

# **Strengthening America by Defending Our Liberties**

**An Agenda for Reform**

CENTER FOR  
**DEMOCRACY**  
&  
**TECHNOLOGY**

CENTER for AMERICAN PROGRESS  




*Center for National  
Security Studies*

**October 31, 2003**

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## Glossary of Terms Used

**FISA:** Foreign Surveillance Intelligence Act of 1978. Provides procedural guidelines originally intended for conducting electronic intelligence gathering directed at a foreign power or an agent of a foreign power.

**NSEERS:** National Security Entry-Exit Registration System. System put in place post-9/11 that requires immigrants from 25 mostly Muslim countries to meet special registration requirements.

**PATRIOT ACT:** Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. Significantly expanded the authority of the Justice Department.

**NCIC:** National Crime Information Center. A nationwide database of individuals wanted for criminal infractions.

**Civilian Defense Counsel (CDC):** Non-military attorney representing the accused before a military commission.

**Detailed Defense Counsel (CDC):** Military attorney representing the accused before a military commission.

# Summary of Recommendations

## I. Treatment of Immigrants

1. Prohibit blanket closures of immigration hearings. Allow the closing of an immigration hearing only on a specific showing of need.
2. Prohibit detention of non-citizens without charges for more than 48 hours as a general rule. For detentions of non-citizens beyond 48 hours, the detainee must be brought immediately before an immigration judge to determine whether specific exigent circumstances exist for limited continued detention without charge.
3. Eliminate the Justice Department regulation that automatically stays immigration judge bond decisions when a government lawyer requests no bond or a bond of \$10,000 or more. Permit stays only where the government is likely to prevail and there is a risk of irreparable harm in the absence of a stay.
4. Require all individuals, except those in categories specifically designated by Congress as posing a special threat, to have a bond hearing that requires an individualized assessment of danger and risk of flight.
5. Terminate the NSEERS registration program. Provide relief to immigrants whose immigration status has changed as a result of failure to comply with NSEERS requirements.
6. For other (non-NSEERS) immigration registration requirements, make civil fines, not a change in immigration status, the penalty for non-compliance.
7. Make civil fines, not deportation, the penalty if an immigrant fails to register an address change within 10 days.
8. Establish an independent immigration court outside of the control of the Justice Department.
9. Prohibit the National Crime Information Center from including purely civil immigration violations unrelated to terrorism or criminal violations. Require the Attorney General to comply with the Privacy Act's accuracy requirements.
10. Allow expedited procedures for removal to be used only in "extraordinary migration situations" – defined as the arrival or imminent arrival of aliens at a United States border in numbers that substantially exceed the capacity for inspection.

## II. USA PATRIOT Act

1. Require that if a FISA wiretap request does not identify a specified location, the targeted person must be specified. Similarly, if a FISA wiretap request does not identify a specific person, a location must be identified.
2. If a roving tap is approved, require the government to ascertain the presence of the targeted person at a particular place before activating the surveillance at that place.
3. Allow delayed notification of a search and seizure of property only when immediate disclosure: 1) will endanger the life or physical safety of individual, 2) result in flight from prosecution, or 3) result in the destruction of or tampering with the evidence sought under the warrant.

4. Require that initial delays, when granted, be limited to seven days. Allow delays to be extended in seven-day increments, upon application of the Attorney General, Deputy Attorney General or Associate Attorney General, if the court finds that there is reasonable cause to believe that notice will endanger the life or physical safety of an individual.

5. Require that the Attorney General, on a semi-annual basis, submit a public report to Congress detailing the following data for the preceding six-month period: (1) the total number of requests for delays, 2) the total number of such requests granted or denied, and 3) the total number of applications for extensions of the delay of notice and the total number of such extensions granted or denied.

6. Allow pen register and trap and trace surveillance under FISA only if there are facts giving reason to believe that the target of the surveillance is engaged in international terrorism or espionage.

7. Limit authority under this section to requests that are reasonably likely to acquire information that would significantly further an investigation into international terrorism or espionage.

8. If the items sought are medical records, library records, or other records involving the purchase and rental of books, video or music or Internet use, require the government to set forth in its application facts and circumstances establishing *probable cause* to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.

9. For all other records and tangible items, require the government to show facts and circumstances establishing a reasonable belief that the person to whom the records pertain is a foreign power or an agent of a foreign power.

10. Require that an order for a pen register or trap and trace device be issued only if the judge finds that the government has presented specific and articulable facts indicating that a crime has been or will be committed and that the information sought is relevant to an investigation of that crime.

11. Clarify that the content of an electronic communication includes the subject line of an e-mail and anything beyond the top level domain (i.e., anything past the first backslash of an Internet address).

12. Permit the use of FISA only when obtaining foreign intelligence information is *the primary purpose* of the surveillance.

13. Repeal the authority accorded to the Attorney General by Section 412. Individuals should be detained on the basis of articulable facts reviewed by a neutral judicial officer.

14. Restrict the use of national security letters to situations where there is a factual basis for believing that the person whose records are sought is an agent of a foreign power (i.e., a suspected spy or terrorist) and the information sought is reasonably likely to significantly further an investigation into terrorism.

15. In Section 802, use the pre-existing definition of the federal crime of terrorism.

16. Require an expanded annual public report by the Attorney General regarding the use of FISA. The report should include: 1) the number of orders for electronic surveillance, physical searches, pen registers, trap and trace devices and access to records granted, modified and denied in the previous year; 2) the number of applications for orders served on the public media and the result

of such applications; 3) the number of United States persons targeted under FISA in the previous year, 4) the number of times the Attorney General authorized the use of FISA information in a criminal trial, and 5) the number of times a statement was completed to accompany a disclosure of information under FISA for law enforcement purposes.

17. Require disclosure of FISC rules and FISC decisions that contain statutory construction analysis, unless the FISC decides that such disclosure would threaten national security.

18. When FISA information is introduced in a criminal case, treat the disclosure of the FISA surveillance application under the procedures of the Classified Information Procedures Act.

19. Reject the Terrorist Penalties Enhancement Act of 2003.

20. Reject the Antiterrorism Tools Enhancement Act of 2003. Congress should preserve the role of grand juries in criminal investigations. In situations where time is of the essence, procedural alternatives already exist.

21. Reject the Pre-trial Detention and Lifetime Supervision of Terrorists Act of 2003.

22. Reject Kyl-Schumer (S. 113).

23. Reject the Anti-Terrorism Intelligence Tools Improvement Act of 2003.

### **III. Treatment and Trials of Enemy Combatants**

1. Limit the jurisdiction of the Commissions to individuals who: 1) are not United States persons, 2) participated in the planning or execution of the 9/11 attacks, 3) are apprehended outside the United States, and 4) are not prisoners of war within the meaning of the Geneva Convention Relative to the Treatment of Prisoners of War or any protocol relating thereto.

2. Terminate the authority of the Military Commissions effective December 31, 2005.

3. Use the Military Rules of Evidence for Military Commissions.

4. Prohibit the government from monitoring or interfering with confidential communications between defense counsel and client.

5. Require attorneys, pursuant to the Model Rules of Professional Conduct, to reveal confidential information "to prevent the client, or another person, from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

6. Ensure that Civilian Defense Counsel (all of whom are required to have security clearances) are present at all stages of the proceedings.<sup>1</sup>

7. Provide Civilian Defense Counsel with all information necessary to conduct a defense, including all exculpatory information, whether or not such information is to be used at trial, subject to the restrictions of the Classified Information Procedures Act.

8. Provide for travel, lodging and required security clearance background investigations for Civilian Defense Counsel. Consider the professional and ethical obligations of Civilian Defense Counsel when scheduling proceedings.

9. Allow Civilian Defense Counsel to: 1) consult with other attorneys, 2) seek expert assistance, advice and counsel outside the defense team, 3) conduct all professionally appropriate factual and legal research, and 4) speak publicly provided that they do not reveal classified or protected information. Allow the Military Commission, on a case-by-case basis, after notice and hearing, to require other conditions.
10. Allow non-U.S. citizen lawyers with appropriate qualifications to serve as Civilian Defense Counsel.
11. Conduct public proceedings unless a public proceeding would threaten the safety of observers, witnesses, Commission judges, counsel or other persons.
12. Prohibit the exclusion of the accused or Civilian Defense Counsel from the courtroom.
13. Make public evidence originating from an agency of the Federal Government that is offered in a trial, subject to the restrictions of the Classified Information Procedures Act.
14. Provide for two levels of appeal: first, to the United States Court of Appeals for the Armed Forces; second, to the Supreme Court of the United States by writ of certiorari.
15. Grant the United States Court of Appeals for the District of Columbia the authority to review any detention decisions.

# Introduction

After the devastating attacks of September 11, 2001, some were quick to conclude that our nation must choose between enhanced security and a free and open society. New laws were hastily enacted and administrative measures put in place as Congress and the Administration were forced to reassess the roles of law enforcement, the intelligence community and the military in protecting our country from the threat of future terrorist acts.

Today that threat is no less compelling, and the nation still is not fully prepared to meet it. There is no disagreement as to what must be done: terrorists must be identified and apprehended, critical infrastructure protected, our ports of entry secured. What is at issue is whether these objectives are advanced or impeded by measures that fail to honor our traditions of due process and respect for the rule of law, that undermine individual rights, and that call into question America's willingness to conduct itself as a responsible member of the international community – in short, whether a free society can win the struggle against tyranny by forsaking the values it is fighting to protect.

In our judgment, such a strategy can advance neither freedom nor security. It can only undermine both by weakening public trust in the government, engendering a climate of fear and suspicion, and damaging our relations with other nations with whom we must make common cause. The recommendations set forth in this paper seek to strike a more sensible balance that will advance the national security while preserving fundamental rights: to restore public confidence in the government; repair our relations with other governments whose assistance we need in the fight against terrorism; deploy more effectively the funds appropriated for counterterrorism efforts; and increase the government's access to information that may be critical to preventing future terrorist attacks.

## Violations of Civil Liberties

Many of the measures adopted by Congress and the Administration in the aftermath of the 9/11 attacks represent reasonable responses to the terrorist threat. Other measures have exploited the emergency for purposes that bear little connection to the fight against terrorism. As detailed below, these actions have resulted in infringements of civil liberties on a scale unprecedented since the era of COINTELPRO and Watergate. While some of these problems have arisen as a result of the enactment of the USA PATRIOT Act, discussed below, most have resulted from the aggressive use of laws that were already on the books, or in some instances, from actions undertaken without apparent legal authority.

### Treatment of Immigrants

According to a report issued by the Department of Justice Inspector General, in the days after 9/11, more than 762 foreign nationals, chiefly men of Arab and Muslim background, were rounded up, most for relatively minor immigration violations, and placed under 23-hour lockdown. Some were denied access to their family members and attorneys for weeks at a time. Some were subjected to physical and verbal abuse by correctional officers. The government refused -- and still refuses -- to release the names of those who were detained.

Ultimately, not a single individual detained after 9/11 was charged with any terrorist crime relating to the attacks on the World Trade Center and the Pentagon. In a statement released by a spokesperson, Attorney General John Ashcroft said he makes "no apologies" for the actions criticized by the Inspector General's report. As of September 2003, the Justice Department had fully implemented only two of 21 measures recommended by the Inspector General to prevent future civil liberties abuses.<sup>2</sup>

The post-9/11 government dragnet is just a part of a systematic policy that has targeted Arab and Muslim men in the United States. For example, the Justice Department created the "Special Registration" program at the INS – requiring foreign nationals from 20 Arab and Muslim countries to report to INS offices to be fingerprinted, photographed and interrogated. More than 80,000 immigrants have been brought in for questioning under this program. In March 2003, the Ashcroft Justice Department took the unprecedented step of allowing state and local law enforcement officials to enforce immigration laws in which they have no special training – thus increasing the likelihood of legal errors, arbitrary decisions, and inconsistent interpretations. Such tactics also impair the relationship between local police and immigrant communities whose assistance is essential to the effective prevention and investigation of terrorist crimes.

In February 2002, Attorney General Ashcroft ordered the Board of Immigration Appeals, often the last hope for those seeking asylum from a homeland that would subject them to death, torture or other inhumane treatment, to clear its 56,000 case backlog in a little over a year. The Attorney General also announced that, after the backlog was cleared, he would reduce the size of the board from 23 to 11 – deciding which members to retain, in part, based on the number of cases each board member had cleared. Immediately, the board members abandoned their traditional three-judge panels in favor of making decisions individually, often taking just minutes to decide. Between March and September 2002, the Board of Immigration Appeals issued over 16,000 decisions without explanation, an exponential growth in such rulings over the previous year, with virtually all upholding the immigration judge's decision.

#### The USA PATRIOT Act (PATRIOT Act)

The PATRIOT Act, signed into law just 45 days after the attacks on the World Trade Center and Pentagon, extends unprecedented authority to the Attorney General and permits intrusive surveillance techniques, previously available principally for foreign intelligence operations, to be used in primarily criminal investigations.

The Justice Department has refused to make comprehensive disclosures about how it is using the act. Rather, it has selectively released information for public relations purposes. Recently, faced with intense criticism from librarians, Attorney General Ashcroft revealed that the Justice Department has never used its authority under section 215 to obtain library records or any other items. But on a number of critical issues – in spite of multiple, explicit, bipartisan requests from Congress – the Justice Department refuses to make straightforward, unambiguous disclosures.

While the PATRIOT ACT was marketed to Congress and the public as a response to terrorism, immediately after the act became law, the Justice Department openly and aggressively sought to exploit its newfound powers outside the scope of the war on terrorism. The Justice Department even offered its staff a course on the PATRIOT Act's effect on "everyday prosecutions."

Meanwhile, the Act has engendered strong local opposition in jurisdictions across the country. Nearly 200 towns and counties and three states have passed resolutions condemning the Act. In Arcata, California, a town of 16,000 people, city officials are prohibited by law to assist with investigations carried out by the Justice Department under the Act.

#### Treatment of Enemy Combatants

The government is holding two United States citizens, Jose Padilla and Yaser Esam Hamdi, as "enemy combatants." The government claims that such individuals have extremely limited constitutional rights and has denied them access to counsel or contact with their families. The impact of this designation may reach far beyond these two; allegedly, others now in the traditional court system have been threatened with the "enemy combatant" classification if they fail to cooperate.

Hundreds of suspects, detained by the military in Guantanamo Bay, Cuba, have been denied hearings required by the Geneva Convention to determine their status. The Administration has selected six for trial before special military commissions where proceedings can be conducted without the presence of the defendant, attorney-client conversations can be monitored, and unreliable information can be admitted into evidence.

### **Need for Change**

These infringements of civil liberties have not enhanced our national security; indeed, they have diminished it by undermining public confidence in the justice system and the rule of law. This is especially true in the immigrant communities that the government has targeted, whose cooperation is essential to the successful prosecution of the antiterrorism campaign. The government should seek to foster an environment in which citizens and immigrants alike will feel safe approaching the government with information. In addition, immigrant communities are a valuable source of qualified translators, cultural consultants and intelligence operatives. By viewing immigrants as suspects rather than partners, the government is less informed and equipped than it otherwise would be, and is less prepared to preempt future terrorist attacks.

The Administration's excesses have also diminished our national security by undermining international cooperation. The terrorist threat is a worldwide phenomenon and an effective response requires the cooperation of a broad coalition of countries. The United States has paid little heed to either international law or world opinion, particularly with respect to the detainees held at Guantanamo Bay. Many countries have refused to extradite suspects to the United States because they believe that such individuals may not be afforded a fair trial – or any trial at all. Recent Administration proposals to extend the death penalty to more terrorist crimes would further undermine cooperation with critical allies,<sup>3</sup> in the European Union and elsewhere, who refuse to extradite suspects or provide evidence for a prosecution that may result in capital punishment.

This report addresses the three major prongs of the Administration's response to 9/11 – the targeting of immigrants, the PATRIOT Act, and the treatment and trials of enemy combatants – and makes specific recommendations for reform. These recommendations seek not to eliminate all of the powers granted to or claimed by the Administration post-9/11, but rather to refocus these powers on balanced and effective measures that will combat terrorism without unduly infringing on civil liberties. By changing our approach, we can restore public confidence in the government, ensure more extensive cooperation from foreign nations, and more efficiently use the funds appropriated for counterterrorism efforts.

# I. Treatment of Immigrants

Over the past two years, the Justice Department has engaged in an aggressive campaign against immigrants and other non-citizens, in particular Muslim and Arab men, residing in the United States. Muslim men and others have been subject to mass interrogations, secret hearings and extrajudicial detentions. This dragnet has resulted in few, if any, convictions for crimes relating to terrorism. It has been successful, however, in spurring a distrust of the government within Muslim communities, squandering limited counterterrorism resources and undermining the legitimacy and the authority of the judiciary. In order to have an effective long-term approach to confronting international terrorism, we need to change the course of our immigration strategy.

## 1. Secret Arrests and Immigration Hearings

On September 21, 2001, Chief Immigration Judge Michael J. Creppy issued a memorandum (the “Creppy Directive”) implementing an order from the Attorney General to close certain immigration hearings.<sup>4</sup> These cases were to be conducted completely in secret with “no visitors, no family and no press.”<sup>5</sup> The mandate for secrecy even prohibited “confirming or denying whether such a case is on the docket or scheduled for hearing.”<sup>6</sup>

It has been reported that the INS did not use classified information in any of these hearings.<sup>7</sup> Instead the government has asserted that *all* purported terrorism-related proceedings need to remain closed in order to protect the privacy of the detainees and prevent information about government intelligence-gathering methods from reaching al Qaeda.<sup>8</sup>

The Federal District Court for the Eastern District of Michigan found that the order closing immigration hearings was unconstitutionally broad, and the Federal Court of Appeals for the Sixth Circuit Affirmed.<sup>9</sup> In a separate case, the Federal District Court for New Jersey found the closures unconstitutional, but the Third Circuit reversed.<sup>10</sup> The Supreme Court declined to hear the case, effectively allowing the government to continue the process, at least within the geographic confines of the Third Circuit.<sup>11</sup>

Open proceedings, in judicial and quasi-judicial settings, protect individuals from arbitrary action and the public from sloppy decision-making.<sup>12</sup> Transparent proceedings are also important in maintaining public confidence in the fairness of government activities.<sup>13</sup> There are clearly individual cases where proceedings should be closed to protect the safety of participants or national security. But the “Creppy Directive” allows the partial closing of proceedings based on the government’s prerogative, without any showing of legitimate security needs.

As of May 29, 2002, 611 individuals have been subject to one or more secret hearings.<sup>14</sup> As noted, there is a split in the circuit that have considered the legality of these proceedings, and, in opposing review by the Supreme Court, the Justice Department announced it was reconsidering its policy.<sup>15</sup> But, in the absence of legislative action, there is nothing to prevent the Justice Department from conducting more secret immigration hearings in the future.

### Recommendation:

- Prohibit blanket closures of immigration hearings. Allow the closing of an immigration hearing only on a specific showing of need.

## 2. Detention Without Charges

Prior to 9/11, the INS was required to charge an alien within 24 hours of the initial detention.<sup>16</sup> On September 20, 2001, the Justice Department issued an interim rule that allows the INS (now the Bureau of Citizenship and Immigration Services) to detain individuals for “an additional reasonable period of time” beyond 48 hours without charges in “emergency or other extraordinary circumstances.”<sup>17</sup> According to the Justice Department’s own Inspector General, this rule was used repeatedly to detain hundreds of immigrants for four days or more without being charged, with some held in excess of 30 days prior to being charged or released.<sup>18</sup>

The Inspector General found that the delays made it impossible for immigrants to understand the charges against them, request bond or be effectively represented by legal counsel.<sup>19</sup> Those detained in the aftermath of 9/11 were held at great expense in high security facilities.<sup>20</sup> If they had been able to go before an immigration judge, many of them would have been released much sooner. In the end, none were charged with any terrorist crime.<sup>21</sup>

### Recommendation:

- Prohibit detention of non-citizens without charges for more than 48 hours as a general rule. For detentions of non-citizens beyond 48 hours, the detainee must be brought immediately before an immigration judge to determine whether specific exigent circumstances exist for limited continued detention without charge.

## 3. Denial of Bail

On October 31, 2001, the Justice Department issued an interim regulation that automatically stayed the decision of an immigration judge to release an alien, whenever the government requested that the alien be held with no bond or a bond of \$10,000 or more.<sup>22</sup> The INS developed a policy of requesting no bond in all cases related to the 9/11 investigation.<sup>23</sup> This policy was adopted in spite of the fact that, according to the INS Deputy General Counsel, there was no evidence supporting the detention of most immigrants arrested post-9/11.<sup>24</sup> The automatic stay was invoked not only to continue the detention of those detainees whom an immigration judge ordered released, but also to discourage immigration attorneys from requesting a bond hearing for their clients.<sup>25</sup> Automatic stays have also been invoked outside the terrorism context. In October 2002, the same authority was used to prevent the release of asylum seekers from Haiti.<sup>26</sup>

An immigration judge must deny bond if an individual is a flight risk or a threat to public safety. The Justice Department regulation operates to deny bond when the individual in question is *not* a flight risk and is *not* a risk to public safety. It treats the decisions of immigration judges as suspect. It strips immigration bond hearings of their legitimacy and authority by allowing prosecutors, in effect, to overrule immigration judges.

These policies needlessly delayed the release of immigrants even after it was determined that they were not tied to terrorism.<sup>27</sup> Automatic stays diverted critical resources from investigating and detaining actual terrorists. The regulation continues today unnecessarily to detain individuals outside of the terrorism context.

The Justice Department’s decision to deny bond to all 9/11 detainees is part of a larger pattern of denying bond to whole classes of non-citizens. For example, Operation Liberty Shield denies bond to all asylum seekers from designated countries.<sup>28</sup> Instead of being detained on the basis of a specific danger posed or a crime committed, individuals are being held on the basis of their race or national origin.

#### Recommendations:

- Eliminate the Justice Department regulation that automatically stays immigration judge bond decisions when a government lawyer requests no bond or a bond of \$10,000 or more. Permit stays only where the government is likely to prevail and there is a risk of irreparable harm in the absence of a stay.
- Require all individuals, except those in categories specifically designated by Congress as posing a special threat, to have a bond hearing that requires an individualized assessment of danger and risk of flight.

#### **4. Immigrant Registration Programs**

On August 12, 2002, the Justice Department promulgated a regulation that required men residing in the United States on temporary visas from 25 predominately Muslim countries<sup>29</sup> to meet “special registration requirements.”<sup>30</sup> The rule required selected immigrants to report to government officials upon arrival, 30 days after arrival, every 12 months after arrival, after every change of address, employment or school, and prior to leaving the country.<sup>31</sup> These men were photographed, fingerprinted and interrogated.<sup>32</sup> Over 82,000 men complied with the registration program.<sup>33</sup> For 13,000 of that number, deportation proceedings were initiated – not for terrorism-related activities but for overstays and other routine status violations.<sup>34</sup>

The National Security Entry-Exit Registration System (NSEERS) makes criminal suspects out of Muslim men lawfully residing in the United States. While actual terrorists are unlikely to present themselves for interrogation and potential removal, the program has been employed to facilitate the deportation of massive numbers of Muslim men on immigration violations unrelated to terrorism.

The NSEERS program has created a culture of fear and suspicion in Muslim communities which discourages cooperation with antiterrorism efforts. By relying on crude racial and ethnic profiling, the program diverts resources from more promising investigations. By abandoning the principle of non-discrimination, the United States is less secure.

#### Recommendations:

- Terminate the NSEERS registration program. Provide relief to immigrants whose immigration status has changed as a result of failure to comply with NSEERS requirements.
- For other (non-NSEERS) immigration registration requirements, make civil fines, not a change in immigration status, the penalty for non-compliance.
- Make civil fines, not deportation, the penalty if an immigrant fails to register an address change within 10 days.

#### **5. Independent Immigration Court**

In February 2002, Attorney General Ashcroft ordered the Board of Immigration Appeals, often the last hope for those seeking asylum from a homeland that would subject them to death, torture or other inhumane treatment, to clear its 56,000 case backlog in a little over a year.<sup>35</sup> The Attorney General also announced that, after the backlog was cleared, he would reduce the size of the board from 23 to 11 – deciding which members to retain, in part, on the number of cases each board member cleared.<sup>36</sup>

Immediately, the board members abandoned their traditional three-member panels and starting making decisions individually, often deciding cases in minutes.<sup>37</sup> Between March and September 2002, the Board of Immigration Appeals issued over 16,000 decisions without explanation, an exponential growth in such rulings over the previous year, with virtually all upholding the immigration judge's finding.<sup>38</sup>

Individuals who have been denied procedural due process from the Board of Immigration Appeals are petitioning the federal appellate courts – creating a new backlog there. In the year ending March 2003, the Ninth Circuit received over 4,200 immigration appeals, more than four times the usual number.<sup>39</sup>

Certain constitutional protections are afforded to all persons within of the United States, not just citizens. Courts should carefully consider the appeals of immigrants and citizens alike. This is especially important in deportation proceedings, where a decision against the alien can sometimes be the equivalent of imposing a death sentence. The Justice Department has used its authority to coerce immigration courts to subordinate justice to speed.

Recommendation:

- Establish an independent immigration court outside of the control of the Justice Department.

## **6. National Crime Information Center**

In December 2001, the government announced that it would add hundreds of thousands of immigrants to the National Crime Information Center database, a nationwide database of individuals wanted for criminal infractions.<sup>40</sup> Most of the aliens who were to be added to the database were not accused of criminal offenses.<sup>41</sup> Further, law enforcement officials have initially decided to only add Muslim men to the database – once again relying on profiling in preferences to more sophisticated methodologies.<sup>42</sup>

In March 2003, the Justice Department issued a regulation exempting the NCIC from the accuracy requirements of the Privacy Act.<sup>43</sup> According to the regulation, the exemption is necessary because “in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely and complete.” The database will thus provide information of dubious accuracy to local law enforcement officials who have little or no training to begin with.

Recommendation:

- Prohibit the National Crime Information Center from including purely civil immigration violations unrelated to terrorism or criminal violations. Require the Attorney General to comply with the Privacy Act's accuracy requirements.

## **7. Expedited Immigration Procedures**

In November 2002, the Justice Department announced that all individuals who arrive illegally by sea will be placed in expedited removal proceedings.<sup>44</sup> Expedited removal gives low-level immigration inspectors the power to deny entry to arriving aliens. Individuals subject to expedited removal are not entitled to hearings or reviews of the justification for their removals.<sup>45</sup> Those removed through this process are barred from re-entering the United States for five years.<sup>46</sup>

A decision to remove individuals who have fled their home countries, oftentimes as a result of political, religious or racial persecution, is extraordinarily serious. It is a decision that

should not be made by a low-level functionary except when absolutely necessary. Shifting the burden of decision making from judicial officers to bureaucrats is part of the larger Justice Department effort to circumvent the judicial process.

Recommendation:

- Allow expedited procedures for removal to be used only in “extraordinary migration situations” – defined as the arrival or imminent arrival of aliens at a United States border in numbers that substantially exceed the capacity for inspection.

## II. USA PATRIOT Act

### Introduction

The PATRIOT Act was signed into law on October 26, 2001, just forty-five days after the terrorist attacks of 9/11. Many provisions of the PATRIOT Act are uncontroversial. But other provisions dramatically weakened statutes that protect us from unnecessary government searches and seizures and electronic surveillance. Given the haste with which the Act was passed, it is critical that we closely examine the more troubling provisions and, where necessary, revise the law to include appropriate checks and balances and to reflect a commitment to civil liberties and due process of law.

Many of the reforms we recommend seek to restore the federal judiciary to its proper role in reviewing the determinations of the Attorney General and his subordinates. Such independent judicial oversight is essential to preventing abuses. It can also enhance the effectiveness of counterterrorism investigations by requiring the government to develop a case that will withstand scrutiny.

Other proposed reforms focus on the importance of comprehensive public disclosure about the Justice Department's use of the powers granted to it under the PATRIOT Act. For many months, the Justice Department refused to disclose how it was using the most controversial sections of the Act. Responding to growing criticism, it has made selective disclosures of how it has used certain authorities. These selective disclosures only continue to obfuscate the use and impact of the Act overall. Only comprehensive disclosure will allow for an accurate assessment of the Act.

The recommendations made in this section are intended to shape the use of the government's powers under the PATRIOT Act, so as to provide an effective check against abuses. If these recommendations are not adopted, the enhanced surveillance powers granted to the government by the PATRIOT Act should be limited to investigations involving international terrorism, and all of the provisions implicating civil liberties should be made subject to the "sunset" which will take effect with respect to a number of specified provisions on December 31, 2005.<sup>47</sup> This will ensure that Congress, two years from now, has the opportunity to fully evaluate the impact of the PATRIOT Act on security and civil liberties.

The PATRIOT Act was enacted into law in an extraordinarily compressed time-frame under a claim of emergency needs. While some of the authorities created by the PATRIOT Act might well be useful to the government in other kinds of criminal investigations, absent the addition of procedures that ensure that constitutional principles are protected, Congress should not authorize their use outside of the terrorism context or beyond the period of the emergency that justified their adoption.

### Section 206: Roving Wiretaps

Prior to the passage of the PATRIOT Act, the Foreign Intelligence Surveillance Act of 1978 (FISA) permitted the government to seek wiretap authority for specific phones or computers or specific apartments or houses.<sup>48</sup> The government had to specify the common carrier, service provider, custodian, landlord or other parties expected to assist in carrying out the surveillance.

Section 206 of the PATRIOT Act allowed the special court created by FISA, the Foreign Intelligence Surveillance Court (FISC), to issue surveillance orders that apply to any phone, computer or apartment that a suspected terrorist might use, without specification. The order does not have to name the service provider or landlord on whom the order will be served. This provision is scheduled to expire in 2005.<sup>49</sup> In addition, shortly after the enactment of the

PATRIOT Act, FISA was quietly amended yet again, as part of the Intelligence Authorization Act, to provide that it was not necessary to name the subject of the surveillance order.<sup>50</sup>

The Justice Department refuses to disclose publicly how many times it has used the authorities granted to it under Section 206.<sup>51</sup> The Justice Department has disclosed, however, that as of May 13, 2003, Section 206 had not been used to prevent a single act of terrorism.<sup>52</sup>

In an era of cell phones, e-mail and instant messaging, allowing “roving” wiretaps makes sense. But granting law enforcement can be granted such authority without sacrificing fundamental civil liberties protections. The changes wrought by the PATRIOT Act and subsequent legislation created a situation where intelligence agencies could obtain a wiretap order that: 1) does not specify the location of the wiretap, 2) does not specify the target or subject of the wiretap, and 3) could compel any unspecified party to assist in the enforcement of the wiretap. This would effectively give law enforcement unlimited authority to conduct surveillance outside of the normal judicial process.

Even when a subject of the surveillance is specified, Section 206 does nothing to require that, as the wiretap “roves,” the subject is actually present, or even likely to be present, at the new location. When the location of the surveillance is, for example, a public computer terminal, this could expose hundreds, even thousands, of innocent people to clandestine surveillance of their online activity.

#### Recommendations:

- Require that if a FISA wiretap request does not identify a specified location, the targeted person must be specified. Similarly, if a FISA wiretap request does not identify a specific person, a location must be identified.<sup>53</sup>
- If a roving tap is approved, require the government to ascertain the presence of the targeted person at a particular place before activating the surveillance at that place.<sup>54</sup>

#### **Section 213: Delayed Notification**

Generally, the Fourth Amendment requires that police provide notice to people when searching their homes or offices. The Constitution generally does not allow secret searches. (Electronic surveillance is one special exception, since the technique would be totally ineffective if contemporaneous notice were given). The Supreme Court has emphasized the Constitutional importance of the “knock and notice” requirement for physical searches of homes and offices. Subject to specific limitations, federal appeals courts have permitted law enforcement to delay notification of physical searches in only a narrow range of circumstances.<sup>55</sup>

Section 213 of the PATRIOT Act provided statutory authority to delay notification of any warrant to “search or seize material that constitutes evidence of a criminal offense.” The legislation states that such a delay could be granted if a court finds that immediate notification would have an “adverse result.” An adverse result is defined as: 1) endangering the life or physical safety of an individual, 2) flight from prosecution, 3) destruction of or tampering with evidence, 4) intimidation of potential witnesses, or 5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.<sup>56</sup> This provision, which is not limited to terrorism cases, is not scheduled to sunset.

As of April 1, 2003, the Justice Department had requested a judicial order delaying notice of a search 47 times, and was never denied,<sup>57</sup> and requested delayed notice of a seizure 15 times, and was rejected by a court only once.<sup>58</sup> Initial delays have been for up to 90 days, with the Justice Department requesting an extension 248 times.<sup>59</sup> The Section 213 searches have been used primarily for drug seizures;<sup>60</sup> the power has not been exercised to combat terrorism.<sup>61</sup>

Without notification of the execution of a search warrant, the constitutional rights guaranteed by the Fourth Amendment are illusory. Thus, it should be only in the rarest of cases that notice of the execution of a search warrant is delayed. The PATRIOT Act standards for delay, which allow notification when it would “seriously jeopardize an investigation” or when witnesses might be intimidated, could be claimed in every criminal case. Moreover, the PATRIOT standards place no limits on the length of the initial delay, risking its continuation when it is no longer needed.<sup>62</sup>

#### Recommendations:

- Allow delayed notification of a search and seizure of property only when immediate disclosure: 1) will endanger the life or physical safety of individual, 2) result in flight from prosecution, or 3) result in the destruction of or tampering with the evidence sought under the warrant.<sup>63</sup>
- Require that initial delays, when granted, be limited to seven days. Allow delays to be extended in seven-day increments, upon application of the Attorney General, Deputy Attorney General or Associate Attorney General, if the court finds that there is reasonable cause to believe that notice will endanger the life or physical safety of an individual.<sup>64</sup>
- Require that the Attorney General, on a semi-annual basis, submit a public report to Congress detailing the following data for the preceding six-month period: (1) the total number of requests for delays, 2) the total number of such requests granted or denied, and 3) the total number of applications for extensions of the delay of notice and the total number of such extensions granted or denied.<sup>65</sup>

#### **Section 214: FISA Pen Registers/Trap and Trace**

Pen registers record the telephone numbers dialed on outgoing calls from a monitored phone, along with other transactional data. Trap and trace devices work like Caller ID, monitoring the originating number of calls received by a telephone and other information such as date and time. Prior to the passage of the PATRIOT Act, the FBI could install such devices without probable cause by submitting to the FISC information demonstrating that the target of surveillance was “an agent of a foreign power or was engaged in international terrorism or clandestine intelligence activities.”<sup>66</sup>

Section 214 of the PATRIOT Act significantly expanded the ability of intelligence agencies to install pen registers and trap and trace devices through FISA procedures. It did so by entirely eliminating the requirement that there be any evidence to believe that the target of such surveillance was engaged in international terrorism or clandestine intelligence activities. Under Section 214, a pen register or trap and trace device may be authorized whenever the government certifies that it is relevant to an ongoing counterterrorism or counterespionage investigation. The application need no longer include any information explaining the relationship between the investigation and the line or service to be monitored. This provision is scheduled to expire in 2005.

The Justice Department refuses to disclose publicly how many times it has installed pen registers or trap and trace devices through Section 214 authority.<sup>67</sup>

This section allows monitoring of communications activity without probable cause and without meaningful judicial review. It takes an authority created by FISA, designed to *limit* such monitoring to suspected spies and terrorists, and allows it to be used against anyone merely on the basis of a claim of relevance to an ongoing investigation. This power should be limited, as it was originally, to situations where there is some factual basis for believing that the monitored line

is being used by foreign powers and their agents or in the commission of acts of international terrorism or espionage.

Recommendation:

- Allow pen register and trap and trace surveillance under FISA only if there are facts giving reason to believe that the target of the surveillance is engaged in international terrorism or espionage.

**Section 215: Access to Business Records**

Prior to the enactment of the PATRIOT Act, the FBI could obtain a court order under FISA for records of common carriers, public accommodation providers, physical storage facility operators and vehicle rental agencies.<sup>68</sup> Disclosure was authorized if the government offered specific facts giving reason to believe that the subject of the order was “an agent of a foreign power” – a suspected spy or terrorist.<sup>69</sup>

Section 215 of the PATRIOT Act greatly expanded the ability of the government to obtain business records. First, there is no requirement that the order authorized by section 215 name any specific target. Instead, records can be accessed as long as the request is part of “an investigation to protect against international terrorism.” Second, disclosures pursuant to this authority are no longer limited to certain designated records but can include “any tangible thing...including books, records, papers, documents and other items” from any entity. Finally, there is no longer meaningful judicial review. The FBI is required to submit a certification to the FISC that the order is being sought as part of “an investigation against international terrorism” but the court has *no authority to reject the certification so long as it is submitted in the proper form*. This provision is scheduled to expire in 2005.

In September 2003, the Justice Department, faced with mounting criticism, disclosed that it has never used the authority granted to it under Section 215. In response to prior Congressional inquiries, the Justice Department had refused to publicly disclose the number of times Section 215 authority had been used<sup>70</sup> or whether it had ever been used to disrupt a terrorist plot,<sup>71</sup> claiming the information was classified. Simply because Section 215 authority hasn't been used to date doesn't mean it will not be used in the future. Moreover, the Attorney General's statement that Section 215 had never been used begs the question of what legal authority the Justice Department has been using to obtain business records. In the case of libraries alone, Assistant Attorney General Viet Dinh revealed earlier this year that FBI agents have sought library records about 50 times since 9/11, apparently under other authorities.<sup>72</sup>

The Justice Department has consistently sought to downplay the significance of Section 215. The web site created by the Department to promote the PATRIOT Act, [www.lifeandliberty.gov](http://www.lifeandliberty.gov), claims that the “PATRIOT Act ensures that business records – whether from a library or any other business – can be obtained in national security investigations with the permission of a federal judge.” This statement is highly misleading. Section 215 contains no requirement that specific facts must be alleged, no independent inquiry into the underlying facts, and no ability of the target of the order to respond. Although an application must be submitted to a federal judge, it is little more than a rubber stamp process.

Not surprisingly, there has been significant confusion in the media about Section 215. The *Washington Post*, in a September 21, 2003 editorial, said that Section 215 “parallels existing authority to seek business records – including library records – in criminal cases.” But the authority to seek business records through a grand jury must at least be related to a criminal investigation. Section 215 is used in intelligence cases, which are not limited to the investigation of illegal activities. In addition, while grand jury subpoenas are not secret, every 215 order prohibits notice to the person whose records are being disclosed.

Section 215 threatens the privacy of United States citizens who are not believed to be agents of a foreign power or involved in any terrorist activity.

#### Recommendations:

- Limit authority under this section to requests that are reasonably likely to acquire information that would significantly further an investigation into international terrorism or espionage.
- If the items sought are medical records, library records, or other records involving the purchase and rental of books, video or music or Internet use, require the government to set forth in its application facts and circumstances establishing *probable cause* to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.<sup>73</sup>
- For all other records and tangible items, require the government to show facts and circumstances establishing a reasonable belief that the person to whom the records pertain is a foreign power or an agent of a foreign power.<sup>74</sup>

#### **Section 216: Criminal Pen Register/Trap and Trace**

Prior to the passage of the PATRIOT Act, the government was required to apply for a pen register or trap and trace device in the jurisdiction where the target telephone was located.<sup>75</sup> It was not entirely clear that the pen register and trap and trace authority covered the collection of transactional data identifying the origin or destination of Internet communications. Section 216 of the PATRIOT Act makes two significant changes to this authority. First, it allows the court with jurisdiction over the offense to issue a single order that could be executed in multiple jurisdictions within the United States. Second, it updates the law to allow pen register authority to apply to e-mail, Internet browsing and other modern communication technologies.

Although updating the law to include modern technologies was a needed change, the PATRIOT Act did not address all the ways in which the pen register/trap and trace statute was outdated. A very important issue, which the PATRIOT Act ignored, is the very low standard under which pen register/trap and trace orders are issued. Under the law before and after the PATRIOT Act, a court must approve a pen register or trap and trace device whenever the government says that it is relevant to an ongoing investigation. A record of every phone call made or received and every e-mail sent or received can be an extraordinary invasion of privacy. The standard should require at least some factual basis for suspecting that a crime is being or is about to be committed. Secondly, as amended, the statute provides that “content” should be excluded from pen register and trap and trace monitoring but does not specify what constitutes content in the context of electronic communications. Unlike telephone calls, the line of demarcation between “content” and “non-content” is not clear with respect to Internet communications. As presently written, the statute could allow the use of pen register authority to capture Internet addressing information that is as revealing as the content itself.

#### Recommendations:

- Require that an order for a pen register or trap and trace device be issued only if the judge finds that the government has presented specific and articulable facts indicating that a crime has been or will be committed and that the information sought is relevant to an investigation of that crime.<sup>76</sup>
- Clarify that the content of an electronic communication includes the subject line of an e-mail and anything beyond the top level domain (i.e., anything past the first backslash of an Internet address).<sup>77</sup>

## **Section 218: Use of FISA in Criminal Investigations**

As originally drafted, FISA authorized intrusive surveillance if the government certified that “*the purpose for the surveillance is to obtain foreign intelligence information.*”<sup>78</sup> Federal appeals courts interpreted that language to mean that the “primary purpose” of a FISA search had to be foreign intelligence gathering, rather than criminal investigation.<sup>79</sup> Section 218 of the PATRIOT Act amends the statutory language in a subtle but important way, requiring that the gathering of foreign intelligence information be only “a significant purpose” of the FISA search. This provision is scheduled to expire in 2005.

Since Section 218 became law, more than 4,500 intelligence files have been reviewed by criminal investigators.<sup>80</sup> The Justice Department has stated that these reviews have resulted in the prosecution of “numerous cases.”<sup>81</sup> But the Attorney General refuses to publicly reveal how many FISA searches conducted since the passage of the PATRIOT Act would have been permitted under the prior, “primary purpose” standard.

The intelligence community has always been permitted to share FISA information with law enforcement. What is at stake in this provision of the PATRIOT Act is how much law enforcement can direct the collection of foreign intelligence for criminal prosecution purposes and still enjoy the lower procedural hurdles of an intelligence operation.

Efficient information sharing between law enforcement and the intelligence community should be encouraged. But there is no reason why prosecutors should be able to control a domestic intelligence gathering operation that is not primarily a criminal investigation. Criminal investigations should be subject to the more stringent requirements of title III wiretaps.<sup>82</sup>

### Recommendation:

- Permit the use of FISA only when obtaining foreign intelligence information is *the primary purpose* of the surveillance.<sup>83</sup>

## **Section 412: Attorney General as Judge and Jury**

The Attorney General, under Section 412, can detain any alien who he reasonably believes is: 1) deportable or inadmissible on grounds of terrorism, espionage, sabotage or sedition, or 2) engaged in *any other activity that endangers the national security of the United States*. After a seven-day period, the Attorney General can continue to detain an alien under this section if he initiates removal or criminal proceedings. Subsequently, every six months a determination must be made that the alien’s release would threaten national security or endanger some individual or the public.

The Attorney General has never exercised this power because “traditional administrative bond proceedings have been sufficient.”<sup>84</sup> Despite its never having yet been used, a provision that permits immigrants to be detained indefinitely at the sole prerogative of an appointed official hardly comports with accustomed standards of due process of law.

### Recommendation:

- Repeal the authority accorded to the Attorney General by Section 412. Individuals should be detained on the basis of articulable facts reviewed by a neutral judicial officer.

## **Section 505: National Security Letters**

A national security letter is a document issued by the Attorney General (or his designee) that compels the recipient to turn records over to the government. Prior to the passage of the PATRIOT Act, a national security letter could be issued only if the letter was directed at the records of a specific person and there were specific facts giving reason to believe that the person or entity to whom the letter pertained was an agent of a foreign power.<sup>85</sup> Section 505 eliminated these requirements, allowing national security letters to be issued with no factual basis and to cover anyone's records, even if they are not suspected of espionage or terrorist activity.

The Justice Department refuses to reveal publicly how many national security letters have been issued by the Attorney General since the passage of the PATRIOT Act – although a log of their use fills up five pages of text. The Department has indicated, however, that Section 505 authority has never been used to disrupt a terrorist plot.<sup>86</sup>

Section 505 can be used to obtain the records of citizens and noncitizens alike. It requires no judicial approval for the issuance of a national security letter – not even the rudimentary review of the government's certification contemplated by Section 215.

### Recommendations:

- Restrict the use of national security letters to situations where there is a factual basis for believing that the person whose records are sought is an agent of a foreign power (i.e., a suspected spy or terrorist) and the information sought is reasonable likely to significantly further an investigation into terrorism.

## **Section 802: Domestic Terrorism and Free Speech**

Section 802 creates a new crime of "domestic terrorism." It defines domestic terrorism as criminal acts under state or federal law that are dangerous to human life and committed primarily in the United States that appear to be intended: 1) to intimidate or coerce a civilian population, 2) to influence the policy of the government by intimidation or coercion; or 3) to affect the conduct of a government by mass destruction, assassination or kidnapping.

As presently written, a political protestor who commits a minor violation, such as blocking traffic or scaling a fence or swinging a sign, could be charged with domestic terrorism. Supporters of this definition argue that the statute would never be applied this way. But the preservation of free speech should not depend on the reasonableness of those enforcing or interpreting the statute. Demonstrators who break the law should be punished for what they do, but they should not be labeled terrorists and threatened with the harsh consequences reserved for terrorism.

### Recommendation:

- In Section 802, use the pre-existing definition of the federal crime of terrorism.<sup>87</sup>

## **FISA Disclosure**

In the past, there has been very little information available to the public about the interpretation and implementation of the FISA. The annual report submitted by the Attorney General consists of two sentences, which almost always say little more than that the FISC has approved all government requests. The PATRIOT Act significantly enhanced the ability of the Justice Department to conduct investigations using FISA, including criminal investigations and investigations targeting United States citizens. In order to assess how these new powers are

being used, much more information needs to be made publicly available. This can be done without jeopardizing national security.

Additionally, with an increased emphasis on information sharing, information obtained using FISA procedures will be used more frequently in criminal prosecutions. Under current procedures, when such evidence is brought before a court, it is nearly impossible for a criminal defendant to contest its introduction because the application is kept secret. When FISA evidence is used in criminal cases, it should be introduced subject to the Classified Information Procedures Act, which offers a balanced and effective way to allow national security evidence to be introduced and challenged in criminal cases so that defendants can assert their constitutional rights.

#### Recommendations:

- Require an expanded annual public report by the Attorney General regarding the use of FISA. The report should include: 1) the number of orders for electronic surveillance, physical searches, pen registers, trap and trace devices and access to records granted, modified and denied in the previous year; 2) the number of applications for orders served on the public media and the result of such applications; 3) the number of United States persons targeted under FISA in the previous year, 4) the number of times the Attorney General authorized the use of FISA information in a criminal trial, and 5) the number of times a statement was completed to accompany a disclosure of information under FISA for law enforcement purposes.<sup>88</sup>
- Require disclosure of FISC rules and FISC decisions that contain statutory construction analysis, unless the FISC decides that such disclosure would threaten national security.<sup>89</sup>
- When FISA information is introduced in a criminal case, treat the disclosure of the FISA surveillance application under the procedures of the Classified Information Procedures Act.<sup>90</sup>

## **Proposals to Expand Authority**

### **1. PATRIOT II: Introduction**

Even as the Justice Department refuses to fully disclose its use of authorities granted by the PATRIOT Act, the Administration is seeking additional powers. In February 2003, a Justice Department draft of the “Domestic Security Enhancement Act” – dubbed “PATRIOT II” – was leaked. That draft, containing 87 pages of legislative language, would have expanded the FBI’s surveillance authority far beyond the broad powers granted by the PATRIOT Act. Although it has not been introduced as a single comprehensive bill, PATRIOT II provisions appear in various bills that have been introduced over the past few months – including one that has already passed the Senate.

In a recent speech delivered before the FBI, President George W. Bush promoted three specific proposals that came directly from PATRIOT II: a proposal to extend the death penalty to more crimes; a proposal to authorize the use of administrative subpoenas in terrorism investigations, and a proposal to amend the federal bail process for terrorist suspects.<sup>91</sup> Each of these proposals would have a deleterious effect on national security. Extending the death penalty to more crimes would hinder our ability to work cooperatively with the European Union and other countries. Authorizing extrajudicial administrative subpoenas would lead to the inefficient expenditure of law enforcement resources. And allowing the Attorney General to influence bail determinations is unnecessary and would impair the legitimacy of our judicial system.

## 2. PATRIOT II: Death Penalty

President Bush seeks to extend the death penalty to a broader group of “terrorist offenses.” The Administration’s proposal was introduced in Congress by Senator Arlen Specter as the Terrorist Penalties Enhancement Act of 2003.<sup>92</sup> The bill extends the death penalty to the new overbroad category of domestic terrorism created by Section 802 of the PATRIOT Act if death results.<sup>93</sup> It makes the death penalty available not only for those who commit terrorist acts, but also for those who unsuccessfully attempt to commit a terrorist act.<sup>94</sup> Even those who provide financial support could be put to death.<sup>95</sup>

Many terrorist crimes are already eligible for the death penalty under federal or state law.<sup>96</sup> Under the Administration’s broad proposal, individuals who have little or no connection to terrorism, but made an ill-advised donation to a group engaged in terrorist activities, could be sentenced to death. Meanwhile, suicide bombers and other actual terrorists are unlikely to be deterred by the prospect of the death penalty.

The real impact will be on the United States’ ability to enlist the assistance of other nations in fighting the war on terror. All European Union countries, for instance, refuse to extradite suspects to the United States, unless they are certain the death penalty will not be imposed on the extradited person.<sup>97</sup> Further, EU countries refuse to supply evidence if it will be used in obtaining a capital conviction.<sup>98</sup> By expanding the number of crimes in which the death penalty is available, the Administration’s proposal may make it more difficult to obtain evidence and successfully prosecute terrorism cases.

### Recommendation:

- Reject the Terrorist Penalties Enhancement Act of 2003.

## 3. PATRIOT II: Administrative Subpoenas

The Administration’s proposal to permit the use of administrative subpoenas in terrorism investigations was introduced in the House of Representatives by Congressman Tom Feeney as the Antiterrorism Tools Enhancement Act of 2003.<sup>99</sup> That bill enables the Attorney General, without any judicial approval or ongoing grand jury proceeding, to compel: 1) the attendance and testimony of witnesses and 2) the production of any tangible thing including books, papers, documents, and electronic data.<sup>100</sup> Individuals could be forced to travel up to 500 miles to be interrogated.<sup>101</sup> Further, persons receiving a subpoena under this authority could be prohibited from disclosing that they had received it.<sup>102</sup> Those who disclosed that they had received a subpoena could be imprisoned for up to five years.<sup>103</sup>

Although administrative subpoenas are not a new concept, the Administration’s proposal is extraordinary. Currently administrative subpoenas are, for the most part, limited to regulatory programs with their own checks and balances. The Administration’s proposal, however, sanctions the use of secret administrative subpoenas in criminal investigations – not only to obtain documents, but also to compel testimony. The government already can use a grand jury subpoena to compel testimony or the production of documents, and a search warrant can be used to obtain documents or other tangible things. When testimony is compelled before a grand jury, however, 23 fellow citizens are looking over the shoulder of the prosecutor, inhibiting abuse. When testimony is compelled pursuant to an administrative subpoena, however, it could be done by a lone FBI agent behind closed doors.

The Justice Department claims that administrative subpoenas are necessary to move terrorism investigations quickly. But in an interview with the *New York Times*, Justice Department officials could not cite a single instance in which obtaining a grand jury subpoena had slowed a terrorism investigation.<sup>104</sup> Further, existing law allows for searches to be conducted without a

warrant in exigent circumstances – including imminent harm, the destruction of evidence or risk of flight.

In defending the original PATRIOT Act, the Administration has repeatedly attempted to blunt criticism by noting that many of the new powers granted in the PATRIOT Act require the prior approval of a federal judge.<sup>105</sup> Now the Administration seeks to eliminate the judiciary's role completely.

The Administration explains this contradiction by claiming that, in fact, there is some judicial review involved in the proposed administrative subpoena power. It is true that, if an individual refuses to comply with an administrative subpoena, the Justice Department can go to court to enforce the order. Likewise, a person served with a summons pursuant to an administrative subpoena can challenge it in court. But, even if the served party refuses to comply, a court only reviews the subpoena to see if the Justice Department claimed it was part of a terrorism investigation. There are no substantive factual or legal bases for a served party to object. Further, only the individual served with the administrative subpoena can challenge it, and anyone complying with an administrative subpoena is granted immunity from liability. In most cases, the entity receiving the administrative subpoena will be, not the subject of the investigation, but rather a company or individual in possession of records pertaining to the individual being investigated.

Recommendation:

- Reject the Antiterrorism Tools Enhancement Act of 2003. Congress should preserve the role of grand juries in criminal investigations. In situations where time is of the essence, procedural alternatives already exist.

#### **4. PATRIOT II: Mandatory Detention**

The Administration also proposes to amend the federal bail process for terrorist suspects. This proposal was introduced in the House of Representatives by Congressman Bob Goodlatte as the Pre-trial Detention and Lifetime Supervision of Terrorists Act of 2003.<sup>106</sup> The bill would permit the Attorney General to create a presumption that bail should be denied for any individual charged with a terrorist crime, including the new crime of “domestic terrorism” created by Section 802 of the PATRIOT Act.<sup>107</sup> And the bill would leave it up to the Attorney General to decide whether an individual is accused of an offense that “appears by its nature or context” to be a crime of terrorism.

Under current law, a federal judge must deny bail when she finds that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person in the community.”<sup>108</sup> The bill could require federal judges to deny bail even when these circumstances do not obtain.

Similarly, under current law, bail is presumptively denied only when a judicial officer finds that there is probable cause to believe that the person committed a crime of violence or a crime punishable by at least ten years in jail.<sup>109</sup> The Administration's proposal would instead authorize the presumptive denial of bail based on the unilateral certification of the Attorney General based on what the offense “appears to be,” without any showing of probable cause, and without any neutral, judicial determination as to whether an individual should be deprived of his liberty. There is no reason to question the commitment of the federal judiciary to ensuring the safety of the public.

Recommendations:

- Reject the Pre-trial Detention and Lifetime Supervision of Terrorist Act of 2003.

## 5. Kyl-Schumer

On January 9, 2003, Senators Jon Kyl (R-AZ) and Chuck Schumer (D-NY) introduced S. 113 (Kyl-Schumer), a bill to amend FISA, the federal statute which authorizes the FBI to conduct surveillance in intelligence investigations.<sup>110</sup> Under the current statute, in order for the government to use FISA to obtain a wiretap or physical search order, there must be probable cause to believe that the target of the surveillance is “an agent of a foreign power,” such as a foreign government or foreign terrorist organization. This is a lower requirement than under standard criminal procedures, which require probable cause that a crime has been, is being or will be committed. Kyl-Schumer amends the definition of “agent of a foreign power” to include individuals who have no known connection to any foreign power, but engage in “terrorist” activities or preparations.<sup>111</sup> An amendment was added to the original Kyl-Schumer bill that contains some of the FISA disclosure provisions advocated in this report.<sup>112</sup> The bill passed the Senate, as amended, on May 8, 2003.<sup>113</sup>

The bill was originally justified by its proponents as a provision that would have allowed the FBI to obtain a warrant before 9/11 to search the computer of Zacarias Moussaoui, who has been accused of conspiring in the attacks.<sup>114</sup> After investigations by the Joint Intelligence Committee and the Senate Judiciary Committee, however, it became clear that the FBI had all the evidence it needed to procure a warrant for Moussaoui’s computer, but simply misunderstood the law.<sup>115</sup> Then, proponents suggested that the bill was necessary to catch so-called “lone wolf terrorists.”<sup>116</sup> But careful consideration of this theory revealed that few, if any, international terrorists work alone,<sup>117</sup> and that in any case, were such a situation to arise, traditional criminal investigatory techniques would be sufficient.<sup>118</sup> Moreover, in private briefings, FBI representatives admitted that they are getting all the warrants they need under current law.<sup>119</sup>

Kyl-Schumer makes it easier for the government to use FISA techniques in cases that would traditionally be investigated using the criminal justice system rather than the secret FISA process. As a result, the Constitutional protections traditionally afforded to criminal suspects by the Fourth Amendment are more likely to be circumvented.

### Recommendation:

- Reject Kyl-Schumer (S. 113).

## 6. Anti-Terrorism Intelligence Tools Improvement Act of 2003

On September 25, 2003, Congressmen F. James Sensenbrenner, Jr. (R-WI) and Porter Goss (R-FL) introduced the Anti-Terrorism Intelligence Tools Improvement Act of 2003 (H.R. 3179).<sup>120</sup> The Sensenbrenner bill proposes to: 1) enforce National Security Letters, a form of administrative subpoena,<sup>121</sup> 2) allow the unfettered use of FISA information in immigration proceedings,<sup>122</sup> and 3) amend the Classified Information Procedures Act to keep more information from criminal defendants.<sup>123</sup> The bill also contains the Kyl-Schumer language discussed in detail above.<sup>124</sup>

1) National Security Letters allow the Justice Department to obtain certain types of records, including credit reports, bank records and telephone/Internet billing and transactional records, without any judicial review. The PATRIOT Act removed the requirement that the government had to have specific facts giving reason to believe that the record being sought pertained to a suspected spy or possible terrorist, and now allows the FBI to compel the disclosure of these records if there are merely “sought for” foreign counter-intelligence purposes. H.R. 3179 penalizes the disclosure of the existence of a National Security Letter with imprisonment of up to one year, even if there was no intent to obstruct an investigation or a judicial proceeding.<sup>125</sup> It also allows the government to cite for contempt of court individuals who fail to comply with a National Security Letter.<sup>126</sup> Instead of imposing draconian penalties on

violators, we should reaffirm the role of an independent judiciary by putting meaningful limits on the use of National Security Letters.

2) Prior to the enactment of the PATRIOT Act, FISA procedures were supposed to be used primarily for foreign intelligence investigations, not criminal or civil proceedings. (If evidence of crimes was discovered in the course of a FISA search or surveillance, the law always allowed it to be used in criminal proceedings.) Under the PATRIOT Act, FISA procedures can be used when the primary purpose of the investigation is gathering evidence for a criminal investigation or civil proceeding, so long as a *significant* purpose is foreign intelligence gathering – meaning that even more FISA evidence will end up being used in criminal and other proceedings. But when FISA information is used in a criminal or civil setting, the government is required to give the defendant notice that it intends to use the information, an opportunity to make a motion to suppress, and the right for an ex parte, in-camera review of the government affidavit supporting the collection of the evidence by the judge.<sup>127</sup> While these procedures are not as strong as they should be – for example, the defendant is not first entitled to view the application for the FISA order or any of the evidence collected except that to be used at trial – H.R. 3179 would dispense with even those procedural safeguards when FISA information is used in an immigration hearing.<sup>128</sup> If enacted, the bill could allow illegally or improperly obtained evidence to be introduced in court and form the basis for deportation or other changes in immigration status.

3) Finally, H.R. 3179 takes discretion away from the judge to decide when classified information should be withheld from a criminal defendant.<sup>129</sup> Judges already have the authority to delete classified information or substitute an unclassified summary when sensitive documents are to be turned over to a criminal defendant,<sup>130</sup> and should be permitted to decide what procedures are appropriate in light of all of the facts and circumstances of the case.

Recommendation:

- Reject the Anti-Terrorism Intelligence Tools Improvement Act of 2003.

## III. Treatment of Enemy Combatants

### Military Commissions

#### Introduction

On November 13, 2001, President Bush issued an order establishing Military Commissions to conduct prosecutions in certain terrorism-related cases.<sup>131</sup> In March 2002 and again in April 2003, the Department of Defense released regulations outlining the procedures to govern these forums.<sup>132</sup> Serious concerns have been raised as to whether these procedures are compatible with fundamental standards of fairness and due process.<sup>133</sup> Attorney-client conversations can be monitored. Hearsay can be freely admitted. Exculpatory evidence can be withheld from the accused. The case has not been made as to why Military Commissions are necessary to prosecute enemy combatants. Either civilian courts or military courts martial would be preferable both in terms of international credibility and due process. However, if Military Commissions are used, the regulations should be revised to conform to basic principles of fairness.

On July 3, 2003, President Bush designated six prisoners being held at Guantanamo Bay, Cuba, including citizens of the United Kingdom and Australia, as eligible for trials before Military Commissions.<sup>134</sup> Before the prosecution of foreign citizens further degrades our relationship with our allies, the reforms detailed below should be adopted.

#### 1. Scope of Jurisdiction and Duration

The President's Order of November 13, 2001 creates broad jurisdiction for the Military Commissions. The order allows for jurisdiction over: 1) known members of al Qaeda, 2) individuals who commit an act of international terrorism or provide any assistance to an individual who commits such an act, or 3) anyone who knowingly harbors an individual from the first two categories.<sup>135</sup> This would allow individuals with an attenuated connection to terrorism to be brought before a Military Commission. Further, there is no limitation on how long a Commission will operate. A firm time limit on the operation of the court would encourage speedy trials.

#### Recommendations

- Limit the jurisdiction of the Commissions to individuals who: 1) are not United States persons, 2) participated in the planning or execution of the 9/11 attacks, 3) are apprehended outside the United States, and 4) are not prisoners of war within the meaning of the Geneva Convention Relative to the Treatment of Prisoners of War or any protocol relating thereto.<sup>136</sup>
- Terminate the authority of the Military Commissions effective December 31, 2005.<sup>137</sup>

#### 2. Standard for Admitting Evidence

Evidence can be admitted in a Military Commission trial if the admission of such evidence would "have probative value to a reasonable person."<sup>138</sup> This differs considerably from the Military Rules of Evidence, used in Court Martial proceedings, which exclude evidence that, while possibly probative, is unreliable or prejudicial.<sup>139</sup> Under the Military Commission standard, second-hand reports of incriminating statements or events, statements made by the defendant during plea bargain negotiations or testimony concerning the defendant's reputation could be admitted.

The Administration claims that hearsay and other types of evidence that are usually excluded from federal court should be admitted before Military Commissions because of the difficulty of obtaining evidence from a battlefield. But the Military Rules of Evidence exclude evidence that could result in an unjust outcome. Hearsay, while technically probative, is often unreliable. Character evidence has some probative value, but makes it likely that the trier of fact will make impermissible, irrational inferences.

Moreover, the Military Rules of Evidence provide for considerable flexibility. For example, out-of-court statements that would normally be excluded can be admitted if the trier of fact determines that: 1) the statement is offered as evidence of a material fact, 2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and 3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.<sup>140</sup> In contrast, the current rules for the Commission allow the introduction of hearsay evidence even when the government has *not* made reasonable efforts to procure other evidence and when the interests of justice would *not* be served by admission of the statement into evidence.

Recommendation:

- Use the Military Rules of Evidence for Military Commissions.

### **3. Attorney-Client Confidentiality**

The rules for Military Commissions do not ensure attorney-client confidentiality. Under the rules, any attorney-client conversations could be monitored. To apply to be qualified as a Civilian Defense Counsel, a lawyer must sign an affidavit stating, “I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes.”<sup>141</sup> Since there are no criteria set forth as to which conversations will be monitored and counsel have no ability to object, Civilian Defense Counsel must assume that all conversations will be monitored.

Civilian Defense Counsel must report to the Chief Defense Counsel and “any other appropriate authorities...information relating to the representation of [his or her] client to the extent [counsel] reasonably believes is necessary to prevent...significant impairment of national security.” These provisions do not allow a detainee to be represented exclusively by civilian counsel. Civilian lawyers must share all information and “work cooperatively with” attorneys appointed by the Military.

These provisions turn every attorney-client conversation into a *de facto* government interrogation. Every conversation can be monitored or recorded by the government. These conditions make effective representation impossible.

Recommendations:

- Prohibit the government from monitoring or interfering with confidential communications between defense counsel and client.<sup>142</sup>
- Require attorneys, as suggested in the Model Rules of Professional Conduct, to reveal confidential information “to prevent the client, or another person, from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”

#### **4. Access to Evidence**

The prosecution or the Commission, on its own initiative, can move to have evidence withheld from the accused. Such information can also be withheld from Civilian Defense Counsel.<sup>143</sup> Although all information admitted into evidence must be revealed to Detailed Defense Counsel, exculpatory information (or any other information) not introduced in trial can be withheld even from them.<sup>144</sup>

The right of a defendant to confront the evidence against him is fundamental to our system of justice. It is both a requirement of due process and an essential means of testing the accuracy of the government's case. Submitting information to a surrogate is not an adequate substitute. The defendant is often the individual with both the knowledge and the motivation to contest evidence most vigorously.

##### Recommendations:

- Ensure that Civilian Defense Counsel (all of whom are required to have security clearances) are present at all stages of the proceedings.<sup>145</sup>
- Provide Civilian Defense Counsel with all information necessary to conduct a defense, including all exculpatory information, whether or not such information is to be used at trial, subject to the restrictions of the Classified Information Procedures Act.

#### **5. Access to Civilian Lawyers**

Although detainees are technically entitled to retain civilian lawyers,<sup>146</sup> there are serious impediments for them to actually do so. First, the government will not pay any costs or fees to civilian attorneys.<sup>147</sup> It is improbable that an individual who has been detained for many months, has no contact with the outside world and is thousands of miles from his home would have any funds available. Thus, detainees could only retain a civilian attorney who agreed to work pro bono.

Even if an attorney decided to represent a detainee pro bono, the rules make it difficult to mount an effective defense. Civilian Defense Counsel must agree not to contact anyone, other than other members of their defense team, potential witnesses and those with particularized knowledge who can assist in locating evidence, regarding any information relating to the case.<sup>148</sup> This means that Civilian Defense Counsel may not be able to consult experts, enlist staff to conduct research or seek the opinion of other attorneys – even if obtaining their assistance does not require communicating classified or sensitive information.

Further, in order to represent an individual before a Military Commission, civilian attorneys must agree not to travel from the site of the proceedings once they have begun without the approval of the military<sup>149</sup> – even if the proceedings continue for weeks or months.

##### Recommendations:

- Provide for travel, lodging and required security clearance background investigations for Civilian Defense Counsel. Consider the professional and ethical obligations of Civilian Defense Counsel when scheduling proceedings.<sup>150</sup>
- Allow Civilian Defense Counsel to: 1) consult with other attorneys, 2) seek expert assistance, advice and counsel outside the defense team, 3) conduct all professionally appropriate factual and legal research, and 4) speak publicly, provided that they do not reveal classified or protected information. Allow the Military Commissions, on a case-by-case basis, after notice and hearing, to require other conditions.<sup>151</sup>

- Allow non-U.S. citizen lawyers with appropriate qualifications to serve as Civilian Defense Counsel.<sup>152</sup>

## 6. Open Proceedings

Under current regulations, Military Commissions can be closed, at the discretion of the Presiding Officer, under a variety of rationales – some of which would apply in nearly every case.<sup>153</sup> For example, proceedings could be closed to protect “intelligence and law enforcement sources, methods or activities” or “other national security interests.”<sup>154</sup> Along with the general public, the accused and Civilian Defense Counsel can be excluded on such grounds.<sup>155</sup>

Holding trials without the presence of the defendant or their counsel discredits the process. It also encourages other nations dealing with real or perceived terrorist threats to adopt similar procedures. Proceedings should be closed to the general public when it would threaten the safety of individuals inside or outside of the courtroom.

### Recommendations:

- Conduct public proceedings unless a public proceeding would threaten the safety of observers, witnesses, Commission judges, counsel or other persons.<sup>156</sup>
- Prohibit the exclusion of the accused or Civilian Defense Counsel from the courtroom.
- Make public evidence originating from an agency of the Federal Government that is offered in a trial subject to the restrictions of the Classified Information Procedures Act.<sup>157</sup>

## 7. Judicial Review

The rules promulgated by the Defense Department do not provide for any external review of the decision of a Military Commission. If the Commission violates its own rules or issues an erroneous decision, the defendant has no recourse. Without judicial review, the decisions of the Military Commission will always be suspect. Federal courts routinely deal with classified and sensitive information and have procedures in place to prevent unauthorized disclosure of such information.

### Recommendations:

- Provide for two levels of appeal: first, to the United States Court of Appeals for the Armed Forces; second, to the Supreme Court of the United States by writ of certiorari.<sup>158</sup>
- Grant the United States Court of Appeals for the District of Columbia the authority to review any detention decisions.<sup>159</sup>

## Treatment of Enemy Combatants

As deplorable as the federal government’s treatment of noncitizens has been since 9/11, some of the most shocking actions have been directed at two U.S. citizens.<sup>160</sup> Jose Padilla was detained on May 15, 2002 at an airport in Chicago as a “material witness” to the 9/11 terrorist attacks.<sup>161</sup> Shortly thereafter, Padilla appeared before the United States District Court for the Southern District of New York, which appointed Donna Newman to serve as his legal counsel.<sup>162</sup> On June 9, however, the government notified the Court (but not Padilla or his counsel) that it

wished to vacate the arrest warrant.<sup>163</sup> At that time, the government designated Padilla an enemy combatant and placed him in the custody of the Secretary of Defense.<sup>164</sup> Since that time Ms. Newman has not been permitted to meet with her client.<sup>165</sup> (She was told that she could write to him, but that he might not receive the correspondence.)<sup>166</sup> No criminal charges have been filed against Padilla.<sup>167</sup>

The Defense Department appears to be improvising a procedure for the handling of the Padilla case as it goes along. At a June 12, 2002 news briefing, Secretary of Defense Rumsfeld said, “[he] will be submitted to a military court, or something like that – our interest really in his case is not law enforcement...”<sup>168</sup> The district court ruled that Padilla could be designated as an enemy combatant if there was “some evidence” that he was “engaged in a mission against the United States on behalf of an enemy with whom the United States is at war.” The court found that, for the limited purpose of challenging the factual circumstances of the government’s case, Padilla should have access to a lawyer. Both sides have appealed.

Another United States citizen, Yasser Hamdi, was captured by Northern Alliance forces in Afghanistan in the fall of 2001 and turned over to the U.S. military.<sup>169</sup> U.S. military screening teams in Afghanistan determined that Hamdi should be treated as an “enemy combatant” and transferred him to Guantanamo Bay, Cuba.<sup>170</sup> After discovering that he was a United States citizen, the military transferred him to the United States. For much of that time Hamdi was imprisoned on a naval brig in Norfolk, Virginia.<sup>171</sup> He has not been permitted to consult an attorney, appear in court, or communicate in any way with the outside world.<sup>172</sup> He may not even be aware that there has been litigation filed in his name.<sup>173</sup>

Federal courts have rejected requests by Hamdi’s father and others to review the lawfulness of his hearing citing the “undisputed fact” that he was seized in a “zone of armed combat.”<sup>174</sup> But Judge Michael Luttig of the Fourth Circuit points out that “the circumstances of Hamdi’s seizure cannot be considered undisputed “because Mr. Hamdi has not been permitted to speak for himself or even through counsel.”<sup>175</sup> Another dissenter, Judge Diana Ribbon Motts pointed out that, if mere presence in Afghanistan in fall 2001 was sufficient, “any of the embedded American journalists, covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an enemy combatant.”<sup>176</sup>

The government’s actions in these cases are in violation of international, constitutional and statutory law. It has been long settled that, during the course of a war, the military has the power to detain people captured on the battlefield or enemy soldiers as enemy combatants.<sup>177</sup> Ordinarily, however, the Geneva Convention Relative to the Treatment of Prisoners of War provides that such combatants should be considered “privileged,” held only for the length of the war, and not prosecuted for their combat actions.<sup>178</sup> Only those who violate the laws of war should be prosecuted by special military commissions.<sup>179</sup> If a detainee’s status is in any doubt, the Convention mandates that he be granted a hearing before a tribunal to determine his status.<sup>180</sup> By detaining Hamdi without affording him a hearing to determine his status the United States violated international law. As Padilla was neither captured on a battlefield nor an enemy soldier, his detention – with or without a hearing – is unlawful.

Hamdi and Padilla have also been summarily denied their constitutional rights. The Fifth Amendment guarantees that persons will not be denied life, liberty or property without due process of law. Hamdi and Padilla have been detained without any judicial process and without legal authority. Finally, the government’s treatment of Hamdi and Padilla has violated federal statutory law. Federal law mandates that “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>181</sup> Without charging them with any crime, the government lacks statutory authority to detain Padilla and Hamdi.

Recommendations:

- No statutory changes are necessary. The courts should find that international, constitutional and statutory law prohibit the detentions of Padilla, Hamdi and any others who may subsequently be designated as “enemy combatants”.

## **IV. Conclusion**

Our government should be given all of the tools it needs to fight terrorism. But the Administration has presented the American people with a false choice; it is not necessary to forfeit our civil liberties to be secure, nor will we enhance our security by doing so. We can treat immigrants respectfully without tolerating the presence of would-be terrorists. We can protect the privacy of law-abiding citizens without turning a blind eye to terrorist conspiracies. We can respect the rule of law without releasing terrorists onto the streets.

Richard A. Clarke served for 11 years as a counterterrorism advisor to Presidents George H. W. Bush, Bill Clinton and George W. Bush. Departing office last February he remarked, "I have never seen one reason to infringe on privacy or civil liberties." It has been said that September 11 changed everything. But however horrifying the events of that day, nothing that occurred changed our Constitution, our values or our commitment to the rule of law. Only by reaffirming our dedication to these principles can we overcome the challenges now before us.

## Appendix: Key Sources

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5. *Military Tribunal Authorization Act of 2002*, S. 1941 107th Cong.
6. DAVID COLE, *ENEMY ALIENS* (2003).

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<sup>2</sup> OIG Analysis of Responses by the Department of Justice and the Department of Homeland Security to Recommendations in the OIG's June 2003 Report on the Treatment of September 11 Detainees *available at* <http://www.usdoj.gov/oig/special/03-06/analysis.pdf> (last visited Oct. 27, 2003).

<sup>3</sup> In June 2002, Congress enacted legislation implementing two international conventions on terrorism which extended the death penalty to certain terrorist crimes. See *Terrorist Bombing Convention Implementation Act of 2002* (PL 107-197).

<sup>4</sup> Memo from Chief Immigration Judge Michael Creppy, Re: Cases Requiring Special Procedures (September 21, 2001) *available at* [http://archive.aclu.org/court/creppy\\_memo.pdf](http://archive.aclu.org/court/creppy_memo.pdf) (last visited October 7, 2003).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> DAVID COLE, *ENEMY ALIENS* 28 (2003).

<sup>8</sup> *Id.*

<sup>9</sup> *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

<sup>10</sup> *New Jersey Media Group Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002); *New Jersey Media Group Inc. v. Ashcroft*, 308 F.3d 198 (3rd Cir. 2002).

<sup>11</sup> *Supra*, note 6 at 28-9 (2003).

<sup>12</sup> *Detroit Free Press v. Ashcroft* 195 F. Supp. 2d 937 (E.D. Mich. 2002).

<sup>13</sup> *Id.*

<sup>14</sup> Letter from Assistant Attorney General Daniel J. Bryant to Congressman Carl Levin (July 3, 2002) *available at* <http://www.immigration.com/newsletter1/752detained.pdf> (last visited October 7, 2003).

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<sup>17</sup> *Id.*

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<sup>18</sup> U.S. Department of Justice Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, 30 (April 2003) [hereinafter “DOG/OIG Report”].

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<sup>20</sup> *Id.* at 111.

<sup>21</sup> *Supra*, note 6 at 30.

<sup>22</sup> Review of Custody Determinations, 66 Fed. Reg. 54909 (Oct. 31, 2001).

<sup>23</sup> DOG/OIG Report, at 76.

<sup>24</sup> *Id.* at 78.

<sup>25</sup> Lawyers Committee for Human Rights, *Assessing the New Normal* 53 (Sept. 2003).

<sup>26</sup> *Id.*

<sup>27</sup> DOG/OIG Report, at 88.

<sup>28</sup> Fact Sheet: Operation Liberty Shield, White House, *available at* <http://www.whitehouse.gov/news/releases/2003/03/20030317-9.html> (last visited Oct. 7, 2003).

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<sup>30</sup> Registration and Monitoring of Certain Non-immigrants, 67 Fed. Reg. 155 (Aug. 2002).

<sup>31</sup> *Id.*

<sup>32</sup> Richard Leiby, *A Day to Wait, and Pray*, WASH. POST, Jan. 11, 2003 at C1.

<sup>33</sup> Lawyers Committee for Human Rights, *Assessing the New Normal* 38 (Sept. 2003).

<sup>34</sup> *Id.*

<sup>35</sup> Lisa Getter and Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at A1.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Jonathan Peterson, *Deportation Sweep Targets Middle Easterners*, L.A. TIMES, January 9, 2002 at A5.

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<sup>43</sup> Department of Justice, Privacy Act of 1974; Implementation, 28 C.F.R. § 16 (2003).

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<sup>45</sup> *Is This America?*, Lawyers Committee on Human Rights (October 2000) *available at* [http://www.lchr.org/refugees/reports/due\\_process/due\\_process.htm](http://www.lchr.org/refugees/reports/due_process/due_process.htm) (last accessed Oct. 10, 2003).

<sup>46</sup> *Id.*

<sup>47</sup> Sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 211 and 222 do not have sunset provisions. The rest of Title II ceases to have legal effect on December 31, 2005 (*See* USA PATRIOT Act § 224).

<sup>48</sup> Issuance of Order, 50 U.S.C. §1805(c)(2)(B).

<sup>49</sup> PATRIOT Act § 224.

<sup>50</sup> Intelligence Authorization Act for Fiscal Year 2002, S. 1428 107th Cong. § 305.

<sup>51</sup> Letter of Assistant Attorney General Daniel J. Bryant to Congressman John Conyers (July 26, 2002) at 3 *available at* <http://www.fas.org/irp/news/2002/10/doj101702.html> (last visited Oct. 10, 2003).

<sup>52</sup> Letter of Acting Assistant Attorney General Jamie E. Brown to Chairman F. James Sensenbrenner (May 13, 2003) at 29.

<sup>53</sup> *See* Protecting the Rights of Individuals Act, S. 1552 108th Cong. § 4(a).

<sup>54</sup> *See Id.* at § 5.

<sup>55</sup> *See e.g.* United States v. Pangburn, 983 F.2d 449 (2nd Cir. 1993).

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<sup>58</sup> *Id.* at 9.

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- <sup>62</sup> Additional grounds for issuing warrant, 18 USC 3103a(b)(3).
- <sup>63</sup> *Supra*, note 52 at § 2.
- <sup>64</sup> *See Id.*
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- <sup>66</sup> Pen registers and trap and trace devices for foreign intelligence and international terrorism investigations, 50 U.S.C. 1842(c)(3) (2000).
- <sup>67</sup> *Supra*, note 50 at 3.
- <sup>68</sup> Access to certain business records for foreign intelligence and international terrorism investigations, 50 U.S.C. 1861, 50 U.S.C. 1862(a) (2000).
- <sup>69</sup> Congressional oversight, 50 U.S.C. 1862(b)(2)(B) (2000).
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- <sup>71</sup> *Supra*, note 56 at 29.
- <sup>72</sup> Eric Lichtblau, *Justice Department Lists Use of New Power to Fight Terror*, N.Y. TIMES, May 21, 2003 at A1.
- <sup>73</sup> *Supra*, note 52 at § 4.
- <sup>74</sup> *See Id.*
- <sup>75</sup> General prohibition on pen register and trap and trace device use; exception ,18 USC 3121(b)
- <sup>76</sup> *Supra*, note 52 at § 6.
- <sup>77</sup> *See Id.* at § 6(c).
- <sup>78</sup> Applications for court orders, 50 U.S.C. 1804(a)(7)(B) (2000) (emphasis added).
- <sup>79</sup> *United States v. Hung*, 629 F.2d 908, 915 (4th Cir. 1980).
- <sup>80</sup> Letter of Acting Assistant Attorney General Jamie E. Brown to Chairman F. James Sensenbrenner (May 13, 2003) at 13.
- <sup>81</sup> *Id.*
- <sup>82</sup> Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq.
- <sup>83</sup> *Supra*, note 52 at § 10.
- <sup>84</sup> Letter of Acting Assistant Attorney General Jamie E. Brown to Chairman F. James Sensenbrenner (May 13, 2003) at 35.
- <sup>85</sup> H.R. REP. NO. 107-236, at 61-62 (2001).
- <sup>86</sup> Letter of Acting Assistant Attorney General Jamie E. Brown to Chairman F. James Sensenbrenner (May 13, 2003) at 20, 27.
- <sup>87</sup> *Supra*, note 52 at § 3.
- <sup>88</sup> *See Id.* at § 8.
- <sup>89</sup> *See Id.*
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- <sup>105</sup> See e.g. *Dispelling the Myths*, Justice Departments Life and Liberty Web Site *available at* [www.lifeandliberty.gov/subs/u\\_myths.htm](http://www.lifeandliberty.gov/subs/u_myths.htm) (last visited Oct. 7, 2003) (“The PATRIOT Act ensures that

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business records – whether from a library or any other business – can be obtained in national security investigations with the permission of a federal judge.”)

<sup>106</sup> Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003, H.R. 3040, 108th Cong.

<sup>107</sup> *Id.* at § 2.

<sup>108</sup> Release or detention of a defendant pending trial, 18 U.S.C. 3142(e).

<sup>109</sup> Release or detention of a defendant pending trial, 18 U.S.C. 3142(f).

<sup>110</sup> S. 113, 108<sup>th</sup> Cong.

<sup>111</sup> *Id.* at § 1(a)

<sup>112</sup> *Id.* at § 1(b)

<sup>113</sup> Eric Lichtblau, *G.O.P. Makes Deal in Senate to Widen Antiterror Power*, N.Y. TIMES, May 9, 2003 at A1.

<sup>114</sup> H.R. REP. NO. 108-40, Additional Views of Senator Leahy and Senator Feingold (2003).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Anti-Terrorism Intelligence Tools Improvement Act of 2003, H.R. 3179, 108<sup>th</sup> Cong.

<sup>121</sup> *Id.* at § 2,3.

<sup>122</sup> *Id.* at § 6.

<sup>123</sup> *Id.* at § 5.

<sup>124</sup> *Id.* at § 4.

<sup>125</sup> *Id.* at § 2.

<sup>126</sup> *Id.* at § 3.

<sup>127</sup> *See e.g.* Use of information, 50 U.S.C. 1806 §§ (c), (e), (f).

<sup>128</sup> Anti-Terrorism Intelligence Tools Improvement Act of 2003, H.R. 3179, 108<sup>th</sup> Cong. § 6.

<sup>129</sup> *Id.* at § 5.

<sup>130</sup> Classified Information Procedures Act, 18 U.S.C. App. 3.

<sup>131</sup> Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

<sup>132</sup> Department of Defense Military Commission Order No. 1 (Mar. 21, 2002); Department of Defense Military Commission Instructions Nos. 1-8 (Apr. 30 2003).

<sup>133</sup> While the final version of the Department of Defense regulations incorporated substantial improvements in response to concerns about due process, further revisions are still essential for the reasons detailed in this report.

<sup>134</sup> Adam Liptak, *Tribunals Move from Theory to Reality*, N.Y. TIMES, July 4, 2003 at A12.

<sup>135</sup> Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 §2(a)(i-iii) (Nov. 13, 2001).

<sup>136</sup> *See* Military Tribunal Authorization Act, S. 1941, 107th Cong. § 3.

<sup>137</sup> *See ID.* at § 8.

<sup>138</sup> Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 § 4(c)1 (Nov. 13, 2001).

<sup>139</sup> MIL. R. EVID., Rules 403, 404, 407-10, 802 & 1002.

<sup>140</sup> *Id.* at Rule 807.

<sup>141</sup> MILITARY COMMISSION INSTRUCTIONS No. 5, Annex B (Apr. 30 2003).

<sup>142</sup> *See* American Bar Association, Task Force on Treatment of Enemy Combatants: Report to the House of Delegates 8 (August 2003) available at [http://www.nimj.com/documents/ABA\\_CDC\\_Corrected\\_Fin\\_Rep\\_Rec\\_FULL\\_0803.pdf](http://www.nimj.com/documents/ABA_CDC_Corrected_Fin_Rep_Rec_FULL_0803.pdf) (last accessed Oct. 12, 2003) [hereinafter ABA Enemy Combatant Report].

<sup>143</sup> MILITARY COMMISSION ORDER No. 1 § 5(a-b).

<sup>144</sup> *Id.* at § 5(b).

<sup>145</sup> *See* ABA Enemy Combatant Report, at 10.

<sup>146</sup> MILITARY COMMISSION INSTRUCTIONS No. 4 § 3(E)(1) (Apr. 30 2003).

<sup>147</sup> *Id.*

<sup>148</sup> MILITARY COMMISSION INSTRUCTIONS No. 5, Annex B (Apr. 30, 2003).

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<sup>149</sup> *Id.*

<sup>150</sup> *See* ABA Enemy Combatant Report, at 13.

<sup>151</sup> *See* *Id.* at 12.

<sup>152</sup> *See* *Id.* at 14.

<sup>153</sup> MILITARY COMMISSION ORDER No. 1 § 6(B)(3)

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *See* Military Tribunal Authorization Act, S. 1941, 107th Cong. § 4(c).

<sup>157</sup> *See* *Id.* at § 4(d).

<sup>158</sup> *See* *Id.* at § 4(e).

<sup>159</sup> *See* *Id.* at § 5(d).

<sup>160</sup> A third individual, Ali Saleh Kahla al-Marri, a citizen of Qatar who legally entered the United States to pursue a masters degree, has been designated an enemy combatant. Mr. al-Marri was arrested on December 12, 2002 in Peoria, Illinois and eventually charged with credit card fraud. He was charged in a second indictment a month later, alleging that he made false statements to the FBI and made false statements on a bank application. During this time, Mr. al-Marri was represented by counsel. On June 23, 2003, as his criminal trial neared, the government presented the District Court judge with an order from President Bush, that ordered al-Marri to be removed from the criminal justice system, placed in the custody of the Secretary of Defense and designated him an enemy combatant. Since that day, Mr. al-Marri has been held incommunicado on a Naval Brig in Charleston, South Carolina. [*See* Ali Saleh Kahla al-Marri, Petition for Writ of Habeas Corpus Pursuant in the District Court of Southern Illinois at 3 (July 7 2003); Partially-Redacted Order of the President to the Secretary of Defense and the Attorney General (June 23, 2003) *available at* <http://news.findlaw.com/hdocs/docs/almarri/almarri62303exord.pdf> (last accessed Oct. 10, 2003).]

<sup>161</sup> *Padilla v. Bush*, 233 F. Supp. 2d. 564 (S.D.N.Y. 2002).

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

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> News Briefing, Department of Defense (June 12, 2002) *available at* [http://www.defenselink.mil/news/Jun2002/t06112002\\_t0611edq.html](http://www.defenselink.mil/news/Jun2002/t06112002_t0611edq.html) (last visited, Oct. 10, 2003).

<sup>169</sup> Yaser Esam Hamdi, Petition for a Writ of Certiorari in the Supreme Court of the United States at 5, Oct. 1, 2003 [hereinafter “Hamdi Petition”].

<sup>170</sup> Hamdi Petition, at 5. [Although this report is limited to civil right violations that have occurred on U.S. soil, there are legitimate concerns surrounding the treatment of detainees in Guantanamo Bay, Cuba and elsewhere. *See* Lawyers Committee for Human Rights, *Assessing the New Normal* at 68-72 (September 2003)].

<sup>171</sup> Hamdi Petition, at 5.

<sup>172</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450 (4<sup>th</sup> Cir. 2003).

<sup>173</sup> Hamdi Petition, at 5.

<sup>174</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450 (4<sup>th</sup> Cir. 2003).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Supra*, note 6 at 40.

<sup>178</sup> Geneva Convention relative to the Treatment of Prisoners of War, Article 5 *available at* <http://www.unhcr.ch/html/menu3/b/91.htm> (last accessed Oct. 28, 2003).

<sup>179</sup> *Supra*, note 6 at 41.

<sup>180</sup> *Id.*

<sup>181</sup> Limitation on detention; control of prisons, 18 U.S.C. §4001(a).