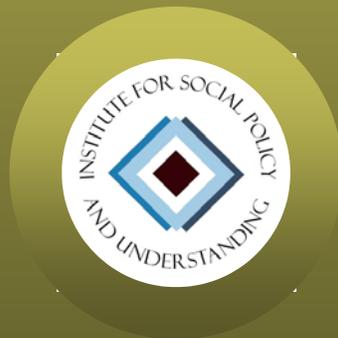


THE USA PATRIOT ACT

IMPACT ON THE ARAB AND MUSLIM AMERICAN COMMUNITY

ANALYSIS AND RECOMMENDATIONS



The Institute for Social Policy and Understanding

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

Soon after the September 11, 2001 terrorist attacks, members of Congress quickly passed legislation to grant sweeping new power to both domestic law enforcement and international intelligence agencies. The new law, known as the USA Patriot Act, was passed within weeks of the attacks, yet received little input from experts outside law enforcement or debate from the general public. This far-reaching piece of legislation, which the government says will strengthen security, broadly expands the powers of federal law enforcement agencies to gather intelligence and investigate anyone it suspects of terrorism.

While Congress undoubtedly had the best of intentions in mind, the new law has been a major blow to the constitution and the cherished freedoms guaranteed to all Americans. Civil liberties of ordinary Americans have taken a tremendous beating with this law, and none more so than Muslims, South Asians and Arab Americans. According to a recent report from the Justice Department's inspector general, which looked into allegations made under the provisions of the Patriot Act, most complaints were from Muslim Americans and Americans of Arab descent.¹ The report has numerous claims from Muslims and Arabs that were beaten or verbally abused while being detained by government officials. In other cases, financial institutions have used extreme interpretations of the Patriot Act to justify blacklisting Muslim account holders simply because their names matched those on a master government list.

In addition, ambiguities in interpreting the law have led to misapplication of the law by government officials as well as abuses by enforcement officers. Incidents include airport profiling, verbal harassment and physical assaults. It has also led to a backlash against Arabs, Muslims and South Asians in which hate crimes are on the rise and neighbors are spying on neighbors simply because their "features" or "traits" look threatening. According to the FBI's Uniform Crime Reporting Program, 481 hate crimes were documented against Muslim Americans and Arab Americans in 2001.² This is a massive increase from the 28 cases reported in 2000. Similar reports more recently have been documented by Human Rights Watch, the Council on American-Islamic Relations, the American Arab Anti-Discrimination Committee and the Lawyers Committee for Human Rights.³ While the Department of Justice has brought federal criminal charges

¹ A copy of the report can be viewed at the Department of Justice website: <http://www.usdoj.gov/oig/special/03-06/chapter1.htm>.

² Federal Bureau of Investigation: Uniform Crime Reporting Program, "Hate Crimes Statistics, 2001," The report was released November 25, 2002. It is available at www.fbi.gov/ucr/o1hate.pdf. Also see Curt Adnerson, "FBI reports jump in violence against Muslims," Associated Press, November 25, 2002.

³ See Human Rights Watch, "We Are Not the Enemy: Hate Crimes against Arabs, Muslims and those Perceived to be Arab or Muslim after September 11," November 2002, p. 17 available at www.hrw.org/reports/2002/usahate. Also see American Arab Anti-Discrimination Committee, "ADC Fact Sheet: The Condition of Arab Americans Post-September 11," March 27, 2002, available at http://www.adc.org/terror_attack/9-11aftermath.PDF. Lawyers Committee for Human

against a number of individuals involved in hate crimes, it is official government policy targeting these communities which creates a climate of discrimination and enables hate crimes to continue.

The problem with the administration's rationale is once the government successfully constructs an enemy group, it can justify detentions without charge, physical abuse, and other drastic means of waging war against "the enemy". Historically there are numerous examples of such shortsighted thinking. The Alien and Sedition Acts of 1798 placed restrictions on which ethnicities or nationalities could apply for citizenship, and authorized the President of the United States to order the deportation of all immigrants judged dangerous to national security. The Chinese Exclusion (Geary) Act of 1882, forbade Chinese laborers from entering the United States. The McCarran-Walter Act of 1952 empowered the Department of Justice to deport immigrants or naturalized citizens engaging in "subversive" activities.⁴ And finally it was the internment of Japanese Americans during the Second World War that elevated this type of xenophobia into national policy. The internment order was rationalized not only by military necessity – the fear of sabotage and espionage – but also by the military's claim that the normal criminal investigatory work of the Justice Department had been overly slow and inadequate to guarantee U.S. security.

A close examination of the Act shows many weaknesses which this report hopes to address. The 342 page Act includes more than 150 sections, and amends over 15 federal statutes, including laws governing criminal procedure, surveillance, foreign intelligence, wiretapping, and immigration. Particularly troubling are sections 206, which permits the use of "roving wiretaps" and secret court orders to monitor electronic communications to investigate terrorists; sections 214 and 216, which extend telephone monitoring authority to include routing and addressing information for Internet traffic relevant to any criminal investigation; and, finally, section 215, which grants unprecedented authority to the Federal Bureau of Investigation (FBI) and other law enforcement agencies to obtain search warrants for business, medical, educational, and library records merely by claiming that the desired records may be related to an ongoing terrorism investigation or intelligence activities – a very relaxed legal standard which does not require any actual proof, or even reasonable suspicion of terrorist activity.

While there is clearly a need for the administration to fight terrorism, national security does not require draconian laws that infringe on the rights of American citizens. There is nothing inconsistent in assuring that law enforcement authorities are properly equipped to respond to the threat of terrorism while, at the same time, assuring that Americans of all religions and ethnic groups are

Rights, "Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties, http://www.lchr.org/us_law/loss/imbalance/imbalance.htm.

⁴ Eleanor Stein "Construction of an Enemy" *Monthly Review Journal*, Vol. 55, No. 3, July-August, 2003.

treated fairly and decently. The government already has the authority to prosecute anyone whom it has probable cause to believe has committed or is planning to commit a crime. It also has the authority to engage in surveillance of anyone whom it has probable cause to believe is a foreign power or spy - whether or not the person is suspected of any crime. The key is to find a balance between avoiding unnecessary self-exposure to the dangers that exist and avoiding blind policing of specific communities.

Two recent bills that provide this balance are worth noting. Republican Senator Lisa Murkowski's "Protecting the Rights of Individuals Act" and Democratic Representative Denis Kucinich's, "Benjamin Franklin True Patriot Act" are two such bills that should be commended. They are a balanced compromise that protects civil liberties while giving the government the authority to fight terrorism. Both bills would make a number of changes to the Patriot Act including requiring a court order for U.S. law enforcement agencies to conduct electronic surveillance. Murkowski's bill would also require increased judicial reviews before law enforcement agencies monitor some telephone and Internet usage, and it would limit the FBI's ability to look at sensitive personal information, including medical, library and Internet records, without demonstrating specific suspicion to a judge. The bills would require that law enforcement agencies wanting to place roving wiretaps on telephones must show courts information that a crime has been, or is expected to be, committed, and it limits law enforcement requests of libraries to turn over information on Internet use by their patrons to the investigation standards outlined in the Foreign Intelligence Surveillance Act. That law requires that law enforcement agents have probable cause to believe that surveillance targets are foreign powers or agents of foreign powers. Senator Murkowski's and Representative Kucinich's bills are a step in the right direction and should be supported.

It is laudable that in passing the Act, Congress was sufficiently mindful to sow into the Act's lining a limited "sunset" provision. Certain sections of the Act, primarily those relating to enhanced surveillance, are due to expire on December 31, 2005. It is to their credit that in July 2003, the U.S. House of Representatives passed a funding bill effectively rolling back a provision of the Act which did away with the longstanding "knock and announce" policy for federal police searches of real property. Despite these safeguards by Congress, there continues to exist a *de facto* unequal protection afforded by the Act, specifically by the enhanced surveillance provisions, financial due diligence provisions and immigration-related provisions of the Act. Constitutional concerns such as these militate toward an accelerated schedule of abandonment of the most pernicious provisions of the Act and enactment of a sunset for all other weak provisions.

In addition, one of the major consequences of rushing the legislation though Congress was the inadequate input received from the general public. An Act as far reaching as this and one that strikes at the core of what it means to be an American should thoroughly be debated and surely get adequate input from

experts and the public; none more so than those most directly impacted by the new law. After all, the core of the American experiment is liberty, the freedom secured through constitutional rights of individuals and limitations on government power. Under the constitution, government powers are subject to limits by the courts, the Congress and the people.

The goal of this report is to add a public dimension to this very important debate and especially give voice to those most directly affected by the Act. By analyzing the provisions that negatively impact the rights of Muslim and Arab Americans, this report hopes to highlight some of the weaknesses of the Act in its current form. It should be noted though that these same provisions have slowly crept into other communities and are now having a profound impact on the rights of all American citizens regardless of their race, ethnicity or religion. We hope this report provides both a basic understanding of the Patriot Act as well as contributes to the ongoing debate of balancing the need for security with protecting civil liberties.

Recommendations:

1. Recommendations to Lawmakers

- Lawmakers should institute oversight, pass sunset addenda, and also repeal some provisions, specially the egregious ones. We suggest a six monthly public review of how the Department of Justice is using the new act.
- Congress should introduce bills amending the Act in a manner that rebalances security concerns with those of civil rights and liberties, the goal in mind being that the administration can provide security to the country yet not infringe on the civil liberties of Americans.
- In the spirit of open government for all citizens, Congress should hold regular oversight hearings into the implementation of the Patriot Act. This includes hearings on data-mining of personal information as well as the special powers to seize personal records.
- Congress should establish objective procedures and standards by which decisionmakers may determine what information or evidence meets the criteria of “a threat to national security.” At this time, at best, federal judges are merely given the opportunity to view classified evidence in camera and *ex parte*, and apply their own individual, personal judgment as to whether revealing the evidence would endanger covert operations or operatives or national security.

2. Recommendations to the Administration

- The Executive branch should realize the counterproductive nature of the Act, the anti-Americanism it fosters and the international problems it raises. Examples of these problems include the British detainees in Guantanamo as well as the political problems which have led to an adversarial rather than cooperative relationship with Muslim Americans.
- The administration should end its xenophobic treatment of Muslims and Arab Americans. Specifically, it should abandon its policy of arbitrary detention based on racial profiling. The administration should also take steps to ensure that all individuals detained have access to fair and non-discriminatory release procedures, including the opportunity to have an independent authority review the basis for the detention.⁵
- The Attorney General should act quickly to address and alleviate the concerns and abuses raised in the June 2003 report of the Office of the Inspector General of the Department of Justice.

3. Recommendations to Judges

- All Judges (but especially federal judges) should exercise their right to judicial review, demand more stringent standards for detention etc. If defense lawyers are not going to see the evidence (secret) then the judges have the responsibility to ensure justice and fairness and due process. The judges must fulfill their checks and balances function by reining in the extra-judicial functions that the executive is appropriating through the patriot act.

4. Recommendations to FBI and law enforcement officers:

- FBI officials and law enforcement officers should exercise restraint, sensitivity and not go overboard with the new powers, which are clearly extra-constitutional. We recommend police officials to voluntarily abstain from using some of the provisions.
- Law enforcement officers must not resort to physical or psychological abuses while administration officials should immediately condemn such conduct unequivocally and make clear that violators will be punished. Guidelines for their rehabilitation or punishment should be affected.

⁵ A number of civil liberties groups filed a complaint against the Department of Justice for failing to disclose information about the detainees under the Freedom of Information Act. To access filings in this case, see Center for National Security Studies v. Department of Justice available at <http://cnss.gwu.edu/~cnss/cnssvdoj.htm>.

I. INTRODUCTION

On October 26, 2001, President George W. Bush signed into law the USA Patriot Act (short for the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001”). The Patriot Act was passed hurriedly and hastily in an environment of fear, anger, paranoia and hatred, emotive reactions understandable in the wake of September 11, 2001. Congress voted on the Act during the course of an Anthrax scare that threatened their chambers and in the midst of daily warnings and briefings by the Administration that more attacks were imminent. Many, if not most, Congressman and Senators later admitted not having even read the bill before voting on it.⁶ Passed unanimously by the Senate, with little resistance by the House, and finalized by a secretive joint committee before being signed swiftly into law by the White House, the Act sweeps onto stage new crimes, new penalties, new procedures, new victims and perhaps most importantly, a new mindset in how to police both conduct as well as thought and, broadly speaking, any person who in any way has a nexus with the United States of America.⁷

The Patriot Act ushers in a new system of government secrecy and a corresponding abandonment of the constitutional principles of, among others, due process, privacy and equal protection. Similarly, the constitutional framework of checks and balances has slid even more towards irrelevance inasmuch as the Act serves not only to let Congress abdicate its lawmaking function in consideration of the executive’s administrative machinations but also to cause the judiciary to become nothing more than the Administration’s rubber-stamping handmaiden in cases purported to involve the cause célèbre known as national security. The Act mounts a frontal assault by the conservative establishment, and neoconservative elements within it, against, on the one hand, civil rights and liberties generally, and on the other hand, their *de facto* equal application to and among Americans, as is evidenced most plainly by the Administration’s unmeasured and increasingly rabid questioning, arrest, detention and deportation of persons based solely on their race, religion, ethnicity or national origin, namely they happen to be Arab-Americans or American Muslims.⁸

Although a number of its provisions are not controversial, the Act nevertheless stands out as radical in its design. To an unprecedented degree, the Act sacrifices American political freedoms in the name of national security

⁶ David Cole and James X. Dempsey, *Terrorism and the Constitution* 151 (2002).

⁷ In order to accomplish all of the above and more, the Act makes changes to over fifteen different federal statutes. Among the modified statutes are the Electronic Communications Private Act of 1986, the Computer Fraud and Abuse Act, the Foreign Intelligence Surveillance Act of 1978 (“FISA”), the Family Education Rights and Privacy Act, the Cable Act, the Federal Wiretap Statute as well as the Federal Rules of Criminal Procedure.

⁸ Lawyers Committee for Human Rights, “Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties,” http://www.lchr.org/us_law/loss/imbalance/imbalance.htm.

and overturns the democratic values that define the United States. The Act consolidates vast new powers in the executive branch of government: it enhances the executive's ability to conduct surveillance and gather intelligence, places an array of new tools at the disposal of the prosecution, including new crimes, enhanced penalties, and longer statutes of limitations, and grants the Administration the authority to detain immigrants suspected of terrorism for lengthy, and in some cases indefinite, periods of time. As the Act inflates the powers of the executive branch, concordantly it insulates the exercise of these powers from meaningful judicial and congressional oversight.

Arguably, the intentional ambiguity of the Act's language affords the Administration and its army of prosecutors largely unfettered discretion. As good a starting point as any to begin to understand the tone and reach of the Act is to examine its treatment of terrorism, which in a strict sense is what prompted the Act's rapid enactment. The Act creates a new crime of "domestic terrorism" defined as any act that "appears to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, [or] affect the conduct of a government."⁹ This definition is so broad and so ambiguous that it may be applied to citizens lawfully expressing their dissent. One wonders if the legislative intent was actually to provide appropriate tools readily pliable by the all too fallible and sometimes ill-intentioned men and women who wield them. Matched only by prosecutors' newfound powers to pursue people is the power ceded by the Act to the Secretary of State to designate, at his sole discretion, any foreign or domestic group that has engaged in a violent activity as a "terrorist organization." Power is always subject to abuse and no less so when the power is held by one person, who can decide, with no statutory repercussions whatsoever, who is or is not a terrorist. Whether acted upon mistakenly, arbitrarily or, worse, with ideological or political motivations, such power – which, when exercised, amounts fundamentally to a declaration of war by the United States – is too crucial to be held by the Secretary of State or even the President without any deliberating and balancing counterweight.

It is exceedingly troubling that the Administration is not only using too liberally its new powers but is covering its abuses by refusing to provide unclassified information under the federal Freedom of Information Act (FOIA), such as who is being targeted for questioning and who is being detained.¹⁰ Such

⁹ Section 802 of the Patriot Act.

¹⁰ Clearly related to the Act is the Attorney General's edict subverting FOIA requests. Ashcroft's edict replaces Attorney General Janet Reno's previous guidelines to agencies within the Administration for fulfilling FOIA requests, which were to make permissible discretionary disclosures except where there was "demonstrated harm." Ashcroft assures agencies that "decide to withhold records, in whole or in part," that they "can be assured that the U.S. Department of Justice will defend [their] decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." The Attorney General's edict enables federal agencies to ignore many FOIA requests for classified information. For example, the Administration has used this edict to keep secret the names of detainees who allegedly pose national security risks and to close detainees' hearings from public scrutiny.

refusal prevents anyone, including U.S. citizens, the media, federal judges and even members of the Congress, from knowing objectively whether the Administration's new powers are effective, or are lending themselves readily to abuse.¹¹ The enhanced secrecy imposed by the Administration makes it all the more imperative that the Congress repeal unwarranted and unnecessary powers that provide no marginal enhancement of civil security but that do clearly threaten civil rights and liberties.¹²

Internal reports¹³ drafted by the inspector general's office at the U.S. Department of Justice identify dozens of cases – out of more than one thousand complaints received “suggesting a Patriot Act-related” abuse – during the first six months of 2003, in which Justice Department employees have been accused of seriously violating the civil rights and civil liberties of Arabs and Muslims in connection with the enforcement of the Act.¹⁴ The inspector general's reports include credible claims that Arab and Muslim immigrants held in federal detention centers administered by the Bureau of Prison had been beaten. One report cites mishandling and verbal and physical abuse by personnel at the Federal Bureau of Investigation, the Drug Enforcement Administration and the erstwhile Immigration and Naturalization Service. Another report found that hundreds of persons out of legal status had been mistreated after they were detained following September 11, 2001. As would happen to them in the custody of any totalitarian regime, many inmates in Justice Department custody languished in unduly harsh conditions for months partly because the Administration had made little effort to distinguish legitimate terrorist suspects from others picked up in roundups of persons “hypertechnically” out of legal status. The inspector general's reports draw no broad conclusions about the extent of abuses by Justice Department employees, although the report suggests that the relatively small staff of the inspector general's office has been overwhelmed by accusations of abuse.

II. The Muslim and Arab American Community

Before discussing the impact of the Patriot Act on Muslims and Arab Americans, it might be helpful to say a few words about the community itself. Muslims and Arab Americans are an increasingly important part of the rich and diverse fabric of this country. They share in the freedoms granted to all

¹¹ See “Protecting the Homeland by Exemption: Why the Critical Infrastructure Information Act of 2002 Will Degrade the Freedom of Information Act,” 2002 Duke Law and Technology Review 0018, September 20, 2002, available at www.law.duke.edu/journals/dltr/articles/2002dltr0018.html.

¹² See “ACLU Presses for Full Disclosure on Government's New Snoop Powers,” January 17, 2003 available at www.aclu.org/NationalSecurity/NationalSecuritylist.cfm?c=107.

¹³ See Report to Congress on Implementation of Section 1001 of the USA Patriot Act (as required by Section 1001(3) of Public Law 107-56), July 17, 2003, available at <http://www.usdoj.gov/oig/special/03-07/>.

¹⁴ “Accusations of Abuse in Report on USA Patriot Act”, Philip Shenon, *New York Times*, (July 20, 2003).

Americans and are actively involved in America's vibrant civil, political, religious and cultural life. The estimated size of the American Muslim population ranges from 5 to 8 million. Of these, nearly 30 percent are African-American, and only 12 percent are Arab. They reside in every state with the largest populations in California, New York, Illinois, New Jersey, Indiana, Michigan, Virginia, Texas, Ohio and Maryland.¹⁵

Within the Muslim community one can find a wide range of ethnic backgrounds and national origins.¹⁶ For instance, a typical American mosque will include some African-American, Arab, and Asian members. South Asians (Indians, Bangladeshis, Pakistanis and Afghanis) make up the largest percentage of regular participants in U.S. mosques (33 percent), closely followed by African-Americans (30 percent) and Arabs (25 percent).¹⁷ Also active, although in smaller proportions, are Muslims from a variety of European and South American backgrounds. It should be noted however that not all Arabs are Muslims.

Muslim and Arab Americans work in a wide variety of occupations and come with various professional backgrounds. One thing for certain is that the community is one of the most highly educated in the country with nearly 62 percent having a college degree.¹⁸ They play a productive and increasingly public role in American society. In addition, there are currently more than 9,000 Muslims on active duty in the U.S. armed forces.¹⁹ On the political front, a recent survey by the State Department showed that more than 70 percent of American Muslims "strongly agree" that they should participate in American institutions and the political process.²⁰ Similarly, a survey by the American Muslim Council in 2000 found that 62.4 percent of American Muslims are registered voters.²¹ Part of this political activism also includes an increased need to voice concern over legislation or policies that strongly impact the community. No where was this activism and need more urgently felt than after September 11th and the subsequent passing of the Patriot Act.

The Backlash

The September 11th terrorist attacks and the immediate speculation that the suspects were Middle Eastern had a direct impact on the treatment of Muslim and Arab Americans throughout the country. Shortly after the attacks, mosques were defaced, businesses were vandalized and many Arabs, South Asians, Muslims were attacked. The terrorist attacks gave rise to a nationwide wave of

¹⁵ Council on American Islamic Relations (CAIR) 2000 Survey, (CAIR, Washington DC, 2000).

¹⁶ Data from the U.S. Department of State, April, 2001.

¹⁷ Data from the U.S. Department of State, April, 2001.

¹⁸ American Muslim Council Voter Survey, August 2000.

¹⁹ Data from U.S. Department of Defense, 1998.

²⁰ Data from the U.S. Department of State, April, 2001.

²¹ American Muslim Council (AMC) voter survey, August 2000.

hate crimes against persons and institutions perceived to be Arab or Muslim. According to Human Rights Watch, unlike previous hate crime waves, however, the September 11 backlash distinguished itself by its ferocity and extent.²² The violence included arson, vandalism, public harassment, death threats, physical assault and murder. Most incidents occurred within the first few months after September 11, with the violence tapering off by the end of the year.

The FBI reported the number of anti-Muslim hate crimes rose from twenty-eight in 2000 to 481 in 2001, a seventeen-fold increase.²³ The ADC reported over six hundred September 11-related hate crimes committed against Arabs, Muslims, and those perceived to be Arab or Muslim, such as Sikhs and South Asians.²⁴ Tabulating backlash incidents ranging from verbal taunts to employment discrimination to airport profiling to hate crimes, CAIR reported one thousand seven hundred and seventeen incidents of backlash discrimination against Muslims from September 11 through February 2002.²⁵

According to the same report, in 2001-2002 CAIR received 525 complaints, a 43 percent rise over the previous year and an increase of almost seven-times since 1995-1996, when CAIR first began to monitor discrimination experienced by members of the Muslim community (See Table below). About two-thirds of those claims came from states with significant Muslim populations, including California, New York, Illinois, Pennsylvania, Virginia, Maryland, New Jersey, Michigan, Florida, Texas and the District of Columbia.²⁶

Number of Incidents by Year

Year	Number of Discrimination Complaints
1995-96	80
1996-97	240
1997-98	284
1998-99	285
1999-2000	322
2000-2001	366
2001-2002	525

Source: CAIR 2002 Civil Rights Report p. 11

²² See 2002 Human Rights Watch Report.

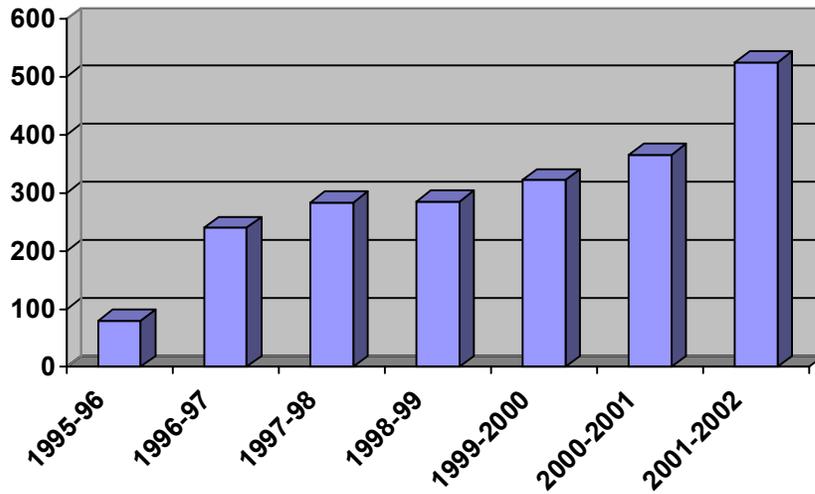
²³ "Crime in the United States - 2001," Federal Bureau of Investigation, retrieved on October 30, 2002, from <http://www.fbi.gov/ucr/01cius.htm>.

²⁴ "ADC Fact Sheet: The Condition of Arab Americans Post-September 11," American Arab Anti-Discrimination Committee, retrieved on September 24, 2002, from [http://www.adc.org/index.php?lbid.=282&no_cache=1&sword_list\[\]=hate&sword_list\[\]=crime](http://www.adc.org/index.php?lbid.=282&no_cache=1&sword_list[]=hate&sword_list[]=crime).

²⁵ "Anti-Muslim incidents," retrieved on September 8, 2002, from <http://www.cair-net.org>.

²⁶ Council on American Islamic Relations 2002 Civil Rights Report p. 11

INCIDENTS PER YEAR



Similarly complaints that charged local and federal government agencies with violations of civil liberties doubled, from 10 percent in 2000-2001 to 19 percent the following year.

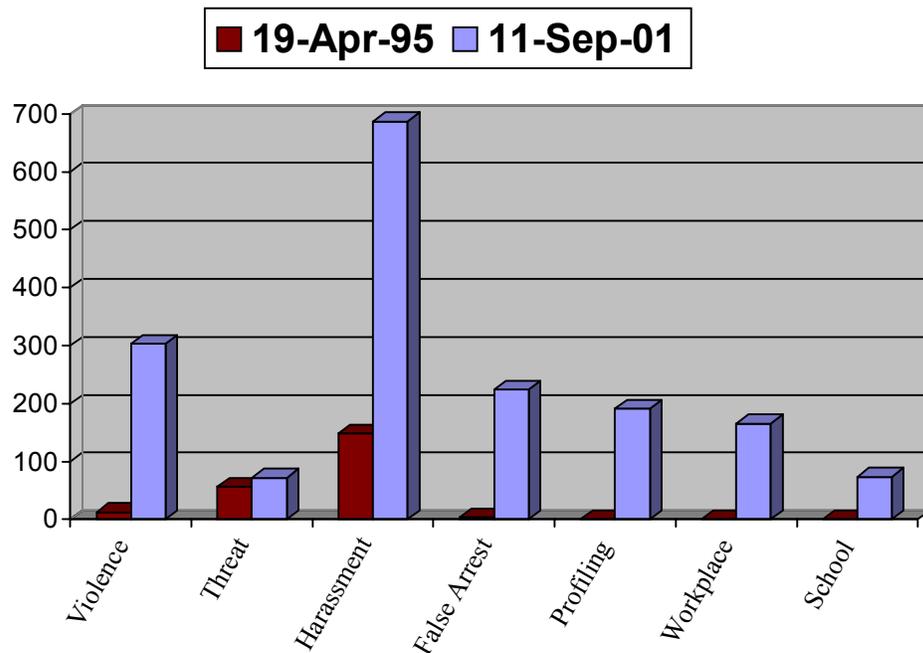
According to CAIR the largest number of complaints (42%) involved profiling incidents at airports or those at the hands of government agencies, especially the INS, FBI, and local law enforcement authorities. This is especially alarming since Muslims rarely complained in the past of mistreatment on account of their name, appearance, travel destination, national origin, ethnicity, and religion. These incidents included not only security-centered scrutiny but also public humiliation, raids by government agents on Muslim homes and businesses, detention and interrogation of Muslims, as well as closure of several Muslim charities.

Similarly, there was nearly an eight fold increase in incidents reported against the Muslim community when one compares the number incidents following the Oklahoma City bombing in April 19, 1995 with those after September 11, 2001.

Backlash Incidents by Type and Number (April, 19, 1995 and September 11, 2001)

Category	April 19, 1995	Sept. 11, 2001
Violence	13	303
Threat	56	72
Hate Message/Harassment	149	687
False arrest/Intimidation by Authorities	4	224
Airport profiling	-	191
Workplace discrimination	-	166
School Discrimination	-	74
Total	222	1,717

Source: CAIR 2002 Civil Rights Report p. 9



At the time false media speculations about Muslim involvement in the Oklahoma City bombing led to a rash of attacks. As mentioned before this time the incidents were qualitatively more violent – perhaps reflecting the fact that the suspected terrorists of Sept. 11, unlike those of April 19, were Muslim.

While the unprecedented nature of the September 11 terrorist attack and its enormity may partially explain the increase in violent incidents against Muslim there are other important factors that must also be considered. Many civil rights organizations have attributed part of the backlash with the Bush Administration’s lack of forcefully distinguishing between the terrorists and people of the Islamic faith. While the Bush Administration made this distinction immediately after the

September 11th attacks, there was not a sustained effort. In addition, the passing of the Patriot Act in October 2001 further eroded the initial positive steps that had been taken by the administration and opened the floodgate of anger against Muslims and Arab Americans. While the backlash against Muslims can not be solely attributed to the passing of the Patriot Act, it can be said that the new law made violations against Arabs and Muslims more likely while disguising it under a legal veneer. Similarly, while the Department of Justice may have brought federal criminal charges against a number of individuals involved in hate crimes, the Patriot Act granted federal agencies the right to target these communities, ultimately creating a climate of discrimination which enables hate crimes to continue.

III. Historical Precedence

An assessment of the Patriot Act's social impact on Muslims and Arab Americans must be gauged within the context of historical antecedent. Two incidents in this nation's past bear direct relevance to both the impetus and justification for current legislative action.

During the Civil War, President Abraham Lincoln suspended the writ of Habeas Corpus- the "Great Writ" - claiming the necessity to preserve national security. Despite judicial determination that such executive proclamation was unconstitutional, President Lincoln merely ignored the decision.²⁷ The right for the public to avail itself of the Writ of Habeas Corpus was not restored until 1866- one year after the conclusion of hostilities between the Union and the Confederacy.²⁸

In more recent times, due process and equal protection rights have been suspended under the guise of national security, despite the target population being U.S. citizens - some third generation Americans. World War II saw one of this country's more egregious violations of civil liberties when Japanese Americans were en masse interned to detention centers, for fear of potential subversive behavior against the U.S. That there was no substantiation for such action, President Franklin Roosevelt ordered the collective confinement. The United States Supreme Court affirmed the constitutionality of this deed in a landmark case. *Korematsu v U.S.*²⁹ declared that certain compelling circumstances permit the wholesale retraction of civil liberties to a suspect class of people - in this case, Japanese-Americans - notwithstanding the citizenship of such class. *Korematsu* is still valid law as no case has since repealed it.

Despite the memory and official governmental repudiation of the internment of US citizens (See Reagan's repudiation) under purported exigent

²⁷ See Ex Parte Merryman

²⁸ See Ex Parte Milligan

²⁹ *Korematsu v U.S.*; 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944).

circumstances, there is no safeguard to prevent the recurrence of what is considered an odious episode of American history. Such fear of recurrence is exacerbated by overtures made by government officials. Peter Kirsanow, a member of the U.S. Civil Rights Commission, intimated that a future terrorist attack, on the level of September 11, would spawn public demands for the internment of Arab Americans, akin to World War II, if they were found responsible for the incident. Mr. Kirsanow, conceded that it would be difficult for the government to defy the tide of public opinion by protecting the rights of citizens and non-citizens alike. The shock was that a government official from an agency dedicated to the supposed protection of civil rights, made such a statement in Detroit, Michigan - the home of the largest Arab community outside the Middle East.

Most troubling is the effort by the current administration to ignore well established principles and rights that stem from one's status as a US citizen. Jose Padilla and Yasser Hamdi are both American citizens, born in this country. Yet both have been declared enemy combatants by the administration and have been deprived even the right to counsel. Neither has been formally charged with any crime; however, they have languished in confinement since their respective arrests. Although the executive branch claims the right to designate someone an enemy combatant, citing precedent from World War II involving German American seditionists, such designation was predicated upon a formal declaration of war by Congress. Currently, the legislative branch has been entirely usurped in favor of the executive. Despite such efforts by the Bush administration, the courts have begun to restore the rights of US citizens. A federal court declared recently that Jose Padilla has the right to counsel - a constitutional protection afforded to a US citizen by the 6th Amendment. Interestingly, Yaser Hamdi's status is being challenged by several interest groups- a position maintained by the administration as well- claiming that Hamdi's status as an American is questionable as he was "only born" in the United States. Hamdi's parents - Saudi nationals - were temporary workers in Louisiana when their son was born. Hamdi was reared in Saudi Arabia for his entire life. The long accepted and acknowledged doctrine of *jus soli* citizenship - citizenship by birth on US soil - is being disputed. Centuries of legal precedent are now the target of deconstruction. With citizens' rights under siege, it is understandable to be concerned about the possible resurrection of prior, odious periods of America's legal past, with internment and suspension of habeas corpus (already a reality) as possible realities.

THE LAW

IV. SURVEILLANCE AND INFORMATION GATHERING

The Patriot Act contains a variety of changes to laws governing electronic communications and the government's powers of search and seizure, which taken together conjure to mind numerous Orwellian images. Title II of the Act, entitled "Enhanced Surveillance Procedures" (Title II), eases the burden on intelligence agencies and law enforcement working in concert to intercept telephone conversations, monitor email and computer usage and obtain medical and business records. Title II also adds terrorism, chemical weapons related actions and computer fraud and abuse as predicate offenses, the suspicion of which enables the government to obtain a wiretap of communications. In such cases the ability to wiretap was a power already held by the government; the actual consequence of the Act – representative of the general policy shift inherent in the Act – is merely to permit wiretapping of U.S. persons suspected of domestic terrorism.

Section 102 of the Act explicitly informs us that Arabs and Muslims are entitled to equal protection under the law. While this Section 102 may certainly be read as if it were written out of an anticipatory defensive posture taken by the Congress – vigilante attacks on Arabs, Persians and South Asians began occurring throughout America as soon as the dust of the September 11 attacks cleared – this section has proven to be useful in some limited instances. Racial profiling of Middle Eastern men on grounds of terrorism and illegal immigration was commonplace before September 11, 2001. After the enactment of the Act, the practice of racial profiling has accelerated in its perceived necessity and acceptability, not only in the intelligence and law enforcement communities but also among Americans at large.³⁰ Enforcement agencies, such as the Justice Department, routinely rely upon race and ethnicity – whether it is the profiling of brown men in relation to terrorist activities or black men in relation to violent crimes – as a predictor of future behavior. Incurably unequal in its treatment of Americans, racial profiling not only unjustly treats innocents, it undermines effective law enforcement and the essential doctrines of American criminal law and policy: individual responsibility and innocence until proof of guilt beyond a reasonable doubt.³¹

The dangers of the Act are exacerbated by edicts and orders issued on its periphery, such as the Bureau of Prisons surveillance order, approved by the Attorney General, which allows federal agents to breach the all-important attorney-client privilege.³² What this surveillance order does is remove the requirement that Bureau of Prisons officials obtain judicial permission before

³⁰ See Cole and Dempsey, *Terrorism and the Constitution*, at 168-171.

³¹ See *id.* at 170.

³² See "Comments of The National Association Of Criminal Defense Lawyers on The Attorney General's Order Regarding Monitoring of Confidential Attorney-Client Communications" available at <http://www.nacdl.org/public.nsf/freeform/Leg-atclientdoc?opendocument>.

listening in on conversations between prisoners and their attorneys, whether before trial or after conviction. More than merely razing the long-standing pillar of attorney-client privacy, the order abridges the First Amendment freedom of speech and, potentially, the Fifth Amendment freedom from self-incrimination.

Also related to the Act is the Attorney General's edict for increased surveillance of certain religious and political organizations, such as mosques and Islamic centers. This surveillance is made possible by the edict which serves to dismantle regulations that forbid the Justice Department from conducting COINTELPRO operations. Regulations prohibiting COINTELPRO operations were originally promulgated in the late 1970s to protect U.S. citizens following abuses by the Justice Department committed against civil rights and peace activists in the 1950s, 1960s and 1970s.³³ By rescinding these regulations prohibiting COINTELPRO operations, and thereby authorizing the FBI to monitor and conduct surveillance on certain religious and political groups, without any evidence of wrongdoing, the edict opens the door to a new wave of COINTELPRO operations which are well known from past experience to be associated with effects that are unwanted in a free and democratic society: harassment and intimidation of people who disagree with the government on issues such as civil rights and the conduct of war.

Legal Process

The Act and especially its implementation by the Justice Department represent a policy-based attempt under the rubric of national security to do away with due process rights and protections afforded to Americans by the U.S. Constitution. U.S. law sets forth the minimum of due process required before a government authority may compel the production of information from a private individual or organization, as well as the standard the government must meet before obtaining such process. As a general matter, the more "private" the type of information, the higher the standard the government must meet in order to compel production. There exists various types of legal processes, such as: (1) a subpoena, which is a document that compels the production of tangible things and can be issued by an official in connection with a grand jury investigation; certain federal agencies have the authority to issue administrative subpoenas in connection with investigations under their authority; (2) a search warrant, which authorizes the search of physical premises and seizure of tangible items, issued by a court upon a showing of probable cause; (3) pen register and trap and trace device court orders, which authorize the collection of telephone and computer identifying information dialed to and from a particular communications device; (4) a wiretap order, also issued by a court, which authorizes the real-time interception of communications; wiretap orders require an affidavit setting forth

³³ See Nancy Talamian, *The USA Patriot Act and Government Actions That Threaten Our Civil Liberties*, available at <http://www.bordc.org/Repeal.pdf>.

detailed information and establishing probable cause that the target committed one of a list of specified serious crimes; and (5) FISA orders, which are issued by a secret FISA court and allow the compelled production of information, ideally under strict procedures, when the search is for information that relates to foreign intelligence and counter intelligence.³⁴

Prior to the passage of the Act, the laws relating to wiretaps, pen registers and trap and trace devices authorized execution of a court order only within the geographic jurisdiction of the issuing court. As a result of the Act, courts may now authorize the use of such devices anywhere in the country.³⁵ The availability of nationwide orders for the interception and collection of electronic evidence removes an important legal safeguard, causing providers of the services that the government may wish to spy upon to be subject to distant issuing courts where the distance can be cost prohibitive in accommodating service providers who wish to object to legal or procedural defects, or seek clarification for many novel issues involving the privacy rights of their subscribers.

Courts' jurisdictional authority is further increased such that any court may authorize search warrants outside of the judicial district in an investigation of domestic or international terrorism. Although permitting nationwide application of search warrants creates the same problem as expanding the scope of surveillance orders, this provision, fortunately, is more narrowly tailored to apply only to anti-terrorism investigations. But, again, given the ambiguity of the definition of terrorism, in concert with the current climate of suspicion with regard to Muslims, this authority could be manipulated or abused liberally without any oversight by prosecutors and courts, causing unimpeded disruptions to innocent lives and businesses.

The Act permits the delayed notification of the exercise of a search warrant in any investigation and not only in matters relating to terrorism. Previously, a person whose property had been searched or seized was to be given notice of such search and/or seizure by delivery of a copy of the warrant and a receipt for the property seized, in accordance with the longstanding "knock and announce" policy.³⁶ Investigators, in addition, were obliged to make a filing in court as to the private property seized in any such search. This allowed the person under search to be informed of the search and to be afforded the ability to seek return of such property.

As a result of the Act, search warrant subjects are no longer entitled to inspect the warrant to ensure the correct property is being searched and that the scope of the warrant is adhered to. This ability to conduct secret "sneak and peek" searches applies where a court in its broad discretion finds "reasonable cause to believe that providing immediate notification of the execution of the

³⁴ See CRS Report for Congress, USA Patriot Act: A Legal Analysis 2-24 (April 15, 2002).

³⁵ See *id.* at 4-6.

³⁶ See *Wilson v. Arkansas*. 514 US 927 (1995).

warrant may have an adverse effect.” The “sneak and peek” warrant must (i) prohibit the seizure of tangible property, any wire, stored or electronic communication and information (unless the court finds reasonable necessity for the seizure of such) and (ii) provide for the delivery of notice within a reasonable time *following* execution of the warrant. Thus, law enforcement personnel may *secretly* conduct searches and seizures and they may *secretly* use the information learned thereby conceivably for a substantial period of time, even up until a charge is made. This radical change in law and policy applies to all government searches for material that constitutes evidence of a criminal offense; it is not limited to investigations of terrorist activity.

Prior law had authorized very limited instances for delayed notification. This expansion of the availability of secret “sneak and peek” warrants departs from established Fourth Amendment standards, and we expect this departure to result in routine surreptitious entries, searches and seizures. Recognizing this possibility, the U.S. House of Representatives voted on July 22, 2003, by a margin of 309 to 118 to roll back the Administration’s ability to conduct secret “sneak and peek” searches of private property.³⁷ This legislation was embedded in a federal funding bill, and if it signed into law, it would block the Justice Department from using any funds to take advantage of the Act’s allowance that investigators may secretly search the homes of suspects and inform them only later, if at all, that a warrant had been issued to do so.

Information Sharing

The Act adds broad new information sharing authority that pertains to previously confidential information, including grand jury information and intercepted communications. Section 203 of the Act permits the sharing among law enforcement and intelligence agencies of any information lawfully obtained by a law enforcement official. The officer may disclose the contents of such communications to any other federal law enforcement official who is to receive the information to perform his official duties “to the extent such contents include foreign intelligence or counter intelligence or foreign intelligence information.” Without the need for a court order, law enforcement may, for example, give the Central Intelligence Agency (CIA) sensitive information gathered in criminal investigations of U.S. persons, including information derived from wiretaps and Internet trapping. The CIA may share such information with other U.S. agencies and even with foreign governments. By encouraging coordination between law enforcement and foreign intelligence surveillance, the Act blurs the vital distinction between the “by any means necessary” policy of foreign intelligence and the previously respected constitutional limitations known in domestic criminal investigations.

³⁷ “House Takes Aim at Patriot Act Secret Searches”, Andrew Clark, *Reuters (newswire)*, <http://asia.reuters.com/newsArticle.jhtml?type=politicsNews&storyID=3138081> (July 22, 2003).

Interceptions of Electronic Communications

Wiretaps must be obtained pursuant to Title III of the 1968 Omnibus Crime Control and Safe Streets Act (Omnibus Act), which allows interception of telephone and face-to-face conversations, or computer and other electronic communications, only for specific crimes based upon a detailed sworn application that must be approved by the Justice Department before submission to a federal judge. Court orders under the Omnibus Act typically consist of detailed instructions regarding the scope and duration of the surveillance and the efforts to be taken to minimize interception of innocent conversations. Telephone records, email and voicemail stored in third party storage are afforded a lower level of protection; the law permits access to these by way of warrant or court order. Least demanding are the procedures relating to court orders approving government use of what are known as trap and trace devices and pen registers – devices that record only identities. Such court orders need only government certification and no court finding.

In addition, the Act enables government agents to monitor computer traffic without the permission of a judge for the purposes of investigating a computer trespasser. A computer trespasser is defined as a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to and from the computer. “Protected computer” includes any computer used in interstate or foreign commerce or communication. Thus, anyone who without proper authorization has accessed a protected computer, for instance, a computer on the Internet, would find himself subject to monitoring by government agents.

Government agents may, with the permission of the owner or authorized operator of the protected computer, intercept communications of the trespasser if the agents believe such interception would be relevant to their investigation. Prior to the Act, the government could obtain no more than the subscriber’s name, address, telephone bills and the length and type of subscriber service. Section 210 of the Act expands this list of obtainable information to include records of session times, the durations thereof and the means and source of payment including credit card and bank account numbers.

The Congress in passing the Act did not explain any policy or express any evidence of intent as to why these expanded powers were needed, and while such powers might seem on the surface to be aimed at terrorism, they are in truth far broader in scope, far deeper in thrust and far more pernicious in impact than the media and politicians have generally let on. Title II places decision making authority in the hands of law enforcement and private owners and/or operators in situations where service provision is the target of surveillance. In these cases, judicial oversight is reduced to mere rubber-stamping contrary to most federal communication-interception laws that require objective oversight

from a party outside of the investigative chain. In those cases where no prosecution results, the interception target will never have had a chance to challenge the wrongful interception. In fact, the target may never have even known of the warrantless interception.³⁸

The Act also serves to expand the abilities of private persons, such as employers, who provide electronic communication services to the public so that they may voluntarily release emails or customer information to the government without their employee's or user's consent if someone at the service provider deems it necessary to protect its own rights or property or if the provider reasonably believes there is some sort of imminent danger. It is expected that an enterprise providing to its employees or to the general public computer-based communications services may now be faced with requests for information from the government regarding its employees or users, who in turn must worry about the implications of such requests – perhaps they were using “highly suspect” words in their emails – upon their employment.

Pen Registers; Trap and Trace

Title II significantly expands law enforcement authority by expanding the nature of the information that can be captured through the use of pen register and trap and trace devices. Such devices now are deemed to cover the Internet, e-mail, Web surfing, and all other forms of electronic communications. Relevant provisions prohibit the capture of “content”, but this does not address the unique nature of the captured information, which contains data far more revealing than phone numbers, such as URLs generated while using the Web.³⁹ Controversial FBI technology known as Carnivore, for example, now lawfully provides access to the communications of all subscribers of a monitored ISP (and not just those of the court-designated target).⁴⁰ The government, by merely informing a judge that the interception is relevant to a criminal investigation, may monitor Web traffic, Internet searches as well as e-mail correspondence.

Sunset

Several of the amendments that broaden the government's surveillance authority are set to expire on December 31, 2005. However, this sunset

³⁸ See also American Civil Liberties Union, “Unpatriot Acts: The FBI's Power to Rifle Through Your Belongings and Personal Records Without Ever Telling You”.

³⁹ See Electronic Frontier Foundation, Analysis of the Provisions of the USA Patriot Act That Relate to Online Activities, available at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.ph

⁴⁰ See Concerns Remain About FBI's 'Carnivore' Wiretap, available at <http://www.cnn.com/2001/TECH/internet/03/12/carnivore.concerns.idg/>.

provision does not apply to numerous invasive provisions of Title II, such as pen register and trap and trace devices, the expanded scope of subpoenas for electronic evidence, the authority to delay notice of warrants and the expansion of jurisdictional authority of search warrants for terrorism investigations.

V. FOREIGN INTELLIGENCE SURVEILLANCE AND INVESTIGATIONS

Section 215 of the Act gives access to records and other items under FISA, the Foreign Intelligence Surveillance Act. In connection with operations deemed to be relevant to foreign intelligence gathering, the FBI director is permitted to seek records from bookstores and libraries regarding books that a person suspected of terrorism has purchased or read, or of his or her activities on the library's computer. It also places a gag order to prevent anyone from disclosing that they have been ordered to produce such documents. As a result of this provision, people are put at risk for exercising their free speech rights to read, recommend or discuss a book or to simply write an e-mail.⁴¹ This provision also conveniently lets government agents create a "terrorist litmus test" composed of reading materials; anyone discovered by agents merely to be reading certain materials would be investigated by the FBI.⁴²

Section 218 of the Act amends FISA by eliminating the need for the FBI to show probable cause before conducting secret searches or surveillance to obtain evidence of a crime. The FBI is given the ability to gather "foreign intelligence information" without a court-issued warrant – thereby eliminating judicial supervision – unless the evidence sought is to be used in a criminal proceeding. An agent may now say merely that "foreign intelligence" is relevant or plays a part in the investigation rather than constituting *the* purpose of the investigation. Probable cause that a crime has been or will be committed no longer needs to be shown when the government wishes to investigate someone. Of course, the nexus of being "foreign" is what is subject to abuse. Conceivably, any American who recalls his or her ancestral roots or who has traveled abroad could be claimed to have a foreign connection.

Section 206 of the Act provides roving surveillance authority under FISA. Thus, roving wiretaps may be authorized secretly. Agents now have the expanded power to tap any device used by a terrorist suspect, irrespective of who is using the device at the time, so long as a foreign intelligence link can be

⁴¹ See Cole and Dempsey, at 159-160.

⁴² Set aside for the time being is action on the Attorney General's wish to create the TIPS program whereby Americans could systematically provide information to the Administration's agents about any persons whom they consider suspicious. Government agents could establish a file on such persons and distribute it without limitation, potentially damaging someone's record due to innocent activities that are misunderstood, mischaracterized or fabricated. In promoting the TIPS program, the Justice Department provided no assurances that anyone who is reported as "suspicious" would be confronted with the evidence against him or her and given an opportunity to explain or defend him or herself.

sustained. Again, the criticism here is that there is insufficient objective transparency about what is foreign and what constitutes suspicion of a link to terrorism.

Before enactment of the Act, FISA authorized collection of business records in very limited situations, mainly records relating to common carriers, vehicles or travel, and only via a court order. Without much concern for the Fourth Amendment right to privacy, the Act substantially expands this collection to all “tangible things” – including business records of basic subscriber information as well as transaction and account information – which may be obtained via a subpoena by secret FISA court order upon application by the FBI. Section 215 of the Act relaxes requirements and extends capabilities of FISA by enabling virtually anyone within the FBI to request a court order for tangible items sought for an investigation “to protect against international terrorism or clandestine intelligence activities.” The judge must without discretion give his or her permission if an FBI agent has so certified, again obviating the very notion of judicial discretion and causing the judiciary to be nothing more than a rubber stamping bureaucracy for the FBI agent’s self-managed invasion into the privacy of U.S. citizens and legal residents acting otherwise lawfully.

VI. ANTI-MONEY LAUNDERING

Title III of the Act, entitled the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (Title III) speaks to the issue of money laundering in order to combat the financing of terrorism. Generally speaking, money laundering may be understood as the flow of cash or other valuables derived from or intended to facilitate the commission of a crime.⁴³

Prior to the Act, the U.S. Department of the Treasury possessed some authority to impose requirements and standards upon financial institutions with respect to anti-money laundering matters. That authority has been vastly expanded in both scope and nature. Title III imposes various new and far reaching anti-money laundering measures by way of broad, often vague language that affords regulators unfettered discretion in interpretation and enforcement, which can be utilized advantageously in the presence of any improper motivations. While Title III does not specifically target Muslims or Islamic financial institutions, there would appear to be a certain understanding or presumption that it is *especially* applicable to such. There are but a few Islamic financial institutions in the U.S., yet anecdotal evidence abounds that many American Muslims and Muslim-owned or -operated businesses in America have

⁴³ See CRS Report for Congress, USA Patriot Act: A Legal Analysis, at 26.

discriminately and personally felt the weight of Title III.⁴⁴ We have not heard or read about similar complaints by non-Muslims.

Who is Subject

Title III is applicable to financial institutions, a term of art the definition of which was extended substantially to increase those persons that could be subject to the Act. The term includes your typical conventional banks, insurance companies, broker-dealers, credit unions, mutual funds, investment advisers, money transmitters and even pawnbrokers and travel agencies. All financial institutions are required to develop internal policies, procedures and controls, using a risk-based approach tailored to their particularities, aimed at detecting and preventing money laundering.

Know Your Customer

Perhaps most importantly and most onerously, Title III imposes upon all financial institutions – recall how broad the definition of this term is – significant customer identification obligations. At this time, final rules have been promulgated but only with respect to traditional banks and trust companies, broker-dealers, mutual funds, introducing brokers and futures commission merchants. Although the requirements under Section 326 are precisely stated, albeit cumbersome, in contrast the definitions are fraught with vagueness and unnecessary breadth, such that merely partnering with a U.S. company, leasing property or simply investing in the U.S. would activate customer identification obligations.

Under the final rules, whenever a customer applies to open a new account, certain customer identification obligations become triggered. Here, as elsewhere, the Act's language is so broadly stated (often an account is defined as a "formal business relationship") that any reasonable reading of it would bring under its purview a variety of commonplace banking and other business transactions, such as having a checking account, borrowing money or even sending money overseas.

There are three integral components to the customer identification process: (1) the identification and verification of persons seeking to open new

⁴⁴ See Banks Allegedly Blacklisting Muslims, available at http://www.sacobserver.com/business/070703/banks_blacklisting.shtml; Report: Western Union blocks funds over name 'Muhammad', available at <http://www.cair-net.org/asp/article.asp?id=998&page=NR>; Court stops bank from closing Muslim man's account, available at http://seattlepi.nwsource.com/local/54278_iraqi11.shtml; Credit Card Companies Close Muslim Accounts, available at <http://www.alternet.org/print.html?StoryID=15659>; Muslim Society Presses Fleet, available at http://www.boston.com/dailyglobe2/094/business/Muslim_society_presses_Fleet+.shtml.

accounts; (2) record-keeping; and (3) comparison with lists of known or alleged terrorists. While this customer identification process is required and hoped by financial institutions to be practical and reasonable, actual practice has demonstrated the requirements to be quite cumbersome and their effectiveness at detecting criminality questionable especially at the expense of privacy and in view of the onerous marginal costs they impose upon the financial institution.

Money Transfers

Under law existing prior to Title III, anyone transporting more than USD 10,000 into or out of the U.S. was required to file a report with the Treasury. Title III increases the types of institutions required to file such reports and now requires the filing of so-called suspicious activity reports (a "SAR") for each such transaction. A false report is punishable by up to five years in prison, but Title III adds forfeiture of the entire smuggled (or unreported) amount in lieu of a criminal fine. Before the enactment of Title III, however, the U.S. Supreme Court had ruled that confiscations could not be grossly disproportionate to the gravity of the offense. Whether this aspect of Title III would pass muster under a constitutional review is unknown because it has not been tested in court vis-à-vis this prior ruling.

As a result of the Act, government officials, financial institutions and their employees are prohibited from tipping off any of the participants that a transaction is being reported as suspicious and the reporting party is immunized from liabilities arising out of filing a report or of not informing transaction participants of such filing. Financial institutions may reveal, without civil liability absent malicious intent in employment references, the simple fact that a suspicious activities report was filed with respect to an individual regardless of whether the transaction was later found by a tribunal to be illegal.

Furthermore, Title III controls informal money transfer systems and networks of people who engage *as a business* in facilitating money transfers domestically or internationally outside the conventional financial institutions system. Title III contributes to the further monopolization by Western banks of their control over money matters as those involved in unlicensed money transmitting business are subject to fines and/or may be imprisoned for not more than five years.

As is well known, many Muslims residing in the U.S. collectively send annually tens of million of dollars to needy persons in Muslim countries by way of *hawalah*, a worldwide money transfer system that operates outside the scope of the international financial system. While the system is extremely cost effective and efficient at placing funds in parts of the world where Western and Western-style banks have not yet reached, the system most importantly makes inroads reliably into areas where food, medicine and others necessities cannot reach by

way of any other method. The aim of the Act in attempting to regulate *hawalah* operators is to provide regulators and enforcement authorities an audit trail in order to track sources and destination of funds; what the Act implies is that the *hawalah* system or any other system not capable of being regulated by the U.S. government is itself illegitimate. This is the Act's policy stance despite the fact that CARE, World Vision International, and similarly distinguished organizations use *hawalah* to deliver funds in Afghanistan and Pakistan and the U.S. government itself has deemed *hawalah* necessary under circumstances in which there is either no functional banking system or no other familiar alternative.⁴⁵ While the stated purpose is to eliminate terrorist financing, the greater impact has been to slow considerably the flow of charitable giving to areas of the world which arguably need aid the most. This slowdown has been especially heightened in Muslim countries where major financial institutions have not set up low-cost transfer operations, such as they have recently between the U.S. and India or Mexico.

Enhanced Due Diligence

Title III imposes enhanced due diligence requirements with regard to (A) correspondent accounts provided by U.S. banks to (i) offshore-licensed banks, (ii) banks licensed by uncooperative jurisdictions and (iii) banks licensed in jurisdictions deemed to be of particular money laundering concern and (B) private banking accounts maintained by senior foreign political figures or their immediate family members. Financial institutions must, at a minimum, know and record the identities of the nominal and beneficial owners of such accounts, their lines of business and sources of wealth, and the source(s) of funds deposited into the accounts.

While conducting due diligence, financial institutions are expected to rely upon "publicly available information" such as journalistic investigations, to ascertain whether customers have been subject to any criminal or regulatory actions or otherwise "linked" to money laundering or terrorism. The implication is that mere allegation, and not a judicial finding of guilt, is sufficient to warrant actions such as the closing of, or refusal to open, accounts. Too often, given the current emotional and psychological climate, a mere Muslim or Arab identity is sufficient cause for suspicion. Significant new criminal penalties imposed upon violators of even these provisions of the Act provide additional incentive for financial institutions impulsively to protect themselves at the expense of others. Augmenting these concerns is the permission granted to financial institutions to share amongst themselves information regarding persons suspected of money laundering. Before passing along any suspicions, an institution need only

⁴⁵ "Afghan Aid Flows Through Dark Channels: U.S. Is Forced to Move Funds in Money-Transfer Networks Used by Terror Groups", in *Wall Street Journal*, page A4 (November 12, 2002).

provide notice of such sharing to the Treasury, so that it now might have cause for suspicion as well.

Many American Muslims have reported various unreasonable requirements imposed upon them by banks at which they have held accounts for years. Requests to provide private information, including tax and banking records, financial statements, residency documentation and proof of identity have routinely been made. Worse, numerous Muslims have reported their accounts shut down or wire transfers refused and the wired moneys confiscated on the basis of mere, unsubstantiated suspicion, and not any stated probable cause of illegality.⁴⁶ Muslim-operated non-profit institutions and other Muslim-owned businesses report an inability to open or maintain bank accounts despite fulfilling all relevant requirements imposed upon their counterparts, and others report discriminate delays in tax exempt status applications to the Internal Revenue Service (IRS). Islamic financial institutions have also been subject to burdensome due diligence by their long-time business partners, creditors, landlords or the vehicles in which they invest.

Officials managing institutions that have canceled Muslims' accounts say that they are merely implementing standard procedures and precautions in their attempts to block terrorist financing. Bank officials also cite random selection and reports from credit agencies, even when individual victims of these bank tactics have had impeccable credit. As for the assertion of preventing the financing of terrorism, it is sufficient to note that those applying to open an account or obtain tax-exempt status remain free and uninvestigated by the government. In fact, many victims were singled out because their names are similar to those that appearing on official as well as unofficial and inaccurate lists (or worse, mass media generated information) of known or suspected terrorists.⁴⁷ There is no regulatory guidance with respect to instances in which name similarities exist. It is precisely this sort of ambiguity of Title III's language and the context of its passage which opens the door to abuse.

VII. ALLIENS AND BORDER CONTROL

Since the attacks of September 11, 2001, immigration policy has been gripped by conservatism regarding who should or should not enter the U.S. The Act deprives immigrants of their due process and First Amendment rights through two mechanisms operating in tandem. Section 411 vastly expands the class of

⁴⁶ See supra note 31 and accompanying text.

⁴⁷ See Ryan Singel, *Due Process Vanishes in Thin Air*, April 8, 2003, available at <http://www.wired.com/news/privacy/0,1848,58386,00.html>; Michael Scherer, *Business Blacklists*, May/ June 2003, available at http://www.motherjones.com/news/outfront/2003/19/ma_377_01.html; Kevin Aldridge, *Name's Same But Doctor No Terrorist*, October 21, 2001, available at http://www.enquirer.com/editions/2001/10/21/loc_names_same_but.html.

immigrants who are subject to removal on terrorism grounds through its broad definitions of the terms “terrorist activity,” “engage in terrorist activity,” and “terrorist organization.” Following on the heels of Section 411, Section 412 of the Act vastly expands the authority of the Attorney General to place immigrants whom he suspects are engaged in terrorist activities in detention while their removal proceedings are pending. Thus, the Act gives the Attorney General broad powers to certify immigrants as “suspected terrorists” without their having been proven as such or even providing probable cause. Immigrants certified as suspected terrorists can be, and have been, placed in mandatory detention indefinitely without the availability of any due process rights such as *habeas corpus* or judicial review, without enjoying the Sixth Amendment right to a speedy and public trial and full knowledge of the nature and cause of the accusation and without being availed of the Eighth Amendment right to be free from excessive bail and excessive fines and cruel and unusual punishment.

To appreciate the breadth of the Act in this regard, previous law should be considered. The erstwhile Immigration and Naturalization Service (the “INS”) had authority to detain any alien who posed a threat to national security or a risk of flight. What the Act adds to prior law is the ability of the Administration to detain those who do not pose an imminent threat to national security, who are a risk of flight or who are not removable because they are entitled to asylum or some other similar protection. It is important to keep in mind that the Act authorizes *indefinite* detention even in cases in which the alien has prevailed in removal proceedings (whereas before the Act, such success afforded the alien to reside in the U.S. lawfully).

Expanding the Class of Immigrants Subject to Removal

Section 411 of the Act vastly expands the class of immigrants that can be removed on grounds of terrorism. The term “terrorist activity” is commonly understood to be limited to pre-meditated and politically-motivated violence targeted against a civilian population. Section 411, however, stretches the term beyond recognition to encompass any crime that involves the use of a “weapon or dangerous device (other than for mere personal monetary gain).” Under this broad definition, an immigrant who grabs a makeshift weapon in the midst of a sudden altercation or in committing what criminal law has looked upon with relative sympathy as a crime of passion may be subject to removal as a “terrorist” within the hypertechnical interpretation of that term. This is cause for concern because the Administration has already demonstrated its affinity for perverted legal outcomes based on mere hypertechnicalities.

The term “engage in terrorist activity” has been expanded to include soliciting funds for, soliciting membership for, and providing material support to, a “terrorist organization,” even when that organization has lawful political and humanitarian ends and the non-U.S. citizen seeks only to support these lawful

ends. In such situations, Section 411 would permit guilt to be imposed solely on the basis of political associations that courts have traditionally viewed as being protected by the First Amendment.⁴⁸

As a further complication, the term “terrorist organization” is no longer limited to organizations that have been officially designated as terrorist and that therefore have had their designations published in the Federal Register for all to see. Instead, Section 411 now includes as “terrorist organizations” groups that have never been designated as terrorist if they fall under the loose legal criterion of “two or more individuals, whether organized or not,” which engage in specified terrorist activities. In situations where a non-U.S. citizen has solicited funds for, solicited membership for, or provided material support to, an undesignated “terrorist organization,” Section 411 of the Act saddles him or her with the difficult, if not impossible, burden of demonstrating – in view of all the secret evidence and *in camera* proceedings that go along with national security cases – that he or she did not know, and should not reasonably have known, that the act would further the organization’s terrorist activity. Whereas Section 411 prohibits the removal of a non-U.S. citizen on the grounds that he or she solicited funds for, solicited membership for, or provided material support to, a designated “terrorist organization” at a time when the organization was not designated as a “terrorist organization,” Section 411 does not prohibit the removal of a non-U.S. citizen on these same grounds if they are shown to have occurred in relation to an *undesignated* “terrorist organization” prior to the enactment of the Act.

The Constitution and laws protect the rights of immigrants to due process of law, requiring the government to provide a fair hearing to anyone the government wants to deport, and giving federal courts the power to review immigration actions. The Supreme Court reaffirmed these basic principles two years ago, stating “Judicial intervention in deportation cases is unquestionably required by the Constitution.”⁴⁹

Detention at the Attorney General’s Whim

While Section 411 of the Act expands the class of immigrants who are removable on terrorist grounds, Section 412 of the Act inflates the Attorney General’s power to detain immigrants who are suspected of falling into that class. Upon no more than the Attorney General’s unimpeachable certification that he has “reasonable grounds to believe” that a non-U.S. citizen is engaged in terrorist activities or other activities that threaten national security, a non-U.S. citizen can be detained for as long as seven days without being charged with either a criminal or immigration violation. This low level of suspicion falls far short of a finding of probable cause, and appears even to fall short of the “reasonable and

⁴⁸ Cole and Dempsey, at 153-156, 158.

⁴⁹ *INS v. St. Cyr*, 533 U.S. 289 (2001)

articulable suspicion” standard that supports a brief investigatory stop under the Fourth Amendment.

If a non-U.S. citizen is charged with an immigration violation, he becomes subject to mandatory detention and is ineligible for release until he is removed from the U.S., or until the Attorney General determines that he should no longer be certified as a terrorist. While immigration proceedings are pending, the Attorney General is required by the Act to review his certification once only every six months. However, Section 412 does not direct the Attorney General either to inform the non-U.S. citizen of the evidence on which the certification is based, or to provide the non-U.S. citizen with an opportunity to contest that evidence at any administrative or judicial review. Instead, Section 412 limits the non-U.S. citizen’s ability to seek review of the certification to no more than a *habeas corpus* proceeding filed in federal district court, appeals from which must be filed in the Court of Appeals for the District of Columbia. Due to the ruling that *habeas* proceedings are civil rather than criminal in nature, the government has no obligation under the Sixth Amendment to provide non-U.S. citizens with free counsel in such proceedings.

In the case in which a non-U.S. citizen who is found removable is deemed eligible for asylum or other relief from removal, Section 412 does not permit his release. Further, in the event that the non-U.S. citizen is found removable, but removal is “unlikely in the reasonably foreseeable future” – most likely because no other country will accept him – he may be detained for additional periods of six months “if the release of the alien will threaten the national security of the United States or the safety of the community or any person.” Only *habeas* review of such a determination is available under Section 412.

Although constitutional due process is supposed to apply to all natural persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent, nevertheless, Section 412 exposes immigrants to extended, and, in some cases, indefinite, detention on the sole authority of the Attorney General’s uncontestable certification that he has “reasonable grounds to believe” that the non-U.S. citizen is engaged in terrorist activities. The Attorney General may, of course, build safeguards into the Justice Department regulations implementing Section 412, although this has not happened yet. It also remains to be seen how rigorous federal court *habeas* reviews of such certifications will be and to what extent the courts will demand that the Attorney General base his certification on objective evidence. It is difficult to avoid the conclusion that the Act will deprive non-citizens who are within the United States of their liberty without due process of law.

Secret Military Tribunals and Enemy Combatant Designation

The White House by military order has established secret military tribunals to try suspected terrorists using secret evidence and hearsay. In addition to being unfair, unnecessary and a patent denial of the due process of law as enshrined in the Fifth Amendment (which applies to all natural persons within the U.S.), the Administration's threat of using military tribunals to try foreigners or aliens increases the likelihood that U.S. citizens will be treated accordingly overseas and opens the door for the Administration to try U.S. citizens outside the pale of their constitutional rights.

President Bush's order designating the "enemy combatant" category provides that a committee comprising the Attorney General, the Secretary of Defense and the CIA Director may label U.S. citizens and non-citizens alike as enemy combatants, thereby placing such designees in military custody indefinitely, interrogating them and denying them communication with any outsiders. As confirmed by the judiciary itself (another instance of rubber stamping), no aspect of this designation or its consequences would be subject to judicial review. The designee would have no opportunity to defend himself against the presumption of guilt or to retain any of the aforementioned constitutionally-guaranteed rights in a court in which the prosecution, defense counsel and even the judge belong to the U.S. military, although the "enemy combatant" most assuredly does not.

Implications for Foreign Students

While the prevalence of a risk-averse mood as evidenced by these unjust and constitutionally questionable orders is not startling, what is worrying many of those in mainstream America who are most exposed to foreigners on regular basis, such as faculty and students in higher education, is that such a mood would be allowed as it has been to transgress upon the cultural and economic benefits of inculcating foreign students to the ways of American capitalism and democracy. Foreign students who have been admitted to study at U.S. institutions, particularly those students from the Islamic world, have been subjected by the new Bureau of Immigration and Customs Enforcement (a successor to the INS) to denials and delays in student visa receipt. Students already studying in the U.S. are reluctant to leave the U.S. for fear of not being readmitted to complete their programs of study.⁵⁰

Officials in higher education have cited a panoply of obstacles faced by their foreign students. First, there exist enormous backlogs in the Administration's visa screening processes due to inefficiencies and administrative incompetence. For example, a pernicious component of the visa screening process has been the Administration's special registration for Arab and

⁵⁰ See John Sutherland, Real Lives: Nowhere has post-9/11 paranoia struck more deeply than in American Universities, September 1, 2003, The Guardian; Sarah Murray, If I go home, can I get back for My MBA? The Financial Times, June 29, 2003.

non-Arab Muslim men, who have been “asked” to register with the government regardless of their visa status. It is well documented that thousands of men, both in legal status and out of legal status, were called in for registration, and hundreds if not thousands were detained and jailed without charges.⁵¹ This cycle repeated itself throughout the country, and the reason cited for it by the Administration was that its registrars were so overwhelmed with the number of people seeking to register at the last moment that registrars could think of nothing else to do with the registrants than to place them in custody while they, the registrars, went home for the weekend. In fact, people learned only at the last minute of their obligation to register due to the government’s underwhelming information dissemination.⁵²

Compounding the visa delays are problems with rolling out the new foreign student monitoring system, the Student and Exchange Visitor Information System (SEVIS), which was to have been made available to universities, by mandate of the Act, not later than January 30, 2003. Officials in higher education complain that SEVIS is replete with systemic errors, causing by one estimate, thousands of students who would otherwise be in the U.S. legally to be on an illegal status.⁵³

VII. CONCLUSION

The Patriot Act and its impact on specific communities will require an ongoing and open discussion as we balance the need for security while protecting civil liberties. By analyzing the provisions of the law that negatively impact the rights of Muslim and Arab Americans, this report highlighted some of the weaknesses of the Act in its current form. While the focus of this report has been on abuses against Muslims and Arab Americans specifically, it is clear that there are an increasing number of incidents against Americans of other religious and ethnic backgrounds. Furthermore, a corresponding abandonment of the constitutional principles of due process, privacy and equal protection has increased the likelihood of future abuses, as well as weakened the rights of all American. In addition, the constitutional framework of checks and balances that is the bedrock of this country has also been damaged with the passage of this new law. As the administration continues its war on terrorism, Congress is slowly sliding towards irrelevance inasmuch as the Patriot Act allows legislatures to abdicate their lawmaking function in consideration of the executive branch’s desire to protect national security.

⁵¹ See Thousand Across the Nation Protest INS Special Registration, AsianWeek, January 2003.

⁵² See Migration Policy Institute, Government Widens Efforts to Scrutinize Foreign Visitors, available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=154>.

⁵³ See Tech Snags Delay INS Student Tracker, available at <http://www.fcw.com/fcw/articles/2003/0210/tec-ins-02-10-03.asp>; Critics Dog Student Tracking System, available at <http://www.fcw.com/fcw/articles/2003/0407/news-tracking-04-07-03.asp>.

Despite these abuses and the frightening aspects of the Patriot Act, the administration is now considering an even more draconian version of the Act.⁵⁴ The proposed "Domestic Security Enhancement Act of 2003," (Patriot Act II) would make it easier for the government to initiate surveillance and wiretapping of U.S. citizens, repeal current court limits on local police gathering information on religious and political activity, allow the government to obtain credit and library records without a warrant, restrict release of information about health or safety hazards posed by chemical and other plants, expand the definition of terrorist actions to include civil disobedience, permit certain warrant-less wiretaps and searches and loosen the standards for electronic eavesdropping of entirely domestic activity. The new law would even strip native-born Americans of their rights granted under the Constitution, if they are believed to provide support to organizations labeled as terrorist by the government.⁵⁵

Rather than introducing even harsher laws, it is time for a careful reassessment of the Patriot Act and our overall approach to security. As we have seen, the Act is fundamentally flawed because it relies on a false premise – that America can be safer if it does away with basic individual liberties as well as with the checks and balances that are the hallmark of American democracy.⁵⁶ By undermining the role of the courts, the Congress and the press, all of which have their role in providing a real check on executive power, the Act mistakenly directs its ire at the institutions of democracy and at its American citizenry, instead of at the terrorists that threaten them. The Act threatens to undermine the rights of ordinary Americans and the fairness that makes America great in their eyes; this is happening, ironically, at the expense of stamping out terrorism.

Our government must have the authority to take strong action against any individual who threatens safety or national security, but this should not be a license to assume group guilt, particularly not on the basis of nationality or appearance. As in the past, the loss of civil liberties for all often begins with the reduction of rights in a time of crisis, for a particular minority. Scapegoating law-abiding residents and unwaveringly loyal American citizens, is not only un-American, it will lead to division in the country and leave us further vulnerable to the threats our nation faces.

⁵⁴ Anita Ramasastry, "Patriot II: The Sequel Why It's Even Scariest than the First Patriot Act," Findlaw, February 17, 2003, <http://writ.news.findlaw.com/ramasastry/20030217.html>.

⁵⁵ For a copy of the January 9, 2003 document leaked on February 7, 2003, see: www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf.

For further analysis see David Cole, "What PATRIOT II Proposes to Do," February 10, 2003, www.cdt.org/security/usapatriot/030210cole.pdf; ACLU, Interested Persons Memo: Section-by-Section Analysis of Justice Department draft "Domestic Security 2003," also known as "PATRIOT Act II," February 14, 2003, www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206 Also see: Jason Kuiper, "Organizations, lawmakers question proposed Patriot Act II legislation," Daily Nonpareil, April 3, 2003, www.zwire.com/site/news.cfm?newsid=7594285&BRD=2554&PAG=461&dept_id=507134&rfi=6

⁵⁶ See "Homeland Insecurity: Excessive Secrecy Protects No-one," Columbia Journalism Review, January/February 2003.

APPENDICES

About the Institute for Social Policy and Understanding

The Institute for Social Policy and Understanding (ISPU) is an independent and nonprofit organization committed to solving critical social problems in the United States through education, research, training, and policy analysis. ISPU provides cutting-edge analysis and policy solutions through publications, public events, media commentary, and community research. Major areas of focus include domestic policy, economy, health, education, environment, and foreign policy. Since our inception in 2002, ISPU's research aims to increase understanding of key domestic and foreign policy issues and how they impact various communities in the United States.

US society is far from being monolithic, whether culturally, socially or politically. It is imperative that the thoughts and insights of each aspect of this heterogeneity play a contributory role in the discourse and debate of issues that affect all Americans. ISPU was established and premised on the idea that each of these communities must address, debate, and contribute to the pressing issues facing our nation. It is our hope that this effort will give voice to creative new ideas and provide an alternative perspective to the current policy-making echelons of the political, academic, media and public-relations arenas of the United States. Through this unique approach, ISPU will produce scholarly publications that build on the ideas of the scholarly community. Optimal analysis and treatment of social issues mandates a comprehensive study from several different and diverse backgrounds.

As social challenges become more complex and interwoven, ISPU is unique in its ability to bring this new approach to the human and social problems facing our country. Our multidisciplinary work in partnership with universities and other research institutes serves to build understanding and create programs that effect lasting social change.

Further information about ISPU can be obtained from our website at www.ispu.us