

Testimony of

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November 18, 2003

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American Civil Liberties Union

Testimony at a Hearing on

"America after 9/11: Freedom Preserved or Freedom Lost?"

Before the

Senate Judiciary Committee

Submitted by

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Chairman Hatch, Senator Leahy and Members of the Committee:

On behalf of the American Civil Liberties Union and its over 400,000 members, dedicated to defending the Bill of Rights and its promise of due process under law for all persons, I welcome this opportunity to present the ACLU's views at this hearing on the impact of federal anti-terrorism efforts on civil liberties since September 11, 2001.

I commend Chairman Hatch and Senator Leahy for coming together to look at whether, in our efforts to preserve freedom by fighting terrorism, we have given up too much of it. This country needs exactly this public discussion, and I feel privileged to play a role, as a leader of the ACLU, in challenging the government to see its role as preserving our rights and our system of checks and balances while it ensures our safety.

America faces a crucial test. That test is whether we -- the political descendents of Jefferson and Madison, and citizens of the world's oldest democracy -- have the confidence, ingenuity and commitment to secure our safety without sacrificing our liberty.

For here we are at the beginning of the 21st century, in a battle with global terror. Terrorism is a new and different enemy. As a nation, we learned this on September 11, 2001 when a group of terrorists attacked us here at home, and within the space of minutes murdered nearly 3,000 of our fellow Americans and citizens of other nations, innocent civilians going about their everyday lives.

ACLU lawyers and activists can never forget that day. Our national offices in New York and near the Capitol in Washington were evacuated. John William Perry, a New York Police Department officer and Board Member of the New York Civil Liberties Union, volunteered to assist employees escaping the World Trade Center on September 11, 2001, and himself became a victim. We pledged on that day to support President Bush in the battle against terror, while standing strong against any efforts to use the attacks to abridge civil liberties or our system of checks and balances.

We must be ready to defend liberty, for liberty cannot defend itself. We as a nation have no trouble understanding the necessity of a military defense. But there is another equally powerful defense that is required, and that is the defense of our Constitution -- the defense of our most cherished freedoms.

Put aside our popular culture which changes by the day, and our material success which is now vulnerable to the vicissitudes of the global economy -- strip away all that is truly superficial. What is left that distinguishes us if not our constitutional values? These values -- freedom, liberty, equality and tolerance -- are the very source of our strength as a nation and the bulwark of our democracy. They are what have permitted us to grow abundantly, and to absorb wave after wave of immigrants to our shores, reaping the benefits of their industrious energy.

Now, we are in danger of allowing ourselves to be governed by our fears, rather than our values. How else can we explain the actions of our government over the last two years to invade the privacy of our personal lives and to curtail immigrants' rights, all in the name of increasing our security?

Congress must step in - now - to preserve the freedoms that have been eroded since September 11, 2001.

PATRIOTISM AND GRASSROOTS DISSENT

Mr. Chairman, when Attorney General Ashcroft appeared before this Committee shortly after September 11, he accused the ACLU and other defenders of civil liberties of aiding the terrorists and weakening America's resolve with our criticism of some government policies. It was a statement profoundly unworthy of the Office of Attorney General.

Mr. Chairman, by holding this hearing, and by extending the ACLU an invitation to testify, you have acted in the best traditions of the Senate. Mr. Chairman, I know we disagree about some aspects of the USA

PATRIOT Act and some other important civil liberties issues. I hope to convince you and other Senators that some revisions are in order.

Before I describe the freedoms lost since September 11, 2001, and the clear abuses of civil liberties that have taken place, I would like to set the record straight on a few things that have been said about the ACLU and its supporters.

Since September 11, 2001, the ACLU has been privileged to be an important part of a remarkable grassroots movement to defend the Bill of Rights. Resolutions have been passed in 210 communities in 35 states, including three state-wide resolutions.

The resolutions have passed in towns from Maine to Alaska, from New York to Texas. They have attracted support in liberal strongholds, like Berkeley, California, and in small towns in Utah, Idaho, and Alaska - three of the most conservative states in the Union. The resolutions are the most visible symbol of a growing movement that is perhaps most notable for uniting allies across the political spectrum - from the ACLU and its liberal allies like People for the American Way and MoveOn.org, to some of the nation's most important member-based conservative organizations: the Free Congress Foundation, Americans for Tax Reform, and the Gun Owners of America. Our campaign has included closely working with former Congressman Bob Barr (R-GA), a Board Member of the National Rifle Association. I am pleased to share the witness table with Congressman Barr today.

The resolutions take issue with portions of the PATRIOT Act and many other government actions, including Executive Orders and regulations undermining the right to counsel, the right to a jury trial, and the rights of immigrants. Hundreds of thousands of Americans have written their elected representatives to express their views about these issues, and to urge Congress to take corrective actions.

Some have accused these engaged citizens, who are acting in the best tradition of Thomas Jefferson, of being naïve, misinformed, even ignorant. On the contrary, while the arcane details of these issues can flummox the finest legal minds, I have found our supporters to be remarkably well informed.

This is a movement based on knowledge, not ignorance.

Many have read the PATRIOT Act closely and have studied what its defenders have to say. They have also followed the debate around other government powers, including attorney-client monitoring, immigrant registration and detention, and FBI guidelines governing investigations of religious and political groups.

There is no doubt that both PATRIOT Act detractors and defenders alike have sometimes had difficulty wading through the arcane details of the Foreign Intelligence Surveillance Act and other complex federal laws amended by the Act. It does not help matters when spokespersons for the Department of Justice (DOJ) make misleading and inaccurate statements about the PATRIOT Act - such as that "U.S. citizens cannot be investigated under this act" or that "the standard of proof before the [Foreign Intelligence Surveillance Court] is the same as it's always been."

Ordinary Americans are profoundly troubled by the government's policies. They do not believe America's system of checks and balances, including meaningful judicial review of surveillance and detention, represent "unreasonable obstacles" to law enforcement, as President Bush and Attorney General Ashcroft have argued.

Rather, they see judicial review, and meaningful standards for government surveillance and detention, as essential bulwarks against abuse. They view judges as partners - not obstacles - in the war on terrorism.

The online satirical publication, the "Onion," recently had this headline: "Revised Patriot Act Will Make It Illegal to Read Patriot Act." The serious point is that the more Americans learn about the government's

actions since September 11, the more they say the government went too far, too fast. Thankfully, we do live in a country where people can go to the source, read the law and make up their own minds.

LISTEN TO THE PEOPLE

Many members of Congress, from right to left and in between, have heeded their constituents' calls to look at the PATRIOT Act, and other post-9/11 government actions, evaluated arguments for and against, and have decided to bring some of these powers back in line with constitutional freedoms. Congressman Butch Otter (R-ID) and Bernie Sanders (I-VT), and Senators Larry Craig (R-ID), Richard Durbin (D-IL) and Russ Feingold (D-WI) have joined forces to revise the PATRIOT Act.

Americans are concerned because the PATRIOT Act put in place statutory authority for the government to get a court order to come into your home without your knowledge and even take property without notifying you until weeks or months later. Americans are concerned because the PATRIOT Act allows the government to obtain many detailed, personal records - including library and bookstore records, financial and medical records, and Internet communications - without probable cause and without meaningful judicial review. For those records that may be obtained using "national security letters," there is no judicial review at all. Americans are concerned because the PATRIOT Act - as well as changes to immigration regulations since 9/11 and the President's claimed authority to detain "enemy combatants" - all sanction indefinite detention without criminal charge and without meaningful judicial review.

Some have dismissed these concerns, saying the government has not used some of these anti-terrorism powers, or has used them appropriately. In fact, as we informed members of this Committee prior to its last hearing, there has already been evidence of widespread and systematic civil liberties abuses of non-PATRIOT powers in the area of detention, both of citizens and non-citizens. There is anecdotal evidence of excessive government surveillance and other overreaching under the PATRIOT Act. Unfortunately, the Administration's excessive secrecy prevents the American people from getting an adequate picture about its use of PATRIOT Act surveillance powers.

What the ACLU can say for certain is that these and other powers make abuses far more likely because they remove the checks and balances that prevent abuse. Excessive power has, throughout our history, inevitably been used excessively.

Some have dismissed concern about an expanded PATRIOT Act - dubbed PATRIOT II - as misinformed, saying that the draft legislation that provoked a firestorm earlier this year was never introduced. In fact, many provisions of this draft legislation have been introduced separately, including bills to sweep aside the last vestiges of prior judicial review from FBI records demands (H.R. 3037), to require automatic pretrial detention for certain crimes (H.R. 3040 and S. 1606), and to expand the death penalty to include any crime that fits the PATRIOT Act's overbroad definition of terrorism (H.R. 2934 and S. 1604).

As reported in the New York Times just last week, a major expansion of the FBI's powers to obtain records without any judicial review was attached to this year's Intelligence Authorization Act. Constituents are right to be concerned about an expanded PATRIOT Act. Part of it will - unless removed by the conference committee - become law this year.

Some have dismissed concerns about immigrants' rights, including the selective fingerprinting and registration of visitors from the Arab and Muslim world under the National Security Entry-Exit Registration System (NSEERS), also known as special registration. This program is seriously damaging the image of the United States abroad and, as a result, hindering international cooperation against terrorism.

Special registration is again creating havoc in Arab and Muslim communities as the deadlines for re-registration approach. The ACLU has discovered that immigration authorities gave many who registered confusing and woefully inadequate notice of their obligations - including the requirement that they register

their departure and that they re-register annually. Those who were given inadequate or no notice are at risk of falling afoul of their status through no fault of their own.

AMERICAN FREEDOMS LOST AFTER SEPTEMBER 11

The specific freedoms that have been abridged - by the PATRIOT Act and by other government actions - often involve technical and complex changes to surveillance laws, detention regulations, and government guidelines. However, they share common themes. The government's new surveillance and detention powers have undermined important checks and balances, diminished personal privacy, increased government secrecy, and exacerbated inequality.

Checks and Balances. At bottom, the issue with respect to all these powers - PATRIOT Act and non-PATRIOT Act alike - is the removal of basic checks and balances on government power. The genius of our founding fathers was to design a system in which no one branch of government possessed all power, but instead the powers were divided among legislative, executive and judicial branches.

The government's actions since September 11 have undermined this system. Prior to September 11, the government had ample power to investigate, detain, convict and punish terrorists, with meaningful judicial review. The changes have made that review less meaningful.

It is a myth to say that prior to September 11, the government could wiretap organized crime suspects but not terrorist suspects. In fact, the government has always had far greater powers to wiretap foreign terrorist suspects, because it could use either its criminal or its intelligence powers to do so. The PATRIOT Act simply enlarged further the already loose standards for both kinds of wiretapping.

It is a myth to say that prior to September 11, the government was prevented by the Foreign Intelligence Surveillance Act from sharing information acquired in intelligence investigations with criminal prosecutors. In fact, it could do so, under procedures designed to ensure the intelligence powers were not being abused as a prosecutorial end-run around the Fourth Amendment. The PATRIOT Act did not authorize such information sharing - it was already legal. Rather, the Act reduced the judicial oversight designed to prevent abuses of information sharing.

It is a myth that the government lacked adequate power to detain terrorist suspects. In fact, the government could, and did, detain many terrorist suspects prior to September 11 using both immigration and criminal powers. Indeed, President Bush joined the ACLU in criticizing the use of secret evidence against some Arab and Muslim immigration detainees under the Clinton Administration. The PATRIOT Act, and government changes to detention regulations, did not authorize detention of terrorism suspects. Rather, it made immigration hearings and judicial review of those detentions far less meaningful.

It is a myth that the government could not effectively prosecute foreign terrorists without revealing classified information. The Classified Information Procedures Act has long been on the books to protect the government's secrets while ensuring a fair trial, and prosecutors of prior Al Qaeda plots have said the Act worked well to protect both the rights of the accused and the national security interests of the government. The President's military tribunals order was not needed to safeguard classified information. Rather, its effect was to substitute a commission subject to Defense Department control for an independent judge in running terrorism trials.

It is a myth that the government could not listen to the conversations of attorneys who betrayed their profession by abusing the attorney-client privilege to implicate themselves in their clients' ongoing criminal acts. The government could always obtain a court order, based on probable cause, to listen in to conversations that lacked the protection of the attorney-client privilege. The monitoring regulation was drafted to evade that requirement of judicial oversight.

Understanding how these actions undermine checks and balances illustrates the sophistry of one of the government's main defenses of its post 9-11 actions. Government officials point out that courts have not struck down many of their actions - but their actions are a threat to liberty precisely because they are calculated to undermine the role of the courts, diminishing their oversight of government action.

The defense that courts have not struck down these court-stripping measures reminds me of the old cliché of the man who murdered his parents and pleaded for mercy on the grounds he was an orphan.

Personal Privacy. The right of privacy, Justice Brandeis said, is that most simple and most important of freedoms - the right to be left alone. The PATRIOT Act and other legislation, coupled with new investigative guidelines, have eroded this right alarmingly. I will discuss just two - new records powers under sections 215 and 505 of the Act, and "sneak and peek" searches under section 213 of the Act.

Under section 215 of the PATRIOT Act, the government may now obtain any and all records, no matter how sensitive or personal, with a "business records" order from the Foreign Intelligence Surveillance Court, which sits in secret and has denied or modified a grand total of six out of more than 15,000 surveillance orders sought in a quarter century. Under section 505 of the PATRIOT Act, the FBI has now has broader power to use what are called "national security letters" to obtain some records - including records of financial institutions, credit reports, and billing records of telephone and Internet service providers - on its own authority, without any court order at all.

National security letters and records demands under section 215 are not made in the course of ordinary criminal investigations, which involve grand jury subpoenas, search warrants, and other longstanding government powers; rather, they are intelligence powers that do not require any criminal wrongdoing on the part of those being investigated.

Before the PATRIOT Act, the government was required to show "specific and articulable facts" that the records it sought in intelligence investigations (whether through a "business records" order or a national security letter) pertained to a spy, terrorist, or other agent of a foreign power. As a result of sections 215 and 505, that is no longer the case - now anyone's records may be obtained, regardless of whether he or she is a suspected foreign agent, as long as the government says the records are sought for an intelligence or terrorism investigation. The effect is to put the privacy of many more Americans at risk. The record holder must comply with these records demands, and is prohibited from informing anyone - the person whose records were obtained, the press, or an advocacy group like the ACLU - that they have turned over these records.

Section 213 of the PATRIOT Act substantially lowered the standard for government agents to come into your house, look around, and even take property. These "sneak and peek" warrants no longer require, as they did in some circuits, that notice be given within seven days - an indefinite "reasonable time" is the new standard. Nor do they require the government to show specific harms from notice, instead also permitting the government to get a delay under a catch-all provision that applies whenever harm to the prosecution may result.

As a result of this provision, the government has acknowledged using these warrants to invade dozens of homes and businesses without providing notice for as long as three months. The government has sought to delay notice in these cases over 200 times.

While sold as a terrorism power, this provision has little to do with terrorism. In answering questions from Congress on how this provision was being used, the Justice Department cited ordinary criminal cases - from drugs to crime - to justify these searches.

Government Secrecy. The American tradition of open government has suffered a severe blow as a result of the government's post 9-11 actions.

The Justice Department's guidance to federal agencies on implementation of the Freedom of Information Act (FOIA) prior to September 11 included a basic affirmation of the policy of open government the Act embodies, urging agencies to comply with FOIA requests absent a good reason. Shortly after September 11, the Attorney General issued a memorandum to all federal agencies reversing that presumption of openness and pledging the Justice Department's support for denial of FOIA requests.

Reform policies governing classification and declassification of government secrets have suffered a similar blow. On March 25, 2003, President Bush issued Executive Order 12958, which continued classification of many historical documents and reverses a presumption against excessive classification for new documents in President Clinton's prior Executive Order. The new Order flies in the face of findings of the Senate and House intelligence committees that excessive classification may have contributed to the intelligence breakdowns that contributed to the September 11 attacks. Former chairman of the Senate Select Committee on Intelligence, Senator Bob Graham (D-FL), criticized the move, saying "this administration is being excessively cautious in keeping information from the American people."

Perhaps the most dramatic example of unwarranted secrecy has been the government's secret arrest and deportation of hundreds of Muslim and Arab immigrants after September 11. The Justice Department refused to identify the detainees, arguing that to do so might jeopardize national security and tip its hand to terrorists. The secrecy was alarming and, after our repeated requests for basic information about the detainees were denied, the ACLU filed a federal lawsuit seeking names under the Freedom of Information Act.

Then, in a further effort to deny information to the public and press, the Justice Department closed all immigration hearings involving the September 11 detainees. Twice more, the ACLU went to court -- with lawsuits arguing that transparency and accountability are essential to the workings of democracy. In an eloquent decision, a three-judge panel of the United States Court of Appeals in Cincinnati unanimously declared that secret deportation hearings were unlawful. "A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution," Judge Damon Keith wrote. He further noted that "democracy dies behind closed doors."

That was a clear victory for civil liberties and stands today, as the government chose not to seek Supreme Court review in that case. However, in the second lawsuit, the federal appeals court in Philadelphia sided with the government's position in a 2-1 ruling. The Supreme Court has declined to hear that case.

The ACLU's actions, however, have not been limited to the legal arena. Concerned that the secret hearings were a cover for civil liberties abuses, we initiated an ambitious effort to identify the people affected. We sent letters to the U.S.-based consulates and embassies of ten countries offering legal assistance to innocent people caught up in the government's crackdown on terrorism.

Then in the spring of 2002, the ACLU extended its investigations abroad. Working with the Human Rights Commission of Pakistan (HRCP), we located 21 detainees who had been forcibly removed to Pakistan, or who had left the U.S. voluntarily to avoid indefinite detentions. The interviews were heart-breaking. Before their detentions, these people were indistinguishable from previous generations of immigrants who had come to our shores. They had been salesmen, housewives, and cab drivers with children and homes in America, grateful to be in a country where they could achieve a better life and live in freedom.

Their detention put an end to all that. They described the anxiety-ridden days, which turned into weeks, and then into months -- culminating in deportation. Few had been charged with crimes, and many had been deprived of access to counsel. In some cases, the U.S. government ignored the citizenship rights of spouses or even children born in this country. Back in Pakistan, these American children, unable to speak the local language, were miserable and failing at school. The plight of these families was featured on CNN, National Public Radio and on the front page of The New York Times.

The ACLU's concerns about the treatment of September 11 detainees were vindicated by a highly critical report released this year by the Office of Inspector General of the Department of Justice, finding that detainees were effectively denied access to counsel and languished in jail for months without legal justification. Excessive secrecy clearly contributed to the abuse of the rights of hundreds of Arab and Muslim immigrants and visitors. More sunlight could have prevented many of those abuses from taking place.

Increasing Inequality. "Equal Justice Under Law" is the motto inscribed above the Supreme Court building, but the legal system's treatment of the Arab and Muslim community in this country since September 11 has been separate, unequal and wrong.

Military detention of both citizen and non-citizen Arab and Muslim terrorism suspects stands in stark contrast to the treatment of homegrown terrorists like Timothy McVeigh. Arab and Muslim non-citizens - who enjoy the protection of the Bill of Rights no less than citizens - are facing what amounts to an entirely new legal system, with basic due process suspended. Not only do they face potential trial before special military tribunals - with access to counsel and information limited severely, unlike ordinary military courts - they can be whisked away without a hearing to face injustice in the legal netherworld of Guantanamo Bay, Cuba, or to detention and interrogation by governments with some of the worst human rights records in the world.

Recent reports indicate profoundly disturbing, and possibly criminal, United States collusion with regimes that practice torture, including Syria and Saudi Arabia. Maher Arar, a Canadian citizen, was detained by United States authorities in a New York airport while en route to his home in Canada, then sent to Syria, where he was held and, he alleges, tortured by the Syrian secret police. These allegations of torture, with the consent and possible encouragement of the United States, must be thoroughly investigated.

Many more Arab and Muslim non-citizens who have not faced the harrowing ordeal of detention without due process have had to undergo a demeaning registration process that is doing more to tarnish America's image abroad, and inhibit international cooperation, than any amount of money spent on public diplomacy could wash away. The Department of Homeland Security is continuing the INS' immigrant tracking program known as the National Security Entry Exit Registration System (NSEERS), also called special registration. Special registration is severely exacerbating the problem of unwarranted detentions and selective deportation.

The special registration process does not apply equally to all immigrants and visitors, but rather requires registration, fingerprinting, photographing and questioning of citizens and nationals of countries within the Arab and Muslim world, as well as North Korea. In December 2002, the INS used the first stage of this program to round-up hundreds of Arab and Muslim men on minor immigration infractions, many of which were caused by the INS' own bureaucratic incompetence. The agency detained a full one-quarter of all those who sought to comply with the new requirements at its Los Angeles office.

The government says the tracking program is necessary because it needs more information on who is in the country, legally or illegally. However, the agency's real problem is not a shortage of information, but rather the inability to process the information it already has. More than 200,000 change-of-address forms are piled up, unfiled, in an underground records storage facility in Kansas City, Missouri. As these forms pile up, hundreds of thousands of people are at risk of wrongful arrest and deportation.

13,000 Arab and Muslim immigrants and visitors now face deportation after seeking to comply with the law. Many more could get in trouble, through no fault of their own, because of a systemic and inexcusable failure to notify registrants of their obligations under the program, including the obligation to leave through specially designated ports and to re-register every year. The deadlines for the first re-registration are fast approaching, and there is every indication the process will again be chaotic and haphazard.

THE RECORD: POWERS MISUSED, POWERS ABUSED

These attacks on basic American freedoms have resulted in serious civil liberties abuses. Some are a result of the PATRIOT Act, while some are the result of other anti-terrorism powers.

There is no doubt that, after September 11, the government systematically abused its non-PATRIOT powers, particularly with respect to the detention of hundreds on immigration violations. Here are just a few examples of the impact of the practices documented by the DOJ's own Inspector General on the 762 September 11 immigration detainees. These examples are similar to the stories of detainees the ACLU interviewed and, in some cases, assisted with habeas corpus petitions:

? Mr. H., a Pakistani, has lived in the United States for the last eighteen years and is the sole provider for his wife and four-year-old son, who is a U.S. citizen. In November 2001, Mr. H was arrested after a co-worker at the hospital where Mr. H. worked as a registered nurse called the FBI to complain about Mr. H. "behaving suspiciously," because the co-worker was concerned with his wearing a surgical mask more than necessary. He was detained at Passaic County Jail for six months, despite the fact that an immigrant visa that Mr. H had applied for was granted six weeks after his arrest in December 2001. In January 2002, Mr. H. was at last "cleared" and in May 2002 he was released on parole.

? Sidina Ould Moustapha, a citizen of Mauritania, arrived in the United States in April 2001 on a valid visitor's visa. On October 11, 2001, Mr. Moustapha was charged with overstaying his visa, and detained at Passaic County Jail. At his immigration hearing on October 30, 2001, the Immigration Judge granted his request to voluntarily leave the country. The INS did not appeal, but continued to detain him for five months after the Immigration Judge's order. Throughout this time, Mr. Moustapha could not contact his wife and two young children in Mauritania. Finally, Mr. Moustapha's attorney filed a petition for a writ of habeas corpus, and the INS allowed him to leave.

? After Altin Elezi was arrested by the FBI at his home in Kearney, New Jersey on October 3, 2001, he effectively disappeared. Mr. Elezi's brother, Albert Elezi, learned about the arrest from neighbors, and desperately contacted government officials to find out where his brother was. After failing to hear from him for two weeks, Albert Elezi hired an attorney for his brother. The attorney contacted government officials who told him Albert Elezi's brother was being held in a detention facility in New York. When the attorney called the facility, however, he was told that Mr. Elezi was not there. The attorney called another detention facility and the Bureau of Prisons "Federal Prisoner Locator" service, but still could not find his new client. Finally, on October 22, 2001, the attorney filed a habeas corpus petition in federal court. Albert Elezi stated in an affidavit accompanying the petition, "Our entire family has been terrified since the disappearance. . . I respectfully beg this Court [to] allow my brother to visit with his lawyer and his family."

? Asif-Ur-Rehman Saffi, a citizen of France, came to the United States on July 6, 2001. On September 30, 2001, Mr. Safi was arrested by the INS and charged with working in the United States without authorization. He was held in the most restrictive conditions possible - the administrative maximum special housing unit at the Metropolitan Detention Center in New York. In Mr. Saffi's case, as with other September 11 detainees, the Bureau of Prisons deferred to the FBI's "interest" classification for September 11 detainees, abdicating its own internal policies for classifying the security risks presented by detainees in its custody. As a result, garden-variety immigration violators like Mr. Saffi were held in "lockdown" 23 hours a day in cells that were continuously lighted; allowed only a very limited ability to contact attorneys and families; placed in handcuffs, leg irons, and a heavy chain linking the leg irons to the handcuffs for interviews and visitation; and subjected to body-cavity searches after all visits. Mr. Saffi was also subjected to severe physical and verbal abuse. Guards at MDC bent back his thumbs, stepped on his bare feet with their shoes, and pushed him into a wall so hard that he fainted. After Mr. Saffi fell to the floor, they kicked him in the face. The lieutenant in charge told Mr. Saffi that he would be treated harshly because of his supposed involvement in the September 11 attacks.

What about PATRIOT Act abuses? Of course, the ACLU cannot say - because it cannot know - whether those parts of the PATRIOT Act that the government uses in secret have been abused. Nevertheless, even

the threat of some powers has plainly had a chilling effect on the exercise of constitutional rights - including the freedom to speak, read and associate in ways that challenge government policy.

For well over a year, the ACLU has been asking the government to explain its use of one of these powers - the power to obtain "business records" under section 215 of the PATRIOT Act. Only after that provision had come under fire from the American Library Association - which feared its use to obtain library records would inhibit library patrons' privacy - did the Attorney General declassify the number of times it had been used - which, at that time, was zero.

The Justice Department said that section 215 was so essential to preventing terrorist attacks that it was imperative that Congress give it this "vital tool" without debate or amendment immediately after September 11 - and that section 215 could not be narrowed or amended. Yet the Justice Department now says, under fire from mild-mannered librarians, that section 215 has not been used at all in the past two years - during what it describes as the largest terrorism investigation in the history of the United States.

No wonder some have been so perplexed by the debate about the PATRIOT Act.

In the ACLU's constitutional challenge to section 215 of the PATRIOT Act, the plaintiffs have filed declarations showing how the threat of this provision, whether or not used, has already been harmful to the Arab American community and others who have come under suspicion since September 11:

? Two Muslim and Arab community and civil rights organizations - the Muslim Community Association of Ann Arbor and the Islamic Society of Portland - have reported that their members have left or become less active, fundraising has dried up, and attendance at prayers and community events has dropped specifically because of fear the government could use the PATRIOT Act to obtain the organizations' records and target their members for investigation. In one case, a Board Member even resigned from the association.

? Bridge Refugee and Sponsorship Services, a refugee and immigrant service organization, has been forced to alter record keeping practices, eliminating some sensitive information that clients do not want released. The new practices interfere with the organizations' ability to serve their clients, who are victims of torture, persecution and domestic violence, because they cannot keep detailed, sensitive information in their clients' files for fear it could be obtained by the government.

We also know of compelling anecdotal evidence that some powers under the Act have been misused:

? The Act's provisions - sold as necessary to fight terrorism - have often been used in a wide variety of common crimes that do not involve terrorism. Indeed, DOJ attorneys are being trained in how to use the PATRIOT Act to tilt the balance toward the prosecution. For example, Nevada newspapers are reporting that PATRIOT Act terrorism financing powers were used to investigate Michael Galardi, the owner of two Las Vegas strip clubs, in a probe of alleged corruption involving local officials.

Source: "PATRIOT Act: Law's Use Causing Concerns," Las Vegas Review-Journal, November 5, 2003.

? In July 2002, a graduate student was charged under the USA PATRIOT Act with possession of a biological agent with no "reasonably justified" purpose. His crime: discovering 35-year-old tissue samples from an anthrax-infected cow in a broken university cold-storage unit and moving them to a working freezer. Cooperating fully with authorities, Foral finally agreed to community service and some restrictions on his activities. To his chagrin, however, he also found that his name had been added to the Interagency Border Inspection System, a watch list, after he was detained when trying to reenter the country. His case could chill research in the world of microbiology.

Source: Rosie Mestel, "Scientists Experiment with Caution," Los Angeles Times, September 10, 2002.

? Anti-money laundering provisions that are now being implemented have had the unintended consequence of denying ordinary Americans access to financial services. French Clements of San Jose, CA, recently tried to open an on-line brokerage account with Harrisdirect in the hopes of beginning a retirement fund. His plans were stymied, however, when the system denied his request, citing the PATRIOT Act, probably because he is a college student whose frequent moves set off a red flag under the new PATRIOT Act regulations.

Source: Kathleen Pender, "PATRIOT Act Halts Would-be Investor," Seattle Post-Intelligencer, September 6, 2003.

? Passage of the PATRIOT Act muted protests over the U.S. Navy's continued use of the Vieques bombing range in Puerto Rico. Activists cite fears of extended jail sentences for civil disobedience under the PATRIOT Act's overbroad definition of terrorism as reason for lackluster turnouts at Vieques protests since 9/11.

Source: "Vieques protesters muted by 9/11," Associated Press, September 4, 2002.

WHAT CONGRESS CAN DO

Congress must say yes to responsible anti-terrorism powers by saying no to these excesses. You can start right now by passing a sensible measure that fixes just a few provisions of the PATRIOT Act: S. 1709, the Security and Freedom Ensured (SAFE) Act. The SAFE Act is sponsored by a strong bipartisan team that includes Senators Larry Craig (R-ID), Richard Durbin (D-IL) Michael Crapo (R-ID), Russ Feingold (D-WI), John Sununu (R-NH), Ron Wyden (D-OR) and Jeff Bingaman (D-NM).

What does the SAFE Act do? It does not repeal any section of the PATRIOT Act, but rather would amend that law to bring some of its controversial provisions back into line with constitutional freedoms. Specifically, the SAFE Act requires:

? Individualized suspicion for searches of library, bookstore or other sensitive records. Section 215 of the PATRIOT Act expanded the Foreign Intelligence Surveillance Act (FISA) to allow the government to obtain library, bookstore or other personal records simply by saying to the Foreign Intelligence Surveillance Court or a federal magistrate that they are wanted for a counter-intelligence or counter-terrorism investigation. The SAFE Act protects the freedom to read and the privacy of other personal records maintained by universities, doctors, banks, travel agents and employers by requiring articulable suspicion that the records relate to a spy, terrorist, or other foreign agent. The SAFE Act would also amend the law to clarify that federal agents may not use "national security letters" to get the records of users of a public library's computers, and must obtain a court order for such records.

? Reasonable limits on "sneak and peek" searches. The PATRIOT Act allows "sneak and peek" searches whenever the government shows that notice might have an "adverse result" and permits delays for an unspecified "reasonable time." The SAFE Act requires the government to show one of three specific reasons - preserving life or physical safety, preventing flight from prosecution, or preventing destruction of evidence - to delay notice of a search warrant, and delays are limited to renewable seven day periods.

? Safeguards for "roving wiretaps" in foreign intelligence investigations. The PATRIOT Act authorized roving wiretaps in foreign intelligence investigations, but did not include a sensible privacy safeguard that is required of roving wiretaps in criminal investigations. For criminal roving wiretaps, when federal agents place a wiretap and do not know what telephone or other device the target may use, they must "ascertain" that the target is using that telephone or device. The SAFE Act extends this safeguard to foreign intelligence investigations, helping to ensure the government does not eavesdrop on the conversations of innocent people. The USA PATRIOT Act (as amended shortly thereafter by the Intelligence Authorization Act for FY2002) also contains an anomaly in that it allows roving wiretaps even if federal agents do not

know who is the target or what telephone or device is being used. The SAFE Act clarifies the law to require that federal agents know at least one of these two things to obtain a roving wiretap.

? An expanded sunset, and additional reporting on USA PATRIOT Act powers. The SAFE Act would cause four additional USA PATRIOT powers to expire at the end of 2005, allowing them to be reviewed when Congress considers whether to extend the sunset. These powers, which are exempt from the current sunset provision, are "sneak and peek" delayed-notification searches (sec. 213), monitoring of detailed Internet and website addressing information without probable cause (sec. 216), nationwide search warrants (sec. 219), and expanded "national security letter" authority to obtain personal records without a court order (sec. 505). The SAFE Act also requires additional reporting on "sneak and peek" searches and FISA records searches.

Passage of the SAFE Act would represent just one step in restoring basic freedoms. The ACLU also supports passage of other bills that members of this Committee have introduced to protect civil liberties, including:

? S. 1695, the PATRIOT Oversight Restoration Act of 2003, sponsored by Senators Leahy (D-VT) and Craig (R-ID), which expands the PATRIOT Act's sunset provision to include additional powers that are particularly controversial;

? S. 436, the Domestic Surveillance Oversight Act, sponsored by Senators Leahy (D-VT), Edwards (D-NC), and Specter (R-PA), which requires additional reporting on the use of the Foreign Intelligence Surveillance Act (FISA);

? S. 609, the Restoration of Freedom of Information Act of 2003, sponsored by Senators Leahy (D-VT) and Feingold (D-WI), which narrows the new FOIA exemption for critical infrastructure created by the Homeland Security Act of 2002;

? S. 1507, the Library, Bookseller, and Personal Records Privacy Act, sponsored by Senators Feingold (D-WI), Kennedy (D-MA) and Durbin (D-IL), which provides for stricter standards for obtaining "business records" under section 215 of the PATRIOT Act; and

? S. 188, the Data Mining Moratorium Act of 2003 and S. 1544, the Data Mining Reporting Act of 2003, sponsored by Senator Feingold (D-WI), which address the problem of standardless searches of personal data by federal agencies using commercial data mining software

We also strongly support efforts to draft legislation that would end secret detentions and deportations, provide for a meaningful custody hearing before an Immigration Judge and otherwise protect the civil liberties of immigrants.

Much more needs to be done, including restoring the rule of law to military tribunals and detentions, and reining in the use of terrorism powers for non-terrorism cases.

We pledge to work with you to restore these important safeguards.

Thank you.