

# **Civil Liberties Restoration Act of 2004**

## **Introduction**

With the benefit of more than two years of hindsight since September 11, 2001, many security experts, law enforcement representatives, government officials, Members of Congress and community leaders have concluded that a number of the government's post-9/11 initiatives have not only failed to make us safer from future attacks, but may have undermined our security while eroding fundamental civil liberties. The policies in question disserve the nation's twin goals of freedom and security by weakening public trust in the government, undermining legal safeguards that ensure fairness and due process, engendering a climate of fear and suspicion, and damaging our relations with other nations with whom we must make common cause.

The Civil Liberties Restoration Act of 2004 (CLRA) seeks, in measured fashion, to restore essential protections and basic freedoms without compromising our nation's safety. The CLRA aims to reverse policies that weaken our constitutional commitment to due process before the law; restore public confidence in the government; repair our relations with other nations whose assistance we need in the fight against terrorism; deploy more effectively the funds appropriated for counterterrorism efforts; and increase the government's access to information that may be critical to preventing future terrorist attacks.

## **Section-by-Section Analysis**

### **Title I—Restoring First Amendment Rights**

#### **Sec. 101: Limitation on Closed Immigration Hearings**

Section 101 prohibits blanket closures of immigration hearings. Consistent with the First Amendment, it authorizes closure of all or part of an immigration hearing only when the government can demonstrate a compelling privacy or national security interest.

Background: On September 21, 2001, the Department of Justice (DOJ), through what is known as the "Creppy memo," ordered immigration judges to close all hearings related to individuals detained in the course of the 9/11 investigation. Not only were over 600 hearings held in secret - excluding all family members, visitors, and press - but the very identities of the jailed individuals were withheld from public disclosure. Transparency in judicial and quasi-judicial proceedings is at the core of a free society because it ensures that the government cannot wield its enormous power over individuals without public scrutiny.

### **Title II—Providing Due Process for Individuals**

#### **Section 201: Timely Service of Notice**

Section 201 requires DHS to serve a Notice to Appear (NTA) – the charging document that begins an immigration proceeding – on every non-citizen within 48 hours of his arrest or detention. It also requires that any non-citizen held for more than 48 hours be brought before an immigration judge within 72 hours of the arrest or detention. This section recognizes an exemption for non-citizens who are certified by the Attorney General, based on reasonable grounds, to have engaged in espionage or a terrorist offense.

Background: Prior to September 11, 2001, the INS was required to make charging determinations within 24 hours of arrest. On September 20, 2001, the Justice Department issued an interim rule extending that charging period to 48 hours or “an additional reasonable period of time” in “emergency or other extraordinary circumstances.” According to the Justice Department’s own Inspector General, many non-citizens were jailed without being charged for lengthy periods, including some who were not informed of the charges against them for more than a month after being arrested. The Inspector General found that the delays in serving notice of charges made it impossible for immigrants to understand the basis for their detention, request bond, or be effectively represented by legal counsel.

## **Section 202: Individualized Bond Hearings**

Section 202 requires the Secretary of Homeland Security to provide all detainees, except those in categories specifically designated by Congress as posing a special threat, with an individualized assessment as to whether the non-citizen poses a flight risk or a threat to public safety. If the individual is determined to not be a flight risk or danger, the Secretary of Homeland Security must set a reasonable bond or other conditions that will ensure the person’s appearance in future proceedings. The Secretary’s determination is subject to review by an immigration judge pursuant to the same standards. Only an immigration judge may revoke or modify a bond determination and only upon a showing of changed circumstances.

Background: The Justice Department and the Department of Homeland Security have adopted policies since September 11, 2001 that deny bond to whole classes of non-citizens with no individualized hearings before a judge. For example, all individuals detained on immigration violations during the course of post-September 11 investigations were subjected to a “hold until cleared” policy. Even individuals who did not contest their removability, and against whom final orders of removal had been entered, remained in detention until the FBI affirmatively cleared them. This practice was criticized as indiscriminate and haphazard by the Justice Department’s own Inspector General.

Similarly, the Attorney General issued a precedent Board of Immigration Appeals decision declaring that all Haitian asylum applicants who arrive by sea must be held in detention throughout the pendency of their asylum proceedings. DHS extended this policy of harsh treatment of asylum seekers through its (now defunct) Operation Liberty Shield initiative, which mandated detention of all asylum seekers from thirty-plus countries during their asylum proceedings. Most recently, DHS announced the “Hartford pilot project,” a policy that mandates detention on every non-citizen who loses before the immigration judge, regardless of whether she has a pending appeal.

Unilateral executive branch decisions to mandatorily detain whole classes of individuals erode fundamental due process principles and individual liberty interests. Moreover, blanket detentions of individuals who pose no risk of flight or harm to the community waste critical resources that should be concentrated on investigating and detaining actual terrorists.

### **Section 203: Limitation on Stay of a Bond**

Section 203 permits the Board of Immigration Appeals to stay the immigration judge's decision to release the alien only for a limited time period and only when the government is likely to prevail in appealing that decision and there is a risk of irreparable harm in the absence of a stay.

Background: On October 31, 2001, the Justice Department issued an interim rule that enables the government to effectively nullify a judge's order to release an individual on bond after finding that he is neither a flight risk nor a danger to the community. The rule permits the Department to automatically stay an immigration judge's decision to release an alien if the government originally denied bond or set it at \$10,000 or more. The automatic stay regulation strips immigration bond hearings of their legitimacy and authority by allowing the government's immigration attorneys, in effect, to overrule immigration judges.

### **Section 204: Immigration Review Commission**

Section 204 establishes a new independent regulatory agency, the Immigration Review Commission, to oversee and regulate the immigration court system.

Background: In early 2002, with the expressed intent to eliminate a backlog of pending cases, the Department of Justice issued a series of "Procedural Reforms" for the Board of Immigration Appeals. These so-called reforms highlight in sharp relief the degree to which the immigration system's integrity and impartiality have been compromised. Altering its practices in accordance with the new mandates, the Board has issued thousands of single-member decisions (as opposed to the traditional 3-member panel decisions), most of them affirmances without any written opinion. Before the changes were instituted, 1 in 4 appeals was granted: now only 1 in 10 is, with profound consequences for immigrants and their families.

Moreover, rather than truly eliminating the backlog of cases, the reforms appear to have instead shifted the burden to the federal courts. The number of BIA decisions being appealed to the federal courts increased from 5% in 2001 to 15% in 2002. In the year ending March 2003, the Ninth Circuit received over 4,200 immigration appeals, more than four times the usual number. Results indicate that the procedural reforms have lowered the quality and reliability of the decisions being made. The Board is unable to consistently and efficiently fulfill its core purpose: to provide guidance to immigration judges below through the interpretation of the law, to achieve uniformity and consistency of decisions rendered by the 200-plus immigration judge corps, and to assure fair and correct results in individual cases.

Immigration decisions can profoundly affect human lives. At stake for these individuals and their families are some of the most important issues in their lives,

including preservation of family unity. This is especially true in deportation proceedings, where an ill-considered decision can result in a person's removal to a country he has not lived in since childhood, where he has no relatives or familiarity with the language, or still worse, where he may be exposed to the risk of persecution, torture, or even death.

### **Title III—Effective Law Enforcement**

#### **Section 301: Termination of the NSEERS Program; Establishment of Reasonable Penalties for Failure to Register**

Section 301 terminates the failed National Security Entry-Exit Registration System (NSEERS or special registration) program and provides relief to certain non-citizens whose immigration status has changed as a result of the program. This section closes removal proceedings against individuals who were (1) in status but placed in removal proceedings solely for failure to comply with the NSEERS requirements, or (2) out of status and placed in removal proceedings after complying with the NSEERS requirements and a) have a current application for an immigration benefit for which a visa is immediately available; b) did not have a pending application but were eligible to apply for an immigration benefit for which a visa is immediately available; c) were eligible to apply for other forms of relief, like asylum, except individuals who were removable for having engaged in terrorist activity or for having been convicted of certain crimes.

Background: On August 12, 2002, the Department of Justice launched the NSEERS program, a tracking scheme that required visitors from certain countries—and others whom an immigration inspector decides meet certain secret criteria—to be fingerprinted, photographed, and interrogated when they enter the country. The Justice Department then expanded NSEERS to four groups of men already in the United States. This subsequent initiative, known as “call-in” registration, applied to certain men 16 years of age and older from 25 predominantly Muslim and Arab countries.

Immigration officials were not provided sufficient resources or training to administer the program. The resulting due process violations ranged from denial of access to counsel and interpreters to unlawful detention.

Given the program's discriminatory focus and the due process violations, NSEERS was widely perceived as an effort to round up and deport as many Muslim, Arab, and South Asian men in the country as possible. The net effect has been the creation of a culture of fear and suspicion in immigrant communities that discourages cooperation with antiterrorism efforts and destroys the cohesion and trust in government that is one of our country's strongest security assets.

In December 2003, DHS wisely suspended certain re-registration requirements associated with the program, but left other components in effect. This failed program now must be eliminated entirely.

#### **Section 302: Exercise of Prosecutorial Discretion**

Section 302 codifies an existing DHS memo related to prosecutorial discretion. This provision identifies positive factors such as family ties, humanitarian concerns,

eligibility for relief, and resources for exercising prosecutorial directions favorably towards a non-citizen. The provision also expresses the sense of Congress that the exercise of prosecutorial discretion is not an invitation to violate or ignore the law, but rather provides the government with flexibility to maximize its allocation of resources.

Background: More than 13,000 individuals who voluntarily complied with the registration program were placed in removal proceedings for immigration violations unrelated to terrorism. Many of these individuals had avenues of relief available to them or were in the process of normalizing their status through pending benefits applications. Immigration officers, however, uniformly refused to exercise favorable prosecutorial discretion. This resulted in a massive diversion of resources away from investigations, prosecutions, and removals of individuals who meant to harm us. Given the problems inherent in the NSEERS program, the government should carefully weigh the equities in pending NSEERS cases and consider whether to exercise prosecutorial discretion favorably.

### **Section 303: Elimination of Criminal Penalties for Violations of Registration and Change of Address Requirements**

Section 303 eliminates criminal liability and deportation as penalties for failure to timely file a change of address form and eliminates criminal liability for technical registration violations. It replaces those penalties with civil fines. This provision creates a more appropriate nexus between the punishment (civil fines) and the administrative requirements being regulated (i.e. registration or submission of a change of address form). The provision also prohibits the government from penalizing people for failing to file change of address forms during a transition period which would conclude when the enforcing agency certifies its administrative capacity to handle the processing.

Background: In July of 2003, the Attorney General promulgated a rule clarifying the alien's obligation to provide an address to the immigration service, including a change of address within 10 days. The rule clarified that a "willful" failure to register with the immigration authorities, or a failure to give written notice of a change in address, is a criminal violation. Enforcement of the long-dormant change of address notification policy has jeopardized the freedom and immigration status of millions of otherwise law-abiding immigrants and visitors.

As news of the policy change traveled through immigrant communities, change of address notifications flooded the immigration services offices, and agency officials freely admitted that district offices were simply unable to handle the backlogged administrative load, much less the increase spurred by the policy change. The media carried reports of hundreds of thousands of change-of address filings mishandled by immigration authorities, including stories of boxes of address forms stored in remote locations without being filed, forms sent to the INS by certified mail but rejected by the agency for lack of the manpower to acknowledge their receipt, and a contractor who was disciplined for "processing" thousands of immigration documents by shredding them wholesale.

### **Section 304: Compliance with the Privacy Act**

Section 304 requires the Attorney General to comply with the Privacy Act's accuracy requirements with respect to data entered into the National Crime Information Center (NCIC) database.

Background: The NCIC is a computerized index of criminal justice information, such as criminal record history information, fugitives, stolen properties, and missing persons. The purpose of the NCIC system is to provide a computerized database for ready access by criminal justice agencies and for prompt disclosure of information in the system from other criminal justice agencies about crimes and criminals. This information assists authorized agencies in apprehending fugitives, locating missing persons, and locating and returning stolen property, as well as in the protection of law enforcement officers encountering the individuals described in the system.

For the past thirty years, the FBI has operated the NCIC database with the Privacy Act accuracy requirement in place. The relevant provision requires that any agency that maintains a system of records, "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individuals in the determination." However, in March 2003, the Justice Department issued a regulation exempting the NCIC from the accuracy requirements of the Privacy Act. According to the regulation, the exemption is necessary because "in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely and complete."

Circumventing the statutory obligation imposed by the Privacy Act poses significant risks not only for individuals whose record files may be part of this data system, but also for communities that rely on law enforcement to employ effective, reliable tools for ensuring public safety. Several well publicized incidents demonstrate the consequences of inaccurate and incomplete information in the NCIC. In one case, a Los Angeles man was arrested five times, three at gun point, due to an error in the NCIC.

In addition, government officials have confirmed that thousands of immigration violators recently have been entered into the database. Lawmakers, immigration experts, and Administration officials have long recognized the pervasive insufficiency of resources for immigration services and enforcement, and the notoriously inaccurate record-system that has resulted. Requiring the Attorney General to comply with the Privacy Act's accuracy requirements is one way to prevent a flood of inaccurate and unreliable information from corrupting the NCIC, and causing harm to individuals and communities.

#### **Title IV—Protecting Privacy and Ensuring Due Process for Targets of Surveillance**

##### **Section 401: Modification of Authorities on Review of Motions to Discover Materials Under Foreign Intelligence Surveillance Act of 1978**

Section 401 provides that when FISA information derived from electronic surveillance, physical searches, business records, pen registers or trap and trace devices is introduced in a criminal case, disclosure of the surveillance application, order, or other materials relating to the surveillance is permitted under the procedures set forth in the Classified Information Procedures Act.

Background: The Patriot Act amended FISA to permit FISA surveillance and searches when a “significant purpose”, as opposed to the “primary purpose”, of the surveillance or search is foreign intelligence. As a result, information obtained through FISA will be used more frequently in standard criminal prosecutions. Under current procedures, when such evidence is brought before a court, it is nearly impossible for a criminal defendant to contest its introduction because the government’s application for the FISA search and related materials are kept secret. When FISA evidence is used in criminal cases, the court should disclose the application and related materials to the defendant subject to the Classified Information Procedures Act, which offers a balanced and effective way to protect both national security information and the rights of defendants.

## **Section 402: Data-Mining Report**

Section 402 requires all federal agencies to report to Congress within 90 days and every year thereafter on data-mining programs used to find a pattern indicating terrorist or other criminal activity and how these programs implicate the civil liberties and privacy of all Americans.

Background: The practice of data-mining allows the government to collect and analyze a combination of intelligence data and personal information such as an individual’s financial records, traffic violations, credit card purchases, travel expenses, medical records, communications records, and virtually any information collected on commercial or public databases. Data-mining is a broad search of public and/or non-public databases in the absence of a particularized suspicion about a person, place or thing. Through comprehensive data-mining many records that ordinary citizens believe are private can be fed into a computer and then used by the federal government without the individual’s knowledge.

While it is important to provide law enforcement the necessary tools to secure our safety, if left unchecked, the collection of this data and the use of data-mining technologies could threaten the privacy and civil liberties of each and every American. Congressional oversight is an important part of preventing this outcome. Yet time and time again, Congress has learned about a data-mining program only after millions of dollars have been spent and implementation is underway. We need to have law enforcement programs, but we need to do it right. This provision will enable Congress to engage in effective oversight of federal agencies using this emerging technology.