GOODWIN SEMINAR: CONSTITUTIONAL DECISIONMAKING

ARTICLES AND SURVEYS

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Say “Cheese.” Uncle Sam Wants Your Photograph and Fingerprints or You Are Out of Here. Does America Have a Peace Time Constitution in Danger of Being Lost?

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THE REAL FRENCH CONSTITUTION

ANTHONY CHASE*+

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I. INTRODUCTION

Admittedly, the first analytic forays into popular legal culture,1 especially including research on law and film,2 did not initially make much of a dent in American legal scholarship. One law professor, Kenneth Lasson of the University of Baltimore, even expressed skepticism regarding the intellectual value of such research on the basis of the title of one published essay in the field.3 Lasson, himself the author of an oddly titled law book, Mouse-traps and Muffling Cups, inspired another law review essayist, Oklahoma City attorney Michael D. McClintock, to adopt an equivalently shorthand approach, questioning the value of research into American legal culture simply by reproducing Lasson’s original list of presumably dopey article titles. The sarcasm of Lasson and McClintock’s writing style appeared to eclipse the sincerity of their argument.

Where Lasson had adroitly removed author information, McClintock deleted entire citations, making it impossible for readers to decide for them-

+ At the author’s request, Nova Law Review has retained the informal essay format of this article and thus deviated from standard procedure with regard to providing sources for each of the textual references employed.

* Professor of Law, Nova Southeastern University, Shepard Broad Law Center.


3. Kenneth Lasson, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 HARV. L. REV. 926, 930–31 (1990). Lasson’s essay is routinely cited for the proposition that legal scholarship is partly a consequence of pressure to obtain academic tenure, though so mundane a fact was no doubt appreciated by most of those reading what Lasson wrote beforehand. The real trick is to take the next step and provide a socioeconomic explanation of why law schools were integrated into institutions (universities) which required academic scholarship of legal professionals in the first place. See Anthony Chase, The Legal Scholar as Producer, 13 NOVA L. REV. 57, 65 (1988).
selves whether the suspect titles had been drawn from articles worth reading. But good things come to those, including Lasson and McClintock, who wait, and a confluence of factors ranging from the dramatic rise of culture studies within the late-twentieth century American college curriculum through the ubiquity of legal culture in American society have, after almost two decades, brought the study of law and popular culture into legal academia’s mainstream. “Mass-mediated images,” argue Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, “are as powerful, pervasive, and important as are other early twenty-first-century social forces—for example, globalization, neo-colonialism, and human rights—in shaping and transforming legal life.” This realization seems to have taken hold both inside and outside law schools.

Published in 2002, Movies on Trial: The Legal System on the Silver Screen illustrates one way of approaching legal culture, giving special focus to different cinematic genres dealing with law and lawyers. Therein the reader will find, for example, a brief discussion of why there have been so few motion pictures and television series based upon the workings of the United States Supreme Court or devoted to an exploration of constitutional law and practice. But there has developed an important if carefully circumscribed narrative tradition in both fiction and film dealing with the American Revolution, an event from which constitution-making in the United States is inseparable, as well as with the historical context within which the origins of American constitutional government must be situated.

The same holds true for France. While French cinema has rarely given focus to French appellate practice or constitutional decision-making, the French Revolution has been a popular subject of French movies and mass entertainment. As a companion piece to what has already been written about the popular culture of the American Revolution, this essay confronts one of the ways the French Revolution has been portrayed in French motion pic-

7. See Anthony Chase, Movies on Trial: The Legal System on the Silver Screen (2002).
8. Id. at 35–66.
9. Id.
tures and suggests that interpretation of such "mass-mediated images" can help shed light on the fundamental character of French law and politics.

II. END OF AN AFFAIR?

The U.S.-French relationship has, of course, become enormously controversial since the French failed to support the United States in its decision to invade Iraq in 2003. At one level, the dispute between the two countries is said to turn on a sharp divide over the relationship between the Iraq war, the United Nations, and international law. On this view, the French are made uncomfortable by the Bush administration's embrace of a unilateralist policy in foreign affairs, especially including the invasion of Iraq, and by the two nations' contrary views of how international law should be applied to the circumstances of Iraq's alleged efforts to develop weapons of mass destruction, and its relationship to international terrorism.

With respect to the first issue, I have elsewhere sought to show that claims of a new unilateralism in American foreign policy are greatly exaggerated. And the United States has pursued a self-interested foreign policy quite consistently since the end of the Second World War. It would, for example, be silly to argue that America's war in Vietnam was somehow less "unilateral" than the recent invasion of Iraq. As to the second issue, how international law should be applied to American conduct, I have also sought elsewhere to demonstrate that international law has in common with other kinds of law a certain flexibility which permits arguments to be marshaled—and marshaled convincingly—on both sides of most major international disputes, including the Iraq war. Both the United States and France, their diplomats and lawyers, understand this and are well aware of the fact that legal arguments are not at the heart of the friction between the two nations over Iraq.

While it is true that the United Nations Security Council did not sanction the United States' use of military force against Saddam Hussein in 2003 (in contrast to the Gulf War of 1990-91), the U.N. also failed to approve the use of military force by NATO in Bosnia to combat the "ethnic cleansing" practiced by Slobodan Milosevic's Serbian regime—and in that instance, the French not only approved the use of force but were themselves participants in its deployment. The lack of correspondence between NATO's use of force in Bosnia and what Secretary General Kofi Annan refers to as the

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“U.N. paradigm” did not trouble the French when the human rights of Albanian Kosovars were on the line.

To be sure, American pundits like Ann Coulter are quick to assert that the real difference between the United States and France is simply that Americans have the backbone to stand up for liberty and the French do not.\textsuperscript{12} With regard to President Ronald Reagan’s bombing of Tripoli, for example, in an effort to discourage Libya’s sponsorship of terrorism, the French did not, in Coulter’s view, rise to the occasion. “Quaking in the face of [Reagan’s] show of manly force,” she writes, “France denied America the use of its airspace. As a consequence, American pilots were required to begin their missions from airbases in Britain.”\textsuperscript{13} Nevertheless, some important facts are omitted from Coulter’s rendition of events. Neither France’s airspace in the bombing of Tripoli, nor its Security Council vote in the United Nations at the time of the Iraq invasion were even important to the success of American military operations, let alone essential to them.

It was a very different story in Vietnam, however, when France’s own war was very much in doubt and the United States held all the cards. Foreign correspondent John Newhouse records that in April 1954, the position of the French garrison at Dien Bien Phu was hopeless. “By then, [the U.S. Navy’s] Admiral Radford had reported the conclusion of an ‘advance study group’ in the Pentagon: ‘Three tactical A-weapons, properly employed, would be sufficient to smash the Vietminh effort there.’”\textsuperscript{14} The Vietminh was the fighting force assembled by Ho Chi Minh and the Vietnamese communists, under the leadership of General Vo Nguyen Giap, for the purpose of resisting a continuation of French colonial domination in Southeast Asia. “In Paris,” continues Newhouse, “the French military were counting on American military intervention, which alone could head off the loss of their colony. Radford, they felt, had promised aerial strikes against enemy positions.”\textsuperscript{15}

The air strikes were not forthcoming, nor were the three tactical nuclear weapons the Pentagon’s “advance study group” rather optimistically predicted could eliminate the Vietnamese resistance.\textsuperscript{16} Nor was a miracle that the French suffered one of the most humiliating military defeats in their na-
ational history at the hands of the communists at Dien Bien Phu.\textsuperscript{17} Ironically, the United States itself, twenty years later, would suffer military defeat when confronted with these same tenacious Vietnamese patriots. But the point to be made here is that France could certainly be forgiven for feeling "betrayed" by an America unwilling to fight or, at least, unwilling to fight when French national pride hung in the balance in Southeast Asia.

At times France has come to the aid of the United States (e.g., Lafayette during the Revolution) and at times Americans have fought to save France (as in World War II); there have also been times when each nation pursued a course of action that bitterly disappointed the other. So what is the current falling out between America and France actually about? In the wake of an obviously acrimonious United Nations debate between the two countries in 2003, a series of bitter tracts have appeared, each entry in the line claiming a fundamental irreconcilability between American and French interests, each failing to identify the historical terrain on which fundamental differences invariably are fought out, substituting a list of carefully selected events—especially recent ones—which obviously fortify rather than subvert their main line of argument.\textsuperscript{18} Such pop comparative history or jerry-rigged international relations theory is of little lasting value.

III. READING HISTORY

There are fundamental differences between French and American political histories and cultures, but they are not likely to be rationally explored in books ready-made for an anti-French (or anti-French fries) American reading public whose prejudices seem easily enflamed by publishing houses looking for a fast buck, occasionally willing to stoke any xenophobic bonfire. Until the last two decades of the twentieth century, a familiar debate in the social sciences turned on the issue of American Exceptionalism.\textsuperscript{19} It is, to be sure, beyond dispute that since the arrival in New England of white European settlers in the seventeenth century, Americans had regarded themselves as somehow politically and spiritually unique, destined to forge not simply a

\textsuperscript{17} See id. at 99–100.

\textsuperscript{18} See, e.g., \textsc{John J. Miller \& Mark Molesky}, \textit{Our Oldest Enemy: A History of America's Disastrous Relationship with France} (2004); \textsc{Kenneth R. Timmerman}, \textit{The French Betrayal of America} (2004); \textsc{Richard Z. Chesnoff}, \textit{The Arrogance of the French: Why They Can't Stand Us—and Why the Feeling Is Mutual} (2005); \textsc{Denis Boyles}, \textit{Vile France: Fear, Duplicity, Cowardice and Cheese} (2005).

new nation but an original genus of civilization, a kind of new harmony out of the transatlantic wilderness. But just how accurate was this national self-perception? Has it survived intact into the twentieth-century world of industrial development and economic underdevelopment, technological invention and military intervention, violence and war? And what concrete consequences has it had for politics and society?

Does it, for example, explain why, in Werner Sombart’s phrase, “There is No Socialism in the United States?” While many political historians and social commentators used the concept of American exceptionalism to explain why neither socialism nor Marxism enjoyed the sort of intellectual credibility or popular embrace in America that they had achieved in Europe by the end of the Second World War, the decades following the elections of Ronald Reagan and Margaret Thatcher, the international export (and not just to Western Europe after the fall of the Soviet Union) of Reaganomics or, later, neoclassical laissez faire and globalization, seemed to render the differences between the United States and Europe, which had appeared in such sharp outline as recently as the Euro-Communist bid for power in Italy and France, much less visible. The rise of southern rim (or sunbelt) states (and their economic power bases, including military bases) in the United States—and the Californiaization (as some called it) of America—only foreshadowed a seemingly unstoppable Americanization of Europe. The more Europe was like the United States, the less exceptional America would inevitably become.

So if the United States and Europe, including France, are more and more like each other, at least in the grand scale of things, why should the United States and France have such a bitter falling out now? Another way of asking this question is to inquire why, with Europe so far along the road of unification, with all that means, should France, in 2005, vote against European constitutionalism in a much-watched national referendum, thus veering off the main highway onto a side trip of its own? And why should the Netherlands, for that matter, wish to join France, breaking out of the pack to chart another stray national itinerary? Amsterdam and Paris would appear, almost single-handedly, to have dynamited Europe’s road to utopia—symbolized first and foremost by the American-style economic prosperity promised by the European Union’s bureaucratic ruling elite in Brussels.

22. See Mike Davis, Prisoners of the American Dream (1986).
An acute observation on the outcome of the 2005 European constitutional referendum provides us with a useful key to understanding more than just the Franco-Dutch shredding of the Europeans Unions’ vaunted roadmap. According to Jean-Christophe Cambadélis, a French Deputy from Paris’ nineteenth arrondissement, the no vote represented “la victoire posthume de Georges Marchais sur François Mitterrand.”23 Georges Marchais, general secretary of the French Communist Party for twenty-two years (1972–94), and Francois Mitterand, leader of the Socialist Party in France and president of the country for a key decade-and-a-half (1981–95), are indeed both dead. But Cambadelis sees the French rejection of E.U. constitutionalism as a postmortem victory for Marchais in the sense that Marchais not only boisterously opposed Mitterand’s efforts to reconcile a tepid socialism with free-market capitalism during the Reagan years but also vigorously countered Mitterand’s love affair with the Common Market and its successor, the European Economic Community, with a deeply French version of what Benedetto, Browne, and Quaglia label “Euroscepticism.”24

In spite of the fact that the two most successful political parties in recent French national elections represented the center-right and the far-right, the French left still has sufficient political clout to throw a roadblock onto the Autobahn, so to speak, the fast track to one Europe. It is that same left which is today even more skeptical of America than of Europe and firmly plants its feet in the soil rather than being dragged along on elite projects like the creation of a single state in Europe or a single definition of freedom, imposed by American militarism, around the world. And this explains much of French hostility to America’s Middle Eastern ambitions. To the consternation of pro-American right-wing political philosophers who have come to dominate the French intellectual scene in the past couple of decades, French conservatives, not least of all President Jacques Chirac, often publicly and dramatically opposed the U.S. invasion of Iraq in 2003 as well.

But just as the conservatives alone could not persuade the French to rubber stamp the E.U. Constitution, they could not have placed France in so prominent a position of resistance to American foreign policy as has been the case since the U.N. Security Council debacle of 2003. But if the enduring


left-wing quality of French political culture helps explain the tension between an increasingly conservative America\textsuperscript{25} and France today, what explains this “path-dependency”\textsuperscript{26} of French politics, this habitual adherence to a dialectical field of political (and social) conflict within which the left looms large—before, during, and after the Soviet experiment in Russia? Political scientist Mark Lilla, in an insightful essay comparing Anglo-American and Continental philosophical traditions, argues that there has been a sharp divide between the two approaches and asserts that “[t]he estrangement of political philosophy in the two traditions had . . . concrete causes.” Those causes were, says Lilla, “not surprisingly, political.”\textsuperscript{27}

In other words, the chasm separating American and European, especially French (in Lilla’s critique), political philosophy reflected, in fact, a concrete and decisive separation between American and French political history and social experience, not just philosophy. That conflict emerged most clearly from the French Revolution forward. “French political debate in the nineteenth century,” claims Lilla, following the work of noted French historian, François Furet, “devolved into contentious struggles over the revolutionary heritage that largely excluded the kind of liberal politics that developed in England and America.”\textsuperscript{28} How could contrasting perspectives on the French Revolution shape French philosophy, indeed French politics, decade in and decade out, from the Revolution to the present, long after the Revolution itself was consigned to dusty textbooks in dilapidated libraries and museums? To be sure, observes Lilla, the “Revolution was over. But to those intellectuals for whom the Revolution was an eternal process, ever to be extended and reconceived . . . the Revolution was internationalized, with the French Communist Party (PCF) and the Soviet Union now serving as honorary sans-culottes.”\textsuperscript{29} While, to be sure, the Soviet Union is no longer and the PCF and the French left are alive and well (as the E.U. constitutional referendum made transparent), it is to the theory and practice of the French left which, in effect, Mark Lilla opposes the contemporary practice of American politics and imperial outreach. Thus, in an attempt to come to terms with the contemporary relationship between the United States and France, between French law and politics and America’s version of the same institutions and


\textsuperscript{27.} Mark Lilla, The Legitimacy of the Liberal Age, in New French Thought: Political Philosophy 3, 3 (Mark Lilla ed., 1994).

\textsuperscript{28.} Id. at 7.

\textsuperscript{29.} Id. at 10 (footnote omitted).
systems, we can reasonably begin by taking a closer look at the French Revolution—especially at how it has been represented in French popular culture.

IV. THE GREAT REVOLUTION

Italian filmmaker, Roberto Rossellini, once remarked that Karl Marx dreamed of a society without classes and without government, the very ideals of the American Revolution. One might ask whose American Revolution did Rossellini have in mind? That of the New England merchants or Boston’s poor? Of Alexander Hamilton or Tom Paine? Just as the premier Russian movie director, Sergei Eisenstein, never managed to make a film out of Marx Capital, a project on which he had set his sights for years, Rossellini failed to get around to making a movie about the American Revolution. Others did, however, as mentioned above, though perhaps fewer in number than one might expect. The French Revolution, by contrast, has attracted novelists and filmmakers like flies.

Will it continue to do so? Sociologist Barrington Moore, writing during the decade of the 1960s, placed the Bolshevik Revolution in a direct line of descent from the French. As Mark Lilla suggests, it is well known that debates within modern French historiography over the revolution of 1789, the “Great Revolution,” have often been nothing more than arguments camouflaging bitter disagreement over socialism, communism, and the revolutions they have inspired. Does the disintegration of the Soviet Union at the end of the twentieth century, and America’s “victory” in the Cold War, signal it is high time to reevaluate the relationship between these two extraordinary, late-eighteenth-century revolutions? If Americans now see their revolution, and the legal and political system it founded, as a model for the rest of the world’s nations to emulate, does that not place France’s revolution increasingly in the shadow, a discredited progenitor of failed left-wing social movements and, in power, botched schemes for a worker’s paradise? We shall have to wait and see.

In a catalogue accompanying the 1983 Rediscovering French Film exhibition organized by New York’s Museum of Modern Art and France’s Ministry of Culture, curator Richard Roud describes Abel Gance’s French Revolution film, Napoléon, which premiered at the Paris Opera House in

1927, as one of the "milestones in the history of world cinema." Napoléon certainly deserves as much as any film ever made to be designated as avant-garde or ahead of its time. Gance, the film's director, not only pioneered an editing process which employed a rapid and rhythmically compelling mode of inter-cutting powerful images but also invented the use of hand-held cameras—later utilized so successfully by French Nouvelle Vague and cinéma vérité filmmakers—image distorting lenses, and what Gance called Polyvision. The latter process involved first shooting, then projecting onto a screen, three separate images arranged horizontally, creating both a wide-screen and split-screen effect which, not surprisingly, overwhelmed early film-goers. Also relying upon a range of masking devices (familiar from D.W. Griffith's movies) and even a 275mm telephoto lens, Gance established himself, according to film historians David Bordwell and Kristin Thompson, as the boldest innovator in the history of film technology.

A minority of critics, over the past eighty years, have resisted the seductive force of Gance's Napoléon and refused to be enlisted by its furious enthusiasms, decrying it as Hollywood spectacle gone mad. For example, in the film's sequence during which a youthful officer presents the Revolution with its anthem, or Napoleon's trial at sea in which the raging storm against which he struggles is inter-cut with the political storm raging in the legislative convention back in Paris, or in the sequence near the end of the film in which, as army commander in the Italian campaign, Napoleon is visited by the ghosts of the Revolution, the leaders whose authority he inherits, some critics have seen Gance's transformation of historical forces into those of nature, personality, and spirit as defects in his narrative technique.

The personification of history seems typical of Hollywood's own version of historical spectacle. Describing Jean Renoir's film of the French Revolution, La Marseillaise (1938), made a decade after Napoléon, Jonathan Buchsbaum says that Renoir specifically sought to avoid making just another Hollywood historical epic or its French equivalent, hysterical drama like Gance's Napoléon. A critic for the politically-oriented Cineaste magazine even accused Gance of employing an essentially fascist cinematic technique.

Attribution of politics to aesthetic technique alone often seems overdrawn. Perhaps less so in Brecht's famous theory of alienation effect, but

when both Godard and Luc Mollet write in *Cahiers du Cinéma* that a traveling (or tracking) shot is a moral statement, you have to wonder exactly what they mean. A specific motion picture image, shot in a certain way, can secure a political meaning just as it can any other kind of meaning. Eisenstein's "montage," or juxtaposition of successive images of stone lions that appear to be rising to their feet in anger during the Odessa Steps massacre sequence in *The Battleship Potemkin* (1925) provides a familiar illustration. This kind of inter-cutting between two different sets or streams of images, used by Godard and other French New Wave filmmakers as well as Gance and Eisenstein before them, constitutes one of the elementary principles of Rudolph Arnheim's psychological theory of film technique.

But the "form is content" theory actually goes further and posits, for example, that Eisenstein's method of editing is itself a political or ideological statement. Its defenders usually argue that it is a Marxist approach to filmmaking, but by the time Godard's own approach to making movies had evolved to the point, revealed at the end of *Weekend* (1968), where he believed the history of cinema had come to an end, he regarded Eisenstein's *Potemkin* as a right-wing film simply because it retained evidence of conventional narrative or story-telling strategies. Another director, Constantine Costa-Gavras, expressed surprise at Godard's statement—recalling that *Potemkin* had an unmistakably left-wing influence on his generation of filmmakers. It is fine for Godard to glibly observe, for example, that you cannot make left-wing films on a right-wing editing table, but again, how does that translate into a coherent political idea about film practice?

In any event, Abel Gance's effort to tell the story of the French Revolution through his depiction of the life of a single man, Napoleon Bonaparte, makes sense in the context of real French history. Within a few years of the Corsican's arrival on the scene, as E.J. Hobsbawm reminds us, "France had a Civil Code, a concordat with the Church and even, most striking symbol of bourgeois stability, a National Bank."36 Of course, there is a limit to the impact of a single individual on history—even a Napoleon, as they say. "[M]ost—perhaps all—[Napoleon's] ideas," Hobsbawm acknowledges, "were anticipated by Revolution and Directory."37 If, as is certainly the case, Napoleon eventually drew the line on the Jacobin project of social emancipation, the dreams of Robespierre and Jean-Paul Marat, the Jacobin revolutionary sensibility still managed to survive the legend of Napoleon.

In the section of Gance's film titled, *Thermidor*, following the intertitle, a mask shot is used to reveal the Convention in turmoil. Along with the

37. Id. at 75.
well-dressed politicians, the chamber is now flooded with George Rude’s “crowd,” and there are calls of “Death to Saint-Just!” and “Death to Robespierre,” as a reaction sets in. “Death to the monsters!” is cried by a shiftless rabble that has suddenly turned against the Revolution. Robespierre, begging to be given a chance to speak, is simply shouted down. One of his opponents raises a dagger and promises to stab this “new Cromwell” if the “Convention lacks the courage to indict him.” With another knife, held in the trembling hand of Charlotte Corday, those most frightened by and bitter toward the Revolution have already murdered Marat in his bathtub—an historical incident filmed by Gance with great deference to the Republican painter Jacque-Louis David, who as a revolutionary Deputy voted for the execution of King Louis XVI and would later paint the most noble of Marat’s portraits.

Finally, after a couple of false starts, Saint-Just, played by Abel Gance himself, obtains the podium. This scene, in which Saint-Just is able to win over the assembled mass, even though his personal fate may already be sealed, is one of the true glories not only of Gance’s career but of the history of French film. “Yes, we had to have victims,” says Saint-Just, “but is not the Revolution a great beacon lit upon tombs?” Gance cuts to a close-up of Saint-Just’s face which now fills the screen. “Have you forgotten that during this time we have created for you a France that is new and ready to be lived in?” Here Gance gives focus to the beautiful face of Violine Fleuri, one of his characters in the film, who is obviously moved by these words. “And we have done all this,” cries Saint-Just, again in close-up, “with that vulture, the Vendee, at our flanks, and on our shoulders that mass of tigers, the kings!” A medium shot of the crowd, now standing and clapping, follows along with one of Robespierre, stony-faced, then Saint-Just, again, like a cat ready to strike: “You can now scatter our limbs to the four winds—Republics will rise up from them!” Saint-Just glances upward, as he concludes his fiery polemic, and most of the listeners in the packed hall rise to their feet, applauding wildly. Robespierre stoically stands and embraces Saint-Just.

V. CONCLUSION

Like Saint-Just, the German philosopher, G.W.F. Hegel, decried the abolition of equality in wealth, that political gambit Hegel believed had led directly to the decline of the great republics in classical antiquity. “There

was no longer any activity for the whole,” wrote Georg Lukacs in his book on Hegel, “for an idea—each man either laboured for himself or was forced to work for another. . . . All political freedom faded away; the law only gave the citizen a right to the security of property, the pursuit of which now filled his entire life.” The republican values Hegel saw personified in Napoleon, a world-historical figure, and his victory at Jenna in 1806; that Robespierre and Saint-Just saw in the Great Revolution; that Lukacs saw in the revolutionary social movements which derived hard lessons as well as inspiration from the fierce Jacobin commitment to freedom—all this can be felt building, moment by moment, throughout Abel Gance’s compelling cinematic tribute to the utopian aspirations of French political history.

Would one be wrong to regard this aspiration as the real French Constitution, the political and moral dynamic animating the Civil Code and its efforts to undercut the undemocratic authority of judges and generals and even bureaucrats in Brussels? Can we be surprised that French republicanism should produce a foreign policy—or legal process—contrary to that generated by American liberalism, a political and constitutional ideology with which we, on this side of the Atlantic, have lived for much too long?

SAY "CHEESE." UNCLE SAM WANTS YOUR PHOTOGRAPH AND FINGERPRINTS OR YOU ARE OUT OF HERE.

Does America Have a Peace Time Constitution in Danger of Being Lost?

MARK D. FRIEDMAN* 

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* Mark D. Friedman, Esquire, is an attorney at the West Palm Beach office of the law firm of Becker & Poliakoff, P.A. This article was written by Mr. Friedman while he was completing his legal education at Nova Southeastern University where he was a senior staff member of Nova Law Review. He wishes to thank his parents William and Rosita Friedman for all of their support and encouragement during his years in law school. He also wishes to thank the entire staff of Nova Law Review for their hard work and dedication in publishing this volume of Nova Law Review, with special thanks to Nicole Velasco for bringing this article to the attention of the Law Review Board.
I. INTRODUCTION

War broke out in the Middle East. Domestic terrorism got out of control. The President tirelessly toured the country, urging patience and calm. . . . Martial law was declared, and the United States of America was turned, overnight, into a police state. Curfews were enforced. Identity papers were required for all. Penalties for unlawful behavior were harsh and certain. And it worked too, for a time. The riots stopped. Everyone had food, water, and power. Stability and peace were returned to the country. But it was peace without Freedom.¹

The passage quoted above sounds like a modern-day headline, but it is not. These words, from the introduction to a recent television program,² echo those of one of our Founding Fathers. At its base is Benjamin Franklin's quote in 1759, in which he says, "[t]hose, who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety."³ This article analyzes what happens when the United States gives up civil liberties for security. It further attempts to determine, based on historical precedent, if this country is heading down that dangerous road again. Are the words in the quotes above unfounded fears, or have they actually become reality in our country's short history? Is the United States now in a new cycle of civil liberty deprivation that will once again lead us down a path that was not intended by ostensibly well-intentioned policy makers?

¹. Freedom (United Paramount Network (UPN) television broadcast 2000) (transcript of Introduction available at http://geocities.yahoo.com.br/foreword_freedom). This prophetic paragraph is known as "Decker's Intro" from the UPN television series Freedom, which aired in the 2000–2001 television season. Id. The quote appeared as a graphic with a voice-over at the beginning of each episode. Id. The final line of the quote, omitted above, states, "And that was a price some of us would not pay." Id. The action-drama featured four freedom fighters who were trying to restore the government to civilian authority because the military was not willing to step down from power now that peace was restored. Id.

². Freedom, supra note 1.

³. THE HOME BOOK OF QUOTATIONS: CLASSICAL AND MODERN 1106 (Burton Stevenson ed., 10th ed. Greenwich House 1984). This quote is attributed to Benjamin Franklin in his Historical Review of The Constitution and Government of Pennsylvania. BENJAMIN FRANKLIN, HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA (1759). However, this "sentence was much used in the Revolutionary period" and its earliest use was in November 1755, "in an Answer by the Assembly of Pennsylvania to the Governor." RICHARD FROTHINGHAM, THE RISE OF THE REPUBLIC OF THE UNITED STATES 413 n.1 (4th ed. 1886).
National crises and emergencies in the United States have, at times, meant that civil liberties were abandoned to preserve our national security. However innocent the initial retrenching of these liberties may have been, the lessons of history demonstrate what happens when constitutional freedoms are lost. In each century, a President has taken away our country's fundamental liberties. Thus far, the United States has been able to survive these transgressions on its constitutional values. Nevertheless, are we destined to repeat the past as we move forward to the even greater challenges in this country's future?

Following a Democratic administration, a Republican President takes office. There is turmoil within the country's borders. The President, against the judgment of the Chief Justice of the United States Supreme Court, suspends the writ of habeas corpus throughout the land. At first this was to protect the national safety interest, but eventually it became a tool whereby people considered subversive or against national security were arrested and brought before a military tribunal. If this sounds startling, like the present day United States of America, it might surprise the reader to know that this

5. See id. at 218–24.
7. See ex parte Merryman, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487).
8. Habeas corpus is defined as "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." Black's Law Dictionary 715 (7th ed. 1999).
9. See Rehnquist, supra note 4, at 24–25. The initial suspension was just for Maryland because it was a "strategic location [that had a] substantial degree of secessionist sympathy in Baltimore, [a]king the city the Achilles' heel of the early efforts to bring federal troops to defend Washington." Id. at 18. The writ was eventually suspended throughout the United States in 1863. See Proclamation No. 7, 12 Stat. 734 (1863).
10. See Proclamation No. 7, 12 Stat. 734 (1863).
12. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 6 (1866); Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 244 (1863).
happened in the 1860s under President Abraham Lincoln. The target was anyone opposing the war effort, but what ended up happening was "13,000 arbitrary arrests." People were dragged from their beds in the middle of the night and interned in military confinement without judicial process. When Lincoln’s administration was criticized, First Amendment rights were trampled upon.

Fast forward to World War II: the year is 1941. President Franklin Roosevelt directs that the conduct of the Japanese within the United States is to be observed. This led the United States down a slippery-slope that evolved into curfews and eventually created the relocation camps, which, a year later, incarcerated loyal American citizens of Japanese descent.

With a new century came a new challenge—September 11, 2001—another day that will live in infamy in U.S. history. The Twin Towers of the World Trade Center were destroyed by terrorists using jetliners as weapons. The national security was again being threatened by those within our borders. In response, the United States Congress enacted the USA PATRIOT Act. Subsequent to that Act, the Attorney General of the United States, John Ashcroft, announced the National Security Entry-Exit Registration System. This new program would more closely monitor aliens within U.S. borders from certain unnamed countries. The major newspapers reported that the people that were to be monitored would be primarily Muslims. However, the Justice Department would not state that outright.

13. See REHNQUIST, supra note 4, at 11–25.
14. General Order No. 38 stated, "[t]he habit of declaring sympathies for the enemy will no longer be tolerated in this department. Persons committing such offenses will be at once arrested." Writ of Liberty, supra note 11.
16. See ex parte Merryman, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487).
17. See REHNQUIST, supra note 4, at 221.
21. "[A] date which will live in infamy" is the opening line of Franklin Roosevelt’s address to Congress on December 8, 1941, asking Congress to declare war on the Empire of Japan. President’s Address to a Joint Session of Congress, 87 CONG. REC. 9504 (1941).
24. Id.
Is history once again repeating itself? In each of the historical contexts there was an enemy that was well defined—the South in the Civil War and the Japanese in World War II. Each of these battles was won in a clear, concise manner, after which civil liberties were restored. In the current situation, there is not just one country we are fighting against. Will there ever be a clear victory? Our goal in the war on terrorism is aimed at “the disruption and . . . the defeat of the global terror network.” What will that mean in the long term to civil liberties in the United States? Aspects of the current Entry-Exit Registration System will be examined in a historical context with these questions in mind.

Part II will explore the Lincoln administration's battle with the United States Supreme Court, exploring whether the Court is really able to be the branch of government that comes to the rescue when civil liberties are trampled upon. Part III will explore what happens when national sentiment and political motivation get in the way of a government’s quest for national security. Finally, Part IV will bring together the historical elements and review the current national security situation in the United States and some of the actions being taken to see what dangers might lay in our path.

II. CONSTITUTIONAL LIBERTIES IN TIMES OF NATIONAL CRISSES, A HISTORICAL PERSPECTIVE

A. “King Lincoln” and “Conquering Peace”

“I must pronounce that the liberties of America cannot be unsafe, in the number of hands proposed by the federal Constitution. From what quarter can the danger proceed? . . . But where are the means to be found by the President . . . [but he] cannot possibly be [a] source[] of danger.”

—James Madison

26. See Ashcroft, supra note 23.
28. Rehnquist, supra note 4, at 66. The full quote from Clement Vallandigham was “a plea to citizens who valued their rights to exercise the franchise and hurl ‘King Lincoln’ from his throne.” Id. He was arrested shortly after making these remarks. Id.
29. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 19 (1866). “[T]o conquer a peace” is a quote from this Supreme Court case. Id. The full quote is: “During the war [the President’s] powers must be without limit, because, if defending, the means of offence may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view,—to conquer a peace.” Id. at 18–19.
James Madison, in the Federalist Papers, speaks to how protected he felt the United States Constitution would be, such that he could not conceive of how the liberties could be stripped away, especially by the President. However, he apparently never conceived of Lincoln and the Civil War. The Founding Fathers never anticipated that the sixteenth President would ignore civil liberties and do things his own way, even to the extent of ignoring the United States Supreme Court on these issues.

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." President Lincoln insisted that this clause in the Constitution, the only mention of habeas corpus, meant that he, as President, had the power to suspend it. He first suspended the writ of habeas corpus by Presidential Proclamation in 1862, even before Congress gave him the authority to do so, in the belief that it was within his power. This was a limited suspension designed primarily for the State of Maryland due to its strategic importance to Washington D.C. in the war effort.

He even went as far as to ignore United State Supreme Court Justice Taney’s admonition that “only Congress, and not the President, may suspend the privilege of the writ of habeas corpus,” and only a person who was enlisted in the military could be “subject to the Articles of War.” In Ex parte Merryman, a Maryland case over which Justice Taney presided, “[t]he petitioner... while peaceably in his own house, with his family... at two o’clock [a.m.]” had an “armed force” enter his home “professing to act under

31. See id.
32. See REHNQUIST, supra note 4, at 38.
34. Writ of Liberty, supra note 11.
35. REHNQUIST, supra note 4, at 38. Justice Rehnquist is speaking of President Lincoln’s Fourth of July message to a special session of Congress. Id.
36. Proclamation No. 1, 12 Stat. 730 (1862). Lincoln wrote, in a letter to the Commanding General of the Army of the United States, that if he found “resistance which renders it necessary to suspend the writ of habeas corpus” that he granted him the power to do so. REHNQUIST, supra note 4, at 25. The Presidential Proclamation of September 24, 1862 stated: That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court-martial or military commission.
Proclamation No. 1, 12 Stat. 730, 730 (1862).
37. REHNQUIST, supra note 4, at 18.
38. Id. at 36 (speaking about Justice Taney’s remarks in his Merryman opinion).
military orders. He was arrested and imprisoned at Fort McHenry. When the writ of habeas corpus was issued to:

examine into the legality of the imprisonment, the answer of the officer [was] that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

Lincoln, in a speech to Congress, also seemed to ignore Justice Taney and his holding in *Merryman* and proceeded with the implementation of his policy.

Congress, supporting the President’s position during the war, passed the Habeas Corpus Act of 1863 in order to give merit to the administration’s actions. The President then expanded the suspension of the writ in 1863 to cover the entire United States. Now that he had the authority he used his

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40. *Id.*
41. *Id.* at 148.
42. See REHNQUIST, *supra* note 4, at 38; *Merryman*, 17 F. Cas. at 153. *Merryman* provided:

It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to “take care that the laws be faithfully executed,” to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

*Merryman*, 17 F. Cas. at 153 (quoting U.S. CONST. art. II, § 3).

43. Act of March 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. The statute reads:

That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue.

*Id.*

44. Proclamation No. 7, 12 Stat. 734, 734–35 (1863). Presidential Proclamation No. 7 states:

Now, therefore, I, ABRAHAM LINCOLN, President of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the writ of habeas corpus is suspended throughout the United States in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion, or until this proclamation.

https://nsuworks.nova.edu/nlr/vol30/iss2/1
proclamation to put the courts and citizens of the United States on notice that no further challenges will be tolerated with the language, "I do hereby require all magistrates . . . to take distinct notice of this suspension, and to give it full effect, and all citizens . . . to conduct and govern themselves accordingly." 45

1. A General and the Power to Decide Who Deserved the Writ

While President Lincoln may have felt justified in his action in the suspension of the civil liberties, his men were starting to take advantage of the power that it gave them, which would inevitably embarrass their commander-in-chief. 46 General Ambrose Burnside, in command of Ohio's military district, was one of those men. 47 He issued General Order No. 38, which did not allow for "'sympathies for those in arms against the Government of the United States, declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its effort to suppress the unlawful rebellion.'" 48 Clement L. Vallandigham would be one of the first citizens to experience the restraint on his civil liberties. 49 "Vallandigham appeared at a Democratic rally" and Burnside sent observers to take notes. 50 Vallandigham called the General's Order No. 38 "a usurpation of arbitrary power," 51 and finished his lengthy speech with a call to "hurl 'King Lincoln' from his throne." 52 Burnside was not pleased with these remarks and set in motion Vallandigham's silencing by having him arrested. 53 With sixty-seven men, they broke through the door of his home and sent him by specially commandeered train to a military prison near Cincinnati. 54 His charges indicated that he was "'declaring disloyal sentiments and opinions,

45. Id.
46. See Writ of Liberty, supra note 11.
47. See id.; REHNQUIST supra note 4, at 63.
48. REHNQUIST supra note 4, at 66 (citation omitted); accord ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 244 (1863).
49. See Vallandigham, 68 U.S. (1 Wall.) at 244.
50. REHNQUIST, supra note 4, at 65.
51. Id.
52. Id. at 66.
53. See id.
54. Id.
with the object and purpose of weakening the power of the Government in its effort to suppress the unlawful rebellion."55 The charges indicated that he had declared that "the present war is a wicked, cruel and unnecessary war, one not waged for the preservation of the Union."56 The First Amendment to the Constitution was of little concern to the administration of this era57 and "the government sought to suppress public criticism of the administration’s war effort."58 This was a time in U.S. history when newspapers and the very presses on which they were printed were seized if they spoke out against the government’s policies.59

Vallandigham’s petition for certiorari was denied by the Court.60 However, Lincoln would not sign the order suspending Vallandigham’s writ of habeas corpus,61 as it seemed that the President knew little of what was going on in the case other than what he “read in the newspapers” and the “vague response” he received from his inquiries.62 The President’s cabinet discussed the case in a subsequent meeting and “[m]ost members seemed to agree with the assessment of [the] Secretary of the Navy . . . that Burnside’s summary action had been a mistake. But now that it had taken place, there was no way to back down.”63 This matter was an embarrassment to the President64 and he commuted the “sentence from imprisonment for the duration of the war to banishment ‘beyond the Union lines.’”65

2. A Peace Time Constitution

The United States Supreme Court refused to grant certiorari in the Vallandigham matter stating that they “had no jurisdiction to review the decision of the military commission.”66 “While the bloody Civil War raged on, the Supreme Court decided it was not the time to challenge the power of General Burnside or his commander-in-chief, Abraham Lincoln.”67 There were over

55. REHNQUIST, supra note 4, at 66 (citation omitted).
56. Id. (citation omitted).
57. See id. at 221.
58. Id.
59. Id.
60. Ex parte Vallandigham, 68 U.S. (1 Wall) 243, 254 (1863).
61. REHNQUIST, supra note 4, at 67.
62. Id.
63. Id.
64. Writ of Liberty, supra note 11.
65. REHNQUIST, supra note 4, at 67 (citation omitted).
66. Id. at 67–68 (citing ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 251–52 (1863)).
67. Writ of Liberty, supra note 11.
"13,000 arbitrary arrests" of "Northern citizens who opposed his policies" during the time the writ of habeas corpus remained suspended.

In 1864, under military orders, Lamdin P. Milligan, a U.S. Citizen, was arrested while at home and confined to a military prison. He was charged with: "[c]onspiracy against the Government;” “[a]ffording aid and comfort to rebels;” “[i]nciting insurrection;” “[d]isloyal practices;” and “[v]iolation of the laws of war.” He was found guilty and sentenced to have his life ended at the gallows.

In this case, decided after the conclusion of the Civil War, the United States Supreme Court indicated that "[d]uring the war [the President's] powers must be without limit, because, if defending, the means of offence may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view,—'to conquer a peace.'" The Court reasoned that the challenges of war are fast paced and the legislative process is slow to act, so the President needed some room to maneuver to meet these challenges.

The amendments to the United States Constitution provide for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation" and "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The United States government, in its argument in the Milligan case, called these amendments "peace provisions," which are silent during war time when the government's only concern is for the safety of its citizens.

The government called this concept the "supreme law." They further stated that "the Constitution takes it for granted that [the writ of habeas corpus] will be suspended . . . in time of war . . . when the public safety requires it."

68. Neely, supra note 15.
70. Neely, supra note 15.
71. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 6 (1866).
72. Id. (internal quotations omitted).
73. Id. at 7.
74. Id. at 18–19.
75. Id. (citing THE FEDERALIST No. 26 (Alexander Hamilton), No. 41 (James Madison)).
76. U.S. CONST. amend. IV.
77. U.S. CONST. amend. V.
79. Id.
80. Id. at 21.
Milligan’s attorney\textsuperscript{81} stated that, “[i]t is a question of the rights of the citizen in time of war.”\textsuperscript{82} The question he poses seems to reverberate two centuries later as the United States goes through its current terrorism crises.

Is it true, that the moment a declaration of war is made, the executive department of this government, without an act of Congress, becomes absolute master of our liberties and our lives? Are we, then, subject to martial rule, administered by the President upon his own sense of the exigency, with nobody to control him, and with every magistrate and every authority in the land subject to his will alone?\textsuperscript{83}

As it is stated in the United States Constitution, “‘[t]he privilege of the writ of \textit{habeas corpus} shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.’”\textsuperscript{84} The argument was that Lincoln did not have the power to suspend \textit{habeas corpus} because this privilege of suspension was contained in the first article of the Constitution—powers of the legislature—not in the section where the President derives his authority.\textsuperscript{85} The words of the government’s counsel\textsuperscript{86} are also words that ring true in the United States after September 11, 2001:

the facts are unprecedented; because the war out of which they grew is unprecedented also; . . . because the necessity which called forth this exertion of the reserved powers of the government is unprecedented, as well as all the rest. . . . [W]e shall have set precedents how a nation may preserve itself from self-destruction.\textsuperscript{87}

\textsuperscript{81} Mr. David Dudley Field was one of the attorneys for the petitioner who presented the case to the United States Supreme Court. \textit{Id.} at 22.

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Milligan}, 71 U.S. (4 Wall.) at 22; see also Proclamation No. 7, 12 Stat. 734, 734–35 (1863). In the Proclamation, Lincoln makes it clear that it is his authority that must be obeyed and that the courts should “take distinct notice” of his suspension of \textit{habeas corpus} and “give it full effect.” \textit{Id.} at 734. This was proclaimed after Congress gave him full authority in such matters earlier in that year, 1863. See Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755.

\textsuperscript{84} \textit{Milligan}, 71 U.S. (4 Wall.) at 40 (quoting U.S. CONST. art. I, § 9, cl. 2). This is the only mention of habeas corpus in the United States Constitution. \textit{Writ of Liberty, supra} note 11; see generally U.S. CONST.

\textsuperscript{85} \textit{Milligan}, 71 U.S. (4 Wall.) at 41–42.

\textsuperscript{86} Mr. Butler gave the reply for the United States. \textit{Id.} at 84.

\textsuperscript{87} \textit{Id.} at 88.
"The [war] power is tremendous. It is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, property, and life."\textsuperscript{88}

After weighing the arguments presented, the Court issued its opinion.\textsuperscript{89} The Supreme Court noted that the framers of our constitutional liberty foresaw that a time would arrive when our nation’s leaders, in times of trouble, might conclude that the ends justified the means in abating the unrest.\textsuperscript{90} They realized that one day constitutional liberties might be put “in peril, unless established by irrepealable law.”\textsuperscript{91} The Court held that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”\textsuperscript{92} The Court ruled that Milligan, who was a private citizen, should not have been tried by a military tribunal even during the war because the courts in his state were open and able to handle such matters.\textsuperscript{93} The Constitutional guarantees could have been preserved and the same result would have followed if he was arrested and tried before the courts in his home state.\textsuperscript{94}

Martial law gave the commander of the armed forces “the power . . . to suspend all civil rights and their remedies, and subject citizens . . . to the rule of his will”\textsuperscript{95} without due restraint, thus “substitut[ing] military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.”\textsuperscript{96} The Court was concerned that this would be the “end of liberty regulated by law,” “destroy[] every guarantee of the Constitution,” and “render[] the ‘military independent of and superior to the civil power’ . . . .”\textsuperscript{97}

The Supreme Court was not totally without sympathy for the great task of keeping the peace that befell the federal government. They allowed for occasions in which martial law could be implemented.\textsuperscript{98}

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, . . .

\begin{itemize}
\item \textsuperscript{88} Id. at 104 (internal quotations omitted).
\item \textsuperscript{89} See id. at 107–31.
\item \textsuperscript{90} Milligan, 71 U.S. (4 Wall.) at 120.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id. at 120–21 (emphasis added).
\item \textsuperscript{93} Id. at 121–22.
\item \textsuperscript{94} Id. at 122.
\item \textsuperscript{95} Milligan, 71 U.S. (4 Wall.) at 124.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id. (citation omitted).
\item \textsuperscript{98} See id. at 127.
\end{itemize}
there is a necessity to furnish a substitute for the civil authority . . . to preserve the safety of the army and society; and . . . it is allowed to govern by martial rule until the laws can have their free course. 99

However, the Court was insistent that there must be an actual invasion, not a “threatened invasion” and “[m]artial rule can never exist where the courts are open, and . . . in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be ‘mere lawless violence.’” 100 Milligan “clearly limited the powers of the President and Congress in time of war.” 101 However, Lincoln may have thought that the ends justified the means when he asked rhetorically, “[a]re all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?” 102 This is a justification that any President could use to eliminate some aspect of our civil liberties. Isn’t this same justification being used today? 103

B. Roosevelt, the 1940s, and the Alien Enemies 104

“The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.” 105

—James Madison

The current Entry-Exit program has the United States government keeping close tabs on all non-resident aliens within its borders. 106 That sounds innocent enough—a country wanting to protect itself from within. However, isn’t that how it began in 1941 with President Roosevelt’s orders to keep tabs on all Japanese over the age of fourteen? 107 As we have already seen, the
Supreme Court, almost one hundred years prior to World War II, put stringent guidelines on when and how martial law could be imposed. It has been said that ""[i]t is devoutly to be hoped that the decision of the Court may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will be necessarily disregarded.""

It began innocently enough after the December 7, 1941 attack on Pearl Harbor by the Japanese Imperial Forces. Franklin D. Roosevelt, issued a Presidential Proclamation entitled ""Alien Enemies—Japanese." Under 50 U.S.C. §§ 21-24, which he relied on for his authority, the President directed that the conduct to be observed on the part of the United States toward all natives, citizens, denizens or subjects of the Empire of Japan being of the age of fourteen years and upwards who shall be within the United States or within any territories in any way subject to the jurisdiction of the United States and not actually naturalized, who...are termed alien enemies...

The President wanted to keep track of possible enemy activity within our country's borders. How then did the United States go from a sincere effort to observe possible enemies to forcing Japanese-Americans from their homes into ""concentration camp[s]?""

1. Moods and Attitudes

It is difficult to understand why history unfolded in the manner which it did without having an understanding of American society at the time. The day after the attack on Pearl Harbor, the United States declared war on Japan. By March 1942, Lieutenant General DeWitt was in command of the

108. See generally ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that if civil courts are still operating during wartime, military tribunals may not try civilians).
110. President's Address to a Joint Session of Congress, 87 CONG. REC. 9504 (1941). President Roosevelt addressed a joint meeting of the two Houses of Congress. Id.
112. Id.
113. Id.
114. Korematsu v. United States, 323 U.S. 214, 223 (1944); see generally Public Proclamation No. 4, 7 Fed. Reg. 2601, 2601 (Apr. 4, 1942); Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, 982 (Jan. 21, 1943). In Korematsu, there was disagreement among the Justices as to whether the term ""concentration camp"" should be used. Korematsu, 323 U.S. at 223.
states on the west coast of the United States in what had been designated the "Western Defense Command." There were racist overtones to what was beginning to happen to the Japanese population. This was also an era when federal laws prohibited naturalization of Japanese ex-patriots who wanted to become citizens. Laws forbade land ownership, intermarriage with Caucasians, and the Japanese were often "unable to secure professional or skilled employment except in association with" their former countrymen.

Special interest groups were involved in supporting the concept of mass evacuations. The *Saturday Evening Post* published an article entitled, "The People Nobody Wants." The article spoke about the special interest groups whose comments were less than subtle.

"We’re charged with wanting to get rid of the Japs for selfish reasons... We... If all the Japs were removed tomorrow, we’d never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don’t want them back when the war ends, either."

Popular media, such as movie serials, portrayed the Japanese as evil villains and portrayed those who defeated them as being good and heroic.


119. Hirabayashi, 320 U.S. at 96 n.4 (citation omitted).

120. Id. (citation omitted).

121. Id. (citation omitted).

122. *Korematsu*, 323 U.S. at 239 n.12 (Murphy, J., dissenting).


124. See id.

125. Id. (quoting Taylor, supra note 123, at 66).

126. E.g., *BATMAN* (Columbia Pictures Corp., Movie Serial 1943) (copy on file with author). In this movie, Batman and Robin battle the "evil Japanese, Dr. Daka." *Id.* The serial features background narration such as "since a wise government rounded up the shifty eyed Japs" and "Daka, the sinister Jap spy." *Id.* An interesting note is that Sony now owns the rights to this first Batman serial. Batman, http://www.batmantoysonline.com/articles/article41.html (last visited Mar. 5, 2006). As a Japanese company, they deleted these phrases during a re-release of the video series. *Id.* Additionally, one of this generation’s cultural icons, George Takei, who portrayed Mr. Sulu in the television series Star Trek was forced, as a child, to
While this was the popular sentiment, in the eleven months that it took to remove all of the "subversive" Japanese, "not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free." 127

[Yet the military] makes the amazing statement that as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage. 128

This quote comes from a report written by General DeWitt, the commander responsible for making the decisions about the way the Japanese were to be handled to protect the national security on the western-most coast of our country. 129

But why internment camps? Why not just let the Japanese move from the military zones into the interior of the country? The residents of these coastal areas were afraid of the Japanese living in their midst. 130 It was not the recommendation of the head of the Western Military Command but of "three California officials—the state's Governor and Attorney General, and the Mayor of Los Angeles—and the congressional delegations of the three west coast states." 131 Chief Justice Rehnquist 132 surmises that had the military not gone along with this plan and it had proved in hindsight to have been necessary then "their names will very likely [have been] 'Mudd' [for rejecting] a widely popular security measure." 133 That may answer the question of why the relocation program, but why internment?

Why take people from their homes and force entire families to live in a single room, black tar-papered barracks with nothing more than a potbellied

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127. Korematsu, 323 U.S. at 241 (Murphy, J., dissenting).
128. Id. at 241 n.15 (quoting J.L. DeWitt, Final Report: Japanese Evacuation from the West Coast 1942, at 34 (1943) [hereinafter Final Report]).
129. See Rehnquist, supra note 4, at 189.
130. Id. at 188.
131. Id. at 204.
133. Rehnquist, supra note 4, at 204.
stove for cooking? After all, "an Assembly Center was a euphemism for a prison [as no person . . . was permitted to leave except by Military Order."

Of the 112,000 Japanese forced to leave their homes for the internment camps, 70,000 were United States citizens, also known by the Japanese word "Nisei" meaning second generation. They were, in large part, "children and elderly men and women." The British government had investigated about 74,000 Germans and Austrians, and categorized them as either "real enemies" or a "friendly enemy." Our allies ended up holding only 10,000 "real enemies" of that entire number and accomplished this task in only six months. What prevented the United States military from moving the Japanese to the interior states, where security would not be an issue, and doing the same kind of sorting? This "was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration." This prevented the military from a "planned and orderly relocation" because without such supervision "there might have been a dangerously disorderly migration of unwanted people to unprepared communities." It was the Governors of those states that would not allow for an open relocation of primarily United States citizens because of the prejudices of their local constituents.

2. Military Authority

With the exception of Hawaii, the civilian government and courts maintained authority in the United States. However, not unlike the dramatic introduction to his article, the government empowered the military to make decisions as to how to promulgate Executive Orders. In this war, the three branches of government were working in unison in what amounted to the abridgment of civil liberties, conducted at the discretion of military com-

134. TAKEI, supra note 126, at 21, 23.
136. Id. at 242.
137. See REHNQUIST, supra note 4, at 188.
138. Korematsu, 323 U.S. at 242 (Murphy, J., dissenting).
139. Id. at 242 n.16 (citing Robert M.W. Kempner, The Enemy Alien Problem in the Present War, 34 AM. J. INT’L L. 443, 445–46 (1940); H.R. REP. No. 2124, at 280–81 (1942)).
140. Kempner, supra note 139, at 446.
141. Ex parte Endo, 323 U.S. 283, 295–96 (1944) (citation omitted).
142. Id. at 296–97.
143. See id. at 295–97.
144. See REHNQUIST, supra note 4, at 212.
manders. These decisions revolved around Presidential Executive Order 9066, issued for "the protection of our war resources against espionage and sabotage." The United States Supreme Court stated in *Hirabayashi v. United States* that the "[a]ppellant ha[d] been tried and convicted in the civil courts and ha[d] been subjected to penalties prescribed by Congress for the acts committed." This case is unlike *Milligan* in that there was "no question of martial law or trial by military tribunal." While Roosevelt wanted the military to be as reasonable as it could in the internment process, the people actually in charge of the operation thought that they had "carte blanche" from the President to conduct the operation. Roosevelt's Attorney General, Francis Biddle, reflected that he did not feel "that the Constitutional difficulty plagued [Roosevelt]. The Constitution has not greatly bothered any wartime President."

3. From *Hirabayashi* to *Endo*, the Court Comes Full Circle

"There was no physical brutality, but there were certainly severe hardships—physical removal from the place where one lived, often forced sale of houses and businesses, and harsh living conditions in the spartan quarters of the internment centers." This was the backdrop upon which the main cases of *Yasui v. United States*, *Hirabayashi*, *Korematsu*, and *Endo*—all of which involved American citizens—would take place.

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147. *Id.* at 102.
149. *Id.* at 92.
150. REHNQUIST, *supra* note 4, at 191 (quoting FRANCIS BIDDLE, IN BRIEF AUTHORITY 218 (1962)).
151. *Id.* at 190.
152. *Id.* at 191 (quoting BIDDLE, *supra* note 150, at 219).
153. *Id.* at 192.
155. See *Hirabayashi* v. United States, 320 U.S. 81, 84 (1943); *Yasui*, 320 U.S. at 116; *Korematsu* v. United States, 323 U.S. 214, 215 (1944); *Ex parte* Endo, 323 U.S. 283, 284 (1944).
Both Gordon Hirabayashi and Minoru Yasui were born in the United States to Issei parents. Hirabayashi was convicted of two charges, "disobey[ing] the curfew . . . [and] fail[ing] . . . to register for evacuation from the prescribed military area" when he did not show up at a Civil Control Station as scheduled. In Hirabayashi, the Court espoused the philosophy of "Inter arma silent leges: In time of war the laws are silent." There were two charges—internment and curfew, in that order—and the sentences were to run concurrently. The Court found that the second charge of violating the curfew was "without constitutional infirmity," thus totally sidestepping the more difficult question of whether reporting to a Civil Control Station meant that Hirabayashi would necessarily be confined in a relocation center. Yasui was another case of curfew violation which the Court upheld based on the ruling in Hirabayashi.

When the military decided that the curfew alone would not be an adequate measure, they began to exclude the Japanese from certain areas. In Korematsu, "the Court was required to confront . . . the far more draconian relocation requirement." The Court upheld Korematsu's exclusion and the conviction for violating Exclusion Order No. 34 by stating that he "was not excluded . . . because of hostility to him or his race." "He was excluded because we are at war with the Japanese Empire," and because the military authority decided that "the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily." The Court also noted that Congress gave the military the authority to do this. It was not until the Endo case that the Supreme Court began to look at the internment of

156. "Issei" is a Japanese term referring to first generation Japanese born in Japan, as opposed to "Nisei," which means second generation born in the United States. REHNQUIST, supra note 4, at 188.
157. Id. at 192.
158. Id.
159. Hirabayashi, 320 U.S. at 84.
160. See REHNQUIST, supra note 4, at 202.
162. Id. at 105; see REHNQUIST, supra note 4, at 198.
165. REHNQUIST, supra note 4, at 200.
168. Id.
169. Id.
loyal U.S. citizens, however, still choosing not to address the constitutional issues.\textsuperscript{170}

\textit{Ex parte Endo} was a case which came before the Supreme Court based on a writ of habeas corpus.\textsuperscript{171} Mitsuye Endo was an American of Japanese descent who had been detained by the War Relocation Authority.\textsuperscript{172} The government had no question as to her loyalty to the United States.\textsuperscript{173} However, the War Relocation Authority wanted her held for an additional period as “an essential step in the evacuation program.”\textsuperscript{174} It was already 1944 and “the United States’ military position was much more favorable... than it had been in the spring of 1942.”\textsuperscript{175} The Court no longer felt it needed to be silent.\textsuperscript{176} Endo was given her freedom.\textsuperscript{177} The Court held that Relocation Centers were not “part of the original program of evacuation but developed later to meet what seemed to the officials in charge to be mounting hostility to the evacuees on the part of the communities where they sought to go.”\textsuperscript{178} The Court further held that the authority to hold a person under these circumstances should end once the individual is shown to be a loyal citizen.\textsuperscript{179} Holding such a person because of public sentiment and hostility was not supported by the President’s Executive Order, which was created to protect our nation against disloyal saboteurs and fashioned to prevent espionage and sabotage.\textsuperscript{180}

4. The Disloyal Citizen

While the Court held that a loyal citizen could not be held by the military in the internment camps,\textsuperscript{181} it was a different matter for those who were

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{170} See \textit{ex parte Endo}, 323 U.S. 283, 302 (1944); see also REHNQUIST, supra note 4, at 201–02.
\item \textsuperscript{171} \textit{Endo}, 323 U.S. at 297.
\item \textsuperscript{172} Id. at 285.
\item \textsuperscript{173} Id. at 284–85.
\item \textsuperscript{174} Id. at 294. “It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty.” Id.
\item \textsuperscript{175} \textit{Endo}, 323 U.S. at 295.
\item \textsuperscript{176} REHNQUIST, supra note 4, at 202.
\item \textsuperscript{177} See id.
\item \textsuperscript{178} \textit{Endo}, 323 U.S. at 297.
\item \textsuperscript{179} Id. at 301.
\item \textsuperscript{180} Id. at 302.
\item \textsuperscript{181} Id. at 302–03 (citations omitted).
\item \textsuperscript{182} Id. at 302–04.
\end{itemize}
\end{footnotesize}
On the east coast of the United States, a group of German agents, one of whom professed American citizenship, came ashore, took off their German uniforms, changed into civilian clothes, and entered the country in a clandestine manner to sabotage the United States' war effort. The Court made the distinction between "[l]awful combatants [who] are subject to capture and detention as prisoners of war by opposing military forces [and] [u]nlawful combatants . . . [who] are subject to trial and punishment . . . for acts which render their belligerency unlawful." They found that:

an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

An enemy combatant, even one with United States citizenship, is not relieved of the consequences of his belligerency. Those "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."

In this case, there was a claim by the petitioners that they had not actually committed any anti-American activity. However, the Court held that "[t]he offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification."

These will become important issues when reviewing the current situation in the United States. Are the Muslim and Arab-Americans being treated more like the Japanese in World War II, or more like the enemy combatants of the same era?

183. See generally ex parte Quirin, 317 U.S. 1, 48 (1942) (upholding detention of German belligerents despite U.S. citizenship).
184. Id. at 20–21.
185. Id. at 31 (footnote omitted).
186. Id.
187. Id. at 37.
189. Id. at 38.
190. Id.
III. BEING A PATRIOT IN THE NEW MILLENNIUM

"Those who refuse to comply and are already in the country, if we discover them, we’ll be taking steps for them to be deported." 191

The foregoing historical perspective provided to demonstrate how far the United States has already gone in the abridgment of civil liberties and how it has recovered. The section that follows will speak to where this country is now and where it may be heading.

President George W. Bush has called for a review of the Posse Comitatus Act which limits the role that the military can have in domestic affairs. 192 The head of the Northern Command, a Four Star General, favors giving “greater domestic powers to the military to protect the country against terrorist strikes.” 193 However it is uncertain what new role the military might play if the Act, which was put in force after the Civil War, is repealed. 194 “Congress enacted the law in reaction to excesses by ... troops ....” 195 These perceived misuses were committed during “domestic law enforcement.” 196 Will modern era generals take the place of General Burnside 197 and General DeWitt in the abridgment of civil liberties in the fight for peace and freedom? 198

A. A War on Terror Versus a Declared War

In each of the aforementioned historical times—the Civil War and World War II—the United States was in a state of declared war. 199 The former Chief Justice of the United States Supreme Court, William Rehnquist, noted that “[w]ithout question the government’s authority to engage in con-

191. Ashcroft, supra note 23.
193. Id.
194. Id.
196. Id.
197. See Writ of Liberty, supra note 11.
198. See FINAL REPORT, supra note 128, at 34.
199. REHNQUIST, supra note 4, at 218. There was no actual declaration of war on the Southern Confederacy since it was not recognized by the Union as a separate nation. Id. However, the Court held that the “insurrection could be treated by the government as the equivalent of a declared war.” Id. (citing In re Prize Cases, 67 U.S. (2 Black) 635 (1862)).
duct that infringes [on] civil liberty is greatest in time of declared war."

Where does that leave the current war on terror? The United States is striking back against those who would cause terrorist acts within its borders. President Bush declared a national emergency and called up the ready reserve of the armed forces to active duty. However, there was no country to target, only individuals that the President determined planned and executed the terrorist actions against our country. Congress did not declare war, but only authorized the use of military force. This is the first notable difference between this time of unrest and those previously discussed. The United States then proceeded with its retaliation against Al Qaeda by bombarding Afghanistan. However, the United States needed to be protected from the inside, so the President, through an Executive Order, established the Office of Homeland Security. The primary functions of this newly created office are to be “responsible for administering such polic[ies] with respect to terrorist threats and attacks within the United States.” This office will be responsible for “detecting, preparing for, preventing, protecting against, responding to, and recovering from terrorist threats or attacks within the United States.” Prevention, as would be expected, is one of the key components of this effort. Since the terrorists who attacked the World Trade Center were from outside the United States—from Middle Eastern countries—there will also be careful scrutiny of immigration and visas.

200. Id.
204. See id. The Act provides:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.
205. See id.
206. See supra Part I.
209. Id. at 51,816.
210. Id. at 51,812.
211. Id. at 51,813.
civil liberties stand in the way of these investigative activities? Not according to section 3(k) of the Executive Order which indicates that if the legal authority to act is inadequate they will periodically review the matter and seek Presidential and legislative action to change the laws to accommodate the functions of this office.\footnote{Id. at 51,815.}

B. \textit{The USA PATRIOT Act and the Arab and Muslim in America}

The United States already has "relatively poor relations with the Muslim world,"\footnote{Adrien Katherine Wing, \textit{Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective}, 31 \textit{COLUM. HUM. RTS. L. REV.} 561, 581 (2000).} a kind of "Islamophobia."\footnote{Id. (citing Farhan Haq, \textit{Religion-Rights: UN Report Shows Mixed Picture on U.S. Muslims}, \textit{INTER PRESS SERVICE}, Mar. 18, 1999).} The USA PATRIOT Act goes to great lengths to reassure Arab and Muslim Americans that the United States does not see them as the enemy.\footnote{USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 102(a)-(b), 115 Stat. 272, 276-77.} In response to incidents of hate crimes that have taken place since September 11, 2001,\footnote{See Laurie Goodstein & Gustav Niebuhr, \textit{Attacks and Harassment of Arab-Americans Increase}, \textit{N.Y. TIMES}, Sept. 14, 2001, at A14.} the President has even gone so far as to visit a Mosque to show his support for Muslim and Arab-Americans.\footnote{Blaine Harden, \textit{Arab-Americans Are Finding New Tolerance Amid the Turmoil}, \textit{N.Y. TIMES}, Sept. 22, 2001, at B1.} He has stated in a political address that the people of the United States respect those of the Muslim faith.\footnote{Presidential Address, \textit{supra} note 27.} However, not unlike World War II and the reaction to the Japanese living in our country, this is a time when non-Muslim Americans are retaliating, with hate, in their own communities, and the targets are innocent Arab and Arab-looking individuals.\footnote{See Tamar Lewin & Gustav Niebuhr, \textit{Attacks and Harassment Continue on Middle Eastern People and Mosques}, \textit{N.Y. TIMES}, Sept. 18, 2001, at B5. The article lists a series of hate crimes in which a Sikh gas station owner was killed; a Lebanese clerk at another gas station was shot at; a Pakistani grocery store owner was gunned down; Mosques were being attacked, and the list goes on.} The fear is that "life is going to be miserable," for the Arab Ameri-
These criminal acts are admittedly the work of extremists and the United States government has worked hard to cast them in their proper light. However, there is an attitude that has developed in the United States which has caused us to give a second look at the Arab-looking person.

There is a fear that President Bush will follow the lead of Lincoln and Roosevelt in abrogating constitutional liberties. "Americans [seem] deeply conflicted about the balance between security and civil liberties..." The undercurrent seems to be about taking civil liberties from Middle Easterners. "[M]any Muslims... have felt like targets in a larger society where 'Arab' and 'Muslim' are often equated with 'terrorist.' Yet others are worried that people in power who have their own personal agendas could use this situation to take too many of our liberties away. To quote one Arab-American, "'[o]fficials come and say there's a distinction between terrorists and Islam... Publicly they say we are friends. But secretly they say, 'No, go behind them, tape them and spy on them.'"

It is little wonder that the Arab and Muslim American community is worried when Attorney General Ashcroft makes remarks like "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you." Having a person who has the power to certify that you are engaged in terrorist activities without showing evidence understandably makes the presumed targets of that scrutiny uneasy.

C. National Security Entry-Exit Registration System

The new Entry-Exit Registration System is becoming a reality. The system will have three prongs. The first is “fingerprinting and photographing at the border.” Next is “periodic registration of aliens who stay in the United States thirty days or more.” Finally, the implementation of “exit controls that will help the Immigration and Naturalization Service remove those aliens who overstay their visas.” The worry seems to come from the second part of the process since it would affect those law abiding residents already here legally. American Muslim groups do not like the plan because they feel that it will target Muslims and Arabs instead of terrorists, becoming a kind of modern day “witch-hunt.” Ashcroft would not, even with repeated questioning, state from which countries visitors would be fingerprinted. However, “other government officials said men 18 to 35 years of age from about 20 largely Muslim and Middle Eastern nations, including important allies like Saudi Arabia and Egypt, would make up the bulk of those who would be fingerprinted, photographed and required to fill out a long form.

Since this new system has been put in place without Congressional consultation, not everyone on Capitol Hill is pleased with the plan. Senator Edward Kennedy of Massachusetts stated that he was “deeply disappointed” by this new system and considered it a way of “target[ing] Muslim and Arab nationals.” He felt it would do little to protect against terrorist attacks and would “further stigmatize innocent Arab and Muslim visitors, students, and workers who have committed no crimes and pose no danger to us.”

233. See Ashcroft, supra note 23.
234. Id.
235. Id.
236. Id.
237. Id.
238. See Jerry Seper, New INS Policy Targets Middle Easterners, WASH. TIMES, June 6, 2002, at A01.
240. See Ashcroft, supra note 23.
242. Seper, supra note 238.
243. Id.
244. Id.
1. The New Face of Racial Profiling

A concise definition of racial profiling is a "law enforcement-initiated action based on an individual's race, ethnicity, or national origin rather than on the individual's behavior or on information identifying the individual as having engaged in criminal activity." However, the United States Court of Appeals for the Sixth Circuit has held that "when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator known to the officer include race."

When the United States government treats the entire Arab and Muslim communities as if they are terrorist suspects, they "don't create trust or cooperation. [They] create fear." Many writers point out that targeting people by their country of origin will be ineffective because Zacarias Moussaoui held a French passport and suspected shoe-bomber Richard Reid [held] a British passport. The question then becomes, if the threat can just as easily come from U.S. citizens and national origin is an unreliable factor, what possible means can we use other than physical appearance?

2. Power to Regulate Immigrants

The reason that there is no constitutional challenge to Ashcroft's plan is because "[t]he Supreme Court has stated that the power to regulate immigration is firmly in the hands of the political branches of the Federal Government." The question really is whether the power falls to the Attorney Gen-

245. United States v. Coleman, 162 F. Supp. 2d 582, 589 (N.D. Tex. 2001) (quoting TEX. CODE CRIM. PROC. ANN. art. 3.05 (Vernon 2005)).
247. Editorial, "Treating Visitors Like Enemies," ST. LOUIS POST-DISPATCH, June 14, 2002, at C18 (quoting David A. Harris, a visiting law professor at St. Louis University, and "an expert on racial-profiling").
248. Zacarias Moussaoui, a self-admitted member of al Qaeda, is suspected by the United States government of being the "26th hijacker" on Sept. 11, 2001. See Raymond Bonner & Douglas Frantz, "French Suspect Moussaoui in Post-9/11 Plot," N.Y. TIMES, July 28, 2002, at 22. He was kept off the plane when he was taken into custody for violating the terms of his visa. Id.
249. Lochhead, supra note 239; see also America's War Against Terrorism; New INS Mandate May Be More Divisive than Effective at Preventing Terrorism, MORNING CALL (Allentown, Pa.), June 7, 2002, at A18.
250. See Lochhead, supra note 239.
eral or the Congress? The answer is Congress. Therefore, the courts will not be much help in this matter.

But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws, and the requirement of Due Process may entail certain procedural observances. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.

The USA PATRIOT Act was created by Congress and signed into law by the President. As of that date, when the law became effective, the Attorney General was given the power to implement the Entry-Exit program, including fingerprint identification. When decisions are made, however, there is a clause which states that no court shall have, absent special circumstances, jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision. As with all laws, "[a]nyone who [is] truly dangerous is not going to show up to be registered." "This is targeting a group of people, the overwhelming majority of whom are innocent, but whose lives will be turned upside down . . . ."

3. McVeigh and Padilla—The United States Citizen Who Terrorizes

Terrorists are not just from outside of our borders; many are United States citizens. Timothy McVeigh blew up the Alfred P. Murrah Federal

253. Id. at 589 (majority opinion).
254. Id. at 597–98 (Frankfurter, J., concurring) (citations omitted).
257. USA PATRIOT Act § 405(a).
258. See USA PATRIOT Act § 412.
260. Id. (quoting James J. Zogby, President, Arab American Institute).
261. See Not All Terrorists Are from Mideast, THE ADVOCATE (Baton Rouge, La.), May 10, 2002, at 8B.
Building in Oklahoma City, causing 168 deaths. The bomb "destroyed 14 buildings, damaged 309 others and ... injured more than 500 people." He was caught and subsequently executed for his crimes. He was not the only one. There was "the Unabomber" who sent explosive letters through the mail. The mailbox bomber put pipe bombs in mailboxes throughout the Midwest. Finally, there was Jose Padilla who was arrested for planning a dirty bomb attack. Americans, one and all, yet not one of them would have had to pass through the new Entry-Exit system. There was no government ultimatum that all Americans should be fingerprinted and photographed, although there was talk of a type of national identification card through United States driver licenses. The plan would be a "back door" approach to do the same thing to the American citizenry as is being done to the foreigners entering our borders.

IV. CONCLUSION

In times of peace, the government is in a precarious balance of power between the judiciary, administrative, and legislative branches. However, in times of war all of that begins to break down. Our Constitutional guarantees no longer become ones that are for every citizen, but become ones that are for those that fall within the popular and political beliefs of the nation at the time of crisis. The Supreme Court has shown itself to be powerless if there is a strong President or if the President and Congress work in unison to abridge civil liberties.

Unlike previous wars where the North had to defeat the South or the unconditional surrender of Japan ended the need for worrying about the interned Japanese citizens, the United States has no clear cut foreseeable vic-


263. Id.


265. See Not All Terrorists are from Mideast, supra note 261.

266. Id.

267. See id.

268. See Stuart Taylor, Jr., GC Pay Weathers the Storm: Congress Must Set Rules for How We Lock up Potential Terrorists, LEGAL TIMES, July 22, 2002, at 44.

269. See Ashcroft, supra note 23.


271. See id.
tory in the war on terror. The civil liberties that are disappearing will probably disappear forever. Those within our borders who are from other countries have no choice but to turn themselves in for fingerprinting and photographing, not unlike an arrested criminal. But who will really come forward? The terrorist who wants to check in or the law abiding citizen who wants to follow the rules and live in our country peaceably? This is another instance where the government is intruding into the lives of the innocent in order to find the few that might be guilty. It is no different than the internment camps of World War II, seeking a few saboteurs among an otherwise loyal populace, except that the barbed wire has been replaced with fear of arrest without habeas corpus rights and deportation. As seen by the news of recent days, the popular sentiment is still not strongly sided with the Muslim and Arab community. Perhaps it is a fear of the unknown, both about their religious beliefs and about when and where the next attack might be perpetrated. The United States must learn from the past so that it does not become a totalitarian regime in the future. It is a dangerous path this country is on when it seeks to take away a group’s civil liberties to prevent future criminal events. That should be left to the stuff of fiction. 272

272. MINORITY REPORT (Twentieth Century Fox 2002). The film featured officers who would arrest people before a crime was committed or even thought of, in order to prevent it from ever taking place in the future. Id. This made for a peaceful society, free of violent crime. Id. Is this where we are heading?
THE CONSTITUTION AND POLITICAL COMPETITION

RICHARD H. PILDES

I. INTRODUCTION

Something has gone awry with American democracy. Since at least the start of this decade, the country has been closely and sharply divided when it comes to national elections and national policy. Yet at the very same time, more and more elections in the United States are becoming little more than formal rituals; they are affairs of acclimation rather than intensely competi-

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* Sudler Family Professor of Constitutional Law, New York University School of Law. Carnegie Scholar 2004-05. I would like to thank former Congressman and independent candidate for the Presidency in 1980, John Anderson, now a professor at Nova Law School, whose commitment to competitive democracy has been an inspiration to many.

+ This article is based on an amici curiae brief I co-authored with my colleagues, Professors Samuel Issacharoff and Burt Neuborne, and filed in the currently pending “Texas redistricting case,” League of United Latin American Citizens v. Perry. Brief of Samuel Issacharoff, Burt Neuborne, & Richard H. Pildes as Amici Curiae in Support of Appellants at 1, League of United Latin Am. Citizens v. Perry, Nos. 05-204, 05-254, 05-276, 05-439 (U.S. Aug. 11, 2005). I would like to personally thank Sam and Burt, best of colleagues, for their indulgence in permitting me to reproduce portions of that brief here. I also thank David Letterine-Kaufman for research assistance.
tive contests that force conflicts over policies and ideologies to the surface and give voters meaningful choice. This is true for certain national elections, such as for Congress, and for many elections to state institutions, such as state legislatures.

Consider the following striking fact: the post-redistricting elections in 2002 were the least competitive in American history.¹ Challengers managed to defeat only four congressional incumbents.² More than one-third of state congressional delegations did not change at all.³ There were 338 incumbents who won by more than a twenty-point margin, the generally accepted definition of a "landslide."⁴ There were only thirty-eight minimally competitive districts nationwide, using the generally accepted definition of less than a ten-point margin of victory (and even many of those districts were designed by commissions, not partisan legislatures).⁵ These figures reflect a dramatic decline from previous decades in competitiveness.⁶

The purpose of this essay is to offer a constitutional framework for identifying and rectifying the constitutional threat posed by the most pernicious cause that now contributes to the near elimination of competitive congressional elections: the design of election districts.⁷ In particular, the aim of this essay is to offer an alternative framework to the way litigants and the Court have previously thought about the constitutional issues concerning election-district design. In the past, litigants and the Court have relied primarily on the Equal Protection Clause to challenge and judge the structure of election districts, whether in the original malapportionment cases, the vote

². Id.
⁴. See tbl.1 infra p. 273.
⁵. See CONG. QUARTERLY'S STAFF, supra note 3. On the effects of commission rather than legislative redistricting, see infra pp. 275–76.
⁶. See tbl.1 infra p. 273.
dilution cases, or the racial-redistricting cases.\textsuperscript{8} This has led to continuing judicial struggle to define partisan "excessiveness" in districting, whether through the "consistent degradation" test of \textit{Davis v. Bandemer},\textsuperscript{9} or through the three different proposals of the dissenters in the recent \textit{Vieth v. Jubelirer}\textsuperscript{10} decision.\textsuperscript{11}

When it comes to the threat that non-competitive elections pose to legitimate representative self-government, then, the instinct of lawyers and judges will similarly be to turn to the Equal Protection Clause. This impulse is understandable. For over forty years, the Equal Protection Clause has served as the principal constitutional vehicle for intensive judicial involvement in protecting the right to vote and to run for office.\textsuperscript{12} The Supreme Court's insistence on rigorous compliance with principles of formal electoral equality has provided—and continues to provide—an essential foundation for American democracy.

In the last decade, however, it has become clear that formal political equality can co-exist with suppression of an essential element of democratic self-governance—competitive elections in which voters can hold their representatives electorally accountable. When a state legislature designs a congressional apportionment that satisfies the formal mathematical norms of "one-person one-vote," but intentionally dispenses with competitive elections in virtually every congressional district, the lens of formal equality no longer reveals the nature of the constitutional injury. Nor is that injury fully addressed in a search for a "fair" allocation of the political spoils between the political parties. Rather, the constitutional violation lies in the structural harm to representative self-government that results when state legislatures abuse their powers under the Elections Clause, Article I, Section 4, and deliberately suppress competitive elections in systematic fashion.

Such a structural harm to the fundamental mechanisms of representative self-government is a kind of harm that the Equal Protection Clause is not well designed to recognize, let alone remedy. My aim here is to provide an alternative, one tied more directly to the constitutional underpinnings for

\textsuperscript{9} 478 U.S. 109, 132 (1986) (plurality opinion).
\textsuperscript{10} 541 U.S. 267 (2004).
\textsuperscript{11} \textit{Id.} at 339 (Stevens, J., dissenting); \textit{Id.} at 346–53 (Souter, J., dissenting); \textit{Id.} at 362–67 (Breyer, J., dissenting).
state regulation of national elections. As the Supreme Court increasingly confronts these and related issues, as in the Texas mid-decade redistricting case before the Court this Term, the need for an appropriate framework for constitutional protection of the basic mechanism of representative self-government—the electoral accountability of officeholders to voters—is all the more urgent.

II. THE ASSAULT ON COMPETITIVE ELECTIONS

As noted above, congressional elections in the wake of the post-2000 redistricting were the least competitive in American history. No matter which way the question is framed—incumbents defeated, incumbents retired, incumbents victorious in a landslide—the 2002 elections were less competitive than after any redistricting in any decade since Baker v. Carr. Turnover, the percentage of new representatives, is at an all-time low. The following published Table provides the summary statistics:

Table 1. Comparison of the 2002 Election with Elections from 1972 to 2000

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Incumbents reelected</td>
<td>375</td>
<td>348</td>
<td>381</td>
</tr>
<tr>
<td>By &gt; 20 points</td>
<td>297</td>
<td>261</td>
<td>338</td>
</tr>
<tr>
<td>By &lt; 20 points</td>
<td>78</td>
<td>87</td>
<td>43</td>
</tr>
<tr>
<td>Incumbents defeated</td>
<td>21</td>
<td>35</td>
<td>16</td>
</tr>
<tr>
<td>In the primary</td>
<td>3</td>
<td>13</td>
<td>8</td>
</tr>
<tr>
<td>In the general</td>
<td>18</td>
<td>22</td>
<td>8</td>
</tr>
<tr>
<td>Incumbent retirements</td>
<td>37</td>
<td>48</td>
<td>35</td>
</tr>
<tr>
<td>New members</td>
<td>60</td>
<td>87</td>
<td>54</td>
</tr>
</tbody>
</table>

This lack of competitive elections for Congress contrasts notably with the greater competitiveness seen in Senatorial and Gubernatorial elections. While only one of eleven House elections was decided by less than ten percentage points, fully half of state governorships and Senate seats contested on the same day—in elections impervious to political gerrymandering—were instead competitive enough to be decided by less than this ten-point margin. As one of the leading political science analysts of congressional elections has

17. Id. at 183 tbl.1.
18. Challengers defeated only four incumbents in the 2002 election. Jacobson, supra note 1, at 10–11. An additional four incumbents lost seats due to diminution in the size of their States’ congressional delegations. Hirsch, supra note 16, at 183. They challenged other incumbents and lost. Id.
put it: "Redistricting was clearly one source of the loss of potentially competitive districts, especially after 2000."

The virtual elimination of competitive congressional elections has come about as a result of multiple causes. But of these causes, only one is subject to easy change, has little justification, and is capable of being reached through constitutional law: political gerrymandering of election districts. Over the last twenty years or so, state legislatures have learned to "perfect" two forms of gerrymandering. The first is the partisan gerrymander, such as the Texas plan before the Court this Term, in which a faction with transitory dominance draws district lines to maximize its party's political advantage at the expense of the minority party. The second kind is the "sweetheart," bipartisan gerrymander, in which the two major parties work as a cartel and risk-aversely agree to allocate political representation to protect as many

19. See Jacobson, Congressional Elections, supra note 15, at 8. In earlier work shortly after the 2002 elections, Jacobson attributed a strongly causal role to redistricting: "Redistricting patterns are a major reason for the dearth of competitive races in 2002 and help to explain why 2002 produced the smallest number of successful House challenges (four) of any general election in U.S. history." Jacobson, supra note 1, at 10-11.

20. The other potential contributing causes appear to be the greater consistency with which voters vote along party lines; the greater geographical concentration of voters by party affiliation independent of the way election districts are designed; and the increasing cost of elections, which disadvantages challengers. Of course these factors likely interact, also, in complex ways. Some have argued, for example, that the apparent greater polarization in voting patterns is an effect of safe districting, rather than a cause; faced with only the extreme partisan choices generated by non-competitive safe districts, voters, on this view, will appear to be more partisan in their voting behavior. See Morris P. Fiorina et al., Culture War? The Myth of a Polarized America (2005). In recently published work, some authors have suggested that redistricting practices have not played a significant role in the decline of competitive elections. Alan I. Abramowitz et al., Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections, 68 J. Pol. 75, 86 (2006). But other experts have convincingly pointed out serious methodological flaws that undermine this recent work; in particular, this study uses the three-way 1992 Presidential election, in which Ross Perot received 18.9% of the vote, as a baseline for assessing the 1992 congressional elections, while using the conventional two-party Presidential race in 1988 as a baseline for the 1990 elections. This greatly distorts the results; when the data are reanalyzed with less distorted baselines, they continue to show that redistricting has contributed to the decline of competitive congressional elections. See Michael McDonald, Re-Drawing the Line on District Competition, 39 PS: Pol. Sci. & Pol. 99 (2006); see also Michael McDonald, Drawing the Line on District Competition, 39 PS: Pol. Sci. & Pol. 91 (2006). Although Gary Jacobson, a leading analyst of congressional elections, earlier concluded that redistricting practices were "a major reason" for the decline in competitive elections, more recent, unpublished work by Jacobson concludes that increasing partisan consistency and polarization in voters' voting patterns in all elections, districted or not, contributes more than redistricting to the decline in competitive congressional elections. See supra note 19.
incumbents as possible.\textsuperscript{21} Common to each form is intentional state legislative action to minimize the risk of competitive elections or eliminate that risk altogether. These tactics have contributed to the decline in competitive congressional races.\textsuperscript{22} Even during the decades of gross malapportionment, disfranchisement, and a virtual Democratic Party monopoly on political power in the South, incumbents still lost 10-11\% of the time on average during, for example, the 1930s and 1940s—as compared to 1.8\% in the 2000s so far.\textsuperscript{23}

These results are even more troubling because the first election after the decennial census, reapportionment, and redistricting is historically the time when congressional elections are most competitive. When not intentionally manipulated to eliminate competitive elections, redistricting is historically the moment at which incumbents and prior political coalitions are most destabilized and elections therefore most open to new blood. As the data presented above show, with new incumbents settling into their seats in new districts, congressional elections typically become less and less competitive over the ensuing decade.

The impact of self-interested, anti-competitive gerrymandering on electoral accountability is also suggested by differences between the competitiveness of congressional districts that are drawn by courts or commissions and those that partisan state legislatures design.\textsuperscript{24} In 2002, the seventeen states using commissions or courts to draw congressional lines, 31\% of the commission-drawn districts were competitive enough to preclude a landslide, 23.3\% of the court-drawn districts were similarly competitive, but only 16.3\% of the legislatively-drawn districts were competitive enough to be won by less than a landslide.\textsuperscript{25} A decade earlier, the 1992 redistricting produced the same general pattern: Commission-drawn districts were the most competitive, court-drawn districts were less so, and legislatively drawn districts were the least competitive. The major difference between 1992 and

\begin{itemize}
  \item 21. Experts characterize California, New York, Illinois, and Ohio (with a combined total of 119 seats) as having adopted bipartisan gerrymanders in which nearly all seats were protected, though both California (Democratic) and Ohio (Republican) were nominally under unified party control. BARONE & COHEN, supra note 3, at 44.
  \item 22. See supra, note 20.
  \item 25. Id. at 456, 460 tbl.1. "A race is [defined here as] competitive if the winning candidate received less than 60 percent of the two-party vote in the general election." Id. at 460 tbl.1.
\end{itemize}
2002 was a decline of almost 50% by 2002 in the number of congressional districts not won by a landslide when legislatures controlled districting. Thus, these data further confirm the perverse "perfection" in recent years of the political insider's "art" of undermining competitive congressional elections.

The cost of these "designer districts," artificially manipulated to ensure non-competitive elections, is not just the loss of electoral accountability that is the defining element of representative self-government. Competitive elections also are essential to other tangible democratic and constitutional values. Thus, it is well documented that competitive elections encourage the appearance of strong challengers to incumbents and increase voter turnout and party mobilization. The two-party system itself is enhanced over the long run by competitive elections, for political parties that are overwhelmingly dominant in particular localities have no greater incentives than do lazy monopolists in economic markets.

Finally, the structural role of the House is to be the institution most immediately and directly responsive to shifts in popular political preferences. Elections every two years and minimal qualifications for office were designed for exactly this reason. That is why mid-term congressional elections have historically served, as designed, as a partial referendum on national policy in the long interval between Senatorial and Presidential terms. State legislative abuse of the Elections Clause power interferes with this intended structural role of the House. As a result of anti-competitive districting, the House is now perhaps the least responsive institution in the national government:

A national swing of five percent in voter opinion—a sea change in most elections—will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia that arrests the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion, and


thus frustrates change and creates undemocratic slippage between the people and their government.  

To ensure that all elections are competitive is, of course, impossible. A natural political advantage enjoyed by one or another political faction in a geographical area may render election outcomes a foregone conclusion. Nothing in the Constitution or in democratic political theory guarantees a perennial political minority anything other than a fair chance to persuade the political majority and continued enjoyment of equal treatment under law. But as evident from the design of 90% of congressional districts nationwide, a lethal combination of modern technology, partisanship, and incumbent self-dealing renders it possible for state legislatures to assure that nearly all congressional elections are non-competitive.

Challenges by the political parties to partisan gerrymandering have always been framed in terms of whether one party or the other has been so “discriminated” against in districting as to violate the Equal Protection Clause. The political parties dispute the distributional equity of one or another districting plan. But even as they do so, the undeniable fact of modern political life is the virtual disappearance of competitive congressional elections. None of the equal-protection arguments about the partisan implications of one or another districting plan captures the full insult to the constitutional commitment of electoral accountability that state legislative creation of overwhelmingly “safe” congressional districts entails. In California, for example, not a single challenger in the 2002 congressional general election received even 40% of the vote. Political actors facing such an absence of electoral competition well understand that the power to “choose” representatives in “elections” resides, not in “the People,” but in what the Court has elsewhere termed a “self-perpetuating body” of self-dealing insiders. One need look no further for proof than this unabashed admission regarding California redistricting by Representative Loretta Sanchez, in which she describes the role of redistricting czar Michael Berman, the leading consultant to the controlling Democratic Party in drawing the new district lines:

So Rep. Loretta Sanchez of Santa Ana said she and the rest of the Democratic congressional delegation went to Berman and made their own deal. Thirty of the 32 Democratic incumbents have paid Berman $20,000 each, she said, for an “incumbent-protection

plan." "Twenty thousand is nothing to keep your seat," Sanchez said. "I spend $2 million (campaigning) every election. If my colleagues are smart, they'll pay their $20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them." 32

No political actor seeking such a path to electoral sinecure has an incentive to bring before the courts the full constitutional harm that political gerrymandering of this sort imposes. Nor is the Equal Protection Clause, focused on alleged discrimination between the political parties, well designed to address the full constitutional harms at stake in the systematic, intentional elimination of electoral competition and accountability. The Elections Clause 33 grants the States enumerated powers to regulate national elections only for legitimate purposes. As Part III now seeks to show, judicial enforcement of the limits contained in the Elections Clause, particularly when read in conjunction with other constitutional provisions, best protects the structural constitutional values under assault by the systematic, intentional, and self-interested design of overwhelmingly "safe" election districts that make officeholders less accountable to voters.

III. CONSTITUTIONAL LIMITATIONS ON STATE MANIPULATION OF NATIONAL ELECTIONS

The Constitution contains at least three textual provisions that, properly understood, prohibit state legislative efforts to systematically design non-competitive congressional election districts and frustrate the Constitution’s essential requirement that members of Congress be electorally accountable to the voters.

First, the Elections Clause delegates power to state legislatures to establish only the "[t]imes, [p]laces and [m]anner" of congressional elections. 34 Just as Article I’s grant of enumerated powers to Congress necessarily limit the exercise of those powers to the reasons for which granted, the specific and limited delegation of power in the Elections Clause does not license state legislatures to eviscerate competitive congressional elections and undermine electoral accountability. Yet the systematic creation of overwhelmingly "safe" election districts on behalf of partisan allies does precisely that. In

34. Id.
terms of constitutional law, the question should not be simply whether, under the Equal Protection Clause, one of the major political parties has been unconstitutionally discriminated against in districting. The question should also be—indeed, perhaps the central question ought to be—whether state legislatures have the constitutional power intentionally and systematically to insulate congressional candidates and incumbents from contested elections. In my view, the Elections Clause should be understood to grant no such power.

This inherent limitation on state legislative authority over congressional elections is confirmed by two other constitutional provisions: Article I, Section 2, which requires that the People (not the state legislatures) choose the members of Congress, and the First Amendment, which guarantees freedom of speech, assembly, association, and petition. Together with the Elections Clause, these provisions combine to prevent state legislatures from manipulating congressional elections through the creation of overwhelmingly “safe” election districts. Under Article I, Sections 2 and 4, and the principle of representative self-government that motivates the First Amendment, the abuse of redistricting authority to turn congressional elections into empty rituals should be found unconstitutional.

I will develop each of these points in turn. But before doing so, it is helpful to keep a more general perspective in mind. The Supreme Court has long protected two of the three great structural pillars of the American political and constitutional system: federalism and separation of powers. In just the same way, the Court should protect the Constitution’s third great structural imperative—representative self-government through contested elections—from destruction at the hands of self-dealing political incumbents and their allies of both major parties. Moreover, as the last part of this essay will suggest, manageable judicial standards to do so exist.

A. The Elections Clause

The states’ power to design congressional districts derives exclusively from the specifically enumerated grant of power in the Elections Clause.

35. U.S. CONST. art. I, § 2; U.S. CONST. amend. I.
36. Id.
The states have no reserved or inherent powers over the regulation and design of congressional districts and elections.38

Just as the grant of enumerated powers in Article I to Congress limits the exercise of those powers to the scope and objectives for which granted,39 the constitutional grant of specifically enumerated power to the states over congressional districting limits the scope and aims for which those powers can be exercised.40 The Supreme Court has indicated many times the importance of ensuring that Congress' powers are limited to the scope and aims for which the Constitution specifically enumerates the grant of particular powers.41 In exactly the same way, the Court should continue to recognize that, when state legislatures exercise power pursuant to a specifically enumerated grant in Article I, this power is limited to the scope and aims for which the Constitution grants it.

In particular, state legislatures have no delegated power under Article I to design congressional districts for the purpose and effect of destroying the electoral accountability between representatives and citizens that is essential to representative democracy. The Elections Clause does not grant states the power to regulate congressional elections with the aim and effect of artificially insulating members of Congress from electoral competition through state creation of overwhelmingly "safe," non-competitive congressional election districts. As the Court noted in United States Term Limits, Inc. v. Thornton, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."42

40. See Cook, 531 U.S. at 523. "[T]he States may regulate the incidents of [congressional] elections, including ballotsing, only within the exclusive delegation of power under the Elections Clause." Id.
42. United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995). See also Smiley v. Holm, 285 U.S. 355, 366 (1932) (noting that the Elections Clause grants states the power to regulate national elections "as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right [to vote] involved").
The Elections Clause, like the Qualifications Clauses at issue in Term Limits, does not empower the states (or Congress) to design congressional districts in a way that "would lead to a self-perpetuating body to the detriment of the new Republic." At the Constitutional Convention, James Madison noted the risk of leaving unfettered power in the hands of potentially self-interested political actors to regulate elections: "A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." The Court has constrained the ability of political bodies to manipulate electoral outcomes through gerrymandering voting ("the number authorised to elect") and vote-counting rules. But artificially non-competitive election districts are now the most direct and devastatingly effective means of creating a "self-perpetuating body" in the House, in light of modern election-behavior data bases and sophisticated computer technology. The manipulation of district design to ensure artificially that one party or the other's congressional candidates face no meaningful competition on general election day is neither a necessary nor a proper exercise of the specific power delegated to the state legislatures in the Elections Clause.

The Court and individual members of the Court have recognized that numerous provisions of the Constitution were specifically designed to protect against even the risk of self-interested manipulation of the election process by those in power. That those temporarily in office will seek to leverage their power over election-rule design into more enduring power for themselves and their allies is eminently predictable. As Justice Scalia has noted, "[t]he first instinct of power is the retention of power." Similarly, Justice Thomas has observed that the structure of the Census and Apportionment Clauses reflected the Framers' realization that the danger of self-interested

43. Term Limits, 514 U.S. at 793 n.10.
44. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 250 (Max Farrand ed., 1911).
45. Id.
47. For recent scholarship also addressed to the limitations the Elections Clause imposes on state legislative regulation of national elections, see Jamal Greene, Note, Judging Partisan Gerrymanders Under the Elections Clause, 114 YALE L.J. 1021 (2005), and Note, A New Map: Partisan Gerrymandering as a Federalism Injury, 117 HARV. L. REV. 1196 (2004) [hereinafter A New Map].
political manipulation of the census and apportionment required that the Constitution create "a standard that would limit political chicanery."49

If numerous provisions of the Constitution are understood to guard against the risk of self-interested manipulation of the election process, surely the Elections Clause prohibits the actual, transparent, and even brazen self-interested manipulation involved in the willful creation of overwhelmingly "safe," non-competitive election districts that destroy electoral accountability. It is also odd that some of the Justices most attentive to the risk that "[t]he first instinct of power is the retention of power," such as Justices Scalia and Thomas, are among those Justices least inclined to find political gerrymandering claims justiciable.50 And unlike campaign finance regulation or statistical sampling under the Census Clause, there can be no dispute about the purpose and effects of the current redistricting—and now, mid-decade redistricting—processes I challenge here: Political insiders candidly admit that they intentionally design congressional districts to be overwhelmingly safe for partisan allies and incumbents. As the post-2002 redistricting elections demonstrate, these plans have contributed to achieving precisely that aim.

The Elections Clause does not empower state legislatures to artificially create overwhelmingly non-competitive congressional districting plans whose purpose and effect is overwhelmingly to insulate preferred candidates from electoral accountability.51 As noted above, not all districted elections can be made competitive. But just as there is a difference between natural and illegal economic monopolies, there is a difference between safe districts that arise naturally from following traditional districting principles in particular geographic areas and safe districts that arise because political insiders have grossly manipulated district designs for the purpose and effect of insulating preferred candidates from meaningful competition.52 The latter should not be understood to be a permissible justification for exercise of the limited,

50. McConnell, 540 U.S. at 263 (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part).
51. For recent scholarship also addressing the limitations the Elections Clause imposes on state legislative regulation of national elections, see Greene, supra note 47, and A New Map, supra note 47.
enumerated power delegated to state legislatures on behalf of the people of the United States under the Elections Clause. Judicial enforcement of the Elections Clause is necessary to enforce the structural commitment to representative self-government through competitive elections that enable voters to hold elected officials accountable.

B. Article I, Section 2 and the Fundamental Voting Right for the United States House

Article I, Section 2, of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Constitution thereby expressly recognizes an affirmative right of the People to choose their representatives through properly structured congressional elections. This is the only textual reference to "the People" in the body of the original Constitution and the only express, original textual right of the People to direct, unmediated political participation in choosing officials of the national government.

Whatever issues may still cloud the justiciability of partisan vote dilution claims under the Equal Protection Clause, the Court has recognized for many decades its power to enforce strictly the guarantees to the People under Article 1, Section 2. In Wesberry v. Sanders, the Court rejected any justiciability claim that:

would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction . . . . The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article 1.

The protections of Article I, Section 2, specifically designed to guarantee the integrity of national elections, are greater than those under the general provisions of the Equal Protection Clause. The Supreme Court reached this conclusion with specific reference to the redistricting process itself already.

55. Id. at 6–7 (citations omitted).
As the Court has recognized many times, Article I, Section 2, makes unconstitutional state electoral practices that obstruct the right of the People to "fair and effective representation" and "an equally effective voice" in the selection of representatives, as identified by Reynolds v. Sims.\(^{57}\) The importance of the voting rights of the People in congressional elections is highlighted by three cases whose significance for the Article I, Section 2 implications of non-competitive congressional districts has been underappreciated: Powell v. McCormack,\(^{58}\) U.S. Term Limits, Inc. v. Thornton, and Cook v. Gralike.\(^{59}\) Each overturned an effort to deny or improperly condition the ability of the People of a State to choose freely a congressional representative of their choice, either by congressional refusal to seat a disfavored representative,\(^{60}\) by state constitutional restriction on the ability to return a preferred candidate to office,\(^{61}\) or by imposition of conditions that compelled the attention of voters to predetermined issues.\(^{62}\) In each case, as expressed in Term Limits, the Court sought to "vindicate[] the same 'fundamental principle of our representative democracy' that we recognized in Powell, namely, that 'the people should choose whom they please to govern them.'"\(^{63}\)

These cases recognize two principles with direct bearing on the unconstitutionality of grossly manipulated "safe" elections. First, the Court reiterated the importance of the sovereignty of the people in selecting freely their own representatives; as expressed by Justice Kennedy, "[n]othing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives."\(^{64}\) Recalling the infamous Wilkes incident from Britain, in which Parliament attempted to usurp the power to decree proper representation, Powell turned to the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'"\(^{65}\)

Second, the Court identified a concern at the Founding that reposing the power to set the terms of congressional qualifications in the hands of incum-

\(^{60}\) Powell, 395 U.S. at 489.
\(^{61}\) U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 783.
\(^{63}\) Term Limits, 514 U.S. at 819 (quoting Powell, 395 U.S. at 547).
\(^{64}\) Id. at 842 (Kennedy, J., concurring).
bent officeholders would be a direct threat to the constitutional guarantee of voter sovereignty:

[In Powell,] we recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government. For example, we noted that “Robert Livingston... endorsed this same fundamental principle: ‘The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.’”

Whatever the right of the political parties not to be discriminated against in districting, a critical question of constitutional law ought to be whether the carving up of essentially uncontestable and uncompetitive spheres of influence is an impermissible effort, in purpose and effect, that threatens to “lead to a self-perpetuating body” as identified in Term Limits. The constitutional principle that meaningful electoral accountability depends on the competitive integrity of congressional elections is not captured through the narrow framework of impermissible partisan advantage previously presented to the Supreme Court in cases like Vieth and Bandemer. Article I, Section 2’s specific grant of an affirmative right of the People to demand the accountability of their Representatives itself requires protection against artificially manipulated, non-competitive elections. As expressed by Justice Kennedy, “freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office.”

The Constitution prohibits state legislatures from undermining the House’s essential structural role. Article I, Section 2 works hand-in-hand with the Elections Clause. The Elections Clause does not grant state legis-

66. Term Limits, 514 U.S. at 794–95 (omission in original) (quoting Powell, 395 U.S. at 541 n.76).
67. Id. at 793 n.10.
71. See Pildes I, supra note 7, at 55, 61.
lates the power to manipulate congressional elections for impermissible reasons. This limitation on the grant of power is necessary to protect the affirmative right “of the People” in Article I, Section 2, to choose their Representatives.

C. The First Amendment

In addition to the Article I concerns already addressed, the intentional evisceration of competitive congressional elections can also be understood to threaten or violate core principles of the First Amendment. Widespread anticompetitive gerrymanders do disrupt and damage the profound relationship—both substantive and textual—that the Supreme Court has recognized between self-government and the First Amendment. Although the Elections Clause and Art. I, Section 2 most directly address limits on manipulation of congressional districts, the best understanding of these provisions is buttressed by the First Amendment’s grounding in principles of democratic competition.

The Framers organized the six textual clauses of the First Amendment in an order that reflects the nature of democracy itself. These clauses move in disciplined order from a citizen’s conscience, to individual expression (speech), to mass expression (press), to political organization (assembly and association) and, finally, to interaction with elected officials (petition). Indeed, it is common ground that the First Amendment’s core purpose is the protection of the free flow of information needed to permit genuine electoral choice. When genuine electoral competition is systematically and intentionally subordinated to partisan and incumbent advantage, the damage to the First Amendment is serious.

Moreover, the clauses themselves describe the essence of self-government. The quintessential act of political expression is the casting of a ballot. The quintessential act of political association occurs in the relation-

73. See id.
74. See id.
75. See Pildes I, supra note 7, at 31–32.
77. This insight is attributable to my colleague, Burt Neuborne, who originally authored, for the brief noted above, these paragraphs on the First Amendment.
79. See U.S. Const. amend. I.
ship between a voter and a favored candidate. The quintessential act of assembly is the rallying to the polls on Election Day. The election itself is the modern analogue of the petition for redress of grievances. When statewide political gerrymanders—either partisan or bipartisan—intentionally and systematically turn congressional elections into a mere formality, the acts of voting, assembling, associating, and petitioning are reduced to hollow rituals. Under such circumstances, voters ratify political choices made for them by someone else, but do not exercise the generative political power that is the essence of representative self-government.

An obvious political gerrymander that systematically constructs islands of voters throughout a state in such a manner that competitive elections are virtually eliminated in every congressional district artificially destroys the core element of self-governance—competitive elections—and for no legitimate public purpose. It matters not that the apportionment respects formal equality. It matters not that the resulting political division of congressional representation is said, in some contexts, to be roughly equitable. What matters is that the state has treated voters, not as individuals, but as fungible political units whose democratic role is not self-governance, but the allocation of political spoils. 80

IV. JUDICIAL REMEDIES FOR STATE LEGISLATIVE ABUSE OF THE POWER TO REGULATE NATIONAL ELECTIONS

A. The Courts Should Recognize A Per Se Prohibition Against Mid-Decade Redistricting, Absent Judicial Order or Extraordinary Circumstance

Amidst all the pre-existing problems with politically self-interested manipulation of the design of election districts, this decade has added a new, "sudden shock to the ritual of redistricting politics." 81 For the first time in what appears to be at least the 20th century, state legislatures have begun to take multiple bites at the redistricting apple. 82 At least two states, as of the time of this article, have engaged in mid-decade "re-redistricting" of their congressional districts; 83 after the census and apportionment, these state leg-

82. See id. at 751–52.
83. Id.
islatures were gridlocked by partisan divisions, courts were forced to draw new districting plans for the decade, and then later in the decade, when the legislature had a new partisan configuration, the legislature created a new districting plan for what remained of the decade. State legislatures have also commenced mid-decade re-redistrictings for state legislative seats as well. With respect to Congress, the purpose of these "re-redistrictings" was, quite obviously, to bolster the partisan prospects of the state legislatures' partisan allies in the congressional battle for control of the United States House. In the most egregious case, a court drawn plan for Colorado's congressional districts, which reflected the state's entitlement to one new district after the Census, created one of the most competitive districts in the nation, which a Republican then won by 121 votes in the 2002 elections. When Republicans gained control of the state legislature, they then drastically re-drew the congressional districts, shifting large populations around in advance of the next election, in an effort to turn this competitive district into an overwhelmingly safe one for the Republican incumbent.

Whatever the United States Supreme Court's response to the inevitable abuses at the decennial reapportionment stage, the Court should recognize that the Elections Clause does not grant state legislatures the power to engage in mid-decade re-redistricting, absent judicial decision requiring it or extraordinary circumstances (such as Hurricane Katrina and the accompanying massive population shifts). I have no belief the Court will actually do so in the Texas case currently pending, however; the political-party challengers in the case have not pressed the issue of competitive elections, nor sought such a per se bar on mid-decade redistricting. But such a bright-line rule would enforce the limitations of the Elections Clause's grant of enumerated power and would reinforce the constitutional protection of electoral accountability and competitive elections. The risks that mid-decade districting will be used for purposes not within the scope of the Elections Clause, and the costs of mid-decade redistricting, are simply too substantial to tolerate.

The constitutional requirements of the decennial census and congressional reapportionment, combined with the constitutional requirement of one person, one vote, require the states once a decade to exercise their Article I

84. See Pildes I, supra note 7, at 62.
85. See id. at 61.
powers. When this power lies in the hands of partisan, self-interested incumbents (as in most states), it is predictable and inevitable that those insiders will seek to insulate their allies from electoral accountability, to pursue partisan advantage, or both.

The misuse of these Article I powers artificially to eliminate electoral accountability and create non-competitive districts, as noted above, should be unconstitutional, in principle, in any context. But whatever the Court’s response to abuses during the decennial redistricting process, the risk that mid-decade redistricting will be used to abuse the Elections Clause power mandates a discrete rule dealing with mid-decade redistricting. A bright-line, per se prohibition would forestall the risk of a spiral of retaliatory mid-decade redistrictings, as the political fortunes of the two parties ebb and flow throughout the decade across different states or as incumbents find themselves at electoral risk.

No constitutional compulsion—indeed, no legal compulsion of any sort—exists for state legislatures to engage in redistricting during the decade as partisan political prospects wax and wane in particular states. Indeed, nothing in our historical experience compels this extraordinary assumption of power by the state legislatures. In the Twentieth century, there had been no practice of mid-decade congressional redistricting before mid-decade redistricting efforts suddenly erupted this decade. Indeed, as one historical study of redistricting in the United States concluded, politicians have long understood that districting takes place once a decade, in response to a new census and reapportionment. As that study put it:

[T]here is no denying that when a new party gains a legislative majority in mid-decade it does not redistrict the state’s congressional delegation right away but waits until the next Census. This is another of the “rules of the game” in legislative life, for everyone wants to avoid violent seesaws in policy.

But the rules of the game have changed in recent years. Mid-decade redistricting has suddenly emerged as a new strategy in the partisan wars. The recent emergence of this practice results from a combination of: 1) closely balanced partisan control of the House; and 2) technological break-

88. U.S. CONST. art. I, § 2, cl. 3.
90. Id.
91. Pildes I, supra note 7, at 62.

https://nsuworks.nova.edu/nlr/vol30/iss2/1
throughs in election databases and computer technology that enable “perfecting” the self-interested creation of overwhelmingly safe districts. The partisan margin of power in the House has hung in the balance for a more sustained period than at any time over the past 100 years; when partisan control was last divided as closely, numerous state legislative schemes sprung up to manipulate congressional elections. National legislation and constitutional law now prohibit most of the offending historical practices, such as legislative manipulations of suffrage rules and vote fraud. But given the allure of political power, efforts to invent new practices not yet prohibited—such as mid-decade redistricting—will inevitably arise again when partisan control of the House is at stake.

In criticizing mid-decade redistricting, I do not mean to defend the constitutionality, the fairness, or the appropriateness of the prior legislative plans that preceded the recent mid-decade redistrictings in those states that have engaged in the practice thus far. However, as a matter of constitutional doctrine, a per se rule against mid-decade congressional redistricting, when not required by judicial decision or extraordinary circumstance, is the most appropriate judicial means to implement the guarantees and limitations of Article I and the First Amendment. The risk that such a power will be used for constitutionally impermissible purposes is obvious; the benefits of such power for legitimate purposes are undemonstrated, given the absence of a historical state practice of mid-decade redistricting; and, even assuming mid-decade redistricting might conceivably be used in some context for permissible purposes, the courts will find it difficult on a case-by-case basis to distinguish mid-decade redistricting that reflects constitutionally permissible versus impermissible purposes. To judge whether a prior plan was “fair,” or whether the new, mid-decade plan uses the purported unfairness of the prior plan to justify a new plan that is also “unfair,” would require the Supreme Court to re-visit the inquiries that divided it in Vieth. To judge the sole, dominant, or partial purpose of a particular mid-decade redistricting similarly requires difficult judicial determinations—and only invites political actors to disguise their purposes better the next time around.

These inquiries are difficult, to say the least, for courts. They are also politically charged in the context of redistricting, since the allocation of political power is at stake. For these reasons, courts would do better not to get mired in these kind of inquiries when an appropriate bright-line doctrinal rule is available. Instead, a per-se rule that the Elections Clause does not permit mid-decade redistricting is the most appropriate means to enforce the Elections Clause’s enumerated grant of limited power to state legislatures.  

A per se prohibition also reinforces the right incentives for political actors who control districting. Those actors likely to lose at the start of a new districting cycle have an incentive to paralyze the process, to game the outcome that might be reached, perhaps through a court-drawn plan, and then to revisit the plan if they dislike it and gain more legislative power over the decade. A per se rule makes clear that political actors must negotiate and compromise at the start of the decade, at the risk of otherwise losing control of the outcome. A per se rule also indirectly constrains partisan gerrymandering. Justice O’Connor suggested in Bandemer that “political gerrymandering is a self-limiting enterprise.” To an extent that remains so in the age of computer technology, it is because political actors must bind themselves to a redistricting plan at the start of the decade and live with the consequences until the next census. Mid-decade redistricting destroys that inherent, structural check.  

Moreover, were mid-decade redistricting to be permitted, the political parties would inevitably engage in retaliatory re-redistricting—particularly when partisan control of the House is closely divided. In the Dormant Commerce Clause context, the United States Supreme Court recognized long ago that the appropriate means to address discriminatory state commercial laws was not for states to enact retaliatory discriminatory laws of their own; instead, the Court declares such laws unconstitutional, lest a downward spiral of retaliation, in which national prosperity is drained, ensue. The Court

97. See C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (condemning “local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”) (citing THE FEDERALIST No. 22 (Alexander Hamilton); James Madison, Vices of the Political System of the United States, in 2 WRITINGS OF JAMES MADISON 361, 362–63 (Gaillard Hunt ed. 1901)).
should instead stop this cycle in its inception by recognizing that the Constitution does not authorize states to engage in mid-decade redistricting, at least absent judicial compulsion or extraordinary circumstance.

B. Judicial Standards Are Available for Future Decennial Redistricting

For contexts outside that of mid-decade redistricting, including more routine, decennial redistricting, the specific standards courts can employ to respond to the attempts of state legislatures to eliminate or diminish electoral accountability and competition cannot adequately be addressed here. Suffice it to say, a principal tool for legislative self-dealing in this context is running roughshod over traditional districting principles: the freewheeling parceling out of pieces of towns, cities, and counties into a number of different districts; the cavalier disregard of any obligation to keep districts reasonably compact; the use of wholly artificial means to purportedly keep districts "contiguous" in only the most nominal sense; and the use of increasingly refined partisan electoral data in the districting process.98 In earlier decades, respect for these principles imposed tacit constraints on the extent to which self-interested redistricters could manipulate district design to insulate preferred incumbents and candidates from political competition and electoral accountability. As with other tacit constraints, once these informal, generally accepted limitations on unmediated pursuit of political self-interest begin to break down, a race to the bottom quickly ensures the virtual elimination of these traditional constraints altogether. Mid-decade redistricting is but one example of the recent erosion of such long-understood constraints.

Most importantly, it is essential to recognize that judicial standards in this area need not take the form of bright-line rules, with necessary and sufficient doctrinal criteria of application fully specified in algorithmic-like form.99 Just as in other areas involving the Constitution's central structural commitments, certain aspects of gerrymandering's constitutional threat might lend themselves to bright-line judicial doctrine; others will not. In enforcing federalism and limits on enumerated national powers, for example, the Court has been able to craft bright-line rules in certain contexts.100 But for other contexts, the Court has candidly acknowledged that even the best formulated doctrine will inevitably leave "legal uncertainty" concerning the

99. See Pildes I, supra note 7, at 69–70.
doctrine's boundaries. Nonetheless, as the Court concluded in United States v. Lopez, "[a]ny possible benefit from eliminating this 'legal uncertainty'"—either through abandoning judicial enforcement or overly rigid judicial doctrine—"would be at the expense of the Constitution's system of enumerated powers." 102

Similarly, in enforcing the separation of powers, the Court has sometimes recognized violations that lend themselves to bright-line boundaries. 103 But for some of the most momentous issues, the Court has acknowledged that maintaining the proper constitutional balance between diffusing and integrating governmental power cannot be judicially enforced through highly determinate legal doctrine. 104 The structural foundations of the constitutional order, including the commitment to self-government through the electoral accountability of representatives, are too essential to be judicially unenforceable, but too complex always to yield to bright-line judicial doctrine. "The great ordinances of the Constitution do not establish and divide fields of black and white." 105

Judicial standards for enforcing the limits on the power delegated to state legislatures in the Elections Clause, and for enforcing the right of "the People" under Article I, Section 2, and the First Amendment to hold their representatives electorally accountable, 106 should be evaluated in this context, not against abstract ideals of doctrinal perfection neither available nor applied in enforcing the Constitution's other fundamental structural commitments.

V. CONCLUSION

Three structural ideas permeate the Constitution: separation of powers, federalism, and representative self-government. One of the institutional roles of the United States Supreme Court has been the forging of constitutional

101. United States v. Lopez, 514 U.S. 549, 566 (1995). "[A]s the branch whose distinctive duty it is to declare 'what the law is,' we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines." Id. at 579 (Kennedy, J., concurring) (citation omitted).
102. Id. at 566 (majority opinion); see also City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (employing "congruence" and "proportionality" standard).
103. See, e.g., Bowsher v. Synar, 478 U.S. 714, 722 (1986) (invalidating an "active role for Congress in the supervision of officers charged with the execution of the laws it enacts").
104. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.").
106. See U.S. CONST. art. 1, § 2; U.S. CONST. amend. 1.
doctrine preserving separation of powers\textsuperscript{107} and federalism\textsuperscript{108} in settings where leaving these commitments to the political branches cannot protect the relevant structural values. While the contested nature of separation of powers and federalism occasionally involve the Court in controversy, the Court has recognized that judicially-enforced constitutional law must provide a keystone for two of the Constitution’s three great structural arches.

The third structural arch and arguably the most important—representative self-government through periodic competitive elections, in which voters are able to hold their representatives accountable—similarly cannot be left to the political process itself. Mid-decade redistricting, absent judicial order or extraordinary circumstance, should be unconstitutional. Judicial standards should also be developed to limit state legislative abuse of the Elections Clause power in the more regular decennial redistricting context.


SECURING LIBERTY: TERRORIZING FOURTH AMENDMENT PROTECTIONS IN A POST 9/11 WORLD

DARA JEBROCK

I. INTRODUCTION

On September 11, 2001, nineteen men affiliated with the al Qaeda terrorist organization hijacked four commercial airliners. At approximately 8:46 a.m., American Airlines Flight 11, holding eighty-one passengers,
crashed into the North Tower of the World Trade Center.2 "[S]omething terrible is happening,"3 Stuart Meltzer declared while on the phone with his wife from the 105th floor of the building.4 This would be the last time the two would speak.5 All of the passengers onboard Flight 11, including an unknown number of people in the building, were killed.6

Approximately eighteen minutes later, United Airlines Flight 175, with fifty-six passengers on board, slammed into the South Tower of the World Trade Center.7 "'The place is filling with smoke,' a person [located] in [a] New York office was heard to say [just before the phone] connection was cut off."8 Consequently, all of the passengers on board Flight 75, along with an undetermined number of people in the building, were killed.9

It is "an 'apparent terrorist attack'" on our country,10 President Bush proclaimed just before American Airlines Flight 77, traveling at approximately 530 miles per hour, smashed into the Pentagon.11 All fifty-eight passengers on board Flight 77 were killed, in addition to 125 civilian and military personnel located in the building.12

At approximately 10:00 a.m., "Alice Hoglan's son, Mark, called her from United Airlines Flight 93" and told her that the plane had been "taken over."13 Shortly thereafter, the fourth plane holding thirty-seven passengers crashed into a rural field in southern Pennsylvania.14 The hijacker's objective was to crash the fourth airliner into either the Capitol Building or the White House, but a counterattack by the passengers of United Flight 93 defeated that goal.15 Unfortunately, all of the people on board the airliner were killed.16

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4. Id. (citation omitted).
5. See id. (citation omitted).
6. See EXECUTIVE SUMMARY, supra note 1, at 2.
7. Id. at 1; Chronology, supra note 2.
8. Veale, supra note 3 (citation omitted).
10. Id.
12. Chronology, supra note 2; see also COMM'N REP., supra note 11, at 10.
13. Veale, supra note 3 (citation omitted).
14. See EXECUTIVE SUMMARY, supra note 1, at 1; Chronology, supra note 2.
15. EXECUTIVE SUMMARY, supra note 1, at 1.
16. See id. at 1–2.
The deadly terrorist attacks of September 11, 2001 were unprecedented in America’s national history.\textsuperscript{17} There is no doubt that sophisticated technologies, especially internet communication, were essential to allow the planning and plotting of the attacks.\textsuperscript{18} As a result, President Bush, along with Congress, responded by enacting the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,\textsuperscript{19} generally known as the USA PATRIOT Act, in order to allow law enforcement and intelligence agencies greater authority in tracking and intercepting communications.\textsuperscript{20}

More specifically, the USA PATRIOT Act made a series of controversial amendments to the United States Code.\textsuperscript{21} In particular, this article focuses on 18 U.S.C. § 2709, which “authorizes the Federal Bureau of Investigation (FBI) to compel . . . internet service providers (ISPs) or telephone companies, to produce . . . customer records whenever the FBI certifies that those records are ‘relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.’”\textsuperscript{22} The FBI makes those demands by sending national security letters to the communication provider.\textsuperscript{23} Once the national security letter is formally issued, § 2709 bars the recipient from contesting the grounds for the letter and prohibits the recipient from notifying the customers that their personal information has been provided to the FBI.\textsuperscript{24} That means the provider is forced to turn over the requested records or else face criminal prosecution.\textsuperscript{25} Thus, this provision raises serious constitutional questions because § 2709, as amended, grants the FBI the extraordinary power to obtain records without obtaining a warrant\textsuperscript{26} supported by probable cause and judicial oversight as required by the Fourth Amendment.\textsuperscript{27}

\begin{footnotesize}
\begin{enumerate}
\item[18.] See President George W. Bush, Remarks by the President to Employees at the Federal Bureau of Investigation (Sept. 25, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010925-5.html; see also Orin S. Kerr, Internet Surveillance Law After the USA PATRIOT Act: The Big Brother that Isn’t, 97 Nw. U. L. Rev. 607, 636 (2003) (stating al Qaeda was known to favor internet technologies).
\item[22.] Ashcroft, 334 F. Supp. 2d at 474–75 (quoting 18 U.S.C. § 2709 (Supp. 2003)).
\item[23.] Id. at 475.
\item[24.] Id. (citing 18 U.S.C. § 2709(c) (2000)).
\item[25.] See § 2709.
\end{enumerate}
\end{footnotesize}
According to President Bush, the USA PATRIOT Act provision granting the FBI such vast power was necessary in allowing the government to enforce laws "with all the urgency of a nation at war." However, this article will demonstrate that expanding the FBI's power to conduct terrorism investigations abolishes important Fourth Amendment protections. Part II of this article will provide a historical overview of Fourth Amendment jurisprudence, while Part III will examine traditional Fourth Amendment protections in light of national security operations. Part IV will discuss the erosion of Fourth Amendment freedoms after 9/11 as a result of the technologies that allowed terrorists to evade law enforcement more easily. Part V will analyze the decision rendered in *Doe v. Ashcroft*, because the opinion describes how Fourth Amendment protections cannot be guaranteed within the sole discretion of the FBI and, in turn, without judicial approval. Part VI will provide recommendations to revise § 2709 in order to reduce Fourth Amendment implications. Lastly, part VII will conclude with a summary of this article.

II. HISTORY OF FOURTH AMENDMENT PROTECTIONS

The Fourth Amendment affords individuals with some of the most basic protections against government intrusion. In short, the Framers of the Constitution designed the Fourth Amendment as a way to break away from British policy, which allowed for the issuance of general warrants. Those types of warrants generally allowed officials to break into an individual's home, store, or other personal place and seize goods based on minimal suspicion of criminal activity. Since there were no requirements of probable cause and judicial oversight, the use of the general warrant was widely abused and caused significant intrusions into individuals' personal lives because once the warrant was obtained, there was no limit to what the official could search or obtain a warrant based on probable cause, supported by judicial authorization, particularly describing the place to be searched and the persons or things to be seized).

27. The Fourth Amendment guarantees:
   [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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.

U.S. CONST. amend. IV.


30. See U.S. CONST. amend. IV.


32. See id. at 693–94.
seize. Moreover, because there was no fact finder to determine whether the suspicion was justified, the official could easily lie to obtain a warrant.

However, the Framers' concern when drafting the Fourth Amendment was not the issuance of the warrant itself. The Framers' concern was the lack of procedural limitations placed on law enforcement's ability to invade an individual's privacy. As a result, the Fourth Amendment's warrant requirement, as examined below, was specifically written to protect individuals against unjustified police behavior.

A. The Warrant Requirement

Requiring a warrant to conduct a search or seizure was the Framers' way of protecting individuals from unwarranted government intrusions by limiting its ability to conduct investigations. One of the first cases decided concerning the scope of the warrant requirement was *Ex parte Jackson*. In *Jackson*, the United States Supreme Court clearly stated that searches and seizures of personal documents in a criminal investigation require a warrant. The Court held that:

[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. [Letters and sealed packages] can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.

Thus, under *Jackson*, a warrantless search and seizure of an individual's private property constitutes a violation of the Fourth Amendment.

Over time, the Court broadened the scope of Fourth Amendment protection to include searches and seizures involving entry into a person's home, as

33. See id. at 703-06.
34. See id. at 576-79.
35. Id. at 571-82.
36. See Davies, supra note 32, at 571.
37. See id. at 700-01.
38. See id. at 703-06.
39. 96 U.S. 727 (1877).
40. Id. at 733.
41. Id.
42. See id.; U.S. CONST. amend. IV
well as the curtilage surrounding the property. That augmentation was significant because it furthered the premise that individuals should be protected from unwarranted government intrusion not only in the privacy of their own home, but also in a limited, judicially-defined area surrounding their home. Moreover, in Camara v. Municipal Court, the Court then extended those principles to include routine administrative searches of a home. In Camara, the petitioner leased the ground floor of a building to use as his personal residence. The case arose when the petitioner did not allow an inspector of the Division of Housing to perform a routine administrative search of his home. As a result, the petitioner was charged with "refusing to permit a lawful inspection in violation" of a city ordinance. On appeal, the petitioner alleged that a search of private property is unreasonable unless it has been authorized by a search warrant. The Court agreed, holding that administrative searches authorized and conducted without a warrant are significant intrusions upon privacy interests protected by the Fourth Amendment. Thus, the Court reversed the conviction, reinforced the importance of the Fourth Amendment warrant requirement, and expanded the scope of this amendment's protections.

1. Probable Cause

The Fourth Amendment generally requires a showing of probable cause before law enforcement may obtain a warrant to conduct a search or seizure

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43. E.g., Hester v. United States, 265 U.S. 57, 59 (1924) (recognizing that Fourth Amendment protection extends not only to houses, but also to the area surrounding the residence, generally known as "curtilage"); United States v. Dunn, 480 U.S. 294, 296 (1987); Oliver v. United States, 466 U.S. 170, 180 (1984).
44. See Oliver, 466 U.S. at 180.
45. Camara, 387 U.S. at 523 (1967).
46. Id. at 534. In general, an administrative search is an inspection made by a government official in regards to municipal fire, health, and housing evaluation programs. BLACK'S LAW DICTIONARY 1378 (8th ed. 2004).
47. Camara, 387 U.S. at 526.
48. Id.
49. Id. at 527. This case dealt with section 503 of the Housing Code which permits: [a]uthorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.
50. See id. at 525.
51. Camara, 387 U.S. at 534.
52. See id. at 534, 546.
of property. Under the probable cause rule, law enforcement cannot search a person's home or seize private documents unless they have specific facts to believe that the subject of the search or seizure is connected with criminal activity. The purpose of that requirement is to lessen the possibility that law enforcement will commit perjury to create a reason for discovering incriminating evidence. For that reason, warrants lacking probable cause usually violate the Fourth Amendment.

2. Judicial Approval

In addition, the warrant requirement generally mandates that an independent judicial officer determine whether probable cause exists to conduct a search or seizure. In Johnson v. United States, the United States Supreme Court stated that a warrant can only be issued by a "neutral and detached magistrate." Writing for the majority, Justice Jackson reasoned that:

[The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably

53. Id.
55. See Camara, 387 U.S. at 528; Giordenello v. United States, 357 U.S. 480, 486 (1958); McDonald v. United States, 335 U.S. 451, 455 (1948).
58. 333 U.S. 10 (1948).
59. Id. at 14.
yield to the right of search is, as a rule, to be decided by a judicial
officer, not by a policeman or government enforcement agent.60

Moreover, the Court emphasized that the Fourth Amendment was designed
to prevent the depreciation of personal freedom, personal security, and prop-
erty interests because those rights "are to be regarded as of the very essence
of constitutional liberty."61 Accordingly, the Court recognized that allowing
law enforcement to seek personal information without judicial oversight vio-
lates the core principles of the Fourth Amendment.62

Subsequently, in Coolidge v. New Hampshire,63 the Court held that it is
unconstitutional under the Fourth Amendment for a government official to
issue a warrant, even if authorized to do so as a justice of the peace, when
that official is engaged in the criminal investigation.64 In Coolidge, police
got to the defendant's home to question him about a murder.65 Thereafter,
the police presented the results of their inquiry to the State Attorney General
because he was leading the murder investigation.66 After concluding there
was sufficient evidence to charge the defendant, the Attorney General, acting
as a justice of the peace,67 issued a warrant to search the defendant's prop-
erty.68 At trial, the defendant was convicted of murder based on evidence
obtained from the searches.69 The defendant appealed, alleging that such
evidence should not have been admitted at trial because it was obtained in
violation of the Fourth Amendment.70 The Court agreed, holding that a war-
tant issued by a government official involved in law enforcement activities
does not constitute a "neutral and detached magistrate" in accordance with
the warrant procedure of the Fourth Amendment.71

60. Id. at 13–14 (footnotes omitted).
61. Id. at 17 n.8 (quoting Gouled v. United States, 255 U.S. 298, 304 (1921)).
62. See id. at 17.
63. 403 U.S. 443 (1971).
64. Id. at 453.
65. Id. at 445.
66. Id. at 446–47.
67. "Under New Hampshire law in force at that time, all justices of the peace were au-
thorized to issue search warrants." Id. at 447.
68. Coolidge, 403 U.S. at 447.
69. See id. at 448.
70. Id. at 449.
71. Id.
B. From Property to Privacy

The invention of surveillance technologies provided law enforcement with the ability to surreptitiously observe and record an individual's private telephone conversations. The warrantless use of such technology to aid securing criminal convictions was challenged for the first time in *Olmstead v. United States.* In *Olmstead,* the defendants were convicted of conspiracy to violate the National Prohibition Act. Federal officers obtained the evidence that led to their conviction by inserting small wires along the ordinary wires of a telephone company which was connected to the defendants' residences. Using the taps on the telephone wires, federal officials surreptitiously listened to the defendants' conversations and took stenographic notes. As a result, federal officials procured evidence to indict and eventually convict the defendants of conspiracy. In 1928, the Supreme Court granted certiorari to determine whether the use of evidence obtained from wiretapping the defendants' private conversations constituted a violation of the Fourth Amendment. On a five-to-four vote, the Court held that the use of wiretapping to obtain evidence without a search warrant was not within the confines of the Fourth Amendment because there was no physical encroachment onto the defendants' property.

After *Olmstead,* the measure of Fourth Amendment protection was determined on a property-based analysis. However, in 1967, the Supreme Court redefined the Amendment's scope by recognizing "that the principal object of the Fourth Amendment is the protection of privacy rather than [the further protection of] property." In *Katz v. United States,* the Supreme Court held that the "Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," and that its reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." In *Katz,* the petitioner, a bookkeeper, was suspected of using a public telephone booth to conduct business transactions in violation...

72. See *Olmstead v. United States,* 277 U.S. 438, 455 (1928).
73. Id. at 438.
74. Id. at 455.
75. Id. at 456-57.
76. Id. at 457.
77. *Olmstead,* 277 U.S. at 455, 457.
78. Id. at 455.
79. Id. at 466.
82. Id. at 353.
of a federal statute. To confirm those suspicions, the FBI placed an electronic eavesdropping device on the outside of the telephone booth, which recorded the petitioner's conversations. As a result, the petitioner was charged and convicted of transmitting gambling information by telephone across state lines. On appeal, the petitioner alleged that the recordings had been obtained in violation of the Fourth Amendment. However, the Ninth Circuit Court of Appeals disagreed, holding that no violation occurred because the FBI agents did not physically enter the telephone booth.

In light of that ruling, the United States Supreme Court granted certiorari to consider whether electronic surveillance was subject to the Fourth Amendment prohibition against unreasonable searches and seizures. Writing for the majority, Justice Stewart declared that:

the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

For those reasons, the Court ruled that a violation of the Fourth Amendment occurs when FBI agents conduct electronic surveillance of an individual without presenting "their estimate of probable cause for detached scrutiny by a neutral magistrate," even when there is no interference with property. Consequently, the petitioner's conviction was reversed because he had not been provided with the procedural safeguards of the Fourth Amendment. Thus, the Court's decision is significant because it recognizes the importance of protecting Fourth Amendment liberties, especially when technological innovations threaten personal privacy.

83. Id. at 348. 18 U.S.C. § 1084 made it a crime to "knowingly [use] a wire communication facility for the transmission in interstate . . . commerce of bets or wagers . . . on any sporting event or contest, . . . which entitles the recipient to receive money or credit as a result of bets or wagers." Id. at 348 n.1 (citation omitted).
84. Id. at 348.
86. Id. at 348-49.
87. Id. at 349.
88. Id. at 349-50.
89. Id. at 351-52 (citations omitted).
91. Id. at 359.
92. See id. at 349-53.
III. NATIONAL SECURITY AS A POTENTIAL EXCEPTION

In *Katz*, the majority declined to consider whether national security investigations should be exempt from the Fourth Amendment warrant requirement. 93 However, Justice White noted in his concurring opinion that the warrant requirement and the objective judgment of a magistrate would be unnecessary "if the President of the United States or his chief legal officer, the Attorney General," authorized electronic surveillance in national security situations. 94

Alternatively, Justice Douglas in his concurring opinion proclaimed that:

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. 95

In his conclusion, Justice Douglas acknowledged that throughout history the Fourth Amendment has never been construed to distinguish between different types of crimes. 96 Thus, those opinions suggest that there are constitutional limitations on the government's ability to obtain intelligence information even in the name of national security.

A. National Security in Domestic Affairs

Following *Katz*, courts had difficulty determining whether there is in fact a national security exception to the Fourth Amendment warrant requirement. 97 For example, in *United States v. Smith*, the defendant was found guilty of violating a federal statute and sentenced to two years in prison. 98 The defendant appealed his conviction and while "pending, the government

93. *Id.* at 358 n.23.
94. *Id.* at 364 (White, J., concurring).
96. *Id.* at 360.
98. *Id.* at 424.
disclosed to the Court of Appeals that it" monitored the defendant’s conver-
sations by electronic surveillance to gather information regarding a national
security investigation.99 Accordingly, the Court of Appeals remanded the
case to the United States District Court of the Central District of California to
consider whether it was constitutional under the Fourth Amendment for the
government to conduct warrantless electronic surveillance without judicial
approval, even though such surveillance had been authorized by the Attorney
General for national security purposes.100 At the proceeding, the government
argued that although a warrant was not obtained prior to conducting the sur-
veillance, it was constitutional because it had been expressly authorized by
the Attorney General to gather information necessary to protect the nation.101
More specifically, that the surveillance was reasonable because “the Presi-
dent, acting through the Attorney General, has the inherent constitutional
power” to authorize electronic surveillance without a judicially approved
warrant in national security cases and to unilaterally determine whether a
situation constitutes a national security matter.102 However, the district court
disagreed, holding that in domestic situations there is no national security
exception to the Fourth Amendment warrant requirement.103 Moreover, “the
President is . . . subject to the constitutional limitations imposed upon him by
the Fourth Amendment,”104 which means that he cannot judicially determine
the restrictions on his power to protect the security of the nation.105 The
court reasoned that the Constitution was drafted “to strike a balance between
the protection of political freedom and the protection of the national security

99. Id.
100. Id. at 424, 426.
101. Id. at 426. To support its argument, the government relied on the Omnibus Crime
Control and Safe Streets Act of 1968, which stated in relevant part:
[T]he constitutional power of the President to take such measures as he deems necessary to
protect the Nation against actual or potential attack or other hostile acts of a foreign power, to
obtain foreign intelligence information deemed essential to the security of the United States, or
to protect national security information against foreign intelligence activities. Nor shall any-
thing . . . limit the constitutional power of the President to take such measures as he deems
necessary to protect the United States against the overthrow of the Government by force or
other unlawful means, or against any other clear and present danger to the structure or exis-
tence of the Government. The contents of any wire or oral communication intercepted by au-
thority of the President in the exercise of the foregoing powers may be received in evidence in
any trial hearing, or other proceeding only where such interception was reasonable, and shall
not be otherwise used or disclosed except as is necessary to implement that power.
Smith, 321 F. Supp. at 425 (quoting Omnibus Crime Control and Safe Streets Act of 1968,
102. Id. at 426.
103. Id. at 429.
104. Id. at 425.
105. See id. at 425-30.
TERRORIZING FOURTH AMENDMENT PROTECTIONS

Thus, "to sacrifice those freedoms in order to defend them" would undermine the democratic system. Consequently, the electronic surveillance violated the defendant's Fourth Amendment rights because it had been authorized without judicial oversight.

Likewise, in *United States v. Sinclair*, the United States District Court of the Eastern District of Michigan furthered the *Smith* rationale by holding that the President, acting through the Attorney General, does not have the inherent constitutional power to authorize, without a judicial warrant, electronic surveillance in national security investigations. In *Sinclair*, the defendant was indicted based on evidence which was obtained when the FBI conducted warrantless electronic surveillance of the defendant's telephone conversations.

The dispute arose when the defendant made a motion to suppress such evidence, alleging that it was acquired in violation of the Fourth Amendment warrant requirement because it lacked judicial approval. In response, the government asserted that the electronic monitoring of the defendant's conversations was lawful because the Attorney General, acting as an agent of the President, authorized the surveillance in the interest of national security. Particularly, the government argued that the evidence should not be suppressed because the President has the inherent constitutional power to authorize warrantless electronic surveillance when gaining such information is essential to the security of the nation.

Nevertheless, the district court disagreed, stating that the purpose of the Fourth Amendment warrant procedure is to maintain a system of checks and balances between the citizens and the government. Therefore, independent judicial review of whether or not probable cause exists to issue a warrant is essential because it protects citizens' "constitutional right to be free from unreasonable searches and seizures." Further, the court explained that if the executive branch were granted unchecked investigative power in domestic situations, citizens' Fourth Amendment protections would be threat-

107. *Id.*
108. *See id.*
109. *See id.*
111. *Id.* at 1077.
112. *Id.* at 1075–76.
113. *Id.* at 1076.
114. *Id.*
116. *Id.* at 1078.
117. *Id.*
nened. For those reasons, the court held that the evidence should be suppressed because there is no exception to the Fourth Amendment warrant requirement in domestic situations involving national security.

Following Smith and Sinclair, the Supreme Court ruled that in domestic situations the executive branch is not exempt from obtaining a judicially approved warrant when seeking information in a national security investigation. In United States v. United States District Court (Keith), the government "charged three defendants with conspiracy to destroy [g]overnment property in violation of" a federal statute. During pretrial proceedings, the defendants filed a motion to determine whether certain surveillance information obtained by the government complied with the defendants' Fourth Amendment rights. In response, the government alleged that such information was obtained lawfully because the surveillance conducted without judicial approval was authorized by the Attorney General "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." More specifically, the government argued that requiring judicial oversight would create a danger of leaks, threaten the need for secrecy, and endanger the lives of informants and agents. However, the District Court disagreed and the Court of Appeals affirmed, holding that the surveillance violated the Fourth Amendment.

In response to that decision, the Supreme Court granted certiorari to determine "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving . . . national security." To answer this question, the Supreme Court began by noting that under Article II, Section 1 of the Constitution, the President has the duty "to 'preserve, protect and defend the Constitution of the United States,'" especially against those who try to depose the government. Writing for the majority, Justice Powell expressed his apprehension towards allowing electronic surveillance in national security matters because it provides the gov-

118. See id. at 1079.
119. Id. at 1079–80.
121. Id. at 297.
122. Id. at 299.
123. See id. at 299–300.
124. Id. at 300 (citation omitted).
126. Id. at 301.
127. Id. at 309 (quoting Katz v. United States, 389 U.S. 347, 358 n.23 (1967)).
128. Id. at 310 (quoting U.S. CONST. art. II, § 1).
129. Id.
ernment with the capability to intrude upon individuals’ Fourth Amendment rights.\textsuperscript{130} However, Justice Powell recognized that technological developments have resulted in new ways to depose the government.\textsuperscript{131} For that reason, Justice Powell stated that it would be contrary to public interest to deny the government use of such technology, since it is necessary to counteract the practice of techniques which threaten democracy.\textsuperscript{132} As a result, the Court acknowledged that the conflict between the government’s need to act when safeguarding the nation’s security and individual rights will be implicated in any situation concerning electronic surveillance of a person’s private activities.\textsuperscript{133} Consequently, the Court balanced those values, concluding that the guarantee that an individual’s privacy can only be invaded upon the issuance of a warrant by a neutral and detached magistrate founded on probable cause prevails over the government’s duty to preserve national security.\textsuperscript{134} Moreover, domestic security surveillances conducted entirely within the discretion of the Executive Branch is inconsistent with the Fourth Amendment because those officials are not neutral and detached.\textsuperscript{135} Finally, the role of judicial approval cannot be dispensed because it “accords with [the] basic constitutional doctrine that individual freedoms will best be preserved through [the] separation of powers and division of functions among the different branches and levels of [g]overnment.”\textsuperscript{136}

B. National Security in Foreign Affairs

Based on the Court’s decision in \textit{Keith}, it is clear that there is no national security exception to the Fourth Amendment in situations involving domestic investigations.\textsuperscript{137} However, the Court expressly refused to define the constitutional limitations on the Executive Branch’s power to meet foreign threats to the nation.\textsuperscript{138} As a result, the scope of Fourth Amendment protections still remain uncertain in situations involving the Executive Branch and foreign security surveillance.

In \textit{Noro v. United States},\textsuperscript{139} the Fifth Circuit Court of Appeals considered whether the search and seizure of account books owned by Japanese

\begin{itemize}
\item \textsuperscript{130} See \textit{Keith}, 407 U.S. at 312.
\item \textsuperscript{131} See \textit{id}. at 312.
\item \textsuperscript{132} \textit{id}.
\item \textsuperscript{133} See \textit{id}. at 312–13.
\item \textsuperscript{134} See \textit{id}. at 312–17.
\item \textsuperscript{135} \textit{Keith}, 407 U.S. at 316–17.
\item \textsuperscript{136} \textit{id}. at 317.
\item \textsuperscript{137} \textit{id}. at 321.
\item \textsuperscript{138} \textit{id}. at 321–22.
\item \textsuperscript{139} 148 F.2d 696 (5th Cir. 1945).
\end{itemize}
citizens living in the United States was a violation of the Fourth Amend-
ment. In Noro, the defendants were Japanese citizens who established a
business in the United States, which had been licensed by the Secretary of
the Treasury. Following the attack on Pearl Harbor, the President ordered
customs officers to remove books, files, and accounts of all Japanese enter-
prises licensed in the United States. As a result, customs officers seized
account books from the defendants' business without obtaining a judicially
approved warrant. After searching the books, the government discovered
that the defendants completed false income tax returns. Based on that dis-
covery, the defendants were charged with tax evasion and were convicted at
trial. On appeal, the defendants argued that the entry into their place of
business and the seizure of their account books violated the Fourth Amend-
ment because such documents were obtained without a judicially authorized
warrant. However, the court disagreed stating that no violation occurred
because "searches in the sudden emergency of war [are] necessary to be
made . . . with all speed and efficiency, under the urgent orders of the Presi-
dent and Secretary of the Treasury." Thus, the court recognized that the
Executive Branch has the power to authorize searches and seizures without
judicial oversight in situations that involve foreign threats to the security of
the nation.

Likewise, in United States v. Brown, the Fifth Circuit Court of Ap-
peals held that warrantless electronic surveillance authorized by the President
for the purpose of gathering foreign intelligence information without prior
judicial approval was constitutional under the Fourth Amendment. In
Brown, the defendant was charged and convicted of transporting a firearm in
violation of a federal statute. The defendant appealed his conviction and,
while the appeal was pending, federal officials monitored and recorded the
defendant's telephone conversations without judicial authorization. On
appeal, the defendant argued that the warrantless wiretaps violated his Fourth

140. Id. at 697.
141. Id. at 697–98.
142. Id.
143. Id. at 697.
144. Noro, 148 F.2d at 697.
145. Id.
146. Id.
147. Id. at 698.
148. Id. at 698–99.
149. 484 F.2d 418 (5th Cir. 1973).
150. Id. at 426 (citing United States v. Clay, 430 F.2d 165, 170–72 (5th Cir. 1970)).
151. Id. at 420.
152. Id. at 421.
Amendment rights. In response, the government contended that no violation occurred because the wiretaps had been authorized by the Attorney General, acting as an agent of the President, for the purpose of gathering foreign intelligence. Consequently, the court agreed with the government, explaining that the President has the inherent authority to protect national security in the context of foreign affairs. Thus, the court recognized that it is constitutionally permissible for the Executive Branch to conduct searches or seizures without a judicially approved warrant when "safeguard[ing] the nation from possible foreign encroachment."

Similarly, in United States v. Butenko, the Third Circuit Court of Appeals held that the President's authority to authorize warrantless searches in foreign intelligence investigations does not contravene the safeguards of the Fourth Amendment. At trial, one of the defendants, a Soviet national, was convicted of conspiring to transmit foreign government information relating to the national defense of the United States. Federal officials obtained the evidence that led to this conviction by conducting warrantless electronic wiretaps of the defendant's conversations which were authorized by the Attorney General for purposes of gathering foreign intelligence information. The defendant appealed his conviction on the basis that his Fourth Amendment rights were violated because the material collected through the electronic surveillance was obtained without a judicially authorized warrant. However, the court noted that under these circumstances the Fourth Amendment requires post-search judicial review in order for electronic surveillance to be lawful because post-judicial oversight ensures that the primary purpose of the government's investigation is to obtain foreign intelligence information.

153. Id. at 425.
154. Brown, 484 F.2d at 425.
155. Id. at 426.
156. Id. (citations omitted).
157. 494 F.2d 593 (3d Cir. 1974).
158. Id. at 603–06.
159. Id. at 596.
160. Id. at 596–601.
161. Id. at 596.
162. Butenko, 494 F.2d at 603–06.
163. Id. at 605–06.
IV. EROSION OF THE FOURTH AMENDMENT AFTER 9/11

Following September 11, 2001, securing the nation demanded heightened vigilance because technological innovations allowed terrorists to evade law enforcement more easily. On October 26, 2001, Congress enacted the USA PATRIOT Act to provide government officials with greater authority when conducting terrorism investigations. In particular, the USA PATRIOT Act revised 18 U.S.C. § 2709 in order to expand the FBI’s power to obtain customer information from internet service providers and telephone companies.

Originally, § 2709 was enacted as a part of the Electronic Communications Privacy Act (ECPA) of 1986, which was designed to protect communications customers from unwarranted invasions into privacy, while at the same time allowing law enforcement access to records after satisfying the warrant requirement. Under the ECPA, § 2709 operated as an exception to the warrant requirement in order to permit the FBI to seek records upon issuing a national security letter to an internet service provider or telephone company by certifying that 1) the requested “information was ‘relevant to an authorized foreign counterintelligence investigation[;]’” and 2) that there was probable cause to believe that the customer to whom the information sought was connected to a “‘foreign power or an agent of a foreign power.’” Subsequently, Congress further revised § 2709 to allow the FBI to obtain customer records where there is a contact with a suspected terrorist or where circumstances of the conversations indicate that the customer may have information regarding terrorist activities. Recently, in 2001, § 505 of the USA PATRIOT Act dispensed § 2709’s foreign nexus requirement, “replacing that prerequisite with a broad standard of relevance to investigations of terrorism or clandestine intelligence activities.” Under the current provision, law enforcement officials have unchecked power to obtain a person’s

165. See Kerr, supra note 18, at 607.
168. Ashcroft, 334 F. Supp. 2d at 480 (citation omitted).
169. Id. at 481 (quoting 18 U.S.C. § 2709 (2000)).
170. Id. at 482 (citation omitted).
172. The amended version of § 2709 states:
(a) DUTY TO PROVIDE. – A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic
private information from an internet service provider or telephone company without a warrant, and, in turn, without judicial authorization. As discussed below in the case of Doe v. Ashcroft, to allow the government to obtain private information in the manner provided by § 2709 is arguably an unjustified encroachment upon an individual’s Fourth Amendment rights.

V. DOE V. ASHCROFT

A. The Case for Controversy

The controversy began when John Doe received a telephone call from the FBI informing him that he would be served with a national security letter. Shortly thereafter, Doe received a document stating that pursuant to 18 U.S.C. § 2709, he was required to provide certain intelligence information to the FBI. Printed on FBI letterhead, the national security letter was certified in compliance with the terms of § 2709. Specifically it stated, “that the information sought [was] relevant to an authorized investigation to pro-
tect against international terrorism or clandestine intelligence activities." 178 Moreover, Doe was warned not to disclose anything about the national security letter, not even that he received it.179 Accordingly, Doe contacted the American Civil Liberties Union (ACLU)180 and the American Civil Liberties Foundation (ACLF) seeking legal advice about whether the FBI had the authority to demand records from him.181

In April 2004, the ACLU and the ACLF, acting as counsel for John Doe, filed a lawsuit challenging the FBI’s authority to issue national security letters instructing communication firms to disclose customer records.182 In the complaint, the plaintiffs alleged that § 2709 violates the Fourth Amendment because it allows the FBI to obtain private information without any form of judicial oversight.183 In response, the government argued that the congressional purpose of the provision was to allow the FBI greater investigative powers because there is a need for secrecy in national security investigations.184

B. Securing Fourth Amendment Freedoms

Unwilling to sacrifice liberty for security, Judge Marrero of the United States District Court of the Southern District of New York ruled that the provision authorizing the FBI to demand customer records from internet service providers and telephone companies “whenever the FBI certifies that those records are ‘relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities,’”185 violates the Fourth Amendment.186 Judge Marrero began his analysis by recognizing that “[n]ational security is a paramount value, unquestionably one of the highest purposes for which any sovereign government is ordained. Equally scaled... is personal security, ... [a] guarantee ... to be free from imposition by [the] government.”187 Moreover, Judge Marrero acknowledged that in order “[t]o

178. Ashcroft, 334 F. Supp. 2d at 478–79 (citation omitted).
179. Id. at 479.
180. The ACLU is an organization that advocates for individual rights and liberties. See American Civil Liberties Union, About Us, http://www.aclu.org/about/index.html (last visited Feb. 14, 2006) [hereinafter Challenge to NSL Authority].
181. See Ashcroft, 334 F. Supp. 2d at 475, 479.
184. Id. at 500.
185. Id. at 475 (quoting 18 U.S.C. § 2709 (Supp. 2003)).
186. Id. at 506.
187. Id. at 476.
perform its national security functions properly, government must be em-
powered to respond promptly and effectively to public exigencies as they
arise," while at the same time "maintain a reasonable measure of secrecy"
when conducting its investigations. Consequently, such a race will inevi-
tably cause a collision between securing the nation and protecting Fourth
Amendment freedoms. 189

Expounding on those principles, Judge Marrero recognized that the
temptation to dispense with such freedoms was arguably grounded given the
emotional aftermath of 9/11. However, in addressing the Government’s
reach to combat terrorism, Judge Marrero declared that the "'state of war is
not a blank check'" to dispense those rights so clearly grounded in the core
of the Constitution. Therefore, because "longstanding Supreme Court doc-
trine makes clear" that Fourth Amendment guarantees are fundamental to
the democratic system, § 2709 "must be invalidated because . . . it has the
effect of authorizing coercive searches effectively immune from any judicial
process." Thus, the decision rendered in Ashcroft suggests that expanding
the FBI’s investigative power to seek personal information without judicial
oversight, even during times when national security is at its apex, is likely
unconstitutional since such authority allows for abuse of Fourth Amend-
ment rights. 194

VI. RECOMMENDATION

Applying the abovementioned Supreme Court jurisprudence to § 2709,
as amended by the USA PATRIOT Act, clearly infringes on our Fourth
Amendment rights. However, the technological innovations used by the
terrorists to plan and plot the events of 9/11 clearly were not within contem-
plation of the Supreme Court at the time it rendered those pre-9/11 deci-
sions. Yet what is clear from the Court’s rulings is that it is necessary to
preserve both liberty and security and not compromise one for the other.

188. Ashcroft, 334 F. Supp. 2d at 476.
189. See id. at 477.
190. See id. at 477–78.
191. Id. at 477 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)).
192. Id. at 495.
193. Ashcroft, 334 F. Supp. 2d at 506.
194. See id. at 501.
195. See supra Parts II-V.
197. See id.; see also Ashcroft, 334 F. Supp. 2d at 495, 506 (concluding that § 2709 vio-
lates the Fourth Amendment as applied).
Based on that premise, this article proposes several possible checks which could be placed on the FBI in fighting the war against terrorism, while at the same time preventing erosion of Fourth Amendment protections.

A. Prior Judicial Approval

First, Congress could redraft § 2709 to limit the FBI’s current unchecked ability to issue national security letters. One way of accomplishing this goal would be to include a provision which allows for judicial approval of national security letters before the FBI issues them. Although doing so would inhibit the FBI’s need for secrecy in terrorism investigations because of the likelihood that the information will be overheard by the judge’s clerks or staff, it would better protect Fourth Amendment rights. Under this approach, the “coercive searches” that Judge Marrero mentioned would be at a complete minimum, since a neutral judge or magistrate could objectively determine whether or not there was probable cause to demand customer records from communications firms.

B. Post Judicial Oversight

Alternatively, Congress could also draft the provision to mandate judicial oversight after the national security letter is received. Although there is a heightened possibility of infringing upon Fourth Amendment rights because of the possibility that the information could be leaked by the judge’s employees, this approach at least ensures that the primary purpose of the government’s investigation is to secure intelligence information relating to terrorism investigations. Moreover, such a requirement would make certain that the government is not using the national security letters as a means of obtaining information solely to conduct domestic intelligence investigations.

201. See Johnson, 333 U.S. at 14.
203. Id. at 606.
C. *The Keith Approach*

In *Keith*, as mentioned above, the Supreme Court recognized that the warrant requirement "may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection."205 In dicta, the Court suggested that it may be willing to approve a different standard by which to obtain probable cause in domestic security situations.206 Thus, because in terrorism investigations it is unclear whether the government’s interest is truly "domestic"207 or "foreign,"208 lowering the probable cause standard may meet the reasonable needs of the FBI.209 Like the Prior Judicial Approval approach, the *Keith* approach would prevent "coercive searches,"210 since judicial approval would still be required, just at a lower standard of reasonableness.211 Moreover, like the Post Judicial Oversight approach, this approach would ensure that the issuance of national security letters truly pertained to terrorism investigations.212

VII. CONCLUSION

Prior to 9/11, "[t]errorism was not the overriding national security concern for the U.S. government."213 The government never had a need to develop the tools necessary to thwart plots of overthrowing the government and in turn, the democratic system.214 As a result, the attacks of 9/11 transformed the nation and eventually transformed the FBI’s communications to counteract terrorism operations.215 Congress responded by enacting the USA

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206. *Id.* Specifically, the Court stated:
   It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements ... but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court ... and that the time and reporting requirements need not be so strict ...
   *Id.*
208. *See, e.g.*, *Butenko*, 494 F.2d at 606; United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973); Noro v. United States, 148 F.2d 696, 699 (5th Cir. 1945).
211. *See Keith*, 407 U.S. at 323.
213. EXECUTIVE SUMMARY, *supra* note 1, at 10.
PATRIOT Act which provided the FBI with investigative tools to shield the nation from another 9/11 experience.\textsuperscript{216} However, the government may have gone too far because it took away certain liberties in order to protect such freedoms in the name of national security.

When Congress amended 18 U.S.C. § 2709 through the USA PATRIOT Act, it gave the FBI unchecked power to infringe on Fourth Amendment rights.\textsuperscript{217} Specifically, § 2709 authorized the FBI to issue national security letters to obtain a person’s private information from an internet service provider or telephone company without satisfying Fourth Amendment requirements of probable cause and judicial authorization.\textsuperscript{218} At the time, Congress’ reasons for compromising Fourth Amendment protections seemed justified, considering the state of the nation after 9/11.\textsuperscript{219}

Three years after 9/11 and the enactment of the USA PATRIOT Act, the ACLU and an unknown internet service provider fought to protect the dissemination of Fourth Amendment rights by challenging the constitutionality of § 2709.\textsuperscript{220} Standing up for those rights, Judge Victor Marrero ruled that Fourth Amendment protections cannot be guaranteed solely within the discretion of the FBI because Supreme Court doctrines demonstrate that the “state of war is not a blank check”\textsuperscript{221} to infringe upon the rights of American citizens.\textsuperscript{222}

In a post-9/11 world, technological innovations will continue to threaten personal privacy. Therefore, it is clear that Congress needs to set boundaries concerning law enforcement’s ability to secure the nation from future terrorist attacks. The suggestions mentioned above will provide an effective way to conduct terrorism investigations, while at the same time protect against future attacks on Fourth Amendment rights.

\textsuperscript{216} Remarks by President Bush at PATRIOT Act Signing, supra note 20.
\textsuperscript{218} See id. at 495–97.
\textsuperscript{219} See id. at 477–78.
\textsuperscript{220} Challenge to NSL Authority, supra note 180.
\textsuperscript{221} Ashcroft, 334 F. Supp. 2d at 477 (quoting Hamdi v. Rumsfeld, 524 U.S. 507, 536 (2004)).
\textsuperscript{222} Id.
THE GROWTH OF CHABAD IN THE UNITED STATES AND THE RISE OF CHABAD RELATED LITIGATION

LOUIS REINSTEIN*

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I. INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These first two clauses of the United States Constitution have meant so many things to so many people over the years. These are but some of the many groups that have made it their mission to kill Jews

* J.D. Candidate 2006, Nova Southeastern University Shepard Broad Law Center; M.A. in Jewish Studies, Emory University, Atlanta, Georgia; B.A. in Religious Studies, University of Florida, Gainesville. The author would like to thank his wife, family, and friends for all of their love and support during the writing of this article and to the hard work and dedication of the Nova Law Review staff during the editing process for their support and guidance.

1. U.S. CONST. amend. I. These clauses are often referred to as the Establishment Clause and the Free Exercise Clause, respectively. BLACK'S LAW DICTIONARY 586, 690 (8th ed. 2004).

2. See infra Parts III–IV.

and to extinguish the light of Judaism. Fleeing from war torn Europe of the 1940s, Chabad-Lubavitch (Chabad), a branch of Orthodox Judaism that practices Hasidism, has made 770 Eastern Parkway, Crown Heights, New York their world headquarters. From this location, Chabad has become one of the most visible Jewish groups in the world.

Chabad’s mission is in fact to be visible and to spread its form of Judaism to other Jews around the world. Chabad has made it a goal to place shlichim, emissaries, on every corner of the globe. It is this wide visibility that has led to numerous lawsuits in the United States, both initiated by Chabad and by those wishing to stop Chabad’s efforts. These lawsuits have made their way from coast to coast across the United States.

This paper will focus on how Chabad has attempted to spread its message from community to community and how Jewish and non-Jewish neighbors have reacted with litigation. While often times the reaction has been one of welcome and open arms, there are many examples of communities responding with concerted attempts to force Chabad out. Even when others did not initiate suit against Chabad, Chabad has been willing to complain when members felt their rights were being violated. Part II of this

4. Chabad is an acronym of the Hebrew words, chochmah, binah, and da’at (wisdom, understanding, knowledge). Avraham Rubinstein, Habad, in 7 ENCYCLOPAEDIA JUDAICA 1013 (1982); FISHKOFF, supra note 3, at 18. The term Lubavitch is a geographical reference to the Russian town where four of the founding rebbes taught. FISHKOFF, supra note 3, at 18. Hasidism is commonly referred to as mystical Judaism. Id. at 17. This form of Judaism was founded by Rabbi Israel ben Eliezer (born around 1700), or the “Baal Shem Tov” (Besht), meaning “Master of the Good Name.” Id.; Rubinstein, supra, at 1013. The Baal Shem Tov’s disciple Rabbi Dov Ber was the teacher of Rabbi Shneur Zalman, the “Alter Rebbe,” who is the founder of the Chabad-Lubavitch Movement. FISHKOFF, supra note 3, at 18.

5. FISHKOFF, supra note 3, at 24, 73.
6. Id. at 10.
7. Id. at 12, 31.
8. Id.
9. See, e.g., Lucas Valley Homeowners Ass’n v. Chabad of N. Bay, Inc., 284 Cal. Rptr. 427, 443 (Cal. Ct. App. 1991) (holding that Chabad’s receipt of a permit to hold services in a residential neighborhood was valid even in the face of neighbors’ concerns about parking and noise); Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341, 345, 348 (7th Cir. 1990) (recognizing that displaying a Christmas tree in an airport is secular while displaying a menorah is a reasonable time, place, and manner restriction); Chabad-Lubavitch of Vt. v. City of Burlington, 936 F.2d 109, 112 (2d Cir. 1991) (denying Chabad’s right to place the menorah in the city park). This is not an exhaustive list, but a few examples in a long trail of litigation. Cases in Ohio, Georgia, and Florida are discussed below. This paper does not analyze litigation involving Chabad outside the United States.
10. See Lucas Valley, 284 Cal. Rptr. 427; Lubavitch Chabad House, 917 F.2d 341; Chabad-Lubavitch, 936 F.2d 109.
11. FISHKOFF, supra note 3, at 24, 72; see infra Parts III–IV.
12. See infra Parts III–IV.
paper will introduce the message and the mission of Chabad and how that has often times, unwittingly, instigated lawsuits. Chabad’s message has not wilted even in the face of these lawsuits.\textsuperscript{13} If anything, in more recent lawsuits, Chabad is learning from past mistakes and more carefully choosing the best legal arguments. Part III of this paper focuses on the Chabad menorah, which has been heavily litigated across the country. This section discusses a few examples of cities where Chabad has both succeeded and failed in its efforts at displaying the menorah. In all of the examples to be discussed, the goal of publicity for Chabad was achieved. In Part IV of this paper, the focus is on Florida. Due to the recent growth of the active Chabad community in Florida and the tough real estate market, there have been a number of cases concerning the location of Chabad centers in residential neighborhoods. In the examples which will be discussed, the old adage, “location, location, location,”\textsuperscript{14} rings true. Finally, Part V will conclude this paper with a premonition that Chabad will continue to grow across the country, and so too will the number of Chabad-related lawsuits.

II. CHABAD COMES TO THE UNITED STATES: A LIGHT UNTO THE JEWS

Chabad became the well-known movement that it is today under the leadership of the seventh and last rebbe, Menachem Mendel Schneerson.\textsuperscript{15} In 1941, Schneerson, affectionately referred to as “the Rebbe,” arrived on the shores of New York.\textsuperscript{16} The long and dangerous journey out of Nazi-occupied Europe took him to the United States to join his father-in-law and other family members.\textsuperscript{17} His father-in-law, the sixth Lubavitcher rebbe, quickly saw Menachem Mendel’s potential and appointed him in charge of outreach.\textsuperscript{18} Upon taking the helm of Chabad, Schneerson transformed Chabad from a small and insulated remnant of European Jewry to a major force in the Jewish community.\textsuperscript{19}

Part of the Rebbe’s vision for Chabad was to have Chabad centers established all around the world.\textsuperscript{20} It is considered an honor for a young Cha-

\begin{itemize}
\item \textsuperscript{13} See FISHKOFF, supra note 3, at 10.
\item \textsuperscript{14} “Location, location, location” is the colloquial phrase referring to the importance of real estate when building or opening a new home or business.
\item \textsuperscript{15} See FISHKOFF, supra note 3, at 10.
\item \textsuperscript{16} See id. at 73.
\item \textsuperscript{17} See id.
\item \textsuperscript{18} See id at 72–73.
\item \textsuperscript{19} See id. at 10–12.
\item \textsuperscript{20} See FISHKOFF, supra note 3, at 12. Even after the Rebbe’s death, Chabad has continued to grow:
\end{itemize}
bad member, a Chabadnick, to be sent out as an emissary to open up a Chabad Center, whether it is in Boca Raton or Timbuktu. Most often a young couple is sent with just enough money for housing and to get started. It would be up to them to meet people and create a center in the community. This usually requires a lot of hard work and fundraising. The first goal though is always to get people interested and involved and to spread Chabad teachings. The size of the center will depend on the needs of the community.

Usually Chabadnicks will set up shop wherever they believe they can best meet the needs of the community and of course this decision also depends on the funding they have received, if any, prior to their arrival there. If a storefront shop is in the best location and affordable, then the emissary might set up there; however, if the emissary can only afford a home to live in at that time and not such a meeting place, then often times the emissary’s home will become the meeting place. The focus though is always on providing for the community’s needs, over and above any emissary’s needs. Wherever Chabad emissaries do choose to live or set up a center, Chabad has always been involved in the local community. Sometimes this means speaking at the local schools about Jewish holidays, and other times it means inviting people over for Shabbat dinner.

Between 1994 and 2002, more than 610 new emissary couples took up their postings and more than 705 new Chabad institutions were opened, including 450 new facilities purchased or built from scratch, bringing the total number of institutions world-wide—synagogues, schools, camps, and community centers—to 2,766. In the year 2000, 51 new Chabad facilities were established in California alone.

Id. at 31. One rabbi exclaimed that one can “find more [people] every day willing to go on shlichus [missions] to farther places . . . . One guy just called me. He wants to go to Cyprus. Imagine . . . . the rest of his life in Cyprus.” Id. at 15.

See Fishkoff, supra note 3, at 15. “These young, newly married Chabad couples leave home with one-way tickets and—if they’re lucky—a year’s salary. After that, most are expected to make their own way financially . . . . [T]he individual shliach [emissary] couple is pretty much on its own . . . .” Id. at 160.

See id. at 11, 121.

See id. at 161.

Each Chabad center is responsible for itself. See id. “Shlichim in the field are responsible for their own fundraising, and they must find the money they need not only for their own operation, but also to raise their children, pay their mortgage, and put food on their table.” Id. at 161.

See id. at 11, 30.
Chabad emissaries is to host large parties celebrating the Jewish holidays. This has become a way for Chabad members to show non-observant Jews how Judaism can offer both spirituality and fun.

The Jewish holiday that has often received the most public attention, due to the way Chabad chooses to spread the holiday’s message, is Chanukah. It is Chabad’s display of one of the symbols of the holiday, the Chanukah menorah, a nine-branched candelabrum, that has led to some of the most protracted litigation.

III. IF YOU BUILD IT A LAWSUIT WILL FOLLOW: TO LIGHT THE MENORAH OR NOT TO LIGHT THE MENORAH

One of the best known symbols of Chabad in most communities, other than the men being known for wearing black hats and black coats and having beards, is their large Chanukah menorahs. Chabad emissaries usually try to find the most visible place in the city possible to place the menorah. While some might argue that this symbol of Chanukah is meant to compete with the Christmas tree or Christmas decorations, Jewish law requires that every Jew place a Chanukah menorah in a place that can be seen by strangers. This

32. See id. at 11.
33. See id. at 11, 30.
34. See id. at 11. The Jewish holiday of Chanukah is an eight-day festival, commemorating two great miracles in Jewish history: 1) a small group of Jews, known as the Maccabees, defeated the much larger Syrian-Greek army; and 2) the rededication of the Holy Temple in Jerusalem (circa 164 B.C.E.). See Moshe David Hern, Hanukkah, in 7 ENCYCLOPAEDIA JUDAICA 1280 (1982); RABBI JOSEPH TELUSHKIN, JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE, AND ITS HISTORY 117-18 (1991). Chanukah is known as the Holiday of Lights because upon the Maccabees entering the Temple, they discovered a small jar of holy oil that was only enough to last for one day, but instead it lasted for eight days. Hern, supra, at 1283-84. This is also often referred to as a Chanukah miracle. Id. at 1284.
35. See FISHKOFF, supra note 3, at 11. The menorah is a symbol of the holiday and has eight evenly laid branches with a ninth branch set off from the others known as a shammash (servant) that is meant to light all of the others. Jacob Elbaum, Hanukkah Lamp, in 7 ENCYCLOPAEDIA JUDAICA 1288-92, 1315 (1982).
36. See generally, e.g., Chabad-Lubavitch of Vt. v. City of Burlington, 936 F.2d 109 (2d Cir. 1991) (regarding denial of request to place menorah in city park); Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341 (7th Cir. 1990) (regarding the City of Chicago's denial of Lubavitch's request to display a free-standing Chanukah menorah at O'Hare International Airport).
37. See FISHKOFF, supra note 3, at 11.
38. See id.
symbol of Chanukah is over a thousand years old. During the Chanukah holiday, the menorah is often placed in a central location, so that many members of the local community can see it. The more visible the location, the more attention it gets. This increased visibility has brought both admirers and detractors out of the woodwork.

A. Cincinnati, Ohio Exemplifies the Difficulty Faced by Chabad in Many Cities

One example of a city that has attempted (and is continuing to attempt) to prevent Chabad from placing its menorah in the city’s downtown square is the City of Cincinnati. In Chabad of Southern Ohio v. City of Cincinnati, a battle ensued between a local Chabad group and the City of Cincinnati (the City). This case was not the first time the City has faced off with groups wanting to use the downtown square, known as Fountain Square Plaza; in fact, this case is one out of a series of cases where the City has attempted to limit public displays to only those of the City counsel’s choosing.

It was not difficult to anticipate that litigation would follow when Rabbi Sholom Kalmanon was told that the only time that he could not put up a menorah in the city square was during the winter months, which is of course during the season of Chanukah. The City created an ordinance that restricted the use of Fountain Square for the City’s exclusive use from the last two weeks of November, through the month of December, and the first week

40. See id. at 1288–90. Most often, Jews who display a menorah place it on their window sill to be seen by passersby. Id. at 1289–90.

41. See id.


43. Id. at 975.

44. See id. at 979–80. While the court documents do not make any claims of antisemitism or anti-Judaism as a motive for the actions of the City, Rabbi Kalmanon believes that it is “obvious what was behind it all.” Telephone Interview with Sholom B. Kalmanon, Rabbi, Chabad of Southern Ohio (July 24, 2005).

45. Chabad Ohio I, 233 F. Supp. 2d at 977, 981, 984. The city has a history of litigation. See, e.g., Knight Riders of the Ku Klux Klan v. City of Cincinnati, 72 F.3d 43 (6th Cir. 1995). While not frequently linked, both the Ku Klux Klan and Chabad have found themselves suing the city over the years to lift restrictions on their ability to gather ceremoniously in Fountain Square Plaza. See id. at 45; Congregation Lubavitch v. City of Cincinnati (Congregation Lubavitch I), 923 F.2d 458, 459 (6th Cir. 1991).

of January.\textsuperscript{47} This is the very square that Rabbi Kalmanson had already submitted a permit request to display his approximately ten-foot tall menorah from November 29, 2002 to December 8, 2002.\textsuperscript{48} In fact, Chabad had been celebrating Chanukah in the very same square since 1985 by erecting a menorah\textsuperscript{49} and holding a candle lighting ceremony on one of the days of the holiday.\textsuperscript{50}

The Cincinnati City Counsel unanimously passed the restrictive ordinance without community discussion.\textsuperscript{51} The ordinance’s text specifies, among other purposes, that its goal is “to promote and develop tourism and recreation” and “to encourage, promote, stimulate, and assist in the development of the Cincinnati business economy.”\textsuperscript{52} Not surprisingly, Chabad filed a complaint, along with a homeless advocacy group that annually sponsors a program called “Santa on the Square” during the winter season, requesting an injunction from the court.\textsuperscript{53} In \textit{Chabad of Southern Ohio}, the simple yet persuasive argument by Chabad was that their First Amendment rights were violated.\textsuperscript{54} The district court agreed.\textsuperscript{55}

During an evidentiary hearing before the court, the City was incapable of presenting evidence that explained the origins or the reason for the ordinance’s seven-week ban on issuing permits during the time of the year when the Fountain Square was most widely requested.\textsuperscript{56} However, there was evidence presented that the City was at that time preparing for a display created by the City, which was to include two Christmas trees and a skating rink.\textsuperscript{57} Coincidentally, a tree lighting ceremony was also planned by the City to take place on November 29, the first night of Chanukah that year.\textsuperscript{58}

\textsuperscript{47} \textit{Id.} at 978 (citation omitted). Since the Hebrew calendar and the Jewish holidays are set according to a lunar cycle, the days of Chanukah on the secular calendar fluctuate from any time in November to the first week of January. See \textit{id.} at 977 n.1. The first day of Chanukah on the Hebrew calendar is always Kislev 25. Hern, \textit{supra} note 34, at 1280.

\textsuperscript{48} \textit{Chabad Ohio I}, 233 F. Supp. 2d at 979.

\textsuperscript{49} \textit{Id.} at 977

\textsuperscript{50} See \textit{id.} at 979.

\textsuperscript{51} \textit{Id.} at 978.

\textsuperscript{52} \textit{Id.} at 979.

\textsuperscript{53} \textit{Chabad Ohio I}, 233 F. Supp. 2d at 979.

\textsuperscript{54} \textit{Id.} at 981. Chabad also argued that the City violated the Due Process Clause of the Fourteenth Amendment by retroactively applying the city’s new regulations. \textit{Id.}

\textsuperscript{55} \textit{Id.} at 988.

\textsuperscript{56} \textit{Id.} at 980.

\textsuperscript{57} \textit{Chabad Ohio I}, 233 F. Supp. 2d at 980.

\textsuperscript{58} \textit{Id.}
Chabad made a strong case, and the court ruled that Chabad had met its burden for a preliminary injunction.\textsuperscript{59} It is ironic that one of the arguments by the City was that the display of a menorah is not symbolic speech and thus not protected by the First Amendment\textsuperscript{60}—as this fact was conceded by the City in the same court in a similar case ten years earlier.\textsuperscript{61}

Chabad’s primary First Amendment arguments were based on the protected nature of speech\textsuperscript{62} and their ability to use the public forum for this type of speech.\textsuperscript{63} In both arguments, the court cited previous Chabad litigation against the City where “the very same menorah at issue here [was upheld] as speech deserving full First Amendment protection.”\textsuperscript{64} This decision was easy for the court based on clear precedent.\textsuperscript{65} Even though the menorah is considered speech (of a symbolic nature) deserving protection, the court also needed to decide if “the [g]overnment’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.”\textsuperscript{66}

In determining the government’s interest, the court defined the forum at issue and determined the type of forum.\textsuperscript{67} This classification is an important step in the constitutional analysis since different types of forums are afforded varying levels of protection.\textsuperscript{68} Again, this determination was easy since there was no argument that Fountain Square was the relevant forum, and, furthermore, it had already been defined by the Sixth Circuit Court of Appeals as a traditional public forum.\textsuperscript{69} The final step taken by the court was to determine if the City’s regulation was a constitutional restriction on the use of Fountain Square.\textsuperscript{70}

\textsuperscript{59.} \textit{Id.} at 981. Chabad proved that there was a “strong likelihood of succeeding on the merits of their free speech claims under the First Amendment.” \textit{Id.}

\textsuperscript{60.} \textit{Id.} (citing Congregation Lubavitch v. City of Cincinnati (Congregation Lubavitch III), 997 F.2d 1160, 1164 (6th Cir. 1993)).


\textsuperscript{62.} \textit{Chabad Ohio I}, 233 F. Supp. 2d at 981.

\textsuperscript{63.} \textit{See id.} at 982–86.

\textsuperscript{64.} \textit{Id.} at 981 (citing Congregation Lubavitch v. City of Cincinnati (Congregation Lubavitch I), 923 F.2d 458, 461–62 (6th Cir. 1991)).

\textsuperscript{65.} \textit{See id.} at 981–86.

\textsuperscript{66.} \textit{Id.} at 982 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

\textsuperscript{67.} \textit{Chabad Ohio I}, 233 F. Supp. 2d at 982.

\textsuperscript{68.} \textit{Id.} at 982 n.3.

\textsuperscript{69.} \textit{Id.} at 982 (citing Knight Riders of the Ku Klux Klan v. City of Cincinnati, 72 F.3d 43, 45 (6th Cir. 1995)).

\textsuperscript{70.} \textit{Id.} at 983.
The restrictions were considered content-neutral on their face since all types of private speech were forbidden during the holiday season, regardless of their content.\textsuperscript{71} This is not the end of the analysis because even a content-neutral restriction on its face can be content-based in fact.\textsuperscript{72} This situation was similar to a previous Chabad case where the City passed an ordinance restricting unattended structures in Fountain Square.\textsuperscript{73} In that case, the ordinance was found facially content-neutral; but the Sixth Circuit Court of Appeals found it \textit{de facto} content-based\textsuperscript{74} since the aim, as evidenced by statements of various city council members, was to prohibit a Ku Klux Klan cross and a menorah from being erected.\textsuperscript{75} In this instance, the court heard testimony by Rabbi Kalmanson that a city official suggested that the rabbi quickly get his permit request in, since the permits were being issued on a first come first serve basis to prevent the Ku Klux Klan from receiving a permit.\textsuperscript{76} It was also telling that the City's own stated intention was to ensure that any speech that was heard in Fountain Square appealed to "the widest of audiences," thus forbidding that speech which appealed to a minority of individuals.\textsuperscript{77}

After concluding that the regulations were content-based, the court then looked to whether the City's permit scheme was "narrowly tailored to achieve a compelling state interest."\textsuperscript{78} The City listed six interests, which it believed justified the ban on non-governmental use of Fountain Square during the winter season.\textsuperscript{79} All six were found not to justify the regulation and

\textsuperscript{71} Id. at 984.
\textsuperscript{72} See Congregation Lubavitch v. City of Cincinnati (Congregation Lubavitch III), 997 F.2d 1160, 1166 (6th Cir. 1993).
\textsuperscript{73} Id. at 1162.
\textsuperscript{74} Chabad Ohio I, 233 F. Supp. 2d at 984.
\textsuperscript{75} Congregation Lubavitch III, 997 F.2d at 1164–65.
\textsuperscript{76} Chabad Ohio I, 233 F. Supp. 2d at 984.
\textsuperscript{77} Id. "Distinctions between speech that is 'controversial' and speech that is 'acceptable,' or between that which appeals to 'the widest of audiences' and that which appeals to only a few individuals, are distinctions based, at the very least, on content." Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 984–85. The newly amended city code listed the following purposes for its enactment:

1. to better coordinate competing uses of Fountain Square;
2. to ensure equal access to Fountain Square;
3. to promote and develop tourism and recreation;
4. to encourage, promote, stimulate, and assist in the development of the Cincinnati business economy;
5. to maintain, develop, and increase employment opportunities for those who live, work, and may consider moving to Cincinnati and the Cincinnati region; and
6. to pursue efforts to promote the expansion of the population residing within Cincinnati and to specifically encourage, stimulate, and develop an expanding downtown resident population.
its ban on issuing permits. None of them clearly rose to the level of a compelling state interest that could override Chabad’s First Amendment rights.

The City was also unable to show how the ban on the issuance of permits over the seven weeks during the winter holiday season fulfilled any of the City’s stated interests. On the contrary, the court commented that it would seem as though the menorah, “Santa on the Square” program, or any other private speech, would attract more tourists and visitors to Fountain Square than just the “arguably Christian symbols featured in the City-sanctioned holiday display.” Even if the regulations were content-neutral, under a lesser constitutional standard (that of time, place, and manner restrictions), the ordinances were still not “narrowly tailored to serve a significant government interest,” nor would they leave open the required alternative channels of communication.

The district court issued the preliminary injunction barring enforcement of the ordinances and concluded that, based on Chabad’s arguments, the suit had a strong likelihood of success on the merits. However, this was not the end. In a whirlwind of appeals over a forty-eight hour timeframe, the city obtained a stay of the injunction from the Sixth Circuit followed by Chabad taking the issue to the United States Supreme Court, where Justice Stevens, acting as a Circuit Justice, vacated the stay. Chabad prevailed over the “outrageous intrusion on the rights guaranteed by the First Amendment” and was able to celebrate Chanukah in Fountain Square. This dispute began just prior to Chanukah in November 2001, but it took the Sixth Circuit until April 2004 to affirm the District Court’s decision.

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80. *Id.*

81. *Id.* The court cited the prevention of terrorism and the practice of professions as the types of regulations that rise to the level of compelling state interests to justify restrictions on freedom of speech. *Id.*

82. *Id.*


84. *Id.* at 986. The court explained that no other place in Cincinnati is comparable to Fountain Square as a location providing the opportunity for speeches and demonstrations. *See id.* Even presidential candidates chose to hold rallies in Fountain Square when in the area. *Id.*

85. *Id.* at 986–87. The injunction was ordered on November 27, 2002, just two days before the first night of Chanukah for that year. *Chabad Ohio I,* 233 F. Supp. 2d at 975, 980, 988.


88. *See Chabad of S. Ohio v. City of Cincinnati (Chabad Ohio III)*, 363 F.3d 427, 436 (6th Cir. 2004). In reality, the case history between Chabad and the city goes back to the
Even though, during Chanukah of 2004, Chabad of Southern Ohio received the proper permit and placed the menorah in Fountain Square, future Chanukah celebrations are still in doubt. According to Rabbi Kalmanson, more litigation might be on the horizon. The City has notified Chabad that it is planning to do construction in Fountain Square and is also considering selling it to private entities. In light of the past two decades of fortitude exhibited by Chabad in Ohio, it appears that the City once again will have a fight on its hands.

B. Atlanta, Georgia Greets Chabad with Good Old Southern Hospitality

In the case of Chabad-Lubavitch of Georgia v. Harris, followed by Chabad-Lubavitch of Georgia v. Miller, two Chabad rabbis sought to place a menorah on the steps of the capitol building and in the Capitol Rotunda. Similar to the cases in Ohio, Chabad of Georgia did not succeed at first, but, in the end, the First Amendment prevailed, and the menorah took its place in Atlanta.

In 1989, the Georgia Building Authority granted Chabad permission to display their fifteen-foot menorah in Atlanta on the plaza in front of the state capitol building for the eight days of Chanukah. Permission was also granted for an accompanying sign, "‘HAPPY CHANUKAH from CHABAD OF GEORGIA,'" and for a lighting ceremony. Each day the menorah was to be lit for no more then forty-five minutes. Located inside the Capitol Rotunda was a live nativity scene, "surrounded by a Christmas tree, reindeer, gifts and a Santa Claus." This display was sponsored and organized by the

89. Telephone Interview with Sholom B. Kalmanson, supra note 44.
90. Id.
91. Id. Rabbi Kalmanson has not shied away from litigating with the City as a matter of principle. Id. The rabbi also sees the attention that the menorah has received as positive since it helps to publicize the miracle of Chanukah, which is his goal to begin with. Id.
95. Chabad Ga. IV, 5 F.3d at 1395-96.
97. Id.
98. Id.
99. Id. at 1065.
Georgia Building Authority. There were no public complaints or disturbances formally noted that year attributed to the menorah’s placement or the nativity scene and its accoutrements.

The following year, in 1990, Chabad attempted to get the same permission from the Building Authority, but was met with new limitations. According to the Attorney General, Chabad could still display the menorah and conduct a candle lighting ceremony, but, instead of eight days, they could only observe one day. Ironically, this scenario sounds like the Chanukah miracle in reverse. The Attorney General concluded that the entire eight days would give off the impression of an unconstitutional state endorsement of religion. The Christmas scene, as displayed the previous year, was given a similar pronouncement due to the dominance of religious symbols, but a tree and ceremony led by a Methodist minister was permitted.

Soon after the restrictions were placed on Chabad’s ability to exhibit the menorah, Chabad, led by two rabbis, initiated a complaint and requested a temporary restraining order based on First Amendment violations. Chabad had to meet four elements to obtain the order: 1) irreparable harm would be inflicted; 2) there was no harm to the state; 3) public interest was not adversely affected; and 4) the claim was likely to succeed on the merits of the case if a trial was to proceed. The district court found that Chabad had met the first three requirements, but it was the final one that Chabad did not overcome.

The first step in the court’s analysis was to determine if Chabad did in fact have a constitutionally valid claim. Chabad was able to show that the menorah did fall under the category of constitutionally protected symbolic speech. The issue then became whether this type of speech was permitted on the steps of the capitol building. Since the state had previously determined that the plaza was a public forum and that it has been regularly used

100. Id.
102. Id. at 1065.
103. See id.
104. Id.
105. See id. In addition to the invocation by the minister, secular and religious songs were performed, and the governor’s wife gave a benediction. Chabad Ga. I, 752 F. Supp. at 1065.
106. See id. at 1064–65.
107. Id. at 1066.
108. Id. at 1066, 1068.
109. See id. at 1066.
111. See id.
over the years for public debates and rallies, the court then needed to decide if the restrictions placed on Chabad were content based.\textsuperscript{112}

A content based restriction on speech in the public forum required a strict scrutiny analysis, whereby the state must show the restrictions were "narrowly tailored to serve a compelling state interest."\textsuperscript{113} In its analysis, the court distinguished this case from two other Chabad menorah cases that were published the year before: one in the Supreme Court and one in the Second Circuit.\textsuperscript{114} The court did not believe that people visiting the capitol building would confuse "a menorah labelled as the property of Chabad for a state sponsored event."\textsuperscript{115}

The State also argued that under a non-content-based policy, the restrictions placed on Chabad were reasonable in the time, place and manner that the menorah could be displayed.\textsuperscript{116} This was a persuasive argument for the court since the State could show that the Georgia Building Authority had instituted an unrelated policy in 1988 "that placement of any object on the property of the grounds by members of the public is prohibited."\textsuperscript{117} While Chabad claimed that the 1988 policy did not play a part in the decision to deny Chabad permission in 1990, the court held that since the policy is valid it made no difference if it was originally considered by the Building Authority.\textsuperscript{118}

Interestingly enough, the court concluded its order in denying Chabad the right to place the menorah in the square by contrasting the Christmas tree and the menorah.\textsuperscript{119} The court found that the Christmas tree in the Rotunda "is a mixed secular-and-religious symbol which is not predominantly reli-

\textsuperscript{112.} Id.
\textsuperscript{113.} Id. at 1066–67 (citing Widmar v. Vincent, 454 U.S. 263, 270 (1981)).
\textsuperscript{114.} Id. at 1067 (distinguishing this case from County of Allegheny v. ACLU, 492 U.S. 573 (1989) and from the majority opinion in Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989)). The Georgia court decided that its case was different from the case in Pennsylvania because the menorah at issue there was to be maintained by county employees. \textit{Chabad Ga. I}, 752 F. Supp. at 1067. The Vermont decision was not binding in its finding that by the mere proximity of the menorah to the seat of government the state was endorsing religion. \textit{Id}. The court agreed with the dissent in Kaplan where the judge concluded: "[p]ermitting religious speech in a public forum in and of itself 'does not confer any imprimatur of state approval on religious sects or practices' any more than permitting political speech conveys governmental endorsement of a political group." \textit{Id}. (quoting Kaplan, 891 F.2d at 1033) (Meskill, J., dissenting)).
\textsuperscript{115.} Id.
\textsuperscript{116.} Id.
\textsuperscript{118.} Id. at 1068.
\textsuperscript{119.} Id.
gious," whereas the menorah is a predominantly religious symbol. The court held that the ban on Chabad's eight-day celebration was narrowly tailored, and thus Chabad's motion for a temporary restraining order was denied.

This final comment by the district court foreshadowed how they were to rule the following year. Since Chabad could no longer keep the menorah on the square throughout the celebration of Chanukah, they next sought to move the menorah into the Rotunda, surrounded by secular displays and right where the Christmas tree was permitted to be displayed.

Chabad made the request of the governor to allow the menorah to be placed in the Rotunda like the Christmas tree, but four months went by without an answer. Chabad returned to the courts again to seek relief. At first, the request by Chabad to place the menorah in the Capitol Rotunda, in the form of an amended complaint before the appellate court, was denied per curiam by a three-judge panel of the Eleventh Circuit. Eventually, the Eleventh Circuit convened en banc to reverse and granted Chabad's menorah a place in the Rotunda. The court, in an opinion by the chief judge, concluded that although the state had a compelling interest in distancing itself from the endorsement of any religion, the allowance of Chabad to display the menorah in the Rotunda would not necessarily signify that the state is endorsing, and thus establishing, Judaism.

Over the years various groups have utilized the open space in the center of the Capitol Building. The court highlighted various organizations and programs that have utilized the Rotunda such as the National Organization for the Reform of Marijuana Laws, two Holocaust commemoration ceremonies, and the previous year's Methodist minister. There have also been

120. \textit{Id.}
121. \textit{Id.}  The decision by the court was entered on December 11, 1990, the first evening of Chanukah that year. \textit{Chabad Ga. I}, 752 F. Supp. at 1063.
122. \textit{See id.} at 1068.
125. \textit{Id.} at 1387.
129. \textit{Id.} at 1386.
130. \textit{Id.}
unattended displays there, such as an eighteen-foot tall Indian hut that was exhibited during Indian Heritage Week.\textsuperscript{131}

The court focused its discussion on the inability of the state to demonstrate how the exclusion of Chabad's display from the Rotunda based solely on the content of the exhibit could withstand the heightened constitutional analysis of strict scrutiny.\textsuperscript{132} More specifically, the court could not "countenance Georgia's exclusion of Chabad's display from the Rotunda unless Georgia [could] demonstrate that the exclusion [was] 'necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."\textsuperscript{133} Georgia was unable to do so.\textsuperscript{134}

Georgia could not support its claim that it must not permit Chabad to display the menorah in order to avoid an Establishment Clause violation.\textsuperscript{135} The court went one step further to state that if Georgia did have a compelling state interest in keeping the menorah out of "the Rotunda, total exclusion is not narrowly tailored to achieve that interest."\textsuperscript{136}

In order to determine that Georgia would not violate the Establishment Clause, the court utilized the test created in \textit{Lemon v. Kurtzman}.\textsuperscript{137} The test must be used to determine if Georgia did permit Chabad open-access to the Rotunda, as it does all of its citizens,\textsuperscript{138} would Georgia be violating the Establishment Clause?\textsuperscript{139} The \textit{Lemon} test requires that the state act: 1) with a secular purpose; 2) with the primary effect neither advancing nor inhibiting religion; and 3) without fostering excessive entanglement with religion.\textsuperscript{140}

Georgia did not argue in depth either the first or the third prong of the test, but focused its attention on the second prong.\textsuperscript{141} The court used the

\begin{enumerate}
\item[131.] \textit{Id.}
\item[132.] \textit{Id.} at 1387.
\item[133.] \textit{Chabad Ga. IV, 5 F.3d} at 1387 (quoting \textit{Burson v. Freeman}, 504 U.S. 191, 198 (1992)).
\item[134.] \textit{Id.}
\item[135.] \textit{Id.} at 1388.
\item[136.] \textit{Id.}
\item[137.] \textit{Id.} (citing \textit{Lemon v. Kurtzman}, 403 U.S. 602, 612–13 (1971)).
\item[138.] \textit{Chabad Ga. IV, 5 F.3d} at 1389. The court set out to review under the \textit{Lemon} test whether the denial of Chabad's request to display the menorah in the rotunda was consistent with its neutral open-access policy. \textit{Id.} The court stated:
\begin{quote}
As a matter of course, Georgia grants private speakers equal and unimpeded access to the Rotunda, a designated public forum. Its citizens may come and go, speak and listen, applaud and condemn, and preach and blaspheme as they please. . . . In sum, Georgia neutrally opens the Rotunda as a public forum available to all speakers, and Chabad seeks to exercise its constitutional right to speak in that public forum.
\end{quote}
\textit{Id.} at 1388–89.
\item[139.] \textit{Id.} at 1389.
\item[139.] \textit{Id.} (citing \textit{Lemon}, 403 U.S. at 612–13).
\item[141.] \textit{Chabad Ga. IV 5 F.3d} at 1389.
\end{enumerate}
County of Allegheny v. ACLU decision, in conjunction with Lemon, to determine if the placement of the menorah in the Rotunda would create the appearance of state endorsement of religious beliefs, as argued by Georgia.142

The court stated that Georgia was just plain wrong.143 It is Georgia's stated policy to allow open and equal access to the Rotunda, as a public forum.144 Any reasonable person would not visit the capitol building, enter the Rotunda, and, upon seeing either a menorah or a Christmas tree, believe that Georgia officially endorsed Judaism or Christianity.145 "Precisely because the religious speech is communicated in a true public forum, however, the state, by definition, neither endorses nor disapproves of the speech . . . but rather acts in a strictly neutral manner toward, private speech."146

In dicta, the court advised the state not to create a public forum in a place that citizens would automatically associate with state authority if it believed the citizens of Georgia would not be able to distinguish the private speech of some with the state sponsored speech of others.147 If the state was so concerned with this perception, it should have taken steps to teach the uninformed and not to silence constitutionally protected speech, such as the display of Chabad's menorah.148 Thus, the Eleventh Circuit held that Georgia could allow Chabad a place in the Rotunda to display its fifteen-foot menorah during Chanukah and this display would not violate the Establishment Clause.149

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142. Id. at 1390 (citing County of Allegheny v. ACLU, 492 U.S. 573, 597 (1989)). Allegheny added an endorsement test that may be considered in Establishment cases, but in that case the courthouse steps were not considered a public forum so it is distinguished from the facts of Chabad Ga. IV. See Allegheny, 492 U.S. at 597; Chabad Ga. IV, 5 F.3d at 1390–91.
143. See Chabad Ga. IV, 5 F.3d at 1395–96.
144. Id. at 1392.
145. Id. at 1390 n.11.
146. Id. at 1393.
147. Id. at 1393–94.
148. Chabad Ga. IV, 5 F.3d at 1394. The court, seemingly amused, quoted Chabad's counsel who recited a limerick at oral argument in order to emphasize his point: "It seems to a young rabbi of Chabad, [t]hat the Constitution is exceedingly odd; [t]o protect all speech in a public place [o]n AIDS, abortion, or race, [b]ut to prohibit any person's mention of God." Id. at 1394 n.17.
149. Id. at 1395–96.
IV. LOTS OF LITIGATION IN THE SUNSHINE STATE

A. Home Is Where the Prayer Is at: Disney World, Universal Studios, and Chabad

Two additional examples of Chabad-initiated litigation occurred just south of Georgia, in Florida. In both cases, a local Chabad rabbi lawfully owned a home in a residential neighborhood; and, in both cases, the rabbi’s neighbors were not pleased with the apparent transformation of the rabbi’s home into a place of meeting and worship. In each of the cases discussed below, it was not only an individual neighbor that challenged Chabad’s right to hold services or meetings out of their homes, but it was also the city through a zoning enforcement board or local city commission.

While in each case various First Amendment arguments were made, as well as other constitutional arguments, in both cases there also appeared potential claims of antisemitism against the city. In neither case though did Chabad outwardly claim such motives were involved in denying them the right to worship in the community of their choosing. Antisemitic motives are not easy to prove, but in both cases there were non-Jewish, particularly Christian, groups that were allowed to do what the city was arguing Chabad was not permitted to do.

In Sue Fishkoff’s book, The Rebbe’s Army, she dedicates a whole chapter to the South Florida Jewish community and the growth of Chabad in Florida. South Florida is described as the second largest Jewish community in the United States, only after New York City. Not only does Chabad in


151. Konikov II, 302 F. Supp. 2d at 1331–32; Omnibus Order Denying in Part and Granting in Part Defendant Sal Oliveri’s Motion to Dismiss Amended Complaint (D.E. 17-1); Denying Motion to Strike in Part Amended Complaint (D.E. 17-2); Denying as Moot Defendant Sal Oliveri’s Motion for Protective Order (D.E. 29); Denying Defendant Sal Oliveri’s Motion to Strike Plaintiff’s Response (D.E. 47) at 2, Hollywood Cnty. Synagogue, Inc. v. City of Hollywood, No. 04-61212 (S.D. Fla. Mar. 18, 2005) [hereinafter HCS Order].

152. Konikov II, 302 F. Supp. 2d at 1332; HCS Order, supra note 151, at 3.

153. See Konikov II, 302 F. Supp. 2d at 1334–35; HCS Order, supra note 151, at 5.


156. See Fishkoff, supra note 3, at 33. In this chapter, Fishkoff’s research focuses on Boca Raton, in Palm Beach County, which has not in fact had any known litigation filed against Chabad there. Id.

157. Id.
South Florida make itself seen and heard because of the hard work of each individual Chabad rabbi, but now attention is also on Chabad because of its numbers and the sheer masses that are visible in the community. This growth has led to at least two recent legal actions in the Sunshine State.

One of the examples of Chabad related litigation can be found in one of the most tourist friendly cities in the world, Orlando, Florida. The court reminded the parties in Konikov v. Orange County that Orange County is home to Disney World, Sea World, and Universal Studios, among other theme parks, but it seems to not have room for Chabad. This suit began in 2001 in a county administrative hearing, and eventually made its way up to the United States Eleventh Circuit Court of Appeals. On June 3, 2005, the court decided that the district court left some unanswered questions and sent the case back for a determination of the definition of "religious organization" under the Orange County Zoning Code. The Eleventh Circuit also held that Chabad did have an action under the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 as to unequal treatment and with regard to Due Process. Finally in January 2006, the district court, on remand, concluded that Rabbi Konikov and Chabad of Orlando did have a right to utilize the residential home as a place of worship.

In 2001, Rabbi Konikov began to use a single-family home situated in a residential neighborhood as a meeting place. While many new neighbors might bring over apple pie or freshly baked cookies, the rabbi’s neighbors complained of excessive noise and traffic. Even though there are many examples in the same county of religious groups meeting in a member’s

158. Id.
159. See, e.g., Konikov II, 302 F. Supp. 2d 1328; HCS Order, supra note 151.
161. Id. at 1317.
162. Id. at 1319–20.
163. Id. at 1320.
164. Id. at 1330. As of the time of the writing of this paper, the district court has not yet settled the matter.
166. Order on Remand at 1, 9-10, Konikov v. Orange County, No. 02-CV-376 (M.D. Fla. Jan. 20, 2006) [hereinafter Konikov Order].
168. Id. at 1332. One neighbor eagerly testified that a “high traffic business is being run out of a single-family dwelling.” Id. at 1334 (internal quotations omitted). Another explained his dissatisfaction with Chabad as a neighbor: “I did not buy my house next to a chabad or a synagogue or anything else. I bought my house in a residential neighborhood four years ago. And now it’s become changed.” Id. (internal quotations omitted).
home, in a residential neighborhood, the complaints against Konikov brought on a full-scale investigation by the Orange County Code Enforcement Division.

This investigation led the Code Enforcement Board to conclude that Rabbi Konikov "was operating a religious organization from a residential property without special exception approval and thus was in violation" of a number of county codes. It was at that time that Konikov initiated litigation against the county and against a number of members of the Code Enforcement Board personally.

The first two issues before the court were 1.) whether Rabbi Konikov could have two rabbis testify on his behalf as experts in Hebrew and Yiddish terms and to testify as to the religious practices and obligations of Hassidim, and 2.) whether an attorney could testify as an expert on the constitutionality of the zoning codes as applied in the case. The court held that the attorney could not testify, but that the rabbi's testimony would offer insight into determining the extent that the county regulations restrict Rabbi Konikov's ability to observe Judaism.

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169. Id. at 1335. The pastors at Northland Community Church and Trinity Baptist Church testified on behalf of Rabbi Konikov that their worshippers meet weekly at individual homes for prayer and none of their groups have been fined or ticketed by the code enforcement division for such activities. Konikov II, 302 F. Supp. 2d at 1335.

170. Id. at 1332.

171. Id. at 1336. No explanation was offered by Rabbi Konikov to the court as to why he never sought a code provided exception to the zoning regulation. See id.

172. Id.


174. Id. at 1319–20. The Magistrate's decision was confirmed and ordered by the court. Id. at 1316. Rabbi Immanuel Schochet of Ontario, Canada and Rabbi Eliyahu Touger of Jerusalem, Israel were allowed to explain the Chabad movement and the obligatory practices and rituals that are binding on Hasids, followers of Hasidism. Id. at 1320. Rabbi Touger explained how Jews commonly meet in their rabbis' homes:

It is longstanding Jewish practice to gather in the homes of Rabbis—either because they cannot come to the synagogue or as a token of respect—for communal prayer. And yet no one would consider their private homes anything other than that. For example in my community in Jerusalem, there is a [minyan] three times a day in the home of Rav Ovadah Yosef, the former Chief Rabbi of Israel. Now although he lives in an apartment building with 20+ families, no one considers his holding these prayer services as transforming his home into a synagogue.

Id. at 1319; see also Eliyahu Ashtor, Minyan, in 12 ENCYCLOPAEDIA JUDAICA 67 (1982) (defining the term "minyan" as a prayer quorum of ten Jews). Rabbi Schochet also concurred that "communal prayer will not transform the private dwelling into a synagogue" or consecrated place. Konikov I, 290 F. Supp. 2d at 1319.
the rabbi’s claim that his home was not a house of worship will cause the code’s definition of “religious institution” to fall short.\textsuperscript{175}

Rabbi Konikov sued Orange County, Florida and four members of the county’s Code Enforcement Board claiming that the county’s enforcement of its zoning regulations violated his right to practice Judaism.\textsuperscript{176} In total, Konikov’s complaint contained nine counts, which included a challenge to the county code based on the Free Exercise Clause of the United States and Florida Constitutions, as well as various claims under RLUIPA and Florida’s Religious Freedom Restoration Act (RFRA) of 1998.\textsuperscript{177} There was also a count of civil conspiracy.\textsuperscript{178}

The Free Exercise claims under both the United States Constitution and the Florida Constitution were held invalid based on the court’s ruling that “[t]he Orange County zoning ordinances comprise a valid system of land use regulation that does not infringe on Plaintiff’s constitutional rights.”\textsuperscript{179} The court found that Konikov was controlled by Grosz v. City of Miami Beach,\textsuperscript{180} which dealt with a similar situation in which the court ruled that the zoning ordinance in question did not violate the plaintiff’s free exercise of religion.\textsuperscript{181} While Grosz did not involve Chabad, it did involve another Orthodox Jewish group that was held in violation of city zoning ordinances by holding religious services in the residence of their rabbi.\textsuperscript{182} In Grosz, the court concluded that zoning laws aimed at maintaining the residential quality of a neighborhood must be enforced “whenever that quality is threatened.”\textsuperscript{183} The court concluded that the Groszs could find another location nearby with different zoning to hold services and not find their religious observances restricted.\textsuperscript{184} In addition to denying Rabbi Konikov’s claims based on the precedent set by Grosz, the court also predicated its denial on the same reasons for which Konikov’s RLUIPA claim was denied.\textsuperscript{185}

\textsuperscript{175} See Konikov v. Orange County (Konikov III), 410 F.3d 1317, 1328 (11th Cir. 2005). The code defines a “religious institution” as a place “used primarily or exclusively for religious worship and related religious activities.” Id. at 1328 (internal quotations omitted).

\textsuperscript{176} Konikov v. Orange County (Konikov II), 302 F. Supp. 2d 1328, 1331, 1336 (M.D. Fla. 2004).

\textsuperscript{177} Id. at 1336.

\textsuperscript{178} Id.

\textsuperscript{179} Id. at 1337.

\textsuperscript{180} 721 F.2d 729 (11th Cir. 1983).

\textsuperscript{181} Konikov II, 302 F. Supp. 2d at 1338–40 (citing Grosz, 721 F.2d at 733, 741).

\textsuperscript{182} Id. at 1338–39 (citing Grosz, 721 F.2d at 731–32).

\textsuperscript{183} Id. at 1340 (quoting Grosz, 721 F.2d at 739).

\textsuperscript{184} Id. at 1341 (citing Grosz, 721 F.2d at 739).

\textsuperscript{185} Id. at 1345.
While RLUIPA was enacted to broaden religious protection, the court held that Rabbi Konikov did not show that his religious exercise had been sufficiently burdened.\textsuperscript{186} The court also explained that while the county zoning regulations might make religious practice more expensive based on appropriation of suitable facilities for worship, this did not mean that a "substantial burden" under RLUIPA was manifested.\textsuperscript{187} The RFRA claim was decided similarly in that Konikov did not present evidence as to a substantial burden in light of the county's compelling interest to maintain the residential quality of the neighborhood.\textsuperscript{188}

Rabbi Konikov also charged civil conspiracy against four members of the Board, arguing that they conspired to violate his religious rights.\textsuperscript{189} This count is understandably a common complaint among Jewish groups that find themselves in the minority and find their freedom to practice their beliefs restricted. Whether the limitation is based on antisemitism or not, it is hard to prove such a claim, and, thus, often left out of complaints.\textsuperscript{190} Konikov was unable to present enough evidence to prove the conspiracy claim.\textsuperscript{191} In all nine counts, the Middle District of Florida ruled against Rabbi Konikov and granted the defendants' motion for summary judgment.\textsuperscript{192} The case was then appealed to the Eleventh Circuit.\textsuperscript{193}

It was the RLUIPA claims of unequal treatment and Due Process violations that the Eleventh Circuit reversed and remanded to the Middle District.\textsuperscript{194} The court found that the relevant "question [was] whether the land use regulation or its enforcement treats religious assemblies and institutions on less than equal terms with nonreligious assemblies and institutions."\textsuperscript{195} The code did not define "religious organization" even though Konikov was

\textsuperscript{186.} Konikov \textit{II}, 302 F. Supp. 2d at 1344. While RLUIPA's whole aim is to prevent unreasonable government exclusion of religious groups from a jurisdiction, the court concluded that the statute's use of the word "unreasonab[le]" suggests Congress must have intended that "religious assemblies could be reasonably limited within a jurisdiction." \textit{Id.} at 1345–46.

\textsuperscript{187.} \textit{Id.} at 1345.

\textsuperscript{188.} \textit{Id.} at 1346.

\textsuperscript{189.} \textit{Id.} at 1357.

\textsuperscript{190.} \textit{See Konikov \textit{II},} 302 F. Supp. 2d at 1357. "An action for civil conspiracy ordinarily requires proof of an agreement between two or more people to achieve an illegal objective, an overt act in furtherance of that illegal objective, and a resulting injury to the plaintiff." \textit{Id.} (quoting Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc., 140 F.3d 898, 912 (11th Cir. 1998)).

\textsuperscript{191.} \textit{Id.} at 1357.

\textsuperscript{192.} \textit{Id.} at 1358.

\textsuperscript{193.} Konikov v. Orange County (\textit{Konikov III}), 410 F.3d 1317 (11th Cir. 2005).

\textsuperscript{194.} \textit{Id.} at 1319 n.1.

\textsuperscript{195.} \textit{Id.} at 1324.
cited for operating one. The Board based much of their conclusion—that Konikov operated a religious organization—on the investigation of the Code Enforcement Division. The court’s analysis of the transcript of the Board hearing showed that the Board’s conclusions relied heavily on the weight of the evidence showing a high frequency of meetings. However, the testimony by the Code Enforcement Officers showed that even they were unclear as to what constituted high frequency. The court recognized the contrast between the violation by Konikov’s Chabad, which was cited for a few weekly meetings, and those meetings which are not considered violations—such as when the Cub Scouts hold weekly meetings out of homes or even when friends gathered to watch a sports game a few times a week. There are no examples of the officers citing those groups. “In other words, a group meeting with the same frequency as Konikov’s would not violate the Code, so long as religion is not discussed. This is the heart of [the court’s] discomfort with the enforcement of this provision.” Thus, the court concluded that by treating religious assemblies on unequal terms with nonreligious assemblies, an equal terms violation existed. Because the Code was not clear on what constitutes a violation, the court also held that there was no fair notice to those that might be violating the Code.

On remand to the Middle District in January 2006, in light of the Eleventh Circuit’s opinion, District Judge John Antoon II concluded both in favor of Rabbi Konikov on his RLUIPA challenge and his claim that the Code was unconstitutionally vague. The court found that the Eleventh Circuit’s opinion clearly pointed to the Board’s violation of RLUIPA and that Orange County failed to provide any compelling reason for treating Chabad differently than other religious groups. The court also held that the Code was

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196. Id. at 1330. The court discussed how the Code defined “religious institution,” but not “religious organization,” which when given their ordinary and natural meaning, are distinct from one another. Id. at 1328, 1330.
197. See Konikov III, 410 F.3d at 1330–31.
198. Id. at 1327.
199. Id. at 1328. Testimony by two of the Code Enforcement Division officers makes clear that the code is unclear as to what constitutes a violation. Id. While the manager of the division commented “that even one meeting per week might constitute a violation,” another officer “testified that it would not be a violation for a group to meet with the same frequency as Konikov if the group had a social or family-related purpose.” Id.
200. Konikov III, 410 F.3d at 1328.
201. See id.
202. Id.
203. Id. at 1329.
204. Id. at 1329–31.
205. Konikov Order, supra note 166, at 1, 9–10.
206. Id. at 3, 6.
vague as to its definition of "religious organization" and, therefore, also vague as to its notice to citizens of what in fact the regulation prohibits. While for now Konikov has won his case, the final celebration will have to wait until the county decides what move it will make next.

B. Hollywood Is Home to Chabad

Not too far south of Orange County, a similar Chabad lawsuit was initiated in Broward County. While in the Orange County case Rabbi Konikov was up against tough odds because he could have sought an exception to the zoning code and did not, in this case in Hollywood, Rabbi Korf did apply for the exception.

In Hollywood Community Synagogue, Inc., v. City of Hollywood, Chabad is in the midst of litigation to protect its Chabad center from seemingly biased actions on the part of the City and one particular city commissioner. The Hollywood Community Synagogue, Inc. (HCS) is a Chabad center located in a residential neighborhood of Hollywood.

In 1999, Yosef Elul, president of the synagogue, purchased two homes for the purpose of holding classes on Judaism and to serve as a residence for the associate rabbi of the synagogue. At that time, religious services were also being held there, and it was suggested to the synagogue by the Director of Planning for the City of Hollywood that they apply for a House of Worship Special Exception. In May of 2001, an exception was applied for and "[t]he Board of Appeal and Adjustments (BAA) granted a six month Special Exception." In September 2001, HCS was granted a one-year exception and was informed that it was to be reviewed by the Board after the year was up.
During this time, Chabad members were regularly receiving parking tickets for parking on the synagogue’s property.\(^{218}\) The rabbi witnessed that only the cars parked on the side of the synagogue’s property were ticketed and not other similarly parked cars across the street or nearby.\(^{219}\) Upon further inquiry, the rabbi was told by an officer that he was following the orders of Commissioner Sal Oliveri.\(^{220}\) The synagogue administrator also relayed that a Code Enforcement Officer told him “that the department was under orders from Commissioner Sal Oliveri and the Mayor to keep an eye on the Chabad . . . and to enforce the code.”\(^{221}\)

“In September 2002, the Development Review Board . . . granted . . . a six month Temporary Special Exception subject to certain enumerated conditions.”\(^{222}\) The Board explained that the property could be used as a house of worship and be “compatible with the existing natural environment and other properties within the vicinity.”\(^{223}\) Commissioner Oliveri filed an appeal to the Commission.\(^{224}\) Seemingly without a response to Oliveri’s September 2002 appeal, in March 2003 the Board granted the synagogue a Permanent Special Exception subject to certain conditions being met within six months.\(^{225}\) Commissioner Oliveri appealed again.\(^{226}\)

One month after receiving the Permanent Special Exception, the Commission reversed the decision of the Development Review Board finding that HCS was “too controversial.”\(^{227}\) Oliveri was recorded as saying, “‘it’s almost common sense and reasonable that the Chabad . . . will never fit in Hollywood Hills.’”\(^{228}\)

\(218.\) See id. at 3.
\(219.\) Id.
\(220.\) HCS Order, supra note 151, at 3.
\(221.\) Id.
\(222.\) Id. at 3–4. Five conditions were laid out by the Board: 1) no parking was permitted in the alley behind the synagogue; 2) a lease agreement for off-site parking must be obtained; 3) City-approved garbage dumpsters were required; 4) they must enter into a property maintenance agreement with a provider who will keep the property in compliance with the city code; and 5) they must create an approved buffer along the rear side of the residences. Id. at 4 n.1.
\(223.\) Id. at 4.
\(224.\) HCS Order, supra note 151, at 4. HCS also claims that “Oliveri was permitted to vote on his own appeal and cast the deciding vote . . . [which was] against” Commission procedure. Id.
\(225.\) Id.
\(226.\) Id.
\(227.\) Id. (internal quotations omitted).
\(228.\) HCS Order, supra note 151, at 5.
By July of 2004, Commissioner Oliveri was asking the Commission “‘to evict’” HCS.\textsuperscript{229} He even went so far as to say in support of eviction, “‘[w]e’re talking about neighborhoods here. We’re talking about neighborhoods having a smell.’”\textsuperscript{230} Later that month, the city filed suit in Broward County Circuit Court against HCS for operating as a house of worship without a Special Exception.\textsuperscript{231}

HCS offered as evidence of unfair treatment that there were at least twelve houses of worship in residential neighborhoods in Hollywood Hills.\textsuperscript{232} In one home only blocks away from HCS is a residence operating as a shrine to the Virgin Mary.\textsuperscript{233} Even though numerous complaints have been made about the traffic, noise and garbage associated with the activities there, no Special Exception has been requested or granted.\textsuperscript{234} When Oliveri was asked by synagogue members as to why the shrine was not required to obtain an exception, he is alleged to have shrugged them off claiming the shrine did not need an exception because it was a miracle.\textsuperscript{235}

HCS filed a complaint in federal court in response to the state court complaint by the city.\textsuperscript{236} The amended complaint by HCS had a total of fifteen counts, levied against the city and Oliveri, individually.\textsuperscript{237} Most of the claims centered around HCS’s First Amendment rights (freedom of speech, freedom of religion, and freedom of assembly) being taken away by the denial of the Special Exception, as well as various similar claims under RLUIPA and FRFRA.\textsuperscript{238} The First Amendment claims are similar to those made by Rabbi Konikov in Konikov v. Orange County.\textsuperscript{239}

\begin{footnotes}
\item[229] \textit{Id.}
\item[230] \textit{Id.} at 5, 22. In a footnote to the court’s order, Judge Lenard adds that “Oliveri subsequently stated that his comment was an effort to compare his efforts to protect his single family neighborhood with the City of Hollywood’s efforts to protect the Hollywood Lakes section from a smelly waste treatment facility.” \textit{Id.} at 5 n.5.
\item[231] \textit{Id.} at 5.
\item[232] HCS Order, \textit{supra} note 151, at 5.
\item[233] \textit{Id.} at 6. Rosa Lopez, who owns the home, has hosted as many as 4000 people. \textit{Id.} She also operates a gift shop on the premises. \textit{Id.}
\item[234] \textit{See id.}
\item[235] \textit{See HCS Order, \textit{supra} note 151, at 6.} Oliveri is alleged to have replied: “[T]he Virgin Mary visits that particular home . . . . If you people know anything about the Catholic religion, that’s called a vision. To Christians and Catholics, that is considered a miracle. That’s not establishing a house of worship. That is a miracle.” \textit{Id.} (omission in original).
\item[236] \textit{See HCS Complaint, \textit{supra} note 150, at 1, 16.}
\item[237] \textit{Id.} at 17–33. At the time of the writing of this paper there was only one order issued by the court. \textit{See HCS Order, \textit{supra} note 151.}
\item[238] \textit{See HCS Complaint, \textit{supra} note 150, at 22–26.}
\item[239] \textit{See Konikov v. Orange County (Konikov II), 302 F. Supp. 2d 1328 (M.D. Fla. 2004), aff’d in part, rev’d in part, 410 F.3d 1317 (11th Cir. 2005).}
\end{footnotes}
One of the counts that HCS charged was that the its right to Substantive Due Process under the Fourteenth Amendment was violated. This charge was based on the Commission's reversal of the Board's decision to grant the Permanent Special Exception. HCS claimed the Commission's reversal had nothing to do with "public health, safety, welfare or morals." This claim was substantiated by the fact that HCS had not created a greater problem than the other twelve houses of worship in the neighborhood and the shrine a few blocks away. Also, distinct from Konikov, HCS applied for the exception and at least temporarily received it. HCS could therefore claim a property interest in the grant of the exception and an injury based on its expenditures for relying on that grant in good faith. HCS claimed this property right is protected under the Fourteenth Amendment.

Some of the actions described by HCS as violating its rights are charged against Oliveri specifically. In count three of the complaint, HCS claims that he abused his power and authority as a commissioner By ordering law enforcement to focus their attention on HCS and to only ticket synagogue members' cars, HCS argued that "Oliveri acted under color of law" to harass HCS's congregants. The synagogue did not claim, for example, that cars parked on the side of the road cannot be ticketed according to the city's parking code, but rather that under the direction of Oliveri there had been selective enforcement of this code. Thus, HCS claimed that Oliveri has denied its members rights guaranteed by the Constitution.

Making the accusations against Oliveri is one thing, but it is much more difficult to bring Oliveri into court. While no decisions have been reached by the court on the merits of HCS's claims, HCS did overcome a high hurdle in just being able to sue Oliveri individually. Since Oliveri is a city commissioner, generally, his status as a government official would entitle him to

240. HCS Complaint, supra note 150, at 29.
241. See id.
242. Id.
243. See id.
244. See id. at 8–9.
245. HCS Complaint, supra note 150, at 29.
246. Id.
247. See id. at 20–21, 27.
248. Id. at 20. Oliveri succeeded in having this claim dismissed based on HCS's lack of proof "that it was arbitrarily and capriciously deprived of its property right in a Permanent Special Exception." HCS Order, supra note 151, at 33. The court held that there is no fundamental right in the Constitution to a Permanent Special Exception. Id.
249. HCS Complaint, supra note 150, at 21.
250. HCS Order, supra note 151, at 20.
251. HCS Complaint, supra note 150, at 21.
qualified immunity.\textsuperscript{252} This defense was argued by Oliveri in his motion to dismiss the case.\textsuperscript{253}

Qualified immunity is meant to free the hands of government officials, individually, who are acting in the legal capacity of their office and to prevent them from constantly defending frivolous lawsuits.\textsuperscript{254} The caveat to this type of immunity is that if an official knowingly violates long held "statutory or constitutional right[s] of which a reasonable person would have known," then such immunity cannot serve as a defense.\textsuperscript{255} The court stated that it does not shield "'the plainly incompetent and those who knowingly violated the law.'"\textsuperscript{256}

In determining whether Oliveri was shielded by qualified immunity from the charges levied by HCS, the court had to first determine if the commissioner "was acting within the scope of his . . . authority when the allegedly unconstitutional acts [claimed by HCS] took place."\textsuperscript{257} The court looked at the accusation that he abused his power by instructing law enforcement personnel to ticket HCS cars parked on the side of road.\textsuperscript{258} In this example, the court found that it was his job to ensure that the city's code was being upheld.\textsuperscript{259} Since it was within his power to instruct law enforcement to make sure that residents abided by parking regulations, Oliveri did act within his job.\textsuperscript{260} Once Oliveri proved this, the burden shifted to HCS to show that qualified immunity does not apply.\textsuperscript{261}

At first, the court noted that when looking at Oliveri's activities generally, they appeared to fall within the discretion of his job as commissioner (e.g., working with code inspectors and police on upholding parking regulations in the community).\textsuperscript{262} But after its analysis, the court changed its view based on HCS's claims of selective enforcement of the law in order to harass synagogue members and disrupt and discourage HCS's activities.\textsuperscript{263} The court stated that the testimony regarding the selective enforcement of parking and the comments regarding the shrine indicated "a nexus linking Oliveri, the harassment of the synagogue by city personnel, and the discouragement

\begin{footnotes}
\item \textsuperscript{252} See Ray v. Foltz, 370 F.3d 1079, 1081 (11th Cir. 2004).
\item \textsuperscript{253} HCS Order, supra note 151, at 16.
\item \textsuperscript{254} Williams v. Consol. City of Jacksonville, 341 F.3d 1261, 1267 (11th Cir. 2003).
\item \textsuperscript{255} Ray, 370 F.3d at 1081.
\item \textsuperscript{256} HCS Order, supra note 151, at 16 (quoting Ray, 370 F.3d at 1082).
\item \textsuperscript{257} Id. (citing Storck v. City of Coral Springs, 354 F.3d 1307, 1314 (11th Cir. 2003)).
\item \textsuperscript{258} Id. at 20.
\item \textsuperscript{259} Id. at 19.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} HCS Order, supra note 151, at 19–20.
\item \textsuperscript{262} Id. at 19.
\item \textsuperscript{263} Id. at 20–22.
\end{footnotes}
of the Chabad from continuing its religious activities in the Hollywood Hills neighborhood." The facts were also "sufficient to state a prima facie case of selective enforcement." The court ruled that if the amended complaint was "taken as true and if all reasonable inferences therefrom are considered in the light most favorable" to HCS, then "a reasonable person could find that Defendant Oliveri targeted the Synagogue and its members for the purpose of discouraging them from joining together to practice their faith." The court found that all of the facts taken together as presented by HCS and the allegation that the inspections and citations happened over a long period of time were enough to establish that Oliveri's behavior and orders fell outside the permitted range of conduct for a commissioner.

The facts presented by HCS have so far been enough to overcome Oliveri's motion to dismiss, but the judge has warned HCS that more evidence will be needed to substantiate the facts presented to overcome Oliveri's qualified immunity defense on a likely forthcoming motion for summary judgment. While the conclusions by the court are merely reflective of HCS's right to go forward with their claims of constitutional violations, it is a significant step in moving forward against Oliveri. Unless some compromise is met, there is likely still a long way to go before the Chabad members of the Hollywood Community Synagogue are out of the courts.

V. CONCLUSION

Chabad's goal or mission when it comes to outreach is to be seen and to be heard. Chabad emissaries are driven by the Rebbe's message of spreading Judaism to those who want to embrace it. Sometimes, though, the

264. Id. at 23.
265. Id. at 25. Oliveri argued that he could not have targeted Chabad for selective enforcement, since Temple Sinai and Temple Solel, which operated near HCS, were similarly situated (meaning both were Jewish houses of worship) and there were no allegations against Oliveri from those synagogues. HCS Order, supra note 151, at 28. The court seemed to think Oliveri's argument was misguided and responded accordingly:

This line of argument appears to assume that the improper or discriminatory motive underlying Oliveri’s alleged acts is anti-Semitism, and then argues that anti-Semitism has not been shown since there is no allegation of selective enforcement against Temple Sinai of Hollywood and Temple Solel. The Court notes however that Chabad, unlike Temple Sinai of Hollywood or Temple Solel, was described in Commission hearings as "too controversial."

Id. at 28–29.
266. Id. at 21.
267. Id. at 31.
268. Id. at 31–32.
269. FISHKOFF, supra note 3, at 11–12.
270. Id.
message is perceived as too loud by those who are not interested. Many have resorted to the court system to silence Chabad. As the litigation headlining Chabad around the country has shown, it is not very difficult today to bring a lawsuit, nor to defend one. In Chabad’s case, there are plenty of attorneys who are willing to take on the case pro bono. Chabad members have also not hesitated to initiate litigation when they felt their rights were being constrained. While the litigation might be time consuming, it has also helped garner attention to Chabad and the attention often helps Chabad fundraise.

While clearly Chabad rabbis and members are not seeking to be sued, nor do they want to be forced into court to be able to display a religious symbol or to hold services out of their home, such things have become regular occurrences in the past two decades. This situation may be partly due to the ever-growing ease of bringing a lawsuit, or it may be due to the growth of Chabad. Whichever way, it does not appear that there is an end in sight for either.