Introduction

First published in 1999 and updated in a post-9/11 second edition, *Terrorism and the Constitution* by David Cole and James Dempsey addresses an issue now at the forefront of national debate: must we as a nation tolerate diminished civil liberties, political freedom and privacy in order to protect ourselves against the threat of terrorism that has now hit home with such devastating force? Cole and Dempsey attempt to put that question in the historical context of our response to other perceived threats to national security, including, most notably, the Cold War threat of international communism and the reaction to that threat in the form of 1950s McCarthyism. They chart the pendulum of recovery from the surveillance excesses of earlier eras and watch as it swings back again in what they characterize as mistaken overreaction to the current threat from ideologically-motivated terrorists.

Their thesis, rooted in classic First Amendment doctrine and undeterred by the tragedy of 9/11, is a straightforward call to stay the liberal course of civil liberty: “we should focus on perpetrators of crime, avoid indulging in guilt by association, maintain procedures designed to identify the guilty and exonerate the innocent, insist on legal limits on surveillance authorities, and bar political spying.”¹ To do otherwise, they argue is not only unnecessary and unconstitutional but “may well prove counterproductive in the fight against terrorism.”² An antiterrorism policy that “cuts corners constitutionally” by focusing on ideology rather than evi-

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¹ Professor of Law, University of Utah College of Law; J.D., 1982, Yale Law School; M.A.T., 1997, Brown University; B.A., 1974, Yale College. Mr. Harris is currently a partner at the firm of Morrison & Foerster LLP in San Francisco. His clients include John Walker Lindh.

² David Cole is a Professor of Law at Georgetown University; James X. Dempsey is Executive Director at the Center for Democracy and Technology and former assistant counsel to the U.S. House Judiciary Subcommittee on Civil and Constitutional Rights.

2. Id. at xi.
dence of criminal conduct will likely be ineffective and even contribute to violence; it will fail to adapt quickly enough to the changing face of terrorism (from white separatists one day to Islamic fundamentalists the next),\(^3\) lose the essential cooperation of targeted social groups and take away the safety valve of non-violent dissent.\(^4\)

The authors focus largely on the conduct of the Federal Bureau of Investigation that they contend has historically relied on guilt by association and has systematically violated First Amendment freedoms of speech and association by engaging in counterintelligence against social, ideological and political groups rather than confining its investigations to suspected criminal activity. They advocate a “criminal model” that distinguishes criminal conduct from political activity and requires suspicion of actual involvement in past, ongoing or planned criminal conduct as the necessary predicate for launching an investigation.

This second edition of the book, apparently completed in late 2001, catalogs how the PATRIOT Act,\(^5\) passed by a hasty Congress in the wake of 9/11, has given further momentum to prosecutions, indefinite detentions and deportations that are often conducted in secret and based on association rather than criminal conduct. The authors could not have fully anticipated, however, the degree to which the “criminal model” would give way in the months following 9/11 not only to political monitoring, counterintelligence, and ethnic targeting, but to a “war model” in which a suspected terrorist, without even a showing of probable cause to believe that he has committed a crime, may be held indefinitely in military detention as an “enemy combatant”\(^6\) or assassinated by a military missile attack.\(^7\) One wonders if the authors would be able to chart this development along the trajectory they draw from the 1996 anti-terrorism legislation to the post-9/11 PATRIOT Act or if they would find instead that this blurring of the dis-

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3. The authors point out: As soon as the FBI launched a massive campaign against Muslim fundamentalists in the wake of the World Trade Center bombing, the Murrah building in Oklahoma City was blown up by white, native born ex-GIs. And while the FBI and the INS pursued innocent Arab and Muslim political activists, terrorists, careful to avoid any showing of religious or political orientation, planned and carried out the September 11 attacks. Id. at 183.

4. Id. at 15-16.


7. CNN News, Sources: U.S. kills Cole suspect, Nov. 5, 2002 (“CIA drone launched a ‘Hellfire’ missile” and struck the car in which six suspected al Qaeda members were traveling, killing them all), at http://www.cnn.com/2002/WORLD/meast/11/04/yemen.blalt/index.html; see also BBC News, CIA ‘Killed al-Qaeda Suspects’ in Yemen, Nov. 5, 2002 (“America’s CIA carried out an attack in Yemen that killed six suspected members of Osama bin Laden’s al Qaeda network”), at http://news.bbc.co.uk/2/hi/middle_east/2402479.stm.
tinction between civil law enforcement and military action represents a new and distinct challenge to the primacy of the “criminal model” as the proper focus for our response to the threat of terrorism.

The basic premise of *Terrorism*, unchanged in its post-9/11 second edition, is that the current threat of terrorism is not so different in magnitude or kind from past threats to our national security that it should deter us from the basic path of civil liberty and due process, even in the pursuit of the terrorist perpetrators, or that it can justify a repetition of extreme measures taken in prior eras that are now generally discredited. The authors argue that the current threat posed by terrorism is certainly no greater than that posed by the Soviet-led communist design for world domination. And it was in the context of that threat that the Supreme Court firmly established the principle that criminal prosecutions must proceed on the principle of individual culpability—specific intent to further illegal activity—not guilt by association.

The authors do not, however, confront directly the full force of post-9/11 arguments for the uniqueness of the present threat. The communist bloc never mounted an attack on U.S. soil resulting in the deaths of thousands of innocent civilians. As a nation, we have little context for such trauma other than perhaps the Japanese attack on Pearl Harbor, which led to the internment of 110,000 Americans of Japanese descent with the Supreme Court’s stamp of approval. With the identification of a primary and identifiable, if loosely confederated, enemy—Usama bin Laden’s al Qaeda organization—and the actual militarization of the “war” on terrorism, the proponents of extraordinary measures have added to their constitutional arsenal the formidable force of the president’s “war power.” Such is the changed climate of constitutional debate, not entirely anticipated by the authors even in their post-9/11 edition, that the decision of a federal district court holding that a suspected terrorist can be held in indefinite military detention based on “some evidence” of association with al Qaeda is hailed by many as a victory of civil liberty, simply because the suspect will be allowed to have assistance of counsel.

I. Investigating Crimes, Not Groups

*Terrorism* presents an array of twentieth century exemplars to demonstrate the folly of the FBI’s historical penchant for investigating political or other groups and engaging in “counterintelligence” in the absence of any specific

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9. See discussion of Padilla case, infra at 113–115; see also Andrew Cohen, *Lawyers Win Access to Padilla*, Dec. 5, 2002 (stating that “[a]ctually, the decision is more favorable to Padilla than it is to the White House. His lawyers have the power to argue on his behalf, the court noted, and Padilla has the right to see those attorneys so that, together, they can better challenge the government’s decision to detain him as an enemy combatant.”), at http://www.cbsnews.com/stories/2002/12/04/news/opinion/court_watch/main531784.shtml; see also American Civil Liberties Union, *ACLU Calls Victory for Right to Counsel in Enemy Combatant Case Positive Step*, Dec. 4, 2002 (heralding decision as “a clear rebuke of the Bush Administration and a victory for civil liberties.”) at http://www.aclu.org.
evidence of illegal conduct. The authors present in their introductory chapter the following four stories to demonstrate "the recurring nature of the government's misguided response to political threats": the 1950s McCarthy era investigation and prosecution of Frank Wilkinson, founder of what is now the National Committee Against Repressive Legislation; the COINTELPRO surveillance of protest movements during the 1960s and 70s, including environmental activists, Vietnam protesters and women's liberation advocates; the investigation of Central American activists, including the Committee in Solidarity with the People of El Salvador ("CISPES") during the 1980s; and the investigation of Palestinians and Muslims, including the Popular Front for the Liberation of Palestine ("PFLP") during the 1990s. The authors devote a chapter each to the investigation of CISPES and the investigation and attempted deportation of the PFLP "Los Angeles 8" and a chapter to intelligence investigations of various other groups, such as Amnesty International, Earth First and the "library awareness project" through which the FBI has monitored the reading interests of selected ethnic groups. Cole and Dempsey argue that the FBI has repeatedly devoted enormous resources to monitoring and investigating legitimate political activity, resulting in a substantial chilling effect on their targets' First Amendment rights of freedom of association and speech and few, if any, prosecutions of actual criminal activity.

_Terrorism_ then tells the story of the historical push and shove to define the proper limits of the FBI's investigative authority—"the ongoing struggle between control and discretion, between efforts to limit monitoring of political dissent and efforts to preserve or extend FBI powers." One gauge of these limits is the Justice Department's evolving guidelines. Guidelines issued by Attorney General Edward Levi in 1976 "required suspicion of criminal conduct before a domestic security investigation was opened." Under Ronald Reagan, however, Attorney General William French Smith changed those guidelines to allow investigations based on mere advocacy of crime, or of "activities that 'may lead to . . . serious disruptions of society,'" a standard that the authors argue "would easily encompass investigations of both the civil rights and the anti-Vietnam War movements."

The authors chronicle how during "the 1980s and 1990s, FBI powers were again extended in the name of foreign counterintelligence and antiterrorism." After the Oklahoma City bombing, an interpretative memorandum from the Justice Department, negotiated by FBI Director Louis Freeh, served to further relax the application of the Attorney General's domestic security guidelines. Under this new interpretation, "the number of domestic open security investigations rose from approximately 100 in 1995 to

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11. _Id._ at 89.
12. _Id._ at 79.
13. _Id._ at 80-81.
14. _Id._ at 89.
more than 800 in 1997."\(^{15}\)

Guidelines governing counterintelligence and international terrorism investigations provide even more latitude for investigation of political activity, and the FBI’s ability to gather information in the name of anti-terrorism was greatly expanded by the post-9/11 PATRIOT Act, which authorizes the seizures of records and things “to protect against international terrorism or clandestine intelligence activities” without regard to any evidence of criminal activity.\(^{16}\) By eliminating the requirement that the records or wiretap surveillance sought pertain to the agent of a foreign power, the Act allows the FBI to compel disclosure of any record that it determines is relevant to the investigation of international terrorism. As the authors explain:

Previously, the FBI could get the credit card records of anyone suspected of being a foreign agent. Under the PATRIOT Act, the FBI can get the entire database of the credit card company. Under prior law, the FBI could get library-borrowing records only by complying with state law, and always had to ask for the records of a specific patron. Under the PATRIOT Act, the FBI can go into a public library and ask for the records on everybody who ever used the library, or who used it on a certain day, or who checked out certain kinds of books. It can do the same at any bank, telephone company, hotel or motel, hospital, or university—merely upon the claim that the information is “sought for” an investigation to protect against international terrorism or clandestine intelligence activities.\(^{17}\)

The government obtains warrants for such searches from the Foreign Intelligence Surveillance Act (“FISA”) court,\(^{18}\) which meets in secret and whose decisions are subject to little or no review.\(^{19}\) The FISA court has denied only one of approximately 10,000 warrant applications sought since its inception in 1978.\(^{20}\) The Foreign Intelligence Court of Review, which rarely meets, has already approved the Justice Department’s expanded surveillance powers under the PATRIOT Act and the use of intelligence surveillance in the prosecution of persons accused of being terrorists.\(^{21}\)

Terrorism concludes noting that “[a]s we enter 2002 engaged in a global struggle against terrorism, the FBI’s powers to engage in political spying remain largely unrestricted by statute or executive regulation.”\(^{22}\) It must come as no surprise to the authors that the Ashcroft Justice Depart-

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15. Id. at 83.
16. Id. at 166 (quoting the USA PATRIOT Act, Section 215, amending 50 U.S.C. §§ 1862 & 1863).
17. Id. at 167.
22. COLE & DEMPSEY, supra note 1, at 89.
ment has continued to push the envelope. On May 30, 2002, Attorney General Ashcroft announced a new version of the guidelines governing FBI domestic surveillance. By emphasizing the need for preventive investigation “to neutralize terrorists before they are able to strike,” the new guidelines further sever the tie between evidence of crime and authorization for investigation and clear the way for surveillance of religious and political groups, Internet chat rooms and other forums for social gathering. 23 Similar efforts have been undertaken to remove restrictions on investigations by local law enforcement authorities. 24

With the militarization of the “war” on terrorism, however, the FBI no longer poses the only, or perhaps even the greatest, threat to Americans' privacy and First Amendment freedoms. The Defense Department is reportedly proceeding with a Total Information Awareness Project (the “TIAP”) that would search data from various databases, including telephone records, credit card transactions, travel information, medical records and library records, in the search for potential terrorists. 25 This program, and the FBI’s interest in the program, 26 have attracted some legislative concern though only in the form of a proposed reporting requirement. 27

23. See U.S. Department of Justice, Fact Sheet, Attorney General’s Guidelines: Detecting and Preventing Terrorist Attacks, May 30, 2002 (specifying that agents may engage in online research and use commercial data mining services “even when not linked to an individual criminal investigation”; agents may “enter any public place that is open to other citizens”; “investigations of suspected terrorists with ties to religious and political organizations will proceed according to the principle of neutrality.”) at http://www.usdoj.gov/ag/speeches/2002/53002factsheet.htm.

24. See Michael Moss & Ford Fessenden, New Tools for Domestic Spying, and Qualms, N.Y. TIMES, Dec. 10, 2002, at A1 (“From New York to Seattle, police officials are looking to do away with rules that block them from spying on people and groups without evidence that a crime has been committed. They say these rules, forced on them in the 1970s and ‘80s to halt abuses, prevent them from infiltrating mosques and other settings where terrorists might plot.” According to the press report, “[W]hen the Federal Bureau of Investigation grew concerned this spring [2002] that terrorists might attack using scuba gear, it set out to identify every person who had taken diving lessons in the previous three years.”).

25. See, e.g., Alan Gathright, U.S. Evolving into Big Brother Society, ACLU Says, S.F. CHRON., Jan. 16, 2003, at A4; see also John Markoff & John Schwartz, Bush Administration to Propose System for Wide Monitoring of Internet, N.Y. TIMES, Dec. 20, 2002, at A22 (“The Bush administration is planning to propose requiring Internet service providers to help build a centralized system to enable broad monitoring of the Internet and, potentially, surveillance of its users.”).


27. In January of 2003, the Senate passed a measure that would halt the development of the program absent required reporting about the program, including its impact on privacy and civil liberties. See Data Mining May Be Attached to Omnibus Budget Resolution, WASH. INTERNET DAILY, Jan. 17, 2003, available at http://www.nexis.com. This measure has been agreed to by House conferees, but its fate remains uncertain because of its inclusion in a larger spending bill. See Adam Clymer, Congress Agrees to Bar Pentagon From Terror Watch of Americans, N.Y. TIMES, Feb. 12, 2003, at A1 (“The only obstacles to the provision becoming law would be the failure of the negotiators to reach an agreement on the overall spending bill in which it is included, or a successful veto by President Bush of the bill.”).
The motivations and justifications for these increased invasions of privacy and incursions on civil liberties all derive, of course, from the seemingly unassailable proposition that our response to terrorism should not focus on punishment but on prevention. In arguing for the adequacy of the "criminal model" and against this increased emphasis on intelligence and surveillance, the authors of *Terrorism* swim against the tide of national trauma, anxiety and fear that is the very aim of the terrorist enemies and the fruit of their horrific acts.

The authors assert, however, that the current expansion of government surveillance is unnecessary and even counter-productive to the effort to prevent terrorism. They point out that the 9/11 hijackers "had no overt political inclinations [and] they never engaged in the type of political or associational activity that the FBI has traditionally made the focus of its counterterrorism efforts."<sup>28</sup> Ethnic profiling, they argue, is not only constitutionally prohibited because it is not narrowly tailored to accomplish its anti-terrorist purpose, it is also ineffective:

When one treats a whole group of people as presumptively suspicious, it means that agents are more likely to miss dangerous persons who take care not to fit the profile. In addition, the fact that the vast majority of those suspected on the basis of their Arab or Muslim appearance are innocent will inevitably cause agents to let their guard down. Overbroad generalizations, in other words, are problematic not only because they constitute an unjustified imposition on innocents, but because they undermine effective law enforcement.<sup>29</sup>

Targeting of certain groups and communities will also, the authors contend, alienate those communities and inhibit the kind of communication and cooperation necessary to effectively identify and thwart potential terrorists. "If we have reason to believe that there are potential terrorist threats within the Arab and Muslim community in the United States, we should be seeking ways to work with the millions of law-abiding members of those communities to help identify the true threats, not treating the entire community as suspect."<sup>30</sup>

That less is actually more when it comes to preventing terrorism will, however, undoubtedly continue to be a hard sell to elected officials whose greatest fear, other than terrorism itself, is the prospect that they could be perceived to have not done enough when the next strike hits. In the first edition of *Terrorism*, published in 1999, the authors suggested that the threat of a massive terrorist attack might be overblown:

There are a number of reasons to be skeptical about the claim that terrorists or their weapons have changed qualitatively in ways that justify a curtailment of civil liberties. First, there is reason to question the claim that terrorists today "know no bounds." Hamas, Hizbollah, and Islamic Jihad, for example, have been engaged for many years in terrorism motivated in part by concepts of religious martyrdom, yet they have strategically targeted and

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29. *Id.* at 170.
30. *Id.*
timed their attacks to further their political agenda, and have not sought mass destruction.\textsuperscript{31}

Pointing to Timothy McVeigh and the Oklahoma City bombing, they also noted “the emergence of the lone terrorist, the member of no known group.”\textsuperscript{32} These passages seem eerily dated now and are, for obvious reasons, not included in the current edition.

In their defense, the authors also argued in the first edition that the curtailments of civil liberties present in 1999 would not be justified or effective even assuming a “qualitatively different threat today.”\textsuperscript{33} They also take credit in the current, post-9/11 edition for having “correctly warned that the federal anti-terrorism effort was flawed and ill-suited to meet the terrorist threat.”\textsuperscript{34} Nonetheless, while it does not necessarily undermine the logic of the authors’ position about an effective anti-terrorism policy, the overwhelming devastation of 9/11 and the emergence of Usama bin Laden’s al Qaeda as the identifiable enemy in a global “war” effort has certainly changed the environment in which this debate must take place. The argument for a “criminal model” for the investigation and prevention of terrorism is much more heavily burdened in such an environment, especially if one accepts the concept that we are now at war with the terrorist perpetrators.

II. Guilt by Association and the War on Terrorism

\textit{Terrorism} focuses a great deal of its attention on the Anti-Terrorism and Effective Death Penalty Act of 1996 (“1996 Anti-Terrorism Act”),\textsuperscript{35} passed in the wake of the World Trade Center bombing and the Oklahoma City federal building bombing (which “overwhelmed all rational discussion” about the proposed legislation),\textsuperscript{36} and the PATRIOT Act, passed little more than a month after the 9/11 attacks. In the view of the authors, this legislation is a largely misguided overreaction to the threat of terrorism that severely and unnecessarily compromises our civil liberties.

The 1996 Anti-Terrorism Act, as amended by the PATRIOT Act and codified at 18 U.S.C. section 2339B, makes it a crime punishable to up to 15 years in prison to provide “material support or resources” to any organization designated by the Secretary of State as a “foreign terrorist organization.”\textsuperscript{37} “Material support or resources” is defined to include:

\begin{itemize}
  \item Currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons,
\end{itemize}

\textsuperscript{31}. \textit{JAMES X. DEMPESEY \& DAVID COLE, TERRORISM AND THE CONSTITUTION} 152 (First Amendment Foundation 1999).
\textsuperscript{32}. Id.
\textsuperscript{33}. Id.
\textsuperscript{34}. COLE \& DEMPESEY, \textit{supra} note 1, at x.
\textsuperscript{36}. COLE \& DEMPESEY, \textit{supra} note 1, at 108.
lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.38

Section 2339 thereby creates a complete prohibition on financial as well as other assistance to a designated organization and its prohibition on providing “personnel” arguably includes even mere membership.39

For purposes of these criminal penalties, “terrorism” is, in the authors’ view, whatever the Secretary of State decides it is.40 The Secretary has authority to designate a foreign group as a “terrorist organization” if the Secretary concludes that the group engages in “terrorist activity” that is a threat to the “national security of the United States.”41 “Terrorist activity” is broadly defined to include virtually any unlawful use of, or threat to use, a weapon against person or property, unless for mere personal monetary gain.42 “National security” is also broadly defined to mean “national defense, foreign relations, or economic interests of the United States.”43 In making these findings, the Secretary can use almost any source, including “third hand accounts, press stories, material on the Internet or other hearsay regarding the organization’s activities,”44 or secret, classified material.45 The designation is subject to limited court review.46 The statute also does not allow the defendant in a 2339B criminal proceeding to contest the designation of the subject organization. It is essentially a strict liability crime.

Characterizing 2339B as criminalizing support for humanitarian and political activities, the authors argue that prohibiting material support to terrorist organizations was “unnecessary” because it was already illegal to

39. See United States v. Lindh, 227 F. Supp. 2d 565, 567 (E.D.Va. 2002). John Walker Lindh was charged with providing material support in the form of “personnel” to al Qaeda and to another designated organization, Harakat ul-Mujahadin, based on having attended training camps allegedly conducted by those organizations.
40. COLE & DEMPSEY, supra note 1, at 119-20.
42. 8 U.S.C. § 1182(a)(3)(B)(ii)(V)(b) (2003). It includes, for example, “the use of any explosive, firearm . . . (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.”
44. People’s Mojahedin Org. of Iran v. Dep’t of State, 182 F.3d 17, 19 (D.C. Cir. 1999).
45. See Nat’l Council of Resistance of Iran v. Dep’t of State, 251 F.3d 192, 196 (D.C. Cir. 2001).
46. COLE & DEMPSEY, supra note 1, at 121 (noting that “a court can set aside the determination only if it finds it to be ‘arbitrary’ or ‘capricious,’ unconstitutional, or ‘short of statutory right,’” the authors describe the Secretary’s designation determination as effectively unreviewable). In National Council of Resistance of Iran, however, the D.C. Circuit held that the designation of the organizations at issue violated due process. Nat’l Council of Resistance of Iran, 251 F.3d at 209. The court emphasized “the dearth of procedural participation and protection afforded the designated entity,” which provided no notice of or opportunity to participate in the designation process. Id. at 196. Rather than revoking the designation, however, the court remanded to the Secretary for further proceedings. Id. at 209.
aid or abet in the criminal conduct of such organizations. They point out that had this law been in effect in the 1980s, “it would have been a crime to give money to the African National Congress [ANC] during Nelson Mandela’s speaking tours [in the United States] because the State Department routinely listed the ANC as a ‘terrorist group.’” Even groups more popularly associated with terrorism may also be substantially engaged in other political or humanitarian activities. According to the authors, “[t]he Israeli government itself estimates that Hamas devotes 95 percent of its resources to legal social service activity and only 5 percent to violent or military activity.”

This and other provisions of the 1996 Anti-Terrorism Act, the authors contend, “reintroduced to federal law the principle of ‘guilt by association’ that had defined the McCarthy era.” They argue that the Act violates the First Amendment principle, developed in the communist party cases in the 1960s and that the government cannot punish a person for associating with an organization, even one that engages in illegal activity, absent a specific intent to further the organization’s unlawful purposes:

Simply put, the fundraising ban of the 1996 Antiterrorism Act ignores what has long been a fundamental precept of our constitutional law—that a “blanket prohibition of association with a group having both legal and illegal aims,” without a showing of specific intent to further the unlawful aims of the group, is an unconstitutional infringement on “the cherished freedom of association protected by the First Amendment. . .”

David Cole made this argument as counsel in Humanitarian Law Project v. Reno in which he represented groups seeking to enjoin enforcement of Section 2339B. The Ninth Circuit, however, rejected this argument in a pre-9/11 opinion by Judge Kozinski. While finding that Section 2339B’s prohibitions on providing “personnel” and “training” were

47. Cole & Dempsey, supra note 1, at 121-22.
48. Id. at 118.
49. Id. at 155.
50. Id. at 118.
51. See, e.g., Scales v. United States, 367 U.S. 203, 229 (1961) (holding, in the context of alleged association with communist organizations, that the Smith Act’s prohibition on organizing, being a member of or affiliating with an organization that advocates the violent overthrow of the U.S. government should be construed to punish such association only with “clear proof that a defendant ‘specifically intend[s] to accomplish (the aims of the organization) by resort to violence.’”) (quoting Noto v. United States 367 U.S. 290, 299 (1961)); Aptheker v. Sec’y of State, 378 U.S. 500, 514 (1964) (striking down provisions of statute that prohibited members of a communist organization from applying for or using a passport because the statute, among other things, did not require any specific intent to further the unlawful aims of the organization); Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) (holding unconstitutional Arizona statute that permitted prosecution for perjury and discharge from office of person who took an oath to the United States but knowingly and willfully became or remained a member of the Communist party: “[l]aws such as this which are not restricted in scope to those who join with the ‘specific intent’ to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization.”).
unconstitutionally void for vagueness and upholding a preliminary injunction on enforcement of those parts of the statute,\footnote{Id. at 1137-38.} the court was unwilling “to characterize the statute as imposing guilt by association”:

The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. Plaintiffs are even free to praise the groups for using terrorism as a means of achieving their ends. What [the 1996 Anti-Terrorism Act] prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course is there a right to provide resources with which terrorists can buy weapons and explosives.\footnote{Id. at 1113.}

Relying on a Congressional finding incorporated into the statute “that ‘foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,’” and reasoning that money is fungible, the HLP court found that “all material support given to such organizations aids their unlawful goals.”\footnote{Id. at 1136 (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1248).} The Ninth Circuit thereby held, in effect, that the Secretary of State’s finding that an organization is “terrorist” is a constitutionally suitable surrogate for the normally required finding of specific intent to further illegal activity.

The HLP holding thus puts extraordinary constitutional pressure on the designation process, a process that leaves much room for arbitrariness. Indeed, the D.C. Circuit, in National Council of Resistance of Iran v. Department of State,\footnote{Nat’l Council of Resistance of Iran, 251 F.3d at 196.} held that the Secretary’s designation process did not meet the minimum requirements of due process. That process provides no notice to the organization or its members and no opportunity to comment.\footnote{Id.} The Secretary is free to rely on “third hand accounts, press stories, material on the Internet or other hearsay regarding the organization’s activities”\footnote{Id. at 1136 (quoting People’s Mojahedin Org. of Iran, 182 F.3d at 19) (internal quotations omitted).} and “classified material, to which the organization has no access at any point during or after the proceeding.”\footnote{Id. at 209.} The D.C. Circuit did not, however, void the designation of the National Council of Resistance of Iran (“NCRI”) as a terrorist organization but instead remanded it to the Secretary for further proceedings.\footnote{Id. at 1139.}

Judge Takasugi in the Central District of California was troubled enough by these circumstances, despite the decision in HLP, to dismiss the indictment in United States v. Rahmani that alleges that the defendants have
provided material support and resources to the NCRI. The court found that because the designation of the organization was obtained in violation of due process, "[it] is a nullity and cannot serve as a predicate in a prosecution for violation of Section 2339B."\textsuperscript{63} \textit{Rahmani} is now on appeal in the Ninth Circuit.

\textit{Terrorism} notes that the government was slow in implementing some central aspects of the 1996 Anti-Terrorism Act and that as of publication, "the government had prosecuted only three cases involving material support to terrorist organizations"\textsuperscript{64} in the entire history of the Act. In the further aftermath of 9/11, however, 2339B has received considerably more attention. Since the publishing of this edition, John Walker Lindh, the Lackwanna defendants, the Portland defendants and the University of South Florida computer engineering professor, Sami Al-Arian, among others, have all been charged with material support to designated foreign terrorist organizations.\textsuperscript{65}

More fundamentally, however, in ways that the authors could not perhaps have thoroughly anticipated in the days immediately following 9/11, the government's anti-terrorism effort has shifted its focus from prosecu-

\textsuperscript{62} United States v. Rahmani, 209 F. Supp. 2d 1045, 1052 (C.D. Cal. 2002). The People's Mojahedin of Iran ("PMOI") is dedicated to the overthrow of the current regime in Iran. Defendants are accused of raising money for the organization. The government alleges, for example, that defendant, Roya Rahmani, attended fundraising meetings and solicited and accepted donations (about $200) on behalf of the PMOI. If convicted of that charge, Ms. Rahmani faces up to ten years in prison. Under the PATRIOT Act the maximum sentence was increased to fifteen years. USA PATRIOT Act, Pub. L. No. 107-56; § 810(d)(1), 115 Stat 272, 380. Because of the "terrorist" enhancement in the sentencing guidelines, even first-time offenders will typically be subject to the maximum penalties. Under the federal sentencing guidelines, there is a twelve-level upward adjustment if the offense involved or was intended to promote a federal crime of terrorism. 18 U.S.C. § 3A1.4 (2003). The defendant's criminal history category is also automatically a Category VI even for a first-time offender who would otherwise fit in Category I. \textit{Id.}; see United States v. Leahy, 169 F.3d 433, 446 (7th Cir. 1999).

\textsuperscript{63} \textit{Id.} at 1059.

\textsuperscript{64} COLE \& DEMPSEY, supra note 1, at 127.

tion to prevention. The primary goal is no longer conviction but detention and interrogation. Federal criminal prosecution, considered inadequate by itself to achieve these goals, is viewed as merely one weapon in a detention arsenal that includes material witness warrants, secret deportation proceedings and, relying on the president’s war power, military detention of those designated as “unlawful enemy combatants.”

Jose Padilla, a U.S. citizen, was initially arrested on a material witness warrant in May of 2002, in Chicago, far from any war zone. Shortly thereafter, however, he was transferred into the custody of the Department of Defense and has been held since in a Navy brig in Charleston, South Carolina as an “enemy combatant.” The government has also suggested that it is prepared to rely on the “enemy combatant” designation in other circumstances when expedient. Had the judge in the Lackawanna case decided to grant bail to the defendants, for example, the government reportedly would likely have transferred them to military custody.

The government has taken the position in the Padilla case that, since Mr. Padilla was being held as an “enemy combatant” pursuant to the President’s war power, his detention is not subject to habeas review, and he has no right to counsel. In a decision issued in December of 2002 now on appeal in the Second Circuit, Judge Mukasey of the Southern District of New York rejected that opinion, holding that Mr. Padilla has the right to consult with counsel and to submit facts and argument in support of his habeas petition. In the wake of the Fourth Circuit’s decision a little more than a month earlier in Hamdi v. Rumsfeld, denying counsel to another detained “enemy combatant,” the Padilla court’s decision was regarded

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66. Relying on use of the term, unlawful enemy combatants, in Ex parte Quirin, 317 U.S. 1, 48 (1942), the government has taken the position that those suspected of terrorism, at least those suspected of association with al Qaeda, are “unlawful enemy combatants.” As “enemy combatants” in an active war they can be held as prisoners without the necessity of criminal charges; as “unlawful” combatants, they are not entitled to the rights of prisoners of war under international law. Id. at 31. In Ex parte Quirin, eight alleged German saboteurs, including one who claimed to be a U.S. citizen, were tried and convicted in a military tribunal. The Supreme Court upheld the jurisdiction of the military tribunal. The defendants were convicted and sentenced to death within sixty days of the commencement of the proceedings; six of the eight were executed by the electric chair shortly thereafter. The Dark History of a Military Tribunal, Quirin Revisited, 24 NAT'L L.J. at A17 (extensive discussion).
68. Id. at 569.
69. Stewart Powell, Terror Suspects ‘Enemies’; Bush May Order Lackawanna Men Held in Military Custody, HAMILTON SPECTATOR, Sept. 21, 2002, at D02 (“President George W. Bush could order the American terror suspects arrested in western New York into indefinite military custody without trial if new information warrants designating them as ‘enemy combatants’”).
70. Padilla, 233 F. Supp.2d at 569.
71. Yaser Hamdi, like Jose Padilla, is apparently a U.S. citizen. Unlike Jose Padilla, Mr. Hamdi was taken into custody in a war zone, after having emerged with John Walker Lindh and 82 others from the basement of the Qala-i-Janghi fortress in Afghanistan after an uprising of prisoners held by Northern Alliance warlord General Rashid Dostum. The Fourth Circuit, overruling district court judge Robert Doumar, held that Hamdi was not entitled to counsel or to challenge the government’s hearsay declaration by which his detention had been justified, because it was “undisputed that he was captured in an
by some as a victory for the due process rights of those detained in the war on terrorism.\textsuperscript{72}

Overlooked in the celebration over affirmation of the right to counsel, however, were the court's decisions impacting the merits of the case. Significantly, the court held that "Padilla's detention is not per se unlawful;" pursuant to his constitutional war power and the Congressional resolution authorizing the use of military force against the perpetrators of 9/11, the President, through the Defense Department, has the power to detain those he determines to be associated with the perpetrators.\textsuperscript{73} In reaching that decision, the court took clear note of the government's new policy of emphasizing prevention over punishment. The court quoted at length Secretary of Defense Donald Rumsfeld, commenting on the purpose of Padilla's detention:

It seems to me that the problem in the United States is that we have—we are in a certain mode. Our normal procedure is that if somebody does something unlawful, illegal against our system of government, that the first thing that we want to do is apprehend them, then try them in a court and then punish them. In this case that is not our first interest. . . . Our interest is to—we are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows. . . . So I think what our country and other countries have to think of is, what is your priority today? And given the power of weapons and given the number of terrorists that exist in our world, our approach has to [be] to try to protect the American people, and provide information to friendly countries and allies, and protect deployed forces from those kind of attacks.\textsuperscript{74}

Perhaps more troubling than the court's affirmation of the President's right to detain in military custody U.S. citizens captured on U.S. soil outside of any combat zone, is the standard articulated by the court for such detention. The court will not "decid[e] de novo whether Padilla is associated with al Qaeda and whether he should therefore be detained as an unlawful combatant" but will only determine "whether there is some evidence to support [the President's] conclusion" to that effect.\textsuperscript{75} In reaching this holding, the Padilla court relied on the resolution of Congress "authoriz[ing] the President to use necessary and appropriate force in order, among other things, "to prevent any future acts of international terrorism against the United States."\textsuperscript{76}

\textsuperscript{72} See supra, note 9.
\textsuperscript{73} Padilla, 233 F. Supp.2d at 569.
\textsuperscript{74} Id. at 574.
\textsuperscript{75} Id. at 608 (emphasis added).
\textsuperscript{76} Id. at 590 (quoting Authorization for Use of Military Force § 2(a)).
The Padilla decision thus comes very close to saying that the executive can imprison indefinitely anyone whom it has some basis to suspect of associating with terrorists. “Some evidence” of associating with al Qaeda is a far cry from probable cause to believe that a crime has been committed, let alone proof beyond a reasonable doubt. It has been nearly a year since Mr. Padilla was taken into custody, and one suspects that the government has by this time exhausted his use as a source of intelligence on potential future attacks. It seems unlikely, moreover, that if there were reliable evidence of criminal conduct on his part that he would not have been charged with his crimes by now. As an “enemy combatant,” however, he can apparently be imprisoned indefinitely—as long, that is, as the war on terrorism continues—based on nothing more than suspicion of association with terrorists and “some evidence” to support that suspicion.

III. Civil Liberty, War, and Fear

There is, of course, precedent for preventive detention outside the bounds of the criminal justice system in time of war. As the authors point out, in a section entitled “Repeating History,” in World War I we imprisoned dissidents for merely speaking out against the war; and, in World War II, with the Supreme Court’s approval, “we interned 110,000 persons, over two-thirds of whom were U.S. citizens, not because of individualized determinations that they posed a threat to national security or the war effort, but solely for their Japanese ancestry.”

As Chief Justice Rehnquist has reminded us, “law is silent in time of war.” By transforming its anti-terrorism policy from the “criminal model” urged by the authors to a “war model” not fully anticipated by the authors, the administration has played a powerful card against those who would use the courts to reign in its authority. Unlike the threat posed to our national security and consequently to our civil liberties in World Wars I and II, however, the current war on terrorism conjures the prospect of being at perpetual war and courts being perpetually silent in the face of executive actions in the name of prevention and national security. Ironically, to the degree that present policies fail to prevent future attacks, further incursions on civil liberties in the name of national security will undoubtedly gain momentum from the resulting national apprehension and fear. One shudders to imagine the impact on civil liberties of another attack of the magnitude of 9/11.

Certainly the case can be made and is being made by those with the administration’s ear that we are genuinely at war with the perpetrators of terrorism, albeit a war of a new and different kind, and that the criminal justice system is simply not equipped to deal by itself with the current

77. COLE & DEMPSEY, supra note 1, at 150.
threat of terrorism. Moreover, even World Wars I and II, with their histories of excesses in the name of national security, did not result in repeated or extensive attacks on U.S. soil, let alone attacks perpetrated by those who hide among us. One wishes that the authors of Terrorism, perhaps with the benefit of post-9/11 developments since their publication date, had taken on more directly the arguments for the uniqueness of the present circumstance.

Whichever side of the debate one takes, however, it should be acknowledged, as the authors so ably illuminate, that principles fundamental to our system of justice are at stake. Those principles include the separation of powers between the executive and the judiciary, the presumption of innocence of those accused of criminal conduct and the principle of individual culpability rather than guilt by association. At the height of the Cold War and our confrontation with the perceived threat of domination by the international communist movement led by the Soviet Union, Justice Warren wrote for the Supreme Court in United States v. Robel:

> For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.79

By charting the historical pendulum of infringement on civil liberty in the name of national security, Terrorism attempts to provide historical context to the present debate over the proper response to the threat of terrorism and to exhort us to avoid the excesses of the past. Implicit in that perspective is the assumption that the pendulum will continue to swing back and forth. If we are truly entering an era of perpetual struggle against terrorism marked by increasing national insecurity and fear, however, one is left to wonder how far the pendulum may swing and what will reverse its course.

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