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In post-Sept. 11 America, a new approach to the law

BY ADAM LIPTAK
The New York Times

WASHINGTON – There is a place for alarmism where threats to civil liberties are concerned. Too much worry about our freedoms is better than too little.

But there is also a place, a decade later, for sober reflection. By historic standards, the domestic legal response to 9/11 gave rise to civil-liberties tremors, not earthquakes.

John Ashcroft

Consider the USA Patriot Act, short for this Orwellian mouthful: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. The law sailed through Congress seven weeks after the attacks with scant dissent.

The Patriot Act expanded the government's surveillance powers and the scope of some criminal laws. But this was nothing compared with the responses of other developed democracies, where preventive detention and limits on subversive speech became commonplace.

John Yoo

"In comparative perspective, the Patriot Act appears mundane and mild," Kent Roach, a law professor at the University of Toronto, writes in a new book, "The 9/11 Effect: Comparative Counter-

The U.S. government held people without charge for almost a decade, engaged in torture as that term is understood in international law, and sent people abroad for questioning to countries known to engage in torture.

But criminal law itself changed surprisingly little. What changed was how law enforcement conceived its mission.

Almost immediately after the attacks, Attorney General John Ashcroft announced "a new paradigm." Preventing terrorist acts, he said, was more important than punishing crimes after the fact.

The new paradigm encouraged the arrests of people thought to be dangerous for, as Ashcroft put it, "spitting on the sidewalk," or for immigration offenses, or as material witnesses.

It increased surveillance of religious and dissident groups. It ramped up the use of a law barring even benign support for organizations said to engage in terrorism, putting pressure on activities long thought to be protected by the First Amendment. And it inserted informants into Muslim communities, giving rise to charges of entrapment.

The number of people directly affected by these changes was small. The indirect chilling effect on free speech, association rights and religious freedom was impossible to measure. But by the standards of the Alien and Sedition Acts of 1798, the Palmer raids of 1920, the internment of Japanese Americans during World War II and the McCarthy era, the contraction of domestic civil liberties in the past decade was minor.

As they generally have, the courts acquiesced in government efforts to combat terrorism, although the Supreme Court placed some limits on the executive branch's ability to hold prisoners at Guantánamo Bay.

The goal of stopping terrorism before it happens caused federal law-enforcement officials to make early arrests and then to rely on charges that required little proof of concrete conduct. Prosecutors often charged defendants accused of involvement in terrorism with conspiracy or "material support" of groups said to engage in terrorism.

Those laws were in place, said Robert Chesney, a law professor at the University of Texas. "The difference is they just weren't being used."

After the Sept. 11 attacks, things changed. In the first five years, prosecutors charged more than 100 people with providing material support to terrorist groups. That support often took tangible form, such as providing weapons. But some prosecutions were based on sending money to groups that engaged in both humanitarian work and violence.

Last year, in Holder v. Humanitarian Law Project, the Supreme Court ruled it could be a felony merely to urge terrorist groups to use peaceful means to resolve disputes.

Such speech, the court said, amounted to material support and could be made criminal notwithstanding the protections of the First Amendment.

The Humanitarian Law Project decision "is akin to the kind of criminalization in the McCarthy era of speech and guilt by association," said David Cole, a law professor at Georgetown University who represented the challengers in the Humanitarian Law Project case as a lawyer with the Center for Constitutional Rights.

Not all tactics in combating terrorism in the United States were based on existing laws.

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