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AMERICA AFTER 9/11: FREEDOM PRESERVED OR FREEDOM LOST?

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UNITED STATES SENATE

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AMERICA AFTER 9/11: FREEDOM PRESERVED OR FREEDOM LOST?

TUESDAY, NOVEMBER 18, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, Sessions, Chambliss, Leahy, Biden, Feinstein, Feingold, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Good morning. I want to welcome everyone to our second hearing in a series to examine the adequacy of our Federal laws to protect the American public from acts of terrorism against the United States.

At the outset, I would like to thank our ranking minority member, Senator Leahy, for his continued cooperation in working together to examine these important issues. Senator Leahy has been a tireless advocate for the protection of our individual rights and liberties, as has, I believe, every person on this Committee.

As the Chairman of this Committee, he helped to craft the PATRIOT Act into a bipartisan measure which carefully balances the need to protect our country without sacrificing our civil liberties. Without the leadership of Senator Leahy and the support of my fellow colleagues across the aisle, we could not have acted so effectively after 9/11 to pass this measure by a vote of 98 to 1. I am confident that we will continue to work cooperatively in the future as we plan additional hearings when Congress returns next year.

Today's hearing focuses on the issue of our civil liberties in the aftermath of the horrific September 11 attacks against our people. The unprovoked and unjustified attacks on 9/11 require us all to take every appropriate step to make sure that our citizens are safe. This is the first responsibility of Government.

Thomas Jefferson said, "The price of freedom is eternal vigilance." Congress must be vigilant. True individual freedom cannot exist without security, and our security cannot exist without the protection of our civil liberties.

There are some who say that the cost of protecting our country from future terrorist attacks is infringement upon our cherished freedoms. Some have suggested that our anti-terrorism laws are contrary to our Nation's historical commitment to civil liberties.

Well, we disagreed, or we would not have passed the PATRIOT Act. However, the fact that we did doesn't mean that that is perfect and that it can't be criticized. Personally, I think that we have to combine both our civil liberties and our National security or we will have neither.

While we all share this common commitment to security and freedom, the question we are examining today is how best to do so in an environment where terrorists like the 9/11 attackers are able to operate within our borders, using the very freedoms that we so dearly cherish, to carry out their deadly plots against our country.

Let me remind everyone that the 9/11 attackers were able to enter into our country without the strictures of immigration laws, enjoy the fruits of our freedom, secure for themselves all the necessary trappings of law-abiding members of our society, and then carry out their terrible attacks under the radar screen of law enforcement, intelligence, and immigration agencies.

Let me make just one comment with respect to immigration-related matters. There has been much in the press in recent weeks concerning the detention of certain aliens suspected of terrorist activities. The Supreme Court will hear a case in this area. While this issue is not the central focus of today's hearing, important issues have been raised that this Committee must wrestle with over the next number of months.

This hearing will examine our Government's efforts to promote our freedoms, not just the freedom to live in a safe and security society, but the freedoms that our country was founded on and the freedoms that each of us enjoy each and every day and, of course, the freedoms that are the lifeblood of our very society.

I am especially interested in hearing from today's witnesses about the details of any specific abuses that have occurred under our current laws. We have invited five critics to ensure that interested parties have ample opportunity to express their concerns. I am very interested in listening to them.

At the outset, let us make it clear who is not a witness today—Attorney General Ashcroft. At the last hearing, some negatively and unfairly commented on the AG's absence, even though he was not invited to testify by me. We are planning on the Attorney General, FBI Director Mueller, and Secretary Ridge to testify early next year. I think that John Ashcroft is a good man, and he is doing a very good job as our Attorney General.

At our last hearing, my good friend and colleague, Senator Feinstein, made an important point about the dearth of hard evidence of specific abuses under current law. We must not let the debate fall into the hands of those who spread unsubstantiated or outright false allegations when it comes to these important issues.

We will question today's witnesses on specific abuses of our laws. We also want to hear their ideas about how current law should or can be modified to better protect our National security interests, while maintaining our civil liberties.

I am hopeful we can examine the issue of civil liberties today in a responsible manner. This Committee will continue to gather all of the facts. We will ascertain whether the Government has actually infringed on anyone's civil liberties while exercising its authority under current law.

I want to now turn it over to Senator Leahy for his opening statement. After that, I will ask each witness to speak for 5 minutes and then we will a ten-minute round of questions for each member.

Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman.

As you noted, this is the second in our series of oversight hearings reviewing America's progress in the fight against terrorism. Our focus today is on the ways the administration's policies and actions affect the privacy and civil liberties of United States citizens, as well as, of course, the rule of law.

We will examine the implications of secret detentions and roundups based on religion and ethnicity, the implications of granting the government more power over our liberties without sufficient checks and balances, and the implications of government secrecy or stonewalling. It is an ambitious subject for one hearing. We all know that we will need additional hearings next year on related issues.

I compliment the Chairman, because we have worked together and agreed on the need for a separate hearing to examine the administration's discretion to designate certain individuals as enemy combatants. I appreciate very much working with the Chairman on that.

Now, as you noted, the Attorney General is going to come before us next year. If we don't adjourn this week, I would hope that we could actually have him appear this year. There was criticism on both sides of the aisle when we learned that the Attorney General, who has had plenty of time to make public appearances and lobbying appearances around in the country was not available to appear. In the 29 years I have been here, I cannot remember an Attorney General who has spent less time before the Senate Judiciary Committee.

I do welcome our witnesses today. I thank them for coming. It is important for us to revisit the policy decisions we made in the PATRIOT Act. As the Chairman noted, it was negotiated and passed in the emotional aftermath of the terrorist attacks of September 11. I think we have to look beyond the four corners of that legislation and we have to examine other administration policies and actions that affect the civil liberties of the American people in the name of fighting terrorism. All of us want to fight terrorism.

One major area of concern involves the mass arrest and secret detentions that followed the September 11 attacks. Columnist Stuart Taylor referred to it recently as the administration's truly alarming and utterly unnecessary abuses of its detention powers. Earlier this year, the Department of Justice's own Inspector General reported critically on the Department's handling of immigration detainees swept up in the 9/11 investigation.

The Inspector General found that the vast majority of these immigrants were never linked to terrorism. Rather, they had committed only the civil violation of overstaying their visas and then found themselves in the wrong place at the wrong time. I welcomed

the hearing the Committee held on the Inspector General's report in June, but I think we also have to hear from outside experts, not just administration experts.

Of course, it is proper for the Government to enforce our immigration laws, but when we suddenly see a major shift in the way they are being enforced, we have to make sure that the laws are not being enforced with regard to the religion or the ethnicity of the aliens involved. An unbiased immigration policy is not simply the right thing for a great country like ours to do, but it is also the best national security policy.

Along these lines, I am alarmed by recent reports that the FBI assisted in the rendition of a Canadian Syrian citizen to Syria. He was stopped while changing planes in New York and he was sent to Syria with the help of the United States, where he was put in a prison and beaten for hours until he confessed to attending a training camp in Afghanistan; according to him, confessing just to stop the beatings. Whether that is true or not, we ought to find out because he says he was held in a cell that was 3 feet wide, 6 feet deep, 7 feet high, for 10 months, until he was released by Syrian authorities in October.

Living just less than an hour's drive from the Canadian border, I see a lot of the Canadian press. There is no better ally we have than Canada. It is our largest trading partner. Let me tell you this has given an enormous black eye to the United States, and as several administration officials have stated in the press, at least anonymously, they have acknowledged that they know it gives the U.S. a black eye. It seriously damages our credibility as a responsible member of the international community.

When earlier allegations of rendition surfaced, I wrote to administration officials asking for guarantees that the United States is complying with the United States obligations under the Convention Against Torture, something that we have signed and ratified. I sent a letter to National Security Adviser Condoleezza Rice on June 2 of this year. It was answered by Department of Defense General Counsel William Haynes on June 25.

I was assured that if the United States should transfer an individual to another country, we would obtain specific assurances that the receiving country would not torture the individual. I wrote a follow-up letter to Mr. Haynes asking for greater detail on how our Government is going to get a guarantee from another country that if we turn somebody over to it, the government is not going to torture that individual. I want to know what the assurances are. We never received a response, but Mr. Haynes is coming before this Committee in a confirmation hearing tomorrow and we will ask him again. I also sent a letter to the FBI Director to inquire about the alleged role of the FBI in this case.

I will put my full statement in the record, but I want to just touch on two things. They involve certain Government powers that are not subject to effective checks and balances to ensure against abuse and certain administration policies that perpetuate Government secrecy rather than ensure Government accountability to the American people.

When a government is accountable and open, it is a better government. When a government is secret and unaccountable, I don't

care whether it is a Democratic administration or Republican administration, it is not as good a government.

The civil liberties entrusted to each generation of Americans are ours to enjoy and defend, but they belong not only to us, they belong to the next generation. We are benefactors of the freedoms we ourselves have inherited, but we are also the stewards of those freedoms. Our children and our grandchildren will look back to see whether we were diligent when we were tested or whether we sat silent. Others around the world, including right now the people of Iraq, will also take note of how vigilant we are in defending the freedoms of our democracy.

Our civil liberties were hard-won. We fought a revolution, we went through very trying times. But as hard as these liberties are to win, they are very easy to lose, and once we give them away, they are very difficult to reclaim. Benjamin Franklin said, "Those who would trade their freedom for security deserve neither."

Hearings like this produce report cards on how well we are meeting this test and honoring the trust of the American people. So again I thank the Chairman, my good friend from Utah, for his attention to these matters, and also colleagues on both sides of the aisle for their active and informed participation in this important debate.

I will put my full statement in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator.

We are going to start with Representative Barr, who currently occupies the 21st Century Liberties Chair for Freedom and Privacy in the American Conservative Union. He is a consultant to the American Civil Liberties Union. From 1995 to 2003, Bob represented the 7th District of Georgia in the U.S. House of Representatives, serving as a senior member of the Judiciary Committee and Vice Chairman of the Government Reform Committee, and was an 8-year veteran of the Committee on Financial Services. Prior to his service in Congress, Congressman Barr was appointed by President Reagan to serve as the U.S. Attorney for the Northern District of Georgia from 1986 to 1990.

Nadine Strossen is the President of the American Civil Liberties Union and a Professor of Law at New York Law School. Prior to her current positions, Ms. Strossen practiced law for 9 years in Minneapolis and New York City. She graduated from Harvard College and Harvard Law School, where she was editor of the Harvard Law Review.

We welcome both of you here.

Professor Viet Dinh served in the Justice Department as Assistant Attorney General for the Office of Legal Policy from May 2001 until May 2003. Before joining the Justice Department, Professor Dinh was Deputy Director of Asian Law and Policy Studies at the Georgetown University Law Center. Professor Dinh graduated from both Harvard College and Harvard Law School. He was a law clerk to Judge Lawrence H. Silberman, of the U.S. Court of Appeals for the D.C. Circuit, and to U.S. Supreme Court Justice Sandra Day O'Connor.

James J. Zogby is founder and president of the Arab American Institute. He is a lecturer and scholar on Middle East issues, U.S.–Arab relations, and the history of the Arab American community. Mr. Zogby is a board member of Middle East Watch, a human rights organization, and a member of the Council on Foreign Relations.

We welcome you, Professor Dinh, and you, Mr. Zogby, as well.

James Dempsey has served as the Executive Director of the Center for Democracy and Technology since 2003. Before working at CDT, Mr. Dempsey was the Deputy Director of the Center for National Security Studies, and from 1985 to 1994, Mr. Dempsey served as assistant counsel to the House Judiciary Subcommittee on Civil and Constitutional Rights. It is good to see you again.

Mr. Muzaffar Chishti—I think I am pronouncing that correctly.

Mr. CHISHTI. Almost correctly.

Chairman HATCH. Almost correctly? Tell me how to do it correctly.

Senator LEAHY. In the ball park.

Mr. CHISHTI. Chishti.

Chairman HATCH. Muzaffar Chishti, okay. I am doing better.

He is based at the Migration Policy Institute's office at NYU School of Law. Prior to joining MPI, Mr. Chishti was founder and director of the Immigration Project of the Union of Needle Trades, Industrial and Textile Employees, UNITE. Mr. Chishti also serves as treasurer of the U.S. Committee for Refugees, and is a member of the Coordinating Committee on Immigration of the American Bar Association.

We welcome you, as well.

Robert Cleary joined Proskauer Rose in June 2002 after a lengthy career as a Federal prosecutor. From 1999 to 2002, Mr. Cleary served as the U.S. Attorney in two different judicial districts, the District of New Jersey and the Southern District of Illinois.

Before being appointed United States Attorney, Mr. Cleary was the lead prosecutor in the Unabomber case, *United States* v. *Theodore J. Kaczynski*, from 1994 until his appointment as the Unabomber prosecutor in 1996. Mr. Cleary was the First Assistant United States Attorney in the District of New Jersey. From 1987 to 1994, Mr. Cleary served as an Assistant United States Attorney in the Southern District of New York, a man of great experience, and we are delighted to have you here with us as well.

We welcome all of you and we look forward to your testimony. We would like you to conclude when the light goes on up here. We will give each of you 5 minutes. I am not going to be tough about it, but I would like you to try and stay within that if you can so we have enough time for questions.

Bob, welcome back to the Congress. We are glad to have you here.

STATEMENT OF HON. BOB BARR, A FORMER REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. BARR. Thank you, Chairman Hatch. It is a distinct honor to be here today with you and your colleagues on both sides of the aisle, particularly my dear friend from Georgia and former House

colleagues, Saxby Chambliss, who I know is distinguishing himself in this body as he did in the former body in which I had the honor of serving with him. I appreciate the invitation extended to me by the entire Committee to be here today with such a distinguished panel of witnesses.

The bipartisan approach reflected by both the Chairman and the ranking member's remarks and the work of this Committee is also reflective of the bipartisan approach of those of us who have expressed some concerns, not just with the PATRIOT Act, but with the whole panoply of government programs and regulations, including the PATRIOT Act, including CAPPS II, including TIA and TIPS, and so on and so forth.

It is bringing together citizens in this country, both those in the law as well as citizens not steeped in the law, who are concerned about their civil liberties in a way that I think is unique and very healthy in America. I very much appreciate the Chairman's indication that those of us who have expressed some concerns with the PATRIOT Act and Government programs are not doing anything un–American at all, that this is very much a part of the fabric of how we come up with the very best product, the very best laws, and the implementation of those laws in this country.

I would also like to thank on the record today Attorney General Ashcroft and the entire Department of Justice. They have been faced over the last 2 years with challenges that are unique in our history. While I and some others find some substantive fault and have some disagreements with some of the provisions of these Federal laws and how they are being implemented, I know I don't, and I don't think any of us certainly on this panel and in America, find fault with the motivation of the Attorney General and the perspective that he brings. We are all trying to do the right thing by America. We simply have some disagreements on exactly how we need to get there.

I would appreciate my written remarks being included in their entirety in the record, Mr. Chairman.

Chairman HATCH. Without objection.

Mr. BARR. Without going into all of that, being very mindful not only of the Committee's time constraints as well as the considerable background that the Committee has, which is far greater than mine, I will let that speak for itself and, if I could, just take a couple of moments to address one point that the Chairman made at the beginning of his remarks, and that is so-called hard evidence about abuses.

Part of the problem, of course, Mr. Chairman, with coming up with what traditionally might be thought of as hard evidence of abuses—that is, actual cases in which the Government has abused the powers in the PATRIOT Act or other laws—is made necessarily difficult because of the secrecy, of course, that surrounds it.

So holding those of us who have expressed some concern and some criticism of the PATRIOT Act and its implementation for failure to come up with a range of so-called hard-evidence actual cases is very difficult, if not impossible, in most instances because we don't know. Certainly, at this point some of these cases are still working their way through the court system and they are sur-

rounded by this aura of secrecy, which is a problem with the entire PATRIOT Act and this approach.

I do think, though, Mr. Chairman, that there is some hard evidence out there, hard evidence when you talk to both religious and political as well as social activist groups who feel very properly and very legitimately and very realistically that this law and the other Government programs and policies are having a very pronounced and very palpable chilling effect on their willingness, their ability to express their views in ways that heretofore have been not only appropriate, but accepted forms of expression in this country.

I think also, Mr. Chairman, there are a number of instances of so-called fishing expeditions on which the Government has gone. There was one written about just yesterday in the Atlanta Journal Constitution that caught my attention, a case both from Virginia as well as with some aspects down in Georgia that are being handled through the court system.

According to the newspaper accounts that I saw, there is very clear evidence that this is an example of a fishing expedition where the Government is using one particular power under the PATRIOT Act, and that is the broadened national scope of subpoenas to gather evidence in other districts around the country from individuals and organizations in other parts of the country against whom the Government has no evidence even remotely approaching probable cause that there is a connection between those individuals and corporations and terrorist activity, or even criminal activity in the first place. So I think we are seeing evidence of abuse of the PATRIOT Act in the sense that we are seeing these fishing expeditions.

I do think also, Mr. Chairman, that there already is some very serious damage being done to the fabric of the Fourth Amendment in these various programs, such as some under the PATRIOT Act, CAPPS II, TIA, and other programs with which the Chairman and the Committee are very well aware, in which we now seem to be allowing the Government to gather evidence on citizens and other persons lawfully in this country without any of the traditional limitations, the traditional burdens which the Government has to surmount such as probable cause and reasonable suspicion. I think if we continue down that road, it will do very serious permanent damage to the Fourth Amendment.

I think also, finally, Mr. Chairman, there is very clear evidence that some citizens and others, again, lawfully in this country, exercising their right to travel, is being arbitrarily abused, arbitrarily denied because of the exercise of some of these powers.

In that regard, I know the Committee has concerns not just about the PATRIOT Act, but about some of these other programs that are very tangibly in terms of hard evidence infringing and denying people some of the basic liberties, such as the right to travel interstate, that have heretofore been protected activities in this country.

So I think, Mr. Chairman, in response to your very legitimate concern—sort of show us the beef, where are the problems, are these very real problems or are they theoretical problems—I think that they are not theoretical problems. And as time goes on and these cases work their way through the court system, as hopefully

some of the secrecy surrounding these problems is stripped away in those court proceedings, it will become even more apparent that we are indeed embarked on, at least in some respects with regard to the PATRIOT Act and these other Government powers since 9/11, a very, very slippery slope.

I know the Committee shares the concerns of us as citizens to make sure that we correct that. Even those of us such as myself, and perhaps many on this panel that voted for the PATRIOT Act, certainly have some concerns about it, how it is being implemented, and how it is also being implemented in the context of all of these other things that the Government is doing that need to be addressed, need to be brought more back into balance.

I appreciate the opportunity to both submit a written statement, provide this oral statement, and answer whatever questions the Committee might have today in this very important endeavor.

[The prepared statement of Mr. Barr appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Barr.

We will turn to Ms. Strossen.

STATEMENT OF NADINE STROSSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION, NEW YORK, NEW YORK

Ms. STROSSEN. Thank you so much, Chairman Hatch and Senator Leahy and other distinguished members of this Committee. I am very honored to be before this Committee again. As I reminisced with Chairman Hatch before we started, my first such honor was more than 11 years ago, astoundingly, to testify on an issue that might seem very different, but I think actually has a lot in common. It was in defense of something called the Religious Freedom Restoration Act.

What it had in common with the testimony we are presenting to you today is that that, too, was supported by an incredibly broad and diverse coalition entirely across the political spectrum, including Chairman Hatch himself, who was very gracious and courteous.

I think the broad coalition in support of the reforms that we are asking for is illustrated very dramatically by the fact that I am not the only witness here this morning on behalf of the American Civil Liberties Union. Bob Barr is testifying on behalf of the American Civil Liberties Union and the American Conservative Union.

I was struck as I looked at the transcript of the last hearing that this distinguished Committee had on October 21 on these issues that Senator Hatch and others indicated that those who are supporting reforms and who are criticizing some of the overreaching post–9/11 are the political extremes, the right and left. I think that is not true. I urge you to look at the list of 180-plus citizens organizations who support our coalition, right, left and center, and many non-partisan organizations, everything from the League of Women Voters to many mainstream religious groups.

I want to also emphasize that the positions we are taking are not extreme. The positions we are taking are, first of all, looking at every provision of every measure individually. We are not wholesale saying, "Repeal the PATRIOT Act, take away all executive orders". No.

We are simply saying some of these exceed the basic constitutional tests—and I will put on my constitutional law professor hat here—namely does this measure really maximize national security with minimal costs to civil liberties? That is the substantive test. If we can enhance safety to the same extent with lesser costs to civil liberties, then that is what we should do, and that is what many of the reform measures would do.

The second test is a procedural one. Do these measures adhere to that fundamental core concept pervading our Constitution of essential checks and balances? And here, too, too many of the measures that have been implemented post–9/11 have consolidated power, unreviewable power in the executive branch of Government, have ignored the oversight responsibilities of this great body, and have eviscerated the important power of judicial review. Again, it is restoring the checks and balances, not taking away the executive branch power, that we are seeking to do.

I am going to cut right to the chase of the two questions that Senator Hatch posed at the outset. Number one, hard evidence of factual abuses. I echo and endorse everything that my colleague, Congressman Barr, has said. I would just like to add a couple of points here.

Number one, my written testimony, which I hope will be incorporated into the record, on pages 12 to 13 gives specific examples of abuses, including specifically under the PATRIOT Act. I did see Senator Feinstein's e-mail that she referred to, or the e-mail from a staff member of the ACLU that she referred to, and I am very proud of that e-mail.

This was referred to in the last hearing, in which Senator Feinstein asked a very specific question: Do you have specific, hard evidence of actual abuses of the PATRIOT Act in California? And our staff member correctly said we do not have specific evidence of that particular type of abuse. I think that is completely responsible, and completely inconsistent, by the way, with those who have accused their critics of being hysterical and overblown.

We do have specific evidence of misuse of the PATRIOT Act and many of the other post–9/11 powers. I think the most damning abuses were—and the most damning documentation was, of course—in the report of the Inspector General which Senator Leahy has referred to.

Specifically with respect to the PATRIOT Act, I want to say that what the ACLU has the most experience with, and has been the basis of a constitutional challenge that we brought, is Section 215 of the PATRIOT Act. Its mere existence—Chairman Hatch and others its mere existence has already enormously eviscerated the precious First Amendment rights of people in this country. It doesn't even have to be used, let alone abused.

I would be happy to show you the briefs and affidavits that we have filed in that lawsuit, heartbreaking testimony from patriotic individuals who say that they have stopped going to worship services; they have dropped out of mosques, in particular. They have stopped expressing their political views because they are afraid that this power can be used against them.

I am very struck by the fact that the Attorney General, of course, has said that he has not found it necessary to use this power in

order to pursue the war on terrorism. I also noted from the last hearing that you asked the very pertinent question of the Government officials, law enforcement officials who were testifying, which of the new powers that they had gotten post–9/11 were helpful and important to them. And none of the powers that any of those witnesses listed—as Senator Feingold noted, not a single one of them included Section 215 or the others that we and other critics are objecting to. So I think this, like RFRA, could be very constructively an area where there are common concerns and a meeting of the minds.

Very quickly with respect to Chairman Hatch's second question, what are we asking for, that is laid out specifically on pages 15 to 16 of my written testimony. High among them is one of the modest reform measures that has been endorsed by broad bipartisan leadership, including on this Committee Senators Craig, Durbin and Feingold.

What these provisions would do is return the law closer to where it was pre–PATRIOT Act, completely consistent with the testimony that you heard from the law enforcement officials at your last hearing. None of these modest reforms—not repeals—would interfere with the powers that they have said are necessary for them in order to protect us all from terrorism.

So I very much appreciate this opportunity and look forward to continuing to work together constructively.

[The prepared statement of Ms. Strossen appears as a submission for the record.]

Chairman HATCH. Thank you.

Professor Dinh.

STATEMENT OF VIET D. DINH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. DINH. Thank you very much, Mr. Chairman, Ranking Member Leahy, members of the Committee. Thank you very much for the honor and the pleasure of being here to talk about this very important topic. I have a written statement which I ask to be submitted for the record.

Chairman HATCH. We will submit all written statements as though fully delivered, so you won't have to say that anymore.

Mr. DINH. Thank you very much, Mr. Chairman. I would like very quickly to go through some of the concerns that the Ranking Member and my colleagues have expressed, as well as some concerns that have been expressed in the public debate.

I first want to echo Congressman Barr's bipartisan statement that we are all in good faith trying to discover the best way to protect the civil liberties and security of America at a time when these things are under threat. I know that no one in the Department of Justice, no one in the administration, no one at this table or other participants in this debate question the patriotism of those who engage in this debate. Governance is not a static process; it is a dynamic process, and I appreciate this Committee taking its time to do this valuable work in light of the threat of terror threatening our civil liberties.

I want to go through my opening statement by converting my prepared statement to track the constitutional amendments that

seem to be of concern. I want to start first with the First Amendment, and then the Fourth Amendment, and then conclude with the Fifth and Sixth Amendment regarding the right to trial by jury.

With respect to the First Amendment, much noise and much criticism has been directed at Section 215 of the USA PATRIOT Act. As members of this Committee well know, Section 215 translates into the national security context, the Foreign Intelligence Surveillance Act context, powers that preexisted Section 215, powers that the grand jury has always had since time immemorial and indeed can be exercised by prosecutors and investigators with much lesser checks than those that this Committee and Congress have afforded in Section 215.

I do not doubt that individual activists and organizations may well feel a chill to their First Amendment activity. I do not doubt that these fears are sincere. I am also very confident they are not founded because they really should be addressed to preexisting criminal processes that preexisted Section 215. And indeed it is a legitimate question whether or not to extend to other contexts the protections of Section 215 and elsewhere in the Foreign Intelligence Surveillance Act that do not permit Government officials to target First Amendment activities by the use of these powers. That is a legitimate debate.

Indeed, I note here that in the Attorney General's revisions to the Attorney General guidelines which he published last June, June of 2002, at page 7 he instituted administratively such a restriction that investigations not be targeted solely at First Amendment activities, thereby extending the same protection that Section 215 affords to Foreign Intelligence Surveillance Act authorities to general criminal processes.

I do think that questions regarding confidentiality and secrecy are very weighty ones in our constitutional structure, including in our criminal processes. That is why I welcome the very significant restrictions that Section 215 puts on law enforcement authorities, including the accountability provisions that the Department of Justice is under obligation to report to Congress every 6 months.

With respect to the Fourth Amendment, Congressman Barr has noted that there has been significant concern regarding the USA PATRIOT Act. And much more importantly, preexisting authority in criminal law and foreign intelligence surveillance may have an undue burden on our constitutional protection against unreasonable searches and seizures. These are significant concerns.

One of the commentaries that I have on the current debate is that the focus on what are considered to be politically-charged or sexy issues, like Section 215, like the delayed notice provisions, has drowned out legitimate conversation and debate regarding how we go about protecting the Fourth Amendment even as we use these very important tools in the Foreign Intelligence Surveillance Act.

For example, Section 218 of the USA PATRIOT Act makes a very critical change to the Foreign Intelligence Surveillance Act to allow better communication and coordination between law enforcement and intelligence. I don't think anybody, including those at this table and other critics, have questioned that underlying change in law.

Many questions, however, are raised by that change in law, including what exclusion procedures would be applicable. Are they Fourth Amendment exclusion procedures, are they FISA exclusion procedures, or are they procedures under the Classified Information Protection Act? These are the questions that the courts, in particular the district court of Florida in the Sami Al–Arian case, are trying to work out and ultimately the courts will answer. But these are the kinds of questions that I think the public debate should focus on and this Committee will focus on in the near future in order to ascertain what, if anything, we can do in order to better protect the Fourth Amendment.

Finally, a note about the Fifth and Sixth Amendments and the right to trial. There has been much talk regarding the detention of Mr. Jose Padilla and also Yasser Hamdi. Focus has been put on the Fifth and Sixth Amendment right to trial and how these rights are not being afforded to these particular individuals.

Also of relevance, of course, is Article II of the Constitution, which grants to the President the commander-in-chief authority. It is under this authority that the President has sought military detention of these individuals, just as Presidents in other times of war have detained battlefield detainees in order to incapacitate them from doing harm to our men and women fighting on the battlefield.

In this war against terror, the terrorist has chosen the battlefield not to be restricted to Afghanistan or Iraq, but indeed expanding to Morocco, Saudi Arabia, Turkey and, of course, on September 11, the World Trade Center and Washington, D.C. In such a circumstance, I think it is an easy question, not particularly an easy question, but I think it is only a small step to extend the President's authority to detain battlefield detainees outside the traditional battlefield.

A much harder question, one that I think the Supreme Court will ultimately answer—and frankly I do not find much support in the cases to provide the answer—is whether or not the Court will defer to the Executive when there is nothing to defer to; that is where there are no alternative processes, either military, executive or other types of processes, as we have seen in the past with the *In Re Quirin or Ex Parte Milligan* cases. Those are the questions that the Second Circuit grappled with yesterday. I think ultimately the Supreme Court will answer those questions.

I would note, in conclusion, however, that it is not the Court alone that should be answering these questions, and it certainly should not be the Executive alone. But this body, this Committee, has a very significant voice in the constitutional debate, and I sincerely hope that out of these hearings and out of the increased attention paid to these issues would be a Congressional voice with respect to these very, very important issues.

Thank you very much.

[The prepared statement of Mr. Dinh appears as a submission for the record.]

Chairman HATCH. Thank you, Professor.

Mr. Zogby.

STATEMENT OF JAMES J. ZOGBY, PRESIDENT, ARAB AMERICAN INSTITUTE, WASHINGTON, D.C.

Mr. ZOGBY. Thank you, Mr. Chairman. Thank you to you and to the Ranking Member and to the members of the Committee for convening this important session.

Much has been done in the last 2 years to combat the threat of terrorism. We have had significant accomplishments. We deposed the regime in Afghanistan that was hosting those who committed damage to our country. We created the Department of Homeland Security. We have taken steps to enhance airport and border security and we have improved information-sharing between intelligence and law enforcement agencies.

Arab Americans are proud to have played a part in these efforts. We serve on the front lines of the war on terrorism as police officers, firefighters, soldiers, FBI agents, and translators. My institute has worked with Federal, State and local law enforcement in efforts to secure the homeland.

We helped recruit Arab Americans with needed language skills and tried to serve as a bridge between law enforcement and my community. Recently working with the Washington Field Office of the FBI, my institute helped create the first Arab American FBI Advisory Committee. It is now serving as a model for other similar efforts around the country.

As someone who has spent my entire professional life working to bring Arab Americans into the mainstream of American political life and to build a bridge between my country and the Arab world, I am concerned about the direction, however, of some of the efforts to combat the terrorist threat and the impact that some of these initiatives are having on our country and on my community.

I am going to leave the constitutional issues to those more qualified to speak about them. But as a professor myself, a professor of religion, and someone who has written extensively on the Middle East and traveled there and worked in my community here, I want to talk about the impact that these initiatives are having not only on civil liberties, but also on the very well-being of my community here and on our image overseas.

Specifically, I speak of a number of initiatives that have been launched by the Department of Justice, many of which went beyond the PATRIOT Act. First, there was the dragnet that rounded up over 1,000—we don't know the number because they stopped giving it when it got too high—in the aftermath of 9/11.

What troubles me was not the fact that some were arrested and charged with immigration violations. But it was the deliberate conflation and confusion of those arrests with the war on terrorism, creating the impression that hundreds, if not all of these, somehow were wrapped up in the war on terrorism.

The same occurred when the call-up of 5,000 and then 3,000 occurred. The notion was, in other words, that somehow this was not just a cleanup operation for an INS system that is in serious trouble, but somehow it had to do with the war on terrorism, creating enormous fear in my community and suspicious about my community.

This was, I think, in many ways exacerbated by the poor way that these programs were implemented. For example, when letters

were sent out, in many instances citizens got letters, creating even greater fear as to what this program was about. The same happened with NSEERS, resulting in not only the registration of individuals, but fear to go and register, and that fear was compounded when many of those who actually abided by the law and registered ended up being detained and in some cases are now scheduled for deportation.

These programs combined have harmed individuals and their rights. They have created fear. They have also promoted suspicion, as many of our fellow Americans view as a result of these programs that have been based on profiling recent immigrant Arabs or Muslims as collectively a threat to our country. And when those of us who were in leadership roles in my community criticized the programs and how they were being implemented, we found immediately how great the fear and how great the suspicion because we became subject ourselves to death threats.

In fact, it was ironic that the FBI had to go and investigate people who threatened me because I was criticizing some of the programs initiated by the Department of Justice. And these programs serve to break trust between ourselves and the FBI. In fact, the FBI would call us and criticize these very programs because they were concerned that they were breaking down the community policing relationship that we, both of us, were working to establish.

Equally significant is the impact that these programs have had on our nation's image overseas, and I think is significant because the war on terrorism requires partnership, requires trust, and requires a good American relationship with countries that we need to be our allies.

Visitors are down. Student and business visas are down. Doctors, and even Fulbright scholars, are down. There is fear of coming to the United States, and coming to the United States has been so important in the past for building the relationships necessary to help transform not only the way countries view America, but how those countries advance and move forward.

There is also a threat to our image in terms of how we have projected ourselves to the world. I had a debate with a foreign minister of an Arab country and I was arguing with him about the way he was treating prisoners in his own country—trial without due process, no charges given, no access to attorney, et cetera. After 9/11 he saw me at one point and said, you know, you are doing exactly what you have accused us of doing. That hurt me as an American and I think it hurts our country.

If the President is right and reform in Arab countries is necessary to combat terrorism, then we must acknowledge that with our post 9/11 behavior, we have stopped setting a standard for the world. We have lowered the bar. We are no longer the city on the hill that reformers can look up to. We have now become just another one of the guys that abuse human rights. That is wrong and it is not good for our country or the war on terror.

So I close with the observation that I think we have some soul-searching to do. Have these programs that I outlined contributed to the war on terror? Have they succeeded in making us more secure, or have they only served the purpose of creating a kind of a publicity stunt that says, oh, we are rounding up 5,000 or going

after 3,000 or registering people, with negligible effect on the war on terror?

I think the damage down outweighs any good. In fact, we have seen no good from most of these programs, according to the Inspector General's reports and others. So I think we need to take a long, hard look at how we move forward so that we once again become America, the country that is looked up to, that sets a standard for the world, and can not only be the role model we seek to be, but also can become more secure with partners working with us to achieve that security.

Thank you.

[The prepared statement of Mr. Zogby appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Zogby.

Mr. Dempsey.

STATEMENT OF JAMES X. DEMPSEY, EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY, WASHINGTON, D.C.

Mr. DEMPSEY. Mr. Chairman, Senator Leahy, members of the Committee, good morning, and thank you for the opportunity to testify at this important set of oversight hearings.

Terrorism poses a grave and imminent threat to our Nation. While more needs to be done, huge strides have been made since 9/11 to improve our counter-terrorism capabilities. We are all very fortunate to be protected by the dedicated officials of the FBI and the Department of Justice and the other agencies. To do their jobs, these officials need powerful legal tools. These powers, however, must be subject to controls, standards, and oversight.

Since 9/11, the Federal Government has engaged in a series of serious abuses of constitutional and human rights. The phrase "the PATRIOT Act" has become a symbol or a shorthand reference to the Government's response to terrorism since 9/11, but the most egregious abuses of civil liberties and human rights have taken place outside of the PATRIOT Act or any other Congressional authorization.

The PATRIOT Act itself contains many useful and non-controversial provisions, but also in the PATRIOT Act, not surprisingly given the time pressures and the emotional situation under which it was passed, mistakes were made. The pendulum swung too far, and important checks and balances were eroded that now need to be restored.

Of course, the FBI should be able to carry out roving taps during intelligence investigations of terrorism, just as it has long been able to carry out roving taps in criminal investigations of terrorism. But the PATRIOT Act standard for roving taps in intelligence cases omits some of the important procedural protections that exist on the criminal side.

Of course, the law should clearly allow the Government to intercept transactional data about Internet communications, but the standard for both Internet communications and telephones is so low that the judges are reduced to mere rubber stamps and cannot even inquire into the factual basis for the surveillance application.

Of course, prosecutors should be able to use FISA evidence in criminal cases and to coordinate intelligence and criminal investigations, but FISA evidence in criminal cases should not be shielded from the adversarial process, as it has been in every case so far where it has been used.

The worst civil liberties abuses since 9/11, as I said, have occurred outside the PATRIOT Act. These include the detention of U.S. citizens in military jails without criminal charges. I think the case of Padilla illustrates the inadequacy of the war metaphor applied without thinking to the present situation. We all use it. There are clearly war elements to what is going on, such as the operation in Afghanistan.

But as Professor Dinh said, if you start with the war metaphor and apply it uniformly, and if you assume that the President as commander-in-chief is carrying out his commander-in-chief responsibilities in this war, and if you assume that the battlefield is without borders and that the battlefield includes the United States, then as Professor Dinh said, it is a short and relatively easy step to say that the President can arrest and incarcerate citizens without criminal charges and hold them indefinitely in military prisons.

I think the solution there is to distinguish when the war concept is correct and when the criminal justice concept must be applied. And in the case of citizens, people arrested in this country, the criminal justice system is fully adequate to deal with those cases and should be used.

The detention of foreign nationals at Guantanamo and other locations with no due process, I think, is another example not where full criminal process should be applied, but at least where there should be compliance with the Geneva conventions, which this administration has also sought to avoid.

The post–9/11 detentions of foreign nationals in the United States has been alluded to. The Office of Inspector General at the Department of Justice has documented the abuses there.

Senator Leahy referred to the alleged rendition of suspects to other countries, knowing or intending that they will be tortured. There is also the abuse of the material witness law to hold aliens and citizens alike in this country for long periods of time without bringing them before a grand jury or without seeking their testimony. All of these are important, documented civil liberties and human rights abuses, all of them, I believe, unnecessary in winning this struggle.

Turning to the PATRIOT Act, one of the clearest abuses concerns the use of sneak-and-peek searches in ordinary criminal cases, including even non-violent crimes unrelated to terrorism. The Government admits using the Section 213 authority in non-violent cases. These included the investigation of judicial corruption, where agents carried out a sneak-and-peek of judicial chambers; a health care fraud investigation where they carried out a sneak-and-peek of a nursing care business.

Section 213 fails in its stated purpose of establishing a uniform national standard applicable to sneak-and-peek searches throughout the United States and does not give judges the guidance they need either in terms of the standards or the length of time for which notice may be delayed.

I don't really know why we are still debating Section 215, the business records section. The Justice Department has admitted that they have not used this a single time since 9/11, not only not for library records, but not for any kind of records. I think it is an unnecessary provision and should be repealed. It illustrates the failure to examine before the adoption of the law whether any of the authorities being sought were needed, but we clearly have one there that is not needed.

The use of FISA evidence in criminal cases without due process is another abuse. There is a solution readily at hand, namely the application of the Classified Information Procedures Act to ensure that FISA applications can be scrutinized and subjected to the adversarial process by defendants.

And there are other abuses, of course, outside of the PATRIOT Act. Congressman Barr referred to some of the data-mining applications. The U.S. Army recently acquired records from the JetBlue Airline about air passenger travel without any form of authorization, and that is clearly something that needs to be looked at because I believe that the JetBlue case is really the tip of the iceberg in terms of the Government's use of data-mining techniques.

We are in an epic struggle. None of us doubt that. These are very, very difficult and dangerous times that our country faces. But in order to be successful in this struggle, we are going to need every check and balance, every guideline, every standard, every form of oversight and accountability at our disposal. I don't see how we can possibly win otherwise, domestically or internationally.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dempsey appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Dempsey.

Mr. Chishti.

STATEMENT OF MUZAFFAR CHISHTI, DIRECTOR, MIGRATION POLICY INSTITUTE AT NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. CHISHTI. Thank you, Mr. Chairman.

Chairman HATCH. A vote has just started, so what we are going to do is try and finish the last two testimonies, then we will all go vote. We have two votes in a row, so we will use up most of the time of the first vote and then we will try and vote quickly and come right back.

So, Mr. Chishti, we will go to you.

Mr. CHISHTI. Thank you, Mr. Chairman and other distinguished members of the Committee. We applaud you for holding these hearings on this extremely vital topic, and thank you for the invitation to testify here.

The Migration Policy Institute, which is a D.C.-based think tank on immigration and refugee matters, recently completed an 18-month review of our Government's post–9/11 immigration measures. The report, titled "America's Challenged Domestic Security, Civil Liberties, and National Unity after 9/11," is a very comprehensive look at our immigration policies from these three distinct perspectives. Doris Meissner, the former Commissioner of the INS, is one of the co-authors of the report, along with me.

The report is based on interviews with a wide range of current and former law enforcement and intelligence officials, and leaders of the Arab American and Muslim and other immigrant communities all across the country. It provides a legal analysis of the Government's immigration measures since 9/11 and it looks historically at how the country has dealt with similar chapters of national crises in the past.

Most importantly, the report is based on the profiles of over 400 people detained in the immediate aftermath of September 11. Mr. Chairman, we have submitted the entire report and the appendix which contains these profiles for inclusion in the record.

The report concludes that our Government has overemphasized the use of the immigration system as the lead weapon against terrorism, at least in the domestic context, since 9/11. The immigration system simply cannot be a lead weapon in the war against terrorism. As an anti-terrorism measure, immigration enforcement is of limited effectiveness. The failure of 9/11 was not a failure of our immigration policy. It was fundamentally a failure of intelligence.

But on the other hand, immigration measures that have targeted specific nationality groups that Jim Zogby talked about, and noncitizens in many of these measures, have provided us a false sense of security, have not made us safer, but instead have undermined some of the bedrock constitutional principles and eroded our sense of national unity. They have alienated the important and critical communities in the Arab and Muslim populations in the U.S., and these actions have an echo effect around the world.

When actions are taken against Muslim and Arab communities which alienate them, they deepen the perception in the Muslim and Arab world that America is anti–Muslim and our principles are hypocritical. That only strengthens the voices of radicals in those parts of the world.

Let me tell you about what we learned from the profiles of 406 people who were detained post–9/11. As we have heard here, secrecy was paramount in the Government's actions regarding detainees after 9/11, but we were able to gather these profiles based mostly on information we got from lawyers who did their cases, sometimes from detainee interviews themselves, and a lot from the press reports. Let me give you highlights of these profiles.

About one-third of these people—and, by the way, the sample of 406 is thrice the size of the Office of Inspector General's profile of the numbers that they looked at in their report, but it draws similar conclusions.

About one-third of the people caught after 9/11 were Pakistanis and Egyptians, with no clear understanding or explanation of why there was such a disproportionate number. Unlike the hijackers who we think were rootless and recent arrivals, about 46 percent of the people in our sample had lived in the country for more than 6 years, and about half of them had spouses, children, and other relatives in the country.

A large number of these people were detained for long periods of time. About half of them were detained for more than 9 weeks, and about 10 percent were detained for more than 9 months. Many were detained without a charge being brought against them for

long periods, circumventing the USA PATRIOT Act's mandate of bringing a charge within 7 days of an arrest.

Fifty-two percent of people in our sample were held on what came to be known as FBI holds after a final determination on their case, and about 42 percent were denied the opportunity to post a bond. We also found that the Government brought people as material witnesses in about 50 cases, which meant that they had circumvented the procedural aspects of detaining these people.

Six hundred immigration hearings were closed to the public and, most importantly, none of the arrests that were made as a result of the immigration initiatives of the Government after 9/11 resulted in a terrorism-related prosecution.

We made recommendations in six areas in our report, ranging from Congressional oversight to foreign policy. Let me just highlight only two. Congress has shown extraordinary deference to the executive branch on immigration measures after 9/11. In the immediate aftermath of 9/11, that would be understandable, but I think it is high time for Congress to reassert its policy and oversight role, and evaluate how these immigration procedures have been used after 9/11.

The executive branch, for example, has defended closed hearings, and it has defended withholding the names of people whom they have arrested on the basis that it provides an important way for them to seek informants. I think we need to ascertain whether there is validity in these claims via a Congressional committee.

Detention, Mr. Chairman, is the most onerous power a state can have and it should be exercised very carefully. We believe that detentions of more than 2 days after the charge, closed hearings, and use of classified information are all matters that should be subject to judicial review.

Finally, the last point I would make is that even in the war on terrorism, we are dealing in a world of limited resources, of both human and financial resources. It is important for us to spend those resources on information-sharing and analysis, on interagency cooperation, instead of having broad, blanket operations against specific groups of people.

The one measure that is still alive today is the special registration program, the call-in registration program that targeted nationals of 25 countries. The Government decided not to extend that program last year beyond the first 25 countries. Since it decided not to extend that, we believe it is important that the follow-up requirements of that measure should be abandoned.

Thank you.

[The prepared statement of Mr. Chishti appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Chishti.

Mr. Cleary, we will go to you.

STATEMENT OF ROBERT J. CLEARY, PROSKAUER ROSE, LLP, NEW YORK, NEW YORK

Mr. CLEARY. Mr. Chairman, Ranking Member Leahy, and members of the Committee, thank you so much for holding these important hearings and for inviting me to present my views.

I was the United States Attorney in the District of New Jersey on September 11, 2001. Immediately after the attacks, we established a command post which served as the nerve center for the New Jersey 9/11 investigation. Because New Jersey as it turned out had been a staging ground for the attacks, we played a vital role in the global 9/11 investigation.

In order to illustrate how indispensable the PATRIOT Act is to the war on terrorism, and to illustrate why some of the loudest criticism against the Act is misplaced, I would like to provide a brief glimpse into our command post.

Those in charge of the command post were gripped on a daily basis with an all-consuming fear that another catastrophic terrorist attack was about to happen any hour, any day. We did not know where and we did not know when. Everyday, we challenged ourselves and we pushed our subordinates to work faster, to work more efficiently, to work more expeditiously.

Our overriding goal everyday was to, as quickly as possible, detect and dismantle any terrorist plot that we feared was on the horizon. Speed and efficiency—those became our watch words in the command post, and I would suggest to this Committee that speed and efficiency need to be the watch words of every terrorist investigation. They need to be the watch words because those investigations must prevent the next terrorist attack.

As we soon found out in our command post, the speed and efficiency that we valued so highly was compromised by administrative impediments imposed by antiquated laws. The PATRIOT Act removed those obstacles. As just one example, I should mention the efforts Government made, that law enforcement made to obtain e-mail evidence. E-mail is a preferred method of communication among terrorists. In order to obtain e-mail content, the message itself or the subject line, law enforcement quite properly needs to obtain a search warrant.

Here is the problem: Prior to the PATRIOT Act, the law required that the search warrant for e-mail content could only be obtained in the district where the Internet service provider—Yahoo, America Online, Hot Mail, et cetera—where that service provider existed. Two of the three largest service providers in this country exist in the Northern District of California.

What that meant as a practical matter during our 9/11 investigation was that our New Jersey search warrant seeking e-mail from a terrorist that resided in New Jersey and who had sent e-mail from New Jersey—that search warrant could not be filed in the District of New Jersey. It had to be filed and only could be filed 3,000 miles away in California, along with the search warrants seeking similar information by every other United States Attorney's office throughout our country.

This created an enormous bottleneck because, in addition to the paperwork that got filed out there, each and every one of those U.S. Attorneys' offices had to find a prosecutor in California and an agent in California who was unfamiliar with our New Jersey case to act as the people to submit the application to the California judge. This slowed down our investigation, and the PATRIOT Act thankfully has removed that bottleneck. And why shouldn't it? The same protections and safeguards that were in place prior to the

PATRIOT Act—a need to demonstrate probable cause—apply after the PATRIOT Act.

Similar impediments concerning search warrants for other materials in terrorism cases and for requests for Internet activity have likewise been removed by the PATRIOT Act, all without any diminution in the constitutional or privacy safeguards that existed under prior law.

In closing, as a citizen I thank you and your colleagues in Congress for providing law enforcement with the tools they need to protect us in the PATRIOT Act.

Thank you.

[The prepared statement of Mr. Cleary appears as a submission for the record.]

Chairman HATCH. Well, thank you. We appreciate the testimony of all of you. We are going to go vote twice now and we will return as soon as we can and we will start the questions as soon as we get back, and probably start with Senator Leahy.

With that, we will recess until we can get back.

[The Committee stood recess from 11:14 a.m. to 11:44 a.m.]

Chairman HATCH. If we can have order, I appreciate that.

Let me just ask one question of each of you and then I will be happy to turn to Senator Leahy.

I will ask this question, Ms. Strossen, of you, and I don't mean to single you out. It is just that I think you are probably the one who should answer this first. We have heard testimony from several U.S. Attorneys, including Jim Comey, the new Deputy from New York, whom the Judiciary Committee just last night unanimously voted on as our next Deputy Attorney General, that from a statutory and enforcement perspective our Nation is better prepared to prevent and respond to terrorist attacks than we were on the morning of September 11, 2001.

I have two related questions. First, do you agree that our country is better prepared to stop acts of terrorism today than we were 2 years ago? And, secondly, are our strengthened laws and vigilant efforts at law enforcement consistent with our traditional American respect for civil liberties and constitutional rights?

So those are the two questions, and we will start with you and then I will go to—

Ms. STROSSEN. I couldn't hear the second question.

Chairman HATCH. Well, the second would be—

Ms. STROSSEN. I think the sound system isn't working.

Chairman HATCH. I am having trouble with this laryngitic voice.

Are our strengthened laws that we just referred to and vigilant efforts at law enforcement consistent with our traditional American respect for civil liberties and individual rights?

Ms. STROSSEN. On the first question, Senator Hatch—are we better prepared to face terrorism—I have never held myself forward, nor has my organization held it itself forward as an expert on counter-terrorism. I can only hope that we are better prepared.

I have followed all of the expert analyses that have been made publicly available on that issue, including, as far as I know, the most in-depth having been done by the intelligence committees of both the House and the Senate, the joint inquiry. Although part of their findings were, of course, classified and not released to the

public, I did read with great interest the findings and recommendations that were released to the public and I noted with great interest that most of those findings and recommendations had absolutely nothing to do with increasing the Government's powers of surveillance, investigation, and prosecution, but rather had to do with what some of the Senators on this Committee referred to in the last hearing as nuts-and-bolts problems, mundane but critically important, having to do with, for example, improving the computer system in the FBI, having more translators.

And I noted at the last hearing of this Committee on this issue on October 21 Senator Leahy was very concerned that the Government still had not followed the repeated recommendations of Congress to do such a basic thing as hiring more translators of Arabic and other languages that are obviously essential to really make us safer.

And I continue to be concerned—I must say as somebody who flies at least 200,000 miles a year, I have a very deep interest in aviation security, and yet I heard just this morning that we are only now beginning to institute the beginnings of cargo searches even of the air cargo, 22 percent of which goes onto passenger flights. So I continue to be concerned about some of these nuts-and-bolts steps that have not been taken.

Senator Hatch, referring to your second question, which I think really is kind of the flip side of the first one, I listened with great interest to the two Government witnesses here, Messrs. Dinh and Cleary, and the only specific example that I heard them allude to was in Mr. Cleary's statement of a new power that had been given post–9/11 that was deemed to be necessary, or indeed even specifically helpful in order to improve our counter-terrorism efforts. The one specific new power that was referred to by Mr. Cleary was the nationwide search warrant power.

Now, here, too, Chairman Hatch, I want to stress what I said in my opening remarks that it is sort of like apples and oranges. The Government witnesses are saying we can do a better job to protect national security because of these powers, and the civil libertarian critics across the political spectrum are saying we object to these other powers.

The nationwide search warrant power is a perfect case in point. The only objection we have to the wide-open way in which that new section of the law is written is that it is written in such an open-ended way that it could be used only for judge-shopping. That is not the situation that was described by Mr. Cleary. He described a situation where there was a legitimate nexus between the jurisdiction where the investigation was going on and that where the search warrant application was made.

So I have not heard anything either today or in this Committee's prior hearings that makes me convinced that we cannot go forward with the modest revisions that are put forward in bills such as the SAFE bill that would be completely consistent with both civil liberties and the national security concerns that the Government is raising.

Chairman HATCH. Let me go to Professor Dinh next, since he will have perhaps another point of view.

Mr. DINH. Thank you very much, Mr. Chairman. I think it is undoubted that the country's law enforcement and intelligence agencies and our State and local partners in the fight against terrorism have more resources, more legal authorities to combat terrorism today than they did on September 10, 2001.

In order to illustrate the necessity and the critical importance of these tools that Congress has provided to law enforcement, I would simply point the Committee and members of the panel to the May 13, 2003, submission to the House Judiciary Committee, a 60-page document in which the Department of Justice and other Government agencies in response to that Committee gave a section-by-section compendium of how these authorities were used and how they were helpful in the fight against terrorism.

I would note, echoing your opening remarks about the bipartisan nature of the fight against terrorism, that the proposals the Congress accepted as part of the USA PATRIOT Act did not come from the administration out of the blue right after September 11, but rather they came from recommendations, for example, of the Hart–Rudman Commission which issued its report in 1999, but largely recommendations that were unheeded.

Indeed, we had an opportunity earlier last week to speak on a panel with former Deputy Attorney Jamie Gorelick, who noted that many of the proposals were ones that she had thought were necessary prior to September 11, but were not acted on before then.

Do we have more authorities? Absolutely. Is there more work that needs to be done? Undoubtedly, including the breaking down not just of the legal barriers which Congress has done with Section 218 of the USA PATRIOT Act, but the institutional and cultural barriers to cooperation and collaboration between the intelligence community and the law enforcement community, and between State and Federal law enforcement communities. I think that these sets of hearings elucidate the need for further action, but also to evaluate the successes that we have had in the last 2 years of keeping America safe.

Chairman HATCH. Thank you.

Mr. Barr, we will go to you and then Mr. Cleary, so that we kind of have the two different points of view.

Mr. BARR. Thank you, Mr. Chairman. If I could, as I related to both the Chairman and the ranking member, I have a plane to catch, and if I could be excused after this.

Chairman HATCH. We understand and we will certainly excuse you.

Mr. BARR. I appreciate the Committee's forbearance and apologize for leaving early. I certainly would be happy to answer any additional questions in writing that any member of the Committee would care to send.

Chairman HATCH. We will keep the record open for any questions in writing that members of the Committee would care to submit.

Mr. BARR. Mr. Chairman, from my perspective as a former intelligence official with the CIA, as a former United States Attorney, a Federal prosecutor, as a former Member of Congress and a member of the House Judiciary Committee, and as a defense attorney—in all of those capacities, and certainly perhaps most importantly

as a citizen observer, I believe that America is safer today than we were on 9/11.

Are we safe enough? No. Will we ever be safe enough to rest assured that there will be no further attacks? No, we will not. This is always the risk that anybody, even a free society as ours, faces, or especially a free society as ours.

I do think that when one looks at the legitimate reasons why the terrorist attacks succeeded on September 11, one is struck by a couple of things. One is the Government pre–9/11 had fully sufficient power to have stopped those attacks. The Government had in many respects fully sufficient resources to have stopped those attacks. And that is not necessarily being over-critical of the Government that we did not stop those attacks, but simply to say that some mistakes were made both at the local and at the State, as well as the Federal level.

There were indeed poor policy decisions made, such as in the Moussaoui case. There was not a legal prohibition on getting access to Moussaoui's computer, but a bad policy decision was made by field officials with the FBI, for example. There were security breaches at a number of locations, including the aircraft training schools, including license bureaus, including access to airports and flight facilities and planes themselves, none of which had to do even remotely with the expanded powers that the Government sought and obtained in the PATRIOT Act, and which it also is taking through these various other programs.

So I think first and foremost, certainly what we ought to look to in terms of remedying those reasons that account for why the terrorists succeeded on 9/11 are indeed deficiencies in preexisting resource allocation prioritization, policy decisionmaking, and effective and consistent use of preexisting laws.

I think also, Mr. Chairman, we ought to keep in mind as we look at your second question, and that is the focus on our freedoms and traditional constitutional norms in this country—I believe that we are in danger of rapidly accelerating a trip down a very slippery slope toward effectively completely gutting the Fourth Amendment. Now, I know that may sound like an overstatement, but I truly do worry about this.

When we say to the Government that you take the authorization to catch terrorists by profiling law-abiding American citizens, by gathering evidence on law-abiding citizens and lawful visitors to this country without any pretext whatsoever that they have done anything wrong, I think we should say to the Government that doesn't appear on the face of it to be the most effective or efficient way, or the most constitutional way to catch terrorists.

I think there are much better ways, much more efficient ways of going about this than the route of TIA, CAPPS II, the MATRIX program, and so forth. And if we indeed continue down that road, I think that we will wake up 1 day in the not too distant future when the Fourth Amendment has been effectively rendered meaningless. And at that time, the answer to your question will not only be, the way the question was posed, no, we are not fighting this fight consistent with traditional constitutional norms, but we may be to the point beyond which we can't even return to those traditional constitutional rights.

Chairman HATCH. My time is up, but, Mr. Cleary, do you have additional comments?

Mr. BARR. May I be excused, Mr. Chairman?

Chairman HATCH. Sure, we will be happy to excuse you, Bob. Thanks for being here.

Senator LEAHY. I just was going to say, Congressman Barr, I will submit questions to you, and among them will be whether you have seen the Domestic Surveillance Oversight Act which adds transparency to FISA, the PATRIOT Oversight Restoration Act which subjects several controversial provisions of that law to the December 2005 sunset, and the restoration of the Freedom of Information Act which protects public access to information regarding our Nation's infrastructure.

I will submit that to you because I want to know, one, whether you have seen the laws, and, two, whether you support them.

Mr. BARR. Thank you, and with the Chairman's indulgence, the answer to both questions is yes, I have reviewed them, as well as a number of other pending provisions such as the SAFE Act, and I do support them, including those that the Ranking Member mentioned.

Chairman HATCH. Mr. Cleary, we will wind up with you and then we will turn to Senator Leahy.

Mr. CLEARY. Thank you, Mr. Chairman. As to your first question, the strength, no doubt we are better able to fend off, to detect, and to deter any sort of terrorist attack today much better than we were before. In large measure, that is due to two things: one, additional attention given to the problem by both Congress and the executive branch, and particularly as it relates to Congress the tools that you have provided which are set forth in my view of that in my written statement. In particular, it is the strength of the statutes, the modernization of the statutes, and the speed and efficiency that it provides.

As to your second question about respect for civil liberties, I have no doubt that we can do a better job protecting civil liberties, and I am heartened to see that this Committee is focusing on that issue. But I think the important point, Mr. Chairman, is to identify those particular aspects of the legislative package that really do need to be changed or amended.

A lot of criticism I hear about the PATRIOT Act is simply misplaced. As a simple example, I have read a lot of criticism about Section 213, the delayed notification search warrant. Law enforcement has had the authority to seek delayed notification warrants for time in memorial, so this is no radical change in the law.

The law is quite clear that there is no constitutional right to immediate notification. All Section 213 does is codify the standards, make them applicable around the country.

Chairman HATCH. To terrorism?

Mr. CLEARY. That is correct, Your Honor—I mean Mr. Chairman. I have been hanging out in court too long.

Senator LEAHY. That is what all the rest of us call him, I want you to know.

[Laughter.]

Chairman HATCH. I hate to tell you what they call me.

Mr. CLEARY. So the point being that we need to identify those areas that really do affect individual rights and liberties in a way that they had not been before.

Ms. STROSSEN. Is it possible to respond to that characterization, because here I hear a joinder of issue which we really haven't had so far?

Chairman HATCH. If you can do it quickly.

Ms. STROSSEN. Unfortunately, it is not correct that Section 213 merely codifies preexisting power in a number of respects. Number one, Section 213 applies to any crime, not just terrorism crimes. Number two, Section 213 allows the Government to get delayed notice not only in the three specific situations that had been allowed under prior law, namely if life or physical safety is threatened, number one; number two, if there is a danger of fleeing prosecution; number three, a danger of tampering with or destroying evidence. Instead, Section 213 adds a catch-all provision of any adverse impact to the Government's interest.

And finally, and very importantly, Section 213 does not specify a presumptive length of delay. It is an open-ended, undefined, quote, "reasonable period," whereas the two circuit courts that had previously upheld this authority had had a presumptive delay of only 7 days, subject to renewed showing by the Government.

And this is a perfect example, Chairman Hatch and Senator Leahy, of why the SAFE proposal is such a safe one, ensuring safety and freedom, and because it would restore those safeguards, reasonable safeguards that had existed in prior law.

Chairman HATCH. Mr. Cleary.

Mr. CLEARY. The prior power to conduct sneak-and-peek, like the 213 power, applied to all crimes, not just terrorism crimes. So there has not been a change in the law in that respect. Whether there is going to be a presumptive period that the courts impose in their interpretation of 213, as was the case under prior law, is something that has not been determined yet. So the law is very consistent, with minimal change. There has been an additional basis to seek a Section 213 sneak-and-peek warrant, but that is a basis that is available nationwide, making for consistent application of this important tool.

Chairman HATCH. What is the purpose of the so-called sneak-and-peek?

Mr. CLEARY. The purpose, Mr. Chairman, is so that investigations do not get compromised if they are continuing past the time of the execution of the warrant. If a Title III wiretap is up and running and providing productive information to the Government but there is a time to execute a warrant, you don't want to compromise the ongoing Title III wiretap, as an example.

Chairman HATCH. And you are saying this has been used in general criminal law for a long time?

Mr. CLEARY. Yes, it has.

Chairman HATCH. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. I will put in the record a statement by Senator Kennedy and a number of other submissions for the record, if I may.

Chairman HATCH. Without objection.

Senator LEAHY. I have asked the question, of course, of former Congressman Barr and I was pleased that he is supportive of our three bills that I, along with others in both parties, have introduced—the Domestic Surveillance Oversight Act; the PATRIOT Oversight Restoration Act, which adds to the sunset provisions; and the restoration of Freedom of Information Act to make sure that citizens have the ability in our country to know what is going on.

The Freedom of Information Act was of particular importance to me because it has been my experience here after 29 years and 6 different administrations that all administrations, no matter which party controls the White House, are very eager to send out reams of press releases when they feel they have accomplished something which sheds good light on them and will be politically helpful, and are somewhat reluctant to do that if it is the other way around.

The Freedom of Information Act has been a chance for the press and the Congress, but especially the press, to find out those things that go wrong, as well as those things that go right. Democracy is better off if we know about the things that go wrong because then we have the ability to correct it.

Now, Professor Strossen and Mr. Zogby, I am going to ask you this question. I mentioned earlier in my opening statement that I am concerned that the United States may be engaging in the rendition of non-citizens to countries who rely on torture as a means of interrogating prisoners. We are all well aware of the Canadian Syrian citizen who was sent to Syria, instead of back to Canada where he resides.

We all know that torture is a crime. The United States has always condemned torture. And, of course, we all know that if you make a couple of exceptions here and there for torture, then the exceptions become the rule. If the United States is seen as being complicit in torture, it makes it very difficult for the United States to articulate a moral position against torture, whether it takes place in China or Iraq or Chile or Pakistan or anywhere else.

If an American soldier is captured and tortured now, how do we say, well, we have always been against this? Or if torture is justified to obtain information from a suspected terrorist, well, then why can't we justify torturing the terrorist's spouse or terrorists' children, or friends or acquaintances of those who work with a suspected terrorist who might know about his whereabouts?

A lot of Members of Congress on both sides of the aisle have criticized other governments numerous times for treating prisoners that way, and we stand up for the rule of law. So now, having done that, I understand, Professor Strossen, that the ACLU filed a Freedom of Information Act request and a subsequent lawsuit with relevant agencies to obtain general non-classified information about the Government's practice of rendition. I have tried to get the same information and have not been very successful.

Have you been successful?

Ms. STROSSEN. Not yet, Senator Leahy, and before I answer that I would like to take this opportunity to say that my staff expert said I made one misstatement on Section 213, and I want to correct the record immediately because precision and accuracy are critical here. It is true, as Mr. Cleary said, that that power was not pre-

viously limited to terrorist cases, but the other two distinctions stand.

Senator Leahy, we really appreciate your vigorous defense of FOIA and freedom of access to information, in general, including with respect to this issue. This is one of many Freedom of Information Act requests that the ACLU has submitted since 9/11 in an attempt to get basic information about how our Government is conducting the so-called war on terrorism.

As you probably know, we have not been successful in getting answers from the Government to any of those requests and in some cases have already gone to court. In some cases, the courts have ordered the Government to turn over the information. In one such case, the request is now pending before the United States Supreme Court to get the names of those hundreds of post–September 11 detainees who turned out, according to the Inspector General, only to be innocent immigrants—I am sorry—guilty of immigration violations to be sure, but hardly guilty of or even charged with terrorism.

With respect to the request that we submitted in September, Senator Leahy, just this morning I spoke to the lawyer for the ACLU who is the lead counsel on that case, Jameel Jafir, and he told me that we have as yet not gotten any information from any of the Government agencies from which we had sought information—and by the way, it was information that was sought based on plausible press accounts, including quoting anonymous senior officials who not only said that our Government was rending to countries that are, according to our own State Department, engaging in torture and other degrading and inhumane treatment, but also that there were senior officials who were participating in this knowingly, and perhaps even encouragingly.

So rather than the general conclusory denials that we have gotten from the administration which are welcome, that is only the first step. We are asking for documentation.

Now, when I spoke to Jameel Jafir this morning, I said I looked at the date of our FOIA request and isn't the Government's answer overdue? And he said, well, they are always late. So we are, in fact, contemplating litigation yet again to enforce what should be turned over under the statute.

I would like to add one other comment about that FOIA proceeding, Senator Leahy, and that is that the ACLU and the Center for Constitutional Rights are bringing that together with not only Physicians for Social Responsibility, but also—I think this is very significant—two veterans organizations whose members have fought in every war from the Vietnam War and earlier to the first Gulf War. They understand better than anybody else how the lives of American men and women, service members, are jeopardized, how they are in danger of being tortured themselves.

Senator LEAHY. I understand that and I appreciate it. I am sorry to cut you off, but certainly you will have time to add more. But in the time available, I did also want to ask a question of Mr. Zogby, who is, as we know, the respected head of a highly regarded organization. I ask you this question, Mr. Zogby, because you are in contact with people throughout the Arab and Muslim world.

How do you believe that citizens in predominantly Muslim nations are going to react if they find that it is true that the United States sent back an individual to Syria for interrogation? The citizen was allegedly tortured while he was detained there. What is that going to do to our image overseas, especially in the Muslim world?

Mr. ZOGBY. Thank you, Senator. I am very troubled about this because not only in the case of the Syrian Canadian citizen who was sent to Syria for them to get the information from him that we apparently wanted, but it appears that on a number of levels we have moved in a very different direction.

There are reports from Afghanistan and Iraq that we may be sliding down the slippery slope ourselves of using cruel, inhumane and degrading treatment of detainees, and/or of civilians whom we treat in a manner equal—something that can be characterized as collective punishment in order to get their relatives to turn themselves in or to get information from them about their relatives. I am concerned about that.

I am concerned about the cooperation that we have had with several countries in the Middle East, Israel and Arab countries, accepting intelligence information from them that we know was derived by means that we in the past have found unacceptable.

The problem exists on two levels. Certainly, there is the public opinion level that you have raised, and I find that worrisome and I am hearing it. But I am also worried about the impact it has on the leadership level because, in fact, they feel we have now joined the club.

Senator LEAHY. On the leadership level. You mean the leadership of these other countries?

Mr. ZOGBY. Of countries in that region. We have now joined the club. We validate what they have always done. So if President Bush is right, and I believe that he was when he noted that reform and advancement of human rights and democratic rights is critical in the war on terrorism, I believe that practices such as these undercut the fundamental truth in that message.

We validate practices on the one side that the President is criticizing on the other side, and so we set back the movement for reform. That is the detriment of our overall program; it is to the detriment of our values that we have sought so intensively to project in the world. I think that it harms our country and it harms our ultimate goal of combating terrorism by promoting reform and a democratic agenda.

Senator LEAHY. Thank you.

I notice my time is up, Mr. Chairman. I do have other questions, especially about national security letters and I will submit those to Mr. Dempsey. I am especially curious about those that may be given to everybody from a real estate agent to a car dealer and effectively shut down their business.

Thank you.

Chairman HATCH. Thank you, Senator Leahy.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Part of the problem that I think we have here—and I appreciate the effort of some of you to find joinder on specific issues because

at the end of the day, as legislators, we are going to have to come together and refine the law, if that is called for—but part of the problem in doing that is the kind of political climate that has been created by hyperbole and, shall we say, over-zealous language.

All of you represent respected national organizations or are associated with the enforcement of the laws and therefore clearly appreciate how important it is to be precise as lawyers and to try to keep the debate from rubbing the raw emotions that are so close to the surface on this particular issue.

There are several examples that I could point to here, but let me focus a little bit on the ACLU because it has a reputation as a respected and careful organization. I think in your testimony today, Ms. Strossen, you have certainly tried to do that, but I note on the website, for example, at least according to the extract that has been provided to me here for high school and college students, www.stopthepatriotact.org. "Stop the PATRIOT Act"; the title itself, it seems to me, is not designed to encourage a fair debate and careful examination.

According to the website, you claim that Section 802 of the PATRIOT Act, and I am quoting now, "broadly expands the official definition of terrorism, so that students groups that engage in certain types of civil disobedience could very well find themselves labeled as terrorists," end of quote.

It is my understanding that under Section 802, a protester can only be said to be engaging in domestic terrorism if he or she partakes in criminal wrongdoing that could result in death. So the question I ask you is whether that is a fair statement or whether it encourages this kind of hyperbole that prevents the kind of careful discussion that I think we need to have.

Ms. STROSSEN. A very fair question, Senator Kyl, and as you can tell from comments I have already made today, I take great pride in the carefulness of my organization, which depends for its credibility on not overstating. That is why Senator Feinstein received an answer that we did not know whether the PATRIOT Act was being abused in California.

First of all, I would say please do not judge any organization by the name of the website. Obviously, that is overly simplified, and as you could tell from the content of the website itself, it was not calling for a repeal of the PATRIOT Act. Al Gore did that. The ACLU and its website did not.

We have always listed a number of specific provisions that are troubling and have troubling implications. Section 802 is one of them. By the way, Congressman Bob Barr's written testimony, as well as my written testimony, give specific examples that are of concern, in Bob Barr's case specifically to conservative organizations in the right-to-life movement and gunowners' movement. Let me tell you the exact language.

Senator KYL. Can I just note that we only have a very limited amount of time, so if you could answer my question, I would appreciate it.

Ms. STROSSEN. Here is the exact language: "Domestic terrorism means activities that involve acts dangerous to human life, that are a violation of the criminal laws of the United States or of any state,

and appear to be intended to influence the policy of government by intimidation or coercion."

So if you have a student group—let's use Bob Barr's example that it is a pro-life student group that is engaging in an activist tactic of exercising its First Amendment rights outside of an abortion clinic, engaging in some scuffles with members of the public that are trying to enter or exit from that facility. As we know, some of those organizations have done that. It could be dangerous to human life.

Senator KYL. Scuffles are different than threats to life or danger to life.

Ms. STROSSEN. Actually, acts dangerous to human life—there are cars coming in and out of parking lots.

Senator KYL. I think I make the point—

Ms. STROSSEN. I hope that a prosecutor—

Senator KYL. —that you stretch beyond the point of reason, and names like that and stretching this beyond reason don't contribute to a careful debate. Some of us up here are willing to examine some of the legal points that have been made.

Mr. Zogby, with all due respect, you are a person whose views are respected in this city, but when you refer in your testimony to John Ashcroft's Justice Department, it is not in a respectful way. It is a way that he is referred to by people who don't respect him.

Ms. STROSSEN. Senator Kyl, may I please respond because we did make a specific proposal that I think would be consistent with your concept and the general concept of terrorism? That would be an intent to harm human life or endanger human life. This talks about "involve acts that are dangerous and that appear to be intended"—

Senator KYL. If I could make the point now, it was that your website is inciting people to opposition in an inappropriate and emotional way. You may have recommended very sensible solutions. It would be far preferable to suggest on your website that there may be a potential danger with wording of a definition of terrorism rather than suggesting to students that their activities in civil disobedience could characterize them as terrorists.

The reason I make this point is that the ACLU has been such a leader in trying to prevent the chilling of the expression of First Amendment.

Ms. STROSSEN. Thank you.

Senator KYL. And yet this kind of hyperbole will chill students from engaging in activity that would clearly not be defined as terrorism because of the way you have expressed it on your website.

Ms. STROSSEN. Well, our concern is that the language of the Act is hyperbolic, and I hope that we are inciting students to exercise their First Amendment rights to lobby for the kinds of reforms to this law that we are advocating.

Senator KYL. Let me cite a couple of other examples. You talk about invading—"the Government has knowledge using delayed notice and search warrants to invade dozens of homes and businesses." Now, getting a court-ordered search warrant doesn't fall into my definition of invading a home.

When you talk about the ability of the FBI to enter mosques and political meetings on a whim, out of curiosity, I think you would

have to agree that if you look at the wording of the FBI guideline, that is hyperbolic.

Go ahead and respond.

Ms. STROSSEN. With all due respect, I disagree. First of all, I do completely agree that if the Fourth Amendment, with its requirements of probable cause and a search warrant issued by a neutral and independent magistrate, were adhered to, that is fantastic. That is an A-plus from a civil liberties point of view.

But we don't even have a requirement of individualized suspicion under many of the powers that we are complaining about in the PATRIOT Act. And the most important case in point—we keep coming back to it—is Section 215 which requires even less than relevance. All the Government has to do is assert that it is seeking the information for a terrorism investigation and the judge must issue the warrant. Worse yet is Section 505, which Senator Leahy began to refer to, which doesn't require any judicial participation at all. It is simply unilateral action by the Government itself.

Senator KYL. Going to a public place in which there is no expectation of privacy, is that not correct?

Ms. STROSSEN. That is not correct, sir. Section 215 applies to any record that is held by anybody, anywhere, and Section 505 refers to certain kinds of records, regardless of where they are held, but typically by financial institutions and the other specified businesses. So it would be private business premises.

Senator KYL. I thought you were talking about the FBI guidelines.

Ms. STROSSEN. And the FBI guidelines—yes, thank you—also what they do is turn back the prior guidelines that had been put in place since Congress's investigation and hearings into the COINTELPRO abuses.

Senator KYL. So you defend the "whim and curiosity" portrayal?

Ms. STROSSEN. Unfortunately, it can be any reason. No reason is required.

Senator KYL. And you also defend the characterization of search warrants to invade—this is a court-ordered search warrant—to invade dozens of homes and businesses? That may be a minor point, but language matters.

Ms. STROSSEN. If what you are talking about is 213, which is a court-ordered search warrant, it is an invasion in the sense that the time-honored requirement of knocking on a house before you enter it is no longer applicable.

Senator KYL. I understand you are defending the language still.

Ms. STROSSEN. I am.

Senator KYL. Let me ask, does anybody here believe that the PATRIOT Act, as distinguished from other Government policies, because this is where confusion—and I appreciate some of you pointing out that confusion—that the PATRIOT Act essentially suspends habeas corpus? Does anybody believe that that is true on this panel?

Let the record reflect nobody is answering that question in the affirmative.

Ms. STROSSEN. I certainly am concerned about what remains of habeas corpus, which unfortunately had been gutted through a series of Supreme Court decisions and prior legislation.

Senator KYL. The PATRIOT Act, not other Government policies that we are talking about, the PATRIOT Act itself.

Ms. STROSSEN. Other Government policies certainly contributed.

Senator KYL. But my question is does the PATRIOT Act essentially suspend habeas corpus.

Mr. DEMPSEY. There is nothing in there one way or the other.

Chairman HATCH. I didn't hear you.

Mr. DEMPSEY. There is nothing in there one way or the other.

Senator KYL. Thank you.

Mr. ZOGBY. Senator, before we leave, did you throw my name out on a whim or was there something there?

Senator KYL. I didn't throw it out. I specifically referred to you, though, and if you would like to respond, you are very welcome to do so.

Mr. ZOGBY. I don't quite get what the point was.

Senator KYL. What I was trying to say—

Mr. ZOGBY. I mentioned John Ashcroft's Department of Justice—

Senator KYL. Yes, yes, you did.

Mr. ZOGBY. —as opposed to Janet Reno's Department of Justice, as opposed to the career officers who serve in that department, and FBI and law enforcement officials who serve throughout successive administrations, et cetera. It was a descriptive term, meant nothing more, nothing else.

Senator FEINGOLD. Mr. Chairman, I want to agree with Mr. Zogby on this. I know it is out of order, but there is absolutely nothing wrong with referring to John Ashcroft's Justice Department. The only error is you should have called it what it really is, George Bush's Justice Department. That is what it is. That is the only error.

Chairman HATCH. Now that we have that clear—

[Laughter.]

Senator KYL. I appreciate the clarification on that. Thank you, Mr. Chairman.

Chairman HATCH. Mr. Cleary, you had some comments. Mr. Dempsey, you had some comments. Mr. Dinh, you had some comments. Let's go in that order.

Mr. CLEARY. Thank you, Mr. Chairman. I just wanted to talk about Section 215 briefly, which is another section people have talked about here today that I think misses the point of where our attention should be focused. Our attention should be focused on civil liberties issues. This is not one of them.

What 215 does is it allows the FISA court to issue an order seeking the production of tangible things, and this has become in the popular media a concern about library records, what are people doing in the library. All this statute does with respect to libraries is allow the intelligence community to do what criminal investigators have done historically, and that is to obtain library records.

Chairman HATCH. In libraries?

Mr. CLEARY. That is correct, and as one case in point I would point back to the Unabomb investigation.

Chairman HATCH. You actually tried that case for the prosecution?

Mr. CLEARY. That is correct, Mr. Chairman, and those of you who may remember, Theodore Kaczynski sent what became known as

the Unabomb Manifesto before he had been identified. That manifesto identifies or quotes from a number of books and one of the things the investigators did, with a subpoena, is go to the local library in Lincoln, Montana, and find out that through an exchange program run by that library, a fellow named Theodore Kaczynski had checked out a number of those books, and that became a large part of the probable cause showing that was used to get the search warrant to search Kaczynski's cabin and the rest is history.

I use that as one very dramatic example of how historically the Government has been able to obtain records from libraries and should be allowed to do it. That is with a grand jury subpoena where there is no court oversight. What 215 does is provide for an order for similar sorts of records, but pursuant, and only pursuant to the FISA court's oversight.

Chairman HATCH. Thank you.

Mr. Dempsey and then Mr. Dinh.

Mr. DEMPSEY. Well, Mr. Chairman, there are several points that could be responded to here. Let me just for a second respond to a question that Senator Kyl raised which has to do with the FBI guidelines.

The language of the guidelines says that for the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place on the same terms and conditions as members of the public generally. Now, as a guideline, this gives no guidance. It doesn't say how to prioritize, it doesn't say how to focus investigative activities, it doesn't say what to do. It says that an FBI agent can do whatever a member of the public can do, which is you are walking down the street and you say, oh, there is a nice interesting building, nice architecture, let me walk into it. I think that is a whim.

Now, I don't think that this serves the national security interest of telling FBI agents how, given limited resources and a terribly overwhelming problem, to focus their activities, where to go, when to go, how to decide what to do. So they are left rudderless.

The fear, of course, is that they will be guided by inappropriate factors such as ethnicity, religion, political factors, et cetera. But even leaving those aside, the guidelines provide no guidance, and in that sense I think they need to be revisited.

Chairman HATCH. Mr. Dinh, and then we are going to go to Senator Biden.

Mr. DINH. Thank you, Mr. Chairman. On that very quick point, the Attorney General's guidelines are guidelines; they are not exclusive of all the various training procedures and supervision that the Department of Justice imposes on, and the FBI internally imposes upon its own personnel with respect to they conduct investigations.

This merely states very clearly that for purposes of terrorism investigations, the FBI agents have the same authority as any community police officer does in order to be on the same terms and conditions as general members of the public.

Two other clarifications. Section 802, it must be pointed out, is not a substantive provision; it is merely a definitional provision. It amends, it adds to Section 2331 of Title 18 of the United States

Code a definition of domestic terrorism; that is, terrorism that occurs within the geographical boundaries of the United States.

The reason that was necessary was prior to the USA PATRIOT Act, the only definition of terrorism was international terrorism; that is, terrorism that occurs outside the geographical boundaries of the United States. It is meant to be a geographical description, not a purpose or an intent provision.

And even so, when this Committee considered the provision, it was very careful. It did not import the previous definition of international terrorism lock, stock and barrel. But, rather, the definition of international terrorism is violent acts or acts dangerous to human life that are a violation of the criminal law of the United States or States of the Union.

When the Committee considered that definition, it removed the phrase "violent acts" precisely because of a fear of potential chilling or overreach into acts occurring in the geographical boundaries of the United States that might otherwise be protected by the letter or the spirit of the First Amendment.

Let me repeat, it does not criminalize domestic terrorism. Rather, it gives a definitional base for other crimes, most significantly, for example, Section 805, which is terrorist financing. Without that definition, it would apply to terrorist financing that occurred outside the geographical boundaries of the United States, but would stop when the boundaries of the United States take hold. I think it is simple common sense in order to extend that definition. It is also very careful work by this Committee to protect the interests of the First Amendment in that regard.

The mischaracterization has been endemic on this provision. I want to be very, very clear. Even very, very distinguished scholars, one of them my beloved colleague, Sam Dash, have made the same mistake in other places. And it just suggests it is not an error of characterization, but simply a fundamental error of misunderstanding that I think should be corrected.

Chairman HATCH. Senator Biden, Mr. Zogby wanted to make one comment and then I will go to you.

Mr. ZOGBY. Just one comment to Senator Kyl.

I agree with you, Senator, about the need to use temperate language and to avoid overladen rhetorical expressions and emotionally-driven language that can be very damaging to this political discourse. It is an important discussion.

But I would suggest to you that there have been repeated hearings that I have taken note of on very sensitive issues close to this discussion about the nature of Islam, about Wahabbism, about Saudi Arabia, and about Muslims in America that have frequently featured individuals who have used rhetorical excess, who have not helped us better understand these phenomena, and who frankly have had a political agenda designed specifically to obfuscate and, I believe, to inflame passions.

And I would urge you, let's make this a two-way street. Let's have a temperate discussion. Let's come to an understanding of where we are, what we need to do, and how we have to proceed to better understand each other so that we can better serve, I think, our collective goal of making our country more safe, secure, respected, and understood.

Thank you.

Chairman HATCH. Thank you.

Senator Biden.

Senator BIDEN. Thank you very much, Mr. Chairman, and thank you for holding the hearing. I am going to try to see if I understand whether there are any points of general agreement here among all of us first.

I might note that I—and I will say this for the record, but I have said it before, that a lot of the difficulty and a lot of the misunderstanding, to the extent there is any, I think is a consequence of the attitude of this administration, not merely actions, but the attitude of this administration of not being responsive to, in my view, this Committee.

I know the Chairman is a good man. Just as I might find myself when I was Chairman—and thank God, I am not anymore—when I was Chairman of this Committee or Ranking Member for 18 years, when you have an Attorney General of your own party, you try to be helpful if you can even when you disagree. I am not suggesting the Chairman disagrees, but I found myself in that spot once in a while.

There has been not a whole lot of disclosure. There has not been a whole lot of cooperation and there has been an attitude of arrogance that has emanated from this administration with regard to this legislation. I think that feeds into some of the necessary corrections that need to be made in the PATRIOT Act.

I have been a Senator for 31 years. There is not one major piece of criminal legislation in the last 21 years that I haven't cosponsored or written, and every time we pass one I say the same thing. This requires us to go back and look at it after a year or so. We make mistakes.

So if we had the normal oversight of this, with cooperation in a very tenuous time, at a time when it is not surprising that there are excesses in American society on the part of Government—and I know it is an old saw, but Franklin Roosevelt took every Japanese American and put them behind barbed wire. So bad things happen when very bad things happen and people are frightened. That is why we are here, for oversight. That is the purpose, and that is why some of this was sunseted as well.

But if I read through this, the bulk of—don't be defensive, either side of this debate—the bulk of the most egregious mistakes made on the part of our Government, I sense from all of you, are things that occurred unrelated to the PATRIOT Act. So let's kind of put this in context. It doesn't mean the PATRIOT Act shouldn't be scrapped or altered or amended or touched, but the bulk of the things that have caused us the worst—I have changed seats; I am now on the Foreign Relations Committee as the senior Democrat. I can tell you that Guantanamo Bay has done more damage to the United States image abroad than anything else that has happened, anything else that has happened.

Without passing judgment on whether we should or shouldn't have had Guantanamo Bay, the fact of life is as I travel the world, no matter where I am, this is brought up. I think it has endangered American soldiers. I think it has endangered the American military. I think it has endangered American diplomats. I think it

has endangered American personnel. So you can see the effects of it in non-judicial ways, in non-legal ways just in terms of the perception of who we are.

I think there is an absolute need for us to redefine, for Congress to exercise its responsibility, as Schiff has in the House, and as some of us over here—Durbin, Feingold, and others have talked about redefining or defining, laying out definitional criteria for what constitutes a combatant and a whole lot of different things. That is our responsibility, and history is going to judge us on not that we didn't do it within a year or two, but if we don't get about doing it pretty soon. So we are still within the time warp that it takes big nations, like supertankers, to turn around here, and hopefully we will do that.

I want to now move to the PATRIOT Act to make sure I understand, again, if there is any consensus. We are basically talking about—and when I say basically, it doesn't mean it is inconsequential. We are talking about a disagreement relating to basically three sections of the PATRIOT Act—213, the delayed notice provisions; 215, FISA and the changes in FISA that are accommodated in this Act, and there are changes; and 802 in terms of definitional, whether, A, it is a definition, what its meaning is, and if it is a definition, whether it can be further refined, or go back behind it to 2331 and redefine it.

So the arguments are who are terrorists; if there are terrorists, if it is a suspected terrorist, what constitutes the ability for a court to allow delayed notice and the fact that you have gone in and impacted on their Fourth Amendment rights; and whether or not FISA, in fact, has been expanded in a way that is a problem.

Now, as the author of FISA, I find myself in an interesting dilemma here, and that is that I suspect, Professor, you don't like FISA, period. So part of your criticism, which is totally legitimate, by the way—I am not in any way impugning anyone's motive here, okay?

You are not for FISA, period. You don't think there should be FISA.

Ms. STROSSEN. Well, actually, I consulted with my staff experts to see whether my instinct was right, which was that it was better than the prior law which it corrected.

Senator BIDEN. But you still don't like it. It is okay. A lot of people don't like it.

[Laughter.]

Ms. STROSSEN. We love the Fourth Amendment.

[Laughter.]

Senator BIDEN. Look, I will be candid with you if you are candid with me, all right?

Ms. STROSSEN. We prefer the Fourth Amendment.

Senator BIDEN. It is time to be straight up about this, right?

Ms. STROSSEN. As you know, it was a compromise on both sides, and I think it was a workable compromise.

Senator BIDEN. I know. I wrote it. I am the guy that wrote it. I understand the compromise, and I understand my usual allies in the civil liberties community were opposed to it, period. So let's not kid each other here, all right?

So part of the problem is not merely whether or not FISA has been—my first question is if we amended FISA like I think we should, as Senator Feingold has suggested—and I happen to think he is right—to essentially take FISA and bring it back to the standard required prior to the PATRIOT Act, would you be for it, then?

Ms. STROSSEN. We would certainly support that.

Senator BIDEN. Okay.

Ms. STROSSEN. That is in the SAFE Act; it is in several other Acts.

Senator BIDEN. Would anybody else who is opposed to the PATRIOT Act think that is—let me back up. For those of you who believe, with good reason from your perspective, that this Act, the PATRIOT Act, per se, has a chilling effect and it is a bad idea, et cetera, is there anything other than repeal of the Act, total repeal, that would satisfy you in the sense that you would say I now support the Act, other than total repeal?

I am not being a wise guy. I am trying to get the parameters here so we know what we are talking about.

Ms. STROSSEN. Well, Senator Biden, I could say that in addition to the three reforms that you referred to, there is an additional one in the SAFE Act itself, which is constricting the roving wiretaps authority, which now do not have safeguards to protect against sweeping up conversations by innocent people. So that is one more reform.

Senator BIDEN. Again, I am the guy that proposed the roving wiretaps in previous legislation.

[Laughter.]

Senator BIDEN. No, seriously, and Orrin and I worked on that because it was about organized crime.

Ms. STROSSEN. And we are not saying repeal it. We are saying amend it slightly.

Senator BIDEN. That is what I am trying to get at.

Ms. STROSSEN. And the two amendments would be, number one, that there be a requirement that law enforcement ascertain that the target of the wiretap is actually using the communications device that is going to be wiretapped.

Senator BIDEN. I don't think that is an unreasonable suggestion.

Ms. STROSSEN. Exactly.

Senator BIDEN. I don't think that is an unreasonable suggestion, but again I am trying to understand. The worst of all things would be—and I will end in a second, Mr. Chairman—is that we go through all of this and assume for the sake of discussion we make the bulk of these, what I would call tweaks, refinements, changes, alterations—and I must tell you, Professor, I have been most impressed by your testimony.

Ms. STROSSEN. Thank you.

Senator BIDEN. And you support the Act, but you acknowledge what the real underlying debates here are. There are real civil liberties questions here.

Ms. STROSSEN. But they are relatively apart from the national security concerns which have been raised by the Government.

Senator BIDEN. Well, again, what I want to make sure of is if we go through this exercise and we amend it along the lines that are

being discussed here, are we still going to have—and, Mr. Zogby, I have great respect for you, and I really mean this. I think that not only the Arab American community, but all Americans are indebted to you because of your prominence and your willingness to take on and speak up at a time other folks in your profession might view it as damaging to their interest to do so. So we owe you lot.

But my guess is you are not for this Act, period, no matter how we change it, because it has a generic chilling effect. Is that right?

Mr. ZOGBY. No, Senator, we have actually not said that at all.

Senator BIDEN. Well, I am not arguing. I am just trying to figure it out.

Mr. ZOGBY. Let me just be clear. We have not said that. We have been very careful not to say that.

Senator BIDEN. Okay.

Mr. ZOGBY. We have not supported those who have used language that has gone above and beyond where we feel the discourse ought to go. We support the SAFE Act and we feel very strongly that there is a legislative fix that is possible and we are looking for ways to accomplish that.

Senator BIDEN. Okay.

Mr. DEMPSEY. Senator, if I could?

Senator BIDEN. Yes, please.

Mr. DEMPSEY. Just speaking for the Center for Democracy and Technology, my organization, we do not, in principle, oppose the PATRIOT Act. We don't oppose FISA, in principle. We don't oppose Title III, we don't oppose roving taps. As I said in my opening remarks, I believe that the extension of roving tap authority to intelligence investigations made perfect sense. The addition of other Title III predicates in the PATRIOT Act made perfect sense. It was to some extent overdue.

We have proposed a series of very specific amendments. I think I can categorically say that there is not in the PATRIOT Act a single grant of power to the Government and not a single provision in the PATRIOT Act that deals with a Government power where we oppose that Government power.

Senator BIDEN. Good.

Mr. DEMPSEY. All we are talking about here are the standards. And as you said, in the emotion and time pressure of the moment, some mistakes were made. We can have a legitimate debate about what should be the standards for delayed notice.

Senator BIDEN. Good. Again, I am not in any way being critical of any of you. I am just trying to make sure I understand the place from which we can all agree to start. Some of you will say we start there and stop there, and others suggest we go beyond.

That is a very helpful statement for you to make that none of the powers granted in here to the Government are, per se, from your perspective, Mr. Dempsey, bad, if you will. I have a lot of questions. I will cease and desist now, except to say to you I find this very helpful.

Mr. Chairman, this is a lousy thing to do to you, but I really think that we should consider, at a time when we are not in session and Mr. Ashcroft has no excuses and we don't either, to have extensive hearings here maybe in December on this very issue. We

have done that on every important thing before. We did that on the crime bill, we did that on a lot of other things.

This is the time to maybe work through what I am most concerned about and what Mr. Zogby said, and that is working through left, right, center, the misconceptions, the hysteria, the political agendas. I am not talking about any one of you at the table, but just to get to the American people, through serious hearings and disclosure by the administration as to what they are doing and not doing, what the problems are.

Ms. STROSSEN. Senator, I think that is so constructive and if it could be focused section by section, as opposed to just the PATRIOT Act.

Senator BIDEN. I agree. Anyway, I thank you and I yield the floor.

Chairman HATCH. Senator Feinstein.

Senator BIDEN. Mr. Zogby wanted to say something.

Mr. CHISHTI. Can I just add one comment to Senator Biden's question?

Chairman HATCH. Let's take Mr. Chishti first and then Mr. Zogby.

Mr. CHISHTI. I just want to say that I think it is appropriate that we should hold hearings not just on the FISA issue.

Senator BIDEN. I mean on the Act. I didn't mean just FISA, across the board.

Mr. CHISHTI. But I think, more than the Act, as you said in your initial statement, most of the acts of the Government, especially in the immigration realm, have taken place outside the USA PATRIOT Act.

Senator BIDEN. I agree.

Mr. CHISHTI. So, therefore, it is important to have oversight hearings on those issues as well.

Senator BIDEN. I agree, I agree.

Mr. ZOGBY. And I think that is the point I was going to make, is that for clarity sake it is important to recognize the PATRIOT Act to become a symbol for all of those other concerns, all of those other fears.

Senator BIDEN. Which is exactly what it has become.

Mr. ZOGBY. And therefore to make, I think, the political discourse more meaningful and more temperate, it is important to sort of separate those out and be able to criticize what needs to be criticized and protect what needs to be protected. I think that that would help us a lot.

Senator BIDEN. You have said it more succinctly and in a more articulate manner than I attempted to say it. That is the entire purpose, because we end up having speeches by friends of mine and political allies of mine that it is all under the rubric of the PATRIOT Act. If you walk out there and constituencies that support me—everything is under the rubric of the PATRIOT Act, and it is not because people are trying to—they are just not informed. We haven't delineated the problems and separated them out, and then begun to address each one of them ad seriatim here, which I think we have to do.

Anyway, I thank you. I apologize, Mr. Chairman, for going on.

Chairman HATCH. That is fine.

Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman HATCH. I have to be through here in a short time, so I hope we can stay within the ten minutes, and that is longer than I really can stay.

Senator FEINSTEIN. I may be the only one that feels this way, but I still believe there is a great deal of confusion about the PATRIOT Act. I mentioned that at a previously hearing I had received over 21,000 letters, e-mails, post cards, and the like about the Act and related issues. Since that hearing, the number has risen 2,000. And we still have calls against PATRIOT II, a draft bill that has never actually been introduced. We have also had calls supporting the SAFE Act, which my colleagues have introduced, and we have now about 1,300 against the PATRIOT Act, but they are all very non-specific.

To a great extent much of the criticism relates to the national security entry-exit registration system, known as special registration, which Professor Strossen mentioned. That comes through in the critics that I have heard from.

And then I was listening to others and they were saying that the Department of Justice Office of Inspector General had found 34 specific abuses of the PATRIOT Act, and you mentioned them as well, Dr. Strossen. So I wrote a letter to the IG, Mr. Fine, on November 12 asking for clarification of that and he sent a response back to me, and I think it is important that it be read in the record. It is a letter dated yesterday.

"In your letter, you asked whether any of the complaints investigated by the OIG pursuant to Section 1001 of the PATRIOT Act involve an abuse or violation of a specific provision of the PATRIOT Act. The 34 allegations to which we refer in our July 1903 semi-annual report do not involve complaints alleging misconduct by Department of Justice employees related to their use of a provision of the PATRIOT Act. As we discussed in our report, we received several hundred complaints from individuals alleging that their civil rights or civil liberties have been infringed pursuant to the directives of Section 1001 of the PATRIOT Act. We reviewed those complaints," et cetera.

"These allegations"—and I think this is the key—"range in seriousness from alleged beatings of immigration detainees to verbal abuse of inmates. They generally involve complaints of mistreatment against Middle Eastern or Muslim individuals by the Federal Bureau of Prisons, the Federal Bureau of Investigation, or the Immigration and Naturalization Service. We detailed the specific complaints in our semi-annual reports to Congress and used the label 'PATRIOT Act complaints' because we received, investigated them, et cetera, under Section 1001 of the PATRIOT Act."

Every time I try to zero in on an abuse specific to the PATRIOT Act, it disappears before my very eyes. So I have come to the conclusion that most of the criticism that is out there is really not specifically related to the PATRIOT Act, but is related to a whole host of other things—special registration provisions, special searches that are done under other authorities, et cetera.

Now, having said that, being a non-lawyer on this Committee, I spend a lot of time reading about terrorism and terrorists, and I

go back to Ramzi Yousef and his encrypted computer which had details of a plot to destroy 11 airliners on it, to reports in the public press about there being the possibility of operatives in this country designed to carry out a second wave of attacks to 9/11. You recognize that you have to provide the wherewithal for domestic intelligence to function if you are going to get at the terrorist threat, and that is really what the PATRIOT Act is designed to do.

I have heard enough reported in the public press to be concerned that there may well have been a second wave in play after September 11. And if there are people out there, the question, I guess, I would ask each of you is do you not want to get at them before they at us in a big way, and can we not do this through this Act.

Senator Feingold and I were just talking about section 215 and perhaps giving the judge more flexibility to deny a FISA application under that section 215 instead of making it so kind of cut-and-dried. But I want intelligence to respect the civil liberties of people residing in this country, but at the same time to have the ability to properly function and have enough clout to be able to get at what may be out there.

Would you respond to that? Let me hear from Mr. Dinh because, Professor, you have been very articulate.

Mr. DINH. Thank you very much, Senator Feinstein. I will limit my comment to public press reports, as you have, regarding the terrorist threat because I do not want to do anything untoward with respect to our classifications.

There have been reports of multiple phases following September 11, and I think that the fact that none of these phases have hit in the territory of the United States is a great tribute to the men and women of law enforcement, and in particular the men and women of State and local law enforcement who are our eyes and ears on the ground, and the men and women of intelligence who provide the basic information upon which law enforcement can take action.

The key to that is, as you noted, both the intelligence and the action, actionable intelligence. We are no longer in a Cold War world whereby nation states watch each other and try to determine their bargaining positions at key rounds in order to look for deterrence purposes, but rather we are dealing with a world whereby a relatively small number of people with relatively little resources can inflict incredible catastrophic damage on nation states.

And so the key is not simply to get information, to get intelligence for the sake of intelligence, but rather to transfer and take action based upon that intelligence, and, God help us, to interrupt terrorism before it happens before the terrorists act without the restraint of a nation state.

I think that, in particular, Section 218 of the USA PATRIOT Act provides us with the critical tools in order to facilitate that process of collaboration and information-sharing. Much more needs to be done to change the culture to encourage such functional cooperation and collaboration, and perhaps the shift, which is a very significant shift in the nature of how intelligence does its business and how law enforcement does its business—the experience may suggest to us better ways in order to make this happen so that we get the full benefits of such coordination without any danger of re-

turning to the days of COINTELPRO. I think that this Committee's work is very, very important in that regard.

Mr. DEMPSEY. Senator, I think—

Senator FEINSTEIN. Before you answer, may I ask that you place this letter of November 17, Mr. Chairman, in the record before I forget?

Chairman HATCH. Sure, I will be happy to do that.

Senator FEINSTEIN. Thank you.

Yes, sir.

Mr. DEMPSEY. Senator, there should be no doubt that there are people today planning terrorist attacks against innocent Americans. I don't think any of us should doubt that there are people in this country today doing that, and those attacks may involve biochemical or nuclear materials.

But before 9/11, our intelligence and law enforcement agencies were drowning in information. They knew two of the 9/11 hijackers had been spotted in Southeast Asia. They flew on those airplanes on September 11 under their own names, and yet the CIA had failed to get that information to the FBI and the INS in time. There was absolutely no legal barrier to sharing that information from the intelligence agencies to the law enforcement and immigration agencies.

Senator FEINSTEIN. Which the PATRIOT Act enables now to be shared.

Mr. DEMPSEY. Actually, Senator, no, there was no barrier to the sharing of intelligence information with law enforcement agencies, and the PATRIOT Act has no provision on the sharing of intelligence information collected abroad with the law enforcement agencies. The PATRIOT Act does allow law enforcement to share information collected under law enforcement authorities with intelligence agencies. That was probably a very appropriate and legitimate change, although I think it should have been subject to more appropriate safeguards.

The PATRIOT Act also tried to address the question of coordination, but again there was no prohibition in FISA to prosecutors and intelligence officers coordinating with each other. That was really an invention of the FISA court and the Justice Department, which came up with that really in secret and the whole thing got totally perverted and did do, I think, harm to national security without actually serving civil liberties.

Senator FEINSTEIN. I am sorry. What did harm to national security?

Mr. DEMPSEY. The perverted concept of the wall, this notion that law enforcement officers and intelligence officers within the FBI and the Justice Department couldn't talk to each other, which was this rule that had been developed in secret by the FISA court and by the Justice Department. Attorney General Reno had actually tried to overcome that.

Senator FEINSTEIN. You will admit the PATRIOT Act lowered the wall. Whether you think it was there or not, it was there.

Mr. DEMPSEY. Well, I think that the wall that was there had been a perverted wall and it could have been lowered without some of the other changes in the PATRIOT Act. I also think that to get to these terrorists who undoubtedly are planning these acts, we

need these guidelines and these standards and this sense of direction and control and oversight.

The last thing we need is a situation in which the Government draws in yet more information that it can't process; information that is unfocused and not guided by some reasonable suspicion and compounds the problem that existed before. What we are talking about today is what are the appropriate standards that can guide this vitally crucial activity; what are the checks and balances and guidelines that will help these agents do the job they need to do without tying their hands.

Chairman HATCH. If I can interrupt, I am very interested in your comments and interested in your suggestions on how we might improve the PATRIOT Act, but that is not my understanding, Mr. Cleary or Mr. Dinh.

Mr. CLEARY. If I may, Mr. Chairman.

Senator Feinstein, you are, I believe, one hundred-percent correct based on the practical application of what the standard was at the time. The standard at the time for FISA action was a primary purpose, a primary purpose being foreign intelligence. The practical consequence of that was that the Government was concerned, the law enforcement community was concerned that if the information the intelligence community was gathered was shared with the law enforcement community, it would appear to the FISA court that the investigative technique used in the intelligence community no longer had as its primary purpose—the standard they have to meet no longer had as its primary purpose intelligence-gathering, and therefore the intelligence community would run the risk of no longer being able to continue with that investigation.

Senator FEINSTEIN. Thank you, because it was my amendment that changed it to "significant purpose." So I remember it well.

Mr. CLEARY. Thank you, Senator.

Senator FEINSTEIN. Thank you.

Chairman HATCH. We want to thank you.

Mr. DINH. Can I make one note here, Mr. Chairman?

Chairman HATCH. Yes.

Mr. DINH. There has been a lot of focus—and I think Jim is right that it is not about the information that is collected, better use of that information that is collected, but much more importantly, it is also the information that got away.

What we saw with a lot of pre–USA PATRIOT Act operations is that it is not that the Government's net is not big enough, but there were holes in it; that is, you could evade by simply throwing away your cell phone, or in one case anecdotally an alleged terrorist cell has formed its own Internet service provider in order to evade the formal processes of CALEA and other law enforcement authorities.

It is those kinds of evasive maneuvers that are being exploited that really hampers the ability of law enforcement and intelligence to create a complete mosaic of intelligence information. It is not information that we have, but it is information that we don't have.

Ms. STROSSEN. Once again, Senator Feinstein, that provision is not one that has been objected to by the ACLU or any other organization, the one that allows you to tap multiple cell phones of a particular suspect.

Senator FEINSTEIN. I think we know that, but I also think in the eyes of the public it is all confused. That is just one of the things that is happening out there. Everybody just hits at the PATRIOT Act and people confuse it with a whole host of other laws.

Chairman HATCH. Senator Feingold, we will finish with you.

Senator FEINGOLD. Thank you, Mr. Chairman. As everybody has been pointing out, a lot of the recent discussion about terrorism and civil liberties has focused on the PATRIOT Act. The law does raise many concerns, and I do hope that Congress takes action on some very common-sense proposals to remedy some of the most troubling provisions.

As I have previously and repeatedly said, there is much in the PATRIOT Act that I support. In fact, I said right when I voted against it that I probably support, if you count them all up, 90 percent of the provisions. But there also are provisions that I and a growing number of Americans have serious and valid concerns about.

The American people are increasingly concerned about the potential for abuse in some of the new powers granted by the PATRIOT Act. These concerns are not baseless and they are not based on myths. And I want to take issue with Senator Kyl's presentation, where he read quotes from the ACLU and others saying that somehow it is wrong to have a website that says stop the PATRIOT Act. That is perfectly normal discourse in our country.

I would note that those websites probably didn't exist until well after the Attorney General of this country came before this Committee and said the following inflammatory thing: "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."

Mr. Chairman, this is the real history of what has happened with the PATRIOT Act. If people have a misconception about what is in the USA PATRIOT Act, that is our fault. It is not the fault of the American people. They are not expected to know every line and every word in a 200- or 300-page document.

The fact is this body scared the American people by rushing through a document before it was ready. At the time, as you know, I tried to raise four or five specific concerns, and I honestly thought that there was a vote that I could vote for this piece of legislation. Instead, the process collapsed. This entire significant bill in the history of our country's civil liberties had only three or four hours of debate, and even my leader instructed my fellow Democrats to, quote, "not vote on the merits of the amendments" because we had to rush so fast.

That is how we got here. It is not because the American people are somehow confused or being irrational. It is the hysterical language and approaches that have been used by those in advocacy of this bill and their unwillingness to look at specific provisions and work as we all want to do to change them that is the real problem.

So I appreciate, frankly, Mr. Chairman, the tone of much of the conversation today. Senator Biden talked about trying to identify the specific provisions that need to be changed. I hope nobody actually answered his question saying if we do this and this, we are all

done. This is a very important piece of legislation. We don't know how many of these provisions will work out, but we are in a position now to know that certain provisions need scrutiny and need change.

In response to Senator Feinstein, who is very earnestly trying to address her feeling that perhaps some people don't know exactly what is in the bill, but also showing a willingness to change some of the provisions, I would urge her and others to look at the fact that there are provisions of the bill that we do know are being used. The expanded sneak-and-peek powers apparently have been used at least in 47 cases.

The administration says that Section 215 has not been used to access library and other business records, which, of course, raises the very critical point that Mr. Dempsey has pointed out that why in heck do we need it if it hasn't been used during this critical time.

But let me add another point. Under the national security letters provision, Section 505, it may well be that the libraries are being contacted for the very same information. So when the administration says we have never used it, they are not necessarily telling the whole story. A survey in Chicago indicated that a number of libraries believe that they had been contacted in this regard. So perhaps it was under another provision of the Act, but that doesn't mean it isn't being used.

The roving wiretaps provisions are almost certainly being used, although we can't be absolutely sure because of the secrecy of the FISA proceedings. And I believe a provision that doesn't get enough attention, Section 217, the computer trespass provisions, needs serious scrutiny because, as I understand it, they allow the definition of a trespasser to be somebody who not only hasn't done anything with regard to terrorism, but hasn't even committed a crime. All they have to do is buy a Christmas present on their employer's computer and they are trespassers and therefore may be subject to this provision. So anyone who believes that there aren't specific provisions of the USA PATRIOT Act that are being used and may be abused is wrong, and I don't want this hearing to go forward without that conclusion.

But my feeling that is coming out of this is that the members of this Committee on both sides of the aisle actually do genuinely want to do what should have been done in the first place, which is to find those provisions that we know may be a problem now and fix them, especially provisions that the administration itself isn't even using. It is a great time to fix it, before anyone has been harmed by it. But even in cases where they may be harm, this is the opportunity to pass some legislation.

So I do appreciate this hearing, Mr. Chairman. I think it is important and I think we are moving in the right direction on this issue.

Mr. Chishti, in response to the criticism of the round-up of over 750 men, almost all of whom were either Arab or Muslim and who were detained on immigration violations in connection with the September 11 investigation, the administration has said that its conduct was justified because each of these individuals had broken the law and was simply enforcing the immigration laws.

How do you respond to that?

Mr. CHISHTI. I think that it is fair for them to say that they were enforcing the immigration laws. I think the point we are trying to make in the context of this hearing is that we should see what the aim and the goal of the post–9/11 immigration initiatives were.

If the administration would come to announce that we are going to initiate a new campaign to deport people who have stayed beyond their authorized visas, there would not be a question. The point was that these actions of the Government and immigration enforcement were sold to counter terrorism, and these round-ups of people under various immigration measures did not respond to the terrorism threats we had. All they did was intimidate this group of people and the communities they come from without any measure of success on the terrorism front. That is the real criticism. We should be clear about what we were doing here. If we were doing this in the name of fighting terrorism, we were not accomplishing it by these acts.

Senator FEINGOLD. I certainly agree with that.

Mr. Dempsey, both the House and the Senate versions of the intelligence authorization bill currently in conference contain a provision that greatly expands the FBI's authority to issue these so-called national security letters that I just mentioned, a form of secretive administrative subpoena used in foreign intelligence and terrorism investigations.

Currently, the FBI may serve NSLs on traditional financial institutions; that is, banks. And under the new provision, the FBI could also serve NSLs on pawnbrokers, travel agencies, car dealers, boat salesmen, casinos, real estate closing agencies, and the U.S. Postal Service.

Today, I joined my colleagues, Senators Durbin and Leahy—and I congratulate them for their leadership on this—in sending a letter to the Intelligence Committee asking that they refer this issue to the Judiciary Committee and defer action on it.

What do you know about this provision and do you have any concerns about it?

Mr. DEMPSEY. Well, we have serious concerns about this provision. It is in both the House-passed and Senate-passed intelligence authorization bills which are still pending in conference.

The national security letter is an extraordinary device. This is literally a letter signed by an FBI agent and submitted to a credit company, a bank, or a telephone service provider to get certain transactional records.

Now, in the past Congress has always been careful in expanding these. In each case, there was a careful justification made and they were narrowly focused. Unfortunately, in the PATRIOT Act the particularized suspicion standard was removed. In the past, where there was some reason to believe that a person might be a terrorist or might be a spy, the national security letter could be used to obtain that person's records.

That particularized suspicion standard was eliminated by the PATRIOT Act, and honestly I am not sure how they are now being interpreted. They could cover entire databases, including information about innocent persons, all on the basis of a claim by the FBI

agent, with absolutely no judicial scrutiny, that the information is sought for a counter-terrorism investigation.

Senator FEINGOLD. So it is identical to the concern that many of us have about the language in Section 215.

Mr. DEMPSEY. Exactly.

Senator FEINGOLD. Contrary to the myth that is being perpetrated that somehow there is judicial review, in fact, it is essentially a mandatory provision. All the administration has to say is that they seek this information and the judge has to give it. Isn't that right?

Mr. DEMPSEY. The judge is really a rubber stamp. The statute says he "shall" issue the order if the Government makes the certification. The judge cannot even look behind the certification to determine whether those facts are there.

Senator FEINGOLD. That is exactly what I wanted to get to.

Mr. DEMPSEY. In the national security letter, there is no judge at all. It is simply the FBI agent saying to himself "I want this." And now in this provision that is in the intelligence authorization bill, a financial institution would be defined to include a car salesman, a travel agent, and a host of other businesses not traditionally regulated, not like banks, which are required to report information to the Government.

The way the definition works, a financial record is any record of a financial institution. So the records that will be obtained are not necessarily about bank transactions, but you can go to the travel agency and the travel agency becomes a financial institution, and then all the records of the travel agency become financial records that can be obtained by this letter signed by an FBI agent.

Senator FEINGOLD. Thank you for that specific answer.

Mr. Chairman, my time is up, but this is exactly the kind of analysis that we have been seeking for a couple of years to get down to the specifics and fix the provisions that are potentially open to abuse.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator. We appreciate that. I think it deserves to be pointed out that, yes, they can get the warrant from the judge. It is automatic, but they had better be right in their representations or the judge can take them apart afterwards.

Mr. DEMPSEY. I think that goes back to Senator Biden's point, which is to not repeal the—

Chairman HATCH. Well, that is integrity on the part of the Government. That is the point.

Mr. DEMPSEY. Well, right now, the judge under either 215—

Chairman HATCH. He has to issue it, but if the Government has acted with a lack of integrity, that same judge can take the Government to task.

Mr. DEMPSEY. But, Mr. Chairman—

Chairman HATCH. It may be after the fact, but he can take them to task.

Mr. DEMPSEY. But there is no reporting back to the judge. The judge will never know. There is no return.

Chairman HATCH. Well, that is where the ACLU comes in. And don't worry, they will come in.

Ms. STROSSEN. We will.

Mr. DEMPSEY. Well, Mr. Chairman, every recipient of a national security letter and of a 215 order is prohibited from telling anybody.

Chairman HATCH. It isn't just the ACLU. It is—

Senator FEINGOLD. It is a secret process, isn't it?

Mr. DEMPSEY. We will never find out, Mr. Chairman. There is a permanent gag order.

Chairman HATCH. Well, not necessarily. If they misrepresent to the court and that can be shown—in some cases, I suppose, in criminal law that can be shown—then they are going to suffer some tremendous problems.

Mr. DEMPSEY. Only if it comes into court.

Chairman HATCH. And I might add that Section 215 provides for Congressional oversight, as well. Every 6 months, we have to look at that, and we will. But be that as it may, I just wanted to make that one point.

Senator Durbin.

Senator DURBIN. Mr. Chairman, because I serve both on this Committee and the Intelligence Committee, I want to tell you we didn't spend a minute, not a minute, discussing these national security letter changes as part of this intelligence authorization bill—none.

Senator Feinstein—I am sorry she is not here—said we have never seen PATRIOT Act II. Here it is; here is one provision. Here is PATRIOT Act II, not coming through this Committee with a hearing for an opportunity for this discussion to really be full-blown on both sides. Instead, we have given jurisdiction over an expansion of the PATRIOT Act to the Intelligence Committee, which has not spent one minute discussing its substance, not a minute.

To suggest that if the Government goes too far in a secret investigation involving someone's records at a travel agency or an insurance company or a real estate broker, that somehow the ACLU is going to find out about it—how, when? I really think this is a classic illustration of what can't be done by direction is being done by indirection. The PATRIOT Act is being expanded, and it will be unless, I hope, Mr. Chairman, you assert jurisdiction and say to the Intel Committee, stop, this is our responsibility; it is not yours.

Let me just say, as well, that I voted for the PATRIOT Act with some misgivings, but understanding that we were facing a national tragedy and a national challenge. And I heard the argument that we wanted to pass the PATRIOT Act because we wanted to break down the wall between law enforcement and intelligence which had stopped us from finding would-be terrorists before they struck.

I thought it was a decent argument, but I have come to understand as I have looked at it that there is another side to the story. We need more intelligence in law enforcement, and that is an element that I have really come to understand more, serving on both of these committees.

The argument from the Government has been we need more information and we are sorry if the privacy of individuals has to be compromised to secure it. I think that is what is behind sneak-and-peek, that is what is behind the roving wiretap, and that is what is behind the effort to come up with library records.

The Government is saying we regret that in searching library records for terrorists, we are also going to look at Aunt Louise's book club, but, you know, we have got to stop terrorism. And they are saying we are sorry that in tapping the phones of would-be suspects of terrorism, we are going to listen in to the conversations of innocent people.

Doesn't that raise an interesting constitutional question for us here as to whether or not we are prepared to say that in stopping terrorism, we will compromise the rights of innocent people? That is what this debate is all about.

I might also say that it isn't just a matter of gathering more information. In the time since September 11, it has been my experience that much of the information gathered by the Government is not used properly. Archaic computers at the FBI are finally, finally being replaced by Bob Mueller, and he deserves credit for that.

The bureaucracy which stops immigration records from being shared with people in Homeland Security, and vice versa, finally is starting to change. Also, I think there is a very bad record when it comes to analyzing this information. They don't share it, they don't analyze it; it is not being used properly. There is also a "cover your fanny" timidity now about saying things between agencies. And all of that suggests that just enlarging the body of information gathered is not the be-all and end-all of this, and particularly at the expense of innocent people.

I want to ask Mr. Zogby a question and preface it by saying that there has been no staff that has gone into this; this is my question alone and I am asking it of you directly.

The Chicago Tribune started a series on Sunday, "Immigration Crackdown Shatters Muslims' Lives." They started following the Pakistanis who were deported back to Pakistan, and on the front page the finding just hit me between the eyes. "Since September 11, 2001, 83,310 foreign visitors from 24 predominantly Muslim nations and North Korea registered with the government after U.S. Attorney General John Ashcroft required them to do so. 13,740 of those were ordered into deportation. Zero were publicly charged with terrorism, although officials say there are a few terrorism connections that come out of this."

I guess my point, Mr. Zogby and Mr. Chishti, and others as well, is this: How can we engage Arab Americans, the Muslim population, good, patriotic people who want to stop terrorism, if we are also embarking on this kind of effort that sweeps up so many people clearly who have been profiled by this Government that deports so many people and has so little to show for it?

I think bringing intelligence and law enforcement together would argue the opposite should have been done. We could have reached out more constructively, come up with more positive information, made America safer, with a less heavy-handed approach.

Mr. Zogby, you made reference to this in your statement, if you would like to comment on that.

Mr. ZOGBY. I would. Thank you, Senator. As important as this discussion is, and as both Senators Feinstein and Feingold and Senator Biden have made clear, a detailed discussion of the PATRIOT Act to pull apart the pieces that work and don't work, are needed, not needed, dangerous, not dangerous, et cetera—we need

to look at all the other practices that have been initiated by the Department of Justice that have created fear and panic, and that in many instances have then bounced back on the PATRIOT Act and the symbol for all these things.

One of them, of course, is the special registration program, which from the very beginning was poorly conceived and I believe dangerous. When we first got word of it, we wanted, of course, to encourage our people to comply and to register. We were told that it would cover all countries, not just Arab and Muslim countries; that it would be for everybody.

Senator DURBIN. That is right.

Mr. ZOGBY. We then said to the Department of Justice, what are you doing—we called INS and said what are you doing to make this work? They came back to us and said, well, we have sent out notices to all of your organizations. And I said, well, wait; number one, the people that you are registering don't belong to our organizations. They are visitors. They don't log onto the Arab American website to become members because they are only going to be here in the country for a short period of time. And they said, well, we have gone out to our offices.

So we on our own called INS offices around the country to see what had been done to date. We found half of the offices that we called had done nothing. Some of them were not sure what they had to do. The Los Angeles office was interesting. They said we are all set; we are ready to go. We are going to be able to process these people. We are going to be able to get a hundred through in a day and we are all equipped to get the job done. Getting the job done differed from office to office because instructions weren't clear.

INS offices are underfunded, understaffed, and they were ill-equipped to carry out this program, so that in Los Angeles, 800 people showed up in 1 day; 700 got detained because they didn't know what to do with them. The fear that that created that spread across the country created panic.

I have a weekly television show, a live call-in program, and we were getting calls from people saying I can't go; I am not going to register. I am afraid. I can't be detained. I have a job, I have family; I have this, I have that. We said you have to go and do it.

Of the 83,000 who registered, I believe maybe an equal amount didn't go and register because they were so afraid after the L.A. Iranian situation, number one. Number two, what is tragic is that the people who complied, who obeyed the law and registered—of them, we are now deporting 13,000. The shock that that has sent throughout this community, because most of these people have ties of one sort or another, and has sent overseas has been very dangerous and damaging to our country.

I think, therefore, that we need to take a very close look at this program and look at how it has not only not worked, but probably was designed not to work from the get-go.

Senator DURBIN. Mr. Chishti, before you respond I would like to have Professor Dinh's comment because I want to hear both sides of this story. But do you sense in my remarks that I have suggested that it isn't just about strengthening the hand of law enforcement, but it is also strengthening the intelligence-gathering,

and at times they are at cross-purposes? Clearly, this registration is one effort.

I might also add that although the PATRIOT Act has become a shorthand for all of the fear of Government excess and many times a misnomer, it does reflect the feeling among many Americans that our liberties are being compromised in the name of security.

Now that you have been in the administration and back out again into civilian life, can you understand this anxiety felt by the American people, and also sense that perhaps we are too heavy on the law enforcement side and should use intelligence more to protect America?

Ms. STROSSEN. Chairman Hatch and Senator Durbin, with apologies, I have a plane to catch, so thank you very much for your important work and for including me.

Senator DURBIN. Thank you.

Chairman HATCH. Well, we are very happy to have you here.

Mr. DINH. Senator Durbin, on your very important question, I do agree with you that the USA PATRIOT Act has been a brand, and a brand that has been severely diluted, and the dilution results from a general anxiety that is out there. Whether or not that anxiety is properly placed or not is the conversation that this Committee is having, and ultimate resolution on specifics with respect to constitutional rights will be ultimately resolved by the courts, I hope with help from this Committee and Congress in general.

I do agree with you profoundly that the work of law enforcement and intelligence needs to be done better, and not only that they should work together, but each should be able to deliver the mail and make the trains run on time in their own respective organizations better, including the coordination between the two institutions.

I do want to make a little note regarding the immigration enforcement. As you know, this is an issue that we have worked on before 9/11 to bring what I call sanity to the immigration policy so that we do not have a disconnect whereby the immigration laws are passed without proper resources to be enforced and therefore routinely ignored, to return some semblance of an immigration policy to this country.

In that respect, I do think you are proper, and Mr. Zogby certainly is justified, to focus on the 80,000 number and the 13,000 deportations. But to put it in context, every year the immigration authorities initiate proceedings against approximately one million persons who are illegally or unlawfully in this country. These numbers should be put in context so that there is not an untoward message that only these persons are being profiled, only these persons are being enforced against. But it is one part of immigration policy enforcement, and also national security protection.

Senator DURBIN. But this was a proactive effort by the Government. They decided that people primarily from Arab and Muslim nations would be called in to register. It is tantamount to a situation where an FBI agent called me—he is in a Midwestern city—and said I can't really go to a group of Arab Americans at a community center and say I want to talk to you about any concerns we should have in this community. But before we talk, what is your immigration status? Is it possible that you are out of status

and maybe you should be deported? How far does that conversation go?

Mr. DINH. That does not go very far, and I very much agree with you on that very important technical point. One note I would make, however—and I do not know whether it is true or not, but one of the most welcome pieces of news I read in the newspaper within the last several months is that the Department of Homeland Security, the Bureau of Immigration and Customs Enforcement, is now ready to fully implement the charge of Congress since 1996 that there be a comprehensive entry-exit registration system.

That has been a charge from Congress since 1996. That deadline, of course, was missed in 2001 and then extended. I am very glad that that comprehensive system has now been implemented, or at least is in the beginning stages of implementation, so that the complaint of Mr. Zogby and the justifiable perception that there is selective enforcement is no longer the reality that is out there.

Senator DURBIN. Mr. Chairman, you have been very patient. I thank the panel. I wish I could go longer, but I know that you don't. Thank you.

[Laughter.]

Chairman HATCH. Well, you all have gone longer. Let me just say this is important and it is important to you.

I think it is important to point out that there is no bill that is this large that you can't refine or make better. This panel has helped us to a degree with regard to that, but still I think Senator Feinstein is right. An awful lot of criticism of what is going on in the administration is not of the PATRIOT Act, because it has nothing to do with the PATRIOT Act. A lot of it has to do with the immigration laws and the enforcement of those laws in those society.

Frankly, that doesn't negate the fact that we have to be fair and that we have to do what is right, not just to Arab Americans, but to all Americans, and not just to non–Arab Americans, but all non–American people who are legally in this country. Those who are here illegally we need to treat with consideration as well, although we should enforce the laws.

Now, what I have been interested in is that almost all the criticism of the PATRIOT Act has been, I think, very much misplaced if you listen to the experts in the field like Mr. Cleary who have had to actually implement it, and had to implement the laws before the PATRIOT Act came long, and will to a person, I believe, say that they are much better equipped today to fight against terrorism than they were before. Now, that doesn't mean that we can't look for ways of improving this law, and that is one reason for this hearing.

I think in the regard, Mr. Dempsey, you have been very helpful to the Committee. We would enjoy receiving further information on a section-by-section basis on what you think could improve it. You haven't come here and said get rid of it, throw it out, it is a lousy law, et cetera, et cetera. You have come here and tried to make some constructive suggestions, not all of which I agree with, by the way, and neither did Senator Biden. I can't speak for him, but we have worked very closely on these criminal law issues.

This is a very important Act. Without it, I don't think we could curtail terrorism like we are, and I think the record of the Justice

Department, the FBI, and other law enforcement agencies in this country has proven that thus far.

Now, if the Act goes too far, then we want to correct that. On the other hand, this business of sneak-and-peek—my gosh, criminal law enforcement has used that throughout the years. To make that sound like that is some big, brand new thing, it isn't at all. Under the PATRIOT Act, they are subject to reasonable rules.

You know, I hear on the one hand from Ms. Strossen that she is not really against roving wiretaps. Yet, on the other hand, I heard her say she is basically against some aspects of it. Well, if she can make the case, we are going to listen. But I in many respects prefer to listen to Mr. Cleary, who is in private practice today but who was on the front line.

Now, Professor Dinh worked with us day in and day out, 18-hour days. I remember it was right here in this room where the PATRIOT Act was born. Senator Leahy and I had a lot to do with it; as a matter of fact, had almost everything to do with it. The fact of the matter is that without Professor Dinh, we wouldn't have done as good a job as we did.

Now, there is no Act that is 300 pages or whatever it is that can't be improved. So we are interested in your comments, and interested in having any suggested improvements and we will certainly consider them. Mr. Zogby, that goes for you, and it goes for you, Mr. Chishti, because this is important.

I want to thank all the witnesses for testifying today. This has been an important hearing. Security and freedom are the very foundations of our country. I don't know anybody on this panel, in the Judiciary Committee, who is not interested in protecting civil liberties and freedoms. Our country is a beacon of freedom throughout the world. It is a country where people come from all over the world and share the American dream.

In preserving our place in the world, however, we have to be careful to act responsibly to identify, stop and disable terrorists around the world, but particularly in our country, and especially those who enter our country who want to perpetrate attacks on innocent Americans. Anybody who thinks this is just talk hasn't lived in the last few years.

From today's hearing, it is apparent to me that much of the criticism surrounding the Government's anti-terrorism efforts centers on laws and policies that have little or nothing to do with the PATRIOT Act. That doesn't mean that we can't look for ways of improving it.

In future hearings, this Committee will examine further some of these important civil liberties issues, such as the designation of enemy combatants and the detention of the Guantanamo Bay prisoners. Those are matters that bother all of us.

On the other hand, wouldn't it be awful if we overemphasize civil liberties to the degree that we also have another major, major terrorist incident in our country because we didn't do the things that were protective of American citizens and others?

George Washington once said, "There is nothing so likely to produce peace as to be well prepared to meet the enemy." So we have to maintain our vigilance and our commitment to winning the

war against terrorism, but do so in a manner that ensures the civil liberties and freedoms of all our people within our borders.

Finally, I would like to commend Dr. Zogby for the work of his son, Joe, Senator Durbin's head staffer on immigration and other matters. We appreciate his work for the Committee. I think you should be a proud father, and I am sure you are. I can see by the look on your face that you are, and I would be disappointed if you weren't.

Mr. ZOGBY. I thank you for your sign of good taste.

Chairman HATCH. Thank you very much.

Well, we have enjoyed having you all here today, and we will continue to research this matter, look at it further, and hopefully make the right decisions down the line. But I hope people realize this PATRIOT Act has played a significant role in protection of this land and we should never deemphasize that.

With that, we will recess until further notice.

[Whereupon, at 1:37 p.m., the Committee was adjourned.]

[Additional material is being retained in the Committee files.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Hearing Before the Senate Judiciary Committee
"America After 9/11: Freedom Preserved Or Freedom Lost?"
November 18, 2003

QUESTION BY SENATOR PATRICK LEAHY FOR PROFESSOR VIET DINH

1. To date, the Administration has refused to establish any criteria for who may qualify as an "enemy combatant." On November 14, the *Washington Post* quoted Judge Michael Chertoff – formerly head of the Criminal Division -- as stating "it may be time to develop a system by which enemy combatants could contest such designations." Do you agree with Judge Chertoff's suggestion for a system to allow enemy combatants to contest their designation?

QUESTION BY SENATOR PATRICK LEAHY FOR JAMES ZOGBY

1. The *Washington Post* recently reported that there is now a "colossal" backup of materials obtained through wiretaps that *no one has ever listened to* because the government has been unable to hire enough translators.

   (A) Were you involved in trying to help the government find translators?

   (B) Why do you think the government has had such difficulty hiring translators?

QUESTIONS BY SENATOR PATRICK LEAHY FOR MUZAFFAR CHISHTI

1. One of the findings of your report for MPI is that the government's treatment of immigrants since 9/11 has failed to make us safer and may have hurt the government's efforts to fight terrorism. Please expand on this.

2. The *Washington Post* recently reported on a study of 219 men who registered under the call-in registration program that applies to certain male nationals from 25 predominantly Muslim nations. 110 of the 219 men faced deportation after registering under the program. The study found that not one of them was charged with any terrorist activity, while many of them had pending applications for green cards at the time the government sought to remove them.

   (A) Some have suggested that such a registration program is rather pointless since no actual terrorist will voluntarily come in and present themselves to the government. What do you think of that critique, and of the program generally?

(B) I know that many other nations have objected to the call-in registration. Could you comment on the international impact of this program, and of post 9/11 immigration policies more generally?

3. In section 412 of the PATRIOT Act, Congress authorized the detention without charge of non-citizens, formally designated by the Attorney General as terrorist suspects, for up to seven days. After seven days, these aliens must be charged or released. Rather than using this statutory power that it requested, the Administration has instead relied on *preexisting* regulations – adopted on September 20, 2001 – that permit detention without charge for an unspecified period of time in "an emergency or other extraordinary circumstance." As a result, aliens have been held for periods extending well beyond seven days without charge, under the regulation that predated the PATRIOT Act.

   (A) The Administration has relied heavily on "rule of law" rhetoric to justify its approach toward immigration since 9/11. How do you believe the Administration's decision to ignore section 412 reflects upon its dedication to the rule of law?

   (B) Do you believe the September 20 regulation should be withdrawn?

   (C) How have these detentions without charge affected the perception internationally of America's dedication to the rule of law?

4. The Justice Department Inspector General found a pattern of physical and verbal abuse by some corrections officers at federal facility in Brooklyn.

   (A) What specific steps should the Justice and Homeland Security Departments (Bureau of Prisons and ICE) take to prevent such abuse from occurring in the future?

   (B) What kinds of training and safeguards are needed to ensure that no person held in the custody of the United States will be mistreated?

5. After the September 11 attacks, the Department of Justice issued a blanket order to conduct deportation hearings of "special interest" detainees in total secrecy – closed to the press, the public, and even their family members. The Department also continues to refuse to release the names of all those it arrested in connection with the September 11 attacks. Do you believe the secrecy that surrounded these detentions contribute to the abuses suffered by detainees, including prolonged detention without charge, denial of access to counsel, denial of access to release on bond, unduly harsh conditions of confinement, and cases of physical and verbal abuse?

6. On October 31, 2001, the INS issued a new "automatic stay" rule that allowed it to keep a detainee in custody even after an immigration judge orders him or her released on bond after a hearing on the case. This rule operates to override judicial orders to release individuals on bond after a hearing.

   (A) Does this rule inappropriately infringe on the authority of immigration judges to make bond determinations, and ultimately on the opportunity for detainees to seek release on bond?

   (B) Should the Department of Homeland Security rescind the rule?

QUESTIONS BY SENATOR PATRICK LEAHY
FOR ROBERT CLEARY

1. I am concerned that the Administration's dismissive attitude toward organizations like the American Library Association, which zealously protect Americans' First Amendment freedoms, have actually worked to the *detriment* of law enforcement. For example, I understand that the grand jury subpoenaed library records in the Unabomber case to see who had been reading the four "esoteric" books cited in the "Unabomber's Manifesto." There was a criminal investigation under way and the government had specific reasons for subpoenaing the library records. As far as I know, no library contested production of the material in that case.

   But in another case I know about, a bar-coded library card was found at the scene of an armed carjacking, attached to an unidentified and possibly stolen key chain. Attempts to track down the owner of the bar code were unsuccessful because the library did not keep historical records of its patrons' checkout records, precisely to avoid having to release information about their reading habits.

   Do you have any thoughts on how can we elicit cooperation from libraries and booksellers if there are inadequate safeguards for records that uniquely implicate First Amendment rights?

2. Last week, the press reported that a researcher for the SITE Institute identified a magazine entitled the "Voice of Jihad," purporting to be published by Al Qaeda. A recent issue supposedly includes a Q&A with Saif Al-Adel, Al Qaeda's military commander and one of the world's most-wanted terrorists. In the same reports were links to other websites affiliated with Osama bin Laden. In preparing for this hearing, my staff spent some time looking to find the websites and an on-line version of the magazine -- ultimately without success.

   Let's say that my staff was working out of a public library. Their research could very well surface in a data stream obtained by an FBI agent reviewing the "toll records" of that library, now deemed by the government to be an "internet service provider." Information that a person had visited this sort of website could be used

as the basis for an NSL for the person's financial records or credit reports. Under section 505 of the PATRIOT Act, the FBI can issue an NSL simply by certifying that the information sought is "relevant" to a foreign counter intelligence or terrorism investigation.

(A) Would you agree that the FBI can use NSLs in this type of preliminary investigation?

(B) Are you aware of any DOJ or FBI guidelines about storage and dissemination of records obtained by NSL? Are they shredded? Filed? Returned? Kept in an envelope and archived for years with the case file?

3. Both the President and the Attorney General have called on Congress to permit the use of administrative subpoenas in terrorism investigations. They argue that administrative subpoenas are necessary to move terrorism investigations quickly. In the House, a bill has been introduced that would enable federal law enforcement authorities – without the approval of a court, prosecutor, or grand jury -- to compel both the production of documents and the attendance and testimony of witnesses.

(A) Please explain what is involved in obtaining a grand jury subpoena. Let's say an FBI agent whom you've been working with on an important investigation calls you to say that he needs a grand jury subpoena ASAP. What do you have to do to get him that subpoena? How long will it take?

(B) During your long career with the Department of Justice, did you ever have a case, or hear of case, in which the time it took to obtain a grand jury subpoena somehow impeded a criminal investigation?

(C) Do you see any benefit to requiring administrative subpoenas, like grand jury subpoenas, to be reviewed by the Assistant U.S. Attorney who is supervising the investigation before they are served?

QUESTION BY SENATOR PATRICK LEAHY
FOR NADINE STROSSEN

1. In 1994, the U.S. ratified the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Under Article 3 of the CAT, the United States may not "expel, return … or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Given the fact that the State Department has documented the use of torture by the government of Syria, do you believe it would be illegal for the U.S. to knowingly render an individual to that country?

2. On November 23, 2003, the New York Times reported that the FBI has collected information on antiwar demonstrators and is involved in an apparent nationwide effort to coordinate intelligence information regarding demonstrations. What do you think of this development and the change last year in the FBI guidelines that allows monitoring of political and religious groups?

3. We were unable to spend much time discussing datamining at the hearing. What are the ACLU's concerns with programs such as TIPS, TIA and CAPPS II?

4. Your written testimony expresses the ACLU's concern for the treatment of immigrants by this Administration. What are your specific concerns and what remedies would you recommend?

5. What FOIA requests has the ACLU made of the Department of Justice and what response has been received from the Department?

6. It seems like the ACLU and the Justice Department are talking past each other on many of the issues surrounding the PATRIOT Act. For example, Mr. Cleary cited the nationwide subpoena authority in the PATRIOT Act as something that prosecutors have found helpful since September 11, 2001. Yet, the ACLU appears to have little problem with that provision. Exactly which provisions are of concern to the ACLU?

QUESTIONS BY SENATOR PATRICK LEAHY
FOR JAMES DEMPSEY

1. We saw the demise of Admiral Poindexter's "Total Information Awareness" program earlier this year, but it certainly did not mean the death of government data mining efforts. Other federal agencies continue to collect and analyze large amounts of personal data on U.S. citizens and residents. Would you please discuss the current status of government "data mining" efforts – what agencies are engaged in data mining, for what purposes, using what data? Also, please discuss what Congress should be doing to address the very real tension between our privacy and civil liberties, on the one hand, and the needs of law enforcement on the other.

2. At the time of the USA PATRIOT Act debates following the 9/11 attacks, you noted that the foreign intelligence wiretap standard that was then being considered, and that ultimately was passed, could act as an end-run around the relatively stringent requirements for wiretaps in criminal cases and a breach of the understanding that led to enactment of FISA. In fact, in 2002, the FISA Court granted 1,228 wiretap applications -- almost 300 more than in 2001 -- while federal judges approved only 497 wiretaps under Title III for 2002. Though I supported the language for lowering the standard for FISA wiretaps, I am also concerned, as you were then, that law enforcement is using FISA in lieu of Title

III when Title III would be more appropriate. Can you explain in layman's terms the difference between a secret FISA wiretap and a Title III wiretap, whether there is any basis for concern that criminal investigators are using FISA as a substitute, and what legislative response, if any, we should have to this issue?

3. You have advocated for greater public accountability of certain provisions of the PATRIOT Act, especially those that address surveillance issues. What level of reporting would you like to see before Congress considers any extension of those provisions of the PATRIOT Act that are set to sunset on December 31, 2005?

QUESTION BY SENATOR PATRICK LEAHY
FOR HON. BOB BARR

1. You have been quoted as stating that expanding investigative powers such as administrative subpoenas under PATRIOT constitute "A whole new approach to law enforcement in America: gathering evidence on law-abiding citizens in the hopes that that will somehow identify terrorists." Can you explain what you meant by this statement and why we should all be concerned about unlimited, unchecked law enforcement powers, particularly in investigations that are inherently conducted in secret?

2. Mr. Barr, you voted for the PATRIOT Act. Why are you now criticizing it?

3. Many proposals have been recently introduced, or drafted, which expand the government's powers -- proposals such as the VICTORY Act and expansion of administrative subpoena authority. What is your opinion of these proposals?

Questions Submitted by Senator Edward M. Kennedy
Judiciary Committee Hearing on
"America after 9/11: Freedom Preserved or Freedom Lost?"
Tuesday, November 18, 2003

I. Questions to witnesses: Robert Cleary, Professor Dinh, Bob Barr, Nadine Strossen, James Zogby, and Muzaffar Chishti

"Extraordinary Rendition" and Torture / Maher Arar Case: I would like to ask all the witnesses for their views on the Maher Arar case. Mr. Arar runs a consulting company in Ottawa. He previously worked as an engineer for a high-tech company in Natick, Massachusetts. He has dual Canadian and Syrian citizenship, but has not lived in Syria for sixteen years.

Returning to Montreal from a family visit in Tunisia, Mr. Arar made a stopover at Kennedy Airport in New York City on September 26, 2002. Immigration officials detained him at the airport and told him he had no right to a lawyer because he was not an American citizen. He was taken to the Metropolitan Detention Center in Brooklyn, where F.B.I., New York police, and INS officials interrogated him for several days. Arar repeatedly asked to be sent home to Canada. He pleaded not to be sent to Syria, for fear he would be tortured.

Nevertheless, on October 8th, U.S. officials flew Mr. Arar on a small jet to Washington, where a new team of officials got on the plane. They flew to Amman, where the American officials handed Arar over to Jordanian authorities, who chained, blindfolded, and beat Arar while transporting him in a van to the Syrian border. In Syria, Mr. Arar was placed in a small, dark cell – three feet by six feet, much like a grave – and was confined there for almost a full year. He was slapped, beaten, and whipped on his palms, wrists, and back with an electric cable. He lost 40 pounds during his confinement. On October 5, 2003, the Syrian government released him; Syrian officials have told reporters that their investigators found no link between Mr. Arar and Al Qaeda. Mr. Arar is now back home in Canada.

Question (1): I assume that all agree with the proposition that U.S. officials should never engage in torture. Official acts of torture unequivocally violate the U.S. Constitution; the Convention Against Torture, which the U.S. has ratified; and customary international law. Do you believe it is appropriate for U.S. officials to turn

over individuals like Maher Arar to countries such as Syria with the expectation that they will be tortured?

Question (2): According to news reports, CIA officials have repeatedly engaged in what it calls "extraordinary renditions": handing over captives to foreign security services known for their brutal treatment of prisoners and use of torture – sometimes with a list of questions the agency wants answered. Article 3 of the Convention Against Torture provides, "No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing he would be in danger of being subjected to torture." Do you believe that the current Administration is complying with this provision?

Question (3): In a November 6 speech to the National Endowment for Democracy, President Bush condemned the government of Syria for leaving its people "a legacy of torture, oppression, misery, and ruin." Syria's use of torture is widely known and has been criticized by the State Department in its annual human rights reports. Are you concerned that the Administration is undermining its message about human rights and the need for change in the Middle East, through its policy of rendering suspects to Syria and other countries for torture-based interrogations?

II. Questions to Muzaffar Chishti and Nadine Strossen

OIG Report on 9/11 Detainees: In June 2003, Glenn Fine, the Inspector General for the Justice Department, found "significant problems in the way the detainees were handled" following 9/11. These problems included:

- a failure by the FBI to distinguish between detainees whom it suspected of having a connection to terrorism and detainees with no connection to terrorism;
- the inhumane treatment of the detainees at a federal detention center in Brooklyn; and
- the unnecessarily prolonged detention resulting from the Department's "hold until cleared" policy – made worse by the FBI's failure to give sufficient priority to carrying out clearance investigations.

Many of us have been dismayed by the Department's response to the Inspector General's report. This was a detailed and thoroughly substantiated report issued by one of the Department's most respected attorneys. Yet when the report was issued, the Department's spokesperson issued a statement declaring that the Department makes "no apologies" for any of its actions or policies. Also, the Department continues to post

on its own web site – "life and liberty dot gov" – an article that describes the report "as much a misrepresentation of the government's actions as the shrillest press release from Amnesty International" and describes the Inspector General's recommendations as reading "frankly, like a joke."

Question (1): In your opinion, has the Justice Department responded in an appropriate manner to the abuses identified in the Inspector General's report?

Question (2): What steps should the Justice Department and the Department of Homeland Security be taking to prevent such abuses from occurring in the future?

Question (3): Many regulatory and policy changes made unilaterally made by the Justice Department have led to the prolonged and unfair detention of immigrants, stripped immigration judges of their ability to make independent decisions based on the facts before them, and closed these hearings to the public. What action should Congress take to curtail these and other Justice Department directives that are violating the due process rights of immigrants?

Question (4): Are legislative changes warranted?

III. Questions for James Zogby

NSEERS: Thousands of immigrant men, a vast majority from Arab and Muslim countries, were fingerprinted, photographed and interrogated the government under the NSEERS program. It was conceived on the absurd notion that actual terrorists would present themselves for registration and be caught. Instead, the program produced wide-spread fear in Muslim communities and discouraged cooperation with anti-terrorism efforts as more than 14,000 men were placed in removal proceedings for minor immigration violations.

Question (1): Do you believe that targeting persons based on their religion or national origin, rather than on specific evidence of criminal activity or connections with terrorist organizations, is an effective tool in fighting terrorism?

Question (2): Our government has expended valuable time and resources to recruit U.S. citizens in our Arabs and Muslim communities to assist in our fight against terrorism. At the same time, the Justice Department has been photographing, fingerprinting and registering their law-bidding siblings and cousins visiting the U.S.

What impact do you think these policies have had on the Arab and Muslims communities in the U.S. if we are holding job fairs in the morning and fingerprinting in the afternoon?

Arab Opinion Abroad: You say that civil liberties abuses against Arabs and Muslims have been well-publicized in the Arab world and that there is an increasing perception that America is not Arab- and Muslim-friendly. The opinion polls you cite show that favorable ratings of the U.S. are quite low.

Question (3): What impact have these reports had on our foreign policies abroad: not only among Arab and Muslim countries, but other countries around the world? What can we do to begin to change this perception?

Question (4): You also say that Democratic reformers and human rights activists in other countries used to point to the U.S. as the world's leader in democracy and human rights. Now, these same people are being dismissed by their countrymen when they use America as the shining example. Can you tell us more about how America is being perceived abroad?

Senate Judiciary Hearing on
"America After 9/11: Freedom Preserved or Freedom Lost?"
November 18, 2003

Written Questions
Submitted by Senator Joseph R. Biden, Jr.

Below are Senator Biden's written, follow-up questions for the following witnesses who testified at the November 18th oversight hearing of the Judiciary Committee: Professor Viet Dinh, Mr. Robert Cleary, and Dr. James Zogby.

QUESTIONS FOR PROFESSOR VIET DINH

I have been deeply troubled by the Administration's recent action with respect to so-called "enemy combatants." I can imagine no greater modern-day threat to civil liberties and to our historic understanding of due process than the Administration's insistence that it has unfettered power to detain indefinitely any individual (including U.S. citizens seized on U.S. soil) – without charging them with any crime, without trial, and without providing them with access to an attorney. It strikes me that, at the very least, these individuals should be afforded a meaningful opportunity to contest their status.

Question: I was intrigued by your testimony on this subject and especially appreciative of your willingness to concede that many of the questions on this topic are both difficult and without precedent. In your testimony, you suggested that Congress has an important role to play in helping the Administration develop a coherent policy with respect to enemy combatants. Please describe in greater detail the role that you believe Congress can and should play? What, if any, statutory improvements would you suggest?

Question: It appears that the Administration is making somewhat arbitrary and ad-hoc decisions regarding designation of individuals as enemy combatants. There appear to be no uniform principles that guide the decision-making process – as evidenced by the fact that seemingly similar defendants are treated very differently. For example, both Yaser Hamdi and John Walker Lindh are both U.S. citizens supposedly captured on the battlefield in Afghanistan and then shipped to the U.S. Naval Station in Guantanamo Bay, Cuba – yet, Hamdi has been designated an enemy combatant, and Waker Lindh's case was settled within the context of the civilian criminal system. How would you suggest that the designation policy be modified to make the process more uniform and coherent?

Question: Assuming that the President, under certain limited circumstances, should be able to designate individuals as enemy combatants – what basic criteria should inform designation decisions? What factors should the executive branch consider when designating an individual as an enemy combatant, as opposed to a prisoner-of-war or criminal defendant?

Question: Once an individual is designated as an enemy combatant, what types of procedural and substantive safeguards should be afforded to accused individuals, without sacrificing our national security interests?

QUESTIONS FOR MR. ROBERT CLEARY

Some reports have suggested that the government has threatened criminal defendants with designation as enemy combatants as a method to compel cooperation or secure plea-bargained settlements in terrorism-related prosecutions. Reportedly, the prospect of "enemy combatant" status has so frightened some defendants that they quickly pled guilty to terrorism charges and accepted prison terms, when faced with the threat of being tossed into a secret military prison without trial – where they could languish indefinitely without access to courts or lawyers.

Question: To what extent does the implicit threat that, unless the defendant pleads guilty, he/she will be designated as an enemy combatant taint the fairness of criminal proceedings – especially with respect to potentially innocent people accused of terrorism-related crimes?

Question: Should the U.S. Department of Justice prohibit federal prosecutors from using, explicitly or implicitly, the threat of indefinite detention or trial by military commission as leverage in criminal plea bargaining or prosecutions?

QUESTIONS FOR DR. JAMES ZOGBY

It is my fear that the Administration's excesses in its domestic war on terrorism (especially with respect to enemy combatant designations) have not made us more secure – but, rather, have had the unfortunate effect of undermining our national security by discouraging international cooperation. Terrorism is a global threat that requires global responses; yet, this Administration's scant attention to international law or the opinion of other world leaders works to weaken the international collaboration that is required.

Question: Can you detail for us the effect that the Administration's domestic policies may be having in the international community? For example, some observers have suggested that some countries may be reluctant to provide assistance for counter-terrorism cases in which suspects may be held as enemy combatants and not afforded a fair trial (or any trial at all). To

what extent should we be concerned about this reluctance? How does it affect broader cooperation in the war against terrorism, especially with respect to Middle Eastern and Arab countries?

Question: The American Bar Association has noted that international documents recognized by the U.S., including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, support a detainee's right to judicial review and access to counsel. To the extent that the U.S. is perceived as flouting its international obligations, to what extent do we lose credibility in the international community? To what extent do we jeopardize the safety of civilians and military personnel living abroad (since some foreign states might conceivably use the Administration's stance on enemy combatants to justify their own, poor detention policies)?

Senate Judiciary Committee
Hearing on "America after 9/11: Freedom Preserved or Freedom Lost?"
November 18, 2003

Questions Submitted by Senator Russell D. Feingold

Question to James Dempsey

1. As you know, the Department of Defense recently terminated its data-mining program, the Total Information Awareness system. But that program was not the only use or development of data-mining by the federal government. The Department of Homeland Security CAPPS II system and the Department of Justice Trilogy plan would also use data-mining technology to access commercial and government databases to collect information on individuals who have no links to terrorism. What concerns do you have about data-mining programs and what steps do you believe Congress should take to ensure that the information collected about innocent people is accurate and the privacy interests of the American people are respected?

Question to James Dempsey and Nadine Strossen

2. In his testimony, Professor Viet Dinh defends section 215 of the PATRIOT Act. He argues that this provision is comparable to the use of grand jury subpoenas in criminal cases, narrow in scope because it can only be used in international terrorism or counter-intelligence investigations, and requires the approval of a federal judge. He also notes that this provision has not yet been used and that it contains a protection against investigations conducted solely on the basis of activities protected by the First Amendment. Can you respond? Do you agree that concerns with section 215 are exaggerated?

Question to The Honorable Bob Barr and James Dempsey

3. As you both pointed out in your prepared remarks, Section 802 of the USA Patriot Act defines domestic terrorism, in part, as acts dangerous to human life that violate any state or federal criminal law and appear to be intended to intimidate or coerce a civilian population or influence government policy. This well-intentioned effort to define domestic terrorism is much more vague and broader than the well-established definition of terrorism contained in federal law prior to the Patriot Act, 18 United States Code Section 2332(b)(g)(5). Could you tell us how Section 802 could be used against groups that no one has ever thought of as terrorist groups? What steps do you believe Congress should take to improve the definition?

Questions to Nadine Strossen

4. As you know, the Justice Department has consistently refused to disclose the identities of the individuals detained on immigration violations in connection with the September 11th investigation, or to open their proceedings to the public. In arguing that secrecy was needed, the Department has asserted that disclosing the identities of immigrant detainees could alert al-Qaeda to whom we did and did not have in custody. But in contrast, the Justice Department has disclosed, and sometimes even aggressively publicized, the identities of individuals held on criminal and terrorism charges. Can you comment on this issue and explain how this blanket policy of secret arrests and secret hearings undermines our nation's commitment to fairness and justice?

5. On a website created by the Justice Department, www.lifeandliberty.gov, the Department argues that the courts have sustained a number of controversial initiatives, including the practice of withholding the names of immigration detainees. The Justice Department claims that the detention of American citizens as enemy combatants, as well as the detentions in Guantanamo Bay without individualized review, has also been sustained by the federal courts. Do you agree with the Department's characterization? Have the courts upheld these controversial initiatives, or are they open questions, still being litigated in the courts?

Question to James Zogby

6. You discussed some of your dealings with federal law enforcement since September 11th and your concern about the alienation of the Arab and Muslim American community as a result of the federal government's targeting of the community for heightened law enforcement scrutiny. I also am aware that some local law enforcement officials refused to participate in the Interview Program when the administration asked them to participate in it in the fall of 2001 and early 2002. These local law enforcement officials believed that interviewing selected people based on their ethnicity or religion amounted to racial profiling and would harm the trust and community policing efforts that they had taken great pains to cultivate over the years. What lessons do you think federal law enforcement could take from state and local law enforcement officials on the importance of building and sustaining a trustful, not antagonistic, relationship with your community?

Question to Muzaffar Chishti

7. On September 17, 2001, the Justice Department issued a regulation requiring that immigration detainees be notified of the charges against them within 48 hours

of their arrest. There was an exception: in the event of an emergency or other extraordinary circumstances, the charging decision could be made within an additional "reasonable period of time." No definition of "reasonable period of time" was given, but in practice, many detainees did not receive notice of the charges for weeks, and some for more than a month after being arrested, according to the Justice Department's own Inspector General. Section 412 of the USA PATRIOT Act, which deals with aliens designated by the Attorney General as terrorists, says categorically that if a terrorist alien is not charged within seven days, "the Attorney General shall release the alien."

(a) Given that Congress had required the Attorney General to release terrorist aliens unless they're charged within seven days, do you agree that it was contrary to congressional intent for the Administration to hold visa violators for more than a month, as described in the Inspector General's report released in June?

(b) What steps do you believe Congress should take to ensure that seven days means seven days?

THE HONORABLE LARRY E. CRAIG
UNTIED STATES SENATE COMMITTEE ON THE JUDICIARY
HEARING ON: "AMERICA AFTER 9/11: FREEDOM PRESERVED OR FREEDOM LOST?"
QUESTIONS FOR THE PANEL
NOVEMBER 18, 2003

QUESTION FOR MR. DINH:

1) You've been called, the "Architect of the PATRIOT Act." As such, I have a drafting question for you that pertains to Section 213, the Sneak and Peek provision of the Act. In drafting the SAFE Act, I came up with ONE possible scenario that would justify the inclusion of the language, "seriously jeopardizing an investigation or unduly delaying a trial," under the broad standard of an "adverse result." And that's to prevent the flight of other co-conspirators from prosecution. That's it. What's more is that this scenario can easily be read to be included in the provision, "result in flight from prosecution."

   What originally prompted you to adopt the broad "adverse result" language, and do you know of any scenarios that, in your mind, would necessitate the inclusion of the language, "seriously jeopardizing an investigation or unduly delaying a trial?"

QUESTIONS FOR BOB BARR, NADINE STROSSEN, VIET DINH, JAMES ZOGBY, JAMES DEMPSEY, AND ROBERT CLEARY:

1) Though many of you have different opinions about the legitimacy of several provisions of the PATRIOT Act, there seems to be real disagreement over what Section 215 (as it amends Section 501 of FISA) authorizes law enforcement to do. Some argue that Section 215 allows law enforcement to obtain business records at a standard lower than relevance, simply by specifying in the application that the records are "sought for" an investigation to protect against international terrorism or clandestine intelligence. Opponents assert that the safeguards put in place—that is, an application to a federal judge, language providing that an investigation of a United States person may not be conducted solely upon the basis of activities protected by the first amendment, and the requirement of frequent Congressional oversight—make such reservations unfounded. What do you say to this?

2) In your written testimony, several of you have distinguished between abuses of civil liberties under the PATRIOT Act and abuses outside of the Act. Speaking within the four corners of the PATRIOT Act, what's the single most troubling provision in your estimate? Please provide concrete examples of abuses, ambiguities, or problematic drafting (where possible), and how you'd change the provision if given the chance.

OFFICE OF BOB BARR

MEMBER OF CONGRESS, 1995-2003

Answers to Questions regarding Bob Barr's testimony before the Senate Judiciary Committee hearing on "America after 9/11: Freedom Preserved or Freedom Lost?" on November 18, 2003.

Question Submitted by Senator Patrick Leahy

1. Senator Leahy, before I answer this particular question, it is important to point out that the administrative subpoena expansion to which I referred is not part of the USA Patriot Act, rather it is one of the three new Patriot-style powers requested by the President during his speech at the FBI Academy in Quantico earlier this year. Section 505 of the Patriot Act loosened restrictions on "national security letters," and the proposal by the President would take that process much further.

   Having said that, an expansion of administrative subpoena power, currently available in limited cases for only moderately sensitive personal records, shares similar characteristics with both the national security letter and Section 215 court order powers authorized in the Patriot Act, as well as several proposed data-mining services.

   All of these measures are problematic for one main reason: they encourage investigative fishing expeditions. As with many new post-9/11 security measures, administrative subpoenas permit investigators to gratuitously use them to sweep through large batches of innocent Americans' personal records in the hope of rooting out the bad guys.

   As a former CIA officer and federal prosecutor, I can tell you that this is the wrong way to approach federal law enforcement.

   Proponents of broad administrative subpoena authority and similar unilateral executive search and seizure powers argue that Americans generally do not have a Fourth Amendment right over records and personal information held by third parties. This argument is actually a red herring and factually untrue – the law remains grey on this point.

   Nonetheless, this makes it all the more imperative that Americans' privacy be accorded greater protection in statute, rather than the rampant expansions of federal snooping power in laws like the Patriot Act and the administrative subpoena proposal.

   Greater benefits to security and liberty can be achieved in more narrowly tailored legislation or policy that allows some court scrutiny of federal warrants demanding such information. Even legislation that leaves such subpoenas within the ambit of the grand

jury system would be acceptable as it has at least the added protection of 23 regular citizens weighing the merits of the prosecutor's requests. Crucially, also, administrative subpoenas, CAPPS II, TIA and Section 215 need not be limited to terrorism investigations, an important point to make to those who argue that these new powers are required only to meet the new challenges posed by 9/11 and international terrorists.

Implicit in the unilateral nature of these subpoenas and surveillance systems is a troubling amount of secrecy sanctioned and required around details about their usage. There is a gag order, for instance, on people served by Section 215 court orders and presumably there would be no avenue for public scrutiny of the use of administrative subpoenas.

In sum, I am concerned with the very existence of a regime of non-judicial subpoenas requiring the production of personal records based solely on the discretion of the Justice Department, especially when coupled with computerized federal tracking systems like CAPPS II or TIA–databases containing vast quantities of evidence on citizens, compiled with no basis to suspect the person has committed <u>any</u> offense.

2. As Senator Hatch said during this very hearing, "there is no bill that's as large [as the Patriot Act] that you can't refine or make better."

   In October 2001, legislative debate on the Patriot Act was muted and deliberation retarded. It was, as my fellow Republican Don Young from the great state of Alaska said, "emotional voting." Our nation had just suffered the worst terrorist attack in its history and the greatest loss of life on its soil since the Civil War. Every member of Congress felt that loss and the continuing threat acutely.

   However, good intentions in hard cases can make bad law. And, to be clear, the USA Patriot Act contains many useful and good ideas. Unfortunately, it also contains less than a dozen provisions that simply went too far, too fast and need to be reined in. I'm not urging repeal of the bill as a whole, and I strongly support giving our federal law enforcement the tools they need to prosecute the war on terrorism. However, after the trauma of 9/11, House leadership inserted a number of provisions that, upon reflection, are of great concern to me as a former prosecutor, as a supporter of the Constitution, and as a conservative.

   Indeed, recent votes on fix-Patriot measures sponsored by my Republican friend Rep. Otter from Idaho, which have garnered significant bipartisan support, suggest that many others from both sides of the aisle are having similar second thoughts.

   Despite my previous vote, I feel no contradiction in calling for a narrowing of those provisions of the Patriot Act that can be co-opted to spy on and prosecute Americans based on their personal and political beliefs.

3. I think that the time has come for self-reflection and careful deliberation on behalf of our lawmakers before any further expansions of federal surveillance or investigative powers are authorized.

Certainly, we need to go back and reexamine the measures passed directly after the national trauma of 9/11, narrow the ones that went too far and examine the effectiveness of others. We would be irresponsible were we not to do so.

As for future spying and investigative powers, they should certainly not follow the example of the past two years. We need to ensure that federal prosecutors and police are under the control of the judiciary and we need to ensure that the executive branch not be given too much slack under our system of checks and balances. While I laud and wholeheartedly support the courageous efforts of the President and our Attorney General in the war on terror, I also fear the implications of vesting overly expansive and discretionary investigative power in the White House, a place whose occupant can change every four years.

As a result, I oppose new administrative subpoenas and the VICTORY Act. The government has already been granted, or has assumed, very broad investigative and law enforcement powers. That panoply of powers should not be expanded without serious consideration of the effectiveness – or ineffectiveness – of existing powers. That consideration has simply not taken place.

As we saw in the tragedies at Ruby Ridge and Waco, an overly-enthusiastic Justice Departments and White Houses can pose deadly serious problems if allowed to play around with the Constitution. My concerns, and those of many others, are not aimed at this or any other past or future Administration. Overly broad powers in the hands of a President or Attorney General from either party, leads to abuse.

Questions Submitted by Senator Edward M. Kennedy

1. Like many conservatives, I have serious reservations about imposing foreign fads or fashions on Americans through judicial interpretations of vague notions of international law. However, the prohibition against torture is not some vague notion, but a clear-cut prohibition on government conduct that the United States has always supported. Torturing prisoners has been against the law in the United States for well over a century, ever since the passage of federal criminal laws punishing violations of civil rights under color of law. What's more, the United States has ratified the Convention Against Torture, which makes it the law of the land. It is also prohibited by our Uniform Code of Military Justice. Accordingly, the act of torture abroad is a federal crime in America and federal officials should not use the practice of "rendering" to circumvent that criminal prohibition. Indeed, the Convention Against Torture makes it a crime to conspire to commit torture, both on American soil and overseas. It would not be a stretch of the law, to hold government officials criminally liable for facilitating the rendition of a non-citizen, irrespective of their motives in doing so.

   If there was a colorable expectation that Maher Arar would be tortured if returned to Syria, especially given his Canadian citizenship, he should not have been so rendered.

2. To reiterate, I don't believe that the United States should be complicit in the use of brutal instruments of torture by foreign powers through the practice of rendering. Not only has physical torture been found to be one of the most ineffective and inaccurate means of interrogation(witness the British experience in Northern Ireland), the "extraordinary rendition" of a captive non-citizen by the Central Intelligence Agency would violate our sovereign laws. That said, I do not know whether the allegations that the current administration has deliberately engaged in such activity are true. They should certainly receive a thorough and impartial investigation. .

3. The war against terrorism is one of fine lines and gray areas. Faced with foes that blend into the everyday of American life until they strike, our government must make hard calls on a daily basis. Once again though, the rendition of a detainee or non-citizen to another sovereign country with the foreknowledge that that person would be tortured violates the law.

   However, I think that in the court of public opinion, even international public opinion, the President's condemnation of Syria's deplorable human rights record and support for terrorism remains resonant and well taken. I am concerned that the President's message may be undermined by cozying up to Syria for short-term intelligence gains. The policy of cooperation with regimes like Syria's should be thoroughly reviewed – and may need to be scaled back -- in light of President Bush's laudable embrace of a policy of promoting democracy and human rights in the Arab and Muslim world.

Questions Submitted by Senator Russell D. Feingold

1. As you rightly point out Senator Feingold, Section 802 was indeed well intentioned but poorly drawn. The drafters of the Patriot Act were right to attempt to codify the exact parameters of the federal definitions of domestic and international terrorism, however in doing so, they opened the door to terrorism investigations and prosecutions of individuals that strain the bounds of common sense.

   Under the new definition of "domestic terrorism" in Section 802, federal officials can argue that certain acts that normally wouldn't be construed as terrorism are, in fact, "domestic terrorism." Specifically, officials can make such a claim if they argue that the act in question was "dangerous to human life," violated federal or state law, appeared "to be intended i) to intimidate or coerce a civilian population; ii) to intimidate the policy of a government by intimidation or coercion; iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping," and occurred "primarily within the territorial jurisdiction of the United States."

   If investigators can meet this three-prong definition, they can accordingly treat an otherwise garden-variety crime of violence case as terrorism, which would bring with it a significantly enhanced powers.

This particular section is extremely contentious among conservatives, and especially among the pro-life movement. For instance, under Section 802, a protester attempting to protect the lives of the unborn by blocking an abortion clinic doorway, who mistakenly delays the entrance of a woman returning with complications from her abortion, could be investigated as a terrorist. Even a cursory examination of the statute shows that a pro-abortion Justice Department could easily meet those three prongs of the definition of domestic terrorism. This part of the USA Patriot Act, like the Racketeering Influenced and Corrupt Organizations Act, could be co-opted from its initial mission to target minority political agitation.

I think the appropriate fix to this problem is a minor modification to the statute to ensure a linkage in the definition to more serious federal crimes of terrorism, like kidnapping, the use of explosives and other munitions, hijacking and the like. This is the approach taken by the bipartisan Security and Freedom Ensured (SAFE Act) and I believe it is the right one.

Questions Submitted by Senator Larry E. Craig

1. Section 215 is of great concern to privacy hawks like myself. Not only does it indeed permit federal agents to seize personal business, library, medical, genetic and travel records without a showing of probable cause, it could also permit, for instance, dragnet sweeps of firearms dealer receipts anywhere in the country. Legally, the provision permits federal agents to request court orders from the Foreign Intelligence Surveillance Court, or FISC, upon nothing more than their specification that the "tangible things" sought (which encompasses a huge number of different types of records) are needed for an investigation into foreign intelligence or counter-terrorism.

   Significantly, the FISC judges must grant the court orders if that specification is made, and have no discretion to judge the grounds for that specification; thereby rendering judicial review a formality without any substantive mechanism for preventing abuses. In addition, proponents of this particular section of the Patriot Act also constantly cite the clause in the statute about not basing applications for 215 orders solely of First Amendment activity. To be clear, that prohibition only applies to U.S. "persons," meaning that certain non-citizens can still be subjected to 215-sanctioned surveillance based *solely* on their political or religious speech and association -- and 215 court orders can be sought for U.S. citizens based *in part* on First Amendment activity.

   Section 215 could be easily fixed to bring it back in-line with civil liberties -- by, for instance, requiring some individualized suspicion that the target of these records searches is a terrorist, spy or other foreign agent.

2. In addition to Section 215, which I cover in the previous question, several other provisions in the Patriot Act are of equal concern.

   Contrary to the pre-Patriot Act use of delayed-notification "sneak and peek" -- which required specific showings that notice would endanger life, evidence or would

unreasonably delay prosecution – Section 213 of the Patriot Act vaguely codified the power in statute, permitting the indefinite delay of notice if it would have an "adverse result." As would be done in your SAFE Act, Senator Craig, the requirements of a sneak and peek warrant would be narrowed with the power retained; a reasonable correction. Specifically, by requiring officials to show that delaying notice would preserve life or physical safety, prevent flight from prosecution or prevent the destruction of evidence, the SAFE Act fix would significantly ameliorate the harm to privacy and civil liberties inherent in the Patriot Act's sneak and peek statute.

Also dealt with appropriately in the SAFE Act is the roving wiretap statute, which permits agents to use a roving wiretap even if they do not know who the target is or what device is to be monitored. Your bill would correctly require agents to know at least one of these things before executing such a surveillance order.

The SAFE Act's installment of sunset provisions in the sneak and peek and national security letter Patriot Act statutes is an appropriate stopgap against surveillance and investigative abuses. During the initial negotiations on the legislation, we were careful in the House Judiciary Committee to include appropriate expirations for some of the more extraordinary powers that were to be granted to the government. Some of these were unfortunately removed. You are right to attempt to put them back in.

Finally, as mentioned in a previous question, the SAFE Act's approach to the overbroad definition of domestic terrorism in Section 802 is also appropriate. By requiring a linkage in the provision to more traditional and specific acts of terrorism -- like bombings, hijackings and kidnapping -- it will be more difficult for overzealous prosecutors to be heavy-handed in the use of terrorism statutes against direct action protesters and activists.

Hearing Before the Senate Judiciary Committee
"America After 9/11: Freedom Preserved or Freedom Lost?"
November 18, 2003

ANSWERS OF MUZAFFAR CHISHTI TO QUESTIONS OF SENETOR EDWARD M. KENNEDY.

Q I (1). Senator, it is inappropriate—and unlawful—for our government officials to return any individual to a country with the expectation or belief that he or she will be tortured. In the Mahar Arar case, our information comes only from the press accounts. If the press accounts are indeed true, there is real concern that US officials violated the Convention Against Torture. It is thus extremely important that Congress should investigate the facts surrounding the Arar case, including why the Department of Justice did not return Mr. Arar to Canada instead of deporting him to Syria.

Q I (2). It is difficult to answer that question without knowing more facts. A congressional hearing would certainly help establish these facts.

Q I (3). All of us should be concerned if the facts, as reported by the press, are true.

Q II (1). The Inspector General's (IG's) findings are quite consistent with the findings of our report. We have made a wide ranging set of recommendations in our report to address some of the concerns raised by the Inspector General's report.

In terms of its responsiveness, the Department of Justice certainly was not very keen to highlight the IG's report. Indeed, it took some effort to access the report it on DOJ's website.

The IG's findings raise very serious issues. In addition to the concerns mentioned by you regarding prolonged detentions during "FBI holds", the IG's report also concluded that, in many cases, even after the detainees were cleared by the FBI, they continued to be detained for long periods. The more recent report of the IG issued on December 18, 2003 only adds to the seriousness of the treatment of detainees. The conclusions of the IG reports require immediate attention. Congress must assert its oversight role and shed the necessary light on the abuses that many detainees suffered after 9/11.

Q II (2). Senator, as I responded earlier to the question of Senator Leahy, the urgent need is to set the tone by the highest ranking officials of the Department of Homeland Security and the Department of Justice reinforcing a strong commitment that established guidelines on treatment t of detainees be adhered to, and rigorously enforced. And officials who violate the guidelines—or violate their supervisory responsibilities---have to be made accountable.

Q II (3) These are all very good questions, and many of them we have addressed in the recommendations of our report.

Congress has accorded extraordinary deference to the executive branch since September 11. Congressional committees should assert their oversight role in evaluating how immigration measures have been used since September 11. For example, the government asserts that closed immigration hearings in which the person's name is kept secret are useful to recruit informants. Congress should evaluate the validity of this assertion. Even if it is determined to be useful, the practice is so counter to US notions of justice that Congress should carefully consider whether it should be used at all. Similarly, Congress should review government's practice of withholding information on the post-September 11 detainees, the practice of closed hearings, and the use of the material witness statute. Based on their assessment, the intelligence committees should issue a report so that a public debate is possible.

Intelligence and the Judiciary committees should carefully examine the many issues raised by data-mining, a technique that officials hope will identify terrorist suspects and networks among the general population. Doe it work? How should officials handle the many false positives that are produced? Will people identified this way be subject to further investigations based on previously unknown forms of reasonable suspicion? Will data miners range over private sector as well as government information? Will they examine IRS or other confidential government files.

Our report also made specific recommendations regarding the regulatory or policy changes that you refer to. We believe that a charge in an immigration proceeding should be brought within two days of arrest, unless extraordinary circumstance require additional period. The case for extraordinary circumstances should be presented to an immigration judge. Pre-charge detention beyond two days should be subject to judicial review.

Closed immigration proceedings should be allowed only on a case by case basis, and only after judicial approval.

Independence and discretion of immigration judges must be defended, especially in making bond decisions. Immigration authorities must not have automatic authority to overrule an immigration judge's bond determination. If the government disagrees with the bond determination, it can always appeal.

Regarding the other due process issues raised by immigration actions of the government post 9/11, the need for right to counsel deserves special attention. After 9/11, immigration violations were widely used as a basis for investigation of more severe criminal violations. This follows a disturbing recent trend to criminalize minor immigration violations. For these reasons, immigration detainees, who traditionally have not had the right to a government-appointed counsel, should be granted such right.

Q. II (4). If the government does nor rescind or amend its regulations or internal policy guidelines to reflect the above-mentioned immigration enforcement recommendations, legislation may be necessary to make Congressional intent clear.

Beyond immigration-specific measures, there are some related issues to 9/11 actions that require legislative action. Among these is the USA PATRIOT Act's amendment to the Foreign Intelligence Surveillance Act (FISA) that allows surveillance when foreign intelligence is a "significant purpose" rather than "the purpose", as originally enacted. This does not enhance collection of information on foreign terrorists, and raises the possibility that FISA will be used to gather evidence of ordinary crimes, which we believe is unconstitutional. The original language should be restored and language added making it clear that the law permits gathering of evidence to prosecute specified foreign intelligence crimes.

The sunset provision of the USA PATRIOT Act should be retained. Any new antiterrorism legislation should include similar sunset provisions to ensure that such measures receive the ongoing reevaluation that they deserve before becoming a permanent part of our law.

Hearing Before the Senate Judiciary Committee
"America After 9/11: Freedom Preserved or Freedom Lost?"
November 18, 2003

ANSWERS OF MUZAFFAR CHISHTI TO QUESTIONS SUBMITTED BY SENETOR RUSSELL D. FEINGOLD

Q. 1 (a) The report we issued at the Migration Policy Institute (MPI) confirms the findings of the Department of Justice's Inspector General. Indeed, our research indicated that long periods of pre-charge detentions were quite widespread.

If Congress required that suspected terrorists should be released unless they are charged within seven days of arrest, it is only logical to assume that it would apply at least the same standard with respect to ordinary visa violators. The DOJ's September 17, 2001 rule is certainly contrary to the spirit of Section 412 of the USA PATRIOT Act.

Our MPI report recommends that in immigration proceedings, a charge should be brought within two days of arrest. However, in the post 9/11 world, we recognize that there could be situations when the government may need more than two days to bring a charge. But such exceptions should be allowed only on a case by case basis and only by the approval of an immigration judge. And all pre-charge detentions of more than two days should be subject to judicial review.

(b) As explained above, the general rule in immigration proceedings should be two days. Exceptions should be allowed but only under the above-mentioned circumstances. Unless the government amends regulations to reflect this change, this may need legislation.

To make sure that the new time lines are adhered to, the regulations should include a provision that allows an immigration judge to terminate proceedings when timely charges are not brought. That is precisely what an Immigration Judge in New York did last year after he ruled that the government had failed to establish "emergency or other extraordinary circumstances" to prolong the period of pre-charge detention.

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ANSWERS OF MUZAFFAR CHISHTI TO QUESTIONS OF SENETOR PATRICK LEAHY.

Q. 1. Senator, immigration measures can play an important role in responding to the threats of terrorism. What our report concluded is that in response to the attacks of September 11, we relied excessively on these measures. Immigration measures by themselves are not effective in identifying terrorists. Immigration measures are only as useful as the information provided by intelligence and law enforcement agencies. What immigration measures are able to do is to prevent terrorist suspects, about whom the government already has information, from entering the country. And they can set up gateways and tracking systems so that someone already inside the country can be found if intelligence agencies identify him as a suspect.

Immigration and intelligence have to work together for either to be effective. These two systems should have—and did not – work together in the weeks before the attack of September 11.

After September 11, by overly relying on immigration restrictions, we misplaced our efforts and did not spend our scarce resources – both financial and human – on intelligence gathering and analysis and better coordination of law enforcement actions. Those efforts would have paid off in greater benefits in the fight against terrorism.

Our domestic immigration measures hurt our efforts against terrorism because we treated a large number of immigrants and their communities as criminals, assumed that they were guilty until proven innocent, and equated national origin of immigrants with dangerousness. Such actions not only harm the civil liberties of all of us, they also reduce compliance and cooperation of individuals. That did not help in our effort to gather intelligence about potential terrorist activities.

Domestic immigration policy reverberates in foreign policy through perceptions it conveys about America and the character of our society. When we intimidate Arab and Muslim communities in the United States, there is an echo effect that deepens the perception abroad that America is anti-Muslim and that its principals are hypocritical. This re-enforces fears in the Arab and Muslim worlds of persecution and exclusion by the west. It strengthens the voices of radicals in there drive to recruit followers and expand influence. Thus in the name of increasing domestic security, our immigration actions may have contributed to forces that potentially make us more vulnerable.

Q. 2 (A) Senator, in our report we made a sharp distinction between the "port of entry" registration program and the "call- in" registration program. We believe that the "port of entry" registration program is defensible in the aftermath of September 11, and there is a statutory basis for it. Most importantly, in theory, it is not based simply on national origin criteria. The "call-in" registration program, on the other hand, was indefensible. It lacked appropriate statutory authority, and was based purely on national origin criteria. The program also had a diminishing utility since the "port of entry" registration program would, over time, register all non-immigrants entering the United States. The "call-in" registration program alienated Muslim and Arab communities. The fact that the Department of Homeland Security on December 2, 2003 announced its decision to suspend the future requirements of this program is an indication that the program has also proven to be ineffective.

Q. 2 (B) The "call-in" registration program produced a strong negative reaction abroad. Since the targets of the "call-in" program were nationals of predominantly Muslim countries, the press in those countries had a hay-day in projecting America as anti-Muslim. The program was a public relations bonus to the extremists in those countries. Internationally, there was a far greater reaction to the "call-in" registration program than the "port of entry" program, because many countries themselves have some variations of the "port of entry" program.

Our broader post-9/11 immigration measures have had a profound international impact. Our actions since September 11 have encouraged foreign governments to restrict individual freedoms in the name of security. There is now growing evidence that governments in many parts of Europe, Central Asia, Africa, South Asia, and the Far East have either adopted new measures or amplified existing legislations to give police wide powers to investigate, search, and detain suspects. Detentions for long periods of time is becoming more common, as is monitoring electronic communications and commercial transactions. Similarly, torture of political prisoners and summary executions have intensified according to a number of investigative reports. The new measures have frequently been used by these governments to squelch political dissent. Our own heightened scrutiny of foreign students and scholars has also cost us internationally by discouraging critical intellectual cultural exchange.

Q 3 (A) Senator, whether the administration ignored the rule of law or not, it certainly acted against the spirit of Section 412 of the USA PATRIOT Act. Detention is the most onerous power of the state, and should rarely be used as a preventive or investigative tool, absent a charge. As we recommended in our report, in immigration proceedings, a charge should be brought within two days of arrest. But, as we also noted in our report, in the post-9/11 world, there may be some circumstances where the government may legitimately require additional period of initial detention. However, the cases for such extraordinary circumstances should be presented to an immigration judge. Also, such pre-charge detentions beyond two days should be subject to judicial review. Only such a balanced approach can respond to needs of security and the requirements of the rule of law.

Q 3(B) Yes, the regulation should be withdrawn and replaced with the one that allows for a detention beyond two days on a case by case basis with the approval of an immigration judge and subject to judicial review.

Q 3(C) Senator, as I stated in my answer to your earlier question, many of our post 9/11 immigration actions are proving to be a model for other countries to restrict individual rights. That has, in turn, diminished our standing in the international community as the standard bearer of the rule of law.

Q 4. The findings of the report issued by the Inspector General of the Department of Justice this summer is consistent with many of the findings that we made in our report. We were able to base our findings on the facts surrounding the accounts of more detainees than the Inspector General's report does. The pattern of violation of rights and the physical and mental torture that detainees were subjected to is very troubling. The more recent report, issued by the Inspector General on December 18, 2003, raises even more serious concerns than the earlier report. It appears that there was a pattern of mistreatment of detainees which lasted for a long period of time. It is critical that a Congressional committee investigate the serious allegations made in the Inspector General's report and action be taken against officials who engaged in the mistreatment of detainees. It is also important to investigate whether any officials engaged in a cover up.

The Department of Justice and the Department of Homeland Security should send a strong signal from the highest levels re-enforcing their commitment to high standards of professional behavior and accountability among its staff. It is precisely in a charged atmosphere like the post 9/11 period that adherence to strict guidelines and regulations is critical. This is particularly true when contract facilities are employed to house detainees. Along with better training, it is important the violators of guidelines be appropriately sanctioned.

Q 5. As we concluded in our report, there was considerable secrecy surrounding the detentions, especially in the weeks immediately following September 11. The Inspector General's report now confirms that for the first few weeks after 9/11 there was a stated policy not to provide any information about the detainees in various detention facilities. Even when the formal ban on revealing any information was lifted, it was extremely difficult in many instances to get any information about the location of the detainee, and the nature of charges against them.. Our report lists a number of such examples. Legal aid groups, counselor officials, family members and the lawyers of those arrested had difficulty locating detainees. Given the difficulty of access to detainees for such long periods of time, many of the abuses that we note in our report-- and those reported by the Inspector General-- went undetected.

In our report we found that at least six hundred cases were classified as "special interest" cases. The courts barred access to records of the persons in detention, closed their deportation hearings and the cases were not listed on the immigration docket. Such practices not only violate the rights of the individual detainees, they also violate

important 1st Amendment rights of the press to have access to public hearings. As we maintain in our report, there certainly can be situations when secrecy may be warranted, but it must be allowed only on a case by case basis, and only by judicial intervention.

Q 6 (A) Yes, the "automatic stay" rule does infringe on the authority of immigration judges. Independence of immigration judges in all determinations, including bond determinations, must be maintained.

Q 6 (B) As we recommended in our report, the "automatic stay" rule should be rescinded. Bond determinations should be left to the discretion of an immigration judge. Immigration judges balance security, flight risk, and right-to-release claims. If the government disagrees, the decision can be appealed.

Hearing Before the Senate Judiciary Committee
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November 18, 2003

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ANSWERS TO QUESTIONS POSED BY SENATORS
LEAHY, KENNEDY, BIDEN, AND CRAIG

QUESTIONS BY SENATOR PATRICK LEAHY
FOR ROBERT CLEARY

1. I am concerned that the Administration's dismissive attitude toward organizations like the American Library Association, which zealously protect Americans' First Amendment freedoms, have actually worked to the *detriment* of law enforcement. For example, I understand that the grand jury subpoenaed library records in the Unabomber case to see who had been reading the four "esoteric" books cited in the "Unabomber's Manifesto." There was a criminal investigation under way and the government had specific reasons for subpoenaing the library records. As far as I know, no library contested production of the material in that case.

   But in another case I know about, a bar-coded library card was found at the scene of an armed carjacking, attached to an unidentified and possibly stolen key chain. Attempts to track down the owner of the bar code were unsuccessful because the library did not keep historical records of its patrons' checkout records, precisely to avoid having to release information about their reading habits.

   Do you have any thoughts on how can we elicit cooperation from libraries and booksellers if there are inadequate safeguards for records that uniquely implicate First Amendment rights?

RESPONSE

1. As an initial matter, I do not believe that the underlying premise of this question -- that there are inadequate safeguards regarding records that uniquely implicate First Amendment rights -- is correct. Criminal investigators have always had the authority to obtain records of libraries and booksellers, and quite properly so. As more fully explained in my testimony, section 215 of the USA PATRIOT Act ("the Act" or "the Patriot Act") has only given the intelligence community similar powers under equivalent standards.

As for eliciting cooperation, certain libraries and booksellers apparently believe that the harm from maintaining such records (in terms of the potential for misuse by law enforcement and improper invasions of privacy) outweighs the

benefits (assisting the government apprehend criminals and terrorists and thwart crimes and acts of terrorism). The problem if it exists is one of education. If libraries and booksellers understood how such records are used by law enforcement, that law enforcement only sought such records in extremely limited and appropriate scenarios, and that these records might help and have actually helped catch a terrorist and thwart future acts of terrorism, I believe that most would choose to maintain their records. Law enforcement outreach programs have often been effective at educating the public. Perhaps one might be effective here.

But in the absence of a pre-existing, specific regulation mandating the preservation of records, law enforcement cannot compel libraries and booksellers to maintain their records. Moreover, it would not be appropriate to impose such requirements. If a library or bookstore does not wish to keep its records, it would not have to do so in our free society. Libraries and booksellers must understand, however, that if they refuse to do so, crimes might not be prevented, terrorist acts might not be thwarted, and criminals and terrorists might evade capture and prosecution.

2. Last week, the press reported that a researcher for the SITE Institute identified a magazine entitled the "Voice of Jihad," purporting to be published by Al Qaeda. A recent issue supposedly includes a Q&A with Saif Al-Adel, Al Qaeda's military commander and one of the world's most-wanted terrorists. In the same reports were links to other websites affiliated with Osama bin Laden. In preparing for this hearing, my staff spent some time looking to find the websites and an on-line version of the magazine — ultimately without success.

   Let's say that my staff was working out of a public library. Their research could very well surface in a data stream obtained by an FBI agent reviewing the "toll records" of that library, now deemed by the government to be an "internet service provider." Information that a person had visited this sort of website could be used as the basis for an NSL for the person's financial records or credit reports. Under section 505 of the PATRIOT Act, the FBI can issue an NSL simply by certifying that the information sought is "relevant" to a foreign counter intelligence or terrorism investigation.

   (A) Would you agree that the FBI can use NSLs in this type of preliminary investigation?

   (B) Are you aware of any DOJ or FBI guidelines about storage and dissemination of records obtained by NSL? Are they shredded? Filed? Returned? Kept in an envelope and archived for years with the case file?

RESPONSE

2.(A) I believe I understand the concerns underlying your question. But before I can directly respond, there are certain underlying assumptions in the question that I should address. In the first instance, the hypothetical question presumes that the FBI already had the equivalent of a pen register on the particular computer used by the member of your staff ("the Staffer"). In the absence of a pen register on this particular computer ("the Computer"), the FBI could not reasonably have received information that the Staffer had accessed the websites in question. More importantly, before the FBI could have obtained the pen register on the Computer,

the FBI would already have developed independent evidence sufficient to be able to obtain a pen register on the Computer.

There are several reasons why it would be highly unlikely that the FBI would obtain a pen register on a public library computer. If, as in the usual case, there were multiple computers at the library in question, the FBI would have to be able to obtain authorization for pen registers on all the computers or risk the possibility that the subjects of the investigation would use one of the computers without a pen register. Even if the FBI were able to do so, the pen registers would obtain vast amounts of useless, irrelevant information. Moreover, it is important to remember that terrorists generally operate in extreme secrecy. Computers in public libraries provide no assurance of secrecy. It would be exceedingly rare for a terrorist to access al Qaeda sites and plot acts of terrorism out in the open areas of a public library, on a publicly visible computer, for anyone to observe over his or her shoulder.

Because the probability that the FBI would obtain a pen register on any one computer in a public library is very small, the likelihood that the FBI would have already been up on a pen register on *the* Computer, during the particular time when the Staffer happens to use that same computer, is infinitesimal. Given the total number of computers with internet access in all public libraries across the country, and given the limited number, if any, of internet pen registers operating at any one time on public library computers, the chances that an individual randomly chooses to use a computer on which there is already a pen register to conduct

searches for information regarding al Qaeda has to be virtually nil. Thus, it must first be understood that it is extremely unlikely that the posed hypothetical would ever happen.

If that confluence of events did occur, however, it does *not* necessarily follow that NSLs would issue. Although it is hard to predict in a vacuum what an investigator might do, most likely, the FBI would first want to *identify* the person who accessed that website. Although I am no expert in intelligence investigations, it is my understanding that the FBI would first initiate a "preliminary inquiry" to determine the identity of the person accessing the website. The FBI has well-established regulations and limitations as to the types of information that it could properly obtain during a preliminary inquiry. Notably, I believe that the FBI *cannot* obtain financial records unless a "full field investigation" is authorized, which requires much more evidence than what is presented in the posed scenario. If the FBI wanted to identify the Staffer in the hypothetical, once it did so, presumably the investigation would end there, and would never develop into a full field investigation. Thus, the FBI would never seek the financial records of the Staffer.

Even if the FBI had the authority to issue an NSL, whether the FBI would do so is a different question. I do not have the background and experience to determine, in every situation, whether an investigatory step is appropriate in an intelligence investigation. Throughout my career as a prosecutor, I specialized in

criminal investigations and prosecutions. There are considerations present in intelligence investigations that are generally not present in criminal investigations.

But ultimately, I believe the only way to answer this question properly is to flip it around. Assume, God forbid, that another major terrorist incident occurred. Also assume that afterwards, during the course of the investigation, it was revealed that: (1) the terrorist learned how to commit the act through an al Qaeda publication accessed through a public library computer; (2) the FBI had known that this information was so accessed, because it had a pen register on the computer in question, but the FBI had not investigated the individual's financial information; (3) had the financial information been subpoenaed or obtained through an NSL, the FBI would have uncovered very suspicious wire transfers that could have been traced to terrorist organizations; and thus (4) the terrorist plot might have been thwarted had the FBI pursued the lead.

Under this scenario, would the FBI be criticized for not detecting this terrorist plan? Would the same people who would otherwise decry the FBI's "invasion" of the Staffer's privacy join those who would vilify the FBI for "ignoring" the information that was in its possession? Investigators cannot know in advance whether a bit of information will lead to evidence of a terrorist plot. If the FBI, *in hindsight*, is going to be criticized and taken to task for not aggressively following up on every possible lead to thwart what turns out to be an actual terrorist plot, then we *cannot* also criticize them for following up on every

possible lead in the overwhelming majority of investigations that will not lead to a terrorist plot. The FBI should not be put in this impossible Catch-22.

Ultimately, lines will have to be drawn. But every time we say that the FBI should not follow up on a possible lead out of our legitimate concerns for privacy and individual liberties, we necessarily permit some increased risk that a terrorist plot will go undetected. That is a price we willingly choose to pay in order to preserve our freedoms. It is just a question of *where* the line should be drawn.

One thing is clear, however: if the FBI is going to thwart terrorist attacks effectively, it will necessarily investigate individuals who are not terrorists, if only to eliminate the possibility. Thus, law enforcement will sometimes obtain personal information regarding innocent individuals. There is nothing inherently wrong with that result, provided of course that law enforcement does not misuse that information.

Regardless, intelligence investigators *must* have the authority to obtain library records and financial information through the use of NSLs. The standards for obtaining pen registers and NSLs in an intelligence investigation are very similar to those for obtaining pen registers and grand jury subpoenas, respectively, in criminal investigations. In fact, NSLs issued to libraries require additional safeguards. I simply do not believe we can afford to provide foreign intelligence and terrorism investigators with fewer investigatory tools than those used to investigate bank fraud, postal theft, customs violations, counterfeiting crimes, or other federal crimes. The Patriot Act merely puts intelligence investigators on an

equal playing field – providing the equivalent investigatory tools, under equivalent standards and process, as those provided to criminal agents. These tools, therefore, should not be eliminated.

(B) I am not specifically familiar with the particular rules regarding storage, retention, dissemination, and/or destruction of records obtained by an NSL. It is my understanding, however, that records obtained by an NSL as part of FISA investigations or in intelligence investigations generally, are generally classified at the level of SECRET or higher. Thus, at a minimum, I would presume that the FBI must follow the rules regarding the storage, retention, dissemination, and/or destruction of classified documents.

3. Both the President and the Attorney General have called on Congress to permit the use of administrative subpoenas in terrorism investigations. They argue that administrative subpoenas are necessary to move terrorism investigations quickly. In the House, a bill has been introduced that would enable federal law enforcement authorities — without the approval of a court, prosecutor, or grand jury — to compel both the production of documents and the attendance and testimony of witnesses.

   (A) Please explain what is involved in obtaining a grand jury subpoena. Let's say an FBI agent whom you've been working with on an important investigation calls you to say that he needs a grand jury subpoena ASAP. What do you have to do to get him that subpoena? How long will it take?

   (B) During your long career with the Department of Justice, did you ever have a case, or hear of case, in which the time it took to obtain a grand jury subpoena somehow impeded a criminal investigation?

   (C) Do you see any benefit to requiring administrative subpoenas, like grand jury subpoenas, to be reviewed by the Assistant U.S. Attorney who is supervising the investigation before they are served?

RESPONSE

3. Before I respond directly to these questions regarding administrative versus grand jury subpoenas, let me first say that I fully support the use of administrative subpoenas in terrorism investigations. Terrorism investigations, such as the 9/11 investigation, involve following threads of information from one lead to the next. As I mentioned in my written testimony, the need for speed and efficiency in moving from one lead to the next is paramount. Special Agents of the Drug Enforcement Administration ("DEA") and the United States Customs Service ("Customs") *routinely* use and historically have used administrative subpoenas in investigating narcotics cases, particularly in the early stages of an investigation. Administrative subpoenas are particularly useful when the case has not yet developed to the point where the oversight by an Assistant U.S. Attorney

("AUSA") is as important. There are many more federal investigators than there are AUSAs, and these agents can, should, and do investigate far more cases than can be actively overseen by the limited number of AUSAs. The use of administrative subpoenas frees up AUSAs to focus their attention on the numerous cases on which their guidance is necessary. Thus, administrative subpoenas issued in these narcotics cases substantially increases the efficiency of criminal investigations. So long as administrative subpoenas are deemed an appropriate tool in the war on drugs, it necessarily follows that administrative subpoenas are also appropriate in fighting the war against terrorism.

(A) Generally, an agent will contact an AUSA and request a subpoena. If the United States Attorney's Office ("USAO") has not already opened a case, and has not already issued any grand jury subpoenas, the AUSA will generally ask the agent about the case, obtaining sufficient comfort that a grand jury investigation is warranted. The AUSA then has to open a case file, which entails filling out a case opening form. Additionally, the AUSA must comply with Federal Rule of Criminal Procedure 6(e), which sets forth the requirements regarding grand jury secrecy. To comply with Rule 6(e), the AUSA must obtain a list of all the agents and their assistants who will be working on the investigation and who might review grand jury materials. The AUSA must notify these individuals, in writing, of their obligations under Rule 6(e). Moreover, the AUSA is then obliged to

inform the district court, in writing, that he or she has notified the agents and their assistants of their obligations under Rule 6(e).

After that process is complete, the AUSA can prepare the subpoena. The amount of time required to prepare a single subpoena greatly varies. Some subpoenas may take only minutes to prepare; other subpoenas take hours to prepare. Sometimes, an AUSA must develop the list of the information that is requested in the subpoena. Such lists may be quite specific, detailed, and lengthy, in order for the subpoena to be complete and thorough, but not overbroad, vague, or unduly burdensome.

It is important to recognize that agents may submit requests for hundreds of subpoenas in a single investigation. In the weeks after 9/11, the U.S. Attorney's Office for the District of New Jersey alone prepared an average of 50 subpoenas per day for that investigation. While such a scenario is not routine, a request for a dozen or multiple dozens of subpoenas is hardly uncommon. Even if the AUSA assigned to the case were able to drop everything else on which he or she is working, meeting such requests may take days.

Of course, AUSAs are not just assigned one investigation or case at a time. The press of other more time sensitive matters – search warrants, wiretaps, arrests, court hearings, etc. – frequently results in substantial delays in the processing of agents' subpoena requests. Accordingly, agents are routinely required to wait some period of time for AUSAs to prepare grand jury subpoenas.

(B) The time required to obtain grand jury subpoenas does impede some criminal investigations. This problem is most noticeable in investigations that involve multiple rounds of subpoenas. For example, in a money laundering investigation, law enforcement must often trace the transfer of funds from financial institution to financial institution. Information obtained from the response to one subpoena commonly generates new leads, which must be followed up by the issuance of additional subpoenas. Each time there is a delay in the issuance of subpoenas, the next necessary step of the investigation is also delayed. Large money laundering investigations can involve thousands of accounts with financial institutions, with numerous "rounds" of subpoenas as new information is continually developed. Each delay in the process holds up, or "impedes" the investigation. While subpoenas are waiting to be prepared (as well as issued, served, processed, and responded to), and while the underlying investigations are slowed as a result, drugs are being bought and sold, money is being laundered, credit card fraud is occurring, criminals are leaving the country and escaping prosecution, and terrorists are being financed.

These delays are one of the main reasons why administrative subpoenas are so beneficial. The DEA and Customs routinely use administrative subpoenas in an effective and efficient manner in narcotics investigations. Agents are often able to issue numerous administrative subpoenas and gather substantial evidence of wrongdoing much more quickly than through the use of grand jury subpoenas. Administrative subpoenas are particularly useful during the embryonic stages of

an investigation, when obtaining numerous grand jury subpoenas from a busy AUSA is more likely to entail delay. Additionally, as previously stated, the use of administrative subpoenas during the early stages of an investigation allows AUSAs to focus their limited resources on more pressing concerns, and on investigations that more appropriately require their supervision. Generally, once an investigation passes the early stages and substantial evidence has been gathered, the investigation is referred to an AUSA, a grand jury investigation begins, and agents cease using administrative subpoenas.

(C) There is always some benefit to an additional layer of review. But there also are costs involved whenever an additional layer of bureaucracy is added. Here the cost would be additional delay in obtaining the information and advancing the investigation. Agents investigating narcotics offenses are trusted with the responsibility of issuing administrative subpoenas without first obtaining the approval of an AUSA. Since an AUSA's review is not necessary for administrative subpoenas issued in narcotics investigations, I do not believe that this requirement is appropriate for administrative subpoenas generated in terrorism investigations. Again, we cannot treat the war against terrorism less seriously than the war on drugs. Congress must afford agents investigating terrorism offenses with the full arsenal of powers available to agents investigating other types of crimes.

Questions Submitted by Senator Edward M. Kennedy
Judiciary Committee Hearing on
"America after 9/11: Freedom Preserved or Freedom Lost?"
Tuesday, November 18, 2003

I. Questions to witnesses: Robert Cleary

"Extraordinary Rendition" and Torture/Maher Arar Case: I would like to ask all the witnesses for their views on the Maher Arar case. Mr. Arar runs a consulting company in Ottawa. He previously worked as an engineer for a high-tech company in Natick, Massachusetts. He has dual Canadian and Syrian citizenship, but has not lived in Syria for sixteen years.

Returning to Montreal from a family visit in Tunisia, Mr. Arar made a stopover at Kennedy Airport in New York City on September 26, 2002. Immigration officials detained him at the airport and told him he had no right to a lawyer because he was not an American citizen. He was taken to the Metropolitan Detention Center in Brooklyn, where F.B.I., New York police, and INS officials interrogated him for several days. Arar repeatedly asked to be sent home to Canada. He pleaded not to be sent to Syria, for fear he would be tortured.

Nevertheless, on October 8th, U.S. officials flew Mr. Arar on a small jet to Washington, where a new team of officials got on the plane. They flew to Amman, where the American officials handed Arar over to Jordanian authorities, who chained, blindfolded, and beat Arar while transporting him in a van to the Syrian border. In Syria, Mr. Arar was placed in a small, dark cell — three feet by six feet, much like a grave — and was confined there for almost a full year. He was slapped, beaten, and whipped on his palms, wrists, and back with an electric cable. He lost 40 pounds during his confinement. On October 5, 2003, the Syrian government released him; Syrian officials have told reporters that their investigators found no link between Mr. Arar and Al Qaeda. Mr. Arar is now back home in Canada.

Question (1): I assume that all agree with the proposition that U.S. officials should never engage in torture. Official acts of torture unequivocally violate the U.S. Constitution; the Convention Against Torture, which the U.S. has ratified; and customary international law. Do you believe it is appropriate for U.S. officials to turn over individuals like Maher Arar to countries such as Syria with the expectation that they will be tortured?

Question (2): According to news reports, CIA officials have repeatedly engaged in what it calls "extraordinary renditions": handing over captives to foreign security services known for their brutal treatment of prisoners and use of torture — sometimes with a list of questions the agency wants answered. Article 3 of the Convention Against Torture provides, "No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing he would be in danger of being subjected to torture." Do you believe that the current Administration is complying with this provision?

Question (3): In a November 6 speech to the National Endowment for Democracy, President Bush condemned the government of Syria for leaving its people "a legacy of torture, oppression, misery, and ruin." Syria's use of torture is widely known and has been criticized by the State Department in its annual human rights reports. Are you concerned that the Administration is undermining its message about human rights and the need for change in the Middle East, through its policy of rendering suspects to Syria and other countries for torture-based interrogations?

RESPONSE

Although I would like to assist the Committee in addressing these important issues, I do not believe I have a basis to render an informed opinion. I have no knowledge whatsoever that U.S. officials have turned over individuals to certain countries where there are substantial grounds for believing the individuals would be in danger of being subjected to torture. While, of course, I fully support the proposition that torture is abhorrent and must be condemned, these issues are beyond the scope of my knowledge and experience.

Written Questions
Submitted by Senator Joseph R. Biden, Jr.

QUESTIONS FOR MR. ROBERT CLEARY

Some reports have suggested that the government has threatened criminal defendants with designation as enemy combatants as a method to compel cooperation or secure plea-bargained settlements in terrorism-related prosecutions. Reportedly, the prospect of "enemy combatant" status has so frightened some defendants that they quickly pled guilty to terrorism charges and accepted prison terms, when faced with the threat of being tossed into a secret military prison without trial – where they could languish indefinitely without access to courts or lawyers.

Question: To what extent does the implicit threat that, unless the defendant pleads guilty, he/she will be designated as an enemy combatant taint the fairness of criminal proceedings – especially with respect to potentially innocent people accused of terrorism-related crimes?

Question: Should the U.S. Department of Justice prohibit federal prosecutors from using, explicitly or implicitly, the threat of indefinite detention or trial by military commission as leverage in criminal plea bargaining or prosecutions?

RESPONSE

These questions are important ones, and should be carefully considered. I do not, however, feel sufficiently knowledgeable about the intricacies of enemy combatant status, secret military tribunals or proceedings, or related issues, to intelligently weigh the equities involved.

There are, however, certain guideposts to assist in the analysis. On the one hand, it is generally acceptable for prosecutors, during plea negotiations, to explain the potential consequences that will occur if a defendant rejects a guilty plea offer. Fully explaining the benefits of a guilty plea offer requires describing

the potential increased sentencing exposure and/or other adverse consequences if the plea offer is rejected. Defendants cannot make a knowing, voluntary, and intelligent decision whether to accept a plea offer – as the law requires -- unless they understand both the benefits *and* the costs of their decision.

On the other hand, the Department of Justice does have a policy barring prosecutors from inducing guilty pleas by threatening the death penalty. This policy was appropriately instituted in light of the uniqueness and harshness of this "ultimate punishment."

Since I am not sufficiently familiar with the particulars of enemy combatant status or the effect that the threat of granting this status would likely have on a defendant, I do not believe I am able to render an informed judgment as to which side of the line the threat of enemy combatant status falls.

In debating this issue, however, it is important to bear in mind that our criminal justice system has many built-in safeguards designed to prevent the hypothetical posed in the question. For example, even though the government may constitutionally charge a defendant with a crime if there is *probable cause* to believe that he or she committed it, Department of Justice Policy mandates that no defendant is to be charged unless there is evidence establishing his or her guilt *beyond a reasonable doubt*. Additional safeguards are built into plea proceedings. The court accepting a defendant's guilty plea is required to engage in a lengthy colloquy with the defendant. Federal judges taking guilty pleas must, among other things: place defendants under oath or affirmation; advise defendants of their

rights; explain the rights they are waiving by pleading guilty; ensure that they understand the nature of the charges against them; discuss the maximum possible sentencing consequences and the U.S. Sentencing Guidelines; ensure that the plea is a knowing, voluntary, and intelligent one; and satisfy themselves that there is a factual basis for the plea, i.e., that the defendant did in fact commit the crime(s) charged.

THE HONORABLE LARRY E. CRAIG
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
HEARING ON: "AMERICA AFTER 9/11: FREEDOM PRESERVED OR FREEDOM LOST?"
QUESTIONS FOR THE PANEL
NOVEMBER 18, 2003

QUESTIONS FOR BOB BARR, NADINE STROSSEN, VIET DINH, JAMES ZOGBY, JAMES DEMPSEY, AND ROBERT CLEARY:

1) Though many of you have different opinions about the legitimacy of several provisions of the PATRIOT Act, there seems to be real disagreement over what Section 215 (as it amends Section 501 of FISA) authorizes law enforcement to do. Some argue that Section 215 allows law enforcement to obtain business records at a standard lower than relevance, simply by specifying in the application that the records are "sought for" an investigation to protect against international terrorism or clandestine intelligence. Opponents assert that the safeguards put in place — that is, an application to a federal judge, language providing that an investigation of a United States person may not be conducted solely upon the basis of activities protected by the first amendment, and the requirement of frequent Congressional oversight — make such reservations unfounded. What do you say to this?

2) In your written testimony, several of you have distinguished between abuses of civil liberties under the PATRIOT Act and abuses outside of the Act. Speaking within the four corners of the PATRIOT Act, what's the single most troubling provision in your estimate? Please provide concrete examples of abuses, ambiguities, or problematic drafting (where possible), and how you'd change the provision if given the chance.

RESPONSE

1) Section 215 gives the intelligence community an important investigatory tool while providing appropriate safeguards against abuse. Library records have always been available to law enforcement through a grand jury subpoena, which can be issued without court review, without a finding of relevance, and without a finding of probable cause. At times, there have been compelling justifications for such records. Section 215 only gives the intelligence community equivalent access to records that have always been available to criminal investigators.

Safeguards are still in place, including the requirement of a FISA court order, upon the application of, at minimum, an Assistant Special Agent in Charge at the FBI. Indeed, the safeguards are more stringent than those imposed on criminal investigators.

2) Although I would be happy to assist the Committee in addressing these concerns, I do not believe I can make an informed judgment. It heartens me to see the Committee analyze and study the Patriot Act in a dispassionate and objective manner. There are many important issues to explore, including whether Congress should revise certain sections of the Act, such as the immigration provisions, in order to provide greater safeguards to privacy concerns and individual liberties. I have very little experience with those provisions and would defer to those with greater expertise.

It is important to note, however, that much of the criticism regarding the core law enforcement and intelligence investigation provisions of the Patriot Act are misleading, passionate exhortations that undermine attempts to have a constructive debate on the issues that do raise legitimate privacy and constitutional concerns. For the reasons more fully set forth in my prior oral remarks and written testimony, these core and critical law enforcement and intelligence provisions should be beyond debate and should not be weakened or eliminated. These provisions include, among others: § 206 (roving surveillance authority under FISA); § 209 (seizure of stored wire communications); § 213 (delayed notification

search warrants); § 214 (pen registers and trap and traces under FISA); § 215 (access to business records, including library records, under FISA); § 216 (single jurisdiction, single order pen registers, and internet pen registers); § 218 (which has the effect of easing the *de facto* restrictions on the intelligence community sharing information with law enforcement); § 219 (single jurisdiction search warrants in terrorism cases); and § 220 (single jurisdiction search warrants for e-mail).

THE HONORABLE LARRY E. CRAIG
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
HEARING ON "AMERICA AFTER 9/11: FREEDOM PRESERVED OR FREEDOM LOST?"
QUESTIONS FOR THE PANEL
NOVEMBER 18, 2003

QUESTION FOR MR. DINH:

1) You've been called the "Architect of the PATRIOT Act." As such, I have a drafting question for you that pertains to Section 213, the Sneak- and Peek provision of the Act. In drafting the SAFE Act, I came up with ONE possible scenario that would justify the inclusion of the language, "seriously jeopardizing an investigation or unduly delaying a trial," under the broad standard of an "adverse result." And that's to prevent the flight of other co-conspirators from prosecution. That's it. What's more is that this scenario can easily be read to be included in the provision, "result in flight from prosecution."

What originally prompted you to adopt the broad "adverse result" language, and do you know of any scenarios that, in your mind, would necessitate the inclusion of the language, "seriously jeopardizing an investigation or unduly delaying a trial?"

ANSWER:

I want to make clear that, despite differing characterizations in the popular media, my personal role with respect to the USA Patriot Act was no more than to kibbitz extant ideas, expertise, and proposals through the policy-making process of the executive and legislative branches during those momentous six weeks after September 11th. Any credit for the USA Patriot Act, and the successful prevention of another terrorist attack on the American homeland that the Act helped facilitate, goes to the hundreds of persons who devoted tens of thousands of man-hours responding to America's call in her hour of need.

As you know, the judicial authority to delay notice of a search warrant pre-existed the USA Patriot Act. Inherent in a federal judge's power to issue a search warrant is her authority to supervise the terms of its use, including the delay of any notice of the execution of the warrant. So firmly established is this authority that the Supreme Court in 1979 labeled as "frivolous" an argument that notice must be immediate. Even the Court of Appeals for the Ninth Circuit has consistently recognized that notice may be delayed for a reasonable period of time. The problem is that different judges exercised their discretion to delay notice differently, resulting in a mix on inconsistent standards, rules, and practices across the country.

Congress solved this problem in section 213 of the USA Patriot Act by adopting a uniform standard—that a judge may delay notice for a reasonable period upon showing of "reasonable cause" that immediate notification may have an adverse result such as endangering the life or physical safety of an individual, flight from prosecution, evidence

tampering, witness intimidation, seriously jeopardizing an investigation, or unduly delaying a trial.

Under the USA Patriot Act, a judge must still approve the delayed notice and only for specified situations. And the uniform "reasonable cause" standard is similar to the Supreme Court's reasonableness test to judge the circumstances surrounding the service of a warrant. For example, the Court last year unanimously approved as reasonable police entry into a drug house 15 seconds after announcing their presence. Indeed, the reasonable cause standard is arguably more restrictive than the prevailing standard prior to the USA Patriot Act—that the government show "good reason" to delay notice of a warrant.

Although I do not recall the exact circumstances under which Congress adopted the "adverse results" language contained in section 213, it is my belief that Congress sought to use a phrase that was pre-existing under law, in this case, 18 U.S.C. 2705. As you may know, the statutory definition of adverse result to include "seriously jeopardizing an investigation" also pre-existed the passage of the USA Patriot Act, and I have no special knowledge as to the drafting or legislative history of 18 U.S.C. 2705.

With respect to your specific request for examples where an investigation may be seriously jeopardized other than through the flight of a co-conspirator, I refer you to the letter from Assistant Attorney General William E. Moschella to the Honorable Dennis Hastert, Speaker of the House of Representatives, dated July 25, 2003. Pages 3 to 5 of that missive recount cases where a judge had the foresight to delay notice of a warrant for a short period of time and thereby saved from jeopardy a number of important investigations, including investigations into child pornography, drug trafficking, and terrorism.

THE HONORABLE LARRY E. CRAIG
UNTIED STATES SENATE COMMITTEE ON THE JUDICIARY
HEARING ON: "AMERICA AFTER 9/11: FREEDOM PRESERVED OR FREEDOM LOST?"
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NOVEMBER 18,2003

QUESTIONS FOR BOB BARR NADINE STROSSEN, VIET DINH, JAMES ZOGBY, JAMES DEMPSEY, AND ROBERT CLEARY:

1) Though many of you have different opinions about the legitimacy of several provisions of the PATRIOT Act, there seems to be real disagreement over what Section 215 (as it amends Section 501 of FISA) authorizes law enforcement to do. Some argue that Section 215 allows law enforcement to obtain business records at a standard lower than relevance, simply by specifying in the application that the records are "sought for" an investigation to protect against international terrorism or clandestine intelligence. Opponents assert that the safeguard put in place -- that is, an application to a federal judge, language providing that an investigation of a United States person may not be conducted solely upon the basis of activities protected by the first amendment, and the requirement of frequent Congressional oversight -- make such reservations unfounded. What do you say to this?

ANSWER:

I very much appreciate the opportunity to clarify some of the recent confusion and misunderstanding engendered by section 215. Grand juries for years have issued subpoenas to businesses for records relevant to criminal inquiries. Section 215 gives courts the same power, in national security investigations, to issue similar orders to businesses, from chemical makers to explosives dealers. Like its criminal grand jury equivalent, these judicial orders for business records conceivably could issue to bookstores or libraries, but section 215 does not single them out.

Section 215 is narrow in scope. The FBI cannot use it to investigate garden-variety crimes or even domestic terrorism. Instead, section 215 can be used only to "obtain foreign intelligence information not concerning a United States person," or to "protect against international terrorism or clandestine intelligence activities."

Section 215 plainly states that a judge "shall enter an ex parte order as requested, or as modified, approving the release of the records if the judge finds that the application meets the requirements of this section." Some have mischaracterized the "shall enter" language as requiring the judge to rubber stamp the government's application and depriving the judge of any discretion to assess the validity of that application. Such a reading offends common sense and established rules of grammar. Although I am far from being an expert on the English language, but it seems rather obvious that the "shall enter" phrase is qualified by the conditional clause "if the judge finds that the application meets the requirements of this section." Indeed, the provision clearly contemplates that the judge has discretion to "modify" the requested order.

Because section 215 applies only to national security investigations, the orders are confidential. Such secrecy raises legitimate concerns, and thus Congress embedded significant checks in the process. First, they are issued and supervised by a federal judge. By contrast, grand jury subpoenas are routinely issued by the court clerk.

Second, every six months the government has to report to Congress on the number of times and the manner in which the provision has been used. The House Judiciary Committee has stated that its review of that information "has not given rise to any concern that the authority is being misused or abused." Indeed, the Attorney General has recently made public the previously classified information that section 215 has not been used since its passage.

It may well be that the clamor over section 215 reflects a different concern, that government investigators should not be able to use ordinary criminal investigative tools so easily to obtain records from purveyors of First Amendment activities, such as libraries and bookstores. Section 215, with its prohibition that investigations "not be conducted of a United States person solely upon the basis of activities protected by the first amendment of the Constitution of the United States," may indeed be more protective of civil liberties than ordinary criminal procedure. Perhaps this limitation should be extended to other investigative tools. In this regard, I note that the Attorney General's Guidelines governing criminal and terrorist investigations already require that "such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States." Congress may well consider whether to codify this requirement, but that is a debate far different from the utility of section 215.

2) In your written testimony, several of you have distinguished between abuses of civil liberties under the PATRIOT Act and abuses outside of the Act. Speaking within the four corners of the PATRIOT Act, what's the single most troubling provision in your estimate? Please provide concrete examples of abuses, ambiguities, or problematic drafting (where possible), and how you'd change the provision if given the chance.

ANSWER:

As my answer to your previous questions indicate, I do not think that fears about sections 213 and 215 of the USA Patriot Act, although no doubt sincere, are well-founded in fact or law. All the sound and fury over these politically charged issues, however, have drowned out constructive dialogue about fundamental changes in policy. For instance, section 218 of the USA Patriot Act amended the Foreign Intelligence Surveillance Act to facilitate increased cooperation between agents gathering intelligence about foreign threats and investigators prosecuting foreign terrorists. I doubt that even the most strident of critics would want another terrorist attack to happen because a 30-year-old provision prevented the law enforcement and intelligence communities to communicate with each other about potential terrorist threats.

This change, essential as it is, raises important questions about the nature of law enforcement and domestic intelligence. The drafters grappled with questions such as whether the change comports with the Fourth Amendment protection against unreasonable searches and seizures (yes), whether criminal prosecutors should initiate and direct

intelligence operations (no), and whether there is adequate process for defendants to seek exclusion of intelligence evidence from trial (yes). We were confident of the answers. But lawyers are not infallible, and the courts ultimately will decide. Meanwhile, better airing of these weighty issues would help the public understand the government's actions and appreciate their effects.

I do not mean to suggest that section 218 poses a problem to be cured by new legislation, nor do I have a ready palliative to prescribe. I do think that the American public and their public officials should pay closer attention to the truly important jurisprudential questions posed by the war on terror -- most of which have little, if anything, to do with the important work of this Committee and the U.S. Congress in passing the USA Patriot Act.

Hearing Before the Senate Judiciary Committee
"America After 9/11: Freedom Preserved Or Freedom Lost?
November 18, 2003

QUESTIONS SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

QUESTIONS FOR PROFESSOR VIET DINH

I have been deeply troubled by the Administration's recent action with respect to so-called "enemy combatants." I can imagine no greater modern-day threat to civil liberties and to our historic understanding of due process than the Administration's insistence that it has unfettered power to detain indefinitely any individual (including U.S. citizens seized on U.S. soil) - without charging them with any crime, without trial, and without providing them with access to an attorney. It strikes me that, at the very least, these individuals should be afforded a meaningful opportunity to contest their status.

Question: I was intrigued by your testimony on this subject and especially appreciative of your willingness to concede that many of the questions on this topic are both difficult and without precedent. In your testimony, you suggested that Congress has an important role to play in helping the Administration develop a coherent policy with respect to enemy combatants. Please describe in greater detail the role that you believe Congress can and should play? What, if any, statutory improvements would you suggest?

ANSWER:

I am grateful for your question and your genuine desire to assist the executive branch in this most difficult of decisions in these most difficult of times. It is my strong belief that the Constitution commits the whole of executive power in the President of the United States. Compare U.S. Const. Art. I, sec. 1, cl. 1, with id. Art. II, sec. 1, cl. 1. Perhaps in no other area is executive duty higher--and, correspondingly, executive authority greater--than the defense of our nation and the conduct of armed conflict against enemy belligerents.

That said, Congress has a significant voice in the conduct of executive branch activities. As Justice Jackson famously articulated in his concurring opinion in the Steel Seizure Cases, executive authority in areas of shared power ebbs with congressional disapproval and rises with congressional acquiescence. In matters of core executive authority such as war, however, it is important that Congress does not act in a manner that unduly intrudes in executive prerogative and creates unnecessary constitutional conflicts with a coordinate branch of government. Such care is counseled as much by the reality that our enemies not be able to question our country's resolve as by concern for the constitutional separation of powers.

The Administration recently announced that it would permit lawyers access to Yasser Hamdi and Jose Padilla. This is an important development because the government has always maintained that the courthouse doors are open to the detainees to challenge the legality of their detention through habeas corpus. Access to counsel makes access to the courts meaningful.

The determination as to when and under what circumstances to grant access to counsel disruptive to the interrogation process necessarily rests with the executive in the first instance. Few would doubt that, if Al Qaeda leaders like Khalid Sheik Mohammed were held in U.S. territory, they would have continuing intelligence value and government efforts to extract information should not be disrupted. On the other hand, when access would not disrupt the intelligence flow, as the government has decided for Hamdi, the government has no reason to bar detainees from speaking with their lawyers.

There is room for the Administration to move into even safer legal harbor by providing, after a reasonable period, some procedure for Padilla and Hamdi to contest the underlying facts of their detention. It need not be full-dress judicial process. A military hearing to evaluate the information underlying the detention would suffice. The Supreme Court is more likely to defer to an executive judgment when the process by which it is arrived at is capable of inspection.

The developments in the Hamdi and Padilla cases should comfort those who distrust executive authority because they demonstrate that the Administration is exercising its discretion responsibly to accommodate changed circumstances. Likewise, those who support executive prerogative should commend the Administration for not pushing the envelope and risk a judicial backlash that would erode presidential authority.

The Administration's action is especially noteworthy given Congress' silence. Two years after the horror of 9/11 and recognizing that the Administration's efforts have successfully protected the American homeland from another catastrophic terrorist attack, it is time for Congress to contribute its voice, either to affirm the President's authority or to suggest refinements to Administration policy. I agree with Judge Michael Chertoff that the country collectively needs think more systematically about a sustainable architecture for determining when, why, and for how long someone may be detained as an enemy combatant.

With respect to specific procedures, one must distinguish between preliminary processes to determine whether a person is an enemy combatant (which are akin to the military or executive version of a probable cause hearing) and military tribunals to determine a combatant's unlawful conduct (which are akin to the military or executive version of a trial). One should also keep in mind that any person under U.S. detention has a right to file a habeas petition to challenge the legality of his detention. Whether the courts would intervene depends on a host of questions—whether the person is being held in U.S. territory, whether the person is a U.S. citizen, to what extent would the courts defer to executive fact-finding and decisionmaking processes, etc.—which the Supreme Court is currently considering in several cases.

Question: It appears that the Administration is making somewhat arbitrary and ad hoc decisions regarding designation of individuals as enemy combatants. There appear to be no uniform principles that guide the decision-making process - as evidenced by the fact that seemingly similar defendants are treated very differently. For example, both Yasser Hamdi and John Walker Lindh are both U.S. citizens supposedly captured on the battlefield in Afghanistan and then shipped to the U.S. Naval Station in Guantanamo Bay, Cuba -- yet, Hamdi has been designated an enemy combatant, and Walker Lindh's case was settled

within the context of the civilian criminal system. How would you suggest that the designation policy be modified to make the process more uniform and coherent?

As an initial matter, one must distinguish between preliminary processes to determine whether a person is an enemy combatant (which are akin to the military or executive version of a probable cause hearing) and military tribunals to determine a combatant's unlawful conduct (which are akin to the military or executive version of a trial). One should also keep in mind that any person under U.S. detention has a right to file a habeas petition to challenge the legality of his detention. Whether the courts would intervene depends on a host of questions—whether the person is being held in U.S. territory, whether the person is a U.S. citizen, to what extent would the courts defer to executive fact-finding and decisionmaking processes, etc.—which the Supreme Court is currently considering in several cases.

The initial decisions by the executive whether to designate a person as an enemy combatant subject to military detention or to bring a criminal indictment, whether to achieve justice through a military tribunal or through civilian criminal courts, and under what circumstances to grant access to counsel or other procedures of necessity depend on the circumstances of particular cases. That is why, I believe, that the Constitution commits these decisions to the Executive in the first instance, subject as always to judicial review under habeas proceedings.

Question: Assuming that the President under certain limited circumstances, should be able to designate individuals as enemy combatants - what basic criteria should inform designation decisions? What factors should the executive branch consider when designating an individual as an enemy combatant, as opposed to a prisoner-of-war or criminal defendant?

The general considerations include whether a person has continuing intelligence value, whether sources and methods of intelligence would be compromised if revealed in a public trial, and the timing of any eventual adjudication. The civilian criminal system operates under very strict legal and constitutional mandates with respect to these considerations. At the same time, a military process I believe could accommodate the military interest in these areas while affording basic protections against mistake or abuse. The exact parameters of this process depend on a host of questions—whether the person is being held in U.S. territory, whether the person is a U.S. citizen, to what extent would the courts defer to executive fact-finding and decisionmaking processes, etc.—which the Supreme Court is currently considering in several cases.

I should be happy to provide comments on the constitutionality and wisdom of specific proposals that Congress may consider to assist the Executive and the Courts in these important matters.

Question: Once an individual is designated as an enemy combatant, what types of procedural and substantive safeguards should be afforded to accused individuals, without sacrificing our national security interests?

As an initial matter, one must distinguish between preliminary processes to determine whether a person is an enemy combatant (which are akin to the military or executive version of a probable cause hearing) and military tribunals to determine a combatant's unlawful conduct (which are akin to the military or executive version of a trial). One should also keep in mind that any person under U.S. detention has a right to file a habeas petition to challenge the legality of his detention. Whether the courts would intervene depends on a host of questions—whether the person is being held in U.S. territory, whether the person is a U.S. citizen, to what extent would the courts defer to executive fact-finding and decisionmaking processes, etc.—which the Supreme Court is currently considering in several cases.

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Hearing Before the Senate Judiciary Committee
"America After 9/11: Freedom Preserved Or Freedom Lost?
November 18, 2003

QUESTIONS SUBMITTED BY SENATOR EDWARD KENNEDY

1. Questions to witnesses- Professor Dinh

"Extraordinary Rendition" and Torture / Maher Arar Case: I would like to ask all the witnesses for their views on the Maher Arar case. Mr. Arar runs a consulting company in Ottawa. He previously worked as an engineer for a high-tech company in Natick, Massachusetts. He has dual Canadian and Syrian citizenship, but has not lived in Syria for sixteen years.

Returning to Montreal from a family visit in Tunisia, Mr. Arar made a stopover at Kennedy Airport in New York City on September 26, 2002. Immigration officials detained him at the airport and told him he had no right to a lawyer because he was not an American citizen. He was taken to the Metropolitan Detention Center in Brooklyn, where F.B.I., New York police, and INS officials interrogated him for several days. Arar repeatedly asked to be sent home to Canada. He pleaded not to be sent to Syria, for fear he would be tortured.

Nevertheless, on October 8th, U.S, officials flew Mr. Arar on a small jet to Washington, where a new team of officials got on the plane. They flew to Arrunan, where the American officials handed Arar over to Jordanian authorities, who chained, blindfolded, and beat Arar while transporting him in a van to the Syrian border. In Syria, Mr. Arar was placed in a small, dark cell - three feet by six feet, much like a grave - and was confined there for almost a full year. He was slapped, beaten, and whipped on his palms, wrists, and back with an electric cable. He lost 40 pounds during his confinement. On October 5, 2003, the Syrian government released him; Syrian officials have told reporters that their investigators found no link between Mr. Arar and Al Qaeda. Mr. Arar is now back home in Canada,

Question (1): I assume that all agree with the proposition that U.S. officials should never engage in torture. Official acts of torture unequivocally violate the U.S. Constitution, the Convention Against Torture, which the U.S. has ratified, and customary international law. Do you believe it is appropriate for U.S. officials to turn over individuals like Maher Arar to countries such as Syria with the expectation that they will be tortured?

ANSWER:

I agree that the United States and all civilized nations should reject torture unequivocally. I have neither first-hand knowledge nor adequate understanding of the facts surrounding the Arar case to venture an opinion on its handling.

Question (2): According to news reports, CIA officials have repeatedly engaged in what it calls "extraordinary renditions": handing over captives to foreign security services known for their brutal treatment of prisoners and use of torture - sometimes with a list of questions the agency wants answered. Article 3 of the Convention Against Torture provides, "No State Party shall expel, return or extradite a person to another State where there are

substantial grounds for believing he would be in danger of being subjected to torture." Do you believe that the current Administration is complying with this provision?

ANSWER:

I do not have any first-hand knowledge concerning extraordinary renditions. Likewise, I have no information or basis to believe that the United States is contravening its obligations under Article 3 of the Convention Against Torture.

Question (3): In a November 6 speech to the National Endowment for Democracy, President Bush condemned the government of Syria for leaving its people "a legacy of torture, oppression, misery, and ruin." Syria's use of torture is widely known and has been criticized by the State Department in its annual human rights reports. Are you concerned that the Administration is undermining its message about human rights and the need for change in the Middle East, through its policy of rendering suspects to Syria and other countries for torture-based interrogations?

ANSWER:

I agree that the United States and all civilized nations should reject torture unequivocally. I do not have any first-hand knowledge or any basis to believe that the United States has a policy of rendering suspects other countries for torture-based interrogations.

Hearing Before the Senate Judiciary Committee
"America After 9/11: Freedom Preserved Or Freedom Lost?
November 18, 2003

QUESTION BY SENATOR PATRICK LEAHY FOR PROFESSOR VIET DINH

1. To date, the Administration has refused to establish any criteria for who may qualify as an "enemy combatant." On November 14, the *Washington Post* quoted Judge Michael Chertoff -- formerly head of the Criminal Division -- as stating "it may be time to develop a system by which enemy combatants could contest such designations." Do you agree with Judge Chertoff's suggestion for a system to allow enemy combatants to contest their designation?

ANSWER:

The Administration recently announced that it would permit lawyers access to Yasser Hamdi and Jose Padilla. This is an important development because the government has always maintained that the courthouse doors are open to the detainees to challenge the legality of their detention through habeas corpus. Access to counsel makes access to the courts meaningful.

The determination as to when and under what circumstances to grant access to counsel disruptive to the interrogation process necessarily rests with the executive in the first instance. Few would doubt that, if Al Qaeda leaders like Khalid Sheik Mohammed were held in U.S. territory, they would have continuing intelligence value and government efforts to extract information should not be disrupted. On the other hand, when access would not disrupt the intelligence flow, as the government has decided for Hamdi, the government has no reason to bar detainees from speaking with their lawyers.

There is room for the Administration to move into even safer legal harbor by providing, after a reasonable period, some procedure for Padilla and Hamdi to contest the underlying facts of their detention. It need not be full-dress judicial process. A military hearing to evaluate the information underlying the detention would suffice. The Supreme Court is more likely to defer to an executive judgment when the process by which it is arrived at is capable of inspection.

The developments in the Hamdi and Padilla cases should comfort those who fear executive authority because they demonstrate that the Administration is exercising its discretion responsibly to accommodate changed circumstances. Likewise, those who support executive prerogative should commend the Administration for not pushing the envelope and risk a judicial backlash that would erode presidential authority.

The Administration's action is especially noteworthy given Congress' silence. Two years after the horror of 9/11 and recognizing that the Administration's efforts have successfully protected the American homeland from another catastrophic terrorist attack, it is time for Congress to contribute its voice, either to affirm the President's authority or to suggest refinements to Administration policy. I agree with Judge Michael Chertoff that the country collectively needs think more systematically about a sustainable architecture for determining when, why, and for how long someone may be detained as an enemy combatant.

Hearing Before the Senate Judiciary Committee
"America After 9/11: Freedom Preserved Or Freedom Lost?"
November 18, 2003

Prof. Nadine Strossen
President, American Civil Liberties Union

Answers to Written Questions

Questions by Senator Patrick Leahy

1. The State Department's determination that Syria is among those countries that violate fundamental human rights by using torture casts serious doubt on the lawfulness of a policy of rendering detainees in United States custody – however and wherever captured and wherever held – to the government of Syria.

   In fulfillment of the United States' obligations under the Convention Against Torture, Congress has enacted legislation that makes the commission of torture by anyone – even outside the United States – a federal crime. The statute defines torture as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1). The term "severe mental pain or suffering" is further defined to include such techniques as threatened or actual forced administration of drugs, the threat of imminent death, or the threat of killing or torturing another. 18 U.S.C. § 2340(2). The State Department has found that Syria often uses techniques on prisoners that fall within this definition.

   United States courts have jurisdiction over the crime of torture if the alleged offender is a national of the United States or is present within the United States. 18 U.S.C. § 2340A. The crime of torture carries penalties of up to 20 years in prison and (if death results) life in prison or the death penalty. Id. The statute also provides the same penalties (except for the death penalty) for persons who conspire to commit torture. Incidentally, the crime of torture is also listed as a federal crime of terrorism under 18 U.S.C. § 2332b(g)(5)(B)(i).

   It is doubtful whether rendering any prisoner to Syria is consistent with United States obligations under the Convention Against Torture, given Syria's systematic use of torture. Where the United States knows of specific plans to use methods that amount to torture in the interrogation of particular suspects, it may well be a criminal offense for United States officials to participate in rendering a detainee to Syrian custody.

   In October 2003, the ACLU and other human rights organizations submitted a request for any records involving allegations of torture of detainees in

United States custody or who are in the custody of governments to which the United States rendered detainees. The request makes clear that the ACLU is not seeking the release of any properly classified information. Unfortunately, as in other cases in which the ACLU has requested basic information concerning terrorism investigations and detentions, the government has not provided responsive documents. We urge you and other members of the Senate Judiciary Committee to insist that these documents be released immediately.

2. The ACLU is profoundly disturbed by any reports that the FBI is collecting information on First Amendment activities because such information collection can chill unpopular speech or speech that is critical of government policies such as the war in Iraq. The revelation of the FBI's nationwide efforts to coordinate surveillance of peaceful protest activities with state and local law enforcement agencies shows that concerns about the erosion of civil liberties after September 11, 2001 are well-founded. The New York Times described a memorandum which specifies how FBI agents, in conjunction with local police, can counter the tactics of demonstrators. Particularly troubling is a section that warns against the so-called "intimidation" that results from protesters using hand-held video cameras to monitor police responses to demonstrations. Such use of videotape is entirely appropriate to both deter and document possible abuses by law enforcement officers.

Our concerns do not stop with the FBI's memorandum, but also relate to the misuse of Joint Terrorism Task Forces, such as the task force in Denver, Colorado, to collect information on citizens who are activists in local causes but have nothing to do with terrorism. We have also protested the relaxation of FBI investigative guidelines in place since the late 1970's. These guidelines now permit the monitoring of peaceful protests and religious and political meetings with no requirement that there be any indication anyone is planning to do anything illegal. The FBI has also indicated it has no mechanism for tracking how much of its agents' time is spend on such surveillance, frustrating accountability. The lack of any standard for the use of FBI investigative resources is an invitation to government action that is arbitrary at best and discriminatory at worst.

Congress should promptly hold hearings to investigate these revelations of surveillance of peaceful, constitutionally-protected activities by the FBI and by state and local police. Scarce law enforcement investigative resources would be better used investigating real terrorists, who do not announce their plans at peaceful demonstrations or public meetings. Congress should enact legislation to ensure that investigative resources are not diverted from the terrorism mission by prohibiting surveillance of demonstrations and political gatherings absent a reasonable indication that the gathering of such information would be relevant to the investigation or prevention of some criminal activity.

3. Our primary concern with programs like TIPS and TIA is their potential to create a surveillance society, in which law-abiding citizens and others must fear the government will keep track of their every electronic transaction. A lack of privacy safeguards, coupled with advances in technology, put few if any real barriers between the government's use of data collected by third parties and then aggregated for marketing or other purposes. Our privacy tools have not kept pace with advancing technologies. For more information about our concerns regarding data mining, please see the ACLU's report by Jay Stanley and Barry Steinhardt, *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society* (January 2003), which is appended at the end of these answers as appendix A.

   CAPPS II poses these dangers, but also poses other specific problems. For example, the government still has not provided for an effective way that someone who is wrongly flagged as a suspected terrorist, or otherwise as a danger to civil aviation, can get his or her name off what amounts to a "no-fly" list. These due process problems could undermine public confidence in the government's aviation security efforts and could also exacerbate the problem of racial profiling.

   Congress has barred the Transportation Security Administration (TSA) from proceeding with CAPPS II unless the Department of Homeland Security certifies that the program will be effective and that passengers' privacy, due process, and equal protection rights will be protected. The General Accounting Office (GAO) is also required to release a report by February 15, 2004, addressing these issues.

   For more information, please see the ACLU's fact sheet on problems with CAPPS II, which is appended at the end of these answers as appendix B. As this fact sheet explains, the concept behind the CAPPS II program suffers from fundamental flaws. The program should therefore be abandoned in favor of more effective and proven air security measures that require additional funding to implement. We urge Congress to fund these measures, rather than waste its limited air security dollars on a complex and ultimately unworkable surveillance system.

4. The policies of this Administration towards immigrants have had the effect of equating immigrants with terrorists. Even as the Department of Justice took swift and decisive action to stop hate crimes against Arabs, Muslims, and South Asians, it began a massive preventive detention campaign. This campaign has resulted in the secret detention and deportation of close to 1000 immigrants designated as "persons of interest" in its investigation of the attacks. Government officials now acknowledge that virtually all of the persons that it detained shortly after September 11 had no connection to terrorism. While the government told the public not to engage in ethnic stereotyping or to equate immigrants in general with terrorists, its own policies did precisely that.

Under new Department of Justice policies, immigrants today can be arrested and held in secret for a lengthy period without charge, denied release on bond without effective recourse, and have their appeals dismissed following cursory or no review. They can be subjected to special, discriminatory registration procedures involving fingerprinting and lengthy questioning concerning their religious and political views. An immigrant spouse who is abused by her husband must fear deportation if she calls the local police. Asylum-seekers fleeing repressive regimes like those of the Taliban or Saddam Hussein may face mandatory detention, without any consideration of their individual circumstances.

One example of an ill-considered policy that has been adopted after September 11, 2001 with implications for all immigrants – and not only those who are suspected of involvement in terrorism – is this Administration's invitation to state and local police to become deeply involved in immigration enforcement. This change to a decades-old Department of Justice policy violates the considered views of many state and local police chiefs and organizations. They fear such local involvement in federal immigration matters could pose a threat to public safety because it will drive a wedge between the police and immigrant communities. Immigrants who are victims of crime, or witnesses to crime, will fear contacting local police if they believe that they, or close family members, could be deported as a result.

The federal government is now adding the names of persons who are suspected only of civil immigration infractions into the National Crime Information Center (NCIC) database, which is available to state and local police. The new policy violates two federal statutes – the statute establishing the NCIC, which limits the NCIC to criminal violations, and the Immigration and Nationality Act, which sets forth a comprehensive regulatory scheme that specifies the limited circumstances in which state and local police may be enlisted to enforce immigration laws. As a result, the ACLU and its coalition partners have filed a lawsuit seeking to set aside this policy.

America should focus its resources on investigating and apprehending those who intend to commit acts of terrorism. America puts itself at greater risk by alienating immigrant communities, making immigrants distrustful and fearful of government.

The ACLU's Washington Legislative Office Director, Laura Murphy, provided comprehensive testimony on the effects of this Administration's policies on immigrants at a hearing before the Immigration Subcommittee of the House Judiciary Committee on May 8, 2003. That testimony is attached at the end of these answers as appendix C.

5. The ACLU, and coalition partners such as the Center for National Security Studies, have made a number of FOIA requests since September 11, 2001 regarding the government's detentions of "persons of interest" to the investigation, its use of national security letters and other surveillance powers expanded by the USA PATRIOT Act (including its expanded records power under section 215 of the Act), problems with innocent travelers who have found themselves on the government's "no fly" list, and allegations that suspects returned to Syria and other repressive regimes have been tortured.

   In every case, these requests have been rebuffed by the Administration and the ACLU has had to go to court to try to establish the public's right to know this basic information. The ACLU has been careful in its requests to make clear that we do not seek access to properly classified information. Still, the government has been adamant in its refusal to release this information. The government's attitude towards public access has certainly contributed to the mistrust many Americans have of its actions in the anti-terrorism arena. It is both ironic and troubling that, even as the ACLU and its partners are refused basic information from the government, officials complain that the public is not well informed about its anti-terrorism actions.

   One particularly stark example of such non-responsiveness, which is attached at appendix D, is an entirely blacked-out list of orders for national security letters. The list obviously provides no useful information at all about the government's use of this controversial surveillance power.

   In September 2003, Attorney General Ashcroft announced that the government had not used one particular section of the USA PATRIOT Act, section 215, to obtain any records (including library records), arguing that this showed the privacy concerns of library users resulted from "hysteria." In fact, the Attorney General's announcement did not quell legitimate concerns about the use of other powers, including national security letters, to monitor Americans' reading habits. The Department has made it clear that it reserves the right to use section 215 in the future, and may have done so since the Attorney General's announcement in September. Even assuming for the sake of argument, however, that the Attorney General's point is valid, the ACLU had been asking for this information via a request under the FOIA for well over a year before the Attorney General's announcement. It is hard to see how the Justice Department can say its critics are guilty of fomenting hysteria when it rebuffs legitimate FOIA requests that allegedly could allay privacy fears.

6. The Justice Department has, from the beginning of this debate, sought to obscure, rather than illuminate, the legitimate civil liberties concerns raised by parts of the USA PATRIOT Act. The Department's statements in defense of the USA PATRIOT Act have been largely non-responsive to the complaints of civil liberties organizations. The example of the nationwide search warrants provision, at section 219 of the Act, are a case in point. Civil

liberties groups do not object in principle to a nationwide search warrant power; rather, our concern is that the existence of such a power could provide a temptation for the government to engage in judge-shopping, i.e., choosing to apply for a warrant in a particular jurisdiction only because a judge is known to easily approve warrant applications. These concerns could be addressed by a sensible amendment to section 219 to ensure that a nexus exists between the investigation and the particular judge who is chosen to review nationwide search warrant applications.

The debate over the government's actions, and their impact on civil liberties, would be greatly aided by a more targeted discussion that focuses on the specific areas in which civil liberties are threatened.

Our most substantial objections to the USA PATRIOT Act concern only a handful of its provisions. Most of the highly troubling provisions of the USA PATRIOT Act are repealed by the Benjamin Franklin True Patriot Act, H.R. 3171. These are:

(1) Section 213, relating to `sneak and peak searches'.

(2) Section 214, relating to the use of pen registers for foreign intelligence purposes.

(3) Section 215, relating to the government's power to obtain certain business records under the Foreign Intelligence Surveillance Act.

(4) Section 216, relating to the use of pen registers in criminal cases.

(5) Section 218, relating to the Foreign Intelligence Surveillance Act .

(6) Section 411, relating to new grounds for deportation.

(7) Section 412, relating to mandatory detention of certain aliens.

(8) Section 505, relating to national security letters.

(9) Section 507, relating to educational records.

(10) Section 508, relating to collection and disclosure of individually identifiable information under the National Education Statistics Act of 1994.

(11) Section 802, relating to the definition of domestic terrorism.

The ACLU certainly agrees that many of the administration's most troubling actions are not authorized by the USA PATRIOT Act. Some of these actions are also rescinded or limited by the Benjamin Franklin True Patriot Act.

Other USA PATRIOT Act provisions, such as those regarding money laundering, may also pose dangers for civil liberties. These provisions have not been the focus of the ACLU's advocacy.

Finally, the ACLU certainly has no objection to large portions of the USA PATRIOT Act. Attached as appendix E is a chart that details the parts of the USA PATRIOT Act that the ACLU supports, or to which the ACLU has no objection. This chart may be useful to those who might wonder why the ACLU, which has been such a forceful critic of some parts of the USA PATRIOT Act, does not argue that the repeal of the entire Act is necessary to preserve civil liberties.

Questions by Senator Edward M. Kennedy

I. (1) It is completely inappropriate – and contrary to obligations the United States has assumed under the Convention Against Torture – for United States government officials to turn over custody of any person to any country if United States officials expect that country's government may torture that person. In fact, such action may well constitute a federal crime. Please see the answer to question 1 from Senator Leahy.

(2) If the news reports are accurate, the United States is clearly in breach of its international obligations under article 3 of the Convention Against Torture. Willful blindness seems the most appropriate description of the conduct recounted in these news reports. Outsourcing torture to be performed by others is no more acceptable, or lawful, than engaging in torture directly.

(3) Rendering suspects to Syria, or any other country that routinely practices torture, undermines the United States government's message urging respect for human rights everywhere, including in the Arab world. Actions speak louder than words. Credible allegations of cooperation by the United States in the use of unlawful interrogation practices will cause those who are fighting for human rights in countries that use torture to accurately view the United States as hypocritical. No amount of money spent on "public diplomacy" can erase the clear message sent by United States double standards on human rights in the war on terror.

II. (1) The Justice Department's decision to attack the findings of its own Inspector General regarding the mistreatment of immigration detainees after September 11 is deeply troubling. Such actions show that some of its officials still refuse to acknowledge any mistakes in its treatment of hundreds of immigration detainees, even when its own Inspector General has found serious abuses. These actions are also troubling to the ACLU as an organization because they seem to fly in the face of a speech given by FBI Director Robert Mueller at our membership conference on June 13, 2003. In that speech, Director Mueller indicated that the FBI welcomed

the Inspector General's report and would work to change government policy in light of its recommendations.

Given that the OIG's recommendations were quite limited, and the apparent openness of Director Mueller to considering those recommendations, the aggressive attacks on the OIG that were posted on a DOJ website are quite troubling and call into question the Administration's good faith.

On December 18, 2003, the Office of Inspector General filed a new, highly disturbing report that documents even more instances of physical abuses of September 11 detainees. That report relies on videotapes that the Inspector General was told during his previous investigation had been destroyed. In fact, the videotapes had not been destroyed but were not where they were supposed to be. These new revelations raise additional questions about the good faith of the Department and its dedication to internal oversight.

The ACLU submitted testimony for the record of a hearing held on June 25, 2003 before this Committee entitled "Lessons Learned – The Inspector General's Report on the 9/11 Detainees." That testimony is also available on the ACLU's website at:
http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13062&c=206

(2) The recommendations of the Office of Inspector General (OIG), while positive, do not go far enough in addressing the root causes of the mistreatment of September 11 detainees. The government established, after September 11, a "clearance" process that resulted in what amounted to a presumption of guilt. The process by which detainees were administratively "cleared" of involvement in terrorism was entirely separate from the immigration hearings at which they were given virtually no useful information about the reasons for their detention.

As a result, while implementing in full the recommendations of the OIG would be a important first step, the potential for civil liberties abuses will remain as long as the government adheres to a "hold until cleared" policy. The government should honor President Bush's promise to cease relying on secret evidence in deportation proceedings by abandoning this policy and instead should permit detainees to confront terrorism accusations directly in open court.

The ACLU joined with other national organizations in submitting comments to Secretary of Homeland Security Tom Ridge, detailing our recommendations on what the Homeland Security Department must do to reform its detention practices in light of the Inspector General's findings. That letter is attached as appendix F.

(3) and (4). The regulatory and policy changes in curtailing the due process rights of immigrants should be promptly addressed by Congress. Legislation should be introduced, and passed, that reverses these violations of fundamental fairness. Legislation should:

- Prohibit the blanket closures of immigration hearings and prevent secret arrests by allowing immigration judges to determine on a case-by-case basis whether and when information can be withheld from the press and the public;

- Stop the open-ended detention, without charges, of non-citizens who are never certified as terrorism suspects under the USA PATRIOT Act, through strict time limits on when charges must be brought;

- Ensure that all non-citizens have a meaningful bond hearing, unless specially designated by Congress as subject to mandatory detention;

- Let immigration judges determine bond based upon the facts of the case, not a result of unspecified claims of harm to national security;

- Create an independent immigration court system for meaningful administrative review;

- Terminate the NSEERS "special registration" program that applies to nationals of Arab and Muslim nations and provide relief to certain classes of individuals adversely affected by the program;

- Eliminate draconian criminal penalties for technical violations of registration requirements, and for simple failure to file change of address forms;

- Require that information contained in the NCIC database adhere to Privacy Act standards;

- Affirm constitutional limits on government's secret seizures of records and databases through amendments requiring individual suspicion for the use of USA PATRIOT Act intelligence powers; and

- Ensure due process for the targets of secret surveillance by allowing defendants to obtain, through the Classified Information Procedures Act, more information about evidence obtained under the Foreign Intelligence Surveillance Act that is used against them in criminal trials.

Questions by Senator Russell D. Feingold

1. The ACLU's concerns about section 215 of the USA PATRIOT Act are detailed in my written statement, where I also describe the ACLU's lawsuit challenging this provision as a violation of the First and Fourth amendments. These constitutional infirmities are not assuaged by the fact that the government says it has not used this power. The government retains the right to use section 215, and may have done so since the Attorney General's announcement in September.

   In any event, the existence of such a sweeping authority to obtain personal records – including library, bookstore, medical and other personal records – in intelligence investigations, without the ordinary safeguards associated with the criminal process, itself has a chilling effect on First Amendment and other constitutionally protected activity even if it is never used. In my written statement, I describe specific instances of organizations and individuals who have been chilled in the exercise of their constitutional rights by section 215. These instances show that the provision in section 215 that prohibits investigations of United States persons based "solely" on First Amendment activity has not proved a sufficient safeguard to ensure against the chilling of First Amendment rights.

   Section 215 differs in critical respects from grand jury subpoenas. Section 215 does not require the approval of a federal prosecutor, and the information that is sought by a section 215 order need not relate to any investigation of criminal activity. A target of a section 215 order – unlike the target of a grand jury subpoena – may not inform anyone that an order has issued. The secrecy of section 215 would prevent targets of government surveillance from raising alarms about the use of the power with members of the press or civil liberties organizations. Finally, section 215 provides no mechanism for a recipient of an order to seek to quash the order before a judge, while a grand jury subpoena does provide such a mechanism.

   Much of the public confusion surrounding section 215 may result from a series of misstatements and half-truths that Department officials have made in defending the controversial power. The ACLU has documented the Justice Department's misleading characterizations of section 215 in a report entitled "Seeking Truth from Justice: Patriot Propaganda," which is attached to the end of these answers as appendix G.

2. As I describe in my written statement, the secrecy surrounding the September 11 detentions had the effect of facilitating serious civil liberties abuses. As you point out, the government's release of the names of individuals it claims are connected to terrorism is inconsistent with its argument that revealing such names would harm national security. The government has not backed up its claims of harm with any specific evidence; rather, it has asked the courts to defer to its determination without such evidence.

Public arrests and public hearings are essential to ensure public confidence in the justice system. Communities that are deeply suspicious of the government's motives can see for themselves that suspects are being treated fairly. The world community can see that, even when faced with the threat of terrorism, the United States is committed to basic fairness and justice. Secrecy sends the opposite message.

3. Blanket claims that the government's actions have been upheld by the courts are inaccurate. At best, such claims are imprecise and premature. The Supreme Court has yet to issue a decision in any of the cases in which the Bush Administration's controversial policies have been challenged.

   On December 18, 2003, the Second Circuit Court of Appeals issued a dramatic rebuke to the President's claimed power to detain a United States citizen who was arrested on United States soil as "enemy combatant" without criminal charges or access to counsel. Notably, even the dissenting judge in that case – who would have affirmed the President's detention power – rejected the government's position that the detainee could be denied access to a lawyer. On the same day, the Ninth Circuit issued a decision rejecting the government's attempt to shield from judicial scrutiny all aspects of the detentions of suspected terrorists at a United States naval base in Guantanamo Bay, Cuba. The legal issues involving the Guantanamo Bay detainees will be reviewed by the Supreme Court. It is likely the issue of detention without charges of persons labeled "enemy combatants" will also be reviewed by the Supreme Court.

   In a case involving the government's blanket closure of September 11 detainees' immigration hearings, the Sixth Circuit ruled against the government, and the government declined to seek Supreme Court review. The government prevailed, by a 2-1 vote, in a similar case that was heard in the Third Circuit, and the Supreme Court declined our petition for certiorari in that case.

   With respect to the case involving the names of September 11 detainees, the government lost twice in the lower courts, once in New Jersey state court and once in the United States District Court in Washington, DC. While it has since prevailed on appeal, it did so in the New Jersey case only because it issued a superceding regulation that had the effect of nullifying New Jersey's century-old "jailkeepers' law" that required a book be kept detailing the names of detainees in New Jersey jails and prisons.

   Even in cases in which the government can be said to have won, the courts have often rejected its most extreme arguments. For example, in a case involving the expansion of intelligence surveillance under the Foreign Intelligence Surveillance Act (FISA), the special FISA court of review rejected the government's argument that a legitimate purpose of intelligence surveillance can be to uncover evidence of unrelated criminal activity that can be used as a pretext for detaining alleged foreign agents.

While the government is certainly mistaken in asserting that its actions have been upheld by the courts, when in fact most are still under consideration, it is true that, in the past, the courts have all too often failed to protect our liberties in the face of government assertions about national security. This means that judicial approval should not be the true measure of whether government action in fact accords with constitutional principles. Courts are not infallible, and Congress's independent duty to enforce constitutional rights is an essential element in the Constitution's overall scheme of checks and balances.

The Supreme Court upheld the internment of Japanese Americans, even though that gross violation of constitutional and human rights was not in fact justified by any actual security risk. The Supreme Court has never overturned its rulings in the Japanese American internment cases. Rather, it was Congressional action that finally provided some redress for that grave miscarriage of justice. This historic experience demonstrates why Congress must honor, with the utmost seriousness, its independent obligation to preserve and defend the Constitution. Congress cannot delegate this essential responsibility to the courts, especially when the courts too often are too deferential to the national security claims of the Executive Branch.

Questions of Senator Larry E. Craig

1. While section 215 does contain certain limits, these do not solve the basic problem with section 215: there is no standard for a judge to determine that a particular record is related to a spy, terrorist, or other foreign agent. The ACLU favors restoring the prior standard for FISA records searches of "specific and articulable facts" connecting the record sought with an agent of a foreign power, which you have also proposed in the Security and Freedom Enhanced Act of 2003. This one change would greatly alleviate any risk of abuse of this intelligence power. Without a change in the substantive standard, the other limits – including the requirement of a judge's order, and Congressional oversight – are not sufficient to protect against abuse.

2. As I describe in my written statement, while many abuses of civil liberties have occurred "outside of" the USA PATRIOT Act, it is simply wrong to say that the Act has not been abused. While many of the provisions of the USA PATRIOT Act that are most troubling are used in secret, the government is using these powers broadly in many cases not related to terrorism, and a number of abuses have already occurred which I describe.

   The ACLU is now preparing, and will soon be releasing, a report that describes the government's abuses of its authority under the USA PATRIOT Act. When that report becomes available, the ACLU's Washington Legislative Office will forward it to you and other members of the Senate Judiciary Committee.

   Among the most troubling provisions in the USA PATRIOT Act are:

- The expanded power to obtain business records under FISA (section 215) and to issue "national security letters" (section 505) – all without any evidence linking the records to a foreign agent,

- The "sneak and peek" provision (section 213) which threatens to turn an exception to the Fourth Amendment's "knock and announce" rule into a routine, rather than extraordinary, method of law enforcement,

- The poorly drafted "roving wiretap" provision, which manages to allow an intelligence wiretap where neither the name of the target nor the facility the target is using is specified, and which omits the sensible "ascertainment" requirement for intelligence roving wiretaps that is already required for criminal roving wiretaps, and

- The limited "sunset provision," which omits key provisions of the USA PATRIOT Act that should be examined again when some parts of the law expire in 2005.

Each of these provisions is targeted for modest – but essential – revisions by the bipartisan Security and Freedom Enhanced Act of 2003. We support these changes, which will help ensure the protection of civil liberties from some of the more troubling provisions of the USA PATRIOT Act.

Responses to Questions from the United States Senate Judiciary Committee

Hearing on "America after 9/11: Freedom Preserved or Freedom Lost?"

November 18, 2003

Dr. James J. Zogby
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Question Submitted by Senator Patrick Leahy

1.

A. The Arab American Institute has worked with federal, state and local law enforcement to assist efforts to protect the homeland. Recently, working with the Washington Field Office of the FBI, the Arab American Institute helped to create the first Arab American Advisory Committee, which works to facilitate communications between the Arab-American community and the FBI. I proudly serve as a member of the FBI Advisory Committee, which serves as a model and is now being copied across the United States.

After 9/11, AAI worked to find translators for the FBI, CIA, and US Army by, among other things, publishing notices on our website and including notices in our weekly email newsletter. The initial response from the community was so great that the FBI asked us to remove the notice from our website since they could not respond to all of the inquiries. In addition, we have made space available at different venues for the FBI to distribute recruiting information directly to the community.

B. Despite our efforts, the government has been unable to hire a sufficient number of translators. Based on discussions with government officials and feedback from the community, this is due to:

- The lengthy security clearance process, which often takes as long as a year. By the time the process is completed, many applicants have pursued other employment options.

- The apparent preference for native-born US citizens limits the pool. The larger pool of Arab Americans with Arabic language skills are naturalized citizens who were born overseas. However, based on our experience, it seems that the government would prefer not to hire naturalized citizens. In addition, the security clearance process for naturalized Arab American citizens seems to be even longer than the normal process.

- Government policies that single out Arab Americans for heightened scrutiny have created fear in the community and a reluctance among some to seek federal employment, especially in national security related positions. This is particularly true among recent immigrants, many of whom emigrated from countries with repressive governments, and therefore are more fearful of dealing with law enforcement.

Questions Submitted by Senator Edward M. Kennedy

I. "Extraordinary Rendition"/Torture

1. I agree that it is never appropriate for the United States to engage in torture. It is also inappropriate for the U.S. to turn over individuals to other countries when there is an expectation that they may be tortured. We are increasingly relying on intelligence and evidence provided by countries that engage in torture and cruel, inhuman and degrading treatment – Arab countries and Israel.

AAI is also very concerned about reports that U.S. personnel may have engaged in interrogation practices that constitute torture or cruel, inhuman, and degrading treatment in Afghanistan and Iraq, including painful bindings, contorted positions, sleep and food deprivation, piercing noises, and even beatings. We believe that the U.S. government should fully investigate these allegations to ensure the U.S. is fully complying with international law.

2. Based on reports that we have heard, it appears that the Bush administration is violating Article 3.

3. Yes. The Bush administration has rightly linked the spread of democracy and human rights to the war on terrorism. However, renditions of detainees to countries that use torture and the reported use of questionable interrogation tactics by U.S. personnel have harmed our ability to advocate credibly for human rights and democracy in the Middle East. In fact, some governments now point to American practices to justify their own human rights abuses. As President Bush has suggested, and as we have learned so painfully, anti-democratic practices and human rights abuses promote instability and create the conditions that can breed terrorism.

II.

NSEERS

1. No, targeting suspects based on their religion or national origin, rather than evidence of criminal or terrorist activity, is an ineffective counterterrorism strategy. As law enforcement experts recognize, it may be appropriate to consider a suspect's race, national origin, or religion, in combination with other descriptors, in the context of a suspect-specific profile. However, broad-based racial, ethnic or religious profiles waste law enforcement resources and alienate communities whose cooperation law enforcement needs. The ineffectiveness of religious and national origin profiling has been demonstrated in state and local law enforcement, and, as a result, many law enforcement agencies around the country have adopted strict policies prohibiting its use. Experts recognize that such profiles are similarly ineffective in counterterrorism efforts.

2. Several Bush administration programs, including NSEERS, have singled out large numbers of Arabs and Muslims for heightened scrutiny. The Arab American Institute has found that these programs have created fear and suspicion in the community, especially among recent immigrants, and damaged our efforts to build bridges between the community and law enforcement.

At the same time, these discriminatory practices have validated and even fed the suspicion that some have of Arabs and Muslims. They have created a public impression that federal law enforcement views our entire community with suspicion, which, in some cases, has fostered discrimination. For example, we received reports of instances where the FBI visited individuals at their workplace, and then these individuals were subsequently demoted or terminated by their employers.

There is a general feeing of intimidation in the immigrant community and a sense among Arabs and Muslims in particular that they are no longer welcome in the U.S. In response, many Arab and Muslim immigrants have tried to lower their profile by changing their names and/or appearances, or sticking to their local neighborhoods and community centers. In polling we have done, we find that Arab immigrants report that they are less likely to speak Arabic in public and to discuss political issues in public.

On the other hand, ethnic identification among U.S.-born Arab Americans has increased and they have become more politically active. Generally, the motivation for increased political activity is to protect the Arab American community.

AAI has worked to facilitate the recruitment of Arab Americans by the federal government. For example, we have published job notices on our website and in our weekly email newsletter. In addition, we have made space available at different venues for the FBI to distribute recruiting information directly to the community.

After 9/11, there was an overwhelming response from Arab Americans to the government's call for translators, which was driven by patriotism and a desire to contribute to the war on terrorism. The initial response was so great that the FBI asked us to remove the job announcement from our website since they could not respond to all of the inquiries.

Despite a high level of commitment to public service in the Arab American community, interest in federal employment has diminished since that time. Based on discussions with government officials and feedback from the community, this is due to:

- The lengthy security clearance process, which often takes as long as a year. By the time the process is completed, many applicants have pursued other employment options.

- The apparent preference for native-born US citizens limits the pool. The larger pool of Arab Americans with Arabic language skills are naturalized citizens who were born overseas. However, based on our experience, it seems that the government would prefer not to hire naturalized citizens. In addition, the security clearance process for naturalized Arab American citizens seems to be even longer than the normal process.

- Government policies that single out Arab Americans for heightened scrutiny have created fear in the community and a reluctance among some to seek federal employment, especially in national security related positions. This is particularly true among recent immigrants, many of whom emigrated from countries with repressive governments, and therefore are more fearful of dealing with law enforcement.

Arab Opinion Abroad

3. As a result of our decreased popularity and credibility abroad, it is more politically difficult for our allies to cooperate with our counter-terrorism efforts. American efforts to promote democracy and human rights are also hamstrung.

We must improve our public diplomacy efforts by, for example, providing sufficient funding for public diplomacy programs with direct support from the White House, as recommended in the Djerijian Public Diplomacy Report.

However, efforts to sell American policy alone will not halt the decline in America's popularity and credibility abroad. We can begin to reverse these trends only by changing our policies. We should implement a fair policy towards the Palestinian-Israeli conflict that shows balanced compassion for the suffering of both peoples, and that stresses the responsibilities of both parties and consequences of non-performance.

The President has spoken eloquently about bringing democracy and human rights to the Middle East. However, his rhetoric is undercut by his administration's policies toward the Middle East, which are perceived as unilateralist, militaristic, and disengaged from Arab and Muslim policy makers and civil society. We must improve our efforts to support and engage progressive Islamic and Arab leadership in specific programs to promote needed reforms, build understanding, and encourage respect for human rights.

Ultimately, however, as long as civil liberties abuses against Arabs and Muslim persist in the U.S., we will be viewed with suspicion in the Arab world and elsewhere abroad.

4. The change in perceptions of the U.S. in the Arab world and elsewhere in the last two years is striking. This is due largely to U.S. policies. According to polls we have conducted, Arab public opinion of the United States had dropped to very low levels even before the U.S.-led invasion of Iraq.

U.S. foreign policy regarding the Middle East, especially the Israeli-Palestinian conflict and Iraq, is a very significant factor, but perceived civil liberties abuses against Arab and Muslim Americans, immigrants, and visitors are also a contributing factor. Civil liberties abuses against Arabs and Muslims have been well-publicized in the Arab world and elsewhere, and there is a growing perception that Arab immigrants and visitors are not welcome in the United States. Stories of the mistreatment of Arabs and Muslims in the U.S. and the treatment of Iraqis by U.S. forces in their own country are high-profile front-page stories in the Arab media.

America's credibility in the Middle East is also on the decline due to, among other things, widespread sentiment that the Bush administration misled the world about the threat posed by Iraq and the belief that the U.S. preaches democracy and human rights abroad while abusing civil liberties at home.

There has also been a noticeable drop in interactions between the U.S. and the Arab and Muslim worlds. Fewer Americans visit the Middle East and fewer Arabs and Muslims visit the U.S. There has been a large decrease in the number of Arab and Muslim students, businesspeople, tourists, and patients seeking medical treatment in the U.S. Such visitors used to be valuable ambassadors when they returned to their countries, puncturing stereotypes about the U.S. and educating their fellow citizens about American democracy and human rights. Now there are fewer such ambassadors to counteract the regular media reports about Arab and Muslim immigrants and visitors who have been mistreated in the U.S. Each of these "human" stories feed the image of Americans as hostile and insensitive to the Arab and Muslim worlds.

Responses to Questions Submitted by Senator Joseph R. Biden, Jr.

1. The change in perceptions of the U.S. in the Arab world and elsewhere in the last two years is striking. This is due largely to U.S. policies. According to polls we have conducted, Arab public opinion of the United States had dropped to very low levels even before the U.S.-led invasion of Iraq.

U.S. foreign policy regarding the Middle East, especially the Israeli-Palestinian conflict and Iraq, is a very significant factor, but perceived civil liberties abuses against Arab and Muslim Americans, immigrants, and visitors are also a contributing factor. Civil liberties abuses against Arabs and Muslims have been well-publicized in the Arab world and elsewhere, and there is a growing perception that Arab immigrants and visitors are not welcome in the United States. Stories of the

mistreatment of Arabs and Muslims in the U.S. and the treatment of Iraqis by U.S. forces in their own country are high-profile front-page stories in the Arab media.

As a result of our decreased popularity and credibility abroad, it is more politically difficult for our allies to cooperate with our counter-terrorism efforts. In general, key allies in the Arab and Muslim world have cooperated with American counter-terrorism efforts, but this cooperation may actually harm U.S. national security by weakening popular support for those regimes in the long term. American efforts to promote democracy and human rights in the region are also hamstrung by our unpopular policies.

The Bush administration's counterterrorism policies, particularly enemy combatant designations, have had different effects in different parts of the world. We have heard reports that some European countries have expressed reluctance to cooperate with the U.S. in counterterrorism cases where suspects are denied due process or may be subjected to the death penalty. In the Middle East and elsewhere, enemy combatant designations and other civil liberties abuses have undermined efforts to improve respect for human rights. In fact, some countries with poor human rights records have cited Bush administration policies as justification for their own human rights abuses. They argue that they are fighting the same enemy as the U.S.

2. There has been widespread sentiment in the Arab and Muslim worlds that the U.S. uses international law to promote its policies while disregarding it when it runs counter to U.S. interests. For example, many in the Middle East point to an alleged double standard in the enforcement of international law against Israel and Iraq.

This belief has been reinforced by the perception that that the Bush administration preaches democracy and human rights abroad while abusing civil liberties at home. Polling, media reports, and anecdotal evidence from the Arab world indicate a great deal of unhappiness with the U.S. regarding its failure to observe international legal obligations in the war on terrorism. Many feel that, on the one hand, we tell the world of the need for an independent judiciary and due process, but, on the other hand, ignore those requirements at home in the name of national security. As a result, America's credibility in the Middle East and elsewhere is on the decline.

There is always a concern that Americans may face similar treatment abroad. The greater risk is that, due to our decreasing popularity and credibility, American civilians and military personnel abroad may become targets for militants who strike us where we are most vulnerable, e.g., Americans living and working overseas. There are already reports of aggravated social behavior (verbal abuse, physical abuse, social exclusion, etc.) against Americans in Arab and Muslim countries, reflecting popular frustration with American policies and pronouncements.

Responses to Questions Submitted by Senator Russell D. Feingold

1. As we have discussed with FBI Director Mueller on a number of occasions, federal law enforcement should adopt a community policing philosophy, working cooperatively with the Arab and Muslim American communities to build trust, rather than relying on crude ethnic and religious profiles. We have come to believe that law enforcement officials reject "politically driven" actions that hurt relations with the community. Nonetheless, programs like NSEERS and the Interview Project foster mistrust and fear in the community.

Federal law enforcement should learn from the experiences of state and local law enforcement. In recent years, many state and local agencies have rejected racial, ethnic and religious profiling as a law enforcement strategy because they have learned that it is ineffective. Broad-based profiles waste precious law enforcement resources and alienate the profiled communities, creating fear and suspicion and reducing the level of cooperation. In contrast, community policing makes the community a partner in law enforcement, building trust and cooperation and leveraging additional resources.

We have had some positive experiences with federal law enforcement that should serve as building blocks for crafting a community policing strategy. After 9/11, the federal government reached out to the Arab American community to educate us about federal civil right protections and facilitate the intake of discrimination complaints. Unfortunately, these efforts seem to have stopped completely, which has resulted in increasing alienation from the government.

The Arab American Institute has worked with federal law enforcement to assist efforts to protect national security. We have served as a bridge to connect law enforcement with our community. After 9/11, AAI worked to find translators for the FBI, CIA, and US Army by, among other things, publishing notices on our website and including notices in our weekly email newsletter. The initial response from the community was so great that the FBI asked us to remove the notice from our website since they could not respond to all of the inquiries. In addition, we have made space available at different venues for the FBI to distribute recruiting information directly to the community.

However, despite all of our efforts, too few Arab Americans have been hired by federal law enforcement and intelligence agencies. We would like to see a more consistent and sustained recruitment effort that resulted in increased representation of our community in federal law enforcement and national security positions. This would increase the government's knowledge of and sensitivity towards our community and thereby increase their effectiveness in working with our community.

Recently, working with the Washington Field Office of the FBI, AAI helped to create the first Arab American Advisory Committee, which works to facilitate communications between the Arab-American community and the FBI. This FBI Advisory Committee serves as a model and is now being copied across the United States. I proudly serve as a member of this Committee.

However, federal officials are not consistent in conducting outreach to the community to build relationships and explain law enforcement efforts and programs. Nor have they made a sufficient effort to solicit the advice and expertise of community leadership in formulating policy. We have repeatedly suggested that the government create a national interagency advisory committee, including Arab-American leaders, to assist in the formulation and implementation of policies that impact our community. Such an effort could help to avoid many of the implementation problems that have plagued many of the federal government's post-9/11 counterterrorism programs. For example, many of the problems with NSEERS and the Interview Project could have been avoided if the Justice Department, INS and FBI had consulted with community leadership before, rather than after, rolling out these programs.

We have also assisted the government in conducting cultural diversity training for federal law enforcement. This training is effective because increased understanding of the community increases law enforcement's ability to build trust and work with the community cooperatively. However, the training has been sporadic and inconsistent. We believe there should be an effort to provide such training to all federal law enforcement personnel who interact regularly with the Arab and Muslim American communities.

Responses to Questions Submitted by Senator Larry E. Craig

1. AAI supports the former view. Section 215 of the Patriot Act permits law enforcement to obtain a vast array of business records with minimal judicial oversight. Before the Patriot Act, in order to obtain business records under FISA, federal law enforcement was required to state specific and articulable facts showing reason to believe that the person to whom the records relate is a foreign power or an agent of a foreign power. If a court found that there were such specific and articulable facts, it would issue the order.

Under FISA as modified by Section 215, the FBI is only required to certify that the records are "sought for" an international terrorism or intelligence investigation, a standard lower than relevance. The FBI no longer must show that the documents relate to a suspected terrorist or spy. The court no longer has the authority to reject this certification.

Librarians have expressed concern that Section 215 might allow the FBI to conduct fishing expeditions, obtaining information concerning a patron's access to library materials regardless of the lack of suspicion. Arab Americans, especially recent immigrants, are concerned that they might be disproportionately targeted for such surveillance.

2. The Patriot Act made some reasonable and necessary changes in the law. However, the Patriot Act contains several controversial provisions that go to far, including Sections 213, 215, and 505. These provisions make it much easier for the FBI to monitor innocent people with little judicial oversight. AAI supports S. 1709, the SAFE Act, which would increase judicial oversight and impose reasonable limits on the FBI without affecting their ability to fight terrorism.

SUBMISSIONS FOR THE RECORD

Report on Hate Crimes and Discrimination Against Arab Americans:
The Post-September 11 Backlash
September 11, 2001- October 11, 2002

American-Arab
Anti-Discrimination Committee

The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization committed to defending the rights of Arab Americans and promoting their heritage. ADC, which is a non-partisan and non-sectarian, is the largest Arab-American grassroots organization in the United States. It was founded in 1980 by U.S. Senator James G. Abourezk in response to stereotyping, defamation and discrimination directed against Americans of various origins, including Arab.

Hon. Mary Rose Oakar
President

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EXECUTIVE SUMMARY

In this Report, the American-Arab Anti-Discrimination Commitee Research Institute (ADCRI) surveys the experiences of the Arab-American community in the year following the September 11, 2001, terrorist attacks.

PRINCIPAL FINDINGS

Hate crimes and discrimination

- Over 700 violent incidents targeting Arab Americans, or those perceived to be Arab Americans, Arabs and Muslims in the first nine weeks following the attacks, including several murders.
- 165 violent incidents from January 1-October 11, 2002, a significant increase over most years in the past decade.
- Over 80 cases of illegal and discriminatory removal of passengers from aircraft after boarding, but before take-off, based on the passenger's perceived ethnicity.
- Over 800 cases of employment discrimination against Arab Americans, approximately a four-fold increase over previous annual rates.
- Numerous instances of denial of service, discriminatory service and housing discrimination.

New discriminatory immigration policies

- Secret detentions, hearings and deportations.
- Alien registration based on national origin and ethnicity.
- "Voluntary interviews" of thousands of young Arab men.
- Monitoring of international students.
- Discriminatory visa screening procedures for young Arab men.
- Selective deportation of Middle Eastern "absconders."

Disturbing provisions of the USA Patriot Act

- Indefinite detention of foreign nationals without process or appeal.
- New search and surveillance powers with insufficient judicial review.
- Measures providing for guilt by association.

Additional civil liberties concerns

- Eavesdropping on attorney-client communications.
- Military tribunals.
- Suspension of constitutional rights of U.S. citizens without due process or appeal.
- Domestic law enforcement spying on lawful political and religious activities.
- Seizure of assets without due process, especially from Muslim-American charities.
- "Operation TIPS" — Terrorist Information and Prevention System, and other programs encouraging Americans to spy on each other.

Police and FBI misconduct

- Arbitrary and abusive stops and detentions.
- Abuse of detainees.
- Racial profiling or stereotyping.

Persistent problems in educational institutions

- Physical assaults, death threats, and overt ethnic and religious bigotry in schools and on college campuses.
- Harassment and bias against Arab-American and American-Muslim students by teachers and administrators.

Defamation by public figures and in the media

- A campaign of vilification against Islam and the Prophet Mohammed by leaders of the evangelical Christian right, including Jerry Falwell, Pat Robertson and Franklin Graham.
- Pervasive acceptance of hostile commentary against Arabs, Arab culture and Islam in mainstream media and publications.
- Increased use by the mainstream media of commentators whose main aim is to promote fear and hatred of Arab Americans, including Steven Emerson and Daniel Pipes.
- Openly racist statements by members of Congress and other prominent persons.

Instances of support, compassion and reassurance for Arab Americans

- Statements defending the community by many prominent persons, including President Bush and Secretary Powell, and institutions, including both houses of Congress.
- Fundraising for backlash victims.
- Volunteer escorts, especially for hijab-wearing Muslim women.
- Public relations efforts promoting tolerance.

CONCLUSIONS

- Arab Americans suffered a serious backlash following September 11, 2001.
- The worst elements of this backlash, including a massive increase in the incidence of violent hate crimes, were concentrated in the first nine weeks following the attacks.
- Arab Americans continue to suffer from increased levels of discrimination from their fellow citizens in many fields, while the government has shown a real commitment to uphold the law and punish offenders.
- Arab Americans, especially immigrants from the Arab world, have been the principal focus of new government powers that restrict individual freedoms and protections, and infringe upon civil liberties.

- Defamation against Arabs and Muslims, particularly attacks on Islam as a faith, has steadily increased in intensity and frequency during the entire period covered by this Report, laying the groundwork for potential future waves of hate crimes.
- In spite of numerous expressions of support for the community from public figures and thousands of private citizens, Arab Americans remain exceptionally vulnerable to hate crimes, discrimination, extreme vilification by prominent persons, and derogations of civil rights and liberties.

RECOMMENDATIONS

- Arab Americans should continue to work as closely as possible with the authorities and our fellow citizens to help ensure the security of our country while preserving civil rights and liberties.
- The government should continue to rigorously prosecute those who commit illegal discrimination and hate crimes.
- The government should avoid any new policies that discriminate on the basis of national origin, ethnicity or religious affiliation, especially in combination with other factors such as age and gender.
- There is no place in the American legal system for secret detentions, evidence, hearings or deportations, or for indefinite detention without due process.
- The fundamental human and constitutional rights of immigrants and foreign nationals in the United States should not be sacrificed, including the right to due process of law.
- Law enforcement investigations should be restricted to persons or groups suspected of criminal activity, not those engaged in lawful political or religious activities, and should never be based on national origin, ethnicity or religious affiliation.
- No form of racial profiling is ever acceptable or effective.
- Extraordinary measures taken in response to a national security emergency should, by definition, be regarded as temporary and rescinded as soon as possible.
- The government should make every effort to compile statistics on law enforcement stops and searches of Arab Americans, and security checks at airports.
- The Department of Transportation (DOT) should work with the airline industry, pilots' unions and Arab-American and Muslim groups to create guidelines for crews, including safeguards and recourses for passengers, in cases where concerns or actions based on perceived ethnicity are raised or taken following boarding.
- National leaders, including the President, and mainstream Christian, Jewish and Muslim religious leaders, should forcefully denounce public figures who engage in vicious defamation against Arabs and Islam.
- The media should not present hate speech as a legitimate contribution to the national conversation, or rely on commentators who routinely resort to racist stereotypes and smearing entire communities.
- The entertainment industry should begin to feature positive and neutral Arab and Arab-American characters, and move away from stereotypical Arab villains which have long been used and have a negative impact.
- Schools, colleges and universities should make every effort to ensure that their students have access to basic and accurate education on the fundamentals of Islam and Arab culture.
- Arab Americans should redouble their efforts to build bridges with other communities, engage in civic life at all levels of American society, and empower themselves within the political system.

The US Patriot Act
Immigration and Immigration Changes and Problems

- **Arab American Immigration:**

  - Arabs began immigrating to the US as early as the early 1800's. Arab immigrants and Arab Americans have fought and died for the US in every war since that time.

  - The first major wave of immigrants came between 1875 and lasted through 1920. This first group was primarily made up of Christian Syrians and Lebanese.

  - The second major wave came after World War II. Many of these immigrants were from rural areas and had limited amounts of education. They were from Egypt, Palestine, Jordan, Yemen, and Iraq.

  - After the 1970's, immigrants from the Arab World (22 countries covering North Africa and the Middle East except for Iran and Israel) were more diverse in terms of their country of origin, religious background, and educational achievements. Many of these immigrants came and continue to come because of the political and economic hardships that hd been escalating over the last few decades.

  - There are approximately three million Arab-Americans, 35% of whom live in California, New York, and Michigan. The other states with significant numbers of Arab Americans are Illinois, Ohio, Texas, Florida, Massachusetts, New Jersey, and Pennsylvania.

  - According to the US Census 2000 Supplementary Survey; 32% of Arab Americans are of Lebanese origin, 11% Syrian, 10% Egyptian, 5% Palestinian, 5% Jordanian, 4% Moroccan, 3% Iraqi, 20% unidentified Arab origin, and 10% from the other Arab countries.

- **Immigration Problems Since 9/11:**

  - 8,000 Arab immigrants were subjected to the "voluntary" interview program initiated by Attorney General Ashcroft.

  - Thousands of men, mostly of Arab and South Asian origin, have been held in secretive federal custody for weeks and months, sometimes without any charges filed against them. The government has refused to disclose their names and whereabouts even when ordered to do so by the courts.

  - The press and the public have been barred from immigration court hearings of those detained after September 11, 2001, and the courts are ordered to keep secret even that the hearings are taking place.

- The "Deportation Absconder Apprehension Initiative," initiated by Attorney General Ashcroft, targeted 6,000 Arab men based solely on their national origin for outstanding orders of deportation even though there were 315,000 with outstanding orders of deportation. These mens' information was placed in the national criminal database operated by the FBI and accessed by all local and state law enforcement.

- The Special Call-in Registration Program (a.k.a. National Security Entry Exit Registration System; NSEERS), also initiated by Attorney General Ashcroft, targeted men from 25 countries (all Arab or Muslim with the exception to North Korea) to register, re-register, and go through departure control with immigration authorities. Failing to do so resulted in a criminal felony and deportability from the US.

- Those required to register faced deadlines to appear at a local immigration office. They are also required to re-register within ten days of their one year anniversary of registering. Additionally, they are required to go through a departure control interview at the airport before leaving the US. Finally, if they return and are registered at the airport, they are required to re-register between days 30 and 40 of their stay in the US.

- The Justice Department did nothing to inform those required to register of this new requirement, resulting in 13,000 men facing deportations. Additionally, those who failed to register were also placed in the national criminal database; the FBI's national criminal database. According to the Attorney General's office, the special registration program resulted in the "detention and removal of eleven alleged terrorists," none of whose names or identities were made public nor charged with or convicted of any terrorist activity. Rather, those individuals were deported for violating civil immigration laws.

- 8) Of the 515 individuals Attorney General Ashcroft claims were deported due to "terrorist ties" not one person was detained for, charged with, or convicted of any terrorist activity. All were deported due to technical immigration violations which are civil (not criminal) in nature.

- **<u>The USA Patriot Act:</u>**

  - The Patriot Act was passed within six weeks of the terrorist attacks of Sept. 11, 2001. No hearings or discussion took place when it was introduced. The House version (viewed by many as more moderate) was replaced with the Senate version without compromise by the House Judiciary Committee. Only one Senator, Russ Feingold (D-WI) voted against it in the Senate. House members were not given a chance to even read the legislation before facing the full-vote which was 356 to 66.
  - The Patriot Act gives the President and the Attorney General a great deal of

latitude in regard to what they perceive as acts of terrorism - especially those actions that are "calculated to influence or affect the conduct of government."

- Will speaking out in a public forum against the government's "War on Terrorism" be seen as an action "calculated to influence or affect the conduct of government?"
- Does the government feel intimidated by persons who question or expose their conduct?
- Does publishing something that the government wishes suppressed become an act designed "to retaliate against government conduct?"
- Will driving around with a hunting rifle in the gun rack of a pick-up truck intimidate a government employee?

- Some of the troubling sections include:
  - Sec. 215 - expanding the government's ability to obtain records of individuals held by others including library records, medical records, credit records, membership records, etc. (ADC is party to the litigation opposing this section).
  - Sec. 213 - expanding the government's ability to search private property without notice to the owner by simply obtaining a secret court order without showing probable cause - known as the "sneak and peak" provision.
  - Sec. 412 - giving the government the power to detain non-citizens up to seven days without charging them with anything and up to six-months if the person's release is deemed a threat to the national security of the US. This authority is reserved strictly to the Attorney General with no possible judicial review or appeal.
  - Sec. 218 - expanding the government's powers under the Foreign Intelligence Surveillance Act -FISA- which provides a narrow exception to the Fourth Amendment.
  - Sec. 214 - expanding the government's "trap and trace" search ability - another Fourth Amendment exception, to collect the origin and destination of communications and not simply the content of communication.
  - Sec. 802 - creating a federal crime of "domestic terrorism" that broadly

extends to "acts dangerous to human life that are a violation of criminal laws" if they "appear to be intended to influence the policy of a government by intimidation or coercion." This may include the example of marching in an anti-globalization protest where someone decides to vandalize a McDonalds or burn a vehicle.

- Sec. 411 - forbidding representatives of a political or social group "whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines the United States efforts to reduce or eliminate terrorist activities." Additionally, the term "engage in terrorist activity" has also been expanded to include soliciting funds for, soliciting membership for, and providing material support to, a "terrorist organization," even when that organization has legitimate political and humanitarian ends and the non-citizen seeks only to support these lawful ends. In such a situation, Sec. 411 would permit guilt to be imposed solely on the basis of political associations protected by the First Amendment. To complicate matters further, the term "terrorist organization" is no longer limited to organizations that have been officially designated as terrorist and that therefore have had their designations published in the Federal Register for all to see. Instead, Sec. 411 includes as "terrorist organizations" groups that have never been designated as terrorist if they fall under the loose criterion of "two or more individuals, whether organized or not," which engage in specified terrorist activities. In situations where a non-citizen has solicited funds for, solicited membership for, or provided material support to an undesignated "terrorist organization," Sec. 411 saddles him with the difficult, if not impossible, burden of "demonstrat[ing] that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity." Furthermore, while Sec. 411 prohibits the removal of a non-citizen on the grounds that he solicited funds for, solicited membership for, or provided material support to, a designated "terrorist organization" at a time when the organization was not designated as a "terrorist organization," Sec. 411 does not prohibit the removal of a non-citizen on the grounds that he solicited funds for, solicited membership for, or provided material support to, an undesignated "terrorist organization" prior to the enactment of the Act.

- Finally, not one single alleged-terrorist has so far been detained and/or arrested as a result of any section within the USA Patriot Act. The only person so far facing terrorism charges related to the September 11, 2001, attacks is Zacharias Moussaoui who was arrested as a result of good'ole fashion law enforcement work not related in any way to the USA Patriot Act.

- Aside from the Constitutional arguments that are made, the Patriot Act has indeed made our country weaker; creating internal divisions, weakening our time proven

system of checks and balances, especially weakening the Judicial Branch of the government, and providing historical powers to the Executive Branch of the government without demonstrating any benefits.

- **Immigration Laws and Their Effects on Citizens:**
  - The 1798 Alien & Sedition Act was extended during World War II by the Enemy Alien Act which resulted in the detention of over 100,000 Japanese Americans, 70,000 of whom were US citizens.
  - The 1903 Immigration Act and the 1798 Alien & Sedition Act were both extended to citizens during World War I and were later, with the introduction of the Smith Act in 1940, used to target US citizens during the Red Scare by Sen. MacCarthy.
  - After the first anniversary of September 11, 2001, National Public Radio conducted a poll asking US citizens whether they have had to sacrifice any of their own civil liberties in the war against terrorism: 7% said Yes.
  - After the second anniversary of September 11, 2001, CBS News conducted a poll asking US citizens the same question: 52% said Yes.
  - The "Domestic Security Enhancement Act" (a.k.a. Patriot Act 2) would grant the government sweeping powers not only over non-citizens, but also over US citizens. Some of the troubling sections include:
    - Sec. 201 - The government would no longer be required to disclose the identity of anyone, even an American citizen, detained in connection with a terror investigation, until criminal charges are filed, no matter how long that takes.
    - Sec. 312 - Current court limits on local police spying on religious and political activity would be repealed.
    - Secs. 126, 128, 129 - The government would be allowed to obtain credit records and library records without any warrant.
    - Sec. 103 - Wiretaps without any court order for up to 15 days after a terror attack would be permissible.
    - Secs. 501, 120, 121, 428 - The reach of an already overbroad definition of terrorism would be expanded, individuals engaged in civil disobedience could risk losing their citizenship and their organization could be subject to wiretapping, and asset seizure.

- Secs. 320, 321 - Americans could be extradited, searched and wiretapped at the request of foreign governments, without regard to any international treaties.

- Secs. 503, 504 - Lawful immigrants would be stripped of the right to a fair deportation hearing and federal courts would not be allowed to review immigration rulings.

EXECUTIVE BRANCH ACTIONS

The following are administrative actions taken by the Executive Branch since 9-11. These actions:

- curb rights and due process
- undermine fundamental constitutional protections
- profile certain communities and target them for heightened measures
- respond to various actions by the INS that have drawn criticism

- **September 20, 2001: Detention without Charges**

The Department of Justice publishes an interim regulation allowing detention without charges for 48 hours or "an additional reasonable period of time" in the event of an "emergency or other extraordinary circumstance". The rule is made effective 9-17-02, *three days prior to publication.* Comments due 11-19-01. *[66 FR 183 at 48334, 9-20-01]*

- **September 21, 2001: Closed Hearings**

Chief Immigration Judge Michael Creppy issues a memo stating: "the Attorney General has implemented additional security procedures for certain cases in the Immigration Court". Creppy further states that these procedures "require" IJs to "close the hearing to the public…". *[Creppy Memo, 9-21-01, 12:20 PM]*

- **October 4, 2001: FBI "mosaic" Memo, Opposing Bond**

The FBI begins to use a boilerplate memo to oppose bond in all post-9-11 cases. The memo states:

> "The FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals who have been detained…the FBI has been unable to rule out the possibility that respondent is somehow linked to, or possesses knowledge of, the terrorist attacks…" *[Memo submitted to United States Department of Justice, Executive Office for Immigration Review, Immigration Court, "In Bond Proceedings", "Exhibit A", signed by Michael E. Rolince, Section Chief, International Terrorism Operations Section, Counter terrorism Division, Federal Bureau of Investigation]*

- **October 31, 2001: Automatic Stays of Bond Decisions**

DOJ issues an interim regulation that provides an automatic stay of IJ bond decisions wherever DD has ordered no bond or has set a bond of $10K or more. The rule is made effective 10-29-02, two days *prior to publication.* Comments due 12-31-01. *[66 FR 211, at 54909, 10-31-01]*

- **October 31,2001: Eavesdropping on Attorney/Client Conversations**

DOJ issues a Bureau of Prisons interim regulation that allows eavesdropping on attorney/client conversations wherever there is "reasonable suspicion…to believe that a particular inmate may use communications with attorneys to further or facilitate acts of terrorism"; the regulation requires written notice to the inmate and attorney, "except in the case of prior court authorization". The rule is made effective 10-31-01. Comments due 12-31-01. *[66 FR 211, at 55062, 10-31-01]*

- **October 31, 2001: New Terrorist Groups Designated**

The Attorney General issues a letter requesting that the Secretary of State designate 46 new groups as terrorist organizations, per powers authorized by USA Patriot Act (9 groups identified in President's Executive Order of 9-23-02; 6 groups identified in joint State-Treasury designation of 10-12-02, and 31 groups designated by DOS Patterns of Global Terrorism Report, published April 2001). *[Letter from Attorney General to Colin L. Powell with attachment]*

- **November 7, 2001: Creation of Foreign Terrorist Tracking Task Force**

The President announces the first formal meeting of the full Homeland Security Council, and the creation of a "Foreign Terrorist Tracking Task Force" which will deny entry, locate, detain, prosecute and deport anyone suspected of terrorist activity The Task Force includes DOS, FBI, INS, Secret Service, Customs and the intelligence community. Mandates a thorough review of student visa policies. *[White House Announcement, 11-07-01]*

- **November 9, 2001: Interviews of Arab/Muslim Men**

The Attorney General issues a memo directing interviews of a list of 5000 men, ages 18-33, who entered US since Jan. 2000 and who came from countries where Al Queda has a "terrorist presence or activity". The interviews are to be "voluntary" but immigration status questions may be asked (see Pearson memo, Nov. 23).

- **November 13, 2001: Military Tribunals**

President Bush issues an Executive Order authorizing creation of military tribunals to try non-citizens alleged to be involved in international terrorism (http://www.whitehouse.gov/news/orders/).

- **November 15, 2001: New 20-Day Wait for Certain Visa Applicants**

The State Department imposes new security checks on visa applicants from unnamed countries. The State Department refuses to confirm the new requirement, but the following message appears when individuals born in certain countries attempt to make a visa appointment through the on-line Visa Appointment Reservation System:

> "Effective immediately, the State Department has introduced a 20-day waiting period for men from certain countries, ages 16-45, applying for visas into the United States."

The following countries of birth are among those for whom this message appears: Afghanistan, Algeria, Bahrain, Dijbouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen.

- **November 16, 2001: Secrecy re INS Detainees**

The Department of Justice issues a letter to Senator Feingold asserting that identities/locations of 9-11 detainees will not be disclosed. *[U.S. Department of Justice, Office of Legislative Affairs, to Senator Russell D. Feingold, dated 11-16-01]*

- **November 23, 2001: INS Actions re Interviewees**

INS issues memo stating that "officers conducting these interviews may discover information which leads them to suspect that specific aliens on the list are unlawfully present or in violation of their

immigration status." The memo directs INS to provide agents to respond to requests from state and local officers involved in the interviews. *[Memorandum for Regional directors, from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, dated 10-23-01]*

- **November 26, 2001: Interviews to be "voluntary"**

US Attorneys in Detroit issue a letter stating that the interviews are voluntary, but that "we need to hear from you by December 4." *[Letter from U.S. Attorney, Eastern District of Michigan, signed by Jeffrey Collins and Robert Cares, dated 11-26-01]*

- **November 29, 2001: "Snitch Visas"**

The Attorney General issues a memo announcing the use of S visas for those who provide information relating to terrorists. *[Attorney General Directive on Cooperators Program, 10-29-01]*

- **December 4, 2001: Senate Hearings**

Senator Feingold holds hearings on the status of 9-11 detainees. The Attorney General states that those who question his policies are "aiding and abetting terrorism" (http://www.lexis.com/research/retrieve/frames?_m=d88b568e87c195aecaf968445f816c1f&csvc=bl&cform=bool&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVlb-lSllB&_md5=cbdb097ca85216c342e7a33a47c91389)

- **January 25, 2002: "Absconder Initiative"**

The Deputy Attorney General issues a memo of instructions for the "Absconder Apprehension Initiative", announced by INS Commissioner Ziglar in December, to locate 314,000 people who have a final deportation or removal order against them. 6,000 men from "al Qaeda-harboring countries will be first to be entered in the National Crime Information Center (NCIC) database. DOJ uses country, age, and gender criteria to prioritize this selective enforcement list. *[Office of Deputy Attorney General, Subject: Guidance for Absconder Apprehension Initiative, dated 1-25-02]*

- **February 19, 2002: BIA "Reforms"**

The Attorney General publishes a new regulation proposing to restructure the Board of Immigration Appeals. The BIA "reform" would institute one-judge review, streamlined procedures, and would reduce the Board itself to 11 members (from the current complement of 21 positions.) Comment due 3-21-02. *[67 FR 33 at 7309, 2-19-02]*

- **February 26, 2002: Interview Report**

The Department of Justice issues a final report on its project of interviewing the 5,000 Arab/Muslim men. The Report states that approximately half (2261) of those on the list were actually interviewed and that fewer than twenty interview subjects were taken into custody. Most of these were charged with immigration violations; only three were arrested on criminal charges. *[Report from U.S. Department of Justice, Executive Office for U.S. Attorneys, Memorandum for the Attorney General, from Kenneth L. Wainstein, Director, entitled "Final Report on Interview Project, dated 2-26-02]*

- **March 19, 2002: Additional Interviews**

DOJ announces another round of interviews of 3000 Arab/Muslim me *Memorandum from U.S. Department of Justice, Executive Office for U.S. Attorneys, TO: All US Attorneys, from Kenneth L. Wainstein, Director, entitled "Interview Report", dated 3-19-02.*

- **April 10, 2002: Local Law Enforcement Powers**

News of a new DOJ legal opinion that states that local law enforcement personnel have "inherent" power to enforce the nation's immigration laws is leaked to the press. *[Various news reports]*

- **April 12, 2002: New Limitations on Visitors/Students**

INS issues a proposed regulation establishing a presumptive limitation on visitors to the US of 30 days, or a "fair and reasonable period" to accomplish the purpose of the visit. The regulation also prohibits a change of status from visitor to student, unless student intent is declared at time of initial entry. Comments due 5-13-02. *[67 FR 71 at 18065, 4-12-02]*

- **April 12, 2002: New Limitations on Student Change of Status**

INS issues an interim rule prohibiting a visitor from attending school while an application for a change to student status is pending. The rule is made effective 4-12-02. Comments due 6-11-02. *[67 FR 71 at 18062, 4-12-02]*

- **April 22, 2002: States Forbidden to Release Detainee Information**

The Attorney General issues an interim regulation that forbids any state or county jail from releasing information about INS detainees housed in their facilities. This regulation flies in the face of a New Jersey state court decision ordering the release of information regarding detainees in New Jersey facilities. The rule is made effective 4-17-02, *a week prior to publication.* Comments due 6-21-02. *[67 FR 19508, 4-22-02]*

- **May 9, 2002: Aliens Ordered to Surrender within 30 days**

The Attorney General issues a proposed regulation that requires that aliens subject to final orders of removal surrender to INS within 30 days of the final order or be barred forever from any discretionary relief from deportation, including asylum relief, while he/she remains in the U.S. or for 10 years after departing from the U.S. Comments due 6-10-02. *[67 FR 90 at 31157, 5-9-02]*

- **May 10, 2002: New Security Checks Required**

The INS issues a memo requiring District Offices and Service Centers to run IBIS (Interagency Border Inspection System) security checks for *all* applications and petitions, including naturalization. The checks are to be run not only on foreign nationals, but also on every name on the application, including US citizen petitioners and attorneys. IBIS includes information on "suspect" individuals and can also be used to access NCIC records. It is used by INS, Customs, and 20 other federal agencies (FBI, Interpol, DEA, ATF, IRS, Coast Guard, FAA, Secret Service, etc.) *[INS Memorandum from William Yates to Regional Directors, Service Center Directors, and District Directors, 5-10-02]*

- **May 16, 2002: Student Reporting Required**

The Attorney General issues a proposed regulation that implements a new student reporting system, SEVIS. The system will become voluntary on July 1, 2002, and mandatory for all covered school on 1-30-03. The new SEVIS system will require reporting of student enrollment, start date of next term, failure to enroll, dropping below full course load, disciplinary action by school, early graduation, etc. Comments due 6-17-02. *[67 FR 95 at 34862, 5-16-02]*

- **May 28, 2002: Immigration Judges Given Authority to Seal Records and Issue Protective Orders**

The Attorney General issues an interim regulation authorizing immigration judges to issue protective

orders and seal records relating to law enforcement or national security information. The rule applies in all immigration proceedings before EOIR. The rule is made effective as of May 21, 2002, *a week prior to publication.* Comments due 7-29-02. *[67 FR 102 at 36799, 5-28-02]*

- **June 13, 2002: Registration and Monitoring of Certain Nonimmigrants**

The Attorney General issues a proposed rule requiring certain yet-to-be-designated aliens to register (fingerprints and photographs and other information) at entry, at 30 days after entry, at one-year intervals thereafter, and at exit, which must be through designated exit points. The registration requirements may be applied to certain named nation groups already within the United States whenever the Attorney General so orders.

Failure to satisfy any of the required reporting results in criminal penalties, and in the entering of the person's name in the NCIC database. The regulation is accompanied by a statement by the Attorney General indicating that local law enforcement officers will be requested to check the names of any persons they encounter against the NCIC data base, and arrest and detain not only those who have violated the registration requirement, but also those who have overstayed a visa whose names will also be entered into the database.

The power of local law enforcement to arrest people for mere civil violations of immigration laws is stated to derive from a new DOJ Office of Legal Counsel opinion which has not been made public, which states that local law enforcement officers have "inherent authority" to enforce not only criminal violations of immigration law, but civil violations as well.

It is contemplated that the new registration requirements will be put into effect by September 2002, and will first apply to nationals from Syria, Libya, Iraq, Iran and Sudan. The list is contemplated to expand to all 26 countries now subject to heightened security checks at visa posts (Afghanistan, Algeria, Bahrain, Dijbouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen.) Comments due 7-15-02. *[67 FR 114 at 40581, 6-13-02]*

- **July 24, 2002: Powers of State or Local Law Enforcement Officers To Exercise Federal Immigration Enforcement** *[Final Rule]*

The Department of Justice has issued a final rule which implements INA 103(a)(8), which allows the Attorney General to authorize any state or local law enforcement officer, with the consent of the head of the department whose geographic boundary the officer is serving, to exercise and enforce immigration laws during the period of a declared "mass influx of aliens."

The rules authorize the Attorney General to consider the definitions of "immigration emergency" and "other circumstances" under 28 C.F.R. 65.81 when making a declaration of "mass influx of aliens". The rules purport that civil liberties and civil rights will be protected with officer training, and a complaint reporting procedure. The final rule is effective August 23, 2002. *[67 FR 142 at 48354*, 07-24-02]

- **July 26, 2002: Address Notification to be Filed with Designated Applications**

The Attorney General proposed a rule clarifying the alien's obligation to provide an address to the Service, including a change of address within 10 days. The rule will require every alien to

acknowledge having received notice that he or she is obliged to provide a valid address to the Service. The rules clarify that a "willful" failure to register with the INS, or a failure to give written notice of a change in address, is a criminal violation. This proposed regulation is accompanied by a statement by Department of Justice.

The proposed regulations will allow the Service to mail a "Notice to Appear" to the most recent address reported by the alien. Upon such mailing, the Service will have met its burden of the "advanced notice" an alien must receive before an Immigration Judge issues an *in absentia* order of removal. See, Matter of G-Y-R. This expanded definition of "notice" increases the likelihood for *in absentia* orders to be issued against non-criminal aliens who fail to report an address change.

The stated intent of this rule is to provide clear notice to aliens of their obligation to report their address, and to punish those who fail to do so. Comments due 8-26-02. *[67 FR* 144 at 48818, 7-26-02]

Prepared by Jeanne A. Butterfield
American Immigration Lawyers Associaltion (AILA)
Updated 07/26/02
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Office for Information
Technology Policy

ALA American Library Association

November 17, 2003

The Honorable Orrin Hatch
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

I am writing to submit a statement for the record of the hearing, "America After 9/11: Freedom Preserved or Freedom Lost?". The statement is submitted on behalf of the American Library Association and is endorsed by the American Association of Law Libraries, the Association of Research Libraries, the Medical Library Associaton, and the Special Libraries Association.

We appreciate this opportunity. Contact information for each of the five associations is contained in the attachments.

Sincerely,

Carla Hayden

2002-2003 CD # 20.1
2003 ALA Midwinter Meeting

RESOLUTION ON THE USA PATRIOT ACT AND RELATED MEASURES THAT INFRINGE ON THE RIGHTS OF LIBRARY USERS

WHEREAS, the American Library Association affirms the responsibility of the leaders of the United States to protect and preserve the freedoms that are the foundation of our democracy; and

WHEREAS, libraries are a critical force for promoting the free flow and unimpeded distribution of knowledge and information for individuals, institutions, and communities; and

WHEREAS, the American Library Association holds that suppression of ideas undermines a democratic society; and

WHEREAS, privacy is essential to the exercise of free speech, free thought, and free association; and, in a library, the subject of users' interests should not be examined or scrutinized by others; and

WHEREAS, certain provisions of the USA PATRIOT Act, the revised Attorney General Guidelines to the Federal Bureau of Investigation, and other related measures expand the authority of the federal government to investigate citizens and non-citizens, to engage in surveillance, and to threaten civil rights and liberties guaranteed under the United States Constitution and Bill of Rights; and

WHEREAS, the USA PATRIOT Act and other recently enacted laws, regulations, and guidelines increase the likelihood that the activities of library users, including their use of computers to browse the Web or access e-mail, may be under government surveillance without their knowledge or consent; now, therefore, be it

RESOLVED, that the American Library Association opposes any use of governmental power to suppress the free and open exchange of knowledge and information or to intimidate individuals exercising free inquiry; and, be it further

RESOLVED, that the American Library Association encourages all librarians, library administrators, library governing bodies, and library advocates to educate their users, staff, and communities about the process for compliance with the USA PATRIOT Act and other related measures and about the dangers to individual privacy and the confidentiality of library records resulting from those measures; and, be it further

RESOLVED, that the American Library Association urges librarians everywhere to defend and support user privacy and free and open access to knowledge and information; and, be it further

RESOLVED, that the American Library Association will work with other organizations, as appropriate, to protect the rights of inquiry and free expression; and, be it further

RESOLVED, that the American Library Association will take actions as appropriate to obtain and publicize information about the surveillance of libraries and library users by law enforcement agencies and to assess the impact on library users and their communities; and, be it further

RESOLVED, that the American Library Association urges all libraries to adopt and implement patron privacy and record retention policies that affirm that "the collection of personally identifiable information should only be a matter of routine or policy when necessary for the fulfillment of the mission of the library" (*ALA Privacy: An Interpretation of the Library Bill of Rights*); and, be it further

RESOLVED, that the American Library Association considers that sections of the USA PATRIOT ACT are a present danger to the constitutional rights and privacy rights of library users and urges the United States Congress to:

1) provide active oversight of the implementation of the USA PATRIOT Act and other related measures, and the revised Attorney General Guidelines to the Federal Bureau of Investigation;

2) hold hearings to determine the extent of the surveillance on library users and their communities; and

3) amend or change the sections of these laws and the guidelines that threaten or abridge the rights of inquiry and free expression; and, be it further

RESOLVED, that this resolution be forwarded to the President of the United States, to the Attorney General of the United States, to Members of both Houses of Congress, to the library community, and to others as appropriate.

Initiated by: Committee on Legislation
Cosponsored by: Committee on Legislation and Intellectual Freedom Committee
Endorsed by: OITP Advisory Committee, LITA, Intellectual Freedom Roundtable
Endorsed in principle by: ACRL, ALTA Executive Board, ALSC, ASCLA, AASL Legislation Committee
Prior History: CD#19.1 January 2002, CD#20.5 January 2002, CD#20.3 January 2002

The Association of Research Libraries (ARL) is a nonprofit organization of 124 research libraries in North America. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service.
Contact: Prue Adler (202-296-2296)

The American Association of Law Libraries (AALL) is a nonprofit educational organization with 5,000 members dedicated to providing leadership and advocacy in the field of legal information and information policy.
Contact: Mary Alice Baish (202-662-9200)

The American Library Association (ALA) is a nonprofit educational organization of over 64,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society.
Contact: Lynne Bradley (202-628-8410)

The Medical Library Association (MLA), a nonprofit, educational organization, is a leading advocate for health sciences information professionals with more than 4,700 members worldwide. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public.
Contact: Mary Langman (312-419-9095 x.27)

The Special Libraries Association (SLA) The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 13,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy, and networking initiatives.
Contact: Doug Newcomb (202-939-3676)

Statement of Dr. Carla Hayden
President of the American Library Association

I appreciate the opportunity to submit a statement, on behalf of the American Library Association (ALA), for the record of the hearing, "America After 9/11: Freedom Preserved or Freedom Lost?" The American Library Association affirms the responsibility of the leaders of the United States to protect and preserve the freedoms that are the foundation of our democracy, and we are committed to ensuring that our country is safe and secure. We believe, and we practice the belief, that the free flow of information and ideas are at the core of what we seek to protect, of what makes our country strong. Vibrant discussion and expression and the ability to research both broadly and deeply are what have made the United States a beacon of freedom and they are what keep us strong.

The ALA has long opposed efforts to censure, control, or to oversee the information sought by the public, particularly in libraries. Privacy is essential to the exercise of free speech, free thought, and free association and lack of privacy and confidentiality chills users' choices, and can have the same effect as the suppression of ideas. The possibility of surveillance, whether direct or through access to records of speech, research and exploration, undermines a democratic society. Libraries are a critical force for promoting the free flow and unimpeded distribution of knowledge and information for individuals, institutions, and communities.

The American public has clearly conveyed — through the passage, in three states and 210 localities, of resolutions, ordinances or ballot initiatives protecting the civil liberties of their over 26 million residents — its discomfort with some provisions of the USA PATRIOT Act. We are, as members of the American public and as librarians, deeply concerned about certain provisions of the USA PATRIOT Act which increase the likelihood that the activities of library users, including their use of computers to browse the Web or access e-mail, may be under government surveillance without their knowledge or consent. We are also deeply concerned about the revised Attorney General Guidelines to the Federal Bureau of Investigation, and other related measures that give the federal government overly-broad authority to investigate citizens and non-citizens without particularized suspicion, to engage in surveillance, and to threaten civil rights and liberties guaranteed under the United States Constitution and Bill of Rights.

As the Committee is aware, the ALA has been very involved in advocating for legislation that would amend the USA PATRIOT Act to protect civil liberties and the privacy of the public while at the same time ensuring that law enforcement has the appropriate tools necessary to safeguard the security of our country. We have also advocated meaningful Congressional oversight of and accountability to the public for the implementation of these expanded authorities, and we consider this hearing an important step in that process.

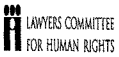
We thank Senators Hatch and Leahy for holding this hearing to address how the protection of civil liberties, privacy, and the free and open exchange of ideas enhance the vital efforts of law enforcement and the security of our country.

Thank you the opportunity to submit this statement for the record.

Endorsed by: American Association of Law Libraries
Association of Research Libraries
Medical Library Associaton
Special Libraries Association

Attachments: Resolution On The USA PATRIOT Act And Related Measures That Infringe On The Rights Of Library Users
Information on the Associations

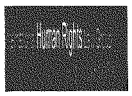
November 17, 2003



The Honorable Colin L. Powell
Secretary of State
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

Dear Secretary Powell:

We are writing to you to express our deep concern over the reported role of United States officials in transferring a Canadian citizen, Maher Arar, to Jordan with the understanding that he would then be turned over to Syria. Mr. Arar alleges that he was brutally tortured by Syrian authorities over a period of 10 months. As you may be aware, these allegations are contained in a front-page story on November 5, 2003 in the Washington Post. Mr. Arar claims that he strenuously protested being handed over to Syria and expressed the strong fear that he would be tortured there. We urge you to investigate his allegations, to report publicly on your findings, and to hold accountable any US officials who may have violated US law and human rights commitments in his case.



On June 26th in a statement commemorating UN Torture Victims Recognition Day, President Bush pledged that the United States is leading the fight against torture by example. He called upon all governments to join the United States in "prohibiting, investigating, and prosecuting all acts of torture...." These statements reinforced the even more specific assurances you provided to the Senate Foreign Relations Committee on February 6, 2003 in which you said "[i]n any cases where the United States transfers detainees to other countries for detention we seek and receive assurances that detainees will not be tortured."

INTERNATIONAL JUSTICE MISSION

RFK Memorial Center for Human Rights

Similar assurances have been provided by Department of Defense General Counsel William J. Haynes in a letter to Senator Leahy on June 25, 2003 stating that "United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored."

INTERNATIONAL LEAGUE
FOR HUMAN RIGHTS

Independent of these pledges, the United States has obligations under both the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and US law to refrain from sending any

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individual to a country where there are substantial grounds for believing that he would be in danger of being tortured. The United States has long protested the use of torture in Syria. Indeed, in the President's November 6th speech to the National Endowment for Democracy he specifically mentioned the problem of torture there.

We urge the Administration to make good on these pledges and comply with its legal obligations by swiftly and thoroughly investigating this case and taking appropriate action against those responsible if the allegations prove correct. If Mr. Arar was in fact treated in the way he describes, it raises very serious questions over whether US officials have violated United States legal obligations and the President's pledges. In addition, either US officials failed to obtain the "appropriate assurances" discussed by General Counsel Haynes, or the Governments of Jordan and Syria violated those assurances.

There are many aspects of Mr. Arar's report that are troubling. First, of course, is the allegation that US authorities actively participated in sending an individual to a country known to use torture when interrogating prisoners despite his fear that there was a substantial likelihood that he would be tortured. This report is similar to earlier reports that US officials participated in the transfer to Syria of a prisoner seized in Morocco. In this case, however, the individual was allegedly detained in the United States and then transported by US officials. It is not clear that even receiving assurances of proper treatment from a government like Syria that has a well-documented record of torturing prisoners would satisfy US obligations.

Second, it is not clear what legal basis exists for "rendering" an individual to another government in general or in this specific case. Mr. Arar is allegedly a Canadian citizen and resides there. He was reportedly traveling from Tunisia to Canada by way of New York City when US officials detained him and held him for two weeks before flying him out of the country. There is no allegation that he has been charged with or is being sought by any government for having committed a crime. Thus, it does not appear that he was extradited, removed or deported under any of those applicable statutory provisions in US law. In the absence of an express statutory authorization, US officials are not authorized to seize, detain, transport and surrender an individual to a foreign state.

Third, the Washington Post article quotes anonymous Bush Administration officials who appear to contradict the Administration's public statements concerning the abuse and rendition of prisoners. In this instance, anonymous officials claim that the United States has engaged in "a lot of rendition activities" and that one of the reasons for these renditions is the desire to place suspects "in other hands because they have different standards...." While we appreciate the Administration's repeated public assurances that suspects are not being transferred to other countries so that they will be abused in order to extract information from them, we continue to be troubled by the statements of unnamed officials contradicting these public statements. The repeated claims of unnamed Bush Administration officials involved in actual cases raise serious questions about whether the President's policy against torture is being violated in practice. Those concerns are bolstered by the comments of former US intelligence officials, such as Vincent Cannistraro and Robert Baer, who have said publicly that they believe that transferred suspects are being tortured.

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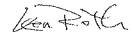
We call on the Administration to undertake a swift and thorough investigation into Mr. Arar's case and to make public the results of that investigation. We also urge the Administration to investigate and publicly respond to the repeated public claims of past and present intelligence officers that the United States is participating in many prisoner transfers and that transferred prisoners are known to be tortured. Finally, we urge the Administration to end the practice of transferring persons to countries where it cannot effectively assure that they will be free from torture or other mistreatment. We look forward to hearing from you concerning this matter.

Sincerely,

William F. Schulz
Amnesty International USA

Doug Johnson
The Center for Victims of Torture



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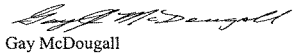
Human Rights Watch



Gay McDougall
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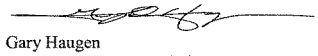

Gary Haugen
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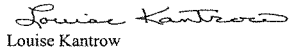

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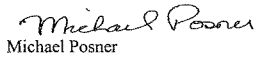

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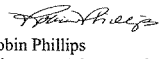

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OFFICE OF BOB BARR
Member of Congress, 1995-2003

TESTIMONY SUBMITTED TO THE U.S. SENATE JUDICIARY COMMITTEE ON "AMERICA POST-9/11: FREEDOMS PRESERVED OR FREEDOMS LOST"

BY

BOB BARR

21ST CENTURY LIBERTIES CHAIR FOR FREEDOM AND PRIVACY AT THE AMERICAN CONSERVATIVE UNION

November 18, 2003

Chairman Hatch, Ranking Member Leahy, and distinguished committee members, thank you for inviting me to testify on the state of our freedoms in post-9/11 America. I applaud your oversight and appreciate the chance to speak.

My name is Bob Barr. Until January of this year, I had the honor to serve as a United States Representative from Georgia. Previously, I served as the presidentially appointed United States Attorney for the Northern District of Georgia, as an official with the U.S. Central Intelligence Agency, and as an attorney in private practice. Currently again a practicing attorney, I also now occupy the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union, and consult on privacy matters for the American Civil Liberties Union. My testimony today will reflect this background as I speak on behalf of both these organizations, both long-dedicated to protecting constitutional principles cherished by many generations of Americans.

I also speak as a citizen deeply concerned about the erosions of basic constitutional liberties since the tragic and deplorable attacks here and in New York City on September 11, 2001.

The question before us today -- whether the government response to those attacks has adversely affected our individual liberties, including the right to privacy – could not be more important. It is at once complex and simple. In short, the answer is yes.

While every one of us in this room today, and probably every person with whom we come in contact, understands the need for government to succeed in its responsibility to protect our nation and our People against acts of terrorism, as a student and supporter of the Constitution and its component Bill of Rights, I will not concede that meeting this responsibility must sacrifice our Rights given us by God and guaranteed in that great document. Yet, unfortunately, the road down which our nation has been traveling these past two years, with the USA PATRIOT Act and other related government programs and activities, appears to take us in a direction in which our liberties *are* being diminished in that battle against terrorism. This need not be so, and it ought not to be so.

Traditionally and historically, except for aberrations throughout our history, the three branches of our government – legislative, executive and judicial – acting together if not always in concert, have acted responsibly, within the bounds of law and constitutional understanding. Throughout most of our nation's short but glorious history, our citizens could rest assured that government operated in a way as to balance security needs and civil liberties. When all else failed, our courts would guarantee this result even if one or both of the other two branches "got carried away."

Any law or series of laws or federal programs that weakens the ability of any one of these three branches of government to serve as a check and balance on the other two, is inherently problematic and ought to be viewed with concern if not alarm. This is perhaps the fundamental concern with the manner in which the government has responded to the terrorist attacks of 9/11 – significantly weakening as a matter of law the power and ability of the judiciary to check the exercise of executive power; and weakening as a matter of practice the ability of the legislature to conduct meaningful oversight of the same.

Our view of this problem, and how to address it, must be viewed from a politically neutral perspective; that is, regardless of which party maintains power in the Executive Branch.

Each member of this esteemed Committee understands well the Constitution, federal criminal laws, the USA PATRIOT Act, and the full panoply of other laws, regulations, procedures and activities that comprise the arsenal of the federal government's response to the terror attacks of 9/11. I am respectfully mindful of the Committee's expertise

in this area, as I am aware of the constraints on the Committee's time. Even though it would be difficult to treat the entirety of this topic in a year-long law class, let alone five-minute testimony, I will therefore touch upon a few of these post-9/11 policies, laws, initiatives and federal actions that offend traditional conservative values such as individual freedom, federalism and personal privacy.

Some of these, such as the controversial Computer Assisted Passenger Pre-Screening System (CAPPS II), offend conservative values by blindly intruding into the private records of law-abiding Americans in the vain hope of that such privacy intrusions will somehow expose a terrorist. CAPPS II and its ilk are false security on the cheap. Airports and other terrorist targets will only be made safer with better, more solid, advance intelligence (and better coordination, analysis, evaluation and dissemination of same) on who the specific threats are -- not which innocent person looks most suspicious at the gate or in a "black box" database. The arbitrary exercise of power by federal employees now occurring and which would be greatly expanded if CAPPS II goes into effect is of the sort that has never heretofore withstood the test of probable cause or even reasonable suspicion. It ought not to be allowed to do so now.

Other programs, including certain provisions in the USA PATRIOT Act, implicate privacy but also imperil Americans' cherished right to engage in peaceful debate about the issues of the day. Several sections in the USA PATRIOT Act are especially illustrative of this suppressive attitude to security.

However, before I discuss these problem provisions, I first would like to express my sincere gratitude to the Justice Department and Attorney General Ashcroft. Few outside the halls of the Department and its component enforcement agencies, can truly be aware of the stresses and hard decisions required to keep us safe.

As I have repeatedly and publicly stated, my concern with the USA PATRIOT Act and other post-9/11 policies has nothing to do with politics or personalities – it is a matter of constitutional principle.

Indeed, much of the USA PATRIOT Act is non-controversial, and some of it quite welcome. The Act's problems lie in a relatively few provisions, squirreled away in the bill during the negotiations before its

passage. While they may be few in number, they are major in their impact on civil liberties in America. Contrary to how some characterize these problem provisions, they represent anything but "tinkering" or "fine tuning" of pre-existing law and procedure.

Not only do these provisions undercut basic conceptions of due process and privacy, their effectiveness is questionable. As a former CIA official, I witnessed first-hand how much of our national security apparatus -- even our counter-terrorism and international intelligence work -- is built on very basic policing methods. From your local grifters to the Bin Ladens of the world, bad guys are generally found and punished using a system that includes basic checks and balances on government power and which militates against dragnet investigative fishing expeditions.

As an example of what not to do in national security, take Section 213 of the PATRIOT Act, the so-called "sneak and peek" provision. In addition to ignoring fundamental Fourth Amendment privacy rights, it also greases the slippery slope that was clearly anticipated, but specifically addressed and avoided by the drafters of our Constitution in the threefold separation-of-powers system of government they crafted so magnificently.

Specifically, Section 213 of the PATRIOT Act statutorily codifies delayed-notification search warrants, making them easier to obtain. This provision (not subject to a "sunset" expiration) takes what had been the exception to the rule of search and seizure notice, and has made it the rule.

Prior to the passage of the PATRIOT Act, this authority – which permits federal investigators to break into Americans' homes and businesses and then search their belongings, peruse the contents of their computer hard drives, and not tell them about it until weeks or months afterward – was allowed by courts, but only in extreme circumstances when lives or evidence could be lost by observing the traditional Fourth Amendment "knock and announce" convention.

By lessening the burden on prosecutors seeking to obtain these warrants, thus giving the executive branch a leg up on the judiciary, the fear, especially among conservatives, is that this extraordinary power will become ordinary. My former colleague in the House, Rep. Butch Otter from Idaho, reportedly took up the fight to narrow sneak and peek

power after hearing from pro-life groups who worry the warrants would be misused, like the RICO statute, to advance the pro-abortion agenda. This is hardly the only scenario wherein these powers could be abused; it is frighteningly illustrative.

The problems with another controversial new power, laid out in Section 215 of the 2001 Act, sounds similar themes as the sneak and peek issue. Under Section 215, FBI agents can obtain court orders for the release of, among other things, business information, reading histories, Internet surfing data, medical records and even lawful firearm purchase receipts, under a standard of evidence that equates to a "rubber stamp."

Known primarily for its effect on access to library records -- it could be used to monitor Americans' book borrowing habits -- 215 is legally wide-ranging; extending, frighteningly, even to medical and genetic information. While much has – appropriately – been written about this provision's chilling effect on library users (a result that is very real regardless of how many times the government *says* it has or hasn't employed the power), the dangers in its broad reach cannot be over emphasized.

A companion provision, found in Section 505 of the USA PATRIOT Act, raises concerns similar to those raised by Section 215. Section 505 is, in some respects even more troubling; it expands the government's ability to use so-called "national security letters," which are essentially administrative subpoenas, to secure access to a wide range of data and information on U.S. citizens. As this Committee knows, administrative subpoenas can be issued without probable cause, and without even the "rubber stamp" judicial review of a Section 215 search.

Of great concern to conservatives and liberals alike, is Section 802 of the Act. This section defines a new crime of "domestic terrorism." Direct action *conservative* advocates, such as those advocating anti-abortion principles, fear use of this provision just as do direct action *liberals*, such as those protesting certain government policies (for example, military use of Vieques), because it could very easily be employed as the justification to target such groups. This abuse of the Act could very easily prevail, even though no reasonable person would equate the activities of such groups or advocates with "terrorism" -- such as gave rise to consideration of the USA PATRIOT Act in the first place.

Under 802, terrorism is defined sufficiently broad such that if this, or indeed any future administration were so inclined, it could use the USA PATRIOT Act to prosecute protesters as terrorists when any reasonable person would view that as excessive. Section 802 has a suppressive, Orwellian effect on speech and political advocacy, especially direct action advocacy, arguably the most effective grassroots technique to influence political change.

Furthermore, Section 802's over-breadth implicates other sections of the USA PATRIOT Act and even other laws. If the contemplated, so-called "Son of PATRIOT" were ever to be enacted, its further expansion of terrorism offenses, and its further reductions of due process in those prosecutions, could all be extended to political advocacy under 802's overly ambitious language. Sections 803 and 805 build on 802 and expand the crime of "material support," which now could result in those who harbor or conceal political protesters being hit with a terrorism prosecution.

802 should be narrowed so that terrorism offenses target terrorism, not political protest.

My fellow witnesses have addressed, and will touch on other parts of the USA PATRIOT Act. I need not belabor the specifics of the law but I do hope its flaws will be corrected, and soon, before they harden into a concrete barrier surrounding the Bill of Rights. The SAFE Act, introduced and supported by an impressively bipartisan group of Senators, is one commendable and responsible such effort.

In line with the reflective approach of this hearing, I think it is important to note several encouraging victories for constitutional freedoms in a post-9/11 America. The looming specter of giant, voracious super-databases -- tasked with assessing our threat levels through the monitoring, cross-referencing and analyzing of minute details in the daily lives of law-abiding citizens – has to some degree abated. But only sufficiently to allow us to catch our breath; not nearly to the extent we can breath easy.

Around this time last year, the controversy surrounding the citizen-spy program known as Operation TIPS (Terrorism Information Prevention System) reached its boiling point. Thankfully, the program was then shelved. The program, which would have recruited postal workers,

utility workers, and many others with vocational or simply occasional access to private residences, as government informants encouraged to report any "suspicious" activity to a central government hotline.

In what has been one of the most unexpected "strange bed fellows" moves of recent years, but emblematic of how fundamental these issues are in our democracy, then-majority leader Richard Armey from Texas and minority leader Nancy Pelosi inserted an amendment in the Homeland Security Bill barring all funding for Operation TIPS and like programs.

Regrettably, programs expanding federal powers – programs such as TIPS or the similarly discredited TIA (Total Information Awareness) – rarely die a final death, even if Congress directs their demise. However, that at least some action is being taken is a heartening development. Hopefully, it will continue, especially through both the oversight and legislative work of this Committee and its counterpart in the House.

We must remain vigilant. TIPS and TIA are being resurrected in part under other names in other departments. For instance, some proponents of blanket surveillance technologies are attempting to circumvent Congress, the agencies or even federal law (such as the Privacy Act) by providing federal taxpayer funds to states or local governments to establish or implement the programs themselves.

The MATRIX Program (Multi-state Anti-Terrorism Information Exchange) developed in Florida with federal dollars, by a *private* company, to do what Congress has already indicated it did <u>not</u> want done directly through TIA, is an example of this approach.

The Justice Department is presumably taking similar steps with future PATRIOT-style legislation, including the Domestic Security Enhancement Act of 2003, also known as "Son of PATRIOT Act," or "PATRIOT II." While it hasn't been formally introduced in Congress, pieces of it are appearing piecemeal in other seemingly innocuous or non-germane legislation.

Not least of Son of PATRIOT's problems, is a proposed section that would permit the federal government to strip Americans of their citizenship (whether natural-born or naturalized), if they are convicted of "material support" for terrorism (a charge that could apply to actions

that citizens of common sense would be hard-pressed to see as terrorism). The framers of our Constitution deliberately omitted mention of such power, because they realized the authority to strip our citizenship is the ability to tailor the electorate to one's advantage – a truly terrifying state of affairs.

In sum, the Constitution and its Bill of Rights have taken some hits in the two years since 9/11; hits that must be fixed via the SAFE Act, for example. The simple fact that we appear here seeking to identify and address these problems demonstrates Americans' reticence to allow understandable concern over terrorism to mutate into the crippling of our most cherished rights and freedoms.

That should give us some encouragement. There is a great deal of work to be done, and further hard decisions to be made, but there remains time to turn back the constitutional clock and roll back excessive post-9/11 powers before we turn the corner into another Japanese internment or, closer to our own experiences, before we witness a legally sanctioned Ruby Ridge or Waco scenario.

In many other countries, it is neither acceptable nor lawful to reflect openly on and refine past action. In America, it is not only allowable, it is our *obligation*, to go back and reexamine the decisions made by the federal government during the panic of an event like September 11th.

Of course, a country suffering through the immediate fallout from the worst terrorist attack on American soil ever is going to make some mistakes. To err isn't just human, it's a direct result of representative democracy.

Case in point: myself. I voted for the USA PATRIOT Act. I did so with the understanding the Justice Department would use it as a limited, if extraordinary power, needed to meet a specific, extraordinary threat. Little did I, or many of my colleagues, know it would shortly be used in contexts other than terrorism, and in conjunction with a wide array of other, privacy-invasive programs and activities.

According to a growing number of reports, as well as a GAO survey, the Justice Department is actively seeking to permit USA PATRIOT Act-aided investigations and prosecutions in cases wholly unrelated to national security, let alone terrorism.

This should not be allowed to continue. As my esteemed colleague in the House, former Speaker Newt Gingrich wrote recently, "in no case should prosecutors of domestic crimes seek to use tools intended for national security purposes." When we voted for the bill, we did so only because we understood it to be essential to protect Americans from additional, impending terrorist attacks.

That I can stand before you and urge the Act's correction should serve as a lesson to lawmakers who voted for the PATRIOT Act, and supported similar initiatives, that you *can* go back again. It's okay to revisit past decisions. Indeed, it's an obligation.

Conservative or liberal, Republican or Democrat, all Americans should stand behind the Constitution; for it is the one thing – when all is said and done – that will keep us a free people and a signal light of true liberty for the world. Thank you again for allowing me to testify in support of this principle.

Strengthening America by Defending Our Liberties

An Agenda for Reform

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 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.[1]

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.[2]

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, is 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,[3] 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.[4] These cases were to be conducted completely in secret with "no visitors, no family and no press."[5] The mandate for secrecy even prohibited "confirming or denying whether such a case is on the docket or scheduled for hearing."[6]

It has been reported that the INS did not use classified information in any of these hearings.[7] 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.[8]

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.[9] In a separate case, the Federal District Court for New Jersey found the closures unconstitutional, but the Third Circuit reversed.[10] 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.[11]

Open proceedings, in judicial and quasi-judicial settings, protect individuals from arbitrary action and the public from sloppy decision-making.[12] Transparent proceedings are also important in maintaining public confidence in the fairness of government activities.[13] 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.[14] 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.[15] 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.[16] 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."[17] 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.[18]

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.[19] Those detained in the aftermath of 9/11 were held at great expense in high security facilities.[20] 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.[21]

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.[22] The INS developed a policy of requesting no bond in all cases related to the 9/11 investigation.[23] 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.[24] 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.[25] 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.[26]

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.[27] 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.[28] 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[29] to meet "special registration requirements."[30] 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.[31] These men were photographed, fingerprinted and interrogated.[32] Over 82,000 men complied with the registration program.[33] For 13,000 of that number, deportation proceedings were initiated – not for terrorism-related activities but for overstays and other routine status violations.[34]

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.[35] 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.[36]

Immediately, the board members abandoned their traditional three-member panels and starting making decisions individually, often deciding cases in minutes.[37] 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.[38]

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.[39]

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.[40] Most of the aliens who were to be added to the database were not accused of criminal offenses.[41] 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.[42]

In March 2003, the Justice Department issued a regulation exempting the NCIC from the accuracy requirements of the Privacy Act.[43] 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.[44] 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.[45] Those removed through this process are barred from re-entering the United States for five years.[46]

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.[47] 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.[48] 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.[49] 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.[50]

The Justice Department refuses to disclose publicly how many times it has used the authorities granted to it under Section 206.[51] 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.[52]

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.[53]

• 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.[54]

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.[55]

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.[56] 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,[57] and requested delayed notice of a seizure15 times, and was rejected by a court only once.[58] Initial delays have been for up to 90 days, with the Justice Department requesting an extension 248 times.[59] The Section 213 searches have been used primarily for drug seizures;[60] the power has not been exercised to combat terrorism.[61]

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.[62]

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.[63]

• 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 that there is reasonable cause to believe that notice will endanger the life or physical safety of an individual.[64]

• 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.[65]

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."[66]

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.[67]

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.[68] 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.[69]

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[70] or whether it had ever been used to disrupt a terrorist plot,[71] 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.[72]

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, 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.[73]

• 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.[74]

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.[75] 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.[76]

• 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).[77]

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."[78] 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.[79] 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.[80] The Justice Department has stated that these reviews have resulted in the prosecution of "numerous cases." [81] 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.[82]

Recommendation:

• Permit the use of FISA only when obtaining foreign intelligence information is *the primary purpose* of the surveillance.[83]

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."[84] 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.[85] 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.[86]

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.[87]

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.[88]

• Require disclosure of FISC rules and FISC decisions that contain statutory construction analysis, unless the FISC decides that such disclosure would threaten national security.[89]

• 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.[90]

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.[91] 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.[92] 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.[93] 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.[94] Even those who provide financial support could be put to death.[95]

Many terrorist crimes are already eligible for the death penalty under federal or state law.[96] 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.[97] Further, EU countries refuse to supply evidence if it will be used in obtaining a capital conviction.[98] 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.[99] 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.[100] Individuals could be forced to travel up to 500 miles to be interrogated.[101] Further, persons receiving a subpoena under this authority could be prohibited from disclosing that they had received it.[102] Those who disclosed that they had received a subpoena could be imprisoned for up to five years.[103]

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.[104] 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.[105] 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.[106] 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.[107] 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."[108] 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.[109] 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.[110] 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.[111] An amendment was added to the original Kyl-Schumer bill that contains some of the FISA disclosure provisions advocated in this report.[112] The bill passed the Senate, as amended, on May 8, 2003.[113]

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.[114] 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.[115] Then, proponents suggested that the bill was necessary to catch so-called "lone wolf terrorists."[116] But careful consideration of this theory revealed that few, if any, international terrorists work alone,[117] and that in any case, were such a situation to arise, traditional criminal investigatory techniques would be sufficient.[118] Moreover, in private briefings, FBI representatives admitted that they are getting all the warrants they need under current law.[119]

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).[120] The Sensenbrenner bill proposes to: 1) enforce National Security Letters, a form of administrative subpoena,[121] 2) allow the unfettered use of FISA information in immigration proceedings,[122] and 3) amend the Classified Information Procedures Act to keep more information from criminal defendants.[123] The bill also contains the Kyl-Schumer language discussed in detail above.[124]

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.[125] It also allows the government to cite for contempt of court individuals who fail to comply with a National Security Letter.[126] 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.[127] 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.[128] 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.[129] 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,[130] 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.[131] In March 2002 and again in April 2003, the Department of Defense released regulations outlining the procedures to govern these forums.[132] Serious concerns have been raised as to whether these procedures are compatible with fundamental standards of fairness and due process.[133] 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.[134] 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.[135] 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.[136]

• Terminate the authority of the Military Commissions effective December 31, 2005.[137]

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."[138] 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.[139] 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.[140] 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."[141] 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.[142]

• 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.[143] 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.[144]

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.[145]

• 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,[146] there are serious impediments for them to actually do so. First, the government will not pay any costs or fees to civilian attorneys.[147] 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.[148] 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[149] – 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.[150]

• 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.[151]

• Allow non-U.S. citizen lawyers with appropriate qualifications to serve as Civilian Defense Counsel.[152]

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.[153] For example, proceedings could be closed to protect "intelligence and law enforcement sources, methods or activities" or "other national security interests."[154] Along with the general public, the accused and Civilian Defense Counsel can be excluded on such grounds.[155]

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.[156]

• 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.[157]

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.[158]

• Grant the United States Court of Appeals for the District of Columbia the authority to review any detention decisions.[159]

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.[160] Jose Padilla was detained on May 15, 2002 at an airport in Chicago as a "material witness" to the 9/11 terrorist attacks.[161] 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.[162] On June 9, however, the government notified the Court (but not Padilla or his counsel) that it

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

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…"[168] 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.[169] U.S. military screening teams in Afghanistan determined that Hamdi should be treated as an "enemy combatant" and transferred him to Guantanamo Bay, Cuba.[170] 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.[171] He has not been permitted to consult an attorney, appear in court, or communicate in any way with the outside world.[172] He may not even be aware that there has been litigation filed in his name.[173]

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."[174] 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."[175] 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."[176]

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.[177] 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.[178] Only those who violate the laws of war should be prosecuted by special military commissions.[179] 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.[180] 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 solider, 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."[181] 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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[8] ID.
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[140] Id. at Rule 807.
[141] MILITARY COMMISSION INSTRUCTIONS No. 5, Annex B (Apr. 30 2003).
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[144] Id. at § 5(b).
[145] *See* ABA Enemy Combatant Report, at 10.
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[149] Id.
[150] *See* ABA Enemy Combatant Report, at 13.
[151] *See* Id. at 12.
[152] *See* Id. at 14.
[153] MILITARY COMMISSION ORDER No. 1 § 6(B)(3)
[154] Id.
[155] Id.
[156] *See* Military Tribunal Authorization Act, S. 1941, 107th Cong. § 4(c).
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[160] 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).]
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[179] *Supra*, note 6 at 41.
[180] Id.
[181] Limitation on detention; control of prisons, 18 U.S.C. §4001(a).

Testimony of

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on

"America after 9/11: Freedom Perceived or Freedom Lost?"

before the

Committee on the Judiciary
United States Senate
Washington, D.C.

November 18, 2003

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Mr. Chairman and other distinguished members of the committee. My name is Muzaffar Chishti. I am a lawyer and I direct the Migration Policy Institute's office at New York University's School of Law. I applaud you for holding these hearings to address the serious implications of our government's policies since September 11, and thank you for inviting me to testify.

The Migration Policy Institute (MPI) is an independent, non-partisan think-tank dedicated to the study of the movement of people world-wide. The institute provides analysis grounded in research and practical experience, develops policy proposals, and offers evaluation of immigration and refugee policies and programs at the local, national, and international levels. It aims to meet the rising demand for pragmatic responses to the challenges and opportunities that large scale migration, whether voluntary or forced, presents to communities and institutions in an increasingly integrated world.

In our commitment to generating informed and thought provoking proposals that support sound immigration policy, MPI recently concluded its report, "America's Challenge: Domestic Security, Civil Liberties and National Unity after September 11". I co-authored the report along with Doris Meisner, the former INS Commissioner and now a Senior Fellow at MPI, and Demetrios Papademetriou, Jay Peterzell, Michael Wishnie, and Stephen Yale-Loehr.

MPI's report is a comprehensive look at our immigration policies after September 11. It critically examines major anti-terrorism initiatives from the perspectives of national security, civil liberties, and social unity. It is based on the views of senior intelligence and law enforcement officials, results of numerous interviews with Arab and Muslim community leaders, and more than 400 profiles of post-September 11 individual detainees. The report advances an alternative framework of immigration policy and enforcement that is more likely to achieve security, civil rights, national unity goals than a number of current policies. A distinguished group of experts—ranging from former senior law enforcement, intelligence, and foreign policy officials to leaders of immigrant and civil rights community – served as our advisory panel. This testimony is based on our report.

Our report found that the U.S. government's harsh measures against immigrants since September 11 have failed to make us safer, have violated our fundamental civil liberties, and have undermined national unity.

The devastating attacks of September 11 demanded a wide-ranging response. The United States has responded with military action, as in Afghanistan; through intelligence operations to disrupt al Qaeda and arrest its members; and by re-organizing homeland security.

But our new security measures must be effective rather than merely dramatic, and must not destroy what we are trying to defend. The government's post-September 11 immigration measures have failed these tests.

These actions have not only done great harm to the nation; they have also been largely ineffective in their stated goal of improving our domestic security. Despite the government's heavy-handed immigration tactics, many of the September 11 terrorists would probably be admitted to the United States today.

Al Qaeda's hijackers were carefully chosen to avoid detection: all but two were educated young men from middle-class families with no criminal records and no known connection to terrorism. To apprehend such individuals before they attack requires a laser-like focus on the gathering, sharing and analysis of intelligence, working hand-in-glove with well-targeted criminal and immigration law enforcement.

Instead, the government conducted roundups of individuals based on their national origin and religion. These roundups failed to locate terrorists, and damaged one of our great potential assets in the war on terrorism: the communities of Arab- and Muslim-Americans.

We believe it is possible both to defend our nation and to protect core American values and principles, but doing so requires a different approach. It is too easy to say that if we abandon our civil liberties the terrorists win. It is just as easy to say that without security there will be little room for liberty. What is hard is to take both arguments with equal seriousness and to integrate them within a single framework. We set out to reach that important balance in our report.

As we worked on this project we became convinced that more than security and civil liberties—that is, the rights of individuals—are at stake. There is a third element: the character of the nation. Our humblest coin, the penny, bears the words *e pluribus unum*, or "from many, one." The phrase goes to the heart of our identity as a nation and to the strength we derive from diversity. We strongly believe that fully embracing Muslim and Arab communities as part of the larger American society would not only serve this American value but help break the impasse between security and liberty, strengthening both.

Here are some highlights of our report:

Harsh Measures Against Immigrants Have Failed to Make Us Safer

Our 18-month-long review of post-September 11 immigration measures determined that:

- The U.S. government overemphasized the use of the immigration system;
- As an antiterrorism measure, immigration enforcement is of limited effectiveness; and

- Arresting a large number of non-citizens on grounds not related to domestic security only gives the nation a false sense of security.

In some cases, the administration simply used immigration law as a proxy for criminal law enforcement, circumventing constitutional safeguards. In others, the government seems to have acted out of political expediency, creating a false appearance of effectiveness without regard to the cost.

Our research indicates that the government's major successes in apprehending terrorists have not come from post-September 11 immigration initiatives but from other efforts such as international intelligence activities, law enforcement cooperation, and information provided by arrests made abroad. A few non-citizens detained through these immigration initiatives have been characterized as terrorists, but the only charges brought against them were actually for routine immigration violations or ordinary crimes.

Many of the government's post-September 11 immigration actions have been poorly planned and have undermined their own objectives. For example, the goals of the special call-in registration program have been contradictory: gathering information about non-immigrants present in the United States, and deporting those with immigration violations. Many non-immigrants have rightly feared they will be detained or deported if they attempt to comply, so they have not registered.

Our research also found serious problems at the Federal Bureau of Investigation (FBI) that are hampering our nation's counterterrorism efforts and damaging other key national interests. The State Department has tried for 10 years to get access to FBI information to add to its terrorist watch-lists; those discussions are still going on. Automating this process would help to overcome long delays in visa approvals that are damaging U.S. political and economic relations abroad. It would also allow agencies to focus on a more in-depth risk assessment of visa applicants who raise legitimate security concerns.

Finally, the Justice Department's efforts to enlist state and local law enforcement agencies into enforcing federal immigration law risks making our cities and towns more dangerous while hurting the effort to fight terrorism. Such action undercuts the trust that local law enforcement agencies have built with immigrant communities, making immigrants less likely to report crimes, come forward as witnesses, or provide intelligence information, out of fear that they or their families risk detention or deportation.

Government Immigration Actions Threaten Fundamental Civil Liberties

The U.S. government has imposed some immigration measures more commonly associated with totalitarian regimes. As our report details, there have been too many instances of long-time U.S. residents deprived of their liberty without due process of law, detained by the government and held without charge, denied effective access to legal

counsel, or subjected to closed hearings. These actions violate bedrock principles of U.S. law and society.

Take the experience of Tarek Mohamed Fayad, an Egyptian dentist arrested in southern California on Sept. 13, 2001, for violating his student visa. During Fayad's first 10 days of incarceration he was not allowed to make any telephone calls. Thereafter, he was allowed sporadic "legal" calls and only a single "social" call per month. The "legal" call was placed by a Bureau of Prisons counselor either to a designated law office or to one of the organizations on the INS's list of organizations providing free legal services in the region. The privilege of making a call was deemed satisfied once the call was placed, regardless of whether the call was answered. Of the agencies on the list provided to Fayad, only one number was a working contact for an agency providing legal counseling to detainees and none of the organizations agreed to provide representation. In the meantime, Fayad's friends had hired an attorney for him, but the attorney was unable to determine his location for more than a month. Even after the attorney found out that Fayad was being detained at a federal facility in New York, the Bureau of Prisons continued to deny having Fayad in custody.

Rather than relying on individualized suspicion or intelligence-driven criteria, the government has used national origin as a proxy for evidence of dangerousness. By targeting specific ethnic groups with its new measures, the government has violated another core principle of American justice: the Fifth Amendment guarantee of equal protection.

The government also conducted a determined effort to hide the identity, number and whereabouts of its detainees, violating the First Amendment's protection of the public's right to be informed about government actions. This right is at the heart of our democracy, and is crucial to maintaining government accountability to the public.

The government's post-September 11 actions follow a repeating pattern in American history of rounding up immigrant groups during national security crises, a history we review as part of our report. Like the internment of Japanese-Americans during World War II, the deportation of Eastern-European immigrants during the Red Scare of 1919-20, and the harassment and internment of German-Americans during World War I, these actions will come to be seen as a stain on America's heritage as a nation of immigrants and a land where individual rights are valued and protected.

Profiles of 406 Detainees, Despite Government Secrecy

More than 1,200 people—the government has refused to say exactly how many, who they are, or what has happened to all of them—were detained after September 11. Despite the government's determined efforts to shroud these actions in secrecy, as part of our research we were able to obtain information about 406 of these detainees. The appendix to our report contains summaries of each of these individuals, which we believe to be the most comprehensive survey conducted of the detainees. They reveal the following:

- Unlike the hijackers, the majority of non-citizens detained since September 11 had significant ties to the United States and roots in their communities. Of the detainees for whom relevant information was available, over 46 percent had been in the United States at least six years. Almost half had spouses, children, or other family relationships in the United States.

- Even in an immigration system known for its systemic problems, the post-September 11 detainees suffered exceptionally harsh treatment. Many were detained for weeks or months without charge or after a judge ordered them released. Of the detainees for whom such information was available, nearly 52 percent were subject to an "FBI hold," keeping them detained after a judge released them or ordered them removed from the United States. More than 42 percent of detainees were denied the opportunity to post bond. Many of the detainees were subjected to solitary confinement, 24-hour lighting of cells and physical abuse.

- Although detainees in theory had the legal right to secure counsel at their own expense and to contact family members and consular representatives, the government frequently denied them these rights, especially in the first weeks after September 11.

- Many of the detainees were incarcerated because of profiling by ordinary citizens, who called government agencies about neighbors, coworkers and strangers based on their ethnicity, religion, name or appearance. In Louisville, Ky., the FBI and INS detained 27 Mauritanians after an outpouring of tips from the public; these included a tip from a suspicious neighbor who called the FBI when a delivery service dropped off a box with Arabic writing on it.

  In New York, a man studying studying airplane design at the New York Institute of Technology went to a Kinko's store to make copies of airplane photos. An employee went into the wastebasket to get his information and then called the FBI; after nearly two months in detention, he accepted voluntary departure. Nearly 28 percent of the detainees were arrested because of a tip to the authorities by private citizens.

Most importantly, immigration arrests based upon tips, sweeps and profiling have not resulted in any terrorism-related convictions against these detainees. Of the four detainees in our sample who had terrorism-related charges brought against them, all four were arrested based on traditional investigative techniques, not as the result of immigration enforcement initiatives. One has since been convicted and two have been acquitted; charges were dropped against the fourth individual and he was deported.

Government Targeting of Arab and Muslim-Americans Undermines National Unity

The government's actions against Arabs and Muslims have terrified and alienated hard-working communities across the nation.

President Bush's visit to a Washington mosque shortly after September 11 had a temporary positive impact on Arab- and Muslim-American communities. But the subsequent failure of government leaders to speak out on a sustained basis against discrimination, coupled with the Justice Department's aggressive immigration initiatives, sent a message to individuals and companies that discrimination against Arabs and Muslims was acceptable, leaders of these communities said. These views emerged in a coast-to-coast series of interviews that the Migration Policy Institute conducted to gauge the impact of the crisis on Arab- and Muslim-Americans.

"September 11 has created an atmosphere which suggests that it is okay to be biased against Arab-Americans and Muslims," said a regional director of an Arab-American civil rights organization.

The Justice Department's decision to conduct closed immigration proceedings for many of the detainees only increased suspicion that Arab- and Muslim-Americans were being treated under a different standard of due process. "The automatic association with terrorism is present in all these proceedings," said a prominent Arab-American lawyer in Michigan.

There is a strong belief among Arab- and Muslim-Americans that these measures are ineffective in responding to threats of terrorism, but are being undertaken for political expediency or public relations at a huge price to their communities. "This is political smoke to make people feel good," said the spokesman of a national Arab-American organization.

In a striking consensus, however, many leaders of the community have developed a positive reaction to law enforcement agencies since September 11, especially to local police. "The local police are our friends," said the chief imam of a New York Islamic center, citing their constant presence to protect his mosque.

Discrimination in the workplace soared after September 11. So overwhelming was the number of complaints it received that the Equal Employment Opportunity Commission (EEOC) created a new category to track acts of discrimination against Middle Eastern, Muslim and South Asian workers after September 11. In the 15 months between Sept. 11, 2001, and Dec. 11, 2002, the EEOC received 705 such complaints. Many more went unreported. And to add insult to injury, some of those who were detained after September 11 have been fired by their employers as a result.

Yet the experience of Arabs and Muslims in America post-September 11 is more than a story of fear and victimization. It is, in many ways, an impressive story of a community that at first felt intimidated but has since started to assert its place in the American body politic. Naturalization applications from Arab and Muslim immigrants have jumped and voter registration has risen since September 11.

September 11 and its aftermath have ushered in what could be called the "Muslim moment:" a period of rising Muslim self-consciousness, new alliances outside their own

communities, interfaith dialogue, and generational change. The sense of siege has strengthened many Muslim- and Arab-American political organizations and has led them to a greater focus on civil rights, social services, economic development, and engagement with government agencies. The notion of a distinct "American Muslim" identity has gained new currency. It is an identity that seeks to assert its independence from forces abroad, one that combines the essential elements of Islam and the values of U.S. constitutional democracy.

International Consequences of U.S. Actions

Unfortunately, U.S. actions since September 11 have encouraged foreign governments to restrict their citizens' freedoms in the name of security. There is now growing evidence that governments in many parts of Europe, Central Asia, Africa, South Asia, and the Far East have either adopted new measures, or amplified existing legislations, to give police wide powers to investigate, search and detain suspects. Detentions for long periods of time without trial is becoming more common, as is monitoring electronic communications and commercial transactions.

Similarly, torture of political prisoners and summary executions have intensified after September 11, according to a number of investigative reports. The new measures have frequently been used by governments to squelch political dissent. Our government's policies may have even influenced the terminology of new measures. For example, press reports suggest that in Liberia, the now-exiled President Charles Taylor declared three of his critics "illegal combatants", to be tried in a military court.

An Alternative Framework for Immigration Enforcement and Domestic Security—Defending Our Nation and its Core Values

America's challenge is to meet new security demands while defending and strengthening the civil liberties and national unity that contribute to our great strength as a nation. The terrorist threat demands a reaction that is strong but also smart. The necessary measures may please neither civil libertarians nor those who believe civil liberties are a luxury we can no longer afford.

To meet this challenge, Congress must reassert leadership. Congress has accorded extraordinary deference to the executive branch since September 11. This may have been understandable immediately after the attacks. But in our constitutional system, it is now vital for Congress to assert its policy and oversight role, and to closely monitor the executive branch's use of its expanded domestic security powers.

The primary domestic security responses to terrorism should be strengthened intelligence and analysis, compatible information systems and information-sharing, and vigorous law enforcement and investigations. Improved immigration controls and enforcement can support good antiterrorism enforcement, but they are not enough by themselves.

The broad framework that should guide the nexus between immigration policy and counterterrorism should center on four broad policy imperatives:

- **Mobilizing intelligence and information capabilities:** More than anything else, September 11 demonstrated the need to dramatically improve the nation's intelligence capabilities. The immigration system captures voluminous amounts of data that can be important in "connecting the dots" about individuals under investigation. But for this to be effective, information from visa and immigration data systems must be fully linked to establish complete immigration histories of visitors and residents, and government agencies must greatly improve their information-sharing and their systems for maintaining watch-lists.

- **Protecting the security of air, land and sea borders and beyond:** Border enforcement must permit vast numbers of legitimate crossings while identifying and stopping a very small, but potentially lethal, number of wrongdoers. This calls for new systems, infrastructure, and policies rooted in risk management principles that identify reliable people and traffic, so that enforcement officials can concentrate on unknown and high-risk travelers that may constitute security threats.

- **Supporting vigorous law enforcement and law enforcement cooperation:** Strengthened enforcement of immigration laws can play an important role in combating terrorism. In specific cases, immigration violations and charges may be a method for identifying or developing criminal or terrorism-related charges, just as tax evasion has been used to thwart organized crime. But safeguards must also be established so that violations of immigration status requirements, for example, do not serve as a pretext for avoiding due process requirements.

  Tools such as the use of classified information in terrorism prosecutions should be allowed only on a case-by-case basis and only with judicial authorization. Arrests and detentions for immigration violations should be subject to time limits that may be extended, but only in exceptional instances, case-by-case, and with a showing before and authorization from an immigration judge. And individuals detained for immigration violations, who do not now enjoy the right to government-appointed counsel because immigration proceedings are civil matters, should be granted that right when immigration charges result in detention.

- **Engaging Arab- and Muslim-American communities:** It is crucial for law enforcement to engage Arab- and Muslim-American communities as it works to identify terrorism-related conspiracies, recruitment, and financial networks. This requires cultivating new relationships and building trust. The government should also embrace these communities as bridges of understanding to societies and peoples around the world who are deeply alienated from the United States.

The detailed findings and recommendations contained in our report are as follows:

Findings

- To combat terrorism since September 11, the U.S. government has relied to an excessive degree on its broad power to regulate immigration.

  Although parts of the immigration system have been tightened to good effect, even under the best immigration controls most of the September 11 terrorists would still be admitted to the United States today. That is because they had no criminal records, no known terrorist connections, and had not been identified by intelligence methods for special scrutiny. The innovation al Qaeda introduced is "clean operatives" who can pass through immigration controls.

  Immigration measures are an important tool in the domestic war against terrorism, but they are not effective by themselves in identifying terrorists of this new type. The immigration system can only set up gateways and tracking systems that: (1) exclude terrorists about whom the United States already has information; and/or (2) enable authorities to find "clean" operatives already in the country if new information is provided by intelligence agencies. The immigration and intelligence systems must work together for either to be effective.

  To that end, the lead domestic security responses to terrorism should be strengthened intelligence and analysis, compatible information systems and information-sharing, and vigorous law enforcement and investigations. Improved immigration controls and enforcement are needed and can support good anti-terrorism enforcement, but they are not enough by themselves.

- The government's use of immigration law as a primary means of fighting terrorism has substantially diminished civil liberties and stigmatized Arab- and Muslim-American communities in this country. These measures, which were primarily targeted at Muslims, have diminished the openness of U.S. society and eroded national unity.

- Congress has accorded extraordinary deference to the executive branch. This may have been understandable immediately after September 11. But in our constitutional system, it is now vital for Congress to assert its policy and oversight role.

- Despite the government's refusal to provide information about the more than 1,200 non-citizens detained immediately after September 11, we were able to obtain information on 406 of them. We believe this to be the most comprehensive survey conducted of these detainees. The summaries, which are contained in the Appendix to this report, reveal the following:

- One-third of the detainees in our survey were from just two countries: Egypt and Pakistan. We found no rational basis for this disproportionate concentration.

- Of the detainees for which information about the total amount of time spent in the United States was available, over 46 percent had been in the United States at least six years. Of those for whom relevant information was available, almost half had spouses, children, or other family relationships in the United States. This suggests that the majority of non-citizens detained since September 11 had significant ties to the United States and roots in their communities, unlike the hijackers.

- We did not find any substantial evidence that government officials systematically used Middle Eastern appearance as the primary basis for apprehending these detainees. However, we found that many of the detainees were incarcerated because of profiling by ordinary citizens, who called government agencies about neighbors, coworkers and strangers based on their ethnicity or appearance. We also found that law enforcement agencies selectively followed up on such tips for persons of Arab or Muslim extraction. These findings are based on our review of these 406 cases and on interviews with community leaders, lawyers, and advocates who had contact with the detainees.

- Large numbers of detainees were held for long periods of time. Over half of the detainees for whom such information was available were detained for more than five weeks. Almost nine percent were detained more than nine months before being released or repatriated.

- Even in an immigration system known for its systemic problems, the post-September 11 detainees have suffered exceptionally harsh treatment. Many of these detainees had severe problems notifying or communicating with their family members and lawyers or arranging for representation at all. Many were held for extensive periods of time before they were charged on immigration violations. Many had exceptionally high bonds posted against them or were not allowed to post bond. Of the detainees for whom such information was available, approximately 52 percent were believed to be subject to an FBI hold, preventing their repatriation for weeks or months even after they were ordered removed from the United States and did not appeal.

- Most importantly, from our research it appears that the government's major successes in apprehending terrorists have not come from post-September 11 detentions but from other efforts such as international intelligence initiatives, law enforcement cooperation, and information provided by arrests made abroad. A few non-citizens detained after September 11 have been characterized as terrorists, but the charges brought against them were actually for routine immigration violations or unrelated crimes.

- We found that established due process protections have been seriously compromised:

    - Nearly 50 people have been held as material witnesses since September 11. The use of the material witness statue allowed the government to hold them for long periods without bringing charges against them. Many were held as high security inmates subjected to the harshest conditions of detention. The government's use of the material witness statute effectively resulted in preventive detention, which is not constitutionally permissible.

    - Over 600 immigration hearings were closed because the government designated the detainees to be of "special interest" to the government. Such hearings raise serious constitutional concerns and have been applied primarily to Muslim detainees.

    - Although detainees had the legal right to secure counsel at their own expense and to contact family members and consular representatives, the reality of the detentions frequently belied the government's assertions regarding these rights.

- The government has selectively enforced immigration laws based on nationality since September 11. Though claiming to include other factors, the record is one of de facto national origin-based enforcement. In addition to arrest and detention policies, examples of nationality-based enforcement include:

    - The voluntary interview program.

      This program greatly alarmed Arab- and Muslim-American communities. In some places, the FBI worked to establish good relations with the community and conducted the program in a non-threatening manner. Problems occurred, however, when poorly-trained police officials were tasked to implement the program. Moreover, the goals of the program (investigating the September 11 terrorist attacks, intimidating potential terrorists, recruiting informants, and enforcing immigration violations) were contradictory. The immigration enforcement focus and public fanfare that surrounded the program worked against its potential for intelligence gathering.

    - The absconder initiative.

      As a general immigration enforcement measure, the absconder apprehension initiative is legitimate and important. However, after September 11 the government changed the character of the program to make it nationality-specific. This has marginal security benefits, while further equating national origin with dangerousness. Although stepped-up absconder apprehension efforts are eventually to encompass all nationalities, this has not happened so far.

- Special registration.

  The "call-in" special registration program (part of the National Security Entry-Exit Registration System (NSEERS)) has been poorly planned and has not achieved its objectives. Its goals have been contradictory: gathering information about non-immigrants present in the United States, and deporting those with immigration violations. Many non-immigrants have rightly feared they will be detained or deported if they attempt to comply, so they have not registered. Moreover, any potential security benefits of registering people inside the United States will fade over time as new non-immigrants are required to register at the border.

- Another critical civil liberties concern is the administration's assertion that local police officials have inherent authority to enforce federal immigration statutes and enter information about civil immigration violations into the National Crime Information Center (NCIC) database. We found no clear statutory authority to allow immigration information to be stored in NCIC. Such measures undercut the trust that local law enforcement agencies have built and need with immigrant communities to fight terrorism and other crimes.

- Arabs and Muslims in America feel under siege, isolated, and stigmatized. They believe they have been victimized twice: once by the terrorists and a second time by the reaction to that terrorism.

  The President's visit to a Washington, D.C. mosque shortly after September 11 had a profound positive impact on Arab- and Muslim-American communities. Community and religious leaders all emphasized the symbolic importance of such actions and a critical need for senior government officials to deliver sustained messages of inclusiveness, tolerance, and the value of diversity.

  Hate crimes against Muslims soared after September 11, rising more than 1,500 percent. The number of violent hate crimes has since tapered off.

  Employment discrimination against Muslim-Americans, Arab-Americans, and South Asians also increased dramatically. The federal Equal Employment Opportunity Commission (EEOC) received over 700 complaints concerning September 11-related employment discrimination in the first 15 months after the attacks. Community leaders believe many hate crimes and acts of employment discrimination have gone unreported. Government officials have spoken out only occasionally against such incidents.

  Paradoxically, the sense of siege has also resulted in some communities starting to assert their civil and political rights and engage in the political process in new, classically American ways. And Arab- and Muslim-American organizations have started to react to the crisis of the attacks as a significant opportunity to strengthen

their organizational structures, build new alliances, and increase their profile as advocates.

We also reviewed the historical record. In times of similar crisis in the past, U.S. immigration law has often been misused to selectively target non-citizens based on their nationality and/or ethnicity under the pretext of protecting domestic security. In most of these cases, the government failed to prove the existence of the alleged threat from within these communities, and the U.S. public has come to regret our government's actions. Targeting whole communities as disloyal or suspect has damaged the social fabric of our country as a nation of immigrants.

- Finally, we found an important international echo effect from domestic immigration policy. By targeting Muslim and Arab immigrants the U.S. government has deepened the perception abroad that the United States is anti-Muslim and that its democratic values and principles are hypocritical. This echo effect is undermining U.S. relationships with exactly the moderate, pro-western nations and social groups whom we need in our fight against terrorism.

Recommendations

The issues examined in our report touch wide-ranging aspects of our national life. They span the distance from how we interact with one another individually to the policymaking role of Congress under the Constitution. They truly are "America's Challenge." To reflect this range, we have grouped our recommendations into six themes.

A. Congressional Oversight and Legislation

1. New executive branch powers, especially those provided by the USA Patriot Act, should be carefully monitored on an ongoing basis. Congress sensibly included sunset provisions in that legislation, recognizing that emergency measures passed to deal with the unprecedented threat presented by the rise of terrorism deserve ongoing evaluation, oversight, and reconsideration before becoming a permanent part of our legal tradition. This decision was particularly appropriate given the amorphous and open-ended character of the terrorist threat and the uncertainty of the long-run costs and benefits of these measures. These sunset provisions in the USA Patriot Act should be retained, and Congress should use the oversight opportunities that they invite. Any new anti-terrorism legislation should include similar sunset provisions to ensure that such measures receive the ongoing reassessment and re-evaluation that they deserve before becoming a permanent part of our law.

2. Congress has accorded extraordinary deference to the executive branch. This may have been understandable immediately after September 11. But in our constitutional system, it is vital for Congress to assert its policy and oversight role. Among the issues for review should be the USA Patriot Act's amendments to the Foreign Intelligence Surveillance Act (FISA) that allow surveillance where foreign

intelligence is a "significant purpose" rather than "the purpose," as originally enacted. This does not enhance collection of information on foreign terrorists and raises the possibility that FISA will be used to gather evidence of ordinary crimes, which we believe is unconstitutional. The original language should be restored and language added making it clear that the law permits gathering evidence to prosecute specified foreign intelligence crimes.

3. Congressional committees should also assert their oversight role in evaluating how immigration law provisions have been used since September 11. For example, the government asserts that closed immigration hearings in which the person's name is kept secret are useful to recruit informants. Congress should evaluate the validity of this assertion, especially in light of the Supreme Court's recent decision not to hear a case on this issue. Even if determined to be useful, the practice is so counter to U.S. notions of justice that Congress should carefully consider whether it should be used at all. Congressional review should similarly include the government's practice of withholding information on the post-September 11 detainees, and the use of the material witness statute. Based on their assessment, the Intelligence committees should issue a report so that public debate is possible.

4. The Intelligence and Judiciary committees should carefully examine the many issues raised by data-mining, a technique that officials hope will identify terrorist suspects and networks among general populations. Does it work? How should officials handle the many false-positives that are produced? Will people identified this way be subject to further investigation based on previously unknown forms of reasonable suspicion? Will data-miners range over private sector as well as government information? Will they examine IRS or other confidential government files?

B. Information-sharing and Analysis

1. Unifying and automating government watch lists must be completed on an urgent basis. As the CIA has done, the FBI should provide all relevant information for inclusion in TIPOFF, the State Department's terrorist watch list. Centralizing this information in TIPOFF will avoid long visa processing delays, which damage U.S. political and economic relations abroad.

2. To protect against violations of individual rights caused by mistaken or incomplete information, clear procedures for who is placed on and taken off watch lists should be developed. These procedures should be subject to public comment and review and should:

   - establish explicit criteria for listing names;
   - provide for regular review of names listed; and

- set out steps for assessing the quality of information that can result in listing or removing names.

3. The State Department, CIA, and FBI should devise mechanisms for doing in-depth risk-assessments of particular visa applicants who are of plausible security concern. To be effective, these must be based on narrower intelligence criteria than mere citizenship in a country where al Qaeda or other terrorist organizations have a presence.

C. Due Process and Immigration Procedure Issues

1. A disturbing trend exists in recent legislation to criminalize minor immigration violations. In addition, immigration violations are now being widely used as a basis for investigating more severe criminal violations. For these reasons, immigration detainees, who traditionally have not enjoyed the right to government-appointed counsel because immigration proceedings are considered civil matters, should be granted the right to such counsel.

2. Closed proceedings should be allowed only on a case-by-case basis. Arguments and evidence to close some or all of a hearing should be presented to a court for its approval. Similarly, classified information should be allowed only on a case-by-case basis.

3. Prolonged detentions without charge pose the strongest threat to civil liberties. A charge should be brought within two days of detention unless there are extraordinary circumstances that require an additional period of initial detention. The case for extraordinary circumstances should be presented to an immigration judge. Pre-charge detentions beyond two days and FBI holds should be subject to judicial review.

4. Detention is the most onerous power of the state, and should rarely be used as a preventive or investigative tool absent a charge. Bringing timely charges when evidence is available has no security cost. If the government requires additional time in extraordinary circumstances, an individual showing should be made to a judge.

5. Those detained should be released on bond unless there is a clear flight risk. Immigration authorities should not have automatic authority to overrule an immigration judge's bond determination. If the government disagrees with a bond decision, it can appeal and obtain a stay while the decision is pending. The Attorney General's recent decision challenging immigration judges' discretion to grant bonds lends special urgency to address this issue.

6. According to an "automatic stay" rule issued by the Department of Justice shortly after September 11, immigration authorities can automatically stay an immigration judge's decision to order a non-citizen's release from detention if the bond has been set at $10,000 or higher. The rule should be rescinded. Immigration judges balance security, flight risk and right-to-release claims. If the government disagrees, the decision can be appealed.

7. Individuals should be promptly released or repatriated after a final determination of their cases. The government should only be able to detain an individual for security reasons after a final removal order if a court approves the continued detention. The detainee should have full due process rights in such a proceeding.

8. With the secrecy, erosion of rights, and fear surrounding immigration, it is more important than ever that immigration officials take special care to uphold the following policies:

    - Informed consent to waivers of the right to counsel should be guaranteed and should be in writing in the detainee's own language.

    - Those offering legal counseling or pastoral services should have access to detainees, as should consular officers for their nationals.

    - When detainees are transferred to locations away from their families or to places where access to counsel is limited, notice should be promptly provided.

    - INS detention standards should be upheld to prevent abusive conditions (solitary confinement, lack of appropriate and adequate food, 24-hour exposure to lights, physical abuse, the inability to engage in religious practices, and harassment), especially when the INS contracts with non-federal facilities. Investigations of alleged abuses should be prompt and thorough.

9. The material witness statute should not be used to circumvent established criminal procedures. Any individual detained as a material witness should be entitled to the full procedural protections of the Fifth and Sixth Amendments, including due process and the immediate right to counsel.

D. Law Enforcement Programs

1. Revised FBI guidelines allow field offices to approve terrorism investigations. That authority should be returned to FBI headquarters officials. New Attorney General guidelines for domestic and foreign terrorist investigations have given the FBI broad authority to collect information on First Amendment activity to enhance domestic security. The breadth of these new powers calls for improved agency oversight to address legitimate civil liberties concerns.

2. Law enforcement officials at all levels must build ties with immigrant communities to obtain information on unforeseen threats. If special circumstances arise in the future that require interviews of immigrants, such interviews must be truly voluntary. As our research and a recent General Accounting Office report found, interviewees in the recently concluded voluntary interview program did not believe the program was truly voluntary. If special contingencies require voluntary interview programs again in the future, the model adopted by law enforcement officials in Dearborn, Michigan should be followed. Individuals should receive written requests informing them of the voluntary nature of the program and have the opportunity to have counsel present during the interview. Participants should be assured that no immigration consequences will flow from coming forward to be interviewed.

3. In pursuing absconders, immigration authorities should enforce final orders of removal based either on nationality-neutral criteria, such as dangerousness, criminal records, or ability to locate, or on intelligence-driven characteristics, which can include nationality but only in combination with these other characteristics.

4. Absconders who are apprehended should be able to reopen their final orders if they are eligible for immigration remedies or if they can establish that their in absentia orders were entered through no fault of their own.

5. Registration of non-immigrants entering the country is part of entry-exit controls that have been mandated by Congress. It is a defensible and long-needed immigration control measure as long as it is not nationality-specific and is driven by intelligence criteria. But the "call-in" registration program, which has been mischaracterized as part of the entry-exit system, is nationality-specific and is being implemented with contradictory goals of compliance and immigration law enforcement. Since the government has not extended call-in registration to all countries, which was its original stated intent, follow-up reporting requirements for those who have already registered should be terminated.

6. Any future registration of non-immigrants already in the country should only be carried out under the following circumstances:

    - Compliance should be the goal. This requires providing meaningful incentives for out-of-status individuals to register, including eventual regularization of their status.

    - To be meaningful, registration must be nationality-neutral and must include all non-immigrants in the country, including the large undocumented population.

    - Registrants with pending applications for adjustment of status, including under section 245(i) of the Immigration and Nationality Act, should not be put into immigration proceedings or detained.

- Registrants who are unlawfully present in the United States should be allowed to apply for a waiver of the three- and ten-year bars that normally apply to them.

- A registration program must be carefully planned, with sufficient lead-time and resources to handle literally millions of registrants, and be accompanied by a major outreach and public education program.

7. The government should reaffirm that state and local law enforcement agencies do not have inherent authority to enforce federal immigration law. Cooperative agreements between the Justice Department and the state governments (allowed under a 1996 law) that permit state and local officials to enforce immigration law should contain detailed plans regarding training such officials in immigration procedures. State and local law enforcement agencies should not affirmatively enforce federal immigration law.

8. Civil immigration information should not be entered into the NCIC, and the Justice Department's proposal to waive privacy standards for NCIC information should be abandoned.

9. To ensure effective oversight of civil rights issues in the work of the new Department of Homeland Security (DHS) and to aggressively investigate complaints alleging civil rights abuses, the Secretary of Homeland Security should establish a new position of Deputy Inspector General for Civil Rights in the DHS Office of Inspector General. Only with a dedicated senior official able to dedicate full attention to this portfolio will there be the oversight and accountability these sensitive issues require.

E. National Unity

1. An independent national commission on integration, made up of a wide spectrum of distinguished civic leaders, should be created to address the specific challenges of national unity presented by post-September 11 events and actions. The commission's goals should be guided by the principle that long-term interests of the nation lie in policies that strengthen our social and political fabric by weaving into it, rather than pulling out of it, all immigrant and ethnic communities. In the post-September 11 world, this means paying special attention to the experiences of Arab and Muslim communities, as well as to South Asian communities who are sometimes mistaken to be Muslim or Arab. Examples of issues the commission might address include:

- Policies that consciously and systematically prevent stigmatization of Muslim and Arab communities and actively turn them into social, political, and security assets.

- Sensitivity by airport personnel and other private and public entities to dress codes and protocols of Muslims, Arabs, and South Asians.

- The need for educational instruction about Islam and Muslims in schools and workplaces.

- Encouragement for interfaith dialogue at national and local community levels that leads to common programs across faiths.

- The role that charitable giving plays in the lives of Muslims and the implications on religious freedom of new bans on or monitoring of Muslim charities.

2. Public leadership and government policies and actions have important roles to play too:

   - To reassure the Muslim and Arab community in the United States, the President should use the moral authority of his office to deliver sustained messages of inclusiveness, tolerance, and the importance of diversity in our society.

   - Senior administration officials should consistently address conferences and other public events hosted by Arab and Muslim community groups. Similarly, issue-specific meetings should regularly be held with leaders of those communities.

   - There should be an increased and visible presence of Arab- and Muslim-Americans in key policymaking roles in the government. In particular, the FBI and other law enforcement agencies should expand efforts to hire Arab- and Muslim-American agents.

   - Widespread bans on Islamic charities should be re-examined. The U.S. government should issue guidelines to Muslim not-for-profit agencies regarding distribution of funds for charity purposes.

   - The government should aggressively pursue acts of private discrimination.

   - Relevant government agencies should use "testers" to track housing and employment discrimination against Muslims, Arabs, and South Asians to determine whether there has been a sustained increase in discrimination against such groups since September 11 and whether additional efforts to address it are needed.

3. Islam is misunderstood in America. This creates a special burden for Muslim Americans and Muslim immigrants living in America who have to cope with prejudices about their communities and their religious beliefs, while also experiencing the more general post-September 11 security fears that they share with other Americans. But many of the leaders also recognize the extraordinary opportunity they are presented with. Community, business, and religious leaders in

Arab and Muslim communities should take a more active role both in promoting democratic values overseas and in promoting their own rights and interests through the political process in the United States.

4. A small number of extremists have misappropriated Islam to promote acts of terrorism and preach hatred. Muslims have a special obligation to denounce such acts. Similarly, leaders of other religions have a responsibility for fostering an understanding of Islam and to denounce hate speech within their own faiths.

5. It is especially important that Islam's impressive history of tolerance and respect for pluralism be promoted and publicized. This is a huge challenge that can only partially be met through the efforts of the Muslim community in the United States. Like so many other ethnic and religious minorities, Muslim Americans cannot alone dispel the prejudices about their communities and religion. Rather, Americans generally, and the U.S. government in particular, must share the responsibility to learn about the different traditions and faiths that make up the true mosaic that is American society.

6. The advocacy, representational, and service capacities of Arab- and Muslim-American organizations should be expanded and strengthened. The donor community has a special role to play here.

F. Foreign Policy

1. Immigration policy has always had foreign policy dimensions and implications. But rarely has it had the resonance in national security matters that it has today. In re-examining domestic policies to strengthen national security, policymakers should also weigh the impact U.S. immigration policies have on our nation's long-term foreign policy goals in combating terrorism.

2. Immigration policy should not rely on enforcement programs that give propaganda advantages to terrorist foes and contribute to their ability to influence and recruit alienated younger generations. Immigration policy should also not undermine the great comparative advantage we have as a nation, which is openness to the world and to people of all nationalities and cultures. Instead, immigration policy should be actively used to promote cultural exchange, education, and economic activities that serve America's national interests abroad.

Conclusion

Immigration strategies grounded in the general framework and detailed recommendations set forth in the MPI report will both make the United States safer and respect civil liberties. Our recommendations also recognize, strengthen and use the advantage Arab and Muslim immigrant communities offer the United States in advancing its long-term domestic and foreign policy interests.

Unfortunately, by targeting and alienating these communities, the U.S. government's immigration actions since September 11 have deepened the perception abroad that America is anti-Muslim and that its principles are hypocritical. This strengthens the voices of radicals in their drive to recruit followers and expand influence, at the expense of moderates and others more sympathetic to Western philosophies and goals. Thus, in the name of buttressing security, current U.S. immigration policy may be making us *more* vulnerable to terrorism.

In the post-September 11 era, immigration policy must be part of a new security system in which the measures we take to protect ourselves also help us win the war for hearts and minds around the world. We urge Congress to take action now to help us win that war.

STATEMENT OF
ROBERT J. CLEARY
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FORMER UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEW JERSEY
AND THE SOUTHERN DISTRICT OF ILLINOIS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

PRESENTED ON

NOVEMBER 18, 2003

Mr. Chairman and Members of the Committee: It is an honor to appear before you today. I appreciate this opportunity to speak before the Committee about my experience as a prosecutor as it relates to the tools provided under the USA Patriot Act and their indispensable role in the investigation and prosecution of terrorists.

I am an attorney currently engaged in the private practice of law as a member of the law firm of Proskauer Rose LLP. From 1999 to 2002, I was privileged to serve first as the United States Attorney for the District of New Jersey and later as the United States Attorney for the Southern District of Illinois. Prior to being appointed as United States Attorney, I was the lead prosecutor in the Unabomb case, *United States v. Theodore J. Kaczynski.* In total, I spent 18 years as a federal prosecutor.

The September 11, 2001, terrorist attacks on our country occurred during my tenure as United States Attorney in New Jersey. In that capacity, I supervised a massive deployment of investigative and prosecutorial resources to the global terrorism investigation that followed. I believe my experience in supervising the New Jersey "9/11 investigation" and in leading the

Unabomb prosecution team gives me unique insight into the benefits the USA Patriot Act provides prosecutors and agents in the field in domestic and international terrorism cases.

In the days and weeks following the unspeakable tragedy of September 11, the New Jersey investigative team was consumed with a fear that another horrific attack had been planned and that its execution was imminent. Our investigative team – which consisted of over 500 investigators and prosecutors – literally worked around the clock, seven days a week, at a frenetic pace in an effort to detect and dismantle any terrorist plot before more blood was spilled. Tensions were heightened by several reports from the intelligence community and from law enforcement sources that, in fact, another devastating attack might be on the horizon. As a result, the investigative team felt constant pressure to move at breakneck speed.

This concern underscores a bedrock principle of terrorism investigations: the need to move quickly and efficiently. This necessity is borne, as suggested above, by the fear of another terrorist attack. The necessity of speed and efficiency is further bolstered by the realization that the investigative trail to terrorists and their confederates quickly grows very cold. In order to increase the odds of bringing terrorists to justice, investigators and prosecutors must be able to operate with enhanced efficiency. In the Patriot Act, Congress has given them the tools to do so.

I would like to focus my remarks this morning on how the Patriot Act enables terrorism investigators and prosecutors to move more nimbly and expeditiously. The Act has accomplished this by eliminating needless administrative burdens and mechanical impediments (see Section III, below). Earlier in these hearings, my former colleagues from the Department of Justice pointed out that in waging its war on terrorism, the Government needs strong laws and laws that are modernized to fit the state of technological advancement. The Patriot Act provides those tools as well. I would like to spend a few moments reviewing some of those statutory

provisions before addressing the ways in which the Patriot Act has increased the efficiency of terrorism investigations.

I. Stronger Laws Combating Terrorism And Terrorist Support Networks

As the Committee is well aware, the Patriot Act has been vital to strengthening criminal laws in the fight against terrorism. For example, the Act increased the maximum prison sentences for terrorism offenses. The leverage of stronger penalties provides greater incentive to cooperate against confederates. The Act also has eliminated the statute of limitations for certain terrorism crimes. Terrorists, like murderers, should never be free from prosecution, no matter how long it takes to track them down. Additionally, federal jurisdiction now extends to American facilities abroad, including our diplomatic and consular facilities and the related private residences overseas, with respect to crimes committed by or against United States nationals. With the broader jurisdictional reach, we can now prosecute these crimes in the United States, instead of relying on foreign courts. In these days, when our diplomatic and consular facilities and personnel are subject to an increased threat of attack, this is an especially useful law.

Government intelligence suggests that for every person who commits a terrorist act, there are as many as 35 individuals who provide support to that terrorist. In order to maintain an infrastructure for his criminal enterprise, the terrorist must rely on a wide array of assistance -- housing, technical support (such as expert advice and false documentation), and financial support. The Patriot Act targets this support network. Federal prosecutors can now criminally charge those who house, harbor, or conceal terrorists or those who are about to commit terrorist acts. They can also prosecute those who provide technical expertise to terrorists. The Act strengthened the law against providing material support to terrorists by broadening the definition

of "material support" to include expert advice and assistance. For example, if a civil engineer advises terrorists on how to destroy a building, that now constitutes material support. The material support statute has also been amended so that support provided *outside* the United States is now proscribed as well.

Further, the Act increased the Government's ability to target terrorists' financial support. Thus, the Act authorizes the forfeiture of assets of terrorists and terrorist organizations. The Government can confiscate terrorists' assets, regardless of the source of the property, and regardless of whether the property has been used to commit a terrorist act or whether the assets were proceeds of terrorist acts. The Government can also forfeit all assets that have been used or, more importantly, *are intended to be used* to facilitate a terrorist act. This critical provision enables the Government to disrupt a terrorist plot before it occurs by seizing the resources that are intended to support that criminal activity.

Finally, counterterrorism efforts are now afforded the full arsenal of powers that are used to combat other crimes. The most important illustration of this is that the Patriot Act added terrorism offenses to the list of the only crimes for which the Government may seek wiretap authorization. This enactment eliminates a glaring -- and inexplicable -- omission in the law. As another example, terrorism offenses are now included as RICO predicates. This amendment allows the Government to utilize the powers under the RICO statutes, which were traditionally used to combat organized crime, in the war against terrorism as well.

II. Modernization of the Law

Prior to the Patriot Act, our laws providing investigative tools to law enforcement did not keep pace with the development of new technologies. This problem led to a number of anomalous results, several of which are discussed below. The Patriot Act modernized our laws,

allowing for Government investigative techniques to apply *equally* to new technologies – to obtain the *same* information in the digital age that they could in earlier times, *under the same standards* that traditionally have been in place.

Cable Companies: Before the passage of the Act, special rules applied to attempts to gather information from cable companies, including notifying the subject of the Government inquiry and providing that person an opportunity to contest it in court. As a result, such investigative steps were rarely conducted. Before the internet era, this was not problematic for law enforcement because cable companies had provided only cable television programming. When cable companies began providing digital services, including the internet, law enforcement sought to obtain the same types of information, under the same process, which they obtained from internet companies. The cable companies, however, took the position that the old rules still governed. As a result, if the target of the investigation had internet service through an Internet Service Provider ("ISP"), such as AOL, the Government could obtain certain information using the normal processes -- subpoenas, court orders, and search warrants. As an example, law enforcement *could* obtain the contents of a target's e-mail account with a court-authorized search warrant if the target used an ISP such as AOL. If, on the other hand, the target had internet service through a cable company, as many people do today, the Government could not access the same information. This illogical dichotomy frustrated law enforcement efforts to investigate criminals who fortuitously, or perhaps even intentionally, chose cable internet service.

The Patriot Act changed this by rationalizing the process. For traditional cable services, such as pay-per-view and television programming, the old rules protecting viewer privacy still apply. For other services, however, such as the internet, the general rules that apply to all other

ISPs apply to the cable internet services as well. Here, the Patriot Act simply moved the law into step with the changing technologies – cable internet service – nothing more.

Internet Pen Registers and Trap and Traces: As another example, pen registers and trap and traces on telephone lines are well-recognized, time-honored, critical investigative tools of law enforcement. A traditional pen register records in real time all telephone numbers dialed from a telephone. The content of the calls are *not* disclosed. A trap and trace records all the telephone numbers making calls into the target telephone line. As with the pen register, the content of the calls are *not* disclosed. Law enforcement can then obtain subscriber information, such as the name and address, on the incoming and outgoing telephone numbers. In establishing a conspiracy, it is imperative to prove who is talking to whom and when. Together with surveillance and other investigative techniques, pen registers and trap and traces (collectively, "pens") are often critical tools to prove those crucial facts. Pens are also essential in developing evidence for other investigative devices, such as wire taps. Providing pen analysis -- an analysis of the telephone call logs -- is all but mandatory in affidavits for authorization to obtain a wire tap.

Pens require a court order. To obtain subscriber information, the Government must establish reasonable cause to believe, based on specific and articulable facts, that the subject of the investigation had violated or was violating federal law, and was using the target phone line to further criminal activity. Prior to the Patriot Act, the controlling statutes -- which were enacted in 1986 -- did not explicitly provide for pens on e-mail traffic or other internet activity inasmuch as they were unknown communication vehicles at that time. As a result of section 216 of the Act, law enforcement now has the statutory authority to install pens on the internet. Law enforcement, with the still-required court order, under the same standards, can obtain in-box and

out-box information from an e-mail account, along with the subscriber information on those e-mail accounts. The Government cannot get the subject line of the e-mail, or any other content of the e-mail with a pen, but may only obtain the equivalent information that can be obtained from a pen on a telephone line. Thus, this is no more intrusive than the traditional law enforcement devices on the telephone lines -- law enforcement is simply able to obtain the equivalent, critical information from this modern method of communication.

Voice Mail and Other Stored Voice Communications: Under the prior laws, law enforcement could not use search warrants to obtain voice and wire communications stored by electronic communication service providers, for example, voice mail messages stored and maintained by AT&T or Verizon for a subscriber. Rather, to acquire that evidence, the prosecutor had to undertake the much more difficult, labor intensive, and time-consuming process of obtaining a wiretap order from the court. This led to some anomalous results. If the target of an investigation had a traditional answering machine at home, law enforcement could obtain a copy of his or her taped messages with a search warrant. If, on the other hand, the target had a private voice mail service with a telephone company, the Government needed a wiretap to listen to the same recorded voice messages. Similarly, if law enforcement had a search warrant to obtain the contents of a target's e-mail account, it could read the e-mails and the attachments to the e-mails, such as pictures, documents, and other written communications that were attached to the e-mails. However, if there was a voice recording attached to the e-mail, the Government arguably was prohibited from listening to that voice message in the absence of a court-ordered wiretap.

Section 209 of the Act eliminated the different treatment with respect to the storage of wire communications versus the storage of other electronic communications. Now, voice mail

services are treated no differently than answering machines. The Government's ability to listen to voice mail messages should not depend on whether the target uses an answering machine or a voice mail service. The privacy concerns relating to messages on answering machines are the same as those relating to messages on voice mail services. Similarly, the content of voice mail attachments are appropriately treated as equivalent to other content-based e-mail attachments.

III. Speed and Efficiency

The Patriot Act has reduced purely administrative and mechanical burdens on investigators and prosecutors. This, in turn, has increased the efficiency of law enforcement without circumventing or undermining the protections and safeguards of civil liberties.

Single-Jurisdiction Pen Registers: Prior to the passage of the Patriot Act, if a federal prosecutor in New Jersey needed a pen register on a cellular phone with a New York area code, the prosecutor would be required to obtain a court order from New York. This entailed contacting a federal prosecutor in New York and having that prosecutor submit the application to a Magistrate Judge in New York. In some instances, the requesting prosecutors must meet certain peculiar stylistic or other non-substantive requirements of the district in which the application is made. Consequently, it is a much more time consuming and burdensome process. In New Jersey, where many areas serve as suburbs to New York City or Philadelphia, countless investigations involve phone numbers that cross state lines. Cumulatively, substantial resources were wasted as a result. I would guess that the federal prosecutors in Washington, DC, Virginia, and Maryland have had similar experiences.

Now, under section 216 of the Patriot Act, if New Jersey has jurisdiction over the crime under investigation, the New Jersey prosecutor could obtain a pen register on any telephone in the country with an order signed by a Magistrate Judge in the District of New Jersey. This

process only eliminates the red tape, but not the substance – it requires the same court order, under the same legal standards, but fewer administrative hurdles. Consequently, the investigation is conducted with greater speed and efficiency, without sacrificing privacy protections.

Single Order for Multiple Service Providers: Prior to the Patriot Act, law enforcement could track someone's internet activity with a court's permission. Once the Government identified the target's internet account, it could obtain an order that required the ISP, such as AOL, to disclose the internet sites visited by the person using his or her internet account. This investigative tool can provide important evidence, for example, if two co-conspirators are using a particular chat room to communicate, or if the target has visited a website that explains how to make a pipe bomb. Under the old rules, an order was only valid for a single ISP. In other words, if the target had an internet account with AOL, the Government obtained an order requiring AOL to provide the requested information. The problem arose if the target used AOL to enter one internet site ("site A"), and then used a link to jump to a second site ("site B") -- AOL could only disclose that the target visited site A. Only site A's ISP could reveal that the target jumped to site B from site A. Because the court order was only valid for AOL, the Government would need another order for site A's ISP. If the target continuously jumped from site to site, investigators would need an order for every ISP the target used. When you multiplied this by potentially hundreds of sites and ISPs, tracking down this information became prohibitive.

The Patriot Act changed this by giving federal courts the authority to issue one order on an internet account that is binding across the country. Under section 216, the order compels assistance from any ISP through which the target internet account travels. The Government can take the single court order and serve it on the ISP for each site visited by the target. Through the

connection information provided by each site, the Government is able to follow the target from site to site without having to prepare multiple applications and obtain separate court authorizations for each ISP.

Under this new provision, the same evidentiary standards are in place. The only difference is one of process efficiency. Instead of potentially having to write hundreds of substantively duplicative orders for each and every ISP, regurgitating the same information in multiple orders, and repeatedly obtaining an audience with the Court to sign such orders, the Government can now prepare a single order that binds all ISPs.

Nationwide Search Warrants for E-Mail: Prior to the Patriot Act, federal prosecutors who wanted to obtain the equivalent of a search warrant for an e-mail account to access the contents of a target's e-mails frequently encountered substantial administrative impediments. They were required to go to the district where the search and seizure would take place -- where the information was physically stored by the ISP -- to get a judge in that district to sign the search warrant. In the days following September 11, this requirement imposed an enormous bureaucratic burden and caused a significant bottleneck to the progress of the terrorism investigation. During the course of the 9/11 investigation, on many occasions, we needed a search warrant to examine the contents of an e-mail account. These search warrants had to be signed and executed in the districts where the ISPs, such as AOL, were located. Two of the three largest ISPs that we dealt with were in the Northern District of California. As a result, e-mail search warrants from all over the country, involving virtually every aspect of the global terrorism investigation, were filed in that judicial district. In short order, that court was overrun by applications for search warrants and other court orders involving these ISPs. In an effort to manage this staggering workload, the court implemented certain procedures. These procedures,

in turn, imposed additional burdens on the out-of-district prosecutors. As a result, however -- and through no fault of the court in the Northern District of California -- the processing of one of these applications, which would have taken mere hours in New Jersey, in fact, took an entire day or more, and required the efforts of several extra hands. In terrorism cases, when time is of the essence -- possible confederates may be fleeing the country, shedding aliases, obtaining new false documents, or otherwise disappearing, or worse yet, a terrorist plot may not be thwarted – such an unnecessary delay is simply unacceptable.

Section 220 of the Act changed that by providing nationwide search warrants for e-mail accounts. Now, when a New Jersey investigation needs the contents of an e-mail account, a federal prosecutor in New Jersey can file the application for a search warrant with a Magistrate Judge in New Jersey. The search of the e-mail account can then be conducted in the Northern District of California. This change merely reduces administrative hassles. The same constitutional standards still apply -- a federal Magistrate Judge must still find that there exists probable cause to believe that criminal activity is occurring, and probable cause to believe that evidence, fruits, or instrumentalities of the specified federal offenses will be found in the location to be searched.

Single-Jurisdiction Search Warrants for Terrorism Cases: Another change regarding search warrants is found in Section 219 of the Act, which provides for single-jurisdiction search warrants for terrorism cases. Whether an e-mail account, a storage facility just across the state lines, or any other property had to be searched, under the old rules, prosecutors had to present the search warrant application to a Magistrate Judge in the district in which the search was to be conducted. Similar to the problems with e-mail searches, this requirement frequently

necessitated substantial coordination among different prosecutors' offices and the court, resulting in bureaucratic burdens and invariable delays.

Now, as a result of section 219, a search warrant in a terrorism case can be obtained in the investigating district to search property in another district, as long as events related to the terrorism activities have occurred in the investigating district. Again, no safeguards are sacrificed or diminished under this section. A United States Magistrate Judge still must make the same probable cause finding. Particularly in terrorism investigations, where delay could be catastrophic, reducing the red tape without reducing the protections to civil liberties is an obvious benefit.

Easing the Restrictions to Information Sharing: Prior to passage of the Act, the law required that the "primary purpose" of the use of the investigative tools authorized under the Foreign Intelligence Surveillance Act ("FISA") was for foreign intelligence. This standard constrained the intelligence community's ability to share information with law enforcement.

Not surprisingly, in certain instances, the use of FISA (e.g., a wiretap authorized by the FISA Court) developed evidence of criminal conduct by the targets of such surveillance. The problem arose if the agents working on the intelligence investigation wanted to turn FISA-derived information over to criminal investigative agents and prosecutors. In particular, the Government was concerned that if a parallel criminal investigation resulted and began to progress, based on that fact, the FISA Court might determine that the primary purpose of the FISA wire was no longer foreign intelligence. In such a case, the FISA Court could then shut down the FISA wire, thereby compromising an on-going intelligence investigation. Due to these concerns, the "primary purpose" standard had the effect of preventing the dissemination of FISA-derived evidence for use in criminal investigations.

Section 218 of the Act changed the standard for using FISA to gather intelligence. Now, as long as a significant purpose is foreign intelligence, FISA may be used. This allows, in a greater number of situations, for FISA-derived information to be used in criminal cases. In fact, I know of at least one instance in which the Government was able to prosecute a fundraiser for terrorist organization as a result of information gathered from a FISA wire -- a prosecution that probably would not have happened without the Patriot Act.

The Act included another important change that increased the flow of information between the criminal and intelligence communities. Federal Rules of Criminal Procedure 6(e), which regulates grand jury secrecy, was amended to allow the disclosure, to members of the intelligence community, of information developed through a grand jury investigation that relates to foreign intelligence. Whereas the change in the FISA requirements allowed criminal investigators to benefit from information developed during intelligence investigations, the change in the grand jury secrecy rules allowed the intelligence community to benefit from information obtained from grand jury investigations. Additionally, the change to Rule 6(e) also allows the CIA to participate on the Joint Terrorism Task Forces throughout the country. The potential benefits of these measures, which have helped to open up the avenues of communication between the intelligence and criminal investigators, cannot be overstated.

IV. Closing

I applaud the open and constructive debate over the details of the Patriot Act and the tools it provides in the war against terrorism. To be sure, as with any other substantial legislative package, reasonable people can and do disagree about some of the specifics of the Patriot Act. There is one thing, however, about which there can be no reasonable divergence of opinion: The American people deserve the protections afforded by the Patriot Act. As a citizen, I would like

to express my appreciation to this Committee and to your colleagues in Congress for enacting this important piece of legislation.

This completes my prepared remarks. I would be pleased to attempt to answer any questions that you may have at this time.

STATEMENT OF THE HONORABLE LARRY E. CRAIG
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
HEARING ON: "AMERICA AFTER 9/11: FREEDOM PRESERVED OR FREEDOM LOST?"
NOVEMBER 18, 2003

Mr. Viet Dinh, a member of today's esteemed panel, said in an interview that right after 9-11, the President turned to the Attorney General and said, "John, you make sure this does not happen again." Thanks to law enforcement's zealous use of the tools enumerated in the PATRIOT Act, it hasn't. For two years, American citizens have been safe on American soil.

Though swift passage of the PATRIOT Act reflected Congress' primary commitment to national security, it did not dissolve the need to secure a balance between liberty and security that's requisite to free democratic government. David Hume reminds us that "it is seldom that liberty of any kind is lost at once." The public's interest in today's hearing and the numerous bills that my colleagues have introduced to limit the authority of the PATRIOT Act go to making sure that Hume's observation is not descriptive of the case now, or in the future.

I think an inquiry into how provisions of the PATRIOT Act affect and change Americans' freedoms is democratically healthy, and I'm grateful to Senator Hatch for convening this hearing.

To quote a famous philosopher, an act as contentious as the PATRIOT Act causes people to take sides according to what things the government should, would, or would not do; but very rarely will they take sides about what things are "FIT TO BE DONE" by government. Reviewing the PATRIOT Act in that context - that is, the extent of the government's legitimate role in post-9/11 law enforcement - is something that has largely been left out of the argument.

The Founders perhaps better described what things the government is "fit to do" in Federalist 51: "In framing a government which is able to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." Passage of the USA PATRIOT Act of 2001 enabled the government to effectively "control the governed"; however, Congress must limit that grant of power to what is necessary, within the confines of the Constitution, in order to "oblige it to control itself." It has been said that "the highest proof of virtue is to possess boundless power without abusing it." We know, however, that when it comes to government power, American democracy is less a test of virtue and more a lesson in checks and balances.

In perilous times of our history, American citizens have been willing to loosen those checks and give the government more power to respond to national security concerns. In the face of the terrible tragedy two years ago, the American people gave that power willingly, and their representatives in Congress responded accordingly.

Some have criticized Congress for acting too swiftly. I disagree and stand by my vote in favor of the PATRIOT Act. It was the right thing to do at the time. However, nobody contended that PATRIOT was a perfect bill that should be permanent law forever - indeed, many of its provisions were sunsetted in order to force a re-examination at a later date.

Since PATRIOT's enactment, concerns have been raised about many of its provisions. The low boil of discontent around the nation exploded in the House of Representatives some months ago with a strong vote to prohibit the use of appropriated funds for requesting delayed notice of a search warrant under the Act. It's unfortunate that some of the floor speeches leading to that vote were inflammatory, misleading, and even misinformed. It's particularly unfortunate because that undermines the legitimate concerns that led to this vote.

In fact, I and several Senators from both sides of the aisle have found real cause for concern in parts of the PATRIOT Act. In response, we've introduced the SAFE Act, a bill that would amend, not eliminate these tools in the PATRIOT Act, bringing them back to a level that befits a balanced and checked executive.

The SAFE Act, unlike other hasty legislative responses to the PATRIOT Act, is a measured bill that guarantees law enforcement the tools it needs to combat terrorism while protecting the rights of Americans not involved in terrorist investigations. I have full confidence in this. If you do not, or if you think particular provisions are antithetical to the bill's stated purpose, let me know, let's talk about it, and I'll reexamine it.

What must be made clear is that efforts by Congress to oversee the executive's use of PATRIOT authority and to limit it, in very small ways, is not an attack on the Administration. The Department of Justice's anti-terror record of accomplishments is long and each member of the Department has served this country and served it well. I thank all representatives of the Department for their commitment.

However, it is my hope that the openness with which I approach this revision process is met with the same openness and honestly from the Department. Along those lines, it's troubling to hear repeated again and again by the Department that the delayed warrant provisions of PATRIOT simply "codified a longstanding procedure-delaying notification of a search warrant-which courts had already held is perfectly constitutional." This is troubling because it's not the whole story: though the United States Supreme Court has held that delayed notice of a covert entry for the purpose of Title III wiretapping is constitutional, it has issued no decision on whether delayed notice for searches for physical evidence is constitutional, and federal circuit courts are divided on the issue.

It is also disturbing to have the Constitution used as a shield for the use of these investigative powers. In response to questions about the FBI's increased ease in obtaining private records of ordinary Americans, the DOJ asserted that "the PATRIOT

Act specifically protects Americans' First Amendment rights, and *terrorism investigators have* no interest *in the library habits of ordinary Americans*." The Framers who wrote the Constitution in the first place and knew our system of government more intimately than anyone, warned against the inability of a branch of government to check its own power. Asking Congress to simply trust that law enforcement agencies will not abuse the authority granted to them, by simply not probing the records of innocent citizens, is not how this government works-before, during, or after the war on terrorism.

The legislative efforts of myself and my colleagues were not undertaken with the Administration in mind, but rather the law. For while Administrations and Congresses change, the law lasts-and it's imperative that it embodies a smooth balance of liberty and justice. As the Framers stated in Federalist #51: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until *liberty be lost in the pursuit*." The latter, I'm convinced, will not happen. And it's Congress' responsibility to make sure that it doesn't.

I appreciate the panel's testimony and welcome any input you would offer.

Statement of James X. Dempsey
Executive Director
Center for Democracy & Technology[1]

before the
Senate Committee on the Judiciary

"America after 9/11: Freedom Preserved or Freedom Lost?"

November 18, 2003

Mr. Chairman, Sen. Leahy, Members of the Committee, thank you for the opportunity to testify today at this important set of oversight hearings on the nation's responses to terrorism and the impact on civil liberties. Since 9/11, the federal government has engaged in serious abuses of constitutional and human rights. The most egregious of these abuses have taken place outside of the PATRIOT Act or any other Congressional authorization. In the PATRIOT Act itself, not surprisingly given the pressures under which that law was enacted, the pendulum swung too far, and Congress eliminated crucial checks and balances that should now be restored in the interest of both freedom and security.

Terrorism poses a grave and imminent threat to our nation. The government must have strong legal authorities to prevent terrorism to the greatest extent possible and to punish it when it occurs. These authorities must include the ability to conduct electronic surveillance, carry out searches effectively, and obtain business records pertaining to suspected terrorists. These powers, however, must be guided by the particularized suspicion

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[1] The Center for Democracy and Technology is a non-profit, public interest organization dedicated to promoting civil liberties and democratic values for the new digital communications media. Our core goals include enhancing privacy protections and preserving the open architecture of the Internet. Among other activities, CDT coordinates the Digital Privacy and Security Working Group (DPSWG), a forum for computer, communications, and public interest organizations, companies and associations interested in information privacy and security issues.

principle of the Fourth Amendment, and subject to Executive, legislative and judicial controls as well as a measure of public oversight.

During consideration of the PATRIOT Act and today, the debate has never been about whether the government should have certain powers. Instead, the focus of concern has always been on what standards those powers should be subject to. Of course, the FBI should be able to carry out roving taps during intelligence investigations of terrorism, just as it has long been able to do in criminal investigations of terrorism. But the PATRIOT Act standard for roving taps in intelligence cases lacks important procedural protections applicable in criminal cases. Of course, the law should clearly allow the government to intercept transactional data about Internet communications (something the government was doing before the PATRIOT Act anyhow). But the pen register/trap and trace standard for both Internet communications and telephones is so low that judges are reduced to mere rubber stamps, with no authority to even consider the factual basis for a surveillance application. Of course, prosecutors should be allowed to use FISA evidence in criminal cases (they did so on many occasions before the PATRIOT Act) and to coordinate intelligence and criminal investigations (there was no legal bar to doing so before the PATRIOT Act). But prosecutors should not be able to initiate and control FISA investigations, and FISA evidence in criminal cases should not be shielded from the adversarial process (as it has been in every case to date).

Prior to 9/11, the government had awesome powers, but failed to use them well. Those failures had little if anything to do with the rules protecting privacy or due process, but the Executive Branch has proceeded since 9/11 as if the elimination of checks and balances would make its efforts more effective. The lessons of history and the experience of the past two years show that law enforcement and intelligence agencies without clear standards to

guide them and without oversight and accountability are more likely to engage in unfocused, unproductive activity and more likely to make mistakes in ways that are harmful to civil liberties and ineffective, even counterproductive from a security standpoint.

The promised trade-off between freedom and security is often a false one. There are undoubtedly people in the United States today planning additional terrorist attacks, perhaps involving biological, chemical or nuclear materials. Yet it is precisely because the risk is so high that we need to preserve the fullest range of due process and accountability in the exercise of government powers.

Abuses of Civil Liberties and Human Rights Since 9/11 Outside the PATRIOT Act

The phrase "the PATRIOT Act" has become a symbol or a shorthand reference to the government's response to terrorism since 9/11. Both the Justice Department and its critics, abetted by the media, share responsibility for this. The PATRIOT Act ends up being cited for things that are not in it. Both sides in the debate have claimed that the PATRIOT Act is more important than it is. Certainly, many of the worst civil liberties abuses since 9/11 have occurred outside the PATRIOT Act. These will be described in greater depth by others at this hearing and in other hearings the Committee will hold.[2] But it is useful to outline them:

-- **The detention of US citizens in military jails without criminal charges**

For many Americans, it is simply inconceivable that a U.S. citizen could be held without criminal charges in a military prison. Yet that is precisely the situation today of two

[2] Many of these abuses are detailed in the reports of the Lawyers Committee for Human Rights, "Assessing the New Normal: Liberty and Security for the Post-September 11 United States," September 2003, and "Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties," March 11, 2003. See also Stephen J. Schulhofer, "The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11," The Century Foundation, August 2002.

U.S. citizens. One of these, Jose Padilla, was arrested at Chicago's O'Hare airport by the FBI. He was transported to New York on a material witness warrant in connection with a criminal investigation. The President then plucked Padilla out the criminal justice system, turned him over to the military, and now claims the right to hold him indefinitely in military prison without criminal charges. This has to be a fundamental violation of the Constitution. Nothing in *Ex parte Quirin*, 317 U.S. 1 (1942) supports this. In *Ex parte Quirin*, the German saboteurs, including one who might have been a citizen, admitted that they were members of the official armed force of a nation with which the United States was in a declared war. Congress had authorized the use of military commissions to try violations of the law of war.[3] None of these factors apply today.

-- **The detention of foreign nationals in Guantanamo and other locations, with no due process and purportedly outside of any US or international legal scheme.**

Over the past century, one of the most important achievements of international law in general and human rights in specific has been the general diffusion and acceptance of the principle that there is no place and no person outside the law. The drawing of all governments into a web of international obligations and constraints – obligations that range from human rights to arms control -- was one of the cornerstones of the successful effort to break the Soviet Union. It was a basis for the invasion of Iraq. It remains an impetus for the ongoing struggle for religious freedom and other civil liberties in China. And yet the

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[3] Among other things, the contrast between Quirin and Padilla illustrates the inadequacy and the dangers of the "war" metaphor applied to the present struggle against terrorism. The notion that there is a "war" without borders, without a defined enemy, and without a conclusive end drains the concept of "war" of all legally-relevant meaning. The same theory that justifies the incarceration of these citizens without charges justified the President's order

President of the United States claims to have a found in Guantanamo a place outside of any system of law other than the one that he dictates. The President claims that his actions there are outside the jurisdiction of the U.S. courts, outside, of course, the reach of Cuban courts, and outside the jurisdiction of any international entity. He claims that the people held there fall between the cracks legally – they are not prisoners of war subject to the Geneva Conventions and they are not criminals and that he has the sole power to decide their fate.

Yet it is clear that not all the people who have been detained at Guantanamo were terrorists. The Executive Branch, on its own schedule and at its discretion, has already concluded that some of those detained at Guantanamo were not dangerous at all, for it has released them. It is logical to assume that other victims of mistake are still in custody. The U.S. government, after all, relied on bounty hunters in Afghanistan, who had been promised enough money to support an entire village if they turned in an al Qaeda or Taliban member. Was there ever a situation more deserving of independent fact-finding to root out mistakes and false accusations?

-- **The rendition of detainees to other governments known to engage in torture**

It has been widely alleged, and anonymously acknowledged, that the US government has turned over people it detains to other governments knowing or expecting that they will be tortured.[4]

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to extrajudicially execute suspected al Qaeda members wherever in the world they are found, which resulted in the U.S. government killing an American citizen in Yemen.

[4] DeNeen L. Brown and Dana Priest, "Deported Terror Suspect Details Torture in Syria," *Washington Post*, Page A01, November 5, 2003; David Kaplan et al., "The Inside Story of How U.S. Terrorist Hunters Are Going After Al Qaeda," *U.S. News & World Report*, June 2, 2003; Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogation; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities,"

– **Post 9/11 detentions of foreign nationals in the U.S.**

Others can comment in detail on the multiple abuses posed by the government's treatment of immigrants since 9/11. There have been many. More than 1,200 immigrants were detained in this country in the months after 9/11. The government refused to release their names. Many were held for days, weeks, or even longer without charges. The INS blocked access to lawyers and families. In all cases designated as related to the September 11 investigation, the Justice Department ordered a blanket closing of deportation hearings. It adopted a policy of denying bail and gave INS attorneys unilateral authority to automatically stay any bond-release ruling of an immigration judge. The abuses of civil liberties were documented by the Department of Justice Inspector General in his report of June 2003. The Committee has held a hearing on that report. The OIG found in June 2003 that many of the detainees did not receive core due process protections. The OIG found that the "vast majority" were never accused of terrorism related offenses but only of civil violations of federal immigration law. Most significantly, the OIG found that, at the time of arrest, the link between many of the detainees and the attacks of 9/11 was "extremely attenuated." The OIG concluded that the designation of detainees as "of interest" to the September 11 investigation was made in an "indiscriminate and haphazard" manner. In other words, the national security justification for the blanket closure of deportation hearings and the withholding of the names of the detainees was not sound – an example of how abuses result from the exercise of power without independent scrutiny. More recently, on September 8, 2003, the OIG reported that the DHS and DOJ were taking steps to address many of the problems identified.

Washington Post, December 26, 2002; Rajiv Chandrasekaran and Peter Finn, " U.S. Behind Secret Transfer of Terror Suspects," *Washington Post*, March 11, 2002.

-- **Detentions of citizens**

It is clear that the detentions without normal due process also swept up U.S. citizens. Fathi Mustafa, a naturalized U.S. citizen and his son, a U.S. citizen by birth, were arrested September 15, 2001 at Bush Intercontinental Airport in Texas after returning from a trip to Mexico to purchase leather products for their dry-goods store. Both were charged in federal court with passport fraud, on the ground that the laminate on their passport appeared to be altered (it may have been worn). Fathi Mustafa was released from jail on September 26 on a $100,000 bond. His son Nacer, the native born citizen, was held for 67 days. Both were cleared of all charges. [5]

-- **Abuse of the material witness law**

Under a law little known even by most lawyers prior to 9/11, the material witness law, the U.S. government has arrested aliens and citizens alike and held them in jail without charges. Yet according to new reports, many had not been called to testify before a grant jury after months of detention. Steve Fainaru and Margot William, "Material Witness Law Has Many in Limbo: Nearly Half Held in War on Terror Haven't Testified, " Washington Post, p. A1, November 4, 2002. The Justice Department has refused to disclose information about these cases, making it difficult to determine what is going on, but the practice surely stretches the material witness law far beyond its intended purpose of allowing the government to preserve a witness's testimony.

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[5] Ed Asher, "Palestinian-Americans Arrested Here Face Passport Charges; Attorney Says Pair Persecuted Because of Terrorist Attacks," *The Houston Chronicle*, September 27, 2001; Allan Turner and Dale Lezon, "Our Changed World; Remembering Sept. 11; Nothing to Hide; A Year Later, Many Muslims Still Shackled by 9/11 Stigma," *The Houston Chronicle*, September 8, 2002.

Abuses under the PATRIOT Act

-- **Sneak and Peek Searches**

It would astound most Americans that government agents could enter their homes while they are asleep or their places of business while they are away and carry out a secret search or seizure and not tell them until weeks or months later. That is what Section 213 of the PATRIOT Act authorizes. Moreover, it applies equally to all federal offenses, ranging from weapons of mass destruction investigations to student loan cases. In our opinion, one of the clearest abuses of the PATRIOT Act is the government's admitted use of Section 213 sneak and peek authority in non-violent cases having nothing to do with terrorism. These include, according the Justice Department's October 24, 2003 letter to Senator Stevens, an investigation of judicial corruption, where agents carried out a sneak and peek search of a judge's chambers, a fraudulent checks case, and a health care fraud investigation, which involved a sneak and peek of a home nursing care business.

Section 213 fails in its stated purpose of establishing a uniform statutory standard applicable to sneak and peek searches throughout the United States. For a number of years, under various vague standards, courts have allowed delayed notice or sneak and peek searches. Section 213 confuses the law in this already confused area. In the PATRIOT Act, Congress did not try to devise a standard suitable to breaking and entering into homes and offices for delayed notice searches. Instead, the PATRIOT Act merely incorporated by reference a definition of "adverse result" adopted in 1986 for completely unrelated purposes, concerning access to email stored on the computer of an ISP. Under that standard, not only can secret searches of homes and offices be allowed in cases that could result in endangering the life of a person or destruction of evidence, but also in any case that might involve

"intimidation of potential witnesses" or "seriously jeopardizing an investigation" or "unduly delaying a trial." These broad concepts offer little guidance to judges and will bring about no national uniformity in sneak and peek cases.

Section 213 also leaves judges guessing as to how long notice may be delayed. The Second and Ninth Circuits had adopted, as a basic presumption, a seven day rule for the initial delay. Section 213 says that notice may be delayed for "a reasonable period." Does this mean that courts in the Ninth Circuit and the Second Circuit no longer have to adhere to the seven day rule? At the least, it suggests that courts outside those Circuits could make up their own rule. "Reasonable period" affords judges considering sneak and peek sneak and peek searches no uniform standard.

But there is a deeper problem with Section 213: The sneak and peek cases rest on an interpretation of the Fourth Amendment that is no longer correct. The major Circuit Court opinions allowing sneak and peek searches date from the 1986, *United States v. Freitas*, 800 F.2d 1451 (9th Cir.), and 1990, *United States v. Villegas*, 899 F.2d 1324 (2d Cir.) before the Supreme Court decision in *Wilson v. Arkansas*, 514 U.S. 927 (1995). The sneak and peak cases were premised on the assumption that notice was not an element of the Fourth Amendment. *United States v. Pangburn*, 983 F.2d 449, 453 (2d Cir. 1993) starts its discussion of sneak and peek searches stating: "No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment." *Pangburn* goes on to states, "The Fourth Amendment does not deal with notice of any kind … ." Id. at 455. *United States v. Simons*, 206 F.3d 392, 403 (4th Cir. 2000), even though it was decided after Wilson, states, "The Fourth Amendment does not mention notice." Yet in *Wilson v. Arkansas*, the Supreme Court, in a unanimous opinion by Justice Thomas, held that the knock and notice

requirement of common law was incorporated in the Fourth Amendment as part of the constitutional inquiry into reasonableness, directly repudiating the reasoning of the sneak and peek cases. *Wilson v. Arkansas* makes it clear that a search without notice is not always unreasonable, but surely the case requires a different analysis of the issue than was given it by those courts that assumed that notice was not a part of the constitutional framework for searches. A much more carefully crafted set of standards for sneak and peek searches, including both stricter limits of the circumstances under which they can be approved and a seven day time limit, is called for. Even then, secret searches of homes must be on shaky constitutional ground except in investigations of the most serious crimes.

-- **Section 215 - Business Records**

Section 215 is not a matter of abuse, since the Justice Department recently admitted that it has never been used, but it does illustrate one of the fundamental flaws in Congress's approach to the PATRIOT Act in the frenzied and emotion-filled days after 9/11: there was never any discussion whether the new authorities were needed. Now, after two years of debate in which the Attorney General defended Section 215 as a key tool in the fight against terrorism, he has more recently announced that Section 215 has never been used even once, not only not for library records but also not for any other kind of business records.

Section 215 amended the Foreign Intelligence Surveillance Act to authorize the government to obtain a court order from the FISA court or designated magistrates to seize "any tangible things (including books, records, papers, documents, and other items)" that an FBI agent claims are "sought for" an authorized investigation "to protect against international terrorism or clandestine intelligence activities." The subject of the order need not be suspected of any involvement in terrorism whatsoever; indeed, if the statute is read literally, the order

need not name any particular person but may encompass entire collections of data related to many individuals. The Justice Department often says that the order can be issued only after a court determines that the records being sought are "relevant" to a terrorism investigation. Actually, the section does not use the word "relevance." Relevance is quite broad but has some outer limits. The PATRIOT Act provision says only that the application must specify that the records concerned are "sought for" an authorized investigation. And the judge does not determine that the records are in fact "sought for" the investigation - the judge only can determine whether the FBI agent has said that they are sought for an investigation. The PATRIOT Act does not require that applications must be under oath. It doesn't even require that the application must be in writing. It doesn't require, as for example the pen register law does, that the application must indicate what agency is conducting the investigation. In Section 505 of the PATRIOT Act similarly expanded the government's power to obtain telephone and email transactional records, credit reports and financial data with the use of a document called the National Security Letter (NSL), which is issued by FBI officials without judicial approval.

The Justice Department argues that Section 215 merely gives to intelligence agents the same powers available in criminal cases, since investigators in criminal cases can obtain anything with a subpoena issued on a relevance standard. First of all, as noted, the standard in Section 215 and two of the three NSL statutes is less than relevance. Second, a criminal case is at least cabined by the criminal code – something is relevant only if it relates to the commission of a crime. But on the intelligence side, the government need not be investigating crimes – at least for non-U.S. persons, it can investigate purely legal activities by those suspected of being agents of foreign powers.

There are other protections applicable to criminal subpoenas that are not available under Section 215 and the NSLs. For one, third party recipients of criminal subpoenas can notify the record subject, either immediately or after a required delay. Section 215 and the NSLs prohibit the recipient of a disclosure order from ever telling the record subject, which means that the person whose privacy has been invaded never has a chance to rectify any mistake or seek redress for any abuse. Secondly, the protections of the criminal justice system provide an opportunity for persons to assert their rights and protect their privacy, but those adversarial processes are not available in intelligence investigations that do not end up in criminal charges.

Since Section 215 has never been used, it should be repealed as unnecessary. At the least, it should be amended to require a factual showing of particularized suspicion.

-- **Use of FISA evidence in criminal cases without full due process**

Before the PATRIOT Act, there was no legal barrier to using FISA information in criminal cases. The wall between prosecutors and intelligence officers as it evolved over the years was a secret invention of the FISA court, the Department's Office of Intelligence Policy and Review, and the FBI, with little basis in FISA itself. It did not serve either civil liberties or national security interests. The primary purpose standard did not have to be changed to promote coordination and information sharing.

As a result of the PATRIOT Act and the decision of the FISA Review Court, criminal investigators are now able to initiate and control FISA surveillances. The number of FISA has gone up dramatically. USA Today reported on November 11 that in the past year, the FISA court has granted about 2,000 requests by government agents to conduct electronic

eavesdropping. In 2002, the court approved 1,228 requests. Toni Locy, "For linguists, job is patriotic duty, USA Today, November 11, 2003, http://www.usatoday.com/news/washington/2003-11-11-linguists_x.htm. The FISA court now issues more surveillance orders in national security cases than all the other federal judges issue in all other criminal cases. In the past, when FISA evidence has been introduced in criminal cases, it has not been subject to the normal adversarial process. Unlike ordinary criminal defendants in Title III cases, criminal defendants in FISA cases have not gotten access to the affidavit serving as the basis for the interception order. They have therefore been unable to meaningfully challenge the basis for the search. Defendants have also been constrained in getting access to any portions of the tapes other than those introduced against them or meeting the government's strict interpretation of what is exculpatory. This is an abuse. If FISA evidence is to be used more widely in criminal cases, and if criminal prosecutors are able to initiate and control surveillances using the FISA standard, then those surveillances should be subject to the normal criminal adversarial process. Congress should make the use of FISA evidence in criminal cases subject to the Classified Information Procedures Act. Congress should also require more extensive public reporting on the use of FISA, to allow better public oversight, more like the useful reports issued for other criminal wiretap orders.

-- **Definition of "domestic terrorism"**

The PATRIOT Act's definition of domestic terrorism is a looming problem. Section 802 of the Act defines domestic terrorism as acts dangerous to human life that violate any state or federal criminal law and appear to be intended to intimidate civilians or influence

government policy. 18 USC 2331(5). Under the PATRIOT Act, this definition has three consequences – the definition is used as the basis for:

- Seizure of assets (Sec. 806)
- Disclosure of educational records (Secs. 507 and 508)
- Nationwide search warrants (Sec. 219)

The definition appears many more times in Patriot II, where it essentially becomes an excuse for analysis and consideration. Congress should either amend the definition or refrain from using it. It essentially amounts as a transfer of discretion to the Executive Branch, which can pick and choose what it will treat as terrorism, not only in charging decisions but also in the selection of investigative techniques and in the questioning of individuals.

Other Issues Outside the PATRIOT Act

-- **Data Mining**

In September 2002, a U.S. Army contractor acquired from the JetBlue airline the itinerary information of over 1.5 million passengers, including passenger names, addresses, and phone numbers. The disclosure occurred in apparent violation of JetBlue's privacy promise to its customers and without the necessary Privacy Act notice by the Army, indicating that it was creating a databases of air passenger records. The contractor purchased from a commercial vendor demographic data on many of the JetBlue passengers including gender, home specifics (owner/renter, etc.), years at residence, economic status (income, etc.), number of children, Social Security number, number of adults, occupation, and vehicle information. The contractor then prepared a Homeland Security Airline Passenger Risk

Assessment, attempting "to measure the viability of verifying and scoring passengers by checking them against data-aggregation companies' files."[6]

The JetBlue case not only represents an unauthorized invasion of privacy, but also represents the tip of an iceberg on the government's development and use, without adequate guidelines of the technique known as "data mining," which purports to be able to find evidence of possible terrorist preparations by scanning billions of everyday transactions, potentially including a vast array of information about Americans' personal lives such as medical information, travel records and credit card and financial data. The FBI's Trilogy project includes plans for data mining. According to an undated FBI presentation obtained by the Electronic Privacy Information Center, the FBI's use of "public source" information (including proprietary commercial databases) has grown 9,600% since 1992.[7]

Current laws place few constraints on the government's ability to access information for terrorism-related data mining.[8] Under existing law, the government can ask for, purchase or demand access to most private sector data. Unaddressed are a host of questions: Who should approve the patterns that are the basis for scans of private databases and under what

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[6] Philip Shenon, JetBlue Gave Defense Firm Files on Passengers, *NY Times*, Sept. 20, 2003, at A; Don Philips, JetBlue Apologizes for Use of Passenger Records, *Washington Post*, Sept. 20, 2003 at E01; Ryan Singel, JetBlue Shared Passenger Data, *Wired News*, Sept. 18, 2003; Torch Concepts, Homeland Security Airline Passenger Risk Assessment 11, Feb. 25, 2003, available at http://cryptome.org/jetblue-spy.pdf (last accessed Sept. 21, 2003).

[7] http://www.epic.org/privacy/publicrecords/cpfbippt.pdf.

[8] CDT has prepared a detailed memo on data mining, which discusses Section 215 and the NSLs: "Privacy's Gap: The Largely Non-Existent Legal Framework for Government Mining of Commercial Data," May 19, 2003, available online at http://www.cdt.org.

standard? What should be the legal rules limiting disclosure to the government of the identity of those whose data fits a pattern? When the government draws conclusions based on pattern analysis, how should those conclusions be interpreted? How should they be disseminated and when can they be acted upon? Adapting the Privacy Act to government uses of commercial databases is one way to look at setting guidelines for data mining. But some of the Privacy Act's principles are simply inapplicable and others need to have greater emphasis. For example, perhaps one of the most important elements of guidelines for data mining would be rules on the interpretation and dissemination of hits and on how information generated by computerized scans can be used. Can it be used to conduct a more intensive search of someone seeking to board an airplane, to keep a person off an airplane, to deny a person access to a government building, to deny a person a job? What due process rights should be afforded when adverse actions are taken against individuals based on some pattern identified by a computer program? Can ongoing audits and evaluation mechanisms assess the effectiveness of particular applications of the technology and prevent abuse?

All of these questions must be answered before moving forward with implementation. As it stands now, Congress doesn't even know how many other JetBlue cases exist, for there is no disclosure of what commercial databases agencies are acquiring. Congress should limit the implementation of data mining until it knows what is going on, the effectiveness of the technique has been shown and guidelines on collection, use, disclosure and retention have been adopted following appropriate consultation and comment.

-- **The FBI Guidelines**

The FBI is subject to two sets of guidelines, a largely classified set for foreign intelligence and international terrorism investigations ("National Security Investigation (NSI) Guidelines"), and an unclassified set on general crimes, racketeering and domestic terrorism ("Criminal Guidelines").[9] Last year, the Attorney General changed the Criminal Guidelines. Just last month, he changed the NSI Guidelines, which relate to intelligence investigations of Osama bin Laden and Al Qaeda.

As they now stand amended, neither set of guidelines offers much guidance to FBI agents and supervisors seeking to prioritize and focus their intelligence gathering activities. In the past, the FBI was able to open investigations where there was some specific basis for doing so. Under the Criminal Guidelines, the FBI was able initiate a full domestic counter-terrorism investigation when facts and circumstances reasonably indicated that two or more people were engaged in an enterprise for the purpose of furthering political goals through violence. Under the old national security guidelines, the FBI was authorized to open an investigation of any international terrorist organization (there was a long-running investigation prior to 9/11 of Osama bin laden's group) and to investigate separately any individual suspected of being a member or supporter of a foreign terrorist organization. FBI agents could conduct quite intrusive preliminary investigations on an even lower standard.

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[9] Both sets of guidelines relate to investigations in the United States. The difference between the two sets of guidelines has to do with the nature of the organization being investigated. The NSI guidelines govern investigations inside the United States of international terrorism organizations (such as al Qaeda or Hamas), groups that originate abroad but carry out activities in the US, and their agents. In the past, the domestic guidelines governed investigations of terrorist groups that originate in the US – e.g., white supremacists and animal rights activists.

Both sets of guidelines gave agents wide berth. The old guidelines allowed FBI agents to go into any mosque or religious or political meeting if there was reason to believe that criminal conduct was being discussed or planned there or that an international terrorist organization was recruiting there, and, in fact, over the years the FBI conducted terrorism investigations against a number of religious organizations and figures. Separate guidelines even allowed undercover operations of religious and political groups, subject to close supervision.

Now, the FBI is cut loose from that predication standard, with no indication as to how it should prioritize its efforts or avoid chilling First Amendment rights. As the Attorney General has stated, FBI agents can now surf the Internet like any teenager. They can now enter mosques and political meeting on the same basis as any member of the public – on a whim, out of curiosity. Fortunately, FBI agents may have more sense than that. The head of the counter-terrorism efforts was quoted as saying that Al Qaeda was not recruiting in mosques. But the results may be previewed in New York, where there were disturbing reports that local police, shortly after their guidelines were changed, engaged in questioning demonstrators about their political beliefs.

In responding to the issues raised by the guideline changes, Congress should require the adoption, following consultation and comment, of Guidelines for collection, use, disclosure and retention of public event information. Such guidelines should include a provision specifying that no information regarding the First Amendment activities of a US person or group composed substantially of US persons can be disseminated outside the FBI except as part of a report indicating that such person or group is planning or engaged in criminal activity.

Conclusion

In the debate over the PATRIOT Act, civil libertarians did not argue that the government should be denied the tools it needs to monitor terrorists' communications or otherwise carry out effective investigations. Instead, privacy advocates urged that those powers be focused and subject to clear standards and judicial review. The tragedy of the response to September 11 is not that the government has been given new powers – it is that those new powers have been granted without standards or checks and balances.

We need limits on government surveillance and guidelines for the use of information not merely to protect individual rights but to focus government activity on those planning violence. The criminal standard and the principle of particularized suspicion keep the government from being diverted into investigations guided by politics, religion or ethnicity. Meaningful judicial controls do not tie the government's hands –they ensure that the guilty are identified and that the innocent are promptly exonerated.

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Prepared Testimony of
Viet D. Dinh
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America After 9/11
Freedom Preserved or Freedom Lost?
Committee on the Judiciary
United States Senate
November 18, 2003

Mr. Chairman, Ranking Member, and Members of the Committee,

Thank you very much for the honor of appearing before you today. In answer to the question posed by this hearing, my view is that the current threat to America's freedom comes from Al Qaeda and others who would do harm to America and her people, and not from the men and women of law enforcement who protect us from harm. That said, I think that it is critically important for us to assess the success of the terrorist prevention effort and, where necessary, to consider additional safeguards to the liberties of law-abiding citizens.

That the American homeland has not suffered another terrorist attack in the last 26 months is a testament to the incredible efforts of our law enforcement, intelligence, and homeland security personnel--aided by the tools, resources and guidance that Congress has provided. According to Department of Justice figures, 284 individuals of interest to the 9/11 investigation have been criminally charged, and 149 of them have been convicted or pled guilty. And 515 individuals linked to the 9/11 investigation have been deported for immigration violations. In addition, $133 million in terrorist assets have been frozen around the world, and 70 terrorist financing investigations have been initiated, with 23 convictions or guilty pleas to date.

These successes would not have been possible without the important work of Congress. As the Department of Justice wrote to the House Judiciary Committee on May 13, 2003, the Government's success in preventing another catastrophic attack on the American homeland "would have been much more difficult, if not impossibly so, without the USA Patriot Act." That Act, of course, owes its existence to the important and careful work of this Committee and in particular to the efforts of Chairman Hatch and Ranking Member Leahy.

During the six weeks of deliberations that led to the passage of the Act, you heard from and heeded the advice of a coalition of concerned voices urging caution and care in crafting the blueprint for America's security. That conversation was productive, and the Administration and Congress drew on the coalition's counsel in crafting the USA PATRIOT Act.

The debate has since deteriorated, and the shouting voices ignore questions that are critical to both security and liberty. Lost among fears about what the government could be doing are questions about what it is actually doing and what else it should be doing to protect security

and safeguard liberty. And rhetoric over minor alterations has overshadowed profoundly important questions about fundamental changes in law and policy.

For example, consider the debate relating to section 215 of the Act, the so-called library records provision. Critics have rallied against the provision as facilitating a return to J. Edgar Hoover's monitoring of reading habits. The American Civil Liberties Union has sued the government, claiming that the provision, through its mere existence, foments a chilling fear among Muslim organizations and activists.

I do not doubt that these fears are real, but also am confident that they are unfounded. Grand juries for years have issued subpoenas to businesses for records relevant to criminal inquiries. Section 215 gives courts the same power, in national security investigations, to issue similar orders to businesses, from chemical makers to explosives dealers. Like its criminal grand jury equivalent, these judicial orders for business records conceivably could issue to bookstores or libraries, but section 215 does not single them out.

Section 215 is narrow in scope. The FBI cannot use it to investigate garden-variety crimes or even domestic terrorism. Instead, section 215 can be used only to "obtain foreign intelligence information not concerning a United States person," or to "protect against international terrorism or clandestine intelligence activities."

Because section 215 applies only to national security investigations, the orders are confidential. Such secrecy raises legitimate concerns, and thus Congress embedded significant checks in the process. First, they are issued and supervised by a federal judge. By contrast, grand jury subpoenas are routinely issued by the court clerk.

Second, every six months the government has to report to Congress on the number of times and the manner in which the provision has been used. The House Judiciary Committee has stated that its review of that information "has not given rise to any concern that the authority is being misused or abused." Indeed, the Attorney General has recently made public the previously classified information that section 215 has not been used since its passage.

It may well be that the clamor over section 215 reflects a different concern, that government investigators should not be able to use ordinary criminal investigative tools so easily to obtain records from purveyors of First Amendment activities, such as libraries and bookstores. Section 215, with its prohibition that investigations "not be conducted of a United States person solely upon the basis of activities protected by the first amendment of the Constitution of the United States," in this regard is more protective of civil liberties than ordinary criminal procedure. Perhaps this limitation should be extended to other investigative tools. But that is a different debate, one that should fully consider the costs and benefits of such a change in law.

All the sound and fury over politically charged issues such as section 215 has drowned out constructive dialogue about fundamental changes in policy. For instance, section 218 of the USA Patriot Act amended the Foreign Intelligence Surveillance Act to facilitate increased cooperation between agents gathering intelligence about foreign threats and investigators prosecuting foreign terrorists. I doubt that even the most strident of critics would want another

terrorist attack to happen because a 30-year-old provision prevented the law enforcement and intelligence communities to communicate with each other about potential terrorist threats.

This change, essential as it is, raises important questions about the nature of law enforcement and domestic intelligence. The drafters grappled with questions such as whether the change comports with the Fourth Amendment protection against unreasonable searches and seizures (yes), whether criminal prosecutors should initiate and direct intelligence operations (no), and whether there is adequate process for defendants to seek exclusion of intelligence evidence from trial (yes). We were confident of the answers. But lawyers are not infallible, and the courts ultimately will decide. Meanwhile, better airing of these weighty issues would help the public understand the government's actions and appreciate their effects.

Some debates focus on the right issues but ask the wrong questions. The Court of Appeals for the Second Circuit yesterday heard arguments on the military detention of Jose Padilla, captured in O'Hare Airport with an alleged plot to detonate a dirty bomb. Many have decried the President's military authority to detain Padilla. But surely a military commander should have the power to incapacitate enemy combatants, and Supreme Court precedent confirms this common sense proposition. The more difficult question, one that past cases provide less guidance, is whether the executive branch can hold these unlawful combatants without any process, such as military tribunals or other quasi-judicial alternatives. The judiciary is grappling with this question, but I think that Congress also has a significant voice in the constitutional discourse and should express its views. Whatever the answer, the question has nothing to do with the USA Patriot Act, as some have erroneously asserted.

The debate certainly would benefit from clarity. But more significant are the potential costs imposed by the current confusion. Are unobjectionable innovations not being considered that would help further the effort to respond to the continuing terrorist threat? Are unfounded criticisms of potential governmental overreach deterring peace officers from taking necessary actions to prevent terrorism? And, instead of blanket denunciation and repeal of certain law enforcement authorities, are there safeguards that can prevent governmental abuse while preserving important law enforcement tools?

I am heartened that the Committee has convened to consider these and other weighty questions. Karl Llewellyn, the renowned law professor, once observed: 'Ideals without technique are a mess. But technique without ideals is a menace'[1] During these times, when the foundation of liberty is under attack, the important work of this Committee will serve to reaffirm the ideals of our constitutional democracy and also to discern the techniques necessary to secure those ideals against the threat of terror. Thank you.

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[1] Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 Colum. L. Rev. 651, 662 (1935).

U.S. Department of Justice

Office of the Inspector General

November 17, 2003

The Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

I am responding to your November 12, 2003, letter requesting clarification of certain information contained in semiannual reports submitted to Congress by the Office of Inspector General (OIG) pursuant to requirements set forth in Section 1001 of the USA PATRIOT Act (Patriot Act).

In your letter, you asked whether any of the complaints investigated by the OIG pursuant to Section 1001 of the Patriot Act involve an abuse or violation of a specific provision of the Patriot Act. The 34 allegations to which we refer in our July 2003 semiannual report do not involve complaints alleging misconduct by Department of Justice employees related to their use of a provision of the Patriot Act.

As we discussed in our reports, we received several hundred complaints from individuals alleging that their civil rights or civil liberties have been infringed. Pursuant to the directives contained in Section 1001 of the Patriot Act, the OIG reviewed those complaints and is investigating certain allegations that fall within our jurisdiction. In addition, we have referred some of the allegations to other Department components for investigation.

These allegations range in seriousness from alleged beatings of immigration detainees to verbal abuse of inmates. They generally involve complaints of mistreatment against Middle Eastern or Muslim individuals by the Federal Bureau of Prisons, the Federal Bureau of Investigation, or the Immigration and Naturalization Service. We detailed the specific complaints in our semiannual reports to Congress and used the label "Patriot Act complaints" because we received, investigated, and reported the allegations pursuant to our duties under Section 1001 of the Patriot Act, not because they alleged a violation of a specific provision of the Patriot Act.

As we discussed with your staff, we intend to make this point more explicit in the next Section 1001 report – due in January 2004 – in order to clarify the type of allegations we are receiving and investigating pursuant to Section 1001 of the Patriot Act.

Please contact me if you have additional questions about this matter.

Sincerely,

Glenn A. Fine
Inspector General

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

November 18, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

"AMERICA AFTER 9/11: FREEDOM PRESERVED OR FREEDOM LOST?"

I want to welcome everyone to our second hearing in a series to examine the adequacy of our federal laws to protect the American public from acts of terrorism against the United States.

At the outset, I would like to thank the Ranking Minority Member Senator Leahy for his continued cooperation in working together to examine these important issues. Senator Leahy has been a tireless advocate for the protection of our individual rights and liberties.

As the Chairman of this Committee, he helped to craft the PATRIOT Act into a bipartisan measure which carefully balances the need to protect our country without sacrificing our civil liberties. Without the leadership of Senator Leahy and the support of my fellow colleagues across the aisle, we could not have acted so effectively after 9/11 to pass this measure by a vote of 98-1. I am confident that we will continue to work cooperatively in the future as we plan additional hearings when Congress returns next year.

Today's hearing focuses on the issue of our civil liberties in the aftermath of the horrific September 11th attacks against our people.

The unprovoked and unjustified attacks on 9/11 require us to take all appropriate steps to make sure that our citizens are safe. That is the first responsibility of government.

Thomas Jefferson said, "The price of freedom is eternal vigilance." Congress must be vigilant. True individual freedom cannot exist without security, and our security cannot exist without protection of our civil liberties.

There are some who say that the cost of protecting our country from future terrorist attacks is infringement upon our cherished freedoms.

Some have suggested that our anti-terrorism laws are contrary to our Nation's historical commitment to civil liberties. I disagree. I believe that we must have both our civil liberties and national security or we will have neither.

While we all share this common commitment to security and freedom, the question we are examining today is how best to do so in an environment where terrorists – like the 9/11

attackers – are able to operate within our borders, using the very freedoms that we so dearly cherish to carry out deadly plots against our country.

Let me remind everyone that the 9/11 attackers were able to enter into our country within the strictures of immigration laws, enjoy the fruits of our freedoms, secure for themselves all the necessary trappings of law-abiding members of our society, and then carry out their terrible attacks, under the radar screen of law enforcement, intelligence and immigration agencies.

Let me make just one comment with respect to immigration-related matters. There has been much in the press in recent weeks concerning the detention of certain aliens suspected of terrorist activities. The Supreme Court will hear a case in this area. While this issue is not the central focus of our hearing today, important issues have been raised that this Committee must wrestle with over the next months.

This hearing will examine the government's efforts to protect our freedoms – not just the freedom to live in a safe and secure society – but the freedoms that our country was founded on, the freedoms that we enjoy each and every day, and the freedoms that are the lifeblood of our society.

I am especially interested in hearing from today's witnesses about the details of any specific abuses that have occurred under our current laws. We have invited five critics to ensure that interested parties have ample opportunity to express their concerns.

At the outset, let me make it clear who is not a witness today: Attorney General Ashcroft. At the last hearing some negatively, and unfairly, commented on the AG's absence even though he was not invited to testify.

We are planning on the Attorney General, FBI Director Mueller, and Secretary Ridge to testify next year. I think that John Ashcroft is a good man and is doing a very good job as our Attorney General.

At our last hearing, my good friend and colleague Senator Feinstein made an important point about the dearth of hard evidence of specific abuses under current law. We must not let the debate fall into the hands of those who spread unsubstantiated or outright false allegations when it comes to these important issues.

We will question today's witnesses on specific abuses of our laws.

We also want to hear their ideas about how current law should be modified to better protect our national security while maintaining our civil liberties.

I am hopeful we can examine the issue of civil liberties today in a responsible manner. This Committee will gather all of the facts. We will ascertain whether the government has *actually* infringed on anyone's civil liberties while exercising its authority under current law.

# # #

Statement of Edward M. Kennedy
Senate Judiciary Committee Hearing
"America Afterafter 9/11:
Freedom Preserved or Freedom Lost?"
November 18, 2003

Mr. Chairman, thank you for calling today's important hearing.

On September 11, we learned that the oceans no longer protect us from the terrorist attacks have plagued so many other nations.

We also learned that our law enforcement agencies and our intelligence agencies are not adequately organized, trained or prepared to identify terrorists and prevent them from striking.

We learned as well, from the report of the Senate and House Intelligence Committees, that there are serious problems with information analysis and information sharing between agencies at all levels, federal, state and local.

As the FBI Director told the Intelligence Committees, no one can say whether the tragedy of 9/11 could have been prevented if all of the problems of our foreign and domestic intelligence and law enforcement agencies had been corrected before 9/11. But 9/11 was certainly a wake-up call to these agencies. It put them on notice that, whatever the reasons for their failure to connect the many "dots" which their separate activities had uncovered before the terrorist attacks, they needed to change their ways.

In the last two years, Congress, working with the Administration, has done much to respond to the vicious terrorist attacks.

We have authorized the use of force against terrorists and those who harbor them in other lands. We have enacted legislation to strengthen the security of our airports, seaports and borders, and required our intelligence and law enforcement agencies to share critical information with front line agencies responsible for determining who is admitted to the United States. We have given law enforcement and intelligence officials greater powers to investigate and prevent terrorism. State and local enforcement agencies have worked closely with federal agencies to protect the many vulnerable targets of terrorist attacks in communities across the country.

But not every measure or policy proposed after 9/11 has been effective, legal, or fair. The Administration has used fear of terrorism as an excuse to ignore basic rights in our society.

Claiming that the end justifies the means, the Administration has approved searches and detention without warrants or probable cause, incarcerated citizens and non-citizens without hearings or counsel, and allowed secret criminal proceedings.

Immigrants, especially Arab and Muslim immigrants, have become targets as the Administration pursues ill-conceived measures based on national origin, race and ethnic background, rather than any specific assessment of dangerousness. Abusive detention practices have denied due process of law. Massive registration programs have fingerprinted, photographed and interrogated over 80,000 innocent Arab and Muslim students, visitors, and workers. "Voluntary interview" programs have made criminal suspects out of Muslims legally residing in the U.S.

These sweeping policies, proposed without consultation with Congress, have done little to protect us against terrorism. Instead, they have stigmatized innocent Arabs and Muslims who pose no danger, and discouraged those who might have been willing to assist our law enforcement and counter-intelligence efforts.

The past two years have demonstrated the need to revise some of the provisions in the PATRIOT Act. Senator Feingold and I recently introduced a bill to expand protection for library and bookstore records, while still allowing the FBI to follow up on legitimate leads.

The Attorney General recently toured the country in support of the PATRIOT Act, but he spoke only to audiences sympathetic to his views. In Boston, citizens with questions and concerns about the Act were shut out. That's hardly the way to promote dialogue and understanding.

Congress needs to act to restore the balance of civil liberties, especially for immigrants. Many regulatory changes made unilaterally by the Bush Administration have led to the unfair detention of innocent people, and stripped immigration judges of the ability to make independent decisions based on the facts in cases before them. Even in pursuit of terrorist suspects, the government should not be riding rough-shod over the basic rights of immigrants.

Three important reports have recently been issued assessing the state of domestic security and civil liberties in America. One is called, "America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11" by the Migration Policy Institute. Another is called, "Assessing the New Normal: Liberty and Security for the Post-September 11 United States" by the Lawyers Committee for Human Rights.

The third is, "Strengthening America by Defending Our Liberties: An Agenda for Reform," a joint project of the Center for Democracy and Technology, the Center for American Progress, and the Center for National Security Studies.

These reports contain excellent recommendations on perfecting security without jeopardizing liberty.

Perhaps their most important recommendation of all is the need for adequate Congressional oversight over post-9/11 policies and laws. Today's session is an important opportunity to hear from leading experts who have closely studied these issues.

It is clear that effective Congressional oversight cannot be carried out unless the Attorney General stops ducking an appearance before the Committee.

He is so obviously deeply involved in the Department's anti-terrorism policies, and he has a clear responsibility to appear before us.

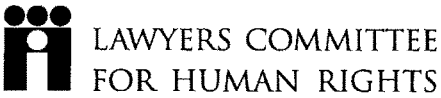
I also urge the Chairman to hold a hearing soon on the serious issues raised by the detention of so-called "enemy combatants". It is wrong for the Administration to detain U.S. citizens indefinitely, without access to counsel, and with no judicial review. I am also very concerned about the Administration's detention of 660 foreign nationals at the Guantanamo Naval Base in Cuba. The International Committee of the Red Cross recently took the extraordinary step of criticizing the United States for its policy, stating that there has been a "worrying deterioration" in the detainees' mental health and no "significant movement on the ICRC's request that the detainees be afforded rights in accordance with the Geneva Conventions."

As we work to bring terrorists to justice and protect our security, we must also act to protect the Constitution and our obligations under international law. The ideals we stand for here at home and around the world are indispensable to our strength. When, the Administration betrays these ideals, it also undermines our effort to defeat terrorism at home and abroad.

Today, we have an opportunity to raise these issues with a distinguished panel of witnesses, and I look forward to their testimony and their recommendations.

Assessing the New Normal

Liberty and Security for the Post-September 11 United States



ABOUT US

LAWYERS COMMITTEE FOR HUMAN RIGHTS

Since 1978, the Lawyers Committee for Human Rights has worked in the U.S. and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; promote fair economic practices by creating safeguards for workers' rights; and help build a strong international system of justice and accountability for the worst human rights crimes.

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INTRODUCTION

Therefore pass these Sirens by, and stop your men's ears with wax that none of them may hear; but if you like you can listen yourself, for you may get the men to bind you as you stand upright on a cross piece half way up the mast, and they must lash the rope's ends to the mast itself, that you may have the pleasure of listening. If you beg and pray the men to unloose you, then they must bind you faster.

Homer, *The Odyssey*

ɜgal scholars have often invoked the story of Ulysses and the Sirens to explain the ɔnstitution's role in American life. Just as Ulysses had himself tied to the mast to save himself ɔm the Sirens' song, so have we tied ourselves to the Constitution to keep short-term impulses ɔm compromising a long-term commitment to a free society. The metaphor that describes the ɔnstitution is equally apt for the rule of law more broadly. In a society bound by the rule of w, individuals are governed by publicly known regulations, applied equally in all cases, and ıforced by fair and independent courts. The rule of law is a free society's method of ensuring at whatever crisis it faces, government remains bound by the constraints that keep society free.

This report, the third in a series, documents the continuing erosion of basic human rights ɔtections under U.S. law and policy since September 11, 2001. The reports address changes in ve major areas: government openness; personal privacy; immigration; security-related ɜtention; and the effect of U.S. actions on human rights standards around the world. Changes in ese arenas began occurring rapidly in the weeks following September 11, and have been rgely sustained or expanded in the two years since. As Vice President Dick Cheney explained ıortly after September 11: "Many of the steps we have now been forced to take will become ɜrmanent in American life," part of a "new normalcy" that reflects "an understanding of the orld as it is." Indeed, today, two years after the terrorist attacks, it is no longer possible to view ese changes as aberrant parts of a short-term emergency response. They have become part of a ıew normal" in American life.

Some of the changes now part of this new normal are sensible and good. Al Qaeda ɔntinues to pose a profound threat to the American public, and the government has the right and ıty to protect its people from attacks. A new national security strategy aimed at reducing this reat is essential. We thus welcome efforts to improve coordination among federal, state, and cal agencies, and between law enforcement and intelligence officials. Equally welcome would ɜ greater efforts to protect the nation's critical infrastructure supporting energy, transportation, ɔod, and water; and efforts to strengthen the preparedness of our domestic "front-line" forces – ɔlice, fire, and emergency medical teams, as well as all those in public health. Many of these ıanges are past due.

But the new normal is also defined by dramatic changes in the relationship between the U.S. government and the people it serves – changes that have meant the loss of particular freedoms for some, and worse, a detachment from the rule of law as a whole. As this report details, the United States has become unbound from the principles that have long held it to the mast.

ABANDONING THE COURTS

Perhaps most marked of these changes, the new normal has brought a sharp departure from the rule-of-law principles guaranteeing that like cases will be treated alike, and that all will have recourse to fair and independent courts as a check on executive power. In the two years since September 11, the executive has established a set of extra-legal institutions that bypass the federal judiciary; most well known are the military commissions and the detention camp at the U.S. military base in Guantánamo Bay, Cuba. Individuals subject to military commission proceedings will have their fate decided by military personnel who report only to the president; there will be no appeal to any independent civilian court. And the administration maintains that those detained by the United States outside the U.S. borders – at Guantánamo and elsewhere – are beyond the jurisdictional reach of U.S. courts altogether.

At these facilities, there is no pretense that like cases need be treated alike. Thus, the Defense Department announced without explanation that six current detainees at the Guantánamo camp had become eligible for trial by military commission. Among the six were U.K. citizens Moazzam Begg and Feroz Abassi, and Australian citizen David Hicks (the identities of the other three are unknown). In the face of staunch protests from the United Kingdom and Australia, both close U.S. allies, the United States promised that the Australian and U.K. detainees – unlike the nationals of the other 40-some nations represented in Guantánamo – would not be subject to the death penalty, and would not be monitored in their conversations with counsel. Despite vigorous international opposition to the camp and military commission justice, the United States has thus far refused to afford similar protections to any other nation's detainees. The United States' obligation to adhere to the international laws to which it remains bound – including the Geneva Convention protections for prisoners of war – appears forgotten altogether.

In those cases that have come before the U.S. courts, the executive now consistently demands something less than independent judicial review. The Justice Department has continued to advance the argument that any U.S. citizen may be detained indefinitely without charges or access to counsel if the executive branch presents "some evidence" that he is an "enemy combatant," a category it has yet properly to define. The Justice Department has argued that U.S. citizen José Padilla should not be allowed an opportunity to rebut the evidence that the government presents – an argument that the district court in the case refused to accept. Yet despite the federal court's order that the Justice Department allow Padilla access to his counsel – and in the face of briefs filed on Padilla's behalf by a coalition including both the Lawyers Committee and the Cato Institute – the Justice Department has refused to comply with the court's order. Neither Padilla's counsel nor any member of his family has seen or heard from him in 15 months.

And notwithstanding the fundamental rule-of-law principle that laws of general application will be equally applied to all, the executive has, without explanation, detained some terrorist suspects in military brigs as "enemy combatants," while subjecting others to criminal prosecution in U.S. courts. Detainees in the former category are deprived of all due process rights; detainees in the latter category are entitled to the panoply of fairness protections the Constitution provides, including access to counsel and the right to have guilt established (or not) in court. As the Justice Department put it: "There's no bright line" dividing the "enemy" detainees from the everyday criminal defendant. Indeed, the executive accused both John Walker Lindh and Yaser Hamdi of participating in hostilities against the United States in Afghanistan. Both are U.S. citizens, captured in Afghanistan in 2001, and handed over to U.S. forces shortly thereafter. Yet the executive brought charges against Lindh through the normal criminal justice system, affording Lindh all due process protections available under the Constitution. Hamdi, in contrast, has remained in incommunicado detention for 16 months. He has never seen a lawyer.

In any case, the executive designation that one is an "enemy combatant" and another a criminal suspect appears subject to change at any time. Some who have been subject to criminal prosecution for alleged terrorism-related activities now face the prospect that, should they begin to win their case, the government may take away the privilege of criminal procedure and subject them to the indeterminate "enemy combatant" status – a prospect now well known to all suspects not already in incommunicado detention. Criminal defendant Ali Saleh Kahlah al-Marri was designated an enemy combatant just weeks before his long-scheduled criminal trial. And the administration has suggested that if it loses certain procedural rulings in the prosecution of Zacarias Moussaoui, he too may lose the constitutional protections to which he is entitled.

PRIVACY AND ACCESS TO GOVERNMENT INFORMATION

As the breadth of these examples should suggest, the changes that have become part of the new normal are not limited to the role of the courts. The two years since September 11 have seen a shift away from the core U.S. presumption of access that is essential to democratic government – the presumption that government is largely open to public scrutiny, while the personal information of its people is largely protected from government intrusion. Today, the default in America has become just the opposite – the work of the executive branch increasingly is conducted in secret, but unfettered government access to personal information is becoming the norm.

For example, the administration continues vigorously to defend provisions of the USA PATRIOT Act that allow the FBI secretly to access Americans' personal information (including library, medical, education, internet, telephone, and financial records) without having to show that the target has any involvement in espionage or terrorism. With little or no judicial oversight, commercial service providers may be compelled to produce these records solely on the basis of a declaration from the FBI that the information is for an investigation "to protect against international terrorism or clandestine intelligence activities." And the PATRIOT Act makes it a crime to reveal that the FBI has searched such information. Thus, a librarian who speaks out about having to reveal a patron's book selections can be subject to prosecution. Because of the secrecy of these surveillance operations, little is known about how many people have been

subject to such intrusions. But many have been outspoken about the potential these measures have to chill freedom of expression and inquiry. As one librarian put it, such measures "conflict[] with our code of ethics" because they force librarians to let the FBI "sweep up vast amounts of information about lots of people – without any indication that they've done anything wrong."

At the same time, according to the National Archives and Records Administration, the number of classification actions by the executive branch rose 14 percent in 2002 over 2001 – and declassification activity fell to its lowest level in seven years. The Freedom of Information Act – for nearly four decades an essential public tool for learning about the inner workings of government – has been gravely damaged by an unprecedented use of exemptions and new statutory allowances for certain 'security-related' information, expansively defined. And a new executive order, issued this past spring, further eases the burden on government officials responsible for deciding what information to classify. As a result, being an informed, responsible citizen in U.S. society is measurably more difficult than it was before the September 11 attacks.

IMMIGRANTS AND REFUGEES

Citizens are far from alone in feeling the effects of these rapid changes in U.S. policy. The new normal is also marked by an important shift in the U.S. position toward immigrants and refugees. Far from viewing immigrants as a pillar of strength, U.S. policy now reflects an assumption that immigrants are a primary national threat. Beginning immediately after September 11, the Justice Department's enforcement of immigration laws has ranged from "indiscriminate and haphazard" (as the Department's independent Inspector General put it with respect to those rounded up in the aftermath of the September 11 attacks) to rigorously selective, targeting Arab, Muslim, and South Asian minorities to the exclusion of other groups. Through the expenditure of enormous resources, the civil immigration system has become a principal instrument to secure the detention of "suspicious" individuals when a government trawling for information can find no conduct that would justify their detention on any criminal charge. And through a series of nationality-specific information and detention sweeps – from special registration requirements to "voluntary" interviews to the detention of all those seeking asylum from a list of predominantly Muslim countries – the administration has acted on an assumption that all such individuals are of concern.

Despite the sustained focus on immigrants, there is growing evidence that the new normal in immigration has done little to improve Americans' safety. By November 2001, FBI-led task force agents had arrested and detained almost 1,200 people in connection with the investigation of the September 11 attacks. Of those arrested during this period, 762 were detained solely on the basis of civil immigration violations. But as the Inspector General's report now makes clear, many of those detainees did not receive core due process protections, and the decision to detain them was at times "extremely attenuated" from the focus of the September 11 investigation. Worse, the targeted registration and interview programs have seriously undermined relations between the Arab community and law enforcement personnel – relationships essential to developing the kinds of intelligence law enforcement has made clear it most needs. An April 2003 GAO report on one voluntary interview program is particularly telling. While finding that

most of the interviews were conducted in a "respectful and professional manner," the report explained that many of the interviewees "did not feel the interviews were truly voluntary" and feared that they would face "repercussions" for declining to participate. As for the security gains realized, "information resulting from the interview project had not been analyzed as of March 2003," and there were "no specific plans" to do so. Moreover, "None of [the] law enforcement officials with whom [the GAO] spoke could provide examples of investigative leads that resulted from the project."

THE UNITED STATES IN THE WORLD

Finally, the United States' detachment from its own rule-of-law principles is having a profound effect on human rights around the world. Counterterrorism has become the new rubric under which opportunistic governments seek to justify their actions, however offensive to human rights. Indeed, governments long criticized for human rights abuses have publicly applauded U.S. policies, which they now see as an endorsement of their own longstanding practices. Shortly after September 11, for example, Egypt's President Hosni Mubarak declared that new U.S. policies proved "that we were right from the beginning in using all means, including military tribunals, to combat terrorism. . . . There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual."

In addition to spurring a global proliferation of aggressive counterterrorism measures, the United States has at times actively undermined judicial authority in nations whose court systems are just beginning to mature. In one such instance, Bosnian authorities transferred six Algerian men into U.S. custody at the request of U.S. officials, in violation of that nation's domestic law. The Bosnian police had arrested the men, five of whom also had Bosnian citizenship, in October 2001 on suspicion that they had links with Al Qaeda. In January 2002, the Bosnian Supreme Court ordered them released for lack of evidence. But instead of releasing them, Bosnian authorities handed them over to U.S. troops serving with NATO-led peacekeepers. Despite an injunction from the Human Rights Chamber of Bosnia and Herzegovina, expressly ordering that four of the men remain in the country for further proceedings, the men were shortly thereafter transported to the detention camp at Guantánamo. They remain there today.

As the report that follows demonstrates in greater detail, the U.S. government can no longer promise that individuals under its authority will be subject to a system bound by the rule of law. In a growing number of cases, legal safeguards are now observed only so far as they are consistent with the chosen ends of power. Yet too many of the policies that have led to this new normal not only fail to enhance U.S. security – as each of the following chapters discusses – but also exact an unnecessarily high price in liberty. For a government unbound by the rule of law presides over a society that is something less than free.

The Lawyers Committee for Human Rights
September 2003

EXECUTIVE SUMMARY & RECOMMENDATIONS

ASSESSING THE NEW NORMAL, the third in a series of reports, documents the continuing erosion of basic human rights protections under U.S. law and policy since September 11. Today, two years after the attacks, it is no longer possible to view these changes as aberrant parts of an emergency response. Rather, the expansion of executive power and abandonment of established civil and criminal procedures have become part of a "new normal" in American life. The new normal, defined in part by the loss of particular freedoms for some, is as troubling for its detachment from the rule of law as a whole. The U.S. government can no longer promise that individuals will be governed by known principles of conduct, applied equally in all cases, and administered by independent courts. As this report shows, in a growing number of cases, legal safeguards are now observed only insofar as they are consistent with the chosen ends of power.

PRINCIPAL FINDINGS

CHAPTER ONE: OPEN GOVERNMENT

- The administration continues efforts to roll back the Freedom of Information Act (FOIA), both by expanding the reach of existing statutory exemptions, and by adding a new "critical infrastructure" exemption. The new exemption could limit public access to important health, safety, and environmental information submitted by businesses to the government. Even if the information reveals that a firm is violating health, safety, or environmental laws, it cannot be used against the firm that submitted it in any civil action unless it was submitted in bad faith. At the same time, the administration has removed once-public information from government websites, including EPA risk management plans that provide important information about the dangers of chemical accidents and emergency response mechanisms. This move came despite the FBI's express statement that the EPA information presented no unique terrorist threat.

- The administration has won several recent court victories further restricting FOIA's reach. In *American Civil Liberties Union v. U.S. Department of Justice*, a federal district court denied the ACLU's request for information concerning how often the Justice Department had used its expanded authority under the PATRIOT Act. In *Center for National Security Studies v. U.S. Department of Justice*, a divided three-judge panel of the U.S. Court of Appeals for the D.C. Circuit upheld the executive's assertion of a FOIA exemption to withhold the names of those detained in investigations following September 11, as well as information about the place, time, and reason for their detention. Contrary to well-settled FOIA principles requiring the government to provide specific reasons for withholding information, the appeals court deferred to the executive's broad assertion that disclosure of the information would interfere with law enforcement.

- Executive Order 13292 (E.O. 13292), issued by President Bush on March 28, 2003, also promotes greater government secrecy by allowing the executive to delay the release of government documents; giving the executive new powers to reclassify previously released information; broadening exceptions to declassification rules; and lowering the standard under which information may be withheld from release – from requiring that it "should" be expected to result in harm to that it "could" be expected to have that result. In addition, E.O. 13292 removes a provision from the previously operative rules mandating that "[i]f there is significant doubt about the need to classify information, it shall not be classified." In essence, this deletion shifts the government's "default" setting from "do not classify" under the previous rules to "classify" under E.O. 13292.

- The administration continues to clash with Congress over access to executive information. The Justice Department recently provided some limited responses to congressional questions about the implementation of the PATRIOT Act only after a senior Republican member of the House threatened to subpoena the requested documents. Indeed, the Justice Department now operates under a directive instructing Department employees to inform the Department's Office of Legislative Affairs "of all potential briefings on Capitol Hill and significant, substantive conversations with staff and members on Capitol Hill" so that the office may "assist in determining the appropriateness of proceeding with potential briefings." Controversy also erupted over the administration's insistence on classifying key sections of a congressional report on the intelligence failures surrounding September 11. As of August 2003, 46 senators had signed a letter to the president requesting that he declassify additional portions of the report.

- Members of Congress from across the political spectrum are beginning to heed security experts' warnings that too much secrecy may well result in *less* security. For example, Porter Goss (R-FL), Chair of the U.S. House of Representatives Permanent Select Committee on Intelligence, recently testified that "there's a lot of gratuitous classification going on," and that the "dysfunctional" classification system remains his committee's greatest challenge. Others have emphasized that secrecy can breed increased distrust in governmental institutions. As Senator John McCain (R-AZ) has noted: "Excessive administration secrecy on issues related to the September 11 attacks feeds conspiracy theories and reduces the public's confidence in government."

CHAPTER TWO: PERSONAL PRIVACY

- The administration is vigorously defending sections 215 and 505 of the PATRIOT Act, which allow the FBI secretly to access personal information about U.S. citizens and lawful permanent residents (including library, medical, education, internet, telephone, and financial records) without demonstrating that the target has any involvement in espionage or terrorism. With little or no judicial oversight, commercial service providers may be compelled to produce these records solely on the basis of a written declaration from the FBI that the information is sought for an investigation"to protect against international terrorism or clandestine intelligence activities." And the PATRIOT Act makes it a crime to reveal that the FBI has requested such information. Thus, a librarian

who speaks out about being forced to reveal a patron's book selections can be subject to prosecution. Many have spoken out about the potential these measures have to chill freedom of expression and inquiry. As one librarian put it, section 215 "conflicts with our code of ethics" because it forces librarians to let the FBI "sweep up vast amounts of information about lots of people – without any indication that they've done anything wrong." The president's proposed additions would broaden such powers even further, allowing the attorney general to issue administrative subpoenas (which do not require judicial approval) in the course of domestic as well as international terrorism investigations.

- The administration also continues efforts to resuscitate some version of the Total Information Awareness project (TIA) – an initiative announced in 2002 that would enable the government to search personal data, including religious and political contributions; driving records; high school transcripts; book purchases; medical records; passport applications; car rentals; and phone, e-mail, and internet logs in search of "patterns that are related to predicted terrorist activities." The initial TIA proposal raised widespread privacy concerns, and experts have strongly questioned the efficacy of the project. The U.S. Association for Computing Machinery – the nation's oldest computer technology association – recently warned that even under optimistic estimates, likely "false positives" could result in as many as 3 million citizens being wrongly identified as potential terrorists each year. To its credit, Congress has taken these warnings seriously and has begun efforts to rein in TIA-related work. The Senate recently adopted a provision eliminating funding for TIA research and development, and requiring congressional authorization for the deployment of any such program. The House also adopted a provision requiring congressional approval for TIA activities affecting U.S. citizens, but it did not cut off funds. In the meantime, TIA remains part of ongoing executive efforts.

- The Transportation Security Administration's (TSA) current system for preventing terrorist access to airplanes relies on watchlists compiled from a variety of government sources. TSA has refused to supply details of who is on the lists and why. But the rapid expansion of the lists has been matched by a growing number of errors: TSA receives an average of 30 calls per day from airlines regarding passengers erroneously flagged as potential terrorists. Even this may be an underestimate: TSA has no centralized system for monitoring errors, so it does not collect complete data on how many times this happens. The confusion stems from a range of sources – from outdated name-matching algorithms to inaccuracies in the data from intelligence services. Passengers have found it almost impossible to have even obvious errors corrected.

- TSA also continues to develop a new "passenger risk assessment" system – the Computer Assisted Passenger Pre-Screening System II (CAPPS II). As envisaged, CAPPS II would assign a security risk rating to every air traveler based on information from commercial data providers and government intelligence agencies. The new system would rely on the same intelligence data used for the existing watchlists, and would also be vulnerable to error introduced by reliance on commercial databases. CAPPS II would be exempt from existing legislation that requires agencies to provide individuals with the opportunity to

correct government records. And TSA has proposed that CAPPS II be exempted from a standard Privacy Act requirement that an agency maintain only such information about a person as is necessary to accomplish an authorized agency purpose.

- The past two years have seen a significant increase in the use of foreign intelligence surveillance orders (a type of search warrant whose availability was expanded by the PATRIOT Act). These so-called "FISA orders" may be issued with far fewer procedural checks than ordinary criminal search warrants. Requests for FISA orders are evaluated *ex parte* by a secret court in the Justice Department, and officials need not show probable cause of criminal activity to secure the order. Between 2001 and 2002, FISA orders increased by 31 percent, while the number of ordinary federal criminal search warrants dipped by nine percent. The number of FISA orders issued in 2002 is 21 percent greater than the largest number in the previous decade, and FISA orders now account for just over half of all federal wiretapping. In addition, since September 11, the FBI has obtained 170 *emergency* FISA orders – searches that may be carried out on the sole authority of the attorney general for 72 hours before being reviewed by any court. This is more than triple the number employed in the prior 23-year history of the FISA statute.

CHAPTER THREE: IMMIGRANTS, REFUGEES, AND MINORITIES

- The Justice Department has moved aggressively to increase state and local participation in the enforcement of federal immigration law. The Justice Department has argued that state and local officials have "inherent authority" to "arrest and detain persons who are in violation of immigration laws," and whose names appear in a national crime database. The legal basis for this "inherent authority" is unclear. These moves have encountered strong resistance from local officials concerned that they will drain already scarce law enforcement resources and undermine already fragile community relations. As the chief of police in Arlington, Texas explained: "We can't and won't throw our scarce resources at quasi-political, vaguely criminal, constitutionally questionable, [or] any other evolving issues or unfunded mandates that aren't high priorities with our citizenry."

- During primary hostilities in Iraq, from March to April 2003, the Department of Homeland Security (DHS) operated a program of automatically detaining asylum seekers from a group of 33 nations and territories where Al Qaeda or other such groups were believed to operate. Under the program, arriving asylum seekers from the targeted countries were to be detained without parole for the duration of their asylum proceedings, even when they met the applicable parole criteria and presented no risk to the public. The program was terminated in April 2003 in the wake of a public outcry. The administration has not disclosed whether any of those detained under the program have yet been released from detention.

- While the administration has taken some steps to remedy the draconian policies that led to mass detentions of non-citizens in the weeks following September 11, the harsh effects of these now-discontinued round-ups have become clear. By the beginning of November 2001, FBI-led task force agents had detained almost 1,200 people in connection with the investigation of the September 11 attacks. Of these, 762 were detained solely on the

basis of civil immigration violations, such as overstaying their visas. As a 198-page report issued by the Justice Department Office of the Inspector General now verifies, the decision to detain was at times "extremely attenuated" from the focus of the investigation. Many detainees did not receive notice of the charges against them for weeks – some for more than a month after arrest – and were deprived of other core due process protections. Particularly harsh conditions prevailed at a Brooklyn detention center and at Passaic County Jail in Paterson, New Jersey. Of greatest ongoing concern, the expanded custody authority that was used to effect these extended detentions is still on the books. As a result, there is as yet little to prevent such widespread round-ups and detentions from occurring again.

- On April 17, 2003, Attorney General John Ashcroft issued a sweeping decision preventing an 18-year-old Haitian asylum seeker from being released from detention. In the decision (known as *In re D-J-*), the attorney general concluded that the asylum seeker, David Joseph, was not entitled to an individualized assessment of the need for his detention based on "national security" concerns. There was no claim that Joseph himself presented a threat. The expansive wording of the decision raises concerns that the administration may seek to deny broader categories of immigration detainees any individualized assessment of whether their detention is necessary whenever the executive contends that national security interests are implicated.

- The effects of the temporary registration requirements imposed by the Justice Department's "call-in" registration program – instituted last summer and concluded on April 25, 2003 – are now evident. Call-in registration required visiting males age 16 to 45 from 25 predominantly Arab and Muslim countries to appear in Immigration and Naturalization Service (INS) offices to be fingerprinted, photographed, and questioned under oath by INS officers. But misinformation about the program, including inaccurate, unclear, and conflicting notices distributed by the INS, led some men unintentionally to violate the program's requirements – often resulting in their deportation. Attorneys reported that they were denied access to their clients during portions of the interviews, and some of the registrants inadvertently waived their right to a removal hearing. There were also troubling reports of mistreatment. In Los Angeles, for example, about 400 men and boys were detained during the first phase of the registration. Some were handcuffed and placed in shackles; others were hosed down with cold water; others were forced to sleep standing up because of overcrowding. In the end, 82,000 men complied with the call-in registration requirements.

- The U.S. program to resettle refugees has long been a model for states all over the world, a reminder of the country's founding as a haven for the persecuted. But in the immediate aftermath of September 11, amid high security concerns, the program was shut down. Nearly two years later, the U.S. Refugee Resettlement Program is still struggling. Significant delays in the conduct of security checks, insufficient resources, and management failures are among the problems that bedevil the program. From an average of 90,000 refugees resettled annually before September 11, the United States anticipates 27,000 resettlements in 2003.

CHAPTER FOUR: UNCLASSIFIED DETAINEES

- A number of individuals – including two U.S. citizens – continue to be held by the United States in military detention without access to counsel or family, based solely on the president's determination that they are "enemy combatants." The executive's decision to declare someone an "enemy combatant" – as opposed to a prisoner of war or criminal suspect – appears unconstrained by any set of guiding principles. José Padilla and James Ujaama are both U.S. citizens, arrested in the United States, and accused of plotting with Al Qaeda. While Ujaama was criminally indicted and then entered a plea agreement, Padilla has never been formally charged with any offense. He has been held in incommunicado military detention for 15 months. Likewise, the executive accused U.S. citizens John Walker Lindh and Yaser Hamdi of participating in hostilities against the United States in Afghanistan. Lindh was prosecuted through the civilian criminal justice system, enjoying all due process protections available under the Constitution. Hamdi, in contrast, has remained in incommunicado detention for sixteen months. He has never seen a lawyer. The reasons for the differing treatment are unclear.

- Advocates for the two U.S. citizens held as "enemy combatants" are actively challenging their detention in court – challenges the Justice Department has vigorously resisted. In briefs filed with the U.S. Court of Appeals for the Second Circuit this summer, a wide range of experts (including the Lawyers Committee and the Cato Institute) argued that the executive's treatment of Padilla is illegal. They maintain that U.S. citizens are entitled to constitutional protections against arbitrary detention, including the right to counsel; the right to a jury trial; the right to be informed of the charges and confront witnesses against them. The Constitution identifies no "enemy combatant" exception to these rules. Further, 18 U.S.C. § 4001(a) makes clear that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The parties await a decision by the Second Circuit. In Hamdi's case, the U.S. Court of Appeals for the Fourth Circuit ruled largely in the executive's favor, but rejected the executive's "sweeping proposition . . . that with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."

- There are strong indications that the executive has threatened criminal defendants with designation as "enemy combatants" as a method of securing plea-bargained settlements in terrorism-related prosecutions. As defense counsel Patrick J. Brown explained with respect to a case involving six Arab-American U.S. citizens from Lackawanna, New York: "We had to worry about [them] being whisked out of the courtroom and declared enemy combatants if the case started going well for us. . . . So we just ran up the white flag and folded." In a separate case, the president designated Ali Saleh Kahlah Al-Marri an "enemy combatant" less than a month before his criminal trial was set to begin, placing him in incommunicado detention, dismissing his criminal indictment, and cutting him off from his lawyers who had been vigorously defending his case. *The New York Times* quoted one "senior F.B.I. official" as explaining that "the Marri decision held clear implications for other terrorism suspects. 'If I were in their shoes, I'd take a message from this.'" And executive officials have suggested that unfavorable procedural rulings

in the Zacarias Moussaoui prosecution may lead them to consider dropping the case in federal court to pursue military commission proceedings under the president's control.

- Since President Bush announced the creation of military commissions for non-citizens accused of committing "violations of the laws of war and other applicable laws," the Defense Department has issued more detailed rules explaining commission procedures. Despite some improvements made by these rules, the commissions still provide markedly fewer safeguards than either U.S. criminal court or standard military court proceedings. The commissions allow for no appeal to any civilian court. The chargeable offenses expand military jurisdiction into areas never before considered subject to military justice. The government has broad discretion to close proceedings to outside scrutiny in the interest of "national security." And defendants will be represented by assigned military lawyers – even if they do not want them. Defendants will also be entitled to civilian lawyers, but unless a defendant can provide financing, civilian lawyers will receive no fees and will have to cover their own personal and case-related expenses. Civilian lawyers can be denied access to information – including potential exculpatory evidence – if the government thinks it "necessary to protect the interests of the United States." The Defense Department may (without notice) monitor attorney-client consultations; and lawyers will be subject to sanction if they fail to reveal information they "reasonably believe" necessary to prevent significant harm to "national security."

- In early 2002, the U.S. military removed several hundred individuals from Afghanistan to the U.S. Naval Base in Guantánamo Bay, Cuba. About 660 detainees are now housed at Guantánamo – including nationals from at least 40 countries, speaking 17 different languages. Three are children, the youngest aged 13. Since the camp opened, about 70 detainees, mainly Afghans and Pakistanis, have been released. There have been 32 reported suicide attempts. While U.S. officials originally asserted the Guantánamo prisoners are "battlefield" detainees who were engaged in combat in Afghanistan, some now held at Guantánamo were arrested in places far from Afghanistan. For example, two Guantánamo prisoners are U.K. residents who were arrested in November 2002 during a business trip to Gambia in West Africa. The Gambian police kept the two men in incommunicado detention for a month while Gambian and U.S. officials interrogated them. In December 2002, U.S. agents took the men to the U.S. military base at Bagram, Afghanistan, and, in March 2003, transported them to Guantánamo, where they remain.

- On July 3, 2003, the Defense Department announced that six current detainees at Guantánamo had become eligible for trial by military commission. Among the six were two U.K. citizens and an Australian citizen. These designations sparked protests in the United Kingdom and Australia, close U.S. allies. The British advanced "strong reservations about the military commission," and ultimately obtained some accommodations for the U.K detainees, including U.S. promises not to seek the death penalty or to monitor their consultations with counsel, and to consider letting them serve any sentence in British prisons. These promises were also extended to the Australian detainee. Despite widespread international criticism, the United States has thus far not afforded the same protections to nationals from any of the other countries represented at Guantánamo.

CHAPTER FIVE: THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS

- In the two years since September 11, a growing number of foreign governments have passed aggressive new counterterrorism laws that undermine established norms of due process, including access to counsel and judicial review. On June 30, 2003, experts associated with the UN Commission on Human Rights issued a joint statement emphasizing their "profound concern at the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights—civil, cultural, economic, political and social." They also drew attention to "the dangers inherent in the indiscriminate use of the term 'terrorism,' and the resulting new categories of discrimination."

- The United States has been pressuring other governments to hand over Al Qaeda suspects, even when this violates the domestic law of those nations. In one such case, the government of Malawi secretly transferred five men to U.S. custody, in violation of a domestic court order. The men were held in unknown locations for five weeks before being released on July 30, 2003, reportedly cleared of any connection to Al Qaeda. In a separate incident, at the request of the U.S. government, Bosnian authorities transferred six Algerian men into U.S. custody, again in violation of that nation's domestic law. The Bosnian police had arrested the men, five of whom had Bosnian citizenship, in October 2001 on suspicion that they had links with Al Qaeda. In January 2002, the Bosnian Supreme Court ordered them released for lack of evidence. But instead of releasing them, Bosnian authorities handed them over to U.S. troops serving with NATO-led peacekeepers. Despite an injunction from the Human Rights Chamber of Bosnia and Herzegovina, expressly ordering that four of the men remain in the country for further proceedings, the men were shortly thereafter transported to the U.S. detention camp at Guantánamo. They remain there today.

- During the past decade, there has been a steady erosion in states' willingness to protect fleeing refugees. The events of September 11 added new momentum to this trend. States are reducing the rights of refugees who succeed in crossing their borders, increasingly returning refugees to their countries of origin to face persecution, and devising new ways to prevent refugees from arriving in their territory in the first place. Australia and Europe (led by the United Kingdom), for example, are considering extra-territorial processing and detention centers for refugees who seek asylum in Australia and the European Union, respectively.

- According to a series of press reports, the CIA has been covertly transferring terrorism suspects to other countries for interrogation – notably Jordan, Egypt, and Syria, which are known for employing coercive methods. Such transfers – known as "extraordinary renditions" – violate Article 3 of the UN Convention Against Torture, which prohibits signatory countries from sending anyone to another state when there are "substantial grounds for believing that he would be in danger of being subjected to torture." Some detainees are said to have been rendered with lists of specific questions that U.S. interrogators want answered. In others, the CIA reportedly plays no role in directing the

interrogations, but subsequently receives any information that emerges. Although the number of such renditions remains unknown, U.S. diplomats and intelligence officials have repeatedly (but anonymously) confirmed that they do take place. There have also been reports that U.S. forces have been using so-called "stress and duress" techniques in their own interrogations of terrorism suspects. Concerns about U.S. interrogation techniques intensified in December 2002 when two Afghan detainees died in U.S. custody at the U.S. military base in Bagram, Afghanistan. Their deaths were officially classified as "homicides," resulting in part from "blunt force trauma." The U.S. military launched a criminal investigation into the deaths in March 2003. The military is also investigating the June 2003 death of a third Afghan man, who reportedly died of a heart attack while in a U.S. holding facility in Asadabad, Afghanistan.

RECOMMENDATIONS

CHAPTER ONE: OPEN GOVERNMENT

1. Congress should pass a "Restore FOIA" Act to remedy the effects of overly broad provisions in the Homeland Security Act of 2002, including by narrowing the "critical infrastructure information" exemption.

2. Congress should remove the blanket exemption granted to DHS advisory committees from the open meeting and related requirements of the Federal Advisory Committee Act.

3. Congress should convene oversight hearings to review the security and budgetary impact of post-September 11 changes in classification rules, including Executive Order 13292 provisions on initial classification decisions, and Homeland Security Act provisions on the protection of "sensitive but unclassified" information.

4. Congress should consider setting statutory guidelines for classifying national security information, including imposing a requirement that the executive show a "demonstrable need" to classify information in the name of national security.

5. The administration should modify the "Creppy Directive" to replace the blanket closure of "special interest" deportation hearings with a case-specific inquiry into the merits of closing a hearing.

CHAPTER TWO: PERSONAL PRIVACY

1. Congress should repeal section 215 of the PATRIOT Act to restore safeguards against abuse of the seizure of business records, including records from libraries, bookstores, and educational institutions, where the danger of chilling free expression is greatest. Congress should also amend section 505 of the PATRIOT Act to require the FBI to obtain judicial authorization before it may obtain information from telephone companies, internet service providers, or credit reporting agencies.

2. Congress should review changes to FBI guidelines that relax restrictions on surveillance of domestic religious and political organizations to ensure that there are adequate checks on executive authority in the domestic surveillance arena. The guidelines should be specifically amended to better protect against the use of counterterrorism surveillance tools for purely criminal investigations.

3. Congress should delay implementation of the Computer-Assisted Passenger Pre-Screening System II pending an independent expert assessment of the system's feasibility, potential impact on personal privacy, and mechanisms for error correction. Separately, Congress should immediately eliminate all funding for "Total [or Terrorism] Information Awareness" research and development.

4. The Terrorist Threat Integration Center should be housed within DHS where it may be subject to oversight by departmental and congressional officials – who can ensure investigation of possible abuses and enforcement of civil rights and civil liberties.

5. Congress should establish a senior position responsible for civil rights and civil liberties matters within the DHS Office of the Inspector General. This position would report directly to the Inspector General, and be charged with coordinating and investigating civil rights and civil liberties matters in DHS.

CHAPTER THREE: IMMIGRANTS, REFUGEES, AND MINORITIES

1. The Justice Department and DHS should continue cooperating with the Justice Department Office of the Inspector General (OIG) by implementing the remaining recommendations addressing the treatment of the September 11 detainees by the OIG's October 3, 2003 deadline. In addition, Congress should require the OIG to report semi-annually any complaints of alleged abuses of civil liberties by DHS employees and officials, including government efforts to address any such complaints.

2. The Justice Department should rescind the expanded custody procedures regulation that allows non-citizens to be detained for extended periods without notice of the charges against them, as well as the expanded regulation permitting automatic stays of immigration judge bond decisions.

3. The president should direct the attorney general to vacate his decision in *In re DJ* and restore prior law recognizing that immigration detainees are entitled to an individualized assessment of their eligibility for release from detention. Congress should enact a law making clear that arriving asylum seekers should have their eligibility for release assessed by an immigration judge.

4. The administration should fully revive its Refugee Resettlement Program and publicly affirm the United States' commitment to restoring resettlement numbers to pre-2001 levels (90,000 refugees each year). It should ensure that adequate resources are devoted to refugee security checks so that these procedures do not cause unnecessary delays.

5. The Justice Department should respect the judgment of local law enforcement officials and cease efforts to enlist local officials in the enforcement of federal immigration law.

CHAPTER FOUR: UNCLASSIFIED DETAINEES

1. The administration should provide U.S. citizens José Padilla and Yaser Hamdi immediate access to legal counsel. These individuals, and all those arrested in the United States and designated by the president as "enemy combatants," should be afforded the constitutional protections due to defendants facing criminal prosecution in the United States.

2. The Justice Department should prohibit federal prosecutors from using, explicitly or implicitly, the threat of indefinite detention or military commission trials as leverage in criminal plea bargaining or in criminal prosecutions.

3. The U.S. government should carry out its obligations under the Third Geneva Convention and U.S. military regulations with regard to all those detained by the United States at Guantánamo and other such detention camps around the world. In particular, the administration should provide these detainees with an individualized hearing in which their status as civilians or prisoners of war may be determined. Detainees outside the United States as to whom a competent tribunal has found grounds for suspecting violations of the law of war should, without delay, be brought to trial by court martial under the U.S. Uniform Code of Military Justice. Those determined not to have participated directly in armed conflict should be released immediately or, if appropriate, criminally charged.

4. President Bush should rescind his November 13, 2001 Military Order establishing military commissions, and the procedural regulations issued thereunder.

5. The administration should affirm that U.S. law does not permit indefinite detention solely for purposes of investigation, and that suggestions to the contrary in the Declaration of Vice Admiral Lowell E. Jacoby (USN) do not reflect administration policy.

CHAPTER FIVE: THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS

1. The United States should publicly renounce efforts by other governments to use global counterterrorism efforts as a cover for repressive policies toward journalists, human rights activists, political opponents, or other domestic critics.

2. As a signal of its commitment to take human rights obligations seriously, the United States should submit a report to the UN Human Rights Committee on the current state of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR). The United States ratified the ICCPR in 1992, but has not reported to the Human Rights Committee since 1994.

3. The United States should affirm its obligation to not extradite, expel, or otherwise return any individual to a place where he faces a substantial likelihood of torture. All reported

violations of this obligation should be independently investigated. The United States should also independently investigate reports that U.S. officers have used "stress and duress" techniques in interrogating terrorism suspects, and it should make public the findings of the military investigations into the deaths of three Afghan detainees in U.S. custody.

4. The United States should respect the domestic laws of other countries, particularly the judgments of other nations' courts and human rights tribunals enforcing international law.

5. The United States should encourage all countries to ensure that national security measures are compatible with the protections afforded refugees under international law.

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Committee On The Judiciary
Hearing On
"America After 9/11: Freedom Preserved Or Freedom Lost?"
November 18, 2003

This is the second in our series of oversight hearings to review America's progress in the fight against terrorism. Our focus today is on the ways the Administration's policies and actions have impacted the privacy and civil liberties of United States citizens as well as the rule of law. We are examining the implications of ever granting government more power over our liberties, without sufficient checks and balances; the implications of secret detentions and roundups based on religion and ethnicity; and the implications of government secrecy and stonewalling.

This is an ambitious subject for one hearing, and we will need to hold additional hearings next year on related issues. Chairman Hatch and I have already agreed on the need for a separate hearing to examine the Administration's unfettered discretion to designate certain individuals as "enemy combatants." These include two U.S. citizens who were unilaterally transferred from our court system to military custody, where they have no access to lawyers or family, and no meaningful right to challenge the validity of their detention. In addition, more than 650 foreigners are being held without charge or access to counsel at Camp Delta on Guantanamo Bay. Issues raised by their detention are currently pending before the U.S. Supreme Court.

We are still waiting to hear from the Attorney General to find out when he might make the time to appear before this Committee. At our last oversight hearing, on October 21, members of this Committee on both sides of the dais made it clear, if it were not already clear, that they had wanted and expected the Attorney General to testify. If we do not adjourn this week, I hope that the Chairman will make every effort to obtain the Attorney General's appearance before the end of the year. Otherwise, we will expect to see the Attorney General here in January.

We welcome our witnesses today and I thank them for coming. It is important for this Committee to have the opportunity to revisit the policy decisions Congress and the Administration made in the PATRIOT Act, which was negotiated and passed in the emotional aftermath of the terrorist attacks of September 11. At the same time, we need to look beyond the four corners of that legislation to examine other Administration policies and actions that have affected the civil liberties of the American people in the name of the war on terrorism. The recently released report by the Center for American Progress identifies a wide range of civil liberty concerns that include, but go well beyond, the PATRIOT Act, and I appreciate their analysis and recommendations on these issues.

Today, I'll focus on three broad areas of concern.

Denying Liberty Without Due Process

One major area that of concern involves the mass arrests and secret detentions that followed the terrorist attacks – what columnist Stuart Taylor referred to recently as the "Bush Administration's truly alarming and utterly unnecessary abuses of its detention powers."

Earlier this year, the Department of Justice's own Inspector General reported critically on the Department's handling of immigration detainees who were swept up in the 9/11 investigation. The Inspector General found that the vast majority of these immigrants were never linked to terrorism – rather, they had committed only the civil violation of overstaying their visas, and then found themselves in the wrong place at the wrong time. I welcomed the hearing that the Committee held on the report in June, but we also should have heard from outside experts and not just from Administration witnesses. Today we have that opportunity.

Many of the 9/11 detainees were held for weeks or even months without charge or counsel. Indeed, the Justice Department ignored the power it asked for, and that Congress gave it in the PATRIOT Act, to hold aliens suspected of terrorist links for up to seven days without charge. Instead, the Justice Department preferred to hold aliens for longer on its own regulatory say-so. The Department of Justice has refused to this day to release the detainees' names, expending countless hours of DOJ litigation resources to keep their identities secret, even after almost all of them have been removed from the United States.

Even when aliens were finally charged and thus received hearings in the immigration court system, they faced an INS that adopted blanket policies opposing bond in all cases and unilaterally imposed stays in all cases where a judge nonetheless decided to release the alien on bail. The result of these policies was that aliens who had been caught up in the 9/11 investigation were held for months – often in harsh conditions fit for serious criminal offenders – for civil violations. Even after accounting for the severe stress of the post-9/11 period, the Inspector General found that the Justice Department committed serious errors. I agree. As such, it was particularly disappointing when the Inspector General released a subsequent report in September stating that the Justice Department had not yet addressed any of the recommendations of the June report with enough specificity and completeness for the OIG to consider them closed. Full implementation is necessary and should be accomplished without further delay.

It is certainly proper for the government to enforce our immigration laws. At the same time, those laws should be enforced without regard to the religion or ethnicity of the aliens involved. An unbiased immigration policy is not simply the right thing to do – it is also the best national security policy. Immigration enforcement is not a substitute for sound and thorough criminal investigations, and arbitrarily enforcing rules can make matters worse. Notwithstanding whether a sleeper terrorist would voluntarily comply with special registration rules, I suspect that to the extent the government has singled out Arab and Muslim aliens for differential treatment, it has detracted from our government's

ability to enlist the help we need within the communities where these aliens reside. It has also created resentment that may be exploited by al Qaeda recruiters.

For example, the "call-in" registration program, under which nationals from 25 predominantly Arab and Muslim nations were forced to come into INS offices and register, created significant tension both here and abroad. As a result of the program, more than 13,000 aliens – the vast majority of whom had absolutely nothing to do with terrorism – have faced removal from the United States. Of these 13,000, many would have been in legal status but for INS backlogs that delayed the processing of their "green card" applications. (The Senate agreed to eliminate the "call-in" program, but that provision was removed in conference.)

As Ejaz Haider, a visiting Pakistani scholar at the Brookings Institution who was himself arrested after he took the advice of the INS and did not register under a related program, wrote in a *Washington Post* op-ed, "It is argued that this policy is meant to increase security for the United States. A worse way of doing so could hardly be imagined. The policy is an attempt to draw a Maginot line around America. Not only is it likely to fail in securing the homeland, it is creating more resentment against the United States. Does America need a policy that fails to differentiate between friend and foe?"

Contrary to this Administration's instinct, protecting our country, our ideals and our citizens requires that we uphold, not assault, our civil liberties. Our long-term fight against terrorism hinges on promoting democracy and American values, particularly in nations like Iraq. We undermine our credibility and our efforts by failing to respect individual rights here at home.

Along these lines, I was deeply troubled by recent reports that the FBI assisted in the rendition of a Canadian-Syrian citizen to Syria, where he reportedly was put in a prison and beaten for several hours until he confessed to attending a training camp in Afghanistan. He says that he was held in a cell that was three feet wide, six feet deep and seven feet high for 10 months until he was released by Syrian authorities in October. Stories like this are appalling, if true, and seriously damage our credibility as a responsible member of the international community.

When earlier allegations of rendition surfaced, I wrote to Adminsitration officials asking for guarantees that the United States is complying with its obligations under the Convention against Torture. I sent a letter to National Security Advisor Condoleezza Rice on June 2 of this year, which was answered by Department of Defense General Counsel William Haynes on June 25, 2003. Mr. Haynes stated that if the United States should transfer an individual to another country, it would obtain specific assurances that the receiving country would not torture the individual. I wrote a follow-up letter to Mr. Haynes on September 9 asking for a greater detail on how the our government could guarantee compliance with any such assurances. I have not received a response, but I intend to ask him about this topic tomorrow when he appears before the Committee in a confirmation hearing for a seat on the 4th Circuit Court of Appeals. Finally, I wrote to to FBI Director Mueller yesterday to inquire about the alleged role of the FBI in this case.

While non-citizens have suffered many of the most questionable uses of government power in the post-9/11 era, U.S. citizens have also been affected. The most prominent examples are Jose Padilla and Yaser Esam Hamdi, who have been incarcerated without charge or access to counsel under the Administration's "enemy combatants" policy. As I said earlier, I look forward to the Committee's hearing on enemy combatants and will save further comment on that set of cases for that hearing.

In addition, dozens of individuals were rounded up after 9/11 and held as "material witnesses" under 18 U.S.C. § 3144. This includes the eight men in Evansville, Indiana, to whom the FBI eventually felt compelled to apologize. I and other Members have repeatedly voiced concerns that the material witness statute invites confusion and abuse, but efforts to clarify or reform that statute have been met with disinterest by the Administration. I wrote to Attorney General Ashcroft in early June, proposing five specific changes to the statute, but have yet to receive a response.

Increased But Unchecked Powers

Let me turn now to a second area in which the Administration's response to 9/11 has raised civil liberties concerns. This area involves certain government powers, including some that Congress provided in the PATRIOT Act, that are not subject to effective checks and balances to ensure against abuse.

One example is the so-called National Security Letter, or "NSL." NSLs are a form of administrative subpoena that are used to secretly obtain certain types of business records in terrorism and intelligence investigations. Section 505 of the PATRIOT Act greatly broadened the FBI's authority to gather information under NSLs, including information from public libraries. Efforts to further broaden this authority are already underway.

The Attorney General has said that judicial approval requirements constitute a "critical check" on law enforcement. Administrative subpoenas do not require this critical check – an FBI agent can simply pull a form out of his desk, fill it in, sign it, and serve it. The Administration simply has not made the case for further eroding the judiciary's role in overseeing federal investigations.

The public is also concerned about so-called "sneak and peak" search warrants, as authorized by section 213 of the PATRIOT Act. Like conventional search warrants, "sneak and peaks" are predicated on probable cause to believe that evidence of criminal activity will be found on the premises; unlike conventional search warrants, however, "sneak and peaks" permit law enforcement to delay notice to the owner that his premises have been searched. Recognizing the value in this tool, but also its vulnerability to abuse, I worked hard to ensure that section 213 included significant protections against government overreaching. Still, this provision could be improved if the Administration were more forthcoming with information about how it is being used.

We should also examine privacy threats like the Justice Department's various data-mining projects, which collect vast amounts of personal information about citizens with little or no process for ensuring that the information is accurate.

Government Secrecy

Finally, we need to examine certain Administration policies that perpetuate government secrecy rather than ensure government accountability to the American people. The knee-jerk reaction of this Administration is to keep its actions secret and conduct the public's business behind closed doors.

For example, the *Wall Street Journal* reported earlier this month that, due to a "glitch," the public became aware of secret court hearings on an immigrant's challenge to his secret detention. This matter is now before the Supreme Court.

Over the past few months, we have witnessed a standoff between the Administration and the 9/11 Commission, which Congress established last year to examine the circumstances surrounding the 9/11 attacks. Only under the threat of subpoena did the Administration come to the table with information, and it is still not clear at this point whether that information will be complete. This Administration continues to operate as if the checks and balances incorporated in statute are a bothersome nuisance that they need not trouble themselves with.

We also need to examine whether the Justice Department is attempting to extend the number and types of matters that are pursued before the FISA court, rather than through traditional, more transparent and accountable investigatory means. Recent statistics suggest that this may be happening, and we need to consider the impact on accountability. The FISA Court, though staffed by highly respected jurists, is not required to publish its opinions. Any information that is released about its operations is classified or highly redacted. I have introduced several pieces of legislation, including the Domestic Surveillance Oversight Act, to restore the necessary level of transparency, and the Restoration of Freedom of Information Act, which would protect public access to non-classified information regarding critical infrastructure, ensuring government accountability. The purposes of these bills are central to the democratic process and to the government's accountability to the American people.

The Administration has attempted to defend its unprecedented levels of secrecy and unaccountability by repeatedly citing 9/11 and terrorism. But their own actions threaten to erode the very liberty and democracy that the terrorists are attacking.

The civil liberties entrusted to each generation of Americans are ours to defend, but they belong not only to us but to every generation that follows. We are benefactors of the freedoms we have inherited, but we are also their stewards. Our children and grandchildren will look back to see whether we were diligent when we were tested, or whether we were silent. Others around the world, including, right now, the people of

Iraq, will also take note of how vigilant we are in defending the freedoms of our own democracy.

Our civil liberties were hard won, but they are easy to lose. And once we give them away, they are difficult to reclaim. Benjamin Franklin said those who would trade their freedom for security deserve neither.

Hearings like this produce report cards on how well we are meeting this test and honoring this trust.

I thank Chairman Hatch for his attention to these matters and my distinguished colleagues for their active and informed participation in this vital debate.

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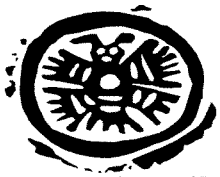

MALDEF

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TESTIMONY

Submitted to the Senate Judiciary Committee

Hearing

On

"America After 9/11: Freedom Preserved or Freedom Lost?"

By

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November 18, 2003

MALDEF Is Unified With Immigrant Communities and People of Color in Our Concerns About Unnecessary Post-9/11 Actions That Have Led to Civil Liberties and Civil Rights Violations.

MALDEF, a national, nonpartisan, nonprofit organization that has been defending the civil rights of Latinos for 35 years, is very pleased that the Senate Judiciary Committee ("Committee") is holding this hearing to examine the serious civil liberties violations that have occurred and continue since 9/11. Many of the measures taken in the name of fighting terrorism have not been effective at finding terrorists, but have resulted in civil liberties and civil rights violations. Lessening of civil liberties and due process protections disproportionately affects Latino communities, who are less likely to have access to counsel and other legal and economic safeguards that other Americans enjoy.[1]

One area of particular concern is the increasing use of racial profiling by law enforcement officials. Arab and Muslim communities have been wrongfully targeted and their civil liberties limited since 9/11.[2] Moreover, the use of racial profiling through Special Registration and similar post-9/11 policies—none of which has made America safer[3]—has exacerbated the long-standing problem of racial profiling of Latinos.[4]

The Department of Justice ("DOJ") recently issued a Guidance Regarding the Use of Race by Federal Law Enforcement Agencies ("Guidance"), as requested by President

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[1] See, e.g., Justice on Trial: Racial Disparities in the American Criminal Justice System (LCCR, 2000).

[2] See, e.g., Special Registration: Discrimination and Xenophobia as Government Policy (Asian American Legal Defense and Educational Fund, Nov. 13, 2003).

[3] See, e.g., B. Dedman, "Words of Caution Against Airport Security: Memo Warns Against Use of Profiling as a Defense," Boston Globe, Oct. 12, 2001 (discussing the Assessing Behaviors memorandum by senior U.S. law enforcement officials, circulated to American law enforcement agents worldwide); and See D. Harris, "Racial Profiling Revisited: 'Just Common Sense' in the Fight Against Terror?," Criminal Justice (Summer 2002), at 40-41. See also America's Challenge: Domestic Security, Civil Liberties and National Unity after September 11 (Migration Policy Institute, June 2003), available at www.migrationpolicy.org. And See: "Vincent Cannistraro, former head of counterterrorism at the CIA, believes the FBI's decision to round up 5,000 Arabs for questioning is 'counter-productive... It is a false lead. It may be intuitive to stereotype people, but profiling is too crude to be effective. I can't think of any examples where profiling has caught a terrorist.'" A Year of Loss: Reexamining Civil Liberties Since September 11 (Lawyers' Committee for Human Rights ("LCHR"), Sept. 5, 2002), at p. 24 (available at www.lchr.org).

[4] See §§1-2, Civil Rights Concerns Within the Department of Homeland Security [hereinafter "MALDEF Civil Rights Concerns"] (MALDEF, Feb. 2003), documenting post 9/11 racial profiling; and See M. Waslin, Counterterrorism and the Latino Community Since September 11 (NCLR Issue Brief No. 10, April 2003) at p. 8 ("Racial profiling is of particular concern to the Latino community because of an increasingly well-documented history of profiling tactics by local, state, and federal law enforcement."). See also: C. Joge, The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence and Law Enforcement Abuse in the '90s (NCLR, Nov. 1999), describing a long-standing pattern of selective enforcement of the law against Latinos. (Both NCLR reports can be found at www.nclr.org.)

Bush, prohibiting racial profiling by federal law enforcement agencies. However, the DOJ left open the possibility for exceptions to the new federal rules against racial profiling "for law enforcement activities or other efforts to defend and safeguard against threats to national security or the integrity of the nation's borders,.."[5] The Guidance leaves too much discretion as to whether and how race and national origin profiling could be used.[6] The exceptions to the racial profiling prohibition could easily swallow the rule.

The DOJ and the DHS have not yet clarified that the use of racial profiling—e.g., profiling based on race, ethnicity or national origin—should also be prohibited in national security measures, at the borders, and in matters involving immigration. This directly impacts Latino communities, forty percent of whom are immigrants. The long history of unconstitutional racial profiling at the Southwestern border has been exacerbated and allowed to spread by the federal government's failure to clarify that racial profiling was not only wrong then (pre-9/11), it is also wrong now (post-9/11).[7]

While we are very concerned about national security, we are equally concerned that these civil rights and civil liberties violations have not made America any safer. We need to be united in the war against terrorism. Tactics such as racial profiling lead to alienating the very communities who may have valuable information about possible criminals and terrorists.[8]

Post-9/11 Policies Have Negatively Affected Latino Immigrants' Rights.

While most of the reports that have been issued regarding civil rights and due process violations have focused on Arabs, Muslims, and Sikhs, such as the Office of Inspector General ("OIG") of the Department of Justice Report criticizing the treatment of 762 immigrants held since 9/11, Latinos have also been negatively affected by post-9/11 strategies and tactics.

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[5] Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (Dept. of Justice, June 2003), at 2.

[6] Id. at 9-10.

[7] Wrong Then, Wrong Now: Racial Profiling Before & After September 11, 2001 (Leadership Conference on Civil Rights ("LCCR"), Feb. 2003)(discussing same memorandum), available at www.civilrights.org. [Hereinafter "Wrong Then, Wrong Now."]

[8] More than 80 anti-immigrant legislative and administrative policies have been undertaken against immigrants since 9/11, and they have not been effective in finding terrorists. D. Kerwin, Counterterrorism and Immigrants' Rights Two Years Later, Vol. 80, No. 39 Interpreter Releases (Oct. 13, 2003)("many immigration policy changes adopted in the guise of national security since 9/11 did not make us safer and, in fact, may even undermine our national security"); R. Suro (Exec. Dir. PEW Hispanic Center), Who are "We" Now? The Collateral Damage on Immigration, Ch. VI, The War on Freedom (2003)(discussing lack of effectiveness); M. Fazlollah, "Agency Inflates Terrorism Charges" (Knight Ridder, May 16, 2003); See also America's Challenge, Migration Policy Institute, supra. n. 3 (also discussing counter-effectiveness of post-9/11 measures targeting immigrants).

Below is a short list of ten such policies that have adversely affected Latinos:

1. Since 9/11, a number of Latino workers have been rounded up through aggressive enforcement measures such as "Operation Tarmac." The premise that airport workers pose security risks was doubtful to begin with, and shown to be false after no terrorists were identified through this operation.[9] If immigrants, including Legal Permanent Residents ("LPRs"), pose too much risk because of their immigration status to work in airport food services, they could not be serving so honorably in the war in Iraq.

2. Secretary of Homeland Security Tom Ridge made a statement to the Hispanic press that undocumented persons pose no *per se* national security risk,[10] yet immigration enforcement and unconstitutional profiling of Latino immigrants in the name of national security has become the new *status quo*.[11]

3. A NOW Legal Defense Fund survey demonstrated that fear of deportation was the most significant reason that battered immigrant women are much less likely to report abuse. This reality has been exacerbated by state and local police threatening to enforce civil immigration laws, in the name of fighting the war against terrorism.[12] This is in direct contradiction to the legal protections for immigrant women set forth in the Violence Against Women Act.[13]

4. Considering that community policing is a valuable tool for public safety, numerous police departments across the country have made public statements against becoming involved in civil immigration enforcement.[14] Yet Attorney General Ashcroft and the

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[9] Statement of Marisa Demeo, Regional Counsel, MALDEF D.C., Hearing before the Subcommittee on Immigration, Committee on the Judiciary, Serial No. 85 (107th Cong., 2nd Sess., June 19, 2002).

[10] Governor Tom Ridge recently announced that he believes that undocumented immigrants do not present any security risk, and that he is in favor of legalization of their status. "U.S. Official Upbeat on Migration Pact with Mexico," Reuters (July 1, 2003); R. Logan, "Ridge dice que indocumentados no son amenaza a la seguridad interna," EFE América (July 1, 2003).

[11] MALDEF Civil Rights Concerns, supra. n. 4.

[12] L. Orloff, Safety Implications of Police Response to Calls for Help from Battered Immigrants, Testimony Before the House Judiciary Committee, Subcommittee on Immigration, Border Security and Claims, New York City's "Sanctuary" Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration (Feb. 27, 2003) at 26 (www.house.gov/judiciary/85287.PDF).

[13] See Recent Developments—U.S. 9th Circuit Makes Landmark Decision Protecting Immigrant Women's Rights under the 1994 Violence Against Women Act (Refugee Rights, Immigration and Refugee Services of America/U.S. Committee for Refugees, 2003)(discussing wrongful deportation of battered immigrant women with rights to remedies under the Violence Against Women Act as well as asylum and refugee law, and under new T-visa).

[14] See, e.g. Big City Police Say They Should Not Be Immigration Agents, Vol. 4, No. 7, National Immigration Forum Immigration Fax Sheet (Nov. 10, 2003): Law Enforcement, State and Local Officials, Community Leaders, Editorial Boards, and Opinion Writers Voice Opposition to Local Enforcement of Immigration Laws, National Immigration Forum (updated July 31, 2003).

111 House co-sponsors of the Clear Law Enforcement for Criminal Alien Removal Act of 2003 ("CLEAR Act") continue to misstate that state and local police have "inherent authority" to enforce federal civil immigration laws. Such misstatements have already resulted in serious and widespread local police abuse of the fundamental civil rights of Latino immigrants and citizens alike.[15]

5. Abuses of the 9/11 detainees happened in the context of immigration detention, setting questionable precedents. Immigration detention conditions, which were already abysmal, are unlikely to improve. For children and adults, many of whom may have valid immigration claims, and are Latino, detention conditions in general have been substandard. Immigrants are mixed with criminals, and cases of physical abuse and substandard facilities have been common.[16]

6. Latino immigrants' due process rights are being limited by the precedent set through the mistreatment of the 9/11 detainees. Access to counsel, the right to know the charges, the right to bail and the right to a defense have all been put into question for immigrants.[17] These are all fundamental rights that belong to every person, under the Bill of Rights, and they are being taken away from immigrants.[18]

7. Human rights violations at the Southwestern border have increased. Thousands have been detained and deported, but no terrorist suspects have been identified. Violence and deaths in the desert have increased since 9/11.[19]

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[15] §2, MALDEF Civil Rights Concerns, supra. n. 4; See also Testimony Submitted to the House Judiciary Committee, Immigration, Claims and Border Subcommittee, Hearing on the CLEAR Act (MALDEF, Sept. 30, 2003)(citing cases).

[16] See, e.g., Florida Immigrant Advocacy Center Update (Winter 2002/2003)(abysmal detention conditions for women, children, asylum seekers); and See From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers (Physicians for Human Rights, June 2003); J. Mintz, "Report Faults Handling of Immigrant Children" (Washington Post, June 9, 2003).

[17] 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 (U.S. Dept. of Justice, Office of the Inspector General, June 3, 2003) www.justice.gov/oig/special/0603.fullpdf (reporting pre-emptive detentions without bond months longer than permitted under special provisions of the USA PATRIOT Act; lack of access to counsel and other due process violations; abuse and mistreatment). See also S. Fainaru, "Report: 9/11 Detainees Abused" (Washington Post, June 3, 2003); E. Lichtblau, "U.S. Report Faults the Roundup of Illegal Immigrants After 9/11: Many With No Ties to Terror Languished in Jail" (New York Times, June 3, 2003).

[18] See also: Demore v. Kim, 538 U.S. ----, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003).

[19] Niko Price, Associated Press, "2 Year Crackdown Along US-Mexican Border to Prevent Terrorists Entry Nets Zero Terrorists Among Thousands of Detainees" (Hispanic Vista, Nov. 2, 2003)("A crackdown along the U.S.-Mexico border designed to prevent terrorists from entering the United States hasn't stopped even one known militant from slipping into America since Sept. 11, an Associated Press investigation has found. Instead, the tightening net of Border Patrol and Immigration agents has slowed trade, snarled traffic and cost American taxpayers millions, perhaps billions, while hundreds of migrants have died trying to evade the growing army of border authorities.")

8. Despite an increase in interior enforcement agents to 5,500 officers, the Bureau of Customs and Border Patrol Chief Bonner recently reversed the long-standing policy that the Border Patrol should not conduct interior enforcement. Chief Bonner's decision overrides an August 8, 2003 memo issued by San Diego Border Patrol Chief William Veal, which reaffirmed a "long standing agency policy" preventing Border Patrol agents from conducting sweeps near residential areas and places of employment. Chief Veal had also restated that interior enforcement should be conducted by the properly authorized federal immigration agency, not the Border Patrol. This older directive was based in legal decisions supporting community safety and just access to social services. Its reversal has caused fear and violence in faith-based service centers and on border city streets, and it is very likely to lead to racial profiling.[20]

9. Despite the Administration's promises and the express requirements of Section 458 of the Homeland Security Act,[21] backlogs in immigration services have been increasing, in part because the new Bureau of Citizenship and Immigration Services is doing enforcement work.[22] The former I.N.S. bureaucracy was so mismanaged that it will take years to re-organize the new B.C.I.S. to ensure accuracy and efficiency. This leaves many Latino immigrants out of status through no fault of their own.[23]

10. Family- and employer-sponsored visas from Mexico have current backlogs of 10 years. Citizens and LPRs who want to reunite their families either have to wait up to 10 years, or they risk undocumented immigration. Employers who hire hard-working Latino immigrants, upon whom the U.S. economy depends, must wait years and years for the current "legal" procedures to be completed. Due to this irony, millions of hard-working immigrants and close family members are in an undocumented status.[24] The backlogs must be reduced, and the only way to do so is through comprehensive immigration reform, which has been delayed and perhaps even derailed by the post-9/11 anti-immigrant backlash.

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[20] See Letter to Stuart Verdery, Assistant Secretary for Border and Transportation Security Policy and Planning Border and Transportation Security Directorate, DHS (Immigrants' Rights Coalition, Enforcement Committee, Oct. 13, 2003)(attaching legal analysis).

[21] §458, Homeland Security Act of 2002, P.L. 107-296, 116 Stat. 2135 (Nov. 25, 2002)(backlog elimination to commence 1 year after the date of enactment of this Act).

[22] See, e.g. Messy Bureaucratic Backlogs Plague Bureau of Citizenship and Immigration Services (BCIS)(Independent Monitoring Board, Aug. 29, 2003).

[23] See, e.g. Padilla v. Ridge, Complaint No. ___ (S.D. Tex. 2003)(class action of persons with valid immigration rights approved by the judiciary unable to receive documentation from the DHS due to backlogs and other breaches of due process rights under the 4th Amendment of the U.S. Constitution).

[24] U.S. Dept. of State, Bureau of Consular Affairs, Visa Services, Visa Bulletin, No. 63, Vol. VII, Immigrant Numbers for November 2003 (Oct. 17, 2003).

Conclusions and Recommendations:

MALDEF Urges Congress to Restore Immigrants' Civil Rights, So That We Can Identify the Real Terrorists and Preserve American Democracy.

The anti-immigrant backlash since 9/11 has severely and negatively affected Latino communities, in ways that Congress and the Administration must recognize and correct.

- The DOJ and the DHS must immediately enact policies prohibiting racial profiling under any circumstances. Current policies are undermining our collective national security and violating peoples' fundamental constitutional rights to freedom from discrimination. It is up to the DOJ and the DHS to enact anti-racial profiling policies, before further damage is done.

- For its part, Congress should enact the 2003 End Racial Profiling Act ("ERPA"), in order to clarify that racial profiling is prohibited for federal as well as state and local police, under any circumstances, including post-9/11 national security, border and immigration issues. Under ERPA and under current constitutional law, there are certain limited exceptions when race, ethnicity or national origin may be used to identify suspects or groups of suspects. In those cases, race, etc. may be only one of many factors used to identify suspects. Moreover, race, ethnicity or national origin may not, in any circumstances, be used before reasonable suspicion based on individualized behavior has developed.[25]

- First responders such as state and local police should concentrate on protecting against crime and terrorism, while maintaining community policing practices recognizing America as a nation of immigrants. Congress and the DHS should re-clarify that civil immigration enforcement is under the exclusive jurisdiction of the DHS.

- Congress and the Administration must restore all of the due process rights put in jeopardy through the policies practiced during the detention of the "September 11th Detainees." At the very least, the recommendations of the Office of Inspector General of the Department of Justice must be enacted, and Congress must ensure continued oversight of immigration detention conditions and all immigration proceedings.

- Effective access to the protections of the rights of battered immigrant women, asylum seekers, and persons entitled to the new T-visa, must be effectively ensured and guaranteed by the DOJ and the DHS.

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[25] For further information on ERPA, which will be introduced shortly, contact the offices of Representative Conyers or Senator Feingold. For further information on applicable law, see Wrong Then, Wrong Now, supra. n. 7.

- Congressional oversight of the DHS immigration bureaus (the Bureau of Immigration and Customs Enforcement, the Bureau of Customs and Border Patrol, and the Bureau of Citizenship and Immigration Services) must include input from immigrants' and civil rights groups, and work to effectively ensure against abuses of immigrants' rights.

- MALDEF supports the Rule of Law and is not against enforcement of federal immigration laws. But Congress and the Administration have acknowledged that the system is broken; therefore, comprehensive immigration reform is needed before any massive enforcement effort would not lead to serious due process violations and permanent damage to democracy and the American economy.

- The same reasons that existed for immigration reform that existed prior to 9/11 are even more important today. America is a nation of immigrants, and our economy is dependent upon immigrant labor. The former I.N.S. and former immigration policy reflected a system that was badly broken and out of touch with reality. Comprehensive immigration reform must be a priority for Congress and the Administration.

POST-HEARING TESTIMONY OF

ELISA MASSIMINO

DIRECTOR,WASHINGTON OFFICE
LAWYERS COMMITTEE FOR HUMAN RIGHTS

HEARING ON

"AMERICA AFTER 9/11:
FREEDOM PRESERVED OR FREEDOM LOST?"

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

NOVEMBER 25, 2003

The Lawyers Committee for Human Rights appreciates the opportunity to submit testimony concerning issues raised at the November 18, 2003 hearing on "America After 9/11: Freedom Preserved or Freedom Lost?"

The Lawyers Committee recently released a comprehensive analysis of many of the issues considered by the Committee on November 18 and at other recent hearings. That report, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, the third in a series we have produced on these issues, documents how significant changes in U.S. law and security policies over the past two years have impacted human rights and civil liberties at home, while helping undermine respect for human rights abroad. We have provided copies of the new report to Judiciary Committee Members and staff, and would be pleased to address any of the issues discussed therein in greater detail.

Portions of the interchange between certain Committee Members and witnesses at the November 18 hearing appeared to reflect a growing concern about one of the central issues addressed in our *New Normal* report: the implications of post-9/11 law and security measures on U.S. adherence to international human rights principles – and the consequences of any diminished U.S. adherence for the country's global leadership on human rights issues.

Our testimony focuses on this broad issue and highlights, in particular, the following examples: rendition, extralegal detention, and the protection of human rights in the new global security environment.

Rendition

The Lawyers Committee has monitored with great concern the reported U.S. transfer of security detainees for interrogation in countries where torture and other ill-treatment are widespread and routinely practiced. This issue of "rendition" has received heightened attention in recent weeks in the wake of reports that the then-Acting Attorney General approved sending Maher Arar, a Canadian citizen, to Jordan with the understanding that he would then be transferred to Syrian officials, and that this decision was based upon assurances Syria had provided to the Central Intelligence Agency. As discussed at the November 18 hearing, Mr. Arar alleges that he was tortured by Syrian authorities over a ten-month period.

The allegations in the Arar case raise profound concerns about the commitment of the United States to upholding its obligations under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which this country ratified in 1994. In 1998, Congress reaffirmed that it is U.S. policy not to deport, remove, extradite, or otherwise transfer individuals to countries where there is a substantial likelihood that they will be tortured. To underscore this, Congress required regulations to be promulgated by each of the relevant agencies implementing this obligation to refrain from sending individuals to face torture. Both the Department of State and the Immigration and Naturalization Service subsequently promulgated regulations in compliance with this requirement.

But the recent transfer of Mr. Arar to Syria calls into question the effectiveness of stated U.S. policy with respect to the transfer of individuals to other countries – namely, the process of seeking assurances from receiving countries that those transferred by the United States will not be tortured.

The Lawyers Committee is extremely troubled by the apparent willingness of the United States Government to approve Mr. Arar's transfer based on assurances from a government repeatedly cited – including within days of the decision itself – by the President and the Congress as a gross violator of human rights.

The Lawyers Committee has elaborated on these concerns in letters sent jointly with several other human rights organizations on November 17 to Secretary of State Powell, National Security Advisor Rice, and Defense Department General Counsel Haynes (a copy of the letter to Secretary Powell is attached). We urge Members of the Judiciary Committee to seek additional information on the circumstances of Mr. Arar's transfer to Syria and subsequent ill-treatment at the hands of authorities there.

Further, as the United States continues to repatriate individuals once held at the U.S. naval base at Guantánamo Bay, Cuba, we urge Congress to closely monitor the Executive Branch's actions in order to ensure that no person is handed over to another country where he is likely to face torture or any treatment inconsistent with U.S. obligations under national or international law.

Extralegal Detention

The Arar matter appears to exemplify, more broadly, the "new normal" that the Lawyers Committee has catalogued – a new status quo characterized by diminished U.S. respect for human rights and the rule of law.

At the heart of the concerns described in detail in our *New Normal* report is the use of modes of security-related detention that operate outside any constraints of either national or international law. Without providing an exhaustive list of these concerns here, we highlight three related issues:

the status of detainees at Guantánamo; the pending use of military commissions to try selected individuals; and the designation of certain American citizens as "enemy combatants."

In each case, the government has worked to circumvent longstanding, widely accepted legal approaches and procedures – with significant ramifications for adherence to the rule of law. As we state in the *New Normal* report: "The executive's mix-and-match approach . . . has seen bedrock principles of the rule of law transformed into little more than tactical options. The new normal in punishment and prevention is characterized by the heavy use of extra-legal institutions and the propensity to treat like cases in different ways."

The Lawyers Committee has documented how the nearly 700 foreign nationals detained at Guantánamo have been placed in a form of legal limbo – treated neither as prisoners of war subject to the procedural requirements and other terms of the Geneva Conventions, nor as suspects subject to criminal procedures in U.S. court. We therefore welcome the recent decision of the U.S. Supreme Court to hear a set of consolidated cases that raise the issue of whether any U.S. court has jurisdiction to hear the claims of the Guantánamo detainees, or whether their physical location deprives them of any opportunity to challenge the legality of their detention, and thus any form of legal protection.

With respect to the proposed rules for the military commissions that are expected to try certain of the non-U.S. citizen detainees, the Lawyers Committee has described an array of procedural shortcomings that raise fundamental due process concerns, including limitations on attorney-client communications, restrictions on defense lawyers' access to evidence, unfettered discretion to close the proceedings in the name of national security, and the lack of opportunity to appeal convictions to courts outside the military chain of command. As the *New Normal* report

reflects, this is not a system of military justice in any traditional sense; several procedural protections of military courts martial are notably absent from the rules for the new commissions.

We note further that these problems have led some supporters of the concept of utilizing military commissions in the wake of the September 11 attacks, such as Lawyers Committee Board member and former Deputy Solicitor General Philip Lacovara, to challenge the propriety of the rules under which the commissions likely will operate. A copy of Mr. Lacovara's analysis,"Trials and Error," as published in the November 13 *Washington Post*, is attached to this testimony. As he notes: "The rules governing military commissions issued over the last two years depart substantially from standards of fair procedure . . . Given the stakes for both security and liberty interests, a more precise and balanced – and therefore more credible – approach to military justice certainly is in order."

Finally, we welcome the Judiciary Committee's announcement that it plans to convene a hearing early in the next session to focus on the issue of "enemy combatants." The Lawyers Committee has been actively engaged in litigation in this area, including the matter of Jose Padilla, argued on November 17 before a three-judge panel of the U.S. Court of Appeals for the Second Circuit. In briefs submitted to the court in that case, *Padilla v. Rumsfeld*, the Lawyers Committee, joined by a cross-section of legal scholars, former Federal judges, and other organizations, set out the fundamental problems surrounding the use of "enemy combatant" status as a matter of both law and policy.

The three "friends of the court" briefs coordinated by the Lawyers Committee in the *Padilla* case raise a set of profound questions about the authority of the Executive Branch to seize U.S. citizens and hold them indefinitely as "enemy combatants" without filing any charges or providing

access to counsel. The three briefs detail why such actions by the government violate the protections of the Constitution as well as both domestic statutory requirements and international law.

We would welcome the opportunity to expand on these concerns as the Judiciary Committee analyzes that issue in greater detail in the coming months.

Human Rights in the New Global Security Environment

Uniquely among those documenting the domestic legal consequences of changes in U.S. law and policy, the Lawyers Committee has also closely scrutinized the impact that security measures undertaken over the past two years have had on the protection of human rights around the world.

As chronicled in our September 2003 report, *Holding the Line: A Critique of the Department of State's Annual Country Reports on Human Rights Practices*, a number of countries around the world rapidly enacted new laws in the name of combating terrorism in the months after September 11. In many instances, countries have implemented those provisions in ways that have infringed on human rights and civil liberties – while extending them well beyond the fight against terrorism. As we noted in that report, the quality and completeness of the State Department's annual reports may well have been undermined by highly problematic language in last year's instructions to U.S. embassy personnel responsible for drafting the reports: "Actions by governments taken at the request of the United States or with the expressed support of the United States should not be included in the report."

While the Lawyers Committee welcomed the decision of the Department of State to eliminate this instruction from the guidelines for this year's reports, we remain concerned that the message sent last year both encouraged misrepresentation of the human rights situation in countries allied with the

United States in the fight against terrorism, and also conveyed a diminished U.S. interest in human rights concerns arising in the context of counterterrorism measures.

Moreover, some of these governments, beyond enacting their own new measures, have also cited changes in U.S. law and policy in order to justify their poor human rights records. As we detail in the final chapter of our *New Normal* report, governments that hold individuals in prolonged incommunicado detention without charge, that deny legal counsel, and that seek expanded use of military tribunals, all increasingly can point to the United States as having either approved, or at least countenanced, these practices. However unintended, the "new normal" in the United States has provided a greater sense of legitimacy for increased restrictions on human rights protections, and heightened threats to the personal security of those on the frontline of defending human rights and promoting democracy, in many other countries.

In short, the Lawyers Committee is deeply concerned that the changes in domestic law and policy not only affect civil liberties within the United States, but also put at risk our country's most prized asset in the battle to protect and promote human rights worldwide: the leadership role the United States has long played, and hopes to continue to play, because of the example this country sets at home.

We welcome the Judiciary Committee's interest in holding this series of important oversight hearings, and look forward to working with Committee Members and staff in the months ahead. We particularly look forward to playing a role in helping evaluate how security can be enhanced without sacrificing protection of human rights and the rule of law.

Thank you for this opportunity to submit testimony for the record.

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THE SATURDAY PROFILE

Qaeda Pawn, U.S. Calls Him. Victim, He Calls Himself.

By CLIFFORD KRAUSS

OTTAWA — Maher Arar has been back from Syria for five weeks now, with his wife and two children in their simple apartment, earnestly pleading to all who will listen that he is an innocent casualty of the Bush administration's war on terror.

As Mr. Arar tells it, American officials detained him on circumstantial evidence during what was supposed to be a brief stopover at Kennedy Airport on Sept. 26, 2002. Within days, they packed him off to Syria where, he says, he was locked in squalor and tortured for nearly a year. Though he holds dual Canadian and Syrian citizenship, he had not lived in Syria for 16 years.

"After what happened, I started asking myself questions," Mr. Arar, 33, said in a calm voice in an interview in his living room. "How can a country like the United States send me to a country where they know torture is commonplace, where they know there is no law?"

His story has proved deeply embarrassing to American officials, even if they continue to insist, privately, that Mr. Arar is not just the mild-mannered computer consultant he seems, but a man with ties to a probable cell of Al Qaeda in Canada, though he has never been charged with a thing.

Whatever the truth, Mr. Arar's soft, steady voice has touched the conscience of Canada and raised disturbing questions about whether Washington's pursuit of terror suspects has trampled judicial due process, or swept up guiltless bystanders.

In his short time home, Mr. Arar's sad, bearded face has become a staple of Canadian television news shows. He has been the subject of newspaper editorials and angry debate in the House of Commons, whose foreign affairs committee called for a public investigation.

Today Mr. Arar appears a determined but shattered man. He says his limp comes from almost a year of beatings and sleeping on a cold tile floor. Though he lost 40 pounds, he has little appetite. He still paces his living room, a habit he picked up in his tiny cell.

At night, he wakes from nightmares in which a guard slaps him and tells him he must return to Syria. In the day, his mind wanders to a world so distant he does not hear his wife, Monia, pleading for him to return.

Bush administration officials concede that the entire episode has been a public relations disaster. "The damage has been done," one official said. "We need to say something because `Arar' is going to become shorthand for excess in the name of security, running roughshod over the rule of law."

While the administration has yet to make its case publicly, American officials who spoke on condition of anonymity said the evidence was strong that Mr. Arar had associated with suspected Islamic militants over a long period in Canada. They say he confessed under torture in Syria that he had gone to Afghanistan for terrorist training, named his instructors and gave other intimate details.

In the interview, Mr. Arar said that he would have said anything to stop his beatings, so intense that he urinated on himself twice, and that he had never been to Afghanistan or Syria or anywhere nearby since he came with his family to Montreal at 17.

At least part of the evidence against him, he said, was a 1997 apartment lease that was witnessed and signed by Abdullah Almalki, another Syrian-Canadian immigrant suspected of having terrorist links.

American officials, Mr. Arar said, showed him a copy of the lease at the airport, where he was to make a connecting flight on his way home from a vacation in Tunisia, his wife's family home. His answer, he said, was that he had wanted Mr. Almalki's brother to sign, but that he had not been available.

He said his request for a lawyer was ignored. Taken to the Metropolitan Detention Center in Brooklyn, he said, he was strip-searched and given an injection that prison officials refused to identify.

During his interrogations in Brooklyn, he said, he was asked about his politics. "I had nothing to hide," he recalled, and said he told the Americans that he supported the Palestinian cause but abhorred the tactics of Osama bin Laden. He said in the interview that he had never associated with any radicals.

Mr. Arar said he pleaded with American officials not to send him to Syria for fear he would be tortured. The officials said they had the discretion to deport him to Canada or Syria, but did not explain why they chose Syria, or why they did not keep him in the United States.

Within two weeks of his detention, on Oct. 8, 2002, Mr. Arar said, he was put on a private jet with Americans whom he described as C.I.A. agents. He was flown to Amman, Jordan, where he was blindfolded, chained and put in a van destined for Syria. His beatings began in the van, he said, and only intensified at the hands of his Syrian captors, with thrashings on his palms, wrists, lower back and hip with a cable.

Mr. Arar said he whiled away the days thinking about how his two young children might be growing up, worrying about his family's financial well-being. He became so desperate, he said, that he banged his head against the wall.

He was visited by Canadian consular officials, who told him there was not much they could do because he was a dual citizen, he recalled. "During every visit, I used to cry and say I want to go back to Canada," he said.

The Syrian government finally released him without explanation on Oct. 5. Syrian officials say their investigators found no direct link between Mr. Arar and Al Qaeda, and deny he was tortured.

Prime Minister Jean Chrétien has rejected calls for a public inquiry into what role the Royal Canadian Mounted Police played in handing over information to American authorities that led to Mr. Arar's arrest.

An American official, speaking on condition of anonymity, said Secretary of State Colin L. Powell has asked Attorney General John Ashcroft and the director of central intelligence, George J. Tenet, for a

clarification of what happened.

For now, Mr. Arar's American lawyers are preparing a suit against the United States as he tries to restore his life. "I look at life differently now," he said. "I would never have imagined before that human beings could do such things to other human beings."

Worst of all, he says, is knowing that he may never be able to bury the suspicions that he is a Qaeda agent; he may never get his family off welfare and restart his career.

Mr. Arar graduated from McGill University with a degree in computer engineering and earned a master's in telecommunications from the National Institute of Scientific Research in Montreal. He worked in Boston as an engineer at MathWorks, a high-tech company, before setting up a consulting company in Ottawa. Those achievements, he fears, may not mean much now.

"My life and career are destroyed," he said matter-of-factly. "To brand someone as a terrorist after 9/11 — I don't think it will be easy to return to normal life."

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American Civil Liberties Union

Testimony at a Hearing on

"America after 9/11: Freedom Preserved or Freedom Lost?"

Before the

Senate Judiciary Committee

Submitted by
Nadine Strossen
President

and

Timothy H. Edgar
Legislative Counsel

November 18, 2003

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Submitted by
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November 18, 2003

Chairman Hatch, Senator Leahy and Members of the Committee:

On behalf of the American Civil Liberties Union and its over 400,000 members, dedicated to defending the Bill of Rights and its promise of due process under law for all persons, I welcome this opportunity to present the ACLU's views at this hearing on the impact of federal anti-terrorism efforts on civil liberties since September 11, 2001.

I commend Chairman Hatch and Senator Leahy for coming together to look at whether, in our efforts to preserve freedom by fighting terrorism, we have given up too much of it. This country needs exactly this public discussion, and I feel privileged to play a role, as a leader of the ACLU, in challenging the government to see its role as preserving our rights and our system of checks and balances while it ensures our safety.

America faces a crucial test. That test is whether we — the political descendents of Jefferson and Madison, and citizens of the world's oldest democracy — have the confidence, ingenuity and commitment to secure our safety without sacrificing our liberty.

For here we are at the beginning of the 21st century, in a battle with global terror. Terrorism is a new and different enemy. As a nation, we learned this on September 11, 2001 when a group of terrorists attacked us here at home, and within the space of minutes murdered nearly 3,000 of our fellow Americans and citizens of other nations, innocent civilians going about their everyday lives.

ACLU lawyers and activists can never forget that day. Our national offices in New York and near the Capitol in Washington were evacuated. John William Perry, a New York Police Department officer and Board Member of the New York Civil Liberties Union, volunteered to assist employees escaping the World Trade Center on September 11, 2001, and himself became a victim. We pledged on that day to support President Bush in the battle against terror, while standing strong against any efforts to use the attacks to abridge civil liberties or our system of checks and balances.

We must be ready to defend liberty, for liberty cannot defend itself. We as a nation have no trouble understanding the necessity of a military defense. But there is another equally powerful defense that is required, and that is the defense of our Constitution — the defense of our most cherished freedoms.

Put aside our popular culture which changes by the day, and our material success which is now vulnerable to the vicissitudes of the global economy — strip away all that is truly superficial. What is left that distinguishes us if not our constitutional values? These values —freedom, liberty, equality and tolerance — are the very source of our strength as a nation and the bulwark of our democracy. They are what have permitted us to grow abundantly, and to absorb wave after wave of immigrants to our shores, reaping the benefits of their industrious energy.

Now, we are in danger of allowing ourselves to be governed by our fears, rather than our values. How else can we explain the actions of our government over the last two years to invade the privacy of our personal lives and to curtail immigrants' rights, all in the name of increasing our security?

Congress must step in – now – to preserve the freedoms that have been eroded since September 11, 2001.

PATRIOTISM AND GRASSROOTS DISSENT

Mr. Chairman, when Attorney General Ashcroft appeared before this Committee shortly after September 11, he accused the ACLU and other defenders of civil liberties of aiding the terrorists and weakening America's resolve with our criticism of some government policies. It was a statement profoundly unworthy of the Office of Attorney General.

Mr. Chairman, by holding this hearing, and by extending the ACLU an invitation to testify, you have acted in the best traditions of the Senate. Mr. Chairman, I know we disagree about some aspects of the USA PATRIOT Act[1] and some other important civil liberties issues. I hope to convince you and other Senators that some revisions are in order.

Before I describe the freedoms lost since September 11, 2001, and the clear abuses of civil liberties that have taken place, I would like to set the record straight on a few things that have been said about the ACLU and its supporters.

Since September 11, 2001, the ACLU has been privileged to be an important part of a remarkable grassroots movement to defend the Bill of Rights. Resolutions have been passed in 210 communities in 35 states, including three state-wide resolutions.

The resolutions have passed in towns from Maine to Alaska, from New York to Texas. They have attracted support in liberal strongholds, like Berkeley, California, and in small towns in Utah, Idaho, and Alaska – three of the most conservative states in the Union. The resolutions are the most visible symbol of a growing movement that is perhaps most

[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

notable for uniting allies across the political spectrum – from the ACLU and its liberal allies like People for the American Way and MoveOn.org, to some of the nation's most important member-based conservative organizations: the Free Congress Foundation, Americans for Tax Reform, and the Gun Owners of America. Our campaign has included closely working with former Congressman Bob Barr (R-GA), a Board Member of the National Rifle Association. I am pleased to share the witness table with Congressman Barr today.

The resolutions take issue with portions of the PATRIOT Act and many other government actions, including Executive Orders and regulations undermining the right to counsel, the right to a jury trial, and the rights of immigrants. Hundreds of thousands of Americans have written their elected representatives to express their views about these issues, and to urge Congress to take corrective actions.

Some have accused these engaged citizens, who are acting in the best tradition of Thomas Jefferson, of being naïve, misinformed, even ignorant. On the contrary, while the arcane details of these issues can flummox the finest legal minds, I have found our supporters to be remarkably well informed.

This is a movement based on knowledge, not ignorance.

Many have read the PATRIOT Act closely and have studied what its defenders have to say. They have also followed the debate around other government powers, including attorney-client monitoring, immigrant registration and detention, and FBI guidelines governing investigations of religious and political groups.

There is no doubt that both PATRIOT Act detractors and defenders alike have sometimes had difficulty wading through the arcane details of the Foreign Intelligence Surveillance Act and other complex federal laws amended by the Act. It does not help matters when spokespersons for the Department of Justice (DOJ) make misleading and inaccurate statements about the PATRIOT Act – such as that "U.S. citizens cannot be investigated under this act"[2] or that "the standard of proof before the [Foreign Intelligence Surveillance Court] is the same as it's always been."[3]

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[2] *Florida Today*, Sept. 23, 2002 (statement of DOJ spokesman Mark Corallo). In fact, United States citizens can be investigated with PATRIOT Act powers, as the text of sections 215, 505 and many other provisions of the PATRIOT Act makes clear, so long as the investigation is not based "solely" on First Amendment activities.

[3] *Springfield (MA) Union-News*, Jan. 12, 2003 (statement of DOJ spokesman Mark Corallo). In fact, section 218 of the PATRIOT Act lowered the standard for FISA electronic surveillance by requiring only that a "significant purpose" of the surveillance be the acquisition of foreign intelligence (instead of the primary purpose). Section 215 of the PATRIOT Act lowered the standard for FISA business records searches from "specific and articulable facts that the records pertain to an agent of a foreign power" to allow records to be obtained whenever the FBI certifies they are "sought for" an authorized intelligence or terrorism investigation. For more examples of such misleading

Ordinary Americans are profoundly troubled by the government's policies. They do not believe America's system of checks and balances, including meaningful judicial review of surveillance and detention, represent "unreasonable obstacles" to law enforcement, as President Bush and Attorney General Ashcroft have argued.

Rather, they see judicial review, and meaningful standards for government surveillance and detention, as essential bulwarks against abuse. They view judges as partners – not obstacles – in the war on terrorism.

The online satirical publication, the "Onion," recently had this headline: "Revised Patriot Act Will Make It Illegal to Read Patriot Act." The serious point is that the more Americans learn about the government's actions since September 11, the more they say the government went too far, too fast. Thankfully, we do live in a country where people can go to the source, read the law and make up their own minds.

LISTEN TO THE PEOPLE

Many members of Congress, from right to left and in between, have heeded their constituents' calls to look at the PATRIOT Act, and other post-9/11 government actions, evaluated arguments for and against, and have decided to bring some of these powers back in line with constitutional freedoms. Congressman Butch Otter (R-ID) and Bernie Sanders (I-VT), and Senators Larry Craig (R-ID), Richard Durbin (D-IL) and Russ Feingold (D-WI) have joined forces to revise the PATRIOT Act.

Americans are concerned because the PATRIOT Act put in place statutory authority for the government to get a court order to come into your home without your knowledge and even take property without notifying you until weeks or months later.[4] Americans are concerned because the PATRIOT Act allows the government to obtain many detailed, personal records – including library and bookstore records, financial and medical records, and Internet communications – without probable cause and without meaningful judicial review. For those records that may be obtained using "national security letters," there is no judicial review at all. Americans are concerned because the PATRIOT Act – as well as changes to immigration regulations since 9/11 and the President's claimed authority to detain "enemy combatants" – all sanction indefinite detention without criminal charge and without meaningful judicial review.

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and inaccurate statements, please see the ACLU's report *Seeking Truth from Justice – PATRIOT Propaganda: The Justice Department's Campaign to Mislead the Public About the USA PATRIOT Act* (July 2003), available at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13099&c=207

[4] While some courts had permitted these delayed notice searches even in the absence of Congressional sanction, the PATRIOT Act broadened the practice by eliminating some of the safeguards courts had required, such as a presumptive seven-day limit on such searches. *See United States* v. *Villegas*, 899 F.2d 1324, 1337 (2nd Cir. 1990); *United States* v. *Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986).

Some have dismissed these concerns, saying the government has not used some of these anti-terrorism powers, or has used them appropriately. In fact, as we informed members of this Committee prior to its last hearing, there has already been evidence of widespread and systematic civil liberties abuses of non-PATRIOT powers in the area of detention, both of citizens and non-citizens. There is anecdotal evidence of excessive government surveillance and other overreaching under the PATRIOT Act. Unfortunately, the Administration's excessive secrecy prevents the American people from getting an adequate picture about its use of PATRIOT Act surveillance powers.

What the ACLU can say for certain is that these and other powers make abuses far more likely because they remove the checks and balances that prevent abuse. Excessive power has, throughout our history, inevitably been used excessively.

Some have dismissed concern about an expanded PATRIOT Act – dubbed PATRIOT II – as misinformed, saying that the draft legislation that provoked a firestorm earlier this year was never introduced. In fact, many provisions of this draft legislation have been introduced separately, including bills to sweep aside the last vestiges of prior judicial review from FBI records demands (H.R. 3037), to require automatic pretrial detention for certain crimes (H.R. 3040 and S. 1606), and to expand the death penalty to include any crime that fits the PATRIOT Act's overbroad definition of terrorism (H.R. 2934 and S. 1604).

As reported in the New York Times just last week, a major expansion of the FBI's powers to obtain records without any judicial review was attached to this year's Intelligence Authorization Act.[5] Constituents are right to be concerned about an expanded PATRIOT Act. Part of it will – unless removed by the conference committee – become law this year.

Some have dismissed concerns about immigrants' rights, including the selective fingerprinting and registration of visitors from the Arab and Muslim world under the National Security Entry-Exit Registration System (NSEERS), also known as special registration. This program is seriously damaging the image of the United States abroad and, as a result, hindering international cooperation against terrorism.

Special registration is again creating havoc in Arab and Muslim communities as the deadlines for re-registration approach. The ACLU has discovered that immigration authorities gave many who registered confusing and woefully inadequate notice of their obligations – including the requirement that they register their departure and that they re-register annually. Those who were given inadequate or no notice are at risk of falling afoul of their status through no fault of their own.

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[5] The provision is at section 354 of the Senate bill (S. 1025) and section 334 of the House bill (H.R. 2417).

AMERICAN FREEDOMS LOST AFTER SEPTEMBER 11

The specific freedoms that have been abridged – by the PATRIOT Act and by other government actions – often involve technical and complex changes to surveillance laws, detention regulations, and government guidelines. However, they share common themes. The government's new surveillance and detention powers have undermined important checks and balances, diminished personal privacy, increased government secrecy, and exacerbated inequality.

Checks and Balances. At bottom, the issue with respect to all these powers – PATRIOT Act and non-PATRIOT Act alike – is the removal of basic checks and balances on government power. The genius of our founding fathers was to design a system in which no one branch of government possessed all power, but instead the powers were divided among legislative, executive and judicial branches.

The government's actions since September 11 have undermined this system. Prior to September 11, the government had ample power to investigate, detain, convict and punish terrorists, with meaningful judicial review. The changes have made that review less meaningful.

It is a myth to say that prior to September 11, the government could wiretap organized crime suspects but not terrorist suspects. In fact, the government has always had far greater powers to wiretap foreign terrorist suspects, because it could use either its criminal or its intelligence powers to do so. The PATRIOT Act simply enlarged further the already loose standards for both kinds of wiretapping.

It is a myth to say that prior to September 11, the government was prevented by the Foreign Intelligence Surveillance Act from sharing information acquired in intelligence investigations with criminal prosecutors. In fact, it could do so, under procedures designed to ensure the intelligence powers were not being abused as a prosecutorial end-run around the Fourth Amendment. The PATRIOT Act did not authorize such information sharing – it was already legal. Rather, the Act reduced the judicial oversight designed to prevent abuses of information sharing.

It is a myth that the government lacked adequate power to detain terrorist suspects. In fact, the government could, and did, detain many terrorist suspects prior to September 11 using both immigration and criminal powers. Indeed, President Bush joined the ACLU in criticizing the use of secret evidence against some Arab and Muslim immigration detainees under the Clinton Administration. The PATRIOT Act, and government changes to detention regulations, did not authorize detention of terrorism suspects. Rather, it made immigration hearings and judicial review of those detentions far less meaningful.

It is a myth that the government could not effectively prosecute foreign terrorists without revealing classified information. The Classified Information Procedures Act has long been on the books to protect the government's secrets while ensuring a fair trial, and prosecutors of prior Al Qaeda plots have said the Act worked well to protect both the rights of the accused and the national security interests of the government. The President's military tribunals order was not needed to safeguard classified information. Rather, its effect was to substitute a commission subject to Defense Department control for an independent judge in running terrorism trials.

It is a myth that the government could not listen to the conversations of attorneys who betrayed their profession by abusing the attorney-client privilege to implicate themselves in their clients' ongoing criminal acts. The government could always obtain a court order, based on probable cause, to listen in to conversations that lacked the protection of the attorney-client privilege. The monitoring regulation was drafted to evade that requirement of judicial oversight.

Understanding how these actions undermine checks and balances illustrates the sophistry of one of the government's main defenses of its post 9-11 actions. Government officials point out that courts have not struck down many of their actions – but their actions are a threat to liberty precisely because they are calculated to undermine the role of the courts, diminishing their oversight of government action.

The defense that courts have not struck down these court-stripping measures reminds me of the old cliche of the man who murdered his parents and pleaded for mercy on the grounds he was an orphan.

Personal Privacy. The right of privacy, Justice Brandeis said, is that most simple and most important of freedoms – the right to be left alone. The PATRIOT Act and other legislation, coupled with new investigative guidelines, have eroded this right alarmingly. I will discuss just two – new records powers under sections 215 and 505 of the Act, and "sneak and peek" searches under section 213 of the Act.

Under section 215 of the PATRIOT Act, the government may now obtain any and all records, no matter how sensitive or personal, with a "business records" order from the Foreign Intelligence Surveillance Court, which sits in secret and has denied or modified a grand total of six out of more than 15,000 surveillance orders sought in a quarter century. Under section 505 of the PATRIOT Act, the FBI has now has broader power to use what are called "national security letters" to obtain some records – including records of financial institutions, credit reports, and billing records of telephone and Internet service providers – on its own authority, without any court order at all.

National security letters and records demands under section 215 are not made in the course of ordinary criminal investigations, which involve grand jury subpoenas, search warrants, and other longstanding government powers; rather, they are intelligence powers that do not require any criminal wrongdoing on the part of those being investigated.

Before the PATRIOT Act, the government was required to show "specific and articulable facts" that the records it sought in intelligence investigations (whether through a "business records" order or a national security letter) pertained to a spy, terrorist, or other agent of a foreign power. As a result of sections 215 and 505, that is no longer the case – now anyone's records may be obtained, regardless of whether he or she is a suspected foreign agent, as long as the government says the records are sought for an intelligence or terrorism investigation. The effect is to put the privacy of many more Americans at risk. The record holder must comply with these records demands, and is prohibited from informing anyone – the person whose records were obtained, the press, or an advocacy group like the ACLU – that they have turned over these records.

Section 213 of the PATRIOT Act substantially lowered the standard for government agents to come into your house, look around, and even take property. These "sneak and peek" warrants no longer require, as they did in some circuits, that notice be given within seven days – an indefinite "reasonable time" is the new standard. Nor do they require the government to show specific harms from notice, instead also permitting the government to get a delay under a catch-all provision that applies whenever harm to the prosecution may result.

As a result of this provision, the government has acknowledged using these warrants to invade dozens of homes and businesses without providing notice for as long as three months. The government has sought to delay notice in these cases over 200 times.

While sold as a terrorism power, this provision has little to do with terrorism. In answering questions from Congress on how this provision was being used, the Justice Department cited ordinary criminal cases – from drugs to crime – to justify these searches.

Government Secrecy. The American tradition of open government has suffered a severe blow as a result of the government's post 9-11 actions.

The Justice Department's guidance to federal agencies on implementation of the Freedom of Information Act (FOIA) prior to September 11 included a basic affirmation of the policy of open government the Act embodies, urging agencies to comply with FOIA requests absent a good reason. Shortly after September 11, the Attorney General issued a memorandum to all federal agencies reversing that presumption of openness and pledging the Justice Department's support for denial of FOIA requests.

Reform policies governing classification and declassification of government secrets have suffered a similar blow. On March 25, 2003, President Bush issued Executive Order 12958, which continued classification of many historical documents and reverses a presumption against excessive classification for new documents in President Clinton's prior Executive Order. The new Order flies in the face of findings of the Senate and House intelligence committees that excessive classification may have contributed to the intelligence breakdowns that contributed to the September 11 attacks. Former chairman of the Senate Select Committee on Intelligence, Senator Bob Graham (D-FL), criticized

the move, saying "this administration is being excessively cautious in keeping information from the American people."

Perhaps the most dramatic example of unwarranted secrecy has been the government's secret arrest and deportation of hundreds of Muslim and Arab immigrants after September 11. The Justice Department refused to identify the detainees, arguing that to do so might jeopardize national security and tip its hand to terrorists. The secrecy was alarming and, after our repeated requests for basic information about the detainees were denied, the ACLU filed a federal lawsuit seeking names under the Freedom of Information Act.

Then, in a further effort to deny information to the public and press, the Justice Department closed all immigration hearings involving the September 11 detainees. Twice more, the ACLU went to court — with lawsuits arguing that transparency and accountability are essential to the workings of democracy. In an eloquent decision, a three-judge panel of the United States Court of Appeals in Cincinnati unanimously declared that secret deportation hearings were unlawful. "A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution," Judge Damon Keith wrote. He further noted that "democracy dies behind closed doors."

That was a clear victory for civil liberties and stands today, as the government chose not to seek Supreme Court review in that case. However, in the second lawsuit, the federal appeals court in Philadelphia sided with the government's position in a 2-1 ruling. The Supreme Court has declined to hear that case.

The ACLU's actions, however, have not been limited to the legal arena. Concerned that the secret hearings were a cover for civil liberties abuses, we initiated an ambitious effort to identify the people affected. We sent letters to the U.S.–based consulates and embassies of ten countries offering legal assistance to innocent people caught up in the government's crackdown on terrorism.

Then in the spring of 2002, the ACLU extended its investigations abroad. Working with the Human Rights Commission of Pakistan (HRCP), we located 21 detainees who had been forcibly removed to Pakistan, or who had left the U.S. voluntarily to avoid indefinite detentions. The interviews were heart-breaking. Before their detentions, these people were indistinguishable from previous generations of immigrants who had come to our shores. They had been salesmen, housewives, and cab drivers with children and homes in America, grateful to be in a country where they could achieve a better life and live in freedom.

Their detention put an end to all that. They described the anxiety-ridden days, which turned into weeks, and then into months — culminating in deportation. Few had been charged with crimes, and many had been deprived of access to counsel. In some cases, the U.S. government ignored the citizenship rights of spouses or even children born in this country. Back in Pakistan, these American children, unable to speak the local

language, were miserable and failing at school. The plight of these families was featured on CNN, National Public Radio and on the front page of The New York Times.

The ACLU's concerns about the treatment of September 11 detainees were vindicated by a highly critical report released this year by the Office of Inspector General of the Department of Justice, finding that detainees were effectively denied access to counsel and languished in jail for months without legal justification. Excessive secrecy clearly contributed to the abuse of the rights of hundreds of Arab and Muslim immigrants and visitors. More sunlight could have prevented many of those abuses from taking place.

Increasing Inequality. "Equal Justice Under Law" is the motto inscribed above the Supreme Court building, but the legal system's treatment of the Arab and Muslim community in this country since September 11 has been separate, unequal and wrong.

Military detention of both citizen and non-citizen Arab and Muslim terrorism suspects stands in stark contrast to the treatment of homegrown terrorists like Timothy McVeigh. Arab and Muslim non-citizens – who enjoy the protection of the Bill of Rights no less than citizens – are facing what amounts to an entirely new legal system, with basic due process suspended. Not only do they face potential trial before special military tribunals – with access to counsel and information limited severely, unlike ordinary military courts – they can be whisked away without a hearing to face injustice in the legal netherworld of Guantanamo Bay, Cuba, or to detention and interrogation by governments with some of the worst human rights records in the world.

Recent reports indicate profoundly disturbing, and possibly criminal, United States collusion with regimes that practice torture, including Syria and Saudi Arabia. Maher Arar, a Canadian citizen, was detained by United States authorities in a New York airport while en route to his home in Canada, then sent to Syria, where he was held and, he alleges, tortured by the Syrian secret police. These allegations of torture, with the consent and possible encouragement of the United States, must be thoroughly investigated.

Many more Arab and Muslim non-citizens who have not faced the harrowing ordeal of detention without due process have had to undergo a demeaning registration process that is doing more to tarnish America's image abroad, and inhibit international cooperation, than any amount of money spent on public diplomacy could wash away. The Department of Homeland Security is continuing the INS' immigrant tracking program known as the National Security Entry Exit Registration System (NSEERS), also called special registration. Special registration is severely exacerbating the problem of unwarranted detentions and selective deportation.

The special registration process does not apply equally to all immigrants and visitors, but rather requires registration, fingerprinting, photographing and questioning of citizens and nationals of countries within the Arab and Muslim world, as well as North Korea. In December 2002, the INS used the first stage of this program to round-up hundreds of Arab and Muslim men on minor immigration infractions, many of which were caused by

the INS' own bureaucratic incompetence. The agency detained a full one-quarter of all those who sought to comply with the new requirements at its Los Angeles office.

The government says the tracking program is necessary because it needs more information on who is in the country, legally or illegally. However, the agency's real problem is not a shortage of information, but rather the inability to process the information it already has. More than 200,000 change-of-address forms are piled up, unfiled, in an underground records storage facility in Kansas City, Missouri. As these forms pile up, hundreds of thousands people are at risk of wrongful arrest and deportation.

13,000 Arab and Muslim immigrants and visitors now face deportation after seeking to comply with the law. Many more could get in trouble, through no fault of their own, because of a systemic and inexcusable failure to notify registrants of their obligations under the program, including the obligation to leave through specially designated ports and to re-register every year. The deadlines for the first re-registration are fast approaching, and there is every indication the process will again be chaotic and haphazard.

THE RECORD: POWERS MISUSED, POWERS ABUSED

These attacks on basic American freedoms have resulted in serious civil liberties abuses. Some are a result of the PATRIOT Act, while some are the result of other anti-terrorism powers.

There is no doubt that, after September 11, the government systematically abused its non-PATRIOT powers, particularly with respect to the detention of hundreds on immigration violations. Here are just a few examples of the impact of the practices documented by the DOJ's own Inspector General on the 762 September 11 immigration detainees. These examples are similar to the stories of detainees the ACLU interviewed and, in some cases, assisted with habeas corpus petitions:

- Mr. H., a Pakistani, has lived in the United States for the last eighteen years and is the sole provider for his wife and four-year-old son, who is a U.S. citizen. In November 2001, Mr. H was arrested after a co-worker at the hospital where Mr. H. worked as a registered nurse called the FBI to complain about Mr. H. "behaving suspiciously," because the co-worker was concerned with his wearing a surgical mask more than necessary. He was detained at Passaic County Jail for six months, despite the fact that an immigrant visa that Mr. H had applied for was *granted* six weeks after his arrest in December 2001. In January 2002, Mr. H. was at last "cleared" and in May 2002 he was released on parole.

- Sidina Ould Moustapha, a citizen of Mauritania, arrived in the United States in April 2001 on a valid visitor's visa. On October 11, 2001, Mr. Moustapha was charged with overstaying his visa, and detained at Passaic County Jail. At his immigration hearing on October 30, 2001, the Immigration Judge granted his

request to voluntarily leave the country. The INS did not appeal, but continued to detain him for *five months* after the Immigration Judge's order. Throughout this time, Mr. Moustapha could not contact his wife and two young children in Mauritania. Finally, Mr. Moustapha's attorney filed a petition for a writ of habeas corpus, and the INS allowed him to leave.

- After Altin Elezi was arrested by the FBI at his home in Kearney, New Jersey on October 3, 2001, he effectively disappeared. Mr. Elezi's brother, Albert Elezi, learned about the arrest from neighbors, and desperately contacted government officials to find out where his brother was. After failing to hear from him for two weeks, Albert Elezi hired an attorney for his brother. The attorney contacted government officials who told him Albert Elezi's brother was being held in a detention facility in New York. When the attorney called the facility, however, he was told that Mr. Elezi was not there. The attorney called another detention facility and the Bureau of Prisons "Federal Prisoner Locator" service, but still could not find his new client. Finally, on October 22, 2001, the attorney filed a habeas corpus petition in federal court. Albert Elezi stated in an affidavit accompanying the petition, "Our entire family has been terrified since the disappearance. . . I respectfully beg this Court [to] allow my brother to visit with his lawyer and his family."

- Asif-Ur-Rehman Saffi, a citizen of France, came to the United States on July 6, 2001. On September 30, 2001, Mr. Safi was arrested by the INS and charged with working in the United States without authorization. He was held in the most restrictive conditions possible – the administrative maximum special housing unit at the Metropolitan Detention Center in New York. In Mr. Saffi's case, as with other September 11 detainees, the Bureau of Prisons deferred to the FBI's "interest" classification for September 11 detainees, abdicating its own internal policies for classifying the security risks presented by detainees in its custody. As a result, garden-variety immigration violators like Mr. Saffi were held in "lockdown" 23 hours a day in cells that were continuously lighted; allowed only a very limited ability to contact attorneys and families; placed in handcuffs, leg irons, and a heavy chain linking the leg irons to the handcuffs for interviews and visitation; and subjected to body-cavity searches after all visits. Mr. Saffi was also subjected to severe physical and verbal abuse. Guards at MDC bent back his thumbs, stepped on his bare feet with their shoes, and pushed him into a wall so hard that he fainted. After Mr. Saffi fell to the floor, they kicked him in the face. The lieutenant in charge told Mr. Saffi that he would be treated harshly because of his supposed involvement in the September 11 attacks.

What about PATRIOT Act abuses? Of course, the ACLU cannot say – because it cannot know – whether those parts of the PATRIOT Act that the government uses in secret have been abused. Nevertheless, even the threat of some powers has plainly had a chilling effect on the exercise of constitutional rights – including the freedom to speak, read and associate in ways that challenge government policy.

For well over a year, the ACLU has been asking the government to explain its use of one of these powers – the power to obtain "business records" under section 215 of the PATRIOT Act. Only after that provision had come under fire from the American Library Association – which feared its use to obtain library records would inhibit library patrons' privacy – did the Attorney General declassify the number of times it had been used – which, at that time, was zero.

The Justice Department said that section 215 was so essential to preventing terrorist attacks that it was imperative that Congress give it this "vital tool" without debate or amendment immediately after September 11 – and that section 215 could not be narrowed or amended. Yet the Justice Department now says, under fire from mild-mannered librarians, that section 215 has not been used at all in the past two years – during what it describes as the largest terrorism investigation in the history of the United States.

No wonder some have been so perplexed by the debate about the PATRIOT Act.

In the ACLU's constitutional challenge to section 215 of the PATRIOT Act, the plaintiffs have filed declarations showing how the threat of this provision, whether or not used, has already been harmful to the Arab American community and others who have come under suspicion since September 11:

- Two Muslim and Arab community and civil rights organizations – the Muslim Community Association of Ann Arbor and the Islamic Society of Portland – have reported that their members have left or become less active, fundraising has dried up, and attendance at prayers and community events has dropped specifically because of fear the government could use the PATRIOT Act to obtain the organizations' records and target their members for investigation. In one case, a Board Member even resigned from the association.

- Bridge Refugee and Sponsorship Services, a refugee and immigrant service organization, has been forced to alter record keeping practices, eliminating some sensitive information that clients do not want released. The new practices interfere with the organizations' ability to serve their clients, who are victims of torture, persecution and domestic violence, because they cannot keep detailed, sensitive information in their clients' files for fear it could be obtained by the government.

We also know of compelling anecdotal evidence that some powers under the Act have been misused:

- The Act's provisions – sold as necessary to fight terrorism – have often been used in a wide variety of common crimes that do not involve terrorism. Indeed, DOJ attorneys are being trained in how to use the PATRIOT Act to tilt the balance toward the prosecution. For example, Nevada newspapers are reporting that PATRIOT Act terrorism financing powers were used to investigate Michael

Galardi, the owner of two Las Vegas strip clubs, in a probe of alleged corruption involving local officials.

Source: "PATRIOT Act: Law's Use Causing Concerns," Las Vegas Review-Journal, November 5, 2003.

- In July 2002, a graduate student was charged under the USA PATRIOT Act with possession of a biological agent with no "reasonably justified" purpose. His crime: discovering 35-year-old tissue samples from an anthrax-infected cow in a broken university cold-storage unit and moving them to a working freezer. Cooperating fully with authorities, Foral finally agreed to community service and some restrictions on his activities. To his chagrin, however, he also found that his name had been added to the Interagency Border Inspection System, a watch list, after he was detained when trying to reenter the country. His case could chill research in the world of microbiology.

  Source: Rosie Mestel, "Scientists Experiment with Caution," Los Angeles Times, September 10, 2002.

- Anti-money laundering provisions that are now being implemented have had the unintended consequence of denying ordinary Americans access to financial services. French Clements of San Jose, CA, recently tried to open an on-line brokerage account with Harrisdirect in the hopes of beginning a retirement fund. His plans were stymied, however, when the system denied his request, citing the PATRIOT Act, probably because he is a college student whose frequent moves set off a red flag under the new PATRIOT Act regulations.

  Source: Kathleen Pender, "PATRIOT Act Halts Would-be Investor," Seattle Post-Intelligencer, September 6, 2003.

- Passage of the PATRIOT Act muted protests over the U.S. Navy's continued use of the Vieques bombing range in Puerto Rico. Activists cite fears of extended jail sentences for civil disobedience under the PATRIOT Act's overbroad definition of terrorism as reason for lackluster turnouts at Vieques protests since 9/11.

  Source: "Vieques protesters muted by 9/11," Associated Press, September 4, 2002.

WHAT CONGRESS CAN DO

Congress must say yes to responsible anti-terrorism powers by saying no to these excesses. You can start right now by passing a sensible measure that fixes just a few provisions of the PATRIOT Act: S. 1709, the Security and Freedom Ensured (SAFE) Act. The SAFE Act is sponsored by a strong bipartisan team that includes Senators Larry Craig (R-ID), Richard Durbin (D-IL) Michael Crapo (R-ID), Russ Feingold (D-WI), John Sununu (R-NH), Ron Wyden (D-OR) and Jeff Bingaman (D-NM).

What does the SAFE Act do? It does not repeal any section of the PATRIOT Act, but rather would amend that law to bring some of its controversial provisions back into line with constitutional freedoms. Specifically, the SAFE Act requires:

- Individualized suspicion for searches of library, bookstore or other sensitive records. Section 215 of the PATRIOT Act expanded the Foreign Intelligence Surveillance Act (FISA) to allow the government to obtain library, bookstore or other personal records simply by saying to the Foreign Intelligence Surveillance Court or a federal magistrate that they are wanted for a counter-intelligence or counter-terrorism investigation. The SAFE Act protects the freedom to read and the privacy of other personal records maintained by universities, doctors, banks, travel agents and employers by requiring articulable suspicion that the records relate to a spy, terrorist, or other foreign agent. The SAFE Act would also amend the law to clarify that federal agents may not use "national security letters" to get the records of users of a public library's computers, and must obtain a court order for such records.

- Reasonable limits on "sneak and peek" searches. The PATRIOT Act allows "sneak and peek" searches whenever the government shows that notice might have an "adverse result" and permits delays for an unspecified "reasonable time." The SAFE Act requires the government to show one of three specific reasons – preserving life or physical safety, preventing flight from prosecution, or preventing destruction of evidence – to delay notice of a search warrant, and delays are limited to renewable seven day periods.

- Safeguards for "roving wiretaps" in foreign intelligence investigations. The PATRIOT Act authorized roving wiretaps in foreign intelligence investigations, but did not include a sensible privacy safeguard that is required of roving wiretaps in criminal investigations. For criminal roving wiretaps, when federal agents place a wiretap and do not know what telephone or other device the target may use, they must "ascertain" that the target is using that telephone or device. The SAFE Act extends this safeguard to foreign intelligence investigations, helping to ensure the government does not eavesdrop on the conversations of innocent people. The USA PATRIOT Act (as amended shortly thereafter by the Intelligence Authorization Act for FY2002) also contains an anomaly in that it allows roving wiretaps even if federal agents do not know who is the target or what telephone or device is being used. The SAFE Act clarifies the law to require that federal agents know at least one of these two things to obtain a roving wiretap.

- An expanded sunset, and additional reporting on USA PATRIOT Act powers. The SAFE Act would cause four additional USA PATRIOT powers to expire at the end of 2005, allowing them to be reviewed when Congress considers whether to extend the sunset. These powers, which are exempt from the current sunset provision, are "sneak and peek" delayed-notification searches (sec. 213),

monitoring of detailed Internet and website addressing information without probable cause (sec. 216), nationwide search warrants (sec. 219), and expanded "national security letter" authority to obtain personal records without a court order (sec. 505). The SAFE Act also requires additional reporting on "sneak and peek" searches and FISA records searches.

Passage of the SAFE Act would represent just one step in restoring basic freedoms. The ACLU also supports passage of other bills that members of this Committee have introduced to protect civil liberties, including:

- S. 1695, the PATRIOT Oversight Restoration Act of 2003, sponsored by Senators Leahy (D-VT) and Craig (R-ID), which expands the PATRIOT Act's sunset provision to include additional powers that are particularly controversial;

- S. 436, the Domestic Surveillance Oversight Act, sponsored by Senators Leahy (D-VT), Edwards (D-NC), and Specter (R-PA), which requires additional reporting on the use of the Foreign Intelligence Surveillance Act (FISA);

- S. 609, the Restoration of Freedom of Information Act of 2003, sponsored by Senators Leahy (D-VT) and Feingold (D-WI), which narrows the new FOIA exemption for critical infrastructure created by the Homeland Security Act of 2002;

- S. 1507, the Library, Bookseller, and Personal Records Privacy Act, sponsored by Senators Feingold (D-WI), Kennedy (D-MA) and Durbin (D-IL), which provides for stricter standards for obtaining "business records" under section 215 of the PATRIOT Act; and

- S. 188, the Data Mining Moratorium Act of 2003 and S. 1544, the Data Mining Reporting Act of 2003, sponsored by Senator Feingold (D-WI), which address the problem of standardless searches of personal data by federal agencies using commercial data mining software

We also strongly support efforts to draft legislation that would end secret detentions and deportations, provide for a meaningful custody hearing before an Immigration Judge and otherwise protect the civil liberties of immigrants.

Much more needs to be done, including restoring the rule of law to military tribunals and detentions, and reining in the use of terrorism powers for non-terrorism cases.

We pledge to work with you to restore these important safeguards.

Thank you.

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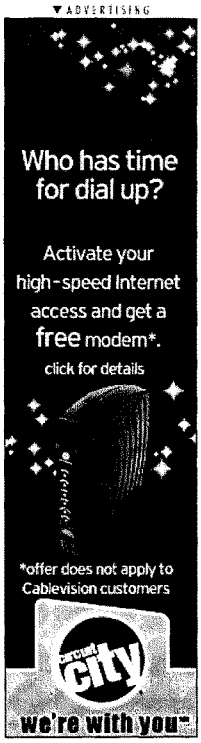

Ex-Detainee Details Fearful Path to Syria

Torture Followed Handover By American 'Removal' Unit

By DeNeen L. Brown
Washington Post Foreign Service
Wednesday, November 12, 2003; Page A14

OTTAWA, Nov. 11 -- On the luxury jet that flew Maher Arar from the United States to the Middle East, where he was certain he would be tortured, members of a U.S. "special removal team" put him in shackles, served him dinner and asked whether he minded if they watched a movie.

"They put me in the back and made me watch a CIA movie," Arar said Tuesday in an interview here. But Arar, a dual citizen of Canada and Syria, who was arrested in New York last year and deported on accusations he was a terrorist, remembered that he was not interested in the movie.

"At that time," Arar recalled, "I was thinking of what would happen once I arrived in Syria and how am I to avoid torture."

Arar, 33, spent 10 months in a Syrian prison, where he said he was beaten with an electric cable, forced to sign confessions that he had been to Afghanistan and kept in a cell he called a grave. U.S. officials have said that Arar, who was arrested on Sept. 26, 2002, was seized as part of a secret procedure known as "rendition," in which terrorism suspects are turned over to foreign countries known to torture people in their custody.

Arar was released from the Syrian prison and flown back to Canada last month. At a news conference last week, he described his torture and maintained his innocence of any involvement in terrorist activity.

The Center for Constitutional Rights in New York on Tuesday asked Congress and Attorney General John D. Ashcroft to conduct a criminal investigation into the role of intelligence agencies in the torture of Arar, who was never charged. The organization also demanded that Ashcroft investigate "whether U.S. officials condoned and aided torture."

"This is a legal and moral outrage," said Michael Ratner, the center's president. "Not only does the treatment of Maher Arar and the practice of rendition violate the Convention Against Torture, but it is antithetical to the basic values of our democracy."

Arar, who was born in Syria, was arrested at John F. Kennedy International Airport while traveling on his Canadian passport and making a connection en route to Montreal. Arar said officials asked him about his work for a U.S.-based computer company, confiscated his Palm Pilot and asked him about his relatives. He said the officers did not identify themselves, but they had badges showing they were from the FBI and the New York Police Department. They asked Arar about his connection to Abdullah Almalki, another Canadian Syrian, who was arrested in Syria in May 2002. He told them he knew Almalki casually.

In the interrogation room, they ignored his pleas for an attorney, Arar said. "Then they put me in chains, on my wrists and ankles, like you see the Guantanamo detainees in."

The next morning, the U.S. officials questioned him for eight hours about Osama bin Laden, the Palestinians and Iraq, and asked about mosques where he had worshiped.

Eventually, a U.S. immigration agent entered the room and told Arar he wanted him to volunteer to go to Syria. "I said no way," Arar said. "I wanted to go home. He said you are a special interest. They asked me to sign a form. They would not let me read it, but I just signed it. I was exhausted and confused."

He was then driven in a van to the Metropolitan Detention Center in New York, where he was strip-searched and given an injection, which officials did not identify. Arar was given a document that accused him of being a member of al Qaeda.

After a 3 a.m. hearing, he said, he was chained and driven in an armored truck to an airport in New Jersey, where he was placed on a small jet. Arar said he was flown first to Washington, which he determined from a video display showing the location of the plane. The plane spent an hour on the ground in Washington before a "special removal unit," a term he overheard, came on board.

"They did not introduce themselves," he said. "They did not have badges." Arar overheard phone conversations. "They said Syria was refusing to take me directly and I would have to fly to Jordan." The plane flew first to Portland, Maine, then to Rome and finally to Amman, the Jordanian capital.

During the flight, Arar said, he talked with an agent who identified himself as "Khoury," and who said his grandfather had moved to the United States from Syria. "He was in charge. He was an old man in his fifties. Khoury appeared sympathetic. He told them to take off the shackles and chains."

Arar told the man he was afraid of being tortured. "The man told me, 'Why don't you talk to the Jordanians? They might be able to keep you in Jordan.' In his eyes he felt sorry. But he was in the special removal unit. His job was to hand over people."

When the plane landed in Jordan, Arar said, the U.S. authorities returned his passport, his hand luggage and laptop computer. He said six or seven Jordanians were waiting for him. He did not hear any conversations between the Americans and the Jordanians. He was placed in a van parked a few feet from the plane.

"Just right away, after they handed me over, they put me in the van, they started beating me," Arar said. He said he was blindfolded and remembers hearing Arabic music playing in the van. Ten hours later, he arrived at the Syrian border.

"I know because the accent changed," Arar said. He said he was taken to the Palestine branch of the Syrian military intelligence. Over the next months, Arar said, he was tortured, and spent six months in the small cell that he described as a grave. "I thought when I went in the grave I would stay one or two days. I realized that was my home. I had moments I wanted to kill myself. I was like a dead person."

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EDITORIAL

Freedom vs. Torture?

Sunday, November 9, 2003; Page B06

MAHER ARAR, a Canadian-Syrian dual citizen, was on his way to Montreal last fall on a flight path that took him through New York City. Unbeknownst to him, he had been placed on the terrorist watch list, and American immigration authorities detained him on his arrival in New York. After reportedly concluding that they lacked evidence to charge him with a crime, they decided to deport him. And faced with a choice between democratic Canada, where he would presumably remain free, and totalitarian Syria, which could be expected to lock him up and torture him, authorities chose the latter. As a consequence, Mr. Arar was locked up for 10 months until pressure from the Canadian government secured his release. Now, back in his adopted country, he alleges that he was savagely tortured during his months as an unwilling guest of Syrian President Bashar Assad. His case has long been a cause celebre in Canada, where many see in it evidence of American arrogance and disrespect for human rights and for Canada.

▼ADVERTISING Deporting someone to a vicious police state knowing the fate that awaits him there is morally repugnant. America shouldn't be subcontracting torture. But saying that much is the easy part. The harder question is what should be done with a suspected al Qaeda associate in such circumstances. Sending Mr. Arar to Canada, as a practical matter, meant setting him free, since there was little prospect of bringing charges there either. Authorities faced this choice: torture in Syria or freedom on the other side of the longest undefended border in the world.

If credible intelligence linked him to al Qaeda, Mr. Arar could have been designated an enemy combatant and held at Guantanamo Bay. The trouble with this solution is that the legal process given alleged enemy combatants is so opaque and unfair. The military won't provide data on who is being held at Guantanamo or the standards used to keep people there. Were there some publicly understood process for handling these cases, so that sending a suspected enemy combatant to Guantanamo was not the same as dumping him into a legal black hole, authorities would have an option for people such as Mr. Arar other than torture in Syria and freedom in Canada.

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Trials and Error

By Philip Allen Lacovara

Wednesday, November 12, 2003; Page A23

Two years ago this week, President Bush authorized trials by military commission for people accused of membership in al Qaeda or attacks on the United States. Six men have been identified thus far to appear before these commissions.

Shortly before the president issued his executive order, and just weeks after the Sept. 11, 2001, attacks, I raised my voice in strong support of military commissions. As deputy solicitor general in the Nixon administration, I had been in charge of the government's criminal and internal security cases before the Supreme Court. I understood how the Bush administration could invoke the laws of war sanctioned by the Supreme Court to deal with international terrorists -- as distinct from "mere felons" (including mass murderers) and legitimate combatants entitled to protection under the 1949 Geneva Convention as prisoners of war. I urged the administration to do so.

When I proposed using military commissions to try terrorists, I conceived of trials with fair and reliable procedures designed to ascertain guilt -- or, equally important, innocence. I knew there would be critics of this approach but was confident that both legal and policy factors justified such trials.

Now, two years later, I reluctantly conclude that the administration's approach to military commissions confirms many of the critics' worst fears.

The rules governing military commissions depart substantially from standards of fair procedure. Most problematic, they undermine the basic right to effective counsel by imposing significant legal constraints on civilian defense attorneys. The rules negate normal attorney-client confidentiality and authorize the withholding of key evidence from defendants and their civilian counsel. In addition, the military commission rules permit the Defense Department to restrict defense lawyers' ability to speak publicly about a case -- while Pentagon officials face no such constraint.

While the government reserves the right to listen in on attorney-client communications, defendants and their civilian counsel may be denied access to relevant and even exculpatory information if the military concludes that concealment is "necessary to protect the interests of the United States." The rules also purport to bar the civil courts from any review of the eventual judgments of the tribunals.

Not surprisingly, few eligible defense lawyers have decided to participate in these cases, and the criminal defense bar has called for lawyers to boycott the proceedings. In defending these military commissions, representatives of the Bush administration constantly refer to the well-known *Quirin* case -- in which the Roosevelt administration established a military

commission during World War II to try eight Nazi saboteurs who had sneaked into the United States and thereby forfeited their status as soldiers entitled to be treated as POWs.

What they fail to note is that the Supreme Court decision in that case accorded much more in the way of legal rights to those eight Nazis than the administration is proposing today. The accused saboteurs retained the right to confidential communications with their counsel, access to all relevant evidence and Supreme Court review of the lawfulness of the proceedings against them. In a subsequent case involving the notorious Japanese Gen. Tomoyuki Yamashita, the Supreme Court reaffirmed this important principle, granting even enemy leaders the right to have civil courts review the lawfulness of their prosecution and conviction by military commissions.

Surely if such procedural guarantees could be extended to acknowledged enemies prosecuted under the Articles of War applicable during World War II, they also can be accorded to the suspects the administration wants to put on trial before specially constituted military commissions today. But they are not. Further undermining the legitimacy of the process is the fact that the Defense Department's instructions for the military commissions grant broad discretion to the president and secretary of defense to close the entire proceeding, acting on undefined "national security interests." Armed with this license to close the trials, the Defense Department has also failed to respond to repeated inquiries from human rights groups and others seeking authorization to attend military commission trials as observers.

As a lawyer who has served as an international observer at "state security" trials in Yugoslavia and Turkey, I know how important it is to ensure that the antiseptic glare of sunlight be allowed to shine on politically sensitive trials. Earlier assurances by senior administration officials that proceedings before military commissions generally would be open, with some type of public access provided, have given way more recently to vague statements that the issue of access for impartial legal observers will be addressed once trials are officially scheduled.

The administration's refusal to make a definitive commitment now suggests that public access may become another casualty in the war on terrorism.

All of this needs to be scrutinized and sorted out quickly -- especially now that the administration has identified six potential defendants for these military trials. Given the stakes for both security and liberty interests, a more precise and balanced -- and therefore more credible -- approach to military justice certainly is in order.

The writer, a former deputy solicitor general of the United States and former counsel to the Watergate special prosecutor, is a board member of the Lawyers Committee for Human Rights. He will answer questions about this column during a Live Online discussion at 2:30 p.m. today at www.washingtonpost.com.

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Statement before the
United States Senate Committee on the Judiciary

Hearing on
"America after 9/11: Freedom Preserved or Freedom Lost?"

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November 18, 2003

Mr. Chairman, Ranking Member, Members of the Committee, thank you for convening this important hearing and for inviting me to be with you today.

The horrific terrorist attacks of September 11 were a profound and painful tragedy for all Americans. None of us will ever forget that awful day when thousands of innocent lives were lost.

The attacks were a dual tragedy for Arab Americans. We are Americans and it was our country that was attacked. Arab Americans died in the attacks. Arab Americans were also part of the rescue effort. Dozens of New York City Police and rescue workers who bravely toiled at Ground Zero were Arab Americans.

Sadly, however, many Arab Americans were torn away from mourning with our fellow Americans because we became the targets of hate crimes and discrimination. Some assumed our collective guilt because the terrorists were Arabs. Arab Americans and Muslims and other perceived to be Arab and Muslim were the victims of hundreds of bias incidents. According to the Justice Department's Civil Rights Division, "The incidents have consisted of telephone, internet, mail, and face-to-face threats; minor assaults as well as assaults with dangerous weapons and assaults resulting in serious injury and death; and vandalism, shootings, and bombings directed at homes, businesses, and places of worship." As a result of the post-9/11 backlash, in 2001, the FBI reported a 1600% increase in anti-Muslim hate crimes and an almost 500% increase in ethnic-based hate crimes against persons of Arab descent.

Thankfully, the American people rallied to our defense. President Bush spoke out forcefully against hate crimes, as did countless others across the nation. Both the Senate and the House of Representatives unanimously passed resolutions condemning hate crimes against Arab Americans and Muslims. Federal, state and local law enforcement investigated and prosecuted hate crimes, and ordinary citizens defended and protected us, refusing to allow bigots to define America. We will always be grateful that our fellow Americans defended us at that crucial time.

Much has been done in the past two years to combat the threat of terrorism. Among other significant accomplishments, we have deposed the Taliban regime, created the Department of Homeland Security, taken steps to enhance airport and border security, and improved information sharing between intelligence and law enforcement.

Arab Americans are proud to have played a crucial role in these efforts, serving on the front lines of the war on terrorism as police, firefighters, soldiers, FBI agents, and translators. The Arab American Institute has worked with federal, state and local law enforcement to assist efforts to protect the homeland. We helped to recruit Arab Americans with needed language skills and we have served as a bridge to connect law enforcement with our community.

Recently, working with the Washington Field Office of the FBI, the Arab American Institute helped to create the first Arab American Advisory Committee, which works to facilitate communications between the Arab-American community and the FBI. I proudly serve as a member of the FBI Advisory Committee, which serves as a model

and is now being copied across the United States.

As someone who has spent my entire professional life working to bring Arab Americans into the mainstream of American political life and to build a bridge between my country and the Arab world, I am very concerned about the direction of some of our efforts to combat the terrorist threat and the impact these initiatives have on our country and my community. Unfortunately, the Bush administration has devoted too many resources to counterterrorism measures that threaten our civil liberties and do little to improve our security. Going well beyond the provisions of the Patriot Act, John Ashcroft's Justice Department has unleashed a series of high-profile initiatives that explicitly target Arabs and Muslims and have resulted in the detention of thousands of people.

In the immediate aftermath of 9/11, the Justice Department rounded up at least 1200 immigrants, the vast majority of whom were Arab or Muslim. The DOJ refused to release any information about the detainees, and charged that the detentions were related to the 9/11 investigation. At the time, the Arab American Institute and others in the Arab-American community expressed concern about the broad dragnet that the Justice Department had cast in Arab immigrant communities. We fully supported the government's efforts to investigate the 9/11 terrorist attacks, but we questioned the efficacy of this dragnet approach. Based on reports from family members of the detainees, we also were very concerned about the conditions in which the detainees were confined, and their ability to contact counsel and their families.

In response, the Attorney General questioned the patriotism of us and others who raised questions about the DOJ's policies:

> 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. They encourage people of good will to remain silent in the face of evil.

It is wrong to suggest that patriotic Americans who question the efficacy and impact of their government's policies are supporting terrorists. This assertion, combined with policies and statements that conflate undocumented Arab and Muslim immigrants with terrorists cast a cloud of suspicion over the Arab American community that contributed to additional discrimination.

Last year, the Justice Department's Inspector General issued a report that vindicated our concerns. The IG found that the Justice Department classified 762 of the detainees as "September 11 detainees." The IG concluded that none of these detainees were charged with terrorist-related offenses, and that the decision to detain them was "extremely attenuated" from the 9/11 investigation. The IG concluded that the Justice Department's designation of detainees of interest to the 9/11 investigation was "indiscriminate and haphazard." and did not adequately distinguish between terrorism suspects and other immigration detainees.

The IG also found detainees were subjected to harsh conditions of confinement, including cells that were illuminated 24 hours per day, and confinement to their cells for all but one hour per day. Disturbingly, the IG also found, "a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11

detainees, particularly during the first months after the attacks."

I'm not suggesting that the government should never use immigration charges to detain a suspected terrorist, but the broad brush of terrorism should not be applied to every out-of-status immigrant who happens to be Arab or Muslim. Our immigration system is fundamentally broken. Comprehensive immigration reform is required to address this problem. We should not confuse the problems with our immigration system with our efforts to combat terrorism. Detaining large numbers of undocumented Arab and Muslim immigrants will not aid our efforts to combat terrorism, and might actually harm them.

Another example of conflating immigration enforcement against Arab and Muslims immigrants and visitors with counterterrorism is the National Security Entry-Exit Registration System (NSEERS) "call-in" program (also known as Special Registration), which requires male visitors from 24 Arab and Muslim countries and North Korea, to register with local INS offices. By singling out a large group of mostly Arabs and Muslims, Special Registration involves a massive investment of law enforcement resources with negligible return. It also creates fear of law enforcement in our immigrant communities, whose cooperation law enforcement needs. At the same time, these discriminatory practices validate and even feed the suspicion that some have of Arabs and Muslims.

From the outset, NSEERS was plagued by implementation problems. Due to inadequate publicity and INS dissemination of inaccurate and mistranslated information,

many individuals who were required to register did not do so. Many who were required to register in the call-in program were technically out of status due to long INS backlogs in processing applications for permanent residency. Many such individuals have been placed in deportation proceedings.

Across the country, many were detained in harsh conditions due to the government's inability to process registrants in a timely fashion. For example, in December 2002, the INS in Los Angeles detained hundreds of men and boys who report they were denied access to legal counsel and their families, held in handcuffs and leg shackles, and forced to sleep standing up due to overcrowding.

In response to criticism that the "call-in" program discriminates against Arabs and Muslims, Justice Department officials originally said that it would be expanded to include visitors from all countries. When the program was transferred to the Department of Homeland Security, the administration announced that the program was being terminated. However, those who were already required to register, including male visitors from every Arab country, are still subject to the program's requirements and penalties for noncompliance, including deportation.

The Department of Homeland Security reports that more than 80,000 people have registered in the call-in. Of these, more than 13,000 have been placed in deportation proceedings. Deporting those who comply with Special Registration will deter others from complying with the program or otherwise cooperating with law enforcement. If a goal of Special Registration is to track possible terrorists, deporting those who comply with the program undermines this aim, especially if it reduces future compliance. The

DOJ claims that special registration resulted in the apprehension of 11 suspected terrorists, but DHS reports that none have been charged with terrorist-related activities. This raises questions about the efficacy of the program and the validity of the DOJ claims.

In a similar vein, the Justice Department also launched the "Interview Project," to interview thousands of Arabs and Muslims, including U.S. citizens. The Arab American Institute found that these interviews created fear and suspicion in the community, especially among recent immigrants, and damaged our efforts to build bridges between the community and law enforcement.

Like other DOJ programs that cast a wide net, the interviews created a public impression that federal law enforcement views our entire community with suspicion, which, in some cases, fostered discrimination. For example, we received reports of instances where the FBI visited individuals at their workplace, and then these individuals were subsequently demoted or terminated by their employers.

FBI officials with whom I have spoken also questioned the project's usefulness as a law enforcement and counter-terrorism program. They told me it involved a significant investment of manpower, produced little useful information, and damaged their community outreach efforts.

The General Accounting Office reviewed the Interview Project and concluded:

> How and to what extent the interview project – including investigative leads and increased presence of law enforcement in communities – helped the government combat terrorism is hard to measure … More than half of the law enforcement officers that [the GAO] interviewed raised concerns about the quality of the questions or the value of the responses.

According to the GAO, "Attorneys and advocates told us that interviewed aliens told them that they felt they were being singled out and investigated because of their ethnicity or religious beliefs." The GAO also concluded that many of those interviewed "did not feel the interviews were truly voluntary," and feared "repercussions" if they declined to be interviewed.

I am concerned about these and other government efforts that infringe upon civil liberties for several reasons. First, it is wrong to single out innocent people based on their ethnicity or religion. This runs contrary to the uniquely American ideal of equal protection under the law.

By casting such a wide net, these efforts squander precious law enforcement resources and alienate communities whose cooperation law enforcement needs. They run counter to basic principles of community policing, which reject the use of racial and ethnic profiles and focus on building trust and respect by working cooperatively with community members.

According to polls conducted by the Arab American Institute and Zogby International, the Justice Department's efforts are taking a toll in the Arab American community. Immediately after 9/11 Arab Americans were heartened by President Bush's strong display of support for the community. In October 2001, 90% said that they were reassured by the President's support, while only six percent were not reassured. By May 2002, those who felt reassured dropped to 54% as opposed to 35% who were not. In a July 2003 poll, the ratio dropped even further, with only 49% now saying that they feel

assured by Bush's support for the community while 38% say that they are not assured. Thirty percent of Arab Americans report having experienced some form of discrimination, and 60% say they are now concerned about the long-term impact of discrimination against Arab Americans.

Civil liberties abuses against Arabs and Muslims have been well-publicized in the Arab world, and there is a growing perception that Arab immigrants and visitors are not welcome in the United States. As a result, America is less popular, and it is more politically difficult for our Arab allies to cooperate with our counter-terrorism efforts.

According to polls conducted by the Arab American Institute and Zogby International, Arab public opinion attitudes toward the United States had dropped to dangerously low levels even before the U.S.-led invasion of Iraq. We found that Arabs had strong favorable attitudes toward American values, and also had largely favorable attitudes toward the American people. However, they had extremely negative attitudes toward U.S. policy, which shaped their views of America. To be sure, U.S. policy toward the Israeli-Palestinian conflict and Iraq contribute to these attitudes, but perceptions of civil liberties abuses against Arab and Muslims Americans are also a contributing factor.

The countries polled included some of the United States' strongest allies in the Middle East: Egypt, Jordan, Morocco, Saudi Arabia and the United Arab Emirates. In an earlier AAI/ZI poll, done in March of 2002, we found that U.S. favorable ratings were already quite low. The most significant drops in U.S. ratings occurred in Morocco and Jordan. In 2002, for example, 34% of Jordanians had a positive view of the United States

as compared with 61% who had a negative view. In 2003, only 10% of Jordanians now hold a positive view of the United States, while 81% see the country in a negative light. Similarly in Morocco the favorable/unfavorable rating towards the United States in 2002 was 38% to 61% percent. Today it is 9% favorable and 88% unfavorable.

The U.S. favorable/unfavorable rating was already quite low in Egypt, Saudi Arabia, and the UAE. It has remained low. In 2002, the ratings in Egypt were 15% favorable to 76% unfavorable. In 2003, Egyptians' ratings of the United States are 13% favorable and 80% unfavorable. In Saudi Arabia the rating toward the Untied States was 12% favorable to 87% unfavorable in 2002. Today it has dropped to 3% favorable and 97% unfavorable. In the UAE the ratio showed almost no change from an 11% favorable/87% unfavorable in 2002 to 11% favorable/85% unfavorable in 2003.

Buttressing these poll results are my experiences in the Arab world, where I travel frequently. In conversations with opinion leaders across the region, the concern they raise most frequently is American civil liberties abuses against Arabs and Muslims.

Due to a variety of factors, including fear of discrimination, many fewer Arabs come to the U.S. for medical treatment, tourism, study, or business. In the past, Arab visitors to the U.S. have had a chance to observe first-hand the unique nature of American democracy and freedom and have returned to the Arab world as ambassadors for our values.

In his address on November 6, President Bush rightly linked the spread of democracy to the war on terrorism. Unfortunately, civil liberties abuses against Arabs

and Muslims in the U.S. have undermined our openness and have harmed our ability to advocate credibly for democratic reforms in the Middle East. In fact, some Arab governments now point to American practices to justify their own human rights abuses. As President Bush suggested, and as we have learned so painfully, anti-democratic practices and human rights abuses promote instability and create the conditions that breed terrorism. Democratic reformers and human rights activists used to look to the U.S. as an exemplar, the city on a hill. Now they are dismissed by their countrymen when they point to the American experience.

Once we set a high standard for the world, now we have lowered the bar. The damage to our image, to the values we have sought to project, and to our ability to deal more effectively with root causes of terror have been profound.

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