# IMBALANCE OF POWERS

## How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties

**September 2002 — March 2003**

***Imbalance of Powers*** **is an update to Lawyers Committee's** ***A Year of Loss: Re-examining Civil Liberties Since September 11*****, which was published in September 2002.**

LAWYERS COMMITTEE
FOR HUMAN RIGHTS

# Chapter 1

## OPEN GOVERNMENT

### INTRODUCTION

A mantle of secrecy continues to envelop the executive branch, largely with the acquiescence of Congress and the courts. The administration's insistence on secrecy makes effective oversight impossible, upsetting the constitutional system of checks and balances at a time when the executive branch is accruing vast new powers. History has demonstrated that periods of national emergency pose the greatest threat to the constitutional order, as judges and legislators abdicate their traditional roles and more easily endorse executive violations of basic rights that would be unimaginable during times of peace. But it is precisely at such moments that the legislature and judiciary must defend their constitutional authority and serve as guardians of democracy, ensuring that the balance between liberty and security is properly struck.

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By fostering a culture of secrecy, the administration is turning its back on the very principles that make democracy flourish. As John Adams warned two centuries ago, "liberty cannot be preserved without a general knowledge among the people."[2] Neither the courts nor the legislature can fulfill their constitutional duties without information from the administration. And the Constitution relies on an informed electorate to provide the ultimate check against arbitrary government. In the wake of September 11, however, judges and legislators have too often yielded to executive demands, without safeguarding their own obligation to oversee executive actions and defend the right of the American people to know what their government is doing.

## ERODING OPEN GOVERNMENT LAWS

Over the last eighteen months, the administration has spearheaded an unprecedented roll-back of federal open-government statutes. Most recently, Congress granted the administration broad exemptions from the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA) in the legislation establishing the Department of Homeland Security. As enacted in 1966, FOIA requires federal agencies to disclose documents requested by the public unless they fall within nine statutory exemptions.[3] FACA was enacted in 1972 to limit the ability of special interest groups to secretly influence executive decision-making.[4]

### THE FREEDOM OF INFORMATION ACT

Public access to information under FOIA has been declining steadily in the wake of September 11, 2001. Most dramatically, on October 12, 2001, Attorney General John Ashcroft issued a new FOIA directive to the heads of executive agencies, encouraging the presumptive refusal of requests.[5] Previously, the Department of Justice (DOJ) would defend an agency's refusal to release information under FOIA only when it could be argued that releasing the information would result in "foreseeable harm."[6] Under the new directive, however, Ashcroft urged agency employees to consider all potential reasons for non-disclosure, and announced that the DOJ would defend court challenges to decisions to withhold information as long as those decisions rested on "a sound legal basis," a much lower standard. Although the directive was issued shortly after September 11, 2001, the new policy had been planned well before the attacks.[7]

In November 2002, Congress further undermined FOIA by acceding to an expansive new "critical infrastructure" exemption in the Homeland Security Act.[8] Under Section 214 of the Act, "critical infrastructure information" voluntarily provided to the Department of Homeland Security (DHS) is not subject to disclosure under FOIA. As defined in the Act, critical infrastructure information encompasses all "information not customarily in the public domain and related to the security of critical infrastructure or protected systems."[9]

Despite the dry, circular language, the exemption is extremely far-reaching. The term "critical infrastructure" encompasses a broad sweep of private and governmental systems that include (but are not limited to) telecommunications, energy production, banking and finance, transportation, water systems and emergency services.[10] In the United States, more than 85 percent of "critical infrastructure" is

under private sector control.[11] Furthermore, although the exemption applies only to information submitted to the new DHS, the department itself is massive, amalgamating 22 separate federal agencies and more than 170,000 federal employees.

The administration has insisted that the "critical infrastructure" exemption is necessary to facilitate information-sharing with the government in the wake of September 11. Companies had claimed they would be reluctant to provide information if they thought it would become public.[12] FOIA already contained an exemption for confidential business information,[13] however, as well as for national security information,[14] and sensitive law enforcement information.[15] Now, evidence of simple ineptness or wrong-doing may also be exempted from disclosure, without any confidential business justification. Exempting such information from disclosure across the board seems counterproductive, weakening private-sector incentives to solve problems and implement reforms. For example, the wholesale suppression of information about environmental hazards could directly threaten community safety, while the extent of its contribution to national security remains questionable.

The four Democratic Representatives on the House Select Committee on Homeland Security warned that the new exemption threatened the United States' "strong tradition of open and accountable government" and "needlessly curtail[ed] the public's right to health and safety information."[16] In order to highlight the practical implications of the new exemption, they cited the example of an energy company, which could now "hide information from the public about a leak at a nuclear facility by simply submitting their documents, unsolicited, to the DHS."[17] Other examples of exempted material might include information about the safety of drinking water or the dependability of transportation infrastructure such as railways, bridges, and tunnels.[18]

Senator Carl Levin (D-MI), the ranking Democrat on the Senate Armed Services Committee, also criticized the exemption for "unnecessarily limit[ing]" the public's right to information.[19] Senator Levin emphasized that the exemption effectively ties the DHS' hands, preventing it from warning other government agencies (as well as the public at large) about known threats to public safety, without the written consent of the submitter.[20] Government employees who improperly disclose the information will not only lose their jobs, they will be subject to imprisonment and fines — even if their sole motivation is protecting the public.[21]

Under the new Act, moreover, any information accepted as "critical infrastructure information" cannot be used against the submitter in any civil action arising in federal or state court, providing it was sub-

mitted in good faith.[22] The breadth of the new exemption has raised concerns that corporations will use it proactively, to shield themselves from civil liability. Even if the information reveals that the submitter is clearly violating federal health, safety, or environmental laws, for example, the DHS can not bring civil enforcement actions on the strength of that information.[23]

Not surprisingly, many of the companies benefiting from the new exemption had been seeking these kinds of protections for years.[24] Senator Patrick Leahy (D-VT) called the exemption a "big-business wish list gussied up in security garb."[25] He warned that it represented the "most severe weakening" of FOIA to date.[26]

## THE FEDERAL ADVISORY COMMITTEE ACT

The Homeland Security Act also authorizes the Department of Homeland Security to create advisory committees that are exempt from the Federal Advisory Committee Act (FACA).[27] Since 1972, FACA has worked to limit the ability of special interest groups, acting through advisory committees, to influence public policy behind closed doors. FACA was enacted to ensure that Congress and the public were aware of the number, purpose, membership, and activities of advisory committees set up by the executive branch.[28] Under FACA, advisory committees must announce their meetings, hold them in public, provide for the representation of differing viewpoints, and make their materials available to the public.[29]

DHS advisory committees are now exempt from FACA's requirements under Section 871 of the Homeland Security Act. Although the Secretary of the DHS is still required to publish a notice in the Federal Register (announcing the establishment of such a committee and identifying its purpose and membership), the committees themselves can meet in secret. Their activities and reports will be shielded from congressional and public scrutiny. As FACA already contained exemptions for information relating to national security, it is not clear why its provisions could not have been applied in full to the new DHS.[30] As discussed in the next section, a recent dispute between members of Congress and the administration exemplifies the dangers of exempting the executive branch from FACA.

## INVESTIGATIVE ARM OF CONGRESS ABANDONS SUIT FOR RECORDS

In April 2001, the General Accounting Office (GAO), the investigative arm of Congress, launched an investigation into an energy task force established by President Bush. The task force was created "to develop

a national energy policy" and was chaired by Vice President Dick Cheney. Claiming that all of the members of the task force were federal employees (and not private citizens), the task force did not abide by the requirements of FACA.[31]

The GAO was asked to investigate the energy task force in the wake of press reports that the task force had been secretly meeting with a group of insider lobbyists. According to these reports, the task group's meetings had included members of conservative interest groups, as well as energy executives who had made large contributions to President Bush's election campaign (including Enron officials). These lobbyists had reportedly been given secret, high-level access to the administration officials who were deciding the country's energy policies — precisely the kind of scenario that FACA was designed to prevent.

Representatives Henry Waxman (D-CA) and John Dingell (D-MI), both ranking members of House committees, asked the GAO to investigate these reports.[32] Specifically, the GAO was to provide Congress with the names of the people the task force had met with; information on when and where those meetings took place; and an account of the subject matter of issues discussed.[33] In May 2001, the GAO requested a list of documents from Cheney in order to provide Congress with the requested information and determine whether the task force had broken any laws.[34] Cheney refused to hand over many of the documents, however, saying that to do so would "unconstitutionally interfere with the functioning of the executive branch."[35]

The GAO eventually sued Cheney in federal district court in Washington, DC, the first time the GAO has ever filed suit against an executive official over the issue of access to information.[36] In the past, the executive branch has provided the information requested or has negotiated a compromise acceptable to all sides.[37] On February 22, 2002, the GAO released a statement explaining its decision to pursue disclosure of the documents through litigation:

> We take this step reluctantly. Nevertheless, given [the] GAO's responsibility to Congress and the American people, we have no other choice. Our repeated attempts to reach a reasonable accommodation on this matter have not been successful. Now that the matter has been submitted to the judicial branch, we are hopeful that the litigation will be resolved expeditiously.[38]

The case was heard before Judge John Bates, a Bush appointee who had been confirmed a year earlier (and previously worked for Independent Counsel Kenneth Starr during the Whitewater investiga-

tion).[39] On December 9, 2002, Judge Bates dismissed the GAO's lawsuit out of hand, holding that David Walker, the Comptroller General of the United States (and head of the GAO), lacked standing to sue because he had not personally suffered a sufficiently concrete injury.[40] Judge Bates noted that the GAO's standing to sue derives from its status as an agent of Congress, and emphasized that no congressional committee had issued a subpoena for Cheney's records. Minority members cannot issue subpoenas, however, as they do not control congressional committees — and it has traditionally been members of the minority who rely on the independent GAO to conduct investigations, especially when the majority party controls both the executive and the legislature.[41]

On February 7, 2003, the U.S. Comptroller General announced that the GAO would not appeal the district court's decision.[42] Walker emphasized that he strongly disagreed with the decision, but said that the GAO could not invest the resources necessary to launch an appeal.[43] Walker then made the following appeal to the administration:

> Based on my extensive congressional outreach efforts, there is a broad and bi-partisan consensus that GAO should have received the limited and non-deliberative ... information that we were seeking without having to resort to litigation. While we have decided not to pursue this matter further in the courts, we hope the Administration will do the right thing and fulfill its obligations when it comes to disclosures to the GAO, the Congress, and the public, not only in connection with this matter but all matters in the future.[44]

Faced with continuing executive resistance and an unfavorable district court decision, the GAO simply abandoned its suit and decided to rely on the administration's good faith. The GAO's decision exemplifies a new, post-September 11 dynamic: a Congress that strives to be deferential to the executive branch, and an administration that is not only distrustful of the legislature, but hostile to any attempts at oversight. That dynamic is explored in detail below in the context of the implementation of the USA PATRIOT Act and the secretive drafting of PATRIOT II.

## SECRECY SURROUNDING POST-SEPTEMBER 11 EMERGENCY LAWS

### IMPLEMENTATION OF THE USA PATRIOT ACT

At the urging of the administration, Congress enacted the USA PATRIOT Act less than six weeks after September 11.[45] Drafted primarily by the Department of Justice (DOJ), the Act grants unprecedented new surveillance and detention powers to law enforcement and intelligence agencies.[46] Despite the sweeping nature of the changes, it was passed with little opportunity for hearings or debate and many members of Congress did not even have time to read the final version of the bill before it came up for a vote. [47]

When Congress attempted to oversee the administration's use of its new powers, the DOJ initially failed to respond to congressional requests for information. It was only after Republican Representative James Sensenbrenner, chair of the House Judiciary Committee, publicly threatened to "blow a fuse" and start subpoenaing executive documents that the DOJ provided any response at all to many of the congressional questions posed.[48] The House Judiciary Committee had submitted a list of 50 questions to the Department of Justice on June 13, 2002, and on July 25, 2002, the Senate Judiciary Committee expanded upon this list, adding 43 questions of its own. In a July 26, 2002 letter to Representative Sensenbrenner, the Department of Justice included responses to 28 of the original 50 questions, in most of these answers indicating that the required information was classified.[49] The Senate Judiciary Committee has revealed that although the Department of Justice sent follow-up letters in August and December 2002, 37 of the 93 congressional questions remained unanswered in February 2003.[50] In an interim report, the Senate committee complained of its "disappointment with the non-responsiveness" of the Department of Justice.[51]

Meanwhile, in August 2002, the American Civil Liberties Union (ACLU) had filed an expedited request under the Freedom of Information Act (FOIA), seeking information on USA PATRIOT implementation.[52] The DOJ agreed that the FOIA request would be processed expeditiously, but it had not released any records by late October 2002. The ACLU was forced to file suit in Federal District Court, joined by the Electronic Privacy Information Center, the American Booksellers Foundation for Free Expression, and the American Library

Association's Freedom to Read Foundation (see chapter 2). The court ordered the DOJ to comply with the FOIA request by January 15, 2003. Although the government released more than 200 documents on January 15, the pages had been heavily redacted.[53] According to the ACLU, the documents are effectively "meaningless" and fail to address key civil liberties concerns such as the use of surveillance against U.S. citizens who are not suspected of criminal or terrorist activity.[54] The groups plan to return to court to seek more responsive disclosure.

The General Accounting Office (GAO) has been asked by Senator Russell Feingold (D-WI) and Representative John Conyers, Jr. (D-MI) to review various anti-terrorism measures and their potential impact on civil liberties. The GAO's investigation will examine the procedures proposed for military commissions, the use of authority to monitor attorney-client discussions, the criteria for and process of questioning non-citizens for information on terrorist activity, and the detention of non-citizens in connection with the Justice Department's post-September 11 investigation. The Lawyers Committee will continue to watch for developments in this investigation.[55]

## THE DRAFTING OF PATRIOT II

In recent months DOJ officials have drafted a new legislative proposal to further expand the administration's USA PATRIOT powers. On February 7, 2003, the Center for Public Integrity released a leaked copy of the "Domestic Security Enhancement Act of 2003," which has been nicknamed PATRIOT II.[56] The draft bill would sweep away important constitutional checks on executive power that are fundamental to American democracy. In particular, the bill would wall off from judicial oversight precisely those areas in which the courts have questioned the constitutionality of the administration's actions in the first 18 months after September 11.

Former Representative Bob Barr (R-GA) has said that he finds the draft of PATRIOT II deeply worrying. He emphasized that the DOJ's initial draft of the first USA PATRIOT Act had asked for "all sorts of powers far beyond what any normal person would deem necessary to fight terrorist acts," and in the end, "they got an awful lot of what they asked for."[57] He noted:

> Now just a year and a half later — without the opportunity to even digest the enormous powers they got in the PATRIOT Act — apparently they're getting ready to draft another bill to get more powers that go far beyond what was in the PATRIOT Act.[58]

The secrecy surrounding the drafting of PATRIOT II has deepened concerns about the accrual of executive power in the wake of September 11. Although rumors of the DOJ's plans had been circulating for months, the DOJ had repeatedly denied reports that it was preparing any such draft legislation.[59] As late as February 3, 2003, the DOJ had reassured the staff of Senator Patrick Leahy, the ranking Democrat on the Senate Judiciary Committee, that no such proposals were being drafted.[60] The concern has been that the DOJ was planning to introduce its proposals at a time of weakened congressional resistance — during a war in Iraq for example — in order to repeat the hasty passage of the USA PATRIOT Act.[61]

These concerns came to a head at a hearing before the Senate Judiciary Committee on March 4, 2003, where Attorney General Ashcroft was questioned about the PATRIOT II proposal. Senator Patrick Leahy emphasized to the attorney general that a member of his own staff had been told by a Justice Department official that no new proposal was being drafted less than a week before the leaked copy of PATRIOT II was made public. Senator Leahy told Attorney General Ashcroft, "Somebody who reports directly to you lied to [Leahy's aid], and this is not a good thing. I think it shows a secretive process in developing this."[62]

Senator Russell Feingold questioned the attorney general about the administration's plans for the PATRIOT II proposal. In response, Attorney General Ashcroft assured the Senator that neither he nor the administration was prepared to present a PATRIOT II proposal to Congress. He said that the administration was continuing to "think expansively" about these issues, and did not rule out the possibility that any of the proposals contained in the PATRIOT II draft might be submitted to Congress in the future. He concluded, "Until I have something I think is appropriate, I don't know that I should engage in some sort of discussion."[63] Given the administration's pressure for quick passage of the USA PATRIOT Act, and the lack of congressional debate prior to its adoption, the current draft bill needs to be fully debated, and so we explore its content in detail throughout this report.

Among the most troubling of the changes the draft law would introduce are:

- **Authorizes Secret Arrests.** The PATRIOT II draft overturns a federal court decision requiring the Justice Department to turn over the names of the people it detained in post-September 11 sweeps, a ruling that the government has appealed. Although the Justice Department has argued on appeal that current law does not require the disclosure of these names, the draft hedges those bets by

explicitly authorizing the government to keep secret the names of those it arrests and jails without charge.

- **Authorizes Stripping Americans of their Citizenship for Engaging in Constitutionally Protected Conduct.** The proposal to allow the executive branch to strip American citizens of their nationality, reminiscent of Soviet practices at the height of the cold war, is among the most extraordinary of the bill's assaults on fundamental American rights and values. Citizenship is often described as the fundamental safeguard of all rights.

  Current law reflects the sacrosanct nature of American citizenship by making it very difficult for the government to take it away from people. Only in rare cases, for example when a person serves in the armed forces of a state at war with the United States, can the government deprive an American of his or her citizenship. And even in those cases, the government must prove that there was a specific intention to relinquish American citizenship by engaging in that conduct.

  In 1967, Supreme Court Justice Hugo Black wrote in *Afroyim v. Rusk* that "[t]he very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."[64]

  The Justice Department's PATRIOT II draft takes a different approach to citizenship. It would create a system where the government can strip an American of citizenship as a form of punishment if, for example, the person gave "material support" to a group designated by the government as "terrorist." The question of what constitutes "material support" has been challenged in the courts, because it is vague and appears to include political association and speech that is protected by the Constitution. The draft defines "material support" to include "instruction or teaching designed to impart a specific skill."

- **Permits Extradition — including of U.S. Citizens — without Treaty.** The Justice Department proposes in the draft to upend a fundamental principle of liberty established virtually at the foundation of our democracy: that the executive may not deliver a person to prosecution by a foreign government except pursuant to treaty or explicit statutory authority. Extradition treaties between countries typically provide specific conditions for prosecution (for example, ensuring

a fair trial and protecting against a prosecution under unjust laws). The administration could, if it wanted to, negotiate extradition treaties to cover any gaps it finds. Instead, it proposes to bypass the treaty process, creating a situation in which even American citizens could be sent for trial to countries with which the United States does not have extradition treaties — countries that include Saudi Arabia, Syria, Libya, China, Yemen, and Indonesia.

- **Eliminates Court Orders Issued to Prevent Police Spying.** Last year, Attorney General Ashcroft unilaterally lifted restrictions on domestic spying by the FBI that had been put in place after revelations that the government had conducted oppressive surveillance on Martin Luther King, Jr. and other civil rights leaders deemed "subversive." Many state and local law enforcement agencies, some with disturbing histories of similar abuses, are party to court-supervised consent decrees arising out of legal challenges to these practices. These consent decrees prohibit illegal spying by police departments, and as such the Justice Department argues that they inhibit "effective cooperation" with the federal spying now permissible under the new Ashcroft guidelines. The draft would address this problem by abolishing all of these consent decrees.

  In the Senate Judiciary Committee hearing on March 4, 2003, Senator Feingold probed the need for the elimination of the consent decrees, asking Attorney General Ashcroft repeatedly whether actual investigations had been constrained by these safeguards:

  > FEINGOLD: Can you cite an example of a terrorist plot that went undetected because local police had their hands tied by a consent decree placing limits on their domestic spying capabilities?
  >
  > ASHCROFT: I cannot.[65]

- **Radically Expands Grounds on which Non-Citizens — Including Legal Permanent Residents — Can be Deported Without a Hearing and Further Limits Judicial Review of Attorney General Decisions.** The draft has a number of provisions that are simply unrelated to terrorism, including one that broadens the already overly-broad grounds on which non-citizens can be deported without a hearing, and another that applies those provisions to legal permanent residents, as well as other immigrants. What this means in practice is, for example, a long-time legal permanent resident who wrote a bad check in 1976 is now subject to mandatory deportation under "expedited

removal," a form of administrative decision that skips the courts altogether. For whole categories of people, the proposal would eliminate the possibility of judicial review of the attorney general's decision to deport them.

In expanding executive surveillance and detention powers, PATRIOT II would also enhance the administration's capacity to exercise those powers in secret. Section 204 of the draft would require judges to consider *in camera* (alone in chambers) and *ex parte* (considering one side only) the government's applications to submit secret evidence at trial, when so requested by the government.[66] Section 206 would gag grand jury witnesses in terrorism cases, preventing them from discussing their testimony publicly — even to contradict false information reported about them in the press.[67] Most significantly, as discussed above, Section 201 would explicitly authorize secret arrests, overturning a federal court decision requiring the DOJ to release the names of the hundreds of people detained within the United States in the post-September 11 sweeps. In so doing, Section 201 would deal a further blow to FOIA, the open-government statute under which the administration was ordered to release the detainees' names. The eventual fate of PATRIOT II will be a new test of congressional autonomy.

In light of the speed with which the administration pushed the USA PATRIOT Act through Congress and the lack of substantive debate on its provisions, we believe that each and every one of the provisions of the PATRIOT II draft should receive a full public airing and debate. With that in mind, we examine a number of its specific provisions in greater detail elsewhere in this report.

## LAST-MINUTE INCLUSION OF PROTECTIONS FOR HOMELAND SECURITY WHISTLEBLOWERS

One encouraging development was the congressional insistence on including whistleblower protection in the Homeland Security Act. The administration's original draft of the Homeland Security Act effectively exempted DHS employees from the protections of the Whistleblower Protection Act (WPA). Senator Charles Grassley (R-IA), co-author of the WPA in 1989, led the fight to ensure that the final version of the Homeland Security Act included strong whistleblower protections.[68] In explaining why such protections are important, Senator Grassley emphasized:

> Whistleblowers are the key to exposing a dysfunctional bureaucracy.... Government agencies too often want to cover up their mistakes, and the temptation is even greater when bureaucracies can use a potential security issue as an excuse. At the same time, the information whistleblowers provide is all the more important when public safety and security is at stake.[69]

Senator Grassley cosponsored an amendment to preserve whistleblower protections for all DHS employees, and the amendment was incorporated into the final version of Act. In the end, Congress made clear that the executive may not "waive, modify, or otherwise affect" the "protection of employees from reprisal for whistleblowing." DHS whistleblowers who believe they have been retaliated against may file complaints with the Office of Special Counsel and appeal their agency's response to the Merit Systems Protection Board (MSPB).

Another example of congressional independence is the Senate Judiciary Committee's review of the administration's powers under the Foreign Intelligence Surveillance Act (FISA), a statute governing the FBI's collection of foreign intelligence information (see chapter 2). In February 2003, the Senate Judiciary Committee released a preliminary report identifying serious problems in the FISA process, including the widespread misunderstanding of the governing law among FBI agents and a pervasive lack of accountability in implementing FISA procedure.[70] Following from this, the Senate committee noted that when the administration fails to use its FISA powers properly, "pressure is brought on the Congress to change the statute in ways that may not be at all necessary."[71] The committee then emphasized, "From a civil liberties perspective, the high-profile investigations and cases in which the FISA process appears to have broken down is too easily blamed on the state of the law rather than on inadequacies in the training of those responsible for implementing the law."[72]

The Senate Judiciary Committee's oversight is laudatory. Yet this was the "first comprehensive review of the FBI in nearly two decades."[73] Without ongoing oversight, Congress cannot adequately resist the outside pressure to enact new and unnecessary executive powers. Indeed, Congress has already expanded the administration's FISA powers under the USA PATRIOT Act (as discussed extensively in chapter 2) — without the benefit of the information the Senate Judiciary Committee has uncovered in this review.

# Endnotes

[1] *A Year of Loss: Reexamining Civil Liberties since September 11* is available at: http://www.lchr.org/us_law/loss/loss_main.htm.

[2] John Adams, *A Dissertation on the Canon and Feudal Law* (1765), reprinted in 1 *Papers of John Adams* 120 (M.J. Kine ed., 1977).

[3] 5 U.S.C. §552 (1966).

[4] 5 U.S.C. Appendix 2.

[5] *See* Attorney General John Ashcroft, "Memorandum for Heads of All Federal Departments and Agencies," October 12, 2001, available at http://www.doi.gov/foia/foia.pdf (accessed March 2, 2003).

[6] *See* Attorney General Janet Reno, "Attorney General Reno's FOIA Memoranda," October 4, 1993, available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (accessed March 2, 2003).

[7] *See* Adam Clymer, "Government Openness at Issue as Bush Holds on to Records," *New York Times*, January 3, 2003.

[8] *See* The Homeland Security Act of 2002, available at http://news.findlaw.com/wp/docs/terrorism/hsa2002.pdf (accessed March 2, 2003).

[9] *See* ibid., at § 212(3).

[10] *See* "The Clinton Administration's Policy on Critical Infrastructure Protection: Presidential Decision Directive 63," available at http://www.epic.org/reports/epic-cip.html (accessed February 2, 2003).

[11] *See* Dan Caterinicchia, "Sharing Seen as Critical for Security," *Federal Computer Week*, May 9, 2002.

[12] *See, e.g.*, "Protecting the Homeland by Exemption: Why the Critical Infrastructure Information Act of 2002 Will Degrade the Freedom of Information Act," 2002 *Duke Law and Technology Review* 0018, September 20, 2002, available at http://www.law.duke.edu/journals/dltr/articles/2002dltr0018.html (accessed March 2, 2003).

[13] *See* 5 U.S.C. § 552(b)(4).

[14] *See* 5 U.S.C. § 552(b)(1)(A).

[15] *See* 5 U.S.C. § 552(b)(7).

[16] H.R. Rep. No. 107-609, p. 220 (2002).

[17] Ibid.

[18] *See* "Editorial: Secrecy Isn't Security," *Denver Post*, November 3, 2002.

[19] Senator Carl Levin, "Statement of Senator Carl Levin (D-Mich.) on Confirming Governor Ridge as Department of Homeland Security Secretary," January 22, 2003, available at http://levin.senate.gov/floor/012203fs1.htm (accessed March 3, 2003).

[20] Ibid.

[21] Ibid; Homeland Security Act of 2002, § 214(f).

[22] Homeland Security Act of 2002, § 214(a)(1)(C).

[23] *See* Center for Democracy and Technology, "Coalition Letter Opposing Bennett-Kyl Legislation (S. 1456) Creating FOIA Exemption for Information on Critical Infrastructure Security," May 7, 2002, available at http://www.cdt.org/security/critinfra/020507coalition.shtml (accessed March 3, 2003); Matt Bivens, "Holes in the Homeland Security Act," *Nation*, December 19, 2002, available at http://www.thenation.com/failsafe/index.mhtml?bid=2&pid=229 (accessed March 3, 2003).

[24] *See* "Too Many Secrets," *Orlando Sentinel Tribune*, January 10, 2003; David Banisar, "Reject the Corporate Secrecy Grab: Industry's Push for New Exemptions from the Freedom of Information Act is Unnecessary and Dangerous," *Security Focus*, January 28, 2002, available at http://online.securityfocus.com/columnists/56 (accessed February 5, 2003).

[25] *See* Reporters Committee for the Freedom of the Press, "Committee Warns of Severe Restrictions in Homeland Security Bill," November 19, 2002.

[26] *See* "Homeland Insecurity: Excessive Secrecy Protects No-one," *Columbia Journalism Review*, January/ February 2003.

[27] *See* The Homeland Security Act of 2002, § 871.

[28] *See* 5 U.S.C. App. 2 (1972).

[29] *See* H.R. Rep. No. 107-609, p. 221 (2002).

[30] *See* Ibid. (Noting that many agencies with homeland security missions, such as the DOJ and the FBI, operate under FACA without difficulty).

[31] *See* John W. Dean, "GAO v. Cheney Is Big Time Stalling: The Vice President Can Win Only If We Have Another *Bush v. Gore*-like Ruling," Part II, *FindLaw's Legal Commentary*, February 1, 2002, available at http://writ.news.findlaw.com/dean/20020201.html (accessed March 2, 2003).

[32] *See* Dana Milbank and Ellen Nakashima, "Cheney Rebuffs GAO's Records Request," *Washington Post*, August 4, 2001.

[33] *See* Byron York, "GAO vs. Cheney: Coming Soon," *National Review*, February 20, 2002, available at http://www.nationalreview.com/york/york022002.shtml (accessed February 2, 2003).

[34] *See* Paul Courson, "GAO Files Unprecedented Suit Against Cheney," CNN News, February 22, 2002.

[35] *See* Dana Milbank and Ellen Nakashima, "Cheney Rebuffs GAO's Records Request," *Washington Post*, August 4, 2001.

[36] *See* Marcia Coyle, "GAO is Hit with Setback to Power," *National Law Journal*, December 16, 2002.

[37] *See* Stuart Taylor, Jr., "A Victory Gone Too Far, *Legal Times*, December 16, 2002.

[38] General Accounting Office, "GAO Statement Concerning Litigation," February 22, 2002, available at http://www.gao.gov/press/gaostatement0222.pdf (accessed March 2, 2003).

[39] *See* "Biography of Judge John D. Bates," available at http://www.dcd.uscourts.gov/bates-bio.html (accessed March 2, 2003).

[40] *See Walker v. Cheney*, Civil Action No. 02-0340 (JDB), U.S. District Court for the District of Columbia, available at http://www.dcd.uscourts.gov/02-340.pdf (accessed March 2, 2003).

[41] *See* Stuart Taylor, Jr., "A Victory Gone Too Far, *Legal Times*, December 16, 2002.

[42] *See* Dana Milbank, "GAO Backs Off Cheney Lawsuit," *Washington Post*, February 7, 2003.

[43] *See* United States General Accounting Office, "GAO Press Statement on Walker v. Cheney," February 7, 2003, available at http://www.gao.gov/press/w020703.pdf (accessed March 2, 2003).

[44] Ibid.

[45] *See* "President Signs Anti-Terrorism Bill," While House Press Release, October 26, 2002, available at http://www.whitehouse.gov/news/releases/2001/10/20011026-5.html (accessed March 2, 2003).

[46] *See* Lawyers Committee for Human Rights, *A Year of Loss: Re-examining Civil Liberties since September 11*, pp.7-8, available at http://www.lchr.org/us_law/loss/loss_main.htm (accessed March 2, 2003).

[47] Ibid.

[48] *See* Steve Schultze, "Sensenbrenner Wants Answers on Act," *Journal Sentinel*, August 19, 2002; "Justice: From the Ashes of 9/11: Big Bad John," *National Journal*, January 25, 2003.

[49] Letter of Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr., July 26, 2002, enclosing "Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation," available on http://www.house.gov/judiciary/patriotresponses101702.pdf (accessed February 20, 2003).

[50] Senators Patrick Leahy, Charles Grassley, and Arlen Specter, "Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures," p. 13, February 2003, available at http://specter.senate.gov/files/specterspeaks/ACF6.pdf (accessed March 5, 2003).

[51] Ibid.

[52] *See* "ACLU Seeks Information on Government's Use of Vast New Surveillance Powers," August 21, 2002, available at http://archive.aclu.org/issues/privacy/USAPA_feature.html (accessed March 2, 2003).

[53] *See* ACLU, "ACLU Presses for Full Disclosure on Government's New Snoop Powers," January 17, 2003, available at http://www.aclu.org/NationalSecurity/NationalSecuritylist.cfm?c=107 (accessed March 2, 2003).

[54] *See* "Groups Hit DOJ's Data on Wiretap FOIA Request as 'Meaningless,'" *Washington Internet Daily*, January 21, 2003.

[55] Letter to David M. Walker, Comptroller General of the U.S., U.S. General Accounting Office, from U.S. House Representative John Conyers, Jr. and U.S. Senator Russell D. Feingold, dated January 28, 2002, available at http://www.house.gov/judiciary_democrats/gaoantiterrorltr12802.pdf (accessed December 10, 2002).

[56] *See* Draft Domestic Security Enhancement Act of 2003, January 9, 2003, available at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (accessed March 2, 2003).

[57] *See* Jake Tapper, "More Secret Arrests, More Power to Spy," *Salon*, February 11, 2003.

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] *See, e.g.*, Ibid.; Jack Balkin, "A Dreadful Act II: Secret Proposals in Ashcroft's Anti-Terror War Strike Yet Another Blow at Fundamental Rights," *Los Angeles Times*, February 13, 2003.

[62] Jesse H. Holland, "Ashcroft, Mueller, Ridge Talk to Senate Committee about Terrorism Battle," Associated Press, March 4, 2003.

[63] Ibid.

[64] U.S. Supreme Court, *Afroyim v. Rusk*, 387 U.S. 253 (1967), BLACK, J., Opinion of the Court.

[65] Senate Judiciary Committee, Hearing on the War against Terrorism, March 4, 2003, testimony of U.S. Attorney General John Ashcroft, Homeland Security Secretary Tom Ridge, and Federal Bureau Of Investigation Director Robert Mueller, Federal News Service, March 4, 2003.

[66] Under current law, it is up to the judge to determine how much of the government's application to consider *in camera* and *ex parte*. *See* Timothy Edgar, "Interested Persons Memo: Section-by-Section Analysis of Justice Department draft 'Domestic Security Enhancement Act of 2003,' February 14, 2003, p. 10, available at http://www.aclu.org/news/NewsPrint.cfm?ID=11835&c=206 (accessed March 10, 2003).

[67] Ibid. Rule 6(e) of the Federal Rules of Criminal Procedure requires attorneys and grand jurors to refrain from publicly commenting on "matters occurring before the grand jury." The current rule does not apply to grand jury witnesses.

[68] *See* Chuck Grassley, "Grassley Seeks Whistleblower Protections for New Federal Employees Senator Says Public Safety and Security at Stake," Press Release, June 26, 2002, available at http://www.senate.gov/~grassley/releases/2002/p02r6-26b.htm (accessed January 19, 2003).

[69] Ibid.

[70] Senators Patrick Leahy, Charles Grassley, and Arlen Specter, "Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures," pp. 5-6, February 2003, available at http://specter.senate.gov/files/specterspeaks/ACF6.pdf (accessed March 5, 2003).

[71] Ibid., p. 32.

[72] Ibid.

[73] Ibid., p. 1.

[74] *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

[75] *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

[76] John Ashcroft, "Welcoming Big Brother," *Washington Times*, August 12, 1997. Mr. Ashcroft wrote this op-ed as a U.S. senator, in response to a request by the Clinton administration for increased authority to survey high-tech communications.

[77] Electronic Privacy Information Center, EPIC Briefing on Total Information Awareness, available at http://www.epic.org/events/tia_briefing/ (accessed December 9, 2002).

[78] The American Library Association puts this simply on its website: "Libraries or librarians served with a search warrant issued under FISA rules may not disclose, under of penalty of law, the existence of the warrant or the fact that records were produced as a result of the warrant. A patron cannot be told that his or her records were given to the FBI or that he or she is the subject of an FBI investigation." Available at http://www.ala.org/alaorg/oif/usapatriotlibrary.html (accessed February 20, 2003).

[79] "Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation," submitted with letter of Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr., July 26, 2002, question 12, available at http://www.house.gov/judiciary/patriotresponses101702.pdf (accessed February 20, 2003).

[80] Dana Hull, "Libraries Face Privacy Test," *Mercury News*, October 18, 2002; Eleanor J. Bader, "Thought Police: Big Brother May be Watching What You Read," *In These Times*, October 25, 2002.