

*FORFEITING “ENDURING FREEDOM”
FOR “HOMELAND SECURITY”*

A CONSTITUTIONAL ANALYSIS
OF THE USA PATRIOT ACT OF 2001
AND THE
JUSTICE DEPARTMENT’S ANTI-TERRORISM INITIATIVES

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FOREWORD

“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 our nation, President Bush vowed, “We will not allow this enemy to win the war by changing our way of life or restricting our freedoms.” Yet within several months following the attacks, it became increasingly evident that the war on terrorism was evolving into a reshaping of our national security and was challenging the value we place on our civil liberties.

While Congress’s anti-terrorism law—the so-called “USA Patriot Act”—may not have been designed to restrict the civil liberties of American citizens, its unintended consequences threaten the fundamental constitutional rights of people who have absolutely nothing to do with terrorism.

For example, in the name of stopping terrorism, law enforcement officials and government leaders have now been given the right to conduct searches of homes and offices without prior notice, use roving wiretaps to listen in on telephone conversations, monitor computers and e-mail messages—even eavesdrop on attorney/client conversations. The President has also moved to try suspected terrorists in military tribunals. And there is growing sentiment for the establishment of a national identification card system in the United States.

For the sake of greater security in this post-September 11th climate, many Americans have also expressed the willingness to relinquish some of their freedoms. This is somewhat understandable in light of the terrorist attacks on the World Trade Center and the Pentagon, the anthrax scare, and the wall-to-wall coverage the media has afforded these events. After all, we are only human. However, we must be mindful that while ensuring the security of our husbands, wives, children, and friends may be worth *some* price paid in terms of our freedoms, even small infringements over time could become major compromises that alter the American way of life.

History has shown that in times of war the courts—even the United States Supreme Court—have upheld restrictive laws passed by our government that abridge rights protected by our Constitution. And this is likely to happen again. For example, William Rehnquist, the current Chief Justice of the Supreme Court, has consistently adhered to such legal/political philosophy. As Rehnquist wrote in his book, *All the Laws But One*, “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.”

Yet, whatever the outcome of this undeclared war, we should not labor under the misconception that freedoms forsaken today might somehow be regained tomorrow. Unlike previous wars, this time there may be no truce to signal the return of our freedoms. With or without sunset clauses, there is no horizon

for recapturing any freedoms we relinquish today. And the U.S. Constitution, if compromised now, will, in my opinion, never again be the same.

In today's world, once we place a barbed-wire fence around our civil liberties, they may never be freed. Yet the outcome, at least for now, is perhaps less important than understanding that we are operating in a new paradigm. Concerns for security and freedom will always conflict to some degree. And while Americans must understand that this is a new kind of war on terrorism, with no immediate end in sight, it is also a new kind of challenge to our civil liberties.

Thus, it is time for a fundamental rethinking of what we consider our basic freedoms. We may decide—and I, for one, hope we do—that certain freedoms, especially those guaranteed in the United States Constitution, are simply too precious to sacrifice, at any cost, on the altar of security.

John W. Whitehead, President
The Rutherford Institute

FORFEITING “ENDURING FREEDOM” FOR “HOMELAND SECURITY:”
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AND THE JUSTICE DEPARTMENT’S ANTI-TERRORISM INITIATIVES

I. Introduction

In response to the September 11th attacks on the World Trade Center and the Pentagon, President George W. Bush declared a state of emergency¹ and invoked presidential powers² on September 14, 2001. These included the authority to summon reserve troops and marshal military units.³ The proclamation was based upon the terrorist attacks “and the continuing and immediate threat of future attacks on the United States.”⁴

From the outset, the Bush Administration has chosen to view the attacks as acts of war by foreign aggressors, rather than as criminal acts that require redress by the justice system. Two weeks after the attacks, the nation’s chief law enforcement officer, Attorney General John Ashcroft, appeared before 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.” Ashcroft stated, “Mr. Chairman and members of the committee, we are at war.... We have responded by redefining the mission of the Department of Justice. Defending our nation and its citizens against terrorist attacks is now our first and overriding priority.”⁵ This historic “redefinition” of the Justice Department’s mission turned the focus of federal law enforcement from apprehending and incarcerating criminals to detecting and halting terrorist activity on American soil and abroad:

This new terrorist threat to Americans on our soil is a turning point in America’s history. It is a new challenge for law enforcement. Our fight against terrorism is not merely or primarily a criminal justice endeavor – it is defense of our nation and its citizens. We cannot wait for terrorists to strike to begin investigations and make arrests. The death tolls are too high, the consequences too great. We must prevent first, prosecute second.⁶

Ashcroft reiterated to the Senate this new emphasis on “prevention first” over prosecution, stating, “From [the morning of September 11], at the command of the President of the United States, I began to mobilize the resources of the Department of Justice toward one single, over-arching and over-riding objective: to save innocent lives from further acts of terrorism.”⁷ The Administration, Ashcroft testified, has “embarked on a wartime reorganization of the Department of Justice.... [T]he FBI is undergoing an historic reorganization to put the prevention of terrorism at the center of its law enforcement and national security efforts.”⁸

Whatever practical wisdom that adopting this martial mindset in response to the September 11th attacks may hold for preventing future similar attacks, its ramifications for the civil rights of American

citizens and resident non-citizens are becoming increasingly evident. The USA PATRIOT Act of 2001, passed by Congress in response to the Bush Administration's request for "the tools to fight terrorism,"⁹ is only the phalanx of a broad new set of operating procedures adopted by federal law enforcement agencies, 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, like the Patriot Act, were politically driven by the executive branch and Congress and well publicized.¹⁰ Others have been quietly ushered in as executive orders or agency operating procedures.

A. Centralization of Law Enforcement Powers in the Justice Department

The "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," known by its shorter name, the "USA PATRIOT Act" or simply "the Patriot Act," was passed by Congress on October 26, 2001 and signed into law by President Bush the same day. The ten-part, 300-plus-page Act is much too voluminous to describe in any detail herein. Therefore, this analysis will focus only upon certain portions of the Act that are particularly troubling for their potential impact on civil liberties and constitutional freedoms. The text of the Act is set out in Appendix B for reference.

The Justice Department has warned that it will use its new authority under the Patriot Act to the maximum:

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.¹¹

The Attorney General describes the Justice Department's response to the September 11th attacks as "the largest, most comprehensive criminal investigation in world history."¹² As of mid-December 2001, 4,000 FBI agents were being utilized, according to Ashcroft.¹³

This massive investigation has been significantly empowered by the Patriot Act's centralization of federal law enforcement authority in the Justice Department. 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 (under the Treasury Department) and the Coast Guard, to the Attorney General, in addition to his authority for investigating "all federal crimes of terrorism."¹⁴ These new areas of investigation include assault against specified federal high office holders;¹⁵ threats of homicide, assault, intimidation, property damage, arson or bombing;¹⁶ arson or bombing of federal property;¹⁷ conspiracy to destroy property of a foreign government;¹⁸ malicious mischief

against United States government property;¹⁹ destruction of property of an energy utility;²⁰ assault against presidential or White House officials;²¹ sabotage of harbor defenses;²² and sabotage of war industry facilities.²³ Essentially for the sake of combating 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.

The Justice Department's new authority appears to extend even beyond the traditional geographical limits on its power, the national borders. 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.²⁴ Likewise, the Bush Administration appears to have determined to assign control over lawful entry into the United States, which is a State Department function, to the Justice Department. Ashcroft stated:

Working with the State Department, we have imposed new screening requirements on certain applicants for non-immigrant visas. At the direction of the President, we have created a Foreign Terrorist Tracking Task Force to ensure that we do everything we can to prevent terrorists from entering the country, and to locate and remove those who already have.²⁵

The extent to which these executive branch powers have been consolidated in one official, the Attorney General, is unprecedented in recent history.²⁶

At the same time, the Administration has displayed resistance to Congressional oversight of its new powers. Section 904 of the Patriot Act allows the Secretary of Defense, 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, if they certify that it will "impede the work of officers or employees who are engaged in counterterrorism activities," until a later date specified. This provision effectively postpones the statutory obligation imposed upon these public servants to report to Congress on the "War on Terrorism," on foreign or domestic fronts, virtually indefinitely. Ashcroft echoed this resistance in testimony before the Senate. Although he acknowledged his obligation to report on the Administration's activities,²⁷ he also stated:

Congress' 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.²⁸

In other words, the Administration has reserved to itself 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 the Bush Administration has centralized authority for international and domestic law enforcement in the Justice Department, the Administration, through the Patriot Act, has also transferred authority for coordinating domestic intelligence gathering from the Justice Department to the Central Intelligence Agency. The Patriot Act added a new subsection (c)(6) to the statute defining the CIA Director's authority, 50 U.S.C. § 403-3, to provide that the CIA Director shall:

(6) establish requirements and priorities for foreign intelligence information to be collected under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801, *et seq.*) and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that Act is disseminated so it may be used efficiently and effectively for foreign intelligence purposes.

This coordinating role was formerly taken by the Attorney General. Essentially, the Patriot Act has given the CIA the central role in gathering and using 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 ostensibly limiting the CIA's authority, § 403-3(d)(1), which provides that the CIA "shall have no police, subpoena, or law enforcement powers or internal security functions." By placing the CIA over the Justice Department and the FBI, this provision of the Patriot Act turns on its head existing policy and practice that was put in place as a result of CIA abuses during the Cold War era and permits the CIA to begin once again to spy on American citizens.²⁹ Moreover, according to the Attorney General, the federal government reserves the right to monitor religious groups and charitable organizations as well, a practice that has subjected federal law enforcement authorities to considerable judicial scrutiny for its chilling effect on the right to free association and worship under the First Amendment.³⁰ Also, as is discussed in detail below, the CIA has at the same time been given unprecedented access to a broad range of intelligence gathering powers that allow information collection and monitoring of American citizens under other provisions of the Patriot Act.³¹

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

The Justice Department assures Americans that its new authority is targeted only at "terrorists":

Each action taken by the Department of Justice, as well as the war crimes commissions considered by the President and the Department of Defense, is carefully drawn to target a narrow class of individuals – terrorists. Our legal powers are targeted at terrorists. Our investigation is focused on terrorists. Our prevention strategy targets the terrorist threat.³²

At the same time that the Justice Department is ostensibly targeting only this "narrow class of individuals," it has greatly expanded that class of suspects through the Patriot Act. Section 802 of the Act amends

Chapter 113B of the criminal code, 18 U.S.C. § 2331, to add a new definition of “domestic terrorism” to include activities that:

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

Likewise, Section 808 amends 18 U.S.C. § 2332b to include any such acts that result in virtually any federal crime of violence.³³ 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, PETA, Operation Rescue, and the Vieques demonstrators.³⁴

The Attorney General recently assured the Senate: “Since 1983, the United States government has defined terrorists as those who perpetrate premeditated, politically motivated violence against noncombatant targets.”³⁵ If that is true, it certainly begs the issue of why the Bush Administration felt the need to now redefine “terrorism” to include within the scope of the term a wide variety of domestic criminal acts of violence.

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, not just to citizens.³⁶ In the case of lawfully resident and temporary aliens, the Supreme Court has affirmed, “It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the meaning of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.”³⁷ “A lawfully resident alien may not captiously be deprived of his constitutional rights to due process.”³⁸

The Supreme Court has often held that even undocumented aliens living inside United States borders are entitled to the protections of the Bill of Rights:

The term “person,” used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.... The contention that persons within the territorial jurisdiction of

this republic might be beyond the protection of the law was heard with pain on the argument at the bar – in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.³⁹

“[T]here are literally millions of aliens within the jurisdiction of the United States,” the Supreme Court has stated. “The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”⁴⁰ For example, in *Plyler v. Doe*,⁴¹ the Supreme Court held that a Texas public school district denied illegal immigrants the benefit of equal protection under the Fourteenth Amendment by excluding them from public education. These constitutional protections also apply to the exclusion of aliens within United States borders. “[O]nce 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, temporary, or permanent.”⁴² “Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”⁴³

In view of America’s historical extension of constitutional protections to all within her borders, the apparently 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.⁴⁴ 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 cavalier lack of concern for the rights of non-citizens runs thematically through the warp and woof of the Administration’s response to the terrorist attacks.

II. The First Amendment Rights of Speech and Association

Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.

UNITED STATES CONST., AMEND. I

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.⁴⁵ Such activities are protected against blanket prohibitions and from restrictions which are based upon government opposition to the content of the idea being expressed, or the identity of the speaker.⁴⁶ The First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁴⁷ Resident aliens and undocumented aliens with “substantial ties” to the United States belong to the “national community” that makes up “the people” and, as such, enjoy the rights afforded by the First Amendment.⁴⁸

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.”⁴⁹ 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 market-place of ideas.⁵⁰ The Court has stressed the importance of this fact, noting that “falsehoods may be exposed through the process of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.”⁵¹ The Supreme Court has warned against the “chilling effect” of governmental restrictions on speech, particularly core political speech: “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”⁵²

A. Prosecution Under the Sedition Act of 1918

Federal prosecutors have acknowledged that they intend to prosecute certain persons suspected of terrorist activities under the Sedition Act, 18 U.S.C. § 2384.⁵³ 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.

While the law has generally been held to be constitutional on its face as an appropriate exercise of authority to protect national security,⁵⁴ it has historically been shown to be subject to abuse if applied broadly to otherwise protected activities. For example, in *Skeffington v. Katzeff*,⁵⁵ the Sedition Act was applied to determine that the Communist Party had been organized for the purpose of overthrowing the United States government, based in part on statements in the *Communist Manifesto*. First Amendment material has been used to prosecute individuals under this Act, making it a particularly dangerous tool by government authorities to chill speech they may consider to be contrary to governmental interests.⁵⁶

B. Exclusion of Non-Citizens Accused of “Endorsing” Terrorism

Section 411 of the Patriot Act amends the Immigration Act, 8 U.S.C. § 1182, to prohibit the entry into the United States of any non-citizen who is a representative of a “foreign terrorist organization,” “a political, social, or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities,” or has supported or encouraged others to support such organizations. Spouses and children of such non-citizens

are also prohibited from entry.

Attorney General Ashcroft explained the need for this provision to the Senate:

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. Under current law, the existing grounds for removal of aliens for terrorism are limited to direct material support of an individual terrorist. We propose to expand these grounds for removal to include material support to terrorist organizations.⁵⁷

The Patriot Act itself, however, threatens exclusion not only to those who provide “material support” to such organizations but also to those who provide “encouragement” as well. As of December 5, 2001, the State Department, at the Attorney General’s request, had designated 39 groups as “terrorist organizations.”⁵⁸ Under Section 411, any alien who is deemed to have made statements in support of or contributed funds to such organizations, or associated with alleged members thereof, is subject to deportation. As in the case of prosecutions for “sedition,” the United States has frequently deported aliens on suspicion of supporting unpopular political positions.⁵⁹ This raises the very real specter of “blacklisting” as an accepted immigration policy.⁶⁰

C. “Gagging” Businesses Subjected to Federal Searches

Section 215 of the Patriot Act permits seizures under the Foreign Intelligence Surveillance Act (“FISA”) (*see* III. A., below) of records and other tangible items, including computer systems, from businesses upon the Attorney General’s certification that the seizure is in furtherance of “an investigation to protect against international terrorism or clandestine intelligence activities.”⁶¹ The Act further provides, “No person shall disclose to any other person...that the Federal Bureau of Investigation has sought or obtained tangible things under this section.”⁶² 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, including presumably disclosures to the media. Moreover, the court issuing the subpoena is prohibited from disclosing the purpose of the order.⁶³

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

In his recent testimony before the Senate, the Attorney General has demonstrated a willingness to reprimand civil libertarians who have called into question the Bush Administration’s commitment to civil rights in the wake of the terrorist attacks. Employing rhetoric reminiscent of McCarthy-era labeling of critics as “un-American” and “unpatriotic,” Ashcroft stated:

Some of our critics, I regret to say, have shown less affection for detail. Their bold declarations of so-called fact have quickly dissolved, upon inspection, into vague

conjecture. 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.⁶⁴

Coupled with the administration’s rather facile dismissal of fundamental First Amendment freedoms, such as the right to free speech, to freely associate without being monitored, and the right to speak to the press about perceived abuses of the subpoena power, the Attorney General’s statements demonstrate an extreme insensitivity to the fundamental American right to dissent without fear of retaliation.

III. The Fourth Amendment Freedom from Unreasonable Search and Seizure

The right of the people 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.

– UNITED STATES CONST., AMEND. IV

The Supreme Court has frequently stated that “[t]he Fourth Amendment imposes limits on search and seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”⁶⁵ And: “The point of the Fourth Amendment...is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*”⁶⁶

The Court has noted that the amendment “functions differently” from other constitutional protections in the criminal justice process;⁶⁷ it prohibits unreasonable searches or seizures *whether or not the evidence is ever used in a criminal proceeding*, and a violation of the Amendment is “fully accomplished” at the time of the unreasonable governmental intrusion.⁶⁸ And 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. As 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.⁶⁹

In view of this, the Supreme Court has “repeatedly decided that [the Fourth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or ‘gradual depreciation’ of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers.”⁷⁰ And while the “often competitive enterprise of ferreting out crime” requires that police have the authority to thoroughly investigate criminal activity and to disarm dangerous citizens,⁷¹ 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.”⁷² Indeed: “The manner in which the seizure and search were conducted is... as vital a part of the inquiry as whether they were warranted at all.”⁷³

By validating wholesale disregard for the historic constitutional protections of notice, probable cause, and proportionality, the Patriot Act is an example of what Justice William O. Douglas called “powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand.”⁷⁴

A. Expansion of Searches Under the Foreign Intelligence Surveillance Act (FISA)

Electronic surveillance is conducted by law enforcement and intelligence authorities predominantly under the authority of two federal statutes. The Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*, allows wiretapping of citizens as well as resident aliens in the United States⁷⁵ on a showing of probable cause to believe that the target is a “foreign power” or an “agent of a foreign power.”⁷⁶ The FISA court is a secret court consisting of eleven federal judges appointed by the Chief Justice of the Supreme Court to hear surveillance requests on an expedited basis.⁷⁷

Section 218 of the Patriot Act is, thus, critically significant. It amends FISA to provide that “foreign intelligence” need not be “the purpose” of investigations seeking orders under the Act, but merely a “significant purpose.”⁷⁸ The amendment applies both to FISA electronic surveillance warrants and FISA warrants for physical searches of property.⁷⁹ This greatly expands the power of federal authorities to use the looser standards of FISA to investigations of both United States citizens and residents that only tangentially touch on national security.

B. Sections 206 and 207: Roving FISA Wiretaps

Sections 206 and 207 amend FISA to allow: (a) the imposition of the FISA wiretap warrant against unspecified “persons,” rather than specific communications providers, allowing federal agents to apply FISA wiretaps to any provider of communications services without geographical limitation if the FISA court agrees that limiting the order to one provider would have the effect of “thwarting” the investigation (§ 206); and (b) increasing the time period for FISA warrants (1) from 90 days to 120 days for a wiretap order;

and (2) from 45 to 90 days for a physical search, unless against an “agent of a foreign power,” in which case the maximum is 120 days.

Attorney General Ashcroft explained the Administration’s desire for this “roving surveillance authority”:

Our proposal would allow a federal court to issue a single order that would apply to all providers in a communications chain, including those outside the region where the court is located. We need speed in identifying and tracking down terrorists. Time is of the essence. The ability of law enforcement to trace communications into different jurisdictions without obtaining an additional court order can be the difference between life and death for American citizens.⁸⁰

However, this provision eliminates two extremely important checks from the system that have historically provided a measure of accountability for the validity of a warrant. First, the amendment allows the issuance of so-called “blank warrants,” by which the parties required to respond to the order need not be listed on the face of the document. This places such communications providers in the position of having to accept the validity of the warrant and its application to them virtually without question (although the section does permit a provider to inquire with the Attorney General – who, through his various agents, obtained the order in the first place – whether the order is valid). Second, the order may not have been issued in the responding party’s jurisdiction, creating hindrances of geography and expense for a party that desires to challenge the order in court.

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

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

Section 216 expands FISA pen register and trap and trace authority to “anywhere in the United States.” Formerly, the order was limited to that particular jurisdiction and to a particular communications provider or location. Now, the order follows the FBI and the subject anywhere. This raises the same concerns relating to identification of the party charged and the practical ability to challenge the order discussed in the context of roving surveillance powers (*see* III. B., above).

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 as well. The ability to monitor Internet sites visited by the subject of a search, in the absence of a showing of probable cause or even reasonable suspicion, is an unprecedented expansion of federal surveillance powers.

D. Section 215: Business Records Seizures Allowed Under FISA

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

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

The second major federal surveillance statute, the Wiretap Act of 1968, 18 U.S.C. § 2510 *et seq.*, sometimes referred to as “Title III,” has also been considerably expanded by the Patriot Act. The Wiretap Act imposes a much higher hurdle than is required to obtain a FISA order, at least in theory. It ordinarily requires a court order based upon an affidavit establishing probable cause to believe a crime has been or is about to be committed and that the search will turn up evidence thereof.⁸¹

Further, the protections afforded by the Federal Wiretap Act of 1968 were also intended to exceed those guaranteed by the Fourth Amendment. For an expectation of privacy to be constitutionally protected under the Fourth Amendment, the subject’s expectation of privacy must be one that society is willing to recognize, and the subject must have taken reasonable precautions to protect the privacy of the communications.⁸² The year after the Supreme Court’s seminal Fourth Amendment right of privacy case, *Katz v. United States*, the Wiretap Act was passed by Congress specifically to deal with the electronic interception of oral communications.⁸³ Nothing in the Act’s history, language, or definitions requires that the subjects of a wiretap took precautions to avoid being overheard or recorded.⁸⁴ The Act presumes that *any time* the government must use an eavesdropping device to intercept an oral communication, the communication must have been intended to be private.⁸⁵ 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 national security.”⁸⁶

Despite this high standard, wiretap orders are virtually never denied. For the years 1996 through 2000, reported wiretap requests by federal and state agencies totaled 6,205; only three were denied, an approval rate of 99.9%+⁸⁷ Despite the apparent lack of judicial checks on the availability of wiretap orders

currently, the Patriot 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” investigation, “chemical weapons” investigations, or “computer fraud and abuse” investigations.⁸⁸ This expands the federal government’s wiretap authority into the broad, as-yet-undefined area of “terrorism” investigations and investigations related to computer use.

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

Section 203b of the Patriot Act employs the same broadened definition of “foreign intelligence information” used in Section 203a, which permits grand jury information sharing (*see* IV. A., below), to allow sharing between federal agencies of any information derived from wire, oral, or electronic communications intercepted pursuant to the Wiretap Act, 18 U.S.C. § 2510 *et seq.*, where contents of such communications include “foreign intelligence information.” The effect is to allow sharing of wiretap information with any federal agency, including the CIA and INS, whereas previously sharing had to be related to the same investigation that gave rise to the wiretap. This new provision is an important component of the Justice Department’s desire to build a general federal database of all criminal information.

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

Section 209 amends the Wiretap Act, 18 U.S.C. § 2510, to allow wiretaps of voice mail messaging systems. Under prior law, stored voice mail messages fell under the Title III category of “wire communications,” meaning messages stored by a service provider could only be seized pursuant to the higher standards applicable to a wiretap order.⁸⁹ This put voice mail in the same category as a real-time telephone or Internet communication between two parties. The Patriot Act inserts “wire communication” into the definition of an “electronic communications system,” effectively permitting access to such messages via a standard search warrant, as if a voice mail message were merely a documentary record. Clearly, however, an individual’s constitutionally recognized expectation of privacy in his or her message is not diminished at all by the fact that the message is stored temporarily in a voice messaging system before being retrieved by the recipient.⁹⁰ Consequently, this provision of the Patriot Act is constitutionally suspect under the Fourth Amendment.

Section 210 allows federal law enforcement officials to use an “administrative subpoena” to obtain telephone or Internet/e-mail service provider records of customer names, addresses, telephone connection records, including time and duration, length of service, and source of payment, including credit card or bank account numbers.⁹¹ The amendment added time and duration and source of payment to the information obtainable. Now, federal authorities possess the power to easily access 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.⁹² The Supreme Court has held that a search or seizure of a dwelling may be constitutionally defective if police officers entered without prior announcement.⁹³ This requirement is codified in the federal criminal procedure statutes,⁹⁴ which allows the subject of the warrant an opportunity to respond by challenging 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.⁹⁵ A legion of tragic incidents resulting from execution of “no-knock” warrants demonstrates the potential dangers inherent in serving such warrants on innocent victims.⁹⁶

Despite the Supreme Court’s cautions and the statutory mandate for the “knock and announce” protocol, Section 213 of the Patriot Act now permits federal law enforcement officials to delay giving notice of the execution of a search warrant to the subject of the warrant – even until after it has been executed – if notification “may have an adverse result.” Authority for the issuance of search warrants derives from two statutes: 18 U.S.C. § 3103, which implements the standards set out in Federal Rule of Criminal Procedure 41 for issuing warrants;⁹⁷ and 18 U.S.C. § 3103a, a “catchall” provision that allows as additional grounds for the issuance of a warrant “to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States.” Section 213 amends the latter “catchall” provision to add a new subsection (b), which provides that required notice of the issuance of any warrant (under any provision of law) “may be delayed if...the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in Section 2705).”⁹⁸ The warrant need only provide for giving notice “within a reasonable period of its execution,” and the period may be extended for “good cause.”⁹⁹ And 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.”¹⁰⁰ In other words, 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.¹⁰¹

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.¹⁰² That provision, 18 U.S.C. § 2705, includes as “adverse results” justifying delayed notice:

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

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

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

No person shall be held to answer for a capital, or otherwise infamous crime, *unless on a presentment or indictment of a grand jury*; 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.

– UNITED STATES CONST., AMEND. V

A. Ending the Historic Secrecy of Grand Juries

Section 203a of the Patriot Act amends Rule 6 of the Federal Rules of Criminal Procedure relating to grand jury indictments to vitiate the historic secrecy of grand juries. Grand juries have broad powers to subpoena documents and witnesses, as seen in the Monica Lewinsky investigation when the jury sitting under Judge Norma Hollowell Johnson subpoenaed numerous White House officials to testify. The transcripts and documents obtained by grand jury process were heretofore secret except for disclosure upon court order showing substantial need or for defendants to challenge the indictment. The reason for this protection derived from the formidable power of the grand jury. Because the function of the grand jury, alone among American criminal justice authorities, is inquisitorial, allowing it broad-ranging authority to secure documents and testimony through the subpoena power, the secrecy of its proceedings and the information obtained thereby have historically been sacrosanct.¹⁰³ “It 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 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.”¹⁰⁴ Among the objectives of grand jury secrecy noted by the Supreme Court are two that have particular application to the internal secrecy of subpoenaed documents and testimony: “to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes” and “to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation.”¹⁰⁵ The amendments to the Patriot Act are likely to have the effect of discouraging free disclosure since witnesses will know their information may be shared with a wide range of law enforcement authorities. Also, the “innocent accused” will find their private records disseminated widely among federal law enforcement agencies and perhaps placed in a central databank of suspect information, despite their formal exoneration.

Abandoning traditional safeguards on the power of grand juries, new Federal Rule 6(e)(3)(c)(I)(V) allows disclosure:

(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence

information (as defined in clause (iv) of this subparagraph), *to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.*

“Foreign intelligence information” is, in turn, defined broadly to include:

(I) *information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—*

(aa) *actual or potential attack* or other grave hostile acts of a foreign power or an agent of a foreign power;

(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power;
or

(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or

(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(aa) the national defense or the security of the United States; or

(bb) the conduct of the foreign affairs of the United States.

(Emphases supplied.) The non-restriction to “United States persons” means that information relating to any person, citizen or non-citizen, 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” 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. The constitutionality of the order, and its application to resident citizens, is discussed below at section VI.

V. The Sixth Amendment Right to Counsel

In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.

– UNITED STATES CONST., AMEND. VI

A. Executive Order Allowing Monitoring of Attorney-Client Conversations

For the first time in modern history, federal authorities may now refuse to respect the age-old,

virtually absolute confidentiality enjoyed by a prisoner consulting with his or her attorney. On October 30, 2001, the Justice Department unilaterally imposed a requirement on federal correctional facilities that the correspondence and private conversations of prisoners with their counsel are now subject to monitoring in most cases.¹⁰⁶ The 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.¹⁰⁷ It was posted in the Federal Register on October 31, 2001, the day after it went into effect.¹⁰⁸ Further, the rule by its terms is not limited to alleged terrorists but extends to all incarcerated individuals that the Attorney General suspects may seek to commit or facilitate “acts of violence.” The rule provides:

28 CFR Parts 500 and 501: National Security; Prevention of Acts of Violence and Terrorism; Final Rule [excerpt]:

[I]n those cases where 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, this rule amends the existing regulations to provide that *the Bureau is authorized to monitor mail or communications with attorneys* in order to deter such acts, subject to specific procedural safeguards, to the extent permitted under the Constitution and laws of the United States.¹⁰⁹

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 the monitoring will not rapidly expand to potentially include a large percentage of federal prisoners.¹¹⁰ As the American Bar Association has noted, this is a clear violation of the Sixth Amendment right to counsel of the suspect.¹¹¹ In addition, the monitoring places the attorney in the position of violating his or her ethical obligation to maintain confidentiality of communications with the client or foregoing such communications altogether, and thereby seriously jeopardizing legal representation.¹¹²

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

The Justice Department has detained in excess of 1,000 non-citizens in its investigation into the September 11th attacks. Some of these detainees reportedly have been discouraged from obtaining legal counsel or have had access to counsel blocked outright.¹¹³ Such tactics are a clear violation of the Sixth Amendment right to counsel.¹¹⁴

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

In all criminal prosecutions, the accused shall enjoy the right to 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, and to have the assistance of counsel for his defense.

– UNITED STATES CONST., AMEND. VI

On November 13, 2001, President Bush issued a Presidential Proclamation and Executive Order suspending the right of indictment, trial by jury, appellate relief, and habeas corpus for all non-citizen persons accused of aiding or abetting terrorists.¹¹⁵ The Proclamation, issued pursuant to the President's authority as Commander in Chief of the Armed Forces, cited the terrorist attacks as having "created a state of armed conflict that requires the use of the United States Armed Forces" and the threat of future attacks.¹¹⁶ The President found that "[t]o 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 by military tribunals."¹¹⁷ The order subjects "any individual who is not a United States citizen with respect to whom I [the President] determine from time to time in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
 - (i) is or was a member of the organization known as al Qaida;
 - (ii) 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
 - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
- (2) it is in the interest of the United States that such individual be subject to this order.¹¹⁸

The proclamation directs the Secretary of Defense to promulgate orders and regulations for the appointment and administration of the military commissions. However, the President stated, "Given the danger to the safety of the United States and the nature of international terrorism...it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."¹¹⁹ Thus, the military will sit as both the triers of fact and of law, and the regulations shall only permit admission of evidence that the Secretary deems not to violate national security.¹²⁰ The death penalty may be imposed,¹²¹ despite that sentence may be passed without unanimity on a two-third vote of the members.¹²²

Review from final decisions of military commissions is to be had only to the Secretary of Defense.¹²³ The order also purports to suspend the right of appeal and of habeas corpus relief:

(7)(b) With respect to any individual subject to this order –

- (1) *military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and*
- (2) *the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.*¹²⁴

While the Bush Administration's draft procedures for military tribunals reportedly address certain objections by civil libertarians, including allowing for unanimous verdicts in death penalty cases and permitting trials to be ordinarily open to the public,¹²⁵ the final regulations have not yet been adopted. Until they are, 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 amendments to the Order, which has remained unchanged. Moreover, while the reported draft procedures would permit review of tribunal decisions by "an appeals body," that body would not be a court of law, according to reports, but perhaps a separate military review panel.¹²⁶

Article III, § 2 of the United States Constitution provides:

*The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law direct.*¹²⁷

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

The power to try civilians in military tribunals has not been held to be vested in Congress by its authority "[t]o make rules for the government and regulation of the land and naval forces."¹²⁸ 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*.¹²⁹ 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 (four on Long Island and four in Florida) with orders to destroy American military manufacturing plants.¹³⁰ They were wearing German military uniforms or military items when they landed and were under the pay and orders of the German High Command.¹³¹ They were arrested by the FBI in Chicago and New York.¹³²

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.¹³³ The President further, on the same day, directed by Proclamation that:¹³⁴

all persons who are subjects, citizens or residents of any nation at war with the United States *or who give obedience to or act under the direction of any such nation*, and who during time of war enter or attempt to enter the United States...through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.¹³⁵

Since Roosevelt was held to be acting within his executive power pursuant to Congress's declaration of war under Article 15 of the Articles of War, the Court found it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation."¹³⁶

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. The Court first reviewed the Civil War case of *Ex Parte Milligan*,¹³⁷ 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, had been arrested and tried by a military tribunal for seditious assistance to the Confederacy.¹³⁸ After his conviction and sentence of hanging, he sought relief by writ of habeas.¹³⁹ The Supreme Court declared the issue of his right to habeas relief to be one as to which the importance "cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty."¹⁴⁰ Despite the issuance of the presidential proclamation,¹⁴¹ jurisdiction was had under Congressional authorization to review denial of the writ to civilian citizens of Northern states.¹⁴²

Writing for the Court in *Milligan*, Justice David Davis observed:

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law.... By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military

trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve 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. By that Constitution and the laws authorized by it this question must be determined.¹⁴³

The protections of due process, grand jury indictment, trial by jury, and habeas corpus, if available to Milligan, unquestionably controlled the case, the Court cautioned.¹⁴⁴

Turning to the question of the military tribunal's authority to try Milligan, the Supreme Court found authority neither in Congress's constitutional Article III, § 1 authority, nor in presidential authority. "They cannot justify [military trials] on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws."¹⁴⁵ The federal courts of Indiana were open for criminal cases throughout the War Between the States, and the acts alleged were the subject of Congressionally prescribed criminal penalties. Thus, "[t]he Government had no right to conclude that Milligan, if guilty, would not receive in that [federal] court merited punishment."¹⁴⁶ Moreover: "If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury...and, if indicted, try him according to the course of the common law."¹⁴⁷

The Court also held that Milligan's constitutional right to trial by jury was violated. "[T]his right – one of the most valuable in a free country – is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service."¹⁴⁸ 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, which 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."¹⁴⁹ 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."¹⁵⁰

The Supreme Court in *Ex Parte Quirin* construed *Ex Parte Milligan* to not reach military tribunals established to try violations of the "law of war."¹⁵¹ Nor was it of consequence that Congress had not delineated by statute the particular offenses within the scope of that term.¹⁵² As the Court noted: "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants."¹⁵³ Spies and saboteurs are examples of such "unlawful combatants" who are subject to trial

and punishment by military tribunals, the Court stated.¹⁵⁴ The Court restricted *Milligan* to its factual predicate, that of non-military citizens:

We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as – in circumstances found not there to be present, and not involved here – martial law might be constitutionally established.¹⁵⁵

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. "Congress...has thus exercised its 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. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law."¹⁵⁶

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 terror attacks, as it arguably has limited authority to do under Article III, § 1 of the Constitution. ("The 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.")¹⁵⁷ 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.¹⁵⁸ The broad reach of the 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.¹⁵⁹ Such persons have been held by the Supreme Court to be entitled to all the protections afforded "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. *See generally* I. D., above (disregard of the constitutional rights of resident non-citizens).¹⁶⁰ Although the writ of habeas corpus is often referred to as a "privilege," its availability is a matter of constitutional import, as Article I, § 9, cl. 2 of the Constitution provides, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The *Milligan* Court appears to have implicitly considered the Civil War one such appropriate case. It is doubtful, however, that the attacks of September 11th and the prospect of further terrorism could be construed to amount to "cases of rebellion or invasion" requiring suspension of the writ. Consequently, any enforcement of the Executive Order to impose trial by military tribunal on any person other than a non-United States national outside the borders of the country will not pass constitutional muster.

VII. The Fifth Amendment Right to Due Process of Law

No person shall be...deprived of life, liberty, or property, without due process of law.

– UNITED STATES CONST., AMEND. V

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

Section 412 of the Patriot Act requires the Attorney General to take into custody any alien whom he certifies is subject to the preceding section 411, or any alien he has “reasonable grounds to believe” is “engaged in any other activity that endangers the national security of the United States.”¹⁶¹ He may hold the alien for seven days, at which point he must either charge him criminally or initiate the process of deportation.¹⁶² Habeas corpus review is the only court review available to such a detainee; and whereas a petition for habeas may be initiated in the Supreme Court, to “any justice of the Supreme Court,” the District of Columbia Court of Appeals, or “any district court;” an appeal from a district court may go only to the D.C. Court of Appeals.

If an immigrant is detained for purposes related to immigration under this provision, there is no end point imposed by statutory or constitutional authority for the length of the detention. This has frequently resulted in the indefinite detention of non-resident foreigners in United States “detention facilities” and oftentimes prisons, with no remedy.¹⁶³

B. Section 106: Seizure of Assets Without Due Process

Title I, Section 106 of the Patriot Act greatly increases presidential authority by amending Section 203 of the International Emergency Powers Act, 50 U.S.C. 1702, to grant the Chief Executive broad new powers:

(C) when the United States is *engaged in armed hostilities* or has been *attacked by a foreign country or foreign nationals, 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; and 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.¹⁶⁴

The Attorney General explained the perceived need for this provision, stating, “[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.”¹⁶⁵ As discussed above, however, in section I. D., temporary and permanent aliens in the United States enjoy the Fifth Amendment right to due process, which encompasses the right to hold personal and real property. The proposition that the President may seize and dispose of such assets unilaterally with no meaningful judicial review is constitutionally untenable.

It is under this authority, apparently, that the President has ordered the seizure of the bank accounts and property of suspected terrorist organizations and individuals associated with them. Note that he 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.” There is no time limit or other cabining provision on the use of this authority. No judicial review is granted by the terms of this statute, and if judicial review is obtained, new section (c) allows such review to be conducted *ex parte* on the basis of secret evidence. Judicial review may be available under new Section 316 of the Patriot Act, but that provision only grants a “right” of owners of confiscated property to challenge the determination that the property was an asset of suspected terrorists by filing a federal lawsuit. That section, however, specifies that the Federal Rules of Evidence need not apply where their application “may jeopardize the national security interests of the United States,” or, in other words, more secret evidence.

Moreover, Section 106 may constitute an unconstitutional bill of attainder in violation of the federal Bill of Attainder Clause, Article I, § 9, cl. 3.¹⁶⁶ The Bill of Attainder Clause has not been the subject of extensive Supreme Court jurisprudence, its chief treatment by the Court having come in three cases, *United States v. Brown* (1965),¹⁶⁷ *United States v. Lovett* (1946),¹⁶⁸ and *Cummings v. Missouri* (1867).¹⁶⁹ 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. *Cummings* invalidated under the under the Bill of Attainder Clause a provision of the Missouri constitution prohibiting service as an officeholder, lawyer, clergyman, teacher, or corporate officer by anyone who could not take an oath that he had never been in the service of the Confederate states.¹⁷⁰ *Lovett* invalidated under the clause an act of Congress prohibiting the payment of any compensation for government service to three named individuals who had allegedly engaged in “subversive” activities.¹⁷¹ *Brown* struck down as a bill of attainder a provision of the Labor-Management Reporting and Disclosure Act of 1959 that imposed criminal penalties on a member of the Communist Party serving as an officer of a labor union.¹⁷²

Brown contains the Court's most thorough modern analysis of the clause. The Court discussed the history of the clause at length, noting that attainders have been regarded as possessing three chief characteristics: (1) they are directed against specific individuals or discernable groups; (2) they affect the life or property of those targeted; and (3) they amount to legislative usurpation of the judicial function.¹⁷³ Nor does a legislative act need to be punitive in nature, the Court stated; prophylactic measures taken against individuals or group activities based upon their perceived characteristics may also constitute attainders.¹⁷⁴ The Bill of Attainder Clause, the Court concluded, “was not to be given a narrow historical reading...but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment,

of any form or severity, of specifically designated persons or groups.”¹⁷⁵

In view of the historical concern of the Supreme Court 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 would seem to be vulnerable to a challenge under the Bill of Attainder Clause. These provisions are directed against a specific group, *i.e.*, Islamic or pro-Islamic organizations; they create automatic asset forfeitures of those the President designates as “terrorist groups;” and they afford little or no judicial process to that designation and the subsequent forfeitures. The chief distinction in the case of the Patriot Act provisions, that it is not Congress, but the Chief Executive, who nominates the entities belonging to the disfavored group, is one without a difference; an attainder is unconstitutional because of the co-opting of the judicial function by the legislature. And 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.

VIII. The Constitutional Right to Privacy

[S]pecific 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.

– Justice William O. Douglas, *Griswold*
v. Connecticut, 381 U.S. 479, 484 (1965)

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

Sections 355 and 356, along with other provisions of Title III of the Patriot Act (surnamed the “International Money Laundering and Anti-Terrorist Financing Act of 2001”), increase the monitoring and reporting obligations of citizens against other citizens. Section 355 allows financial institutions to note their “suspicion” that an ex-employee was involved in “potentially unlawful activity” in an employment reference. Section 356 requires securities brokers and dealers to “submit suspicious activity reports” to “suspicious transactions,” as that term is defined in 31 U.S.C. § 5318(g).

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 Financial Right to Privacy Act of 1978, 12 U.S.C. § 3412, to allow law enforcement authorities to obtain financial data where related to “intelligence or counterintelligence activity, investigation *or analysis* related to international terrorism,” in lieu of the former provision which allowed it for “any legitimate law enforcement inquiry.” Thus, “financial analysis” is now a sufficient basis for federal authorities to review citizen financial information. A similar amendment is applied to the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, to require furnishing credit reports to

federal law enforcement agents who certify they need the information for that purpose.

C. Section 507: Required Disclosure of Educational Records

The Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, was passed by Congress in 1974 to protect the right to privacy of students and their parents in their educational records.¹⁷⁶ The law was enacted out of Congress’s concern that school district practices would “not invade the privacy of students or pose any threat of psychological damage to them” by unauthorized disclosures.¹⁷⁷

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 to a criminal investigation.¹⁷⁸ 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.”¹⁷⁹ This amendment makes disclosure of educational records the rule, rather than the exception, permitting federal “sweeps” of the educational records of certain groups of persons, notably aliens residing in the United States on student visas.

D. Building Biometric Databases of Citizens

Sections 405, 414, 417, and 1008 of the Patriot Act require the Attorney General to explore the feasibility of using “biometric identification systems” – fingerprint I.D. systems – at United States ports of entry (customs offices at airports, harbors, etc.) and 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.

CONCLUSION

The September 11th attacks have challenged America in ways that are unprecedented in recent history, and 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 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 upon. To set aside the lessons of 225 years of American freedom, enshrined in the Declaration of Independence as a commitment to the truth that “All men are created equal [and] endowed by their Creator with certain inalienable rights...life, liberty and the pursuit of happiness,” as politically or practically inexpedient in a time of “war,” would be to allow the extremists to win by surrendering who we are as a nation. If the American people accept a form of police statism in the name of a promise of personal security, that would be the

greatest defeat imaginable.

TABLE OF APPENDICES

- A. Presidential Proclamation 7436, Declaration of National Emergency by Reason of Certain Terrorist Attacks, September 14, 2001
- B. USA PATRIOT Act of 2001, H.R. 3162 (2001)
- C. Bureau of Prisons, Department of Justice, Interim Rule, “National Security: Prevention of Acts of Violence and Terrorism,” October 31, 2001 (66 F.R. 55061-55066)
- D. Presidential Proclamation, Military Order of November 13, 2001 (66 F.R. 57831-57836)

ENDNOTES

1. See Presidential Proclamation 7436, Declaration of National Emergency by Reason of Certain Terrorist Attacks, September 14, 2001, Appendix A.
2. 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.
3. Presidential Proclamation, n. 1, *supra*, Appendix A, citing *inter alia*, 10 U.S.C. § 527 (unit deployment); 10 U.S.C. § 12302 (reserves).
4. Presidential Proclamation, n. 1, *supra*, Appendix A.
5. Written Testimony of Attorney General John Ashcroft before Senate Committee on the Judiciary, September 25, 2001.
6. *Id.*
7. Written Testimony of Attorney General John Ashcroft before Senate Committee on the Judiciary, December 6, 2001.
8. *Id.*
9. Testimony of Attorney General Ashcroft, September 25, 2001.
10. The meteoric passage of the Patriot Act is remarkable. H.R. 3162 was introduced in the House on October 23, 2001. Pursuant to a rule waiver, it was passed out the next day on a 357-66 vote. The Senate approved the bill without amendment by a vote of 98-1 on October 26th, and it was signed into law the same day by President Bush.
11. Testimony of Attorney General Ashcroft, December 6, 2001.
12. *Id.*
13. *Id.*
14. P.L. 107-56, Title VIII, § 808, 115 Stat. 378.
15. This crime is codified at 18 U.S.C. § 351(e).
16. Codified at 18 U.S.C. § 844(e).
17. Codified at 18 U.S.C. § 844(f)(1).
18. Codified at 18 U.S.C. § 956(b).
19. Codified at 18 U.S.C. § 1361.
20. Codified at 18 U.S.C. §§ 1366(b) and (c).
21. Codified at 18 U.S.C. § 1751(e).
22. Codified at 18 U.S.C. § 2152.

23. Codified at 18 U.S.C. § 2156.
24. Testimony of Attorney General Ashcroft, December 6, 2001.
25. *Id.*
26. The administration's centralization of authority and resistance to accountability bring to mind James Madison's words in FEDERALIST NO. 51. Addressing the inherent tension between liberty and authority in democratic governments, Madison said:

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 difficulty lies in this: You must first enable the Government to control the govern; and in the next place, oblige it to control itself.

27. "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." Testimony of Attorney General Ashcroft, December 6, 2001.
28. *Id.*
29. 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 American 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. Central Intelligence Agency*, 685 F.2d 13 (1st Cir. 1982); *National Lawyers' Guild v. Attorney General*, 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*, 485 F.Supp. 664 (S.D.N.Y. 1978); *Krause v. Rhodes*, 535 F.Supp. 338 (N.Dist. Ohio 1979); *Socialist Workers' Party v. Attorney General*, 642 F.Supp. 1357 (S.D.N.Y. 1986). CHAOS was concerned with the degree of influence exerted over critics of the Johnson administration's Vietnam policy by "Soviets, Chicoms [Chinese Communists], Cubans and other Communist countries.... Of particular interest is 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*, Sen. Rep. No. 94-755, 94th Cong., 2nd Sess. (1976). Groups targeted included "radical students, anti-Vietnam war activists, draft resisters and deserters, black nationalists, anarchists, and assorted 'New Leftists.'" 690 F.2d at 982, n. 9. The CIA maintained several thousand computerized files on Americans involved in these activities. *Id.* at 982. Its 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. 690 F.2d at 983-984.
30. *Ashcroft: Groups Could be Monitored*, *Washington Post*, December 3, 2001. *See, e.g., 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); *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997) (Fourth Amendment rights of clergy and prisoner were violated by surreptitious taping of prison confessional).

31. For a description of how this inter-agency information gathering works, see “Personnel from Assorted Agencies Work Together at FBI Headquarters,” *Washington Post*, October 14, 2001, A16 (describing agents of FBI, CIA, NSA, DIA, Customs and others working side-by-side in anti-terrorism headquarters of the FBI and CIA). 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.

Testimony of Attorney General Ashcroft, September 25, 2001.

32. Testimony of Attorney General Ashcroft, December 6, 2001.

33. P.L. 107-56, Title VIII, § 808. The Act’s amendment to 18 U.S.C. § 3077, 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.” See P.L. 107-56, Title VIII, § 802(b).

34. 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, 18 U.S.C. § 1961 *et seq.*, to pro-life protesters. RICO was passed with broad language that was 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.” 18 U.S.C. § 1962(c). A “pattern” of RICO activity occurs if two acts are committed within a ten-year span. 18 U.S.C. § 1961(5). In *National Organization of 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. The Court as a whole did not address RICO’s potential chilling effects upon free speech or associational rights, although Justice Souter recognized in a concurring opinion that RICO had the potential of infringing legitimate free speech rights. 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 technical trespass can be elevated to a federal crime.” Angela Hubbell, *FACE’ing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion*

Protesters, 21 Ohio N.L. Rev. 1061, 1067 (1995). *Cf. Palmetto State Medical Center v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997) (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. American Coalition of Life Activists*, 945 F.Supp. 1355 (D.Or. 1996) (plaintiffs adequately stated RICO claims against all but one defendant); *National Organization of Women v. Scheidler*, 1997 WL 610782 (N.D.Ill. 1997) (permitting certain RICO claims to proceed against defendants, while granting judgment in favor of plaintiffs on other RICO claims).

35. Testimony of Attorney General Ashcroft, December 6, 2001. The Attorney General is apparently referring to the former versions of the provisions cited above, which now employ broadly expanded definitions of “terrorism” pursuant to the Patriot Act amendments.

36. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

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

38. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), *Kwong Hai Chew v. Colding*, 344 U.S. at 598.

39. *Plyler v. Doe*, 457 U.S. 202, 212, n. 11 (1982), quoting *Wong Wing v. United States*, 163 U.S. 228, at 242-243 (1896) (concurring in part and dissenting in part).

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

41. 457 U.S. 202.

42. *Zadvydas v. Davis*, 121 S.Ct. 2491, 2500 (2001), citing *Plyler v. Doe*, 457 U.S. at 210; *Mathews v. Diaz*, 426 U.S. at 77; *Kwong Hai Chew v. Colding*, 344 U.S. at 596-598; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

43. *Shaughnessy v. United States ex rel Mezei*, 345 U.S. at 212. However, it should be noted that as to aliens who have not entered the borders of the United States, no constitutional due process protections are extended. “It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside the territorial boundaries.” *United States v. Verdugo-Urquidez*, 494 U.S. at 269. Likewise, illegal aliens who have been intercepted at the border and deemed “excludable” may be subjected to summary exclusion without due process. “The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” *Zadvydas*, 121 S.Ct. at 2500. Accordingly, this analysis does not address the application of the Patriot Act or Justice Department actions with regard to excludable aliens.

44. The administration’s characterization of aliens tends to shift with context. They are defended as “Americans” when subject to retaliatory attacks and threats, *e.g.*, Testimony of Attorney General Ashcroft, December 6, 2001 (“We have investigated more than 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: “In today's environment, we are not going to wait around for something to happen.... 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.” “Airport Workers Indicted in Security Probe,” *Washington Post*, December 12, 2001, A26.

45. *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463, 464 (1979).
46. *Id.*; *Police Dept. of Chicago v. Moseley*, 408 U.S. 92 (1972); *Boos v. Barry*, 485 U.S. 312 (1988).
47. *Roth v. United States*, 354 U.S. 476, 484 (1957).
48. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
49. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
50. *Pacific Gas and Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 8 (1986).
51. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).
52. *Id.*, at 101-102.
53. “Sedition Law Used to Hold Suspects,” *Associated Press*, November 8, 2001.
54. *E.g.*, *United States v. Lebron*, 222 F.2d 531 (2nd Cir. 1955), *United States v. Rodriguez*, 803 F.2d 318 (7th Cir. 1986).
55. 277 F. 129 (1922).
56. *E.g.*, *Wells v. United States*, 257 F. 605 (9th Cir. 1919) (resolution by defendant that organized workers should demand exemption from military service of all conscientious objectors held admissible to show seditious state of mind); *Haupt v. United States*, 330 U.S. 631 (1947) (in trial for treason, proof of conversations expressing pro-German sentiment, though they had long before alleged acts of treason, were held admissible to prove motive and intent); *United States v. Rahman*, 189 F.3d 88 (2nd Cir. 1999) (World Trade Center bombing; evidence that defendants had possession of Islamic materials describing Jihad admissible). *Cf.* 18 U.S.C. § 552 (prohibiting United States officers from assisting in importation of books and articles containing illegal advocacy); 18 U.S.C. § 1717 (printed matter containing such material non-mailable).
57. Written Testimony of Attorney General Ashcroft, September 25, 2001.
58. Written Testimony of Attorney General Ashcroft, December 6, 2001.
59. *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 30 years, but had briefly been a member of the Communist Party).

60. The practice of “blacklisting” organizations finds precedent in the McCarthy era, when marginalized groups found themselves listed by the Attorney General as “communist.” *See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). 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 U.S. Seizes Assets of 3 Islamic Groups: U.S. Charity Among Institutions Accused Of Funding Hamas*, *Washington Post*, December 5, 2001, A1; *Muslims Wary of Making Donations: Ramadan a Time for Charity, But Many Fear Being Questioned by FBI*, Associated Press, November 23, 2001. 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.
61. P.L. 107-56, Title II, § 215, enacting new Sec. 501(a)(1), amending 50 U.S.C. § 1861 *et seq.*
62. *See id.*, inserting new Sec. 501(d).
63. *See id.*, inserting new Sec. 501(c)(2) (“An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a)”).
64. Testimony of Attorney General Ashcroft, December 6, 2001.
65. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).
66. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (emphasis supplied).
67. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).
68. *Id.*, quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974); *United States v. Leon*, 468 U.S. 897, 906 (1984).
69. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). One example of such a case is *Brown v. Texas*, 443 U.S. 47 (1979), in which the defendant was observed in a high crime area, stopped and patted down absent reasonable suspicion that he was armed or engaged in criminal activity. 443 U.S. at 47. 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 “deliberate indifference to” or “reckless disregard for” the subject’s personal liberty. *Sacramento v. Lewis*, 523 U.S. 833 (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. 443 U.S. at 53.
70. *Gouled v. United States*, 255 U.S. 303, 304 (1921).
71. *Terry v. Ohio*, 392 U.S. 1, 12 (1968), quoting *Johnson v. United States*, 333 U.S. at 14 (1948).
72. *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)); *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).

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

74. *Terry*, 392 U.S. at 60 (Douglas, J., dissenting).

75. Outside the United States, there is no statutory limit on wiretapping U.S. citizens or resident aliens abroad. However, per an Executive Order issued by President Reagan in 1982, EO 12333, if a citizen or permanent legal resident is the target of surveillance abroad, the order requires the approval of the Attorney General.

76. 50 U.S.C. § 1805(a)(3).

77. 50 U.S.C. § 1803.

78. P.L. 107-56, Title II, § 218.

79. Section 218 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 search is to obtain foreign intelligence information....”

80. Testimony of Attorney General Ashcroft, September 25, 2001.

81. 18 U.S.C. §§ 2516, 2518.

82. See *Katz v. United States*, 389 U.S. 347, 352 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.... “); *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).

83. In passing Title III, Congress found:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network.... There has been extensive wiretapping carried on without legal sanctions and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings....

* * * *

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception

of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

Act June 19, 1968, P.L. 90-351, Title III, § 801, 82 Stat. 211. A 1986 amendment to the Act provided, “Nothing in this Act or the amendments made by this Act constitutes authority for the conduct of any intelligence activity.” Act Oct. 21, 1986, P.L. 99-508, Title I, § 107, 100 Stat. 1858.

84. *Cf. Katz v. United States*, 389 U.S. at 360 (Fourth Amendment requires that expectation of privacy be both subjectively held and objectively justified and that subjects took reasonable precautions to protect the privacy of their communications).

85. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985) (discussing at length history of federal wiretaps and adoption of the Wiretap Act).

86. *Mitchell, supra*, 472 U.S. at 514, citing *United States v. United States District Court*, 407 U.S. 297 (1972) (*Keith*). “*Keith* finally laid to rest the notion that warrantless wiretapping is permissible in cases involving domestic threats to national security,” *Mitchell*, at 534.

87. *See* Table, “Authorized Interceptions Granted Pursuant to 18 U.S.C. § 2519 as Reported in Wiretap Reports for Calendar Years 1990-2000,” www.uscourts.gov/wiretap00/table700.pdf

88. The necessity for permitting such warrants for investigation of “computer fraud” is questionable. Prior law permitted interception and disclosure of communications by a computer service provider in order to protect the service provider’s “rights or property,” including in cases of fraud. 18 U.S.C. § 2511(2)(a)(i).

89. In passing the Title III amendments of the Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986), Congress observed that “wire communications in storage like voice mail, remain wire communications, and are protected accordingly.” S. Rep. No. 99-541, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3566 (emphasis added); *see United States v. Smith*, 155 F.3d 1051, 1058-59 (9th Cir. 1998) (company voice mail message intercepted by unauthorized co-worker violated Wiretap Act).

90. *Cf. Katz v. United States*, 389 U.S. at 352: “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected....”

91. 18 U.S.C. § 2703(c)(2).

92. *Wilson v. Arkansas*, 514 U.S. 927 (1995) (common-law knock and announce principle formed a part of the Fourth Amendment reasonableness inquiry); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (there is no “felony drug search exception” to the knock and announce requirement). The Supreme Court noted that this ancient common law standard dates back to the Magna Carta era. *Wilson*, 514 U.S. at 932, n. 2.

93. *Wilson, supra*.

94. *See* 18 U.S.C. § 3109 (“The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance....”).

95. *Wilson*, 514 U.S. at 931-933 (discussing historical reasons for rule). The *Richards* Court subsequently elaborated:

While it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. As we observed in *Wilson v. Arkansas*, the common law recognized that individuals should have an opportunity to themselves comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.

Additionally, when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry. The State pointed out at oral argument that, in Wisconsin, most search warrants are executed during the late night and early morning hours. The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

520 U.S. at 393, n. 5 (citations omitted).

96. *See, e.g., Atkins v. City of Dallas*, 1997 U.S. Dist. LEXIS 4983 (N.D. Tex.) (officers executed “dynamic entry” with battering rams and flashbang devices, black uniforms and masks; suspect had vacated home one month earlier); “Officer Who Killed Grandfather in Mistaken Raid was Named in 2 Force Suits,” *Los Angeles Times*, October 5, 1999; T. Lynch, *Another Drug War Casualty*, Cato Institute, November 30, 1998 (detailing death of Pedro Oregon Navarro in raid on wrong address); “Cops Kill Man, Raid Wrong House,” Associated Press, October 6, 2000 (raid of home next door to correct address results in death of occupant); “Police Officer Pleads Guilty in ‘No-Knock’ Drug Raid Killing,” Associated Press, October 5, 2000; “Unity Plea in Slaying’s Wake,” October 5, 2000, Modesto Bee (11-year-old boy killed in SWAT raid); Office of the District Attorney, County of Ventura, “Report on the Death of Donald Scott,” March 30, 1993 (seizure and forfeiture operation targeting alleged marijuana growth on economically desirable property resulted in shooting death of 61-year-old owner; no marijuana was found). In Boston in 1994, a mistaken SWAT raid on a 75-year-old minister’s home resulted in the man’s death from a heart attack; police had targeted the wrong house. “Boston to Give Victim’s Widow \$1 Million in Wrongful Death Suit,” *New York Times*, April 25, 1996.

97. FED. R. CRIM. PROC. Rule 41 permits the issuance of a warrant

to 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.

98. P.L. 107-56, Title II, § 213, amending 18 U.S.C. § 3103a (new 3103a(b)(1)).

99. P.L. 107-56, Title II, § 213, adding new 18 U.S.C. § 3103a(b)(3).

100. P.L. 107-56, Title II, § 213, adding new 18 U.S.C. § 3103a(b)(2).

101. Arguably, this kind of “notice” is not notice at all, since the owner had no notice whatever before the fact. 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, “Notice delayed is notice denied.”

102. Private homes have enjoyed a virtually sacrosanct position in English and American law. The Supreme Court recently harkened back to this principle in *Wilson v. Layne*, 526 U.S. 603, 610 (1999), in which it unanimously held the practice of media “ride-alongs” to film the execution of warrants in residences as violative of the Fourth Amendment. The Court quoted *Semayne’s Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195, an English case dating back to 1604 which made the now-famous observation that “the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.” In fact, “[t]he zealous and frequent repetition of the adage that a ‘man’s house is his castle’ made it abundantly clear that both in England and in the Colonies ‘the freedom of one’s house’ was one of the most vital elements of English liberty.” *Payton v. New York*, 445 U.S. 573, 596-97 (1980).

103. See *Blair v. United States*, 250 U.S. 273 (1919); LaFave & Israel, *CRIMINAL PROCEDURE* (1984), § 8.2(c) (discussing history of grand juries).

104. *Blair, supra*, 250 U.S. at 282.

105. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958). *Proctor & Gamble* involved a civil suit brought against the company by the Justice Department for alleged violations of the Sherman Act. 356 U.S. at 679. The civil suit followed a grand jury investigation for criminal violations of the Act, which resulted in no indictment. *Id.* The Justice Department nonetheless used the grand jury transcript in preparing for the civil trial. *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).

106. “U.S. Will Monitor Calls to Lawyers: Rule on Detainees Called ‘Terrifying,’” *Washington Post*, November 9, 2001, A1. *See* “National Security; Prevention of Acts of Violence and Terrorism; Final Rule,” Federal Register: October 31, 2001 (Volume 66, Number 211), pp. 55061-55066, at 55061, amending 28 C.F.R. Parts 500 and 501.
107. *See, e.g.*, 5 U.S.C. § 553, requiring posting of proposed federal agency rules in the Federal Register and an invitation for public comment and providing that “[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date,” unless the agency provides otherwise for “good cause.”
108. *Supra*, n. 106.
109. Federal Register: October 31, 2001 (Volume 66, Number 211) [Rules and Regulations] pp. 55061-55066, at 55061 (emphases added). *See* Appendix C for full text.
110. The Attorney General claims, “We 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.” Testimony of Attorney General Ashcroft, December 6, 2001. If that is so, why did the Justice Department claim the need for such broad language, which does not restrict monitoring to suspected “terrorists?”
111. ABA Leadership Statement of Robert E. Hirshorn, President, November 9, 2001, reported at www.abanet.org/leadership/justice_department.html. *See, e.g.*, *Black v. United States*, 385 U.S. 26 (1966) (conviction for tax evasion vacated and case remanded for new trial after United States admitted to Supreme Court that FBI had surreptitiously monitored conversations between accused and counsel; suggestion to remand for hearing on whether evidence used was tainted by FBI evidence rejected by the Court in favor of vacating for new trial altogether).
112. Model Code of Professional Responsibility DR 4-101 (1981); Model Rules of Professional Conduct Rule 1.6 (1983).
113. *See* “Questions Swirl Around Men Held in Terror Probe,” *Washington Post*, October 15, 2001, A1; “Scope of Jailings Stirs Questions on Detainees’ Rights to Representation and Bail,” *Washington Post*, September 26, 2001, A10. In the most widely publicized example, San Antonio physician Albadar Al-Hazmi was held incommunicado for days as a “material witness,” despite his lawyers’ efforts to win access to him. *Id.*
114. *See, e.g.*, *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (confession held not voluntary when accused’s request to speak to lawyer met with statement that it “might be worse” for him if he had one).
115. *See* Presidential Proclamation, Military Order of November 13, 2001, Appendix D hereto.
116. Proclamation, Appendix D, Section 1(a)-(d).
117. *Id.*, Section 1(e).
118. *Id.*, Section 2.

119. *Id.*, Section 1(f).
120. *Id.*, Sections 4(c)(2) and 4(c)(3).
121. *Id.*, Section 4(a).
122. *Id.*, Section 4(c)(6).
123. *Id.*, Section 4(c)(8).
124. *Id.*, Section 7(b).
125. “Terrorism Tribunal Rights are Expanded; Draft Specifies Appeals, Unanimity on Death Penalty,” *Washington Post*, December 28, 2001, A1.
126. *Id.*
127. *See Reid v. Covert*, 354 U.S. 1 (1957).
128. UNITED STATES CONST., Article I, § 8; *Reid*, 354 U.S. at 20-21; *see also United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).
129. 317 U.S. 1 (1942).
130. 317 U.S. at 21.
131. *Id.* at 21-22.
132. *Id.* at 22.
133. *Id.* The Articles of War are cited as 10 U.S.C. §§ 1471-1593. *See* 317 U.S. at 26-27:

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 courts 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 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.

134. 7 Fed. Reg. 5101; 317 U.S. at 22.
135. *Id.* at 22-23. The italicized clause appears to have potentially extended the scope of the Proclamation to permit trial by military tribunal of United States citizens or resident aliens found to have

engaged in acts of war. However, the Court did not address this provision or comment upon potential application of the President's order beyond foreign nationals.

136. The precise issue created by the current presidential order, of course.

137. 71 U.S. 2, 4 Wall. 2 (1866).

138. 71 U.S. at 108.

139. Milligan had also been the subject of a civilian grand jury investigation, which was discharged without returning an indictment. *Id.* at 108.

140. *Id.* at 109. Justice Davis's explanation rings cautionary for our own times:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

Id. See also *Fay v. Noia*, 372 U.S. 391 (1963):

We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence.... Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, § 9, cl. 2, incorporated into the first grant of federal court jurisdiction, Act of September 24, 1789, habeas corpus was early confirmed by Chief Justice John Marshall to be a "great constitutional privilege." Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is 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. 75, 4 Cranch 75 (1807).

141. 13 Stat. at Large, 734 (September 15, 1963). President Lincoln suspended the privilege in cases in which officers of the United States

hold 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.

The proclamation was authorized by Congress by an act earlier that year, 12 Stat. at Large, 755, which also limited 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.

142. 71 U.S. at 115-116. See note *ibid*.

143. 71 U.S. at 119.

144. Once again, the Court’s words ring true for our age:

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. 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.*

71 U.S. at 120-121 (emphasis added).

145. 71 U.S. at 121.

146. *Id.* at 122.

147. *Id.* The Justice Department’s recent conspiracy indictment of an alleged insider to the September 11th attacks, Zacarias Moussaoui, a legal resident French Moroccan, is an example of the availability of established criminal law and procedure to try alleged terrorists. See “Man Indicted in Attacks Conspiracy,”

Associated Press, December 11, 2001. As an example of the application of this principle to a World War II civilian conspirator, see *Haupt v. United States*, 330 U.S. 631 (1947), which upheld the indictment and conviction of a civilian for treason for knowingly aiding a would-be saboteur.

148. 71 U.S. at 123.

149. *Id.*

150. *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 125-126.

151. 317 U.S. at 29.

152. *Id.*

153. *Id.* at 30-31.

154. *Id.*

155. *Id.* at 45.

156. 317 U.S. at 28.

157. See *Ex Parte Milligan*, 71 U.S. 2 (1866).

158. See, e.g., *Artuz v. Bennett*, 121 S Ct 361 (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).

159. 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) (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 (1944) (War Relocation Authority could not subject American citizen of Japanese ancestry to detention who was concededly loyal).

160. 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. Stephen Gillers, *No Lawyer to Call*, *New York Times*, December 3, 2001 (arguing rules of professional responsibility preclude attorneys from taking representation of accused in military tribunals).

161. P.L. 107-56, Title IV, § 412, adding new Section 236A(3).

162. P.L. 107-56, Title IV, § 412, adding new Section 236A(5).

163. *See, e.g., Zadvydas v. Davis*, 121 S.Ct. 2491 (2001). The Supreme Court held last term in *Zadvydas* that the indefinite detention of a deportable alien past the statutory six-month period after the entry of the deportation order, without an opportunity for a parole hearing, would violate the right of due process. 121 S.Ct. at 2502. An example of such an indefinite detention is *Patel v. Zemski*, 2001 U.S. App. LEXIS 26907 (3rd Cir. 2001), in which a longterm permanent resident of the United States was convicted of harboring an undocumented alien (an employee in one of his businesses). *Id.*, at 5. 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.* at 6. 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 7. 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 23, quoting 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 40.

164. P.L. 107-56, Title I, § 106 (emphases added).

165. Testimony of Attorney General Ashcroft, September 25, 2001.

166. An identical provision, Article I, § 10 applies to the States.

167. 381 U.S. 437.

168. 328 U.S. 303.

169. 71 U.S. (4 Wall.) 277.

170. 4 Wall. at 320.

171. 328 U.S. 303.
172. 381 U.S. at 439.
173. 381 U.S. at 441-446.
174. *Id.* at 458.
175. *Id.* at 447.
176. *See* December 13, 1974 CONG. REC. 39859.
177. *See* U.S. CODE CONG. & ADMIN. NEWS, at 4251 (1974) (Sen.Rep. No. 93-1026, 93rd Congs., 2nd Sess.187).
178. 20 U.S.C. § 1232G(b)(1)(J) (2000).
179. P.L. 107-56, Title V, § 507, new subsection 1232G(j).