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The Rule of Law, Terrorism and Countermeasures Including the USA Patriot Act of 2001

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PANEL III: CRIMINAL LAW, RULE OF LAW, POST-SEPTEMBER 11TH COUNTERTERRORISM MEASURES

THE RULE OF LAW, TERRORISM, AND COUNTERMEASURES INCLUDING THE USA PATRIOT ACT OF 2001

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I. INTRODUCTION

Law is representation and relationships, customs, opinions, beliefs, and rules. The perceptions and beliefs as well as the acceptance of each man and each woman impact the degree of their willingness to commit to and obey the laws — be it the speed limit, use of illegal and/or misuse of legal drugs, insider trading, or advocacy of overthrow or rebellion, to name just a few.

Rules, agreements, obligations, formal or otherwise, in a democracy facilitate order and expectations, and make it possible to live together in an organized, predictable, peaceful, and secure fashion.[1] International agreements establish procedures and rules intended to provide peace, security, and well-being to individuals, groups, and cross-border transnational governmental exchanges.[2]

Terrorists intend to disrupt the peace and security of nation states through premeditated politically motivated violence.[3] Among the

1. *See generally* RICHARD D. SCHWARTZ, SOCIETY AND THE LEGAL ORDER, CASES AND MATERIALS IN THE SOCIOLOGY OF LAW (Richard D. Schwartz & Jerome Skolnick eds., 1970); *see also* JACQUES ELLUL, THE POLITICAL ILLUSION (Konrad Kellen trans., 1972).

2. *See generally* MYRES MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER, PRINCIPLES OF CONTENT AND PROCEDURE (1967).

3. *See generally* EUGENE VICTOR WALTER, TERROR AND RESISTANCE, A STUDY OF POLITICAL VIOLENCE (1969); *see also* PETER BERGEN, HOLY WAR, INC., INSIDE THE SECRET WORLD OF OSAMA BIN LADEN (2001).

consequences of the attack upon the World Trade Center was the creation of widespread personal fear and panic, as well as the disruption of the global economy.[4] The terrorists attempted to create a state of anarchy.[5] The U.N. Security Council concluded that the attacks threatened international security perhaps by influencing or affecting the conduct of government by intimidation or coercion.[6] Humanitarian intervention to prevent not only terrorists acts, but also genocide, famine or otherwise, should be a priority of the United Nations and every member state capable of assuming responsibility for economic transnational rehabilitation.

The only point here is that one must recognize that law is a necessary and important component of social control. Law is a critical, though not the only, instrument of social control. The concept of social control implies the notion of governance.[7] Terrorists intend their results to accomplish the opposite. One cannot predict with any degree of certainty the type or time of the consequences of terrorist attacks. As the U.N. Security Council Resolution 1368 noted, a nation state has the legitimate right of self-defense against such attacks.[8]

Governance implies policy, which in turn implies choice and decisions, expectations, and opportunity; it excludes terrorism and anarchy.[9] To have input in the development and revision of the rules, knowledge of the rules and expectations and the opportunity to make one's opinion heard are major factors in a democratic sense of self-control. Further, these expectations and opportunities are, within this citizen's frame of influence, translated into constitutional rule.[10]

I suspect traditional societies had a different focus, although similar aspirations. Their governors possessed single control with a list of "shoulds" for those being controlled. "Rights" were an entity belonging to

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4. *See, e.g.*, HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR (James F. Hoge, Jr. & Gideon Rose eds., 2001); *see generally* ROLAND JACQUARD, IN THE NAME OF OSAMA BIN LADEN, GLOBAL TERRORISM AND THE BIN LADEN BROTHERHOOD (Samia Serageldin ed., George Holoch trans., 2002).

5. ROHAN GUNARATNA, INSIDE AL QAEDA GLOBAL NETWORK OF TERROR (2002); *see also* JEAN-CHARLES BRISARD & GUILLAUME DASQUIE, FORBIDDEN TRUTH: U.S.—TALIBAN SECRET OIL DIPLOMACY AND THE FAILED HUNT FOR BIN LADEN (Lucy Rounds et al. trans., 2002).

6. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

7. *See generally* ROSCOE POUND, JUSTICE ACCORDING TO LAW (1951).

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

9. *See* S. Res. 22, 107th Cong. (2001); *see* MCDOUGAL ET AL., *supra* note 2, at 3-77.

10. *See generally* LON F. FULLER, THE MORALITY OF LAW (1964).

the governors; the common run of humankind had limited access to those "rights."[11]

The sense of constitution, as it developed, provided nature, functions, and limitations upon the government, as well as articulating rights and liberties of the citizenry. A constitution also facilitates control, security, direction, and development. A constitution, in theory, assures change from within. When the change comes from without, the legitimate constitutional government has a right to self-defense.

II. THE CONCEPT OF THE RULE OF LAW

Within this emerging concept of law, there were also certain moral and social standards that began to take hold. Certain acts became taboo and were decried by the society as beyond toleration. The reason was that in order for a society to survive it has a right and duty to implement and enforce rights and responsibilities through its institutions.[12]

What, in part, separates societies is the differing views of the very purpose of society. In the West, the goal of society was to maximize individual freedoms consistent with the integrity of that society.[13] For example, Lord Patrick Devlin argued that a society has a right to protect its own existence provided it is following given moral convictions and is attempting, in its defense, to protect its social, economic, and legal environment.[14] To concede Devlin's point, which assuredly differs considerably from John Stuart Mill,[15] one must go a step further. For surely, Lord Devlin did not mean to suggest that public condemnation alone was sufficient to justify making an act a crime.

The late Lon Fuller agreed that there are moral principles and moral standards which a society has every right to place beyond toleration, and society has a right to impose sanctions upon those who dissent.[16] Child pornography immediately comes to mind. However, he notes that the majority rule in a democratic society is also a moral conviction stripped of emotional reaction (prejudice). How does a society know when a threat is directed toward the very existence of that society? When is there sufficient

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11. *See generally* MAX GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY (1965); *see also* Fletcher N. Baldwin, Jr., *Western Constitutionalism and African Nationbuilding: The Anglophonic East African Experience*, 2 HASTINGS CONST. L.Q. 373 (1975).

12. Baldwin, *supra* note 11, at 373.

13. *See generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965).

14. *Id.* at 86-101.

15. *Id.* at 124-39.

16. FULLER, *supra* note 10.

clear and present danger to justify societal reaction? Many who are drawn to terrorists encampments reject as myths the functions of a democratic society:

a) Decisions must be made in the public interest;
b) Decisions must be made objectively on the basis of shared values and shared facts; and
c) Decisions of government must be fair.[17]

If the democratic philosophy is an illusion, is that sufficient for the disillusioned to rise against the society? Or must an active response require additional evidence of clear, illicit governmental action, such as former segregation laws in the southern United States?[18] The question becomes: How does one go about the process of social change? Are there constitutionally recognized means available to the dissenter?

Democracy is a good and proper instrumentality to serve people. The problem has been that although democracies deal with popular control of power sharing, who deals with popular control of social change? Have our institutions been successful in changing the rules to meet rapid social and economic change? Does society stop institutions or restructure them? Fuller argued that by asking the questions the answers become clearer. He notes that there are eight conditions that exist in order for a society to claim its existence based upon a rule of law. If the eight are met, neither terrorism nor anarchy are an option.[19]

1. Laws are to be generalized as rules.
2 Laws are to be made known.
3. Laws are to impose liability for acts prospectively and not retroactively.
4. Laws should be sufficiently clear to serve as standards for decisions made in their name.
5. Laws are to avoid practical contradictions.
6. Laws ought not require what is impossible.
7. Laws are to be sufficiently constant to enable reliance on them.
8. Laws are to be implemented according to their terms.[20]

What instrument confers the authority defined by Fuller? Do the eight principles provide a way of arguing against any particular condition?

In Dr. Bonham's case Lord Coke said:

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly

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17. *Id.* at 159-67.
18. *Id.*
19. *Id.* at 100-06.
20. *See generally* LON F. FULLER, THE LAW IN QUEST OF ITSELF (1940).

> void: for when an Act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will controul it, and adjudge such Act to be void.[21]

In the United States, the constitutional framers understood Lord Coke to mean the doctrine of judicial review. There must be an institution established that determines justification for the proposal of other principles and for the identification of fundamental conditions; that institution is found in Article III.[22]

In an unpublished paper co-authored by this writer and Winston Nagan, we argued that the constitutional rule is a critical component to the well-being of any society.[23] If anarchy is to be avoided or neutralized, Myres McDougal concluded that the focus must be upon the constitutive process.[24] Only then can it be said that those who arm and physically attack a functioning system of constitutional well-being are by all accounts, terrorists.

Therefore, we suggested that a constitutive process must be an identifiable transparent process of the kinds of social and political decisions that continuously, and over time, establish and maintain the larger processes of law and governance. We borrowed heavily from our former professor, the late Myres McDougal, and his works on authoritative decision making. For McDougal, the constitutive processes serve to identify and characterize legitimate authoritative decision-makers; they, guided by the communities' rules of law, articulate and seek to specify the basic values and policies of the community. The decision makers establish the basic structures of authority, serve to allocate power for effective sanctions, authorize procedures appropriate to diverse structures of authority and institutional frames, and secure a process where by a myriad of decisions regarding public and civic order are made for the effective process of lawmaking (prescription) and law-enforcing (application).

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21. Dr. Bonham's Case, 8 Co. 1136, 118a, 77 ENG. REP. 652 (1610).

22. *See* EDWIN CORWIN, LIBERTY AGAINST GOVERNMENT 34-40 (1948).

23. F. Baldwin & W. Nagan, *Constitutional Imperatives* (1988) (paper delivered to the Nairobi Roundtable on Constitutional Governance in Nairobi, Kenya).

24. MYERS MCDOUGAL, STUDIES IN THE WORLD PUBLIC ORDER (1960); MCDOUGAL ET AL., *supra* note 2, at 35-118.

> I submit that the body of laws I have been discussing is essentially a branch of constitutional law, largely and properly developing outside the framework of our written constitution. It is constitutional law in that it involves the allocation among the various institutions of our society of legal power, that is, the authority to enact rules and to reach decisions that will be regarded as properly binding on those affected by them.

FULLER, *supra* note 10, at 128.

Neither terrorism nor anarchy have a place within a society implementing the process of authoritative decision.

An empirical conception of constitutive process may, then, be reformulated for policy-process purposes by the use of a phase analysis. Such an analysis would systematically describe, for example, who the relevant participants in the constitutive process are; what their perspectives of identification, demand and expectation are; what resources (bases of power) are at their disposal; what strategies of action or intervention are at their disposal (coercive-persuasive); in what situational contexts do they operate — organized (formal), unorganized (informal); and with what results and what effects. It can be demonstrated that for policy-process purposes a phase analysis may be a useful tool to comprehensively and systematically describe either social process in general or selected outcomes of social process in particular. Included within selective outcomes is the right to legitimate self-defense, which include intended as well as, at times, unintended consequences. Indeed, the level of both generality and particularity characteristic of governance, law and human rights claims necessitates a methodological tool that permits self-defense. The constitutive process notion is an outcome of social process and more precisely, the power process implicit in the right of legitimate national survival.

III. THE SOCIAL PROCESS CONTEXT OF CONSTITUTIONAL LAW

Those working in a process-policy frame of reference have sought criteria that can be employed to isolate key facts in the social process that separate those who aspire to power through bloodshed from those who respect and implement law, human rights, and policy. McDougal proposed a general model for these purposes. The model invokes human beings pursuing values through institutions based upon resources. The model employed is a contextual guide for those implementing self-defense legislation which must factor in both a comprehensive and a selective understanding of the context of social process problems, decisional responses thereto, and consequences or impacts on social process of governmental decisional interventions.[25]

25. *See* MCDOUGAL ET AL., *supra* note 2, at 3-34.

IV. THE PROCESS OF EFFECTIVE POWER: A NECESSARY PREDICATE FOR CONSTITUTIONAL LAW, GOVERNANCE, AND HUMAN RIGHTS

The problem of degree of use of power in society is one of the most important questions encountered by those concerned with the rule of law and human rights. The relationship of law to power is also one of the most important questions anyone developing protection policy might encounter. The full appreciation of this relationship requires not only an operational understanding of what the law is, but also an understanding of the nature of the power available to a given society and the impact upon global environments should the society elect to implement power to the maximum. The traditional approach that emerges from the social and political literature about the idea of power focuses upon basically three distinct theories that explain the nature of power.[26]

The first is a theory of elites. To understand the power dynamics of any society, one must identify the group that constitutes itself as the operative elite. It is the power elite that fundamentally determines the ideology, the morality, the law, and the significant social dynamics of the society.[27]

The second theory suggests that power in society is expressed in terms of the pattern of social stratification. The pattern of social stratification is fundamentally determined by economic factors; hence, the critical concept that defines power is the notion of class.[28] In the orthodox Marxian theory, the dominant class is the class that controls the means of production. Ideology, morality, and law simply reflect interests of the dominant class.

The third major modern theory of power in society is, we submit, the most reasonable for dynamic societies. Within any dynamic society, there are usually myriad group alignments. These alignments are often reflected in political interest groups representing general and special interests within the society. These groups may be composed of ethnic alignments, economic alignments, skill group alignments, and so forth. In a pluralistic context, no one group ever controls the allocation of all the desired goods and services of a society. Complex adjustments, bargains, and negotiations are made between groups in a complex pattern of cooperation and conflict. In this sense, power is highly diffused and control is often a function of the principle of give and take. In such a system, the role of law in the maintenance of the pluralistic scheme is an extremely complex one: The role of law and lawyers are crucial to the success of pluralist-legal nexus

26. *Id.*
27. *Id.*
28. *Id.*

provided there are adequate theoreticians.[29] This model, though best reflecting the United States and most other constitutional democracies, nevertheless has elements of the first two as well.

This last model is consistent with a focus of government that, in part, encourages movement towards equilibrium which requires collaboration in pursuit of common interests. Some could criticize the model's implementation because it appears to be resistant to radical change. However, this ignores the fact that the model insists upon participatory democracy in order to function properly.[30]

Efforts to integrate conflict and consensus paradigms of social process are rooted in the intuitive insight that in all human interaction, one can discover patterns of both collaboration and conflict. The trick is to discover when people will collaborate and when they will fight. In other words, the control and regulation of collaboration and conflict in the common interest poses a significant problem for the law and for the conceptions of law within a society. If we accept the ideal that law is a major — indeed a massive — instrument of social control, then, the relationship of law to the process of effective power is an entirely relevant datum. If the formal foundations of the process of effective power are reflected in constitutive arrangements, the relevance of power to constitutionalism would seem to be apparent.

We suggest, in this Article, that in its most basic sense, a national constitution is not a document fed by precedents about its scope and relevance. In its most fundamental sense, a national constitution is in reality a process concerned with the allocation of decisional competence regarding the implementation of the institutions of power, as well as implementation of deployment of self-preservation defenses.

These understandings have been codified in our most basic document, the U.S. Constitution. What is conventionally called constitutional law is, in reality, the decision process undertaken by societies which contain conflict between different power groups and alignments. Conflict control must, then, be considered a major purpose for any constitutive scheme. The impetus to limit the cost and scope of a conflict through constitutional containment is also well established in the doctrine of separation of powers.[31] Both the conflict and collaboration power paradigms are intrinsic to any constitutive process, as well as the central features of the conditions that sustain such processes.

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29. *Id.*
30. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).
31. *See* Beharry v. Reno, 183 F. Supp. 2d 584, 596-601 (2002).

For anyone concerned with governance, there is the problem of the application of generalized values — such as community policies or human rights — to concrete problems. What principles of procedure and content can be devised to guide decision-making, especially in the arena of human rights as applied to concrete, particular problems, in a way that enhances the process of both governance and human rights? With these conditions in place, if the society becomes the target of terrorists or anarchists, the right to self-defense becomes a constitutional imperative.[32]

V. A NATION HAS A RIGHT TO DEFEND ITSELF

The initial response to the terrorists attacks of September 11, 2001 came from the international community on two levels: (1) military; and (2) U.N. resolutions calling for the implementation of domestic legislative anti-terror programs. The United States responded in kind and legislators, speaking to the self-defense issue, came forth with the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*,[33] euphemistically known as the USA PATRIOT Act of 2001. The Act is in direct response to terrorism worldwide and to U.N. Security Council Resolution 1373. The Patriot Act followed Congressional authorization of September 14, 2001 granting broad powers to the executive to seek out and destroy terrorists. The Act is, in part, 1) intended to complement and support the military campaigns in Afghanistan and elsewhere, and 2) to allocate to law enforcement and financial regulators more realistic weapons and user-friendly laws to fight terrorists and terrorist funding. The two goals, especially the second, required a complex redesign of the U.S. Bank Secrecy Act, and its subsequent amendments did just that.[34] The Act defines terrorism and focuses upon enhancing domestic security by implementing legislation involving, among other things, computer privacy, electronic surveillance, warrants to trap and trace, no-knock searches, and extraterritorial search warrants. The Act also implicates matters involving immigration and borders, including bulk cash smuggling. More importantly, in Title III,

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32. Bas v. Tingy, 4 U.S. (4 Dall.) 37, 39 (1800); Franklin Lor, *Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism*, 34 NAVAL L. REV. 1-2 (1985).

33. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); *see also* Bruce Zagaris, *United States Enacts Counter-Terrorism Act with Significant New International Provisions*, 17 INT'L ENFORCEMENT L. REP. 522 (2001).

34. Allison L.C. de Cerreno, *Sec. 208 of the Patriot Act Walking a Fine Line Between Security and Free Exchange of Scientists and Knowledge*, *available at* http://members.nyas.org/events/policy/pol_01_1023.html (last visited Aug. 12, 2003); *see* USA PATRIOT Act § 358.

there are over forty complex new banking and other money transmitting regulations impacting extraterritoriality, offshore correspondent banking, underground banking, new predicate crimes complementing the crime of money laundering, and agency information sharing.[35]

Much of the focus of the Act is international money laundering and anti-terrorism financing. This focus derives from the extreme danger the modern terrorist poses to infrastructure, national defense, and the international economic system.

Title III of the Act, as well as the subsequent rules promulgated thereunder by the Treasury Department, impact upon the illicit money trails, foreign bank correspondent accounts, foreign person private banking accounts, and identification and verification of all customers seeking to do business at a U.S. financial institution (a daunting task indeed!). Savings associations, credit unions, casinos, and others similarly situated are also subject to regulation under the Act. In brief, Title III grants to the Secretary of the Treasury extensive powers to impose special measures against any foreign financial institution, regardless of jurisdictional considerations.

The Act permits forfeiture of proceeds even if the crime took place on foreign soil as long as the proceeds from the illicit act were transferred to or invested in the United States. The specific crimes include any crime of violence, bribing of a public official, embezzlement of public funds, munitions smuggling, or any offense which, if committed in the United States, would subject the perpetrator to extradition or criminal prosecution. Of significant importance, Title III permits *in rem* forfeiture of funds where illicit funds are transferred from a correspondent bank account to an interbank account and the illicit funds account is traceable to funds originally deposited in a foreign bank or other financial institution holding the account. Under the Act, the foreign bank from which the funds are forfeited has no standing in a U.S. court to contest the forfeiture. Only the owner of the funds account in the foreign bank has standing. Significant problems and conflicts may develop within the foreign bank's home jurisdiction if there is a mandated duty to pay depositors. In Title III, the

35. Jim McGee, *An Intelligence Giant in the Making; Anti-Terrorism Law Likely to Bring Domestic Apparatus of Unprecedented Scope*, WASH. POST, Nov. 4, 2001, at A4; *see, e.g.*, United States v. Swiss Am. Bank, Ltd., 116 F. Supp. 2d 217 (D. Mass. 2000) (regarding the impact of Title III and resulting impact of section 317 of the Patriot Act); *see* Bruce Zagaris, *United States Appellate Court Disallows United States Jurisdiction Over Offshore Bank*, 18 INT'L ENFORCEMENT L. REP. 103, 105 (Mar. 2002). The difficulty in implementation is only now being addressed publicly. *See, e.g.*, A Report to Congress in Accordance with § 326 (b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Submitted to Congress by the Department of the Treasury, Oct. 21, 2002.

U.S. Congress is also attempting for the first time to regulate the underground banking systems such as hawala and hundi.[36]

On October 26, 2001, President Bush signed the Patriot Act into law.[37] With the apparent lack of political will that existed prior to September 11, 2001 no longer an obstacle, federal law enforcement has moved quickly to begin the implementation of the Act. The goal was, and is, to penetrate the heart of the terrorist organizational machine, or as author Peter L. Bergen termed it: *Holy War, Inc.*[38] The goals of the Act implicate and require international cooperation, redesignation of internal laws, and enhanced cross-border cooperation. Without international cooperation, the Act will lose most of its intended impact.

VI. LEGISLATIVE HISTORY

To achieve their goals, terrorist and organized crime operations require support internationally and otherwise.[39] User-friendly states, citizens, and institutions are a necessity. Banks citing bank secrecy, nations citing sovereignty concerns, and elected public officials citing freedom from governmental financial controls intentionally or unintentionally created safe havens for the transfer and hiding of the illicit funds and profits of organized crime and organized terrorists. Funds gathered within less-than-vigilant jurisdictions are funneled to terrorist cells around the world. Lax banking regulations and poor financial oversight provide steppingstones and networks for the financing of terrorist activity.

Prior to September 11, law enforcement worldwide had noted increased activity by terrorist groups. They had received little governmental support in their efforts.[40] Reading such recent works as *Holy War, Inc.*, one has reason to speculate that there was very little political will to encourage law enforcement to conduct an all-out assault upon the financial networking of

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36. *See infra* Part VIII.A.

37. George W. Bush, Address at the White House, Signing of the USA PATRIOT Act of 2001 (Oct. 26, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/10/print/20011026-5.html (last visited Sept. 15, 2003).

38. BERGEN, *supra* note 3; *see also* American Civil Liberties Union, *How the Anti-Terrorist Bill Limits Judicial Oversight of Telephone and Internet Surveillance*, *available at* http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9154&c=111 [hereinafter *Judicial Oversight*] (last visited Oct. 9, 2003).

39. History of Terrorism, *available at* http://www.terrorismfiles.org/encyclopaedia/history_of_terrorism.html (last visited Sept. 15, 2003).

40. Martin Walker, A Brief History of Terrorism, *available at* http://www.eurunion.org/magazine/0110/p26.htm (last visited Aug. 20, 2003).

organized terrorist groups such as al-Qaeda.[41] Nevertheless, who could have ever envisioned the catastrophic acts of September 11, 2001?

The events of that day appear to have changed the earlier political posturing. In the United States, the recognition of vulnerability to, and threat of, future acts resulted in the Patriot Act. The Act, controversial to be sure, nevertheless signaled support from previously silent elected and appointed officials for the efforts of law enforcement in the transnational arena. Governments, democratic and otherwise, have now signaled their approval and support for an all-out assault upon the holdings of terrorist groups. September 11, 2001, was and is a defining date not only for the people of the United States, but also for democratic societies everywhere. The spiraling impact of September 11 has reached and penetrated many shores.[42] Since then, people of many nations have demonstrated a will to deal with both the magnitude of the terrorist attacks and the threat and fear of continuing terrorism.

Terrorists have learned their lessons from history. In the nineteenth century, terrorists became more political, turning from the religious ideals of twelfth century Ismailis, and to more modern ideas such as anarchism.[43] Recently, in Bosnia, the terrorist threat to civilization finally got the attention of some nations.

Terrorists have emerged and are prepared to die voluntarily; their rewards awaiting them in the afterlife, unaware that they are sacrificing their lives for mortals seeking territory, profit, and political power.[44] With extensive preparation and about $532,000, the sponsors and the actors of September 11, 2001 committed devastating acts of terror.[45]

Since the conclusion of World War II, old and new democracies grew accustomed to, and, some might argue, tolerant of, global, white collar organized crime. However, tolerance in some arenas does not translate into

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41. *Id.*

42. BERGEN, *supra* note 3; *see* S.C. Res. 1438, U.N. SCOR, 57th Sess., 4624th mtg. at 1, U.N. Doc. S/RES/1438 (2002) (condemning the terrorists attack in Bali, Indonesia).

43. The Ismailis, remembered more commonly in history by the name Assassins, "used assassination, and the fear of it, as a political weapon." K. Gajendra Singh, *Jihadis: Assassins by Another Name*, ASIA TIMES, Sept. 12, 2003, *available at* http://www.atimes.com/atimes/Middle_East/EI12Ak01.html (last visited Nov. 6, 2003).

44. Kurt Eichenwald, *A Nation Challenged: The Money; Terror Money Hard to Block*, N.Y. TIMES, Dec. 10, 2001, at A1; *see also* BERGEN, *supra* note 3.

45. Eichenwald, *supra* note 44, at B4; *see also* Comment, *Responding to Terrorism: Crime, Punishment and War*, 115 HARV. L. REV. 1217, 1224 (2002).

tolerance in others.[46] Terrorist activity impacts upon the very foundation of the democratic state.

Government and business in the United States, as well as elsewhere, regardless of external impressions, have a sophisticated understanding of the workings of organized crime and its transnational components. The same cannot be said of transnational terrorism. Religious and nationalist fanatical fervor has not been well understood. Gathering information regarding terrorist activity has been difficult as has sharing the information, even between colleagues in law enforcement. September 11, 2001, resulted in, among other alterations, a modification or redirection of government with respect to more effective law enforcement weapons, information sharing, reevaluation of financial secrecy programs, and implementing financial controls designed to better trace and seize the illicit money.

The reality now penetrating the political mindset is, one can only assume, that both organized crime and organized terrorism operate in similarly borderless environments. Each pose a threat to the stability and security of international and national communities. Although organized terrorist groups and organized crime syndicates profit from their illicit acts, the acts of the terrorists pose a far greater threat to a nation's political psyche as well as its financial markets. The threat from organized terrorists is by far the more intense and the more complex.

Organized crime has in the past caused many nations to redesign their laws; the privatization of terror is accomplishing a similar purpose. Nations have formally stated that the threat and impact of global organized crime is a threat to national security. The same can be said of organized terrorism. Organized crime and organized terrorism have a common thread, common characteristics, and perhaps some similar goals. Organized criminals and organized terrorists have at times joined together for mutual benefit.[47] The victim states learn from the commonalities and react accordingly. If a distinction needs to be established between organized crime and terrorism, it would be that organized crime's activities seem to focus upon profit, though corruption of power must in many instances be factored in. Organized terrorism's illicit activities ostensibly focus on power or power sharing.

A major post September 11 financial concern is the impact upon public confidence. Public confidence in banks, and hence financial stability, can be, and has been, undermined by the adverse publicity that has resulted

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46. NIALL FERGUSON, CLASHING CIVILIZATIONS OR MAD MULLAHS: THE UNITED STATES BETWEEN INFORMAL AND FORMAL EMPIRE IN THE AGE OF TERROR 121 (Stobe Talbott & Nayan Chana eds., 2001).

47. Walker, *supra* note 40; *see also* Eichenwald, *supra* note 44, at A1.

from the association, although perhaps inadvertent, of banks with terrorists' accounts. Some financial institutions and user-friendly states are, for the most part, unwittingly functioning as links that enable intermediaries to transfer or deposit funds to be employed in exporting terrorism in all of its obscene forms. Money, including terrorist money, is attractive to financial markets. The systems are designed to make payments and transfer funds from one complex series of accounts to another.[48] Add to the mix the complexity of offshore banking and correspondent accounts operating on September 11, as well as the underground banking systems, and the fact that half of the approximately $550 billion in U.S. currency in existence is in the hands of foreigners, and that 90% of all $100 bills in circulation are held in foreign hands.[49] Given these facts, one can better understand why the tracing of terrorist money is an increasingly difficult task requiring intense and complex management.

Through negligence and/or lack of diligence, the failure to screen out undesirable customers results in a negative impact upon the integrity of banks and finance officers. Some well intentioned financial systems are undermined through unwitting association with the money managers of organized crime or organized terrorism.[50]

Weapons and procedures were and are available to governments who in good faith elect to counter the threats posed by both organized crime and terrorism. One such weapon focuses upon taking the illicit funds from the criminal. That weapon is now being applied worldwide.

A. *International Emergency Economic Powers Act (IEEPA)*

Within the United States, there are numerous legal weapons available to the government to assist in taking money from the terrorist. The goals of the government are reflected in a recent government report, the *United States General Accounting Office Report to Congressional Committees on Combating Terrorism*.[51] This report was drafted prior to September 11 but released on September 20, 2001. Another important document is the *Report on Intelligence Authorization FY2002*.

Prior to September 11, the President had powers to act quickly. After September 11, the President did just that by invoking, among others

48. Christopher Byron, *Terrorists, Dollars and A Tangled Web: The Tentacles of Terrorist-Linked Offshore Money in America* (on file with the author).

49. *Id.*

50. *Id.*

51. U.S. General Accounting Office, *Combating Terrorism, Selected Challenges and Related Recommendations*, GAO-01-822 (Sept. 20, 2001).

powers, the International Emergency Economic Powers Act (IEEPA).[52] IEEPA permits the executive to identify and freeze the assets of foreign drug lords and terrorists. It also permits the executive to apply sanctions to those who aid and abet terrorists and other international criminals.[53]

B. *Anti-Terrorism and Effective Death Penalty Act*

Another pre-September 11, 2001 weapon was enacted into law when, after the terrorist bombing in Oklahoma City, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (ATEDP Act).[54] The relevant provisions of the ATEDP Act authorize the Secretary of State to make findings of fact, based upon war and national emergency powers, that a targeted group is a foreign organization engaged in terrorist activity, i.e., activity that threatens the national security of the United States. Once labeled and announced, all bank accounts in the United States traced to that entity can be seized. Anyone who knowingly contributes financial support to the named terrorist group is subject to criminal prosecution. U.S. courts have assigned themselves a minor role;[55] however, they have not, to date, willingly accepted the rubber stamp role of the clerk.[56] On March 5, 2001, the U.S. Supreme Court refused to review a somewhat similar holding in the 9th Circuit: *Humanitarian Law Project v. Reno*.[57]

C. *IEEPA First to be Employed*

On September 23, 2001, the President issued an executive order blocking property exchange and prohibiting transactions with persons who commit, threaten to commit, or support terrorism. In so doing, the President signaled his intention to declare war (used in a political not a constitutional context) on illicit (terrorist) financial expenditures. Twenty-seven entities or persons were named. The President issued the executive order under the authority of IEEPA and the U.N. Participation Act.

The world has not been silent on this point; the Foreign Ministers of the leading economic nations agreed on September 25, 2001, to produce a

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52. 18 U.S.C. § 1831 (1996).

53. *See* Eichenwald, *supra* note 44, at A1.

54. 8 U.S.C. § 1189 (1999).

55. People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999).

56. NCRI v. U.S. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001); *see also In Re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (2002) [hereinafter Memorandum Op.].

57. Humanitarian Law Project v. Reno, 205 F. 3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

coordinated plan to seize the assets of terrorist groups. Japan and the European Union, among others, have accelerated cooperation among nation states, especially in the arena of anti-terrorist legislation with a focus upon money laundering, banking, and other money exchange centers, increasing supervision, arrest warrants, and surveillance.

Parochial preoccupation with national borders and national sovereignty has begun to give way to borderless search and seizure of persons and assets. The worldwide campaign against terrorism prompted by September 11, 2001 is defined in the President's September 23, 2001 Executive Order 13224, and implemented in the U.N. Security Council Resolution 1373, as well as the NATO statements of September 12 and October 1, 2001. Full implementation of U.N. Security Council Resolution 1373 requires significant transnational countermeasures to combat organized (privatized) terror.

D. *U.N. Security Council Resolution 1373*

Security Council Resolution 1373 establishes binding obligations upon the 189 U.N. member states. It focuses upon an international security threat and a campaign to root out terrorists and terrorist assets. The language of Resolution 1373 is mandatory. The requirement that states report back within ninety days has resulted in many states adopting anti-terrorism acts. For example, the USA PATRIOT Act is the direct result of Resolution 1373. Organized efforts by international agencies have increased as well. The International Monetary Fund Communique of November 17, 2001 speaks to matters involving international security and focuses upon implementation of Resolution 1373. The Financial Action Task Force met in extraordinary session on October 29, 2001, and expanded its mission by adopting eight anti-terrorism special recommendations. All international agencies considering the issue recognized one point: the problems presented by the present roster of terrorists are basically matters of first impression. In adopting Resolution 1373 on September 28, 2001, the U.N. Security Council stated that the September 11, 2001 act of international terrorism was a threat to international peace and security.[58] This was the first time such determination had ever been made.[59]

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58. S.C. Res. 1373, *supra* note 6.

59. *See* U.S. Report to UNSC on Counterterrorism Measures, *available at* http://usinfo.state.gov/topical/pol/terror/01121906.htm (last visited Sept. 17, 2003).

VII. THE USA PATRIOT ACT OF 2001: AN ACT TO PROVIDE THE APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM: THE FINDINGS

In order to extract financial resources from terrorist organizations, the United States, among others, targets businesses, front companies, charitable organizations, banks, and now, the underground money transfer systems, as well as correspondent banks that potentially or in fact serve as a major source of funding for organized crime and terrorism. What makes the task so difficult is that some legitimate businesses and charitable organizations unintentionally commingle funds with contributions from terrorist front organizations. At present, simply distinguishing legitimate from illegitimate money sources is a formidable task. There is substantial evidence demonstrating that some Islamic charitable organizations have (in all probability) been penetrated, exploited, and controlled by terrorists involved with al-Qaeda.[60] Islamic charitable organizations accused of having ties to al-Qaeda include, as of this writing, multinational Persian Gulf-based businesses that operate with multimillion dollar budgets at one end of the spectrum, to small, tightly organized front cells at the other.[61] Listed in the U.S. President's Executive Order 13224 and its annex are Islamic charitable organizations that are accused of serving as covers for terrorist groups, groups that adopt innocuous names and co-opt legitimate causes. Terrorism engulfs many unsuspecting and well-intentioned individuals who support relief efforts for refugees through various charitable organizations. Unbeknownst to the donors, their monies may be diverted, ultimately ending up in the coffers of al-Qaeda.

A. *Enter the USA PATRIOT Act of 2001: A Response to Security Council Resolution 1373*

It is the intent of the U.S. Congress that the Act serve as a broad-brush aid to law enforcement officials in the search for and seizure of the assets of terrorists. The Act allots much wider statutory latitude to federal authorities who already possess *in rem* forfeit powers. The Act expands access to data and sharing of intercepted data among government agencies. "Today, we take an essential step in defeating terrorism while protecting

60. *See* Eichenwald, *supra* note 44, at B4.
61. *See generally id.*; BERGEN, *supra* note 3.

the constitutional rights of all Americans," said President Bush during the signing ceremony.[62] The two concepts, however, may be incompatible.

Implementation of programs now covered by the Act required congressional acknowledgment of past serious problems.[63] For example, Congress has long ignored bulk cash smuggling as a threat. In *United States v. Bajakajian*,[64] for the first time in U.S. history, the Supreme Court held that the forfeiture of cash from bulk cash smuggling was prohibited under the Eighth Amendment prohibition against excessive fines. The Court found that neither the meager legislation nor the U.S. Constitution permitted an *in rem* forfeiture program where one of the so-called criminal acts in question was nothing more than a failure to declare at the border cash sums in excess of $10,000.[65] The bulk cash smuggling provision of the Act settles the matter in favor of preventing illicit bulk cash smuggling within or without the United States. Further, the Patriot Act expands forfeiture of assets when the assets are earmarked for terrorist organizations (though nations will at times disagree on the use of the designation "terrorist" to refer to some politically active organizations). The Act also enhances the powers of the Financial Crimes Enforcement Network and the Office of Foreign Assets Control. The Patriot Act encourages closer cooperation through a policy coordinating committee made up of representatives from the Departments of Treasury, Justice, and State; the National Security Council; the Federal Bureau of Investigation; and the Central Intelligence Agency. Executive Order 13224 also expands the work of the Foreign Asset Tracking Center, as well as Operation Green Quest. The Act also focuses upon international cooperation and due diligence. There are provisions expanding long-arm jurisdiction over foreign money launderers and money laundering through foreign banks.[66]

The Act permits a federal judge or magistrate to issue a pen register or trap and trace order without specifying the service provider, leaving it to the law enforcement officer to insert the service provider as necessary to

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62. Memorandum Op., *supra* note 56; *see generally* EFF Analysis of the Provisions of the USA PATRIOT Act That Relate to Online Activities (Oct. 31, 2001), *available at* http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.php [hereinafter *EFF Analysis*] (last visited Aug. 20, 2003); *see also* S. Osher, Essay, *Privacy, Computers and the Patriot Act. The Fourth Amendment Isn't Dead, but No One Will Insure It*, 54 U. FLA. L. REV. 533-34 (2002).

63. *See* USA PATRIOT Act § 371 (2001).

64. 524 U.S. 321 (1998).

65. *See generally* Comment, *Excessive Fines Clause*, 112 HARV. L. REV. 152 (1998).

66. *See generally EFF Analysis*, *supra* note 62; *see also* 147 CONG. REC. S10990-11060 (Oct. 25, 2001) (Senate).

complete an investigation.[67] The order is valid anywhere in the United States.[68] An ancillary effect of this provision is that if there are challenges to the order, the challenge must occur in the jurisdiction where the order was issued. With little to gain, few service providers are likely to bring such a challenge.

A troubling provision of the Act involves the so-called "knock and announce" prior to execution of a search warrant. The Supreme Court has signaled its distrust of no-knock entries.[69] "Knock and announce" was established as a prerequisite to executing a search warrant, except, of course, under exigent circumstances. In Section 213, the Act amends 18 U.S.C. § 3103(a), thus, allowing federal law enforcement to enter without a homeowner's knowledge and to examine or copy papers and effects. The homeowner may not be made aware of such intrusion until weeks later. The problem is that it is not, on its face, limited to terrorists or terrorist activity. It can also apply to drug cases, tax or tax fraud cases, or, in fact, any federal predicate crime.

The Act permits enhanced surveillance by readopting the so-called roving wiretap. Under the Act, a warrant need not specify a single phone line. Any phone will suffice if the user is suspected of terrorism. The Attorney General has argued that roving wiretaps do not violate the Fourth Amendment because they do not eliminate the particularity requirements for search warrants;[70] they merely substitute particularity of person for particularity of place.[71]

The definition of law enforcement officer is amended to include federal law enforcement, national security, intelligence, national defense, protective, immigration personnel, and the President or Vice President of the United States when the issue relates to foreign intelligence. The Act also combines relevant portions of Title II with the Foreign Intelligence Surveillance Act for purposes of domestic surveillance.[72]

The Act also authorizes interception of the contents of communications by persons deemed computer trespassers. The interceptor must first obtain the permission of the owner or operator of the computer being unlawfully accessed. A computer trespasser is defined as a person who is not

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67. *Judicial Oversight*, *supra* note 38.

68. *Id.*; *see also* Osher, *supra* note 62.

69. Wilson v. Arkansas, 514 U.S. 927 (1995); Richards v. Wisconsin, 520 U.S. 385 (1997).

70. Tracey Maclin, *On Amending the Fourth: Another Grave Threat to Liberty*, NAT'L L.J., Nov. 12, 2001, at A20.

71. *Id.*

72. *See* USA PATRIOT Act §§ 201-06 (2001); *see also* CONG. REC., *supra* note 66, at S10990, 11005-07.

authorized to access a protected computer and, as such, has no reasonable expectation of privacy with regard to communications transmitted through the computer accessed; hence, judicial oversight is not required. There must, however, be "reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant"[73] to a law enforcement investigation. This section is intended to provide for responses to cyberattacks that may be the work of organized crime or terrorists. Section 217 of the Act also protects government from liability for warrantless wiretaps; however, this provision does not appear to protect from liability the service provider who has provided services or technical assistance to the government.[74]

The Act expands the scope of subpoenas for records of electronic surveillance and amends existing law to authorize a subpoena for transactional records to determine the payment used by suspected terrorists in order to determine identities when persons are operating under aliases.[75] The Act also permits, though does not require, service providers to make emergency disclosure of electronic communications to protect life and limb. Thus, service providers could disclose their customers' electronic communications or records relating to such communications such as contents of stored mail and customer information. The provider must reasonably believe that an emergency exists involving immediate danger of death or serious bodily injury to any person to permit disclosure without delay. Under preexisting law, the provider was not authorized to disclose non-content information, such as subscriber login records.

The Act amends the statutory suppression of the evidence rule under the 1968 Wiretap Statute that provides that illegally intercepted wire or oral communications cannot be used in court or in agency hearings.[76] The Act extends the statutory exclusionary rule to electronic communications and applies to both real time and stored communications.

B. *Foreign Intelligence Surveillance Act of 1978*[77]

The key impact of Title II is the amending of the Foreign Intelligence Surveillance Act of 1978 in a manner that reflects modern reality. Section 204 of the USA PATRIOT Act separates foreign intelligence surveillance from the criminal procedure protections afforded to domestic wrongdoers.

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73. USA PATRIOT Act § 217 (2001).
74. *Id.* §§ 201-06.
75. *Id.*
76. 18 U.S.C. § 2515 (1968).
77. 50 U.S.C. § 1801 (1978).

The term foreign intelligence means "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, foreign persons, or international terrorist activities."[78] The term foreign intelligence information includes information about a U.S. citizen that concerns a foreign power or foreign territory and information relating to "the national defense or the security of the United States" or "the conduct of the foreign affairs of the United States."[79] Therefore, when information about a U.S. citizen's relationship with a foreign country or its government becomes available from a criminal investigation, that information is eligible to be disseminated widely as "foreign intelligence information."[80]

Investigatory authority is expanded in Section 204 of the Act by affirming the intelligence exceptions and disclosure of wire or oral electronic communications.[81] To this point, the Act grants federal agents expanded authority to conduct warrantless surveillance, provided that the primary purpose of the investigation is to obtain foreign intelligence information.[82] The Act amends the criteria for FISA authority by "striking 'the purpose' and inserting 'a significant purpose'"[83] of the investigation, meaning any relationship of the investigation to foreign intelligence is sufficient grounds.

The Act also permits investigators to obtain, in a less complex manner, wiretaps for activity on the Internet by expanding the previously discussed pen register statute to include electronic communications and Internet usage. It also allows the collection of information that is more private than IP addresses, which are, it is argued, the Internet's equivalent of phone numbers. Additionally, Internet service providers must make their services more wiretap friendly, giving law enforcement the ability to capture pen register information, or allowing the installation of Carnivore technology. Further, Section 209 treats voice mail messages as stored data subject to seizure under a search warrant, not a wiretap order.

One concern is that when sensitive information from the investigation of criminal cases is disseminated to agencies with intelligence, military, and other national security responsibilities, the risk that it will be deployed

78. 50 U.S.C. § 401a(2) (2001); *see Fact Sheet 9: Wiretapping/Eavesdropping on Telephone Conversation*, Utility Consumers' Action Network, Mar. 1993/Revised Aug. 2001; *see* Bruce Zagaris, *Counterterrorism and Economic Sanctions*, 17 INT'L ENFORCEMENT LAW REP. 480 (2002).

79. USA PATRIOT Act § 203 (2001).

80. *Id.*; *see*, Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839 (2003).

81. 50 U.S.C. § 1801 (1978).

82. *Id.* § 1801(c).

83. *See* Memorandum Op., *supra* note 56, at 613.

elsewhere is multiplied.[84] The Act includes a provision that is intended to guard against the expanded sharing of information from electronic surveillance. If the government uses the electronic surveillance procedures of the FISA to monitor the conversations of a person, and that information is disclosed without proper authority, under the Act, the aggrieved person may have an action against the federal government and recover money damages.

As a deterrent against malicious leaks, the Act includes procedures for administrative discipline. When a court or the appropriate agency determines that there are serious questions about whether or not an employee willfully disclosed information without proper authority, disciplinary proceedings are initiated. If the agency head decides that discipline is not warranted, he or she must notify the Inspector General with jurisdiction over the agency and provide the reasons for the decision not to impose discipline. This is not new — civil and criminal sanctions for violations by individuals of improper disclosure were initially authorized under the electronic surveillance legislation in 1968 and again in 1978.[85] The Act does, however, change surveillance and intelligence gathering procedures for all types of criminal and foreign intelligence investigations, not just for terrorism investigations.[86]

The Act also amends 50 U.S.C. § 1804(a)(7) and § 1823(a)(7)(B). Currently, when an application is made for an order for electronic surveillance, it must be upon a written request to the FBI Director, the Secretary of Defense, the Secretary of State, or the CIA Director. The request must certify that the purpose of the investigation is to obtain foreign intelligence information. The certification must be for an order against anyone that knowingly is engaging in espionage or terrorism and is not an agent of a foreign power. Under the old rule, the Attorney General had to personally review the order and foreign intelligence gathering had to be the sole or primary purpose of the investigation. Law enforcement must constantly evaluate the investigation and the courts ultimately determine whether this condition is met. Under the new rule, however, law enforcement has only to certify that the information gathering is a significant purpose of the investigation, and a judge must review it. The provision is designed to expedite the issuance of orders for foreign

84. CONG. REC., *supra* note 66, at S10990-11060.
85. *See generally* United States v. U.S. Dist. Court, 407 U.S. 297 (1972).
86. 50 U.S.C. §§ 1802, 1805(e) (1991).

information gathering; nevertheless, the user-friendly provision appears to have been misused by the FBI.[87]

Another controversial provision in the Act permits law enforcement to share information about foreign intelligence that is gathered during criminal investigations with specified law enforcement, protective, immigration, or national defense personnel when they are performing official duties. Currently, under the criminal code, it is difficult for law enforcement officials to share information (even when it is foreign intelligence information, including information from wiretaps authorized by the criminal code) with the intelligence community. Title II of the Act authorizes sharing of foreign intelligence information gathered by law enforcement in criminal investigation with those government officials who are intimately involved in transnational terrorism investigations. This would seem to also domesticate the CIA.

The Act lessens the government's burden by making it easier to subpoena business records. The revised law permits a national security letter to be issued when it is relevant to an authorized foreign counterintelligence investigation instead of the currently required certificate to obtain subscriber information and toll billing records of a wire or electronic communications service. The Act eliminates the showing of a nexus between the foreign agent and a possible violation of criminal laws, thereby decreasing the government's burden when pursuing investigations.[88] In order to quell the fear of those who argue that the Act unacceptably violates the values set forth in the U.S. Constitution, such as right of privacy and protection against unreasonable search and seizure, there is a partial four-year sunset provision which applies to the expanded surveillance authorities under the FISA. However, the sunset provision is not universal within the Act.

The Act is troubling. It alters the relationship between law enforcement and intelligence agencies. Long before the current crisis, many agencies worldwide argued that there was justification for expanding authority specifically for counterintelligence to detect and prevent international terrorism. However, the greatest departure from past recommendations is the Act's authorization to share foreign intelligence from criminal investigations with other federal law enforcement, intelligence, protective, immigration, national defense, or national security personnel. For example, under Section 203 of the Act, "matters occurring before a grand jury . . . when the matters involve foreign intelligence or country intelligence or

87. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 455-74 (Little, Brown & Co. 1990).

88. *See* Memorandum Op., *supra* note 56.

foreign intelligence information" may be disclosed to agents of the CIA, FBI, Secret Service, IRS, and OFAC, to name just a few.[89] The authority to investigate U.S. citizens in counterintelligence investigations involving terrorism and spying activities would, most probably, not change as a result of the Act.[90]

The authority to disseminate foreign intelligence from criminal investigations, including grand juries and law enforcement wiretaps, appears to be an invitation to expand the reach of law enforcement without special safeguards. There is, however, a provision to maintain a degree of judicial oversight of the dissemination of grand jury information. The National Security Act of 1947 had Cold War safeguards, drawing a sharp line between foreign intelligence and domestic law enforcement. The law which established the CIA, states that the CIA "shall have no police, subpoena, or law enforcement powers or internal security functions."[91] The Patriot Act in Title II seems to have voided this portion of the 1947 Act.

VIII. TITLE III OF THE USA PATRIOT ACT

Originally intended as a separate statute amending the 1970 Bank Secrecy Act, Title III has become the centerpiece of the USA PATRIOT Act.[92] Title III is also known as the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001 (IMLAA). Title III amends the Bank Secrecy Act in numerous, complex ways. In so doing, some sections are self-executing while others, such as section 352, require implementing regulations from the Department of the Treasury. For example, interim rules promulgated by Treasury establish obligations not only for banks, but also for savings associations, credit unions, brokers, dealers, and others. The Bank Secrecy Act regulations concerning financial institutions are amended to ensure increased and stronger due diligence by private banking, as well as regarding correspondent accounts. Strict "know your customer" requirements are now included. IMLAA also includes enhanced reporting mandates, and promulgates in-house anti-money laundering procedures. Foreign bank correspondent accounts must now

89. USA PATRIOT Act § 203 (2001).

90. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. § 1189.

91. National Security Act of 1947, 50 U.S.C. § 403(d)(3).

92. *See* Michael Zeldin & Edward Rial, *Anti-Money Laundering, USA Patriot Act*, NAT'L L.J., May 6, 2002, at A18.

have an identifiable ownership of foreign banks maintaining correspondent accounts in the United States.

Covered financial institutions are subject to additional regulations. The regulations prohibit correspondent accounts of foreign shell banks and enhance record keeping and reasonableness standards in ensuring that correspondent accounts are not employed by a foreign shell bank. A shell bank is a correspondent account with no identifiable ownership report; it is defined as a foreign bank without a physical presence in any country. Physical presence is an actual place of business.

It is the intent of Congress as expressed in Title III that banks and other financial institutions begin to follow "know your customer" practices with enhanced due diligence. If any jurisdiction or financial institution in or outside of the United States is a money laundering concern, the Secretary of the Treasury[93] will require any domestic financial institution or agency that opens or maintains an account, payable-through account, or correspondent account to identify the customer who is permitted to use or conduct transactions through the account and to obtain information about the customer that is similar to the information obtained during the regular course of business in a financial institution.[94]

IMLAA sets forth jurisdictions, institutions,[95] and types of accounts and transactions that are of primary money laundering concern and authorizes the Secretary of the Treasury to acquire information regarding a suspect from any financial institution. Some of the jurisdictional factors that are considered include:

(1) evidence that organized criminal groups, international terrorists, or both, have transacted business in that jurisdiction;

(2) the extent to which that jurisdiction or financial institutions operating in that jurisdiction offer bank secrecy or special regulatory advantages to nonresidents or non-domiciliaries of that jurisdiction;

(3) the substance and quality of administration of the bank supervisory and counter-money laundering laws of that jurisdiction;

(4) the relationship between the volume of financial transactions occurring in that jurisdiction and the size of the economy of the jurisdiction;

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93. *See* USA PATRIOT Act § 311 (2001) (amending 18 U.S.C. § 5318A).

94. Michelle Cottle, *Eastern Union: Hawala v. the War on Terrorism*, NEW REPUBLIC, Oct. 15, 2001, at 24, 38-40.

95. 31 U.S.C. § 5312 (defining broadly the financial institution); *see also* Zeldin & Rial, *supra* note 92, at A18.

(5) the extent to which the jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups;
(6) whether the United States has a mutual legal assistance treaty with that jurisdiction, and the experience of the U.S. law enforcement and regulatory officials in obtaining information about transactions originating in or routed through or to such jurisdiction; and
(7) the extent to which that jurisdiction is characterized by high levels of official or institutional corruption.[96]

The institutional factors considered are:

(1) the extent to which such financial institutions, transactions, or types of accounts are used to facilitate or promote money laundering in or through the jurisdiction;
(2) the extent to which such financial institutions, transactions, or types of accounts are used for legitimate business purposes in the jurisdiction; and
(3) the extent to which such action is sufficient to ensure, with respect to transactions involving the jurisdiction and institutions operating in that jurisdiction, that the purposes of this subchapter continue.[97]

Section 328 of the Act enlarges wire transfer provisions of the Bank Secrecy Act. IMLAA requires that the U.S. Attorney General and the Secretary of State encourage foreign governments to require the name of the original person in wire transfer instructions sent to and from the United States and other countries until the point of disbursement.[98]

IMLAA recognizes the high degree of usefulness of adequate records maintained by both insured depository institutions and uninsured institutions for criminal, tax, and regulatory investigations, as well as for intelligence or counterintelligence activities.[99] The Act mandates the availability of these records to governmental agencies for investigative and/or counterterrorism purposes.

Finally, bulk cash smuggling into or out of the United States is now a criminal offense.[100] The statute provides that whoever, with intent to evade a currency reporting requirement, knowingly conceals more than $10,000

96. USA PATRIOT Act § 311 (2001).

97. *Id.*

98. *See* USA PATRIOT Act § 314 (2001) (requiring the Secretary of Treasury to issue regulations encouraging information sharing among financial institutions, regulators, and law enforcement).

99. Further, Section 315 expands the list of specific unlawful activities considered to be crimes under 18 U.S.C. § 1956(c)(7) for money laundering. *Id.* § 315.

100. *See* United States v. Bajakajian, 524 U.S. 321 (1998).

in currency or other monetary instruments in the person's possession and transports, transfers, or attempts to transport or transfer such currency into or out of the United States will be punished under either or both criminal and civil statutes.[101]

IMLAA also amends the definition of "financial institution"[102] and "money transmitting businesses"[103] to include informal money transfer systems. Now, persons involved in the non-conventional financial market are also subject to mandatory records and reporting requirements of the Bank Secrecy Act.[104]

A. *Non-Conventional Exchanges*

Non-conventional financial institutions include underground banking. Underground banking systems are called, among other names, hawala or hundi.[105] Underground banking appears to be ideal for terrorists who want to transfer funds with virtually no record of the transaction.[106] The hawala system discretely moves funds around the world. Terrorists often use this age-old system because of the trust factor. The funds are moved by user-friendly hawala agents called hawaladars.[107] Hawala emerged several centuries ago as a way for Asian traders to avoid being robbed on their routes.[108] Pakistan estimates that $2.5 billion flowed into Pakistan in 2001 via hawala, as opposed to $1 billion via legitimate banks.[109]

Hawala works.[110] A person desiring to transfer money to another part of the world simply deposits money with a hawaladar.[111] Then, usually in about two or three days, the intended recipient can go to his local hawaladar and pick up the transferred funds, minus the hawaladar's fee[112] (a system which sounds similar to the Black Market Peso Exchange as defined by the U.S. Custom Service in July, 1999[113]). The process is

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101. *See* 31 U.S.C. §§ 5316 & 5372 (Supp. 2001).
102. *See* USA PATRIOT Act 18 U.S.C. § 328 (amending 31 U.C.S. § 5312 (a)(2)(R)).
103. *Id.* (amending 31 U.S.C. § 5330(d)(1)(A)).
104. *Id.* (amending 31 U.C.S. § 5312(a)(2)(R)).
105. Sapra India Bulletin Article, Underground Banking and National Security, *available at* http://www.subcontinent.com/sapra/bulletin/96feb-mar/si960308.html (last visited Sept. 15, 2003).
106. Cottle, *supra* note 94, at 38-40.
107. *Id.*
108. *Id.*
109. *Id.*
110. Katherine Macklem, *Follow the Money,* MACLEAN'S, Oct. 22, 2001, at 62.
111. *Id.*
112. Cottle, *supra* note 94, at 38-40.
113. *Id.*; *see also* U.S. Department of the Treasury, *FinCEN Advisory*, Issue No. 9, Nov. 1997.

quicker and cheaper than that of banks. Further, underground banking services parts of the world where banks' services are not readily available or do not exist.[114] The major benefit to terrorists is that the hawala system leaves virtually no paper trail; records are often kept in code and destroyed once the transaction is completed.[115] Hawala services function in the United States as well, usually in communities that have a significant South Asian population.[116]

Another non-conventional institution is the money transfer shop. In addition to hawala, terrorists use other more familiar money transfer mechanisms to distribute money worldwide.[117] Money transfer shops have flourished in the last decades due to the large number of immigrants desiring to send cash home.[118] Money transfer businesses like Western Union and MoneyGram facilitate the transfer of funds around the world in as little as fifteen minutes.[119] Western Union is the largest regulated money transfer business, with 124,000 agencies worldwide having completed 109 million transfers in 2001.[120] Those transfers amounted to over $40 billion. No bank account or background check is required and identification is often unnecessary unless the transfer exceeds $1,000.[121] The September 11 terrorists received transfers via Western Union about a year before the attacks.[122] Before September 11, 2001, several of the terrorists used Western Union to wire $15,000 to a person in the United Arab Emirates (UAE).[123] The money transferred just days before the attacks was apparently the unspent portion of the funds used to finance the attacks. Western Union also has an agent in the UAE that operates out of an al Baraka exchange storefront.[124]

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114. Tarik M. Yousef, *Terrorist Financing Mechanisms*, Congressional Testimony, Nov. 14, 2001.

115. Cottle, *supra* note 94, at 38-40.

116. *Id.*

117. *Id.*

118. Heather Timmons, *Western Union: Where the Money Is — In Small Bills*, BUS. WK., Nov. 26, 2001, at 40.

119. *Id.*

120. *Id.*; *see* Richard Stevenson & Leslie Wayne, *More Regulations to Thwart Money Laundering Are Imposed*, N.Y. TIMES, Apr. 23, 2002.

121. Timmons, *supra* note 118, at 40.

122. *Id.*

123. *Id.*

124. *Id.*

B. *Offshore Banking*

Although al-Qaeda may have curtailed its use of banks to move money throughout the world, banks continue to play an important role in the financing of terrorism.[125] Offshore banking centers are considered by some to be a heaven and a haven for terrorists who are looking for a place to store large sums of money while planning how to use it.[126] Some, though certainly not all,[127] of the offshore banking centers have lax regulations.[128] Furthermore, some offshore centers have correspondent banking relationships with many of the world's largest banks.[129] These are the conclusions of IMLAA. The Act now mandates strict regulations with respect to correspondent banking. Nevertheless, unregulated banks can, it would seem, still be user-friendly. This is why IMLAA focuses upon banks licensed in user-friendly states designated: (i) non-cooperative with international money laundering principles or, (ii) warranting special measures due to money laundering concerns.[130]

It is alleged that al-Qaeda moves its money through a network of under-regulated banks, and then, when the source of the money is sufficiently disguised, it moves it into safer G-7 financial institutions.[131] After the terrorists route their money through these under-regulated systems, often in accounts registered to shell companies or legitimate businesses, the money appears to be clean.[132] Investigators report that bin Laden maintained accounts at the discredited Bank of Credit and Commerce International (BCCI).[133] The United States detained one person after he donated $2 billion to al-Qaeda. He was said to be a former director of BCCI.[134]

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125. David Kaplan, *How a Terror Funds Attacks — and Hides Its Tracks*, U.S. NEWS & WORLD REP., Oct. 1, 2001, at 20.

126. Adam Cohen, *Banking on Secrecy; Terrorists Oppose Scrutiny of Offshore Accounts and So Do Many United States Bankers and Lawmakers*, TIME, Oct. 22, 2001, at 73.

127. 32 U.S.C. § 5318(1)(4)(A).

128. *See* Cohen, *supra* note 126.

129. *Id.*

130. *See* Non-Cooperative Countries and Territories, *available at* http://www1.oecd.org/fatf/ncct_en.htm (last visited Nov. 6, 2003).

131. William F. Wechsler, *Follow the Money*, FOREIGN AFF., July/Aug. 2001, at 40.

132. *Id.*

133. Maeve Sheehan, *Dublin Link to Heart of Terror Cash Network*, SUNDAY TIMES (London), Sept. 30, 2001.

134. *Id.*

The question remains whether the Act will be adequate to effectively counter money laundering and terrorism.[135] The Act has now placed more restrictions than ever before on domestic financial institutions and/or agencies that open or maintain private bank accounts in the United States, and for foreign international banks to do away with secrecy rights, requiring these foreign international banks to identify each customer who accesses the account under similar "know your customer" standards that are used for U.S. customers of U.S. banks. In addition, the Act requires identification and authentication of original persons in wire transactions.[136]

Consider that al-Qaeda wired large sums of money to terrorists' accounts in Florida.[137] The money, it is alleged, was then used to purchase flying lessons at numerous flying schools.[138] The events simply point to the fact that governments face many obstacles in identifying, locating, and seizing terrorist funds. Current money laundering detection techniques have been geared toward the detection of large sums sent regularly or frequently.[139] Terrorist funding, on the other hand, seems to be transmitted in much smaller amounts and on an irregular or infrequent basis.[140]

Another major problem is that some countries' entire banking industry is built on strict bank secrecy.[141] While many countries in the past have opposed stricter regulation and greater financial transparency, recent events have caused them to recognize the impact upon world order of continued strict bank secrecy.[142] International cooperation has increased exponentially since September 11, 2001.[143] Some countries, however, are still reluctant to release information about some organizations designated by the United

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135. *See* Zagaris, *supra* note 78; *see* Report of the National Commission on Terrorism, *Countering the Changing Threat of International Terrorism* [hereinafter Report], *available at* http://www.fas.org/irp/threat/commission.html (last visited Sept. 15, 2003).

136. Ottawa Communique of G-7, Feb. 9, 2002, *available at* http://www.un.org/esa/ffd/themes/g8-20.htm#Debt (last visited Sept. 15, 2003).

137. Daniel Klaidman & Mark Hosenball, *On the Trail of the Paymaster*, NEWSWEEK, Nov. 19, 2001, at 38.

138. *Id.*

139. Mike McNamaee, *A Hard Slog for Financial "Special Forces,"* BUS. WK., Nov. 26, 2001, at 39.

140. *Id.*

141. *See* Wechsler, *supra* note 131.

142. *See, e.g.*, Ulrika Lomas, *Naming and Shaming Banks is "Useful," Says Swiss Bankers Association Chief*, TAX-NEWS.COM., BRUSSELS, Nov. 14, 2001, *available at* http://www.tax-news.com/asp/story/story.asp?storyname=6245 (last visited Oct. 9, 2003); *see* Bruce Zagaris, *FATF Adopts New Standards to Combat Terrorist Financing*, 17 INT'L ENFORCEMENT L. RPT. 493 (2001).

143. U.S. Report, *supra* note 59.

States as terrorists.[144] The reality is that what constitutes a terrorist group to U.S. authorities might not be so designated by the European Union or others. The matter, nevertheless, is global in nature; the concerns are not local, and one nation cannot successfully go against it alone.

Added to the mix is the fact that prior to September 11 the procedures for detecting and reporting suspicious transfers did not work as effectively as envisioned. The suspicious activity reports sent to understaffed agencies sometimes would take a week or longer to process and in that amount of time the money may already have been put to use.[145] If nothing else is clear, it is understood that terrorists generally have a wealth of funding sources to draw from in order to finance their terror.[146] Thus, what is important under IMLAA is the emergence of enhanced due diligence policies and controls, new predicate offenses, expanded forfeiture programs, strict controls over correspondent bank accounts, long arm jurisdiction over foreign money launderers, and increased civil and criminal penalties.

C. *Other Provisions*

There are additional provisions in the Act which provoke controversy.

Title IV: Section 411 defines terrorism and Section 413 identifies terrorist organizations in the name of national security, which permits detention of suspected noncitizen terrorists; further, these provisions limit judicial review.[147]

Title V: In addition to requiring closer cooperation and coordination among law enforcement as discussed previously, Section 507 permits disclosure of educational records under the National Education Statistics Act.[148] The purpose is to aid in the investigation and prosecution of terrorists. Questions of privacy are not dealt with, presumably leaving the matter to judicial review.

Title VIII: This defines the federal crime of cyberterrorism and focuses upon terrorist attacks. Title VIII also expands upon the concept of terrorism, terrorists, those harboring terrorists and seizure of terrorists assets, foreign or domestic. Title VIII encourages *in rem* seizure of all assets derived from, involved in, or used or intended to be used to commit any act of domestic international terrorism against U.S. citizens or

144. Paul Shukovsky, *Russians Urge FBI to Close the al Qaeda Linked Bank Account with Chechen Connections*, BULL. FRONTRUNNER, Nov. 15, 2001.

145. Cohen, *supra* note 126, at 68.

146. Osher, *supra* note 62; *see* Eichenwald, *supra* note 44, at B4.

147. USA PATRIOT Act §§ 411, 413 (2001).

148. *Id.* § 507.

residents, or their property. Section 806 is significant because it places terrorists in the same category as that of organized crime.[149]

Finally, the Act reaffirms and adds to the Critical Infrastructure Protection Act of 2001,[150] as well as the Crime Identification Technology Act of 1998.[151] What is noticeably in short supply in the Act are provisions recognizing the role of Article III of the U.S. Constitution; that is, the role and scope of U.S. federal courts in the fight against terrorism. The Act expands the numbers of the secret federal court which meets to approve or disapprove warrants requested by federal law enforcement.

IX. SELF-PRESERVATION

A society has a duty to protect its own existence. The majority in the society have the right to follow their own moral convictions in defending their legal, social, and economic environment from changes or assaults it opposes. Within the United States, these principles implicate constitutional values. For example, prejudice based upon appearance is an unacceptable, emotion-based harm (for example, discrimination because an individual is Arabic). This is unacceptable unless a factual basis for the prejudice emerges (for example, if terrorism impacts domestic security). Otherwise, prejudice will not be formalized into law, and indeed the law must discourage its circumvention in the name of expediency. The point is, government intrusion as well as moral conviction must, short of actual war (and in some instances, de facto war), be tested within the context of constitutional credentials.

It is argued that the U.S. policies established to fight terrorists stem from a desire to protect commercial and economic interests and to ensure market and social stability globally. At certain junctures since September 11, 2001, the goals and policies are at odds with notions of constitutional protections. Each day terrorists become more proficient in their illicit designs and more worldwide in scope. Just as one expects protection for arcane systems of commerce, the new challenges and threats appear to governmental authorities to be growing beyond constitutional and human rights parameters.

149. *Id.* § 806.
150. *Id.* § 1016.
151. 42 U.S.C. § 14601 (2000).

X. PRIVACY

Privacy is a major concern. For example, computer source code is a language that speaks and functions in similar ways to other symbol systems. Just as other languages are combinations of letters and sounds to be written or spoken in order to convey meaning, so too is computer source code a construct of human engineering. The debate surrounding government's insistence upon an encryption key (or keys) to protect national security pits privacy versus governmental self-preservation. The battle lines have become a synthesis of international concerns about these borderless technologies and their impact upon matters of privacy as well as governmental self-preservation.[152]

The Internet changes database privacy,[153] i.e., personal data, in that it eases access to numerous databases.[154] These databases may have previously been accessible, but only rarely; whereas now accessing transnational databases is as easy as pushing a computer key.[155] The issue is merely a quantitative one, but when the information is a transfer of military secrets or a matter of security interest, legal concerns will be generated, indeed are being generated, where none were previously warranted.[156] Terrorists and the Internet have impacted constitutional concerns about privacy. Qualitative privacy is no longer a reality.[157]

Terrorism conjures up the notion that conceptions of privacy are dependent upon society's technology. This notion has at its core the belief that the Internet is not changing views of how privacy may be invaded, but how it is shaping the very idea of what expectations of privacy are or have become, especially within the context of the Act. Prior to September 11, 2001, privacy was measured by a reasonable expectation of privacy standard.[158] Since the U.S. Supreme Court in *United States v. Miller*[159] held that there is no expectation of privacy in banking records, the question of retaining a zone of privacy around informational data remains

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152. *See generally* Critical Infrastructure Protection and the Endangerment of Civil Liberties, Electronic Privacy Information Center Washington (1998), *available at* http://www.epic.org/security/infowar/epic-cip.html (last visited Sept. 15, 2003).

153. Frederick Schauer, *Internet Privacy and the Public-Private-Distinction*, 387 JURIMETRICS J. 555-56 (1998).

154. *Id.*

155. *Id.*

156. *Id.* at 558-59.

157. *Id.* at 559.

158. Schauer, *supra* note 151, at 562 (quoting Katz v. United States, 389 U.S. 361 (1967)).

159. 425 U.S. 435 (1976).

unanswered,[160] and, therefore, strengthens the Act's commands of Title III. Whether an expectation of privacy exists in electronic commerce transactions, electronic data collection, storage, and dissemination may ultimately depend upon how technology, and the Internet in particular, has been transformed and molded by terrorists organizations and user-friendly states.[161]

XI. ROLE OF THE COURTS

As the changes in the current legislation are implemented, it remains to be seen whether the changes will withstand constitutional challenges in the United States or indeed whether judicial review will survive jurisdictional challenges when based upon matters involving national security. Past examples assist in answering these questions.

A. *FISA, Challenged and Sustained*

For example, the constitutionality of the Foreign Intelligence Surveillance Act has been judicially challenged and sustained on several grounds.[162] But it is important to note that, first and foremost, the courts assumed jurisdiction. Those cases, along with the lower courts' analysis of constitutional challenges and procedures, support the conclusion that if the U.S. Supreme Court determines constitutional difficulties exist within portions of any legislation presenting a federal constitutional issue, it will not hesitate to rule. Even within the context of international terrorism, courts rule.[163] Surveillance and national security as developed in the FISA Act are good examples. Generally, U.S. courts have consistently held that both the electronic surveillance and the physical search provisions of FISA are valid. In cases such as *United States v. United States District Court*,[164] the Supreme Court has concluded in dicta, since it was a decision prior to FISA, that foreign intelligence surveillance satisfies the constraints the Fourth Amendment places upon surveillance conducted by the government.

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160. *Id.* at 563.

161. *Id.* at 563-64.

162. *See* In the Matter of Application of the United States for an Order Authorizing the Physical Search of Non-Residential Premises and Personal Property, U.S. Foreign Intelligence Surveillance Court, 1981 unnumbered slip op.; *see* DYCUS ET AL., *supra* note 87, at 469.

163. *See* United States v. Bin Laden, 160 F. Supp. 2d 670 (S.D.N.Y. 2001) & 126 F. Supp. 2d 264 (S.D.N.Y. 2000).

164. United States v. U.S. Dist. Court, 407 U.S. 297 (1972); *see also* United States v. Cavanagh, 807 F.2d 787 (9th Cir. 1987).

The Court noted that the standard of probable cause necessary to justify surveillance to protect national security is not necessarily the same standard as that for general criminal warrants.

Lower courts have also addressed the argument that the need for foreign intelligence surveillance does not justify an exception to the warrant requirement. In *United States v. Pelton*,[165] the Court of Appeals held that FISA has numerous safeguards that provide sufficient protection under the Fourth Amendment. The court recognized that "[t]he governmental interests in gathering foreign intelligence are of paramount importance to national security; and may differ substantially from those presented in the normal criminal investigation."[166] However, even given these differences, unlawful government intrusions upon personal civil liberties are prevented by the independent judicial review mandated by FISA and the limitations placed on the exercise of FISA powers. The courts have found that the use of FISA against terrorist organizations has been, for the most part, constitutional. Innovative techniques to suppress and deter terrorists are being developed including tracking terrorists and their illicit money. Changing technology continues to be addressed in the courts and it is not enough to simply argue that new techniques are required for rapid response to terrorist threats.[167]

The question remains whether the Act will be adequate to effectively counter money laundering and terrorism.[168] The Act has placed more restrictions than ever on domestic and foreign financial institutions and/or agencies that open or maintain private bank accounts in the United States.[169]

A recent Supreme Court case, *Kyllo v. United States*,[170] although not directly dealing with national security threats, is significant. *Kyllo* involves domestic treatment of the Fourth Amendment. The *Kyllo* Court attempts to reconcile law enforcement with new and complex technology. Since at least 1967, the focus of a court has been a person's expectation of privacy and whether society is prepared to honor that expectation as being reasonable in nature.[171] In *Kyllo* the majority concluded that an advanced

165. 835 F.2d 1067, 1075 (4th Cir. 1987), *cert denied* 486 U.S. 1010 (1988).

166. *Id.* (citing *U.S. Dist. Court*).

167. Dorothy Denning, *Cyberterrorism, available* at http://www.cosc.georgetown.edu/~denning/infosec/cyberterror.html (last visited Sept. 15, 2003).

168. *See* Zagaris, *supra* note 142; *see also* Report, *supra* note 135.

169. Ottawa Communique, *supra* note 136.

170. 533 U.S. 27 (2001).

171. *See* Katz v. United States, 389 U.S. 374 (1967).

technology, such as the Agema Thermovision 210[172] which is able to reveal details of an intimate nature from without, must give way to the Fourth Amendment demand for privacy unless the sense-enhancer device has been in general use exploring other intimate details without physical intrusion. If it has not been in general use, it is presumptively unreasonable. If it is in general use, for national security purposes the *Kyllo* Court appears prepared to permit domestic invasions without a warrant as well. The critical term is national security and whether government has successfully made its case in each individual instance. *Kyllo* would seem to allow "[c]ountervailing technologies that defend against government surveillance . . . as they improve and become more widespread, [which may] offset the privacy-threatening effects produced by the dispersion of surveillance technology into general use."[173]

There is additional help in understanding just how the federal appeals courts will respond to the USA PATRIOT Act. Consider, for example, 8 U.S.C. § 1189 which empowers the Secretary of State to designate a foreign organization as a terrorist if the Secretary finds that the organization is: 1) foreign; 2) engages in terrorist activity (as Congress had defined it); and 3) threatens the security of the United States,[174] then the ramifications of such a designation would permit the government to, among other things, freeze the organization's assets.[175] Should such designation by the Secretary be subject to review by the courts? Two recent cases illustrate the historical role the courts serve where threats to national security are at issue.

B. People's Mojahedin Organization of Iran v. United States Department of State[176]

In *Mojahedin*, although the circuit court took jurisdiction, it did recognize its inability to gauge the accuracy of the facts the Secretary of State compiled as an evidentiary record regarding terrorist designation.[177] The fact is that, unlike other run-of-the-mill administrative proceedings, in *Mojahedin* there was no adversary hearing, no presentation of what courts and agencies consider to be evidence, and no advance notice to the entity

172. *Kyllo*, 533 U.S. at 27.

173. Leading Cases, *Fourth Amendment Warrantless Searches — Surveillance Technology*, 115 HARV. L. REV. 346, 354 n.69 (2001).

174. 8 U.S.C. § 1189 (2001).

175. *Id.* § 1189(a)(2)(C).

176. People's Mojahedin Organization of Iran v. U.S. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999); NCRI v. U.S. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001).

177. *Mojahedin*, 182 F.3d at 19.

affected by the Secretary's internal deliberations.[178] Because the matter involved a question of national security, the Secretary needed only to accumulate information on the targeted terrorist organization.[179]

C. National Council of Resistance of Iran v. United States Department of State[180]

In *NCRI v. United States Department of State*, two organizations, the National Council of Resistance of Iran (Council) and the PMO petitioned the district court for review of the Secretary's designation of them as terrorist organizations.[181] The *NCRI* court determined that in this case, unlike in the *Mojahedin* case, the groups designated as terrorist were denied due process rights since they had acquired property in the United States (in the form of a small bank account) that the *NCRI* court said was placed in jeopardy by government intervention.[182] The *NCRI* court accepted the Secretary's conclusions that the Council was merely an alias for the PMO and lumped these two organizations together as one before the *NCRI* court set out to arbitrate a reasoning which created due process rights for the organization.[183]

Before the Secretary of State designates an organization terrorist, he or she must notify specific members of Congress by classified written communication. The designation becomes effective seven days later.[184] The *Mojahedin* court, as noted, rejected the PMO's argument that the U.S. Constitution's Fifth Amendment Due Process Clause prohibits the government from condemning organizations without giving them notice and an opportunity to be heard.[185] It recognized that the statute's administrative record requirement supporting the Secretary's designation was unlike the normal run-of-the-mill administrative proceedings of U.S. agency law.[186] It remained for the *Mojahedin* court to determine what "substantial support"[187] the Secretary would need in order to properly designate a group as terrorist.[188] The administrative record, which a given

178. *Id.*
179. *Id.*
180. *NCRI*, 251 F.3d at 192.
181. *Id.*
182. *Id.* at 193.
183. *Id.* at 199.
184. 8 U.S.C. § 1189(a)(2).
185. *Mojahedin*, 182 F.3d at 22.
186. *Id.* at 19.
187. 8 U.S.C. § 1189 (b)(3).
188. *Mojahedin*, 182 F.3d at 24; *see also* 8 U.S.C. §§ 1189(a)(1)(B) & 182(a)(3)(ii).

petitioner could attack for insufficient or unsubstantiated accusations, can have classified materials not available for public discourse or review,[189] or nothing more than news reports, Internet information, third-hand accounts and other hearsay which have not been subjected to any type of adversarial examination.[190] The *Mojahedin* court recognized an issue of balance of power.

Balance of power issues, such as the scope of judicial review or the discretion accorded to the executive in taking action against suspected foreign terrorist organizations, are sources of great concern to the courts.[191] If a court, upon judicial review, invokes a minimal interpretation of the statute and the requirement that the Secretary compile a record that substantially supports the terrorist designation, such an interpretation may leave limited room for judicial review.[192] The argument is that if a court's only function is to decide whether the Secretary simply had enough information to make his or her designation, then the Secretary would have broad and unfettered discretion in the fact-finding process, immune and isolated from judicial scrutiny.[193] A court would function as a mere rubber stamp of the Secretary's actions, thereby, allowing the reputation of the judiciary to be "borrowed by the political branches to cloak their work in the neutral colors of judicial action."[194]

However, if courts were to take a more stringent interpretation of the statute, it would perhaps serve as an impediment to the efficiency and strength of the Secretary's determination. Arguably, it would undermine the very power of the Executive Branch, creating a precedent backlog of cases where the Secretary's findings are overturned by actively maximus courts, resulting in the judiciary's undertaking unnecessary detective work of suspicious executive decisions in the very sensitive political arena of foreign terrorism (an area in which the judiciary lacks expertise). After the events of September 11, 2001, it is unlikely that the courts will be second-guessing and engaging in critical reviews of the Secretary's designations.[195]

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189. *Mojahedin*, 182 F.3d at 19.

190. *See generally* Alan Wolfe, *The Home Front: American Society Responds to the New War*, *in* HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR (James Hoge, Jr. & Gideon Rose eds., 2001).

191. *See also* 8 U.S.C. § 1189 (2001).

192. Derek P. Jinks, *International Decision:* People's Mojahedin Organization of Iran v. United States Department of State, 182 F.3d 17 (D.C. Cir. 1999), 94 AM. J. INT'L L. 396 (2000).

193. *Id.* at 399.

194. *Id.* at 400; *see also* Misretta v. United States, 488 U.S. 361, 407 (1989).

195. After this date, the law will be in a process that will potentially expand it, and make it more easy to collect, gather, and adjudicate information on potential terrorist activity.

The *Mojahedin* court undertook the former minimal approach, taking a hands-off approach with respect to the Secretary's findings.[196] The *Mojahedin* court took the sort of interpretation we will probably see much more of in the future. The *Mojahedin* court stated that:

> We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. . . . The record consists entirely of hearsay. . . . Her conclusion might be mistaken . . . something we have no way of judging.[197]

The statute was meant to give the judiciary the opportunity to analyze terrorism in a legal context.[198] In legal contexts, courts are used to the rules of evidence, the procedures of administrative practice, and the constitutional demands of due process or notice. However, the concept and philosophy of terrorism is usually not a legal one, but a political or religious one, rooted in desire and ideology, not necessarily money or legality.[199] As such, the politics and ideologies that are inherent in terrorism are the paper trails that will lead the evidentiary way to the rule of law. The terrorist battles are fought on diplomatic and political fronts through treaties, and the rule of law intrudes by way of judicial review.[200]

Of course, the issue is not whether a terrorist organization will be brought to justice, but rather what rights they will be afforded. The courts will, in the final analysis, determine what organizations are entitled to the full range of U.S. constitutional rights. It seems that foreign organizations that have unclear mission statements, that are engaged in undermining political schemes around the world, and that are in many ways linked to terrorism are by their very definition unconventional; however, if domestic links are apparent, then there is entitlement to most conventional constitutional rights. Here, the standard of evidence relied on by the Secretary, and eventually a reviewing court, is what is at dispute, which includes the issue of procedural rights for foreign organization engaged in illicit activity outside the territorial limits of the United States.[201]

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196. Jinks, *supra* note 190, at 399.

197. *Mojahedin*, 182 F.3d at 25.

198. Jinks, *supra* note 190, at 400.

199. *Id.*

200. *See* Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1643, 860 U.N.T.S. 105; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

201. 8 U.S.C. § 1189 (2001).

The PMO argued that it had been denied due process of law partly because the Secretary's designations had the effect of making it a crime to donate money to the organization.[202] However, the *Mojahedin* court pointed out that these groups did not have any U.S. ties, including ties to financial institutions holding any of their property.[203] From the facts as presented in a non-criminal context, the PMO had no presence in the United States.[204] Thus, the *Mojahedin* court stated that a foreign entity without property or presence in the United States has no constitutional rights under the due process clause or otherwise.[205] Alien organizations are to receive constitutional protections only when they have come within the territory of the United States and developed substantial connections within the country.[206] The *Mojahedin* court considered the rights which the PMO enjoyed purely statutory.[207] These organizations had the right, for instance, to seek a court's judgment about whether the Secretary followed statutory procedures or whether she made the requisite findings, or whether she assembled a record which substantially supported her findings.[208] However, one of the statutory findings which the Secretary is duty bound to make is whether the terrorist activity by the alien organization threatens the security of the United States; that conclusion is not subject to judicial review.[209] It

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202. *Mojahedin*, 182 F.3d at 19.

203. *Id.* at 22. "Aliens receive constitutional protections only when they have come within the territory of the United States and developed substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990); *see also* Regan v. Wald, 468 U.S. 222 (1984).

204. *Mojahedin*, 182 F.3d at 19.

205. *Id.*

206. *Id.*

207. *Id.*

> Whatever rights the LTTE and the PMO enjoy in regard to these cases are statutory rights only. Because Congress so allowed, the LTTE and the PMO are entitled to contest their designations on the grounds set forth in § 1189(b)(3). Under the statute, they may for instance seek our judgment about whether the Secretary followed statutory procedures, or whether she made the requisite findings, or whether the record she assembled substantially supports her findings.

Id.

208. *Id.*

209. *Mojahedin*, 182 F.3d at 23; "Of the three findings mandated by § 1189(a)(1), the third (C) the terrorist activity of the organization threatens the security of the United States nationals or the national security of the United States is non-justiciable." Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

> It is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

is a political judgment reserved for the foreign policy expertise of the executive, a judgment call beyond the aptitude, facilities, and responsibilities of judicial inquiry.[210]

The *Mojahedin* court stated that courts do not have to assume whether the Secretary was right or wrong,[211] but only whether the Secretary had a quantitively adequate record upon which to rely (the minimalist approach).[212] This ruling is rooted in the idea that the appeals courts are designed to review judgments.[213] In the realm of administrative decisions, courts are not to engage in the choice of deciding whether the agency engaged in the right-result or the wrong-reason.[214] A court's function is to remand the case back to the agency if deemed necessary to adjust its reasoning or alter its result.[215] The *Mojahedin* court was content with the minimal role that Congress intended within the national security context.[216]

In order for a foreign entity to obtain constitutional protections under due process or otherwise, that entity must have come within the territory of the United States and developed substantial connections with the country.[217] The *Mojahedin* court's main task is to judge[218] whether the Secretary had enough information upon which to rely for her designation.[219] But it is still left to the *Mojahedin* court to determine what substantial connections an organization needs to have in the United States in order to be afforded due process.[220] This is the importance of the *NCRI* case.[221]

The *NCRI* court focused upon whether the Secretary, on the face of things, had enough information before her to conclude that a particular organization is terrorist.[222] Thus, the dynamic of judicial review in the foreign organization (civil) context is reduced to a quantitative judgment of how much information the Secretary has relied upon rather than a

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Id. at 111.

210. *Mojahedin*, 182 F.3d at 23-24.

211. *Id.*

212. *Id.*

213. *Id.* In cases on appeal from the district court, courts are to review judgments, not opinions. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

214. *Mojahedin*, 182 F.3d at 23.

215. *Id.*

216. *Id.; see also* Jones v. United States, 137 U.S. 202 (1890).

217. *Mojahedin*, 182 F.3d at 22.

218. *Id.* at 19.

219. *Id.* at 25.

220. *Id.* at 22. "A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

221. NCRI v. U.S. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001).

222. *Id.* at 196, 199; 8 U.S.C. § 1189(b) (2001).

qualitative judgment of what kind of information was relied upon.[223] The *NCRI* court focused its rationale on aspects of designating that were not dealt with in the *Mojahedin* case.[224] The *NCRI* court concluded that the Secretary's designation of the Council as an alias for the PMO was substantially supported by the record and was neither arbitrary, capricious, nor otherwise unlawful.[225] The ramification of the *NCRI* court approving the Secretary's finding that the Council was a mere cover or alias for the PMO may have actually found more rights available than the *Mojahedin* court was willing to concede.[226]

Constitutional presence in the United States as found by the *NCRI* court was sufficient to grant the petitioners more rights than the petitioners were given in *Mojahedin*. The *NCRI* re-assessed the PMO's presence in the United States by claiming that although the PMO had not established a constitutional presence by 1997, it had established a presence by 1999, along with a record.[227] The controversy was whether the Council had actually developed the substantial connections[228] necessary to characterize a presence in the United States.[229] The *NCRI* court rationalized its decision by engaging in a review of several cases, dissecting and compartmentalizing the legal English vernacular into critical adverbs and nouns.[230] The Court's interpretations of these prior cases and its reasoning came full circle. After having reviewed the entire record, the PMO had sufficient presence in the United States to grant it constitutional rights.[231] Further, because the Council was merely the PMO's alias, it also had a right to Fifth Amendment due process.[232]

The *NCRI* court ignored the fact that in dealing with foreign or alien organizations, the United States has frequently exercised its inherent powers of external sovereignty, independent of the grants of the U.S. Constitution.[233] Thus, the *NCRI* court escaped the sovereign versus constitutional dilemma[234] by noting that because neither the Council nor the

223. *NCRI*, 251 F.3d at 196.
224. *Id.*
225. *Id.* at 197.
226. *Id.* at 198-99
227. *Id.*
228. *NCRI*, 251 F.3d at 199.
229. *Id.* at 201.
230. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).
231. *NCRI*, 251 F.3d at 203.
232. *Id.* at 204.
233. Jinks, *supra* note 190; *see* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 561 (1999).
234. *NCRI*, 251 F.3d at 202-03.

PMO are governments, but merely organizations, the Secretary's argument and authority that the United States should deal with foreign organizations through sovereign contexts instead of constitutional ones has no weight. The USA PATRIOT Act soon to follow would seem to take issue with the *NCRI* court's conclusion.[235]

The *NCRI* court concluded that the Secretary has given no reason not to award a pre-deprivation due process hearing.[236] The *NCRI* court seemed to take the position that national security was a question of what kind of hearing the petitioners should get as opposed to when they should get it.[237]

In the end, at least according to the *Mojahedin* and *NCRI* cases, a given foreign organization being considered by the Executive Branch as terrorists thus subject to civil sanctions could arguably expect the following rights:[238]

1) If the foreign organization has some form of property interest in the United States (perhaps a small bank account or even a closet-size office with a telephone and chair would suffice), they are entitled to the constitutional rights of Fifth Amendment due process which includes:

— Pre-deprivation notice of unclassified evidence pointing toward the organization in question as "terrorist" (unless the Secretary can prove a particular need or urgency to not give early notice).

— The opportunity to present (at least in written form) evidence which can rebut the administrative record or negate the "terrorist" proposition.[239]

2) If the organization cannot prove some sort of property interest in the United States, it will not be afforded Fifth Amendment due process rights and will at best receive a post-designation notice.[240]

The point is that reasonable measures to protect against international terrorism implicate all three branches: the executive, legislative, and judicial, as well as the international community.[241]

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235. *Id.*

236. *Id.*

237. *Id.* at 207. "Certainly the United States enjoys a privilege in classified information affecting national security so strong that even a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality." United States v. Yunis, 867 F.2d 617 (D.C. Cir 1989).

238. *NCRI*, 251 F.3d at 207. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

239. *NCRI*, 251 F.3d at 205-07.

240. People's Mojahedin Org. Of Iran v. U.S. Dep't of State, 182 F.3d 22-23 (D.C. Cir. 1999).

241. *See* 8 U.S.C. § 1531 (2001); Klareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999).

XII. CONCLUSION

Overall, the USA PATRIOT Act is designed to support law enforcement in addressing complex issues regarding the role of money laundering, asset forfeiture, intervention into foreign affairs, and control of complex technology in terrorism. The Act is not intended to implement a due process model of constitutional adjudication. It is instead a crime control model; a model which receives its signals from modern U.S. Supreme Court jurisprudence. The President speaks in terms of a war on terrorism. This is, however, an undeclared war. The President suggests that this war will require patience, determination, and resolve. Judicial review and world-wide concerns cannot be ignored. Judicial review is constitutionally mandated where constitutional issues emerge. Worldwide input is reflected in the U.N. Charter, as well as Resolution 1373. The traditional role of the U.S. federal judiciary is, in part, to focus upon law enforcement and ensure that any attempt, even temporary, at derailing legitimate constitutional human rights freedoms is itself considered an affront to democratic values.[242] The traditional constitutional role cannot be eroded by fear or instant fixes. Although a society has a duty to protect its own existence, the majority in the society have the right to follow their own moral convictions in defending their social environment from assaults from within or without, and to ensure that their society works successfully. These concepts must continue to include constitutional and transnational values. It is unacceptable to infringe upon and diminish these values unless a tested factual basis for infringement emerges.[243] It is not adequate enough to simply formalize into law alterations to human rights values through speeches to user-friendly audiences. Governmental intrusion must be tested within the context of compelling credentials.

242. *See* Fletcher Baldwin, *The United States Supreme Court: A Creative Check of Institutional Misdirection*, 45 IND. L.J. 550 (1970); *see also* Zagaris, *supra* note 142, at 526; Zadvydas v. Davis, 533 U.S. 678 (2001).

243. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961).