

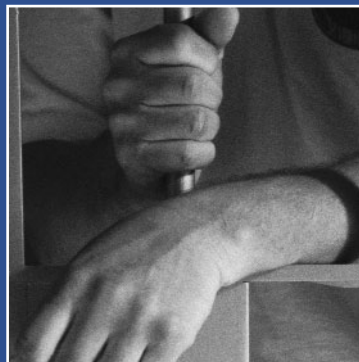
INSATIABLE APPETITE



The Government's
Demand for New and
Unnecessary Powers
After September 11



An **ACLU** Report



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New and Unnecessary Powers
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This report has been prepared by the American Civil Liberties Union, a nationwide, nonpartisan organization of 300,000 members dedicated to preserving and defending the principles set forth in the Bill of Rights.

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The Government's Demand for New and Unnecessary Powers After September 11

Public Law 107-56 bears an extravagant title: The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. Its acronym – the USA PATRIOT Act – seems calculated to intimidate.

Indeed, the legislative process preceding the law's enactment featured both rhetoric and procedures designed to stifle voices of opposition. Soon after the tragic September 11 terrorist attacks, Attorney General John Ashcroft transmitted to Congress a proposal containing the Justice Department's wish list of new police powers, including dramatic new authority to obtain sensitive private information about individuals, eavesdrop on conversations, monitor computer use and detain suspects without probable cause, all with diminished judicial oversight. Ashcroft demanded that his proposal be enacted within three days, and, when that deadline was not met, he suggested publicly that members of Congress would be responsible for any terrorist attack that occurred during the bill's pendency. Congress passed the far-reaching law after abbreviated debate, handing Ashcroft virtually all the investigative tools he sought and several he had not even asked for.

Yet the Government's hunger for new powers was not satisfied. Soon after passage of the USA PATRIOT Act, Justice Department spokeswoman Mindy Tucker declared: "This is just the first step. There will be additional items to come."¹

Additional items have come, some in the form of peremptory executive actions. Officials have detained hundreds of Middle Eastern and South Asian men and engaged in dragnet questioning of thousands of others without individualized suspicion. The Administration has asserted unilateral authority to establish secret military tribunals

and breach attorney-client communications without a court order. It has even locked up American citizens in military briggs without charging them with a crime and has argued they should have no access to the courts. When challenged, government officials insist their actions represent a natural reordering of the balance between liberty and security. But while the loss of liberty is apparent, there is surprisingly little evidence that the new powers will actually enhance security.

The loss of liberty associated with these new measures takes various forms, but can be distilled into three basic overarching themes:

- An unprecedented and alarming new penchant for government secrecy and abandonment of the core American principle that a government for the people and by the people must be transparent to the people.
- A disdain for the checks and balances that have been a cornerstone of American democracy for more than 225 years. Specifically, the Administration has frequently bypassed Congress, while both the Executive and Legislative branches have weakened the Judiciary's authority to check government excesses.
- A disrespect for the American value of equality under the law. Government enforcement strategies that target suspects based on their country of origin, race, religion or ethnicity pose a serious threat to the civil liberties of citizens and non-citizens alike.

A year after the attacks, the Administration continues to augment its bulging statutory arsenal and members of Congress seem all too anxious to accommodate these unceasing demands. Attorney General Ashcroft authorized the FBI to spy on First Amendment activities of reli-

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gious and political organizations in the United States even when they are suspected of doing nothing wrong. The Customs Service secured legal authority to engage in routine searches of packages sent overseas in the US mail. A pending Homeland Security bill already approved by the House would allow state and local police to obtain sensitive intelligence information developed by federal agents, even as legal protections against the dissemination of such information are weakened. The Justice Department is implementing an electronic tracking system for non-citizens and it has asked Congress for an additional expansion of its intelligence surveillance powers.

The American Civil Liberties Union has sought to counter these dangerous developments through legislative advocacy, public education and litigation. From the moment the Administration put forth its proposals, the ACLU's Washington National Office worked intensively to moderate the excesses of the USA PATRIOT Act. The output of legislative analyses, background briefing documents and letters to law and policy makers increased dramatically. The legislative communications unit fielded upwards of 8,000 individual press calls in a three-month period – making it one of the busiest non-governmental media relations operations in the country. The Washington field staff mobilized ACLU members in opposition to the new measures, generating hundreds of thousands of letters to the Capitol and the Administration.

Meanwhile, ACLU Executive Director Anthony Romero, ACLU President Nadine Strossen and other officials brought the struggle to protect civil liberties to the nation's airwaves and testified on numerous occasions before House and Senate committees urging that Congress reclaim its constitutional mandate to reign in overbroad executive branch policies adopted in the wake of September 11.

Working with other organizations, the ACLU has also brought its arguments to the courts, filing lawsuits to uncover information about hundreds of detainees, challenge a new law prohibiting non-citizens from working as airport screeners and obtain public access to immigration hearings. The ACLU continues to insist that the dichotomy between security and liberty is false: we believe that we can be both safe *and* free, and that government poli-

cies should not be based on the myth that liberties must be curtailed to protect the public.

One of the most important missions of the ACLU and other civil and human rights groups in this time of crisis is public education: calling attention to the alarming anti-liberty trend in a range of government actions since September 11. In furtherance of that goal, this report catalogues some of the new and unnecessary powers the government has granted itself over the last twelve months, and describes other new powers the Administration still seeks or that Congress is contemplating. It then highlights ways in which these new laws and regulations threaten the bedrock values of liberty, equality and government accountability on which the nation was founded.

I. THE EVER-EXPANDING ARSENAL

When commercial airplanes struck the twin towers of the World Trade Center on September 11, 2001, Americans literally did not know what had hit them.

In quick succession a third plane hit the Pentagon and a fourth crashed in Pennsylvania. Over the course of the morning there were rumors of numerous other plane crashes, car bombs and explosions near government buildings. The White House reported that Air Force One was itself a target. In those confusing hours, no one could be sure of the magnitude of the threat confronting the United States or what drastic means might be needed to repel it. No one could assert confidently that new government powers were unnecessary to prevent the next brutal hijacking or the next skyscraper from crumbling.

But within days, the contours of the challenge became clearer. Congress promptly responded to the attacks with two measures that built upon current legal authorities. First, it appropriated substantial new funds for existing security agencies to carry out their ongoing duties. Second, it enacted a "Use of Force" resolution authorizing the President to deploy the nation's standing armed forces against the terrorists overseas who had launched the attacks.

President Bush made aggressive use of the civilian and military personnel already at his disposal. American military forces launched a campaign against the instigators of

the attack in their home base of Afghanistan, destroyed the terrorists' infrastructure and toppled the repressive regime that had harbored them. At the same time, domestic law enforcement agencies mobilized to guard against additional attacks at home.

Accomplishments in the war on terrorism have been achieved using statutory tools and other assets available to the government prior to September 11. Our technological superiority on the battlefield, the hard work of domestic public safety officers and the vigilance of ordinary citizens have all contributed. These advantages were available instantly in a moment of crisis. A 342-page bill was not needed to mobilize the nation's abundant resources.

Yet the campaign to enlarge federal police powers has taken on a life of its own. There is no evidence that statutory gaps facilitated the September 11 attacks, but that has not stopped the Administration and Congress from amassing an overabundance of new laws, executive orders and regulations to inflate the government's previously ample authority to defend the country. Anxious to be seen as responsive to public fears, politicians are passing laws for the sake of passing laws rather than to meet any genuine security concerns. The battle in Afghanistan is largely won, but there is no end in sight to the battle over the Constitution.

Even during times of crisis requests for new government powers should bear some relation to the nature of the threat they are designed to counter. Before obtaining new powers, government officials should be required to demonstrate that (1) the new power is necessary to thwart future attacks; and (2) the benefit of the new power outweighs its adverse effect on liberty.

To be sure, there have been other scares since September 11, and there may well be future terror attacks as the Administration has warned. But the basic formula governing consideration of proposals to award the President new anti-terror powers should remain the same: Will the proposed new power really enhance security? If so, does the anticipated gain outweigh any loss of liberty that will result? Weighing the civil liberties implications of new government powers makes it more likely that we will emerge from this period in our nation's history both safe *and* free.

The USA PATRIOT Act

A mere two days after the attack, influential members of the Senate Judiciary Committee led by Ranking Member Orrin Hatch (R-UT) proposed a floor amendment to a routine spending bill that would have expanded the government's authority to intercept oral and electronic communications.

Although no hearings had been held on the proposal, Hatch explained that he wanted to arm the government with "the right tools to hunt down and find the cowardly terrorists who wreaked such havoc two days ago."² Judiciary Committee Chairman Pat Leahy (D-VT) urged a more deliberative process, but Senator Jon Kyl (R-AZ) voiced impatience: "Our constituents are calling this a war on terrorism. In wars, you don't fight by a Marquis of Queensberry rules."³ The amendment passed quickly and the stampede was on.

One week after the attack, Attorney General John Ashcroft transmitted to the Congress an omnibus anti-terrorism proposal. In addition to expanded wiretap authority, the Justice Department sought new authority to detain suspicious immigrants indefinitely and without charge, new powers for government agents to obtain financial and other records without probable cause, expanded powers to forfeit assets of suspects, and lower barriers to the involvement of intelligence agencies in domestic law enforcement. Ashcroft declared that his massive proposal should be enacted within three days.

The congressional debate that followed was not as abbreviated as the Administration requested, although it might as well have been since the Attorney General eventually secured nearly all of the powers he requested.

The Judiciary Committees in the House and Senate convened a hearing on the proposal, but Ashcroft made himself available to the panels for only about an hour. In the Senate, the bill moved directly to the floor without a committee vote. Majority Leader Tom Daschle (D-SD) sought unanimous consent to pass the bill without amendment, but Senator Russell Feingold (D-WI) insisted on offering amendments, each of which was promptly tabled with only a few votes of support. In the House, the Republican-led Judiciary Committee debated the proposal and amended it to incorporate additional

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civil liberties protections. Acting with rare unanimity, the deeply partisan committee adopted that version of the bill, but the Administration persuaded the House leadership to rewrite the bill in the middle of the night before the floor debate to conform the text more closely to Ashcroft's specifications.

There was no official conference committee meeting of Senators and Representatives to reconcile differences between the two bills: instead, a small group of members and Administration officials met behind closed doors to negotiate the package. Final passage of the 342-page legislation occurred just as the anthrax scare paralyzed Congress. Most members of Congress had no access to their offices and no opportunity to read the bill. Critiques of the bill's civil liberties implications provided by the ACLU and other like-minded groups and citizens were virtually ignored in the frantic environment.

The USA PATRIOT Act showers abundant new law enforcement powers on federal agents. Most of its provisions are not limited to terrorism offenses, but instead apply to all federal investigations; in fact, the Justice Department had unsuccessfully sought many of the proposals well before September 11 to bolster routine drug cases and other non-terrorism investigations.

Some skeptical members of Congress argued for a sunset provision under which the law would expire in several years, forcing congressional reconsideration under less frenzied conditions. In the end, a four-year sunset applies to only a handful of the eavesdropping sections in one part of the 10-part bill.

Among the most far-reaching provisions in the law are the following:

- It permits the Attorney General to incarcerate or detain non-citizens based on mere suspicion, and to deny re-admission to the United States of non-citizens (including legal, long-term permanent residents) for engaging in speech protected by the First Amendment.
- It minimizes the power of the courts to prevent law enforcement authorities from illegally abusing telephone and Internet surveillance in both anti-terrorism investigations *and* ordinary criminal investiga-

tions of American citizens.

- It expands the authority of the government in both terrorism and non-terror investigations to conduct so-called "sneak and peek" or "black bag" secret searches, which do not require notification of the subject of the search.
- It grants the FBI – and, under new information sharing provisions, many other law enforcement and intelligence agencies – broad access to highly personal medical, financial, mental health and student records with only the most minimal judicial oversight.
- It permits law enforcement agents to investigate American citizens for criminal matters without establishing probable cause based on an assertion that the investigation is for "intelligence purposes."
- It puts the CIA firmly back in the historically abusive business of spying on Americans by giving the Director of Central Intelligence broad authority to target intelligence surveillance in the United States.⁴
- It contains an overbroad definition of "domestic terrorism." The new definition is so vague that the government could designate lawful advocacy groups – such as Operation Rescue or Greenpeace – as terrorists and subject them to invasive surveillance, wire-tapping, and harassment and then criminally penalize them for what had been constitutionally protected political advocacy.

The immigration provisions of the bill are also expansive. They empower the Attorney General to detain a non-citizen if he believes there are "reasonable grounds to believe" the individual may be a threat to national security. The suspect may be detained for seven days before criminal or deportation charges are brought, but thereafter may be detained indefinitely in six-month increments without meaningful judicial review. (As narrow as these protections are, the Administration has essentially ignored them in its subsequent actions.)

President Bush signed the USA PATRIOT Act into law on October 26. Yet even while negotiating with members of Congress about the scope of new authorities in the bill, the Administration was pushing the limits of its existing

powers by practicing widespread preventive detention of Arab and South Asian men and planning a series of non-statutory initiatives to expand executive supremacy.

Spying on Americans

On May 30, 2002, Attorney General Ashcroft announced that he had rewritten the guidelines that govern FBI domestic surveillance. The Ashcroft guidelines sever the tie between the start of investigative activities and evidence of crime. Ashcroft's guidelines give the FBI a green light to send undercover agents or informants to spy on worship services, political demonstrations and other public gatherings and in Internet chat rooms without even the slightest evidence that wrongdoing is underfoot.

The surveillance guidelines that Ashcroft re-wrote were adopted in the 1970s after disclosures that the FBI and CIA had operated widespread domestic surveillance programs – known as COINTELPRO, COMINFIL and Operation CHAOS – to monitor activists such as Dr. Martin Luther King Jr.⁵ In response to reports that Ashcroft intended to rewrite the guidelines, the ACLU Washington National Office distributed a report on the FBI's excesses in its scheme to discredit Dr. King that led, in part, to adoption of the original guidelines.⁶

The new guidelines call for utilizing 21st century methods – such as data mining to pull together intimate details of a person's life activities – to carry out 1960s era spying on domestic groups. The Ashcroft guidelines also diminish FBI headquarters oversight of its field offices. In so doing, they invite abuses that result from rogue investigations.

Detention of Non-Citizens

Immediately following September 11, some 75 men, largely of Arab and South Asian origin, were rounded up and held in secretive federal custody. Lacking evidence to prove that these detainees were involved in the plot to destroy the World Trade Center, the government relied on minor immigration violations to justify their continued incarceration. The number of detainees grew steadily through September and October, and by early November, 1,147 people were being held in connection with the investigation, according to the Justice Department. At that point the Department declared it would no longer release a tally of detainees. To this date, despite repeated

requests from members of Congress and the media, the Administration has failed to present a full public accounting of the prisoners.

The American Civil Liberties Union and other organizations have filed suit under the Freedom of Information Act seeking a meaningful report on the detainees. Papers filed by the government in response to the suit reveal that a number of the detainees were held without any civil or criminal charges being filed against them for weeks or even as long as two months.⁷ On August 2, a federal court ordered the government to release the names of the nearly 1,200 people detained since September 2001. In her order, U.S. District Judge Gladys Kessler wrote, "Unquestionably, the public's interest in learning the identity of those arrested and detained is essential to verifying whether the government is operating within the bounds of law."⁸

The ACLU filed another lawsuit in New Jersey state court seeking access under New Jersey law to information about the state's INS detainees. The lower court ordered disclosure of information about the detainees and criticized the government's reticence to disclose basic information about the detainees, saying in its ruling that secret arrests are "odious to democracy." The Department of Justice then successfully undercut the court's ruling by adopting a new regulation barring INS detention contractors from complying with state freedom of information laws requiring disclosure of information about immigration detainees.⁹

In late November 2001, shortly before Assistant Attorney General Michael Chertoff testified before a Senate committee, the Justice Department grudgingly released minimal information about the detainees, such as a list of their countries of origin. But the disclosure omitted the names of detainees, the location of their detention, the charges against them and whether they were represented by counsel.

Some of the detainees held without bond had overstayed their visas or committed other technical violations of the immigration laws that would rarely result in incarceration prior to September 11. Others were held without bond as "material witnesses," but witnesses are very rarely incarcerated in ordinary criminal cases; it has become clear that these individuals are not, in fact, witnesses, but rather sus-

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pects against whom no formal charges could be lodged for lack of evidence. For example, a Catholic citizen of the Ivory Coast named Tony Oulai was detained in various federal facilities for months following his September 14 arrest without charges, without evidence of his affiliation with terrorist organizations and largely without access to an attorney.¹⁰

Most of the detainees were of Arab or South Asian descent and almost all were Muslims. In effect, the government had executed a dragnet, rounding up men who bore superficial similarities to those who had carried out the September 11 attacks. But by mid-December authorities conceded that only a handful of the hundreds of detainees were still suspected of terrorism, and only one – Zacarias Moussaoui – has actually been charged with conduct relating to September 11.¹¹ By early March some of the detainees had been released or deported,¹² but a full year later, it appears that scores of these young men remain in custody.

Those detainees charged with crimes or held as material witnesses are entitled to court-appointed lawyers and to have their circumstances reviewed by an independent federal judge. But those held on violations of visa status and other civil immigration offenses do not obtain appointed counsel and their cases are heard by administrative law judges within the Justice Department. A rule change permits the government to hold a non-citizen without charge for an undefined “reasonable” period, and another rule change – implemented without public comment – gives the government authority to maintain custody of non-citizens even if an immigration judge has ordered them freed.¹³ Ironically, the United States is a signatory to the International Covenant on Civil and Political Rights, which limits the period of custody allowed before a detainee must be brought in front of a judge to only a “few days.”¹⁴ The arbitrary and indefinite detention of non-citizens plainly violates this international accord. Already, the government detained one person in solitary confinement for more than eight months without bringing him before a magistrate or letting him see a lawyer.¹⁵

In another judicial repudiation of the Department of Justice’s overzealous detention activities, a federal judge recently ruled against the use of the “material witness” statute to justify the detention of persons innocent of wrongdoing. The court ordered the release of a Jordanian

student being held as a material witness, saying that the government cannot use the statute to coerce testimony. The government has appealed that ruling, and convinced one other federal court that its position is correct.¹⁶

And the dragnet continues to widen. In an internal memo made public earlier this year, the Department of Justice explicitly adopted a policy of selective immigration enforcement. Certain immigrants who have overstayed their visas are now targeted for speedy deportation based on their of national origin.¹⁷ While the Attorney General has defended the large scale roundup of young Arab and South Asian men on national security grounds, even former FBI officials have questioned the effectiveness of a strategy so dependent on national origin profiling.¹⁸

A year after the campaign of preventive detention began, its sponsors have failed to demonstrate that the vast majority of those ensnared in the net were criminals, much less terrorists.

Detention of Citizens

The Administration’s detention-without-trial campaign has even ensnared U.S. citizens. Upon discovering that Yaser Esam Hamdi, one of the men captured in Afghanistan and detained at Guantanamo Bay, Cuba, was born in the United States, the government transferred him to a military brig, denied him access to counsel, failed to charge him with a crime and asserted that no court could review its actions.

Then, on June 20, in a dramatic live speech from Moscow, the Attorney General announced that another American had been labeled an “enemy combatant” by the President, removed from the criminal justice system and placed in a military brig for an indefinite period. On television, Ashcroft accused Abdullah al-Muhajir (who is also known as Jose Padilla) of scouting targets in the United States for a dirty bomb attack. In court, al-Muhajir was accused of nothing. He was removed to military detention only days before the expiration of the 30-day period the court had given the government to charge or release him. As if to underline the apparent lack of evidence to charge al-Muhajir with a crime, White House officials reportedly surprised by Ashcroft’s announcement issued an alternate, less alarming statement about the arrest.¹⁹

This assault on the rights of American citizens to be free from detention without charge or trial flies in the face of constitutional guarantees and a specific statute prohibiting the same.²⁰ And there is no limiting principle to suggest that Hamdi and al-Muhajir are not the first of many citizens to be subjected to such summary treatment.

Dragnet Questioning and Fingerprinting of Immigrants

While one group of Middle Eastern and South Asian immigrants was detained, a much larger group of them was singled out for questioning. On November 9, 2001, Attorney General Ashcroft unveiled a plan to interview some 5,000 young men who had entered the United States within the past two years from specified countries. As those interviews were winding down in mid-March, the Attorney General extended the program to 3,000 more Middle Eastern and South Asian immigrants who had more recently entered the United States. Ashcroft conceded that the list was compiled without particularized suspicion of any of these men. It was apparent they were targeted for law enforcement attention because of their country of origin.

In many parts of the country local police carried out the questioning despite the fact that few such officers are trained to conduct terrorist investigations. The Department of Justice provided a list of questions to guide the interviews, covering such matters as the subject's employment and sources of income, foreign travel, reaction to terrorism and sympathy for terrorists. Some local police departments balked at the request to conduct the interviews because the scheme violated state laws or local policies against profiling based on race or national origin.²¹

The Attorney General Ashcroft also announced a massive new program to fingerprint over 100,000 Arab and Muslim immigrants suspected of no wrongdoing.²² Earlier in the year both President Bush and Attorney General Ashcroft had vowed to end racial profiling, but neither proffered a persuasive argument as to why the mass questioning and fingerprinting of these immigrants did not constitute blatant reliance on this discredited practice.

These programs engender mistrust and resentment in Arab-American communities and among immigrants generally. In addition, the Attorney General has not to

date provided any evidence either program has been effective in identifying new suspects in the September 11 attacks or preventing other acts of terror.

Military Tribunals

On November 13, 2001, the President issued an order in his capacity as Commander-in-Chief investing himself with unprecedented authority to try individuals suspected of terror-related activity in a military tribunal rather than a civilian court.²³

In this order the President asserted the authority to try by military commission any non-citizen suspected of being a terrorist, aiding a terrorist or harboring a terrorist. The option could be exercised against legal immigrants in the United States, even those arrested by domestic law enforcement agencies. The President reserved to himself the exclusive discretion to invoke the tribunal option against any particular suspect. In effect, the President decides who will be entitled to constitutional rights and who will not.

The President's order provoked immediate controversy on procedural grounds. First, it came on the heels of a legislative process, however abbreviated, in which the question of how long immigrant suspects could be held without access to the courts was the subject of careful compromise. That compromise was embodied in section 412 of the USA PATRIOT Act, but the tribunal order essentially negated the new law's meager protections. Second, President Bush acted unilaterally, without congressional authorization or even consultation. Supporters of the concept cited the precedent of President Roosevelt's order to try Nazi saboteurs by military tribunal, but Roosevelt had acted pursuant to a declaration of war and with statutory authority, since repealed, that authorized the procedure.

Some of the rules of the tribunal are spelled out in the President's order and others were put in place in a March 21, 2002, order issued by Secretary of Defense Donald Rumsfeld. The orders were criticized for disregard for procedures needed for reliable fact-finding. The orders make it clear that military officers handpicked by the President, Rumsfeld or their designees would serve as judges and jurors. Only a two-thirds vote would be needed for conviction in all but capital cases, where unanimity would be required. The trials may be held in secret.

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Evidence may be withheld from the defendant and the defendant's civilian lawyer, regardless of whether disclosure would reveal classified information.

Under the orders, no court – federal, state, or international – is allowed to review the military commission's proceedings. While limited habeas corpus review may be available should the proceedings be conducted in the United States, the Defense Department apparently intends to conduct the proceedings abroad, and the government recently convinced a federal judge that no U.S. court has jurisdiction to hear a challenge to detentions at a U.S. military base in Guantanamo Bay, Cuba.²⁴ The Administration has even indicated that it may hold the Guantanamo detainees indefinitely without even a trial before a military tribunal, and reserves the right to continue to detain persons indefinitely even if a military tribunal finds them not guilty of all charges.

The breadth of the order's scope is extraordinary. International law contemplates reliance on military justice in the zone of combat. But the order is not limited to, for example, Al Qaeda fighters captured in the caves of Tora Bora and transported to Guantanamo Bay. Instead it applies to all individuals the President has reason to believe may have "aided or abetted" or "conspired to commit" terrorism "or acts in preparation therefore." It applies to someone the President has a reason to believe has "knowingly harbored" or aided a terrorist. It does not apply to American citizens but potentially applies to any of the 18 million foreign-born legal residents of the United States.²⁵

Attorney-Client Privilege

On October 31, 2001, the Justice Department published in the Federal Register a new regulation authorizing prison officials to monitor communications between detainees and their lawyers without obtaining a court order.²⁶

Here, as with the military tribunal regulations, the Administration bypassed Congress altogether. By pursuing this authority unilaterally instead of including it among the surveillance authorities it sought from Congress in the USA PATRIOT Act, which had been signed into law only days before the new regulation was promulgated. The Administration's anti-terror campaign

eroded constitutional checks and balances.

Under prior law, monitoring of attorney-client communications could occur if the government obtained a court order based on probable cause to believe that communication with an attorney was being used to facilitate a new crime or for foreign intelligence purposes. But in the October 31 regulation, the Attorney General bestowed on himself discretion to monitor communications without a court order. The regulation became effective immediately, with public comment to follow implementation.

The new authority is an unjustified exception to the well-recognized confidentiality of attorney-client communications. That privilege is intended to encourage candor in such communications to ensure effective representation by defense counsel. To date, it appears that this new power has been exercised only once in which a court order had already authorized a wiretap, suggesting that the regulation was never needed to fill a real gap in current law. But of course the mere threat of government intrusions in the attorney-client relationship, even if never carried out, undermines the trust between lawyers and clients and chills their communications.

New Secrecy Measures

Attorney General Ashcroft has earned ridicule by spending \$8,000 in public funds to cover a revealing Art Deco statue in the Great Hall of the Justice Department. Less well known are the Attorney General's persistent efforts to shield the Administration's controversial policies from public view.

As described earlier, the Administration's failure to respond to reasonable requests under the Freedom of Information Act led to a lawsuit by the ACLU and others seeking basic information about September 11 detainees. More generally, since September 11 the Attorney General has reversed prior Justice Department guidance and counseled executive branch agencies to resist FOIA requests; instead of requiring that information be released except when its disclosure would result in some harm, Attorney General Ashcroft has directed that information be withheld whenever possible under the statute, regardless of whether disclosure would be harmful.²⁷

Within the Department of Justice, the Attorney General

has instituted new secret procedures for cases before immigration judges. In a memo to his fellow judges dated September 21, 2001, Chief Immigration Judge Michael J. Creppy declared that certain hearings would be closed to the public and that information about such cases could not be disclosed to anyone outside the immigration court. On January 2, 2002, House Judiciary Committee ranking member John Conyers (D-MI) was turned away when he sought to attend a court hearing involving one of his constituents, Rabih Haddad.

Soon after, Conyers, the ACLU and a number of news outlets filed a lawsuit challenging this unconstitutional practice in the Haddad case. A federal district court judge rejected in no uncertain terms the government's argument that all such hearings should be closed on a blanket basis for reasons of national security. And a federal appeals court, declaring, "Democracies die behind closed doors," issued a resounding affirmation on August 26. The ACLU filed another lawsuit challenging the closure of immigration hearings more broadly, and that case is pending.

Ashcroft also has created an interagency task force, the first in two decades, to review administrative and criminal sanctions for the leak of classified information. Media organizations and watchdog groups have argued that such actions discourage whistleblowers and undermine legitimate efforts to hold government agencies accountable, but the Attorney General is undeterred.²⁸ The FBI even went so far as to ask members of Congress – who were themselves investigating the FBI's performance prior to September 11 – to submit to lie detector tests in connection with the FBI's investigation of one alleged leak. Many members declined out of fear of inaccurate results. Experts expressed doubt about Congress's ability to investigate the FBI's performance leading up to the September 11 attacks while the FBI was investigating the members of Congress conducting the investigation.²⁹

Finally, the Administration has asked Congress to broadly shield from public disclosure information businesses voluntarily submit to the government that they mark secret. Congress seems poised to reject this overly broad proposal to protect "critical infrastructure" information in favor of a more limited compromise, because the original proposal would have shielded corporate inaction or wrongdoing from public disclosure.

Frustrated with the Administration's regime of secrecy, the ACLU on August 21, 2002, filed a new FOIA request seeking information on 14 different categories of Justice Department records. The ACLU FOIA request mirrors questions posed by House Judiciary Committee Chairman James Sensenbrenner (R-WI) and Ranking Minority Member John Conyers (D-MI). Sensenbrenner, in fact, has expressed such great frustration with Attorney General Ashcroft that he has threatened to subpoena the Justice Department to turn over information about how it is utilizing the powers granted it by the USA PATRIOT Act. In an interview with National Public Radio, Sensenbrenner said that the Ashcroft Justice Department has been the least cooperative of any in his 24-year tenure on the Judiciary Committee.³⁰

Chairman Sensenbrenner is not alone in questioning this Justice Department. In a remarkable decision made public in August 2002, the secret Foreign Intelligence Surveillance Court explicitly rejected Ashcroft's efforts to eliminate federal "bright line" protections against having prosecutors direct intelligence investigations to use them for criminal prosecutions. Although the decision says the Justice Department expended "considerable effort justifying deletion of that bright line," it emphatically added, "the Court is not persuaded."

The decision decisively demonstrates that Congress should reject two proposals pending in the Senate Intelligence Committee to reduce the level of proof the government must provide to the surveillance court to obtain an intelligence warrant. As the ACLU stated, "the intelligence court's opinion shows that the Department of Justice has abused the intelligence powers it already has and should not be showered with more until it addresses the problems the court identified."

The Administration's preference for secrecy extends beyond the war on terrorism. Even before September 11, Vice President Cheney had rebuffed lawful requests by the General Accounting Office for documents relating to his energy policy task force. And in November, President Bush issued an executive order limiting the release of presidential documents from past administrations, notwithstanding a statute that appears to mandate public availability. Finally the Administration has restricted the amount of information available to the public on agency web sites, even though, according to the Federation of

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American Scientists, much of the information removed “appears to have little bearing on the terrorist threat.”³¹

An apt summary of the Administration’s hostility to open government comes from Representative Dan Burton, Republican Chair of the House Government Reform Committee, who has criticized the Bush Administration’s invocation of executive privilege in refusing to turn over documents subpoenaed by Congress. Burton observed that “[a]n iron veil is descending over the executive branch.”³²

II. ADDITIONAL MEASURES ON THE HORIZON

The mammoth USA PATRIOT Act expanded government powers in ways that will diminish liberty for years to come, and the subsequent executive branch actions pose additional challenges. But even the policies now on the books may be dwarfed in significance by the far-reaching activities that the federal government is contemplating but has not yet undertaken. Even now, some six months after the attack, the pressure to add new ammunition to the federal law enforcement arsenal has not abated.

Surveillance

Many of the proposed new government powers under consideration in Congress and elsewhere involve increased surveillance authority. Only weeks after passage of the USA PATRIOT Act and before that law’s provisions were fully implemented, the Justice Department asked Congress for an additional major expansion of electronic surveillance powers.³³

The USA PATRIOT Act granted the FBI broad access to records about individuals maintained by third parties, such as businesses and libraries.³⁴ According to a study by the University of Illinois, such powers have been used by law enforcement officials to seek information from 85 libraries about their patrons.³⁵ The Attorney General declared that the frequency of his use of this power is classified, and refused to disclose this information to key members of Congress.³⁶

New technology tends to magnify the intrusive nature of

government surveillance, and a number of new surveillance proposals partake of technological developments. For example, President Bush has proposed a high-tech tracking system for non-citizens involving biometric equipment of unproven efficacy.³⁷ And a leading Democratic Congressman has suggested that the Postal Service should reduce the anonymity of mail service, perhaps issuing encoded stamps that could be traced back to the purchaser.³⁸

Not content with the new broad surveillance powers he granted FBI agents himself, Attorney General Ashcroft announced a new program to recruit millions of Americans to spy for the government. “Operation TIPS” would train truckers, utility workers, postal workers, and local cable, gas and electric technicians to report activities they deem suspicious to a special Department of Justice hotline.

Once revealed as an effort to evade warrant procedures by having workers with access to private homes snoop for the government, the program was roundly condemned. Some critics dubbed it a government-sanctioned “peeping Tom” program while others equated it with George Orwell’s “1984” and with the former East German Stasi, a secret police service that recruited thousands to spy on dissidents and compile dossiers about them.³⁹

Members of Congress moved quickly to head off the program. House Majority Leader Dick Army (R-TX) is attempting to outlaw the program by means of an amendment to the Homeland Security Act.⁴⁰ The Administration, however, is intent on going forward with what it has called a scaled back version of the program.

In addition, the long-standing campaign to establish a system of national identification cards has gained new momentum in the wake of September 11. Current proposals typically incorporate new technology into the card in what its proponents call efforts to guard against forgery, but doubts about the concept’s effectiveness and fears of the abuses it may breed remain.⁴¹

Some in Congress have proposed measures to standardize driver’s licenses nationwide, proposals that have provoked an unusual alliance among such ideologically divergent groups as the ACLU and the Eagle Forum to decry the proposals as de facto national IDs. A House bill, introduced by Reps. Jim Moran (D-VI) and Tom

Davis (R-VI), and a Senate counterpart, soon to be introduced by Sen. Dick Durbin (D-IL), would implement such a system.⁴²

Remarkably, even the apolitical National Research Council has expressly identified the driver's license standardization scheme as a "nationwide identity system" and raised questions about its effectiveness.⁴³

State and Local Insatiable Appetites

The federal government is not alone in seeking to augment its powers in the aftermath of September 11. According to Time magazine, 46 state legislatures planned to debate anti-terrorism bills in 2002, many expanding local law enforcement powers.⁴⁴ Among the ways in which federal anti-terror policies have begun to influence state laws is in challenges to principles of open government. A number of state legislatures have limited public access to government documents in the name of public safety.⁴⁵ California and other states are exploring new wiretap laws that mirror federal statutes.⁴⁶ Meanwhile a number of local jurisdictions, including the District of Columbia, are expanding their network of surveillance cameras. According to D.C. officials, the city's grid links hundreds of government video cameras that routinely monitor streets, Metro stations, schools and other government facilities.⁴⁷ Other cities are aggressively experimenting with facial recognition technology.

In Congress, the pending Homeland Security bill would relax privacy safeguards by enabling state and local police to obtain virtually all of the sensitive intelligence information developed by federal agents. Vast law enforcement databases containing detailed information about suspects and law-abiding citizens alike would be shared seamlessly among all enforcement agencies. The widespread dissemination of personal information about private citizens, even among law enforcement agencies, is inevitably prone to abuse. These concerns are especially relevant given the additional powers granted to the CIA in the USA PATRIOT Act, which essentially put the agency back in the business of spying on Americans. Basic civil liberties are imperiled if state and local law enforcement agencies are able to acquire information gathered by the CIA without normal constitutional restrictions.

III. CHALLENGES TO AMERICAN VALUES

Some of the new statutes, rules and executive orders adopted in the last year may be benign while others are obviously troublesome. But in any event there has been little showing that the post 9-11 avalanche of laws, in the aggregate, make America safer. And, while the benefit of these measures is hard to discern, *there is no question* that they exact a profound cost to civil liberties and core constitutional values.

Would efforts to prevent terrorism be any less successful if in the weeks after the attacks Congress had merely appropriated funds for existing agencies, authorized the deployment of troops to Afghanistan, and if the executive branch had simply exercised its extant pre-September 11 powers?

The Threat to Patriotic Dissent

Looming over other threats is the threat that those who voice opposition to government policies will be branded unpatriotic. The most basic of all American values, one that buttresses all others, is the First Amendment right to express dissenting views about government actions.

Attorney General Ashcroft has a different view. Testifying before the Senate Judiciary Committee on December 6, 2001, the Attorney General stated, in his prepared remarks, "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends."

This threat, though chilling, was hollow. If the Attorney General hoped to silence critics of the Administration's anti-terror tactics he has plainly failed, because public concern about those tactics is growing, not waning.

Yet it appears that the Attorney General's sentiment has been translated into action. Reports have emerged recently of federal agents investigating an art museum that exhibited materials on American covert operations and government secrets, a student who displayed a poster critical of President Bush's position on the death penalty and a San Francisco weightlifter who publicly criticized the Administration, among others.⁴⁸

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The Threat to Liberty

Individual liberty is the central precept of our system of government, but new government powers challenge that value in both extreme and subtle ways.

One of the most significant attacks on individual liberty in the name of anti-terrorism is the government's lengthy detention of individuals whose conduct has not warranted such a deprivation. At one time more than a thousand individuals were jailed in reaction to September 11. Today that number is smaller, but the Justice Department still refuses to provide a precise accounting. Some may deserve to be detained for criminal conduct, but many do not.

Conservative columnist Stuart Taylor, who has defended a number of the new anti-terror measures, observes that:

Not since the World War II internment of Japanese-Americans have we locked up so many people for so long with so little explanation. The same logic that made it prudent to err on the side of overinclusiveness in rounding up suspects after the crimes of September 11 makes it imperative to ensure that these people are treated with consideration and respect, that they have every opportunity to establish their innocence and win release, and that they do not disappear for weeks or months into our vast prison-jail complex without explanation.⁴⁹

A more long-term infringement of liberty is posed by the loss of privacy that will result from many of the provisions in the USA PATRIOT Act and related measures. The new authorities interfere with the right to privacy by making it easier for the government to conduct surveillance, listen in on conversations, obtain sensitive financial, student and medical records and otherwise track the daily activities of individuals. Subjecting individuals to intrusive police questioning without particularized suspicion is an additional deprivation of liberty that has flourished in recent months. The potential for such deprivation increased with the decision to allow the CIA to, once again, compile dossiers on ordinary Americans and then – through new information sharing provisions – distribute that information throughout the law enforcement and intelligence communities.

Defenders of liberty do not take issue with the minor inconveniences that accompany many current security measures. Few Americans quarrel, for example, with reasonable screening procedures in airports such as luggage matching and strict control of secure areas to prevent weapons from being carried onto airplanes. Rather, the debate is about measures, like the USA PATRIOT Act, that represent genuine encroachments on privacy. Opinion polls suggest that a growing number of Americans are unwilling to sacrifice core values in the fight against terrorism, especially without proof that any particular measure is likely to be effective.

Before it may scrutinize such personally sensitive materials as medical records, school records, banking records or an individual's Internet use, the government should be required to demonstrate in a particularized fashion that such scrutiny is necessary to achieve safety. That balance, of course, is embodied in the Fourth Amendment, which prohibits "unreasonable" searches and seizures and authorizes the government to intrude on privacy only upon a finding of probable cause by a neutral judge.

The new enforcement powers conferred by Congress and assumed by the Justice Department reflect impatience with the Fourth Amendment, and its embodiment of the fundamental American conviction that individual liberty is accorded the benefit of the doubt when enforcing criminal law. The surveillance authorities in the USA PATRIOT Act undermine the role of the courts as the protectors of the individual against unfair and unwarranted government scrutiny or harassment. And the new Ashcroft surveillance guidelines reflect the view that dissent is to be feared and monitored, not protected under the First Amendment.

The Threat to Equality

The Constitution guarantees equal protection of the laws. It prohibits the government from establishing different sets of rules for similarly situated groups without a compelling reason. Citizenship is a characteristic upon which some distinctions may be made, but not others. For example, non-citizens may not vote in federal elections but they are entitled to equal treatment, due process and other constitutional protections by virtue of their presence in the country.

It is striking how many of the new restrictions and investigative tactics distinguish between citizens and non-citizens. Many of the government's actions, such as the military tribunal framework, the dragnet interviews and of course the immigration-related detentions, all apply to non-citizens but not citizens. Also, new rules prohibit non-citizens from serving as airline screeners and limit the jobs non-citizens may perform at certain federal facilities.

The broad premise of this distinction is that non-citizens pose a threat to Americans that citizens do not. That the 19 men who hijacked planes last September were non-citizens makes this premise superficially appealing, but in fact citizenship is a highly unreliable proxy for evidence of dangerousness.

First, at least one of the Al Qaeda members convicted in the trial arising from the terror attack on U.S. embassies in Africa was an American citizen (Wadih el-Hage), and at least two American citizens have been apprehended as suspected Taliban soldiers (John Walker Lindh and Yaser Esam Hamdi). Second, the President has made clear that the war on terrorism is not limited to Al Qaeda and the Taliban but encompasses all who utilize violence to intimidate civilian populations. By that measure, there have been numerous U.S. citizen-terrorists, including Timothy McVeigh whose bombing of the federal building in Oklahoma City was the bloodiest act of terrorism on U.S. soil prior to September 11.

But while some citizens are terrorists, a more important fact is that the overwhelming majority of non-citizens are not terrorists. Of the millions of non-citizens residing in the United States legally or illegally, only an infinitesimally small number of them have been tied to September 11 or other terror plots. As a statistical matter, citizenship status reveals essentially nothing about likely involvement in terrorism. Factoring in age and gender by focusing on young male non-citizens does not meaningfully narrow the targeted class.

The pattern of detentions, the efforts to selectively deport out-of-status non-citizens and the dragnet effort to question 8,000 young Arab and South Asian men and fingerprint 100,000 more constitute profiling on the basis of national origin. Profiling is a flawed law enforcement tactic and a flawed tactic in the war on terrorism. It is inefficient and ineffective, since it squanders limited law

enforcement resources based on a factor that bears no statistically significant relationship to wrongdoing. Also, unwarranted focus on non-citizens as a class engenders hostility and resentment in immigrant communities. Yet it is precisely those communities in which law enforcement agencies are now seeking to recruit agents, hire translators and search for suspicious behavior.

An undue investigative focus on non-citizens threatens to spill over into governmental or non-governmental harassment of citizens who happen to "look foreign" or who have "foreign-sounding" names. Already the federal government's reliance on a national origin dragnet has spawned similar tactics: detectives in New York City's warrant squad have prioritized their activities by culling through computers for petty crime suspects with Middle Eastern-sounding names.⁵⁰ And on more than 200 college campuses investigators have contacted administrators to collect information about students from Middle Eastern countries and have approached foreign students without notice to conduct "voluntary" interviews.⁵¹

Reliance on mere non-citizenship as a distinguishing characteristic is not just ineffective law enforcement; it is also anathema to American values. Vice President Cheney has said that those who kill innocent Americans would get "the kind of treatment we believe they deserve" since such people do not deserve "the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."⁵² The Vice President's dichotomy between "an American citizen" and "those who kill innocent Americans" is dangerously misleading. Citizenship is simply not a trait that distinguishes those who kill innocent Americans from those who do not.

The Threat to Constitutional Checks and Balances

The Administration's actions since enactment of the USA PATRIOT Act betray a serious disrespect for the role of Congress. That law emerged from a flawed legislative process, and a number of the subsequently announced initiatives were never even discussed with Congress. For example, painstaking negotiations with Congress over the circumstances under which non-citizens could be detained in the name of national security led to enactment of section 412 of the Act, which limits detentions to seven

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days before the individual must be brought before a judge to face immigration or criminal charges. But just after enactment, the Administration unveiled its military tribunal proposal, permitting indefinite detention of non-citizens without any review by an independent judicial officer. Now the designation of certain individuals as “enemy combatants” renders even the meager protections of the military tribunal regulations inoperative.

Moreover, both the USA PATRIOT Act and the subsequent executive actions undermine the role of the judiciary in overseeing the exercise of executive authority. The Act essentially codifies a series of short cuts for government agents. Under many of its provisions, a judge exercises no review function whatsoever; the court must issue an order granting access to sensitive information upon mere certification by a government official. The Act reflects a distrust of the judiciary as an independent safeguard against abuse of executive authority.

This trend is particularly apparent in the electronic surveillance provisions of the Act. For example, the USA PATRIOT Act subjects surveillance of Internet communications to a minimal standard of review. This surveillance would reveal the persons with whom one corresponded by e-mail and the websites one visited. Law enforcement agents may access this information by merely certifying that the information is relevant to an ongoing investigation. The court must accept the law enforcement certification; the judge must issue the order even if he or she finds the certification factually unpersuasive.

The subsequent executive actions are even more flawed in this regard. The regulation allowing for monitoring of attorney-client communications was promulgated to bypass the courts, since prior to its promulgation government agents could only engage in such monitoring if they obtained a court-issued warrant and now they may act upon their own suspicions without judicial review. And the military tribunal order and military detention of American citizens constitute pure court-stripping by removing federal judges from the process altogether.

These initiatives misunderstand the role of the judiciary in our constitutional system. They treat the courts as an inconvenient obstacle to executive action rather than an essential instrument of accountability.

The Framers of the Constitution understood that legislative and judicial checks on executive authority are important bulwarks against abusive government. It is true that the President plays a heightened role as Commander in Chief in defending the nation against foreign threats. But current circumstances do not render ordinary constitutional constraints on his role inoperative or unnecessary.

The Threat to Open Government

In our democracy, executive and legislative actions derive legitimacy from the fact that they emerge from a process that is deliberative and largely open to the public, at least through the media. But many of the new anti-terrorism measures fail this fundamental test.

As described above, much of the USA PATRIOT Act was negotiated out of public view. Key stages of the legislative process – committee vote, floor debate, and conference – were either short-circuited or skipped altogether. Similarly, the executive order concerning attorney-client communications and the presidential order authorizing military tribunals were developed in secret with no opportunity for public debate about their efficacy or wisdom before their promulgation.

At the same time, secrecy permeates the process by which hundreds of young Arab and South Asian men have been detained by the government. One reason the justice system must be open to the public is to ensure that the government affords individuals due process consistent with the Constitution and applicable statutes. One detainee was held for eight months without being brought before a judge. Georgetown Law Professor David Cole has observed: “In open proceedings the government would never get away with holding a person for three weeks without bringing charges. The only reason they have gotten away with it is these proceedings have been conducted under a veil of secrecy.”⁵³

The Administration’s FOIA policies threaten to usher in a new era of government secrecy. While the Attorney General invoked the threat to terrorism in his directive limiting FOIA compliance, the order covers all government information, much of which has no national security or law enforcement connection whatsoever. As a result, all executive branch activities will be less open and less accountable under this new regime.

To be sure, there is a need for some secrecy in times of crisis. No one advocates the disclosure of documents that might endanger troops on the battlefield. But secrecy appears to be a hallmark of the Bush Administration's every move, even in the development of policies that should emerge from the crucible of public scrutiny and in the adjudication of charges against individuals.

The Threat to the Rule of Law

It is often said that ours is a government of laws, not those who inhabit high office at any given moment. Americans may trust or admire such individuals, but their enduring faith is reserved for certain fundamental legal principles and traditions that emanate from our Constitution: that the federal government is one of limited, enumerated powers; that the Congress makes the law, the President executes the law, and the judiciary interprets the law; that criminal suspects are innocent until proven guilty and entitled to various procedural protections during the process of adjudicating guilt. Many of the new powers assumed by the President and his officers since September 11 run counter to these principles.

For example, the detention of Americans in military brigades, and the contemplated procedures for non-citizens facing military tribunals skirt the rule of law. Department of Defense guidelines governing the tribunals shows marked and alarming deviation from traditional courts martial.

First, while the Pentagon has codified tribunal procedures in a less offensive fashion than opponents originally feared, the tribunals still – unacceptably – lack a clear appeals process. The guidelines essentially give the final word on the accused's fate to the President or the Secretary of Defense.

Also, the guidelines confer complete discretion on the President or the Secretary of Defense to hold the tribunals in secrecy. Finally, in a surreal twist, it appears that the government will still be able to detain indefinitely suspects acquitted by the tribunals.

In the final analysis, the main difference between the tribunals and courts-martial is that nothing is binding with the tribunals. The Administration has given itself unlimited discretion to compose the rules for the tribunals as they go – an affront to the American tradition of impar-

tial procedures to protect individual rights from the caprice of persons in authority.

American citizens are treated no better. According to the Bush Administration, the President need only sign an order labeling an American citizen an "enemy combatant" to begin a process in which the citizen can be held indefinitely – without charge and without a right to see a lawyer – until the "war on terrorism" has ended. And the Administration argues that no court can review the President's designation of an "enemy combatant."

Other facets of the war on terrorism also undermine the rule of law. Secret detentions, the unreviewable assertion of executive authority, the deployment of law enforcement agents against groups of people without particularized suspicion, recruiting ordinary Americans to spy on their neighbors – these are the hallmarks of undemocratic, strong-arm governments, not the two-century-old American democracy. Resorting to such tactics, even temporarily or in limited contexts, is cause for serious concern.

One reason for concern is that the new powers, especially many of the investigative tools in the USA PATRIOT Act, are not limited to the pursuit of terrorists. Even those that are reserved for terrorism investigations may be used in contexts that the drafters of the Act never contemplated. The label "terrorism" is notoriously elastic; it has recently come to light that the Department of Justice categorizes as "terrorism" such garden variety crimes as erratic behavior by people with mental illness, passengers getting drunk on airplanes, and convicts rioting to get better prison food.⁵⁴

In recent decades the United States has styled itself a champion of international human rights, and has encouraged the development of civilian legal institutions and the "rule of law" in countries throughout the world. For example, the State Department has pressured Egypt to abandon military tribunals in that country's war on terrorism, and has also criticized the secret trials that frequently characterize the justice systems in South America and China. What force will those criticisms have if the United States avails itself of these shortcuts even though its civilian courts are fully functional and open for business?

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CONCLUSION

America, more so than at any time in the past three decades, stands at a crossroads. The Administration has invoked historical precedents to justify its wartime tactics, and in doing so has brought key segments of American society and politics to the brink of repeating much in our history that we have come to regret. It is true that throughout American history -- from the 18th century Alien and Sedition Acts to the suspension of habeas corpus during the Civil War to the Palmer Raids and the internment of Japanese-Americans during World War II -- constitutional protections have taken a back seat to national security. But with the benefit of hindsight, Americans have regretted such assertions of new government powers in times of crisis.

It is especially true that immigrants and others, citizens and non-citizens alike, have been mistreated in wartime. The disgraceful internment of Japanese-Americans remains a stain on our national honor. That is surely not a precedent on which the Administration would want to rely.

Concepts of due process, military justice and international human rights have advanced substantially since World War II. Departure from these principles has detrimental consequences for the war on terrorism. European allies, already wary of extraditing suspects to the United States because of opposition to the death penalty, have now expressed misgivings about the possibility of military tribunals and other measures.⁵⁵

Some national leaders downplay these concerns, saying that wartime limitations on civil liberties are temporary and normal conditions will return once hostilities end. But the war on terrorism, unlike conventional wars, is not likely to come to a public and decisive end. Both Homeland Security Director Tom Ridge and the newly appointed drug czar, John Walters, recently equated the war on terrorism with the nation's continuing wars on drugs and crime. So restrictions on civil liberties may be with us for a very long time. So long, in fact, that they may change the character of our democratic system in ways that very few Americans desire.

In the absence of a broader sunset provision in the USA PATRIOT Act, and since the subsequent orders and

regulations are of indefinite duration, Congress must be vigilant in monitoring implementation of these new authorities. These powers have been structured in a manner that limits the role judges would ordinarily play in ensuring that enforcement agencies abide by constitutional and statutory rules. Without judicial oversight, there is a real danger that the war on terrorism will have domestic consequences that are inconsistent with American values and ideals.

It is as *New York Times* columnist Bob Herbert has written:

“We have a choice. We can fight and win a just war against terrorism, and emerge with the greatness of the United States intact. Or, we can win while running roughshod over the principles of fairness and due process that we claim to cherish, thus shaming ourselves in the eyes of the world - eventually, when the smoke of fear and anger finally clears- in our own eyes as well.”⁵⁶

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