

The Civil Liberties Restoration Act: A Response to Counterproductive Post-9/11 Policies

The Issue: The Bush Administration, since September 11, 2001, has initiated new policies and practices that negate fundamental due process protections and jeopardize basic civil liberties for non-citizens in the United States. These constitutionally dubious initiatives undermine our historical commitment to the fair treatment of every individual before the law and do not enhance our security. Issued without congressional consultation or approval, these new measures include regulations that increase secrecy, limit accountability, and erode important due process principles that set our nation apart from other countries. Furthermore, these regulations and policies have undermined law enforcement officials' ability to perform their duties, have done little to gather worthwhile intelligence, have granted the executive branch broad powers to act in secret, and have made it difficult for foreign visitors to maintain legal status. While effective steps must be taken to protect the American public from further terrorist acts, our government must not trample on the Constitution and on those basic rights and protections that make American democracy so unique and so strong. (*For more background on post-9/11 policies, see AILA's Backgrounder entitled "Due Process, Civil Liberties, and Security: All Essential for a Strong America."*)

AILA's Position: AILA strongly supports policies undertaken since 9/11 that truly promote our security (such as the Enhanced Border Security and Visa Entry Reform Act, P.L. 107-173). The executive actions highlighted below, however, have done nothing to enhance our security and have eroded our constitutionally protected civil liberties. AILA strongly supports the Civil Liberties Restoration Act (H.R. 1502), which seeks to roll back some of the most egregious post-9/11 policies and strike an appropriate balance between security needs and liberty interests.

Current Legislation: First introduced in both the House and Senate in the 108th Congress, the Civil Liberties Restoration Act (CLRA) was reintroduced in the 109th Congress by Representatives Berman (D-CA) and Delahunt (D-MA). The CLRA (H.R. 1502) would secure due process protections and civil liberties for non-citizens in the U.S., enhance the effectiveness of our nation's enforcement activities, restore the confidence of immigrant communities in the fairness of our government, and facilitate our efforts at promoting human rights and democracy around the world. The CLRA would redress a number of troubling post-9/11 policies affecting non-citizens, including the following:

- **Closure of immigration hearings and refusal to disclose basic information on detainees:** The Department of Justice (DOJ) ordered immigration judges to close all hearings related to individuals detained in the course of the 9/11 investigation. Not only were the hearings held in secret—excluding all visitors, family, and press—but the very identities of the jailed individuals were withheld from public disclosure. The immigration process should be open to the public; secret hearings are the practice of repressive regimes, not open and democratic societies. The CLRA would prohibit blanket closures of immigration proceedings, authorizing closure only after a judge has determined that there is a compelling reason to keep out the public or withhold information in a particular case or portion thereof.
- **Holding non-citizens in jail indefinitely without charges:** The DOJ issued regulations authorizing the INS to hold any non-citizen in custody for 48 hours or an unspecified “additional reasonable period of time” before charging the person with an offense. A DOJ Inspector General Report (April 2003) on post-9/11 detainees reveals that INS detained non-citizens for weeks, and in some cases months, before charging them with immigration violations. Tellingly, none of the detainees ever was charged with an offense related to the 9/11 attacks. This rule violates a fundamental principle in our constitutional system—no person should be subject to arrest and imprisonment without reason, explanation, and due process. The CLRA would explicitly supersede the DOJ regulation by requiring charges to be filed, and notice of charges to be served, within 48 hours of the detention (unless the detainee is certified as a suspected terrorist under the PATRIOT Act provision). It also would require the detainee to be brought in front of an immigration judge within 72 hours of being detained.
- **Keeping non-citizens jailed even after an immigration judge has found them eligible for release:** The DOJ issued regulations that require people in immigration proceedings to remain in custody even though an immigration judge has found them eligible for bond. DOJ argued that the new regulation will “avoid the necessity for a case-

by-case determination of whether a stay [of a release order] should be granted in particular cases.” This regulation effectively enables prosecutors to circumvent the considered decision of independent adjudicators as to the likelihood that an individual will appear for future proceedings and the threat a detainee poses to the community. When an individual faces detention—a fundamental deprivation of liberty—a case-by-case review is exactly what the principles of our judicial system demand. The CLRA would eliminate the power of DHS prosecutors to automatically stay immigration judges’ bond determinations, and it defines the conditions under which temporary stays should be granted, giving the government ample opportunity to demonstrate a person’s dangerousness while providing a fair process of adjudication.

- Denying bond to whole classes of non-citizens without individual case consideration: Since September 11, 2001, DOJ and DHS have established policies mandating the detention of certain classes of non-citizens without any possibility for release until the conclusion of proceedings against them. For example, all the individuals who were detained on immigration violations during the course of the post-9/11 investigation were subjected to a “hold until cleared” policy. Even individuals who did not contest their removability, and against whom final orders of removal had been entered, remained in detention until the FBI cleared them. Again, the government never charged any of these detainees with a terrorism-related offense. Unilateral executive branch decisions to require detention of whole classes of individuals contravene important due process principles and individual liberty interests. The CLRA would require immigration authorities and immigration judges to provide an individualized assessment of whether persons should remain in detention because they constitute a flight risk or a danger to society. If not, the CLRA would require their release under reasonable bond or other conditions.
- Entering certain immigration status violators into a criminal database and exempting the data from accuracy requirements of the Privacy Act: The DOJ reversed a legal opinion drafted under a previous Administration, concluding that states and localities, as sovereign entities, have the “inherent authority” to enforce federal immigration laws, including civil violations of immigration law. This opinion conflicts with the long-standing legal tradition that immigration is exclusively a federal matter. Moreover, if local police begin serving as federal immigration agents, immigrant communities will lose confidence in the police, and decades of successful community-based policing initiatives will be undone.

DOJ also announced in December 2001 that it would begin entering the names of hundreds of thousands of immigration status violators into the National Crime Information Center (NCIC) database so that local police could apprehend them. Compounding the potentially disastrous consequences of this initiative is a regulation DOJ issued in March 2003 that exempts the NCIC database from the accuracy requirements of the Privacy Act. The database thus will provide information of dubious accuracy to local law enforcement officials who have little or no training in immigration law, increasing the likelihood of unfair or unlawful arrests and detentions or other civil rights abuses. To forestall some of these concerns, the CLRA would require information entered into the NCIC database to comply with the Privacy Act accuracy standards.

- Implementing a discriminatory “special registration” policy: The National Security Entry-Exit Registration System (NSEERS or special registration) imposed new registration requirements on all males 16 years of age or older who were citizens or nationals of one of twenty-five designated predominantly Muslim countries. Targeting people based on national origin, race, and religion, it required such individuals to be interrogated, fingerprinted, and photographed. As with the post-9/11 detainees, none of the call-in registrants was charged with a terrorist-related offense; instead, this initiative succeeded only in alienating immigrant communities, straining international relations, and diverting precious law enforcement resources from identifying people who intend to harm us. In December 2003, DHS wisely suspended certain re-registration requirements associated with the program, but it left other components intact. The CLRA would terminate the NSEERS program in its entirety and provide relief from immigration consequences to some individuals who were placed in immigration proceedings due to this failed program.
- Instituting “reforms” that severely undermine due process rights for immigrants appearing before the BIA: A series of DOJ regulations has stripped the BIA of its ability to serve as a meaningful watchdog over the lower courts. The “reforms” at issue include: reducing the overall number of judges sitting on the Board of Immigration Appeals from 23 to 11 and reassigning the 5 most “immigrant friendly” judges to other positions; making one-judge review of lower court decisions the norm as opposed to the traditional three-judge panels; expanding dramatically the range of cases which can be affirmed without any opinion; and eliminating the Board’s de novo review authority. A report commissioned by the American Bar Association that evaluated the regulations determined that the increased speed in the decision-making process has had a significant impact on substantive outcomes: “decisions in favor of the respondents have decreased alarmingly from 1 in 4 to 1 in 10.” The CLRA would establish an independent immigration court system and establish, for the first time, explicit statutory parameters for its makeup and functions.