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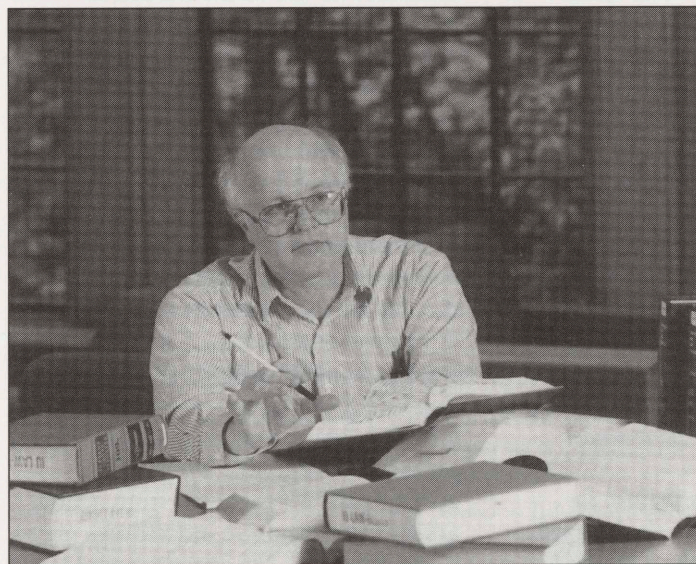
Thoughts on proposed immigration reforms

by John Scanlan

On Oct. 2, 2001, the front page of the *New York Times* announced, "Negotiators Back Scaled-Down Bill for Terror Fight." The story described the compromise reached in the House of Representatives "on a bill that would give law enforcement officials expanded authority to wiretap suspected terrorists, share intelligence information about them, and seize their assets."

This compromise affects only the principal House bill; other measures are in the works in both houses of Congress. On the Senate side, work is proceeding more slowly, in part because the chamber is in the hands of the Democrats, and Sen. Patrick Leahy, the chair of the Judiciary Committee, has, in the words of the *Times*, "made it plain he will not be rushed into accepting many of the administration's proposals."

It seems likely, though, that something like the House bill eventually will be enacted and signed into law. If so, the government will be given some powers it currently does not possess. Included will be expanded "roving wiretap"



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authority, keyed to particular individuals, not to particular telephones; facilitated tracing of e-mail, since the government will be permitted to obtain the e-mail addresses of suspected terrorists without first obtaining a warrant; and a relaxed standard for obtaining court orders permitting electronic surveillance of suspected terrorists overseas.

The House bill also will permit the government to detain non-citizens — the folks our immigration laws refer to as "aliens" — suspected of being terrorists, for up to seven days before charging them with a crime or a violation of immigration law. This provision is a significant extension of present law and administrative practice. Before Sept. 11, such detentions were limited to one — or in some cases —

two days. Nevertheless, the extension is much milder than the one proposed and still championed by Attorney General John Ashcroft. Ashcroft supports indefinite detention without the necessity of bringing charges for those suspected of terrorist activity. Although the administration's proposal has undergone almost daily changes, it has also supported limiting the opportunity for judicial review of those so detained. The most radical administration proposal — which apparently has now been withdrawn — would have denied such aliens *all* judicial review, including the right to petition for habeas corpus.

These are not the only measures now being considered. In my own area of immigration law, legislators are anxious to close loopholes that permitted individuals to enter the United States with suspect documentation. Sen. Dianne Feinstein has proposed putting a hold on all new student visas for six months to permit better vetting of the applicants' bona fides. Sen. Christopher "Kit" Bond has proposed a thorough review of the entire nonimmigrant visa and visa waiver program. (That program currently permits some visitors from 29 countries to enter the United States for up to 90 days without first securing visas). A press release from Bond's office says Bond's legislation has four major goals: (1) improve the screening of foreigners applying for visas; (2) close the loopholes exploited by the terrorists; (3) boost oversight and control of those who overstay their visa deadlines; and (4) increase the accountability of U.S. persons or institutions, such as schools, that sponsor visa holders.

At least 30 days would be added to all visa applications under Bond's plan. Other proposals are likely to subject "exchange visitor" and "vocational education" nonimmigrant visas to greater scrutiny, in an attempt to better regulate who attends flight schools and other similar institutions.

The substance of these measures and the motives behind them are inherently interesting, as is the related question: How much good will they actually do? I intend to say a few words about motives in a few minutes. But equally interesting is the relatively moderate course that I believe the Congress is pursuing. Despite administration pressure for immediate action, Congress has demonstrated a willingness to listen to those counseling it to slow down and think before it acts. Two small but telling examples:

1. The House bill would eliminate the statute of limitations for terrorist crimes, but it restricts the definition of what constitutes terrorist crimes, insisting that they be committed with a *motive* to influence or change the government. This is a squishy standard, to be sure, but it cuts back substantially on what the administration proposed.

2. The administration proposed that "schools be required to disclose information about foreign students to investigators" if those investigators "said they had a reasonable need to obtain it." Disclosure of such information currently is

prohibited without a much stronger showing of need, usually requiring a warrant. The House negotiators dropped this provision from their bill.

This resistance to the administration suggests that Congress is even less likely to be stamped by some of the more extreme voices in our society urging that we sacrifice liberty for security. Two examples, provided by colleagues, stand out.

1. In an article by Tony Blankley in the *Washington Times* on Sept. 26, "Trade civil liberties for better security," Blankley characterizes himself as someone who was, until two weeks ago, a "crypto-anarcho-Libertarian advocate of maximum civil liberties. I have always feared government intrusion far more than I have feared the price of living with maximum freedom. But the price has just gone up. Now, every congressman, senator, and citizen must discard everything they thought they believed about civil liberties."

Blankley argues that for a defined period, President Bush should emulate President Lincoln. He says:

Prior to the Civil War, Abraham Lincoln had always held a Libertarian view of civil liberties. But ... fearful that Union troops marching from Philadelphia to Washington might face insurrection in Maryland, he issued to Gen. Scott his first suspension of the writ of habeas corpus: "If ... you find it necessary to suspend the writ of habeas corpus for the public safety, you, personally, or through an officer in command at the point where resistance occurs, are authorized to suspend the writ."

He acted pursuant to Article 1, Section 9, Paragraph 2 of the Constitution, which reads in full: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Lincoln asserted his authority, and Congress subsequently enacted supporting legislation.

As a result, thousands of American citizens were arrested and

incarcerated indefinitely without benefit of due process. Not only dangerous actions, but seditious words were sufficient grounds for such arrests. The Union was preserved and the use of the writ was then returned to the people.

Was Lincoln's action necessary to preserve the Union? We will never know. But at a time of unlimited danger, Old Abe didn't hesitate to take unlimited power.

2. An article by Ann Coulter, author of *High Crimes and Misdemeanors: The Case Against Bill Clinton*, that appeared in the *Jewish World Review* on Sept. 28., says:

As the entire country has been repeatedly lectured, most Muslims are amazingly peaceful, deeply religious, wouldn't hurt a fly. Indeed, endless invocations of the pacific nature of most Muslims is the only free speech it is safe to engage in these days.

This is a preposterous irrelevancy. Fine, we get it. The New York Times can rest assured that every last American has now heard the news that not all Muslims are terrorists. That's not the point. Not all Muslims may be terrorists, but all terrorists are Muslims — at least all terrorists capable of assembling a murderous plot against America that leaves 7,000 people dead in under two hours.

How are we to distinguish the peaceful Muslims from the fanatical, homicidal Muslims about to murder thousands of our fellow citizens? The only thing we know about them — other than that they live among us — is that they are foreign-born and they are Muslims.

Her solution: take advantage of the asserted "fact" that "Congress has authority to pass a law tomorrow requiring aliens from suspect countries to leave." She continues, "As far as the Constitution is concerned, aliens, which is to say non-citizens, are here at this country's pleasure. They have no constitutional right to be here."

So, according to Coulter, Congress should enact a "Terrorist Deportation Law":

There will be two fail-safes: 1.) Muslim immigrants who agree to spy on the millions of Muslim citizens unaffected by the deportation order can stay; and 2.) any Muslim immigrant who gets a U.S. senator to waive his deportation — by name — gets to stay.

She admits that "This is brutally unfair to the Muslim immigrants who do not want to kill us," but tells us: "It's not our fault. It is the fault of the terrorists who are using their fellow Muslims as human shields."

My reading of Congress's current mood is that it has no intention right now of going the direction proposed by Blankley and Coulter. I think that some of the half-formed ideas on restricting the availability of non-immigrant visas will be reconsidered in the light of the economic benefits that relatively open borders have long conferred. But I want to underline the word "current." Americans have tended to value "civil liberties" highly, and have defined them in an essentially negative way, signaled most directly by the constitutional language, "Congress shall not ...," in the Bill of Rights. "Civil liberties" are zones of freedom, permitting speech, assembly, an active press, religious choice, and privacy, among other things. The government is prevented from acting arbitrarily to deprive individuals of those freedoms. Yet constitutional law, particularly in the area of privacy, has tended to focus on what is "reasonable." In 1941, President Roosevelt announced the existence of four fundamental freedoms. These included the traditional "negative" rights. But they also included "positive" ones as well — most notably, "freedom from want," and "freedom from fear." The World Trade Center bombings put fear back on the agenda. We must be concerned about what will happen in the future to our cities, our peace of mind, and our traditional freedoms.