

Out of a Cruel Blue Sky: A Test of America's Values

The day the towers fell and the outer ring of the Pentagon was broken, the United States found new unity in a time of trouble and fear. The immediate response was both measured and tinged with desperation and disbelief. Emergency teams scrambled to recover survivors from the rubble; first estimates of the death toll hovered at six thousand or more. Air traffic controllers moved smoothly to bring down some five thousand civilian aircraft then in the air across the country, any one of which could have been another flying bomb. Airports and border crossings were closed and military aircraft patrolled the skies. A search for accomplices in the attacks led to widespread arrests – and a questioning of immigration policies and practices. A chorus of international sympathy and support was offered from around the world. The attacks were crimes against humanity for which the perpetrators and those who assisted them were to be held accountable.

Before nightfall that day, the nation also came to question its own readiness to confront dangers until then associated with other countries. The Oklahoma City bombing in April 1995, which killed 168 people, had shaken the nation to the core, but nothing had prepared the public for September 11. Devastation on a scale previously seen only abroad filtered through ten-second spots on the television news, assumed a new reality. The reality of the attacks was brought home in endless television replays – and for people in and near New York City, Washington, and the crash site of Flight 93 in rural Pennsylvania, by pyres of smoke and ash.

The missing and the dead became a national – and international – tapestry of names and photographs and biographical sketches in newspapers, magazines, and the nightly news. The enormous toll of New York's police, firefighters and other emergency services personnel lost in the Twin Towers collapse resonated throughout a country in need of heroes. In addition to thousands of U.S. citizens, the list of victims included foreign visitors and immigrants from more than 90 other countries. In neighborhoods all over New York, families pasted posters with photographs of their loved ones on walls and lampposts, asking for news about their fate. The faces were a mosaic of the nation's multi-ethnic population, people of diverse origins, religions, and nationalities.

In the days that followed, rescue efforts drawing emergency teams from around the country turned to the recovery of human remains. Weeks later, New Yorkers still awoke to a haze of smoke from the plumes rising out of the devastation of lower Manhattan. The toll of missing gradually resolved into a list of 2,512 confirmed dead by mid-August. Almost 200 others remained unaccounted for.

The attacks had as an immediate effect a reassessment of the security needs of the United States at home and abroad – compelled, for the first time since the 19th century, by a foreign attack on the U.S. mainland. Institutional reforms were clearly required to

meet new and tangible threats to the security of the United States, challenges similar to those faced in other countries that have long confronted war and covert violence.

The emergency response found new impetus on September 20, when the first of several letters containing deadly anthrax spores was reported to the FBI. Similar letters were sent through the U.S. mail in the following weeks and received by news media outlets and congressional offices. A letter postmarked October 9 and sent to Senate Majority Leader Tom Daschle was confirmed to contain anthrax spores; a letter addressed in much the same manner and sent to Senator Patrick Leahy was confirmed to contain anthrax on November 16.¹

On October 2, photo-editor Robert Stevens was hospitalized in Florida with inhalation anthrax and confirmed to be the first victim of the new attacks. He died three days later. By October 23, two postal workers were confirmed to have died of inhalation anthrax, with treatment ordered for many others. Other deaths followed, and anxieties over the new threat spread.² The source of the letters and of the anthrax remains a mystery, although by mid-2002, the news media reported that investigators were concentrating on people who had been a part of the United States' own biological research establishment. The next outrage could as well come from almost any quarter.

Common Sense and Uncommon Desperation

A lot of what was done in the wake of September 11 and the anthrax panic was just common sense. New priority was given to providing state-of-the-art computer technology for police and intelligence agencies, to the substantial strengthening of agency competence in relevant languages, and to enhancing coordination and communication among law enforcement agencies. The risks posed by the failure of such bodies to talk to each other, or to act on information received, were no longer theoretical.

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 of security personnel. There was serious rethinking and adjusting of safeguards against aircraft hijacking across the board. The U.S. Postal Service scrambled to introduce new procedures to safeguard staff and the public alike from the threat of biological and chemical warfare agents.

Details about the immigration procedures under which some of the hijackers entered and remained in the United States highlighted existing problems inside the INS, including the failures of communication in its vast bureaucracy, which led to the posthumous issuance of visas to two of the hijackers. Steps were taken to ensure greater interrelation of INS and law enforcement databases and to require enhanced background checks to prevent, at a minimum, the INS from granting visas to known terrorists.

¹ "Anthrax Timeline," ABCNews.com, available at http://abcnews.go.com/sections/us/DailyNews/US_ANTHRAX.html (accessed August 20, 2002).

² Ibid.

Likewise, enhanced requirements were placed on educational institutions to assist the INS in monitoring compliance with the terms of student visas.

But the practical, principled measures taken by federal and state agencies were matched by measures that, in their disregard for common sense and human rights, reflected the desperation of the moment. These measures, and the lack of public debate about the appropriate response to the attacks, reflected a narrow and short-sighted conception of security. Some were alarmingly eager to sacrifice basic freedoms, as if this was a key to national security and an objective in itself. But there is no proven equation whereby a diminution in rights and freedoms leads to greater security. Quite the contrary, less accountability and less transparency, more executive privilege and less judicial and congressional oversight, all create the risk that public security will be further endangered by poor government decision-making and lack of accountability.

An initial casualty was the principle of open government. Some of the post-9/11 emergency measures were intrinsically designed to shield government action from public scrutiny and criticism, even as the American public had thrown its support wholeheartedly behind its leaders in a dramatic show of unity. The overwhelming display of confidence and support for the nation's leadership allowed it to make sweeping policy changes quickly and effectively. But the rapid and unilateral consolidation of power by the executive branch has gradually emerged as a matter of concern and debate in broad sectors of the public.

Congress voted overwhelming on September 14, 2001 to authorize the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."³

Sweeping emergency legislation – the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act—was rushed through Congress and signed into law on October 26, 2001. Forty-four days after the attacks, President George W. Bush signed the 342-page act into law. Despite its far-reaching consequences for civil liberties, there was virtually no public debate; during much of that period, legislators had been locked out of congressional offices as a consequence of the anthrax contamination there. The USA PATRIOT Act sweeps away constraints on police powers to conduct surveillance and collect information on citizens and non-citizens alike, while establishing new crimes and enhanced penalties. (See "The Right to Privacy.")

The law also grants new powers to the Immigration and Naturalization Service to detain any immigrant for lengthy periods of time solely on the say so of the attorney general's office. (See "Treatment of Immigrants, Refugees and Minorities.") The

³ Public Law No: 107-40, September 18, 2001.

overall effect of the Act is to extend the powers of the executive while eroding individual rights and creating barriers to oversight by the legislature and the judiciary.

Among the most disturbing applications of the new police powers was unprecedented federal access to personal information in electronic databases of all kinds. This power extends to library circulation records and Internet use records and threatens both the integrity of the home and freedom of expression – the right to freely receive and impart information. Every book or video checked out of the local library or video store, every website called up for a school project, every essay written for a college course and every purchase from Amazon.com can now become a part of an FBI profile on any citizen’s ideological soundness, if this is determined by federal officials to contribute to the fight against subversion. Previously, U.S. law had allowed access to personal records of suspected foreign agents. Now this authority extends to U.S. citizens through broad and essentially discretionary police powers largely without judicial supervision. (See “The Right to Privacy.”)

Similarly, freedom of assembly and freedom of association face new constraints as police powers allow intimidating surveillance and infiltration of any organization. The new police powers are reminiscent of FBI programs at the height of the cold war in which federal agents monitored, harassed, intimidated and planted evidence to obstruct the civil rights movement.

Almost a year after the USA PATRIOT Act became law, little has been disclosed even to congressional oversight panels of the way in which the new police powers have been used.⁴ A request of the House Judiciary Committee, posing 50 questions to the Department of Justice on the use of special police powers under the Act, went without response for nearly a month – although Assistant Attorney General Daniel J. Bryant said by letter that “some classified information would be provided to the House intelligence committee instead.” Rep. James Sensenbrenner, chairman of the Judiciary Committee, responded angrily, saying he might “start blowing a fuse” if the response was not forthcoming and threatening to issue a subpoena requiring Ashcroft’s presence if a more substantive response was not received by early September.⁵ In mid-August, DOJ sent abbreviated responses to half the questions.

In another clash, the chairman of the Senate Judiciary Committee and two Republican members protested that the Department of Justice officials have withheld from the committee “a legal opinion issued by the court that oversees secret intelligence warrants, even though the document is unclassified.”⁶

The courts, too, found fault with Department of Justice compliance with the legal terms of its surveillance and domestic intelligence operations. An opinion by the federal

⁴ Dan Eggen, “Lawmakers Say Oversight Is Blocked,” *Washington Post*, August 21, 2002.

⁵ Steve Schultze, “Sensenbrenner wants answers on act, He threatens to subpoena Ashcroft to get details on antiterror measure,” *Milwaukee Journal Sentinel*, August 20, 2002.

⁶ *Ibid.*

court that oversees the Foreign Intelligence Surveillance Act (FISA) states that Justice Department and FBI officials misled the court in more than 75 applications for search warrants and wiretaps, in cases going back to the Clinton administration, and that intelligence information was improperly shared. This was a basis for opposing aspects of new regulations issued by the Attorney General in March 2002, which would have had the effect of extending even further the broad police powers provided by the USA PATRIOT Act.

Attorney General Ashcroft has contested the ruling, and a Department of Justice statement said: “We believe the court's action unnecessarily narrowed the PATRIOT Act and limited our ability to fully utilize the authority Congress gave us.” The May 17 opinion, made public in August 2002, was the first ever released by the court since its creation in 1978 to provide judicial oversight for intelligence operations in the United States after the domestic spying scandals of the early 1970s. Members of Congress welcomed the court’s release of the opinion as providing essential information for their oversight and legislative functions.⁷

Freedom from discrimination and equal protection under the law is also a fundamental value under threat. Within two months of the September attacks, nearly 1,000 complaints from Muslims, Sikhs, and people of Middle Eastern and South Asian descent were filed by victims alleging hate crimes. Four were murdered. Mosques and Sikh temples were vandalized and worshippers threatened and attacked. U.S. citizens were turned away from public transportation because of the color of their skin – and because others felt “uncomfortable” with their presence.

To their credit, top officials, including President George W. Bush and Attorney General John Ashcroft, spoke out strongly to condemn the violence – and the racial and religious discrimination through which minority communities were being blamed for the attacks of September 11. Yet racial profiling by government agencies found legitimization in public policies developed in the weeks and months that followed, even as private discrimination against people identified as Muslims and other minorities continued in many spheres. Religious freedom, protected by the constitution’s First Amendment, faced new challenges.

As law enforcement officials scrambled to find suspects, roundups were carried out across the country of people who were of the same race, or religion, or national origin of the hijackers. Citizens and non-citizens, green-card holders and temporary visitors all fell into the net, although the vast majority of those held for long periods were immigrants whose visa status was in question. In the immediate aftermath of September 11, the INS served as the primary jailer for the Department of Justice as federal officials conducted sweep arrests of immigrants from the Middle East, South Asia, and North

⁷ Dan Eggen and Susan Schmidt, “Secret Court Rebuffs Ashcroft, Justice Dept. Chided On Misinformation,” *Washington Post*, August 23, 2002.

Africa. The resettlement of refugees from abroad was suspended, and those already processed and approved to come to the United States were stranded, many in danger.

The actual number of arrests in those early days after the attacks has never been confirmed. Many individuals who were called in for questioning or voluntarily went to authorities faced only short-term detention. Many others were detained without charge for months for immigration violations or as material witnesses. Of those held on immigration violations, most have been deported. The authorities said in late November that 1,182 detainees were in custody in relation to the investigation into the attacks, but did not at that time clearly define who these individuals were or their precise legal status.⁸ Most were later found to have been held on immigration violations that ordinarily would not have led to detention before September 2001.

No numbers were released on how many people – citizens and non-citizens – were subjected to short-term detention and interrogation prior to that date, and the validity of the figure 1,182 even as a snapshot of the population in detention on a particular day has not been independently confirmed. The number and circumstances of arrests in relation to the ongoing investigations since the November statement have not been accounted for in official statements. As the numbers of detainees rose, the Attorney General announced on November 8, 2001 that the Department of Justice would no longer release tallies on the number of detainees it was holding.

The uncertainty regarding how many people the government had in custody and who they were was due in large part to a government policy to withhold even the names of the post-September 11 detainees in the United States – a policy defended as necessary to avoid giving enemies “a road map” of its investigative strategy. But since detainees were generally not prohibited from talking with family members, or even the press when possible, the government's rationale for withholding their names from the public, press and legal-aid organizations rang hollow.

The large-scale arrests were largely a random exercise to target visitors and migrants of Muslim and Arab origin, many of whom had family ties to United States citizens and other deep roots in the country. Its consequences for minority communities within the United States, and for government relations with them, were severe. The arrests were paralleled by a demand by the Attorney General that police around the country seek out and question an estimated 5,000 young men believed to be legally in the country from Middle East and South Asian countries. (See “Treatment of Immigrants, Refugees and Minorities.”)

The arrests of non-citizens were essentially secret detentions insofar as authorities refused to provide official information on the arrests to the news media and to families, or to allow access to detainees. Many of these administrative proceedings were closed to

⁸ Dan Eggen and Susan Schmidt, “Count of Released Detainees is Hard to Pin Down,” *Washington Post*, November 6, 2001; Amy Goldstein and Dan Eggen, “U.S. to Stop Issuing Detention Tallies,” *Washington Post*, November 9, 2001.

the media, families and to human rights monitors. The manner in which the detention policy was open to abuse was in some ways reminiscent of the methodology of “disappearances,” in which military dictatorships deliberately avoided providing a paper trail acknowledging detentions – an analogy made by former Secretary of State Warren Christopher, among others. But the secrecy was not absolute, as most were allowed some contact with families and legal counsel, and the news media and human rights organizations made efforts to report on individual cases. Nor were the detainees entirely at the disposition of the executive – although the courts did little to enforce the rights of most. Most were under the jurisdiction of the Executive Office for Immigration Review, the immigration court system that is a division of the Justice Department and reports to the Attorney General. The immigration courts operated with little independence under the Attorney General’s direct orders.

Action was taken to impose secrecy across the board in immigration proceedings that were designated “special cases,” a euphemism given to cases in which the Attorney General asserted a terrorism concern. Overnight, public hearings became closed and even routine records of detentions and hearings on immigration cases were expunged, sealed, or buried in computer systems in accord with new procedures expressly designed to conceal. Court challenges to this secrecy were brought throughout 2002, leading to rulings that the blanket policy of secrecy must be lifted and the names of detainees released. Federal appeals against the rulings were pending. (See “Treatment of Immigrants, Refugees and Minorities.”)

A large proportion of the arrests appeared to have been carried out solely to create a pool within which investigators would fish for information – a rationale made almost explicit in government affidavits defending the secrecy concerning the process to the courts. Although formally held on immigration charges or under a statute permitting detention of material witnesses to crimes under exceptional circumstances, officials obliquely acknowledged that the detentions were ordered in order to allow prolonged interrogation on the off chance that detainees – members of ethnic or national groups considered suspect – would have information useful to the broader investigation.

The most visible aspects of the extraordinary measures that followed the September attacks, beyond the new checkpoints and barriers, the metal detectors and building security procedures, and the National Guard presence at airports and public buildings, were those that most directly affected minority communities. Less visible but more pervasive and ultimately affecting the fundamental structures and values of the United States were moves to progressively and permanently curtail freedoms through law and a realignment of government powers.

In the immediate aftermath of the September attacks, the White House announced the creation of an Office of Homeland Security, with a mission to create a national strategy for homeland security. Former governor of Pennsylvania Tom Ridge was appointed to head the new office. In a televised speech on June 6, 2002, President Bush called upon Congress to create a single government department to take on primary

responsibility for homeland security, in what he called the biggest shakeup in the United States government in 50 years. The new department is to coordinate everything from border security to processing intelligence reports, consolidating a role in which “as many as a hundred different government agencies have some responsibilities.”⁹ The proposed permanent, Cabinet-level department is “to unite essential agencies that must work more closely together: Among them, the Coast Guard, the Border Patrol, the Customs Service, Immigration officials, the Transportation Security Administration, and the Federal Emergency Management Agency.”¹⁰

The new Department of Homeland Security, which is to bring under one cabinet officer agencies with some 170,000 employees, is expected to be created by late 2002. Discussions over the means to maintain congressional oversight over domestic and foreign intelligence operations and other areas to be a part of the new department’s mandate were as yet unresolved. Disputes were also unresolved over the retention of civil service and union rights currently held by government employees who would form part of the new department. Congressional action to create the new department continued as this report went to press.

The War in Afghanistan

The international dimension of the response to September 11 centered initially on the marshalling of support from around the world to search out those behind the attacks and to preempt further such attacks. A chorus of sympathy was accompanied by an unprecedented commitment from traditional and less traditional allies to actively collaborate in the United States’ international effort.

The Security Council acted swiftly on September 12, through resolution 1368, to condemn the attacks and declare those and other acts of international terrorism a threat to international peace and security. The resolution called in broad terms for all states to work together “to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks,” while stressing that those “aiding, supporting or harbouring” them would also be held accountable. Security Council resolution 1373, adopted on September 28, 2001, specified the form this international cooperation was to take, including steps that were to be required of all governments.

In October, the United States went to war with Afghanistan, in what it termed “Operation Enduring Freedom.” The campaign against the Taliban – Afghanistan’s de facto government – and al Qaeda network and army and the Taliban’s foreign allies gave shape and material substance to a war declared on a hitherto largely intangible enemy – the al Qaeda network. As a conventional war between states, the war was likely to have a beginning and an end – unlike the open-ended “war against terrorism” of which it was a part.

⁹ White House, “Remarks by the President in Address to the Nation,” June 6, 2002, <http://www.whitehouse.gov/news/releases/2002/06/20020606-8.html> (accessed August 28, 2002).

¹⁰ Ibid.

The brief campaign in Afghanistan and the collapse of the Taliban provided a cathartic lift to a nation that otherwise had little to show for months of government action following the September 11 attacks. Mass arrests of visitors and immigrants in the United States had turned up almost no suspects and, apparently, few if any solid leads to the perpetrators of the attacks. Nor had interrogations of thousands of Muslim and Arab men who responded to police action seeking their voluntary cooperation.

The detentions carried out in Afghanistan with the defeat of the Taliban offered some respite to officials dealing with a public impatient for results. Expectations were high, even when the primary targets of the campaign, Osama bin Laden and his top lieutenants, were nowhere to be found. The pressure to locate bin Laden and other al Qaeda leadership was considerable and, not surprisingly, the government's primary objective with regard to these detainees was to gain information. The disputed status of the conflict itself, particularly as concerned the potentially broader role of non-Afghans seized there, however, led to some anomalies in U.S. policy that represented departures from accepted U.S. and international legal standards.

The fall of the Taliban was followed by the transfer of hundreds of detainees from Afghanistan to the US naval base at Guantanamo, Cuba. Many had been detained by Afghan Northern Alliance forces before being handed over to U.S. troops and intelligence personnel. They were followed by others seized because of suspected links with the al Qaeda network from as far afield as Bosnia.

The conditions of prisoners during the transfers from Afghanistan and after the detainees arrived at the Guantanamo base generated enormous doubt over the commitment of the United States to abide by international standards. Prisoners were held in open air, wire cages where they were exposed to the elements, and official film released from the time of the first groups of prisoners at the base showed detainees bound, wearing goggles and kneeling.

But even more than the photographs of detainees in the military prison camp at Guantanamo, initial statements from the Administration laying out its views about the irrelevance of the Geneva Conventions to the war on terrorism caused deep concern about the United States' questioning of well-established international humanitarian law. Secretary of Defense Donald Rumsfeld announced that none of the Guantanamo detainees would be handled as prisoners of war because they are "unlawful combatants" and therefore had no rights under the Geneva Conventions.¹¹

The government's initial posture – that the Geneva Conventions were not relevant to the combatants in US custody – was modified only partially, and reportedly only after military officers, most notably general and former Chairman of the Joint Chiefs of Staff Secretary of State Colin Powell, intervened to make clear just what the country's own

¹¹ CNNfyi.com, "Pentagon defends treatment of detainees," January 15, 2002, <http://fyi.cnn.com/2002/fyi/news/01/15/cuba.detainees/> (accessed July 25, 2002).

military personnel had to lose should the laws of war themselves be set aside – or opened to debate. Certain U.S. military personnel operating on the ground in Afghanistan were out of uniform. Among the concerns within the military was that the argument by U.S. officials that Afghan forces were “illegal combatants” because they operated out of uniform could rebound on U.S. forces. A compromise satisfied no one concerned with the integrity of international humanitarian law: President Bush’s declaration that the United States would be bound only by “the principles” of the Geneva Conventions appeared to challenge the very foundations of the laws of war.

At the same time, concentrating hundreds of detainees in an offshore base shielded U.S. treatment of the detainees from public scrutiny – and from oversight by United States courts. The administration persisted in a unique interpretation of U.S. obligations under the Geneva Conventions regarding the status accorded the Guantanamo detainees. Declaring the detainees collectively to be “unlawful combatants,” administration officials said no individual hearings would be convened to determine the status (e.g. prisoner of war, hapless civilian, etc.), as required by the Geneva Conventions.

The administration further declared that presidential authority alone was sufficient to justify holding the detainees indefinitely and that no further legal authority would be invoked in their cases. No judicial authority was recognized as having jurisdiction to test the legality of any of the detentions – as, for example, in the cases of several foreign nationals who claimed to have had no involvement with the Taliban or al Qaeda and that their detention was in error.

By mid-August 2002, the 598 detainees held in Guantanamo had reportedly provided little in the way of useful intelligence to their captors. Media reports cited intelligence officers as acknowledging that few if any were of any particular importance in the al Qaeda organization.¹² The detainees are said to include nationals of 43 countries – but their names have not officially been released. And more than six months after their detention, none had been brought before a court of justice, appeared before a military tribunal, or been charged with any crime.

Several American citizens have been detained on the grounds of alleged links with the al Qaeda organization or the Taliban’s military forces. Yaser Esam Hamdi was captured with Taliban soldiers in Afghanistan and taken to Guantanamo; after a birth certificate revealed he was born in Louisiana he was transferred to a Navy brig. Brooklyn-born Jose Padilla, who has been accused of planning to detonate a “dirty bomb,” was detained on arrival in Chicago from overseas and is being held in a brig in South Carolina after being transferred from a federal jail. Both are being held in military custody incommunicado, without charge and without access to legal counsel, on the basis of executive decisions labeling them “enemy combatants.” The measure, which eliminates the presumption of innocence, is being challenged before the courts.

¹² Bob Drogin, “No Leaders of Al Qaeda Found at Guantanamo,” *Los Angeles Times*, August 18, 2002.

A number of foreign nationals detained in the United States as suspects in the planning of violent political attacks have recently been indicted for trial by the ordinary civilian courts. The decision to prosecute represents a renewed and welcome reliance on the criminal justice system to address threats to national security.

Ironically, the Americans detained in relation to the September attacks have had less protection under the law than several of the non-citizens accused of taking action against the U.S. – such as Zacarias Moussaoui, accused of being the 20th hijacker, and Richard Reid, the so-called “shoe bomber.” Both of these men are being tried in federal criminal court. Only one of the U.S. citizens detained in Afghanistan, John Walker Lindh, was charged with crimes, based on his incorporation into the Taliban’s forces. He was convicted by a civilian court after having agreed not to contest the case.

The administration also acted hastily to establish special military courts outside the U.S. armed forces’ own established system of military justice. On November 14, President Bush issued a Military Order in his capacity as Commander-in-Chief that authorized military commissions to try non-citizens designated by the President as terrorists. The commissions would function without the fair trial safeguards required either by U.S. constitutional law or by the Uniform Code of Military Justice which governs the military’s own courts. The scheme was adopted in haste and some apparent desperation as a possible means to try suspects detained abroad in cases where available evidence would not stand up in ordinary courts. The special courts were also to operate under conditions of strict secrecy, in which access to legal counsel would be severely limited. A year after the attacks, no case had been brought before a military commission.

The Smoke Clears

The post-September measures responded to an emergency that was unprecedented for the United States. In desperate times, desperate measures were taken. After an initial period of response to the new threats, however, the more extraordinary departures from fundamental democratic principles should have been corrected. Emergency measures should have been promptly superseded by actions and policies fully consonant with the fundamental values of American law and custom. Readiness to deter – and preempt – further attacks from unexpected quarters requires reinforcement of the bedrock institutions of the United States and a reaffirmation of underlying national values.

In the initial period of undeclared national emergency there was a general consensus that the country’s leadership – above all, the President – should be given considerable latitude to take emergency action. The U.S. government is responsible for ensuring the country’s security and must have the tools to do so – but which tools were found lacking in the immediate aftermath of the attacks?

The United States, perhaps surprisingly to observers abroad, did not declare a state of emergency and a formal limitation of constitutional guarantees, nor did it formally declare that it would suspend any of its obligations under international human

rights treaties. Yet a fundamental adjustment of governmental powers and prerogatives was undertaken in little time and with little deliberation. Without a full understanding of the scope of these changes, the public generally accommodated constraints imposed on individual freedoms. These were freedoms to which the people of the United States were accustomed and which were promoted around the world as models for democratic government.

The general acquiescence to new controls on the individual was in part a consequence of unity in the face of adversity, and was in part because the new restrictions on individual liberties were largely unannounced and unknown to most. For many, they would remain a distant concern until they themselves faced intimidating surveillance, the sequestering of personal records, or a knock on the door. The detention without charge or trial of a family member, a friend, a colleague, or neighbor – or simply being called in for questioning – had already brought home for many ethnic and religious minorities in the United States that their liberties rested on fragile ground.

The federal government's growing intrusion in public and private life was gradual and almost imperceptible to most Americans. It initially stirred little outrage outside the minority communities most immediately affected. The public's passive consent to expanding executive powers only began to break down after most of a year had passed. The war in Afghanistan had been reduced to a peacekeeping and policing operation, the anthrax threat had been contained, and no new outrages had been committed against the United States at home.

But the progressive erosion of rights affecting everyone in the United States had a cumulative effect, even when implemented largely through executive action. The first steps to build in new powers, and new structures, regulations, and laws to reinforce them, generated concerns most significantly when they threatened to impose permanent constraints on the fundamental freedoms at the heart of most Americans' conception of their country. These controls and exceptions were gradually seen to threaten a transformation of the very culture and values of the nation, and the dynamics of its government.

The initial period of unity, of solidarity steeped in tragedy, had set the scene for a readiness to make minor sacrifices by accepting inconvenience and governmental intrusions with which the public was unfamiliar. A certain comfort was found in the new normality of heightened security in public places and transportation hubs, in pledges to enhance surveillance of potential enemies, and in the speed with which an adversary at least masquerading as a nation state was the object of military action. The readiness to set aside more fundamental civil rights was tempered by a gradual deepening of awareness of what rights were at risk.

As time passed and the smoke cleared, a tension had emerged in the balance between concerns about rights and the needs of public safety. The resolve to do what was necessary to meet the new threats to the nation was unquestioned. But doubts about

the course to be taken gradually emerged. Dissent was muted by the absence of public information on much of what was occurring. Those who spoke out for greater openness and discussions were challenged by top public officials who questioned their patriotism.

In time, the pervasive anxiety yielded to a weary confidence that what needed to be done was being done and that any gaps in the United States' armor were being mended. A strident minority remained, calling for rights to be stripped wholesale from whole sectors of the population deemed by them suspicious because of their ethnicity, religion, or national origin – citizens and non-citizens alike. But by mid-2002, the more extreme proposals from the public and the presidency increasingly found eloquent and effective adversaries in public office and in the press.

The recalibration of the balance of rights and security to address the emergency required deliberation and adjustment before being cast as permanent. But permanent realignments of the balance between the judiciary, the legislature, and the executive were under way already by late 2001. A year after the attacks, this realignment has proceeded quietly but inexorably to change the political landscape of the United States.

New Rules at a Critical Juncture

The rules in the new political landscape have changed quickly and almost without notice. Freedom of expression and of association are newly vulnerable to government interference. Due process of law may be denied in the deprivation of liberty of citizens and non-citizens alike. The security of one's own home and property and personal records is now vulnerable to government intrusion on strictly political grounds of suspicion. New laws and regulations constrain even the courts' capacity to limit federal access to private property or intrusion into private information in written or electronic form – so long as officials assert that materials are required on national security grounds – now defined simply as to “protect against international terrorism or clandestine intelligence activities.” (See “The Right to Privacy” and “Open Government.”)

What is at issue? Ultimately, the checks and balances of the United States' democratic government provide the greatest safeguards of fundamental rights, and it is these balances that have been severely disrupted. The new alignment throws into question the constitutional separation of powers and balance between the elected lawmaker, the courts which interpret the law, and the administration's enforcement and implementation of the law, as well as the relation of federal and state authorities.

The structures of government were devised to limit government action to what was necessary and prescribed by law. The balance of government powers and the rights of individuals was built into the United States constitution, and made explicit in the Bill of Rights. This setting out of rights and freedoms and the obligations of government to protect them, in turn, provided a model for the global standards that were agreed to in the wake of World War II at the United States' prompting.

The government has taken a number of steps that radically transform the dynamic of political participation itself, extending new powers to the executive by law and administrative fiat. In doing so, new restrictions have undermined the bedrock guarantees of international law and the United States Constitution. Any steps to curtail fundamental liberties should be taken, if at all, only after careful reflection and thorough national debate and legislative action.

The country will be living with the decisions made now for a long time to come. At a minimum, there should be a full airing of the costs and a testing of the real benefits of rights-restricting measures against the loss of American values. Any long term reforms of principles and structures of government require the most careful deliberation if they are not to damage the integrity of the very institutions of law and community they were designed to protect.