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**PRIVACY AND OTHER CIVIL  
LIBERTIES IN THE UNITED STATES  
AFTER SEPTEMBER 11**

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# **PRIVACY AND OTHER CIVIL LIBERTIES IN THE UNITED STATES AFTER SEPTEMBER 11**

Fred H. Cate<sup>1</sup>

## **INTRODUCTION AND SUMMARY**

The September 11 hijackings and attacks on the World Trade Center and the Pentagon and the subsequent dissemination of anthrax-contaminated mail have led U.S. government officials to substantially compromise civil liberties. Moreover, the public's interest in ensuring that the perpetrators are identified and brought to justice, and in protecting against future attacks, has created a political environment in which the undermining of civil liberties is not only tolerated, but in many cases applauded.

This willingness to trade civil liberties for justice (or vengeance) and security is especially clear in the case of privacy. The government has begun or announced a number of initiatives that significantly infringe on individual privacy—including warrantless searches of commercial and university records, expanded tapping of e-mail and telephone conversations, monitoring inmates' conversations with attorneys, expanded surveillance of foreign visitors and immigrants, and both requiring identification and searching persons and luggage before permitting individuals to board public transportation or enter many public buildings. Yet the public's tolerance for these and other incursions into personal privacy has been very high, and repeated opinion polls taken since September 11 indicate a widespread willingness to give up privacy in exchange for security.

There are signs that this willingness is already declining, however, with the passage of time, the continuing expansion of government (especially presidential) authority, and the growing sense that the sacrifice of our privacy and other civil rights is not gaining the public more security, just less liberty. That, in the words of Benjamin Franklin, "those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety," and all too often achieve neither as well.

This essay surveys a number of major U.S. government restrictions post-September 11, considers their impact on civil liberties and especially privacy, and offers some concluding observations on the changing political climate and on the possible future of the broader information privacy debate.

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## THE ASSAULT ON CIVIL LIBERTIES

In the days immediately following the September 11 attacks, the Bush administration launched an unprecedented effort to identify those responsible for the attacks and to protect against future attacks. The government sought information on possible hijackers and their accomplices from hundreds of private and public data sources, including credit card companies, banks, airlines, rental car agencies, flight training schools, and thousands of private individuals. Searches were conducted of dozens of homes and vehicles.

Law enforcement officials sought student records, and the Department of Education notified colleges that they were free to provide the requested information, despite the fact that the Family Educational Rights and Privacy Act would have required the government to obtain a subpoena and the educational institution to provide notice to the students whose records were sought.<sup>2</sup> The administration sought information on large or suspicious financial transactions, and on any accounts involving suspected terrorists, not just from U.S. banks, but from all U.S. financial institutions and even from foreign banks that do business in the United States.<sup>3</sup>

U.S. airports were reopened, but only on the condition that passengers submit to expanded security screening, including repeated physical searches and random, suspicionless questioning. The government removed information from many of its web-sites, and in October Attorney General Ashcroft issued a memorandum to federal agencies announcing a new interpretation of the Freedom of Information Act that would permit officials to withhold information from the public on any “sound legal basis,” thereby reversing the prior policy that access be restricted only when necessary to prevent “foreseeable harm.”<sup>4</sup>

In the weeks after September 11, as public shock gave way to outrage and demands for justice, the administration began to consolidate power taken from the other branches of government and civil liberties taken from the public. Citing the need for strong leadership during a “time of war,” a phrase heard frequently through October and November, the president claimed increasing authority. In the words of White House Press Secretary Ari Fleischer: “The way our nation is set up and the way the Constitution is written, wartime powers rest fundamentally in the hands of the executive branch.”<sup>5</sup>

To be certain, the aggregation of power to the executive branch during times of national crisis is not unusual. However, the extent of the Bush administration’s reach, which the *Washington Post* described on November 20 as “exceeding that of other post-Watergate presidents and rivaling even Franklin D. Roosevelt’s command,”<sup>6</sup> and the fact that it is taking place during an undeclared war, surprised many members of Congress and other observers.

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<sup>2</sup> 20 U.S.C. § 1232g (1997).

<sup>3</sup> On October 26, many of these expanded requirements, many of which had been sought by law enforcement officials prior to September 11, had been enacted into law as part of the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.

<sup>4</sup> Quoted in Jim Oliphant, “War on Terror is Reshaping Legal Landscape,” *The Recorder*, Nov. 19, 2001, at 3.

<sup>5</sup> Quoted in Dana Milbank, “In War, It’s Power to the President,” *Washington Post*, Nov. 20, 2001, at A1.

<sup>6</sup> *Ibid.*

Not all of the signs of the rise of this “Imperial Presidency” concern the terrorist attacks or the war in Afghanistan (for example, the White House’s refusal to cooperate with a General Accounting Office investigation into Vice President Cheney’s energy task force, and the president’s refusal to consult with Congress on cuts in the U.S. nuclear arsenal or to achieve those cuts through treaties that would require Senate ratification). Nor do all of the measures directly affect civil rights (for example, the administration’s refusal to seek Senate confirmation of Governor Tom Ridge’s appointment as director of the new office of Homeland Security, and the president’s order restricting intelligence briefings to only eight of the 535 members of Congress). But many of the administration’s most prominent acts post-September 11 do claim to respond to those attacks and do significantly affect civil liberties. Among the most important:

### **Detention of Witnesses and Suspects**

One of the earliest and now most notable incursions into civil liberties was the government’s detention of legal immigrants who were suspected of either being involved in, or having information about, the September 11 attacks. On September 18, the administration announced a new rule under which federal law enforcement officials were permitted to detain legal immigrants indefinitely during a national emergency.<sup>7</sup> By late November, almost 1200 people had been arrested. In only a handful of the cases has the government identified the people it has seized or the reason for their detention. A Freedom of Information Act request by 38 civil rights groups, including the American Civil Liberties Union, was denied by the Department of Justice.

The secrecy surrounding the detentions is surprising in view of the Supreme Court’s interpretations of the U.S. Constitution that require that detainees be provided with legal counsel and either speedily charged or released. Moreover, while Attorney General Ashcroft has cited national security concerns as the reason for the government’s silence, he has also appeared at press conferences at which he provided information about selective arrestees. As a result, the national security claim is, according to Kate Martin of the Center for National Security Studies, “just not plausible given that their daily press briefing is not only naming individuals but detailing some evidence against them. . . This looks like a selective release of information, not for security or law enforcement reasons, but for public relations reasons.”<sup>8</sup>

Press reports about the few detainees who have been identified support Martin’s view: The Department of Justice is interested in talking only about its successes, not its failures. For example, the *Toronto Star* writes that many Muslims in particular, “be they American citizens or visitors—are targets of sometimes painfully inept and over-exuberant anti-terrorist crackdowns.”

- Syrian immigrant Mohammed Refai runs a gas station in Akron, Ohio. He keeps a cot to nap on. The FBI concluded the gas station was a terrorist “safe house,” accused him of selling dangerous cigarette lighters and placed him in solitary confinement in a New York jail. Then the FBI realized it was a case of mistaken identity.

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<sup>7</sup> Philip Shenon & Robin Toney, “U.S. Widens Policy on Detaining Suspects,” *New York Times*, Sept. 19, 2001, at A1.

<sup>8</sup> Quoted in William Walker, “Secret Trials Order Raising Concerns,” *Toronto Star*, Nov. 19, 2001, at A10.

- Ahmad Abou El-Khier, a native of Egypt, was arrested after checking out of a hotel in Maryland on Sept. 11. The FBI concluded he was an “associate” of the jet hijackers. Once they realized they’d erred, police threw a three-year-old disorderly conduct charge at him.
- Mehdi Madani, a native of Iran, had the misfortune of being a San Diego aircraft mechanic in the wake of Sept. 11. The FBI suspected him, apparently, because he made frequent trips to Las Vegas and was flying to Hamburg, Germany, where the hijackers are thought to have met prior to Sept. 11. He was arrested by the FBI, then released in another case of mistaken identity.<sup>9</sup>

Whatever the explanation for the government’s refusal to identify the detainees, allow independent verification of the conditions in which they are being held, provide them with counsel, and either charge or release them significantly compromises constitutionally protected civil liberties. Congress—including the Republican leadership—has asked Attorney General Ashcroft to appear to explain his actions, but to date he has refused to comply.

### **USA PATRIOT Act**

In one of the most striking and intrusive—on the prerogatives of Congress and the civil liberties of the public—actions came with the introduction of the attorney general’s Anti-Terrorism Act of 2001 on September 19. Introduced just eight days after the terrorist attacks, the bill sought extensive expansions of law enforcement powers, many of which had been sought prior to the terrorist attacks, including the authority to detain immigrants suspected of terrorism indefinitely, without charging them or making public their arrest. Attorney General Ashcroft called on Congress to enact his bill within the week.<sup>10</sup>

Although Congress did not act with the haste sought by the attorney general, but it did enact a comprehensive anti-terrorist bill—the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act)<sup>11</sup>—with no consideration by the Senate Judiciary Committee, in place of a measure approved by the House Judiciary Committee, without a committee or conference report, and with only a few minutes of floor debate. The president signed the bill, which the press has called one of the “swiftest-moving bills in federal history” into law on October 26.<sup>12</sup> The 342-page law is very complex and affects fifteen existing statutes. Its major sections:

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<sup>9</sup> Ibid.

<sup>10</sup> Jack Torry, “Anti-Terrorism Proposals Worry Civil-rights Groups,” *Columbus Dispatch*, Sept. 20, 2001, at A7.

<sup>11</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (H.R. 3162).

<sup>12</sup> J. M. Lawrence, “War on Terrorism; Anti-terror Laws in Place; Feds Urgently Implement Crackdown,” *Boston Herald*, Oct. 27, 2001, at 5.

- Greatly expand government surveillance authority, by
  - allowing investigators to more readily obtain court orders for “roving wiretaps” that allow the government to tap any phone a suspected terrorist might use;
  - permitting criminal investigators and intelligence officers to share grand jury, wiretap and other information without judicial oversight;
  - broadening the scope of the government’s ability to search for and seize stored communications, such as voice mail and e-mail messages, under an ordinary warrant rather than a wiretap order;
  - authorizing “national search warrants” so that courts with jurisdiction over an offense to issue search warrants for electronic communications in electronic storage anywhere in the country, without requiring the intervention of judges in districts where Internet service providers are located;
  - enlarging the ability of law enforcement to install “pen register” and “trap and trace” devices that capture information about a call rather than the contents of the call without a warrant, and specifying that those devices can be used with Internet communications (such as the FBI’s “Carnivore” system to intercept e-mail), all with very limited judicial oversight;
  - expanding the list of crimes that may be used as predicates for wiretaps; and
  - permitting computer service providers who are victims of attacks by computer trespassers to authorize law enforcement officials to monitor trespassers on their computers.
  
- Create new impediments to money laundering including imposing new reporting responsibilities of banks and other financial institutions.
  
- Authorize funds to triple the number of border patrol agents along the U.S.-Canadian border and to triple the number of Immigration and Naturalization Service inspectors at each port of entry along that border.
  
- Increase scrutiny of immigrants and visitors to the United States, both upon entering the country and while in the country, by
  - permitting the attorney general to detain foreigners for as long as seven days with a crime before charging them or beginning deportation proceedings;
  - granting unreviewable authority to the Secretary of State to designate “terrorist” groups and to prohibit entry to the U.S. by anyone connected with or who supports such groups; and
  - granting the Department of State and the Immigration and Naturalization Service access to FBI Criminal History Records.

- Expand the authority of the attorney general to pursue terrorists and perpetrators of other violent crimes and increase the penalties and statutes of limitations for those offenses.
- Provide compensation for the victims of terrorism and their families.

Not all of these provisions affect civil liberties, but the very breadth of the Act, the extent to which it reduces judicial oversight of law enforcement activities, and the speed with which it was adopted have provoked concerns among human rights and civil liberties groups, some members of Congress, attorneys, and the press, although apparently not to any significant degree among the general public.

### **Immigrant Questioning**

The attorney general has also announced that he has directed federal, state, and local law enforcement officials to begin questioning as many as 5,000 legal immigrants. Those targeted for questioning are not suspected of any involvement in the terrorist attacks on the World Trade Center or the Pentagon; they are being sought solely because of the countries from which they came to the United States. Congress has expressed concern about this practice, and even state and local law enforcement officials have begun to complain that they are being required to participate in groundless interrogations of people selected on strictly ethnic or religious grounds.

### **Inmate-Attorney Monitoring**

On October 31, the Justice Department published an emergency order announcing that it would eavesdrop on prisoners' conversations with their attorneys if the attorney general believed it necessary to fight terrorism or other acts of violence.<sup>13</sup> The change in policy, which came without the usual waiting period for public comment, applies even to inmates who have not been charged with a crime and even in the absence of a court order.

### **Military Tribunals Order**

The most controversial incursion into civil liberties was President Bush's November 13 military order stating that non-U.S. citizens suspected of terrorism would be tried, at the president's discretion, by military tribunals, rather than the justice system.<sup>14</sup> According to the order, cases would be heard by a panel of officers, rather than a jury; defendants would not be entitled to confront witnesses or hear the evidence against them; only a two-thirds, rather than a unanimous, vote would be necessary to convict; the tribunals would have the power to impose the death penalty; appeals to civilian courts would not be permitted; and both the trial and penalty phases could be conducted in secret. It is unclear whether the tribunals would require proof "beyond a reasonable doubt" to convict, as civilian courts do, or whether the tribunals would operate under a lower standard, such as "preponderance of the evidence."

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<sup>13</sup> National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (2001) (Department of Justice, Bureau of Prisons, final rule).

<sup>14</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Federal Register 57,831 (2001) (The President, notice of military order).

The president justified the order as necessary in time of war, and cited to prior use of military tribunals by President Lincoln during the Civil War and President Roosevelt during World War II.

### **Restrictions on Newsgathering and Expression**

Finally, among the major incursions into civil liberties have been a series of actions, not all of which are related to the terrorist attacks of September 11, restricting press access to information and limiting newsgathering. The attorney general's October memorandum reinterpreting the Freedom of Information Act to permit officials to withhold information from the public on any "sound legal basis," even if the information poses no "foreseeable harm," has already been noted. "When you carefully consider FOIA requests and decide to withhold records," the attorney general wrote to federal agency officials, "you can be assured that the Department of Justice will defend your decisions."

On November 1, the president issued an executive order allowing either a former president or the sitting president to block public access to the former president's papers.<sup>15</sup> Under this order, which reverses prior policy and appears to conflict with the Freedom of Information Act, any request for a former president's papers must not be granted until the former president and the sitting president have an opportunity to review the material and determine whether they wish to grant access. The order specifies a ninety-day limit in which those reviews must take place, but either president may extend the ninety-day limit.

Perhaps farthest removed from the events of September 11 is the Justice Department's continued incarceration of a writer for failing to turn over her notes of an interview with a suspected murderer. Even though the suspect is dead (and so could not be prosecuted) and is known to law enforcement authorities (who, in fact, held him in custody until his death), the attorney general maintains that access to the writer's notes is essential. So essential, that the he had to violate the Justice Department own regulations to jail her, and attempted to do so in secret. Now in her fifth month in jail, the writer has served more time in prison for failure to disclose information than any other U.S. journalist. The United States is one of only two countries to acknowledge having a journalist in jail for failing to disclose interview notes. The other is Cuba.

Cleveland *Plain Dealer* editor Doug Clifton summed up the legal—and, to a large extent, popular—response to the terrorist attacks in a September 21 speech: "What began as musing about restrictions of civil liberties and openness became a full throated roar within days. The very freedoms that have come to define us as a nation were being questioned with greater urgency. We were reminded again and again that "We live in a dangerous world," and such a world challenged our traditional notions about freedom."<sup>16</sup>

## **PUBLIC SUPPORT**

Public reaction to these and other responses to the September 11 attacks has been remarkably positive. An NBC/*Wall Street Journal* poll conducted in the first week after the

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<sup>15</sup> Presidential Documents, 66 Federal Register 56,023 (2001) (The President, notice).

<sup>16</sup> Doug Clifton, Remarks before the Cleveland City Club, Cleveland, OH, Sept. 21, 2001.

terrorist attacks found that 78 percent of respondents supported new laws against terrorism “even if that meant reducing privacy protections such as limits on government searches and wiretapping.”<sup>17</sup> A Harris poll conducted a month later showed that 86 percent of those surveyed favor wider use of facial surveillance, 81 percent want closer monitoring of bank and credit-card transactions, 68 percent support a national identification card, 63 percent support expanded camera surveillance of streets and other public places and police monitoring of Internet discussions.<sup>18</sup> A majority (54 percent) of those surveyed favored expanded government surveillance of cell phone conversations and e-mail.<sup>19</sup>

The notable features of these and similar polls are the extent to which the events of September 11 transformed the public’s views of privacy and security, and how long that transformation has lasted. In 1998, the Pew Research Center found only 29 percent of respondents were willing to give up civil liberties to fight terrorism; in October 2001, Pew found that 55 percent were willing to trade liberty for security.<sup>20</sup> And the post-September 11 numbers have remained steady, or in some cases actually increased, through November. Similarly, polls show that public support for President Bush has remained steady in the 85-90 percent range, the highest ever recorded for a sitting president.<sup>21</sup> Despite what many observers identify as significant and dangerous incursions into civil liberties by the administration, public support remains exceptionally high.

## THE FUTURE

Will that support for the president and willingness to give up civil liberties in exchange for security continue? The answer is almost certainly “no,” for a number of reasons.

### The Public Opinion Cycle

U.S. law and political and social life, from the earliest days of the Republic, reflect an inherent tension between citizen distrust of government and reliance on government to protect and defend the public. This tension is reflected, for example, in the fact that U.S. law includes many public disclosure and oversight statutes that inevitably interfere with efficient (and often with effective) government operations, while at the same time the taxpayers support one of the world’s largest standing military organizations and extensive federal and state law enforcement, intelligence, and border patrol agencies.

While this tension between distrust of, and reliance on, government is always present to some degree, it is most apparent as a cyclical pattern in which public opinion and legislative responses move over time between cynicism and patriotism. The early 1970s, for example, marked a high point of distrust of government (with Watergate and Vietnam); the early 1980s

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<sup>17</sup> Edward J. Markey, “Balancing Privacy and Security in an Age of Terror,” *The Hill*, Oct. 17, 2001, at S3.

<sup>18</sup> “Privacy vs. Security: Tread Carefully,” *Business Week*, Nov. 5, 2001, at 124.

<sup>19</sup> *Ibid.*

<sup>20</sup> Reid Kanaley, “Terrorism Has Americans Rethinking Privacy Issues,” *San Diego Union-Tribune*, Oct. 23, 2001, at 5.

<sup>21</sup> Ronald Brownstein, “Response to Terror; The Times Poll; Americans Unified in Support for Bush, War,” *Los Angeles Times*, Nov. 15, 2001, at A1.

marked a pronounced move toward greater confidence in government (under the administration of President Reagan). The certainty and speed of the transition is one of the defining features of American political life during the past twenty years. Recall that President Bush's father, when he was president, went from unprecedented popularity at the height of the Gulf War to lose his bid for re-election the following year.

The response to the terrorist attacks of September 11, and the effort to both bring to justice the perpetrators and protect the public against future attacks, generated a patriotic fervor unseen in the United States since World War II. The public lauded the actions of public servants, especially police and firefighters, and turned to the government for information, comfort, leadership, protection, and pride. Public opinion polls reflected approval for President Bush's actions and a widespread willingness to sacrifice prosperity, convenience, and even liberty in the pursuit of justice and public safety.

If history is any guide, however, the recent surge in confidence in government will be followed by a period of growing skepticism. Rather than reflecting a transformation, the good feelings and willingness to sacrifice merely mark the beginning of another cycle highlighting the fundamental tension in the public's (and the legal system's) view of government. This is true not just because of some determinist view of history, but rather because of the deep tension in the relationship between citizens and government that the history of U.S. public opinion reflects.

### **The Demand for Success**

A second reason why public tolerance for compromising civil liberties is likely to be short-lived is that once one moves beyond the sheer emotional response to the attacks of September 11 and the fear of subsequent incidents, the public expects the government to keep up its side of the bargain. If asked to trade civil liberties for security, the public will expect security. If subsequent events show that the public's sacrifice did not yield security, support for continuing sacrifices is likely to wane.

The problem for the administration is that the events of September 11 would have challenged any government, and that challenge has been made infinitely greater by the nature of the attacks and the subsequent anthrax-infected letters (perpetrated by nameless, faceless terrorists, rather than an identified government power), and by the public expectation of rapid, decisive action. In a "war" against an enemy that cannot be seen or identified, and that is willing to die for its cause, the government is unlikely to be able to prevent all future incidents or produce an unbroken string of victories without U.S. casualties. And such incidents, battlefield reversals, or the failure to apprehend those responsible for the September 11 attacks will undermine public support for both the administration and the intrusion into civil liberties.

### **The Demand for Rationality**

A more subtle parallel to the demand for success is the public's expectation that the government's security-based interferences with personal liberty will be rational. For example, public patience with waiting in long security lines at airports has begun to decline in the face of widespread reports that passengers are getting through security with knives and even guns. Similarly, cumbersome and time-consuming hand searches of carry-on baggage seem pointless when checked baggage goes uninspected. It was this type of sentiment that contributed to Congress federalizing airport security, despite widespread ideological opposition to bigger

government. But if federal airport security forces do not bring a more rational and proportional approach to airline security, the public is unlikely to prove tolerant for long.

Rationality requires some type of link between government action and government objective. In the absence of that link, public support for the objective is unlikely to translate into support for the action. For example, the President's order reducing access to the papers of former presidents seems unrelated to pursuing the war on terrorism and so is unlikely to benefit from support motivated by the public's desire for justice and safety. Similarly, many of the provisions of the USA PATRIOT Act apply not only to terrorist attacks, but to a wide range of violent crimes and other offenses. The fact that September 11 has heightened the public's willingness to trade civil liberties in pursuit of security from terrorism does not mean that the public is willing to make the trade for some lesser goal. Spectators at athletic events and concerts are now routinely searched by security officers. While few, if any, weapons are detected during those searches, guards have confiscated thousands of bottles of water and packages of candy that might have competed with the arena's food service operations. The public may be willing to undergo body searches to protect their lives, but are likely to prove less interested if the effect is merely to protect the profits of the arena.

### **The Presence of a Growing Opposition**

Although the president, as a single leader and as commander-in-chief, always enjoys heightened public support during times of crisis, that support, as well as public support for his initiatives, can be undermined by the growth of a vocal opposition. In the immediate aftermath of September 11, Republicans and Democrats, executive and legislative officials, civil liberties groups and law enforcement banded together in the face of a common tragedy. In the ensuing months, however, a growing and increasingly vocal opposition has emerged to the Bush administration's apparent disregard for civil liberties and the jurisdiction of the legislative and judicial branches.

This collection of congressional leaders, journalists, attorneys, academics, civil liberties and immigrant rights groups, and even local and former law enforcement officials has begun asking the tough questions and noting the embarrassing inconsistencies in administration statements. Initially muted and deferential, the skepticism has grown in some instances to harsh criticism of the government. Even some traditional administration supporters have joined the chorus. Conservative columnist William Safire wrote a blistering column in the November 15 *New York Times* chastising the president for assuming "dictatorial power" and instituting a new "Star Chamber." "Misadvised by a frustrated and panic-stricken attorney general," Safire wrote, "we are letting George W. Bush get away with the replacement of the American rule of law with military kangaroo courts."

No longer does the judicial branch and an independent jury stand between the government and the accused. In lieu of those checks and balances central to our legal system, non-citizens face an executive that is now investigator, prosecutor, judge, jury and jailer or executioner. In an Orwellian twist, Bush's order calls this Soviet-style abomination "a full and fair trial."<sup>22</sup>

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<sup>22</sup> William Safire, "Seizing Dictatorial Power," *New York Times*, Nov. 15, 2001, at A31.

Even if the public does not in large numbers yet share these concerns, the fact that there are respected and vocal proponents of these alternative perspectives greatly increases the likelihood that they will be heard. Their presence assumes even more importance as the discussion expands from primarily recovery and security issues, to a broader range of often specialized legal and technological issues.

## THE IMPACT ON PRIVACY

The impact of the terrorist attacks and the government's response on the U.S. debate over privacy and the role of the government in protecting it is significant but complex. Beginning in the late 1990s, both federal and state governments had focused extensive attention on the protection of information from primarily nongovernmental intrusion. In 1998 Congress adopted legislation restricting the collection and use of information from children on-line,<sup>23</sup> and the following year enacted the first comprehensive federal financial privacy legislation as part of the Gramm-Leach-Bliley Financial Services Modernization Act.<sup>24</sup> Federal regulators had not only implemented these and other privacy laws, but also adopted sweeping health privacy rules under the Health Insurance Portability and Accountability Act<sup>25</sup> and negotiated a privacy "safe harbor" for U.S. companies seeking to comply with European data protection law.<sup>26</sup> The Federal Trade Commission had released two proposals for legislation concerning adult's online privacy.<sup>27</sup> And state legislatures had considered more than 400 privacy bills while state attorneys general have initiated aggressive privacy investigations and litigation. Legislation was pending in Congress and state legislatures concerning financial privacy, medical privacy, employee privacy, online privacy, the use of Social Security Numbers, protection against identity theft, and other privacy-related subjects.

It should be noted that some of the ardor for new privacy legislation applicable to the nongovernmental use of information was already beginning to diminish prior to September 11. Newly confirmed Federal Trade Commission chairman Timothy Muris had already signaled his desire to focus on enforcement of existing laws, rather than the adoption of new ones. An increasing number of legislators had discovered what a quagmire privacy regulation could be, especially in light of the U.S. experience with Gramm-Leach-Bliley financial privacy notices

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<sup>23</sup> Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-728 (codified as amended at 15 U.S.C. §§ 6501-06 (1999)).

<sup>24</sup> Gramm-Leach-Bliley Financial Services Modernization Act tit. V, 106 Pub. L. No. 102, 113 Stat. 1338 (1999) (codified at various sections of 15 U.S.C.).

<sup>25</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (2000) (HHS, final rule) (codified at 45 C.F.R. pt. 160, §§ 164.502, 164.506).

<sup>26</sup> Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24, 2000) (International Trade Administration, Dept. of Commerce, notice) (available at <<http://www.export.gov/safeharbor/>>).

<sup>27</sup> Federal Trade Commission, *Online Profiling: A Report to Congress* (Part 2)—Recommendations (July 2000); Federal Trade Commission, *Privacy Online: Fair Information Practices in the Electronic Marketplace: A Report to Congress* (May 2000).

(which were required to be delivered by the end of June 2001): 40,000 financial institutions had mailed approximately 2 billion notices, which the public had almost uniformly ignored (early evidence indicates that fewer than 1 percent have responded). And mounting criticism of the European Union's data protection directive (a January 2001 study of online privacy by Consumers International had found that "[d]espite tight EU legislation in this area . . . U.S.-based sites tended to set the standard for decent privacy policies"<sup>28</sup>) had further contributed to decreasing interest in new private-sector privacy regulations.

In the immediate aftermath of September 11, the shock at the magnitude of the atrocity, and the subsequent efforts to locate survivors, identify the victims, apprehend the perpetrators, protect against future attacks, and to punish those responsible rewrote political agendas and effectively stymied consideration of all legislation not related to those purposes. The threat of anthrax and other attacks has further contributed to refocusing U.S. political processes. This was certainly true in the case of privacy.

Moreover, it rapidly became clear that information was the public's greatest resource in the campaign to track down the perpetrators and prevent future attacks. Law enforcement officials sought information on suspects from credit card companies, banks, airlines, rental car agencies, landlords, flight training schools, and countless other sources. Although some of the information was contained in public sources (immigration, motor vehicle, and law enforcement records, for example), much—perhaps most—of the useful information was created and maintained by the private sector for purposes unrelated to detecting and preventing criminal activity. The same public and political sentiment that led to passage of the USA PATRIOT Act, with its easing of restrictions against government intrusions against privacy, motivated—albeit perhaps to a lesser degree—against new restrictions on commercial use of information.

Mike France and Heather Green wrote in the November 5 edition of *Business Week*: "The war on terrorism is still in its early days, but one thing is already clear: In the future, information about what you do, where you go, who you talk to, and how you spend your money is going to be far more available to government, and perhaps business as well. . . . Across a wide range of battlefields, privacy is on the retreat."<sup>29</sup> Even as prominent a privacy advocate as Robert Pitofsky, chair of the Federal Trade Commission under President Clinton, has commented: "September 11 changed things. Terrorists swim in a society in which their privacy is protected. If some invasions of privacy are necessary to bring them out into the open, most people are going to say, 'O.K., go ahead.'"<sup>30</sup>

However, this sentiment is likely to be short-lived, for several reasons. First, as it became clear that the terrorists had impersonated other people, Congress and state legislatures have already begun to show renewed interest in identity theft legislation and bills that would restrict the dissemination of Social Security Numbers. Second, as already noted, concern over whether the government made too readily available information about critical national infrastructure elements led to the rapid removal of certain information from government web-sites, a revision of the administration's policy concerning Freedom of Information Act requests, and the

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<sup>28</sup> Consumers International, *Privacy@net: An International Comparative Study of Consumer Privacy on the Internet* at 6 (2001).

<sup>29</sup> Mike France & Heather Green, "Privacy in an Age of Terror," *Business Week*, Nov. 5, 2001, at 82.

<sup>30</sup> Quoted in *ibid.*

consideration of limits on other information. Some states responded with laws and executive orders blocking public access to information. For example, Florida, historically one of the most open states in the country, is currently considering six bills to limit access not only to some public records, but to Senate sessions and the records of Senate votes in certain circumstances.

Most importantly, as with the public's tolerance for government incursions into civil liberties, a backlash against the widespread accessibility of personal information and its use by the private sector seems inevitable. And that backlash will be informed by the post-September 11 disclosures how precisely how much information is available and how readily the government did have (and after passage of the USA PATRIOT Act certainly will in the future have) access to it.

As the "freeze" on virtually all non-terrorist-related legislation thaws in the days ahead, it is difficult to predict precisely how these two dynamics will interact. The public has clearly indicated a willingness to trade privacy for security, and now has ample evidence of the value of accessible information for security and crime prevention and detection. Moreover, if revealing more information (for background checks or passenger identification) brings greater convenience (such as not standing in security checkpoint lines at airports), it seems certain that many people will happily comply. On the other hand, the pressures for greater privacy—the heightened awareness of how much information is available and how accessible that information is to the government, the fear of further disclosure or misuse of information provided for security purposes, concerns about identity theft and terrorist impersonation of citizens or legal aliens—are all likely to fuel new demands for legislation protecting privacy in commercial contexts. And this dynamic will ultimately gain added support from the certain resurgence in public skepticism about the government.

This is an ironic reality, because under the U.S. Constitution, only the government is subject to any obligation to respect personal privacy; non-governmental entities are free to collect and use information. This reflects the fact that only the government exercises the power to compel disclosure of information and to impose civil and criminal penalties for noncompliance, and only the government collects and uses information free from market competition and consumer preferences. However, the public appears rarely to distinguish between government and private entities when considering information privacy issues. To the extent that industry benefits today from the public's reliance on government to provide security, even if it requires compromising privacy to do so, the commercial use of information is certain to suffer in the future as public confidence in government declines.

## **CONCLUSION: THE PROBLEM OF TRADING CIVIL LIBERTIES FOR SECURITY**

The most significant obstacle to long-term public support for giving up civil liberties in the search for security, and for any government that claims the switch is necessary or effective, is the futility of the attempted trade. Most of the evidence of recent events, history, and logic suggests that giving up civil liberties rarely if ever ensures greater security.

## Current Issues

In recent days we have seen, for example:

- Some government officials have suggested expanding the use of video surveillance cameras to protect against future terrorist attacks. The *Toronto Sun* has noted, however, the failure of existing video surveillance technology to deter the known perpetrators of the September 11 attacks. “[I]n one 16-hour period,” the paper pointed out, two of the known terrorists were “picked up on video cameras in Portland, Maine, at a bank machine, a gas station, a Wal-Mart department store, a motel, a pizza restaurant, entering the parking garage at the local airport, entering the terminal, clearing security, arriving at Boston’s Logan airport, and finally boarding the airplane they flew into New York’s World Trade Center.” All that surveillance did nothing to prevent the hijackings. “Sadly,” the paper concluded, “another 1,000 surveillance cameras likely would not have saved a single life.”<sup>31</sup> Moreover, as other commentators have noted, cameras may be useful in tracking down criminal suspects, but they do not offer much promise against terrorists who are willing to die.
- In urging Congress to expand law enforcement ability to engage in surveillance or searches without first seeking a warrant or court-order, the attorney general argued that this was necessary to apprehend the terrorists and prevent future attacks. An observer would have thought that courts were routinely blocking legitimate warrant requests. In fact, the Justice Department’s own figures paint quite a different picture. Last year, 1,190 wiretap requests were approved; none were denied. During the last five years, 6,202 wiretaps were approved; three were denied.<sup>32</sup> It seems that the need to get a warrant was not a major stumbling block to detecting and apprehending terrorists. Rather, National Public Radio reports that efforts to get a warrant to search the computer files of one suspected terrorist were blocked not by a court, but by the FBI, which did not think there was enough evidence to make the matter worth pursuing. The FBI may have been following the lead of Attorney General John Ashcroft, who, NPR reports, “was far less inclined [than his predecessor, Janet Reno] to consider or grant those warrants.”<sup>33</sup>
- Proposals for a national identification card are provoking increasing skepticism. Critics note that two of the known terrorists were operating with false identification documents, provided by the Florida Department of Motor Vehicles. All of the hijackers must have presented identification cards, yet the presence of those cards obviously did not prevent the attacks. Short-term visitors to the country would not have an identity card; they would likely rely on foreign

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<sup>31</sup> Greg Weston, “Big Brother’s Big Chance,” *Toronto Sun*, Oct. 9, 2001, at 15.

<sup>32</sup> <[www.uscourts.gov/wiretap00/table700.pdf](http://www.uscourts.gov/wiretap00/table700.pdf)>

<sup>33</sup> Barbara Bradley, “Balancing Privacy Concerns with the Threat of Terrorism,” *All Things Considered*, National Public Radio, Oct. 3, 2001.

passports, as it is believed that at least some of the terrorists did. And what would these cards signify anyway, some commentators are asking; as the *Toronto Star* pointed out in an editorial, the cards are not likely to identify anyone's occupation as "terrorist."<sup>34</sup>

- The president's order for trying suspected terrorists in military tribunals has provoked the most intense response from Congress, civil libertarians, and the press. U.S. newspapers that editorialized on the subject were almost uniformly against the idea.<sup>35</sup> Now the legal profession, initially strangely silent, has begun weighing in against the tribunals and the precedents that the president identified for them. First, they point out, unlike the present situation, the prior examples all involved wars declared by Congress, as the Constitution gives only Congress the power to do. Second, reliance on a case immediately following the Civil War, in which the government sought to try Confederate sympathizers in a military court, is misplaced because the U.S. Supreme unanimously overturned their convictions. The holding there, that the president may not try civilians before military tribunals "where the courts are open and their process unobstructed," seems to repudiate the president's current position.<sup>36</sup> Third, although the president cites most frequently to the summary trial of eight German saboteurs, they actually did get an appeal to the Supreme Court, something the president has tried to deny any suspected terrorists he tries. And, while the Court upheld their sentences (six were executed, two were imprisoned), it based its decision on the fact that Congress had declared war on Germany and authorized the establishment of military commissions to try war cases. After the war, President Truman paroled the two living defendants, recognizing that FBI Director J. Edgar Hoover appears to have trumped up the evidence against them in an effort to hide the FBI's bungling of the case (the two tried repeatedly to turn themselves and their comrades in, but the FBI would not take them seriously).<sup>37</sup> The case is hardly a model of judicial fairness, especially since the government had ten lawyers, while the eight defendants were allowed one.
- The military tribunals order is also provoking a muted but pointed response from military attorneys who are concerned by the many protections for civil liberties traditionally found in military proceedings that the order sweeps away. The Uniform Code of Military Justice requires, for example, "a public trial, proof beyond reasonable doubt, an accused's voice in the selection of juries and right to choose counsel, unanimity in death sentencing and above all appellate review by

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<sup>34</sup> "Fight Terrorism, Not Privacy," *Toronto Star*, Oct. 2, 2001, at A20.

<sup>35</sup> "U.S. Editorials on Military Tribunals," United Press International, Nov. 19, 2001.

<sup>36</sup> Ex parte Milligan, 71 U.S. 2 (1866); see also William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (1998).

<sup>37</sup> Jeff Nesmith, "Some See Lesson for Today in Secret Trial of WWII 'Saboteur'," *Atlanta Journal and Constitution*, Nov. 18, 2001, at 14A; William W. Turner, *Hoover's FBI: The Men and the Myth* (1970).

civilians confirmed by the Senate.” As Safire and others have noted, “Not one of those fundamental rights can be found in Bush’s military order . . . Bush’s fiat turns back the clock on all advances in military justice, through three wars, in the past half-century.”<sup>38</sup>

- What is the government going to do with all of the information it collects with its new powers? Recall that it was the FBI’s inability to catalog and provide all of the information it collected on the Oklahoma City bombing that prompted a delay in the execution of Timothy J. McVeigh. The government already had two of the terrorists on a “watch list” but neglected to provide that information to the necessary authorities. Law enforcement agents had one of the intended terrorists in jail on an immigration charge on September 11, but could not convince senior FBI and Justice Department officials to apply for a search warrant. The government gave at least two of the terrorists’ fraudulent identification documents. Every one of the terrorists we believe passed through a security checkpoint. To date, there is no credible claim that a greater intrusion into civil liberties was necessary to prevent the terrorist attacks of September 11; rather, it appears that law enforcement and security personnel failed to exercise diligently the lawful powers they already had.

### **The Lesson of History**

The hollow nature of the trade-off between security and liberty—and the failure of either public sentiment or judicial review to protect against unconstitutional bargains—is the consistent lesson of U.S. history as well.

During World War II, following the Japanese attack on Pearl Harbor, President Roosevelt issued an executive order calling for the internment or displacement of over 100,000 Japanese-Americans, over two-thirds of whom were citizens of the United States. The internment began in April 1942, and the last camp was not closed until four years later, well after the end of the war, in March 1946. The move, fueled by outrage at the attack on Pearl Harbor, drew overwhelming public support. The Supreme Court upheld its legality.<sup>39</sup> But fifty years later, the United States apologized to the victims of the order and paid \$20,000 to those still living who were detained or lost property.<sup>40</sup> It is not a chapter of U.S. history of which many Americans are proud.

Similarly, during the cold war, the federal government made it a crime to be a member of the Communist Party, and passed the Immigration and Naturalization (McCarran-Walter) Act,<sup>41</sup> which authorized the government to keep out and expel non-citizens who advocated Communism or other proscribed ideas, or who belonged to the Communist Party or other groups that advocated proscribed ideas. In the frenzy led by Senator Joseph McCarthy, these actions met with widespread public approval. “Under the McCarran-Walter Act, the United States denied visas to, among others, writers Gabriel Garcia Marques and Carlos Fuentes, and to Nino Pasti,

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<sup>38</sup> Safire, *supra*, at A31.

<sup>39</sup> *Korematsu v. United States*, 319 U.S. 432 (1943).

<sup>40</sup> The Civil Liberties Act of 1988.

<sup>41</sup> Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

former Deputy Commander of NATO, because he was going to speak against the deployment of nuclear cruise missiles.”<sup>42</sup> Congress later repudiated Senator McCarthy and, in 1990, repealed the McCarran-Walter Act political exclusion and deportation grounds.<sup>43</sup>

Georgetown University Law Professor David Cole wisely cautions that “[t]his history should caution us to ask carefully whether we have responded today in ways that avoid overreaction and are measured to balance liberty and security.”<sup>44</sup>

### **The Sacrifice of Principles**

Justice Louis Brandeis, co-author of perhaps the most influential U.S. privacy article,<sup>45</sup> wrote almost seventy-five years ago “that fear breeds repression; that repression breeds hate; and that hate menaces stable government.”<sup>46</sup> These words take on new meaning in a time of national exigency, and suggest that not only is the trade-off between liberty and security a pointless one, it is a counterproductive one as well: Protecting liberty is itself essential to maintaining security.

The trade-off is also undesirable. In his first public statement on September 11, as Air Force One refueled at Barksdale Air Force Base, President Bush called the terrorist acts an “attack on freedom itself.” “Freedom itself was attacked this morning by a faceless coward,” the president said. “And freedom will be defended.”<sup>47</sup>

In the days that followed, the president returned repeatedly to this theme. During his September 19 address to a joint session of Congress, the president asked about the terrorists: “Why do they hate us?” And then he answered: “They hate what they see right here in this chamber, a democratically elected government. . . . They hate our freedoms, our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other. . . . These terrorists kill not merely to end lives but to disrupt and end a way of life.”<sup>48</sup>

As many commentators have observed, essential liberties are often hard to take away, but they are remarkably easy to give up. If, in response to the attacks of September 11, the public voluntarily sacrifices in a Faustian bargain for greater security, the terrorists will have achieved their goal.

In the days following September 11, the public has been asked to sacrifice liberties for themselves, but also, far more frequently, for others. The metaphor of “evil” attacking “good” has been used extensively by administration officials, many of whom have stressed that the detentions, enhanced surveillance, and the other incursions into civil liberties are primarily targeted at non-U.S. citizens who “do not deserve” the protection of law. In the words of

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<sup>42</sup> Hearing on Civil Rights and Anti-Terrorism Efforts, Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee, Oct. 3, 2001 (statement of Georgetown University Law Professor David Cole).

<sup>43</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

<sup>44</sup> Hearing on Civil Rights and Anti-Terrorism Efforts, *supra* (statement of Professor David Cole).

<sup>45</sup> Samuel D. Warren & Louis D. Brandeis, “The Right to Privacy,” 4 *Harvard Law Review* 193 (1890).

<sup>46</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927).

<sup>47</sup> Quoted in Elisabeth Bumiller with David E. Sanger, “A Day of Terror: the President; A Somber Bush Says Terrorism Cannot Prevail,” *New York Times*, Sept. 12, 2001, at A1.

<sup>48</sup> “A Nation Challenged; President Bush’s Address on Terrorism Before a Joint Meeting of Congress,” *New York Times*, Sept. 21, 2001, at B4.

Attorney General John Ashcroft: “[F]oreign terrorists who commit war crimes against the United States are not entitled to and do not deserve the protections of the American Constitution.”

Vice President Cheney put it this way: “The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans, men, women and children, is not a lawful combatant. They don’t deserve to be treated as a prisoner of war. They don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.”<sup>49</sup>

Undoubtedly, most Americans would agree. But the problem is knowing *who* is a terrorist. The Supreme Court has interpreted the Constitution to require that only a judicial process meeting the requirements of the Fourth, Fifth, and Sixth Amendments can determine guilt. Until that determination is made—in a capital case, by a jury—the law presumes every person in the country, even non-citizens, innocent. The Supreme Court has repeatedly found that the Constitution protects citizens, legal aliens, and even people in the country illegally.<sup>50</sup> While administration officials appear to feel comfortable talking about “us” and “them,” the U.S. Constitution refuses to recognize that distinction: Until a jury of peers in a lawfully conducted trial says otherwise, we are all entitled to the full protection of the Constitution. As the Supreme Court wrote more than a century ago, striking down the post-Civil War convictions of southern sympathizers by a military tribunal: “The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.”<sup>51</sup>

The failure to adhere to that bedrock principle compromises the legitimacy of government actions (and certainly of any verdicts that might be reached or sentences imposed by an unconstitutional tribunal), poses significant practical issues (already a Spanish judge has refused to extradite six suspects until assured that they will receive due process of law in a civilian court), and threatens every person—citizen or not—who may be wrongly accused or misidentified. As a result, the U.S. will have failed to fulfill its pledge to bring the terrorists to justice. As a George Washington University Law Professor has written, “We do not defeat the Taliban by embracing its view of swift and arbitrary justice.”<sup>52</sup> But far more importantly, the impulse to deny to some the full protection of the law compromises all citizens and brings the terrorists one step closer to achieving their goal.

The Supreme Court reached a similar conclusion in 1967, when it struck down an anti-Communist law: “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.”<sup>53</sup>

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<sup>49</sup> Quoted in DeWayne Wickham, “Even Terrorists Have Civil Rights,” *USA Today*, Nov. 27, 2001, at 15A.

<sup>50</sup> *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Plyler v. Doe*, 457 U.S. 202 (1982); *Wong Wing v. United States*, 163 U.S. 228 (1896).

<sup>51</sup> *Ex parte Milligan*, 71 U.S. 2 (1866).

<sup>52</sup> Quoted in “Sliding Down the Slippery Slope; Ashcroft’s Military Courts for Terrorists Make a Mockery of American Values,” *Pittsburgh Post-Gazette*, Nov. 18, 2001, at E3.

<sup>53</sup> *United States v. Robel*, 389 U.S. 258, 264 (1967).

National leaders face exceptionally difficult choices in times of crisis. The current situation is no exception; no one would envy the president or the attorney general the decisions they face. Many people argue that security cannot be obtained without some limits on the freedoms that people in the United States enjoyed prior to September 11, and that conclusion, while regrettable, seems likely to prove true. How great the incursions into liberty need to be—how far should the government go?—is an important question, but one about which there is ample room for reasonable minds to disagree.

A different, and arguably more important question, concerns what might be characterized as the *procedural* protections around those incursions—protections that include legislative and judicial oversight, legislative participation in setting policy, requirements for warrants, and public scrutiny. These have proved to be the greatest guarantors for individual liberty, and these are what appear most at risk of being compromised by the administration's excesses. The administration's actions excluding Congress from meaningful participation, removing trials from courts, prohibiting appeals, eliminating or reducing warrant requirements, detaining suspects and witnesses without benefit of either judicial or public oversight, restricting expression and association, and planning for secret trials and even executions all undercut those procedural protections. Those actions therefore threaten not only liberty, but also the capacity of the political process, judicial system, press, and informed public to defend against those threats. Those actions are an attack on freedom itself.

In the play, "A Man for All Seasons," Sir Thomas More asks his son-in-law, Will Roper, whether he would level the forest of English laws to punish the Devil. "What would you do?" More asks, "Cut a great road through the law to get after the Devil?" Roper affirms, "I'd cut down every law in England to do that."

More's response, always powerful, seemed prescient when Senator Russ Feingold, the lone dissenter in the Senate to the USA PATRIOT Act, quoted it on the floor of the Senate:

And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast . . . and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>54</sup>

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<sup>54</sup> Quoted in Russ Feingold, Statement of U.S. Senator Russ Feingold from the Senate Floor on the Anti-Terrorism Bill, Oct. 25, 2001.