

# **THE USA-PATRIOT ACT, 2001: A STUDY OF CONFLICT BETWEEN NATIONAL SECURITY AND CIVIL LIBERTIES**

Dissertation submitted to Jawaharlal Nehru University in  
partial fulfillment of the requirements  
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**MASTER OF PHILOSOPHY**

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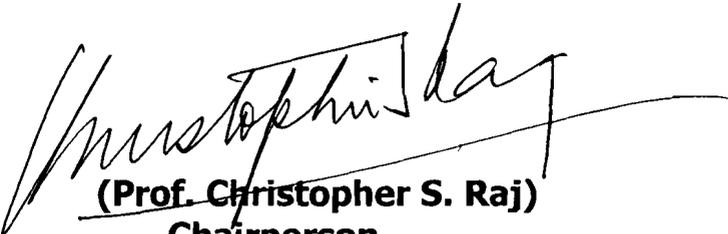
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**CERTIFICATE**

Certified that this dissertation entitled "**THE USA-PATRIOT ACT, 2001: A STUDY OF CONFLICT BETWEEN NATIONAL SECURITY AND CIVIL LIBERTIES**" submitted by me in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** has not been previously submitted for any other degree of this or any other university and is my own work

  
**Signature of Student**

We recommend that this dissertation be placed before the examiners for evaluation.

  
**(Prof. Christopher S. Raj)**  
**Chairperson**

  
**(Prof. Christopher S. Raj)**  
**Supervisor**

***Dedicated to  
my parents***

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## PREFACE

The present research work is basically a study of conflict between national security and civil liberties. Soon after the terrorist attacks of 9/11 on New York World Trade Centre and the Pentagon, the Bush Administration proposed and passed the USA-PATRIOT Act 2001 “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism”, on 26<sup>th</sup> Oct, 2001 to deter and punish terrorist acts in the United States and around the world. The law was designed to enhance law enforcement tools to intercept and obstruct terrorism. It was largely believed that the terrorists could enter into the USA because of various lacunae in the US law and law enforcement machinery.

The USA -PATRIOT Act, 2001 was primarily designed to rearrange the national security with civil liberties. But in the process of this rearrangement, however, they gave priority to national security. The limitation on habeas corpus, extra ordinary detention, expanded police power, search and seizures, expanded surveillance, government secrecy, telephone wiretap, internet monitoring, stricter immigration procedures, treatment of captives, detainees and so on have been given importance. An aggressive national security policy has been made through the act. As a result, many civil libertarians came out to protest against the act, which

to them has belittled the idea of freedom and democracy. Thus, starts a robust national debate on the conflict between security and liberty. While, in the First Chapter, the origin and theory of nation-state and the national security is explained, but in Second Chapter nature and scope of USA-PATRIOT Act and similar other laws in the history has been explained. In Chapter Three and Four various issues concerning conflict between national security and civil liberties, arising out of the act has been discussed. Chapter Five, however, deals with balancing the conflict of national security and civil liberties. And Chapter Six provides some concluding observations.

The intention of this study is not to declare the winner, but to understand delicate balance between the two. In what way security and liberty can be settled and how the conflict can be minimized has been emphasized. National Security is an important aspect of any sovereign nation, especially, at the time of terrorist attacks like 9/11. But at the same time civil liberties are not valueless principles. Even though, a number of provisions of the act are going to expire (the Sunset Provisions) on 31 December 2005 but the cry for liberty is not expected to expire unless certain essential liberties of the citizens are restored and guaranteed, besides some constitutional protections too. An act which fails to secure the acceptability of the public can neither provide security nor liberty. Both descriptive and analytical methodology have been adopted for the present

study. Arguments and counter arguments on the conflict between national security and civil liberties have been analyzed. Both primary and secondary sources have been utilized for an objective study in knowing the concept of balancing national security and civil liberties.

## ACKNOWLEDGEMENT

It is indeed an important moment in my career to write this acknowledgement for my M. Phil. Dissertation.

But the task of completing this research work "The USA-PATRIOT Act, 2001: A Study of Conflict between National Security and Civil Liberties", would not have been materialized without the proper guidance and cooperation of Prof. Christopher S. Raj my esteem guide. I am really thankful to him for his encouragement, inspiration, cooperation and timely help. He initiated me into the field of 'International Law' for which, I am greatly indebted to him.

My elder father Mr. G.B. Bharas, a great scholar who inspired and encouraged me to do my research, also helped me to understand many legal and administrative terms and concepts deserves thanks.

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New Delhi

  
(Chandrabhanu Bharas)

# INTRODUCTION

“They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety”<sup>1</sup>

**Benjamin Franklin,**

When Benjamin Franklin said so, he wanted to remind his fellow colonists that liberty is the supreme good. Those who would give up their essential liberty in the name of security would never be capable of governing themselves. They would never be capable of make them safe. But Abraham Lincoln, after a century, justified his decision of suspending the writ of habeas corpus. He asked, “Are all the laws, but one to go unexecuted and the government itself to pieces, lest that one be violated”.<sup>2</sup> President Lincoln was of the view that liberty was an obstacle to the government’s proper functioning.

The conflict between security and liberty is an age-old phenomenon. But in modern sense, it traces back to the advent of Nation-State in Europe in 18<sup>th</sup> century. So, right from the advent of the nation-state system, the issue of conflict between security and liberty has been much raised, much recognized, much debated and much

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<sup>1</sup> Historical Review of Pennsylvania (1759), Carruth, Gorton, and Ehrlich, Eugene, American Quotations, (New York, Gramercy Books, 1999, p.132).

<sup>2</sup> Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, reprinted in 4 collected works of Abraham Lincoln, 421, 430.( Basler P. Roy, Ed.,1953).

confronted as well but has not been possible to be settled on the consensual lines. One group of scholars on international relations thinks that the nation-state and national interests are more important than the individuals and individual interests. For them, the state is primary and individual is secondary. The state is an end in itself and the individuals are the means. The state is the highest authority and individual citizens are supposed to abide by that authority. The **realists** or those who think in favour of the nation and national security like John Hertz, George E. Kennan, Edward H. Carr and Hans J. Morgenthau and others were influenced by traditional theorists such as Nicholo Machiavelli, were of the view that the **'struggle for power'** is the centre of every interaction of nation states. They believe that the life of individuals in the state of nature was always nasty, brutish solitary and poor. It was based on the principle of 'this is mine and that is thine'. The realists believe that individual is always exposed to outside threat so he must be prepared every now and then to challenge the enemies for the protection of his own life, liberty and property. This basic instinct of men guides the states too. Unlike the life, liberty and property of the individuals are always at risk, as they are exposed to outside attacks, so the individuals always be ready to protect them at any cost. In the same way, nation

states are also guided by their national interests and that national interests become the real replica of their foreign policies as well.

As the nation-states are the real so are the conflict. This is the reason why, the realists consider the 'struggle for power' to be the center of interactions amongst nation-states. National interests is given utmost importance and considered as an end in itself. Individual interests are asked to surrender before the national interest. As the realists count that the life, liberty and property of the nation state are more important and stable than the life, liberty and property of the individuals. The theory has been further strengthened by later realists who are well known as **neo-realists** such as Kenneth N. Waltz, Robert O. Keohane, Grieco, and Joseph Nye. The neo-realists suppose that strength only respects strength. When the entire system is Hobbsian by nature, its important on the part of the nation-state to be Hobbsian or else be prepared for the graveyard. They consider the structure of international relations to be an anarchic one. Every nation-state is against competitive and conflict with every other nation-state. There is hardly friendly relation and strife, rivalry competition and animosity dominate. In such a system, the nation-states have to play a vital role as the key players of international relations. A nation's power and capability is always calculated in terms of its national security. The anarchic state

of the world political system has further funneled by terrorism, civil wars and religious war, a fact, can hardly be denied.

Not only the nation state should go for a national interest centric free in policy, but it should also apply the same realist principle in the domestic policy as well. If, we look into the post cold war periods, the system of nation state has been seriously challenged not only from outside but also from within. The ethnic conflict in Yugoslavia (between Croats and Serbs and between Serbs and Bosnians), conflict in Pakistan (Shia and Sunni) conflict in Sri Lanka, conflict in Nicaragua, the caste conflict in India, conflict in Afghanistan, conflict in Iraq etc are some examples which reveals the facts that even within a nation there can be conflicting factions. The group clash against each other for power is a reality. So struggle for power is natural, unless, the conflicting faction is killed or perished or accept the dominancy of the other, there cannot be lasting peace and security. The realists argue that during the cold war period, peace and security could be expected to some extent due to bipolarity. But lasting peace at the hand of the USA could be possible only after Russia withered away. With the USA emerging as the unipolar super power in the world politics, premier world organizations such as UNO, WTO etc are also accepting the dominant power of the American nation-state.

The realists thus, are of the view that a nation-state should do every possible strategy to be powerful and be secured at home and outside home as well.

But the other group of thinkers, who are called the **idealists** are of the view that human nature is essentially good. They are rational so can they detect right from the wrong. The centre of international relations is not the power but the conscience, good behaviour, rationality, morality and civil liberty of individuals. The exponents of idealist school of thought such as Woodrow Wilson, Aldous Huxley, St. Simon etc. are of the view that the nation-states would have stopped to struggle for power, if war, inequality, tyranny etc. would have been replaced by human rationality, education, conscience and morality. International peace and security can be attained by human cooperation and morality. A number of conflicts across the world can be solved when good sense would prevail in the mind of the men. When they would shun the idea of resorting to violence and immoral for the achievement of a particular and when the nations states would sit and initiate dialogue, they would be able to settle many problems without any difficulty. The idealists regard nation to be an organization like any other organization and must be subservient to the individual citizen.

There is still, a third group of thinkers who do not believe in the extremism of both the theories. They rather believe in the best possible synthesis of both the realist theory and the idealist theory. They are called **liberals** for their view of integration of both. Charles Kegley and Eugeune Wittkopf to name a few thinkers in the line who not only reject the 'struggle for power' of the realists but also reject the 'idea of anarchy' in the international relations. The liberals are of the view that the struggle for power is a gone case along with the bipolar system, now the world is heralding towards a multi-polar system of interdependence. With the revolutions in the field of science and technology and in the field of communication, the world is becoming more homogenous, more interdependent politically, economically and socially. In a world of interdependence, the role of various world organizations such as UNO, WTO etc. are highly commending. They are making the world an integrated system of peace security and cooperation than the diversified conflicting warring nation-states. The united efforts of eradicating poverty, unemployment, human rights, civil liberties, education, health, natural disaster, peace, security, inequality, racism etc are praise worthy.

The role of various multinational companies and various non-governmental organizations in making the world for interdependence

and cooperation is recognizable. The liberals thus, think that the world is moving from a security-centric system towards a liberty-centric system. The liberals so are those who strike a balancing approach between the extreme 'theory of realism' and the extreme 'theory of idealism'. To them, while the realists are cynical in their approach, the idealists are suffered from utopian approach.

Thus, it would be worth making a point here that both the realists and the idealists are correct in their pleadings to some extent. But an extreme in both the theories would sure lead to chaos and confusions. For, a balanced approach, the good in both the theories must be looked into. A blend of both the pessimism of realists and optimism of idealists can be taken into consideration. As Quincey Wright has observed that realism represents the short run national policies but idealism represents the long-term national policies. So, both the theories are useful in the present day world.

The liberals are those who believe in the integration of the system. They follow a middle-path of balancing the national security which is very important from the stand point of life and existence of the nation and civil liberties which are at the same time no less important for individuals to live a complete social life. Extolling liberty, H.J. Laski says, "By liberty I mean the eager maintenance of that atmosphere in which

men have the opportunity to be their best selves".<sup>3</sup> This implies civil liberties or personal liberties are not matter of philosophy or tenet but a quality , a basic instinct a matter of right without which men can never be in a position to live their lives as human beings. Maximum of liberty can be possible only when there will be minimum state action. The greatest champions of human liberty John Locke and J.S. Mill go to the extent to explain it that the authority of the state should be markedly limited so as to leave as much room as possible for liberty. Liberty is the very essence of man. In fact, state action and individual freedom goes hand in hand. National security is nothing but a sum total of civil liberty and civil liberty is an abstract of national security. Civil liberty of individuals subsists in the national security. Security is the very precondition of freedom. There can never be any civil liberties unless there will be a national security. No civil liberty can be well guaranteed without any order. In fact, liberty can be best enjoyed in the steel framework of national security. The nation exists to vindicate them. Both the security and liberty are complementary and supplementary to each other. Regulation of liberty denotes the recognition of security of the state. When liberty of the individuals can not be absolute, how come security of the state can be absolute, because both the liberty and

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<sup>3</sup> Laski, Harold J.. A Grammar of Politics, (1925) p.142.

security are subjected to limitations. Unless a balance is calculated, the conflict between liberty and security is very grave. As D.D. Raphael says, "no state has unlimited practical power to make any law that it pleases, even though it may possess unlimited legal power. A legislature that has any sense and that wants to remain in office will pay more regard to political than to legal possibilities, to what it can effectively do than to what it may legally do".<sup>4</sup>In fact, a well-proportionate blend of the two can make a miracle in a society and a disproportionate can cause harm equally. The dichotomy between liberty and security should be brought to an end as quickly as possible. For the very reason that liberty and security does not conflict with each other. They are rather two sides of the same coin. On civil liberty, Ernest Barker has said, "is the liberty of a man in the capacity of an individual person- his personal liberty. That consists in: three somewhat differently expressed articles –i) physical freedom from injury or threat to the life, health, and movement of the body, ii) intellectual freedom for the expression of thought and belief; iii) and practical freedom of the playoff will and the exercise of choice in the general field of contractual action and negotiations with other persons".<sup>5</sup> The 'freedom of contract' that Barker

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<sup>4</sup> Raphael, D.D., Problems of Political Philosophy, (Macmillan Press Ltd, London, 1979), p. 135.

<sup>5</sup> Barker, Ernest, Principles of social and Political Theory,(London: Oxford University Press, 1961), pp.146-47.

says is the contract people enter into for their mutual advantage. But when the freedom is exploited, the very contract is violated and places the weak party at disadvantage position. For the very existence and good of both parties, the contract should be respected and in no case should be breached and in that respect alone rests the good and well being of both liberty and security.

So, by protecting civil liberty the national security can be legitimized and the authority of the state can be justified.

But, the incident of terrorism of 9/11 once again, made the people of America to review the arrangement of national security with civil liberties. In a situation, where in a threat to national security revealed, aspects of civil liberties become a distance possible thing on the part of a nation. Consequently, following the 9/11 episode, President George W. Bush has upheld that in order to protect civil lives and liberties, a strong national security is indispensable. He thus, went ahead with a stricter form of legislation on national security, called as the USA-PATRIOT Act, 2001. This act had upheld, national security and armed the state with to defuse , and empowering state machinery for attaining optimum security for individual at the cost of circumscribe the individual liberty.

# **CHAPTER – I**

## **1) Origin and Theory of Nation-States**

## **2) The National Security**

### **Origin and Theory of Nation-States**

The conflict between national security and civil liberty arose with the arrival of political organization of a definite territory in the form of nation-state in 18<sup>th</sup> century. When the individual liberty and popular participation were raised in England, When the freedom movement was brought about by the American against the colonial rules, in which, right to life, right to liberty and pursuit of happiness were emphasized; When French revolution was started out for individual liberty, rule of law, separation of powers and against the tyrannical rules; When nationalism played a vital role in Germany and when the spirit of 'one nation' triggered the unification of Italy; the conflict was much recognized and became a matter of debate.

Before moving on to the issue of conflict, it's important to understand the situation under which the nation-state came into being or in other words what made the people in Europe to think of their race, nationality or language to be well organized into different nations and be not laid scattered.

The nation-state as we have perceived is not of a very old origin in the modern sense of the term. It was only in 18<sup>th</sup> century the true nation-states were installed in Western Europe, though the process started in England a bit earlier. It was with the **Treaty of Westphalia** in 1648, when the thirty years old war brought to a halt in Europe, peace and security progressed in Europe. The Treaty of Westphalia was based on three important premises, (i) the king is the emperor in his own realm. This means, the sovereign is not subjected to any higher political authority, (ii) the sovereign determines the religious belief of his realm. That the outsiders have no right to intervene in it. This means he is supreme (iii) The balance of power will have to be there in the sovereign. That it prevents any hegemony.<sup>1</sup> Thus, though the nation-states appeared towards the close of the middle age, when strong rulers were able to free themselves from the clutches of the feudal lords, only then they could establish their own nation-states with a well-demarcated land areas.

Its indeed quite difficult to define a nation state. The French orientalist and historian Ernest Renan once said that the 'nation' was a spiritual unity which wished to uphold its sense of unity through a day to day vote of confidence. Certainly, an ideal definition of a nation. But to

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<sup>1</sup> John Baylis and Steve Smith, *The Globalization of World Politics* (2<sup>nd</sup> ed., Oxford, NY, 2001), p. 43.

Joseph Stalin, "a nation is a historically constituted, stable community of people, formed on the basis of common language, territory, economic life and psychological makeup manifested in a common culture." (Marxism and the National Question). He thus, gave a material definition. The modern scholars are of the opinion that possessing a common language is the key to the nation formation like Italian unification on the basis of language (1861). But language can not be the only basis of a nation for, even though English is spoken both in England and in the USA they are two different nations. And again, the people of Switzerland speak three different languages but they are one nation. Therefore, we can say that a nation is a group of people who feel that they are enough like each other and enough unlike other groups so that they wish to live under their own law and government.

However, a good number of factors were responsible for the emergence of nation-state. The renaissance movement in Europe was in fact so strong that it gave a tremendous fillip to the national language, thereby; scholars produced tons of literatures which in turn shaped the nationalism and feeling of oneness among the people. A sense of affinity prevailed in the mind of the men who suddenly, started behaving as a distinct race or entity. This feeling of oneness thus, was the basis of nationalism and nation state. The commercial rivalries among the merchants of different nation states too helped a lot in the development

of the feeling of oneness among the people. When the conflicts were inevitable these merchants sought the protections of the kings who got supports in return. Thus, these kings came out to help the merchants, thereby creating a sense of 'we and they' which was certainly in favour of the nation-states. The rise of a middle class in Europe also was a great contributory factor in the nation building. The middle class which earned their living by sheer hardwork could give donations and seek the help of rulers for their protection against the feudal lords which helped the kings to build a strong nation. In fact, the rise of nation-state and national security sounded the death knell of feudal lords. And when the authority of the church was separated and limited, by the kings, the kings became not only head of the political system but also controlled the activities of the church. The reformation movements which were initiated, were also greatly helped in this direction. The nation-states became triumphant and omnipotent. But the idea of nation and nationalism came to America later only. While, the "one nation" norm and spirit of nationalism developed in Europe before centuries, in the case of the USA; it was yet to come. As in the words of Nevins and Commager, "It was a fact of immense significance that whereas in the making of most new states - Portugal, for example, or Norway, or

Germany or Italy – the nation came centuries before the state, in the making of the United States the state came before the nation."<sup>2</sup>

As the papal authority was slowly waning and the Roman empire was beaming, there thus, came a new awakening in the form of nation-state. Then, states were absolute and centralized with standing armies. Such absolute states had the right to taxation and right to use force with the boundaries of the state. In fact, the emergence of centralized states were products of wars in Europe and the idea of taxation was linked to waging wars as well. The primary intention of these states was to enhance their economic power along with their military power. A small state could never be in a position to set on power unless, it had to shape itself bigger in terms of economy, military and territoriality. The spirit or driving force of such states was infact 'nationalism' which when mixed with such states produced nation-state. And the nation-state when intermingled with the modern states gave rise to the concept of sovereign state. The nation-state passed all the features onto the sovereign state. As Palmer and Perkins have rightly said, "We might call them corollaries."<sup>3</sup>

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<sup>2</sup> Allan Nevins and Henry S. Commager, *A Short History of the United States*, (Calcutta, Scientific Book Agency, 1973). p. 168.

<sup>3</sup> Palmer and Perkins, *International Relations*, (3<sup>rd</sup> ed., 1970), p. 10.

## Main Features of Nation-State

The nation-states which emerged in Europe, soon spread to the other parts of the world in 19<sup>th</sup> and 20<sup>th</sup> centuries. The nation-state system became a much sought after political organization of the people of the world. It became a trend in the national politics of the people throughout the world. The nation-state had taken the guise of sovereign state which was the roof of modern state. Important features of the nation-state can be summarized as below.

First, sovereignty was the nucleus of the nation-state. It was the supreme authority of the political system. It has been described by many political thinkers to be the 'nucleus' of the nation-state. But sovereign was understood in two different ways such as the 'supreme authority' and the 'ultimate law' of the land. The nation-state with sovereignty could do according to its own discretion while, dealing with the international relations. This means that the nation-state will neither be subdued before any external powers nor be subordinated to any internal force or organization. The concept of divisible sovereignty is contrary to logic and political unfeasible...<sup>4</sup> Its that capacity of a nation state with the help of which it interact with other nation-states of world. In the present day context, it's that capacity which makes a state a state.

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<sup>4</sup> Hans, J. Morgenthau, *Politics Among Nations*, (3<sup>rd</sup> ed., N.Y.: Alfred A. Knof 1962), p. 326.

Second, territory was another indispensable factor of the nation-state. It's definite portion of land area which was carved out by the law of the land and so also recognized by the other nation-states. The territory of a nation-state was the territorial limitation of the authority of the state. It was a political integrity inhabited by the nationality whose primary responsibility was to sentinel the boundary and the territoriality. Without a definite territory there could not be a nation-state. But at the same time, there was not any established principle that the size of the nation-state should be very large, there could be a small state as well. Whatever could be the size of the territory of a nation-state but importance was always given on this that whether it could provide 'national security' to the size of its populace or not.

Third, legality was another character of the nation-state. When we talk of legality, we talk of sovereign equality. It was the feature through which a nation-state was recognized and accepted as well. Every such nation-state was an authority in itself vis-à-vis a member of the international community. The feature of legality is explained in two ways i.e., defato legality and de jure legality. The nation-state had to maintain its own authority by conforming to the international law. While, there was no established principle that a government had to be highly authoritative, but there could be a less authority government, or even an exiled government as well.

Fourth, the nationality of the feeling of one-nation was always there with the nation-state. The people living in an organized territory were those people who were feeling themselves to be one people. There was always an inner spirit and force which directed them to develop their own form of nationalism. The nation-state was viewed as political unit and individuals were asked to spring up to the national main stream. The individuals living under the control of authority of nation-states were asked to protect their national interests such as security and state boundary. The individuals were filled with emotional dose to protest their nation and national security even at the cost of their own lives. The encouragement of national feeling was so acute during later period that it made the people of the world arrogant fascists. They failed to understand the repercussion of a devastated uncalled for Second World War. A very strong feeling for nation definitely, creates problems for internationalism and too less of it results in identity crisis. But the achievements of science and technology especially, in information technology and the 'idea of globalization' has pushed down the idea of nationalism to the back bench.

Those features which were indispensable for the nation-state have become dominant features of the modern states. Though, the nomenclature of the nation-state has been changed over times but the nature and behaviour have remained the same, even today.

## **The National Security**

The advent of nation-states in Europe changed the course of world history. Soon after their reorganizing into various nation-states, they started giving priority to their own nation-states and national interests. The national interests were included into important areas of their concern such as a foreign policy fuelled by a strong spirit of nationalism, safely guiding the national borders and maintaining a strong national security by means of any possible methods. The emergence of nation-state in Europe not only filled into the mind of the people with a strong sense of nationalism and patriotism but provoked the people to fight against any force that caused any damage to their national security. The national security became a matter of prestige and struggle for power. It was due to such national interests in the form of national security they were hell bent upon the idea of "expansionism" and "imperialism" in Asia and America etc. Even, if, the contests and competitions were resulted in serious rivalry among them and had drawn them into the battle field still, they had never compromise with their national interest and national security. Such national interest and security had profound impact on the domestic sectors then, and now as well. As in the words of Morton A. Kaplan, "the national interest is the interest which a national actor has in implementing the needs of the

national system of action."<sup>5</sup> Even though, nations in the present day world are making different types of policies such as one set of policy for domestic affairs and the other set of policy for foreign affairs, their primary concern is their national interests and security. During the cold war period, nations were eager to maintain their national security first. Though detente was a phase in Super-Power relations, of normalization still, tension prevailed and enforced the nations around world to reshape their national security policy to meet any out side threat. But by and large, since the end of cold war there had been a systemic change that had altered the distribution of power and hierarchy. The US has emerged as lone superpower and nature of security threat also changed. Of the three paradigms of the US foreign policy during the cold war years: containing the soviet union, containing communism and promoting a growing global economy under US leadership, the first had become irrelevant, the second had diminished in significance and the third had altered in significance. It may be significant to observe that in the post-cold war years until 9/11 episode, the US had perceived threats in Europe, Asia and Africa of the nature of conflicts within states and failure of states. The US never visualized any threat emanating from within the US until the terrorist attacks on New York Trade Center and

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<sup>5</sup> Kaplan, Morton, A., *System and Process in International Politics*, (New York: Robert E. Krieger Publishing Company, Inc., 1957), p. 164

Pentagon on September 11, 2001 when a major threat to national security was upheld and proclaimed.

### **National Security Explained**

Security in ordinary parlance denotes freedom from danger. The national security thus, is the freedom of a nation from any danger or threat. Right from the post Second World War period, the threat to American security was inevitable. And it as further aggravated during the cold war in which even if the erstwhile. Soviet Union did not make an attack on the USA practically, still, there was always war like situations in almost every steps both the Super Powers were taking. This inevitability of threat on the USA made the leaders of the nation to give priority over national security. Its important to note her that though, the Americans were known as a liberty-lover people in the world, they too, suddenly started giving priority to their national security even at the cost of their civil liberties.

But the national security that we are contemplating was not created just after the terrorist attacks on the USA, rather it was felt indispensable during the post Second World War period ( Franklin D. Roosevelt Administration). The National Security Act, 1947, was introduced and passed in the US Congress and it was this act, which created the National Security Council. The National Security Act of 1947

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also created the Central Intelligence Agency (CIA) and Department of Defence (earlier Departments of War and Navy). The National Security Act, 1947 provided various provisions relating to purposes, functions and structure of the National Security Council such as,

1. To "advise the President with respect to the integration of domestic, foreign and military policies relating to the national security so as to enable the military services and the other departments and agencies of the government to cooperate more effectively in matters involving national security".
2. To "assess and appraise the objectives, commitments, and risk of the United States in relation to (its) actual and potential military power in the interests of national security...."
3. To "consider policies on matter of common interest to the departments and agencies of the government concerned with the national security...."
4. It is open to the President any time to ask for advice on any specific subject relating to national security, or ask the NSC to undertake studies in a particular area of national security. Thus, the basic purpose of the NSC is to advise the President in the making of national security policy, to achieve, functional integration and institutional coordination of national security policy

in the light of nation's politico-military goals and economic strength.<sup>6</sup>

The national Security, Act, 1947, also provided for structure of the NSC. The NSC as a statutory body is consisted of the President, the Vice-President (not original but added as a member by an amendment in 1949), the Secretary of State and the Secretary of Defense. But secretary of Treasury is also invited to the NSC meeting which was started by President Harry Truman as a practice. However, from time to time, the membership of NSC has been changed on account of various reasons and situations.

National Security thus, is the security of the nation or nation-state. When we are referring a nation by her name this means we are referring her sovereignty, her populace, her organized government, and legally well-demarcated boundaries.

Though, the very term 'nation' has been a matter of serious debate still, a nation is a complete unity of its own. It's the first and foremost duty of the organized government to look after the security of its populace, sovereignty and territoriality in the case of any danger and threat. When such elements of a nation-state expose to threat or danger, the nation-state goes on to tighten its security system by every

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<sup>6</sup> US Congress, House Committee on Armed Services, National Security Act, 1947 (Amended in 1973) Washington, D.C. : GPO, 1973, pp. 2-3

possible means, primarily, securing to the boundaries and freedom to the populace is indispensable for the very existence of the nation itself. The safety to the boundaries implies a proper sentiment to the territorial limits of the nation. It may also enforce the nation to make supportive relations with other nation-states around and remain as a 'watch-dog' of international relations. Nevertheless, security implies two important aspects such as physical security and psychological security. Indeed it is the responsibility of the nation state to provide the citizens with their bodily security i.e., freedom from threat or danger and psychological fear of threat and danger.<sup>7</sup>

So, national security broadly speaking, is a policy made by a nation state to provide adequate sentinel to the demarcated boundaries of the nation in which, the citizens can live their lives peaceably, happily and free from any outside or inside threat or danger.

Thus, it is natural on the part of a nation to make its own national security policy for the protection of its citizens life, liberty and property. So, the terrorist attacks on 9/11 upon the USA has made the leaders of America to go for a stricter form of legislation called as the USA-PATRIOT Act, 2001 (Uniting and Strengthening America by Providing

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<sup>7</sup> Donald M. Snow, National Security Enduring Problems of U.S. Defense Policy, (New York: St. Martins' Press, 1987), p. 5.

Appropriate Tools Required to Intercept and Obstruct Terrorism).<sup>8</sup> It was widely believed that without a proper rearrangement of their national security with their civil liberty, neither their liberty nor their national security could be protected. U.S. President George W. Bush addressed to the nation and vowed to find those responsible and bring them to justice.<sup>9</sup>

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<sup>8</sup> HR 3162, PL 107-56, October 26, 2001 (115 Stat. 272).

<sup>9</sup> President Bush's Address to the Nation, September 11, 2001. The White House, Office of The Press Secretary, September 11, 2001.

## **CHAPTER – II**

### **1. The Nature and Scope of USA-PATRIOT Act, 2001**

#### **2. Similar Laws in History**

- i. Alien and Sedition Act, 1798**
- ii. Espionage Act, 1917**
- iii. Sedition Act, 1918**
- iv. Reichstag Fire Decree, 1933**
- v. National Security Act, 1947.**
- vi. Anti-Terrorism and Effective Death Penalty Act, 1996.**

#### **The Nature And Scope of USA-PATRIOT Act, 2001:**

The shocking 9/11 terrorist episode propelled American policy-makers to urgently review the arrangement of national security with civil liberties. In a situation, wherein a threat to the national security revealed, aspects of civil liberties become a distant possible objective on the part a nation. Consequently, following the 9/11 episode, President Bush has upheld that in order to protect civil lives and liberties a strong national security policy is indispensable. He thus, went ahead with a stricter form of legislation on national security.

The 9/11 episode essentially was a series of terrorist attacks on New York, World Trade Center and the Pentagon with its collateral damage and death of some 3000 (more than 2, 600 died at World Trade

Center, 125 died at the Pentagon; 256 died on four planes)<sup>1</sup> Americans that changed the thought process of liberty – loving American leaders. President Bush and his administration expert especially, Attorney General John Ashcroft presumed that unless civil liberties will be restricted, there cannot be effective counter of national security. Noted Jurist Richard A. Posner's remarks in this regard is noteworthy, when he said, "The law is human creation rather than a define gift, a tool of government rather than a mandarin mystery. It is an instrument for promoting social welfare, and as the conditions essential to that welfare change, so must it change."<sup>2</sup> Therefore, within a short period of six weeks the "anti-terrorism" Act called USA- PATRIOT Act, 2001 was introduced in the Congress, significantly, without a serious Congressional debate, or a Congressional hearing. Many Congressmen and Senators just read the summaries of the Act, of 342 pages, which passed into law on 26 October, 2001 by the President.<sup>3</sup> The Senate Voted 98-1 to approve it and the House voted 356-66 for approval.<sup>4</sup>

The USA-PATRIOT Act, 2001 in fact, is not altogether a new legislation to counter terrorist intentions but a rearranged and carefully

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<sup>1</sup> The 9/11 Commission Report, July 2004, Final Report of the National Commission on Terrorist Attacks Upon the United State, p.1.

<sup>2</sup> Posner, Richard A., Security Versus Civil Liberties, The Atlantic Monthly, Boston, December 2001, Vol. 288, Issue 5, pp. 46-57.

<sup>3</sup> Te Liao, Fort Fu, Right to Liberty and Fair Trial, EurAmerica, vol. 34, no. 3, September, 2004, p.518.

<sup>4</sup> The USA-PATRIOT Act and You, Act/React, UTA Libraries Online, 2003.

crafted legislation to build a strong national security to curb any sort of terrorist activities and so also to protect and reshape up civil liberties. Right from the period of President Franklin Roosevelt till 1978, the American government could search the belongings of a terrorist even without any judicial permission by invoking **President's inherent power** to collect various intelligence informations from a foreign terrorist/enemy. Invoking President's inherent power any terrorist acts could be controlled. Any person who was involved in terrorism could be booked. There was no need of showing that the person involved is a foreign terrorist and also a member of an international terrorist group. It was due to this provision, the government could at least, question those people who were involved in terrorist activities. But, the legislation of Foreign Intelligence Security Act, (FISA) 1978, barred any searches of suspected terrorists and espionages unless the attorney general can obtain a warrant from a special national security court (the FISA court). And another problem was that the warrant application had to show not only that the target is a foreign terrorist but also that he is a member of an international terrorist group. All these loopholes in the tracking machinery of the system, made the US leaders to think for a change in the form of a stricter act.

It is said that when threat to the national security increases, the standard of civil liberties decreases. The Americans have been target of

Islamic Militant for quite a long time. The Islamic terrorist groups such as al-Qaida has become a successful organization in slaughtering a large number of American and others in the name of Jihad, al-Qaida has been capable of destroying American lives and property to a great extent. The Fidayeen Squad (suicide bombers) is more dangerous than any other. Suicide bombers are inflamed by religious zealotry (Jihadists/ Fidayeen) or impelled by apocalyptic visions of the world (Aum Shinrikyo).<sup>5</sup> They can go to the extent to end their own lives in the operation of killing Americans and leave no source of their origin and whereabouts. They make the system of spy ineffective and mute spectator. In recent time, the terrorists' attack on America on September 11, 2001 was an example to this.

In the USA-PATRIOT Act, 2001, the Bush Administration claimed that it has reshaped national security keeping the importance of civil liberties into account. It has claimed to balance the conflict between national security and civil liberties. But the question is how much civil liberties should be given out in favour of national security so that the nation can be protected. As in the words of Harvard Law School's Laurence H. Tribe, "The question is not whether we should increase

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<sup>5</sup> Indo-US Relations: Promoting Synergy, Report of an independent Core Group, Institute of Peace and Conflict Studies, Delhi, Feb 2003, p.43.

governmental power to meet such dangers, the question is how much.”<sup>6</sup> Or is it a tactic of increasing state action in the name of national security even at the cost of individual freedom is remained unanswered. Especially, when various civil rights organizations such as American Civil Liberties Union (ACLU), American Library Association (ALA), Progressive Caucus, Electronic Frontier Foundation (EFF), the National Lawyers’ Guild, the Lawyers Committee for Human Rights etc. have already cautioned against the act. The other endorsing organizations are the American Booksellers Foundation for Free Expression, Electronic Privacy Information Center, Feminists for Free Expression, First Amendment Project, National Coalition Against Censorship, On Line Policy Group, Peace fire, PEN American Center, People for the American Way, Washington Area Lawyers for the Arts etc.<sup>7</sup> have already cautioned against the Act. Just after 6 weeks of the terrorist Attack of 9/11, the Bush Administration went ahead with a new legislation. By passing the act “overnight”<sup>8</sup> in a quick and haphazard manner the US Congress gave the Executive Branch the unlimited powers. Soon after that a series of public orders, rules, regulations, policies and practices were made targeting an unnecessary suspension

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<sup>6</sup> Taylore, Stuart Jr., Rights Liberties and Security, The Brookings Review, Washington D.C., Winter 2003, Vol. 21, Issue I, pp. 25-32.

<sup>7</sup> Free Expression Networks, Internet 2002.

<sup>8</sup> Te Liao, Fort Fu, Rights to Liberty and Fair Trial Sacrificed in the Name of Anti-Terrorism, EuAmerica, Vol. 34, No. 3, September 2004, p. 518.

of civil rights and liberties. The Bill of Rights, which has been the very ethos of democracy in America, has been seriously threatened. In such a situation, the act has become a matter of robust national debate. While, the Republican Party plays the role of Realist Party of Security in war time, the Democrats stand for principles and liberty.

The USA-PATRIOT Act, 2001, is concerned primarily with the prevention of terrorist activities. The act, provides appropriate tools required to intercept and obstruct terrorism in USA and around the world. Though the act was passed after the terrorist attacks of 9/11, to rearrange the set up of national security with civil liberties, it not only attempted to book and bring to justice those culprits who were involved in the attacks but tried to uproot the bases of terrorist cells within America and elsewhere around the world.

The act is basically a well-thought out plan and an appropriate means to deter and punish terrorist activities. The following is a series of measures the act provide to fight against terrorism.

First, in **Title-I**, the act provides for enhancing domestic security against terrorism. The first and foremost measure the Bush Administration has taken to wipe out terrorism is to increase domestic security by counter terrorism fund, sense of Congress condemning discrimination against Arab and Muslims, to increase funding for technical support center at the FBI, to request for military assistance, to

expand National Electronic Crime Task Force Initiative and Presidential Authority.

In **Title-II**, the act provides for enhanced surveillance procedures. The authority to intercept wire, oral and electronic communications relating to computer fraud and abuse offenses, authority to share criminal investigative information, clarification of intelligence exceptions, authority under the FISA, 1978, Designation of judges, pen register, trap and trace authority under FISA, access to records and other items, trade sanctions and sun set etc are explained.

In **Title-III**, the act provides for international money laundering, abatement and anti-terrorist financing Act of 2001, which contains in three subtitles. In Sub-title-A, International Counter Money Laundering and Related Measures are provided, in Sub-title-B, Bank Secrecy Act Amendments and Related Improvements are provided. In Sub-title-C, currency crimes and protection are provided.

In **Title-IV**, Protection of Border is provided. This is a important measure to fight against terrorism. While, Sub-title-A, provides for protecting the northern border, but Sub-title-B, is for Enhanced Immigration Provisions, the Sub-title-C, provides for Preservation of Immigration Benefits for Victims of Terrorism. This is a welfare measure.

In **Title-V**, the act provides for removing obstacles to investigating terrorism. It Contains Attorney General's, authority to pay rewards to

combat terrorism, DNA identification of terrorists, coordination with law enforcement authorities, disclosure of educational records and other important obstacles are discussed here.

In **Title-VI**, the act provides for victims of terrorism, public safety officers and their families. While in sub-title-A, Aid to Families of Public Safety Officers is provided, but in Sub-title-B, Amendments to the victims of Crime Act, 1984 is explained.

In **Title-VII**, the act provides for increased information sharing for critical infrastructural protection. But in **Title-VIII**, the act has strengthened the criminal laws against terrorism and in **Title-IX**, the act provides for improved intelligence and responsibilities of Director of Central Intelligence regarding foreign intelligence collected under FISA, 1978, the training of government officials regarding identification and use of foreign intelligence etc. are explained.

**Title-X**, is a miscellaneous provision which contains review of the department of justice, sense of Congress, definition of electronic surveillance, venue in money laundering cases, and crimes against charitable Americans and so on.

So unlike the earlier laws on anti-terrorism, the USA-PATRIOT Act, 2001 is vibrant and stricter and has been able to increase state action even at the cost of individual freedom. By passing such an act, the Bush Administration has not only given way to the theory of nation-

state and national security but has been able to convince to the people regarding limitations of essential civil liberties. Right from enhancing to protecting border, to providing aids to victims to improved intelligence, the act has been laudable and capable of covering every aspect of anti-terrorism.

### **Similar Laws in History**

- I. Alien and Sedition Acts, 1798.
- II. Espionage Act, 1917.
- III. Sedition Act, 1918.
- IV. Reichstag Fire Decree, 1933.
- V. National Security Act, 1947
- VI. Antiterrorism and Effective Death Penalty Act, 1996.

### **The Alien and Sedition Act of 1798:**

When the threat from France was lurking on US and the US was not able to get rid of aliens, the Congress passed the Alien and Sedition Acts, 1798 in an effort to strengthen the Federal Set Up.<sup>9</sup> While, on the one hand, the legislation was triggered against French but on the other hand, it was also set to quell any political oppositions from the Republicans who then, were creating problems for the Federalists.

There were four important laws in this legislation such as the naturalization Act, which was passed on 18<sup>th</sup> June. And the act made it

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<sup>9</sup> The Alien and Sedition Act, 1798: (1 Stat. 570-572).

mandatory for every alien to be resident for 14 years in the USA instead of 5 years to become eligible for US citizenship. Another law was the Alien Act, which was passed on 25<sup>th</sup> June. And the act empowered the President to deport alien who were dangerous to the peace and safety of the USA even during peace time. The third law was the Alien Enemies Act, which was passed on 6<sup>th</sup> June. The act allowed the wartime arrest, imprisonment and deportation of aliens subjected to enemy power.

The fourth one was the sedition Act, which was passed on 14 July. The Act announced that who ever would be involved in any treasonable activity including publication of any false, scandalous and malicious writing would be punishable with imprisonment and fine. It is said that as many as 25 writers and editors were arrested on account of this act because, they were involved in Republican News papers. Their news papers were also asked to shut down. Benjamin Franklin Bache was editor of "Philadelphia Democrat-Republican Aurora". He was charged with libeling President Adams.<sup>10</sup> The arrest of Bache in fact made the Americans angry and they cried for repeal of the Act. Later on when Thomas Jefferson became Republican President of the US he

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<sup>10</sup> Milestone Historic Documents. available at [http://early\\_america.com/earlyamerica/milestones/sedition/](http://early_america.com/earlyamerica/milestones/sedition/)

released every convicted persons and paid back all fines with interests.<sup>11</sup>

This was a time when Americans had questioned the authenticity and constitutionality of the Act. They stand for civil liberties even at the cost of national security.

### **Espionage Act, 1917:**

The U.S. Congress passed the Espionage Act of 1917 on 15 June, 1917, when U.S. declared war against Germany during First World War.<sup>12</sup> It provided for a fine to the tune of \$ 10,000 and 20 years of imprisonment for interfering with the recruitment of troops or disclosure of information relating to national security.<sup>13</sup> There were also penalties for any refusal to perform military duty. Those who demonstrated or conducted rally against war or protested against the U.S. policy of entering into war were arrested and put behind bar. Those who wrote in newspapers or organized any talk against war were also punished severely. Hundreds and thousands of innocent people were sent to prison for no wrong doing.

The Act, however, has been criticised by the libertarians on the ground that it was highly unconstitutional and motivated against any

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<sup>11</sup> Ibid.

<sup>12</sup> Primary Documents, First World War.com, Available at <http://www.firstworldwar.com/source/espinoageact.htm>

<sup>13</sup> Sec-3, Espionage Act, 1917.

radical or socialist uprisings. The Act punished those who were indulged in anti-war movement. A number of left wing political persons were arrested including Eugene V. Debs, Bill Haywood, Phillip Randolph, Victor Burger, John Reed and Emma Goldman. Eugene V. Debs was sentenced to 10 years imprisonment for giving a speech in Ohio on 16<sup>th</sup> June, 1918 against the Espionage Act of 1917.

There was an atmosphere of fear in the U.S. that the radicals and the socialists would sway over the U.S. This apprehension of the government, instigated the U.S. leaders to protect their people from the influence of Bolshevik ideals and to punish those who disobey the act. On 23<sup>rd</sup> August six members of the Frayhayt, a group of Jewish who were having link with the socialists were arrested. The group was charged with publishing articles against the U.S. war.

Though, the intention of the act was to control radical and socialist movements but a large number of U.S. citizens too got a bad taste of the law. Essential rights and liberties of the citizens were suspended. Many constitutional provisions were abrogated and the U.S. was made a police state.

The Act, however, was amended in May 1918. But one more act had come into being in the same year. The Sedition Act of 1918, was an amendment to the Espionage Act of 1917.

## **Sedition Act of 1918:**

The Sedition Act, 1918 was more powerful than the earlier one. The Act prescribed strict disciplinary actions against those who tried to be disloyal, scurrilous or use abusive language against American state, American Flag or American Armed forces.<sup>14</sup> The act went to the extent to restrict the delivery of mails, if, they contained anti-U.S. writings or the sender was a protester.

While, the Espionage Act made it a crime to help the enemies of the U.S. but the Sedition Act made it a crime to express an opinion against the U.S. The Sedition Act, 1918 enhanced the police power and repressed those American citizens who were shouting against the state and state activities. Any anti-U.S. slogans, writings, protesting or disloyalty were punished by the government. The U.S. President Woodrow Wilson called out to the young men to participate in the war but only a few turned up. The sense was such in the U.S. that the legislative, executive and even judiciary were tied in one.

So, unlike the Espionage Act, the Sedition Act of 1918 was also known for its suppression of individual rights and liberties. It was known

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<sup>14</sup> From Wikipedia, The Free Encyclopedia. Available at [http://en.wikipedia.org/wiki/sedition\\_act\\_of\\_1918](http://en.wikipedia.org/wiki/sedition_act_of_1918)

for limiting constitutional guarantees. However, both these acts were repealed in 1921.<sup>15</sup>

### **The Reichstag Fire Decree**

Another draconian law that suppressed individual liberties to a great extent was the Reichstag Fire Decree. No sooner when Adolf Hitler came to power in 1933, he systematically tried to do away with important rights and liberties of Germans.

Hitler assumed the office of Chancellor of Germany definitely but not with a democratically expressed mandate.<sup>16</sup> In order to protect himself and his Nazi Party, he started using administrative measures, to quell his political oppositions and people against the state he used coercive methods. He declared the 'Reichstag Fire Decree' on the pretext of the defensive measures against communist-uprising and those who were against the state. He quickly eroded several sections of the Constitution that guaranteed individual rights and civil liberties, the right to free speech and civil liberties. The right to free speech and the right to assembly and association were restricted. The postal, telegraphic and telephonic communications of individual citizens were limited. The search warrants and orders of confiscation of property were

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<sup>15</sup> Ibid.

<sup>16</sup> Rick, Jonathan, The Reichstag Fire Decree, April 21, 2004. Available at <http://students.hamilton.edu/2005/jrick/nazis3.htm>

passed. The 'Reichstag Fire Decree' also allowed death punishment for those who resorted to armed rebellion and disturbance of peace.

Though, the Reichstag Fire Decree had political purpose but it resulted in violating human rights and civil liberties severely.

### **The National Security Act of 1947**

The National Security Act, 1947 which was legislated soon after the Second World War to rearrange the US foreign policy and military policy created the famous and powerful National Security Council (NSC). It was from this time onward the United States of America took a keen interest in shaping and formulating a vibrant national security. The NSC was created to aid and advise the President in matters related to National Security. The President, the Vice President, Secretary of State, Secretary of Defense, the Director of CIA and other members were there in NSC. The national security related issues of short terms and long terms were discussed in this body of selected few. Though, later presidents were adopting their own styles of structure and functioning of the NSC but the body never deviated itself from its core National Security matters. Right from this time, the US has been pursuing and maintaining a strict policy on national security which is inevitably limiting civil rights and liberties.

## **The Anti-terrorism and Effective Death Penalty Act of 1996.**

In recent time, the U.S. has legislated extensively on Anti-Terrorism such as the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA). The Oklahoma City Federal Building bombing made the USA to pass stricter immigration laws in the form of these laws.<sup>17</sup> With the help of these two acts, the US tried to check the menace of unlawful immigrations. These two laws taken together amended a number of provisions of the INA. Essential rights and liberties of both citizens and non-citizens were suppressed and national security was upheld. But in reality, these two acts failed to protect the Americans appropriately. Interestingly, when these two acts were in operation, the terrorist attacks of 9/11 took place and caused death and destructions.

The repercussions of these two acts were such that many Americans failed to cope up with them. They had sought the repeal of the acts that had harsh effects on residents and their relatives.<sup>18</sup> The role of INS officials during this time was seriously criticized and frowned upon by the law-abiding citizens.

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<sup>17</sup> Stock, Margaret D., "United States Immigration Law in a World of Terror", The Federalist Society. Available at [http://www.fed\\_soc.org/Publications/Terrorism/immigration.htm](http://www.fed_soc.org/Publications/Terrorism/immigration.htm)

<sup>18</sup> Ibid.

Many innocent citizens and non-citizens as well have been victimized by the law. Besides, the poor implementation, there have been complains of poor screening or knowledge of entry into the US but no knowledge of departure. Those who entered into the country once with valid visa were living happily thereafter and the INS did not bother to track them in the case of an over stay or any terrorism related activities. How to regulate the problem of immigration has been an important question before the INS but it has never been able to do it satisfactorily. Some elected officials, even called for a return to a "Fortress America" proposing harsh measures to target or reduce immigration altogether.<sup>19</sup> The Anti-Terrorism and Effective Death Penalty Act 1996, (AEDPA) did many commendable tasks in expediting procedures for the removal of alien terrorist. It expanded the criteria of deportation, allowed the deportation of non-violent offenders even before they served their term in jail. Those who were not permanent citizens, were dealt with penalty and deportation.

The Personal Responsibility and Work Opportunity Reconciliation Act, 1996 too had harsh provisions on immigration. The Act prohibited legal immigrants from obtaining **Food Stamps** and Supplemental Security income. It allowed screening of recipient of these programs.

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<sup>19</sup> Krikorian, Mark and Camarota, Steven, How did the Terrorist get in? San Francisco Chronicle, 19<sup>th</sup> September, 2001.

The act increased the responsibility of immigrant sponsors by making the affidavit of support legally enforceable, imposed new requirements on sponsors and required the INS to verify the status of the immigrants who were getting public benefits.<sup>20</sup>

The Illegal Immigration Reform and Immigrant Responsibility Act, 1996 (IIRAIRA) too came heavily on immigrants. The act provided measures to control the borders of US and expedite removal of criminal aliens.<sup>21</sup>

The IIRAIRA was stricter in many ways. The act had not only harassed law abiding citizens and families, but had stricter measures and increased penalty on the offenders for illegal entry into the USA, passport fraud, Visa-overstay and inability to leave the USA for whatever reasons. The act also had **expedited removal** to speed up deportation and made the grounds of admissibility stricter.

The IIRAIRA made various provisions with regard to bar of admissibility of aliens for 3-years and 10-years for any wrong doing inside the US. But the bar of 3-years and 10-years, failed to gather any stone because section-245 (i) expired (Sunset) in 14 January 1998. Even though, section 245 (i) was helpful to the aliens to adjust their out-of-status without leaving the country, but after the expiry the out-of-

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<sup>20</sup> Danilov, Dan P., Attorney, Immigration to the USA, (7<sup>th</sup> Ed., Self Counsel Press Inc., USA, 1999).

<sup>21</sup> Ibid.

status aliens had to leave the USA to adjust their status. And those who left the country were barred from reentering for 3-years or 10-years into the US.

Later on President Bill Clinton, increased the number of available H-1B visas to double.<sup>22</sup> But by this measure only a few students could respite, the position of aliens however, remained unchanged.

These two acts had not only upheld in favour of national security but also limited civil liberties of both citizens and non-citizens to a considerable extent.

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<sup>22</sup> Ibid.

## **CHAPTER – III**

### **THE ISSUES OF CONFLICT**

#### **CIVIL LIBERTIES CONCERNS**

- I. Due Process of Law**
- II. Extra Ordinary Detention**
- III. Government Secrecy**
- IV. Roving Wire Tapping**
- V. Internet Monitoring**
- VI. Library Records, Computer Sign Up Records**

The makers and supporters of the USA-PATRIOT Act, 2001 feel that its indeed urgent to enhance the procedure of surveillance and intercept the terrorists cells not only within America but elsewhere also. However, the civil rights and liberties activists have seriously challenged this move of the U.S. administration. They have come out openly to protest against such a stringent law which has least concern for the individual freedom. The following is an account of issues of conflict that concerns civil liberties.

#### **Due Process of Law:**

When we talk about due process of law in the American context, it means we talk about some thing that the American people think to be right for themselves. The due process of law of a society implies those laws of society which are thought to be right. They are evolved from

customs traditions, habits, manners and behaviours etc. of a people. They are established laws of a people and when they are codified and written, they become Constitution. Due process therefore, refers to the fairness, regularity, equality, justice and rule of law. It is that established procedure of law which guarantees that justice will have to be delivered in a certain established process. No body can obstruct the course of action of law. So Due Process can be defined as “the exercise of governmental power under the rule of law with due regard for the essential and fundamental fairness rights of individuals”.<sup>1</sup>

Due process of law is thus, the procedure established by law in the Constitution of USA. Constitutionally, due process of law is viewed in two different ways, such as, “Procedural Due Process” and “Substantive Due Process”.<sup>2</sup> While, in the former case, due process is explained as how the law is just and the source of fairness is constitution i.e., “announcement before hand” but in the later case, due process is explained as why the law is just and the source of fairness is beyond constitution i.e., “depending on situations or requirements”. Though, due process is exclusively mentioned in two places such as the Fifth Amendment and the Fourteenth Amendment in the U.S. Constitution, a number of inalienable rights of Americans which have

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<sup>1</sup> Due Process Issues, Retrieved From <http://faculty.ncwc.edu/mstevens/410/410ect06.htm>

<sup>2</sup> Ibid,p.2.

been enshrined in the 'Bill of Rights' in the Constitution has been seriously violated by various provisions of the USA-PATRIOT Act, 2001. However, the issue of conflict between security and liberty from the stand-point of due process of law is viewed primarily in two ways of flawed process and the civil liberties concerns.<sup>3</sup> The act passed through a "flawed process" under heavy pressure from the Bush Administration and Office of the Attorney General. The act became law before any real effort was made to determine what intelligence and law enforcement breakdowns had failed to prevent the attacks.<sup>4</sup> The Senate judiciary committee held only one hearing with a single witness Attorney General John Ashcroft who left the senate before answering any questions from the Senators.<sup>5</sup> Again, the act has surpassed many constitutional provisions and has infringed upon civil liberties of citizens. The U.S. Constitution is the primary source of law in the United States. Thus, none of the other types of law may stand if it is in conflict with the constitution.<sup>6</sup>

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<sup>3</sup> People for the American Way- The Issue: USA-PATRIOT Act, Retrieved from <http://www.pfaw.org/pfaw/general/default.aspx?oid=9394&print=yes&units=all>

<sup>4</sup> Ibid, p. 1.

<sup>5</sup> Ibid, p. 1.

<sup>6</sup> Carp, Robert A., and Stidham, Ronald, *Judicial Process in America*, (5<sup>th</sup> ed., Washington D.C., Congressional Quarterly Inc., 2001), p.5.

## **The Due Process and Constitutional Amendments:**

The following is an account of several Constitutional Amendments made to qualify due process of law. But the USA-PATRIOT Act, 2001 has been designed in such a manner so that a number of important amendments have been violated. Or in other words, no care has been taken to respect these amendments.

1. **The First Amendment**, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances";
2. **The Fourth Amendment**, which declares, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized";
3. **The Fifth Amendment** of the Constitution of United States declares; "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”;

4. **The Sixth Amendment**, which guarantees defendants, “The right to a speedy and public trial, by an impartial jury and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defense”;
5. **The Eight Amendment**, which states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted”; and
6. **The Fourteenth Amendment**, which prohibits the government from denying “to any person within its jurisdiction the equal protection of the laws”.

It is claimed that various provisions of the USA-PATRIOT Act, 2001, either has clashed with constitutional provisions and laws or has abrogated them violating the due process of law. The act has enabled the President and the administration (Attorney General) to control the life, liberty and property of both the citizens and the non-citizens. A false apprehension of the administration on national security has made to restrict the essential liberties. The following is a summary of sections of the Act, which shows how the law has been made to scrape essential liberty of the people.

1. Under Sections 411,412, 802 and 808, the Attorney General and the President of the USA are entitled to interpret overly broad definitions of terrorism and creation of new crime of domestic terrorism.
2. The Act Under Section 216 eliminates judicial supervision of telephone and internet surveillance,
3. Under Section-209,213,215,218-220, the government authority has expanded to conduct secret searches.
4. The Act permits the FBI broad access to individual medical, mental health, financial, employment and educational records without having to show evidence of a crime and without court order; and

5. Under Section 215, the act allows the FBI to track individual book borrowing in libraries and book purchases and video rentals in stores and makes it a crime for librarians and vendors to reveal their knowledge of such tracking.

### **'Federal Executive Orders' and 'Federal Government Actions'**

Beside these, the act permits government authority to issue the Federal Executive Orders and Federal Government Actions. These Orders are being issued since 9/11 and have been implemented to:

- Permit wiretapping of conversations between federal prisoners and their lawyers, (Justice Department, Bureau of Prisons, 28 CFR 501.3, October 31, 2002):
- Eliminate Justice Department regulations against illegal COINTELPRO- type operations by the FBI-covert activities that in the past targeted domestic groups and individuals (Attorney General's Guidelines, May 30, 2002);
- Establish secret military tribunals for terrorism suspects, including both citizens and non-citizens (M.O., 11/13/01);
- Permit thousands of men, mostly of Arab to have been held for many months in secret custody, most without any charges filed against them, with publication of their identifies and location, and without

confidential access to counsel or meaning full access to the federal courts (28 CFR 501.3, 10/31/02);

- Limit the release of public documents and records in many subject areas which have previously been available under the Freedom of Information Act (Attorney General's Memorandum, Oct 12, 2001);
- And the provisions of the US Constitution apply in war time as well as in peace time. And any attempt to violate deviate from them, under false necessity or in any other pretext is subversive of good government.
- President Bush has ordered military commission to be set up to try suspected terrorists who are not citizens. They can be convicted on hearsay and secret evidence by only 2/3 vote.
- American citizens suspected of terrorism are being held indefinitely in military custody without being charged and without access to lawyers.
- The press and public have been barred from immigration court hearings of those detained after 9/11 and the courts are ordered to keep secret even that the hearings are taking place.

#### **New Provisions Granted:**

But this is not the end of violation of due process of law. The USA PATRIOT Act, 2001 has enhanced the power of the surveillance and

governmental machinery to a considerable extent. The following is an account of **new provisions** granted by the Act, which goes against the due process of law.

- As per Section 104 of the act, the Department of Defense is allowed to share information with the Department of Justice during emergency situations that involve “weapons of mass destruction”.
- As per Section-106, the President of United States is empowered to seize property belonging to foreign nationals connected with terrorism. And if that seizure is based on classified evidence, then the judge reviewing the case cannot share that evidence with the defense attorneys.
- As per Section-203, information collected by the police or presented to a **Federal Grand Jury** to be shared by intelligence agencies. Such information sharing is limited to evidence of terrorist activities. As clauses (a) and (b) of section 203 doesn't (sunset) expire.
- As per Section-206, a wiretap is granted against an individual, instead of a particular phone. But earlier, if a person had a cell phone or a home phone or an office phone then, the government had to seek separate warrant on them.
- As per Section-207, the duration of a wiretap can be increased as “permitted for on non-US citizens who are agents of a foreign power.

- As per Section-208, the act increased from 7 to 11, the number of **district court judges** designated to hear applications for and grant orders approving electronic surveillance. As Section-208 doesn't (sunset) expire.
- As per Section-209, the act permits the seizure of voice-mail message under a warrant.
- As per Section-213, the FBI agents can conduct a search of a business or a place without notifying the owner that the search has been conducted until later. The agents still, need a warrant and only a **Federal District Court judge** can issue this type of warrant. Further, this type of warrant may only be issued if, notified the owner of the search would result in 'adverse consequences'. As Section 213 doesn't (sunset) expire.
- As per section-216, the law enforcement in ordinary criminal cases to get a warrant to track which websites a person visits and collect general information about the e-mails a person sends and receives. Law enforcement doesn't have to prove the need; the judge only has to determine that law enforcement has 'certified' that this relates to an ongoing investigation. In other words, the judge cannot reject to the warrant if law enforcement 'certifies' that the warrant was meant

to apply to those unnamed people. As section 216 doesn't (sunset) expire.

- As per Section – 217, the government is empowered to intercept the electronic communication of a computer trespasser, i.e., hacker, without a court order in certain circumstances, if the owner of the hacked computer consents.
- As per Section-402, the act triples the number of Border Patrol, Customs Service, and INS Personal stationed along the US borders.
- As per section- 411, the definition of a terrorist for the purpose of the act is expanded. To sum up the section: Before passage, only members of the groups designated as terrorist organizations by the State Department could be denied entry to or deported from the US. The law extends those actions to any foreigner who publicly endorses terrorist activity, belongs to a group that does, or provides support to a group that does. The definition of "terrorist activity" is extended to include any foreigner who uses 'dangerous devices' or raises money for a terrorist group, if that person knows or reasonably should have known that the group is engaged in terrorism.

As per Section-412, the act extends the power of attorney general to detain aliens. The attorney general can order the detention of any alien if he certifies that has reasonable grounds to believe, or

involvement in terrorism or activity that poses a danger to national security. He does not need to explain his reasoning or show evidence. Criminal or immigration violation charges have to be brought against such people within **seven days**, but they can be held indefinitely. However, they retain their right to petition the US Supreme Court, the US Court of Appeals for the District of Columbia, or any district court with jurisdiction to entertain a "habeas corpus".

As per Section-416, the act directs the Attorney General to implement fully and expand the foreign student monitoring program to include other approved educational institutions like air flight, language training, or vocational schools.

As per Section-503, the act, requires DNA samples of convicted terrorists to be collected and add to DNA database of violent convicts.

As per Section-805 (a)(2), the act, expands the definition of the material, support to foreign terrorist organizations to include "expert advice and assistance". According to an **article in Reason Magazine**, this section has been cited by Assistant US Attorney Christopher Morvillo and Assistant US Attorney Rabin Baker as grounds for prosecuting a US Lawyer who defends a terror suspect. Critics suggest that this amounts to state intimidation of defense counsel and likely to undermine the constitutionally protected due process right to counsel.

As per Section-814, the act allows wiretaps for suspected violations of the **Commuter Fraud and Abuse Act**, including anyone suspected of exceeding the “authority of commuter” used in inter-state commerce, causing over \$5,000 worth of combined damage.

### **The Other New Provisions:**

This is not an end to the attempt of the act to scrape due process, the USA-PATRIOT Act, 2001 has followed other stricter new provisions as well. The other new provisions which can be discussed as below:

In the **first** place, as per new Department of Justice guidelines, the FBI is empowered to monitor religious and political groups without specific evidence of wrong doing i.e., without ‘probable cause’ in the name of national security. The Operations TIPS (Terrorist Information and Prevention System) which was discussed but failed to pass in the Congress, the credit, of course, goes to then, House Majority leader Dick Armey. If the move would have been successful, then, it would have encouraged the civilian surveillance of private persons. It was claimed by the critics that “Operation TIPS” was designed to circumvent the due process of law limitations and restrictions ordinarily imposed on the police.

**Secondly**, another effort in this direction was Pentagon’s “Total Information Awareness” data mining programme, which in fact, would

examine a variety of public and private database to search for evidence of terrorist group activity. And if this effort would not have been stopped by the congress then, it would have made the provisions of the act easier for law enforcement agencies to gain access to various kinds of personal records such as schools, libraries, bookstores, doctors and employers.

**Thirdly**, the expanded power of the police to track, monitor and question individuals has become a matter of concern. The plan to take fingerprint of the Arabs and Muslims and track them electronically has been started by the Department of Justice. The Department of Homeland Security which is a creation of the act has plans such as to "standardize State drivers" licenses is nothing but a plan to create a 'national identity card'. The police is also authorized to interrogate and investigate any Arab and Muslim origin man even, without any suspicious or wrongdoing.

**Fourthly**, the 'probable cause' was an important ground to grant search warrants and wiretaps in cases involving national security but now they can be granted even without probable cause and lower standard of proof. As per the new provisions the geographical coverage of search warrants granted on national security issues is expanded, making them as effectively as national warrants. They are not limited to

the jurisdiction of the court where they are issued. The wiretap orders are more flexible now, allowing the multiple telephones and cellular phones to be covered under a single judicial authorization. The new 'sneak and peek' searches for national security cases, in which the suspect remain unaware that a search is going on him, needs a lower burden of proof even than, searches that are undertaken in the case of an ordinary criminal investigation.

**Fifth**, as part of expanded police power, the act authorizes the FBI and CIA to cooperate and share information more closely, bringing together the work of intelligence and law enforcement agencies which was debarred and separated in the past to give way to civil liberties. The act also has integrated the police effort in its fight against terrorism. The Department of Home and Security is asked by the act to gather important informations from the national law enforcement agencies and again these informations would have to be shared by the local law enforcement.

**Finally**, the **Posse Comitatus Act, 1878** prohibits the use of military for any domestic purposes (certain domestic police functions)<sup>7</sup> but as per new provisions of the act, military forces can be used to aid and assist the civilian law enforcement agencies in their fight against

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<sup>7</sup> Wechsler, William, Law in Order, Reconstructing U.S. National Security, The National Interest, NO.67, Spring 2002,p.18.

terror. The Department of Home and Security is assessing the possibility of use of military in this respect.

### **Alleged Abuse of Due Process:**

Right from the passing of the USA-PATRIOT, Act, 2001, in the Congress, the Executive has come out to implement it. The following shows the alleged abuses of the USA-PATRIOT Act, 2001

- In the city of Las Vegas, the police used a FISA warrant to monitor the activities of a strip club owner.
- The FBI ordered all journalists that have ever written about computer hacker Adrian Lamo to turn over their information under the auspices of act.<sup>8</sup>
- In September, 2003, the 'New York Times' reported that a study by Congress showed hundreds of cases where the act was used to investigate non-terrorist crimes.<sup>9</sup>
- In April, 2004, a Muslim Idaho man went on trial on charges of supporting terrorism by maintaining some websites that supported violent activities.<sup>10</sup> This type of 'guilt by association' was resurrected by the 1996, 'anti-terrorism' act signed by President Bill Clinton, but later was further expanded by the act.

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<sup>8</sup> Available at [http://www.theregister.co.uk/2003/09/29/fbi\\_bypasses\\_first\\_amendment/](http://www.theregister.co.uk/2003/09/29/fbi_bypasses_first_amendment/)

<sup>9</sup> Available at <http://www.jointogether.org/sa/news/summaries/reader/O,1854,567051,OO.html>

<sup>10</sup> Available at [http://www.washingtonpost.com/wp\\_dyn/articles/A13072-2004Apr 14.html](http://www.washingtonpost.com/wp_dyn/articles/A13072-2004Apr 14.html)

- In May, 2004, the FBI cordoned off the entire block of a University of Buffalo, Associate Art Professor's house, impounding his computers, manuscripts, books, equipments for further analysis. The Buffalo Health Department temporarily condemned the house as a health risk after suspicious vitals and bacterial cultures were discovered at his house. The Professor's art involves the use of biology equipment as part of a project educating the public about the politics of biotechnology was charged with section-175 of the US Biological Weapons Anti-Terrorism, which was expanded by the Act.<sup>11</sup>
- A man was arrested at a college library in New Mexico on 13<sup>th</sup> February, 2003. Andrew J.O'Connor was arrested at St. John's College Library in Santa Fe, New Mexico, after Secret Service agents accused him of making threatening remarks about President Bush in an Internet Chat room. He was arrested by the security officer while, talking to a woman in Internet, however, he was released after 5 hours.<sup>12</sup>

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<sup>11</sup> Available at <http://www.caedefensefund.org/>

<sup>12</sup> The USA-PATRIOT Act and you, Act/React. Available at <http://libraries.uta.edu/actreact/privacy.asp>

- A reputed organization ACLU was prevented from releasing the text of its law suit challenging aspects of the act. Its because the authority claimed it would violate secrecy provisions of the act.<sup>13</sup>
- The maintainer of a TV show for website was charged with copy right infringement after the MPAA directed the FBI to obtain records from the sites internet services provider about the site under the act.<sup>14</sup>
- Another important issue wherein its alleged that the due process of law has been violated is the suspension of **habeas corpus** as guaranteed by the US Constitution. While, the Constitution has warned against any suspensions of the habeas corpus in the interest of individual liberty and privacy, (the 'habeas corpus' can only be suspended by an act of the Congress and in the event of an emergency). But the procedural questions have been raised in relation to those who were non-citizens, at least two cases are there wherein US citizens are involved, Yaser Hamdi, who was captured after fighting with the Taliban in Afghanistan and Jose Padilla was arrested in Chicago for his alleged involvement in a plot to denote a "dirty bomb" have been designated "**enemy combatants**" by the act. Such involvement of Yaser Hamdi and Jose Padilla has held them under indefinite detention without criminal charges. They are not

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<sup>13</sup> Available at <http://www.washingtonpost.com/wp-dyn/articles/A51423-2004Arp28.html>

<sup>14</sup> Available at <http://www.sg1archive.com/nightmare.shtml>

allowed to access to the courts violating provisions of habeas corpus and Non-Detention Act, which provides “no citizen shall be imprisoned or otherwise detained by the U.S. excepts pursuant to an Act of Congress”.<sup>15</sup>

### **Extraordinary Detention:**

The extraordinary Detention provided by the act is another important issue of conflict between security and liberty. As per various provisions of the act, extraordinary detention is permitted without any limitation of time as part of investigation and an unnecessary suspension of habeas corpus. (which can only be suspended by an act of Congress). The expanded power of government has endangered rights of individuals before the courts. It crushes the right of privacy in the process of investigation the treatment of those individuals, especially non-citizens who have been detained for an indefinite period of and in unknown location as part of investigation after the 9/11 terrorist attacks. Though, the Department of Justice states that those detainees have been accorded “procedural protections” due to them, many libertarians claim that not all detainees are accorded procedural problems due to them. A number of detainees have been held without any wrongdoing or without the knowledge of the crime they committed. They are not

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<sup>15</sup> Title 18 United States Code Sec. 4001(a) (2000).

allowed to access to the court of law and legal counsel as well or if at all they were allowed to access to counsel, they were allowed with government supervision i.e., without 'attorney-client privacy'. A number of detainees have been held under extraordinary jurisdictions.

Those detainees who have been held for minor immigration violations were charged with trivial criminal offenses or were held on 'material witness'. Such warrants are issued only for 'mafia trails' but in the minor immigration violations they have been used. The right to protest and the right to assemble have been drastically limited.

As the part of war on terrorism, the USA-PATRIOT Act, 2001 has gone far with a policy without any congressional approval to designate citizens of America as "Enemy Combatants" who are suspected of having any link with terrorist activities.

In a landmark decision, the Supreme Court upheld that the detention of persons as enemy combatants who were "part of or supporting forces hostile to the U.S. or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States".<sup>16</sup> But the court ruled the detention of Hamdi invalid in an 8-1 decision.<sup>17</sup> In another notable case, the Supreme Court, rules in 6-3 decision that foreign detainees held at the U.S. naval base in

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<sup>16</sup> Hamdi v/s Rumsfeld, 124 S.Ct.2633, United States Supreme Court, 28 June, 2004.

<sup>17</sup> Ibid.

Guantanamo Bay, Cuba, are entitled to file petition for writs of habeas corpus when they feel they are detained illegally.<sup>18</sup> And the administration is adamant on its policy and claim its designation is legal and constitutional as well.

Though, the procedural question is raised in relation to non-citizens. But there are no dearth of cases in which even the citizens of America are implicated. There are at least two eye-borrow raising cases wherein citizens of America too are not spared. They are Yaser Esam Hamdi and Jose Padilla, Yaser Hamdi is accused of involvement with Al Qaeda, was born in Louisiana to Saudi Arabian parents. But Jose Padilla was a man of New York born to Puerto Rican parents. Both Hamdi and Padilla were captured in different situations but were accused of involvement of terrorism.

Yaser Hamdi is allegedly a Taliban fighter who was captured and detained in Afghanistan by the "North Alliance" forces in Afghanistan<sup>19</sup> in 2001. He however, was transferred to US Military Custody and again transferred along with other prisoners to a Naval base in Guantanamo Bay of Cuba in 2002.<sup>20</sup> But when his American citizenship was established, he was removed from the naval base of Guantanamo Bay

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<sup>18</sup> Rasui v/s Bush, 124 S.Ct. 2686, United States Supreme Court, 28 June, 2004.

<sup>19</sup> Caron, David D., International Decisions, American Journal of International Law, Vol.98, No.4, Oct 2004, p.782.

<sup>20</sup> Ibid, p.782.

to another naval base in Norfolk, Virginia. When another accused called John Walker Lindh (was the first to be captured in Afghanistan) was sent to civilian custody and also allowed to access to counsel, but Yaser Hamdi was never allowed these facilities as prisoner.

Jose Padilla who was arrested on 8<sup>th</sup> March, 2002, when he arrived at an airport in Chicago. He was arrested on a material witness warrant.<sup>21</sup> Soon after his arrival he was arrested and detained. But Padilla was assigned counsel under the material witness statute. While, a hearing was fixed on 11 June for his challenge to his detention by a federal court judges but the administration, instead of contesting his case transferred him to a military custody. He was not allowed to access to any court of law or his counsel, hence. Later on declared that the judge no longer had jurisdiction to try the case. In defense of his action, Attorney General John Ashcroft said in a national televised program that Jose Padilla was involved in a conspiracy to detonate a conventional bomb that would have spread radioactive material.

Attorney General Ashcroft proved that the detention of Padilla was inevitable to disrupt a terrorist plot, Padilla has been confined in a military custody in Goose Creek of South Carolina since then. It is

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<sup>21</sup> Edgar, Timothy H., ACLU Memorandum on Indefinite Detention without charge of American Citizens as "Enemy Combatants", 13<sup>th</sup> Sept, 2002. Retrieved From <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=10673&C=206&Type=s>

claimed that except Padilla, all other accused were held on federal or state criminal charges, but Padilla was never allowed these procedures.

The act provides to expand the indefinite detention of American citizens in the military custody if they found to be involved in any sort of terrorist activities defined in the act. As per a report, the administration is planning to constitute a high-level commission of Secretary of Defense, Attorney General and the Director of CIA to determine the Secret and without hearing cases in which American citizens will be designated as 'enemy combatants'.<sup>22</sup> And such 'enemy combatants' will be subjected to military custody.

The plan also reveals that President will no longer be required to personally certify such designation as Commander-in-Chief. Those citizens a non-citizens who have been sent to military custody will be imprisoned without any charge, access to counsel, without judicial review and without any rights to be released until the govt. has stopped fighting the 'war on terrorism'. This means that such detention will be indefinite. Tom Ridge, the Homeland Security Director has said that the 'war on terrorism', like the 'war on drugs will not come to any real close.'<sup>23</sup> It is also said that the President has not received and not

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<sup>22</sup> Jess Brevin, White House Seeks to Expand Indefinite Detention in Military Brigs, Even for U.S. citizens, Wall Street Journal, August 8, 2002.

<sup>23</sup> Jonathan D. Salant, Ridge: War on Terrorism to take years, Associated Press, January 13, 2002.

subjected to seek the approval of the congress in executing this plan. This means the administration can go single handedly to execute the plan of deputation of “enemy combatants” to the military custody.

Second thing is that the indefinite detention without charge of American citizens has been against the constitutional provisions. The constitutional provisions are applicable during normal time or war or even during national emergency. Thus, constitutional guarantees include the right to a trial by jury in criminal cases and the privilege of the writ of ‘habeas corpus’ which shall not be suspended except under laws made by the congress i.e., in the case of foreign aggression or rebellion, when safety of citizens will be at stake.<sup>24</sup>

In the same way, such a plan also violates the Fifth Amendment which states that no person shall be deprived of his life without due process of law. The act of suspension of habeas corpus can only be done by the congress. The Congress only can determine that an ‘invasion or rebellion’ has taken place and authorized to take measure of indefinite detention without judicial process and suspending the basic

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<sup>24</sup> U.S. Constitution, Art 1, Sec-9.

right of habeas corpus.<sup>25</sup> The congress can only declare war, detention and trial of “enemy combatants” by the military tribunals.<sup>26</sup>

The rationale behind detention and suspension of habeas corpus was to put the constitutional provisions into practice. The founding fathers of the constitution never intended to give the Executing Branch any extra power to curtail individual liberties, they wanted that the basic fabric of the constitution in no case be abridged.

The powers of the President under Article 11 comprise of his power as Commander-in-Chief and his duty to take care that of law of the land i.e., the constitution be faithfully executed. In the capacity of President of the USA, he is required to act in accordance with the constitutional limitations. So it is not the President but the Congress is empowered to declare war and make laws regulating the armed forces, constitute tribunals inferior to the Supreme Court and so also can suspend the habeas corpus.

The makers of the US constitution were well aware of misuse of power if power had to be concentrated in a single hand. It was due to this, they did away with the single power centre and opted for a separation of power. The inevitability of danger of concentration of

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<sup>25</sup> Ex Parte Milligan, 72 US 2, 121, 122, (1866); Ex Parte Merryman, 17 F. Cas. 144, 149 (D. Md 1861).

<sup>26</sup> Ex Parte Quirin, 317 US 1 (1942); IN re Yamashita, 327 US 1, 11-12, (1946).

power in one single person, they made the provision of three different branches of government so that executive would never be in a position to command superiority.

In order to prevent such an abuse of power in the times of war and emergency, the makers of the constitution, spilt the power of war and kept in two branches, the legislative and the executive. While, legislative or congress was given power to declare war, make rules and regulations relating to captures and regulate the arm forces, but, armed forces were under the command of the President. As James Madison has said, "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>27</sup>

By entrusting the power of declaring war to congress, the makers of the constitution cleared the confusion. They deliberately rejected a British System in which the king will be all powerful. The position of the president in U.S. would be same as that of the position of British king in normal time but in emergency time, the U.S. President would be more democratic than his British counter part. As Alexander Hamilton said, "the power of the Commander-in-Chief would amount to nothing more

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<sup>27</sup> The Federalist No. 47, James Madison.

than the Supreme Command and direction of the military and naval forces; while, that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, "all of which, by the constitution under consideration, would appertain to the legislature."<sup>28</sup> So, the president had the power to command the armed forces but the can not determine the legal aspects of conducting war and who is enemy. Whether to order for military tribunals to try offenders or to suspend habeas corpus is certainly not at the disposal the President.

The president is supposed to act within the limit prescribed by the constitution or else, there will be a serious violation of separation of power and the judiciary is always there to check the foul move of the President.

In 1801, Chief Justice Marshall had made it clear that the Executive Branch did not have free-floating war power, which exceeded the power prescribed by the congress. When an undeclared war against France was going on, in a number of cases involving the seizure of vessels, the Supreme Court clarified that it is the congress which is the ultimate authority to order military and not the president.<sup>29</sup>

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<sup>28</sup> The Federalist No. 69, Alexander Hamilton.

<sup>29</sup> Little v/s Barreme, 6 US 170 (1804); Talbot v/s Seeman, 5 US 1, 28 (1801); Bas v/s. Tingy, 4 US, 37 (1800).

When, President Abraham Lincoln tried to use his power of President and suspended the writ of habeas corpus, Chief Justice Taney, obstructed him and showed him his limitations to accede the power of congress. And again, when President Truman ordered for the seizure of steel mills to settle a labour dispute during the time of Korean War, the Supreme Court struck down the seizure order for the reasons that the order was not passed by the congress.<sup>30</sup>

Thus, the said plan when involve in the decision of whether an American is to be declared as an “enemy combatant” and a detainee is to be made not by the court but by the high-level committee which will be composed of the Attorney General, Secretary of Defence and the Director of CIA the plan will be no less than the Star Chamber – the Secret Court which was abolished in 1641, which decided among other things that such which enemies of the crown to imprison without judicial process.

In such a situation, its doubtful whether such a plan can be constitutional or if at all constitutional, can be passed by the congress. For a simple question that there is no clear cut definition of either ‘enemy’ or ‘combatant’. And whether American citizens can be labeled

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<sup>30</sup> Youngstown Sheet and Tube Co. v/s Sawyer, 343 US 579 (1952).

as 'enemy combatants' and detained in what standard and evidence has been an answered question.

But when we compare this plan with the case of Second World War Period, we find that Congress in its declaration of war had clearly defined who the enemy was, the time period of military detention and tribunals formulation. The Supreme Court, had made it clear that 'enemy combatants' were those individuals "who associate themselves with the military arm of the enemy government and with its aid, guidance and direction enter this country bent on hostile acts..."<sup>31</sup>

This implies that the congress had taken care to define who the enemy was and who was not. The congress made it clear with regard to confusion of detentions and military tribunals as well. As the practice was that military tribunals, were existing so long as the state of war existed and once the war was over the military tribunals were also ceased to exist.

The makers of the U.S. constitution were well aware of the fact of executive tyranny in the absence of congressional checks. The writ of habeas corpus can only be suspended by the congress during invasion and rebellion. And Federal Statues has the authority over emergency powers such as detention of non-citizen enemies and seizure of

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<sup>31</sup> Ex parte Qurin, 317 US, 1, 38 (1942).

communication facilities, business and property etc when congress has declared war.<sup>32</sup> The Supreme Court has cleared is that the president can invoke extra ordinary taking the time of no war or emergency.

Secondly, detention of American citizens in Military Facilities violates Federal Law. The detention of US citizens as “unlawful combatant” violates Federal Statute.<sup>33</sup> The statute prohibits clearly any indefinite detention of American citizens without charge. Such a provision will definitely provoke American citizens especially those who had experienced the inhuman treatment of internment during the Second World War.

The repercussions of internment of Japanese were well understood by the congress and as result of this the congress repealed the Emergency Detention Act in 1971. It made clear that the spies and saboteurs would now have to be tried in court for their crimes, and not detained indefinitely. The congress further, made it clear that no citizens shall be imprisoned or otherwise detained by the United State, except pursuant to an Act of Congress. Then, why should there be an exception to ‘enemy combatants’

Recently, the Bush Administration has tried it vigorously to legislate on indefinite detention of non-citizens in which the accused

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<sup>32</sup> Title 50 United States Code Sec- 21; Title10 United States Code Sec- 2538.

<sup>33</sup> Title 18 United States Code Sec- 4001.

would not be allowed the judicial review and writ of habeas corpus.<sup>34</sup> But the congress rejected it and clarified that charges should be filed within seven days. Even for non-citizens who have been detained indefinitely but have been found removable but could not be deported, subject to reviews each six months to determine whether there was a continuing threat to national security such as non-citizens would be detained indefinitely and would be allowed to judicial review through writ of habeas corpus.

Thus, congress never intended to give enormous power to Executive, to detain American citizens, indefinitely without charge. It neither wanted to apply that law to non-citizens as well even often the incident of 9/11.

Thirdly, military detention of American citizens violates 'Assurances' President Bush made personally to the Congress. When President George Bush assured to members of the congress that John W. Lindh who was captured fighting with Taliban, would be allowed to fair trial in the civilian court, people applauded the President for his foresight but when he signed a Military Order, last November, approving the detention and trial of non-citizens by military tribunals it became a

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<sup>34</sup> Title 28 United States Code, Sec- 2442.

matter of serious debate on national security.<sup>35</sup> People were apprehensive of military detention plan with respect to American citizens.

The plan as unleashed by the authority states that those American citizens who would be found in any terrorist activities would be held indefinitely in military facilities and would be charged 'enemy combatants' as part of 'War on terrorism'. It stated clearly such 'enemy combatants' would never be in a position to get the benefit of due process in military tribunals. Thus, such an act of the president would definitely sound well for national security. But when it comes to civil liberty of American citizens it would keep quite. Now, question comes, what is the value of that security in which there would be no protection of liberty? Can ordinary American citizens be in a position to declare that they have been provided with security when their own personal liberty would be threatened?

A great champion of liberty, Thomas Paine once said that he that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.

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<sup>35</sup> Military Order, Detention, Treatment and Trial of Certain Non-Citizens in the War of Terrorism, 66 Federal Register 57, 833 (13 November 2001).

The indefinite detention of American citizens in military facilities may be counter productive for administration, if it would not learn anything from its past mistakes and expert advices.

### **Government Secrecy:**

The provisions of extraordinary detention and military tribunals are not only the provisions in which security clashes with liberty but in intensification of internal government secrecy in surveillance, wiretapping, investigation of private records... is also unleashing the debate between security and liberty.

The immigration and naturalization service has asked by the administration to maintain secret any deportation hearings pertaining to the USA PATRIOT Act, 2001. The Attorney General has made every possible effort to resist Freedom of Information Act when ever sought by citizens and non citizens as well. The height of secrecy that was maintained with regard to those who were detained as part of 'war on terrorism' and investigationis was definitely stood against the free and fair enjoyment of civil liberties.

The government secrecy that was followed after the terrorist attacks of 9/11 in surveillances and investigations can be outlined as under.

## **Roving Wire Tapping:**

Section –206 of the act allows a FISA (Foreign Intelligence Surveillance Act) court to grant a 'roving' wiretap. This means that the wire tap is attached to a person and not a particular phone or computer. While, the law before the USA-PATRIOT Act, 2001 was restricted to a particular type of telephone device for a wire tapping but the present Act has gone too far on wire-tapping. The new law on wire-tapping should have protected the privacy of citizens against governmental authority. It could have made a balanced approach keeping the privacy of the people into account, but in stead, the act established a 'No Privacy Zone', which follows a target of surveillance.<sup>36</sup> And if a surveillance target enters one's home his or her telephone comes within that "no Privacy Zone" and thus, his / her telephone can be tapped. In a situation in which law becomes so callous and careless that private rights and liberties of citizens gets jeopardized even without any wrong doing or knowledge of wrong doing.

## **Internet Monitoring:**

The healthy practice of monitoring a citizen's communications is backed by 'probable cause' of suspicion of any criminal intention. But

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<sup>36</sup> The Issue: USA-PATRIOT Act, People for the American Way. Retrieved From <http://www.pfaw.org/pfaw/general/default.aspx?oid=9394&print=yes&units=all>

the act by allowing the enforcement authority to monitor one's internet communication misdemeanor now the process of surveillance. The certification of surveillance of internet by the law enforcement authority is sufficient to establish nexus between the person and terrorism. Such a certification would surely substandard the process of surveillance. They would fall short of active judicial oversight. The act states that surveillance does not apply to the 'content' of internet communications but applicable to e-mail address and the recipients as well. In the present day context, disposable cell phone and public internet are frequently used. These can be best tools at the hand of law enforcement system to track the culprits. The anti-terrorism law permits the law enforcement agents to ascertain that the target is actually using the phone to be tapped. This implies that if a terrorist was using the internet connection at a public library and law enforcement was using a FISA wiretap order to monitor his internet communications. The law enforcement agency might monitor all internet communications at that web site after the terrorist left the site and was no longer using the internet. This is nothing but an invasion in the private life of innocent citizens. Though, the Supreme Court is yet to decide whether roving

wiretaps amount to violate the Fourth Amendment, a number of lower courts have definitely decided them.<sup>37</sup>

### **Library records, Computer Sign-Up Records:**

The USA PATRIOT Act, 2001, under section 215 changes the rules relating to records on researches. While, the Foreign Intelligence Security Act (FISA) had subjected only to common carriers such as airplanes, public accommodation facilities, hotels, physical storage facilities or can rental facilities to business record authority. But the present act has done away with those categories and opened all types of records which included library record, medical record, purchase record, and internet sources record to investigate various aspects.

Such records can be collected by "Subpeona" from a federal grand jury for a certain case. The Act allow investigations to go the FISA Court which requires a lower burden of proof than criminal courts. It was not possible to use FISA Court Orders if, the primary purpose of the order was to gather foreign intelligence informations. The present Act has changed the 'primary purpose' to 'significant purpose' making it fit for wider application.

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<sup>37</sup> Unites States v/s Hermanek, 298 F. 3d 1076, 1087, 289, (9<sup>th</sup> Cir. 2002);  
Unites States v/s Gaytan, 74 F. 3d 545, 553 (5<sup>th</sup> Cir. 1996);  
United States v/s. Bianco, 998, F. 2d 1112, 1121 (2<sup>nd</sup> Cir. 1993).

Under Section –215, the Act states “No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the FBI has sought or obtained tangible things under this section.” This means that if law – Enforcement Authority have asked for records, the person or institutions to which the request made may not reveal the request to anyone. This comprises co-workers, the press, or the person whose records were sought.

The irony with Sect 215 is that the section has not been in use. It has not been invoked so far. The existing criminal laws can provide the administration enough tools to intercept any terrorist activities. The government way use a National Security Letter which doesn't require, judicial approval. The Sec 215 however is up for review in 2005. Asstt. Attorney General Viet Dinh an 20<sup>th</sup> May, 2003 testified before the House Committee on the Judiciary about the USA-Patriot Act, 2001. He stated that we have made, in light of the recent public information concerning visits to library, we have conducted an informal survey of the field offices relating to the ‘its visits to library’. And I think the results from this informal survey is that libraries have been contacted approximately 50 times, based upon articulable suspicion or calls, voluntary calls from librarians regarding suspicions activities. Most if not all of these contacts that we have identified were made in the context of a criminal

investigation and pursuant to voluntary disclosure or a grand jury subpoena in that context.

Mr. Viet Dinh later classified his testimony pointing out that the visits related to voluntary disclosure, not FISA court orders.

But under section 216, the Act uses the revised wording, "Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested or as modified approving the release of records, if the judge finds that the application meets the requirements of this section." This wording indicates that the court must approve the application. Even without this wording, the FISA court has approved almost all of 14,000 warrant applications requested right from 1978.<sup>38</sup>

The Act under section 216 has allowed to expand the use of 'trap and trace' and 'pen-register devices' from telephones to a variety of digital communications including e-mail, web surfing, instant messaging etc. But earlier it was not clear whether the rules applicable to telephone tapping also applied to internet.

Without the pen register statute, the government could conduct 'envelop surveillance' without a court order. The government or even a person could wiretap the internet and collect any information if wished without restriction. Applying the pen register laws to the internet denied

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<sup>38</sup> The USA-PATRIOT Act and You, Act/React. Available at <http://www.libraries.uta.edu/actreact/records.asp>

the government the power to conduct envelop surveillance without a court order which limited government power and blocked private entities from conducting prospective envelope surveillance thus protecting privacy...

This implies that the Act requires a court order where before it may not have been necessary.

But the assurances that only 'envelop information' is being captured does not persuade every one. As unlike a phone call, one is suddenly revealing the content. Its impossible to obtain the address information without seeing the content of the data. For example, in the case of Google Searches or any other search engines, the address information contains the search terms used. This would reveal the context even though it is part of the envelop information.

The act under section 216 reveals that upon an application made under section 3122 (a) (1), the court shall enter an ex parte order authorizing the installation and use of 'pen register' or 'trap and trace device' any where within the United States, if the court finds that the attorney for the government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

This, means that the terms “upon application made...” has been interpreted to mean that the court cannot refuse the application. Again, the government only has to ‘certify’ that the information is ‘likely’ to be relevant to an investigation.

Even though, a number of sections are subjected to review in 2005 but Sec. 216 is not for that and is not restricted to terrorism investigations as the wording ‘criminal investigation’ allows investigating agencies to apply this section to a number of criminal activities such as computer hacking and drug dealing as well.

Thus, the Act was formulated basically to deter and punish any types of terrorist activities in the USA and elsewhere has caused many controversies between those who hail the Act as inevitable to protect American citizens and those who condemn the Act as an invasion of privacy and civil liberties. Soon after the Act signed into law on 26<sup>th</sup> October, 2001, criticisms came from various quarters. As members of both houses of the US Congress, Liberal and Conservative associations, the City Governments and the State Governments have demonstrated against unnecessary restriction on their civil liberties in the name of national security.

## CHAPTER – IV

### THE OTHER ISSUES OF CONFLICT

#### HUMAN RIGHTS CONCERNS

- I. Treatment of Terrorist Captives
- II. Treatment of Detainees
- III. Torture is Violation of Human Rights
- IV. Changed Immigration laws
- V. Unbridled Authoritarianism

#### Treatment of Terrorist Captives:

Another important area of conflict between national security and civil liberties is treatment of captives through the military operation abroad.

A large number of persons were captured or arrested by the American government and in their allies after the terrorist attacks of 9/11 or in the name of national security. Though, these captives have been captured, they have been denied the status of 'Prisoners of War'; but have been labeled as 'enemy combatants', which definitely goes against the Geneva Convention on the 'Prisoners of War'. The treatment of some 600 captives at a military base in Guantanamo Bay (Cuba) has been much talked and raised by the media. More grave are the reports of physical torture meted out to these captives at Abu Ghraib Prison in Baghdad, (Iraq) to extract various informations. While, libertarians have

cautioned against the use of torture to extract informations, detaining them in remote or unknown locations, falsely implicating them in dubious human rights records and trial by military tribunals, but law professor of Harvard Alan Dershowitz has said that the treatment meted out to the captives at different locations are as per laws keeping an eye with human rights standards. He said that if non-lethal torture methods can be used to extract informations from captives then, there would be no violation of established procedures of human rights. He has justified the action but a good number of civilitarians have criticized it.

Right from the passage of the Act, a large number of people have been captured as terrorists. These terrorists have been denied their basic rights and liberties. They have been deprived of access to a lawyer or legal procedures. Even the Geneva Convention's protections to the lawful combatants are not available to the Prisoners of War. An angry Amnesty International demanded immediate access to the scene of these abuses.<sup>1</sup>

Its claimed that following criteria must be satisfied to declare a person as **lawful combatant**. (i) That he must be under the command of a persons responsible for his subordinates, (ii) that he must wear a fixed distinctive emblem recognizable at a distance (iii) that he must carry

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<sup>1</sup> Rabkin, Jeremy, After Guantanamo, The War Over the Geneva Convention, The National Interest, No.68, Summer 2002,p.15.

arms openly; and conduct operations in accordance with the law and customs of war.<sup>2</sup> But those persons whom the United States has taken in custody have not even a single criteria attached to them. The government follows a broad policy in dealing with the captives. If a captured unlawful enemy combatant is believed to have further information regarding terrorism, he can be held without access to legal counsel and without charges being filed. Once the government is satisfied that it has all the relevant information it can obtain, the captive can be held until the end of hostilities, or be released, or be brought to charges before a criminal court.

The administration however, followed one of the above options in the case of John Lindh. John Lindh, who was an American citizen fought with the Taliban in Afghanistan was captured in the course of fighting. As per an agreement signed by him, Lindh has been sentenced to twenty years in prison.<sup>3</sup> But the case of Zacarias Moussaoui, another important case is more complicated (the 9/11 Commission Report reveals that 19 hijackers were there in all). Moussaoui who is thought to be involved in planning of 9/11 terrorist attacks on the USA but the government proposes to use only unclassified materials in its prosecution. Moussaoui, a French citizens of Moroccan heritage has

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<sup>2</sup> Bork, Robert H., *Civil Liberties After 9/11*, Commentary, Vol.116, Issue 1, July/Aug 2003, pp.29-35

<sup>3</sup> Ibid, pp.29-35.

admitted in the open court about his link with al Qaeda and sworn his allegiance to Osama bin Laden. He has demanded to see classified materials and to have access to other captives for preparation of his defense.

Certainly, such demands of Moussaoui have been rejected by the government for the very reason that it does not want to disclose classified information or allow terrorists to communicate with each other. In this connection, the presiding judges have also rejected the prosecutor's offer of an alternative procedure. So, if the government would decide to prosecute Moussaoui in a special military tribunal created for the terrorist, civil libertarians would raise questions for the reason that if this was the case then, he should have been prosecuted in the first place. While, the cases of Lindh and Moussaoui have been kept secret by the government for extracting valuable information in the future. They both are American citizens and have been charged with terrorist activities and both have been detained rather than brought to trial. But the cases of Yaser Hamdi and Jose Padilla are different even though they are also U.S. citizens and should have allowed access to the legal process. Yaser Hamdi has been detained at Harford, Naval Brigade and Jose Padilla is at Charleston, Naval Brigade.

Hamdi was captured in Afghanistan by American forces while the fight against terrorism was on. He was carrying an AK-47 rifle. He was

classified by the law enforcement authority as an **unlawful 'enemy combatant'**. He has claimed full protections of the constitution as a citizen. He has filed a writ petition for 'habeas corpus' challenging the legality of his detention. His detention was in violation of Fifth and Fourteenth Amendments. But the Court of Appeals for the Fourth Circuit held differently. Though, the detention of US citizens is subjected to judicial review, that review must be 'deferential'. That the constitution explicitly confers powers of war on the political authority, in going to war in Afghanistan. The President had relied both on those powers and on Congress's authorization of all 'necessary and appropriate force' against nation, organizations or persons, he determined to be involved in terrorist attacks. The court said Hamdi was really an "enemy combatant" and so should be detained.

The purpose of such detention is to prevent enemy combatants from rejoining the enemy and continuing to fight against the authority. Hamdi's case was thus, a preventive detention. Captivity is neither a punishment nor an act of vengeance its rather a measure during the time of war. As in the words of Ahmad Siddique, prevention of crime or delinquency can be achieved in a number of ways and contexts.<sup>4</sup>

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<sup>4</sup> Siddique, Ahmad, *Criminology, Problems and Perspectives*, (4<sup>th</sup> ed., Lucknow, Eastern Book Company, 1997),p.264.

Jose Padilla who was also a US citizen was arrested at O'Hare airport, Chicago when he arrived from Pakistan. The authority claimed that he planned acts of terrorism (dirty bomb). Unlike, Hamdi, Padilla also pleaded for the writ of habeas corpus and challenged the legality of his detention. The court said in the same fashion that the President is authorized under the constitution and by law to direct the military to detain enemy combatants. But the court allowed Padilla take the help of counsel to litigate the facts surrounding his capture and detention. At the same time the court did not allow the presence of his counsel during the time of Padilla's interrogations.

While, a number of lawful 'Prisoners of War' have been held by the United States without any right to access to counsel but the unlawful 'enemy combatants' are not even allowed that right.<sup>5</sup>

The issue of detention would be incomplete without mention of name of Michael Chertoff, President Bush's nominee to succeed Tom Ridge as Chief of the Department of Home Land Security. Mr. Chertoff has been an accomplished attorney and lawyer of repute. Its surmised that he was the key person behind preparing and tabling of the USA-PATRIOT Act, 2001. it was he, who has been an ardent supporter of strict national security policies. He is also said to have been

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<sup>5</sup> Robert H. Bork. Civil Liberties After 9/11, Commentary, July/Aug 2003, vol.116, Issue 1, pp.29-35.

uncompromising and supported stern actions against those detainees who were captured and detained in the course of war against terrorism.

### **Treatment of Detainees:**

Just after the terrorist attacks of 9/11, the FBI started the most extensive criminal investigation in American history. The Pentagon-Twin Towers-Bombing (PENTTBOM) is one of government's investigative tactics formulated at the highest level of Department of justice.<sup>6</sup> It involved in aggressive pre-textual detention of persons of interest to the investigation.

Of all the violations of civil liberties including the USA-Patriot Act, 2001, the PENTTBOM Investigation detentions has been most detailed and documented.

As journalist and author Stephen Brill says that Michael Chertoff was given primary authority over all detentions and would make all decisions on who was to be released and even who was held in solitary. Thus, the following is a summary of the findings of the 198-pages June 2003, DOJ Inspector General's Report on the controversial detentions.

As per the Inspector General's June, 2003 Report, almost 1,200 citizens and non citizens were detained and questioned in the two months following the attacks. The Department of Justice used a variety

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<sup>6</sup> Siobhan Gorman, The Ashcroft Doctrine, National Journal, 21 December 2002, at 3715.

of legal authorities to justify these detentions, including material witness warrants and criminal charges. But almost all the non-citizens were held under civil immigration violations. These were 762 immigration male detainees who were held in “INS custody list” for 11 months after the 9/11 attacks.

Interestingly, even if immigration violations and charges are civil, they were not allowed to civil procedures. No such detainee was ever charged with a crime equal terrorism.<sup>7</sup> Almost all the 762 detainees were of either Middle East or South Asia or North Africa. More than half of the detainees were from either Pakistan or from Egypt but they were detained in New York and New Jersey.

It was clarified later on that as a matter of policy any person with an immigration violation who was in the company of an individual identified in the case would be taken into custody.

The following is an example, how the detainees of post 9/11 attacks were taken into custody. In the first case, a person was taken into custody after he mentioned in casual conversation with a tipster that he would like to learn how to fly an airplane.<sup>8</sup>

In the other, three building workers who were all from middle east were taken into custody, even though their employer verified that

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<sup>7</sup> Dan Eggen, 'Tapes Show Abuse of 9/11 Detainees,' Washington Post, 19<sup>th</sup> December 2003.

<sup>8</sup> Inspector General Report, June, 2003, Department of Justice, Supra Note 2, at 16-17.

building plans discovered by the police in their car were there because they were working on a construction company at a school.<sup>9</sup>

In yet another case, a person of Muslim origin was taken into custody as detainee because an acquaintance wrote a letter to law enforcement authority saying the man had made 'very general' anti-American comments.<sup>10</sup>

In other case, several other persons were taken into custody because they were Arabs or Muslims and were keeping old schedules. This was done by a tip.<sup>11</sup>

### **Inconsistent Justification:**

The justification that the Department of Justice is extending with regard to detention is no less curious. Except a few, all the detainees were held under minor civil immigration violations. They included visa overstay or entering the USA without proper inspection or with invalid document. But the Department of Justice asserted that detaining these persons on such charges was not precarious. Even Chertoff has gone to the extent in saying before the Senate Judiciary Committee in November 2001 that nothing that we are doing differs from what we do in the ordinary case or what we did before September 11.

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<sup>9</sup> Ibid. at 42.

<sup>10</sup> Ibid. at 64.

<sup>11</sup> Ibid. at 16.

It can be said that the Department of Justice was detaining outsiders on immigration violations which was never enforced in the past. The intention behind such mass detection was not to prosecute them but to prevent them from repeating in future.

The Inspector General report finds that, its unlikely that most if not all of the individuals arrested would have been pursued by law enforcement authorities for these immigration violations but for the PENTTBOM investigation.<sup>12</sup>

Journalist Brill also reveals the fact that the process of investigations changing very fast. When FBI Director Robert Mueller said that the FBI was not used to detaining persons whom they had no real evidence of criminality, Attorney General John Ashcroft replied that the new paradigm of prevention required the FBI to 'round up anyone who fit the profile. Such are the processes of detention.

Again, in addition to the conspicuous grounds in which a large number of persons have taken into custody, the Inspector General report highlighted a series of serious procedural deficiencies in the policy of detention of the Department of Justice. They can be explained as below:

- (1) Only 60% of the 9/11 detainees had received the notice of the reason for their detention known as "Notices to Appear" (NTAs)

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<sup>12</sup> Inspector General Report, June, 2003, Department of Justice, Supra note, 2 at 41.

within 72 hrs target set by the headquarters. The average length of the time for service of an NTA was 7 days and many were not told why they were in custody for many weeks. In fact, these delays hindered detainee's ability to obtain proper legal counsel as they did not know the specific charges against them.

- (2) FBI and INS officials told the Inspector General about an official "hold until cleared" policy, which required the detention without bond of those men on the INS custody list until the FBI had formally cleared them.

Normally, a non-citizens held for such civil violations would likely to be entitled to release on bond while, waiting a hearing in front of an immigration judge. Although, the policy was never committed to paper, the Inspector General report makes it clear that it had been communicated to agents in the field.

- (3) INS attorneys, moreover reported to the Inspector General that the FBI was frequently unable to provide any specific evidence to support their opposition to bond for the detainees, requiring the filing of multiple continuances or of vague declarations of the general security interest in keeping these person in prison. And due to this, the detainees often languished in prison while, the broken process unduly delayed.

(4) The FBI process for clearing detainees of any suspected connection to terrorism, more over was not expeditious. The bureau cleared less than 3% of 762 detainees within 3 weeks of their arrest. The average length of time between arrest and clearance was 80 days and the median 69 days. And the Inspector General, however attributed these delays to a number of reasons like the assigned FBI agents were performing additional duties along with these tasks.

The delay in clearing had not only hit the cases citizens alone but non-citizens too suffered a lot due to such malpractices.

#### **Conditions of Confinement:**

The Inspector General's report had not only lashed out at the policy of clearance of detainees but also criticized the conditions of detainees in the confinement. Though the report did not categorically mention the name of any official but singled out Department of Justice for their irresponsibilities.

Of the total 762 detainees who were undergoing punishment were split among various detention facilities on the basis of their category of 'interest'. Those who were classified as 'high interest' were put in high security prisons across the USA and those who were classified as "of interest" or of "undetermined interest" were put in lower security facilities. As the Inspector General examines the conditions of detainees

of 9/11, in the Brooklyn, New York alone 84 of the 184 'high interest' detainees were there. Those non-citizens who were held on immigration violations were classified as "of interest or of 'undetermined interest' thus, were subjected to lower security prisons. But in New Jersey, 400 detainees out of 762 were housed.

The report, on the conditions of detainees in Metropolitan Detention Centre (MDC) Brooklyn, explained in the following manner.

- After taking in custody of the detainees from the FBI, the Bureau of Prisons (BOP) an agency of the Department of Justice, held the high-security detainees incommunicable for a several weeks, by imposing a complete "communication blackout". During this period of time the detainees could not communicate with the outside world at all. The family members and the attorneys did not know the reason and the whereabouts of these detainees.
- The Bureau of Prison initially labeled all PENTTBOM detainees as 'witness security' (WITSEC), inmates, a classification usually reserved for people who agree to testify for the government. But for the detainees of 9/11, the WITSEC Classification was meant that their families and attorney were often unable to find out where they were being held, even after the communications blackout. It also resulted in MDC personnel cheating the family members that their

relatives were not being held in that facility but in reality they were there inside.

- The MDC inmates were severely hindered in their ability to obtain legal counsel. Even though, most entered without having retained an attorney they were permitted only one legal phone call a week and the pro bono lists provided by the government often contained obsolete or inaccurate contact information.
- Those who were interviewed by the Inspector General said that, officials from the deputy attorney general's office told the Bureau of Prison to "not to be in a hurry" to provide detainees with communications access including the ability to contact a lawyer or family.
- Those detainees who were allowed to access to foreign consular officials too faced the same. The Bureau of Prison officials classified telephone contact with diplomatic personnel as "social call" and the inmates were permitted only one call a month.
- It was confirmed that the MDC guards were involved in Physical and verbal abuse of the detainees. Although the footage graphically, showed the physical and verbal abuse of detainees, a number of interviewees told the Inspector General that the abuse has been 'dropped off' due to installation of cameras.

- Another significant abuse noted was that the Bureau of Police persuade a strict detention policy such as “lockdown for 23 hrs a day”,<sup>13</sup> round the clock, cell lighting, shackling and allowing the detainees to out of cell with heavy escort.

But the IG report shows that the abuse in Passaic (New Jersey) detention center were much less than those at the MDC. Not aware of any other procedures, the detainees were unable to protest or reach out to legal system available to them. Even, the INS was seldom careful about the conditions of alien detainees. The INS was heavily criticized for its inefficiency in carrying out the provisions of the IRA.<sup>14</sup>

Another important area wherein gross violation of law has been taken place in relation to the detainees is the Material Witness Warrant. Its claimed that Michael Chertoff who was a government official, knowing well the repercussions and consequences forcefully advocated that if persons of interest were in the country legally or were citizens, the Department of Justice could use ‘material witness warrants’ to detain them.<sup>15</sup> He intended to secure witnesses for the grand jury testimony but material witness warrants can only be obtained when a witness’s

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<sup>13</sup> Report Biasts Detainee Treatment, CBS News.com. Washington, 3<sup>rd</sup> June, 2003.

<sup>14</sup> West’s Encyclopedia o American Law, 2<sup>nd</sup> Edition, Vol.1, Thomson Gale, 2005,p.227.

<sup>15</sup> Eric Lichtblau, Hard Changer on Terror War’s legal Front-Michael Chertoff, New York Times, 12<sup>th</sup> January, 2005, at A 14.

testimony is material to an on going criminal investigation and the person is likely to free.<sup>16</sup>

The purpose was certainly not a substitute for the lawful arrest of a suspect when law enforcement could not meet the criminal evidentiary requirements. Michael Chertoff in fact, circumvented the Fourth Amendment requirement of criminal probable cause to support the arrest of a criminal suspect by misusing material witness ground.

When the intention of material witness statute was questioned, Chertoff defended it on the ground that the 9/11 material witness detentions were not just intended to security testimony. He said, "its an important investigative tool in the 'war on terrorism'. Bear in mind that you get not only testimony – you get finger prints, you get hair samples – so there is all kinds of evidence you can get from a witness.<sup>17</sup> But it was not clear how many material witnesses are detained through the PENTTBOM investigations.

The ill-treatment of detainees at various locations was not something unexpected especially, after the 9/11 attacks. But Chertoff who is instrumental in following a strict detention policy is claimed to be the man behind a dreaded law called the Anti-Terrorism and Effective

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<sup>16</sup> Title 18 United States Code Sec 3144 (2004). (No material witness may be detained because of inability to comply with any condition of release...).

<sup>17</sup> Steve Fainaru and Margot Williams, Material Witness Law Has Many In Limbo, *Washington Post*, 24<sup>th</sup> November, 2004, at A1.

Death Penalty Act, 1996. The Anti-terrorism and Effective Death Penalty Act, 1996 has been claimed to be precursor of the USA-PATRIOT Act, 2001. Both these acts have been capable of pushing up a strict national security curtailing indispensable civil liberties.

### **Torture is Violation of Human Rights:**

Another important issue of conflict between security and liberty is physical torture of detainees. Bush Administration's policy on detention, interrogation and physical torture to extract informations has been labeled by libertarians to be of inhuman and against a good number of human rights laws. More dangerous is the move to appoint White House Counsel, Alberto Gonzales as the top law enforcement officer, the Attorney General. It's claimed that Alberto Gonzales has been a man of evil reputation. He was the person who supported and pushed forward Bush's policy of detention. He wrote an article disrespecting the Geneva Convention and ordered and reviewed legal memoranda that stated that some of the laws against torture did not apply in Afghanistan and that a number of horrific interrogation techniques did not constitute 'torture'. In fact, it was the memo of Gonzales which unleashed in the ill-treatment of prisons by military interrogation. Gonzales was the central player in radically changing U.S. policy on the use of torture. He also wrote an important legal opinion arguing that the Geneva Convention was 'quaint'

and 'absolute' and did not apply to many of the prisoners caught by the U.S. government.<sup>18</sup>

He is also the person who has stated that brutal and inhuman practices if used for law enforcement then that would not constitute torture.<sup>19</sup> But Michael Chertoff was no less in his endeavour to use torture as a means to extract informations. He has been often criticized for being the patron of controversial provisions of USA-PATRIOT Act, 2001. The civil libertarians have doubted him to be instrumental in drafting the law.<sup>20</sup>

The New York Times reported that Chertoff was approached by officials of the CIA, when he was the chief of Criminal Division as to whether CIA officers would face prosecution if they would engage in certain coercive interrogation techniques.<sup>21</sup> Even though, the White House denied his involvement in approving certain techniques, the article reveals that he gave tacit approval by assuring CIA officers that they wouldn't be prosecuted for those techniques.

The article further states that the CIA officials could use 'water boarding' without fear of prosecution. This is a technique where a

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<sup>18</sup> American Civil Liberty Union's Urge to Release all Torture Related Documents. Available at <http://www.aclu.org/news/NewsPrint.cfm?ID=17083&C=108>

<sup>19</sup> Ibid.

<sup>20</sup> Kevil Johnson and Toni Locy, Patriot Act at Heart of Ashcroft's influence, USA Today, 15<sup>th</sup> September, 2003 at A08.

<sup>21</sup> Douglas Jehl et al., Security Nominee Gave Advice to CIA on Torture Laws, New York Times, 29 January, 2005, at A1.

detainee is made to believe that he is about to drown. And other techniques that did not involve any infliction of pain, like tricking a prisoner into believing that he is being questioned by another country's security service.

It is also complained that he advised the CIA officials relating to other interrogation methods such as death threats against family members and psychological procedures designed to disrupt a detainee's personality. All these methods were however prohibited by the laws.<sup>22</sup> He also suggested some harsher measures if, the health condition of the detainees is fine and depending on his response, torture can be used as a method.<sup>23</sup>

### **Torture Cases in Third Circuit:**

Defending 'torture' to be natural and conduced to the procedural laws, Chertoff said in a noted case *Shardar v/s. Ashroft*<sup>24</sup> that the denial of an asylum claim by a Bangladeshi political dissident who had been severely beaten in the police custody when he was arrested in a demonstration in early 1990. But Shardar asked the court to not to deport him. He argued that severe beating in the custody was amount to

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<sup>22</sup> See *Miranda Decision and Suspects' Rights*, by Robert A.Leo, in *Encyclopedia of Crime And Punishment*, Vol.2, 2002, p.929.

<sup>23</sup> Douglas Jehl et al, *Security Nominee gave advice to CIA on Torture Laws*, *New York Times*, 29<sup>th</sup> January, 2005, at A1.

<sup>24</sup> *Shardar V. Ashcroff*, 382 F. 3d 318, 324 (3<sup>rd</sup> Cir 2003).

be torture and if he would be removed he would get the same treatment again. This would be unlawful to remove him to his country under the convention against torture.<sup>25</sup>

Even if, Shardar confessed his involvement and possession of weapons and explosives and had to renounce his political association to save his own life but to Chertoff this did not amount to be torture. On the other hand, the **U.N. Convention Against Torture** considers that beating in prison constitutes torture. Alberto Gonzales, the architect of Bush Administration's **torture policy** has classified torture as only "a narrow band of extreme activity", which has been criticized by almost every quarter.

In another case, *Zewdie v/s. Ashcroft*, in which an Ethiopian Woman was involved.<sup>26</sup> The Eight Circuit found substantial evidence supported her claim that she would be tortured if she returned to her country. This was based on her testimony that she was beaten repeatedly in prison over a period of 26 days with fire whips and sticks.

In yet another case, *Al-Safer v/s. INS*,<sup>27</sup> the Ninth Circuit found that an Iraqi had been tortured within the meaning of the Convention Against Torture (CAT) when he was beaten continuously for one month

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<sup>25</sup> The Convention Relating to the Status of Refugees (1951) and its Protocol (1966); See the Organization of American States Convention on Diplomatic Asylum, 1954.

<sup>26</sup> *Zendie v/s. Ashcroft*, 381 F.3d 804 (8<sup>th</sup> Cir. 2004).

<sup>27</sup> *Al-Safer v/s. INS.*, 268 F. 3d 1143 (9<sup>th</sup> Cir 2001).

during his first arrest. And in his second arrest, he was severely beaten and cigarette burns over 10 days. The court said these actions were not inherent practices but they were intended by the officials in-charge of the prison. Besides, torture of physical type, the Department of Justice has promulgated a new **Clandestine Policy** of monitoring every prison house conversations between the under trials and their counsels which included pre-trial detainees, material witness and immigration detainees as well. But earlier it was not allowed and prohibited to be indulged in the client attorney privacy. It was protected part of constitutional provisions. Now, with the help of Attorney General Ashcroft's Guidelines, the FBI is free to send under cover operatives into the houses of worships, social gathering and public places, even without any evidence of suspicion or wrong doing. But such practices, were prohibited keeping the FBI's abuse into account in the past. As during the time of social upheavals and ramping up of the cold war in 1950s, 1960s and 1970s the FBI had built a Secretive Counter-Intelligence Program (COINTELPRO), whose target was, to monitor the First Amendment protection.<sup>28</sup> But with the help of COINTELPRO, the FBI started looking into the off work political activities of the people and falsely implicated them and put their lives in danger.

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<sup>28</sup> US Congress, 94<sup>th</sup> Session 1, Select Committee on Intelligence Activities, Committee on Government Operations, Final Report, "Intelligence Activities and the Rights of Americans" (Government Printing Press, Washington D.C., 1978), p.10.

Though, torture has been worldwide condemned as inhuman as in human punishments and techniques they are receiving warm welcome when they come to US. The Americans have very often claimed to be people who are known to the world as liberty lovers and who consider themselves as the protectors of Human Rights. But the post 9/11 position reveals that there is a false claim love of liberty, and despite a number of requests in congressional hearing, the administration is following a clandestine policy on torture and not making the torture related documents public.

### **Changed Immigration Laws:**

The incident of 9/11 has not only made the Bush Administration to go for a rearrangement of security with liberty but has made the existing immigration laws stricter for the foreigners. The new laws of immigration is provided in the USA-PATRIOT Act, 2001 contains three important parts on Immigration and Naturalization Services (INS) to intercept and obstruct terrorists sneaking into America. The Subtitle-A of Title IV of the Act, contains stop gap measures designed to enhance security at the border between the USA and Canada. The Subtitle-B contains provisions relating enhanced immigration and Subtitle-C contains, preservation of immigration benefits for victims of terrorism, provisions

designed to help the family members of the victims of 9/11 terrorist attacks.

It was largely believed that the terrorists who caused enormous devastating of lives and properties on September 11, 2001 could have been evaded and those terrorists and miscreants could have been intercepted and obstructed, if there would have been stricter immigration laws. Its claimed those terrorists were sneaked into America either with students' visa or without a valid passport.

It has been said that right from the foundation of nation of USA, there are more than 55 million immigrants have made their homes here, coming from different continents.<sup>29</sup> It would be no wrong to say that except the Native-Americans (Indian People) everyone settled here is either an immigrant on the descendant of voluntary or involuntary immigrants.

But the process of immigration, which has not taken place at a single time, rather has been of slow and steady process. The immigrants have come to this country in phases. Though, their immigration have been authorized in the course of time yet, they have faced fear and hostility during the times of economic crisis, political turmoil and war. In 1882 alone the US Congress passed the Chinese

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<sup>29</sup> Immigrant Rights, American Civil Liberties Union. Retrieved From <http://www.aclu.org/immigrants> Rights/ImmigrantRightsmain.cfm

Exclusion Act 1882, to keep the Chinese origin people out of USA. In 1920s, thousands of foreigners who were suspected of radicalism in US were either arrested or brutalized or ill treated seriously. Many were deported without even hearing. In 1942, during the Second World War, around 120,000 Japanese descent living in America were interned in various camps.

Those who come to America as immigrants have settled here and enjoyed the protected rights and liberties. The US constitution never gives any foreigner permission to enter into the country but once they entered into, they have been subjected to various national and racial discriminations, arbitrary treatments at the hand of the government. But they have never asked by the government to vacate the country. The immigrants come here , they work and so also pay taxes like others. They have married US citizens and lived their lives like any other citizens. In the case of any violation of their fundamental rights, the law of the land have come to give protections to them.

However, the terrorist strikes of 9/11 have spurred a burst of interest in the immigration laws of the US. The news media reports claimed that the terrorists had entered into the US with students visas, violating various norms of immigrations and once they were inside USA

even the INS failed to track them properly.<sup>30</sup> It was due to this failure, many US officials and elected representatives called for an immediate change in the immigration laws so that no unwanted person could enter into the US and cause harm on the life, liberty and property of the US citizens. Calling for changes in the existing immigration laws is not altogether a new phenomenon. Such changes and rearrangements have been made even during the 1993 World Trade Centre bombing and 1996 Oklahoma City bombing. It is claimed that it was not that terrorists entered into the US because of absence of rules and regulations in immigration laws but because there were loopholes in the laws and these loopholes in the laws were best used by the terrorists. So a conscious attempt was made tightening the entry system and there by the nation could be secured. It was also thought that by just tightening the entry process, America may do a serious mistake of amalgamating 'war on immigrations' with "war on terrorism". It was upheld that the Executive must see beyond its efforts of capturing the culprits and bring them to be booked. Unless, the serious organizational problems, resources and technological issues which have weakened the INS for quite sometimes now be fixed, the real problem can not be

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<sup>30</sup> McDonnel, Patrick J., America Attacked, Policy Changes: Immigration System Allows Some to sidestep procedures, Los Angeles Times, 16<sup>th</sup> September, 2001.

addressed. So proposals were made to rearrange and change the lacunae in the immigrations law.

In the recent years, America has been the most sought after destination of foreigners. Approximately thirty million foreigners enter the US every year as non-immigrant visitors, students and temporary workers.<sup>31</sup> More than half a million foreigners enters as refugees, permanent residents and family members of US residents. Around 10% of the US population is foreign born. Americans claim their laws to be international laws of a society and people who are well connected globally. Thus, to fight terrorism is not to adopt a stricter immigration law which would have an impact on socio-economic well-being of the people but to target those groups who are hell bent upon committing terrorist activities.

### **Immigration laws before 9/11:**

The US immigration laws are incorporated in the Immigration and Nationality Act (INA) and all the foreigners who seek to enter into the USA are subjected to INA. The INA, before the terrorists attacks of 9/11 had two important checks on foreigners seeking to enter into U.S. (1) That all the foreigners must apply for Visa. The INA grants the US State Department Consular Officers overseas broad and larger unbelievable

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<sup>31</sup> The United States Immigration and Naturalization Service, Statistical Year Book, 1919(Ed), Table-36.

power to deny visas to foreigners who are 'inadmissible' for whatever reason. (2) That the INS officials at any US port of entry can re examine persons seeking admission and deny them entrance even if they have been granted a visa to enter.

This means that there are already potential laws to check unscrupulous and unlawful entry. Lets discuss these laws at length.

#### **(a) National Security and Immigration Law:**

The provisions of INA contain a number of national security related measures with the help of which a terrorist can be denied a visa or permission to enter into the USA.<sup>32</sup> As a Consular Officer or INS official can deny a visa or permission if the Consular Officer or INS official has reasonable ground to believe that the person seeks to enter the USA to engage "solely, principally, or incidentally" in any unlawful activity; the person has engaged in terrorist activity; or the person is likely to engage in terrorist activity after entry. Again, the Secretary of State is empowered to deny a foreigner his entry into the USA, if the Secretary of State has reasonable ground to believe the person's admission or activities would have potentially serious adverse foreign

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<sup>32</sup> Stock, Margaret D., *United States Immigration Law in a World of Terror*, The Federalist Society, Available at [http://www.fed\\_soc.org/Publications/Terrorism/immigration.htm](http://www.fed_soc.org/Publications/Terrorism/immigration.htm)

policy consequences for the USA.<sup>33</sup> So, in the entry gate itself, the US immigration laws can check a terrorist effectively.

Secondly, if a foreigner enters the US, he can also be detained and removed. The terrorist related grounds for deporting or removing someone are quite broad. A person can be removed for planning terrorist activities, fund raising for a terrorist group, soliciting membership in a terrorist group, or providing material support for terrorist activity. A person is also removable if, he has engaged in any other criminal activity which endangers public safety or national security, regardless of whether he has been convicted of a crime or not.<sup>34</sup> Again, a person can be denied asylum in the US if that person is a threat to national security or is a terrorist or suspected terrorist.<sup>35</sup>

The INS too, has extraordinarily broad powers to nab and detain a person who has violated the US immigration laws. The INS is empowered to arrest and detain a person for at least 48 hours, if the person is suspected of even a minor immigration violation. Generally, persons those who were arrested eventually seek their release by furnishing (posting) a bond but persons charged with deportability for terrorist activity or other violent crimes are not eligible to apply for release from custody. But even if a person is eligible to seek bond while

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<sup>33</sup> Title 8, United State Code, Sec-1182(a) (c).

<sup>34</sup> Title 8, United State Code, Sec- 1227 (a) (4) (A) (ii).

<sup>35</sup> Title 8, United State Code, Sec-1158(b) (2)(A) (iv) & (2) (A) (V).

awaiting a hearing before an immigration judge, the judge can deny bond altogether if the person is a threat to national security, or a danger to the community or a flight risk. The US law provides that every foreigner who enters USA is issued an entry document called INS form 1-94 that contain a unique number. When such foreigners come to the border, the INS agents collect that form, they tear off it and give one portion to the foreigner and keep the other portion of the form with them. This number is entered into the tracking system. The foreigner is supposed to keep the other half of the form number and upon his departure, return the portion to the INS authority. But unfortunately this task has not been done so far by the INS properly.

The law before 9/11 allows the Attorney General to require foreigners in the United States to register and be fingerprinted. Though such finger print has been waived by regulation for the non-immigration, but the Attorney General can require such finger print after publishing a notice in the Federal Register. The Attorney General also has power to order foreigners to notify him of their current addresses and other information.

The INS is empowered to do all finger print even on all lawful permanent residents who are of 14 years of age. It can also collect finger print information on foreigners who have been turned away at the border or placed in removal proceedings. If a foreigner is required to

register he must notify by the INS of any address change within a period of 10 days or face deportation. But the job of INS has been unsatisfactory. The INS has not only failed to take note of the changed addressees properly but has not been able to use the finger print data amicably.

Now, coming to the visa for the students who pursue studies in the USA have special requirement category. Reports indicated that more than half a million foreign students are enrolled in schools and colleges in the USA. Those who apply for a students' visa, prove before the authority on their eligibility criteria. And once they are in the US, the schools are required to keep track of them such as, where is their current addresses, the date of their enrolment, admissions applications and supporting documents the school uses to determine eligibility, the date and reason of termination of a student and any disciplinary actions if taken against any student or if any student has been convicted of any criminal activity.

It appears that the collected data has not been monitored or used or analyzed properly. It is required that once the data is collected, the INS should do its job but very often the INS remains ignorant of various data and fails to take any action or note whether a student has been expelled or violated any law. Very often, the INS fails to track them. For instance, if a student or a foreigner file an application to change his

status, because he wants to extend his stay or attend school or engage in any other activity different from which he was admitted then, the INS fails miserably. Another important problem is that INS is not able to process such requests in a definite time and thus, keeping backlogged. A foreigner who requests for a six months extension of stay, he may wait for more than six months for the request to be processed. And such slow processing is giving rise to various unlawful activities. The processing gets delayed to that extent that even the INS fails to know who is overstaying.

### **Immigration Law in 1996:**

The US law of immigration had to change when the Oklahoma city building was bombed. The congress made quick attempt to reshape the US immigration laws in the form of the anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIARA). Both these laws amended the INA to enact provisions relating to anti-terrorism. Even though, these provisions in reality were of little help in combating and curtailing unwanted immigration. The Congress, however, got a chance to convince the people that they have done every possible measures to check on potential terrorists. They were also successful in putting the ball in INS official's court. The Congress could allege that the INS

officials were not doing their duty in accordance with the procedures but they are abusing it.

It is also claimed that before the 9/11 there was consensus to repeal several AEDPA and IIRAIRA provisions because they had harsh effects on long-term residents and relatives of US citizens.

### **Section 110 of IIRAIRA**

Laws are made with good intentions but their implementation have always raised doubt. Section-110 of IIRAIRA is one of such provision. As law under section 110 of the IIRAIRA required the INS to have an automatic entry and exit system to collect a record of departure for every foreigner departing the US and match these records of departure with the record of foreigner's arrival in the US.

The immigration law while, strictly regulates who is allowed to enter the US but fails to regulate the records of departing of foreigners. The INS has not done its duty satisfactorily in tracking people who enter the United States and overstay. Under Section 110, every entry and exist data must be collected from immigrants who enter the USA by land, sea or air. The section is supposed to make INS to monitor those who overstayed and find them and depart them.

## **The Student Visa Tracking System:**

The 1996 Immigration laws also have been responsible for a creating a false sense of security in changing the pattern of student's visa. In 1993 when the World Trade Centre was bombed, the INS immediately created a 'taskforce' to determine how to gather information on foreign students studying in the schools of US. Again in 1996, as per IIRAIRA, the INS was asked by the US congress to implement the "Coordinated Interagency Partnership for Regulating International Students (CIPRIS)" system. It was an electronic database for tracking foreign students by 2001. Though, it was felt inevitable to implement as quickly as possible but the INS was unable and asked for an extension of deadline. The CIPRIS could not be implemented by the INS in time. But there was no dearth of laws to track students.

In fact, there was required law to ask the school authority to collect various information on students and send the information to INS on regular basis. It was also within the law that if a school fails to report to the INS then the INS could prohibit the school from enrolling any foreign students. This implies that there was required laws to counter terrorists using students' visa. But the INS could not be in a position to implement it.

### **Expedited Removal:**

The IIRAIRA had given INS agents enormous power to deny admission and summarily remove persons whom INS agents suspect of making false documents or enter the US through fraud or misrepresentation.<sup>36</sup> The outcome has been such that the INS agents have removed a number persons even US citizens. And those persons who are subjected to expedited removal are barred from obtaining a United States visa for at least five years or more. Though, expedited removal has been like any other law to counter terrorism, nothing much or desired has been achieved through this.

### **Secret Evidence and the Alien Terrorist Court:**

Another important provision of IIRAIRA is that the new set of procedures enacted by the Congress for the INS to help remove persons of suspected terrorists and created a new court to hear terrorism related cases. The new procedures helped the government to conduct deportation hearings with the use of secret evidence on suspected terrorists. It is claimed that if the INS would have chosen the Alien Terrorist Court it would have removed alien terrorists through the use of a special Alien Terrorist Removal Court, composed of five district court judges appointed by the Chief Justice of the US Supreme Court.

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<sup>36</sup> Title 8 United State Code, Sec- 1225 (b) 91) (A).

But the INS chose not to use this practice because of the fact that it was easier for INS to use secret evidence in the context of existing deportation or removal proceedings. Again, its not that the INS has been reluctant to use secret evidence to try to deport persons suspected of being terrorists but the 'secret evidence' has been so faulty that can not be relied on.

### **INS Reforms:**

The terrorists attacks of 9/11 made the US Administration to change in the immigration laws. But even before the terrorist attacks of 9/11, laws relating to immigration and naturalization services were there but their implementation was very poor. The INS was lashed out because of its inefficiency and incompetence. Lawmakers were criticizing it as the "agency from hell" it was a broken window beyond fixing. There were various news report involving the INS of corruption, mismanagement, racism and abuse. Even, President Bush during his campaign called for a "splitting in the agency". Attorney General Ashcroft too, had reiterated to change the process of INS. However, all these had never been fulfilled due to a number of reasons.

### **Immigrations Laws After 9/11:**

The immigration laws of the US after the terrorist attacks of 9/11 got a sea change. The Bush Administration on 26<sup>th</sup> October, 2001

signed the much talked about anti-terrorist law USA-PATRIOT Act, 2001. The new law contains three important parts with regard to immigration. They are Subtitle-A of title IV of the Act contains, stop gap measures designed to enhance security at the border between the U.S. and Canada; Subtitle-B contains, provisions with regard to directly, to the admissibility of terrorists and those who sponsor them; and Subtitle-C, contains provisions designed to help the family members of the victims of the September 11 terrorists attacks. Subtitle A is designed to enhance border security and intelligence system in the short term. These provisions helped the Northern Border Security management, allow INS and DOS to access to FBI criminal history records through the National Crime Information Center and helped verification of identity of the people.

Subtitle-B is to make substantive changes to the law that are purported to enhance the Government's ability to identify and deport terrorists or potential terrorists. Subtitle-B thus, gives a little extra legal authority to INS for fighting terrorism.

Subtitle-C concerns with changes designed to help victims of the 9/11 terrorists attacks. It granted citizenship to lawful residents who died in the attacks.

Under Section-411, the law adds new grounds of inadmissibility for representatives of foreign terrorist organizations or any groups that

publicly endorses act of terrorism. The section provides unrenovable authority to the Secretary of State to designate any group, foreign or domestic as terrorist organization, upon publication in the Federal Register. So, fund raising, solicitation for membership, or material support even if, for humanitarian project were made deportable offence and prohibited.

Section-411 also redefines the term “terrorist activity” which includes, the threat to use, or the use of any “dangerous device (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.<sup>37</sup> It was largely belief that airline hijackers were possessed of box cutters which could not be screened out sufficiently by the specific hijacking language already in the law. The law makers so broadened the definition terrorist activity to arrest such a situation in future. As per new definition of terrorist activity, if a person had involved in a knife fight in a bar will be inadmissible to the U.S.

Under Section – 412, the Attorney General and the Deputy, Attorney General have been given enormous power of non-delegable nature to certify an alien as a terrorist if the Attorney General has ‘reasonable grounds’ to believe that the alien is a terrorist or has committed a terrorist activity. The INS can have power to detain such a

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<sup>37</sup> USA-PATRIOT ACT, 2001, Sec- 411 (a) (1) (F).

person who has been certified. As per the new law, the INS detention can be as long as 7 days before bringing immigration or criminal charges.

Aliens those who were detained by the INS have judicial review of their detention of filing a petition for a writ of habeas corpus in a federal court but their only appeal shall be to the US Court of Appeal for the District of Columbia Circuit. And if a person who has got final order for removal but has been certified as a terrorist and thus, cannot be removed, the Attorney General can detain him / her but this case would under go a review every six months. The Attorney General can also have power to detain a person for more than six months, if he can prove that the release of the person will endanger the national security of the United States or the Safety of the Community or any person.

Under Section-413 of the Act, the State Department records can be provided to a foreign government on a case-by-case basis for the purpose of preventing, investigating, or punishing acts of terrorism. Thus, with the help of new law, the US government officials can share such information with governments that may then take action to not to harm those individuals who are not terrorists.

For example, the US can non provide State Department records of a Visa-application by an Iraqi asylum seeker to the government of

Iraq – if those records are purportedly being given to the Iraqi government for the purpose of investigating terrorism.

Section-414, supports section 110 of IIRAIRA, that the integrated entry and exit data system should fully be implemented at all ports of entry with all deliberate speed and as expeditiously as practicable and that the establishment of the “Integrated Entry and Exit Data System Tasks Force” should start quickly.

Section-416 of the Act, requires the full implementation of the Foreign Student visa Monitoring Program as established by IIRAIRA. Section-417 requires all countries designated to participate in the Visa Waiver Program to satisfy the requirements of using machine-readable passport by October 1, 2003, instead of 2007. And the Secretary of State is required to perform annual audits of the designation of countries participating in the Visa Waiver Program.

Under Section-1006 of the Act, a person who is involved in any offence of money laundering is prohibited to enter into the USA. A Consular Officer or the Attorney General Knows or has reason to believe that a person has engaged, is engaging or will engage in an offence of money laundering, then such person would not be allowed into the US. The section also states categorically that the Secretary of State must establish within 90 days a watch list that identifies individuals worldwide who are known or suspected of money laundering. The

section directs the Consular Officials and the INS agents to check out this watch list before issuing any visa or allowing a person admission into the US. The reason behind such an exercise was that the perpetrators of 9/11 terrorist attacks could have been stopped if, the US government had cracked down on money laundering. The perpetrators had used informal networks such as 'Hawala System'.

Thus, it is surmised that the existing system of law is sufficient enough to stop terrorists to enter into the US. The law is capable enough to intercept and obstruct terrorists and suspected terrorists as well. But law has its own limitations. It is because, no terrorists would ever disclose his intention to commit the acts of terrorism while, applying for visa to enter into the US, neither an act of terrorism is a pathological or clinical problem which can be studied in a laboratory and can be reached at a conclusion. Its an act which is very difficult to read out or in other words, INS officials and Consular officials, can not read the minds of terrorists and they have to rely on the information in their database. Now, the question is to what extent such databases can be the most sure way to nab terrorists. The reality is that those terrorists who entered into the US and caused the attacks of 9/11 were admitted into the country through student visas and none of them was a criminal earlier. When such persons entered into the US the entire immigration law

machinery would be ineffective. And to deal with such a problem there is absolutely no machinery.

The USA-PATRIOT Act, 2001 and its various new provisions are definitely strict enough but have least practical utility in the absence of a friendly atmosphere created throughout the world. As for instance, in the new provision of deportation the INS has the power to deport those innocent people who gave money to an organization with a humanitarian intention, because the new law allows INS to deport any one who speaks to a terrorist, debates with a terrorist over the Internet or speak out in favour of terrorists.

Again, suspending the basic rights of citizens and non citizens as well, detaining them for no valid reasons, and excessive use of police and military powers many undermine the entire system. If innocent people would be charged with terrorism they would be violent and inadvertently turned into hands of terrorists. So for the sake of law, law should not be tyrannical and must not make life and liberty of citizens difficult.

### **Unbridled Authoritarianism:**

The enhanced police power, curtailment of civil liberties of citizens and non-citizens, the provisions of military tribunal and military detention and the treatment of captives in various locations have exposed the

unbridled authoritarian nature of administration in the US. Historically the “threat of sanction” has been found to be an inadequate instrument for eliciting obedience.<sup>38</sup> But the use of power must receive general acceptance or what Max Weber called ‘legitimacy’. Legitimacy comes from the people. It depends on the belief of the people that the state is necessary and that its actions are lawful and valuable to society. A state is in serious trouble, if the people think that the state policy and military polity of the state are not responding properly to their rights and liberties. The state is based on the consent of the citizens so, it provides protection to liberty. The citizens, should become thus, the “defenders of security”.<sup>39</sup>

The terrorist attacks of 9/11 has made the leaders of US to rearrange the relations between national security and civil liberty. In order to protect the national security, essential civil liberties of citizens have been suppressed. The fight against terrorism has made the US an unbridled authoritarian state system in which civil liberties are nothing and national security is everything. Such an approach in fighting terrorism by the US has not received world admiration.

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<sup>38</sup> Ray, Amal, and Bhattacharya, Mohit, Political Theory, (11<sup>th</sup> Ed, Calcutta, World Press, 1989),p.224.

<sup>39</sup> Powers, Thomas F., Can we be Secure and Free?, Public Interest, 22<sup>nd</sup> March, 2003,p.13. Retrieved From [http://www.lexis.com/research/retrieve?\\_m=C77c182d547d309449061d6725669&\\_bro...](http://www.lexis.com/research/retrieve?_m=C77c182d547d309449061d6725669&_bro...)

The miscalculation of the U.S. on its war against terrorism has been a matter of debate. While, to some experts the U.S. has been doing a good job of wiping out the terrorists who are enemies of mankind. But to others, in the guise of fighting against terrorism, the U.S. is heralding towards a nation-state system. It is following those principles of authoritarianism or Fascism in which have perished. Impractical state-actions are always hindrances to the individual freedom. The U.S. as global power and leader is expected to protect individual freedom.

## CHAPTER – V

### BALANCING SECURITY AND LIBERTY

The concept of balancing security and liberty is as old as the conflict between security and liberty. When we are talking about a balance between security and liberty we are talking about the sphere of activity of state vis-à-vis importance of individual liberties. This is not a new dichotomy.<sup>1</sup> Right from the time of Thomas Hobbes, it has been argued that the state is necessary to provide security to the individuals and individuals in return provide services to the state in the form of duties of law, taxation and military services etc. Every one has the right to life, liberty and security of person.<sup>2</sup> It is the responsibility of the state to ensure these rights. From this perspective, balancing security and liberty has been inevitable even though, there is conflict between them. The terrorist attacks of 9/11 have brought the conflict into forefront again.

With the passing of USA-PATRIOT Act, 2001, the US administration has surely limited essential liberties of citizens and glorified national security. Many measures taken up by the government

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<sup>1</sup> Dinh, Viet D., Freedom and Security After September 11, Harvard Journal of Law and Public Policy, Vol. 25, Issue 2, Spring 2002, p. 399.

<sup>2</sup> Article-3, The Universal Declaration of Human Rights.

in its attempt to 'fight against terrorism' have raised civil liberties concerns. Some Americans fear the actions taken by Congress may infringe upon basic American liberties.<sup>3</sup> The Bush Administration is of the impression that for the last half century, America's national defense has been based on deterrence – the ability to respond with overwhelming force to a nuclear attack. During the Cold War peace between the US and Soviet Union relied on this policy. But with the emergence of new and more widespread security threats, support has grown for a national missile defense system that would protect the United States from attack by states like North Korea, Iraq or Iran.<sup>4</sup>

In its fight against terrorism, the Bush administration has changed many existing system of laws, a number of amendments has been initiated for adjustment with the Act. These amendments have threatened Foreign Intelligence Surveillance Act, 1978 (FISA) as well.<sup>5</sup> And has taken stern measures which are seriously effecting both the US citizens and non-citizens as well. They are-

**First,** anti -terrorism measures taken up by the Bush Administration have raised civil liberties concerns. Many US citizens are being harassed in the hands of administration without any terrorist

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<sup>3</sup> Bulzomi, Michael J., Foreign Intelligence Surveillance Act: Before and After the USA-Patriot Act, FBI Law Enforcement Bulletin, June 2003, p. 25.

<sup>4</sup> National Security After the Cold War, Congressional Digest, (Washington, DC), Vol. 80, No. 8-9, August/September 2001, p.193.

<sup>5</sup> Dlouhy, Jennifer A., Amendments Threat Put FISA on Hold, *Congressional Quarterly*, April 12, 2003, p.886.

activities. The wider use of roving wiretaps and the ability to subpoena e-mail records provisions in the Act, in actuality creating problems for the citizens. In May 2002, the Department of Justice declared guidelines letting FBI agents investigating terrorism more freely and allowed them to monitor the Internet and religious and political groups openly. The Justice Department Spokesman Bryan Sierra said, "We would use whatever tools are available to us, within reason, to prosecute violations of law."<sup>6</sup> The actions of government has reached to a stage where, the citizens are coming out openly to protect against the laws. These measures are affecting non-citizens as well. As many as 1,000 unnamed terrorist suspects have been detained so far.<sup>7</sup> Some of them are detained for months. The act allows the enforcement authorities to listen to the conversation between detainees and their lawyers. A large number of men from Middle East are questioned and detained when they entered the US and a number of non-citizens are secretly sent to military custody and tribunals just for an immigration violation. According to figures cited by the Attorney General on December 7, 563 people are being held for violation of their immigration status and another 60 are in

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<sup>6</sup> Murry, Frank J., Patriot Act of 2001 Casts Wide Net, The Washington Times, 16 June, 2003.

<sup>7</sup> Terrorism : Q&A, Council on Foreign Relations. (In Cooperation with the Markle Foundation),

p.1.

federal custody for other reasons. Of these 60, roughly two dozen are being detained as material witnesses.<sup>8</sup>

**Second**, the USA-PATRIOT Act, 2001 has given enormous power to the FBI. As the apex agency of handling counter terrorism, the FBI now can monitor any public gatherings and send “undercover agents” into houses of worship without prior notice and even without any evidence of possible criminal activities.<sup>9</sup> The FBI now can investigate into the use of Internet. Though the FBI has restricted right from 1976 (Director J. Edgar Hoover) not to encroach upon personal rights of the people but the new law has little regard for the same.

**Third**, whether the act has been made keeping various indispensable constitutional provisions into account has been a matter of debate. While, the supporters of the Act believe that constitution is nothing but the national guideline of the people of US. When their national security is at stake, the people can alter their guideline i.e., the constitution. Again, during the time of war, the constitution upholds the national security first including the war on terrorism. Attorney General John Ashcroft has said that the FBI was not able to work satisfactorily

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<sup>8</sup> Masci, David, and Marshall, Patrick, Civil Liberty in Wartime, Congressional Quarterly Researcher, Vol.II, No.43, 14 December, 2001,p.1023.

<sup>9</sup> Terrorism : Q&A, Council on Foreign Relations, (In Cooperation with the Markle Foundation),

p.1.

due to various restrictions on it in the past especially, when fighting terrorism.<sup>10</sup> But now it's working properly at the same time protecting civil rights and personal freedom well.

But this argument has been challenged by libertarians. As the New York Times has called the FBI's domestic spying powers draconian.<sup>11</sup> The FBI is empowered now to peep into the affairs of any one even if, one is not in any way linked to terrorist activities or illegal activities.

**Fourthly**, the question of applicability of constitutional rights to citizens as well as non-citizens has been a matter of debate through out the United States. The US Supreme court has declared that the right to due process of law should be applicable to both citizens and non-citizens. But with regard to all other rights whether both citizens and non-citizens should be treated equally has not been settled. The Supreme Court has given different opinions in different circumstances.

**Fifth**, in the fight against terrorism and as part of investigations, the US authority has detained a number of persons in various custody and military tribunals. The Department of Justice stopped tallying the number itself in 2001 when the total had crossed 1,100.<sup>12</sup> But details about those who are detained has never been disclosed including their

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<sup>10</sup> Ibid., p.1

<sup>11</sup> Ibid,p.1.

<sup>12</sup> Ibid., p.2.

names and places of birth. However, Attorney General John Ashcroft released information with regard to detainees on their places of birth. There were 548 detainees then and out of 548, Pakistan alone had 208, followed by Egypt 74 and the others were Middle Eastern countries, European and African countries.<sup>13</sup>

**Sixth**, many people those who have been held were either without charge or with minor immigration charges. Less than 100 were criminal defendants.<sup>14</sup> Other criminal charges were minor offences such as credit card fraud and lying on passport applications or major charges like fraudulent licenses for hazardous materials. At least 24 people were detained on the grounds that they were material witness who might have information relevant to the ongoing grand Jury investigations in terrorism related cases. Even a federal judge of New York has ruled that witnesses could not be held on this basis.<sup>15</sup> As the war on terrorism continues, statistics on terrorist attacks are becoming as important as the unemployment rate or the GDP. Yet the terrorism reports produced by the U.S. government do not have nearly as much credibility as its economic statistics, because there are no safeguards to ensure that the data are as accurate as possible and free from political manipulation.

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<sup>13</sup> Ibid., p.2.

<sup>14</sup> Ibid., p.2.

<sup>15</sup> Ibid., p.2.

The Secretary of State Collin Powell has said very rightly, "The flap over the error-ridden 2003 Patterns of Global Terrorism was a big mistake".<sup>16</sup>

**Seventh**, on the question of whether such detainees have been held in violation of civil liberties or not, the Bush Administration and the supporters of the Act plead that such detentions are constitutional and indeed necessary. But those who oppose the move say that the right to due process as guaranteed by the Fifth Amendment is seriously damaged. When the detainees are not allowed to see their lawyers, Sixth Amendment too is breached. There has been grounds of violation of basic human rights which are upheld throughout the world.<sup>17</sup>

**Eighth**, the new anti- terrorism act allows the Department of Justice to monitor Bureau of Prisons. The Act also allows the Attorney General to listen to conversation between terrorist suspects and their lawyers. But critics are of the view that attorney client relation is a matter of privacy and oldest practice of legal system. And when attorney – client conversation is listened, it violates the Sixth Amendment right to counsel.<sup>18</sup> This is highly indecent and unconstitutional to listen to such counseling or preparation of case in advanced. On October 31, 2001, the Attorney General issued regulations permitting warrant less

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<sup>16</sup> Krueger, Alan B., and Laitin, David D., Misunderestimating Terrorism, *Foreign Affairs*, Vol.83, No.5, Sept/Oct 2004, pp.8-13.

<sup>17</sup> Article 12, The Universal Declaration of Human Rights.

<sup>18</sup> *Ibid.*, p.3.

monitoring of attorney-client communication without Judicial Review under certain circumstances in cases involving terrorism.<sup>19</sup>

**Ninth**, the Bush Administration has come up with roving wiretaps on terrorism suspects. The US law enforcement authority now can tap any phone that a suspect uses. Though, the practice of roving wiretaps has been in use from 1986, but the present law has made it easier on terrorist investigations.<sup>20</sup>

**Tenth**, investigating into the e-mail accounts of innocent citizens who are in no way related to terrorism is unconstitutional. The new Act allows investigations to subpoena the addresses of email messages. But critics argue that such expanded measures violate the Fourth Amendment against unreasonable searches and seizures which states that search warrants must be issued based on 'probable cause' and must designate a specific place to be searched.<sup>21</sup>

**Eleventh**, how far it is justified to target young men from Middle East alone? Soon after the terrorist attacks of 9/11 took place, a large number of young men especially, from the Middle East were taken into custody. Attorney General John Ashcroft ordered federal prosecutors to

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<sup>19</sup> The USA-PATRIOT Act Six Months Later, Free Expression Networks, Internet, 2002.

<sup>20</sup> Terrorism : Q&A, Council on Foreign Relations, (In Cooperation with the Markle Foundation), p.3:

<sup>21</sup> Fourth Amendment Protection, U.S. Constitution.

interview some 4,800 young men of 18 to 33 years of age.<sup>22</sup> Its claimed that the terrorists entered into the US on student, business or tourist visas and most were hailing from Middle East. As John Ashcroft said that they fit the criteria of persons who might have knowledge of foreign-based terrorists.<sup>23</sup> The Department of Justice also insisted that the law enforcement authority must ask about the place of birth and reason of travel or visiting into the US, so also they must ask whether these persons were having knowledge of any terrorist activities. If you are an Arab-American, or a tourist from an Arab country, if you have a name that sounds like Mohammed, or have expressed criticism of America, you may find your self under suspicion today.<sup>24</sup>

The Department of Justice in March, 2002 announced that half of these people had been interviewed and 20 of them had subsequently been arrested but no one was charged with terrorism. The department also went for a second round of interview on 3000 foreigners but ended up without any result.

Now the question is that is it legal on the part of US government to engage in such type of questioning? Experts are of the view that the government of US in its fight against terrorism can ask questions, in fact

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<sup>22</sup> Terrorism : Q&A, Council on Foreign Relations, (In Cooperation with the Markle Foundation), p.3.

<sup>23</sup> Ibid., p.3.

<sup>24</sup> Estrich, Susan, The Thin, Thin Line between Safe and Free, USA Today, September 13, 2001.

it can ask innumerable questions. But it cannot force the people to answer all the questions. The Department of Justice stated that the questions were voluntary and upto the people to answer them. But in reality, many people either concealed or afraid of immigration charges by the authority. In such a situation, the purpose of authority could not be achieved.

**Twelfth**, conducting interview at random is fine but when it is targeted to a particular religious or ethnic background, it becomes a racial approach. Its criticized by the libertarians that this interviews were constituted of racial profiling. Attorney General John Ashcroft declared in Nov, 2001 in a memorandum that the individuals were not selected in order to single out a particular ethnic or religious group.<sup>25</sup> But people of Muslim origin and Arab ethnic backgrounds have complained that the law enforcement authority and the police are interested in racial profiling illegally.<sup>26</sup>

**Thirteenth**, has the government ever restricted civil liberties in the past or during the time of wars in the past?

The answer is that the US has always curtailed the basic rights and civil liberties of the citizens whenever it had any wars or conflicts

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<sup>25</sup> Ibid., p.4.

<sup>26</sup> Terrorism : Q&A, Council on Foreign Relations, (In Cooperation with the Markle Foundation), p.4. Retrieved from , [http://cfrterrorism.org/security/liberties\\_print.html](http://cfrterrorism.org/security/liberties_print.html)

overseas. As during First World War, President Woodrow Wilson had signed the Espionage Act, which banned either making or mailing any statement intended to interfere with military operations or promote the success of America's enemies. Another step was taken by the US Supreme Court in declaring that the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.<sup>27</sup> The Supreme Court upheld the act in 1919. The US in the aftermath of war also came heavily on the Germans. For instance, from a strict regulation of German-American relations was formulated: every German was asked to register with the federal government; local prohibition of speech; and teaching of German in the US. The German as people were declared high risk in the USA.

The situation was not different even during the Second World War period. As many as 120,000 Japanese and Japanese Americans were kept in internment camps. In 1942, the US President Franklin Roosevelt issued an order designating the entire West Coast a "military area" from which the Japanese and Japanese Americans were to forcefully relocated. The interesting part is that the US Supreme Court could have denounced it in the name of civil liberties but the Supreme Court upheld the internment.<sup>28</sup> But only in 1983 a Congressional Commission

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<sup>27</sup> Ibid., p.4.

<sup>28</sup> Korematsu vs. United States, (1944).

declared the rule to be 'overruled' in the court of history. And subsequently President Regan permitted or compensation and modalities of reconciliation.

Fourteenth, learning the art of balancing the security and liberty from others seems a right idea. How various democracies through out the world are coped up with emergency. How they are prosecuting the culprits and at the same time, protecting their civil liberties, they are able to maintain their democracies? Its not only a case with the US, many countries in the world today are confronting unwanted threat to their security. Terrorism has been a problem of the entire world. But countries prefer to 'fight terrorism' in their own ways. The U.K. deals with terrorist related problems in its own way. After cracking down. Irish Republican Army, the Anti-terrorist Act, 2001 of U.K. has made it legal to detain any suspect terrorist for 7 days without charges and also without access to law. The citizens are asked to be alert every now and then for a possible attack of terrorism. Country's important places are covered with close circuit cameras and the rests are well guided by the authority in charge. In many countries in Europe, the citizens are provided with ID Cards. The British Home Secretary David Blunkett's proposal of "preemptive justice"<sup>29</sup> is one example. To deal with potential terrorists shows how fear of terrorism over shadow civil liberties of citizens. Blunkett, in

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<sup>29</sup> Secret Terror Trial Plan by Blunkett, "Is shameful", The Times, 2 Feb, 2004.

February 2004, gave an idea of pre-emptive, justice to arrest and detain suspect terrorists.<sup>30</sup> The proposal was so strong that people started thinking again about the balance between security and liberty.

In country like Turkey which is inhabited by various races fights against terrorism in its own way. In order to control terrorist activities, Turkish government justifies phone taps and raiding private homes. In Israel, bags are thoroughly searched at the entrances of market places and Arabs are specially checked. The culprits are dealt with severe punishments such as sleep deprivation and physical torture as well. In Japan, too, criminals are dealt with heavy punishments like deprive of food, sleep and physical and mental abuse till, they confess their crime. In Canada, terrorists are dealt with severely. The War Measures Act of 1914 which allowed the police to hold the terrorist suspects without bail for 3 months. There is also martial law which can confine a terrorist for six months, besides, the October Crisis in which civil liberties of citizens were suspended (1970).

In India, the **Prevention of Terrorism Act, 2002**, deals with terrorist activities with stern. Who ever commits a terrorist act shall be punishable with death or imprisonment for life.<sup>31</sup>

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<sup>30</sup> Chandler, David, Balancing Liberty and Security, Spiked-Central, Spiked Liberties, 4 February, 2004.

<sup>31</sup> The Prevention of Terrorism Act, 2002, Sec-3(a) and (b).

Thus, terrorism is recognized world wide as a heinous crime against humanity. It can be committed by an individual or a group of individuals or even by a state. But of all these types, the state terrorism or the state sponsor terrorism which is committed for the achievement of a political /religious goal is most dangerous. When terrorism is sponsored by a state its no less than a war. Such act of terrorism definitely an act of threat on the national security of the other state. So, terrorism as a matter of fact is spread through out the world even though, the breeding place of terrorism or factory of terrorism is fixed in the Middle East. Its important to fight against terrorism with iron hand but at the same time quality of human life should not be subdued in any way. Civil liberties or personal liberties of people should not be undermined while, fighting against terror. It's the very nature of some people or those people who by their very nature are strong believers in their ideology, religion or way of life to create problems for the others but the others should be prepared to handle it. They should not leave the place out of fear but they should give them a befitting reply and push the terror back. As Tom Ridge, Secretary of Homeland Security, US, said, "Though hardly a new phenomenon, fear and terror have always been the weapons wielded by those who would oppress the innocent and enslave the free".<sup>32</sup>

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<sup>32</sup> Address by Tom Ridge. Secretary of Homeland Security, US, Delivered to the Students.

Today, talking about balancing security and liberty is to defeat liberty at the hand of security. This is certainly not because the world is experiencing a stringent national security policy or the U.S. is in favour of national security even at the cost of civil liberties but because people are slowly coming to term with security. They slowly relinquishing or in a position to bestow their liberty on security. In a world of hypothetical fear of post 9/11, people are ready to give away their basic liberties for national security. In such a situation, balancing national security with civil liberties is becoming an impossible task. Politics in the present world is dominated not by diplomatic or trade related talks but by fear. So long as fear would prevail upon a state, there can never be any atmosphere of liberty. When future is seen in terms of threats, protecting civil liberties can never be possible. The U.S. Vice President Dick Cheney said that another attack is a matter, not of if, but when.<sup>33</sup> This fearful mind was of course, not came as a result of terrorist attacks of 9/11 but the world is growing apprehension day by day. People are more apprehending of their life and liberty. So, unless, there would be an atmosphere of 'free from fear', there can never be any enjoyment of liberty. No liberty can be protected so long as there would be fear and apprehension in the society. As Michael Mandelbaum has said very

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London School of Economics, London, England, January 14, 2005.

<sup>33</sup> Chandler, David, Balancing Liberty and Security, Spiked-Central, Spiked Liberties, 4th February, 2004.

rightly, A Public good is something the benefits of which no potential consumer can be prevented from enjoying. National defense, clear air and water are three examples. He says, "The essence of global leadership is to pay more for public goods".<sup>34</sup> Or else, there would be chaos and confusion.

**Fifteenth**, it is said that when the prevailing system of customs, traditions, habits, manners, behaviours, rules and regulations, culture, polity and society etc become difficult for the people of the system, then they start revolt against the system to uproot. The act has not only affected the non-citizens or aliens or any political groups but has been able to erode many essential liberties of U.S. citizens as well. American Civil Liberties Union (ACLU) has been most important organization to complaint against many provisions of the act, such as due process issue, secret searches and seizures, extraordinary detention, ill-treatment of detainees and immigration law, torture and has raised many issues relating to Human Rights. The ACLU has sought to amend many provisions of the act which conflict with the U.S. Constitution and procedures established by law.

The Free Expression Network has raised a list of 'troubling issues' such as government surveillance, access to government information,

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<sup>34</sup> Mandelbaum, Michael, The Inadequacy of American Power, Foreign Affairs, Vol. 81, No. 5, September / October, 2005, p. 66.

freedom of association, suppression of speech and dissent etc. The pattern of these events show significant erosion of fundamental rights and legal principles...<sup>35</sup> But the equivocal resolution of opposing the USA-PATRIOT Act, by North Carolina Academy of Trial Lawyers has been more vibrant. The group of trial lawyers has raised many issues right from 'Bill of Rights' in the US constitution to 'Declaration of Rights' in North Carolina Constitution. The group of advocates has said that they have tradition and history of democracy and the act has eroded many essential freedom and civil liberties. They have complained that the act has questioned the judgments of many constitutional amendments.

They have also resolved that the act be amended and give scope for human rights and civil liberties. Constitutional supremacy be held and executive order, should not conflict with the constitution. They urge that the Governor of North Carolina and General Assembly should review and evaluate the act in the light of erosion of civil liberties of the citizens.

The People for the American Way, another notable civil liberty organisation also has showed its anguish over the act.<sup>36</sup> The

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<sup>35</sup> Free Expression Network: Internet 2002, Available at <http://www.freeexpression.org/patriotstmt.htm>

<sup>36</sup> People for the American Way, The Issue-USAPATRIOT Act, Available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=9394&print=yes&units=all>

organization has termed the act as a 'flawed process' because the act was never passed in the legislature democratically and through proper process. The US President and the Attorney General were the only persons to expedite it. The organization has raised issues relating to many civil liberties. The expanded ability of the federal government to conduct secret search and seizures minimal judicial supervision, expanded telephone wiretaps, internet surveillance, designating domestic groups as terrorist organisations, indefinite detention of immigrants etc a.e some important issues raised by the organization, to cite for examples.

The Unitarian Universalist Association is another notable organization which speaks for civil liberties. The organisation stands for justice equity, and compassion in human relations, a free and responsible search for truth and meaning, the right of conscience and the use of democratic process. The organisation also supported the legislation of SAFE Act, 2003. The Security and Freedom Ensured (SAFE) Act of 2003 which was introduced in the Senate to target some worse excesses of the USA -PATRIOT Act, 2001.<sup>37</sup> The Electronic Frontier Foundation, is a known civil liberties organization, has raised

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<sup>37</sup> Unitarian Universalist Association: Washington Office for Advocacy, Security and Freedom Ensured (SAFE) Act, 2003 (HR 3352,S.1709), Available at <http://dev.uua.org/uuawo/new/article.php?id=279>

issues relating to privacy, surveillance and other civil liberties which are violated by the act.

Many other organisations such as the American Booksellers Association (ABA) which is devoted to free speech, literacy, programs relating to reading and writing and developing ideas has been eloquent against suppression of free speech. The society places the highest value on the ability to speak freely on any subject.<sup>38</sup> The PEN American centre is another outstanding organization of distinguished writers, editors, translators has come out openly to denounce USA PATRIOT Act , 2001 against its expanded surveillance suppression of free speech and violation of human rights. The American Library Association (ALA) which has the distinction of being the oldest organization has raised voice against the anti-terrorism law passed by the U.S. Administration. The association stands for right to privacy and recently has joined the Campaign for Reader Privacy against the USA PATRIOT Act, 2001. Another important organization is the Association of American Publishers (AAP). the U.S. Publishers are committed to human rights and spread of knowledge. The Association of American Publishers is critical of Section –215 of the act, which violates First Amendment.<sup>39</sup>

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<sup>38</sup> Campaign For Reader Privacy, Available at <http://www.readerprivacy.org/about.jsp>

<sup>39</sup> Ibid.

The National Association for the Advancement of Colour People (NAACP) is a known civil liberties organisation which has raised issues relating to civil rights and liberties in the act. The approach and description of anti-terrorism was so strong that President Bush failed to appreciate the NAACP. The Benjamin Franklin True Patriot Act, 2003 (H.R. 3171) was introduced in the House on 4<sup>th</sup> September 2003 to review the USA-PATRIOT Act, 2001. But the bill referred to sub-committees for consideration without any action was taken on it, (before the 108<sup>th</sup> Congress). And it has many important supporters, including the ACLU, the NAACP and such other organizations.<sup>40</sup>

A number of other organizations which are highly critical of the USA PATRIOT Act, 2001 are the Electronic Privacy Information Centre and the Centre for Democracy and Technology, which have raised issues relating to cyberspace and other technology which are violated by the act.<sup>41</sup> The protest of the Rutherford Institute against the act for its negligence on individual freedom has been evident. The institute is also critical of provision of Homeland security and violation of various constitutional guaranteed rights. And the Bill of Rights Defense Committee, though a new organization still, has been an important forum for protection of Bill of Rights and various civil liberties. The role

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<sup>40</sup> Benjamin Franklin True Patriot Act, From Wikipedia, the free encyclopedia, available at [http://en.wikipedia.org/wiki/Benjamin\\_Franklin\\_Ture\\_Patriot\\_Act](http://en.wikipedia.org/wiki/Benjamin_Franklin_Ture_Patriot_Act) USA-Pa

<sup>41</sup> USA-PATRIOT Act, Youth For Justice NetNews, Aug.2003. Available at LEAP\_Kids.com

played by the Amnesty International and the Human Rights Watch in questioning the very authenticity of various provisions of the act has been praiseworthy.

## CHAPTER – VI

### CONCLUSION

The USA-PATRIOT Act, 2001, therefore, has once again brought the conflict between national security and civil liberties to the forefront. The terrorist attacks of 9/11 has not only made the USA to rearrange its liberty with security but a lot many nations of the world are compelled to give a serious thought on their national security policy and civil liberties. They are being content at making a stricter national security policy by suspending or limiting their essential civil liberties.

Now, the question is, is it sufficient enough to enact a law giving expanded powers to the law enforcement authority and limiting essential liberties of citizens and non-citizens can be only the measures required to fight terrorism in USA particular and in the world in general?

It was not that the US Congress has made such a law for the first time. In the past, a number of rules and regulations, orders and acts have been passed, expanding the powers of law enforcement authority, the surveillance and limiting essential liberties of the citizens but in their presence, terrorist attacks of 9/11 could be possible.

There is a CIA, an informed Police Force, a strong military, a stricter immigration policy which could intercept and obstruct any terrorist act appropriately, there is a strong law enforcement authority

(FBI) , the American citizens were educated and well-informed, and above all there is a best use of modern technology especially, information technology. Again the US Security-System is considered the most impenetrable security system of the world. Then, what went wrong? How come a man who was living in bush could snatch out sleep from the eyes of a President who is leader of world information technology empire. These are a few questions which are yet to be answered.

The USA-PATRIOT Act, 2001, is claimed to protect America from any future terrorist attack. The terrorist attacks of 9/11 was so devastating that the US leaders could not resist the call of change in the arrangement of security with liberty. It was agreed by the Executive, Legislative and Judiciary branches of government that unless a broad and stricter national security policy be enacted their nation can never be protected. In order to protect the nation first, the US leaders passed the USA-PATRIOT Act, 2001. Passing an act to protect the nation's security would be legitimate, but when the provisions of such security limited the standard of liberty of the people, then, it became an issue of conflict. Consequently, criticism and opposition to the Act became natural from within the US and also from abroad. A number of experts, citizens, organizations, and nation around the world have either complained

against the mal-adjustment of security with liberty or have expressed their concerns about the Act.

The complains or concerns that have been publicly echoed and required speaks of liberty being compromised at the cost of national security. These observations have been summarized in the following pages:

**First**, the USA -PATRIOT Act, 2001, is a travesty.<sup>1</sup> It is the most dangerous law ever made by a nation to provide security to its people. The act has seriously violated many constitutional provisions of the US Constitution such as due process, First, Fourth, Fifth, Sixth and Eighth Amendments. Its expanded police-power, surveillance, search and seizures, wiretapping, internet and E-mail, library record, medical prescription, donation for good causes, criminal records etc. have effected both citizens and non-citizens. Without the knowledge of the citizens and in a haste manner, without any national debate or hearing the law was passed in a revengeful intention, out of fear. The issues concerning its repercussions were never raised.

**Second**, many Americans do not have the knowledge of the act. They do not know what the law is and what it contains. The 'sneak and peak' provisions of the act are such that they can be targeted and their premises can be raided even, without their knowledge and permission.

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<sup>1</sup> Bergen, Jennifer Van, Repeal the USA-PATRIOT Act, Part-I, truthout, 1 April, 2002, Retrieved From [http://www.truthout.org/docs\\_02/04.024.JVB.Patriot.P.htm](http://www.truthout.org/docs_02/04.024.JVB.Patriot.P.htm).

And the punishment for violating any provisions of the act may draw, the attention of clauses of stripping of citizenship, if he is a citizen to detain in judicial custody to military tribunal to genetic studies to physical torture etc. Not only the suspect terrorist but his / her accomplice and patron or person who had a knife fighting at a bar too would be treated as an act of terrorism and would be dealt with in accordance with law.

**Third**, it has been claimed by experts in the USA and the world that the USA-PATRIOT Act, 2001 did not come into being solely because of terrorist attacks of 9/11. There has been an anti-Muslim wave in the West in general and the US in particular right from the beginning. Either on one reason or the other, the European and American thinkers have fixed the Middle East as the 'factory of terrorism'. Terrorism is not a clinical or a pathological behaviour rather a case of strong unilateral perspective or partisan belief in one's religion i.e., Islam or a terrorist is a 'Holy War Crusader'. So, the history of law making in the West and in America has been to crush their enemies. Those who were in charge of ruling have always tried to have that power so that they could rebut their rivals. Everything that has happened since September 11 can be viewed in the context of mortal fight between the fundamentalisms of Protestant Puritanism and Sunni Wahhabism.<sup>2</sup> The incident of 9/11 was just an eye-wash. The US Administrations was

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<sup>2</sup> Galtung, Johan, Religion is Behind the Bush Policies, Peace Research, Vol. 36, No. 2, November 2004, p. 59.

ready with a proposal but without an opportunity to expedite. Now, when they got an opportunity, they quickly grab it, they attacked on their enemies, made a stricter law USA-PATRIOT Act against their (enemies') entry into their homeland and they could convince to the world about their actions, by claiming they did because of justice. In the past, many laws have been framed in the United States which can be compared to the present USA-PATRIOT Act, 2001. The Alien and Sedition Act, 1798 was passed to arrest, imprison and deport dangerous immigrants on mere suspicion, treasonable or secret machinations against the government.<sup>3</sup> In a state of fear, the U.S. made this law to keep the French out from the U.S. The law was created against the immigrants but the Federalists (Right Wing) used the same law against their political opponents as well. The law, then violated various civil rights not only of immigrants but of citizens too.

**Fourth**, the complainants argue against the Act, that it provides for foreign intelligence gathering with domestic criminal investigation. It allows the FBI to spy on US citizens even without any wrong doing. But the core values for which the FBI strives are to adhere to the rule of law and the rights conferred to all under the United States Constitution; integrity through everyday ethical behaviour; accountability by accepting

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<sup>3</sup> Bergen, Jennifer, Van, Repeal the USA-PATRIOT Act, Part-II, The Wheel of History, truthout, 2 April, 2002, Retrieved From [http://www.truthout.org/docs\\_02/04.03D.JVB.Patriot.htm](http://www.truthout.org/docs_02/04.03D.JVB.Patriot.htm).

for our actions and decisions- and the consequences of our actions and decisions; fairness in dealing with people; and leadership through example, both at work and in our communities.<sup>4</sup> The Act allows the FBI to share informations with the CIA and other local agencies as well. The CIA has been a reputed organization to work for foreign intelligence but as per new provisions, it can also spy on domestic matters which certainly goes against its charter. The act also allows use of military for domestic purposes which is against established US laws.

**Fifth**, the scope of USA-PATRIOT Act, 2001, has been so wide that critics complains it as legislature against the individual freedom. The enactment of national security has led to the curtailment of civil liberty. In the name of national security and fight against terrorism, essential liberties of law abiding citizens and non-citizens have been suspended. Right from police custody and confinement to military detention and physical torture have been allowed by the act violating and amending a number of acts and provisions of constitution as well. It has been criticised by the liberatarians that Bush Administration has advocated torture with the help of Attorney General John Ashcroft.

**Sixth**, the changes in the Immigration and Naturalization Services too have criticized by many. America right from its beginning has been a country of immigrants. Those who were frustrated either without a job, or

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<sup>4</sup> Facts and Figures, 2003, FBI Priorities. Available at <http://www.fbi.gov/priorities/priorities.htm>

engagement or ventured into search of God or make wealth; undertook a hazardous journey to reach in America from Europe. Now, they are claiming America to be their own and restricting others to enter into America. As per the Law, if the Attorney General declares 'certified' to a person that this alien is a terrorist or a threat to national security, the Immigration and Naturalization Services, may detain him without indictment for seven days before any charges are labeled again him.<sup>5</sup>

The aftermath news reports revealed that terrorists entered into USA with student visas.<sup>6</sup> So, now the visa applying process and search and checking procedures have been stricter. Even, such student who would be admitted in a school without a valid visa would be expelled from the school and even the school may be asked by the INS to shutdown. If the school failed to report to INS, then it may be prohibited from enrolling any foreign students.<sup>7</sup>

The new immigration procedures have not only effected the non-citizens, but many citizens, are being harassed on various pretexts.

**Seventh**, it has been written in plenty that the USA-PATRIOT Act, 2001 has once again opened the Fascist Chapter in the world. The Americans are known to the world as liberty-lover people, a society that

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<sup>5</sup> Bergen, Jennifer Van, Repeal the USA-PATRIOT Act, Part-IV, Patriotism or Tyranny? truthout, 4<sup>th</sup> April, 2002. Available at [http://www.truthout.org/docs\\_02/04.05D.JVB.patriot.htm](http://www.truthout.org/docs_02/04.05D.JVB.patriot.htm)

<sup>6</sup> Stock, Margaret D., United States Immigration Law in a World of Terror, The Federalist Society, p.1. Available at <http://www.fed-soc.org/publications/terrorism/immigration.htm>

<sup>7</sup> Ibid, p.5.

values democracy and do away with authoritarianism. But with the enactment of new anti-terrorism law, even, USA is being branded as a tyranny. Washington can not run a global order driven by military action and the fear of terrorism.<sup>8</sup> The enactment of a stringent law is not going to protect them, so long as such fear would prevail upon their mind. If they would be preoccupied with fear, they can neither be in a position to enjoy their liberty nor can they buy safety.

**Eight**, human rights are those basic rights which are acknowledged and respected universally. But as part of its fight against terrorism, the Bush Administration has scraped many essential human rights and liberties. The **Universal Declaration of Human Rights** states that “No one shall be subjected to arbitrary arrest, detention or exile.”<sup>9</sup> The Universal Declaration of Human Rights was created with sincere help of US after the Second World War. But now, the US itself is deviating from it. Article 9 of the **International Covenant on Civil and Political Rights** guarantees the right to liberty and security. And paragraph-I of the Article declares that no person shall be subjected to arbitrary arrest or detention, and no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are

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<sup>8</sup> Ikenberry, G. John, Illusion of Empires: Defining the New American Order, Foreign Affairs, Vol.83, No.2, March/April 2004, p.150.

<sup>9</sup> Art. 9, The Universal Declaration of Human Rights.

established by law.<sup>10</sup> The International Covenant on Civil and Political Rights declares, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".<sup>11</sup> Another important line worth noting here is that the International Covenant on Civil and Political Rights has granted due process protections to everybody irrespective of their citizenship.

There is a solid similarity between Bill of Rights in the US and the International Covenant on Civil and Political Rights. And the United States of America is one of important signatories to both these documents protecting human rights and civil liberties. The US ratified the ICCPR in 1992.<sup>12</sup> But, the US is disrespecting it now. The U.S. says that provisions of Articles 1-27 of the Covenant are not self executing.<sup>13</sup>

Article 7 of the '**Rome Statute**' defines crime against humanity as several acts committed as part of a wide spread or systematic attack directed against any civilian population. Those acts which include murder and other inhuman acts causing great suffering or serious injury to the body or mind fall under this category of crime against humanity. The terrorist attacks of 9/11 were definitely directed against civil population and thus, come under crimes against humanity. Those who

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<sup>10</sup> Human Rights Committee, General Comment 8, Rights to Liberty and Security of Persons(Art.9), June 30, 1982.

<sup>11</sup> Art. 10, The International Covenant on Civil and Political Rights.

<sup>12</sup> Te Liao, Fort Fu, Rights to Liberty and Fair Trial-Scarified in the name of Anti-Terrorism, EurAmerica, Vol. 34, No. 3, September 2004, p. 531.

<sup>13</sup> The USA declared when it ratified the ICCPR. It is available at [http://www.unhchr.ch/html/menu3/b/treaty5\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm).

are responsible for the attacks need to be prosecuted personally. As per Article 25 of the 'Rome Statute' the **International Criminal Court** has the power to trial over such crimes. A person who commits a crime against humanity shall be individually responsible and liable for punishment in accordance with its provisions. The International Criminal Court has jurisdiction over crimes against humanity. The other thing is that unlike domestic crimes, no statute of limitations is applied here. But the USA, without ratifying the Convention on the "Non-Applicability" of statutory limitations or the 'Rome Statute' is desperately trying to obtain immunity.

Article 5 of the **European Convention on Human Rights** too guarantees the right to liberty and security. That no person shall be deprived of his liberty save in certain cases and in accordance with a procedure prescribed by law.

**Ninth**, checks and balances are another important concerns of the U.S. Constitution. The US has been a democratic country which has high regard for constitutional practices. In order to check concentration of power in one hand, the makers of US constitution opted for a separation of powers i.e., dividing the government into three important branches of legislative, judiciary and executive. While, the legislative was in charge of lawmaking, judiciary was for interpreting and the executive was to implementing. But the USA-PATRIOT Act, 2001 has

eroded the democratic practice of checking and balancing one branch of government with another. The Act allows the Executive to make laws and interpret it also and Congress, the Court and the Press do not want to be accused of being undermining state security. Almost the Act has proclaimed state security or national security equivalent to human security. Therefore, the state, i.e., Executive/White House has assumed responsibility to define the parameters of security.

Tenth, the USA-PATRIOT Act, 2001 has already created a serious chaos, confusion, and fear among citizens and non-citizens. Meanwhile, Bush Administration is planning to enact even more stringent law called PATRIOT Act, II. The Department of Justice is currently drafting another act as a sequel to the USA-PATRIOT Act.<sup>14</sup>This is son of earlier Act of 2001.<sup>15</sup> This Act being called as Domestic Security Enhancement Act, 2003. The draft of the new act reveals that this act would be more stringent and Smarter than the earlier one. The PATRIOT-II would expand law enforcement and intelligence gathering authorities. It would reduce or eliminate judicial oversight over surveillance, create a DNA Database, authorizes secret arrests, create new death penalties, eliminate privacy protections, striping of citizenship for good-will political protests or associations,

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<sup>14</sup> How "Patriot Act II" would further erode the Basic checks on Government Power that keep America safe and free. Legislative Update, American Civil Liberties Union, 20 March, 2003. Available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12161&C=206>

<sup>15</sup> Dalrymple, Mary, "Though'Son of Patriot' Draft Raised Hackles of Civil Liberties", *Congressional Quarterly Weekly*, Feb 15, 2003,p.405.

provides for access to credit reports, extradition without treaty etc.<sup>16</sup> Many experts are of the opinion that PATRIOT-II would be more powerful more dreaded and draconian than the earlier law of 2001.

**Eleventh**, the increasing importance to nation and national security is resulting in discouraging the coveted idea of World Government, World Village and Internationalism. With the advancement in science and technology especially, in information technology, trade and commerce, polity and economy, the world is progressing and forgetting its bitter past. And in such a time talking about parochial nationalism, nation-state and national security is to defeating the prospects of World Government in 21<sup>st</sup> century. When the world is trying to get rid of nation-state and national security, an important state like the USA should not drag the world into the past. False sense of nationalism has already created two World Wars. Being the only Super Power, the US should take every action with care and responsibility because that would become inspiration for the rest of the world.

The terrorist attacks of 9/11 filled in the mind of Americans with fear. Terrorists were successful in their ambitions. Then, what guarantee is there that they would not go for a second strike? The stern measures taken up by Bush Administration to proclaim a war on terrorism has ensured the nation state of America to define parameters of security. In

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<sup>16</sup> Cole, David, (Georgetown University Law Centre, 10 February 2003), What PATRIOT-II Proposes to Do, available at <http://www.cdt.org/security/usapatriot/03210cole.pdf>.

the process there has been unbalancing of security and civil liberty. Indeed, there has been clear sign of clash between national security and civil liberties. As in words of David Beetham, "Democracy without freedom is a contradiction in terms".<sup>17</sup>

It is a fact that al Qaeda is deadly and extremist terrorist organisation. The Afghanistan based al Qaeda network is the prime suspect in the Sept 11 attacks. Significantly, it may be noted that it was the US which created the terrorist group under the leadership of Osama bin Laden in Afghanistan to overthrow the Soviet occupation of Afghanistan. Once Soviet withdrew from Afghanistan in 1987, al Qaeda network links with US became negligible. Soon al Qaeda with the Pakistan support established Taliban regime in Afghanistan. It slowly focused their terrorist activities in Western world. It is also highly lethal and its members go to any extent to finish their own lives to kill Americans and Europeans. They have been haters of Americans and Europeans in the past, present and in future they would remain in those lines. Historical anti-Americanism has its roots in past U.S. behaviour<sup>18</sup> and role in Saudi Arabia and pro-Israeli policies. Yet, al Qaeda as a terrorist organization stands condemned and the nations of the world

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<sup>17</sup> Beetham, David, The quality of Democracy: Freedom as the Foundation, Journal of Democracy, Vol.15, No.4, Oct 2004,p.62.

<sup>18</sup> Naim, Moises, Anti-Americanism: A Guide to Hating Uncle Sam, Foreign Policy, Issue No.128, Jan./Feb 2002, Washington D.C., p.104.

have supported the US in condemning and joining hands with it to eliminate al Qaeda.

Indeed, the Bush Administration's declaration of "War on terrorism" is on two front domestic and Afghanistan Iraq. In the domestic front the passing of the USA-PATRIOT Act, 2001 upheld that state security is pre-eminent and civil liberty is best served when the state is secure and sovereign. Therefore, the idea of balancing national security and civil liberty remained in the realm of debate and President Bush and his policy-makers triumphed in upholding national security of America primary and not civil liberty, so long terrorism threatens the nation-state.

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