



**STRATEGY
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**THE AMERICAN DILEMMA:
FREEDOMS OR SECURITY**

BY

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ABSTRACT

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The fundamental U.S. ideals of freedom, justice and respect for human life have endured all major threats during the course of our nation's history. Today our nation faces a different, omnipresent challenge to these ideals - the specter of terrorism. The United States is hampered by its very ideals of freedom in restraining terrorists and preventing potential terrorist acts. Ironically, our nation's vulnerability rests in the potency of our open society and the value we place on traditional civil liberties. Can a law-abiding nation, conceived in liberty and dedicated to individual freedoms, effectively protect itself and its citizens against terrorism without infringing on these fundamental principles? *The Antiterrorism and Effective Death Penalty Act of 1996* was a democratic attempt to do just that: provide a strong new law to combat terrorism while maintaining traditional freedoms. However, law enforcement agencies and the President assert the law is not strong enough. On the other hand, civil libertarians and some Congressional leaders claim legislation of additional governmental powers would sacrifice civil rights. This paper explores the American debate on this controversial law and argues a more "commonsense" approach to the dilemma would have yielded stronger legislation. Following a brief background and discussion of terrorism, this analysis projects future trends of terrorism to determine if current legislation is sufficient in view of disturbing trends.

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We The People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The Constitution Of The United States

For over 200 years the fundamental U. S. ideals of freedom, justice, and respect for human life have prevailed. These principles, on which our country was founded, have endured all major threats during the course of our nation's history. Today our nation faces a different, omnipresent challenge to these ideals - the specter of terrorism. ¹ On April 17, 1996, Senator Dianne Feinstein (D-California) cited a new study on terrorism. This study lists the U. S. among the 20 nations experiencing the highest level of terrorism and political violence in the world. The study reports 44 U.S. incidents, an increase of 200 percent since 1988. This number of incidents ranks the United States ahead of Lebanon as a target of terroristic attacks. ²

Inspired by a magnitude of real and perceived inequities, terrorists are operating throughout the world's communities. Paradoxically, the United States is hampered by its very ideals of freedom in restraining terrorists and preventing potential terrorist acts. Ironically, our nation's vulnerability rests in the potency of our open society and the value we place on traditional civil liberties.

Can a law-abiding nation, conceived in liberty and dedicated to individual freedoms, effectively protect itself and its citizens against terrorism without infringing on these fundamental principles? *The Antiterrorism and Effective Death Penalty Act of 1996* was a democratic attempt to do just that: provide a strong new law to combat terrorism while

maintaining traditional freedoms. However, law enforcement agencies and the President assert the law is not strong enough. On the other hand, civil libertarians and some Congressional leaders claim legislation of additional governmental powers would sacrifice civil rights. This paper will explore the American debate on this controversial law, analyzing the complex issue of trying to deter terrorism through legislation in our democratic society. The paper will argue a more “commonsense” approach to the dilemma would have yielded stronger legislation. Following a brief background and discussion of terrorism, this analysis projects future trends of terrorism to determine if current legislation is sufficient in view of disturbing trends.

Background

There is no single, commonly used definition of terrorism. This paper uses the definition found in the United States Code (U.S.C.). Title 22 U.S.C. Section 2656f describes terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents,”³ usually intended to influence an audience. A terrorist act therefore involves the use of force, violence, or intimidation against noncombatants to achieve a political objective, outside the context of other hostilities.

Motivated by their ideals, terrorists strive to let the world know of their perceived injustices. In Crusaders, Criminals, Crazyies, Frederick Hacker suggests terrorists seek “not personal gain, but prestige and power for a collective goal; they believe that they act in the service of a higher cause as ‘crusaders.’”⁴ These misguided individuals gain attention to their causes through their ruinous and lethal acts. Terrorists thrive on the publicity generated by their actions. They

attempt to gain support from those who may otherwise be unaware of or sympathetic toward their cause.

Efforts to combat terrorism, delineated in Joint Publication 3-07, involve two basic strategies: antiterrorism and counterterrorism. Antiterrorism, defined as “defensive measures taken to reduce vulnerability of terrorist attacks,”⁵ is pursued through training and defense procedures that strike a balance among the desired level of protection, the infrastructure, and available resources. Counterterrorism refers to “offensive measures taken to prevent, deter, and respond to terrorism.”⁶ It “provides response measures that include preemptive, retaliatory, and rescue operations.”⁷

The location and type of the terrorist incident determine which U.S. Agency will lead the response to the situation. The Department of State is in charge of incidents that take place outside the United States. The Department of Justice, specifically the Federal Bureau of Investigation is the lead agency for terrorist acts within the United States. The Department of Transportation, Federal Aviation Administration, takes the lead in responding to incidents aboard airborne aircraft within the United States’ jurisdiction.⁸ The Counterterrorist Center, operated by the Central Intelligence Agency, coordinates efforts of the above federal agencies.⁹

Terrorism: No Longer a “Foreign” Problem

Until 1993, most Americans viewed horrendous terrorist attacks as something that happened in other countries. Content in our secure lifestyle, we blithely assumed we were immune to terrorist acts at home. Then it happened: the smoke unfurled into the sky for miles as the Twin

Towers at the World Trade Center shook from a terrorist's bomb. For those who heaved a sigh of relief thinking that could only happen in New York City, the subsequent bombing of the Alfred P. Murrah Federal Building in Oklahoma City proved otherwise. Suddenly, it became perfectly clear to all Americans that we also are vulnerable to these heinous acts. We are no longer immune to terrorism in our homeland. Enraged and fearful citizens now look to our government leaders in search of quick remedies to deter future terrorist acts.

After the World Trade Center bombing, President Clinton took the lead on February 9, 1995, in proposing comprehensive legislation to combat terrorism when he transmitted the *Omnibus Counterterrorism Act of 1995* to Congress. This proposed legislation was part of his administration's "comprehensive effort to strengthen the ability of the United States to deter terrorist acts and punish those who aid or abet international terrorist activity in the United States."¹⁰ The President asserted the legislation corrected "deficiencies and gaps in current law" and asked the Congress for immediate attention and enactment of his proposal.¹¹

Soon after the Oklahoma City bombing, President Clinton asked federal law enforcement agencies to re-evaluate their requirements and ascertain what tools would help them meet the new challenges of domestic terrorism. The President then incorporated their proposals into a second package of legislation, the *Antiterrorism Amendments Act of 1995*, transmitted to the Congress on May 3, 1995.¹² In his message to Congress, the President declared that the fatal bombing of the Murrah Federal Building "stands as a challenge to all Americans to preserve a safe society. In the wake of this cowardly attack ... we must ensure that law enforcement authorities have the legal tools and resources they need to fight terrorism."¹³ President Clinton

said his legislation would provide an effective and comprehensive response to terrorist threats and still protect the civil liberties of all Americans.

Future Trends of Terrorism in the United States

The Oklahoma City bombing suggests that most of the terrorism faced by the United States in the near future will be home-grown. There is the potential, though, that U.S. foreign policy will provoke terrorist attacks from foreign-backed groups. If this happens, the United States is not ready.¹⁴

The militia movement in the United States surfaced early in the 1990s. According to the Militia Watchdog, it began as a backlash among the radical right, prompted by their perception “that a corrupt federal government had begun or would soon begin to confiscate the weapons of free-thinking American patriots.”¹⁵ However, the creation of the neo-militia movement remained largely unknown to the average citizen. The destruction of the Murrah Federal Building on April 19, 1995, instantly made the general public aware of the organized existence of active, anti-government extremists. The media frenzy that followed the bombing surfaced a considerable number of such groups: The Neo-Militia, the Mountaineer Militia, the Patriot Movement, the Anti-tax Militia, the Montana Freemen, and the Blue Ridge Hunt Club, to name a few.¹⁶

The Militia Watchdog purports to monitor the militia movement with the intent to keep the public informed. This publication, as well as other observers of the movement, think there may be cause for concern:

The very existence of such groups implies the use of force rather than the force of ideas to achieve one's goals... they often think they are acting justifiably when they are not. And even groups that

as groups may not pose a danger can spawn individuals committed to violent or extreme acts. ...there are growing indications that these different strains of the patriot movement will be working in concert in the future. The implications are plain to see: a shadow government backed by a shadow army ... the markings of a real domestic terrorist movement.¹⁷

Until the last few years, these varied, non-associated groups meeting across the nation were considered more of an anomaly than a threat to civil society. However, with the increased use of the Internet, these groups now have a mechanism to link up, forming a solidarity of the down-trodden. The future may offer fertile ground for widespread or super violent acts of terror unleashed by such groups, either singularly or collectively.

The United States remains a target for international terrorists also. Our National Security Strategy of engagement and enlargement has set the goal of bolstering America's economic revitalization by actively participating abroad to open foreign markets. However, as a consequence of this strategy, the threat to our American way of life from the organized forces of terrorism has increased in tandem with our world-wide influence and active participation. Seen by other countries and populations as a great power, the United States inevitably offends some who see themselves as the underdog. America's leading role in peace and democracy around the world has made us the enemy of those who distrust the U.S. as a trade bully. Additionally, foreign adversaries may test our democratic will to support controversial U. N. activities by sponsoring terrorist acts against the U.S. Furthermore, the fall of the Soviet Union and the subsequent world disorder has caused some to speculate that Americans are at an even greater risk today than ever before since the disappearance of the bi-polar world order has led to regional instability and ethnic strife.

In his speech at Georgetown University on September 5, 1996, John Deutch,

then Director of Central Intelligence, spoke of the increasingly dangerous threat of foreign terrorism:

These [terrorist] groups use terror as their only way to combat the popularity of democratic institutions we espouse and our overwhelming military and economic strength. Their goal is to make the price of our leadership so high that we will stop what we are doing abroad and go home... The American people must understand that this foreign terrorist threat exists... So, we face a growing threat for which the evidence is all too clear.¹⁸

In addition to the probability of increased acts of terrorism, the future is likely to bring a change in the way terrorists inflict their random evil. Airplane hijackings were a popular method twenty years ago. But, they lost their unique appeal to the media with continued repetition. In recent years, bombings appear as the method of choice. However, if terrorists hope to capture the publicity they so desperately need, they will seek to produce something more dramatic. The March 1995 release of the highly toxic sarin nerve agent in the Tokyo subway by a Japanese terrorist group quickly comes to mind as an example of a scenario we might see. This cowardly attack has shown us that terrorists may turn to chemical, biological, and even nuclear devices to make future assaults.

Terrorists will not restrict themselves simply to only human destruction. Joseph F. Coates, president of Coates & Jarratt, Inc., a futurist consulting firm in Washington, D.C., states, "What will be a high-probability target..., [is] the information infrastructure."¹⁹ In his, "A Thriving Future for Terrorism," he contemplates the effects of a terrorist act that cuts off telephonic communication from Washington, D.C. for a period of 24 hours. The resulting pandemonium could be devastating to the nation.

Due to the nature of terrorism, the terrorists enjoy a tremendous advantage of seizing the initiative in timing and choice of target. Terrorists are becoming increasingly mobile and technologically sophisticated. Given today's fluid environment and tomorrow's uncertainty, our nation needs to prepare by taking advantage of every means available.

Acts of terrorism will most likely escalate. Americans will more frequently be subjected to these acts in their own habitats if the experts are correct. In the interest of public safety, we must suppose they are. Then, the obvious question re-emerges: What happened to the get tough-stand on terrorism proposed by the President? Was it simply political rhetoric prior to an election year, proffered to soothe an angry and fearful populace in the wake of recent terrorist acts? Are legislators interested in strengthening federal antiterrorism capabilities? Or does Congress see no need to intensify our focus on the threat to America from within? Can this lack of focus be democracy in action?

Domestic Tranquillity Versus Individual Liberties

On April 24, 1996, President Clinton signed Public Law 104 - 132, *The Antiterrorism and Effective Death Penalty Act of 1996*. After months of lengthy Congressional debates and testimony, the final bill differed significantly in content from that originally proposed. Upon signing the Bill into law, the President noted he was happy that Congress had included nearly all the provisions in his proposals. However, he continued, "as strong as this bill is, it should have been stronger."²⁰ He chastised Congress for its refusal to act on key components intended to give law enforcement officials the tools they need to battle international and domestic terrorism.

Although President Clinton and congressional leaders promised quick and bipartisan cooperation on terrorism legislation, it took fourteen months to produce the final law, which was weakened during the legislative process. The most prominent factor stirring debate, affecting voting in the legislature, and ultimately producing a watered-down law was a philosophical split. An ideological division emerged within both parties on how to achieve a just balance between governmental powers to fight terrorism and our traditional civil liberties. Reportedly, legislators wanted to be cautious about removing established controls on police power. Conservatives in both parties cautioned against moving too fast: they wanted to “sort out the proper parameters for law enforcement.”²¹ These differences grew more pronounced when organized civil liberties advocates became increasingly concerned over certain elements in the proposals.²²

Public Law 104 - 132
The Antiterrorism and Effective Death Penalty Act of 1996

The Antiterrorism and Effective Death Penalty Act reflects the compromise of what some would say were the two extremes. The law does furnish important new provisions to combat domestic and international terrorism. It includes expanded federal jurisdiction over crimes linked to terrorism and increased authority to keep foreign terrorists from entering the U.S. or raising funds in the U. S.²³ However, the law does not grant some notable powers and provisions the President and law enforcement agencies wanted. The most significant proposals stricken from the final law are:

- Enhanced surveillance capabilities for terrorist cases to augment wiretapping capability;
- Allowing military assistance in cases involving chemical and biological weapons;
- A ban on the dissemination of bomb-building technology when there is knowledge that the bomb will be used in a crime;²⁴
- Taggants in black and smokeless powder to enable tracing bombs to their makers;
- Increased access to hotel, phone, and other records for individuals involved in terrorism cases; and
- A longer statute of limitations to allow law enforcement more time to prosecute terrorists who use such weapons as machine guns, sawed-off shotguns, and explosive devices.²⁵

Proposal For Enhanced Surveillance Capabilities Spurs Conservative Resistance

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated ...

Article IV, The Constitution of the United States

Among the enhanced surveillance capabilities excluded from the law were emergency and roving (or multipoint) wiretaps. Considered a powerful and intrusive tool, wiretapping is tightly regulated to ensure our right to privacy. Current wiretap statutes contain a number of restrictions to prevent the abuse of emergency wiretaps. The final legislation did not change the present restrictions.

Emergency wiretap authority is already legal and available for use in investigating organized crime. The provision to expand this authority to terrorist cases would have put terrorism on the same level. Senator Joseph Biden (D-Delaware) stated in support of the provisions: "What is good for John Gotti is good for any terrorist ... The last time I looked the Mafia had not blown up a Federal building. The last time I looked the Mafia had not blown up the World Trade Center."²⁶

It is difficult to fault the Senator's reasoning. It is difficult to comprehend why, if the justification exists for the mob, it does not also exist to investigate terrorist activities. To give law enforcement agencies the upper hand we need the edge to gain intelligence on a terrorist group thought to be operating and active. It is difficult to understand why Congress denies our law enforcement agents this means of enhancing the security of our society. Nevertheless, we are a democratic society. Rival opinions receive due consideration; sometimes they prevail.

Opponents of the act cited concern about unnecessarily broadening emergency wiretap authority and thereby permitting the Government to tap a wire prior to obtaining court approval in a greater variety of cases than the law presently allows. Senator Orrin Hatch (R-Utah) the Senate Judiciary Committee Chairman, thought the expanded authority was unnecessary, since federal law enforcement agencies already had similar authority. The Senator observed that an escalating number of libertarian conservatives had become concerned over law enforcement and some of the methods that had been taken. He said these concerns had been heightened by the Waco disaster, Ruby Ridge ATF/FBI activities against Weaver, and the "Good Ol' Boys' Roundup."²⁷ It appears, then, that questionable law enforcement activities led to conservative resistance to increase police powers, no matter what the issue!

The provision for multipoint wiretaps sought to expand existing authority. Under current law, after approval by one of only three individuals in the top level of the Justice Department, an application to tap a wire is submitted to a Federal judge. The judge must have proof that the person suspected of committing the crime intends to thwart the wiretap surveillance but the new provision specified if the effect of the target is to thwart the surveillance, then no other justification is necessary.²⁸ Senator Lieberman (D-Connecticut) contended America's "best defense against terrorists is a good offense."²⁹ Representative John Conyers Jr. (D-Michigan), during the House of Representatives Hearings on terrorism legislation, expressed his disbelief in the urgency of the issue: "Its my belief that there isn't any more problem [terrorism] than there's ever been and that there's plenty of good law controlling it, that all we have to do is use it, that the law is already in existence."³⁰

As lawmakers decided whether to join the conservative or liberal camp, outside groups began to exert pressure. Gregory Nojeim, Legislative Counsel for the American Civil Liberties Union (ACLU), while testifying before the House Committee Hearing, spoke against both wiretap proposals. Mr. Nojeim charged that expansion of federal wiretap authority is a violation of the Fourth Amendment, since multipoint wiretaps would permit FBI investigations without evidence of criminal activity. His testimony quickly reminded elected officials that their constituents were deeply concerned about the issue. He stated that ACLU is a nationwide, non-partisan organization of more than 275,000 members "devoted to protecting the principles of freedom set forth in the Bill of Rights."³¹

Debate over expanding wiretap privileges is representative of the arguments presented throughout the legislative process on the bill. The heated controversy continually matched

visions of a bomb destroyed federal building in Oklahoma City against that of a slow burning Branch Davidian compound in Waco, Texas. For better or for worse, legislators sought to find the balance; the horror of terrorism was brought to bear against suspicions that federal law enforcement agencies could become a U.S. Gestapo.

Military Assistance In Civil Affairs Versus Fear Of A Military Police State

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress...

Chapter 263, Section 15, Army as Posse Comitatus

For over 100 years the Posse Comitatus Act has governed the military's involvement in civilian law enforcement activities. The act prohibits federalized military forces from partaking in the execution of laws except as explicitly authorized by Congress.³² In 1981 legislation passed, as chapter 18 of Title 10, U.S.C., that defines the types of assistance possible for the military to render.³³ For example, Section 831 of Title 18, U.S.C. permits the Armed Forces to assist in dealing with crimes involving nuclear materials.³⁴

Proposed antiterrorism legislation permitted law enforcement agencies to call on the special expertise of the Department of Defense for direct military assistance in terrorist activities involving incidents in which terrorists used or possessed chemical and biological weapons of mass destruction. Military participation could be authorized upon the request of the Attorney General and approval of the Secretary of Defense. The proposal was similar to the exception

that currently permits military participation in incidents involving improper use of nuclear materials.³⁵ However, the final law did not contain this provision.

Senators Sam Nunn (D-Georgia) and Joseph Biden were the proponents of the bill. They contended the military is the only organization possessing the special capability to counter biological and chemical weapons. Their argument contended that the military is trained and equipped to detect, suppress, and contain these dangerous weapons in hostile situations, whereas local police and fire departments lack this capability. Supporters of the bill further argued the President needs the statutory authority to respond quickly in this type of emergency situation. They maintained the insurrection statute of Title 10 U.S.C. is mainly for civil disorders, not terrorism. Thus the current authority of the President is “inadequate in this situation.”³⁶

In spite of the fact that such authority already exists in situations involving nuclear materials and the sound arguments in support of legislative changes, the proposal met strong objection. Speaking for the opposition, Senator Hatch proclaimed the American people have sought to limit military involvement in civil affairs since earliest days of our country's existence. He recalled that “It was [the] abuse of military authority in domestic affairs... that motivated Congress to impose the first so-called posse comitatus statute.”³⁷

Opponents of the new legislation further contended that the assertion that civil authorities are not capable of dealing with chemical and biological agents was faulty. They asserted that such expertise does exist outside the military. They claimed that civil authorities and the private sector, particularly in the matter of chemical agents, have substantial experience. They believe the military is already authorized to assist in matters proposed by the legislation, other than the actual use of military personnel to disable or contain the device.³⁸ According to Senator Hatch,

the proposed legislation raised "troubling implications going to the heart of the Posse Comitatus Act." ³⁹

Representatives in the House ⁴⁰ also voiced dissent. In their view the expanded military role in law enforcement, in the context of the terrorism legislation, was inconsistent with the Republican position in the Waco hearings. Allegedly, Republicans were deeply concerned over the military providing ATF agents with training and equipment in preparation for the raid on the Branch Davidian compound. They further contended that the long acknowledged provisions of the Posse Comitatus Act would be abrogated by this legislation. ⁴¹

Congress was not the only government body that waged debate over the Posse Comitatus issue. Consensus does not even exist within the leadership of the U.S. Army. While some advocate the use of the Army set forth in the proposal and justified by Senators Nunn and Biden, others view such incremental changes as a dangerous slippery slide. Army officials in opposition fear OPTEMPO may be sacrificed if they become too involved in domestic affairs. They are also concerned about the implications of turning soldier against civilian.

American citizens nevertheless want protection against the horrors of chemical and biological weapons, yet they do not want to live in a military state. Perhaps our legislators did reach the proper balance on the Posse Comitatus question. The President does have the authority to waive provisions of the act, as he did for military support of the Olympics and the Inauguration. So the American populace may be best served by leaving the law as is for the time being. Furthermore, law enforcement agencies appear to have adequately handled the World Trade Center bombing, in which strong evidence existed that the explosive material contained a chemical component. ⁴²

Collective Security Versus The Individual Right To Freedom Of Speech

Headline: "Three Boys Used Internet to Plot School Bombing, Police Say."
The New York Times, February 2, 1996

Also deleted from the bill was the provision to outlaw circulation of bomb-building technology when there is knowledge that the bomb will be used in a crime. Defenders of the First Amendment opposed this provision based on Americans' right to freedom of speech and "intellectual property concerns."⁴³ Senator Hatch asserted that anyone who knowingly conveys information on how to use explosives to commit a felony is subject to punishment under existing federal law. He thus concluded that failure to include the provision in the antiterrorism law was not a reason to delay passing the legislative package.⁴⁴

Despite the reservations of those who advocate freedom of speech, even at the expense of the innocent, if ever there was a crime warranting law enforcement's full range of capabilities, it is terrorism. For example, a manuscript currently on the Internet entitled The Terrorist Handbook details how to make a bomb. But dissemination and potential use of this text to strike terror is not a crime in the United States. Since disseminating such destructive information is not a criminal act, those who devise and promote methods of human destruction are concerned about their intellectual property rights to their depraved, yet legal, works. I believe, if elected officials surveyed their constituents prior to voting this proposal down, they would have found the majority of Americans place a higher value on human rights, morality, and decency than on their First Amendment rights. Those few who use freedom of speech as the mechanism to advocate violence and ruin of humanity should also be held accountable for the consequences of their actions.

Lastly, Senator Hatch's claim that existing law is sufficient skirts the intention of the provision. It is hard to comprehend how existing law is totally sufficient when it is now perfectly legal for one individual to teach another how to build a bomb out of baby food or a light bulb. Unless it can be proven that there was a conspiracy to commit a crime,⁴⁵ simply instructing someone, either in person or over the Internet, is not illegal. In regard to this provision, a commonsense approach by lawmakers could serve this country well. One need only consider the lack of legal uses a law-abiding citizen may have for this information.

Special Interest versus Public Safety?
Taggants in Black and Smokeless Powder

Another proposal mandated the placement of taggants in explosives for the purpose of tracing their origin. By the time the bill passed both Houses, however, legislators excluded the requirement for taggants in black and smokeless powder. Opponents included the Institute Makers of Explosives, the National Mining Association, the Sporting Arms and Ammunition Manufactures' Institute Inc., and The National Rifle Association (NRA). These organizations supported the placement of taggants in plastic explosives but objected to their inclusion in black and smokeless powder. Their opposition centered on three issues: the taggants posed a safety risk; taggants introduce "efficacy and contamination" questions; and the use of taggants would "result in significant costs for minimal law enforcement benefit."⁴⁶

Not only were black and smokeless powders exempted from the taggant requirement, they were also exempted from a study requirement. Senator Feinstein observed that in the proposed legislation taggants were not required where small amounts of powder were purchased for

antique guns and small arms. Then she advocated further study of the impacts of tagging black powder. The NRA still opposed. She asked the Senate, “Can you imagine the power of an organization that is able to successfully say we will not even study the impact of tagging black powder, which is also used as the triggering device on major explosive bombs that are used by terrorists?”⁴⁷

Senator Feinstein’s question strikes at the core of the problem. The outcome of this debate graphically illustrates the power of special interest groups in our democratic process. To exclude taggants based on their real potential as hazards to workers and product users is a justified action. However, to exclude thoroughly studying the problem is not appropriate. A study could find a solution to the safety and contamination issue. The only remaining issue for the special interests would then be their claim of additional cost to the industry for minimal law enforcement benefit. Herein lies the industry’s real agenda - the almighty dollar! Since the explosive industries are hardly qualified to testify on what enhances law enforcement capabilities, we can easily deduce that their underlying concern was mainly economic. So now we have a law that fails to provide a potential deterrent to terrorism, since lawmakers are apparently more influenced by industry’s economic concerns than by the country’s need to counter a real, formidable threat.

Thwarting Terrorism Or Invading The Right To Privacy

...and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article IV, The Constitution of the United States

The President's proposal for increased legal access to hotel, airline, telephone, credit card, and other records for individuals suspected of being involved in terrorism cases again met resistance. Referred to as a "warrantless data gathering" technique, opponents claim document subpoenas are currently available "whenever the government wishes to coerce a company into disclosing private customer information."⁴⁸ The proposed legislation would not increase the type of private information that the government is able to acquire. However, it would allow access to the information even when the government cannot demonstrate to the court that there is probable cause to conclude that the documents contain evidence of terrorist activity.⁴⁹

As with other controversial proposals, civil liberties and special interest groups were offended. The ACLU quickly went on record with strong opposition to any measures that permitted FBI investigation without evidence of criminal activity.⁵⁰ The Gun Owners of America took exception to anything that broadens government's access to information from "law-abiding businesses,"⁵¹ about the groups of individuals served by these businesses.

After much discussion, the proposal was tabled and subsequently died in the Senate. The prevailing argument was that current U.S. laws already provided adequate emergency authority to address the issues specified or implied in the new legislation.⁵² Dissenting views in the House of Representatives Report on Terrorism Legislation cite similar arguments.⁵³

Congressional concern over doing grave damage to civil liberties and fear that the government is gaining too much power in the name of thwarting terrorism killed this proposal. Americans obviously value their right to privacy. However, the Congressional logic in requiring law enforcement agencies to obtain a court order to obtain credit records seems absurd, since

private parties can obtain them almost at will. Nevertheless, federal officials still face the burdensome subpoena requirement.

Extending The Statue Of Limitations:
An Aid To Prosecute Terrorists Or A Bureaucratic Abuse

...the right of the people to keep and bear arms, shall not
be infringed.

Article II, The Constitution of the United States

Lawmakers likewise struck down the proposal designed to correct an anomaly in the U. S. C. This proposal called for an increased period of limitations on violations under the National Firearms Act. The provision mandated, in crimes dealing with bomb-making, silencers, or sawed-off shotguns, that law enforcement officials would have five years to track down and prosecute the criminal. Currently, under the U.S.C. these types of crimes are the only ones with a three-year statute of limitations.

Supporters of the provision emphasized the importance of giving law enforcement ample time to investigate these complex cases. Law enforcement personnel, the Justice Department, the Treasury Department, and forty-seven police chiefs asked legislators to fight for the provision that extended the statute of limitations.⁵⁴

Senator Boxer (D-California) noted in the Congressional Record, that the National Rifle Association (NRA) voiced opposition to the provision. Traditionally the NRA objects to anything that may impinge on the right of the people to bear arms under Article II of the Constitution. Members of the Senate and House raised further opposition by claiming the provision was not necessary and had nothing to do with terrorism. They contend the statute of

limitations should be created on fairness. It must protect the Government's ability to prosecute claims and violations of the law but it must as well "protect the citizenry from stale claims and bureaucratic abuse."⁵⁵

If Congress were truly committed to passing get-tough legislation on terrorism, then this provision would aid their cause. It is doubtful the majority of American people would oppose bringing the statute of limitations for these crimes into line with limitations specified for almost every other federal crime, especially in view of the types of weapons covered in the provision: poison gas; bombs; grenades; rockets with more than 4 ounces of propellant charges; missiles with an explosive or incendiary charge larger than a quarter of an ounce; and mines.⁵⁶

Furthermore, if the average citizen knew the five-year statute applied to crimes like simple assault, car theft, impersonating a Federal employee, and buying contraband cigarettes, they would acknowledge the obvious reasonableness of including these reprehensible crimes as well. The extension was indeed a commonsense provision. Failure to include this provision in the law means that the five-year statute of limitations applies for "impersonating, without authority, the character Smokey the Bear,"⁵⁷ whereas law enforcement officials have only three years to find and prosecute someone for a crime involving poison gas or a bomb.

Establish Justice, Insure Domestic Tranquillity,
Provide For the Common Defense

We can't sacrifice our constitutional principles because
we're angry at people for bombing.
Melvin Watt, D.-North Carolina

In general, there was much rhetorical support for strong terrorism legislation. In reality this concern was always secondary to legislators' fear of infringing on civil liberties or offending powerful lobbies, such as the NRA! Our nation can ill afford to legislate away precious civil liberties in the wake of terrorist attacks like those in Oklahoma City and the World Trade Center. On the other hand, our nation should not lose its will to respond because of fear and anger ignited by the dreadful confrontations at Waco, Texas and Ruby Ridge, Idaho. Only rational, purposeful, and decisive leadership from our elected officials can help to protect us before we face an epidemic of terrorism. However, in this country, legislation is normally reactive, not proactive and democracy gives us a pro-longed, deliberative process.

Our democratic system of government is reluctant to pass legislation until a proven need exists for a given law. But the terrorist threat is emerging rapidly. As different groups link up, as they develop newer, more lethal techniques, what is at least minimally adequate from a legal standpoint today may not be adequate tomorrow. Our system relies on a legal structure that has been slowly constructed and that changes only gradually. But as terrorism swiftly mutates, we may find ourselves either continually left behind the legal power curve or constantly re-visiting the same legislative proposals. Nero fiddled while Rome burned. Will we be deliberating our constitutional rights while our shining republic explodes in a terrorist attack?

Perhaps *The Antiterrorism and Effective Death Penalty Act of 1996* serves as an example of our democratic dilemma. Incited by the bombing at the Atlanta Olympics last July and the bomb explosion that killed American military personnel in Saudi Arabia the preceding month, the President and Congressional leaders reacted by revisiting two important provisions left out of *The Antiterrorism and Effective Death Penalty Act of 1996*. On July 27, 1996, just one day after

the Olympic tragedy, President Clinton asked Congress to pass his original wiretapping proposal.⁵⁸ Two days after a truck bomb slaughtered 19 Americans on foreign soil, the Senate passed a defense bill amendment to authorize Department of Defense to react to a domestic terrorist attack when nuclear, chemical, or biological weapons are employed.⁵⁹ If either of these provisions had been included in the original law, would they have helped curtail these senseless acts of terrorism? We will never know.

Terrorism will remain a problem for the foreseeable future. And the unforeseeable future can approach very quickly, as we have recently and traumatically learned. "Transportation, energy, communications, finance, industry, medicine, defense, diplomacy and government itself rely on intricate interrelated networks. Given these inherent vulnerabilities, and the fact that Americans are increasingly the targets of terrorist attacks..., it is apparent that a potentially serious domestic threat exists."⁶⁰

The Executive and Legislative branches of the federal government have served us well for over two centuries. They must continue working - perhaps with a greater sense of urgency - to make Americans safer from the threat of terrorism. The American public must also realize that there are no guarantees: we cannot expect total security; we must acknowledge that some acts of terrorism will occur. Americans must prepare themselves now for what lies in waiting by coming to understand the problem and its consequences. It is only through understanding that we can rationally decide if accepting some restrictions on our constitutional rights is worth the price of enhancing collective safety and security. To "insure domestic Tranquillity, provide for the common defense," and "promote the general Welfare" for ourselves and "our Posterity," it is time to accept some sacrifices of our sacred liberties.

END NOTES

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- ² Congress, Congressional Record, 104th Con., 2d sess., Vol. 142, no. 49 (17 April 1996): S3467.
- ³ Title 22, U.S. Code, vol. 11, sec. 2656f (1994).
- ⁴ Frederick J. Hacker, Crusaders, Criminals, Crazyies (New York: W.W. Norton & Company, Inc., 1976), 12.
- ⁵ Chairman of the Joint Chiefs of Staff, Joint Doctrine for Military Operations Other Than War, Joint Pub 3-07 (Washington: U.S. Department of Defense, 16 June 1995), III-2.
- ⁶ Ibid.
- ⁷ Ibid.
- ⁸ Ibid., III-3.
- ⁹ The Counterterrorist Center (CTC) was established in 1986. It fosters interagency cooperation through bringing the various federal agencies together to collect and analyze information about terrorist groups. The Central Intelligence Agency operates the CTC. See John Deutch, "Fighting Foreign Terrorism," A Director Of Central Intelligence Agency speech, Georgetown University 5 September 1996. <http://www.odci.gov/cia/public_affairs/speeches/dci_speech_090596.html . 2.
- ¹⁰ William J. Clinton, "Message to the Congress Transmitting the 'Omnibus Counterterrorism Act of 1995'," Weekly Compilation of Presidential Documents Vol. 31, Issue 6 (13 February 1995): 227 - 228.
- ¹¹ Ibid.
- ¹² William J. Clinton, "The President Signs Counterterrorism Legislation," Foreign Policy Bulletin Vol. 7, no. 3 (May/June): 28.
- ¹³ William J. Clinton, "Message to the Congress Transmitting the 'Antiterrorism Amendments Act of 1995'," Weekly Compilation of Presidential Documents Vol. 31, issue 18 (8 May 1995): 760 - 761.
- ¹⁴ Steven Metz, "To Insure Domestic Tranquillity: Terrorism and The Price of Global Engagement," in Terrorism: National Security Policy and the Home Front, ed. Stephen C. Pelletiere (Carlisle, PA: Strategic Studies Institute, US Army War College, 1995), 84.
- ¹⁵ Mark Pitcavage, "The Militia Watchdog," 8 November 1996, <http://www.sff.net/people/pitman/militia.htm>, 8 November 1996, 2.
- ¹⁶ Ibid., 4.
- ¹⁷ Ibid., 2.
- ¹⁸ Deutch, 2.
- ¹⁹ Joseph F. Coates, "From My Perspective: A Thriving Future for Terrorism," Technological Forecasting and Social Change 51 (1996): 298.
- ²⁰ William J. Clinton, "The President Signs Counterterrorism Legislation," 29.
- ²¹ Holy Idelson and Bob Benenson, "Plans to Expand Police Powers Follow in Bombing's Wake," Congressional Quarterly weekly Report Vol. 53, no. 17 (29 April 1995): 1177.
- ²² Holy Idelson, "Senate Gets Started on Bill to Combat Terrorism," Congressional Quarterly Weekly Report Vol. 53, no. 21 (27 May 1995): 1509.
- ²³ Ibid.
- ²⁴ Ibid., 1046.
- ²⁵ William J. Clinton, "The President Signs Counterterrorism Legislation," 28 - 29.
- ²⁶ Congress, Congressional Record, 104th Cong., 2d sess., Vol. 142, no. 49 (17 April 1996): S3466.
- ²⁷ Ibid., S3467.
- ²⁸ Ibid., S3436.
- ²⁹ Ibid.
- ³⁰ Congressional Information Service Index, 1995 Abstracts of Legislative Histories of U.S. Public Law, 104th Congress, 1st sess., (Bethesda: Congressional Information Service, Inc.): H521-5, 3.

³¹ Ibid., 97.

³² The Posse comitatus Act evolved out of congressional concern over the increased use of the military in civil law enforcement during the years after the Civil War. Specifically, concern focused on the enforcement of reconstruction laws in the South and suppression of the labor movement in the northern states. See Congress, Congressional Record, 104th Cong., 2d sess., Vol. 142, no. 48 (16 April 1996) : S3371.

³³ Ibid. Chapter 18 of title 10 U.S.C. includes the loan and operation of equipment, supplying of advice, and aerial surveillance. It also ensures reimbursement to DOD for the military assistance rendered when the assistance does not provide a training benefit that would have otherwise been incurred. Chapter 18 does not authorize military involvement in civilian matters such as arrests, searches or seizures.

³⁴ Ibid., S3370.

³⁵ Ibid.

³⁶ Ibid., S3370 - S3373.

³⁷ Ibid., S3373.

³⁸ Ibid., S3373. Statement by Senator Hatch points out the National Defense Authorization Act of 1996 allows the armed forces to provide: facilities for training; sensors; protective clothing; and "antidotes" to local, State and Federal law enforcement agencies in emergencies involving chemical and biological substances.

³⁹ Ibid., S3374.

⁴⁰ Representatives John Conyers, D-Michigan; Patricia Schroeder, D-Colorado; Jerrold Nadler, D-New York; Robert Scott, D-Virginia; Melvin Watt, D-North Carolina; and Xavier Becerra, D-California expressed dissenting views. See House Report 104-383, Comprehensive Antiterrorism Act of 1995 in the Congressional Information Service, Abstracts January - December 1995, 104th Congress, 1st sess. (Bethesda: Congressional Information Service, Inc., 1995) : 185.

⁴¹ Ibid.

⁴² Congress, Congressional Record, 104th Cong., 2d sess., Vol. 142, no. 48 (16 April 1996) : S3370.

⁴³ Congress, Congressional Record, 104th Cong., 2d sess., Vol. 142, no. 49 (17 April 1996) : S3449.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ See testimonies provided at the International Terrorism: Threats and Responses Hearings before the Committee on the Judiciary, House of Representatives contained in the Congressional Information Service Index, 1995 Abstracts of Legislative Histories of U.S. Public Law : 386.

⁴⁷ Congress, Congressional Record, 104th Cong., 2d sess., Vol. 142, no. 48 (16 April 1996) : S3365.

⁴⁸ See excerpts from written testimony before the Senate Committee on the Judiciary, submitted by David B. Kopel, Associate Policy Analyst in Congress, Congressional Record, 104th Cong., 2d sess., Vol. 141, no. 89 (26 May 1995) : S7604.

⁴⁹ Ibid.

⁵⁰ Congressional Information Service Index, 1995 Abstracts of Legislative Histories of U.S. Public Law : 97.

⁵¹ See written testimony submitted by Larry Pratt, Executive Director, Gun Owners of America in Congress, Congressional Record, 104th Cong., 2d sess., Vol. 141, no. 89 (26 May 1995) : S7603.

⁵² Ibid., S7607.

⁵³ Congressional Information Service, Abstracts January - December 1995 : 184.

⁵⁴ See statement by Senator Boxer, D-California, in Congress, Congressional Record, 104th Cong., 2d sess., Vol. 142, no. 49 (17 April 1996) : S3432.

⁵⁵ For full statement by Senator Hatch see Ibid., S3433.

⁵⁶ Congressional Record, 104th Cong., 2d sess., Vol. 142, no. 49 (17 April 1996) : S3433.

⁵⁷ Ibid.

⁵⁸ Todd S. Purdum, "Clinton Proposes Harsher Measures Against Terrorism," The New York Times, 29 July 1996, sec. A, p. 1.

⁵⁹ Pat Towell, "Senate Backs Anti-terrorism Measure," Congressional Quarterly Weekly Report Vol. 54, no. 26 (29 June 1996) : 1885.

⁶⁰ Bush, 6.

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