

**DIVINEST SENSE OR STARKEST MADNESS:
DEFENDING CIVIL LIBERTIES
IN A POST-SEPTEMBER 11 WORLD**

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The War on the Bill of Rights and the Gathering Resistance. By Nat Hentoff. *Seven Stories Press*, 2003. 176 pages. \$18.00

The War on Our Freedoms: Civil Liberties in an Age of Terrorism. Edited by Richard C. Leone & Greg Anrig, Jr. *Public Affairs*, 2003. 317 pages. \$15.00

Much Madness is divinest Sense –
 To a discerning Eye –
Much Sense – the starkest Madness –
 ’Tis the Majority
 In this, as All, prevail –
 Assent – and you are sane –
Demur – you’re straightaway dangerous –
 And handled with a Chain –

—Emily Dickinson¹

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1. EMILY DICKINSON, FINAL HARVEST 101 (Thomas H. Johnson ed., 1961).

I. INTRODUCTION

Despite the grand guarantees of freedom contained in the First Amendment, the government has often repressed political dissent.² From the implementation of the Alien and Sedition acts to the present day, laws annulling the rights of those who dare challenge the existing power structure have been used to fine, jail, harass, blacklist, or deport, typically in the name of “national security.”³ Such tactics are not a modern invention, of course. “From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights.”⁴

Since the events of September 11, 2001, the government has increased its use of laws prohibiting individuals from providing “material support and resources” to any group designated by the Secretary of State as a “foreign terrorist organization.”⁵ With the nation currently embroiled in battle in Iraq, the pressure on dissenters looms even larger. Although only “foreign” organizations are able to be designated,⁶ the threat of being labeled a “terrorist”⁷ may have a chilling effect on the desire and ability of citizens to exercise their First Amendment rights⁸ to free speech and free association with domestic organizations as well.⁹

2. Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL'Y 75, 79 (2001).

3. *Id.* at 78-79.

4. *Duncan v. Kahanamoku*, 327 U.S. 304, 330 (1946) (Murphy, J., concurring).

5. See Eric Lichtblau, *1996 Statute Becomes the Justice Department's Antiterror Weapon of Choice*, N.Y. TIMES, April 6, 2003, at B15 (stating that the law has become “the Justice Department’s main weapon in pursuing people it contends are linked to terrorists.”).

6. See *infra* note 19 and accompanying text.

7. In the present political climate, “terrorist” has become a sobriquet to hurl at those with whom one disagrees. See, e.g., Robert Pear, *Education Chief Calls Union “Terrorist,” Then Recants*, N.Y. TIMES, Feb. 24, 2004, at A20 (discussing Education Secretary Rod Paige’s comment that the National Education Association was like “a terrorist organization”). Perhaps the “T-word” will replace the “L-word,” liberal, as the ad hominem label of choice to use against those even marginally left of center.

8. “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . .” U.S. CONST. amend. I.

9. See Randy Furst, *Activists Decry “Terrorism” Label*, STAR TRIB. (Minneapolis), Mar. 11, 2003, at B3. Of course, the “War on Terrorism” has taken aim at domestic groups as well. See, e.g., John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA Patriot*

The increasing focus of law enforcement on those who disagree with governmental action has occurred on local, as well as national, levels. In March 2003, Captain Bill Chandler of the Hennepin County, Minnesota, Sheriff's Department gave a speech at the Governor's Emergency Management Conference, in which he urged Minnesota law enforcement officials to "become aware of" a number of groups in the state, ranging from the Posse Comitatus to Students Against War, a group that was formed at the University of Minnesota to oppose U.S. military actions in Iraq.¹⁰ Although Chandler stated that "[w]e are not calling any of them terrorists[;] [w]e call them domestic identified groups that may affect our communities,"¹¹ the title of his presentation, "Understanding Terrorism in Minnesota,"¹² made the implications quite clear: dissenters are under increased scrutiny.

More recently, prosecutors for the United States attorney's office for the southern district of Iowa subpoenaed attendees at an antiwar forum held at Drake University.¹³ The subpoenas sought "details about the forum's sponsor—its leadership list, its annual reports, its office location—and the event itself."¹⁴ The government stressed that the subpoenas were issued simply to try to learn more about a single individual who had attempted to scale a security fence at an Iowa National Guard base the day after the forum, but the scope of the subpoenas gave rise to fears that they were issued in an attempt to quell protest.¹⁵ Although the subpoenas subsequently were dropped in the face of mounting public pressure,¹⁶ the incident raises valid concerns about government motives.

Act and the Justice Department's Anti-Terrorism Initiatives, 51 AM. U. L. REV. 1081 (2002) (discussing the ways in which the USA Patriot Act has expanded governmental powers with respect to both foreign and domestic groups suspected of terrorism).

10. Randy Furst & Mike Kaszuba, *Several Minnesota Groups Listed as Extremist; A Counterterrorism Expert Identified Organizations from Neo-Nazis to Radical Environmentalists*, STAR TRIB. (Minneapolis), March 5, 2003, at B1.

11. *Id.*

12. *Id.*

13. Monica Davey, *An Antiwar Forum in Iowa Brings Federal Subpoenas*, N.Y. TIMES, Feb. 10, 2004, at A14.

14. *Id.*

15. *Id.*

16. Monica Davey, *Subpoenas on Antiwar Protest are Dropped*, N.Y. TIMES, Feb. 11, 2004, at A18.

II. DEFENDING LIBERTY

In response to increased erosion of civil liberties, many have begun to speak out in defense of freedom. Two recent books, *The War on the Bill of Rights and the Gathering Resistance* and *The War on Our Freedoms*, reflect this trend.

In *The War on the Bill of Rights*, longtime Village Voice columnist Nat Hentoff presents a very readable, yet forceful, indictment of the government's actions in response to the tragedy of September 11, 2001. The book lays bare the worst features of the "war on terror," including a steady erosion of the Fourth Amendment protections against unreasonable search and seizure and the attempts by the executive branch to hold people, including American citizens, indefinitely, without charges, as "enemy combatants." Hentoff points to the very real potential of the ill-conceived and hastily passed Patriot Act¹⁷ to chill free speech and curtail individual privacy. In many ways, he argues, we have returned to the days of COINTELPRO.¹⁸

Attorney General John Ashcroft has been aggressive in pushing the limits of the new laws.¹⁹ The Justice Department guidelines call for initiating a "terrorism enterprise investigation" when the facts or circumstances "reasonably indicate" that two or more individuals are attempting to further social or political goals "wholly or in part through activities that involve force or violence and a federal crime."²⁰ The broad and vague nature of this language allows a variety of peaceful and lawful actions to fall under its rubric. As Hentoff points out:

[t]hese insidiously malleable guidelines for terrorism investigations could apply to political action (and the reaction) during demonstrations by environmentalists, anti-globalizationists, animal rights pickets, or union

17. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (codified as amended at various portions of U.S.C.).

18. NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE* 26 (Seven Stories Press 2003) [hereinafter *WAR ON RIGHTS*]. COINTELPRO was the FBI's counterintelligence program, under which the bureau "monitored, infiltrated, [and] manipulated" various political and social organizations during the 1950s and 1960s. *Id.*

19. *See id.* at 40-41.

20. *The Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations* (Department of Justice, May 30, 2002), quoted in *WAR ON RIGHTS*, *supra* note 18, at 29.

members on strike, as well as pro-lifers trying to talk, and only to talk, to women entering abortion clinics (“obstruction” at clinics can be a federal crime).²¹

Much of Hentoff’s ire is (rightly) aimed at those he refers to as the “Patriot Enforcers,” individuals who decry any deviation from the official government line and upbraid as unpatriotic those who voice even the slightest dissent. Emblematic of this mindset is John Ashcroft’s pronouncement that “those who scare peace-loving people with phantoms of lost liberty . . . aid terrorists . . . and give ammunition to [America’s] enemies”²² In a period where the pressure to conform to the orthodoxy is reminiscent of McCarthyism, Hentoff looks to Margaret Chase Smith, Republican senator from Maine, for inspiration. In 1950, Senator Smith was the first member of Congress to publicly confront Senator Joseph McCarthy.²³ Her words ring as true today as they did when they were first spoken. “Those of us who shout the loudest about Americanism are all too frequently those who . . . ignore some of the basic principles of Americanism—the right to criticize, the right to hold unpopular beliefs, the right to protest, the right of independent thought.”²⁴

The War on the Bill of Rights reads as a series of short articles. In it, Hentoff presents a useful history of government repression in response to crises. Drawing parallels between past and present is useful, although some may find his approach hyperbolic and his analogies exaggerated. Such criticisms carry some validity, but the potential for an ever-increasing erosion of civil liberties is insidious enough that I am willing to grant him license.

A somewhat more measured approach is offered by *The War on Our Freedoms*. The book presents fourteen essays, including the introduction, written by a variety of journalists and scholars.

Columbia University provost Alan Brinkley offers a historical view of our modern notion of civil liberties and their abridgment in times of crisis. Looking especially to the response of the Woodrow Wilson administration toward critics of U.S. entry into World War I, he suggests that the present actions of the government present “a

21. WAR ON RIGHTS, *supra* note 18, at 29.

22. Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps; Civil Liberties Groups’ Attacks “Only Aid Terrorists,” Senate Panel Told*, WASH. POST, Dec. 7, 2001, at A1. See also WAR ON RIGHTS, *supra* note 18, at 50.

23. WAR ON RIGHTS, *supra* note 18, at 50.

24. *Id.*

familiar story.” Brinkley also examines the curtailment of civil liberties after September 11, 2001 as the culmination of a process that had begun some years before. A backlash to the increasing concern over civil liberties and the rights of the accused had been growing in certain conservative circles since the end of the 1960s. “The attacks of September 11 became, among other things, a vehicle for advancing an assault on civil liberties that was already underway for other reasons.”²⁵

Former *New York Times* columnist Anthony Lewis focuses on the administration’s policy of indefinitely incarcerating “enemy combatants” without charges or access to legal counsel. He offers Viet Dinh, an official with the Justice Department, an opportunity to justify the administration’s actions, but Lewis ultimately concludes that these policies overstep legal and moral boundaries. A double standard seems to be operating. As *The Economist* has written: “It is hard to imagine that America would look kindly on a foreign government that demanded the right to hold some of its own citizens in prison, incommunicado, denying them access to legal assistance for as long as it thought necessary without ever charging them with a crime.”²⁶

Among the most alarming of the topics covered in this collection is the increase in domestic surveillance and concomitant decrease in privacy proffered by the Patriot Act. Both NYU law professor Stephen Schulhofer and Kathleen Sullivan, dean of the Stanford Law School, discuss the changes to the Foreign Intelligence Surveillance Act (FISA) contained in the Patriot Act.

Before September 11, FISA allowed for surveillance of suspected foreign agents by permitting access to records of a narrow range of travel-industry businesses.²⁷ Under the Patriot Act revisions, the FBI may access all records of any business or non-business entity regarding any person whenever an investigator thinks that those records may be relevant to a terrorism

25. Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedom*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 23, 45 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

26. *Hard to Defend*, *THE ECONOMIST*, Dec. 14, 2002, *quoted in* Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 47, 57 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

27. Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 74, 77-78 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

investigation.²⁸

Moreover, a significant limit on FISA has been removed. “Prior to 9/11, FISA was not considered a law enforcement tool; its function was exclusively preventative.”²⁹ Under the Patriot Act, prosecutors are able to use the broad FISA powers when their primary objective is to gather evidence for a criminal prosecution.³⁰ This has dramatic consequences, permitting activities that would otherwise not be allowed. “The key feature of FISA is that it permits wiretaps more readily than the law that governs criminal investigations FISA warrants do not require a showing of probable cause of criminal activity.”³¹ Such provisions, the authors warn, undermine the system of checks and balances carefully erected by the Framers of the Constitution.

One of the book’s most interesting essays looks at the growing level of secrecy within the administration and the media’s general unwillingness to question or push for greater access. Such secrecy, argues John Stacks, deputy managing editor of *TIME*, undermines the ability of the public to trust, understand, and engage in a dialogue with its government. Relatedly, dwindling attention to foreign news impedes the ability of the public to understand the complexity of foreign affairs. Stacks attributes this to the fact that, counter to the myth of left-wing bias, “most organs of the American press hug the political center”³² The media seek the center in the quest for large audiences, and this quest breeds a timidity that gets in the way of in-depth investigation and critique.³³

All of the essays in *The War on Our Freedoms* are thought-provoking, to say the least. The editors and authors provide insights that are missing from much popular discussion. This book should be read by all who care about the future of civil liberties in the United States.

28. *Id.* at 78.

29. *Id.*

30. *Id.* at 80.

31. Kathleen M. Sullivan, *Under a Watchful Eye: Incursions on Personal Privacy*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 128, 136 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

32. John F. Stacks, *Watchdogs on a Leash: Closing Doors on the Media*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 237, 250 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

33. *Id.*

III. CONCLUSION

They take away our freedom
In the name of liberty.³⁴

After the September 11, 2001, attacks, a common question asked by Americans was “Why do they hate us?” The answer, according to President Bush, is that they hate us because of our freedoms.³⁵ Apparently this line of thinking has led the administration to believe that the solution is therefore to reduce “our freedoms.” The events were undeniably tragic and brought with them understandable concerns about future terrorist attacks. Unfortunately, the government’s solution has been to crack down on dissent and push civil liberties into the background. When trying times arise, this is a common response. Yet it is in just such times that the preservation of constitutional freedoms is most important.³⁶ The First Amendment “should be targeted for the worst of times.”³⁷ Those who, in the name of security, would seek to limit the rights of individuals to freely speak and associate with one another would do well to remember the words written by Chief Justice Hughes in *De Jonge v. Oregon*:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.³⁸

34. STIFF LITTLE FINGERS, *Suspect Device, on INFLAMMABLE MATERIAL* (Restless Records 1979).

35. See Mark Silk, Editorial, *It's Not Our Freedom That They Hate*, HARTFORD COURANT, April 4, 2003, at A17. In his address to Congress on September 20, 2001, President Bush stated that “[t]hey hate our freedoms—our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.” *Id.*

36. See generally Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL’Y 461 (2002) (discussing the proposition that courts should vigilantly resist pressures to curtail civil liberties in times of national stress).

37. *Id.* at 469 (quoting legal scholar Vincent Blasi).

38. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).