

Fall 2004

## The Domestic Security Enhancement Act of 2003: A Glimpse Into a Post-Patriot Act Approach to Combating Domestic Terrorism, 38 J. Marshall L. Rev. 327 (2004)

Timothy Scahill

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Jurisprudence Commons](#), [Law Enforcement and Corrections Commons](#), [Legal History Commons](#), [Legislation Commons](#), [Litigation Commons](#), [National Security Law Commons](#), and the [President/Executive Department Commons](#)

---

### Recommended Citation

Timothy Scahill, The Domestic Security Enhancement Act of 2003: A Glimpse Into a Post-Patriot Act Approach to Combating Domestic Terrorism, 38 J. Marshall L. Rev. 327 (2004)

<https://repository.law.uic.edu/lawreview/vol38/iss1/12>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

# THE DOMESTIC SECURITY ENHANCEMENT ACT OF 2003: A GLIMPSE INTO A POST-PATRIOT ACT APPROACH TO COMBATING DOMESTIC TERRORISM

TIMOTHY SCAHILL\*

“They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”

-Benjamin Franklin<sup>1</sup>

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.<sup>2</sup>

## I. INTRODUCTION

Justice Davis’s famous quote from *Ex parte Milligan*,<sup>3</sup> cited above, was the unequivocal construction mandated by the Constitution of the United States: there is to be one law in times of war and in times of peace.<sup>4</sup> Since 1866, when *Milligan* was decided, the Supreme Court has nonetheless permitted the curtailment of certain constitutional protections by the Executive and Legislative branches during times of war or perceived

---

\* J.D. Candidate, May 2005. This Comment is dedicated to the memory of Patricia Gerdes, who provided me with assistance, friendship, and inspiration in the publication of this Comment and throughout my law school career.

1. BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759), reprinted in THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS 141 (Anthony Jay ed., 1996).

2. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866).

3. *Id.*

4. PETER IRONS, A PEOPLE’S HISTORY OF THE SUPREME COURT 188-89 (2d ed. 2000).

emergency.<sup>5</sup> The “one law in war and peace” construction of the Constitution espoused by the *Milligan* doctrine has been replaced to varying extents by a doctrine that can be best summarized by the Latin maxim *inter arma silent leges*, which means “in the time of war the laws are silent.”<sup>6</sup> While constitutional protections are rarely so abrogated that the laws are completely silent, civil liberties have not occupied as favorable a position in wartime as they have during times of peace.<sup>7</sup>

During almost every major emergency in which the United States has been engaged, there has been some curtailment of formerly guaranteed civil liberties. This was ostensibly done to increase the collective security of the country.<sup>8</sup>

In the wake of the terrorist attacks on the World Trade Center and the Pentagon in 2001, the United States faces a threat unlike any other it has faced in its short history.<sup>9</sup> The threat of terrorist attacks on United States soil has resulted in drastic changes made to the United States government’s approach to increasing the collective security of the country. The most prominent change in the government’s approach to fighting terrorism was the passage of the USA PATRIOT Act<sup>10</sup> in 2001. The Patriot Act drastically changed the United States’ approach to combating both domestic and international terrorism. Perhaps in recognition of the specific exigent circumstances faced by the United States in the wake of September 11, many of the Patriot Act’s provisions are set to “sunset” in December of 2005.<sup>11</sup> As a result, the United States will soon need to decide in the context of an ongoing and indefinite war on terrorism whether to renew the USA PATRIOT Act, whether to repeal it, or whether to extend its provisions even further.

In early 2003, the American public was given a glimpse into a potential approach to fighting the threat of terrorism. A Department of Justice draft of the Domestic Security Enhancement Act of 2003<sup>12</sup> was leaked to the Center for Public

---

5. *Id.* at 189.

6. WILLIAM H REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224 (Alfred A. Knopf ed., 1998).

7. *Id.* at 224-25.

8. *See id.* at 222-23 (noting that it cannot be said that in every conflict between individual liberty and government authority that individual liberty will prevail).

9. *See* JOHN LEWIS GADDIS ET AL., *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11* ix-x (Strobe Talbott & Nayan Chanda eds., 2001) (noting that, despite other terrorist attacks on U.S. soil, September 11th represented an entirely new threat).

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

11. *Id.* § 224.

12. Department of Justice, *Domestic Security Enhancement Act of 2003*,

Integrity. The DSEA represents a broad prevention-based approach to combating terrorism in a post-September 11th world.

Part I of this Comment will explore the advantages and disadvantages of this approach at the macro level by using specific provisions of the DSEA as illustrations of this potential new approach to combating the modern terrorist threat. This analysis will draw upon the historical experience of the government's attempts to deal with threats to national security and the nature of the modern terrorist threat to the United States. An examination of the DSEA under the light of historical experience and the diffuse nature of the modern terrorist threat will ultimately lead to the conclusion that the broad approach to terrorism prevention that the DSEA represents permanently threatens core civil liberties and will not likely make the United States safer from terrorist attacks.

Part II will provide a background of the various approaches that have been taken by the United States government in response to war and perceived emergencies. This section will explore a few relevant episodes during various time periods from the passage of the Alien<sup>13</sup> and Sedition Acts of 1798<sup>14</sup> to the passage of the Patriot Act in 2001. Part II will also discuss the nature of the threat of modern terrorism that the United States faces in a post-September 11th world.

Part III will analyze three key provisions of the DSEA as representative of one possible approach to revising national security policies for combating terrorism. The benefits and drawbacks of the broad, prevention based approach will be discussed in the context of combating terrorism.

Part IV will conclude that the broad and indefinite scope of the potential approach to combating modern terrorism, as represented by the DSEA, will not necessarily make the United States safer from terrorist acts. In contrast, such approach will definitely result in the curtailment of civil liberties to an extent never deemed permissible throughout the history of the United States.

The specific proposal of this Comment is that the United States seize the opportunity presented by the expiration of the Patriot Act in 2005 to formulate a more responsible approach to combating terrorism. In addition, other macro level solutions to combating terrorism will be also suggested.

---

available at [http://www.publicintegrity.org/docs/PatriotAct/story\\_01\\_020703\\_doc\\_1.pdf](http://www.publicintegrity.org/docs/PatriotAct/story_01_020703_doc_1.pdf) (Jan. 9, 2003 draft) [hereinafter DSEA].

13. Alien Act, 1 Stat. 570 (1798) (expired 1800).

14. Sedition Act, 1 Stat. 596 (1798) (expired 1801).

## II. BACKGROUND

### A. *Historical Background of the United States' Response to National Emergencies*

#### 1. *Alien and Sedition Acts*

In 1798, during a wave of anti-French sentiment,<sup>15</sup> Congress enacted a set of three laws, including both the Alien Act<sup>16</sup> and the Sedition Act.<sup>17</sup> The Alien Act vested in the President the power to order the deportation of any aliens that he judged dangerous to the peace and safety of the United States.<sup>18</sup> The Sedition Act criminalized the utterance or publication of any false, scandalous, or malicious statements that might expose Congress or the President to "contempt or disrepute."<sup>19</sup>

While the Alien Act was criticized as granting a power "nowhere delegated to the Federal government,"<sup>20</sup> the Sedition Act was criticized as being directly in conflict with the express right of free speech set forth in the First Amendment.<sup>21</sup> The public's fear that the two Acts would be used as political weapons rather than a means to increase national security was realized when the Acts' provisions were used to prosecute domestic political opponents of President John Adams instead of protecting the country from foreign enemies.<sup>22</sup> As such, history has since passed judgment on the Alien and Sedition Acts as unconstitutional,<sup>23</sup> barbarous, and a bold attempt by the government to "deal arbitrarily with aliens and dissenters."<sup>24</sup>

#### 2. *World War I*

From the beginning of World War I, there was an active resistance to and criticism of the war by various groups.<sup>25</sup> In

---

15. IRONS, *supra* note 4, at 98-99.

16. Alien Act, 1 Stat. 570.

17. Sedition Act, 1 Stat. 596.

18. Alien Act § 1.

19. Sedition Act § 2.

20. *Fong Yue Ting v. United States*, 149 U.S. 698, 748 (1893) (Field, J., dissenting).

21. IRONS, *supra* note 4, at 99.

22. *Id.* at 99-100.

23. *Fong Yue Ting*, 149 U.S. at 747. The Alien and Sedition Acts' unpopularity led Kentucky's legislature to pass a resolution stating that the Alien and Sedition Acts were unconstitutional. Kentucky Resolution (Dec. 3, 1799), available at <http://www.yale.edu/lawweb/avalon/kenres.htm>. Virginia's legislature passed a similar resolution. Virginia Resolution (Dec. 24, 1798), available at <http://www.yale.edu/lawweb/avalon/virres.htm>.

24. ALAN BRINKLEY, *A Familiar Story: Lessons on Past Assaults on Freedoms*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 23, 25 (2003).

25. IRONS, *supra* note 4, at 266. Groups opposed to the war included

response to this activism, the Wilson Administration began to stifle criticism of the war by sponsoring a program to facilitate citizens spying on other citizens through a Justice Department program named the American Protective League.<sup>26</sup> In June of 1917, Congress responded to the war and its attendant criticism by enacting the Espionage Act.<sup>27</sup> This Act was used to criminalize almost any speech critical of the war effort.<sup>28</sup> The basic effect and legacy of the Espionage Act was the criminalization of “seditious utterances” critical of the war.<sup>29</sup> In total, nine hundred people were imprisoned pursuant to the Espionage Act.<sup>30</sup> In addition to these official prosecutions under the Espionage Act, individuals suspected of disloyal behavior were often prosecuted for unrelated infractions.<sup>31</sup> This “state sponsored repression”<sup>32</sup> caused “widespread popular intolerance of dissent”<sup>33</sup> among the general population that occasionally turned violent.

---

German-Americans who supported their homeland, Irish-Americans who opposed support for England, Quakers and Mennonites who opposed the war in general as pacifists, and Socialists who believed the war was being fought in the name of capitalism and imperialism. *Id.*

26. *Id.* at 266. This program, the American Protective League (APL), reached a membership of almost 100,000 members. These “volunteer spies” tried to uncover disloyal citizens and those who criticized the war effort. These members acted privately and without police powers. APL members allegedly uncovered three million cases of “disloyalty”. *Id.*

27. 40 Stat. 217 (1917).

28. See *Stokes v. United States*, 264 F. 18, 20 (8th Cir. 1920) (reversing the lower court that had sentenced a woman to ten years in prison under the Espionage Act for writing “[n]o government which is for the profiteers can also be for the people, and I am for the people, while the government is for the profiteers” in a local newspaper); *Doe v. United States*, 253 F. 903, 905 (8th Cir. 1920) (holding that the defendant violated the Espionage Act by publishing statements, which included calling the war “the greatest campaign of lies the world has ever known” and suggesting that “the young men of the world are being duped into hating and killing each other”); *Shaffer v. United States*, 255 F. 886, 887-88 (9th Cir. 1919) (reasoning that a critical book violated the Espionage Act because it undermined the spirit of individuals to enlist in the military and weakened patriotism).

29. See IRONS, *supra* note 4, at 268 (explaining that after certain judges refused to convict individuals for general criticism of the war effort, Congress amended the Espionage Act to criminalize speech that “intended to bring the form of the government of the United States . . . into contempt, scorn, contumely, or disrepute”). See also Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 413 (discussing the Espionage Act’s misuse and subsequent suppression of civil liberties).

30. IRONS, *supra* note 4, at 267.

31. Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 768 (2002). Furthermore, after an explosion near the home of Attorney General Palmer, Palmer launched a campaign that eventually led to the arrest of over 6,000 immigrants without probable cause and the deportation of 500 immigrants for their political beliefs. *Id.*

32. BRINKLEY, *supra* note 24, at 27.

33. *Id.*

### 3. World War II

During the two months following the Japanese attack on Pearl Harbor, there was a rising tide of public opinion calling for the internment of Japanese-Americans on the west coast.<sup>34</sup> As the American public had apparently learned a lesson from the abuses of the repressive emergency legislation following World War I, there was no official war legislation in World War II.<sup>35</sup> Nonetheless, President Roosevelt responded to anti-Japanese public sentiment on February 19, 1942 by signing Executive Order 9066.<sup>36</sup> The mass internment of Japanese-Americans followed, despite the fact that there was no evidence that individuals of Japanese descent had committed any acts of espionage or sabotage.<sup>37</sup> As a result of Executive Order 9066, the government confined more than 110,000 people to "relocation centers."<sup>38</sup>

A series of cases challenging these internments soon found their way to the Supreme Court: *Hirabayashi v. United States*,<sup>39</sup> *Korematsu v. United States*,<sup>40</sup> and *Ex parte Mitsuye Endo*.<sup>41</sup> While only *Endo* held that the government had acted wrongfully in interning individuals based solely on race, Congress ultimately condemned the internment of Japanese-Americans by providing reparations and issuing a formal apology for the internments.<sup>42</sup>

### 4. The Red Scare

Fear of communism during the "Red Scare" led to an extensive campaign to prosecute suspected communists for their beliefs.<sup>43</sup> The United States apparently learned from the "security

---

34. See IRONS, *supra* note 4, at 349 (noting that at least one Congressman, the Los Angeles Times newspaper, and other newspaper columnists called for the internment of all individuals of Japanese descent on the West Coast).

35. BRINKLEY, *supra* note 24, at 39.

36. Exec. Order. No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

37. *Ishida v. United States*, 59 F.3d 1224, 1226 (Fed. Cir. 1995).

38. IRONS, *supra* note 4, at 349.

39. 320 U.S. 81, 104 (1943) (holding that a curfew order was not unconstitutional discrimination against persons of Japanese ancestry because the surrounding circumstances of the war and of Japanese communities in the United States afforded substantial basis for the military commander's conclusion that persons of Japanese ancestry required differentiation from others).

40. 323 U.S. 214, 223 (1944) (holding that the exigencies of war and the threat to national security justified the exclusion order).

41. 323 U.S. 283, 297 (1944) (holding that the government had no authority to subject citizens, who were concededly loyal, to its leave procedure).

42. *Id.* See Civil Liberties Act of 1988, 50 U.S.C.S. APP. §§ 1989b-1989b-9 (2000) (providing a formal statement of apology to individuals excluded from their homes under Executive Order 9066 because of their Japanese ancestry and a one-time payment of \$20,000 to each eligible individual).

43. DOUGLAS T. MILLER & MARION NOWACK, *THE FIFTIES: THE WAY WE REALLY WERE* 26 (1977). Miller and Nowack note that President Truman's launching of a security program in Executive Order 9835 was largely

measures run amok<sup>44</sup> of the World War II internments, as there was never any attempt to intern communists.<sup>45</sup> Nonetheless, Congress established the House Un-American Activities Committee (“HUAC”) in 1938 and made it a standing committee in 1945.<sup>46</sup> Congress was essentially charged with “investigating political thought and speech among American citizens.”<sup>47</sup>

Beyond this, Congress passed the Alien Registration Act of 1940, referred to as the Smith Act<sup>48</sup>. The Smith Act was the first peacetime sedition act in American history.<sup>49</sup> While the Supreme Court upheld the constitutionality of the Smith Act in *Dennis v. United States*,<sup>50</sup> Justices Black and Douglas, in separate dissents, prophesied the obviation of the *Dennis* decision.<sup>51</sup> Justice Black

---

responsible for creating a “great wave of hysteria.” *Id.* Between March 1947 and December 1952, some 6.6 million people were investigated for espionage and not a single case of espionage was found. *Id.* The broad scope of this official “Red Hunt” helped to feed the public’s fear that America was “riddled with spies” when the reality showed no such situation. *Id.*

44. BRINKLEY, *supra* note 24, at 42.

45. *Id.*

46. William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 398-99 (discussing the history of anti-communism measures in the United States).

47. *Id.* at 399.

48. Act of June 28, 1940, ch. 439, 54 Stat. 670 (codified as amended at 18 U.S.C. § 2385). Section 1 of the Smith Act is similar to the Espionage Act. Sections 2 and 3 of the Smith Act make it a criminal offense for a person to advocate the overthrow of the United States government.

49. Wiecek, *supra* note 46, at 424.

50. 341 U.S. 494 (1951). Eugene Dennis, the general secretary for the American Communist Party, and a number of other Communist Party officials were charged under the Smith Act with conspiring to advocate the overthrow of the United States government. These charges were based almost exclusively on the general communist teachings of Marx, Lenin, and Stalin rather than any specific advocacy of overthrow of the United States government by any of the defendants. Thus, Dennis and the other defendants were being prosecuted for being Communists rather than specifically advocating any type of definite, immediate action by their members. The Court was forced to reconcile their holding with the “clear and present danger” test for permissibly infringing on the First Amendment’s guarantee of free speech. *Id.* at 503-05. The majority opinion, delivered by Chief Justice Vinson, held that the defendants’ efforts “to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit” met this standard. *Id.* at 509.

51. William W. Van Alstyne, *Civil Rights and Civil Liberties: Whose Rule of Law?*, 11 WM. & MARY BILL OF RTS. J. 623, 627, 627 n.28 (2003). Van Alstyne notes that *Brandenburg v. Ohio* “requires that the speaker meant to incite violence or some other serious breach of a valid law” for a conviction. *Id.* at 627 n.28. Thus, freedom of speech does not permit “a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* These requirements effectively overrule the rule espoused in *Dennis*. *Id.*



alluded to the fact that the government had overreacted to the threat of communism by voicing his hope that “when present pressures, passions, and fears subside”<sup>52</sup> the United States would return civil liberties to their rightful pre-emergency state.

##### 5. *The War on Terrorism*

While terrorist acts have been perpetrated around the world since the beginning of time,<sup>53</sup> the United States had been relatively immune from such acts perpetrated on its own soil until the early 1990s.<sup>54</sup> The modern threat of terrorism on United States soil consists primarily of four events.

On February 26, 1993, Islamic Fundamentalists exploded a car bomb under the World Trade Center in New York City killing six people and injuring hundreds more.<sup>55</sup> Two years later, Timothy McVeigh—an individual with anti-government ideas<sup>56</sup> specifically related to the government’s handling of the raid of David Koresh’s compound in Waco, Texas,<sup>57</sup> which lead to the death of 85 individuals<sup>58</sup>—exploded a truck bomb outside of the Alfred R. Murrah Federal Office Building in Oklahoma City killing 168 people and injuring hundreds more.<sup>59</sup> In 1996, Eric Rudolph—an individual with anti-abortion and anti-government opinions<sup>60</sup>—allegedly exploded a pipe bomb at an outdoor Olympic exhibition killing two people and injuring 111.<sup>61</sup> Most significantly, on September 11, 2001, terrorists affiliated with the terrorist group

---

52. *Dennis*, 341 U.S. at 581.

53. See *History of Terrorism*, at [http://www.terrorismfiles.org/encyclopaedia/history\\_of\\_terrorism.html](http://www.terrorismfiles.org/encyclopaedia/history_of_terrorism.html) (last visited Sept. 27, 2004) (describing how terrorism was practiced by the ancient Greeks and Roman Empire).

54. See John Lewis Gaddis, *And Now This: Lessons from the Old Era for the New One*, in *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11* 1, 6 (Strobe Talbott & Nayan Chanda eds., 2001) (noting that the United States hasn’t suffered any significant attack on its own soil since British troops burned the White House and the Capitol in 1814).

55. TIMOTHY LYNCH, CATO INSTITUTE POLICY ANALYSIS, NO. 443, *BREAKING THE VICIOUS CYCLE: PRESERVING OUR LIBERTIES WHILE FIGHTING TERRORISM* 3 (2002), available at <http://www.cato.org/pubs/pas/pa443.pdf> (June 26, 2002).

56. Elizabeth Gleick, *Who Are They: The Oklahoma Blast Reveals the Paranoid Life and Times of Accused Bomber Timothy McVeigh and His Right-Wing Associates*, *TIME*, May 1, 1995, at 44.

57. Sandy Banisky, *McVeigh Defense Focuses on Rage; Jury Sees Tapes of Waco Fire in Bid to Explain Motives*, *BALT. SUN*, June 11, 1997, at 1A.

58. Howard Chua-Eoan, *Tripped up by Lies*, *TIME*, Oct. 11, 1993, at 39.

59. Hugh Dellios, *Man Sought in Bombing Apprehended*, *CHI. TRIB.*, May 13, 1995, at 1.

60. Denise Noe, *Eric Rudolph: Suspected Serial Bomber, Eric Rudolph*, at [http://www.crimelibrary.com/terrorists\\_spies/terrorists/eric\\_rudolph/6.html?sect=22](http://www.crimelibrary.com/terrorists_spies/terrorists/eric_rudolph/6.html?sect=22) (last visited Oct. 16, 2004).

61. Leonard Greene, *Sinister Survivalist’s Skills Kept Him Free for Five Years*, *N.Y. POST*, June 1, 2003, at 5.

Al-Qaeda crashed hijacked airplanes into the World Trade Center in New York City and into the Pentagon outside of Washington, D.C. killing over 3,000 people.<sup>62</sup>

In response to each terrorist attack since 1993, legislation was introduced increasing law enforcement powers<sup>63</sup> ostensibly to prevent future terrorist attacks.<sup>64</sup> Most notably, these terrorist attacks lead to the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996<sup>65</sup> and the Patriot Act in 2001.

Congress hastily enacted The Patriot Act in response to the September 11th attacks<sup>66</sup> with overwhelming congressional

---

62. *September 11, 2001: A Day of Terror*, at <http://www.cnn.com/2003/US/03/10/sprj.80.2001.terror/index.html> (Mar. 10, 2003).

63. LYNCH, *supra* note 55, at 3. Shortly after the World Trade Center bombing in 1993, Congressman Charles Schumer introduced the Terrorism and Prevention Act of 1993. Terrorism and Prevention Act, H.R. 1301, 103rd Cong. (2001). This Act would have “federalized all violent offenses, allowed the use of secret evidence in deportation proceedings, and increased the surveillance powers of the [FBI].” LYNCH, *supra* note 55, at 3. Shortly after the Oklahoma City bombing, Senators Robert Dole and Orrin Hatch introduced the Comprehensive Terrorism Prevention Act of 1995, which was eventually passed as the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA]. See JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 119 (2002) (noting that the AEDPA criminalized material support to organizations designated as terrorists by the Secretary of State, deportation of designated terrorists without basic due process rights, and curtailed the right of habeas corpus). The Patriot Act was passed shortly after the September 11 attacks on the World Trade Center and Pentagon.

64. LYNCH, *supra* note 55, at 3. After signing the AEDPA into law, President Clinton noted that “our law enforcement officials will [now] have tough new tools to stop terrorists before they strike.” *Id.* After signing the Patriot Act into law, President Bush said the legislation would enable law enforcement “to identify, to dismantle, to disrupt, and to punish terrorists before they strike.” *Id.*

65. While this Comment will discuss only the Patriot Act in this section, the AEDPA arguably began the curtailment of civil liberties in response to the threat of terrorism. See DEMPSEY & COLE, *supra* note 63, at 117 (noting that AEDPA contained “some of the worst assaults on civil liberties in decades”). AEDPA was the government’s reaction to the public’s fear of terrorism due to the bombing of the World Trade Center in 1993 and the bombing of the Edward P. Murrah Building in Oklahoma City in 1995. *Id.* at 113. AEDPA expanded the use of pre-trial detention, expanded the government’s ability to use wiretaps, criminalized support of groups that the government alleged had terrorist ties, and restricted appeals in death penalty cases. *Id.* at 118-19. The fact that a number of AEDPA’s current provisions had been sought and rejected by Congress for decades arguably indicates the opportunistic nature of these provisions. See *id.* at 108-09 (noting that many key provisions of the AEDPA, including associational deportations and criminalization of otherwise legal material support for terrorist groups, were developed long before the terrorist attacks that ostensibly triggered their enactment).

66. Senator Tom Daschle introduced The Uniting and Strengthening America Act of 2001 (USA Act of 2001) to the Senate on October 4, 2001. S. 1510, 107th Cong. (2001). Congress enacted the Patriot Act, in its present form

support.<sup>67</sup> Opponents of the Patriot Act have charged that the hasty passage of the law was used to opportunistically enact previously unsuccessful law enforcement provisions into law.<sup>68</sup> Supporters of the Patriot Act contend that the hasty passage of the legislation was necessary for the immediate security of the country.<sup>69</sup> In either event, the provisions of this document create sweeping new law enforcement powers based on broad prevention and amend existing laws to enhance their effectiveness.<sup>70</sup>

The public has criticized many USA PATRIOT Act provisions as unreasonable and excessive curtailments of civil liberties.<sup>71</sup>

---

after a brief (one day) debate and George W. Bush signed it into law on October 26, 2001. "The bill was never the subject of a Committee debate or mark-up in the Senate. There was a truncated process in the House, which heard no official testimony from opponents of the bill." DEMPSEY & COLE, *supra* note 63, at 151.

67. The House vote was 357-66. 147 CONG. REC. H7224 (daily ed. Oct. 24, 2001). The Senate vote was 98-1. 147 CONG. REC. S11059 (daily ed. Oct. 25, 2001) (Roll Call No. 313).

68. Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1751 n.233 (2003). O'Connor and Rumann note the statement of Senator Russ Feingold, the lone dissenter in the Senate to passage of the Patriot Act, on the Senate floor that "[t]he Administration's proposed bill contained vast new powers for law enforcement, some seemingly drafted in haste and others that came from the FBI's wish list that Congress has rejected in the past." *Id.* O'Connor and Rumann also note Representative Robert L. Barr, Jr.'s question regarding the rushed passage of the Patriot Act: "Does it have anything to do with the fact that the department has sought many of these authorities on numerous other occasions, has been unsuccessful in obtaining them, and now seeks to take advantage of what is obviously an emergency situation to obtain authorities that it has been unable to obtain previously?" *Id.*

69. See U.S. Dep't of Justice, *The USA PATRIOT Act: Preserving Life and Liberty*, at <http://www.lifeandliberty.gov> (last visited Sept. 18, 2004) (setting forth the specific benefits of the Patriot Act with respect to national security). See also Attorney General John Ashcroft, Testimony Before the House Committee on the Judiciary (Sept. 24, 2001), available at [http://www.usdoj.gov/ag/testimony/2001/agcrisisremarks9\\_24.htm](http://www.usdoj.gov/ag/testimony/2001/agcrisisremarks9_24.htm) (stating that "the American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts"). Ashcroft further defended enactment of the Patriot Act by describing it as a "careful, balanced, and long overdue improvement[] to our capacity to combat terrorism" and "a modest set of essentials." Attorney General John Ashcroft, Testimony Before the Senate Committee on the Judiciary (Sept. 25, 2001), available at <http://www.usdoj.gov/ag/testimony/2001/0925AttorneyGeneralJohnAshcroftTestimonybeforetheSenateCommitteeontheJudiciary.htm>.

70. As the Patriot Act contains almost 200 changes to the law, comprehensive discussion of these changes would far exceed the scope of this Comment. For a comprehensive constitutional analysis of the USA PATRIOT Act see John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002).

71. ACLU, *Surveillance Under the USA PATRIOT Act*, at <http://www.aclu>.

Some have derided certain Patriot Act provisions as patently unconstitutional.<sup>72</sup> A significant number of communities across the country have passed resolutions banning enforcement of the Patriot Act's provisions or calling for immediate repeal of the Patriot Act.<sup>73</sup>

The contentious nature of the Patriot Act may soon be moot, as a "sunset provision" expires many of the Patriot Act's provisions in 2005.<sup>74</sup> Thus, Congress will soon begin to broach the issue of what approach to combating terrorism should follow the Patriot Act. As this future approach will likely be with us indefinitely, the propriety and effectiveness of this new approach must be examined very closely.

In the meantime, the threat of terrorist acts on United States soil<sup>75</sup> and abroad on U.S. identified targets<sup>76</sup> remains, making the future approach to combating terrorism imminently more important. Exploring the nature of the modern terrorist threat is necessary to evaluate the propriety and effectiveness of any new approach.

---

org/SafeandFree/SafeandFree.cfm?ID=12263&c=206 (last visited Sept. 18, 2004) (discussing the way in which the Patriot Act reduces "checks and balances"). See also ACLU, *USA PATRIOT Act: Further Analysis*, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12224&c=207> (last visited Sept. 18, 2004) (discussing problems that the USA PATRIOT Act poses to dissent, freedom of association, and judicial oversight).

72. See generally Whitehead & Aden, *supra* note 70 (analyzing the constitutionality of the Patriot Act). See also Michael P. O'Connor & Celia Rumann, *Emergency and Anti-Terrorist Power: Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 FORDHAM INT'L L.J. 1234 1244-53 (2003) (discussing the constitutionality of the Patriot Act's amendments to FISA in relation to the Fourth Amendment). See generally David Hardin, Note, *The Fuss over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 319-45 (2003) (discussing the unconstitutionality of the Patriot Act Amendments to FISA under the Fourth Amendment). See also Kathryn Martin, *The USA PATRIOT Act's Application to Library Patron Records*, 29 J. LEGIS. 283 (2003) (discussing the Patriot Act's disregard of the Fourth Amendment in relation to library records).

73. Resolutions have been passed in 350 communities in 41 states, including 3 state-wide resolutions. ACLU, *List of Communities that Have Passed Resolutions*, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (last visited Sept. 10, 2004).

74. Patriot Act § 224.

75. See LYNCH, *supra* note 55, at 3-4 (noting that the anthrax attacks shortly after September 11, 2001 and "shoe-bomber" Richard Reid's attempt to blow up an airplane in mid-flight on December 22, 2001 are "powerful recent evidence that the president and his police agents are not capable of stopping terrorist attacks").

76. See U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2002 83-98 app.A (2002) [hereinafter PATTERNS OF GLOBAL TERRORISM], available at <http://www.state.gov/s/ct/rls/pgtrpt/2002/pdf> (last visited Oct. 16, 2004) (providing a summary of global terrorist attacks on United States and international interests).

### B. *The Nature of Modern Terrorism*

Each of the four abovementioned terrorist acts committed on U.S. soil since 1993 were committed in the name of different, unrelated, and specific causes which ranged from the United States' presence in Saudi Arabia,<sup>77</sup> to the United States' sponsorship of secular leadership in Egypt,<sup>78</sup> to the United States government's oppressive control of its own citizens.<sup>79</sup> The methods of attack were varied.<sup>80</sup> The citizenship status of terrorists involved has ranged from foreign-born individuals in the United States by a variety of means,<sup>81</sup> to natural born United States citizens.

As the diversity of the nature of the acts committed and the identity of the perpetrators and their citizenship status indicates, the modern threat of terrorism is uniquely distinguishable from threats the United States has faced throughout its history. While the duration of the hostilities in the above historical examples<sup>82</sup> could never really be defined temporally, the cessation of the particular threat that necessitated the placing of security over liberty could be articulated or attained though the realization of

---

77. See Lisa Anderson, *Jury Finds 4 Guilty in Embassy Bombings; Convictions on All 302 Counts for '98 Attacks in Africa*, CHI. TRIB., May 30, 2001, at 1 (describing the pre-September 11th testimony of an Al Qaeda operative that "Al Qaeda's terrorist activities were motivated by bin Laden's anger at the presence of U.S. troops in Saudi Arabia"). See also Diana Johnstone et al., *This Is Not Our War: A Letter from United States Citizens to Friends in Europe*, in RIGHTS VS. PUBLIC SAFETY AFTER 9/11: AMERICA IN THE AGE OF TERRORISM 126 (Amitai Etzioni & Jason H. Marsh eds., 2003) (noting that "fifteen of the nineteen identified hijackers were Saudi Arabians hostile to the presence of U.S. military bases on Saudi soil").

78. Egyptian Cleric Sheik Omar Abdul Rahman, who was convicted with nine others for conspiring to blow up the World Trade Center in 1993, has maintained that his activism was motivated only by "oppression and tyranny imposed on the Egyptian people by Hosni Mubarak's government" and the United States' sponsorship of secular leaders in Egypt. Ian Williams, *In the Eye of the Meida Storm: Sheik Omar Abdul Rahman*, WASH. REP. ON MIDDLE E. AFFAIRS, Apr./May 1993, at 24.

79. See Stephen McFarland, *Angry McVeigh Rips Role of Gov't*, DAILY NEWS (N.Y.), Apr. 23, 1996, at 23 (noting Timothy McVeigh's statement that "when [the government] govern[s] by the sword, they must reckon with protest by the sword").

80. See LYNCH, *supra* note 55, at 3 (describing the methods employed in the terrorist attacks since 1993).

81. See Steven Camarota, Center for Immigration Studies, *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001*, at <http://www.cis.org/articles/2002/terrorpr.html> (last visited Oct. 16, 2004) (noting that of the 48 foreign-born militant Islamic terrorists that have been charged, convicted, pled guilty, or admitted to involvement in terrorism within the United States since 1993, 16 of the 48 terrorists in the study were on temporary visas, another 17 were lawful permanent residents or naturalized U.S. citizens, 12 were illegal aliens, and 3 of the 48 had applications for asylum pending).

82. See *supra* Part II.A.1-4.

some pre-emergency goal.<sup>83</sup>

Terrorism must be looked at with a different paradigm altogether.<sup>84</sup> Unlike previous conflicts, terrorism cannot be defined by nationality, ethnicity, or form of government.<sup>85</sup> Terrorists do not subscribe to a uniform ideology.<sup>86</sup> Terrorism is a volitional act.<sup>87</sup> The nature of this threat is a diffuse threat<sup>88</sup> of innumerable groups or individuals<sup>89</sup> who seek to affect distinctly different

---

83. The goal of the Alien and Sedition Acts was to protect the country from the French and their political supporters. IRONS, *supra* note 4, at 98. Thus, this emergency would end when France was defeated. World War I, as a declared war, ended when Congress approved a joint resolution terminating the conflict. CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918* 1 (1989). World War II ended with the Emperor of Japan's surrender. HAROLD EVANS, *THE AMERICAN CENTURY* 367 (1998). While probably the closest analogy to the threat of terrorism is the threat of communism during the Cold War, history indicates that the Cold War and the threat of communism effectively ended when the Soviet Union finally collapsed on December 25, 1991. Malcolm Brinkworth, *The Soviet Union's Last Stand*, at [http://www.bbc.co.uk/history/war/coldwar/soviet\\_stand\\_06.shtml](http://www.bbc.co.uk/history/war/coldwar/soviet_stand_06.shtml) (last visited Oct. 16, 2004).

84. See U.S. DEPT' OF STATE, NATIONAL STRATEGY FOR COMBATING TERRORISM, STRATEGIC INTENT 2 (2003) [hereinafter NATIONAL STRATEGY], available at <http://www.whitehouse.gov/news/releases/2003/02/200.30214-7.html> (last visited Oct. 26, 2003) ("Victory . . . against terrorism will not occur as a single, defining moment . . . [like] the surrender ceremony . . . that ended World War II. . . . Victory will be secured only as long as the United States . . . maintain[s] [its] vigilance to prevent terrorists from inflicting horrors like those of September 11, 2001.").

85. NATIONAL STRATEGY, *supra* note 84, at 1 ("The enemy is not one person. It is not a single political regime. Certainly it is not a religion. The enemy is terrorism-premeditated, politically motivated violence perpetrated against non combatant targets by subnational groups or clandestine agents.").

86. See PATTERNS OF GLOBAL TERRORISM, *supra* note 76, at 99-146 apps. B-C (describing the ideological goals of designated and non-designated terrorist organizations).

87. See OXFORD AMERICAN DICTIONARY 951 (Oxford University Press Heald Colleges ed. 1999) (defining terrorism as "use of violence and intimidation, especially for political purposes"); BLACK'S LAW DICTIONARY 702 (2d Pocket ed. 2001) (defining terrorism as "[t]he use or threat of violence to intimidate or cause panic, especially] as a means of affecting political conduct"). There is little agreement on a universally accepted definition of terrorism. See Oliver Liblaw, *How Do You Define Terrorism?*, at [http://www.abcnews.go.com/sections/us/dailynews/strike\\_011011definingterror.html](http://www.abcnews.go.com/sections/us/dailynews/strike_011011definingterror.html) (Oct. 11, 2001) (discussing different definitions of terrorism, all of which involve the use of violence to achieve some nameless, political end).

88. See Andrew P.N. Erdman, State Department Policy Planning Staff, Remarks to the Gaudino Forum, Williams College (Nov. 18, 2002), available at <http://www.state.gov/s/p/rem/15554.htm> (last visited Oct. 25, 2003) (noting that terrorists "operate in countless countries, independent of any state sponsor or single home base"). See also Ted Galen Carpenter, *Protecting Liberty in a Permanent War*, WASH. TIMES, June 25, 2002, at A17 (noting that "[t]he war against terrorism . . . is against a shadowy network of adversaries rather than a nation-state").

89. See Director Robert S. Mueller III, Remarks at the American Civil

political conduct<sup>90</sup> through various means of violence or threatened violence.<sup>91</sup>

It is also not clear exactly how victory would be defined in the War on Terrorism. President Bush stated that the War on Terrorism “will not end until every terrorist group of global reach has been found, stopped, and defeated,”<sup>92</sup> and that “[t]he threat of terror will be with us for years to come.”<sup>93</sup> As terrorism is a volitional act, it is not clear how victory could ever be sufficiently clear and certain in the War on Terrorism<sup>94</sup> to compel official cessation of the state of emergency.<sup>95</sup> This essentially leaves the United States with the real prospect of “perpetual war.”<sup>96</sup> It is in this context that any new anti-terrorism strategy must be evaluated.

### III. ANALYSIS

#### A. *A New Solution? : Domestic Security Enhancement Act*

##### 1. *A Three-Pronged Attack on Civil Liberties*

The Domestic Security Enhancement Act of 2003 is a piece of

---

Liberties Union 2003 Inaugural Membership Conference (June 13, 2003), available at <http://www.fbi.gov/pressrel/speeches/speech06132003.htm> (last visited Oct. 16, 2004) (“Al Qaeda, of course, is not the only threat. Prior to September 11th, Hizballah had killed more Americans than any other terrorist group. And, we cannot forget domestic terrorists who operate in our own country. They also use violence to intimidate and coerce Americans, and they are also a deadly threat, as we came to understand by the April 1995 bombing in Oklahoma City.”). See also U.S. Dep’t of State, Office of Counterterrorism, *Fact Sheet: Foreign Terrorist Organizations*, at <http://www.state.gov/s/ct/rls/fs/2003/12389.htm> (last visited Oct. 25, 2003) (listing thirty-six designated foreign terrorist organizations).

90. PATTERNS OF GLOBAL TERRORISM, *supra* note 76, at 99-146 apps. B-C.

91. *Id.*

92. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html> (last visited Oct. 16, 2004). See also Ken Fireman, *Bush’s Vow: We’ll Stop at Nothing, Demands All Nations Choose Sides in War on Terror*, N.Y. NEWSDAY, Sept. 21, 2001, available at <http://www.nynewsday.com/ny-usbush212376897sep21,0,7510960.story>.

93. Press Release, White House, President Discusses Dept of Homeland Security in Radio Address (Nov. 16, 2002), available at <http://www.whitehouse.gov/news/releases/2002/11/20021116.html> (last visited Oct. 16, 2004).

94. See Carpenter, *supra* note 88 (noting that victory in the War on Terrorism would be inherently difficult to define and achieve because of the political consequences attendant with declaring victory over an act that could recur at any time).

95. While an emergency declared by the President can be overridden by a joint resolution of Congress, the President retains a veto that can only be overridden by a two-thirds vote of Congress. MAY, *supra* note 83, at 255-56.

96. Carpenter, *supra* note 88.

draft legislation that has not yet been proposed in Congress. However, there is evidence that the DSEA was circulated to Speaker of the House Dennis Hastert and to the Office of Vice President Richard Cheney.<sup>97</sup> A copy of this draft legislation was leaked to the Center for Public Integrity in early 2003.<sup>98</sup>

In the face of vocal opposition to passage of the DSEA from groups representing a wide spectrum of political beliefs,<sup>99</sup> the Justice Department has officially disavowed its intentions to seek enactment of the DSEA set forth in the leaked draft.<sup>100</sup> As such, it seems unlikely that the DSEA will be enacted as law in a single piece of legislation.<sup>101</sup>

These factors do not, however, ensure that the DSEA will not define the United States' approach to combating terrorism. A number of DSEA provisions have already been enacted.<sup>102</sup> The Bush Administration has also endorsed numerous proposals to expand the reach of the Patriot Act.<sup>103</sup> Thus, the DSEA approach remains a distinct contender to replace the Patriot Act in 2005.

The DSEA contains sweeping new law enforcement powers

---

97. Charles Lewis & Adam Mayle, *Justice Department Drafts Sweeping Expansion of Anti-Terrorism Act*, at <http://www.publicintegrity.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0> (Feb. 7, 2003).

98. *Id.*

99. See ACLU, *Main Street America Fights Back*, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=1256&c=206> (last visited Sept. 25, 2004) (noting the prevalence of communities adopting anti-Patriot Act resolutions); see also Dean Schabner, *Conservative Backlash: Provisions of "Patriot Act II" Draft Worry Those on the Right*, at [http://abcnews.go.com/sections/us/2020/conservatives\\_patriot030312.html](http://abcnews.go.com/sections/us/2020/conservatives_patriot030312.html) (Mar. 12, 2003) (describing right-leaning groups' opposition to expansion of law enforcement powers of the DSEA); ACLU, *Conservative Voices Against PATRIOT Act II*, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12634&c=206> (last visited Sept. 25, 2004) (listing statements of Republicans who have voiced skepticism of the provisions contained in the DSEA).

100. Press Release, Department of Justice, Statement of Barbara Comstock, Director of Public Affairs (Feb. 7, 2003), available at [http://www.publicintegrity.org/dtaweb/downloads/Story\\_01\\_020703\\_Doc\\_3.pdf](http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_3.pdf) (last visited Oct. 26, 2003).

101. See Jesse J. Holland, *Bush Administration Looks to Avoid Patriot Connection*, THE TIMES UNION, Sept. 21, 2003, at D8 (discussing the problems with passing a post-Patriot Act omnibus anti-terrorism law). See also Aubrey Hudson, *"Patriot II" Bid Garners Little Favor on Hill*, THE WASH. TIMES, Sept. 12, 2003, at A01 (discussing opposition that would be faced in an attempt to further expand the government's anti-terrorism powers through post-Patriot Act legislation).

102. See Timothy Edgar, *Interested Persons Memo Updating the Status of "Pieces of Patriot II" Proposals*, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14000&c=206> (Oct. 8, 2003) (discussing the measures the government can currently take in responding to terrorism).

103. See *id.* (discussing the proposed Antiterrorism Tools Enhancement Act, the Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003, and the Terrorist Penalties Enhancement Act, all of which were originally provisions of the DSEA draft).



beyond even those contained in the Patriot Act.<sup>104</sup> The effect of many of the new powers in the DSEA will cast an even wider net to prevent future terrorist attacks than its predecessor. While by no means exhaustive, three key provisions of the DSEA illustrate the goals and means by which the DSEA seeks to combat terrorism. These provisions represent an approach to combating terrorism that focuses upon monitoring, removing, or convicting potential terrorist actors before affirmative acts of violence are committed. This approach ultimately amounts to ideologically based terrorism prevention.

a. Expansion of FISA Surveillance Warrants

Section 101 of the DSEA would amend the Foreign Intelligence Surveillance Act of 1978 ("FISA").<sup>105</sup> The previous mandate for obtaining a foreign intelligence warrant under FISA required the government to show probable cause that the targeted individual was acting on behalf of a "foreign power."<sup>106</sup> The DSEA version would change this definition to include "individuals" as "foreign powers."<sup>107</sup> The definition of a "foreign power" is expanded as well in section 111 to include domestic or international terrorist organizations.<sup>108</sup> These changes are ostensibly to target "sleeper cells" or lone terrorists who may not have active ties to an established terrorist group.<sup>109</sup> This section also builds upon an

---

104. See DONALD J. MUSCH, CIVIL LIBERTIES AND THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 211 (2003) (noting that Patriot Act II (DSEA) is a "broad brush initiative covering a multiplicity of areas and having a significant impact on a wide range of actions").

105. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-11). The purpose of FISA was to regulate and ensure the reasonableness of foreign intelligence wiretaps. See Hardin, *supra* note 72, at 309 (discussing the background and requirements of FISA). FISA created a Foreign Intelligence Surveillance Court that has exclusive jurisdiction to hear and grant applications for foreign intelligence surveillance. *Id.* at 308. Various safeguards originally existed to prevent unconstitutional surveillance, such as the requirement that the sole purpose of the surveillance be to secure foreign intelligence information and that (if the individual being surveiled is a United States citizen) the foreign intelligence information must be "necessary to . . . the ability of the United States to protect against" foreign threats. *Id.* at 309-11. Despite these safeguards, all 4,275 FISA warrants applied for between 1996 and 2000 were granted. Susan Herman, *The USA PATRIOT Act and the U.S. Department of Justice: Losing Our Balances?*, at <http://jurist.law.pitt.edu/forum/forumnew40.htm> (Dec. 3, 2001). Between 1997 and 2002, all 5,605 government requests for FISA warrants were approved. MUSCH, *supra* note 104, at vii.

106. 50 U.S.C. § 1802.

107. DSEA § 101.

108. DSEA § 111.

109. See U.S. Dep't of Justice, *Domestic Security Enhancement Act of 2003 Section-by-Section Analysis*, § 101, available at <http://www.dailyrrotten.com/source-docs/patriot2draft.html> (last visited Sept. 22, 2004) [hereinafter *DOJ Section-by-Section Analysis*] (explaining that the purpose of the amendment of

amendment made to FISA by the Patriot Act that authorizes FISA warrants when foreign intelligence is a “significant purpose” rather than the “primary purpose” for seeking the warrant.<sup>110</sup>

Finally, section 102 amends FISA to remove the requirement that an individual targeted for surveillance be involved in intelligence activity involving a federal crime.<sup>111</sup> Thus, FISA warrants could be granted for individuals, including U.S. citizens,<sup>112</sup> engaged in lawful intelligence activities.

Thus, the aggregate effect of the DSEA amendments on the FISA may provide the government the ability to surveil any individual who has been identified as engaging in any type of intelligence gathering for a “foreign power.” However, since a “foreign power” can be comprised of a single individual,<sup>113</sup> this section could be applied to monitor the lawful activities of anyone so long as the government states that a “significant purpose” of the surveillance is foreign intelligence.<sup>114</sup> Furthermore, to stretch the definition of what constitutes “foreign intelligence,” section 121 of the DSEA eliminates the distinction between domestic and international terrorism so the scope of activities that qualify as “foreign intelligence” gathering would be expanded to include wholly domestic activities.<sup>115</sup> Combined with the historically low threshold for granting FISA warrants,<sup>116</sup> this expanded scope could allow for surveillance of anyone provided, that the government articulates some foreign intelligence purpose.

This could result in the government possessing a virtual carte

---

the “foreign power” definition is because the current definition would not allow FISA investigations into “lone wolf” terrorists or “sleeper cells”).

110. Patriot Act § 218.

111. DSEA § 102.

112. See Timothy H. Edgar, *Interested Persons Memo: Section-by-Section Analysis of Justice Department Draft “Domestic Security Enhancement Act of 2003,” Also Known as “PATRIOT Act II,”* at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206> (Feb. 14, 2003) (noting that the DSEA changes the existing standard that applies to U.S. citizens for FISA warrants from a higher standard of the government needing to show that the U.S. citizen may be engaged in activities that involve a violation of law to a lower standard, currently only applied to aliens, which allows approval of a FISA warrant where the U.S. citizen only engages in foreign intelligence activities, which may be entirely lawful).

113. DSEA § 101.

114. The American Civil Liberties Union gives the example that these amendments would permit surveillance of a United States citizen preparing a report on human rights for Amnesty International, a “foreign political organization.” Edgar, *supra* note 112, at 267.

115. DSEA § 121. See also DOJ *Section-by-Section Analysis*, *supra* note 109, § 121 (describing how section 121 expands electronic surveillance investigations to include “all investigations of criminal terrorist activities”).

116. See MUSCH, *supra* note 105, at vii (noting that from 1997 to 2002, all 5,605 applications for electronic surveillance warrants were approved). See also Herman, *supra* note 105 (noting that all 4,275 FISA warrants applied for between 1996 and 2000 were granted).

blanche to surveil anyone who is acting suspiciously and is connected to a group of foreign origin, even if his or her activities are entirely legal and not in furtherance of any recognized terrorist group's interests.

b. Criminalization of Material Support for Terrorism

Providing "material support" for designated terrorist groups is illegal.<sup>117</sup> Material support charges are frequently brought in terrorism prosecutions.<sup>118</sup> Material support includes providing monetary services, lodging, training,<sup>119</sup> expert advice or assistance, false identification, weapons, and various other means of support.<sup>120</sup> However, this crime currently requires that an individual knowingly provide certain resources to organizations that have been previously designated as terrorist organizations by the Secretary of State under section 219<sup>121</sup> of the Immigration and Nationality Act.<sup>122</sup>

The DSEA amendment would modify the existing material support law to allow prosecution of individuals who provide material support to organizations that have not previously been designated as terrorist organizations by the government.<sup>123</sup> As the distinction between domestic and international terrorism would be removed under the DSEA for the purposes of the criminalization of

---

117. 18 U.S.C. § 2339B(a)(1). Before the Patriot Act was passed, aliens could be deported only if the government proved that the alien knew or reasonably should have known that their support was being used to conduct terrorist activities. 8 U.S.C. § 1182(a)(3)(B)(iii), *amended by* Patriot Act § 411. The Patriot Act amendments allow aliens to be deported for engaging in activity with a terrorist organization regardless of whether the particular activity has any connection to acts of violence. Patriot Act § 411.

118. See Siobhan Roth, *Justice Dept. Making Abundant Use of Material Support Law*, THE RECORDER, May 9, 2003, at Roth (discussing the use of material support charges against terror suspects).

119. The Ninth Circuit recently affirmed a district court decision that found that 18 U.S.C. § 2339B's criminalization of material support in the form of providing "training" and "personnel" was "void for vagueness" under the First and Fourteenth Amendments because these actions cover constitutionally protected speech and advocacy. *Humanitarian Law Project v. United States DOJ*, 352 F.3d 382 (9th Cir. 2003). Perhaps in anticipation of such a challenge, the DSEA seeks to make criminalization of material support through "training" or "personnel" more specific by explicitly defining these terms. *DOJ Section-by-Section Analysis*, *supra* note 109, § 402.

120. 18 U.S.C. § 2339A(b).

121. 8 U.S.C. § 1189.

122. The Immigration and Nationality Act is codified in 8 U.S.C. § 1, *et seq.*

123. DSEA § 402. This is done by amending the definitions of international and domestic terrorism at 18 U.S.C. § 2331 to make the definition of terrorist activities encompass acts which "by their nature or context" appear to be intended to accomplish some politically motivated goal and by removing the requirement that the organization have been previously designated as terrorist under the Immigration and Nationality Act by the Secretary of State before an individual can be prosecuted for providing material support. *Id.*

material support,<sup>124</sup> this could include foreign and domestic organizations alike. The penalties for violation of this section could include life imprisonment<sup>125</sup> and even the stripping of citizenship from United States citizens.<sup>126</sup>

The elimination of the pre-designation requirement before an individual could be convicted of providing material support creates a climate where individuals can be imprisoned for life or stripped of their citizenship for supporting groups that are ex post facto designated as terrorist. The decision to apply this designation in any particular case would, furthermore, now rest with the prosecutor rather than the Secretary of State.<sup>127</sup>

Thus, the effect of the material support amendments of DSEA could be criminalization of activities on behalf of organizations that government prosecutors later designate as adverse to the ideological goals of the United States government.<sup>128</sup> This would provide the government with the ability to delay passing judgment on certain groups' ideological positions until it benefits the government to do so.<sup>129</sup> Moreover, putting this decision in the hands of a prosecutor, an adversarial position, rather than a semi-detached government official such as the Secretary of State, may lead to capricious application of the "terrorist group" designation. Effectively, this could be used to target support of any group that could be construed as posing an ideological threat to the

---

124. *Id.*

125. 18 U.S.C. § 2339A(a).

126. DSEA § 501. Under this section, the intent of a person to relinquish their citizenship "need not be manifested in words, but can be inferred from conduct." Nat Hentoff, *Ashcroft out of Control: Ominous Sequel to the USA Patriot Act*, VILLAGE VOICE, Feb. 28, 2003, available at <http://www.villagevoice.com/issues/0310/hentoff.php> (last visited Oct. 16, 2004).

127. See MUSCH, *supra* note 104, at 284 (noting that the decision to apply the terrorism definition to any particular group lies with the prosecutor who chooses to invoke the definition).

128. The dubious constitutionality of the current material support law, which requires that the Secretary of State have designated the supported organization as terrorist before support for this organization is criminalized, may actually hinge on the fact that the organizations are designated before support is given. See *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1202-03 (C.D. Cal. 1998) (upholding material support law because designation of terrorist groups by the Secretary of State gave notice to plaintiffs that they were committing a crime), *aff'd in part, rev'd in part*, 352 F.3d 382 (9th Cir. 2003).

129. It is theoretically possible that a citizen could support groups lawfully in existence that later commit acts of civil disobedience that bring them within the ambit of a "terrorist group." Examples could be EarthFirst, Greenpeace, ELF, anti-abortion groups, militia groups, and any other groups that have traditionally participated in illegal acts, but have not been officially designated as terrorist groups. An individual donating money or other support to these groups, even if only to support the lawful activities of these groups, could fall under the scope of this provision, as well.

government.<sup>130</sup> Thus, guilt by association without notice is a possibility inherent in this provision.<sup>131</sup>

c. Enhancement of Discretionary Exclusion and Removal of Immigrants

The DSEA would significantly enhance the ability of the government to deport resident aliens and punish immigration related offenses. Section 503 would allow the government to deny admission or remove any alien if “the Attorney General has reason to believe [the alien] would pose a danger to the national security of the United States.”<sup>132</sup> This power is effectively discretionary as the national security of the United States includes any national defense, foreign relations, or economic interest of the United States.<sup>133</sup> Section 503 applies to aliens seeking admission to the United States as well as current residents of the United States.<sup>134</sup>

Thus, exclusion and removal of aliens may be effectuated at the sole discretion of the government by concluding that an individual poses some amorphous threat to national security. This is an expansion of the Patriot Act’s exclusion of aliens who endorse

---

130. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10 (2003). Material support charges could also have been filed against Americans who donated money to the African National Congress (“ANC”) to support its struggle against apartheid, as the ANC was designated a terrorist organization by the State Department in the 1980s. *Id.* The DSEA’s version of “material support” takes this approach to even more extreme levels, as State Department designation would no longer be required for prosecution under the material support section.

131. If the frequency with which similar “material support” provisions, such as that contained in the Patriot Act, have been used are any indication, this provision would likely be frequently employed in the government’s pursuance of terrorists. *See id.* at 9 (noting that almost every terrorism case filed by the government since September 11th has included a “material support” charge).

132. *See* DSEA § 503 (amending sections 212(a)(3) and 237(a)(4) of the Immigration and Nationality Act to provide more discretion in the exclusion and removal of aliens by permitting exclusion and removal, respectively, when the Attorney General “has reason to believe” that a particular individual poses a threat to national security).

133. Immigration and Nationality Act, 8 U.S.C. § 1189(c)(2).

134. It is undisputed that, while contrary to American constitutional ideas of freedom of speech, exclusion of aliens who have not yet entered the United States is constitutionally permissible as certain constitutional protections do not apply to aliens who have never stepped foot into the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”). However, the Supreme Court has unambiguously reaffirmed the rule that resident aliens do have constitutional Due Process rights. *See id.* at 693 (holding that since the Due Process Clause of the Fifth Amendment applies to all “persons” within the United States, aliens are entitled to the same Due Process rights as citizens regardless of whether they are in the country unlawfully or on a temporary basis). Thus, the constitutionality of this provision as applied to resident aliens is dubious.

terrorist activity.<sup>135</sup> This type of unchecked discretion certainly leaves open the possibility that removal or denial of entry may be the consequence of participation in entirely lawful activities that the government perceives as ideologically threatening.<sup>136</sup> The ambiguous discretion inherent in the “reason to believe” standard<sup>137</sup> could result in removal or exclusion based solely on ideological grounds, guilt by association, or just plain suspicion.

## 2. *Aggregate Ideological Focus of DSEA*

While the DSEA contains many more anti-terrorism provisions than the three examples above, the three examples given illustrate the general approach to combating terrorism that the DSEA takes. The purpose of the DSEA is to enhance the domestic security of the United States of America. Thus, the DSEA seeks to accomplish similar ends as the Patriot Act, i.e., to prevent terrorist attacks before they occur.<sup>138</sup> The DSEA goes a bit further than the Patriot Act. The means employed to accomplish anti-terrorism goals are to cast a wide net of liberalized surveillance capabilities,<sup>139</sup> criminalization of acts the government perceives as aiding terrorist organizations,<sup>140</sup> and enhanced discretionary

---

135. Patriot Act § 807.

136. An example of possible applications of this section would be a resident alien’s summary deportation for suspected but unsubstantiated ties to a terrorist group. Illustrative is the example of Abdallah Higazy, an Egyptian student who was detained for a month and then released after the FBI found an aviation radio in his New York hotel room soon after the September 11th attacks. Phil Hirschhorn, *Egyptian College Student Freed; Charges Dropped*, available at <http://www.cnn.com/2002/LAW/01/16/inv.wtc.hotel.arrest/index.html> (Jan. 17, 2002). This certainly would give one reason to believe that there was a potential threat to national security. However, as the final disposition of this case indicates, “reason to believe” does not always comport with reality: Mr. Higazy was released after an American citizen and private pilot claimed ownership of the radio. *Id.* Thus, procedural protections eventually exonerated this individual whose predicament may have given the FBI or Attorney General “reason to believe” he would be a threat to national security.

137. DSEA § 503. While this standard obviously remains unquantifiable because the DSEA is not law yet and has not been interpreted by any court, arguably one’s suspected associations could provide at least “reason to believe” that there may be a potential for a threat to national security. The plain language of the “reason to believe” standard indicates a low threshold for the Attorney General to meet.

138. See Patriot Act, *supra* note 10 (stating that the goal of the Act is to “deter and punish terrorist acts”). See also U.S. Dep’t of Justice, *Anti-Terror Record of Accomplishments*, available at [http://www.lifeandliberty.gov/subs/a\\_terr.htm](http://www.lifeandliberty.gov/subs/a_terr.htm) (last visited Sept. 25, 2004) (“Prevention of terrorist attacks is one of our highest priorities.”); President George W. Bush, Remarks at Signing of the Patriot Act, Anti-Terrorism Legislation (Oct. 26, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/print/20011026-5html> (last visited Sept. 25, 2004) (stating that the Patriot Act will help to identify and punish terrorists before they strike).

139. See *supra* Part III.A.1.a (discussing expansion of FISA warrants)

140. See *supra* Part III.A.1.b (discussing changes to the material support

capabilities of government to remove and exclude aliens<sup>141</sup> in hopes of catching individuals who intend to commit terrorist acts or may pose some future threat to national security.

In furtherance of prevention, the provisions above allow for monitoring, criminal charges, or deportation/removal based solely upon ideological associations or beliefs. The expansion of FISA to permit surveillance of U.S. citizens who engage in wholly lawful activities under the guise of a “significant foreign intelligence purpose” allows the government to ideologically target groups that have committed no criminal act.

These provisions represent an extension of the “guilt by association intelligence model”<sup>142</sup> of terrorism prevention. This model assumes that individuals who share ideological or political positions have the potential to resort to violence in furtherance of ideological or political goals.<sup>143</sup> The basic mechanics of this approach are to cast as wide a net as possible to intercept potential terrorists and sort out errors later.

### *3. Counter Argument: An Ideologically Based Terrorism Prevention Model is Effective and Necessary to Combat Modern Terrorism*

The benefits of an ideologically based terrorism prevention model are obvious. If government and law enforcement are able to arrest, detain, and possibly convict people before any specific acts are planned (or even intended), it is likely that some individuals who might commit terrorist acts in the future would be prevented from doing so. This could potentially increase the internal security of the United States.

#### *a. Criminalization of Material Support Cuts Off Terrorist Financing and Alerts the Government to Future Terrorists*

While there is some benefit to reducing the resources of terrorist groups through material support convictions,<sup>144</sup> the real effectiveness of material support criminalization lies in thwarting future terrorist attacks by convicting (or at least identifying)

---

statutes).

141. See *supra* Part III.A.1.c (discussing the enhanced ability of the government to remove and exclude aliens under the DSEA).

142. DEMPSEY & COLE, *supra* note 63, at 13.

143. *Id.*

144. See *Progress Since 9/11: The Effectiveness of U.S. Anti-Terrorism Financing Efforts: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Fin. Servs.*, 108th Cong. 2-6 (Mar. 11, 2003) (testimony of Alice Fisher, Deputy Assistant Attorney General, United States Department of Justice), available at <http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=188> (last visited Sept. 27, 2004) (discussing the benefits of the government’s vigorous use of the material support provisions of the Patriot Act).

potential terrorists before they express their extremist views affirmatively via an actual act of violence.<sup>145</sup> Since terrorism is cheap,<sup>146</sup> the effectiveness of reducing terrorism financing in stopping future terrorist attacks is far from certain.<sup>147</sup>

The real strength of the material support law lies in preventing an individual's expressed support of terrorist groups by donating money or other resources from taking the next step of their advocacy for a terrorist group, which may be an affirmative violent act rather than passive support. Thus, targeting individuals who have manifested an affinity toward terrorist organizations through providing material support could prevent this affinity from devolving into affirmative violence.

**b. Removing and Excluding Suspicious Aliens Based on Associational Ties Increases Internal Security by Removing Terrorists Before They Act Violently**

Giving the government wide discretion to exclude or deport aliens simply for giving the Attorney General "reason to believe" that they would later pose a threat to national security<sup>148</sup> prevents aliens from committing terrorist acts within the borders of the United States by simply removing suspicious individuals from inside those borders. By allowing broad discretion and deference in the exclusion and removal of aliens,<sup>149</sup> the government can prevent individuals who have associational ties to suspicious individuals from remaining in the United States. Thus, if these associational ties were an accurate indicator of a future propensity to commit a violent act,<sup>150</sup> these acts could be prevented.<sup>151</sup>

---

145. See *id.* at 7-8 (discussing the intelligence gathering benefits that can be reaped from the investigation of suspected terrorist supporters or financiers).

146. See PAUL R. PILLAR, *TERRORISM AND U.S. FOREIGN POLICY* 94 (2002) (noting that the truck bomb that was used in the first World Trade Center attack in 1993 was estimated to have cost only \$400). See also Gaddis, *supra* note 54, at 9-10 (discussing the cost-effectiveness of the September 11th attacks).

147. See PILLAR, *supra* note 146, at 96 (noting that financial control of terrorist acts is largely a symbolic way of demonstrating the United States' dedication to eradicating terrorism on all fronts).

148. DSEA § 503.

149. The deportation process already lacks a way for immigration judges to decide if the deportation is constitutional. See Aubrey Glover, *Terrorism: Aliens' Freedom of Speech and Association Under Attack in the United States*, 41 DUQ. L. REV. 363, 371-75 (2003) (describing the deportation process). Thus, the discretionary grounds for deportation are left largely unchecked by judicial review. *Id.*

150. See generally ANN COULTER, *TREASON* 259-83 (2003) (discussing the practicality of ideological profiling in preventing future terrorist attacks).

151. See generally Dana B. Weiss, Note, *Protecting America First: Deporting Aliens Associated with Designated Terrorist Organizations that Have Committed Terrorism in America in the Face of Actual Threats to National Security*, 50 CLEV. ST. L. REV. 307 (2002-2003) (discussing the necessity of



c. **The DSEA Prevention Based Provisions Would Be an Effective Weapon in Battling the Diffuse Threat of Terrorism**

The ideologically targeted provisions of the DSEA could arguably be seen as a method to combat the diffuse threat of terrorism.<sup>152</sup> The sweeping nature of law enforcement powers contained in the DSEA and the indefinite duration of the DSEA<sup>153</sup> seem to indicate the potential genesis of a movement toward terrorism legislation that parallels the indefinite nature of the threat of terrorism.

The DSEA recognizes that terrorists and terrorist acts can come from anywhere at any time. By the absence of a sunset provision,<sup>154</sup> the DSEA recognizes (where the Patriot Act did not) that the threat of terrorism will not cease anytime in the near future. The imposition of “guilt by association” and ideological targeting of certain groups is the most effective manner in which to react to the diffuse nature of modern terrorism.<sup>155</sup> Furthermore, the DSEA is consistent with the Bush Administration’s willingness to preemptively strike in the War on Terrorism in order to prevent terrorist attacks.<sup>156</sup> In short, the DSEA seeks to effectuate the stated intent of the War on Terrorism: to secure and maintain a world free from the fear of terrorism.<sup>157</sup>

#### IV. PROPOSAL

##### *A. Ideological, Prevention Based Anti-Terrorism Legislation in the Context of Modern Terrorism is Counter-Productive*

In the context of a diffuse threat,<sup>158</sup> legislation that simply casts a wide ideological net to prevent future terrorist acts is counterproductive. At the outset, it should be noted that preventive law enforcement is at odds, in some ways, with basic

---

denying aliens freedom of association with terrorist groups in the name of national security).

152. See Part II.B (discussing the diffuse nature of the modern terrorist threat).

153. See DSEA § 110 (removing the sunset provision from portions of the Patriot Act).

154. *Id.*

155. See ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 172-81 (2002) (explaining how “collective accountability and punishment” is an effective way to deter terrorist attacks).

156. See President George W. Bush, Remarks by the President at 2002 Graduation Exercise of the United States Military Academy (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (last visited Sept. 23, 2004) (describing the Bush Administration’s preemptive strike approach to fighting the War on Terrorism and noting that “[i]f we wait for threats to fully materialize, we will have waited too long”).

157. NATIONAL STRATEGY, *supra* note 84, at Strategic Intent, 2.

158. See *supra* Part II.B (describing the inherent uncertainty of the threat of terrorism).

tenets of the United States' criminal justice system. Specifically, the criminal justice system requires the commission of an actual crime before sanctions can be imposed and carries a presumption of "innocent until proven guilty."<sup>159</sup> Beyond this, the specific approach to combating terrorism that the DSEA represents contains a number of abstract deficiencies that may actually make the United States less safe.

When the Patriot Act expires in 2005, the United States should resist the temptation to expand the scope of its anti-terrorism approach. The DSEA approach should not be pursued. The United States must adopt an anti-terrorism approach that preserves civil liberties while effectively addressing the root causes of terrorism.

### *1. The Constitutionality of Ideological, Prevention Based Anti-Terrorism Laws Is Uncertain*

Federal courts around the country have struggled with the standards that should be applied to ideologically based laws.<sup>160</sup> While the Supreme Court has upheld ideologically based anti-terrorism laws in the past,<sup>161</sup> the lower federal courts have continued to struggle with the extent to which ideologically based anti-terrorism laws will remain within the bounds of the Constitution.<sup>162</sup> Thus, in a general sense, the propriety of

---

159. See Cole, *supra* note 130, at 2-3 (noting several problems with prevention based law enforcement).

160. See, e.g., *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 471 (D.C. Cir. 1991) (noting that the government may not investigate individuals merely because they express politically unpopular views); *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1017 (7th Cir. 1984) (attempting to formulate a distinction between permissibly investigating immediate threats and impermissibly investigating vague threats posed by certain groups); *Rafeedie v. INS*, 795 F. Supp. 13, 23 (D.D.C. 1992) (attempting to further reconcile governmental interests in security with broad ideological prohibitions with respect to immigration). See generally Susan Dente Ross, *In the Shadow of Terror: Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL'Y 75, 98-103 (2001) (discussing the struggle of the lower federal courts to define the standards by which to weigh the constitutionality of associational grounds for investigation and deportation of immigrants).

161. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999) (upholding the constitutionality of the AEDPA's material support provision). It should be noted that *American-Arab* did not entirely resolve the question of whether ideologically based deportations (that is, deporting an individual because the government believes her to be a member of an organization that supports terrorism) are proper. The Court found only that ideologically based deportations are not improper when an additional deportable immigration violation exists. *Id.* at 491-92.

162. See Ross, *supra* note 160, at 108-12 (examining post-*American-Arab* cases and determining that the courts of appeals continue to reach different conclusions about the propriety of ideologically based deportations). Most cases broaching the propriety of deportation on ideological grounds have focused on the jurisdiction of the court to hear the appeals of deportation

ideologically based laws remains uncertain.

## 2. *Ideologically Based Laws May Make the United States Less Safe*

Beyond the uncertain constitutionality of ideologically based anti-terrorism laws, these laws potentially will make the United States less, rather than more, safe. Broad based ideological monitoring risks overlooking terrorists who do not fall into established profiles and “stigmatizes the innocent.”<sup>163</sup> This happened to Muslims in the days following the Oklahoma City Bombing.<sup>164</sup>

Ideologically repressive legislation itself may provide a catalyst for violent acts based on an increased feeling of alienation by groups that may not have otherwise acted violently. The experiences of Northern Ireland<sup>165</sup> and Israel,<sup>166</sup> two countries that are continually grasping for ways to combat domestic terrorist attacks, indicate that ideological targeting of certain groups has historically been ineffective at preventing terrorist attacks and may instead actually cause an increase in political violence through the polarization of former moderates to extremist positions.<sup>167</sup>

---

orders rather than on the substantive issue of ideological deportation. *Id.*

163. DEMPSEY & COLE, *supra* note 63, at 15.

164. See Robert Marquand, *Media Still Portray Muslims as Terrorists*, CHRISTIAN SCIENCE MONITOR, Jan. 22, 1996, at 11 (describing how Muslims were harassed by the police and fingered by the media as terrorists after the Oklahoma City Bombing in 1995). See also Elise Aymer, *The American Muslim Political Renaissance*, 18 YALE POL. Q. 1 (Dec. 1996), available at <http://www.yale.edu/ypq/articles/dec96/dec96c.html> (last visited Sept. 27, 2004) (describing the FBI's initial targeting of Muslims in the days following the Oklahoma City bombing and the violence and harassment to which Muslims were subjected).

165. The global precedent for the dangers that may result from ideological targeting can be shown by Northern Ireland's attempts to curb terrorist attacks through the “targeted internment” and targeting of “emergency laws” toward the Catholic Nationalist community. O'Connor & Rumann, *supra* note 68, at 1678-81. Targeted enforcement of “emergency laws” actually caused increased terrorist activity and IRA membership by polarizing former moderates into more extreme positions. *Id.* at 1680. Interviewees of O'Connor and Rumann frequently cited the treatment of family members under the “emergency laws” as being a motivation to join an outlawed paramilitary group. *Id.*

166. See generally Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective*, 31 GA. J. INT'L & COMP. L. 493 (2003) (discussing Israel's efforts to curb terrorism through guilt by association, collective punishment, and torture). See also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 956, 956 n.13 (2002) (explaining how the Israelis' imposition of guilt by association, collective punishment, and summary executions of terrorists has been ineffective in curbing terrorism).

167. O'Connor & Rumann, *supra* note 68, at 1680.

Ideological targeting may also contribute to political violence by “shutting off th[e] safety valve”<sup>168</sup> of peaceful dissent, thereby encouraging those who may have sought social change through peaceful dissent to instead react violently. Suppression of the expression of political activities “may prompt violent expression of ideas that will have no other outlet.”<sup>169</sup>

### *3. Ideologically Based Anti-Terrorism Laws Are Not Well Suited to Combating the Diffuse Nature of Terrorism*

The specific goals of past terrorist attacks have been varied and prompted by different specific causes.<sup>170</sup> While the Bush Administration believes that terrorists act violently toward the United States because of some amorphous hatred of freedom,<sup>171</sup> history indicates that terrorist acts are generally caused by violent reactions to specific governmental acts and policies, both at home and abroad.<sup>172</sup>

An approach that fails to look at the specific, initial motivations of terrorist groups to commit acts of terrorism is an inefficient way to prevent attacks over time.<sup>173</sup> The approach represented by the DSEA would direct governmental attention and resources to individuals that may have no violent intentions toward the United States. By using scarce resources, this precludes law enforcement from recognizing and responding to specific and imminent motivations of individuals with affirmative animosity toward the United States.

For example, just as the presence of U.S. troops in Saudi Arabia seems to have provided the initial catalyst for Osama bin Laden’s acts toward the United States,<sup>174</sup> the presence of an ideologically repressive law itself may provide the catalyst for domestic groups to react violently.<sup>175</sup> The DSEA approach could

---

168. DEMPSEY & COLE, *supra* note 63, at 16.

169. Ross, *supra* note 160, at 121.

170. See *supra* notes 68-72 (discussing the differing motivations of the perpetrators of the terrorist attacks on U.S. soil in the past decade).

171. See President’s Letter on the “National Strategy for Homeland Security,” 38 WEEKLY COMP. PRES. DOC. 29 (July 16, 2002) [hereinafter Letter from the President], available at [http://www.whitehouse.gov/homeland/book/letterfromthe president.pdf](http://www.whitehouse.gov/homeland/book/letterfromthe%20president.pdf) (last visited Sept. 24, 2004) (stating that “[t]errorists wish to attack us . . . because of the freedoms we hold dear”).

172. See *supra* notes 77-79 (describing the specific motivations supplied by some terrorists for their attacks on U.S. soil).

173. In addition to the problems associated with broad ideologically based anti-terrorism laws, an overly general conception of the War on Terrorism risks weakening the commitment of our allies in the fight against terrorism, ignores international law, and violates the sovereignty of other countries. RICHARD FALK, *THE GREAT TERROR WAR* 8 (2003).

174. See Anderson, *supra* note 77 (noting that bin Laden’s hostility toward the U.S., at least initially, was specifically directed at the presence of U.S. troops in Saudi Arabia).

175. See Banisky, *supra* note 57. Timothy McVeigh’s feelings that the

miss the opportunity to recognize and prevent these terrorist attacks, as they may not fit into established associational profiles. Failure to recognize the specific nature of terrorist motivations has the dual deficiency of missing the ability to prevent certain terrorist acts while alienating and stigmatizing the innocent.

#### 4. "But We Have to Do Something!"

A terrorist attack such as the one that occurred on September 11th must be met with drastic changes by the government to prevent such attacks from occurring in the future. Thus, perhaps the government's regression to techniques that have been used in the past is understandable. Terrorism, however, poses a very different type of threat than has faced the United States in the past. The current trend of an ideological, prevention based anti-terrorism strategy that appears to be taking shape is both too broad and too narrow to effectively prevent future terrorist attacks.

It is too broad in the sense that it focuses criminal sanctions and surveillance on groups that have not committed any crime and may never intend to do so. There is also the ever present risk that broad discretionary laws such as the DSEA will be used to prosecute crimes that have nothing to do with terrorism at all.<sup>176</sup>

The DSEA approach is too narrow in the sense that it does not effectively prevent future violent terrorist attacks. Reactionary anti-terrorism laws do absolutely nothing to address terrorists' motivations for committing acts of terrorism in the first place; they simply seek to penalize those who are perceived as having pre-existing hostility toward the United States. These laws fail to address the important issue of why certain individuals desire to attack the United States. The current approach that has been adopted (and will possibly be extended via enactment of DSEA provisions) addresses this issue in the most myopic way possible: terrorists attack us because they hate freedom.<sup>177</sup>

Thus, beyond the negative proposal of this Comment that the government not pursue the anti-terrorism approach represented by the DSEA after the Patriot Act expires, there must be an affirmative shift in the approach that the government employs to make the country safer in the future. On a macro level, the most

---

government had been too intrusive into the lives of its citizens seem to have been at least a partial motivation for the Oklahoma City bombing. Thus, the prospect of terrorist activities by U.S. citizens motivated by repressive government activities is not at all far-fetched.

176. If history is any indication, this possibility is not mere conjecture. The Patriot Act was recently used by the FBI to obtain the financial records of a Las Vegas strip club owner who was being investigated for bribery of local officials. Michael Isikoff, *Show Me the Money*, NEWSWEEK, Dec. 1, 2003, at 36.

177. See Letter from the President, *supra* note 171 (noting that the terrorists attack us because of the "freedoms we hold dear").

effective manner to address the indefinite threat of terrorism is to concentrate instead on the roots of terrorism.

The ultimate problem with preventing terrorist attacks through ideological targeting is that it fails to attack the problem of terrorism at the volitional stage. As terrorism is entirely volitional, it can be committed at the whim of any angry individual with minimal resources.<sup>178</sup> This being true, there is no way to effectively combat this volitional act through repressive and reactionary “band-aid” solutions, such as the DSEA approach, while maintaining our democratic values.

Broad ideological anti-terrorism laws are suited to totalitarian states, but not democracies.<sup>179</sup> Effective measures should include broad foreign policy initiatives, such as ending support for repressive governments around the world, global economic development to eradicate poverty, and fostering productive channels of political dissent domestically and internationally.<sup>180</sup> True preventive measures such as these are the only way to make the United States safer in the future while retaining the principles of freedom that the United States was founded upon.

#### V. CONCLUSION: THE FUTURE OF ANTI-TERRORISM LEGISLATION

The sunset provision of the Patriot Act<sup>181</sup> expires much of the Act’s provisions on December 31, 2005. Thus, Congress may determine at that time whether the Patriot Act’s provisions remain reasonable responses to the threat of terrorism and whether this particular law remains well suited to preventing terrorist attacks. Hopefully, by 2005, time will have given lawmakers and the American public an opportunity to reflect on the tenuous efficacy of the current approach to combating terrorism. Calm reflection could result in a new focus on attacking the roots of terrorism.

History has shown that legislative excesses are generally condemned after an emergency ceases.<sup>182</sup> However, “permanent

---

178. See Gaddis, *supra* note 54, at 9-10 (discussing the cost-effectiveness of terrorism).

179. Democracies do not have the “luxury” of using certain means that may be useful in eradicating terrorism, as certain rights are inalienable in a democracy. See PAUL JOHNSON, *The Seven Deadly Sins of Terrorism*, in TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL 189, 193 (Henry H. Han ed., 1993) (noting that totalitarian states can always defend themselves from terrorism because they do not have to abide by the rule of law).

180. See PILLAR, *supra* note 146, at 31 (explaining how policy initiatives can affect the roots of terrorism).

181. Patriot Act § 224.

182. See *supra* Part II.A.1-4 (discussing the historical experience of the United States’ responses to emergencies).

war”<sup>183</sup> never allows the necessary “breathing space”<sup>184</sup> for the American public to appreciate the severity of the freedoms that are being lost. Thus, the opportunity for the American people in calmer times to appreciate and condemn governmental excesses may never arise.

The ultimate danger of the DSEA’s approach is twofold: the DSEA will make us less safe and less free, and the perpetual nature of modern terrorism will prevent us from realizing it. In 2005, the Patriot Act must not be renewed or replaced by the DSEA approach. Instead, the American people must institute a new approach that preserves the freedoms that America was founded upon. If we wait any longer to demand our civil liberties, they may be irretrievably lost. While victory in the War on Terrorism cannot be clearly defined, defeat can be. The United States will lose the War on Terrorism if the very essence of American values—freedom—is compromised in the name of security. Thus, in deciding whether a new Patriot Act is proper, the United States should heed the prescient words of Russ Feingold, the lone Senator opposed to the passage of the first Patriot Act:

There is no doubt that if we lived in a police state, it would be easier to catch terrorists. . . . But that would not be a country in which we would want to live . . . that would not be America. Preserving our freedom is one of the main reasons that we are now engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people.<sup>185</sup>

---

183. Carpenter, *supra* note 88.

184. ANTHONY LEWIS, *Security and Liberty, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 47, 51 (2003).

185. USA PATRIOT Act of 2001, 147 CONG. REC. S11020 (2001) (statement of Sen. Russ Feingold).