
Rule of Law or Dictates by Fear: A German Perspective on American Civil Liberties in the War Against Terrorism

JOSEF BRAML¹

Following the terrorist attacks of September 11, 2001, it became evident that concerns of national security have gained priority over the protection of civil rights in the United States. An examination of changing political parameters and specific legal issues—the status of detained Taliban and al-Qaeda combatants, the creation of military commissions, the arrest and “preventive detention” of suspicious foreign nationals as well as immigration restrictions for, and a general stigmatization of, foreign students originating from Muslim countries—reveals several indicators for the emergence of a problematic understanding of both national and international law in the United States.

Despite constitutionally anchored notions of “due process” and “equal protection” guaranteeing the protection of civil liberties for “any person,” the Bush administration apparently believes that foreigners currently residing in the United States do not enjoy the same protection under law as American citizens. Should these foreigners be singled out as alleged terrorists, they lose even these limited rights. The decision as to who “deserves” which rights is made *a priori* by the executive branch; an *ex post facto* assessment by the courts is not possible. From a constitutional standpoint, many observers consider this to be a precarious balancing act which threatens to undermine the principle of checks and balances inherent in the U.S. political system.

Josef Braml is a Senior Fellow at the German Institute for International and Security Affairs (SWP) in Berlin. The SWP, the largest research institute of its kind in Western Europe, advises the German Parliament and the German federal government on all matters relevant to German foreign and security policy. A former Congressional Fellow with the American Political Science Association, Braml previously held positions at the Brookings Institution, the World Bank, the German-American Center, and the Aspen Institute Berlin.

The decisive question is whether societal pressure—motivated in no small part by media coverage and adherence to political principles—would, as it has so often in American history, engender a counter-impulse causing the pendulum to swing back in the direction of civil liberties. As it is, it appears that American rule of law is in danger of increasingly mutating toward the direction of a police state. A further question that makes this all the more precarious is how these developments in America, with its free and open society serving as a role model, will influence the worldwide perception of international law. For Germany, and Europe as a whole, these are matters of substantial concern.

SEPTEMBER 11 AND ITS EFFECTS ON SOCIETY IN THE UNITED STATES OF AMERICA

Collective Sense of Vulnerability and the Need for Proactive Protection

After September 11, America's basic sense of its own strength as the only remaining superpower was replaced by an awareness of the vulnerability of the "homeland."² After all, the attacks on the World Trade Center and the Pentagon destroyed or severely damaged symbols of the United States' economic and military might. America's awareness of its own vulnerability engendered an immense need for security, a need to feel protected, and a need to act. Correspondingly, President Bush postulated a new strategy: "America is no longer protected by vast

Fundamental constitutional principles regarding the contest between national security and civil liberties are being reassessed within the constraints of the laws of war.

oceans. We are protected from attack only by vigorous action abroad, and increased vigilance at home."³ In the initial general insecurity and lack of orientation, an appeal for national authority was clearly articulated.

In stark contrast to European views, the September 11 attacks were understood in the United States not merely as terrorist acts, but as belligerent acts. America thus declared War on Terrorism.⁴ This perception on the part of Americans has come to fundamentally affect not only the "constitution" of the individual citizen, but that of U.S. society in its entirety as well. A war scenario gives the President, as commander-in-chief, an extensive room for maneuver. In this context, fundamental constitutional principles regarding the contest between national security and civil liberties are being reassessed within the constraints of the laws of war.

September 11 not only provided the President with a confidence advance, it also changed the preconditions and dynamics of the midterm elections. In the

course of the election year, the War against Terrorism and national security, as well as the sluggish economy, established themselves in American minds as the nation's most urgent problems. Yet, ultimately, the economy did not decisively influence the outcome of the elections.

According to a Gallup poll taken between November 8 and 10, 2002, nearly two-thirds (64 percent) of respondents felt that Republicans displayed the necessary toughness in the fight against terrorism. The Democrats were deemed considerably less tough—only a third of those polled before the election (34 percent) firmly believed that the Democrats would forcefully assume the fight against terrorism.⁵ Not surprisingly, the vast majority of those identifying terrorism as the most important issue wanted to vote Republican (81 percent) versus 19 percent in support of a Democratic candidate.⁶ The November 5 election results confirmed this trend. President Bush got what he had been asking for during the election campaign—a “united government.” He could now govern with Republican majorities in both houses of Congress.

Confidence in the President and Government

Although the term *government* has in recent decades triggered negative associations in the minds of most Americans, the American government is now being perceived more positively by its citizens. Approval ratings of the government as a whole surpassed 60 percent,⁷ beating the “confidence gap”—i.e., the low trust in government present since the 1960s. The results of a national survey conducted for the Brookings Institution confirm this significant shift in public opinion. A closer look reveals, however, that this overwhelming confidence in government can be interpreted as an emotional reaction to the terrorist attacks (see Table 1). The confidence barometer was at 29 percent in July 2001, shot up to 57 percent shortly after the terrorist attacks, and tapered off at 40 percent in May 2002. But compared to the poll results prior to the terrorist attacks, the level of confidence in the American government has increased significantly.

TABLE I
RISE AND FALL OF TRUST AND CONFIDENCE
IN GOVERNMENT AFTER SEPTEMBER 11 (IN %)

| Trust in Government to Do What's Right | July 2001 | Oct. 2001 | May 2002 |
|--|-----------|-----------|----------|
| Just about always | 4 | 15 | 8 |
| Most of the time | 25 | 42 | 32 |
| Only some of the time | 66 | 39 | 53 |
| Never | 4 | 2 | 4 |

Source: Brookings Institution; May 30, 2002.⁸

Conventional wisdom would assume a causal relationship between the assessment of government actors' previous accomplishments and the level of confidence: confidence emerges as a result of experience. But because September 11 exploded the American people's horizon of experience, the enormous confidence advance cannot alone be attributed to an *ex post* evaluation of the government's behavior. Rather, citizens were probably expressing their expectation that the government would protect them. It is useful in this context to distinguish between specific and diffuse support. The first is based on citizen satisfaction with concrete policies or the specific achievements of government representatives; the latter reflects the population's general attitude toward political institutions.⁹

Both the first and second terrorist attacks on the World Trade Center resulted in increased public confidence in its government's power to protect it. After the terrorist attacks on September 11, 2001, almost twice as many people were confident that their government was able to effectively protect the country from further terrorist attacks.¹⁰

Presidential Government

In extremely threatening times, the President assumes the role of a patron or protector. As commander-in-chief, he is at the center of attention. The patriotic impulse to rally around the flag entails an immense increase in power and advance confidence for the President and the executive branch. The presidency symbolizes national unity, and the White House is the place where the flag still flies high in times of crisis.

This is all the more remarkable when considering the weak mandate the President initially had after the November 2000 election. Although George W. Bush failed to gain the majority of the popular vote, and his conduct in office met a divided, even increasingly negative reception, since the attacks he has come to enjoy his people's considerable, if slowly decreasing, confidence.¹¹ Judging by these and more specific evaluations,¹² the President's confidence bonus largely lies in the expectations linked to his institutional role as commander-in-chief in the War against Terrorism. Even 15 months after the attacks on September 11, 2001, three out of four Americans saw their President as a "strong leader."¹³ In comparison, Congress has had a relatively weak position, which is reflected in significantly sinking approval ratings since September 11.¹⁴

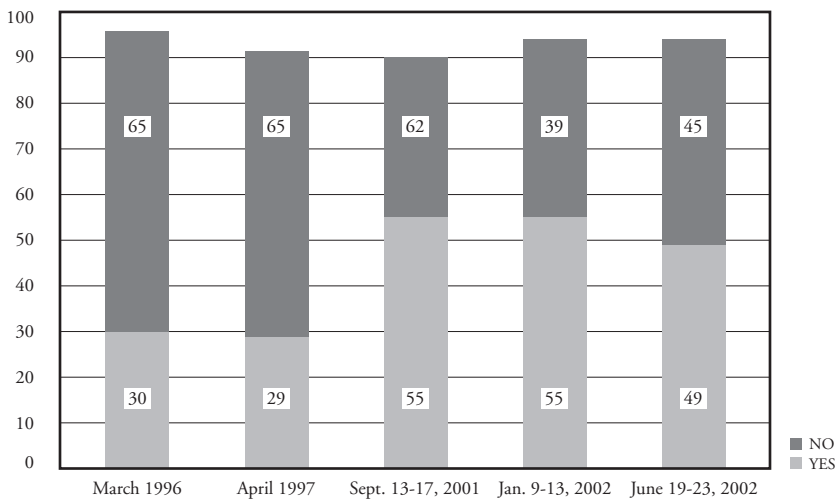
In this situation, the legislative branch would be ill-advised to tip the scales with its institutional counterweight¹⁵ in order to play a strong and distinctive oppositional role. Congress does not have the political weight in this state of emergency to challenge such a popular President waging War against Terrorism. Thus, in early October 2001, nearly two thirds (65 percent) of the American people expressed the opinion that Congress should approve everything deemed necessary by the attorney-general and the security agencies to thwart the terror-

ists and guarantee national security, even if the chosen means would threaten civil liberties and rights. Only one in five Americans opposed Congress giving the executive branch a *carte blanche*.¹⁶ Republican Bob Barr, then member of the House Judiciary Committee and one of the most prominent civil liberties advocates, explained Congress's narrow room for maneuver: "It's very difficult to get members of Congress to do anything that might appear to the untrained eye...not to be going after the terrorists....[A] lot of the members think the folks back home will feel we're not tough enough."¹⁷

Need for Protection versus Fear of Tougher Government

In opinion polls immediately following September 11, it became evident that a terrorized American people articulated an emotional protection need, which was also expressed in the demand for greater security—even at the cost of civil liberties (see Figure 1).¹⁹ But as the attack recedes further into the past, and if new attacks do not occur, it is likely that the subjective threat will decrease and that the American people will reassume a more critical attitude (see Figure 2).²⁰ Though demands for stricter anti-terror legislature were louder, and worries about excessive infringements on civil liberties muted immediately following September 11, the climate had changed fundamentally just nine months later: about a third of the American people is worried that the government is not passing stricter anti-terror legislation, but about a half has misgivings that such laws may constitute severe infringements on civil liberties.

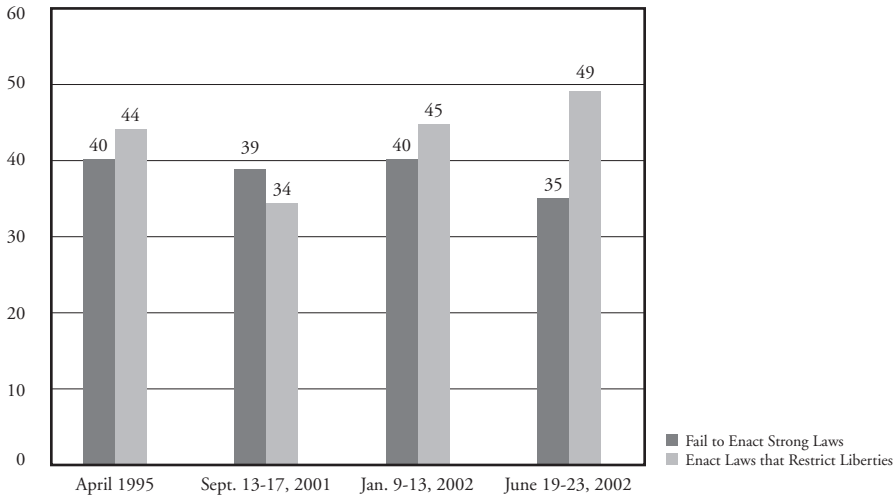
FIGURE 1:
**PUBLIC OPINION POLL: DOES FIGHTING TERRORISM
REQUIRE A TRADEOFF WITH CIVIL LIBERTIES? (IN %)**



Source: PSRA/Pew Research Center.²¹

Among individuals harboring misgivings, one would expect to find members of those groups that have had negative experiences with police or government action and whose personal suffering occupies a significant place in the collective memory. For example, African Americans' attitude with regard to the War on Terror follows a distinct pattern.²² Only 55 percent of African Americans (compared to 84 percent of Caucasians) endorsed the Bush administration's interviewing approximately 5,000 young men from the Middle East, visiting the United States on temporary visas.²³ The detention of 600 people as a part of the September 11 investigation is also evaluated differently by white and black Americans. Ninety percent of white Americans approve of this measure, compared to 75 percent African Americans.²⁴ As African American Congressman Melvin Watt (D-NC), member of the House Judiciary Committee, emphasized, "Some of us—who have a different history in America with delegation of authority to the government and the abuse of that authority—proceed a lot differently than others when we talk about giving authority to the government that can be abused."²⁵

FIGURE 2:
PUBLIC OPINION POLL: WHAT IS OF GREATER CONCERN:
THE FAILURE TO ENACT STRONG ANTI-TERRORISM LAWS
OR LAWS THAT RESTRICT CIVIL LIBERTIES? (IN %)



Source: Los Angeles Times, *April 1995*; PSRA/Pew Research Center: *September 2001-June 2002*.²⁶

By contrast, another group with considerable moral weight in human and civil rights, Jewish Americans, has for the time being remained remarkably quiet about the issue.²⁷ Senator Charles Schumer (D-NY) offers a plausible explanation for this phenomenon: "September 11 has forced all but the most doctrinaire on the right and the left to be open to a recalibration of the balance between security

and liberty....Jewish groups are perhaps more open to this re-examination, since so many of the threats are directed not only at Israel but at Jews worldwide.”²⁸

All in all, Americans demanding that the government use any means necessary to prevent further terrorist attacks regardless of infringements on civil liberties are now in the minority (40 percent). The majority (56 percent) would disapprove of those measures infringing on fundamental civil liberties. In January 2002, these numbers were still nearly equal (47 percent versus 49 percent).²⁹ This data supports the thesis that “the higher the fear, the greater the willingness to curtail liberty to protect safety...if the panic subsides some more, the proportion of those supporting a curtailment of rights will further decline.”³⁰

This change of perception in public opinion could encourage some members of Congress to put civil liberties back into the center of the legislative agenda along with the now dominant security aspects. According to *The New York Times*, “Responsible questioning and dissent are essential elements of our democracy. As Senator Charles Schumer has properly noted, there is no subject more suited to public debate and legislative oversight than the tension between liberty and security.”³¹

RESTRICTION OF CIVIL LIBERTIES FOR U.S. AND FOREIGN NATIONALS

The tension between civil liberties and security affects not only national debates, but also issues with acute international relevance. The main issues involve (1) the status of detained Taliban and al-Qaeda combatants, (2) the creation of military commissions, (3) the arrest and “preventive detention” of suspicious foreign nationals, and (4) the immigration restriction for, and general stigmatization of, foreign students originating from Muslim countries.

Outlaws: The Status of Detained Taliban and al-Qaeda Combatants

About 600 to 800 Taliban and al-Qaeda fighters, captured primarily during combat in Afghanistan, have been held since early January 2002 at the U.S. Marine base in Guantanamo Bay, Cuba.³² The location was not chosen by accident. Since a court decision has confirmed that Guantanamo Bay lies outside of U.S. sovereign territory, foreign nationals detained there have no right to trial by an American jury.³³

This and other similar decisions have created a legal vacuum. Accordingly, a task force of the American Bar Association has confirmed, referring to Supreme Court precedents, “Aliens not within the United States have few, if any, constitutional protections.”³⁴

Further evidence indicates that the Bush administration actually considers these prisoners outlaws. The first published photos of hooded and chained prisoners forced to kneel on the back of the truck bringing them to “Camp X-Ray”

triggered a wave of international protests, including from Mary Robinson, former UN High Commissioner for Human Rights. The U.S. government justified the detainees' treatment as necessary, precautionary security measures. But it was the prisoners' status that offered grounds for stronger and more fundamental protest. The American president—without prior consultation with the Congress—revoked the detainees' prisoner of war (POW) status and designated them "unlawful combatants," thus acting outside of international law. According to Article 5 of the Third Geneva Convention, this decision should have been made by an appropriate court.³⁵ Rather, President Bush, Vice-President Richard Cheney, and Secretary of Defense Donald Rumsfeld declared that the Third Geneva Convention applies to none of the detainees.³⁶

These declarations not only incurred international outrage, but caused controversy within the executive branch at home as well. Secretary of State Colin Powell, with the support of the Joint Chiefs of Staff, was able to convince Secretary Rumsfeld to oppose the President's position.³⁷ The decisive concern on the part of the military was that if the United States disregards such basic norms, American soldiers may reciprocally not enjoy the same international protective rights either. The President revised his position on February 7, 2002, and declared that the Third Geneva Convention would apply to the Taliban combatants, but not to members of al-Qaeda. At the same time, Bush stood by his refusal to grant POW status to either group,³⁸ his decision in part motivated by the legal status of POWs and, in particular, their right to refuse to testify if interrogated. The status granted by the President instead allowed security agencies the possibility of interrogating detainees to gain operationally useful information for the fight against terrorism.

Creation of Military Commissions through Presidential Executive Order

As commander-in-chief, President Bush had assumed the role of a legislator and a judge. Independently and without the backing of Congress, Bush issued an executive order on November 13, 2001, authorizing military tribunals.

As commander-in-chief, President Bush had assumed the role of a legislator and a judge.

According to this order, the accused would not be tried before a jury but by a military court behind closed doors. The defense counsel would not have access to incriminating witness testimonies. A two-thirds majority of the military panel, not the usual unanimous jury decision, could convict and even pass a death sentence. The President

reserved the right to a "final decision by me" without a possibility of an appeal.³⁹

Massive public criticism⁴⁰ led the President to tone down the order: the tribunals, it was said, would take place in public, the defense would have access to the prosecution's evidence, the accused would be granted the right to refuse testimony,

and, finally, the President would no longer have the last word in legal matters. "The President's initial order, which imperiously claimed 'a final decision by me' on the outcome of these trials, has been modified (nobody dares say 'reversed') by the Pentagon rule stating that a verdict of not guilty 'shall not be changed.'"⁴¹ But regardless of this modification, many observers still consider these military tribunals to be a legally precarious instrument with only weak constitutional legitimacy, subject to heavy criticism at home and abroad.⁴²

From a political standpoint, Congressman Jerrold Nadler (D-NY), member of the House Judiciary Committee, interpreted the President's action as an "arrogation of power": "For the administration to do this without coming to Congress is a tremendous arrogation of power....If they had suggested military tribunals, they would have been laughed out of Congress. So instead, they do it by executive order...to avoid the Congress."⁴³

President Bush legitimated his decision on the basis of a congressional resolution, as well as by referring to historical precedents, granting him the right to use force in the War against Terrorism.⁴⁴ However, both justifications are controversial when measured against the constitutional principle of checks and balances. According to a task force of the American Bar Association, Congress did not present the President with a blank check when it passed the resolution.⁴⁵ Furthermore, the historical parallels are not completely accurate. In the first relevant precedent, *Ex Parte Milligan*,⁴⁶ the Supreme Court argued in 1866 that President Lincoln had not been granted approval by Congress to create military tribunals. And the 1942 Supreme Court ruling in *Ex Parte Quirin*⁴⁷ is not really applicable either, since the Second World War was formally declared by Congress, explicitly granting President Roosevelt the right to create military courts.⁴⁸ Furthermore, in these cases, additional controlling mechanisms were still intact, including judicial review of executive decisions.

In addition to this important constitutional discussion about the institutional balance of power and legitimization of presidential action, the administration's decisions brought out politically motivated misgivings with regard to foreign policy. "We need to understand the international implications of the President's order, which sends a message to the world that it is acceptable to hold secret trials and summary executions, without the possibility of judicial review, at least when the defendant is a foreign national," then Senate Judiciary Committee Chairman Patrick Leahy (D-VT) warned his colleagues.⁴⁹ Indeed, the executive's notion that there are two classes of accused is questionable. "Foreign terrorists who would face trial in a military tribunal don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process," as Vice-President Cheney interprets the law.⁵⁰

Nevertheless, the executive had broad popular support for these measures, as long as these military tribunals try only foreign nationals in the most remote

sense.⁵¹ Yet, while the suspected American terrorist John Walker Lindh was tried and convicted before regular courts, two other American citizens, Yaser Esam Hamdi and Jose Padilla (alias Abdullah al-Muhajir), have been classified as “enemy combatants.” Martial law has thus been applied to Americans as well, their basic rights have been revoked, and the debate about the application of martial law assumed a new dimension. The extension of martial law’s jurisdiction awakened public awareness that every U.S. citizen could have his or her civil liberties curtailed. In light of these developments, the American Bar Association took an initial public (albeit not official) stand in the form of its “preliminary report,” declaring that “the implications of these detentions are much broader

The extension of martial law’s jurisdiction awakened public awareness that every U.S. citizen could have his or her civil liberties curtailed.

than these two cases [of Hamdi and Padilla].”⁵² Editors of *The New York Times* were alarmed too, as not just the civil liberties of foreign nationals, but now also domestic civil liberties were jeopardized.⁵³

The Bush administration countered that in times of war, only the executive had the authority to determine enemy combatants. The judiciary had no constitutionally founded powers to question such decisions by the commander-in-chief. According to

Attorney-General John Ashcroft, it is a matter of life and death: “We are acting very carefully to protect American lives.”⁵⁴ And the President—all the more so after recent court rulings—feels legitimated, “given the danger to the safety of the United States and the nature of international terrorism,” to override the usual legalities of investigation with American citizens as well.⁵⁵

The courts found that in the Padilla case, the President was authorized to “exercise the full powers of the commander-in-chief which also includes the authority to arrest unlawful combatants. The fact that Jose Padilla is a U.S. citizen and was arrested on American soil doesn’t matter.”⁵⁶ And in the Hamdi case, the judges made an even clearer statement about the powers of the President. Based on “the conviction that the balance of power gains special significance when the nation itself is attacked,” the three judges unanimously ruled that “the constitutional allocation of war powers affords the President extraordinarily broad authority as commander-in-chief and compels courts to assume a deferential posture in reviewing exercises of this authority.”⁵⁷

It is important to note that the judges in the Hamdi case, like their colleagues in the Padilla case, did not go so far as to deny *habeas corpus*. Nevertheless, judicial review of the legality of internment was reduced to a minimum. Yet, sooner or later, the issue of unlawful combatants’ legal status will have to be brought before the Supreme Court.

Arrest and "Preventive Detention" of Suspicious Foreign Nationals

On September 18, 2001, the Bush administration issued a directive authorizing security personnel in a national state of emergency to detain suspicious immigrants or foreign nationals residing in the United States. According to unofficial estimates, more than 1,200 persons, mostly of Arabic or South Asian origin, were placed in "preventive detention." Most of them have since been deported to their home countries or released from custody.⁵⁸ Despite repeated court rulings and orders, the exact number of those detained, released, or deported has been kept secret. Among those held in preventive custody were individuals detained on misdemeanors (for example, remaining in the country after visa expiration date), as well as so-called material witnesses considered useful sources of information. A memorandum dated September 21, 2001,⁵⁹ stipulates secrecy in special interest cases, that is, deportation hearings following violations of immigration and residency regulations: "no visitors, no family, no press."⁶⁰ This practice, because of its complexity, will also pass through several jurisdiction levels before probably landing in the Supreme Court.

To strengthen its own position in this theater of the War against Terrorism, the Bush administration obtained backing from Congress with the USA Patriot Act of October 26, 2001.⁶¹ This act authorized the attorney-general to detain foreign nationals

From the standpoint of the executive, the preventive function has priority over the functions of due process and the rule of law.

for an indefinite time period if deportation does not seem possible,⁶² or if these foreign nationals are believed to constitute a threat to the security of the United States, general safety, or the safety of an individual.⁶³ The attorney-general's judgment can also be based on secret evidence, unknown to both the detainee and his or her lawyers. While this evidence may not be used in a later trial, it lays the foundation for the legitimacy of imprisonment.

This example of targeting foreign nationals reflects the observable tendency to fundamentally reinterpret the role of the law. As Attorney-General Ashcroft said in December 2001 before the Senate Judiciary Committee: "We are at war with an enemy who abuses individual rights as it abuses jet airliners: as weapons with which to kill Americans. We have responded by redefining the mission of the Department of Justice. Defending our nation and its citizens against terrorist attacks is now our first and overriding priority."⁶⁴ From the standpoint of the executive, the preventive function has priority over the functions of due process and the rule of law.

Such interpretation of the law is controversial. On August 2, 2002, a court ruled that the practice of preventive detention derived from this understanding

was “odious to a democratic society.” Representatives of 22 civil liberties advocacy groups—among them the Center for National Security Studies, the American Civil Liberties Union, the Reporters Committee for Freedom of the Press, the American Arab Anti-Discrimination Committee, and the People for the American Way—brought forth litigation against the government’s arrest policy. Justice Gladys Kessler from the Federal District Court in Washington, D.C., ruled that the government had to publish the names of those in custody, with only a few exceptions. In her opinion, she emphasized that regardless of the executive’s task to protect the American people, the highest priority is still given to operating within the constraints of democracy and the rule of law.⁶⁵ Transparency is essential to determining whether a state is operating within the legal requirements.

The ruling is the clearest judicial challenge to the executive branch to date, although after Justice Kessler approved an appeal, the decision is pending higher court rulings. The Supreme Court will also have to deal with this precarious issue.⁶⁶

The Bush administration’s tenacity became evident in its immediate reaction to Justice Kessler’s ruling. Robert McCallum, assistant attorney-general for the Civil Division, strongly condemned the decision.⁶⁷ The advocates of the executive prerogative of judicial interpretation adhered to their previous strategy and evoked threatening scenarios of further attacks: “We are standing firm in our commitment to protect American lives....We’re removing suspected terrorists who violate the law from our streets to prevent further terrorist attack. We believe we have al-Qaeda membership in custody, and we will use every constitutional tool to keep suspected terrorists locked up.”⁶⁸

While observers demand more proof of “preventive detention’s” efficiency,⁶⁹ those responsible must increasingly answer to specific cases of abuse. Reports and charges abound regarding individuals who have evidently fallen victim to the abuse of government power.⁷⁰ One of the detainees, an Egyptian student Abdallah Higazy, was released after it had been revealed that a security agency officer had constructed evidence against him. A further investigation has been launched as to whether the FBI threatened Higazy that his failure to confess would endanger his family.⁷¹

Available information indicates that this was an isolated incident; yet still, it is not impossible that other cases of abuse of power will be unearthed when the attorney-general reveals the names of detainees, including those already released or deported.

Foreign Students of Muslim Origin under General Suspicion

After government officials indicated that many terrorists involved in the September 11 attacks were in the United States on student visas, the manhunt focused on Muslim students. However, education is one of the United States’

most important exported goods. According to data from the U.S. Department of State Bureau of Consular Affairs, the number of foreign students visiting the United States on non-immigration “F,” “J,” and “M” category visas has more than doubled in the past two decades.⁷² Foreign students not only provide cultural and financial enrichment for American universities, but they also serve as vehicles for the exercise of the U.S.’s “soft power.” Foreign students are often the future elite of their home countries who, in the course of their professional education in the United States, establish personal contacts and relationships with American elites. This reciprocal investment in foreign human capital amortizes itself in no small way. In the United States as well as abroad, future decision makers and public leaders have gained a better understanding of alternative models of government and society, which, as a result, informs their subsequent behaviors.

At the same time, this free flow of human capital and ideas also means a higher risk to national security. There had already been a cause for concern, and security measures had been taken, before the September 11, 2001, attacks. Indeed, one of the convicted perpetrators of the first attack on the World Trade Center in 1993 was a student who remained illegally in the United States after his student visa had expired.

In 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), which ordered the attorney-general, in cooperation with the Departments of State and Education, to establish a comprehensive database of every holder of category “F,” “J,” and “M” non-immigration visas with his or her personal data and school or university status by the year 2003. The implementation of this Student and Exchange Visitor Information System (SEVIS) was to be financed by visa fees while following regionally limited pilot projects set up nationwide. Various education institutions resisted this initiative on the grounds that it violated data confidentiality, and influenced their congressional representatives until the operation was postponed indefinitely.⁷³ However, these protests were silenced after September 11. The USA Patriot Act of October 2001 approved measures to expand SEVIS and allocated an additional \$36 million to the program.

In another initiative, in November 2002, the FBI tried to persuade educational institutions to provide names, addresses, telephone numbers, nationalities, dates, places of birth, and other information about foreign students and international faculty members. The Office of the Attorney-General and the FBI base

Foreign students not only provide cultural and financial enrichment for American universities, but they also serve as vehicles for the exercise of the U.S.’s “soft power.”

these measures on the USA Patriot Act, while stressing that the information was provided to them “voluntarily.” At the same time, the agencies have not excluded the possibility of legal action and a threat of punishment to induce educational institutions to cooperate.

Opinion on the legality of these measures is divided. While two Senate Judiciary Committee members, Patrick Leahy (D-VT) and Edward Kennedy (D-MA), as well as countless associations and educational institutions, questioned the legitimacy of these initiatives, others, such as Sheldon Steinbach of the American Council on Education, had no qualms about the FBI’s recent inquiries: “This is part of the new landscape that we’re all becoming accustomed to since September 11.”⁷⁴

A series of initiatives was put before Congress, including a demand for moratoria on student visas until appropriate security precautions could be taken.⁷⁵ The bills were in no small part inspired by popular sentiments. Immediately following the attacks, 84 percent of Americans favored stricter conditions for student and other visa holders;⁷⁶ still in May 2002, 36 percent were willing to suspend all visas for foreign students.⁷⁷

Special security measures now apply to students from Muslim countries. For example, since November 2001, visa applicants for students from 26 designated Muslim countries have to wait an additional 20 days while security agencies run background checks. This group of students, ranging from ages 16 to 45, is additionally obliged to fill out more extensive questionnaires. Male guests from Iran, Iraq, Libya, Sudan, and Syria are registered upon arrival, with authorities taking their fingerprints and a passport-size photo.⁷⁸

Furthermore, foreigners already staying in the United States are subjected to special scrutiny. About 5,000 foreign students, business travelers, and tourists from countries suspected of cooperating with terrorists were personally invited by security agencies for interviews. Although these interviews are purportedly voluntary, there is the danger that those who refuse to interview would make themselves appear suspicious or give an impression of having something to hide. There are also incentives to interviewing: possible U.S. citizenship was offered as a reward for useful information.⁷⁹

In November 2002, the attorney-general issued another order, calling upon male citizens, aged 16 and older, from 20 Muslim countries to register within a certain period of time by submitting a photo and fingerprints. Failure to comply with this order would result in criminal prosecution and eventual deportation. The first deadline for citizens of Iran, Iraq, Libya, Sudan, and Syria had run out on December 16, 2002. According to unofficial estimates, 1,000 people, mostly Iranians, were arrested upon registering.⁸⁰ Further deadlines had been set for January and February 2003 for people from Afghanistan, Algeria, Yemen, Morocco, Pakistan, and Saudi Arabia.

On January 16, 2003, the authorities confirmed that 1,169 people had been arrested during this registration drive, primarily on violations of immigration laws. In about 170 cases, all those in custody were released on the condition that they appear at the deportation hearings.⁸¹ Upon release of the official numbers—which were twice as high as originally admitted—another five countries (Egypt, Bangladesh, Indonesia, Jordan, and Kuwait) were added to the list requiring registration, now totaling 25.⁸² Visitors to the United States from these countries were asked to register between March 24 and 28, 2003.

While the Pakistanis and Saudi Arabians had time until February 21, other nationals whose deadline had already passed were granted “another chance” for registry between January 27 and February 7.⁸³ Reports about registration practices and arrests caused insecurity and even panic, which deterred many from registering. Because of mass arrests, the American-Arab Anti-Discrimination Committee, the Alliance of Iranian Americans, the Council on American-Islamic Relations, and the National Council of Pakistani Americans have filed a class action suit against the Immigration and Naturalization Service and Attorney-General John Ashcroft.⁸⁴

MOVING FROM THE RULE OF LAW TO RULE BY FEAR?

Problems regarding civil liberties restrictions have revealed that those in charge distinguish between two classes of legal identities: American citizens and “non-Americans.” Regardless of due process or equal protection measures guaranteeing civil liberties of “any person,” foreign nationals in the United States, in the view of the Bush administration—and contrary to common legal opinion and previous judicial interpretation⁸⁵—do not enjoy the same protection under the law as American citizens. And if they have been classified as alleged terrorists, they lose even these “limited rights.” When such individuals are not within the sovereign territory of the United States, they are treated as outlaws, like the imprisoned Taliban and al-Qaeda combatants at Guantanamo Bay. The decision as to who “deserves” which rights is made *a priori* by the executive branch; an *ex post facto* assessment by the courts is not possible. Many observers, speaking from a constitutional standpoint, consider this a precarious balancing act which threatens to undermine the principle of checks and balances inherent to the U.S. political system.

The decision as to who “deserves” which rights is made a priori by the executive branch; an ex post facto assessment by the courts is not possible.

By contrast, the advocates of extraordinary executive authority feel these are legitimized by the commander-in-chief’s protective function. From this standpoint,

it is tenable that in times of war, civil law, which emphasizes individual civil liberties, might mutate into martial law which places collective security above all other considerations. A common denominator in the aforementioned illustrative cases seems to be that the criminal prosecution of individual perpetrators is less important than the general prevention of possible future acts of violence. According to Attorney-General Ashcroft, the “culture of inhibition” before September 11 was “so sharply focused on investigations of past crimes that it limited the prevention of future terrorism.”⁸⁶

The Ashcroft Doctrine of prevention, which has rid itself of such inhibitions, manifests itself by not letting groups of potentially dangerous people who display certain characteristics into the country, deporting them, “removing them from the street,” or placing them in “preventive detention.” Possible informants are made material witnesses. Military tribunals become weapons in the War against Terrorism: “The military order adds additional arrows to the President’s quiver,” explained U.S. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper before the Senate.⁸⁷

The boundaries between civil prosecution and prevention on the one hand, and military operation and martial law on the other, are becoming increasingly blurred. In that respect, the emerging paradigmatic shift in the interpretation of the state’s protective function has repercussions not only for the understanding of democratic rule of law, but also for the system of checks and balances that guarantees the protection of individual civil liberties.

Checks and Balances for the Protection of Individual Civil Liberties

Civil liberties are guaranteed primarily through the principle of checks and balances, the competing executive, legislative, and judicial branches of government controlling each other. However, throughout American history there have been times of external security threats in which the balance of power among the competing branches of government shifted in favor of executive power. In his extensive analysis of this phenomenon, *All the Laws but One: Civil Liberties in Wartime*,⁸⁸ former Supreme Court Chief Justice William Rehnquist warns of the danger present when the commander-in-chief is tempted by additional wartime powers to test the limits of constitutional constraints.⁸⁹ Yet, Rehnquist is not very optimistic that a sense of restraint and the power of the judiciary will contain the executive within the appropriate boundaries and guard civil liberties during wartime. “If the decision is made after the hostilities have ceased,” Rehnquist writes, “it is more likely to favor civil liberty than if made while hostilities continue.”⁹⁰

Although some civil society advocacy groups have achieved partial successes through relevant court rulings, these were usually refuted by executive pressure in a higher jurisdiction or declared null and void. As long as the War on Terrorism continues—and, judging by repeated statements by President Bush and his secretary of

defense, that will be a long time—the Roman maxim *inter arma silent leges*⁹¹ will remain applicable to U.S. political system. In times of crisis or war, the Supreme Court as a non-political institution exercises restraint. It does not want to stab the commander-in-chief in the back. Thus, all eyes are focused on the Congress. Accordingly, a *Washington Post* editorial warned: “The administration owes the country a more thoughtful balance; Congress’s role—the patriotic thing to do—is to help find it.”⁹²

Unlike the more homogenous, closed, and party-disciplined German Bundestag, the U.S. Congress is a competitive arena of individual entrepreneurs, offering more avenues of influence to outsiders. Unlike legislatures in parliamentary systems of government, the U.S. Congress has a very strong and institutionally grounded position of power beside the executive. However, when national security is perceived to be under threat, Congress exerts this potential power very judiciously; in wartime, each individual, normally acting on his or her own behalf, or that of his or her constituents, must join the cause of national security. Although American representatives are not party soldiers, they stand by the commander-in-chief when it is necessary to grant him “patriotic authority” and support him in “defending the homeland.” As long as there is still danger ahead, concern for protecting civil liberties and the balance of power “necessarily” remains secondary.

*The USA Patriot Act and Homeland Security Department—
Significance for the Balance of Power*

It is not surprising that the USA Patriot Act,⁹³ which puts a number of severe restrictions on civil liberties, was propelled by heavy administrative pressure through the legislative channels of Capitol Hill without great resistance from members of Congress. The pressure to act was further increased on October 11, 2001, when the FBI issued a public warning that further terrorist attacks could occur within the next few days. In light of this “clear and present danger,”⁹⁴ Congress did not push for any significant changes.⁹⁵ Parliamentary discussion was reduced to a minimum, and many members of Congress voted for the comprehensive legislation package without knowledge of its content.⁹⁶ Meanwhile, some analysts voiced concerns that the new law would not withstand judicial scrutiny because of its insufficient legislative history.⁹⁷

With the passage of the USA Patriot Act, Congress gave the commander-in-chief the backing he sought in the fight against terrorism. Attorney-General Ashcroft, in an address to Congress, went so far as to put criticism of the restriction of civil liberties in the same league as treason.⁹⁸ But in mid-2002, the legislative branch won an interim victory coinciding with a period of leadership weakness perceived in the President. The percentage of Americans articulating their doubts about the nation’s political course rose noticeably. President Bush’s

popularity was also sucked into the vortex of increasingly dissatisfied general public opinion. Within one week, his confidence rating dropped from 77 percent on May 28-29 to 70 percent on the June 3-6, 2002 (see Figure 2).

The President was able to regain the initiative from Congress and reverse the downward trend of his poll ratings when on June 6, 2002, he unveiled the plan for the creation of the Department of Homeland Security.⁹⁹ The President thus appropriated an idea he had originally categorically refused when Congress developed and articulated such plans to the executive. Furthermore, Bush asked that Congress implement his reorganization plans before the end of the year. In an early June Gallup poll, almost three-quarters (72 percent) of those polled were in favor of the new Department of Homeland Security.¹⁰⁰ Meanwhile, the Congress, especially the Democratic leadership in the House, did not let themselves be sidelined by the President and even tried to outdo him. The House Minority Leader Richard Gephardt (D-MO), although without direct influence on or responsibility for the timetable, took the political offensive and demanded that Congress pass the bill on the new department so that the President could sign it into law before the first anniversary of the terrorist attacks.

With less than 50 session days left and faced with a number of difficult budget bills on the legislative agenda, the Senate and the House had little time to intensively deal with the very complex and politically precarious material entailing the most comprehensive administrative reorganization in the United States

Unlike the more homogenous, closed, and party-disciplined German Bundestag, the U.S. Congress is a competitive arena of individual entrepreneurs.

since the end of World War II. According to the President's plan, 22 federal agencies with approximately 170,000 employees and an annual budget of \$37.5 billion were to be subsumed under the new Department of Homeland Security. Until then, about 80 congressional committees and sub-committees controlled the relevant executive organizational structures.

The President signed the bill on November 25, 2002,¹⁰¹ after some controversial items were taken out and their discussion postponed to the next session of Congress. The law's implementation itself promises a political tug-of-war over the redistribution of financial resources and political authority within both the legislative and the executive branches, and between the two branches themselves. It seems that in this case, too, the executive branch, led by the commander-in-chief, will have the upper hand. As the *Congressional Quarterly Weekly* report, "Homeland Security Department: Another Victory for Administration," puts it, "the slowly and subtly shifting balance of power between the White House and Congress lurched toward Pennsylvania

Avenue.”¹⁰² According to expert opinion, “this President has done such a terrific job on focusing the American attention on terrorism...that Congress is essentially paralyzed.”¹⁰³ Under these circumstances—as the name of the planned department already indicates—the creation of the Department of Homeland Security will put the national security aspect back into the foreground and relegate any concerns about the curbing of civil liberties to the background.

This does not mean that Congress has not exercised any control over the executive in the past. The Republican House leadership had spoken out vehemently against the attorney-general’s plans to implement an informant network under the acronym TIPS (Terrorism Information and Prevention System).¹⁰⁴ The new Department of Homeland Security will also have a so-called privacy officer, although it remains to be seen what authority the position will actually wield.

As with the USA Patriot Act, Congress has yet to assert its institutional role in effectively maintaining the balance between national security and individual civil liberties in the course of the debate over the Department of Homeland Security. Nevertheless, tactical potential has emerged: it became clear that even a wartime president is forced to react to a congressional initiative, which in turn should not run counter to public opinion. Public opinion on the War against Terrorism in general as well as on concrete policy initiatives are especially significant if future congressional hearings and bills are to give civil liberties any more weight.

PUBLIC DIPLOMACY AND SOFT POWER

Why are these issues of interest to Europeans? As the boundaries between civil prosecution and crime prevention, and military operations and martial law, become increasingly blurred, so does the distinction between domestic and foreign policy. This emerging domestic policy paradigm shift in the interpretation of the nation’s protective function affects not only the understanding of democratic rule of law, but also the jurisdiction of international law. It is thus crucial to include European as well as U.S. decision makers in this debate. As the “common transatlantic values” and “German-American friendship” are being tested, it should be taken for granted that frank and controversial debate “among friends” is possible concerning basic democratic principles which form the nucleus of a new world order.

European decision makers and public leaders should thus use various private and public channels to bring the following issues onto the transatlantic agenda: (1) prosecuting terrorists according to international law and (2) increased use of soft power in international diplomacy.

The creation of military tribunals for the prosecution of suspected terrorists and the impending death penalty will continue to burden the cooperation

between the United States and many of its allies, as Spain's refusal to extradite apprehended terrorists has already demonstrated.¹⁰⁵ Prosecution of terrorists according to international law would mark a significant change in the Bush administration's previous attitude, evidenced in the conflict over the International Criminal Court's jurisdiction and reservation towards *ad hoc* tribunals for war crimes in the former Yugoslavia and Rwanda. These issues are only the tip of an iceberg of diverging conceptions of sovereignty and international rule of law. But there are ways to avoid a collision with this transatlantic iceberg. Both political and legal discussions about the presidential executive order authorizing military tribunals¹⁰⁶ should favor an international approach.¹⁰⁷

The creation of the Department of Homeland Security will put the national security aspect back into the foreground and relegate any concerns about the curbing of civil liberties to the background.

Furthermore, the commander-in-chief's powers in combating terrorism also entail using international ways and means: "Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, members of al-Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."¹⁰⁸ This approach is supported by a majority of the American people—in a *Gallup/CNN/USA*

Today poll, 41 percent favored trying Osama bin Laden before an international court, while only 29 percent favored a secret military tribunal, and 17 percent voted in favor of the regular U.S. court system.¹⁰⁹

The international solution would be an opportunity for the Bush administration to counter domestic and international criticism and offer a guiding principle—justice and freedom—to hold together the international coalition against terrorism. It would contribute to public diplomacy, which is just as necessary to win the War against Terrorism as are the increased security measures.

The soft power of public diplomacy would enhance the credibility of the "USA" brand, which stands for "democracy, personal freedom and free markets,"¹¹⁰ and increase international brand allegiance. Both the legislative and the executive branches have recognized the importance of this strategy. But as Graham Fuller, an expert on the Middle East and former high-ranking CIA official, warns, "If fundamental policies are seen to be flawed, a prettied-up package will not make a difference."¹¹¹ It would be laudable for the United States to set the goals that correspond to the actual policy, thereby providing an example that preserves civil liberties and does not waste the enormous potential of soft power.¹¹²

OUTLOOK: A CHANGING WORLD VIEW?

“America’s view of the world will change, with friends and enemies more sharply defined. Americans will debate fundamental questions of freedom and security.”¹¹³ American decision makers’ new view of the world and its repercussions need to be understood and followed attentively. Both political action and the legal interpretation of constitutional principles are shaped by, and bound to shape, public awareness and societal value preferences. Accordingly, the competing values of a living Constitution requiring the balance of national security and civil liberties are continuously reevaluated. The September 11 attacks have left indelible traces in the collective consciousness. They form the background against which the nation’s protective function has gained significance at the cost of civil liberties.¹¹⁴

The commander-in-chief’s powers in combating terrorism also entail using international ways and means.

The threat to national security has given the presidency a power advantage over its institutional adversary in Congress, as well as over the judiciary. In these circumstances, the Congress, it seems, has a unique responsibility. It must ensure that even in times of national insecurity, individual civil liberties are not overly restricted by the collective need for protection.

Congressional elections on November 5, 2002, once again exemplified the significance of the President’s special position as well as the perceived threat to national security. Hitherto, neither the Supreme Court nor Congress has been able to offer sustainable guarantees for the protection of civil liberties. It remains to be seen further whether and to what extent the general wartime mentality and need for protection increase through possible further attacks or warnings. For Europeans, deteriorating protection of civil liberties in America is not merely of academic interest, but of increasingly deep concern for policymakers in general. ■

NOTES

- 1 The author would like to thank his SWP colleagues—Christoph Bertram, Albrecht Zunker, Jens van Scherpenberg, Stefan Mair, and Natalie Gravenor—for their helpful input and critical support in strengthening this paper. The views expressed in this essay are those of the author and should not be ascribed to the board, officers, or other staff members of the SWP.
- 2 Such was the introduction to an editorial in the August 10, 2002 issue of *National Journal*, devoted to the question of security: “On the morning of September 11, 2001, America’s sense of security collapsed along with the twin towers of the World Trade Center.” See Sydney J. Freedberg Jr. and Siobhan Gorman, “National Security: Are We Safer?” *National Journal*, August 10, 2002.
- 3 George W. Bush, “Address Before a Joint Session of the Congress on the State of the Union,” January 29, 2002, <<http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html>> (accessed May 12, 2003).

- 4 It is important to note, however, that this perception was also supported by the reaction of the international community to the attacks. On September 12, the NATO Council invoked Article V, guaranteeing collective defense of one member nation by all other members. On the same day, the UN Security Council passed a resolution (UNSC. Res. 1368) granting the United States the right of self-defense.
- 5 For further pre-election poll results, see Josef Braml, "Freie Hand für Bush? Auswirkungen der Kongresswahlen auf das innenpolitische Machtgefüge und die Außenpolitik der USA," *SWP-Aktuell* 55/02, December 2002, available at <http://www.swp-berlin.org/pdf/swp_aktu/swpaktu_55_02.pdf>.
- 6 See Gallup Poll October 31-November 3, quoted in David W. Moore and Jeffrey M. Jones, "Higher Turnout Among Republicans Key to Victory," *Gallup News Service*, November 7, 2002, <<http://www.gallup.com/poll/releases/pr021107.asp>> (accessed May 12, 2003).
- 7 Poll by *Gallup/CNN/USA Today*, October 5-6, 2001, quoted in "American Public Opinion on the War on Terrorism," *AEI Studies in Public Opinion* (Washington: American Enterprise Institute, January 10, 2003), 40.
- 8 G. Calvin Mackenzie and Judith M. Labiner, "Opportunity Lost: The Rise and Fall of Trust and Confidence in Government After September 11," Center for Public Policy Service at the Brookings Institution, Washington, D.C., 3, available at <<http://brook.edu/dybdocroot/gs/cps/opportunityfinal.pdf>>.
- 9 See David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965).
- 10 *Washington Post-ABC News* Poll: "America at War," *Washington Post*, November 28, 2001.
- 11 The Gallup poll question reads: "Do you approve or disapprove of the way George W. Bush is handling his job as President?" David W. Moore, "Bush Approval Drops Below 60% for First Time Since 9/11," *Gallup News Service*, January 14, 2003, <<http://www.gallup.com/poll/releases/pr030114.asp>> (accessed May 12, 2003).
- 12 Americans giving a positive job appraisal gave the following reasons: "his general personal strength and sense of leadership since September 11" (44 percent); "his response to the events of September 11 and the direction of the war in Afghanistan" (34 percent); "his policies have resulted in no further terrorist attacks" (6 percent); "the present administration's response dealing with the economic downturn" (6 percent). Survey by Public Opinion Strategies, January 14-17, 2002, quoted in "American Public Opinion on the Terrorist Attacks," *AEI Studies in Public Opinion* (Washington: American Enterprise Institute, June 28, 2002), 25.
- 13 Survey by *Washington Post/ABC News*, quoted in Dana Milbank and Claudia Deane, "President's Ratings Still High, Poll Shows," *Washington Post*, December 22, 2002, A4.
- 14 *Gallup/CNN/USA Today*, quoted in "American Public Opinion on the War on Terrorism," *AEI Studies in Public Opinion*, January 10, 2003, 37.
- 15 Kurt Shell accurately describes this "antagonistic partnership" between Congress and the Presidency as the core of the American political system which distinguishes it from European parliamentary systems. See Kurt L. Shell, "Kongreß und Präsident," in Willi Paul Adams and Peter Lösche, eds., *Länderbericht USA* (Bonn: Bundeszentrale für politische Bildung, 1998), 207.
- 16 Fox News/Opinion Dynamics, October 3-4, 2001, quoted in "American Public Opinion on the Terrorist Attacks," *AEI Studies in Public Opinion*, June 28, 2002, 53.
- 17 Bob Barr, quoted in Jennifer A. Dlouhy and Elizabeth R. Palmer, "New Assertions of Executive Power Anger, Frustrate Some on Hill," *Congressional Quarterly Weekly*, November 24, 2001, 2784.
- 19 The question was: "In order to curb terrorism in this country, do you think it will be necessary for the average person to give up some civil liberties, or not?"
- 20 The question asked was: "What concerns you more right now: that the government will fail to enact strong new anti-terrorism laws, or that the government will enact new anti-terrorism laws which excessively restrict the average person's civil liberties?"
- 21 PSRA/Pew Research Center, quoted in "American Public Opinion on the Terrorist Attacks," *AEI Studies in Public Opinion*, June 28, 2002, 47.
- 22 See also "Black Leaders Attack Bush on Civil Rights," *Washington Post*, July 9, 2002, 4(A).
- 23 Poll conducted on November 27, 2001; "*Washington Post/ABC News* Poll: America at War," *Washington Post*, November 28, 2001.
- 24 Ibid.
- 25 Elizabeth R. Palmer, "Terrorism Bill's Sparse Paper Trail May Cause Legal Vulnerabilities," *Congressional Quarterly Weekly*, October 27, 2001, 2533.
- 26 *Los Angeles Times* and PSRA/Pew Research Center, quoted in "American Public Opinion on the Terrorist Attacks," *AEI Studies in Public Opinion*, June 28, 2002, 48.
- 27 See Ronald Dworkin, "The Threat to Patriotism," *The New York Review of Books*, February 28, 2002, 45. See also Laurie Goodstein, "Jewish Groups Endorse Tough Security Laws," *The New York Times*, January 3, 2002.
- 28 Ibid.

- 29 *Gallup/CNN/USA Today*, January 25-27, 2002 and June 21-23, 2002, quoted in "American Public Opinion on the Terrorist Attacks," *AEI Studies in Public Opinion*, June 28, 2002, 53.
- 30 See Amitai Etzioni, "How Democracy is Preserved," *Christian Science Monitor*, August 26, 2002.
- 31 See Editorial, "The Role of Congress," *The New York Times*, June 6, 2002.
- 32 According to an Associated Press report, 204 cells will be added to expand the prison camp's capacity to a total of 816 cells by October 1, 2002. See "New Expansion at Prison Camp in Guantanamo," *The New York Times*, August 9, 2002.
- 33 See Neil MacFarquhar, "Kuwaitis Sue U.S. Over 12 Held at Guantanamo," *The New York Times*, June 26, 2002; Rebecca Allison, "Terror Suspects 'have no right to US trial,'" *The Guardian*, August 1, 2002, 1. The preliminary report of the American Bar Association documents the legal state of affairs: "Two United States District Courts have recently dismissed *habeas corpus* claims on behalf of Guantanamo detainees on jurisdictional grounds because the detainees were not within the territorial jurisdiction of the courts." See American Bar Association, "Task Force on Treatment of Enemy Combatants, Preliminary Report," August 8, 2002, 5, available at <http://www.abanet.org/leadership/enemy_combatants.pdf>. See also *Coalition of Clergy v. Bush*, 189 F. Supp.2d 1036 (C.D.Cal. 2002); *Rasul v. Bush*, 2002 WL 760825 (D.D.C. 2002).
- 34 See American Bar Association Task Force on Terrorism and the Law, "Report and Recommendations on Military Commissions," January 4, 2002, available at <<http://www.abanet.org/leadership/military.pdf>>. The decisions quoted were *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
- 35 See Office of the High Commissioner for Human Rights, <<http://193.194.138.190/html/menu3/b/91.htm>> (accessed May 12, 2003).
- 36 See Katharine Seelye, "Detainees Are Not P.O.W.s, Cheney and Rumsfeld Declare," *The New York Times*, January 28, 2002; Tom Shanker and Katharine Seelye, "Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions," *The New York Times*, February 22, 2002.
- 37 See Katharine Seelye, "Powell Asks Bush to Reverse Stand on War Captives," *The New York Times*, January 27, 2002, 1; William Safire, "Colin Powell Dissents," *The New York Times*, January 28, 2002, A21; John Mintz, "Debate Continues on Legal Status of Detainees," *Washington Post*, January 28, 2002, A15; Katharine Seelye and David Sanger, "Bush Reconsiders Stand on Treating Captives of War," *The New York Times*, January 29, 2002.
- 38 For a justification of this position, see White House Fact Sheet, "On the status of the Guantanamo detainees," Office of the Press Secretary, February 7, 2002, <<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>> (accessed May 12, 2003).
- 39 See White House Press Release, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," November 13, 2001, <<http://www.state.gov/coalition/ct/prs/6077.htm>> (accessed May 12, 2003).
- 40 Conservative columnist William Safire went so far as to chastise President Bush for seizing "dictatorial power." "Misadvised by a frustrated and panic-stricken Attorney-General," Safire continues without pulling any punches, "we are letting George W. Bush get away with the replacement of the American rule of law with military kangaroo courts." See William Safire, "Seizing Dictatorial Power," *The New York Times*, November 15, 2001, A31.
- 41 See William Safire, "Military Tribunals Modified," *The New York Times*, March 21, 2002. See also Editorial "Refining Military Tribunals," *The New York Times*, March 22, 2002.
- 42 The publishers of the *American Journal of International Law* provided conflicting positions on the international lawfulness of the President's *executive order* in its April 2002 issue. See "Agora: Military Commissions," *American Journal of International Law* 96 (2) (April 2002): 320-364. For a further controversial debate between George P. Fletcher, Cass Sunstein, and Laurence Tribe, see Letters to The Editor, "The Military Tribunal Debate," *American Prospect*, February 25, 2002, <<http://www.prospect.org/print-friendly/webfeatures/2002/03/fletcher-g-03-05.html>> (accessed May 12, 2003).
- 43 Jennifer A. Dlouhy and Elizabeth R. Palmer, "New Assertions of Executive Power Anger, Frustrate Some on Hill," *Congressional Quarterly Weekly*, November 24, 2001, 2784.
- 44 *Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States*, Public Law 40, 107th Congress, 1st session, September 18, 2001.
- 45 See American Bar Association Task Force on Terrorism and the Law. See also John Lancaster and Helen Dewar, "Congress Clears Use of Force, \$40 Billion in Emergency Aid," *Washington Post*, September 15, 2001, A4.
- 46 *Ex Parte Milligan*, 71 U.S. 2 (1866).
- 47 *Ex Parte Quirin*, 317 U.S. 1 (1942).

- 48 In its *Ex Parte Quirin* ruling, the Supreme Court left open whether in light of the powers granted by Congress, the President's authority as commander-in-chief was sufficient to create military tribunals without congressional approval: "It is unnecessary for present purposes to determine to what extent the President as Commander-In-Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions."
- 49 Dlouhy and Palmer, 2784.
- 50 Ibid.
- 51 In the approval of military tribunals, public opinion distinguishes between "foreign suspects captured overseas" (74 percent approve of military tribunals for them), "foreign suspects who came to the U.S. only a few years ago" (46 percent), and other "suspicious non-U.S. citizens who have been living in the U.S. for many years" (33 percent). The willingness to accept military tribunals reflects an interesting sociological perception of "inside versus outside," "us versus them." The findings also demonstrate that this sense of group belonging does not rest on nationality alone. See PSRA/*Newsweek* poll of November 29-30, 2001, quoted in "American Public Opinion on the Terrorist Attacks," *AEI Studies in Public Opinion*, June 28, 2002, 35.
- 52 The preliminary report continues, "Sadly, in what promises to be a long, complex, and difficult struggle with a worldwide terrorist network, this is not likely to be the last instance in which a U.S. citizen is believed to be or accused of acting in concert with such terrorists." See American Bar Association, 3.
- 53 "[D]eclaring American citizens to be enemy combatants, and therefore not entitled to basic constitutional protections, is a clear matter of domestic civil liberties. The courts have an obligation to play an active role in reviewing these determinations." See Editorial, "Unlimited Presidential Power," *The New York Times*, August 8, 2002.
- 54 Attorney-General John Ashcroft in an NBC interview on November 19, 2001, quoted in Dlouhy and Palmer, 2784.
- 55 See Section 1, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."
- 56 See Review & Outlook, "An Enemy Combatant's Rights," *The Wall Street Journal*, December 10, 2002.
- 57 See *Hamdi v. Rumsfeld*, 316 F.3d 450 (C.A.4 VA 2003), available from <<http://pacer.ca4.uscourts.gov/>>.
- 58 See Susan Sachs, "U.S. Deports Most of Those Arrested in Sweeps After 9/11," *The New York Times*, July 11, 2002.
- 59 This memo written by Chief Immigration Judge Michael J. Creppy, is also known as the "Creppy Memo."
- 60 Quoted in Editorial, "Open the Hearings," *Washington Post*, April 8, 2002, A16.
- 61 See Section 236 (A) "Detention of Terrorist Aliens." *The USA PATRIOT Act of 2001*, Public Law 56, 107th Congress, 1st session, October 26, 2001.
- 62 For example, if the person in question has no nationality, the country of origin refuses re-entry or the threat of torture looms upon return.
- 63 The person in question may be held for seven days without specific charges. Should charges then be pressed, even if they are not directly related to terrorism, and the attorney-general decides that security is at risk, the suspect can be detained for repeated periods of up to six months each, as long as the attorney-general considers the suspect a threat to national security.
- 64 Testimony of Attorney-General John Ashcroft, Senate Committee on the Judiciary, December 6, 2001.
- 65 See Neil Lewis, "Judge Orders Names of Sept. 11 Detainees Released," *The New York Times*, August 2, 2002.
- 66 In a commentary on the legal debate, *The New York Times* sharply criticized the Supreme Court's heretofore restraint. See Editorial, "Closing the Door to Public Scrutiny," *The New York Times*, June 29, 2002. For reporting about the legal debate, see Steve Fainaru, "U.S. Loses a Ruling On Secret Detentions. Judge Rejects Order Closing Hearings," *Washington Post*, May 30, 2002, A1; Dan Eggen, "U.S. Must Keep Terror Hearings Open, Court Says," *Washington Post*, June 18, 2002, A10; Susan Sachs, "Ashcroft Petitions Justices for Secrecy in Deportations," *The New York Times*, June 22, 2002; Steve Fainaru, "Immigration Hearings Case Goes to High Court," *Washington Post*, June 22, 2002, A11; Steve Fainaru, "Court Allows Closed Immigration Hearings to Continue," *Washington Post*, June 29, 2002, A14; Abstracts, "Supreme Court Allows Secrecy to Stand in Deportation Cases," *The New York Times*, June 29, 2002.
- 67 Lewis, 2002.
- 68 Attorney-General Ashcroft in a press statement November 27, 2001, <http://www.justice.gov/ag/speeches/2001/agcrisisremarks11_27.htm> (accessed May 12, 2003).
- 69 As Stuart Taylor summarizes: "The record does seem to suggest that we gain precious little safety by detaining so many people based on so little evidence. Perhaps Ashcroft can show otherwise. Congress should invite him to try." Stuart Taylor, Jr., "Legal Affairs: Congress Should Investigate Ashcroft's Detentions," *National Journal*, November 25, 2002.

- 70 See Steve Fainaru, "Judge to Hear Abuse Case of Sept. 11 Detainee," *Washington Post*, February 15, 2002, A16; Steve Fainaru, "Jordanian Detainee Testifies On Abuse," *Washington Post*, February 19, 2002, A9; Steve Fainaru, "Detainees Offer Glimpse of Life In N.Y. Facility," *Washington Post*, April 17 2002, A1; Benjamin Weiser, "F.B.I. Faces Inquiry on a False Confession From an Egyptian Student," *The New York Times*, August 6, 2002.
- 71 See Christine Haughney, "A Sept. 11 Casualty: 'Radio Man' Jailed for A Month, Then Freed," *Washington Post*, March 11, 2002, A3; Benjamin Weiser, "F.B.I. Faces Inquiry on a False Confession From an Egyptian Student," *The New York Times*, August 6, 2002.
- 72 CRS Presentation of data from the U.S. Department of State Bureau of Consular Affairs. See Ruth Ellen Wasem, "Foreign Students in the United States: Policies and Legislation," *Congressional Research Service*, March 28, 2002, 5. The so-called non-immigration visas are granted for specific purposes for a limited period. Visa categories F (for academic studies), M (for vocational training), and J (for cultural exchange) are the most common ways for foreign students to enter the U.S.
- 73 Eric Schmitt, "Agency Finds Itself Under Siege, With Many Responsibilities and Many Critics," *The New York Times*, March 15, 2002.
- 74 Dan Eggen, "FBI Seeks Data on Foreign Students," *Washington Post*, December 25, 2002, A1.
- 75 For example, H.R. 3181 (Rep. Michael Bilirakis) or H.R. 322 (Rep. Marge Roukema).
- 76 *Los Angeles Times* Poll of September 13-14, 2001, quoted in "American Public Opinion on the Terrorist Attacks," *AEI Studies in Public Opinion*, June 28, 2002, 59.
- 77 Although about one half of those polled (53%) were against such measures. See *Fox News/Opinion Dynamics*, May 14-15, 2002; quoted in "American Public Opinion on the Terrorist Attacks," *AEI Studies in Public Opinion*, June 28, 2002, 61.
- 78 Siobhan Gorman, Sydney J. Freedberg Jr., Neil Munro, Peter H. Stone, and James Kitfield, "National Security: Preventing New Attacks," *National Journal*, August 10, 2002.
- 79 "We have offered non-citizens willing to come forward with valuable information a chance to live in this country and one day become citizens." Testimony of Attorney-General John Ashcroft, Senate Committee on the Judiciary, December 6, 2001, <<http://www.justice.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>> (accessed May 12, 2003).
- 80 "Arab, Muslim Groups Sue INS, Ashcroft over Detentions," *Washington Post*, December 25, 2002, A14.
- 81 "U.S. Detains Nearly 1,200 during Registry," *Washington Post*, January 17, 2003, A14.
- 82 Nick Madigan, "U.S. Expands List of Nations Whose Visitors Must Register," *The New York Times*, January 17, 2003.
- 83 This applies to citizens of Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Qatar, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen.
- 84 "Immigrants Sue over Detentions after Checking In," *The New York Times*, December 25, 2002; Reuters, "Arab, Muslim Groups Sue INS, Ashcroft over Detentions," *Washington Post*, December 25, 2002, A13.
- 85 "Aliens present within the United States are entitled to due process protections." See American Bar Association Task Force on Terrorism and the Law. A landmark Supreme Court decision—*Zadvydas v. Davis*, 533 U.S. 678 (2001)—further specifies: "But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."
- 86 Attorney-General John Ashcroft's address at the U.S. Attorneys Conference in New York on October 1, 2002, quoted in Siobhan Gorman, "There Are No Second Chances," *National Journal*, December 21, 2002.
- 87 Pierre-Richard Prosper, quoted in Senate Committee on the Judiciary, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, December 4, 2001, <http://judiciary.senate.gov/print_testimony.cfm?id=129&wit_id=77> (accessed May 12, 2003).
- 88 See William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York/Toronto: Alfred A. Knopf, 1998).
- 89 *Ibid.*, 224.
- 90 *Ibid.*
- 91 When weapons speak, the laws are silent. See Cicero, "Pro Milone," in D.H. Berry, trans., *Cicero Defense Speeches* (Oxford: Oxford University Press 2001), §11a.A.S.a. C 88, J114, V 32, and 162 ff.
- 92 See Editorial, "Detaining Americans," *Washington Post*, June 11, 2002, A24.
- 93 USA PATRIOT Act of 2001.
- 94 James Sensenbrenner Jr. (R-WI), Chairman of the House Judiciary Committee, quoted in Elizabeth A. Palmer, "House Passes Anti-Terrorism Bill That Tracks White House's Wishes," *Congressional Quarterly Weekly*, October 13, 2001, 2399.

- 95 To be sure, some of the measures originally considered by the administration were toned down. For example, in the executive version, it would have been sufficient that the attorney-general “had reason to believe” that the suspect is a terrorist to detain him indefinitely. In the version approved by Congress, the attorney-general needs “reasonable grounds” to enact such measures. But this weighing is also ultimately at the attorney-general’s discretion, and should prove difficult to counter his assessment with contrary evidence in order to challenge the protective measures.
- 96 The Senate passed the bill after only three hours of plenary debate without having discussed the bill in the relevant committees. In the House, majority leader J. Dennis Hastert (R-IL), responding to massive White House pressure, replaced a bill that had been discussed in the committees with a new one and whisked it through the plenary on the same day. See Elizabeth A. Palmer, “House Passes Terrorism Bill...,” 2399.
- 97 See Elizabeth A. Palmer, “Terrorism Bill’s Sparse Paper Trail May Cause Legal Vulnerabilities,” 2533.
- 98 “To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends. They encourage people of good will to remain silent in the face of evil.” Testimony of Attorney-General John Ashcroft, Senate Committee on the Judiciary.
- 99 For a transcript of President George W. Bush’s speech, see “Overriding and Urgent Mission for New Agency,” *Washington Post*, June 7, 2002, A19.
- 100 Frank Newport, “Americans Approve of Proposed Department of Homeland Security Source,” *Gallup News Service*, June 10, 2002, <<http://www.gallup.com/poll/releases/pr020610.asp>> (accessed May 12, 2003).
- 101 *Homeland Security Act of 2002*, 107-296.
- 102 Shirley Anne Warshaw, quoted in Mary Dalrymple, “Homeland Security Department Another Victory for Administration,” *Congressional Quarterly Weekly*, November 16, 2002, 3002.
- 103 *Ibid.*
- 104 See Adam Clymer, “Ashcroft Defends Plan for National Hotline on Terrorism,” *The New York Times*, July 25, 2002; Adam Clymer, “Worker Corps to be Formed to Report Odd Activity,” *The New York Times*, July 26, 2002; Dan Eggen, “Ashcroft: TIPS Plan Won’t Have Central Database,” *Washington Post*, July 26, 2002, A10.
- 105 See Philip Shenon and Neil Lewis, “The 20th Hijacker—France Warns It Opposes Death Penalty in Terror Trial,” *The New York Times*, March 28, 2002; Katharine Seelye, “Russians Want 3 Back From Guantanamo,” *International Herald Tribune*, April 4, 2002, 2; “Todesstrafe für Moussaoui beantrag,” *Frankfurter Allgemeine Zeitung*, March 30, 2002, 7; Bradley Graham, “British to Turn Over Prisoners to Afghans,” *Washington Post*, April, 30, 2002, A1; “Canada Halts Suspect’s Extradition,” *Washington Post*, June 5, 2002, A17; “Washington an deutschen Zeugen interessiert,” *Frankfurter Allgemeine Zeitung*, June 19, 2002, 6.
- 106 See George Fletcher, “War and the Constitution,” *American Prospect*, 13 (January 1-14, 2002) 1, 26.
- 107 See Anne-Marie Slaughter, “Al Qaeda Should Be Tried Before the World,” *The New York Times*, November 17, 2001, A23.
- 108 The law became effective on August 2, 2002: PL 107-206, 116 Stat. 820. See Section 2015, “Assistance to International Efforts.”
- 109 See *Gallup/CNN/USA Today* poll of December 14-16, 2001, quoted in “American Public Opinion on the Terrorist Attacks,” *AEI Studies in Public Opinion*, June 28, 2002, 37.
- 110 See Karen DeYoung, “Bush to Create Formal Office To Shape U.S. Image Abroad,” *Washington Post*, July 30, 2002, A1.
- 111 *Ibid.*
- 112 For a similar assessment, see Catharin Dalpino, “Listen to What Moderate Muslims Say,” *International Herald Tribune*, July 29, 2002.
- 113 John Cochran and Mike Christensen, “Regrouping With A Common Purpose,” *Congressional Quarterly Weekly*, September 15, 2001, 2114.
- 114 For a fundamental criticism of the assumption of a “trade-off” or “balance” between the two values of liberty and security see Ronald Dworkin, “The Threat to Patriotism.”