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## FlashPoint #2: CEI on Anti-Terrorism and Civil Liberties

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This is the second in a series of commentaries the Competitive Enterprise Institute will issue on anti-terror measures in the wake of the recent terrorist attacks on America. Our hope is that the executive and legislative branch will effectively defend our nation consistent with our tradition of limited government. In rating proposals, we ask:

- Is the measure consistent with our constitutional tradition of due process and limited government, particularly the Fourth Amendment?
- Does the measure mark a significant shift in the balance of power between law enforcement and U.S. citizens?
- Does the evidence support the view that the measure would be necessary or effective to combat terrorism?

**THESE PROPOSALS GET A GREEN LIGHT.** A “green light” doesn’t mean “pass the law without reading it,” or without question. Proposals that get a green light may in our judgment be passed without posing a critical threat to limited government.

The Nationwide Search Warrant: Section 351 of the “Anti-Terrorism Act of 2001.” This would allow police to get a single federal warrant for surveillance of message traffic passing through multiple jurisdictions, rather than multiple warrants across every jurisdiction. The warrant would be issued by the district judge where the terrorist act occurred. However, provision should be made for judicial observance of the warrant after it has been issued. And if the warrant is issued in New York but someone wishes to challenge in California (for example, a non-suspect whose phone is under roving wiretap), the objection should move forward in a California court.

Allowing ISPs to volunteer information to prevent death: Section 110 of the “Anti-Terrorism Act of 2001.” This would amend the law to explicitly allow communications service providers to disclose customer’s records or the content of e-mail to authorities to prevent injury or death.

Expanding authority for “roving wiretaps.” Roving wiretaps allow the police to listen to a person’s phone conversations, even if he is attempting to evade surveillance by switching to pay phones and cell phones. Current law allows the police some authority to use roving wiretaps. But some additional uses of roving wiretaps in cases of terrorism may be consistent with the Fourth Amendment. Appropriate time limits should be placed on the duration of a tap of a privately owned non-suspect’s phone, after it is no longer being used by the suspect.

Allowing investigators to use subpoenas rather than court orders to obtain credit card numbers of ISP or phone customers: Section 107 of the “Anti-Terrorism Act of 2001.” Currently, investigators must get a court order to compel ISP or phone companies to turn over a customer’s credit card number. This information is often important to discovering the customer’s real identity. Our present understanding of this provision is that it would not allow the content of credit reports to be viewed without a warrant. But this proposal

does mark a significant departure from current practice likely to be reviewed closely by the courts, and almost rates a yellow light.

**CAUTION: THESE PROPOSALS GET A YELLOW LIGHT!** A proposal gets a yellow light if it represents a significant departure from current surveillance practice, especially if there is reason to question that that it would improve our security from terrorists.

Expanding wiretap authority to computer crimes: S.A. 152. This component of the proposal has nothing to do with terrorism, but covers any computer crime.

Tracing Internet Traffic Without a Warrant: Section 101 of the “Anti-Terrorism Act of 2001”, and S.A. 152. This proposal would allow law enforcement to trace Internet email and surfing traffic without a warrant. This is a significant departure from current practice, because tracing Internet traffic gives investigators far more information than tracing phone traffic with a pen register. An ex-parte order from a court would be required. Just how much does a warrant requirement delay starting a trace, given that law enforcement may proceed in an emergency without a warrant, judges rarely refuse warrant requests, and emergency warrants are available? If passed, this provision should at least have a) a sunset date, or b) be limited to terrorist investigations, or c) a higher standard than the pen register’s “relevancy” standard.

Empowering the FBI to require business records in investigating terrorism: Section 156 of the “Anti-Terrorism Act of 2001.” This broad provision would empower the FBI to subpoena businesses to produce “records, papers, documents and other items,” that are “relevant” to an investigation of international terrorism. This is a significant departure from current Fourth Amendment law. Courts will take a very close look at this, as it lends itself to endless “fishing expeditions” at the cost of innocent private businesses.

Support of Terrorism Through “Expert Advice or Assistance,” Section 306 of the “Anti-Terrorism Act of 2001.” Could this provision be used to charge lawyers represented suspected terrorist in legal proceedings with offering “expert advice or assistance” to terrorists? Doctors that give them medical treatment? What does it mean?

**STOP! THESE PROPOSALS GET A RED LIGHT.** Such proposals represent a critical threat to civil liberties. Note that these powers would come into play after an investigation has been completed—it is questionable, that they are as important to preventing terrorist incidents as additional investigative powers or surveillance might be.

Expanding Forfeiture Powers Against Assets Not Traced to the Crime: Section 406 of the “Anti-Terrorism Act of 2001.” Law enforcement *already* has the authority to seize terrorist assets without trial. They are now demanding expanded power to seize assets without trial for any alleged crime. This tempts police to enrich themselves through forfeiture by planting evidence. It also may prevent alleged terrorists from defending themselves in court by depriving them of funds necessary to hire an attorney. Innocent parties who are wrongly accused rarely, if ever, get their assets back. A nationwide rule granting a judge the power to freeze the assets of suspects awaiting trial prevents suspects from fleeing without the threat of corruption.

Expanding the Presidential power to seize property in an undeclared war: Section 159 of the “Anti-Terrorism Act of 2001.” The President has broad power to seize the property

of enemies in the United States during wartime. The bill proposes to expand this power to times of *undeclared* war. This overbroad proposal, of questionable utility, threatens to obfuscate the important line between military and police action. As of this writing, it is our understanding that a compromise approach is being worked out, but no further information is available.

Detaining suspected terrorists indefinitely: Section 202 of the “Anti-Terrorism Act of 2001.” This provision would give the Attorney General the power to keep those he deems to pose a threat to national security in custody until they are removed from the United States or he determines they no longer pose a threat. There seems to be no particularly good reason to empower the Attorney General to hold even suspected terrorists in custody for indefinite periods of time; some provision should be made for judicial review.

Redefine Ordinary Computer Crimes or Gun Possession as Terrorism. Originally, and for no reason related to terrorism, the Anti-Terrorism Act of 2001 would have made several ordinary crimes into “terrorist” offenses. As of this writing, it is our understanding that this measure has been improved by providing that these ordinary offenses are only “terrorism” if done with the intent of changing U.S. government policy and to cause serious injury or death.

Confining *habeus corpus* review of terrorist detentions to District of Columbia courts: Section 203 of the “Anti-Terrorism Act of 2001.” There is no strong reason to remove the power to make *habeus corpus* rulings concerning the detention of terrorists the exclusive jurisdiction of the District of Columbia. Such a decision is likely to result in a decline in the quality of judicial discourse concerning the vital right of *habeus corpus*. While this would be more convenient for law enforcement, it would be a hardship for defendants to arrange travel to D.C. and hire additional D.C. counsel in addition to his local attorney. A *habeus* proceeding takes place after the suspect has been detained. This provision is therefore of limited relevance to preventing terrorist attacks by improving law enforcement’s investigative powers. And it raises the issue of forum shopping. Do law enforcement officials perhaps think they will receive more favorable decisions in the D.C. Courts?