The terrorist attacks of 9/11 cast a shadow over civil liberties in the United States, both for citizens and non-citizens. Erosions of civil liberties during war are not new. They appear whenever emergency power is exercised. Rep. John Conyers (D-Mich.) reviewed the record of the twentieth century: "In the wake of World War I, we experienced the [Palmer] raids when thousands of immigrants were wrongfully detained, beaten and deported. World War II brought about the shameful internship of Japanese American citizens. The Korean War led to the era of McCarthyism, guilt by association, and the Vietnamese War resulted in the FBI digging into the personal lives of those opposed to the Administration policy."

What is new about 9/11 is that it ushered in a state of war with no likely termination date, a condition aptly referred to as "permanent war." For that reason, the restoration of civil liberties that typically comes with the cessation of hostilities may not occur this time. No one knows when the current war will end because there is no state enemy to surrender, unless it is the loose organization known as al Qaeda. In these circumstances, how much will executive power expand permanently at the cost of civil liberties?

President George W. Bush came to Congress after September 11 to seek legislative authority to respond to the terrorist attacks. Under the Constitution, Congress has the option of either declaring or authorizing war. In requesting congressional authority, Bush broke ranks with Presidents Harry S. Truman, George H. W. Bush, and Bill Clinton, all of whom claimed they could order large-scale military operations in Korea, Iraq, and Yugoslavia without seeking statutory authority from Congress. After this promising start, Bush and his administration began to follow a different theory of government, one that relies on unilateral actions based on perceived inherent powers of the President. The executive branch often claimed that it did not need to obtain authority from Congress or even consult its members.

Senator Patrick Leahy (D-Vt.) laid down an early marker after the tragedy of 9/11. He cautioned against tipping the scales to the extent of endangering and jeopardizing civil liberties. "The worse thing that could happen is we damage our Constitution," he said. "If the Constitution is shredded, the terrorists win." Similarly, Senator Russ Feingold (D-Wis.) warned: "Preserving our freedom is the reason we are now engaged in this new war on terrorism. We will lose that war without a shot being fired if we sacrifice the liberties of the American people in the belief that by doing so we will stop the terrorists." But for many citizens and non-citizens in the country, the Constitution seemed to disappear, and it is too early to tell whether lawmakers or the courts will intervene to restore and protect civil liberties.
Withholding Information

In time of war, administrations typically overclassify documents and withhold information from Congress and the public. One of the first initiatives, quickly reversed, was a Bush memo of October 5, 2001, to limit the disclosure of classified and sensitive law enforcement information. Such briefings were to be restricted to eight members of Congress: House Speaker, House Minority Leader, the Senate Majority and Minority Leaders, and the chairs and ranking members of the Intelligence Committees. Anyone familiar with executive-legislative relations should have recognized the memo’s absurdity. It read like something drafted late at night without enough alert, experienced people to stop it before it went out.

Someone from Bush’s own party, Senator Chuck Hegel of Nebraska, remarked: To put out a public document telling the world he doesn’t trust the Congress and we leak everything, I’m not sure that helps develop unanimity and comradeship. Added Senate Armed Services Committee Chairman Carl Levin (D-Mich.): We have to have classified briefings if we’re going to do our oversight role. Other lawmakers pointed out that members of the Foreign Relations, Armed Services, Judiciary, and Appropriations Committees could not function without access to classified materials.

What prompted this overblown, misguided memo? Bush was clearly upset by what he considered an inappropriate statement by a member of Congress who received a classified briefing from an executive official. Exactly who the lawmaker was, and what sensitive information was released to the public, is unclear. Apparently an intelligence official said that there was a 100 percent chance of an attack on America if U.S. troops conducted military operations against Afghanistan, and a lawmaker might have repeated something of that nature. No one could argue that the information was at all sensitive or did any injury to national security. In the face of a bipartisan congressional revolt, Bush beat a quick and predictable retreat.

In mid-2002, the administration charged that Congress had leaked classified intelligence information. Amazingly, the two Intelligence Committees allowed the FBI to conduct a probe to determine the source of the leak on Capitol Hill. Eventually, seventeen Senators on the Intelligence Committee were asked to turn over their phone records, appointment books, and schedules to reveal possible contacts with reporters. Congress should never have authorized an executive agency to investigate the legislative branch. Congress creates the agencies, not the other way around. If concern is expressed about possible leaks on Capitol Hill, the investigative body should be Congress, not the executive branch.

In the midst of these interbranch battles, the Bush administration regularly dumped massive amounts of classified and sensitive data into the public arena whenever it seemed politically opportune to do so. During debate in 2002 over going to war against Iraq, newspapers were filled with detailed battle plans, supposedly the most secret of all executive documents. Nevertheless, perhaps as a way of intimidating Iraq or displaying the administration’s toughness, battle plans made front page news week after week. When President Bush wanted to buttress his case for going to war against Iraq, he declassified satellite photos and released them to the press.

Consider a story that appeared in the Washington Post on October 29, 2002, describing efforts to interrogate detainees at Guantanamo Bay. It gave the name of Omar al-Farouq, a suspected al Qaeda operative captured in Indonesia, who is now revealing many al Qaeda secrets. Giving his name to the press amounts to a virtual death sentence for al-Farouq if he is ever released and sent back to the Middle East. Also named is Omar Khadr, a particularly
talkative prisoner. The story quotes a U.S. official: He is singing like a bird. Information of that nature should never be released to the public.

Some of these leaks from the executive branch may have been unauthorized: the kinds that would offend any President. But the outpouring of military information and battle plans strongly implies that the Bush administration was willing to transmit highly sensitive data to journalists on a routine basis as part of its strategy of saber-rattling and well-orchestrated threats. Defense Secretary Don Rumsfeld issued a memo objecting to the leaking of classified information: It is wrong. It is against the law. It costs the lives of Americans. It diminished our country's chance for success. It may be all that, but administrations will release whatever information promotes its policy.

Another step in withholding information was the position of the Bush administration in interpreting and administering the Freedom of Information Act (FOIA). On October 12, 2001, Attorney General John Ashcroft issued a guideline to agency heads, instructing them of the need to consider sensitive business data and personal privacy as well as national security and law enforcement before releasing documents to the public. He promised them that the Justice Department will defend your decisions [to withhold records] unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

In other words: An invitation to agencies to limit public access. The House Government Reform Committee, which has jurisdiction over FOIA, included this line in the new edition of its Citizen's Guide, which describes how to best use FOIA and the Privacy Act in requesting government records: Contrary to the instructions issued by the Department of Justice on October 12, 2001, the standard should not be to allow the withholding of information whenever there is merely a sound legal basis for doing so.

Finally, what should we make of the refusal of Tom Ridge, head of the Office of Homeland Security, to testify before Congress? Senators Robert C. Byrd and Ted Stevens, chairman and ranking member of the Appropriations Committee, wrote to Ridge on March 4, 2002, inviting him to testify before the Committee on the $38 billion budget for homeland security. Ridge declined to testify on the ground that he was a presidential adviser and not a Senate-confirmed head of an agency. Later he agreed to take questions from lawmakers informally but in public, explaining that this compromise would meet the needs of Congress and avoid the setting of a precedent that could undermine the constitutional separation of powers and the long-standing traditions and practices of both Congress and the executive branch. He followed through on this promise by meeting informally with a subcommittee of House Appropriations and the House Government Reform Committee.

What does any of this have to do with constitutional principles and separation of powers? First, there are no long-standing traditions and practices that prohibit presidential advisers from testifying before congressional committees. White House aides, national security advisers, White House counsels, and other White House staff have come to Congress to testify. There is no magic immunity for presidential advisers. Second, was it at all persuasive for Ridge to agree to meet informally and take questions, but draw the line at appearing formally to take questions? That type of artificial legalism merely added fuel to congressional efforts to create, by statute, an agency headed by someone who must be confirmed by the Senate.
Limits on Free Speech

The intent of the Bush Administration to act unilaterally, without constitutional checks and balances, was evident in the December 6, 2001, testimony of Attorney General Ashcroft before the Senate Judiciary Committee. He bluntly warned that criticism of the administration helps the terrorists. His language was somewhat qualified, but not much: We need honest, reasoned debate, not fear-mongering. To those who pit Americans against immigrants and citizens against non-citizens, 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 and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends. They encourage people of good will to remain silent in the face of evil.

Who decides what is honest and reasoned? Shall there be a Truth Unit created within the Justice Department, always on the alert for wayward comments? How much does the quest for national unity discourage public debate and the individual voice? The executive branch can claim no monopoly on wisdom.

A day after the hearing, the Justice Department announced that Ashcroft did not intend to discourage public debate. What he found unhelpful to the country are misstatements and the spread of misinformation about the actions of the Justice Department. Yet the Administration itself has made its share of misstatements. At the Senate Judiciary hearings, Ashcroft claimed that the President’s authority to establish military tribunals arises out of his power as Commander-in-Chief. For centuries, Congress has recognized this authority and the Supreme Court has never held that any Congress may limit it. Ashcroft appeared to claim that tribunals are created under the exclusive authority of the President and that, according to judicial precedents, Congress may not limit that authority. The legal and historical record of military tribunals presents quite a different picture: the creation of tribunals is typically done jointly by Congress and the President, Congress has not recognized a unilateral presidential authority to create these tribunals, and the Supreme Court has repeatedly held that Congress has the constitutional authority to create tribunals, decide their authorities and jurisdiction, and limit the President were he to act unilaterally by military order or proclamation to create these tribunals. In the face of this record, does it make any sense to suggest that Ashcroft’s misstatements and the spread of misinformation give aid to terrorists?

The war against terrorism does not justify any weakening of the constitutional rights of free speech and free press. It is particularly during war, and not just during time of peace, that free speech and public debate must be respected. During World War I, Zechariah Chafee, Jr., convinced Justice Oliver Wendell Holmes, Jr., that the war clauses of the Constitution cannot break down the freedom of speech. It is in time of war that the government must be vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its just purposes are accomplished.

On May 30, 2002, Attorney General Ashcroft released new guidelines that will permit FBI agents to conduct domestic surveillance of public events, such as political rallies and religious gatherings. The changes he ordered loosen the guidelines adopted in 1976 to prevent the FBI from spying on domestic groups. Reporters asked President Bush whether there was a risk of going too far in the battle against terrorism and actually losing some freedoms that are very important to the nation? He replied: We intend to honor our Constitution and respect the freedoms that we hold so dear.
It could be argued that the FBI has the right, along with any citizen, to attend public events and listen for information that might be helpful in the fight against terrorism. However, citizens do not have the capacity, or the incentive, to maintain files and dossiers on various groups and organizations, the kind of conduct that the FBI pursued from the 1950s to the 1970s. Moreover, having hundreds of FBI agents attend public events and record remarks does not seem a wise use of strained government resources.

Military Tribunals

The executive branch claimed exclusive authority for President Bush to issue his military order of November 13, 2001, creating a military tribunal to try terrorists. The administration did not touch base with anyone on Capitol Hill (even the Judiciary Committees), nor did it consult with experts in the Judge Advocate General office in the Pentagon. To justify the Bush order, the administration cited Ex parte Quirin (1942) as a solid legal precedent. In that case, a unanimous Supreme Court upheld the use of a military tribunal for eight Nazi saboteurs. Bush clearly modeled his order on a 1942 proclamation by President Franklin D. Roosevelt creating a tribunal to try the Germans. However, the FDR proclamation targeted a subgroup of eight people, while Bush order covered a much larger population: Any individual who is not a United States citizen about eighteen million inside U.S. borders) who gave assistance to the September 11 terrorists. Any noncitizen, including resident aliens, is at risk of being detained and tried by a military tribunal, perhaps because they donated to what they thought was a legitimate charitable organization, but one that turned out to be a front for the al Qaeda.

Why did Bush focus only on non-citizens? His legal advisers may have convinced him, because of Ex parte Milligan (1866), that U.S. citizens have a right to be tried in civil courts when they are open and operating. But imagine how different the public reaction would have been if the military tribunal had jurisdiction over everyoneBBcitizen or non-citizenBBwho gave assistance to the terrorists.

At closer look, Ex parte Quirin turns out to be an unattractive precedent. The trial was held in secret on the fifth floor of the Justice Department, Washington, D.C., to keep from the public the fact that one of the Germans turned himself in and fingered his colleagues. The administration wanted the public to think that the FBI had the capacity to ferret out any saboteurs who attempted to enter the United States. Instead of letting the War Department handle the military trial, subject to procedures spelled out in the statutory Articles of War and the published Manual for Courts-Martial, procedures were made up as the trial went along and prosecution was handled was Attorney General Francis Biddle and Judge Advocate General Myron Cramer.

The Supreme Court was poorly prepared to hear the case. The briefs are dated the same day that oral argument began. There was only a cursory district court decision, issued the evening before oral argument, and no action yet by the D.C. Circuit. The Court handed down a brief per curiam on July 31, but without any legal reasoning. It would take another three months to produce a full opinion, but by that time six of the eight Germans had been executed. Chief Justice Stone had his hands full trying to write the opinion for the Court without judicial unity being marred by dissents or concurrences. Constitutional scholar Edward S. Corwin dismissed the final opinion as Alittle more than a ceremonious detour to a predetermined end.@ Justice Frankfurter later said that Ahe Quirin experience was not a happy precedent.@ In an interview on June 9, 1962, Justice Douglas made a similar comment: AThe experience with Ex parte Quirin indicated, I think, to all of us that it is extremely undesirable to announce a decision on the merits
without an opinion accompanying it. Because once the search for the grounds, the examination of
the grounds that it has been advanced is made, sometimes those grounds crumble. 

The conduct of the military trial in 1942 so angered Secretary of War Henry L. Stimson that
he intervened forcefully three years later, when another tribunal was established to try two more
saboteurs who had arrived from Germany. Unlike the military order of July 2, 1942, President
Roosevelt did not name the members of the tribunal or the counsel for the prosecution and
defense. Instead, he empowered the commanding generals, under the supervision of the Secretary
of War, to appoint military commissions for the trial of such persons. Moreover, the trial record
would not go directly to the President, as it did in 1942. The review would be processed within
the Judge Advocate General's office. This time, Attorney General Biddle had no role as
prosecutor, and Judge Advocate General Cramer would be limited to his review function within
the JAG office. The trial took place not in Washington, D.C., but at Governors Island, New York
City.

Bush military order of November 13, 2001, covers any individual that the President determines there is
reason to believe (i) is or was a member of the organization known as al Qaida, (ii) has engaged in, aided or abetted, or conspired to commit,
acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause,
or have as their aim to cause, injury to or adverse effects on the United States, its citizens,
national security, foreign policy, or economy, or (iii) has knowingly harbored one of more
individuals described in subparagraphs (i) and (ii).

What process will be used to determine a terrorist or a terrorist organization? Does the
President merely announce the result and force the target to mount a defense? In 2002, a district
court in California ruled that the process used by the Secretary of State in designating foreign
terrorist organizations violates on its face the Fifth Amendment's due process clause.

USA Patriot Act

The USA Patriot Act, enacted on October 26, 2001, strengthens the power of the
administration to deter and punish terrorists. Yet the statute goes far beyond the threat of
terrorism, because it gives the government broad new powers to conduct any criminal
investigation. Any increase in the power of the executive branch especially over law
enforcement inevitably places at risk some constitutional rights and liberties. Especially is that
so for legislation, such as the USA Patriot Act, that shoots through Congress at great speed
without the regular care and deliberation of legislative hearings, committee mark-ups, and floor
debate. How much individual rights and liberties are eroded will depend on the manner in which
the administration implements the statute and the willingness of Congress, the courts, and the
public to monitor the executive branch and supply necessary checks.

The House Judiciary Committee held one hearing on September 24, conducted a mark-up
with amendments offered and agreed to, and issued a lengthy committee report on H.R. 2975. This bill, reflecting bipartisan support, passed the committee by a vote of 36 to zero and rejected
some of the extreme measures advocated by the administration. However, on the floor, the
House acted under a closed rule to prohibit amendments, except an amendment in the nature of a
substitute consisting of the text of a new bill, H.R. 3108, that few members had seen. Among
other changes, the House deleted a 2-year sunset provision for foreign intelligence surveillance
and replaced it with a 5-year termination date. Many of the sections in the bill had no sunset
provision at all. The House rejected a motion to recommit the bill to House Judiciary and have it report back clearer definitions of surveillance procedures.

On the Senate side, Senator Feingold objected that there was not a single moment of markup or vote in the Judiciary Committee. He offered three amendments during floor action, but each was tabled rather than proceed to a vote on the merits. Senate Majority Leader Tom Daschle (D-S.D.) objected to all amendments, urging his colleagues to join him in tabling the first Feingold amendment and every other amendment that is offered. When the House acted on the bill that became the USA Patriot Act (H.R. 3162), it did so under suspension of the rules, a procedure that prohibits amendments. The final bill adopted a four-year sunset for some of the surveillance procedures.

Many of the provisions of the USA Patriot Act had been considered in previous years and rejected. For example, Section 219 authorizes nationwide service of search warrants in terrorism investigations. A single judge, having authorized the first warrant, may grant future warrants in other jurisdictions. The warrant is not limited to a particular locality. It will apply to any district in which activities related to the terrorism may have occurred. The purpose is to build expertise and accountability in a single judge rather than having to bring up-to-speed judges in other jurisdictions. While this is convenient for law enforcement, it means that many defendants will lack the funds to hire attorneys in distant states.

Section 206 provides for roving wiretaps under the Foreign Intelligence Surveillance Act (FISA). This provision allows surveillance to follow a person, thus avoiding the need for a separate court order that identifies each telephone company every time the target of investigation changes phones. Section 213, referred to as sneak and peek, authorizes surreptitious search warrants and seizures without the previous requirement to immediately notify a person of the entry and seized items. Law enforcement officers may therefore enter someone’s home without giving immediate notice, which may be delayed for a reasonable period. Section 216 updates existing statutory authority relating to the use of pen registers, which allow government officers to determine the telephone number being dialed from a phone. Federal judges may grant pen register authority to the FBI to cover not just telephones but also such communications as e-mail. Like roving wiretaps, once authority is obtained to install a pen register, it will now apply anywhere in the United States.

In Section 411, Congress added language to help soften a provision that would have enabled the administration to deport someone who had innocently contributed to a charitable organization that the administration determined to have ties to terrorism. Congress limited the retroactive effect of this provision, but it still places the burden on an alien to demonstrate that he did not know, and should not reasonably have known, that his actions would further terrorist activity.

One of the most controversial provisions appears in Section 218, which changed the FISA requirement that had allowed surveillance only if the purpose is to obtain foreign intelligence information. Originally, Congress wanted to maintain separation between wiretaps conducted by the intelligence community and criminal investigations pursued by law enforcement officers. For criminal investigations, a wiretap requires both probable cause that a crime has been committed and an authorizing order from a federal judge. Wiretaps for intelligence are conducted with a lower standard, and the information obtained was to be used only for foreign intelligence.

FISA was enacted in 1978 after congressional investigations revealed that intelligence agencies had violated the rights of U.S. citizens. For years, the federal government had been conducting warrantless surveillance over domestic organizations and the private lives of citizens. FISA created a special court, the Foreign Intelligence Surveillance Court (FISC), to authorize surveillance over foreign activities, not domestic affairs. The Bush administration wanted to relax
a requirement in the 1978 statute by allowing FISA surveillance if its purpose is to obtain foreign intelligence information. The two branches compromised by adopting the words a significant purpose. Section 504 added language to clarify when federal officers who conduct FISA wiretaps may consult with federal law enforcement officers to investigate or protect against actual or potential attacks of international terrorism.

From the operation of FISA in May 1979 to 2002, the FISA court approved all of the government's applications for a search order. That pattern changed on May 17, 2002, when the court released its first published opinion. It challenged the government's argument that FISA can be used primarily for a law enforcement purpose, so long as a significant foreign intelligence purpose remains. The court was troubled by an inadequate wall between FISA information-gathering and the criminal investigations conducted by the Justice Department. It charged that procedures adopted by the administration in March 2002 appear to be designed to amend the law. The court objected not to information-sharing but to the capacity of law enforcement investigators to give advice to FISA searches. To the court, coordination between intelligence and criminal investigators had been replaced by the subordination of both investigations to law enforcement objectives.

The Justice Department appealed this ruling to a three-judge FISA appeals court, the first time that this court found it necessary to meet. On November 18, 2002, the appeals court reversed the May 17 ruling and upheld the authority of criminal prosecutors to be actively involved in foreign intelligence wiretaps. The court did not find in the 1978 statute, or in any litigation since that time, a requirement that a wall be maintained between the acquisition of intelligence and the needs of criminal law enforcement. Moreover, Congress was aware in passing the USA Patriot Act that it was relaxing a requirement that the government demonstrate that the primary purpose of surveillance be the collection of intelligence rather than criminal prosecution. As a result of this appellate decision and the USA Patriot Act, it is possible to conduct a criminal investigation without the probable cause standard of the Fourth Amendment.

Do Detainees Have Rights?

In terms of damage done to civil liberties, the USA Patriot has thus far been far overshadowed by other techniques of law enforcement: holding individuals under the material witness statute, detaining suspects without charging them or giving them access to attorneys, holding closed immigration hearings, and relying on secret evidence. Beginning in December 2002, the Justice Department required men from certain countries (predominantly Muslim) to register with the INS, be fingerprinted and photographed, and respond to questions. Exceptions were made for certain categories, such as permanent residents and men with green cards. Failure to register risked deportation. When the men showed up, hundreds were handcuffed and detained for days because their student or work visas had expired. Some of the men lacked proper papers because their application for permanent residency had been delayed for years in INS proceedings. Beyond the harassment of the Arab-American and Muslim communities, the policy of registration and detention seems to have little bearing to the war on terrorism. Undocumented terrorists are unlikely to show up at an INS office to be registered.

After 9/11, much of the harshness, arbitrariness, and abuse of law enforcement fell on Arab-Americans and Muslims. Dr. Al Bader al-Hamzi, a 34-year-old radiologist from Saudi Arabia, was arrested at his townhouse in San Antonio the day after the September 11 terrorist attacks. He was held for twelve days before he was permitted to answer questions put to him by authorities. On September 24 he was finally released. The government brought no charges
against him. Supposedly these men are held to obtain information about terrorism, but many of them have been detained for weeks and months without ever being interrogated by the FBI or the INS.

Ali Al-Maqtari, born in Yemen, came to the United States with the hope of becoming a French teacher. Four days after the September 11 attacks, he arrived at Fort Campbell, Kentucky, to drop off his American wife, who was reporting for active duty with the U.S. Army. He was ordered out of his car and later detained for two months by the INS in Mason, Tennessee. He appeared before a Senate subcommittee to explain what had happened to him.

On September 12, 2001, Hady Hassan Omar was placed in jail because the FBI was convinced he had some connection to al Qaeda. Born in Egypt, he lived in Fort Smith, Arkansas with his American wife and baby daughter. A deputy from the local sheriff’s office asked him to come to the station for a few questions. He was then held in captivity for 73 days, some of it in solitary confinement, until he became suicidal. He was released, but legal expenses left the couple broke and he was fired from his job. The government never presented charges against him.

One more example. Tony Oulai, a Catholic from the Ivory Coast, was arrested as a suspect in the 9/11 attacks. After a deportation order was issued on November 15, 2001, the government designated him a material witness. Three months later, federal prosecutors filed a court document acknowledging that they had no evidence he was involved in any terrorist activity. Still, he was held on a new charge: making a false statement to federal officials (telling them he was living in the United States legally, when in fact his visa had expired). All told, he was held for 422 days before being sent back to the Ivory Coast.

The Justice Department has not adopted consistent or even understandable principles in its prosecution of suspects. John Walker Lindh, born in California but captured in Afghanistan among Taliban forces, was tried in civil court. Yasser Esam Hamdi, born in Louisiana and captured in the same Afghan prison rebellion as Lindh, was held initially at Guantanamo Bay but was moved to a brig at the Norfolk Naval Station. He has not been charged. Zaccarias Moussaoui, a French citizen of Moroccan descent, was arrested in Minnesota as the 20th hijacker. He has been charged and is being tried in civil court. Richard E. Reid, the British shoe bomber, is also being tried in civil court. Jose Padilla, born in New York, was held by the military as a suspect in a plot to detonate a radiological dispersal device or dirty bomb in the United States. Although arrested by the FBI on May 8, 2002, and incarcerated since that time, he has yet to be charged with a crime.

After 9/11, the Immigration and Naturalization Service began to close deportation proceedings to the press and the public. The government used this period to question a number of non-citizens, primarily young men of Arab or Muslim background. Rabih Haddad, co-founder of a Muslim charity in Illinois, was held for nine months because the government suspected that he had supplied money to terrorist organizations. He was finally able to testify at an open hearing after a federal judge ordered the Justice Department to either give him an open hearing or release him. Several court decisions found that the government’s interest in closing these proceedings was not compelling.

The Sixth Circuit held that there is a First Amendment right of access by the press and the public to deportation proceedings. In his ruling, Judge Damon J. Keith explained why the press had to watch executive branch decisions: Democracies die behind closed doors. After this decision was issued, Associate Attorney General Jay Stephens admitted that the release of past transcripts on the Haddad immigration proceedings will not cause irreparable harm to the national security of to the safety of the American people.
In the one case that reached the Supreme Court, a district court decision in New Jersey that supported open deportation hearings, the Court stayed the decision pending appeal. The Third Circuit later overturned the district court decision, finding that the tradition of open hearings for criminal and civil trials did not apply to the same extent to administrative hearings. Writing for a 2-1 majority, Chief Judge Edward R. Becker agreed that, procedurally, deportation hearings and civil trials are practically indistinguishable, and that openness in deportation hearings offers all the salutary functions recognized in civil and criminal trials: educating the public; promoting public perception of fairness; providing an outlet for community concern, hostility, and emotion; serving to check corrupt practices in court; enhancing the performance of all involved; and discouraging perjury. However, he accepted the Justice Department’s argument that open deportation hearings could threaten national security by revealing sources and methods, giving terrorists organizations an opportunity to see what patterns of entry work and which ones fail, and providing other facts that might assist terrorist attacks. Although closed deportation hearings would shield that type of information, nothing prevents the detainees or their attorneys from making that information public.

Chief Judge Becker, agreeing with the newspapers that the government’s representations were to some degree speculative, declined to lightly second-guess the concerns of Attorney General Ashcroft about national security. In reversing the district court, Becker said that he was keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy.

In his dissent, Judge Anthony J. Scirica noted that deportation hearings have a consistent history of openness, and that Congress left deportation hearings presumptively open while expressly closing exclusion proceedings. He agreed with the majority that judicial deference to the executive branch is appropriate, but not to the extent of abdicating our responsibilities under the First Amendment. Instead of accepting the INS policy of a blanket closure rule on deportation hearings, Judge Scirica preferred a case-by-case approach to allow Immigration Judges to weigh the conflicting values between the First Amendment and the government’s national security responsibilities.

Another dispute is the government’s decision to conceal the identities of hundreds of people arrested after the 9/11 attacks. On August 2, 2002, Judge Gladys Kessler ordered that most of the names be released within fifteen days. Secret arrests, she said, are odious to a democratic society. Judge Kessler suspended her order two weeks later to allow the government to appeal her decision to the D.C. Circuit. The Justice Department argues that disclosing the names of hundreds of people arrested on immigration charges would help terrorists of al Qaeda determine how the government was conducting its antiterrorist campaign. Why? What persuasive reasons (rather than conclusory statements) can be advanced?

Some of these individuals were held as material witnesses, a category that Congress authorized in 1984 to assure the testimony of a person that is material in a criminal proceeding. If it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may arrest the person. Release of a material witness may be delayed for a reasonable period of time. Thus, Congress did not establish a time limit for detention. Although these people are held to provide information for a criminal proceeding, many of them have never been called to testify before a grand jury or even give depositions. Nabil Almarabh, a former Boston cab driver from Kuwait, was arrested one week after the 9/11 attacks. As of November 23, 2002, he had been held in custody for 432 days without appearing before a grand jury.
Two federal district judges from New York's Southern District have split on the government's authority under the material witness statute. Judge Shira A. Scheindlin ruled that federal authorities cannot use the statute to detain witnesses for grand jury proceedings, concluding that Congress has never granted authority to the government to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation. On the other hand, Judge Michael B. Mukasey held that the material witness statute does apply to grand jury witnesses. His ruling would allow the government to hold someone as a material witness for the length of a grand jury (up to eighteen months).

As to the 600 suspected terrorists held at Guantanamo Bay, a federal judge held that they had no right to bring a case in U.S. courts. Judge Colleen Kollar-Kotelly rejected their lawsuit, which stated that they were being held without charges and without access to attorneys or trial dates. Their geographical location, she said, denied them the right to press their interests in U.S. courts. Because writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States, this court does not have jurisdiction to hear the case.

Enemy Combatants

What emerged from the Hamdi and Padilla cases is the concept of enemy combatant. Whoever fits that category is held but not charged, has no right to an attorney, and (according to Justice) federal judges have no right to interfere with executive judgments. A Justice Department brief for the Fourth Circuit argued: The court may not second-guess the military enemy combatant determination. Going beyond that determination would require the courts to enter an area in which they have no competence, intrude upon the Constitutional prerogative of the Commander in Chief . . . and possibly create a conflict between judicial and military opinion highly comforting to enemies of the United States.

Enemy combatant is another term for unlawful combatants. Lawful combatants are held as prisoners of war and may not be prosecuted for criminal violations for belligerent acts that do not constitute war crimes. Lawful combatants wear uniforms with a fixed distinctive emblem and conduct their operations in accordance with the laws and customs of war. On November 26, 2002, the General Counsel of the Defense Department defined an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, for example, the term includes a member, agent, or associate of al Qaida or the Taliban. In applying this definition, we note our consistency with the observation of the Supreme Court of the United States in Ex parte Quirin, 317 U.S. 1(1942): Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. However, Hamdi did not enter the United States. He was apprehended in Afghanistan.

Both Hamdi and Padilla, as American citizens, are supposedly covered by this provision in the U.S. Code: No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress. The Bush administration, however, argues that it is not limited by this statute because Article II alone gives the President the power to detain enemies during wartime, regardless of congressional action.

In the Hamdi case, a federal district judge several times rejected the broad arguments put forth by the Justice Department, insisting that Hamdi had a right of access to the public defender
and without the presence of military personnel. However, he was repeatedly reversed by the Fourth Circuit. In its most recent ruling of January 8, 2003, again overturning the district court, the Fourth Circuit juggled two values—the judiciary’s duty to protect constitutional rights versus the judiciary’s need to defer to military decisions by the President—and came down squarely in favor of presidential power.

The Fourth Circuit arrived at that conclusion through a strange reading of separation of powers. It cites an opinion by the Supreme Court in 1991 that the ultimate purpose of this separation of powers is to protect the liberty and security of the governed. Instead of reading this language as an affirmation of the checks and balances that prevent an accumulation of power in a single branch, the Fourth Circuit interprets the Court’s sentence as a warning to the federal judiciary not to interfere with powers vested in another branch: The judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. The reading is bizarre because whereas the Fourth Circuit acquiesces wholly to the judgment of the President, the Supreme Court in 1991 expressly intervened to strike down a statutory procedure adopted by Congress. No philosophy of deference appears in the 1991 decision.

Although the Fourth Circuit plays lip-service to independent judicial scrutiny (The detention of United States citizens must be subject to judicial review), the review here scarcely exists. The Fourth Circuit left little doubt about its willingness to defer to the President. The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II. With such a frame of reference, judicial review is emptied of meaning.

Compare the Hamdi case with the treatment of Padilla. The FBI arrested Padilla in Chicago on May 8, 2002 on a material witness warrant to secure his testimony before a grand jury in New York City. After President Bush designated him as enemy combatant, the material witness warrant was withdrawn and the government moved Padilla to a Navy brig in Charleston, South Carolina. He had access to an attorney, Donna Newman, in New York City, but not after his removal to Charleston. In a ruling on December 4, 2002, a district judge in New York City ruled that Padilla had a right to consult with counsel under conditions that will minimize the likelihood that he could use his lawyers as unwilling intermediaries for the transmission of information to others. The court held that Padilla had a right to present facts and the most convenient way to do that was to present them through counsel. Moreover, on the issue of Padilla’s status, the court insisted on evidence to support Bush’s finding that Padilla is an enemy combatant.

The court did not grant to Padilla the right of counsel because of the Sixth Amendment, which applies only to criminal prosecutions. With no charges filed against him, there was no criminal proceeding. Instead, the court looked to congressional policy on habeas corpus petitions, entitling an applicant to deny any of the facts set in the return or allege any other material facts (28 U.S.C. 2243). As to the government’s concern that Padilla might somehow use his attorney to communicate to the enemy, the court noted that such an argument would even prohibit an indicted member of al Qaeda from consulting with counsel in an Article III proceeding.

Conclusions

Although there have been many deprivations of civil liberties since the 9/11 attacks, some public officials have made efforts to limit the damage to Arab-Americans and Muslims. President Bush went out of his way to emphasize that the war in Afghanistan was not a war against Islam or against the Arab world. Two days after the terrorist attacks, standing in the company of New
York City Mayor Rudy Giuliani and New York Governor George Pataki, he cautioned that Arab Nation must be mindful that there are thousands of Arab-Americans who live in New York City who love their flag just as much as the three of us do. In a visit to the Islamic Center of Washington, D.C., Bush stated that Muslims in America make an incredibly valuable contribution to our country. Muslims are doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads. And they need to be treated with respect. In our anger and emotion, our fellow Americans must treat each other with respect.  

Three days after the terrorist attacks on New York City and Washington, D.C., the House passed a concurrent resolution condemning bigotry and violence against Arab-Americans, American Muslims, and Americans from South Asia. Rep. George Gekas (R-Pa.) said that part of the purpose of the resolution was to avoid repeating the insidious events that took place after Pearl Harbor with respect to the treatment of Japanese-American citizens. Rep. Dave Bonior (D-Mich.) spoke out in defense of diversity and for the rights of every American of every heritage and faith to live and worship with safety and confidence and pride. The resolution passed with overwhelming support in the House and in the Senate. 

The USA Patriot Act includes Section 102, which condemns discrimination against Arab and Muslim Americans, stating that these groups play a vital role in our Nation and are entitled to nothing less than the full rights of every American. The statutory language condemns acts of violence against Arab and Muslim Americans and states that anyone who commits acts of violence against these communities should be punished by the full extent of the law.

The tragedy of 9/11 has helped educate Americans on Arabs and Muslims. Most Arabs in the United States are probably not Muslim. They are likely to be Christians from such countries as Lebanon. Moreover, most Muslims are not Arabs. They come from South Asia or are African-Americans. People from the Middle East need not be Arabs. They can be Turks, Iranians, or Kurds. Each step of education helps puncture erroneous and dangerous stereotypes.

With some unfortunate incidents of vandalism, the Muslim and Arabic communities in the United States have been largely spared the kinds of violence that can be directed toward minorities. Elected officials and community leaders have helped keep violence in check. There have been major demonstrations throughout the country on the Middle East, often pitting pro-Palestinians against pro-Israelis. These protests have been emotional, tense, and angry, but thus far not violent.

Facing opportunities and difficulties like other immigrant groups, Arabs are finding acceptance politically, economically, and socially. Americans are learning more about the history of Islam and the extent to which it builds upon Judaism and Christianity. They understand that neither Islam nor Arab are monoliths, that they are complex social entities with many subsets within. Many Muslims in America, after September 11, have been rediscovering their religious faith. The Fourth Circuit rejected an attempt by a conservative Christian group to prevent the University of North Carolina from using a text on the Koran to teach incoming students. With patience and understanding, America can hold true to a motto that has, over the centuries, made possible a community: E Pluribus Unum.

Endnotes

1 This paper was presented at a conference on The Presidency, Congress, and the War on Terrorism, held at the University of Florida (Gainesville), Feb. 7, 2003.
3 Adriel Bettelheim and Elizabeth A. Palmer, Balancing Liberty and Security, CQ Weekly Report, Sept. 22,
2001, at 2210.


5 White House Memorandum of Oct. 5, 2001, Disclosures to the Congress, from President Bush to the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Director of Central Intelligence, and the Director of Federal Bureau of Investigation. See Bush orders limits on disclosure of classified data to Congress, Wash. Times, Oct. 9, 2001, at A15.


8 Susan Schmitt and Bob Woodward, FBI, CIA Warn Congress of More Attacks As Blair Details Case Against Bin Laden; Retaliation Feared if U.S. Strikes Afghanistan, Washington Post, October 5, 2001, at A1


14 Memorandum of July 12, 2002, The Impact of Leaking Classified Information, from Secretary Rumsfeld to top officials in the Defense Department and the Joint Chiefs of Staff.


23 For example, 1 Ops. Att Gen. 233 (1818); 11 Ops. Att Gen. 297 (1865); William Winthrop, Military Law and Precedents 831 (2000 ed); Ex parte Milligan, 71 U.S. 2, 121-22 (1866); Coleman v. Tennessee, 97 U.S. 509, 514 (1878); Ex parte Quirin, 317 U.S. 1, 28-29 (1942); In re Yamashita, 327 U.S. 1, 10-11, 16, 23 (1946); Duncan v. Kahanamoku, 327 U.S. 304 (1946);Madsen v. Kinsella, 343 U.S. 342, 348-49 (1952).


28 Ex parte Milligan, 4 Wall. (71 U.S.) 2 (1866).


30 Ex parte Quirin, 63 S.Ct. 1-2 (1942). The per curiam is also reproduced in a footnote in Ex parte Quirin, 317 U.S. 1, 18-19 (1942).

31 Ex parte Quirin, 317 U.S. 1 (1942); Alpheus Thomas Mason, Inter Arma Silent Leges; Chief Justice Stone's Views, 69 Harv. L. Rev. 806 (1956).

32 Edward S. Corwin, Total War and the Constitution 118 (1947).


34 Conversation between Justice William O. Douglas and Professor Walter F. Murphy, June 9, 1962, at 204-05; Seeley G. Mudd Manuscript Library, Princeton University.


36 For further details, see Louis Fisher, Nazi Saboteurs on Trial: A Military Tribunal and American Law (2003).


41 Id. at S10574.


43 In re All Matters to Foreign Intelligence Surveillance, 218 F.Supp.2d 611 (Foreign Intel. Surv. Ct. 2002).

44 In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. of Rev. 2002).


Matthew Brzesinski, A Lady Hassan Omar is Detained, @N.Y. Times Magazine, Oct. 27, 2002, at 50-55.


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


Id. at 220.

Id. at 226.


Letter of Nov. 26, 2002, from William J. Haynes II, General Counsel, Department of Defense, to Senator Carl Levin, at 102.


Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002).


Id. at 23.

Id. at 26.

79 Id. at 75.
80 Id. at 86.
82 Id. at 1306 (Sept. 13, 2001).
83 Id. at 1327 (Sept. 17, 2001)
85 Id. at H5692.
86 Id. at H5698 and S9859 (daily ed. Sept. 26, 2001).
87 On Campus, a Reflection of Middle East Anger @Wash. Post, May 10, 2002, at A3.
88 The Fabric of Their Faith @Wash. Post, May 19, 2002, at C1.