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National Security, Civil Liberties, & Political Dissent in the United States

Background to the Current Crisis

This book is about the rippling and sometimes chilling effects of antiterrorism and national security policy and law on a range of aspects of American life since the terrorist attacks of September 11, 2001. The early outlines of this story are by now reasonably well known and have been discussed in detail by David Cole and James X. Dempsey, Nat Hentoff, Nancy Chang, Raneta Lawson Mack and Michael J. Kelly, and others—the early, quick passage of the USA Patriot Act and its influence in American life; the detention of citizens and noncitizens on suspicion or charges of terrorist activity; increasing government secrecy and regulation on such varied issues as bioterrorism, cybersecurity, and a host of other topics; and the growing resistance from civil libertarians, legislators, citizens, and many others.[1] This chapter surveys some of the key developments in that first stage of antiterrorism policy after September 11. It is but a brief summary of a wide and complex range of government measures and responses since September 11, intended to provide an overview for the general reader rather than in-depth scholarly analysis. Nor can this volume deal with a number of issues of interna-

tional law, including the revelations of torture and abuse of prisoners in Iraq and Afghanistan.[2]

The core of this volume goes beyond earlier and more detailed studies of the Patriot Act, detentions and other early (and continuing) important issues. The chapters that follow analyze the effects of antiterrorism in American life by looking at five other important but more recent and generally understudied aspects of antiterrorism beyond the Patriot Act. They seek to present these issues to a general audience concerned with policy issues.

- The struggle over some less well-understood recent "second wave" attempts to expand and extend federal antiterrorism policy, including the Total Information Awareness (TIA) data mining program supported by the Pentagon; the Justice Department's Operation TIPS (Terrorist Information and Prevention System) designed to create a system of national informants on suspicious individuals and occurrences; the CAPPS II (Computer Assisted Passenger Prescreening System II) air passenger monitoring and profiling program; Patriot Act II, the Justice Department's plans for a further strengthening of the Patriot Act, sometimes presumed dead but remaining alive, in part, through provisions in other legislation; the Defense Department's Eagle Eyes program of informants and reporting; and the Matrix (Multistate Anti-Terrorism Information Exchange) partnership of states and a private company undertaking data mining and profiling of millions of American citizens and residents—and, of course, the wiretapping by the National Security Agency approved by the President and revealed by the *New York Times* in December 2005, which sparked national debate.[3]
- The development of antiterrorism strategies at the state level, including a first surge of strict new laws in the immediate wake of the September 11 attacks, followed by attempts to extend wiretapping and other authority, and

the coalitions of resistance that have begun to spring up at the state level.

- The contradictory effects of antiterrorism policy on the academic community, including government investigations and subpoenas, the chilling of academic and political discussion on some campuses, new restrictions on sensitive information, slowing and reductions in the issuance of visas to foreign students and scholars, and other limitations—within an American academic sector that, it must be said, remains extraordinarily free.
- The effects of antiterrorism in the American nonprofit sector, a topic until recently virtually ignored by American nonprofits and foundations, including the prosecutions of Muslim charitable leaders for alleged ties to terrorist organizations, the freezing of assets in those organizations, the chilling of giving to Muslim charities, and government attempts to provide guidelines for American nonprofits and foundations making grants overseas.
- A final chapter examines antiterrorism policy in three other countries—the United Kingdom, Australia, and India—as a lens to understand our own experience and to show that whereas some aspects of the debates over antiterrorism, security, and liberty are issues in more than one country, other facets of these conflicts are specific to particular societies.

Several themes begin to emerge here: the response to external threats is tightening through executive action and legislative acts at home; the means include enhanced surveillance of noncitizens in the United States (and some citizens as well), data gathering and profiling of American citizens and nonresident aliens alike, restrictions on use and release of official information, limitations on access of foreigners to American society, and a tightened environment for some aspects of the work of civil society and the nonprofit sector. These activities

have taken place in several waves—an early wave of antiterrorist policy and law in the wake of the September 11 attacks that was questioned but largely enacted and then a second, overlapping wave of antiterrorist government acts and legislative proposals that encountered much more substantial opposition and an expanding coalition of critics.

Historical Roots of Government Control
Before September 11

All of this has roots in our history: episodes of resurgent government control and historical moments of the threat of restriction on the exercise of our basic freedoms of speech and assembly; discriminatory treatment against aliens and immigrants, particularly in times of national tragedy or difficulty; increased surveillance of citizens and noncitizens; and persecution of political dissent.

One of the earliest such episodes occurred soon after the founding of the American republic when, in the midst of fierce conflict between warring parties, Congress adopted the Sedition Act of 1798. The Sedition Act criminalized political criticism of the new U.S. government and led to a number of convictions of political opponents of the Federalist Party, which had sponsored the act. During the Civil War, President Lincoln sought to employ the military to maintain order in the North and to end the right of citizens to challenge their detention through filing writs of habeas corpus. Under his orders the Union army arrested thousands of nonmilitary citizen personnel, an action approved by Congress during the war. In 1866 the Supreme Court stepped in, reasserting the right to the writ of habeas corpus and denying the role of the military to supplant regular courts.[4] The Court ended with a ringing endorse-

ment of the Constitution's role in protecting rights in a time of national travail, a passage well worth reviewing now: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."[5]

Controlling political dissent was again the goal of the Espionage Act of 1917, adopted in World War I during America's first period of sustained anticommunism. Under the Espionage Act, U.S. residents could be jailed for speaking, printing, writing, or publishing any "disloyal, profane, scurrilous, or abusive language" about the U.S. government or causing, inciting, or attempting to cause or incite "insubordination, disloyalty, mutiny, or refusal of duty" in the military.[6] The Espionage Act was upheld by the Supreme Court against a challenge that it violated the First Amendment rights of free speech and freedom of the press when political dissidents were charged with circulating leaflets "urg[ing] men to refuse to submit to the draft." The Court held that the doctrine of free speech "does not . . . protect a man from an injunction against uttering words that may have all the effect of force" and that such circumstances are justified "[w]hen a nation is at war [because] many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured."[7] The Sedition Act of 1918 continued this treatment. Forced detentions were an issue once again in the midst of World War I, when anticommunism first entered American political and legal debate. Thousands of noncitizen residents of the United States were detained throughout the country in 1919 during the "Palmer Raids," which occurred after Attorney General A.

Mitchell Palmer's home was attacked by anarchists. "Pains were taken to give spectacular publicity to the raids, and to make it appear that there was great and imminent public danger. . . . The arrested aliens were in most instances perfectly quiet and harmless working people."[8] More than five hundred were forced out of the country, "not one of whom was proved to pose a threat to the United States."[9]

Dissent was once again challenged in the Smith Act of 1940, which was adopted by Congress and signed into law by President Roosevelt at a time of growing conflict between the United States and the Soviet Union and the gradual growth of progressive and left wing groups and unions in the United States. Under the Smith Act, it became a crime to "knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence" or "organiz[ing] . . . any . . . assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence."[10] The Smith Act was sparingly used, but it was employed in the late 1940s to convict eleven leaders of the U.S. Communist Party in a famous trial. That conviction was later upheld by the Supreme Court, rejecting a free speech challenge to the Smith Act and narrowing the free speech dissent available to political dissenters. Only in 1957 were the Smith Act convictions actually reversed by the Court.[11]

The most famous case of alien detention in American history is, of course, the Japanese internments of World War II. The details of this sorry episode are by now well known and have been covered in detail by Lawson Fusao Inada, Alfred Yen, Mark Tushnet, James Houston, Minoru Kiyota, and others. Over one hundred thousand American residents of Japanese origin, most of them U.S. citizens, were detained and interned in the western and southwestern United States begin-

ning in 1942 under an executive order issued by President Roosevelt. In a time of international conflict and domestic emergency, a compliant Congress declined to challenge this blatant use of racial classifications to deny protection of the law to a particular racial group. And the Supreme Court upheld the executive branch's order against an appeal by a Japanese American, Fred Korematsu, who had been charged and convicted with resisting detention and internment. In dissent, Justice Murphy wrote prophetically: "Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. . . . [American residents of Japanese origin and other racial groups] must . . . be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution."[12] About forty years later, Korematsu's conviction was set aside by a federal judge in California, with the government's consent, and Congress—much belatedly—sought to undo its earlier compliance by adopting an act recognizing that the internments had been wrong, providing an apology and a small financial sum.[13]

The Cold War and McCarthy periods stand as perhaps the most widespread use of law to suppress disagreement and punish dissenting citizens and noncitizens in recent American history. The history of this period, too, is well known. In the McCarthy era, a member of Congress and a congressional committee, the House Un-American Affairs Committee, took the lead in repressive tactics. Not that the executive branch was passive: some of the key mechanisms of the Cold War and the McCarthy era—such as federal investigations, loyalty oaths, surveillance, and other tactics—depended heavily on surging executive power. The Supreme Court did not begin to reassert its role until 1957, and it was not until 1967, in *U.S. v. Robel*, that the Court unambiguously reasserted freedom of association when Chief Justice Earl Warren noted: "It would indeed be ironic if, in the name of national defense, we would sanction the subver-

sion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."[14]

Attempts to silence dissent were, of course, prominent features of executive branch strategies during the Vietnam War era. As in the Cold War and McCarthy eras, the Federal Bureau of Investigation was a key tool of executive branch interference with free speech and free association to oppose progressive and radical groups—and eventually to oppose the wide swath of American society that came to protest U.S. involvement in the war in Vietnam. These government activities took a number of forms, but among the most well known was an FBI-wide counterintelligence and antiactivist program known as COINTELPRO. The program went far beyond research or the building of intelligence files—it was intended to "expose, disrupt, misdirect, discredit, or otherwise neutralize" civil rights, women's, trade union, and antiwar organizations and individuals affiliated with them, beginning in the mid-1950s and extending until the early 1970s.

Congress roused itself to the threats from the FBI and COINTELPRO only twenty years after the program was established, in 1976, when a Senate committee headed by Senator Frank Church revealed the full extent of the program and severely criticized it. The ramifications of COINTELPRO continue to this day. In the wake of the Church hearings, FBI rules limiting domestic security investigations were issued in 1976, then relaxed in 1983 under President Reagan and again in 2002 under President Bush.[15]

Antiterrorism Policy & Law after September 11

The First Wave

The most well known of the post–September 11 antiterrorism tools, and the first major one enacted, is the law referred to as

the USA Patriot Act—an abbreviation for the full title of Public Law 107-56, which was signed into law by President Bush on October 26, 2001: "The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act." The rapid adoption of antiterrorism measures—often without sufficient congressional review—actually began within days of the September 11 tragedy. As early as September 13, 2001, Senator Orrin Hatch proposed loosening the restrictions on wiretapping of phones and other communications. Senator Patrick Leahy of Vermont tried to slow the progress of this legislation: "I worry that we may run into the situation where—all of us have joined together in our horror at these despicable, murderous acts in New York and at the Pentagon—we do not want to change our laws so that it comes back to bite us later on."[16] But those amendments passed quickly, and there was more to come.

As Senator Leahy put it:

> What does this do to help the men and women in New York and their families and those children who were orphans in an instant, a horrible instant? . . . Maybe the Senate wants to just go ahead and adopt new abilities to wiretap our citizens. Maybe they want to adopt new abilities to go into people's computers. Maybe that will make us feel safer. Maybe. And maybe what the terrorists have done made us a little bit less safe. Maybe they have increased Big Brother in this country. . . . [D]o we really show respect to the American people by slapping something together, something that nobody on the floor can explain, and say we are changing the duties of the Attorney General, the Director of the CIA, the U.S. attorneys, we are going to change your rights as Americans, your rights to privacy? We are going to do it with no hearings, no debate. . . . If we are going to change habeas corpus, change our rights as Americans, if we are going to change search and seizure provisions, if we are going to give new rights for State investigators to come into Federal court to seek remedies in the already overcrowded Federal courts, fine, the Senate can

> do that. But what have we done to stop terrorism and to help the people in New York and the survivors at the Pentagon?[17]

In the words of Attorney General John Ashcroft, the act "provide[s] the security that ensures liberty. . . . First, it closes the gaping holes in our ability to investigate terrorists. Second, the Patriot Act updates our anti-terrorism laws to meet the challenges of new technology, and new threats. Third, the Patriot Act has allowed us to build an extensive team that shares information and fights terrorism together."[18] Civil libertarians saw it differently. In the words of the American Civil Liberties Union (ACLU), the act was "an overnight revision of the nation's surveillance laws that vastly expanded the government's authority to spy on its own citizens, while simultaneously reducing checks and balances on those powers such as judicial oversight, public accountability, and the ability to challenge government searches in court."[19]

The Patriot Act is a complex and broad statute, and this brief review for the general reader seeks only to provide a general picture of the act. The Patriot Act has been covered in considerable detail by a number of legal and other scholarly commentators; that in-depth legal and scholarly analysis of the Patriot Act is cited in the Further Readings section as well as in the endnotes. The Patriot Act provided the executive branch with an expanded menu of authority to act against various forms of crime and terrorism, very broadly defined. Little here was actually new, at least in the form of legislative proposals, and many of those proposals were originally responses not to terrorism but to the use of rapidly expanding new technologies such as cell phones and e-mail. But the political environment after September 11 provided the opportunity for congressional adoption, and, as other commentators have discussed, the debate was over rapidly.[20] Though adopted in less than two

months, the Patriot Act is a lengthy and highly complex statute. In this chapter, we discuss in very general terms some of its most important or controversial elements before moving on to a discussion in more detail of the second wave of antiterrorist policy and law in chapter 2.

The New Crime of Domestic Terrorism

The Patriot Act enlarged the laws countering terrorism to provide for a new crime of "domestic terrorism," under which a range of law enforcement agencies could conduct investigations, surveillance, wiretapping, and other actions against organizations and individuals in the United States. The new offense was defined broadly to include "acts dangerous to human life" intended to "influence the policy of the government by intimidation or coercion." And even providing assistance to such a group—without any involvement in direct "terrorist" activities—may trigger prosecution under the act. The breadth of this definition of domestic terrorism has been the subject of substantial controversy. Civil libertarians, conservative privacy activists, and others cite a range of organizations—including the antiabortion group Operation Rescue—as examples of groups that could come within the new definition of domestic terrorism, and they argue that investigation and prosecution of terrorists are already amply covered under existing criminal law. Others argue that these concerns are substantially overdrawn, that the new powers will be sparsely employed, and that sufficient checks are in place to limit government excesses. It is worth noting that noncitizens may be at particular risk under the new crime of "domestic terrorism," for noncitizen aliens resident in the United States may be held or deported if such an individual merely donates to or is a member of a group that is considered a terrorist organization.

The Problem of "Secret Searches" Under section 213 of the act, law enforcement organizations are permitted to undertake secret searches, often called "sneak and peek" searches, without informing the subjects of those searches, allowing wider surveillance than permissible before to the FBI and other law enforcement authorities. The Justice Department has not denied that such searches have occurred, though it refuses to provide detailed data on the use of the section 213 power. And the act does not limit this power to terrorism investigations—it is now available for non-terror-related criminal investigations as well.

New Dangers to Personal Records As originally passed, the Patriot Act also permits law enforcement authorities to obtain medical, financial, student, computer, and other personal records from "third party" holders of those records under section 215, without notice to the target of the investigation, without explicitly tying the search to terrorism or spying, by recourse to the semisecret Foreign Intelligence Surveillance Court. Section 215 was drafted broadly enough to allow the FBI to require public libraries, university libraries, bookstores, medical offices, doctors, Internet service providers, and other record holders to provide information. For example, libraries and bookstores can be required to supply data about individuals' reading habits, which has sparked significant public outcry and an alliance between traditional civil liberties groups and the library, bookselling, and publishing communities. Law enforcement authorities may now obtain information without showing a reasonable suspicion of criminal activity or "probable cause" under the Fourth Amendment to the Constitution. So even speech activities, such as political statements or mate-

rials read can trigger this sort of largely unrestricted surveillance and information order. Nor is the government required to show that the person concerned is an "agent of a foreign power," as previously required by law.

The American Civil Liberties Union and other civil libertarians assert that section 215 of the Patriot Act violates First Amendment protections of free speech (for those subject to record production orders and for those whose searches have been triggered by the exercise of free speech), Fourth Amendment protections against government searches without probable cause, and Fourth and Fifth Amendment protections of due process.

Section 505 of the act also permits federal authorities to obtain records from credit reporting firms, Internet service providers, and telecommunications companies through "National Security Letters" issued by the FBI without a requirement of suspicion that the individual targeted is involved in terrorism. The recipients of law enforcement orders under either section 215 or section 505 are generally prohibited from disclosing the order to the target, the press, activists, or anyone other than those required to know in order to facilitate the provision of the information to the authorities.

As discussed later in this chapter, faced with substantial opposition from a growing alliance of libraries and other information providers and archivists, the government was forced to announce in the fall of 2003 that section 215 had not yet been specifically employed to obtain information from libraries or other sources. In 2003 and 2004 a national movement to amend section 215 of the Patriot Act gathered force, with a coalition of civil liberties organizations, the American Booksellers Association, American Library Association, Gun Owners of America, the American Conservative Union, and other conservative groups, along with more than a million petition

signers lobbying for the SAFE Act, which would relax some of section 215 and other more severe portions of the Patriot Act.

At the same time, new doubts arose about the use of section 215 after the attorney general's 2003 statement that it had not yet been employed. In May 2004, the Justice Department told a Detroit federal district court judge hearing an ACLU challenge to section 215 that the Justice Department could not "undertake an obligation to keep the court informed on an ongoing basis if and when the government seeks a section 215 order," raising the possibility that section 215 might have been utilized since the attorney general's 2003 statement.[21] No such assurances were made with respect to section 505, and in fact a significant number of National Security Letters seem to have been issued.[22]

Wiretapping and Foreign Intelligence Earlier law had maintained a certain barrier between the gathering of information for intelligence purposes and for criminal investigation purposes. As the Lawyers Committee for Human Rights puts it: "law enforcement could not use the intelligence division to collect information for a criminal case which it would otherwise be barred from collecting due to insufficient evidence to support a search warrant within the criminal justice system."[23] The Patriot Act has substantially lowered this wall, providing the government with enhanced powers to collect information related to foreign intelligence and loosening the requirements for that collection of information. Under the act, the Justice Department has reduced the barrier between intelligence surveillance and criminal investigations, increasing the information available to prosecutors on non-intelligence-related crimes by allowing them access to data collected during intelligence wiretaps and surveillance. Now only a "significant" purpose of the search need be collecting foreign intelligence, a

considerably less restricted standard than existed under the Foreign Intelligence Surveillance Act of 1978 (FISA). The ease with which wiretapping orders may now be obtained under FISA, after the relaxing amendments of the Patriot Act; the easy availability of "emergency" FISA orders—with even fewer protections; and the weakening of the wall between intelligence investigations and criminal prosecutions may have contributed to the fact that "FISA orders now account for just over half of all federal wiretapping conducted" according to a major human rights organization.[24]

Dealing with Technology and Terrorism: The Addresses and Content of Communications The Patriot Act also expands the use of so-called trap and trace searches, permitting the government to gather information based on the "addresses" of communications rather than the content of those communications. This procedure has been allowed in a limited form for a number of years, but section 214 expands the ability of the government to undertake the trap and trace (also called "pen register") searches by enlarging such wiretapping orders issued by a federal judge to cover the entire country, not just the specific judicial district in which they are issued; allowing agents to complete required information after a judicial order has been issued; and applying the trap and trace rationale to the Internet. Each of these powers potentially substantially weakens earlier protections.

The CIA, the FBI, and Domestic Surveillance In the wake of the abuses of the 1950s, 1960s, and 1970s, the Central Intelligence Agency had been prohibited from engaging in domestic intelligence work, and the FBI had been prohibited from conducting surveillance on political dissidents outside normal investigative limits. The Patriot Act now provides the CIA, through the

director of central intelligence, with a role in defining domestic intelligence requirements. And in May 2002, the attorney general sharply expanded the ability of the FBI to monitor political organizations and public dissent, reversing earlier regulations adopted after the abuses of the 1960s and 1970s.[25]

Other surveillance mechanisms, operating or failed—such as the Total Information Awareness project established at the Defense Department, Operation TIPS, watch lists maintained over air travel by the Transportation Security Administration, plans for the passenger monitoring and profiling system, CAPPS II, including the uses of CAPPS II beyond identifying potential terrorists, the Matrix database in development at the state level, and the military's Eagle Eyes program, are discussed in chapter 2.

The Treatment of Noncitizens

Under the Patriot Act, residents of the United States who are not American citizens came under special scrutiny. In the immediate wake of the September 11 attacks, immigration and interrogation sweeps were undertaken against thousands of immigrants and aliens, many of Arab and Muslim background. Well over a thousand were detained in 2001 and 2002, for an average of eighty days each, in a process that the Justice Department's own inspector general later called "indiscriminate and haphazard." Those detentions were also plagued by extensions of time in custody without charge at the order of the Justice Department, refusals to allow communications with lawyers, and a policy of refusing bond to those picked up in the initial sweeps. A host of public interest legal organizations filed a suit in 2001 seeking the names and circumstances of those picked up in the post–September 11 sweeps. After an initial victory, a federal appellate court allowed the government to

retain secrecy over the sweeps, on the grounds that the "judiciary owes some measure of deference to the executive in cases implicating national security."[26]

Between the summer of 2002 and late April 2003, the Justice Department conducted a much-criticized "registration" program for noncitizens from some 25 countries, mostly Arab and Muslim states. This National Security Exit-Entry Registration System (NSEERS) required males from 16 to 45 years old to appear at Immigration and Naturalization Service offices for fingerprinting, pictures, and questioning. More than 1,800 were detained after seeking to comply with the registration rules, and the treatment of those detained was often odious. According to Human Rights First, "[I]n Los Angeles, for example, about 400 men and boys were detained during the first phase of call-in registration. Some were handcuffed and had their legs put in shackles; others were hosed down with cold water or forced to sleep standing up because of overcrowding."[27] Civil liberties and mainstream organizations criticized the haphazard nature of the registration program, some organizations likened it to singling out Jews during the Nazi era, and conservatives called the program ineffective and overreaching.[28] A number of aliens were deported or barred from returning to the United States, and none have, it appears, been charged with any terrorist activity as a result of the registration program as of early 2004.

Interviews were also conducted with several thousand Arab and Muslim men in 2002 and 2003, a process extended to Iraqi-born citizens and aliens when war with Iraq was imminent. Asylum seekers from thirty-three suspect Arab and Muslim nations were also automatically detained in a program called "Operation Liberty Shield." And of perhaps even more concern for the future, the number of refugees invited to settle in the United States has been on a substantial decline since September 11, and

local police and other authorities are increasingly being drawn into federal immigration enforcement.

The Struggle over the Detainees

Attempts to understand the legal and policy implications of the controversial detentions since the September 11 attacks are complicated by the fact that the detainees held by the U.S. government fall into not one but several categories.[29]

Noncitizen Combatant Detainees Held at Guantanamo Bay One important category of post–September 11 detainees is noncitizen, international detainees taken into custody in Afghanistan, Pakistan, Bosnia, and elsewhere. By 2003, over six hundred of those "battlefield detainees" from more than forty countries were held at Guantanamo Bay at a camp established at a U.S. naval facility. The Guantanamo detainees have not been identified as "combatants" by the U.S. government, for that would require, in most cases, that the United States comply with the Geneva conventions requirements for protection of prisoners of war. Nor have the Guantanamo detainees been identified as criminal suspects, for that would entitle them to certain rights in the U.S. criminal justice system. The holding of detainees with British and Australian citizenship has prompted diplomatic tension with those countries. Legal challenges by detainees' families to the detentions have also failed, initially because the detainees were being held at Cuba-leased Guantanamo Bay, an area that the courts defined as under U.S. "jurisdiction and control" rather than "sovereign" U.S. territory subject to judicial mandate.

The distinction between "prisoner of war," entitled to certain internationally mandated protections, and "enemy combatant" or "battlefield detainee," entitled to far fewer legal protec-

tions, has been a particularly difficult issue. Noncitizens accused of international terrorism or violations of the law of war who are not prisoners of war may eventually be tried under the controversial military commissions established by the U.S. government in the fall of 2002. The commissions, not yet operating, would provide some but not all of the procedural guarantees of a regular court, with substantial constraints on legal representation. The proceedings may also be closed to the public. The threat of trying international detainees in U.S. military commissions has sparked considerable opposition among key U.S. allies and others around the world, as well as in the United States, with legal scholars and diplomats arguing that trial in regular courts or extradition home to face trial in home countries are the only legal alternatives available to the United States. In late 2003 the U.S. Supreme Court agreed to hear arguments on the Guantanamo detentions, setting the stage for a judicial resolution of the detainees' status, the use of indefinite detention, and perhaps the circumstances of potential trials.

The Knotty Problem of Citizen Combatants Captured Abroad or Arrested in the United States In addition to the noncitizens held at Guantanamo, several U.S. citizens have been held, and in one case charged and convicted, for terrorism-related offenses. Treatment has varied depending on the circumstances of these individuals' capture or arrest, their activities abroad, the evidence available against them, and other variables with which we may not be entirely familiar. The American John Walker Lindh was captured with the Taliban in Afghanistan, held by U.S. forces under harsh circumstances, and questioned by the FBI after the FBI had notice that Lindh's family had hired a lawyer for him. Lindh was then imprisoned in the United States and then, through the criminal justice system, pled guilty to assisting the Taliban.

James Ujaama is a second and considerably less well-known U.S. citizen held by the United States for terrorism- and war-related offenses. Ujaama was arrested in the United States in the summer of 2002 and charged with conspiracy to provide support to Al Qaeda through plans to establish a terrorist training camp in Oregon. His case was handled through the regular criminal justice system. Ujaama pled guilty in 2003, and he was sentenced to two years in prison.

The cases of two other U.S. citizens held by the U.S. government have turned out to be far more complex. One of these citizens, Yaser Hamdi, was captured abroad, in Afghanistan. Another, Jose Padilla, was arrested in Chicago. Both have been held as enemy combatants and refused counsel, and their cases have become major tests of government policy toward citizen detainees.

Yaser Hamdi was born in Baton Rouge and spent most of his childhood in Saudi Arabia. Like Lindh, he was captured in Afghanistan, allegedly while assisting the Taliban—but because he is being held incommunicado and the government has released little information about him, we know equally little about his alleged activities. After his capture in Afghanistan in 2001, Hamdi was taken to Guantanamo and then transferred to a military prison in Charleston, South Carolina, after his U.S. citizenship was confirmed.

Hamdi was named an enemy combatant by the government and denied access to a lawyer, but he has not been charged. In 2002 a U.S. federal judge ordered that Hamdi be able to meet with a public defender. When an appellate court vacated that order the district judge questioned the government's designation of Hamdi as an enemy combatant in more forceful terms, ordering production of documents to substantiate that designation. The appellate court again vacated the district judge's order, holding that "Hamdi's detention conforms with a legitimate exercise of the war powers given the executive." But it

also refused to accept the notion that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." And there were several ringing dissents. In late 2003, the government finally allowed Hamdi access to a lawyer. And in early 2004, the Supreme Court agreed to hear the Hamdi case and to decide whether U.S. citizens such as Hamdi, detained outside the United States, may be held indefinitely and under what conditions.[30]

Jose Padilla is another U.S. citizen, now held outside the criminal justice system, whose case has produced significant controversy. Padilla was arrested at O'Hare Airport in Chicago in 2002 and designated an enemy combatant. The attorney general has called him a "known terrorist" who intended to set off a radioactive "dirty bomb" on U.S. territory. Padilla is being held with Hamdi at a naval base in South Carolina and, like Hamdi, was denied access to a lawyer for many months. In Padilla's case, a federal appellate court in New York decided that the government's mere assertion that Padilla was an enemy combatant was insufficient to allow him to be held indefinitely, basing its decision in part on Padilla's capture within the United States rather than in a foreign country. The Justice Department immediately sought review of that decision in the Supreme Court, and the Supreme Court agreed to hear the Padilla case in spring 2004.

Thus the stage was set for the U.S. Supreme Court to hear and decide on the lawfulness of the government's detention of over six hundred noncitizens on Guantanamo, as well as the detention of a U.S. citizen captured overseas (Hamdi) and a U.S. citizen arrested in the United States (Padilla) on terrorism and national security offenses. At issue were two crucial and linked concerns—the possibly varying rights of detainees of these various kinds (foreigners, citizens captured abroad, and citizens arrested in the United States) and also the authority of

the courts to review determinations made by the federal government in its war powers and national security roles.

The Remaining Detainees: Noncitizens Arrested in the United States Two other detainee cases have raised special controversy. Ali Saleh Kahlah al-Marri, a citizen of Qatar, was arrested in the United States at the end of 2001 on suspicion of assisting Al Qaeda. Rather than initially being held as an enemy combatant, al-Marri was processed through the criminal justice system and charged with a variety of terrorism-related financial and other crimes. But shortly before his trial was to begin, the government changed Hamdi's status to enemy combatant, dismissed the charges against him, and transferred him to the same Charleston military jail holding Hamdi and Padilla. There he is not allowed access to the lawyers who were defending him on the criminal charges.

It is not clear why the U.S. government made this abrupt choice. Some civil liberties organizations believe that al-Marri had a reasonable chance of suppressing some of the government's evidence in the criminal case and perhaps even of winning acquittal. The government has said that new information was developed on al-Marri's ties to terrorism and that it was "confident" that the Justice Department would have won the criminal case.[31]

A considerably more well-known noncitizen detainee arrested in the United States has also been threatened with a change in status from criminal defendant—with a range of protections available—to enemy combatant, particularly if the government does not have its way with the conduct of his trial. This is Zacarias Moussaoui, an Arab who grew up in France,[32] who was charged with assisting the September 11 terrorists. For nearly a year and a half, Moussaoui was allowed to represent himself, and his erratic filings and statements further disrupted the proceedings in his case. But in 2003, a federal dis-

trict court decided that Moussaoui had the right to take a deposition from an alleged Al Qaeda member captured in Pakistan. The government appealed, arguing that upholding the deposition order would interfere with military operations and interrogations abroad and that the individual captured in Pakistan was outside the authority of the federal courts.

In the summer of 2003, the government formally refused to allow Moussaoui to question the alleged Al Qaeda member held in Pakistan and implicitly threatened to transfer Moussaoui to incommunicado, enemy combatant status if it lost that battle.[33] In response, the federal court dismissed most of the charges against Moussaoui and refused to allow consideration of the death penalty because Moussaoui could not gather evidence to support his case. The government appealed to a federal appellate court, where the matter remained in early 2004.[34]

In June 2004, the U.S. Supreme Court ruled that both U.S. citizens and noncitizens held in the wake of September 11 may have access to the American courts to challenge their detention and treatment. In the *Hamdi* case, the Court ruled that the president had the authority to detain Hamdi and other U.S. citizens as alleged enemy combatants—but the Court refused to deny Hamdi and other U.S. citizen detainees access to the courts to challenge such detentions and their treatment. In a separate case, *Rasul v. Bush*, the nearly 600 noncitizens held at Guantanamo Bay were also permitted to challenge their detention in the courts. In the case of Jose Padilla, the Court, by a 5-4 decision, required that Padilla refile his case in a lower federal court, thereby avoiding a direct decision on that matter. "Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat," wrote Justice Sandra Day O'Connor in the *Hamdi* decision. "But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments

that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. . . . [A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[35] In March 2006, the Supreme Court heard arguments on plans to try Guantanamo detainees before military commissions and on whether the Detainee Treatment Act, passed by Congress in 2005, deprived the federal courts of jurisdiction over Guantanamo detainees.[36]

The New Attacks on Releasing Government Information

Because of a range of actions separate from the Patriot Act, public access to official information has clearly suffered since September 11. In the first wave of executive action after the attacks, the Justice Department limited citizens' access to government information under the Freedom of Information Act by increasing the use of exemptions to providing information. The department also announced that it would defend agencies that decline to release information if that refusal had a "sound legal basis." This substantially weakened an earlier standard for release of official information under the act—that information should be released unless it would result in "foreseeable harm." Now a government agency need not argue or show foreseeable harm but only demonstrate that it has a sound legal basis under the act to refuse to give up information. Under the 2002 Homeland Security Act, Congress also added a broad and vaguely worded exemption for information on "security or critical infrastructure" to the range of data that the government need not disclose. Furthermore, as discussed in chapter 4, the White House has also strongly pushed government agencies to refuse to release a broad category of "sensitive but non-

classified material," a stance reinforced in the Homeland Security Act, leading to substantial controversy in the academic world, and the president has issued an executive order strengthening the classification process and erecting stronger barriers to declassification of official information.

The executive branch's reluctance to release information extends beyond the public to Congress, which has had immense difficulties in obtaining information on the implementation of the Patriot Act; the numbers and status of detainees; the activities of the Foreign Intelligence Surveillance Court; and plans for new legislation, including the Patriot Act II discussed in chapter 2. For the most part, the courts have upheld the government's considerably broader reading of the Freedom of Information Act since late 2001, part of an initial pattern of deference to the executive branch that was among the troubling aspects of the post–September 11 era.

The Patriot Act & the Growing Power of Alliance

The Justice Department has consistently refused to provide any detailed information on the use of the Patriot Act, either to the public or to Congress, including information on the actual uses of the new surveillance powers provided to law enforcement under the act. This is disturbing because it indicates a lack of executive branch accountability to Congress. But in another sense the increasing willingness of Congress—often spurred by constituents' rage—to ask about the uses of the Patriot Act in practice may also bode well for the reawakening of a somewhat compliant legislature.

In the face of growing criticism from librarians, library associations, publishing and bookselling associations, and other groups—and a growing alliance between those organizations

and civil liberties forces—the Justice Department gave way a bit in an attempt to defuse the controversy over a particularly problematic part of the act: section 215. As mentioned previously, section 215 allows for tracking of bookstore and library use and seizure of organizational files, computers, and other materials but also prohibits those ordered to provide information—such as bookstores and libraries—from divulging those requests. The attorney general announced in October 2003 that the government has not yet made use of section 215 in its investigatory work. The notification, which came in the form of declassification of the secret information relating to the use of section 215, was for the purpose "that the public not be misled regarding the manner in which the U.S. Department of Justice, and the FBI in particular, have been utilizing the authorities provided in the . . . Act." The attorney general pointedly noted that the Justice Department and the FBI "have not been able to counter the troubling amount of public distortion and misinformation in connection with Section 215."[37]

The politics of this begrudging admission were perhaps more important than its legal implications, for the statement clearly showed the power of civil liberties and pro-privacy groups in alliance with powerful social, cultural, and economic actors such as public libraries, university libraries, and the bookselling industry. In legal terms it probably meant somewhat less, for the government has certain other tools available (such as National Security Letters) to obtain similar information. And, as one prominent Washington watchdog organization, OMB (Office of Management and Budget) Watch, noted: "The fact that Section 215 has never been invoked may give some small comfort to those who fear the Patriot Act gives government unchecked and out-of balance powers. In the end, such questions—and the underlying public distrust of government—can be put to rest only when government is less secretive, reports forthrightly on its use of the tools our laws grant

it, and thereby shows a stronger commitment to the democratic process."[38] As noted earlier, the Justice Department's refusal to provide information on section 215 usage to a federal court in Detroit hearing a civil liberties challenge to the provision raised some renewed concerns in 2004 about the utilization of section 215 after the attorney general's September 2003 assertion that it had not yet been used.

This is but one example of the power of alliance to force retreats by the government in the implementation of antiterrorist law and policy. It is important not to overstate the importance of those retreats. But it also is important to note, as the following chapters often do, that growing alliances—often involving civil libertarians; conservative privacy activists; libertarians; and even gun owners, antiabortion activists, and others—have played substantial roles in defeating or slowing the enactment or implementation of antiterrorist measures, especially in the second wave of measures proposed after the Patriot Act. As discussed in chapter 2, the American Civil Liberties Union has played a leading role in forming these alliances.

Considerable portions of the more controversial parts of the original Patriot Act—particularly those relating to surveillance authority and foreign intelligence—will "sunset," or expire, at the end of 2005 as the result of compromises made when the Patriot Act was originally adopted in 2001. These sunset provisions include wiretapping in terrorism cases, sharing of wiretaps and foreign intelligence information, roving wiretaps, "trap and trace" authority, the controversial access to business records (the "library" issues), national service of search warrants, and other important provisions.[39] Already the battle has been joined on whether these important parts of the Patriot Act should be renewed—as the president forcefully advocated in his State of the Union speech in January 2004—or scrapped. The alliance building of the last several years on particular portions of the act, and particularly on second wave

initiatives after that—such as TIA, Patriot Act II, TIPS, and other efforts mentioned earlier and discussed in detail in chapter 2—played a critical role in the results of this debate when the Patriot Act came up for reconsideration in Congress in 2005.

In the building of opposition alliances and the approaching sunset clauses, the Patriot Act adopted with such fervor and speed after the 2001 attacks may now be coming full circle. Some elements of the conservative and libertarian community have already sided with civil libertarians and others against the act or particular portions of it. Even Viet Dinh, the former high ranking Justice Department official who, as head of the Office of Legal Counsel, played a substantial role in drafting the Patriot Act, Patriot Act II, and other measures, said in early 2004 that "there has . . . to be some sort of access to counsel and some sort of process" for detained U.S. citizens like Jose Padilla.[40] The Patriot Act went far, though perhaps not as far as its critics have charged, and it continues to hold substantial potential danger in the powers it gives government—even if government is not actually using those powers yet. But the Patriot Act was also accompanied by strong state activities to expand antiterrorist wiretap and surveillance authority, and it would soon be followed by a second wave of antiterrorist policies and government programs. Opposition also strengthened, often in an innovative alliance between traditional civil liberties advocates, conservatives, libertarians concerned with privacy and government power, and a range of other constituencies. And antiterrorism policies and program came to have increasing effects on the academic and nonprofit sectors. We now turn to these developments.

Much of the Patriot Act as adopted in 2001 was made permanent. But a number of the most controversial sections were enacted so as to expire at the end of 2005. The renewal or amendment or final expiry of these sections became the main

issues in the renewal of the Patriot Act, particularly in late 2005. Attempts to renew the act with a majority of the most controversial provisions intact were throttled in the Senate in late 2005, caught up in the political fallout of the news that the National Security Agency had conducted secretly approved wiretapping in the United States.

After two extensions, lengthy debate, and some compromise, the renewal was approved by the House of Representatives in early March 2006 and signed by the president. The renewal provisions relieve libraries of the obligation of responding to the National Security Letters, and they allow persons who receive section 215 subpoenas for personal records an opportunity to oppose the nondisclosure provisions attached to section 215 orders. Although significant portions of the Patriot Act were made subject to reauthorization in 2001, only two provisions remain "sunsetted" under the 2006 reauthorization. FBI roving wiretaps and the seizure of business records were reauthorized in March 2006, but they must be renewed in another four years by Congress, or they will lapse.[41]