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ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES

INTRODUCTION

[Y]ou will come to the Sirens who enchant all who come near them. If any one unwarily draws in too close and hears the singing of the Sirens, his wife and children will never welcome him home again, for they sit in a green field and warble him to death with the sweetness of their song. . . . Therefore pass these Sirens by, and stop your men's ears with wax that none of them may hear; but if you like you can listen yourself, for you may get the men to bind you as you stand upright on a cross piece half way up the mast, and they must lash the rope's ends to the mast itself, that you may have the pleasure of listening. If you beg and pray the men to unloose you, then they must bind you faster.

Homer, *The Odyssey*

Legal scholars have often invoked the story of Ulysses and the Sirens to explain the Constitution's role in American life. Just as Ulysses had himself tied to the mast to save himself from the Sirens' song, so have we tied ourselves to the Constitution to keep short-term impulses from compromising a long-term commitment to a free society. The metaphor that describes the U.S. Constitution is equally apt for the rule of law more broadly. In a society bound by the rule of law, individuals are governed by publicly known regulations, applied equally in all cases, and enforced by fair and independent courts. The rule of law is a free society's method of ensuring that whatever crisis it faces, government remains bound by the constraints that keep society free.

This report, the third in a series, documents the continuing erosion of basic human rights protections under U.S. law and policy since September 11, 2001. The reports address changes in five major areas: government openness; personal privacy; immigration; security-related detention; and the effect of U.S. actions on human rights standards around the world. Changes in these arenas began occurring rapidly in the weeks following September 11, and have been largely sustained or expanded in the two years since. As Vice President Dick Cheney explained shortly after September 11: "Many of the steps we have now been forced to take will become permanent in American life," part of a "new normalcy" that reflects "an understanding of the world as it is." Indeed, today, two years after the terrorist attacks, it is no longer possible to view these changes as aberrant parts of a short-term emergency response. They have become part of a "new normal" in American life.

Some of the changes now part of this new normal are sensible and good. Al Qaeda continues to pose a profound threat to the U.S. public, and the government has the right and duty to protect its people from attacks. A new national security strategy aimed at reducing this threat is essential. We thus welcome efforts to improve coordination among federal, state, and local

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agencies, and between law enforcement and intelligence officials. Equally welcome would be greater efforts to protect the nation's critical infrastructure supporting energy, transportation, food, and water; and efforts to strengthen the preparedness of our domestic "front-line" forces – police, fire, and emergency medical teams, as well as all those in public health. Many of these changes are past due.

But the new normal is also defined by dramatic changes in the relationship between the U.S. government and the people it serves – changes that have meant the loss of particular freedoms for some, and worse, a detachment from the rule of law as a whole. As this report details, the United States has become unbound from the principles that have long held it to the mast.

Abandoning the Courts

Perhaps most marked of these changes, the new normal has brought a sharp departure from the rule-of-law principles guaranteeing that like cases will be treated alike, and that all will have recourse to fair and independent courts as a check on executive power. In the two years since September 11, the executive has established a set of extra-legal institutions that bypass the federal judiciary; most well known are the military commissions and the detention camp at the U.S. military base in Guantánamo Bay, Cuba. Individuals subject to military commission proceedings will have their fate decided by military personnel who report only to the president; there will be no appeal to any independent civilian court. And the administration maintains that those detained by the United States outside the U.S. borders – at Guantánamo and elsewhere – are beyond the jurisdictional reach of U.S. courts altogether.

At these facilities, there is no pretense that like cases need be treated alike. Thus, the Defense Department announced without explanation that six current detainees at the Guantánamo camp had become eligible for trial by military commission. Among the six were U.K. citizens Moazzam Begg and Feroz Abassi, and Australian citizen David Hicks (the identities of the other three are unknown). In the face of staunch protests from the United Kingdom and Australia, both close U.S. allies, the United States promised that the Australian and U.K. detainees – unlike the nationals of the other 40-some nations represented in Guantánamo – would not be subject to the death penalty, and would not be monitored in their conversations with counsel. Despite vigorous international opposition to the camp and military commission justice, the United States has thus far refused to afford similar protections to any other nation's detainees. The United States' obligation to adhere to the international laws to which it remains bound – including the Geneva Convention protections for prisoners of war – appears forgotten altogether.

In those cases that have come before the U.S. courts, the executive now consistently demands something less than independent judicial review. The Justice Department has continued to advance the argument that any U.S. citizen may be detained indefinitely without charges or access to counsel if the executive branch presents "some evidence" that he is an "enemy combatant," a category it has yet to properly define. The Justice Department has argued that U.S. citizen Jose Padilla should not be allowed an opportunity to rebut the evidence that it presents – an argument that the district court in the case refused to accept. Yet despite the

federal court's order that the Justice Department allow Padilla access to his counsel – and in the face of briefs filed on Padilla's behalf by a coalition including both the Lawyers Committee and the Cato Institute – the Justice Department has refused to comply with the order of the federal court. Neither Padilla's counsel nor any member of his family has seen or heard from him in 15 months.

And notwithstanding the fundamental rule-of-law principle that laws prohibiting certain conduct will be generally applied to all, the executive has, without explanation, detained some terrorist suspects in military brigs as "enemy combatants" while subjecting others to criminal prosecution in U.S. courts. Detainees in the former category are deprived of all due process rights; detainees in the latter category are entitled to the panoply of fairness protections the U.S. Constitution provides, including access to counsel and the right to have guilt established (or not) in court. As the Justice Department put it: "There's no bright line" dividing the "enemy" detainees from the everyday criminal defendant. Indeed, the executive accused both John Walker Lindh and Yaser Hamdi of participating in hostilities against the United States in Afghanistan. Both are U.S. citizens, captured in Afghanistan in 2001, and handed over to U.S. forces shortly thereafter. Yet the executive brought criminal charges against Lindh through the normal criminal justice system, affording Lindh all due process protections available under the Constitution. Hamdi, in contrast, has remained in incommunicado detention for 16 months. He has never seen a lawyer.

In any case, the executive designation that one is an "enemy combatant" and another a criminal suspect appears subject to change at any time. Some who have been subject to criminal prosecution in federal court for alleged terrorism-related activities face the prospect that, should they begin to win their case, the government may take away the privilege of criminal procedure and subject them to the indeterminate "enemy combatant" designation – a prospect now well known to all suspects not already in incommunicado detention. Criminal defendant Ali Saleh Kahlah al-Marri was designated an enemy combatant just weeks before his long-scheduled criminal trial. And the administration has suggested that if it loses certain procedural rulings in the prosecution of Zacarias Moussaoui, he too may lose the constitutional protections to which he is entitled.

Privacy and Access to Government Information

As the breadth of these examples should suggest, the changes that have become part of the new normal are not limited to the role of the courts. The two years since September 11 have seen a shift away from the core U.S. presumption of access that is essential to democratic government – the presumption that government is largely open to public scrutiny, while the personal information of its people is largely protected from government intrusion. Today, the default in America has become just the opposite – the work of the executive branch increasingly is conducted in secret, but unfettered government access to personal information is becoming the norm.

For example, the administration continues vigorously to defend provisions of the USA PATRIOT Act that allow the FBI secretly to access Americans' personal information (including library, medical, education, internet, telephone, and financial records) without having to show

that the target has any involvement in espionage or terrorism. With little or no judicial oversight, commercial service providers may be compelled to produce these records solely on the basis of a declaration from the FBI that the information is for an investigation "to protect against international terrorism or clandestine intelligence activities." And the PATRIOT Act makes it a crime to reveal that the FBI has searched such information. Thus, a librarian who speaks out about having to reveal a patron's book selections can be subject to prosecution. Because of the secrecy of these surveillance operations, little is known about how many people have been subject to such intrusions. But many have been outspoken about the potential these measures have to chill freedom of expression and inquiry. As one librarian put it, such measures "conflict[] with our code of ethics" because they force librarians to let the FBI "sweep up vast amounts of information about lots of people – without any indication that they've done anything wrong."

At the same time, according to the National Archives and Records Administration, the number of classification actions by the executive branch rose 14 percent in 2002 over 2001 – and declassification activity fell to its lowest level in seven years. The Freedom of Information Act – for three decades an essential public tool for learning about the inner workings of government – has been gravely damaged by an unprecedented use of exemptions and new statutory allowances for certain 'security-related' information, expansively defined. And a new executive order, issued this past spring, further eases the burden on government officials responsible for deciding what information to classify. As a result, being an informed, responsible citizen in U.S. society is measurably more difficult than it was before the September 11 attacks.

Immigrants and Refugees

Yet citizens are far from alone in feeling the effects of these rapid changes in U.S. policy; the new normal is also marked by an important shift in the U.S. position toward immigrants and refugees. Far from viewing immigrants as a pillar of strength, U.S. policy now reflects an assumption that immigrants are a primary national threat. Beginning immediately after September 11, the Justice Department's enforcement of immigration laws has ranged from "indiscriminate and haphazard" (as the Department's independent Inspector General put it with respect to those rounded up in the aftermath of the September 11 attacks) to rigorously selective, targeting Arab, Muslim, and South Asian minorities to the exclusion of other groups. Through the expenditure of enormous resources, the civil immigration system has become a principal instrument to secure the detention of "suspicious" individuals when a government trawling for information can find no conduct that would justify their detention on any criminal charge. And through a series of nationality-specific information and detention sweeps – from special registration requirements to "voluntary" interviews to the detention of all those seeking asylum from a list of predominantly Muslim countries – the administration has acted on an assumption that all such individuals are of concern.

Despite the sustained focus on immigrants, there is growing evidence that the new normal in immigration has done little to improve Americans' safety. By November 2001, FBI-led task force agents had arrested and detained almost 1,200 people in connection with the investigation of the September 11 attacks. Of those arrested during this period, 762 were detained solely on the basis of civil immigration violations. But as the Inspector General's report now makes clear,

many of those detainees did not receive core due process protections, and the decision to detain them was at times "extremely attenuated" from the focus of the September 11 investigation. Worse, the targeted registration and interview programs have seriously undermined relations between the Arab community and law enforcement personnel – relationships essential to developing the kinds of intelligence law enforcement has made clear it most needs. An April 2003 GAO report on one voluntary interview program is particularly telling. While finding that most of the interviews were conducted in a "respectful and professional manner," the report explained that many of the interviewees "did not feel the interviews were truly voluntary" and feared that they would face "repercussions" for declining to participate. As for the security gains realized, "information resulting from the interview project had not been analyzed as of March 2003," and there were "no specific plans" to do so. Moreover, "None of [the] law enforcement officials with whom [the GAO] spoke could provide examples of investigative leads that resulted from the project."

The United States in the World

Finally, the United States' detachment from its own rule-of-law principles is having a profound effect on human rights around the world. Terrorism has become the new rubric under which opportunistic governments seek to justify their actions, however offensive to human rights. Indeed, governments long criticized for human rights abuses have publicly applauded U.S. policies, which they now see as an endorsement of their own longstanding practices. Shortly after September 11, for example, Egypt's President Hosni Mubarak declared that new U.S. policies proved "that we were right from the beginning in using all means, including military tribunals, to combat terrorism.... There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual."

In addition to spurring a global proliferation of aggressive counterterrorism measures, the United States has at times actively undermined judicial authority in nations whose court systems are just beginning to mature. In one such instance, Bosnian authorities transferred six Algerian men into U.S. custody at the request of U.S. officials, in violation of that nation's domestic law. The Bosnian police had arrested the men, five of whom also had Bosnian citizenship, in October 2001 on suspicion that they had links with Al Qaeda. In January 2002, the Bosnian Supreme Court ordered them released for lack of evidence. But instead of releasing them, Bosnian authorities handed them over to U.S. troops serving with NATO-led peacekeepers. Despite an injunction from the Human Rights Chamber of Bosnia and Herzegovina, expressly ordering that four of the men remain in the country for further proceedings, the men were shortly thereafter transported to the detention camp at Guantánamo. They remain there today.

As the report that follows demonstrates in greater detail, the U.S. government can no longer promise that individuals under its authority will be subject to a system bound by the rule of law. In a growing number of cases, legal safeguards are now observed only so far as they are consistent with the chosen ends of power. Yet too many of the policies that have led to this new normal not only fail to enhance U.S. security – as each of the following chapters discusses – but also exact an unnecessarily high price in liberty. For a government unbound by the rule of law presides over a society that is something less than free.

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