

BALANCING CIVIL LIBERTIES AND HOMELAND
SECURITY: DOES THE USA PATRIOT ACT AVOID
JUSTICE ROBERT H. JACKSON'S "SUICIDE PACT"?

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I. INTRODUCTION

As we commemorate the fiftieth anniversary of the passing of Robert H. Jackson, we honor a man who capitalized on the infinite possibilities a legal education provides. Following his studies at Albany Law School, Justice Jackson's diverse career included serving as a country lawyer in Western New York, a close advisor to President Franklin Delano Roosevelt, Solicitor General and Attorney General of the United States, Justice of the United States Supreme Court, and chief U.S. prosecutor in the Nuremburg trials against Nazi war criminals. Although his career ended over fifty years ago, Jackson, in each of his legal capacities, wrestled with issues that continue to provoke debate in our nation and world today.

A review of Justice Jackson's career reveals his involvement in some of the critical issues with which our country continues to struggle. During his tenure at the Department of Justice, Jackson co-authored briefs and argued the government's position before the United States Supreme Court in cases regarding the constitutionality of the Social Security Act.¹ Today our Congress and President assiduously work to define, or possibly redefine, the role of Social Security and to insure its viability for future generations. Additionally, as a Justice on the United States Supreme Court, Jackson authored the majority opinion in the case

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¹ See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding Social Security's unemployment compensation system); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding Social Security's old age pension system).

extending First Amendment protection to school children unwilling to salute the American flag.² Spirited debate persists today regarding the constitutionality of prayer in public arenas and the use of “God” in the Pledge of Allegiance. Perhaps one of Jackson’s most historic statements as a Supreme Court Justice, however, arose from his dissent in *Terminiello v. Chicago*,³ where Jackson, drawing on his experience at Nuremburg, argued to uphold a law restricting disorderly conduct and inciting unrest in an effort to preserve order and justice. Clearly, debate regarding the appropriate balance between civil liberties and governmental controls of those liberties is one of the paramount issues we are called upon to face today.

II. THE USA PATRIOT ACT: A MODERN DAY *TERMINIELLO*?

A. *A Brief History of Terminiello v. Chicago*

It is often only with the passing of time that we come to appreciate fully the importance of the works of our legal predecessors. At the time of Justice Jackson’s dissent in *Terminiello*, one easily could have viewed his opinion as an inconsequential departure from the majority in an otherwise forgettable case. Jackson’s rhetoric, however, now stands for certain hallmark principles in assessing the government’s role in preserving civil liberties. The case stems from Father Arthur Terminiello, a suspended Catholic Priest and follower of American fascist leader Gerald L.K. Smith, being found guilty of disorderly conduct in violation of a Chicago city ordinance. Terminiello urged a mob of his sympathizers at a public meeting hall to rise up against a surrounding gathering of his critics. Terminiello warned of the risk of a Communist revolution in the United States, labeled former First Lady Eleanor Roosevelt a Communist, and condemned “atheistic, communistic . . . or Zionist Jews.”⁴ He referred to the mob of his critics as “slimy scum that got in by mistake.”⁵ Terminiello’s comments incited some members of the audience themselves to make callous remarks about Catholics, Jews, and African Americans,⁶ while inciting critics to throw bricks and rocks

² See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³ 337 U.S. 1, 13 (1949) (Jackson, J., dissenting).

⁴ *Id.* at 17–20 (Jackson, J., dissenting).

⁵ *Id.* at 17 (Jackson, J., dissenting).

⁶ *Id.* at 22 (Jackson, J., dissenting).

through the meeting hall windows and break down the auditorium doors.⁷ The police experienced difficulty in controlling the mob, but ultimately arrested seventeen individuals and charged Terminiello with provoking the episode.⁸

Justice Douglas, writing for the majority hearing Terminiello's appeal, overturned the conviction, arguing that inviting dispute is a function of the free speech guaranteed by our Constitution.⁹ Justice Jackson dissented. In explaining his divergence from Douglas, Jackson wrote: "An old proverb warns us to take heed lest we 'walk into a well from looking at the stars.'"¹⁰ Jackson faulted the Court's majority for considering liberty and order diametric opposites of one another: "This Court seems to regard [liberty and order] as enemies of each other and to be of the view that we must forego order to achieve liberty."¹¹ Referencing the Nazi conspiracy and aggression with which he was intimately aware, Jackson argued that governments must have the power to control the speech and activity of organized demonstrators and "revolutionary fanatics" or risk being overtaken by terrorist factions; this was the consequence of unchecked factions that arose in pre-World War II Europe.¹² He recognized that while the substance of Terminiello's speech was protected by the First Amendment, Terminiello could not seek constitutional immunity for speech that incited such violence.¹³ Jackson concluded his dissent with these historic words: "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."¹⁴

⁷ *Id.* at 16 (Jackson, J., dissenting).

⁸ *Id.* (Jackson, J., dissenting).

⁹ *Id.* at 4.

¹⁰ *Id.* at 14 (Jackson, J., dissenting).

¹¹ *Id.* (Jackson, J., dissenting).

¹² *Id.* at 23–24 (Jackson, J., dissenting). Jackson, quoting *Mein Kampf*, wrote:

We should not work in secret conventicles, but in mighty mass demonstrations, and it is not by dagger and poison or pistol that the road can be cleared for the movement but by the conquest of the streets. We must teach the Marxists that the future master of the streets is National Socialism, just as it will some day be the master of the state.

Id. (Jackson, J., dissenting).

¹³ *Id.* at 25 (Jackson, J., dissenting).

¹⁴ *Id.* at 37 (Jackson, J., dissenting). It appears that Justice Jackson first used the term "suicide pact" in an unpublished draft opinion in *Hirabayashi v. United States*, a case assessing the power of the U.S. Army to impose a curfew on United States citizens of Japanese ancestry during World War II. "Nothing in the Constitution requires it to be construed as a suicide pact. It recognized the existence of a war power which it does not define or expressly limit." Dennis J. Hutchinson, "The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455, 463 (2002)

Almost certainly more than any other United States Supreme Court Justice in history, Justice Jackson had a first-hand appreciation of the risk of evil inflicted upon a society by a terrorist faction. Presiding over the Nuremberg trials, Jackson heard actual evidence of genocide and terrorism, and was a witness to the aftermath of a continent being terrorized for over a decade by an organized mob.¹⁵ Jackson had only returned from Nuremberg three years prior to the *Terminiello* decision, and the lesson of the downfall of the Weimar Republic was foremost in his mind.¹⁶ He understood that civil liberties could only survive under governments with the power to protect those liberties from attack. Recognizing that competing political interests could be fought out through the political system, or “with boots and brass knuckles in the streets,” as was the case of the Nazi aggression,¹⁷ Jackson perceived riots as a credible threat to a nation, and had the proof to support his claim.

According to Jackson, the only reason Father Terminiello was able to arrive at the meeting hall, deliver his speech, and escape unharmed was because officers of the law possessed authority to restrain the mob. Order established by law enforcement carved the path for liberty. Quoting Chief Justice Hughes’ opinion in *Cox v. New Hampshire*, Jackson reminded the Court that “[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.”¹⁸

(quoting Undated draft, Box 128, RHJP). Ultimately, Jackson’s opinion was not published. *Id.* The term “suicide pact” was later quoted by Justice Arthur Goldberg in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Assessing the citizenship rights of draft evaders, Goldberg theorized “[t]he powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact.” 372 U.S. at 159–60. The *Mendoza-Martinez* decision tends to be more frequently cited than *Terminiello* for the term “suicide pact,” possibly because it was the majority opinion. Nevertheless, Justice Jackson had employed the phrase fourteen years earlier.

¹⁵ See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 195 (1998) (noting that Justice Jackson’s experiences as United States prosecutor at the Nuremberg trials “had a profound effect on his judicial philosophy”).

¹⁶ GLENDON SCHUBERT, *DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* 89 (1969).

¹⁷ *Id.*

¹⁸ *Terminiello v. Chicago*, 337 U.S. 1, 31 (1949) (Jackson, J., dissenting). Jackson also referred to this balance between liberty and rule of law as “the oft-forgotten principle . . . that freedom of speech exists only under law and not independently of it.” *Id.* (Jackson, J., dissenting).

B. The USA PATRIOT Act

Although the issues concerning Father Terminiello, including communism and fascism, are not at the forefront of today's news, the extent to which civil liberties should be governed or limited by law continues to be hotly debated. After the horrific terrorist attacks against the United States on September 11, 2001, our country had no choice but to develop new techniques to combat terrorism. Law enforcement and intelligence agencies alike were forced to devise new methods to protect our citizenry and our institutions from the menace of violence and the potential use of weapons of mass destruction against our very homeland. Various governmental entities acknowledged that, historically, cooperation between agencies including law enforcement and intelligence agencies was less than ideal. For example, grand jury testimony and information obtained from court-authorized FBI wiretaps often could not legally be passed on by law enforcement for use by the intelligence community. Likewise, the transmission of intelligence information to law enforcement was frequently inhibited for fear of compromising highly sophisticated electronic surveillance techniques or jeopardizing the lives of under-cover operatives and cooperating witnesses.

Public outrage upon learning that information in the files of one government agency is not fully shared with other agencies is understandable, particularly when the stakes are as high as they inevitably are in both the prevention and prosecution of terrorist activities. Accordingly, a broad national consensus has developed regarding the need to fully empower those to whom we have assigned the task of fighting domestic terrorism. Hearty debate arises, however, when we undertake to determine the exact meaning we should give to the concept of "fully empower."

In an effort to allow more comprehensive intelligence sharing among agencies defending the homeland, Congress passed, by a large margin, the USA PATRIOT Act ("the Act").¹⁹ Enacted just six weeks after September 11th, the Act sought to remove barriers between various law enforcement and intelligent agencies to provide more effective use of intelligence in fighting terrorism.²⁰

¹⁹ 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 (2001).

²⁰ For a discussion of the barriers the PATRIOT Act seeks to eliminate, see Craig S. Lerner, *The USA PATRIOT Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493 (2003); see also *Counterterrorism Technology and Privacy: Report on the Cantigny Conference*, 27 A.B.A. NAT'L SECURITY L. REP.

The Act resulted in a myriad of other changes in the law as well. For example, the Act closed the technology gap in court-authorized electronic surveillance by recognizing the now widespread use of cellular phones and the Internet.²¹ The Act also tightened rules for the treatment of an estimated eleven million illegal aliens residing within our borders²² and extended the reach of money laundering prohibitions to all types of financial service institutions and instruments.

Despite the fact that the Senate passed the USA PATRIOT Act bill 98 to 1 and the House of Representatives passed the bill 357 to 66, much criticism has arisen since its enactment regarding the Act's alleged infringements on civil liberties and other constitutional rights.²³ Some argue that the PATRIOT Act imposes "guilt by association" on aliens by requiring deportation of any alien associated with or endorsing a terrorist organization.²⁴ Critics also assert that the Act allows the detention of aliens without a hearing or a showing that they pose a threat to national security, both standards below those provided to criminal defendants.²⁵ Others allege that the Act unfairly amends the Foreign Intelligence Surveillance Act ("FISA"),²⁶ allowing the issuance of search warrants and wiretaps without probable cause of criminal conduct.²⁷

4-5 (2005) (noting that international threats to national security and domestic threats from terrorists are no longer distinguishable) [hereinafter *Counterterrorism Technology and Privacy*].

²¹ See generally Orin S. Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607 (2003) (discussing changes to electronic surveillance laws and arguing that the PATRIOT Act does not significantly encroach upon electronic privacy expectations, as common wisdom might suggest).

²² See generally Lawrence M. Lebowitz & Ira L. Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA PATRIOT Act and Other Measures*, 63 U. PITT L. REV. 873 (2002) (outlining various shifts in immigration laws and policies as a result of the September 11th terrorist attacks).

²³ While some believe that the PATRIOT Act was rushed through Congress, the Act reflects the drafters' concerns in balancing civil liberties and national security. See Viet D. Dinh, *How the USA PATRIOT Act Defends Democracy*, 2 GEO. J. L. & PUB. POL'Y 393, 394 (2004).

²⁴ David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 966-70 (2002).

²⁵ *Id.* at 970-71.

²⁶ 50 U.S.C. §§ 1801-1863 (2000).

²⁷ See Cole, *supra* note 24, at 973. This criticism misconstrues the law in that the issuance of warrants for wiretaps and other surveillance without a showing of probable cause of criminal conduct is only permitted if the foreign power or its agent is a non-U.S. individual. Even in those instances, government officers still must show that there is probable cause to believe the target of the surveillance is a foreign power or an agent of a foreign power and that each of the facilities or places to be monitored are being used or are about to be used by the foreign power or its agent. 50 U.S.C. § 1805 (a)(3) (2000). If the agent is of a foreign power is a U.S. person, the element of criminality must be present. *Id.* § 1801 (b)(2)(A)-(E). This system allows the government to monitor foreign powers and their agents without

Detractors theorize that such revision will result in the government using the less restrictive FISA standard to obtain criminal evidence it could not otherwise collect under a probable cause standard.²⁸

What is apparently not acknowledged fully by critics of the Act is the crucial distinction that exists between the roles of law enforcement agencies and intelligence gatherers. Law enforcement agencies seek legally admissible evidence to prove a specific criminal offense in court before a judge and jury. Intelligence gatherers, on the other hand, seek information, whether legally admissible or not, to thwart a planned terrorist attack. While information and tactics in these two situations may overlap, they are certainly not the same. The former are designed to punish those who have committed terrorist attacks *after* the fact, while the latter are designed to prevent terrorist attacks *before* the fact. While the PATRIOT Act may at times appear to alter the standards of probable cause and sufficiency of evidence, the Act's primary purpose is to prevent further appalling attacks on U.S. citizens, such as those inflicted on September 11th.²⁹ The fact that evidence obtained under various provisions of the Act might be inadmissible in court should have no bearing, as the intent is to stop terrorist activity from *ever taking place*.³⁰

The consequences of the aforementioned intelligence breakdowns became apparent shortly after the attacks on September 11th. Reports surfaced that several of the hijackers had been previously identified as terrorist threats and were being watched by various government agencies. Sharing of information among law enforcement and intelligence agencies, it is argued, could have thwarted the attacks. Information collected by the CIA and FBI regarding the hijackers did not reach all U.S. law enforcement agencies, resulting in the government's failure to "connect the

impinging upon the rights of U.S. persons.

²⁸ Cole, *supra* note 24, at 973–74.

²⁹ Justice Jackson offered a similar analysis in his dissent in *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting), one of the Japanese internment cases. Scrutinizing the constitutionality of a military order excluding, for security reasons, all persons of Japanese ancestry from a certain area, he said: "In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved." *Id.* at 245 (Jackson, J., dissenting). Although Jackson ultimately believed the military exclusion order was unconstitutional, his reasoning here shows his recognition that security measures do not always have to follow principles of criminal law and evidentiary procedure.

³⁰ See *Counterterrorism Technology and Privacy*, *supra* note 20, at 5 (explaining that the role of law enforcement personnel is to look backward to reconstruct a crime, while the role of intelligence personnel is to look forward, usually covertly, to prevent a crime).

dots.”³¹

As U.S. Attorney General, Jackson struggled with many of the same frustrations in the law. In a lecture to the American Judicature Society in 1941, Jackson called for legislation aimed at controlling the number of illegal aliens within our borders.³² He noted that, at the time, the United States had over 6,000 deportable aliens, many of whom were criminals and Communists proven to have advocated overthrow of the U.S. government.³³ While outstanding deportation orders existed for these individuals, statutory authority to enforce the orders was absent.³⁴ Jackson also articulated concerns about foreign agents, arrested for acts against our nation, who were released on bail and returned to American society.³⁵

Further, Jackson urged legislation permitting the monitoring and intercepting of telegrams between saboteurs, explaining to the Judicature Society that “[t]he wires of America today are a protected communication system for the enemies of America.”³⁶ As an example, Jackson pointed to the sabotage of U.S. ships in U.S. ports ordered via telegrams sent to the ships’ masters.³⁷ He argued that “carefully limited legislation” would allow the government forewarning of enemy attacks, while still respecting privacy of the mails and wires.³⁸ Jackson warned his audience that efforts to strengthen law enforcement would be obstructed by critics, but challenged the Judicature Society and the Bar to nevertheless effect the necessary changes to the law.³⁹

Today, our constitutional Bill of Rights faces the same risk of becoming a “suicide pact” as it did in 1949 when Justice Jackson wrestled with *Terminiello*. If our government does not enact laws necessary to surveil for dangers and protect our democracy, our Bill of Rights could lose all meaning. If true freedom and liberty are to continue to be realized, our government must be permitted to exercise adequate powers in protecting them. Unlimited freedom of

³¹ Lerner, *supra* note 20, at 493.

³² See Robert H. Jackson, *Put Law of National Defense in Order*, 25 J. AM. JUDICATURE SOC’Y 6, 9 (1941–1942).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* Jackson advocated strongly for the power to monitor and prevent the transmission of terrorist threats through the mails and wires: “Must we not only allow foreign attacks on our policy but also carry it for them in our mails?” *Id.*

³⁷ *Id.* at 9.

³⁸ See *id.*

³⁹ *Id.*

speech, privacy, or entry across our borders will be of little benefit when terrorists invade our homeland.

Our world as we knew it changed on that frightful morning in September 2001. Our vulnerability to terrorists who despise our way of life became apparent. We must now, as a nation, act affirmatively to protect our democracy. While debate regarding the role our government should have in our lives inevitably will continue, Jackson's "suicide pact" principle holds true. We can only enjoy genuine liberty alongside the existence of order; eroding order for the sake of unlimited civil liberties will result in a terrorist triumph.

In the wake of September 11th and the enactment of the PATRIOT Act, evidence illustrates success in striking a balance between homeland security and civil liberties. In 2004, Utah Senator Orrin Hatch praised the ability of the PATRIOT Act to effectuate justice without eroding civil liberties. Senator Hatch stated that the Justice Department's Inspector General reported, in three consecutive semi-annual reports, that it had received "absolutely no complaints" alleging misconduct by Justice Department employees in their application of the substantive provisions of the PATRIOT Act.⁴⁰ This is due, in part no doubt, to provisions of the Act that provide additional protection to civil rights by allowing recovery for willful violations of the law⁴¹ and requiring judicial oversight of certain investigations.⁴² If abuses occur in the future, however, they will be treated similarly to the misuse of any other law, resulting in suppression of evidence, reversals of convictions, and damages awarded for misconduct.⁴³

As portions of the PATRIOT Act approach sunset on December

⁴⁰ *Federal Government Counterterrorism Efforts: Hearing of the Senate Judiciary Comm.*, 108th Cong. (2004) (opening statement of Sen. Orrin G. Hatch, Chairman, Senate Comm. on Judiciary) [hereinafter *Federal Government Counterterrorism Efforts*]. See Joseph G. Poluka, *The PATRIOT Act: Indispensable Tool Against Terror*, 76 PA. BAR ASS'N. Q. 33, 38 (2005) (stating that the warnings of abuses from implementing the PATRIOT Act "simply have not been realized"); Beryl A. Howell, *Surveillance Powers in the USA PATRIOT Act: How Scary are They?*, 76 PA. BAR ASS'N. Q. 12, 13–14 (discussing certain myths about the PATRIOT Act, including the facts behind accusations that Congress "rubber stamped" the Administration's request for the Act, that Congress "short-circuited" the normal legislative process, and that the Act is responsible for a multitude of contentious civil liberties actions taken by the Bush Administration).

⁴¹ See *Oversight of the USA PATRIOT Act: Hearing of the Senate Judiciary Comm.*, 109th Cong. (2005) (statement of Attorney General Alberto R. Gonzales) (noting that Section 223 of the Act provides for monetary damages for willful violation of the criminal wiretap statute) [hereinafter *Oversight of the USA PATRIOT Act*].

⁴² See *id.* (discussing Sections 201, 202, 206, 209, 214, 215, and 220, all of which require some degree of court approval for wiretaps and search warrants).

⁴³ See Poluka, *supra* note 40, at 38.

31, 2005, controversial provisions will likely be subject to legislative effort at amendment. Although unable to document any specific abuse of its provisions, the Patriots to Restore Checks and Balances, a broad coalition of advocates made up of public interest groups and former Members of Congress, has stated they will seek to focus on three provisions of the Act they claim are inimical to the exercise of civil rights and liberties: the so-called “sneak and peek” searches by federal agents without the requirement of instant notification; the availability of records from institutions such as libraries, gun shops, and medical offices; and the use of an overly broad definition of “terrorism” in pursuing suspects.⁴⁴ Despite its qualms, the coalition agrees that the PATRIOT Act is a necessary tool for defeating terrorism.⁴⁵ Current Members of Congress will also introduce legislation aimed at reducing the scope of the Act.⁴⁶ Responding to criticisms, Attorney General Alberto R. Gonzales stated before the Senate Judiciary Committee that while he invites ideas for improving the PATRIOT Act provisions due to sunset in 2005, he adamantly urges making all of these provisions permanent, as they are indispensable tools for fighting terrorism and serious crime.⁴⁷

Former Attorney General John Ashcroft also recently testified before the Senate Judiciary Committee, stressing the significance of protections the PATRIOT Act provides. Ashcroft stated, “al Qaeda has a fanatical desire to wage war on Americans in America. Al Qaeda will send terrorist soldier after terrorist soldier to infiltrate our borders and to melt into our communities. And they do not wear uniforms. They do not respect human rights. They target

⁴⁴ See Eric Lichtblau, *Coalition Forms to Oppose Parts of Antiterrorism Law*, N.Y. TIMES, Mar. 23, 2005, at A10. See also Howell, *supra* note 40, at 19 (noting that courts, including the U.S. Supreme Court, have sanctioned “sneak and peek” warrants for over a decade); Andrew C. McCarthy, *Spinning the PATRIOT Act: Sneaking a Peek at “Judge” Napolitano’s Latest Debacle*, NAT’L REV. ONLINE, available at <http://www.nationalreview.com/mccarthy/mccarthy200504070805.asp> (noting widespread misconceptions of “sneak and peek” searches, including former New Jersey Superior Court Judge Andrew Napolitano’s mischaracterization of this provision on the April 4, 2005 edition of *The O’Reilly Factor*, alleging, incorrectly, that FBI agents can conduct “sneak and peek” searches by using self-written warrants that permit them “to break into your house and make it look like a burglary” and “steal your checkbook” or “plant a chip in your computer”). In actuality, “sneak and peek” warrants, or delayed-notice search warrants, can only be issued by a federal judge and only upon a showing of probable cause that the property to be searched or seized constitutes evidence of a criminal offense. Delayed-notice warrants differ from normal search warrants *only* in that a judge specifically authorizes law enforcement to wait a limited time before notifying the subject of the search that the warrant has been executed. See 18 U.S.C. § 3103(a) & (b).

⁴⁵ See Lichtblau, *supra* note 44, at A10.

⁴⁶ See Dan Eggen, *Patriot Act Changes to Be Proposed*, WASH. POST, Apr. 5, 2005, at A21.

⁴⁷ See *Oversight of the USA PATRIOT Act*, *supra* note 41 (statement of Attorney General Alberto R. Gonzales).

civilians.”⁴⁸ If we fail to provide our government with effective tools to seek out terrorists and bring them to justice, our way of life will be degraded once again as it was on September 11th.

Chief Justice William H. Rehnquist has also weighed in on the issue of liberty versus order and, like Jackson, arrived at conclusions similar to those discussed herein in light of the PATRIOT Act. The Chief Justice argued that civil liberties can only truly be protected by a government with power to maintain order among its people:

It is not simply ‘liberty’ but *civil* liberty of which we speak. The word ‘civil,’ in turn, is derived from the Latin word *civis*, which means ‘citizen.’ A citizen is a person owing allegiance to some organized government, and not a person in an idealized ‘state of nature’ free from any governmental restraint. Judge Learned Hand, in remarks entitled ‘The Spirit of Liberty,’ delivered during World War II, put it this way: ‘A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few’⁴⁹

In conflicts between individual liberty and governmental authority, Rehnquist noted, individual liberty will not always prevail.⁵⁰ One can imagine Justice Jackson penning the following, also written by Justice Rehnquist: “In wartime, reason and history both suggest that [the balance between freedom and order] shifts to some degree in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being.”⁵¹

C. Justice Jackson: A Common Sense Perspective

If Justice Jackson were alive today, he would warn us that it is more important now more than ever that the United States take decisive steps to prevent our Constitution from becoming the “suicide pact” he referred to in the *Terminiello* case. Terror, and the threat of terror, is alive in historic proportions. Jackson would advise that we need to prevent our cherished freedoms from falling

⁴⁸ *Federal Government Counterterrorism Efforts*, *supra* note 40 (statement of Attorney General John Ashcroft).

⁴⁹ REHNQUIST, *supra* note 15, at 222 (citation omitted).

⁵⁰ *See id.* at 222–23.

⁵¹ *Id.* at 222. *See also* Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 104 (1951) (noting: “Freedom is achieved only by a complex but just structure of rules of law, impersonally and dispassionately enforced against both rules and the governed.”).

into the hands of a savage few. He would point us to the horrors of terrorism and genocide in Nazi Germany, the evidence of which he was intimately familiar and the proponents of which he prosecuted. As Jackson once wrote, “Mussolini, Hitler, Stalin, and lesser imitators rejected the process of out-arguing and out-voting adversaries and have forcibly sized power, suppressed liberties and set up dictatorships.”⁵² If he were drafting this passage today, Jackson surely would add al Qaeda and Osama bin Laden’s names to the list.

Justice Jackson would view the PATRIOT Act for what it is—a necessary and common sense means to protect our system of democracy and organized government. But he would do so with a sense of fairness and recognition of the importance of the presumption of innocence. Prior to the commencement of the Nuremberg trials, Jackson fiercely negotiated for a presumption of innocence with U.S.S.R. prosecutor General Ion T. Nikitchenko, who argued that Nazi defendants should be presumed guilty.⁵³ Jackson’s presumption of innocence argument prevailed only after he threatened Nikitchenko that the U.S. would not otherwise participate in the trials.⁵⁴ Again recognizing that liberty and order must operate in tandem, Jackson remarked in his opening statement at the trials, “[t]o pass these defendants a poisoned chalice is to put it to our own lips as well.”⁵⁵ This standard of guilt resulted in the acquittal of three Nazi defendants.⁵⁶

While Jackson would recognize the rights of individuals under the

⁵² Robert H. Jackson, *Liberty Under Law*, Address Before the New York State Bar Association (Jan. 30, 1954), at www.roberthjackson.org/Man/Libertyunderlaw/.

⁵³ See Henry T. King, Jr., *Robert Jackson’s Transcendent Influence Over Today’s World*, 68 ALB. L. REV. 23, 26 (2004); see also Robert H. Jackson, *Justice Jackson’s Report to President Truman on the Legal Basis for Trial of War Criminals*, 19 TEMP. L.Q. 144, 148 (1945–46) [hereinafter *Justice Jackson’s Report to President Truman*] (“But indiscriminating executions or punishments [of the alleged war criminals] without definite findings of guilt, fairly arrived at, would . . . not set easily on the American conscience or be remembered by our children with pride.”); Robert H. Jackson, *Justice Jackson Weighs Nuremberg’s Lessons*, N.Y. TIMES MAG., June 16, 1946, at 12 (arguing that without trying the alleged Nazi criminals, the United States could be likened to Nazis executing political enemies without a hearing).

⁵⁴ See King, *supra* note 53, at 26. Jackson was cognizant of the fact that the Nuremberg trials provided the accused with a liberty unavailable under their former regime. In his closing remarks at Nuremberg, Jackson said: “History will know that whatever could be said, [the defendants] were allowed to say. They have been given the kind of trial which they, in the days of their pomp and power, never gave to any man.” Robert H. Jackson, *Closing Arguments for Conviction of Nazi War Criminals*, 20 TEMP. L.Q. 85, 85 (1946–47).

⁵⁵ Opening Statement for the United States of America by Robert H. Jackson, Chief of Counsel for the United States at the Palace of Justice, Nürnberg, Germany, November 21, 1945, reprinted in ROBERT H. JACKSON, *THE NÜRNBERG CASE* 30, 34 (1947).

⁵⁶ See King, *supra* note 53, at 26.

PATRIOT Act, he would have stern words for the Act's critics. He would remind them of the old proverb he cited in *Terminiello*: "take heed lest we walk into a well from looking at the stars." Jackson would argue that while certain methods of implementing such safeguards may have the real or perceived effects of limiting civil liberties, we cannot pretend that our civil liberties are constant or that they reside in a vacuum. Justice Jackson knew that it is not a choice between liberty and order, but a choice between liberty with order or anarchy without either. In response to critics of the Nuremberg trials, Jackson wrote, "[f]riends of liberty will find grim instruction in the rise of the Nazi party, its methods of seizure of power, and its establishment of dictatorial control over the German people."⁵⁷ While our civil liberties may not be absolute under the PATRIOT Act, our liberties could become non-existent without it. A society that presumes innocence in a court of law while aggressively pursuing evidence of planned bad acts will remain stable.

III. CONCLUSION

Eugene Gerhart, the sole biographer of Robert H. Jackson, once said, "[l]ike President Ronald Reagan, Jackson operated on principles, not on the basis of public opinion polls."⁵⁸ Jackson understood that, while not always popular, striking a balance between civil liberties and government order is of paramount importance. As U.S. Prosecutor at Nuremberg, Jackson wrote to President Truman: "The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and non-technical."⁵⁹ Jackson carried this philosophy with him throughout his career—as advocate, prosecutor, defender, and judge—recognizing that a common sense balance of power and liberty promotes democracy and stability.

⁵⁷ *Justice Jackson Weighs Nuremberg's Lessons*, *supra* note 53, at 60.

⁵⁸ Eugene C. Gerhart, *The Legacy of Robert H. Jackson*, 68 ALB. L. REV. 19, 20 (2004).

⁵⁹ *Justice Jackson's Report to President Truman*, *supra* note 53, at 152.