CHAPTER – III

THE CONGRESS AND THE BALANCING OF NATIONAL SECURITY AND CIVIL LIBERTIES

The Congress (Senate and House of Representatives) in the United States and Parliament in other democratic countries, are places wherein national debates and deliberations by the elected representatives ensure and shape the direction of nation’s survival and glory. It is the highest law making body of the nation-state which acts as the national political platform for not only initiating, contemplating, deliberating, discussing, and passing the laws but also acts as the mirror reflexing various contentious issues of the nation-state being resolved by majority or unanimous decision. The USA PATRIOT Act which has been much debated and criticized by the libertarians would not have passed without the active support of the Congress. The role played the US Congress in initiating, coordinating, debating its cons and pros and above all passing the Act has been most significant legislative process. As soon after the terrorist attacks of September 11, 2001 upon the bastion of American economy, New York Trade Tower, the Bush administration came out with a new law within weeks to fight against terrorism. The law neither could be seen in draft for the personal of legislators nor any hearings on it nor could be debated in the House and the Senate but was passed and got enforced. The US the constitution provides certain process which will have to be gone through before a bill to become an act. But in the case of Patriot Act many such rules were ignored.

The "First Draft" of the Patriot Act introduced in the Congress on September 19, 2001 just after one week after 9/11 terrorist attacks. "However, due to congressional opposition of its broad power, the act is revised and introduced on 2 October. " (Raj 2007: 57) The Act got reintroduced on October 2, 2001 again, but by this time it was not only Senator Russel Feingold (D-WI) alone in the Congress to oppose the Act, other Senators like Tom Daschle (D-SD) and Patrick Leahy (D-VT) who joined his team and pleaded for restoration of Constitutional rights and civil liberties. It has been surmised that when Tom Daschle was the leader of the majority in the Senate and Patrick Leahy was the Chairman of Senate Judiciary Committee, they could have blocked or slow passage of the bill (Lancaster 2001). They were reported to be concerned about the broad powers of the Act. However, on 4 October,
Patrie Leahy (D-VT) made the Bush administration responsible for state of confusions but "others warned that law makers were overlooking constitutional flaws in their rush to meet the administration's timetable"\(^1\) and deadline. Later on from 6 October to 9 October 2001 "Anthrax Letters" were sent from New Jersey to Senators Tom Daschle and Patrick Leahy as difficulties in passing the patriot Act persisted.\(^2\) But on October 9, 2001, Senator Russel Feingold (D-WI) tried his best and resists attempt to rush the Patriot Act for voting without any debate. "He criticized the bill as a threat to civil liberties" (Jess 2001). On October 23, 2001 the Patriot Act was introduced in the House of Representatives as H.R. 3162 by Frank James Sensenbrenner, Jr (R-WIS). The bill then was sent to consideration of various Committees, even though, there are complaines that it was not processed through proper committees procedures, as "subject to no committee process" (The Village Voice, Date: 11/9/2001). On Oct 24, 2001 the bill was passed by the House of Representatives. But amidst serious chaos and confusion the law could see the light of the day in the House of Representatives without any reading or knowledge of the bill. The voters did not know that they are going to vote in the Congress for Patriot Act. As Republican Representative Ron Paul says, "It's my understanding the bill wasn't printed before the vote- at least I could not get it ...." And other Representatives admitted that they did not read the bill and voted. (Kelly Patricia 2001). Even though, many Representatives tried to block it, they were unsuccessful because of lack of majority with them.

The Patriot Act was voted by majority of Representatives and Senators in the US Congress. As on Oct 24, 2001, out of total 432 House of Representatives from both the Republicans and Democrats present and voting, 357 Representatives voted in favour of the bill and only 66 voted against the it. And of the 357 Representatives, 211 were Republicans, 145 were Democrats and 1 was Independent who supported the bill to be passed by the Congress. But of the 66 Representatives who did not favour the bill were 3 Republicans, 62 Democrats and 1 Independent. As many as 9 Representatives in total were Not-Voting which includes 5 Republicans and 4 Democrats. Nevertheless, the support of the congressman could be concluded to be bipartisan. The voting in the Senate the picture was very different. As of the total 100 Senators, 98 Senators voted in favour of the bill, only 1 Senator Russell Feingold (D-WIS) voted against it and another Senator Landrieu (D-LA) did not vote either in

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\(^1\) Timeline of Key events in anthrax investigation, Associated Press, Date: August 7, 2008.
\(^2\) Ibid.
support or against it but remained as Not-Voting (Adachi 2006). The Senate too proclaimed the impression of bi-partisan support for the USA PATRIOT Act. On October 26, 2001, President “signed it into law” the USA PATRIOT Act of 2001.

A careful study of the voting pattern of both the House of Representatives and the Senate of the US Congress over a sensitive issue such as terrorism shows that while, in the House of Representatives the number of opposition was considerable but in the case of Senate it was almost unanimous. It can be summarized that the House of Representatives which is the House of Commons of the US and represented by the young and energetic has demonstrated its thinking process. It exhibited the limitation of USA PATRIOT Act in balancing security and liberty. There were as many as 66 Representatives who voted against the bill and had their option got reserved with them. They did not vote for a bill which eroded many constitutional norms and did not conform to essential civil liberties which were otherwise considered as basic fabric of US democracy. The voting pattern of House of Representatives showed that there were valued reservations. But the voting pattern of the Senate was quite different. Even though, the Senate is known as the House of Elders and professionally experienced took the side of executive which emphasized the survival of nation-state. They out of fear and tragic episode of 3000 instant death and shattering of the pride of “invincible America”, voted overwhelmingly in favour of the bill knowing well that this bill could erode their fundamental rights and civil liberties. They feared that if terrorism was not be intercepted and obstructed then, it will head gear towards their lives and property.

Reauthorization of the Act vs. Repeal of the Act:

However, voting and debating during the time of reauthorization of the Patriot Act in 2006 were not the same as it were during the 2001 voting. As the sunset was fixed for USA PATRIOT Act to be Dec 31, 2005, the act had to be reauthorized and extended to Dec 31, 2009, again in 2006 which was titled as “The Additional Reauthorizing Amendment Act, 2006.” Thus, voting for a renewal of the Patriot Act took place on March 2, 2006 with altogether a changed equation and shift in party position. In the Senate, the Upper House of the Congress, out of 100 Senators, there were 89 Senators who voted in favor of renewal of Patriot Act as the USA PATRIOT Act Additional Reauthorizing Amendment Act of 2006. And 10 Senators including, Daniel Akaka (D-HI), Jeff Bingaman (D-NM), Robert Byrd (D-WV), Russell
Feingold (D-WI), Tom Harkin (D-IA), Jim Jeffords (I-VT), Patrick Leahy (D-VT), Carl Levin (D-MI), Petty Murray (D-WA), Ron Wyden (D-OR) Were those who voted against the reauthorization of the Act (Adachi 2006). But in the House of Representatives the voting took place on March 7, 2006 and out of 432 total voting and present, 214 were Republican Representatives and 66 Representatives were Democrats (i.e, 280 Representatives) who voted in favour of renewal of the Act. Only 13 Republican Representatives, 124 Democratic Representatives and 1 Independent (i.e 138 Representatives) voted against it. However, 3 Republicans, and 11 Democrats i.e 14 Representatives remained as 'Not-Voting'. As compared to the voting on the Patriot Act in October 2001, the voting pattern in March 2006 was quite different numerically. There were 10 Senators and 138 Representatives voted against the law as they felt it undermined constitutional right and Civil liberties. Nevertheless, the reauthorized Patriot Act was passed by legislature with a thumping majority both in the House of Representatives and in the Senate.

The Bush Administration reauthorized the act before its expiry date and thus, the debate over reauthorization of the act started before the sunset limitation. While, the Republicans were of the view that since the threat on the U.S. is still looming large, since the terrorists were yet to be flushed out and terrorism yet to be under control, the act should not be expired and should be reauthorized again. The tone of the reauthorization was: “Senate Intelligence Committee Chairman Pat Roberts (R-KS) plans to introduce legislation that would not only reauthorize sunsetting provisions of the USA PATRIOT Act, but also expand the government’s investigative powers...”3 But the Democratic stand on the act was different. In the opinion of some Democrats, the Patriot Act as a strongest piece of law has already limited many established laws, rules and regulation of the U.S. It had eroded many guaranteed constitutional provisions and has been able to curtail essential civil liberties of the citizen’s and non-citizens both so, such a law should not be continued for law. It must be repelled. They proposed that when an expiry date was fixed to this law, there was no point why it should be continued again after that expiry date. Senator Russell Feingold (D-WI) and Senator Dick Durbin (D-IL) have questioned the Act and sought for revision and reform so that “surveillance can be judicious.”4 They observed that

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4 Ibid.
the Bush Administration had an evil-intension of suppressing its political opponents and hitting at their Muslim enemies. So, this juxtaposition view of some of the Republicans and the Democrats have confronted legislators over the issue of reauthorization of the Patriot Act. The Republicans were of the view that the situation is not yet changed and the problem of terrorism is still persisted and the threat on U.S. Security is not yet resolved completed. The Attorney General Alberto Gonzales affirmed, "Our nation cannot afford to let these important counterterrorism tools lapse"\(^5\) More over Bush and Senate majority leader Bill Frist and House Speaker Dannis Hastert had said "they will not accept a short term extension of law."\(^6\) So the Patriot Act must be reauthorized as per the terms and conditions of the GOP. Before the expiry date in 31 Dec, 2005, the act has been reauthorized with approval at both the Senate and the House in July 2005, as the USA PATRIOT Reauthorization Acts, (H.R. 3199) and S. 1389, the USA Patriot Act Additional Reauthorizing Amendments Act and S. 2271. The President Bush signed the reauthorization Act on March 9, 2006.

The USA PATRIOT Improvement and Reauthorization Act. of 2005 thus, made 14 of 16 conflicting provisions permanent. And the two important sections such as Sec.206 and Sec.215 which were to expire on Dec 31, 2009 have been extended temporarily. But to the Republicans like George Bush, Alberto Gonzales and others, these two sections should be extended till Dec. 31, 2015 (a ten years extension). However, the Democrats such as Senators Russ Feingold (D-Wis), Larry Craig(R-Idaho) and their allies were against its extension.\(^7\) The Republicans were of the opinion that the 'FISA Wiretaps' and 'FISA Orders' must be continued for protection of the U.S. They have proposed the reauthorization of Patriot Act again after the sunset this year i.e. 31 Dec. 2009. But what changes have been proposed are yet to be disclosed. The Senate Judiciary Committee Chairman Arlen Specter(R-PA) described it as "cosmetic changes."\(^8\) When asked to comment on the proposed legislation, the National Security Division assistant Attorney General David Kris said, "the Justice Department does not have an official position on the bill beyond the administration’s


\(^6\) Ibid.

\(^7\) Ibid.

support of reauthorizing the expiry provisions”. (Ramonas 2009) Even, the National Security Division Deputy Assistant Attorney General Todd Hinnen, refused to elaborate on the possible changes to the provisions. However, it is surmised that the Bush Administration is sure of certain provisions such as (1) the Telephone Records (Sec.206) (2) the Business Records (Sec.215) and (3) the Lone Wolf Provision to be reauthorized. “The Lone Wolf provision allows Government to track a target without any discernible affiliation to a foreign power, such as an international terrorist group. The provision only applies only to non-U.S. person.” 9 It has never been used in a FISA application. The second provision of business records, (Sec 215) “allows investigators to counsel third parties, including financial services and travel and telephonic companies, to provide them access to a suspect’s records without the suspect’s knowledge. From 2004 to 2007, the FISA Court issued about 220 orders to produce business records. 10 The third provision deals with Roving Wiretaps (206) which “allows the government to monitor phone lines or Internet accounts that a terrorism suspect may be using, whether or not others who are not suspects also regularly use them. The government must provide the FISA Court with specific information showing the suspect is purposely switching means of communication to evade detention. The Government has applied for roving wiretaps an average of 22 times a year since 2001.11

The interesting aspect is that even, the Obama Administration is supporting these provisions. Therefore, reauthorizing the Patriot Act again after the after expiry date of 31 December, 2009 did not face any major problem in the Congress. Majority of Republican Representatives and Senate members were supporting the act for a reauthorization. As such when Jeff Sessions (R-Ala) said “there is no indication that there have been any abuses to date”12 and there after the road to reauthorize the act gets clear. Further, when a question was asked about whether the Patriot Act would be reauthorized, David Kris, the National Security Division Assistant Attorney General replied, “We are willing to look to see if these tools can be sharpened,”13 making clear that the Republicans would not be sidelined along with their opponents to scrape the

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10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
law. They will endorse it. However, the stand which has been taken by the Democrats in this regard is worth discussing. Some Democrats have not only against the extension of the Patriot Act but they were also in favour of the U.S. Constitution. Right from the time of enactment of Patriot Act, some of the Democrats were positioning against the bill. They were sure that this act will curtail their basic rights and liberties so they had started raising their voice against it. It was decided in 2008 that, if they will come to power, they will scrape this law and stand by the U.S. Constitution.

The “USA PATRIOT Act Sunset Extension Act of 2009” (S.1692) which was introduced in the Senate by Senators Patrick Leahy (D-Vermont), Benjamin Cardin (D-Maryland), Dianne Feinstein (D-CA), Ted Kaufman (D-DE), and cosponsored by Senator Benjamin Cardin (D-Md.) and Senator Ted Kaufman (D-Del.) in the 1st Session of the 111th Congress (2009-2010) on September 22, 2009. It extended three provisions of the Patriot Act including the Sec.206, Sec.215, and the “Lone Wolf” provision and the sunset date to December 31, 2013. When the Senate Judiciary Committee voted it in a heated debate Democrats including Senator Benjamin Cardin (D-Maryland), Senator Dianne Feinstein (D-California), Senator Al Franken (D-Minnesota), Senator Edward Kaufman (D-DL), Patrick Leahy (D-Vermont), Senator Herb Kohl (D-WI) and Republican Senators including John Cornyn (R-TX), Jon Kyl (R-Arizona) voted in favour of the move but Democrats such as Senator Arlen Specter (D-Pennsylvania), Russell Feingold (D-WI), Senator Richard Durbin (D-Illinois) and Republicans such as Senator Orin Hatch (R-Utah), Senator Jeff Sessions (R-Alabama), Senator Tom Coburn (R-Oklahoma), Senator Charles Grassley (R-Iowa), voted against it (Kravets: October 8, 2009). And another bill called as the “USA PATRIOT Amendments Act of 2009” (H.R. 3845) which was introduced in the House by Judiciary Committee Chairman John Conyers Jr. in the 111th Congress (2009-2010) on October 20, 2009 to bring about needed reforms in the Act too could not progress. But “the Senate approved the one-year extension Wednesday by a voice vote and without any debate. The House followed suit on Thursday night, voting 315 to 97 in favor of the legislation” (Van Auken 2010: 1). However, President Obama has signed on February 27, 2010 the three important provisions into law until February 28, 2011, for one year only. The difference of opinion as to reauthorization of various provisions of the Act persisted between the Senate and the House. Representative Anthony Weiner (D-NY) a House Judiciary
Committee Member says in this regard, “the extra time would help Congress work out its differences on the bill”\textsuperscript{14} Even though, anti-Patriot Act propaganda was too strong in the beginning but they were not sufficient to repeal the Patriot Act in the Congress. It has rather, been reauthorized by the Congressmen and the Senators as well. So, the idea of repealing the Patriot Act seems to be impossible than, the idea of reauthorizing of Patriot Act.

It is clear that Patriot Act as if came for reauthorization in 2006 and 2009 more Democrats criticized the act. The Congress in the Patriot Act led in the language of Senator Harry Reid (D-Nev), declare that “we killed the patriot Act.” (Kessler 2006) And presidential candidate in 2004 Senator John Kerry said, Patriot Act is “an assault on our basic rights.”(Kessler 2006). But Alcee Hastings, (R-Fla), hinted “The Patriot Act has given the government new powers to bug telephones, monitor e-mails and Internet use and search public databases. This is unacceptable.” Even though, the reply of President George Bush was quite lucid when he said to the Democrats that “They must not think we are at war. They must think that the best way to protect you is to respond after the attack.” Yet the voice of protest did not stop. The Democrats had joined hands with many civil liberty and human rights organizations to sharpen their protest against the act. As a result of this, the debate between the advocates and opponents of the Act became graver. It is not that civil liberties and human rights organizations only come out openly to lodge complain against the Act but even, film associations have also jointed them and started picturing on the troubling provisions of the act. Michael Moore, in his controversial film, \textit{Fahrenheit 9/11}, has showed the act which has not been read properly by the Congressmen and became a law. He records, Congressman, Jim Mc. Dermott saying that no Senate member has read the bill and John Conyers reply that we don’t really read most of the bills” (Moore 2004). He asked, do you know what will happen, if all of us would read the bill? He himself answers, “this will slow down the legislative process.” (Moore 2004). The Television that telecast this shows was NCIS, Law & Order Special Victims Unit of Las Vegas. Another significant aspect was that the act was made to restrict the rights and liberties of people and to harass the Arabs basically. Indeed the act was not only cried fault by the Democrats, Civil Liberties and Human Rights organizations, film and T.V.

associations, but it has also been condemned by many dignitaries and important personalities. As Anita Ramasastry, an Associate Professor of law of University of Washington reveals that the act would deprive basic rights for immigrants to the U.S. She has also questioned the idea of indefinite detention of citizens as per the act makes the Patriot Act as Taliban Fatwa. The University of California also has passed a resolution against the indefinite detention of persons in the act. While, Prof. David D. Cole of Georgetown University has shown his anger at the suppression of right to privacy by the act, Prof. Orin Kerr has spoken against the collection of voice mails by the authority. Besides adopting a draconian practice within the U.S. the Patriot Act has also questioned about the authenticity of many national organizations of foreign countries. International laws and international humanitarian assistance and donations and teachings have suffered due to the law. Besides adopting a draconian practice within the U.S. the Patriot Act has also questioned about the authenticity of many national organizations of foreign countries. The role of Senators Patrick Leahy and Senator Russel Feingold in demanding an amendment to Patriot Act so that civil liberties concerns and human rights violations could be addressed can not be sidelined. Senator Russell Feingold (D-DI) among other provisions, “wants to do away with the “lone wolf” provision entirely” (York 2009) but Senator Jeff Sessions says, “Before the Patriot Act, terrorist investigations had far less authority to get records and documents than a DEA or an IRS agent” (York 2009). However, many committees which have been constituted to consider various provisions of the Patriot Act such as the U.S. House Committee on the Judiciary, the Permanent Select Committee on Intelligence, the Committee on Financial Services, the Committee on International Relations, the Committee on Energy and Commerce (the Subcommittee on Telecommunications and Internet), the Committee on Education and the Workforce, the Committee on Transportation and Infrastructure, and the Committee on Armed Forces have given their reports and comments with regard to amendments and adjustment of civil liberties and national security. As a result of all these studies and testimonials, the Bush Administration came out with a new version of Patriot Act which is known as the Patriot Act Improvement and Reauthorizing Act of 2005 and the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006. Even then, the gap created by the Bush Administration between National Security and Civil liberties could not be filled up. The civil libertarians and the Democrats are yet to accept the compromising position of national security and civil liberty adopted by the
Bush Administration. They have again geared up their grievances against the act. And when the expiry was nearing in 31st December, 2009, they were equivocally pleading for no more reauthorization of the act and repeal it. This has led to another debate in the Congress as to whether, the three provisions of the Telephone Records (Sec.206), the Business Records (Sec.215) and the “Lone Wolf” of the act to be extended or not. Reports indicated that the Obama Administration is ready to support these provisions and their further extension after 31st December, 2009 which has not only made the intention of the US as clear in favour of reauthorization but has made the complains and objections to the act as frivolous and unscrupulous.

Significantly, the 111th Congress in the 1st Session of 2009-2010 has amended the USA PATRIOT Improvement and Reauthorization Act of 2005 and new sunset date has been proposed as of 31 Dec 2013 (Sec.2) with agreement of both the Senate and the House by reauthorizing the three most talked about provisions of Electronic Surveillance (Sec.206), Business Record Surveillance (Sec.215), and the “Lone Wolf” under the USA PATRIOT Act Sunset Extension Act of 2009 (S.1692). While, the Senate has supported the extension of all the three provisions but the House has supported only for two provisions and not the “Lonewolf” provision. Because of this disagreement, the congress could not reach out to an amicable solution. However, President Obam has signed the three provisions to be extended until February 28, 2011. Even if, public opinion in the US, “favours the Patriot Act to be extended but certainly people don’t want the FBI’s provisions of surveillance of personal postal letters and other records” (Langer 2005).

Congressional Debate over the Patriot Act

Liberty vs. Authority:

At a time, when different organs of government have differences with one another and would not come to a consensus, then, conflict between authority and liberty is natural. Some aspect of this trend revealed on the passage of the Patriot Act. When the country’s very sovereignty was under attack, the entire nation is alarmed. When the US woke up on the morning of Sept 11, 2001 to see a massive terrorist attacks on their people’s lives, liberties and property by a foreign Islamic terrorist organization called al Qaeda, the entire nation came to a stand still, it became unfurled. As Bush said, “On September the 11th, enemies of freedom committed an act of war against our country” (Dietrich: 2005: 50). The attack was so deadly that it
instantly killed some 3000 persons, devastated a huge size of property and infrastructure and left the U.S. in a state of fear for ever. In such a situation, the U.S has tried to get together those broken and scatted pieces of lives, liberties and sovereignty and surged up again as usual. The executive made up its mind that unless a strict law can be legislated, their lives, liberties and property can never be protected. It thus, legislated a law called the USA PATRIOT Act, 2001 to counter terrorism at home and in the abroad as well. “Available reports indicated that on 15 September, 2001 President Bush summoned his top national security advisers (possibly the members of the National Security Council) to Camp David to plot America’s retaliation for the terrorist attacks on New York and Washington” (Raj 2007 : 53). They organized their people and declared a “War on Terrorism.” In the words off President Bush, “al Qaeda is to terror what the Mafia is to crime. But its goal is not making money; its goal is remaking the world and imposing its radical beliefs on people every where.” (Dietrich: 2005:51). Thus, it is important on the part of Americans to defend their lives, liberties properties and sovereignty first. The Patriot Act was passed to protect all these which were under threat from al Qaeda. As Bush explains, “The progress of liberty is a powerful trend. Yet, we also know that liberty, if not defended, can be lost. The success of freedom is not determined by some dialectic of history. By definition, the success of freedom rests upon the choices and the courage of free peoples, and upon their willingness to sacrifice…” (Dietrich: 2005: 259). Thus, when a people’s freedom was under attack or was in constant threat, why should such people come forward to defend their freedom first? Secondly, in the U.S. administrative circle especially, among immigration officials, it has been realized by and large that the 9/11 terrorist attacks would not have been possible had the law enforcement authorities and the immigration officials had taken their jobs properly and without any negligence. The terrorists enter into the U.S. with student visas and could bombard inside the U.S. territory killing innocent people and spreading terrorism world wide. The Bush Administration too realized it and incorporated a stringent provision relating to the in-comings and out-goings of citizens and non-citizens into the U.S. The basic idea behind this was to deter the terrorist plots and to intercept and obstruct terrorism within the U.S and abroad. Such a policy of Bush Administration was not only admired by the Republicans but even noted Democrats like Hilary Clinton and Barack Obama the current President had endorsed the policy. They had realized the importance of checking potential terrorists
into their country and “Supported the Bush plan: Strengthen borders, implement new enforcement laws, provide a path to citizenship for undocumented worker in the United States.” (Foer: 2007:285). But, Republicans like Massachusetts's Governor Mitt Romney (R-Mass) and Ron Paul (R-Texas), the US House of Representative were opposed to Bush immigration policy in the Act. Mitt Romney opposed Bush backed Guest-Workers plan. He wanted a system for employers to verify legal status of workers. Moreover, he opposed allowing illegal immigrants to gain legal status apart from existing procedures. Ron Paul strongly opposed Bush plan: Wants a heavy focus on border Security (Foer: 2007: 286 & 287), and check illegal immigrants.

Thirdly, the Torture Debate was more famous during the entire debate of Patriot Act. The Patriot Act has once again raised the debate concerning torture in the US and around the world. The deportation of thousands of criminals and suspects into Guantanamo Bay (Cuba) and Abu Ghraib Prison, (Iraq) and subsequent torture & abuse by the CIA officials and the military officials on them have been controversial. The question of whether the techniques used by these officials to extract information from the detainees are legal or fall short of definition of torture as accepted by the U.S and the world has been raised by American legislators. After publishing the pictures of mental, Physical and sexual abuse of prisoners and detainees by the officials and "the CIA’s destruction of videotapes that reportedly depicted the use of disrupted interrogation tactics,"\(^\dagger\) has been most controversial according to the U.N. Convention against Torture. Torture is defined whether as “any act by which severe pain or suffering, whether physical or mental” is intentionally inflicted by or at the instigation of someone acting in an “official capacity”.\(^\dagger\) The U.S as a party has ratified the convention and they have included into the U.S laws as its own law. Torture has not only been prohibited as an unlawful act on criminals, Prisoners of War, detainees and captives by the Geneva Convention but it has also been prohibited by the Army Field manual of U.S. The Army Field Manual of the U.S has categorically described about the method of interrogation and prohibits any unlawful tactics or methods to extract truth from the criminals. It prohibits any kind of “Water boarding, electrocution, sensory deprivation, withholding food, Water or medicines.”\(^\dagger\) In the recently passed Intelligence Reauthorization Act, 2008 by the U.S government has prohibits to use

\(^\dagger\) Ibid, p.33.
\(^\dagger\) Ibid, p.33.
torture on human body. It states, "No individual in the custody or under the effective control of an element of the intelligence community or instrumentality thereof, regardless of nationality or physical location shall be subjected to any treatment or techniques of interrogation not authorized by the United States Army Field Manual on Human Intelligence Collector Operations."\(^{18}\) Again the Detainee Treatment Act, 2005 also has prohibited to conduct any interrogation and torture without the prescribed legal standard. But Abu Ghraib Prison's video clips, especially, abuse could show it to the world that all possible methods are used including inhuman treatments and terrible physical abuse, without respecting the legal or prescribed standards of physical abuse. In such a situation, the U.S Congress is divided into compartments. While, Republicans legislators think the debate over whether the intelligence officials have been following the U.S Army Field Manual standards or not is a baseless discussion. They point out that there is no such problem existing. Pete Hoekstra, (R-MI) says "Torture is already prohibited."\(^{19}\) Those standards that are used by the administrative officials are based on U.S laws and approved by the Congressmen. The Republican Representative from Washington, Doc Hastings, (Washington-R) in this regard says that unless the intelligence officials would be provided with proper protections, they will not be in a position to monitor foreign terrorists. He has doubt over restricting the officials in their work and at the same time making the U.S. secured. But Republican Representative Mae Thornberry's view is different. He said on techniques of the officials, "it's a mistake to telegraph to al Qaeda or other potential enemies exactly what we are going to do and when we capture you."\(^{20}\) He thus, rejected the new bill to curb the provisions of interrogation techniques by officials. However, Democrats have quite opposite view on the interrogation techniques and torture. They have always supported progressive ideas and have seen the international humanitarian law as the protector of illegal methods used by officials. They are in favor of the act which puts a ban on indiscriminate use of torture on detainees and under trials. The view expressed by the Democrats in this regard is just opposite. The U.S. Representative from Illinois, Jan Schakowsky says, "The military has voluntarily imposed these restrictions upon itself, and now we must impose the same rules on the intelligence

\(^{18}\) Sec. 327(a), Intelligence Authorization Act, 2008.  
\(^{19}\) The Torture Debate, *Congressional Digest*, vol. 87, no.2, February, 2008, p.45.  
\(^{20}\) Ibid, p.51.
community."\textsuperscript{21} This meant that the U.S had endorsed the Geneva Convention and so also in the Army Field Manual to follow a certain standard in interrogation and thus, it must apply that standard. Another U.S Representative from Maryland Steny Hoyer has said aptly "in the pursuit of those who seek to harm us, we must not sacrifice the very ideals that distinguish us from those who preach death and destruction".\textsuperscript{22} This means that in the fight against terrorism and subsequent ill-treatment of prisoners and captives, the U.S. Should not lay down its democratic ideals and constitutional provisions. It should not side tract the ratification of Geneva Convention.

National Security vs. Civil Liberties:

The 9/11 terrorist attacks on the U.S and the subsequent passing of the USA PATRIOT Act, 2001 has once again raised the issue of national security versus civil liberties. While, the republicans have argued in favour of national security but the democrats have argued for civil liberties. However, instances of arguing beyond the partisan lines are no less when it comes to balancing between national security and civil liberties. Senator Joe Lieberman (ID-Conn.) and Senator Lindsey Graham (R-S.C.) "threatened to hold up any and all legislation in the Senate until Congress passes its legislation to prohibit the release of photos showing detainee abuse in Iraq and Afghanistan."(Pierce 2009). Even, President Barack Obama has "supported such provision along with a large number of Senators."(Pierce 2009). The stringent measures incorporated in the act have restricted the basic right to life, liberty and pursuit of happiness, for the sake of national security. The act has been strict to allow essential civil liberties to the citizens which are otherwise guaranteed by the US Constitution. While, the Bush Administration and the Republicans as well as some important followers of Bush Doctrine such as Secretary of Defense, Donald Rusfeld, Deputy Defense Secretary Paul Wolfowitz, Vice President Dick Cheney and Secretary of State Condoleezaa Rice argue that when the nation and security are at threat, it is necessary to legislate on subjects such as these. President Bush said in his State of Union Address of 2002, , "I will not wait on events while dangers gather. I will not stand by as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons"(Wright 2004 : A01). He hinted about going to battle field alone.

\textsuperscript{21} Ibid, p.44.
\textsuperscript{22} Ibid, p.48.
in the case of danger to the US. More over, the Bush Administration seems to convince that “The invasion of Iraq, therefore, was not a “preemptive” war but a “preventive” war” (Zunes 2007 : 28). With the change of time, the methods and techniques of terrorism also have been changed. Potential terrorists in these days are no more old fashioned. They are equipped with modern scientific apparatus and sophisticated tools to carry out their design and operation. They are trying to access to chemical, biological and nuclear means of attacks. So it is important on the part of legislature and executive to legislate appropriately so that the nation can be free and safe. In such attempt, even if, some essential rights and liberties are required to be restricted then, the citizens should be ready for that, this is what has been the presumption of the national security. Speaking about a strong national security, Senator Evan Bayh of Indiana said, “We need a national security policy that is both tough and smart”. Senators John McCain(R-AZ) and Joseph Lieberman(I-CT), “Introduce Bill to Authorize Indefinite Detention”23 As former Attorney General Michael Mukasey says, “Roving wiretaps have been used for decades by law enforcement in routine narcotics cases”(Mukasey 2009). Thus, there is no point in speaking ill of the style of functioning and law enforcement system.

Secondly, the “search and seizure measures”24 of the act is not a new concept. It is already part of the US law. Significantly, President Barrack Obama has not only allowed it in the US but he also gives full diplomatic immunity and exempts INTERPOL from search and seizure within the United States.(Executive Order No.12425 : Date Dec 17, 2009) Utah Republican Senator Orrin Hatch drafted a proposal to repeal the clause of “Sunset” provisions and make the Patriot Act a permanent fixture (Randal 2003). The law is that a person and his private premise can be searched in the case of a doubt with a valid warrant from the court of law by the law enforcement authority. This means that no person’s house or private premise can be searched or seized without due process of law (4th Amendment Protection). However, the state is justified to put that person under suspicious list if, the person concerned is of doubtful social habits and of suspicious movements. Persons traveling with high suspicious category are labeled with 'S' and are bound to cooperate with the law enforcement authority. A special type of software which is fitted to Airline


24 Sec.213, the USA PATRIOT Act,2001.
reservation counter called the Computer Assisted Passenger Pre-Screening system (CAAPPSS) helps officials to prevent the plot of nefarious terrorists as well.

Thirdly, the use of modern technology and stricter immigration procedures have helped the innocent citizens to a considerable extent. Ron Paul (R-Texas) concludes that, “Physically secure our borders and coastlines, enforce visa rules, no amnesty, no welfare for illegal aliens, end birthright citizenship (which is currently an incentive to illegal immigrant)” but Mitt Romney (R-Mass) thinks “I want to see more immigration in our country, but more legal immigration and less illegal immigration”.

The US custom control, reinforce cockpit doors, bomb and metal detector tools, the Computer Screening of bags and Physical body and use of other information technology for preventing many terrorist plots. Fourthly, laws are made to provide social security to the society. Even though, many Democrats including Barack Obama(D-IL) have campaigned for Abortion Rights but Representative like Bart Stupak(D-MI) did not think it as a civil liberty and are busy leading group of anti-abortion Democrats. It has always been the duty of the administration to look after democracy, development and happiness of the people. The people of America have empowered the legislative to make law for them. Thus, it becomes the liability and responsibility of the Congress to pass such laws which are in the interest of individual citizens and social welfare. So, they should not meddle with the law of the land for whom, it has been legislated. It is very natural and unavoidable to control the abuse and ill-use of law in certain times and situations. A few abuses of law that is to say a tip-of-iceberg can not be taken to interpret it that the law is abusive and strictly observed. And it is highly immature to withdraw such law, which can provide security to all due to such unavoidable situations. This is no wise to repel a forceful law for just a rare abuse through the process of its judicious implementation. Fifthly, civil liberties are enjoyed in a democratic set up. They are better enjoyed in a system wherein law of the land is respected. The U.S. Constitution is the most primary source of law and the constitution is supreme law of the land. It is an embodiment of rule of law in the country. Speaking about the status of non-citizens in the Act which contains provisions in the Lone Wolf clause, that a non-citizen can be booked for assisting any foreign organizations having a link with a terrorist organization, House Representative Patsy Mink “notes that in theory supporters of Greenpeace could now be convicted for supporting terrorism.” (San Francisco Chronicle Date: 11/12/2001). Thus, the views expressed by some Democrats are just the opposite of the Republican
views on national security and civil liberty. Republican Senators among others who supported national security are Liza Murkowski(R-Alaska), Richard Shelby(R-Alabama), Jon Kyl(R-Arizona), Wayne Allard(R-Colorado), Stevens(R-Alaska), Jeff Sessions(R-Alabama), Ben Campbell(R-Colorado), Larry Craig(R-ID), Peter Fitzgerald(R-Illinois), Jim Burnning(R-Kentucky), Susan Collins(R-Maine), Olympia Snowe(R-Maine), Jesse Helms (R-North Carolina), Chuck Hagel(R-Nebraska), Mike DeWine(R-Ohio), James Inhofe(R-Oklahoma), Lincoln Chaffe(R-Rhode Island). Those who supported civil liberties were among others Senator Russell Feingold(D-WI), and Patrick Leahy(D-Vermont), Representative Ron Paul(R-TX), Senator Tom Daschle(D-SD). However, civil liberties got a strong support in the House of Representatives from among others Representative Earl Hilliard(D-Alabama), Sam Farr(D-California), Edward Pastor(D-AZ), Mark Udall(D-Colorado), Kendrick Meek(D-FL), Butch Otter(R-Idaho), Danny Davis(D-IL), Cynthia MacKinney(D-Georgia), Diana DeGette(D-CO), Patsy Mink(D-HI), Alcee Hastings (D-FL), John Lewis (D-Georgia), Michael Honda (D-California), Barbara Lee (D-California).

While, Democrats such as former Vice-President Al Gore, “Urges Repeals of Patriot Act”,(Brownstein 2003 ), but other Democrats like Rep. George Miller (D-Martinzer) who demands for a total repeal of the act (Lochhead 2003) have not only vociferously criticized the Patriot Act but they have pleaded for a total repeal of the act. It has been argued that terrorism is not a new concept that has taken place only in 2001 and caused enormous devastations. In the pages of history also we have seen terrorist acts on innocent human beings, civilians and military population regularly. When democratic principles have been challenged in the past from different forces, the door of democracy was never closed. The democratic principles, rather, got a tremendous boost to fight them out, and in the course of time had uproot it. Thus, there is always a support for the national security policy but at the same time, an opposition for eroding essential civil liberties existed.

Speaking about roving wiretaps, Senator Al Franken (D-Minn), “challenged the constitutionality of such wiretaps”(York 2009). Significantly, Senator Patrick Leahy(D-Vermount) speaking against the business records , “wants to return to legal standards that existed before September 11 regarding national security letters”(York 2009). It has been pointed out that in the name of fighting against terrorism, the Bush Administration has detained many person who are not related to terrorism in any way. Such persons are detained in various prisons and military detention facilities in the
U.S. and abroad. They are ill-treated and/or subjected to grievous torture. Before passing of the Patriot Act, detention was limited to only 24 hours but after the law was enforced a person can be detained for 48 hours without charge and/or even more on "emergency and extraordinary circumstance". They are denied access to court of law for their defence. Such a practice, even if, discouraged by the Geneva Convention, the UNDHR as well as the U.S. Constitution, the Bush Administration is hardly careful about it. Such a step would not only fill revenge in the eyes of the detainees but people around the world will be susceptible of intention of the U.S. In defending national security only a nation will be secured but in defending the moral stand, the entire human kind world be secured. The President Obama once said, "restore... over moral standing"- that is to put an end to our aggressive ways." (Muravchik 2008 : 23). Speaking about the detainees, Obama said, "there is also no question that Guantanamo set back the moral authority that is America's strongest currency in the world" (Obama 2009 : 292). President Obama has ordered to close the Gitmo by Jan 2010. However, even Obama has not been able to implement his order.

Some Democrats such as Rep. Mel Watt (D-Charlott) argue that the act is very often misused by the law enforcement authority such as Police and the FBI and innocent people are victimized. The FBI has been most famous as per the Patriot Act by issuing "more than 30,000 National Security Letters each year." (Yen 2005) but 50,000 by another account. It has been used against the political opponents or even against the old women, children and faithful army men. In the case of a doubt, people are made to prove their innocence. They are asked to prove their patriotic quality or else, they have to pay the price. A large number of persons from Arab world have been subjected to racial profiling. In this context, former Deputy Secretary of State, Richard Armitage says, "Following the September 11 attacks, Americans started exporting something that's very foreign to the United States: we started exporting our anger and our fear, rather than more traditional exports of hope, opportunity and optimism (Koto 2008 : 166). The post 9/11 strategy of the US, has in fact defeated the U.S. in the world. The U.S used to be the most sought after destination of many but the enhanced police power, racial profiling, enhanced power of FBI, restrictions on the foreigners and a stricter immigration rules have discouraged them to enter into the U.S.

Foreign intelligence Gathering vs. Fourth Amendment Protection:

Soon after the 9/11 terrorist attacks on the U.S, the Bush Administration had gone for a Robust electronic surveillance on both the citizens and non-citizens to gather authentic information relating threat to nation. The secret search and seizure operation has been done in such a massive scale that it has not only annoyed many U.S. citizens but their Fundamental Right and Civil Liberties have been seriously restricted. The coveted Fourth Amendment of the Constitution which is considered to be the protection of civil liberties of citizens seemed to have been undermined by Patriot Act. This has created a controversy between the Executive and the U.S. Citizens. The US constitution categorically states “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures...”26 This means that no person’s house or papers or belonging etc can be put to secret searches without warrant (except war time).

The US constitution and governance operating on separation of power and check and balance principle has led the US Supreme Court to hold that warrantless wiretaps of domestic groups for national security reasons violated the constitution.27 This pronouncement of the Supreme Court thus, fixed the action of the executive on search and seizure operations. In order to counter the decision of the Supreme Court, the U.S. Administration passed a new law called the Foreign Intelligence Surveillance Act (FISA) in 1978. So right from 1978 till 2001, the search and seizures operations of the executive were well within the constitutional provision. But in the event of 9/11 the Bush Administration changed the techniques of foreign information gathering and enhanced the surveillance procedures with the help of new technologies and wider the scope of surveillance which includes not only the non-citizens but cover the U.S. citizens as well. Hence, the controversy redoubled. While, the FISA was meant for foreign terrorists and agents, it barred the electronic surveillance on U.S citizens basically, but the new tool with USA PATRIOT ACT, 2001 provided for electronic surveillance and warrantless wiretaps on the foreign nationals and terrorist groups and their agents. However, the U.S. citizens are not barred. They are also included within the scope of such surveillance procedures. Thus, upon such a question, the entire US Congress is divided into two camps. While, the Republicans supported the move of the Bush Administration, the Democrats have opposed it. Republican Senator from

Missouri, Kit Bond said “The Bottom line in this story of FISA is terrorists were able to use technology and our own outdated laws to stay a step ahead of us. We can't afford to give them that step. The intelligence committee’s bill gives our intelligence operators and law enforcement officials the tools they need to conduct surveillance or foreign terrorists and foreign countries planning to conduct attacks inside the United States, against our troops, and against our allies. It is the balance we need to protect our civil liberties without hand cuffing our intelligence professional”.28 Another Republican Senator from Texas, was of the view that unless, the intelligence community would be given freedom in their operations, it would be too hard to protect the U.S. In her own words, “Unless we take action, this protection of our ability to intercept potential plots against our country will go out of existence.”29 The burden of the executive and Republican legislators justification has been that there is a need for a law more than the FISA provision because of change of time and technology to counter terrorism. Earlier, as per FISA provisions, a potential terrorist phone number had to be checked in order to locate him. The officials thus, had to obtain court permission for surveillance. The Bush Administration officials and Republicans pointed out now that cell-phones are used and the user can throw his cell phone and behave innocent before the officials could get a court order to conduct surveillance on him. So, with change of time and situation, the intelligence community’s scope of surveillance must be changed. Their scope of surveillance must be wider, then, only they can be easily intercept and obstruct terrorists inside the U.S and abroad as well. But the views expressed by Democrats on this aspect are different. To them, in fighting against the potential threat of terrorism, the constitutional ideals and essential civil liberties cannot be undermined. As Patrick Leahy, the Democratic Senator from Vermont, is of the view that right and liberties are equally important in fighting against terrorism. To him it is not the Intelligence Committee which can make proper amendment to the FISA but the Judicial Committee can do it. To expand the scope of executive surveillance would be irrelevant, but it is also important to look whether the constitutional provisions have been violated or not. Patrick Leahy says, “FISA is among the most important pieces of legislation this congress has passed. It is

28 Ibid, p.91.
29 Ibid, p.93.
there to provide a mechanism to conduct surveillance; it is critical to own security, but also to protect the privacy and civil liberties of all Americans.\textsuperscript{30}

But the Bush Administration did not think it fit to obtain a certificate from the court as there would be loss of time and possible revelation of information before they could start surveillance. As in the words of Jay Rockefeller(D-WV), has expressed strongly against by stating "After Sept 11, 2001, the President chose to deal with the problem unilaterally and created a warrantless surveillance program that relied on, to my mind, questionable legal justification. I think that was a mistake."\textsuperscript{31} Another Democratic Senator from Wisconsin, Russel Feingold, expressed the point of view that between the Intelligence Committee and the Judiciary Committee, the later need to be followed. The intelligence immunity that the Intelligence Committee is talking about would not solve the individual's survival and privacy. As the need of the hour is to restore the damage done to civil liberty and the requirements could be filled up by the Judiciary Committee. He said, "I strongly oppose the immunity."\textsuperscript{32} Immunity for telecommunication companies is to violate the right of privacy of many citizens. Christopher Dodd, another Democratic Senator from Connecticut, is of the view that no immunity should be allowed to private companies on telecommunication because they will exploit the situation and violate rule of law of the land and civil liberties as well. The foreign intelligence gathering can be done without disturbing the existing laws and if the executive would grab more powers in the name of intelligence gathering then, there would be serious chaos and confusion of law and order. He pointed out that, "the intelligence version, by purporting to end warrantless wiretapping of Americans, might actually allow it to continue unabated."\textsuperscript{33} There is every possibility that the executive branch would use it for its own purpose. Therefore, the Democrats perceived that it is important to think about restriction of executive actions before we think about to ban on constitutional rights and restriction or civil liberties at the time of fear. The FISA Amendment Act has given enormous power and tools in the hands of officials to do their duty. Such powers and tools appeared to have been taken by the executive to safeguard national security and eradicate citizens' fear.

\textsuperscript{30} Ibid, p.76.  
\textsuperscript{31} Ibid, p.77.  
\textsuperscript{32} Ibid, p.80.  
\textsuperscript{33} Ibid, p.90.
Congressional Power vs. Authority of the Court:

The founding fathers of the U.S. Constitution knew it well that if, the separation of power would not be observed in a strict sense, then, it would create disturbance among the branches. It would create chaos and confusion in their relations with one another. Thinking this positively, they had introduced a concept of check and balance. While, Art. I of the constitution deals with legislative power, Art. II and Art III deal with the Executive and the Judiciary. Art. I explains that the legislative Power is vested in the Congress which comprises of the House of Representatives as the Lower House and the Senate as the Upper House. As “All legislative power herein granted shall be vested in a congress of the United States.” 34 This means that the Congress has the ultimate power to make laws. The U.S Constitution provides for a list of powers such as what Congress can do and what it can not do and what the state can not do. There are eighteen powers listed as the exclusive responsibility of the legislative. 35 But it also has certain restriction of making laws such as it is prohibited to suspend a Writ of Habeas Corpus. 36 However, the third list deals with limitations of power of the states. Under this Article, the states are by the constitution, prohibited to make laws or treaty with any foreign powers. 37 But Art. 3 deals with the Judicial Power and this power is vested in the Supreme Court which is the apex court of the legal system of the U.S. Thus, the Supreme Court has the power of interpretation of laws made by the Congress and considered as the Custodian of the Constitution. But the trouble starts when laws made by the congress are rejected by the Supreme Court and declared it unconstitutional in the U.S. The court of law invokes the Judicial Review. “The American constitutional system of separate institutions sharing power inevitably produces tension between Congress and the Court.” (Davidson & Oleszek: 2006:363) Although the legislative and judicial branches share an affinity- prevalence of legal training- generalization about their interaction are especially difficulty to pin down. (Campbell & Stack Jr.: 2001: 2) The Congress as the legislative branch would always be interested that the judiciary should carry out its assigned task appropriately and faithfully without becoming a check on law making power of the Congress and the Judiciary would be interested in its own existence of interpretation of law and independence of judiciary. The same conflict has taken place between the U.S.

34 Art. I, Sec. 1, The U.S. Constitution.
35 Art. I, Sec. 8, The U.S. Constitution.
36 Art. I, Sec. 9, The U.S. Constitution.
Congress and the U.S Supreme Court when the Patriot Act was passed in 2001. While, the Republicans have been the proponents of the act, the Democrats have opposed it and this is not only the case inside the Congress, but outside the Congress, the Supreme Court too is divided in those lines. The Congressman from Bush Camp are of the view that the court must confine itself to the task assigned to it and it must interpret law as per the intention of the Congress. The Supreme Court serves as both the referee between the two nationally elective branches and as the umpire of federal-state relations (Davidson & Oleszek: 2006: 366) that would be sufficient for the judiciary. The U.S Supreme Court Chief Justice John Marshall was of the opinion that the Constitution is paramount and the duty of the court is to say what the law is. The constitution implicitly grants to the Supreme Court the power to declare actions of state and federal legislatures and executives unconstitutional. This authority inserts the court into the dynamics of the legislative game. (Smith, et al: 2006: 314).

But the U.S. Constitution explicitly declares that the Judicial appointments are to be made within “Advice and Consent” of the Senate. However, The role of partisan interests and ideological moves can not be denied in that advice and consent. Partisan and ideological forces are of course, inextricably linked to the contemporary Congress as the two legislative Parties have diverged ideologically in recent decades. Democrats obstruction of several of Bush’s nominees in the 108th Congress (2003-2004) was similarly attributed to partisan pique (Dodd & Oppenheimer :2005:301).

Besides these, the other techniques the Congress can opt, are the withdraw of Jurisdiction, Impeachment of Judges, fixing size, procedure and salary of Judges and bring an amendment to the conflicting provision. As the constitution provides that “Congress may threaten to withdraw the Supreme Court’s authority to review certain categories of cases (Davidson & Oleszek: 2006: 371). It can bring out an impeachment motion against the judges proving misbehavior and unfit & can fix the size of judges in the court and so also it has power to initiate an amendment to an existing provision in the constitution. But the court of law has not withdrew itself from the game of politics. Besides, choosing the role of referee in the game, it has involved itself with the question of Congressional power and politics. In recent time of ‘Judicial Activism’, the Supreme Court has been able to question some powers

39 Marbury vs. Madison, 1 Cr (5 U.S.) 137 (1803).
40 Little vs. Barreme, (1804), This case is also called as “Flying Fish Case.”
41 Art.II, Sec. 2, The U.S. Constitution.
enjoyed by the Congress. Such as the ‘Commerce Clause’. When the administration argued that Congress has implicit authority from its ability to interpret the commerce clause to regulate firearms for such a public purpose. The court ruled that nothing in the commerce clause or other constitutional provisions authorizes Congress to regulate such behavior, absent compelling evidence that the presence of firearms in school zones has an adverse effect on interstate commerce (Smith, et al: 2006: 319). The court has questioned the investigative power of the Congress also. As the constitutional practice is that the legislative can have a right to seek necessary information regarding a certain law or constitutional question and the court of law is bound by the constitutional provisions to allow it. This does not come within the Judicial Review of the court. So the court has limited option on this. However, the Supreme Court has restricted the power of investigation of Congress by stating that private matters can not be investigated by the Congress. The investigative power of Congress is & confined to public matters.42 Again, the court has been questioning the Congress regarding misuse of campaign funds. The court has said, that limitation on campaign expenditures, as for any restraint on political speech, are constitutional only if some compelling government interest exists. (Smith et al: 2006: 321). The concepts of ‘judge-made-laws’ and ‘judges as the policy-makers’ are other important aspects of judicial control of legislative organ of government. In 2008, the FISA Amendment Act was passed by the Congress. When the Bush Administration changed the clauses of ‘warrant’ and ‘probable cause’ in their search and seizure operations, the court strike it down and upheld that ‘warrant ’is a must to go for ‘search and seizure’ operation by the law enforcement authority.

National Security vs. Human Rights:

The USA PATRIOT Act, 2001 has once again brought the issue of conflict between National Security and Human Rights to the forefront. Once again the attempt to bring an amicable balance between the two has been raised. However, this is not a new task before the Administration. In the last fifty years, almost every administration in the U.S. has either limited the one and expanded the other or expanded the one and limited the other in the interest of their own objective, logic, beliefs and requirements. The measurement has always become a problem for the U.S. Administration. Though,

42 Kilbourn v. Thompson, (1881).
the national security and the human rights breeds germs against one and other but attempts have always been made to find a balance between the two exclusive domains. More over the Bush Administration is not free from this trouble. The National Security strategy of George W Bush too has comprised of a commitment to protection of Human Rights. This means that even, the Bush Administration has tried to bring a balance between national security and Human Rights. But in this balance, it has made national security primary and human rights are secondary. As a result of this, the U.S. Congress has debated seriously on the issue. While, the Patriot Act was being debated in the Congress for reauthorization Senator Evan Bayh (D-Indiana) said “this is the right time to push human rights bill”. But Senator John McCain has led a group of 10 Senators to expedite the law relating to human rights. President Barack Obama also has supported the move and in favour of addressing violations of human rights through out the world. But the stand taken by Independent Senator Joseph Lieberman of Connecticut on human rights violation in relation to Patriot Act implementation has been praiseworthy.

While, to most Republican Congressmen, national security is primary and human rights is secondary issues. So, they have spoken in favour of national security and have given importance to it. But the Democrat Congressmen feel that human rights are no less important, they are part and parcel of the law of the land and that they, must be respected at any cost. As noted human rights supporters Representative Ileana-Ros Lehtinen (R-FL) and Representative Diaz-Balart (R-FL) said about Attorney General John Ashcroft, “We have ample evidence that this man was torturer” The House Representative Henry Hyde (R-IL) too has contributed for the promotion of human rights in the debate of Patriot Act reauthorization. The Republican legislators are of the view that in the hour of attack on their nation, national security is placed in the mind of the men predominantly. They say, “Our destination to uphold the rule of law begins with more effective enforcement, giving our agents the tools and resources they need to protect our sovereignty, completing the border fence quickly and securing the borders, and employing complementary strategies to secure our parts of entry.” In order to protect the nation first, the Republicans have taken the route of rule of law in other words who do not believe in

giving license to illegal drivers and illegal overstayed aliens. For security of the nation protection individual liberties would be secondary. They say, “We must significant increase the size of own Armed Forces, crucial to that goal will be retention of combat veterans”\textsuperscript{45}. Thus, they not only do cheer for their armed forces which are relentlessly trying to protect their nation and sovereignty but they also believe in the idea of ‘Pre-emptive War’.

In order to protect their society from aliens, unscrupulous attackers, and gang of criminals, the Republicans including Senator Barack Obama(D-IL) have pleaded for right to possession of firearms. They defend the right under Second Amendment and criticized those who raise their voice against it. They believe in the fact that national security is the sum total of individual security taken together and, individual security must be given top priority. To them, individual security is the root and national security is the fruit. In preserving and protecting the individual security only the long cherished goal of national security can be realized, otherwise not. The life, liberty and prosperity of Americans are more important than to think about human rights. However, the Democrats do not conform to it, which can be illustrated in the following lines. Senator John Kerry(D-Massachusetts), Senator Barbara Boxer(D-California), Senator Olympia Snowe(R-Maine), Senator Susan Collins(R-Maine), Representative Bill Delahunt(D-Massachusetts), Representative Ted Poe(R-TX), and Jan Schakowsky(D-IL) have been supporters of human rights and violence against women.\textsuperscript{46} The Democrats are of the view that human rights are no meaningless rights which can be implemented or realized at the mercy of an administration or at the wish of a person. The US Constitution also has a liability to protect them as its own prescription. Right from the Declaration of Independence to the adoption of the Constitution, to Codification of the Bill of Rights to the creation of United Nation to the ratification of the Universal Declaration of Human Rights, the US has always given space and relevance to the idea of human rights in the United States and across the World. It has always respected human rights as a nation. Senator Barrack Obama speaking against the racial biasness and faith in Philadelphia said, “Constitution promises liberty, justice to all and faith in decency.”(White 2008). The Countries around the world have viewed the US as the preserver and protector leader of human

\textsuperscript{45} Ibid, p.237.
rights. However, the passing of Patriot Act has undermined human rights of the US. The Democrats, as a political party has always spoken in favour of democracy and social security than national security. They have given importance to and raised questions relating to health care, family welfare, old age pension, education and equality of opportunity. They have favoured a fair trade policy and cutting down of tax for low income groups. On the question of War, they have always warned the Administration against declaring war on Afghanistan and Iraq and pleaded for return of US troops from those countries. In the fight against terrorism, they have opted to go to war field not alone but with the allies of the world. They are those who believe in the value of dialogue and diplomacy. The Democrats also have the first to urge, the US Administration to pursue diplomacy in the case of Iraq and make sure that nuclear weapons are not available in their hands. The Homeland Security will be at the top of their priorities than to deployment of troops out side the U.S. For immigration policy, the Democrats think that work permit should not be stopped. They say, “We need to secure our borders, and support additional personnel, infrastructure and technology on the border and at our ports of entry.” The Democrats want a reformed immigration policy in the U.S, so that the workers in the U.S. would not suffer in the hands of law enforcement authority. Among the other notable issues that the Democrats support unequivocally are end of inhuman treatments on Prisons of War, Captives and Detainees. “We will close the detention camp in Guantanamo Bay, the location of so many of the worst constitutional abuses in recent years,” In the name of fighting against the terrorism, constitutionally guaranteed laws can not be undermined. The Democrats including Senator Patrick Leahy(D-Vermont) say “We support Constitutional protections and judicial oversight on any surveillance program involving Americans. We will review the current Administration’s warrantless wiretapping program. We reject illegal wiretapping of American citizens, wherever they live” Thus, the Democrats have opted to follow the path of human rights than to the path of national security. Their stand on such a issue subsist on this premise that no nation can best realize its national security without and disrespecting its human rights. Therefore, the Democrats have upheld that civil liberties can not be dropped to

make way for national security. Nevertheless, the Democrats controlled Senate and House have passed the Patriot Act in December 2009.

Conservatism vs. Progressivism:

It has been argued that the passing of USA PATRIOT ACT, 2001 and the consequent declaration of war on terrorism, has a root cause of conservatism, among other things. The Bush Administration which has a tradition of following conservative path and linking every aspect of terrorism to traditional belief has been the force behind a stringent patriot Act. The Republicans who Campaign the cause of conservatism and religion lines of thinking believe that terrorism is deep rooted in Islamic religious thinking and such bigotry of Muslims populace make them to create terrorism through out the world. The concept of terrorism advocated by a section or group of fundamentalist Islamists called Jihadis declare it as a Quaranic advice and Muslims follow in the name of god to destroy and devastate the non-Muslims across the world. Such a belief of the Republicans had made them to zero-in on Muslims as terrorists and thereby influenced their every decision. Even through, the conservative lines of thinking is not the realist way of thinking and suffers from dogmatic thinking still, the Republicans find it as an indispensable principle to declare war on terrorism. Newt Gingrich, the former Speaker of the House of Representatives and a noted Republican leader, lined the Declaration of Independence with Christian virtues and Says “We are endowed by our creator with certain inalienable rights among which are life, liberty and pursuit of happiness. This is fundamental to the nature of America. We are the only country in history that says, your personal rights come from god directly to you, and you loan the government sovereignty.” (Gingrich 2009 : 370) This means that rights and liberties are endowed to the human beings by the creator and the state, government, and the authority cannot take them out from the individuals. They are bestowed on them at the birth by their creator and no person or organization has any power to take them out. Favoring the Guantanamo Bay Detention centre, Gingrich says, “Cheney has a fairly simple message – the reason we have Guantanamo is that we have people at Guantanamo that are dangerous. They are called terrorists. We call them terrorist because they want to kill us. It is good not to have them anywhere near us because it makes it harder for them to kill us.” (Gingrich 2009 : 372). This shows that the republican thinking is always centered on keeping the U.S safe but not through liberal exercise of system but through traditional and
conservative style. They relate the state of America to be a creation of Divine Power. The American policy makers and people strongly believe in Social Darwinism: The progressive view is different from the fact that the state is not the divine gift but has been built through the process of evolution of human society. The current President Barrack Obama and Obama as Senator believed that state must run not by the religious fanaticism but by the spirit of constitution and respect for human rights and civil liberties. Many progressive Senators such as Russell Feingold(D-WI), Tom Daschle(D-SD), Patrick Leahy(D-Vermont) and others were those who advocated for building America which would be free from superstition, religion and racial biasness. The president Obama rushed to make those detainees free from detention in Guantanamo Bay of Cuba, no sooner when he became the President of the US. But Obama though a lawyer, has failed and finds difficulty to implement still, there is greater question of law that, is terrorist civil liberty equal to civil liberty? As an enactment of security will automatically curtail the prospect of civil liberties, and an enactment of civil liberties will in the same way restrict the national security. But with a firm legislation and what Hans Gadamer has said an “agreement in understanding”(Palmer 2004) the difference can be sorted out and a balance can be made.

Balancing National Security and Civil liberties

To strike a balance between national security and civil liberties is a most tough job on the part of political leadership and security community including the national bureaucracy. Even though, attempt to balance national security and civil liberties is an old phenomenon, there has always been conflict between them. The enactment of national security legislation has always given rise to a curtailment of civil liberty. As the Washington Post puts it, “It’s always difficult to find the right balance between a citizen’s right to be free and undue government intrusion and a government’s duty to protect national security.”(Washington Post, Date: September 12, 2007). The national security thus, while, goes with law, civil liberty goes with freedom. The national security is an indispensable tool to protect populace from out side attacks. But civil liberty is that condition of human life without which no one can live one’s life. While, security is arranged to keep the nation protected from foreign invasion, but liberty is provided to live in peace and freedom. The security is a remote liberty and liberty is a near security. The basic purpose of both these principles is to look after the
individuals. Again, the controversial statements as given by the scholars and the inevitable conflicts associated with it, makes the issue more difficult to ascertain a conclusion that will be acceptable to all. Therefore, balancing national security and civil liberty is extremely delicate a task to accomplish.

However, “every system of law is the expression and codification of the dominant class interest in any society. This is as much true of national as of international law.” (Jain 2002: 75). When the dominant class interest will be adjusted with the every class interest of mankind, then the problem of balancing would be resolved. So, the conflict between security and liberty can only be resolved by all the three branches of government. In the words of Peter Moskos, “It is the job of our court and legislature to strike the balance between security and liberty.” (Moskos 2004: A17). So, when we are talking about balancing between security and liberty, we are talking about the sphere of activity of state vis-à-vis importance of individual liberties. This is not a new dichotomy. (Dinh 2002: 399). Right from the time of Thomas Hobbes, it has been argued that the state is necessary to provide security to the individuals and individuals in return provide services to the state in the form of duties of law, taxation and military services. John Locke “distinguishes the legislative power, that is, the power which makes general rules, from the executive and federative power. But he does not at all attribute the legislative power to Parliament, and the executive and federative power to the king” (Friederich 1937: 147). He rather, divided the legislative power between the Parliament and the King. Every one has the right to life, liberty and security of person. It is the responsibility of the state to ensure these rights. From this perspective, balancing security and liberty has been inevitable even though, there is conflict between them. The terrorist attacks of 9/11 have brought the business of balancing into forefront again. However, national security and civil liberties can be balanced basically at National or Constitutional Level.

Balancing at the National/ Constitutional Level: Balancing national security and civil liberties at national or constitutional level means bringing an amicable solution to the conflict between the two in the constitution itself. As the conflict begins with the constitution, so it must come to an end with the constitution. This can be done by

applying various constitutional approaches and striking a balancing act at different organs of government in the following manner.

**The Legislative Balancing:**

Legislative balancing can be discussed as under. The Legislature, as the law making branch of government can be responsible for making right laws. It can be strict to carefully crafted legislation only. The law relating to national security should be made in such a style so that the nation can be protected from terrorism on the one hand and civil liberties of citizens would not be violated on the other. The role of House of Representatives and the Senate in the US congress in law making is primary. Both these houses thus, be practical enough to legislate on those areas where the entire state can be protected and at the same time, civil liberties of citizens can also be sustained and preserved. The congressional control of executive and judiciary is tremendous. So, it is the duty of the congress to avoid confrontation with executive and judiciary, but uphold the democratic norms. Again, the power of amendment is with the legislature. It can use this power to weed out anything unwanted from the list of laws.\(^5\) It should work in the interest of public safety and civil liberties. It has the power to question the authenticity of any law and thus, can pave the way for democratic atmosphere in the state. While, Senators like Patrick Leahy (D-Vermont), Senator Tom Daschle (D-SD) and Senator Russell Feingold (D-WI) have struggled to bring a balance in the congressional level itself, Congressman Ron Paul (R-TX) has cautioned the administration with regard to passing of such law thoughtlessly. He said to a Fox News Interview that “there were enough laws on the books to protect the American people from terrorism and that the government has essentially dropped the ball.” However, the views of Senator Chuck Schumer (D-New York) were different as he pleaded for tools in the hands of the law enforcement authority to do surveillance appropriately. And Representative Bob Barr (R-Georgia) emphasizing civil liberties said, “We can and must achieve an appropriate balance between our homeland security and personal security.” Thus, the enactment of Patriot Act has given rise to a new form of legislative tyranny. In the first place, the anti-terrorism measures taken up by the Bush Administration have raised civil liberties concerns. Many US citizens are being harassed in the hands of administration without any terrorist activities or

\(^5\) Art. 1, Sec.8, The US Constitution.
record. As Russell Feingold (D-WI) said, “Americans want to defeat terrorism and they want the basic character of this country to survive and prosper. They want both security and liberty, and unless we give them both, and we can if we try, we have failed.” (Roberts 2006). The wider use of roving wiretaps and the ability to subpoena e-mail records provisions in the Act, in actuality creating problems for the citizens. In May 2002, the Department of Justice declared guidelines letting FBI agents investigating terrorism more freely and allowed them to monitor the Internet and religious and political groups openly. The Justice Department Spokesman Bryan Sierra said, “We would use whatever tools are available to us, within reason, to prosecute violations of law.” (Murry 2003). The actions of government has reached to a stage where, the citizens are coming out openly to protest against the laws. These measures are affecting non-citizens as well. As many as 1,000 unnamed terrorist suspects have been detained so far. Some of them are detained for months. The act allows the enforcement authorities to listen to the conversation between detainees and their lawyers. A large number of men from Middle East are questioned and detained when they entered the US and a number of non-citizens are secretly sent to military custody and tribunals just for an immigration violation. According to figures cited by the Attorney General on December 7, 563 people are being held for violation of their immigration status and another 60 are in federal custody for other reasons. Of these 60, roughly two dozen are being detained as material witnesses (Masci and Marshall 2001 : 1023).

Secondly, whether the act has been made keeping various indispensables constitutional provisions into account has been a matter of debate. Senator Harry Reid(D-Nevada) about the misuse of the Act says, “Ours support for the Patriot Act does not mean a blank check for the president” (Roberts 2006). While, the supporters of the Act believe that constitution is nothing but the national guideline of the people of US. When their national security is at stake, the people can alter their guideline i.e., the constitution. Again, during the time of war, the constitution upholds the national security first including the war on terrorism. Attorney General John Ashcroft has said that the FBI was not able to work satisfactorily due to various restrictions on it in the past especially, when fighting terrorism. But now it’s working properly at the same

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53 Ibid.
time protecting civil rights and personal freedom as well. But this argument has been challenged by libertarians.

As the New York Times has called "the FBI's domestic spying powers draconian." (The New York Times, May 31, 2002: A22). The FBI is empowered now to peep into the affairs of any one, even if, one is not in any way linked to terrorist activities or "even when there is no evidence of illegal activities." (The New York Times, May 31, 2002: A22) Thirdly, the constitution entrusts the "law making power" to the legislature as its primary function and responsibility for the entire federal government and the state units. But it is not that the legislature makes law and leave it for the executive to implement in the way it like or just perform its function and leave it for the executive to do any thing they like. Rather, it keep a watch on every action of the executive closely so that the executive comply appropriately with legislative intent of the law. "The Constitution doesn't provide explicitly any express authority to oversee or investigate the affairs of executive." But it "derives from its "implied" powers in the constitution, public laws, House and Senate rules." It provides for "Congressional Oversight" (the power of careful watch on executive by the legislature) to not only ensure that the executive comply with the legislative intent but to improve the efficiency, effectiveness, and economy of governmental operations, to evaluate program performance, to prevent executive encroachment on legislative prerogatives and powers, to investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse, waste, dishonesty, and fraud, to ensure that executive policies reflect the public interest, to protect individual rights and liberties and other purposes. (Kaiser et al 2007). In other words, the innermost intention of the constitution is that the democratic ideal of check and balance among different organs of government be maintained without any constraints. However, when questions with regard to extension of sunset and amendments concerning civil liberties were raised the congressional oversight remained dormant and gave way to further reauthorization of Patriot Act.

54 Art. I, Sec. 8; Art. II, Sec 2 and Sec. 4, The US Constitution.
The Executive Balancing:

The Legislative is empowered to make laws but the Executive is responsible for implementation of the law. This is the most crucial branch of the government. The executive branch thus, has the primary authority and sole responsibilities for the day to day administration of the Unite States with the help of bureaucracy. But “executive power shall be vested in the President of the United States.” He is not only the Head of the State but also Head of Executive and Legislative, Head of Diplomacy, Army and Economy of the United States. As in this phase, the theory will be made into practical. “It was in the presidency that the “energy” and “vigor” of the new republic fused.” (Quinn 1993: 25). The president of the US is not only the head of the state but he is the chief of armed forces and commandant of warfare, even though, congress declares war and finance the military, chief diplomat of the nation, chief employer of Federal Judges and so on. Thus, it became necessary for the executive to be more careful in enforcing laws relating to terrorism. It must enforce such sensitive law in a human manner and must not enforce what is not ordered. The rule of law is an indispensable part of constitutional process. When we are talking about rule of law, we are talking about the fact that law only rules. It is rule of law and not the rule of man. The logic is that when man rules, corruption breeds because of his personal likings and disliking. As man is partial by nature so he can not be just, only law can be impartial. Again, the US constitution has given enormous power to the President to check and balance the system. The President should act according to the constitution and democratic practices and in no case he should rule with his biasness, even at time of crisis. “The American presidency, as we know it today, is one of the chief products of the political machinery of constitutional inference.”(Skowronek 2009: 2072). Therefore, the role of executive in implementing the act is crucial and accountable.

First, instead of putting a restriction on the USA-PATRIOT Act, 2001 the executive has given enormous power to the FBI. Senator Patrick Leahy (D-Vermont) by demanding the need of sunset to Patriot Act had sought to review of the executive power to award the reauthorization of the Act. (Porter 2009). Another aspect of limiting executive power was highlighted by Senator Russell Feingold (D-WI) when he said, “powers of the federal government must be limited in areas which deal with

56 Art. 2, Sec.2, The US Constitution.
search warrant requirements.” (Porter 2009). Similar sentiment was expressed by Senator Bernard Senders (D-Vermont) by reiterating, “I think the Patriot Act was a mistake and we are trying to undo that” (Porter 2009). Even though, the position of the FBI was restricted by the constitution to deal with the matter more carefully there are conflicting reports. “The FBI Field Officers, for example, were required to get approval from Washington before they could begin investigations. Undercover Agents could not be sent into Churches, Synagogues, or Mosques, unless agents could produce probable cause to believe someone there had committed a crime. There were also restrictions on FBI agents conducting searches of public information, including Internet searches, without probable cause.” (The New York Times, May 31, 2002 : A22). But report indicated that the apex agency handling counter terrorism, now can monitor any public gatherings and send “undercover agents” into houses of worship without prior notice and even without any evidence of possible criminal activities. 58

The FBI now can investigate into the use of Internet also. The FBI was established by John Edgar Hoover. He had used to harass political opponents and civil rights activists including Martin Luther King. 59 He was instrumental in reaching out to personal and ‘secret files’ of many political leaders. 60 He used illegal and unconstitutional methods such as illegal wiretapping to extract the evidence. It was mainly because of his and FBI involvement, suppressing the civil liberties, constitutional liberties, and abuse of power, the tenure of a director of FBI has been reduced to 10 years after his death in 1972 as FBI Director: for more than 37 years.

Though the FBI has restricted right from 1976, not to encroach upon personal rights and liberties of the people, the Patriot Act has almost nullified them. Therefore, not only in “the city of Fairfax of the state of California resolutions are adopted to oppose the Patriot Act and support to the constitutional rights and civil liberties” (Glick 2003) but as many as four States such as “Hawaii, Alaska, Maine and Vermont and 331 cities including New York, Los Angeles, Chicago, Philadelphia” (Raj 2007: 62) have passed resolutions against the Patriot Act.

Second, in the fight against terrorism and as part of investigations, the US authority has detained a number of persons in various custody and military tribunals. The Department of Justice stopped tallying the number itself in 2001 when the total

60 Ibid.
had crossed 1,100. Details about those who were detained had not disclosed initially but subsequently, Attorney General John Ashcroft released information with regard to detainees on their places of birth. There were 548 detainees then and out of 548, Pakistan alone had 208, followed by Egypt 74 and the others were Middle Eastern countries, European and African countries. But now the question arose whether a terrorist can be detained indefinitely and without access to legal procedures? Whether a terrorist suspect can be held without any material evidence on his charge? Or if at all he can be detained, what treatment should be meted out to him? And whether torture is lawful to extract informations etc are some questions which need serious answers. While, the US constitution categorically denied to detain any person both citizens and non-citizens without proper ground of detention. But the Administration went ahead with its own policy of detain under Patriot Act. The constitution states that no person can be detained in police or military custody without a valid reason for more that 24 hours. And such that person will have to be informed by the authority of the ground for which he has been detained. Such a person has constitutional right to seek legal assistance to defend his case. The due process is an important pillar of constitution and democracy which can not be destroyed. Yet, both Republicans and Democrats passed and reauthorized Patriot Act as late as 2009 to uphold the national security rather than balancing national security and civil liberties.

Third, the Bush Administration has come up with roving wiretaps on terrorism suspects. The US law enforcement authority now can tap any phone that a suspect uses. Though, the practice of roving wiretaps has been in use from 1986, but the present law has made it easier on terrorist investigations. But the question arises, can the authority wiretap a conversation between two person or between an accused and his counsel? The constitution strictly prohibits the use of wiretap in any conversations. Unless there is a material evidence and probable cause to do so or there is a legal necessity from the stand point of public safety or national security, no conversation can be interrupted or wiretapped. The right to privacy as an individual person is recognized as Fundamental Right in the constitutions of entire world. Every one has the right to recognition every where as a person before the law. Thus, the

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62 Ibid., p.2.
63 Ibid, p. 3.
law enforcement mechanism should proceed to wiretap, when there is reason to believe that the conversation is anti-national or likely to cause damage to national security and public safety. This would be balancing of national security and civil liberties.

Fourth, investigating into the e-mail accounts of innocent citizens who are in no way related to terrorism would be unconstitutional. The new Act allows investigations to subpoena the addresses of email messages. But critics argue that such expanded measures are violation against Fundamental Rights of citizens. For unreasonable searches and seizures, the constitution states that search warrants must be issued based on ‘probable cause’ and must designate a specific place to be searched.\textsuperscript{65} The constitution categorically declares that there is right to freedom of speech and expression. This right includes the right to send and receive letters and messages without any hindrances. The UNDHR also declares that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impact information and ideas through any media and regardless of frontiers.”\textsuperscript{66} Yet, in determining innocence of a person has a grey-area which the executive has adopted for reasons of national security rather than civil liberty.

\textbf{The Judicial Balancing:}

“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”\textsuperscript{67} Besides the lower courts, “the United States is divided geographically into 12 judicial circuits, including the District of Columbia.”(Mosely 2007: 68). Interpretation of law is the constitutional responsibility of judiciary. The founding father of the US “Hamilton argues that an independent judiciary was essential to a creditable government because no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today.” (Quinn 1993 : 26) Judiciary can only be independent when certain conditions would be created. On the basis of check and balance principle America has reasonably independent judiciary. During extension of sunset provisions and proposed amendments to Patriot Act thus,

\textsuperscript{65} Fourth Amendment Protection, U.S. Constitution.
\textsuperscript{67} Art. III, Sec. I, The US Constitution.
civil liberties could be well protected, but the FBI and the DOJ did not accept the changes initiated by Judiciary Committee Chairman Patrick Leahy (D-Vermont) and Senator Russell Feingold (D-WI). The FBI is being granted extraordinary authority again under the Act to conduct roving wire taps (Sec.206), investigating business records (Sec.215) and “Lone Wolf” provisions. While, Russell Feingold criticized it saying “overly differential to executive branch desires.” 68 Senator Jeff Sessions (R-Alabama) said, “the changes had been requested by executive branch officials.” 69 As a result Democrats like Senators Russell Feingold (D-WI), Richard Durbin (D-Illinois), and Arlen Specter (D-Pennsylvania) did not think it fit to vote in favour of the Bill. However, later on, even though, Patrick Leahy and Jeff Sessions lauded the compromising position of Patriot Act but Senators John Cornyn (R-TX) and Jon Kyl (R-Arizona) failed to do so.

**Balancing at Social Justice:**

The aspect of social justice was debated in the US congress and significantly Senator Sherrod Brown (D-Ohio), Senator Amy Klobuchar (D-Minnesota), Senator Ben Cardin (D-Maryland) and Senator Sheldon Whitehouse (D-Rhode Island) who have not only contributed for social justice but challenged the Patriot Act relating to social and ethnic profiling. Right from the 9/11, a systematic discrimination is carried out against Muslims and Arabs either by their names, the dress they wear, or looks by the police to which Representative Kurt Eckhardt (R-Chicago) called as “Islamophobia”, a remark for which she was criticized. 70 Even though, the Bush Administration has prohibited the law enforcement to discriminate and harass any citizens because of their faith, looks, languages and culture but the police and the FBI have not taken it seriously. The Patriot Act has been criticized for antipathy towards other fellow citizens. The “Spying Powers” as given to law enforcement mechanism to study their personal behaviour has been questioned by many including the Chairman of the House Judiciary Committee John Conyers Jr. (D-Michigan) (Kravets : 2009). Other Representatives who have questioned the authenticity of National

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69 Ibid.

70 Civil Liberties and Social Justice, Combating Islamophobia and anti-Semitism, Jewish-Muslim Community Building Initiative, (JCUA). Available at http://jmcbi.webnode.com/justice/
Security Letters have also joined Conyers are Representative Jerrold Nadler (D-NY) and Representative Bobby Scott (D-Virginia), (Kravets: 2009).

**Balancing the Patriot Act Democratically:**

Democracy is considered to be the best form of government and governance. Although the Patriot Act was passed by the US Congress, the executive as enforcing agency of Patriot Act has restricted many democratic ideals such as freedom of expression, freedom of thought, freedom of dissent and disagreement and equality in the eyes of law. Even though, many Senators such as Orrin G. Hatch (R-Utah), his fellow Senator Robert Bennett (R-Utah) and Senator Joseph Lieberman (I-CT) have upheld democracy to be the best practice, but the Bush administration has used democracy against its rivals and so called enemies. As “killing in the name of democracy has a long and sordid history”\(^{71}\), in his war against terrorism, “President George W. Bush perpetually invokes the goal of spreading democracy to sanctify his foreign policy.”\(^{72}\) While, Representatives like Gary Ackerman (NY), Howard Berman (CA), and Tammy Baldwin (WI) have supported the voice of people as indispensable part of “Public Opinion”, many Senators including Senator Barbara Boxer (CA), Jeff Bingaman (NM), Robert Casey (PA) and Jon Tester (MT) have endorsed it. However, the security and liberty does not conflict against one another in democratic state, but they exist with one another peaceably. Democratic values are supporters of civil liberties thus, democracy is the best state to enjoy civil liberties appropriately but it also faces dilemma in a security challenged situation.

In India, the Prevention of Terrorism Act, 2002, dealt with terrorist activities with stern. Although, this Act is revoked it had permission under which who ever commits a terrorist act shall be punishable with death or imprisonment for life.\(^{73}\) Thus, terrorism is recognized world wide as a heinous crime against humanity. It can be committed by an individual or a group of individuals or even by a state. But of all these types, the state terrorism or the state sponsor terrorism which is committed for the achievement of a political / religious goal is most dangerous. So, terrorism as a matter of fact is spread through out the world even though, the breeding place of terrorism or factory of terrorism is almost identified in the Middle East and South

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\(^{72}\) Ibid.

\(^{73}\) The Prevention of Terrorism Act, 2002, Sec-3(a) and (b).
Asia. Even though, majority Congress was behind Bush's declared war against Iraq, but a lot many Senators dared enough to vote against such a move. Senators including Ben Cardin (D-Maryland), Sherrod Brown (D-Ohio), Jeff Bingaman (New York), and Debbie Stabenow (D-Michigan) were those among 23 Senators who voted against Iraq war. Civil liberties or personal liberties of people need not to be ignored while, fighting against terror. Tom Ridge, Secretary of Homeland Security, US, said, “Though hardly a new phenomenon, fear and terror have always been the weapons wielded by those who would oppress the innocent and enslave the free” (Ridge 2005).

Today, talking about balancing security and liberty appears to be defeating liberty at the hand of security. This is certainly not because the world is experiencing a stringent national security policy or the U.S. is in favour of national security even at the cost of civil liberties but because people are slowly coming to term with security. They slowly relinquishing or in a position to bestow their liberty on security. In a world of hypothetical fear of post 9/11, people are ready to give away their basic liberties for national security. In such a situation, balancing national security with civil liberties is challenging task. Politics in the present world is dominated not by diplomatic or trade related talks but by fear. So long as fear would prevail upon a state, there can never be any atmosphere of liberty. When future is seen in terms of threats, protecting civil liberties becomes uncertain. The U.S. Vice President Dick Cheney said that another attack is a matter, not of if, but when (Chandler 2004). This fearful mind was of course, not came as a result of terrorist attacks of 9/11 but the world’s growing apprehension day by day. No liberty can be protected so long as there would be fear and apprehension in the society. As Michael Mandelbaum has aptly observed that “A Public good is something the benefits of which no potential consumer can be prevented from enjoying”. “National defense, clear air and water are three examples”. He says, “The essence of global leadership is to pay more for public goods” (Mandelbaum 2005: 66). Or else, there would be chaos and confusion.

Second, the act has not only affected the non-citizens or aliens or any political groups but has been able to erode many essential liberties of U.S. citizens as well. Many world organizations and advocates of democratic principles have criticized the Patriot Act. The American Civil Liberties Union (ACLU), The Free Expression Network, the North Carolina Academy of Trial Lawyers, The People for the American Way, another notable civil liberty organization also has showed its anguish
over the act. The organization also supported the legislation of SAFE Act, 2003. The Security and Freedom Ensured (SAFE) Act of 2003 which was introduced in the Senate to target some worse excesses of the USA -PATRIOT Act, 2001. The Electronic Frontier Foundation, The American Booksellers Association (ABA), The PEN American Center, The American Library Association (ALA) The association stands for right to privacy and recently has joined the Campaign for Reader Privacy against the USA PATRIOT Act, 2001. The Association of American Publishers (AAP). the U.S. Publishers are committed to human rights and spread of knowledge. The Association of American Publishers is critical of Section.215 of the act, which violates First Amendment. The National Association for the Advancement of Color People (NAACP) is a known civil liberties organization which has raised issues relating to civil rights and liberties in the act. The Benjamin Franklin True Patriot Act, 2003 (H.R. 3171) was introduced in the House on 4th September 2003 to review the USA-PATRIOT Act, 2001. But the bill referred to sub-committees for consideration without any action was taken on it, (before the 108th Congress). And it has many important supporters, including the ACLU, the NAACP and such other organization A number of other organizations which are highly critical of the USA PATRIOT Act, 2001 are the Electronic Privacy Information Center and the Center for Democracy and Technology, which have raised issues relating to cyberspace and other technology which are violated by the act. The Rutherford Institute, and the Bill of Rights Defense Committee, the Amnesty International and the Human Rights Watch have questioned the very authenticity of different provisions of the Act with regard to detention, unwarranted arrest, ill-treatment of captives and detainees, physical torture, inhuman punishments, and defying the process of international law are significant.

All these NGOs’ raising of the issue of balancing national security and civil liberties have been possible primarily because in USA there exists functioning democracy and democratic governance.

76 Ibid.
77 Benjamin Franklin True Patriot Act, From Wikipedia, the free encyclopedia, URL: http://en.wikipedia.org/wiki/Benjamin_Franklin_True_Patriot_Act USA- Pa