of cooperation has been frustrating, aggravating, and on different occasions has required rather strong action, not just by the Chair of this particular Committee but by other Committees, to secure cooperation. And if we don't have some

> leverage, we're not going to get it. That's been the conclusion that I've reached as a result of my experience here. (Reauthorization of the USA PATRIOT Act, 2005, pp. 51-52)

At this point, Delahunt's time had run out and he was the last person to have a turn at asking questions. However, Sensenbrenner gave him 30 additional seconds to finish his argument. He does so by acknowledging the necessity of culture change in the Justice Department but points out, by using Comey's metaphor, that the sunsets are necessary parts of the culture change—they serve to "keep the tug boats running well:"

> In addition to the incentive—and I understand the culture change that you're talking about—you know, if the tug boats aren't there—I think that was your metaphor—I just want to encourage and incentivize the Department of Justice to keep the tug boats running well. That's what I see as the incentive. We're watching, and we do have leverage. And as long as those tug boats are steaming, and steaming well, and not going off course, are charting a course that we can all embrace and be proud of as Americans with our cherished core values of civil liberties and privacy, then fine. But we're going to incentivize. (Reauthorization of the USA PATRIOT Act, 2005, p. 52)

He makes the appeal to patriotism and that's essentially the end of the debate. Sensenbrenner thanks Comey for his testimony; he then salutes him and Gonzales for changing the "'I've got a secret' attitude" put forth by their predecessors (this comparison to Ashcroft was analyzed thoroughly above) and the hearing is adjourned.

Summary

Despite the fact that there are still some remnants of the old Ashcroft patriotism, evidence suggests that the legislative process has improved since the implementation stage of debate. The only witness in this debate, James Comey, the Deputy Attorney General of the United States, continues to extend the new tone put forth by Gonzales. Furthermore, as recognized by Justice Department critics, Comey answers questions much more directly and provides more information about the Patriot Act for debate than Ashcroft does. The sharing of information and compromise over the way in which the

deliberative process should work, allow for a rational clash of ideas. The participants in the debate are able to more clearly see the substance of what it is that needs to be debated—the biggest of which is the symbolism of the Patriot Act and the way in which it paved the way for the Bush Administration to make non-Patriot Act decisions in the war on terror without consulting Congress. According to many critics, debate over the Patriot Act should expand to include oversight of those non Patriot Act policies as well the Patriot Act provisions because of the way in which they were enacted via the "spirit of the Patriot Act."

As discovered in the next chapter, the agreed upon level of increased transparency and quality of dialogue is for many minority members of the Committee, a chance to finally begin this important debate over patriotism; whereas for Chairman Sensenbrenner and perhaps other majority members, the perception of transparency is a sign that it is time for the debate to end. The symbolism of oversight and the message to the public that many members of this Committee want to take their functions as checks to the executive branch of government very seriously by virtue of extending the debate and expanding its scope, becomes the most significant and contentious component of the legislative process yet.

Chapter 13

The Ships Collide

With a new spirit of collaboration that developed in the House Judiciary Committee's hearings over the reauthorization of the Patriot Act, the minority party—encouraged by the sense that real deliberation over the war on terror was finally taking place, opted to extend the debate beyond the time originally allotted through a clause in the Rules of the House of Representatives. The rule is in place to ensure that the minority party has ample opportunity to express itself since for obvious reasons, the majority party controls the content of much of the debate. As explained in Chapter 3—methodology, this debate is not officially part of the data set. It will not receive the full, thorough analysis afforded previous debates. But to not examine it at all would be to miss a critical part of the context for this study. So, we will take a look at the very beginning and the very end of this hearing which included the testimony of four minority witnesses: Carlina Tapia Ruano (first Vice-President, American Immigration Lawyers Association), James Zogby (President, Arab American Institute), Deborah Pearlstein (Director, U.S. Law and Security Program), and Chip Pitts (Chair of the Board, Amnesty International USA). It is noteworthy that this unplanned continuation of the reauthorization hearing is the only full committee hearing in which minority witnesses are present; though, there is at least one minority witness at each of the subcommittee hearings.

As is easily noticeable, any sense of cooperation that had developed between the majority and minority participants during the course of the deliberative process fades away.

The Awkward Beginning

Chairman Sensenbrenner calls the hearing to order by saying, "This hearing has been called by the Democratic Members of the Committee pursuant to clause 2(j)(1) of Rule 10 of the Rules of the House of Representatives. They have chosen the witnesses. They have also chosen the topic of the hearing, and the Chair now recognizes the gentleman from Michigan, Mr. Conyers to make his opening statement" (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 1). That the Democrats have chosen the topic is a critical component of the way in which Sensenbrenner begins the hearing.

So, Conyers take control of the hearing. He announces that the purpose of the hearing is not limited to the sunsetted provisions of the Patriot Act but the general manner in which the government uses its legal authority. This discussion was such a big part of the 6/8/05 debate and the Democrats very much wish to extend it. According to Conyers, the scope of the debate is important because our nation's reputation as "a beacon of liberty" is at stake:

> Thank you, Mr. Chairman, this is a special hearing brought by the request of the Democratic side of the House of Representatives. I thank you for complying with it. There are few issues more important to this Committee, and I might add, the Congress, than the war against terror and the PATRIOT Act that accompanied it from a legislative perspective. This not only affects the rights and privacy of every American, but it impacts, the extent to which our Nation is able to hold itself out as a beacon of liberty as we advocate for democracy, both here and around the world. For many of us, this process of hearings is not merely about the extension of 16 expiring provisions that sunset in the PATRIOT Act, but it is about the manner in which our Government uses its legal authority to prosecute the war against terror, both domestically and abroad. And as we hear from our witnesses today, I think we will demonstrate that much of this authority has been abused. (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 1)

Conyers then previews a few of the topics to be raised by the witnesses in the hearing: Guantanamo Bay, the infamous Inspector General's report documenting illegal detention

of immigrants post 9/11, and a policy of racial profiling embedded as part of the internal changes to the Justice Department enacted without consent from Congress.

Following Conyers' opening statement, Sensenbrenner recognizes himself in response and this is when the recently expressed cooperative tone of deliberation begins to break down. Sensenbrenner refers back to his very initial opening when he stated that the Democrats chose the topic for the hearing—the reauthorization of the USA Patriot Act, and then expresses that he is disturbed they are going outside the topic:

> As I said earlier when I called this hearing to order, this hearing was requested by the Democratic Minority. The Democratic Minority also stated what the scope of this hearing would be, which would be the reauthorization of the USA PATRIOT Act. I am disturbed that some of the testimony that has been presented in written form by the witnesses today are far outside the scope of the hearing which the Democratic Minority called and which they said in their letter. (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 2)

Mr. Conyers tries to raise a point of order but Sensenbrenner prevents that from happening by snapping at him, saying, "I didn't interrupt you, Mr. Conyers" (p. 2). Sensenbrenner continues his retort to Conyers by claiming that he has been more than fair to the minority party during the course of the reauthorization hearings. He talks about how there have been so many hearings at which minority witnesses have been allowed to testify and then suggests that he has been happy to expand the scope of the debate to include non-sunsetting provisions and issues that are "only tangentially related to the Patriot Act...so that there would be full and complete discussion of this law" (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 3).

At this point, after defending his own sense of fair-mindedness, Sensenbrenner goes on the offensive by suggesting that the extent to which the minority members are now trying to expand the scope of the debate is "irresponsible and totally unfounded

hyperbole" (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 3) and that it cheapens the meaningful discussion that has been had about the Patriot Act:

> Now, the American people expect and deserve that Members of Congress will approach terrorism prevention in a thoughtful, factual and responsible manner. All too often, opponents of the PATRIOT Act have constructed unfounded and totally unrelated conspiracy theories, erected straw men that bear no relation to reality, engaged in irresponsible and totally unfounded hyperbole, or unjustly criticized or impugned the honorable law enforcement officials entrusted with protecting the security of the American people. These efforts that which often bear no relation to the reauthorization of the PATRIOT Act, coarsen public debate and undermine the responsible, substantive examination which must inform this Committee and Congress' consideration of this critical issue. (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 3)

Then, he warns witnesses that any testimony in which he deems to not be topical will not be included as part of the hearing record pursuant to another rule of the House of Representatives:

> As the Members of this Committee know, I have great respect for the Rules of the House, and believe they should be enforced fairly and uniformly. In keeping with the spirit of those rules, it is the Chair's intention to limit the scope of the hearing to the topic that was chosen by the Democratic Minority that called this hearing and chose the witnesses, which is the ''Reauthorization of the USA PATRIOT Act.'' This should be a serious hearing on a serious subject and not a forum for assertions or complaints that concern matters unrelated to the PATRIOT Act. Members and witnesses are advised that questions and testimony not falling within the subject matter of the hearing chosen by the Democrats will not be included in the hearing record pursuant to House Rule 11, section (k)(8). (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 4)

Then, Conyers gets the chance to respond.

He begins by drawing attention to Sensenbrenner's hostile tone, saying that discussion does not need to proceed in such a way. He also rejects the notion that the Democrats have ever agreed to limit the scope of the discussion in the way Sensenbrenner describes. In fact, to even suggest the scope would be limited misses the point of why its been called—a point that was developed quite extensively in the hearing leading up to this point:

> I want to, again, thank you for complying with the rules. But, I mean, we can do this in a friendly tone or a hostile tone. I think that tells the story to everybody about what the real environment is like here. But first of all, we have never had the meeting that we were going to set. Number two, we have never, we have never determined what the limits will be on this hearing, because I never talked with you about it. Number four, it is very important that we understand that in this Committee and in the other body, we have gone way beyond the 16 sunsetting provisions as we all know and there are more coming every day. So to suggest to me and our membership that we are now going to talk about the 16 sunsetting provisions precisely misses the point of why we have asked for the hearing. (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 4)

Sensenbrenner answers by saying that he is merely "complying with the rules, which includes the Rules of the House of Representatives relative to pertinence and relevancy and the Chair will enforce the rules as they are written" (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 4).

In Conyers final chance to respond before the first witness is called, he provides a justification for expanding the scope that we have not heard before—and perhaps it might have helped the cause of the minority party if we had. He talks about a provision of the Patriot Act that has not received a great deal of attention during the course of the deliberative process: section 1001 which authorizes the Inspector General to oversight all alleged civil rights abuses by the Justice Department, not just ones related to the other sections of the Patriot Act. Conyers explains how this in and of itself justifies an expanded scope of the hearing:

> Well, I am happy to have yielded for that information. But section 1001 of the PATRIOT Act gave the Inspector General the responsibility of investigating "complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice." All of the topics today that are before us with these four witnesses fall under this category. It does not say only civil liberties abuses under the PATRIOT Act, but civil liberties in general in their totality. And all of the witnesses today I claim are experts in this area.
> So we didn't come here to have a special hearing to be told that we are only going to investigate 16 sunsetting provisions. That is what we have had, nine, 10, 11 hearings about. The question is about the issues of violations or abuses alleged of civil rights and civil liberties. So we didn't come here today to be muted by some well-intentioned recitations of the rules by the Chairman. And, I thank you. And I

> return the time. (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 4)

Conyers adds to the layers of reasons justifying a significant expansion of the scope of the debate. From the 6/8/05 hearing we heard that in addition to the symbolic reasons of needing to keep the ethos of the Executive branch in check, that a minimum sections 215 (a sunsetted provision) and 412 directly connected the Patriot Act directly to outside issues such immigration. Furthermore, the discussion of section 218 and the FISA law amendment led to a connection between the Patriot Act and virtually the entire criminal code. Now, by Conyers mentioning section 1001, a direct, legal connection seems to be recognized between the Patriot Act and all other Justice Department activities.

Sensenbrenner will not relent however and reiterates that the previously mentioned rule of the House of Representatives "requires that the subject matter of the hearings requested under this rule be confined to that measure or matter, which was the subject of the earlier hearing" (p. 4). Thus, according to Sensenbrenner, "in order to be pertinent and relevant, (the testimony must) be on the subject of the reauthorization of the USA PATRIOT Act, and that is specifically the 16 sections…which were sunsetted in the law which was passed 31/2 years ago" (Reauthorization of the USA PATRIOT Act (continued), 2005, pp. 4-5).

Jerrold Nadler jumps in on the discussion at this point and simply asks what the harm is in expanding the scope of the debate. He says that we should not be fearful of finding out the truth:

> I would wonder why the Chairman seems so fearful of elucidating any information beyond what he thinks proper. Are we afraid of learning about this misconduct by agents of the executive branch that traduce civil liberties? If that happened, if it happened, we should know about it and we should discuss in this Committee what actions to take about it. We should not be fearful of knowledge and we should not be fearful of laying out to the American people such information, officially laying out to the American people information, the readers

> of much of which the readers of any newspaper in the United States or the world knows. Much conduct has occurred, I shouldn't say that. Much conduct has allegedly occurred which, if true, disgraces this country, spoils its good name and action should be taken about that if true. And we should learn about it. And I hope we are not fearful of learning about the truth or falsity of those statements that we have all read in the general press. Thank you. I yield back. (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 5)

Sensenbrenner does not respond and begins to swear the witnesses in. While he is doing so, Sheila Jackson Lee (D TX) attempts to gain recognition on the floor by asking for a point of order. But Sensenbrenner ignores her and continues to introduce the witnesses. Once he is done doing so, Jackson Lee again attempts to raise a point of order. Sensenbrenner responds by simply saying that Ms. Tapia Ruano is already testifying—in other words—it is too late to raise a point of order.

The Even More Awkward Ending

The witnesses testify, and to no one's surprise, they do bring up the issues, which Conyers had previewed earlier—issues which had been so much a part of the 6/10/05 debate. Sensenbrenner, with the exception of a few rather rude declarations to "wrap it up," let the testimonies happen. However, after the witnesses had testified, and toward the end of the questioning period, the hearing ended in a more awkward fashion than it had begun. Sensenbrenner thanks the witnesses for testifying today but then admonishes the Democratic members of the Committee for over-extending the scope of the debate. He offers that as evidence that the Patriot Act is being used as a "buzzword" for anybody who objects to the Bush Administration's policies:

> Let me say that the purpose for which this hearing was called and the scope of the hearing was stated in a letter that was submitted to me, signed by the Democratic Members, which was the reauthorization of the USA PATRIOT Act. I have sat here listening very patiently to the testimony and the answers to the questions, and much of what has been stated is not relevant to the 16 sections of the USA PATRIOT Act which were sunsetted when the law was enacted in October of 2001. One of the things that people who are opposed to the PATRIOT Act have been doing is stating that the PATRIOT Act was responsible for a whole host of

> frustrations or objections to Administration policy. This hearing confirmed that fact, that the PATRIOT Act is being used as a buzzword for people who have very broad-brush objections. I think that when Congress debates the reauthorization of the PATRIOT Act, we ought to stick to the subject, and that subject is the 16 provisions of the PATRIOT Act which we must consider and decide whether to reauthorize, whether to lapse or whether to amend. (Reauthorization of the USA PATRIOT Act (continued), 2005, pp. 59-60)

Sensenbrenner goes on to mention some specific issues brought up in the current hearing and claims they have "nothing to do with" (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 60) the Patriot Act. He argues that lumping these issues with the Patriot Act is "irresponsible and indicative of the broadbrush accusations" (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 60) mentioned earlier.

At this point, Jackson Lee again, tries to gain recognition on the floor by asking, "Will the gentleman yield" (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 60)? Rather than ignoring her, like he did the last time Jackson Lee tried to gain recognition, Sensenbrenner said, "No, I will not yield—" and continues on with his tirade: "Let me say that I think this hearing very, very clearly shows what the opponents of the PATRIOT Act are doing. They will talk about practically everything but what's in the PATRIOT Act and what this Committee is considering" (Reauthorization of the USA PATRIOT Act (continued), 2005, p. 60). Sensenbrenner further argues that there was only one relevant point made throughout the entire hearing and it was Chip Pitts' testimony pertaining to section 215. Other than that, no other discussion was remotely relevant to the Patriot Act reauthorization. Then, while both Jackson Lee and Nadler were trying to gain recognition on the floor, Sensenbrenner adjourns the hearing prematurely and the official record of the hearing comes to an end.

Fortunately, news reporters in the room kept reporting. According to the Washington Post, "He (Sensenbrenner) completed his reproof of the witnesses and left

the Rayburn House Office Building hearing room amid a cacophony of protests from Democrats seeking to be recognized" (Allen, 2005, June 11, p. A04). C-SPAN 2 continued to televise the event for a few minutes after Sensenbrenner left. In fact, Nadler, one of the members trying to gain recognition toward the end, kept talking: "The other thing that I wanted to say—and that I will say at this point, even though the chairman is not going to listen…" (Allen, 2005, June 11, p. A04) and then all of a sudden, his voice faded—the microphones had been turned off. "'I noticed that my mike was turned off,' Nadler said, speaking up, 'but I can be heard anyway'" (Allen, 2005, June 11, p. A04).

The Aftermath and Reauthorization

The process that seemed to be transforming into a rather cooperative one in which meaningful rational-critical debate was taking place quickly turned into a polarizing demonstration of "politics as usual." The way in which Sensenbrenner shuts down debate at the end of this reauthorization process ruins any chance that Bush Administration officials and critics of the Administration may have had to see eye to eye on the nature of patriotism. Throughout this last stage in the deliberative process, critics begin to show confidence that the democratic process can and will work according to a spirit of cooperation and good faith. The breakdown occurs though due to the fact that the confidence displayed by the critics is that the process is moving in the right direction (present and future directed) whereas Bush Administration officials and supporters view the process as having worked (in the past tense). This breakdown causes the public part of the process to end in a very awkward fashion, leaving very little hope for compromise. It seems as if the Bush Administration, supported by a majority in both houses of Congress would once again pass its version of the Patriot Act as is, paying very little attention to the feedback offered by legislators. However, as the debate moves toward the

final vote, legislators muster a little influence through the democratic tactic of last resort—the filibuster. This time though, it was the Senate stalling the process whereas during authorization of the act, it was the House that had the most influence upon altering the Administration's plans—if only temporarily.

Rushing to meet the sunset deadline of December 31, 2005, "the House voted 251-174 to renew the 16 provisions after striking a compromise that altered some of them" (Senate gives Patriot Act six more months, 2005, December 22). Though the vote was a little closer in the House to reauthorize than it was to authorize, there was still not enough momentum to slow down the Justice Department. It looked as if the expiring provisions would be easily reauthorized and all made to be permanent, i.e. the sunset would no longer exist. Once reaching the Senate for a vote though, the reauthorization momentum slowed. Through a filibuster, the deliberative process was extended. According to a CNN.com article, "Republican leaders tried to break the filibuster…but could muster only 52 of the necessary 60 votes to do so." (Senate gives Patriot Act six more months, 2005, December 22). Four Senate Republicans crossed party lines in support of the filibuster. Thus, the filibuster successfully staved off the Administration's rush to make all of the provisions permanent. But because no one wanted the Patriot Act to go away entirely, a compromise was offered by Administration critics to extend the original Patriot Act until February 3, 2006. Not doing so would have meant that the 16 most controversial provisions would have expired on December 31, 2005.

Stalling tactics continued to be successful for the Administration critics given that in early February, just prior to the expiration of the original extension, a second extension was passed by both houses of Congress. This time, the 16 provisions of the Patriot Act were set expire on March 10. This would be the final extension though. On February 17,

2006, the Senate defeated the final filibuster effort by a vote of 96-3. Then on March 9, 2006, a day before the final extension was set to expire, the Patriot Act reauthorization was signed into law. The final draft included a number of additional safeguards that according to Bush Administration officials represent successful compromise. According to critics, the changes are not enough. Aside from a number of amendments of clarification and of additional reporting requirements, the new Patriot Act bill placed a four- year sunset on three provisions of the act: 215—the "library provision," 206—the roving wiretap provision, and the "lone wolf provision" (one not a part of the original Patriot Act but added in 2004 during the drafting of another intelligence bill). Thus, thanks to the sunset of a modest three provisions, the legislative process is not over. Debate over the Patriot Act will continue in 2009.

Summary of the Reauthorization Stage

Throughout the first two full committee hearings in this round of debate, and presumably the subcommittee hearings happening in between, dialogue displays a robust, healthy debate over the Patriot Act. Some concessions are made on both sides. Justice Department officials admit mistakes were made (but not directly related to the Patriot Act) and critics acknowledge that there is a better flow of information between the Justice Department and the Judiciary Committee, thus providing more effective oversight. Furthermore, everyone seems to agree—except for the Justice Department witness that the sunsetted provisions of the Patriot Act need to remain sunsetted during the reauthorized version. Almost every Committee member values the sunsets because they guarantee that future debate will happen over the Patriot Act. Without the sunsets, the fear is stated by members from both sides of the political aisle that the type of oversight necessary will not occur. In other words, the sunsets are the key to maintaining a political form of patriotism and that seems to be a source of agreement for the policymakers. Debate seemed to be occurring in a democratically ideal fashion—much disagreement but expressed by and large in a collaborative fashion. Unfortunately, at the end of the debate, during the extension of the hearing process, a total meltdown occurred. Chairman Sensenbrenner was hostile from the very beginning of the final hearing. Debate was polarized once again and the deliberative process was extended by non-debate—a filibuster that forced negotiations behind closed doors. However, the debate over the Patriot Act is not over. It will pick up again in 2009.

Chapter 14:

Summary and Discussion of Results

The primary purpose of this project is to interpret the way in which the meaning of "patriot" is negotiated during the course of public policy debate governing the Patriot Act. Given the unique (and awkward) way in which the word is anachronistically constructed as condensation symbol (Edelman, 1964) through the titling of the act, it is arguable that every argument found within the transcripts of the debate process contributes to an understanding of patriotism. Thus, to limit the scope of analysis, I view the debate from the purview that negotiating who is or who is not a patriot falls under the argumentative typology of the Aristotelian notion of ethos, as distinct from pathos and logos. The distinction is not to suggest that ethos could be analyzed in a vacuum without noticing its interconnectivity to logos and pathos. This sort of artificial operationalization could not even be meaningful from the confines of an experimental research design. But by focusing the lens of observation and description upon ethos as argumentative proof, a unique and important contribution is made in the effort to more fully understand the Patriot Act. As Chapter 1 notes, most studies of the Patriot Act focus on the law itself—the soundness of the legal precedent, or lack thereof. The symbolism of "patriot" is but a secondary or tertiary issue at best during the course of those studies. The present study however, treats the symbolism as a primary issue—an important task because as analysis supports, the way in which "patriotism" was negotiated during the legislative process is the one message that establishes "congruency" and "corroboration" (see Schuetz, 1986) for the Bush Administration's post 9/11 political strategy. The way in which the Patriot Act was originally authorized became known as the "spirit of the Patriot Act," a phrase used specifically by John Ashcroft—the progenitor of the act (see Chapter 9, p. 282).

This spirit set the tone for not just the legislative process governing the Patriot Act itself but also for the entire "war on terror."

Part I: Getting Started

Prior to jumping into analysis, some preliminary work was needed. To begin, some understanding of "patriotism" as the object of analysis was necessary. For a study in which the goal is to predict and control the outcome, this phase of research might be considered as the "operationalization of the variables;" for this interpretive study however, we call this phase understanding the "horizons" (Gadamer, 1960/2003) of patriotic consciousness. Rather than hypothesizing the anticipated results of the study prior to commencing the analysis itself, understanding in the hermeneutic sense of the word means recognizing that understanding occurs differently for different people at different times and places. Therefore, by describing the "horizons" of patriotism, we attempt to bracket the boundaries around which understanding takes place—the discursive space where different understandings can be understood. By turning to Kramer's (1997) theory of dimensional accrual/dissociation, this task becomes more expedient. Building upon Gebser's (1949/1985) work, Kramer (1997) suggests that communicative expressions reveal a mode of awareness as those expressions are directed toward particular objects of consciousness. As Chapter 1 explains, there are essentially four types of expressivity: "magic/idolic," "mythic/symbolic," "perspectival/signalic," and a newly emergent integral style (Kramer, 1997, p. xiii). If the theory holds true then it also holds true that there are four types of patriotic expression. Chapter 1 turns to the example of flag burning to briefly illustrate what magic-mythic and perspectival expressions of flag burning might entail. But more importantly in Chapter 1, in depth studies supporting this theory of patriotic consciousness are cited.

Most poignantly, Viroli (1995) distinguishes between a religious form of patriotism and a political one. The religious form embodies a magic-mythic expression whereby a patriot religiously supports the leadership of the country no matter what. The two dimensionality of this expression is such that there is no distinction between the country and leadership—the two are one and the same. Political patriotism, on the other hand, reveals a three-dimensional awareness whereby a distinction is made between country and leadership. According to expressions of political patriotism, it is possible for a person to love her country enough that she is willing to stand against a country's leadership when that is what the country needs. This rational-critical perspective of patriotism emanates from the mythos of democratic thinking handed down to the Western world from Antiquity. The founding "fathers" of America were ideologically grounded in the story of the ancient Greek philosophers, and this mentality served as justification for revolution. Citations of some of the progenitors of America are cited in Chapter 1 as examples of expressions of political patriotism.

Throughout the debate over the Patriot Act, we find both religious and political ideals of patriotism expressed by many individuals. In many ways, patriotic consciousness reinvented itself following the 9/11 catastrophe. While the attacks were happening, an archaic-magic consciousness seems to have enveloped much of the nation. As discussed in Chapter 1, at least for myself, the 9/11 attacks were space-less and timeless events. Even though I was sitting in front of my television watching the attacks "live," they did not seem "real"—I could not believe what my eyes were telling me. I went into shock due to so much fear, and when this happens, the natural response of the body is to shut down and go numb. The brain stops being responsible and the body protects one's self by blocking neurons and preventing pain stimuli from reaching the

brain. I sat there with my spouse speechless—we had nothing to say; there were no words to describe what was happening—in my mind, it was not really happening—it couldn't be. I was not alone in speechlessness. We managed to pick up the phone and call a few people to make sure that they were aware of what was going on and to see if we could verify that someone had heard from one particular friend who was living in New York City at the time—only blocks away from the World Trade Center. During one of these short phone calls, the collapse of the first tower occurred and none of the participants in the phone conversation said a word. We just stared at the television in disbelief. While my body was awake, my awareness was dormant.

My awareness of 9/11 (or lack thereof), while it was happening, was not an individualized experience. Virtually everyone whom I have talked to reports a similar sort of awareness of the day's events. No one could "wrap brains" around what was happening—it was just happening. Students, colleagues, and family members report similar reactions. Examples from popular culture also seem to identify 9/11 as a space-less and timeless event. Alan Jackson's song, "Where Were You When the World Stopped Turning?" earned global acclaim for the success it had in capturing a sense of the national consciousness, and according to the song, awareness of the world stopped—unless Jackson meant that the world itself literally stopped turning. The national psyche was in so much pain that it could not process it; so, it shut down. It needed to heal. It needed to make sense out of something that was seemingly senseless—the rhetorical function of myth (Rowland, 1990).

Our whole lives are governed by myth, from birth to death. Myths "narrate not only the origin of the World, of animals, of plants, and of man, but also all the primordial events in consequence of which man became what he is today-mortal, sexed, organized in

a society, obliged to work in order to live, and working in accordance with certain rules" (Eliade, 1963, p. 11). Everything one knows about how the world has operated in the past is possible by virtue of the stories that pass knowledge from one generation to the next. Without myth, civilization would start from scratch each and every time a new person is born. Myths transcend time; they give us reason to look to the past in order to make decisions about the present and the future. Whether historically true or not, myths must be a true story in the sense that they convey "facts of the mind" (Campbell, 1972, pp. 10-11). If a myth does not convey these so called "facts of the mind," then the story in question is more likely a folk-tale or a legend—not a myth (of course some stories transcend the boundaries).

When 9/11 happened, a basic breakdown of our understanding of national security took place. Not since the bombing of Pearl Harbor, roughly 60 years prior, had a battle in a war been fought on American soil. The nation has been insulated from war, breathing a sense of safety into the homeland. While the country had certainly felt the impacts of war since then, the impacts were from afar—they originated from Viet Nam, Korea, Iraq, and other places from around the world. Civilians living in the homeland were never threatened during those wars. We were living a narrative that spoke of safety and insulation. Prior to 9/11, it was unimaginable by most that anything like that could have happened. We trusted the heroes in our safety narrative to make sure that nothing ever like that could happen—then it did. Our understanding was shattered—our sense of safety was no longer. Thus, we fell out of our mythic comfort zone and into the depths of darkness, i.e. the unknown. It was George W. Bush's job as President of the United States to bring us out of that darkness—to make sense of something that was seemingly senseless.

Part II: Authorization

Bush wasted no time in trying to rebuild the story of safety and security. Chapter 4 examines the rhetoric of Bush in the aftermath of 9/11. On 9/11 proper, he addressed the nation very briefly to ensure us that the government was being held together and measures were already being taken to identify the threat. He also assured Americans that the problem would be rectified and that the culprits would be punished. On September 12th, the story took on a more offensive tone through the use of the word, "war." Throughout the course of his rhetorical response to 9/11, he told the story of Americans in the process of fighting evil—it was an epic battle of good versus evil, lightness versus darkness, civilized versus the uncivilized, and so forth. On September 20th, he famously cemented the mythic duality of the story by saying that in the war on terror, "you are either with us or against." There is no middle ground, no room for debate, and no negotiation. The true patriots are easily identifiable; it's a black and white issue—the bottom line is either "all or nothing." The patriots are, aside from the rescue workers at 9/11 and the people who brought down Flight 93, the ones who support Bush's strategy—policymakers, soldiers, police officers, the Central Intelligence Agency, the Justice Department, the FBI and etc.

Bush also spelled out the way in which average Americans could show their true patriotism and that comes in the form of economic patriotism. Those who support the country yet do not have a direct role in carrying out Bush's strategy, e.g. the general public, can show their patriotism by going back to work, spending money, and "getting on board" by putting the economy back together. Members of the public should play their parts through the functional fit of being consumers. Chapter 4 demonstrates just how explicit Bush is about the separation between his role and the public's role. From Bush's

worldview, the public does not need to be concerned with the Government's response to terror—he states specifically that the public fights terror through economic patriotism. While consumerism is very much the product of rational-perspectival awareness and the change in consciousness resulting from the industrialization of the economy, it has become so embedded as a part of the American consciousness through advertising (Ewen, 1976), that it has a tendency to become detached from its mythic, magic, and archaic origins; i.e., it becomes a deficient form of rationality. In other words, consumption occurs for consumption's sake—it becomes its own myth—the myth of "progress." The end product gets confused for the means—the distinction is lost. Martin Heidegger (1977) refers to this as a process of "enframing" which leads to a "standing reserve." He explains enframing as a dangerous phenomenon:

> Enframing comes to presence as the danger. But does the danger therewith announce itself as the danger? No. To be sure, men are at all times and in all places exceedingly oppressed by dangers and exigencies. But the danger, namely, Being itself endangering itself in the truth of its coming to presence, remains veiled and disguised. This disguising is what is most dangerous in the danger. In keeping with this disguising of the danger through the ordering belonging to Enframing, it seems time and time again as through technology were a means in the hands of man. But, in truth, it is the coming to presence of man that is now being ordered forth to lend a hand to coming to presence of technology (p. 37)

Through economic patriotism, Bush insulates his strategy in the war on terror from public criticism. Good consumers will not criticize the government because they are too busy being patriots in their own way—which is very much distinct from the government's way. The enframing phenomenon detaches the public's role in the process of questioning government, which is exactly what Habermas (1962/1998) describes as the "decline of the public sphere." Habermas was cited in Chapter 1 and serves as an important justification for this study. The very discourse of "patriotism" espoused by the President

of the United States endorses the decline of the public sphere—the decline of a rational-critical discourse.

In Chapter 5, we learn that Bush is of course not the only leader who desires little criticism of the establishment's war strategy. John Ashcroft, Attorney General at the time of 9/11, also desired little to no discussion over the Patriot Act—a cornerstone of homeland defense and an integral part of the war strategy. He accuses critics of rattling off "phantoms of lost liberty" and of giving aid and comfort to the enemies. He also argues that now is not the time for talk; it is a "time for leadership." Furthermore, he over generalizes criticisms made against the Patriot Act by speaking of a false dichotomy; i.e. every criticism is an argument for rejecting the entirety of the act, whereas in reality, most critics involved with the legislative process were for the act—they simply wanted to make it better through greater accountability of its implementation. Thus all critics are soft on terror according to Ashcroft. The all-or-nothing dichotomy is an extension of Bush's false dichotomy and represents the mythic dualistic element of the war on terror message. Another interesting, highly significant part of this developing mythos of patriotism is the fact that the title, "USA PATRIOT Act" was born.

The Administration's message is heard loud and clear and is very effective from its perspective. Cited repeatedly throughout the course of this project is the statistic that the Bush Administration gained a 90% plus approval rating from the public. Remember that the public's psyche at this point is healing and the Bush Administration is seen as the healer. Gebser (1949/1985) describes healing as a magical, unifying process—helping to explain how Bush gained such a high approval rating;

> The healing process is a descent whereby the believer in the one God descends down to the darkness of the source ruled over by the sheltering mother: a descent to the unity "below," where the individual loses his individuality and is united with everything. When the diurnal or wakeful consciousness is sufficiently depressed so

> that the surroundings are no longer present to the suppliant, and he "sinks" even deeper where even the psychic reality of dream and image vanish, his individuality is obliterated in the magic realm (of the grotto or cavern) and he becomes one with the unity to which all differentiation is unknown. (p. 163)

The unification of the public left very little space for dissent in the public sphere—including the legislature. While both houses of Congress held one hearing of the Administration's draft of the anti-terror legislation, only the House held a markup of the bill. Only one Senator, Russ Feingold, expressed any desire whatsoever to markup the bill and this one person's desire did not come anywhere close to coming to fruition.

Even on the House side of the debate, where a majority of the debate occurred, the dialogue was not very "robust" to use an adjective that kept recurring throughout multiple phases of the debate. During the hearing, Representatives obviously felt quite intimidated by the all-or-nothing dichotomy given that most criticisms were expressed quite sheepishly. Chapter 5 illustrates that many critics felt as if they had to begin arguments by defending themselves from the accusation of being unpatriotic. This negotiation took place in the form of, "I really do want to be tough on terror…but…I have a problem with x, y, and z." Another similar types of response was, "I don't want this to turn into a debate…but…" This sort of negotiation typifies the way in which critics posed their criticisms—they were very much concerned about the public image and the risk of being seen as one who disrupts the healing process by differentiating between healer and those being healed. Very few critics were what I would call "outspoken." Interestingly though, one of those very few who was outspoken, Bob Barr, was registered as a Republican (though in reality, he is a Libertarian). Despite sharing a party line, he was without question the most outspoken critic of the Administration on the day of the hearing and interestingly, he was not re-elected. In fact, his electorate was re-districted in such a way that it would have been virtually impossible to be re-elected.

Nonetheless, despite the tenuous nature of the debate, critics did manage to win the right to a markup of the bill whereas their counterparts in the Senate had no aspirations. In response to this questioning, the Bush Administration went back to work on its message. Prior to the markup of the bill as discussed in Chapter 6, the bill in question was simply known as the "Antiterrorism Bill of 2001," a referential symbol; however, leading up to the markup, the title changed becoming a condensation symbol. The title condensed the message of the establishment's response to 9/11 into one dichotomizing symbol: the USA PATRIOT Act.

With very little mention of the change in title, notwithstanding one criticism of the title by Barney Frank submitted for the record after the fact, the markup commenced. Chapter 6 demonstrates a high level of satisfaction with the work that had been accomplished during the hearing in the House Judiciary Committee, so much so that they passed up the opportunity to amend the bill during markup. There were many amendments proposed during markup that were withdrawn by those proposing them. The withdrawal was done in a premeditated sort of way so as not to slow down the process. The examples of the withdrawal of controversy were demonstrations of good faith that the amendment would be debated later. Enough had been done to satisfy the critic for the time being and unity was the theme of the day. They acknowledged a need to get legislation passed expediently. The only amendments passed were those that were cosmetic changes—and non-controversial ones at that. There are a very few examples of controversial amendments that were not withdrawn but these were swept under the rug by the Chair of the Committee James Sensenbrenner. The all-or-nothing dichotomy was utilized to do the sweeping, and quick votes were taken to reject those amendments. In all, there was one example of what I would call "meaningful debate" in which a

controversial amendment was proposed, debated from all sides of the issue, and voted on. The vote was close enough that a roll call vote was needed to determine the decision. Ultimately though, the amendment was voted down.

The theme of the day was unity and healing; additional rational-critical debate would have to wait for another time. Legislators felt as if they had done enough for the time being. Even Bob Barr, the most vocal critic from the hearing (Chapter 5), seemed content that the process struck a proper balance between process expediency and appropriate questioning. Things seemed to be going as well as possible under the circumstances of having been attacked so ferociously the month before. People were cooperating, and democracy was working—until that is, the agreed upon draft of the Patriot Act went to the full House for a vote. At that time, divisiveness entered the debate in such a way that would never be recovered from. At the very last moment, the night before the vote, the Justice Department decided to ignore the debate and essentially go back to the original drafting of the bill. In the heat of the moment, during the rush to get the bill passed, no one bothered to read the final draft until it was too late. This generated much anger; however, that anger would not have the chance to be expressed during the official legislative process until years later.

Part III: Implementation

Between the time in which the Patriot Act was originally authorized and the first oversight hearing took place in the House Judiciary Committee—over two years, the "mood" of the public changed. Chapter 7 details the drastic decline that occurred in Bush's approval rating during that timeframe. Issues such as the war in Iraq, as well as the Patriot Act, drew much criticism from the public. The steady decline in approval

rating is signalic that the magical period of healing and unity was subsiding and that the public psyche was once again ready to entertain criticisms of the country's leadership.

As Chapter 8 illustrates, the first oversight hearing did not move too far along before frustrations over the end of the authorization stage came pouring out. Jerrold Nadler, minority leader of the subcommittee in which the hearing was taking place, summarized the way in which the Justice Department pushed their agenda through Congress and ignored the will of the House Judiciary Committee. He called it a "shameful procedure." During the questioning of witnesses, a new source of tension emerged—the issue of whether or not the Justice Department was being open enough with Congress and the American people about how the Patriot Act was being implemented. Critics argue that officials were not transparent enough to provide a sufficient means of oversight, claiming that the manipulative methodology of the Bush Administration was being extended in a similar fashion as when the act was originally authorized; i.e. that they were following a unilateral, independent paradigm of decision making—trust the leaders, "we know what is best." The Justice Department responded by promising their respect for the process and claiming that there are checks in place (like the 4th amendment and the sunset on Patriot Act provisions) to prevent abuse. For these reasons, they deserved to be trusted and granted some leeway when secrecy was necessary.

Chapter 9 examines a very important debate because the figurehead leader of the Patriot Act, John Ashcroft, was the only witness. The debate took place in the full Judiciary Committee and again, critics were in attack mode. Though, I must admit my surprise when the attack did not begin as vehemently as expected. Conyers began the criticism by very subtly suggesting that more debate needed to take place. However, by

the time questions came around, the attack intensified. Critics accused the Department of a lack of cooperation, not being forthright and of abusing civil liberties. William Delahunt referred to the culture of the Department as the "culture of concealment." Ashcroft responded in a variety of different ways. First of all, he denied that the Department was being secretive and claimed that they have been consulting with Congress. But then, he argues that it is better to err on the side of safety, as opposed to liberty, in the war on terror claiming that leeway is needed. But do not worry, Ashcroft argues, because the Justice Department is very adamant about protecting civil rights that no one has anything to worry about. They can be trusted with their enhanced power.

Toward the beginning of this dialogue between critics and Ashcroft, an example comes up demonstrating the validity and significance of the symbolic meaning of patriotism being negotiated here. James Sensenbrenner, chair of the Committee, was the first to ask a question, and he asked what was surprisingly a rather penetrating question. He questioned the way in which the Levy guidelines were changed without consultation with Congress. The Levy guidelines are, to review, a set of standards that the Justice Department must adhere to when decisions are made concerning the surveillance of the public. They were changed without consultation with Congress. Ashcroft agreed that this was the case, but that he made that decision based upon the "spirit of the Patriot Act." Part of

Ashcroft's quotation cited in Chapter 9 is worth repeating here:

> In terms of the change in the guidelines which govern the internal operation of the Justice Department, the consultation was not substantial or significant. Perhaps I came to the conclusion that extending those guidelines in the same spirit as the PATRIOT Act had been extended was something that would be appropriate and would meet with the approval of the Congress. But I must say that we did not have extensive consultations about this exercise of executive responsibility to define the way in which the executive branch would conduct investigations. (United States Department of Justice, 2003, p. 11)

The "Spirit of the Patriot Act" becomes its own separate issue, connected to but distinct from the law itself. The quotation proves how significant the symbolism of the act is given the way in which Ashcroft admits that its "spirit" served as the primary factor leading to the changes in the Levy guidelines. The admission begs the question of, what other policies were decided upon in the same "spirit?" This is the question that critics would try to broach in the next round of debate. It is also the question that would lead to the demise of the semblance of cooperation that began to develop during the course of the next phase.

Part IV: Reauthorization

The reauthorization stage of debate began with a huge shift in direction. The magic-mythic message of unity espoused by the Bush Administration, and John Ashcroft in particular, had lost much of its magic. The "spirit of the Patriot Act" was no longer an acceptable response to the public—they were demanding accountability. The national legislature was beginning to pass legislation that would have limited the Justice Department and all over the country, local communities were rebuking the Patriot Act. In response the public outcry for rational-critical discussion, Ashcroft responded with more mythic dualism. His public tour, called "the USA PATRIOT Act Outreach Initiative," was more than ever chock full of the earmarks of this dualism: critics are hysterical, the Patriot Act is all-or-nothing, and etc. Chapter 10 examines several of the speeches given by Ashcroft during this public tour, and not once does he acknowledge any credence to any criticism whatsoever lodged by anybody. The issue is black and white: "you're either with us or you're with the terrorists."

This last mythic appeal is what finally did Ashcroft's leadership in. His popularity continued to plummet and so did public support for the Patriot Act. During the

authorization stage, the public accepted the sort of mythos he (and the entire Bush Administration) espoused—arguably, they needed it for the purposes of healing. However, the psyche of the public changed to demand a more rational-perspectival perspective—one that Ashcroft was unwilling (or perhaps unable) to entertain. Ultimately, his leadership of the Justice Department became too much of a drain on the Bush Administration and so, Ashcroft had to go. His replacement, Alberto Gonzales, was feared to be too similar to Ashcroft to represent a meaningful change. However, after being confirmed, a different tone did emerge. He acknowledged past mistakes related to the dissemination of Patriot Act related information, released a great deal more information than did Ashcroft, and defined patriotism much differently. Rather than labeling all critics as hysterics and claiming that debate over the Patriot Act is inherently a bad thing, his leadership claimed to welcome criticism and specifically defined a patriot as one who would criticize. Chapter 11—the very beginning of the reauthorization stage, displays this new tone involved with the transition to a more rational-critical discourse. Critics directly attacked the tone created by Ashcroft; Gonzales acknowledged the mistakes made, and then true "deliberation" finally began.

After the initial full committee debate, the deliberation broke off into several subcommittee hearings. These hearings are not a part of the data set, but based upon the debate analyzed in Chapter 12, it is inferred that deliberation was rather meaningful (at least compared to the previous two stages of debate), that the new tone of political patriotism continued, and that better policymaking was taking place. James Comey, the Assistant Attorney General, continues to define a patriot as one who questions authority and critics recognize that the deliberative process has improved significantly. In fact, a direct comparison to Ashcroft is made to prove this point. There are still some serious

disagreements—but the participants in the debate recognize the other side of the disagreements as legitimate. There is a spirit of cooperation that seems to exist in this debate. Ultimately though, one disagreement in particular, the notion that the scope of the debate was too narrow, could not be resolved and ultimately caused polarization and divisiveness once again.

Chapter 13 analyzes the beginning and the end of the very last debate over the Patriot Act in the House Judiciary Committee. The Democrats, building upon the momentum of cooperation that had been building, exercised their right as the minority party to extend the debate. However, Sensenbrenner, whether acting on his own or perhaps in cahoots with the Bush Administration, would have none of it. As far as he was concerned, there had been enough debate and he used his administrative authority to end this last debate prematurely. The purpose of the extended debate was to widen the scope of the debate to examine other acts of the Administration that are perhaps only tangentially related to the Patriot Act. Despite the arguments that there were both legal and symbolic connections between the Patriot Act and the other acts to which the Democrats referred, Sensenbrenner would not hear it. He ended the debate—practically in the middle of an argument being made by one of the critics, and left the room and the country in awe. Any momentum that had been built toward developing an ethos of cooperative rational-critical discourse was destroyed. The room was in awe, and so was the rest of the country. The debate over the Patriot Act very quickly turned divisive once again, this time though, it was more of the result of a deficient mental expression of divisiveness rather than a mythic-dualistic one. It was a breakdown of rationality, as opposed to the previous level of divisiveness, which was a conflict between mythic and mental modes of expression.

At this point, the public debate ended and negotiations carried on behind closed doors and during House-Senate Committees. As Chapter 13 explains, the divisiveness continued to intensify—especially in the Senate. In fact, a filibuster occurred in the Senate that extended the debate past the original December 31st, 2005 deadline. An agreement was made to keep the then current Patriot Act in tact until the debate could come to an end. Ultimately, there were two other similar sorts of extensions before the Senate eventually overrode the final attempt at filibuster. Though critics were not happy in the end, they did influence the final draft. From among various amendments, mostly calling for more reporting and accountability by the Justice Department, the most significant result is the three provisions that were sunsetted for four years—a much smaller number than the 16 provisions that were originally sunsetted, but still, an assurance that debate over the Patriot Act will continue into the future. The sunset date occurs in 2009.

Chapter 15:

Closing Thoughts

As this project comes to a close, deference must be given to the notion that the analysis of patriotism in the post 9/11 public sphere is only just beginning. Patriotism as communicative phenomenon must continue to receive attention from all different vantage points. It is a mood that links residents of a country together into a common sphere of discourse. Regardless of various differences in ethnic, religious, and socioeconomic backgrounds existing across any country, everyone interacts with the idea of patriotism. Whether the interaction is transparent or latent, every person has a relationship with the country they live in. Prior to 9/11, my own personal relationship with my country was very much taken for granted—it was latent. As stated in Chapter 1, I was "shocked into awareness" (Zaner, 1970) after discovering just how oblivious I was to the importance of understanding such a relationship. I became confronted with the task of understanding the phenomenon with more depth. By considering patriotism as argument during the course of deliberative debate in the House Judiciary Committee, we have analyzed many different expressions of patriotism and have observed the way in which participants in the debate negotiate back and forth between the horizons of magic-mythic expressions of religious patriotism and rational-critical expressions of political patriotism.

Neither form of patriotic expression is ever a pure form of that horizon. Expressions exist in relation to other expressions as well as expressions of other related phenomenon. Yet, the post 9/11 world has provided to us, through very unfortunate circumstances, the opportunity to come as-close-as-is possible to seeing the phenomenon reinvent itself. We have witnessed the way in which religious patriotism inspires healing and unity during times of crisis. We have also witnessed the way in which political

patriotism can produce very meaningful policymaking debate. Both expressions of patriotism have value and play an important role in the discourse of making our country work. Sadly though, we have also seen what happens when those expressions of patriotism exist in their deficient manifestations—the most poignant of which is the effect of what happens when the rhetorical situation calls for political expressions of patriotism and a country's leadership remains steeped in mythological rhetoric. The Bush Administration's legacy will be the story of what happens when this is the case.

This project is but a small part of the effort to try and describe the way in which the debate is unfolding before our eyes. Perhaps through concerted efforts, we may come to understand patriotism as an integral phenomenon—one that includes rational, mythic, magic, and archaic origins. But now, as this particular project comes to an end, it is necessary to briefly summarize the contributions, acknowledge limitations, and look forward to the future direction this analysis will take.

Contributions

The introduction to this chapter encapsulates the primary importance of this study, but as Chapter 1 previews, the contributions are broken into smaller parts. The first contribution is that this study proves to be quite a unique study of the Patriot Act. It differs from other studies in that the primary focus is the negotiation of what it means to be a patriot. While a few studies such as Etzioni (2004) and Foerstel (2004) broach the subject, its importance is as a segue into a legal analysis. As this project demonstrates, an analysis of the symbolism of the Patriot Act is of equal importance. Thus, this study begins to fill a gap in the knowledge base pertaining to the Patriot Act. Not only does this study though contribute a specific knowledge base related to the Patriot Act, but it also seems to demonstrate an innovative method to study congressional debate more

generally. This study builds upon prior work to achieve a unique, thorough way to analyze the legislative process. The input of the hermeneutic methodological tradition adds an increased level of attention to the specific language of the debate as well as a philosophy of communication that views subjectivity as real and empirical.

A second contribution then is an increased focus on the legislative process. As Scheckels (2000) points out, the legislative process is surprisingly not covered very well in the discipline of communication studies. Chapter 2 provides a plethora of reasons why this is the case—mainly revolving around the notions that politicians are too interested in politics to have meaningful debate and that studying transcripts of congressional debate is too tedious. Chapter 2 also provides though, reasons why the study of congressional debate is actually very important. Cain (1954; 1955) for instance, argues that while the political game is important to politicians and that the game does detract from the quality of arguments made while policymaking, meaningful debate does ultimately occur and that important decisions are based upon the debate that takes place. Cain also alludes to another reason why congressional debate is an important subject of scholarship and that is the way in which it interacts with the public sphere of discourse. Accordingly, policymaking debate is both a reflection of the will of the public but also an educational influence upon it. Though this function would seem to diminish given the cynicism displayed by some of the authors cited in Chapter 2, it seems to be very prevalent given the results of the study. By continuously referencing context during the course of analyzing the text, a connection is made between the legislature and public opinion. As the Bush Administration's approval rating declined, debate in the House Judiciary Committee seemed to become more critical. There is a relationship between the House Debate and public opinion, even if that relationship is rather indirect and vague. The

thread of patriotism, as demonstrated throughout the course of this project, weaves in and out of the legislative process and connects it to the broader phenomenon of public sphere discussion.

The increased focus on the legislative process leads into the third contribution of this study and that is to facilitate a stronger connection between the legislature and the public. Habermas (1962/1998), as cited in Chapter 1, argues that a decline in the public sphere is occurring for a variety reasons. At the heart of those reasons lies the impact of technology on the public's rational-critical sensibilities. Because it so easy for citizens to sit at home and watch Fox News, MSNBC or CNN to catch up with what is going on in the world, that we as a society are slowly losing our ambition to go seek information on our own. Furthermore, because of the way in which the media market is shrinking and is becoming more and more a sensationalized experience, the information coming from those news sources is becoming less reliable. Even though CSPAN is readily available for consumption, few people watch it because they can get a quick summary elsewhere (Herman and Chomsky, 2002). Unfortunately, as participants from all sides of the legislative debate acknowledge, the media has grossly distorted the debate over the Patriot Act. This distortion is largely to blame for the success of Ashcroft's all-or-nothing dichotomy. It was easy for him to identify uncalled-for paranoia in the public sphere of discourse because it was there. There were indeed many people who made wild accusations about the Patriot Act when they knew very little about it. Thus, meaningful criticisms fell by the wayside because Ashcroft, as well as other Bush Administration officials, successfully lumped all criticisms into the category of paranoia.

Finally, the fourth contribution of this study is that hopefully, it can become a small part of what it takes to improve the legislative process. It stands to reason that the

greater extent to which policymakers' performances in debate are scrutinized from a scholarly perspective, that they will be encouraged to prepare even harder than they do and be even more focused on quality argumentation. While this may be a far-fetched, idealistic goal, it is not unreasonable; John Conyers substantiates the validity of that goal during a quotation provided in Chapter 1 and restated here. Conyers is speaking directly to John Ashcroft at a hearing on June 5, 2003:

> It is in that spirit that we come together, Attorney General Ashcroft, hoping that we can do our job. We are marching into history. This is not only being examined in great detail right now, but it is going to be examined, as we all know, in far more detail after it is over. And we want to acquit ourselves as honorably as we can under these circumstances. (p. 3)

So, the current analysis contributes to the understanding necessary to evaluate and re-evaluate what happened during the course of this historic debate.

Limitations

Perhaps the biggest limitation, one that is mentioned a great deal throughout the course of analysis, is the limited data set. To begin, the Senate side of the debate was not a part of the data—except for a few references as context. But for pragmatic reasons, a decision had to be made and it seemed that for a variety of reasons described in Chapter 3, limiting analysis to the House Judiciary Committee made the most sense. Nonetheless, not accounting for the Senate side of the debate is a limitation. I suspect that there would be similarities to the debate in the House, but I also suspect that there would be some differences as well. Furthermore, as the end of Chapter 13 alludes to, the debate in the Senate arguably turned more contentious than in the House given the fact that the filibuster stalling the final decision over the reauthorization took place in the Senate.

Another limitation regarding the data set is the fact that even after deciding to limit the analysis to the House Judiciary Committee, some other limitations were

necessary for pragmatic reasons. The limitations were not necessary until reaching the reauthorization stage where the amount of debate expanded by a multiple of 6, when compared to the previous stages. Thus, the decision to only analyze full committee debates was made, eliminating the nine subcommittee hearings from the data. Though sound methodological criteria were used to limit the data, any limitation of data is a limitation of the completeness of the study.

Direction for Future Study

Aside from accounting for the limitations described above and examining the nine missing subcommittee hearings from the House, and then examining the Senate side of the debate, there are at least five directions that could and should be taken in future research. One is, of course, to remember that the debate over the Patriot Act is far from over. Three provisions of the reauthorized act are set to expire in 2009; so undoubtedly, there will be at least one more round of debate over them. At that point, a different Presidential Administration will be in office and so it is likely that the tone of the debate will be much different.

A second direction to take with this research is to analyze other post 9/11 debates to see if/how patriotism appears elsewhere. The debate about the Iraq war would be an obvious data choice. Another obvious and important choice would be an analysis of the ways in which additional provisions allowed the DOJ under the Patriot Act were used and misused. Just one example is the FBI's underreporting of its use of the provisions that force businesses to turn over customer information (see, for example, "FBI Patriot Act probes underreported, audit shows" as reported by CNN.com, March 9, 2007).

A third direction for future study involves conducting a comparative analysis of this debate over the Patriot Act and other debates in American history that are similar in context. For instance, it would be fascinating to compare the debate over the Patriot Act to the debate over the anti-terrorism legislation that was implemented after the Oklahoma City bombing. During that time, Bill Clinton was in office and I suspect that the tone in that debate would be much different than the tone of the Patriot Act debate simply because there was a different Administration and a different Congress in office.

A fourth direction for future study would be an effort to analyze the same data from different methodological and theoretical vantage points. For instance, continuing with a textual analytic methodology, Kenneth Burke's Pentad, could be used to describe the data from a different angle. For that matter, it would also be interesting to approach the data from an entirely different methodological perspective. For instance, I hypothesize, based upon the results of the present study, that "groupthink" occurred (Irving Janis's notion). It would be interesting to conduct a content analysis of the decision making process through the lens of that theory to see if my hypothesis is supported.

And, finally, a study designed to take up issues related to the *process* of the debate and how a bill passes through congress could yield useful information. An exploration of the ways the rules of debate were used during the Patriot Act proceedings—a form of structural analysis—could be a useful contribution to the literature. For example, as described in Chapter 13, when Sensenbrenner abruptly ended the final debate for re-authorization, the effect on the process was substantial. Also, the way in which the Democratic Party employed a rarely-used rule to initiate the extra

debate at the end of the re-authorization stage had a significant impact on the tone of the debate.

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