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LEARNING LESSONS FROM INDIA: THE RECENT HISTORY OF ANTITERRORIST LEGISLATION ON THE SUBCONTINENT

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I. INTRODUCTION

On October 26, 2001, one month after the most deadly terrorist attack to ever be carried out on U.S. soil,¹ the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001² became law. Prior to the enactment of the PATRIOT Act, the United States had minimal legislation specifically targeted at terrorist activity.³ However, two years after the

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¹ In addition to the 3000 fatalities suffered in New York, Washington D.C., and Pennsylvania, a figure that exceeded the number of fatalities from any previous terrorist attack by a factor of ten, Paul R. Pillar, *Fighting International Terrorism: Beyond September 11*, Address at the College of William and Mary, Nov. 28, 2001, available at http://www.cia.gov/nic/PDF_GIF_speeches/wmspeechNov01.pdf, the direct economic costs of the terrorist attacks of September 11th, 2001, was estimated to be over \$100 billion dollars. *Department of Defense Budget Priority for Fiscal Year 2004: Hearing Before the Committee on the Budget House of Rep.*, 108th Cong. 4 (2003) (prepared statement for Paul Wolfowitz), available at <http://www.house.gov/budget/hearings/wolfowitzstmt022703.htm>.

² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) [hereinafter PATRIOT Act]. The bill was passed in the Senate, with no debate or hearings, by a vote of 98-1, 147 CONG. REC. S11,059-60 (daily ed. Oct. 25, 2001), and by the House of Representatives by a vote of 357-66. 147 CONG. REC. H7224 (daily ed. Oct. 24, 2001).

³ See CENTER FOR ARMS CONTROL AND NON-PROLIFERATION, *HISTORY OF U.S. COUNTER-*

passage of the PATRIOT Act, and despite heavy criticisms and denouncements from civil libertarian groups⁴ and over 220 city council resolutions opposing the Act,⁵ the Department of Justice proposed a new bill, the Domestic Security Enhancement Act of 2003, nicknamed PATRIOT Act II by some,⁶ which would further expand the powers of the federal government and law enforcement agencies in the ongoing War on Terror. The government's proposal of PATRIOT Act II follows the course of action of numerous other countries that have responded to terrorist attacks between their own borders by passing more and more criminal legislation.

On December 13th, 2001, halfway across the world from the mourning United States, a group of heavily armed militants attempted to storm India's Parliament in New Delhi, triggering off a firefight in which five of the attackers and fourteen innocents were killed.⁷ Security forces immediately sealed off the red sandstone parliament building where, ironically, discussions were to have begun on a new antiterrorist bill.⁸ The bill, the Prevention of Terrorism Act (POTA), which originally had failed to get Parliamentary approval when discussed in 2000, was passed soon after in a rare joint session of both Houses of the Indian Parliament.⁹

With the original PATRIOT Act set to expire on December 31, 2005, a

TERRORISM POLICY, available at <http://www.armscontrolcenter.org/terrorism/101/history.html> (last visited Oct. 28, 2004). The most substantial piece of anti-terrorist legislation prior to the PATRIOT Act was the Anti-Terrorism Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (1996).

⁴ See, e.g., LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* (2003), available at <http://www.lchr.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf>; Press Release, ACLU, PATRIOT Act Fears Are Stifling Free Speech, ACLU Says in Challenge to Law, (Nov. 3, 2003), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14307&c=262>.

⁵ Included in this group are Los Angeles and Chicago. ACLU, *Dallas Residents: Oppose the USA PATRIOT Act*, available at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=14483&c=24> (last visited Oct. 28, 2004).

⁶ [citation to Domestic Security Enhancement Act of 2003] [hereinafter PATRIOT Act II]; Donald A. Downs, *A Response To Anthony Lewis: Civil Liberties in a New Kind of War*, 2003 WIS. L. REV. 385, 388 (2003) (discussing the circulation of the draft form of the Domestic Security Enforcement Act).

⁷ Microsoft Network India, *Complete Coverage: December 13th Attack*, at <http://server1.msn.co.in/completecoverage/Dec13attack/index.asp> [hereinafter *December 13th Attack*] (last visited Oct. 28, 2004); see also *India on High Alert After Attack on Parliament*, AGENCE FRANCE PRESSE, Dec. 13, 2001; *Six Gunmen Open Fire on Indian Parliament*, OAKLAND TRIB., Dec. 13, 2001.

⁸ *December 13th Attack*, *supra* note 7.

⁹ *Id.*

debate regarding the effectiveness of the legislation currently rages.¹⁰ The efficacy of the counter-terrorist response in the United States has, due to the relative newness of these domestic attacks, been largely untested. In contrast, India's legal system, operating under a democratic system governed by a constitution heavily influenced by the United States,¹¹ has been responding to recurrent terrorist activity within its borders from independence in 1947 through to the present day.¹² The Indian experience has shown that with each new piece of legislation aimed at fighting terrorism comes a similar pattern of abuses. India's antiterrorist laws have consistently been used beyond their originally prescribed scope to bypass the normal rules and safeguards afforded to criminal defendants under both the Indian Constitution and the Code of Criminal Procedure.

This comment will consider the Indian experience in an effort to learn lessons from a legal system that has had to deal with the dreadful reality of domestic acts of terrorism and determine whether the same legislative overreach of antiterrorist legislation is beginning in the United States. Part II of the comment will examine instances in the United States where criminal procedure is bypassed in favor of new methods based on the new threat of terrorism. It will also examine cases that could normally be handled by the criminal justice system, but have, questionably, been handled under provisions of new antiterrorist legislation. With this in mind, this comment will look to the Indian experience in an attempt to gain insight from the fifty years of experience the Indian legal system has in grappling with the unique challenges terrorism poses to domestic criminal law. Part III will analyze why India's experience may be one that the U.S. legal system may learn from and argue that based on the history of India's Constitution and the particular nature of the recent terrorist activity within its borders, India does serve as a good point of comparison for the United States. The comment will next analyze the history of terrorism in post-independence India and the government's various responses. Part IV will

¹⁰ Declan McCullagh, *Bush Wants Patriot Act Renewed*, CNET NEWS, Jan. 20, 2004, at http://news.com.com/2100-1028_3-5144203.html.

¹¹ See Vijayashri Sripathi, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 422 (1998).

¹² In fact, one of the earliest pieces of anti-terror legislation to be enforced in India was The Rowlatt Act (1919), enacted under British rule. The most recent national security legislation to be enacted by the Indian Government is the Prevention of Terrorism Act, C.I.S. Schedule (2002), The Prevention of Terrorism Act of 2002 of the Indian Parliament, New Delhi, 28 Mar. 2002 [hereinafter POTA], which entered into law in March 2002. Suhas Chakma, Symposium, *Do Ends Justify Means?*, 512 SEMINAR: STATES OF INSECURITY, Apr. 2002, at 27.

examine reports of abuse of antiterrorist legislation and look at how these abuses have changed or developed with each new piece of national security legislation. Having outlined this history, Part V will then analyze the pattern of constant overreach of India's national security legislation and examine instances of overreach in the United States. The comment will conclude with a brief examination of lessons the United States may learn from India when looking at the legal complexities in the War on Terror.

II. NATIONAL SECURITY LEGISLATION "CREEP" IN THE UNITED STATES POST-9/11

As is well known, the major piece of legislation passed in the wake of the September 11th terrorist attacks was the USA PATRIOT Act.¹³ Passed with little debate in the highly tense and emotional time period immediately following the attacks, the PATRIOT Act was ostensibly the government's reaction to protect the United States from any further terrorist activity.¹⁴ Despite the public face given to the act by its supporters, the purposes of the PATRIOT Act were far broader than just battling terrorism.¹⁵ Many of the provisions endowed law enforcement agencies in general with a greater amount of freedom in surveillance and investigation.¹⁶ Included in the act were provisions that

created new record-keeping and reporting measures on financial institutions, provided for greater information-sharing among federal intelligence and criminal justice officials; enable[d] a special intelligence court to authorize the collection by law enforcement authorities of data from roving wiretaps; enlarge[d] the availability of information from grand jury investigations; restricts access to biological and chemical agents and criminalizes their possession for other than peaceful purposes; relax[e]d rules for gaining access to electronic communications and student records by subpoena; provides for limited detention of certified terrorists; and facilitate[d] governmental eavesdropping and so-called "sneak and peek" searches of private premises.¹⁷

¹³ Michael P. O'Connor & Celia M. Rumann, *Into The Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1705 (2003).

¹⁴ *Id.* at 1706:

Proponents of the legislation contended that the legislation served three purposes: to strengthen and streamline the government's ability to gather information to 'disrupt, weaken, and eliminate the infrastructure of terrorist organizations,' to 'make fighting terrorism a national priority in our criminal justice system,' and 'to enhance the authority of the Immigration and Naturalization Service to detain or remove suspected alien terrorists.'

Id.

¹⁵ *Id.* at 1707.

¹⁶ *Id.*

¹⁷ James A.R. Nafziger, *The Grave New World of Terrorism: A Lawyer's View*, 31 DENV.

As opposed to specifically targeting gaps in the way the criminal justice system currently handled the menace of terrorism, the expansion of the powers of general law enforcement investigatory tools seemed to dominate the provisions of the PATRIOT Act.¹⁸ While initially used in probes related to battling terrorism, the use of the PATRIOT Act has begun to creep further into general law enforcement investigations.¹⁹ For example, in Las Vegas, federal authorities used the money laundering sections within the PATRIOT Act to access the financial information of strip club owner Michael Galardi and “numerous other politicians” in a public corruption probe.²⁰ While some politicians stated that they were unaware that the Act could be used in non-terrorist related investigations, a spokesman for the Justice Department replied, “I think probably a lot of members (of Congress) were only interested in the anti-terrorism measures . . . but when the Judiciary Committee sat down, both Republicans and Democrats, they obviously discussed the applications, that certain provisions could be used in regular criminal investigations.”²¹

While the PATRIOT Act had ostensibly been passed directly in response to September 11th, its provisions were a wish list that law enforcement officials wanted to apply beyond the scope of terrorist-related activities long before the attacks.²² However, it has become clear to some that a strictly law enforcement approach to terrorism is inadequate, and in order to aid the besieged civil authorities, some formal military action is necessary.²³ Consequentially, in addition to the PATRIOT Act, Congress passed Public Law 107-40, which authorized the President to use “all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States.”²⁴ This Congressional declaration of war was the basis of the post-September-11th military actions taken in Afghanistan, but also had effects domestically. A portion of the action taken on behalf of the Executive to prevent future acts of terrorism has overlapped with traditional law enforcement duties as the Office of the President has begun designating suspected members of Al-Qaeda as

J. INT’L L. & POL’Y 1, 5 (2002).

¹⁸ O’Connor & Rumann, *supra* note 13, at 1707.

¹⁹ See, e.g., J.M. Kalil, *PATRIOT ACT: Law’s Use Causing Concerns*, LAS VEGAS REV. J., Nov. 5, 2003, at 1A.

²⁰ *Id.*

²¹ *Id.*

²² O’Connor & Rumann, *supra* note 13, at 1707.

²³ Derek Jinks, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT’L L. 83, 91 (2003).

²⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

“unlawful enemy combatants” and placing them in military detention.²⁵

The power of the Executive to label a U.S. citizen an “unlawful enemy combatant” was upheld by the Supreme Court in the World War II case *Ex Parte Quirin*.²⁶ During the military operations in Afghanistan, a handful of U.S. citizens were found to have been taking part in the combat against U.S. forces, and upon their discovery in military detention, were labeled “unlawful enemy combatants.”²⁷

Although the Executive has argued against the judiciary’s right to do so, since September 11th the Courts have reserved their right to scrutinize the designation of an enemy combatant.²⁸ In *Rasul v. Bush*, the U.S. government argued that fourteen individuals, who had been detained in the military hostilities in Afghanistan, had no right to challenge the grounds of their detention in a U.S. court.²⁹ The Supreme Court, with Justice Stevens writing the majority decision, rejected the argument, noting:

[p]etitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe custody in violation of the Constitution or laws or treaties of the United States.³⁰

The Court remanded the cases to the District Court to consider the detainees’ claims on the merits.³¹

One of the most recent cases to involve stretching the “unlawful enemy combatant” designation is the one of Jose Padilla.³² Padilla is a U.S. citizen who was picked up in Chicago, Illinois, initially on grounds of

²⁵ Alejandra Rodriguez, Comment, *Is the War on Terrorism Compromising Civil Liberties? A Discussion of Hamdi And Padilla*, 39 CAL. W. L. REV. 379, 381 (2003).

²⁶ *Ex Parte Quirin v. Cox*, 317 U.S. 1 (1942). In *Quirin*, eight Nazi saboteurs, including one U.S. citizen, had been captured after landing in the United States and were scheduled to face charges in front of a military tribunal. *Id.* at 8-10. The Court held that unlawful enemy combatants were those that had violated the universal rules of war and who, based on their violation, were subject to trial in front of a military tribunal, but not with the traditional protections afforded to prisoners of war. *Id.* at 30-31.

²⁷ *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

²⁸ *Hamdi*, 316 F.3d at 464 (agreeing that petitioners have the right to file a writ of habeas corpus asking for judgment on the validity of their military detention).

²⁹ *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

³⁰ *Id.* at 2698.

³¹ *Id.* at 2699.

³² *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003).

acquiring his testimony as a material witness to a grand jury.³³ The Government accused Padilla of being a member of Al-Qaeda and entering the United States for the purpose of detonating a “dirty bomb.”³⁴ Padilla was labeled an “unlawful enemy combatant” and transferred to a high-security Navy prison in Charleston, South Carolina.³⁵ Although Padilla’s writ of habeas corpus has not yet been judged on the merits,³⁶ the original District Court hearing the case stated that it would determine the validity of the “unlawful enemy combatant” designation dependent on whether the Executive had “some evidence” regarding Padilla’s connection to Al-Qaeda.³⁷ The Court’s statement underscores the difference in standards required to detain a suspected terrorist under the powers given to the Executive versus the traditional constraints faced by law enforcement officials. While under traditional criminal law, no suspect may be punishable for a crime unless they are found guilty “beyond a reasonable doubt,” under the “unlawful enemy combatant” standard, the Executive branch may indefinitely detain a suspected terrorist without bringing formal charges against them so long as they have “some evidence” to do so.³⁸

The decreased evidentiary standards required under the Presidential powers endowed partially by P.L. 107-40 parallels the new powers given to law enforcement under the PATRIOT Act. Both initiatives are efforts to better equip the government to fight the asymmetrical warfare undertaken by the terrorist organizations targeting the United States. Doing this has meant increasing law enforcement powers and privileges in the hopes that the world is spared another September 11th. The danger in this increase in power and privilege is that it is difficult to keep these powers focused just on matters related to “terrorism,” especially given the fact that it is so hard to pinpoint the definition of “terrorism.”

The temptation to use the greater powers of enforcement beyond the

³³ *Padilla*, 124 S. Ct. at 2715.

³⁴ *Id.* “[T]he principal type of dirty bomb . . . combines a conventional explosive, such as dynamite, with radioactive material.” U.S. NUCLEAR REGULATORY COMMISSION, FACT SHEET ON DIRTY BOMBS, at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/dirty-bombs.html> (last revised Feb. 25, 2004).

³⁵ *Rodriguez*, *supra* note 25, at 383.

³⁶ The Supreme Court upheld Padilla’s right to challenge his detention, but stated that the original habeas petition had been filed erroneously in the Southern District of New York, which did not have jurisdiction over Padilla’s custodian, Commander Melanie Marr. *Padilla*, 124 S. Ct. 2711. Padilla’s habeas appeal may not ever be heard as it is believed that, after the Supreme Court decision, the Justice Department has filed charges against Padilla—nearly two and a half years after first detaining him. See Emma Schwartz, *Terror Indictments May be Linked to Padilla*, L.A. TIMES, Sept. 17, 2004, at A16.

³⁷ *Padilla*, 256 F. Supp. 2d at 219.

³⁸ *Id.*

problems created by September 11th has already begun to manifest. As government officials now are asking for an even greater increase in powers through the proxy of the PATRIOT Act II, it is important to analyze the very real danger of the creep of national security legislation into all areas of criminal law. As dealing with terrorism is a relatively new phenomenon in the United States, it may be of use to study the long, controversial history of antiterrorist legislation in India in order to isolate whether patterns exist that can be seen in the United States. The next section of the comment will analyze why a comparison with India may be of particular use when discussing the scope and direction of the antiterrorist response in the United States.

III. INDIA AS A MODEL FOR THE UNITED STATES

India is not often thought of as a country from which the United States has much to learn. Burdened with three times the U.S. population in one-third the total square-mileage,³⁹ India still faces development challenges that the United States surmounted decades ago. Despite the wide cultural and socio-economic differences between them, there are commonalities between the two countries that provide grounds for learning from one another. Of particular interest as it relates to counterterrorist response is the long, bloody history the Indian subcontinent has faced in attempting to respond to continual acts of domestic terrorism.⁴⁰ What makes the legislative response of India particularly useful for study is the fact that it has been undertaken firmly entrenched in a constitutional context that is quite similar to that of the United States.⁴¹ In addition, the fact that the agents of many of the more recent acts of terrorism in India belong to the same group that has been named responsible for the September 11th attacks⁴² gives more credence to the notion that there may be some lessons to be learned regarding antiterrorist responses by looking at the Indian experience.

A. TERRORISM IN INDIA

Since Independence India has faced terrorist movements in Punjab and Jammu and Kashmir, bordering Pakistan, and part insurgent-part terrorist movements in the northeast, bordering Myanmar and Bangladesh; in Bihar, bordering Nepal; and in certain interior states like Andhra Pradesh, Madhya

³⁹ CIA, INDIA: THE WORLD FACTBOOK (2004), at <http://www.cia.gov/cia/publications/factbook/geos/in.html>.

⁴⁰ See discussion *infra* Part III.A.

⁴¹ See discussion *infra* Part III.B.

⁴² See *infra* text accompanying notes 48-50.

Pradesh and Orissa.⁴³ Most recently, on July 28, 2003, a bus bomb was detonated in Bombay, recently named Mumbai, killing three and injuring thirty.⁴⁴ Earlier in the year, in March, a bomb was detonated on a commuter train in Bombay, which resulted in the death of eleven civilians.⁴⁵ The March bombings occurred almost ten years to the day when fifteen massive explosions were set off throughout Mumbai, resulting in the death of scores of people and paralyzing the city.⁴⁶ As of late, the most fertile site of domestic terrorism has been taking place in the states Jammu and Kashmir. Indian officials allege that Pakistani sponsored militants have been launching attacks on Indian security forces in the area and attacking Hindu civilians.⁴⁷

On October 1, 2001, at least thirty-one people were killed and seventy-five injured when "Islamic militants, allegedly Pakistanis with close Al-Qaeda links, launched a suicide attack on the Kashmir state assembly in Srinagar."⁴⁸ The first wave of attackers drove an explosive-laden vehicle into the heavily guarded main gate of the assembly complex, blowing the gate and themselves up.⁴⁹ Other militants rushed into the building, opening fire on those inside.⁵⁰ On May 14, 2002 at least thirty people including army personnel and seven tourists were killed and forty-eight others were hurt in an attack inside the army quarters at Kaluchak, Jammu.⁵¹ On November 25, 2002, security forces killed two terrorists after armed militants attacked the Raghunath and Shiv temples in Jammu, killing at least thirteen devotees.⁵² Attacks continue to occur with civilians and Indian military personnel losing their lives in an all-too-frequent pattern of violence.

Under the latest antiterrorist legislation in India, the Prevention of Terrorism Act of 2001, over thirty-two organizations suspected of operating

⁴³ B. Raman, *Terrorism: India's Unending War*, REDIFF NEWS, Apr. 4, 2003, at <http://www.rediff.com/news/2003/apr/03spec.htm>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Suhasini Haider, *India Boosts Security After Blasts*, CNN, Aug. 26, 2003, available at <http://www.cnn.com/2003/WORLD/asiapcf/south/08/25/mumbai.blasts/>; Clark Staten, *Indian Bombings Caused by "Foreign Extremists", According to Police*, EMERGENCYNET NEWS, Mar. 1, 1993, at <http://www.emergency.com/bombay.htm>.

⁴⁷ Gaurav Kampani, *Indo-Pakistani Military Standoff: Why It Isn't Over Yet*, Nuclear Threat Initiative, at http://www.nti.org/e_research/e3_12b.html (last visited Oct. 28, 2004).

⁴⁸ Microsoft Network India, *Heinous Terror Strikes*, at <http://server1.msn.co.in/completecoverage/Dec13attack/terror.asp> (last visited Oct. 28, 2004).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

Terrorism Act of 2001, over thirty-two organizations suspected of operating in India have been labeled “terrorist.”⁵³ The list of terrorist organization includes Al Qaida, Al-Umar-Mujahideen, and Hizb-ul-Mujahideen, all groups also designated as terrorist by the USA PATRIOT Act.⁵⁴

B. LEGAL SIMILARITIES BETWEEN THE UNITED STATES AND INDIA

One facet that differentiates India from a number of other developing countries faced with battling terrorism on its own soil is that India, like the United States, is a secular, constitutional democracy whose legal system was heavily influenced by contact with the British system of Common Law.⁵⁵ In 1946, after it became clear that post-War England did not have the will or energy to maintain India as one of its colonies, the ruling British Labour government created a Constituent Assembly plan that was meant to create a Constitution for a new, independent India.⁵⁶ When the Constituent Assembly met for the first time at the end of 1946, its President, Dr. Satchinda Sinha, urged the members of the assembly to follow the lead set by America’s founding fathers in Philadelphia at the end of their Revolution against the British.⁵⁷ He asked the Assembly members to carefully study provisions of the U.S. Constitution while drafting India’s own.⁵⁸

The resulting Constitution—the longest in the world—drew from many foreign constitutions, but was heavily influenced by the United States, especially as it related to constitutionally protected fundamental rights.⁵⁹ One important difference between the United States and India was the latter’s decision to follow the example of Britain by adopting a Parliamentary style of government with a strong Federal government.⁶⁰ Despite this structural difference, India did depend heavily on the U.S. Constitution, particularly for the Bill of Rights, which were largely incorporated into the Indian Constitution.⁶¹ The first Prime Minister of India, Jawaharlal Nehru, acknowledged the heavy influence in a speech to the United States Congress soon after taking office.⁶²

Therefore, in many senses, India is the “constitutional offspring” of the

⁵³ POTA, *supra* note 12.

⁵⁴ *Id.*

⁵⁵ Sripati, *supra* note 11, at 425, 452, 469.

⁵⁶ *Id.* at 421.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 423.

⁶¹ *Id.* at 422, 428.

⁶² *Id.*

United States.⁶³ As such, "India can serve as a laboratory for testing difficult questions of constitutional law arising in the United States since India purposefully incorporated the quintessential aspects of United States constitutionalism."⁶⁴

In regards to its Constitutional Criminal Procedure, India follows the lead of the United States by providing criminal defendants with safeguards prior to conviction for certain offenses.⁶⁵ Its Constitution guarantees defendants freedom from being charged for retroactive crimes, double jeopardy, and self-incrimination.⁶⁶ Defendants have the right to know the grounds of their arrest, a right to legal counsel when detained, access to free legal counsel if deemed indigent, and the right to appear before a magistrate within twenty-four hours of arrest.⁶⁷

The Indian Constitution and that of the United States differ in two significant respects. The first is that the Indian Constitution lacks a due process clause.⁶⁸ Although the Constituent Assembly had originally included a clause mirroring the U.S.'s, they ultimately adopted a version stating, "no person shall be deprived of life or personal liberty except according to procedure established by law."⁶⁹ In the early years after Independence, the Indian Courts read Article 15 as giving the legislature unfettered power to pass laws restricting life, liberty, and property.⁷⁰ However, in recent years, after the case of *Maneka Gandhi v. Union of India*,⁷¹ the Indian Supreme Court has interpreted the Article to mean that no one may be denied their liberty unless the procedure is "right, just, fair, and infused with the principles of natural justice."⁷²

The other major difference in the Indian Constitution is that it allows for preventive detention.⁷³ This difference has led to substantively different antiterrorist provisions in India than could be passed in the United States.⁷⁴

⁶³ *Id.* at 418.

⁶⁴ *Id.* at 417.

⁶⁵ *Id.* at 430.

⁶⁶ *Id.* at 430-31.

⁶⁷ *Id.*

⁶⁸ *Id.* at 434.

⁶⁹ INDIA CONST. part III, art. 21.

⁷⁰ Sripati, *supra* note 11, at 439.

⁷¹ A.I.R. 1978 S.C. 597 (India). The landmark case centered on the Indian government impounding the petitioner's passport without any judicial or administrative hearings. The Court held "that an inquiry in compliance with the principles of natural justice was implicit in the power given to impound passports for the public good." *Id.*

⁷² Sripati, *supra* note 11, at 442.

⁷³ INDIA CONST. part. III, art. 22, cl. 4-7.

⁷⁴ For example, the National Security Act of 1980, C.I.S. 65 (1980), The National

However, as the comment is interested in the pattern of the way antiterrorist legislation has been used to bypass normal constitutional safeguards, this difference does not reduce the utility of using India as a point of comparison

IV. INDIA'S HISTORICAL ANTITERRORIST LEGISLATION

The history of today's modern antiterrorist legislation on the Indian subcontinent can be traced back to the British introduction of preventive detention in 1793.⁷⁵ That year, the East India Company Act authorized the government to "secure and detain in custody any person or persons suspected of carrying on . . . any illicit correspondence dangerous to the peace or safety of any of the British settlement or possession in India . . ."⁷⁶ When India won its Independence, the Constituent Assembly kept this vestige from the British and incorporated preventive detention in the new Constitution.⁷⁷ Although this power was understood as harsh, in the wake of the brutal assassination of Mahatma Gandhi, the framers believed that preventive detention was the only way save the "infant nation from being engulfed by communal riots and social unrest."⁷⁸

A. ARMED FORCES SPECIAL POWERS ACT, 1958

Since Independence, the list of legislation adopted by both the Central Indian government and various states is staggering.⁷⁹ One of the first pieces of legislation enacted by the new Indian government was the Armed Forces

Security Act of 1980 of the Indian Parliament, New Delhi, 27 Dec. 1980, greatly expanded the powers of preventive detention in the troubled areas of Assam and Nagaland.

⁷⁵ Vinay Lal, *Normalisation of Antiterrorist Legislation in Democracies: Comparative Notes on India, Northern Ireland, and Sri Lanka*, MANAS: HISTORY AND POLITICS, at http://www.sscnet.ucla.edu/southasia/History/Independent/anti_terr.html (last visited Oct. 28, 2004).

⁷⁶ *Id.*

⁷⁷ Sripati, *supra* note 11, at 427.

⁷⁸ *Id.* at 436.

⁷⁹ See Lal, *supra* note 75 (providing a brief, incomplete listing of antiterrorist legislation that has been adopted in the last fifteen years, including: Prevention of Terrorism Act (2001); Special Protection Group Act (1988); Criminal Courts and Security Guard Courts Rules (1987); Terrorist and Disruptive Activities (Prevention) Rules (1986, amended 1987); National Security Guard Act (1986); Terrorist and Disruptive Activities (Prevention) Act (1985, amended 1987); National Security (Second Amendment) Ordinance (1984); Terrorist Affected Areas (Special Courts) Act (1984); Chandigarh Disturbed Areas Act (1983); Punjab Disturbed Areas Act (1983); Armed Forces (Punjab and Chandigarh) Special Powers Act (1983); Suppression of Unlawful Acts Against Safety of Civil Aviation Act (1982); Anti-Hijacking Act (1982); Essential Services Maintenance Act (1981); National Security Act (1980, amended 1984 and 1987); Assam Preventive Detention Act (1980); Jammu and Kashmir Public Safety Act (1978)).

(Special Powers) Act of 1958 (AFSPA), which extended to the troubled Northeastern states of Assam and Manipur.⁸⁰ AFSPA empowered law enforcement personnel to shoot and kill any person who

is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of more than 5 or more persons or carrying of weapons or of things capable of being used as weapons or of fire arms, ammunition or, explosive substances

if the officer determines that it is necessary for maintenance of law and order in the region.⁸¹ The officer may shoot to kill after giving such due warning, as he may consider necessary.⁸² These broadly defined provisions of the AFSPA were justified as a drastic but necessary remedy for the armed insurgency going on in the Northeastern parts of India.⁸³ Human rights organizations interpreted AFSPA as giving law enforcement and military a “license to extra judicially execute innocent and suspected persons under the disguise of maintaining law and order.”⁸⁴ They have also pointed out that despite the extraordinary power given to the armed forces and the police, AFSPA has “manifestly failed” in solving the problems caused by the insurgency and has further isolated the residents of the troubled region from the central government.⁸⁵ This pattern of increased legislation broadening police powers has continued on to the present day, despite the lack of any substantive evidence that the increase in power has led to a decrease in the targeted problem—be it insurgency or incidents of terrorism.⁸⁶

While it is clear that responses to terrorism and insurgency movements have both military and legal components, AFSPA is a quintessential example of a government favoring the military response due to the decreased burden of procedural safeguards they encounter if they opt to

⁸⁰ See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, HUMAN RIGHTS DOCUMENTATION CENTER, ARMED FORCES SPECIAL POWERS ACT: A STUDY IN NATIONAL SECURITY TYRRANY, Sec. 4, available at http://www.hrdc.net/sahrhc/resources/armed_forces.htm (last visited Oct. 28, 2004) [hereinafter SAHRDC AFSPA Report]; see also C.I.S. Section 4(c) (1958), Armed Forces (Special Powers) Act of 1958 of the Indian Parliament, New Delhi, 22 May 1958 [hereinafter AFSPA].

⁸¹ SAHRDC AFSPA Report, *supra* note 80 (quoting AFSPA, *supra* note 80, § 4(a)).

⁸² *Id.*

⁸³ *Id.* Although AFSPA was defined to deal with armed insurgents, it is of interest in the history of India’s antiterrorist response as modern day national security legislation has come to deal with armed insurgents in the same manner as dealing with those labeled “terrorists.”

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

employ the criminal justice system.⁸⁷ Article 22 of the Indian Constitution states that

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.⁸⁸

Despite the twenty-four hour requirement, AFSPA has allowed security personnel to detain suspects for days and months at a time without ever bringing them in front of a magistrate.⁸⁹ Article 22 does provide for limits on the twenty-four hour requirement if the arrested detainee was apprehended under preventive detention legislation.⁹⁰ While some organizations have argued that AFSPA is not preventive detention legislation and therefore the requirements under Articles 22(1) and 22(2) must be respected,⁹¹ they have added that even if AFSPA is found to be preventive detention legislation, it still contravenes the constitutional rules governing such legislation.⁹² Preventive detention laws can allow the detention of the arrested person for up to three months.⁹³ Under Article 22(4) an Advisory Board must review any detention longer than three months and under Article 22(5) the person must be told the grounds of their arrest.⁹⁴ Section 4(c) of AFSPA allows a person to be arrested without a warrant on the suspicion that they are going to commit an offense.⁹⁵ The arresting forces are not required to communicate the grounds of the arrest, and no advisory board is empowered to review the arrests under AFSPA.⁹⁶ The justification for these constitutionally questionable provisions has been that under Article 355 of the Indian Constitution, the Central Government has a duty to protect states from internal disturbances, and as such, AFSPA

⁸⁷ *Id.*

⁸⁸ INDIA CONST. art. 22.

⁸⁹ SAHRDC AFSPA Report, *supra* note 80.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ INDIA CONST. art. 22(4)-(5).

⁹⁴ *Id.*

⁹⁵ AFSPA, *supra* note 80, § 4(c).

⁹⁶ SAHRDC AFSPA Report, *supra* note 80.

was born out of that duty.⁹⁷ While a number of cases questioning the constitutionality of AFSPA have been filed with the Supreme Court of India, the Court has yet to hand down a final judgment on its provisions, and the controversial legislation remains in effect today.⁹⁸

AFSPA was the precursor to the more recent antiterrorist legislation that applies throughout all of India, the Terrorist And Disruptive Activities (Prevention) Act (TADA) and most recently POTA. AFSPA, like its antiterrorist offspring, endowed law enforcement powers beyond the scope of normal criminal procedure and justified the suspension of normal rights due to the threat the insurgents posed to national security.⁹⁹ TADA and its latest incarnation POTA will be discussed in the following sections.

B. TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987

While AFSPA dealt with a targeted, troubled region within India, TADA was antiterrorist legislation that was meant to apply throughout all of India.¹⁰⁰ Originally adopted in May 1985 and expected to expire within two years, the central government renewed TADA in 1987 for another six years.¹⁰¹ The government stated that the “continuing menace” of terrorism made it “necessary to [not just] continue the said law, but also strengthen it further.”¹⁰² Under Section 3(1) of TADA, a terrorist was broadly defined as:

Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.

The penalty for a crime committed under TADA that did not result in

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ C.I.S. Supp. Part 1, § 1(2) (1987), The Terrorist and Disruptive Activities (Prevention) Act of 1987 of the Indian Parliament, New Delhi, 3 Sept. 1987 [hereinafter TADA].

¹⁰¹ *Id.* pmb1.

¹⁰² *Id.*

the death of another person was a minimum of five years, extending up to life imprisonment.¹⁰³ In addition to the commission of a terrorist attack, TADA criminalized the concealment or harboring of any terrorist¹⁰⁴—whether known or unknown—and made punishable the abetting or advisement of any terrorist act.¹⁰⁵ As the Act admittedly did not result in a reduction of terrorist activity in the periods of 1985-1987, the government amended TADA in 1987 to increase the powers given to law enforcement in the hopes of deterring future terrorist attacks.¹⁰⁶

One of the amended changes allowed for the admission of confessions of detainees in the legal proceedings against them.¹⁰⁷ Due to the long history of police brutality during interrogations and the forcible eliciting of confessions under British Rule, the Indian Criminal Procedure Code had barred confessions made to police officers, making them inadmissible in a court of law.¹⁰⁸ In 1987, TADA reduced the standards required for a positive eyewitness identification to be admissible in court.¹⁰⁹ While the Code of Criminal Procedure required identification be made at a test identification parade, TADA allowed identification based on a witness having picked out the detainee's photograph.¹¹⁰

In addition, TADA was also amended to change the burden of proof against suspected terrorists. In contrast to the traditional criminal procedure which presumed the innocence of a detainee prior to their being found guilty by a court of law, TADA presumed a suspect guilty if they were found to be in possession of arms, weapons, or explosives specified by prior legislation,¹¹¹ or if the fingerprints of the accused were found at the scene of the terrorist act.¹¹² The presumption of guilt also applies to cases where the detainee has been accused of involvement in the act by the confession of a

¹⁰³ *Id.* Part 1, § 3(2).

¹⁰⁴ *Id.* Part 2, § 3(4).

¹⁰⁵ *Id.* Part 2, § 3(3).

¹⁰⁶ *Id.* pmb1.

¹⁰⁷ *Id.* Part 3, § 15(1).

¹⁰⁸ "Sections 25 and 26 of the Indian Evidence Act 1872 explicitly prohibit the admissibility of confessions made to police officers as evidence. These provisions were introduced and remain in Indian law because of the acknowledgement that 'confessions' are regularly extracted by police through torture or duress in India." AMNESTY INTERNATIONAL, INDIA: AN APPEAL AGAINST DEATH SENTENCES (1999), at <http://web.amnesty.org/library/Index/ENGASA200311999?open&of=ENG-IND>.

¹⁰⁹ TADA, Part 4, § 22.

¹¹⁰ *Id.* Part 4, § 22.

¹¹¹ *Id.* Part 4, § 3(1)(a) (specifically, the weapons or explosives listed in "the Arms Act, 1959 (34 of 1959), the Explosives Act, 1884 (4 of 1884), the Explosive Substances Act, 1908 (6 of 1908), or the Inflammable Substances Act, 1952 (20 of 1952)").

¹¹² *Id.* Part 4, § 21(1)(b).

co-accused party,¹¹³ or if the accused has made a confession to anyone other than a police officer.¹¹⁴

One of the most controversial aspects of TADA related to the broad definition that applied to the crime of “abetting a terrorist or terrorist act.”¹¹⁵ Under Section 2(1)(a) of TADA, any person who is found to have assisted terrorists or disruptionists in any manner may be subject to a minimum penalty of five years imprisonment.¹¹⁶ Abetment is defined as the passing on of “any information likely to assist . . . terrorists.”¹¹⁷ After implementation and widespread use of this section by law enforcement officials, the Supreme Court eventually struck down this broad definition as it criminalized association with terrorists and did not require any criminal intent.¹¹⁸

While the increased powers under the amended version of TADA purported to give law enforcement more tools to better deal with increased terrorist activity, the actual result of the new law was widespread abuse as its broad definition of terrorism was used to crack down on political dissidents, regardless of whether the dissent was violent, and was used in some regions exclusively against religious and ethnic minorities.¹¹⁹ For example, in the state of Rajasthan as of September 1, 1994, 409 of 432 people detained were minorities.¹²⁰ Other published statistics of detentions under TADA paint a similarly grim picture showing selective enforcement and widespread abuse. The largest number of arrests made under TADA were not, as one would expect, in the highly volatile regions of Punjab or Assam, but rather in Gujarat, a state not threatened by any secessionist or terrorist movements.¹²¹ In Gujarat, the government used TADA to crush political activity by students and labor unions.¹²² Of the 52,998 people detained under TADA at the end of 1992, a mere 434, or 0.81%, had been convicted.¹²³

¹¹³ *Id.* Part 4, § 21(1)(c).

¹¹⁴ *Id.* Part 4, § 21(1)(d).

¹¹⁵ *Id.* Part 1, § 2(1)(a)(i-iii); *id.* Part 2, § 3(3).

¹¹⁶ *Id.* Part 2, § (3)(3).

¹¹⁷ *Id.* Part 1, § 2(1)(a)(ii).

¹¹⁸ SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, HUMAN RIGHTS DOCUMENTATION CENTER, PREVENTION OF TERRORISM ORDINANCE 2001: GOVERNMENT DECIDES TO PLAY JUDGE AND JURY 24, (2001) [hereinafter SAHRDC POTA Report] (referencing *Kartar Singh v. State of Punjab*, (1994) 3 S.C.C. 569 (India)).

¹¹⁹ Chakma, *supra* note 12, at 27.

¹²⁰ *Id.*

¹²¹ Lal, *supra* note 75.

¹²² *Id.*

¹²³ *Id.*

Despite these statistics and widespread criticism by human rights groups, TADA was further extended an additional two years in 1993.¹²⁴ The extension was passed despite anecdotes telling of widespread torture and abuse under TADA.¹²⁵ Amnesty International documented the story of one young man who was detained under TADA and during interrogation was “hung upside down, given electric shocks in his genitals, fingers, tongue and nose, and forced to eat human feces.”¹²⁶ Amnesty also documented the case of Harjit Singh, an individual detained under TADA whose friends and family were not told of the detention until it was revealed that he had been killed in police custody eight years prior.¹²⁷ While the specific cases of torture and extrajudicial executions may not be the direct result of TADA, the increased police power and subsequent decreased rights of detainees under the legislation created situations which allowed these events to go unnoticed.

In 1995, under the weight of tremendous public outcry, the Indian government finally allowed TADA to expire.¹²⁸ The National Human Rights Commission of India (NHRC) applauded the decision and noted that TADA was “incompatible with [India’s] cultural traditions, legal history and treaty obligations.”¹²⁹ However, just five years after TADA’s expiration, the government attempted to revive TADA and, in keeping with the pattern of past legislation, increase the power of law enforcement officials attempting to battle terrorism.¹³⁰ The newly proposed legislation drafted by the Law Commission of India was known as the Prevention of Terrorism Bill, 2000.¹³¹ With the abuses of TADA still fresh in their mind, political parties, human rights organizations, and the NHRC vocally opposed the new bill so strongly that it was never formally introduced in parliament.¹³² However, one year later, after the September 11th attacks in the United States and the December 13th attacks in New Delhi, the Bill,

¹²⁴ *Id.*

¹²⁵ AMNESTY INTERNATIONAL, INDIA: PROPOSED ANTITERRORIST LEGISLATION RISKS HUMAN RIGHTS VIOLATIONS (2000), *at* <http://web.amnesty.org/library/Index/ENGASA2000262000?open&of=ENG-IND>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ SAHRDC POTA Report, *supra* note 118, at 31.

¹²⁹ *Id.* at 14 (citing NATIONAL HUMAN RIGHTS COMMISSION, MINISTRY OF HOME AFFAIRS, PREVENTION OF TERRORISM ORDINANCE, 2001 (2001), *at* <http://www.mha.nic.in/pr102001.htm#2510> [hereinafter MINISTRY OF HOME AFFAIRS]).

¹³⁰ AMNESTY INTERNATIONAL, BRIEFING ON THE PREVENTION OF TERRORISM ORDINANCE (2001), *at* <http://web.amnesty.org/library/Index/ENGASA200492001?open&of=ENG-IND>.

¹³¹ *Id.*

¹³² *Id.*

now known as the Prevention of Terrorism Act (POTA), was passed with virtually no changes in content from its initial structure.¹³³

C. PREVENTION OF TERRORISM ACT, 2001

Despite the well-documented rampant abuses under TADA, a mere seven years after its expiration, the Indian government enacted the more stringent POTA in March 2002.¹³⁴ The dramatics of the December 13th attacks on the Parliament building, combined with the September 11th atrocities in the United States gave the supporters of POTA ammunition against detractors of the bill who were wary of increasing police power given the long history of past abuses.¹³⁵ The Indian Ministry of Home Affairs (MHA) justified the Ordinance by claiming “an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country.”¹³⁶ The Indian government also justified POTA by pointing to the United Kingdom’s adoption of the Prevention of Terrorism Act (PTA) and the United States’ PATRIOT Act as evidence that other countries had acknowledged the need to move beyond traditional domestic criminal procedure in order to properly battle terrorism.¹³⁷ The dominant theme running through the government position in this debate was that the current laws left law enforcement ill-equipped to handle the new threats brought on by terrorism and, as such, new legislation was necessary.¹³⁸

POTA retained a number of TADA’s most controversial provisions and further added powers not present in the old legislation.¹³⁹ POTA kept the broad definition of “terrorist act” from TADA, which had been repeatedly used under the prior legislation to take crimes such as murder and robbery, normally handled by the Indian Penal Code, and placed them

¹³³ SAHRDC POTA Report, *supra* note 118, at 39; *see also* POTA, *supra* note 12.

¹³⁴ HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WOLDWIDE (2003), at 15, *available at* http://www.hrw.org/un/chr59/counter-terrorism-bck4.htm#P252_51825 [hereinafter HRW India Report].

¹³⁵ SAHRDC POTA Report, *supra* note 118, at 13.

¹³⁶ *Id.* (quoting MINISTRY OF HOME AFFAIRS, *supra* note 129). However, at the time of the introduction of the draft version of the Bill in 2000, the MHA’s own assessments contradict this justification—its Annual Report for the year 2000 reported a *decrease* in terrorist incidents in Jammu and Kashmir, a state which remains the main focus of the Indian Government’s counter-terrorism measures. MINISTRY OF HOME AFFAIRS, ANNUAL REPORT ch. 4, § 4.8 (2000).

¹³⁷ SAHRDC POTA Report, *supra* note 118, at 35.

¹³⁸ *Id.* at 17-19. The government in virtually all debates about National Security Legislation has used this justification.

¹³⁹ *Id.* at 39.

under the purview of the special procedures established by the antiterrorist legislation.¹⁴⁰ The criminalization of “abetting” a terrorist, which had been struck down in TADA by the Indian Supreme Court, is revived under POTA.¹⁴¹ It criminalizes the membership of an organization labeled “terrorist” by the Central Government, regardless of criminal intent or activity.¹⁴² POTA also retained the admissibility of confessions, a provision that many had pointed to as one of the sources of the high incidences of torture and brutality during TADA interrogations.¹⁴³

POTA goes beyond TADA in numerous ways. While TADA was reviewed every two years, POTA will first be subject to legislative scrutiny in 2007, five years after its enactment.¹⁴⁴ Mandatory minimum sentences were retained for crimes handled under POTA, reducing judicial freedom to judge cases on their individual merits.¹⁴⁵

In keeping with the pattern of past antiterrorist legislation, POTA treats terrorist acts as outside the normal criminal procedure which has been established to balance the rights of criminal defendants with the interests of the State. POTA establishes special courts to handle cases of terrorism.¹⁴⁶ These special courts have the discretion to hold trials in non-public places such as prisons and have the power to withhold trial records from the public.¹⁴⁷ These courts may also keep the identity of witnesses used against defendants secret,¹⁴⁸ and have the discretion of beginning proceedings against a defendant even if they or their legal representation are absent.¹⁴⁹

POTA also significantly departs from traditional Indian Criminal Procedure by allowing the pretrial detention of a suspected terrorist for up to 180 days.¹⁵⁰ This prolonged detention before being brought in front of a court leaves the door open for police brutality and arbitrary detention of political opponents.¹⁵¹

Since its enactment over one year ago, POTA has provided ample

¹⁴⁰ *Id.* at 40.

¹⁴¹ *Id.* Part 2, § 3(3).

¹⁴² *Id.* Part 2, § 3(5).

¹⁴³ *Id.* Part 4, § 32; SAHRDC POTA Report, *supra* note 118, at 80.

¹⁴⁴ SAHRDC POTA Report, *supra* note 118, at 39.

¹⁴⁵ POTA Part 2, § 5.

¹⁴⁶ *Id.* Part 4, § 23.

¹⁴⁷ *Id.* Part 4, § 24.

¹⁴⁸ *Id.* Part 4, §§ 30(2)(b)-(c).

¹⁴⁹ *Id.* Part 4, § 29(5).

¹⁵⁰ *Id.* Part 6, § 49(2)(b) (contrast with INDIA CODE CRIM. PROC. §§151(2), 167(2) which mandate that defendants be brought in front of a magistrate within twenty-four hours of apprehension).

¹⁵¹ SAHRDC POTA Report, *supra* note 118, at 87-88.

evidence that its opponents' worries about abuse were well founded.¹⁵² In the year since POTA has been in force, Human Rights Watch has documented the Act's use against political opponents, religious minorities, Dalits (untouchables), tribals, and children.¹⁵³ On July 11, 2002, in the state of Tamil Nadu, Vaiko, a leader of the opposition political party, was arrested and charged under POTA for making remarks in support of the Liberation Tigers of Tamil Eelam, an organization deemed terrorist by the central government.¹⁵⁴ Two weeks later, P. Nedumaran, another opposition leader in Tamil Nadu, was arrested under POTA for similar charges.¹⁵⁵

In Uttar Pradesh, twenty-five Dalits were arrested under POTA between April and July 2002.¹⁵⁶ Tribals in the area claim that POTA has been used to characterize their struggle for worker's rights as membership in the banned, extreme leftist Maoist-Leninist groups known collectively as Naxalites.¹⁵⁷ In one district, "nine out of twelve people arrested were bonded laborers who refused to return to work because of the physical abuse of their employer."¹⁵⁸ POTA has been used in a similar way in the state of Jharkhand.¹⁵⁹ On February 19, 2003, almost 200 people were arrested under POTA, including "a twelve-year-old boy and an eighty-one-year-old man."¹⁶⁰ The arrests were criticized widely, leading the Deputy Prime Minister Advani to direct the state to review the cases.¹⁶¹ The resulting investigation concluded with charges against eighty-three of the detainees being dropped.¹⁶²

In response to these abuses, a newly elected Cabinet repealed POTA in September 2004.¹⁶³ Discussions are underway regarding new antiterrorist legislation that will "definitely be milder than the old law," and tries to ensure that "innocents don't suffer."¹⁶⁴ While it would be a leap to say that POTA is the sole cause of the rampant abuse of power by police officers, it seems clear that the reduction of defendant's rights under the legislation had

¹⁵² See HRW India Report, *supra* note 134, at 15.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 16.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *POTA To Go, Centre to Beef up on Another Law*, THE INDIAN EXPRESS, Sept. 18, 2004, available at http://www.indianexpress.com/full_story.php?content_id=55357.

¹⁶⁴ *Id.* (quoting Indian Home Minister Shivraj Patil).

made such abuses easier to conceal and harder to report. For each reported case of abuse, countless unknown ones remain undocumented due to the defendant's lack of social network, the prolonged period of pretrial detention, and the secrecy of the courts when the cases do get to trial.

The next section will conclude with an analysis on India's antiterrorist legislation and will highlight some lessons the United States may wish to keep in mind as it moves further into the complicated world of counterterrorism legislation.

V. THE AMERICAN EXPERIENCE, POST 9/11

There may be a temptation to dismiss the history of India's abuse of antiterrorist legislation as a unique problem suffered by a developing country struggling with a distinctive social and political context that does not apply to the United States. There may be some merit in setting aside tales of particularly egregious torture and abuse in India as the illegal activities of individuals going beyond their official duties sanctioned by the state.¹⁶⁵ However, the India experience is not meant to serve as a cautionary tale about specific acts of abuse but rather as an example of recurrent patterns of abuse encountered when attempting to combat terrorism. As will be discussed below, the pattern seen in India of greater state secrecy coupled with increased law enforcement power, the overbroad definitions of terrorism used to expand the subject matter antiterrorist legislation applies to, and the almost-exclusive targeting of religious and ethnic minorities, can also be seen emerging in the United States.

A. HISTORICAL ABUSES BY U.S. INTELLIGENCE AGENCIES

Attorney General John Ashcroft has warned that "those who scare peace-loving people with phantoms of lost liberty . . . give ammunition to America's enemies, and pause to America's friends."¹⁶⁶ Supporters of the PATRIOT Act have echoed the Attorney General's sentiments regarding the "phantoms of lost liberty" and stated that critics of antiterrorist legislation are relying on hypothetical abuses that detractors think will be

¹⁶⁵ SAHRDC POTA Report, *supra* note 118, at 87-88. While the torture discussed previously in Section IV is not sanctioned by Indian counterterrorism legislation, critics have argued that the decreased rights given to criminal defendants increase the chances that they may be subjected to torture.

¹⁶⁶ John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT ACT and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1100 (2002) (quoting *Homeland Defense Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (Sept. 25, 2001) (written testimony of the Honorable John Ashcroft, Attorney General)).

perpetrated by the American government on its citizens.¹⁶⁷ However, critics have responded to such arguments by pointing out that documentation of abuses committed under the PATRIOT Act is nearly impossible as the Justice Department has repeatedly refused to divulge information on individuals detained or warrants secured under the PATRIOT Act.¹⁶⁸

Critics of the PATRIOT Act also scoff at their being characterized as anti-government conspiracy theorists and point to the history of abuses committed by domestic intelligence agencies during the Cold War as basis for their fears that antiterrorist legislation will be used improperly.¹⁶⁹ In the mid 1970's, following revelations about intelligence agency misconduct during the Watergate and Nixon impeachment hearings, the secret world of U.S. intelligence agency activity was briefly put in the national spotlight.¹⁷⁰

House and Senate investigation committees coupled with independent investigative reports revealed the staggering scope of intelligence agency surveillance of U.S. citizens during the 1960's.¹⁷¹ It was found that FBI headquarters had over 500,000 files on groups or individuals inside the United States.¹⁷² Between 1953 and 1973, over 250,000 letters inside the United States were opened and photographed by CIA.¹⁷³ Over 100,000 Americans were profiled in Army intelligence dossiers.¹⁷⁴

Intelligence agencies went beyond mere collection of information by developing programs to "disrupt, neutralize, and destroy those perceived as enemies."¹⁷⁵ These activities were consistent with the mandate of a 1954 Hoover Commission on Government Organization classified report that stated, "we must learn to subvert, sabotage, and destroy our enemies by more clever, more sophisticated and more effective methods than those used against us."¹⁷⁶ While these abuses occurred under the anti-Communist consensus of the 1950's,¹⁷⁷ opponents of the PATRIOT Act worry that they may be repeated under the new anti-terrorist consensus that has taken hold

¹⁶⁷ R. Robin McDonald, *PATRIOT Act: Are Abuses Real?*, 11 FULTON COUNTY DAILY REP., No. 19, Nov. 19, 2003 (quoting John G. Malcolm, Deputy Assistant Attorney General, Department of Justice).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ MORTON HALPERIN, ET AL., *THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES* 1 (1976).

¹⁷¹ *Id.* at 2 (The final Congressional report was suppressed by Congress itself.).

¹⁷² *Id.* at 3.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *Id.* at 6.

since September 11th.

Similar to India's short-term memory regarding the abuses that took place under TADA, the lessons learned from Cold War intelligence agency abuses seem to have faded. Much of the blame for the intelligence failure that allowed the September 11th attacks to occur has been placed on limitations on the intelligence agencies that were enacted because of the investigations of the 1970s.¹⁷⁸ As a result, the PATRIOT Act has greatly expanded the powers given to law enforcement if the investigations are related to terrorism.

For example, Section 215 of the PATRIOT Act allows seizures of records and "other tangible items including computer systems" from businesses including libraries and prohibits people from disclosing knowledge of these seizures.¹⁷⁹ In a one-year period immediately after the September 11th attacks, federal and local law enforcement officers had visited nearly eleven percent of all public libraries requesting library records.¹⁸⁰ Seizures of records are authorized if the Attorney General certifies that they are "in furtherance of 'an investigation to protect against international terrorism. . . .'"¹⁸¹ Prior to the enactment of the PATRIOT Act, a warrant and probable cause that a crime had been committed was required to access private records.¹⁸²

B. OVERBROAD DEFINITION OF "TERRORISM"

What is particularly worrisome about the reduced standards required to investigate and seize private records is that the definition of terrorism has been broadened considerably since September 11th.¹⁸³ Section 802 of the PATRIOT Act defines "domestic terrorism" as acts that:

¹⁷⁸ See generally THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (last visited Oct. 28, 2004); *9/11 Commission Faults U.S. Intelligence*, CNN, May 19, 2004, available at <http://www.cnn.com/2004/ALLPOLITICS/04/14/911.commission/>.

¹⁷⁹ Whitehead & Aden, *supra* note 166, at 1099.

¹⁸⁰ Norman Oder, *Survey: Librarians Divided Over Post-9/11 Privacy Issues*, LIBRARY JOURNAL, Feb. 15, 2003, available at <http://www.libraryjournal.com/article/CA273945>.

¹⁸¹ Whitehead & Aden, *supra* note 166, at 1100 (quoting USA PATRIOT Act § 215, Pub. L. No. 107-56, 115 Stat. 272, 287 (2001)).

¹⁸² Dahlia Lithwick & Julia Turner, *A Guide to the PATRIOT Act, Part 1*, SLATE, Sept. 8, 2003, at <http://slate.msn.com/id/2087984/>.

¹⁸³ Whitehead & Aden, *supra* note 166, at 1092 (citing USA PATRIOT Act, 115 Stat. at 376 ("providing . . . that violation of certain domestic criminal laws constitutes domestic terrorism")).

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended –

- i. to intimidate or coerce a civilian population;
- ii. to influence the policy of a government by mass destruction, assassination, or kidnapping; or
- iii. to effect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.¹⁸⁴

Critics have expressed discomfort with this overly broad definition that may potentially be used against domestic political groups such as “Act Up, People for the Ethical Treatment of Animals, Operation Rescue and the Vieques demonstrators.”¹⁸⁵ Attorney General Ashcroft has attempted to allay these fears by stating that since 1983, the U.S. government has defined terrorists as only “those who perpetrate premeditated, politically motivated violence against noncombatant targets.”¹⁸⁶ However, if this is the case, commentators have wondered why the Bush Administration felt the need to expand the definition to include a “wide variety of domestic criminal acts.”¹⁸⁷ As the Indian experience has shown, there is a propensity for government to take advantage of the generalized definition of terrorism to neutralize political opponents and minority groups.¹⁸⁸

C. TARGETING OF RACIAL AND ETHNIC MINORITIES IN THE UNITED STATES

Immediately after September 11th, Arabs and Muslims in the United States were subject to racial profiling.¹⁸⁹ Airlines removed passengers that were, or appeared to be, Muslim or Arab.¹⁹⁰ This ad hoc system of racial

¹⁸⁴ *Id.* at 1092-93 (quoting USA PATRIOT Act § 802, 115 Stat. at 376).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1093-94 (quoting *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (Dec. 6, 2001) (written statement of the Honorable John Ashcroft, Attorney General)).

¹⁸⁷ *Id.* at 1094.

¹⁸⁸ *See supra* Section IV.

¹⁸⁹ Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2001-2003).

¹⁹⁰ *Id.* at 295-96 (One of the passengers removed was a Secret Service agent protecting President Bush.); Ken Ellingwood & Nicholas Riccardi, *Arab Americans Enduring Hard Stares of Other Fliers*, L.A. TIMES, Sept. 20, 2001, at A1; *Guard for Bush Isn't Allowed Aboard Flight*, N.Y. TIMES, Dec. 27, 2001, at B5.

profiling was roundly criticized, but in its place, a formalized, government sanctioned system that rates each passenger's security threat level and assigns it a color-code is proposed to be adopted by 2004.¹⁹¹ Passenger information will be compared "against criminal records and intelligence information" to determine the exact level of threat the passenger poses.¹⁹²

While on its face the proposed changes may seem innocuous, there is a fear that the assessment of security risk will unduly burden those with Muslim or Arab backgrounds.¹⁹³ In September of 2002, immigration authorities at Kennedy Airport apprehended Maher Arar, a Syrian-born Canadian Citizen because his name had appeared on a watch list of possible international terrorists.¹⁹⁴ Upon seizure, Arar was denied the right to speak with a lawyer and was flown to Washington D.C. to meet with what were presumably CIA agents.¹⁹⁵ From there, Arar was flown to Syria, which while being the place of his birth was a country Arar had not lived in for sixteen years.¹⁹⁶ In Syria, Arar was placed in an underground cell "3 feet wide, 6 feet long, 7 feet high."¹⁹⁷ For ten months Syrian authorities tortured and interrogated Arar.¹⁹⁸ When finally convinced that he had no ties to terrorism, he was let go—some forty pounds lighter than when he had first arrived at Kennedy Airport.¹⁹⁹

Arar had been placed on the terrorist watch list because intelligence agencies suspected that he might be a member of the group The Muslim Brotherhood.²⁰⁰ The tenuous link tying Arar to the organization was that nine years prior, well after he had moved to Canada with his family, Arar's mother's cousin had been a member of the group.²⁰¹ Additionally, the United States had learned from the Royal Canadian Mounted Police that "the lease on Arar's apartment had been witnessed by a Syrian-born Canadian who was believed to know an Egyptian-Canadian whose brother

¹⁹¹ Sara K. Goo, *Fliers to be Rated for Risk Level*, WASH. POST, Sept. 9, 2003, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A45434-2003Sep8?language=printer>.

¹⁹² *Id.*

¹⁹³ See Graham Fraser & Susan Delacourt, *Ottawa Calls Inquiry Into Maher Arar Case*, TORONTO STAR, Jan. 29, 2004, at A01; Christopher H. Pyle, *Torture By Proxy: How Immigration Threw a Traveler to the Wolves*, S.F. CHRON., Jan. 4, 2004, at D1.

¹⁹⁴ Pyle, *supra* note 193.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

was allegedly mentioned in an al-Qaeda document.”²⁰²

Given the flimsiness of the evidence that allowed Maher Arar to be tortured for ten months, it seems understandable to be wary of the proposed color-coded security risk screening system proposed by the Transportation Security Administration. All passengers that are screened “red,” estimated to be one to two percent of all airline passengers, will be prohibited from boarding the airplane, subjected to police questioning, and possibly arrested.²⁰³ Since September 11th, many of those detained as suspected terrorists “have been discouraged from obtaining legal counsel or have had access to counsel blocked outright.”²⁰⁴ Once detained, Muslims also have legitimate reason to fear their treatment in the prison system. A Justice Department report has asserted that the majority of current reported violations against Muslims have involved mistreatment at Bureau of Prisons facilities.²⁰⁵ Incidents have included a prison guard verbally abusing a Muslim man and throwing his Quran into a garbage can and the claims that “a prison warden and some guards threatened to gas certain inmates after” the September 11th attacks.²⁰⁶

The combination of security policies weighted towards detaining those of Muslim or Arab descent, coupled with the reduction of rights granted to detainees, expands the opportunity for abuse.²⁰⁷ Much in the same way that the Indian government had demonized and targeted the Muslim population after high profile terrorist attacks, U.S. policies also seem to unfairly target the Arab and Muslim populations. Even prior to September 11th, Muslims had disproportionately borne the weight of heightened suspicion of being involved in terrorist activities.²⁰⁸ In 1998, of the eighty-seven terrorist attacks in the United States since 1984, eighty-five were tied to non-Arab, non-Muslim groups.²⁰⁹ Despite this, of the twenty-eight groups designated as terrorist organizations by the Secretary of State in 1999, over half were

²⁰² *Id.*

²⁰³ Goo, *supra* note 191.

²⁰⁴ Whitehead & Aden, *supra* note 166, at 1117.

²⁰⁵ Curt Anderson, *Justice Investigators Find No Abuses of Anti-Terrorism PATRIOT Act*, ASSOCIATED PRESS, Jan. 27, 2004.

²⁰⁶ *Id.*

²⁰⁷ See generally Michael J. Whidden, Note, *Unequal Justice: Arabs and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825 (2001) (arguing that the Antiterrorism and Effective Death Penalty Act “has been disproportionately felt by Arabs in its designation the application of the fundraising prohibition, and the authorization of secret evidence”).

²⁰⁸ See *id.*

²⁰⁹ *Id.* at 2829. One of these terrorist attacks was the 1993 World Trade Center bombing. However, the Oklahoma City bombing far exceeded the 1993 attack in terms of total number of casualties and the cost of property damage. *Id.*

“either Muslim or Arab.”²¹⁰

VI. CONCLUSION: LESSONS TO BE LEARNED FROM INDIA’S EXPERIENCE

The history of antiterrorist legislation in India supports the old assertion that power corrupts and absolute power corrupts absolutely.²¹¹ Since before Independence, the rulers of the Indian subcontinent have struggled with how best to tackle asymmetrical warfare. While the number of terrorist attacks have waxed and waned over time, individual acts of violence against the State have never been completely eradicated. While the Indian government has endowed its law enforcement and military with more and more power to extinguish the threat of terrorism, there is scant evidence that this increase in privileges has had its desired effect. What has been well documented is that with each piece of additional legislation and slight diminishment of criminal defendant rights comes increased abuse.

It would be unfair to conclude that the Indian experience will be mirrored in the United States. The history of corruption in India that began with the British colonization has continued virtually unabated in to India’s current democratic incarnation.²¹² The relative youth of the Indian nation and its comparative economic disadvantages may perhaps be significant differences with the United States that will result in a divergent trajectory for antiterrorist legislation in the United States. However, despite these differences, the patterns of overreach and abuse that exist in India can already be seen emerging in the United States.

One consistent theme that has run through the Indian experience is the reach of antiterrorist legislation into areas that many argue are properly handled under the traditional criminal procedure. One of the culprits of this abuse has been an overly broad definition of what constitutes a “terrorist” act. As antiterrorist legislation often endows law enforcement with greater freedoms and less procedural hurdles to clear when conducting an investigation, there has been a historical trend to use this increased power in cases that may not have originally been in reach of the legislation. This has been shown time and time again in India and isolated incidents in the United States begin to show a pattern following this same trend.

²¹⁰ *Id.* at 2828.

²¹¹ Letter from Lord Acton, to Bishop Mandell Creighton (1887). “Power tends to corrupt, and absolute power corrupts absolutely.” *Id.*

²¹² In the 2003 Transparency International rankings of corruption levels across the world, India ranked the 83rd least corrupt country while the United States ranked 18th. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2003, *available at* http://www.transparency.org/pressreleases_archive/2003/dnld/cpi2003.pressrelease.en.pdf (last visited Oct. 28, 2004).

Another lesson to be learned from India is the need to temper legislative response to a particular terrorist attack. As was shown by the passage of the PATRIOT Act, a dramatic attack may leave the populace feeling vulnerable and desiring signs that their government is taking adequate measures to prevent such incidents from occurring again. However, it should be remembered that the legislation passed in these highly emotional times often are ancestors of failed past attempts to augment police powers. As the Indian government passed the controversial POTA in wake of the December 13th attacks, despite the long history of abuse that existed under TADA, the American populace should be wary of any attempts to hastily pass the equally controversial PATRIOT Act II, particularly if another attack is takes place on U.S. soil.

Terrorism is a real, devastating problem. The proper response by legal systems to this problem remains elusive. As countries such as the United States endeavor to find the proper reaction, they should look to the histories of other countries such as India in an effort to not repeat mistakes and abuses made in the past. India's experience is an example of the danger of overreaching, overly broad legislation that is ripe for abuse against the most vulnerable sectors of a society. The United States should keep this in mind when examining whether to renew the PATRIOT Act in 2005 and when new legislation, such as the PATRIOT Act II, is under consideration.

