

Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of
the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives

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Introduction

"They that can give up essential liberty to obtain a little temporary safety
deserve neither liberty nor safety." - Benjamin Franklin (Inscribed on the
pedestal of the Statue of Liberty)

One day after the September 11, 2001, terrorist attacks on the United States, President George W. Bush vowed that "we will not allow this enemy to win the war by changing our way of life or restricting our freedoms." Yet within several months following the attacks, it became increasingly evident that the "War on Terrorism" was evolving into a reshaping of our national security policies and challenging the value that Americans have always placed on civil liberties. While Congress' anti-terrorism law, the so-called Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("Patriot Act") may not have been designed to restrict American citizens' civil liberties, its unintended consequences threaten the fundamental constitutional rights of people who have absolutely no involvement with terrorism.

Americans' liberties have been trammled in a variety of different ways. Under the guise of stopping terrorism, law enforcement officials and government leaders have now been given the right to conduct searches of homes and offices without prior notice, use roving wiretaps to listen in on telephone conversations, and monitor computers and e-mail messages, even to the degree of eavesdropping on attorney/client conversations. In addition, the President has made efforts to bring suspected terrorists into military tribunals for prosecution. Finally, a growing sentiment for the establishment of a national identification card system in the United States has emerged, threatening to force all citizens to be "tagged."

For the sake of greater security in this post-September 11th climate, many Americans have expressed the willingness to relinquish some of their freedoms. This readiness is somewhat understandable in light of the terrorist attacks on the World Trade Center and the Pentagon, the anthrax scare, and the resulting exhaustive coverage that the media has afforded these events. However, Americans must be mindful that while the security of husbands, wives, children, and friends may be worth some limitations placed on American freedoms, even small infringements, over time, may become major compromises that alter this country's way of life.

The clash between civil liberties and national security is not a new one, and history demonstrates that, in times of war, the courts - even the United States Supreme Court - have upheld restrictive laws that abridge rights otherwise protected by the Constitution. Unfortunately, history repeats itself. Chief Justice William H. Rehnquist has consistently recognized that times of questionable international safety may impact the American stance on its domestic freedoms. Rehnquist has written, "It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime." The United States is now at war, and the protection of civil liberties may become less of a priority.

Americans should not underestimate the impact that such reprioritizing will have in the long run. Whatever the outcome of the undeclared "War on Terrorism," Americans should not labor under the misconception that freedoms forsaken today might somehow be regained tomorrow. Unlike previous wars, this time, enemies may not reach a truce which would signal the return of civil liberties. With or without sunset clauses, there is no horizon for recapturing any freedoms relinquished today. The U.S. Constitution, if compromised now, may never again be the same. In today's world, once civil liberties are fenced, they may never be freed, becoming captive to the warden of national security.

Yet the ultimate outcome, at least for now, is perhaps less important than understanding that Americans are operating in a new paradigm. Concerns for security and freedom will always conflict to some degree. Therefore, Americans must understand that this is a new kind of "War on Terrorism," with no immediate end in sight, and that it is also a new kind of challenge to civil liberties. Thus, it is time for a fundamental rethinking of what U.S. citizens consider basic freedoms. Americans may decide that certain freedoms, especially those guaranteed in the United States Constitution, are simply too precious to sacrifice at any cost, even on the altar of security.

I. Overview: The Newly-Created Legal Framework

On September 14, 2001, in response to the September 11th attacks on the World Trade Center and the Pentagon, President George W. Bush declared a state of emergency, invoking presidential powers. The Proclamation was issued because of the terrorist attacks and the "continuing and immediate threat of future attacks on the United States." The Order provides important powers, such as the authority to summon reserve troops and marshal military units.

From the outset, the Bush Administration has chosen to view the attacks as acts of war by foreign aggressors, rather than as criminal acts that require redress by the justice system. Two weeks after the attacks, the nation's chief law enforcement officer, Attorney General John Ashcroft, submitted written testimony to the Senate Judiciary Committee on behalf of President Bush and asked Congress for broad new powers to enable the Administration to conduct its "War on Terrorism." In later testimony, Ashcroft stated that the Department of Justice's mission was redefined, placing

the defense of the nation and its citizens above all else. This historic "redefinition" of the Justice Department's mission turned the focus of federal law enforcement from apprehending and incarcerating criminals to detecting and halting terrorist activity on American soil and abroad. Ashcroft's written statement to the Senate Committee on the Judiciary emphasized that the attacks presented a new challenge for law enforcement officials, due to their occurrence on American soil, and stated that, in light of this, America cannot wait to take precautionary actions, as "we must prevent first, prosecute second."

Ashcroft reiterated to the Senate this new emphasis on "prevention" over prosecution, directing the DOJ, at the President's request, toward one single, over-arching and overriding objective: "to save innocent lives from further acts of terrorism." Ashcroft testified that the DOJ, as well as the FBI, was undergoing "a wartime reorganization" that focused its efforts on the prevention of terrorism.

Whatever practical wisdom the adoption of this martial mindset may hold for preventing similar attacks in the future, its ramifications for the civil rights of American citizens and resident non-citizens are becoming increasingly evident. Congress passed the Patriot Act in response to the Bush Administration's request for "the tools" to fight terrorism.

This Act is only the phalanx of a broad new set of operating procedures adopted by federal law enforcement agencies, procedures which demonstrate a reassessment by the Bush Administration - and perhaps the American public itself - of the political expediency of maintaining a commitment to certain established civil and constitutional rights. Some measures, such as the Patriot Act, were politically driven by both the executive and legislative branches, and were well publicized. Others have been quietly ushered in as executive orders or agency operating procedures. Regardless of the manner of execution, it is clear that all of these measures will have a significant impact on the American views of civil liberties enshrined in the Constitution and the traditional functioning of the government.

A. Centralization of Law Enforcement Powers in the Justice Department

In order to empower the Department of Justice, Congress passed the Patriot Act on October 26, 2001, and President Bush signed it into law the next day. The Act is exceedingly long and complex, comprising ten-parts and over 300 pages. Therefore, the subsequent analysis in this article will focus only on certain provisions of the Act that are particularly troubling for their potential impact on civil liberties and constitutional freedoms.

The Justice Department has warned that it will use its new authority under the Patriot Act to the maximum. Exemplifying this intent, Attorney General Ashcroft stated:

Within hours of passage of the USA PATRIOT Act, we made use of its provisions to begin enhanced information sharing between the law-enforcement and intelligence communities. We have used the provisions allowing nationwide search warrants for e-mail and subpoenas for payment information. And we have used the Act to place those who access the Internet through cable companies on the same footing as everyone else.

Ashcroft then described the Justice Department's response to the September 11th attacks as "the largest, most comprehensive criminal investigation in world history." Ashcroft reported that, as of mid-December 2001, the government was utilizing 4,000 FBI agents to investigate terrorism.

The Patriot Act's centralization of federal law enforcement authority in the Justice Department has significantly empowered this massive investigation. Section 808 of the Act reassigns the authority for investigating numerous federal crimes of violence from other federal law enforcement agencies - such as the Secret Service, the Bureau of Alcohol, Tobacco and Firearms, and the Coast Guard - to the Attorney General, thus adding to his authority for investigating "all federal crimes of terrorism." These new areas of investigation include assault against specified federal high office holders; threats of homicide, assault, intimidation, property damage, arson, or bombing; arson or bombing of federal property; conspiracy to destroy property of a foreign government; malicious mischief against United States government property; destruction of property of an energy utility; assault against presidential or White House officials; sabotage of harbor defenses; and sabotage of war industry facilities. In essence, to combat terrorism, Congress has granted the Attorney General the power to investigate not only acts of terrorism but most acts of violence against public offices and property.

Additionally, the Justice Department's new authority appears to extend beyond its traditional geographical limitation - the national borders - in two ways. First, Justice's terrorism initiatives are being conducted multilaterally. The Attorney General has said that agencies under his direction, including the FBI, are "engaged with their international counterparts" in Europe and the Middle East in investigating terrorists. Second, Justice's subject matter of investigation has been extended to cover the flow of foreigners into the United States. The Bush Administration appears determined to assign control over lawful entry into the United States, a monitoring function of the State Department, to the Justice Department. Regarding this transition, Ashcroft stated: "Working with the State Department, we have imposed new screening requirements on certain applicants for non-immigrant visas." He continued, explaining that, "at the direction of the President, we have created a Foreign Terrorist Tracking Task Force to ensure that we do everything we can to prevent terrorists from entering the country, and to locate and remove those who already have." The extent to which these executive branch powers have been consolidated in one official, the Attorney General, is unprecedented in recent history.

The Administration has made further efforts to consolidate power over the "War on Terrorism" into the Executive branch by displaying resistance to congressional

oversight of its new powers. For example, section 904 of the Patriot Act allowed the Secretary of Defense, the Attorney General, and the Director of the CIA to defer the date for submitting any required intelligence report to Congress until February 1, 2002, or until a later specified date if they certified that it would "impede the work of officers or employees who are engaged in counterterrorism activities." This provision effectively postponed the statutory obligation imposed upon these public servants to report to Congress regarding the "War on Terrorism," on foreign or domestic fronts, virtually indefinitely. Ashcroft echoed this resistance to oversight in testimony before the Senate. Although he acknowledged his obligation to report on the Administration's activities, he also stated:

Congress's power of oversight is not without limits In some areas ... I cannot and will not consult you I cannot and will not divulge the contents, the context, or even the existence of such advice to anyone - including Congress - unless the President instructs me to do so. I cannot and will not divulge information, nor do I believe that anyone here would wish me to divulge information, that will damage the national security of the United States, the safety of its citizens or our efforts to ensure the same in an ongoing investigation.

In other words, the Administration has reserved to itself the right to determine what information it will disclose to Congress in its oversight role and what information it will withhold as sensitive.

B. CIA Oversight of Domestic Intelligence Gathering

At the same time that the Bush Administration has centralized authority for international and domestic law enforcement in the Justice Department, the Administration has used the Patriot Act to transfer authority for coordinating domestic intelligence gathering from the Justice Department to the Central Intelligence Agency. The Patriot Act added a new subsection to the statute, defining the CIA Director's authority to provide that the CIA Director will have the power to set requirements and priorities in the collection of foreign intelligence information under the Foreign Intelligence Surveillance Act of 1978 and "to provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that Act is disseminated so it may be used efficiently and effectively for foreign intelligence purposes"

This coordinating role was formerly taken by the Attorney General. The Patriot Act has given the CIA the central authority to gather and use intelligence information garnered from domestic sources, including intelligence on United States citizens and residents. This authority raises an inherent conflict with another section of the statute that ostensibly limits the CIA's authority, section 403-3(d)(1), which provides that the CIA "shall have no police, subpoena, or law enforcement powers or internal security functions." By allowing the CIA to take a prominent position over the Justice Department and the FBI, this provision of the Patriot Act turns on its head existing

policy and practice that was established as a result of CIA abuses during the Cold War era, and permits the CIA to begin, once again, to spy on American citizens. Moreover, under the legislation, the federal government has reserved the specific right to monitor religious groups and charitable organizations as well, a practice that has subjected federal law enforcement authorities to considerable judicial scrutiny for its chilling effect on the right to free association and worship under the First Amendment. The Patriot Act also gives the CIA unprecedented access to a broad range of intelligence gathering powers that allow information collection and monitoring of American citizens.

C. Expanding the Scope of "Terrorism" and "Domestic Terrorism"

The Justice Department assures Americans that its new legal and investigatory authority is "carefully drawn" to target only "terrorists." At the same time that the Justice Department is ostensibly targeting only this "narrow class of individuals," it has greatly expanded that class of suspects through the Patriot Act. Section 802 of the Act amends the criminal code, 18 U.S.C. 2331, to add a new definition of "domestic terrorism" to include activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended -
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by mass destruction, assassination, or kidnapping; or
 - (iii) to effect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.

Likewise, section 808 of the Patriot Act amends 18 U.S.C. 2332b to include any such acts that result in virtually any federal crime of violence. Conceivably, these extensions of the definition of "terrorist" could bring within their sweep diverse domestic political groups, which have been accused of acts of intimidation or property damage such as Act Up, People for the Ethical Treatment of Animals (PETA), Operation Rescue, and the Vieques demonstrators.

Cognizant of these criticisms and fears, the Attorney General recently assured the Senate that the U.S. government's definition of terrorism has, since 1983, included as terrorists only "those who perpetrate premeditated, politically motivated violence against noncombatant targets." If that is true, it certainly begs the question of why the Bush Administration felt the need to redefine "terrorism" to include a wide variety of domestic criminal acts.

D. Disregard of the Constitutional Rights of Resident Non-Citizens

The Supreme Court has affirmatively held that the Fifth and Sixth Amendment rights of due process and access to a jury trial in criminal matters apply to all "persons" and those accused in criminal cases, respectively, not just to citizens. In the case of lawfully resident and temporary aliens, the Supreme Court has affirmed that where such permanent alien residents remain "physically present" in the United States, they are deemed "persons" for purposes of the Fifth Amendment, and, as such, are entitled to due process protections of life, liberty, and property. Therefore, "[a] lawful resident alien may not captiously be deprived of his constitutional rights to due process."

Furthermore, the Supreme Court has held that even the millions of undocumented aliens living inside U.S. borders are entitled to the protections of the Bill of Rights. This entitlement flows not only from the broad reach of the Fifth Amendment, but also from principles of equal protection of the law to which all those obeying such laws are entitled. The Supreme Court has stated that "the Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." For example, in *Plyler v. Doe*, the Supreme Court held that a Texas public school district's exclusion of illegal immigrants from public education denied them equal protection under the Fourteenth Amendment.

These constitutional protections also apply to the exclusion of aliens within U.S. borders. The Supreme Court has clarified the extent of constitutional protection by stating that, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Accordingly, proceedings for the expulsion of aliens must conform to fairness incorporated by due process standards.

In view of the historical extension of constitutional protections to all who reside within America's borders, the seemingly intentional disregard for the constitutional status of resident and temporary aliens displayed in the Administration's recent actions and certain provisions of the Patriot Act is alarming. Several of the more egregious examples, such as suspension of the right to a jury trial, infringements upon the right to counsel, and seizures of property without due process, are discussed below. However, the lack of concern for the rights of non-citizens runs thematically through the Administration's response to the terrorist attacks.

II. The First Amendment Rights of Free Speech and Association

Much of the legislation enacted pursuant to the government's prosecution of the "War on Terrorism" has had a deleterious effect on the sacrosanct protection of the First Amendment right to free speech. The First Amendment precludes Congress from creating laws that will abridge "the freedom of speech, or of the press; or the right of the people peaceably to assemble."

The First Amendment encompasses the right to advocate ideas, to speak freely, to associate with whomever one chooses, and to petition the government for redress of grievances. Such activities are protected against blanket prohibitions and from restrictions based upon government opposition to the content of the idea expressed, or the identity of the speaker. The First Amendment functions to protect the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." The application of the Amendment is not intended to be limited. Resident aliens and undocumented aliens with substantial ties to the United States belong to the national community and, as such, enjoy the rights afforded by the First Amendment.

The Supreme Court has repeatedly referred to a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The right to free speech serves not only to protect the rights of the speaker but also to uphold the general public's interest in having access to information within a free flowing marketplace of ideas. The Court has stressed the importance of this fact, noting the power of discussion to expose falsehoods, and stating that "those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth."

In addition, the Supreme Court has warned against the "chilling effect" of government restrictions on speech, particularly core political speech. The Court stated that "the freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

A. Prosecution Under the Sedition Act of 1918

While First Amendment rights are significant, they are not absolute and are subject to some limitations. These limitations are likely to be recognized in cases of threats to national security generally, and in the context of the "War on Terrorism" specifically. Federal prosecutors have acknowledged that they intend to prosecute certain persons suspected of terrorist activities under the Sedition Act of 1918. That Act provides:

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

Courts generally have held the law to be constitutional on its face as an appropriate exercise of authority to protect national security, though historically it has been subject

to abuse if applied broadly to otherwise protected activities, such as the right to free speech. For example, in *Skeffington v. Katzeff*, the Sedition Act was applied to determine that the Communist Party had been organized for the purpose of overthrowing the U.S. government, based in part on statements in the Communist Manifesto. Prosecutors have used such material to prosecute individuals under the Sedition Act, rendering it a particularly dangerous tool by which government authorities may chill speech that they consider to be contrary to government interests.

B. Exclusion of Non-Citizens Accused of "Endorsing" Terrorism

Parts of the Patriot Act explicitly allow determinations to be made based on an individual's beliefs or speech. Section 411 of the Patriot Act amends the Immigration and Nationality Act to prohibit the entry into the United States of any non-citizen who represents a "foreign terrorist organization," is a member of "a political, social, or other similar group whose public endorsement of acts undermines United States efforts to reduce or eliminate terrorist activities," or supports or encourages others to support such organizations. In addition, spouses and children of such non-citizens also are prohibited from entry.

Attorney General Ashcroft justified this provision by explaining to the Senate that the "ability of terrorists to move freely across borders and operate within the United States is critical to their capacity to inflict damage on the citizens and facilities in the United States." He then proposed to expand the grounds for removal of aliens for terrorism to include material support to terrorist organizations. The Patriot Act itself goes even further than the Attorney General's suggestions and threatens exclusion not only to those who provide "material support" to such organizations but also to those who provide "encouragement."

As of December 5, 2001, the State Department, at the Attorney General's request, had designated thirty-nine groups as "terrorist organizations." Under section 411, any alien who is deemed to have made statements in support of, or contributed funds to, such organizations, or associated with alleged members thereof, is subject to deportation. As in the case of prosecutions for "sedition," the United States has frequently deported aliens upon suspicion that they support unpopular political positions. The additional authority granted by the Patriot Act raises the very real specter of "blacklisting" as an accepted immigration policy, reminiscent of McCarthyism in the 1950s. This activity could have a devastating effect on the First Amendment rights of Muslims in the United States to practice their religion and support the Muslim faith.

C.

"Gagging" Businesses Subjected to Federal Searches

The Patriot Act also stifles the First Amendment rights of businesses. Section 215 of the Act permits seizures from businesses, under the Foreign Intelligence Surveillance Act ("FISA"), of records and other tangible items, including computer systems, upon the

Attorney General's certification that the seizure is in furtherance of "an investigation to protect against international terrorism or clandestine intelligence activities." The Patriot Act further prohibits persons from disclosing that they have any knowledge of such seizures. In other words, the owners and officers of the business are gagged from disclosing that they have been the subject of an FBI search and seizure, presumably including disclosures to the media. Moreover, the court issuing the subpoena is prohibited from disclosing the purpose of the order.

D. The Attorney General's View of Civil Libertarians Who Oppose Him

In his recent testimony before the Senate, the Attorney General has demonstrated a willingness to reprimand civil libertarians who have called into question the Bush Administration's commitment to civil rights in the wake of the terrorist attacks. Employing rhetoric reminiscent of McCarthy-era labeling of critics as "un-American" and "unpatriotic," Ashcroft stated that critics have made "bold declarations of so-called fact" that turned out to be vague conjecture. He continued his counter-criticism by stating that:

Charges of "kangaroo courts" and "shredding the Constitution" give new meaning to the term, "the fog of war." We need honest, reasoned debate; not fearmongering 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.

Coupled with the Administration's rather facile dismissal of fundamental First Amendment freedoms, such as the rights to free speech, free association without monitoring, and the freedom to speak to the press about perceived abuses of the subpoena power, the Attorney General's statements demonstrate an extreme insensitivity to the fundamental American right to dissent without fear of retaliation.

III. The Fourth Amendment Freedom from Unreasonable Search and Seizure

The Patriot Act allows officials to sidestep the Fourth Amendment by validating the wholesale disregard of the historic constitutional protections of notice, probable cause, and proportionality. The Act exemplifies what Justice William O. Douglas called "powerful hydraulic pressures ... that ... water down constitutional guarantees" and give the police more power than the magistrate.

The Fourth Amendment protects Americans from unreasonable searches and seizures. The Supreme Court has frequently expressed that the purpose of this Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." The Court also has noted that the purpose of the Fourth Amendment is to let a "neutral and detached" judge decide when a search or

seizure is appropriate as opposed to a potentially biased "officer engaged in the often competitive enterprise of ferreting out crime."

The Court has noted that the amendment functions differently from other constitutional protections in the criminal justice process in that a violation of the Fourth Amendment occurs as soon as there has been an unreasonable search or seizure, regardless of whether the evidence is ever used in a criminal proceeding. However, since the exclusion of evidence seized in a subsequent criminal proceeding is the only remedy ordinarily available for such violations, the mass of Fourth Amendment violations go undisclosed and unredressed.

In view of this, the Supreme Court has frequently decided that, in order to prevent encroachment upon Fourth Amendment rights, the Amendment should be given a liberal construction. Thus, while proper criminal investigation requires that police have the authority to investigate suspect activity thoroughly and disarm dangerous citizens, the Court has always maintained that "the scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Indeed, courts will scrutinize the manner in which the search or seizure was conducted as much as they do its initial justification.

A. Expansion of Searches Under the Foreign Intelligence Surveillance Act

One of the most dramatic interferences with privacy under the Fourth Amendment comes through the monitoring of communications between individuals. Law enforcement authority to conduct electronic surveillance and intelligence arises predominantly from two federal statutes. The Foreign Intelligence Surveillance Act ("FISA") allows wiretapping of citizens as well as resident aliens in the United States upon a showing of probable cause that the target is a "foreign power" or an "agent of a foreign power." The FISA court consists of eleven federal judges appointed by the Chief Justice of the Supreme Court. It hears surveillance requests on an expedited basis.

Section 218 of the Patriot Act is, thus, critically significant. It amends FISA to provide that "foreign intelligence" need not be the purpose of investigations seeking orders under the Act, but merely a "significant purpose." The amendment applies both to FISA electronic surveillance warrants and FISA warrants for physical searches of property. This greatly expands the power of federal authorities to apply the relatively loose standards of FISA to investigations of both U.S. citizens and residents that only tangentially touch on national security.

The FISA court recently broke with its traditional secrecy to publicly issue its May 17, 2002 Memorandum Opinion denying the Justice Department the authority to broaden information sharing with the Criminal Division of the Justice Department. The FISA court refused to approve Justice's proposed "minimization procedures," which govern the handling and reduction to usable form of raw data obtained in foreign intelligence investigations, and its proposed "wall" procedures, which establish standards for ensuring that information obtained via FISA procedures is not routinely

shared with criminal prosecutors. The FISA court found that the proposed revisions, which would have allowed sharing of raw FISA data with criminal investigators and prosecutors, extensive consultation with and reporting to prosecutors of FISA information and coordination with prosecutors regarding FISA surveillance gathering, amounted to giving criminal prosecutors "a significant role directing FISA surveillances and searches from start to finish in counterintelligence cases having overlapping intelligence and criminal investigations or interests, guiding them to criminal prosecution." The court suggested that the proposed procedures were "designed to amend the law and substitute the FISA for Title III electronic surveillances and [Fed. R. Crim. Proc.] Rule 41 searches," and expressed its concern that Justice had adopted this tactic "because the government is unable to meet the substantive requirements of these law enforcement tools, or because their administrative burdens are too onerous." The FISA court noted but declined to address the Attorney General's overall position that the Patriot Act amendments to FISA mean that FISA now can "be used primarily for a law enforcement purpose, so long as a significant foreign intelligence purpose remains." The FISA appellate court, the U.S. Foreign Intelligence Surveillance Court of Review, met for the first time in its history on September 9, 2002, to hear the Justice Department's request for a review of the FISA court's decision. The FISA review court's decision is pending, but it is not known whether the court will make its ruling public.

B. Sections 206 and 207: Roving FISA Wiretaps

The expansion of the definition of those subjected to surveillance further undercuts Fourth Amendment privacy. Section 206 of the Patriot Act amends FISA to allow the imposition of the FISA wiretap warrant against unspecified persons, rather than specific communications providers, thus allowing federal agents to apply FISA wiretaps to any provider of communications services without geographical limitation. The FISA court is required to find that the actions of the target of the wiretap may thwart the identification of a specified provider. Section 207 of the Patriot Act increases the time period for FISA surveillance warrants (1) from 90 to 120 days for a wiretap order, and (2) from 45 to 90 days for a physical search, unless against an "agent of a foreign power," in which case the maximum is 120 days. Attorney General Ashcroft justified this "roving surveillance authority" by explaining that, because tracking terrorist activity is so time sensitive, Americans could be harmed if law enforcement had to take the time to get an additional court order when tracking suspects into new jurisdictions.

This provision is problematic in that it distorts two extremely important checks in the legal system that historically have provided a measure of accountability for the validity of a warrant. First, the amendment allows the issuance of so-called "blank warrants," by which the parties required to respond to the order need not be listed on the face of the document. This places such communications providers in the position of having to accept the validity of the warrant and its application to them virtually without question (although the section does permit a provider to inquire with the Attorney General as to who, through his various agents, obtained the order in the first place, whether or not the order is valid).

Second, the order may not have been issued in the responding party's jurisdiction, creating hindrances of geography and expense for a party that desires to challenge the order in court.

C. Sections 214 and 216: FISA Pen Register and "Trap and Trace" Orders

The capabilities of registering communications have created a greater challenge to privacy protection. Section 214 expands the pen register and trap and trace orders available under FISA to include any investigations "to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." A pen register is a device that registers and records all telephone or Internet service provider numbers dialed by a phone for outgoing communications. A trap and trace device similarly registers numbers of telephones dialing in. FISA orders are not based on a probable cause or reasonable suspicion requirement, but on "certification" that the information sought is related to the professed law enforcement purpose. This is done on an *ex parte* basis, without notice to the subject of the surveillance.

Section 216 expands the range of FISA pen register and trap and trace authority to "anywhere in the United States." Formerly, the order was limited to the jurisdiction of the court and to a particular communications provider or location. Now, the order follows the FBI and the suspect anywhere. Like the roving surveillance powers, this raises concerns relating to identification of the party charged and the practical ability to challenge the order.

These expanded powers to monitor telecommunications are particularly prone to abuse in the Internet age, since pen register and trap and trace orders now disclose not only standard telephone numbers called by or dialing in to a subject, but also Internet URLs and dedicated lines for data transmission. The ability to monitor Internet sites visited by the subject of a search, in the absence of a showing of probable cause or even reasonable suspicion, is an unprecedented expansion of federal surveillance powers.

D. Section 215: Business Records Seizures Allowed Under FISA

Section 215 expands the business records seizures available under a FISA order to allow law enforcement officials to obtain business records and tangible things (e.g., computers and disks) upon a similar *ex parte* rubber stamp order. In addition, the Act states that, "no person shall disclose to any other person ... that the Federal Bureau of Investigation has sought or obtained tangible things under this section." Therefore, the business is gagged from disclosing that it has been the subject of an FBI search and seizure, including to the media.

E. Sections 201 and 202: Expanding the Scope of the Wiretap Act

The second major federal surveillance statute, the Wiretap Act of 1968, sometimes referred to as "Title III," also has been considerably expanded by the Patriot Act. The

Wiretap Act imposes a much higher hurdle even than is required (at least in theory) to obtain a FISA order. It ordinarily requires a court order based upon an affidavit establishing probable cause that a crime has been or is about to be committed and that the search will turn up evidence thereof. The Patriot Act, however, amends the Wiretap Act to allow any investigative or law enforcement officer or government attorney to obtain foreign intelligence information that relates to the ability of the United States to protect against terrorism.

The protections afforded by the Federal Wiretap Act of 1968 were intended to exceed those guaranteed by the Fourth Amendment. In order to receive constitutional protection for a communication under the Fourth Amendment, a subject's expectation of privacy must be one that society is willing to recognize and one that the subject has taken reasonable precautions to protect. One year after the Supreme Court's seminal Fourth Amendment right of privacy case, *Katz v. United States*, Congress passed the Wiretap Act specifically to address the electronic interception of oral communications. Nothing in the Act's history, language, or definitions requires that the subjects of a wiretap take precautions to avoid being overheard or recorded. The Act presumes that the oral communication on which the government is eavesdropping is private. Further, the Supreme Court has declared that the Fourth Amendment itself "does not permit the use of warrantless wiretaps [even] in cases involving domestic threats to the national security."

In spite of this purportedly high standard, wiretap orders are virtually never denied. Between 1996 and 2000, of 6,207 reported wiretap requests by federal and state agencies, only three were denied, an approval rate of over 99.9%. Despite the apparent lack of judicial checks on the availability of wiretap orders before the passage of the Patriot Act, the Act expands their availability even further. Sections 201 and 202 of the Patriot Act amend the Wiretap Act to allow the FBI to obtain wiretap warrants for "terrorism" investigations, "chemical weapons" investigations, or "computer fraud and abuse" investigations. This expands the federal government's wiretap authority into the broad, as-yet-undefined area of "terrorism" investigations and investigations related to computer use.

F. Section 203b: Information Disclosed to CIA and Other Intelligence Agencies

Section 203b of the Patriot Act employs the same expanded definition of "foreign intelligence information" used in section 203a, which permits grand jury information sharing, to allow sharing between federal agencies of any information derived from wire, oral, or electronic communications intercepted pursuant to the Wiretap Act, where contents of such communications include "foreign intelligence information." The effect is to allow sharing of wiretap information with any federal agency, including the CIA and INS, whereas previously such sharing had to be related to the same investigation that initially gave rise to the wiretap. This new provision is an important component of the Justice Department's desire to build a general federal database of all criminal information.

G. Sections 209 and 210: Voice Mail, Internet, and Telephone Monitoring

Section 209 amends the Wiretap Act to allow wiretaps of voice mail messaging systems. Under prior law, stored voice mail messages fell under the Title III category of "wire communications," meaning that messages stored by a service provider could only be seized pursuant to the higher standards applicable to a wiretap order. This placed voice mail in the same category as a real-time telephone or Internet communication between two parties.

The Patriot Act incorporates "wire communication" into the definition of an "electronic communications system," effectively permitting access to such messages via a standard search warrant, as if a voice mail message were merely a documentary record. However, an individual's constitutionally recognized expectation of privacy in his or her message is not diminished by the fact that the message is stored temporarily in a voice messaging system before being retrieved by the recipient. Consequently, this provision of the Patriot Act is constitutionally suspect under the Fourth Amendment.

Section 210 allows federal law enforcement officials to use an "administrative subpoena" to obtain telephone or Internet/e-mail service provider records of customer names, addresses, telephone connection records, including time and duration, length of service, and source of payment, including credit card or bank account numbers. The amendment added time, duration, and source of payment to the information obtainable. Now, federal authorities possess the power to access easily a suspect's financial information through his or her telephone number.

H. Section 213: "Sneak and Peek" Warrants

Notice of the execution of a warrant has long been held to be an important component of the "reasonableness" of a search under the Fourth Amendment. The Supreme Court has held that a search or seizure of a dwelling may be constitutionally defective if police officers enter without prior announcement. This requirement is codified in the federal criminal procedure statutes, which allow the subject of the warrant an opportunity to challenge the lawful authority of the warrant or to prevent its defective execution, such as when the wrong address is targeted or the subject no longer resides at the address. A legion of tragic incidents resulting from execution of "no-knock" warrants demonstrate the potential dangers inherent in serving such warrants on innocent victims.

In spite of the Supreme Court's cautions and the statutory mandate for the "knock and announce" protocol, section 213 of the Patriot Act permits federal law enforcement officials to delay giving notice of the execution of a search warrant to the subject of the warrant, even until after it has been executed, if notification may have an adverse result. Authority for the issuance of search warrants is derived from two statutes: 18 U.S.C. 3103, which implements the standards for issuing warrants set out in Federal Rule of Criminal Procedure 41 and 18 U.S.C. 3103a, a "catchall" provision that provides additional grounds for the issuance of a warrant "to search for and seize any property

that constitutes evidence of a criminal offense in violation of the laws of the United States." Section 213 amends the latter "catchall" provision, adding a new subsection (b), which provides that the requisite notice of the issuance of any warrant (under any provision of law) may be delayed if the court has reasonable cause to believe that the immediate notification of execution of the warrant will have an adverse effect. The warrant need only provide for giving notice "within a reasonable period of its execution," and the period may be extended for "good cause."

Furthermore, while section 213 stipulates that warrants issued under the delayed notice provision prohibit the seizure of tangible property, communications, or electronic data, such as computer equipment, mail, or voice mail, this requirement may be waived if the court finds "reasonable necessity for the seizure." Consequently, a person whose home has been the subject of a search and whose computer equipment, mail, and other sensitive items have been seized may find out about it through a letter in the mail weeks or months later.

Moreover, the definition of "adverse result" is borrowed from another provision of the code that permits relaxed notification requirements in the context of a court order or subpoena for stored e-mail or voice mail data, not the search of a residence, which has always been held to the highest standard of protection under the Fourth Amendment. That provision includes the following as "adverse results" justifying delayed notice:

- (A) endangering the life or physical safety of an individual;
- (B) flight from prosecution;
- (C) destruction of or tampering with evidence;
- (D) intimidation of potential witnesses; or
- (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

The phrase "otherwise seriously jeopardizing an investigation" injects an inherently subjective criterion into the standard, permitting law enforcement authorities and courts broad authority to expand the number of cases involving delayed notice.

IV. The Fifth Amendment Right to Indictment by a Grand Jury

The new anti-terrorism legislation and regulations are problematic for the Fifth Amendment right to grand jury indictment. The Fifth Amendment provides citizens the right to indictment by jury for capital or other infamous crimes, "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"

A. Ending the Historic Secrecy of Grand Juries

Section 203(a) of the Patriot Act amends Rule 6 of the Federal Rules of Criminal Procedure relating to grand jury indictments and vitiates the historic secrecy of grand juries. The transcripts and documents obtained by the grand jury process were heretofore secret, allowing only for disclosure upon court order showing substantial

need or challenge by defendants to the indictment. The reason for this protection derived from the formidable power of the grand jury. Because the function of the grand jury is inquisitorial, alone among American criminal justice authorities in this respect, it is afforded broad-ranging authority to secure documents and witness testimony through subpoena power, and the secrecy of its proceedings and the information obtained thereby have historically been sacrosanct. A recent example of this power is seen in the Monica Lewinsky investigation when the jury sitting under Judge Norma Hollowell Johnson subpoenaed numerous White House officials to testify.

The Patriot Act may potentially distort the grand jury's function of maintaining secrecy. The Supreme Court has noted that two objectives of grand jury secrecy have particular application to the internal secrecy of subpoenaed documents and testimony. These include the grand jury's goals (1) "to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes" and (2) "to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation" The Patriot Act may likely have the effect of discouraging free disclosure because witnesses will know their information may be shared with a wide range of law enforcement authorities. Also, the "innocent accused" will find his private records disseminated widely among federal law enforcement agencies and perhaps placed in a central databank of suspect information, despite his formal exoneration, a phenomenon that flies in the face of the maxim "innocent until proven guilty."

Abandoning traditional safeguards on the power of grand juries, new Federal Rule 6(e)(3)(c)(I)(V) allows disclosure of foreign intelligence, counterintelligence, or "foreign intelligence information" to an array of federal officials "in order to assist the official receiving that information in the performance of his official duties." "Foreign intelligence information" is, in turn, defined broadly to include:

- (A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against
 - (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
 - (iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or
- (B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to
 - (i) the national defense or the security of the United States; or
 - (ii) the conduct of the foreign affairs of the United States.

The non-restriction to "United States persons" means that information relating to any person, citizen, non-citizen, or alien, can be the subject of grand jury information sharing.

B. Elimination of the Right to Indictment by Grand Jury for Non-Citizens Accused of "Terrorism"

The constitutional right to indictment by a grand jury for any infamous crime has come under fire in the "War on Terrorism." It would be entirely obviated by the application of President Bush's Executive Order establishing military tribunals to accused alien residents, as well as accused citizens.

V. The Sixth Amendment Right to Counsel

Many of the new regulations have undercut the Sixth Amendment right to counsel by inhibiting both the ability to obtain counsel and the privacy that is afforded through the attorney-client relationship. The Sixth Amendment guarantees citizens accused in criminal proceedings "the assistance of counsel" for their defense.

A. Monitoring Attorney-Client Conversations

For the first time in modern history, federal authorities may now refuse to respect the age-old, virtually absolute confidentiality enjoyed by a prisoner consulting with his or her attorney. On October 30, 2001, the Justice Department unilaterally imposed a requirement on federal correctional facilities that would allow the correspondence and private conversations between prisoners and their counsel to be subjected to monitoring in most situations. This rule was put into effect immediately by Attorney General Ashcroft, without the usual protections of notice and public comment afforded by the federal Administrative Procedures Act. The rule was posted in the Federal Register on October 31, 2001, the day after it went into effect. Further, the rule is not limited to alleged terrorists; rather, it extends to all incarcerated individuals. Under the rule, communications or mail between prisoners and their attorneys may be monitored if the Attorney General "has certified that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism."

Because the phrase "acts of violence" is so broad and discretion is vested in the Attorney General to certify which prisoners are subject to the rule, no protections exist to ensure that the monitoring will not rapidly expand to include a large percentage of federal prisoners. As the American Bar Association has noted, this monitoring violates the attorney-client privilege and is a serious infringement upon a suspect's Sixth Amendment right to counsel. Prior to the issuance of this regulation, a judicial order could permit monitoring of attorney-client communications only upon a showing that the government had probable cause to believe that criminal activity was occurring. The monitoring places an attorney in the position of either violating the ethical obligation to maintain confidentiality of communications with the client or foregoing such communications altogether, thereby seriously jeopardizing the ability to obtain or sustain legal representation.

B. Refusing Suspects Access to Counsel and Discouraging Detainees from Obtaining Legal Counsel

The Justice Department has detained over 1,000 people in its investigation into the September 11th attacks. Reportedly, some of these detainees have been discouraged from obtaining legal counsel or have had access to counsel blocked outright. For example, San Antonio physician Albador Al-Hazmi was held incommunicado for days as a material witness, despite his lawyer's efforts to gain access to him. Historically, courts have placed great importance on proper attorney-client relations in determining the legitimacy of things like evidence and confessions. The tactics in the Patriot Act which sidestep this principle are a clear violation of the Sixth Amendment.

VI. Military Tribunals: The Sixth Amendment Right to Trial by Jury

President Bush's proposal to try suspected terrorists in military tribunals undermines the constitutional guarantee of the right to trial by jury. The Sixth Amendment provides the accused in a criminal prosecution with the right to receive "a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor."

On November 13, 2001, President Bush issued an Executive Order suspending the rights of indictment, trial by jury, appellate relief, and habeas corpus for all non-citizen persons accused of aiding or abetting terrorists. The Order, issued pursuant to the President's authority as Commander in Chief of the Armed Forces, stated that the terrorist attacks had created an armed conflict necessitating the use of the military. The President declared that, in order to "protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this Order ... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws" in military tribunals. The Order allows the President to subject non-U.S. citizens to this order if he determines and states in writing that there is reason to believe that the individual (1) is or was a member of al Qaida, (2) has "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy," or (3) has harbored any of the aforementioned individuals knowingly and that the best interest of the United States is served by applying the Order to such a person.

The Order directs the Secretary of Defense to promulgate orders and regulations for the appointment and administration of the military commissions that will try suspected terrorists. However, the Order declares that, because of the dangerous nature of international terrorism, these commissions will not "apply the principles of law or the rules of evidence that are used in normal criminal cases." The regulations only permit admission of evidence that the Secretary deems not to violate national security.

Therefore, the military will sit as both the adjudicator of fact and arbiter of law. In addition, these tribunals may impose the death penalty, even though only a two-third majority vote, instead of the unanimity mandated in civilian trials, is required for a sentence.

Suspects tried under this Order will be under the exclusive jurisdiction of the military tribunals. They will not be afforded habeas corpus relief nor will they be permitted to appeal to any court, either within the United States or internationally. Only the Secretary of Defense will be able to review final decisions of the military commissions.

While the Bush Administration's draft procedures for these military tribunals reportedly address some of the concerns raised by civil libertarians, including allowing for unanimous verdicts in death penalty cases and opening trials to the public, the final regulations have not yet been adopted. Until they are finalized, the language of the Executive Order controls the interpretation of the procedures to be followed. Further, certain reported provisions of the draft procedures that run counter to the Executive Order, such as the requirement for unanimity in death penalty cases, may require an amendment to the Order itself, which might be difficult to obtain. Moreover, while the reported draft procedures would permit review of tribunal decisions by "an appeals body," that body, according to the reports, would not be a court of law, but perhaps a separate military review panel.

The U.S. Constitution provides that all crimes except for impeachment shall be tried by a jury in the state where the crimes have been committed or, when the crime is not committed within any state, in a place that is selected by Congress.

The military tribunal Order, by abolishing the right to trial by jury and reserving the power to the Executive Branch to determine when, where, and under what conditions such tribunals will be conducted, represents arguably the most drastic curtailment of the Sixth Amendment rights of the criminally accused since the Second World War.

Courts have held that the authority vested in Congress "to make rules for the government and regulation of the land and naval forces" does not grant it the power to try civilians in military tribunals. Thus, the Executive Branch has sought to create the military tribunals itself. The chief authority upon which the Department of Justice relies for the Executive Branch's purported authority to impose trial by military tribunal is the World War II-era Supreme Court case of *Ex parte Quirin*, a case meriting extensive review given the framework it has laid for assessing the post-September 11th tribunals. In a special session called by Chief Justice Harlan Stone, the Supreme Court considered the habeas corpus petitions of eight German citizens who had landed by submarine on East Coast ports in New York and Florida, with orders to destroy American military manufacturing plants. They were wearing German military uniforms or military items when they landed and were under the pay and orders of the German High Command. The FBI arrested the men in Chicago and New York.

By order as Commander in Chief on July 2, 1942, President Franklin Delano Roosevelt appointed a military commission and directed it to try the subjects for offenses against the law of war and the Articles of War. On the same day, the President further proclaimed that:

all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States ... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals

Since Roosevelt was held to be acting within his executive power pursuant to Congress' declaration of war under Article 15 of the Articles of War, the Court did not determine "to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation." Thus, the case does not directly address the precise issue that arises under the current Executive Order, leaving open the question of the legitimacy of the currently proposed military tribunals in a time of undeclared war.

The Court in *Ex parte Quirin* did battle with the general issue of the president's authority to create military tribunals. The petitioners' main contention was that the President lacked constitutional or statutory authority to order a military tribunal and that they were entitled to be tried in civilian courts and afforded the protections of the Fifth and Sixth Amendments. In its analysis, the Court first reviewed the Civil War case of *Ex parte Milligan*, which arose out of President Lincoln's suspension of habeas corpus during the Civil War. Milligan, a civilian resident of the Union state of Indiana, was tried and convicted by a military tribunal for seditious assistance to the Confederacy and sought habeas relief after receiving his sentence of hanging. The Supreme Court emphasized the importance of the issue of Milligan's right to habeas relief, declaring that it "involves the very framework of the government and the fundamental principles of American liberty." Despite the issuance of the presidential proclamation, which suspended the writ under certain circumstances, the Court obtained jurisdiction by congressional authorization to review denial of the writ to civilian citizens of Northern states.

In *Milligan*, Justice David Davis wrote about the pressing concern before the Court, observing that, "it is the birthright of every American citizen when charged with crime, to be tried and punished according to law By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people." He noted that, unless law justified military trial, the Court had the duty to nullify the acts of the military. He stressed that a decision regarding the existence of justifiable law was not to be made based on precedent and argument, but rather was to be determined by the Constitution and the laws authorized by it. The Court

clarified that, if the protections of due process, grand jury indictment, trial by jury, and habeas corpus were available to Milligan, they unquestionably controlled the case.

The Court determined that the military tribunal did not have the authority to try Milligan because Congress's constitutional Article III, section 1 authority was not broad enough to grant it, and the President's power, under the separation of powers doctrine, allowed him only the right to execute laws, not make them. The Court further explained that, because federal courts of Indiana were trying cases during the Civil War, and the acts alleged were the subject of congressionally prescribed criminal penalties, the government had no reason to assume that a federal court would not sentence Milligan, if guilty, to an appropriate punishment. Even if an unrestrained Milligan presented danger because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the court was not without remedy. Legally, he could have been arrested and confined so that he could not cause further harm, after which his case would have gone to the grand jury and possibly to trial.

The Court further held that Milligan's constitutional right to trial by jury had been violated. This right, which is cherished in a free country, is granted to everyone accused of a crime who is not actually serving in the military or a part of the army or navy. The Framers intended the Sixth Amendment right to trial by jury in criminal cases to be enjoyed by all persons who were included in the right to indictment or presentment by grand jury via the Fifth Amendment. Martial law could not be imposed, the Court warned, absent an "actual and present" necessity arising from a real invasion, "such as effectively closes the courts and deposes the civil administration."

The Supreme Court in *Ex parte Quirin* construed *Ex parte Milligan* not to reach the issue of military tribunals established to try violations of the "law of war." Furthermore, Congress had not delineated by statute the particular offenses within the scope of that term. The Court noted that the law of war, created by universal agreements and practice, "draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants." The Court stated that spies and saboteurs are examples of such "unlawful combatants" who are subject to trial and punishment by military tribunals. The *Quirin* Court restricted Milligan to its factual predicate and concluded that the law of war does not apply to non-military citizens.

It is important to note, moreover, that the Court's approval in *Ex parte Quirin* of this exercise of the Articles of War appears to have been predicated, at least in part, upon the formal declaration of war by President Roosevelt on the Axis powers, making it distinguishable from the situation that existed in *Milligan*. The Court defined the action, following the President's proclamation triggering the law of war, as an exercise of the congressional authority "to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."

The application of *Milligan* and *Quirin* to President Bush's Executive Order is evident. Congress has not restricted the writ of *habeas corpus* for persons suspected of engaging in or abetting the terrorist attacks, as it arguably has limited authority to do under Article III, section 1 of the Constitution. The Article III power to "ordain and establish" inferior courts has generally been held to grant Congress the authority to circumscribe the jurisdictional limits of inferior federal courts. The broad reach of the Executive Order, ostensibly drawing in all persons who are non-citizens and whom the President determines have aided or abetted terrorist acts, includes resident legal and undocumented aliens. The Supreme Court has found that such persons are entitled to all of the protections afforded to "persons" via the Fifth and Sixth Amendments, including the right to indictment by a grand jury, the right to trial by jury, the right to counsel, and the right to confront witnesses.

Although the writ of *habeas corpus* is often referred to as a "privilege," its availability is a matter of constitutional import, as Article I of the Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The *Milligan* Court appears to have implicitly considered the Civil War one such appropriate case. It is doubtful, however, that the attacks of September 11th and the prospect of further terrorism could be construed to amount to cases of rebellion or invasion requiring suspension of the writ. Consequently, any enforcement of the Executive Order to impose trial by military tribunal on any person other than a non-United States national outside the borders of the country will not pass constitutional muster.

VII. The Fifth Amendment Right to Due Process of Law

Certain anti-terrorism proposals jeopardize the individual right to receive due process. The Fifth Amendment states that, "no person shall be ... deprived of life, liberty, or property, without due process of law."

A. Section 412: Indefinite Detention of Non-Citizens Without Due Process

The Patriot Act creates challenges to protected Fifth Amendment liberty. Section 412 of the Act requires the Attorney General to take into custody any alien whom he certifies is subject to the preceding section 411, or, in other words, any alien that he has "reasonable grounds to believe" is "engaged in any other activity that endangers the national security of the United States." He may hold the alien for seven days, at which point he must either charge him criminally or initiate the process of deportation. Habeas corpus review is the only court review available to such a detainee. While a habeas petition may be initiated in the Supreme Court, to any justice of the Supreme Court, the District of Columbia Court of Appeals, or any district court, only the D.C. Court of Appeals may review an appeal from a circuit or federal district court judge.

If an immigrant is detained for purposes related to immigration under this provision, there is no statutory or constitutional authority to control the length of the detention.

This has frequently resulted in the indefinite detention of non-resident foreigners in U.S. detention facilities, and oftentimes prisons, with no remedy.

B. Section 106: Seizure of Assets Without Due Process

The Patriot Act also invokes the issue of property protection under the Fifth Amendment. Title I, section 106 of the Patriot Act greatly increases presidential authority over the property or assets of foreign persons or organizations by amending section 203 of the International Emergency Powers Act. The section grants the Chief Executive broad new powers in the time of armed hostilities or attack by foreign actors to "confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States." The section further allows the President to direct other agencies or individuals to use or transfer such property as he sees fit.

The Attorney General explained the perceived need for this provision, stating that:

law enforcement must be able to "follow the money" in order to identify and neutralize terrorist networks. We need the capacity for more than a freeze. We must be able to seize. Consistent with the President's action yesterday [seizing aspects of identified groups and individuals allegedly associated with al-Qaida], our proposal gives law enforcement the ability to seize their terrorist assets.

As discussed above, however, temporary and permanent aliens in the United States enjoy the Fifth Amendment right to due process, a right which encompasses the right to hold personal and real property. The proposition that the President may unilaterally seize and dispose of such assets with no meaningful judicial review is constitutionally untenable.

President Bush apparently has used section 106 of the Patriot Act to order the seizure of the bank accounts and property of suspected terrorist organizations and individuals associated with them. It is important to note that the President may invoke the law any time the United States is engaged in foreign hostilities, or any time the United States is attacked by a foreign national. The terms of the statute do not grant judicial review for these seizures, and any judicial review of a determination based on classified information will be conducted *ex parte*. Although judicial review may be available under section 316 of the Patriot Act, that provision only grants the owners of confiscated property the right to file federal lawsuits challenging the determination that the property was an asset of suspected terrorists. That section, moreover, allows for suspension of the Federal Rules of Evidence if the court determines that compliance with the Federal Rules could jeopardize national security interests. In other words, the section allows for more secret evidence, a function which distorts the idea of a fair trial. . .

VIII. The Constitutional Right to Privacy

Provisions in the Patriot Act allowing for increased monitoring of financial transactions and educational records threaten the right of privacy to which citizens are entitled. As the Supreme Court has recognized, the common law has established that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."

A. Sections 355 and 356: Monitoring and Reporting on Citizen Financial Transactions

Sections 355 and 356, along with other provisions of Title III of the Patriot Act (surnamed the "International Money Laundering and Anti-Terrorist Financing Act of 2001"), increase the monitoring and reporting obligations of citizens against other citizens. Section 355 allows financial institutions to communicate and document their suspicions concerning the involvement of current or former employees in "potentially unlawful activity." Section 356 requires securities brokers and dealers to submit reports documenting any suspicious activity or transactions as defined under 31 U.S.C. 5318 (1994)."

B. Section 358: Amending the Federal Privacy Statute to Allow Disclosure of Banking Records for "Financial Analysis"

Section 358 of the Patriot Act amends the Right to Financial Privacy Act of 1978 n304 to allow law enforcement authorities to obtain financial data related to intelligence or counterintelligence activities, investigations, or analysis in an effort to protect against international terrorism. Thus, "financial analysis" is now a sufficient basis for federal authorities to review citizen financial information. A similar amendment is applied to the Fair Credit Reporting Act to require furnishing credit reports to federal law enforcement agents who certify that they need the information for that purpose.

C. Section 507: Required Disclosure of Educational Records

Congress passed the Family Educational Rights and Privacy Act in 1974 to protect the privacy rights of students and their parents with respect to their educational records. The law was enacted with the congressional intent of ensuring that school district practices resulting in unauthorized disclosures do "not invade the privacy of students or pose any threat of psychological damage to them."

Previously, FERPA permitted disclosure of educational records to law enforcement authorities pursuant to a subpoena, based upon probable cause and a sworn affidavit demonstrating that the information sought was probative of a criminal investigation. Section 507 of the Patriot Act amended FERPA to require automatic disclosure of educational records to federal law enforcement authorities upon an ex parte court order based only upon certification that the educational records may be relevant to an investigation of domestic or international terrorism. This amendment makes disclosure of educational records the rule, rather than the exception, permitting federal "sweeps" of

the educational records of certain groups of persons, notably aliens residing in the United States on student visas.

D. Building Biometric Databases of Citizens

Sections 405, 414, and 1008 of the Patriot Act require the Attorney General to explore the feasibility of using "biometric identification systems," or fingerprinting, at U.S. ports of entry, such as customs offices at airports and harbors. The provisions also allow this identification to be used for issuing passports and visas, as well as other secure information systems, such as bar code identifiers that will "interface" with other law enforcement agencies to identify and detain individuals who may pose a threat to national security.

Conclusion

The September 11th attacks have challenged American society in ways that are unprecedented. A strong military and law enforcement response is necessary to answer that challenge. But to view these acts of terrorism as principally a military strike for strategic purposes, like the Japanese attack on Pearl Harbor, would be a mistake. The extremists who perpetrated the attacks did not want to simply destroy American landmarks of industry and government, they wanted to destroy America as America, to demolish the foundations upon which American culture and freedom, and all they represent to the world, are built. To set aside the lessons of over two hundred years of American freedom, enshrined in the Declaration of Independence, as a commitment to the truth that "All men are created equal [and] endowed by their Creator with certain inalienable rights ... life, liberty and the pursuit of happiness," as politically or practically inexpedient in a time of "war," would be to allow the extremists to win by surrendering who we are as a nation. If the American people accept a form of police statism in the name of a promise of personal security, that would be the greatest defeat imaginable.