Civil Liberties, National Security and U.S. Courts in Times of Terrorism

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Abstract

Civil liberties in democratic countries have been threatened by counterterrorism measures that sacrifice liberty for security. The United States has been no exception. The courts in the United States have often been seen as the bastion of civil liberties protection, but they have given Presidents and Congresses a great deal of deference in dealing with foreign policy and latitude when national security is an issue. This deference and the latitude on national security issues - especially after 9/11, the lack of judicial information in the foreign policy area, and the nearly absolute (plenary) power over immigration issues held by Congress and the executive branch have created a toxic mix which has resulted in significant reductions in individual liberties. An understanding of the limitations of judicial action also contributes to any explanation of the difficulties involved for formulating an effective counterterrorist policy.

Keywords: Democracy, Human Rights, National Security, Patriot Act, Terrorism, 9/11

Introduction

Since the attacks on 9/11, the struggle against terrorism has taken center stage for many governments throughout the world. Of course, many nations were already focused on terrorist activities since such violence was hardly new in Sri Lanka, India, Israel, Bosnia and Herzegovina, Colombia, and many other countries. West European countries, Australia, Canada, and the United States, however, only took greater notice since the attacks of 9/11 and the bombing in Bali in 2002 as well as the Madrid train bombings in 2004. These signalled an increased danger of terrorism for the West. Recent attacks in Paris, Brussels, Berlin, London, Manchester and other cities have increased these levels of concern. One consequence of the greater apprehension and fear in many Western democracies has been an increase in tension between the perceived need to provide security and the continued respect for the protection for the civil liberties accorded to individuals suspected of being terrorists or having linkages with terrorists—or even of sympathizing with the plight of the groups that the terrorist organizations claim to represent. The United States has been no exception to this trend and has even become more focused on security concerns since the devastating 9/11 attacks occurred on American soil. During peacetime, it frequently has been the US judicial branch that has been very protective of individual civil liberties. In many respects, however, this branch of the government has provided only limited protections in an era with heightened fears of terrorism. The courts have accepted the adoption of enhanced security measures by the other branches. The court decisions and practices have accepted a toxic mix composed of deference to the other branches in foreign policy and national security decisions, plenary power in the area of immigration control, and lack of opportunities for judicial oversight due to limited information on foreign policy issues. The lack of judicial protection has perhaps been most obvious in regard to immigrants and foreign residents in the United States, but it has affected citizens as well.

The following discussion will first look at the tensions between security and liberty in democratic systems in regard to terrorist threats. This serves to provide a general background to the situation in the United States. It will then look at the failure of the courts over time to provide protection for migrants and for citizens as well. It is important to note that this lack of protection is *not* a new phenomenon. The deference to the executive and legislative branches and the long-established principle that these branches have virtually unlimited plenary power in the area of immigration control, provides the background for understanding why there are such limited protections in this area and raises concern for civil liberties in an era of continuing international

terrorism on a global level.

Security and Liberty: Tensions in Democracies

There has always been tension between the security of the state and its citizens and constitutional guarantees of liberties for those same citizens. The fear for individual safety can be the enemy of civil liberties. Although no country has provided its citizens with absolute liberties and freedom of action, a key tenet of democracy in Western political systems has been the protection for individual rights. At various times leftist groups in Europe sought to use this fear to get their governments to limit civil liberties in response to terrorist attacks. They thought that the elite would be forced to adopt restrictions on civil liberties of the people in defense of capitalist domination of the polity and society and that the subsequent popular response would be the mobilization of the masses to change the system of exploitation of the masses.[1]

When faced with challenges from the left in the latter part of the twentieth century, most democracies managed to avoid major limitations on civil liberties. Italy, for example, faced a significant threat from the Red Brigades. The government defeated the group and other leftists without relying on extra-constitutional changes and limitations on civil liberties.[2] There were contingency plans for the military and security forces to use clandestine security groups to create increased tensions that would have permitted or forced the government to introduce significant restrictions on leftist groups; yet in the end the plans for such an intervention were discovered and blocked before there was any effort to implement these plans.[3] When former Prime Minister Aldo Moro was kidnapped and then killed, public opinion turned against the Red Brigades. This decline in public support and more effective counterterrorism efforts led to the effective dismantling of the group.[4]

On the other hand, from 1983 to 1987 the Spanish government utilized a clandestine, unofficial death squad, the Anti-Terrorist Liberation Group (GAL), to track down and kill Basque nationalists in Spain and France, There can be no doubt that such extra-judicial executions constitute a major violation of civil liberties. Once it was discovered that this group was operating, it was disbanded, and persons involved with the GAL received significant jail sentences.[5] In Turkey, on the other hand, high levels of terrorism and other violence between leftists and rightists triggered military coups in 1971 and 1980. The weight of the crackdown following the first coup largely fell on the left,[6] while members of the right-wing groups were protected by sympathetic personnel in the security agencies.[7] After the military returned power quickly to civilians, the violence involving the left and right reappeared and became worse. The second coup in 1980 led to repression of violent groups on both the left and the right.[8] Although the military on both occasions dealt with the instability using enhanced security measures, these limitations were not continued after the violence was brought under control and power was returned to civilian politicians.

Over many years of 'The Troubles' in Northern Ireland the activities of the Irish Republican Army (IRA) did lead to enhanced security measures in the United Kingdom with concomitant limitations on civil liberties. The aftermath of the pub bombings in Guildford and Woolwich in 1974 led to the passage of a series of legal measures designed to deal with the IRA terrorist threat. These measures were ostensibly temporary but eventually were given a permanent base.[9] New laws granted enhanced powers to the police and security forces. They were permitted to hold people for longer periods of questioning if they were suspected of terrorism or of having links with Irish nationalist terrorist groups. It even became a crime to not report IRA activity to the authorities.[10] Further, anyone suspected of providing support for the IRA could have their property or financial assets seized because of the connection.[11] The laws also permitted a form of internal exile in which it was possible that residents of Northern Ireland would not be allowed to enter Great Britain.[12] The British started to use preventative detention or internment of *suspected* terrorists in Northern Ireland for indefinite periods of time rather than relying on convictions in trials to impose prison sentences.[13] These actions were taken against both Irish nationalists and members of Protestant paramilitary groups that were engaged in communal violence against suspected Irish nationalists and Catholics in general.[14] Some of the individuals subjected to indefinite detention were subjected to enhanced interrogation

techniques. Their situation reached the European Court of Human Rights in a case brought by Ireland against the United Kingdom where the court ruled that their treatment was inhumane but not torture.[15] The idea of indefinite detention for suspected terrorists was extended in 2001 to include persons who are "certified" as international terrorists by appropriate government officials.[16]

The British government opted to create Diplock Courts in Northern Ireland where juries were not utilized and convictions or acquittals were dependent upon the decision of the judge. The British were forced to use this expedient because of IRA intimidation of juries had prevented convictions for obvious terrorists.[17] These courts, moreover, were also permitted to include evidence based on unsubstantiated reports by informers.[18] The atmosphere of tension in Northern Ireland also led to a tendency of police and juries in Great Britain to be quick to convict any Irish suspects of terrorist violence. The police were willing to "enhance" the available evidence to obtain convictions, and juries were willing to believe the worst of defendants; consequently, there were convictions of individuals who were not guilty of the crimes they were charged with.[19] This general atmosphere and the quickness to reach a conviction resulted in anyone with Irish connections becoming part of a suspect community where individuals were prejudged as guilty.[20] Today, Muslims in the United Kingdom have replaced the Irish as the major suspect community.[21] There are still some limitations in place on individual rights, such as prosecution for "glorifying terrorism" or inciting terrorism.[22]

A number of other governments in democratic states increased security measures in the aftermath of the attack on the World Trade Centers and the Pentagon. European democracies enacted changes in anti-terrorism laws and restrictions on civil liberties. Britain, France, and Germany joined the United States, Australia, and Canada as the most restrictive of individual rights among democracies.[23] In addition, there has been an increase in cooperation among governments in tracking terrorists or providing information and sharing intelligence on their activities with other governments. European governments share the information that has been gathered with data mining of communication patterns of individuals.[24] In Asia, Malaysia like other countries has adopted preventative detention and other new security laws to deal with the threat of terrorism.[25] There is little doubt that there have been significant pressures to limit civil liberties that increased in the aftermath of major terrorist incidents (in the case of 9/11) or major campaigns (in the case of the IRA).

The restrictions on civil liberties in democratic countries that have occurred may ultimately be counterproductive. Terrorist attacks have weakened public support for protecting the civil liberties in democratic states.[26] There has been a decrease in the protection provided by national judiciaries when it comes to the defence of the civil liberties of those suspected of connections with terrorist organizations that have accompanied this decline in public support.[27] The United States has been no exception to this trend. Muslim defendants have become a suspect community in the United States in many respects, and portions of the American public favor the detention of suspected terrorists and restrictions on their legal rights. Public views on the need to limit the rights of suspects, however, have not extended to right-wing extremists suspected of terrorist activities [28].In much of the post–World War II era, courts have been conscious of the need to protect individuals' civil liberties, but the willingness of the courts to safeguard these rights has proven to be limited in some ways when such protection conflicts with foreign security issues. Ultimately weakening support for civil liberties does meet with the approval of terrorist groups such as ISIS and al-Qaeda who view the lack of protection as weakening their opponents in their efforts to counter terrorist violence. One study found that democracies with high levels of support for civil liberties have been less susceptible to terrorism.[29] Extremist groups can gain recruits when individuals become suspect because of their community or group identification. How well American courts manage to remain the traditional defenders of civil liberties thus becomes extremely important in this rather hostile environment.

Defense of Civil Liberties by Courts in Period of Heightened Fear

The reluctance of U.S. courts to provide relief to persons who might be facing intrusive or unrestrained government activity has been present for over a century in terms for potential immigrants and non-citizens resident in the country. The principle that the other two branches of government have virtually unlimited power in areas of immigration was established more than a century ago in key decisions; the precedents that were established so early continue to limit the role of the judicial branch. In the aftermath of the increase in terrorism with the first attack on the World Trade Center in 1993, the Oklahoma City Bombings, the 9/11 attacks, and the increase in domestic and international terrorist attacks in the twenty-first century, even American citizens have come to have less protection from the courts in at least some circumstances.[30]

Immigrants and the Idea of Plenary Power: The Early Examples

Immigrants have always had fewer protections than US citizens. They have been targeted as potential terrorists not only in the twenty-first century but in earlier periods as well. Anarchists at the end of the nineteenth and at the beginning of the twentieth century became a suspect group, and efforts were made to exclude them. The Red Scare after World War I led to a significant attempt to deport "foreign radicals". Migrants from predominately Muslim countries have just been the most recent group of individuals to be denied entry, to face deportation, or to be subjected to other limitations. In many cases, all of these groups have had limited or even nonexistent support from the American judiciary.

The Supreme Court in early decisions acknowledged the idea of plenary power in the area of immigration in *Chae Chan Ping v. United States* in 1889 and in *Nashimura Ekin v. United States* in 1892.[31] In these cases, the Supreme Court had affirmed the right of the national government to exclude immigrants if officials thought it was necessary for any reason as long as they operated within the limits of existing laws established by Congress.[32] In 1893 in *Fong Yue Ting v. United States* the Supreme Court specified that the right to deport non-citizens was absolute and unqualified.[33] The courts would not intervene since the other branches were considered to have this complete plenary power to do as they saw fit.[34] It was a sign of the times that the courts were willing to grant such broad plenary powers to the other branches when they were being used to exclude or deport Asians.

This doctrine also underlay the willingness of the courts to support the Anarchist Exclusion Act. The courts upheld the Immigration Act of 1903, usually referred to as the Anarchist Exclusion Act, which was passed after the assassination of President McKinley by an anarchist who actually was a natural born US citizen. The 1903 act and its later extension gave immigration officials great latitude in determining who could be denied admittance into the country. The Supreme Court even acknowledged that if there was evidence that the laws or their application were flawed, that it was up to Congress to correct the problem by changing the laws, not the courts [35]. This judicial approach clearly gave Congress a free hand to act (or not) and conferred significant power. The intent, of course, was to exclude foreign radicals because of their political beliefs. The right of the national government to prohibit the admission of individuals solely on the basis of their political beliefs was upheld by the Supreme Court in *US ex rel John Turner v. Williams* in 1904 that dealt with the deportation of an anarchist.[36]

Courts also frequently tolerated a variety of activities that were directed against domestic and foreign radicals during the Red Scare after World War I. Actions against such radicals peaked with what came to be known as the Palmer Raids. Due to President Wilson's incapacity as a consequence of a stroke, Attorney General Palmer felt that he had a free hand to deport communists, socialists, and radicals.[37] Approximately 6,000 radicals were rounded up in the Palmer Raids although less than a thousand were actually deported.[38] He was able to rely at least in part on the Anarchist Exclusion Act in these efforts. There was no effective interference from the courts in Palmer's efforts to rid the country of foreign radicals. What limited any influence that the courts might have had in dealing with the presumed threats to civil liberties due to national security concerns about foreign radicals was the willingness of the courts to defer to other branches of government, combined with judicial doctrines previously established in the area of immigration law.

The fate of the individuals who were detained was determined in administrative hearings. In these hearings, which were considered to be civil processes rather than criminal ones, the government could present hearsay evidence, could rely on information gathered in searches and seizures without warrants, whereby the persons detained had limited or no access to legal counsel.[39] Hearsay evidence and materials from secret intelligence sources could be used, and some evidence was presented in the private chambers of the judge with no opportunity for the persons facing deportation to challenge such evidence.[40] Further, the courts had previously ruled that since deportation was not punishment as would be the case in criminal proceedings, persons facing immigration hearings did not have the due process rights that would have been present in criminal trials.[41] In essence the proceedings could be and often were extremely one-sided. Persons considered to be radicals were also held under immigration rulings in what was the American version of preventative detention until they could be removed from the country.[42] Such detention could be short-term or even long-term with no potential for judicial appeal. The mass deportations that Palmer was planning were only prevented by the actions of other government officials.[43] Some of these same powers were given anew to government officials with the passage of the USA Patriot Act.

Deference to Other Branches

This latitude in dealing with non-citizens has been buttressed by the fact that the Supreme Court, setting the precedent for lower courts, has accepted that Congress, and especially the President, have the necessary knowledge, expertise, and information to deal with foreign policy issues, a view that was directly stated in the 1936 Curtiss Wright decision (*United States v. Curtiss Wright Corporation*) which included the statement that the Supreme Court lacked the expertise to second guess the government's foreign policy decisions. This decision is known for implanting in constitutional law the proposition that the presidency is the sole organ for conducting foreign policy which presented presidents with inherent power not constrained by Congress or the judiciary. Such deference has come to provide a major limitation on the willingness of the courts to protect civil liberties when foreign affairs are involved.[44] This deference in the foreign policy area is even more marked when it includes national security claims and when immigration law is involved since the legislative and executive branches have acknowledged plenary power in this area given the fact that the issues are considered to be political ones decided by the elected branches of government.[45] The combination of plenary power in immigration plus national security expertise, and later the sole organ theory of presidential power in foreign policy, has combined into a cocktail of doctrines that is lethal for the rights of non-citizens suspected of radical ideas or of supporting terrorism.

Deference to the position of the other branches in terms of foreign policy knowledge was present more recently with the various travel bans created by President Trump. It is true that the various iterations of President Trump's travel ban faced difficulties in the courts but not because of a refusal to defer to the executive branch. The initial executive orders were badly prepared and incomplete and to some extent displayed inappropriate prejudice. The travel ban was confusing in terms of who would or would not be admitted, and the priority given to Christian refugees created First Amendment questions. The White House argued that the ban was not reviewable by the judiciary, a premise that was rejected. The judgments against the ban, however, did not challenge the plenary power of the legislative and executive branches. The ban was not religiously neutral, was vague in terms of implementation, and did not address a number of due process issues. The travel bans dealt with domestic policy (migration) that had foreign policy implications (security issues). Eventually, however, the courts accepted the travel bans when the executive orders were correctly prepared. At no point was there any significant consideration as to whether the bans on migrants from particular countries was good or bad foreign policy because courts do not pass judgment on the value of the courts. In addition, there appears to have been no documentation presented which demonstrated that there had been no one from some of these countries who had been implicated in any terrorist actions on US soil, notwithstanding the claim in the executive order that "[n]umerous foreign-born individuals have been convicted in terrorism-related crimes since September 11, 2001 who entered the United States."[46] The principle that the travel bans were acceptable as a means of maintaining national security was confirmed. President Trump, of course, used the travel ban to solidify support with his base, drawing on the fears and

ethnocentrism of some Americans. There is an interesting historical parallel. Attorney General Palmer attempted to leverage his actions to deport un-American radicals to provide an issue that would create an opportunity for him to gain the Democratic nomination for the presidency for the 1920 election.[47] His efforts to promote a political run for the presidency failed, however, perhaps because the nomination was in the hands of party regulars who were less influenced by his actions that targeted the radicals than might have been the case with populist feelings among the general public at that time.

US Citizens and Residents and Limits on Foreign Policy Issue Involvement

The deference of the Supreme Court toward the executive branch has been increased by the war analogy connected with the Global War on Terror and the continuation of the view that there is an ongoing struggle with an enemy.[48] An additional area of concern involves the use of warrants issued by the Foreign Intelligence Surveillance (FISA) Court established in 1978 and later given increased powers under Presidents William J. Clinton and George W. Bush. The increases in power that occurred after the bombing in Oklahoma City in 1995 were in the interests of furthering national security.[49] The court has the power to issue warrants for foreign individuals who are under suspicion of working for other governments or involved in terrorist groups or maintain contacts with these or US citizens or residents who have contacts with such outside interests. FISA warrants issued by the court can be used for monitoring communications related to operations of foreign governments or groups. Such warrants became more important after 9/11 as a means of preventing terrorist attacks on US soil or attacks against US interests overseas. These warrants can approve wiretaps, secret searches, access to library records, reviews of financial information and inquiries into internet use. While such warrants do require probable cause as a justification for these activities, requests to the FISA Court apparently are infrequently declined. The executive branch has been very supportive of the use of such warrants until recently when, somewhat ironically, individuals close to the Trump presidential election campaign apparently became targets for investigation because of their possible connections with foreign groups. One consequence has been concern about their use or abuse from conservative political groups that had previously been largely silent about FISA warrants as part of the Global War on Terror. The judicial branch has accepted the use of such warrants in general, and it is extremely difficult for individuals to challenge such surveillance activities, especially since oftentimes the individuals under surveillance are unaware that they are under observation or the subject of related actions. In the aftermath of the bombing by Timothy McVeigh in 1995, President Clinton signed new legislation, the Espionage Act, that made the deportation of those suspected of terrorism easier than it had previously been.[50] This legislation was somewhat ironic given the fact that McVeigh was a US citizen just as McKinley's assassin had been. This legislation provides greater scope for federal investigations of possible terrorists that potentially came at the expense of civil liberties. After 9/11 the standard for securing a FISA warrant was weakened. It was no longer necessary to demonstrate probable cause in order to receive judicial authorization but relied on the weaker standard of a preponderance of evidence.[51]

The passage of the USA Patriot Act after 9/11 gave the authorities even greater power to deal with threats or what might be considered potential threats. Individuals who are suspected of supporting terrorist groups or who appeared to be endorsing terrorism could now be deported or prevented from entering the country.[52] Further, persons entering the United States can be detained if the Attorney General (or some lower ranking official in the Justice Department) has a reasonable suspicion that the person represents a threat to national security or has been engaged in terrorist activities. Individuals so detained are provided with no right to a review hearing or given a chance to challenge the government's evidence that led to these suspicions.[53] Other provisions have made it possible to accelerate deportations of foreign nationals. Even when resident aliens cannot be deported, they can be held indefinitely.[54] In one case, indefinite detention was overturned in court but only because Congress had not passed a law permitting such actions. Once Congress did pass such a law, the opportunities for judicial intervention were, however, significantly reduced.[55] The plenary powers granted to the executive and legislative branches more than a century earlier in areas of immigration and later in terms of national security are still limiting the courts. Further, individuals charged with terrorist

acts can be detained and questioned initially with fewer rights than those accorded suspects in criminal cases.[56] The names of those who are being detained do not even have to be released.[57] This approach is very reminiscent of the Alien Exclusion Act. The plenary powers to deport resident aliens and conduct hearings with no regard to the due process rights of the individuals detained.[58]

What is considered support for a terrorist group under the Patriot Act—and thus illegal—can be wide-ranging. It can be construed to include giving verbal support or expressing sympathy for the conditions that led a dissident group to use violence. Further, the deportations are based on speech rather than conduct and there is an assumption of guilt by association rather than by any actions that are actually undertaken. In addition, this provision has in effect denied entry into the country on the basis of a mere speech act rather than actual conduct.[59] Individuals can be targeted on the basis of what they might do rather than what they did.[60]It was now easier under the Patriot Act for the government to freeze the financial assets of individuals or an organization under suspicion. Prior to the act, a special designation was required under existing legislation to impose financial sanctions. With the passage of the Patriot Act it became possible for assets to be frozen in aid of an investigation in order to prevent the movement of these assets to foreign locations.[61] Any challenge to the official designation of a group as one that is supporting terrorism takes place in an administrative hearing rather than a court.[62] As already noted, such administrative hearings provide few protections to individuals under official scrutiny. Finally, the Patriot Act enhanced earlier provisions that made the provision of legal assistance and expert advice as constituting material support for terrorist organizations. These provisions have been upheld by the Supreme Court in the *Holder v. Humanitarian Law Project* that will be discussed below.[63] The acceptance of these limitations on individual and group rights by the courts as necessary provisions for dealing with foreign threats to national security has come at the expense of providing protection for the rights of individuals simply suspected of inappropriate activity.

The Patriot Act also allowed other types of government activities that could infringe on civil liberties. It permitted more latitude in efforts to detect money laundering—provisions that have been among the less controversial extensions of government power.[64] Efforts of the Bush Administration to indefinitely hold "enemy non-combatants" at Guantanamo Naval Base in Cuba and to use enhanced "interrogation techniques" against suspected terrorists also raised significant questions in the United States and worldwide about US commitment to civil liberties. In this last area the judicial branch proved to be more effective in protecting the rights of those who were being detained, perhaps, in part, because the courts could rely on their knowledge of judicial procedures and established doctrines in the criminal justice system supportive of civil liberties. These situations also involved legal processes where the Supreme Court could be less concerned about foreign policy consequences or face fewer pressures to defer to the other two branches of government due to their presumed superior expertise.

Deference to the executive branch in the area of foreign policy also played a significant role in the decision of the Supreme Court in the *Holder v. Humanitarian Legal Project* case in 2010. This case addressed the use of the legal provisions that prohibited assistance to dissident groups to prevent the Humanitarian Law Project from facilitating their negotiations with their governments for solutions to the issues between them. The Humanitarian Law Project was charged with providing material assistance to two foreign terrorist organizations.[65] The Supreme Court accepted limitations on the activities of the Humanitarian Law Project, and therefore other private organizations, that was assisting the Kurdish Workers Party (PKK) and its successors and the Liberation Tigers of Tamil Eelam (LTTE—usually referred to as the Tamil Tigers) as well as Hamas whose situation became attached to the case. The advice that was proffered by the Humanitarian Law Project was considered material assistance to the groups and therefore prohibited by law because the organizations had been designated as Foreign Terrorist Organizations (FTOs) by the Secretary of State. This decision by the Supreme Court accepted the foreign policy position of the United States in support of its allies abroad without significant questioning of any basic facts. In the case of the PKK, the Turkish government was opposed to the idea of negotiations; instead the government preferred a military solution to the problem.[66] The efforts to use the military to eliminate the threat to the Turkish state by Kurdish dissidents to date have been less than totally effective. The government of Sri Lanka in its battles with the Tamil Tigers was

willing to negotiate at some points in time but after the tsunami of 2001 had weakened the separatists, the government was determined to eliminate the threat once and for all—even at the cost of high levels of civilian casualties. In the case of Israel and the Palestinians, negotiations between the two sides have offered the best hope for a solution in the form of the Oslo Peace Accords. Had Americans been involved in the preliminary consultations between the PLO and Israeli representatives, after the Humanitarian Law Project decision, they would have been in violation of later laws.

The Humanitarian Law Project decision to limit negotiations also ignored the fact that one of the major ways in which terrorism has come to an end in many countries has been through negotiations.[67] One study found that for terrorist groups that survived for longer than a year, they were slightly more likely to end by successful negotiations than by military efforts at eliminating them.[68] The successful negotiations that ultimately ended the conflict in Northern Ireland included the good offices of President Clinton as a mediator. While the government of Sri Lanka defeated the Tamil Tigers through military efforts, it did negotiate before, namely with the leftist Janatha Vimukthi Peramuna (JVP) or Peoples Liberation Front, which had also launched a terrorist campaign against the government. The JVP never received the FTO designation even though it was almost as much a terrorist organization as the Tamil Tigers. The government of Sri Lanka never pressed to have the JVP so designated because it was willing to negotiate with that group unlike the LTTE.[69] As a result of the negotiations the violent activity by the JVP was ended, and the JVP and its supporters were accepted back into the political system as active participants. Even though negotiations can work, there is a widespread fear among governments, including governments of US allies, that negotiations might grant legitimacy to dissident groups.[70] Granting such implicit legitimacy to dissident is often the last thing a government desires—as was the case for the LTTE and the PKK.

One important fact in any judicial proceeding is that restrictions on support for foreign terrorist groups have been linked to a group's designation as a Foreign Terrorist Organization (FTO) by the Secretary of State. When a group is given this designation, it becomes difficult or even impossible to operate within the United States or to solicit funds. Placement of a militant group on the FTO list criminalizes virtually all contact.[71] It also becomes easier to extradite individuals suspected of membership in such groups. While membership in an FTO is not directly prohibited, it can be construed as providing support, especially if an individual is paying membership dues.[72] This designation also makes it illegal for US citizens or legal residents to provide any types of assistance that would permit the organization to save its own resources for other activities, which, of course, could include support for violent actions. Court decisions have, as a consequence, resulted in limitations on freedom of speech and association.[73] In theory, independent advocacy was still permitted by the Humanitarian Law Project decision.[74] Even though individual US citizens are still allowed to advocate for groups that have been designated as FTOs, they can only do so independently and with no coordination with the group in question. The Obama administration, however, chose to consider the writing of an *amicus curiae* brief in support of an FTO to constitute coordination.[75] At least one lower court, moreover, has indicated that coordination does not even require direct contact.[76] This type of interpretation can have a chilling effect since there could be a claim that any type of advocacy could be considered coordination, leading groups and individuals to self-censor in order to avoid prosecution.[77]

The basic problem with judicial recognition of the FTO designation is that while it was established by legislative action, there are no clear criteria to determine which political organizations rightfully receive the designation. The presumption is that the executive branch utilizes the designation as part of its foreign policy, but there are virtually no checks on how relevant the basis for the designation is. The designation is considered to be an administrative process, and, thus, it is not subject to judicial review.[78] Designations can be made not only on the basis of actual attacks but also when there is an assumption that a particular group might be a threat.[79] The threat assessment, moreover, is not reviewable by outside actors such as the courts.[80] The designation can be used to support foreign allies against dissidents whether that support is deserved or not. Ultimately the designation can be quite arbitrary.[81] The designation of FTO status can be revoked by Congress or the Secretary of State, or (at least in theory) by the DC Circuit Court of Appeals.

[82] This court, however, has refused to review any FTO designations, thereby "effectively insulating that type of political decision" from court action.[83] A group that the Secretary of State may be considering for the FTO designation can receive advance notification and have the opportunity to present written objections if the group has a domestic presence in the United States. Foreign organizations without a US presence do not have any opportunity to object, and even groups with a domestic presence will not have the opportunity if delay could harm the security of the United States or undermine its foreign policy objectives. In addition, the courts have accepted the notion that the other two branches are better situated to determine what actions will undermine US foreign policy objectives.[84] Moreover, there is no mechanism available for a group to challenge the designation once it has been conferred.[85]

A number of examples illustrate how arbitrary the FTO designation can be. A comparison of terrorist designations by different governments demonstrates great variability. As of 2010, the United States had forty-five groups given the official designation. Although the United States and the United Kingdom agreed in twenty-seven cases, in another forty cases one country or the other included a group on its list when the other country did not. The British list included many groups, including the IRA, that were not on the US list. The United States did include a splinter Irish group—perhaps as a concession to the British government (or to reality). Canada had thirty-two of the same groups on its list, but in twenty-three cases Canada excluded groups that could be found on the US list; furthermore, Canada included seven not on the US list. Australia, on the other hand, had the greatest correspondence to the US list. There were only eighteen organizations designated, but all of them were on the US list. In contrast, the United States and India have great divergence. There were only five groups in common and sixty-six cases where only one country included an organization but the other did not.[86] The Indian list includes many groups active in Kashmir or organizations which are local to the South Asian region. The obvious conclusion is that governments create definitions or put violent groups on their respective prohibited lists that fit their own needs or respond to local political situations. They may avoid putting other groups on their official lists because they do not threaten their interests or because there could be domestic or international complications should they do so.

Probably the most obvious example of an omission in the US list of FTOs was the fact that the Irish Republican Army (IRA) was never on it. The IRA has been an obvious terrorist group, but there was significant American opposition to officially proclaiming it to be a terrorist organization. Sentiment in the United States among Irish Catholics supporting the unification of Northern Ireland and the Republic of Ireland, even among those who disagreed with the tactics of the IRA, made it politically unwise to label the IRA as a terrorist group. Thus, for many years it remained much easier for Americans to provide verbal and material support to the goals of the IRA and to publicly argue on its behalf that it was for groups with the FTO designation. The precedent of providing the executive branch extreme discretion in designating FTOs carried over into President Trump's executive order that established the travel ban. The travel ban executive order in Section 3 specifies that countries subject to the travel ban are to be determined by the Secretary of Homeland Security in consultation with the Secretary of State and the Director of National Intelligence.[87] This leaves the designation solely within the purview of the executive branch, just as is the case with the FTO designation.

Deference to the other branches due to the lack of expertise on the part of the Justices of the Supreme Court or the lower courts could in theory be rectified by presentations of expertly prepare *amicus curiae* (friends of the court) briefs that would bring additional views pertinent to cases involving national security and terrorism to the attention of the Justices. Such briefs are typically supplied by organizations that perceive that the outcome will be important to their own interests. The government, of course, has experts with the necessary background and appropriate credentials to support its positions. Experts with terrorism and national security knowledge are at a disadvantage in providing information in an appropriate form in any effort to challenge the government's arguments since the debates occur in a legal setting. For example, there were no presentations by academics about the value of negotiations or challenges to the position of the governments of Turkey and Sri Lanka in *Holder v. Humanitarian Law Project*. The briefs filed in the court on behalf of the Humanitarian Law Project focused on the limiting effects on freedom of assembly and speech

and other constitutional issues that were involved and not on the merits of the governmental policies. Only one brief in support of the government, included marginal outside references. It was also the brief that brought Hamas into the limelight as another FTO that should not receive any assistance.[88] The inclusion of Hamas with the Tamil Tigers and the Kurds was an inspired political choice since it placed the defendants on the side opposite of Islamic extremists. It also drew upon the pattern of deference of the courts to the other branches and the limited availability of competing information by foreign policy experts from outside of the government. While the choice of Hamas as the sole non-party FTO may have been coincidental, when significant sections of officialdom and the populace view anyone who is Muslim with suspicion, coupled with the centrality of al-Qaeda as the chief enemy in the war on terror, introducing an Islamist group here was a neat trick. Because al-Qaeda is not a good example, as it has only a violent wing, bring up one of the other detested Islamist bogeymen is a way of diverting attention from the specific examples of the PKK and LTTE to underscore one of the more unnerving and misunderstood aspects of the war on terror.[89]

Given the variability of *amicus curiae* briefs and the difficulties that the Justices could have in weighing the merits of competing arguments in the foreign policy arena, they cannot consistently depend upon such briefs to provide them with the necessary information to determine the validity of policy choices.

Conclusions

The deference of the courts to other branches, the lack of alternative information sources, and the idea of plenary power established in key early cases and carried into the current century have proven to be a toxic blend for civil liberties in the United States. Although there have been judicial decisions that have been supportive of individual civil liberties and the rights of association in cases involving national security, in many other cases this toxic blend has led to court opinions that have limited the ability of citizens and legal residents to speak or act in support of foreign organizations or populations facing repression—or what might be seen as repression. Non-citizens may also face the threat of deportation without due process safeguards. Furthermore, these actions can be applied in effect on the basis of race, religion, place of national origin, or political beliefs, which would obviously allow the government to discriminate on these criteria.[90] It would appear that the early important cases giving plenary power to other branches in regard to immigrants drew upon anti-Asian animus present in the United States in the late nineteenth century.

Freedom of speech and association should not be limited in discussions of controversial issues or restricted because a group has been designated as an FTO. There are also implicit limitations on rights of association and freedom to assemble to protest government policies since these might be considered assistance to foreign terrorists. What might be considered support for terrorist groups has been broadened in such a way that a great deal of free discussion is potentially stifled as individuals and groups seek to avoid facing charges under existing laws. Even if individuals or organizations can successfully defend themselves—unlikely as that may be, it would require an expenditure of resources that could otherwise be used for different purposes, and the threat of prosecution for what might be prohibited activities can be a mechanism for intimidating persons who do not agree with the official policy of the United States or its foreign allies.

Judicial decisions and non-decisions are counterproductive in terms of limiting or ending group involvement in terrorist actions. The efforts of the Humanitarian Law Project, for example, created the potential to assist violent opposition groups to make the transition to peaceful efforts when opposing official policies. As noted, this type of transition is, in fact, one of the ways in which terrorist groups can effectively transform themselves into peaceful participants in the political system. While negotiations are not always successful—as the failure of the Oslo Peace Accords demonstrates—any successful negotiations that end violence are to be valued. While there may be some citizens who object to permitting former terrorists to freely participate in the political systems of their countries, it is a way to reintegrate members of the terrorist organization into society. The decisions by the Supreme Court, however, have made it more difficult for groups to follow this process. As a consequence, periods of violence in at least some situations may be prolonged because this option is not available for organizations in the United States.

These concerns have been exacerbated by the willingness of the Supreme Court as well as lowers courts to defer to the executive branch and Congress because of their presumed expertise in the foreign policy arena. Such deference has been obvious with the continued existence of weaker criteria for deportations or exclusions under the Patriot Act and with the judicial willingness to accept the vague and imprecise criteria for determining that organizations will be designated as FTOs (or not)—with all the limitations that go with that designation. One potentially serious consequence of this deference is that it can lead to suboptimal counterterrorism efforts.[91]

The failure of the courts to provide greater protection of civil liberties because of deference and long-established views of plenary power can have negative policy implications. When counterterrorism policies ignore civil liberties they can become suboptimal because they can play into the hands of terrorist groups. There have been times when violent dissident organizations have even actively sought to push governments to limit civil liberties. They have followed a provocation strategy in which they attempt to have new limitations imposed in the hope that the governmental system will be weakened.[92] It has been argued that democracies have been proven to be susceptible to overreacting when terrorist attacks have occurred since their populations have shown a willingness to trade liberty for greater security.[93] Limitations in the United States could reduce the appeal of the country as an example abroad and provide useful themes for propaganda designed to recruit members to do battle against US allies abroad or the United States or its interests. The American judiciary has actually furthered the goals of these types of groups at times with the failure to act and, in other cases, by supporting limitations on citizens or legal residents in the United States or by those seeking to legally enter the country. What might help to redress this imbalance would be mechanisms that would permit those with recognized foreign policy expertise to present their views on the wisdom or likely success of foreign policy decisions and the likely consequences. That could at least reduce the problem of deference to the other branches even if that situation cannot be avoided entirely. Groups involved in presenting *amicus curiae* briefs could play their part by doing more to provide expert presentations. However, the courts have to demonstrate a willingness to accept the credentials of those outside the government who are likely to offer differing viewpoints from the policies in question and consider them equally with the information provided by the government and its officials. Until the courts allow themselves to have greater input, the toxic blend will continue to negatively affect civil liberties for citizens and non-citizens and undermine US counterterrorism efforts.

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