CIVIL LIBERTIES, NATIONAL SECURITY AND HUMAN RIGHTS TREATIES: A SNAPSHOT IN CONTEXT

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INTRODUCTION[1]

This essay will discuss the impact on civil liberties of concepts and principles of foreign affairs, in particular considerations of national security. It will first situate the present era by summarizing what has gone before. It then will illustrate the current state of affairs by examining the recently enacted Anti-Terrorism Act and the way in which the United States has implemented human rights treaties. Finally, it considers what more can be done, and how.

I. THAT WAS THEN [2]

There is little room for dispute here. Foreign affairs and its close relation, national security, have usually been graveyards for civil liberties. This is true even though governmental authority in the foreign sphere is not exempt from the liberty-bearing provisions of the Constitution. The Supreme Court made this clear as early as 1919, when it stated that the war power is subject to "applicable constitutional limitations."[3] Only rarely, however, has the Court found such "limitations" to be "applicable." Its decisions are traceable, in large part, to *United States v. Curtiss-Wright Export Corp.*, where, in a passage unnecessary to the holding, the Court stated that "the President alone has the power to speak or listen as a representative of the

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[1] This paper was prepared for a symposium held on October 10, 1996, at the University of California Law School at Davis to commemorate the publication of the second edition of Louis Henkin, *Foreign Affairs and the US Constitution.*

The first edition of the book was widely hailed because of its learned scholarship, careful and lucid writing, and common sense. The materials in Chapter IX of the second edition (Individual Rights and Foreign Affairs), of which this article is an elaboration, are consistent with this high standard.

[2] *See* Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L. L. 840 (1989) (conceptualizing this section).

[3] Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919).

nation."[4] *Curtiss-Wright* ignored the foreign affairs authority accorded by the Constitution to the Congress—including the appropriations, confirmation and treaty ratification powers— and slighted the judiciary's special responsibility for the protection of liberty.[5]

Despite these lapses, the Supreme Court soon made it clear that it would rarely intervene when the government offered foreign affairs or national security interests to justify restraints on individuals. The World War II *Japanese Internment Cases* showed that, even when racial discrimination is patent, the Fourteenth Amendment can be unavailing.[6] The McCarthy era, which reached its apex in the early 1950s, witnessed a series of cases in which national security considerations resulted in severe setbacks for civil liberties. For instance, loyalty oaths designed to root out Communists from influential positions were upheld;[7] Communist leaders were convicted of conspiracy to advocate forcible overthrow of the government, speech twice removed from action;[8] the power of congressional committees to inquire into the political beliefs of private citizens was sustained;[9] the Communist Party's associational rights were rejected;[10] the privilege against incrimination proved a fragile shield against official inquiries about radical associations;[11] and aliens long resident in the United States were deported solely on the basis of previous membership in the Communist Party, a legal entity.[12]

Yet during this period the groundwork was laid for enhanced protection of civil liberties in some cases relating to foreign affairs. Perhaps the most important ruling, in 1952, declared unconstitutional the Executive's "emergency" seizure of steel mills whose production for the Korean War had been halted by strikes.[13] Although the decision protected property rights, its

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[4] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[5] *See generally* Jeanne M. Woods, *Presidential Legislating in the Post-Cold War Era: A Critique of the Barr Opinion on Extraterritorial Arrests*, 14 B.U. INT'L L.J. 1, 20-22 (1996).

[6] *See* Korematsu v. United States, 323 U.S. 214, 218 (1944) (holding that Japanese residents, including Japanese-Americans, could be confined because of possible disloyalty).

[7] *See* American Communications Ass'n v. Douds, 339 U.S. 382, 415 (1950) (upholding constitutionality of Loyalty Act).

[8] *See* Dennis v. United States, 341 U.S. 494, 516-17 (1951) (ruling that Smith Act, prohibiting willful advocacy of over throw of government by force or violence and organization of any group advocating overthrow of government, did not violate constitution).

[9] *See* Barenblatt v. United States, 360 U.S. 109, 134 (1959) (affirming conviction for contempt of Congress for plaintiffs' refusal to answer whether he had been a member of communist party).

[10] *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 88-89 (1961) (holding that First Amendment does not prohibit Congress from requiring registration and filing of information, including membership lists, by organizations controlled by foreign powers).

[11] *See* Knapp v. Schweitzer, 357 U.S. 371, 379-80 (1958) (stating that Fifth Amendment is not general policy against compelling testimony, but rather to protect against conviction by one's own words).

[12] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952) (concluding that deportation provisions of Alien Registration Act of 1940 do not violate Due Process).

[13] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-86 (1952).

implications went far beyond the holding as it recognized constitutional limits on executive action, even during wartime.

In the decade beginning with 1957, there was a series of striking victories for civil liberties that established the right to international travel,[14] invalidated government restrictions on "Communist political propaganda,"[15] invalidated restrictions on the employment of Communists in a "defense facility,"[16] and secured the citizenship rights of both native-born[17] and naturalized American citizens.[18]

The high-water mark for civil liberties was probably reached in 1971 in the *Pentagon Papers Case*,[19] when the Court barred government censorship of a contemporaneous history of the Vietnam War despite the highly classified nature of much of the published material. Praised by civil libertarians, the decision was nevertheless weakened by the sharp dissenting opinions and the varying theories of the concurring Justices. It thus was "a harbinger of a more deferential attitude towards national security claims."[20]

Events amply justified these fears, as even an incomplete list will show. In the 1970s and 1980s, the Court upheld the denial of a visa to a foreign journalist who was a "revolutionary Marxist;"[21] upheld a requirement that a former employee of the Central Intelligence Agency submit all his future writings for agency review before publication;[22] permitted the Secretary of State to restrict an American's travel abroad whenever he determined that the travel was "likely" to damage foreign policy or national

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[14] *See* Kent v. Dulles, 357 U.S. 116, 129-30 (1958) (holding that Secretary of State did not have authority to deny passports to communists whom evidence showed were going abroad to further communist causes).

[15] *See* Lamont v. Postmaster Gen., 381 U.S. 301, 302 (1965) (stating that detention and destruction of communist propaganda by post office is contrary to First Amendment).

[16] *See* United States v. Robel, 389 U.S. 258, 260 (1967) (holding that restrictions on employment of communists abridges First Amendment right to association).

[17] *See* Afroyim v. Rusk, 387 U.S. 253, 261 (1967) (drawing on Chief Justice Marshall's opinion in Osborn v. Bank, 9 Wheat. 738, 827 (1924), "the Fourteenth Amendment . . . has conferred no authority upon congress to restrict the effect of birth . . . [a] complete right to citizenship").

[18] *See* Nowak v. United States, 356 U.S. 660, 663 (1958); Maisenberg v. United States, 356 U.S. 670, 672 (1958) (stating that evidence showing that an applicant for citizenship had been a member of communist party was insufficient to prove fraud in obtaining citizenship).

[19] *See* New York Times Co. v. United States, 403 U.S. 713, 715 (1971) (barring government censorship of news of Vietnam War).

[20] *See* Morton H. Halperin, *The National Security State: Never Question the President*, *in* The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986 50, 50-51 (H. Schwartz ed. 1987).

[21] *See* Kleindienst v. Mandel, 408 U.S. 753, 755 (1972) (concluding that Congress has plenary power to exclude aliens, that this power has been conditionally delegated to executive, and that when executive exercises that power for legislative reasons, the court will defer to the executive).

[22] *See* Snepp v. United States, 444 U.S. 507, 510 (1980); United States v. Morison, 844 F.2d 1057 (4th Cir.) (ruling that Espionage Act applies to unauthorized transmittal of satellite-secured photographs to periodical), *cert. denied*, 488 U.S. 908 (1988).

security;[23] and upheld the ideologically-based restriction of the countries Americans were permitted to visit.[24] Some of these decisions were broad holdings; others were narrower. Some were constitutional rulings; others were primarily statutory. But all significantly restricted civil liberties.

In the above cases, and others, the opinions relied on three principal decisional techniques, to cabin individual rights. The first is virtually unlimited judicial deference to the government, especially the Executive, on questions of foreign policy. Thus, the Court said that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,"[25] and it spoke of the "traditional deference to executive judgment '[i]n this vast external realm.'"[26] To be sure, the Supreme Court in recent years has frequently been respectful to decision makers in a variety of government institutions, including schools,[27] prisons[28] and mental institutions,[29] but a special degree of deference is evident in foreign affairs.[30]

The second technique used by the Supreme Court to reject claims of civil liberty is to employ an amorphous "balancing test" to assess these claims against asserted government interests. In doing so, the court tends to undervalue the importance of individual liberty while exaggerating the imperative of national security.[31]

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[23] *See* Haig v. Agee, 453 U.S. 280, 297 (1981).

[24] *See* Regan v. Wald, 468 U.S. 222, 235 (1984).

[25] *Haig*, 453 U.S. at 292.

[26] *Regan*, 468 U.S. at 243 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936)).

[27] *See, e.g.*, Hazelwood School Dist. v. Kuhlmeir, 484 U.S. 260, 267 (1988) (arguing that due to unique nature of high school student newspaper, high school principal can remove articles because they impinge on privacy rights of parents and pregnant students without violating First Amendment right of free speech).

[28] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 548 (1979) (denying prisoners hardcover books not mailed by publishers, book clubs or bookstores is not First Amendment violation). *See also* Thornburgh v. Abbott, 490 U.S. 401, 416 (1989) (noting that prison wardens' broad discretion is rationally related to security interests).

[29] *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (noting that judges or juries are not better qualified than professionals in making decisions about institution's internal operations).

[30] *See, e.g.*, United States v. Morison, 844 F.2d 1057, 1082-83 (4th Cir.) (Wilkinson, J., concurring) (stating that government restrictions may be sustained "where national security and foreign policy are implicated."), *cert. denied*, 488 U.S. 908 (1988).

[31] *See, e.g.*, Haig v. Agee, 453 U.S. 280, 301 (1981) (holding that President, acting through Secretary of State, has authority to reserve a passport on the ground that holder's activities in foreign countries are causing, or are likely to cause, severe damage to national security or foreign policy of the United States); Snepp v. United States, 444 U.S. 507, 513 (1980) (ruling that former CIA agent had harmed United States by not submitting material for clearance before it was published). The Supreme Court followed this approach in the 1950s and early 1960s in rejecting free speech claims that were "balanced" against national security concerns, *see* Konigsberg v. State Bar, 366 U.S. 36, 41 (1961) (noting that State of California could not constitutionally bar admissions to State Bar because of refusal to answer questions respecting communist party); Barenblatt v. United States, 360 U.S. 109, 126 (1959) (refusing balance between witness' individual interest in not divulging association and common interest in communist activities be struck in favor of government).

The third judicial technique, which usually leads to the same result, is to dismiss lawsuits on justiciability grounds such as standing,[32] ripeness,[33] sovereign immunity and political questions.[34] It has truly been said that "[a]ll the doctrines that lead courts not to decide cases find a home in the field of foreign affairs."[35] When these doctrines are employed, challenged government action is of course immunized and individual rights are unrecognized.

In viewing the history of foreign affairs and civil liberty, it is important to recall that, in a properly functioning society, judges are not the only protectors of liberty. Elected officials share a fiduciary duty to the Constitution. Unfortunately, Congress, particularly during periods of international stress, has often sought to achieve foreign policy goals through legislation that is insensitive to civil liberty, including the approval of the statutes that were unsuccessfully challenged in the cases referred to above.

The Executive has been even more culpable than Congress for using its powers to plight individual liberty. The Executive is the motor of government, controlling the bureaucracy, the military and, increasingly, public opinion. It can resist and veto unconstitutional legislation. It can also exercise its broad discretion in favor of an open society by, for example, permitting Americans to travel without restraint, by limiting the classification of documents and by presenting accurate information to the public. As the branch that develops and implements policy on a day-to-day basis, it, more than the others, affects civil liberties directly, for ill or good.

In recent years the Executive has often fallen short. The Carter Administration pressed foreign affairs cases that resulted in significant defeats for the First Amendment.[36] The Reagan Administration was even more prone to permit national security interests to devour individual liberties. Among many other initiatives, it interpreted the Export Administration Act to permit government interference with unclassified university research by restricting

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[32] *See, e.g.*, Velvel v. Nixon, 415 F. 2d 236, 239 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (denying that tax payer has standing to sue to end Vietnam War).

[33] *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 8-9 (1972) (denying relief from U.S. army surveillance of lawful activity because of lack of injury).

[34] *See* Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103, 108 (1948). *See also* Dalton v. Specter, 114 S.Ct. 1719, 1721 (1994) ("Where...a statute commits decisionmaking to the President's discretion, judicial review of his decision is not available.").

[35] Andreas F. Lowenfeld, *Book Review*, 87 HARV. L. REV. 494, 506 (1973) (reviewing LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972)). *See also* THOMAS FRANCK & MICHAEL GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 849-1021 (2d ed. 1993).

[36] *See* Snepp v. United States, 444 U.S. 507, 511-12 (1980) (requiring former CIA agent to submit all future writings to prepublication review and enjoining future breach of confidentiality agreement); *see also* Haig v. Agee, 453 U.S. 280, 297 (1981) (confirming executive power to revoke passport of former CIA officer whose intended activities abroad, exposing CIA operations, were likely to cause serious damage to national security or foreign policy of United States).

the exchange of scientific information; it interpreted the Foreign Agents Registration Act to require documentary films to be labeled as "political propaganda,"[37] and it increased the ease with which government documents are classified.[38] The Bush Administration generally followed the policies of the Reagan Administration.[39] It is quite plain, therefore, that the current Administration and current Congress work in an historical context that is, to say the least, not propitious.[40]

II. THIS IS NOW

What about the current Administration and Congress? The news is not good. On many occasions both the Executive and the Legislative branches have continued the long tradition of sacrificing civil liberty to national security and foreign affairs interests. In a scathing column about President Clinton, Anthony Lewis asked why "is a lawyer President indifferent to constitutional rights and their protection by the courts?"[41] I do not propose to relate a history of the mid-1990s but rather to draw attention to two issues: (1) the Anti-Terrorism and Effective Death Penalty Act of 1996[42] ("Anti-terrorism Act" or "AEDPA"), and (2) the American reaction to treaties designed to protect human rights.

A. The Anti-Terrorism Act

Terrorism is of course horrifying. But as in the case of other crimes, there is a right way and a wrong way to combat terrorism.[43] This point was

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[37] Meese v. Keene, 481 U.S. 465, 467-69 (1987) (sustaining government's position).

[38] *See generally* FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980S (Richard O. Curry ed., 1988).

[39] *See* AMERICAN CIVIL LIBERTIES UNION, RESTORING CIVIL LIBERTIES: A BLUEPRINT FOR ACTION FOR THE CLINTON ADMINISTRATION 22-39 (Dec. 1992).

[40] This paper does not purport to address the record of states in this area. But even a cursory examination reveals many instances where state governments weighed foreign affairs and national security interests more heavily than civil liberties concerns, *see* Schware v. Board. of Bar Examiners, 291 P.2d 607 (1955), *rev'd*, 353 U.S. 232 (1957); Oregon v. De Jonge, 51 P.2d 674 (Or. 1936), *rev'd* 299 U.S. 353 (1937); California v. Stromberg, 290 P. 93 (Cal. 1930), *rev'd* 283 U.S. 359 (1931).

[41] Anthony Lewis, *Abroad at Home: Clinton's Sorriest Record*, N.Y. TIMES, Oct. 14, 1996, at A17. To be sure, in the same column Lewis said that it is "by no means clear that Bob Dole would do better," and he noted that the "Republican Congress of the last two years initiated some of the attacks on the courts." *Id.*

[42] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat. 1214).

[43] *See* Letter from Gregory T. Nojeim, Legislative Counsel to the American Civil Liberties Union, to all U.S. Representatives, (April 17, 1996) (regarding Civil Liberties and the Conference Report on the Anti-Terrorism Bill) (on file with the Library of Congress). *See also* Note, *Blown Away? The Bill of Rights after Oklahoma City*, 109 HARV. L. REV. 2074, 2090-2091 (1996) ("[i]n light of the serious threat

well made recently in a letter to The New York Times by the brother of a man who died in the crash of TWA Flight 800 in July 1996, then assumed to be the work of terrorists.[44] He wrote that the "countries that commit these atrocities seek to destroy not a nation but a way of life," and they "should endure the heaviest toll we can place upon them."[45] But he went on to say that "[i]ncreases in security, identification checks, added costs and burdens upon us will not deter attacks but envelop us in fear."[46]

Those who seek to punish terrorists but also oppose draconian methods of control have a duty to speak out. Let us look at some provisions of the the Anti-Terrorism Act. The law authorizes the use of secret evidence in deportation proceedings against aliens accused of being "terrorists;"[47] gives the Secretary of State the power to designate groups as "terrorist" organizations and thereby exclude their members from the United States and bar Americans from supporting their otherwise legal activities;[48] defines terrorism so broadly as to risk selective prosecution based on political beliefs;[49] provides for summary exclusion without adequate process for refugees who arrive without travel documents and are unable to prove their asylum case in the airport immediately upon arrival;[50] provides for mandatory detention of criminal aliens who have already completed their prison sentences;[51] and requires banks to freeze the assets of U.S. citizens and domestic groups that the bank believes are agents of designated foreign terrorist organizations, even though these citizens and groups themselves could not be so designated, and provides no mechanism for appeal.[52]

To facilitate these provisions, the Anti-Terrorism Act authorizes several problematic investigative methods. For example, it authorizes the FBI to investigate activity protected by the First Amendment and to conduct such investigations without a reasonable indication of criminality;[53] it expands wiretap powers by removing warrant protection for any "electronic funds

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posed by terrorism . . . the Court might sacrifice individual rights in the name of national security" and arguing that "preventing the initial enactment of unconstitutional provisions is crucial").

[44] *See* Richard Penzer, *Letter to Editor*, N.Y. TIMES, Sept 12, 1996, at A22.

[45] *Id.*

[46] *Id.*

[47] *See* Anti-Terrorism and Effective Death Penalty Act of 1996, § 504(e)(3)(A).

[48] *See id.* § 302(a), 110 Stat. at 1248-50 (to be codified at 42 U.S.C. § 1189).

[49] *See id.* § 303 (a), 110 Stat. at 1250-51 (to be codified at 18 U.S.C.A. §2339B).

[50] *See id.* § 422, 110 Stat. at 1270, 1272 (to be codified at 8 U.S.C.A. §§1225, 1227(a)). These provisions of the Anti-Terrorism Act were replaced by a slightly revised version of summary exclusion, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 305, 1996 U.S.C.C.A.N. (110 Stat.) at 1651.

[51] *See* Anti-Terrorism and Effective Death Penalty Act of 1996, § 507 (to be codified at 8 U.S.C.A. §1537).

[52] *See id.* § 219(a)(2)(C), 110 Stat. at 1248 (to be codified at 8 U.S.C.A. §1189).

[53] *See id.* § 323, 110 Stat. at 1303 (dropping prohibition on investigating First Amendment activities).

transfer information . . . stored by a financial institution in a communications system used in the electronic storage and transfer of funds;"[54] and it opens for law enforcement purposes files submitted on a confidential basis to the Immigration and Naturalization Service for the amnesty and special agricultural workers programs.[55]

A brief discussion of sections 303 and 416 of the Act will illustrate the civil liberties problems. First, section 303(a)(1) prohibits people from funding the legal, non-violent, often charitable activity of groups designated as "terrorist organizations." Even providing in-kind support (other than medicine and religious materials), such as a blanket for a hospital run by the organization, subjects a donor to prosecution and to a prison term of ten years and a substantial fine.[56] Donors who face criminal charges for providing material support to a designated organization are barred from challenging the validity of the "terrorist" designation in court.

Section 303 is unnecessary, unlikely to be effective, and possibly unconstitutional. It is already a crime to provide material support for violent, criminal activity abroad.[57] Furthermore, although it targets group loyalties rather than individual activities, this provision fails to account for new groups that form for the purpose of committing criminal acts. For example, Section 303 would not have stopped a person in the United States from furnishing a gun to Yigal Amir for the purpose of killing Israeli Prime Minister Rabin. Amir's group would not have been designated by the Secretary of State because it was unknown.

If section 303 had been re-drafted to focus on "knowing support" for a serious crime of violence, rather than on support for legal activities of disfavored groups, it would be constitutional and more likely to be effective. The government probably would oppose this suggestion on the ground that it would be too onerous to require proof of an individual's "knowing support" for a violent crime. In the 1960s, the government made a similar argument, with much stronger support, in cases involving the Communist Party. Then, as now, it was claimed that a specific intent requirement was too difficult to prove and was unnecessary because the Party was foreign-dominated (as Congress had found), engaged in terrorism with intent to overthrow the United States government, and presented a clear and present danger to our national security. It was claimed further that all members of the Party were dedicated to its illegal aims and therefore were properly the subject of sanctions without proof of individual activity. In a series of cases the

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[54] *Id.* § 731(1)(D), 110 Stat. at 1303.

[55] *See id.* § 431, 110 Stat. at 1273 (to be codified at 8 U.S.C.A. §1255a).

[56] *See id.* § 303(a), 110 Stat. at 1250-51 (to be codified at 18 U.S.C.A sect. 2339(B)).

[57] *See* 18 U.S.C. § 2339A.

Supreme Court rejected this argument.[58] In the contemporary context, when no group has the power or foreign support that the Communists did in the 1960s, the contention should be summarily denied.

A second dubious provision is section 411,[59] which allows the government to exclude aliens merely on account of their membership in an organization the Secretary of State has designated a foreign terrorist organization under section 302 of the Act.[60] Potentially dangerous persons are already excluded under current law. The new provision permits exclusion of those who are not dangerous, but who have ideas the government regards as dangerous. This resurrects the McCarthyite notion that Congress buried six years ago, when it repealed the McCarran-Walter Act, that people can be excluded from the United States on account of associational activity that would be protected under the First Amendment. The targeting of associations rather than participation, or even potential participation, in criminal or violent activity is inconsistent with principles underlying the First Amendment.

The Anti-Terrorism Act is not the only recent example of constitutional abridgement when national security interests appear to be at stake.[61] For example, the Immigration Act, which was signed into law in September 1996, severely impairs the internationally recognized right of refugees to seek asylum by providing for the summary exclusion of asylum-seekers who arrive in the U.S. without proper travel documents and by applying a strict time deadline on the filing of asylum applications.[62]

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[58] *See* United States v. Robel, 389 U.S. 258, 262 (1967) (invalidating ban on Communist Party members working in defense facilities absent showing of "specific intent"); Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967) ("Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); Elfbrandt v. Russell, 384 U.S. 11, 19 (1966) (invalidating oath requiring state employees not to join Communist Party because "a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); Scales v. United States, 367 U.S. 203, 221–22 (1961) (construing Smith Act, which barred membership in organization advocating violent overthrow of government, to require showing of "specific intent").

[59] *See* §§ 411-13, 110 Stat. 126869, 1277 (to be codified at 8 U.S.C.A. 1182); *see also* § 440(b), 110 Stat. 1277 (to be codified at 8 U.S.C. 1101(a)).

[60] *See id.* § 302, 110 Stat. 1248 (to be codified at 8 U.S.C.A. 1189) (authorizing Secretary of State to designate organization as foreign terrorist organization).

[61] *See Policy Report: Combatting Terrorism, Protecting Freedom*, 1996 CATO INST. 8 ("the prevalence of terrorism in the modern world and how it might be countered without infringing on individual rights").

[62] *See* Illegal Immigration and Reform and Immigrant Responsibility Act, Pub. L. No. 104–208 (Sept. 30, 1996). In addition, the Government has moved to dismiss cases, such as the "L.A. 8," involving aliens who claim they were singled out for deportation because of political activities, *see* David Johnston, *Government is Quickly Using Power of New Immigration Law*, N.Y. TIMES, Oct. 22, 1996, at A20.

B. Human Rights Treaties[63]

Another way to view the contemporary relationship in the U.S. between foreign affairs and civil liberties focuses on the human rights dimension of American foreign policy.

In measuring human rights observance in other countries, the State Department uses the standards contained in the Universal Declaration of Human Rights and the treaties that implement it. These include limits on the reservations that states may make to treaties and the rule permitting derogation from some treaty provisions in time of public emergency.[64] But the United States has not taken appropriate steps to ensure its own compliance with the international human rights treaties that it has ratified, and this diminishes its authority in speaking to others.

Since 1992, the United States has ratified three international treaties dealing with human rights: the International Covenant on Civil and Political Rights ("Political Covenant" or " ICCPR"); the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the "Torture Convention");[65] and the International Convention for the Elimination of All Forms of Racial Discrimination (the "Race Convention").[66] These treaties obligate states parties to guarantee and protect enumerated human rights within their territories, and to submit periodic reports describing the legislative, judicial, administrative and other measures adopted for this purpose.[67]

(1) Withdrawal of RUDs and Elimination of Legal Gaps.[68] — In an attempt to ensure that they would make virtually no change in domestic law, the United States ratified all three treaties subject to a series of reservations, understandings and declarations (RUDs). Under these RUDs, the United States declined to accede to almost all terms at odds with existing law, and entered an understanding that other provisions should be construed to be

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[63] *See In the National Interest, The 1996 Quadrennial Report on Human Rights and U.S. Foreign Policy*, 1996 LAWYERS COMM. FOR HUMAN RIGHTS, NEW YORK at 61 [hereinafter *In the National Interest*].

[64] *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, § A(4)(1), 999 U.N.T.S. 171 (adopted by the United States, Sept. 8, 1992).

[65] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 UN GAOR, Supp. (No. 51), UN Doc. A/39/51, at 197 (1984), *reprinted in* 23 I.L.M. 1027 (1984) (entered into force June 26, 1987).

[66] *See* International Convention for the Elimination of All Forms of Racial Discrimination, adopted 21 Dec. 1965, 660 UNTS 195, *reprinted in* 5 I.L.M. 352 (1966) (entered into force Jan. 4, 1969).

[67] *See In the National Interest*, *supra* note 63, at 61 (noting that United States has yet to ratify other international human rights treaties, including the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child; the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the American Convention on Human Rights).

[68] *See In the National Interest*, *supra* note 63, at 62-63.

congruent with, but not broader than, existing law. In addition, to avoid having the treaty standards interpreted to create private rights that were judicially enforceable, the United States declared that the treaties were non-self-executing.[69]

Like all states parties to the human rights treaties, the United States is obligated to review its RUDs and eliminate all reservations except those that are not inconsistent with the object of the treaty, for example those that protect rights in American law which the treaties either fail to recognize or recognize to a lesser extent. Upon its review of the initial report of the United States under the Political Covenant in 1995, the U.N. Human Rights Committee suggested that U.S. reservations to the treaty's prohibitions of death sentences for juvenile offenders and cruel, inhuman or degrading treatment or punishment for prisoners violated peremptory norms. The United States reservation to the Torture Convention's prohibition of cruel, inhuman or degrading treatment or punishment can also be challenged as incompatible with the purpose of that treaty.

Although in most instances American law already guarantees the rights protected under the three treaty regimes, some rights set forth in the treaties—even as modified by the RUDs—are not currently provided for under U.S. law. These include protection against the expulsion, return, or extradition of aliens to countries where there is a substantial likelihood they will be tortured; protection against indefinite detention, as applied to excludable aliens; prevention of discrimination on grounds of sexual orientation and the right to privacy on matters of sexual orientation; the right of victims of torture to redress and to fair and adequate compensation; and protection of the right of agricultural and other excluded employees to form and join trade unions.

(2) Review of Existing and Proposed Laws.[70] — The United States has not instituted a process to review existing laws for compliance with the three treaties. Nor do federal and state legislatures systematically review proposed laws for their consistency with human rights obligations. Such efforts are vital to effective compliance as well as to accurate reporting. For example, the United States' first report under the Race Convention is in preparation. But the federal government does not appear to have launched a comprehensive review of policies and laws to determine whether they have

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[69] According to Professor Baxi, "the intention of this declaration is to inhibit or prevent the United States judiciary from taking account of treaties already declared as the supreme law of the land," *see* Upendra Baxi, *A Work in Progress?, The United Nations Report to the United Nations Human Rights Committee*, 36 INDIAN J. OF INT'L. L. 34, 36 (1996). And "to undertake treaty obligations this way, without any serious commitment to transform domestic law and adjudicatory practices...constitutes a pathetic evasion of the human rights responsibilities . . . ," *see id.*

[70] *See In the National Interest, supra* note 62, at 64.

an unjustifiable effect of discrimination on the basis of race or national or ethnic origin (nor are any state initiatives of this kind apparently underway).

(3) Monitoring, Reporting On and Enforcing the Treaties.[71] — Implementation of the treaties depends not only on whether U.S. law is coextensive with the treaties but also on how effective the laws are. The government has yet to allocate the necessary resources to carry out the formidable task of reporting on U.S. compliance with the treaties. One full-time attorney in the Office of the Legal Adviser to the Secretary of State is charged with overseeing that task for all three treaties, and he has significant additional responsibilities. The attorney is assisted by persons in various executive agencies, none of whose portfolios include human rights treaty reporting as a primary duty.

In its first periodic report on U.S. compliance with the Political Covenant, in 1994, the United States maintained that it was in compliance with the treaty's requirements in most respects, essentially because of the extensive network of federal and state laws protecting civil rights. The UN Human Rights Committee criticized the report for focusing on protections afforded by the letter of existing law without considering whether treaty standards are met in practice. The U.S. report also was criticized for not sufficiently addressing whether state law and practice satisfy treaty requirements.

In spite of the many domestic laws protecting civil rights in the United States, violations of the treaties' standards continue to occur. The Lawyers Committee for Human Rights has identified the following deficiencies:[72] conditions of detention in many federal and state prisons below the treaties' standards; improper practices by law enforcement officials such as use of excessive force or the arbitrary use of authority; statistical data that reflect disturbing differences in treatment between races in the criminal justice system; the high incidence of racially motivated violence; stark gaps in the enjoyment of housing and employment between racial groups; and sexual harassment and other gender inequities in employment and education.

To preserve the United States as an international leader in securing respect for human rights and the rule of law, the government should promptly take specific steps to ensure compliance with the three treaty regimes. The Lawyers Committee recommends that, at a minimum, this should include the creation of an inter-agency committee which would have several functions:[73] coordinate the review of existing and proposed state and federal legislation for consistency with the treaties; make recommendations to the President and

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[71] *See id.* at 67.
[72] *See id.* at 63–64.
[73] *See id.* at 65.

the Congress regarding compliance, including the need to enact new legislation to fill legal gaps or to allow for the withdrawal of existing RUDs; develop plans for an ongoing evaluation of treaty compliance, including the periodic reports required under the treaties; gather data to permit assessment whether state law is in accord with treaty obligations; receive individual complaints under the treaties and, in appropriate cases, investigate and report on alleged violations; and plan and assure implementation of education programs for federal and state units, including prosecutors and law enforcement, prison and immigration officials.[74]

III. WHAT SHOULD BE DONE

It would be naive to expect a fundamental change in the American way of national security. But incremental reform may not be too much to hope for, on the part of courts and the elected branches of government.

Several years ago I proposed three sorts of cases in which courts could safeguard individual rights in cases touching foreign affairs consistently with American judicial traditions.[75]

Content-based restrictions on speech and association are the first promising category. It is well-established that these governmental restraints are strongly disfavored.[76] Although they have sometimes been upheld, especially in the national security area, the Supreme Court has not since 1961 sustained such a restriction because the speech in question might induce listeners or readers to engage in criminal conduct. Moreover, many of the most important cases are prior restraints, where there is a "heavy presumption against . . . constitutional validity"[77] and the government "carries a heavy burden of showing justification."[78] In cases of content-based restrictions, the First Amendment right should prevail over foreign affairs or national security interests unless the government can prove, through clear and convincing evidence, that speech would "surely" result in "direct, immediate and irreparable" harm to the nation, the stringent standard used in the pivotal opinions of Justices Stewart and White in the *Pentagon Papers Case*.[79] If properly used, this standard would provide appropriate protection for speech in national security cases.

Procedural due process cases are a second category in which change

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[74] *See id.*

[75] *See* Dorsen, *supra* note 1, at 846–50.

[76] *See, e.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 217, 225–26 (1983).

[77] Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

[78] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[79] *See* New York Times Co. v. United States, 403 U.S. 713, 730 (1971).

is desirable and consistent with the best of our constitutional heritage. In Justice Frankfurter's words, "[t]he history of liberty has largely been the history of observance of procedural safeguards,"[80] and not only in criminal cases.[81] Unfortunately, in the foreign affairs realm there has, at times, been a lamentable reluctance to grant hearings to people who have been deprived of "liberty" or "property." The Civil Liberties Act of 1988[82] acknowledges, as Justice Frank Murphy maintained in dissent in the *Korematsu Case*, that the Japanese-Americans forced from their homes during World War II should have received individualized hearings, as German and Italian nationals did in Great Britain.[83] Similarly, it is difficult to grasp why the Palestine Information Office, operated by American citizens, was not constitutionally entitled to contest its designation as a "foreign mission" of the Palestine Liberation Organization before the Department of State ordered it to close.[84] It surely is more consonant with procedural fairness to permit the object of a disputed punitive action to be heard on all relevant issues prior to its implementation. And of course a rule of procedural due process would invalidate section 504(e)(3)(A) of the Anti-Terrorism Act, which permits secret evidence in deportation proceedings against aliens accused of being "terrorists."[85]

A third category of civil liberties case in which judicial intervention seems appropriate despite foreign affairs considerations arises if one of the elected branches of government has encroached on powers allocated by the Constitution to another. In such controversies, the courts do not hold that government as a whole cannot take certain action; they rather act as the "umpire of the federal system" in determining whether another branch take the disputed action or be a partner in achieving a desired policy objective.[86] The classic example is the *Steel Seizure Case*, where a majority of the justices who held that the Executive lacked inherent constitutional power to requisition steel mills during the Korean War suggested, for varied reasons, that Congress could have authorized the action.[87] The Vietnam War cases

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[80] McNabb v. United States, 318 U.S. 332, 347 (1943).

[81] *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539-41 (1985); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-20 (1978).

[82] *See* 50 U.S.C. § 1 (1989) (acknowledging fundamental injustice of evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry).

[83] *See* Korematsu v. United States, 323 U.S. 214, 241-242 (1944). Among other things, Justice Murphy pointed out that during World War II Great Britain afforded hearings to German and Italian aliens to determine whether each one was a "real enemy" before deciding on internment, *see id.* at 242 n.16.

[84] *See* Palestine Info. Office v. Shultz, 853 F.2d 932, 937-38 (D.C. Cir. 1988).

[85] *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 504(e)(3)(A), 1996 U.S.C.C.A.N. (110 Stat.) at 1214.

[86] *See* Paul A. Freund, *Umpiring the Federal System*, 54 COLUM L. REV. 561, 563-65 (1954).

[87] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

provide another instance. Rather than strain nonjusticiability doctrines to avoid the merits of the highly charged question whether Congress was required to "declare war" pursuant to Article I of the Constitution, the Supreme Court could have granted certiorari in one of the cases presented to it; resolved some of the troublesome legal issues, such as whether there was a "war" in the constitutional sense; and ruled that Congress in some way had to authorize so substantial a military venture. Indeed, the Court of Appeals for the Second Circuit issued an opinion of just this sort, holding that whether there was appropriate congressional authorization for the war was justiciable and not a "political question."[88]

For the judiciary to embark on even the relatively modest path charted by the above three categories, it must be fortified by a firm understanding that courts have an undelegable responsibility to preserve fundamental rights.

Elected officials must also do their part; they are on the front lines, with initial responsibility for policy formulation and implementation. It is easy to identify what is needed: sensitivity to civil liberties principles, will and courage. In a classic statement, Justice Brandeis wrote that "those who won our independence . . . valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."[89] In the same passage Justice Brandeis, anticipating the argument that governments would regularly use to justify restrictions on liberty, said that the framers of the Constitution

> [R]ecognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[90]

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[88] Berk v. Laird, 429 F.2d 302, 305-06 (2d Cir. 1970) (discussing requirement of "some mutual participation" between Congress and President); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) (concluding there was mutual participation between Congress and President). *See also* the War Powers Resolution, 50 U.S.C. §§ 1541-48 (1982), which was adopted partially in response to the *Orlando* decision. Its statement of purpose and policy declares that the Act is meant to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . ," *see id.*

[89] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[90] *Id.*

A major obstacle to fulfilling Brandeis's prescription is the well-known propensity of politicians to crave re-election, which saps courage and weakens fidelity to long-term constitutional values.

The future will surely provide ample opportunities for the President and Congress to take actions—one might say compensatory actions—that will somewhat redress the imbalance struck in recent decades between civil liberties and national security.

Civil liberties is, almost by definition, a minority interest. When those holding levers of power seek to protect their basic concerns they can do so at the ballot box or through lobbying, without relying on the Bill of Rights or on fancy constitutional theories in the Supreme Court. But others —notably, members of minority groups and political dissidents—cannot be optimistic about what they might expect from government when the perceived needs of national security, fed by fear, are arrayed against their claims under the Bill of Rights.