Civil Liberties in Wartime

Is the government’s crackdown on terrorism too harsh?

Following the Sept. 11 terrorist attacks on the World Trade Center and Pentagon, the Bush administration and Congress acted forcefully to deter future incidents. A new law was passed giving the government more authority to conduct surveillance and track Internet communications. The administration also detained more than 600 possible suspects and announced it might use military tribunals to try alleged foreign terrorists. But civil libertarians say the tough, new procedures abridge fundamental constitutional rights like due process and the attorney-client privilege. Some media-watchers, meanwhile, contend that journalists are not aggressively reporting about the war in Afghanistan and the crackdown on terrorism out of fear of seeming unpatriotic during wartime.
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The Issues

As a Republican senator from Missouri, Attorney General John Ashcroft served on the Judiciary Committee. So when he testified on Capitol Hill on Dec. 6 before his old panel, the camaraderie was palpable as he joked and reminisced with his former colleagues.

But the smiles quickly disappeared when the hearing — on civil liberties following the Sept. 11 terrorist attacks on the World Trade Center and the Pentagon by Middle Eastern airplane hijackers — began in earnest. Democrats and Republicans alike closely questioned and even criticized Ashcroft on some of the tough, new policy changes made by the Bush administration in the name of national security — changes that critics say restrict cherished freedoms.

In particular, committee members worried that the Justice Department’s continued detention of more than 600 mostly Muslim men may infringe on their rights. They also questioned Ashcroft’s recent order permitting federal agents to eavesdrop on conversations between inmates and their attorneys. Until now, such communications have been considered privileged, or protected by law from disclosure. In addition, many senators worried that the president’s plan to try foreigners charged with terrorist acts in secret military tribunals might lead to “victor’s justice” at the expense of due process.

The Constitution does not need protection when its guarantees are popular,” said Committee Chairman Patrick Leahy, D-Vt. “But it very much needs our protection when events tempt us to, ‘just this once,’ abridge its guarantees of our freedom.”

Ashcroft repeatedly dismissed panel members’ concerns. “Our efforts have been crafted carefully to avoid infringing on constitutional rights, while saving American lives,” he said.

In fact, the attorney general turned the tables and criticized his critics, arguing that they help the enemy when they oppose efforts to give the government more tools to fight terrorism.

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“To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists — for they erode our national unity.”

The impulse to restrict liberties has always been and still is especially strong during wartime, and not just among the military and law enforcement communities. Polls show that the American people generally support the steps taken by the administration since Sept. 11, just as they backed the last great raft of security measures — President Franklin D. Roosevelt’s internment of Japanese-Americans and other restrictions enacted during World War II.

For instance, according to a recent Washington Post/ABC News survey, 73 percent of Americans favor allowing the federal government to eavesdrop on normally privileged conversations between suspected terrorists and their attorneys. The new rules — which so far affect only 16 suspects — would be used in cases where the attorney general believed the person might be passing information to his lawyer that would further a terrorist act by their co-conspirators still at large.

Ashcroft claims that discussions not involving terrorist plans will still be privileged and will not be used against the suspect.

But civil libertarians and others counter that lawyers and their clients need absolute privacy in order to speak freely when planning defense strategy. “An inmate won’t feel like there is privacy, since the people who are prosecuting you are also the people who are listening into the conversation and deciding what is and isn’t privileged,” says Irwin Schwartz, executive director of the National Association of Criminal Defense Lawyers. Moreover, Schwartz says, there is an existing process — which involves acquiring a warrant from a judge — that allows officials to breach attorney-client privilege, but it at least requires the approval of a third, independent party.

Schwartz and others also have strongly criticized the Justice Department’s initial arrest of more than 1,200 immigrants — mainly from predominantly Muslim countries — in the weeks following the attacks and the continuing detention of about half of them. Most are being held on immigration violations, but a small number are also being detained as possible material witnesses to terrorist acts.
Critics charge that in its efforts to prevent another attack, the department has essentially gone on a fishing expedition, rounding up Arabs and others without giving any real reasons that justify such a mass detention. “The federal government needs to explain what it’s doing here, needs to publicly show that these people are planning criminal activity or have engaged in criminal activity, instead of just throwing them in jail and not saying anything,” says James Zogby, president of the Arab American Institute, an advocacy group for Americans of Arab descent.

The secrecy surrounding the detentions is causing loyal Arab-Americans to feel threatened and disillusioned in their own country, he adds. Zogby and others are also disturbed by charges that some detainees have been held for weeks or even months with little or no evidence to link them to terrorist acts or groups. They point to Al Bader al-Hazmi, a San Antonio physician who was held for 13 days before being cleared, and Tarek Abdelhamid Albasti, an Arab-American and U.S. citizen from Evansville, Ind., who was detained for a week because he has a pilot’s license. His detention came at the time authorities were investigating reports that Middle Eastern men were taking flying lessons in the United States, or seeking to rent crop-duster planes.

But Ashcroft has argued that his strategy of “aggressive detention of lawbreakers and material witnesses” has very possibly prevented new attacks. “This is an entirely appropriate reaction,” agrees Kent Scheidegger, legal director at the conservative Criminal Justice Legal Foundation. “Given what happened on Sept. 11 and the shadowy nature of the perpetrators, we need to look at a lot of people in order to effectively stop future acts of terrorism.”

The Justice Department also says that none of the detainees have been denied their rights. “All persons being detained have the right to contact their lawyers and their families,” Ashcroft told the Judiciary Committee. At the same hearing, Ashcroft was called on, repeatedly, to explain and defend the administration’s plan to possibly use military courts to try high-ranking, foreign terrorism suspects. The attorney general and other defenders of the proposal say that such courts may be needed because much of the evidence presented against defendants may be highly classified and not appropriate for use in an open court. In addition, they say, using traditional courts to try terrorists may endanger the lives of all of those involved, including the jury, prosecutors and judges. (See sidebar, p. 1024.)

But military courts, with their lower standards of due process, might not guarantee defendants a full and fair trial, says Ralph Neas, president of People for the American Way, a liberal civil liberties advocacy group. “This looks like a star chamber to me,” he says. In particular, Neas worries that defendants may not be allowed to confront all of the evidence presented against them and that juries, made up of military officers, will be able to convict someone with a two-thirds vote rather than the usual unanimous verdict.

Civil libertarians also are concerned about some of the provisions of the

### Public Attitudes Toward Censorship

Public support for military censorship is almost as high as it was during the 1991 Persian Gulf War. By a 53 percent to 39 percent margin, respondents in late November said it is more important for the government to be able to censor stories than for the media to be able to report news it sees as in the national interest.

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Source: The Pew Research Center For The People & The Press, Nov. 28, 2001

* On Dec. 11, a federal grand jury indictment charged that Zacarias Moussaoui, a French Morroccan, conspired with terrorist Osama bin Laden in the Sept. 11 attacks — the first U.S. charges in the case. Moussaoui had sought pilot training in Minnesota last summer, but school officials became suspicious when he only wanted to learn to steer a plane. He was arrested shortly afterward on immigration charges. Moussaoui had trained in bin Laden terrorist camps in Afghanistan, the indictment alleges.
USA Patriot Act, which cleared the Congress and was signed into law by President Bush just six weeks after the Sept. 11 attacks. The new law creates new terrorist-related offenses as well as giving the federal government new powers to conduct surveillance and detain non-citizens (see p. 1034).

Opponents say the new law’s provisions allowing the detention of immigrants are particularly worrisome because non-citizens can be held indefinitely so long as the attorney general believes they threaten national security. “They’ve gone way overboard here because the government can hold someone as long as they like. Period,” says Stephen Henderson, an assistant professor of law at Chicago’s Kent Law School.

But Clifford Fishman, a professor of law at Catholic University, says the new law is necessary to protect the country in a time of war. “This is not some great expansion of government authority,” he says. “And besides, people who come here are still going to be much freer here than where they came from.”

The performance of the news media also has been swept up in the raging post-9/11 civil liberties vs. security debate. Media-watchers of all political stripes have complained that some editors and reporters at times have acted more like patriots than journalists and thus have failed in their “free-press” mission to keep the public fully informed, especially since the war in Afghanistan began.

The debate over the proper balance between liberty and security is as old as the American Republic. In 1798 President John Adams’ Federalist Party passed the Alien and Sedition Acts, which restricted free speech and the rights of immigrants. Enactment of the law produced a storm of criticism and it was largely overturned during the first term of Adams’ successor in the White House, Thomas Jefferson. Similar questions were raised during the Civil War and during both world wars, when the federal government curtailed certain liberties in the name of protecting the nation. (See “Background,” p. 1028.)

As the United States prepares to enter the fourth month of its latest war, here are some of the questions lawyers, national security experts and others involved in the debate over civil liberties and security are asking:

Should the Justice Department monitor conversations between lawyers and defendants in the interest of preventing further terrorist attacks?

For defense lawyers, the ability to communicate confidentially with clients is tantamount to a sacred right. The “attorney-client privilege,” as it is known, “is one of the most significant and oldest rules governing” what is and isn’t admissible in court, says Schwartz of the criminal defense lawyers association. “It’s one of our most cherished and long-recognized rights.”

On Oct. 30, though, the Department of Justice instituted new rules, which took effect immediately, that limit the attorney-client privilege for certain criminal defendants in federal custody. The changes permit the department to listen in on communications between inmates and their lawyers when “reasonable suspicion exists . . . that a particular inmate may use the communications with attorneys or their agents to further or facilitate acts of terrorism.”

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Evaluating the War on Terrorism

In early November, the vast majority of Americans approved of the way top administration officials and major governmental institutions were handling the war on terrorism, but they gave a low rating to the performance of the news media.

Do you approve or disapprove of the way the following people and institutions are handling the war on terrorism since September 11?

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<td>Secretary of State Colin Powell</td>
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<td>Defense Secretary Donald Rumsfeld</td>
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<td>Attorney General John Ashcroft</td>
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<td>Vice President Dick Cheney</td>
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<td>Centers for Disease Control and Prevention</td>
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<td>Homeland Security Director Tom Ridge</td>
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<td>The news media</td>
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Source: The Gallup Organization, Nov. 8-11, 2001
The inmate and attorney would be notified of the monitoring, which would be conducted by a special “taint team” that would disclose only information that might be used to prevent future attacks. Other information, such as discussions of the inmate’s guilt or innocence and defense strategy, would remain confidential and would not be made available to federal prosecutors, the department said. 5

In explaining the new procedure, Attorney General Ashcroft said that given the threats currently facing the nation, the new rules were needed to “thwart future acts of violence or terrorism.” 6 He gave assurances that the power to eavesdrop would be used sparingly, noting that only 16 out of 158,000 federal prisoners are now subject to the special monitoring. 7

Still, many lawyers, lawmakers and civil libertarians immediately condemned the new rule as unnecessary and unconstitutional. They contend that by eliminating the attorney-client privilege for some suspected terrorists the Justice Department has denied inmates both their Sixth Amendment right to an attorney and their Fourth Amendment right to unreasonable search and seizure. *

“A client in a criminal case can’t trust his lawyer and really can’t work with him unless he believes that whatever he’s saying is being said in confidence,” Schwartz says. “So we’re taking away one of the fundamental rights of criminal defendants.”

“It’s absolutely impossible to defend someone if you can’t speak to them in private,” agrees Henderson at Kent Law School. “If someone is listening in, you simply can’t speak your mind, which of course is crucial when planning your defense.”

Opponents also worry that the so-called taint team won’t be able to adequately protect inmates because it may reveal more to Justice Department officials than is proper under the disclosure guidelines. “Look, the problem with this is that the team is made up of Justice Department officials,” Henderson says. “How can an inmate feel confident when the people who are listening work for the same organization as the people who are prosecuting the case?”

In addition, Henderson and others say, there is a means, under the old rules, by which prosecutors can break the attorney-client privilege while still affording constitutional protections. “If you have ‘probable cause’ to believe that [attorney-client] privilege is being exploited to further criminal ends,” says David Cole, a law professor at Georgetown University, “then you can go to a judge and get a warrant to listen in to the conversation.”

Requiring the government to show “probable cause” is more demanding than the “reasonable suspicion” standard required under the new anti-terrorism rule, but it makes it more likely that a breach of the attorney-client privilege will be justified, Cole says.

More important, the old rules give final authority to an independent judge while the new procedure puts the entire decision in the hands of the attorney general, says Neas of People for the American Way. “This change gives the attorney general unbridled powers because he’s become the only real arbiter in this process,” Neas says. “We’ve cast off the role of the judiciary and in doing so have cast off the checks and balances given to us by the founders.”

But supporters of the new powers echo the attorney general, arguing that they are needed to prevent another major terrorist attack. “One thing that we know for sure is that the enemy is planning more and worse attacks,” Fishman says. “The other thing we know is that we didn’t do enough to prevent the Sept. 11 attacks.”

Indeed, supporters of the new rules say, there are many examples of inmates directing criminal activity from prison, making the possibility that terrorists would do the same quite high. “Violent criminals — especially gang members — order murders and attacks from prison all the time,” Scheidegger of the Criminal Justice Legal Foundation says.

Scheidegger, Fishman and others say that the taint team and other safeguards built into the new rules are adequate to protect a client’s right to consult with his attorney in confidence. “We know that there’s always a possibility for abuse or mistakes because there are people involved, and people aren’t perfect,” Fishman says. “But I think that, in general, everything that doesn’t involve plotting a new attack” will still be confidential.

Supporters also argue that the less rigorous “reasonable suspicion” standard is needed because Justice Department officials should have the authority to follow hunches when the fate of the nation is at stake.

“One could imagine a legitimate situation where important information discovered because of a ‘reasonable suspicion’ would not have been discovered using ‘probable cause,’ ” Fishman says. “I’m not happy that the government has to [lower the standard], but I’ll sleep better at night knowing they have more tools to prevent the next attack.”

Is the detention of hundreds of terrorism suspects an overreaction to the events of Sept. 11?

Following the attacks on New York City and the Pentagon, the Justice Department rounded up more than 1,700 people possibly connected to terrorist acts or groups. And while many were released in subsequent weeks, more than 600 remained in custody in early December. 8 In addition, the department is currently engaged in questioning an additional 5,000 recent im-

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* Notably, recent polls have shown that Americans overwhelmingly believe that U.S. citizens charged with terrorism, like Oklahoma City bomber Timothy McVeigh, should be afforded constitutional rights, while non-citizens should not.
migrants who could also be detained. (See sidebar, p. 1029)

The current detainees are mostly male, foreign born and from predominantly Muslim countries like Egypt, Saudi Arabia and Pakistan. According to figures cited by the attorney general on Dec. 7, 563 people are being held for violations of their immigration status and another 60 are in federal custody for other reasons. Of these 60, roughly two dozen are being detained as “material witnesses,” indicating that investigators believe they may have some information about past or future terrorist attacks.

Critics of the detentions say the government initially prevented the detainees from contacting defense attorneys, often for several days. In addition, the government has not revealed the identities of some of those being held, what they are being charged with or where they are being detained.

While polls show that most Americans support the detentions, many civil libertarians and Arab-American advocates point to the stories of those who have been released, as proof of the haphazard and heavy-handed nature of the operation. Countless Arab-Americans now out of prison have told of spending weeks or even months in jail, often based on very tenuous evidence. For instance, two Palestinian-Americans were held for more than two months because a federal agent at an airport in Houston determined that their passports looked like they could have been tampered with. Tests later showed that nothing had been altered and the men were finally released.

But Fishman defends the policy as a necessary element in the government’s efforts to bring those responsible for past attacks to justice and to stop future terrorist acts. Indeed, Fishman and other detention supporters say, the fact that some innocent people may have to spend weeks or even months in jail is a price worth paying, since the detentions may prevent future terrorist activity.

“It’s clearly better to err on the side of sweeping too broadly than not sweeping broadly enough,” Fishman says. “The worst that will happen is that someone will be wrongfully detained for a few weeks or months, and frankly that pales in comparison with the consequences of not detaining legitimate suspects.”

Attorney General Ashcroft alluded to this argument recently when he compared the current detention strategy to Attorney General Robert F. Kennedy’s efforts to snuff out organized crime in the early 1960s.

“Robert Kennedy’s Justice Department, it is said, would arrest mobsters for spitting on the sidewalk if it would help in the battle against organized crime,” he said. “It has been and will be the policy of the Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.”

Supporters also point out that the net is not cast as wide, or as carelessly, as it might at first seem. “It’s important to remember that there are hundreds of thousands of young Arab men in this country right now,” says Orin Kerr, an associate professor at the George Washington University School of Law. “Sure, the government has made mistakes — detaining people they have since let go — but this idea that they’re pulling all of them off the street is incorrect. They’ve arrested only a very small fraction of them.”

Finally, defenders of the policy argue that it is dangerous to second-guess the Justice Department — especially at this early stage in the investigation. “Frankly, it’s hard to know what is and isn’t appropriate because we don’t know what Ashcroft and the others know,” Kerr says.

Fishman agrees. “At this stage we have to trust the people in charge because they have the best information available to make these decisions. The way I see it, we really don’t have a choice.”

But opponents argue that lack of information about the nature of the threat the United States faces is not an excuse for trampling on the civil liberties of hundreds of possibly innocent people.

“Everyone knows we’re going through a troubled and tense time and that the situation is very difficult,” says Neas of People for the American Way. “But that doesn’t mean that we can’t bring some standards and accountability to the process.”

“There needs to be more transparency here,” agrees the Arab American Institute’s Zogby. “The government needs to start showing probable cause for keeping those people they decide to detain.”

Neas and Zogby find the secrecy surrounding the detentions especially troubling. Not only are names and locations not being revealed, they point out, but also no one is really sure that the rights of the detainees are being respected.

“It’s not good enough for the Department of Justice to say, ‘Trust us,’ ” Neas says. “Right now, all of the big decisions are essentially being made by the attorney general, and we don’t know what those decisions are. It’s as if there were only one branch of government.”

“We’ve heard a lot of troubling stories,” Zogby adds, “like some people are being denied access to their lawyer, or detainees have no idea why they’re being held.”

Opponents also contend that the detentions are reinforcing negative stereotypes that all Arab-Americans cannot be trusted and might be terrorists. “This kind of behavior on the part of the federal government is feeding the impression that if someone’s young, Arab and male, they’re guilty,” Zogby says. “I think the Justice Department wants to look like they’re doing something, so they detain a lot of people and go to the American people and say, ‘We have 600 Arabs in jail, so you can feel safer.’ ”

Finally, opponents argue that in a large, open society, the detention —
Military Tribunals Play by Different Rules

These are extraordinary times,” President Bush said after authorizing the creation of secret military tribunals to try suspected terrorists. “And I would remind those who don’t understand the decision I made that Franklin Roosevelt made the same decision in World War II. Those were extraordinary times, as well.”

Military tribunals have a long history in the United States as well as in other countries. Most countries typically try members of the armed forces in a different court system than civilians. And, in times of war, military tribunals have judged civilians and military personnel of other nationalities. Military courts have also substituted for domestic civilian courts in the United States under conditions where the civilian court system could not function.

Neither international nor U.S. law sets procedures for military tribunals. Historically, however, U.S. military courts have provided fewer protections for the accused than civilian courts. Generally, military courts do not require a presumption of innocence, nor do they require a jury of one’s peers or proof of guilt “beyond a shadow of a doubt.” In recent history, U.S. military courts have required only a two-thirds vote of the officers on the tribunal to convict, and there are no provisions for appeal.

Revolutionary War

The first and most notable instance of an American military court passing judgment on a foreign national occurred during the Revolutionary War. Officers chosen by Gen. George Washington convicted British secret agent Major John Andre of collaborating with Benedict Arnold and sentenced him to be hanged. The British government did not object to the use of a military tribunal in judging Andre.

Civil War

During the Civil War, not only was the right of habeas corpus suspended by President Lincoln but also many civilians were judged by military courts. Accused civilians, thus, were denied their constitutionally protected right of a trial by jury, and there was no procedure available for them to challenge the legality of the proceedings.

In 1866, the attorney general of the United States argued that the legal protections established in the Bill of Rights were “peacetime provisions.” But the Supreme Court ruled that the Lincoln administration had no authority to take away civilians’ right to a trial by jury: “[U]ntil recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right — one of the most valuable in a free country — is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The Sixth Amendment affirms that ‘in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,’ language broad enough to embrace all persons and cases.”

World War I

In a case recalling that of Major Andre, a German spy caught near the Mexican border in 1918 was tried in secret by the U.S. Army. Lothar Witzke, a lieutenant in the German Navy, was found guilty and sentenced to hang. In 1920, with the war over, President Woodrow Wilson commuted his sentence to life imprisonment. As it happened, in 1923 Witzke rescued a number of fellow inmates during a prison fire. He was then set free and returned to Germany.

World War II

Two particularly notable uses of military tribunals occurred during the Second World War. In 1942, eight German saboteurs were tried in a secret by a military commission. German submarines had landed them on beaches in Long Island and Florida, and they were captured after one of their party, George Dasch, turned himself in. The government may have used military trials both to ensure conviction and to apply the death penalty, a punishment not available in civilian courts. Six of the eight were convicted and electrocuted on Aug. 8, 1942. Dasch and another defendant who cooperated received prison terms and were released after the war.

Lawyers for the defendants did manage to get their case before the Supreme Court on the grounds that one of the defendants was the son of naturalized American citizens. In its decision, however, the Court held that both citizens and non-citizens lose the protection of the American legal system when they become agents of the enemy in time of war.

Military tribunals also judged foreign nationals at Nuremberg, Germany, after the war. The International Military Tribunal, established by the United States, Great Britain, the Soviet Union and France, indicted and tried 24 former Nazi leaders for a variety of war crimes. Three were acquitted, eight received long prison sentences and the rest were sentenced to death.

While the International Military Tribunal reflected the tradition of Anglo-American civil law, it differed from civilian courts in several critical areas. Most notably, the tribunal did not offer trial by jury. Also, hearsay evidence — evidence provided by those not available for questioning by the defense — was admissible. And there was no way to appeal the tribunal’s judgment.

A similar postwar tribunal in Tokyo tried 25 Japanese nationals for war crimes. Seven were sentenced to hang — including General Hideki Tojo, the prime minister from 1941-44; 16 were sentenced to life imprisonment.

1 Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
2 Ex Parte Quirin, 317 U.S. 1 (1942).
even of several hundred people — is not a very effective way of preventing future terrorist attacks.

"With more than 4 million aliens who have overstayed their visas currently residing in the country, and 5,000 miles of largely unprotected borders, detaining a thousand people probably isn't making too much of a dent in the threat," says Michael Ratner, a lecturer at the Columbia University School of Law and vice president of the Center for Constitutional Rights in New York City. "On top of this, we don't really know if any of these people we've detained are dangerous."

Zogby goes so far as to say the department's strategy is probably backfiring, since it is alienating an ethnic community that might be able to offer all kinds of help in tracking down the real terrorists. "We are loyal Americans, and we want to cooperate with the investigation," he says. "But when you do this, you create so much ill will that people are much less inclined to help."

But Kerr cautions that it is unrealistic to expect that no one will be unjustly detained during what has become the largest criminal investigation in U.S. history. "Look, they've been trying to prevent another attack, using sketchy information, so they're bound to make mistakes," he says. "But that's the price of doing business when you're trying to save thousands, maybe tens of thousands of lives."

**Should the federal government try suspected terrorists in a military court?**

In 1996, Sudan offered to arrest Osama bin Laden and hand him over to Saudi Arabia for eventual extradition to the United States. The suspected mastermind of the terrorist actions of Sept. 11, 2001, ultimately left Sudan a free man, in part because the United States could not convince Saudi Arabia to take him.

But even if the Saudis had cooperated, another obstacle prevented bin Laden's extradition to the United States. "The FBI did not believe we had enough evidence to indict bin Laden [in a civilian court] at that time, and therefore opposed bringing him to the United States," said then deputy national security adviser Samuel R. "Sandy" Berger. 10

The failure to nab bin Laden in 1996 is often cited as a reason for supporting President Bush's plan to set up military tribunals to try foreigners suspected of terrorism. Bush has not said that he will use military courts, only that he wants the option. In addition, the administration has yet to explain how the courts will operate, since the Pentagon hasn't finished drafting operational guidelines for the tribunals, according to William J. Haynes II, the Defense Department's general counsel. 11

Still, if military tribunals are established, they probably would require less rigorous evidentiary standards than a civilian court, allowing prosecutors to offer information against a defendant that would be barred from a traditional trial. For example, the secondhand recounting of a conversation, or "hearsay" evidence, could be used against a defendant in a military court, though such evidence is generally prohibited in federal criminal judicial proceedings.

In addition, evidence culled from classified information could be offered in secret in a military trial in order to protect national security — and defendants could be prevented from challenging the information, even if it led to their conviction.

Moreover, in a military trial, defendants would be denied judgment by a jury of their peers and instead would face a panel made up of American military officers. The usual requirement of a unanimous jury verdict for conviction also would be set aside. Defendants could be convicted and sentenced on a two-thirds jury vote. Appeals would also be limited: Only the Supreme Court could review a verdict.

In the face of domestic and international criticism, President Bush has defended the use of military tribunals as "the absolute right thing to do." 12 Even as the government of Spain announced that it would not hand over terrorist suspects to the United States without assurances that they would be tried in civilian courts, the president insisted that he "must have the option of using a military tribunal in times of war." 13

Douglas W. Kmiec, dean of the Catholic University School of Law, agrees with Bush that revealing classified information at a public trial could severely compromise national security.

"Frankly, we can't always reveal how and what we know and the identities of the people who help provide us with this information in open court," he says.

In addition, Kmiec says, trying terrorists in federal court could put the lives of judges, prosecutors, jurors and others at risk.

"I'd be concerned for my safety if I were on a jury that convicted an Al Qaeda member," he says. "These trials would even endanger the cities they were held in because they might be bombed in retribution for the conviction of a terrorist."

Beyond practical considerations, tribunal supporters say, terrorists simply are not entitled to civilian trials, and the president has complete authority to use military tribunals.

"Foreign terrorists are unlawful combatants, and they do not have a right to civilian trial," says Todd Gaziano, director of the Center for Legal and Judicial Studies at the Heritage Foundation, a conservative think tank. "The Constitution gave Congress the authority to set up a military justice system to deal with military personnel and others in the theater of war, and Congress has delegated the president the authority to use this military justice system."

Supporters also point out that the United States has a long history of using military tribunals during past conflicts to try foreign nationals and that the Supreme Court has upheld their use.
“I would remind those who don’t understand the decision I made that Franklin Roosevelt made the same decision in World War II,” Bush said, referring to the use of military courts to try German nationals who had been caught on U.S. soil in 1942 trying to commit acts of sabotage. 14

But opponents counter that using military tribunals against certain defendants runs counter to American notions of justice and is completely unnecessary. “In no way does this comport with our idea of due process,” says Columbia University’s Ratner. “If we go forward on this, we’ll look back on it as a dark day in American history.”

Ratner is troubled by the fact that much evidence that is inadmissible in a regular court could be used against a defendant in a military trial. “People say that such and such a conversation wouldn’t be admissible in a regular court,” he says. “There’s a reason why it wouldn’t be admissible: It’s unreliable. All of a sudden that doesn’t matter anymore.”

Ratner says it is possible to present classified evidence in open court without jeopardizing national security. “In the 1993 [World Trade Center] bombing case, we used a lot of classified information to help convict the defendants,” he says. “In cases like this, you enter or present the evidence in private and then present a non-classified version of the evidence to the jury.”

In fact, Georgetown’s Cole says, the public trials and convictions of the bombers of the World Trade Center, the two American embassies in East Africa as well as the federal building in Oklahoma City show that it is possible to effectively try domestic and even foreign terrorists in an open, non-military court. “Have we shown that we can’t try terrorism suspects in open court?” Cole asks. “No. The opposite is true, because we’ve already tried horrendous crimes of terrorism in open court, and on more than one occasion.”

Finally, opponents argue that trying terrorism suspects in military courts will make any convictions suspect. “When you have a trial where people are being tried in secret and they are unable to confront the evidence against them, they lack the kind of legitimacy that an open court would give,” Cole says.

This lack of legitimacy will tarnish America’s moral standing in the world and erode its reputation as a nation that respects human rights and the rule of law, according to Judiciary Committee Chairman Leahy. In his view, President Bush’s order “sends a message to the world that it is acceptable to hold secret trials and summary executions, without the possibility of judicial review, at least when the defendant is a foreign national.”

But supporters counter that if handled properly, military courts will not hurt America’s reputation, nor deny defendants their most basic rights.

“This is not going to be some sort of barbaric process, like you see in countries like Peru,” Kniec says. “Our military has a history of following fair guidelines and procedures, and I think that anyone who appears before one of these tribunals will have a fair chance to defend himself.”

Has the press bowed to patriotic fervor and not reported critically on U.S. efforts to fight terrorism?

Some conservatives have joined liberals in complaining that journalists have failed to fulfill their responsibility to properly inform the public. Other media analysts argue that the system is working just as it should.

Critics of the media’s performance point to three major issues. First, the general compliance, and lack of an outcry, when the government asked TV networks to broadcast only limited portions of speeches by bin Laden. Second, critics cite the firings of journalists who have criticized President Bush’s behavior immediately following the incidents of Sept. 11. Third, critics complain of the limited attention paid by the press to policies and legislation, such as the USA Patriot Act, that would potentially infringe on Americans’ civil liberties.

Marvin Kalb, executive director of the Joan Shorenstein Center on the Press, Politics, and Public Policy at Harvard University, believes that some press failings are explained by the fact that immediately after the terrorist attacks, the press responded with patriotic emotion, like the rest of the country.

“Right after Sept. 11, everyone was caught up in a rush of patriotism,” Kalb says. “The idea of criticizing your country was something that most reporters didn’t want to do. And they didn’t. It was a patriotic press.”

Soon, however, Kalb says that the press returned to its proper, questioning role. “Once the bombing began and the Taliban began to fall apart, the coverage changed,” he says. “Before, the reporters were almost totally dependent upon whatever [Defense Secretary Donald H.] Rumsfeld told them. Now reporters are in the field covering the story, seeing it and being exposed to terrible danger.”

Far from being uncritical of the government, reporters are doing their jobs vigorously, some observers say. “I don’t think the press is being too submissive,” says Neil Hickey, editor-at-large at the Columbia Journalism Review. “I’ve talked to eight or nine Pentagon correspondents, and they’re mutinists down there over the problem they’re having of penetrating the Pentagon. The curtain has come down, and the word has gone out that nobody is supposed to talk to them except Rumsfeld, [Pentagon spokesman Rear Adm. John] Stufflebeam and Gen. Meyers, the chairman of the Joint Chiefs of Staff.”

Hickey complains that similar restrictions on access to information are in place overseas. “Foreign editors and newspaper executives are extremely
1776-1864 The new nation struggles to define and protect citizens’ rights, but the government clamps down on civil liberties during the Civil War.

Dec. 15, 1791
The Bill of Rights is ratified.

1798
Congress passes the first Alien and Sedition Act, which restricts immigrants' free speech and other rights.

April 27, 1861
President Abraham Lincoln suspends the right of habeas corpus, allowing the government to hold arrested persons indefinitely without explaining the reasons for detention to the courts.

September 1862
Lincoln orders citizens suspected of disloyal practices to be tried under military jurisdiction.

1870-1922 Economic problems and waves of labor unrest plague the country and state and local officials, often aided by federal resources, use their power to break the unions. World War I brings the threat of foreign influence and domestic agitation.

1886
Labor protests in Chicago lead to the Haymarket bombing and riots in which seven policemen are killed and 70 wounded, along with many civilian casualties. The affair marks the beginning of new actions curtailing the rights of domestic labor and radical groups.

1894
A strike at the Pullman railway car factory in Chicago is broken up by 16,000 federal troops.

March 1917
War Department authorizes Army officers to repress acts committed “with seditious intent.”

1918
Congress passes the Sedition Act, making virtually all criticism of the government and the war effort illegal.

November 1919
In America’s first “Red Scare,” Attorney General A. Mitchell Palmer begins cracking down on individuals and organizations suspected of communist leanings. The so-called Palmer raids reach their climax on Jan. 2, 1920, when federal agents in more than 30 cities arrest 5,000 to 10,000 alien residents.

1941-1945 World War II offers new challenges for domestic and international law.

1941
Japan attacks Pearl Harbor on Dec. 7. Hawaii’s governor places the territory under martial law for three years.

1942
In February, President Franklin D. Roosevelt interns ethnic Japanese on the West Coast.

1945
House Un-American Activities Committee (HUAC) becomes a standing committee.

1950-1975 Red scares return, and America tries to protect itself.

1950

1954
Congress censures McCarthy.

1956
FBI launches COINTELPRO, a secret program of intelligence gathering and disruption of legal organizations in the United States.

2001 Terrorism strikes on U.S. soil.

Sept. 11
Middle Eastern terrorists hijack four civilian airliners. Two crash into the World Trade Center; a third hits the Pentagon and the fourth crashes in rural Pennsylvania.

Oct. 26
President Bush signs the USA Patriot Act, aimed at deterring terrorist acts.

Oct. 30
New Department of Justice rules limit the attorney-client privilege for certain criminal defendants.

Nov. 13
President Bush authorizes military tribunals to try suspected terrorists.

Dec. 6
Attorney General John Ashcroft appears before lawmakers on Capitol Hill to defend the crackdown on terrorism.
Continued from p. 1026

iritate that their reporters have been excluded from contact with those in the staging areas in Pakistan,” he says. Hickey says most reporters also have been excluded from the aircraft carrier Kitty Hawk, from which many of the commando raids have been launched. The exception, he says, was “a tiny [media] pool that is with the Marines in Kandahar — and that consists of an AP guy, a Reuters guy, a still photographer, a TV cameraman and, of all things, a reporter from the Marine Times.”

Other observers criticize the press for being too lax in covering potential threats to civil liberties at home, especially the antiterrorism legislation and the proposed military tribunals.

“Rumsfeld, Ashcroft and Powell keep saying, ‘We are going to protect our basic values,’ while they’re really shredding them,” columnist Nat Hentoff says. “Well, most people don’t see the contradiction. And the press is not illuminating that contradiction.”

Hentoff blames two factors for the limited coverage. First, he says, the pressure of deadlines and the 24-hour news cycle cause reporters to rush material to print without doing as much research as they should. Secondly, he says, “Many reporters and editors don’t know that much about the Constitution, about past precedent.”

Reed Irvine, director of Accuracy in Media, a conservative watchdog group, generally agrees with Hentoff’s assessment. “There’s a tendency on the part of journalists today to accept the word of the government as being the word of God,” Irvine says. “They don’t challenge it. One of the reasons for that, I believe, is that most of the reporters that cover these things are beat reporters. If you’re assigned to cover aviation, for example, you’d better be on good terms with the FAA. You’d better not make people mad at you by revealing that they’ve been lying.”

Hentoff also points to the firing of two journalists — Tom Guthrie of the Texas City (Texas) Sun and Dan Guthrie of the Grants Pass (Ore.) Daily Courier — over columns critical of President Bush as signs of an overly submissive press.

“In both cases, publishers appeared to be responding to furious reader rejection to criticism of the commander in chief in time of war,” Hentoff wrote in a recent column. “Fear had conquered freedom of the press.”

Daily Courier Editor Dennis Roler says that Guthrie’s criticism of Bush for flying around the country instead of immediately returning to the White House in the wake of the Sept. 11 attacks wasn’t the only reason he was fired. Still, Roler felt compelled to write an editorial apologizing for Guthrie’s column, stating, “Criticism of our chief executive and those around him needs to be responsible and appropriate. Labeling him the nation’s other top leaders as cowards as the United States tries to unite after its bloodiest terrorist attack ever isn’t responsible or appropriate.”

Most press observers, however, disagree with the proposition that controversial columns should be vetted. “The antidote to controversial speech is not less controversial speech, it’s more controversial speech,” Hickey says. “Let the public be exposed to a whole range of ideas and let them make up their own minds. The public doesn’t need protection.”

Indeed, throughout America’s history, with the notable exception of racist acts, the greatest challenges to civil liberties have come at the hands of well-meaning politicians and government officials during wartime or in response to other perceived dangers to national security.

The first such acts by federal officials that attracted significant attention were during the Civil War. Southern states began seceding from the Union shortly after, and partly due to, the election of Abraham Lincoln as president in 1860. On April 12, 1861, Confederate forces began firing on Fort Sumter, a Union garrison near Charleston, S.C.

Fully aware that the nation’s capital was surrounded by states sympathetic to the Confederacy — Lincoln even had to enter Washington surreptitiously for his inauguration to avoid the violence of pro-South mobs — the president felt it necessary on April 27 to issue a proclamation suspending the right of habeas corpus. The carryover from English common law requires the government to explain to the court why it is detaining a prisoner and, if the court decides the reason is not sufficient, to free the prisoner.

In one of the more notable incidents, in the fall of 1861 the suspension of habeas corpus was used to detain more than a dozen Maryland legislators who the federal government thought favored secession. They were arrested to prevent them from voting their sentiments.

Lincoln knew the step was of questionable legality. “Are all the laws, but one, to go unexecuted and the government itself go to pieces, lest that one be violated,” Lincoln asked Congress in a special message on July 4, 1861, in an attempt to quiet critics.

Perhaps surprisingly, Lincoln’s suspension of habeas corpus provoked little public outcry. Today, Chief Justice William Rehnquist suggests that

### Background

#### Lincoln’s Action

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding,” wrote Supreme Court Justice Louis Brandeis in a court decision in 1928. 17
Is Questioning Immigrants Fair?

The government’s plan to prevent future terrorist attacks on American soil relies to a large extent on the Justice Department’s ongoing efforts to interview thousands of recent immigrants from the Middle East. But critics charge the plan is unconstitutional and racist.

When the Bush administration began conducting the interviews in early November, it portrayed the operation as an effort to gather information, not a massive dragnet intended to arrest thousands of suspects. “Terrorist activity rarely goes entirely unnoticed,” Attorney General John Ashcroft said on Nov. 29. “Non-citizens are often ideally situated to observe the precursors to, or early stages of, terrorist activity.”

Some 5,000 people who have arrived in the U.S. since Jan. 1, 2000, mostly Middle Eastern men between the ages of 18 and 33, have been asked to voluntarily submit to questioning at their homes.

“We’re being as kind and fair and gentle as we can in terms of inviting people to participate,” Ashcroft said. Indeed, on Nov. 29, the attorney general tried to sweeten the pot by announcing that the government would help those who provide useful information to remain in the country and even become citizens.

The Fifth Amendment to the Constitution protects a suspect’s right against self-incrimination, including the right not to answer questions from police. In addition, the Fourth Amendment protects privacy by prohibiting “unreasonable searches and seizures.”

“The government has the right to ask questions,” said Norman Dorsen, former president of the American Civil Liberties Union. “But people have a right not to answer questions.”

In 1973, the Supreme Court fleshed out the Constitution’s protections against self-incrimination, stating that consent to be searched or answer questions must be “voluntarily given and not the result of duress or coercion, express or implied.”

But some civil liberties advocates worry that a number of factors could make those interviewed feel compelled to cooperate, regardless of their legal protections. For instance, they argue that since all the interviewees are recent immigrants, many could be concerned that the Immigration and Naturalization Service would detain or even deport them depending on whether and how they decide to cooperate. “My sense is that many of these people will only talk to the government because they think they’ll be arrested or deported if they don’t,” says Michael Avery, an associate professor of law at Suffolk University in Boston. “That sounds like coercion to me.”

Others might be intimidated because they feel like they are one of the targets of what has become a massive investigation in the wake of the Sept. 11 attacks, Avery says. “The government is already holding a lot of people, and these folks know it,” he says. “That fact has to be in the back of their minds when they talk to federal officials.”

Opponents also say that targeting Middle Eastern immigrants amounts to racial profiling on a mass scale. “You’re stigmatizing a whole community when you do this,” says James Zogby, executive director of the Arab American Institute.

But others defend the administration’s efforts as well-directed and within the bounds of the law. “Look, we need to cast a wide net and suck in as much information as possible, and these people could be well suited to help us do that,” says Kent Scheidegger, legal director for the Criminal Justice Legal Foundation, a conservative think tank in Sacramento, Calif. “Asking people to come in voluntarily and answer questions is not unconstitutional. It’s what police investigators do.”

Scheidegger also defends the decision to focus on people from Middle Eastern countries. “The terrorist threat is from the Middle East, so you don’t want to waste your time interviewing recent immigrants from Norway,” he says. “It’s appropriate to look a certain group when, as in this case, there’s a substantial connection between national origin and the threat.”

3. Lewis, op. cit.
4. Quoted in Glaberson, op. cit.

this may be because the court opinion that held Lincoln did not have the authority to do so was authored by Chief Justice Roger B. Taney, who was also the author of the infamous Dred Scott decision. Rehnquist notes that the case “inflamed the North and would cast a cloud over the High Court for at least a generation.”

Suspending habeas corpus was not the only violation of citizens’ civil rights. First Amendment protections were also abused. Newspapers that were not sufficiently sympathetic to the Union cause were banned from the mails, which was the major means of delivery at the time.

The New York Times tried to fight the policy by hiring newsboys to deliver it locally. The government ordered U.S. marshals to seize copies of the paper and one newsboy was arrested for selling it.

“Remarkably, other New York papers did not rally round the sheets that were being suppressed,” writes Rehnquist. “Instead of crying out about an abridgement of First Amendment rights — as they would surely do today — their rivals simply gloated.”

Worse still, President Lincoln went much farther than suspending habeas corpus in September 1862 — just a month after the Emancipation Proclamation. He issued a proclamation holding that citizens found “discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels,”
would be subject to trial and punishment under military law. Rehnquist commented that, “Such people faced, in other words, stringent penalties for actions that were often not offenses by normal civilian standards, and faced them, moreover, without the right to jury trial or other procedural protections customarily attending a criminal trial in a civil court.” 21

**Attacks on Labor**

In the years after the Civil War, periodic economic crises were the occasion for federal actions against what were perceived to be radical labor unions that threatened the economic stability of the country.

“Union organization depended on the constitutional freedoms of speech, press and assembly, but employers consistently abridged these rights. Their reliance on espionage, blacklisting, strikebreakers, private police and, ultimately, armed violence, nullified the Bill of Rights for those workers who had the temerity to resist their employers’ unilateral exercise of power,” a historian wrote. 22

Not only did the federal government not do anything to defend the constitutionally protected rights of workers, but on a number of occasions it actually took action against workers.

“During the 1870-1900 period, all of the various techniques used to repress labor were gradually developed and institutionalized by business and governmental elites: the company town, the use of private police, private arsenals and private detectives, the depoliticization of private police, the manipulation of governmental police agencies, the revival of conspiracy doctrine and the labor injunction,” writes Robert Justin Goldstein, professor of political science at Oakland University in Rochester, Mich. 23

During a strike against the Pullman railway car company in 1894, for example, federal troops were sent to Chicago to quell the strike. “Federal troops were also sent to Los Angeles; Sacramento; Ogden, Utah; Raton, New Mexico, and many other areas, especially in the West, and often on the thinnest of excuses,” writes Goldstein. In all, 16,000 federal troops were sent.

“In a number of cases the actions of the troops were so reckless that local officials protested bitterly,” Goldstein notes. “Thus, the Sacramento Board of City Trustees adopted a resolution condemning the tyranny and brutality which has characterized the conduct of the U.S. soldiers who have wounded and assaulted unoffending persons upon the streets,’ and condemned troops for free and unprovoked use of their bayonets and guns and for the reckless woundings of innocent citizens.” 24

**The Palmer Raids**

The threat of world war brought the next wave of federal erosions of civil liberties.

“The story of civil liberties during World War I is a dreary, disturbing and, in some respects, shocking chapter out of the nation’s past,” writes Paul L. Murphy, professor of history and American studies at the University of Minnesota. “Americans, committed through their president, Woodrow Wilson, to ‘make the world safe for democracy’ — a phrase which implied that the nation and its allies bore a responsibility to free the world to adopt America’s traditional ‘liberal’ commitment to liberty and justice — stood by on the domestic scene and saw liberty and justice prostituted in ways more extreme and extensive than at any other time in American history.” 25

As early as March 1917, the War Department authorized Army officers to repress acts committed with “seditious intent.” The guidelines were so vague that abuses were widespread. “Military intelligence agents participated in a wide range of dubious activities, which involved a wholesale system of spying on civilians that would be unmatched in scope until the late 1960s. Military intelligence activities included surveillance of the International Workers of the World (IWW), the Pacific Fellowship of Reconciliation and the National Civil Liberties Bureau, forerunner of the American Civil Liberties Union.” 26

The Sedition Act, passed in May 1918, made illegal virtually all criticism of the government or of the war effort.

The Wilson administration also helped organize the American Protective League, a privately funded organization that was intended to help the government with, among other things, food rationing and investigating the loyalty of soldiers and government personnel.

“The organization quickly became a largely out-of-control, quasi-governmental, quasi-vigilante agency which established a massive spy network across the land,” writes Goldstein. 27

The assault on civil liberties didn’t end with the armistice. The Bolshevik Revolution and the Red Scare that ensued in the United States resulted in a series of further measures.

Under pressure from Congress to take steps against anarchists and communists, Attorney General A. Mitchell Palmer launched a series of raids, which came to be known as “Palmer Raids,” against groups with suspected communist leanings, such as the Union of Russian Workers, the Communist Party and the IWW. Alien residents associated with the groups were arrested and detained while deportation proceedings were conducted. The raids, which began in November 1919, reached their climax on Jan. 2, 1920, when federal agents raided organizations in more than 30 cities and arrested between 5,000 and 10,000 alien residents.
During World War II, barely more than two months after Japanese forces bombed Pearl Harbor on Dec. 7, 1941, President Roosevelt signed Executive Order 9066, which authorized the removal of ethnic Japanese — many of them U.S. citizens — from West Coast communities.

At the time, at least, the action seemed understandable to many. There was widespread fear of Japanese attacks on the coast and of sabotage of critical facilities. And, unlike ethnic Italian and German populations in the United States, ethnic Japanese were not seen as integrated into American society.

“Both federal and state restrictions on the rights of Japanese emigrants had prevented their assimilation into the Caucasian population and had intensified their insularity and solidarity,” writes Rehnquist. “Japanese parents sent their children to Japanese-language schools outside of regular school hours, and there was some evidence that the language schools were a source of Japanese nationalistic propaganda. As many as 10,000 American-born children of Japanese parentage went to Japan for all or part of their education. And even though children born in the United States of Japanese alien parents were U.S. citizens, they were under Japanese law also viewed as citizens of Japan.”

While the internment of Japanese-Americans during World War II has since come to be seen as an injustice, the Supreme Court decided in several cases in 1943 and 1944 that the internment was justified, given the threats facing the country.

Internment was the most dramatic civil rights issue during World War II, but it was not the only issue. In the wake of the attack on Pearl Harbor, the governor of Hawaii placed the islands under martial law and suspended habeas corpus. At the same time, and with Gov. Poindexter’s blessings, Lt. Gen. Walter Short, commander of the Military Department of Hawaii, declared himself military governor of Hawaii.

Short issued a series of ordinances, and violations could and did land many civilians in military rather than civilian courts. The military rule of Hawaii continued for three years until President Roosevelt ordered it revoked.

At the end of World War II, civil liberties advocates were hopeful that the climate was improving. “In July 1945,” writes Goldstein, “the ACLU reported that its caseload had ‘markedly declined’ and that it foresaw its post-war activities as revolving much less around court cases that involved challenges to individual civil liberties. Instead it looked forward to building ‘institutional arrangements to protect civil liberties’ such as fighting monopolistic practices in communications and promoting ‘the wider participation of faculties and students in educational control.’ ”

By August 1947, however, the ACLU reported “the national climate of opinion in which freedom of public debate and minority dissent functioned with few restraints during the war years and after, has undergone a sharply unfavorable change.”

Historians credit two factors with the turnaround. First, there was a wave of labor strikes in 1946, which resulted in a rise of anti-labor sentiment. Secondly, and even more significantly, it became apparent that America was involved in a new kind of war, a Cold War with the Soviet Union. The United States now had global responsibilities, and it had an enemy with global reach. Espionage was a major fear.

The House Un-American Activities Committee (HUAC) was made a standing committee of the House in January 1945. Soon after, a series of spy scares...
Limiting Free Speech Online

When terrorists crashed two airliners into the World Trade Center on Sept. 11, Stuart Biegel tried to reach friends in Manhattan. He couldn’t get through using a telephone or a cell phone, but he was able to reach them via e-mail.

“So much for the Internet being a vulnerable medium,” says Biegel, a professor at the University of California-Los Angeles (UCLA) who specializes in cyberspace law. “The Internet is like water flowing. If it’s blocked from one direction it goes around.”

And it’s not just e-mail that’s circulating on the Web. Americans following events in Afghanistan and the nation’s war on terrorism can find a wealth of information. Neither Osama bin Laden nor the now-deposed Taliban regime have Web sites, but at www.rawa.org readers can read about the heroic efforts of the Revolutionary Association of the Women of Afghanistan (RAWA). In addition to a calendar of protests and press conferences and a history of the organization, a pop-up window on the site hawks RAWA T-shirts and coffee mugs.

Online visitors also can participate in a chat with a journalist just back from CNN’s Web site. (http://www.cnn.com/2001/COMMUNITY/08/24/shah/)

The Internet is coming into its own, much like talk radio, as a public medium for citizens to voice their opinions on the issues. The lively chat rooms maintained by America Online, Yahoo and Microsoft Network feature strong opinions on all sides — but only up to a point.

“Certainly, there were a lot of very strong emotions that were expressed in the days after Sept. 11, which is exactly what our service is designed for,” says Nicholas Graham, a spokesperson for AOL.

Biegel agrees that people seem more inclined to speak their minds on the Internet than in other places, including his classroom. “People tend to feel more comfortable because they perceive anonymity when they take a screen name, and also because they’re doing it in the privacy of their own home,” he says. “I even see this with my students in on-line discussion forums. Some who may not speak out in class are suddenly very articulate in an online discussion forum. They’re not sitting there in a room with everybody around, so they feel more relaxed.”

Discussions have been so lively, in fact, that online services can become offensive to a given community.”

Given the large number of chat groups and messages, however, chaperones or moderators find it very difficult to keep up with the huge flow of messages. Accordingly, most actions by the online services are initiated in response to a user complaint.

Since chat rooms take place in real time, however, monitoring and controlling content is very difficult, as indicated by a Dec. 10 spot check of AOL’s chat room on the World Trade Center. In addition to several instances of extremely vulgar language, there was even a user proposing to drive an armored tank to Washington, D.C.

...Continued on p. 1034

2 Ibid.
Should airports use racial profiling to screen passengers?

CLIFFORD S. FISHMAN
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WRITTEN FOR THE CQ RESEARCHER, DEC. 6, 2001

Airport and airline security in this country — or more accurately, the lack of it — has been an open scandal for decades. On September 11, we paid the price.

Now it is proposed that airport security personnel should "profile" airline passengers from Moslem and Middle Eastern countries for special scrutiny.

To target an entire ethnic group, the overwhelming majority of whom are good, decent, innocent people, because of the crimes committed by a tiny handful of them, is immoral, in most instances illegal and violates fundamental American values.

Nevertheless, in the aftermath of September 11, airport security officials are temporarily justified in doing so, for three reasons:

First, because since 1993, the perpetrators of every terrorist act committed or attempted by foreigners within the U.S. — the World Trade Center car bomb, September 11 and several unsuccessful conspiracies in between — have been from the Middle East, Algeria or Pakistan.

Second, September 11 taught us that failing to prevent terrorists from boarding an airliner can cost thousands of lives and significantly disrupt our way of life.

Third, because we do not yet have in place the resources or personnel to properly scrutinize every individual who boards and every package loaded onto a plane, it would be irresponsible not to focus most of our attention on people who fit the "profile" of those most likely to attempt another September 11.

This justification is temporary, for two reasons: Permanently profiling any group violates our ideals and values. And the next group of hijackers might not fit the profile. They might be from Somalia or Indonesia (where allegedly there are Al Qaeda cells in each country). Or they could be members of Aum Shinrikyo, the Japanese sect that a few years ago released a deadly chemical in the Tokyo subway.

Or they might be "all-American guys" like Timothy McVeigh and Terry Nichols, who blew up the federal building in Oklahoma City. Until adequate security resources are put in place to properly screen everyone, we can only hope that security personnel who "profile" Middle Easterners will act professionally and courteously. Inevitably, though, thousands of innocent, decent people will be singled out unfairly, and many will be harassed and humiliated — and that is an outrage, even though it is temporarily necessary.

Let us pray that those who are singled out or mistreated will have the grace to understand, and to forgive us for the wrongs that will be done to them.

JEAN ABINADER
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WRITTEN FOR THE CQ RESEARCHER, DEC. 10, 2001

In poll after poll taken after September 11, Arab Americans indicated their overwhelming desire to cooperate with the authorities to improve airline security. This desire to cooperate, however, does not justify the rude and abusive behavior by airline crews, ground personnel and security staff.

Many of the improvements in procedures and technology can be implemented in a non-discriminatory fashion. Recommendations ranging from baggage matching to better equipment and training for security personnel can be applied to all passengers equally, thus ensuring greater security without the need to single out passengers because of perceived ethnic origin, or other characteristics such as clothing or accents.

There is a continuing need for airlines to restate their policies against racial profiling, especially to inform and advise passengers and crew that federal and state statutes do not permit "vigilantism," particularly if the person in question has passed the common screening procedures for all passengers.

Perhaps a variation of the "passenger bill of rights" regarding profiling needs to be included in the materials available to passengers in their seat pockets.

Finally, racial profiling presents more complications than solutions. Based on testimony by security officials, profiling does not make a measurable difference in the prevention of crimes, although it is helpful in investigating criminal activities once there has been a crime. This is not to suggest that law enforcement officials should be passive because of ethnic or racial considerations. Rather, it requires that great caution be exercised if racial or ethnic factors are to be included as one of a number of variants that may warrant that a security person investigate further.

Basing security procedures solely on racial or ethnic characteristics leads to discriminatory behaviors by the officials involved and reinforces stereotypes that damage the government's ability to reach out and coordinate its efforts with the affected communities.

We recommend that the government work diligently to improve its screening of all travelers and their belongings. Equally applied procedures and reminders that racial profiling is unhelpful can also be useful in reducing the potential for disruptive behavior by passengers intent on independently assuming the role of air police.

Efforts should also be made to hire more Arab-Americans and American Muslims. Qualified and trained Arab-Americans can be resources to the security services and to the airlines by validating non-discriminatory practices and helping to deal with passengers from Arab and Muslim countries who may feel overwhelmed by enhanced security procedures.

CQ on the Web: www.cqpress.com  Dec. 14, 2001 1033
The anti-communist hysteria resulted in extensive hearings over the next two years by HUAC and its Senate counterpart, the Permanent Investigations Subcommittee. By the time McCarthy was finally censured by his colleagues in 1954, countless careers and reputations had been needlessly ruined.

**COINTELPRO and the Vietnam War**

It wasn’t much of a step from the anti-communist hysteria and blacklistings of the early 1950s to federal actions against suspected domestic radical opponents of the Vietnam War in the 1960s and early '70s. In fact, the most dramatic federal violation of citizens’ civil rights actually began in 1956 when the FBI launched COINTELPRO, a counterintelligence program designed to disrupt what remained of the Communist Party in the United States.

The initial FBI memo that formalized COINTELPRO indicated that the agency would explore a number of tactics to combat communist influences in domestic organizations, including using the Internal Revenue Service to investigate suspected citizens, planting informants and attempting to create dissent within the groups and to disrupt their activities.  

Between 1964 and 1968 alone, the FBI conducted more than 1,000 undercover operations against antiwar, white supremacy, civil rights and other domestic groups.

## CURRENT SITUATION

### USA Patriot Act

Within hours of the Sept. 11 attacks, lawmakers and commentators were calling for Congress to give new powers to the federal government to fight terrorism. And in spite of warnings by civil libertarians and some members of the House and Senate to tread carefully, Congress quickly complied, sending legislation to the president six weeks after the attacks.

Attorney General Ashcroft had asked for a variety of new powers in the weeks after the tragedy. In particular, Ashcroft requested new authority to conduct searches and detain suspects.

Exactly a month after the attacks, the Senate easily passed an anti-terrorism bill that had been crafted by Republican and Democratic leaders that encompassed many of Ashcroft’s proposals. The following day, the House passed its own tougher version. Less than two weeks later, on Oct. 25, the Senate cleared a compromise bill, 98-1. President Bush signed the USA-Patriot Act the next day.

Although the bill was tempered somewhat by more liberal members of Congress, especially Senate Judiciary Committee Chairman Leahy, it gave Ashcroft much of what he had asked for, including provisions that:

- Allow “roving wiretaps” that follow suspects no matter what telephone they use. Old rules required law enforcement officers to acquire a new warrant each time a suspect used a different phone. The provision “sunsets” in 2005.
- Give law enforcement the authority to conduct “secret searches” of a suspect’s residence, including computer files. Authorities can delay telling the suspect of the search for “a reasonable time” if such information would adversely affect the investigation. Previously, law enforcement had to inform suspects of any search.
- Allow the attorney general to detain any non-citizen believed to be a national security risk for up to seven days. After seven days the government must charge the suspect or begin deportation proceedings. If the suspect cannot be deported, the government can continue the detention so long as the attorney general certifies that the suspect is a national security risk every six months.
- Make it illegal for someone to harbor an individual they know or should have known had engaged in or was about to engage in a terrorist act.
- Give the Treasury Department new powers and banks and depositors new responsibilities in tracking the movement of money.
- Allow investigators to share secret grand jury information or information obtained through wiretaps with government officials if it is important for counterintelligence or foreign intelligence operations.
- Allow authorities to track Internet communications (e-mail) as they do telephone calls.

While not entirely happy with the new law as written, many civil libertarians and others applauded Congress for not including all of the provisions requested by the attorney general. For instance, under Ashcroft’s initial proposal, evidence obtained overseas in a manner that would be illegal in the United States would still have been admissible in an American court if no laws had been broken in the country where the evidence was gathered.

“So if you had a wiretap in Germany that would have been illegal here, but is legal there, the evidence would have been admissible here,” law Professor Henderson says. “Congress said ‘no way’ and tossed that out.”

And yet, Henderson and George-town’s Cole argue, even though it doesn’t contain some of the most
troubling provisions proposed by the Justice Department, the bill still goes too far. They particularly object to those parts of the law that allow the government to detain and deport or hold immigrants.

“I think the most radical provisions are those directed at immigrants,” Cole says. “Under this law, we impose guilt by association on immigrants. We make them deportable not for their acts but for their wholly innocent associations with any proscribed organization and you’re deportable.”

But George Washington University’s Kerr argues that the Patriot Act does not, as critics contend, go too far. “Overall, I think this is a very balanced act, giving the government just what it needs in this fight,” Kerr says. “I’m actually impressed at how narrowly tailored this language is. The administration could have gotten even more authority, but they asked just for what they needed.”

“It’s a gross overreaction to say that this new law is going to take away vital freedoms. It gives the government a bit more power than it had.”
— Professor of Law Clifford Fishman, Catholic University

We have a long history of overreacting during times of crisis, whether it be the Alien and Sedition Acts or the internment of the Japanese during World War II,” says Neas of People for the American Way. “After a while, we usually look back at those actions and realize that they were a mistake, and I think that’s what will happen here.

“Congress put sunset provisions in the Patriot Act for a reason. But I wouldn’t be surprised if popular pressure forced the government to sunset the law and some of these other changes before five years passed.”

Schwartz of the criminal defense lawyers’ association agrees that after the initial shock of the attacks wears off, Americans will want the government to relinquish the new powers it has acquired. “The American people are not going to let the government burn the Constitution in the name of fighting terrorism,” he says. “Look at the Congress and the press: They’re already challenging the administration on many of its policies. This, only three months after attacks.”

But others, on both sides of the civil liberties debate, say that the terrorist attacks on New York and Washington have thrust the United States into a long struggle, similar to the Cold War, and that new limits on freedoms could remain in place for years.

“Everything is different now,” says Columbia University’s Ratner. “The fact that serious people are now talking about using torture means that the [civil liberties] bar has been lowered...
dramatically since Sept. 11, and I don’t see it being raised any time soon.”

“Unless there are very visible abuses of this new authority, I doubt there will be a groundswell of support for repeal of these new powers any time soon,” agrees Catholic University’s Fishman. He points out that most people supported giving the government more crime-fighting authority even before Sept. 11, because they don’t see the changes as a direct threat to their personal freedom. “They say, ‘I’m not a criminal so I have no problem with the government taking more power to get the bad guys.’ ”

In addition, Fishman says, new terrorist attacks would make Americans even more supportive of tough, new measures to fight terrorism. “Another great disaster would further solidify opinion behind these changes.”

But Scheidegger of the Criminal Justice Legal Foundation predicts only modest changes in future U.S. civil liberties. “There’s always this great push for new authority when something dramatic happens,” he says, “and then things always settle down and we take it back a little. While I don’t think we’ll go back to where we were before Sept. 11, I also don’t think the long-term changes will be as far-reaching as it might appear they’ll be right now.”

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**FOR MORE INFORMATION**


American Civil Liberties Union, 122 Maryland Ave., N.E., Washington, D.C. 20002; (202) 544-1681; www.aclu.org. The ACLU initiates court cases and lobbies for legislation with the aim of protecting civil liberties.


Criminal Justice Legal Foundation, P.O. Box 1199, Sacramento, Calif. 95816; (916) 446-0345; www.cjlf.org. Advocates victims’ rights and a strengthening of the ability of law enforcement to fight crime.


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5 Ibid.
7 Ibid.
9 Goldstein, op. cit.
14 Quoted in Ibid.
17 Olmstead v. United States (1928), 277 U.S. 438 at 479.
19 Ibid., p. 45.
20 Ibid., p. 47.
21 Ibid., p. 60.
24 Ibid., p. 55.
26 Goldstein, op. cit., p. 110.
27 Ibid., p. 111.
29 Goldstein, op. cit., p. 287.
31 Goldstein, op. cit., p. 407.
Books


Goldstein, a political science professor at Oakland University, details the history of repressive actions against U.S. citizens, especially the little-covered actions against labor unions in the late 1800s and the early 1900s. Includes extensive footnotes and a lengthy bibliography.


Linfield, a Los Angeles attorney, chronicles the dangers to civil liberties during wartime, with special focus on actions during the Revolutionary War.


A professor of history and American studies at the University of Minnesota readably explores the severe erosion of Americans’ civil rights during World War I and the Red Scare afterwards.


This readable work by the chief justice of the United States deals heavily with the Civil War and its aftermath and the Japanese internments during World War II, paying close attention to Supreme Court actions.

Articles


Glaberson details the debate over the administration’s proposed use of military tribunals.


Goldstein looks in detail at the government’s detention of potential terrorism suspects.


A Supreme Court reporter argues that President Bush’s recent steps in the war against terrorism are consistent with those taken by his predecessors in similar situations.


Lardner explains the Justice Department decision to monitor attorney-client communication when the defendants are suspected terrorists.


The article chronicles the legislative course of the U.S.A. Patriot Act and details its provisions.


A noted federal judge urges Americans not to overreact to possible curtailing of freedoms as the government gears up to combat terrorism.


The conservative columnist argues that military tribunals are a tragic mistake. “Intimidated by terrorists . . . we are letting George W. Bush get away with the replacement of the American rule of law with military Kangaroo courts,” he writes.


In the past few weeks, Ashcroft has led such an aggressive campaign to stamp out subversion that even old-time G-men are wondering whether the attorney general is trying too hard to fill the shoes of the late J. Edgar Hoover.


Toner examines recent steps to strengthen government authority in the fight against terrorism in light of historical precedent as well as popular attitudes.


More than 1,200 people have been detained in the probe into the attacks on the World Trade Center and the Pentagon, and 548 of them are illegal aliens, most of them young Muslim men, who likely never would have come to the attention of immigration officials had they not been scooped up by the FBI.

Reports and Studies


The conservative think tank argues that military tribunals make sense and are probably constitutional.
Attorney General John Ashcroft

“An ‘Unapologetic’ Ashcroft; Tough and unrepentant, the attorney general defends the nationwide dragnet and puts terrorists on notice,” Newsweek, Dec. 10, 2001, p. 46.

John Ashcroft has emerged as one of the Bush administration’s most forceful — and controversial — voices on bringing terrorists to justice. In an interview with Newsweek, he explained the new policies — but made no excuses.


Eleven weeks after the terrorist attacks in New York and Washington, an expanding coalition of lawmakers and civil liberties groups is complaining that Attorney General John D. Ashcroft’s campaign against terrorism has gone too far.


Just a year ago, John Ashcroft’s future looked grim. But since Sept. 11, he has emerged as perhaps the most powerful attorney general of modern times.


In forceful and unyielding testimony, Attorney General John Ashcroft defended the administration’s array of antiterrorism proposals and accused some critics of providing “ammunition to America’s enemies.”

Detainees


More than 1,000 people have been detained, most on immigration charges. Now the Justice Department has asked law-enforcement officers across the country to pick up and question 5,000 men, most of Middle Eastern origin.

Cloud, John, et al., “Hitting the Wall: A TIME probe shows why so many have been detained in search of just a few,” TIME, Nov. 5, 2001, p. 65.

Under the new law, those individuals designated as suspected terrorists can be held for questioning for up to seven days.


The Justice Department has quietly expanded its power to detain foreigners, letting the government keep a foreigner behind bars even after a federal immigration judge has ordered him to be released for lack of evidence.


In the nearly eight weeks that he was detained on immigration charges, Ali Al-Maqari was screamed at by federal agents, lied to and cut off from his lawyers, according to testimony before the Senate Judiciary Committee.


Ashcroft’s office told Congress it would continue to withhold the names of detainees, saying to do otherwise would compromise their privacy and potentially hamper the investigation. But it is also possible that Justice officials are as confused as everyone else about a definitive list.


Nearly eight weeks into this country’s largest criminal investigation, most of those detained remain in custody, but no one has been charged with conspiracy in the Sept. 11 attacks.

Military Tribunals


The country wants very much to be supportive of the war on terrorism and is finding it hard to summon up much outrage over military tribunals, secret detentions or the possible mistreatment of immigrants from the Mideast.

Alter, Jonathan, “Keeping Order In The Courts; Military trials for terrorists are inevitable. But Bush can’t be the only one with a gavel,” Newsweek, Dec. 10, 2001, p. 48.

When Attorney General John Ashcroft sent the secret first draft of the antiterrorism bill to Capitol Hill in October, it contained a section explicitly titled: “Suspension of the Writ of Habeas Corpus.” It might as well have been called: “Suspension of the U.S. Constitution.”


President Bush’s order allowing military tribunals to try accused terrorists sets the stage for something not seen since World War II: an emergency legal system designed to bring swift judgment, using rules that make convictions easier but deeply worry civil libertarians.


Before a cheering crowd in Florida, President Bush said today that he needed military tribunals and other legal weapons to protect Americans.

Top administration officials defended a presidential order allowing military tribunals to try foreigners charged with terrorism as the Pentagon prepared for the potential transfer of immigrants detained by the Justice Department into military custody.


Do the Bush measures bend the law? Of course they do. But law is designed to punish past crimes. Unfortunately, we are at war. And in wartime, the imperative is to prevent the enemy from perpetrating future crimes.


The issues surrounding military tribunals cut to the essence of what standards of justice are appropriate in a global war against terrorism.


Do the ends — speedy, secure trials that protect classified intelligence — really justify the authoritarian means? Bush administration lawyers answered yes, without a lot of debate.

Racial Profiling


Police chiefs across the nation are torn between a desire to assist the investigation of the Sept. 11 attacks by interviewing thousands of Middle Eastern men and a concern that the plan seems like racial profiling.


We can neither prove nor prevent racial profiling by playing the numbers game. It is a fact that we all indulge in some profiling. The question is whether it leads to unwarranted behavior.


Beginning this month, there will be new ammunition in the long-running battle between Los Angeles police and civil libertarians over racial profiling: 750,000 paper slips.


Ron Arnold understands racial profiling. “I’m a black American, and I’ve been racially profiled all my life,” said Mr. Arnold, a 43-year-old security officer here, “and it’s wrong.”

But Mr. Arnold admits that he is engaging in some racial profiling himself these days, casting a wary eye on men who look to be of Middle Eastern descent.

USA Patriot Act


The anti-terrorism bill passed by the House of Representatives yesterday expands law enforcement’s power to monitor Americans on the Internet, on the phone and in their homes, leading some groups to complain that the government is sacrificing too much liberty in exchange for security.


We traded many civil liberties for increased police powers when President Bush signed the USA Patriot Act.
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