Report of the Liberty and Security Initiative on First Amendment Issues

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Introduction

The Constitution Project's Liberty and Security Initiative was launched in the days following the September 11, 2001 terrorist attacks on New York and Washington. The Initiative consists of a broad-based committee of prominent Americans who have come together to develop and advance positive proposals to protect civil liberties in a time of crisis. This report of the Initiative addresses some of the First Amendment issues raised by anti-terrorist legislation and regulations adopted since 9/11.[1]

The report reflects the Initiative members' agreement on several important points. First, there is unwavering support for the federal government's objective to protect Americans' lives and the national security from terrorist threats, attacks, and activities. The Initiative's analysis begins, therefore, with recognition of the seriousness of the threat we now confront as a nation.

Second, Initiative members have a shared view of the fundamental rights and values protected by the First Amendment. Among those values is openness in governmental decisions and activities. Political leaders can only be held accountable if the public has access to information on their conduct in office. Unless citizens know what their leaders are doing, they have no way to judge them or to initiate the robust policy debates so necessary to a free society. In addition, openness constitutes an important weapon against terrorism. It helps to dispel misunderstandings about American government, policies and values and it reminds the world that the United States tolerates criticism that in other countries might be punishable by imprisonment or death.

The Initiative recognizes the importance of maintaining throughout its analysis the distinction between anti-terrorist measures that violate the First Amendment and those that may be constitutional but nevertheless could be modified to achieve a better balance between protecting national security and preserving First Amendment ideals such as openness in governmental deliberations. Moreover, although committed to supporting the First Amendment, the Initiative does not want to overstate the threat posed by the government's anti-terrorist initiatives to First Amendment interests. Some members are especially concerned that the assessment of any such threat should not be made on the basis of a speculative parade of horribles but rather on a careful analysis of what is actually being proposed or done as a response to the very real crisis with which we as a society must contend.

To assist the Initiative's analysis and formulation of recommendations for protecting First Amendment values in a time of war, the law firm of Sidley Austin Brown & Wood provided background memoranda on relevant statutes, regulations, and legal doctrine. Michael Gerhardt, Arthur B. Hanson Professor of Law at William and Mary, took the lead in preparing the report.

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[1] The First Amendment provides in pertinent part, " Congress shall make no law . . . abridging the freedom of speech, or of the press: to the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constit. Amend. I.

I. Background: Relevant Statutes and Regulations

Since the September 11, 2001 attacks against the United States, the federal government has implemented several laws, regulations and guidelines aimed at the terrorist threat. Many of these measures have important First Amendment implications.

1. Congress enacted the principal piece of anti-terrorist legislation, the PATRIOT Act, on October 26, 2001.[2] In relevant part, the PATRIOT Act expands federal authority to investigate, engage in surveillance of, or seize assets from individuals or organizations suspected of terrorist activity against the United States.[3] The PATRIOT Act revises or supplements several other federal laws on which the federal government relies for authority to seize the assets of or undertake surveillance of suspected terrorists or terrorist organizations.[4]

2. The government has adopted a policy to refuse to release the names and other information concerning individuals who were detained on immigration charges or as material witnesses in the wake of 9/11. It has also closed all the hearings of the immigration detainees.

3. On May 30, 2002, Attorney General John Ashcroft issued a revised version of the Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (hereafter referred to as "the Revised Guidelines"). The Revised Guidelines were intended to expand the FBI's authority and capability to detect and prevent future terrorist activities through such means as authorizing the FBI to enter any place or attend any event that is open to the public so long as the FBI abides by the same rules as the general public; permitting the FBI to use the Internet to investigate individuals or groups who may be involved in criminal activities; authorizing the FBI to use non-profit and commercial data mining services, as well as information voluntarily provided by private organizations, for the purposes of identifying, preventing, and prosecuting criminal activities.[5] The Revised Guidelines replace the guidelines initially drafted in 1976 at the direction of then-Attorney General Edward Levi and subsequently amended in 1983 at the direction of then-Attorney General William French Smith and in 1989 (hereafter referred to as the "Levi-Smith Guidelines").[6]

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[2] USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (October 26, 2001).

[3] USA Patriot Act, §§ 201-225, 302, 501-508.

[4] See, e.g., Title III of the Omnibus Crime Control and Safe Streets act of 1968, as amended by the USA PATRIOT Act; the Foreign Intelligence Surveillance Act of 1978, as amended, 50 U.S.C. Part 36; Anti-Terrorism and Effective Death Penalty Act, 8 U.S.C. sections 1189 et seq. Several other statutes give the federal government the right to seize the assets of terrorist organizations or individuals who give money or support to such identified groups and impose obligations on financial institutions to track such groups. Some of these statutes include the anti-money laundering provisions added or amended by the PATRIOT Act, which impose record-keeping and reporting obligations on financial institutions in an effort to combat money laundering operations, which may be used by terrorist networks. See 54 U.S.C. sections 5318, 5318A. Also, the Bank Secrecy Act gives the federal government the authority to track funds held in U.S. financial institutions by imposing various reporting and record-keeping requirements on financial institutions, some of which are triggered solely by transaction amount and others that require suspicion of illegal activities as well as transaction thresholds. See 31 U.S.C. section 5311.

[5] The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigation, VI(a)-(b) (2002), available at http://www.usdoj.gov/olp/generalcrimes2.pdf

[6] The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/ Terrorism Investigations, available at http://www.usdoj.gov/ag/readingroom/generalcrimes.htm

4. In October 2002, Attorney General Ashcroft issued a memorandum that encouraged federal agencies to withhold more information under the Freedom of Information Act (FOIA) by changing the standard under which the Department of Justice would defend agency decisions to deny FOIA requests.[7]

The Initiative further recognizes that some important First Amendment values are likely to be implicated by other measures or actions undertaken by federal authorities and state authorities. First, Initiative members have been concerned that, in at least two cases, state prosecutors in the state of New York have arrested and charged people for violating local ordinances even though their primary activity seems to have been engaging in unpopular speech. In one case, officials are prosecuting a man who stood on 42nd Street in Manhattan and screamed that more firefighters and others should have been killed in the terrorist attacks on September 11.[8] Prosecutors have charged this man with inciting a riot, though we fail (at least thus far) to see how this prosecution can be squared with the well-settled principles consistently recognized by the Court as protecting political speech.[9] In a second case, state officials filed but later dismissed charges against a man at the site of the former World Trade Center buildings for displaying a picture of Osama Bin Laden.[10] We have been heartened by the outcome of the second case, since we are hard pressed to reconcile this prosecution, like the other, with the long line of Supreme Court decisions granting considerable latitude for unpopular and disagreeable speech in our society.[11]

The Initiative notes two other circumstances about which the press has reported widely but do not merit, in our judgment, protracted discussion. The first is Attorney General John Ashcroft's suggestion in testimony before the Senate Judiciary Committee that critics of the administration's policies unwittingly give aid and comfort to our enemies. The members of the Initiative view this effort to question the patriotism of administration critics as plainly at odds with our national commitment, recognized explicitly in the First Amendment, to free and robust discourse and disagreement about governmental policies and objectives. A second circumstance is the administration's efforts shortly after September 11, 2001 to pressure national networks not to release certain video-tapes of Osama Bin Laden on the grounds that playing the tapes might facilitate communication among terrorists. Initiative members doubt that on this occasion there was an imminent danger warranting such an attempt to inhibit the press. It does not appear, however, that the government has repeated the questioning of its critics' patriotism or has sought to censor press coverage. Thus the Initiative deems these actions as unfortunate, quite

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[7] "Memorandum for Heads of all Federal Departments and Agencies," October 12, 2001.
[8] *State v. Upshaw*, 741 N.Y.S.2d 664 (2002).
[9] See, e.g., *Republican Party v. White*, 122 S. Ct. 2528 (2002) ("[C]ontent-based restrictions on political speech are 'expressly and positively forbidden by' the First Amendment.") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964)); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).
[10] See New York Law Journal, April 26, 2002, p. 6.
[11] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) ("The First Amendment does not permit . . . special prohibitions on those speakers who express views on disfavored subjects"); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) ("Plainly a community may not suppress . . . the dissemination of views because they are unpopular, annoying, or distasteful.").

temporary, lapses.

II. Anti-Terrorist Measures Must Respect First Amendment Values of Openness, Robust Political Debate, and Freedom of Association

The Initiative recognizes three fundamental, related principles of First Amendment law that it strongly recommends the federal government should take, or continue to take, seriously in formulating anti-terrorism measures. These basic principles are (1) openness, (2) robust political dialogue, and (3) freedom of association.

Openness promotes widespread understanding of what our government is doing and thus is indispensable for ensuring an informed citizenry. Openness allows for robust public dialogue about important social and political questions as well as the proliferation of information that makes such dialogue possible. In addition, openness contrasts our values with those of regimes that criminalize public criticism and even put their critics to death and thus is itself a weapon against terrorism.

The Supreme Court has also long recognized that the First Amendment guarantees a right to freedom of association.[12] This freedom extends to non-violent political activity of all kinds [13] and precludes the government from compelling the disclosure of "affiliations with groups engaged in advocacy."[14] This right further requires the government to refrain from harassing or imposing criminal sanctions on individuals because of their political associations.[15]

Initiative members believe that these three principles, which form the bedrock of our democratic system of government, are applicable at all times, including war and periods of national emergency. They believe that, at all times, the government has the heavy burden of justifying restrictions on, or regulation of, speech or speech-related activity. Of course, in exceptional circumstances such as war or times of peril, the government might have less difficulty in meeting this burden, but this does not translate into a presumption that favors governmental regulation of freedom of speech, press, or association. To the contrary, the presumption required by our Constitution favors more rather than less open debate about

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[12] See, e.g., *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) ("This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments"); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the [Constitution],");

[13] In the subcommittee's judgment, the right of freedom of association extends to public meetings of citizens in churches, synagogues, mosques, or other settings in which they have come together to discuss, inter alia, political issues of concern to them. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

[14] *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective . . . restraint on freedom of association . . . .").

[15] The Initiative further believes that the First Amendment's guarantee of free exercise of religion precludes the federal government from making religious associations or affiliations, without more, a basis for investigation or surveillance of American citizens.

political issues and more rather than less openness in governmental activities.

III. Several Anti-Terrorist Measures Violate or Threaten First Amendment Guarantees

Initiative members believe at least five specific policies and practices of the federal government raise serious First Amendment questions. In this Part, we discuss each of the problem areas.

A. Excessive Secrecy Constitutes a General Threat to First Amendment Values. The Initiative is troubled by the federal government's excessive secrecy since September 11, 2001. This excessive secrecy extends to a wide variety of circumstances, including but not limited to the government's ongoing refusal to release the names of the people detained in the wake of 9/11 and the federal government's blanket closure of immigration hearings for those detainees. Moreover, the federal government's excessive secrecy includes the President's refusal to allow the Director of Homeland Security to testify, even in a closed hearing, before a duly constituted congressional committee.

B. The Government's Policies to Preclude Disclosure of Information about Detainees and Immigration Hearings Violate the First Amendment. The federal government's closure of allegedly terrorist-related immigration hearings and its refusal to make public information about people detained in the wake of 9/11 raise serious First Amendment questions.

First, the Initiative believes that the First Amendment establishes a presumption that people should not be arrested in secret except under compelling circumstances and, even then, only with a judicial determination of the propriety of the arrest and the secrecy. At present, there is no statute setting forth specific justifications for maintaining secrecy of arrests and detentions and providing for periodic or internal reviews of the ongoing legitimacy or credibility of these justifications. Nevertheless, it is the responsibility of the judiciary under the Constitution to require federal officials to justify on the basis of particularized facts the reasons for secret arrests, arraignments, and/or detentions and to delineate an appropriate range of officials who are responsible for approving and reviewing the written records of and justifications for such arrests and detentions.

In the judgment of the Initiative, one of the most disturbing things about the secrecy regarding the number and names of detainees apprehended in the immediate wake of 9/11 is that this information is still secret. The initial justification for secrecy was to prevent terrorist organizations from understanding the extent to which the federal government had penetrated their operations or the direction of federal investigations; such a rationale, if it was ever credible, no longer remains plausible. By now, more than a year after September 11, 2001, it is likely that terrorist organizations have developed relatively good information about which if any of their members or sympathizers have been detained by the United States government and about the direction and scope of the government's investigations. Many Initiative members are concerned that federal officials are insisting on secrecy more to cover up the (perhaps necessarily) random nature of the post 9/11 detentions than to protect national security.

Again, the Initiative recognizes that in light of the dangers the nation faces, some secrecy may be in order. There can be circumstances, such as the government's arrest of a close associate of Bin Laden, in which there is an important need for secrecy at the time of the arrest to facilitate other arrests or otherwise to prevent an imminent harm. To the extent the government can make the requisite showing, it would be entitled to maintain the secrecy of a particular arrest, but its burden grows heavier with time. The government has not met the burden of demonstrating why the names of all the post 9/11 immigrant and material witness detainees should be kept secret. Initiative members agree, therefore, with U.S. District Judge Gladys Kessler's rejection of the Attorney General's interpretation of FOIA and the laws governing grand jury secrecy to support the government's refusal to disclose the names of the post 9/11 detainees.[16] They believe further that, under the circumstances here, disclosure is also required by the First Amendment.

Initiative members regard the federal government's order closing all 9/11-related immigration proceedings to the public as also being at odds with the basic First Amendment principles of openness and robust political dialogue. To be sure, members recognize that under the present circumstances more immigration hearings than usual might have to be closed, at least in part. Federal immigration law authorizes a very narrow exception to maintain the secrecy of specific evidence employed in an immigration hearing.[17] The difficulty for the government in justifying secrecy for every aspect of every 9/11-related immigration proceeding is that it could be justified only on the dubious ground that every aspect of such hearing constitutes evidence putting national security at serious risk. It is hard to imagine why over a relatively lengthy period of time the national government needs to maintain the secrecy. Initiative members believe the First Amendment requires at the very least that the government make a specified showing as to why it requires secrecy of all or most aspects of a particular proceeding. They note that there are a variety of mechanisms for protecting classified information without totally closing proceedings.

The Initiative recognizes that the federal courts have not ruled uniformly on the legitimacy of the administration's policy of closed immigration proceedings in all 9/11-related cases. One federal appellate court has struck down the policy[18] while another has upheld it.[19] The Supreme Court recently denied certiorari in the case upholding the policy.[20] In its brief opposing certiorari, the government suggested that it was reviewing its policy.[21] The Initiative believes that the government should reverse its position and accept that a particularized showing on a case-by-case basis is required to justify closing particular proceedings in order to protect national security. If the government fails to do so, Congress has the power to require such a

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[16] See *Center for National Security Studies v. United States Department of Justice*, 215 F.Supp. 2d 94 (2002)(appeal pending).
[17] 8 C.F.R. §§ 3.27, 240.10 (2002).
[18] *North Jersey Media Group, Inc v. Ashcroft*, 308 F.3d. 198 (3d.Cir., 2002), reh'g denied (Dec. 2, 2002) (cert denied, 538 U.S.____, May 27, 2003).
[19] *Detroit Free Press v. Ashcroft*, 303 F. 3d 681 (6th Cir., 2002), reh'g denied (Jan. 22, 2002).
[20] 538 U.S. ___, May 27, 2003.
[21] Brief for the Resp., pp 13-14.

particularized case-by-case showing.

C. The Weakening of FOIA is Inconsistent with First Amendment Values. The Freedom of Information Act implements First Amendment values by enabling the public and the press to find out what "what their government is up to." Since 9/11, the government has weakened FOIA implementation in an important respect.

The Department of Justice has lowered the standard under which it will defend a government agency's failure to comply with a FOIA request. In his memorandum of October 12, 200l to all agencies, Attorney General Ashcroft stated that the Justice Department would defend an agency as long as its decision to deny a FOIA request rested on a "sound legal basis."[22] The previous standard was that the Justice Department would defend an agency's denial of a FOIA request only when the release of the information would result in "foreseeable harm."[23] This change in standards applies to all FOIA requests, not just those related to war or terrorism, and was made without any consultation with the Congress or the public.

D. The Changes in the FBI Surveillance Guidelines Raise Serious First Amendment Issues. The recent revisions to the Levi-Smith Guidelines permit FBI field personnel to monitor religious and political gatherings even without a "reasonable indication" that any criminal activity is involved. Initiative members agree with House Judiciary Chairman Sensenbrenner and others that these revisions, because of their First Amendment sensitivity, should not have been made without consultation with Congress and the public.

Initiative members differ, however, about the substance of the revised guidelines. Some members believe that the government may only investigate and collect information about political or religious activities protected by the First Amendment when there is some reasonable indication of criminal activity – either past or contemplated. They are disturbed that the revised guidelines allow the FBI to collect information by monitoring public events and conducting Internet searches with only a hunch that doing so may help to prevent terrorist activity. They are concerned that individuals may be reluctant to communicate freely on the Internet or attend political demonstrations if they fear that the FBI will be monitoring, and may harass or detain them on the basis of their speech or association. They believe further that as a result of the possibility of FBI surveillance (especially undercover surveillance), members of religious organizations, especially Muslims, may be deterred from exercising their religious freedom and going to their places of worship.[24]

On the other hand, some Initiative members believe that the government's motives in expanding the guidelines should not be presumed to be hostile to First Amendment interests and that certain expansions of FBI surveillance activities of essentially public meetings and data are, under the circumstances, justified. They see no sense, for example, in prohibiting FBI agents from going to public meetings or from looking at information available to any person with a

[22]"Memorandum for Heads of all Federal Departments and Agencies," October 12, 2001
[23]"Attorney General Reno's FOIA memorandum," October 4, 1993
[24]They also doubt that such forms of surveillance will be particularly effective, since terrorists are unlikely to reveal themselves at any of the public events the FBI will monitor and little other useful information is likely to gathered.

computer and they believe that measures can be taken to prevent inappropriate use by the government of the additional information it gathers.

With respect to the use of information, all Initiative members are concerned by the lack of guidance as to how long records will be retained, who will have access to them within the government and how will they be disseminated. If the FBI is going to expand its collection of information about individuals' religious and political activities, it becomes more important than ever to address these questions.

III. Recommendations for the Executive and Legislative Branches

The Initiative proposes several specific recommendations that would enable the federal government to achieve a better balance between protecting national security and preserving First Amendment guarantees. The members hope that these recommendations will spur public debate, receive careful attention from both executive and legislative officials, and be useful at all times regardless of whether the nation is at war.

There Should Be No Blanket Closure of Deportation Hearings. The Administration should reverse its policy of automatically closing all deportation hearings for immigrants who may conceivably have some connection to terrorism. No compelling case has been made that national security will be jeopardized by having public hearings except when classified or similarly sensitive material is being considered. If the Administration does not reverse its policy, Congress should enact appropriate legislation.

The Government Should Release the Names of All Persons It Detains Except Under Compelling Circumstances as Determined by a Court. The Administration should end its blanket refusal to disclose the names of immigrants and material witnesses detained since 9/11 in connection with the investigation of terrorism. If the government believes there are compelling national security reasons, beyond the very general reasons it has advanced thus far, for withholding some of the names, it should make that argument to the district court. If the court agrees that the government has made the compelling showing required by the First Amendment, it should review the non-disclosure every three months.

Congress should consider enacting legislation requiring the federal government to release the names of all detainees (without the necessity of a FOIA request) except when there are compelling national security reasons not to do so. The legislation could give the government the burden of going to court when it wishes to withhold the names of detainees and could delineate the circumstances and conditions under which such withholding is authorized. The law could provide, for example, that the government is not entitled to withhold the names of its detainees unless Congress has authorized the use of military force and the need for maintaining secrecy is specifically linked to the use of such force. It could also require, *inter alia*, that officials responsible for arrests or detentions make written records in which they particularize the facts justifying secrecy of arrests and detentions and specify a timetable for periodic review of the facts.

The Federal Government Should Adopt More Extensive Guidelines and Tighter Controls for Investigations Implicating First Amendment Values. Although Initiative members differ on the predicate required for initiating government investigations related to terrorism, they agree that the FBI guidelines need to be strengthened in several respects. First, the FBI should reinstate central headquarters supervision over those investigations - *e.g.*, of religious and political gatherings - that have First Amendment implications. Such investigations, unlike investigations of flight training schools, should not be left solely to the discretion of field personnel. Second, guidelines should be developed concerning who has access to First Amendment-sensitive records, how long such records will be retained and how they will be disseminated to other agencies. The Attorney General should consult with Congress and the public in the development of these guidelines and Congress should be willing to take legislative action if the guidelines are inadequate.

The Federal Government Should Consult with the Communities Affected by Terrorist-Related Investigations. The FBI and other agencies that are investigating and prosecuting terrorist-related offenses in the United States may sometimes lack a full understanding of the institutions - *e.g.*, mosques, schools and foundations - established by Islamic and Arab communities here. The investigation process may be more effective, and unnecessary investigations avoided, if the agencies engage in broad consultation with representatives of the affected communities.

The Federal Government Should Not Weaken FOIA. The Department of Justice should not defend an agency's denial of a FOIA request unless release of the information would result in "foreseeable harm." The "foreseeable harm" standard is broad enough to protect against disclosures that could assists terrorists and promotes the First Amendment value of openness. If the Administration wishes to change policies related to FOIA in the future, it should first consult the public. A useful model is the informal notice and comment procedure the Clinton Administration adopted prior to changing declassification policy.

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