Shifts in Policy and Power: Calculating the Consequences of Increased Prosecutorial Power and Reduced Judicial Authority in Post 9/11 America

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Introduction

When Congress enacted the USA Patriot Act shortly after the terrorist attacks of September 11, 2001, it responded to a call for increased executive authority in the fight against threats to our national security. The consequences of this legislative action are still being assessed, but one thing appears clear: as a nation and by this legislation, we sought to enhance executive authority to prevent further threats to public safety in the United States. The means by which Congress sought to address such threats includes an enhanced prosecutorial authority to act, frequently out of the public's view, in derogation of traditional notions of individual liberty and privacy, and beyond the reach of officers of the judicial branch.

Among the uncertainties engendered by the legislative reaction to 9/11 is the broad question of the consequences of shifting power from the judicial branch to the executive branch of government. What are the consequences, for example, of authorizing warrantless arrests based on suspicion of an immigration status violation, or of authorizing the Attorney General to detain any noncitizen whom the Attorney General has certified as a spy or terrorist? When the judicial branch cedes to the executive branch its authority to evaluate in advance of arrest the merits of a proposed criminal detention or prosecution, and when lawmakers invest more heavily in the prosecutorial offices than in the judiciary, what results can be predicted?

While these may be untested waters, given the calamity and extraordinary character of the events that spawned this shift in power, there are bases upon which some predictions might reasonably be founded. There is evidence already available to us that might shed light on the implications of this shift, evidence that might suggest the scope of the dangers we invite by divesting our courts of powers traditionally held in the judicial branch of government. It is the thesis central to this article that certain predictions can be made based on well-established data and reason, about the consequences of shifting power from the judiciary to the executive and its prosecutorial functions. These predictions flow from research and reasoning drawn from another institution that relies heavily on balancing the roles of prosecutor and the judiciary: criminal sentencing. For it is in the area of criminal sentencing that we have been witnesses to a substantial loss of judicial power, power that has been diverted from the court to the prosecutor and in some instances coopted by the electorate or specific classes of unelected persons, so that the power is both nonresponsive to the rule of law and wholly unaccountable.

The theory, then, behind this thesis is that we have a substantial body of research and analysis illuminating both the causes and the effects of shifting power from the judicial branch

and to the executive branch (through its prosecutor). Legislation that deprives courts of discretion at the time of sentencing, through sentencing commissions and mandatory minimum sentences, offers a concrete example of such a shift in power. The beneficiaries of this shift – prosecutors who are freed from the vagaries of sentencing discretion exercised by judges – can provide an evidentiary basis for making predictions for what happens when the executive branch is given unbridled and unchecked authority and the judicial branch is in equal measure deprived of that authority. Lessons learned from this shift in power may then be used to inform predictions concerning the consequences – intended or otherwise – of shifts in power occasioned by legislation inspired by the terrorist attacks of 9/11.

Singularly disturbing about these lessons, I propose, is the consequence that much of the criminal justice apparatus concerning pre-warrant detention, currently forced into the light of day, will forever be closed to defense counsel, to the courts, and ultimately to the public. These lessons suggest that once authorized to detain without warrant whole new classes of persons, the prosecutorial offices will be able to preempt and ultimately negate firmly rooted constitutional protections limiting the power of the government to control the liberty of the governed. Where before 9/11 the prosecutor would be required to solicit the support of a judicial officer before taking a person into custody, there will be in the absence of such a requirement a fundamental shift away from due process as we know it, and in derogation of fundamental human rights. Further, I propose that we have a substantial base of knowledge and experience in support of these predictions, particularly with respect to use and abuse of power by prosecutors when prosecutorial functions are removed from public scrutiny. Drawing from these premises, I propose that courts have an affirmative duty to anticipate the unwarranted diminution of constitutional and human rights occasioned by this shift of power, and exercise judicial authority in a manner designed to preserve those rights.

I. The Done Deal: Post 9/11 Legislation

A. USA Patriot Act

Within eight days of September 11, the Bush Administration and its Attorney General, John Ashcroft, proposed what would be known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act), which was signed into law on October 26, 2001.[1] Among its many provisions, the Act "grants additional wiretapping and surveillance authority to federal law enforcement, removes barriers between law enforcement and intelligence agencies, adds financial disclosure and reporting requirements to combat terrorist funding, and gives greater authority to the Attorney General to detain and deport aliens suspected of having terrorist ties."[2]

More specifically within the USA Patriot Act, the Bush Administration sought authority to indefinitely detain non-citizens suspected of terrorism, without ever filing charges against the suspect.[3] Congress resisted this, and the Act as enacted permits unwarranted detention for seven days, after which the suspect must be charged.[4] But this seven-day limit is not universally effective as a check against prosecutorial abuse. Under the Antiterrorism and Effective Death

Penalty Act of 1996,[5] the Attorney General is required to detain and remove aliens convicted of certain crimes, and the Court has construed this to provide for indefinite detention of those not deportable because their country of origin would not accept them.[6] As a result of the USA Patriot Act and prior anti-terrorist laws, the Attorney General is given the power "to detain indefinitely not only those convicted of crimes or immigration offenses, as under old law, but also any person the Attorney General has reasonable grounds to believe is a terrorist or 'is engaged in any other activity that endangers the national security of the United States.' Thus, the USA Patriot Act extends the Attorney General's powers beyond those granted in the 1996 legislation and may give the Attorney General unfettered discretion to determine who is a terrorist. Furthermore, judicial review of the Attorney General's decision is only available through habeas corpus proceedings."[7]

Under the USA Patriot Act, the acts of terrorism to which the Attorney General is given such broad powers includes "any group that engages in violence or the destruction of property," presumably including "advocacy groups causing minor property damage during an act of civil disobedience," and is not limited to foreign or international groups.[8]

B. Immigration: Indefinite Detention under INS Interim Rule 8 C.F.R. 287.3

Pursuant to an amendment effective September 17, 2001, 8 C.F.R. section 287.3(d)[9], permits the Immigration and Naturalization Service to 'detain individuals indefinitely following a warrantless arrest without bringing any charges against them, in times of "emergency or extraordinary circumstance."[10] Commentators have expressed three-fold concerns about these amendments, arising from constitutional law and public policy: "The amended regulation infringes upon Fourth Amendment rights both in the context of immigration law enforcement itself and in the Attorney General's repeated suggestion that immigration law endorsement is being used to effectuate criminal law enforcement purposes. The amended rule also violates fundamental principles of due process rights by detaining individuals for indefinite periods of time without establishing cause. Finally, the rule creates a policy that undermines its purpose by simultaneously sweeping up thousands of innocent individuals whose rights effectively have been terminated, and creating a sense of fear in communities already reeling from violence directed at them by the public."[11]

The amended rule repeals the requirement that the INS bring the arrestee in front of an examining officer within twenty-four hours and replaces it with a forty-eight hour requirement. The amended rule also provides that in the event of 'an emergency or other extraordinary circumstance," the INS is afforded 'an additional reasonable period of time" to examine the arrestee, and is not subject to any specific time period within which it must perform this examination. The amended regulation thus allows immigrants arrested without a warrant to be held indefinitely without even the minimal protection of a determination that the INS has prima facie evidence of any violation."[12]

II. Shifts in Judicial and Executive Power in Modern Penalism

The shift of power from the judiciary to the executive branch manifested in the USA Patriot Act and in the 2001 amendments to 8 C.F.R. 287.3 signal a significant diversion of oversight away from our courts and in favor of the executive branch. Prosecutorial discretion now controls the decision whether to confine suspects who arguably at least meet definitional prerequisites, in a process that until now had called for judicial oversight. Such a shift may well reflect a determination by lawmakers and by the public at large, that courts are simply incapable of responding to threats to our national security in a manner sufficiently tuned and nimble to effectively address such threats. Public support may also be attributed to a collective perception that any adverse consequence flowing from these legislative initiatives will have an impact only upon immigrants and will spare the middle-class electorate. History gives substance to these suppositions, particularly if one examines parallels that exist between the public's reaction to post 9/11 terroristic threat with its reaction to rising crime rates in the late 1970s and early to mid 1980s.

A. Predicates to the Shift

In his seminal and widely respected work on crime and social order, "The Culture of Control,"[13] David Garland (Professor of Law and Sociology, New York University School of Law) describes what he refers to as the "crisis of modern penalism" as a multifaceted reaction to penal welfarism. Drawing from critical examinations of the corrections movement that predominated penal practices in the United States between the end of World War II to the beginning of the 1970, Garland provides a chronological map of the rise of prosecutorial power and the erosion of the judicial role in criminal justice systems. Viewed from the 1960s and early 1970s, criminal justice and sentencing systems in the United States bore the earmarks often associated with social welfare programs. Crime at the time was viewed as "a product of social and economic deprivation," and the public "looked to the state to provide the social reforms and welfare support needed to address this social program."[14]

During the 1970s and even more so during the Reagan years in the 1980s, this view of crime and punishment in America shifted significantly away from a focus on the offender and in favor of the victim of crime. Notable in this period were influential reports that directly challenged the role courts should play in the criminal justice system, with calls for the repeal of indeterminate sentencing laws, restrictions on the use of parole, imposition of fixed term sentences geared not towards the offender but based wholly on the offense, and 'presumptive sentencing' aimed at reducing sentence disparity.[15] In the place of rehabilitation, these reports pursued an agenda of "retributive justice," a penological approach that "stressed the moral superiority of proportional, backward-looking punishment. . . ."[16] As Garland puts it, '[f]or the first time in decades, and in stark contrast to the prevailing orthodoxy, a prominent work of penology argued a general case for retributive punishment as an end in itself."[17] The trend charted by Garland revealed the hope that crime would be addressed by "[b]etter, more vigorous policing and harsher, more certain punishments. . . more deterrence and control, not welfare." [18]

Concurrent with the demise of correctionalism and the rise of retributive justice in the late 1970s and throughout the 1980 was a "hardening of social divisions," as Garland puts it, separating by wealth and social position those with jobs and those without.

> The social and economic distance between the jobless and those in work, blacks and whites, affluent suburbs and strife-torn inner

> cities, consumers in a booming private sector and claimants left behind in collapsing public institutions grew ever greater in these years, until it became a common place of political and social commentary. In place of the solidaristic ideals of the Great Society of the Welfare State there emerged a deeply divided society – variously described as the 'dualized society', the 'thirty, thirty, forty society,' the 'seduced and repressed,' or, in the USA where social divisions were overlaid by racial ones, 'American Apartheid' – with one sector being disciplined in the name of traditional morality.

Garland also notes that by the last third of the twentieth century, society in the United States had largely acknowledged the "normality of high crime rates" and the limitations of the criminal justice state to do much about those rates.[19] This dual realization led to the debunking of what Garland refers to as the "myth of the sovereign state and its monopoly of crime control."[20] Pervasive crime and a realization that the state is ill-prepared to mitigate such rates of crime took a toll on the criminal justice system, and on the political structures that shape the system. Governments at all levels in the late 1980s through to the present, have had to acknowledge that government alone might promise but cannot deliver effective crime control. At the same time, however, the public continues to demand policies that inspire trust and confidence in the security of their lives and property. As Garland explains,

> The emergent outcome is a series of policies that appear deeply conflicted. . . . On the one hand, there has been an attempt to face up to the predicament and develop pragmatic new strategies that are adapted to it: through institutional reforms aimed at overcoming the limits of the criminal justice state, or else through accommodations that recognize these limitations and work within them. But alongside these difficult *adaptations* to the reality principle, there is a recurring attempt to evade its terms altogether, particularly on the part of elected officials who play an increasingly prominent role in criminal justice policy-making. The politicized reaction takes two recurring forms. Either it wilfully *denies* the predicament and reasserts the old myth of the sovereign state and its plenary power to punish. Or else it abandons reasoned, instrumental action and retreats into an *expressive* mode that we might. . . describe as *acting out* – a mode that is concerned not so much with controlling crime as with expressing the anger and outrage that crime provokes.[21]

Courts and lawyers can ill-afford to overlook the threats to civil liberties at stake when legislatures engage in the kind of "acting out" described by Garland. And there are lessons to be learned by considering past instances where legislative reactions were fueled by a desire to

express anger and outrage, at the expense of reasoned, instrumental action. That anger and outrage, palpable and unstoppable in the aftermath of the attacks of September 11, may well have been the dominant driving force for the swift passage of the USA Patriot Act and related legislation. It thus stands to reason that many of the concerns Garland raises about modern penology may be of value when assessing the impact of the Act on criminal justice systems in America.

B. The Role of Extraordinary Events

If, as Garland proposes, lawmakers have recognized the limits of the sovereign state to control criminal conduct, and at the same time lawmakers are to be responsive to public demands for action to prevent crime or at least punish criminals, then legislative responses to public outcries may well have a direct impact on the role of courts in the criminal process. If the public is convinced that the state is powerless or less than adequate to meet the threat of crime, it will invest less trust and authority in the state and retain more of it for itself. Consider the public reaction to the heinous crime that took the life of Polly Klaas. A recidivist offender, released from prison after serving less than a full sentence, kidnaps and kills an attractive, suburban, white teenage girl, inspiring a national movement towards what became the "three strikes" laws. Stark policies of punishment aimed at retribution for its own sake can quickly fill the media markets after this kind of sensational and largely anomalous criminal event. As Garland explains, "the new political imperative is that victims must be protected; their voices must be heard, their memory honoured, their anger expressed, their fears addressed. The naming of criminal laws and penal measures for crime victims (Megan's law, Jenny's law, Stephanie's law, and most recently the British campaign for Sarah's law) purports to honour them in this way, though there is undoubtedly an element of exploitation here too, as the individual's name is used to fend off objections to measures that are often nothing more than retaliatory legislation passed for public display and political advantage."[22] The consequence of such exploitation, Garland argues, is a shift of the debate "away from the instrumental reasoning of crime control analysis towards the visceral emotions of identification and righteous indignation. Once this shift has been effected, the terms of the debate are transformed and 'facts' become 'less persuasive than the moral authority of grief.'"[23]

Yet there is a danger associated accommodating, unquestioningly, the force of such momentum. If our nation has responded to the attacks of September 11 by enacting laws that shift power from courts to prosecutors, and has done so without a reasoned examination of the need for such a shift and in favor of our "visceral emotions," then consequences both unintended and profound may await. We have reason to be cautious, given the consequences of "acting out" that can be tied to criminal sentencing reforms like the "three strikes" laws passed after the murder of Polly Klaas.

The "three strikes" laws are useful here because they offer a concrete example of a deliberate act by lawmakers – driven by an intensely motivated and agitated public – to divest the judicial branch of power and transfer that power to the executive branch through its prosecutor. In much the same way, the USA Patriot Act and other anti-terrorist legislation invests substantial power and discretion in the prosecutor, preemptive of judicial involvement. The

public may well have expressed its desire to enhance a sense of national security – to the extent that it even was aware of the details of this legislation during the two months immediately after our country was attacked. Even so, however, courts must be wary of legislation that restricts the power of the judiciary to act, as experience teaches with the "three-strikes" legislation.

In his address to members of the American Bar Association during its 2003 annual meeting, Associate Justice Anthony Kennedy encouraged members of the legal profession to examine criminal justice issues having to do with sentencing and incarceration.[24] Expressly citing mandatory minimum sentences, Justice Kennedy urged legal professionals to reevaluate the wisdom of penal systems that rely on what he perceived as unduly long sentences and sentencing schemes which divest courts of discretion to impose sentences that are suited to the diverse goals of incarceration. Among the comments which brought the audience of lawyers and judges to their feet in ovation were his very clear and direct challenges to legislation that has led to inflated, over-long terms of imprisonment, and that reduce the discretionary power of judges.

A key subtext of Justice Kennedy's remarks was the proposition that there has been a profound and widespread realignment of power away from the judiciary and in favor of the executive branch of government. This realignment is most apparent in criminal proceedings at both the state and federal levels, and most directly impacts the administration of justice at the time of sentencing and throughout the period of incarceration. In a nation that currently imprisons more than 1.2 million of its citizens and has the world's highest per capita prison population, Justice Kennedy saw a particular urgency in the need for active involvement by legal professionals, involvement that should, in his view, require a reevaluation of sentencing terms and most importantly lead to the abolishment of mandatory minimum sentences.

C. Derogation of Accountability

Although not always transparent, one concrete consequence of legislation aimed at responding to atrocities and crimes of extraordinary public interest is the diminution of discretion on the part of the governmental actor. The "culture of control" described by Garland is one by which public action is aimed increasingly at limiting options for courts when responding to criminal conduct. Mandatory minimum sentences, for example, spawned in reaction to the Polly Klaas murder, remove from the courts discretion with respect to sentencing the recidivist offender. Instead of the elected or appointed judicial officer rendering a reasoned sentence based upon the facts presented in open court, the terms of an offender's sentence is prescribed by lawmakers who know nothing about the circumstances of the particular case. Once a prosecutor determines to charge an accused offender with a three-strikes law, the court has no choice but to impose the enhanced sentence if the accused is convicted, regardless of circumstances in mitigation of such a sentence. While there is some measure of accountability – the prosecutor generally is held accountable through the process of public election – the steps leading to a prosecutor's decision to pursue or avoid the enhanced sentence are conducted wholly outside of the public view.

III. Lessons From a Comparative Prosecutorial System: Japan

In the aftermath of the attacks of 9/11, the criminal justice system was quite predictably rocked by calls for action. Poised with an almost disquieting prescience was the United States Department of Justice and its Attorney General, John Ashcroft, ready almost before the fact, with legislation that would materially enhance prosecutorial power and remove judicial oversight in the investigation and prosecution of suspected criminal and terroristic conduct.[25] Significant legislative authority was proposed, by which federal prosecutors would have the power to detain suspects without first securing court approval and in some instances without ever needing such approval. How significant is this power, and what are the implications on criminal justice systems in general?

Some light can be shed on these questions by considering the prosecutorial culture of Japan. Such a comparison might be warranted in part because the Japanese prosecutorial system is a relatively unified system, at least when compared to the multi-tiered and multi-jurisdictional prosecutorial systems in the United States. Also, much of the prosecutorial system is of relatively recent vintage, evolving from reforms put into place by the occupational forces – predominately from the United States – following World War II. Further, the comparative prosecutorial systems of the United States and Japan have been the subject of careful and well-documented study. Inquiries and analyses into Japanese prosecutorial systems, and comparisons of those systems with modern prosecutorial practices in the United States, supply a substantial base of knowledge, from social scientists in both Japan and the United States.[26]

Most useful in this comparison, however, is the parallel that may be drawn from where Japanese prosecutorial culture is today and how it compares with where prosecutorial systems in the United States appear to be heading. In many ways, the procuracy in Japan – its national cadre of criminal prosecutors – already enjoy many of the advantages sought by the United States and its Attorney General in the aftermath of the attacks of September 11. If post-9/11 legislation achieves some of its more prominent goals – including divesting judicial involvement in key pre-charging criminal processes – then the Japanese model may serve as a valuable resource for judges, lawyers, and lawmakers in the United States.

A. Key Differences in Prosecutorial Systems

In "The Japanese Way of Justice: Prosecuting Crime in Japan," (Oxford 2002) David Johnson offers a comparison of prosecutorial systems in Japan and the United States. His analysis is based on participant observation and in-depth, unstructured interviewing over a period of approximately one thousand days, primarily in the Japanese cities of Kobe and Tokyo, and Alameda County, California.[27] Supporting this research with a wide array of data-gathering that included examination of court and prosecutorial records, surveys, and reviews of existing literature, Johnson brought together the disparate facets of prosecutorial systems in Japan and the United States, offering a significant contribution to the body of knowledge about both systems.

Johnson offers a template of prosecutorial systems for both the United States and Japan, serving as a starting point for comparing the two systems. For the United States, prosecution includes, very generally, these stages:

1. An arrest
2. The prosecutor makes an initial charge decision
3. The accused is brought before a judge or magistrate for arraignment, and is shown the charge, bail is determined, and counsel is identified or appointed

4. Probable cause is determined through a preliminary hearing or grand jury
5. Guilt or innocence is determined through a trial, or plea, or dismissal
6. Sentence is imposed.[28]

This is then contrasted with the Japanese prosecutorial model:

1. The initiation of cases: generally the police do not initiate by arrest; rather they consult with the prosecutor, and the overwhelming majority of cases are submitted to prosecutors without there being an arrest. Johnson states that "police arrest fewer than 20 percent of all suspected Penal Code violators."[29]

2. Once a suspect is arrested, police have forty-eight hours to transfer the suspect and case to prosecutors; but if the suspect is not arrested the investigator (and the prosecutor) have no formal time constraints.

3. Pre-charge detention and interrogation: According to Johnson, "If prosecutors believe a suspect should be detained further, they must ask a judge, within twenty-four hours of receiving the case, to approve up to ten days of additional detention. They may later ask for another ten-day extension. Judges rarely reject these requests for detention. In all, police and prosecutors can detain a suspect for up to twenty days afterwards (twenty-five days for crimes such as insurrection). During the pre-charge period, interrogations are long, thorough, and intense. Police and prosecutors routinely interrogate suspects several times for hours each time."[30]

4. The prosecutor then makes the decision to charge or not charge. There are no "probable cause" hearings, no arraignments, and the accused has no right to be advised by an attorney nor any right to bail until the prosecutor makes the charging decision.

5. Serious cases are then formally prosecuted and tried in either a district or summary court; most minor offenses are prosecuted in summary courts upon the consent of the accused.

6. A one-phase trial is conducted, consisting of one or three judges, where the judges announce a verdict and impose a sentence in the same proceeding. Except for Okinawa, there are no juries, and 94 percent of the cases are brought before the court for trial within six months. Although adversarial in design, most trials include the defendant's confession. Unlike in the United States, prosecutors can appeal an acquittal, and any other decision by the trial court.[31]

As Johnson notes, the "monopoly power to charge" possessed by prosecutors in Japan is a significant difference when compared to the sharing of power found in the United States, and "concentrates more charging power in the prosecutor in Japan than in almost any other democratic country."[32] Also significant is the power to detain and interrogate suspects for substantial periods of time, the power to use a number of tools designed to compel confessions, and the power to introduce at trial the fruits of detentions and interrogations.[33]

B. The Imbalance of Power Between Prosecutor and Judge

As Johnson notes in introducing the topic of prosecutors and judges, the judiciary in pre-war Japan was not independent nor a separate branch of government, but was instead a "'semi-independent' organ in the Ministry of Justice," and the Ministry of Justice was (and is today) run by prosecutors, "who 'controlled all budgetary and administrative matters of the judiciary,

including the appointment, promotion, transfer, supervision, and dismissal of judges and court officials.'"[34] Postwar changes to the structure, according to Johnson, gave judges independence and power they did not have prior to the war, but "judges seldom use their newfound powers to check prosecutor behavior. Whether during investigation, at trial, or concerning the charge decision, prosecutors get what they want from judges with notably few exceptions."[35]

Telling in the relationship between judges and prosecutors in Japan, is the role of judges in pre-charge events. As noted, there is no right to bail nor access to counsel until the prosecutor charges an accused, and by that time the accused may have been detained and repeatedly interrogated for over three weeks. Court involvement is required for such a detention, but according to Johnson, courts overwhelmingly support requests for precharge detention, rejecting the detention request only one in every 705 requests (in 1992 prosecutors requested 77,545 investigative detentions, and judges refused in only 110 cases).[36] Similarly, prosecutors can rely on nearly complete support by judges with respect to bail. No bail is available until after the prosecutor charges the accused, and the court solicits input from the prosecutor seeking what is in effect confirmation that the accused has confessed and the prosecutor's conclusion that the defendant will abide by his or her confession during trial. "Suspects who insist on their innocence stand only a tiny chance of being released.[37] Simply put, suspects who do not confess do not get bail."[38]

C. Abuse in the Prosecutorial Functions: Confessions, Brutality, and Secrecy

Consistently sounded themes in comparisons between prosecutorial systems in Japan and the United States include assessments of the role of confessions, the use of prosecutorial intimidation to obtain those confessions, and the absence of media attention in pre-charge criminal proceedings. Johnson refers to confessions as "the heart" of Japanese criminal justice.[39] Prosecutors in Japan work in an environment driven by confessions, one that considers confessions to be a paramount goal of all prosecutions.[40] Where prosecutors in the United States may have become inured to the use of plea bargains as a means of effective docket control, Japanese prosecutors extract their key prosecutorial weapon before the charge is made, during interrogation and outside the reach of public scrutiny.

Also beyond public scrutiny is the process of procuring these confessions. Media accounts and Johnson's own experiences while in Japan reinforce the logical notion that when hidden from public view, the process of extracting confessions may readily tolerate physical and mental abuse by the interrogators. In one study by the Tokyo Bar Association and described by Johnson, thirty-three former suspects had given false confessions, admitting to crimes they had not committed. On average, according to the study, "suspects in this study were interrogated for sixty-two days, and even the median suspect was interrogated for forty-four days. The longest day of interrogation per suspect averaged thirteen hours. Assuming that a typical day of interrogation lasted three hours instead of thirteen – a conservative conjecture indeed – the median suspect was interrogated for 132 hours. . . ." By comparison, one recent estimate of interrogation practices in the United States found that "92 percent of suspects were interrogated for two hours or less."[41] Further, during the interrogations, the suspects reported repeatedly

being slapped, kicked, punched or otherwise beaten by interrogators.[42] In one instance reported directly by Johnson based on his field interviews in Japan, more than one prosecutor acknowledged forcing suspects to stand on their heads, 'to get more blood flowing into the brains of people who are not thinking clearly."[43]

One of the significant concerns raised by Johnson in his description of the process of extracting confessions in Japan is the complacency of the media. In a representative comment, Johnson quotes a journalist as saying that "in Japan, writing critical investigative articles is not a press custom. We know there are areas where we better not tread. . . . We don't make bold criticisms because if we did, we'd be shut off from information and unable to perform our jobs. . . . We have struck a kind of bargain: prosecutors give us information, and we given them good [uncritical] coverage. Of course, prosecutors don't say directly that if we write so-and-so we'll get shut out of the loop, but everyone understands the deal. Prosecutors are our superiors and we are their supplicants. We have to be humble and play by their rules."[44]

IV. Application of the Lessons

A. The Consequence of Secrecy

Justice Kennedy's exhortation that members of the legal community resist mandatory minimum sentence schemes is based, it appears, on a recognition that certain responsibilities in the criminal justice system cannot be delegated to the executive branch without a significant risk of loss of fundamental fairness. Courts act in a very public way, facing the victims, the accused, the press, and the legal community, all in stark contrast to the decision making process employed by prosecutors when deciding what charges to press against a suspect. Legislative action like that which is found in the USA Patriot Act and other post-9/11 legislation gravitates consistently towards sealing off critical parts of the criminal justice system from public scrutiny and judicial oversight. Secrecy of the proceedings is a baldly accepted goal of this legislation, and should be regarded with great caution.

As Michael T. McCarthy expressed the point, secrecy blocks the very tools needed for maintaining checks and balances over governmental excesses:

> One significant hurdle to effective oversight of how the executive branch uses its new powers is secrecy. [fn omitted] The more politically accountable branch provides an effective check on executive authority only when the legislature is responsive to citizen concerns, which depends on abuses of discretion being discovered. There can be no public outcry and congressional pressure over abuse of secret [Foreign Intelligence Standards Act] warrants if targets are unaware of the surveillance; there can be no habeas corpus proceedings for immigrants secretly detained. Since voters and attorneys will be unable to raise abuses of secret procedures, Congress and the courts must be aggressive in acting sua sponte to monitor how the powers granted by the USA Patriot Act are being used."[45]

Courts and all in the legal community have an obligation to ensure sufficient judicial oversight exists to provide at least minimum safeguards against the abuse of persons and the abuse of power by prosecutors and investigators. Secrecy is a powerful tool, one that traditionally has been
kept in fairly close check by courts. The events of September 11 have not weakened the need for control over the excesses of our government over the governed.

B. The Consequence of Enhanced Prosecutorial Discretion

A key cultural difference noted by Johnson in his examination of prosecutorial culture in Japan is its reliance on a hierarchical review of prosecutorial decision making. Johnson credits close internal controls and collaborative decision making between prosecutors and his or her supervisors as likely reasons for that country's high conviction rate. "Managers in Japan further specify rules for performance by requiring operators to clear decisions with supervisors, chiefly through the *kessai* system of consultation and approval. In order to make charge and sentence recommendation decisions, operators must consult with and obtain the approval of two or three managers, depending on the seriousness of the case."[46] In practical terms, close vetting of charges before actually filing of charges reduces the risk of erroneous criminal prosecution. If the team effectively tests the relative strengths and weaknesses of a case, the process will reduce the likelihood of a miscarriage of justice. There are few acquittals in Japanese criminal trials because, as Johnson puts it, "prosecutors have already 'acquitted' suspects who might have been acquitted at trial."[47]

There is no comparable system in the United States, designed to thoroughly screen cases so as to reject cases in a manner similar to that used in Japan. To the extent post-9/11 legislation expands prosecutorial authority without engendering some concomitant level of accountability and efficacy like the *kessai* system of internal checks on prosecutorial discretion, there is a substantial risk that prosecutors will abuse their increased authority, all in the name of national security. This should be a cause for some concern. As one commentator put it:

> Ultimately, the debate over the USA Patriot Act is just as much about the delegation of executive authority as it is about civil liberties. If the Administration exercises its new authorities with respect for civil liberties, and Congress provides appropriate oversight to prove that this has been the case, then the USA Patriot Act will have been a wise and timely piece of legislation in a national crisis. If the Administration fails to use restraint, and Congress and the courts let down their guard, however, the USA Patriot Act could become another chapter in America's history of suspending Constitutional values during difficult times."[48]

V. Conclusion

Justice Kennedy's call to the legal profession to show a collective concern against

sentencing legislation that deprives courts of discretion is a call not based on constitutional concepts as much as it is based on public policy. As we know from the Court's review of mandatory minimum sentences and "three strikes" sentencing schemes, our constitution tolerates such schemes, at least as construed by the majority of the current Supreme Court.[49] And so too it may be that the enhanced prosecutorial powers created under the USA Patriot Act and other legislation enacted in response to the attacks of September 11 will ultimately pass judicial muster. For reasons similar to those expressed by Justice Kennedy, however, legislation that shifts power from courts to prosecutors must be viewed with substantial and close scrutiny.

Much can be learned from a prosecutorial scheme that bestows the depth of authority shown in Japan, if for no reason other than the fact that so much power is given to the prosecutor prior to the time charges are made against an accused. Clearly the present Administration would have its Attorney General have at least as broad a set of powers as is currently in place in Japan. Should such a shift of power become a reality, indeed if it already done so, it would seem incumbent upon all judges and lawyers to monitor such a shift in power closely indeed.

1.Pub. L. No. 107-56, 115 Stat. 282 (2001).

2. Michael T. McCarthy, Recent Development: USA Patriot Act, 39 Harv. J. on Legis. 435 at 435, citing Pub. L. No. 107-56, 115 Stat. 282 (2001) and Bill Summary and Status, H.R. 3162, at http://thomas.loc.gov.

3.McCarthy, p. 449, citing John Lancaster, Hill Puts Brakes on Expanding Police Powers, Washington Post, September 30, 1991, at A6.

4. McCarthy, p. 449, citing Pub. L. No. 107-56 Section 412, 115 Stat. 272, 351 (to be codified at 8 U.S.C. section 1228(a) (2001)).

5.Publ. L. No. 104-132 sections 422-23, 110 Stat. 1214, 1270-72 (codified at 8 U.S.C. sections 1252, 1961 (1996)).

6.McCarthy at p. 449, citing Fact Sheet, American Civil Liberties Union, How the USA-Patriot Act Permits Indefinite Detention of Immigrants Who Are Not Terrorists (October 23, 2001, at http:///www.aclu.org./gongres/1102301e.html; see also David Cole, National Security State, Nation, December 17, 2001, at 4; Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 107th Cong. (Oct. 3, 2001) (statement of David D. Cole, Professor of Law, Georgetown University Law Center) available at http://judiciary.senate.gov/te100301sc-role.htm, and Antiterrorism and Effective Death Penalty Act of 1996, Publ. L. No. 104-132 sections 422-23, 110 Stat. 1214, 1270-72 (co0fified at 8 U.S.C. sections 1252, 1961 (1996), and Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

7.McCarthy, p. 449-50, citing Fact Sheet, American Civil Liberties Union, How the USA-Patriot Act Permits Indefinite Detention of Immigrants Who Are Not Terrorists (October 23, 2001, at http:///www.aclu.org./congress/1102301e.html); see also David Cole, National Security State, NATION, December 17, 2001, at 4; Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcommittee on the Constitution, Federalism, and

Property Rights of the Senate Comm. on the Judiciary, 107th Cong. (Oct. 3, 2001) (statement of David D. Cole, Professor of Law, Georgetown University Law Center) available at http://judiciary.senate.gov/te100301sc-role.htm, and Antiterrorism and Effective Death Penalty Act of 1996, Publ. L. No. 104-132 sections 422-23, 110 Stat. 1214, 1270-72 (codified at 8 U.S.C. sections 1252, 1961 (1996), and Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

8.McCarthy, p. 450, citing Pub. L. No. 107-56 Section 411, 115 Stat. 272, 346-48, Fact Sheet, American Civil Liberties Union, How the USA-Patriot Act Allows for Detention and Deportation of People Engaging in Innocent Associational Activity (October 23, 2001, at http:///www.aclu.org./congress/1102301h.html).

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10.Administrative Comment: "Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. Section 287.3, Submitted on behalf of Immigrant Rights Clinic, New York University School of Law, 26 New York University Review of Law and Social Change 397, 397-98 (2000/2001)

11. Id.

12. Id.

13. David Garland, Culture of Control: Crime and Social Order in Contemporary Society (University of Chicago Press 2001).

14. Id., p. 56

15. Garland, p. 59, citing Andrew von Hirsch in "Doing Justice: The Choice of Punishments – The Report of the Committee for the Study of Incarceration" and also by Fair and Certain Punishment, the report of the Twentieth-Century Fund Task Force (1976).

16. Garland, p. 59

17.Garland, p. 59

18.Garland, pl 59, citing James Q. Wilson, Thinking About Crime (1975).

19. Garland, p. 106-07

20.p. 109

21.Garland, p. 110

22.Garland, p. 143

23. [W. Kaminer, It's All the Rage: Crime and Culture (New York: Addison-Wesley, 1995) p.71] Garland, p. 144

24. See, Bob Egelko, The San Francisco Chronicle, "High Court Justice Crusades for Mercy; He Calls Sentences Too Severe, Too Long," 2A August 10, 2003.

25. [McCarthy, p. 448 ("The surveillance and money laundering provisions of the USA Patriot Act are good examples of how September 11 provided the impetus to pass reforms that Congress had been moving towards at a glacial pace.")]

26. [See, e.g., J. Mark Ramseyer and Eric B. Rasmusen, "Why is the Japanese Conviction Rate So High?", University of Chicago, 30 J. Legal Stud. 53 (2001), Marcia E. Goodman, "The Exercise and Control of Prosecutorial Discretion in Japan," 5 Pacific Basin Law Journal 16 (1986), Daniel H. Foote, "Prosecutorial Discretion: A Response (to Goodman)," 5 Pacific Basin

Law Journal 96 (1986), Satyanshu Mukherjee, "What's So Good About the Low Crime Rate in Japan?", The Australian Rationalist (December-March 1994-1995) 7-17; and other references noted in David Johnson, "The Japanese Way of Justice,"(Oxford 2002) pp. 4-17 and notes accompanying text.]

27. [Johnson, p. 8-12]

28. [Johnson, p. 13]

29. [Johnson, p. 13]

30. [Johnson, p. 14]

31.[Johnson, p. 14-15]

32.[Johnson, p. 37, noting the possible exception of South Korea.]

33. [Johnson, p. 38-39]

34. [Johnson, p. 61, citing Percy R. Luney, "the Constitution of Japan: The Fifth Decade," 53 Law and Contemporary Problems, nos. 1 and 2,137 (Winter and Spring Special Issue1990)]

35. [Johnson, p. 61]

36. [Johnson, p. 62]

37.[citing Futaba Igarishi, 1989 "Coerced Confessions and Pretrial Detention in Japan," Paper presented at the 41st Annual Meeting of the American Society of Criminology, Reno, Nevada November 11, 1989]

38. [Johnson, p. 62]

39.[Johnson, p. 243]

40. [Johnson, p. 243]

41.[Johnson, p. 253, citing Richard A Leo., Inside the Interrogation Room." 86 Journal of Criminal Law and Criminology 266 (1996)]

42. [Johnson, p. 254.

43. [Johnson, p. 254]

44.[Johnson, p. 262]

45.McCarthy, p. 452.

46.Johnson, p. 130

47.Johnson, p. 226

48.McCarthy, p. 453

49. *See, e.g., Lockyer v. Andrade*, 123 S.Ct. 1166 (2002) (California state court's affirmance of two consecutive prison terms of 25 years to life for "third strike" conviction held not contrary to, nor an unreasonable application of, clearly established federal law).