



ST. MARY'S
UNIVERSITY

The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 4 | Number 2

Article 3

1-1-2002

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Recommended Citation

William C. Harrel, *Federal and State Law Encroachment on Individual Rights*, 4 THE SCHOLAR 191 (2002).
Available at: <https://commons.stmarytx.edu/thescholar/vol4/iss2/3>

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State Law Encroachment on Individual Rights. Please join me in welcoming Mr. Harrell.

FEDERAL AND STATE LAW ENCROACHMENT ON INDIVIDUAL RIGHTS

*William Clark Harrell**

It is an honor to be here, primarily because it is important that people are gathering right now to seriously analyze what has happened to constitutional norms and general principals of civil liberties and civil rights. It has taken us a few months to get to this point, but it is better late than never. It is also always an honor to be in the presence of Gerry Goldstein. Not only is he one of the best litigators on the planet, he was one of the few who had the courage to stand up against the abuses that were in the immediate wake of September Eleventh. That was not a popular and easy thing to do.

It is going to be very difficult to discuss the USA Patriot Act in thirty minutes or less. Frankly, it is going to take many of you law students the next couple of semesters to really figure out what is happening and what has already happened. I look back at what I learned in law school, particularly in constitutional law, and many of that has been rendered obsolete by the Attorney General and the President of the United States. It also reminds me of my days as a student of history and studying very carefully the history of our Constitution, social struggles, the ebbs and flows of civil liberties, and the original intent of the Constitution. We cannot help but reflect upon the premonitions of Benjamin Franklin who said, "They that would give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."⁴ That is essentially the place in which we are today. We have been here before, and I do believe the pendulum will swing back to some level of normalcy, although it is not going to just happen as a matter of course. We are going to have to come together as a community and demand reforms to the reforms.

World War I brought us the Espionage Act⁵ and the general mistreatment of dissenters and those who were of foreign national origin. World War II brought us the internment of Japanese Americans, very similar to the internment of the nameless individuals who are currently being de-

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4. Benjamin Franklin (1706 - 1790).

5. (Barbour Espionage Act), ch. 30, 40 Stat. 217 (1917) (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., & 50 U.S.C.). See the Espionage Act, ch. 72, 54 Stat. 79, 80 (1940) (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., & 50 U.S.C.) and Espionage Act, ch. 434, 67 Stat. 577 (1953) (codified as amended at 22 U.S.C. § 401) for subsequent amendments to the Espionage Act passed shortly after WWI.

tained. We do not know their location, whether they have been provided access to an attorney, or whether they are safe or alive. The Oklahoma City bombing brought us the Prison Litigation Reform Act,⁶ immigration reform,⁷ the Effective Death Penalty Act,⁸ and other reforms effecting legal services to the poor. The common theme in legislative reforms that have been produced in the wake of national crises is the erosion of the judicial branch of government's authority. The debate over whether or not a judicial branch should have authority to keep both the legislature and the executive office in check goes back to the early formation of this nation. This is nothing new. If you look at the Federalist Papers, you will see a similar debate happening 200 years ago.

In times of crisis, immigrants are the first victims and the most vulnerable. They are the first to be impacted. Not only the immigrants of a particular nationality, but immigrants in general. The immigration reforms, administrative efforts, and the policy revisions that have been undertaken by the Attorney General's office and the Immigration and Naturalization Service, although principally and directly affecting South Asians, but also impacting people of Arab-American decent, are here to stay unless we produce legislative reforms and somehow reign in the Attorney General and the Department of Justice.

For many years, law enforcement has been waiting and pushing for the expansion of the type of authority they achieved under the Patriot Act. If anyone believes that John Ashcroft was capable of producing a piece of legislation that extends beyond 342 pages within two weeks of the terrorist attacks on New York, you are naïve. This was waiting in the wings. It was prepared to go. The language was simply cut and pasted onto a computer document and a piece of legislation was submitted.

Before I get into the specific constitutional reforms articulated in the Patriot Act, I want to briefly talk about the process itself. Anybody who respects the traditions of democracy and open and free debate in our congressional body should be offended by the manner in which this legislation was passed. Committee hearings were held, but not even the committee members were given the opportunity to see the legislation until hours before they were to vote on it. They heard testimony from one individual, the Attorney General of the United States, whose legislation

6. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Title I, § 101(a) [Title VIII, §§ 801-810], 110 Stat. 1321-66-1321-77 (1996) (codified as amended at 18 U.S.C.A. § 3626 & 18 U.S.C. § 1932).

7. See Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1274 (1997); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-565 (1997).

8. See Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1274 (1997).

it was. The ACLU and various other organizations demanded a place at the table, but we were not given one. It was not easy to even critique or provide some information to our allies in Congress, as we did not get access to the legislation being proposed and placed to a vote. In merely three weeks, this piece of legislation was passed and expanded police authority, INS authority, and the authority of other federal agencies beyond anything we have ever seen. Their authority was expanded even beyond the times of the Oklahoma City bombing, the second World War, and the internment of Japanese and Japanese Americans in the United States. Some of the excesses go beyond what was imagined at that time.

The Fourth and Fifth Amendments generally protect due process rights. The rights of the accused and limitations on police authority to effect your liberty, either at home or in your communications, have been profoundly effected. For the first time in our history, there is now what can be called a national warrant.⁹ The Federal Bureau of Investigation (FBI) can now go to a federal district court in the District of Columbia, ask for a warrant, and serve it in California. Such action has a significant impact on a system in which circuit courts of appeal are relied upon by the states within their jurisdiction, since the liberties protected in the Ninth Circuit are very different from the way they are protected in the Fifth Circuit. Naturally, this was a coup for law enforcement because it allows them to go to a sympathetic jurisdiction and obtain a warrant that would likely be deemed unacceptable or unwarranted in the Ninth Circuit or other more restrictive circuits. They have generated the ability to engage in what is called a roving wiretap.¹⁰ No longer is the specificity of a warrant—such as a particular place, a particular time, a particular phone line, and for a particular purpose—the requirement. Basically, if the Attorney General deems something is reasonably related to a national security investigation, the government can tap a general area from which a phone call may or may not be made. That has genuine implications that would cause some of the framers of the Constitution—those who had in their mind the recent history of the British Crown's general Writ of Assistance which empowered the rural guard to go into anyone's home at any time and for any reason, as long as it was deemed to further the interest of the Queen—to roll in their graves.

Sneak and peak search warrants. When an officer is given the authority to knock at your door and search your house, you are supposed to have the opportunity to say they have the wrong house, that it is not you who the warrant is targeting, or that you want to see the warrant. Now, they can go into your house, search, and you will not even know it for

9. See USA Patriot Act, Title II, sec. 219-220, 115 Stat. 272, 291-92 (2001).

10. See *id.* at Title II, sec. 206, 115 Stat. 272, 282 (2001).

ninety days, a time period which can be extended. They can enter any room and search any place, download your hard drive, or do whatever the Attorney General deems to be reasonably related to a national security investigation. Internet communications are now easily intercepted, although they generally had been before. Internet service providers, for sometime now, have been voluntarily providing access to communications of their clients to the FBI and other law enforcement agencies.

The Central Intelligence Agency (CIA), who has long been prohibited from engaging in domestic intelligence work, is now in the business. The nexus between the FBI, or what used to be a wall between the FBI and the CIA in terms of the authority and methods of investigation in this country, has been altered profoundly.

The First Amendment has also fallen victim to Ashcroft and his plan. The rights of free speech and free association have been impacted. Previously, the FBI and other agencies could investigate student records, both foreign and American nationals, but the school would have to notify the student ahead of time. Well, that is no longer the case. You may never know whether the FBI is looking into what classes you are taking or the organizations to which you belong. That might not shock anyone, but it has a general chilling effect. Foreign students are going to be less likely to take classes with professors who are deemed to be radical or anti-establishment. They are going to be less involved with associations who have critiqued U.S. foreign policy, and I know for a fact that this has already begun to happen.

There is a new crime of domestic terrorism¹¹ that is so vague almost any action in which mass movements have historically engaged may be deemed domestic terrorism by the Secretary of State or the U.S. Attorney General's office. Essentially, it is the act of trying to influence policy through intimidation. But what is the purpose of a mass mobilization? What is the purpose of civil disobedience if for no other reason but to influence policy? That can now be deemed domestic terrorism, especially if something is broken in the process like a window or something of that nature. Again, immigrants carry a disproportionate brunt of all of this.

There is a new standard of inadmissibility in the realm of immigration. You can be in this country legally, as a permanent resident or here on a student or faculty visa, but if you are engaged in activity that the Secretary of State deems contrary or obstructive to the national security effort, you can be deemed inadmissible—meaning that if you go home after making a speech critical of the Patriot Act or of the bombing in Afghanistan, you may not be admitted into this country upon your return.

11. *See id.* at Title VIII, sec. 802, 115 Stat. 272, 376 (2001).

Privacy issues have been impacted. The Fourth Amendment, which shrouds us with the right to privacy, should not be infringed by law enforcement except under certain circumstances. But we are now seeing various erosions of that. Financial records are more easily obtained, especially if you have investments abroad. Non-profit charitable donations are certainly being monitored. We are seeing the creation of facial recognition technology, and high intensity body search mechanisms being placed not only in airports, but in the streets. In six months, Austin, Texas will have cameras on every corner. These activities, as well as notions of expanding databases, raise serious privacy concerns. They even snuck into the Patriot Act a provision saying that now, all those who commit violent crimes shall be DNA tested and their record entered into a national database.¹² Although these activities have no relation to what happened on September Eleventh, they are generally a law enforcement wish list. It is not only a law enforcement wish list, but the wish list of those in private industry who hope to gain from this or what is known in legislative parlance as pork legislation. There are a few who stand to gain handsomely from the installation of facial recognition technology. Meanwhile, we are lulled into a sense of security thinking we are one step more secure. But in fact, this technology is so bad even the Department of Defense abandoned it. Such technology has a thirty percent error rate. So while we are thinking we are safe because this technology is in use, in fact, we are not. But a few individuals are a bit wealthier. I carry a driver's license. We all must have some form of identification which goes into a database and identifies you. To create a new database not only raises the specter of certain privacy interests, it expands the pocket books of the individuals who are in fact the ones that are lobbying nationally for this technology and legislation.

The principles within the Fourteenth Amendment's Equal Protection Clause have been impacted profoundly. Racial profiling is a concept that is all too common. During this last legislative session, the ACLU, the NAACP, and LULAC¹³ created a racial profiling prohibition in the state of Texas. I am glad that September Eleventh did not happen in the middle of last session because we would be talking about that legislation today. Law enforcement agencies tried to come back to the table, but we were able to say it was now a statute, not a bill, and that they must live with the standards of that statute. There is a lot of resistance out there

12. See USA Patriot Act, Title V, sec. 503, 115 Stat. 364 (2001); see also, e.g., *DNA Technologies: Hearing Before the House Comm. on Gov't Reform, Subcomm. on Gov't Efficiency, Financial Mgmt. and Intergovernmental Relations, 107th Cong. (2001)* (statement of Dwight E. Adams, Deputy Assistant Director, Laboratory Div., Federal Bureau of Investigation)

13. League of United Latin American Citizens.

and I understand why. Immediately after September Eleventh, over seventy percent of African Americans, those who were polled, were prepared to say, "Racial profiling? Well, it might be okay just this once."¹⁴ Well, when you give it up just this once, you establish a precedent that is going to make it easier to do it in the future. We are standing strong against that erosion and it has not been effected in this state.

Nationally, five thousand people were identified on the basis of their age, gender, and national origin to be investigated and interrogated by the Department of Justice and to be sure, many of those investigations have been carried out. I am proud to say, however, that Senate Bill 1074,¹⁵ the racial profiling prohibition passed through the legislature last year, made it very difficult for state law enforcement to engage in this behavior. In fact, we sent a letter to all major urban police departments where we suspected Muslims lived and where most of these interviews would be carried out, stating that police are prohibited from assisting in Department of Justice investigations that are clearly based on national origin because of the state statute. The San Antonio Police Department, the Austin Police Department, and the Richardson, Texas Police Department outright agreed with us and refused to participate in those investigations. The Fort Worth Police Department and El Paso Police Departments said they would consider our demands and forward them to their legal department. To my knowledge, neither they nor the Dallas Police Department participated in these investigations. The Amarillo Police Department also committed to us that they would not do so.

Not only is racial profiling a norm from the law enforcement perspective, it is also one from the private security perspective, from the airport security perspective, and among airline employees. You are all aware, I am sure, that Arab-Americans and others of Arab decent or who are traditionalists and practice the Muslim or Islamic faith are being scrutinized more closely and being held to a higher standard of security in airports. The ACLU has recently filed a lawsuit in the case of a Muslim woman who went through the security check—nothing signaled any metal and there was nothing indicating that she was engaged or was attempting to engage in any criminal activity. But they subjected her to a body search and took off her traditional religious head wear in a blatant disrespect for

14. See Ann Scales, *Polls Say Blacks Tend to Favor Checks*, BOSTON GLOBE, Sep. 30, 2001, at A16; see also NPR Morning Edition Profile – Black Civil Rights Groups Struggle to Keep Focus on Domestic Agenda Since Terror Attacks (Nat'l Public Radio broadcast, Dec. 26, 2001), available at 2001 WL 9330241 (noting early polls showed African Americans were willing to accept racial profiling); Natalie Gott, *News: Tide Turned in Profiling Debate? Rights Leaders Say Its Dubious if Texas Law Would've Passed Today*, HOUS. CHRON., Oct. 7, 2001, at 46.

15. S.B. 1074, 77th Leg., R.S. (Tex. 2001).

her individuality, a bias toward her national origin, and in violation of her religious freedom. There are also other forms of private wrongdoing outside the airline industry that have come to the ACLU's attention repeatedly. There are not only interceptions of Internet communications, but Internet service providers are easily turning over information to federal authorities and allowing the FBI to attach what is called carnivore technology.¹⁶ There have been many instances of job discrimination and discrimination against Arabs and Muslims in the adoption processes. Efforts by these people to become foster parents have also been hampered since September Eleventh. Other forms of discrimination such as job discrimination in both the private and public spheres have been identified. Hate crimes, the deliberate efforts of individuals to retaliate against others because of their perceived national origin out of spite or deriving from their genuine pain and suffering from what happened on September Eleventh, have also increased.

The federal government has taken the lead and many states, as was to be expected, have jumped on the bandwagon. Florida, Illinois, and New York legislatures have passed state legislation very similar to that contained in the USA Patriot Act.¹⁷ In the state of Texas, the Governor's Task Force on Homeland Security has met about six times and recently released their report. It was not as damaging as we had anticipated, but the struggle is not over. Commissioner David Dewhurst, who heads the task force, and all of the members of the task force are people who have had a long history of being very pro law enforcement and not very sensitive to civil liberties or civil rights. That concerned us. They had hearings but were not accepting public testimony, only invited testimony, and the list of invitees included no one from the civil rights or civil liberties community. We protested that and ultimately, Dewhurst gave us a seat at the table. Dean John Brittain from Houston's Texas Southern University-Thurgood Marshall School of Law, testified on our behalf and diverted what could have been a very damaging report and recommendation to the Governor. But as I have said, this is not over. We have to be attentive because the two legislative committees have an interim charge to investigate measures that will heighten Texas' ability to respond to terrorist threats or activity. The House Committee on Criminal Jurisprudence as well as the House Committee on State Affairs has a charge, and

16. See, e.g., *Digital Privacy and the FBI's Carnivore Internet Surveillance Program: Hearing of the Senate Judiciary Committee*, 106th Cong. (2000) (statement of Donald M. Kerr, Assistant Director, Federal Bureau of Investigation).

17. See *Street Terrorism Enforcement and Prevention*, FLA. STAT. ANN. § 874 (West 2002); *International Terrorism*, ILL. COMP. STAT. ANN. 720/29C (West 2002); N.Y. [TERRORISM] LAW § 490 (McKinney 2002).

we are watching for that because to be sure, legislation will be proffered in January of next year when the legislature begins a new session.

One of the principle areas that I think needs to be addressed, of course, is the treatment of immigrants who are trapped up in this dragnet approach to investigate foreigners believed to be involved in either terrorist activity or organizations opposed to this effort. I know Gerry Goldstein has personal experience with that and he will get into those specifics.

In closing, I will simply say that I believe the pendulum will swing. I have been saying that since the beginning because right after September Eleventh, the polling numbers indicated that over eighty percent of people were prepared to give up certain civil liberties for the sake of security, but no one at that time articulated what those particular liberties would be. It was not until the machinery began to operate and real humans were affected that people's opinions started to change. People could read in the paper about a doctor here in San Antonio being swept up and taken away from his family, detained in New York, questioned, not given access to his attorney, spit out onto the streets, and told "we're sorry, it was mistaken identity." People start to reconsider the propositions that are being circulated when they are aware of the facts.

In only three short months after September Eleventh, the eighty percent approval rating dropped to about fifty-four percent. I think no other time in history ever had more than fifty percent of people willing to give up their civil liberties for the sake of security. There is a constant historical tension between liberty and security, but there can be a balance. We should at least demand a nexus be drawn between the proposal and how it will effect our safety. Even John Ashcroft, under questioning, was forced to say that most of the measures that have been offered would not have avoided what happened on September Eleventh. The measures passed anyway, and to speak against them was deemed unpatriotic at a time when it was not easy to be considered unpatriotic. I think rational minds have prevailed. We are now reconsidering these measures and are in a position in which some members of Congress are at least demanding that Governor Tom Ridge, the head of the national Homeland Security Task Force, be called to Congress in order to tell them what he expects to do with the thirty-eight billion dollars he has been given and articulate how this is going to effect our future. Now, he is denying that he has any obligation to report, but there are enough people out there who are going to say yes, you most certainly do, and Congress, you are authorized and we will respect you when you issue the subpoena and demand some account of those public funds.

My optimism was tailored a bit a few weeks ago when Justice O'Connor, who has been one of our more reliable swing votes in the area of protection of civil liberties, said in an opinion addressing the circum-