THE ANTI-TERRORIST LEGISLATION IN THE US: INTER ARMA SILENT LEGES?\(^1\)

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Part two

‘The greatest danger posed by terrorism to our democracy and to our constitutional republic may be our executive branch’s overreaction to terrorism and its use of terrorism to erode the constitutionally mandated checks and balances and sharing of powers in foreign affairs, war powers and combating international crime’. Blakesley (1992)\(^3\)

5. AG Aschroft and the further substantiation of the Patriot Act
The Patriot Act gives the DoJ and the AG far-reaching powers and makes them the central players in the field of anti-terrorism. Because of the broad definition of terrorism, the AG, has legally speaking, reinforced his jurisdiction vis-à-vis specialised law enforcement agencies, such as the Secret Service and the Coast Guard. The AG has complementary legislative competence and has used this on a number of crucial points in order to further substantiate the Patriot Act. In addition to the specific guidelines which we discuss here, guidelines also exist concerning FBI undercover operations and concerning the deployment of informants. These guidelines also apply to terrorism, but they were not elaborated as a result of the Patriot Act. Most guidelines concerning FISA are confidential. Insofar as they are accessible, they have been included in this article.

5.1. AG guidelines on general crimes, racketeering enterprise and terrorism enterprise investigations\(^4\)
and the FBI’s powers of investigation
In May 2002, the AG issued new guidelines seeking to regulate the FBI’s powers of investigation in closer detail. These guidelines complement the specific guidelines concerning informants and undercover operations.\(^5\) The FBI is the primary federal investigative body, to the extent that investigative powers have not been granted to other federal law enforcement agencies, such as for example the Secret Service or the DEA. It is expressly stated that the guidelines do not prejudice the

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4 It is sufficient that two persons are involved in an enterprise whose objective is to commit terrorist offences or provide material support or to ‘further political or social goals wholly or in part through activities that involve force or violence and a federal crime’.
5 In case of computers used for national security or justice it is not necessary to establish serious damage. Ordinary damage suffices.
special FISA guidelines\(^6\) concerning the gathering of information and investigation with respect to international terrorism or foreign activities in the field of intelligence and counter-espionage. The AG guidelines distinguish between preliminary inquiries and criminal investigations. The preliminary inquiry may include various acts: a quick check of initial leads or a preliminary inquiry of up to 180 days. The FBI must initiate the preliminary inquiry if ‘the possibility of criminal activity and responsible handling requires some further scrutiny’. In the framework of the preliminary inquiry the FBI is authorised to make use of a considerable number of investigative powers, undercover operations among them. However, opening mail and tapping electronic communications are strictly prohibited. The actual criminal investigation (or full investigation) must be conducted when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed. The requirement of reasonable indication is a lower threshold than probable cause. The indication can be based on direct evidence, but also on certain acts, such as the activities of the group or statements of its members. Preparatory acts can in any case be punishable under provisions concerning attempt, solicitation, acts in preparation of a terrorist crime (for example, providing material support) or conspiracy.

In case of the full investigation, a distinction must again be made between the investigation of general crimes and criminal intelligence investigations. If, for example, there are concrete indications that certain persons are about to rent an apartment or provide funding to commit terrorist crimes regular investigations are commenced. Criminal intelligence investigations are commenced for the purpose of gathering information concerning criminal groups, networks or enterprises. The focus is not on specific persons or acts. The main objective is to collect information concerning the aims, finances, membership and activities of the group. The group may be a racketeering enterprise within the meaning of the RICO legislation concerning organised crime or it may be a terrorist organisation. In both types of investigations, all investigative techniques are permitted, provided that they meet the specific statutory requirements. The intelligence investigation is limited to one year, but may be extended by top-ranking FBI officials ‘when facts or circumstances reasonably indicate that a group or enterprise has engaged or aims to engage in activities involving force or violence or other criminal conduct’,\(^7\) which is widely interpreted by the FBI, sometimes causing investigations to continue for several years. In addition to the usual methods of investigation (search, seizure, tapping, infiltration, informers, etc.) secret investigation techniques may also be used.\(^8\) In 2003, these guidelines were replaced by the national security intelligence (NSI) guidelines.\(^9\) The distinction between preliminary and full investigations was retained, but a category named threat assessment was added. The FBI may proactively use a number of investigative powers. The connected requirements and the scope are unknown, as many passages of these guidelines are confidential. The NSI guidelines also include far-reaching provisions concerning the exchange of information between intelligence services and the police force.\(^10\)

The FBI has the primary authority in the framework of counter-terrorism and foreign intelligence (Sec. 506).\(^11\) On that basis, the FBI can conduct on-line searches on a massive scale and collect information in public places and store it. In June 2002, the FBI to this end established special units, half of which are active abroad. These units have all the investigative powers at their disposal, including the secret

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\(^{6}\) A comparison with these guidelines is not possible, given the strict confidentiality of their contents.


\(^{8}\) According to the Procedures for the use of classified investigative technologies in criminal cases. This document has not been published due to secrecy reasons.


\(^{10}\) See J.A.E. Vervaele, Gegevensuitwisseling en terrorismebestrijding ; discretionair strafrecht sub rosa, in T.M.Boone, e.a. (eds.) o.c..

\(^{11}\) The Secret Service will still have complementary authority for specific related offences, such as counterfeiting (Sec 506).
powers of investigation under FISA. The AG has elaborated various guidelines on this and collected these in the AG Guidelines for FBI foreign intelligence collection and foreign counter-intelligence investigations,\textsuperscript{12} which are in part confidential.\textsuperscript{13} What is not mentioned in the guidelines, because they address the FBI, is that it is also possible to assign investigative tasks to the military. Although the Posse Comitatus Act\textsuperscript{14} prohibits military personnel from taking part in domestic law enforcement, an exception was introduced in the eighties for the war on drugs and in the nineties for the fight against the use of chemical or biological weapons of mass destruction. To this the fight against terrorism has now been added. For this reason, military personnel can detain persons and conduct searches when there is a threat to human life and if the civil justice authorities are unable to complete the task.

5.2. Detention and legal privilege

In October 2001, the DoJ made it obligatory for penitentiary institutions\textsuperscript{15} to monitor communications between detainees and their attorneys with the objective of preventing acts which ‘could result in death or serious bodily injury to persons or substantial damage to property that would entail the risk of death or serious bodily injury to persons’. This exception to the Sixth Amendment is therefore not at all limited to detainees who are accused of terrorism. Before, this required judicial authorisation and it had to be demonstrated with probable cause that the criminal activity was being carried out. Now it suffices that there is a serious threat and the AG decides alone whether to limit this fundamental right. This was applied, for example, to Richard Colvin Reid, the ‘shoe bomber’. The information obtained can also be used in criminal proceedings against the attorney. Attorney Lynne Stewart, for example, was accused of establishing lines of communication with the aid of her Arabic interpreter between an Islamic organisation and her client, Sheik Omar Abdel-Raman, who is serving a life sentence for conspiracy to bomb buildings in New York and involvement in the plotting of an assassination attempt on the Egyptian President Hosni Mubarak.

6. Presidential exceptional law

6.1. Terrorist organisations and the financing of terrorist organisations

As is known, the US President in his capacity as Commander-in-Chief has far-reaching legislative and operational powers in the field of foreign affairs and military matters. The US has a long tradition of the use of political and economic sanctions, such as, for instance, against Cuba. Initially, this concerns sanctions against states, involving the imposition of export sanctions based on the Export Administration Act (EAA) and the International Emergency Economic Powers Act (IEEPA)\textsuperscript{16} upon companies\textsuperscript{17} which violate the trade embargoes with the states in question. Implementing legislation and decisions are taken by the Secretary of State, the Department of Commerce and the Department of Treasury/OFAC.\textsuperscript{18} The President may therefore decide to impose sanctions, especially in times of emergency. In 1995, President Clinton\textsuperscript{19} took the step of broadening the scope of sanctions under the IEEPA\textsuperscript{20} from states (i.e. state embargoes) to organisations. At that time, ten Palestinian and two

\textsuperscript{12} Counter-intelligence information: ‘information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities’ 50 USC Sec. 401(a)(2).

\textsuperscript{13} The basis of the guidelines is Executive Order 12333 (see infra point 6).

\textsuperscript{14} 18 USC Sec. 1385 (2000) and 10 USC Sec. 371.

\textsuperscript{15} 28 CFR part 501.3(d), 66 Fed. Reg. 55062, 55066.

\textsuperscript{16} 50 USC Sec. 1701-06 (2001).

\textsuperscript{17} A.Q. Connaughon, Exporting to special destinations and entities terrorist-supporting and embargoed countries, sanctioned countries and entities, 844 PLI/Comm 299.


\textsuperscript{20} 50 USC Sec. 1701(a) (2000).
Jewish organisations were blacklisted. Secretary of State Albright subsequently designated 30 organisations as special designated terrorists (SDTs) or foreign terrorist organisations (FTOs) under the Effective Death Penalty and Public Safety Act (1996). By their inclusion in the list, supporting these organisations has become an offence and financial institutions in the US are required to block their balances.

Based on the leading case \(^{21}\) concerning the scope of the Presidential powers, it could be maintained that the Presidential powers with respect to 11 September have been exhausted, as these are completely regulated under the Patriot Act of Congress, which, for example, did not make provisions for the concept of enemy combatant or the establishment of military committees. This view is not shared by the Bush I administration. After the declaration of the state of emergency on 14 September 2001, the President on 24 September 2001 approved executive order 13224 \(^{22}\) on the basis of the International Emergency Economic Powers Act \(^{23}\) and also by way of implementing certain UN Resolutions, mainly Resolution no. 1333. Under this executive order, terrorist organisations were identified as specially designated global terrorists (SDGTs). The Secretary of Treasury may, for example, put any organisation on the list which ‘assist(s) in, sponsor(s), or provide(s) support for or is otherwise associated with a designated terrorist organisation’. The main idea of this executive order is to elaborate a financial sanctioning regime with a view to drying out these organisations’ flow of income. \(^{24}\) This means that the US can block the bank accounts of foreign banks in the US if other countries refuse to cooperate in blocking accounts in their own territory (indirect jurisdiction).

All the property of the following can be blocked: a/ SDGTs included in the list; b/ persons who commit terrorist acts or who pose a significant risk of committing, acts of terrorism that threaten the security of US nationals or the national security, foreign policy, or economy of the United States \(^{25}\) and c/ persons who assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or SDGTs, or to persons who act for or are controlled by SDGTs or are otherwise associated with them. \(^{26}\)

Citizens in the US are also prohibited from performing transactions with blocked property, to set up constructions or to cooperate in their set-up in order to organise the transaction in such a way as to evade the prohibition and to conspire to perform illegal transactions. All persons are prohibited from supporting SDGTs or associating with them through transactions in foreign currencies, credit transfers, the import or export of money or negotiable instruments. These prohibitions therefore also apply to foreign financial institutions that refuse to block the property of SDGTs. This also means that certain donations to charitable institutions become impossible, when they have ties with SDGTs. Civil sanctions may be as high as USD 11 000 per breach, penal sanctions as high as USD 50 000 per breach and 10 years’ imprisonment for wilful intent.

The executive order of 2001 partly overlaps the executive orders of President Clinton, who had already designated quite a number of organisations as SDTs or FTOs. However, the sanctioning regime was given a global scope of application and the type of sanctions available was also extended. Now, not only property of financial institutions can be blocked, but also the property of persons associated with SDGTs. It is therefore perfectly possible to block the property of foreign customers of companies with branches in the US. For this, it is not required that the organisations or persons involved have

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\(^{22}\) Executive Order 13224 blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism, 3 CFR part 786, 790 (210), amended in 50 USC Sec. 1701 (2002). See for the full text http://www.treas.gov/offices/enforcement/ofac/sanctions/terrorism.html.

\(^{23}\) 50 USC Sec. 1701-06 (2001).


\(^{25}\) The Secretary of State further defines this description.

\(^{26}\) The Department of Treasury further defines this description.
committed criminal offences. It is sufficient that they can be associated with those offences. Evidence of this may be kept secret and dealt with in camera and ex parte. A clear example of this is the Holyland Foundation (HLF) case.\textsuperscript{27} HLF is an NGO which was established in 1989 and has its headquarters in Texas, and ties with Hamas. By executive order 12947 issued by President Clinton in 1995, Hamas became an SDT and by executive order 13224 issued by President Bush in 2001, Hamas became an SDGT. On 4 December 2001, the Treasury Department/OFAC decided that HLF was acting for or on behalf of Hamas, which gave HLF the status of an SDT and SDGT. The Treasury subsequently issued a blocking notice which blocked all funds, accounts and property of HFL and prohibited any transactions involving such funds, bank accounts and property. The accounts were also seized. OFAC took the decision based on partially classified information (statements from foreign police informers and a secret FBI report). The District Court allowed the administration a wide margin of discretion and considered secret evidence admissible if it could be confirmed by supporting evidence. It also became clear from the Global Relief Foundation (GRF) case that the judiciary has only very limited powers in testing administrative acts in the field of foreign policy and security. In this case, GRF had been the subject of a FISA search and subsequently of an OFAC blocking order. Upon its application for an injunction order to undo the measures imposed, the GRF was told that ‘as a general principle this Court should avoid impairment of decisions made by the Congress or the President in matters involving foreign affairs or national security’\textsuperscript{28} and that no violations of civil rights under the Bill of Rights could be established. The Court, not the attorneys, was given permission to inspect the evidence ex parte and in camera. This is obviously a far cry from full judicial review, and only a test of the reasonableness of an administrative decision.

The US is continuously updating the list. On 11 October 2001, 39 items were added, especially Al-Qaeda-related ones. On 2 November 2001 quite a few Saudi Arabian businessmen were added and on 22 November 2001, another 22 were added, among which Hezbollah, three Colombian organisations, the IRA, and the Jihad. Meanwhile, the list has become a document of 86 pages filled with thousands of organisations and persons.\textsuperscript{29} In 2004, many NGOs were added that are suspected of being associated with SDGTs. The 9/11 Commission does also recommend that vigorous effects to track terrorist financing must remain front and center in US counterterrorism efforts.\textsuperscript{30}

The IRTPA (2004), in addition to the judicial review procedure, introduces a review of designation as FTO upon petition. However, the organisation must provide evidence in the petition that the relevant circumstances are sufficiently different from the circumstances that formed the basis of the designation. The Decision is taken by the executive (The Secretary of State), who may consider classified information, not subject to disclosure, in making a determination in response to a petition for revocation.

6.2. Military committees and enemy combatants

On 13 November 2001, President Bush, without consulting Congress, signed a military order\textsuperscript{31} for the trial of enemy aliens\textsuperscript{32} by military committees. In the past, members of Al-Qaeda, who were suspected of playing a part in the 1998 bombings of the US embassies in Kenya and Tanzania in which 200 people were killed, were successfully prosecuted and tried by general criminal courts in the US. As the Commander-in-Chief of the army, the President can have people tried before military committees for violations of the laws of war. This power is based on Articles I and II of the US Constitution.\textsuperscript{33}

\textsuperscript{27} Holyland Foundation for Relief and Development v. Ashcroft, 219 F. Supp. 2d 57.
\textsuperscript{29} See http://www.treas.gov/offices/enforcement/ofac/sanctions/terrorism.html.
\textsuperscript{30} http://www.gpoaccess.gov/911, p. 382.
\textsuperscript{31} Military Order, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg 57, 833 (13 November 2001).
\textsuperscript{32} See 50 USC Sec. 21.
\textsuperscript{33} See for a thorough legal analysis of the legal aspects under national and international law, D.M. Amann, Guantánamo, Columbia Journal of Transnational Law, 2004, 263-348.
problem is that wars are declared upon states and that there has been no official declaration of war against Al-Qaeda. Furthermore, members of Al-Qaeda are not citizens of a particular state to whom the Enemy Alien Act applies. The Supreme Court has however recognised that the US can be in a state of war without a formal declaration of war, which does not mean however that military committees can be established for no further reason. During the civil war, President Lincoln had given the army permission to detain citizens who were suspected of treason and rebellion and keep them in detention without judicial authorisation and to deny them habeas corpus. Still, in Ex parte Milligan the Supreme Court held that Milligan, who was the leader of a secret organisation rebelling against the government, could not be tried by a military court because he was a resident, he was not under arms, the civil courts were functioning, the country was not occupied and President Lincoln did not have a mandate from Congress to establish military courts. However, in Ex parte Quirin the Supreme Court declared President Roosevelt’s Executive Order 2561, which provided for the military trial of German saboteurs as enemy belligerents during WWII, to be constitutional. It must be noted, though, that this executive order was based on the declaration of war by Congress and did not impair the habeas corpus proceedings or other legal remedies. Of crucial importance is certainly the decision of the Supreme Court in Johnson v. Eisentrager concerning the trial of German soldiers who were taken prisoner in China and tried by military committees. The Supreme Court held that the term ‘any person’ in the Fifth Amendment ‘does not extend its protection to alien enemies engaged in hostilities against us’.

The Bush I administration has applied concepts from public international law and humanitarian law to terrorist organisations and their members. Their actions have been qualified as acts of war committed by foreign attackers, and not initially as criminal offences, with the result that the principles of criminal (procedural) law do not essentially apply. The persons involved are not suspects, but enemy combatants, who so far have no civil rights under American jurisdiction. An estimated 600 to 800 suspected Taliban and Al-Qaeda members of 40 different nationalities have been held prisoner since January 2002 in the Delta Z-Rayin camps in Guantánamo without having been charged or tried. Some have meanwhile been released in small numbers or transferred to allied countries, leaving some 600 persons in detention. It cannot be ruled out that the vacancies have been filled anew with fresh prisoners from Iraq, Afghanistan, Pakistan, etc. Furthermore, a number of US citizens are also still being held in military bases on the American continent.

Nowhere does the term enemy combatant appear in the Patriot Act. The legal parallel between war and international terrorism has been strongly criticised in the literature. At the same time, moreover,

34 Prixe Cases, 67 US (2 Black) 635, 667-7 (1862).
35 71 US (4 Wall.) 2 9(1866).
40 See Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1048 (C.D. Cal. 2002), affirmed in part and vacated in part, no. 02-55367, 2002 WL 3154359, at *10 (9th Cir. 18 November 2002), vacating the district court’s broad determination that detainees do not have rights to habeas corpus review under any circumstances, but upholding the finding that the petitioners in this case lacked standing; Rasul v. Bush, 215 F. Supp. 2d 55, 72-73 (D.D.C. 2002).
President Bush has restricted the application of international humanitarian law. For a long time, the Bush I administration maintained that the Geneva Conventions did not apply and that the status of prisoner of war did not apply either. In February 2002, certain rights were granted under the Geneva Conventions to Taliban fighters, but not to Al-Qaeda members. Nobody has been recognised as a POW; they are and remain unlawful combatants, who can be questioned at will with no or limited rights for as long as the war on terrorism lasts.

The military order sets aside a number of basic principles of constitutional civil rights and rules of general criminal procedure. Both the organisation and the dispensation of justice by the military committees is special law. Not only are the prosecutors and the judges members of the military, but also the attorneys, or they are civilian attorneys who have been screened by the government and have agreed to the rules of procedure. The entire procedure and the composition of the committees, including the attorneys’ identity, may be kept secret. Habeas corpus does not apply, the Miranda rights do not apply, the rights of the defence are limited, special rules of evidence are in force and there is no jury. Appellate proceedings have been provided for, but not before a federal appeals court of the regular criminal law judiciary. The appeal is lodged with a military panel and the final decision concerning guilt and punishment lies with the President. This is therefore a court procedure in the hands of the executive, which by definition fails to meet the requirements of independence and impartiality. In defence of trial by military committees the Bush I administration mainly argues that the military committees ensure speedy proceedings which do not jeopardise secret investigative information and surveillance methods and operations and thus guarantee public security. The government also contends that the military committees offer better protection to judges and witnesses against potential terrorist threats.

Also from the first elaboration of the further rules of procedure and evidence by the Department of Defense and the DoJ it emerges that many fundamental rights from criminal procedure and the Bill of Rights are not recognised in advance. There is no public trial (proceedings take place in camera), the attorneys do not have access to the witnesses of the other party, their legal privilege is not recognised and they need the permission of the Department of Defense to communicate with the press. Communications between the attorney and the witnesses are recorded. Where evidence is concerned, all evidence that ‘would have probative values to a reasonable person’ would be lawful. Hearsay evidence would be admissible. The prosecution would not be obliged to show the chain of custody of the evidence which means that the origin and the manner of its collection is no longer tested. Secret FISA evidence and secret surveillance evidence is also admissible, in camera, ex parte. It is feared that as a result evidence obtained through torture abroad will be used in the dispensation of justice by military committees. Two thirds of the military committee instead of a unanimous jury can pass a guilty verdict by a majority of two thirds of the votes. If the committee reaches the verdict that the person involved is not guilty, the committee’s chairman can nevertheless still decide that he is. Unanimity is required for imposing the death penalty.

42 The National Association of Criminal Defense Lawyers numbering 11 000 members has advised its members not to act as legal counsel and has thus rejected the limitations applied to the rights of the defence.
43 Department of Defense Military Commission Order no. 1, Procedures for Trials by Military Commissions of certain Non-United States Citizens in the War Against Terrorism, 21 March 2002 and Military Instruction no. 8, Administrative Procedures (30 April 2003), see www.defenselink.mil. The latter document contains the applicable substantive law. For a critical analysis, see http://hrw.org/backgrounder/usa/military-commissions.htm#P18_1065.
In the summer of 2003 the Bush I Administration declared six prisoners in Guantánamo ready for trial, among whom are the British nationals Moazzamde Begg and Feroz Abassi and the Australian David Hicks. The courtroom is finished, the prosecutors have been appointed, but rules of procedure and evidence are still lacking. By now, defence attorneys have also been appointed in two cases, but still there are no formal charges. In ad hoc negotiations with the UK and Australia – both allied countries – it has been agreed that the death penalty will not be demanded against the persons involved, that they will be assisted by attorneys from their country of origin and that the legal privilege will be respected. The treatment of Capt. Jams Yee, the Muslim chaplain in Guantánamo, who is accused of smuggling confidential information, is food for thought. After his arrest in September 2003 he spent months in close military confinement and the Defense Department had allowed it to appear that he could be sentenced to death for these offences. However, in March 2004, when it emerged that the evidence against him was very weak, it was decided to dismiss the case. The official version is that the intention is to protect information in the interest of national security. The New York Times in its editorial, however, unequivocally labelled the proceedings as Military Injustice. Meanwhile, even military attorneys have begun to severely criticise the lack of due process before the military committees.

7. Judicial testing of the Patriot Act and the special government legislation
Concerned parties and interested third parties, NGOs and local authorities have legally challenged the serious limitation of civil rights. This has led to a stream of court cases at local and federal level.

7.1. Civil rights, enemy aliens and open government
A substantial number of citizens and organisations have taken legal action to claim open government in relation to the post-9/11 detentions and removal procedures. Both media groups and NGOs have invoked the Freedom of Information Act (FOIA) in order to obtain access to the names of the detainees, the location and duration of their detention and information concerning the proceedings. Quite a few of these cases have been fought out up to the Federal Courts of Appeal, with conflicting outcomes. The North Jersey Media Group, for example, succeeded in its case against AG Ashcroft and Judge Creppy before the District Court and was given permission to attend removals related to 9/11. However, this decision was completely reversed before the US Third Circuit Court of Appeals which gave priority to significant national security concerns. A number of courts have resolutely let security prevail over the FOIA and the constitutional First Amendment right to access to information. Others have ordered the government only to disclose names or to make available to the press transcripts of closed hearings. For example, Federal Court Judge Gladys Kessler in August 2002, at the request of a number of NGOs in a case against DoJ and INS, decided that the government had to at least disclose the names of 150 prisoners. She considered that, notwithstanding the executive’s duty to protect the people, these tasks had to be exercised within the framework of the Constitution and the rule of law. On appeal, however, it was decided that the names of the detainees and their attorneys did not need to be revealed. Most of the 9/11 prisoners have meanwhile effectively been removed. The Center for Constitutional Rights has brought a class action concerning illegal detention before the District Court in

45 In Australia, a request for the disclosure of documents in the context of open government was denied, due to the fact that this could impair foreign relations.
46 For the charge sheet, see http://news.findlaw.com/hdocs/docs/dod/armyyee101003chrg.pdf.
Brooklyn, which concerns a case on the principle which the NGO would like the Supreme Court to hear. In addition, the Reporters Committee for Freedom of the Press is attempting to get the M.K.B. case before the Supreme Court.

7.2. Material support for terrorism

There have also been legal proceedings concerning the scope of the anti-terrorism provisions themselves, in particular concerning the relationship between material support and the constitutional right of the First Amendment. In January 2004, the US District Court of California in the case Humanitarian Law Project (HLP) v. John Ashcroft et al. tested Sec. 805(a)(2)(B) of the Patriot Act, making it an offence to provide expert advice or assistance to FTOs, against the Constitution. The Court arrived at the conclusion that this concept is so vague that there is a real danger that HLP will no longer be able to provide legal advice to the Kurdish PKK concerning compliance with human rights. This is due to the fact that no distinction is made as to the nature of the advice or expertise: “expert advice or assistance” could be construed to include unequivocally pure speech and advocacy protected by the First Amendment or to encompass First Amendment protected activities’. However, the Court did not consider that the provision in itself poses a danger to the extent that any enforcement of it should be prohibited. The legal remedies offer sufficient guarantees to safeguard the civil right in question. For this reason, the injunction is limited to the activities of the persons concerned and no nationwide injunction is issued, but HLP can continue its activities as regards the PKK without running the risk of being prosecuted for this under Sec. 805 of the Patriot Act.

On the other hand, the Holy Land Foundation and the Benevolence International Foundation lost their cases against Ashcroft. The D.C. Circuit Court found that the blocking orders complained of were an important instrument of US foreign policy.

7.3. Terrorism and contestable evidence in general criminal law

In criminal law terrorism cases, the DoJ and the AG have opted for the military line and as a consequence for confinement under the statute of enemy combatants and trial by military committees. In a few cases, the regular criminal courts are competent, such as in the Zacarias Moussaoui case, concerning a French national of Moroccan birth who was detained in August 2001, i.e. before the attacks, on suspicion of a breach of immigration law. At that time, he was taking flying lessons. After the attacks, he was connected with Al-Qaeda and the terrorist acts of 9/11. Moussaoui is accused of being the twentieth hijacker whom circumstances prevented from boarding and of being jointly guilty of the death of 3 000 people. He has pleaded not guilty, and is risking the death penalty on four of the six charges against him. According to Moussaoui, several witnesses, among whom is Bin Al-Shibh, could prove his innocence. For this reason, he wishes to have Bin Al-Shibh questioned as a witness. The problem is, however, that Bin Al-Shibh, who was detained in Pakistan, is suspected of being the intermediary between Moussaoui and the 9/11 command and is being held as an enemy combatant overseas, presumably in Guantánamo. His statements are classified and can therefore not be contested. Both the District Court and the US fourth Circuit Court of Appeals have recognised Moussaoui’s Sixth Amendment right to subject the witness Bin Al-Shibh to questioning, as one of the fundamental rights.

57 Under the First Amendment, the Court can issue injunctions without any prosecution having taken place. In this case, it was recognised that there was sufficient danger of prosecution.
59 For all relevant information, see http://news.findlaw.com/legalnews/us/terrorism/cases/index.html#moussaoui.
61 Bin Al-Shibh took care of the financial transactions. He further wants to have questioned Abu Zubaydah, a former head of a training camp in Afghanistan, and Ibn-Al-Shaykh al-Libi, a high-ranking paramilitary, who are both detained.
62 The request was denied for the other two witnesses.
of a fair trial. In this case, District Court Judge Brinkema in January 2003 ordered that the testimony be recorded on video and that the video be made available to the jury or that the witness be heard by teleconference. AG Ashcroft continued to underline the fact that this would result in ‘the unauthorized disclosure of classified information’. The AG refused to implement the court decision, which was formally confirmed in a secret affidavit in mid-July 2003. The court could hold the government in contempt of court, but could also declare the Moussaoui case inadmissible, exclude part of the evidence or instruct the jury unfavourably for the government, preventing a death sentence. Judge Brinkema opted to exclude the death penalty and to strike the part of the indictment related to 9/11, as in her view there could be no fair trial under these circumstances. The part of the indictment concerning conspiracy to commit the Al-Qaeda actions has remained intact. Pro-Bush lawyers argue that in the given circumstances the best solution would be to even now declare Moussaoui an enemy combatant and transfer him to military jurisdiction, where he would anyway be barred from relying on the recognised constitutional right to the questioning of witnesses: ‘Although civil libertarians would likely decry his relocation to Guantánamo, the reality is that taking Moussaoui out of the civilian justice system would both better address security concerns and create a firewall so that existing constitutional principles in civilian trial don’t start to bend under the weight of the war on terror’. However, the government lodged an appeal against the decision with the US 4th Circuit Court of Appeals, which is known to be conservative, and which on 22 April 2004 decided to set aside the exclusion of evidence and of the possibility of a death sentence. On the other hand, the three-judge panel also decided that Moussaoui could not be deprived of the right to question detained Al-Qaeda members as witnesses and that he was entitled to present their testimony to the jury. Judge Brinkema was ordered to elaborate a compromise which would allow the witnesses to be questioned in a way which would not prejudice their questioning by the government in the framework of the war against terrorism. The defence has meanwhile lodged an appeal with the full Court of Appeal.

Criminal convictions have meanwhile been delivered against Richard Colvin Reid, known as the shoe bomber and John Walker Lindh, the American Taliban fighter. Reid was sentenced to life imprisonment for the attempted use of a weapon of mass destruction, attempted murder and interference with the flight crew. Lindh was sentenced to twenty years in prison for material support of a prohibited terrorist organisation on the basis of a guilty plea and plea agreement. The remaining charges were dropped as a result of the plea agreement.

7.4. Terrorism, enemy combatants and military committees

Most suspects of terrorism offences have, however, been removed from the ordinary criminal law proceedings by the American government. By declaring them enemy combatants they can be held in military detention while awaiting trial by a military committee. Both foreign and American citizens have been labelled enemy combatants. It is impossible in this context to deal with all cases in detail, but the Hamdi, Padilla and Rasul cases provide a representative glimpse of the legal limbo in which the persons concerned find themselves. On 18 June 2004, the Supreme Court delivered decisions on the

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66 See http://news.findlaw.com/hdocs/docs/moussaoui/ smouss102403gbrf.pdf for the government’s petition in which references to concrete facts or documents have been regularly blackened out, as these, according to the government, concern confidential information in the protection of national security.
67 See Westlaw, 2004 WI 868261 (4th Cir. (Va.)).
68 For all relevant documents, see http://news.findlaw.com/legalnews/us/terrorism/cases/index2.html#reid.
70 See http://www.usdoj.gov/05publications/05_2.html for the original indictment.
principle in these cases, concerning both the legal protection of the field combatants, who are detained
in Guantánamo, and of the enemy combatants, who were arrested and detained in the US itself.
Yaser Esam Hamdi\textsuperscript{72} was taken prisoner in Afghanistan and after a brief stay in Guantánamo he was
transferred to a military detention centre in Virginia, when it emerged that he was a US citizen. Since
April 2002, he is being held without having been formally charged, without the right to an attorney,
without the right to habeas corpus proceedings, etc. Friends of Hamdi have, with varying success,
brought legal actions against the Department of Defense. The District Court\textsuperscript{73} has appointed an attorney
and ordered the government to provide this attorney with free access to the detainee and to respect legal
privilege. On appeal, the US 4th Court of Appeals decided that the District Court (Hamdi I) had taken
insufficient account of national security interests and that the decision was insufficiently reasoned. The
District Court subsequently decided that the grounds for detention – a statement by military advisor
Mobbs – were insufficient to deprive the person concerned of his rights and that the government had to
disclose all kinds of documents, among which the statements from Hamdi, for in camera review. At
least both courts found that the detention could form the subject of judicial control. On appeal, again
with the 4th Circuit\textsuperscript{74} (Hamdi II), the Court decided that military detention for an indefinite period of
time was not only in conformity with the law, but also immune from judicial control, now that Hamdi
had been taken prisoner in an active war zone in a foreign country. The statement by Mobbs was
sufficient evidence of this. In January 2004, the Supreme Court decided to grant a writ of certiorari and
answer a few fundamental questions.\textsuperscript{75} The Supreme Court\textsuperscript{76} recognises the Presidential prerogatives,
and thus the concept of enemy combatant, on the basis of the Authorization for Use of Military Force
Act. However, this does not provide for indefinite detention and is intended for detention in war zones
and moreover limited to ‘necessary and appropriate force’. Even if the detention would be lawful, the
second question is what the detainee’s constitutional rights would be to challenge his status of enemy
combatant. Based on the special constitutional interests – read: the prerogatives of the President and the
government – the government has argued that the balance of powers should be respected and that the
judiciary should display reticence in these matters. The Supreme Court uses clear and edifying
language: ‘Striking the proper constitutional balance here is of great importance to the Nation during
this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values
that this country holds dear or to the privilege that is American citizenship. It is during our most
challenging and uncertain moments that our Nation’s commitment to due process is most severely
tested (...) We have long since made clear that a state of war is not a blank check for the President when
it comes to the rights of the Nation’s citizens.’ The Supreme Court therefore adds that ‘due process
demands that a citizen held in the US as an enemy combatant be given a meaningful opportunity to
contest the factual basis for that detention before a neutral decision maker’. The Court expressly

\textsuperscript{72} See for all relevant documents, http://news.findlaw.com/legalnews/us/terrorism/cases/index.html#hamdi. See also

\textsuperscript{73} Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002).

\textsuperscript{74} Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

\textsuperscript{75} The following questions were at issue:
1. Does the Constitution permit executive officials to detain an American citizen indefinitely in military custody in
the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to
question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized
abroad in a theater of the War on Terrorism and declared by the executive to be an ‘enemy combatant’?
2. Is the indefinite detention of an American citizen seized abroad but held in the US solely on the assertion of
executive officials that he is an ‘enemy combatant’ permissible under applicable congressional statutes and treaty
provisions?
3. In habeas corpus proceedings challenging the indefinite detention of an American citizen seized abroad, detained
in the United States, and declared by executive officials to be an ‘enemy combatant’, does the separation of powers
doctrine preclude a federal court from following ordinary statutory procedures and conducting an inquiry into the
factual basis for the executive branch’s asserted justification of the detention?

\textsuperscript{76} Westlaw, 2004 W1 1431951 (US).
indicates that this can be done before a military tribunal and that it is possible to reverse the burden of proof, as long as the person concerned is given a fair chance to gainsay this, which also presupposes the right to an attorney. Questioning by security officers holding a person in custody ‘hardly constitutes a constitutionally adequate fact finding before a neutral decision maker’. Clear language, but a divided Court nevertheless, as there were three dissenting opinions, in which especially Justice Thomas lashed out strongly and argued that: the judiciary should not test and assess the prerogatives of the executive; national security should not be subjected to ‘judicial second-guessing’ and gathering intelligence in the framework of the war against terrorism may necessitate detention and the judiciary is not in a position, nor should it desire to be the judge of that. In September 2004 Hamdi has been transferred to Saudi-Arabia after bilateral negotiations between the US and Saoudi-Arabia. He lost his US citizenship and cannot leave the Saoudi-Arabia territory.

The Padilla case is interesting, because Padilla was detained at an airport in the US, instead of on a foreign battlefield. José Padilla, an American citizen who converted to Islam and therefore uses the name Abdullah al Muhajir, is suspected of having been active in Al-Queda and to have plotted to explode a radiological dispersion bomb (or ‘dirty bomb’) in the US. The evidence against him is secret. First Padilla was a suspect under criminal law and he was assigned an attorney, but a few months later the President decided that he was an enemy combatant and his case was therefore transferred from the DoJ to the Department of Defense. The District Court recognised that there was military jurisdiction, but was also of the opinion that Padilla had the right to challenge the qualification of enemy combatant by means of habeas corpus proceedings and also held that he had the right to an attorney. The suspect furthermore has the right to submit his own evidence which has to be offset against the government’s evidence in contentious proceedings. The Department of Defense has refused to discuss this. On appeal the US 2nd Court of Appeals in November 2003 decided that Padilla could not be labelled an enemy combatant and that after 19 months of pre-trial detention his illegal detention had to end or the Presidential decision had to be tested on the merits and that the government had to show the basis for his detention beyond a reasonable doubt. In this decision, the difference with the Hamdi case was expressly underlined. The Supreme Court has still not answered the questions presented. After all, the Court was of the opinion that the jurisdiction of New York, the place of jurisdiction under regular criminal law, was the incorrect starting point and that it should have been the jurisdiction of South Carolina, where he was in military detention and where the responsible military staff directly supervised his detention. As a result, the case was referred back to the competent jurisdiction. Objections were raised against this in sharply dissenting opinions, as the secret transfer from Justice to Defense took place on the basis of ex parte proceedings implementing the President’s order and this occurred at the same time when habeas corpus proceedings had been instigated. For this reason, Justices Stevens, Souter, Ginsburg and Breyer urged that the issue should not be clouded: ‘At stake is nothing less than the essence of a free society (...) Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process (...) Executive detention of subversive citizens (...) may not, however, be

80 The following questions were asked:
1. Whether the President has authority as Commander in Chief and in light of Congress’s Authorization for Use of Military Force, Pub. L. no. 107-40, 115 Stat. 224, to seize and detain a US citizen in the US based on a determination by the President that he is an enemy combatant who is closely associated with Al-Qaeda and has engaged in hostile and war-like acts, or whether 18 USC Sec. 4001(a) precludes that exercise of Presidential Authority.
2. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.
justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. In any case, the competent jurisdiction will have to take the decision of the Supreme Court in the Hamdi case into consideration.

Finally, the Supreme Court delivered a judgment in combined cases Rasul et alia v. US.\(^{81}\) The claimants, Guantánamo detainees from the UK, Australia and Kuwait, were arrested in Afghanistan and Pakistan at the beginning of 2002 and have now been in detention for over 24 months without having been charged, without the right to an attorney and without trial. The District Court\(^{82}\) has combined their cases and decided that the Supreme Court’s judgment in Johnson v. Eisentrager\(^{83}\) could be followed here. This means that when an alien finds him/herself outside the territorial sovereignty of the US, he/she has no means of redress to apply the US Constitution. The District Court rejected the argument that this is only true for enemy aliens. No alien held outside the territorial sovereignty of the US can rely on habeas corpus, for example. The US Court of Appeals for the District of Colombia Circuit\(^{84}\) took over the judgment of the District Court and pointed out that the Supreme Court has reconfirmed the criteria in US v. Verdugo-Urquidez.\(^{85}\) However, the Supreme Court held that the US, despite the fact that it does not have full sovereignty over the base, still exercises full and exclusive jurisdiction over it. This means that the federal courts in the US are quite competent to decide on the legality of detentions and the application of constitutional guarantees. With this important decision, the Supreme Court has put an end to the legal limbo of Guantánamo and reinstated the right to habeas corpus in this form of administrative military confinement and the incommunicado regime. Of course, it remains to be seen how the US courts will implement this legal protection in the light of the Presidential prerogatives concerning war, foreign policy and national security. The Hamdi case can serve as a source of inspiration when dealing with the merits (e.g. legality of arrest and detention, access to an attorney, denied questioning, etc.). It is also as yet unclear whether this judgment will also have an effect on the rights of detainees in the hands of the US in military centres in Asia, etc., now that the Supreme Court has abandoned the criterion of territorial jurisdiction and replaced it with the following: ‘habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts within (its) respective jurisdiction’ if the custodian can be reached by service of process’. Justice Scalia in a thunderous dissenting opinion spoke of the extension of habeas corpus proceedings to the four corners of the world. His concluding sentence speaks volumes and explains why he closed with ‘I dissent’ instead of the usual ‘I respectfully dissent’: ‘For this Court to create such a monstrous scheme in time of war, and in frustration of our military commander’s reliance upon clearly stated prior law, is judicial adventurism of the worst sort.’ He also called upon Congress to intervene legislatively.

The Bush I administration considered that it could meet the Supreme Court’s wishes by establishing an annual secret control procedure before a panel of three military officers, who have to assess whether their release constitutes a threat to national security. Decisions of the panel need not be reasoned and are not open to appeal.\(^{86}\) In December 2005 about 210 cases have been reviewed by the panels. Two detainees have been released by the panels. Several detainees did refuse to cooperate, because of the fact that they have neither the right to an independent attorney, nor access to the file. It is doubtful

\(^{81}\)http://www.supremecourts.gov/opinions/03pdf/03-334.pdf. The following question was asked: ‘Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba’.

\(^{82}\) 215 f. Supp. 2d 55.


\(^{84}\) 321 f.3d 1134.

\(^{85}\) US v. Verdugo-Urquidez, 494 US 259 (1950). This case deals with kidnapping (officially termed ‘abduction’) by US authorities in Mexico.

\(^{86}\) N.A. Lewis and D. E. Sanger, Administration changing review at Guantánamo Bay, NY Times, 1 July 2004.
whether this system corresponds to a ‘meaningful and fair opportunity before a neutral decision maker’. From the very start problems have occurred in connection with the independence of certain military officers and as regards the legal quality of the procedure. This is the reason why several proceedings of the panels have been challenged before the regular federal courts. In November 2004 The US District Judge Robertson, dealing with Hamdan’s habeas corpus appeal in the federal court in Washington D.C, issued an order to suspend the panel procedure, as he wanted to fully apply the third Geneva Convention.87

8. Conclusion
In 1998, Chief Justice William Rehnquist88 wrote that civil rights may be limited in times of emergency. During a lecture for the New York City Bar Association, Chief Justice Stephen Breyer89 claimed that the Constitution always matters, perhaps particularly so in times of emergency. These opinions of two justices of the Supreme Court illustrate the heart of the problem. To what extent does the US Constitution provide possibilities for special legislation in times of crisis (war, insurrection, state of emergency)? May essential elements of the rule of law, like equality before the law and fair trial, simply be set aside for certain citizens? Are secret evidence, secret trial, administrative arrest and far-reaching discretionary powers of investigation for police and security services compatible with the Constitution? How are the legislature and the executive subject to judicial control in the implementation of special legislation?

The special Congressional and Presidential legislation since 11 September 2001 is not unique in the history of the US. It is in part an implementation of the constitutional prerogatives of the President in the field of defence, security and foreign affairs. Nevertheless, a clear paradigm switch has taken place. Congress has opted for far-reaching delegation to the executive, with many blanket laws which the executive can interpret at will and without any built-in mechanisms for effective political control. In its implementation of these laws, the Bush I Administration has unleashed the rhetoric of war upon terrorism. The motto is cut down the laws to get at the devil. Insofar as the constitutional state and the fundamental rights and legal guarantees it establishes form an obstacle, they have to be (temporarily) cleared out of the way to make room for concepts of national security. Furthermore, the executive in question is not very taken with abundant transparency and attempts to keep as much information concerning legislation, administration and dispensation of justice secret. Under the Bush I administration, this secrecy has exceeded a limit and is undermining essential concepts of the rule of law, such as accessible legislation, open government and the public administration of justice. Incommunicados become part of the system and attorneys are having great trouble exercising their profession. The rule of law continuously loses out to the security state. Secrecy dims the light of justice and causes the basic ideas of the Enlightenment and modern criminal law to shine less brightly. The 9/11 Commission does not recommend any changes in this respect. It only recommends increasing reporting duties to Congress. These have been integrated in the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004. Title VI90 provides for reporting requirements of the AG to the intelligence committees of Congress concerning the use of coercive measures (electronic surveillance, physical searches, pen registers, access to records) under the FISA, the secret warrants and the use of FISA-information in criminal proceedings. The IRTPA also establishes a Board on Safeguarding Privacy and Civil Liberties. This Board has access to all relevant information in all relevant agencies, but the bill does explicitly include the fact that the Board is working under the responsibility of the NID and the President and that the NID, in consultation with the AG, can decide to withhold certain information to protect national security, sensitive legal information or counterterrorism information.

88 William H. Rehnquist, All the Laws but One: Civil Liberties in Wartime (1998).
90 Section 6002.
Civil liberties are not fully guaranteed by a Board being part of the executive and only having access to information and practices if compatible with the higher interests of national security. Once again the protection of civil liberties is made dependent upon the security agenda.

In addition to secret criminal law, there are also clearly several speeds within criminal law and criminal procedure. Criminal law makes a distinction between ordinary citizens and enemies. The criminal law of the enemy (enemy combatants, enemy aliens) is based on starting points which reach back to criminal law theories developed in the 1920s and 30s which were based on dangerousness instead of unlawfulness. Mezger,\(^\text{91}\) for example, spoke of Täterstrafrecht, Lebensführungsschuld and Lebensentscheidungsschuld, in which criminal law objectifies certain categories of citizens based on race, creed or nationality and in which it no longer matters whether criminal law intervention takes place post or ante-delictum. The criminalisation of enemy aliens and enemy combatants and the launching of the concepts of preventive war and pre-emptive strike\(^\text{92}\) in the field of justice fit in with this context. In criminal procedure, a distinction is made between the common criminal procedure and the FISA procedure. The reach of the special FISA procedure, secret and based upon intelligence investigation, is constantly being increased, both ratiône materiae, personae, in such a way that has become a parallel to the investigative procedural framework, also in domestic criminal cases. The Patriot Act has ensured that FISA criminal law in the field of security may also be used by the FBI in the fight against domestic terrorism. Secret special methods of investigation have been expanded and the classified nature of much of the evidence is resulting in cases that are more and more often dealt with in camera or ex parte. In addition, the powers of investigation of the intelligence services have also been broadened and their information may be used as secret evidence in criminal procedure. It may be feared that the secret dispensation of justice will only promote prohibited questioning techniques, which have been qualified as stress and duress techniques. Finally, the Bush I administration also brought about a considerable militarisation of criminal law justice, both by assigning investigative tasks to intelligence services and military units and by the establishment of the military committee for the enemy combatants. Due to the limited scope of application of the Constitution and the systematic non-recognition of international rights and international jurisdiction, Guantánamo has become a symbol of legal limbo or a legal black hole. The achievements of the Enlightenment and the French Revolution, which were so dear to the Founding Fathers of the US and its Constitution, seemed to have been lost in present-day constitutional relations.

Also within the regular criminal law system reforms have been substantial. As appears from the Patriot Act, the powers of the FBI have been greatly extended. To the extent that judicial control is still required, the threshold for it has been lowered considerably. As a consequence, judicial authorisation threatens to deteriorate into a rubber stamp or digital fiat. For a great many powers of investigation, such as requisitioning stored information from service providers, no judicial authorisation whatsoever is now required and access to information has been subjected to extremely low thresholds. The disclosure duties of service providers and the requisitioning powers of the FBI are so far-reaching that we may speak of actual dragnet tactics in collecting information. It is often not permitted that the persons concerned are informed of the fact that information belonging to them or concerning them has been disclosed.

The effectiveness of important parts of the Patriot Act is not limited in time, such as for example the secret search or the pen/trap orders or the single jurisdiction warrants. The Bush I Administration has already requested Congress to extend the remaining provisions, which expire at the end of 2005. In addition, DoJ has already elaborated a ‘Son of the Patriot Act’\(^\text{93}\) or Patriot Act bis,\(^\text{94}\) which is a second

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\(^{91}\) Mezger, Zeitschrift für die Gesamte Strafrechtswissenschaft, 57, 1938, p. 689.


\(^{93}\) C. Lane, US may seek wider anti-terror-powers, in Washington Post, 8 February 2003. For the text, see http://www.eff.org/Censorship/Terrorism_militias/patriot2draft.html.

framework law. The intention is to put the Bill before Congress in due time. However, the text has leaked out and is known to contain even more drastic limitations of fundamental rights by the further extension of secret FISA criminal law in the field of security, broader powers for the AG with respect to enemy aliens and broader powers of supervision in the framework of national security.

Bush’s Presidential victory in November 2004 underlines that the new republicanism will be able to realise its vision of a new constitutional order. It remains to be seen if the Bush II administration will further expand the anti-terrorist emergency legislation. The 9/11 Commission does underline the fact that some of the most controversial provisions of the Patriot Act are to to meet their sunset at the end of 2005. However, the 9/11 Commission is careful. It does not exclude that the Federal Government may need additional powers and may need to enhance the use of its existing powers. It is aware of the concerns about the restrictions of freedoms and civil rights and the concerns regarding the shifting balance of power to the government and limits its recommendation for that reason to a full and informed debate on the Patriot Act. The Bush I administration was alleged to be seeking a permanent status for the emergency legislation and to wish to expand police powers even further and also to bring the war on drugs under the scope of application of the anti-terrorist law. Security and anti-terrorism will remain a top priority for the Bush II administration. The nomination of Alberto R. Gonzales, known as the architect of the Guantánomo legislation, as Attorney General indicates that Bush wants to further expand the emergency legislation. It is a pity that the Congress hearings of Gonzalez in January 2005 concentrated so unilaterally on the use of torture against terrorism suspects. Gonzalez pledged to abide by all international law in this respect. However, he was not submitted to questioning about strengthening the Patriot Act and further integrating foreign and domestic anti-terrorist legislation and intelligence gathering. It seems that members of Congress themselves are still not sufficiently aware of the importance of the rule of law in times of emergency.

Meanwhile, the Supreme Court has delivered some principled judgments to ensure that security mindedness does not marginalize the constitutional state. The question is whether the Supreme Court has made itself sufficiently clear. Is the decision concerning detention in Guantánamo also applicable to detention in Afghanistan? Why has the Supreme Court not provided stricter requirements for the body which is to test habeas corpus and legal protection? Why has the Supreme Court paid little or no attention to applicable international law? Legal proceedings at the state level as a result of the Supreme Court decisions and the upcoming legislative action under the Bush II administration will determine the degree of constitutionality of the anti-terrorism policy in the US and will therefore also partly determine European policy after the attacks in Madrid on 11 March 2004. We can only hope that both the judiciary and the legislator are fully aware of the fact that undermining the democratic constitutional state and its civil rights and freedoms is the weakest possible answer to one of the largest threats this democratic constitutional state has ever faced.

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95 This is mainly inspired by the political philosophy of Leo Strauss, a fervent critic of liberalism. See http://www.straussian.net/.