

Preface

Next week, the United States will mark the anniversary of the horrific events of September 11, 2001.

America has much to mourn. Individual families will mourn the loss of loved ones, and the country, as a national family, will mourn the tragic loss of life. The U.S. will also grieve another collective loss: the loss of invulnerability – or the idea that America was impervious to this kind of violence.

There is another loss to mourn, however – one that has happened less abruptly and less publicly, but no less profoundly. Since September 11, the United States has lost something essential and defining: some of the cherished principles on which the country is founded have been eroded or disregarded.

Unlike other losses from September 11, this loss did not happen all at once on a clear fall morning. A photograph or video camera cannot convey the damage. These changes have taken place slowly and incrementally, beneath the surface. What's needed is an x-ray – a way to show how the very bones of U.S. law, policy and practice have shifted.

This report explores these changes: the civic lessons – and civic losses – in America since September 11. Some of the changes were smart, right and inevitable. The country needed to recalibrate the balance between concerns about rights and the needs of public safety. The country was attacked, and the threat was – and is – real. The U.S. government is responsible for ensuring the country's security and must have the tools to do so. But other changes undermined fundamental tenets of our democracy, with no obvious relationship to increased security.

How does a free society debate and decide these issues? The way this has been done to date is not sufficient. In the immediate aftermath of the attacks, government leaders passed laws and adopted an array of policies – swiftly, in the name of unity. Republicans and Democrats put aside differences in a show of common cause. There was a conscious and much-heralded decision to take politics and partisanship out of the debate.

Unfortunately, some of the most important changes have not been debated at all. And debate, in many ways, is what keeps democracies healthy. It ensures that all aspects of an issue are explored. It ensures public education and public participation.

Historically, one of the great strengths of the United States has been its tradition of open political debate and dissent, even within government. As we describe in this report, there have been several recent notable court decisions which have challenged some of these changes, as well as statements from an increasingly vigilant Congress questioning executive branch actions. Those voices reflect well on the American tradition of dissent. We seek with this report to encourage a more robust debate on these issues which are of such importance to the country and to the world.

Michael Posner, Executive Director
September 5, 2002

Introduction

On the morning of September 11, men now believed to be members of the al Qaeda network forcibly took control of four commercial jetliners to attack the United States. Within minutes, 19 hijackers crashed two of those planes into the Twin Towers of the World Trade Center, one into the Pentagon, and a fourth into a field in Pennsylvania, killing more than 2,500 people.

In the days and weeks that followed, a wide range of new security measures were put in place in public and private venues throughout the country. Many of these changes were grounded in common sense. But other measures taken by the government violated traditional notions of liberty with no clear connection to increased safety. For example, as the search began for accomplices in the attacks, the Department of Justice swept up more than 1,000 immigrants from Middle Eastern and other Islamic countries, many of whom were subsequently held for months without formal charge or trial.

In the aftermath of the attacks, Americans began to question the country's readiness to confront dangers until then associated only with other countries. Deliberate lethal attacks against civilians – the subject of frequent news reports from abroad – assumed a new and devastating reality in America. The attacks prompted a widespread call for a reassessment of U.S. security needs at home and abroad. The threat of future attacks was, and continues to be, very real. In the face of these attacks, it quickly became clear that heightened security interests required a reassessment – and recalibration – of the balance between individual liberty and national security.

This report examines a wide range of actions taken by the U.S. government over the last 12 months in response to the September 11 attacks. These were extraordinary measures taken at an extraordinary time. Historians will judge whether these measures were excessive at the moment they were taken. This is not our object. Rather in this report we submit each of these measures to strict scrutiny to assess whether they are now necessary and appropriate.

We start from the premise that the U.S. government, like any government, has the right – indeed the obligation – to protect its people from indiscriminate attacks against civilians. We also recognize that the threat posed by al Qaeda and other allied groups is grave. Given the open nature of U.S. society and its vast borders, the potential for future violent attacks against the United States must be considered to be extremely high.

With the continued possibility of additional attacks, many of the measures taken in the weeks and months after September 11 were sensible, necessary and driven by real need. For example, new priority was given to providing state-of-the-art computer technology to police and intelligence agencies, to enhancing coordination and communication among law enforcement agencies, and to substantially enhancing agency competence in foreign languages.

There were also new standards for security in public buildings and in transportation – including photo-identity cards for office workers, and higher educational and training standards and more rigorous supervision for security personnel. There was a series of efforts to prevent airplane hijacking, including legislation making all airport security personnel federal employees work in a unified system. The U.S. Postal Service introduced new procedures to safeguard its staff and the public from the threat of biological and chemical attacks through the mail. A series of new procedures were put in place by the Immigration and Naturalization Service (INS) aimed at gaining greater control over the admission of immigrants and visitors into the country, and tracking and monitoring those in the United States.

At the same time, as this report outlines, over the last year the U.S. government has taken a series of actions that have gradually eroded basic human rights protections in the United States, fundamental guarantees that have been central to the U.S. constitutional system for more than 200 years. Viewed separately, some of these changes may not seem extreme, especially when seen as a response to the September attacks. But when you connect the dots, a different picture emerges. The composite picture outlined by this report shows that too often the U.S. government's mode of operations since September 11 has been at odds with core American and international human rights principles. The basic civics lessons that will be taught in American junior high schools this fall describe a system that in important respects has been significantly eroded in the last 12 months:

- **That there are three separate and independent branches of government – Executive, Judicial and Legislative – that check and balance each other.**
- **That the U.S. government is an open one in which decisions are made in the public square.**
- **That no one can be deprived of life, liberty or property without fundamental due process protections such as access to legal counsel and the right to a hearing before a judge.**
- **That people have the right of privacy from unwarranted government intrusion into their private lives and their homes.**
- **That America is a land of immigrants and that immigrants are “persons” under the Constitution, and are entitled to be treated fairly.**

Many of the changes to law and policy discussed in this report have not been informed by or infused with these core principles – some have flatly contradicted them. It is not yet too late to restore these values.

Secrecy and lack of debate has been a particularly acute problem. As changes have been made, and concerns raised – by members of Congress across the political spectrum and by other mainstream voices – the Attorney General or other administration officials have all too often dismissed them as irrelevant, harmful to the war against terrorism or even disloyal.

We take just the opposite view. What is at stake is nothing less than the fundamental nature of U.S. society and whether we will retain what James Madison called the “Blessings of Liberty.”

Mindful as we are of the serious nature of the threats now confronting the United States, we believe that it is essential to address these security concerns in a manner consistent with fundamental principles of human rights. If the U.S. government fails to do so, we will have lost the most essential element of what we are fighting for. And with potentially little gain. There is no evidence to date that curtailing liberty or abandoning bedrock principles of democratic governance makes the United States safer.

Nor does it make the world safer – or more fair. As we also examine in this report, the U.S. government’s actions in response to September 11 are being closely monitored in other countries. Some of the most draconian elements of what the U.S. government has been doing are increasingly being copied by others and used by repressive governments to justify human rights abuses against peaceful advocates of democratic values – to the detriment of human rights worldwide.

This report calls for a more vigorous national debate about the new calculus of liberty and security. Our hope is that it will spark renewed discussion – and commonsense adjustments. In some ways, that process is already beginning. As we outline in this report, several recent decisions by U.S. federal courts have begun to place important limitations on executive branch actions. In addition, the Justice Department recently brought indictments in federal court against individuals suspected of activities that threaten national security, rather than resorting to special military tribunals or prolonged detention without trial, reinforcing the utility of relying on the regular criminal justice system to try such cases. Coupled with mounting congressional concern and scrutiny, these developments suggest that a livelier, more constructive reexamination of these issues is beginning.

As the debate grows, we conclude that many of the extraordinary measures taken over the last 12 months now require repeal or substantial adjustments and refinements by the executive branch, Congress and the courts. Among the key questions that warrant greater public consideration are these:

- How permanent are these changes? Will amendments to U.S. law and practice be repealed when the emergency abates, or will they become permanent features of our system? Who will decide this and using what standard? Will little-used amendments to the law that are a source of abuse be repealed?
- Will the new Department of Homeland Security have strong internal oversight safeguards, including an office of internal affairs and a civil rights division? Will the Department of Justice develop internal safeguards to reflect the new powers it was given under the USA PATRIOT Act?

- What is the appropriate role for Congress? Will it be able to faithfully and effectively discharge its oversight duties as they pertain to the Department of Homeland Security and the Department of Justice?
- Will Congress take steps to ensure that the history of abuses under the Foreign Intelligence Surveillance Act is not repeated after its expansion? Will Congress examine the new FBI guidelines on domestic spying? Should government workers and other citizens be encouraged to report on their neighbors' activities? What is the future of Operation TIPS: the Terrorism Information and Prevention System?
- What is the appropriate role for the federal courts? Should the federal courts oversee criminal trials of those suspected of endangering U.S. national security, and if so do they need new procedures or resources to do so? Should federal appellate courts have the authority to review decisions of military commissions? Should federal court jurisdiction extend to U.S. military bases?
- What is the proper balance between secrecy and disclosure? Should the names of INS detainees be made public? Should deportation hearings be public? Should detainees have legal counsel? What about criminal trials where national security information is being reviewed?
- Should the government have the power to designate and detain U.S. citizens as enemy combatants? What will Congress and the Courts say? What will happen to the individuals in Guantanamo? Will they be prosecuted? When will they be released? Will they ever be released?
- What has been the effect of new U.S. laws and policies on the human rights situations in other countries?

In this report we address these questions, and make specific recommendations to U.S. officials concerning these important issues.