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# POTA: LESSONS LEARNED FROM INDIA'S ANTI-TERROR ACT

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**Abstract:** Shortly after the September 11 terrorist attacks in the United States, India passed its own anti-terrorism ordinance, the Prevention of Terrorism Act (POTA), following a terrorist attack on India's Parliament building in December 2001. As with the USA PATRIOT Act, Indian legislators acted quickly, declaring the Act to be a necessary weapon against terrorism. But POTA, like the USA PATRIOT Act, had detractors, who criticized the law as unnecessary and draconian. Among other potentially dangerous measures, POTA allowed for 180-day detentions without charge, presumptions of guilt, sketchy review procedures, summary trials and trials in absentia. In many ways, POTA was harsher than the USA PATRIOT Act, but then again, so is India's terrorist threat. In September 2004, a new central government repealed POTA, but other vigorous anti-terror laws are likely to follow. This Note evaluates the most dangerous provisions of POTA, how officials abused those provisions, and what lessons India and the United States can learn from the experience.

## INTRODUCTION

The terrorist attacks of September 11, 2001 sent shockwaves of fear and insecurity far beyond the borders of the United States. India in particular had reason to be afraid, and its fear was not merely for the 250 Indian citizens who were trapped in the burning towers of the World Trade Center.<sup>1</sup> As a nation already at war with terror, it was clear that the struggle was about to get harder.<sup>2</sup> Since gaining independence fifty years ago, India has seen the assassination of its most prominent civil rights leader, a prime minister, a former prime minis-

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\* Articles Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2004–2005).

<sup>1</sup> See His Excellency Kamlesh Sharma, Permanent Representative of India to the United Nations on Measures to Eliminate Terrorism (Agenda Item 166) Statement at the Plenary of the Fifty-sixth Session of the General Assembly ¶ 3 (Oct. 3, 2001), at <http://meaindia.nic.in/disarmament/dm03oct01.htm> [hereinafter Measures to Eliminate Terrorism]. See generally H.E. Atal Behari Vajpayee, Prime Minister of India, Address to the Nation on Terrorist Attacks on the United States (Sept. 14, 2001), at [http://www.indianembassy.org/special/cabinet/primeminister/pm\\_september\\_14\\_2001.htm](http://www.indianembassy.org/special/cabinet/primeminister/pm_september_14_2001.htm) [hereinafter Prime Minister's Address].

<sup>2</sup> See Measures to Eliminate Terrorism, *supra* note 1, ¶ 3. See generally Prime Minister's Address, *supra* note 1.

ter, and a retired Army chief.<sup>3</sup> Moreover, for over ten years, India has been fighting insurgents in Kashmir, including Islamic radicals from Pakistan and Afghanistan.<sup>4</sup> As of the fall of 2001, terrorists in Kashmir had killed thousands of civilians, policemen, and Indian soldiers, and violence raged on.<sup>5</sup> Add to these concerns the continued separatist violence in India's northeast, the potential threat of the Tamil Tigers in the south, and the existence of an organized, international crime network distributing weapons and explosives to all of the above, and it is unsurprising that government officials felt compelled to act swiftly and forcefully in the wake of Al Qaeda's assault on the United States.<sup>6</sup>

<sup>3</sup> See ROBERT PAYNE, *THE LIFE AND DEATH OF MAHATMA GANDHI* 624, 634 (1969) (discussing assassination of Mahatma Gandhi); M.C. Jain, *Introduction: Interim Report on the Jain Commission of Inquiry on the Assassination of Shri Rajiv Gandhi, Former Prime Minister of India on 21st May, 1991 at Sriperumbudur*, ¶ 1 (Aug. 1997), available at <http://www.india-today.com/jain/vol5/chap14.html> (discussing former Prime Minister Rajiv Gandhi's assassination by a Tamil suicide bomber); Manoj Joshi, *Combating Terrorism in Punjab: Indian Democracy in Crisis*, 261 CONFLICT STUD. 1 (May 1993) (discussing the assassination of a former Army chief and Prime Minister Indira Gandhi).

<sup>4</sup> See *The Current Crisis in South Asia: Hearing Before the Subcomm. on the Middle East and S. Asia of the Comm. on Int'l Relations H.R.*, 107th Cong. at 10 (2002) (statement of Michael Krepon, Founding President, The Henry L. Stimson Center) [hereinafter *The Current Crisis in South Asia*]; EMBASSY OF INDIA, 2001–2002 INDIA & THE WORLD 8–10, available at [http://www.indianembassy.org/policy/Foreign\\_Policy/2002/2002.pdf](http://www.indianembassy.org/policy/Foreign_Policy/2002/2002.pdf) (last visited Oct. 20, 2004) (presenting official Indian data on the Jammu and Kashmir conflict). Violence in the Indian state of Jammu and Kashmir has raged for years, gaining particular momentum in 1989, and no end is in sight. See *The Current Crisis in South Asia*, *supra*, at 10–12. Muslim separatists in the region, allegedly supported by Pakistan, catalyzed three wars between India and Pakistan, including a brief but intense border conflict in 1999, raising fears in Washington of a nuclear crisis. *Id.* at 17 (statement of Amit A. Pandya, Senior Fellow for S. Asia, Inst. for Global Democracy); *India and Pakistan: The Elephant and the Pekinese*, ECONOMIST, Mar. 18, 2000, at 25. The violence in Kashmir, combined with the nuclear capabilities of India and Pakistan prompted President Bill Clinton to declare South Asia “the most dangerous place in the world.” *India and Pakistan: The Elephant and the Pekinese*, *supra*, at 25.

<sup>5</sup> See 2003 J&K MILITANCY DATA (Jammu and Kashmir Dep't of Info. and Pub. Rel.), available at <http://jammukashmir.nic.in/normalcy/welcome.html> (last visited Oct. 20, 2004) (showing thousands killed in Kashmir); Measures to Eliminate Terrorism, *supra* note 1, ¶¶ 2, 3; K. SANTHANAM ET AL., *JIHADIS IN JAMMU AND KASHMIR: A PORTRAIT GALLERY* 32 (2003) (showing timeline of terrorist activities following September 11, 2001); Navnita Chadha Behera, *Kashmir: Redefining the U.S. Role*, 110 BROOKINGS INST. FOREIGN POL'Y STUD. POL'Y BRIEF 2, 2–4 (2002), available at <http://www.brookings.edu/comm/policy/briefs/pb110.htm> (discussing terrorist activity post-September 11); John F. Burns, *Gunmen Kill 25 Hindus in Kashmir Attacks*, N.Y. TIMES, June 20, 1998, at A3 (discussing thousands killed in Kashmir); Tavleen Singh, *Striking Terror Whether in the US or Kashmir, It's Time To Stop Compromising on Terrorism*, INDIA TODAY, Sept. 24, 2001, at 21, available at 2001 WL 2176651 (discussing terrorist threat in Kashmir on September 11, 2001).

<sup>6</sup> See, e.g., LAW COMMISSION OF INDIA, 173RD REPORT ON PREVENTION OF TERRORISM BILL, 2000 § II 1.5–9 (2000), reprinted in L.K THAKUR, *ESSENTIALS OF POTA AND OTHER HUMAN RIGHTS LAWS* 58–60 (2002) (citing over 2000 militant-related deaths in the northeast region of India during the late 1990s); 2001 PATTERNS OF GLOBAL TERRORISM 10–11,

India's Union Cabinet issued the Prevention of Terrorism Ordinance (POTO) in October 2001.<sup>7</sup> The central government claimed its action was a response to "an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country."<sup>8</sup> The ordinance granted state law enforcement sweeping powers to investigate, detain, and prosecute for a wide range of terrorist-related offenses.<sup>9</sup> Most notably, POTO targeted those who allegedly incited, supported, abetted, harbored, concealed, or benefited from the proceeds of terrorism.<sup>10</sup>

To some, POTO bore an ominous resemblance to the notorious Terrorist and Disruptive Activities (Prevention) Act (hereinafter TADA), which lapsed in 1995 after years of abuse.<sup>11</sup> Despite some initial criticism, however, events in India soon made POTO an apparent necessity to the ruling coalition and many other legislators.<sup>12</sup> On December 13, 2001, Muslim terrorists, allegedly backed by Pakistan, attacked the Indian parliament in a failed attempt to assassinate legislators.<sup>13</sup> The

(U.S. Dept. of State), available at <http://www.state.gov/documents/organization/10319.pdf> (citing various terrorist threats in India); Jain, *supra* note 3, ¶ 1 (discussing the Tamil Tigers); THAKUR, *supra*, at 1–3 (discussing the rising threat of organized crime and arms trafficking). The Tamil Tigers (also known as the Liberation Tigers of Tamil Elam (LTTE)) is a notoriously violent Sri Lankan separatist group that was responsible for the assassination of former Prime Minister Rajiv Gandhi. See Jain, *supra* note 3, ¶ 1.

<sup>7</sup> THAKUR, *supra* note 6, at xii.

<sup>8</sup> SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, PREVENTION OF TERRORISM ORDINANCE 2001: GOVERNMENT DECIDES TO PLAY JUDGE AND JURY 13 (2001) (quoting Union Home Ministry).

<sup>9</sup> See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 5–9.

<sup>10</sup> Prevention of Terrorism Ordinance, 2001, § 3(1)–(8), reprinted in SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 40–41 (2001).

<sup>11</sup> See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 15; THAKUR, *supra* note 6, at 4; TADA in *New Garb*, TRIBUNE (India), Oct. 18, 2001, ¶ 1, available at <http://www.tribuneindia.com/2001/20011018/edit.htm#1>.

<sup>12</sup> See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 2–3; *11 Killed in Attack on Parliament*, TRIBUNE (India), Dec. 13, 2001, available at <http://www.tribuneindia.com/2001/20011213/main8.htm> (reporting terrorist attack on India's Parliament on December 13, 2001); Jyotsna Singh, *India Launches Anti-Terror Law*, BBC NEWS, ¶ 2 (Oct. 25, 2001), at [http://news.bbc.co.uk/1/hi/world/south\\_asia/1619870.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1619870.stm) (reporting criticism of POTO); TADA in *New Garb*, *supra* note 11, ¶ 1 (criticizing POTO). In response to a terrorist attack on India's Parliament on December 13, 2001, the Union Cabinet declared, "[w]e will liquidate the terrorists and their sponsors wherever they are, whoever they are. . . . The assault is yet another reminder that each of us must measure the issue we take up against the challenge that confronts the country." Union Cabinet of India, Resolution on the Terrorist Attack on Parliament House, ¶ 1 (Dec. 13, 2001), at [http://www.indianembassy.org/new/parliament\\_dec\\_13\\_01.htm](http://www.indianembassy.org/new/parliament_dec_13_01.htm) [hereinafter Union Cabinet of India].

<sup>13</sup> See H.E. Lal Krishna Advani, Indian Home Minister, Statement on the Terrorist Attack on Parliament House, ¶¶ 1, 2 (Dec. 18, 2001), at <http://www.indianembassy.org/>

Cabinet condemned the attack as targeting “the very heart of our system of governance, on what is the symbol and the keystone of the largest democracy in the world.”<sup>14</sup> Three months later, during a rare joint session convened at the Prime Minister’s request, the temporary ordinance became the Prevention of Terrorism Act (POTA).<sup>15</sup>

After the legislature passed POTA in March of 2002, the Indian media and human rights groups observed and criticized frequent abuses of the law, including hundreds of questionable and prolonged detentions with no formal charges filed.<sup>16</sup> The most visible of these involved political figures arrested by rivals in control of state law enforcement machinery.<sup>17</sup> Most abuses arising in the form of prolonged detention without charges, however, went unreported, as the targets were often members of disempowered minorities lacking a forum in which to voice the mistreatment.<sup>18</sup> Detainees languished in jail for weeks or months while the wheels of India’s overburdened criminal

new/parliament\_dec\_13\_01.htm; *Parliament Suicide Attack Stuns India*, BBC NEWS (Dec. 13, 2001), at [http://news.bbc.co.uk/1/hi/world/south\\_asia/1708853.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1708853.stm).

<sup>14</sup> Union Cabinet of India, *supra* note 12, ¶ 1.

<sup>15</sup> *Two Pak-Backed Outfits Banned Under POTA*, TRIBUNE (India), Apr. 1, 2002, available at <http://www.tribuneindia.com/2002/20020402/nation.htm#1>. See generally Prevention of Terrorism Act, 2002, No. 15 (India), reprinted in THAKUR, *supra* note 6, at 7–52. This Note refers to provisions and criticism of POTO interchangeably with those of POTA, because they are nearly identical.

<sup>16</sup> See, e.g., AMNESTY INT’L, ABUSE OF THE LAW IN GUJARAT: MUSLIMS DETAINED ILLEGALLY IN AHMEDABAD 1–2 (Nov. 6, 2003), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/ASA200292003ENGLISH/\\$File/ASA2002903.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ASA200292003ENGLISH/$File/ASA2002903.pdf) (discussing illegal detention of Muslim minority and disregard for POTA safeguards) [hereinafter ABUSE OF THE LAW IN GUJARAT]; Human Rights Watch, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide, Briefing Paper for the 59th Session of the United Nations Commission on Human Rights* 15 (Mar. 25, 2003), available at <http://www.hrw.org/un/chr59/counter-terrorism-bck.pdf> (discussing detention of political figures, children, and the elderly) [hereinafter *In the Name of Counter-Terrorism*]; George Iype, *Terrorising the Politicians*, REDIFF.COM (India), ¶¶ 2, 10 (Aug. 14, 2002), at <http://www.rediff.com/news/2002/aug/14spec.htm> (citing 257 POTA arrests across India as of August 2002, including the arrest of a Tamil Nadu politician).

<sup>17</sup> See Ajay Uprety, *Playing a Crafty Game: Mayawati Kicks Both Friend and Foe on the Shin*, WEEK (India), ¶¶ 10–14 (Feb. 9, 2003), at <http://www.the-week.com/23feb09/events9.htm> (discussing political detainees in the state of Uttar Pradesh); Purnima S. Tripathi, *Coalition Troubles*, FRONTLINE (India), Mar. 1–14, 2003, ¶¶ 3–5, available at <http://www.frontlineonnet.com/fl2005/stories/20030314004204000.htm> (discussing political detentions in Uttar Pradesh); *Selective Use of POTA*, HINDU (India), Apr. 1, 2003, ¶¶ 1, 2, available at <http://www.hinduonnet.com/thehindu/2003/04/01/stories/2003040100391000.htm> (discussing political detentions in the states of Tamil Nadu and Uttar Pradesh).

<sup>18</sup> See ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2; *In the Name of Counter-Terrorism*, *supra* note 16, at 15–16; Manoj Prasad, *A 14-Year-Old Tells You What POTA Means to the Poor*, INDIAN EXPRESS, Mar. 29, 2003, ¶¶ 1, 6, 7, 8, 11, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=21041](http://www.indianexpress.com/full_story.php?content_id=21041).

justice system creaked slowly along.<sup>19</sup> Despite the existence of special courts to expedite the process, at least in theory, they did little to counter POTA's permissive stance on such lengthy incarcerations.<sup>20</sup> Provisions for oversight were similarly impotent.<sup>21</sup> Some of these problems stemmed from the law's broad text, while others were rooted in its enforcement.<sup>22</sup>

In September 2004, a new central government repealed POTA, but other vigorous anti-terror laws are likely to follow.<sup>23</sup> India's experience under POTA is a cautionary tale from which both Indian and U.S. lawmakers might learn. This Note examines how certain provisions of POTA lent themselves to abuse and suggests ways to avoid similar abuses in future anti-terror laws, wherever they may be written and applied. Part I of this Note describes the tools India used prior to POTA to combat terrorist threats throughout the country. Provisions of POTA that are particularly susceptible to abuse are examined in Part II. Part III focuses on how law enforcement officials and politicians misused or abused POTA during the past two years, particularly with improper arrests, prolonged detentions, and ineffective oversight. Part IV examines how the Indian government can avoid some of POTA's shortcomings in the future. Finally, Part V considers the lessons the United States can and should draw from India's experience with POTA.

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<sup>19</sup> See ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2; *In the Name of Counter-Terrorism*, *supra* note 16, at 15–16; Prasad, *supra* note 18, ¶¶ 1, 6, 7, 8, 11.

<sup>20</sup> See Prevention of Terrorism Act, 2002, No. 15 (India), §§ 23, 29, 49, *reprinted in* THAKUR, *supra* note 15, at 23–27, 43–45.

<sup>21</sup> See Prevention of Terrorism Act, §§ 24 (2)–(3), 34, 40, 60 *reprinted in* THAKUR, *supra* note 6, at 25–26, 31–32, 36, 48–49 (establishing review procedures); ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2 (discussing prolonged detention, torture, and disregard of POTA safeguards). See generally V. Venkatesan, *POTA Prospects*, FRONTLINE (India), Mar. 30–Apr. 12, 2002, *available at* <http://www.frontlineonnet.com/fl1907/19070220.htm> (discussing POTA's safeguards) [hereinafter *POTA Prospects*].

<sup>22</sup> See Prevention of Terrorism Act, §§ 3–5, 49, *reprinted in* THAKUR, *supra* note 6, at 43–44 (broadly defining terrorist offenses and permitting prolonged detention without charge); ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2 (discussing prolonged detention, torture, and disregard of POTA safeguards); *In the Name of Counter-Terrorism*, *supra* note 16, at 15 (discussing ineffectiveness of POTA safeguards as applied).

<sup>23</sup> See J. Venkatesan, *President's Nod for Ordinance to Repeal POTA*, Sept. 21, 2004, HINDU (India), ¶1, *available at* <http://www.hindu.com/2004/09/22/stories/2004092207420100.htm>. In addition to repealing POTA, the Indian government passed an ordinance to amend an existing law to replace POTA. See V. Venkatesan, *POTA Reinvented*, FRONTLINE (INDIA), Oct. 23–Nov. 5, 2004, ¶5 *available at* <http://www.frontlineonnet.com/fl2122/stories/20041105004811000.htm>. The amended law immediately drew criticism for not doing enough to solve POTA's problems. See *id.*

## I. POTA IN CONTEXT: FIGHTING TERROR ON THE SUBCONTINENT

POTA was only India's latest tool in combating the continually evolving terrorist threat, which has emerged in several parts of the country since its independence from Great Britain in 1947. One of India's earliest terrorist experiences is also one of its most notorious: the assassination of Mahatma Gandhi by a Hindu extremist on January 31, 1948.<sup>24</sup> Subsequent terrorist attacks involved large and persistent regional groups fighting for secession.<sup>25</sup> As a large, multi-ethnic, post-colonial nation still in development, India is particularly vulnerable to violent political movements predicated upon geography, ethnicity, language, and religion.<sup>26</sup>

To preserve public order and national security, India's Constituent Assembly drafted the Constitution of India to grant explicitly to state and federal legislatures the power to enact laws providing for preventative detention.<sup>27</sup> This practice involves incarcerating individuals based upon the suspicion that such individuals may commit a crime in the future.<sup>28</sup> Both central and state governments incorporated preventative detention provisions—albeit subject to certain constitutional safeguards—in several pieces of legislation throughout India's turbulent history. For example, during a decade of gruesome terrorist violence in the State of Punjab, the central government passed the National Security Act (NSA) and TADA, both of which permitted preventative detentions under broadly defined conditions.<sup>29</sup> Similarly, in Jammu and Kashmir, the state government passed

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<sup>24</sup> See PAYNE, *supra* note 3, at 618, 633–34.

<sup>25</sup> LAW COMMISSION OF INDIA, § II 1.5–9, *reprinted in* THAKUR, *supra* note 6, at 56–60 (discussing terrorism in Jammu and Kashmir, Punjab, and northeastern India); Jain, *supra* note 3, ¶ 1 (discussing the Tamil Tigers).

<sup>26</sup> See U.S. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2004*, 249 (2003) [hereinafter *WORLD FACTBOOK*]; PETER HEEHS, *NATIONALISM, TERRORISM, COMMUNALISM: ESSAYS IN MODERN INDIA* 135 (1998); PAUL WILKINSON, *TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE* 24 (2002). Although liberal democracies are intrinsically vulnerable to terrorism, developing countries are most at risk of terrorist violence erupting into civil wars. WILKINSON, *supra*, at 25. International relations scholar Paul Wilkinson warns that “[i]t is absurdly parochial and dangerously misleading to pretend that terrorism is solely of concern to rich Western democracies. It is a far graver threat to human rights and well-being in the emerging democracies of the ‘Third’ and ‘Second’ worlds.” *Id.* at 24.

<sup>27</sup> See INDIA CONST., pt. III, art. 22(7), pt. XXI, art. 373; Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventative Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 324–25 (2001).

<sup>28</sup> See INDIA CONST., pt. III, art. 22(7), pt. XXI, art. 373; Jinks, *supra* note 27, at 324–25.

<sup>29</sup> See National Security Act, 1980, § 3(2), *reprinted in* D.S. SHUKLA, *THE PREVENTION OF TERRORISM ACT, 2002 (POTA)* 383 (2002); Terrorist and Disruptive Activities (Prevention) Act, 1987, No. 28, § 7(1), *reprinted in* THAKUR, *supra* note 6, at 217; KSHITIJ PRABHA, *TER-*

the Jammu and Kashmir Public Safety Act of 1978 (PSA), which contained equally harsh preventative detention provisions.<sup>30</sup> Although several preventative detention laws have since expired, the NSA and PSA remain operative.<sup>31</sup>

In extreme cases, the Indian government has employed the military to combat terrorism. The Armed Forces (Assam and Manipur) Special Powers Act of 1958 allowed the state governor of Assam and Manipur to declare all or part of the state a "Disturbed Area," wherein military officers had discretion to kill armed individuals or groups and to conduct searches and arrests without warrants.<sup>32</sup> The Indian

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RORISM: AN INSTRUMENT OF FOREIGN POLICY 78–79, 90 (2001) (discussing terrorist violence in Punjab and remedial legislation); Joshi, *supra* note 3, at 1 (discussing separatist violence in Punjab). The government passed many other anti-terrorism laws in Punjab in addition to the NSA and TADA. PRABHA, *supra*, at 90. TADA permits the central government to confer upon police within any state the power to arrest people "for the prevention of, and for coping with, any offence" listed in the sweeping statute, including many that merely involve speech. Terrorist and Disruptive Activities (Prevention) Act, §§ 4, 7(1), *reprinted in* THAKUR, *supra* note 6, at 214–17. The NSA permits police to detain a person virtually indefinitely in order to "prevent[] him from acting in any manner prejudicial to the security of the state government or . . . the maintenance of public order or . . . the maintenance of supplies and services essential to the community." National Security Act, §§ 2(2)–(3), *reprinted in* SHUKLA, *supra*, at 383. Though harsh, the provisions for preventative detention are somewhat understandable given the extent of violence in Punjab at the time of their passage. *See* Joshi, *supra* note 3, at 1. Terrorist atrocities in Punjab included the mass murder of minority Hindus, train shootings, bombings, kidnappings, and beheadings. *See id.* at 8, 11; PRABHA, *supra*, at 79. Disturbingly, the Indian Army and police forces were themselves responsible for excessive and indiscriminate violence and custodial killings. *See* Joshi, *supra* note 3, at 6, 12, 14–15; CYNTHIA KEPPELY MAHMOOD, FIGHTING FOR FAITH AND NATION: DIALOGUES WITH SIKH MILITANTS 10 (1996); JOYCE J.M. PETTIGREW, SIKHS OF THE PUNJAB: UNHEARD VOICES OF STATE AND GUERRILLA VIOLENCE 104 (1995).

<sup>30</sup> *See* Jammu and Kashmir Public Safety Act (PSA) (1978), § 8, Human Rights Centre, Queen's University Belfast, *available at* <http://www.law.qub.ac.uk/humanrts/emergency/india/ind5.htm> (as of Oct. 20, 2004). Under the PSA, police need no court order to detain individuals as punishment or to prevent them from "acting in any manner prejudicial to the security of the state or the maintenance of public order." *Id.*; *see also* Human Rights Watch, *Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue*, ¶¶ 10, 16 (July 1999), *at* <http://www.hrw.org/reports/1999/kashmir/judiciary.htm> (citing several instances where the law was abused) [hereinafter *Behind the Kashmir Conflict*].

<sup>31</sup> Jinks, *supra* note 27, at 327. *See J&K Panel Reviews Cases of Public Safety Act Detainees*, HINDU (India), Jan. 30, 2004, ¶ 1, *available at* <http://www.hindu.com/2004/01/30/stories/2004013003731200.htm>.

<sup>32</sup> Armed Forces (Assam & Manipur) Special Powers Act (1958), No. 28 (India), §§ 3, 4, *available at* [http://www.satp.org/satporgtp/countries/india/document/actandordinances/armed\\_forces\\_special\\_power\\_act\\_1958.htm](http://www.satp.org/satporgtp/countries/india/document/actandordinances/armed_forces_special_power_act_1958.htm) (as of Apr. 17, 2004).

government later invoked variants of this law in both Punjab and Jammu and Kashmir.<sup>33</sup>

Thus, given its history of turbulence, it is not surprising that India's latest anti-terror law was more ruthless than its U.S. counterpart.<sup>34</sup> POTA was more moderate, however, than India's prior national security laws.<sup>35</sup> It neither involved the military nor provided explicitly for preventative detention, although it did resurrect large portions of TADA.<sup>36</sup> Other provisions, however, such as those permitting prolonged detentions with minimal judicial oversight, were virtually as dangerous.<sup>37</sup>

<sup>33</sup> The Armed Forces (Jammu and Kashmir) Special Powers Act (1990), No. 21 of 1990, available at [http://www.satp.org/satporgtp/countries/india/states/jandk/documents/acts\\_andordinances/J&K\\_Specialpoweract.htm](http://www.satp.org/satporgtp/countries/india/states/jandk/documents/acts_andordinances/J&K_Specialpoweract.htm) (as of Apr. 17, 2004); PRABHA, *supra* note 29, at 90.

<sup>34</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act]; Prevention of Terrorism Act, 2002, No. 15 (India), §§ 29, 49, 53, *reprinted in* THAKUR, *supra* note 6, at 27-28, 43-44, 46-47; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 5-9 (citing broad terrorist offenses based on speech and association, presumptions of guilt based on certain evidence, special anti-terror courts, trials in absentia, detention without charge for up to 180 days, and severe bail restrictions).

<sup>35</sup> See Prevention of Terrorism Act, §§ 29, 49, *reprinted in* THAKUR, *supra* note 6, at 27-28, 43-44 (stipulating arrest and detention procedures that do not include preventative detention); Terrorist and Disruptive Activities (Prevention) Act, 1987, No. 28 (India), §§ 4, 7(1), *reprinted in* THAKUR, *supra* note 6, at 214-17 (stipulating criminal offenses and permitting preventative detention); National Security Act, 1980, § 3(2)-(3), *reprinted in* SHUKLA, *supra* note 29, at 383 (providing for preventative detention); Armed Forces (Assam & Manipur) Special Powers Act, 1958, No. 28 (India), §§ 3, 4, *supra* note 32 (providing for military intervention).

<sup>36</sup> See Prevention of Terrorism Act, §§ 3(1), (3)-(5), 16(1)-(2), *reprinted in* THAKUR, *supra* note 6, at 10-12 (identifying various terrorist offenses and penalties similar to TADA); Terrorist Disruptive Activities (Prevention) Act, §§ 3(1), (3), (5), 8(1)-(2), *reprinted in* THAKUR, *supra* note 6, at 214-18 (identifying various terrorist offenses and penalties including preventative detention similar to POTA).

<sup>37</sup> See Prevention of Terrorism Act, § 49(2), *reprinted in* THAKUR, *supra* note 6, at 43-44; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 4 (arguing that POTA's detention provisions are illegitimate and "subvert the cardinal rule of the criminal justice system by placing the burden on the accused"); Human Rights Watch, 14 "We Have No Orders to Save You" *State Participation and Complicity in Communal Violence in Gujarat* 14-15 (Apr. 2002), available at <http://www.hrw.org/reports/2002/india/gujarat.pdf> [hereinafter "We Have No Orders to Save You"]; Mukhtar Ahmad, *Yasin Malik Rearrested After Getting Bail in Pota Case*, REDIFF.COM (India), ¶¶ 1, 2, 4 (July 20, 2002), at <http://www.rediff.com/news/2002/jul/20jkl.htm> (reporting that after being granted bail under POTA, police rearrested Kashmiri political activist Yasin Malik under a preventative detention law for "anti-national activities," which suggests that the laws are used interchangeably).

## II. POTA IN PRINT

### A. Broad Definitions of Terrorism

Many of POTA's flaws stemmed from its broad text.<sup>38</sup> While all laws may be susceptible to abuse, anti-terror legislation in particular invites it by placing permissive language in the hands of zealous law enforcement officers.<sup>39</sup> The USA PATRIOT Act, like POTA, defines terrorism crimes broadly, but POTA's definitions are even less precise.<sup>40</sup> POTA defined terrorism as any violence "with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people."<sup>41</sup> Moreover, the law imposed a minimum five-year sentence on "[w]hoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act . . . ."<sup>42</sup>

Particularly troublesome were the words "advocates" and "incites," for they implicated issues of free speech and political expression.<sup>43</sup> The same problems arose under section 21 of POTA, which made it an of-

<sup>38</sup> See Prevention of Terrorism Act, §§ 3, 21, 49(2), *reprinted in* THAKUR, *supra* note 6, at 10–12, 21, 43–44 (providing broad definitions of terrorist offenses and prolonged detention); ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2.

<sup>39</sup> See MICHAEL FREEMAN, FREEDOM OR SECURITY: THE CONSEQUENCES FOR DEMOCRACIES USING EMERGENCY POWERS TO FIGHT TERROR 1–3 (2003).

<sup>40</sup> See 18 U.S.C. § 2331(5) (2003); Prevention of Terrorism Act, §§ 3, 21 *reprinted in* THAKUR, *supra* note 6, at 10–12; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 43 (discussing the broad definition of terrorism in POTO, which is identical to the definition in POTA); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 789 (2002) (discussing the broad definition of terrorism in the USA PATRIOT Act). The PATRIOT Act's definition of terrorism includes already criminalized "violent acts or acts dangerous to human life" that "appear to be intended" to "intimidate or coerce a civilian population" or "to influence the policy of a government by intimidation or coercion. 18 U.S.C. § 2331(5). Under this legal framework even protests—occasionally violent, sometimes illegal, but always intended to "intimidate or coerce a civilian population" and/or to "influence the policy of a government"—might become subject to governmental surveillance or arrest under this definition. See Lobel, *supra*, at 789; Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375, 410 (2002).

<sup>41</sup> Prevention of Terrorism Act, § 3(1), *reprinted in* THAKUR, *supra* note 6, at 10.

<sup>42</sup> *Id.* § 3(3), *reprinted in* THAKUR, *supra* note 6, at 11.

<sup>43</sup> See *id.*; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 5 (observing that the terms "advocates" and "incites" criminalize mere association or communication with terrorists); *Supreme Court Upholds POTA, Vaiko May Get Some Relief*, HINDU (India), Dec. 17, 2003, available at <http://www.hindu.com/2003/12/17/stories/2003121704620100.htm> (Supreme Court's statement that POTA should not be interpreted as criminalizing mere speech).

fense for one to “invite[] support for a terrorist organization” or “address[] a meeting for the purpose of encouraging support for a terrorist organization . . . .”<sup>44</sup> POTA did more, however, than create broad new crimes under the rubric of terrorism.<sup>45</sup> Like the PATRIOT Act, POTA defined terrorist acts in generalized terms that encompassed ordinary cases of murder, robbery, theft, and comparable offenses.<sup>46</sup> Thus, its violators could have been subject to improperly severe penalties and overzealous law enforcement officials attempting to circumvent constitutionally-mandated procedural safeguards.<sup>47</sup>

### B. *Sweeping Powers of Arrest and Detention*

POTA’s broad definitions of terrorist offenses were especially problematic in light of its modified arrest and detention procedures and special terrorism courts.<sup>48</sup> Section 49(2) of POTA allowed police to detain a suspect for up to 180 days without a formal charge, far exceeding the limit under ordinary Indian criminal law.<sup>49</sup> Although the Indian Constitution requires police to promptly inform a person of the grounds for his or her detention and to provide the “earliest opportunity to make a representation” before a magistrate,<sup>50</sup> and Indian case law identifies a speedy trial as “an integral and essential part of the fundamental right to life and liberty enshrined in [the Constitution],”<sup>51</sup> POTA managed to dramatically undermine these safeguards against the arbitrary and punitive detention of innocents.<sup>52</sup>

<sup>44</sup> See Prevention of Terrorism Act, § 21(1), (3), *reprinted in* THAKUR, *supra* note 6, at 21–22.

<sup>45</sup> See *id.* § 3(1), (3), *reprinted in* THAKUR, *supra* note 6, at 10–11.

<sup>46</sup> See *id.* §§ 3, 4, *reprinted in* THAKUR, *supra* note 6; *In re Sealed Case* No. 02-001, (U.S.F.I.-S.Ct. of R - 2002) (discussing enhanced surveillance of criminal investigations under USA PATRIOT Act); Heath H. Galloway, Note, *Don’t Forget What We’re Fighting For: Will the Fourth Amendment Be a Casualty of the War on Terror?*, 59 WASH. & LEE L. REV. 921, 967–70 (2002) (arguing that the government could circumvent constitutional protections for ordinary criminal investigations under the USA Patriot Act).

<sup>47</sup> See Prevention of Terrorism Act, §§ 3, 4, *reprinted in* THAKUR, *supra* note 6, at 10–13; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 5.

<sup>48</sup> See Prevention of Terrorism Act, §§ 23, 49(2), *reprinted in* THAKUR, *supra* note 6, at 23–24, 43–44.

<sup>49</sup> See *id.* § 49(2), *reprinted in* THAKUR, *supra* note 6, at 43–44; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 87.

<sup>50</sup> See INDIA CONST., pt. III, art. 22(2), (5); SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 87.

<sup>51</sup> Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 S.C.C. 81, at 89, *quoted in* SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 87.

<sup>52</sup> See Prevention of Terrorism Act, § 49(2), *reprinted in* THAKUR, *supra* note 6, 43–44; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 87. In some cases,

Stringent bail procedures further frustrated the rights of the accused.<sup>53</sup> The POTA court could postpone bail petitions for a year.<sup>54</sup> Furthermore, if the prosecutor opposed bail, the court could not release the accused without “grounds for believing that he is not guilty . . . .”<sup>55</sup> This provision reversed the presumption of innocence at the bail hearing and effectively granted the prosecutor a veto of the bail application.<sup>56</sup> The presumption of guilt extended even further beyond the bail procedures. In effect, POTA mandated a presumption of guilt for those accused of terrorist activities, if the accused unlawfully possessed arms or explosives or if his or her fingerprints were found at the scene of the alleged offense.<sup>57</sup>

### C. Appeal and Review

POTA did, however, have some safeguards. Either party could appeal a bail ruling or verdict from a Special Court to a bench of two judges of the High Court of the same jurisdiction.<sup>58</sup> On appeal, a court could review both issues of fact and law.<sup>59</sup> No guidelines existed, however, as to who the reviewing judge would be.<sup>60</sup> Even more problematic was the non-reviewability of orders by the Special Court passed at the interlocutory stage.<sup>61</sup>

The central government initially defended POTA as being safe from abuse because it entrusted only senior law enforcement and judicial functionaries with the most extensive investigative and adjudicative authority.<sup>62</sup> Because POTA operated at the state level, however, state

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however, a trial might have been speedier than a defendant would have liked. *See* Prevention of Terrorism Act, § 29(2), *reprinted in* THAKUR, *supra* note 6, at 45. Once a case finally reached the court, the magistrate could choose to try any offense summarily and without argument from the accused if it was punishable by no more than three years in prison. *Id.* Neither the accused nor a representative thereof needed even be present. *Id.* The provision, however, limited sentencing from summary trials to a year in prison. *Id.*

<sup>53</sup> *See* Prevention of Terrorism Act, § 49 (6)–(7), *reprinted in* THAKUR, *supra* note 6, at 45; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 89.

<sup>54</sup> *See* Prevention of Terrorism Act, § 49 (6)–(7), *reprinted in* THAKUR, *supra* note 6, at 45.

<sup>55</sup> *See id.* § (7), *reprinted in* THAKUR, *supra* note 6, at 45.

<sup>56</sup> *See id.*; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 89.

<sup>57</sup> *See* Prevention of Terrorism Act, § 53(1), *reprinted in* THAKUR, *supra* note 6, at 46–47; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 92.

<sup>58</sup> Prevention of Terrorism Act, § 34, *reprinted in* THAKUR, *supra* note 6, at 31.

<sup>59</sup> *Id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 83.

<sup>62</sup> *POTA Prospects*, *supra* note 21, ¶¶ 12, 13.

governments wielded tremendous power over state law enforcement officials, regardless of their seniority.<sup>63</sup>

In a cursory attempt to check this power, legislators provided for a central review committee with some oversight authority.<sup>64</sup> Although POTA's text provided for a review committee, an absence of interpretive guidelines led to considerable confusion.<sup>65</sup> The government's initial interpretation limited the provision's application to the primarily advisory review of certain surveillance procedures and the designation of terrorist groups.<sup>66</sup> Only after reports of widespread POTA abuses proliferated throughout India did the central government select certain cases for further review.<sup>67</sup> A formal amendment in December 2003 gave the review committee the ability to review *prima facie* cases and made its decisions binding on POTA courts.<sup>68</sup> Still,

<sup>63</sup> See V. Venkatesan, *Reform Without Rationale*, FRONTLINE (India), Nov. 8–12, 2002, ¶¶ 1, 8, 10, available at <http://www.frontlineonnet.com/112023/stories/20031121005902200.htm> [hereinafter *Reform Without Rationale*].

<sup>64</sup> See Prevention of Terrorism Act, §§ 19(4)–(7), 46, 60, reprinted in THAKUR, *supra* note 6, at 20–21, 40–41, 48–49; *Reform Without Rationale*, *supra* note 63, ¶¶ 2, 3, 4 (discussing POTA's central review committee).

<sup>65</sup> See Prevention of Terrorism Act, §§ 19(4)–(7), 46, 60, reprinted in THAKUR, *supra* note 6, at 20–21, 40–41, 48–49; *Reform Without Rationale*, *supra* note 63, ¶ 3.

<sup>66</sup> See *Reform Without Rationale*, *supra* note 63, ¶ 4, 5.

<sup>67</sup> See *Amending POTA: Welcome Decision, Belated Though*, TRIBUNE (India), Oct. 23, 2003, ¶ 2, available at <http://www.tribuneindia.com/2003/20031023/edit.htm#1>; *Reform Without Rationale*, *supra* note 63, ¶ 6. Reported abuses included the detention of politicians, women, children, and the elderly. See N.C. Bipindra, *A Handy Weapon to Settle Political Scores in Jaya's State*, INDIAN EXPRESS, Mar. 31, 2003, ¶¶ 1, 2, 6, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=21149](http://www.indianexpress.com/full_story.php?content_id=21149) (reporting that the Tamil Nadu government arrested a fourteen-year-old boy and politicians); Prasad, *supra* note 18, ¶¶ 1, 10 (reporting that Jharkhand police arrested a fourteen-year-old boy, a fifteen-year-old boy, and five women); *Rising Abuse of POTA*, TRIBUNE (India), Mar. 7, 2003, ¶ 1, available at <http://www.tribuneindia.com/2003/20030307/edit.htm#2> (reporting that Jharkhand police arrested twelve juveniles and an eighty-one-year-old). After the Tamil Nadu state government arrested a political opponent with ties to the central government, the center established a review commission to investigate the charges. See A. Subramani, *POTA Panel Order Challenged*, HINDU (India), Jan. 28, 2004, ¶ 1, available at <http://www.hindu.com/2004/01/28/stories/2004012812650400.htm>. In October, Indian President Abdul Kalam passed an ordinance making the review commission's decisions binding on the states. J. Venkatesan, *Ordinance to Amend POTA Promulgated*, HINDU (India), Oct. 28, 2003, ¶ 1, available at <http://www.hindu.com/2003/10/28/stories/2003102808990100.htm>. At the very least, the review committee has the authority to review whether or not a state government has made a *prima facie* case under POTA. See *Reform Without Rationale*, *supra* note 63, ¶ 8.

<sup>68</sup> Lok Sabha Passes Bill to Amend Terror Law, 1 INDIAN DIG. 2, ¶¶ 1, 2 (Dec. 2003), at [http://www.indianembassy.org/i\\_digest/2003/dec\\_02/terror\\_bill.htm](http://www.indianembassy.org/i_digest/2003/dec_02/terror_bill.htm).

much ambiguity remained, and the central review committee continued to lack both resources and timelines.<sup>69</sup>

### III. POTA AS APPLIED

The states that enacted POTA wasted no time in capitalizing on its broad definitions of terrorist offenses and sweeping powers of arrest and detention.<sup>70</sup> Warning signs of POTA's susceptibility to abuse surfaced in the summer of 2002.<sup>71</sup> Only four months after its effective date, state law enforcement officers had arrested 250 people nationwide under the Act, and the number was steadily increasing.<sup>72</sup> A mere eight months later, , the seven states applying POTA had arrested over 940 people, at least 560 of whom were languishing in jail.<sup>73</sup> The law's application was also erratic, varying from state to state in surprising ways.<sup>74</sup>

The State of Jharkhand in particular appeared to have detained more people under POTA than even terror-plagued Jammu and Kashmir, which had witnessed some of India's most violent insurgency for over ten years.<sup>75</sup> Jharkhand gained particular notoriety for arresting women, children, and the elderly, even as a High Court in Tamil Nadu decided that police could not arrest juveniles under POTA.<sup>76</sup> A

<sup>69</sup> See Rajeev Dhavan, Opinion, *Sugarcoating POTA*, HINDU (India), Oct. 31, 2003, ¶¶ 10, 11, available at <http://www.hindu.com/2003/10/31/stories/2003103100841000.htm>; *Reform Without Rationale*, *supra* note 63, ¶¶ 8, 11.

<sup>70</sup> See Iype, *supra* note 16, ¶¶ 1, 2, 16.

<sup>71</sup> See *id.* ¶¶ 1–4.

<sup>72</sup> *Id.* ¶¶ 1, 2.

<sup>73</sup> Rakesh Sinha & Kavita Chowdhury, *POTA Fact: Jharkhand Has a Lot More Terror Than J-K*, INDIAN EXPRESS, Mar. 28, 2003, ¶ 8 graphic, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=20985](http://www.indianexpress.com/full_story.php?content_id=20985).

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*; Akshaya Mukul, *J&K Send POTA Lists*, TIMES OF INDIA, Jan. 17, 2004, ¶¶ 2, 4, available at <http://timesofindia.indiatimes.com/articleshow/428500.cms>; Iype, *supra* note 16, ¶¶ 1, 2, 16. By March 2003, Jharkhand had accused over 700 people under POTA. Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic. The total number of those accused under POTA in Jammu and Kashmir is unclear because many were unidentified. *Id.* However, Jharkhand had arrested 207 people while Jammu and Kashmir had arrested 168. *Id.* As of January 17, 2004, the Indian Home Ministry estimated that Jharkhand had 130 in jail under POTA while Jammu and Kashmir had more than it had reported, but still less than Jharkhand. Mukul, *supra*, ¶¶ 2, 4.

<sup>76</sup> See Bipindra, *supra* note 67, ¶¶ 1, 2; (reporting that the Madras High Court set aside a POTA charge against a fifteen-year-old boy); Inder Malhotra, *The Use and Misuse of POTA*, HINDU (India), Oct. 10, 2003, ¶ 9, available at <http://www.hindu.com/2003/10/10/stories/2003101005721200.htm> (reporting that Jharkhand police arrested school girls); Prasad, *supra* note 18, ¶¶ 1, 10 (reporting that Jharkhand police arrested a fourteen-year-old boy, a fifteen-year-old boy, and five women); *Rising Abuse of POTA*, *supra* note 67, ¶ 1 (reporting that Jharkhand police arrested twelve juveniles and an eighty-one-year-old).

year after Home Minister Lal Krishna Advani had assured Parliament that POTA would not be abused, he finally conceded that evidence of the misuse of POTA was “serious enough” to warrant review.<sup>77</sup>

Although Jharkhand’s application of POTA was unexpected, other states abused the law in more predictable ways.<sup>78</sup> Both communalism and political gamesmanship have a long and sordid history in India.<sup>79</sup> POTA’s opponents warned that officials would use the law to target minorities and political opponents.<sup>80</sup> Their fears were soon realized.<sup>81</sup>

Misuse of POTA along communal and minority lines was most glaring in Gujarat.<sup>82</sup> In Gujarat, police invoked POTA to arrest 123 Muslims allegedly involved in a vicious attack on a train full of Hindu passengers. The government declined, however, to use POTA against

<sup>77</sup> See Sinha & Chowdhury, *supra* note 73, ¶¶ 1, 2.

<sup>78</sup> See Iype, *supra* note 16, at ¶¶ 5, 6, 10, 11, 13 (discussing politicians harassed under POTA); Malhotra, *supra* note 76, ¶¶ 2–5, 7 (discussing use of POTA to detain politicians); Uprety, *supra* note 17, ¶¶ 10–12 (discussing detention of political figures in Uttar Pradesh).

<sup>79</sup> See Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41, 67–68 (2003); Joshi, *supra* note 3, at 2; Venkitesh Ramakrishnan, *The Bengal Battle*, FRONTLINE (India), Sep. 30–Oct. 13, 2000, ¶ 13, available at <http://www.flonnet.com/fl1720/17200300.htm> (discussing political gamesmanship involving anti-terror legislation in West Bengal). As early as 1939, the Rashtriya Swayamsevak Sangh (RSS), a right-wing Hindu nationalist group still active in India, adopted Nazi propaganda to promote Hindu fascism. See Narula, *supra*, at 43–44. When POTA was passed in 2002, the head of India’s central coalition government, and champion for the Act, was the Bharatiya Janata Party (BJP), the political wing of a family of Hindu nationalist organizations, which includes the RSS. See *id.* at 42, 44; *POTA Prospects*, *supra* note 21, ¶ 1. Hindu nationalist groups like the RSS have long exploited communal tensions in India for their own political ends. See Narula, *supra*, at 42.

<sup>80</sup> See Iype, *supra* note 16, ¶¶ 15–18; *POTA Prospects*, *supra* note 21, ¶ 26. Members of India’s opposition Congress Party decried that the law can be misused to settle political scores and engage in “political witch-hunting.” Iype, *supra* note 16, ¶ 18.

<sup>81</sup> See Iype, *supra* note 16, ¶¶ 5, 7, 9 (reporting on politicians targeted by POTA); Malhotra, *supra* note 76, ¶¶ 8–10 (discussing POTA’s use against politicians, indigent schoolgirls, and Muslim minorities); Uprety, *supra* note 17, ¶¶ 10–14 (discussing harassment of political opposition in Uttar Pradesh).

<sup>82</sup> See ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2; Stavan Desai, *In Gujarat, Only Godhra Case Is Fit Enough for POTA*, INDIAN EXPRESS, Apr. 3, 2003, ¶ 1, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=21360](http://www.indianexpress.com/full_story.php?content_id=21360); Narula, *supra* note 79, at 48–49. In March 2002, the government accused sixty-four people allegedly involved in the train massacre, but withdrew the POTA charges—amidst heavy criticism of biased application—claiming that the required formalities had not been completed. See Desai, *supra*, ¶ 3. Eleven months later, after criticism died down, police arrested 123 people under POTA for the same incident claiming that they had new evidence based on a confession by one of the accused. *Id.* ¶ 4.

Hindus involved in pogroms that killed over 2,000 Muslims.<sup>83</sup> Shortly after the pogroms, Gujarat Chief Minister Narendra Modi justified the government's choice by simply stating that it was unnecessary to invoke POTA against the Hindu rioters.<sup>84</sup> The state government characterized the violence as a "spontaneous reaction" to the train attack, despite evidence that the riots had been organized by right-wing Hindu groups.<sup>85</sup> Gujarat police later used POTA to arrest Muslims allegedly involved in a post-riot reprisal against a former state official, claiming that investigations had "uncovered a major conspiracy . . . to strike terror in the minds of a particular section of people."<sup>86</sup> POTA's text and the state's justifications for prosecuting Muslims under the law supported charges against Hindu groups involved in the riots as well.<sup>87</sup> Instead, the State chose to use POTA to protect majoritarian interests.<sup>88</sup>

All but one of Gujarat's POTA detainees was Muslim and law enforcement officers appeared to be evading the few existing safeguards intended to protect these detainees from abuse.<sup>89</sup> According to Amnesty International, police held people for questioning for days or weeks without access to family members or to counsel, frustrated habeas corpus applications, and threatened to arrest family members under POTA if they petitioned the government.<sup>90</sup> Some detainees complained of being tortured into giving confessions, in spite of POTA provisions limiting the admissibility of self-incriminating statements.<sup>91</sup> It

<sup>83</sup> See Desai, *supra* note 82, ¶¶ 1, 2.

<sup>84</sup> Modi Denies Planning Snap Poll in Gujarat, HINDU (India), Mar. 31, 2002, ¶ 7, available at <http://www.hinduonnet.com/2002/03/31/stories/2002033102520800.htm>.

<sup>85</sup> See *The Current Crisis in South Asia*, *supra* note 4, at 14 (statement by Anatol Lieven, Senior Associate, Carnegie Endowment for International Peace); "We Have No Orders to Save You," *supra* note 37, at 4. On the day of the train attack, a major Hindu nationalist party ordered a state wide shut down for the following day, which its cadre interpreted as a call to action. "We Have No Orders to Save You," *supra* note 37, at 21. Numerous eyewitnesses reported nearly identical attacks during the riot throughout the state capital. *Id.* at 22. Trucks delivered thousands of attackers wearing clothing identified with the Hindu nationalist movement and armed with swords, spears, explosives, and gas canisters. *Id.* The attackers were equipped with printouts of the addresses of Muslim families and their properties as well as voting lists, cell phones, and water bottles. *Id.* at 23.

<sup>86</sup> See ABUSE OF LAW IN GUJARAT, *supra* note 16, at 3–4.

<sup>87</sup> See *id.* at 14; Prevention of Terrorism Act, 2002, No. 15 (India), § 3(1), (3), reprinted in THAKUR, *supra* note 6, at 10–12.

<sup>88</sup> See ABUSE OF LAW IN GUJARAT, *supra* note 16, at 14–15.

<sup>89</sup> See *id.* at 1; Harsh Mander, *State Subversion, Gujarat's Victims Completely Isolated*, TIMES OF INDIA, Nov. 22, 2003, ¶ 5, available at <http://timesofindia.indiatimes.com/articleshow/295528.cms>.

<sup>90</sup> See ABUSE OF LAW IN GUJARAT, *supra* note 16, at 1–2, 5, 6.

<sup>91</sup> *Id.* at 11–12.

appears that in Gujarat, some police compounded government prejudice with personal prejudice and improper police work.<sup>92</sup>

Unfortunately, however, Gujarat was not the only state that targeted Muslim minorities arbitrarily.<sup>93</sup> In April 2003, police in Uttar Pradesh arrested two Kashmiri Muslim students for allegedly sympathizing with a Muslim terrorist group.<sup>94</sup> Every Kashmiri in an area of the state frequented by students became a suspect in a sweeping investigation.<sup>95</sup> Investigators searched school records and school managers kept Kashmiri students under observation.<sup>96</sup>

Similar to POTA's arbitrary application along communal and minority lines was its arbitrary use against political opponents in at least three states.<sup>97</sup> For example, in Uttar Pradesh, after months of harassment in the form of twenty criminal charges and various raids on their property, Chief Minister Mayawati arrested her longtime political rival and his seventy-three-year-old father under POTA.<sup>98</sup> The media and allies of the accused criticized the arrest noisily, but the central government, needing Mayawati's support in upcoming elections, tacitly approved.<sup>99</sup> After defeating Mayawati at the polls, but before being sworn in, her successor, Mulayam Singh Yadav, immediately re-

<sup>92</sup> See *id.* at 6, 14–15; Desai, *supra* note 82, ¶ 7. Amnesty International received numerous reports of illegal detentions, torture, and irregular police work in Gujarat. See ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2, 6, 11. Within a month of the murder of a former Gujarat Home Minister, police had arrested approximately 380 Muslims. *Id.* at 3, 6. Large-scale arrests allegedly connected to the incident continued as of September 2003. *Id.* at 6. Police detained many suspects informally for days or weeks of interrogation without access to counsel and kept no records. *Id.* Police allowed some detainees to see their families but forbade others. *Id.* Prosecutors and court officials in at least one case seriously mishandled a habeas corpus proceeding, while police allegedly terrorized relatives of the suspects into silence. See *id.* at 4–6. Gujarat police may have acted out of incompetence or animus toward Muslims. See *id.* at 6, 14–15; Desai, *supra* note 82, ¶ 7. Statements attributed to Gujarat's Joint Commissioner of Police suggest that police misinterpreted India's Code of Criminal Procedure regarding arrest and detention. See ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 7–8. On the other hand, there are indications that police intentionally applied POTA arbitrarily and punitively against Muslims. See *id.* at 14–15.

<sup>93</sup> See Kavita Chowdhury, *POTA's New Victims: Kashmiri Students, Ostracised, Watched*, INDIAN EXPRESS, Mar. 15, 2003, ¶ 1, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=20223](http://www.indianexpress.com/full_story.php?content_id=20223); Amit Sharma, *In UP, You Need to Be a Kashmiri to Know*, INDIAN EXPRESS, Apr. 2, 2003, ¶ 1, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=21269](http://www.indianexpress.com/full_story.php?content_id=21269).

<sup>94</sup> Chowdhury, *supra* note 93, ¶ 3; Sharma, *supra* note 93, ¶ 1.

<sup>95</sup> See Chowdhury, *supra* note 93, ¶ 5; Sharma, *supra* note 93, ¶ 5.

<sup>96</sup> See Chowdhury, *supra* note 93, ¶¶ 5, 6.

<sup>97</sup> See *Selective Use of POTA*, *supra* note 17, ¶¶ 1–3; Tripathi, *supra* note 17, ¶¶ 3–5.

<sup>98</sup> See Uprety, *supra* note 17, ¶¶ 10–13. Police claim to have recovered a huge cache of arms and a skeleton from the accused's premises. *Id.* ¶ 11.

<sup>99</sup> See Tripathi, *supra* note 17, ¶¶ 3, 4.

leased Mayawati's rivals.<sup>100</sup> The POTA court, however, summarily rescinded his order as arbitrary.<sup>101</sup>

In March 2002, police in Jammu and Kashmir invoked POTA to detain a political figure sympathetic to the separatist movement.<sup>102</sup> A frequent detainee under POTA's forerunners, Yasin Malik is a prominent figure in a coalition of parties which have long sought independence, or at least autonomy, from the Indian union.<sup>103</sup> This time, police alleged that Malik illegally received a large sum of money from Pakistani couriers.<sup>104</sup> In July 2002, a merciful POTA court granted Malik bail because of his frail health.<sup>105</sup> Undeterred, police rearrested Malik within minutes under Jammu and Kashmir's Public Safety Act, which permits preventative detentions.<sup>106</sup> The police detained Malik for five months before the state's new coalition government ordered his release.<sup>107</sup> The government proclaimed magnanimously that the release reflected "a policy shift. We would re-arrest the militants whom we wanted to confine [in the past] but the new government wants to let them off. That speaks about a new policy."<sup>108</sup> More accurately, Malik's detention and release speaks about the arbitrary application of POTA and related laws in Jammu and Kashmir.<sup>109</sup>

The most significant example of political abuse, however, occurred in July of 2002, in the State of Tamil Nadu.<sup>110</sup> Chief Minister J. Jayalalitha arrested several members of a rival party for publicly expressing sympathy for the banned LTTE.<sup>111</sup> Prominent among those

<sup>100</sup> Malhotra, *supra* note 76, ¶ 8.

<sup>101</sup> *Id.*

<sup>102</sup> See Shujaat Bukhari, *Yasin Malik Released*, HINDU (India), Nov. 12, 2002, ¶ 1, available at <http://www.hinduonnet.com/thehindu/2002/11/12/stories/2002111205080100.htm>.

<sup>103</sup> See Arun Sharma, *Releases in J&K: Court Records Rebut BJP Claim*, INDIAN EXPRESS, Nov. 27, 2002, ¶¶ 6-7, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=13753](http://www.indianexpress.com/full_story.php?content_id=13753) (discussing Malik's prior arrests and detentions); *Malik Back to Basics: Mission Azad Kashmir*, INDIAN EXPRESS, Nov. 16, 2002, ¶ 1, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=13139](http://www.indianexpress.com/full_story.php?content_id=13139) (discussing Malik's mission to liberate Kashmir).

<sup>104</sup> Bukhari, *supra* note 102, ¶ 7; Ahmad, *supra* note 37, ¶ 6.

<sup>105</sup> Ahmad, *supra* note 37, ¶¶ 3-4.

<sup>106</sup> *Id.* ¶ 1.

<sup>107</sup> See *id.*; Bukhari, *supra* note 104, ¶¶ 1-9.

<sup>108</sup> Mufti Islah, *Mufti's Healing Touch: Yasin Malik Returns Home from Jail*, INDIAN EXPRESS, Nov. 12, 2002, ¶ 6, available at [http://www.indianexpress.com/full\\_story.php?content\\_id=12927](http://www.indianexpress.com/full_story.php?content_id=12927).

<sup>109</sup> See Ahmad, *supra* note 37, ¶ 1; Bukhari, *supra* note 102, ¶¶ 1, 7-10; Islah, *supra* note 108, ¶¶ 4-7.

<sup>110</sup> See N. Sathiyamoorthy, *TN Police Arrests MDMK Leader Vaiko*, REDIFF.COM (India), ¶¶ 1, 2 (July 11, 2002), at <http://www.rediff.com/news/2002/jul/11vaiko7.htm>.

<sup>111</sup> See *id.* ¶¶ 1, 16-18.

detained was Vaiko, the general secretary of a Tamil nationalist political party known as the Marumalarchi Dravida Munnetra Kazhagam (MDMK).<sup>112</sup> With his detention, Vaiko became the first member of Parliament and chief of a registered political party in the country detained under POTA.<sup>113</sup> After over four and a half months of incarceration without charge, police finally charged Vaiko, along with eight other MDMK officials, in a 440-page report alleging violations of sections 21(2) and (3) of POTA.<sup>114</sup> Vaiko's challenges to the charges and detention at last prompted the Supreme Court to clarify that a mere expression of sympathy or verbal support would not satisfy section 21.<sup>115</sup> Undaunted, Tamil Nadu pressed forward with its case.<sup>116</sup>

Largely in response to Vaiko's detention and prosecution, the central government gave POTA's central review commission the power to issue binding opinions on the validity of a state's prima facie case.<sup>117</sup> Jayalalitha challenged the review committee's jurisdiction over Vaiko's case, which was proceeding in court.<sup>118</sup> Despite the review committee's rejection of the challenge, the POTA judge appealed to the Madras High Court.<sup>119</sup> Finally, on February 7, 2004, as Vaiko awaited word from the POTA court, the review committee, or the High Court, the POTA court released him on bail after eighteen months of needless detention.<sup>120</sup>

#### IV. CURBING THE ABUSE

Overzealous law enforcement officers and executive officials could easily abuse anti-terror laws like the USA PATRIOT Act and POTA along communal and political lines.<sup>121</sup> Broad statutory

<sup>112</sup> *Id.* ¶ 1.

<sup>113</sup> *Id.*

<sup>114</sup> See *Charge Sheet Filed Against MDMK's Vaiko*, REDIFF.COM (India), ¶¶ 1, 2, 3, 5 (Dec. 30, 2002), at <http://www.rediff.com/news/2002/dec/30vaiko.htm>.

<sup>115</sup> See *id.* ¶¶ 8–10; *Supreme Court Upholds POTA*, *supra* note 43, ¶¶ 1–6.

<sup>116</sup> See Subramani, *supra*, note 67, ¶¶ 1–2.

<sup>117</sup> See Dhavan, *supra* note 69, ¶¶ 3, 4, 6; Iype, *supra* note 16, ¶¶ 5, 6, 10, 13; *Reform Without Rationale*, *supra* note 63, ¶¶ 5–8.

<sup>118</sup> *POTA Panel's Verdict on January 23*, HINDU (India), Jan. 21, 2004, ¶ 1, available at <http://www.hindu.com/2004/01/21/stories/2004012104501100.htm>.

<sup>119</sup> *POTA Panel Order Challenged*, HINDU (India), Jan. 21, 2004, ¶ 1, available at <http://www.hindu.com/2004/01/28/stories/2004012812650400.htm>.

<sup>120</sup> See *Vaiko Released from Prison*, REDIFF.COM (India), ¶ 1 (Feb. 7, 2004), at <http://www.rediff.com/election/2004/feb/07mdmk.htm>.

<sup>121</sup> In the months immediately following September 11, the U.S. government interviewed or interrogated thousands of Arab and Muslim Americans for no apparent reason other than nationality or religion. See Christopher Edley, Jr., *The New American Dilemma*:

definitions and sweeping investigative powers alone make this possible in the climate of fear that persists even years after the terrorist attacks of September 11, 2001.<sup>122</sup> Because POTA also curtailed procedural safeguards against arbitrary arrest and detention, and because India is home to numerous minority groups and separatist movements, abuses of the anti-terror law in India were widespread, often painfully visible, and likely to persist.<sup>123</sup>

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*Racial Profiling Post-9/11*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 173 (Richard C. Leone & Greg Anrig, Jr. eds., 2003). The U.S. government continues to investigate Muslim charities based on undisclosed or minimal evidence of terrorist links. *See id.* at 174. Moreover, the Department of Justice directed the fifty-six field offices of the FBI to do an inventory of local mosques to prepare for counter-terrorism investigations. *See id.* A top FBI official involved in the mosque inventory said, "This is not politically correct, no question about it. . . . But it would be stupid not to look at this given the number of criminal mosques that may be out there." Michael Isikoff, *The FBI Says, Count the Mosques*, *NEWSWEEK*, Feb. 3, 2003, at 6. The U.S. government also has a history of using special investigative powers against political figures and organizations. *See* Ann Beeson, *On the Home Front: A Lawyer's Struggle to Defend Rights After 9/11*, in *THE WAR ON OUR FREEDOMS*, *supra* note 8, at 298–299. The FBI wiretapped the homes of Martin Luther King Jr. and other dissidents solely because of their political beliefs. *Id.* at 298. The CIA spied on thousands of Americans including anti-war protestors, student activists, and black nationalists. *Id.* Furthermore, the 1976 Church Committee's Report disclosed that the FBI had compiled over 500,000 intelligence files on individual Americans and domestic organizations, including 65,000 new files in 1972 alone. *Id.* at 298–99; *see also* Nicholas C. Draniias, *The Patriot Act of 2001 Versus the 1976 Church Committee Report: An Unavoidable Clash of Fundamental Policy Judgments*, 17 *CHI. B. ASS'N REC.* 28, 28–30 (2003).

<sup>122</sup> *See* 18 U.S.C. § 2331(5) (2003) (defining domestic terrorism under USA PATRIOT Act); Prevention of Terrorism Act, 2002, No. 15 (India), § 3, *reprinted in* THAKUR, *supra* note 6, at 10–12 (defining terrorist offenses); SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 43 (discussing the broad definition of terrorism in POTO, which is identical to the definition in POTA); Richard C. Leone, *The Quiet Republic: The Missing Debate About Civil Liberties After 9/11*, in *THE WAR ON OUR FREEDOMS*, *supra* note 121, at 67 (2003) (discussing climate of fear and sweeping investigative powers); Lobel, *supra* note 40, at 789 (discussing the broad definition of terrorism and sweeping investigative powers in the USA PATRIOT Act); Dalia Sussman, *Rights Intrusions All Right*, *ABCNEWS.COM*, ¶ 1 (Sept. 10, 2003), at [http://www.abcnews.go.com/sections/us/World/sept11\\_terrorwar\\_poll030910.html](http://www.abcnews.go.com/sections/us/World/sept11_terrorwar_poll030910.html) (discussing U.S. poll indicating Americans were still willing to sacrifice personal liberty to protect against terrorism even two years after the September 11 attacks). As discussed, the abuses of POTA across India are themselves indicative of the climate of fear that persists in the country.

<sup>123</sup> *See* Prevention of Terrorism Act, § 49(2), (6)–(7), *reprinted in* THAKUR, *supra* note 6, at 43–45 (permitting up to 180 days detention without charge and denial of bail without evidence of innocence); *WORLD FACTBOOK* *supra* note 26, at 249 (presenting data on several Indian religious and ethnic minorities); *LAW COMMISSION OF INDIA*, §§ II 1.3–10, *reprinted in* THAKUR, *supra* note 6, at 56–61 (discussing separatism and terrorist violence in India associated with ethnic and religious minorities); *ABUSE OF THE LAW IN GUJARAT*, *supra* note 16, at 1–2 (discussing arbitrary and abusive detention of Muslim minorities in Gujarat); *SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE*, *supra* note 8, at 87, 89 (discussing POTO's effect on length of detention and bail proceedings and the constitu-

Concerns about abuse prompted some of POTA's critics to dismiss the law altogether.<sup>124</sup> In addition to the prevalent abuse of the law, critics argued that it was redundant or ineffective.<sup>125</sup> Supporters of POTA, however, contended that at least some of its provisions for enhanced surveillance were necessary to combat the threat.<sup>126</sup> Terrorists tend to operate in extraordinary secrecy and witnesses may be too frightened to report to police or testify in court.<sup>127</sup> Moreover, India's overburdened legal system could lead to special terrorist courts lessening jail time for accused terrorists and ordinary criminals alike.<sup>128</sup>

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tional guarantee of a speedy trial); Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic (reporting widespread and inconsistent use of POTA across India).

<sup>124</sup> SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 10 (opposing POTO); Dhavan, *supra* note 69, ¶ 11 (arguing that the legislature should repeal POTA); *Throw POTA Out*, HINDU (India), Oct. 28, 2003, ¶ 6, available at <http://www.hindu.com/2003/10/28/stories/2003102800961000.htm> (arguing that the government should repeal POTA).

<sup>125</sup> See ANTI-TERRORISM LAWS: INDIA, THE UNITED STATES, THE UNITED KINGDOM, AND ISRAEL 3–4 (K.R. Gupta ed., 2002) (discussing criticism that POTA is redundant and would likely lead to few convictions) [hereinafter ANTI-TERRORISM LAWS]; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 17–19, 23–25 (arguing that POTO is redundant and likely to be ineffective). Critics pointed out that India already had two dozen special security laws that should have been adequate to combat terrorism. ANTI-TERRORISM LAWS, *supra*, at 3; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 17–19. Furthermore, all the acts of violence mentioned in POTA were already illegal under the Indian Penal Code. ANTI-TERRORISM LAWS, *supra*, at 3; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 20–23. Criticism that POTA would nab few terrorists stemmed from the precedent set by TADA, POTA's predecessor, which lapsed in 1995. See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 31, 32. The conviction rate under TADA was less than one percent and officials misapplied the law in more than 50,000 cases. *Id.* at 31.

<sup>126</sup> See LAW COMMISSION OF INDIA, § IV, reprinted in THAKUR, *supra* note 6, at 79 (explaining that terrorists seek to instill silence among witnesses through fear); ANTI-TERRORISM LAWS, *supra* note 125, at 9 (arguing that Indian police obtained vital links in at least one case through mobile phone intercepts that would have been unavailable prior to POTO); Steven A. Osher, *Privacy, Computers and the PATRIOT Act: The Fourth Amendment Isn't Dead, But No One Will Insure It*, 54 FLA. L. REV. 521, 521 (2002) (asserting that after September 11, "urgent measures were needed to restore domestic security" in the United States); Michael F. Dowley, Note, *Government Surveillance Powers Under the USA PATRIOT Act: Is It Possible to Protect National Security and Privacy at the Same Time? A Constitutional Tug-of-War*, 36 SUFFOLK U. L. REV. 165, 179 (2002) (arguing that the USA PATRIOT Act "may ensure America's continued existence by allowing government agents to keep pace with technological advancements and monitor elusive terror networks within this country's borders").

<sup>127</sup> LAW COMMISSION OF INDIA, § IV, reprinted in THAKUR, *supra* note 6, at 79 (explaining that "one of the prime objects of creating terror is to silence the people by instilling a psychosis of fear in them"); Dowley, *supra* note 126, at 179 (arguing that the USA PATRIOT Act will help to monitor secretive terrorist networks).

<sup>128</sup> See LAW COMMISSION OF INDIA, § VI(b), reprinted in THAKUR, *supra* note 6, at 116–17. The Law Commission of India explicitly observes that:

Because POTA gave police broad, if not indiscriminate, powers of arrest and detention for a variety of ill-defined and constitutionally untested offenses, Indian citizens had far more to fear than infringements upon their privacy.<sup>129</sup> The extent of POTA's abuse proved that fear of prolonged, arbitrary detention was not unfounded or conjectural.<sup>130</sup> The Indian government can, however, salvage the most essential pieces of POTA and eliminate those that deny liberty to Indians and legitimacy to the law.

### A. Redefining Terror

An amendment to POTA that would go far in preventing arbitrary arrests and detentions would be one that narrows the definition of terrorism and its related offenses.<sup>131</sup> Unfortunately, this is a difficult task.<sup>132</sup> The phrase, "One man's freedom fighter is another man's terrorist" is more than a cliché; it is a complex reality.<sup>133</sup> One scholar observes that the phrase "captures the ambiguity, politicization, moral judgment, and high stakes involved in defining terrorism."<sup>134</sup>

A simple definition might be "the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of

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So far as special courts are concerned, their creation has become necessary because of the extraordinary heavy load upon our criminal courts and the delays endemic to our criminal judicial system. . . . The principle and perhaps sole object behind [sic] creation of special courts is the anxiety to have these cases disposed of expeditiously.

*Id.*

<sup>129</sup> See Prevention of Terrorism Act, 2002, No. 15 (India), §§ 3, 49(2), (6)–(7), reprinted in THAKUR, *supra* note 6, at 10–12, 43–45 (defining terrorist offenses, permitting up to 180 days detention without charge, and denying bail without evidence of innocence); SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 87, 89 (discussing POTO's effect on length of detention and bail proceedings).

<sup>130</sup> See ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2 (discussing illegal detention and torture in Gujarat); Prasad, *supra* note 18, ¶¶ 1–10 (reporting that Jharkhand police arrested a fourteen-year-old boy, a fifteen-year-old boy, and five women); *Charge Sheet Filed Against MDMK's Vaiko*, *supra* note 114, ¶¶ 1, 4 (reporting formal charges against a Tamil Nadu political opposition leader filed over five months after his detention).

<sup>131</sup> See Prevention of Terrorism Act, § 3, reprinted in THAKUR, *supra* note 6, at 21; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 4; Lakshmi Iyer, *Blunting the Edge*, INDIA TODAY, Nov. 10, 2003, at 30, available at 2003 WL 2170360.

<sup>132</sup> FREEMAN, *supra* note 39, at 25; see also LAW COMMISSION OF INDIA, § IV, reprinted in THAKUR, *supra* note 6, at 74–82 (discussing the legislative intent behind various definitions of terrorism-related offenses included in POTA).

<sup>133</sup> See FREEMAN, *supra* note 39, at 25.

<sup>134</sup> *Id.*

political change.”<sup>135</sup> Although concise, this definition easily enables political bias to affect enforcement and adjudication.<sup>136</sup> In contrast, listing specific acts would help to curb such abuses of discretion.<sup>137</sup> In this regard, India had done more to delineate terrorist offenses than the United States or the United Kingdom.<sup>138</sup> POTA specified the prohibition of violent or destructive acts that involve weapons, explosives, inflammable substances, gases, chemicals and other lethal weapons.<sup>139</sup> At the same time, however, POTA undermined any benefits of specificity by following its list with the words “or by any other means whatsoever,” which rendered the definition overbroad and again invited abuse.<sup>140</sup>

On the other hand, POTA defined the perpetrator’s intent far more explicitly than several other countries.<sup>141</sup> Under POTA, a terror-

<sup>135</sup> BRUCE HOFFMAN, *INSIDE TERRORISM* 43 (1998).

<sup>136</sup> See Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT’L COMP. L. 357, 365 (2003) (arguing that States may abuse or misapply broad definitions of terrorism); LAW COMMISSION OF INDIA, § IV, *reprinted in* THAKUR, *supra* note 6, at 74–82 (discussing the legislative intent behind various definitions of terrorism-related offenses included in POTA).

<sup>137</sup> See Tiefenbrun, *supra* note 136, at 365. A disadvantage of listing specific acts is that the definition may not apply to new modalities of terror made possible by advances in technology. *Id.* India might be particularly attuned to such dangers as it is home to numerous information technology jobs and Internet access is widespread. John Lancaster, *Village Kiosks Bridge India’s Digital Divide*, WASH. POST, Oct. 12, 2003, at A1 (discussing Internet access in remote villages); Robert J. Samuelson, *The Specter of Outsourcing*, WASH. POST, Jan. 14, 2004, at A19 (discussing the movement of software and communication jobs to India). However, the drafters of POTA were apparently unconcerned about cyber-terrorism because the definition of terrorist acts includes only violent acts or acts relating to terrorist organizations. See Prevention of Terrorism Act, 2002, § 3, *reprinted in* THAKUR, *supra* note 6, at 10–12 (defining terrorism without specific provision for cyber-terrorism); LAW COMMISSION OF INDIA, § IV, *reprinted in* THAKUR, *supra* note 6, at 74–82 (discussing the legislative intent behind various definitions of terrorism-related offenses included in POTA, but not mentioning cyber-terrorism).

<sup>138</sup> See 18 U.S.C. § 2331(5) (2003) (broadly defining domestic terrorism under the USA PATRIOT Act without delineating specific acts); Tiefenbrun, *supra* note 136, at 369 (discussing the United Kingdom’s definition of terrorism that is broad but specifically includes “acts that create a serious risk to the health or safety of the public . . . or disrupt an electronic system”); Jason Binimow & Amy Bunk, Annotation, *Validity, Construction, and Operation of “Foreign Terrorist Organization” Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA)*, 8 U.S.C. § 1189, 178 A.L.R. Fed. 535, 545–46, 550 (2002) (discussing the United States’ vague definition of terror under 1996 anti-terror legislation). *But see* Tiefenbrun, *supra* note 136, at 371, 373–74 (discussing Canadian and French anti-terror laws which delineate specific acts of terrorism including hijacking, murder, and other acts of violence).

<sup>139</sup> Prevention of Terrorism Act, § 3(1), *reprinted in* THAKUR, *supra* note 6, at 10.

<sup>140</sup> *Id.*; Tiefenbrun, *supra* note 136, at 365.

<sup>141</sup> See 18 U.S.C. § 2331(5)(B) (2003) (requiring that an act “appear to be intended” to intimidate or coerce a civilian population or government); Prevention of Terrorism Act, § 3(1)(a), *reprinted in* THAKUR, *supra* note 6, at 10, 18; Tiefenbrun, *supra* note 136, at 369 (discussing the United Kingdom’s definition of terrorism, which requires that an act be

ist act required “intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people . . . .”<sup>142</sup> However, POTA applied to other crimes involving unlicensed weapons so long as the individual “voluntarily does an act aiding or promoting in any manner the objects of” a terrorist group.<sup>143</sup> Despite the prerequisite of voluntariness, the text did not require the intent to aid or promote terrorist objectives.<sup>144</sup> It is entirely possible that many violent or destructive crimes will coincide with terrorist objectives, particularly when those crimes generate public unrest.<sup>145</sup>

Moreover, one criminal offense provision made no mention of intent.<sup>146</sup> Section 21 barred an individual from “invit[ing] support for a terrorist organization” or “address[ing] a meeting for the purpose of encouraging support for a terrorist organization . . . .”<sup>147</sup> Upon Tamil Nadu’s arrest of MDMK minister Vaiko under this section for allegedly stating in public his support of the banned LTTE, the Supreme Court clarified that the provision did not encompass such actions.<sup>148</sup> Specifically, the Court declared that the mere expression of sympathy or verbal support did not satisfy section 21 in the absence of an “intent [to] further[] or encourag[e] terrorist activity or facilitat[e] its commission.”<sup>149</sup> Hopefully, the legislature will draft subsequent anti-terror legislation accordingly.<sup>150</sup>

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“designed to influence the government or intimidate the public,” or “made for the purpose of advancing a political, religious or ideological cause”). The French, on the other hand, explicitly include an element of intent. *See* Tiefenbrun, *supra* note 136, at 371 (translating French anti-terror laws to require an act be “intentionally committed . . . in order to seriously disturb law and order by intimidation or by terror”).

<sup>142</sup> Prevention of Terrorism Act, § 3(1) (a), *reprinted* in THAKUR, *supra* note 6, at 10.

<sup>143</sup> *See id.*, § 3(1) (b), *reprinted* in THAKUR, *supra* note 6, at 11.

<sup>144</sup> *See id.*

<sup>145</sup> *See* Tiefenbrun, *supra* note 136, at 380. For example, a violent robbery that injures a group of people can incidentally cause widespread fear and weaken the local government. *See id.* Terrorist groups can benefit from such lawlessness and political insecurity, particularly if they seek to overthrow the local government. *See id.*

<sup>146</sup> *See* Prevention of Terrorism Act, § 21(1), (3), *reprinted* in THAKUR, *supra* note 6, at 21–22.

<sup>147</sup> *See id.*

<sup>148</sup> *Supreme Court Upholds POTA*, *supra* note 43, ¶¶ 1, 4.

<sup>149</sup> *Id.* ¶ 9.

<sup>150</sup> *See id.* The Supreme Court’s ruling should have been unnecessary given the Law Commission’s guidance regarding the Prevention of Terrorism Bill in 2000, which precipitated POTA. *See* LAW COMMISSION OF INDIA, § IV, *reprinted* in THAKUR, *supra* note 6, at 82. The Law Commission cautioned that “inclusion of mere offensive speech in this Bill is liable to be termed a case of over-reaction and a disproportionate response . . . . [S]uch speech or its punishment should not find place in an anti-terrorism law.” *Id.* at 82. No member of the parliament raised this issue during the debate over POTA in 2002, and the Tamil Nadu government preferred its own interpretation of the ambiguous statute. *See* Moorthy, *supra* note 110, ¶ 2 (reporting that Tamil Nadu police arrested Vaiko under

Delineating terrorist acts with greater specificity and explicitly requiring intent as an element of all terrorist offenses could limit discretion and stave off abuse.<sup>151</sup> A comprehensive, yet less malleable, definition of terrorism than that provided in POTA is beyond the scope of this Note.<sup>152</sup> Presumably, however, it is not beyond the scope of India's legislature or those of other nations fighting terrorism.<sup>153</sup>

### B. *Detention Without Charge*

Given TADA's unpopularity, the Indian legislature wisely declined to allow preventative detentions under POTA.<sup>154</sup> However, states could use POTA to the same effect, namely by locking individuals away without charge for twice the time period permitted under ordinary criminal laws.<sup>155</sup> Without sufficient accountability before the court, it is difficult to determine whether an arrest is preemptive rather than a response to a previous terrorist act.<sup>156</sup>

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POTA for making speeches in support of the Tamil Tigers); *Under POTA, Life & Liberty on Trial*, HINDU (India), ¶ 9 (May 13, 2003), at <http://www.hindu.com/thehindu/op/2003/05/13/stories/2003051300020200.htm> (observing that the Indian parliament did not discuss the Law Commission's position of free speech under POTA.).

<sup>151</sup> See Tiefenbrun, *supra* note 136, at 365, 380; Iyer, *supra* note 131, ¶ 10.

<sup>152</sup> See HOFFMAN, *supra* note 135, at 154 (discussing a definition of terrorism); Tiefenbrun, *supra* note 136, at 378–79 (arguing that more multilateral conventions could reach a universally-accepted definition of terrorism).

<sup>153</sup> See Tiefenbrun, *supra* note 136, at 388–89. Through semiotic analysis, Professor Susan Tiefenbrun argues that definitions of terrorism generally include five basic structural elements. *Id.* at 388. These include: (1) the perpetration of violence by any means; (2) the targeting of innocent civilians; (3) intent to cause violence or wanton disregard for consequences; (4) the purpose of causing fear, coercion, or intimidation, and (5) political, military, ethnic, ideological, or religious ends. *Id.* at 360–61. An awareness of these commonalities and persistent domestic and multilateral efforts could lead to less malleable definitions with universal acceptability and more uniform application. See *id.* at 388–89.

<sup>154</sup> See *POTA Prospects*, *supra* note 21, ¶¶ 8, 19. In a debate over POTA in India's Parliament, Home Minister L.K. Advani asserted, “[I]n the new Bill, all the shortcomings that we experienced in the case of TADA—perhaps the Executive at that time in the States or at the Centre sometimes was tempted to abuse it—have been sought to be eliminated.” *Id.* ¶ 9. In response to Advani's defenses, a rival parliamentarian argued, “[W]e have learnt from the TADA . . . but you have unlearned from it.” *Id.* ¶ 8.

<sup>155</sup> See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 4 (arguing that POTA's detention provisions are illegitimate and “subvert the cardinal rule of the criminal justice system by placing the burden on the accused”); “*We Have No Orders to Save You*,” *supra* note 37, at 14 (equating abuses under POTA with those under TADA, which permitted preventative detentions); Ahmad, *supra* note 37, ¶¶ 1, 2, 4 (reporting that after being granted bail under POTA, police alternatively arrested Kashmiri political activist Yasin Malik under a preventative detention law for “anti-national activities,” thus suggesting that the laws might be used interchangeably).

<sup>156</sup> See “*We Have No Orders to Save You*,” *supra* note 37, at 14 (equating abuses under POTA with those under TADA, which permitted preventative detentions).

Even in India, where lengthier detentions have prevailed in the past, a six-month incarceration without charge is simply too long.<sup>157</sup> Such lengthy detentions arguably violate India's constitutional guarantee to a speedy trial and invite custodial abuses that go undetected by the courts.<sup>158</sup> The danger of terrorism only partially justified POTA's harsh law enforcement procedures.<sup>159</sup> Because no compelling reason for doubling the pre-charge detention period existed or had even been offered, the provision was arbitrary.<sup>160</sup>

The Law Commission Report on India's 2000 Prevention of Terrorism Bill, which precipitated POTA, acknowledged without comment that the proposed law sought to lengthen the duration of detention permitted under India's Code of Criminal Procedure.<sup>161</sup> The report did mention, however, that the legislature sought to grant the special court discretion to lengthen that period "in case it is not possible to conclude investigation within such extended period."<sup>162</sup> One leading criminal lawyer observed that under POTA, "[t]he investigating agency [was] not under any duress to complete investigations in [ninety] days" as under ordinary criminal law.<sup>163</sup> What remains unclear, however, is why time limits placed on investigation of terrorist-related offenses are any more onerous than those placed on ordinary crimes.<sup>164</sup>

<sup>157</sup> See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 4, 10.

<sup>158</sup> See INDIA CONST., pt. III, art. 21 (stating that "no person shall be deprived of his life or personal liberty except according to procedure established by law"); ABUSE OF LAW IN GUJARAT, *supra* note 16, at 1–2, 13–14 (describing alleged custodial abuses in Gujarat); Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead, 1950–2000*, 14 AM. U. INT'L. L. REV. 413, 443–44 (1998) (observing that the Indian Supreme Court interprets Article 21 of the Indian Constitution as requiring a speedy trial).

<sup>159</sup> See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 12 (arguing that national security laws in India are usually defended on the grounds of extreme threats to public order, but are consistently applied in an arbitrary and prejudicial manner). The Law Commission on the Prevention of Terrorism Bill, 2000, acknowledged the severity of the terrorist threat but proceeded to discuss specific justifications for new evidentiary procedures. See LAW COMMISSION OF INDIA, § III, *reprinted in* THAKUR, *supra* note 6, at 70–71. The Commission offered no specific justifications for longer detention periods. See *id.* § V, at 102–03.

<sup>160</sup> See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 4, 10 (asserting that legislators defend national security laws by citing serious threats to the public, but law enforcement officers usually apply such laws in an arbitrary and prejudicial manner); LAW COMMISSION OF INDIA, § III, *reprinted in* THAKUR, *supra* note 6, 102–03 (briefly mentioning longer detention periods for terror suspects without offering specific justification).

<sup>161</sup> LAW COMMISSION OF INDIA, § V, *reprinted in* THAKUR, *supra* note 6, at 103.

<sup>162</sup> *Id.*

<sup>163</sup> ANTI-TERRORISM LAWS, *supra* note 125, at 10.

<sup>164</sup> See *id.*; LAW COMMISSION OF INDIA, § V, *reprinted in* THAKUR, *supra* note 6, at 103.

Indeed, POTA's provisions authorized police to compel evidence, conduct electronic surveillance, and record confessions; allowances that should actually expedite investigations and obviate the need for lengthy detention without charge.<sup>165</sup> Perversely, however, police in Gujarat appear to have used the extended detention periods to unlawfully coerce people into confessing instead of conducting fair and diligent police work.<sup>166</sup>

One common justification for prolonged detention without charge is intelligence gathering.<sup>167</sup> Law enforcement officers have a legitimate interest in questioning terror suspects in order to uncover clandestine networks, and prolonged detention could extract confessions or information that suspects might otherwise conceal.<sup>168</sup> Nevertheless, the Indian Constitution protects its citizens from self-incrimination and guarantees a speedy trial.<sup>169</sup> Even during a declared emergency, wherein the executive is permitted to derogate from fundamental rights, it is unlikely that 180-day interrogations are constitutional.<sup>170</sup>

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<sup>165</sup> See Prevention of Terrorism Act, 2002, No. 15 (India), §§ 27, 32, 36–48, *reprinted in* THAKUR, *supra* note 6, at 26, 30–31, 32–43.

<sup>166</sup> See ABUSE OF LAW IN GUJARAT, *supra* note 16, at 1–2, 6, 11.

<sup>167</sup> See *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49–50 (S.D.N.Y. 2003). The U.S. government offered intelligence gathering as a justification for detaining a U.S. citizen suspected of terrorism indefinitely, without access to family or counsel. *See id.*

<sup>168</sup> See *Padilla*, 243 F. Supp. 2d at 49 (citing the U.S. government's argument that a detained terror suspect could potentially provide information about terrorist training, planning, and recruitment methods); LAW COMMISSION OF INDIA, § III, *reprinted in* THAKUR, *supra* note 6, at 71 (discussing the difficulties of investigating terrorism through conventional methods). Vice Admiral Lowell E. Jacoby, Director of the U.S. Defense Intelligence Agency, argued that "[d]eveloping the kind of relationship of trust and dependency necessary for effective interrogations" could take months or even years. *See Padilla*, 243 F. Supp. 2d at 49.

<sup>169</sup> INDIA CONST., pt. III, arts. 20, 21 (stating that "no person accused of any offense shall be compelled to be a witness against himself" and "no person shall be deprived of his life or personal liberty except according to procedure established by law"); Sripati, *supra* note 143, at 431, 443–44 (observing that Article 21 of the Indian Constitution mandates a speedy trial).

<sup>170</sup> See INDIA CONST., pt. III, arts. 20, 21 (stating that "no person accused of any offense shall be compelled to be a witness against himself" and "no person shall be deprived of his life or personal liberty except according to procedure established by law"); Sripati, *supra* note 158, at 431, 443–44 (observing that the Indian Constitution grants freedom from self-incrimination and mandates a speedy trial). The Indian Constitution permits the suspension of otherwise non-derogable fundamental rights during an emergency. INDIA CONST., pt. XVIII, arts. 352–60. Indira Gandhi declared an Emergency and suspended the Indian Constitution from June 1975 through March 1977. Sripati, *supra* note 158, at 420. The Emergency was unpopular and helped sweep Gandhi's party out of power. *See id.* at 465. The new government amended the Constitution to prohibit the suspension of Articles 20 and 21, even during an Emergency. *See* INDIA CONST., pt. XVIII, art. 359; Sripati, *supra* note 158, at 465.

Another possible justification for increasing the power of the police to detain without charge is that such powers help police contain and eliminate a particular terrorist group entirely.<sup>171</sup> A wide net cast with broad discretion could entrap a terrorist network more quickly than it could replenish its ranks, and thus neutralize its threat altogether.<sup>172</sup> According to this scheme, innocent detainees would be sifted out over time, and the infringement on their liberties is justified by the eradication of a serious public danger.<sup>173</sup>

Countries around the world have invoked the overreach-and-eliminate strategy to justify a host of emergency measures against terrorists, including that of preventative detention.<sup>174</sup> History has demonstrated the perils of such a strategy.<sup>175</sup> Police are almost certain to detain large numbers of innocent people and success likely would vary greatly across India.<sup>176</sup> Although the strategy might be feasible in Punjab, where militant groups are small and geographically contained,<sup>177</sup> in Jammu and Kashmir, the regular influx of militants from Pakistan

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<sup>171</sup> See FREEMAN, *supra* note 39, at 11–12.

<sup>172</sup> See *id.* However, should police arrest large numbers of citizens they know are innocent in the hope of improving their chances of capturing a true terrorist, this would be clearly abusive and unjustified. See *id.* at 38–39.

<sup>173</sup> See *id.* at 2, 11. Canada successfully applied this strategy against the Front de Liberation du Quebec (FLQ) in 1970. *Id.* at 117. Police conducted searches and arrests without warrants and held suspects for up to twenty-one days in jail without charges. *Id.* at 117. Kidnappings and bombings stopped and the FLQ ceased to exist within months. *Id.*

<sup>174</sup> See *id.* at 7. These countries include Britain, Italy, Uruguay, Canada, and Israel. *Id.* Detention without trial was the principle method used to combat terrorism in Northern Ireland in order to isolate all terrorists from the population. *Id.* at 58.

<sup>175</sup> See FREEMAN, *supra* note 39, at 8. In Northern Ireland, the strategy was ineffective because security forces were unable to detain terrorists faster than they could be replaced. *Id.* at 61. Uruguay invoked the strategy with some success, but the police and military abused their powers. *Id.* at 108. In Peru, the government was unable to detain terrorists faster than they could be replaced, and the government abused its powers. *Id.* at 159, 165.

<sup>176</sup> See *id.* at 2, 11–12 (discussing the inevitable costs of emergency powers and their varying effectiveness against terrorist threats); LAW COMMISSION OF INDIA, § II 1.3–1.9, reprinted in THAKUR, *supra* note 6, at 56–60 (discussing different terrorist threats in Tamil Nadu, Jammu and Kashmir, Punjab, and the northeast region); Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic (showing disparities in the application of POTA throughout India).

<sup>177</sup> See LAW COMMISSION OF INDIA, § II 1.4, reprinted in THAKUR, *supra* note 6, at 57–58 (estimating about 300 active militants present in Punjab as of 2000); FREEMAN, *supra* note 39, at 189 (arguing that emergency powers are likely to be effective where “the state can move quickly against a small and weakly supported terrorist group . . .”); *The Current Crisis in South Asia*, *supra* note 4, at 10 (statement of Michael Krepon, Founding President, The Henry L. Stimson Center) (discussing Pakistani support for militancy in Kashmir).

makes laws like POTA largely ineffective. Worse, such laws could further alienate Kashmiris and bolster sympathy for terrorist causes.<sup>178</sup>

In light of the abuses of POTA and its predecessors, Indian legislators should conform future Indian anti-terror laws more closely to the standard procedures of the Indian Penal Code.<sup>179</sup> Specifically, reducing the permissible detention period would encourage police to conduct more careful investigations prior to arresting people under POTA's successors.<sup>180</sup> Though a shorter detention period might not necessarily eliminate arbitrary detention, it would at least limit the duration of the injustice.<sup>181</sup>

### C. *The Review Process*

Given POTA's markedly subjective definitions of terrorism, meaningful review was essential.<sup>182</sup> Threat perceptions vary greatly from state to state within India; thus, an effective central review committee

<sup>178</sup> *The Current Crisis in South Asia*, *supra* note 4, at 13 (statement of Anatol Lieven, Senior Associate, Carnegie Endowment for International Peace) (arguing that "ruthless repression by the Indian armed forces . . . fueled the growth of Kashmiri extremism and militancy and led to a cycle of violence both by Indian security forces and by the Kashmirian [sic] militants"); FREEMAN, *supra* note 39, at 189 (asserting that harsh U.K. detention laws bolstered support for the Irish Republican Army). *But see generally* Singh, *supra* note 5 (arguing for a tougher approach to terrorism in Kashmir).

<sup>179</sup> *See* SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 10.

<sup>180</sup> *See id.* at 31 (discussing the broad powers of arrests and detentions under TADA, which led to thousands of improper arrests and a conviction rate below one percent). One supporter of POTA argued that low conviction rates under TADA were comparable to the overall criminal conviction rate in India of six and one half percent. *See* ANTI-TERRORISM LAWS, *supra* note 125, at 4. K.P.S. Gill, former Director General of Police in Punjab quipped, "[I]f the inefficiency and incompetence of India's criminal justice system are to be accepted as an argument against the existence of specific laws, we would have to throw the entire book of criminal statutes into the dust bin." *Id.* However, 6.5% is still more than six times that of TADA and likely to be significantly higher than POTA as well. *See id.*; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 6, at 31; Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic (showing significant disparities between the number of people accused under POTA and the number of cases tried in court as of March 2003).

<sup>181</sup> *See* ANTI-TERRORISM LAWS, *supra* note 125, at 4; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 10.

<sup>182</sup> *See* Prevention of Terrorism Act, 2002, No. 15 (India), §§ 3(1)–(3), 21, *reprinted in* THAKUR, *supra* note 15, at 10–11, 21–22 (defining terrorist offenses); FREEMAN, *supra* note 39, at 40 (discussing the importance of monitoring the use and abuse of emergency powers); Tiefenbrun, *supra* note 136, at 365 (arguing that broad definitions of terror invite political bias).

was vital to establish some consistency in individual states' interpretations and applications of the law.<sup>183</sup>

Although POTA permitted judicial review, the reviewing state courts often suffered from local prejudice.<sup>184</sup> POTA mentioned the possibility of both state and central review committees but offered few details as to their formation or use.<sup>185</sup> After a year of allegations of abuse, the central government finally established a review committee to hear individual POTA cases.<sup>186</sup> At first, the committee functioned in a purely advisory capacity.<sup>187</sup> As Tamil Nadu's case against MDMK minister Vaiko commenced, the center amended POTA to provide for enhanced judicial review.<sup>188</sup>

In December of 2003, by an overwhelming majority, India's legislature amended POTA with an ordinance designed to expand the scope

<sup>183</sup> LAW COMMISSION OF INDIA, § II 1.3–10, *reprinted in* THAKUR, *supra* note 6, at 56–61 (discussing religious fundamentalist militancy and various other terrorist threats in Jammu and Kashmir, Punjab, and the northeast); *see* Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic (discussing disparities in application of POTA throughout India).

<sup>184</sup> *See* Prevention of Terrorism Act, § 34, *reprinted in* THAKUR, *supra* note 6, at 31 (providing that a High Court within the jurisdiction of the Special (POTA) Court may try an appeal before a bench of two judges); ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 4–6 (describing court mishandling of habeas corpus petition of Muslims illegally detained in Gujarat); “*We Have No Orders to Save You*,” *supra* note 37, at 6 (alleging local and state governmental discrimination against Muslims in Gujarat); Mander, *supra* note 89, ¶¶ 1–5 (reporting abuse of POTA against Muslims in Gujarat).

<sup>185</sup> *See* Prevention of Terrorism Act, § 60, *reprinted in* THAKUR, *supra* note 6, 48–49. The statute provided that the central and state governments “shall, whenever necessary, constitute one or more Review Committees for the purposes of this Act.” *Id.* § 60(1). A Committee consisted of a Chairperson and up to three others. *Id.* § 60(2). The Chairperson was appointed by the center or state government and had to be or have been a member of a High Court. *Id.* § 60(3). Only two provisions of POTA, other than section 60, referred to a Review Committee. *Id.* §§ 19(4)–(7), 40; *Reform Without Rationale*, *supra* note 63, ¶¶ 4, 5. Section 19 provided that a central government review committee could review a refusal to remove an organization from the list of illegal terrorist groups and that the Review Committee’s decision was binding. Prevention of Terrorism Act, §§ 19(4)–(7), *reprinted in* THAKUR, *supra* note 6, 20–21. Section 40 required that the government submit an approved application for electronic surveillance to a Review Committee within seven days, but did not specify whether this would have been a state or central committee. *Id.* § 40. The purpose of this procedure was “for consideration and approval of the order by the Review Committee.” *Id.*

<sup>186</sup> *See* Dhavan, *supra* note 69, ¶ 6; POTA: Govt. Assurance on Review Panel, HINDU (India), ¶¶ 1, 2 (Mar. 5, 2003), at <http://www.hinduonnet.com/thehindu/2003/03/05/stories/2003030504651100.htm>.

<sup>187</sup> *See* Dhavan, *supra* note 69, ¶ 9; J. Venkatesan, *supra* note 67, ¶ 5; *Reform Without Rationale*, *supra* note 63, ¶ 4.

<sup>188</sup> *See* Dhavan, *supra* note 69, ¶¶ 3, 6–7; *Reform Without Rationale*, *supra* note 63, ¶ 9.

of judicial review.<sup>189</sup> The new ordinance gave review commissions the authority to review the prima facie case of an “aggrieved person” and issue orders binding on the state government and police.<sup>190</sup> Though the amendment was an improvement on the purely advisory capacity of the initial review committee because it enhanced the power of judicial review, the central review committee remained largely impotent, as it could not initiate an investigation absent an initial complaint and lacked clearly delineated investigatory powers.<sup>191</sup> Moreover, the review committee’s resources were limited, and it operated under no regulated time-frame.<sup>192</sup> Without sufficient autonomy, resources, or guidelines, the committee was an illusory safeguard.<sup>193</sup>

Given the review committee’s limitations, only the grievances of those persons with political connections to the central government were likely to be heard.<sup>194</sup> Without MDMK leader Vaiko’s political ties to the central government, the review committee may never have taken up his case.<sup>195</sup> Further, even with political pressure from the center and a favorable advisory opinion by the review committee, Tamil Nadu detained Vaiko for over four months without charge, and an additional fourteen months after charging him before granting bail.<sup>196</sup>

If Tamil Nadu had the power to detain a politically-connected person for eighteen months under spurious charges centering on public speech, indigent children in the more turbulent State of Jharkhand would almost certainly fare worse.<sup>197</sup> A major limitation of any central review process is that its sheer ability to address abuses of minorities and the indigent is constrained.<sup>198</sup> This problem is simply an unfortu-

<sup>189</sup> *Lok Sabha Passes Bill to Amend Anti-Terror Law*, 1 INDIAN DIG. 2, ¶¶ 1–2 (Dec. 2003), at [http://www.indianembassy.org/i\\_digest/2003/dec\\_02/terror\\_bill.htm](http://www.indianembassy.org/i_digest/2003/dec_02/terror_bill.htm).

<sup>190</sup> See Dhavan, *supra* note 69, ¶ 9; *Reform Without Rationale*, *supra* note 63, ¶ 6.

<sup>191</sup> See Dhavan, *supra* note 69, ¶¶ 9–10; *Reform Without Rationale*, *supra* note 63, ¶ 12.

<sup>192</sup> Dhavan, *supra* note 69, ¶¶ 9–10; *Reform Without Rationale*, *supra* note 63, ¶ 12.

<sup>193</sup> See Dhavan, *supra* note 69, ¶¶ 9–10; *Reform Without Rationale*, *supra* note 63, ¶ 12.

<sup>194</sup> See Iyer, *supra* note 131, ¶¶ 3, 9; *Reform Without Rationale*, *supra* note 63, ¶ 9.

<sup>195</sup> See Iyer, *supra* note 131, ¶¶ 3, 9; *Reform Without Rationale*, *supra* note 63, ¶ 9.

<sup>196</sup> See *Charge Sheet Filed Against MDMK’s Vaiko*, *supra* note 114, ¶¶ 1, 4; Iyer, *supra* note 131, ¶¶ 4, 6, 9; *Reform Without Rationale*, *supra* note 63, ¶ 9; *Vaiko Released from Prison*, *supra* note 120, ¶ 1.

<sup>197</sup> See *Charge Sheet Filed Against MDMK’s Vaiko*, *supra* note 114, ¶¶ 1, 4; Iyer, *supra* note 131, ¶¶ 4, 6, 9 (discussing Vaiko’s arrest and detention in Tamil Nadu); Prasad, *supra* note 18, ¶¶ 5–8, 11 (describing the plight of juveniles and the indigent under POTA in Jharkhand); *Reform Without Rationale*, *supra* note 63, ¶ 9 (describing political abuse of POTA); *Vaiko Released from Prison*, *supra* note 120, ¶ 1.

<sup>198</sup> See Iyer, *supra* note 131, ¶¶ 3, 9 (asserting that the review process is designed to address political abuse rather than abuses like those in Jharkhand); Prasad, *supra* note 18, ¶¶ 5–8, 11 (describing the predicament of the indigent under POTA in Jharkhand);

nate reality in a developing country with a population of over one billion.<sup>199</sup> Nevertheless, given adequate resources and open channels of communication with the media and India's many human rights groups, a central review committee could have, at a minimum, investigated a few of the more egregious cases.<sup>200</sup>

Even with sufficient resources, a central review committee is not a panacea. On the one hand, it may work well to prevent politically motivated arrests if the accused is an ally of the central government, as was the case in Tamil Nadu.<sup>201</sup> On the other hand, if, as in Uttar Pradesh or Gujarat, the political climate at the center favors the accuser, political and communal abuses would likely continue until the review committee was afforded real autonomy.<sup>202</sup> Nevertheless, some review is better than none at all, especially when national security laws threaten the inherent checks and balances of coalition politics.<sup>203</sup> If left completely unsupervised, a particular majority party would be able to detain or silence the opposition and impose harsher and more

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ABUSE OF LAW IN GUJARAT, *supra* note 16, at 1–3, 18 (discussing alleged abuses of Muslim minority in Gujarat).

<sup>199</sup> See WORLD FACTBOOK *supra* note 26, at 249. The CIA's 2003 edition of its *World Factbook* estimates India's population at 1,049,700,118 as of 2003. *Id.* According to the CIA, "Overpopulation severely handicaps the economy and about a quarter of the population is too poor to be able to afford an adequate diet." *Id.* at 250

<sup>200</sup> See U.S. STATE DEP'T, COUNTRY REP. ON HUM. RTS. PRACTICES 251–53 (2003) (reporting on activity of several human rights groups in India) [hereinafter COUNTRY REP. ON HUM. RTS. PRACTICES]; ABUSE OF LAW IN GUJARAT, *supra* note 16, at 1–3, 18 (reporting alleged POTA abuses in Gujarat and recommending independent review and cooperation with domestic and international human rights organizations); Dhavan, *supra* note 69, ¶ 9 (arguing that "[w]ith no powers of investigation and no time frame such committees are a chimera—good from far, but far from good"); Prasad, *supra* note 18, ¶¶ 5–8, 11 (reporting on POTA abuses in Jharkhand); *Reform Without Rationale*, *supra* note 63, ¶ 12 (arguing that the Review Committee will be ineffective without state cooperation and timelines decision-making).

<sup>201</sup> See Iyer, *supra* note 131, ¶¶ 3–6, 9; *Reform Without Rationale*, *supra* note 63, ¶ 9.

<sup>202</sup> See *The Current Crisis in South Asia*, *supra* note 4, at 14 (statement of Anatol Lieven, Senior Associate, Carnegie Endowment for International Peace) (discussing BJP government involvement in Gujarat Riots); ABUSE OF LAW IN GUJARAT, *supra* note 16, at 14–15, 19 (discussing alleged abuses of Muslim minority in Gujarat and arguing for an independent review committee); Narula, *supra* note 79, at 44, 50 (citing BJP as head of both central coalition government and Gujarat government during 2002 riots); Mander, *supra* note 89, ¶¶ 1–2 (reporting that Indian Home Minister L.K. Advani dismissed claims of government impropriety in Gujarat); Tripathi, *supra* note 17, ¶¶ 1, 3–4 (reporting central government support for Mayawati's arrest of political opponent).

<sup>203</sup> See FREEMAN, *supra* note 39, at 41, 43 (describing the role of opposition parties in checking abuses of power); Iype, *supra* note 16, ¶¶ 5, 10, 13, 16–19 (discussing use of POTA against politicians); Moorthy, *supra* note 110, ¶¶ 1–2, 16–18 (describing Tamil Nadu Chief Minister J. Jayalalitha's arrest of political opponent Vaiko under POTA).

permanent laws than POTA.<sup>204</sup> Tyranny, even at the state level, is a significant threat to liberty and India's burgeoning democracy.<sup>205</sup>

## V. LESSONS FOR THE UNITED STATES

India's experiences under POTA are instructive for the United States and other countries fighting the war on terror. POTA first reflects the fact that overbroad definitions of terrorism are dangerous.<sup>206</sup> Definitions of terrorism that may include acts of speech and association, but do not include an explicit requirement of intent could encompass innocent activity and curtail the political process.<sup>207</sup> No reasonable government would support an extremist who "advocates," "incites," or "invites support for" terrorists. Including those terms in anti-terrorism legislation, however, gives zealots within the government a loaded weapon against those with whom they simply disagree.<sup>208</sup> Similarly, President George W. Bush's declaration "[e]ither you are with us, or you are with the terrorists" bodes ominously for political protesters in the United States whose activities might fall within the PATRIOT Act's broad definition of terrorism.<sup>209</sup>

Second, POTA's application provides insight into the hazards that anti-terror laws pose when implemented. India's experience suggests that taking legislative shortcuts around safeguards designed to prevent arbitrary arrest and detention often result in precisely those arbitrary practices.<sup>210</sup> Although this outcome may initially seem like a reasonable,

<sup>204</sup> See FREEMAN, *supra* note 39, at 41.

<sup>205</sup> *Id.*

<sup>206</sup> See Prevention of Terrorism Act, 2002, No. 15 (India), §§ 3, 21, 49(2), *reprinted in* THAKUR, *supra* note 6, at 10–12, 21, 43–44 (providing broad definitions of terrorist offenses and prolonged detention); ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2.

<sup>207</sup> See Tiefenbrun, *supra* note 136, at 365, 380; Iyer, *supra* note 131, ¶ 10.

<sup>208</sup> See Prevention of Terrorism Act, §§ 3(1), (3), 21(1), (3), *reprinted in* THAKUR, *supra* note 6, at 10–11, 21–22; see Moorthy, *supra* note 110, ¶¶ 1, 2 (reporting on a politician arrested in Tamil Nadu for allegedly giving a speech in support of a dissident group).

<sup>209</sup> President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.htm>; see 18 U.S.C. § 2331(5) (2003). The PATRIOT Act's definition of terrorism includes already criminalized "violent acts or acts dangerous to human life" that "appear to be intended" to "intimidate or coerce a civilian population" or "to influence the policy of a government by intimidation or coercion." 18 U.S.C. § 2331(5) (2003).

<sup>210</sup> See Prevention of Terrorism Act, § 49(2), (6)–(7), *reprinted in* THAKUR, *supra* note 6, at 43–45 (permitting up to 180 days detention without charge and denial of bail without evidence of innocence); ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2 (discussing arbitrary and abusive detention of Muslim minorities in Gujarat); SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 87, 89 (discussing POTO's effect on length of detention and bail proceedings and the constitutional guarantee of a speedy

if not inevitable, compromise, when police arrest, detain, and abuse hundreds of minorities on unsubstantiated grounds, respect for the rule of law suffers.<sup>211</sup>

Due in part to the decentralization of the anti-terror laws' enforcement in India, law enforcement officers have applied such laws differently from state to state.<sup>212</sup> When governments do not apply anti-terror laws even-handedly or consistently, they invite harsh criticism, if not violent reprisals.<sup>213</sup> For example, in Gujarat, only Muslims were subject to POTA, a practice that likely helped violence to endure beyond the 2002 pogroms.<sup>214</sup> In other Indian states, such as Kashmir, Jarkhand, or Tamil Nadu, prolonged repression under anti-terror laws has led to similar cycles of continually escalating violence.<sup>215</sup>

India's practice of subjecting ethnic and political minorities to unfair treatment out of a fear of terrorism is not an isolated one. Like India, the United States previously has detained thousands of innocent people in the name of national security.<sup>216</sup> During the 1920 Palmer Raids, the United States arrested 6,000 suspected Communist radicals in response to a series of terrorist bombings.<sup>217</sup> Thirty years later, dur-

trial); Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic (reporting widespread and inconsistent use of POTA across India).

<sup>211</sup> See FREEMAN, *supra* note 39, at 11–12, 38–39.

<sup>212</sup> See ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2 (discussing arbitrary and abusive detention of Muslim minorities in Gujarat); Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic (showing widespread and inconsistent use of POTA across India).

<sup>213</sup> See *The Current Crisis in South Asia*, *supra* note 4, at 13 (statement of Anatol Lieven, Senior Associate, Carnegie Endowment for International Peace) (arguing that “ruthless repression by the Indian armed forces . . . fueled the growth of Kashmiri extremism and militancy and led to a cycle of violence both by Indian security forces and by the Kashmirian [sic] militants”); FREEMAN, *supra* note 39, at 189 (asserting that harsh U.K. detention laws bolstered support for the Irish Republican Army); ABUSE OF LAW IN GUJARAT, *supra* note 16, at 3–4 (criticizing POTA's exclusive application to Muslims following the riots in Gujarat).

<sup>214</sup> See ABUSE OF LAW IN GUJARAT, *supra* note 16, at 3–4 (discussing POTA's exclusive application to Muslims following the riots in Gujarat).

<sup>215</sup> See *The Current Crisis in South Asia*, *supra* note 4, at 13 (statement of Anatol Lieven, Senior Associate, Carnegie Endowment for International Peace) (arguing that “ruthless repression by the Indian armed forces . . . fueled the growth of Kashmiri extremism and militancy and led to a cycle of violence both by Indian security forces and by the Kashmirian [sic] militants”); LAW COMMISSION OF INDIA, § II 1.5–.9, *reprinted in* THAKUR, *supra* note 6, at 58–60 (citing terrorist violence in Jarkhand and surrounding areas); 2001 PATTERNS OF GLOBAL TERRORISM, *supra* note 6, at 10–11 (discussing terrorist threats in India); Jain, *supra* note 3, ¶ 1 (discussing the Tamil Tigers).

<sup>216</sup> See Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, in *THE WAR ON OUR FREEDOMS*, *supra* note 121, at 30–31.

<sup>217</sup> *Id.* Many remained in custody for weeks or months without formal charges and were denied access to attorneys or family members. *Id.* Most were not radicals or law-breakers and were eventually released. *Id.* The crackdown, intended to reveal and destroy

ing World War II, the U.S. military interned over 100,000 people of Japanese ancestry in California, fearing that a subset were disloyal.<sup>218</sup>

After September 11, the United States has again taken extreme measures to assuage its fears. Although the USA PATRIOT Act does not alter criminal procedure in the manner of POTA, it grants immigration officials broad powers to detain non-U.S. citizens.<sup>219</sup> As of 2003, the government had detained almost 1,200 men of mostly Arab and South Asian descent for immigration infractions, and refused to disclose any information about them, including their names.<sup>220</sup> Many were held for weeks or months without charge.<sup>221</sup>

More harassment of noncitizens and ethnic minorities may be forthcoming. In July 2003, the House of Representatives proposed the

an alleged national, revolutionary conspiracy only netted three pistols and a small amount of radical literature. *Id.*

<sup>218</sup> See *Hirabayashi v. United States*, 627 F. Supp. 1445, 1449 (W.D. Wash. 1986); Brinkley, *supra* note 216, at 40. Lt. Gen. John L. DeWitt, Commanding General of the Western Defense Command, suspected some Japanese and Japanese Americans of being disloyal. See *Hirabayashi*, 627 F. Supp. at 1449; Brinkley, *supra* note 216, at 40. At the time, the Supreme Court deferred to the military's justification of urgent necessity, which precluded individual loyalty hearings. See *Hirabayashi*, 627 F. Supp. at 1454, 1455–56. Subsequent evidence proved that urgency was merely a pretext for General DeWitt's personal prejudice. See *id.* at 1456. In a telephone conversation between General DeWitt and another officer regarding loyalty hearings, General DeWitt asserted that "[t]here isn't such a thing as a loyal Japanese and it is just impossible to determine their loyalty by investigation—it just can't be done . . ." *Id.* at 1452. Presidents Gerald Ford, Ronald Reagan, and Bill Clinton all denounced the internment and issued apologies to Japanese Americans. See Mary Buckley & Rick Fawn, *The War on Terror: International Implications*, in *GLOBAL RESPONSES TO TERRORISM: 9/11, AFGHANISTAN AND BEYOND* 311–12 (Mary Buckley & Rick Fawn eds., 2003).

<sup>219</sup> See 8 U.S.C. § 1226(a)(1), (3), (6) (2003). If the Attorney General has "reasonable grounds to believe" that "an alien is engaged in any . . . activity that endangers the national security of the United States" or is deportable in any other way, the Attorney General may remove that person or detain him or her for consecutive six-month periods so long as the person is considered a threat to any person or the community. *Id.*

<sup>220</sup> See Leone, *supra* note 122, at 9. While this approach might yield nuggets of intelligence and even frustrate some attacks, it is unlikely to isolate and neutralize Al Qaeda in the United States given the group's expansive international network. See *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49 (S.D.N.Y. 2003) (arguing that prolonged detention can elicit information from detainees); FREEMAN, *supra* note 39, at 189 (arguing that emergency powers are likely to be effective where "the state can move quickly against a small and weakly supported terrorist group"); Andrew Tan, *The New Terrorism: Implications and Strategies*, in *THE NEW TERRORISM: ANATOMY, TRENDS AND COUNTER-STRATEGIES* 234 (Andrew Tan & Kumar Ramakrishna eds., 2002) (discussing the emergence of an international terrorist network which could replenish itself indefinitely); Buckley & Fawn, *supra* note 218, at 312–13 (discussing the detention of over 1,200 noncitizens, the need for intelligence, the threat of ethnic harassment to democratic tradition, and the need for international cooperation).

<sup>221</sup> Leone, *supra* note 122, at 9.

Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act.<sup>222</sup> The Act would grant to state and local law enforcement officials the ability to investigate, detain, or remove undocumented aliens; states and localities failing to participate would be denied some of their federal funding.<sup>223</sup> Supporters claim that the Act will combat terrorism by improving coordination among federal, state, and local officials.<sup>224</sup> Critics dispute this assertion and argue that the CLEAR Act is an unfunded mandate that will hamper community policing and encourage racial profiling.<sup>225</sup> Furthermore, without proper training or guidance, local law enforcement might misapply complex federal immigration laws and inject local bias into the process.<sup>226</sup> India's experience with POTA illustrates the risks of granting state and local authorities broad authority to enforce laws that are essentially federal in nature.<sup>227</sup> In light of India's experience and the well-reasoned criticism voiced on Capital Hill, Congress should not pass the CLEAR Act.<sup>228</sup>

Third, India's experience under POTA demonstrates the need for minimal transparency and review for the protection of those detained under severe and secretive anti-terror laws. Although POTA did not deprive Gujarat detainees of all procedural rights, some law enforcement and judicial officers ignored the few rights that prisoners retained.<sup>229</sup> Such deprivations of rights led to India's realization

<sup>222</sup> H.R. 2671, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query> (last visited Sept. 4, 2004).

<sup>223</sup> H.R. 2671, 108th Cong. §§ 101–02; *House Subcommittee Debates Local Enforcement of Immigration Laws Under Proposed CLEAR Act*, 80 INTERPRETER RELEASES 1407 (Oct. 13, 2003) [hereinafter *House Subcommittee Debates Local Enforcement of Immigration Laws*].

<sup>224</sup> *House Subcommittee Debates Local Enforcement of Immigration Laws*, *supra* note 223, at 1408–10.

<sup>225</sup> See *House Subcommittee Debates Local Enforcement of Immigration Laws*, *supra* note 223, at 1410; American Civil Liberties Union, *Statement on H.R. 2671, the "Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003" Before the House Subcommittee on Immigration, Border Security and Claims*, ¶ 5 (Oct. 1, 2003), at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=13881&c=22>.

<sup>226</sup> See *House Subcommittee Debates Local Enforcement of Immigration Laws Under Proposed CLEAR Act*, *supra* note 223, at 1410; American Civil Liberties Union, *supra* note 225, ¶ 8.

<sup>227</sup> See LAW COMMISSION OF INDIA, § II 1.1–10, reprinted in THAKUR, *supra* note 6, at 56–61 (discussing Indian central government proposal for law that precipitated POTA to address pan-Indian terror threat); Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic (depicting widespread and varied application of POTA throughout seven Indian states).

<sup>228</sup> See *House Subcommittee Debates Local Enforcement of Immigration Laws*, *supra* note 223, at 1410; American Civil Liberties Union, *supra* note 225, ¶ 5.

<sup>229</sup> See ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 4–6 (describing court mishandling of habeas corpus petition of Muslims illegally detained in Gujarat). Amnesty International received numerous reports of illegal detentions, torture, and irregular police work in Gujarat. See *id.* at 1–2, 6, 11.

that an active and empowered central review process is necessary to remedy such injustices.<sup>230</sup>

In the United States, a court of review for foreign intelligence surveillance activity exists under the PATRIOT Act.<sup>231</sup> Some anti-terror activity, however, occurs by executive fiat, and thus lacks legislative supervision or meaningful judicial review.<sup>232</sup> For example, the executive branch has suspended unilaterally the due process rights of at least one U.S. citizen seized on U.S. soil.<sup>233</sup> In 2002, Secretary of Defense Donald Rumsfeld alleged that Jose Padilla, a.k.a. Abdullah Al Muhajir, planned attacks in the United States and was associated with Al Qaeda.<sup>234</sup> Rumsfeld argued that his allegations qualified Padilla as an “enemy combatant” not entitled to ordinary due process rights.<sup>235</sup> The government has held Padilla in solitary confinement, without charge or access to counsel for over twenty-one months, and asserts that it has the right to detain Padilla incommunicado indefinitely.<sup>236</sup>

U.S. policymakers might be inclined to limit the lessons of POTA to India’s peculiar geopolitical context. India admittedly has had a more turbulent history of terrorism and harsher anti-terror laws than the United States.<sup>237</sup> Its parliamentary democracy also possesses weaker

<sup>230</sup> See COUNTRY REP. ON HUM. RTS. PRACTICES, *supra* note 200, at 251–53 (reporting on activity of several human rights groups in India); ABUSE OF LAW IN GUJARAT, *supra* note 16 at 1–3, 18 (reporting alleged POTA abuses in Gujarat and recommending independent review and cooperation with domestic and international human rights organizations); Dhavan, *supra* note 69, ¶ 9 (arguing that “[w]ith no powers of investigation and no time frame such committees are a chimera—good from far, but far from good.”); Prasad, *supra* note 18, ¶¶ 5–8, 11 (reporting on POTA abuses in Jharkhand); *Reform Without Rationale*, *supra* note 63, ¶ 12 (arguing that the Review Committee will be ineffective without state cooperation and timelines decision-making).

<sup>231</sup> See, e.g., *In re Sealed Case*, No. 02-001, (U.S. Foreign Int. Surv. Ct. Rev. Nov. 18, 2002).

<sup>232</sup> See Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, in *THE WAR ON OUR FREEDOMS*, *supra* note 121, at 52–54.

<sup>233</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 699–700 (2d Cir. 2003), *rev’d on other grounds*, 124 S. Ct. 2711, 2715–17 (2004); Lewis, *supra* note 232, at 52–54.

<sup>234</sup> *Padilla*, 352 F.3d at 700.

<sup>235</sup> See *id.*

<sup>236</sup> See *id.* at 700, 710.

<sup>237</sup> See generally USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (2001) (not altering criminal penalties or authorizing detention without charge); Prevention of Terrorism Act, 2002, Act No. 15 (India), §§ 29, 49, 53, *reprinted in* THAKUR, *supra* note 6, at 27–28, 43–44, 46–47; SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 8, at 5–9 (citing broad terrorist offenses based on speech and association, presumptions of guilt based on certain evidence, special anti-terror courts, trials in absentia, detention without charge for up to 180 days, and severe bail restrictions); LAW COMMISSION OF INDIA, § II 1.3–10, *reprinted in* THAKUR, *supra* note 6, at 56–61 (discussing religious fundamentalist militancy and various other terrorist threats in Jammu and Kashmir, Punjab, and the northeast).

separation of powers than the U.S. federal government.<sup>238</sup> Moreover, India is a developing nation with a population over three times that of the United States but enjoying far fewer resources.<sup>239</sup> Despite these differences, however, India and the United States share worrying commonalities in their approaches to terrorism and national security.

India's experience under POTA and its previous laws should serve as a warning to the United States that it may have embarked on a perilous path toward arbitrary detention and government oppression. Padilla is just one man, but his detention, combined with the severe crackdown on noncitizens within the United States signifies the shifting of U.S. national security policy in a new and dangerous direction.<sup>240</sup> Following the events of September 11, law enforcement officials have spied on mosques and engaged in other sorts of racial, ethnic, and religious profiling.<sup>241</sup> The United States has detained people out of racial and political prejudice in the past.<sup>242</sup> Detaining more Arab Americans, South Asian Americans, or Muslim Americans as enemy combatants may be the next step in the domestic war on terror.<sup>243</sup> In the United States, where the executive operates with secrecy and the Arab, South Asian, and Muslim minorities are smaller than those in India, such abuses may go unnoticed.<sup>244</sup>

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<sup>238</sup> See FREEMAN, *supra* note 39, at 37 (describing parliamentary democracies as having weaker separation of powers than the U.S. system).

<sup>239</sup> See WORLD FACTBOOK, *supra* note 26, at 249, 561. The CIA estimates that the United States' current population is approximately 290 million, while India's is approximately 1.04 billion. *Id.* The U.S. budget revenue is forty times that of India's. *Id.* at 250, 563.

<sup>240</sup> See *Padilla*, 352 F.3d at 724 (holding that the executive may not detain a U.S. citizen seized within the United States without explicit authorization from Congress and ordering Padilla's release upon a writ of habeas corpus from the District Court); Lewis, *supra* note 232, at 54 (arguing that "[w]hat was done in the case of Jose Padilla made a radical change in our assumptions about the limits on government power.").

<sup>241</sup> See Edley, Jr., *supra* note 121, at 173–74 (discussing profiling based on race, religion, and nationality in investigations and immigration procedures); Isikoff, *supra* note 121, at 6 (discussing FBI inventory of mosques for counter-terrorism investigations).

<sup>242</sup> See *Hirabayashi*, 627 F. Supp. at 1449, 1454 (discussing the detention of over 100,000 people of Japanese ancestry in California under false pretenses during World War II); Brinkley, *supra* note 209, at 30, 40 (describing the detention of 6,000 suspected radicals in 1920 and the internment of over 100,000 people of Japanese descent during World War II).

<sup>243</sup> See Edley, Jr., *supra* note 121, at 189 (arguing that the United States has "begun to slide down a slippery slope" that may lead to detention based on prejudice against immigrants and minorities).

<sup>244</sup> See *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (observing that the discrete and insular minorities are vulnerable to prejudice in the democratic political process); WORLD FACTBOOK, *supra* note 26, at 249, 562 (estimating India's Muslim minority at twelve percent and including the U.S. Muslim minority within the category of "other" at less than four percent); Edley, Jr., *supra* note 121, at 188–89 (arguing that government

The United States need not repeat India's mistakes. One way to avoid similar problems would be to narrow definitions of terrorism and explicitly require intent in harsh anti-terror laws.<sup>245</sup> Legislators must also guard against laws that permit detention without charge.<sup>246</sup> Furthermore, Congress and immigration officers should ensure that minor immigration violations do not result in unreasonably long detentions.<sup>247</sup> To promote consistency in a climate of widespread fear, only federal officers should have the power to enforce immigration laws, which make it easy to detain noncitizens.<sup>248</sup> Finally, federal courts should ensure that the writ of habeas corpus remains a viable check on executive authority, especially in times of war.<sup>249</sup>

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secrecy conceals the extent and purpose of racial profiling, impairs independent analysis, and undermines restraint and reform).

<sup>245</sup> See 18 U.S.C. § 2331(5) (2003) (broadly defining terrorism); Tiefenbrun, *supra* note 136, at 365, 380 (discussing the element of intent in anti-terror laws). The PATRIOT Act's definition of terrorism could easily be read to encompass a wide range of ordinary criminal acts. See 18 U.S.C. § 2331(5).

<sup>246</sup> See Prevention of Terrorism Act, § 49(2), (6)–(7), *reprinted in* THAKUR, *supra* note 6, at 43–45 (permitting detention without charge); ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2 (discussing arbitrary and abusive detention of Muslim minorities in Gujarat).

<sup>247</sup> See 8 U.S.C. § 1226(a) (2003) (permitting lengthy detentions of noncitizens for a wide range of immigration violations); Prevention of Terrorism Act, § 49(2), (6)–(7), *reprinted in* THAKUR, *supra* note 6, at 43–45 (permitting up to 180 days detention without charge and denial of bail without evidence of innocence); ABUSE OF THE LAW IN GUJARAT, *supra* note 16, at 1–2 (discussing prolonged detentions of Muslim minorities in Gujarat); Leone, *supra* note 122, at 9 (discussing the prolonged detention of over one thousand Muslims and South Asians in the United States following the September 11 attacks).

<sup>248</sup> See H.R. 2671, 108th Cong., §§ 101–02 (proposing to grant state and local law enforcement officers authority to enforce federal immigration laws); *House Subcommittee Debates Local Enforcement of Immigration Laws Under Proposed CLEAR Act*, *supra* note 223, at 1410 (citing lawmakers' concerns that local enforcement of immigration laws will be biased); American Civil Liberties Union, *supra* note 225, ¶ 8 (criticizing proposed law granting local law enforcement officers authority to enforce federal immigration laws); Sinha & Chowdhury, *supra* note 73, ¶ 8 graphic (reporting widespread and inconsistent use of POTA across India).

<sup>249</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 699–700 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711, 2715–17 (2004). Jose Padilla invoked the writ of habeas corpus to challenge his detention as an enemy combatant. *Padilla*, 124 S. Ct. at 2715. While the Second Circuit found his detention to be improper, the Supreme Court reversed and remanded the case for lack of jurisdiction. *Id.* at 2717, 2727. The Court held that the proper defendant in the case was the warden at the naval brig in South Carolina wherein Padilla was held, rather than Donald Rumsfeld, thus the federal courts in New York had no jurisdiction to hear the case. *Id.* at 2727. While the Supreme Court's ruling is not fatal to the writ of habeas corpus, it illustrates the technical difficulties that detainees face when seeking redress. See *id.*

### CONCLUSION

The United States has been waging war on terrorists since September 11, 2001. India has been waging that war for over fifty years, and has learned a great deal from its successes and failures. No politician since Indira Gandhi has suspended the constitution. After heavy-handed action within Punjab, the Indian military now fights its largest anti-terror battles at the border. TADA's widespread abuse and unpopularity instructed legislators to include enhanced safeguards in POTA. Abuses persist, however, and the learning must continue. India must continue to refine broad definitions of terrorist offenses and guard against arbitrary detentions motivated by politics, prejudice, or haste. In this regard, the world's largest democracy and the world's richest have much in common. India's lessons are America's lessons, too. For students of the war on terror, the classroom has no walls.