

Center for Constitutional Rights

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The State of Civil Liberties: One Year Later
Erosion of Civil Liberties in the Post 9/11 Era
A Report Issued By The Center for Constitutional Rights

The Center for Constitutional Rights is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys working on behalf of civil rights activists in the Deep South, CCR is committed to the creative use of law as a positive force for social change.

Since September 11th, CCR has worked to ensure that the fear of terrorism does not erode the rights and liberties that define American society. We have filed seven lawsuits to challenge particularly egregious violations of Constitutional rights and international law related to the government response to the attacks of one year ago, both within the United States and in the detention camp at Guantanamo Bay, Cuba. These suits seek to uphold the principle that government action is only legitimate when it accords with fundamental rights of the people as well as the rule of law.

Summary

On September 11, 2001 the United States was brutally attacked by terrorists. The immediate damage included the destruction of the World Trade Center and a wing of the Pentagon, as well as the deaths of thousands of people. Since that time, the Bush Administration, the United States Justice Department and the United States Congress have enacted a series of Executive Orders, regulations, and laws that have seriously undermined civil liberties, the checks and balances that are essential to the structure of our democratic government, and indeed, democracy itself.

The Constitution of the United States separates the federal government into three distinct branches and provides a system of "checks and balances" that prevent any one branch of government from accumulating excessive power. The Executive branch, by using Executive Orders and emergency interim agency regulations as its tools of choice for combating terrorism, has deliberately chosen methodologies that are largely outside the purview of both the legislature and the judiciary. These Executive Orders and agency regulations violate the U.S. Constitution, the laws of the United States, and international and humanitarian law. As a result, the war on terror is largely being conducted by Executive fiat and the constitutional guarantees of both citizens and non-citizens alike have been seriously compromised.

Additionally, the actions of the government have been shrouded in a cloak of secrecy that is incompatible with democratic government. Hundreds of non-citizens have been rounded up and detained, many for months, in violation of constitutional protections, judicial decisional authority and INS policy. The government has repeatedly resisted requests for information regarding the detainees by loved ones, lawyers and the press; it has denied detainees access to legal representatives; and has conducted its hearings in secret, in some cases denying the very existence of such hearings. In a democracy, the actions of the government must be transparent or our ability to vote on policies and the people who create those policies becomes meaningless.

Perhaps the most disturbing aspect of the government's actions has been its attack on the Bill of Rights, the very cornerstone of our American democracy. The War on Terror has seriously compromised the First, Fourth, Fifth and Sixth Amendment rights of citizens and non-citizens alike. From the USA PATRIOT Act's over-broad definition of domestic terrorism, to the FBI's new powers of search and surveillance, to the indefinite detention of both citizens and non-citizens without formal charges, the principles of free speech, due process, and equal protection under the law have been seriously undermined.

Finally, the United States' actions with regard to prisoners held at Camp Delta at the Guantanamo Bay naval station have been in direct violation of the Geneva Conventions. These prisoners are being held as "unlawful combatants," a term that has no meaning in international law. The government's disregard for international law can only serve to encourage other nations to act likewise and undermine the very War on Terrorism it seeks to fight.

The result of all of these actions has been the deliberate, persistent, and unnecessary erosion of the basic rights that protect every citizen and non-citizen in the United States. A free society demands the rule of law. Without it, democracy is meaningless. The government has consistently refused to recognize the protections afforded by the US Constitution and international law, and in doing so, it has failed in its responsibility to maintain a democratic society that is both open to, and accountable to, the people.

Introduction

In the year since terrorists attacked the World Trade Center and the Pentagon, there has been a dramatic transformation in the relationship between the government and the people of this country. In the name of fighting terrorism, the Executive Branch has assumed sweeping powers that show little regard for the principles embedded in the United States Constitution or the protections afforded by it. In the process, the Executive Branch has undermined the political compact between government and the governed that is essential to a democratic system. This Report offers an assessment of the state of checks and balances that are the pillars of our constitutional system, and of individual civil liberties guaranteed under that system, in the wake of the Administration's security efforts.

In order to ensure the continued existence of our free and democratic society, we must continue to follow those basic principles that maintain the balance between the need to govern effectively and the need to maintain individual freedoms. We believe that there are at least five basic principles that define this balance:

1. The Government must be accountable to the people through fair elections in which each citizen has a single and fairly counted ballot.
2. The Government may impose punishment only after the conclusion of fair, open, transparent, and objective procedures designed to protect the rights of the accused and determine innocence or guilt. In particular, these principles must include the right to be free from coerced interrogation, the right to have an objective and independent judge and jury, and the right to a skillful, independent and unintimidated lawyer.
3. The Government may not discriminate against individuals or groups on the basis of arbitrary categories such as race, ethnicity, religion, political belief or gender.
4. The Government must abide by the system of checks and balances set forth in the Constitution that prevent the aggregation of power in the hands of one person or in a single branch of government.
5. People must be free to express ideas, regardless of their content, without fear of reprisal.

In addition, as a participant in the global economy and as a world leader, this country is bound by existing and emerging international legal standards that establish the basic human rights to which all persons are entitled. Our adherence to this principle and our responsibility as one of the world's leading democracies to adhere to the treaties and covenants that bind nations, must also be examined.

Since September 11th, each of these six principles has been severely compromised. In addition, our credibility in the international arena has suffered, as well.

The 2000 Presidential Election brought to light serious inequities in the electoral system, problems that have yet to be seriously addressed. Concerns regarding the other five principles have become increasingly more urgent as the months pass and actions by the United States Department of Justice (the "Justice Department") and the White House trespass on the once inviolable cornerstones of American Democracy:

- Hundreds of individuals have been held in preventive detention. Arrested in conjunction with the terrorism investigation, as many as 1,200 individuals were detained for an extended period without any criminal charge lodged against them, and in most cases, without any basis in immigration law.
- An order allowing law enforcement agents to monitor attorney-client conversations undermines the principle that all criminal defendants are entitled to a fair and competent defense.
- The Justice Department has limited the discretion of immigration judges and the immigration appeals process in ways that threaten the objectivity and independence of the immigration court system.
- The President's Executive Order authorizing military tribunals has stripped away many constitutional protections afforded the accused.
- Governmental actions have targeted individuals of Middle Eastern descent, South Asian descent and of the Muslim faith in violation of laws prohibiting governmental discrimination against ethnic and religious minorities.¹
- Through its use of interim regulations and executive orders, the Executive Branch has usurped the authority and powers assigned to the Legislative Branch.
- By mandating the use of military tribunals for those accused of terrorism, the Executive Branch has deprived the judiciary of its role in deciding criminal cases, and has made the same branch of government both the prosecutor and the judge.
- Key provisions of the USA PATRIOT Act and relaxed guidelines for FBI investigations threaten the right to dissent by raising the possibility of harassment by investigators, by permitting searches on little evidence, and by creating the risk of felony prosecution for minor criminal violations.

This Report details the ways in which the actions of the Executive Branch, and more specifically the Bush Administration, have threatened people's basic freedoms and the foundation of democracy in this country. The first section of the Report discusses the undermining of the Separation of Powers doctrine, the political mechanism that the framers of the Constitution included to protect against the consolidation of governmental power in the hands of a single individual or entity. The second section of the Report addresses the need for transparency in government, and the deliberate efforts by the Bush Administration, to evade rules intended to

hold the government accountable to the people. The third section examines the erosion of the freedoms guaranteed in the Bill of Rights. The fourth section addresses the Bush Administration's disregard for international and humanitarian law and the final section assesses the Executive Branch's refusal to adhere to some of the most important international covenants in existence, and the ramifications of these breaches.

I. Governing by Decree: The Administration's Undermining of the Separation of Powers Principle
By creating three separate branches of government, the framers of the Constitution sought to divide the responsibilities of governing and thereby reduce the risk of any one branch abusing governmental power. Over the history of this country, the Separation of Powers doctrine has proved to be flexible and resilient. While in practice, the separation of authority has occasionally deviated from the framers' intent, attempts to alter the division substantially in favor of one branch have generally failed.² However, the past year has been marked by the persistent and frequently successful efforts of the Executive Branch to expand its powers at the expense of both the Legislature and the Judiciary. Given the many other ways in which the Executive Branch's actions threaten the integrity of the democratic process and the freedoms guaranteed by the Constitution, these encroachments are especially disturbing.

Although Congress has plainly been willing to provide law enforcement agencies with many tools deemed necessary to fight terrorism, the Justice Department and the White House have seen fit to conduct their domestic anti-terrorism efforts largely by Executive fiat. The USA PATRIOT Act - hastily drafted and passed with little or no Congressional debate under pressure from the President - grants sweeping new powers to law enforcement agencies. However, even greater extralegal powers have been provided to these agencies by the implementation of 11 Executive Orders,³ 10 new agency interim regulations, and 2 final regulations implemented by the Justice Department.⁴

Interim regulations are issued by government agencies to implement new policies and practices to be used by agency officials, and go into effect without Congressional input and without any provision for prior public comment. Executive Orders are issued solely at the behest of the President, without any required involvement by other branches of government or governmental agencies. By changing how agencies operate and the rules they must enforce, both interim regulations and Executive Orders have the effect of law. However, they remain wholly outside the purview of the Legislative Branch, and to a more limited extent, outside the reach of the judiciary as well. The dramatic increase in the use of these mechanisms raises several concerns. First, through such mechanisms, the Executive Branch usurps the powers constitutionally accorded to Congress, and thereby upsets the balance of power among the branches of government. Second, in bypassing the Legislature, the Executive Branch evades all mechanisms for accountability to the people. Finally, by relying on Executive Orders, the President acts without the official input and expertise of the governmental agencies charged with enforcing the law in the specific areas of the orders.

An interim regulation issued on September 20th illustrates both the undue power accorded to the Executive Branch and the disdain shown by it for the proper role of Congress. The September 20th regulation expanded the power of the Immigration and Naturalization Service ("INS") to detain immigrants without charge. It states that:

a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, [as to] whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest. . . will be issued.

The phrase a "reasonable period of time," appears to provide the INS with the discretion to hold someone indefinitely. It directly contravenes the very law that Congress enacted to provide greater powers to law enforcement agencies to combat terrorism. Section 412 of the USA PATRIOT Act explicitly prohibits detaining immigrants suspected of terrorism for more than seven days without formal charges. Once the USA PATRIOT Act became law, thirty-six days after the September 20th interim regulation was issued, the Justice Department might have been expected to revise its regulation to bring it into conformity with the law enacted by Congress. It did not. This discrepancy is more striking when one considers the difference in scope. Section 412 only applies to immigrants who the Attorney General has certified that he has reasonable grounds to believe are engaged in terrorist activity. The interim regulation applies to all immigrants. This leaves the Justice Department with something of a dilemma: it must disregard Section 412 or else apply those standards to all immigrants, on pain of providing accused terrorists with more protections than ordinary out-of-status immigrants.

The September 20th interim regulation also illustrates how the Administration has sought to remove itself from constraints imposed upon the Executive Branch by the judiciary. The regulation flies in the face of a recent Supreme Court ruling, *Zadvydas v. Davis*,⁵ which holds that the due process clause of the Constitution applies to all persons physically located within the borders of the United States, including deportable immigrants. The Supreme Court's decision plainly means that non-citizens may not be held without charge or without access to judicial process. Nevertheless, the Administration continues to do just that. In fact, many of the detainees were held long past the time in which they could have been sent to their countries of residence without charge or explanation.

Another example of the Administration's actions seeking to evade judicial scrutiny and review involves an interim regulation issued on October 31, 2001. This regulation allows federal agents to monitor privileged attorney-client communications. In very limited circumstances, such surveillance was permitted prior to issuance of the interim regulation provided that it was authorized by a judge. Under the interim regulation, however, a court order is not required unless the investigator wishes to conduct surveillance without notifying all of the parties being monitored. Otherwise, all that is needed is the approval of the Attorney General. Furthermore, while the regulation includes some minor provisions nominally intended to prevent privileged communications from being passed on to prosecutors, exceptions to this protection in the name of national security are left to the discretion of the investigators. Although judicial oversight of prosecutors' assertion of such exceptions might provide an appropriate check on possible abuses by investigators, the new rules make no provision for independent oversight by the judiciary or anyone outside the Justice Department.

Equally disturbing are changes that undermine the nominal independence of immigration judges from the Justice Department. Immigration Judges, as well as the Board of Immigration Appeals (BIA) above them in the hierarchy, are part of the Department of Justice, and report to the Attorney General. However, these judges are independent from the Attorney General's Office with regard to the decisions they render, which are binding on the INS. Another interim regulation issued on October 31st gives District Directors of the INS who act as prosecutors in immigration cases, the power to stay orders issued by immigration judges to release immigration detainees, pending their appeals to the BIA. This change is tantamount to making the ruling of a judge subordinate to the discretion of the prosecutor. Actions such as this and the blanket order closing all immigration hearings in cases designated by the Justice Department⁶ have curtailed the discretion and authority of immigration judges, and an order in February directing the BIA to streamline its operations by removing half of its judges⁷ raises the specter of a political litmus test to weaken the independence of the remaining judges.⁷ Moves such as these led the judges' union, the National Association of Immigration Judges, to ask Congress to move immigration courts out from under the jurisdiction of the Justice Department.⁸

Perhaps the Administration's most disturbing act undermining the separation of powers was the adoption of an executive order on November 13th authorizing the establishment of military tribunals to try accused terrorists. In recent years, federal courts have proven very adept at trying terrorism cases, and prosecutors have won important victories involving the embassy bombings in Tanzania and Kenya as well as the 1993 attack on the World Trade Center. The Executive Order, however, has removed such cases from federal courts and placed them in the hands of the military. The Executive has taken on the most fundamental role of the Judicial Branch, and has encroached upon the responsibilities of the Legislative Branch, which is constitutionally granted sole authority to create "tribunals inferior to the Supreme Court." Indeed, the degree to which the Order concentrates power in the hands of the Executive is breathtaking: it gives the President the power to decide who will be tried under the system, to create the rules by which trial will proceed, to appoint those who will serve as judge, prosecutor, and defense attorney, to set penalties once guilt is determined (including execution), and to decide all appeals.

These are just a few of the ways in which our system of checks and balances has been undermined by the Administration's actions over the past 12 months. Many of the actions described later in this Report also involve encroachments on the authority of the Legislative and Judicial Branches. By using executive orders and interim regulations to substantially alter the direction and powers of law enforcement, the Bush Administration has avoided deliberation on how these matters should be handled, and unilaterally implemented changes in the law that the Executive Branch is sworn to uphold. Its actions to limit the input of the judiciary, including weakening even the nominal independence of the immigration courts, remove substantial oversight on the legality of its actions. Judicial review is arguably the most important check on potential abuses of power by the other branches of government, inasmuch as the judiciary is responsible for determining the constitutionality of laws enacted by the Legislature and the actions taken by the Executive. By encroaching on the legislative function at the same time that it seeks to insulate its actions from judicial review, the Executive Branch has seriously undermined the integrity of this process.

II. Governing in Secret: Shrouding Governmental Operations And Evading Public Accountability

The government's accountability to the people is one of the cornerstones of a democracy. Elections are the primary mechanism by which the people voice and assert their opinions with regard to the actions of the government. If these actions are not open to public scrutiny, elections as a means of holding government accountable are rendered meaningless. In many of its actions since taking office, the Bush Administration has sought to shield itself from public scrutiny. While this is also true for areas unrelated to civil liberties, the secrecy that has enveloped the terror investigation is perhaps the greatest cause for concern.

The secrecy surrounding those arrested and detained by the FBI and the INS has often reached Kafkaesque proportions for detainees and their families. People were taken from their homes without warning or explanation. Loved ones were not told where the individuals were being taken, or why. For many hundreds or perhaps thousands of persons rounded up in this manner and detained, no charges or explanations for their detention were given either publicly or in private. In some cases, no explanation was ever given during their months-long incarceration. The conditions under which the detainees were held also worked to prevent family members, lawyers, and human rights workers from obtaining information about them and offering assistance. Many of those detained were held in solitary confinement, and were completely denied the means to contact the outside world.⁹ Family members and attorneys for the detainees were denied access to them and information as to their whereabouts for months. There were numerous reports of individuals spending weeks making the rounds of the four main jails in the New York region where detainees were being held, asking each time whether their loved ones were being held, only to be turned away. For example, Amnesty International reports that a Pakistani woman was repeatedly told that her husband and brother were not being held in the Metropolitan Detention Center in Brooklyn, even though she could produce letters posted by them

from within the facility.¹⁰ As a result of being held incommunicado, many detainees were denied access to legal representation, sometimes for the entire time they were held.

This cloak of secrecy received its first official imprimatur when Chief Immigration Judge Michael Creppy issued a memorandum to all immigration judges and court administrators on September 21st, 2001. In the memorandum, Judge Creppy instructed all immigration courts to close the immigration hearings of a broad class of individuals designated by the Justice Department. Family members and journalists, as well as the general public, were to be barred from attendance. Cases were not to be listed on the calendar of scheduled immigration hearings, and court staff were instructed to provide no information whatsoever about such hearings, and were not to confirm even whether a hearing had been scheduled. Press requests were to be referred to the Public Affairs Office in Virginia and other requests were to be made in writing and submitted under the Freedom of Information Act ("FOIA"), a process that frequently takes months. All cases were to be given a special code that would ensure that no information could be accessed through the INS's toll-free number used by attorneys to follow their clients' cases through the court system.

The restriction of public access to hearings violates long-standing judicial procedure that dates back to the founding of the American Republic. Since the immigration court system was established some 50 years ago, there has been a presumption that its proceedings would be open to the public. In limited instances, where sensitive information has been presented, judges have been permitted to hold individual hearings, or portions of hearings, behind closed doors. These closures have been undertaken at the discretion of the individual judge, however, and were based upon the specific facts of each case. A blanket policy covering an entire class of cases abandons this longstanding policy by eliminating judicial discretion and case-by-case consideration. In addition, the secrecy policy in these cases not only limits what the public and the press is permitted to know, but also strains the information provided to judges regarding the reasons that a closed hearing has been requested by the Justice Department.

In October of 2001, a demand was made by a coalition of 19 civil liberties, human rights, public policy, and immigrants' groups to Attorney General John Ashcroft under the Freedom of Information Act asking how many people had been detained, the nationality and/or ethnicity of these people, the basis upon which people have been detained - whether they include immigration violations, criminal charges, material witness needs, possible terrorism charges, or other grounds - the basis for the government's request to hold secret proceedings and to place attorneys under gag orders, the facts regarding access to counsel for the detainees, and the number of cases in which the government is relying on secret evidence. After the Justice Department's refusal to disclose its criteria for holding closed hearings, its refusal to disclose the number of closed hearings held to date, and its decision to no longer release tallies of the number of detainees being held, the coalition filed a lawsuit on December 5th to enforce the federal public disclosure law.

On January 11, 2002, the government released a small amount of information, with the explanation that divulging anything more would jeopardize the investigation by enabling terrorist groups to glean information on how the investigation was proceeding.

On August 2, 2002, a federal court ordered the Justice Department to release the identities of all those detained. Judge Gladys Kessler noted that the government had made no statement whatsoever that any of the detainees had any connections to terrorism, and stated that "[t]he government has provided no information on the standard used to arrest and detain individuals initially."¹¹ By ordering the release of the names of those detained, Judge Kessler's ruling accepted the plaintiffs' argument that the government had acted in violation of the Freedom of Information Act, and repudiated the government's suggestion that this kind of secrecy is necessary for an effective investigation. The ruling stands for the principle that secret detentions

are not permissible in the United States. The tone of the response of the Justice Department was defiant, replete with statements that such rulings only impede the effort to stop terrorism.

On August 26, 2002, a federal appeals ruled that the Creppy memo was unconstitutional, stating that "democracies die behind closed doors. . . . When the government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."¹²

III. Governing above the Law: The Erosion of the Bill of Rights

Beyond the Bush Administration's arrogation of new and expansive powers to the Executive Branch, and beyond even its insistence on a new standard of secrecy in government, perhaps most disturbing is the Administration's willingness to cast aside the protections afforded by the Bill of Rights.

The rights to freedom of speech and assembly, to petition government for redress of grievances, and to freedom of religion guaranteed by the First Amendment are integral to our democratic society. Equally important are those rights guaranteed by the Fourth, Fifth, and Sixth Amendments that protect us against unreasonable searches and seizures, arbitrary detention, and unfair trials. When these rights are systematically violated, and the violations are not addressed, the basic structure of the relationship between government and the people is gravely endangered. When such infringements are codified into law, as many have been in the past year, the danger increases exponentially.

Our concerns are two-fold. First, in the past twelve months, there have been widespread abuses of the rights conferred by the Constitution. These abuses have targeted mainly non-citizens, but as the cases of citizens Jose Padilla and Yaser Esam Hamdi indicate, there is no reason to think that the threat is in any way confined to those who lack American citizenship. Second, and perhaps of greater concern than specific abuses, are the ways in which civil liberties have been eroded by the introduction of sweeping new laws, and by the codification of abusive practices through executive order and interim rules.

The First Amendment

The First Amendment protects our rights of free speech and assembly, the independence of the press,¹³ and prohibits official establishment or denigration of any particular religion. Free speech rights can be construed as having two facets, the right to have unfettered access to ideas, and the right to express ideas freely. The right to peaceable assembly is inextricable from the right to free speech given that demonstrations and other political activity are protected as expressive conduct. While government actions threaten all these rights conferred by the First Amendment, it is our free speech and assembly rights which are most at risk.

The USA PATRIOT Act contains provisions that will chill or even criminalize people's legitimate expressions of their political views. For example, the Act creates a new category of crime, domestic terrorism, which blurs the line between speech and criminal activity. Section 802 of the Act defines domestic terrorism as "acts dangerous to human life that are a violation of criminal laws" that "appear to be intended to influence the policy of a government by intimidation or coercion." This definition is so vague that acts of civil disobedience may be construed to violate the law. Civil disobedience typically seeks to influence government policy, and therefore may be construed as an attempt to coerce that change. Furthermore, the portion of the definition stating that acts must be "dangerous to human life" is extremely broad: it does not distinguish between intentional acts and those that might cause inadvertent harm. Thus, a spontaneous demonstration that blocks the path of an ambulance might invite charges of domestic terrorism under the new law. Such a broad definition invites abuse, in which the distant possibility of danger creates a pretext under which political activists can be arrested and charged with felony domestic terrorism, rather than the misdemeanor charges that they typically incur. This new crime will

inhibit free speech regardless of whether it is enforced because it creates the fear of a disproportionate response to legitimate political expression.

Section 411 of the USA PATRIOT Act also threatens First Amendment rights both by punishing expression and limiting our access to ideas. Section 411 expands the types of association with terrorist activity that are considered deportable offenses in ways that curtail the free speech rights of many immigrants. It amends the Immigration and Nationality Act to expand the definition of "engage in terrorist activity" to include soliciting funds, membership or other material support to designated terrorist organizations, even when those organizations also engage in lawful political and humanitarian ends, and when the activities support only those legitimate ends. It also makes the list of terrorist organizations open-ended, such that support for any organization the state department eventually certifies as terrorist - and not merely those that are already listed - is a deportable offense. Under Section 411, it is entirely possible for non-citizens to be deported for supporting an organization that they do not know is engaged in terrorist acts.¹⁴

Beyond its effect on the free speech rights of immigrants, Section 411 of the Act infringes upon the First Amendment rights of all Americans to have unfettered access to ideas. Under this provision, entry into the United States is made contingent on a political litmus test: individuals associated with groups "whose endorsement of acts of terrorist activity the Secretary of State has determined undermines the United States' efforts to reduce or eliminate terrorist activity" will be denied entry. This restriction is similar to that used in the McCarran-Walter Act - the law which denied entry into the country to any foreign national associated with a communist party or movement. Many prominent scholars and intellectuals were banned from this country because of their perceived association with communism, raising widespread concerns about the ways in which the Act inhibited the flow of information within the United States. It is highly likely that similar cases will occur under Section 411, diluting debate and the free exchange of ideas within our borders, and limiting many opportunities to engage with the peoples of the world.

If these sections of the USA PATRIOT Act raise concerns about the future of free expression in this country, these concerns are far from allayed by the actions of the Justice Department. Beginning immediately after September 11th, reports surfaced of FBI agents questioning citizens about their political views and activities. In one incident in October of 2001, a retired man in San Francisco was questioned extensively about his politics after he voiced doubts about the war in Afghanistan in his health club. Three days later, a college student in North Carolina was interviewed after the FBI received reports that she was displaying an "un-American poster."¹⁵ Agents performed an extensive background check, and questioned her about her mother, who is in the armed forces, and about her opinions about the Taliban.

Such incidents cast a disturbing light on new guidelines that relax restrictions on FBI infiltration and surveillance of political and religious groups. These restrictions were put in place to curb the abuses of the notorious "COINTELPRO" effort of the 1960s and 70s that harmed many political activists and widely undermined public trust in government. While the new rules place some checks on agents, they nonetheless threaten First Amendment rights. The rules allow agents to investigate political groups for any endorsement of violence, even where no imminent threat has been exists. This flies in the face of *Brandenburg v. Ohio*, a 1969 Supreme Court case that found that the advocacy of non-imminent violence is protected speech.¹⁶ Furthermore, once a group has been approved for investigation, there is nothing in the guidelines to prevent the FBI from monitoring the group's legitimate, First Amendment-protected activities such as demonstrations, writings, and information such as membership data and financial transactions. Such unfettered access invites harassment.

The new definition of crime of domestic terrorism could open the doors to a federal investigation with potentially devastating consequences. Together, these developments are likely to have a

chilling effect on the free association and assembly rights of a wide range of dissident groups. The consequences of this suppression of First Amendment rights are not confined to the damage done to individuals. By undermining the ability of Americans to hear unpopular opinions, and by permitting the unfettered monitoring of individuals on the basis of their political affiliation, these policies threaten to choke off currents of thought and expression that often lead to greater justice for all. As one author writes:

What chance would the civil rights movement have stood of bringing about an end to de jure racial segregation in the 1950s and 1960s if it had been operating under today's rules of surveillance? Rosa Parks, Martin Luther King, Jr., Fred Shuttlesworth, and the activists who stood beside them could have been charged with the crime of domestic terrorism for their acts of nonviolent civil disobedience. Their every move, their political activities, their personal relationships, their financial transactions, and their private records could have been monitored and recorded. And [referring to provisions allowing for cooperation with local law enforcement] their dossiers could have been indexed in a law enforcement database and shared instantaneously with local police departments throughout the Deep South.¹⁷

The Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures, and requires law enforcement officers to obtain a warrant from a judge certifying that there is probable cause to believe that criminal activity has taken place before for any search. Because government investigations can have a chilling effect on speech, Fourth Amendment rights have been closely linked to those protected by the First Amendment.¹⁸ In addition, the Fourth Amendment ensures that law enforcement agencies and officers do not act maliciously or conduct investigations where no credible evidence of wrongdoing exists.

Soon after September 11th, an undated letter from Assistant Attorney General Daniel Bryant indicated a growing hostility to Fourth Amendment protections in the Bush Administration, writing that:

The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others. Here, for Fourth Amendment Purposes, the right to self-defense is not that of an individual and its citizens.... If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.¹⁹

This disdain for Fourth Amendment protections was played out when hundreds of immigrants were detained without criminal charges, long beyond the point at which tourist and student visa violations provided legal grounds for holding them in custody. If detainees were and are being held pursuant to a criminal investigation, the Fourth Amendment requires the government to formally charge them with a crime, and provide a court hearing within 48 hours to determine whether there is probable cause to justify their detention. By refusing to take these actions, the government has violated the rights of hundreds of those detained in the course of their investigation.

Equally disturbing are the provisions of the USA PATRIOT Act that greatly weaken the requirement that investigators show probable cause for many types of searches. Prior laws governing electronic communications provided for a lower standard than probable cause to put a trace on telephone calls, allowing investigators to determine who a suspect is calling, but not to monitor the conversations themselves. Under the Act, the same standard is applied to email communications - investigators are allowed to access "dialing, routing and signaling information" without a showing of probable cause. However, routing information on email cannot be physically separated from the content of the message. This means that FBI agents must be entrusted to examine the address information while disregarding the content of the message. Such a practice is tantamount to doing away with the probable cause requirement for reading the content of email communications.

Under the USA PATRIOT Act, the standards for wiretapping have been significantly weakened. Two other provisions of the Act allow the FBI to use concerns about foreign agents as a pretext for conducting criminal searches without probable cause, and to extend these searches, via roving wiretap, to individuals who are not the subject of a warrant. Traditionally, search warrants had to specify the place to be searched, so as to prevent arbitrary extensions of the warrant by errant officers. This limitation applied to wiretaps too, until 1986, when Congress authorized the use of roving taps to track particular suspects as they moved. Under a 1998 amendment, roving wiretaps on a particular telephone may only be monitored when the suspect is actually using that phone. Under Section 206 of the Act, however, the use of roving wiretaps has been extended, but the requirement of actual use is omitted. In addition, under the Foreign Intelligence Surveillance Act of 1978, wiretapping related to the domestic activities of hostile foreign groups was allowed, but only when gathering intelligence was the sole purpose of the surveillance. Information could not be gathered for criminal investigations. Under Section 218 of the USA PATRIOT Act, this restriction has been weakened - foreign intelligence gathering need only be a "significant purpose," of an investigation that may be primarily criminal in nature. Together, these provisions permit law enforcement agents to do exactly what two Courts of Appeal have prohibited. Both the Fourth and the Ninth Circuit Courts of Appeal have held that the Foreign Intelligence Surveillance Act "is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches."²⁰

The Fifth Amendment

The Fifth Amendment protects residents of the United States from criminal punishment without basic protections, such as a thorough explanation of the charges, the right to be free from self-incrimination, and the right to be free from the imposition of multiple punishments for the same crime. The Due Process Clause of the Fifth Amendment is in many ways the heart of the rights guaranteed by the Constitution - stating that defendants must be afforded "due process of law" -- the Clause has been interpreted and applied in great detail by court rulings. In particular, in conjunction with the Fourteenth Amendment, the Due Process Clause requires that all residents of the U.S. be accorded equal protection under the law and thus prohibits discrimination on the basis of race, ethnicity, or religion.

Several provisions of the USA PATRIOT Act substantially erode due process rights as they apply to non-citizens. Section 412 specifies that the Attorney General has the power to detain non-citizens who are under suspicion of terrorist activity. Such detentions are allowed on a finding that there is "reasonable grounds to believe" that the individual is a terrorist.²¹ Reasonable suspicion of criminal activity allows a police officer to make no more than a brief investigatory stop. Under Section 412, the Attorney General's statement permits the arrest and detention of a suspect for up to seven days.²² The Attorney General is not required to share the evidence on which detention is based with the detainee and as a result the detainee is not in a position to dispute that evidence.

The President's Executive Order establishing military tribunals also raises serious due process concerns. The Fifth Amendment guarantee against compelled self-incrimination is not available to those charged under the Order, raising the possibility of coercive psychological and physical tactics being used to extract confessions regardless of their truth. The Fifth Amendment's due process guarantees suffer additional blows under the Order through the structure and staffing of the military tribunals. While in a traditional criminal trial the judge is entirely independent of the prosecutor and sits by virtue of an appointment from the judicial branch as opposed to the Executive branch, *all* of the key roles in the military tribunal process are to be filled by military officers acting upon designation by the President. The evidence will be presented by military

officers acting as prosecutors, and will be weighed by military officers acting as judges, all of whom report through the chain of command to the President in his role as Commander-in-Chief. Even "detailed" defense counsel - the attorney who will work under the guidance of the Chief Defense Counsel - will be military officers. Although the Rules for Military Tribunals would permit the accused to retain his own civilian attorney, that attorney must first be found eligible for access to information classified as SECRET under Defense Department guidelines. Even then, the privately-retained civilian attorney is merely *permitted* to participate in the accused's defense; the appointed military defense counsel remain in charge of the defense and may not be dismissed by the accused. In addition, the Rules state that civilian defense counsel - even if he or she has SECRET level clearance - will not be permitted to be present during any portion of the tribunal proceeding that is ordered closed by the Presiding Officer or the President. In this manner, the military tribunals-staffed and controlled by military officers who work directly at the behest of the President-abandon and offend the Constitution's due process guarantee of an independent judiciary.

In its roundup and detention of hundreds or perhaps thousands of Arab and Muslim immigrants, the government violated due process and equal protection rights on a grand scale. More than 1,000 people were detained in the investigation, and most were held without criminal charges or adequate grounds under immigration law. In specific terms, the detentions violate due process and equal protection rights in the following ways:

I. Detainees were held without being notified of the reason for their detention. Of 718 cases the government has disclosed, 317 were brought before a judge more than the mandated limit of 48 hours after arrest. Thirty-six individuals were provided hearings more than 27 days after arrest, 13 after more than 40 days, and 9 after 50 days. In at least one case, a detainee did not see a judge until 119 days after being taken into custody.

II. Many detainees were held on minor immigration charges. In most cases, these violations did not warrant incarceration, and in any case, they provide grounds for detention only until an order of deportation has been issued. Numerous detainees were held for weeks or months past the issuance of a deportation order and scheduled deportation dates in violation of due process requirements.

III. Detainees were sometimes subjected to coercive and involuntary interrogations, and many were not advised of their right to retain an attorney. These interrogations were presumably meant to extract confessions or other incriminating evidence, but the due process clause prohibits forced interrogation.

IV. All detainees had their personal property confiscated upon detention, and there were numerous instances in which key identification papers, money, clothing, and jewelry were not returned upon their release. This amounts to a seizure of private property by the state. Such a seizure without either legal grounds or judicially mandated compensation violates the Fifth Amendment.

V. There is considerable evidence that detainees have been singled out on the basis of their racial and ethnic backgrounds and religious convictions, rather than any specific evidence of wrongdoing. Further, measures taken against them were often out of proportion compared to the standard course of action - many were held for tourist visa violations, for example, that normally would result in an individual's release on bond. Their detention violates the equal protection guarantee implicit in the due process clause.

These Fifth Amendment concerns focus most specifically on non-citizens. But due process rights are explicitly granted without regard to citizenship or immigration status. In 1896, the Supreme Court ruled in *Wong v. United States* that immigrants as well as citizens enjoy rights guaranteed by the U.S. Constitution. This principle was reaffirmed again in 2001, when the Court ruled in

Zadvydas v. Davis that the due process clause applies to all persons within the boundaries of the United States, including deportable aliens. The abuses described above cannot be explained away by the immigration status of the detainees; in its dragnet approach, and its disregard for the fundamentals of criminal procedure, the government has seriously infringed upon the guarantee of due process under the law.

The Sixth Amendment

The Sixth Amendment ensures the unbiased and timely completion of criminal proceedings, mandating among other things, a clear specification of the criminal charges being alleged, the opportunity to refute evidence, an expeditious trial, and legal representation for the defendant. Immigration proceedings do not offer the same guarantees: for example, an immigration detainee has the right to an attorney, but not to one appointed by the state.

All of the individuals held on immigration charges were kept in custody until they had been cleared of any criminal suspicion, turning the presumption innocent until proven guilty on its head. Furthermore, the immigration detainees who attempted to seek legal assistance were thwarted in their efforts by excessive restrictions on prison telephone usage, and by the fact that the lists of legal services providers made available by the prisons was often hopelessly out of date. Meanwhile, attorneys seeking to work with detainees were routinely turned away. For many detainees, access to an attorney was hindered in these ways for weeks or even months.

Even more disturbing are reports that detainees have been actively prevented from obtaining legal assistance. According to a report released by Amnesty International, some detainees who requested an attorney were turned down by prison officials.²³ In many cases, immigration detainees were interrogated by the FBI, triggering their Sixth Amendment rights to court-appointed counsel. These detainees were not informed of their rights in this respect, and representation was not provided.

The most serious and well-known threat to Sixth Amendment rights arise from the interim regulation issued by the Attorney General on October 31, 2001 discussed above. The regulation allows agents to monitor conversations between attorneys and prisoners, contravening the venerable principle of attorney-client privilege, wherever "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism."²⁴ Both attorney and client must be notified unless a court order has been obtained. The regulation stipulates that privileged discussions will not be disclosed. This regulation is troubling in several respects. First, although such surveillance has been allowed in the past under limited circumstances, the approval of a judge has always been required. Under the new rule, the Attorney General has the power to approve such requests, even though the office of the Attorney General also oversees the criminal investigations that presumably would not have access to the information collected. Likewise, though it is not specified, it is likely that the "privilege team" responsible for determining what communications are protected will also be Justice Department employees, creating the possibility of collusion between those investigating the case for criminal purposes and those monitoring to guard against future terrorist acts.

These aspects of the rule invite abuse. Even if the potential for abuse is not exploited, the rule will likely have a chilling effect on attorney-client communications. Because a court order would allow agents to monitor conversations without the knowledge of either party, neither attorney nor client can ever be sure that their conversations are not being heard. Loose definitions in the text of the regulation heighten such concerns - it is up to agents' supervisors to determine, e.g., what counts as an "imminent act of violence," or what communications "are not related to the seeking or providing of legal advice" and hence may be disclosed to other parties. Under these provisions, a broad category of suspects may have legitimate cause to worry that their conversations will be

monitored, even though no substantive connection exists between their cases and any terrorist plot.²⁵ With no way to determine for sure whether they are under surveillance or not, even innocent clients in detention may be afraid to disclose facts of their case to their attorney.

The interim rule is likely to inhibit detainees from talking freely with their attorneys, and recent events in conjunction with the rule have given attorneys pause before representing such clients at all. On April 9, 2002, Attorney General John Ashcroft announced the indictment of criminal defense attorney Lynne Stewart on charges that she provided material support to a foreign terrorist organization. The accusation - which Stewart unequivocally denies - was based on information gleaned by listening into conversations between the attorney and her client, Sheikh Omar Abel Rahman, a jailed Muslim cleric with ties to Egyptian terrorists. The surveillance was authorized under the Foreign Intelligence Surveillance Act discussed above; future monitoring in her case, however, will be done pursuant to the interim rule.

Without a meaningful guarantee of appropriate attorney-client privilege, the Sixth Amendment right to assistance of counsel is rendered meaningless. By implementing vague guidelines protecting privileged information from disclosure to criminal investigators, and by failing to include any provision for independent oversight, the interim rule raises the possibility that discussions between the client and his attorney may end up in the hands of prosecutors. Because no detainee can be sure that agents are not monitoring their conversations, it is likely that many will shy away from full and honest discussions with their attorneys. In this way, the rule undermines the right to a fair trial and a vigorous defense.

IV. Governing In A Vacuum

Although the United States has an obligation and right to arrest and try the perpetrators of the horrendous crimes of September 11, it must do so in compliance with fundamental principles of national, human rights and humanitarian law. It has not done so. The United States' failure to abide by these fundamental principles sets a precedent for the actions of other states, states that will see U.S. actions as supporting their own violations of international law and human dignity.

Thousands of prisoners were captured by U.S. and Northern Alliance forces in Afghanistan last Fall. On January 11, 2002, the United States military began transporting these prisoners to Camp X-Ray at the U.S. Naval Station in Guantanamo Bay, Cuba. It was reported that the transferred prisoners could face trials by military commission under the Military Order and possibly the death penalty.²⁶ Since that time, there have been allegations of ill-treatment of the prisoners in transit and at Guantanamo, including reports that they were shackled, hooded and sedated during the 25-hour flight from Afghanistan, that their beards and heads were forcibly shaved, and that upon arrival at Guantanamo they were housed in small cells that fail to protect against the elements.²⁷ A number of international bodies including the European Union, the International Committee of the Red Cross ("ICRC") and a number of foreign governments have expressed grave concerns over the treatment of the detainees, their confinement conditions and the refusal of the United States to afford them status under the Geneva Conventions.²⁸

On January 16, 2002, the United Nations High Commissioner for Human Rights issued a statement regarding the Guantanamo detentions, noting that:

"All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the Geneva Conventions of 1949.

The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention.

All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention.

Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention."²⁹

It is the official position of the United States' government that none of the detainees are POWs. Instead, officials have repeatedly described the prisoners as "unlawful combatants" who are not subject to the Geneva Conventions.³⁰ The Government has stated that the Taliban prisoners did not meet the criteria for POWs set forth in the Conventions and that they were therefore not entitled to the protections of the Conventions.³¹ This determination was made without the convening of a competent tribunal required by Article 5 of the Third Geneva Convention.³²

Although the ICRC rarely acknowledges publicly differences with governments, it did so with regard to the United States' refusal to treat the Taliban and al Quida detainees as POWs. On February 8, the day after announcement of the United States' position, Darcy Christen, a spokesperson for the ICRC, said of the detainees: "They were captured in combat [and] we consider them prisoners of war."³³ The ICRC emphasized that it was up to a court to decide if a detainee was not a POW:

You cannot simply...decide what applies to one person and what applies to another. This has to go to a court because it is a legal decision not a political one.³⁴

In its Press Release of February 9, the ICRC again stated that captured "members of armed forces and militias associated to them" are protected by Geneva III and that there "are divergent views between the United States and the ICRC" as to the procedures "on how to determine that the persons detained are not entitled to prisoner of war status."³⁵

Interrogation of the Guantanamo prisoners began on January 23, 2002. No detainees were allowed to have lawyers present during questioning by officers from several United States' civilian and military agencies.³⁶ The U.S. military has reportedly built several windowless plywood structures on the outskirts of the detention center for the purpose of obtaining information from the detainees held there.³⁷

There are presently 598 prisoners held incommunicado at Guantanamo and the government has said that it will build facilities for holding up to 2000 persons. There are no indications that the detainees have been informed of their rights under the Geneva Conventions, the ICCPR, the American Declaration on the Rights and Duties of Man ("ADRDM"), the Vienna Convention on Consular Relations, or any other international instrument which safeguards the fundamental human rights of detainees.³⁸ As a result, prisoners at Camp X-Ray are completely unable either to protect or to vindicate violations of their fundamental rights under domestic and international law.

In published statements, both the Secretary of Defense and other officials recently indicated the United States may hold the detainees under these conditions indefinitely.

The United States has repeatedly refused the entreaties of the international community to treat the detainees under the procedures established under the Geneva Conventions. The Third Geneva Convention applies to the treatment and legal status of POWs. The convention requires that persons captured during an international armed conflict are presumed to be POWs until a competent tribunal determines otherwise.³⁹ Instead of following these procedures, which require individual determinations as to whether or not a combatant is a POW, the United States has simply decided en masse that none of the Taliban or Al Qaeda detainees is a POW. This non-individualized determination made by United States' officials is contrary to the procedures established by the clear commands of the Third Geneva Convention.

As a result, none of the detainees are receiving the protections afforded POWs - protections to which they are entitled— until the United States convenes a competent tribunal to determine their status. These include a prisoner's right under Articles 70 and 71 of the Third Geneva Convention to write directly to his family "informing his relatives of his capture, address and state of health" and to send and receive correspondence. POWs are also entitled to treatment and housing similar to that of U.S. soldiers, issuance of identity cards, protection from interrogation camps (which is what Guantanamo appears to be) and the use of coercion during interrogation. A POW also has the right to engage in hostilities without criminal penalty and valuable procedural protections in any prosecution for war crimes-- protections equivalent to those given to a U.S. soldier during a court-martial.⁴⁰ As military commissions cannot try U.S. soldiers, neither can they try the detainees at Guantanamo.

Human Rights Violations Relating To the Arbitrary, Incommunicado, and Prolonged Detention of the Guantanamo Prisoners

The United States' treatment of the Guantanamo detainees violates norms of international humanitarian law relating to the treatment of individuals detained during times of international armed conflict. United States' actions violate international human rights norms as well. It is a widely accepted principle of international law that the application of international humanitarian law does not "exclude or displace" the application of international human rights law, since both share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity."⁴¹

The United States' treatment of the Guantanamo detainees violates virtually every human rights norm relating to preventive detention. The United States has denied the detainees access to counsel, consular representatives, and family members, has failed to notify them of the charges they are facing, has refused to allow for judicial review of the detentions, and has expressed its intent to hold the detainees indefinitely. Meanwhile, the United States has continued to interrogate the prisoners.

Violations Relating to Trial Before Military Commissions

Through the establishment of the Military Tribunal system by Executive Order, the United States has indicated its intention to subject certain detainees to trial before military commissions, in which they could face the death penalty. These tribunals or commissions could begin processing cases at any time. Meanwhile, the detainees have been given no facilities to begin preparing their defense, and no court has reviewed the validity of their prolonged detention.

The military commissions established by the Order fail to provide minimal guarantees of due process. Instead, the commissions are designed to ensure swift convictions and possible death sentences based on secret evidence. Only the executive branch of the United States' government would review the convictions and death sentences, with no right to judicial review, and no right to appeal. In short, trials before military commissions would be skewed in favor of the government, would fail to provide adequate due process protections.

On February 25, 2002, the Center filed a petition with the Inter-American Commission for Human Rights seeking the Commission's intervention and requesting the issuance of Precautionary Measures to protect the rights of persons detained at Guantanamo, including their right to an independent determination as to their legal status and their right to be free from trial before commissions that fail to afford defendants fundamental due process rights.

On March 13, 2002, the Inter-American Commission on Human Rights granted the Center's request in part and requested that the U.S. Government convene competent tribunals to determine the detainees' legal status. The Commission found that as matters stood, those persons detained were held at the "wholly unfettered discretion of the U.S. government." To date, the government has failed to comply with the Commission's request, claiming the Commission neither had jurisdiction over the situation nor the authority to act as it did.

5. Conclusion

The Bush Administration's war against terrorism, without boundary or clear end-point, has led to serious abrogation of the rights of the people and the obligations of the federal government. Abuses, of Fourth and Fifth Amendment rights in particular, have been rampant, but more

disturbing is the attempt to codify into law practices that erode privacy, free speech, and the separation of powers that is the hallmark of our democracy. Particularly dismaying are two trends on display in government actions. In its conduct of the terrorism investigation, the government has disregarded its responsibility to maintaining a democratic society. Encroachments on the separation of powers threaten the return of authoritarian rule, inasmuch as that division of authority was set to make sure that no one in government holds a disproportionate amount of power. Short of this, they undermine the oversight provided by the legislative and judicial branches over executive authority, and invite abuses by an unchecked government. Further, by seeking to hide its actions under the mantle of national security, the Administration weakens the accountability of government to the people, inasmuch as an informed public is essential to an effective democratic system. Finally, it is abridgment of First Amendment rights, the government - Congress as well as the President - threatens to choke off legitimate expressions of dissenting political viewpoints, undermining the free flow of ideas that is the hallmark of thriving democratic debate. At the same time, government actions also undercut its obligations to maintain the rights that make our society free. New legislation, hard-line regulations in the Justice Department, and the impunity with which the Administration has abused the rights of detainees all pose a threat. The free speech and assembly rights as well as the freedom of the press guaranteed by the First Amendment have variously been compromised by government actions, hampering the flow of ideas, and creating possible penalties for their expression. The rights conferred by the Fourth, Fifth and Sixth Amendments guarantee against arbitrary and malicious persecution of individuals by the state; by weakening those protections, the government has opened the doors to new encroachments on the liberties that all residents of the United States rightfully enjoy.

Endnotes

1. While many of the detainees have been Muslim, it should be noted, some were not, so while it may be said that the government *sought* to discriminate on the basis of religion, the effort was not entirely successful. In the days immediately after September 11th, there were many reports of members of the Sikh faith being singled out for questioning. Further, at least one Hindu man was subject to indefinite detention; he is now a plaintiff in the Center's suit *Turkmen et al. v. Ashcroft et al.*
2. See, e.g., *United States v. United States District Court*, a Supreme Court ruling rejecting an argument by the Nixon Administration to the effect that the President has the inherent authority to suspend articles of the Constitution in times of emergency.
3. See www.whitehouse.gov/news/orders.
4. Cf. "Executive Branch Actions," A White Paper by the American Immigration Lawyers Association, 8/15/02.
5. *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491 (2001).
6. See discussion of the "Creppy Memo," below.
7. See "ACLU Decries Ashcroft Scheme to Gut immigration Courts," press release, American Civil Liberties Union, (March 20, 2002).
8. "Immigration Judges seek independence from Justice Department," *Los Angeles Times*, 1/31/02

9. Similarly, within days of the attacks on September 11th, the Federal Bureau of Prisons pursuant to a directive issued by the Department of Justice, commenced the 24-hour lockdown of political prisoners incarcerated in federal facilities. This lockdown was unannounced and unexpected. The lockdown order resulted in the placement of prisoners in administrative segregation, with no provision for contact with family, friends or counsel, no exercise, and no avenue for filing a grievance about the punishment.
10. "Al's Concerns Regarding Post September 11 Detentions in the USA," Amnesty International, March 2002, pp. 6-7, fn.
11. *Center for National Security Studies v. United States Department of Justice*, No. Civ. A 01-2500 (GK) (Aug. 15, 2002).
12. Al's Concerns Regarding Post September 11 Detentions in the USA," Amnesty International, March 2002, pp. 6-7, fn.
13. The Creppy memo discussed above, by excluding journalists from public proceedings, violates the free press guarantees of the First Amendment (as well as the due process rights of accused immigration violators under the Fifth Amendment). Courts in Michigan and New Jersey have ruled that the closures are unconstitutional on this basis, and on August 26th, a federal appeals court upheld the Michigan ruling. See *Detroit Free Press v. Ashcroft*, Case No. 02-1437 (6th Cir., August 26, 2002); *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002).
14. Section 411 also stretches the definition of terrorism past its natural breaking point. Under that section, a terrorist act is one committed with a "weapon or dangerous device (other than for mere monetary gain)." Conceivably, this would make ordinary crimes committed by non-citizens terrorist acts, provided money is not the motive.
15. The poster concerned the application of the death penalty in Texas under then-Governor George Bush.
16. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
17. Nancy Chang, *Silencing Political Dissent: How Post September 11 Anti-Terrorism Measures Threaten Our Civil Liberties*, Seven Stories Press, 2002, pp. 123-24.
18. *United States v. United States District Court for the Eastern District of Michigan*, 313 U.S. 297 (1972).
19. Undated letter to Sens. Bob Graham, Orrin Hatch, Patrick Leahy and Richard Shelby, p. 9. Letter on file with CCR.
20. This threat to Fourth Amendment rights was dealt a serious setback in May 2002, when the Foreign Intelligence Surveillance Court, empowered to authorize foreign intelligence wiretaps, rejected a Justice Department request for broader powers to share information gathered by counterintelligence agents with criminal investigators. The opinion, which noted numerous instances where it was misled by the FBI under the Clinton investigation, found that the powers sought defied the intent of Congress when it passed the Foreign Intelligence Surveillance Act, and were not "reasonably designed" to protect the privacy rights guaranteed by the Fourth Amendment.
21. Note, too, that this finding need only be made by the Attorney General, not an independent judge, as required for a normal arrest.
22. Most detainees have been held for significantly longer, and it is unclear whether the Justice Department is applying Section 412 to its investigation.

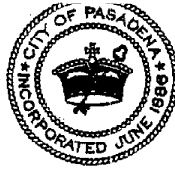
23. Ibid, p. 16
24. "Special Administrative Measure for the Prevention of Acts of Violence or Terrorism," 66 Fed. Reg. 55062.
25. Note that this rule applies to all prisoners, including pretrial detainees, immigration cases and material witnesses, and not just criminal convicts whose rights are curtailed under the Constitution.
26. See e.g., Richard Sisk, *Airport Gun Battle Firefight Erupts As Prisoners Are Flown To Cuba*, New York Daily News, Friday, January 11, 2002 at 27.
27. See e.g., Amnesty International, USA: *AI calls on the USA to end legal limbo of Guantanamo prisoners*, AI Index: AMR 51/009/2002, issued 15/01/2002, at <http://web.amnesty.org/ai.nsf/Index/AMR510092002>. The detainees have been confined in makeshift eight-by-eight foot cells made of chain link fence, with corrugated metal roofs and concrete slab floors. The open-air cages are surrounded by razor wire and guard towers; prisoners have reportedly been provided with thin foam mattresses and rations in plastic bags. Tony Winton, *Guantanamo Gets Ready to House War Prisoners; Site Once Held Boat People*, The Record, Thursday, January 10, 2002 at A13. See also: BBC, *Inside Camp X-Ray*, available at http://news.bbc.co.uk/1/hi/english/static/in_depth/americas/2002/inside_camp_xray/default.stm.
28. Lynne Sladky, *More Scrutiny on Suspects' Treatment*, Associated Press, Tuesday January 22, http://dailynews.yahoo.com/h/ap/20020122/wl/guantanamo_prison_38.html.
29. *Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba*, 16 January 2002, at: <http://www.unhchr.ch/hurricane/hurricane.nsf/newsroom>.
30. *Davis Bloom and Soledad O'Brien, Former Defense Secretary William Cohen Discusses the Status of Prisoners Held by US in Guantanamo Bay and Afghanistan*, NBC News, Saturday, January 12, 2002.
31. See: <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.
32. Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949 (ratified by the United States without reservation on 2 August 1955) (Geneva III), Article 5.
33. Richard Waddington, *Guantanamo Inmates Are POWs Despite Bush View - ICRC*, Reuters, February 9, 2002.
34. Id.
35. ICRC, Communication to the press No. 02/11, February 9, 2002.
36. Jane Sutton, *Prisoners at Guantanamo Bay Face First Questioning*, Reuters, Wednesday January 23, at http://dailynews.yahoo.com/h/nm/20020123/ts/attack_guantanamo_dc_27.html.
37. Reuters, *'Good Cop, Bad Cop Gets Al Qaeda to Talk*, Friday February 1, at: http://story.news.yahoo.com/news?tmpl=story&u=/nm/20020201/ts_nm/attack_interrogations_dc_1.
38. See United Nations General Assembly Resolution on the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Resolution 43/173 (9 December 1988), Principle 11; United Nations Basic Principles on the Role of

Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, (27 August to 7 September 1990), Principles 1 to 8; Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal for Rwanda and the Former Yugoslavia and Rwanda (As Amended) 29 November 1999, Rules 5, 9, 12 and 67.

39. Geneva III, Articles 4 & 5

40. Pows can be charged with war crimes committed both before and during hostilities, Art.85, but the trials of such crimes must be before the same courts employing the same procedures as those of the detaining power. Art. 102, Geneva III.

Coard et al v United States, Case 10,951, Inter-Am. C.H.R. Report No. 109/99, (1999), para.39.



weekly letter

OFFICE OF THE MAYOR

September 4, 2003

Kevin Sea
Democratic Club of Pasadena Foothills
P.O. Box 90643
Pasadena, California 91109

Dear Kevin:

Thank you very much for your letter of August 17 in which you report on recent resolutions adopted by the Democratic Club of Pasadena Foothills. Both relate to important matters, and will be considered in regard to the Council's review of the U.S. Patriot Act. Perhaps you are aware that this matter is on the agenda of one of the Council committees, Economic Development and Technology.

Thank you for your communication and your concern about this issue. I will plan to stay in touch as any developments occur at Council. I hope things are well for you, and that you have had a good summer.

Sincerely,

BILL BOGAARD
Mayor

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August 17, 2003

Hon. Bill Bogaard
Mayor, City of Pasadena
100 N. Garfield Ave. Room 237
Pasadena, CA 91109

Dear Mayor Bogaard:

At our meeting of June 19, 2003, the Democratic Club of Pasadena Foothills passed two motions regarding civil liberties that the club wishes to bring to your attention.

The first motion reads as follows:

The Democratic Club of Pasadena Foothills supports the efforts of the Civil Liberties Coalition in opposition to the portions of the USA Patriot Act and other measures that infringe on civil liberties, opposes any pending and future federal legislation that infringes on American civil rights and liberties, supports the Freedom to Read Protection Act and the Library and Bookseller Protection Act, and joins with the Civil Liberties Coalition in urging local governments to join in this effort by passing resolutions consistent with this statement.

The second motion reads:

The Democratic Club of Pasadena Foothills requests the Pasadena City Council to direct the Pasadena Police Department to monitor any federal action taken under the Patriot Act within the City of Pasadena jurisdiction.

Thanks very much for your attention to these matters and your support of civil liberties.

Sincerely,

Kevin
Kevin Sea
President
Democratic Club of Pasadena Foothills

By [illegible]

DON'T TREAD ON US THE REVOLT AGAINST THE PATRIOT ACT

In the wake of the Supreme Court's decision in *United States v. Jones*, the Justice Department is scrambling to find a way to justify the use of GPS tracking devices on vehicles. The government's argument is that the device is not a search because it is not a physical intrusion. However, the dissenting opinion in *Jones* argued that the government's use of the device is a search because it reveals the vehicle's location and movements. This decision is a significant victory for privacy advocates and a warning to the government that it cannot use technology to track citizens without oversight.

The government's attempt to justify the use of GPS tracking devices is a clear violation of the Fourth Amendment. The Supreme Court's decision in *Jones* is a landmark ruling that will have a profound impact on the government's ability to track citizens. The dissenting opinion in *Jones* is a powerful statement that the government's use of technology is a search and that it is subject to the Fourth Amendment. This decision is a victory for privacy advocates and a warning to the government that it cannot use technology to track citizens without oversight.

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CAPITAL WATCH

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