

Terrorism and the American Constitutional Order

Copyright 2005 Richard Drew

Barry Cooper's *New Political Religions* is a searching analysis of the spiritual disfigurement that drives modern terrorism. It clarifies how vulnerable liberal democracies are against an enemy implacably hostile to anything approaching ordinary political life. But the severe pathology Cooper finds behind the new terrorism only sharpens an old question: how does a constitutional state combat such depravity without sacrificing the principles that make it worth defending?

America has a longer and more complicated history of grappling with this problem than we commonly recognize. Conventional accounts typically fold America's history with terrorism into a more general narrative of civil liberties during wartime that claims to find one relentlessly repeated pattern. First, fearful overreaction to a threat leads to gross and unnecessary violations of constitutional rights. Then, regret sets in as the perceived crisis passes, unconstitutional measures are abandoned, and new safeguards are sometimes erected. Yet the next emergency only starts the cycle again. The overall message is a scolding one: Americans have been so prone to panic in times of danger that they have sanctioned grave breaches of a constitutional framework which if left whole would have protected individual rights while giving ample scope to all truly necessary efforts to protect national security.¹ [1]

¹ [1] Two prominent examples within a large genre are Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (Norton, 2004) and Paul Murphy, *The Constitution in Crisis Times, 1918-1969* (Norton, 1972).

To call this entirely false would be wrong, but it is more false than true, particularly when applied to America's experience with terrorism, as opposed to war generally. Terrorism here has done more than provoke failures of nerve. It has repeatedly posed real and serious challenges to existing constitutional arrangements, forcing Americans to choose between constitutional norms they treasure and an effective response to the terrorist challenge. This paper analyzes how America dealt with two historical episodes of political terror: Southern violence during Reconstruction and anarchist bombings in the early twentieth century. It then concludes with a brief look at problems arising from the current confrontation with the violent Islamic groups whose psychology Cooper describes.

The record that emerges from past anti-terror efforts is, to say the least, uneven. Terror was ultimately victorious in the struggles over Reconstruction. Attachment to traditional constitutional norms helped erode support for protecting the new Southern state governments against white violence. The limited but important successes against the anarchists came with a high cost in the eventually over-broad and unreasonable use of deportation, provoking a reaction that nearly obliterated memory of the very real threat that had existed. The eventual working consensus that emerged on the government's power to act against foreign extremists was unloved and almost unacknowledged.

Integrating the evidence from these episodes with the post-9/11 debates produces several conclusions. Terrorism has the power to throw legal limits designed for ordinary political life into disarray, making them more shields for violence than restraints on arbitrary government power. In these circumstances, to demand unceasing adherence to these rules as the only bulwark against despotism will in fact allow terrorism by private actors to destroy the very ends for which

constitutions are established. However, responding to this dilemma with a doctrine of unlimited executive power becomes self-defeating over time. In a polity reared on constitutionalism and limited government, any claim of unchecked power over individuals will draw suspicion and eventually successful opposition. Instead of either a rigid adherence to old legal limits or a resort to unbounded power, successful sustained anti-terror efforts in a constitutional state are based on the creation of new rules adapted to the violent threat while still providing standards that structure and limit governmental power. Unfortunately, the relative eclipse of the contemporary Congress before the waxing strength of both the judiciary and the executive has made it harder for such new rules to be created in any coherent way.

Terror Triumphant: Southern Violence and the Constitutional

Politics of Reconstruction

If we define terrorism as violence against civilians for political ends, then by far the most extensive American experience of it came during the Reconstruction era following the Civil War. It posed the most agonizing conflict the nation has yet seen between attachment to received constitutional principles and an effective response to terror. In the end, Americans abandoned the South to violence, hamstrung by their initial unwillingness to make wider innovations in the federal system and then by their growing discomfort with the extralegal means needed to sustain the reforms they did make in favor of equal rights.

An earlier generation would have balked at any description of Reconstruction being somehow hindered by overnice constitutional scruples. For many years, Reconstruction was understood as a shameful abandonment of all constitutional principles, in which radical

Republicans used military despotism to dominate a prostrate South as a means of revenge and to further their own corrupt control of national politics.² [2] The last forty years have wrought a revolution in our historical understanding. We now have better knowledge of what radical Republicans actually wanted, and of how much they had to compromise with moderate Republicans who intended to preserve the antebellum constitutional order as much as possible. Ironically, it was the relative triumph of the moderate wing that produced the extensive military involvement once thought the hallmark of "radical" Reconstruction.

To understand the constitutional dilemma terrorism posed in this period, it is necessary to go into some detail about the overall Reconstruction debate. Following the death of Lincoln and the end of hostilities, two positions formed opposite poles in the debate on how the rebellious states should be reunited with the nation. Democrats and President Andrew Johnson thought the Southern states should be readmitted as quickly as possible. So long as they ratified the 13th amendment abolishing slavery, they would otherwise have all the rights of states under the Constitution before the war, with the rest of their domestic institutions in their control. Radical Republicans argued that readmission had to be delayed for a long period to ensure that the rights of the freed slaves would be respected and to protect the Union from being torn apart again by unrepentant Southerners. Led by Thaddeus Stevens, a number of them proposed instead to organize the Confederate states as territories awaiting final admission as states.³ [3]

² [2] A popular and influential explication of this interpretation was Claude Bowers *The Tragic Era: The Revolution After Lincoln* (Literary Guild, 1929). The taproot of the whole line of scholarship was William Dunning *Essays on the Civil War and Reconstruction* (Macmillan, 1904).

³ [3] The foregoing, and much of what follows, is based on Michael Les Benedict *The Fruits of Democracy: Alternatives in Restoring the Union 1865-1877* (University Press of America, 1987) It is the best short introduction available on Reconstruction, and the place to begin for any serious study.

Under territorialization, the former states would have elected legislatures, but their executive and judicial branches would be largely selected by the national government. If needed, Congress would be able to overturn laws passed by the territorial legislatures, and it would also have authority to set conditions for the overall operation of their governments, including voting rights for the freed slaves. By this arrangement, there would be a measure of local self-government, but the involvement and supervision of the national government would insure it developed peacefully, with the nation protected from renewed treason and the freedmen from violent lawlessness. After time, when the former Confederate states were firmly reattached to the Union in sentiment and truly reconciled to respecting the former slaves as fellow citizens, they could be readmitted as states, with the same rights of local self-government and national representation as all the others.

This was the best developed radical plan, but it had little chance of passage. The postbellum center of political gravity was occupied by moderate Republicans who considered the lengthy territorialization of the rebellious states far too great a departure from the original constitutional framework. The former Confederacy would have to be readmitted as states and readmitted soon. But they could not acquiesce in Johnson's moves to readmit them with only the abolition of slavery as a condition. The results from the exclusively white Southern state governments Johnson had organized were too troubling. Their laws had denied basic legal rights to the freedmen, and they had been exceptionally lax in protecting former slaves from violent attack. In response, moderates framed the 14th amendment, which secured basic legal rights and equal protection before the law to the freed slaves. Over

fierce radical objections, they then made the Southern states' ratification of it the sole practical condition of readmission.⁴ [4]

The moderates were confident this would solve the question of Reconstruction, allowing the states to rejoin while also providing some protection for the freedmen. They were thus shocked when all the Confederate states except Tennessee overwhelmingly refused to ratify the amendment. Stung by this intransigence, the moderate Republicans cooperated with the radicals for a more thorough Reconstruction program. But they still clung to the goal of preserving the original constitutional structure as far as possible, drawing back from anything resembling a long term territorialization of the South. They got around the need for such intensive national intervention by falling back on the once radical position of voting rights for the freed slaves. By statute, they required universal manhood suffrage elections for new constitutional conventions in the former Confederate states, thus allowing the freedmen to vote for the first time. The idea was that these conventions would establish constitutions entrenching equal voting rights, which would give the former slaves the means to defend themselves through politics. Once this process was finished, and the 14th amendment ratified, the states could be readmitted.⁵ [5] .

Radicals were happy to see voting rights extended, but horrified at the plan for quick readmission afterwards. The fundamental logic of their territorialization proposal was that the white populations of the Southern states would need intensive national supervision before they would accept equal rights for the former slaves. To offer equal rights without the supervision seemed exceptionally dangerous. Nevertheless, the moderate Republicans had their way after an

4 [4] Ibid, 20ff.

5 [5] Ibid, 30ff. See also Michael Les Benedict *A Compromise of Principle: Congressional Republicans and Reconstruction* (Norton, 1974).

intense parliamentary struggle, and their plan went into motion. Obviously the whites only governments elected under Johnson's orders could not be trusted to oversee the constitutional process that would overthrow them, so the moderates' Reconstruction statute, passed over Johnson's veto, relied on the military to fill the gap before the new multiracial governments were in operation. The South was divided into a number of military districts and their commanders were charged with managing the necessary elections, allowed to displace any member of the old elected governments that interfered, and authorized to set up a system of military tribunals to try law breakers where the state judicial systems proved inadequate.

To install a system of military government and military justice where there were functioning civil governments, even if unrecognized, troubled many observers who pointed to the deep suspicion of military dictatorship in Anglo-American constitutionalism. Radical Republicans could in fact argue that their territorialization proposal would have been less objectionable on this score, since it would have led to a formal subordination to the national civil government, instead of a sort of ad hoc military control. Supporters of the plan responded that states with unrecognized governments were still in the "grasp of war"; they remained theatres of military operations in which military control was entirely legitimate.⁶ [6] Moreover, the entire point of the moderate program was that military government would serve as a transitory stop-gap, not a permanent template. It was the quickest means for readmitting the states to their full rights while also ensuring they were loyal to the Union and just to the former slaves.

The moderates' confidence in their plan's acceptability was shaken by Supreme Court decisions that seemed to attack martial law as unconstitutional outside narrow bounds. In *Ex*

⁶ [6] Benedict, *Fruits of Victory*, 102.

Parte Milligan,⁷ [7] the Court in 1866 unanimously overturned the conviction of a man tried in Indiana before a military tribunal for aiding the enemy during the Civil War, holding that citizens could not be brought before military courts outside the theater of warfare in areas where the civil courts were still functioning. A majority of the Court further held that not only the President but Congress as well had no power to authorize military justice when civil courts were available. This caused consternation among congressmen then occupied with framing Reconstruction policy, but they held back from any action against the Court, reasoning that the former rebellious states had to be considered within the military's area of operations, unlike Northern states such as Indiana.⁸ [8] They thus pushed forward with a system of military justice as an indispensable foundation for providing justice and order while replacing the white Southern governments with multiracial ones. Therefore, when the Court in early 1868 agreed to hear a habeas corpus petition from a man convicted by a military tribunal for inciting violence against Reconstruction efforts in Mississippi,⁹ [9] Congress now reacted swiftly with a bill stripping the Court of appellate jurisdiction under the statute authorizing the petition.¹⁰ [10] In *Ex Parte McCordle*¹¹ [11] the following year the Court upheld this limit on their power.

Once again Congress was charged with grave constitutional violations, not only establishing military justice but sustaining it by gutting the Supreme Court's authority to protect individual rights. Again, Republicans in Congress could defend themselves by stressing by the

7 [7] 71 U.S. 2 (1866).

8 [8] Stanley Kutler *Judicial Power and Reconstruction Politics* (University of Chicago Press, 1968), 69.

9 [9] *Ex Parte McCordle* [first]73 U.S 318 (1868).

10 [10] Kutler, *Judicial Power*, 78ff.

11 [11] 74 U.S. 506

temporary nature of the expedient. Indeed, only a few months after *McCardle* the Supreme Court sharply limited its reach and reasserted a power to hear habeas corpus appeals in a case arising from a military tribunal conviction.¹² [12] Congress did not react.¹³ [13] By then, military reconstruction was winding down. Almost all the Southern states had crafted new constitutions with equal voting rights, elected new governments under them and ratified the 14th amendment. They were already being readmitted as full fledged states in the Union . The Republicans' 1868 campaign electing U.S. Grant president had had as its motto "let us have peace." After the 15th amendment barring racial discrimination in voting nationwide and the readmission of the last few Southern states in early 1870, they considered Reconstruction accomplished and closed as a national issue.¹⁴ [14] Terrorism would soon overturn these complacent hopes.

There had been serious ongoing violence against the former slaves since emancipation. It was one of the main factors that led moderate Republicans to spurn Johnson's plan for Reconstruction. However, in the early stages it was more sporadic and spontaneous than an organized campaign. This changed in 1868 as the plan for establishing multiracial governments went forward. White Southerners began to band together in groups sworn to violently oppose the formation of these governments. Failing that, they aimed to stifle their operation, demonstrate their powerlessness and finally overturn them. The most famous of these groups was of course the Ku Klux Klan, but there were numerous others throughout the South.¹⁵ [15] In organization

12 [12] *Ex Parte Yerger* 74 U.S. 85.

13 [13] Kutler, *Judicial Power*, 86.

14 [14] Benedict, *Fruits of Victory*, 36-37.

15 [15] Stephen Hahn *A Nation Under Our Feet: Black Political Struggles From Slavery to the Great Migration*(Harvard University Press, 2003), 267. .

the early Klan was less hierarchical than the version that reemerged in the twentieth century. It was instead a set of local groups that drew inspiration from each other and sometimes cooperated, akin to the "network" structure Cooper finds characteristic of modern terrorism.

However, across different groups and states there was a common repertoire of terror. Most commonly, black men active in political mobilization were whipped and humiliated in ways resembling slave punishments. This was also sometimes visited upon whites involved in Republican politics. Dozens of black churches and schools were burned as important meeting political meeting places. From there, groups often advanced to targeted assassinations and lynchings of Republican leaders and party workers. There were hundreds of these killings across the South.¹⁶ [16]

Finally, in almost every Southern state the white terror between 1868 and 1871 culminated in mass atrocities. Thirty black citizens, including most of the political leadership, were murdered in a day of mob action in Meridian, Mississippi. A Republican political meeting in Eutaw, Alabama was attacked, with five killed and fifty-four wounded.¹⁷ [17] An attack on a political procession in Camilla, Georgia left nine dead.¹⁸ [18] In Laurens County, South Carolina a racial altercation between two individuals was the starting signal for a rampage that left thirteen black men dead.¹⁹ [19] In Louisiana, which was by far the most violent state during

¹⁶ [16] Eric Foner *Reconstruction: America's Unfinished Revolution* (Harper & Row, 1988) 425-426.

¹⁷ [17] *Ibid* 427-428.

¹⁸ [18] Hahn, *Nation Under Our Feet*, 289-292.

¹⁹ [19] Foner, *Reconstruction*, 428.

Reconstruction, a riot in Opelousas resulted in over a hundred black deaths, including most of the local black officials.²⁰ [20]

The effects of this terror campaign put the newly elected state governments under intolerable strain. The logic behind the moderate Republican plan was that voting rights would give the freedmen all necessary means of defense and allow local autonomy to resume on a just basis. But white terrorism sliced through this logic by simply refusing to accept the results of elections, something moderate Republicans schooled in the norms of popular self-government had seemed unable to anticipate or even imagine. Except in the important cities where small numbers of national soldiers remained, violent groups systematically set about killing, intimidating and driving away local officials and prominent supporters of the new governments, rendering their authority an empty shell across much of their territory and making a free vote in future elections almost impossible.²¹ [21]

Arkansas , North Carolina , Tennessee and Texas , states that had substantial loyal white populations, were able to organize multiracial militias and mount for a time an effective response, arresting hundreds and trying them before state military tribunals for fear local courts and juries were corrupted by Klan influence and intimidation. However, the North Carolina and Tennessee governors quickly drew back from these efforts, retreating before charges of military

²⁰ [20] Gilles Vandal *Rethinking Southern Violence: Homicides in Post-Civil War Louisiana* . (Ohio State University Press, 2000), 69. Vandal speculates that Louisiana 's exceptionally high level of Reconstruction violence resulted first from the substantial black majority in population, which meant that whites could never hope to regain control through a straight vote. Also, much of Louisiana was never occupied by federal troops until after the war ended, which meant much of the populace felt undefeated and little disposed to accept imposed change.

²¹ [21] Benedict, *Fruits of Victory*, 47-48.

despotism and even habeas corpus petitions in federal courts. In short order, both state governments fell under partial control of white supremacist Conservative parties, the result in North Carolina largely determined by falling black voter turnout in areas that had seen intense Klan terrorism.²² [22] Even before this point, the assassination of Republican leaders had helped push Georgia over the edge into exclusive white control.

In the deep South, where white Republicans were rare outside the high leadership, officials drew back from even attempting such a response. With reason, they feared sending an overwhelmingly black militia into action would polarize society into outright civil war. They also had solid ground to worry that the poorly armed ex-slaves might have a hard time contending with well-equipped bands of hardened Confederate veterans. Therefore, as terrorism gathered pace in these states, the cry went up for national protection. President Grant finally moved in 1871, calling a special session of Congress to address the problem.²³ [23]

This put the moderate Republicans in Congress in an exceptionally awkward position. The whole justification and aim of their Reconstruction plan was that it protected the freedmen but allowed the states quick readmission and eliminated the need for sustained national power over them. Nevertheless, after much initial reluctance they responded. They passed the so called "Ku Klux Klan Act" making federal crimes of conspiracies and violent acts aimed at suppressing the right to vote. Even more important, as an aid to enforcing this law they authorized the President to use military force and to suspend the writ of habeas corpus in areas where he judged violence had made normal civil government impossible. Individuals could be detained at length

²² [22] Foner, *Reconstruction*, 439-440.

²³ [23] *Ibid*, 454-455.

without their having recourse to the normal legal process for challenging the grounds of their arrest.²⁴ [24]

Criticism of this law was immediate and furious. Democrats charged it created a "Kaiser Ulysses" with arbitrary authority to suspend constitutional limits and centralize all power.²⁵ [25] Many moderate and conservative Republicans were uncomfortable themselves and abstained from voting on final passage of the bill. Even the proponents of the law bowed to these concerns. In his speech introducing the act to the Senate, James Garfield admitted that "crippling the principle of local government would be as fatal to liberty as secession would have been fatal to the Union."²⁶ [26] The law was justified as being narrowly drawn to only those cases where states themselves were incapable of enforcing the law, and the provisions authorizing military force and habeas corpus suspension were given a time limit that expired at the end of the next session of Congress. Once again, military intervention was painted as only a temporary stop-gap that would soon be unneeded.

At first, it seemed like this might be true. Grant quickly acted by suspending habeas corpus in nine South Carolina counties where the Klan had been rampant. A military unit arrested hundreds of suspects and began assembling evidence for their trials. These would be before the federal courts, not military tribunals, avoiding the legal and political challenges they might have sparked. The first few trials resulted in convictions, and the Klan meanwhile ceased

²⁴ [24] Benedict, *Fruits of Victory*, 57-58.

²⁵ [25] Brooks Simpson, *Reconstruction Presidents* (University of Kansas Press, 1998), 154-155.

²⁶ [26] Benedict, *Fruits of Victory*, 58

to operate in the area.²⁷ [27] Moreover, across the South local officials took heart and began to act against terrorist groups. In reaction to this, and to the threat of further federal intervention, organized terrorism receded during 1871 and 1872.²⁸ [28] The presidential elections of the latter year passed with a relatively free and fair vote in most Southern states.

Yet many on the ground warned this was a false dawn. The fundamental refusal to accept the new Southern state governments remained, and when the Grant administration began dismissing many of the Klan prosecutions that were clogging the federal courts, the local military commander in South Carolina proclaimed that "clemency was being taken for cowardice."²⁹ [29] And indeed, organized terrorism returned in 1873 and 1874. Instead of the constant violent attacks of the Klan, it took the form now of massive violence and intimidation centered around election days, often going by the name of "White Leagues," which functioned as something like open paramilitary wings of the resurgent Conservative/Democratic party.³⁰ [30] In the most severe incident, almost two hundred black citizens were massacred in Colfax , Louisiana , after what had been practically a full scale military engagement over disputed control of the parish government.³¹ [31]

Vulnerable Republican regimes began to teeter. As a result of voter intimidation, and some compensatory fraud by the Republican themselves, there were disputed elections in

27 [27] Lou Falkner Williams *The Great South Carolina Ku Klux Klan Trials* (University of Georgia Press, 1996), 46-47.

28 [28] Foner, *Reconstruction*, 457-459.

29 [29] Williams, *Ku Klux Klan Trials*, 123.

30 [30] Hahn, *Nation Under Our Feet*, 295ff

31 [31] *Ibid*, 292-294.

Alabama , Arkansas and Louisiana . In each case armed forces of each side began to gather in the state capitals, and President Grant was called upon to impose a solution using the small contingents of federal troops still in the cities. He had already been led by violence in these states and a number of others to issue proclamations threatening military intervention if public order was not restored. Now, one after the other, emergencies seemed to demand intervention itself. He was exceptionally reluctant to do so, and pursued a somewhat wavering course when he did: brokering a compromise in Alabama , abandoning the Republican candidate in Arkansas , and ordering straightforward military action only in Louisiana to overturn a violent Democratic takeover of the capital, though this was the first of what would be several interventions there.³² [32]

Grant had tried to pursue the most restrained course possible, directly using military force only in the face of violent revolution in Louisiana . Yet he faced a firestorm of criticism, some of it from within his own party. The federal military interventions in Southern state politics seemed set to continue indefinitely, and they were bound only by the President's own discretion. What was this except arbitrary centralized power and a corrupt mechanism for extending Republican control regardless of election results? Dissatisfaction with Grant's policy was a large factor in the Democrats winning control of the House in 1874 midterm elections.³³ [33] Afterwards, Grant tried to defend himself in his Annual Message of December, 1874. He acknowledged that "executive interference with the affairs of a state is repugnant to public opinion." Yet what

32 [32] Simpson, *Reconstruction Presidents*, 171ff.

33 [33] *Ibid*, 174.

choice did he have in the face of men willing to commit mass murder in order to "spread terror among those whose political action was to be suppressed"?³⁴ [34]

However, the anti-terror imperative was wearing thin among Northern voters. The means used to fight it were coming to seem just as harmful to constitutional government as the violence itself. To be sure, there were a number of reasons for the North's waning support for Reconstruction. The endurance of racist beliefs, disgust with the supposed corruption of several Southern governments, and deteriorating economic conditions that undermined the national government's popularity all played a role.³⁵ [35] But with all that, it is beyond doubt that the perceived constitutional irregularity of continual and discretionary military intervention in states supposedly restored to civil control played an essential part in eroding the will to continue the effort. This finally began to determine national policy. In 1875, despite a series of attacks that had killed dozens and driven many black local officials into hiding, Grant refused the request of Mississippi Governor Adelbert Ames to send federal troops and restore order before the state's elections.³⁶ [36] The Republican majority in the state duly evaporated, and white supremacists "redeemed" the state.

There remained only the coup de grace. In 1876, South Carolina and Louisiana , states with sizable African-American majorities, saw successful White League campaigns to stifle the black vote and finally overthrow their Republican governments.³⁷ [37] The story of the fallout

34 [34] Ulysses S. Grant, *Sixth Annual Message*, December 7, 1874
<http://www.theamericanpresidency.us/1874.htm>

35 [35] Foner, *Reconstruction*, 512ff.

36 [36] Simpson, *Reconstruction Presidents*, 185-186.

37 [37] Hahn, *Nation Under Our Feet*, 306ff.

from the 1876 election is well known. In return for Democrats agreeing to allow the disputed electoral votes from these states and Florida to be counted in Rutherford Hayes favor, Republicans made an informal but binding commitment to withdraw all federal troops from the South. Although this was not entirely clear at the time, effective national efforts to secure civil rights for African-Americans in the South would not resume for almost a century.

What explains the terrorist victory? The moderate Republican program of protecting the former slaves through equal suffrage as a way of returning quickly to the old federalism was upended by the power of terrorism to make these two goals incompatible. Consequently, the national Republicans had to fall back on military intervention to cope with terrorism's effects in the newly restored states. They had earlier promised this was only a transitory mechanism that would be dispensed with as soon as the multiracial state governments were in operation. Instead, they had to resort first to authorizing habeas corpus suspension and then, as terror revived, to constant presidential threats of military deployment and occasionally the actual use of it. As a result, even among those disgusted by Southern violence, there was a rising chorus of uneasiness with Reconstruction policy. The use of military power in the restored states seemed effectively bound by no law. It was a potential tool for partisan manipulation, even creeping despotism. Military intervention had been acceptable as a passing means to restore just and loyal governments, and even as a temporary force to put down insurrection in South Carolina . But it became intolerable when it seemed poised to be a continuous feature of American politics.

Given the extremely limited use to which military force was actually put in the South, and the great evils it was directed against, these concerns can seem now almost frivolous, or even a cover for a lack of real desire to secure equal rights for the former slaves. But they were in fact

entirely consistent with an Anglo-American constitutional tradition disposed to "augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze." 38 [38] However just its aims, over time any unchecked power will draw intense suspicion in such a polity. Thus, the 1878 Posse Comitatus Act, which in reaction to Reconstruction banned the use of the U.S. army in law enforcement, was at the same time a landmark in American civil liberties and the tombstone of American civil rights for generations.³⁹ [39]

In retrospect, the radical Republicans' territorialization plan had a better chance of avoiding this brutal conflict between the forms of constitutional government and its ends. They had had no illusions that simply extending voting rights would give the freedmen all necessary protection against violence and intimidation. But neither did they want to rely simply on untrammelled military power to accomplish their objectives. Taking its legal justification from the constitutional clause guaranteeing a republican form of government, territorialization would have involved the national government in the everyday operations of Southern local government, but in the form of appointed civil officers exercising executive and judicial functions, not ad hoc military interventions. Congress would have had to provide rules for their conduct and fulfill its oversight responsibilities. Local governments backed by such intensive national involvement would have been better able to withstand terrorism, while less liable to charges of governing through arbitrary armed power.

38 [38] Edmund Burke, Speech on Conciliation with America .

39 [39] Compare the different treatments of the act's background in Matthew Hammond "Posse Comitatus Act: A Principle in Need of Renewal" 75 *Washington University Law Quarterly* 953 (1997) and Gary Felecetti and John Luce "Posse Comitatus Act: Setting the Record Straight" 175 *Military Law Review* 86 (2003).

Moreover, even though such a system would have been a large constitutional innovation applied to former states, territorialization might actually have made it possible to preserve something more of traditional federalism than we have today. After all, the radicals' expectation was that the former Confederate states would one day return to their full rights in the Union, even if this would have taken much longer than moderate Republicans were willing to wait. Considering how many expansions of federal control the dismantling of Southern racial oppression finally required, the path marked out by Thaddeus Stevens was, when considered over the long arc of time, a fateful lost chance for both successful Reconstruction and states' rights.

Immigration and the Constitution: The Response to Anarchist Terrorism

The next serious episode of terrorism in America was a series of anarchist attacks in the early decades of the twentieth centuries. Anarchist violence was the first real instance of international terrorism, sweeping through Europe beginning in the late nineteenth century. In outlook, the anarchists were closer to the modern Islamist groups Cooper analyzes than they were to the Klan, even though nearer to the latter in time. The Klan combined utter ruthlessness with a limited, achievable goal: white dominance in a post-slavery South reunified with the North, basically the status quo they had already experienced under the state governments set up by Andrew Johnson.⁴⁰ [40] By contrast the pseudo-religious anarchists shared with today's Islamists a yearning for apocalypse. The actual world was degraded and fallen. Everywhere the

⁴⁰ [40] However the increasingly grotesque and ritualized nature of lynchings in the post-Reconstruction South shows how unlimited violence even in service of a limited goal can become an end in itself, almost a way of life. See Orlando Patterson *Rituals of Blood: Consequences of Slavery* (Basic Books, 1998).

coercive power of government stifled and corrupted man's true cooperative character. Only the state's complete overthrow would allow any real achievement of social justice.⁴¹ [41]

To further this end, many anarchists began to advocate the "insurrectionary deed": acts of violence against figures of authority to destabilize state power. Between 1880 and 1900, anarchist assassins murdered prominent representatives from virtually every form of government: Russian Czar Alexander II (1881), French President Sadi Carnot(1894), Spanish Prime Minister Antonio Cánovas del Castillo(1897), Empress Elizabeth of Austria (1898), King Umberto of Italy (1900). These were only the successes; there were over a score of failed attempts on high state officials, a number of which killed bystanders. Some anarchists also began the random murder of civilians to emphasize the complicity of all in government's evil.⁴² [42]

The early American role in all of this was that of a safe haven for anarchists. Americans had long been proud to offer their nation as a refuge for those fleeing political persecution. In the first series of statutes putting some limited restrictions on immigration, the "moral turpitude" provisions excluding individuals with criminal convictions made explicit exceptions for political crimes.⁴³ [43] Moreover, there had been early and distinguished arguments that Congress' power over immigration was limited and that those admitted had strong constitutional protections against deportation. We tend to think of the 1798-1800 controversy over the Alien and Sedition Acts as being mainly about the free speech issues surrounding the criminalization of "seditious libel." But in their attacks on the laws, Thomas Jefferson and James Madison devoted at least as

41 [41] See George Woodcock *Anarchism* (Pelican books, 1962).

42 [42] For a brief recent overview, see "For Jihadist, Read Anarchist" *The Economist* August 18th 2005.

43 [43] Roger Daniels *Guarding the Golden Door* (Hill and Wang, 2004), 17.

much attention to the Alien Acts, which gave the President authority to deport resident aliens he judged dangerous to public order.⁴⁴ [44] In part, they argued such power over immigration was not one of Congress' enumerated powers. At even greater length they insisted that summary deportation violated core constitutional rights that protected both citizens and aliens alike. Madison argued that a lawfully admitted alien's residence here was akin to a property right. If it could be taken away at all, it could only be as punishment for a criminal act, not a mere potential for harm, and only after full judicial process.⁴⁵ [45]

This libertarian perspective dominated American immigration law during the nineteenth century, though it received a major alteration in series of statutes passed between 1882 and 1891, which first excluded Chinese immigrants and then mandated the deportation of resident alien Chinese. Driven by a mixture of economic and racial fears, the acts also authorized deportation hearings entirely within the executive branch, with almost no opportunity for judicial review.⁴⁶ [46] Nevertheless, although full of implications for the future, these laws were the exception not the rule as the nineteenth century ended. Aside from a few restrictions, immigration was entirely open, and deportation was almost unheard of for lawfully admitted aliens. Therefore, anarchists fleeing increasingly vigilant governments in Europe began filtering in to America .

44 [44] See Thomas Jefferson "Draft of the Kentucky Resolutions" in *Writings*, Merrill Peterson ed. (Library of America, 1984), 449-456 and James Madison, "Report on the Alien and Sedition Acts" in *Writings*, Jack Rakove ed. (Library of America, 1999), 608-663.

45 [45] Madison , "Report on the Alien and Sedition Acts" 623-624.

46 [46] See Lucy Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (University of North Carolina Press, 1995).

The most important was Johann Most, a German-born orator and newspaper editor who had finally run afoul of even the tolerant English state with a newspaper editorial praising Alexander II's assassins. After serving a jail sentence, he decamped to America and immediately began proselytizing for violent anarchism. Aside from his newspaper, he felt free enough to openly publish a pamphlet entitled "Revolutionary War Science: A Little Handbook of Instruction in the Use and Preparation of Nitroglycerine, Dynamite, Gun-Cotton, Fulminating Mercury, Bomb, Fuses, Poison, Etc."⁴⁷ [47] Besides various bomb-making techniques, "Revolutionary War Science" included a full-blown terrorism instruction manual with advice about organization (decentralized and based on small groups) and tactics (careful bomb placement was the key to maximizing casualties.). From his New York base, Most traveled and spoke widely, hawking his pamphlet at ten cents a copy. He sparked what the leading scholar on American anarchism calls a "cult of dynamite,"⁴⁸ [48] firing radicals to begin routinely arming themselves with explosives in preparation for the cataclysm to come.

The consequences soon came into public view with the 1886 Haymarket attack, in which a bomb was thrown at police moving in to disperse a Chicago labor rally where anarchist leaders had been speaking. Seven policemen died from the bomb and confused shooting from their fellow officers in its aftermath. Public shock was immense and only grew as details emerged about the heretofore little noticed anarchist movement in America . Eight local anarchist leaders and workers were put on trial for the murders. All were convicted, and four soon executed. However, although a number of the men had made appeals to violence generally, there was little

⁴⁷ [47] Paul Avrich *The Haymarket Tragedy* (Princeton University Press, 1986), 163ff.

⁴⁸ [48] *Ibid*, 160.

evidence that connected them to the specific bombing for which they were convicted. Regret began to set in, and the men still in prison eventually won gubernatorial pardons on the grounds of a flawed and biased trial.⁴⁹ [49] Some of the impetus went out of the official effort to drive out anarchism. State government prosecutions for incitement became more common. (Indeed Johann Most had finally been arrested in New York before the Haymarket bombing even occurred.) But efforts to get Congress to act against anarchists either domestically or in immigration policy were turned back.

This changed after William McKinley was assassinated. The son of Polish immigrants, Leon Czolgosz first became influenced by anarchist ideas while working in a Cleveland factory. He was particularly taken with a fiery speech given by the Russia-born Emma Goldman. Out of work and at loose ends in 1901, he decided on an "insurrectionary deed," traveled to Buffalo and shot the President, who was visiting an exhibition there.⁵⁰ [50] In the ensuing outcry, Congress revived and eventually passed some Haymarket-era proposals to exclude anarchists from immigration. The 1903 statute barred "anarchists, or individuals who believe in or advocate the overthrow by force or violence of the Government of the United States, or all government or of all forms of law."⁵¹ [51] It also made alien anarchists deportable, though only during the three years immediately following their arrival.

⁴⁹ [49] Ibid, 415ff. One of the leaders in the movement to win a pardon for the imprisoned anarchists was Lyman Trumbull, former senator from Illinois, who had been a leader among moderate Republicans in crafting their Reconstruction plan.

⁵⁰ [50] For a recent account of Czolgosz's background and the assassination, see Eric Rauchway *Murdering McKinley* (Hill and Wang, 2003)

⁵¹ [51] David Cole *Enemy Aliens* (New Press, 2003), 107.

By banning adherents of a particular set of ideas Congress made a large departure from traditional American immigration law, which had heretofore given unconditional refuge for all varieties of political dissidents. By extending the reach of deportation, which until then had only been extensively applied against the Chinese, Congress emphasized the disparity between rights of citizens and rights of aliens, while an earlier generation led by Madison had argued this was constitutionally impermissible. It was long fashionable in conventional accounts of American civil liberties to write this change off as one more example of irresponsible panic in times of crisis. But current events can cast history in a new light, and the fact that America is now using precisely the same powers first claimed in 1903 to exclude and deport radical Islamists and other supporters of terrorism⁵² [52] should force, one would hope, at least a new look at the original innovation. Might it be that some ideologies are so heinous and violent that even an open society will find it reasonable to deny them entrance, or permanent residence if their adherents do manage to gain admission? Even given the potential for abuse, is it not possible that action at the borders against such sects will make it less likely that harsh anti-terror measures will have to be used across the entire domestic sphere? However painful the alteration of old constitutional norms and ideals must have been, Congress' action in 1903 looks like a responsible creation of new rules to deal with a new situation: the growth of pathological modern ideologies.

However, for the first fourteen years in its operation, the new policy had a limited impact. The disinclination of immigrating anarchists to proclaim their ideology at the border, the three year limit on deportation and, above all, the lack of any real federal enforcement capacity combined to make applications of the new law sporadic. Partly as a result, anarchist terror was

⁵² [52] Ibid, 64ff. Cole draws the opposite conclusion, arguing that the 1903 comparison shows that current policies are also hysteria driven, not that the 1903 seems more reasonable.

still able to organize. Far and away the most serious group rose up within the growing Italian immigrant community, whose homeland was a main nerve center of anarchism in Europe . The committed anarchist Luigi Galleani recapitulated Most's performance from the generation before, publishing a radical newspaper urging violence and also putting out a bomb-making pamphlet.⁵³ [53] Galleani however was less open to public scrutiny since he wrote almost exclusively in Italian. Around him rose up a loose network of committed Italian immigrant anarchists increasingly inclined to terrorist action against a society and government they saw as corrupt, cruel and ripe for overthrow. The bombings began in 1914.

In New York , St. Patrick's Cathedral was bombed, though with little damage. An explosive device was found in the courtroom of a New York judge who had sentenced several anarchists to prison. After a number of anarchists were arrested in Boston during a 1916 antiwar rally, a police station was bombed. In the same year, twenty policemen in Milwaukee were killed during the attempted defusing of a bomb planted in the home of an Italian-American priest who had held a patriotic rally that Galleanist anarchists had attempted to disrupt, only to be arrested by the local police.⁵⁴ [54] The anarchists practiced a doctrine of massive retaliation, meeting the initial attempts to hinder with ever larger terrorist responses.

As a result of this activity and of rising security concerns as America edged toward involvement in World War I, Congress in early 1917 strengthened its anti-anarchist policy, removing the three year time limit on deportation of alien anarchists and providing more

53 [53] Paul Avrich *Sacco and Vanzetti: The Anarchist Background* (Princeton University Press, 1991), 98-99.

54 [54] Ted Morgan, *Reds* (Harcourt, Brace, 2003) 57-58.

resources to the Bureau of Investigation, the precursor to today's FBI.⁵⁵ [55] Since its creation a decade before, the Bureau had been kept on a short budgetary leash by a Congress intensely suspicious of a centralized security force as a potential tool of despotism. Now it received more room to maneuver. Working off evidence from the earlier attacks, Bureau investigators began to trace those involved back to Galleani and the group around his newspaper. There was no solid evidence he had directly ordered an attack, but his role as organizer and instigator was clear. After raiding his offices, the federal government used the revised 1917 anti-anarchism statute to begin deportation procedures against Galleani and eight of his associates. Using the procedures pioneered against the Chinese, these deportation hearings took place entirely within executive branch, allowing a much faster way of acting against the anarchists than the slow and uncertain process of trying to convict them of crimes in court. The men were successfully deported back to Italy in 1919.⁵⁶ [56] Investigators began to track down and issue deportation warrants against other members of the group as they waited for the inevitable retaliation.

When it came, its scale was beyond all expectation. Soon after the Galleani deportation order was publicized, mail bombs began to go off: the office of an anti-labor mayor in Seattle and the home of an anti-immigration senator in Georgia . The senator's maid lost both her hands and his wife was severely burned. As news of this spread, the postal service began to intercept suspicious packages, eventually finding twenty-eight other bombs intended for a variety of high government officials and businessmen. Most of the targets were in some way connected with impending Galleani deportation. Six weeks later, almost a dozen bombs were planted and

55 [55] *Ibid*, 59ff.

56 [56] Avrich, *Anarchist Background*, 134-136.

exploded across the nation, again at the homes of prominent government officials and businessmen, some of whom had been targeted for a second time.⁵⁷ [57] The most prominent target was Attorney General Mitchell Palmer, whose house had its porch and front wall blown away. The Palmer bomber himself was the only casualty from all these attacks, probably from a faulty fuse. His identity could not be definitely uncovered at the time, but historical investigation points to him likely being Carlo Valdinoci, a Galleani associate already facing a deportation warrant.⁵⁸ [58]

These bombings understandably enflamed the popular imagination and set off what is rather inaccurately now called the "Red Scare," since it was really sparked by anarchists not communists. Nevertheless, it is true that the recent Bolshevik Revolution was also much in the public mind, and definitional niceties were not always observed. Driven by Palmer, the federal government massively expanded what had been an investigation focused on the Galleanist anarchists into one sweeping in radicals of all type across the nation. Mass deportation orders were filed against the entire membership lists of various organizations judged anarchist or subversive, even when these members had no knowledge of their groups' supposed radical positions.⁵⁹ [59]

After initial enthusiasm, unease set in and then a full scale backlash. Labor Secretary Louis Post, who was charged under statute law with providing appellate review of the executive branch deportation orders before they could be enforced, began to overturn them. Civil liberties

⁵⁷ [57] *Ibid*, 141ff.

⁵⁸ [58] *Ibid*, 156.

⁵⁹ [59] Cole, *Enemy Aliens*, 118ff.

proponents outside government, already mobilizing to defend the free speech of World War I opponents against prosecutions under the 1918 Sedition Act, turned their attention to the Red Scare deportations as well. Federal courts began to grant habeas corpus petitions challenging the executive branch application of the law. By the early 1920s, the whole effort was discredited.⁶⁰ [60] From that time until the present day, the early actions against the Gallenists, the mass deportations that followed the retaliation bombings, and the World War I limits on free speech have usually been treated together as one big "Red Scare" and brought forward as the main exhibit for the "hysteria" model of American civil liberties during times of crisis. What this ignores is that an increasingly successful investigation to break up a very real and dangerous terrorist group was essentially overwhelmed by an overreaching Attorney General.

Still, the Red Scare backlash did reveal real problems with the framework set up to fight alien radicals. The deportation hearing process inside the executive branch was too cursory and too vulnerable to charges of arbitrary executive power over individual rights. As a response, the hearing process became increasingly elaborate, finally developing after 1950 into a formal system of quasi-independent immigration judges within the executive branch charged with running hearings according to formal rules of due process.⁶¹ [61] Nevertheless, with this addition, the basic framework of immigration law, and federal power over alien extremists, has remained as Congress developed it in the early twentieth century. After many of old restrictions on the immigration of anarchist and communists were dropped from the law in 1990, the power was, as mentioned earlier, revived after 9/11 to apply to individuals espousing support for

⁶⁰ [60] Stone, *Perilous Times*, 225-226.

⁶¹ [61] Stephen Legomsky *Immigration and Refugee Law* (Foundation Press, 2001), 643ff.

terrorism. Although no one is really happy with how immigration policy works in America , at least as regards alien extremists it has evolved into a system that gives the nation enough power to protect itself without being vulnerable to ultimately disabling charges of arbitrary, unchecked power.

The Current Situation

What does the past impact of terrorism on American constitutional history tell us about how the government should act during its current struggle with Islamic extremists?

Past lessons are applied easiest to the issue of the indefinite military detention of captured Al Qaeda members either in the Guantanamo Bay facility or within the U.S. itself. One side of the current debate typically insists that Al Qaeda detainees be held either as prisoners of war under the Geneva Conventions or as suspects awaiting trial in American civil courts. The other side claims that the President's Commander in Chief powers and the congressional authorization of force against Al-Qaeda give him the discretion to decide what to do with the detainees as he sees fit. If the limited evidence of the historical episodes indicates anything, it is that neither rigid adherence to preexisting legal frameworks nor claims of unbounded discretion will be adequate. Instead, a sustainable policy will require new rules.

The problems with applying current legal frameworks are fairly apparent. Treating Al-Qaeda members, who serve no state and obey no laws of war, as POWs runs up against the fact that prisoner of war rules were designed precisely for soldiers who do serve a state and do obey the laws of war. The Geneva Conventions allow for the military trial of those held to have violated laws of war, but it requires these trials to be held as soon as possible after capture, which

would obviate almost any opportunity to for interrogation. If they were not tried but instead simply held as POWs, this would have the odd consequence of mandating indefinite containment, since POWs are held to the end of hostilities and the war on terror has no obvious end point. Moreover, POW status carries with it a host of privileges entirely inappropriate for terrorist detainees, including allowing them to be paid salaries and respecting rank within the organization. The problems with treating them as suspects awaiting civil trial are even more obvious. To apply the full panoply of American constitutional restrictions and legal rules of evidence to military operations in the Hindu Kush would be impossible. Would witnesses from Afghanistan and Pakistan have to be flown to the trial location so they could be confronted in person by the detainee under trial? Applying either existing legal framework would cripple the war on terror.

Therefore it might seem that pure executive discretion is warranted for the disposition of these prisoners. There are respectable constitutional arguments and precedents for the President's power to design non-reviewable military commissions to determine both the detainees' status and their ultimate fate.⁶² [62] The arguments against executive discretion are best based not so much on technical questions of constitutional law but on the long term realities of political life in a constitutional republic. Claims of unbounded discretion, however just and necessary its ends, will over time draw suspicion and finally intense opposition. The fact that the war on terror is likely to extend for so long is what makes many of the past precedents for executive discretion less applicable: they occurred in wars of only a few years with definite endpoints. There was less of an opportunity for suspicion to gather steam. It might seem that since the detainees are almost

⁶² [62] John Bickers *Military Commissions are Constitutionally Sound* 34 Texas Tech Law Review 899 (2003).

all foreign citizens held abroad that this dynamic would not be in play. However, a nation founded on universal human rights will eventually apply at least some of the same standards that apply domestically to our operations abroad. And of course not all the detainees are abroad: Jose Padilla is an American citizen held in military detention on American soil. Finally, the Supreme Court has already begun to move in to substitute its own judgment on the question, though it is unclear where it will finally end up.⁶³ [63]

The way past either of these dead ends is to create new rules for a new situation, giving the President adequate power to fight terrorism while at the same time structuring and limiting his discretion. A number of possibilities have already been floated. There could be specialized terrorism courts.⁶⁴ [64] Alternatively, you could authorize a period of detainment for two years, and then mandate either trial by court martial or release.⁶⁵ [65] Whatever the choice, it will require congressional involvement. The greatest difference between the current situation and the past crises I have discussed is the decline of the influence of Congress. Pressed between an executive branch grown massive through generations of constant military activity and a Supreme Court as aggressive as any in our history, Congress in contemporary politics often seems reduced to carping from the sidelines, its historical role little respected by its coequal partners. The plurality opinion in *Hamdi* for example seems to indicate the Court might be perfectly happy coming up with a special set of rules for terrorist detainees on its own.⁶⁶ [66] This is a tragedy

63 [63] *Rasul v. Bush* 542 U.S. 466 (2004) and *Hamdi v. Rumsfeld* 542 U.S. 507 (2004).

64 [64] Thomas Powers "Due Process for Terrorists?" *The Weekly Standard* January 8, 2004.

65 [65] Philip Heymann and Juliette Kayyam *Preserving Security and Democratic Freedoms in the War on Terror*. <http://www.mipt.org/Long-Term-Legal-Strategy.asp>

66 [66] 542 U.S. 507 at 554.

because we need effective rules arrived at through democratic debate and revisable in light of new experience, neither of which is likely to occur through judicial imposition.

The future of our anti-terror efforts will likely depend on our ability to chart a new course as citizens in dialogue with our representatives that properly merges the forms and ends of constitutional government.
