Report of an AAUP Special Committee

Academic Freedom and National Security in a Time of Crisis

They that can give up essential liberty to obtain a little safety deserve neither liberty nor safety.

—Benjamin Franklin
Historical Review of Pennsylvania, 1759

Executive Summary

The American Association of University Professors established the Special Committee on Academic Freedom and National Security in a Time of Crisis on the first anniversary of the tragic events of September 11, 2001. The committee was charged with assessing risks to academic freedom and free inquiry posed by the nation's response to the attacks on the World Trade Center and the Pentagon. Several imperatives led to the creation of the committee. Among them, still-vivid memories of the McCarthy era yielded an awareness of the degree of vigilance needed to avert a recurrence of the excesses of that time: the sweeping claims of threats to national security, the rampant accusations of guilt by association, and the unchecked powers of law-enforcement agencies. There was also a realization that many organizations that should have been vigilant then (the AAUP among them) were regrettably slow to respond.

In recognizing that now is not the first time that our institutions have been tested by the demands of national security, the committee reaffirms the position taken during World War II by the Association's Committee A on Academic Freedom and Tenure: "Academic freedom is one facet of intellectual freedom; other aspects of that larger concept—freedom of speech, freedom of the press, and freedom of religion—are among the avowed objects for which this war is being fought. It would be folly to draw a boundary line across the area of freedom."

This report rests on the premise that freedom of inquiry and the open exchange of ideas are crucial to the nation's security, and that the nation's security and, ultimately, its well-being are damaged by practices that discourage or impair freedom. Measures to ensure the nation's safety against terrorism should therefore be implemented with no greater constraint on our liberties than is necessary. The report questions whether security and freedom are inescapably opposed to one another. In such important areas as scientific research, the free exchange of data may better enable investigators to identify the means for preempting or neutralizing threats posed by information falling into the wrong hands. We contend that in these critical times the need is for more freedom, not less.

The report discusses developments that represent threats to academic freedom. Most have come to the fore since September 11, 2001, but some arose earlier. The report focuses first on the USA Patriot Act, especially on provisions of this hastily enacted law that gravely threaten academic freedom. The report addresses broad areas of concern, such as the ominous mingling of law-enforcement and intelligence-gathering activities, the impairment of public access to vital information, and the questionable efficacy of these measures in combating terrorism. Specific concerns include the loosening of standards under which the government authorities can compel disclosure of electronic communications.

The report looks closely at the act's business-records section, which empowers federal agents to obtain warrants to gather information about the materials individuals borrow from libraries or purchase from bookstores. The agents need only assert that such records may pertain to the investigation of terrorist "or other clandestine intelligence" activities. Even more ominous is a "gag" provision in the act, prohibiting any person who has been served with such a warrant from revealing that fact. Although a measure recently introduced in Congress would exempt libraries and booksellers from such demands, other dangerously intrusive provisions of the USA Patriot Act could be made permanent by a proposed repeal of the "sunset" provisions that accompanied the law in its initial form.

A major section of the report is devoted to restrictions on information. It reviews the evolution of federal regulation of classified research and the persistent uncertainty about the extent and location of such research within the academic world. The report recognizes the limited circumstances under which such restrictions may be warranted but points out that

secret research is fundamentally at odds with the free circulation of research results. The report expresses reservations about the expansion of such constraints in response to national security concerns.

The report takes a similar view of federal laws that required the licensing of certain exports, including research results, long before September 11. It notes that federal courts have on five recent occasions invalidated on free-speech grounds the procedures used to deny export licenses for the international sharing of cryptography.

Also of concern to the committee is the emphasis the federal government has recently placed on the elusive category of "sensitive but unclassified" information. The report describes the rationale for stricter scrutiny of certain types of information and the historical antecedents to the current debate, but it urges that the extent and nature of restraints on unclassified research, however sensitive, should remain chiefly the responsibility of the scientific community.

The report also addresses elevated barriers to entry into the United States by noncitizens, especially foreign students, noting that the original version of the USA Patriot Act adopted by the U.S. House of Representatives would have barred foreign students from working in research laboratories. The federal government's current system for monitoring foreign students and visiting scholars while they are in the United States—SEVIS (the Student and Exchange Visitor Information System)—has been confounded by repeated delays in its full implementation and by serious practical difficulties in its application. Given the pace at which university recruitment of foreign visitors must often proceed, such delay and confusion threaten international scholarly collaboration. The report expresses doubt whether the system can ever operate effectively. It also notes with alarm, as a further threat to transnational scholarship, the apparent expansion of academic subjects and foreign nations to which intensive surveillance applies.

The final section of the report considers the effect of national responses to September 11 on the campus climate for academic freedom. Several potentially serious incidents have occurred, starting with a professor's intemperate statement to his first-year class on the afternoon of September 11, 2001: "Anyone who can blow up the Pentagon gets my vote." With a few notable exceptions, these challenges have been resolved in ways that seem compatible with academic freedom. The same is true of curricular issues that have surfaced since September 11, including one at the University of North Carolina at Chapel Hill in summer 2002. An incident at the State University of New York at New Paltz had a less satisfactory conclusion. Similarly, some controversial visiting speakers have fared well—for example, at the Universities of Colorado and Michigan and Harvard University—but others have been less fortunate, such as those invited to speak at the College of the Holy Cross in Massachusetts and Rockford College in Illinois.

The report concludes with several cautions and a series of recommendations. Among the cautions, the report notes that the impact of September 11 on academic freedom is far from over; the special committee will therefore continue to assess conditions for academic freedom. The report also draws attention to the hazards of self-inflicted wounds. These include the plausible but erroneous advice of one professional organization that those served with a subpoena for records under the USA Patriot Act could not even consult their attorneys, and the similarly unsound views of some scholarly journal editors that they could receive manuscripts from "suspect" countries but could not furnish editorial advice or guidance to the authors of the manuscripts.

Specific recommendations are directed to those who shape policy at the national level and to our colleagues on the nation's college and university campuses.

At the national level, the committee urges that the academic community

- Acknowledge realistically the threat of terrorism and measures needed to deal with it;
- Remind those outside the academic world of the imperative values of academic freedom and free inquiry;
- Collaborate with national associations in advancing the collective interests in academic freedom and free inquiry;
- Collaborate with learned societies in seeking to preserve scholarly communication and collaboration;
- Support measures in Congress and elsewhere that would mitigate the effects of recent federal enactments and edicts on academic freedom;
- Resist further government regulations or intrusions until and unless current measures have proved clearly inadequate;
- Resist or seek to repeal efforts to intensify regulation of unclassified research simply because its content may be deemed "sensitive";
- Limit the classification of research to those grants and contracts for which the interests of national security clearly require secrecy;
- Urge the implementation of fair measures deemed vital to controlling the entry of foreign students and visitors;
- Anticipate future threats to academic freedom, seeking early and effective intervention in the law-making and policy-shaping processes.

At the campus or institutional level, the committee urges that faculties

- Assume a major role in the review and shaping of institutional policies, especially those that should protect academic freedom and may affect it in such vital areas as the freedom to invite and hear controversial speakers;
- Assume a major role in reviewing and developing institutional policies to protect academic freedom against governmental

constraints and threats in such vital areas as sharing of library and student records with external agencies;

• Identify clearly the person or office on each campus responsible for maintaining and enforcing such policies;

• Establish and maintain regular contact with this responsible person or office, and keep colleagues informed of the process, results, and implications;

• Determine precisely what information is collected and maintained about faculty and students, by whom (on and off the campus), and for what purposes;

• Establish closer ties with such potentially helpful campus offices as the dean of students, the college or university attorney, and the campus police;

• Consider commending an administration or governing board for firmly and visibly protecting or defending academic freedom and free inquiry;

• Pursue and develop educational opportunities, on and off the campus, by which to alert the core and surrounding communities to present and future threats to academic freedom.

I. Introduction

The casualties of September 11, 2001, included nearly three thousand fatalities. With the attacks on that single day came calls for new measures to ensure the safety of the nation. The American Association of University Professors designated the Special Committee on Academic Freedom and National Security in a Time of Crisis to assess the implications for academic freedom and free inquiry of a host of measures that the federal government had adopted since September 11, and of other measures that were under consideration.

The special committee first met on November 10, 2002, and convened for a second time on May 9, 2003. At the first session, it agreed upon a charter, set out in Appendix A on page 59. At the second meeting, it reviewed an extensive body of information assembled by the AAUP's staff and members of the committee, and it considered preliminary proposed findings and recommendations. A final draft report was circulated to the standing committees within the AAUP that formed the special committee.[1] The draft was edited in light of their comments and has been approved for publication.

The committee's deliberations were informed not only by the development of events since September 11 but also by the historical record: now is not the first time that our institutions have been tested against the demands of national security. The AAUP was founded shortly after the outbreak of the First World War. The Association responded to our country's entry into the war by appointing a special Committee on Academic Freedom in Wartime. That committee's report was imbued with a spirit of jingoism, as the nascent Association was eager to dispel any suspicion of a want of patriotic fervor on the part of the young academic profession.[2] A quarter century later, chastened by that experience, the AAUP's Committee A on Academic Freedom and Tenure took a different tack:

> As war in its second year becomes the accepted routine of American life, rather than a confused departure from the ways of peace, the decision of the American Association of University Professors to hold fast to its fundamental principles has been justified. The determination to save rather than to jettison what had been won through years of courage and effort was based upon the experience of the First World War and on the knowledge that freedoms lost are difficult to regain. . . . Academic freedom is one facet of intellectual freedom; other aspects of that larger concept—freedom of speech, freedom of the press, and freedom of religion—are among the avowed objects for which this war is being fought. It would be folly to draw a boundary line across the area of freedom.[3]

The Association has consistently maintained this position ever since. Its response to the loyalty-security measures of the Cold War was tardy but categorical: the AAUP placed institutions on its list of censured administrations for the wrongful dismissal of faculty and filed friend-of-the-court briefs that helped to persuade the United States Supreme Court to ban disclaimer oaths as a condition of professorial appointment. In addition, local and state AAUP organizations effectively resisted campus speaker-ban laws. The AAUP's response to events during the Vietnam War was swift and imperative, although it provoked harsh criticism from important political quarters, even those strongly supportive of higher education.[4] In what follows, we draw on that body of accumulated experience and wisdom.

Historically, the government's domestic arsenal in times of crisis has included three weapons: secrecy, surveillance, and suppression. The need to maintain the secrecy of certain critical military information is indisputable, as is the imperative to gather information about an enemy's actions and plans. In

1. The parent committees are the AAUP's Committee A on Academic Freedom and Tenure and the Committee on Government Relations.

2. "Report of the Committee on Academic Freedom in Wartime," *Bulletin of the American Association of University Professors* (February–March 1918): 29–47.

3. "Report of Committee A for 1943," *Bulletin of the American Association of University Professors* (February 1944): 13.

4. See, for example, Edith Green, "A Congresswoman's Warning," *Educational Record* (Summer 1970): 222–24. As the headnote to Congresswoman Green's lecture stated, "A proven friend and chairman of the House Special Subcommittee on Education, Mrs. Green sees in continued campus disruption losses to higher education that cannot be afforded. She states the cause bluntly, and suggests the costs of anything less than responsible student and faculty performance." She singled out the AAUP for special criticism, for its having defended a faculty member at Indiana State University who had burned an American flag.

addition, the law has long criminalized giving aid and comfort to the enemy, which entails, for example, trading with the enemy or providing financial support to it. Confined within proper bounds, such measures need not pose a threat to civil liberties in general or to academic freedom in particular.

But we have learned from experience that in the passion of war, and in the hands of those who may be properly zealous for its successful prosecution, the boundaries can blur. Information the body politic vitally needs to maintain oversight of public affairs has been made secret, and classification has sometimes been imposed solely to save the classifying entity from accountability and embarrassment. Surveillance has been extended to lawful activity. Political dissent has been suppressed and, at points, such suppression has threatened to chill the robustness of debate upon which democracy depends.

To be sure, the government is not the sole source of efforts to discourage lawful speech or conduct. Since September 11, 2001, private groups, parading under the banner of patriotism or acting to further a specific cause, have been monitoring academic activities and have denounced professorial departures from what these groups view as acceptable. A private project called Campus Watch, for example, has subjected professors of Middle Eastern studies to such scrutiny. Antecedents to these efforts can be found in the activities of the John Birch Society in the 1960s and of the Accuracy in Academia movement in the 1980s.

Even so, it is important to distinguish these actions from those of the government. As private entities, these groups are protected by the First Amendment from state censorship or sanction as long as they stay within lawful bounds. They are sheltered by the same freedom of expression that we seek for ourselves, and they are equally subject to public rebuke. Insofar as a particular professor might be thrust into the rough and tumble of the public arena, the law demands, as a prominent legal scholar once put it, a certain toughening of the mental hide. Such is the price of free speech.

The government is necessarily held to a different standard. It has the capacity not only to preach, but also to act: to quarantine information; to place people, even their private telephone and electronic communications, under covert surveillance; and to regulate scholarly exchange, including teaching or research involving foreign students and researchers. Although the actions of private groups may affect the climate of a campus, this report is principally concerned with governmental action.

It has become something of a commonplace to assume that security and freedom exist in an inherent and therefore ineluctable tension. This report questions that assumption. The free exchange of scientific data—for example, a component of a deadly toxin—may well help to equip a terrorist group with a means of mass destruction. But that same openness may better equip researchers to produce the means of preempting or neutralizing that very threat. Secrecy can impede the pace of scientific discovery for good as well as for ill. We are not alone in observing that freedom is often a critical component of security; it is not invariably inimical to it.[5] The recent experience of the People's Republic of China, whose suppression of the full extent of the outbreak of SARS (severe acute respiratory syndrome) seriously exacerbated a threat to world health, with devastating human and economic consequences, stands as a caution to the assumption that secrecy always abets security.

Nevertheless, there may be points where some of our freedoms will have to yield to the manifest imperatives of security. What we should not accept is that we must yield those freedoms whenever the alarm of security is sounded. Given the extensive historical record of governmental overreaching and abuse in the name of security, we are right to be skeptical. Even at the height of the Cold War, when we faced the prospect of nuclear annihilation, the government did not institute security measures as far reaching as some now proposed. In other words, we are historically justified in insisting on a stringent standard of care. In the face of hateful foes who would destroy our institutions, we are right to remind the government and the public, as Committee A did in 1943, that an avowed object of our defense is the maintenance of these institutions, of which intellectual—and so academic—freedom is an inextricable part.

Accordingly, when the government invokes claims of security to justify an infringement of our civil or academic liberties, the burden of persuasion must be on the government to satisfy three essential criteria.

1. The government must demonstrate the particular threat to which the measure is intended to respond, not as a matter of fear, conjecture, or supposition, but as a matter of fact. This report will discuss the sweeping changes in the law governing intelligence gathering, foreign and domestic, that Congress adopted in the wake of September 11, 2001. But we wish to stress here that the presidentially appointed National Commission on Terrorist Attacks upon the United States has yet to complete an investigation of the intelligence failures that led to the lack of detection or reporting of the terrorist conspiracy that culminated in the attacks of September 11. Indeed, the available evidence suggests that excessive secrecy on the part of intelligence and law-enforcement agencies contributed to that failure.[6] We

5. See Thomas Blanton, "National Security and Open Government in the United States: Beyond the Balancing Test," in *National Security and Open Government: Striking the Right Balance* (Syracuse, N.Y.: Campbell Public Affairs Institute, 2003).

6. In a nearly 900-page report released on July 24, 2003, a congressional joint committee concluded that the "intelligence community, for a variety of reasons, did not bring together and fully appreciate a range of information that could have greatly enhanced its chances of uncovering and preventing Usama Bin Laden's plan to attack these United States on September 11, 2001." *Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001,* 107th Cong., 2d sess., 2002, S. Rept. 107-351/H. Rept. 107-792, xv.

have no way of knowing whether any of the legal changes discussed in this report actually respond to the threats we face. At a minimum, we should demand such a showing as a precondition of change.

2. The government must demonstrate how any proposed measure will effectively deal with a particular threat. Foreign graduate students have been targeted by nationality for police interrogation, for example, but, as best the media have been able to determine, the dragnet has yielded only accusations of a handful of visa violations. At no time has the government demonstrated how this tactic achieves any purpose other than publicly to manifest some form of activity—and to intimidate those subject to them, and perhaps those who might be subject to them.

3. The government must show why the desired result could not be reached by means having a less significant impact on the exercise of our civil or academic liberties. The Terrorist Information Awareness Program (previously named the Total Information Awareness Program) announced by the Department of Defense's Advanced Research Projects Agency, which had the potential to monitor automatically the citizenry's every electronic communication, would be an example of patent excess.[7]

In sum, we believe the war on terrorism should be prosecuted with only as much constraint on our freedoms as that effort demonstrably demands. We should be mindful of James Madison's admonition that "it is proper to take alarm at the first experiment upon our liberties."[8]

With these principles in mind, we will provide an account and an assessment of recent developments. The report proceeds through a series of topics vital to an understanding of the state of academic freedom after September 11, 2001: (a) the USA Patriot Act; (b) restrictions on information, which encompass classified research, export regulations, and "sensitive but unclassified research"; (c) restrictions on individuals, especially foreign students and scholars; (d) specific incidents involving threats to the academic freedom of individual faculty members and visiting lecturers; and (e) changes in institutional policies having academic freedom implications. The report's final section draws conclusions and proposes recommendations for future attention and action.

II. The USA Patriot Act

Among the early legislative responses of the national government to the terrorist attacks of September 11, 2001, the USA Patriot Act was foremost both in the sweep of its provisions and in the degree of public concern that it evoked.

Within weeks of September 11, the administration of President George W. Bush sought a new law to combat terrorism through enhanced federal powers of surveillance and investigation. The leadership of the U.S. Senate prepared a bipartisan version of the administration's bill and won passage by a vote of 99 to 1 on October 11, 2001. Wisconsin senator Russell Feingold provided the only dissenting vote. The next day, the House of Representatives passed its version by a vote of 357 to 66. Minor differences between the Senate and House versions of the bill were resolved by October 24, and President Bush signed the USA Patriot Act into law on October 26.

The full title of the act is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." The act consists of ten titles, revises fifteen existing federal statutes, and deals with numerous activities related to terrorism, ranging from laundering money to providing support to the victims of terrorism. The speed with which the law was introduced and passed, the lack of deliberation surrounding its enactment, and the directions it provides for law-enforcement agencies have raised troubling questions about its effects on privacy, civil liberties, and academic freedom. Questions have also been raised about the efficacy of the act in combating terrorism, if only because the statute was enacted without any sense of how law-enforcement and intelligence agencies might have prevented the attacks of September 11.

Another general concern is that the USA Patriot Act has contributed significantly to the mingling of law-enforcement and intelligence activities. The Intelligence Oversight Act of 1980 was one of several legislative initiatives aimed at keeping these realms apart. These laws also gave Congress meaningful oversight of the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI) after the discovery of the serious abuses of the civil rights and antiwar movements by these agencies during the 1960s and early 1970s.

Since the 1990s, and especially after the September 11 attacks, the barriers separating law-enforcement and intelligence agencies have been crumbling. In May 2003, the U.S. Department of Justice testified that these barriers "prevented the sharing of information between, and coordination among, law-enforcement and intelligence officials, thereby interfering with a comprehensive and effective defense of the national security against international terrorism and other threats."[9] The USA Patriot Act requires the attorney general to provide the director of the CIA with "foreign intelligence information," including wiretap intercepts and grand jury information obtained in a criminal investigation. The Justice Department is also required to report to the CIA information it has obtained about contacts that U.S. citizens have with foreign governments or organizations. In turn, department officials can

7. The 2004 defense appropriations bill closed the program but transferred some of its research to other agencies.

8. "Memorial and Remonstrance Against Religious Assessments," June 20, 1785, in *James Madison, Writings* (New York: Library of America, 1999), 31.

9. U.S. Department of Justice, Office of Legislative Affairs, "USA Patriot Act," 13 May 2003 <http://www.house.gov/judiciary/patriotlet051303.pdf>.

review intelligence files to determine whether to initiate criminal charges. The Justice Department reported in spring 2003 that some 4,500 files are under review for this purpose.

Another general observation is in order about the USA Patriot Act and the public's access to government information through the Freedom of Information Act (FOIA). Many scholars, journalists, and others have used FOIA to gain a better understanding of controversial public issues, not the least of which is how government agencies carry out their responsibilities. In 1993, the administration of President William J. Clinton rescinded a 1981 policy that had encouraged federal agencies to withhold information whenever "a substantial basis" existed for doing so. In its place, the administration created a "presumption of disclosure."[10] That presumption was explicitly abandoned when, in a memorandum dated October 12, 2001, Attorney General John Ashcroft assured federal agencies that the Department of Justice will defend a decision not to release documents so long as that decision rests on a "sound legal basis."[11]

The emphasis in the USA Patriot Act on the government's powers of surveillance and investigation is part and parcel of a hardening of the standard for releasing information. The act places a greater burden on those who seek information and, not coincidentally, on the government official who may want to release it.

Pertinent Provisions

As suggested above, the act sweeps broadly, but it contains features that specifically affect colleges and universities, primarily its amendments to the Family Educational Rights and Privacy Act (FERPA), the Electronic Communications Privacy Act (ECPA), and the Foreign Intelligence Surveillance Act (FISA). Through amendments to these statutes, federal law-enforcement and intelligence agencies now have greater authority to gather and share information about citizens and noncitizens alike—and therefore about members of the academic community. In addition, the act creates new federal crimes, increases the penalties for existing crimes, and modifies immigration laws in ways that enhance the monitoring of foreign students.

The Family Educational Rights and Privacy Act. Enacted in 1974, FERPA serves to protect the confidentiality of students' records by preventing their unauthorized disclosure. Section 507 of the USA Patriot Act amends FERPA by creating a procedure through which a senior official in the U.S. Department of Justice may seek a court order to collect educational records deemed relevant to an investigation or prosecution of terrorism as an exception to the requirements for confidentiality. The standard for seeking such a court order and for approving it is that "there are specific and articulable facts giving reasons to believe that the education records are likely to contain" information relevant to an authorized investigation or prosecution of domestic or international terrorism.[12] Such disclosure can occur without the consent of the student or the student's parent(s), and the institution does not have to notify either the student or the parent(s) that information has been disclosed.

FERPA requires an institution to keep records of all requests for information about student records, of the disclosures made concerning these records, and of the reasons for the requests, unless such reasons are exempted by law. Under the USA Patriot Act, however, these FERPA requirements are in effect waived, and the institution is not required to maintain any records of disclosures made to the Justice Department. Moreover, institutions of higher education that disclose records under the act are exempted from liability and are granted immunity from suits by the person whose privacy was violated.

The Electronics Communication Privacy Act. The ECPA, adopted in 1986, controlled the access of federal law-enforcement officials to stored electronic communications such as e-mail and voice mail. To strengthen protections for privacy, voice communications stored with third-party providers were governed by wiretap statutes. Search warrants were required if the same communications were stored on a device like a home answering machine.

The USA Patriot Act significantly altered the ECPA by eliminating the requirement for a wiretap order and permitting law-enforcement agencies to use search warrants to seize any voice-mail message. In so doing, the act weakened existing safeguards for privacy for all users of electronic communications. A search warrant typically requires that law-enforcement agencies meet the standard of probable cause, but the procedural and substantive requirements for a wiretap are more demanding. Authorization for a wiretap must be secured from the attorney general or his or her designee in the criminal division of the Department of Justice. A wiretap application must show that other investigative methods have failed. It must also include a complete statement of the alleged offense, a description of the persons whose communications are to be intercepted, a statement of previous applications involving these persons, and a full and complete statement of the period during which the interception is to be maintained.

From the perspective of law-enforcement and intelligence agencies, the original requirements of the ECPA seriously impeded their ability to gather information about terrorist activities and needed to make way for more flexible and efficient mechanisms for preventing and combating acts of terrorism. From the perspective of the academic community, which often finds itself in a crossfire of controversy when questions arise involving the privacy of electronic communications, the USA Patriot Act's diminished protections for privacy shift the balance ominously between freedom and security.

10. See <http://www.fas.org/sgp/clinton/reno.html>.
11. See <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.
12. Public Law 107-56, 107th Cong., 1st sess. (26 October 2001), *USA Patriot Act,* sec. 507(j) (2)(A).

The Foreign Intelligence Surveillance Act. Under FISA, adopted in 1978, investigations of criminal activity suspected of having been backed by a "hostile foreign power" are partially exempt from the Fourth Amendment's proscriptions on searches and seizures. A law-enforcement agency involved in such an investigation must apply to the Foreign Intelligence Surveillance Court, which reviews the sealed application for a subpoena or a warrant. Before adoption of the USA Patriot Act, the U.S. vice president reported annually to the Senate the number of applications and the number of approvals. No other information about the applications was released. Historically, the court approved nearly all applications.

The USA Patriot Act modestly improved the reporting requirements under FISA. The attorney general must now report semiannually to select congressional committees the total number of applications and the number the court has granted, modified, or denied. These enhanced disclosure requirements, however, are substantially offset by the expanded reach of the FISA system and a built-in gag order.

The USA Patriot Act amends FISA to eliminate the specific categories of information that were covered by it, and it extends FISA to any "person," a designation that can encompass academic libraries, university bookstores, and Internet service providers. To obtain a FISA warrant, the act requires that a law-enforcement agency need only certify that the records sought are relevant to an investigation of "international terrorism or other clandestine intelligence activities." An investigation, the act warns, must not be "conducted of a U.S. person solely upon the basis of activities protected by the First Amendment."[13] The door is therefore opened to investigations of non-U.S. persons without regard to the First Amendment and of U.S. persons that are mainly (but not solely) based on activities protected by the First Amendment.

Moreover, the USA Patriot Act shields the expansion of the FISA system from independent inquiry. In what is perhaps a unique statutory requirement, Section 215 of the act prohibits a record keeper—for example, a university librarian—from disclosing to anyone "other than the persons necessary to produce the tangible things under this section" that the FBI sought or obtained the records in question. For this reason, it is virtually impossible to determine what records the government has sought, how searches are actually conducted, and whether the records obtained have helped to protect the nation's security.

Additional Statutory Changes. Before the enactment of the USA Patriot Act, federal law proscribed the use of biological agents or toxins as weapons. The act expands current laws by, first, criminalizing possession of a "biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose."

Second, the act bars access to or possession of biohazards by what are termed "restricted persons." Of consequence to colleges and universities, the restricted categories include an "alien (other than an alien lawfully admitted for permanent residence) who is a national of a country as to which the Secretary of State . . . has made a determination (that remains in effect) that such country has repeatedly provided support for acts of international terrorism."[14] Pursuit of legitimate research is not a basis for exemption for a restricted person.

Complementing the USA Patriot Act is the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, which President Bush signed into law on June 12 of that year. This law requires every laboratory in the nation that works with "select" biological agents, including university laboratories, to register with the U.S. Department of Health and Human Services or the Department of Agriculture. Previously, only laboratories that shipped such agents were required to register with the government. The registration is valid for three years, and only for the biological agents expressly identified in the application. In addition, institutions must submit to the government the names of those who have access to certain biological agents or toxins that are identified as "select agents" in the federal regulations. The Department of Justice then carries out a "security risk assessment" to determine whether any of the individuals is a restricted person as defined in the USA Patriot Act. The requirement for security checks and uncertainties about the grounds for the government's denying access to select agents has serious potential implications for academic freedom.

In addition to defining restricted persons, the USA Patriot Act sped up implementation of SEVIS (the Student Exchange Visitor Information System), a Web-based system to track foreign students and scholars. Legislation enacted in 1996 required the Immigration and Naturalization Service (INS) to establish an electronic system to collect data on foreign students enrolled in American colleges and universities and exchange visitors in the country for short stays. The USA Patriot Act called for all colleges and universities to participate in the system by January 30, 2003. Because colleges and universities were complaining of "enormous" compliance problems, the deadline was extended to February 15.[15] The new date for full implementation was then changed to the start of the 2003–04 academic year. The problems that continue to plague SEVIS are taken up later in this report.

Several provisions of the USA Patriot Act are set to expire on December 31, 2005, including those relating to FISA investigations, although some legislators and the attorney general have called for their indefinite extension. Other provisions that

13. Sec. 215 (a) (1).

14. The State Department's list of nations that support terrorism consists of Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. Iraq was removed from the list in 1982 but returned to it in 1990 after invading Kuwait. The overthrow of Saddam Hussein's regime may change Iraq's status once again.

15. U.S. House Committee on Science, *Dealing with Foreign Students and Scholars in an Age of Terrorism: Visa Backlogs and Tracking Systems,* 108th Cong., 1st sess., 26 March 2003.

concern colleges and universities, such as the tracking of foreign students through SEVIS, will remain in effect. Moreover, investigations that began under FISA before December 31, 2005, or are under way by that date, are exempt from the sunset provisions.

Implementation of the Act

It is difficult to determine how the USA Patriot Act is being implemented and whether it is achieving its stated aims because of the lack of reporting requirements, the classified nature of much of the information reported to committees of Congress, and the secrecy surrounding the operation of the Foreign Intelligence Surveillance Court. Illustrative of these problems was the Justice Department's response in July 2002 to a request from two senior members of the House of Representatives for information about FBI contacts with libraries and about intercepts of electronic communications. This information was classified, the department spokesperson insisted, and could be shared only with the House Intelligence Committee.

This is not to say that no useful information is available concerning the implementation of the USA Patriot Act. The Department of Justice has provided details about expenditures, physical infrastructure, staffing, and training related to the act. The department's Office of Inspector General (OIG) has also reported to Congress about the status of complaints alleging abuses by members of local police forces and state and federal agencies in enforcing the act. According to a report of the inspector general's office released in January 2003, thirty-three alleged violations of civil rights or civil liberties "raised credible Patriot Act violations on their face." The report stated that these charges "ranged in seriousness from alleged beatings of detainees to INS inspections staff allegedly cursing at airline passengers."[16]

Information more directly relevant to colleges and universities is also available. Surveys conducted in late 2001 and in October 2002 by researchers at the University of Illinois at Urbana-Champaign found that since the USA Patriot Act became law, some 550 libraries had received requests from federal and state law-enforcement agencies for the records of patrons. Some librarians, however, were reluctant to respond truthfully to the survey questions because of the "gag" provision in the act. There have also been reports of librarians shredding records to make them unavailable for inspection by the government.

The experiences of local libraries have resonated in professional organizations, state legislatures, and Congress. The Freedom to Read Foundation, an affiliate of the American Library Association (ALA), has sharply questioned the government's new surveillance powers under the USA Patriot Act. "Until their behavior is criminal," the foundation's deputy director stated, "everybody has the right under the First Amendment to access information freely and anonymously."[17] The ALA itself, in a resolution adopted at its 2003 midwinter meeting, declared that "sections of the USA Patriot Act are a present danger to the constitutional rights of privacy of library users," and it called on Congress to exercise greater oversight of the act as it pertains to libraries and their users.[18]

At the state level, in April 2003, the New Mexico House of Representatives approved legislation directing libraries to inform patrons that the FBI may discover without their knowledge or consent what they have been reading. Nationally, legislation has been introduced in the U.S. House of Representatives to exempt bookstores and libraries from provisions in the USA Patriot Act. The legislation states that "no application may be made . . . with either the purpose or effect of searching for, or seizing from, a bookseller or library, documentary materials that contain personally identifiable information concerning a patron of a bookseller or library."[19] The bill also expands the requirements for the attorney general to provide specific information to Congress semiannually about the number of requests for information under FISA. In addition to details about the number of requests granted, modified, or denied, the bill would require a description of each application and an analysis of the effectiveness of the granted or modified applications in affording protection against terrorism.

It should be noted that additional measures are on the legislative horizon. Draft legislation not yet introduced in Congress would give the government the authority to strip Americans of their citizenship if they are found to have given material support to a terrorist organization; to obtain library records and other personal information without a search warrant; and to remove the tax-exempt status of nonprofit organizations that the Department of Justice designates as aiding terrorism. And on the eve of the second anniversary of the attacks of September 11, 2001, President Bush called for a significant expansion of federal law-enforcement powers under the USA Patriot Act. He proposed, for example, letting law-enforcement agencies issue "administrative subpoenas" in terrorism cases without obtaining approval from courts or grand juries.

But even without new legislation, the USA Patriot Act alone has drawn criticism on campuses. Some researchers and administrators, for example, have criticized the regulations promulgated under the USA Patriot Act and the Biological Preparedness Act affecting work on select biological agents.

16. U.S. Department of Justice, Office of Inspector General, "Report to Congress on Implementation of Section 1001 of the USA Patriot Act" < http://www.usdoj.gov/oig/special/03-07/final.pdf>.

17. Quoted in Martin Kasindorf, "FBI's Reading List Worries Librarians," *USA Today,* 16 December 2002.

18. American Library Association, "Resolution on the USA Patriot Act and Related Measures That Infringe on the Rights of Library Users," 29 January 2003.

19. *Freedom to Read Protection Act of 2003,* 108th Cong., 1st sess., H.R. 1157. A companion bill, S.1158, has been introduced in the Senate.

These researchers and administrators say the new regulations are needlessly complex and unnecessarily onerous, especially those that require continually updated inventories of select agents and information about all those—not just the researchers themselves—who have access to them. One university, Iowa State, is reported to have destroyed its collection of anthrax rather than contend with the regulations, while another, Harvard, has declined to register for a license to continue to house its microscope slides of anthrax and has sent them to another university.

More troubling are the potential effects of the USA Patriot Act and the Biological Preparedness Act on recruiting graduate students from foreign countries. Part of the difficulty is the inevitable lag time under a system of heightened scrutiny for processing visa applications to enter or re-enter the United States, and consequent delays in starting or continuing research projects. But another difficulty is rooted in the USA Patriot Act's category of restricted persons—individuals who are barred from access to specific biological agents, not because they are suspected of wrongdoing but because of where they were born. Faculty members thus face the prospect of trying to recruit graduate students from certain countries under conditions scarcely conducive to the open exchange of ideas.

Notwithstanding concerns about the possible or even likely effects of the USA Patriot Act on biological research, evidence indicates that university researchers and laboratories are pressing forward with their projects. Enormous increases in federal funding for biodefense-related programs over the past two years are sufficient to explain why that is so. It remains to be seen whether concerns among scientists about the USA Patriot Act will subside if the visa system adopts efficient routines and if government funds continue to pour forth.

Summary Observations

We have focused in this discussion of the USA Patriot Act on losses, real and potential, to privacy and freedom rather than on gains to security. The discussion noted the new links created by the act between law-enforcement and intelligence agencies, and argued that students, faculty members, and the academic community are injured to the extent that the act's operation inhibits the pursuit of research and discourages the free exchange of ideas.

A discussion of undesirable effects, however, is inconclusive until desirable effects have been considered. The Department of Justice is confident that the USA Patriot Act has helped to prevent another catastrophic attack against the United States by "substantially" enhancing the government's "ability to prevent, investigate, and prosecute acts of terrorism."[20] Of course, the gains from the USA Patriot Act can be measured only in terms of its goals, but until we have a precise view of the dangers against which the act is securing us, we cannot begin to estimate how successfully the job is being done.

20. Department of Justice, "USA Patriot Act."

No one questions that successful terrorist acts injure our nation's security, but very much in dispute is what national security requires. The USA Patriot Act has spawned a system of surveillance and control that appears to be stretched beyond what it can or, indeed, should seek to regulate. The costs to privacy and freedom are high. Are the costs too high? We do not know whether giving up the freedoms we are being asked to compromise will have any effect on terrorism of the sort we experienced on September 11, 2001, because we still do not have a full accounting from the government of why these attacks took place. A complete answer depends not only on having this information, but also on assessing other initiatives pursued by the government in behalf of national security, which we do in Sections III and IV of this report. The climate for academic freedom on college and university campuses is examined in Section V.

III. Restrictions on Information

This section describes and evaluates the steps the government has undertaken to restrict academic research, and the measures that members of the academic community have adopted themselves. Much of what the government has done antedates September 11, 2001, notably in the area of classified research and with respect to the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). Pre-September 11 precedents exist for what is known as "sensitive but unclassified" information, but since September 11, the executive and legislative branches of the government have focused steadily on this elusive quarry.

Classified Research

The rapid enactment of the USA Patriot Act was a signal political victory for the government. The Department of Defense failed to achieve a similar result when, shortly after September 11, it proposed that scientists whose research was funded by the federal government would have to obtain prior approval from the government before publishing their work or discussing it at scientific conferences. Scientists in and out of government sharply criticized the proposal. They balked at the notion of prior restraints on research that had not been classified as secret.

The Pentagon withdrew the proposal, and administration officials have since affirmed their commitment to the principle stated in 1985 in National Security Decision Directive 189, namely, that, to "the maximum extent possible, the products of fundamental research remain unrestricted."[21] This directive

21. National Security Council, "National Policy on the Transfer of Scientific, Technical, and Engineering Information," National Security Division Directive 189, 21 September 1985. Fundamental research is defined as "basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons."

was strongly influenced by *Scientific Communication and National Security,* a report issued in 1982 by the National Academy of Sciences. The report concluded that "the vast majority of university research, whether basic or applied, should be subject to no limitations on access or communications."[22]

The current administration, however, has added the secretaries of health and human services and of agriculture, and the administrator of the Environmental Protection Agency to the list of agency heads—including the secretaries of state and defense and the director of the CIA—who have classification authority. Each of these agencies funds research in various scientific areas, much of it carried out on college and university campuses.

The Pentagon's proposal drew attention to an issue that has long vexed universities and researchers: how to carry out classified research without impairing freedom of research and scientific progress. Arguments and counter-arguments have swirled around this issue since at least World War II. A key development was the passage in 1946 of the Atomic Energy Act, which gave the Atomic Energy Commission authority to conceal all scientific information concerning "the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power."[23] Debates about classified research were reprised in the early 1980s, when the Reagan administration sought to expand the government's system of classification. Over the past two years, these debates have been repeated.

Many in the 1940s emphasized, as many have since, the importance of concealment and the dire consequences of disclosure. Others in the 1940s and their counterparts in later years claimed that basic scientific discoveries cannot be kept secret, and that concealment hinders achievement by preventing the exchange of ideas and information across academic disciplines.

The distinctive characteristic of classified research is that it is born in secrecy. That has been the hallmark of atomic energy research since the 1940s, but research in other areas, for example, robotics, integrated circuit design, and computer software development, has also been shrouded in secrecy. No one is allowed to have information about the research unless cleared for that purpose. As a university administrator remarked, "I don't review things that fall under security clearance."[24]

To enforce secrecy, institutions must follow certain physical precautions, which sometimes entail separating the facility where classified research is carried out from the institution itself. That has been done, for example, with the Massachusetts Institute of Technology's Lincoln Laboratory, the University of California's Los Alamos National Scientific Laboratory, and Carnegie Mellon University's Software Engineering Institute. The reasons for separation vary by institution, but a common premise is that a stand-alone facility is easier to protect than an on-campus laboratory or building.

Information about which universities currently allow classified research is difficult to obtain. An accurate count would have to add the number of institutions where classified research is regularly carried out, whether on or off campus, to those institutions that permit such research on a case-by-case basis. The former category includes the universities mentioned above and the latter the Universities of Alaska, Colorado, Michigan, and Virginia. The total numbers in each category are, however, unknown. As a rough guess, there may be two dozen universities at which researchers undertake classified work.

Further complicating the picture is the fact that institutions not currently conducting this kind of research may yield to pressure to do so in the future. For example, the past two years have witnessed a huge increase in federal spending for biodefense-related programs, from approximately $50 million in 2001 to an estimated $1.5 billion for 2004. Centers of excellence for research and training designated in ten regions across the country are key elements of the new federal programs. Some of these centers are affiliated with new biosafety-level facilities, or regional biocontainment laboratories.

Moreover, as has already been pointed out, the USA Patriot Act and the Bioterrorism Protection Act require increased security for laboratories engaged in biological research, more detailed tracking of biological agents, and restrictions on access to specified biological agents by some foreign students. It should be noted that in the past, university research in the biological sciences has never been subject to the government's secrecy requirements; that university officials have opposed secret biological research; and that the National Institute of Allergy and Infectious Diseases, the primary source of federal monies for biodefense research, does not sponsor classified research. Nevertheless, an effort to identify the universities where classified research is now allowed or may be in the future would be incomplete if it omitted campuses where pressures, prompted by an array of financial, administrative, and security concerns, could lead a campus administration to permit classification of biodefense research.

Under certain circumstances, academic research can directly affect national security, and in those circumstances, a system of classification may be necessary, as it has been in the past. The hazards of a dangerous world cannot be ignored. At the same time, secrecy, an inescapable element of classified research, is fundamentally incompatible with freedom of inquiry and freedom of expression. In the context of the security measures the government initiated in the aftermath of September 11, this

22. "The Enlargement of the Classified Information System," *Academe: Bulletin of the AAUP* (January–February 1983): 13a.
23. Cited in Walter Gellhorn, *Security, Loyalty, and Science* (Ithaca, N.Y.: Cornell University Press, 1950), 19.
24. Director of the Office of Sponsored Projects, Carnegie Mellon University. Cited in Sara Henneberger, "CMU Blurs the Line on Weapons Research," *The Tartan,* 4 November 2002.

incompatibility has fueled concerns in the academic community that more research projects will be subject to classification.

Paradoxically, the incompatibility between secrecy and freedom suggests to many that, because classified research cannot be expanded without doing grave damage to the academic enterprise and to advances in science, a limited classified research system can serve as a model against which to evaluate other government regulations and initiatives aimed at restricting research. Not only are fewer restrictions better than more, but restrictions on research, to the extent that any are required, must be precise, narrowly defined, and applied only in exceptional circumstances. These seem to be the lessons the academic community has drawn from its past experiences with classified research.

Export Controls

As has been noted, academic research funded by the government can, under specified conditions, be classified. But two regulatory regimes unconnected to any federal sponsorship or funding also bear on the conduct of teaching and research and the dissemination of research results involving foreign nationals: the International Traffic in Arms Regulations (ITAR), administered by the Department of State, and the Export Administration Regulations (EAR), administered by the Department of Commerce.

The major revisions to these regulations that are of interest to the higher education community were adopted before September 11, and no changes have been made since then that alter their basic character. To the extent, however, that these regulatory systems do *not* apply to exchanges with foreign scholars and students when the relevant research is nonproprietary—when the results, in other words, are expected to be shared broadly or are not restricted by the sponsor of the research—they have the perhaps unintended consequence of reinforcing the importance of openness in the free exchange of scientific information.

The potential is present, however, for the rules to be redrafted. The academic community must remain vigilant and insist upon rigorous adherence to the guiding principle set out in the introduction to this report, namely, that any curtailment of free inquiry or limitation on the free circulation of research would have to be justified not by speculation but by the demonstrable failure or inadequacy of the existing rules.

The International Traffic in Arms Regulations. The Export Control Act requires that a license be obtained before the export of any "defense articles and defense services" and technical data related to them, as designated in a complex of regulations called the U.S. Munitions List.[25] Under the act, "export" encompasses disclosing "(including oral or visual disclosure) or transferring technical data to a foreign person whether in the United States or abroad."[26] Classroom discussion or collaborative research with a foreign national; the presentation of a paper, inside or outside the United States, to an audience that includes a non-Canadian foreign national; and even informal conversations may be subject to the act, depending on what has been disclosed or learned. Violations of the act may incur criminal sanctions.

Concerns expressed to the State Department in the late 1970s and early 1980s about the broad sweep of the act led to the narrowing of its application in the academic setting. The act exempts "information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain." The act defines information in the public domain as that generally accessible or available to the public through various means, including "unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States," and information accessible or available

> [t]hrough fundamental research in science and engineering at accredited institutions of higher learning in the United States where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:
>
> (i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or
>
> (ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.[27]

The Export Administration Regulations. The statutory bases for EAR are complex, but the rules have remained in force despite shifts in statutory (and presidential) authority.[28] Like

25. 22 U.S.C. § 2571-2594.
26. 22 C.F.R. § 120.17 (a) (4) (2002).
27. 22 C.F.R. § 120.11 (2002). In March 1999, authority for commercial communications satellite technology was transferred to the U.S. Munitions list under ITAR. The academic community expressed concern that this could result in potential restrictions on disclosure of that information in the classroom. The State Department subsequently clarified the application of ITAR consistent with the exemptions discussed above.
28. The regulatory scheme is set out in Chapter VII, subsection C of 15.C.F.R. It comprises 385 pages of regulations. The "Commerce Control List" runs to 175 pages.

ITAR, EAR covers the export of a long list of items. It defines "items" as "commodities, software, and technology," and it defines "export" as transmission of these items out of the United States, or "release of technology or software" to a non-Canadian foreign national inside the United States.[29] A release may occur by oral exchange in the United States or abroad. However, EAR exempts from its coverage release (or publication) of "fundamental research," and it defines fundamental research more broadly than ITAR does:

> *University based research.* (1) Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research. ("University" means any accredited institution of higher education located in the United States.)[30]

But there is a caveat:

> University based research is not considered "fundamental research" if the university or its researchers accept (at the request, for example, of an industrial sponsor) other restrictions on publication of scientific and technical information resulting from the project or activity. Scientific and technical information resulting from the research will nonetheless qualify as fundamental research once all such restrictions have expired or have been removed.

EAR devotes considerable care to defining what constitutes publication. Information is "published" when it becomes generally accessible to the interested public in any form, including

> (1) Publication in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution. . . .
> (4) Release at an open conference, meeting, seminar, trade show, or other open gathering.
> (i) A conference or gathering is "open" if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a personal record (not necessarily a recording) of the proceedings and presentations.
> (ii) All technically qualified members of the public may be considered eligible to attend a conference or other gathering notwithstanding a registration fee reasonably related to cost and reflecting an intention that all interested and technically qualified persons be able to attend, or a limitation on actual attendance, as long as attendees either are the first who have applied or are selected on the basis of relevant scientific or technical competence, experience, or responsibility. . . .
> (iii) "Publication" includes submission of papers to domestic or foreign editors or reviewers of journals, or to organizers of open conferences or other open gatherings, with the understanding that the papers will be made publicly available if favorably received.[31]

Further, EAR exempts the release of "educational information," and defines this category as "instruction in catalogue courses and associated teaching laboratories of academic institutions."[32] Research for a dissertation is subsumed under the treatment accorded all "university based research" outlined above.

The Department of Commerce offers question-and-answer guidance in an appendix to the regulations. This guidance makes plain that EAR does not cover publication (or submission for publication) in a foreign journal, presentations at foreign conferences so long as they are "open" under EAR's regulations, or instruction of students from countries for which an export license would otherwise be required. The regulations also make clear that some apparent restrictions—for example, on the circulation of a copy of a dissertation not otherwise "published" or the sharing of unpublished research data with a visiting foreign national—do not in fact apply if the contents meet the definition of fundamental research.

It should be noted that EAR includes a separate and exacting provision for encryption commodities and software.[33] Prior regulations had subjected encryption source codes to licensing review. Daniel Bernstein, a professor of mathematics, statistics, and computer science at the University of Illinois, Chicago, challenged this requirement as an impermissible prior restraint on free speech, and his position was sustained in 1999 by the U.S. Court of Appeals for the Ninth Circuit.[34] However, the court was at pains to distinguish "prepublication licensing" of source codes from export controls imposed on encryption commodities, object codes, and technology. In January 2000, the Department of Commerce revised EAR to exempt from prior licensing encryption source codes that are publicly available.[35] After the government changed the regulations, the appellate court sent the case back to the U.S. District Court. In January 2002, Bernstein resurrected his challenge to the revised encryption regulations. The case is pending.

29. 22 C.F.R. § 734.2 (b) (1) (2002).
30. 22 C.F.R. § 734.8 (b).
31. 22 C.F.R. § 734.7.
32. 22 C.F.R. § 734.9.
33. 22 C.F.R. § 740.17.
34. *Bernstein v. U.S. Department of Justice,* 176 F. 3d 1132 (9th Cir. 1999).
35. 22 C.F.R. § 740.13 (e).

In 2000 the Sixth Circuit reached a similar decision in an encryption case titled *Junger v. Daley*. In this case, Peter D. Junger, who teaches a course on computers and the law at Case Western Reserve University, sued the Department of Commerce. He asserted his First Amendment rights and challenged federal regulations that prohibited him from posting to his Web site encryption programs that he had written to show his students how computers work. In a unanimous decision, the court held that the First Amendment protects computer source code.[36]

Sensitive but Unclassified Information

The meaning of "sensitive but unclassified" information is, in one regard, straightforward. It refers to information that does not warrant classification but that cannot be released to the public without authorization. Information of this kind includes personnel information about millions of government employees, law-enforcement information, and information exempt from disclosure under the Freedom of Information Act. The number and kinds of stamps or markings affixed to sensitive documents suggest the sheer variety of this kind of information. A 1997 report on government secrecy identified "at least fifty-two different protective markings being used on unclassified information, approximately forty of which are used by departments and agencies that also classify information. Included among these are widely used markings such as 'Sensitive But Unclassified,' 'Limited Official Use,' 'Official Use Only,' and 'For Official Use Only.'"[37]

Well before September 11, 2001, the government, citing considerations of national security, invoked the term "sensitive but unclassified" as a rationale for not releasing government information or academic research funded by the government. The government's efforts were met with stiff criticism. In 1984, for example, National Security Decision Directive 145 concluded that "sensitive but unclassified government or government-funded information, the loss of which could adversely affect the national security interest, [should be] protected in proportion to the threat of exploitation and the associated potential damage to the national security."[38] The Government Accounting Office was skeptical that the directive would have a limited application: "[U]nclassified sensitive civil agency information affecting national security interests could include hazardous materials information held by the Department of Transportation, flight safety information held by the Department of Aviation, and monetary policy held by the Federal Reserve."[39]

Although the directive was withdrawn in 1990, the term "sensitive but unclassified" did not vanish. It found new leases on life, notably after the events of September 11 and the deaths soon thereafter caused by the anthrax virus. The focus of concern was no longer the Soviet Union and its nuclear-weapons capabilities, as it had been in the early 1980s, but individuals, groups, and countries considered capable of launching terrorist attacks against the United States.

Soon after September 11, federal agencies cut off public access to thousands of documents on the Internet, ordered information in government-deposit libraries to be withheld or destroyed, and stopped providing information that had been routinely made available to the public. In March 2002, the White House instructed the heads of federal agencies and departments to undertake "an immediate reexamination" of current measures for identifying and protecting information concerning weapons of mass destruction "as well as other information that could be misused to harm the security of our nation and the safety of our people."[40] Federal agencies, given ninety days to conduct this review and report to the newly established Office of Homeland Security, moved quickly into compliance. The Homeland Security Act of 2002 followed suit by requiring federal agencies to "identify and safeguard homeland security information that is sensitive but unclassified."[41]

Before considering the responses of the academic community over the past two years to the government's initiatives, we need to describe the government's position in support of those efforts. The capabilities of terrorists to carry out attacks against the United States have expanded at an alarming pace. The government fears that the openness of our borders and the unfettered flow of scientific ideas and information across national borders and in our colleges and universities could contribute to the expansion of the terrorists' capabilities. Terrorist groups have also made good use of rapid strides in commercial technologies such as computers and cellular telephones.

The government's classification system and export regulations are suitable for restricting the release of information that could result in sudden and drastic gains by terrorists. The difficult problem relates to the results of unclassified research that, in the aggregate, can reveal highly sensitive information. The challenge is to restrain the dissemination of only that research which, if disclosed, could harm national security.

The margin of effectiveness provided to terrorists through scientific research may be crucial, and no one wishes to help place a weapon in the hands of a potential adversary. And yet there are formidable obstacles to creating a system of government restraints based on a determination that research is too sensitive to be released but does not warrant classification. Consider, first, the views of an ad hoc faculty committee at

36. *Junger v. Daley,* 209 F. 3d 481 (6th Cir. 2000).
37. Cited in Genevieve J. Knezo, *"Sensitive But Unclassified" and Other Federal Security Controls on Scientific and Technical Information: History and Current Controversy* (Washington, D.C.: Congressional Research Service, April 2, 2003): 16.
38. Knezo, *"Sensitive But Unclassified,"* 11.
39. Knezo, *"Sensitive But Unclassified,"* 12.
40. See <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>.
41. Public Law 107–296, 107th Cong., 2d sess. (25 November 2002), *Homeland Security Act of 2002,* sec. 892 (a) (1) (B).

the Massachusetts Institute of Technology published in a 2002 report on access to and disclosure of scientific information:

> Increasingly of late, MIT has seen the attempt by government contracting officials to include a requirement that research results be reviewed, prior to publication, for the potential disclosure of "sensitive" information. Such a request implies potential restrictions on the manner in which research results are handled and disseminated, and may also restrict the personnel who have access to this material. The difficulty with this approach is that the term "sensitive" has not been defined, and the obligations of the Institute and the obligations of the individuals involved have not been clarified and bounded. This situation opens the Institute and its faculty, students, and staff to potential arbitrary dictates from individual government contracting agents—however well intended. We are aware that many universities have had similar experiences.
>
> To date, MIT has refused, in all cases, to accept this restriction in any of its government contracts. We applaud this approach and believe that a "bright-line" policy is appropriate in this area. MIT has chosen to engage in classified research at Lincoln Laboratory under well-defined obligations but does not, and should not, accept arbitrary restrictions on its research environment.[42]

Consider, next, a joint statement by the presidents of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine:

> Restrictions are clearly needed to safeguard strategic secrets; but openness is also needed to accelerate the progress of technical knowledge and enhance the nation's understanding of potential threats. A successful balance between these two needs—security and openness—demands clarity in the distinctions between classified and unclassified research. We believe it to be essential that these distinctions not include poorly defined categories of "sensitive but unclassified" information that do not provide precise guidance on what information should be restricted from public access. Experience shows that vague criteria of this kind generate deep uncertainties among both scientists and officials responsible for enforcing regulations. The inevitable effect is to stifle scientific creativity and to weaken national security.[43]

Legislators have also been wary of efforts to create a category of research that is subject to governmental restraints but is not classified. Representative Sherwood L. Boehlert, chair of the House Committee on Science, opened a hearing in October 2002 with the question, "Is sensitive but unclassified research legitimate?"[44] The witnesses from the higher education community all criticized government restrictions that relied on the category of "sensitive but unclassified" information. As one witness observed, "sensitive research as a halfway restriction is doomed to failure."[45]

Perhaps mindful of attitudes in the academic community, John H. Marburger, director of the White House Office of Science and Technology Policy, voiced caution in the hearing that the development of guidelines for federal agencies on the subject of sensitive information "is in the formative stage."[46] As of the writing of this report, the administration has not come forward with a definition of sensitive information that is acceptable to the academic community. This seeming delay may be partly a response to the frosty reception by researchers and their institutions, but it may also be a recognition of the voluntary restraints the academic community has imposed on itself.

The historical precedents are instructive. In early 1940, the National Academy of Sciences and the National Research Council established an advisory committee on scientific publications. The committee served as a channel of communication between nuclear scientists and the scientific community without any government involvement, and it created a voluntary mechanism to limit the circulation of research results within the United States. Within a year, "the committee had secured the cooperation of 237 scientific journals, covering every field of research that was judged to relate to national defense."[47] Similarly, during World War II, researchers at the College of Physicians and Surgeons at Columbia University themselves suppressed an article on germ warfare and ways to protect against it. The article was eventually published in 1947.

No doubt the government's interest in these research subjects ran high, and no doubt also government officials told scientists about the dangers to the nation that could result from indiscriminate release of their research results. Some scientists may have acted to avoid government restraints. Still, what is

42. Massachusetts Institute of Technology, *In the Public Interest: Report of the Ad Hoc Faculty Committee on Access to and Disclosure of Scientific Information,* 12 June 2002 <http://web.mit.edu/faculty/reports/publicinterest.pdf>, 12.

43. Bruce Alberts, William. A. Wulf, and Harvey Fineberg, "Statement on Science and Security in an Age of Terrorism," 18 October 2002 <http://www4.nationalacademies.org/news.nsf/isbn/s10182002b?OpenDocument>.

44. U.S. House Committee on Science, "Conducting Research During the War on Terrorism: Balancing Openness and Security," 10 October 2002 <http://www.house.gov/science/hearings/full02/oct10/boehlert.htm>.

45. House Committee on Science, "Conducting Research," testimony of Professor Sheila E. Widnall <http://www.house.gov/science/hearings/full02/oct10/widnall.htm>. Widnall chaired the MIT faculty committee cited above.

46. House Committee on Science, "Conducting Research," Widnall testimony.

47. Alberts, Wulf, and Fineberg, "Statement on Science and Security," background material.

striking even in retrospect is that the scientists imposed the restraints on themselves without government command, and they implemented the restraints through devices of their own choosing.

A different precedent emerged in 1981. The National Security Agency (NSA), which develops, monitors, and breaks military and diplomatic codes, had proposed a statutory system of prior review of articles and monographs about cryptography. A study group convened by the American Council on Education rejected this approach and instead proposed on an "experimental basis" a voluntary system of prior review by the NSA of cryptography manuscripts.

If a researcher agreed to submit a manuscript to the NSA, the agency would then determine whether, in its view, changes, deletions, or delays in publication were needed. Researchers could appeal to a five-member board, composed of two people appointed by the NSA director and three appointed by the science adviser to the president from a list of nominees provided by the president of the National Academy of Sciences. The proposal came under a barrage of criticism. That a researcher was free to decide whether or not to participate in the system of prior review, or could withdraw a paper at any point during the review process, did not mollify critics who saw nothing positive in the government's determining what constituted acceptable academic research.[48]

Over the past year, the scientific community has followed the path of self-review established by scientists in the 1940s. The American Society for Microbiology took the lead, issuing policy guidelines for the society's eleven journals in processing manuscripts dealing with "microbiological sensitive issues." According to the policy, all manuscript reviewers must alert their editors about any manuscript that "describes misuses of microbiology or of information derived from microbiology." After further initial screening of such a manuscript, the regular review continues or the manuscript is declined and returned to the author.[49] In 2002, the society's journals reviewed some 14,000 papers submitted for publication. Approximately 250 dealt with select agents; of this number, two raised sufficient concerns to be reviewed by the society's full publications board. Both papers were revised and then accepted for publication.

In a similar vein, thirty-two of the world's leading journal editors and scientist-authors issued the *Statement on Scientific Publication and Security* in January 2003 to address the "possibility that new information published in research journals might give aid to those with malevolent ends."[50] According to this statement, decisions about the processes used to review papers that raise security issues should be left to scientists and their journals, as should decisions about whether a paper should be modified or not published.

In sum, the government has advanced plausible but inconclusive arguments that terrorists might use some published research against the nation. The academic community has rejected the idea that the government should police the dissemination of scientific research, arguing that such a practice would be an unneeded and dangerous enlargement of the government's role in academic life. Scientists today have rightly asserted that the responsibility must lie with them to draw up any measures necessary to determine whether papers submitted for publication raise national security issues and, if so, how they will handle the matter.

But a caution is necessary: the academic community must be careful not to impose on itself a regulatory burden that differs from the government's only in the locus of administration. No evidence suggests that self-governance by the scientific community has been purchased at the price of individual freedom. Indeed, if the experience of the American Society for Microbiology with potentially controversial manuscripts is representative, good reason exists to think that no evidence is likely to surface. Still, in times of crisis, a realistic appraisal of what the scientific community is doing to monitor its own members requires us to be aware of the possibility that researchers and journal editors might exercise their responsibilities with too much rigor and thus inadvertently give too little attention to freedom's needs.

IV. Restrictions on Individuals

The previous section discussed measures aimed at concealing information that could be useful to terrorists. But as the discussion of the USA Patriot Act indicated, the government strives not only to keep information away from terrorists, but also to keep dangerous people away from information. This goal has led to the development of programs to screen out people presumed to be dangerous before they can do harm.

This section discusses the measures that the government is using to ensure that foreign students and scholars do not have access to information that could be turned against the United States. The difficulty is determining which student or which scholar cannot be trusted. Aside from an obvious but tiny category of people known or suspected to be trained in terrorism, uncertainties abound.

Foreign Students and Scholars

In 2002, more than 580,000 international students attended colleges and universities in the United States. Over the past

48. For the study group's report and comments on it, see "Cryptographic Research and the NSA," *Academe: Bulletin of the AAUP* (December 1981): 371–82.

49. American Society for Microbiology, "Policy Guidelines of the Publications Board of the ASM in the Handling of Manuscripts Dealing with Microbiological Sensitive Issues," August 2002, <http://journals.asm.org/misc/Pathogens_and_Toxins.shtml>.

50. *Science* (21 February 2003): 1149.

twenty years, noncitizens have accounted for more than 50 percent of the growth in the number of Ph.D.'s earned in this country. The growth has been especially significant in the biological and agricultural sciences and in mathematics and computer science. The largest concentration of students (some 60 percent) have been from Asia—China, Taiwan, India, and South Korea—followed by Canada, Brazil, Turkey, Greece, Germany, and Mexico. Students from countries in the Middle East have earned slightly less than 5 percent of all doctoral degrees during this period.[51]

These numbers help to explain why many agree that foreign students contribute greatly to U.S. higher education and to society. Attorney General Ashcroft expressed a common sentiment on May 10, 2002: "Allowing foreign students to study here is one of the ways we convey our love of freedom to foreign students who will one day return to their countries and take on leadership positions."[52] For the higher education community, the March 2003 remarks of American Council on Education president David Ward before the House Science Committee are representative: "I believe that international students and exchange visitor programs are enormously beneficial to the United States. They dramatically increase the knowledge and skills of our workforce. They boost worldwide appreciation for democracy and market-based economics and give future world leaders first-hand exposure to America and Americans. At the same time, international education generates billions of dollars in economic activity every year."[53]

Although the importance of foreign students (and scholars) to the U.S. academic community is ordinarily undisputed, the ordinary was cast aside after September 11. One of the hijackers had entered the country on a student visa, and visas were issued for two of the terrorists six months after they had died. A new consensus quickly emerged in Washington. The president ordered federal officials to undertake a "thorough review" of the student visa system, and the attorney general followed his defense of the love of freedom quoted above with a pointed caution: "We can no longer allow our hospitality to be abused," he said. The State Department gave concrete form to this shift in priorities when it announced in November 2001 that it would "impose more rigorous screening on men seeking visas from twenty-five designated countries."[54]

Legislators did not lag behind in joining the new consensus, and sometimes rushed ahead of it. Senator Diane Feinstein proposed a six-month moratorium on all student visas, but promptly retreated after she encountered significant opposition from higher education associations. The House of Representatives passed a version of the USA Patriot Act that would have prevented foreign students from working in research laboratories. The Senate did not embrace the House's enthusiasm for isolation.

Ultimately, the main tools used to deal with foreign students and scholars in this country have been the USA Patriot Act and SEVIS, the automated system administered originally by the Bureau of Immigration and Naturalization Services to monitor foreign students and visiting scholars while they are in the United States. In March 2003, the INS became part of the Department of Homeland Security, and its functions were divided among bureaus of that department. A new bureau of Immigration and Customs Enforcement within Homeland Security now administers SEVIS.

Problems with SEVIS

All colleges and universities must participate in SEVIS as a condition for accepting foreign students and visitors.[55] An institution enters information in the SEVIS computer system about the foreign students it has accepted and about other noncitizens who plan to visit the campus. When the student or visitor arrives at a U.S. port of entry, the college or university is notified through SEVIS that the individual is in the country and should be reporting for class or to those who will be hosting the visit. The institution must maintain current information about the student, including details about any changes in the student's course of study, employment, and address until the student either completes the academic program and departs the country or changes immigration status. The institution must also report to federal authorities for investigation and enforcement students who fail to enroll or who are no longer enrolled.

Full implementation of SEVIS was scheduled for January 30, 2003, but serious problems continue to plague the system, and it is not yet fully operational. Higher education organizations and college and university administrations have complained that information that colleges and universities provide to the government through SEVIS is frequently lost; that campus personnel and federal enforcement staff have not been provided adequate training; and that SEVIS often does not provide embassies and consulates with real-time access to its data, with the result that some students are incorrectly told that they cannot apply for visas.

The State Department issues visas, and SEVIS links consular records with student records maintained by colleges and

51. Paula Stephen et al., "Doctoral Education of Temporary Residents in the United States" <http://www.gsu.edu/~wwwsps/people/StephanP/Stephan_et_al.pdf>.
52. U.S. Department of Justice, "Justice Department Proposes Rule Governing Foreign Student Reporting," 10 May 2002 <http://www.usdoj.gov/opa/pr/2002/May/02_ag_281.htm>.
53. House Committee on Science, *Dealing with Foreign Students.*
54. Paula E. Stephen et al., "Survey of Foreign Recipients of U.S. Ph.D.s," *Science* (March 22, 2002): 2211. The twenty-five countries are Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen.
55. This description draws heavily on the hearings before the House Committee on Science, *Dealing with Foreign Students.*

universities. Delayed issuance of visas is the most common inefficiency of the new system—and the most troublesome one for foreign students and scholars. Students apply for admission to programs that have specific starting dates, and foreign scholars are invited to participate in scheduled conferences. The time limits associated with those programs or conferences can affect applicants' eligibility for visas. The State Department warns prospective students that "June, July, and August are the busiest months in most consular sections, and interview appointments are the most difficult to get during that period." Yet it also informs students that they "should not apply more than ninety days before the registration date" of the visa application.[56]

After students have entered the country, they can encounter further delays under the SEVIS system. As noted above, colleges and universities must notify the government of any change in a foreign student's major field of study. The SEVIS profile of students includes a list of preselected majors drawn from a list developed by the Department of Education. But the government recognizes that the Department of Education's list, and hence the list used by SEVIS, does not "offer an exact match for all schools." It advises institutions that "choosing the most similar major or area of study should not pose a problem for the student at a later date." One might have greater confidence in the government's optimism if SEVIS had more success in simply listing a change in an academic major. According to American Council on Education president David Ward, "In one instance, a field of study change took forty-seven days to complete."[57]

Some in the academic community doubt whether SEVIS can ever operate efficiently and question even whether the benefits of an efficiently operating system would outweigh the inevitable impact on the vital flow of international visitors. SEVIS's goal of tracking foreign students and scholars is reasonable, but the wider the reach of the government's regulatory arm, the more difficult its task of identifying the truly dangerous. Terrorists and would-be terrorists are notoriously difficult to identify and locate, and the government will therefore have to resort to inferences and presumptions to identify individuals whose academic records suggest that they might be dangerous. Between those who might be dangerous and those who are dangerous lies a large realm of speculation. The government has tried to narrow the bounds of speculation by narrowing the focus of its screening and tracking programs. The aim is laudable, but the result goes in the opposite direction.

Sensitive Countries and Academic Subjects

The State Department maintains a list of countries that are designated as supporters of terrorism. A student from a country on the list (Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria) who wants to study in the United States will need a visa approved by the secretary of state and the attorney general. These are not the only countries, however, whose citizens are subject to more rigorous visa screening. As was noted above, the State Department has identified additional nations that trigger more intense scrutiny. But even that list does not include all the countries that federal departments consider "sensitive." For example, the Department of Energy's national laboratories host thousands of foreign visitors each year, many of whom are researchers. The department maintains a list of countries designated as sensitive, including Russia, China, and India, which are not identified by the State Department as supporters of terrorism and do not appear on the department's list of twenty-five.

The expansion of the number of sensitive countries is matched by a broadening of the academic subjects seen as sensitive. For many years, the State Department has maintained a Technology Alert List. It was established to help maintain technological superiority over Warsaw Pact nations and "other Communist powers." The list was revised in August 2002 to include not only academic fields such as genetic engineering, pharmacology, immunology, and virology, but also architecture, community development, environmental planning, geography, housing, landscape architecture, and urban design.[58] One result of this expansion of the list is that consular offices are requesting security clearances for more foreign students and scientists. The review is carried out in Washington under the Visas Mantis program. A security clearance opinion is required before the consular office can approve or deny the visa application.

Still another government initiative was unveiled in May 2002. The Interagency Panel of Advanced Science and Security grew out of a presidential directive that "prohibit[s] certain international students from receiving education and training in sensitive areas." The panel will screen foreign graduate students, postdoctoral fellows, and scientists who apply for visas to study "sensitive topics." The meaning of "sensitive topics" will be decided on a case-by-case basis, focusing on information that is "uniquely available" in the United States.[59] The panel will also review the status of foreign students already in the country who wish to study a sensitive topic.

The enlargement of the lists of sensitive countries and sensitive academic subjects has resulted in a massive backlog of visa applications. In fall 2002, this backlog was estimated at 25,000. It is difficult to assign numbers to the consequences of such delays: how many students have missed the start of classes, how many scientists have had to cancel travel to

56. See <http://www.travel.state.gov/foreign_student_visas_handout>.
57. House Committee on Science, *Dealing with Foreign Students.*
58. Text of Department of State Cable Sent to U.S. Embassies and Consulates Abroad, August 2002, <http://www.travel.state.gov/state147566>.
59. House Committee on Science, *Dealing with Foreign Students.*

attend a conference, or how many students are enrolling in universities in other countries because of the cumbersome and burdensome visa screening mechanisms. Some data are available, however. An online survey conducted by the Institute of International Education in February 2003 found that 53 percent (189) of the total number of reporting institutions had students who were delayed in arriving for the fall 2002 semester, and that of the 53 percent, nearly 25 percent reported that many students did not arrive for the start of the spring 2003 semester. The most commonly cited reason for delay was visa problems.

The survey also found that 30 percent of the reporting institutions (106) experienced declines in the total number of international students enrolled in their programs for the 2002–03 academic year, with thirteen experiencing declines of 30 percent or more. The sharpest declines in new enrollments were for students from Indonesia, Saudi Arabia, and the United Arab Emirates, with "20 percent or more of the respondents reporting a drop in the newly admitted students from these countries, and many fewer reporting increases." The survey concludes: "The possibilities of further deteriorating enrollments from countries in the Middle East, Africa, and Southeast Asia cannot be ruled out, prompted by various factors including visa approval delays, financial problems, political concerns, and attractive opportunities to study elsewhere."[60] Of course, these gross figures, while important, can only hint at the actual difficulties encountered by foreign students in trying to enter the United States, or the problems they may face after they are on our campuses.

The government monitors the academic progress of foreign students, as it has for years, but it would not be surprising to learn that these students now try to maintain lower profiles on and off the campus than they would have done in the past. For behind the government's watchfulness lies the specter of expulsion from the country. That is not a hypothetical concern. In March 2003, more than one hundred FBI agents, fully armed in riot gear, raided graduate-student housing at the University of Idaho in the early dawn hours to arrest a Saudi graduate student charged with visa fraud and making false statements to the government. He is facing deportation. If these things happen to noncitizens who have violated the terms of their entry or of their stay in the country, one might say that it "serves them right." The issue, however, is not that some might deserve harsh treatment, but that many will feel that the government's extreme response to an alleged visa violation means that they should be even more careful in their academic lives to avoid drawing attention to themselves. To the extent that cautions of this sort prevail, academic life is surely impoverished.

This sense of vulnerability is probably felt most strongly among students from Middle Eastern countries. From 1991 to 1999, these students received fewer than 2 percent of all the doctorates in science and engineering that American colleges and universities awarded to noncitizens. Because of their small numbers, some might be tempted to propose that all of these students should be denied entry into the United States, or those currently here should be required to leave. But such a proposal would be deeply repugnant to this nation's democratic ideals. One's place of birth does not equate with support for terrorism.

We cannot know, and are unlikely ever to know, whether the government has successfully prevented terrorists from entering the country. Much of what the government does in screening applicants for visas is secret. Even the government may not be able to account for all its successes if the terrorist, deciding that the chances of detection are too high, chooses not to come to this country. We are left to rely on what the government says it has accomplished in keeping the seriously dangerous out of the country, measuring its pronouncements against our sense of its credibility in operating efficient and fair visa screening and tracking programs. To date, neither efficiency nor fairness can be said to characterize the operation of these programs.

V. View from the Campus

This report has so far focused mainly on the effects of laws and government regulations on the academic community. The perspective has been from the outside looking in. We now shift position to consider the issues that have arisen within the academic community and the ways in which faculty members, administrators, and governing boards have dealt with challenges to academic freedom since September 11.

Individual Cases

Incidents involving outspoken faculty members have been fewer than one might have expected in the aftermath of so momentous an event as September 11. Moreover, with few exceptions—at least one of them grave—the responses by college and university administrations to the events that have occurred have been reassuringly temperate. Although it has been a long time (perhaps as long ago as the Vietnam War) since the academy has been similarly tested, policies already in place seem to have served the interests of academic freedom surprisingly well. Nonetheless, the tragic lessons of earlier times (notably the McCarthy era) teach us that the academic

60. Institute of International Education, "International Students on U.S. Campuses 2002–03," 16 April 2003 <http://opendoors.iienetwork.org/?p=29113>. Still further delays can be expected if State Department policies announced in May 2003 go into effect without serious modifications. These policies would require that nearly all foreign individuals seeking to visit the United States be interviewed by consular officials, even though most international students and scholars are already interviewed as part of the visa-issuance process, and that visitors from countries not requiring visas will be admitted only if they have machine-readable passports.

community must maintain vigilance so long as a threat exists, and it may well exist for many years to come.

In the weeks immediately following September 11, several potentially volatile incidents occurred on campuses as geographically dispersed as Albuquerque and New York City. On the afternoon of September 11, University of New Mexico history professor Richard Berthold joked to his first-year survey class that "[a]nyone who can blow up the Pentagon gets my vote."[61] Despite pressure from state legislators and irate citizens to dismiss Berthold, a careful internal investigation—perhaps influenced by the professor's own contrition—led several months later to a letter of reprimand, temporary removal from first-year classes, and the prospect of an intensive post-tenure review. The latter sanction soon became moot, however, when Berthold opted late in 2002 for early retirement.

A week after the attacks, Orange Coast College professor Kenneth Hearlson was placed on administrative leave for comments made during a September 18 introductory political science class. Several Muslim students in the class claimed that Hearlson had accused them of being "terrorists" and "Nazis." A painstaking eleven-week investigation concluded that the specific statements attributed to Hearlson—for example, "[Y]ou [Muslim students] drove two planes into the World Trade Center"—were unsubstantiated and had not been accurately reported. Hearlson voluntarily took a leave of absence with pay during the inquiry. He was eventually reinstated for the spring semester, although a letter of reprimand was placed in his file.[62]

Several weeks after September 11, a teach-in took place at the City College of New York. Several faculty members expressed views strongly critical of United States foreign policy; one specifically blamed "American colonialism" for the attacks. Response in and outside the CUNY system was immediate and intense. The chancellor took the faculty critics to task, publicly faulting those who made "lame excuses" for the terrorists. The university's board of trustees threatened to go further. One trustee labeled the speakers' conduct "seditious," and another declared that the board would vote to censure the participating faculty.

Shortly before a scheduled meeting of the trustees, at which such a motion might indeed have passed, Benno Schmidt, the board's vice chair, counseled his colleagues on basic principles of free speech and academic freedom. In a memorandum, Schmidt wrote that "the freedom of thought to challenge and to speak one's mind [is] the matrix, the indispensable condition of any university worthy of the name."[63] This message seems to have carried the day. The incident quickly disappeared from the board's agenda, and no further official rebuke has apparently ensued. In this incident, one might even argue for a modest net gain for the cause of academic freedom.

Strikingly similar events at Columbia University a year and a half later also yielded a positive result for academic freedom. Nicholas De Genova, an assistant professor of anthropology and Latino studies, took part in a teach-in at the height of the war in Iraq. Among many provocative comments, De Genova said he wished for "a million Mogadishus"—recalling the tragic ambush of U.S. troops portrayed in the film *Black Hawk Down.* This challenge was not the professor's first; the previous spring, he had expressed deep hostility toward Israel at a campus rally.

Although word of his comments did not become public for several days, they attracted immediate outrage when the media reported them. Columbia alumni around the globe demanded De Genova's dismissal. Over a hundred members of the U.S. House of Representatives called for his resignation. The leader of the petition drive, Representative J. D. Hayworth, insisted that the issue was not "whether De Genova has the right to make idiotic comments . . . but whether he has the right to a job teaching at Columbia University after making such comments."

Meanwhile, Columbia's president, Lee Bollinger, declared that he was personally "shocked" by De Genova's remarks, noting that "this one has crossed the line, and I really feel the need to say something." Many observers faulted the president for not taking a harsher stand, while a few faculty members argued that such a presidential rebuke could "intimidate any faculty from speaking with similar positions." The controversy at Columbia had only partly subsided by the time the military phase of the war in Iraq ended. In mid-April, Bollinger released an apparently final official statement on the matter. He reaffirmed his "strong disagreement" with De Genova's expressed views, but he insisted once again that "under the principle of academic freedom, it would be inappropriate to take disciplinary action."[64]

An incident that belongs clearly on the negative side of the ledger involves Sami Al-Arian, a Kuwaiti-born computer science professor of Palestinian descent who had taught for two decades, and long held tenure, at the University of South Florida. He had for years been an activist in Middle Eastern matters, and he headed an institute with a strongly pro-Palestinian bias. Soon after September 11, he appeared on the television program *The O'Reilly Factor,* where he acknowledged having made past statements such as "Death

61. Robin Wilson and Scott Smallwood, "One Professor Cleared, Another Disciplined Over September 11 Remarks," *Chronicle of Higher Education,* 11 January 2003, A12.
62. "College Professor in Muslim Controversy Will Return to Teaching," *Associated Press Newswires,* 12 December 2001.
63. John P. Nidiry, "CUNY Trustees: Let Free Speech Flourish" *Newsday,* 19 October 2001, A50.
64. Megan Greenwell, "Bollinger: No Plan to Reprimand De Genova," *Columbia Daily Spectator,* 10 April 2003, 1.

to Israel." Within hours, the university was flooded with calls from angry alumni, uneasy parents, and concerned citizens.

Al-Arian was placed on paid leave pending an investigation of concerns relating to his safety and that of others. The paid leave turned into a suspension (still with pay) when, in December, the administration and the board of trustees issued Al-Arian notice of intent to dismiss. He remained suspended throughout the 2001–02 academic year. During spring 2002, the AAUP conducted an investigation of the case, sending a committee to Tampa and issuing a preliminary report.

As the 2002–03 academic year began, with Al-Arian still suspended, the administration's approach changed radically. The president announced the filing (initially in state court) of a suit seeking a declaration that the university could dismiss Al-Arian with legal impunity. The case was quickly removed to a federal court, where an obviously irritated district judge faulted the USF administration for seeking to "fast forward past the final step in the dispute-resolution process." She ruled that the matter did not belong in her courtroom, but rather in a grievance and arbitration procedure that had been spelled out by the collective bargaining agreement between the faculty and the institution. The administration, however, continued to invoke the unsettled conditions that Al Arian's visibility had created on campus; the president once again cited "the actions [on Al-Arian's part] that have undermined the orderly and effective functioning of the university."

Early one morning in February 2003, federal officers arrested Al-Arian and several others on charges (reflected in a grand-jury indictment) that they had raised funds and provided material support for terrorist organizations. Less than a week later, the administration announced that it was dismissing Al-Arian from his faculty position, relying not only on the federal indictment but also on related charges that the grand jury had not cited. The parties agreed to postpone academic proceedings on the dismissal hearing until the criminal charges against Al-Arian were resolved. There the matter remains.

The Al-Arian case is deeply disturbing. The administration's declaration of its intent to dismiss a tenured professor invoked institutional interests no more substantial than worried parents, anxious students, and alumni allegedly reluctant to support their alma mater so long as it harbored such a controversial person on its faculty. The administration also cited Al Arian's appearance on *The O'Reilly Factor.*

Al-Arian's dismissal in February 2003 raised an interesting question: to what extent can an administration change its grounds for dismissal by relying at a later stage on allegations (and evidence) it had not known and that came to light (or at least became public) long after the administration stated its intent to dismiss? The Al-Arian case promised from the outset to pose the most substantial test of academic freedom in this time of crisis, and nothing in later events has lessened its troublesome character.[65]

As noted above, Al-Arian was a full-time tenured faculty member. At least two subsequent developments have involved adjunct instructors. Mohamed Yousry, a doctoral student at New York University, had been an adjunct instructor since 1995 at York College, City University of New York, where his performance had been unblemished. CUNY's central administration suspended him from his teaching position in April 2002, upon his being arrested (although not incarcerated) on charges of alleged participation in a terrorist conspiracy.[66] His alleged participation related to his conduct while serving as a translator for a convicted leader of the Islamic Jihad movement and the incarcerated man's attorney.

Not until August 2002, after he had prepared teaching materials for the fall semester courses that were about to begin, was he told that he would not be teaching that term. Yousry's status led the Professional Staff Congress, the collective bargaining agent representing faculty in the CUNY system, to file a grievance, which is still pending. In addition, the national AAUP office has authorized an investigation into the apparent breach of the adjunct faculty member's rights.

The second incident involved Mohammed Salah, a part-time lecturer in computer programming at one of the Chicago city colleges, who was dismissed after the institution learned that he had been convicted in Israel of providing funds to the Islamic group Hamas. More than a year earlier, federal officials had informed a public school system where Salah taught that he was permitted to hold a job in this country, although he could not solicit funds for any organization.

Other incidents worthy of mentioning include, for example, verified reports that a campus police officer at the University of Massachusetts–Amherst, working part time as a member of an FBI terrorism task force, helped a federal agent question an Iraqi-born economics professor. The American Civil Liberties Union (ACLU) has sought, through Freedom of Information Act requests, further information about the incident and has demanded an accounting by the FBI. At Florida Gulf Coast Community College, librarians were told by their superior not to wear while on duty a sticker reading "I'm proud to be an American" because of fears that foreign students might be offended. After the state ACLU chapter protested the ban, the college's library director apologized for

65. For the AAUP's final report on this case, see "Academic Freedom and Tenure: The University of South Florida," *Academe: Bulletin of the AAUP* (May–June 2003): 59–73. Delegates to the Association's June 2003 annual meeting voted to condemn the USF administration for its "grave departures" from AAUP-supported standards of academic due process.

66. In July 2003, a federal court dismissed the charge of abetting terrorism but let stand the charge of attempting to defraud the United States.

what she conceded to be a "bad decision" that she promptly reversed.[67]

Policy and Curricular Issues

Some changes to institutional policies have been introduced that may jeopardize academic freedom and that may, at least to some degree, reflect current national security concerns. For example, several universities have expanded the practice of running criminal background checks on prospective faculty. After a vigorous faculty protest at the University of Texas–Austin, a proposed background check policy was narrowed to include only "security-sensitive positions," senior administrative posts, positions involving caring for children or treating patients, and positions involving access to pharmaceuticals and other controlled substances.[68]

Another type of policy skirmish occurred in spring 2003 at Irvine (California) Valley College. The college's academic vice president sent to deans and department chairs a warning that faculty members should not discuss the war in Iraq "unless it can be demonstrated, to the satisfaction of this office, that such discussions are directly related to the approved instructional requirements and materials associated with those classes." When faculty members criticized the directive, the college's chief academic officer insisted that he had no desire to "ban discussions surrounding the war [but] to define the proper context for such discussions."[69]

In principle, the call for relevance is hardly novel; indeed, the AAUP's most basic statement on academic freedom has long declared that professors "should be careful not to introduce into their teaching controversial matter that has no relation to their subject."[70] The concern at Irvine Valley College had to do with fear that the academic vice president's decree might well chill discussion of the Iraq war even in courses to which it was arguably germane. But presenting material relevant to the subject of a course does not preclude exploring arguments or analyses that challenge deeply held beliefs and that are likely to provoke strong reactions.

Beyond personnel situations and policy changes that directly affect faculty, challenges to campus curricula and specially planned events deserve mention. The most notable curricular challenge has been the well-publicized conflict over a summer 2002 reading assignment for incoming students at the University of North Carolina at Chapel Hill. Some critics challenged the recommended book, *Approaching the Qur'an: The Early Revelations,* by Michael A. Sells, as overly sympathetic to Islam at a time still close to the events of September 11. Indeed, a lawsuit was filed in federal court by the American Family Association Center for Law and Policy to force the university to abandon the assignment or choose a different book. Chapel Hill and University of North Carolina system officials stood their ground, however, and kept the assignment, although they made it clear that any student was free to choose an alternate text. The district court dismissed the suit, and the court of appeals affirmed the dismissal, finding no actionable claim.

The issue, however, lingered. At a meeting during the controversy, the UNC system's board of governors declined to adopt a fairly innocuous resolution declaring its support for academic freedom in the context of faculty-selected reading assignments. (At its meeting the next month, the board did affirm its support for academic freedom.) In August 2002, the lower house of the state legislature attached to the university's appropriations bill a requirement—clearly intended as a form of punishment—that if any religion were to be studied at Chapel Hill, equal time must be given to the study of "all other known religions."[71] The North Carolina senate rejected the amendment, and the would-be sanction was removed before final approval of the state budget, which occurred well after the summer reading program was completed.

Chapel Hill was the site of another controversy only weeks after the summer reading assignment conflict cooled down. The same group that had sued to ban the reading assignment protested an Islamic Awareness Week and a conference that would feature several controversial, mainly pro-Palestinian, speakers. The group filed yet another lawsuit, claiming that the university was seeking to advocate or endorse Islam and asking that the conference be barred. Again, the UNC administration stood firm, the conference went on as scheduled, and the lawsuit was dismissed.

A similar dispute had occurred a few weeks earlier at the University of Michigan. A list of controversial speakers, including Sami Al-Arian, had been announced in plans for a mid-October conference on Middle East tensions. A pro-Israeli student group initially protested the conference, calling for its cancellation, and then filed suit in state court seeking to prevent its occurrence. Like their counterparts at Chapel Hill, university attorneys and administrators in Ann Arbor firmly defended the holding of such an event on campus. The conference went on as scheduled, with generally peaceful protest, and the lawsuit was dismissed.

At the State University of New York at New Paltz, the administration took a different approach. Off-campus groups

67. John Vaughn, "University Gets a Patriotic Lesson," *Tampa Tribune,* 29 September 2001.
68. Sharon Jayson, "UT System Revises Employee Policy," *Austin-American Statesman,* 27 November 2002, B6.
69. Kubeshini Naicker, "College Moves to Quell Flap Over War Talk," *Orange County Register,* 3 April 2002, 1.
70. 1940 *Statement of Principles on Academic Freedom and Tenure,* in American Association of University Professors, *Policy Documents & Reports,* 9th ed. (Washington, D.C.: AAUP, 2001): 3.
71. "N.C. Lawmakers Condemn University Reading Assignment," *Associated Press,* 8 August 2002.

protested that a panel for a conference sponsored by the women's studies program would be unbalanced in its criticism of Israel. The administration responded by denying funds for the conference on grounds that supporting it would not serve the "best interests of the university."

The same outcome, the cancellation of a scheduled conference on a controversial subject, occurred at Rutgers University. New Jersey Solidarity–Rutgers Chapters, a registered student organization, had received permission to hold a conference from October 10 through 12, 2003, on the university campus entitled, "Third National Student Conference on the Palestinian Solidarity Movement." Pro-Israeli groups and state politicians objected and urged the university administration to withdraw its permission. The administration initially stood by its decision, but later announced that the student group, because it had not submitted requested information and material about the conference, could not use the university's facilities. President Richard L. McCormick affirmed the university's commitment to free speech, and stated that the university had made "no judgment on the content of the event or the organization's position."[72] The student group was informed that it could reapply to host the event at a later date. Many, however, saw in the administration's turnabout a yielding to political pressure.

Visiting Speakers

Invitations by campus groups to outside speakers often lead to intense community response, even expressions of outrage. The AAUP's position has long been that institutions of higher learning should be free to invite or not invite whomever they wish. Once an invitation has been extended, however, its withdrawal because of public displeasure with the speaker's status or views is inconsistent with the belief that a university is a place where all views—even the morally repugnant—can be heard and discussed.

Visiting speakers have been targets of intense opposition on a number of campuses. The University of Colorado at Boulder and Colorado College had invited to their campuses Palestinian spokesperson Hanan Ashrawi. Several state legislators and even the state's governor criticized the invitations, and one lawmaker declared that Ashrawi's appearance in the state would be "a slap in the face to all who have died and suffered as a result of 9/11." Both institutions stood firm, defending their choice of speaker and refusing to withdraw or modify the invitations, and the scheduled events occurred without incident.[73]

Harvard University wavered about an invitation to Irish poet Tom Paulin after some faculty members learned about his publicized views that "Brooklyn-born Jews" who had settled in the West Bank "should be shot dead," since he saw them as "Nazis, racists" for whom he felt "nothing but hatred." Harvard's president, Lawrence Summers, correctly insisted that the issue should be resolved at the departmental level, despite misgivings that he had apparently shared earlier. The English department restored the temporarily lapsed invitation, and plans are being made for a visit during the 2003–04 academic year.[74]

Less happy was the outcome of a similar dispute at the College of the Holy Cross in Worcester, Massachusetts. The Reverend Michael Prior, a prominent and controversial British cleric, was scheduled to speak there in November 2002 on the subject of Zionism and Christianity. He had already spoken at Harvard and Boston Universities, the University of Notre Dame, and several small church-related colleges and divinity schools. But when Holy Cross faculty members learned of his widely publicized and openly anti-Semitic views, they brought pressure on the sponsors of his lecture, who withdrew the invitation. No effort seems to have been made to reinstate the offer, as in the Paulin case.

In some ways the most troubling incident was the disruption in May 2003 of a *New York Times* reporter's commencement speech. Rockford College in Illinois had originally invited the state's new governor to address the college's graduates, but he was forced to withdraw in March. A student-faculty committee then chose Chris Hedges, a winner of the Pulitzer Prize, as a substitute. The author of many dispatches from the Middle East, Hedges was known to oppose the war in Iraq.

Early in the speech, some of the students turned their backs on Hedges, but he continued. When he declared that the United States was an "occupying force rather than a liberating one" in Iraq, the protest escalated, as some audience members began chanting "God Bless America," eventually drowning out the speaker. The college issued a formal statement of regret and apology, noting that the disruption had not come from students, but from some of the graduates' families and friends.[75]

A few days after the Rockford College incident, television talk-show host Phil Donahue managed to finish his commencement address at North Carolina State University, despite boos, catcalls, and the visible departure of some graduates.

Regarding the reception given to visiting scholars from abroad, several have been treated shamefully solely because of their nationalities or their perceived views. Mohamed Hassan Mohamed, a native of Sudan who is now a Canadian citizen, was detained for nine hours at the U.S. border in September 2002, en route from Toronto to teach his weekly class at the

72. Rutgers University, news release, September 12, 2003 <http://ur.rutgers.edu/medrel/viewarticle.html.articleID=3439>.
73. Kieran Nicholson, "At CU, Arab Activist Urges Free Palestine," *Denver Post,* 15 September 2002, B5.
74. Patrick Healy, "In Shift, Harvard Reinvites Controversial Poet," *Boston Globe,* 21 November 2002, A1.
75. Elizabeth Cranford and Megan Rooney, "Speechless," *Chronicle of Higher Education,* 6 June 2003, A8.

State University of New York at Fredonia. He was not allowed to enter the United States until he signed a declaration that he was a Sudanese national and agreed to be fingerprinted and registered. After complying with these demands, he was deposited on the Canadian side of the bridge in the middle of the night and prevented from entering the United States. Two weeks later, after vigorous protest by the United University Professions, the faculty union in the SUNY system, and the Canadian Association of University Teachers, Mohamed was allowed entry to the United States. He then resumed his teaching at Fredonia, to the great relief of both his U.S. and Canadian colleagues.

An even more celebrated case involved Canadian communications engineer Maher Arar, who was detained by U.S. authorities during a stopover in New York en route to Montreal from Tunisia, after which he was summarily extradited to Jordan and then to his native Syria because of his alleged ties to terrorists. The Canadian foreign affairs minister protested to the U.S. State Department, which gave assurance that henceforth "the place of birth of visitors would not be an automatic trigger for registration."[76] The Canadian Association of University Teachers continues to be concerned, however, because the legal provisions applied in both the Mohamed and Arar cases remain in force. The association has urged vigilance on the part of ranking officials in Ottawa.

One other recent and notable incident involved a visitor from Cuba. Carlos Alzugaray Treto, an expert on U.S.-Cuban relations, has been a popular and frequent visitor to U.S. universities, including Harvard and Johns Hopkins. Although he was scheduled to address the International Congress of the Latin American Studies Association in Dallas in March 2003, he was denied a visa by American authorities, along with more than a third of his fellow Cubans who had registered for the conference.

No more than half the Cuban delegation ultimately received visas after a protest that included several U.S. senators and other members of Congress. The *Chronicle of Higher Education* reported in April 2003 that "Mr. Alzugaray is one of thousands of foreign scholars whose trips to institutions in the United States have been canceled or delayed weeks or months since the federal government introduced a series of measures tightening visa procedures." In addition to attending the conference in Dallas, Alzugaray had been scheduled to visit several campuses in spring 2003. A Miami University geographer who had planned to have the Cuban scholar as a weeklong visitor on his campus lamented the visa denial, calling it a "deeply disturbing sign of the many impacts of the 'war on terror.'"[77]

76. Peter Chevey, "Syria to Charge Ottawa Man," *The Globe and Mail,* 29 April 2002. After a year, Syria released Arar, and he is back in Canada.
77. Burton Bollag, "A Cuban Scholar Shut Out," *Chronicle of Higher Education,* 11 April 2003, A16.

VI. Cautions

Before offering recommendations, we note three conclusions of a cautionary nature. First, this report is necessarily a preliminary assessment of conditions that have changed rapidly since September 11, 2001, and that surely will continue to change. The forces that affect academic freedom in times of crises are hardly static. Indeed, important developments have occurred between the committee's most recent meeting in May 2003 and the drafting of this report. Moreover, even if no further terrorist attacks occur within the United States, a return to conditions as they existed before September 11 seems unlikely. We will thus continue to assess conditions for academic freedom and do our best to keep our colleagues fully informed.

The second caution, easily overlooked but no less vital to a sound perspective on these issues, is that some of the measures and practices that directly threaten academic freedom today substantially predate the events of September 11 and thus cannot be traced to the nation's response to the attack on the World Trade Center and the Pentagon. For example, the FBI's "Carnivore" program, which empowers federal law-enforcement agents to garner sensitive information by attaching data-gathering and scanning devices to computer servers and networks, was well on its way to implementation before September 11.

Similarly, Congress enacted the federal statute that makes it a crime to offer undefined "material support" to terrorist organizations not in 2002, but in 1996. This ominous statute underlies the most recent and potentially troubling federal prosecutions, including that of Sami Al-Arian. In addition, stringent controls on the export of encryption software were put in place during the 1990s. Business groups and civil libertarians, in a rare alliance, repeatedly but unsuccessfully challenged these controls. They yielded only to the judicial process. On five occasions, federal courts have held the controls to be in violation of the First Amendment.

The third caution is that we need to be sensitive to the risk of self-inflicted wounds. Soon after the intrusive business-records provision of the USA Patriot Act took effect, a trusted and respected professional organization advised its members that anyone receiving a subpoena or warrant for such records could not even consult the university attorney or general counsel. The law does forbid any "disclosure" of a demand for records, but it cannot plausibly be read to foreclose seeking legal guidance. The erroneous advice was retracted before any harm could be done.

In a similar vein, Donald Kennedy, the editor of *Science* and former president of Stanford University, noted in an editorial that institutional responses to ambiguities in the regulations that control the exporting of sensitive materials "can reach silly extremes. . . . Editors of some journals have been advised by attorneys that under current interpretations . . . they may receive manuscripts from banned countries but may not supply editorial advice or guidance because that would constitute

'providing a service.'" Such a ruling, Kennedy warned, "is simply bad advice."[78]

In fall 2002, the administration at the University of California, San Diego, inflicted a different type of wound when it told a radical student group that it must shut down its Web site because the site contained a link to an organization in Colombia that was on the State Department's list of terrorist organizations. The repercussions of this edict soon reverberated around the country. Facing rapidly mounting protest and having given the matter further consideration, UCSD's vice chancellor for student affairs soon backed down and apologized for having overreacted.

These examples and others caution us against overreaction and against assuming that the new measures and policies discussed in this report forbid more than they actually do. Nonetheless, sufficient proscriptions are already in place to justify grave concerns and deep apprehension.

VII. Recommendations

In this concluding section, we offer guidance to our faculty, administrative, and association colleagues, first at the national level and then at the campus level.

National Level

To our faculty colleagues, and to organizations that speak for the academic community at the national level, we offer these specific recommendations.

1. First and foremost, we must acknowledge that the threat of terrorism is real, and that new security measures are necessary to deal with this threat.

2. We should, however, pursue every opportunity to remind our friends, families, neighbors, and colleagues outside the university community of the vital and durable values of academic freedom and free inquiry. We should explain that basic precepts of academic freedom are not "negotiable," citing specific examples of society's failure adequately to protect those values during the McCarthy era.

3. Recognizing the extent of shared concerns and common interests, we should collaborate as fully as possible with those national higher education groups that may formally represent the views of presidents and chancellors, but that have in recent months forcefully advanced the interests of the entire academic community.

4. We should welcome and develop opportunities for collaboration with the academic disciplinary organizations and learned societies that have a major mission to preserve the flow of scholarly communications within the domestic and international academic communities. Such collaboration might include making common cause in litigation, such as the filing of joint amicus briefs (a long-standing AAUP practice) to bring to the courts constitutional challenges to the gravest and deepest threats to academic and institutional freedoms.

5. We should actively support measures in Congress and elsewhere (such as the recently introduced Freedom to Read Protection Act) that would relieve or reduce specific burdens upon, and threats to, academic freedom and free inquiry.

6. We should resist and oppose efforts to extend or expand current restrictions, at least until ample time has passed to assess measures now in place and determine areas in which those measures are inadequate to protect national security.

7. We should urge the exercise of far more vigilant and effective congressional oversight of the actions of federal agencies that may impair academic freedom and free inquiry, in the belief that such oversight is an essential ingredient of the creation and delegation of agency powers such as those conferred by the USA Patriot Act.

8. We should resist or seek to repeal efforts to regulate unduly, or to make secret, the results of lawful research projects under novel uses of the "sensitive but unclassified" rubric.

9. We should seek to return the status of legally classified research as nearly as possible to what it was prior to September 11, recognizing that in specific and newly sensitive research areas special review and approval procedures designed and implemented by the academic community may be warranted, at least during current exigent times.

10. We should insist upon fair procedures for noncitizens who seek visas or other approvals to study, teach, or collaborate with researchers in the United States, and we should pursue special efforts to make such visitors feel welcome on U.S. college and university campuses. Specifically, we should continue to advocate the clarification and fair implementation of programs, such as SEVIS, that have been approved to monitor students and scholars from other nations. The effective implementation of such programs is especially important for the advancement of knowledge in scientific fields, which continue to benefit from and depend on the skills and insights of noncitizens of the United States.

11. We should expand efforts to apprise both the academic community and the public of potential new concerns about threats to academic freedom and free inquiry by marshalling contacts with the media, including specialized educational media. AAUP state conferences, chapters, and all faculty unions, with their links to statewide media and state political offices, are particularly well suited to assume such a role, as well as to monitor state antiterrorist initiatives.

Campus Level

To our colleagues at the campus level, however their collective views may best be expressed, we offer these specific recommendations.

1. The faculty should undertake a systematic review of institutional policies on academic freedom and free expression to

78. "Balancing Terror and Freedom," *Science* (13 December 2002): 2091.

ensure that the policies contain adequate safeguards against political pressures from within and outside the institution. Specific attention should be given to the freedom to invite and hear controversial speakers, to freedom of political utterance on and off the campus, and to freedom of teaching. Reference to AAUP policies and reports, which have withstood the test of earlier challenges, would be appropriate and beneficial. These policies make clear that the freedom to invite to campus those who hold varied views should not be constrained by any notion of "balance"—that any view, even the most repugnant, should be heard. On freedom of teaching, institutional policy should recognize that as long as an instructor has observed professional standards of care in drawing conclusions on a subject and has treated students with respect, he or she is free to engage in passionate advocacy no less than in dispassionate dissection.

2. It is essential that, with full and meaningful faculty participation, institutional policies be established to protect academic freedom against governmental constraints and threats of the type this report has described. These policies would address such vital issues as acceptance of classified research grants and contracts, access to personal computer files, and sharing of information with external agencies about library and student records. Where pertinent policies already exist, they should be reviewed and refined, with faculty governance bodies playing a central role in that review process, to ensure the adequacy and efficacy of the policies in addressing current threats to academic freedom. The existence (or absence) of such policies should be widely publicized at each institution.

3. The office or person responsible for maintaining and enforcing such policies should be clearly identified within the institutional structure, making certain that adequate accountability exists to ensure the highest level of responsibility for actions (or omissions) that may imperil academic freedom.

4. Faculty organizations bear a responsibility for establishing and maintaining regular contact with the offices and individuals charged with interpreting and applying relevant policies; those organizations should also keep their colleagues and the campus community well informed about the stewardship of vital faculty, staff, and student interests.

5. Recognizing the special importance of potentially sensitive information being turned over to government hands, we believe that it is essential to know what information is collected (by the college or university itself and by external agencies) about members of the campus community, as well as by whom and for what purposes. It is also critical to guard against the misuse of such information for unauthorized, potentially damaging, purposes.

6. It may be especially valuable in perilous times for faculty to establish substantially closer ties with several campus offices with which they may be unfamiliar unless an urgent personal need takes them there—the offices of the dean of students or the chief student personnel administrator, the director of international student affairs, the campus police, and the university legal or general counsel. These offices are likely to have heightened responsibilities in tense times and may be helpful in anticipating potential trouble spots. Moreover, in the performance of their regular functions, they may assist in reducing potential risks to academic freedom.

7. Where an administration or a governing board has firmly defended academic freedom against external threats, faculty commendation and support would be not only welcome within the institution, but also highly visible beyond the campus. Recent examples of such leadership occurred, for example, in the university systems of North Carolina and Texas, on the CUNY board, and in Columbia University's administration.

8. Faculty, faculty unions, and other faculty organizations should use the mechanisms available to them, including all-campus programs, teach-ins, and campus print and broadcast media, to inform the entire university community of faculty concerns about national security measures and the effect of these measures on academic freedom and free inquiry of faculty, staff, and students. There must also be resistance to pressures from individuals and groups, on and off the campus, who seek to bar speakers whose views they oppose, to ban events for purposes they loathe, or to punish or silence faculty, students, and staff whose opinions they cannot abide.

Special Committee on Academic Freedom and National Security in a Time of Crisis

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Appendix A

The AAUP's Special Committee on Academic Freedom and National Security in a Time of Crisis met on November 10, 2002, and adopted a mission statement laying out the tasks before it.

The events of September 11, 2001, may have profound consequences for academic freedom. Some of these consequences have already been experienced by current and prospective faculty and students, by colleges and universities, and by society at large. The committee recognizes that our national response must protect against threats to security, while at the same time protecting the right to unfettered speech and free inquiry on the nation's university campuses.

The special committee has identified the following areas of concern:

Adverse personnel actions and policies that directly affect the academic freedom of individual faculty members.

Government policies and institutional responses that affect faculty teaching, research and scholarly communication, and international collaboration among scholars, and thus may infringe on academic freedom.

Government policies and institutional policies that indirectly affect the academic freedom of faculty and students through restriction or denial of access to information important to inquiry and research or by the withdrawal, cancellation, or diminished availability of such information.

Government policies or pronouncements that could threaten academic freedom by impairing the climate within which university-based research occurs.

Institutional actions or policies that would impair the climate for academic freedom.

The committee is seeking information from a wide variety of sources. These include government agencies, higher education organizations, and disciplinary societies. The committee hopes to issue an initial report by early June. ✐