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SECURING AMERICA, Protecting Our Freedoms After September 11

History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure ... when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

—THURGOOD MARSHALL¹

In a matter of minutes, the horrific attacks of September 11 shattered our sense of invulnerability and unleashed a security challenge of enormous dimensions. As our leaders rushed to respond to an enemy they did not understand well—but nonetheless knew must be defeated—many concluded that the danger we faced was unlike any other in American history and that new approaches were needed to secure our nation, even if certain constitutional rights were curtailed in the process.² Justice Robert Jackson’s famous statement—that the Bill of Rights is not a “suicide pact”³—has taken on a nearly talismanic importance since September 11.

This impulse to strike a new “balance” between liberty and security—or as some have argued, to allow the government nearly unfettered power during times of war⁴—is in some sense understandable. Three thousand innocent Americans died on September 11, an event that al Qaeda’s leaders have warned was merely a precursor to future, and possibly more catastrophic, attacks.⁵ Yet the Constitution has survived many threats, including civil insurrections and world wars. It is designed to function during periods of crisis, and only in the most extreme circumstances does it contemplate congressional action to suspend certain rights.⁶ Indeed, as

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Our experience during a national crisis 60 years ago is illustrative. After the Japanese attack on Pearl Harbor in December 1941, the government moved quickly to forcibly relocate and intern over 100,000 Japanese-Americans, more than two-thirds of whom were U.S. citizens.⁷ The government's action was based not on individual suspicion or a sensible assessment of the threat, but on membership in a particular ethnic group.⁸ Although we now regard this as a shameful episode in our nation's history,⁹ we must not forget that at the height of this war the Supreme Court upheld this evacuation policy.¹⁰ One of the dissents, now celebrated with the benefit of hindsight, offers useful guidance regarding the incursions on constitutional rights made in the name of security today:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.¹¹

The protection of constitutional liberties need not, and indeed should not, deprive the government of the authorities necessary to vigorously apprehend terrorists at home and abroad, prosecute them, and defend the homeland. Although a number of provisions in the USA PATRIOT Act have infringed on constitutional rights, there is little disagreement over most of the Act's provisions—they provide useful new counterterrorism tools for law enforcement, financial regulators, and intelligence agencies, and update laws to reflect advances in technology.¹² Indeed, the years since September 11 have shown the “choice” between liberty and security to be a false one. Being safe and being free are not mutually exclusive. We do not gain more of one by giving up the other.

The analysis and recommendations set forth in this chapter seek to secure America *and* protect our freedoms after September 11. The recommendations follow a framework of three core principles that aim to offer useful guidance for the president and Congress as they debate our nation's response to terrorism: government actions and official proceedings should be as transparent as possible; the government should be held accountable for its actions through our system of checks and balances; and measures undertaken by the government should be narrowly tailored to the goal of enhancing our security.

Transparency. The public has a right to know how the government is making decisions to protect the nation. Greater transparency within government arms people with the information needed to best respond to threats and enhances public confidence in our law enforcement and intelligence communities. Yet from the secret arrest of foreign nationals in the United States to

the shielding of “ghost detainees” at detention facilities around the world to secret “sneak-and-peak” searches of private homes and businesses, the Bush administration has maintained a shroud of secrecy over its actions.¹³

Accountability. The Founders carefully crafted a political system that prevents a single branch of government from possessing unchecked power.¹⁴ In order for that system to function properly, each branch must hold the other branches accountable. But since September 11, the powers of the executive branch have increased at the expense of Congress and the judiciary. Federal judges have been stripped of their longstanding role in determining whether the facts justify search warrants, physical and electronic surveillance, and deportation orders, and the administration has withheld even the most basic information about counterterrorism measures from Congress.¹⁵

Narrow Tailoring. Since September 11, the Bush administration has repeatedly cast a wide net of suspicion over entire groups of people rather than require individualized evidence of wrongdoing. In an effort to identify possible terrorist activity within immigrant communities, the administration ordered hundreds of thousands of foreign nationals to “register” with the government, sowing fear and suspicion among millions of immigrants, breaking apart families, and destroying the careers of productive, hard-working immigrants.¹⁶ This program not only relied on a crude form of ethnic profiling, it severely strained government resources without uncovering significant terrorist activity.¹⁷ Similarly, law enforcement agencies have monitored, infiltrated, and attempted to disrupt peaceful political organizations merely because they opposed the war, not because of any security threat they posed.¹⁸

These principles are especially important when applied to the three major issue areas below which warrant special scrutiny as the national debate continues on how to reconcile security concerns with civil liberties, and as Congress considers the reauthorization of expiring provisions of the USA PATRIOT Act in 2005.¹⁹

- *Surveillance and law enforcement.* Law enforcement and intelligence officials must be empowered to do their jobs, but they must do so within constitutional limits. While new powers are clearly needed to combat the threat of terrorism in the digital age, many of the powers granted in the Act have not been used for counterterrorism purposes and some have raised serious constitutional concerns. Law enforcement must pursue efficient, targeted, and effective counterterrorism strategies that do not waste precious resources or infringe on civil rights and civil liberties.
- *Immigration.* Establishing effective border security and respecting the rights of immigrants should be a primary goal of the president and Congress. In the wake of September 11, the failures of our border security and immigration enforcement systems were painfully evident. Unfortunately, many of the steps taken to remedy these failures have been both overzealous and ineffective. Sensible immigration policies would encourage cooperation among the many immigrant communities that live in our nation,²⁰ and

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create goodwill around the globe by facilitating the travel, study, and work of foreign nationals, including scientists, artists, and students, who can make a positive contribution to our nation.²¹

- *Executive branch policymaking.* As noted by the 9/11 Commission, many civil rights and civil liberties violations could be prevented if appropriate safeguards were instituted within the executive branch.²² High-level personnel at federal agencies and the White House should be required to consider the impact of government policies on our civil rights and civil liberties. Complaints of possible abuses of civil rights and civil liberties by government officials should be investigated fully.

This list, of course, is not exhaustive. Many important civil liberties issues remain outside the scope of this chapter. Chief among these is recognizing that respect for civil liberties encompasses an international dimension. American credibility in the world has been dangerously impaired by the current administration's disregard for the rule of law. The president must comply with all international agreements to which the United States is a party and with customary international law, including the Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Only by respecting the rule of law can the United States enlist the international cooperation and goodwill on which its security—and the safety of its armed forces—depend.

CURRENT STATE OF PLAY

The Bush administration has offered Americans a false choice between security and liberty. Government policies have undermined constitutional protections without making the nation more secure. Instead of enlisting the help of immigrant communities in identifying terrorist activity, the government has alienated them through measures that violate due process and yield little useful counterterrorism information.²³ The Justice Department has brought criminal investigations with much fanfare, only to see prosecutions collapse due to prosecutorial misconduct, leaving ruined lives in their wake and a nation still susceptible to attack.²⁴

Indeed, the threat we face today from terrorism remains as serious as it was before September 11, 2001.²⁵ The administration's response has in many ways damaged the liberties protected by the Constitution *and* failed to enhance our security. As we describe more fully below, the administration has:

- Eliminated longstanding restrictions on law enforcement's ability to engage in domestic surveillance of political speech and activity protected by the First Amendment;
- Detained individuals for months and years without bringing criminal charges or allowing them to consult with an attorney, sometimes holding them incommunicado and in highly punitive conditions, by improperly using the material witness statute;
- Engaged in ethnic profiling and harassment of innocent individuals through the arbitrary use of terrorist "watchlists" at airports, financial institutions, car rental agencies, and numerous other businesses;

- Made extensive use of legal authorities granted under the USA PATRIOT Act in cases that have nothing to do with terrorism; refused to disclose basic information to Congress and the public about the use of these authorities; and sought to evade congressional and judicial oversight over executive branch decisions;
- Secretly detained hundreds of Arab and Middle Eastern immigrants after September 11, denying them access to legal counsel and family members, subjecting some to solitary confinement and mental and physical abuse;
- Alienated immigrant communities and damaged our international standing by requiring all adult male foreign nationals from 24 predominantly Muslim countries to complete “special registration requirements” (including photographing, fingerprinting, and interrogation);
- Failed to secure our borders and implemented an entry/exit system that has been ineffective and has raised significant concerns about safeguarding the privacy and civil liberties of millions of travelers;
- Deprived immigrants of their right to argue their appeal before an independent, neutral decisionmaker by substantially impairing the immigration court system; and
- Disregarded civil liberties and privacy concerns within the executive branch policymaking process by failing to create a meaningful civil liberties board sufficiently empowered to help shape policy formulation and investigate abuses by government agencies.

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These measures have weakened our nation and our standing in the world while doing little to make us safer.

PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

Surveillance and Law Enforcement

Surveillance and law enforcement practices should improve public safety and safeguard civil rights and liberties. As outlined in greater detail below, the president and Congress should take steps to protect First Amendment activity; prevent abuse of the material witness statute; eliminate the arbitrary and discriminatory use of watchlists; and determine which powers authorized by the USA PATRIOT Act warrant renewal.

Protect First Amendment activity. After September 11, Attorney General John Ashcroft unilaterally weakened longstanding restrictions on the FBI’s ability to conduct domestic surveillance

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by revising the Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations.²⁶ He did this without consulting Congress. The Guidelines govern the conduct of the FBI and the law enforcement community. First established during the Ford administration (and amended thereafter), the Guidelines were created in response to serious abuses of constitutional rights by the FBI,²⁷ such as the infamous COINTELPRO program, a covert campaign to target political dissidents and illegally wiretap civil rights and anti-war leaders.²⁸ The revised Guidelines remove important safeguards limiting the scope and length of federal investigations and decrease internal supervision once those investigations have begun.²⁹ While the attorney general claimed these changes were necessary to enable the FBI to carry out terrorism investigations, the 9/11 Commission did not conclude that any of the failures leading to September 11 were due to restrictions required by the Guidelines.³⁰

There is evidence that activity protected under the First Amendment is being monitored by the FBI. An FBI bulletin issued on October 15, 2003, called for monitoring anti-war rallies, stating that even “peaceful techniques can create a climate of disorder” and that law enforcement should be particularly wary of individuals who wear “goggles, scarves . . . and sunglasses” and extremists with “body protection equipment (layered clothing, hard hats and helmets, sporting equipment, life jackets, etc.) to protect themselves during marches.”³¹ Federal agents have also investigated and attempted to disrupt legitimate political activities, including protests at the Republican National Convention in New York City.³² Department of Justice (DOJ) resources should be focused on criminal and counterterrorism investigations, not investigations of protected First Amendment activity. Therefore, the Center for American Progress recommends that:

- The president should direct the attorney general, in consultation with the FBI director, to restore restrictions on domestic surveillance in the Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, and share those revisions with the Congress.
- The Congress should consider whether additional legislative remedies are appropriate.

Prevent abuse of the material witness statute. The material witness statute permits the detention of witnesses for the narrow purpose of ensuring that they provide testimony for a criminal proceeding when the government believes they pose a risk of flight.³³ Since September 11, however, prosecutors have used the statute as a means of preventive detention when they lack sufficient evidence to make an arrest on criminal or immigration charges. The Justice Department has refused to disclose the full extent to which it has relied on the statute since September 11,³⁴ but it is known that dozens of persons have been detained for months on end, often held incommunicado in highly punitive conditions.³⁵ Although judges must approve the detention of all material witnesses under the statute, the government has limited the availability of counsel to detainees, seriously undermining their ability to refute accusations brought against

them.³⁶ The material witness statute should not be used as an end-run around the constitutional guarantee of due process. Congress should:

- Enact legislation requiring the attorney general to release to Congress all case files, reports, and relevant data (subject to customary protocols governing classified information) regarding DOJ's use of the statute in counterterrorism investigations after September 11.
- Amend the material witness statute to include a requirement that witnesses be detained for no more than 15 days unless the government presents clear and convincing evidence that: (1) the individual poses a flight risk; (2) the individual possesses information of such importance that, if the individual became unavailable, the government's ability to investigate or prosecute serious criminal activity would be substantially damaged; and (3) no less restrictive alternatives are adequate to prevent the individual from fleeing.

As the 9/11 Commission concluded, the burden of proof should remain on the government to explain that each power “materially enhances security” and that adequate civil liberties protections are in place to oversee the use of that power.

Eliminate the arbitrary and discriminatory use of watchlists. After September 11, reliance on watchlists greatly increased as agencies adopted measures to detect suspected terrorists. However, use of the lists was not coordinated among the agencies; a 2003 Government Accountability Office (GAO) report found nine security agencies used more than a dozen different watchlists.³⁷ This has resulted in inaccurate lists and conflicting information. In the days after September 11, for example, the FBI distributed a list of suspected terrorists to a wide array of companies in the private sector. The list was so riddled with errors that the FBI renounced its use, but because it had been widely circulated, particularly over the Internet, numerous innocent people were falsely accused of wrongdoing.³⁸ These errors were compounded by an ineffective administrative process to enable individuals to seek to have their names removed.³⁹

The misuse of the lists has led to repeated instances of ethnic profiling (*i.e.*, many Arab-, Middle Eastern-, and Muslim-Americans have been placed on lists because of their ethnicity⁴⁰) and harassment of individuals for their political beliefs (*e.g.*, peace activists have been included on “no-fly” lists⁴¹). Innocent individuals, including Senator Edward Kennedy and Representative John Lewis, have been stopped at airports because their names were similar to those of individuals on the list.⁴² The administration created the Terrorist Screening Center (TSC) in September 2003 as a multi-agency effort led by the FBI in conjunction with the Central Intelligence Agency, the State Department, and the Department of Homeland Security (DHS) to consolidate, maintain, and operate the government's watchlists.⁴³ Confusion over which agency should direct the TSC has hampered its effectiveness. The inspector general of DHS concluded that the department has failed to fulfill its responsibility to lead the TSC, as directed by Congress.⁴⁴ The report also concluded that the TSC is understaffed and employs an “ad hoc” approach to watchlist consolidation.⁴⁵ Serious concerns have also been raised about the TSC's commitment to protecting privacy and civil liberties; a required privacy impact assessment was never completed due to the haste in which the TSC was created, and extensive data-mining operations are being conducted without sufficient oversight.⁴⁶

Maintaining accurate, up-to-date watchlists is a critically important counterterrorism measure. But without proper oversight and quality control, watchlists are an ineffective tool, inviting discrimination and infringing on legitimate political activity. The president should:

- Establish an interagency working group to identify and direct necessary resources to operate successfully the TSC and expedite the development of a master watchlist.
- Direct the secretary of homeland security to establish a process for individuals to challenge their inclusion before an administrative law judge with a right of appeal in federal court.⁴⁷

Evaluate the efficacy of the USA PATRIOT Act. The USA PATRIOT Act was signed into law just 45 days after the attacks of September 11. Recognizing that many of the new powers granted by the Act received little consideration by members of Congress, an agreement was reached to “sunset” some of the provisions on December 31, 2005 so that Congress could evaluate the implementation of the Act.⁴⁸ Of the more than 150 new provisions in the law, only 16 are scheduled to sunset, and some of these are less controversial than others that do not expire.⁴⁹ All of the Act’s provisions, regardless of whether they are scheduled to sunset, should be evaluated for their efficacy in accordance with the following three guidelines.

First, powers granted under the USA PATRIOT Act should be evaluated to assess how they have been employed and whether they are necessary. The administration promoted the Act as necessary to address the threat of international terrorism. Yet many of the new authorities granted in the Act have been used in hundreds of cases—ranging from local corruption to drug trafficking—that have nothing to do with terrorism. Law enforcement officials have relied on the Act’s broad powers to wiretap phones, monitor private Internet communications, and obtain private financial records in the course of traditional criminal cases.⁵⁰ Before Congress renews these powers, in whole or in part, it must be satisfied that there is a continuing need for them and that they will not be abused. As the 9/11 Commission concluded, the burden of proof should remain on the government to explain that each power “materially enhances security” and that adequate civil liberties protections are in place to oversee the use of that power.⁵¹ It is even more important that the government meet this burden with respect to powers in the Act whose relevance to counterterrorism is tenuous or nonexistent.

Second, powers granted under the USA PATRIOT Act should be evaluated to assess whether they provide sufficient transparency and public accountability. Some provisions in the Act explicitly prohibit disclosure of actions taken by the government, most notably section 215.⁵² That provision permits the government to request “any tangible thing . . . including books, records, papers, documents, and other items” from any entity, yet forbids disclosure that such a request has been made.⁵³ Thus, a business owner who received a request under section 215 is not only obligated to turn over the requested records, but could face criminal prosecution if he or she mentions the request to anyone. This lack of transparency has been exacerbated by the Bush administration’s needless insistence on withholding or classifying even the most rudimentary information about how the Act has been used. Repeated, bipartisan requests from Congress have been rebuffed.⁵⁴ Such information should be disclosed unless a credible threat to national security would be posed by its release (and in such instances, customary protocols should be observed that provide access under appropriate safeguards to the relevant congressio-

nal committees). Permitting law enforcement to operate in secret not only undermines effective counterterrorism measures, but it erodes public confidence in the legal system.⁵⁵

Third, powers granted under the USA PATRIOT Act should be subject to meaningful review by a neutral magistrate that includes written findings of fact whenever possible. Many provisions of the Act strip the courts of their ability to conduct a meaningful review of executive branch actions, leaving power unchecked in the hands of law enforcement officials. For example, section 215 permits the government to obtain the records it seeks merely by making a certification to the Foreign Intelligence Surveillance Court that such records are sought for a counterterrorism or foreign intelligence investigation. The court has no authority to refuse the request as long as it is submitted properly.⁵⁶ Section 412 of the Act permits the attorney general to detain unilaterally any alien for up to seven days without judicial review.⁵⁷ Judicial oversight is essential to preventing arbitrary acts by the government and making certain that the rule of law is scrupulously observed.

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Immigration

For immigration policies to be fair and improve security, the president should end secret arrests and secret hearings, encourage cooperation with immigrant communities, improve border security, and reform the immigration court system.

End secret arrests and secret hearings. The Bush administration has made secrecy a hallmark of its arrest, detention, and deportation efforts, which has too often led to abuse and mistreatment of immigrants and a loss of public trust in our government.⁵⁸ Over 1,000 Arab and Muslim men were secretly arrested in a nationwide dragnet after September 11, many for minor civil immigration violations; some were held in 23-hour lockdown, denied access to legal counsel and family members, and subjected to mental and physical abuse.⁵⁹ Not one was publicly charged with terrorism.⁶⁰ Such secrecy was permitted because the government closed all hearings in the cases of detainees determined to be of “special interest” to the government. Basic information—including the very existence of the case—was withheld from families of the detainees, the press, and public.⁶¹ The names of the detainees remain secret even today.⁶² Denying basic due process to individuals who stand accused of a civil violation—absent compelling evidence that providing such due process would pose an imminent threat to national security—is repugnant to a modern democracy. As one federal judge declared in criticizing the government's policies, “Democracies die behind closed doors.”⁶³

- Congress should enact legislation prohibiting the secretary of homeland security and the attorney general from closing immigration hearings absent a case-specific showing of national security need.

Encourage cooperation with immigrant communities. The National Security Entry-Exit Registration System (NSEERS) required adult male foreign nationals from 24 predominately Muslim countries to complete “special registration requirements” (including photographing, fingerprinting, and interrogation).⁶⁴ As documented by the 9/11 Commission, NSEERS un-

covered no significant terrorist activity, wasted precious counterterrorism resources, and damaged our relations with foreign nations.⁶⁵ The international fallout was so significant that the White House issued a “global message” that attempted to explain and justify NSEERS in order to help “avoid misunderstandings with foreign partners.”⁶⁶ The program’s greatest cost was its severe alienation of immigrant communities in the United States, who are the very people the government needs to cooperate with in order to identify and defeat terrorists most effectively.⁶⁷ Although the administration suspended several of its components, NSEERS remains in effect on a case-by-case basis.⁶⁸

- Congress should enact legislation prohibiting the attorney general and secretary of homeland security from using federal funds for “special registration” programs, such as the National Security Entry-Exit Registration System (NSEERS), unless justified by specific and credible intelligence and no other alternatives exist to carry out a legitimate law enforcement objective.

Improve border security. The challenges we face in securing our nation’s borders were exposed by the September 11 plot in which the 19 hijackers were able to gain admission to the United States and travel frequently abroad and within the country.⁶⁹ In order to improve screening at the nation’s airports, seaports, and land ports of entry, the Department of Homeland Security created the US VISIT program,⁷⁰ a system that uses biometric identifiers (digital finger scans and photographs) to process visitors upon arrival in the United States.⁷¹ Implementation of the program has been slow; current reports estimate the system could take 10 years and \$15 billion to build.⁷² Questions have also been raised about its efficacy. US VISIT uses a two-fingerprint system rather than the 10-fingerprint system used by the Justice Department, drastically reducing its accuracy in identifying suspected terrorists and criminals.⁷³ If properly implemented, the use of biometrics can advance civil liberties by reducing dependence on ethnic profiling. But careful research is needed to ensure that such systems are implemented in a manner that is both accurate and respectful of privacy and civil liberties.

- Congress should enact legislation that provides for more funding and technical assistance to expedite rapid implementation of the US VISIT program. Such legislation should also safeguard privacy and other civil liberties.

Reform the immigration court system. The attorney general controls the immigration court system, both at the trial level and the appellate level (the Board of Immigration Appeals (BIA)).⁷⁴ After September 11, Attorney General Ashcroft issued new policies that sharply curtailed due process protections for immigrants, limited the discretion of immigration judges, and reduced the BIA to little more than a rubber stamp.⁷⁵ He ordered the BIA to resolve 56,000 cases in little over a year, prompting BIA members to decide cases within minutes and to abandon their practice of employing three-judge panels.⁷⁶ Ashcroft also reduced the size of the BIA from 23 members to 11, retaining only those judges whose records indicated that they were least likely to grant immigrant appeals.⁷⁷ These changes not only compromised the quality and reliability of immigration decisions but they also created an enormous burden on the federal court system as the number of BIA decisions appealed to federal courts increased significantly.⁷⁸ This increase has so overwhelmed the federal court system that the Justice Department has been forced to enlist lawyers unfamiliar with immigration law to help handle cases.⁷⁹

Decisions of the immigration courts have a profound impact on people's lives. Family unity, deportation, and even survival—for asylum seekers who face death or torture if returned to their home country—are often at stake. An independent agency charged with reviewing the decisions of immigration judges should be created to provide sufficient due process and to ensure that justice has not been forsaken for administrative expediency.

- Congress should enact legislation establishing a new independent agency, the Immigration Review Commission, to oversee and regulate the immigration court system.⁸⁰

Executive Branch Policymaking

The 9/11 Commission concluded that attention to civil rights and civil liberties must be integrated into the executive branch policymaking process in order to lessen the risk that they will be violated.⁸¹ Moreover, the government has an obligation to ensure that when violations do occur, they are investigated thoroughly. In the recently enacted intelligence reform bill, Congress addressed this concern by creating a “Privacy and Civil Liberties Oversight Board.”⁸² Unfortunately, as explained below, this board falls short of what is needed to protect civil liberties adequately.

Strengthen the civil liberties board created by Congress. To fulfill the recommendation of the 9/11 Commission, a board must have a meaningful opportunity to participate in the policymaking process, investigate complaints and possible abuses of civil liberties, ensure compliance with laws and regulations affecting civil liberties, and draw on outside experts to provide effective oversight of government officials. The board created by Congress is a useful starting point for ensuring that these goals are met, but, as currently constituted, it suffers from several core deficiencies.⁸³

First, the board is too closely tied to the president. It resides in the Executive Office of the President and all five members are appointed by, and serve at the pleasure of, the president.⁸⁴ Making the board an independent agency, ensuring bipartisan composition of the board (by requiring two members to be nominated by the leaders of the minority party), and establishing staggered, fixed terms for members would increase its credibility and effectiveness.

Second, the board lacks important tools to carry out real oversight and investigative functions. The board currently may request information from any person outside the executive branch; but if information is not provided after 45 days, the board is merely permitted to “notify” the attorney general of the denial.⁸⁵ The attorney general then “may take such steps as appropriate.”⁸⁶ Similarly, the board may request information from government agencies, but if denied, has no recourse but to inform the head of the agency and request the information.⁸⁷ Even this modest power is subject to large loopholes. Both the director of national intelligence and the attorney general may prevent the release of information deemed to threaten national security or compromise ongoing investigations.⁸⁸ Such a vague standard invites excessive classification by government officials, a problem documented by the 9/11 Commission.⁸⁹ Board members

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should be granted the requisite security clearances to gain access to all necessary information. When necessary, the board should be able to raise concerns over access to information directly to the president.

Third, although the board is instructed to “consider” civil liberties principles when it provides advice to executive branch officials,⁹⁰ the board is not required to assess each regulation, policy, or law in writing. When considering new or revised regulations, agencies should be required to make an initial determination as to whether significant civil liberties implications are at stake; if so, agencies should conduct a thorough civil liberties impact assessment (akin to privacy impact assessments⁹¹) in order to determine whether the regulation should be promulgated. These requirements would help regularize consideration of civil liberties implications throughout the government.

Finally, the board is required to submit annual reports to Congress. More frequent reporting requirements, such as quarterly reports, would increase awareness of, and confidence in, the board’s work and enable the press and the public to monitor its findings—and for problems to be corrected more quickly.

- Congress should enact legislation strengthening the “Privacy and Civil Liberties Oversight Board” by: making the board and its members independent of the White House; providing the board access to all necessary information, including information held by intelligence and law enforcement agencies; requiring the use of “civil liberties impact assessments”; and increasing the frequency of reports the board must send to Congress.

ENDNOTES

¹ *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

² A recent nationwide poll found that 44 percent of Americans favor some restrictions on the rights of Muslim-Americans. See William Kates, *Nearly Half in U.S. Say Restrict Muslims*, *Associated Press*, Dec. 18, 2004. One year after the September 11 attacks, only one in three Americans said the government was not doing enough to protect those being investigated for terrorist involvement. Richard Morin & Claudia Deane, *Altered Lives, Changing Attitudes: In Poll, Most Americans Say 9/11 Affected Them Permanently*, *Washington Post*, Sept. 8, 2002, at A1. In November 2001, only 30 percent of Americans believed the government was not doing enough to protect the civil rights of suspected terrorists; nearly three of four said the government should be able to wiretap conversations between suspected terrorists and their attorneys. Richard Morin & Claudia Deane, *Most Americans Back U.S. Tactics*, *Washington Post*, Nov. 29, 2001, at A1. And in October 2001, eight of 10 Americans supported police authority to stop and search individuals who fit the profile of a terrorist. Gary Langer, *Power to the Police*, *ABC News*, Oct. 10, 2001, available at http://abcnews.go.com/sections/nightline/DailyNews/STRIKES_civilrightspoll011010.html (last viewed Aug. 15, 2005).

³ *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). See George P. Fletcher, *The Cliché That ‘The Constitution Is Not A Suicide Pact’: Why It Is Actually Pro-, not Anti-, Civil Liberties*, Jan. 7, 2003, available at http://writ.news.findlaw.com/commentary/20030107_fletcher.html (last viewed Aug. 15, 2005).

⁴ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2674-5 (2004) (Thomas, J., dissenting) (“I do not think that the Federal Government’s war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government’s compelling interests and for our own institutional inability to weigh competing concerns correctly.”).

⁵ Remarks of President George W. Bush, *President Thanks DHS Secretary Chertoff at Swearing-In Ceremony*, Mar. 3, 2005, available at <http://www.whitehouse.gov/news/releases/2005/03/20050303-1.html> (last viewed Aug. 15, 2005); The National Commission On Terrorist Attacks Upon The United States, *Overview of The Enemy, Staff Statement No. 15* at 12 (2004); John F. Burns, *Bin Laden Aide Threatens More Strikes*, *N.Y. Times*, Oct. 10, 2001, at B8.

⁶ U.S. Const. art. I, 9, cl. 2 (suspension of habeas corpus “in cases of rebellion or invasion”). The fact that Congress did not suspend the writ of habeas corpus after September 11 led Justices Scalia and Stevens to disagree with the Supreme Court’s decision that the Bush administration had sufficient authority to detain U.S. citizen Yaser Hamdi as an enemy combatant. See *Hamdi v. Rumsfeld*, 124 S. Ct. at 2660 (Scalia, J., dissenting).

⁷ Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *Yale L.J.* 489, 490 (1945).

⁸ *Ibid.*

⁹ President Gerald Ford rescinded President Franklin Roosevelt’s Executive Order authorizing the internment of Japanese-Americans, saying, “We now know what we should have known then—not only was that evacuation wrong but Japanese-Americans were and are loyal Americans.” President Gerald R. Ford, Remarks Upon Signing a Proclamation Concerning Japanese-American Internment During World War II, Feb. 19, 1976, available at <http://www.ford.utexas.edu/library/speeches/760111.htm> (last viewed Aug. 15, 2005); *Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Cal. 1984) (overturning 1942 conviction of Fred Korematsu).

¹⁰ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹¹ *Ibid.* (Jackson, J., dissenting).

¹² John Podesta, *USA Patriot Act: The Good, the Bad, and the Sunset*, *Human Rights Magazine* (Winter 2002), available at <http://www.abanet.org/irt/hr/winter02/podesta.html> (last viewed Aug. 15, 2005).

¹³ See e.g., Memorandum from Chief Immigration Judge Michael Creppy, *Re: Cases Requiring Special Procedures*, (Sept. 21, 2001), available at http://news.findlaw.com/hdocs/docs/aclu/creppy092101_memo.pdf (last viewed Aug. 15, 2005); Letter from Assistant Attorney General Daniel J. Bryant to U.S. Senator Carl Levin (July 3, 2002), available at <http://www.immigration.com/newsletter1/752detained.pdf> (last viewed Aug. 15, 2005); Eric Schmitt & Thom Shanker, *Rumsfeld Issued An Order To Hide Detainee In Iraq*, *N.Y. Times*, June 16, 2004, at A1; Human Rights Watch, *The United States’ “Disappeared”: The CIA’s Long-Term “Ghost Detainees”* (October 2004); Letter of Acting Assistant Attorney General Jamie E. Brown to Chairman F. James Sensenbrenner (May 13, 2003) at 8-9, available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotwcover051303final.pdf> (last viewed Aug. 15, 2005).

¹⁴ THE FEDERALIST NO. 47 (James Madison), *New York Packet*, Feb. 1, 1788 (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

¹⁵ For example, Section 215 of the USA PATRIOT Act permits the government to obtain “any tangible thing” upon a mere certification to a judge without naming a specific target. Section 217 of the Act authorizes individuals to permit law enforcement to monitor their computer for “trespassers” without obtaining a warrant, exposing many computer users to unwarranted surveillance. And Section 412 permits the attorney general to detain unilaterally any alien for up to seven days without judicial review. USA PATRIOT Act, Pub. L. No. 107-56 (2001), §§ 215, 217, 412; Letter of Acting Assistant Attorney General Daniel J. Bryant to Chairman F. James Sensenbrenner (July 26, 2002) at 3 (refusing to disclose information), available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotactcombined responses3.pdf> (last viewed Aug. 15, 2005).

- ¹⁶ Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002); Flynn McRoberts, *Muslim Exodus From U.S. Unravels Tightknit Enclaves*, Chicago Tribune, Nov. 18, 2003, at 1; Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. Times, June 7, 2003, at A1.
- ¹⁷ Thomas R. Eldridge et al., *9/11 and Terrorist Travel*, Staff Report of The National Commission on Terrorist Attacks Upon the United States, at 157-161 (2004); Rachel L. Swarns, *Program's Value in Dispute As a Tool to Fight Terrorism*, N.Y. Times, Dec. 21, 2004, at A26.
- ¹⁸ Michelle Goldberg, *Outlawing Dissent*, Salon.com, Feb. 11, 2004, available at <http://archive.salon.com/news/feature/2004/02/11/cointelpro/> (last viewed Aug. 15, 2005).
- ¹⁹ Since this chapter was originally published, both houses of Congress have passed legislation to reauthorize the expiring provisions of the Act. The two bills, S. 1389 and H.R. 3199, diverge in significant respects, and a House-Senate conference is expected to conclude negotiations to reconcile them shortly after this book goes to press. On June 17, 2005, as the House and Senate prepared to consider these measures, the Center for American Progress released the report of a bipartisan working group of former government officials offering recommendations to Congress and the administration regarding the expiring provisions. The report is available at http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/PATRIOT_ACT.PDF (last viewed Aug. 15, 2005). While the Center continues to favor tougher standards with respect to a number of these provisions, we believe that, taken as a whole, the recommendations represented a constructive contribution to the debate. The Senate-passed bill adopted the majority of the recommendations, and current indications are that a number of them will be included in the conference report. In November 2005, in the midst of the House-Senate negotiations, *The Washington Post* published an article revealing that the enactment of the PATRIOT Act had brought about a 100-fold increase in the FBI's use of national security letters (NSLs), with more than 30,000 issued each year. Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, Washington Post, Nov. 6, 2005, at A1. These revelations led to bipartisan calls for stricter controls on the FBI's ability to demand and retain these records. See, e.g., Mark D. Agrast, *Reforming the Patriot Act*, Nov. 17, 2005, available at http://www.americanprogress.org/site/apps/nl/content3.asp?c=bijRj8OVF&b=837367&content_id=%7BA2008D66-F383-4C9B-968A-8E7F3B877634%7D¬oc=1. It appears that the conference report will provide for enhanced oversight regarding the use of NSLs, but it is unlikely to address the core concerns regarding their use.
- ²⁰ See e.g., Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. Times, Oct. 12, 2003, at A1 (describing tip from community to FBI in Buffalo).
- ²¹ Charles Piller, *Yanking the Mat for Scholars*, L.A. Times, Dec. 19, 2003, at A1; Lee Hockstader, *Post-9/11 Visa Rules Keep Thousands From Coming to U.S.*, Washington Post, Nov. 11, 2003, at A1.
- ²² The National Commission On Terrorist Attacks Upon The United States, *The 9/11 Commission Report*, at 393-395 (2004).
- ²³ See e.g., U.S. Department of Justice Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003); Thomas R. Eldridge et al., *9/11 and Terrorist Travel*, Staff Report of The National Commission on Terrorist Attacks Upon the United States, at 154 (2004); The National Commission On Terrorist Attacks Upon The United States, *Threats and Responses in 2001*, Staff Statement No. 10, at 13 (2004).
- ²⁴ David Cole, *The D.C. Gang That Couldn't Shoot Straight*, L.A. Times, Sep. 19, 2004, at M5; Danny Hakim and Eric Lichtblau, *After Convictions, the Undoing Of a U.S. Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A1.
- ²⁵ Eric Lichtblau, *Under Ridge, Color Alerts and Mixed Security Reviews*, N.Y. Times, Dec. 1, 2004, at A26; see generally Stephen Flynn, *America The Vulnerable: How Our Government Is Failing to Protect Us From Terrorism*, (2004).
- ²⁶ U.S. Department of Justice, *The Attorney General's Guidelines On General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations*, at 1-28 (2003), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last viewed Aug. 15, 2005).
- ²⁷ Jerry Berman & James Dempsey, *CDT's Guide to the FBI Guidelines: Impact On Civil Liberties and Security—The Need for Congressional Oversight*, June 26, 2002, available at <http://www.cdt.org/wiretap/020626guidelines.shtml> (last viewed Aug. 15, 2005); Michael Duffy & Nancy Gibbs, *How Far Do We Want The FBI To Go?*, Time, June 10, 2002, at 24.
- ²⁸ Select Committee to Study Governmental Operations With Respect to Intelligence Activities ("the Church Committee"), *Book III: National Security, Civil Liberties, and the Collection of Intelligence*, Apr. 23, 1976, available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIII.htm> (last viewed Aug. 15, 2005).

- ²⁹ U.S. Department of Justice, The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, at 1-28 (2003), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last viewed Aug. 15, 2005); Jerry Berman & James Dempsey, *CDT's Guide to the FBI Guidelines: Impact On Civil Liberties and Security—The Need for Congressional Oversight*, June 26, 2002, available at <http://www.cdt.org/wiretap/020626guidelines.shtml> (last viewed Aug. 15, 2005); see also Government Accountability Office, FBI Reorganization: Progress Made in Efforts to Transform, but Major Challenges Continue, at 26-32 (June 18, 2003); Don Van Natta, Jr., *Government Will Ease Limits On Domestic Spying of F.B.I.*, N.Y. Times, May 30, 2002, at A1. In November 2003, Attorney General Ashcroft also revised the Attorney General Guidelines for FBI National Security Investigations and Foreign Intelligence Collection. Although the public version of these guidelines is highly redacted, many of the changes made are similar to the revisions to the Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations. See Susan Schmidt, *Intelligence Guide Updated; FBI Standards Authorize Sharing Security Information*, N.Y. Times, Nov. 5, 2003, at A6; U.S. Department of Justice, The Attorney General's Guidelines on National Security Investigations and Foreign Intelligence Collection, at 1-42 (2003), available at <http://www.cdt.org/security/usapatriot/031031nsguidelines.pdf> (last viewed Aug. 15, 2005).
- ³⁰ See generally National Commission On Terrorist Attacks Upon The United States, The 9/11 Commission Report (2004).
- ³¹ See Text of FBI Bulletin #89 (Oct. 15, 2003), available at <http://www.fas.org/irp/agency/doj/fbi/fbi112503.html> (last viewed Aug. 15, 2005); see also Richard Ben-Veniste, Remarks to the Hearing of The National Commission On Terrorist Attacks Upon The United States, at 28 (Dec. 8, 2003), available at http://www.9-11commission.gov/archive/hearing6/9-11Commission_Hearing_2003-12-08.pdf (last viewed Aug. 15, 2005).
- ³² Eric Lichtblau, *FBI Goes Knocking for Political Troublemakers*, N.Y. Times, Aug. 15, 2004, at A1.
- ³³ The material witness statute provides: "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person." 18 U.S.C. § 3144.
- ³⁴ Alison Parker & Jamie Fellner, Above the Law: Executive Power After September 11 in the United States, at 13-14 (Jan. 26, 2004), available at <http://www.hrw.org/wr2k4/download/8.pdf> (last viewed Aug. 15, 2005).
- ³⁵ Human Rights Watch, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees, at 60-67 (Aug. 2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> (last viewed Aug. 15, 2005); Anjana Malhotra, *Material Witness Law is Being Abused*, available at <http://www.hrw.org/english/docs/2004/05/27/usdom8631.htm> (last viewed Aug. 15, 2005); Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004, at A1.
- ³⁶ Alison Parker & Jamie Fellner, Above the Law: Executive Power After September 11 in the United States, at 13 (Jan. 26, 2004), available at <http://www.hrw.org/wr2k4/download/8.pdf> (last viewed Aug. 15, 2005).
- ³⁷ Government Accountability Office, Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing (April 2003), available at <http://www.gao.gov/highlights/d03322high.pdf> (last viewed Aug. 15, 2005). Note that the General Accounting Office was renamed the Government Accountability Office in July 2004.
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- ³⁹ *Ibid.*
- ⁴⁰ See e.g., Kareem Shora, *Guilty of Flying While Brown*, available at <http://www.adc.org/index.php?id=456> (last viewed Aug. 15, 2005); Council on American-Islamic Relations, *Report: Western Union Blocks Funds Over Name 'Muhammad'*, Jan. 15, 2003, available at <http://www.cair-net.org/asp/article.asp?id=998&page=NR> (last viewed Aug. 15, 2005).
- ⁴¹ Sara Kehaulani Goo, *Faulty 'No-Fly' System Detailed*, Washington Post, Oct. 9, 2004, at A1.
- ⁴² Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy At Airport*, N.Y. Times, Aug. 20, 2004, at A1; Sara Kehaulani Goo, *Law Lets Passengers Appeal No-Fly List*, Washington Post, Dec. 18, 2004, at A21.
- ⁴³ Eric Lichtblau, *Administration Creates Center for Master Terror 'Watch List'*, N.Y. Times, Sep. 17, 2003, at A20.
- ⁴⁴ U.S. Department of Homeland Security Office of the Inspector General, DHS Challenges in Consolidating Terrorist Watch List Information, at 3-12 (August 2004); Eric Lichtblau & John Schwartz, *Disarray Thwarts Terrorist List, Inquiry Finds*, N.Y. Times, Oct. 2, 2004, at A12; Daniel B. Prieto, *Ridge's Mixed Legacy on Homeland Security*, Chicago Tribune, Dec. 5, 2004, at 9.
- ⁴⁵ U.S. Department of Homeland Security, Office of the Inspector General, DHS Challenges in Consolidating Terrorist Watch List Information, at 11, 19-20 (October 2004).

⁴⁶ Ibid at 27-28.

⁴⁷ Some progress has been made on this issue but it is limited to the Transportation Security Administration (TSA), a unit within the DHS that guards the nation's airports. Section 4012 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (2004), requires the TSA to implement a coordinated watchlist system for airline passengers that includes the right of passengers to appeal their erroneous inclusion on such lists. See Sara Kehaulani Goo, *Law Lets Passengers Appeal No-Fly List*, Washington Post, Dec. 18, 2004, at A21.

⁴⁸ Robin Toner & Neil A. Lewis, *A Familiar Battle Fought and Won*, N.Y. Times, Oct. 26, 2001, at B5.

⁴⁹ Center for Democracy and Technology, *Patriot Act Sunsets*, available at <http://www.cdt.org/security/20040507sunsets.pdf> (last viewed Aug. 15, 2005). One additional, related provision of U.S. law—the so-called “lone wolf” provision (section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004)—is not contained within the original USA PATRIOT Act but is also scheduled to expire on December 31, 2005.

⁵⁰ Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes From Drugs to Swindling*, N.Y. Times, Sep. 28, 2003, at A1; Michael Isikoff, *Show Me the Money*, Newsweek, Dec. 1, 2003, at 36.

⁵¹ The National Commission On Terrorist Attacks Upon The United States, The 9/11 Commission Report, at 394-395 (2004).

⁵² USA PATRIOT Act, Pub. L. No. 107-56 (2001), § 215 (50 U.S.C. 1861).

⁵³ Ibid.

⁵⁴ See e.g., Letter of Acting Assistant Attorney General Daniel J. Bryant to Chairman F. James Sensenbrenner (July 26, 2002) at 3 (refusing to disclose information), available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotactcombinedresponses3.pdf> (last viewed Aug. 15, 2005); Letter of Acting Assistant Attorney General Jamie E. Brown to Chairman F. James Sensenbrenner (May 13, 2003) at 8-9, available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotwcover051303final.pdf> (last viewed Aug. 15, 2005).

⁵⁵ As Senator John McCain testified before the 9/11 Commission, “Excessive administrative secrecy on issues related to the September 11 attacks feeds conspiracy theories and reduces the public’s confidence in government.” See http://www.9-11commission.gov/hearings/hearing2/witness_mccain.htm (last viewed Aug. 15, 2005).

⁵⁶ USA PATRIOT Act, Pub. L. No. 107-56 (2001), § 215 (50 U.S.C. 1861).

⁵⁷ USA PATRIOT Act, Pub. L. No. 107-56 (2001), § 412.

⁵⁸ See, e.g., U.S. Department of Justice Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (June 2003); Human Rights Watch, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees, at 60-67 (Aug. 2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> (last viewed Aug. 15, 2005)

⁵⁹ U.S. Department of Justice Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (June 2003) at 167-180.

⁶⁰ Susan Schmidt, *Ashcroft Wants Stronger Patriot Act*, Washington Post, June 6, 2003, at A11.

⁶¹ Memorandum from Chief Immigration Judge Michael Creppy, *Re: Cases Requiring Special Procedures*, (Sept. 21, 2001), available at <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf> (last viewed Aug. 15, 2005).

⁶² In response to a suit by the Center for National Security Studies, a federal appeals court upheld the authority of the government to keep the names secret. See *Ctr. for Nat’l Sec. Studies v. U.S. DOJ*, 331 F.3d 918 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1041 (2004).

⁶³ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (Keith, J.).

⁶⁴ Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002).

⁶⁵ Thomas R. Eldridge et al., 9/11 and Terrorist Travel, Staff Report of The National Commission on Terrorist Attacks Upon the United States, at 157-161 (2004); Rachel L. Swarns, *Program’s Value in Dispute As a Tool to Fight Terrorism*, N.Y. Times, Dec. 21, 2004, at A26.

⁶⁶ Thomas R. Eldridge et al., 9/11 and Terrorist Travel, Staff Report of The National Commission on Terrorist Attacks Upon the United States, at 159 (2004).

- ⁶⁷ Flynn McRoberts, *Muslim Exodus From U.S. Unravels Tightknit Enclaves*, Chicago Tribune, Nov. 18, 2003, at 1; Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. Times, June 7, 2003, at A1; Rachel L. Swarns, *Program's Value in Dispute As a Tool to Fight Terrorism*, N.Y. Times, Dec. 21, 2004, at A26.
- ⁶⁸ Department of Homeland Security, *Changes to National Security Entry/Exit Registration System (NSEERS)*, available at <http://www.ice.gov/graphics/news/factsheets/NSEERSfactsheet120103.pdf> (last viewed Aug. 15, 2005).
- ⁶⁹ See generally Thomas R. Eldridge et al., *9/11 and Terrorist Travel, Staff Report of The National Commission on Terrorist Attacks Upon the United States* (2004).
- ⁷⁰ Department of Homeland Security, *US-VISIT: Keeping American's Doors Open and Our Nation Secure*, available at http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml (last viewed Aug. 15, 2005).
- ⁷¹ *Ibid.*
- ⁷² John Markoff & Eric Lichtblau, *Gaps Seen in 'Virtual Border' Security System*, N.Y. Times, May 31, 2004, at C1. See also The National Commission On Terrorist Attacks Upon The United States, *The 9/11 Commission Report* at 388, n.36 (2004).
- ⁷³ Robert O'Harrow, Jr. & Scott Higham, *2-Fingerprint Border ID System Called Inadequate*, Washington Post, Oct. 19, 2004, at A8.
- ⁷⁴ United States Department of Justice Executive Office for Immigration Review, available at <http://www.usdoj.gov/eoir/> (last viewed Aug. 15, 2005).
- ⁷⁵ Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. Times, Jan. 5, 2003, at A1; Eric Lichtblau & Lisa Getter, *Seeking Speedier Deportations, Ashcroft Plans Judicial Reforms*, L.A. Times, Feb. 7, 2002, at A24.
- ⁷⁶ *Ibid.*
- ⁷⁷ Teresa Watanabe, *Federal Policy Becomes Family Matter*, L.A. Times, Oct. 27, 2003, at B1.
- ⁷⁸ Eric Lichtblau & Lisa Getter, *Seeking Speedier Deportations, Ashcroft Plans Judicial Reforms*, L.A. Times, Feb. 7, 2002, at A24.
- ⁷⁹ Dan Eggen, *Immigration Backlog Forces Justice to Shift Staffing*, Washington Post, Dec. 14, 2004, at A11.
- ⁸⁰ See Section 204, Civil Liberties Restoration Act of 2004, S.2528, 108th Congress.
- ⁸¹ The National Commission On Terrorist Attacks Upon the United States, *The 9/11 Commission Report* at 395 (2004).
- ⁸² Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (2004), § 1061. On August 27, 2004, President Bush signed Executive Order 13353 creating the "President's Board on Safeguarding Americans' Civil Liberties." 69 Fed. Reg. 53585. While the fate of this Board is unclear in light of the Privacy and Civil Liberties Oversight Board created by Congress, the president's board is inadequate for safeguarding civil liberties and is designed to function more as an advisory body than an oversight board. The president's board resides in the Department of Justice and consists largely of high-level officials from the law enforcement and intelligence communities rather than individuals outside of government capable of exercising independent oversight. The president's board also lacks the power to investigate claims of civil liberties violations and is not required to issue annual reports to Congress. See Peter Swire, *The Wrong Civil Liberties Board*, Sept. 1, 2004, available at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=180251>; see also Richard Ben-Veniste & Lance Cole, *How to Watch the Watchers*, N.Y. Times, Sept. 7, 2004, at A23; States News Service, *Bush Stacks 9-11 Civil Liberties Board; Senators Call For Panel with Real Independence*, Sept. 21, 2004 (regarding letter from Senators Patrick Leahy and Edward Kennedy to President George W. Bush concerning civil liberties board).
- ⁸³ Many of these deficiencies resulted from opposition to the board from the president and members of the House of Representatives who objected to the more robust proposal for a civil liberties board contained in the Senate version of the intelligence reform bill, which caused significant controversy among House and Senate conferees. Philip Dine, *Left, Right Alike Worry About Liberties*, St. Louis Post-Dispatch, Dec. 12, 2004, at B1; Charles Babington & Walter Pincus, *White House Assails Parts of Bills; House, Senate Remain Far Apart on Intelligence Legislation*, Washington Post, Oct. 20, 2004, at A10. Nearly nine months after the creation of the board, bipartisan frustration has mounted over its lack of funding and failure to convene. Caroline Drees, *Civil Liberties Panel Is Off to a Sluggish Start*, Washington Post, Aug. 8, 2005, at A10.
- ⁸⁴ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (2004), §§ 1061(b) & (e).
- ⁸⁵ *Ibid.* at § 1061(d)(1)(D)(ii).
- ⁸⁶ *Ibid.* at § 1061(d)(2)(B).
- ⁸⁷ *Ibid.* at § 1061(d)(3).
- ⁸⁸ *Ibid.* at § 1061(d)(4).

⁸⁹ The National Commission On Terrorist Attacks Upon the United States, The 9/11 Commission Report, at 410 (2004).

⁹⁰ Ibid at § 1061(c)(1)(D).

⁹¹ For example, the E-Government Act of 2002, Pub. L. No. 107-347 (2002), requires federal agencies to conduct privacy impact assessments whenever new information technology is purchased or personally identifiable information is collected by the agencies.