The Anti-Terrorist Legislation in the US: Criminal Law for the Enemies?

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A. Introduction

Since 11 September 2001, the themes of security and terrorism have dominated the media in the US as never before. The Bush I administration has made the fight against terrorism a top priority of its security and justice policy. It has greatly reduced the fragmented nature of the enforcement organisation. Despite the criticism which was and still is being directed at the FBI for its defective handling of information to prevent the attacks on 11 September, its position has clearly been strengthened. The Bush I administration has also created a new super-ministry for domestic security. This Department of Homeland Security (DHS)[1] is the result of the largest federal reorganisation after WWII.[2] It also deemed it necessary to radically expand, by means of emergency legislation against terrorism embedded in the USA Patriot Act (USAPA)[3] and in presidential executive orders,[4] the competences of the enforcement organisations, also in the proactive phase, and to make their implementation less dependent upon judicial control.

In the first year after 11 September, public support for these reforms and for the special legislation was unquestioned. Less of the rule of law and more security were accepted in broad circles. By now, however, the practical implementation and the way in which the executive has relegated the legislature and the judiciary to the sidelines have caused public support to erode considerably. The tone of the quality media has become much sharper and Congress is requesting the government to account for the anti-terrorism policy conducted. There are pressing

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1 *See* http://www.dhs.gov/interweb/assetlibrary/hr_5005_enr.pdf for the DHS Act. The DHS started functioning in January 2003. *See also* http://www.dhs.gov/dhspublic.

2 It therefore does not seem likely that the DHS will be able to develop its own Home Intelligence Agency, like MI5 in the UK.

3 This is the acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.

4 *See* section D.

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questions concerning the position of information before the attacks and the need for far-reaching powers of enforcement in the fight against terrorism, as well as concerning the growing influence of the intelligence services in criminal law enforcement. Why did the FBI and the CIA withhold information from each other before 11 September? Why did the Bush I administration refuse to disclose information concerning the post-11 September detentions and deportations? Was the substantial limitation of civil rights and the equally substantial expansion of secret procedures (secret detention and trial based on classified evidence) and preventive or proactive criminal law actually necessary? The political row over the reliability of the information underlying the declaration of war against Iraq has stirred up the debate even further. Some critics claim that democracy and the constitutional state are dying a slow death behind closed doors. Did the executive use the 11 September attacks to establish a *de iure* and *de facto* police state which has suspended the constitutional state's functioning until further notice? Have Congress and the judiciary been ousted from the game? The fight against terrorism not only leads to severe criticism,[5] but it also encounters political opposition. In a number of states, local authorities refuse to implement certain parts of the anti-terrorist legislation. They hold the opinion that the national security policy has become the main aim of the justice policy under Attorney General (AG) Ashcroft, at the expense of civil rights and constitutional guarantees.

The 9/11 attacks and the anti-terrorism approach in the US have not remained without consequences in Europe.[6] Many European countries have adopted special anti-terrorism legislation or significantly tightened the existing laws[7] and the European Union has accelerated the adoption of the Framework Decisions on the criminal law harmonisation of terrorism and the European arrest warrant and elaborated an extensive anti-terrorism action plan.[8] The judiciary, both national[9] and supranational,[10] have to deal with emergency measures. After the rail attacks on March 2004 in Madrid and the metro attacks in London in July 2005 there is a real risk that the EU will seek most of its inspiration from the US approach for

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[5] *See e.g.* R. Dworkin, *The Real Threat to US Values*, The Guardian, 9 March 2002 and R. Dworkin, *The Threat to Patriotism*, New York Review of Books, 28 February 2002.

[6] For an in depth study, *see* C. Fijnaut, J. Wouters & F. Naert (Eds.), Legal Instruments in the Fight against International Terrorism. A Transatlantic Dialogue (2004).

[7] *See e.g.* the recent Anti-terrorism, Crime and Security Act (ASTA) of the United Kingdom, http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm.

[8] J. Wouters & F. Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism after '11 September'*, 41 Common Market Law Review 909 (2004).

[9] *See for instance* the Opinions of the Lords of Appeal of the House of Lords for Judgment in the case of A and X *v.* Secretary of State for the Home Department, 16 December 2004, http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm .

[10] C. Warbrick, *The principles of the European Convention on Human Rights and the Response of States to Terrorism*, 2002 EHRLR 287; P. Lemmens, *Respecting Human Rights in the Fight against Terrorism*, *in* C. Fijnaut, J. Wouters & F. Naert (Eds.), Legal Instruments in the Fight against International Terrorism. A Transatlantic Dialogue 223 (2004); and D. Cassel, *Human Rights and the United States Response to 11 September*, *in* C. Fijnaut, J. Wouters & F. Naert (eds.), Legal Instruments in the Fight against International Terrorism. A Transatlantic Dialogue 251 (2004).

the elaboration of an EU home security policy.[11] European criminal law scholars and practitioners should now examine to what extent the fundamental guarantees of the constitutional state have in the US been traded in for guaranteeing national security and how this has been translated into criminal law and criminal procedural law and the connected special legislation. For this reason, this article will outline the main components of the anti-terrorism legislation in the USA.

B. 11 September 2001 and the Enactment of the USA Patriot Act

On 14 September, shortly after the 11 September 2001 attacks on symbolic locations like the Twin Towers in New York, the Pentagon - and presumably also nearly the White House - in Washington DC, President Bush retroactively proclaimed a national emergency[12] based on the National Emergencies Act.[13] He qualified the acts of aggression as acts of war committed by foreign attackers, and not primarily as criminal offences. The tone had been set. AG Ashcroft subsequently underlined that the DoJ's new approach to terrorism would primarily be directed at preventive or proactive enforcement. As early as 17 September, the DoJ issued a new law on terrorism, the Mobilization against Terrorism Act.[14] This proposal formed the framework for a Bill in the House of Representatives on 2 October and in the Senate on 4 October, which was integrated by the President of the Senate in the Bill with the symbolic name USA PATRIOT ACT (USAPA).[15] The Bill (H.R. 3162) was submitted to the House of Representatives on 23 October and voted through the next day by 357 to 66 votes. On 25 October, the Senate passed the text unamended by 98 votes to 1. On 26 October, the President signed the text into law of the land. The Patriot Act is a large and complex law implementing substantial changes in over 15 federal framework laws and granting unfrequented powers to enforcement agencies and intelligence services. Despite the complexity and constitutional sensitivity of many provisions, the Act was approved by Congress in an expedited procedure, without reports, debate or amendments worth mentioning. Nevertheless, the Act includes many provisions which were copied from legislative proposals from before 11 September, but which had fallen by the wayside in the Congressional debates because a large majority considered them fatal to civil rights or questioned their compatibility with the Constitution. In reality the proposal was negotiated by the government and a handful of Congressmen during a period of three weeks. AG Ashcroft asked Congress for its urgent and unconditional approval against the background of imminent new attacks about which the FBI issued a warning on 11 October.

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[11] *See* the European Council Declaration on Combating Terrorism of 25 March 2004, http://www.statewatch.org/news/2004/mar/eu-terr-decl.pdf.

[12] Proclamation no. 7463, 66 Fed. Reg. 48,199 (14 September 2001).

[13] 50 USC Sec. 1631 (1994).

[14] http://www.eff.org/Privacy/Surveillance/Terrorism/20010919_doj_mata_analysis.html.

[15] This is the acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.

The questioning about the quality of information gathering and sharing by and within the intelligence community has led to the establishment of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission), an independent, bipartisan commission created by congressional legislation and the White House. The 9/11 Commission was installed only in late 2002, because of opposition by the Bush I administration to its creation. It released its final report on July 22, 2004,[16] including 41 recommendations. Most of the recommendations deal with the Intelligence Community. The Bush I Administration adopted most of the recommendations and in August 2004 it published several executive orders dealing with the intelligence community.[17] Although the Bush I administration sought intelligence reform legislation in line with the recommendations of the 9/11 Commission, it did water down several aspects, as for instance the overseeing power of the NID concerning the Pentagon. The Bush I administration set up a tough campaign to soften the results of the reform. A final compromise has led to the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).[18] The bill includes very substantial changes in the intelligence community, by amending the National Security Act of 1947. The reform also aims to strengthen the sharing of terrorism information and the creation of what is called a information sharing environment. The reform is not limited to the intelligence community. Several measures are aimed at strengthening transport security and border protection. The 9/11 Commission also recommends that the FBI should give more priority to national security than to criminal justice and should for that reason establish a specialized and integrated national security workforce in order to shift towards a preventive counterterrorism posture.[19] This recommendation has been integrated in the bill in Title II. Finally, the bill contains several Patriot-Act alike provisions, dealing with substantial criminal law and financial enforcement.[20]

However far-reaching the new Patriot Act may be, neither special legislation, nor anti-terrorism legislation is a novelty in the history of the US.[21] The anti-terrorism legislation of the Bush I administration was moreover not created in a vacuum. Important building blocks were provided under the Reagan and Clinton Administrations.[22] The anti-terrorism legislation of the Bush I administration is

[16] *See* http://www.gpoaccess.gov/911.

[17] http://www.whitehouse.gov/news/releases/2004/09/20040908-5.html.

[18] http://www.gpoaccess.gov/serialset/creports/intel_reform.html . The IRTPA was passed in the House of Representatives on 7 December 2004, with a vote of 336-75. It was passed in the Senate on 8 December 2004, with a vote of 89-2. Bush signed it into law on 17 December 2004.

[19] http://www.gpoaccess.gov/911, p. 425.

[20] *See* section C.II.

[21] For elaboration on this point, *see* J. A. E. Vervaele, *The Anti-Terrorist Legislation in the US: Inter Arma Silent Leges?*, 13 European Journal of Crime, Criminal Law and Criminal Justice 201 (2005). *See also* P. B. Heymann, Terrorism, Freedom and Security. Winning Without War (2003); M. Tushnet, The Constitution in Wartime: Beyond Alarmism and Complacency (2004).

[22] For elaboration on this point, *see* Vervaele, *supra* note 21.

elaborated on four fronts. There is the formal Patriot Act of Congress, then there are the Presidential Decrees, the AG Ashcroft internal guidelines[23] and finally the Presidential secret decrees.

C. Analysis of the Patriot Act[24]

The Patriot Act numbers approximately 350 pages and in ten Titles amends over 15 existing federal laws, among which the Wiretap Statute, the Computer Fraud and Abuse Act, the Foreign Intelligence Surveillance Act, the Pen Register and Trap and Trace Statute, the Immigration and Nationality Act, the Money Laundering Act and the Bank Secrecy Act. The complexity of the Act is doubtless the reason why not a single book has yet been published in the US analysing the Patriot Act in-depth and from front to cover. A number of reforms are substantial, but the sting is often in small details. In April 2003, the House of Representative Committee on the Judiciary[25] submitted an extensive list of probing questions to the DoJ. On a number of points, the answers[26] allow some insight into the practical implementation and this has been included in the analysis.

I. Bugging of Verbal Communications, Tapping of Electronic and Digital Communications and Searches[27]

The provisions concerning bugging, tapping and searching digital and electronic communications are mostly amendments of existing rules (federal criminal procedural law, FISA and federal substantive criminal law) and must therefore be analysed in a broader context.[28] Since the 1960s, judicial control over the use of powers of investigation has been a recurring theme in the case-law of the Supreme Court, especially as regards the Fourth Amendment (warrant clause). The Fourth Amendment expressly states that a warrant can only be issued when there is probable cause. As a rule, therefore, a warrant is required, but there are numerous exceptions.[29] In short, tapping without a warrant is always possible in national or international investigations for the purpose of protecting national security. In 1972, the Supreme Court decided in the Keith case[30] that the Constitution makes

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[23] For further information on these guidelines, *see* Vervaele, *supra* note 21.

[24] Relevant aspects, dealing with criminal law enforcement, of the Intelligence Reform and Terrorism Prevention Act of December 2004 (IRTPA) have been included. The reform of the intelligence community as such is not part of the analysis of this article.

[25] *See* the letter by Rep. F. James Sessenbrenner, Jr. and Rep. John Conyers of the House Judiciary Committee to Attorney General Ashcroft containing 50 awkward questions, especially concerning electronic surveillance and migration laws and terrorism.

[26] *See* for questions and answers www.house.gov/judiciary/patriot040103.htm.

[27] *See* http://www.eff.org/Privacy/Surveillance//CALEA/ for the legislation and commentary.

[28] For a good overview, *see* O. S. Kerr, *Internet Surveillance law after the USA Patriot Act: The Big Brother That Isn't*, 97 Nw. U.L.Rev. 607 (2003).

[29] *See* T. P. Metzler, *et al.*, *Warrantless searches and seizures*, 89 Geo L. J. 1084 (2001) and S. M. Beck, *Overview of the Fourth Amendment*, 89 Geo. L. J. 1055 (2001).

[30] US *v.* US District Court (Keith), 407 US 297 (1972).

a warrant compulsory if the investigation concerns 'domestic individuals' and has 'no significant connection with a foreign power'. The legislator got the message and in 1978 the by now infamous FISA surveillance[31] was introduced, which makes it possible to bug and tap 'foreign powers and their agents' without a warrant. For the tapping or bugging of related US citizens or US residents a warrant must be issued by a secret FISA court. In the period between the entry into force of the FISA (1978) and 1 September 2001 this possibility was used 47 times. In the period from September 2001 until the end of 2002 alone, it was used 113 times.[32]

Title II of the Patriot Act amends certain powers of investigation under the general federal law of criminal procedure (Title III of the Crime Control Act) and under the special criminal law and criminal procedural law on security in the FISA. In both systems, it is useful to distinguish between interception orders, pen/trap orders, subpoenas and search warrants. Title II of the Patriot Act considerably expands the possibilities of digital investigation and makes them less dependent on judicial authorisation. That this expansion of powers is usually not limited to terrorism offences has only recently dawned on the politicians in Washington.[33] Finally, the IRTPA (2004) has further widened the application of the FISA, by including in the definition of international terrorism all preparatory acts.[34]

1. Interception Orders and Wiretaps[35]

In general criminal procedural law a warrant is required for listening in on conversations and placing bugs (electronic eavesdropping) and for tapping (i.e. including access to the content of real time conversations), and in practice this warrant is granted in 99.9% of cases.[36] The court can only grant warrants for an exclusive list of crimes and has to determine with due regard to probable cause that the suspect has committed the offence and that the method of investigation will yield evidence. The investigative bodies have to report to the court within 30 days. The court can extend this period by another thirty days. Interception and tapping is possible without a warrant if a specially authorised investigative officer reasonably determines that an emergency situation exists that involves a) an immediate danger of death or serious physical injury to any person, b) conspirational activities threatening the national security interest, or c) conspirational activities characteristic of organised crime and if d) a warrant could have been obtained. The court must authorise the emergency interception

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[31] The Foreign Intelligence Surveillance Act (FISA) defines foreign intelligence as: 'information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities' (50 USC Sec. 401(a)).

[32] *Justice Department Lists Use of New Power to Fight Terror*, NY Times, 21 May 2003.

[33] *See* E. Lichtblau, *US uses terror law to pursue crimes from drugs to swindling*, The New York Times, 27 September 2003.

[34] Section 6001 (of IRTPA).

[35] Title III orders (Title III of the Omnibus Crime Control and Safe Street Acts of 1968), 18 USC Sec. 2510-2522.

[36] *See* http://www.uscourts.gov/wiretap01/table701.pdf.

a posteriori within 48 hours. The Patriot Act adds terrorism, computer fraud and computer abuse to the specific application list (Sec. 201). Crimes like murder, hijacking and kidnapping were already on the list, but due to the broad definition of terrorism[37] in the Patriot Act the scope of application is widened substantially. Roving wiretaps[38] become the rule. Neither the locations, nor the facilities that will be tapped need to be specified (Sec. 206). Reporting the subject is sufficient and all means of communication fall under the scope of application. Roving wiretaps are possible when it can be shown that the persons in question 'have demonstrated a purpose to thwart interception by changing facilities'. In practice, they are often blindly permitted.

For recorded data, such as voice-mail messages, interception orders are no longer required under the Patriot Act (see 4.3.4.). For intercepting communications of suspected computer trespassers judicial authorisation is no longer required either (Sec. 217). Sec. 202 also makes it possible to tap on-line communications for violations of the Computer Fraud and Abuse Act, for example in the fight against hackers who hack teleconferences.

In FISA criminal procedural law[39] it is sufficient that the AG certifies that 'the purpose of an order is a suspicion that the target is a foreign power or an agent of a foreign power'. The tapping order must specify who the target is and the places at which the surveillance is directed. The order is issued by the FISA court, which decides on the basis of classified evidence and with a narrow margin of discretion. The decision is confidential. The order is valid for 90 days or even a year where foreign powers are concerned. There is no duty to report to the FISA court. The Patriot Act has widened the scope of application to a considerable extent. All means of communication that the target uses may from now on be tapped and the person carrying out the tap need no longer be identified in the application and the order. This way, roving wiretaps become possible under the FISA for a period of 120 days (Sec. 206-207). It is moreover sufficient that the AG certifies that it concerns 'a significant purpose' instead of 'the purpose', which relaxes the application of the FISA. This greatly broadens the material scope of application.

2. Pen/Trap Orders[40]

Since 1986, the Pen Register and Trap and Trace Statute regulates the access to and the collection of non-content communication data in general criminal procedural law. With a pen/trap order, for example, phone numbers of all calls from or to a certain telephone number can be traced. It is sufficient to certify to the court that the information is relevant for an ongoing criminal investigation. The order can also apply to other persons besides the suspect, i.e. including third parties. It is not required to report back to the court. Concerning the question whether the rules also permit online pen/trap orders, conflicting judgments have been delivered in case-law. The Patriot Act now makes the orders expressly applicable to electronic

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37 *See* section D.IV.

38 18 USC Sec. 2518 (11)(a) and (b).

39 50 USC Sec. 1801-1811.

40 18 USC Sec. 3121-3127.

networks. This makes it possible to access e-mail addresses, IP addresses and IP remote addresses,[41] for example. Pen/trap orders are non-content orders, but there is still some debate concerning the scope of application to non-content information where electronic networks are concerned. All information concerning dialling, addressing and signalling and the 'from' and 'to' fields in e-mails fall within the scope of application, as does web browsing. The subject line in e-mails, however, is content information. In any case, it is clear that the information which can be obtained through pen/trap orders goes beyond merely identifying data (personal details like name, address) and that they can also concern things like the duration, the dates, the location and the nature of services rendered and account numbers and payment details and can therefore also contain privacy-sensitive information. In the Patriot Act, the pen/trap orders are not limited to terrorism offences.

The Patriot Act (Sec. 220) also deviates from the basic rule that a court can only grant an order for its own jurisdiction. However, communications often run through competing providers of fixed and non-fixed connections with registered offices in different US states. The federal courts now no longer require that the pen/trap orders identify the providers and the orders are valid nationwide, throughout the entire territory of the US. The FBI can also install its own pen/trap equipment at service providers. This is subject to judicial supervision.

In FISA criminal procedural law, the conditions for a pen/trap order are stricter than under the general criminal law system. Relevance for the ongoing investigation is not sufficient; an indication must also be given that the means of communication was used to contact an 'agent of a foreign power'. The legislator clearly wished to avoid that US citizens would be overly subjected to secret pen/trap orders. Due to the Patriot Act (Sec. 214), a pen/trap order is now possible as soon as it concerns 'foreign intelligence information' and does not concern a US citizen or, if it does concern a US citizen, when its objective is to protect against international terrorism and clandestine activities and does not exclusively concern activities which are protected under the First Amendment (freedom of speech). Here, too, the criterion of 'the purpose' has been replaced by 'a significant purpose' (Sec. 218).

3. Subpoenas for Stored Information

Many specific laws provide the possibility to subpoena documents upon penalty of a fine. The Grand Jury also has this power under federal criminal procedural law and uses it often. Probable cause is not a requirement for the Grand Jury. The applicability of such subpoenas to electronically stored information (e-mails, lists of subscribers, transaction overviews at service providers) was the subject of much dispute due to the lack of clarity on this point in the Electronic Communications Privacy Act (ECPA). The Patriot Act has amended the ECPA (Sec. 209-210). From now on, subpoenas can be used not only for obtaining certain information (such as personal details, means of payment, etc.) concerning service providers' clients, but also for obtaining related data (such as credit card

[41] The Internet Protocol address is the address allocated by the provider to the user for a session; the remote IP address is the address of the user when logging in with the provider.

numbers or bank account numbers, the IP and IP remote address), and this is now true for all internet communications. Probable cause is not required. In this way, it has become much simpler for enforcement agencies to uncover the user's true identity. This instrument is often used in practice and also allows information concerning the duration of the session, temporarily assigned network addresses, etc., to be obtained without judicial authorisation. In this way, not only stored e-mails can be inspected, but also stored voice-mails, i.e. both electronically stored and wire-stored information. Before the Patriot Act, voice-mails still required a wiretap warrant under the Wiretap Statute. Another advantage is that all MIME (Multipurpose Internet Mail Extensions) can be inspected in this way, including e-mail with all kinds of attachments (data, voice-mails, etc.).

In addition, the Patriot Act (Sec. 211) has placed the cable companies, which now also offer e-mail and telephone services, on an equal footing with telephone and internet companies. Before that, access to information at cable companies was very limited. The Cable Act provided for judicial proceedings whereby the Public Prosecutor's Office had to show that there was 'clear and convincing evidence' that the subscriber was 'reasonably suspected of engaging in criminal activity', a standard of evidence that is greater than probable cause. The user also had to be informed and was therefore a party to the proceedings. Based on Sec. 212, service providers can now also voluntarily pass on non-content information to enforcement agencies in urgent circumstances of a life-threatening nature. Content data could already be passed on.

Under FISA criminal procedural law, subpoenas always required judicial authorisation, whereby it had to be shown, without probable cause, that the target was a foreign power or an agent of a foreign power. The material application of the subpoena was limited to travel agents and transport companies, etc. Sec. 215 of the Patriot Act has greatly broadened the FISA subpoena to cover all 'tangible things', which includes, for example, company accounts. Judicial authorisation is still needed, but from now on it need only be shown that the information is relevant for the ongoing investigation (relevance standard)[42] into terrorism offences or for the position of information concerning foreign powers or their agents. The addressee of the FISA subpoena does not need to be linked to the criminal activity in any way; it is sufficient that he can supply relevant information. The FISA subpoena also applies to US citizens, but in that case the investigation may not exclusively concern First Amendment information.

Congress further granted the DoJ the power[43] to issue national security letters based on which companies have to supply information concerning financial transactions, telephone communications, e-mails, etc. The companies are also prohibited from notifying the customers that information is so supplied.

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[42] This investigation is further regulated in the AG Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations, which have been approved on the basis of Executive Order 12333 (*see infra* section F.I.). However, these guidelines are confidential.

[43] Based on USC Sec. 3414(a)(5) (the Right to Financial Privacy Act), 15 USC Sec. 1681u and 1681v (The Fair Credit Reporting Act), 18 USC Sec. 2709 (The Electronic Communications Privacy Act) and 50 USC Sec. 436(a).

4. Physical Search Warrants[44]

In general criminal procedural law, a search requires a search warrant for which probable cause is a prerequisite. Recent case-law of the Supreme Court has excepted many situations from this requirement and has also considered a limited delay in the notification of the search to be compatible with the Fourth Amendment. The Patriot Act has broadened the exceptions to the knock and announce rule (Sec. 213), which could make the secret warrant (sneak and peek) the future rule in terrorism offences.[45] The sneak and peek is mainly intended for searches,[46] but is also applied for seizure.[47] The sneak and peek is also used to bug computers. The Patriot Act also put an end to the patchwork of rules and case-law concerning the sneak and peek.[48] The uniform standard has become that notice of the search may be delayed 'if the courts finds reasonable cause to believe' that prior notice could result in the endangerment of people, the threatening of witnesses, disposal of evidence, obstructing the investigation, flight risk, etc. The delay is granted for a reasonable period. In practice, a period of 90 days is often used, but this can be extended. In July 2003, the House of Representatives voted down the expansion of the sneak and peek power in the Patriot Act with a surprising majority.[49] The AG immediately started a campaign to retain this power. The competent Senate committee is still dealing with this proposal.

Under Rule 41(a) of the Federal Rules of Criminal Procedure a search warrant was needed for each separate district. By means of Sec. 219 of the Patriot Act, the courts can now issue a single-jurisdiction search warrant for the investigation of domestic or foreign terrorism, which is valid throughout the entire territory of the US. This power was first used for a search of America Media, Inc., in Florida, the employer of the first anthrax victim.

Under FISA criminal procedural law,[50] the AG can allow searches without the court's intervention for a period of one year if the locations in question have been exclusively used by a foreign power. If the search targets an agent of a foreign power, judicial authorisation is required. In order to grant this authorisation, the court must be convinced of the 'probable cause that the US target is an agent of a foreign power'. Here, too, the investigation may not exclusively concern 'First

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[44] AG's Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties, 28 CFR part 59.

[45] In the period 2001-2002, this power was used 248 times, among other things in connection with the anthrax investigation. This method of investigation can also be used for the entire territory of the US based on a single warrant.

[46] On 1 April 2003, the DoJ entered 213 requests for a delay. The courts allowed them all. *See* www.house.gov/judiciary.

[47] On 1 April 2003, the DoJ entered 15 requests of which 14 were granted. *See* www.house.gov/judiciary.

[48] *See* government note for case-law concerning reasonable cause and reasonable period. In DoJ Field Guidance on New Authorities (Redacted) Enacted in the 2001 Anti-Terrorism Legislation.

[49] With an outcome of 309 to 118 votes, among which were 113 republican votes in favour of revoking this power. *See* http://www.washtimes.com/op-ed/20030803-110549-8745r.htm.

[50] FISA 50 USC Sec. 1822.

Amendment-protected activities'. The total duration is 45 days. The Patriot Act extends this time limit to 120 days (Sec. 207).

II. Financial Enforcement Law

In Title III of the Patriot Act, the focus is on the fight against money laundering and the financing of terrorism. It was originally intended to elaborate a separate Financial Anti-Terrorism Act, but eventually this was integrated into the Patriot Act.[51] For this reason, the Title may also be cited as the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001.[52] Of course there is a clear connection between Title III and substantive criminal law concerning terrorism.[53] It emerged from the national money laundering strategy[54] of 2002 how much the financing of terrorism has become a priority in tackling money laundering. The tasks of the money-laundering unit in the US, FinCEN,[55] have also been enlarged (Sec. 361). All financial transaction systems, from cash transactions, ATM and internet to informal systems such as hawala or hundi and trade in valuable objects (art, diamonds, etc.) are the subject of further regulation and enforcement. The Treasury and FinCEN have elaborated detailed departmental and further regulation on this point.[56] It is noteworthy that financial enforcement law and the fight against the financing of terrorism have been set up as a global enforcement strategy.

The Patriot Act contains a whole catalogue of measures to extend the scope of application of the money laundering legislation in the US and thus to tackle the financing of terrorism,[57] by extending direct jurisdiction over financial institutions. Besides this, there has been a considerable extension of indirect territoriality. This means that severe obligations have been imposed on US financial institutions with respect to foreign account holders (including foreign financial institutions) and foreign transactions.

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[51] *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.03004: for the history of this Bill.

[52] Of course this is also an elaboration of international initiatives against terrorism. Especially in the Financial Action Task Force on Money Laundering (FTAF-GAFI) of the G7 the relationship between money laundering and financing has been elaborated into recommendations. *See* http://www1.oecd.org/fatf/TerFinance_en.htm.

[53] *See* section D.IV. for the penalisation of material support and financing of terrorism.

[54] National Money Laundering Strategy 2002, http://www.ustreas.gov/press/releases/docs/monlaund.pdf.

[55] FinCEN processes annually 12 million currency transaction reports (CTRs) and 200.000 suspicious transaction reports (SARs). See Financial Crimes Enforcement Network (FinCEN).

[56] *See* especially the Global Terrorism Sanctions Regulations of OFAC, 31 CFR part 594, the Terrorism Sanctions Regulations, OFAC, 31 CFR part 595, Terrorism List Governments Sanctions Regulations, OFAC, 31 CFR part 596 and Foreign Terrorist Organizations Sanctions Regulations, OFAC, 31 CFR part 597.

[57] For more detailed literature *see* H. R. Cohen & E. T. Davy, *Memorandum*, 1337 PLI/Corp 67 and P. L. Lion & A. M. Peters, *The USA Patriot Act and anti-money laundering laws*, 1339 PLI/Corp 129.

In October 2001, the Department of Finance established a mixed team of investigation called Operation Green Quest.[58] Led by the US Customs service, experts were selected from the IRS, Secret Service, FBI, OFAC, FinCEN and from amongst DoJ federal prosecutors. The operation exclusively concerns the financing of terrorism. The liaison officers in US embassies worldwide are also used.

The IRTPA (2004) further strengthens the position of FinCEN, by facilitating technological improvements to provide authorized law enforcement and financial regulatory agencies access to FinCEN data[59] and by imposing upon financial institutions the duty to report to FinCEN certain cross-border electronic transmittal of funds.[60] Moreover, the money laundering provisions are widened, by not only referring to certain international transactions, but also to certain types of accounts as such.[61] Finally, the new bill introduces, in addition to any other administrative, civil, or criminal remedy or penalty, tough industry-wide prohibition orders and civil monetary penalties for employees of financial institutions knowingly accepting compensation for certain services.[62]

III. Terrorism and Substantive Criminal Law

The Patriot Act amends the existing substantive terrorism legislation. The most important development is no doubt the fact that by means of Sec. 802, besides the definition of the crime of terrorism,[63] a definition of domestic terrorism is also introduced in federal legislation. In the Patriot Act itself, this also confers jurisdiction for the judicial authorisation of searches with validity throughout the US. The definition is extremely broad and for its delineation strongly depends on the implementing legislation of the government. Domestic terrorism means 'activities that a) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; b) appear to be intended 1) to intimidate or coerce a civilian population; 2) to influence the policy of a government by intimidation or coercion; or 3) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and c) occur primarily within the territorial jurisdiction of the United States.' At the same time, Sec. 808 considerably expands the basic offences constituting the crime of terrorism.

In short, in the US a wide definition of terrorism and material support to terrorism is applied, which in practice is also used to deal with, for example, street gangs.[64] However, it is not an offence to be a member of such an organisation, nor is an apologia for terrorism punishable. On the other hand, the concept of guilt by association is applied for support. Propagating the objectives of a

[58] http://www.cbp.gov/xp/cgov/newsroom/press_releases/archives/2002/22002/02262002.xml.
[59] Section 6101.
[60] Section 6302.
[61] Section 6201.
[62] Section 6303.
[63] 18 USC Sec. 2332b(g)(5)(B).
[64] In May 2004, a street gang was charged in New York based on anti-terrorism legislation, because the gang's intention was to intimidate and coerce the civilian population.

terrorist organisation, for example, is a form of support. No evidence of malice or negligence is needed. According to critics, this greatly reduces the freedom of association and speech as laid down in the First Amendment.[65]

The IRPTA (2004) further extends the definition of providing material support to terrorism.[66] Receiving military-type training from a foreign terrorist organization is defined as a specific offence. The bill includes new and very broad definitions of material support, training and expert advice or assistance. Finally, the bill does provide for a set of new offences dealing with weapons of mass destruction.[67]

IV. Protection of the External Borders and Migration Laws: Enemy Aliens

In the US, an alien can violate immigration laws by failing to comply with visa obligations or by not having a legal visa. The grounds of inadmissibility with respect to immigration procedures have been very broadly defined (Sec. 411): 1) members of organisations which have been designated foreign terrorist organisations (FTOs)[68] by the Secretary of State; 2) members of political, social or similar groups who publicly endorse acts of terrorist activity and thus undermine US efforts to reduce or eliminate terrorist activities and 3) persons, either in an individual capacity or as a member of an organisation, who engage in acts which fall within the definition of terrorist activity, including the soliciting of funds or membership or providing material support. A person who associates with a terrorist organisation and during his stay in the US attempts 'to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the US' is inadmissible. Persons fulfilling these very broad criteria, which are delineated by the Secretary of State, are placed on the Terrorist Exclusion List (TEL).[69] In the migration laws the definition of terrorism is therefore even wider than in substantive criminal law[70] and guilt by association has been used liberally. In reality, this is simply blacklisting as a recognised migration policy.[71]

The Patriot Act has extended the 24-hour rule for giving notice of the reason for administrative detention to 7 days (Sec. 412). Within these seven days, the person in question must have been charged with a criminal offence or brought before the public prosecutor in removal proceedings. The INS has changed the

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[65] D. Cole, The New McCarthyism: repeating history in the war on terrorism, 38 Harv. C.R.-C.I. Rev. 1.

[66] Section 6601-6604.

[67] Section 6801.

[68] The provisions concerning FTOs have been included in the federal immigration laws, 8 USC Sec. 1189.

[69] http://www.state.gov/s/ct/rls/fs/2002/15222.htm.

[70] *See infra* section D.IV.

[71] *See* J. W. Whitehead & S. H. Aden, *Forfeiting 'Enduring Freedom' for 'Homeland Security'. A Constitutional Analysis of the USA Patriot Act and the Justice Departments anti-Terrorism initiatives*, 51 Am. U.L. Rev. 1081 (2002).

period of seven days into within a reasonable time,[72] for which a period of 90 days is used. Persons concerned may be detained for six months, but the AG can extend this period. If national security so requires, this period can be extended several times (Sec. 412). After the removal order, Homeland Security must remove the alien from the country within 90 days, but several cases of indefinite detention have been reported due to failing cooperation with the country of origin. After 11 September, some 800 aliens were detained based on the immigration laws in a massive detention operation by the FBI, known as PENTTBOM.[73] Traditionally the DoJ is responsible for removal proceedings, which are not considered punitive. These proceedings are dealt with by immigration courts, which are part of the Executive Office for Immigration Review at the DoJ. The AG has provided a further legal implementation of the removal proceedings. Since 1964, it is possible to hold these proceedings behind closed doors in the interest of the parties, of the witnesses or in the public interest. On 21 September 2001, Chief Administrative Justice Creppy,[74] at the AG's request, issued a special memorandum declaring the administrative procedures concerning 9/11 prisoners to be cases of 'special interest secrecy'. This means that all information concerning the judicial proceedings must remain secret, including the names of the persons involved, entry of the case in the docket, decision, etc. Because of the secrecy surrounding the detentions and the removal proceedings, a report from the inspector-general of the DoJ was eagerly awaited.[75] His criticism of the detentions is far from mild: aliens suspected of violating immigration laws (expired visa or false entry on passport) have been indiscriminately detained together with aliens suspected of links with the offences of 11 September; both categories have been informed too late concerning the suspicions and had to wait for FBI clearance to know whether they would be removed or released. The clearance took many months to be issued. In most cases, the family was not or incorrectly informed concerning the place of detention and the proceedings against the detainees were kept secret.[76] In fact, the Patriot Act has substantially enlarged the possibilities for replacing custody with detention. The AG and the INS have unprecedented power to detain persons long-term, without the possibility of defence and without having to state expressly what exactly constitutes the threat to national security. The procedure applies both to the period before removal and to the period after the decision to remove and the removal itself.

Under the Patriot Act, additional funding has also been made available for the Border Patrol, the Customs Service and the INS.[77] The Department of State is given access to the National Crime Information Center's Identification Index (NCIC-III), in particular to committed offences and wanted persons. The DoJ

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[72] 8 CFR part 287.

[73] The total number of detentions, i.e. including detentions in the framework of regular criminal investigations, is estimated at 1200.

[74] http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf.

[75] *See* report http://www.usdoj.gov/oig/special/03-06/index.htm. *See also* the recent report concerning compliance with civil rights http://www.usdoj.gov/oig/special/03-07/index.htm.

[76] D. Cole, *Enemy Aliens*, 54 Stanford Law Review 953 (2002).

[77] The INS has now moved from the DoJ to the DHS.

and the Department of State are working on a biometric standard for border controls, visas and passports.[78] Educational institutions are furthermore given the obligation to release specific information concerning the education of aliens.[79]

On January 12, 2005, the Supreme Court has decided[80] that non-citizens have the right to be free from indefinite detention. The Court concluded that the statute relied on by the Government to support the practice of indefinite detention only authorized detention for as long as is 'reasonably necessary' to achieve removal, which means that the Government has to come up with good and justified reasons. Otherwise the persons concerns must be released from detention.

D. Presidential Exceptional Law

I. Terrorist Organisations and the Financing of Terrorist Organisations

As is known, the US President in his capacity as Commander-in-Chief has far-reaching legislative and operational powers in the field of foreign affairs and military matters. The US has a long tradition of the use of political and economic sanctions, such as, for instance, against Cuba. Initially, this concerns sanctions against states, involving the imposition of export sanctions based on the Export Administration Act (EAA) and the International Emergency Economic Powers Act (IEEPA)[81] upon companies[82] which violate the trade embargoes with the states in question. Implementing legislation and decisions are taken by the Secretary of State, the Department of Commerce and the Department of Treasury/OFAC.[83] The President may therefore decide to impose sanctions, especially in times of emergency. In 1995, President Clinton[84] took the step of broadening the scope of sanctions under the IEEPA[85] from states (i.e. state embargoes) to organisations. At that time, ten Palestinian and two Jewish organisations were blacklisted. Secretary of State Albright subsequently designated 30 organisations as special designated terrorists (SDTs) or foreign terrorist organisations (FTOs) under the

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[78] For example, all visa candidates have to apply for a personal interview at the US embassy. Those who travel to the US will have to own a passport which can be inspected digitally. Not all passports in the EU meet this requirement at present. The related information is stored in the US Visit databank.

[79] The information is stored in the SEVIS databank.

[80] http://supct.law.cornell.edu/supct/html/03-878.ZS.html.

[81] 50 USC Sec. 1701-06 (2001).

[82] A. Q. Connaughon, *Exporting to special destinations and entities terrorist-supporting and embargoed countries, sanctioned countries and entities*, 844 PLI/Comm 299.

[83] 31 CFR part 595 Treasury's Terrorism Sanctions Regulations on SDT; 31 CFR part 597 Terrorist Organizations Sanctions Regulations; 66 Fed. Reg. 54404 SDGT's Treasury. A. Connaughton, *Practising Law Institute*, 844 PLI/Comm 299 (2002).

[84] Exec. Order no. 12.947, 3 CFR part 319 (1995), 50 USC Sec. 1701 (2000).

[85] 50 USC Sec. 1701(a) (2000).

Effective Death Penalty and Public Safety Act (1996). By their inclusion in the list, supporting these organisations has become an offence and financial institutions in the US are required to block their balances.

Based on the leading case[86] concerning the scope of the Presidential powers, it could be maintained that the Presidential powers with respect to 11 September have been exhausted, as these are completely regulated under the Patriot Act of Congress, which, for example, did not make provisions for the concept of enemy combatant or the establishment of military committees. This view is not shared by the Bush I administration. After the declaration of the state of emergency on 14 September 2001, the President on 24 September 2001 approved executive order 13224[87] on the basis of the International Emergency Economic Powers Act[88] and also by way of implementing certain UN Resolutions, mainly Resolution no. 1333. Under this executive order, terrorist organisations were identified as specially designated global terrorists (SDGTs). The Secretary of Treasury may, for example, put any organisation on the list which 'assist(s) in, sponsor(s), or provide(s) support for or is otherwise associated with a designated terrorist organisation'. The main idea of this executive order is to elaborate a financial sanctioning regime with a view to drying out these organisations' flow of income.[89] This means that the US can block the bank accounts of foreign banks in the US if other countries refuse to cooperate in blocking accounts in their own territory (indirect jurisdiction). All the property of the following can be blocked: a) SDGTs included in the list; b) persons who commit terrorist acts or who pose a significant risk of committing, acts of terrorism that threaten the security of US nationals or the national security, foreign policy, or economy of the United States[90] and c) persons who assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or SDGTs, or to persons who act for or are controlled by SDGTs or are otherwise associated with them.[91]

Citizens in the US are also prohibited from performing transactions with blocked property, to set up constructions or to cooperate in their set-up in order to organise the transaction in such a way as to evade the prohibition and to conspire to perform illegal transactions. All persons are prohibited from supporting SDGTs or associating with them through transactions in foreign currencies, credit transfers, the import or export of money or negotiable instruments. These prohibitions therefore also apply to foreign financial institutions that refuse to block the property of SDGTs. This also means that certain donations to charitable

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[86] Youngstown Sheet and Tube *v.* Sawyer, 343 US 579 (1952).

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

[88] 50 USC Sec. 1701-06 (2001).

[89] B. Zagaris, *The Merging of the Counter-Terrorism and Anti-Money Laundering Regimes*, 34 Law and Policy in International Business 45 (2002).

[90] The Secretary of State further defines this description.

[91] The Department of Treasury further defines this description.

institutions become impossible, when they have ties with SDGTs. Civil sanctions may be as high as USD 11.000 per breach, penal sanctions as high as USD 50.000 per breach and 10 years' imprisonment for wilful intent.

The executive order of 2001 partly overlaps the executive orders of President Clinton, who had already designated quite a number of organisations as SDTs or FTOs. However, the sanctioning regime was given a global scope of application and the type of sanctions available was also extended. Now, not only property of financial institutions can be blocked, but also the property of persons associated with SDGTs. It is therefore perfectly possible to block the property of foreign customers of companies with branches in the US. For this, it is not required that the organisations or persons involved have committed criminal offences. It is sufficient that they can be associated with those offences. Evidence of this may be kept secret and dealt with in camera and ex parte. A clear example of this is the Holyland Foundation (HLF) case.[92] HLF is an NGO which was established in 1989 and has its headquarters in Texas, and ties with Hamas. By executive order 12947 issued by President Clinton in 1995, Hamas became an SDT and by executive order 13224 issued by President Bush in 2001, Hamas became an SDGT. On 4 December 2001, the Treasury Department/OFAC decided that HLF was acting for or on behalf of Hamas, which gave HLF the status of an SDT and SDGT. The Treasury subsequently issued a blocking notice which blocked all funds, accounts and property of HFL and prohibited any transactions involving such funds, bank accounts and property. The accounts were also seized. OFAC took the decision based on partially classified information (statements from foreign police informers and a secret FBI report). The District Court allowed the administration a wide margin of discretion and considered secret evidence admissible if it could be confirmed by supporting evidence. It also became clear from the Global Relief Foundation (GRF) case that the judiciary has only very limited powers in testing administrative acts in the field of foreign policy and security. In this case, GRF had been the subject of a FISA search and subsequently of an OFAC blocking order. Upon its application for an injunction order to undo the measures imposed, the GRF was told that 'as a general principle this Court should avoid impairment of decisions made by the Congress or the President in matters involving foreign affairs or national security'[93] and that no violations of civil rights under the Bill of Rights could be established. The Court, not the attorneys, was given permission to inspect the evidence ex parte and in camera. This is obviously a far cry from full judicial review, and only a test of the reasonableness of an administrative decision.

The US is continuously updating the list. On 11 October 2001, 39 items were added, especially Al-Qaeda-related ones. On 2 November 2001 quite a few Saudi Arabian businessmen were added and on 22 November 2001, another 22 were added, among which Hezbollah, three Colombian organisations, the IRA, and the Jihad. Meanwhile, the list has become a document of 86 pages filled with

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[92] Holyland Foundation for Relief and Development *v.* Ashcroft, 219 F. Supp. 2d 57.

[93] Global Relief Foundation *v.* Paul H. O'Neill, Colin L. Powell, John Ashcroft, *et al.*, 207 supp. 2d 779.

thousands of organisations and persons.[94] In 2004, many NGOs were added that are suspected of being associated with SDGTs. The 9/11 Commission does also recommend that vigorous effects to track terrorist financing must remain front and center in US counterterrorism efforts.[95]

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

In 2006, it became know that the *Department of Treasury* had requested Swift, the *Society for Worldwide Interbank Financial Telecommunication*, which has its seat in Brussels, to provide subpoena information concerning international financial transactions. Swift is the world leader in this field. The subpoenas are an implementation of the *Terrorist Finance Tracking Program*, with a legal basis in *Executive Order* 13224. According to the Department, the US is entitled to investigate the Swift databases for the purpose of tracking down suspects of financing terrorism.[96] The central banks of Canada, Germany, France, Italy, Japan, the Netherlands, the United Kingdom, Sweden and the US Federal Reserve and the European Central Bank are the ten supervisors of Swift. The statements made by the European Central Bank and by the national central banks in Europe indicate that they were aware of the subpoenas, but did not consider themselves bound to test the legality of the execution of the subpoena. Incompatibility with European and national law apparently had to make way for US demands where refusal to cooperate means facing the threat of economic sanctions.

II. Military Committees and Enemy Combatants

On 13 November 2001, President Bush, without consulting Congress, signed a military order[97] for the trial of enemy aliens[98] by military committees. In the past, members of Al-Qaeda, who were suspected of playing a part in the 1998 bombings of the US embassies in Kenya and Tanzania in which 200 people were killed, were successfully prosecuted and tried by general criminal courts in the US. As the Commander-in-Chief of the army, the President can have people tried before military committees for violations of the laws of war. This power is based on Articles I and II of the US Constitution.[99] The problem is that wars are

[94] *See* http://www.treas.gov/offices/enforcement/ofac/sanctions/terrorism.html.

[95] http://www.gpoaccess.gov/911, at 382.

[96] For more information concerning the legal basis, *see* http://www.treasury.gov/press/releases/js4340.htm.

[97] *Military Order, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg 57, 833 (13 November 2001).

[98] *See* 50 USC Sec. 21.

[99] *See* for a thorough legal analysis of the legal aspects under national and international law, D. M. Amann, *Guantánamo*, 42 Columbia Journal of Transnational Law 263 (2004).

declared upon states and that there has been no official declaration of war against Al-Qaeda. Furthermore, members of Al-Qaeda are not citizens of a particular state to whom the Enemy Alien Act applies. The Supreme Court has however recognised that the US can be in a state of war without a formal declaration of war,[100] which does not mean however that military committees can be established for no further reason. During the civil war, President Lincoln had given the army permission to detain citizens who were suspected of treason and rebellion and keep them in detention without judicial authorisation and to deny them habeas corpus. Still, in Ex parte Milligan[101] the Supreme Court held that Milligan, who was the leader of a secret organisation rebelling against the government, could not be tried by a military court because he was a resident, he was not under arms, the civil courts were functioning, the country was not occupied and President Lincoln did not have a mandate from Congress to establish military courts. However, in Ex parte Quirin[102] the Supreme Court declared President Roosevelt's Executive Order 2561,[103] which provided for the military trial of German saboteurs as enemy belligerents during WWII, to be constitutional. It must be noted, though, that this executive order was based on the declaration of war by Congress and did not impair the habeas corpus proceedings or other legal remedies. Of crucial importance is certainly the decision of the Supreme Court in *Johnson v. Eisentrager*[104] concerning the trial of German soldiers who were taken prisoner in China and tried by military committees. The Supreme Court held that the term 'any person' in the Fifth Amendment 'does not extend its protection to alien enemies engaged in hostilities against us'.

The Bush I administration has applied concepts from public international law and humanitarian law[105] to terrorist organisations and their members. Their actions have been qualified as acts of war committed by foreign attackers, and not initially as criminal offences, with the result that the principles of criminal (procedural) law do not essentially apply. The persons involved are not suspects, but enemy combatants, who so far have no civil rights under American jurisdiction.[106] An estimated 600 to 800 suspected Taliban and Al-Qaeda members of 40 different nationalities have been held prisoner since January 2002 in the Delta Z-Rayin camps in Guantánamo without having been charged or tried. Some have meanwhile been released in small numbers or transferred to allied countries, leaving some 600 persons in detention. It cannot be ruled out that the vacancies have been filled

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[100] Prixe Cases, 67 US (2 Black) 635, 667-7- (1862).

[101] 71 US (4 Wall.) 2 9\(1866).

[102] 317 US 1, 23-24 (1942).

[103] 7 Fed. Reg. 5101 (2 July 1942).

[104] Johnson *v.* Eisentrager, 339 US 763 (1950).

[105] *See* International Commission of Jurists, Military Jurisdiction and International Law, http://www.icj.org/news.php3?id_article=3254&lang=en.

[106] *See* Coalition of Clergy *v.* Bush, 189 F. Supp. 2d 1036, 1048 (C.D. Cal. 2002), affirmed in part and vacated in part, no. 02-55367, 2002 WL 31545359, at *10 (9th Cir. 18 November 2002), vacating the district court's broad determination that detainees do not have rights to habeas corpus review under any circumstances, but upholding the finding that the petitioners in this case lacked standing; Rasul *v.* Bush, 215 F. Supp. 2d 55, 72-73 (D.D.C. 2002).

anew with fresh prisoners from Iraq, Afghanistan, Pakistan, etc. Furthermore, a number of US citizens are also still being held in military bases on the American continent.

Nowhere does the term enemy combatant appear in the Patriot Act. The legal parallel between war and international terrorism has been strongly criticised in the literature.[107] At the same time, moreover, President Bush has restricted the application of international humanitarian law. For a long time, the Bush I administration maintained that the Geneva Conventions did not apply and that the status of prisoner of war did not apply either. In February 2002, certain rights were granted under the Geneva Conventions to Taliban fighters, but not to Al-Qaeda members. Nobody has been recognised as a POW; they are and remain unlawful combatants, who can be questioned at will with no or limited rights for as long as the war on terrorism lasts.

The military order sets aside a number of basic principles of constitutional civil rights and rules of general criminal procedure. Both the organisation and the dispensation of justice by the military committees is special law. Not only are the prosecutors and the judges members of the military, but also the attorneys, or they are civilian attorneys[108] who have been screened by the government and have agreed to the rules of procedure. The entire procedure and the composition of the committees, including the attorneys' identity, may be kept secret. Habeas corpus does not apply, the Miranda rights do not apply, the rights of the defence are limited, special rules of evidence are in force and there is no jury. Appellate proceedings have been provided for, but not before a federal appeals court of the regular criminal law judiciary. The appeal is lodged with a military panel and the final decision concerning guilt and punishment lies with the President. This is therefore a court procedure in the hands of the executive, which by definition fails to meet the requirements of independence and impartiality. In defence of trial by military committees the Bush I administration mainly argues that the military committees ensure speedy proceedings which do not jeopardise secret investigative information and surveillance methods and operations and thus guarantee public security. The government also contends that the military committees offer better protection to judges and witnesses against potential terrorist threats.

Also from the first elaboration of the further rules of procedure and evidence by the Department of Defense and the DoJ it emerges that many fundamental rights

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[107] G. Roma, *Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'*, 27-Fall Fletcher Forum of World Affairs 55 (2003). L. M. Ivey, *Comment: Ready, Aim, Fire? The President's Executive Order Authorizing Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism is a Powerful Weapon, but Should it Be Upheld?*, 33 Cumb. L. rev. 107 (2002-2003). For the ABA's view, *see* Task Force on Terrorism and the Law, *Report and recommendation on Military Commission* (http://www.abanet.org/leadership/military.pdf) and Task Force on Treatment of Enemy Combatants (http://news.findlaw.com/hdocs/docs/aba/abatskforce103rpt.pdf). *See also* American Law Division, http://www.fas.org/irp/crs/RL31724.pdf.

[108] The National Association of Criminal Defense Lawyers numbering 11 000 members has advised its members not to act as legal counsel and has thus rejected the limitations applied to the rights of the defence.

from criminal procedure and the Bill of Rights are not recognised in advance.[109] There is no public trial (proceedings take place in camera), the attorneys do not have access to the witnesses of the other party, their legal privilege is not recognised and they need the permission of the Department of Defense to communicate with the press. Communications between the attorney and the witnesses are recorded. Where evidence is concerned, all evidence that 'would have probative values to a reasonable person' would be lawful. Hearsay evidence would be admissible. The prosecution would not be obliged to show the chain of custody of the evidence which means that the origin and the manner of its collection is no longer tested. Secret FISA evidence and secret surveillance evidence is also admissible, in camera, ex parte. It is feared that as a result evidence obtained through torture abroad will be used in the dispensation of justice by military committees.[110] Two thirds of the military committee instead of a unanimous jury can pass a guilty verdict by a majority of two thirds of the votes. If the committee reaches the verdict that the person involved is not guilty, the committee's chairman can nevertheless still decide that he is. Unanimity is required for imposing the death penalty.

In the summer of 2003 the Bush I Administration declared six prisoners in Guantánamo ready for trial, among whom are the British nationals Moazzamde Begg and Feroz Abassi and the Australian David Hicks.[111] The courtroom is finished, the prosecutors have been appointed, but rules of procedure and evidence are still lacking. By now, defence attorneys have also been appointed in two cases, but still there are no formal charges. In ad hoc negotiations with the UK and Australia – both allied countries – it has been agreed that the death penalty will not be demanded against the persons involved, that they will be assisted by attorneys from their country of origin and that the legal privilege will be respected. The treatment of Capt. Jams Yee, the Muslim chaplain in Guantánamo, who is accused of smuggling confidential information, is food for thought. After his arrest in September 2003 he spent months in close military confinement and the Defense Department had allowed it to appear that he could be sentenced to death for these offences.[112] However, in March 2004, when it

[109] Department of Defense Military Commission Order no. 1, *Procedures for Trials by Military Commissions of certain Non-United States Citizens in the War Against Terrorism,* 21 March 2002 and Military Instruction no. 8, Administrative Procedures (30 April 2003), *see* www.defenselink.mil. The latter document contains the applicable substantive law. For a critical analysis, *see* http://hrw.org/backgrounder/usa/military-commissions.htm#P18_1065.

[110] In May 2004, it emerged that American military and security personnel systematically applied abuse and torture in the questioning of prisoners in Iraq. In August 2004, the Schlesinger Committee released its Report on the Abu Ghraib Torture Scandal. *See* http://64.177.207.201/pages/8_621.html. In December 2004, it became clear from sources of the Red Cross and the FBI that is also the case for prisoners in Guantánamo. *See* http://query.nytimes.com/gst/abstract.html?res=F30910FF3A5A0C738FDDA80994DC404482 and http://www.aclu.org/torturefoia/released/fbi.html. *See also* http://query.nytimes.com/gst/abstract.html?res=F50F14F83B5D0C758CDDA80894DD404482 for the latest news.

[111] In Australia, a request for the disclosure of documents in the context of open government was denied, due to the fact that this could impair foreign relations.

[112] For the charge sheet, *see* http://news.findlaw.com/hdocs/docs/dod/armyyee101003chrg.pdf.

emerged that the evidence against him was very weak, it was decided to dismiss the case. The official version is that the intention is to protect information in the interest of national security. The New York Times in its editorial, however, unequivocally labelled the proceedings as Military Injustice.[113] Meanwhile, even military attorneys have begun to severely criticise the lack of due process before the military committees.[114] After the judgments of the Supreme Court in *Rasul and others v. US*[115] collegiate commissions have been established consisting of three military judges. These are considered to be competent to decide whether the release of a detainee poses a threat to national security. Dozens of actions have been instigated before federal courts against the decisions of these commissions requesting that the habeus corpus procedure be applied. The Supreme Court has recently delivered a landmark decision on this matter in *Hamdan.*[116]

E. Secret Orders of President Bush and Counterterrorism

In 2006, various modus operandi became known concerning the counter-terrorism approach which lack a legal basis in the Patriot Act. Despite the fact that the Bush administration has far-reaching special legislation at its disposal and is given wide discretion by Congress to issue measures sub rosa, the Bush government has nevertheless considered it necessary to take secret measures without even informing the special commissions within Congress. These secret orders constitute a breach of constitutional law and are the subject of much controversy in the US.

In 2005, the domestic spying programme by the *National Security Agency,* which serves as the 'ears' of the Pentagon, came to light. The NSA by this programme circumvents authorisation from the secret FISA court. The FISA legislation was specifically intended to give secret eavesdropping practices a legal basis. In August 2006, a District Court was called upon to give a first ruling on the matter.[117] In the judgment it is stated that the programme constitutes a violation of FISA legislation and of the fourth amendment to the Constitution. The District Court refused to apply the privilege of state secrecy here:

> Although this court is persuaded that Plaintiff have alleged sufficient injury to establish standing, it is important to note that if the court were to deny standing based on the unsubstantiated minor distinctions drawn by defendants, the President's actions in warrantless wiretapping, in contravention of FISA, Title II, and the First and Fourth Amendments, would be immunized from judicial scrutiny. Is was never the intent of the Framers to give the President such unfettered control, particularly where his actions blatantly disregard the parameters clearly enumerated in the Bill of Rights.

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[113] 24 March 2004.

[114] N. A. Lewis, *Military Defenders for Detainees Put Tribunals on Trial*, The New York Times, 4 May 2004.

[115] *See infra*, section G.

[116] *Cf. infra*, section G.

[117] http://www.aclu.org/pdfs/safefree/nsa_govt_motion_dismiss.pdf#search=%22District%20Court%2006-CV-10204%22.

The media have obviously given much attention to the detention of enemy combatants at Guantánamo. The UN, in particular the Human Rights Commission and the High Commissioner for Human rights, have investigated the situation at Guantánamo and issued a critical report.[118] In 2006, it further came to light that the President and the CIA are carrying out a secret programme entitled extraordinary rendition. Its purpose is that enemy combatants are transferred to detention centres in third countries. The countries that were contacted for this purpose do not exactly have good reputations where it comes to human rights protection and decidedly bad reputations where it comes to torturing. For this reason, the secret programme has also been referred to as outsourcing torture.[119] A remarkable example of this practice is the Osama Mustafa Nasr case. Abu Omar was abducted in 2003 in Milan by 13 CIA agents, to be transferred via Germany to Egypt. The judicial authorities of the US refused legal assistance to Italy.[120] The Italian judicial authorities subsequently requested the extradition of the CIA agents. However, the Berlusconi administration refused to transmit the request to the US. It has since emerged that agents of the Italian intelligence service were involved in the abduction. Several senior officers of the Italian intelligence service have since been detained. The request for extradition was submitted anew to the Ministry of Justice, this time, however, under the Prodi administration. Another interesting case, which has been very well documented by the Canadian Commission of Inquiry, is the Maher Arar case.[121]

In the framework of the Council of Europe, the European Commission for Democracy through Law (the Venice Commission) has issued a very critical report concerning secret detentions.[122] In the report, the responsibility from a human rights perspective is analysed of European countries for their cooperation in secret flights or secret detention or detention practices. The Parliamentary Assembly of the Council of Europe has appointed the lawyer Marty as an expert. His research produced indications of the involvement of European countries in secret rendition.[123] Overall, one can clearly speak of the suspected involvement of European States in the abduction, transport and detention by the CIA.

Finally, in the session of the UN Committee for Human Rights of last July, critical judgment was passed on the application by the US of the International

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[118] UN, Commission on Human Rights, *Situation of Detainees at Guantánamo Bay*, E/CN.4/2006/120.

[119] K. J.Greenberg & J. L.Dratel (Eds,), The Torture Papers: The Road to Abu Ghraib (2005).

[120] Like it refused legal assitance in the case of Aleman Motassadeq and in the judicial investigation concerning the attacks on the Madrid metro.

[121] http://publications.gc.ca/control/publicationInformation?searchAction=2&publicationId=295791.

[122] http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?CID=90&L=E, Opinion on the international legal obligations of Council of Europe Member Status in respect of secret detention facilities and Inter-State transport of prisoners.

[123] 124 http://assembly.coe.int/Main.asp?link=/CommitteeDocs/2006/20060124_Jdoc032006_E.htm, Comité of Legal Affaire and Human Rights, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member status.

Convention on Civil and Political Rights.[124] In recommendation no. 12 the immediate closing of secret detention centres is urged. The Committee also requests the US to take measures to end the practice of extraordinary rendition.

In September 2006, Bush openly acknowledged the existence of the secret CIA programme for extraordinary renditions when announcing the transfer of 14 prisoners from secret places of detention to Guantánamo Bay. Bush also acknowledged that they had been subjected to harsh interrogation techniques, which he referred to as necessary, but not illegal. He also clearly indicated that this coercive interrogation would remain necessary in the future.

F. Judicial Testing of the Patriot Act and the Special Government Legislation

Concerned parties and interested third parties, NGOs and local authorities have legally challenged the serious limitation of civil rights. This has led to a stream of court cases at local and federal level.

I. Terrorism and Contestable Evidence in General Criminal Law

In criminal law terrorism cases, the DoJ and the AG have opted for the military line and as a consequence for confinement under the statute of enemy combatants and trial by military committees. In a few cases, the regular criminal courts are competent, such as in the Zacarias Moussaoui case,[125] concerning a French national of Moroccan birth who was detained in August 2001, i.e. before the attacks, on suspicion of a breach of immigration law. At that time, he was taking flying lessons. After the attacks, he was connected with Al-Qaeda and the terrorist acts of 9/11. Moussaoui is accused of being the twentieth hijacker whom circumstances prevented from boarding and of being jointly guilty of the death of 3 000 people. He has pleaded not guilty, and is risking the death penalty on four of the six charges against him.[126] According to Moussaoui, several witnesses, among whom is Bin Al-Shibh,[127] could prove his innocence. For this reason, he wishes to have Bin Al-Shibh questioned as a witness. The problem is, however, that Bin Al-Shibh, who was detained in Pakistan, is suspected of being the intermediary between Moussaoui and the 9/11 command and is being held as an enemy combatant overseas, presumably in Guantánamo. His statements are classified and can therefore not be contested.

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[124] CCPR/C/USA/Q/3/CRP.4, 27 of July 2006.

[125] For all relevant information, *see* http://news.findlaw.com/legalnews/us/terrorism/cases/index.html#moussaoui.

[126] *See* http://www.usdoj.gov/ag/moussaouiindictment.htm for the charges.

[127] Bin Al-Shibh took care of the financial transactions. He further wants to have questioned Abu Zubaydah, a former head of a training camp in Afghanistan, and Ibn-Al-Shaykh al-Libi, a high-ranking paramilitary, who are both detained.

Both the District Court and the US fourth Circuit Court of Appeals have recognised Moussaoui's Sixth Amendment right to subject the witness Bin Al-Shibh[128] to questioning, as one of the fundamental rights of a fair trial.[129] In this case, District Court Judge Brinkema in January 2003 ordered that the testimony be recorded on video and that the video be made available to the jury or that the witness be heard by teleconference. AG Ashcroft continued to underline the fact that this would result in 'the unauthorized disclosure of classified information'. The AG refused to implement the court decision, which was formally confirmed in a secret affidavit in mid-July 2003.[130] The court could hold the government in contempt of court, but could also declare the Moussaoui case inadmissible, exclude part of the evidence or instruct the jury unfavourably for the government, preventing a death sentence. Judge Brinkema opted to exclude the death penalty and to strike the part of the indictment related to 9/11, as in her view there could be no fair trial under these circumstances. The part of the indictment concerning conspiracy to commit the Al-Qaeda actions has remained intact. Pro-Bush lawyers argue that in the given circumstances the best solution would be to even now declare Moussaoui an enemy combatant and transfer him to military jurisdiction, where he would anyway be barred from relying on the recognised constitutional right to the questioning of witnesses: 'Although civil libertarians would likely decry his relocation to Guantánamo, the reality is that taking Moussaoui out of the civilian justice system would both better address security concerns and create a firewall so that existing constitutional principles in civilian trial don't start to bend under the weight of the war on terror'.[131] However, the government lodged an appeal against the decision with the US 4th Circuit Court of Appeals,[132] which is known to be conservative, and which on 22 April 2004[133] decided to set aside the exclusion of evidence and of the possibility of a death sentence. On the other hand, the three-judge panel also decided that Moussaoui could not be deprived of the right to question detained Al-Qaeda members as witnesses and that he was entitled to present their testimony to the jury. Judge Brinkema was ordered to elaborate a compromise which would allow the witnesses to be questioned in a way which would not prejudice their questioning by the government in the framework of the war against terrorism. In March 2005, the Supreme Court rejected the request for the hearing of Guantánamo Bay detainees as witnesses. This judgment cleared the way for carrying on with the proceedings, including the imposition of the death penalty. However, in April 2005 Moussaoui pleaded guilty to six charges of conspiracy related to terrorist offences. In March 2006,

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[128] The request was denied for the other two witnesses.

[129] *See* Brady *v.* Maryland, 373 US 83 (1963).

[130] *US will defy court's Order in Terror Case*, New York Times, 15 July 2003.

[131] Mr. Cofey, *The case for Military Tribunals*, Washington Times, 26 May 2003.

[132] *See* http://news.findlaw.com/hdocs/docs/moussaoui/usmouss102403gbrf.pdf for the government's petition in which references to concrete facts or documents have been regularly blackened out, as these, according to the government, concern confidential information in the protection of national security.

[133] *See* Westlaw, 2004 Wl 868261 (4th Cir. (Va.)).

the trial took a new turn when it emerged that the Public Prosecutor's Office had been coaching witnesses in their testimony. Certain witnessess were excluded by Justice Brinkema. The jury sentenced Moussaoui to life-long imprisonment.

Criminal convictions have meanwhile been delivered against Richard Colvin Reid, known as the shoe bomber and John Walker Lindh, the American Taliban fighter. Reid was sentenced to life imprisonment for the attempted use of a weapon of mass destruction, attempted murder and interference with the flight crew.[134] Lindh was sentenced to twenty years in prison for material support of a prohibited terrorist organisation on the basis of a guilty plea and plea agreement.[135] The remaining charges[136] were dropped as a result of the plea agreement.

II. Terrorism, Enemy Combatants[137] and Military Committees

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

Yaser Esam Hamdi[138] was taken prisoner in Afghanistan and after a brief stay in Guantánamo he was transferred to a military detention centre in Virginia, when it emerged that he was a US citizen. Since April 2002, he is being held without having been formally charged, without the right to an attorney, without the right to habeas corpus proceedings, etc. Friends of Hamdi have, with varying success, brought legal actions against the Department of Defense. The District Court[139] has appointed an attorney and ordered the government to provide this attorney with free access to the detainee and to respect legal privilege. On appeal, the US 4th Court of Appeals decided that the District Court (Hamdi I) had taken insufficient account of national security interests and that the decision was insufficiently reasoned. The District Court subsequently decided that the grounds for detention – a statement by military advisor Mobbs – were insufficient

[134] For all relevant documents, *see* http://news.findlaw.com/legalnews/us/terrorism/cases/index2.html#reid.

[135] *See* http://www.usdoj.gov/ag/pleaagreement.htm.

[136] *See* http://www.usdoj.gov/05publications/05_2.html for the original indictment.

[137] *See* J. J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int. L. J. 503 (2003).

[138] *See* for all relevant documents, http://news.findlaw.com/legalnews/us/terrorism/cases/index.html#hamdi. *See also* http://supreme.lp.findlaw.com/supreme_court/briefs/03-6696/03-6696.resp.html.

[139] Hamdi *v.* Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002).

to deprive the person concerned of his rights and that the government had to disclose all kinds of documents, among which the statements from Hamdi, for in camera review. At least both courts found that the detention could form the subject of judicial control. On appeal, again with the 4th Circuit[140] (Hamdi II), the Court decided that military detention for an indefinite period of time was not only in conformity with the law, but also immune from judicial control, now that Hamdi had been taken prisoner in an active war zone in a foreign country. The statement by Mobbs was sufficient evidence of this. In January 2004, the Supreme Court decided to grant a writ of certiorari and answer a few fundamental questions.[141] The Supreme Court[142] recognises the Presidential prerogatives, and thus the concept of enemy combatant, on the basis of the Authorization for Use of Military Force Act. However, this does not provide for indefinite detention and is intended for detention in war zones and moreover limited to 'necessary and appropriate force'. Even if the detention would be lawful, the second question is what the detainee's constitutional rights would be to challenge his status of enemy combatant. Based on the special constitutional interests – read: the prerogatives of the President and the government – the government has argued that the balance of powers should be respected and that the judiciary should display reticence in these matters. The Supreme Court uses clear and edifying language: 'Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested [...]. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.' The Supreme Court therefore adds that 'due process demands that a citizen held in the US as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker'. The Court expressly indicates that this can be done before a military tribunal and that it is possible to reverse the burden of proof, as long as the person concerned is given a fair chance to gainsay this,

[140] Hamdi *v.* Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

[141] The following questions were at issue:

1. Does the Constitution permit executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theatre of the War on Terrorism and declared by the executive to be an 'enemy combatant'?

2. Is the indefinite detention of an American citizen seized abroad but held in the US solely on the assertion of executive officials that he is an 'enemy combatant' permissible under applicable congressional statutes and treaty provisions?

3. In habeas corpus proceedings challenging the indefinite detention of an American citizen seized abroad, detained in the United States, and declared by executive officials to be an 'enemy combatant', does the separation of powers doctrine preclude a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the executive branch's asserted justification of the detention?

[142] Westlaw, 2004 WI 1431951 (US).

which also presupposes the right to an attorney. Questioning by security officers holding a person in custody 'hardly constitutes a constitutionally adequate fact finding before a neutral decision maker'. Clear language, but a divided Court nevertheless, as there were three dissenting opinions, in which especially Justice Thomas lashed out strongly and argued that: the judiciary should not test and assess the prerogatives of the executive; national security should not be subjected to 'judicial second-guessing' and gathering intelligence in the framework of the war against terrorism may necessitate detention and the judiciary is not in a position, nor should it desire to be the judge of that. In September 2004 Hamdi has been transferred to Saoedi-Arabia afer bilateral negotiations between the US and Saoudi-Arabia. He lost his US citizenship and cannot leave the Saoudi-Arabia territory.

The Padilla case is interesting, because Padilla was detained at an airport in the US, instead of on a foreign battlefield. José Padilla,[143] an American citizen who converted to Islam and therefore uses the name Abdullah al Muhajir, is suspected of having been active in Al-Queda and to have plotted to explode a radiological dispersion bomb (or 'dirty bomb') in the US. The evidence against him is secret. First Padilla was a suspect under criminal law and he was assigned an attorney, but a few months later the President decided that he was an enemy combatant and his case was therefore transferred from the DoJ to the Department of Defense. The District Court[144] recognised that there was military jurisdiction, but was also of the opinion that Padilla had the right to challenge the qualification of enemy combatant by means of habeas corpus proceedings and also held that he had the right to an attorney. The suspect furthermore has the right to submit his own evidence which has to be offset against the government's evidence in contentious proceedings. The Department of Defense has refused to discuss this. On appeal the US 2nd Court of Appeals[145] in November 2003 decided that Padillla could not be labelled an enemy combatant and that after 19 months of pre-trial detention his illegal detention had to end or the Presidential decision had to be tested on the merits and that the government had to show the basis for his detention beyond a reasonable doubt. In this decision, the difference with the Hamdi case was expressly underlined. The Supreme Court has still not answered the questions presented.[146] After all, the Court was of the opinion that the jurisdiction of New York, the place of jurisdiction under regular criminal law, was the incorrect starting point and that it should have been the jurisdiction of South Carolina,

[143] *See* for all relevant documents http://news.findlaw.com/legalnews/us/terrorism/cases/index.html#padilla and http://www.jenner.com/news/news_item.asp?id=12539624.

[144] http://www.nysd.uscourts.gov/rulings/02CV04445_031103.pdf.

[145] http://news.findlaw.com/cnn/docs/padilla/padillarums72303padbrf.pdf.

[146] The following questions were asked:

1. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. no. 107-40, 115 Stat. 224, to seize and detain a US citizen in the US based on a determination by the President that he is an enemy combatant who is closely associated with Al-Qaeda and has engaged in hostile and war-like acts, or whether 18 USC Sec. 4001(a) precludes that exercise of Presidential Authority.

2. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

where he was in military detention and where the responsible military staff directly supervised his detention. As a result, the case was referred back to the competent jurisdiction. Objections were raised against this in sharply dissenting opinions, as the secret transfer from Justice to Defense took place on the basis of ex parte proceedings implementing the President's order and this occurred at the same time when habeas corpus proceedings had been instigated. For this reason, Justices Stevens, Souter, Ginsburg and Breyer urged that the issue should not be clouded: 'At stake is nothing less than the essence of a free society [...] Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process [...] Executive detention of subversive citizens [...] may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence'. In any case, the competent jurisdiction will have to take the decision of the Supreme Court in the Hamdi case into consideration.

Finally, the Supreme Court delivered a judgment in combined cases *Rasul et alia v. US*.[147] The claimants, Guantánamo detainees from the UK, Australia and Kuwait, were arrested in Afghanistan and Pakistan at the beginning of 2002 and have now been in detention for over 24 months without having been charged, without the right to an attorney and without trial. The District Court[148] has combined their cases and decided that the Supreme Court's judgment in *Johnson v. Eisentrager*[149] could be followed here. This means that when an alien finds him/herself outside the territorial sovereignty of the US, he/she has no means of redress to apply the US Constitution. The District Court rejected the argument that this is only true for enemy aliens. No alien held outside the territorial sovereignty of the US can rely on habeas corpus, for example. The US Court of Appeals for the District of Colombia Circuit[150] took over the judgment of the District Court and pointed out that the Supreme Court has reconfirmed the criteria in *US v. Verdugo-Urquidez*.[151] However, the Supreme Court held that the US, despite the fact that it does not have full sovereignty over the base, still exercises full and exclusive jurisdiction over it. This means that the federal courts in the US are quite competent to decide on the legality of detentions and the application of constitutional guarantees. With this important decision, the Supreme Court has put an end to the legal limbo of Guantánamo and reinstated

[147] http://www.supremecourtus.gov/opinions/03pdf/03-334.pdf. The following question was asked: 'Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba'.

[148] 215 f. Supp. 2d 55.

[149] Johnson v. Eisentrager, 339 US 763 (1950). *See* section F.II.

[150] 321 f.3d 1134.

[151] US v. Verdugo-Urquidez, 494 US 259 (1950). This case deals with kidnapping (officially termed 'abduction') by US authorities in Mexico.

the right to habeas corpus in this form of administrative military confinement and the incommunicado regime. Of course, it remains to be seen how the US courts will implement this legal protection in the light of the Presidential prerogatives concerning war, foreign policy and national security. The Hamdi case can serve as a source of inspiration when dealing with the merits (e.g. legality of arrest and detention, access to an attorney, denied questioning, etc.). It is also as yet unclear whether this judgment will also have an effect on the rights of detainees in the hands of the US in military centres in Asia, etc., now that the Supreme Court has abandoned the criterion of territorial jurisdiction and replaced it with the following: 'habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts 'within (its) respective jurisdiction' if the custodian can be reached by service of process'. Justice Scalia in a thunderous dissenting opinion spoke of the extension of habeas corpus proceedings to the four corners of the world. His concluding sentence speaks volumes and explains why he closed with 'I dissent' instead of the usual 'I respectfully dissent': 'For this Court to create such a monstrous scheme in time of war, and in frustration of our military commander's reliance upon clearly stated prior law, is judicial adventurism of the worst sort.' He also called upon Congress to intervene legislatively.

The Bush I administration considered that it could meet the Supreme Court's wishes by establishing an annual secret control procedure before a panel of three military officers, who have to assess whether their release constitutes a threat to national security. Decisions of the panel need not be reasoned and are not open to appeal.[152] In December 2005 about 210 cases have been reviewed by the panels. Two detainees have been released by the panels. Several detainees did refuse to cooperate, because of the fact that they have neither the right to an independent attorney, nor access to the file. It is doubtful whether this system corresponds to a 'meaningful and fair opportunity before a neutral decision maker'. From the very start problems have occurred in connection with the independence of certain military officers and as regards the legal quality of the procedure. This is the reason why several proceedings of the panels have been challenged before the regular federal courts. In November 2004 The US District Judge Robertson, dealing with Hamdan's harbeas corpus appeal in the federal court in Washington D.C, issued an order to suspend the panel procedure, as he wanted to fully apply the third Geneva Convention.[153] However, on appeal the US Court of Appeal (District of Colombia)[154] decided that the military commissions were sufficiently legitimised Congress and that the Geneva Conventions did not confer any rights on Hamdan before the US tribunals. According to the Court of Appeal, it does not follow from the Supreme Court's judgment in *Rasul et alia* that the Geneva Conventions become applicable law before US tribunals. If, however, the Geneva Conventions were nevertheless to apply, too much uncertainty remains concerning the scope of

[152] N. A. Lewis & D. E. Sanger, *Administration changing review at Guantánamo Bay*, NY Times, 1 July 2004.

[153] *See* http://news.findlaw.com/usatoday/docs/tribunals/hamdanrums110804opn.pdf.

[154] United States Court of Appeals for the District Court of Columbia Circuit, 15 July 2005, http://pacer.cadc.uscourts.gov/docs/common/opinions/200507/04-5393a.pdf.

the notion of armed conflict and civil war. Finally, the Court of Appeal stated that Hamdan could always have recourse to the federal courts when all legal remedies against his conviction by the military commissions were exhausted.

In June 2006, the Supreme Court in *Hamdan v. Rumsfeld*[155] found the military commissions to be contrary to the laws of the US and to Article 3 of the Geneva Conventions.[156] This decision did not lead to the closing of Guantánamo or to a prohibition of militiary courts or commissions. The Supreme Court
first dealt with an important point of admissibility concerning the applicability of the Detainee Treatment Act.[157] In subsection (e) para. 1005 provisions are included concerning *judicial review of detention of enemy combatants.* These provisions exclude habeas corpus procedures and grant exclusive jurisdiction to the (conservative) Court of Appeal of the District of Columbia to assess the lawfulness of the final decision concerning the status of enemy combatant. The Supreme Court was of the opinion that the Detainee Treatment Act did not stand in the way of the proceedings against Hamdan (which were pending at the time of the entry into force of the Act) and that the hearing of the case was all the more indicated given the interest of the legality and lawfulness of the military commissions and of applicable procedures. Justice Scalia in a dissenting opinion strongly contested this. The first argument on the merits concerned the compatibility of the military commissions, especially order no. 1 concerning the procedures, with military criminal law as laid down in the Uniform Code of Military Justice (UCMJ). The difference is mainly the possibility before the military commissions to keep evidence secret and to permit that the suspect does not appear at the hearing. In this way, secret evidence can be adduced in the proceedings which has been obtained by hearsay and/or through coercive interrogation. Furthermore, the witnesses called do not need to take an oath of truth. The Supreme Court found no sufficient reason to deviate from the procedure before the military courts. Thirdly, the Supreme Court decided that Article 3 of the Geneva Conventions was applicable in the US and that the US had to apply the customary international law on the matter. Hamdan had to be tried by a *regularly constituted court.* This may also be a military court, provided that the procedures are in conformity with customary international law. In any case the accused should have the opportunity to be present at his trial and to know all the evidence against him. The Supreme Court ordered the disclosure of all incriminating evidence unless legal exceptions applied. For all these reasons, the Supreme Court ruled that the current regulation of the military commissions went against the law of the US and Article 3 of the Geneva Conventions.

The judgment by the Supreme Court was a serious setback for the Bush administration, but it was one that could be remedied. The Supreme Court regularly pointed to the insufficient legal basis on behalf of Congress. Congress could elaborate rules for the military commissions and rectify the relationship with military criminal law. In response to the Supreme Court's ruling, Bush recognised that the enemy combatants of Guantánamo Bay were prisoners of

[155] http://www.hamdanvrumsfeld.com/05-184.pdf.
[156] By a majority of 5 against 3 of the judges on the Court.
[157] DTA, Pub L 109-148, 119 Stsa. 2739.

war, which means they could invoke protection under the Geneva Convetions and protection from the Red Cross. However, it was only to be expected that the Bush administration would go in search of a majority in Congress in order to save the military commissions by providing them with an adequate legal basis. In September 2006, Bush announced his intention to transfer suspects of terrorism from secret places of detention to Guantánamo to have them tried by military commissions. Consequently, he submitted a new statute for these commissions to Congress. This statute was heavily opposed by a group of republicans in the Senate who sought the full application of Article 3 of the Geneva Conventions, which would exclude the interrogation techniques of the FBI and the CIA. At the end of September the White House and Congress made a political deal and the text was adopted by both Chambers. There was no real opposition from the Democratic Party.

The *Military Commissions Act of 2006 (MCA)*[158] now legalises the military commissions, including a body of special procedural rules concerning secret evidence that deviates from regular criminal law and military criminal law. The statute also excludes any type of habeas corpus procedure by granting exclusive jurisdiction to the Court of Appeals of the District of Colombia, exclusively against the final decisions of military commissions. Indefinite incommunicado detention now has a legal basis, therefore. Detainees are also denied any entitlement to invoke rights under international law, including the Geneva Conventions. The opposition from the group of republicans only managed to secure that information obtained on the basis of questionable interrogation may not be used as evidence if the interrogation did go against the prohibition of *cruel, unusual or inhuman treatment or punishment,* as referred to in the 5th, 8th and 14th Amendments to the Constitution.[159] However, the *Military Commissions Act* defines *cruel, unusual or inhuman treatment or punishment* in such a way that it is limited to severe or grave violations. These practices are also defined as war crimes. For non-serious or grave forms, the President is given the power to regulate this further by federal order. In fact, the MCA legalises coercive interrogation and the use as evidence of information obtained in this way, even if these coercive interrogations fall within the scope of application of torture, unusual or inhuman treatment or punishment, as defined by international law. The restriction under the MCA to serious or grave breaches allows the Bush administration a wide margin to provide illegal interrogation methods with a legal basis, contrary to international law. The MCA legalises a system of emergency justice for enemy combatants, setting aside basic constitutional rights such as habeas corpus and precluding the application of international law and international human rights in the US.

[158] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf.

[159] For information obtained prior to the entry into force of the Detainee Treatment Act (December 2005) it is sufficient that the military court considers it of probative value, trustworthy and in the interest.

G. Conclusion

In 1998, Chief Justice William Rehnquist[160] wrote that civil rights may be limited in times of emergency. During a lecture for the New York City Bar Association, Chief Justice Stephen Breyer[161] claimed that the Constitution always matters, perhaps particularly so in times of emergency. These opinions of two justices of the Supreme Court illustrate the heart of the problem. To what extent does the US Constitution provide possibilities for special legislation in times of crisis (war, insurrection, state of emergency)? These questions call to mind associations with the developments in 1920-1930 in the Weimar Republic and the theoretical foundation of the state of emergency by Carl Schmitt.[162] May essential elements of the rule of law, like equality before the law and fair trial, simply be set aside for certain citizens? Are secret evidence, secret trial, administrative arrest and far-reaching discretionary powers of investigation for police and security services compatible with the Constitution? How are the legislature and the executive subject to judicial control in the implementation of special legislation?

The special Congressional and Presidential legislation since 11 September 2001 is not unique in the history of the US. It is in part an implementation of the constitutional prerogatives of the President in the field of defence, security and foreign affairs. Nevertheless, a clear paradigm switch has taken place. Congress has opted for far-reaching delegation to the executive, with many blanket laws which the executive can interpret at will and without any built-in mechanisms for effective political control. In its implementation of these laws, the Bush I Administration has unleashed the rhetoric of war upon terrorism. The motto is cut down the laws to get at the devil. Insofar as the constitutional state and the fundamental rights and legal guarantees it establishes form an obstacle, they have to be (temporarily) cleared out of the way to make room for concepts of national security. Furthermore, the executive in question is not very taken with abundant transparency and attempts to keep as much information concerning legislation, administration and dispensation of justice secret. Under the Bush I administration, this secrecy has exceeded a limit and is undermining essential concepts of the rule of law, such as accessible legislation, open government and the public administration of justice. Incommunicados become part of the system and attorneys are having great trouble exercising their profession. The rule of law continuously loses out to the security state. Secrecy dims the light of justice and causes the basic ideas of the Enlightenment and modern criminal law to shine less brightly. The 9/11 Commission does not recommend any changes in this respect. It only recommends increasing reporting duties to Congress. These have been integrated in the Intelligence Reform and Terrorism Prevention Act (IRTPA) of

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[160] W. H. Rehnquist, All the Laws but One: Civil Liberties in Wartime (1998).

[161] S. G. Breyer *Liberty, Security, and the Courts*, Association of the Bar of the City of New York, 14 April 2003.

[162] C. Schmitt, Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum (1997); C. Schmitt, Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien (2002). *See also* G. Agamben, Stato di eccezione, Homo sacer, II, 1 (2003).

2004. Title VI[163] provides for reporting requirements of the AG to the intelligence committees of Congress concerning the use of coercive measures (electronic surveillance, physical searches, pen registers, access to records) under the FISA, the secret warrants and the use of FISA-information in criminal proceedings. The IRTPA also establishes a Board on Safeguarding Privacy and Civil Liberties. This Board has access to all relevant information in all relevant agencies, but the bill does explicitly include the fact that the Board is working under the responsibility of the NID and the President and that the NID, in consultation with the AG, can decide to withhold certain information to protect national security, sensitive legal information or counterterrorism information. Civil liberties are not fully guaranteed by a Board being part of the executive and only having access to information and practices if compatible with the higher interests of national security. Once again the protection of civil liberties is made dependent upon the security agenda.

In addition to secret criminal law, there are also clearly several speeds within criminal law and criminal procedure. Criminal law makes a distinction between ordinary citizens and enemies. The criminal law of the enemy (enemy combatants, enemy aliens) is based on starting points which reach back to criminal law theories developed in the 1920s and 1930s which were based on dangerousness instead of unlawfulness. Mezger,[164] for example, spoke of Täterstrafrecht, Lebensführungsschuld and Lebensentscheidungsschuld, in which criminal law objectifies certain categories of citizens based on race, creed or nationality and in which it no longer matters whether criminal law intervention takes place post or ante-delictum. The criminalisation of enemy aliens and enemy combatants and the launching of the concepts of preventive war and pre-emptive strike[165] in the field of justice fit in with this context. In criminal procedure, a disctintion is made between the common criminal procedure and the FISA procedure. The reach of the special FISA procedure, secret and based upon intelligence investigation, is constantly being increased, both ratione materiae, personae, in such a way that has become a parallel to the investigative procedural framework, also in domestic criminal cases. The Patriot Act has ensured that FISA criminal law in the field of security may also be used by the FBI in the fight against domestic terrorism. Secret special methods of investigation have been expanded and the classified nature of much of the evidence is resulting in cases that are more and more often dealt with in camera or ex parte. In addition, the powers of investigation of the intelligence services have also been broadened and their information may be used as secret evidence in criminal procedure.

The Bush I administration has been accused of seeking to make the emergency legislation permanent. And it is true that, although the government has had to

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[163] Section 6002.

[164] E. Mezger, Die Straftat als Ganzes, 57 Zeitschrift für die Gesamte Strafrechtswissenschaft 689 (1938).

[165] *See* The National Security Strategy of the USA, 2002, http://www.whitehouse.gov/nsc/nss.pdf.

engage in a severe struggle in Congress, the Bush II administration has managed to extend the Patriot Act without any substantive amendment to the text that is worth mentioning.

Recently, secret anti-terrorism programmes have come to light. Images of Abu Graib and Guantánamo Bay, the occurrence of secret CIA flights and the existence of secret places of detention specialising in torture have all become known.

The victories won by the Enlightenment and the French Revolution, so dear to the hearts of the Founding Fathers of the American Constitution, appear to have been lost in current anti-terrorist politics. Meanwhile, the Supreme Court has delivered some principled judgments to ensure that security mindedness does not marginalize the constitutional state. The question is whether the Supreme Court has made itself sufficiently clear. Is the decision concerning detention in Guantánamo also applicable to detention in Afghanistan? Why has the Supreme Court not provided stricter requirements for the body which is to test habeas corpus and legal protection? Why has the Supreme Court paid little or no attention to applicable international law?

We can only hope that both the judiciary and the legislator are fully aware that what debilitates the Rule of Law and civil rights and freedoms is the worst way of countering one of the severest menaces that threatens the State and society.