

Burdens of War: The Consequences of the U.S. Military Response to 9/11
The Costs to Civil Liberties and the Rule of Law in the U.S.

By Lisa Graves*

How can one quantify the burdens placed on civil liberties and the rule of law after a handful of murderers dramatically toppled the World Trade Center and smashed into the Pentagon in 2001? Qualitatively, the burdens have been substantial within the U.S., and even weightier abroad. Quantitatively, the burdens have been manifold—measured in the number of people whose rights have been eroded or who have been harmed in other ways through an array of domestic and international policy decisions initiated by the administration of George W. Bush and left largely intact by his successor, President Barack Obama. Cumulatively, these decisions have degraded the core meaning of the rule of law and protections for the rights of the American people as well as the rights accorded to people who are not from these shores, but hopefully not permanently so.

The claim is almost always that these policy decisions were necessities, although they are all policies of choice and, in almost all instances, they are choices that diminish civil liberties and human rights. In most instances, there is little demonstrable evidence that the trade-offs have been worth the financial costs and other negative consequences. Plus, we have little evidence of successes that could not have been achieved by giving full measure to the rule of law, although there is much rhetoric of “success” via repetition of the fact that there have been no attacks here since 2001. Recent analysis does suggest that al Qaeda’s current capacity for large-scale incidents is diminished, in the near term, but these conclusions do not disprove that such a result could have been achieved, and more quickly, through other means more consistent with law.

Almost never are other hypothetical conceptions of achieving success examined. *What if* the U.S. had treated the organizers of 9/11 as the criminal outlaws they are—pursuing them single-mindedly, arresting them for the array of criminal acts they were conspiring, and bringing them to justice—without the extensive collateral damage that the chosen new policies have wrought? After ten years of such focus and with dramatically less cost, financially and to innocent people, one can imagine that al Qaeda would have been largely destroyed. And, the blood and treasure of America would not have been spent as it has in the past decade. And, al Qaeda would not have the recruiting base it now has, through misguided policies that have put wind in its sails.

But, that path was not taken. Instead, the terrible events of September 11th have been used by political opportunists to sell the nation two wars in the Middle East, to vastly expand the

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budgets of military and intelligence agencies, and to launch the most technologically sophisticated and wide-reaching surveillance system ever deployed in human history. Instead of the nearly global unity in condemning al Qaeda immediately after that September morning and the wide support for America, the nation will greet the tenth anniversary of that day weaker in almost every way—financially weakened by the expense of combat operations and the enormous sums expended by government agencies, reputationally damaged as a beacon of hope in the eyes of many citizens of the world, and existentially diminished as the foremost nation devoted to the rule of law. Although many will mark the tenth anniversary as demonstrating America’s successful pursuit of the “war on terror,” America’s capacity to win the war of ideas has been greatly undermined. We have not won, and we risk even greater failure if we do not change course. This paper will focus on the cost to civil liberties and human rights of the course pursued.

Substantive Policy Decisions that Have Undermined Civil Liberties in the U.S. and Damaged the Meaning of Human Rights and the Rule of Law Abroad

It is difficult to capture fully the costs to civil liberties and human rights in a short essay, and so this paper will attempt to summarize briefly the major areas in which individual rights have been burdened through the policy decisions of the past nearly decade. This discussion includes two main parts: first, substantive policy decisions that have undermined civil liberties at home, and second, the substantive policy decisions that have diminished the meaning of human rights abroad. This discussion does not include detailed analysis of the expanded budgets of the major agencies administering these policies, because it is anticipated that the budgetary costs are discussed in more detail elsewhere in this comprehensive report.

a. The 2001 Round-Up

A central human liberty is the right to be free from imprisonment without charge of wrongdoing. Physical freedom is a fundamental right that is essential for the exercise of many other rights. That fundamental freedom has long been protected within the U.S. through the federal Constitution, which guarantees that “persons” will not be denied life, liberty, or property without due process of law, as specified in the Fifth and Fourteenth Amendments. Due process has traditionally been construed to require that the government not detain people without charging them with a crime—as articulated in the Sixth Amendment, people have a right “to be informed of the nature and cause of the accusation” against them, and a right to seek bail pending trial, as specified in the Eighth Amendment. These rights combine to protect the right to liberty.

Over the years, prior to September 11th, there has been some erosion of these protections through interpretations that construe them as limitations only in criminal cases or try to render them inapplicable to “civil” detention, in psychiatric cases and in the area of immigration. But, even in the immigration arena, the right to know the civil charge against one and the right to challenge it have long been construed to be part of the due process the Constitution accords persons, whether citizen or not. This has included a right to release under bond absent evidence that an immigrant is a felon, is dangerous, or lacks ties to the community that would

mitigate flight risk. Congress also attempted to create a statutory exception to the constitutional bar on “preventive detention” through a governmental right to hold a person as a “material witness” to a crime, if testimony could not be secured in other ways. In practice, this provision had been used mainly to ensure an actual witness to a crime appeared before a grand jury considering an indictment.

Shortly after September 11, 2001, however, the Bush Administration ordered the physical detention of more than 1,200 citizens and immigrants in the U.S., who were detained outside of the provisions of the criminal justice system or the regular proceedings under the Immigration and Nationality Act. The administration refused to release their identities or whereabouts, except for later as a small minority of the detainees (a little more than 10% of them) were charged with various crimes, some of whom were held as “material witnesses.” The overwhelming majority of the detainees were held for technical violations of immigration law, and many of them were denied pre-hearing release or even communication with family members or lawyers for weeks or even months. This secretive detention harkened back to the dark days of World War II, when Americans of Japanese ancestry, along with a small number of German immigrants, were stripped of their liberty and property and sent to “internment camps”—policies and actions for which the U.S. ultimately apologized and attempted to compensate for, decades later.

In the case of the more than thousand immigrants, primarily of Middle Eastern background, who were seized during the round-up, the vast majority of them were ultimately removed from the U.S., without any criminal charge. It is true, however, that a small number of the detainees who were held under the pretext of immigration violations were found to have links to the 9/11 hijackers or to the pattern of that criminal conspiracy. Most notorious among those held for immigration violations was Zacarias Moussaoui, who was one of two dozen in INS custody prior to 9/11. He had been detained in August for overstaying his admission to the U.S. under the visa waiver program, after he came under suspicion for seeking to learn how to fly a plane but being disinterested in learning how to land one. (How the FBI bureaucracy mishandled that investigation and the sharing of key information about him prior to 9/11 has been the subject of extensive testimony, including by FBI whistleblower Colleen Rowley.) Moussaoui was indicted in late 2001, and later pleaded guilty to being part of a second wave of a plot to crash planes into U.S. landmarks. Given these facts, it is important to remember that Moussaoui’s guilt, though compelling, was an exception among the detainees, not the archetype of the 9/11 detainees.

The INS ultimately detained nearly 800 immigrants as “special interest” detainees—whether they were considered of “high interest” or of “undetermined interest”—between September 2001 and August 2002. These individuals were not processed for deportation or removal in the ordinary course of the INS’ procedures, as others of different nationalities were. There were also numerous allegations of mistreatment, beyond the decision to keep the identities of these people secret and to keep them away from lawyers and their loved ones. It is obvious under these circumstances that immigration rules were used as a pretext for the kind of preventative detention that is inconsistent with the Constitution and that had not been statutorily authorized. In fact, the government categorized these detainees as “hold until cleared,” another way of saying “guilty until proven innocent,” which is directly contrary to American

conception of the rule of law. Although some have attempted to rationalize these policies by reference to the government's prior history of arresting mobsters for "spitting on the sidewalk," as James Zogby pointed out, the round-ups "did not arrest terrorists for spitting; it arrested spitters and treated them as terrorists," without evidence of guilt or any crime in the vast majority of the detentions.

As Judge Pat Wald and Joe Onek have noted, "[w]hile some overreach may have been inevitable in the first days after the terrorist attacks, the failure of the Administration and its supporters to fully acknowledge the abuses committed is a troubling portent for any future mass detention situation." In fact, shortly after the religious and ethnic profiling for the 9/11 detentions began, Congress passed the USA PATRIOT Act, which includes a provision to permit the Attorney General to unilaterally order the preventive detention of foreign nationals suspected of links to terrorists. It does require that they be charged with a crime or violation of immigration law within seven days, but it permits indefinite detention in six-month increments, subject to renewed certifications by the government. Accordingly, one of the costs of the war on terror has been not just the documented mistreatment of innocent people in the U.S. as guilty but also the establishment of an express statutory authority to do so via new preventive detention powers.

b. National Security Letters and Other Data-Gathering

Another area in which the government obtained expanded power to treat innocent people as guilty and violate their expectations of privacy is in the dramatic expansion of "National Security Letters" (NSLs) to secretly obtain information about the financial transactions of people in the U.S., as well as their phone records and records of internet transactions (their social networks) without any proof of criminal activity. Prior to 9/11, the FBI had statutory authority to secretly request information about a person's financial transactions and communications logs if that person was the target or subject of an FBI investigation. The FBI also had authority to file a request with a court to obtain a "trap and trace" order or request what was known as a "pen register" for contemporaneous records of calls made or emails sent, predicated on some evidence of wrongdoing. And, based on probable cause of a crime, the FBI could obtain a wiretap order under criminal law to obtain the content of communications on communications devices used by targets or subjects of predicated federal investigations. And, under the Foreign Intelligence Surveillance Act, the FBI could obtain an order for secret electronic surveillance of foreign nationals considered to be "agents of a foreign power," meaning foreign government or terrorist organization, and it could obtain such an order for the conversations and emails of a U.S. person if there was evidence that the person was conspiring with a suspected foreign terrorist.

Following 9/11, these authorities were changed by law or fiat as described in more detail below. In particular, the NSL authorities were changed by the USA PATRIOT Act to allow the FBI to unilaterally access Americans' financial transactions and communications records even if they were not the subject or target of an authorized investigation. Under the expanded powers in the Patriot Act, the FBI could secretly demand that phone companies, internet service providers, banks, insurance companies, and a laundry list of businesses that deal in cash—like casinos, jewelers, realty firms, and even the U.S. Postal Service—turn over

information about an Americans' transactions, without any court order or independent review of such demands. The statute was changed to allow the privacy of these transactions to be breached if the FBI certified to itself that it believed the information to be "relevant" to an "authorized investigation." And the businesses that received these secret demands were gagged forever from revealing that they have received them, no matter how baseless or extensive or far-reaching the demands were.

Under a broad conception of the meaning of relevance, the FBI been accused of using this authority to demand or threaten businesses for private information, such as the name of everyone who took scuba lessons in the San Diego area or hotel records on more than 300,000 travelers to Las Vegas. These demands were made more possible not just by the changes in the statute but also by changes in investigative guidelines made by Attorney General John Ashcroft. These "reinterpretations" of the law elevated what were known as "preliminary inquiries," which had allowed the FBI to make some relatively unintrusive inquiries based on tips that had no indicia of reliability about people for which there was no evidence of any wrongdoing, to be called preliminary "investigations." This permitted the use of the NSL letters to pry into the financial records and communications networks of people who have not done anything wrong.

As part of the reauthorization of the expiring Patriot Act provisions in 2006, Congress authorized the Inspector General to audit the FBI's use of NSL powers. Those audits revealed that these powers have been used extensively by the FBI, that the powers had been misused numerous times, and that the FBI had even obtained numerous personal records outside of these expanded authorities by concocting a rationale that it could obtain records without even the minimal internal certifications through "exigent letters" that swept in the communications records of over 3,000 Americans. And, as the Inspector General observed: "[W]hen Congress lowered the evidentiary standard for issuing National Security Letters . . . it authorized the FBI to collect information . . . on persons who are not subjects of FBI investigations. This means that the FBI—and other law enforcement or Intelligence Community agencies with access to FBI databases—is able to review and store information about American citizens and others in the United States who are not subjects of FBI foreign counterintelligence investigations and about whom the FBI has no individualized suspicion of illegal activity." That sweeps too broadly.

Although the records are incomplete, it appears that only a few thousand NSLs were issued per year prior to 9/11, it appears that at least a quarter million demands have been issued in the U.S. This means that tens of thousands of people here, including tens of thousands of American citizens, have had their private financial and communications records swept up by the FBI. We also know that one set of NSLs obtained information on over 12,000 subscribers.

Through the expanded NSL powers, the government can now basically "google" its compiled records on any American without any individualized suspicion of wrongdoing and come up with a very detailed dossier on that person without any evidence of criminal activity. The NSL powers allow access not just to information such as who is associated with what telephone number or e-mail account, but also the numbers and names of everyone you call or

who calls you and everyone you correspond with by e-mail as well as every website you visit. It allows access to top-line credit bureau information, such as your address, social security number, date of birth, and employer, as well as the numbers of all of your past and present credit accounts, from Victoria's Secret to Visa. With NSLs, the FBI can learn of virtually everything you have purchased with your debit or credit card and can even learn the pin numbers and passcodes.

The vast majority of people whose private records are swept into federal files through these powers have not been and will never be charged with any wrongdoing. In fact, some FBI agents have reported that the NSLs are more useful for clearing people and closing tips than in building cases. But, even if a person who is swept in is "cleared," the FBI is determined to keep their records for at least twenty years. And, these personal records are dumped into a new, giant federal database accessible by tens of thousands of government employees. That database, the "investigative Data Warehouse," has over a billion records in it. It also includes over 70 million "Bank Secrecy Act" records, including information based on the more than 100,000 "suspicious activity reports" filed by banks about their customers (reports have been filed for activities as innocent as paying off credit debt or paying in cash). Plus, millions of records have been obtained from so-called "open source" information, which has been construed to include access to commercial data on Americans sold by companies like ChoicePoint and other databrokers that harvest "public" or shared information from social networks and other commercial entities.

The NSL authorities and related expanded capacity to sweep up or purchase information on has resulted in people "two or three steps removed" from the subject of an investigation being swept in. If one assumes an average person has contact with at least 500 people in a year—friends, family, colleagues, and service staff—then a conservative estimate would mean two degrees of separation from a target could sweep in 250,000 people (500 x 500). A third degree of separation would sweep in 75,000,000 million. That's a lot of innocent people. This is another way the policy choices are burdening and undermining the privacy of far too many people.

c. Foreign Intelligence Surveillance/Electronic Surveillance/"Black Bag" Jobs

One area of surveillance stemming from the post-9/11 policies that has been particularly controversial and far-reaching is the expanded use of electronic surveillance of the content of electronic communications. Prior to September 11th, the Foreign Intelligence Surveillance Act (FISA) conferred extraordinary authority on the government, namely to wiretap Americans in secret and never notify them that the government has obtained tapes of all their conversations and copies of all their e-mails. Congress approved such authority in 1978, on the stipulation that there would be individualized determinations of probable cause of wrongdoing—such as conspiring with a suspected foreign terrorist—made by a judge before such secret surveillance could be undertaken. When the constitutionality of such secret searches was challenged (by a few individuals who had been notified of the wiretapping because they had been indicted), FISA was upheld because of the individualized protections it contained. FISA had been enacted to limit foreign intelligence surveillance activity on these shores and prevent National Security Agency (NSA) programs that had been used for the wholesale acquisition of

Americans' international communications and that had "watchlisted" Americans without court review.

(In the mid-1990s, FISA was amended to allow secret physical searches of Americans' homes and other facilities of agents of foreign powers based on probable cause as defined in FISA. That authority to conduct what were known as "black bag jobs" in which secret agencies secretly searched homes or offices in the U.S. is why the addition of so-called "sneak and peek" authority in the USA Patriot Act was so unnecessary, and why that new power for what the government calls "delayed notice" searches has been used in hundreds of cases since 9/11 that have absolutely nothing to do with terrorism. Patriot Section 213 has been used mainly in drug cases.)

The specially created FISA court has issued more orders for electronic surveillance in the past nine-plus years than in the entire 22 years combined that preceded this period (15,661 FISA orders approved since 2001 v. 13,102 between 1978 and 2000). And, even more astonishing is the fact that for the past decade the number of FISA surveillance orders has exceeded the number of federal criminal wiretap orders issued across the entire country for the all other federal crimes combined. And, the number of FISA orders has even exceeded the number of criminal wiretap orders issued by all the states combined under state law in this period. What this means is that the U.S. has more people under surveillance under the wiretapping rules that do not typically result in criminal charges than in all the cases in which people in the U.S. are under electronic surveillance for probable cause of criminal activity. Although it is true that for U.S. persons subject to FISA, the required showing to the court approximates the standard for a criminal warrant for many of the categories of surveillance, which is not the case for foreign nationals.

Even with this expanded court approved and predicated surveillance (in contrast to the unilateral use of NSLs by the FBI discussed above), this surveillance amounts to a drop in the bucket compared with the other electronic surveillance that has been conducted here since 9/11. We now know that since shortly after the 9/11 attacks the Bush Administration claimed the power to listen to Americans' conversations and read their e-mails without FISA warrants and in violation of FISA's protections for the privacy of people in the US in both their international and domestic communications. We do not yet know how broadly they exercised that power for the duration of the program, although they have admitted to warrantless surveillance of some international communications of persons in the US, all the while the President and others in the administration claimed publicly, until late 2005, that they obtained warrants to monitor people here. There is also evidence that they have sought to scoop up *all* communications data, presumably in order to conduct traffic analysis of billions of communications by Americans.

The Bush Administration argued when the warrantless surveillance was first revealed, that the President has "inherent" powers as commander-in-chief to set aside the requirements of FISA, if he believes it necessary. This argument ignored the first Article of the Constitution, which expressly commits to Congress shared powers over war and national defense and the system of separated but shared powers described by the Supreme Court in the steel seizure case, even in times of war. So, the administration also contended that the Authorization for the Use of

Military Force in Afghanistan constituted an implicit amendment to FISA authorizing warrantless surveillance of people in the U.S. After much scholarly and bipartisan rejection of these arguments, the administration apparently pressed for a creative interpretation of the law by the FISA court to authorize some part of the most current iteration of such surveillance.

Failing that, the administration sought and obtained from Congress statutory authority to conduct electronic surveillance without individual court orders or showings of wrongdoing, which they fallaciously called “basket warrants,” in which the FISA court would approve “programs” of surveillance. Such surveillance of the contents of communications can now be undertaken when one of the parties to the communication is located outside the U.S. and the purpose is to obtain foreign intelligence information. The law purports to bar the acquisition of purely domestic communications under this new authority, but only when the government knows “at the time of acquisition” that the sender and all the recipients of an email are in the U.S. The law also appears to permit the acquisition of communications data, international or domestic, on an even lesser standard. And, further eroding what had been the rule of law that the U.S. had erected to protect against warrantless electronic surveillance following the Nixon abuses, the law passed in 2008 gave the telecomm companies criminal and civil immunity for giving the administration warrantless access to these private communications for seven-plus years following 9/11.

At the same time that vast increases in the power and range of surveillance technologies give the government greatly expanded powers to intercept and analyze communications, Americans are committing more and more of their private thoughts and communications to electronic form. And globalization has meant an exponential increase in international contacts by Americans— over 40 million Americans travel out of the country each year, for vacations, jobs, missionary work, health care or adoptions; almost half a million Americans serve in the military or work overseas for the government; a couple million more live overseas; and about a quarter-million Americans study abroad every year. These Americans stay in closer contact with friends and family at home than ever before. In addition, more Americans work for or deal with foreign-owned companies than ever before in history. And, with the expanded outsourcing we have witnessed under recent trade policies, even contacts with American-owned companies can involve communication with foreign nationals. Americans routinely deal with many companies owned by foreign governments, which may come within FISA’s definition of “foreign power.”

This globalization calls for increased protections for the communications of Americans, wherever they may be communicating. Judicial review is important for protecting Americans’ privacy and freedom of speech and association by preventing the accumulation of massive databases storing Americans’ private communications, even if those communications are not immediately disseminated. The fact is that the government is accumulating vast pools of data as well as content and internal “minimization” rules are inadequate to protect the civil liberties and human rights issues at stake.

As Senator Sam Ervin observed after investigating the extensive network the U.S. government had assembled up to the 1970’s:

[D]espite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep and share information about citizens is enhanced by computer technology and when it is subjected to the unrestrained motives of countless political administrators, the resulting threat to individual privacy makes it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom. . . . Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom. For the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words.

The warrantless surveillance that was previously barred and is now permitted protected American communications gives the government much greater reach into people's private lives without even any suspicion, much less probable cause that they are doing anything wrong. As Senator Ervin concluded "the collection and computerization of information by government must be tempered with an appreciation of the basic rights of the individual, of his right to privacy, to express himself freely and associate with whom he chooses." As Frank Church forewarned back in 1975, unless closely controlled, the powers of the NSA:

could be turned around on the American people, and no American would have any privacy left, such [is] the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide. If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back, because the most careful effort to combine together in resistance to the government, no matter how privately it is done, is within the reach of the government to know. Such is the capacity of this technology.

These are the some of the substantial burdens that have now been placed on American's rights as a result of the policy choices made since 9/11. They pose even greater risks in the future because the vast trove of information that is being accumulated about Americans is like a loaded weapon that can be trained on selected Americans at any time by officials hungry for power and control. And, we know from America's history that such men and women from time to time do arise. In the Church Committee reports is evidence that the FBI, under J. Edgar Hoover, had prepared a note to civil rights leader Martin Luther King Jr. a few months before his assassination urging him to step down from the movement or face ruin based on the threat that details from his private life, obtained through secret wiretaps of his home and hotel rooms, would be revealed. Unless we reconfirm privacy's status as an essential right, and police robust standards for its protection, no less than Americans' inalienable right to privacy and to freedom of speech, freedom of conscience, freedom of

association, and, of course, freedom from the uninvited ear of the government could be lost based on the expanded surveillance authority of the past decade.

d. Physical Surveillance and Spying, apart from Wiretapping

The past decade has also seen extensive documentation that the government's spying on its citizens in the name of national security has not been limited to electronic surveillance. Instead, we know through numerous Freedom of Information Act requests that the FBI's "Joint Terrorism Task Forces" (JTTFs) and the Defense Department's base "protection" staff have engaged in significant monitoring of peace groups with absolutely no tie to al Qaeda. Examples of groups monitored by federal or state agents who have posed as interested citizens include the pacifist Quakers and Catholics at the Thomas More Center in Pennsylvania, based on their opposition to the war in Iraq. We know that federal and state agents have engaged in monitoring of anti-nuclear activists under the guise of monitoring terrorists. We know that the Secret Service and law enforcement have been deployed to monitor citizens who wish to protest policies at national political conventions, all under the rationale of preventing terrorism. And, most recently, there has been widespread documentation that state homeland security entities are cooperating with businesses to target citizens concerned about pollution and label them as terrorists, as occurred in Pennsylvania with citizens who gathered due to their worries about unregulated drilling for natural gas in local shale deposits and the risk to their drinking water supplies. Unfortunately, the expanded surveillance mission since 9/11, and the associated additional homeland security personnel, have too often been like a man with a hammer who sees everything as a nail.

Part of this is a consequence of having so much money pouring into the "homeland security" mission that ordinary budgetary limits that might dissuade local authorities from wasting money on such folly do not pertain. And, states that had previously been operating under court ordered limits on domestic surveillance based on past abuses of the use of so-called "red squads" to monitor progressive activists, have been unleashed. They have been gathering a far-reaching intelligence gathering mission that is not linked to "predication" or the usual criminal predicates for investigation but instead are focused on accumulating information—criminal, civil, immigration, financial, etc.—and "fusing" it together, in newly created "all hazards" fusion centers in every state. These fusion centers include federal, state, and local law enforcement, as well as National Guard or other military attaches, and their budgets are substantial. Especially with the tight budgets many states have faced due to the economic vagaries of the past decade, the homeland security spending by the feds has become an important trough of money to access to spend on personnel and equipment. And, that personnel and equipment, once acquired, does not readily stay idle. It is deployed, increasingly against people who have nothing to do with al Qaeda and no connection to 9/11.

The FBI and other federal and state agencies have focused extensively on the Muslim, Arab, South Asian (MASA) population of immigrants in the U.S. This focus has been strongly criticized by many as engaging in religious or ethnic profiling. This focus has taken many forms over the past decade, from the use of undercover agents at Mosques and other places of worship to the deployment of "sniffers" to monitor the air in Muslim communities, to the recruitment of "confidential informants" and even to allegations of the widespread use of agent

provocateurs to cultivate idle talk into illegal action. The way some of the terrorist suspects have been spurred on by government informants or agents, like the impoverished men living in subsidized housing in Miami who were charged with plotting the toppling of the Sears Tower, has provoked substantial criticism about the building of cases and the manipulation of some suspects.

At the same time, the government has pointed to several plotted terrorist bombings that have been disrupted through their undercover operations. And, they have pointed to numerous lives saved.

The MASA community has also had divisions over how best to interact with the FBI, the Department of Homeland Security, and other law enforcement and intelligence agencies. The community, along with the civil liberties and human rights advocacy communities, have strongly condemned terroristic violence. And, the MASA community leaders have had numerous meetings with law enforcement to address concerns about how their communities are being affected by various policies and rhetoric, as well as how they can help protect America from actual threats. Since the initial round-ups following 9/11, MASA groups and civil liberties advocates have been united in opposing religious profiling and the attempt by radicals on the right to equate Islam with al Qaeda and terrorism.

At the same time, the MASA community has continued to be singled out through a number of policies, including the special registration immigration procedures, exemptions from proposed racial profiling limits for “national security,” and some of the ways the various watchlists and other TSA and DHS immigration policies have affected Muslim Americans as well as immigrants.

Another way in which the MASA community as a whole has been through U.S. Treasury policies monitoring charities. One of the major expansions in governmental power since 9/11 had been under the rubric of stopping the flow of money to support terrorist activities. But, the broadly worded law against providing “material support” for terrorism has reached far beyond al Qaeda and its loose affiliates. And, the law as currently written does not require the kind “mens rea” or intent that most major crimes do, meaning that people who do not intend to aid terroristic violence can be swept up, face criminal charges and have their bank accounts seized. The material support law has also had a chilling effect on charitable aid in war torn regimes, such as Sri Lanka following the tsunami because some regions of the devastated country were under the control of the Tamil Tigers who are considered to be a terrorist group.

Accordingly, there are a number of ways, aside from electronic surveillance and preventive detention that other national security policies are burdening civil liberties or causing mistrust of the American government or are sweeping so broadly as to counter-productive or harmful.

e. Secrecy/State Secrets

Another way in which the rule of law has been eroded in the U.S. is in the entrenchment of the “state secrets” doctrine and the expanded efforts to “secretize” information that the public has a right to know, as well as that our elected representatives in Congress have a right to know.

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The government has also used secrecy doctrines to go after journalists and whistleblowers who have raised alarms about illegal policies and practices, while protecting the selective and manipulative disclosure of classified information by government officials. While even democracy has legitimate secrets that must be protected, like troop movements, the past decade has seen a rising tide of secrecy that undermines the ability of the people to give informed consent to policies and that has distorted the public debate about national security policies. These developments also undermine the U.S. as a nation with the moral authority to condemn the investigation of journalists and the use of secrecy to thwart democratic decision-making by other governments.