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Protecting Justice and Liberty After 9/11

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BY NADINE STROSSEN

[Testimony Before Congressman John Conyers' Forum on National Security and the Constitution]

The American Civil Liberties Union is a non-partisan, non-profit organization consisting of nearly 300,000 members dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our civil rights laws. We have been involved in responding to Congressional and Administrative actions in the wake of September 11th, some of which we find deeply troubling. Many of the policies are placebos – they are illusory "solutions" that do not make us safer but do threaten fundamental constitutional protections. We believe that it is possible to be both "Safe and Free." We can have effective law enforcement while also protecting individual rights.

As we start a new year and celebrate the birthday of Dr. Martin Luther King, Jr., we commend you, Mr. Chairman, for holding this forum. This is an appropriate time for the Congress to ensure that in our effort to remain secure, we do not sacrifice the very foundations of our democracy.

Dr. King's life is a testament to the power of the Constitution. Dr. King had the social insight and moral courage to challenge government and resist policies that undermined liberty, equality, and justice for all. He stood on the principles of the First Amendment to advocate equality under the Fourteenth Amendment.

Over the past several months, the Executive Branch has initiated an expansive array of new police powers and tactics that raise significant moral and constitutional questions — from secret tribunals and expanded wiretapping authority, to monitoring attorney-client conversations, riffling through confidential business and student records, rounding up and detaining immigrants in secret, and questioning certain young male lawful U.S. residents merely based on their national origin. It is up to the Congress to assert its oversight authority — and responsibility — to examine these dramatic actions.

As you consider the actions taken in response to terrorism, consider that threats to the constitutional rights of one group endanger the constitutional rights of everyone. As Dr. King said in a speech he gave in September 1967: "I have fought too hard and long to end segregated public accommodations to segregate my own moral concerns. It is my deep conviction that justice is indivisible, that injustice anywhere is a threat to justice everywhere."

Justice means that each and every right and liberty in our Constitution must be as strong in a time a crisis as in a time of peace. We cannot sacrifice equality or privacy or basic checks and balances without eroding justice for all. We cannot allow discrimination against one group without threatening equality for all. We cannot allow the government to silence the voice of one dissenter without weakening the core of our democracy. These principles are the bedrock of American democracy.

Justice Means Equality

Secret Detention

The Department of Justice has launched what appears to be an extensive program of preventive detention. The Department admits that over 1,200 people have been detained in connection with the September 11 attacks. Some have been incarcerated for long periods of time, others held for only hours. Because of the secrecy surrounding the detentions, we do not have a full picture as to how many people are still incarcerated, where they are incarcerated, whether they have access to counsel and how they are being treated. Some of the stories being reported upon are disturbing. According to a Washington Post story, two Pakistani immigrants were held for 49 days before being charged with overstaying their visas; and an Israeli national was held for 66 days before being charged with entering the country illegally.1

According to media accounts of the detentions, only a very small number of persons who have been arrested have any involvement with, or knowledge of, the attacks. Approximately 10 people are at what the Washington Post called the "hot center" — believed to have close ties to the Al-Qaeda network or some knowledge of the hijackers. An additional 18 people are believed to have more distant connections to the hijackers or connections to the people in the "hot center." The rest have been charged with unrelated technical immigration violations or minor criminal charges (usually under state law), or are being held as material witnesses under 18 . sec. 3144.

It appears that the vast majority of the people being detained in connection with this investigation are being detained on pretexts: they are suspected of having committed minor offenses that give law enforcement or immigration authorities the power to detain them even though they would not normally be detained for such conduct. By all accounts, the overwhelmingly majority of detainees are Muslims or Arabs, come from Middle Eastern countries, and are non-citizens. However, as was previously mentioned, we know that there have been at least a few detainees from India and Pakistan. It seems that for the most part, similarly situated non-Muslims and non-Arabs who commit the same types of violations are not being detained.

We have the most urgent concern for the detainees who are being held on immigration charges because their access to legal counsel is limited. Although the Attorney General assures us that everyone being held has had access to counsel, many stories are coming to light that belie this assertion. For example, Dr. Al Bader Al-Hazmi, a San Antonio, Texas, Saudi national and a radiologist at the Texas Health Science Center was held incommunicado — denied access to either his lawyer or his family — for seven days. After nearly two weeks in detention, Dr. Al-Hazmi was finally released with no charges filed against him. Another troubling example is Tarek Mohamed Fayad, an Egyptian national and dentist residing in California. He was picked up by the FBI on September 13th and then transferred to the Brooklyn Detention Center in New York City, where we believe he remains to this day. According to the Wall Street Journal, it took his lawyer one month before she was able to locate and talk to him. If

this is the treatment that prominent professionals are receiving, one can only imagine what is happening to people who are less fortunate.

The public has virtually no information about the whereabouts of persons held on immigration violations. Are they being held in custody or have they been released? Where are they being held? How long have they been held? Do they have attorneys? The fact that immigration detainees can be held in so many facilities, coupled with the secrecy surrounding the detention, makes it extremely difficult to determine whether the detainees have access to counsel, are allowed contact with their families, and are being properly treated. We know that at least one detainee – 55-year-old Mohammed Rafiq Butt – died in custody. On October 23, Mr. Butt was found dead in his cell at the Hudson County jail in Kearny, New Jersey, the cause of death ruled heart failure. We know of others who have been held for weeks without any charges being lodged against them. This contradicts the Attorney General's assurances that all those who are being detained are being promptly charged within 48 hours. It also violates the recently enacted USA PATRIOT Act, which requires that, even for those individuals certified by the Attorney General as suspected terrorists, charges must be filed within 7 days or the individuals must be released.

It is not for lack of trying that we have been unable to get adequate information about the detainees. On October 17, 2001 the ACLU wrote to the Attorney General asking him for information about the detainees. He did not respond to that letter. We posed similar questions to the Director of the FBI, Robert Meuller, at two meetings on September 25 and October 25. When those requests for information failed, we filed, along with other organizations, a request under the Freedom of Information Act on October 29. Subsequent to filing the FOIA request, on October 30, we met with Commissioner Ziglar of the Immigration and Naturalization Service who also did not provide the information.

When our repeated attempts to obtain information failed, we filed suit in federal district court on December 5, 2001 along with other organizations including the American-Arab Anti-Discrimination Committee, the Arab American Institute, the Asian American Legal Defense and Education Fund, the Center for National Security Studies, the Council on American Islamic Relations, the Electronic Privacy Information Center, Human Rights Watch, and the Reporters Committee for Freedom of the Press.

Since filing suit, the government's response to our legal request for basic information on individuals arrested and detained after September 11th continues to be "incomplete and inaccurate." We are now seeking further information about the contradictory information contained in documents provided on January 11, 2002. Those documents revealed beyond any doubt that earlier assurances by government officials that rights were being respected were false. For example, while officials said that they were, in general, charging those who were arrested within the constitutionally required 48-hour period, the documents show instead that many individuals were not charged for several weeks, or even as long as two months.

We believe that a complete response to our FOIA request will prove that the vast majority of people detained after September 11 had no connection to terrorism and may also show that the government placed severe obstacles in order to thwart access to counsel. Civil rights and human rights groups who had routinely been given access to detention facilities to offer legal assistance were not permitted to do so after September 11th. Individuals who retained lawyers were denied the right to have a lawyer present during questioning.

The documents that have been provided reveal that the government itself has determined that most of the detainees are not connected to terrorism and that the Attorney General no longer has any national security rationale for withholding information about these individuals. For instance, of the 725 detainees listed in documents, 344 are listed separately under the caption 'INACTIVE CASES,' which would seem to indicate that they have been cleared of any link to terrorism.

Our organization continues to press for basic information about the detainees and about any rights violations that have occurred. The ACLU of New Jersey announced on January 22 the filing of a lawsuit against Hudson and Passaic Counties, seeking disclosure of the names of all Immigration and Naturalization Service detainees held in those counties' jails. The filing was made under the state's strong public records law, which requires that jails make public the names and other information on all those being held.

Attorney General Passes Emergency Regulation to Make it Easier to Detain People

Adding to the concern about unfair detention is a new regulation that makes it easier for the government to detain non-citizens. This regulation was issued by the Attorney General on October 26 and went into effect on October 29. Like many post-September 11 regulations, it was put into effect under the administration's "emergency rule-making authority" that exempts the Attorney General from complying with the normal notice and comment period. The new rule allows the Immigration and Naturalization Service to set aside any release order issued by an immigration judge, simply because it disagrees with the immigration judge's determination, in cases where the INS says it believes that the non-citizen poses a danger to the community or is a flight risk. Previously, the INS needed to request a stay from the Board of Immigration Appeals if it disagreed with an immigration judge's determination, except in limited circumstances where the individual had been convicted of certain crimes or accused of terrorism. Now, even for individuals who are merely accused of overstaying their visas, the hearing before the immigration judge has been rendered meaningless because the decision whether to detain or release rests exclusively with the INS.

The Questioning of 5,000 Men Based on their Country of Origin

In addition to detaining people based on their ethnicity or country of origin, the Attorney General also is using these criteria as the primary reason for questioning people. In a November 9, 2001 directive, the Attorney General ordered the FBI and other law enforcement officials to conduct interviews of at least 5,000 men, 18 to 33 years old, who had entered the U.S. on non-immigrant visas in the past two

years and come from countries where terrorist activities are known or believed to occur. The DOJ's list of the young men targeted for government questioning was compiled based on their national origin, age and gender, not on any individualized suspicion of criminal activity.

The DOJ acknowledged that it has no basis for believing that any of the thousands of men on this list has any knowledge whatsoever that is relevant to the investigation, and it stresses that it has no basis for suspecting any of them of any involvement in any terrorist activities, or of any other criminal activity, or any violation of immigration laws.

The ACLU recognizes the right – indeed the responsibility — of federal law enforcement to gather relevant information in the course of its investigation into the September 11 terrorist attacks. But discriminatory, dragnet profiling is neither an effective investigative technique nor a permissible substitute for the constitutional requirement of individualized suspicion of wrongdoing.

The DOJ guidelines went far beyond any legitimate quest for factual information. Officials were instructed to inquire into the political beliefs of the targeted young men, and to ask them to report on the political beliefs of their families and friends. The Attorney General has reported that the interviews were "successful" and conducted professionally. However, the Attorney General has not claimed that the interviews succeeded in acquiring a significant amount of information relevant to the September 11th investigation. Besides raising constitutional concerns, this investigative technique seemed to be ineffective.

Deporting 6,000 People Based on Their Country of Origin

The most recent discriminatory tactic is the administration's decision to deport 6,000 people who are in violation of their immigration status. The ACLU does not oppose deporting people who have broken immigration laws; we do, however, object strenuously to selective prosecution, a questionable law enforcement tactic that has never been proven effective. While there are over 300,000 outstanding deportation orders, the DOJ plans to focus on some 6,000 based solely on national or ethnic origin. There is no evidence that selectively deporting people with outstanding deportation orders would have prevented the events of September 11th. None of the highjackers had outstanding deportation orders. Many of the hijackers were in the country legally; in fact, the whole point of a "sleeper cell" is to remain innocuous until the last moment before springing into violent action.

A dragnet approach to removing individuals who overstay their visas based solely on national origin is counter-productive because Al-Qaeda is an organization that spans the globe. Focusing on men from the Middle East or North Africa won't prevent terrorism because the terrorists will simply come from a cell in a country far off the radar screen. The government should be encouraging those with information to come forward, rather than alienating individuals who might have information and discouraging them from coming forward because of the targeting and mistreatment of their communities.

Furthermore, a recent article in the Washington Post states that Asia and Africa are believed to be the next possible source of Al-Qaeda operatives. According to government officials, Al-Qaeda, by utilizing Asian and African terrorists, hopes to elude the racial profiles developed by law enforcement agencies.

Increase in Racial Profiling

The government's investigative tactic of focusing on a person's nationality instead of specific, individualized evidence of criminal activity, is encouraging racial or ethnic profiling on other fronts. Dozens of people whom are — or "look like" — Arabs, Muslims, or South Asians have experienced discrimination in our nation's airports. Many have been forced off flights, sometimes by law enforcement and other times by airline personnel, even after being cleared by law enforcement.

Others have been subjected to very intrusive searches. Only last week, on January 16, the ACLU of Illinois filed a lawsuit on behalf of Samar Kaukab, a Muslim woman who was strip-searched at O'Hare Airport. Kaukab passed through metal detectors without setting them off, and there was no indication that she was carrying any banned materials on her person or in her carry-on bags. In 1999, the Government Accounting Office released a study that documented a pattern of racial profiling against African-American women at our nation's airports by the Customs Service. While we had hoped that the problem of racial profiling in our nation's airports was being addressed, it seems that the events of September 11th have set us back in our efforts to make positive reforms.

Discrimination Against Airport Screeners

The recently enacted Airline Security Bill included a provision requiring that persons working as screeners be United States citizens. On January 17, the ACLU's California affiliates, joined by Service Employees International Union (S.E.I.U.), filed suit challenging the citizenship requirement. Plaintiffs include a U.S. Army veteran and a woman who has been employed as a screener for 14 years and received a commendation for detecting a loaded gun.

The impact of this discriminatory policy is profound when one considers that non-citizens make up 80 percent of the screeners at the San Francisco Airport, more than 40 percent at Los Angeles International Airport, and a large percentage of screeners at other major airports around the country. Given that permanent residents can serve in the armed forces and be subject to the draft, this new policy seems doubly absurd. If permanent residents are trustworthy enough to defend our country, why can't they help defend our airports? This policy does nothing to further our security but does deprive many hard working people of jobs. In fact, the policy may well actually make us less safe because it would drastically decrease the number of experienced, qualified people working as screeners and would decrease the overall level of screener job experience at the same time the Department of Transportation is trying improve security at our airports

Justice Means the Right to Dissent Free from Government Intrusion

Relaxing the guidelines on political spying

On December 1, 2001, the New York Times reported that Attorney General Ashcroft is considering a plan to relax restrictions on the FBI, giving them greater freedom to spy on religious and political organizations. Apparently, Mr. Ashcroft is not a student of history.

Many of us remember the horrific revelations made during the Church Hearings in the 1970's. The FBI "monitored political demonstrations, infiltrated civil rights groups, conducted illegal break-ins and warrant-less wiretaps of anti-war groups, sent anonymous poison-pen letters intended to break up marriages of political group leaders, and targeted, among others, Dr. Martin Luther King, Jr." With regard to Dr. King, the FBI had no bona fide investigative purpose for its activities. The campaign against him was predicated on FBI Director J. Edgar Hoover's dislike of King. In 1962, Hoover wrote on a memorandum that Dr. King was "no good." A monograph compiled and published by the FBI and distributed to various officials was described by Burke Marshall, Assistant Attorney General for the Civil Rights Division under Robert Kennedy, as "a personal diatribe. . .a personal attack without evidentiary support on the moral character and person of Dr. Martin Luther King, and was only peripherally related to anything substantive. . ." Dr. King's real crime in the eyes of the FBI was that he "represented a clear threat to 'the established order' of the U.S." The FBI's enmity toward Dr. King led it to bug his telephones and hotel rooms, obtaining highly person information that it then tried to use to break up his marriage and to encourage him to commit suicide. The FBI tried to discredit King in the eyes of the White House, Congress, the religious community, and even foreign governments – all done because Dr. King advocated social justice.

The documented excesses of the FBI in targeting individuals or groups because of their beliefs led to Congressional hearings, and, eventually, guidelines adopted by the Attorney General. These guidelines regulate FBI activity in both foreign and domestic intelligence gathering, and make it clear that constitutionally protected advocacy of unpopular ideas or political dissent alone cannot serve as the basis for an investigation.

The primary safeguard is that the guidelines require a valid factual basis for opening an investigation, which largely precludes wholesale FBI fishing expeditions. The preamble to the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations (hereinafter "Domestic Guidelines") notes investigations "must be performed with care to protect individual rights and to insure that investigations are confined to matters of legitimate law enforcement interest." A domestic terrorism investigation may only be initiated "when the facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States." One of the considerations when determining whether to open such an investigation is "the danger to privacy and free expression posed by an investigation." The Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (hereinafter "Foreign Guidelines") state that investigations

of groups or organizations "should focus on activities of foreign counterintelligence or international terrorism activities, not on unrelated First Amendment activities." [Emphasis added.]

The threshold for opening a formal investigation is low, requiring only a "reasonable indication" that a crime is occurring or is about to occur. This standard is substantially lower than probable cause." The FBI is also authorized to open a preliminary inquiry based on even a lower evidentiary threshold, when it receives any information or allegation "whose responsible handling requires some further scrutiny." These preliminary inquiries are contemplated to be of short duration and more limited than a full investigation. A preliminary inquiry can turn into a full investigation upon the Bureau's receiving "reasonable indication" that a crime has been, or is about to be, committed.

Not only is there already a low standard for FBI investigations, but it is also clear the Bureau's hands are not tied. It need not wait for a crime to occur. The Guidelines recognize that "[i]n its efforts to anticipate or prevent crime, the FBI must at times initiate investigations in advance of criminal conduct." The guidelines also make it clear that the FBI may investigate based on advocacy of violence. While urging respect for the First Amendment, the guidelines state: "When, however, statements advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence, an investigation under these guidelines may be warranted."

We know from history what happens when the FBI is given too long a leash — it targets individuals and groups based on their advocacy and association rather than based on legitimate law enforcement concerns. The guidelines were adopted to shorten that leash and to keep investigations properly focused. To relax the guidelines and allow greater spying on groups based on their First Amendment activity is counter-productive and a waste of resources, as well as violating fundamental constitutional rights.

Political spying not only undermines our political freedom, chilling those who may disagree with the status quo, but it also diverts resources that could be better spent fighting real crime. Thousands of groups espouse views with which the government disagrees, but a relatively small number ever engage in criminal activity. Every FBI agent spending his or her days noting license plate numbers at a political rally or taping and transcribing political speeches is an agent not engaged in preventing or solving crime.

Political spying is also likely to exacerbate violence rather than stop it. Justice Louis Brandeis recognized long ago that the First Amendment acts as a safety valve. If those marginalized in our society are free to express their views and engage in political activity, they are less likely to resort to violence. Political spying plays into the hands of many anti-government extremist groups, driving them underground and encouraging the fanatics among them to respond with violence.

While the Attorney General drafts the Guidelines, Congress has the responsibility to oversee any proposed amendments and examine their effects on the constitutional right to dissent. Since the passage of the USA PATRIOT Act, Congress must be even more vigilant in overseeing the Justice

Department because the USA PATRIOT Act permits law enforcement agencies to share sensitive information gathered in criminal investigations with intelligence agencies including the CIA and the NSA, and also with other federal agencies including the INS, Secret Service, and Department of Defense.

The PATRIOT Act also permits law enforcement officers to share with the CIA intercepts of telephone conversations and Internet communications. No court order would be necessary to authorize the sharing of this sensitive information and the law does not include any meaningful restrictions on subsequent use of the recorded conversations. For example, there is nothing in the Act that prevents this information from being used to screen candidates who apply for government jobs. Moreover, the Act does not prohibit the CIA from sharing with foreign governments surveillance information gleaned from a criminal investigation, even if sharing that information could put at risk members of a person's family who live abroad.

The PATRIOT Act also mandates disclosure to the CIA of "foreign intelligence information" obtained in connection with a criminal investigation, without defining "foreign intelligence information." These provisions represent extraordinary extensions of the previous powers of the foreign intelligence agencies, including the CIA, to obtain information about Americans.

While some sharing of information may be appropriate in some limited circumstances, it should only be done with strict safeguards. The PATRIOT Act lacks essential safeguards, which may well lead to a recurrence of the very abuses that the Church Committee exposed — and sought to end — decades ago.

Justice Means the Right to Meaningful Due Process

Monitoring Protected Attorney Client Conversations

Not only are people being detained without access to counsel, but in addition, once they obtain counsel, there is no guarantee that their attorney-client communications will be kept confidential. The Attorney General promulgated regulations that permit the Department of Justice to monitor confidential attorney-client conversations in any case in which the Attorney General finds that there is "reasonable suspicion" to believe that a particular federal prisoner "may" use communications with attorneys or their agents "to further or facilitate acts of terrorism." The regulation requires that the Director of the Bureau of Prisons (BOP) "shall … provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege.

In short, the Justice Department, unilaterally, without judicial oversight, and with no meaningful standards, is to decide when to monitor the confidential attorney-client conversations of a person whom the Justice Department itself may be seeking to prosecute. This regulation applies not only to convicted prisoners in the custody of the BOP, but also to all persons in the custody of the Department of Justice, including pretrial detainees who have not yet been convicted of any crime and are presumed

innocent, as well as material witnesses and individuals who are being held on suspected immigration violations and who are not accused of any crime.

What makes the regulation even more disturbing is the fact that it is completely unnecessary. The Department of Justice already has legal authority to record attorney-client conversations by going before a judge and obtaining a warrant based on probable cause that the attorney is facilitating a crime. Indeed, the Supreme Court has even approved searches of an attorney's law office, provided a warrant has first been obtained from a neutral and detached magistrate. Similarly, if prison officials have reason to believe that a particular prisoner is using the mail to violate the law or threaten security, they may obtain a search warrant to read and open the mail.

The Justice Department has not articulated a single reason why current law is insufficient to ensure that attorneys are not assisting their clients in committing crime. Indeed, during questioning before the Senate Judiciary Committee on November 27, 2001, Assistant Attorney General Michael Chertoff could not answer Senator Kennedy's question as to why the new regulation was necessary. Though it lacks any justification for doing so, the Department of Justice has made itself the arbiter of when conversations should be monitored, taking away the authority from a neutral judge. This regulation is an unprecedented frontal assault on the attorney-client privilege as well as on the right to counsel and the right of access to the courts guaranteed by the Constitution.

The DOJ defends its regulation by pointing out that it is required to give notice to an inmate that his or her conversations may be monitored. However, this protection does not eliminate the damage to the attorney-client relationship. In a recent opinion, Richard A Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, powerfully explained why "merely" announcing a policy of government monitoring of attorney-client communications would have a devastating impact on the attorney-client privilege and the associated Sixth Amendment rights to representation by counsel and access to the courts. Chief Judge Posner's opinion described a colloquy during the oral argument in which he had asked the government lawyer if the attorney-client privilege would be violated in the following hypothetical situation: all conversations between criminal defendants and their lawyers were taped, but the tapes were never turned over to the prosecutors, and instead were stored in the National Archives. The government lawyer took the position that none of the defendants could complain in this situation because none could be harmed by it, since the prosecutors would not have access to the tapes. Judge Posner rejected that conclusion, explaining:

The hypothetical practice that we have described would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. (Totalitarian-style continuous surveillance must surely be a great inhibitor of communication.)

In sum, then, this regulation is unnecessary for the government's efforts to fight terrorism, but it does harm important constitutional rights.

Military tribunals

On November 13, 2001, President Bush issued a "Military Order" providing for potentially indefinite detention of any non-citizen accused of terrorism, and permitting trial of such defendants in a military commission with no provision for judicial review. Furthermore, the order was issued without a formal Congressional declaration of war and without Congressional authorization to use military tribunals.

The scope of the President's Order is breathtakingly broad. It applies to any individual whom the President determines he has "reason to believe" is (1) a member of Al Qaeda, (2) is in any way involved in "acts of international terrorism" — a term that is not defined by the order — or (3) has "knowingly harbored" either of the above. If the term "acts of international terrorism" is defined by reference to any of several definitions of terrorism in the United States Code, as expanded under the USA PATRIOT Act, the universe of potential defendants could extend to not only those who are directly involved in or knowingly support violent activity, but also many others on the basis of otherwise lawful, non-violent political activities and associations. While Administration officials have insisted the order applies only to those accused of war crimes, the jurisdiction of the order has not been narrowed to explicitly include any such limitation.

The President's Military Order is unjustified and dangerous. It permits the United States criminal justice system to be swept aside merely on the President's finding that he has "reason to believe" that a non-citizen may be involved in terrorism. The order does not differentiate between those who are captured abroad on the field of battle and those who are arrested in the U.S. by federal or state police. And for those who are in the U.S., the order applies regardless of whether the individual is a temporary visitor or a long-term legal resident. Finally, while the order applies in terms only to non-citizens, the precedents on which the President relies make no such distinction, thereby permitting the order to be extended to cover United States citizens at the stroke of a pen.

Since United States courts can effectively hear terrorism cases — and there has been no showing that they cannot — this severely undercuts the argument for military tribunals. Military tribunals, other than ordinary courts-martial, are adopted as a last resort to ensure justice when the civil courts cannot function, not as a method of avoiding available forums for justice by undercutting basic constitutional rights. Military tribunals are used against "certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders." Madsen v. Kinsella, 343 U.S. 341, 348 n.8 (1952) (Emphasis added). Likewise, President Lincoln regarded military tribunals as permissible only if justified by military necessity, and refused demands to create military courts except where made necessary because of the inability of the regular courts to act. Our Courts have successfully tried dangerous terrorists in the past, including members of Al-Qaeda who bombed U.S. Embassies in Africa.

Finally, and perhaps most importantly, President Bush's Military Order utterly fails to account for the evolution of both international law and American constitutional law since World War II, when military commissions were last extensively used. It does not guarantee due process for the accused and could permit trials that our own government has said are fundamentally unfair and violate basic international standards when such trials are held in other countries. If Congress chooses to authorize military tribunals for a limited class of accused terrorist war criminals, it is imperative that such internationally guaranteed standards apply.

Justice Means an Open Government

Secrecy

Americans have experienced the loss of personal privacy and the increase of government secrecy with dizzying speed since September 11. Department of Justice regulations and Executive Orders have covered government operations with a shroud of secrecy.

Immigration hearings, normally open to the public, have been ordered closed in all cases in which the Department of Justice indicates an "interest" related to the September 11 investigation – regardless of whether there is any demonstrated governmental need for such secrecy. Even Chairman Conyers, Ranking Member of the House Judiciary Committee, was denied access to an immigration hearing of one of his constituents. While the government initially denied that it had imposed such a policy of closing hearings, Administration officials were forced to acknowledge that they had indeed issued such a blanket directive when a memorandum surfaced that mandated such closures.

Likewise, Administration officials have announced that they intend to use President Bush's "Military Order" in any case in which they deem an open hearing, consistent with our Constitution and tradition of open trials, not to be consistent with the needs of security.

Freedom of Information Act and Presidential Records

Attorney General John Ashcroft has issued a new statement of policy that encourages federal agencies to resist Freedom of Information Act (FOIA) requests whenever they have legal grounds to do so. The new statement supersedes a 1993 memorandum from Attorney General Janet Reno, which promoted disclosure of government information through the FOIA unless it was "reasonably foreseeable that disclosure would be harmful." The Ashcroft policy rejects this "foreseeable harm" standard. Instead, the Justice Department instructs agencies to withhold information whenever one could argue there is a "sound legal basis" for doing so.

As with many of the Bush Administration's new restrictions on public information, the policy is only peripherally related to the fight against terrorism. Rather, it appears to exploit current circumstances to advance a predisposition toward official secrecy. At the same time that the government is acquiring more legal authority to obtain private information about individuals, it is also cutting back on sharing

with those individuals themselves the information that it has obtained about them, making it more difficult for people to learn what kind of files their government is keeping on them.

Another example of Administration secrecy is an Executive Order, issued November 1, that gives President Bush– as well as former presidents — the right to veto requests to open any presidential records. Even if a former president wants his records to be released, the Executive Order permits President Bush to assert executive privilege to prevent their release. The order also gives President Bush, as well as former presidents, an indefinite amount of time to ponder any requests. This Executive Order openly violates the Presidential Records Act passed by Congress in 1978.

Bad Ideas on the Horizon

National ID

Since September 11, there has been renewed discussion about the implementation of a national ID system. The purpose of such proposals is to divide the world into "us" – the good guys versus "them" – the bad guys. All of us would like an ID card that puts us squarely on the right side of the line and exempts us from suspicion and heightened security measures.

Unfortunately, a national ID system would not effectively sort out the good from the bad, or even establish true identity. An identification system is only as good as the documents that establish identity in the first place. It makes no sense to build an ID system on a faulty foundation. Anyone can falsify or forge the documents needed to get an ID, including social security numbers and birth certificates. Many of the September 11 highjackers had legitimate ID based on government issued social security numbers.

A national ID system would fail as a security measure, but it would require each and every person in the United States to carry an internal passport, chilling our freedom and threatening our privacy. Day to day, individuals could be asked for ID when they are walking down the street, applying for a job or health insurance or entering a building. Law enforcement officials, tax collectors, and other government agents would come up with more and more uses for the ID. Once government databases are integrated or centralized, access to personal information would inevitably expand. Furthermore, private parties, such as health insurers, direct mailers and credit agencies, would begin using the ID, further eroding the privacy of everyone in this country. National IDs would result in a surveillance society where freedom would be limited through a series of daily checkpoints.

In addition, a massive government bureaucracy would be required to implement such a system. One employee mistake, a database error, or fraud could result in individuals being denied ID cards that could severely limit their ability to go about their daily routines. Anyone who has had to correct an inaccurate credit history will understand how hard it could be to correct an error that has found its way into your ID "file."

Finally, some have suggested that a national ID would be the great equalizer, ending racial profiling and other discriminatory practices. Unfortunately, such hopes are illusory. The cards would likely facilitate all too familiar discrimination based on race, national origin, religion, and immigrant status. ID cards would provide police and employers an excuse to subject Latinos, Asians, African-Americans and other minorities to more and more status and identity checks.

We urge the Congress to question whether the national ID proposal would be effective in the first place and also to consider the unintended adverse consequences for our civil liberties. Already, state Departments of Motor Vehicles have proposed to standardize state drivers' licenses. This proposal would effectuate a national ID through a bureaucratic "back door" and suffers from the same flaws already articulated.

Conclusion

Congress must resist any future "quick fix" "antiterrorism" or "security" measures that the administration proposes. Despite Attorney General Ashcroft's promises to uphold the Constitution and protect civil liberties, his actions belie his rhetoric. Our democracy is in real danger if any one branch of the government becomes too powerful. From establishing military tribunals without Congressional approval, to expanding wiretapping authority while limiting judicial oversight, this Administration is demonstrating its disregard for the other two branches of government. The precarious balance of powers is becoming dangerously tilted toward an excess of Executive Branch power. We urge the Congress to play an active role in guarding against continued excesses of the executive branch. We urge Congress to:

Hold quarterly oversight hearings on the implementation of the USA PATRIOT Act to make sure that civil rights and liberties are protected;

Ensure that the Department of Justice complies with section 1001 of the USA PATRIOT Act that requires the Inspector General of the Department of Justice to establish one position to review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the DOJ and report to the Congress on those abuses;

Establish an independent Civil Rights/Liberties Commission of prominent academics and national leaders to monitor and analyze the impact of the USA PATRIOT Act;

Call upon the Department of Justice to give a full accounting of all persons held in detention since September 11, to ensure that all persons are being held on legitimate charges and have access to adequate legal counsel and to immediately release all people being held illegally;

Urge the Attorney General to rescind immediately the regulations that permit the monitoring of attorney-client conversations and that permit the Attorney General to override release orders of immigration judges.

Lastly, I would like to point out that it is not only the ACLU that shares these concerns. Attached to this document is a “Call to Action” signed by 50 national organizations expressing similar concerns.

Thank you very much. I appreciate very much the opportunity to appear here today and look forward to continuing to work with you in the future.

Nadine Strossen is president of the ACLU.