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Book Review: Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties

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Book Review: Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties

Book Review

Silencing Political Dissent:

How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties.
By Nancy Chang. New York: Seven Stories Press, 2002. Pp. 168. \$9.95 [Paperback].

Reviewed by Ben Lieberman*

Since the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, and the informal declaration of a "War on Terrorism" by President George W. Bush, global terrorism and its progeny of wars in Afghanistan and Iraq have been the center of attention for politicians, the media, and the American public. In the days and weeks directly after September 11, a terrified America wanted answers, and it turned to its leaders for a swift response. Part of that response came on October 26, 2001, when President Bush signed the USA PATRIOT Act¹ into law, giving the executive branch of the federal government many new or increased powers.² In her book *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties*³ (hereinafter *Silencing Political Dissent*), Nancy Chang⁴ of the Center for Constitutional Rights⁵ responds critically to this "radical"⁶ legislation and warns of the danger to the political freedoms of every American.⁷ First, she explores the history of Constitutional law and government intervention in political freedoms in the context of conflicts like World War I, World War II, the Vietnam War, and the Cold War.⁸ Second, she states her lengthy objections to the USA PATRIOT Act and other post-September 11 actions by the United States government in the name of national security.⁹ Finally, she concludes with a brief chapter regarding how the country can correct the alleged attack on the civil rights of its citizens.¹⁰ This article reviews the author's main arguments against the USA PATRIOT Act in Part I, and offers commentary on those

arguments in Part II.

I. THE AUTHOR'S ARGUMENT

Silencing Political Dissent challenges the federal government's response to the September 11 terrorist attacks with a three-pronged argument against the USA PATRIOT Act and various actions of the executive branch. First, it condemns the new powers of the executive branch under the act as "undemocratic,"¹¹ invasive, and, in the case of its powers over noncitizens, a violation of due process.¹² Second, it attacks the secrecy of the Bush administration with regard to Immigration and Naturalization Service ("INS")¹³ detentions and deportations in a domestic "shadow war."¹⁴ Third, it suggests that the Bush administration has acted to quash dissenting opinions by branding anyone holding those opinions as unpatriotic.¹⁵ It touts a strong judiciary as the solution, encouraging members of that branch not to "acquiesce in [the] surrender" of the Bill of Rights.¹⁶

A. HOW THE USA PATRIOT ACT UNDERMINES OUR CIVIL LIBERTIES

The author first alleges that the USA PATRIOT Act undercuts the liberties of Americans by jeopardizing First Amendment¹⁷ speech and association freedoms with the new crime of "domestic terrorism"¹⁸ and discriminates against noncitizens on an ideological basis.¹⁹ Her main concern is the broad sweep of the definition of domestic terrorism, which includes all activities that "appear to be intended to . . . intimidate or coerce a civilian population."²⁰ She argues that such broad language authorizes the government to investigate many political orga-

nizations that engage in "legitimate political dissent,"²¹ citing pro-environment, anti-globalization, and anti-abortion groups as potential domestic terrorists under the USA PATRIOT Act.²² The Act also requires the INS to deny entrance to persons from "a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities."²³ The author equates this disparate treatment of foreigners under the USA PATRIOT Act to the McCarran-Walter Act of 1952,²⁴ a Cold War-era statute allowing the State Department to exclude "aliens who are members of or affiliated with the Communist Party of the United States."²⁵

The author's second concern with the Act is that it jeopardizes privacy rights by granting the executive branch excessive surveillance and information sharing powers,²⁶ specifically, the increased power to track Internet activity,²⁷ the power to conduct "sneak-and-peek" searches,²⁸ and the new limitations on the Fourth Amendment's²⁹ requirement for probable cause.³⁰ She is again concerned with the breadth of such powers. The Act allows surveillance of "dialing, routing, addressing and signaling information,"³¹ and the author argues that all Internet activity could fall into one of these four categories.³² Thus, the Act essentially allows for unlimited surveillance of Internet activity.³³ The author's second and third apprehensions concerning privacy are related to the execution of searches.³⁴ Section 218 of the Act allows law

enforcement to bypass the probable cause requirement if a "significant purpose" of the search is to gather foreign intelligence.³⁵ She argues that this erosion of the probable cause requirement, coupled with the authorization of "sneak-and-peek" searches, are contrary to the "knock and announce" doctrine adopted by the Supreme Court³⁶ and required by the Fourth Amendment.³⁷

The author's third attack on the USA PATRIOT Act is her argument that it serves to erode the due process rights of noncitizens because it broadens the class of noncitizens subject to deportation and expands the class of noncitizens subject to detention.³⁸ Section 411 of the Act broadens the definition of "terrorist activity" to include crimes that involve a "weapon or dangerous device (other than for mere monetary or personal gain)."³⁹ It also prohibits the material support of a terrorist organization,⁴⁰ even when that organization has other legitimate means.⁴¹ The author points out that a noncitizen using a knife in a heat of passion crime could be deported under section 411,⁴² and someone donating money to a designated terrorist organization, yet earmarking it solely for humanitarian assistance, could be guilty of engaging in terrorist activity.⁴³

B. EDGING TOWARD GOVERNMENT BY EXECUTIVE FIAT

Though the USA PATRIOT Act increased the powers of the executive tremendously, the author alleges that the Bush administration is even abusing those heightened powers by exercising preventative detentions,⁴⁴ abusing detainees,⁴⁵

and monitoring attorney-client conversations,⁴⁶ all under a veil of secrecy.⁴⁷ She questions the detentions of the Bush administration, as well as the living conditions of those being detained.⁴⁸ She cites Georgetown law professor David Cole's estimate of approximately 2000 domestic detainees by April 2002,⁴⁹ as well as various allegations of physical and mental abuse of detainees by prison guards.⁵⁰

The author is particularly enraged with the recent Department of Justice regulation permitting the monitoring of attorney-client conversations of federal inmates without notice when "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terror-

ism."⁵¹ She contends that such surveillance cuts to the core of the criminal defendant's rights secured by the Constitution because it "is designed to chill, if not freeze, the confidential discussions between an inmate and his attorney that are essential to a well-prepared defense."⁵²

Perhaps the greatest point of fear for the author is the secrecy with which the United States government acts in the post-September 11 world. The government has often kept the names of federal detainees a secret, prohibited them from communicating with the outside world, and barred the public and the press from immigration hearings.⁵³ She accuses the Bush administration of erecting a wall of secrecy around the detainees to hide the fact that they were detained only

on the basis of a racial or ethnic profile and without a link to terrorism.⁵⁴ Additionally, the lack of public access to even a list of detainees, let alone communication with them, effectively strips those detainees of their rights to an attorney.⁵⁵

C. SILENCING POLITICAL DISSENT

The author's final group of assaults on the federal government centers on the Bush administration's efforts to demonize dissenters, labeling them un-American or unpatriotic.⁵⁶ She claims that since September 11, the Bush administration has been so fearful of dissent that it takes any opportunity to undermine and criticize it, as well as attempting to police thought by investigating law-abiding Americans who hold controversial viewpoints.⁵⁷ Angered that administration offi-



cials such as Attorney General John Ashcroft “refus[e] to recognize the distinction between core political speech . . . and the crime of treason,”⁵⁸ Chang fears that political speech, coupled with any protest or civil disobedience, could now lead to charges of domestic terrorism.⁵⁹ She concludes that the increased powers of the administration, along with the increased secrecy in which it acts, “threaten the vitality of our democracy.”⁶⁰

D. RECLAIMING OUR CIVIL LIBERTIES

After a 134-page tirade against

in every person. As the author suggests, Americans must be proactive in protecting our civil liberties. We cannot allow a return to the xenophobia of the past, and we must be vigilant to avoid plunging into a “cycle of restricted freedom”⁶⁴ in which Arabs are forced to live through an experience mirroring the Japanese internment experience of World War II. Openness of government and the freedom of the press are fundamental requirements for democracy because they allow Americans to hold their government accountable for its actions

two fatal flaws. First, the author seems to envision a world in which terrorist organizations are transparent and publish audited financial statements. In reality, we have no way to ensure money earmarked for humanitarian ends will ultimately be utilized for such purposes. Many terrorist organizations operate and raise funds under a veil of charity.⁶⁶ Second, when a terrorist organization offers aid to a community, common sense allows the deduction that the community becomes less likely to bite the hand that literally feeds it,

FAST FACT

The Colorado Constitution prohibits nuclear detonation in the state.

COLO. CONST. art. XXVI.

the USA PATRIOT Act and the Bush Administration, the author concludes her book with a four paragraph solution on reclaiming our civil liberties.⁶¹ She encourages Americans to protest measures that infringe on their liberty by organizing, educating, and reaching out to people.⁶² She calls on the courts to be vigilant in upholding the freedoms granted by the Bill of Rights, and she closes by arguing that “our future safety lies in the expansion, rather than the contraction, of the democratic values set forth in the Constitution.”⁶³

II. ANALYSIS

Silencing Political Dissent raises many compelling concerns about protecting our liberties and the general human rights inherent

and call for change in the case of abuse. However, there are two specific areas—support for terrorist organizations and the sharing of intelligence between government agencies—where I respectfully disagree with the author. The changes in these areas since September 11 have helped and will continue to help in preventing terrorist attacks.

A. SUPPORTING TERRORIST ORGANIZATIONS

The author argues that Americans should be concerned that the definition of “engage in terrorist activity” would include a monetary donation to a terrorist organization with humanitarian ends when the donor earmarks the donation only for those lawful ends.⁶⁵ Her argument contains

i.e., less likely to rise up against the violence and terror that the organization perpetuates. Thus, even assuming that a humanitarian donation ultimately reaches those lawful ends, it indirectly supports a terrorist organization’s violent ends.

An examination of the notorious Middle-Eastern terrorist group Hamas illustrates why the aforementioned donations must be outlawed.⁶⁷ The Hamas military wing has claimed responsibility for many acts of terrorism, including many suicide attacks on Israeli civilians.⁶⁸ Under the same name, the group also builds schools and hospitals in the Palestinian controlled areas of the West Bank and Gaza Strip.⁶⁹ Though the humanitarian ends that Hamas

supports are aimed at helping the Palestinian people survive and thrive, those legitimate and moral ends also bolster its reputation and support, thus indirectly furthering its violence. Other Palestinian charities, such as The United Palestinian Appeal,⁷⁰ provide a less destructive alternative, supporting Palestinian civilians without the murder and terror of Hamas. The USA PATRIOT Act correctly equates a donation to Hamas as engaging in terrorist activity, regardless of the conditions placed on that donation. The failure of the author's argument is in her unrealistic vision of a transparent terrorist organization and in ignoring the indirect effects of terrorist organizations distributing humanitarian aid.

B. INFORMATION SHARING BETWEEN GOVERNMENT AGENCIES

In discussing her objections to preventative detention, noted *supra*,⁷¹ the author questions whether the detention policies of the Bush administration will have any effect on terrorism.⁷² Yet later, when she voices her objections to information sharing among government agencies, notably absent from her commentary⁷³ is the fact that many blame the lack of this very information sharing for the intelligence failures of September 11 and point to information sharing as an essential element in the prevention of future terrorist attacks.⁷⁴ Though the author's main argument relates to sharing of grand jury information, she also raises a more general concern about sharing among government agencies.⁷⁵

In her argument against intel-

ligence sharing, the author cites the now infamous report by the Church Committee in 1976,⁷⁶ revealing CIA and FBI files on, among others, anti-Vietnam War protesters and civil rights leaders.⁷⁷ However, the author's reliance on this example is misplaced. In the instance of a repeat of the Church Committee, loosening of intelligence sharing would not materially alter the scenario. The Church Committee's injustice was that the files *existed in the first place*, not that they were shared between government agencies. It is an example of a disturbing government abuse of power rather than a flaw in how agencies share information obtained using lawful powers. New information sharing laws do not make such abuses more or less probable. In the end, the author's broader argument against the sharing of information is unconvincing. As the key weapon in fighting terrorism,⁷⁸ "working-level"⁷⁹ cooperation will aid law enforcement agencies in preventing future attacks.

CONCLUSION

On September 11, 2001, the United States was not only violently thrust into another crossroads in our own history, but the history of the world as a whole. *Silencing Political Dissent* provides a thorough and well-organized argument against the federal government's reaction to the events of that day. Nancy Chang points out many potential dangers of the USA PATRIOT Act, and she looks to the judiciary to hold other branches of government to the limits imposed on them by the Constitution. All Americans should share the author's concern with the threat

to our civil rights and the human rights abuses relating to federal detainees.

Unfortunately, the USA PATRIOT Act swings the pendulum too far towards a police state, and away from a free society. However, while protecting and reclaiming our civil liberties, it is in our interest to support key provisions of the Act that protect citizens without materially sacrificing liberty. We must cut off all funding to terrorist organizations and share intelligence among all law enforcement agencies. In doing so, America has no small task. We must compile lessons from Cold War and World War II xenophobia, as well as the policy and intelligence failures of September 11, in order to both protect our citizens and concurrently protect the values and ideals of this great nation.

Endnotes

¹ J.D. Candidate, University of Denver College of Law, 2003; M.B.A. Candidate, University of Denver Daniels College of Business, 2003.

² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001).

³ See e.g., USA PATRIOT Act § 213(b), 115 Stat. at 376 (authorizing "sneak and peek" searches), § 802, 115 Stat. at 376 (creating crime of domestic terrorism).

⁴ NANCY CHANG, *SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES* (2002).

⁵ Nancy Chang is a senior litigation attorney at the Center for Constitutional Rights in New York

City. See *id.* at 167.

⁵ The Center for Constitutional Rights is a nonprofit organization in New York City dedicated to protecting Constitutional rights. *Id.*

⁶ CHANG, *supra* note 3, at 43.

⁷ *Id.* at 44.

⁸ *Id.* at 13-42.

⁹ *Id.* at 43-134.

¹⁰ *Id.* at 135-37.

¹¹ *Id.* at 44.

¹² *Id.*

¹³ On March 1, 2003, the INS was integrated into the newly created Department of Homeland Security ("DHS") as the Bureau of Citizenship and Immigration Services ("BCIS"). See Homeland Security Act of 2002, H.R. 5005, 107th Cong. § 451 (2002).

¹⁴ CHANG, *supra* note 3, at 67.

¹⁵ *Id.* at 93-94.

¹⁶ *Id.* at 136.

¹⁷ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

¹⁸ See USA PATRIOT Act § 802, 115 Stat. at 376.

¹⁹ CHANG, *supra* note 3, at 44.

²⁰ USA PATRIOT Act § 802(a)(5)(B)(i), 115 Stat. at 376.

²¹ CHANG, *supra* note 3, at 44; c.f. R. Kenton Bird & Elizabeth Barker Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus*, 7 COMM. L. & POL'Y 431 (2002) (examining disciplinary actions against college and university faculty members who

criticized U.S. foreign policy after Sept. 11, 2001 terrorist attacks).

²² CHANG, *supra* note 3, at 44.

²³ USA PATRIOT Act § 411(a), 115 Stat. 345-46.

²⁴ Immigration and Nationality Act, Pub. L. No. 414-477, § 212(a)(27), (28), 66 Stat. 163, 182-85 (1952).

²⁵ *Id.* § 212(a)(28)(C)(i), 66 Stat. at 182-85.

²⁶ See Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DEN. UNIV. L. REV. 375 (2002) (discussing concerns related to sharing of financial and educational records and information).

²⁷ See USA PATRIOT Act § 216, 115 Stat. at 288-90.

²⁸ A "sneak-and-peek" search is a search without the presence of, or prior notice to, the person being searched. See USA PATRIOT Act § 213(2)(b), 115 Stat. at 288-90.

²⁹ The 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 CHANG, *supra* note 3, at 44.

³¹ USA PATRIOT Act § 411(a), 115 Stat. at 345-48.

³² CHANG, *supra* note 3, at 54-55.

³³ *Id.*

³⁴ *Id.* at 51-59.

³⁵ USA PATRIOT Act § 218, 115 Stat.

at 291. The Foreign Intelligence Surveillance Court of Review recently upheld a Fourth Amendment challenge to § 218. See *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

³⁶ See *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995).

³⁷ CHANG, *supra* note 3, at 51-59; see also Mell, *supra* note 26 (noting that sneak and peek searches create "a vague standard under existing law").

³⁸ CHANG, *supra* note 3, at 44, 62-66.

³⁹ USA PATRIOT Act § 411(a), 115 Stat. at 345-48.

⁴⁰ See *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002) (upholding seizure of assets of terrorist organization under USA PATRIOT Act's revision to 50 U.S.C. § 1702).

⁴¹ USA PATRIOT Act § 411(a)(1)(F)(iv), 115 Stat. at 346-47.

⁴² CHANG, *supra* note 3, at 62.

⁴³ *Id.* at 62-63.

⁴⁴ *Id.* at 70.

⁴⁵ *Id.* at 67, 85-87.

⁴⁶ *Id.* at 87-91.

⁴⁷ *Id.* at 77-85. For a discussion of the constitutionality of the Bush administration's actions, see Lisa M. Ivey, *Ready, Aim, Fire? The President's Executive Order Authorizing Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism is a Powerful Weapon, But Should it be Upheld?*, 33 CUMB. L. REV. 107 (2002).

⁴⁸ CHANG, *supra* note 3, at 69; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 951, 985 (2002).

⁴⁹ CHANG, *supra* note 3, at 67-69.

⁵⁰ Cole, *supra* note 48, at 985-87.

⁵¹ National Security; Prevention of

Of the judges presently sitting on the federal bench, 166 were nominated by our current President, George W. Bush.

Federal Judicial Center Website, Judges of the United States Courts, at http://air.fjc.gov/history/judges_frm.html (last visited Oct. 31, 2003).

Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 & 501).

⁵² CHANG, *supra* note 3, at 87.

⁵³ *Id.* at 79-85; see also Deborah Charles, *Secret Court Says U.S. Has Broad Wiretap Powers*, S. FLA. SUN-SENTINEL, Nov. 18, 2002.

⁵⁴ CHANG, *supra* note 3, at 77-79.

⁵⁵ *Id.*

⁵⁶ *Id.* at 92-94.

⁵⁷ *Id.* at 94, 109-14.

⁵⁸ *Id.* at 94.

⁵⁹ *Id.* at 112-13.

⁶⁰ *Id.* at 134.

⁶¹ *Id.* at 135-37.

⁶² *Id.* at 135.

⁶³ *Id.* at 136-37.

⁶⁴ Margret A. Blanchard, *Why Can't We Ever Learn? Cycles of Stability, Stress and Freedom of Expression in United States History*, 7 COMM. L. & POL'Y 347, 348 (2002).

⁶⁵ See Part I.A., *supra*, and accompanying footnotes.

⁶⁶ See, e.g., *Global Relief Found., Inc.*, 315 F.3d 748 (7th Cir. 2002) (alleging putatively charitable organization funded terrorism).

⁶⁷ Kathryn Wescott, *Who Are Hamas?*, BBC NEWS (Oct. 19, 2000),

available at http://news.bbc.co.uk/1/hi/world/middle_east/978626.stm.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See United Palestinian Appeal online, at <http://www.helpupa.com>.

⁷¹ See Part I.B., *supra*, and accompanying footnotes.

⁷² CHANG, *supra* note 3, at 70-71.

⁷³ The author does concede that "some additional information sharing between agencies is appropriate given the nature of the terrorist threats we face." *Id.* at 61.

⁷⁴ See Robert M. Gates, *A Former CIA Chief on Connecting the Dots*, TIME, May 27, 2002, available at 2002 WL 8386412 ("A key problem prior to Sept. 11 was structural. Since 1986, representatives of a number of national security organizations and the FBI have worked together daily in the CIA's Counterterrorism Center, where information from abroad is shared, integrated, analyzed and acted upon. Before Sept. 11, there was no comparable formal organization for working-level contact among the domestic agencies of government—or between them and the national security agencies. While there appears to

have been a few dots to connect, there was no effective mechanism for those connecting lines to cross domestic and national security boundaries."); Edwin J. Feulner, *Intelligence: A Smarter Route*, WASH. TIMES, Oct. 3, 2002, available at <http://www.washtimes.com/commentary/20021003-554110.htm>; Abraham McLaughlin, *Lessons from Pre-9/11 Warnings*, CHRISTIAN SCIENCE MONITOR, May 17, 2002, available at <http://www.csmonitor.com/2002/0517/p01s02-usju.html>.

⁷⁵ CHANG, *supra* note 3, at 61.

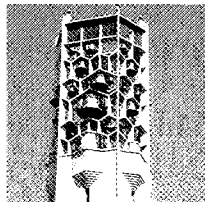
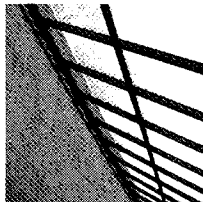
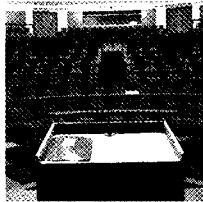
⁷⁶ Select Committee to Study Government Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans*, S. REP. NO. 94-755 (1976).

⁷⁷ CHANG, *supra* note 3, at 61.

⁷⁸ Cara Garretson, *Panel: Government Info Sharing is Key to Fighting Terrorism*, IDG NEWS SERV., Dec. 19, 2001, available at <http://www.computerworld.com/securitytopics/security/story/0,10801,66770,00.html>; Gates, *supra* note 74.

⁷⁹ Gates, *supra* note 74.

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