Statement of Senator Edward M. Kennedy
On the Introduction of the Civil Liberties Restoration Act of 2004
June 16, 2004

It's a privilege to join my colleagues in introducing the Civil Liberties Restoration Act of 2004.

The attacks of September 11 changed this nation forever. Much has been done since then to combat the threat of terrorism and make America safer. But not every measure or policy adopted after 9/11 has been effective, legal, or fair. The strengthening of security has sometimes meant the weakening of civil liberties. Often, the Bush Administration has misused the fear of terrorism as an excuse to ignore basic rights in our society.

Immigrants, especially Arabs and Muslims, became targets as the Administration carried out roundups of individuals based on national origin and religion, rather than any specific assessment of danger. Abusive detention practices took place. Registration programs have made criminal suspects out of legal immigrants.

These changes were implemented without Congressional consultation or approval. They have swept much too broadly and eliminated necessary checks and balances that prevent abuse. They have squandered our limited resources and have been more successful in alienating immigrant communities than in apprehending terrorists. We cannot allow fear to trump and trample the values upon which our country was founded. Our nation can be both secure and free.

The Civil Liberties Restoration Act of 2004 will provide basic civil liberties protections, and restore balance and fairness to our laws in the treatment of immigrants. It will preserve fundamental rights without endangering national security. It will restore the confidence of immigrant communities, especially those unfairly targeted by recent and current policies.

It will place reasonable limitations on closed immigration hearings. On September 21, 2001, the Attorney General ordered immigration judges to close all hearings on individuals detained in the 9/11 investigation. In a highly critical report issued by the Inspector General of the Justice Department in April 2003 we learned that many were arrested as a result of "chance encounters or tenuous connections" to the investigation, rather than "any genuine indications of a possible connection with or possession of information about terrorist activity."

Nevertheless, over 600 immigration hearings were held in secret. Visitors, the press and even family members of the detainees were excluded. Consistent with the First Amendment, our legislation authorizes the closing of immigration hearings only when the government can demonstrate a compelling privacy or national security interest.

The bill will restore other due process protections weakened after 9/11. Before that, the INS was required to give notice to detained non-citizens within 24 hours of arrest, informing them of the charges against them. On September 20, 2001, Attorney General Ashcroft issued a regulation extending that period to 48 hours or "an additional reasonable period of time" in "emergency or other extraordinary circumstances."

This open-ended change led to serious abuses. As the Inspector General reported, some detainees were held for more than a month after their arrest, without being told of the charges against them. Often they were held in harsh and restrictive conditions and prevented from consulting with their attorneys.

Our legislation will require a charging document to be served within 48 hours of an arrest or detention. Non-citizens held for more than 48 hours would have to be brought before an immigration judge within 72 hours of their arrest or detention, with an exception for non-citizens who are certified by the Attorney General, based on reasonable grounds, as having engaged in espionage or a terrorist offense.

After 9/11, the Bush Administration also adopted policies that deny bond to many immigrants with no individual assessment of their danger or flight risk. Two examples of this policy were the "hold until cleared" policy criticized by the Inspector General's report, and the Attorney General's precedent decision declaring that all Haitians arriving by sea were a national security threat and must be detained.

Unilateral executive branch decisions mandating detention violate fundamental rights. Blanket detentions of persons who pose no flight risk or harm to the community waste valuable resources that should be used to apprehend criminals and terrorists.

Our legislation will require the Secretary of Homeland Security to provide all detainees with individual assessments to determine whether they poses a flight risk or a threat to public safety, except those in categories specifically designated by Congress as posing a special threat. If the individual is eligible for release, the Secretary must set a reasonable bond or other conditions to guarantee the person's appearance at future proceedings, and this decision would be subject to review by an immigration judge.

The authority of immigration judges was further weakened by an October 2001 regulation that authorizes the Attorney General to stay a decision by an immigration judge to release an individual if bond had originally been denied, or had been set at $10,000 or more. The current regulation goes too far. It allows the government's immigration attorneys to overrule a decision by an immigration judge that an individual does not pose a risk.

The bill puts reasonable limitations on this automatic stay authority. The Board of Immigration Appeals could stay the immigration judge's bond decision for a limited time, only when the government is likely to prevail in appealing that decision and there is a risk of irreparable harm in the absence of a stay.

In early 2002, Attorney General Ashcroft issued a series of “procedural reforms” purportedly designed to eliminate the backlog of cases in the Board of Immigration Appeals. Altering its practices in accordance with the new mandates, the Board has issued thousands of single-member decisions affirming without written opinions the decisions of the immigration judges. Before the changes took effect, 1 in 4 appeals was granted, now only 1 in 10 is granted. Instead of eliminating the backlog, however, the cases have shifted to the federal courts. The number of Board decisions being appealed to the federal courts has increased dramatically. The Ninth Circuit has received over 4,200 immigration appeals, more than four times the usual number.

These so-called reforms highlight the degree to which integrity and impartiality of the immigration courts have been compromised. To correct the problem, the bill establishes an independent regulatory agency within the Department of Justice to administer the immigration court system. Integrity would be restored by enabling Board Members and immigration judges to exercise independent judgment and discretion. The reforms will help ensure that individuals and families receive fair treatment in immigration decisions, which can have profound consequences for immigrants and refugees, such as permanent separation from loved ones, or deportation to countries where they may face persecution and even death.

The Act will also end the infamous National Security Entry-Exit Registration System – the NSEERS program which was launched by Attorney General Ashcroft in August 2002 and which required men from predominately Muslim or Arab countries to be fingerprinted, photographed, and interrogated, based on the absurd notion that terrorists would present themselves for registration and be caught.

As Vincent Cannistraro, former director of Counterterrorism Operations at the CIA, has said, policies like the NSEERS program caused fear and distrust and worked “against intelligence-gathering by law enforcement, particularly the FBI.” At a time when we needed vital intelligence information, members of these communities were unfairly stigmatized and discouraged from coming forward to help our law enforcement and counter-terrorism efforts.

According to Department of Homeland Security officials, no one registered under the NSEERS program was ever charged with terrorism. Last December, significant parts of the NSEERS program were suspended. Our bill will terminate it completely, and it will also close removal proceedings for certain individuals targeted under it.

A related issue is the exercise of prosecutorial discretion. More than 14,000 individuals who voluntarily complied with the NSEERS program were placed in removal proceedings for technical immigration violations, even though many of them had relief available to them or were in the process of applying for permanent residence. Immigration officers routinely refused to use their discretion not to arrest these individuals, or not to initiate removal proceedings against them, or not to release them

from detention. The result was a massive diversion of resources away from investigations, prosecutions, and removals of criminals and terrorists.

Our bill will codify an immigration memorandum which outlines the parameters for the responsible exercise of prosecutorial discretion. The legislation makes clear that such discretion is not an invitation to violate or ignore the law, but is intended to give the government the flexibility to maximize its allocation of resources. Exercise of such discretion is particularly appropriate in light of the complexity of the immigration laws, the harshness of the consequences of enforcement, and the importance of conserving limited enforcement resources so that they are available for use against individuals who threaten our safety and security.

Given the problems inherent in the NSEERS program, the government should reconsider all pending NSEERS cases and determine whether a favorable exercise of discretion is warranted. Family ties, humanitarian concerns, and eligibility for relief are positive factors that should be considered in assessing such cases.

Our bill also protects the integrity of the National Crime Information Center database. For decades, in maintaining the database, the Department of Justice was required to obey the Privacy Act, which requires each agency to maintain its records "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individuals in the determination." In March 2003, Attorney General Ashcroft issued a regulation stating that these requirements no longer applied to the NCIC database, and justified the exemption because "in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely and complete."

Our legislation requires the Attorney General to comply with the Privacy Act in maintaining the database. Circumventing this statutory obligation poses significant risks not only for individuals whose files may be part of this data system, but also for communities that rely on law enforcement to employ effective, reliable methods for protecting public safety.

This requirement is especially important today. The Attorney General announced last year that information on more than 400,000 persons with removal orders and an unknown number of alleged NSEERS violators would be included in the database. The error rate in immigration records has always been very high – a fact confirmed by numerous reports issued by the Inspector General. Requiring the Attorney General to comply with the Privacy Act will help prevent inaccurate and unreliable information from contaminating the database and harming individuals and communities.

The bill also protects privacy by ensuring that constitutional limitations apply to secret surveillance. The Patriot Act amended the Foreign Intelligence Service Act to permit surveillance or searches when a "significant purpose", not just the "primary purpose", of the surveillance or search is foreign intelligence. Under current procedures, when such evidence is brought before a court, it is nearly impossible for a

criminal defendant to contest its introduction, because the government's application for the search is kept secret. When such evidence is used in criminal cases, the court should disclose the application and related materials to the defendant, subject to the Classified Information Procedures Act, which offers a balanced and effective way to protect both national security information and the rights of defendants.

In addition, the legislation provides that when such information from electronic surveillance and other sources is introduced in a criminal case, disclosure of the surveillance application, order, or other materials is permitted under the procedures in the Classified Information Procedures Act.

Finally, the bill addresses the practice of data-mining. Through comprehensive data-mining, many records that people believe are private can be collected by computer, fed into a database and used by the government without their knowledge. Law enforcement must have the necessary means to protect our safety, but the use of data-mining technology should not be allowed to threaten privacy and civil liberties.

The legislation will require all federal agencies to report to Congress within 90 days and annually in future years on data-mining programs used to find patterns indicating terrorist or other criminal activity and the effect of these programs on civil liberties and privacy, so that Congress can exercise its oversight authority over federal agencies using this technology.

We know that we can protect our nation's security and still respect the basic rights of both citizens and immigrants. The Civil Liberties Restoration Act is a needed effort to end the abuse that has become all too common in the past three years, and Congress has a responsibility to end them. It has been said that our laws are the wise restraints that make us free. The restraints have been weakened in recent years, and we need to make them stronger.