

Common Sense

These are the times that try
Women's souls, Men's too.

"Common Sense is always a blessing of God,
and these days Common Sense in government is a precious jewel."

~John Cardinal O'Hara, C.S.C., President of Notre Dame, 1934-40

Current Issue

Past Issues

Editorial Staff

Contact

About Us

Volume 18, Number 1
October 2003

Israel in Crisis

Avraham Burg

Bush's Secret War

Mary Komperda

Moore to Clark

Michael Moore

**The Race for the
Democratic
Nomination**

John Wojcik

America as Religion

George Monbiot

**America's Imperial
Delusion**

Eric Hobsbawm

**Sharon's Preemptive
Zeal**

Neve Gordon

**Folly Taken to a
Perilous Scale**

Robert Fick

War on the Bill of Rights

Nat Hentoff

The erosion of sections of the Bill of Rights quickened when the president signed the USA PATRIOT Act on October 26, 2001. With Attorney General John Ashcroft insisting on the crucial need for speed, the House passed the 342-page document by a vote of 356 to 56, although few had the chance to read it. Several members later said that parts of the new law seemed unconstitutional, but in view of the coming elections, they did not want to be attacked as "unpatriotic" by their opponents. In the Senate, only one senator, Wisconsin's Russ Feingold, voted against the PATRIOT Act.

In the House, dissenter David Obey of Wisconsin said bitterly, "Why should we care? It's only the Constitution."

The Act has radically extended government electronic surveillance—on and off the Internet—with often reduced judicial review. For example, FBI agents can enter a home or office with a court order—while the occupants are not there—and insert the "Magic Lantern" (also known as the keystroke logger) into a computer.

ROBERT FISK

Judges on Trial

Adrian Acu

**When Do We Get
Vatican III?**

Jerome Downs

Finally Free

David Lindorff

**War on the Bill of
Rights**

Nat Hentoff

**Who's Counting the
Dead in Iraq?**

Helen Thomas

**Law, Morality, and
Homosexuality**

Rev. Richard McBrien

**The Perils of the Bush
Tax Plan**

BJ Strew

Unpaid Overtime

Molly Ivins

Poetry

Leaves Fall

Jacqueline Vaught
Brogan

Newlyweds

Max Westler

It records every stroke, including messages not ever sent from the computer. On returning covertly, the agents can download everything that has been recorded. Notice of their entry can be delayed for 90 days or longer.

Under the PATRIOT Act, with a warrant from the secret Foreign Intelligence Surveillance Court, the FBI is empowered to go to libraries and bookstores to secure the lists of books borrowed or bought by persons under only tenuous suspicion of links to terrorism. A much lower standard than the Fourth Amendment's "probable cause" is permitted for these inquiries. And with a gag rule unprecedented in American history, both the librarian and the bookstore owner are prohibited from informing anyone, including the press, that these searches have taken place.

Among the extraordinary unilateral incursions in the Bill of Rights taken by John Ashcroft: Government agents can now listen in on conversations between lawyers and their clients in federal prisons without a prior court order.

And it goes on. The December 20, 2002, New York Times reported, "The Bush administration is planning to propose requiring Internet service providers to help build a centralized system to enable broad monitoring of the Internet and, potentially, surveillance of its users through the Internet."

Brandon Koerner, a fellow at the New America Foundation, has pointed out in The Village Voice that the bill that Congress passed so hastily—and that is now part of the law—"lowers the legal standards necessary for the FBI to deploy its infamous Carnivore surveillance system." Without showing—as the Fourth Amendment requires—probable cause that a crime has been committed or is about to be committed, the government invades your privacy through Carnivore.

The fearful name “Carnivore” disturbed some folks, and so it has been renamed DCS1000. Carnivore, Koerner notes, is “a computer that the Feds attach to an Internet service provider. Once in place, it scans e-mail traffic for ‘suspicious’ subjects which, in the current climate, could be something as innocent as a message with the word ‘Allah’ in the header.” Or maybe: “SAVE THE FOURTH AMENDMENT FROM TYRANTS!” Carnivore also records other electronic communications.

Ashcroft’s Detention Camps

And there is the PATRIOT Act’s designation of two American citizens, so far, as “enemy combatants,” held in military brigs in this country, without charges and without access to lawyers, and unable to appear personally in court hearings. They are being held indefinitely for interrogation about their possible knowledge of or links to terrorism.

In the case of Yaser Hamdi, taken into custody in Afghanistan and now in a Virginia navy brig, Federal District Judge Robert Doumar, a Reagan appointee, has asked the Justice Department lawyer, “So the Constitution doesn’t apply to Mr. Hamdi?” This treatment of American citizens, Judge Doumar has said, “appears to be the first in American jurisprudence.”

Jonathan Turley, a professor of constitutional and public-interest law at George Washington University, wrote in a column in the August 12, 2002, Los Angeles Times: “Attorney General John Ashcroft’s announced desire for camps for U.S. citizens he deems to be ‘enemy combatants’ has moved him from merely being a political embarrassment to being a constitutional menace.” Actually, ever since Ashcroft pushed the PATRIOT Act through a supine Congress, he has subverted more elements of the Bill of Rights than any

attorney general in American history.

Turley reports that Justice Department aides to General Ashcroft “have indicated that a ‘high-level committee’ will recommend which citizens are to be stripped of their constitutional rights and sent to Ashcroft’s new camps. ... Of course Ashcroft is not considering camps on the order of the internment camps used to incarcerate Japanese-American citizens in World War II. But he can be credited only with thinking smaller; we have learned from painful experience that unchecked authority, once tasted, easily becomes insatiable.”

Turley insists that “the proposed camp plan should trigger immediate congressional hearings and reconsideration of Ashcroft’s fitness for important office. Whereas al-Qaeda is a threat to the lives of our citizens, Ashcroft has

become a clear and present threat to our liberties.” There has, as yet, been no congressional call for such hearings.

On August 8, 2002, the Wall Street Journal, which much admires Ashcroft on its editorial pages, reported that “the Goose Creek, South Carolina, facility that houses [Jose] Padilla—mostly empty since it was designated in January to hold foreigners captured in the U.S. and facing military tribunals—now has a special wing that could be used to jail about twenty U.S. citizens if the government were to deem them enemy combatants, a senior administration official said.” The Justice Department has told Turley that it has not denied this story. And space can be found in military installations for more “enemy combatants.”

But once the camps are operating, can Ashcroft be restrained from detaining—not in these special camps, but in regular lockups—any American investigated under suspicion of domestic terrorism under the new, elastic FBI guidelines for criminal investigations? From

page three of these Ashcroft terrorism FBI guidelines, it's worth noting again that "The nature of the conduct engaged in by a [terrorist] enterprise will justify an inference that the standard [for opening a criminal justice investigation] is satisfied, even if there are no known statements by

participants that advocate or indicate planning for violence or other prohibited acts." That conduct can be simply "intimidating" the government, according to the PATRIOT Act.

Vanishing Liberties

On March 18, 2003, The Associated Press reported that at John Carroll University, in a Cleveland suburb, Justice Antonin Scalia said, "Most of the rights you enjoy go way beyond what the Constitution requires" because "the Constitution just sets minimums." Accordingly, in wartime, Scalia emphasized, "the protections will be ratcheted down to the constitutional minimum."

Most of the radical revisions of the Constitution that I and others have been writing about will ultimately be ruled on by the Supreme Court. Scalia indicates he will come down on the side of Bush and Ashcroft. A few days after the terrorist attacks on the World Trade Center and the Pentagon, Justice Sandra Day O'Connor said that as a result, we are "likely to experience more restrictions on our personal freedom than has ever been the case in our country."

In his book *All the Laws But One: Civil Liberties in Wartime* (Alfred A. Knopf, 1998), William Rehnquist, the chief justice of the United States, who will be presiding over the constitutionality of the Bush-Ashcroft assaults on the Constitution, wrote, "In time of war, presidents may act in ways that push their legal authority to its outer limits, if not beyond."

Reacting to Rehnquist's deference to the executive branch in previous wars, Adam Cohen, legal affairs writer for the New York Times, wrote: "The people whose liberties are taken away are virtually invisible" in the pages of Rehnquist's book.

Meanwhile, in an invaluable new report by the Lawyers Committee for Human Rights, *Imbalance of Powers: How Changes to U.S. Law and Policy Since 9/11 Erode Human Rights and Civil Liberties* (March 2003), a section begins: "A mantle of secrecy continues to envelop the executive branch, largely with the acquiescence of

Congress and the courts. [This] makes effective oversight impossible, upsetting the constitutional system of checks and balances."

So where is the oversight going to come from? If at all, first from the people pressuring Congress—provided enough of us know what is happening to our rights and liberties. And that requires, as James Madison said, a vigorous press, because the press has been "the beneficent source to which the United States owes much of the light which conducted [us] to the ranks of a free and independent nation."

But the media, with few exceptions, are failing to report consistently, and in depth, precisely how Bush and Ashcroft are undermining our fundamental individual liberties.

For example, the Justice Department had kept secret from Congress the Domestic Security Enhancement Act, the proposed sequel to the PATRIOT Act. A week before an anonymous member of Ashcroft's staff leaked PATRIOT Act II, a representative of the Justice Department even lied to the Senate Judiciary Committee about its very existence.

A few sections in that chilling draft were briefly covered in some of

the media. But these invasions of the Constitution were only a one or two-day story in nearly all of the media.

How many Americans know that if the bill is passed (and Bush certainly won't veto it), they can be stripped of their citizenship if charged with giving "material support" to a group designated by the government as "terrorist"? Sending a check for the outfit's lawful activities—without knowing why it landed on Ashcroft's list—could make you a person without a country and put you behind bars here indefinitely.

Justice Denied at its Source

Three days before the first anniversary of September 11, the Daily Journal Gazette of Fort Wayne, Indiana, published an indictment of Ashcroft and the Bush administration in an editorial, "Attacks on Liberty." It was the paper's first full-page editorial in nearly 20 years. The Journal Gazette charged:

In the name of national security, President Bush, Attorney General John Ashcroft, and even Congress have pulled strand after strand out of the constitutional fabric that distinguishes the United States from other nations. ...

Actions taken over the past year are eerily reminiscent of tyranny portrayed in the most nightmarish works of fiction. The power to demand reading lists from libraries could have been drawn from the pages of Ray Bradbury's *Fahrenheit 451*. ... The sudden suspension of due process for immigrants rounded up into jails is familiar to readers of Sinclair Lewis' *It Can't Happen Here*.

Among the quotations from distinguished Americans in the editorial was one of my favorites—Louis Brandeis' "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning

but without understanding.”

The changes in the air are not only far from slight, but they are ominous in view of what another current Supreme Court justice, Anthony Kennedy, has warned: “The Constitution needs renewal and understanding each generation, or else it’s not going to last.”

But the Constitution cannot be continually renewed unless enough Americans understand its crucial guarantees of personal liberties against an executive branch that eagerly and righteously keeps assuming powers that the Constitution mandates be shared with Congress and the judiciary.

During a radio interview in Alaska, on February 11, 2003, Rep. Don Young, a plainspoken conservative Republican, said to a caller from Hooper Bay, Alaska, “The events of September 11, as horrendous and horrible as they were, have had an even more horrendous effect—in my opinion and I think in the opinion of a lot of Americans—on our rights, through such of the legislation that has been passed as the PATRIOT Act. The worst act we ever passed.”

“Did you vote for it?” the caller asked.

“Everybody voted for it,” Don Young said, “but it was stupid. It was what you call ‘emotional voting.’ We didn’t follow it through, we didn’t study it. I think you’re going to see—what I call—improvements, changes. ... I say this very strongly. American citizens have constitutional rights, and we have to follow them.”

On the National Day of Prayer, May 1, 2003, Attorney General John Ashcroft declared in Washington: “It is faith and prayer that are the sources of this nation’s strength.”

In view of Ashcroft’s systematic invasions of our liberties, it is

understandable that he missed the quintessential source of this nation's strength—the Bill of Rights—as Don Young of Alaska and increasing millions of Americans know, and are insistent on protecting.

Nat Hentoff is a columnist for The Village Voice and The Washington Times. ©In These Times, September 29, 2003.