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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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Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives

Keywords

Terrorism, "Domestic Terrorism", Constitutional Rights, First Amendment Rights, Free Speech, "Homeland Security"

ARTICLES

**FORFEITING “ENDURING FREEDOM” FOR
“HOMELAND SECURITY”:
A CONSTITUTIONAL ANALYSIS OF THE
USA PATRIOT ACT AND THE JUSTICE
DEPARTMENT’S ANTI-TERRORISM
INITIATIVES***

JOHN W. WHITEHEAD**
STEVEN H. ADEN***

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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.”¹ 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”)² 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,³ use roving wiretaps to listen in on telephone conversations,⁴ and monitor computers and e-mail messages, even to the degree of eavesdropping on attorney/client conversations.⁵ In addition, the President has made efforts to bring suspected terrorists into military tribunals for prosecution.⁶ Finally, a growing sentiment for the establishment of a

1. *After the Attacks: Bush’s Remarks to Cabinet and Advisers*, N.Y. TIMES, Sept. 13, 2001, at A16.

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

3. *See id.* § 213, 115 Stat. at 285-86 (allowing issuance of warrants with delayed notice to suspected individuals if there is reasonable cause to believe that notification would have an adverse effect on the attempted law enforcement effort).

4. *See id.* §§ 206-207, 115 Stat. at 282 (amending the Foreign Intelligence Surveillance Act of 1978 to allow more expansive protection of secrecy for those carrying out electronic surveillance).

5. *See id.* §§ 201-204, 115 Stat. at 278-81 (providing for enhanced surveillance procedures).

6. Alison Mitchell, *Cheney Rejects Broader Access to Terror Brief*, N.Y. TIMES, May 19, 2002, at A1.

national identification card system in the United States has emerged, threatening to force all citizens to be “tagged.”⁷

For the sake of greater security in this post-September 11th climate, many Americans have expressed the willingness to relinquish some of their freedoms.⁸ This readiness is somewhat understandable in light of the terrorist attacks on the World Trade Center and the Pentagon,⁹ the anthrax scare,¹⁰ 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

7. Jennifer Lee, *Upgraded Driver’s Licenses Are Urged as National IDs*, N.Y. TIMES, Jan. 8, 2002, at A13; Robert O’Harrow, Jr., *States Seek National ID Funds: Motor Vehicle Group Backs High-Tech Driver’s Licenses*, WASH. POST, Jan. 14, 2002, at A4; Robert O’Harrow Jr. & Jonathan Krim, *National ID Card Gaining Support*, WASH. POST, Dec. 17, 2001, at A1; Robert O’Harrow Jr., *States Devising Plan for High-Tech National Identification Cards*, WASH. POST, Nov. 3, 2001, at A10; *New Driver’s Licenses Study Underway*, ASSOCIATED PRESS, Jan. 8, 2002, available at <http://www.nytimes.com/aponline/technology/AP-Identity-Cards.html>.

8. In an NBC News/Wall Street Journal poll, seventy-eight percent of those polled stated they would accept new security laws, even if it meant fewer privacy protections, and seventy-eight percent stated they would support surveillance of Internet communications. *NBC News/Wall Street Journal: 72% Say U.S. Is Moving in the Right Direction*, THE HOTLINE, Sept. 17, 2001. Congressional leaders from both parties have articulated this sentiment. House Minority Leader Richard A. Gephardt (D-Mo.) stated two days after the attacks, “[w]e’re in a new world where we have to rebalance freedom and security.” Eric Pianin & Thomas B. Edsall, *Terrorism Bills Revive Civil Liberties Debate*, WASH. POST, Sept. 14, 2001, at A16. Senate Minority Leader Trent Lott (R-Miss.) echoed this sentiment, stating, “when you’re at war, civil liberties are treated differently.” *Id.*

9. Don Van Natta & Lizette Alvarez, *A Day of Terror: Attack on Military*, N.Y. TIMES, Sept. 12, 2001, at A5.

10. Numerous incidents of cutaneous and inhalation anthrax illness, apparently contracted primarily as a result of exposure through the mail, occurred in diverse locations throughout October and November of 2001, shortly after the September 11th terrorist attacks. These incidents were reported chiefly at print and television media locations, post office facilities, and the U.S. Capitol. *See generally Florida Man Dies After Contracting Rare Form of Anthrax*, ASSOCIATED PRESS, Oct. 5, 2001, available at <http://www.newtribune.com/stories/100601wor1006010029.asp>; *Officials: Tests Show Presence of Anthrax in Second Florida Man and at Newspaper Building*, ASSOCIATED PRESS, Oct. 8, 2001, available at <http://abcnews.go.com/sections/us/DailyNews/anthraxfla011008.html>; *Anthrax Cases*, ASSOCIATED PRESS, Oct. 13, 2001 (“New Yorkers streamed into emergency rooms after an assistant to [NBC News anchor Tom] Brokaw was infected with anthrax, intensifying fear about bioterrorism in a city and nation already on edge”), available at <http://thehonoluluadvertiser.com/2001/Oct/13/In/Intoa.html>; *32,000 Took Medicine as Anthrax Safeguard*, WASH. POST, Nov. 9, 2001, at A10; *Spores Found in More Congressional Offices*, WASH. POST, Nov. 11, 2001, at A13; *Fourth Letter Discovered by FBI: Envelope Addressed to Senator Leahy, Found in Quarantined Mail, Similar ‘In Every Respect’ to Others*, WASH. POST, Nov. 17, 2001, at A1.

the United States Supreme Court—have upheld restrictive laws that abridge rights otherwise protected by the Constitution.¹¹ 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.”¹² 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,¹³ 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

11. *Korematsu v. United States*, 323 U.S. 214 (1944), is perhaps the most notorious example. *Korematsu* upheld the conviction of a Japanese-American citizen for violating an exclusionary order and determined that the order was justified by the exigencies of the war and the perceived threat to national defense and safety. *Id.* at 223. After the war, it became clear that Japanese-American citizens had not posed any significant threat to the nation. In fact, Japanese-American soldiers were among the most highly decorated in the American war effort. A combat battalion consisting of Japanese-American soldiers, the 442nd Regimental Combat Team was highly effective in the Southern European Campaign, and its members included twenty Congressional Medal of Honor recipients and fifty-two Distinguished Service Crosses. See Research on 100th/442nd Regimental Combat Team, National Japanese-American Historical Society, at <http://nikkeiheritage.org/research/hh2.html>. Also notorious from the First World War era are *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921), which upheld the revocation of a socialist newspaper’s second-class mailing privileges for anti-war speech that would be labeled as core protected political speech today, and *Schenck v. United States*, 249 U.S. 47, 51 (1919), which ruled against a First Amendment challenge to a conviction for conspiracy to distribute a circular denouncing conscription “in impassioned terms.”

12. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 224 (1998).

13. A sunset provision is a legislative control that specifies the lifetime of a piece of legislation or, most typically, an agency. WILLIAM F. FOX, JR., *UNDERSTANDING ADMINISTRATIVE LAW* 44 (4th ed. 2000).

that it is also a new kind of challenge to civil liberties.¹⁴ 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,¹⁵ invoking presidential powers.¹⁶ The Proclamation was issued because of the terrorist attacks and the “continuing and immediate threat of future attacks on the United States.”¹⁷ The Order provides important powers, such as the authority to summon reserve troops and marshal military units.¹⁸

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.¹⁹ 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.”²⁰ 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.²¹ This historic “redefinition”

14. See *supra* notes 3-5 and accompanying text (outlining how the Patriot Act has increased the authority of law enforcement officials and resulted in the infringement of civil liberties).

15. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

16. The President may only utilize those powers and authorities made available in national emergencies specifically cited within the proclamation or a subsequent published executive order. 50 U.S.C. § 1631 (1994).

17. Proclamation No. 7463, 66 Fed. Reg. 48,199.

18. See *id.* (declaring the intent of the President to utilize, *inter alia*, 14 U.S.C. § 331 (1994), which allows the Secretary to order any regular officer on the retired list to duty and 10 U.S.C. § 12302 (1998), which provides for the creation of the “ready reserves”).

19. See *supra* notes 15-16 and accompanying text (documenting the active role taken by the President in combating terrorism); see also *infra* notes 25-26 and accompanying text (discussing the congressional involvement in the fight).

20. *Homeland Defense Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (Sept. 25, 2001) [hereinafter *Homeland Defense Testimony*] (written testimony of the Honorable John Ashcroft, Attorney General), available at http://www.senate.gov/~judiciary/print_testimony.cfm?id=108&wit_id=42.

21. *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (Dec. 6, 2001) [hereinafter *DOJ Oversight Testimony*] (written statement of the Honorable John Ashcroft, Attorney General), available at http://www.senate.gov/%7Ejudiciary/print_testimony.cfm?id=

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 "[w]e must prevent first, prosecute second."²²

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."²³ Ashcroft testified that the DOJ, as well as the FBI, was undergoing "a wartime reorganization" that focused its efforts on the prevention of terrorism.²⁴

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.²⁵ 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.²⁶ 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.

121&wit_id=42.

22. *Homeland Defense Testimony*, *supra* note 20.

23. *DOJ Oversight Testimony*, *supra* note 21.

24. *Id.*

25. *Homeland Defense Testimony*, *supra* note 20.

26. The meteoric passage of the Patriot Act is remarkable. H.R. 3162 was introduced in the House of Representatives on October 23, 2001. Pursuant to a rule waiver, it was passed the next day by a vote of 357-to-66. The Senate approved the bill without amendment by a vote of 98-to-1 on October 26th, and it was signed into law the same day by President Bush.

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.²⁷ 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.²⁸

Ashcroft then described the Justice Department's response to the September 11th attacks as "the largest, most comprehensive criminal investigation in world history."²⁹ Ashcroft reported that, as of mid-December 2001, the government was utilizing 4,000 FBI agents to investigate terrorism.³⁰

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,³¹ and the Coast Guard—to the Attorney General, thus adding to his authority for investigating "all federal crimes of terrorism."³² These new areas of investigation include assault against specified federal high office holders;³³ threats of homicide, assault, intimidation, property damage, arson, or bombing;³⁴ arson or bombing of federal property;³⁵ conspiracy to

27. J.M. Lawrence, *War on Terrorism: Anti-Terror Laws in Place*, BOSTON HERALD, Oct. 27, 2001, at 5.

28. *DOJ Oversight Testimony*, *supra* note 21.

29. *Id.*

30. *Id.*

31. This group is organized under the Treasury Department.

32. USA Patriot Act, Pub. L. No. 107-56, § 808, 115 Stat. 272, 378-79 (2001).

33. *Id.* § 808 (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 351(e)).

34. *Id.* (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 844(e)).

35. *Id.* (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 844(f)(1)).

destroy property of a foreign government;³⁶ malicious mischief against United States government property;³⁷ destruction of property of an energy utility;³⁸ assault against presidential or White House officials;³⁹ sabotage of harbor defenses;⁴⁰ and sabotage of war industry facilities.⁴¹ 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 officers 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.⁴² 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.”⁴³ He continued, explaining that, “[a]t 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.”⁴⁴ The extent to which these executive branch powers have been consolidated in one official, the Attorney General, is unprecedented in recent history.⁴⁵

36. *Id.* (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 956(b)).

37. *Id.* (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 1361).

38. *Id.* (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 1366(b) and (c)).

39. *Id.* (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 1751(e)).

40. *Id.* (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 2152).

41. *Id.* (amending 12 U.S.C. § 2332b with respect to 18 U.S.C. § 2156).

42. *DOJ Oversight Testimony*, *supra* note 21.

43. *Id.*

44. *Id.*

45. The administration's centralization of authority and resistance to accountability bring to mind James Madison's words in *The Federalist No. 51*. Addressing the inherent tension between liberty and authority in democratic governments, Madison wrote:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the Government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST NO. 51 (James Madison).

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.”⁴⁶ 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.⁴⁷ Although he acknowledged his obligation to report on the Administration’s activities,⁴⁸ 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.⁴⁹

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.⁵⁰

46. USA Patriot Act § 904, 115 Stat. at 387-88.

47. See *DOJ Oversight Testimony*, *supra* note 21 (claiming that the President’s authority is at least partially constitutionally founded).

48. Ashcroft noted that “America’s campaign to save innocent lives . . . has brought me back to this committee to report to you in accordance with Congress’s oversight role.” *Id.*

49. *Id.*

50. See USA Patriot Act § 901, 115 Stat. at 387 (limiting the CIA Director’s search authority only to the extent that such searches are not “authorized by Statute or Executive Order”).

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"⁵¹

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."⁵² 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.⁵³ Moreover, under the legislation, the federal government has reserved the specific right to monitor religious groups and charitable organizations as well, a practice that

51. 50 U.S.C.A. § 403-3(c)(6) (Supp. 2002).

52. 50 U.S.C.A. § 403-3(d)(1) (Supp. 2002).

53. The most notorious, but certainly not the only, example of the CIA's abuse of this monitoring power is that of "Operation CHAOS," initiated in 1967 to monitor U.S. citizens who protested against the Vietnam War. *See generally* Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); Hrones v. CIA, 685 F.2d 13 (1st Cir. 1982); Nat'l Lawyers' Guild v. Attorney Gen., 96 F.R.D. 390 (S.D.N.Y. 1982); Grove Press, Inc. v. CIA, 483 F. Supp. 132 (S.D.N.Y. 1980); Ferry v. CIA, 458 F. Supp. 664 (S.D.N.Y. 1978); Krause v. Rhodes, 535 F. Supp. 338 (N.D. Ohio 1979); Socialist Workers' Party v. Attorney Gen., 642 F. Supp. 1357 (S.D.N.Y. 1986). CHAOS attempted to monitor the increasing influence exerted over critics of the Johnson Administration's Vietnam policy by "Soviets, Chicoms [Chinese Communists], Cubans and other Communist countries," paying particular attention to "any evidence of foreign direction, control, training or funding." *Halkin*, 690 F.2d at 982 n.8. *See generally* Report to the President by the Commission on CIA Activities Within the United States (1975) (the Rockefeller Report); *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. REP. NO. 94-755, pt. 1, at 135-39. The CIA targeted certain groups, including "radical students, anti-Vietnam war activists, draft resisters and deserters, black nationalists, anarchists, and assorted 'New Leftists.'" *Halkin*, 690 F.2d at 982 n.9. It maintained several thousand computerized files on Americans involved in these activities. *Id.* at 982. The CIA's activities ranged from infiltration and mail monitoring to inclusion of several dozen Americans on a "watchlist," which enabled the CIA to scan and intercept all telecommunications containing references to those names. *Id.* at 983-84.

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.⁵⁴ 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.⁵⁵

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."⁵⁶ 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.⁵⁷ 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;

54. John Solomon, *Ashcroft: Groups Could be Monitored*, ASSOCIATED PRESS, Dec. 2, 2001, available at 2001 WL 31031690; Susan Schmidt & Dan Eggen, *FBI Given More Latitude: New Surveillance Rules Remove Evidence Hurdle*, WASH. POST, May 30, 2002, at A1; John Solomon, *U.S. Extremists, Terror Groups Eyed*, ASSOCIATED PRESS, Feb. 28, 2002 (discussing increased monitoring of U.S. extremist groups out of concern they may try to coordinate with international terrorists); see, e.g., *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997) (holding that the Fourth Amendment rights of clergy and prisoners were violated by surreptitious taping of prison confessionals); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (describing infiltration and extensive monitoring of churches by INS officials investigating alleged alien smuggling).

55. For a description of how this inter-agency information gathering works, see Jim McGee, *In Federal Law Enforcement, 'All Walls Are Down'*, WASH. POST, Oct. 14, 2001, at A16 (describing agents of FBI, CIA, NSA, DIA, Customs, and others working side-by-side in anti-terrorism headquarters of the FBI and CIA). See also Laurie Kellman, *Feds Link Anti-Terrorism Databases*, ASSOCIATED PRESS, Apr. 11, 2002 (describing Attorney General's plan to link databases of local, federal, and international law enforcement authorities). The Attorney General's rationale for this expanded information gathering and sharing capability is similar in tone, if not intent, to the Vietnam-era CIA's rationale for citizen monitoring:

[L]aw enforcement needs a strengthened and streamlined ability for our intelligence gathering agencies to gather the information necessary to disrupt, weaken and eliminate the infrastructure of terrorist organizations. Critically, we also need the authority for law enforcement to share vital information with our national security agencies in order to prevent future terrorist attacks.

Homeland Defense Testimony, *supra* note 20.

56. *DOJ Oversight Testimony*, *supra* note 21.

57. See USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272, 376 (2001) (providing, *inter alia*, that violation of certain domestic criminal laws constitutes domestic terrorism); see also *infra* notes 58-60 and accompanying text.

- (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.⁵⁸

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.⁵⁹ 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.⁶⁰

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

58. USA Patriot Act § 802, 115 Stat. at 376.

59. *Id.* § 808. The Act’s amendment to 18 U.S.C. § 3077 (1)(a) (2000), which includes “domestic terrorism” within the rewards program provided by the Justice Department for information relating to terrorist acts, further confirms that the Justice Department will routinely employ this broader definition of “terrorism.” *Id.* § 802(b).

60. There is precedent for this expansive reading of anti-criminal legislation against political protesters in the application of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1994), to pro-life (anti-abortion) protesters. RICO was passed with broad language designed to take the profit out of organized crime. RICO makes it unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or the collection of an unlawful debt.” *Id.* § 1962(c). A “pattern” of RICO activity occurs if two acts are committed within a ten-year span. *Id.* § 1961(5). In *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994), the Supreme Court unanimously rejected several pro-life protesters’ argument that RICO could not apply to them because they lacked an economic motivation to constitute an “enterprise” under RICO. Although the majority did not address RICO’s potential chilling effects upon free speech or associational rights, Justice Souter recognized in a concurring opinion that the majority opinion does not preclude First Amendment challenges to the application of RICO in certain situations. *Id.* at 262 n.6 (Souter, J., concurring). As one commentator noted after *Scheidler*, it would appear that “any politically unpopular protest movement with resulting property damage or even technical trespass can be elevated into a federal crime.” Angela Hubbell, *Face’ing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion Protesters*, 21 OHIO N.U. L. REV. 1061, 1067 (1995); *cf.* *Palmetto State Med. Ctr. v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997) (finding that no evidence existed to show that Operation Lifeline or any of the individual defendants were engaged in any illegal activities on the particular dates alleged by the plaintiff/hospital); *Planned Parenthood v. Am. Coalition of Life Activists*, 945 F. Supp. 1355 (D. Or. 1996) (concluding that plaintiffs adequately stated RICO claims against all but one defendant); *Nat’l Org. for Women, Inc. v. Scheidler*, No. 86 C 788, 1997 WL 610782, *30 (N.D. Ill. Sept. 23, 1997) (permitting certain RICO claims to proceed against defendants while granting judgment in favor of defendants on other RICO claims).

perpetrate premeditated, politically motivated violence against noncombatant targets.”⁶¹ 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.⁶² 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.⁶³ Therefore, “[a] lawful resident alien may not captiously be deprived of his constitutional rights to due process.”⁶⁴

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.⁶⁵ 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.⁶⁶ The Supreme Court has stated that “[t]he 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.”⁶⁷ For example, in *Plyler v. Doe*,⁶⁸ 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.

61. *DOJ Oversight Testimony*, *supra* note 21. The Attorney General apparently is referring to former versions of the provisions cited above, which now employ broadly expanded definitions of “terrorism” pursuant to the Patriot Act amendments.

62. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-66 (1990).

63. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).

64. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953) (citation omitted).

65. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

66. *Plyler v. Doe*, 457 U.S. 202, 212 n.11 (1982) (quoting *Wong Wing v. United States*, 163 U.S. 228, 242-43 (1896) (Field, J., concurring in part and dissenting in part)).

67. *Mathews*, 426 U.S. at 77.

68. 457 U.S. 202 (1982).

These constitutional protections also apply to the exclusion of aliens within U.S. borders.⁶⁹ 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.”⁷⁰ Accordingly, proceedings for the expulsion of aliens must conform to fairness incorporated by due process standards.⁷¹

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.⁷² 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.

69. *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 2500 (2001) (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

70. *Id.* *Mathews*, 426 U.S. at 77, *Kwong Hai Chew*, 344 U.S. at 596-98, and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) also support the proposition that expulsion cannot occur without adherence to the formalities of due process.

71. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). Constitutional due process protections are not extended to aliens who have not yet entered the United States. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), the Court stated that “[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside the territorial boundaries.” Likewise, illegal aliens who have been intercepted at the border and deemed “excludable” may be subjected to summary exclusion without due process. *Zadvydas*, 121 S. Ct. at 2500 (internal citations omitted). Accordingly, this analysis does not address the application of the Patriot Act or Justice Department actions with regard to excludable aliens.

72. The Administration’s characterization of aliens tends to shift with context. They are defended as “Americans” when subject to retaliatory attacks and threats. See, e.g., *DOJ Oversight Testimony*, *supra* note 21 (stating that the DOJ has investigated over “250 incidents of retaliatory violence and threats against Arab Americans, Muslim Americans, Sikh Americans and South Asian Americans”). On the other hand, Ashcroft recently claimed that peaceful, productive aliens who held jobs at a major airport despite their illegal status were a threat to citizens. See Greg Schneider, *Utah Airport Workers Indicted in Security Probe*, WASH. POST, Dec. 12, 2001, at A16 (quoting Ashcroft as commenting that, “Americans who pass through our nation’s airports and who travel on our nation’s airlines must and will be protected. The Justice Department will enforce the law fully and vigorously to protect Americans.”).

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."⁷³

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.⁷⁴ 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.⁷⁵ The First Amendment functions to protect the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁷⁶ 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.⁷⁷

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."⁷⁸ 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.⁷⁹ The Court has stressed the importance of this fact, noting the power of discussion to expose falsehoods, and stating that "[t]hose who won our independence had confidence in the power of free and fearless reasoning and

73. U.S. CONST. amend. I.

74. *See, e.g.*, *Police Dep't of Chicago v. Moseley*, 408 U.S. 92 (1972) (holding that a distinction between peaceful labor picketers and peaceful picketers is impermissible); *Boos v. Barry*, 485 U.S. 312 (1988) (holding that content-based restrictions on political speech must be shown to be necessary to serve a compelling state interest and must be narrowly tailored to achieve that end).

75. *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463, 464 (1979).

76. *Roth v. United States*, 354 U.S. 476, 484 (1957).

77. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.").

78. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

79. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986).

communication of ideas to discover and spread political and economic truth.”⁸⁰

In addition, the Supreme Court has warned against the “chilling effect” of government restrictions on speech, particularly core political speech. The Court stated that “[t]he 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.”⁸¹

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 1918.⁸² 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.⁸³

Courts generally have held the law to be constitutional on its face as an appropriate exercise of authority to protect national security,⁸⁴ 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*,⁸⁵ 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

80. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

81. *Id.* at 101-02.

82. *Sedition Law Used to Hold Suspects*, ASSOCIATED PRESS, Nov. 8, 2001, available at <http://www.infoshop.org/pipermail/infoshop-news/2001-November/000268.html>.

83. 18 U.S.C. § 2384 (1994).

84. *See, e.g.*, *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986) (noting that the act was passed to help the government cope with urban terrorism and therefore does not conflict with the treason clause of the Constitution which provides a vehicle to make arrests before a conspiracy ripens into a violent situation).

85. 277 F. 129 (1st Cir. 1922).

statements in the *Communist Manifesto*.⁸⁶ 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.⁸⁷

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 Act⁸⁸ 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.⁸⁹ In addition, spouses and children of such non-citizens also are prohibited from entry.⁹⁰

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."⁹¹ He then proposed to expand the grounds for removal of aliens for terrorism to include material support to terrorist organizations.⁹²

The Patriot Act itself goes even further than the Attorney General's suggestions and threatens exclusion not only to those who provide

86. *Id.* at 132-33.

87. *See, e.g.,* Wells v. United States, 257 F. 605 (9th Cir. 1919) (holding that a resolution circulated by the defendant that organized workers should demand exemption from military service for all conscientious objectors was admissible to show seditious state of mind); Haupt v. United States, 330 U.S. 631, 642 (7th Cir. 1947) (deciding that proof of conversations expressing pro-German sentiment, though they had occurred long before the alleged acts of treason, were admissible to prove motive and intent in trial for treason); United States v. Rahman, 189 F.3d 88, 123 (2d Cir. 1999) (allowing evidence that defendants had possession of Islamic materials describing *Jihad* to be used to support a conviction for the World Trade Center bombing); *cf.* 18 U.S.C. § 552 (2000) (prohibiting U.S. officers from assisting in importation or distribution of books and articles containing illegal advocacy); 18 U.S.C. § 1717 (1994) (stating that printed matter containing material pertaining to illegal activity is non-mailable and whoever attempts to mail it will be fined or imprisoned).

88. 8 U.S.C. § 1182(a) (3) (2000).

89. USA Patriot Act, Pub. L. No. 107-56, § 411(a), 115 Stat. 272, 346 (2001).

90. *Id.* (noting an exception to that provision for children and spouses who did not know of the activity of the non-citizen or who have sufficiently renounced such activity).

91. *Homeland Defense Testimony*, *supra* note 20.

92. *Id.* (noting that, under current law, the government can only remove aliens if there is direct material support of an individual terrorist).

“material support”⁹³ to such organizations but also to those who provide “encouragement.”⁹⁴ As of December 5, 2001, the State Department, at the Attorney General’s request, had designated thirty-nine groups as “terrorist organizations.”⁹⁵ 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.⁹⁶ As in the case of prosecutions for “sedition,” the United States has frequently deported aliens upon suspicion that they support unpopular political positions.⁹⁷ 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.⁹⁸ 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.⁹⁹

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”),¹⁰⁰ of

93. See USA Patriot Act § 411, 115 Stat. at 347 (including in the definition of “material support” such things as transportation, a safe house, and communications).

94. *Id.* at 346.

95. *Homeland Defense Testimony*, *supra* note 20; see also Designation of 39 “Terrorist Organizations” Under the “PATRIOT USA Act,” 66 Fed. Reg. 63,620 (Dec. 7, 2001) (classifying thirty-nine groups as “terrorist organizations” as of December 5, 2001).

96. USA Patriot Act § 411, 115 Stat. at 346-47.

97. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (upholding deportation of alien for violation of the Alien Registration Act on sole grounds of former membership in Communist Party); *Galvan v. Press*, 347 U.S. 522 (1954) (upholding congressional power to deport alien who had lived in United States for thirty years because he had briefly been a member of the Communist Party).

98. In what came to be known as the McCarthy era, the practice of blacklisting organizations in a political witch hunt resulted in even marginalized groups being listed by the Attorney General as “communist.” This practice was declared unconstitutional by the Supreme Court. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (holding that the Attorney General did not have the authority to arbitrarily blacklist the defendant groups).

99. The threat of exclusion is particularly real for the thousands of Muslim residents who have contributed to, supported, or associated with the Holy Land Foundation, which claims to be the largest Muslim charity in the United States. See Mike Allen & Steven Mufson, *U.S. Seizes Assets of 3 Islamic Groups: U.S. Charity Among Institutions Accused Of Funding Hamas*, WASH. POST, Dec. 5, 2001, at A1; *Muslims Wary of Making Donations: Ramadan a Time for Charity, But Many Fear Being Questioned by FBI*, ASSOCIATED PRESS, Nov. 23, 2001 (reporting that, although the organization had been the subject of FBI scrutiny for years, many individuals made contributions to it to support its professed mission to aid Palestinian refugees), available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=3859-2001Nov22¬Found=true>.

100. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1829 (1994 & West

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."¹⁰¹ The Patriot Act further prohibits persons from disclosing that they have any knowledge of such seizures.¹⁰² 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.¹⁰³

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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

Coupled with the Administration's rather facile dismissal of fundamental First Amendment freedoms, such as the rights to free speech, free association without monitoring,¹⁰⁷ and the freedom to

Supp. 2002); see discussion *infra* Part III.A (discussing the expansion of searches permissible under FISA).

101. See USA Patriot Act § 215, 115 Stat. at 287 (amending 50 U.S.C. §§ 1861-1863 (1998) by enacting a new section 501(a)(1)).

102. See *id.* (inserting new section 501(d)); see also Nat Hentoff, *Who Knows?*, LEGAL TIMES, May 25, 2002 (discussing First Amendment implications of the provision).

103. See USA Patriot Act § 215, 115 Stat. at 287 (inserting new section 501(c)(2) that allows the judge to issue such secretive order if the judge finds that the FBI's application meets the requirements of the section).

104. *Homeland Defense Testimony*, *supra* note 20.

105. *Id.*

106. *Id.*

107. See *supra* notes 93-94 and accompanying text (discussing the Patriot Act's negative treatment of people who associate with suspect groups).

speak to the press about perceived abuses of the subpoena power,¹⁰⁸ 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.¹⁰⁹

The Fourth Amendment protects Americans from unreasonable searches and seizures.¹¹⁰ 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."¹¹¹ 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.*"¹¹²

The Court has noted that the amendment functions differently from other constitutional protections in the criminal justice process¹¹³ in that a violation of the Fourth Amendment occurs as soon as there

108. See *supra* note 103 and accompanying text (explaining the "gag" order within the Patriot Act).

109. *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

110. U.S. CONST. amend. IV. Specifically, the Amendment gives people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

111. The Court has varied the degree of protection that it will provide privacy based on the context of a given situation. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (finding that the public interest in having vehicle checkpoints at the Mexican border outweighs the slight privacy intrusion); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (holding that a minimal intrusion of a random stop near the U.S. border is within the limits of the Fourth Amendment); *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (deciding that at traffic checkpoints not near the border, officers cannot search vehicles without probable cause). See generally *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967) (explaining that the Fourth Amendment provides rights that are "basic to a free society").

112. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (emphasis added).

113. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (contrasting the Fourth and the Fifth Amendment, the latter of which provides a right that can only be violated at the time of trial).

has been an unreasonable search or seizure, regardless of whether the evidence is ever used in a criminal proceeding.¹¹⁴ 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.¹¹⁵

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.¹¹⁶ Thus, while proper criminal investigation requires that police have the authority to investigate suspect activity thoroughly and disarm dangerous citizens,¹¹⁷ the Court has always maintained that “[t]he scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”¹¹⁸ Indeed, courts will scrutinize the manner in which the search or seizure was conducted as much as they do its initial justification.¹¹⁹

114. *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)); *see also* *United States v. Leon*, 468 U.S. 897, 906 (1984) (explaining that once an unlawful search or seizure has occurred, the use of the evidence from the search creates no new Fourth Amendment violation).

115. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (noting that there is virtually no enforcement of the Fourth Amendment outside of the court because the officers are the ones who are violating it). Specifically, Justice Robert Jackson noted:

The right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court. . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Id. In one example of such a case, the defendant was observed in a high crime area, stopped, and patted down despite the fact that there was no reasonable suspicion that he was armed or had engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 48-49 (1979). Ordinarily, the individual would have gone on his way, intimidated and humiliated, but unable to obtain redress because the actions of the officer were not susceptible to proof that they were “shocking to the conscience” as amounting to a “reckless disregard” for the subject’s personal liberty. *See Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998). It was only because he was arrested and charged for refusing to provide his name that his case came to light, a practice the Court held violative of his right to decline to cooperate. *Brown*, 443 U.S. at 53.

116. *Gouled v. United States*, 255 U.S. 303, 304 (1921) (recognizing the encroachment of Fourth Amendment rights by both courts and police officers), *overruled on other grounds by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

117. *Terry v. Ohio*, 392 U.S. 1, 12 (1968) (disagreeing with the state that the issue should be characterized in terms of the rights of police officers and seeking to balance criminal justice aims with Fourth Amendment rights).

118. *Id.* at 19 (quoting *Hayden*, 387 U.S. at 310); *see also* *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Mendenhall*, 446 U.S. 554 (1980); *Florida v. Royer*, 460 U.S. 491, 500 (1983).

119. *Terry*, 392 U.S. at 28.

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.¹²⁰ The Foreign Intelligence Surveillance Act (“FISA”) allows wiretapping of citizens as well as resident aliens in the United States upon a showing of probable cause¹²¹ that the target is a “foreign power” or an “agent of a foreign power.”¹²² The FISA court consists of eleven federal judges appointed by the Chief Justice of the Supreme Court.¹²³ It hears surveillance requests on an expedited basis.¹²⁴

Section 218 of the Patriot Act is, thus, critically significant.¹²⁵ 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.”¹²⁶ The amendment applies both to FISA electronic surveillance warrants and FISA warrants for physical searches of property.¹²⁷ 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.¹²⁸ The FISA

120. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1829 (1994 & West Supp. 2002); Wiretap Act of 1968, 18 U.S.C. §§ 2510-2522 (2000).

121. 50 U.S.C. § 1805. There is no statutory limit on wiretapping U.S. citizens or resident aliens outside the United States. However, per an Executive Order issued by President Reagan in 1981, if a citizen or permanent legal resident is the target of surveillance abroad, the Attorney General needs to approve it. Exec. Order No. 12,333,46, Fed. Reg. 59,941, 59,951 (Dec. 4, 1981).

122. 50 U.S.C. § 1805(a)(3). The Act further clarifies that no such target will be considered as such solely on the basis of activities protected by the First Amendment. *Id.*

123. *Id.* § 1803.

124. *Id.*

125. USA Patriot Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001).

126. *Id.*

127. Section 218 of the Patriot Act amends 50 U.S.C. § 1804(a)(7)(B), which lists requirements for a court order application for electronic surveillance, and 50 U.S.C. § 1823(a)(7)(B), which lists requirements for an order for a physical search, by striking “the purpose” and inserting “a significant purpose.” In both sections, the amended provision now reads, “Each application shall include . . . *** (7) a certification . . . *** (B) [That] a significant purpose of the surveillance is to obtain foreign intelligence”

128. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, No. 02-429,

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.¹²⁹ 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."¹³⁰ 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,"¹³¹ 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."¹³² 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."¹³³ 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.¹³⁴ The FISA review court's decision is pending, but it is not known whether the court will make its ruling public.

United States Foreign Intelligence Surveillance Court, __ F. Supp. 2d __, at 2002 WL 31017386 (May 17, 2002) [hereinafter Memorandum Op.]. See Dan Eggen & Susan Schmidt, *Secret Court Rebuffs Ashcroft: Justice Dept. Chided on Misinformation*, WASH. POST, Aug. 23, 2002, at A1, available at 2002 WL 25998001; Ted Bridis, *White House Appeals Wiretap Ruling*, ASSOCIATED PRESS, Aug. 23, 2002, available at http://abcnews.go.com/wire/politics/ap20020823_273.html.

129. Memorandum Op., 2002 WL at *1 (requiring that the government's proposed changes be modified under FISA).

130. *Id.* at *11 (emphasis in original).

131. *Id.*

132. *Id.*

133. *Id.* at *3 n.2 (quoting Justice Dep't briefing) (emphasis in original).

134. *Senators Ask Secret Appellate Court to Release Decision, Spar over Justice FISA Request*, ASSOCIATED PRESS, Sept. 10, 2002, available at 2002 WL 26545846.

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.¹³⁵ The FISA court is required to find that the actions of the target of the wiretap may thwart the identification of a specified provider.¹³⁶ Section 207 of the Patriot Act increases the time period for FISA surveillance warrants (1) from 90 to 120 days for a wiretap order,¹³⁷ 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.¹³⁸ 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.¹³⁹

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.¹⁴⁰ 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.¹⁴¹

135. USA Patriot Act § 206 (amending § 105(c)(2)(B) of FISA).

136. *Id.*

137. *Id.* § 207(a)(1) (amending § 105(e)(1) of FISA).

138. *Id.* § 207(a)(2) (amending § 304(d)(1) of FISA).

139. *Homeland Defense Testimony*, *supra* note 20.

140. *See supra* note 135 and accompanying text (discussing the expansion of warrant authority to include any person who might be helpful in the investigation and not just the person who is specifically identified on the warrant application).

141. *See* USA Patriot Act, Pub. L. No. 107-56, § 208, 115 Stat. 272 (2001) (amending 50 U.S.C. § 1803 to authorize courts in any jurisdiction to review such motions or applications).

*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."¹⁴² A pen register is a device that registers and records all telephone or Internet service provider numbers dialed by a phone for outgoing communications.¹⁴³ A trap and trace device similarly registers numbers of telephones dialing in.¹⁴⁴ FISA orders are not based on a probable cause or reasonable suspicion requirement,¹⁴⁵ but on "certification" that the information sought is related to the professed law enforcement purpose.¹⁴⁶ This is done on an ex parte basis, without notice to the subject of the surveillance.¹⁴⁷

Section 216 expands the range of FISA pen register and trap and trace authority to "anywhere in the United States."¹⁴⁸ Formerly, the order was limited to the jurisdiction of the court and to a particular communications provider or location.¹⁴⁹ Now, the order follows the FBI and the suspect anywhere.¹⁵⁰ Like the roving surveillance powers, this raises concerns relating to identification of the party charged and the practical ability to challenge the order.¹⁵¹

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.¹⁵² The ability to monitor

142. *Id.* § 214(a)(1) (amending 50 U.S.C. § 1842 which did not previously include investigations for "clandestine intelligence activities").

143. 18 U.S.C. § 3127(B)(3) (2000).

144. *Id.* § 3127(B)(4).

145. *See* *United States v. Bin Laden*, No. S(7) 98 CR. 1023(LBS), 2001 WL 30061, at *4 (S.D.N.Y. Jan. 2, 2000) (explaining that, under FISA, routine border searches conducted at points of entry into the United States are not subject to a warrant, probable cause, or reasonable suspicion requirement).

146. 50 U.S.C. § 1842(c) (2000).

147. *Id.* § 1842(d).

148. USA Patriot Act, Pub. L. No. 107-56, § 216, 115 Stat. 272, 288-90 (2001).

149. 50 U.S.C. § 1842(d).

150. *See* USA Patriot Act § 216, 115 Stat. at 288-90 (authorizing the installation and use of a pen register or trap and trace device anywhere within the United States when it is relevant to an ongoing criminal investigation).

151. *See supra* Part III.B (discussing roving surveillance powers).

152. *See* USA Patriot Act § 216, 115 Stat. at 290 (defining pen registers and trap and trace devices to include a greater number of wire or electronic communication).

Internet sites visited by the subject of a search, in the absence of a showing of probable cause or even reasonable suspicion,¹⁵³ 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.¹⁵⁴ In addition, the Act states that, “[n]o person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things under this section.”¹⁵⁵ Therefore, the business is gagged from disclosing that it has been the subject of an FBI search and seizure, including to the media.¹⁵⁶

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

The second major federal surveillance statute, the Wiretap Act of 1968,¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹

The protections afforded by the Federal Wiretap Act of 1968 were intended to exceed those guaranteed by the Fourth Amendment.¹⁶⁰ 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

153. 18 U.S.C. § 2511 (2000).

154. USA Patriot Act § 215, 115 Stat. at 288.

155. *Id.*

156. *See supra* Part II.C (discussing the First Amendment rights of businesses).

157. 18 U.S.C. §§ 2510-2522 (1994).

158. *Id.* §§ 2516, 2518.

159. USA Patriot Act § 202, 115 Stat. at 280.

160. *See* S. REP. NO. 99-541, at 1-2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555 (noting that the development of new methods of communication and surveillance devices has dramatically expanded the Framers’ intended scope of the Fourth Amendment).

subject has taken reasonable precautions to protect.¹⁶¹ One year after the Supreme Court's seminal Fourth Amendment right of privacy case, *Katz v. United States*,¹⁶² Congress passed the Wiretap Act specifically to address the electronic interception of oral communications.¹⁶³ Nothing in the Act's history, language, or definitions requires that the subjects of a wiretap take precautions to avoid being overheard or recorded.¹⁶⁴ The Act presumes that the oral communication on which the government is eavesdropping is private.¹⁶⁵ 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."¹⁶⁶

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%.¹⁶⁷ 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.¹⁶⁸ This expands the federal government's

161. *Katz v. United States*, 389 U.S. 347, 351-52 (1967); see also *Bond v. United States*, 529 U.S. 334, 338 (2000); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Smith v. Maryland*, 442 U.S. 735 (1979).

162. 389 U.S. 347 (1967).

163. See Wiretap Act of 1968, Pub. L. No. 90-351, § 801(a), (d), 82 Stat. 211, 211-12 (1969) (stating that wiretapping occurs frequently without the consent of the private parties to be used as evidence and concluding that, in order to safeguard personal privacy, interception should only be allowed when controlled or supervised by a court); see also Wiretap Act, Pub. L. No. 99-508, § 107, 100 Stat. 1858, 1858 (1989) (codified as amended at 18 U.S.C. § 2510 (1991)) (providing that "nothing in this Act or the amendments made by this act constitutes authority for the conduct of any intelligence activity.").

164. Cf. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (asserting that the Fourth Amendment requires that expectation of privacy be both subjectively held and objectively justified and that subjects take reasonable precautions to protect the privacy of their communications).

165. See generally *Mitchell v. Forsyth*, 472 U.S. 511, 514-20 (1985) (discussing the lengthy history of federal wiretaps and adoption of the Wiretap Act).

166. *Id.* at 514-15 (citing *United States v. United States Dist. Court*, 407 U.S. 297 (1972)). The Court stated that the decision "finally laid to rest the notion that warrantless wiretapping is permissible in cases involving domestic threats to national security." *Id.* at 534.

167. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 1997 WIRETAP REPORT 33, tbl. 7, *Authorized Interceptions Granted Pursuant to 18 U.S.C. § 2519 as Reported in Wiretap Reports for Calendar Years 1990-2000* (2002), available at <http://www.uscourts.gov/wiretap01/table701.pdf>.

168. USA Patriot Act, Pub. L. No. 107-156, §§ 201-202, 115 Stat. 272, 278 (2001). See generally 18 U.S.C. § 2511(2)(a)(i) (2000) (permitting interception and disclosure of communications by a computer service provider to protect the service provider'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,¹⁶⁹ 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.”¹⁷⁰ 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.¹⁷¹ This new provision is an important component of the Justice Department’s desire to build a general federal database of all criminal information.¹⁷²

*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.¹⁷³ 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.¹⁷⁴ This placed voice mail in the same category as a real-time telephone or Internet communication between two parties.¹⁷⁵

rights or property, including in cases of fraud).

169. See *infra* Part IV.A (discussing the end of the secrecy of grand juries).

170. USA Patriot Act § 203(b), 115 Stat. at 280.

171. See *id.* § 203(d), 115 Stat. at 281 (authorizing foreign intelligence or counterintelligence to be disclosed to any federal law enforcement official to aid the official receiving that information in the performance of his official duties).

172. See *id.* § 105, 115 Stat. at 277 (explaining that the Director of the United States Secret Service shall take appropriate actions to develop a national network of electronic crime task forces).

173. *Id.* § 209, 115 Stat. at 283.

174. See S. REP. NO. 99-541, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3566 (observing that wire communications in storage like voice mail are protected); see also *United States v. Smith*, 155 F.3d 1051, 1058-59 (9th Cir. 1998) (holding that company voice mail message intercepted by unauthorized co-worker violated Wiretap statute).

175. An “electronic communication service” is a service which provides its users the ability to send or receive wire or electronic communications, including telephone companies and electronic mail companies. S. REP. NO. 99-541, at 12

The Patriot Act incorporates “wire communication” into the definition of an “electronic communications system,”¹⁷⁶ 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.¹⁷⁷ Consequently, this provision of the Patriot Act is constitutionally suspect under the Fourth Amendment.¹⁷⁸

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.¹⁷⁹ The amendment added time, duration, and source of payment to the information obtainable.¹⁸⁰ 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.¹⁸¹ The Supreme Court has held that a search or seizure of a dwelling may be constitutionally defective if police officers enter without prior announcement.¹⁸² This requirement is codified in the federal criminal procedure statutes,¹⁸³ which allow the

(1986), *reprinted in* 1986 U.S.C.A.A.N. 3555, 3560.

176. USA Patriot Act § 204, 115 Stat. at 281.

177. *Cf. Katz v. United States*, 389 U.S. 347, 351-52 (1967) (explaining that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected . . .”).

178. *Cf. Katz*, 389 U.S. at 358-59 (concluding that surveillance of a telephone booth should not be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause to keep individuals secure from Fourth Amendment violations).

179. 18 U.S.C. § 2703(c)(2) (1994).

180. USA Patriot Act § 204, 115 Stat. at 283.

181. *See Wilson v. Arkansas*, 514 U.S. 927, 932 n.2 (1995) (applying the common law knock and announce principle to its Fourth Amendment reasonableness inquiry and noting that this ancient standard dates back to the Magna Carta); *Richards v. Wisconsin*, 520 U.S. 385, 396 (1997) (holding that not even a felony drug search creates an exception to the knock and announce requirement).

182. *Wilson*, 514 U.S. at 936-37.

183. *See* 18 U.S.C. § 3109 (1995) (providing that “[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything

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.¹⁸⁴ A legion of tragic incidents resulting from execution of “no-knock” warrants demonstrate the potential dangers inherent in serving such warrants on innocent victims.¹⁸⁵

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.¹⁸⁶ 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 41¹⁸⁷

therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance . . .”).

184. See *Wilson*, 514 U.S. at 931-33 (discussing the important historical reasons for the common law knock and announce principle, including allowing people to comply with the law and avoid property destruction caused by forcible entry and to prepare themselves by pulling on clothes or getting out of bed).

185. See, e.g., *Atkins v. City of Dallas*, Civil Action No: 3:95-CV-1424-D, 1997 U.S. Dist. LEXIS 4983, at *2 (N.D. Tex. Mar. 27, 1997) (describing a situation in which officers executed “dynamic entry” with battering rams and flashbang devices, black uniforms and masks, but suspect had vacated home one month earlier); *Report on the Death of Donald Scott* (Office of the Dist. Attorney, Ventura, CA), Mar. 30, 1993, at 2 (documenting seizure and forfeiture operation targeting alleged marijuana growth on economically desirable property, which resulted in shooting death of sixty-one-year-old-owner and did not turn up any marijuana), at <http://www.fear.org/chron/scott.txt>; Timothy Lynch, *Another Drug War Casualty*, CATO: TODAY’S COMMENT (Cato Inst., Wash., D.C.), Nov. 30, 1998 (detailing death of Pedro Oregon Navarro in raid on wrong address), at <http://cato.org/dailys/11-30-98.html> (on file with the American University Law Review); Vicki Brown, *Cops Kill Man, Raid Wrong Home*, ASSOCIATED PRESS, Oct. 6, 2000 (discussing raid of home next door to correct address resulted in death of occupant), available at <http://www.crimelynx.com/kill.html>; Daryl Farnsworth, *Unity Plea in Slaying’s Wake Victim’s Kin, Friends Demonstrate Across Town, Outside Gorbachev Speech*, MODESTO BEE, Oct. 5, 2000, at B1 (stating that eleven-year-old boy was killed in SWAT raid); *Holland v. Harrington*, 268 F.3d 1179 (10th Cir. 2001) (execution of misdemeanor assault warrant involved seven SWAT members in “ninja” style uniforms, “no-knock” entrance and children held at gunpoint); *Boston to Give Victim’s Widow \$1 Million in Wrongful Death Suit*, N.Y. TIMES, Apr. 25, 1996, at A17 (documenting 1994 Boston incident in which police targeted the wrong house and their raid on a seventy-five-year-old minister’s home resulted in the man’s death from a heart attack).

186. USA Patriot Act, Pub. L. No. 107-56, § 213, 115 Stat. 272, 286 (2001).

187. FED. R. CRIM. P. 41. Rule 41 permits the issuance of a warrant,

[T]o search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

Id.

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.”¹⁸⁸ 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.¹⁸⁹ The warrant need only provide for giving notice “within a reasonable period of its execution,” and the period may be extended for “good cause.”¹⁹⁰

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.”¹⁹¹ 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.¹⁹²

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.¹⁹³ That provision includes the following as “adverse

188. 18 U.S.C. § 3103(a) (1995).

189. See USA Patriot Act § 213, 115 Stat. at 285-86 (amending 18 U.S.C. § 3103a to create new § 3103a (b)(1)).

190. See USA Patriot Act § 213, 115 Stat. at 286 (adding new 18 U.S.C. § 3103a(b)(3)).

191. See *id.* (adding new 18 U.S.C. § 3103a(b)(2)).

192. Arguably, this kind of “notice” is not notice at all, since the owner did not have warning of forthcoming infringement in advance. Where the execution of a warrant left behind clear evidence that the property had been searched or seized, “notice” by way of a later admission that it was law enforcement authorities, not burglars, who were on the premises seems to make a mockery of the constitutional rationale for notice. To paraphrase an ancient maxim of justice, “[n]otice delayed is notice denied.”

193. See *Payton v. New York*, 445 U.S. 573, 596-97 (1980) (noting that under common law, “the freedom of one’s house” was one of the most vital elements of English liberty); see also *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (explaining that private homes have enjoyed a virtually sacrosanct position in English and American law and concluding that the practice of media “ride-alongs” to film the execution of warrants at residences violates the Fourth Amendment). The Court also quoted an early English case which stated that “the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose.” *Id.*

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.¹⁹⁴

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.¹⁹⁵

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”¹⁹⁶

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.¹⁹⁷ 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.¹⁹⁸ The reason for this protection derived from the formidable power of the grand jury.¹⁹⁹ Because the function of the grand jury is inquisitorial,

(citing Semayne’s case, 77 Eng. Rep. 194, 195 (K.B. 1604)).

194. 18 U.S.C. § 2705 (1995).

195. See, e.g., *United States v. Heatly*, No. S11 96 CR. 515 (SS), 1998 WL 691201, at *5 (S.D.N.Y. Sept. 30, 1998) (discussing the conditions justifying delayed notice of a search order).

196. U.S. CONST. amend. V.

197. USA Patriot Act, Pub. L. No. 107-56, § 203(a), 115 Stat. 272, 278-81 (2001); FED. R. CRIM. P. 6.

198. See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* §§ 8.6-8.7 (2d ed. 1992) (discussing the grand jury’s investigative authority and Fourth Amendment challenges to subpoenas).

199. See *Blair v. United States*, 250 U.S. 273, 282 (1919). The Court stated that the grand jury,

is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of

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.²⁰⁰ 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.²⁰¹

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"²⁰² 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

propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found subject to an accusation of crime.

Id.

200. *See id.* (discussing the investigatory and inquisitory powers of the grand jury under the Fifth Amendment and related statutes); *see also* LAFAYE & ISRAEL, *supra* note 198, § 8.2(c) (discussing the history of grand juries).

201. *E.g.*, Andrew Miga, *Court Demands to See Clinton Lawyer*, BOSTON HERALD, Aug. 5, 1998, at 4 (discussing the Supreme Court's decision to make Lanny Breuer, a member of the White House Counsel's Office, testify before the grand jury).

202. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 n.6, 684 (1958). After a criminal investigation against Proctor & Gamble for Sherman Act violations, the grand jury chose not to bring an indictment. *Id.* at 679. However, the Department of Justice brought a subsequent civil suit against Proctor & Gamble and, despite the absence of an indictment, used the grand jury transcripts in that suit. *Id.* The Supreme Court affirmed the lower court's denial of Proctor & Gamble's discovery request for the transcript, finding no "compelling necessity" to set aside the "indispensable secrecy of grand jury proceedings." *Id.* at 682 (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)).

official receiving that information in the performance of his official duties.”²⁰³ “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.*²⁰⁴

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.²⁰⁵

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.²⁰⁶

203. USA Patriot Act, Pub. L. No. 107-56, § 203a, 115 Stat. 272, 280 (2001).

204. *Id.* § 203a, 115 Stat. at 281 (emphasis added).

205. *See generally* Part IV (discussing the constitutionality of the order and its application to resident citizens).

206. U.S. CONST. amend. VI.

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.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ 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.²¹⁰ 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.”²¹¹

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.²¹² As the American Bar Association has noted, this

207. Courts have held that a solid attorney-client relationship necessarily allows for open communication. *See* *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) (stating that “free two-way communication between client and attorney is essential if the professional assistance guaranteed by the Sixth Amendment is to be meaningful”); *see also* *Flaherty v. Warden of Conn. State Prison*, 229 A.2d 362 (Conn. 1967) (holding that the right to counsel includes the right to consult in private).

208. National Security; Prevention of Acts of Violence and Terrorism; Final Rule, 66 Fed. Reg. 55,061, 55,063 (Oct. 31, 2001) [hereinafter National Security] (amending C.F.R. pts. 500 & 501); *see also* George Lardner, Jr., *U.S. Will Monitor Calls to Lawyers: Rule on Detainees Called ‘Terrifying,’* WASH. POST, Nov. 9, 2001, at A1.

209. *See, e.g.*, 5 U.S.C. § 553 (1966) (requiring posting of proposed federal agency rules in the Federal Register with an invitation for public comment and providing that the rule be published at least thirty days before it becomes effective unless the agency can show “good cause”).

210. *See* National Security, *supra* note 208, at 55,065 (defining “inmate” to include “all persons” in federal custody).

211. *Id.* at 55,062.

212. The Attorney General claims that “[w]e have the authority to monitor the conversations of 16 of the 158,000 federal inmates and their attorneys because we suspect that these communications are facilitating acts of terrorism. . . . Information will only be used to stop impending terrorist acts and save American lives.” *DOJ Oversight Testimony*, *supra* note 21. If that is so, why did the Justice Department claim the need for such broad language, which does not restrict monitoring to suspected “terrorists?”

monitoring violates the attorney-client privilege and is a serious infringement upon a suspect's Sixth Amendment right to counsel.²¹³ 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.²¹⁴ 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.²¹⁵

*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.²¹⁶ Reportedly, some of these detainees have been discouraged from obtaining legal counsel or have had access to counsel blocked outright.²¹⁷ 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.²¹⁸ Historically, courts have placed great importance on proper attorney-client relations in determining the legitimacy of things like evidence and confessions.²¹⁹ The tactics in the Patriot Act which sidestep this principle are a clear violation of the Sixth Amendment.

213. ABA Leadership Statement of Robert E. Hirshorn, President (Nov. 9, 2001) [hereinafter Hirshorn], at http://www.abanet.org/leadership/justice_department.html (on file with the American University Law Review); see, e.g., *Black v. United States*, 385 U.S. 26 (1966) (determining that admission that the FBI had monitored conversations between accused and counsel necessitated vacating the conviction for tax evasion).

214. Hirshorn, *supra* note 213.

215. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1986); MODEL RULES OF PROF'L CONDUCT R. 1.6 (1992).

216. Lardner, *supra* note 208, at A1.

217. Lois Romano & David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, WASH. POST, Oct. 15, 2001, at A1.

218. Peter Slevin & Mary Beth Sheridan, *Justice Dept. Uses Arrest Powers Fully: Scope of Jailings Stirs Questions on Detainees' Rights to Representation and Bail*, WASH. POST, Sept. 26, 2001, at A10.

219. See *Escobedo v. Illinois*, 378 U.S. 478 (1964) (holding statement inadmissible where counsel and accused were prohibited from consulting); see, e.g., *People v. Failla*, 199 N.E.2d 366 (N.Y. 1964) (holding confession involuntary where counsel was denied access to client).

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."²²⁰

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.²²¹ 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.²²² 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 therefor, 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.²²³

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.²²⁴ However, the

220. U.S. CONST. amend. VI.

221. Military Order of Nov. 11, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror*, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

222. *Id.*

223. *Id.* at 57,834.

224. *Id.*

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.”²²⁵ The regulations only permit admission of evidence that the Secretary deems not to violate national security.²²⁶ Therefore, the military will sit as both the adjudicator of fact and arbiter of law. In addition, these tribunals may impose the death penalty,²²⁷ even though only a two-third majority vote, instead of the unanimity mandated in civilian trials, is required for a sentence.²²⁸

Suspects tried under this Order will be under the exclusive jurisdiction of the military tribunals.²²⁹ 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.²³⁰ Only the Secretary of Defense will be able to review final decisions of the military commissions.²³¹

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,²³² 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.²³³

The U.S. Constitution provides that all crimes except for impeachment shall be tried by a jury in the state where the crimes

225. *Id.* at 57,833.

226. *Id.* at 57,835.

227. *Id.* at 57,834.

228. *Id.* at 57,835.

229. *Id.*

230. *Id.* at 57,836.

231. *Id.*

232. Charles Cane, *Terrorism Tribunal Rights are Expanded: Draft Specifies Appeals, Unanimity on Death Penalty*, WASH. POST, Dec. 28, 2001, at A1; John Mintz, *U.S. Adds Legal Rights in Tribunals*, WASH. POST, Mar. 21, 2002, at A1; Ctr. For Democracy & Tech., *Implementation of Other Anti-Terrorism Measures* (tracking changes in military tribunal regulations since Sept. 11, 2001), at <http://www.cdt.org/security/usapatriot/implementation.shtml> (last visited Sept. 4, 2002).

233. *Id.*

have been committed or, when the crime is not committed within any state, in a place that is selected by Congress.²³⁴

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 “[t]o 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.²³⁵ 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*,²³⁶ 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.²³⁷ They were wearing German military uniforms or military items when they landed and were under the pay and orders of the German High Command.²³⁸ The FBI arrested the men in Chicago and New York.²³⁹

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.²⁴⁰ On the same day, the President further

234. U.S. CONST. art. III, § 2; *see Reid v. Covert*, 354 U.S. 1, 20-21 (1957) (holding that American civilians accused of murdering U.S. soldiers abroad could not be tried in military courts).

235. U.S. CONST. art. I, § 8; *see United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (concluding that a civilian could not be retried by the military for crimes allegedly committed while serving in the armed forces).

236. 317 U.S. 1 (1942).

237. *Id.* at 21.

238. *Id.* at 21-22.

239. *Id.* at 22.

240. *Id.* The opinion in *Ex parte Quirin* explains the statutory support for the president’s call for military tribunals. The Court states:

By the Articles of War, 10 U. S. C. § 1471-1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by court martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the “military

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 tribunals²⁴¹

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."²⁴² 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*,²⁴³ 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

commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying But . . . [the Articles do] not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.

Id. at 26-27.

241. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942) (emphasis added). The Proclamation was extended to permit trial by military tribunal of U.S. citizens or resident aliens found to have engaged in acts of war. *Id.* However, the Court did not address this provision or comment upon potential application of the President's order beyond foreign nationals. *Id.*

242. *Ex parte Quirin*, 317 U.S. at 29.

243. 71 U.S. (4 Wall.) 2 (1866).

the Confederacy²⁴⁴ and sought habeas relief after receiving his sentence of hanging.²⁴⁵ 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."²⁴⁶ Despite the issuance of the presidential proclamation, which suspended the writ under certain circumstances,²⁴⁷ the Court obtained jurisdiction by congressional authorization to review denial of the writ to civilian citizens of Northern states.²⁴⁸

In *Milligan*, Justice David Davis wrote about the pressing concern before the Court, observing that, "[i]t 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."²⁴⁹ 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.²⁵⁰ The Court clarified that, if the

244. *Id.* at 108.

245. *Id.* at 107-08. Milligan also had been the subject of a civilian grand jury investigation, which was discharged without returning an indictment. *Id.*

246. *Id.* at 109. Justice Davis' explanation pertaining to the importance of habeas rings cautionary for our own times. He suggested that the concern for safety and the preoccupation with power struggles during times of political and social unrest dominate the rational decision-making process and that it is only in times of security that the rational mind necessary for sound legal judgment can operate. *Id.*; see also *Fay v. Noia*, 372 U.S. 391, 399-400 (1963) (noting the importance of the writ of habeas corpus in the growth of personal liberty and its function to secure a prompt remedy for "intolerable restraints"). The Court stated that "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with fundamental requirements of law, the individual is entitled to his immediate release." *Id.* at 399-400 (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807)).

247. See Proclamation No. 7, reprinted in 13 Stat. 734 (1963). President Lincoln suspended the writ in cases in which officers of the United States:

h[e]ld persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or belonging to the land or naval forces of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service.

Id.; see also 12 Stat. 755 (limiting the authority of such proclamations in cases where citizens of Northern states had been the subject of "no bill" grand jury proceedings in the district courts).

248. *Ex parte Milligan*, 71 U.S. at 115-16.

249. *Id.* at 119.

250. *Id.* Justice Davis further expanded on the role of precedent by stating that these precedents inform the Court of the "struggle to preserve liberty and to relieve

protections of due process, grand jury indictment, trial by jury, and habeas corpus were available to Milligan, they unquestionably controlled the case.²⁵¹

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.²⁵² 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.²⁵³ 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.²⁵⁴ 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.²⁵⁵

those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages." *Id.*

251. *Id.* at 120-21. Once again, the Court's words ring true for our age, as it discussed the foresight of the Framers in creating irrevocable law to withstand detrimental efforts to undermine constitutional liberty. The Court stated:

The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Id. (emphasis added).

252. *Id.* at 121.

253. *Id.* at 122.

254. *Id.*

255. *Id.* Even in times of war, the regular criminal justice system offers some remedies without resort to military tribunals. See *Haupt v. United States*, 330 U.S. 631 (1947) (upholding the indictment and conviction of a World War II civilian conspirator for treason for knowingly aiding a would-be saboteur). Furthermore, in the post-September 11th era, the DOJ has already relied on the normal channels of established criminal law and procedure to try alleged terrorists, such as when it used a conspiracy indictment of an alleged insider of the attacks, Zacarias Moussaoui, a legal resident French Moroccan. *Man Indicted in Attacks Conspiracy*, ASSOCIATED PRESS, Dec. 11, 2001, available at <http://www.firstcoastnews.com/news/2001-12->

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.²⁵⁶ 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.²⁵⁷ 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."²⁵⁸

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."²⁵⁹ Furthermore, Congress had not delineated by statute the particular offenses within the scope of that term.²⁶⁰ 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."²⁶¹ The Court stated that spies and saboteurs are examples of such "unlawful combatants" who are subject to trial and punishment by military tribunals.²⁶² The *Quirin* Court restricted *Milligan* to its factual predicate and concluded

11/usw_indictment.asp.

256. *Milligan*, 71 U.S. at 123.

257. *Id.* (clarifying that this excludes only "cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger").

258. *Id.* at 127. It is fitting to leave *Milligan* with another caution of Justice Davis:

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. . . . The illustrious men who framed [the Constitution] were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

Id. at 125-26.

259. *Ex parte Quirin*, 317 U.S. 1, 29 (1942).

260. *Id.*

261. *Id.* at 30-31.

262. *Id.*

that the law of war does not apply to non-military citizens.²⁶³

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."²⁶⁴

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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸ Although the writ of

263. See *id.* at 45 (concluding that, since *Milligan* was not a member of or tied to the enemy's armed forces and was not a belligerent, *Milligan* was not subject to the law of the war).

264. *Id.* at 28.

265. See U.S. CONST. art. III, § 1 ("[T]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.").

266. *Id.*; see, e.g., *Artuz v. Bennett*, 531 U.S. 4 (2000) (affirming authority of Congress via the Anti-Terrorism and Effective Death Penalty Act to impose statutory restrictions on length of time to bring habeas petition).

267. As to citizens, the availability of due process and civilian trials has been repeatedly confirmed by the Supreme Court. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (holding that a civilian could not be tried in military tribunal for assaulting Marine officers). This applies to citizens of ancestry from enemy nations. E.g., *Ex parte Mitsuye Endo*, 323 U.S. 283, 297 (1944) (holding that the War Relocation Authority could not subject an American citizen of Japanese ancestry to detention who was concededly loyal).

268. See generally *Duncan*, 327 U.S. at 304; *Ex parte Mitsuye Endo*, 323 U.S. at 283 (discussing problems associated with disregarding the constitutional rights 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 “[t]he 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.”²⁶⁹ 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, “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”²⁷⁰

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.”²⁷¹ He may hold the alien for seven days, at which point he must either charge him criminally or initiate the process of deportation.²⁷² Habeas corpus review is the only court review available to such a detainee.²⁷³ While a habeas petition may be initiated in the Supreme Court, to any justice of the

resident non-citizens). The lack of due process to be afforded to those charged in military tribunals may be compounded by difficulty in obtaining counsel to represent them, since the rules of such tribunals may not permit attorneys to provide “competent representation” in accordance with their ethical obligations. See Stephen Gillers, *No Lawyer to Call*, N.Y. TIMES, Dec. 3, 2001, at A19 (arguing that rules of professional responsibility preclude attorneys from providing competent counsel of accused in military tribunals).

269. U.S. CONST. art. I § 9, cl. 2.

270. U.S. CONST. amend. V.

271. USA Patriot Act, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350 (2001).

272. *Id.* § 412, 115 Stat. at 351.

273. See *id.* (providing that judicial review of any action or decision relating to mandatory detention of suspected terrorists is available exclusively in habeas corpus proceedings).

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.²⁷⁴

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.²⁷⁵ This has frequently resulted in the indefinite detention of non-resident foreigners in U.S. detention facilities, and oftentimes prisons, with no remedy.²⁷⁶

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.²⁷⁷ 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.”²⁷⁸ The section further allows the President to direct

274. *Id.* § 412, 115 Stat. at 352.

275. *See id.* § 412, 115 Stat. at 351 (allowing an alien to be detained for additional periods of up to six months if the release of the alien will threaten the national security of the United States).

276. Unnecessary or lengthy detention is a problem for due process, and courts have often found such detention to be unconstitutional. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 2498-99 (2001) (holding that the indefinite detention of a deportable alien beyond six months without benefit of a judicial hearing is a denial of due process); *see also Patel v. Zemski*, 275 F.3d 299, 314 (3d Cir. 2001), in which a long-term permanent resident of the United States was convicted of harboring an undocumented alien who was his employee. *Id.* at 303. After serving his sentence, Patel was taken into custody by the INS pending a deportation hearing on the ground that the conviction constituted an “aggravated felony.” *Id.* Although a bond hearing was provided, it addressed only whether Patel’s offense was an “aggravated felony,” which under the statute automatically deprived Patel of an individual determination of the necessity of his detention. *Id.* at 303-04. The Third Circuit Court of Appeals held the automatic detention provision of the Immigration Act unconstitutional as applied to *Patel*. Citing the Supreme Court’s declaration in *Zadvydas* that “freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects,” *id.* at 309 (quoting *Zadvydas*, 121 S. Ct. at 2498), the Court of Appeals held that “mandatory detentions of aliens after they have been found subject to removal but who have not yet been ordered removed because they are pursuing their administrative remedies violates their due process rights unless they have been afforded the opportunity for an individualized hearing at which they can show that they do not pose a flight risk or danger to the community.” *Id.* at 314.

277. 50 U.S.C. § 1702 (1977).

278. USA Patriot Act § 106, 115 Stat. at 277.

other agencies or individuals to use or transfer such property as he sees fit.²⁷⁹

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

[L]aw 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.²⁸⁰

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.²⁸¹ 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.²⁸² 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.²⁸³ 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*.²⁸⁴ Although judicial review may be available under section 316

279. *Id.* The Act further provides that:

all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, *such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States*, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

Id. (emphasis added).

280. *Homeland Defense Testimony*, *supra* note 20.

281. *See supra* Part I.D (discussing the constitutional rights of non-citizens).

282. *See* A. Jeff Ifrah et al., *Casting a Wide Net*, LEGAL TIMES, Nov. 19, 2001, at 30 (documenting the signing of an Executive Order on September 24, 2001 that identified twenty-seven people with whom all financial activities with the United States were prohibited because of their connection with terrorist activities); *see also* Stewart M. Powell & Dan Freedman, *Foreign Banks Urged to Freeze the Assets of Terrorists*, SEATTLE POST-INTELLIGENCER, Sept. 25, 2001, at 1 (threatening foreign banks with shutdown of their American operations unless they freeze the financial assets of 12 individuals, 11 organizations, 3 charities, and 1 business, all of which were linked to terrorist activity).

283. USA Patriot Act § 106, 115 Stat. at 278.

284. *Id.*

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.²⁸⁵ 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.²⁸⁶ In other words, the section allows for more secret evidence, a function which distorts the idea of a fair trial.

In addition to raising barriers to judicial review and the introduction of evidence, section 106 of the Patriot Act may also constitute an unconstitutional bill of attainder in violation of Article I of the Constitution.²⁸⁷ The Bill of Attainder Clause has not been the subject of extensive Supreme Court jurisprudence, and its chief treatment is illustrated by three cases: *United States v. Brown*,²⁸⁸ *United States v. Lovett*,²⁸⁹ and *Cummings v. Missouri*.²⁹⁰ In each case, the Court referred to the Bill of Attainder Clause to inform its analysis of the constitutionality of a legislative action directed against an individual or group based upon political beliefs. In *Cummings*, the Court invalidated a provision of the Missouri constitution requiring any person holding a position as an officeholder, lawyer, clergyman, teacher, or corporate officer to take an oath declaring that he had never been in the service of the Confederate states under the Bill of Attainder Clause.²⁹¹ Similarly, in *Lovett*, the Court invoked the clause to invalidate an act of Congress prohibiting the payment of any compensation for government service to three named individuals who had allegedly engaged in subversive activities.²⁹² Finally, in *Brown*, the Court struck down as a bill of attainder a provision of the Labor-Management Reporting and Disclosure Act of 1959 that allowed for the imposition of criminal penalties on members of the Communist Party serving as officers or employees of a labor union.²⁹³

Brown contains the Court's most thorough modern analysis of the Bill of Attainder clause. In its opinion, the Court discussed the

285. *Id.* § 316, 115 Stat. at 309.

286. *Id.*

287. U.S. CONST. art. I, § 9, cl. 3; *see Cummings v. Missouri*, 71 U.S. 277, 323 (1867) (defining a bill of attainder as a legislative act which inflicts punishment without a judicial trial). If the punishment is less than death, then the act is a bill of pains and penalties. *Id.* Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. *Id.*

288. 381 U.S. 437 (1965).

289. 328 U.S. 303 (1946).

290. 71 U.S. 277, 317, 320 (1866).

291. *Id.*

292. *Lovett*, 328 U.S. at 313-15.

293. *Brown*, 381 U.S. at 439-40; *see also* 29 U.S.C. § 504 (Supp. IV 1958).

history of the clause at length and attempted to discern the reasons for its inclusion in the Constitution. It noted that attainders have been regarded as possessing three chief characteristics: (1) they are directed against specific individuals or discernable groups;²⁹⁴ (2) they affect the life or property of those targeted;²⁹⁵ and (3) they amount to legislative usurpation of the judicial function.²⁹⁶ The Court further explained that the legislative act need not be punitive in nature; rather, prophylactic measures taken against individuals or group activities based upon their perceived characteristics may also constitute attainders.²⁹⁷ Therefore, the Bill of Attainder Clause, the Court concluded, should be understood within a broad historical context and incorporate the Framers' intent to bar "legislative punishment, of any severity, of specifically designated persons or groups."²⁹⁸

In view of the Supreme Court's concern that the legislature not usurp the judicial function by targeting specific individuals or groups for punishment or deterrence, the asset seizure provisions of the Patriot Act appear to be vulnerable under the Bill of Attainder Clause. These provisions (1) are directed against a specific group, i.e., Islamic or pro-Islamic organizations, and (2) create automatic asset forfeitures of organizations that the President designates as "terrorist groups," and (3) afford little or no due process to those targeted and the subsequent forfeitures.

The chief distinction in the case of the Patriot Act provisions is that it is not Congress, but the Chief Executive, who nominates the entities belonging to the disfavored group. However, this is not a difference of significance. The Supreme Court has made clear that an attainder is unconstitutional because of the co-opting of the judicial function by the legislature.²⁹⁹ The fact that the legislature leaves the specific designation of the organizations that are subject to seizure to the executive does not cure that critical defect.

294. *See id.* at 441 (explaining that attainders were devices often resorted to in sixteenth, seventeenth, and eighteenth-century England for dealing with persons who attempted or threatened to attempt to overthrow the government).

295. *See id.* (noting that the attainders historically carried with them a "corruption of blood," providing that the attained parties' heirs could not inherit his property).

296. *Id.* at 441-46. The Court explained that the clause was intended to ensure that the legislature would not overstep the bounds of its authority and perform the functions of other departments. *Id.* at 446.

297. *See id.* at 458-59 (explaining that English bills of attainder were enacted for preventive purposes, where the legislature made a judgment most likely based on past acts and associations that a given person or group was likely to cause trouble).

298. *Id.* at 447.

299. *E.g., id.*; *Cummings v. Missouri*, 71 U.S. 277 (1866).

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.”³⁰⁰

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.³⁰¹ Section 355 allows financial institutions to communicate and document their suspicions concerning the involvement of current or former employees in “potentially unlawful activity.”³⁰² 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).³⁰³

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 1978³⁰⁴ 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.³⁰⁵ 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 Act³⁰⁶ to require furnishing credit reports to federal law enforcement agents who certify that they need the information for that purpose.

300. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

301. USA Patriot Act, Pub. L. No. 107-56, §§ 355-356, 115 Stat. 272, 324-25 (2001).

302. *Id.* § 355, 115 Stat. at 324.

303. *Id.*

304. 12 U.S.C.S. § 3412 (1978).

305. USA Patriot Act § 358, 115 Stat. at 327 (emphasis added).

306. 15 U.S.C.S. § 1681 (1968).

C. *Section 507: Required Disclosure of Educational Records*

Congress passed the Family Educational Rights and Privacy Act (“FERPA”)³⁰⁷ in 1974 to protect the privacy rights of students and their parents with respect to their educational records.³⁰⁸ 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.”³⁰⁹

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.³¹⁰ 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 405,³¹¹ 414,³¹² and 1008³¹³ 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.

307. 20 U.S.C.A. § 1232g (1974)

308. *Id.* § 1232g(a)(1)(c).

309. Amendments to the Elementary and Secondary Education Act of 1965, Pub. L. No. 93-380, 88 Stat. 484 (1974).

310. *Id.*

311. *Id.* § 405, 115 Stat. at 345.

312. *Id.* § 414, 115 Stat. at 353-54.

313. *Id.* § 1008, 115 Stat. at 355.

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,”³¹⁴ 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.

314. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).