

CIVIL LIBERTIES IN AN AGE OF INSECURITY

BABER ZAFAR

I. INTRODUCTION

Times of war and conflict, when national security is of prime concern, are often stages in a nation's existence during which civil liberties of many go unrecognized, and basic human rights are disregarded. "Civil Liberties" can be defined as "guarantees of freedom of speech, press, or religion; due process of law; and other limitations on the power of the state to restrain or dictate the actions of individuals"¹. The infringement of such legal and moral authorities gives rise to numerous domestic and international concerns of a complex and intricate nature. One of these concerns is to what degree does the possession of judicial and prosecutorial powers by the Executive branch of the government of the United States of America threaten the civil liberties of those living in the U.S and around the world, as provided by various national and international law. The Executive branch of the U.S government has provided itself, through the possession of such powers, with the capacity to override the judicial office. Thus, with this action, a number of fears have arisen in the aftermath of the attacks of September 11th, 2001.

II. BACKGROUND

To recognize the implications of the command of the Executive office over judicial and prosecutorial powers, in addition to any critical analysis, it is imperative that we understand the internationally recognized doctrines that protect the civil liberties and basic rights of the human race. Three of these doctrines that will be referred to constantly in this essay are The United

¹ Dixon, Angie; "[Definitions of Freedom](http://ilovefreedom.com/model/definitions.htm)"; September 11th, 2002; Mark and Claudia Dixon Family; 08 December, 2002; <<http://ilovefreedom.com/model/definitions.htm>>

States Constitution, The Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights.

The Sixth Amendment of the United States Constitution provides a precise description of the rights that are furnished to an individual accused of committing crime, and the processes that should be involved in order to bring him/her to justice. Amendment VI states that when an individual is being prosecuted for any criminal action, the offender “shall enjoy the right to a speedy and public trial by an impartial jury,”² and “to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense” (U.S. Constitution). Therefore, keeping these provisions in mind, one would understand that, if accused, he/she would have the right to know what he/she is being accused of, be able to examine the witnesses against him/her, and be furnished with a lawyer in order to defend themselves. Not adhering to the laws provided in the most basic document of the U.S. government adversely affects the “near universality of the guarantee [of the Sixth Amendment provisions] in this country”³. Although the Sixth Amendment provides for these protections, we have seen several instances of its violation after the terrorist attacks on September 11th 2001, as shall be described further in the context of this essay.

The second set of international guidelines, The International Covenant on Civil and Political Rights⁴, of which the United States is a signed member⁵, is a set of principles and values that people all around the world must adhere to. It provides a foundation for the International

² “U.S. Constitution – Bill of Rights” [Legal information institute Cornell Law School](http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti) 8 December 2002 <<http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti>> Hereafter referred to as “U.S Constitution”

³ “FindLaw: U.S. Constitution: Sixth Amendment: Annotations pg. 3 of 11” [FindLaw](http://caselaw.lp.findlaw.com/data/constitution/amendment06/03.html) 8th December, 2002

<<http://caselaw.lp.findlaw.com/data/constitution/amendment06/03.html>> Hereafter referred to as “FindLaw”
⁴ “UN Covenant on Civil and Political Rights” [The Human Rights Web Home Page](http://www.hrweb.org/legal/cpr.html) 25th January, 1997 8 December, 2002 <<http://www.hrweb.org/legal/cpr.html>> Hereafter referred to as “U.N. Covenant”

⁵ “Signatures to the UN Covenant on Civil and Political Rights” [Human Rights Web Home Page](http://www.hrweb.org/legal/cprsigns.html) 25th January, 1997 8 December, 2002 <<http://www.hrweb.org/legal/cprsigns.html>>

community to protect fundamental human rights such as the right to freedom, liberty, security of person, privacy, practice of one's religion and beliefs, equal protection of law, and prohibits discrimination of any sort on the basis of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (U.N. Covenant). It, too, provides a layout for the methodologies of criminal confinement and prosecution. For example, Article 9 of the covenant explicitly prohibits "arbitrary arrest or detention," while Article 14 describes the "minimum guarantees" to which an accused would have liberty. The assurances included in Article 14 are similar to those provided by the Sixth Amendment of the U.S. Constitution.

A third set of statements of International law and principle that may be examined in order to further endorse the protections made available to the human race, and the methodologies of criminal custody and prosecution is the Universal Declaration of Human Rights⁶. This Declaration was agreed upon by the United Nations General Assembly, and was publicized worldwide after its creation on December 10th, 1948. Several of its articles emphasize the same values that are enforced by the U.S constitution and the International Covenant on Civil and Political Rights. Protection from "...arbitrary arrest [and] detention..." are accentuated in Article 9, while "...full equality to a fair and public hearing by an independent and impartial tribunal..." is enforced in Article 10 (UDHR). These two articles ensure individuals, legal aliens and citizens alike, that, if accused of a crime, they will be prosecuted through the due process of law without discrimination of any sort.

⁶ "Universal Declaration of Human Rights" United Nations 8th December, 2002
<<http://www.un.org/Overview/rights.html>> Hereafter referred to as "UDHR"

III. REVIEW OF LITERATURE

Taking into account the threat posed by international terrorism to the security of mankind, Phillip B. Heymann, Deputy Attorney General, U.S. Department of Justice (1993-1994), proposes three ways to increase the national security of the United States. First, “U.S law enforcement and intelligence agencies”⁷ should conjunctly develop measures that enable us to take the required precautions in order to better combat the risks and dangers of terrorism. These procedures should facilitate effective prevention of its occurrence. Second, they should also be able to administer and cope with the consequences if we are unable to preclude the incidence of a substantial attack, and third, punish those that are accountable for intimidation and terror campaign. Perpetrators should be brought to justice by prosecuting them through means of an effective legislative authority based on a fair and impartial judicial system. Such a system would proceed in accordance with the constitutional rights and civil liberties of an individual as presented by the U.S. Constitution, The Universal Declaration of Human Rights, and The International Covenant on Civil and Public Rights.

This essay mainly deals with the punishment aspect of the foreboding and menace posed by terrorism to our society. Several different approaches have been developed and concurrently deployed by the House of Representatives in order to punish those responsible for the attack of September 11th. An “anti-terrorism bill” was acknowledged by the senate on October 25, 2001 that gave Attorney General Ashcroft the power to “detain any non-citizen”⁸ who is thought to pose a threat to national security for a period of seven days. After this period of detention, the suspect must either be charged or be deported (CQ Researcher, 1034). Two Indian men, Mohammed Jaweed Azmath and Syed Gul Mohammed, were detained near Fort Worth, New

⁷ Heymann, Phillip B, “CIVIL LIBERTIES AND HUMAN RIGHTS IN THE AFTERMATH OF SEPTEMBER 11TH” Harvard Journal of Law & Public Policy Volume 25 No. 2 (2002): 441-456 Hereafter referred to as “Heymann”

⁸ Masci, Davil & Marshall Patrick. “Civil liberties in War Time.” CQ Researcher Volume 11 No.43 (2001):1017-1039. Hereafter referred to as “CQ Researcher”

York on September 12, 2001 as material witnesses⁹. These two men were held in prison for extensive time period before they were given legal counsel. Mr. Azmath received a lawyer after 91 days of captivity, whereas it was 57 days before Mr. Shah received his (NYT). As part of regular procedure, an individual subpoenaed with a “material witness warrant” is provided with a lawyer paid for by the government, whereas legal counsel does not have to be provided in cases of visa violations (NYT). Although the two men “had been detained as material witnesses, [the government’s] lawyers now say that they were held last fall only on immigration violations” (NYT). The charges of participating in the World Trade Center fiasco were dropped against the two men in June. The method with which this case was handles raises immense criticism of the provisions given to the Attorney General. It clearly violates the principles and methods put down by the various doctrines that have been accused of criminal activity.

In the past year or so we have seen the Bush administration arrest and detain thousands of non-Americans on a suspicion that they might be associated with the attacks on the World Trade Center and the Pentagon without any significant material proof. For example, Federal judges have permitted the detention of two Americans “without charges in military brigs, indefinitely, incommunicado and without a road map for how they might even challenge their detentions” (NYT). James Zogby, President of the Arab American Institute, indicates that “there needs to be more transparency” in the way that the government decides who to detain and arrest, even in times when national security is of concern (CQ researcher, 1023). In light of the case of Mr. Azmath and Mr. Shah, as well as the opinion of Zogby it would be reasonable to suggest that the detentions and arrest were of an “arbitrary” nature. Even though these measures were taken in the interest of national security, they clearly violate Article 9 of the Universal Declaration of Human Rights, and article 9 of the International Covenant on Civil and Political Rights.

⁹ Liptak, Adam; Lewis, Neil, A; Weiser, Benjamin, “After Sept. 11, a Legal Battle On the Limits of Civil Liberty” New York Times 4th August, 2002. Hereafter referred to as (NYT)

Moreover, these detainees were tried in secret military tribunals where they were denied their rights to “have assistance of counsel for [their] defense” (U.S. Constitution). This is undoubtedly a noncompliance with the protections of the Sixth Amendment, Article 10 of the Universal Declaration of Human Rights, and Article 14 of the International Covenant on Civil and Political Rights.

The compromise of individual rights and therefore decreased legal protection in incidents of terrorism may be due to several reasons. The first, according to Norman Dorsen, President of the American Civil Liberties Union, is that the judicial system is perceived to be deficient in the “institutional competence to make the necessary judgments of fact in foreign affairs and national security cases”¹⁰. Dorsen argues that federal judges are continuously involved in resolving cases relating to “antitrust, securities and family law controversies” that present several levels of financial, moral, or ethical complexity (Foreign Affairs, 844). Keeping all these factors in mind, it would be reasonable to infer that the judicial system is capable of pronouncing verdicts even in cases with significance to national security.

A second cause for the reluctance of judicial participation in litigations of a sensitive nature may also be the concern for the slight possibility of error due to misinterpretation or misjudgment of sensitive information. Dorsen suggests that the reason for this reluctance is “a blend of institutional insecurity and fear of the consequences of error” (Foreign Affairs, 844). As Dorsen points out, Justice Blackmun bluntly said when he disagreed with the ruling of the *Pentagon papers* case:

[I]f, with the court’s action today, these newspapers proceed to publish the critical documents and there results therefrom “the death of soldiers, the destruction of alliances,

¹⁰ Dorsen, Norman. Foreign Affairs and Civil Liberties American Journal of International Law Vol.83 No.4, The United States Constitution in its Third Century: Foreign Affairs (Oct., 1989): 840-850. Hereafter referred to as “Foreign Affairs”

the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,” to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation’s people will know where the responsibility for these sad consequences rests. (Dorsen, 845)

A marginal error made by the judicial system could lead to disaster, perhaps even of a greater magnitude than that which has already struck, not only for the American society but also for the International community. However, by following carefully the due process of law and therefore abiding by the constitution, it should be possible to prosecute criminals effectively without raising questions of violation of civil liberties.

After the attacks on the World Trade Center and the Pentagon last fall, the Bush administration required that suspects related to the attacks on these landmarks be detained and tried in a military justice system that has been set up by the congress. According to Heymann,

“On November 13, 2001 President Bush signed an order allowing him[self] to direct the trial, in military courts, with penalties up to death, of any individual who is not a United States citizen for activities, even within the United States, that the President determines involve international terrorism or harboring international terrorists”. (Heymann, 452)

The military justice system does not allow any “civilian judicial review”, instead the only review would be through “the president or Secretary of Defense” (Heymann, 452). The Bush administration justifies the use of military courts by indicating that classified information cannot be presented in civilian courts. According to the CQ Researcher, “... evidence called from classified information could be offered in a secret military trial in order to protect national security... even if it led to [the suspect’s] conviction” (CQ Researcher, 1025). However, we have seen in the past, as in the case of the “bombers of the World Trade Center, the two American

embassies in East Africa as well as the federal building in Oklahoma City show that it is possible to effectively try domestic and even foreign terrorists in an open, non-military courts.” (CQ Researcher, 1026). Thus, by keeping in mind the non-military trials conducted to bring the attackers to justice in the above mentioned cases, it would be reasonable to conclude that atrocious crimes of domestic and international terrorism can be effectively tried in civilian courts.

IV. CONCLUSION

It would not be possible to understand all the motives for which the Bush administration has adopted its policies to bring domestic and international terrorists to justice since some, if not most, of the information related to such sensitive cases is classified. However, after developing a better understanding of the protections available to individuals in extreme cases, and reviewing the strategies of the Bush administration during such times, it wouldn't be unreasonable to infer that even though these strategies may be effective, they do breach the principles that this country, and the international community, was founded upon. Mary Robinson, the U.N. Human Rights Commissioner, indicates that “the best way to ensure human security is to uphold fully the standards of human rights because they were also a victim on September 11.”¹¹ Maybe, in the future, further examination of the criteria that is currently classified information might lead us to the realization of a compromise between national security and basic human rights.

¹¹ “Robinson urges rights protection” CNN.com June 06, 2002. December 6, 2002
<<http://www.cnn.com/2002/WORLD/europe/06/06/un.robbinson/index.html>>

Bibliography

- Crossette, Barbara. "The World; In the Secret-Detentions Club" New York Times 11th August, 2002. Sunday Late Edition
- Dixon, Angie; "Definitions of Freedom"; September 11th, 2002; Mark and Claudia Dixon Family; 08 December, 2002; <<http://ilovefreedom.com/model/definitions.htm>>
- Dorsen Norman. "Foreign Affairs and Civil Liberties" American Journal of International Law Vol.83 No.4, The United States Constitution in its Third Century: Foreign Affairs (Oct., 1989): 840-850. Hereafter referred to as "Foreign Affairs"
- "FindLaw: I.S. Constitution: Sixth Amendment: Annotations pg. 3 of 11" FindLaw 8th December 2002; <<http://caselaw.lp.findlaw.com/data/constitution/amendment06/03.html>> Hereafter referred to as "FindLaw"
- Heymann, Phillip B, "CIVIL LIBERTIES AND HUMAN RIGHTS IN THE AFTERMATH OF SEPTEMBER 11TH" Harvard Journal of Law & Public Policy Volume 25 No. 2 (2002): 441-456 Hereafter referred to as "Heymann"
- Liptak, Adam; Lewis, Neil, A; Weiser, Benjamin, "After Sept. 11, a Legal Battle On the Limits of Civil Liberty" New York Times 4th August, 2002. Hereafter referred to as (NYT)
- Masci, Davil & Marshall Patrick. "Civil Liberties in War Time." CQ Researcher Volume 11 No.43 (2001):1017-1039. Hereafter referred to as "CQ Researcher"
- "Robinson urges rights protection" CNN.com June 06, 2002. December 6, 2002 <<http://www.cnn.com/2002/WORLD/europe/06/06/un.robbinson/index.html>>
- Signatures to the UN Covenant on Civil and Political Rights" Human Rights Web Home Page 25th January, 1997 8 December, 2002 <<http://www.hrweb.org/legal/cprsigns.html>>
- "The Historical background of the Declaration" Human Rights: The Essential Reference 8th December, 2002 <<http://www.humanrightsreference.com/chat2.html>>
- "UN Covenant on Civil and Political Rights" The Human Rights Web Home Page 25th January, 1997 8 December, 2002 <<http://www.hrweb.org/legal/cpr.html>> Hereafter referred to as "U.N. Covenant"
- "Universal Declaration of Human Rights" United Nations 8th December, 2002 <<http://www.un.org/Overview/rights.html>> Hereafter referred to as "UDHR"
- "U.S. Constitution – Bill of Rights" Legal Information Institute Cornell Law School 8 December 2002 <<http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti>> Hereafter referred to as "U.S Constitution"