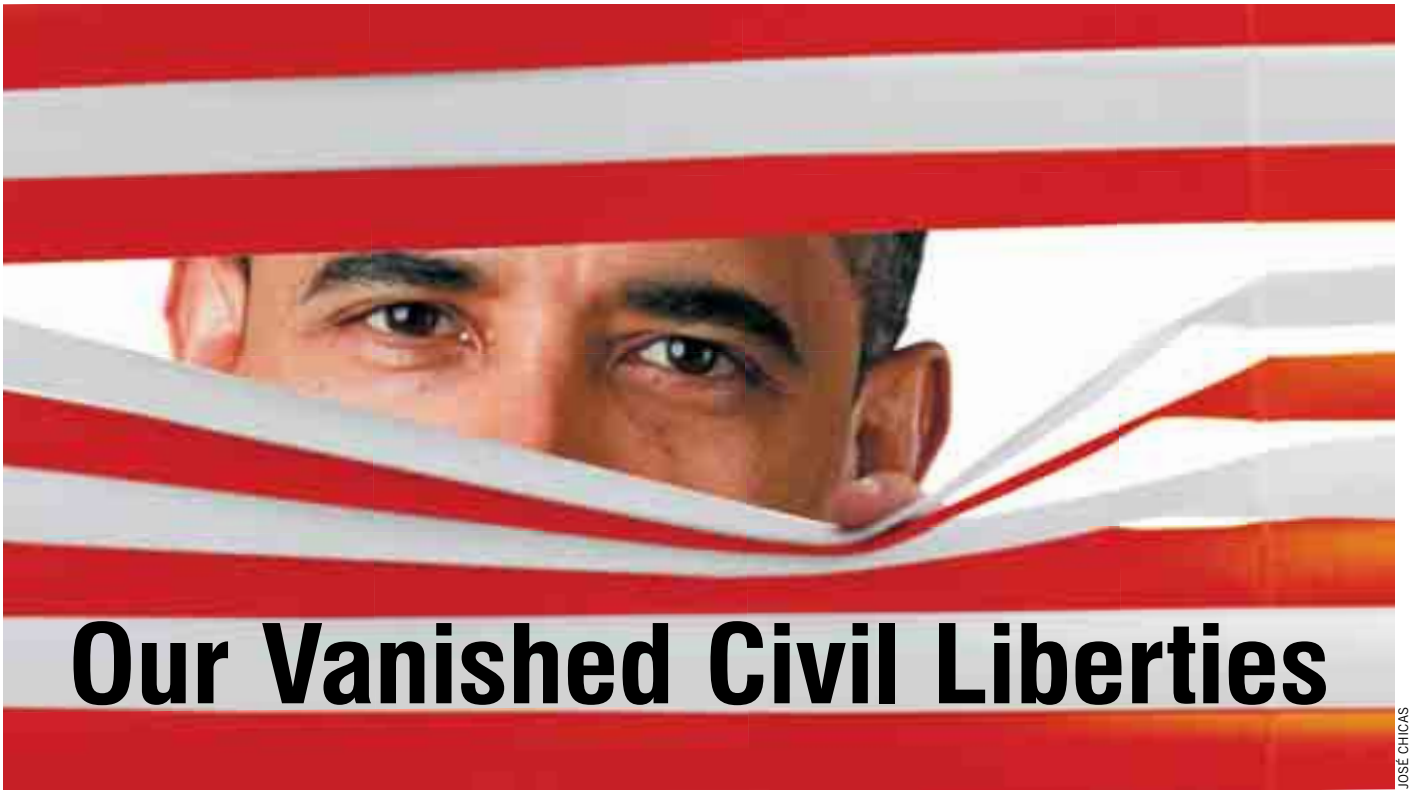

Our Vanished Civil Liberties

JOSÉ CHICAS

Obama came too soon in the historical cycle to be the reformer his supporters believed he'd be.

by DAVID K. SHIPLER

Caricatures created by politics never fit comfortably into the Oval Office. Eisenhower was less deferential to the military than he seemed likely to be, Kennedy was not at all beholden to the pope, George W. Bush was smarter than portrayed and Barack Obama has not led a charge from the left—least of all on behalf of the civil liberties that have eroded since September 11, 2001.

In pursuit of both terrorists and common criminals, Obama has perpetuated so many of the Bush administration's policies that even Republicans might take heart. Granted, he triggered an outcry on the right when he attempted to close the Guantánamo prison and try the accused 9/11 plotters in federal court, and he repudiated the Bush/Cheney torture policies by ordering interrogators to abide by the *Army Field Manual*. His moderately liberal judicial nominees, including two for the Supreme Court, have not won him points with the Federalist Society, which grooms young conservatives for the bench.

Otherwise, though, there has been little in his civil liberties record to bother nonlibertarian Republicans. Data collection on individuals has flourished without judicial oversight. People under no suspicion are still monitored clandestinely with Bush-era legal tools. State secrecy is invoked to thwart lawsuits by victims of government abuse. Leakers and whistleblowers are aggressively prosecuted, and federal agencies vigorously resist inquiries made under the Freedom of Information Act. Last spring the hard line against defendants' rights reached into certain criminal matters that have nothing to do with national security.

Affairs of state tend to drive most presidents toward the center on both foreign and domestic policy, no matter where on the political spectrum they begin, and especially so in the areas of intelligence and law enforcement. Institutional inertia doesn't allow for quick reversals, federal agencies' interests transcend administrations and the White House stands at a confluence of perpetual crises. So presidents are hardly inclined to give up their powers, even those they decried as candidates.

Obama is not an exception to the rule. If he were, he would have made good on his promises to rethink the Patriot Act, curb the use of administrative subpoenas known as national security letters and render government more accountable through transparency. He would have bolstered the rights of criminal defendants, pressed for Internet privacy and supported a robust shield law to protect reporters' confidential sources instead of issuing subpoenas, as his Justice Department has done to James Risen of the *New York Times*. In short, Obama would have given conservatives, rather than liberals, real reason for distress.

But the country remains stuck in the post-traumatic stress from 9/11, notwithstanding the killing of Osama bin Laden. The specter of terrorism haunts us still, the FBI keeps uncovering little plots and deadly aspirations, and officials are braced for some larger assault. Obama came too soon in the historical cycle to be the reformer on civil liberties that many who rallied for him in 2008 expected. In the past, it has taken time for the country to correct its deviations from constitutional principles, and it did so only when security fears abated: after the virtual war with France that generated the Alien and Sedition Acts under John Adams; after the Civil War; after World Wars I and II; after

cold war tensions eased. Nearly a decade after 9/11, Americans have not yet relaxed, and Obama has not yet led us to reflect on what we have done to ourselves.

The question is whether that will occur before the invasive, invisible new powers of surveillance become so routine and convenient that nobody wants them to end. "There is a very real danger," the American Civil Liberties Union warned last year, "that the Obama administration will enshrine permanently within the law policies and practices that were widely considered extreme and unlawful during the Bush administration. There is a real danger, in other words, that the Obama administration will preside over the creation of a 'new normal.'" So, while a reformer may come too soon, at what point will he come too late?

It is already getting late. Counterterrorism methods are spilling over into criminal investigations. Law enforcement, beguiled by the new authority to watch and search, uses the tools more broadly than intended. With advancing technology, shortcuts across constitutional protections are tempting police at every level to scoop up troves of data on the guilty and the innocent alike. Cellphone tracking of users' locations is being done by some local police departments without warrants, according to the ACLU. "Police in Michigan sought information about every cell phone near the site of a planned labor protest," the ACLU reported in August.

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Yet the Obama administration is seeking more authority. The FBI is giving agents more latitude to collect information on people who are under no suspicion by following them for longer periods, mining commercial and law enforcement databases, and rummaging through their trash for information that could be used to pressure them to become informants. Despite these intrusions, the Senate unanimously extended the term of FBI director Robert Mueller for another two years, at Obama's request.

The administration has also petitioned the Supreme Court for the power to avoid the Fourth Amendment's warrant requirement when secretly installing GPS tracking devices on vehicles, so that an investigator may do it on a whim without a judge's signature—that is, without a sworn affidavit that there is probable cause to believe that evidence of a crime will be discovered. Lower courts have given mixed rulings on whether this is constitutional, so the Supreme Court will hear the case late this year.

The administration argues that a GPS is just a high-tech method of tailing a suspect, who has no expectation of privacy on public roads. The US Court of Appeals for the Washington, DC, Circuit found otherwise, noting that the sheer quantity of information creates a picture so complete that privacy is at issue, even if each movement is in the public domain. "A person who knows all of another's travels," the court observed, "can deduce whether he is a weekly churchgoer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts." The government evidently wants to know all such facts.

Certain other constitutional principles have not fared well under Obama. In April the Sixth Amendment right to confront evidence and witnesses was left impaired when the Justice Department missed an opportunity to level the playing field in the criminal justice system. The department opposed a rule change that would have clarified prosecutors' obligations to provide defense attorneys with information that indicated innocence or impeached the credibility of government witnesses. Both requirements, critical to a trial's truth-finding mission, have long been imposed under Supreme Court decisions, in *Brady v. Maryland* (1963) and *Giglio v. United States* (1972), but have never been codified in the Federal Rules of Criminal Procedure.

As a result, subtle misconduct has been endemic. Some prosecutors handicap the defense by concealing information or delaying disclosure, leading in recent years to spectacular miscarriages of justice. The first terrorist conviction after 9/11—of the so-called Detroit sleeper cell—was thrown out because the prosecution withheld multiple pieces of evidence, including a cellmate's assertion that a government witness had bragged about fabricating his testimony. When exculpatory evidence was discovered after the corruption trial of the late Senator Ted Stevens, Attorney General Eric Holder moved to vacate the conviction but then opposed the broader solution suggested by the trial judge, who asked the rules committee of the federal Judicial Conference to spell out a clear procedure. The committee includes judges, defense attorneys, a law professor and a Justice Department representative.

A rule change would presumably have specified what evidence had to be revealed and when. But the Justice Department countered—as it had under previous presidents—that internal guidelines and training are preferable to a binding rule. Witnesses might be endangered if identified too soon, the government said, and extensive litigation would ensue. This swayed a bare majority, according to a member of the committee, which voted six to five to do nothing.

The Obama administration is not zealous or monolithic. This White House and Justice Department harbor no powerful attorneys rationalizing "enhanced interrogation" or military arrests of Americans inside the country. But they frequently acquiesce to the political right, producing policy contradictions in some areas of the law that may, in the long run, damage constitutional protections.

Take sentencing for narcotics. On the one hand, the administration supported a sentence reduction for crack possession. Congress went along in July 2010 by shrinking the illogical

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disparity between penalties for crack versus powder cocaine (from 100-to-1 to 18-to-1). The heavier crack sentences have had a dramatic racial impact, for crack use has been more prevalent among blacks, while whites have been inclined toward powder. For years the legal establishment had pushed to eliminate the disparity entirely. But then, after Congress reduced it, the Obama Justice Department argued in court that anyone who committed the crime before August 2010 should receive the higher sentences. Some judges were flabbergasted and registered strong objections. The administration later agreed to limited retroactivity, recommending reduced sentences for some offenders—but not those who possessed weapons during their crime or who had serious criminal records.

The Fifth Amendment, in the form of the Miranda warning against self-incrimination, has also come under pressure from the administration. In response to Republican complaints that certain terrorism suspects were advised of their rights during interrogation, officials have sought to weaken the protection in terrorism cases. After considering legislation, as some Congressional Republicans have advocated, the administration settled for a less troublesome memo by the FBI. It advises agents to delay reading terrorism suspects their rights—not only to ask those in custody "public safety questions," as the Supreme Court has allowed, but also "to collect valuable and timely intelligence not related to any immediate threat." Such unwarned statements would presumably be inadmissible in court.

Similarly, the administration has moved in two directions on the national security letter (NSL), which can now be issued on the slightest pretext by midlevel FBI officials, without judicial oversight, to demand records from libraries, Internet providers, financial institutions, telephone companies and others. Each comes with a gag order warning the recipient to say nothing about it except to an attorney.

On the one hand, Obama's Justice Department chose not to appeal an important First Amendment ruling by the Second Circuit Court of Appeals that gives a citizen or a company more leverage to challenge a gag order. Previously, you could do so only once a year, and a judge had to defer to the government's claim that disclosure would endanger national security, diplomatic relations, an ongoing investigation or personal safety. The appeals court shifted the burden to the government to justify a gag order when a recipient objects. That opinion, which the Justice Department has applied nationwide, was codified in a bill approved last spring by the Senate Judiciary Committee. (The measure died after the Democratic leadership failed to bring it to the floor. That left the existing law's tougher approach intact everywhere except in the Second Circuit, meaning that a future administration—or the current one, should it change the policy—could choose to employ the stricter provisions elsewhere in the country. And it could appeal any adverse ruling to the Supreme Court.)

On the other hand, despite its flexibility on the gag order, the administration has made extensive use of national security letters, issuing some 50,000 annually, in part to compile lists of people's e-mail and phone contacts as a way of assembling mosaics of associations. The NSLs cannot obtain the contents of e-mails

and phone conversations; those still require warrants. But last year officials proposed an expansion so that NSLs could include Internet activity under an undefined category called "electronic communication transactional records." This might include websites visited, search terms and online purchases such as books, so it has met resistance in Congress and is being reconsidered.

The Patriot Act is ripe for reform, but Obama shows no taste for revision, only renewal. He endorsed Congress's move last spring to extend several expiring provisions until 2015 without even the minor improvements proposed by Democrats on the Senate Judiciary Committee. Hastily passed and signed into law with little debate or opposition six weeks after 9/11, the Patriot Act weakens an array of privacy laws enacted after revelations in the mid-1970s that antiwar and civil rights activists and others had been spied upon by the FBI, the CIA, the IRS, the National Security Agency and military intelligence. An extensive report at the time by a committee headed by Senator Frank Church provoked Congress to regulate domestic intelligence-gathering—something that had not been tried before.

The new law, the Foreign Intelligence Surveillance Act of 1978 (FISA), established a secret court of federal judges to receive classified applications from the FBI and other agencies to bug homes and offices, wiretap phones and demand data on people believed to be agents of a foreign power. The subjects would never know they were targets and therefore could never contest the clandestine orders or rebut the secret conclusions. The Fourth Amendment's criteria for searches did not need to be observed: no probable cause, no warrant "particularly describing the place to be searched, and the persons or things to be seized."

This evasion of constitutional protections was conditional, however. The statute demanded that the "primary purpose" be intelligence collection, not criminal investigation, a limitation weakened more than two decades later by the Patriot Act: it changed the wording to "a significant purpose." That allowed agencies to gather broad categories of information when merely "relevant" to an investigation. The Patriot Act also added as permitted targets those thought to be associated with terrorist groups as well as foreign governments. These and other amendments opened the door to collecting evidence for criminal prosecution without observing the Fourth Amendment's rules.

Inside the United States, the secret FISA warrants have undoubtedly produced masses of information about citizens and foreigners alike, but inspectors general of various agencies have found little indication that the data have been very useful in unraveling terrorist plots. Rather, would-be terrorists have been undone almost entirely by informants, sting operations or their own bungling. A car bomb fizzled in Times Square, an underwear bomb fizzled in a plane approaching Detroit. Meanwhile, the watchers watch, the collectors collect and the analysts struggle against the overwhelming din of excessive information, trying to pick out the melody from the noise.

In August 2007, candidate Obama delivered a ringing denunciation of Bush's policies. The speech makes good reading. "No more national security letters to spy on citizens who are not suspected of a crime," he declared. "The separation of powers works. Our Constitution works.… This administration acts like violating civil liberties is the way to enhance our security. It is not. There are no shortcuts to protecting America." ■