NATIONAL SECURITY AT WHAT PRICE?: A LOOK INTO CIVIL LIBERTY CONCERNS IN THE INFORMATION AGE UNDER THE USA PATRIOT ACT OF 2001 AND A PROPOSED CONSTITUTIONAL TEST FOR FUTURE LEGISLATION

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> History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.
>
> — Justice Thurgood Marshall[1]

INTRODUCTION

Throughout history, each time a severe national security threat was recognized by the United States, the legal system was called upon to answer one important question: To what extent may a democratic society violate the very rights it was founded upon in order to ensure the survival of that society? In answering this question, the government and the courts have applied various tests that should theoretically standardize this evaluation and effectively preserve some minimum level of personal rights while maintaining the necessary protections for society as a whole.

Five examples from the history of this balancing act stand out. In the American Civil War, it was the executive, not the judiciary, which established the tests, resulting in little regard given to individual rights and in widespread constitutional violations. In both the Japanese-American internment cases and the McCarthy era, there were even greater violations. Here the courts mandated the constitutional tests. These tests, however, did little more than legally justify any action the government thought necessary. The anti-terrorism efforts of the 1990s and 2000s, the Foreign Intelligence Surveillance Act (FISA)[2] and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act),[3] extended such constitutional violations into the sphere of electronic surveillance. Additionally, the acts themselves provided their own constitutional tests based upon the earlier framework created by the courts. The egregious civil liberty violations in these examples prove the inability of previous constitutional tests to curb those violations and the necessity of a more effective test that still allows the government the necessary tools to protect the United States from external enemies.

This note not only examines the historical issues that present themselves in this context but also looks at new complexities found in the

[1] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

[2] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1801–63 (2000)). For further discussion, see discussion *infra* Part I.D.

[3] 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).

information age and terrorism's unique challenge of asymmetrical warfare.[4] By taking an in-depth look at the infringement of civil liberties during these historical moments of grave national security concerns and analyzing the USA PATRIOT Act's "electronic information" effects, this note hopes to develop a framework in which to address both civil liberty and security concerns in the modern information age. In doing so, this note proposes a "one step lower" test that could be applied to current and future security scenarios.

This note will therefore examine (1) the history of civil rights in times of threats to the security of the country, culminating in the USA PATRIOT Act, (2) specific civil rights concerns within the electronic information spheres of the USA PATRIOT Act, and (3) a proposed new constitutional test that would more effectively balance the interests of individual rights and national security. The application of the "one step lower" test will provide the courts with a flexible standard to safely balance personal rights with the need to defend the United States for the limited duration of a national security crisis.

I. CIVIL RIGHTS INFRINGEMENTS FOR NATIONAL SECURITY REASONS

The history of infringements upon civil rights in times of crises in national security provides a useful insight into the evolution of these infringements and a backdrop upon which the USA PATRIOT Act can be evaluated. In Fact, an examination of problems in the USA PATRIOT Act without understanding the historical context of civil rights violations in the United States would provide an unrealistic assessment of the problems at hand and would prove of little use in attempting to prepare for future crises. In order to properly evaluate the context of the personal rights dilemma, we will briefly examine a number of representative examples, including the American Civil War, the internment of Japanese-Americans during World War II, McCarthyism during the Cold War, FISA, the antiterrorism legislation of the 1990s, and the events leading to the adoption of the USA PATRIOT Act. Additionally, this section includes a primer on electronic surveillance in the United States.

[4] Asymmetrical warfare is warfare between two opponents who use different combat techniques. Guerrilla warfare, in which one side fights using traditional tactics and the other uses hit-and-run tactics with little regard for the conventions of warfare, is an example of asymmetrical warfare. *See* IAN O. LESSER ET AL., COUNTERING THE NEW TERRORISM, 94–96 (1999).

A. THE AMERICAN CIVIL WAR[5]

While certainly not the first civil rights intrusion in the name of national security,[6] the American Civil War provides perhaps the most egregious early infraction of those rights. At the outbreak of the Civil War, President Abraham Lincoln declared a state of national emergency and suspended all rights in certain key border states.[7] In addition to using federal troops to intimidate state legislators and influence their decisions,[8] Lincoln imprisoned 13,000 civilians and suspended the writ of habeas corpus so that no inquiry could be made into the validity of their detainment.[9] Included in this number were civilians arrested for "discouraging volunteer enlistments."[10] Lincoln had federal troops occupy, by force, large portions of the Maryland countryside, arrested a mayor and nineteen members of the Maryland state legislature, and refused to honor a writ of habeas corpus issued by Chief Justice Taney for a prominent Baltimore citizen who had been "arrested by the military on a charge of aiding the enemy."[11] In Missouri, Lincoln armed 10,000 civilians and used them to disperse gatherings of southern sympathizers.[12] The legislature of Missouri, which was pro-Union, met under the protection of the military, while the governor was effectively discouraged from continuing with the duties of his office.[13] President Lincoln's successful flouting of the Constitution, while no doubt necessary to save the Union, established a dangerous precedent.[14]

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5 For a detailed discussion of President Lincoln's actions during the imposed state of emergency, see JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION (3d ed. 2001); STEPHEN B. OATES, WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN (1977); BRUCE CATTON, THIS HALLOWED GROUND: THE STORY OF THE UNION SIDE OF THE CIVIL WAR (1956).

6 Intrusion into protected civil rights in the name of national security has been a fact as long as the United States has existed under the Constitution. Perhaps the most infamous of these early incidents were the Alien and Sedition Acts under President John Adams and the Federalists, who used the threat of outside interference in American politics as a pretext for silencing Thomas Jefferson and the emerging Democratic-Republican Party. For a discussion, see ENCYCLOPEDIA OF AMERICAN HISTORY 129–30 (Richard B. Morris ed., rev. 1965).

7 These states were Maryland, Kentucky, Missouri, and Tennessee. CATTON, *supra* note 5, at 27–41.

8 MCPHERSON, *supra* note 5, at 166–67.

9 *See* Debora K. Kristensen, *Finding the Right Balance: American Civil Liberties in Time of War*, THE ADVOCATE, Dec. 2001, at 20; CATTON, *supra* note 5, at 28.

10 147 CONG. REC. S11,020 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold), *available at* www.senate.gov/~feingold/releases/01/10/102501at.html.

11 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 90–91 (1922). *See* CATTON, *supra* note 5, at 28; Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

12 *See* CATTON, *supra* note 5, at 31–35.

13 *Id.*

14 President Lincoln's violations of civil liberties were not the first in American history. The Alien and Sedition Acts, Andrew Jackson's unlawful detention of reporter Louis Louailler, and military actions during "Dorr's Rebellion" in 1842 all violated personal civil liberties

President Lincoln's assumption of wartime powers and temporary termination of certain individual constitutional rights was effectively evaluated only by the executive branch.[15] Lincoln's actions demonstrate a belief that only the president could appropriately balance the rights of the individual with the nation's will to survive the threat to its liberty. Lincoln believed that the proper constitutional test was whether the president should "risk[ ] losing the Union that gave life to the Constitution because that charter denied him the necessary authority to preserve the Union."[16] This administrative test of power would become the model for future generations of American presidents during times of domestic crisis.[17]

B. INTERNMENT OF JAPANESE-AMERICANS DURING WORLD WAR II[18]

During World War II, the United States arrested and incarcerated 110,000 people of Japanese descent.[19] The detentions started the evening of December 7, 1941, and continued for over a year.[20] Initially, the Departments of Justice and the Army favored an exclusion policy that would keep Japanese-Americans from sensitive areas only, but three months after Pearl Harbor, the Western Defense Command (WDC)[21] switched to a policy of internment.[22] WDC justified its actions with the belief that many Japanese-Americans sympathized with Japan and would commit acts of sabotage to support a possible invasion.[23] The fact that two-thirds of the Japanese-American population had American citizenship did not have any real effect on the decision to intern or the subsequent court decisions upholding that internment as constitutional.[24] Conditions in the camps got so bad that, in addition to living behind barbed-wire fences, these citizens had to live in horse stalls.[25] Further-

in the name of national security. *See* Kristensen, *supra* note 9, at 20. The Civil War, however, provides a clear and comprehensive example of those violations and the first real attempt to balance individual rights with national security.

15 *See id.* at 21.

16 *Id.*

17 *See id.*

18 *See generally* JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION (1968); Eugene V. Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945).

19 *See* 147 CONG. REC. S11,020 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold).

20 *See* TENBROEK, *supra* note 18, at 101.

21 WDC was the military command for the western states charged with overseeing their defense from possible Japanese land and sea attacks. *Id.* at 100, 352 n.2 (citing U.S. ARMY, THE ARMY ALMANAC 601 (1951)).

22 TENBROEK, *supra* note 18, at 120.

23 TENBROEK, *supra* note 18, at 110.

24 *See* TENBROEK, *supra* note 18, at 311.

25 *See* WILLIAM MANCHESTER, THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 300–01 (1974) (describing the conditions of the internment camps).

more, no specific threat was required; placement in the camps could be justified by race alone.[26]

A succession of cases challenged the internment as a violation of the president's war powers and as a violation of the "equal protection of the laws as guaranteed by the Fifth Amendment,"[27] culminating in *Korematsu v. United States*.[28] The Supreme Court was called upon to confront the very question presented in this Note: To what extent may a democratic society violate the very rights it was founded upon in order to ensure the survival of that society?[29] First, the Court heard *Hirabayishi v. United States*,[30] in which the constitutionality of a curfew targeted entirely at one ethnic group was considered permissible under the theory that "[t]he challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces."[31] Then in *Korematsu*, the Supreme Court, despite articulating the requirements for strict scrutiny for the first time, held that the internment was constitutional.[32] The Court accepted the military's findings that no means were available that could separate those who would probably commit sabotage and other disloyal acts from innocent civilians.[33] Furthermore, the Court noted, "hardships are part of war."[34] In arriving at its conclusion, the Court decided that the proper test in evaluating civil liberty violations during times of crises was to place great deference on the president's war powers and that the Fifth Amendment must be subservient to those powers.[35] The same year that the Supreme Court decided *Korematsu*, it also ruled in *Ex Parte Mitsuye Endo*[36] that the continued detention of "concededly loyal" Japanese-Americans was unwarranted,[37] without specifically overruling *Korematsu*.[38] However, the court based its decision on the

26 *See* Korematsu v. United States, 323 U.S. 214, 217–19 (1944).

27 *Id.* at 235 (Murphy, J., dissenting).

28 *Id.*

29 *See id.* at 228–29.

30 320 U.S. 81 (1943).

31 *Id.* at 94–95.

32 *Korematsu*, 323 U.S. at 216–20 (interpreting the equal protection element of the Fifth Amendment to require strict scrutiny of governmental actions based on racial classification).

33 *Id.* at 218–19.

34 *Id.* at 219.

35 *Id.* at 217–18. The dissent argued for a new test to determine the validity of a deprivation of constitutional rights, based on "whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger." *Id.* at 234 (Murphy, J., dissenting). *See also* Micah Herzig, Note, *Is* Korematsu *Good Law in the Face of Terrorism? Procedural Due Process in the Security Versus Liberty Debate*, 16 GEO. IMMIGR. L.J. 685, 687–88 (2002).

36 323 U.S. 283 (1944).

37 *Id.* at 302.

38 *See id.* at 300–02.

fact that Congressional authorization of the detainment of Japanese-Americans was only with regard to an initial period of evacuation and the fact that Congress later took corrective action regarding the detainment.[39] Even while finding the detainments unconstitutional, *Mitsuye Endo* still granted great deference to the military and focused its discussion of wartime powers on deference to the president and Congress.[40]

C. THE COLD WAR — MCCARTHYISM[41]

After Allied success in World War II, the United States and the Soviet Union quickly reverted to their former antagonisms.[42] As the United States increasingly confronted this new enemy, it found itself involved in a new war, a "cold war."[43] In response, Congress conducted the House Un-American Activities Committee hearings[44] and passed such legislation as the anticommunist oath provisions of the Taft-Hartley Act of 1947[45] and the McCarran Act of 1950.[46] This legislation sought to criminalize communism, membership in a communist organization, and expressions of sympathy towards communist positions.[47] The Supreme Court then agreed to review anticommunist legislation in *Dennis v. United States*.[48] The Court articulated a balancing test that "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[49] In order to evaluate the potential invasion of free speech, the court adopted the "clear and present danger" test first articulated in *Schenk v. United States*[50] and held that mere membership in the Communist Party was sufficient to justify government action.[51] Significantly, *Dennis* recognized the elimination of a continuing peril, in this case the overall threat of communist expansion, as a legitimate national security goal.[52] The "clear and present danger" test, while still maintain-

39 *See id.*

40 *See id.* at 294–305. Some authors contend that *Korematsu* still applies in the post-September 11, 2001, era. *See, e.g.*, Herzig, *supra* note 35, at 690.

41 For a discussion of anticommunist activities within the United States from 1900 to 1950, see William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375 (2002).

42 *Id.* at 406–23.

43 *See id.*

44 *Id.* at 398–99.

45 Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947).

46 Internal Security (McCarran) Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950).

47 *See* Wiecek, *supra* note 41, at 423–28.

48 341 U.S. 494 (1951).

49 *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

50 249 U.S. 47, 52 (1919).

51 *See Dennis*, 341 U.S. at 510–11.

52 *Id. See also* Steven A. Osher, *Privacy, Computers, and the PATRIOT Act: The Fourth Amendment Isn't Dead, But No One Will Insure It*, 54 FLA. L. REV. 521 (2002).

ing deference to the war powers of the president, was the first real attempt at balancing the interests of national security and personal liberty. However, this new test could not prevent the continued violation of the constitutional rights of many American communists during the Cold War.[53]

D. FISA (1978)

The Foreign Intelligence Surveillance Act of 1978[54] provided the next major infringement of civil rights in the interest of national security. FISA was designed to enhance U.S. intelligence capabilities overseas during the Cold War and, as a protection, restrict those activities within the United States.[55] FISA's civil rights concerns focused on foreign nationals within U.S. territory and specifically required that a FISA warrant be used to obtain "foreign intelligence information."[56] However, the FBI and CIA recently revealed that they had used these measures to conduct electronic surveillance of Martin Luther King, Jr., and other members of the civil rights movement.[57]

FISA powers were granted to the executive branch on the theory that the FBI was not investigating crimes at all[58] but was investigating activities of foreign intelligence agencies and, thus, the lower threshold[59] for obtaining wiretap warrants was acceptable.[60] Under this theory, FISA expanded the definitions of intercept orders, pen-traps,[61] search warrants, and subpoenas.[62] FISA did so by authorizing the Attorney General to conduct intercept orders for up to a year before informing the Foreign Intelligence Surveillance Court,[63] discussed *infra*, and did not obligate any reporting of the orders if the intercepts were completed within the one year framework.[64]

53 *See* Wiecek, *supra* note 41, at 429–34.

54 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1801 (2000)).

55 *See* 50 U.S.C. § 1802; Osher, *supra* note 52, at 532; ELECTRONIC FRONTIER FOUNDATION, EFF ANALYSIS OF THE PROVISIONS OF THE USA PATRIOT ACT, *at* http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.html (Oct. 31, 2001) [hereinafter EFF ANALYSIS]. The Electronic Frontier Foundation (EFF) is a non-profit group whose purpose is to advocate for the protection of individual digital privacy protections. More information on the EFF is available at http://www.eff.org.

56 S. REP. NO. 95-604, at 1; *see id.* at 1–19 (1978).

57 *See* EFF ANALYSIS, *supra* note 55, at Executive Summary 3(b).

58 *See* 147 CONG. REC. S11,020 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold).

59 The threshold established is lower than probable cause. *Id.*

60 *See id.*

61 Pen-trap devices intercept in real time all numbers dialed from a telephone. *See* EFF ANALYSIS, *supra* note 55, at I.A.

62 *See id.*

63 Pub. L. No. 107-56, 115 Stat. 283 (2001).

64 *See* EFF ANALYSIS, *supra* note 55, at I.A.

FISA imposed several limits upon the government. First, both FISA and Executive Order 12,333[65] permitted surveillance against an American citizen within U.S. borders to be undertaken only after the Foreign Intelligence Surveillance Court[66] issued a written order.[67] Additionally, the surveillance could not be undertaken if the information sought could have been obtained by less intrusive means.[68] The court was supposed to hold warrant applications to a standard of probable cause and only apply the warrants to those considered agents of a foreign power.[69] However, Executive Order 12,333 § 2.3 allowed for information to be collected and disseminated if the information was needed to "protect the safety of any persons or organizations, including those who are targets, victims or hostages of international terrorist organizations."[70] Any information obtained about U.S. citizens who were not targets of an investigation could not be retained or disseminated by those intelligence agencies.[71] The procedures for collection, retention, and dissemination of civilian information by intelligence agencies are further codified by the classified regulations issued by those agencies.[72] Despite these precautions, between 1996 and 2000, all 4,275 FISA warrants applied for were granted.[73]

E. BASIC ELEMENTS OF ELECTRONIC SURVEILLANCE IN THE UNITED STATES

In the U.S. legal system, four basic methods of electronic surveillance exist.[74] These methods are (1) warrants authorizing the interception of communications, (2) search warrants authorizing the search of physical premises, (3) trap-and-trace devices[75] and pen traps,[76] and (4) subpoenas requiring the production of tangible records, such as printed e-

65 Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2000).

66 FISA, 50 U.S.C. § 1803 (1994).

67 *See* Exec. Order No. 12,333; NAT'L SEC. AGENCY, LEGAL STANDARDS FOR THE INTELLIGENCE COMMUNITY IN CONDUCTING ELECTRONIC SURVEILLANCE, *at* http://www.fas.org/irp/nsa/standards.html (Feb. 2000) [hereinafter NSA LEGAL STANDARDS].

68 *See* NSA LEGAL STANDARDS, *supra* note 67.

69 *See id.*

70 Exec. Order No. 12,333.

71 *See* NSA LEGAL STANDARDS, *supra* note 67.

72 *See id.* at app. A (CIA Headquarters Regulation 7-1, Law and Policy Governing the Conduct of Intelligence Activities) (accompanying classified report only); app. B (Department of Defense Directive 5240.1-R, DoD Activities that May Affect U.S. Persons), *available at* http://cryptome.org/dod5240-1-r.htm) (last visited Mar. 9, 2003); app. C (U.S. Signals Intelligence Directive 18), *available* at http://cryptome.org/nsa-ussid18.htm) (last visited Mar. 9, 2003).

73 *See* Susan Herman, *The USA PATRIOT Act and the U.S. Department of Justice: Losing Our Balances?*, *at* http://jurist.law.pitt.edu/forum/forumnew40.htm (Dec. 3, 2001).

74 *See* EFF ANALYSIS, *supra* note 55, at I.A.

75 In a conventional telephone, trap and trace devices can identify the number and routing information of an incoming telephone call. 18 U.S.C. § 3127(4) (2002).

76 *See supra* note 61.

mails or telephone logs.[77] When the surveillance is conducted for domestic reasons, these categories require a sliding scale of proof in order to be activated.[78] Interception orders and search warrants must meet the Fourth Amendment's probable cause standard.[79] Court orders for certain documents, such as ISP[80] e-mail logs, require a lower standard. The government merely has to show reasonable grounds for believing that the information being sought is relevant and material.[81] Pen-trap surveillance uses an even lower standard in requiring only a sworn government declaration as to the relevance of the information being sought.[82] Each of these standards applies only when the surveillance conducted is of a domestic nature.[83]

Domestic surveillance within the United States and abroad is carried out by a variety of federal agencies. The Federal Bureau of Investigation (FBI) is the primary federal agency responsible for domestic activities,[84] with the National Security Agency (NSA)[85] and the Central Intelligence Agency (CIA)[86] forbidden by U.S. law from monitoring domestic activities and able only to operate outside the United States.[87] All three agencies are responsible for overseas surveillance, assisted by the Departments of State, Treasury, and Justice.[88]

F. THE WAR AGAINST TERRORISM — THE 1996 ANTITERRORISM ACT

The 1996 Antiterrorism Act (AEDPA)[89] arose out of a February 1995 White House proposal to combat what was perceived as a growing threat from international terrorist groups.[90] The act included the establishment of a special court that could use secret evidence to deport noncitizens accused of association with terrorist groups,[91] empowered the

77 *See* EFF ANALYSIS, *supra* note 55, at I.A.

78 *See id.*

79 *See id*; U.S. CONST. amend. IV; Katz v. United States, 389 U.S. 347 (1967).

80 ISP stands for Internet Service Provider, which facilitates the link between an Internet user and access to the data paths of the Internet. *See* 17 U.S.C. § 512 (2002).

81 *See id.*

82 *See id.*

83 For a discussion of the standards for foreign surveillance, see discussion *supra* Part I.D.

84 Exec. Order No. 12,333 § 1.14, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401.

85 *Id.* § 1.12(b).

86 *Id.* § 2.4.

87 50 U.S.C. § 403-3(d)(1) (2000) ("[T]he Agency shall have no police, subpoena, or law enforcement powers or internal security functions.").

88 *See generally* Exec. Order No. 12,333 (providing for the effective division of responsibilities in intelligence gathering and the protection of civil rights).

89 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

90 *See* JAMES X. DEMPSEY & DAVID COLE, TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (1999).

91 *See* AEDPA § 401.

executive branch to criminalize fundraising for groups designated as terrorists,[92] re-enforced the McCarran Act,[93] created the new federal crime of terrorism,[94] created further exceptions to *posse comitatus* law,[95] expanded the use of pre-trial detention,[96] and loosened the rules governing federal wiretaps.[97] The AEDPA was enacted as a delayed response to the terrorist attacks on the World Trade Center in 1993 and in Oklahoma City in 1995.[98]

The AEDPA contained provisions that strike at the very heart of civil rights, in its finding of guilt by association. Civil rights groups complained about four central provisions of the act: (1) the definition of terrorism, (2) the criminalization of support for certain groups, (3) the ideological exclusions in immigration law, and (4) the alien terrorist removal procedures.[99] Under the act, the designation of a terrorist organization was made by the Secretary of State[100] and was defined as "any . . . organization 'engage[d] in terrorist activity' that threatens the 'security of the United States.'"[101] The definition of national security included economic interests of the United States, and the definition of terrorism included almost any act of force.[102] The consequences of being so designated by the Secretary of State made all members of that group ineligible for visas[103] and criminalized the donation of money or other resources to such a group.[104] Civil liberties groups objected to these designations because some groups so designated also conducted substantial humanitarian activities.[105] The primary objection to this clause did not revolve around the restrictions on donations (which can be justified in order to prevent resources from landing in the hands of terrorists) but the wide range of investigative powers granted to the FBI in the name of enforcing

92 *See id.* § 303.

93 *See* Internal Security (McCarran) Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950).

94 This provision was later dropped before the bill was made law. DEMPSEY & COLE, *supra* note 90, at 106, 196 n.2.

95 The law governs the use of military force in police functions. *See* 18 U.S.C. § 1385 (2002); Roger Blake Hohnsbeen, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404 (1986).

96 This provision was also later dropped. DEMPSEY & COLE, *supra* note 90, at 106, 196 n.2.

97 This provision was authorized in the Intelligence Authorization Act for fiscal year 1999. Pub. L. 105-272, 112 Stat. 2396, 2413 § 604 (amending 18 U.S.C. § 2518(11)(b)); *see* DEMPSEY & COLE, *supra* note 90, at 142–43.

98 *See* DEMPSEY & COLE, *supra* note 90, at 105–16.

99 *Id.* at 117–26.

100 *See* AEDPA § 302, 110 Stat. at 1248–50.

101 *Id.*

102 *Id.* § 302.

103 *Id.* § 411.

104 *See id.* § 303.

105 *See* DEMPSEY & COLE, *supra* note 90, at 121–22.

these measures.[106] Even more fervent objections arose to the renewed use of ideological exclusions in the immigration process.[107] Under this reborn policy, guilt by association with any group or advocacy of any idea deemed contrary to national security interests met the standard.[108] Previous law had forbidden only people who were reasonably believed to have engaged in terrorist or criminal activity.[109] Further provisions that drew objections included the alien removal procedures, which allowed for the use of secret evidence that did not have to be disclosed in a public court.[110] The AEDPA effectively lowered FISA's previous constitutional protections and was specifically tailored to create legislatively enacted standards of review in place of constitutional tests. This continued the switch from reliance on presidential authority to reliance on legislative mandates during times of crisis in civil liberties.

G. THE USA PATRIOT ACT

On September 11, 2001, terrorists hijacked American Airlines flights 11 and 77 and United Airlines flights 93 and 175 and, in a horrible act of terrorism, crashed them into the World Trade Center and the Pentagon and brought another plane down in Pennsylvania.[111] President George W. Bush and members of Congress quickly called for new legislation to ensure that such a disaster could never happen again, and law enforcement was given the tools necessary to combat terrorists.[112] The resulting legislation, the USA PATRIOT Act,[113] was intended to close the loopholes in American security that allowed the terrorists to remain undetected while conducting their operation.[114] The bill was passed on October 26, 2001, and signed into law by President Bush.[115]

II. CIVIL LIBERTY CONCERNS WITHIN THE USA PATRIOT ACT AS ENACTED

Within the USA PATRIOT Act, concerns over possible electronic civil rights intrusions can be classified into four basic categories: (1) intercepting Web activities, (2) expanding Internet Service Provider privileges, (3) using the Fourth Amendment's "sneak and peek" provisions in

106 *Id.*

107 *Id.* at 123–26.

108 *Id.*

109 Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

110 DEMPSEY & COLE, *supra* note 90, at 126. *See* AEDPA §§ 401–43.

111 *See* Jennifer C. Evans, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933, 934 (2002).

112 *See id.* at 934, 963–68.

113 USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

114 *See* EFF ANALYSIS, *supra* note 55, at II; Evans, *supra* note 111, at 967–70.

115 Evans, *supra* note 111, at 967.

new ways,[116] and (4) lowering wiretap standards. Recognizing the inherent danger of the USA PATRIOT Act, Congress placed limiting sunset provisions upon its most worrisome elements.[117] The USA PATRIOT Act, like the legislation previously discussed, jeopardizes personal rights by replacing constitutional tests with legislative directives. In the electronic arena, the four areas examined here provide the clearest example of this effect.

A. INTERCEPTING WEB ACTIVITY — PEN REGISTERS AND "TRAP AND TRACE"

Pen registers and "trap and trace" devices present a unique problem to civil liberties law. A pen register is defined by the USA PATRIOT Act as "a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted."[118] Originally, pen registry law was written only for telephones and governed the real-time interception of all numbers dialed from a particular telephone.[119] As such, the law then referred only to numbers dialed, telephone lines, and originating numbers. Before the USA PATRIOT Act, the use of a device to monitor the transmission of those phone numbers required a court order, but the court was granted no discretion because it was required to approve all applications for such an order that the government certified were likely to obtain information relevant to a current criminal investigation.[120]

A "trap and trace" device has been defined as "a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information relevant to identifying the source of a wire or electronic communication."[121] "Trap and trace" devices can be used to determine the number of origin for a telephone call.[122]

116 "Sneak and peeks" are searches conducted under a proper warrant but in which the usual notification of the owner of the property is delayed for a period of days. *See id.* at 973 & nn.262–68.

117 *See* 147 Cong. Rec. S10990, S10991 (daily ed. Oct 25, 2001) (statement of Sen. Leahy).

118 18 U.S.C. § 3127(3) (2001). *See also* ELECTRONIC PRIVACY INFORMATION CENTER, ANALYSIS OF PROVISIONS OF THE PROPOSED ANTI-TERRORISM ACT OF 2001, *at* www.epic.org/privacy/terrorism/ata_analysis.html (Sept. 24, 2001) [hereinafter EPIC ANALYSIS]. Electronic Privacy Information Center (EPIC) is a public-interest research center focusing on emerging civil liberty issues, the First Amendment, and privacy concerns. More information on EPIC is available at http://www.epic.org.

119 *See id.*

120 *See id.*

121 18 U.S.C. § 3127(4) (1994).

122 *Id.*

The effect of pen registers on personal rights is that pen registers can capture a great deal more information then merely a telephone number.[123] Not requiring probable cause for these devices rested on judicial reasoning that neither the "trap and trace" nor the pen register devices could, prior to the USA PATRIOT Act, capture the substantive material of the communication in question.[124] The USA PATRIOT Act's expansion of and consolidation of the definitions of pen registers and "trap and trace" devices endanger the original distinction upon which the lower level of scrutiny was justified. The expanded definition would now seem to cover Web surfing, e-mail messages, electronic fax distributions, and any other electronic form of communication.[125] The FBI justifies these definitional expansions by interpreting Web traffic as substantially similar to telephone conversations.[126] Despite the substantial differences, including the vast amount of information available from an e-mail routing protocol that cannot be gleaned from listening to a phone conversation, this issue has never been litigated and remains unresolved.

B. EXPANDED ISP PRIVILEGE GRANTING

The USA PATRIOT Act expands existing laws concerning Internet Service Providers in three key areas. First, the act allows ISPs to voluntarily surrender large amounts of non-content related data to the government without user permission.[127] Second, a simple subpoena is now all that is necessary to acquire IP addresses,[128] duration and session times, and payment sources.[129] Third, the USA PATRIOT Act authorizes the government to intercept any communication from a "computer trespasser" if the owner or operator of the protected computer in question authorizes it to do so.[130] The key definition at stake is what constitutes a protected computer, and it has been broadly defined in the bill to include one "which is used in interstate or foreign commerce or communication."[131]

In addition to allowing broad discretion and authorization for both the ISPs and computer owner and operators, the USA PATRIOT Act

123 *See* EPIC ANALYSIS, *supra* note 118.

124 *See* Smith v. Maryland, 442 U.S. 735, 741 (1979).

125 *See* EPIC ANALYSIS, *supra* note 118.

126 *See id.*

127 EFF ANALYSIS, *supra* note 55, at Executive Summary 1.c.

128 IP addresses are temporarily assigned addresses that identify the computer user. They are assigned by the ISP provider. Karl Maersch, *ICANN'T Use My Domain Name? The Real World Applications of ICANN's Uniform Domain-Name Dispute Resolution Policy*, 34 J. MARSHALL L. REV. 1027, 1031–34.

129 EFF ANALYSIS, *supra* note 55, at Executive Summary 1.c.

130 EPIC ANALYSIS, *supra* note 118.

131 18 U.S.C. § 1030(e)(2)(B) (2000).

removes most judicial oversight of this particular task.[132] In situations that do not result in prosecution, the computer users whose activities are targeted are likely never to discover the monitoring, and therefore they would be effectively unable to challenge the provision in court.[133] Furthermore, law enforcement could unduly pressure owners and operators of computers to obtain permission for the interception and to circumvent the safeguards built into the PATRIOT Act.[134]

C. SNEAK AND PEEK SEARCHES UNDER THE FOURTH AMENDMENT

The USA PATRIOT Act expands delayed notice of search and seizure by increasing the number of possible exceptions under which authorities may secretly search premises for physical evidence without notifying the owner.[135] Rule 41(d) of the Federal Rules of Criminal Procedure requires officers to leave a receipt for all items seized in a search.[136] However, the FISA and wiretap provisions under Title 18 both allow for delayed notice of intelligence operations and communication interception.[137] The Second Circuit in *U.S. v. Villegas* allowed covert searches in which no physical evidence was removed, but the court cautioned that certain procedural safeguards were needed in order to prevent the abuse of such powers.[138] The court suggested that one such safeguard could be a showing of reasonable necessity for the delayed notice.[139] Contrary to the Second Circuit, the Ninth Circuit held that a delayed notice could not extend beyond a seven-day period except upon a strong showing of necessity.[140] However, the court did allow for a good-faith exception.[141] The USA PATRIOT Act expands the use of these "sneak and peek" seizures.[142]

132 *See* EPIC ANALYSIS, *supra* note 118.

133 *See id.*

134 *See* Peter Murphy, *An Examination of the United States Department of Justice's Attempt to Conduct Warrantless Monitoring of Computer Networks Through the Consent Exception to the Wiretap Act*, 34 CONN. L. REV. 1317, 1321–30 (2002); Sharon H. Rackow, *How the USA PATRIOT Act Will Permit Governmental Infringement upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651, 1674–80 (2002).

135 *See* Marcia Coyle, *New Search Law Likely to Provoke Fourth Amendment Challenge*, SIERRA TIMES, Oct. 30, 2001 *at* http://www.sierratimes.com/archive/files/oct/30/armc103001.htm.

136 FED. R. CRIM. P. 41(d).

137 *See* Coyle, *supra* note 135.

138 United States v. Villegas, 899 F.2d 1324, 1336–37 (2d Cir. 1990).

139 *Id.*

140 United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986).

141 *Id.* at 1456–57.

142 18 U.S.C. § 3103(a) (2002).

D. LOWER WIRETAP STANDARDS

Wiretaps have traditionally been reserved for very specific crimes, and wiretap law has historically lagged behind the advent of new technological means of communication. More properly titled "law enforcement intercept orders,"[143] the USA PATRIOT Act adds terrorism and computer abuses as defined in the Computer Fraud and Abuse Act (CFAA)[144] to the list of acceptable intercepts.[145] While few would see a problem in adding terrorism to this list or in expanding intercepts to cover voice mail, the CFAA presents a more complicated danger in that the law may be broken by merely violating security classifications[146] or by violating the Atomic Energy Act of 1954.[147]

Traditionally, Title III of the Crime Control and Safe Streets Act of 1968[148] governs electronic surveillance in criminal investigations.[149] With the exception of minimal emergency situations, Title III imposes the normal probable cause requirement upon law enforcement, requires a warrant in most situations, and enforces the doctrine through judicial oversight and the inadmissibility of the evidence in court.[150] Under Title III, broad investigative power, including the use of roving wiretaps,[151] can be granted once the probable cause element is satisfied.[152] Furthermore, the standard for intercepting the numbers called from a particular phone is the substantially lesser standard of merely having the government certify that the information is "relevant to an ongoing investigation."[153]

Initially, the USA PATRIOT Act contained provisions that lowered wiretap standards even further. The Bush administration's proposal included an allowance for the use of wiretap information obtained by for-

143 This terminology is used because many intercepted communications no longer travel over wires. Changes in means of communication have created an overlap between the wiretap category and seizure of other means of communication. Cindy Cohn, *EFF Analysis of the Provisions of the USA PATRIOT Act — That Relate to Online Activities*, 701 PLI/PAT 1201 (2002).

144 USA PATRIOT Actn§ 1030.

145 *See* EFF ANALYSIS, *supra* note 55, at II.A.

146 USA PATRIOT Actn§ 1030(a)(1). This is one possible interpretation of the term "protected computer" and the author's evaluation of the statute. The concern is that someone who knowingly accesses a computer that she does not have a high enough security clearance for, even though she has a lower security clearance, could be liable under this statute.

147 Pub. L. No. 83-703, 60 Stat. 755 (1954). *See also* EFF ANALYSIS, *supra* note 55.

148 18 U.S.C. §§ 2510–22 (1994).

149 Herman, *supra* note 73; Rackow, *supra* note 134, at 1657–58.

150 Herman, *supra* note 73; *see* Rackow, *supra* note 134, at 1659.

151 Roving wiretaps have the constitutional problem of failing to satisfy the particularity requirement of the Fourth Amendment for the place to be searched. *See* Herman, *supra* note 73.

152 *Id.*

153 *Id.*

eign governments in a manner that would previously have been deemed illegal when used against U.S. citizens in trials inside the United States.[154] However, this proposal was later dropped at the insistence of members of Congress who were worried about the act's constitutionality.[155]

E. EFFECT OF SUNSET PROVISIONS — ARE THEY ADEQUATE SAFEGUARDS?

The USA PATRIOT Act provides a similar solution to many of the civil rights concerns that previous incursions into these rights had relied on. The act provides that a number of the more suspect or dangerous provisions will expire after a standard period of no less than four years.[156] Included in these provisions are the wiretap authorities,[157] pen registry interception,[158] foreign intelligence information,[159] and roving surveillance.[160] Most notably, not included in the act's sunset provisions are the immunity for compliance with FISA wiretap provisions,[161] the authorization to sneak and peek,[162] the overriding of certain privacy provisions in the Cable Act,[163] single jurisdiction search warrants in cases of terrorism,[164] and the expansion of the Electronic Communications Privacy Act[165] to include e-mail routing information.[166] None of the measures adopted requires a reporting requirement either to Congress or the courts, making congressional determinations of renewal problematic at best.[167]

Sunset provisions allow for the termination of suspect laws but do nothing to solve the violations that occur while those laws run their course. Should one of the provisions of the USA PATRIOT Act be interpreted in a manner that seriously violates personal privacy rights, a sunset provision would provide little comfort to those whom the provision

154 *See* 147 CONG. REC. S11,020 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold), *available at* www.senate.gov/~feingold/releases/01/10/102501at.html.

155 *Id.* at S11,021.

156 18 U.S.C. § 2510 (2002); EFF ANALYSIS, *supra* note 55, at IV.

157 18 U.S.C. § 2516 (West 2000 & Supp. 2002).

158 USA PATRIOT Actn§ 214, 50 U.S.C. § 1842 (West Supp. 2002).

159 *Id.* § 218, 50 U.S.C. § 1822 (West Supp. 2002).

160 USA PATRIOT Actn§ 206, 50 U.S.C. § 1805 (West 1991 & Supp. 2002).

161 *Id.* § 225.

162 USA PATRIOT Actn§ 213, 18 U.S.C. § 3103a (West 2000 & Supp. 2002).

163 USA PATRIOT Actn§ 211, 47 U.S.C. § 551 (West 2001 & Supp. 2002).

164 USA PATRIOT Actn§ 219, FED R. CRIM. P. 41(a) (West 1976 & Supp. 2002).

165 Pub. L. No. 99-508, 100 Stat. 1848 (1986); 18 U.S.C. § 5210 (West 2000 & Supp. 2002).

166 USA PATRIOT Actn§ 210, 18 U.S.C. § 2703 (West 2000 & Supp. 2002).

167 *See* Electronic Frontier Foundation, *USAPA Sunset Provisions Could Leave Congress in the Dark* (Dec. 17, 2001), *at* http://www.eff.org/sc/20011212_eff_usapa_analysis.html (last visited Oct. 16, 2002) [hereinafter EFF Sunset Provisions].

was used against. In order to safely use sunset provisions, the issue at hand must be significantly close to being constitutional that the amount of damage done to a person or group of people is minimal in comparison to the national security gained. This is not to say that a great deal of damage done to a small number of persons or groups would be acceptable if it served the greater societal good but, rather, that the damage to each individual would be of small enough magnitude that the intrusion into whichever right is in question would not result in significant harm.

III. THE FUTURE BALANCE OF CIVIL RIGHTS AND NATIONAL SECURITY IN A TECHNOLOGY ENVIRONMENT

A. WHY IS A NEW STANDARD NECESSARY?

A new constitutional test is necessary because previous tests and standards have failed to adequately protect individual rights during crises in national security, the USA PATRIOT Act and the electronic age present increased challenges and previously unseen circumstances, and existing constitutional tests cannot properly meet these new challenges and circumstances.

The historical examples provided in Section I are but a small sampling of the numerous and repeated infractions of civil rights in times of national security.[168] These examples reveal an ever-changing and inadequate standard that failed to stop some of the more shameful incidents in the history of the United States. Neither President Lincoln's balancing, McCarthyism, nor the Supreme Court's justification for the internment of Japanese-Americans effectively protected individual or even group liberties.

FISA and the anti-terrorism legislation of the 1990s reveal more recent attempts by Congress and various presidential administrations to curb not only the civil liberties of certain individuals and groups but also the ability of the courts to review and redress constitutional violations that might have already occurred. The obvious historical failure to protect individual rights, along with the dubious value to national security of some of these actions,[169] reveal a need for a new constitutional test that will better protect individual rights in times of crisis.

The USA PATRIOT Act — and the information age it was enacted in — present new challenges that courts, applying the current legal tests, are ill-prepared to handle. Our electronic age presents a dizzying array of new technology and new methods of carrying out surveillance, searches, and seizures, with little direction about how to constitutionally

168 For additional examples, see Kristensen, *supra* note 9, at 20–21.

169 *See supra* Part I.C.

evaluate these new methods.[170] FISA, the AEDPA, and the USA PATRIOT Act recognize this problem and attempt to use legislation to define constitutionality, including standards of scrutiny, without explicitly doing so.[171] While congressional mandate may seem the logical way to accomplish a task the courts seem unable to handle, this legislation hinders the basic watchdog function of the courts.[172] The judicial branch cannot abandon its oversight duties in the midst of ever-changing technology and threats to national security but must develop constitutional tests that can effectively balance the competing interests of national security and individual rights.

Such is the case because current legal regimes are not enough, by themselves, to effectively balance the interests in question. This country has a duty to protect its citizens from external threats and to protect individual liberties guaranteed in the Constitution and its Bill of Rights. In recognition of the fact that these duties have come into conflict repeatedly throughout the history of the United States, there are three options. One, the United States could abandon all constitutional guarantees during wartime and only follow the dictates of national security. Given the implausibility of this option, alternatively the United States could enforce all constitutional rights regardless of the peril to the country. This approach would allow for the continued application of all current constitutional tests and a relatively straightforward legal analysis. However, the historical situations previously mentioned show that there are at least some circumstances in which the interests of national security and the interest in protecting all individual liberties conflict.[173] Applying current constitutional tests, regardless of the peril to the country, would deny the government the tools necessary to defend the country in the moments of greatest need.[174] Given these conflicting interests, the best solution would be a new balancing test that could adequately protect individual rights while still allowing the government certain leeway in times of crisis.

170 *See, e.g.*, Jeffrey Yeates, *CALEA and RIPA: The U.S. and the U.K. Responses to Wiretapping in an Increasingly Wireless World*, 12 ALB. L.J. SCI. & TECH. 125, 126–27 (2001).

171 *See* discussion *supra* Parts I.D., I.F., I.G.

172 For example, FISA created a special court outside of the normal chain of review. While this may seem to be an attempt to preserve constitutional rights, the court has considerable power, little constitutional oversight, and an extremely low standard of review. *See supra* notes 54–77 and accompanying text.

173 *See* discussion *supra* Part I.A. There seems, for example, to be little dispute about the effectiveness of President Lincoln's actions in preserving the United States. *See* Kristensen, *supra* note 9, at 21.

174 *See* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (declaring that the Constitution is not a "suicide pact").

B. EFF'S AND EPIC'S PROPOSED NEW CONSTITUTIONAL STANDARDS

As Justice Burger once stated for the Court, "It is 'obvious and unarguable' that no government interest is more compelling than the security of the Nation."[175] Given that national security and civil rights will frequently be in conflict, the Electronic Freedom Foundation (EFF) and Electronic Privacy Information Center (EPIC) have developed criteria for evaluating national security legislation. While these criteria are not legal standards, they are useful in evaluating the effectiveness of the legal standards meant to protect individual rights.

EFF advocates consideration of six factors when evaluating the civil rights implications of electronic media security legislation.[176] Those elements are as follows: (1) carefully limiting all investigations into bona fide terrorist groups to means with appropriate oversight, (2) granting the courts the power to punish any abusers of these new laws, including governmental organizations, (3) enabling courts to exclude evidence obtained in contravention of the safeguards built into national security legislation, (4) defining vague terms in the legislation in favor of civil liberties, (5) requiring certification by the attorney general that a wiretap applies to ISPs and others served with roving wiretaps, and (6) creating congressional accountability for all organizations, so that the sunset provisions may be properly evaluated.[177] While not the entire EFF wish list for national security legislation, this list shows a clear attempt to recognize the USA PATRIOT Act (and future legislation of a similar nature) as temporary and required only so long as the problem exists.

EPIC takes a different approach to arrive at similar conclusions.[178] EPIC's five-point plan for the USA PATRIOT Act involves the following: (1) advocating that law enforcement already possesses broad authority under the AEDPA, (2) instituting a requirement of "clear and convincing need" for each provision, (3) narrowly tailoring national security statutes to avoid infringing upon the rights of millions of legal users of the Internet and other electronic media, (4) preserving to the greatest extent possible the distinction between domestic criminal surveillance and foreign intelligence gathering, and (5) limiting the expanded investigative powers to terrorist activities by not allowing those powers to be used in common criminal investigations or in cases where the nature of the activity is unknown.[179] EPIC's standards revolve around the conviction that the government should be required to show a clear need for any violations of civil rights and to ensure as little intru-

175 Haig v. Agee, 453 U.S. 280, 307 (1981).
176 *See* EFF ANALYSIS, *supra* note 55, at Executive Summary, Future Actions.
177 *See id.*
178 *See* EPIC ANALYSIS, *supra* note 118.
179 *See id.*

sion as necessary into the lives of U.S. citizens by separating the various apparati that conduct foreign and domestic surveillance work.[180] In requiring this separation, EPIC hopes that institutional specializations, mission orientations, and internal cultures will develop along different lines for the agencies tasked with surveillance.[181]

C. THE PROPOSED TEST — "ONE STEP LOWER"

In light of the factors proposed by EFF and EPIC and of the infringements in civil liberties noted above, the appropriate test to apply to future legislation during times of national security crisis is the "one step lower" test. The "one step lower" test consists of three parts. First, the court must apply an intermediate scrutiny-like analysis of the legislation in question. Then the court must determine the appropriate standard of review absent any crisis in national security. Finally, the court must apply the next lowest test, in order from most restrictive to least restrictive upon government action, than the test that would normally be applied absent a national security crisis. For example, if during a time of impending attack by another country, the United States passed a law that would normally be considered content-based, the courts would, after deeming national security an important governmental interest, apply the intermediate test articulated above. If the overall legislation passed that test, and the court determined that the legislation in question would under normal circumstances be reviewed using a strict scrutiny standard, the court would then apply the "one step lower" test and apply the next lower level of review, in this case, intermediate scrutiny.

In order to apply this test, the originating piece of legislation first must undergo analysis similar to the intermediate scrutiny articulated by the Supreme Court for First Amendment questions. If legislation were challenged, courts would have to decide whether to apply the "one step lower" test or the more traditional constitutional analysis. The most obvious identifying marker of proper evaluation would be whether the government raises national security as a justification for the constitutionality of the bill when it is challenged. Once the government raises national security as a justification, the law must undergo an intermediate analysis to determine whether the law in question is substantially related to an important government interest. As every court will no doubt recognize national security as an important governmental purpose, the court's evaluation will center on whether the specific action taken is substantially related to the government's interest in protecting the country. Additionally, the narrowly tailored requirements of intermediate scrutiny will en-

180 *See id.*
181 *See id.*

sure at least some procedural limitations on the scope of any national security legislation.

Once the decision to apply the "one step lower" test is made, the legislation would then be analyzed and classified under either the First Amendment or the Fourth Amendment. The primary concern of this Note, and arguably the USA PATRIOT Act as well, is with Fourth Amendment search and seizure principles. However, the "one step lower" test can be applied to either the First or Fourth Amendments. As such, an order of magnitude must be established for the different tests applied by the Supreme Court. Under First Amendment analysis, the order follows logical succession. A court that would normally apply strict scrutiny would now apply intermediate scrutiny. Likewise, if the court decided to use the "one step lower" test, a rational basis test would be used when normally intermediate scrutiny would apply. The Fourth Amendment presents more of a challenge in determining the order of the tests, but once an agreed-upon order is established, the tests would be easy to apply. Under the Fourth Amendment, the order of tests, ranging from most restrictive to least restrictive might be: warrant based on probable cause always required;[182] probable cause plus exigent circumstances without a warrant;[183] probable cause only, with no warrant necessary;[184] *Terry*-level stops for a limited duration with the corresponding reasonable suspicion standard;[185] and "special government need" searches along the lines of current "administrative-code inspections"[186] and border searches.[187] It is important to note that special government-need searches, with their limited standard of review, cannot be used then as a justification to apply the lowest possible standard and thus circumvent this test.

The rankings of the different tests are this author's own and are meant to illustrate how the proposed test could work. However, the "one

[182] *See* Katz v. United States, 389 U.S. 347, 354 (1967) (holding that a search that implicates a person's constitutionally protected reasonable expectation of privacy generally requires a warrant based upon probable cause).

[183] *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990) (holding that warrantless entry of a home, outside of hot pursuit of a fleeing suspect, is permissible if police have probable cause to believe evidence will be destroyed, the suspect will escape, or harm will come to police or other individuals).

[184] *See id.* at 100–01.

[185] *See* Terry v. Ohio, 392 U.S. 1, 20 (1968) (holding that a reasonable suspicion governed a short, minimal search on the street that lasted for only a few minutes and only briefly seized the suspects).

[186] *See* Camara v. Municipal Court, 387 U.S. 523, 538–39 (1967) (holding that in administrative searches, such as one conducted by a housing inspector, probable cause means "reasonable suspicion").

[187] *See* United States v. Ramsey, 431 U.S. 606, 619 (1977) (holding that a person may be stopped without any individualized suspicion and searched at an international border or an equivalent entry point to the United States).

step lower" test could apply the rankings of the test in any order that a later court would decide. The only element necessary is that a court, preferably the Supreme Court, would establish a ranking of the tests involved so as to simplify and standardize lower courts' application of them.

Any legislation that had the "one step lower" test applied to it would be required to have constitutional safeguards built in. This safeguard would be a sunset provision for all the measures to which the test would be applied. The sunset provision would provide that any measure controversial and constitutionally questionable enough to have to avail itself of the "one step lower" test would expire at the termination of hostilities or after a period of two years, whichever is lesser. This termination period is necessary due both to the indeterminate nature of modern warfare and the continual threat of terrorism. Sunset provisions ensure that measures that are constitutionally questionable but justified in the name of immediate necessity do not become permanent law and that they instead expire at the end of the crises to the security of the nation. Furthermore, the two-year standard requires that ongoing crises and terrorist threats cannot be used to grant a carte blanche for lowered standards of review for extended periods of time.

The proper remedial sanction for Fourth Amendment violations would follow the traditional exclusionary rule[188] and "fruit of the poisonous tree"[189] doctrines. Evidence obtained in violation of the standards of the "one step lower" test would be excluded from use in court, and any evidence derived from it would also be excluded. This would deter police from breaking the lowered standards of review in place during a national security crisis.

Additionally, a defendant would have available the affirmative defense that the evidence used against him was obtained by the use of a national security exception even though the defendant was not connected in any way to an organization or situation that would pose a danger to the country. The defendant would be required to prove by a "preponderance of the evidence" that the investigator was or should have been aware that the defendant was not involved in activities threatening national security. If the investigating officer should have been aware of the lack of national security implications, the normal higher standard of review would apply. This provision prevents the "one step lower" test from being used as a

188 *See* Mapp v. Ohio, 367 U.S. 643, 655–60 (1961) (holding that the exclusionary doctrine keeps evidence that was unconstitutionally obtained by police from being used at trial against a defendant).

189 *See* Nardone v. United States, 308 U.S. 338, 341 (1939) (holding that the "fruit of the poisonous tree" doctrine requires that any evidence obtained as a direct result of police violation of a defendant's constitutional rights must also be inadmissible).

tool during times of crisis in national security to investigate and prosecute non-terrorists. By placing the burden of proof on the defendant, the provision would give the government the benefit of the doubt in the application of these new laws, while still protecting against flagrant abuses of the expanded governmental powers granted under the "one step lower" test.

D. WHY THE "ONE STEP LOWER" TEST WOULD WORK

The "one step lower" test would work better than previous tests because it replaces an eclectic range of tests with one simple, relatively easy to apply test yet builds upon existing constitutional law standards, such as intermediate scrutiny and the various Fourth Amendment standards. Furthermore, the proposed test provides better protection for individual rights during times of crisis in national security.

Despite the relatively complicated constitutional area to which the "one step lower" test would be applied, the test remains relatively simple to apply. As such, it replaces the myriad case law, statutes, and executive standards that have been propagated in times of war with a single standard. It is a standard that can be applied regardless of the circumstances. Furthermore, the standard is broad enough to evolve with ever-changing technologies and threats. The "one step lower" test is designed to be both general enough and flexible enough to apply to the USA PATRIOT Act, other constitutional crises during times of national security threats, and further into the future, until such time as a better balancing of interests can be achieved.

Additionally, the "one step lower" test is easily adaptable because it is composed of existing tests. Parties will not need to litigate over the meaning of the new test. All that is necessary is for the court to apply the traditional intermediate scrutiny test to determine if the conduct in question meets the narrowly tailored prong and reasonably relates to a legitimate government interest. Then the court selects the next less restrictive test and applies that test, again with its historic development, to the incident in question. While the problem of analogizing to previous circumstances and events remains, the court is not required to create or define new legal standards. The proposed test would only require the application of already existing standards to new problems and would thus serve the interests of judicial economy.

Finally, and most importantly, the "one step lower" test best protects individual rights during times of crisis by ensuring that minimum standards are met even during the darkest of times. The "one step lower" test balances individual rights against the country's right to survival by acknowledging the national security interest and correspondingly applying a test that is lower than what would be applied in a normal situation.

However, the real strength of the proposed test is that it only allows for a reduction in constitutional protections by an order of one and prevents the government from using reasons of national security as a rug under which to sweep drastic changes. The protections built into the "one step lower" test ensure that the actions taken are necessary for the emergency in question, narrowly tailored to meet that objective, expire after an appropriate amount of time, and still afford at least a basic minimum of constitutional rights no matter how dire the situation. By doing so, the "one step lower" test most effectively preserves some core constitutional rights while allowing for latitude in governmental action during the crises that most require extreme defensive measures.

CONCLUSION

On September 20, 2001, President George W. Bush declared, "we're in a fight for our principles, and our first responsibility is to live by them."[190] History shows, however, that when we are fighting for our principles, we have frequently failed to live by them. Previous constitutional tests applied during times of crisis have resulted in large-scale constitutional infringements and deprivations. Moreover, the USA PATRIOT Act and terrorism in the electronic age provide ever developing challenges in a legal setting that has difficulty keeping up. This Note's proposed test would provide a clearer, more effective safeguard for those principles in this new and changing world and would provide the necessary balance between protecting individual rights and the society that shelters them.

190 President George W. Bush, *Presidential Response Concerning the Events of September 11, 2001*, 2001 U.S.C.C.A.N. D37, *cited in* Lori Sachs, *September 11, 2001: The Constitution During Crises: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1716 (2002).