

# A YEAR OF LOSS

Reexamining Civil Liberties since September 11



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# A Year in Law

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## Preface

Next week, the United States will mark the anniversary of the horrific events of September 11, 2001.

America has much to mourn. Individual families will mourn the loss of loved ones, and the country, as a national family, will mourn the tragic loss of life. The United States will also grieve another collective loss: the loss of invulnerability – or the idea that America was impervious to this kind of violence.

There is another loss to mourn, however – one that has happened less abruptly and less publicly, but no less profoundly. Since September 11, the United States has lost something essential and defining: some of the cherished principles on which the country is founded have been eroded or disregarded.

Unlike other losses from September 11, this loss did not happen all at once on a clear fall morning. A photograph or video camera cannot convey the damage. These changes have taken place slowly and incrementally, beneath the surface. What's needed is an x-ray – a way to show how the very bones of U.S. law, policy and practice have shifted.

This report explores these changes: the civic lessons – and civic losses – in America since September 11. Some of the changes were smart, right and inevitable. The country needed to recalibrate the balance between concerns about rights and the needs of public safety. The country was attacked, and the threat was – and is – real. The U.S. government is responsible for ensuring the country's security and must have the tools to do so. But other changes undermined fundamental tenets of our democracy, with no obvious relationship to increased security.

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How does a free society debate and decide these issues? The way this has been done to date is not sufficient. In the immediate aftermath of the attacks, government leaders passed laws and adopted an array of policies – swiftly, in the name of unity. Republicans and Democrats put aside differences in a show of common cause. There was a conscious and much-heralded decision to take politics and partisanship out of the debate.

Unfortunately, some of the most important changes have not been debated at all. And debate, in many ways, is what keeps democracies healthy. It ensures that all aspects of an issue are explored. It ensures public education and public participation.

Historically, one of the great strengths of the United States has been its tradition of open political debate and dissent, even within government. As we describe in this report, there have been several recent notable court decisions which have challenged some of these changes, as well as statements from an increasingly vigilant Congress questioning executive branch actions. Those voices reflect well on the American tradition of dissent. We seek with this report to encourage a more robust debate on these issues which are of such importance to the country and to the world.

**Michael Posner,  
Executive Director  
September 5, 2002**

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# Introduction

On the morning of September 11, men now believed to be members of the al Qaeda network forcibly took control of four commercial jetliners to attack the United States. Within minutes, 19 hijackers crashed two of those planes into the Twin Towers of the World Trade Center, one into the Pentagon, and a fourth into a field in Pennsylvania, killing more than 3,000 people.

In the days and weeks that followed, a wide range of new security measures were put in place in public and private venues throughout the country. Many of these changes were grounded in common sense. But other measures taken by the government violated traditional notions of liberty with no clear connection to increased safety. For example, as the search began for accomplices in the attacks, the Department of Justice swept up more than 1,000 immigrants from Middle Eastern and other Islamic countries, many of whom were subsequently held for months without formal charge or trial.

In the aftermath of the attacks, Americans began to question the country's readiness to confront dangers until then associated only with other countries. Deliberate lethal attacks against civilians – the subject of frequent news reports from abroad – assumed a new and devastating reality in America. The attacks prompted a widespread call for a reassessment of U.S. security needs at home and abroad. The threat of future attacks was, and continues to be, very real. In the face of these attacks, it quickly became clear that heightened security interests required a reassessment – and recalibration – of the balance between individual liberty and national security.

This report examines a wide range of actions taken by the U.S. government over the last 12 months in response to the September 11 attacks. These were extraordinary measures

taken at an extraordinary time. Historians will judge whether these measures were excessive at the moment they were taken. This is not our object. Rather in this report we submit each of these measures to strict scrutiny to assess whether they are now necessary and appropriate.

We start from the premise that the U.S. government, like any government, has the right – indeed the obligation – to protect its people from indiscriminate attacks against civilians. We also recognize that the threat posed by al Qaeda and other allied groups is grave. Given the open nature of U.S. society and its vast borders, the potential for future violent attacks against the United States must be considered to be extremely high.

With the continued possibility of additional attacks, many of the measures taken in the weeks and months after September 11 were sensible, necessary and driven by real need. For example, new priority was given to providing state-of-the-art computer technology to police and intelligence agencies, to enhancing coordination and communication among law enforcement agencies, and to substantially enhancing agency competence in foreign languages.

There were also new standards for security in public buildings and in transportation – including photo-identity cards for office workers, and higher educational and training standards and more rigorous supervision for security personnel. There was a series of efforts to prevent airplane hijacking, including legislation making all airport security personnel federal employees work in a unified system. The U.S. Postal Service introduced new procedures to safeguard its staff and the public from the threat of biological and chemical attacks through the mail. A series of new procedures were put in place by the Immigration and Naturalization Service (INS) aimed at gaining greater control

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over the admission of immigrants and visitors into the country, and tracking and monitoring those in the United States.

At the same time, as this report outlines, over the last year the U.S. government has taken a series of actions that have gradually eroded basic human rights protections in the United States, fundamental guarantees that have been central to the U.S. constitutional system for more than 200 years. Viewed separately, some of these changes may not seem extreme, especially when seen as a response to the September attacks. But when you connect the dots, a different picture emerges. The composite picture outlined by this report shows that too often the U.S. government's mode of operations since September 11 has been at odds with core American and international human rights principles. The basic civics lessons that will be taught in American junior high schools this fall describe a system that in important respects has been significantly eroded in the last 12 months:

- 4 **That there are three separate and independent branches of government – Executive, Judicial and Legislative – that check and balance each other.**
- 4 **That the U.S. government is an open one in which decisions are made in the public square.**
- 4 **That no one can be deprived of life, liberty or property without fundamental due process protections such as access to legal counsel and the right to a hearing before a judge.**
- 4 **That people have the right of privacy from unwarranted government intrusion into their private lives and their homes.**
- 4 **That America is a land of immigrants and that immigrants are “persons” under the Constitution, and are entitled to be treated fairly.**

Many of the changes to law and policy discussed in this report have not been informed by or infused with these core principles – some

have flatly contradicted them. It is not yet too late to restore these values.

Secrecy and lack of debate has been a particularly acute problem. As changes have been made, and concerns raised – by members of Congress across the political spectrum and by other mainstream voices – the Attorney General or other administration officials have all too often dismissed them as irrelevant, harmful to the war against terrorism or even disloyal.

We take just the opposite view. What is at stake is nothing less than the fundamental nature of U.S. society and whether we will retain what James Madison called the “Blessings of Liberty.”

Mindful as we are of the serious nature of the threats now confronting the United States, we believe that it is essential to address these security concerns in a manner consistent with fundamental principles of human rights. If the U.S. government fails to do so, we will have lost the most essential element of what we are fighting for. And with potentially little gain. There is no evidence to date that curtailing liberty or abandoning bedrock principles of democratic governance makes the United States safer.

Nor does it make the world safer – or more fair. As we also examine in this report, the U.S. government's actions in response to September 11 are being closely monitored in other countries. Some of the most draconian elements of what the U.S. government has been doing are increasingly being copied by others and used by repressive governments to justify human rights abuses against peaceful advocates of democratic values – to the detriment of human rights worldwide.

This report calls for a more vigorous national debate about the new calculus of liberty and security. Our hope is that it will spark renewed discussion – and commonsense adjustments.

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In some ways, that process is already beginning. As we outline in this report, several recent decisions by U.S. federal courts have begun to place important limitations on executive branch actions. In addition, the Justice Department recently brought indictments in federal court against individuals suspected of activities that threaten national security, rather than resorting to special military tribunals or prolonged detention without trial, reinforcing the utility of relying on the regular criminal justice system to try such cases. Coupled with mounting congressional concern and scrutiny, these developments suggest that a livelier, more constructive reexamination of these issues is beginning.

As the debate grows, we conclude that many of the extraordinary measures taken over the last 12 months now require repeal or substantial adjustments and refinements by the executive branch, Congress and the courts. Among the key questions that warrant greater public consideration are these:

- 4 How permanent are these changes? Will amendments to U.S. law and practice be repealed when the emergency abates, or will they become permanent features of our system? Who will decide this and using what standard? Will little-used amendments to the law that are a source of abuse be repealed?
- 4 Will the new Department of Homeland Security have strong internal oversight safeguards, including an office of internal affairs and a civil rights division? Will the Department of Justice develop internal safeguards to reflect the new powers it was given under the USA PATRIOT Act?
- 4 What is the appropriate role for Congress? Will it be able to faithfully and effectively discharge its oversight duties as they pertain to the Department of Homeland Security and the Department of Justice?
- 4 Will Congress take steps to ensure that the history of abuses under the Foreign Intelligence Surveillance Act is not repeated after its expansion? Will Congress examine the new FBI guidelines on domestic spying? Should government workers and other citizens be encouraged to report on their neighbors' activities? What is the future of Operation TIPS: the Terrorism Information and Prevention System?
- 4 What is the appropriate role for the federal courts? Should the federal courts oversee criminal trials of those suspected of endangering U.S. national security, and if so do they need new procedures or resources to do so? Should federal appellate courts have the authority to review decisions of military commissions? Should federal court jurisdiction extend to U.S. military bases?
- 4 What is the proper balance between secrecy and disclosure? Should the names of INS detainees be made public? Should deportation hearings be public? Should detainees have legal counsel? What about criminal trials where national security information is being reviewed?
- 4 Should the government have the power to designate and detain U.S. citizens as enemy combatants? What will Congress and the Courts say? What will happen to the individuals in Guantanamo? Will they be prosecuted? When will they be released? Will they ever be released?
- 4 What has been the effect of new U.S. laws and policies on the human rights situations in other countries?

In this report we address these questions, and make specific recommendations to U.S. officials concerning these important issues.

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# Chapter 1

## OPEN GOVERNMENT



### INTRODUCTION

This chapter examines the mantle of secrecy that has been steadily enveloping the executive branch in the wake of the September 11 attacks. It is not surprising that the administration has sought to enhance government secrecy in response to September 11. The attacks raised valid concerns that the very openness of American society may benefit those who seek to attack the United States and its people. Yet the balance between secrecy and transparency must be delicately struck. Open government is a value that goes to the very heart of what it means to be a democracy.

### THE LEGAL BACKDROP

Although the Constitution makes no explicit reference to the principle of open government, the founding fathers made clear that transparency in government is a prerequisite to an effective democracy. As James Madison famously warned:

**A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.<sup>1</sup>**

Similarly, John Adams declared that “[l]iberty cannot be preserved without a general knowledge among the people.”<sup>2</sup>

Indeed, the need for openness and accountability is evident in the very framework of the federal government. The founding fathers sought to secure our liberty by diffusing power among three separate branches of government – the legislature, executive, and judiciary. But separation alone was not enough. Wary of power’s

encroaching nature, the framers created an elaborate system of checks and balances to help police the constitutional boundaries.

For the system to work, however, each branch of government must be willing to share information about its activities. The system of checks and balances cannot survive unless each branch is able to monitor the activities of the other two. The American people, moreover, must have access to information about what all three branches are doing. Under the Constitution, it is the American people, who, as an informed electorate, provide the ultimate check against arbitrary government.<sup>3</sup>

### THE REFUSAL TO SHARE INFORMATION WITH CONGRESS AND WITH THE COURTS

In the past year, however, the executive branch has shown an increasing disregard for the importance of transparency to democratic government. The Bush administration has refused to share information not only with the public, but with Congress and with the federal courts. In many ways, this is not entirely unexpected. Even before September 11, disputes over the nature of executive privilege were commonplace when issues of national security were involved.

The administration’s new insistence on unrestrained autonomy, however, has upset the delicate system of checks and balances, painstakingly sown into the Constitution. In the words of West Virginia Senator Robert Byrd:

**Shrouded in ambiguity and cloaked in deep secrecy, this administration continues to suddenly, and sometimes unexpectedly, drop its decisions upon the public and Congress, and expect obedient**

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**approval, without question, without debate, and without opposition.<sup>4</sup>**

Congressional concern has been particularly acute as it relates to the withholding of information from members of congressional oversight committees. One recent dispute concerned the administration's refusal to disclose documents on the allocation of the antiterrorism funds that Congress, itself, had authorized. Another was the demand for information on antiterrorism measures taken under the auspices of the USA PATRIOT Act – a statute Congress had passed, at the urging of the Bush administration, in the immediate aftermath of September 11.

The administration's refusal to share information has upset some of its staunchest supporters in Congress. There is growing bi-partisan concern that the congressional oversight function is being dangerously undermined. The chair of the Senate Judiciary Committee, Democratic Senator Patrick Leahy, observed, "I have never known an administration that is more difficult to get information from than the oversight committees are entitled to."<sup>5</sup> He reported that Republican senators on the committee had urged him to issue subpoenas to force the administration's hand.<sup>6</sup> The chair of the House Judiciary Committee, Republican Representative James Sensenbrenner, expressed similar frustrations. He said that he "would start blowing a fuse" if the information his committee had requested was not provided by early September. He told reporters, "I've never signed a subpoena in my five and a half years as chairman. I guess there's a first time for everything."<sup>7</sup>

The administration's insistence on blanket secrecy has also perturbed members of the federal judiciary – particularly in relation to the government's post September 11 detention practices. The secrecy surrounding these detentions is discussed extensively in chapters 3 and 4. In one such case, involving U.S. citizen Yasser Esam Hamdi, the judge balked at

the government's insistence that it need not share information with the court. After designating Hamdi as an enemy combatant (thereby denying him access to a lawyer), the government simply refused to provide documentary evidence to support the designation. The judge ruled that the government must provide more information, however, emphasizing that he "would be acting as little more than rubber stamp" if he accepted the "sparse facts" the government had provided.<sup>8</sup>

## **ROLLING BACK FEDERAL STATUTES ON OPEN GOVERNMENT**

As discussed earlier in this chapter, the Constitution relies upon the vigilance of an informed citizenry to provide the ultimate check against arbitrary government. To facilitate this, Congress passed the Freedom of Information Act<sup>9</sup> (FOIA) in 1966 – having been long concerned that a burgeoning federal bureaucracy was actively stymieing requests for information and covering up questionable government decision-making. In 1989, Congress struck another blow for government transparency, passing the Whistleblowers Protection Act (WPA),<sup>10</sup> a statute that enables federal employees to expose government wrong-doing by protecting them from retaliation. As explained below, the executive branch has sought to curtail the effects of these important statutes in the wake of September 11.

### **The Freedom of Information Act**

#### *Background to FOIA*

FOIA establishes that records in the possession of agencies and departments of the executive branch of the U.S. government must be accessible to the people. Before FOIA was enacted on July 4, 1966, the burden was on individual citizens to establish a right to examine these records. With the passage of FOIA, the burden of persuasion shifted from the individual to the government. Federal agencies were required to disclose any documents that had been request-

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ed unless they fell within nine limited statutory exemptions.<sup>11</sup> Furthermore, any decision to withhold a document could be challenged in federal court. As a result of FOIA, every federal agency, from the Department of Agriculture to NASA to the U.S. Postal Service, now has a designated FOIA officer to respond to the public's right to access information.

Over the years, FOIA has been increasingly used as a tool to ensure government accountability. In fiscal year 2000, the latest year for which figures are available, federal departments and agencies received 2,235,201 FOIA requests – a 13 percent increase over fiscal year 1999, alone.<sup>12</sup> And indeed, since its enactment, FOIA has been responsible for the exposure of a great deal of important information, such as:

- 4 Reports showing that in the five years before a fatal Amtrak derailment in 2001, 1,500 defects had been found on the tracks in Iowa alone;
- 4 Documents about a CIA program called MK-ULTRA that illegally conducted mind-control experiments on unwitting human subjects;
- 4 Reports showing that the Forest Service was spraying herbicides in the national forests;
- 4 Documents showing that elderly patients at a private Philadelphia nursing home had died while they were being used as subjects in a drug experiment; and
- 4 Reports showing that contamination from recycled uranium may have reached more than 100 federal plants, private factories and colleges.

#### *The Attorney General's FOIA Memorandum*

On October 12, 2001, Attorney General John Ashcroft sent a memorandum to the heads of all federal departments and agencies setting out a new policy on FOIA requests.<sup>13</sup> The administration's new policy encourages the presumptive refusal of requests, through a restrictive interpretation of the Act.

## **The administration's refusal to share information has upset some of its staunchest supporters in Congress.**

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Most significantly, Ashcroft's memorandum changes the standard under which the government will defend an agency's refusal to produce information pursuant to a FOIA request, whenever that denial is challenged in court. Previously, the Department of Justice would only defend an agency's refusal to release information when it could be argued that releasing the information would result in "foreseeable harm." Under the new standard, however, the Justice Department will defend an agency's refusal to comply with a FOIA request so long as the decision rested on a "sound legal basis," a much lower standard.

Furthermore, Ashcroft's memorandum actively encourages federal agencies to fully consider all potential reasons for non-disclosure in making decisions under the Act. Although acknowledging the importance of government accountability, he emphasizes that he is equally concerned by other factors, including national security considerations, effective law enforcement, and the protection of sensitive business information. One of the most troubling aspects of the administration's new FOIA policy, however, is that it covers *all* government information, most of which has absolutely no connection to national security or law enforcement.

By encouraging agencies to "consider the value" of keeping agency communications confidential and ensuring that in virtually all circumstances the government would oppose claims made by individual citizens, the Attorney General has effectively reversed FOIA's pre-

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sumption that citizens have a right to access government information. He has established a policy by which government information will presumptively remain secret, setting the clock back nearly forty years.

Ashcroft's memorandum lies in sharp contrast with the assurances he offered the Senate during his 2001 confirmation process. In his confirmation testimony, he emphasized his commitment to upholding and enforcing FOIA:

"Appropriate public access to governmental records is an important check on arbitrary government action," Ashcroft offered as part of written responses during his confirmation process. "If I am fortunate enough to be confirmed as Attorney General, I will fully and faithfully enforce the Freedom of Information Act and ensure that the Department of Justice does the same."<sup>14</sup>

## **The Whistleblower Protection Act**

### *Background to the Whistleblower Protection Act*

The Whistleblower Protection Act (WPA) strengthened the rights of federal employees who challenge government betrayals of the public trust. The Act protects employees who expose government illegality, waste, fraud and other abuses from adverse employment action. Employees who believe they have been retaliated against can request an investigation by the Office of the General Counsel to vindicate their rights. The Act applies to most federal agencies, with the exception of intelligence agencies like the FBI and CIA.

President George H. Bush signed the WPA into law on April 10, 1989. The bill had passed both the Senate and House of Representatives unopposed. At the signing ceremony, the president emphasized the importance of shielding those who expose government misconduct:

**[A] true whistleblower is a public servant of the highest order. And I share the determination of Congress that we do everything possible to ensure that these dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment.<sup>15</sup>**

In the years since the WPA's enactment, whistleblowers have alerted the public to much important information, including information critical to protecting public safety. Federal whistleblowers have disclosed information, for example, about the failure of the Nuclear Regulatory Commission to enforce public safety requirements at facilities under construction. Whistleblowers at one such facility in Ohio revealed that nuclear safety laws had been systematically violated at the plant. After intensive investigations, sparked by the whistleblowing disclosures, the project was cancelled and the owners converted the plant to a coal-fired facility that now is operating safely.<sup>16</sup>

### *Rolling Back Whistleblower Protections*

In the debates over the creation of a new Department of Homeland Security (DHS), the Bush administration has insisted that the employees of the new department must be exempted from the protections of the WPA. The administration claims that the exemption is necessary to safeguard national security – arguing, in essence, that whistleblowers who reveal DHS incompetence or mismanagement might at the same time reveal sensitive security information.

The implications of excluding all DHS employees are enormous, however, and extend far beyond national security considerations. Under current proposals, the DHS could consolidate approximately 170,000 employees from all or part of 22 different federal agencies. Some of the functions of the agencies to be consolidated have nothing to do with national security. Accordingly, even under the administration's arguments, it would make no sense to exempt all DHS employees, whatever their responsibilities, from the important protections of the WPA.

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Furthermore, one of the primary rationales behind the creation of the DHS was the sense that past agency failings have unnecessarily compromised national security. Indeed, in the months after September 11, the news media was rife with stories of bureaucratic blunders – the most notorious example of which was the granting of student visas to two of the September 11 hijackers, six months after the attacks. Indeed, it seems that applying WPA protection to DHS employees is particularly important, given that they are uniquely positioned to uncover essential information about agency failings which might put our national security at risk.

These protections have never been more important. When FBI whistleblower Colleen Rowley told the Senate Judiciary Committee in June 2002 that the FBI is a bureaucracy rife with “risk aversion,” “roadblocks” to investigations and “endless, needless paperwork,” she hand-delivered copies of her memo to the Senate Select Intelligence Committee in order to ensure that her concerns were addressed.<sup>17</sup> Because FBI employees are excluded from the protections of the WPA, members of Congress extracted personal promises from FBI Director Robert Mueller to ensure that Agent Rowley would face no retaliation for coming forward.<sup>18</sup> Future whistleblowers obviously cannot count on such high-profile intervention, however. In order to encourage them to come forward, they must be explicitly protected under the WPA.

The Attorney General, meanwhile, is sending out a decidedly different message to federal employees. At a time when public attention is focused on understanding intelligence failures in order to take corrective action, he has created an interagency task force to review the criminal penalties for leaking classified information.<sup>19</sup> While the need to protect classified government information is in some ways more important than ever, efforts to prevent “leaks” should not undermine the narrow protections carved out for those brave and principled civil servants who risk their careers to expose government misconduct and incompetence.





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## Chapter 2

### THE RIGHT TO PRIVACY

#### INTRODUCTION

This chapter examines the erosion of Fourth Amendment privacy rights in the wake of September 11. Many fundamental prohibitions on government surveillance have been revoked in the past year – often with little debate. Under the USA PATRIOT Act, for example, the federal government may now use its exceptional powers created for foreign counter-intelligence work in domestic criminal investigations, so long as it can certify that some foreign intelligence purpose will be served. And under new regulations issued by the Attorney General, the FBI can now carry out surveillance on any religious, civic or political organization in the United States, without even the slightest suspicion of wrong-doing. The government has also announced a new program to further enhance its capacity for surveillance, by encouraging private citizens to report on the “suspicious activity” of other people.

#### THE LEGAL BACKDROP

The right of individual privacy is protected under the Fourth Amendment to the U.S. Constitution. The Fourth Amendment provides:

**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>20</sup>**

As the U.S. Supreme Court has explained, the Fourth Amendment limitations on the government’s search and seizure powers are designed to “prevent arbitrary and oppressive interference

by enforcement officials with the privacy and personal security of individuals.”<sup>21</sup> It protects what is in essence, our “right to be left alone,” a right which U.S. Supreme Court Justice Louis Brandeis termed “the most comprehensive of rights, and the right most valued by civilized men.”<sup>22</sup>

The right to privacy is also protected by international law. Article 12 of the United Nations Universal Declaration of Human Rights provides in relevant part, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.” Article 17 of the International Covenant on Civil and Political Rights (ICCPR) protects privacy rights in similar terms. The United States is a signatory to this covenant.

#### THE USA PATRIOT ACT

##### The Passage of the USA PATRIOT Act

In the wake of September 11, Congress enacted the USA PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act.<sup>23</sup> The Act, which amends 15 different federal statutes, grants unprecedented new powers to law enforcement and intelligence agencies. Although Congress passed the Act in response to the September attacks, most of the new powers are not limited to anti-terrorism investigations, but instead apply to all federal investigations.

Despite the sweeping nature of the changes, the USA PATRIOT Act was enacted very quickly. Attorney General John Ashcroft submitted a massive proposal to Congress just one week

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after the attacks and declared that the new powers should be enacted within three days. Although the Act was not adopted this swiftly, President Bush signed an expansive 342-page bill into law on October 26, 2001 – less than six weeks after the attacks.<sup>24</sup>

The pressure to pass the Act had been so great that there was virtually no time for public hearings or debate. The final version of the bill was drawn up by a select group of officials from the administration and Congress, who met hurriedly behind closed doors. Most members of Congress did not even have the opportunity to read the final version before it came up for a vote.

Because the USA PATRIOT Act affects many different areas of law – ranging from immigration to surveillance to intelligence sharing between federal agencies – its many implications for civil liberties arise in different sections of this report. Here, we consider some of the consequences for privacy rights in the context of Fourth Amendment jurisprudence.

### **“Sneak and Peek” Searches and Seizures**

Within the Fourth Amendment’s guarantees of the individual’s rights against unreasonable search and seizure is a requirement that the government give notice before searching through or seizing an individual’s belongings. In executing a warrant, law enforcement officials must generally knock and announce their presence before entering private space.<sup>25</sup> The knock and announce requirement is deeply rooted in English common law.<sup>26</sup>

Before the USA PATRIOT Act, prior notice could be suspended only under a narrow set of circumstances. In *Richards v. Wisconsin*, the U.S. Supreme Court held that officers are not required to knock and announce their presence if they have reasonable suspicion that doing so would be dangerous or futile.<sup>27</sup> They can also enter a dwelling without notice if they have reasonable suspicion that an announcement would

inhibit the investigation of a crime by, for example, enabling the destruction of evidence.<sup>28</sup>

The USA PATRIOT Act has greatly expanded the ability of federal officials to carry out searches and seizures without giving prior notice. Section 213 of the Act authorizes so-called “sneak and peek” warrants, which allow federal agents to covertly enter a person’s home or office. Under Section 213, the government can delay notice of a search if it can show “reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result.” The government can also seize items without prior notice if it can show a “reasonable necessity” for the seizure. Police officers, in other words, can secretly enter a person’s home or office while they are away and search through and seize private belongings – as long as they meet this exceedingly low standard. They can then delay notification for an additional “reasonable period.”

These new powers are not limited to anti-terrorism investigations. They apply to all federal investigations, including routine criminal cases. Furthermore, Congress did not create a sunset provision for this section. This means that, unlike some other powers granted in the Act, the Section 213 powers are permanent.

### **Foreign Intelligence and Domestic Spying**

Section 218 of the USA PATRIOT Act amends the Foreign Intelligence Surveillance Act (FISA) of 1978, which was enacted to establish a separate legal regime for the gathering of foreign intelligence information.<sup>29</sup> FISA grants the FBI extraordinary powers to carry out electronic surveillance and physical searches in counterintelligence operations against foreign powers or their agents. Under the Act, for example, surveillances and searches are conducted surreptitiously, without any notice to targets unless and until they are prosecuted. The surveillances and searches are authorized against a foreign agent for a period of 90 days and against a foreign power for an entire year.<sup>30</sup> In seeking

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warrants under FISA, moreover, the FBI does not have to meet the traditional criminal standard of probable cause, and is instead subject to a more relaxed foreign intelligence standard. In addition, the FBI only has to show that the place to be searched or monitored is being (or is about to be) used.<sup>31</sup>

In light of the intrusive nature of these powers, FISA created a wall between the counter-intelligence measures aimed at foreign agents and the surveillance measures used in ordinary domestic law enforcement investigations. The FBI could only use its FISA powers when it sought warrants for “the purpose of” gathering foreign intelligence information. FISA powers were not to be used to spy on ordinary U.S. citizens.

Section 218 of the USA PATRIOT Act greatly expanded the governments’ powers under FISA, however. It authorizes the issuance of FISA warrants in situations where the gathering of foreign intelligence is merely a “significant purpose” of the warrant. The “primary purpose” could be something else entirely, such as the collection of information for a routine domestic criminal investigation. At first glance, the difference may seem minor, but in practice, the change has far-reaching consequences for basic constitutional rights.

Prior to the USA PATRIOT Act, if FISA was used by government officials, the results of the ensuing search were almost never admissible in criminal cases except where the government could demonstrate that the evidence was only a byproduct of the foreign intelligence that the warrant produced. Now, since foreign intelligence must only be a “significant purpose” of the warrant, government officials could use FISA as a means of collecting evidence for use in criminal investigations so long as they can certify that some foreign intelligence purpose will be served. Thus, FISA, which was specifically enacted to facilitate the gathering of foreign intelligence, can now be used as a way to sidestep the Fourth Amendment’s probable cause requirements in criminal investigations.

**The USA PATRIOT Act  
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Section 218, unlike Section 213, does contain a sunset provision. Without congressional action to the contrary, its provisions will automatically expire on December 31, 2005.

*Foreign Intelligence Surveillance Court*

The Foreign Intelligence Surveillance Court (FISC) has already issued a public decision limiting the government’s interpretation of its new FISA powers.<sup>32</sup> FISC is a secret court composed of 11 federal district court judges, who individually review the Attorney General’s FISA applications.<sup>33</sup> The proceedings are non-adversarial, and the records and files of the cases are sealed. Although the FISC has been in operation for more than 20 years, it has reportedly denied only one government application out of the thousands of applications reviewed.<sup>34</sup>

It is this record, in part, that makes the FISC’s recently issued public decision so remarkable. In the opinion, written by the Honorable Royce C. Lamberth, the Court considered the effects of the USA PATRIOT Act on the ability of FBI counterintelligence officers to share FISA information with criminal prosecutors. The government had proposed new procedures for information-sharing, arguing explicitly that the new amendments “allow FISA to be used *primarily* for a law enforcement purpose.” The Court found that under a fair reading of the government’s proposal, criminal prosecutors would have “a significant role in *directing* FISA surveillances and searches from start to finish...guiding them to criminal prosecution.”<sup>35</sup> Criminal

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prosecutors, in other words, would be telling the FBI when and how to use FISA, turning the entire purpose of FISA on its head.

The Court refused to adopt the government's proposed procedures. Instead, it amended the government's proposal – spelling out very clearly that “law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances.”<sup>36</sup> The Court's decision was unanimous. The Department of Justice, however, has announced it will appeal the decision and insists that the Court has unlawfully restricted its powers under the USA PATRIOT Act.

#### *The FBI's Ability to Access Personal Records*

The USA PATRIOT Act also amended FISA in broadly expanding the government's powers to access personal records. Under Section 215 of the Act, the FBI may apply for a court order requesting the production of “any tangible thing (including books, records, papers, documents and other items).” The judge is required under Section 215 to enter the order so long as the FBI officer provides a written statement declaring that the items are being sought for an ongoing investigation related to international terrorism or clandestine intelligence activities.

Previously, the FISA provision on records applied only to foreign powers or their agents. Now, the Act may be applied with increasing frequency to “United States persons,” a category which includes both U.S. citizens and lawful U.S. residents. Although Section 215 prevents any investigations of U.S. persons based solely on the exercise of First Amendment free speech rights, it does not block investigations on any other basis – no matter how tenuously a person's activities might be connected to an investigation on international terrorism or clandestine activities.

Indeed, the FBI may now be privy to what books an individual checks out at the public library or

purchases at the local bookstore.<sup>37</sup> In a nationwide survey of 1,020 public libraries early this year, for example, the University of Illinois found that 85 – or 8.3 percent – had been approached by federal or local law enforcement officers for information about patrons relating to antiterrorism investigations.<sup>38</sup> The information sought might also include what internet sites an individual surfed while visiting the public library. And to get all of this information, the FBI need only obtain a warrant from the Foreign Intelligence Surveillance Court, which, as already mentioned, is not in the habit of denying warrant applications. Meanwhile, citizens would have absolutely no idea they were the subject of a search, because the law does not require that individuals be informed. Indeed, librarians and booksellers can be criminally prosecuted for revealing the details or extent of the FBI's request for information.<sup>39</sup>

Like Section 218, Section 215 is scheduled to expire on December 31, 2005. Congress has also required the Attorney General to submit semi-annual reports on the government's activities under this section.

#### **NEW FBI GUIDELINES ON DOMESTIC SPYING**

On May 30, 2002, Attorney General John Ashcroft announced dramatic changes to the FBI guidelines on general crimes and criminal intelligence investigations.<sup>40</sup> The new regulations allow the FBI to carry out surveillance on domestic religious, civic and political groups, even when there is no suspicion of wrongdoing. The Attorney General amended the regulations without any public debate or consultation with Congress.

The new guidelines overturn protections that were put in place in the mid-1970s. The FBI first implemented the prohibitions on domestic surveillance in 1976, after congressional probes revealed that the FBI and other intelligence agencies had been carrying out widespread surveillance on members of domestic organizations – most notoriously against anti-war protesters and

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civil rights activists, including Dr. Martin Luther King, Jr. The targets of these intelligence operations spanned a broad spectrum of groups, however, including the “Women’s Liberation Movement,” the John Birch Society, and the American Christian Action Council.<sup>41</sup>

The congressional committee investigating these abuses released a report in 1976. The report decried the intelligence community’s widespread spying on American citizens, many of whom were targeted for their entirely lawful activities and beliefs. The committee explained:

**The Government, operating primarily through secret informants, but also using other intrusive techniques such as wiretaps, microphone “bugs,” surreptitious mail opening, and break-ins has swept in vast amounts of information about the personal lives, views, and associations of American citizens.<sup>42</sup>**

The report also noted the “unsavory and vicious tactics” employed by the intelligence agencies, which included disrupting meetings and ostracizing people from their professions.<sup>43</sup>

Under the Attorney General’s new guidelines, FBI agents may once again monitor and investigate lawful political and religious activities. FBI agents can now keep records of people who attend places of worship – mosques, synagogues, and churches – as well as those who attend meetings of non-governmental groups. To do this, they may covertly attend political or religious gatherings, surf internet sites, and mine commercial databases. Furthermore, they can do all of this without showing any reason to suspect any criminal activity.<sup>44</sup>

Some of these activities, including Internet surfing and commercial data mining, were perfectly permissible under the old guidelines, so long as they were undertaken as part of a preliminary or an ongoing criminal investigation. Now such activities may be used in order to generate (rather than react to) suspicion of criminal conduct.<sup>45</sup> In addition, there is no time limit on how long the information may be retained.

**The FBI may now be privy to what books an individual checks out at the public library or purchases at the local bookstore.**

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Widespread monitoring and reporting on the activities of domestic organizations may lead to a chilling effect on speech. Ultimately, the FBI could begin questioning, and even detaining, individuals whose only “crime” has been the legitimate exercise of fundamental political freedoms. It was precisely this kind of abuse that led to the 1976 restrictions on domestic spying.

Indeed, such concerns were expressed by members of Congress on both sides of the aisle. Republican Representative James Sensenbrenner, the chair of the House Judiciary Committee, emphasized that the original FBI guidelines were put in place because of “documented excesses” by the FBI.<sup>46</sup> He remarked, “I get very, very queasy when federal law enforcement is effectively...going back to the bad old days when the FBI was spying on people like Martin Luther King.”<sup>47</sup> Sensenbrenner also denounced the Attorney General’s decision not to seek congressional input, revealing that he had been informed of the changes only two hours before Ashcroft’s formal announcement. Meanwhile, Representative John Conyers, the ranking Democrat on the House Judiciary Committee, called the new guidelines “a step back for civil liberties in this country” and declared that the changes had “decimated the Fourth Amendment.”<sup>48</sup>

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## OPERATION TIPS

Operation TIPS (the Terrorism Information and Prevention System) is a new government initiative, officially described as “a national system for concerned workers to report suspicious activity.”<sup>49</sup> Operation TIPS first broke into the news in mid-2002, when journalists came across the scheme on a Citizens Corps website.<sup>50</sup> Operation TIPS sets out to recruit people whose everyday activities put them in daily contact with people in their homes and businesses, for example telephone repairmen, cable television installers, postal workers, delivery truck drivers, and workers for courier services.

In late July, the media reported that the government hoped to enlist one million volunteers within months to test the TIPS reporting system in a pilot program in ten cities.<sup>51</sup>

Eventually, the goal is to enlist 11 million civilians (or about four percent of the U.S. population) to report on the “suspicious activity” of others. Domestic and international news media compared the scheme, part of President Bush’s new Citizens Corps volunteerism program, to East Germany’s Stasi secret police network. In a July 17, 2002 editorial, the *Boston Globe* described Operation TIPS as “a scheme that Joseph Stalin would have appreciated,” and denounced the plan as a “vile” and “anti-American” idea.<sup>52</sup>

Members of Congress expressed similar sentiments. In a Senate Judiciary Committee hearing on July 25, 2002, Senator Patrick Leahy compared TIPS to a 1960s FBI informant program in which neighbors were hired to spy upon suspected political activists. As he told the Attorney General, who was appearing before the committee, “It was a very, very sorry time in our history.”<sup>53</sup> At the same hearing, Republican Senator Orrin Hatch told the Attorney General, “We don’t want to see a 1984 Orwellian-type situation here, where neighbors are reporting on neighbors.”<sup>54</sup>

On July 18, 2002, Republican Representative Dick Armey, the House Majority leader, took steps to ban Operation TIPS in the House legislation to create a Homeland Security Department.<sup>55</sup> As the chair of the House Select Committee on Homeland Security, Armey added language to the bill to prevent the Justice Department from initiating Operation TIPS. In his summary of the bill, he explained that he had acted “[t]o ensure that no operation of the department can be construed to promote citizens spying on one another.”<sup>56</sup>

The TIPS program has also been denounced by conservative activists. Phyllis Schlafly, the leader of the Eagle Forum, has said that the proposal would “institutionalize a federal system of informers.”<sup>57</sup> The Rutherford Institute also panned the program, commenting:

**What [Operation TIPS] means for the average citizen is that whatever you read, eat or do – in the privacy of your home or out in public – will now be suspect in the eyes of your cable repairman, postal carrier, meter man or others who, by way of the services they provide, will have access to your home.<sup>58</sup>**

Despite widespread criticism, administration officials said only that the scheduled launch of the program would be postponed until after Congress returned from recess in September.<sup>59</sup> In early September, the official website of the U.S. Citizens Corps continued to include a fact sheet on Operation TIPS, which makes no reference to congressional measures to stop the program. The website merely announces that “[t]he program is scheduled to be operational in the fall of 2002 as one of the new Citizen Corps programs.”<sup>60</sup> Furthermore, it emerged in late August that the Justice Department is now considering a deal with a private company to operate the program, a move which would only deepen accountability concerns.<sup>61</sup>

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## Chapter 3

### TREATMENT OF IMMIGRANTS, REFUGEES AND MINORITIES



#### INTRODUCTION

Immediately after September 11, the United States' national program to admit refugees fleeing persecution around the world was shut down completely for almost three months, stranding more than 22,000 refugees who had already been told they could come to the United States. At the same time, the U.S. government began an intensive effort to apprehend accomplices and prevent another attack. Thousands of people who had nothing to do with terrorism – mostly non-citizens – were trapped in a hastily-cast net. Nearly 1,200 people were detained, mostly Arab, South Asian and Muslim men. Most of the detainees caught up in the initial investigation have now been deported. And to date, only 23,497 refugees out of 70,000 that were to have been admitted into the United States this fiscal year have arrived.

#### REFUGEE RESETTLEMENT PROGRAM SHUT DOWN <sup>62</sup>

For more than two decades, the United States has accepted an average of about 90,000 refugees a year in its resettlement program. Refugees must undergo a long application process – including interviews and security checks – to be accepted for resettlement. In the United States, church groups and other voluntary agencies meet the arriving refugees at the airport and help them to find jobs and schools. Most of them are women and children.

Refugees were already the most-scrutinized group of non-citizens coming into the United States. But after September 11, the program was shut down for nearly three months while the Administration conducted a security review.

Some 22,000 refugees who had already been accepted to come to the United States – in many cases to join family members already here – were told their long-awaited trips had been canceled indefinitely. Many refugees were trapped in homeless limbo after giving up their old living quarters, unable to come to new homes or to join people who awaited them. And those stranded in Pakistan found themselves in extra danger because of anti-American sentiment there. While the program was shut down, almost no new refugees were interviewed abroad.

The refugee resettlement program formally resumed on December 11, 2001 with a flight from Zagreb to Los Angeles, but this important humanitarian program is still only a faint shadow of its former self. The President signed a document authorizing 70,000 refugees to be admitted this fiscal year (ending September 30, 2002), but only 23,497 refugees have been admitted so far.

It is particularly ironic that the attacks of September 11 should have caused so much hardship to such defenseless people as refugees. As Senator Sam Brownback of Kansas said in February, at a Senate hearing on the slowdown of the refugee resettlement program, “we cannot allow those events, which have already caused so much death and sorrow, to undermine our commitment to rescuing the persecuted, the widow, and the orphan.”

#### THE POST SEPTEMBER 11 DETAINEES

In the weeks and months after September 11, nearly 1,200 people, mostly Arab, South Asian

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and Muslim men, were detained as part of the Department of Justice investigation into the attacks. The authorities refused to disclose the identities and locations of those detained. Families, advocates, and organizations are still struggling to obtain information about those who remain in detention, as well as the many who have been deported.

Attorney General John Ashcroft characterized these arrests and detentions as an important step in the antiterrorism investigation. Speaking in October 2001, the Attorney General stated, “[O]ur anti-terrorism offensive has arrested or detained nearly 1,000 individuals as part of the September 11 terrorism investigation. Those who violated the law remain in custody. Taking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders.”<sup>63</sup>

Although the arrests and detentions were described as part of the government’s “anti-terrorism offensive,” few of those detained were ever charged with criminal activity tied to the investigation.<sup>64</sup> The Attorney General’s generic reference to the detainees as “suspected terrorists” strains credulity. Many were deported on non-criminal charges of overstaying a visa or working more hours than is permitted on a student visa. The majority of non-citizens detained by the government were long-term residents, business owners and taxpayers. Many are married to U.S. citizens and have U.S. citizen children.

### **The Law**

Most Americans cannot recite the Bill of Rights, but all Americans are familiar with the basic principles of fairness and due process built into the U.S. Constitution including: the right not to be arbitrarily detained and to challenge the lawfulness of detention in a court of law; the right to a speedy hearing by a competent, independent and impartial tribunal; the right to know the charges and evidence

against one; and protection against torture and other cruel treatment or punishment. These constitutional principles form the foundation for international human rights treaties, drafted with U.S. leadership and support.

The United States is a party to the International Covenant on Civil and Political Rights (ICCPR) which states that “No one shall be subjected to arbitrary arrest or detention.”<sup>65</sup> The circumstances of the government’s arrests and detentions of non-citizens post-September 11 have prompted human rights advocates to submit complaints to international fora. The Human Rights Clinic at Columbia University has submitted a request to the Working Group on Arbitrary Detention of the United Nations Human Rights Commission asking that the practices of the United States, as a party to the ICCPR, be reviewed under international standards for arbitrary detention.<sup>66</sup>

Preventive detention – detention prior to obtaining evidence of crime or in advance of any crime being committed – is contrary to these international principles as well as to U.S. law.

### **Preventive Detention**

In announcing a new Foreign Terrorist Tracking Task Force on October 31, 2001, the Attorney General laid out an explicit strategy to exploit his largely unused power to detain and deport people for minor immigration status violations, as well as the power to detain those who, though not suspected of crime or immigration violations, were believed by the government to be “material witnesses” to crime. The government’s theory appeared to be that, whether or not a particular person posed a threat to the United States, detention would prevent those detained from *proving to be* a threat<sup>67</sup> – an “arrest and detain first, ask questions later” approach. Using the term “suspected terrorist” to refer to all those the government was detaining, the Attorney General explained that:

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**We will arrest and detain any suspected terrorist who has violated the law. If suspects are found not to have links to terrorism or not to have violated the law, they'll be released. But terrorists who are in violation of the law will be convicted, in some cases be deported, and in all cases be prevented from doing further harm to Americans.<sup>68</sup>**

The Justice Department targeted individuals based on their gender, religion, ethnicity and national origin. In many cases, only after they were detained, were grounds sought to justify arrest and, in those cases in which immigration violations, however minor, could be identified, individuals faced lengthy detention pending deportation.<sup>69</sup>

The last complete tally released by the U.S. Department of Justice in early November reported that 1,182 individuals had been detained in the post-September 11 sweeps.<sup>70</sup> At that point, the Department of Justice announced that it would no longer release a tally. Of that number, 752 were held on immigration charges and 129 were held on criminal charges. As of June 13, 2002, the number of immigration detainees remaining was 74 and the number of detainees held on federal criminal charges was 73.<sup>71</sup> In a letter dated July 3, 2002, however, Assistant Attorney General Daniel J. Bryant stated that 81 individuals remained in detention on immigration charges and 76 on criminal charges.<sup>72</sup> The discrepancies in these numbers raise questions as to their accuracy.

These numbers are inconclusive. Individuals detained after November 8, 2001 – the date that the Department of Justice announced it would cease releasing a tally – are not included in the original figure of 1,182. In addition, those detained as a result of the “Absconder Apprehension Initiative” (described below) are not included. The Assistant Attorney General states in his letter that as of May 29, 2002, 611 individuals have been subject to closed hearings, in cases termed “special interest” by federal authorities.<sup>73</sup> There has yet to be a

**In many cases, only after individuals were detained were grounds sought to justify arrest.**

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clear definition of what kinds of cases fit within the “special interest” category. Access to more detailed information remains the subject of litigation under the Freedom of Information Act.

Information about the legal basis for the detentions seeped out slowly. A small number were detained on federal criminal charges for such offenses as theft or credit card fraud, which appeared unrelated to the attacks. At least three dozen others were held as “material witnesses” on the grounds that they may have information that would be useful in a criminal or grand jury proceeding. But the great majority of detainees were held on routine immigration violations, such as overstaying a visa.

### **Criminal Detainees**

Some of the detainees have been charged with crimes such as possession of fraudulent documents, lying to a government official, or illegal entry into the United States. Unlike those charged with immigration violations, individuals charged with a crime are entitled to a lawyer at government expense if they cannot afford one and are entitled to a speedy trial. Some of those originally arrested for immigration violations reported that, once they were granted release on bond by an immigration judge, criminal charges were filed which justified continued detention.<sup>74</sup>

In some cases, it appears that criminal charges may have been filed in retaliation against detainees who challenged their detention. For example, Shakir Ali Baloch, a Canadian citizen, was held in a maximum-security jail without

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charge or explanation for three and a half months from September 20, 2001 to January 4, 2002. Immediately after his attorney filed a *habeas corpus* petition, he was charged with the criminal offense of illegally reentering the United States.<sup>75</sup>

### **Material Witnesses**

Several detainees were held as “material witnesses” – individuals who the government alleges may have information pertaining to a criminal investigation. The law permits detention of a material witness to guarantee availability when testimony is needed in a criminal proceeding, if the government can show that the individual is a flight risk, or that the only means of obtaining testimony is detention.<sup>76</sup> If the government does show a need to detain the witness, the detention should not exceed the amount of time necessary to secure the testimony by deposition.<sup>77</sup>

Although material witnesses are not criminal suspects, those detained in the September 11 investigation were reportedly interrogated as if they were accused criminals and were detained in conditions that were punitive in nature.<sup>78</sup> Many of these detainees were never actually required to testify in any court proceeding, and depositions were not sought to secure their testimony, raising doubts about the legitimacy of the government’s assertions that they were held as material witnesses to crime.<sup>79</sup>

Several of those detained under this provision challenged their detention in court. In *United States of America v. Osama Awadallah*, the use of material witness warrants to detain individuals for potential testimony before a grand jury was ruled unlawful.<sup>80</sup> Awadallah is a lawful permanent resident in the United States and was held in solitary confinement in the maximum-security wing at the Metropolitan Correctional Center in New York for 20 days, based solely on a material witness warrant.<sup>81</sup> The government made several misrepresentations and omissions in order to get an arrest warrant and,

during the time Awadallah was imprisoned, the government failed to take steps to secure his deposition. In ordering his release, Judge Shira Scheindlin said that “since 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation.”<sup>82</sup> The government appealed the decision.

In a subsequent case in the same federal district court in New York, *In re the Application of the United States for a Material Witness Warrant*, Judge Michael Mukasey reached a different conclusion. In this case, the judge upheld the use of the material witness warrants, concluding that the government may invoke the federal material witness statute to obtain the detention of witnesses for grand jury proceedings.<sup>83</sup>

### **Immigration Detainees**

*Immigration Enforcement vs. Criminal Justice System*

The investigation into the September 11 attacks constituted a search for criminal suspects. But the primary legal regime under which this investigation has been conducted is not the United States criminal code, but rather the immigration enforcement system. The discretion given the government under the immigration laws to arrest, detain and deport individuals is much broader than that under the nation’s criminal justice system and provides fewer protections against abuse. There is little judicial oversight of the government’s decision to detain an immigrant subject to deportation, even for prolonged periods. And because immigration proceedings are not considered criminal prosecutions, those detainees are not entitled to legal representation unless they can afford to retain counsel themselves.

The Administration has sought to exploit these advantages under the immigration enforcement system in order to keep people in jail for pro-

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longed periods without access to counsel or to a judge, something it would not be entitled to do under the criminal law.<sup>84</sup> Prior to September 11, individuals detained on minor immigration violations such as overstaying a visa, were routinely released on bond pending their court hearing. But since September 11, the Department of Justice has exercised its authority to prevent release on bond and to prolong detention. Of the nearly 1,200 detainees accounted for by the government, 718 were reported to have been charged with immigration violations.<sup>85</sup>

#### *Basis for Detention*

The Department of Justice now has expanded authority that makes it easier to extend the length of detention pending deportation. This has allowed more time for the government to search for evidence on the chance that it might discover links between immigration detainees and the September 11 attacks. This strategy, while it has caused great hardship to those in detention and their families, appears to have yielded few terrorism suspects and few leads in the investigation.

#### **USA PATRIOT Act**

After relatively little Congressional debate, the USA PATRIOT Act was signed into law on October 26, 2001. The Act granted unprecedented new powers (though not as broad as those initially requested by the administration) to the Attorney General to detain non-citizens he certifies as a suspected terrorist. Congress included some important safeguards against abuse of this power. For example, the Attorney General must charge a detainee with a crime, initiate immigration procedures for deportation, or release the individual within seven days of detention; the Attorney General's certification of an individual as a suspected terrorist must be reviewed every six months and either renewed or revoked; the substantive basis for the Attorney General's certification is subject to judicial review; and he must report to Congress every six months specific details about the use of these new powers.

**The USA PATRIOT Act  
could result in  
long-term detention  
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charged with a crime.**

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Even with these safeguards, the new powers raise serious concerns about the potential for abuse. The USA PATRIOT Act could result in long-term detention of non-citizens who have never been charged with a crime but who have violated their immigration status in some way. The USA PATRIOT Act did not specify what process the Attorney General must follow in making and reviewing the decision to certify an individual as a suspected terrorist. Nor did it provide guidance to the courts on what evidence they should consider in assessing the reasonableness of the Attorney General's decision, whether detainees will have access to the evidence on which such decisions are based and the standards for review of such evidence. Although some provisions of the USA PATRIOT Act contained sunset provisions under which the new measures will automatically expire after a certain period, there is no sunset provision attached to these new detention powers. They are now a permanent feature of our law, and it will take another act of Congress to repeal them.

#### *New Regulatory Authority*

The new detention powers of the USA PATRIOT Act were the most controversial provisions contained in the new law. What little debate there was in Congress about the Act centered mostly on these provisions. Although the administration pressed hard for these expanded powers, in the more than ten months since they have had them, they have yet to use them even once. Perhaps because of the judicial review and con-

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gressional oversight amendments passed by Congress as part of the Act, the government has chosen instead to rely on regulatory authority to accomplish the same goals.

On September 17, 2001, the Attorney General issued a regulation increasing from 24 to 48 the number of hours the INS could detain someone without charge. In addition, the regulation authorized detention without charge for an unspecified additional “reasonable period of time” in the event of an “emergency or other extraordinary circumstance.”<sup>86</sup> Unlike the USA PATRIOT Act provision, this regulatory authority is not limited to detainees suspected of terrorist activity. Determining what “reasonable” means or what constitutes an “emergency” or “extraordinary circumstance” is left open to interpretation by individual INS officers. There are no meaningful checks on INS authority under this regulation.

Documents released by the INS in response to litigation under the Freedom of Information Act provide a window into the abuse that can flourish under such blanket detention authority. Of 718 so-called “special interest” detainees being held on immigration violations, 317 were held without charge for more than 48 hours. In 36 of those cases, individuals were held for 28 days or more before being charged. Thirteen people were held for more than 40 days without charge and nine were held for more than 50 days. The longest period of detention without charge was the case of a man from Saudi Arabia who was held for 119 days without charge.<sup>87</sup>

These figures represent only a partial picture. According to lawyers representing a number of detainees, it is now common for the INS to fail to charge individuals within the prescribed 48 hours.<sup>88</sup> The bipartisan effort in Congress to include in the USA PATRIOT Act a seven-day charge requirement to curb abuse of new government powers has been completely ineffectual. Current practice under INS regulations involves detention without charge not only for a week, but for months.

Another regulation providing expanded detention powers to the INS, which took effect on October 29, 2001, gives the Executive Office for Immigration Review expanded authority to suspend, at the request of the INS, an immigration judge’s decision that a detainee should be released on bond.<sup>89</sup> Prior to this rule, once an alien was ordered released on bond by an immigration judge, the INS could request a stay only in limited circumstances involving aliens subject to mandatory detention, such as those convicted of certain aggravated felonies. The new regulation expands this authority to include any case where an alien has been detained while removal proceedings were pending or where bond has been set at \$10,000 or more. Under these regulations, an INS trial attorney (the prosecutor in immigration proceedings) is authorized, in effect, to overrule the judge’s order that a detainee be released. There is no requirement that the individual be suspected of a crime or terrorist activity. As the appeal process is lengthy, and bond in post-September 11 cases has routinely been high, the result has been prolonged periods of detention.<sup>90</sup>

The automatic stay rule was recently declared a violation of due process by a district court judge in the case of *Almonte-Vargas v. Kenneth Elwood*. Judge R. Barclay Surrick stated in his decision that due process is not satisfied where an individualized custody determination is “effectively a charade.”<sup>91</sup>

### **Failure to Get “Clearance”**

Detainees otherwise eligible for release on bond were regularly denied parole based on an obscure declaration by the government that they had not received “clearance,” a process that has still not been explained. It appears that “clearance” is what is granted when the authorities have ruled out the possibility of any connection between the detainee and terrorist activity. Records on the operation of this procedure are unavailable to the public or the courts. This practice turns the presumption of innocence on its head.

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Essentially, a detainee is presumed guilty until proven innocent.

*Access to Counsel*

Although not entitled to court-appointed counsel, immigration detainees are entitled to have access to counsel at their own expense. In ordinary times, the immigration system is nearly impossible to navigate without a lawyer. But since September 11, with the government's panoply of new powers and commitment to aggressive enforcement, detainees are particularly disadvantaged if they are without legal representation. Obviously, detention impedes the ability to access counsel, but INS rules require that detainees be informed of their right to counsel and about resources available for *pro bono* representation; provided with access to telephones free of charge for legal calls; and provided appropriate time for visits from their attorney.<sup>92</sup>

After September 11, however, immigration detainees have faced greater obstacles to accessing legal representation, including: very limited access to telephones (detainees in Passaic County Jail were allowed only one phone call to an attorney per week) and in some instances collect calling only; outdated phone lists for legal service organizations; failure to provide detainees with the handbooks that contain the information they need to find counsel; and restrictions on lawyers trying to gain access to clients or prospective clients.<sup>93</sup>

In addition to these practical obstacles to effective access to counsel, the Attorney General has issued a new directive authorizing the government to listen in on attorney-client conversations in situations where it suspects the communication may facilitate criminal acts. The government already had the authority to do this, but that power was tempered by a requirement that it first make a showing to a judge that such monitoring was necessary. Now, the executive branch has the power to unilaterally make such decisions, without oversight by the

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charge not only for  
a week, but  
for months.**

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judiciary.<sup>94</sup> The new rule requires the government to notify attorneys and their clients in advance when monitoring will occur, making it unlikely that the government will gain any useful information about terrorist plots. But the rule is likely to significantly disrupt attorney-client communications, and infringe on what the Supreme Court has described as "the oldest of the privileges for confidential communications known to the common law," designed "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>95</sup>

*Secrecy*

The government has sought to keep secret the names of the people it has in detention and the charges, if any, on which they are being held. Various rationales have been offered in defense of this policy, ranging from concern for the privacy of the detainees to fear that releasing information about who the government has in custody would tip off the terrorist network about U.S. investigative strategy. But many sectors of the public, including the media, public interest groups, and members of Congress, have sought access to this information.

The ACLU filed a lawsuit seeking release of the names of detainees being held at two county jails in New Jersey, under a state law which "stipulates that the names and the dates of entry of all inmates in county jails, without exception, 'shall be open to public inspection.'"<sup>96</sup>

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New Jersey Superior Court Judge Arthur D'Italia ruled against the government, calling secret detentions "odious to a democratic society." In response to the ruling, the Department of Justice issued a new regulation prohibiting state authorities from releasing information about immigration detainees.<sup>97</sup> The state court ruling ordering release of the information was effectively overruled by the Justice Department.

At the federal level, a coalition of organizations led by the Center for National Security Studies filed suit in federal district court in the District of Columbia against the Department of Justice to seek responses to their request for information about the detainees under the Freedom of Information Act. Holding that "[s]ecret arrests are profoundly antithetical to the bedrock values that characterize a free and open [society] such as ours,"<sup>98</sup> and noting that none of the detainees held on immigration charges had been tied to terrorism, Judge Gladys Kessler ordered the government to release the names of detainees and their lawyers. "The first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship,"<sup>99</sup> Judge Kessler said. The Justice Department refused to comply and appealed the decision.

In addition to withholding the names of detainees, the Attorney General has also asserted the power to close immigration hearings to the public, including to families of the detainees, in cases of "special interest" to the government. The government has not revealed the criteria by which it classifies a case being of "special interest." Instructions on how to comply with the Attorney General's order that certain hearings be held in secret are contained in a September 21, 2001 memorandum issued by Chief Immigration Judge Michael J. Creppy.<sup>100</sup> The internal memorandum instructs immigration judges to: paper over windows in their courtrooms; deny access to visitors, family and the press; remove cases from the docket list; and change computerized docket sys-

tems to ensure that case names and other information do not appear in any publicly accessible format.

As it did in defense of its policy of withholding the names of detainees, the government asserted a dual purpose in holding secret hearings in "special interest" cases: avoiding setbacks to the terrorism investigation and protecting the privacy interests of the detainee.<sup>101</sup> But lawyers for detainees subject to these measures believe that a secrecy order casts suspicion on their clients which may affect their client's ability to get a fair hearing. As a practical matter, the secrecy provisions of the Creppy memorandum have made it more difficult for lawyers to get information, ordinarily available through an automated information system, on the status of a prospective client's case or even where upcoming hearings will be held.

When the Justice Department designated the case of Rabih Haddad, a well-known Muslim cleric in Michigan, as a "special interest" case and closed his immigration proceedings to the public, Representative John Conyers (D-MI), the ACLU and the Detroit Free Press joined other members of the public in challenging the government's policy of closed hearings. Federal District Judge Nancy G. Edmunds ruled that blanket closure of deportation hearings was unconstitutional.<sup>102</sup>

A parallel case in New Jersey challenging the policy, *New Jersey Media Group v. Ashcroft*, reached similar conclusions.<sup>103</sup> Federal District Judge John W. Bissell held that the government provided no evidence to support the claim that a blanket closure was necessary, and it already had a framework to close sensitive cases based on individualized determinations or risk. In addition, the claim that the closed hearings were aimed to protect the privacy of detainees was unsubstantiated. Many of the detainees did not want this protection and felt disadvantaged by the policy.

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Undeterred by adverse rulings in federal court, the Department of Justice issued a new regulation attempting to ensure its ability to hold secret hearings.<sup>104</sup> Under the new measure, immigration judges are directed to grant “protective orders” on a case-by-case basis to bar disclosure of information which the government wants kept secret. The regulation seeks to replicate the effect of the Creppy memorandum, while addressing the concerns reflected in court decisions about a lack of case-by-case determinations of risk.

The government also sought to preserve its power to close all “special interest” cases by appealing its loss in the Rabih Haddad case to the U.S. Court of Appeals for the Sixth Circuit. But on August 26, 2002, the Sixth Circuit affirmed the lower court’s ruling and held “the blanket closure of deportation hearings in ‘special interest’ cases unconstitutional.”<sup>105</sup> Judge Damon J. Keith, who wrote the opinion, stated that, by asserting “national security” concerns,

**the Government seeks a process where it may, without review, designate certain classes of cases as “special interest cases” and, behind closed doors, adjudicate the merits of these cases to deprive non-citizens of their fundamental liberty interests.... This, we simply may not countenance. A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution.<sup>106</sup>**

### **NEW HARDSHIP FOR REFUGEES SEEKING ASYLUM**

The legal and procedural requirements for a refugee to gain asylum in the United States are rigorous. But many of the measures instituted by the government since September 11 have made it even more difficult for those fleeing repressive governments to find safe haven here.

#### **New Limits on Administrative Review**

The most sweeping change that will impact asylum seekers is a new Department of Justice

**In addition to withholding the names of detainees, the Attorney General has also asserted the power to close immigration hearings to the public.**

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regulation which goes into effect on September 25, 2002.<sup>107</sup> The regulation fundamentally alters the process by which asylum seekers, and other immigrants, can appeal immigration judge decisions. The regulation will drastically curtail the authority of the Board of Immigration Appeals (BIA) – the only administrative appellate body for immigration cases – to review decisions of immigration judges. The regulation eliminates in most cases the BIA’s authority to take a fresh look at immigration judge conclusions, a crucial safeguard in asylum cases, and encourages the issuance of “summary orders,” mere rubber stamps of immigration judge decisions. Advocates for refugees criticized these measures when they were first proposed in February, arguing they would severely undermine the asylum appellate process and would deprive asylum seekers of a meaningful appellate review.<sup>108</sup> None of the amendments proposed by the Lawyers Committee and other advocacy groups were adopted by the government in the final regulation.

#### **Forcing Canada-bound Asylum Seekers to Apply in the United States.**

Another measure that will adversely impact refugees seeking asylum stems from a December 3, 2001 agreement between the United States and Canada to better coordinate security issues along the northern border.<sup>109</sup> As part of the negotiations over this border security agreement, the two countries are

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poised to sign a side agreement that would largely prohibit refugees from seeking asylum except in the country they first entered. Although this provision has nothing to do with security, it is reportedly being sought by the Canadians, since many asylum seekers in Canada transited through the United States first. The net result of such an agreement will be to increase the number of asylum seekers in the U.S. system. This would not seem to be in the interests of the United States, but reportedly the United States is prepared to sign the agreement in exchange for Canada's agreement on other measures desired by the United States. But the agreement will cause unnecessary hardship for asylum seekers who must – because of flight patterns – transit through the United States before traveling on to Canada to reunite with family in Canada.<sup>110</sup>

#### **More Restrictions on Parole from Detention**

Under the harsh provisions of a 1996 immigration law, asylum seekers who arrive without valid travel papers must be detained until they articulate a credible fear of persecution, at which time they are eligible for release on parole, provided they satisfy certain requirements. But INS parole practices, which are routinely arbitrary and abusive, have become even more restrictive since September 11. This is likely the result of a memorandum issued by the INS in November 2001, which states that “[d]uring the nation’s heightened security alert and until further notice,” District Director (or other specified) approval is required in order to parole aliens or take certain other actions. The memorandum states that: “discretion [to release] should be applied only in cases where inadmissibility is technical in nature (i.e., documentary or paperwork deficiencies), or where the national interest, law enforcement interests, or compelling humanitarian circumstances require the subject’s entry in the United States ....” The memorandum states that it does not change existing statutory and regulatory standards for parole,<sup>111</sup> but since parole decisions by the INS are discretionary and not subject to review by a judge, the November memo-

randum is likely seen by parole decision-makers as a further invitation to refuse parole requests.

#### **DISCRIMINATION**

One of the core values of American culture and democracy is that all persons should be treated equally without regard to race, religion, ethnicity, sex, or national origin. The Fourteenth Amendment to the United States Constitution states, “No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” This principle of non-discrimination also forms the foundation on which all international human rights norms are based. The United States is a party to the Convention Against all forms of Racial Discrimination (CERD), an international treaty which aims to ensure that human rights are enjoyed without discrimination based on race.<sup>112</sup>

Prior to September 11, there was a growing consensus in the United States that racial profiling, a law enforcement technique directed largely at people because of their color rather than their behavior, was not only in conflict with American values but was not an effective law enforcement technique. But since September 11, many people, primarily Arabs, Muslims and South Asians, have been targeted for discriminatory treatment in law enforcement and by private individuals, not because of their behavior, but because of their religion, national origin, ethnicity or color. Many have been the target of harassment and hate crimes.

On November 9, 2001, Attorney General Ashcroft issued a directive to members of Anti-Terrorism Task Forces instructing them to interview 5,000 men, 18 to 33 years old, who had entered the United States on non-immigrant visas in the past two years and come from countries in “which intelligence indicated al Qaeda terrorist presence or activity.”<sup>113</sup> The Justice Department’s list of the young men targeted for government questioning was compiled strictly on the basis of national origin. It was announced that the interviews were volun-

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tary, but many questioned how voluntary such interrogations were for most people, who feared that a failure to cooperate with the FBI could render them subject to detention.<sup>114</sup> While these interviews were underway, hundreds of Muslim and Arab men had already been detained in the investigative sweeps by the FBI and Joint Terrorism Task Forces.

In February 2002, the Attorney General announced another program, the “Absconder Apprehension Initiative.” The program places new priority on tracking down and deporting people who have already been ordered deported and failed to leave the country. But the program prioritizes only those from particular Arab and Muslim countries.<sup>115</sup> The names of 6,000 Arab and Muslim non-citizens are being added to the National Instant Criminal Background Check System, which will alert police to the outstanding deportation order.

By April, the Justice Department announced that a plan passed by Congress in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, but never before finalized, would be put into effect by new regulations giving local police the authority to enforce immigration laws. This move was highly controversial, not only in immigrant communities but with many police departments as well who were concerned that it might encourage racial and ethnic profiling and would have a negative impact on public safety by making immigrants fearful of the police. The plan was finalized by a regulation that went into effect on August 23, 2002, and allows the Attorney General to deputize local police officers with authority over immigration only in certain circumstances.<sup>116</sup> Although the new policy is more limited than originally proposed, concerns about the potential adverse effect on relations between police and immigrant communities persist. “We’ve spent decades establishing trust...with our very diverse immigrant communities,” says a San Diego Police spokesman. “If there is an immigration emergency tied to criminal activity, of course we’ll assist. But if it is simply an immigration violation...we will not be involved.”<sup>117</sup>

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In June 2002, the Attorney General proposed a new regulation creating the “Entry-Exit Registration System,” a program to better track the entry and exit of visitors to the United States. But the plan will apply only to nationals of Iraq, Iran, Libya, Sudan and Syria, as well as to “nonimmigrant aliens whom the State Department determines to present an elevated national security risk, based on criteria reflecting current intelligence.”<sup>118</sup> It remains to be seen who will fall in the latter category. The regulation, which was made final in August 2002, requires all nationals from the designated countries to register with the government and be fingerprinted; failure to register is a deportable offense.<sup>119</sup>

In July 2002, the Justice Department announced added penalties for non-citizens who fail to report address changes within 10 days of moving.<sup>120</sup> In the past, the INS was notorious for failing to keep track of change-of-address forms and often lost them; media reports around the time of the announcement about the new penalties stated that there were warehouses full of INS address change forms that had never been entered into the INS database. The new policy raised concerns that the Justice Department was simply seeking to multiply the number of and penalties for technical immigration violations so that they could be exploited to deport individuals against whom the government had no evidence of wrongdoing.

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Career officials in federal law enforcement are concerned that many of these policies, which have generated such distrust and fear in Arab and Muslim communities, are simply ineffective. Vincent Cannistraro, former head of counterterrorism at the CIA, believes the FBI's decision to round up 5,000 Arabs for questioning is "counter-productive. It alienates the very community whose cooperation you need to get good intelligence."<sup>121</sup> He adds, "It is a false lead. It may be intuitive to stereotype people, but profiling is too crude to be effective. I can't think of any examples where profiling has caught a terrorist."<sup>122</sup>

From secret mass arrests, to the "voluntary" interviews of thousands, to fingerprinting and registration for those legally here, to selective enforcement against those who have been held deportable, Arabs, South Asians and Muslims – mostly immigrants – have borne the brunt of many of the government's new police powers. President Bush declared that the war on terrorism would not be a war on immigrants. But subsequent policies pursued by the Administration make that declaration ring hollow.

In addition to the impact of discriminatory government policies, in the first weeks after the September 11 attacks a violent backlash erupted against individuals who were perceived to be Arab or Muslim. Members of these communities were insulted, threatened, intimidated and even murdered. Government leaders, including the President and the Attorney General, spoke out forcefully against these crimes. Two days after the attacks, Attorney General Ashcroft warned, "We must not descend to the level of those who perpetrated Tuesday's violence by targeting individuals based on their race, their religion, or their national origin. Such reports of violence and threats are in direct opposition to the very principles and laws of the United States and will not be tolerated."<sup>123</sup> In remarks delivered at the Islamic Center on September 17, 2001, President Bush said "Those who feel like they can intimidate our fellow citizens to take out

their anger don't represent the best of America, they represent the worst of humankind, and they should be ashamed of that kind of behavior."<sup>124</sup>

Despite these admonitions, the abuse continues. The Justice Department has opened more than 380 investigations into violence or threats against Arab Americans, Muslim Americans, Sikh Americans, South-Asian Americans, and those perceived to be members of these communities since September 11.<sup>125</sup> The Civil Rights Division reports that the "allegations include telephone, internet, mail, and face-to-face threats; minor assaults, assaults with dangerous weapons, and assaults resulting in serious injury and death; and vandalism, shootings, and bombings directed at homes, businesses, and places of worship."<sup>126</sup> In addition to its efforts to educate communities at risk of this violence about how to protect themselves, the Civil Rights Division has focused considerable resources towards bringing perpetrators of these hate crimes to justice. Approximately 70 state and local criminal prosecutions have been initiated against approximately 80 defendants. Federal charges have been brought in 10 cases involving 12 defendants.<sup>127</sup>

These efforts to condemn and combat violent attacks against minorities are important and laudable. But government policies that target immigrants in these same communities for discriminatory treatment and selective prosecution must be seen as helping to perpetuate an environment in which scapegoating and bias are likely to continue.

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## Chapter 4

### THE SECURITY DETAINEES AND THE CRIMINAL JUSTICE SYSTEM



#### INTRODUCTION

The prosecution of the war in Afghanistan has resulted in the detention by the United States of citizens of at least 43 other countries. Almost 600 of these suspects have been transferred to detention and interrogation facilities on the United States Naval Base at Guantanamo, Cuba. At the same time, police action within the United States has resulted in the detention, without charge, of others, including U.S. citizens, suspected of links with the al Qaeda organization. At least two U.S. citizens are being held without charge or trial in U.S. military custody. The executive has maintained that both U.S. citizens and non-citizens suspected of collaboration with the Taliban or al Qaeda can be held indefinitely as “enemy combatants.” As such they are being held without a court order or judicial review of the legality of their arrest. These prisoners are being held incommunicado, without access to counsel, in military custody.

The names of the detainees have not been released. Six months after most of the transfers, officials have acknowledged that no one detained at Guantanamo has been identified as a high-level al Qaeda member. None has been charged with any crime.

On a positive note, in recent months the administration has begun to rely more on the criminal courts to adjudicate national security cases. One U.S. citizen detained in Afghanistan, John Walker Lindh, was charged with crimes based on his incorporation into the Taliban’s forces. He was convicted by a civilian court after having agreed not to contest the case. The government is also prosecuting Zacarias Moussaoui and Richard Reid. In recent weeks,

four foreign nationals detained in the United States as suspects in the planning of violent political attacks, some of whom were held for long periods without charge, have now been indicted by a federal court in Michigan. Another U.S. citizen, James Ujaama, was indicted in Washington State.

But, on a parallel track, in November 2001, President Bush issued a Military Order to create extraordinary military tribunals, called military commissions. The special tribunals were authorized to try non-citizen suspects seized in military and police actions under truncated procedures that do not comply with the standards of U.S. military justice. The plan to create these military commissions met with widespread criticism from across the political spectrum. In part because of this reaction, no case has yet been brought before these tribunals.

#### THE LEGAL FRAMEWORK

International humanitarian law, or the law of war, grew out of a need to codify principles developed over centuries to make wars less inhumane. Humanitarian law outlaws practices of brutality and inhumanity that all states agree have little or no utilitarian value toward the rational end of a belligerent party: destroying the enemy’s ability to continue military resistance. By eliminating unnecessary suffering attendant to war and protecting those who are not, or – as in the case of the wounded or prisoners of war – are no longer, participants in the fighting, humanitarian law created incentives for defeated armies to surrender rather than fight needlessly to the death. It also helped preserve human and material wealth on both sides of a

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conflict whose destruction had no significant impact on the war's outcome. Finally, it facilitated peacemaking at the conclusion of hostilities, by mitigating the grounds for mutual rancor. The most comprehensive and universal expression of international humanitarian law is in the four Geneva Conventions of 1949.

The Geneva Conventions serve as an overlay to the broader body of international human rights law, which sets forth the minimum rights of every human being, at all times. Human rights law is contained in numerous instruments and unwritten traditions and practices (customary international law). Among the most important instruments of international human rights law is the International Covenant on Civil and Political Rights, which sets forth the minimum rights recognized by states parties as applicable "to all individuals within [their] territory and subject to [their] jurisdiction...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>128</sup> Another crucial instrument of human rights law is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>129</sup> The United States is a party to both of these conventions and legally bound by their provisions. While some elements of human rights law may be derogated from in times of war, human rights law itself continues to apply at all times, in war as in peace.

Finally, each state has its own national laws, including constitutions, statutes and judicial case law. These too establish basic rights, norms of treatment, and other kinds of legal obligation. For the United States, the U.S. Constitution is the most important source of standards for the rights of Americans and others within or linked to the United States.

### **Perpetual War or National Emergency?**

One important principle of humanitarian law is that prisoners of war and other enemy belligerents may for security reasons be kept in deten-

tion until the "cessation of active hostilities."<sup>130</sup> This raises a troublesome question relative to both the status of detainees seized in the context of the United States' antiterrorism measures and the broader emergency measures taken domestically. The ongoing investigations and police actions have been described by U.S. officials as part of a "war against international terrorism," but increasingly, they are taking place at home, outside of the immediate context of armed conflict. To a large extent, the relevant standards to apply to the domestic dimension of these measures are to be found in international human rights law and not in humanitarian law.

All indications from the administration are that they conceive of their 'emergency' measures as long-term. As one official put it, "We'd rather be safe than sorry. The administration didn't want to be in the position of conceding power we may need five years from now, because we don't know what the war will be like five years from now."<sup>131</sup> The administration is reluctant to acknowledge that far from protecting powers traditionally held by the executive, they are actually effecting a major shift in balance of powers among the three branches of government. And in doing so, they are asserting broad authorities that should, under both domestic and international law, be wielded sparingly, only to the extent strictly required by the circumstances, and in all cases subject to judicial monitoring and review.

### **GUANTANAMO: PRISONERS OF WAR OR DETAINEES?**

The first U.S. aircraft bearing prisoners from Afghanistan left that country on January 11, taking 20 Taliban and al Qaeda suspects to the United States' naval base at Guantanamo Bay, Cuba, to be joined within days by scores more. By mid-August, some 598 suspected Taliban and al Qaeda prisoners from at least 43 countries had been transferred to the U.S. base at Guantanamo, where they were held in the prisoner compound.<sup>132</sup> Most had been captured in

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or near the battlefield theater, in Afghanistan or Pakistan. Some, however, came from further afield, such as the six Algerian detainees arrested and transported to Guantanamo from Bosnia, after a local court had ordered their release for lack of evidence – reportedly sought in connection with an al Qaeda plot to blow up the American Embassy in Sarajevo.<sup>133</sup> At least one detainee has been sent home due to mental illness, and an unknown number have been secretly transferred to other countries. Officials are preparing accommodations for up to 2,000 inmates.<sup>134</sup> The Defense Department has indicated that many of the detainees can expect to be kept in Guantanamo until the end of the war against terrorism, a war that shows no sign of ending any time soon.<sup>135</sup>

### **The Geneva Conventions and the Guantanamo Detainees**

The Geneva Conventions apply to the actions in war of the United States and every other state, whatever the circumstances. What is at issue is to determine, based on objective criteria, which particular provisions of the Geneva Conventions apply to which particular individuals. The fundamental distinction made in the laws of war is between civilians (and certain other non-belligerents) and combatants. Combatants are authorized to employ violence in combat and are, in turn, themselves lawful targets for enemy forces. Conversely, the law prohibits combatants from targeting civilians, but civilians may not lawfully participate in combat.

The International Committee of the Red Cross has said that the “general principle” of the Geneva Conventions is that:

**Every person in enemy hands must have some status under international law; he is either a prisoner of war...covered by the Third Convention, a civilian covered by the Fourth Convention, or...a member of the medical personnel of the armed forces covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.<sup>136</sup>**

Because the application of specific provisions of the Geneva Conventions turns on an individual’s status as civilian or combatant, the Conventions set out clear guidelines for making that determination. The Third Geneva Convention requires that there be an individualized hearing by a “competent tribunal” should there be “any doubt” whether a detained individual is a civilian or a combatant, and sets out the standards upon which the determination is to be made. The United States has long complied with these procedures,<sup>137</sup> and thousands of such hearings were held in the Vietnam<sup>138</sup> and Gulf wars.

Under article 4 of the Third Geneva Convention, generally, those entitled to prisoner of war status are “members of the armed forces of a conflict, as well as members of militias or volunteer corps forming part of such armed forces”; in addition, “members of other militias and members of other volunteer corps... belonging to a Party to the conflict” are recognized as prisoners of war if their organization satisfies four conditions: organized with a responsible chain of command; use of a distinctive sign (or uniform) distinguishing them from civilians; carrying arms openly; and generally complying with the laws of war. Until the competent tribunal has reached its determination, detainees must be presumed to be prisoners of war.

In a status hearing under the Geneva Conventions, a detainee may also seek to demonstrate that the factual circumstances of his arrest may have been misleading and that he is not a member of a hostile fighting force at all. For example, a prisoner may have been captured on a tip from an Afghan source with an ulterior motive to harm him.

A prisoner of war cannot be tried for his use of violence in the conduct of the war – what is known as the combatant’s privilege. But the combatant’s privilege does not include the right to violate the laws of war or commit other international crimes, and, if the facts warrant, a

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prisoner of war can be tried for war crimes or crimes against humanity. When tried for such a crime, a prisoner of war is entitled to the same procedural rights as a member of the detaining state's military would receive in the same circumstances.<sup>139</sup> For prisoners held by the United States, this would be a court martial. Even if convicted and sentenced for such crimes, a prisoner of war does not lose his prisoner of war status. "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain...the benefits of the present Convention."<sup>140</sup> A prisoner of war may be detained until the end of the hostilities even if he is charged with no crime.<sup>141</sup>

By contrast, a civilian who participates in hostilities does "not enjoy immunity under the law of war for his violent conduct and can be tried and punished under civil law for his belligerent acts." Thus, if the battlefield "competent tribunal" determines an individual has participated in hostilities but does not qualify as a "privileged combatant" (and so as a prisoner of war), he may be prosecuted for his mere participation in the hostilities. However, such individuals "do not lose their protection as civilians under the [1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention)] if they are captured."<sup>142</sup>

Moreover, in appropriate circumstances, if the tribunal determines there is probable cause to believe the civilian may have committed a war crime or other serious violation of international law, the civilian may be detained for further investigation and/or prosecution for those acts. Even in such circumstances, however, the suspect continues to retain his rights as a civilian under the Fourth Convention, and, in addition, in the event of trial, he is entitled to specified minimum rights, including: the right to confidential communications with counsel of his or her choice; prompt notice of the charges, including receipt of any documents that would be given in a trial of a U.S. soldier for the same crime; the right to present evidence and

call witnesses; the right to a public trial (subject to reasonable security measures); and the same appeal rights a U.S. soldier would receive in the same situation, which would require an independent appellate court with civilian judges, such as the Court of Appeals for the Armed Forces that hears appeals from U.S. courts martial.<sup>143</sup>

### **Prisoners of War or Detainees?**

Rejecting these well-established procedures, the administration quickly declared that the Guantanamo detainees would not be considered as normal battlefield prisoners, and announced that, whether al Qaeda or Taliban, the men in custody were, as a group, "unlawful combatants,"<sup>144</sup> and, as such, were not entitled to the rights and protections afforded prisoners of war under the Third Geneva Convention. From then on, denied the status of "prisoner," the captives would be referred to with the legally neutral term "detainees." The International Committee of the Red Cross, despite its general policy of preserving confidentiality about its findings, responded that in an international armed conflict, anyone captured on a battlefield was legally presumed to be a combatant entitled to prisoner of war status: "They were captured in combat...we consider them prisoners of war."<sup>145</sup>

Yet the administration has persisted in a two-edged argument. When appropriate treatment for alleged "enemy combatants" captured in or near Afghanistan is under discussion, authorities say, in effect, "yes, they are combatants, but the law of war does not apply to them, because they are criminals." Conversely, when the issue is proper treatment of individuals arrested in the United States as suspected terrorists, the response is that, "yes, they are criminals, but criminal law (including its constitutional protections) doesn't apply because they are 'enemy combatants.'"

Deceptively simple as a concept, the term "unlawful combatant" appears at first glance as

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an analytical tool fashioned to *resolve* the continuing debate as to whether the perpetrators of the September 11 attacks were *criminals* or *belligerent combatants*, and to guide authorities in determining the proper legal treatment of those suspected or accused of involvement. But the administration has in fact been using the term “unlawful enemy combatant” – a term not found in international law – as a kind of magic wand, waving it to avoid well-established standards of U.S. and international law.

In press statements in early January 2002, Defense Secretary Donald Rumsfeld stated that as a matter of policy, but not of perceived legal obligation, the United States intended to treat the detainees in a manner “reasonably consistent with the Geneva Conventions,” and would “generally” follow the Geneva Conventions, though only to “the extent that they are appropriate,” since “technically unlawful combatants do not have any rights under the Geneva Convention.”<sup>146</sup>

One problem with this approach from the perspective of the U.S. military was that the Geneva Conventions act as a fundamental safeguard protecting U.S. service members who might be captured overseas. If the U.S. wants to be able to rely on the protections in the Geneva Conventions for its own troops, the U.S. must comply with them as well – not just in word, but in deed. In large part this turns upon prisoner of war status, and the required procedure by which a U.S. military tribunal must conduct individual determination hearings to establish whether a detainee is a prisoner of war or a civilian, and, in either case, whether the individual should be tried for war crimes or crimes against humanity.

Concerned about this potential rebound effect against American servicemen, Secretary of State Colin Powell asked in mid-January for a review of the administration’s policy on the Geneva Conventions.<sup>147</sup> According to a leaked memorandum, White House Counsel Alberto Gonzales indicated that Powell “had contended

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that the Geneva rules apply to both al Qaeda and the Taliban.” Gonzales added:

**I understand, however, that he would agree that al Qaeda and Taliban fighters could be determined not to be prisoners of war (P.O.W.s) but only on a case-by-case basis following individual hearings before a military board.** <sup>148</sup>

The promise of review, however, was quickly drowned out by a rash of statements from other top officials suggesting that any review would be limited in scope, and that, whatever the findings, the United States would not consider acknowledging P.O.W. status for any of the detainees.<sup>149</sup>

The administration’s review led to only a minor change in its stated position. On February 7, 2002, White House Spokesman Ari Fleischer announced President Bush’s decision “that the Geneva Convention applies to members of the Taliban militia, but not to members of the international al-Qaida terrorist network.” Even so, though, the Taliban would not be considered eligible for prisoner of war status. The analysis appeared to be that, on the one hand, as members of a non-state terrorist organization, al

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Qaeda forces could never, under any circumstances, be eligible for prisoner of war status; on the other hand, the administration was now willing to accept that the Taliban was in principle potentially eligible for Geneva Convention protections, as the armed force of a state (Afghanistan) that was party to the Conventions, but that when it came to actually “applying” the test set forth in the Conventions, the Taliban, as an organization, was found, in effect, to have forfeited its potential right to Geneva Convention protections because of its violations of humanitarian law. Fleischer added that, notwithstanding these conclusions, the United States would “treat all Taliban and al-Qaida detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Convention.”<sup>150</sup> The administration’s profession of “strong support for the Geneva Convention,”<sup>151</sup> however, belied an interpretation of the United States’ obligations in this regard that undermines the most elementary doctrines of international humanitarian law.<sup>152</sup>

### **Double Standards**

Not everyone in Afghanistan was being judged by the same standards. Lack of uniforms – or, for that matter, a history of atrocities against civilians or disarmed battlefield prisoners – did not lead the Administration to characterize Northern Alliance warlords – or foot soldiers – as “unlawful combatants.”<sup>153</sup> When it came to crimes against humanity, the President’s challenge to the world to be “with us or against us”<sup>154</sup> began to look less like an ironclad pledge of moral consistency than a promise to spare the United States’ new-found friends in the region the kind of scrutiny reserved for its enemies.

Nor did the United States consider operations by its own special forces executed out of uniform to have been unlawful. In recent months, U.S. military and other coalition forces have been increasingly engaging in both military and humanitarian initiatives, obscuring the bright line between military forces and civilians. This

trend has caused growing concern among NGOs operating in Afghanistan, who are “alarmed about the potential confusion created in the minds of Afghans by armed coalition soldiers taking part in civil affairs operations while dressing and operating similarly to NGO staff,” according to a respected authority on humanitarian operations. “There is a real fear that humanitarian action may be seen as a front for intelligence gathering by coalition forces.”<sup>155</sup>

Initially, the administration was unambiguous about who it had transported to Guantanamo: not just enemies, but “among the most dangerous, best trained vicious killers on the face of the earth”;<sup>156</sup> “people that would gnaw hydraulic lines in the back of a C-17 to bring it down.”<sup>157</sup> We were given to understand there could be no doubt as to the kind of men being held since, as Defense Department General Counsel William J. Haynes put it, the Guantanamo detainees “are enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies....”

Secretary Rumsfeld himself opened the door to doubt about many of the Guantanamo detainees, when discussing with the press the importance of the interrogation process there in establishing some basic facts bearing directly on their status:

**Were their actions not really egregious? Were they picked up inaccurately or improperly or – not improperly or inaccurately – unintentionally? Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn’t belong in there.**<sup>158</sup>

As the interrogations in Guantanamo continued, it emerged that in many cases the interrogators did not really know who their prisoners were. As Secretary Rumsfeld suggested, some were “victims of circumstance,” caught in the wrong place at the wrong time.<sup>159</sup> Though some important information was almost certainly being harvested from the intensive interrogations, by August 2002, officials were

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forced to acknowledge that “U.S. authorities have yet to identify any senior al Qaeda leaders among the nearly 600 terrorism suspects...in U.S. military custody at Guantanamo Bay.” Most were low-level or middle-level fighters and supporters – “no big fish.” According to one official, “[s]ome of these guys literally don’t know the world is round.” Some of the detainees were being treated medically for psychological disorders, and at least one had to be repatriated because of his mental illness.<sup>160</sup>

### **Access to the Courts and Right to Counsel**

Lawyers representing some of the detainees held at Guantanamo have filed *habeas corpus* petitions, asking U.S. federal courts to assert jurisdiction over their cases. At least two courts have ruled that they lacked such jurisdiction. In these cases, in addition to asserting its plenary power over military affairs, the Bush administration has successfully argued that U.S. courts have no jurisdiction over non-U.S. detainees in Guantanamo because the military base is not under U.S. sovereignty. The U.S. formally recognizes Cuban “sovereignty” over the base even while occupying and controlling it under a perpetual lease imposed on Cuba long before the present regime there. Although the U.S. Navy has described Guantanamo as a “Naval reservation which for all practical purposes, is American territory....[over which] the United States has for approximately [ninety] years exercised the essential elements of sovereignty,”<sup>161</sup> the administration’s strategy is to reconfigure the territory’s anachronistic colonial status into what one official characterized as the “legal equivalent of outer space” – a place where literally no law applies.<sup>162</sup>

Addressing the question whether, under international and/or U.S. law, including the Due Process Clause of the Fifth Amendment of the U.S. Constitution, “aliens held outside the sovereign territory of the United States can use the courts of the United States to pursue claims brought under the United States Constitution,” the Federal District Court for the

District of Columbia gave a resounding ‘no.’ Moreover, the court added, “no court would have jurisdiction to hear these actions,”<sup>163</sup> even while there is no question that U.S. forces in Guantanamo fall under the umbrella of U.S. law. Though Judge Colleen Kollar-Kotelly concluded that “diplomatic channels remain ongoing and viable means to address the claims raised by these aliens,”<sup>164</sup> she did not elaborate on what these are, or how they can be utilized in practice.

At the same time, there have been troubling reports that “[t]he U.S. government...has secretly transported some suspects to Middle Eastern countries that use interrogation tactics, including torture and threats, that are illegal under U.S. law.”<sup>165</sup> If these reports are true, such a practice would be in clear violation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is party, and which forbids any State Party to “expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>166</sup>

### **The Military Commissions**

The administration’s plans for trials of “unlawful combatants” in military commissions have provided an instructive backdrop to the conflict in Afghanistan, the transfer of detainees to Guantanamo, and the identification of a few U.S. citizens among those accused of association with the Taliban or al Qaeda. In a November 13, 2001 Military Order,<sup>167</sup> President Bush authorized the trial of suspected terrorists for “violations of the laws of war and other applicable laws” in military commissions that side-stepped due process guarantees provided in civilian courts as well as those of the United States military court system.<sup>168</sup> The Military Order allows the trial by military commission of any non-citizen suspected of terrorism (or other crimes “under applicable laws”), inside or outside the United States, whether in connection

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with Osama bin Laden and his al Qaeda network or not. The Order has no termination date. Any non-citizen – even legal permanent residents – could be tried by the new military panels.

The Order creates a parallel criminal justice system in which defendants would have only those rights that the President or Secretary of Defense decide they would have. The President would designate those individuals to be tried by the new courts, and would authorize withholding from them evidence the prosecution deemed sensitive and confidential. This would prevent effective challenge in court of part or all of the information on which the President's designation is based as well as the evidence used in the trial itself. (A military defense lawyer with security clearance, provided to the defendant by the commission, would have access to secret evidence, but would not be able to share that information either with the defendant or with any civilian co-counsel chosen by the defendant). The Order does not require that an individual detained under it be brought to trial at all, and so authorizes indefinite detention without trial. The commissions would be able to convict based on hearsay and other evidence that would not be admissible in a regular court. The accused would have no recourse to the ordinary courts, and could appeal a conviction – which may carry the death penalty – only to the President who named him as a suspected terrorist in the first place.

In support of the military commission proposal, the administration invoked historical precedent for such streamlined military courts, going back to George Washington. In particular, they pointed to the World War II Supreme Court case, *Ex parte Quirin*.<sup>169</sup> This was a case concerning eight Nazi soldiers who in mid-June 1942 disembarked from submarines in New York and Florida with a plan to commit sabotage. One of the men, George Dasch, turned himself in, betraying the others to the FBI. Less than nine weeks after they had landed, the Supreme Court had upheld a military commission's jurisdiction to try them, the trial was completed,

and six of the men were executed. Dasch received a 30-year sentence, and the eighth man was sentenced to life imprisonment.

History has not dealt kindly with the *Quirin* case. "Particularly in recent decades, the Supreme Court has been criticized....The compressed schedule...gave the appearance of a rush to judgment."<sup>170</sup> Moreover, *Quirin* was decided before the 1949 Geneva Conventions, which substantially changed the rules regarding military trials of captured enemy forces. The administration's use of *Quirin* to defend the detentions of American citizens Hamdi and Padilla as "enemy combatants" (in virtually all of the government's court filings) has been particularly awkward since three rights the *Quirin* defendants did receive were right to counsel, right to speedy trial and right to civilian review (by the Supreme Court).

The November Military Order aroused considerable protest from across the political spectrum. Robert A. Levy, a senior constitutional law fellow at the Cato Institute, exclaimed that "[w]e all want to fight terrorism, but shredding the Constitution – which applies to all 'persons,' not just citizens – isn't the way to do it." He also noted pointedly that the President's authority as commander in chief "at best, is shared with the legislative branch. Congress, not the president, is empowered by Article I, section 8 [of the Constitution] 'To make Rules for the Government and Regulation of the land and naval forces.'"<sup>171</sup> Columnist William Safire protested the President's "suspending, with a stroke of his pen, *habeas corpus* for 20 million people," and opined that "[t]he sudden seizure of power by the executive branch, bypassing all constitutional checks and balances...was more than a bit excessive." Safire further reported that military lawyers were "also determined to resist the subversion of the Uniform Code of Military Justice by Bush's diktat."<sup>172</sup>

Law enforcement officials also saw the Military Order as both improper and counterproductive. James Orenstein, former federal prosecutor

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and Associate Deputy Attorney General, argued that the fight against terrorism was fundamentally global, and that international cooperation would be “imperiled when foreign governments don’t trust us to respect the basic rights of the people we ask them to send us.” He also asserted that that use of military commissions would “threate[n] a basic tactic in fighting complex criminal organizations: prosecuting a low-level member to help develop more evidence for another case against someone higher in the organization’s chain of command. Indeed,” he stressed, “much of what law enforcement now knows about al Qaeda was developed as a result of civilian trials and investigations.”<sup>173</sup>

Former FBI and CIA Director William Webster also expressed dissent:

**To me, this [secret military tribunal] was a battlefield tribunal....I did not believe it would be a substitute for our system of justice for people being apprehended in the United States....I don’t think we solve our problems by avoiding the process that has made us what we are...<sup>174</sup>**

Responding to such criticism, White House Counsel Alberto Gonzalez assured critics that *habeas corpus* review would be available to defendants in military commissions in the United States, without providing the same assurances for commissions held outside the U.S.<sup>175</sup> With Guantanamo as the principal venue for the detention of non-citizen “unlawful combatants,” a place that for now is outside the jurisdiction of any court authorized to hear a *habeas corpus* petition, this assurance turned out to be entirely cosmetic.

In March 2002, the Administration issued more detailed procedures to supplement the November Military Order. While some of the most outrageous features of the November Order were moderated, the regulations continue to permit secret evidence, hearsay, hearings closed to the public, limitations on defendants’ choice of counsel, and denial of review of commission determinations by the U.S. federal courts.

**Even if suspected terrorists are eventually tried and then acquitted by military commissions, the administration reserves the right to continue to detain them indefinitely.**

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To date as a response, at least in part to the public criticism of the proposal, no one has been brought before a military commission. In any event, Defense officials have indicated that even if suspected terrorists are eventually tried and then acquitted by these military commissions, the administration reserves the right to continue to detain them indefinitely.<sup>176</sup>

#### **Arrests of Non-Citizens Within the United States**

In contrast with the civil detentions of non-citizens within the United States, discussed in chapter 3 of this report (mostly for alleged immigration law violations) the arrests and prosecutions of those expressly accused of being directly linked to the violent foreign-based groups have presented a peculiar picture: several non-citizens appear to have been accorded more rights than U.S. citizens, even when both have been characterized as “enemy combatants.”

In December 2001 and January 2002, the U.S. government opted to prosecute two non-citizens in U.S. civilian courts. The determination to use the criminal justice system came as the debate still raged over the November Military Order. Zacarias Moussaoui, a Frenchman of Moroccan extraction, the so-called “twentieth hijacker,” was apprehended a month before the September 11 attacks, after arousing suspi-

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cion at a Minnesota flying school. Richard Reid, the British-born “shoe bomber” was arrested after a botched attempt to set off an explosive hidden in his shoe during a trans-Atlantic flight. The prosecution of Moussaoui, who was alleged to have been directly involved in the September 11 conspiracy, in particular, spawned the hope that the administration had backed off from its widely criticized military commission proposal.

With the subsequent detentions without trial of U.S. citizens Yaser Hamdi and José Padilla, the administration’s plans for alleged militants of al Qaeda became murkier and less encouraging. Then, last month, new indictments against non-citizen detainees were issued, auguring, perhaps, a renewed willingness to bring the full force of the criminal justice system into the fight against actions threatening the United States. At the same time, the fate of the U.S. citizens held without charge or trial on identical grounds was under review in the courts.

*Zacarias Moussaoui*

Zacarias Moussaoui was arrested in Minnesota on August 16, 2001, just weeks before the September 11 attacks. Apparently, instructors at a flying school he attended found it suspicious that he paid for his \$8,000 flight classes in cash, expressed “unusual interest” in the fact that a plane’s doors could not be opened during flight, and insisted on learning to fly large aircraft despite what they saw to be minimal aptitude for flying.<sup>177</sup> He was held on immigration charges and was still in INS custody on September 11. The refusal by the FBI’s Washington headquarters to approve a request from local FBI agents to search his home computer, despite apparently incriminating information received from French intelligence services, precipitated a major controversy regarding the effectiveness of the FBI when evidence allegedly tying him to some of the September 11 hijackers was later found in the computer.<sup>178</sup> On December 11, 2001, Moussaoui was indicted in Virginia on charges of conspiracy relating

to the September 11 attacks. The Lawyers Committee for Human Rights welcomed the indictment as a signal that the Administration will not forsake the U.S. criminal justice system even for those suspected of the closest involvement in the September 11 attacks.<sup>179</sup> Moussaoui has rejected court-appointed lawyers and insisted on defending himself. His erratic behavior led to a court-ordered psychological examination, which determined that he was competent to defend himself. Some observers have complained that the pre-trial proceedings so far have resulted in a “circus-like” atmosphere that demeans the judicial system and provides a platform for Moussaoui to spout hatred. But the more important lesson of the case, so far, is for the world to see that even with all of these difficulties, the civilian court is fully competent to assure Moussaoui all the procedural rights and protections that are his due under the Constitution, and still proceed with a meaningful and reliable determination of the truth. The case, before Judge Leonie M. Brinkema, is now scheduled to come to trial in January 2003.

*Richard Reid*

Richard Reid was arrested on December 22, 2001, after failing to ignite an explosive hidden in his shoe on a Paris to Miami flight. Reid was taken into custody in Boston, to where the flight had been diverted, and where he is being tried in Federal District Court. He is represented by two public defenders. A British citizen who converted to Islam, Reid may have met Moussaoui at the Brixton Mosque, in London.<sup>180</sup> His case seems to be proceeding uneventfully, with trial before Judge William G. Young scheduled to begin November 4, 2002.

*Karim Koubriti, Ahmed Hannan, Farouk Ali-Haimoud, and “Abdella”*

On August 28, 2002, indictments were issued against four men allegedly working in a terrorist cell in the Detroit area that was planning attacks in the United States, Jordan and

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Turkey. All of the men are foreign nationals: Koubriti and Hannan are Moroccan, Ali-Haimoud is Algerian; and authorities do not know the full identity of the fourth man, Abdella, who was not taken into custody. The three men in custody were originally arrested in a raid on the apartment of a fourth man, a Kuwaiti named Nabil Al-Marabh, who remains in custody but has not apparently himself been indicted; federal officials believe that Al-Marabh is linked to al Qaeda. Ali-Haimoud had been released shortly after his September arrest, for insufficient evidence, and was arrested again in April. Koubriti and Hannan have been in detention since their original arrests.<sup>181</sup>

### **Detentions of U.S. Citizens**

The Constitution of the United States sets forth the bedrock rights that effectively define the American values of liberty and justice and apply to citizens and non-citizens alike. These rights have not always been fully respected in past periods of emergency. During World War II the government ordered the mass internment of tens of thousands of citizens and non-citizens of Japanese extraction, and at the height of the Cold War an extraordinary internal security act authorized the imprisonment of suspected “subversives” without charge or trial. But the nation has almost always, sooner or later, repudiated such acts, acknowledged that human rights were violated, and generally pledged never to repeat them.<sup>182</sup>

In the most recent action of this kind, Congress in 1971 repealed the Emergency Detention Act of 1950, which was passed during the Korean War to deal with espionage and sabotage activities within the U.S. by a supposed Communist “fifth column.” Title II of this Act authorized the relocation of “alleged subversives” into six national detention centers during wartime. The Act authorized detention without charge or trial on the mere say-so of federal officials, although it did not suspend the right of *habeas corpus*.<sup>183</sup> Detentions were not, in fact, ever carried out under the Act.

In repealing the Emergency Detention Act, Congress legislated that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>184</sup> This measure, passed amid mounting public pressure during the Vietnam War, sought to proscribe the power to create “emergency detention camps” for U.S. citizens and to “restrict the imprisonment or other detention of citizens of the United States to situations in which statutory authority for their incarceration exists.”<sup>185</sup>

Notwithstanding the clear constitutional and statutory injunction, two U.S. citizens have been detained without firm basis in law since September 2001. Other similar cases are possible in the future.<sup>186</sup>

### **U.S. Citizens with Alleged Links to al Qaeda**

The administration has been particularly aggressive in its use of the label “enemy combatant” to justify indefinite detention of two citizens, Yaser Hamdi and Jose Padilla. The government has not disclosed the criteria for this designation, even to the courts, but by naming detainees as “enemy combatants,” federal authorities have declared that prisoners may be held without access to courts – civilian or military – and without access to counsel. According to the Bush administration’s court filings, if a court insists on making *some* sort of review of the decision to detain a U.S. citizen, it “may at most look to see whether the military has supplied a factual basis to support its *own* determination that [the citizen] is an enemy combatant.”<sup>187</sup> In other words, the citizen’s indefinite detention is to be permitted as long as the government puts forward in good faith *some* apparently incriminating fact, a standard substantially lower than “probable cause.” Indeed, under the government’s rules, detention could be permitted even where there is a preponderance of the evidence indicating innocence of wrongdoing. The courts are still sorting out how far they are willing to go along with the administration’s assertion of virtually unfet-

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tered discretion in the treatment of “enemy combatants,” and the record is mixed.

*Yaser Hamdi*

Yaser Hamdi, a Louisiana-born U.S. citizen of Saudi extraction, was captured by Northern Alliance forces in Afghanistan. He was transferred to Guantanamo, where U.S. officials realized that he was a U.S. citizen. As a result, he was subsequently transferred to a U.S. military base in Virginia, where he is now being held, without charge or trial, as an “enemy combatant.” In May 2002 a public defender – who had never been allowed even to see Hamdi – filed a *habeas corpus* petition in a Federal District Court in Virginia, Judge Robert G. Doumar presiding. The petition was denied on the ground that the lawyer was not sufficiently related to Hamdi to act on his behalf as a petitioner. A second filing followed on June 11 2002, this time on behalf of Hamdi’s father, and the court promptly ordered the government to allow the public defender to meet with the detainee in private, without military personnel present. The government successfully appealed the Order and the case was sent back to the District Court for reconsideration as to whether the court had jurisdiction to order a writ of *habeas corpus* over an “enemy combatant.” On July 25, the government filed a motion to dismiss the habeas petition. The government reiterated its position that the court had very limited, if any, authority to review core military decisions, such as those involved in the apprehension and detention of “enemy combatants,” at least if the government showed some evidence that the individual was apprehended in some circumstance related to an armed conflict, the existence of which circumstance was to be accepted by the court on the President’s say-so:

**In particular, in the context in which this case arises, there is no basis for a court to conduct evidentiary proceedings with respect to any of the particular facts or circumstances surrounding an individual’s capture as an enemy combatant, effectively opening the door for “alleged enemy combatants to**

**call American commanders to account in federal court rooms.” The Court’s proper role does not permit it to call members of the United States military back from the front, or to somehow attempt to bring into the courtroom the Northern Alliance forces who accepted Hamdi’s surrender. Nor would it be proper to call Hamdi himself to court and, thus, seriously jeopardize important national security interests related to intelligence gathering....The relevant issue is whether the United States military had a factual basis for treating Hamdi as an enemy combatant. This return and the accompanying declaration readily demonstrate that the military had such a basis, and that is the end of the inquiry.<sup>188</sup>**

Judge Doumar was unconvinced, and on August 16, 2002, he ordered the government to turn over for the court’s *in camera* review the underlying factual evidence supporting the government’s determination that Hamdi is an “unlawful enemy combatant,” together with the “screening criteria utilized to determine the status of Hamdi with the name(s) and address(es) of the persons who made the determination.”<sup>189</sup> Judge Doumar vowed that he would not be a “rubber stamp” for the government, and would not simply accept uncritically the conclusions of a two-page declaration – the “Mobbs declaration” – submitted to him to justify Hamdi’s continued incarceration as an “enemy combatant.”

Judge Doumar bluntly put the prosecutor on notice: “I’m challenging everything in the Mobbs declaration,” he said. “If you think I don’t understand the utilization of words, you are sadly mistaken.”<sup>190</sup> The Judge expressed his concern that while the government asserted that Hamdi was:

**“affiliated with a Taliban military unit and received weapons training” ...[t]he declaration makes no effort to explain what “affiliated” means nor under what criteria this “affiliation” justified Hamdi’s classification as an enemy combatant. The declaration is silent as to what level of “affiliation” is necessary to warrant enemy combatant status....It does not say where or by whom he received weapons training or**

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the nature and extent thereof. Indeed, a close inspection of the declaration reveals that [it] never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban. Without access to the screening criteria actually used by the government in its classification decision, this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled under his present detention.<sup>191</sup>

The Government has filed an appeal of Judge Doumar's ruling.

*José Padilla*

José Padilla (Abdullah Al Mujahir) is a Brooklyn-born U.S. citizen who converted to Islam. He was arrested on May 8, 2002 in Chicago, when disembarking from an air flight from Pakistan. The information leading to his arrest was, according to administration spokesmen, obtained from interrogating Abu Zubaydah, who has been described as the senior al Qaeda leader in U.S. custody.<sup>192</sup> Padilla was originally held as a material witness, in connection with an alleged conspiracy to create and use a radioactive "dirty bomb" against an American urban target. After one month in unpublicized detention, he was transferred to military custody in South Carolina, when Judge Michael B. Mukasey of the Southern District of New York, impatient with the government's apparent intention to hold Padilla indefinitely without charge, threatened to release him. As with Hamdi, the government is detaining him as an "enemy combatant." Though he was represented by public defenders when he was being held as a material witness in New York, since the transfer to military custody, he has been denied further access to his attorneys. The government is resisting his counsel's petition for *habeas corpus*, arguing (among other issues) that the District Court should defer to the President's determination that Padilla is an enemy combatant.

The inconsistency in treatment between Moussaoui and Reid, on the one hand, and Hamdi on the other, already troubling, came to

**President Bush and his lawyers maintain that terrorists are "unlawful combatants," and that unlawful combatants are not entitled to the protections of the Bill of Rights.**

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a head with Padilla's transfer to military jurisdiction, entailing detention in a Navy brig, and cutoff from his previously acting court-appointed lawyers. The *St. Louis Post-Dispatch* criticized Padilla's status of legal "limbo" – ineligible for a military tribunal because of his U.S. citizenship, and, once transferred to military custody, ineligible for a civilian criminal trial – a state of "legal purgatory...[where] he has fewer rights than Zacarias Moussaoui...and Richard Reid – neither of whom are citizens."<sup>193</sup> Similarly, in a June 11 editorial, the *Washington Times*, even while praising the apprehension of Padilla, raised concern about his legal status. "The administration will need to explain why Al Mujahir should be treated any differently from suspected terrorist John Walker Lindh, an American citizen who will be tried in U.S. District Court, or Zacarias Moussaoui, a non-citizen who will be tried in civilian court as well. The proper course of action would be to try Al Mujahir, like the other accused terrorists, in civilian U.S. courts."<sup>194</sup>

Other conservative voices also expressed discomfort at the appropriation of powers by the administration. With regard to domestic detentions, the Cato Institute protested the administration's undermining of constitutional protections, such as excluding the judiciary from the process of issuing arrest warrants, diluting the "probable cause" standard for arrest, for citi-

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zens and non-citizens alike, and overturning the sanctity of trial by jury.

President Bush and his lawyers maintain that terrorists are “unlawful combatants,” and that unlawful combatants are not entitled to the protections of the Bill of Rights. The defect in the president’s claim is circularity. A primary function of the trial process is to sort through conflicting evidence in order to find the truth. Anyone who *assumes* that a person who has merely been accused of being an unlawful combatant is, in fact, an unlawful combatant, can understandably maintain that such a person is not entitled to the protection of U.S. constitutional safeguards. The flaw, however, is that the argument begs the very question under consideration.<sup>195</sup>

*John Walker Lindh*

John Walker Lindh, the first of the “American Taliban,” was apprehended by Northern Alliance forces in Afghanistan. When he was handed over to U.S. intelligence officers, it was discovered that he was American. According to Lindh’s court filings, he was intensively interrogated for weeks during which time he was physically mistreated and denied access to legal counsel despite repeated requests.

Lindh was captured by Northern Alliance forces in late November 2001 and was handed over to U.S. custody on December 1. At that time, the defense alleged, he was malnourished, dehydrated and in need of medical attention to remove shrapnel in his thigh (which “would remain there for over three weeks, during which time Mr. Lindh was incarcerated and interrogated by U.S. forces”). The defense asserted that he was provided minimal food and medical assistance, despite repeated requests. Later, the defense alleged, he was threatened with death, stripped naked, blindfolded and, “shaking violently from the cold nighttime air,” bound to a stretcher “with heavy duct tape wrapped tightly around his chest, upper arms, ankles and the stretcher itself,”

and in this condition placed in a windowless metal shipping container with no light, no heat source and no insulation. The defense states that he was kept in this container for two days, during and after which the U.S. agents continued to question him. On December 14, Lindh was diagnosed by Navy doctors as suffering from dehydration, mild hypothermia and frostbite. Finally, on approximately December 15, Lindh received surgery for his wounds, and the bullet in his leg was removed.<sup>196</sup>

He was brought back to the United States after being held over a month in U.S. custody in Afghanistan, and in January 2002, he was indicted in a civilian federal district court in Virginia on charges of conspiring with al Qaeda forces to kill U.S. nationals, and related charges, facing possible life imprisonment. Despite the ubiquitous publicity and the obvious importance the government ascribed to the case,<sup>197</sup> the prosecution lost confidence in its ability to prove its case, which apparently depended largely on early self-incriminating statements made by Lindh before his lawyers could meet with him. Faced with the possibility that the statements would be excluded from the proceedings, the government ultimately settled the case in July 2002, without going to trial.

*James Ujaama*

James Ujaama, a native born U.S. citizen convert to Islam, was taken into custody in July 2002 as a material witness in connection with alleged plans to set up an al Qaeda training camp in Oregon.<sup>198</sup> Ujaama was indicted at the end of August on charges that he conspired to provide facilities and support for al Qaeda operatives. As with the earlier Moussaoui indictment the Government’s decision to prosecute Ujaama in civilian court again set human rights and civil liberties advocates to wondering whether the criticism of the military detentions of citizens and non-citizens arrested on U.S. territory might have persuaded the Administration to desist from its Constitutional overreaching, and end its practice of indefinite detention without charge. While that

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decision is to be welcomed, there remains plenty of reason for unease, as the Administration continues its aggressive campaign, with the Hamdi and Padilla cases, to persuade the judiciary to go along with the “Commander-in-Chief’s” assertion of virtually unrestricted discretion in the arrest, detention and, if he chooses, trial of those he determines to be the enemy.





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## Chapter 5

### THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS PROTECTION

#### INTRODUCTION

The attacks of September 11 and the U.S. response have had a dramatic impact on the promotion and implementation of international legal standards – spanning international humanitarian law (the laws of war) and the fundamental instruments of human rights and refugee law.<sup>199</sup> These standards are both long established and continually evolving.

This report has examined the ways in which U.S. leaders have responded to the attacks and the sense of ongoing danger by passing legislation or promulgating regulations that have often limited or set aside fundamental constitutional rights. In doing so, the United States has contravened international human rights treaties to which it has long been a party. This has created a climate in which other countries have felt emboldened to follow the U.S. lead, further undermining global respect for human rights and fundamental freedoms.

#### **FOLLOWING THE U.S. LEAD: A NEW CONCEPT OF DEMOCRACY AND HUMAN RIGHTS?**

##### **Introduction**

The curtailment of rights in the aftermath of September 11 has led to foreign governments mirroring the rhetoric and expanding on the substance of the United States' domestic counter terrorism effort. A chorus of voices from governments around the world has already confirmed perceptions that the old commitments to human rights principles may have begun to fade away as a result of U.S. policies. Many of these governments have

spoken out to applaud measures taken by the United States to combat terrorism at home, which they now see as an endorsement of their own practices. Others, in contrast, have decried the U.S. policy changes, declaring that they seriously undermine fundamental human rights principles and appear to give a green light to lowered standards around the world. In particular, traditional allies have spoken up for the importance of high standards – and expressed concern that a loss of moral authority by the United States will have an impact far beyond its borders.

European and Latin American governments in particular have expressed dismay that in compromising its own standards in the name of national security, the United States has severely undercut progress everywhere toward a rights-respecting global order. The U.S. commitment to the rule of law and to inalienable constitutional rights at home had, before September 11, been the mainstay of the nation's moral standing. This commitment was respected abroad even among critics of the nation's foreign and economic policies. Despite growing controversies on such issues as the environment and global warming, treaties to ban landmines, international safeguards against biological weapons, and the International Criminal Court, the United States has been greatly admired by other countries for its application of the constitutional principles on which the country was founded.<sup>200</sup> Despite the variable perceptions of its foreign policies, the global community by and large saw a commitment to the promotion of human rights and fundamental freedoms as an essential value of the

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United States – a powerful source of its moral authority.

### **Co-opting the War on Terrorism**

In the immediate aftermath of the September attacks, the international pledges of support for the United States took several forms with direct consequences for human rights. In too many cases, opportunistic governments expressed support for the fight against terrorism, while presenting their own domestic insurgencies as conflicts perpetrated by terrorist groups analogous to al Qaeda. Some claimed that their own domestic adversaries were linked to the September 11 attackers. These governments clearly expected reciprocal support for battles against domestic dissidents and insurgents as they proclaimed that they and the United States were embedded in a similar conflict, facing a common enemy. Other governments introduced new legislation in the year after the attacks that defined terrorism in broad terms, extended police powers, limited human rights guarantees, and imposed harsh new penalties.

The declarations of common cause came from some unexpected quarters. They came from Liberia, for example, where President Charles Taylor heads an abusive government now confronting an armed insurgency. Taylor told the Liberian legislature that the challenge to his own grip on power was simply an extension of the global threat: “September 11th ushered in a new threat to our national security. That threat is terrorism, and it is manifested in many forms, including political, social and military.”<sup>201</sup>

Taylor went so far as to apply the term “unlawful combatant” to a journalist who had been critical of his policies. On June 24, 2002, Liberian security agents detained Hassan Bility, editor of the Monrovia newspaper *Analyst*, and two other “dissidents.” A civilian judge refused to challenge their incommunicado detention. The judge reportedly said that “since President Charles Taylor had declared the three ‘illegal combatants’ the matter

was above him and his earlier order that the government produce the three in a civilian court could not be effected anymore.”<sup>202</sup>

In Zimbabwe, meanwhile, aides of President Robert Mugabe have equated members of lawful opposition parties with “terrorists.” These aides have also defended the jailing of journalists critical of the president as necessary to combat terrorism.<sup>203</sup>

Syria, too, has joined the chorus. Minister of Information Adnan Omran declared that Syria was “ahead [of the United States] in fighting terrorism” and that “[t]he kind of terrorism that we faced was the same kind and probably the same persons now fighting the United States.” In January 2002, Syrian President Bashar Asad invited the United States to “take advantage of Syria’s successful experiences.”<sup>204</sup>

In Macedonia, where discrimination against ethnic Albanians had fueled a brief insurgency, Macedonian Prime Minister Ljubco Georgievski on September 18, 2001 “said that he hopes that the attacks on the U.S. will lead NATO to change its policy towards ‘terrorism’ in Macedonia.” This prompted a rebuke from James Pardew, the U.S. Special Envoy in Macedonia, for seeking political gain from the tragedy.<sup>205</sup>

China has linked the broader war against terrorism to its own campaign against separatist Muslim groups in the province of Xinjiang, a vast region with a mostly Muslim population. In the past, the United States has criticized China for human rights abuses against Muslims in Xinjiang.<sup>206</sup> Now, China is eager to draw a parallel between its crackdown on separatist groups in Xinjiang and the U.S. battle against al Qaeda. In a recent visit to Washington, D.C., for example, Chinese Vice Foreign Minister Li Zhaoxing remarked, “China too is a victim of terrorism and greatly understands and sympathizes with the disaster that Americans have suffered.”<sup>207</sup> Although the Bush administration was initially reluctant to link the Xinjiang issue

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to its war on terrorism, in August 2002, the State Department listed as a terrorist organization an obscure group of Xinjiang rebels that China claims has ties to al Qaeda.<sup>208</sup>

Russian President Vladimir Putin, meanwhile, has claimed that Russia's war against rebels in the Chechen republic is also part of the global war against terrorism. Observers in Moscow have said that the new rhetoric is expressly intended to diffuse U.S. criticism of atrocities committed by Russian forces in the war: "They have depicted the Chechen people as blood-thirsty terrorists who would impose Islamic law on other Caucasian republics. Today even educated Muscovites commonly say there is nothing wrong with killing Chechen noncombatants, even babies."<sup>209</sup>

In a press conference following an October summit meeting with the Russian president, President Bush said that he had emphasized to Putin "that the war on terror is not, and cannot be, a war on minorities," and that "[i]t's important to distinguish between those who pursue legitimate political aspirations and terrorists."<sup>210</sup> Indeed, although muted, U.S. criticism of human rights abuses in the war in Chechnya has not stopped in the wake of September 11. In their responses to the State Department's annual human rights report in early 2002, however, Russian officials appeared bemused that the United States was still criticizing Russia for its actions in Chechnya. One Russian Foreign Ministry official observed:

**One gets the impression that its writers simply used old drafts, as if nothing had happened in either Russia or the United States in recent years, as if the events of September 11, 2001 had not occurred and the international community had not closed ranks in the battle against terrorism.<sup>211</sup>**

A subtext of the global response was that many of the governments speaking out were engaged in brutal measures against mostly internal opposition groups and were convinced that the new order would relieve them of inter-

national pressure on human rights. The United States' criticism of human rights abuses was expected to fade away as it confronted the challenges at home.

In some cases, the message was explicit. Egypt's Prime Minister Atef Abeid responded to criticism of his country's resort to torture and military trials by rejecting past criticism of Egypt's rights record and linking this to the United States' own challenges:

**The U.S. and U.K., including human rights groups, have, in the past, been calling on us to give these terrorists their "human rights." You can give them all the human rights they deserve until they kill you. After these horrible crimes committed in New York and Virginia, maybe Western countries should begin to think of Egypt's own fight and terror as their new model.<sup>212</sup>**

On December 16, 2001, Egypt's President Hosni Mubarak further developed this theme, claiming that the events of September 11 had altered the very meaning of concepts such as democracy and human rights. He declared, "There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual."<sup>213</sup> He claimed that the new U.S. policies "prove that we were right from the beginning in using all means, including military tribunals" to combat terrorism.<sup>214</sup> The State Department's previous annual human rights report had said Egypt's military tribunals infringe on a defendant's right to a fair trial before an independent judiciary.<sup>215</sup>

And indeed, in the first weeks after September 11, U.S. Secretary of State Colin Powell spoke of his appreciation for Egypt's commitment to the fight against terror in a joint press conference with Egypt's Foreign Minister Ahmed Maher. He said that the United States would, in fact, look to model Egypt in some ways: "Egypt, as all of us know, is really ahead of us on this

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issue. They have had to deal with acts of terrorism in recent years in the course of their history. And we have much to learn from them and there is much we can do together.”<sup>216</sup>

By mid-2002, the administration began to show that there were limits to its passivity in the face of gross abuses despite its “special relationships” with other countries. Thus, for example, in July 2002, the United States withheld \$130 million in supplemental aid to Egypt to protest the prosecution of prominent human rights defender Saad Ibrahim.<sup>217</sup> A dual national of Egypt and the United States, Ibrahim had been convicted under laws restricting the work of independent human rights groups and was sentenced to seven years in prison. Protests from both the Department of State and the White House ensued, culminating in the unprecedented warning that \$130 million would be withheld in large part because of Ibrahim’s continued detention.<sup>218</sup>

Officials of the Indonesian government also stressed their country’s importance as an ally in global antiterrorism efforts, raising expectations that U.S. complaints about abuses by the Indonesian army would quietly lapse. Measures taken by the U.S. administration to lift restrictions on military aid to Indonesia – notwithstanding conditions placed on aid renewal by Congress – encouraged the perception that the rules had changed. So too did a Department of State opinion given to a U.S. court considering a case brought against the energy giant Exxon-Mobile under the U.S. Alien Tort Claims Act and the 1992 Torture Victim Protection Act.<sup>219</sup> The suit, brought by eleven villagers from Indonesia’s oil-rich Aceh province, alleges torture and murder by members of the Indonesian security forces who were employed by Exxon Mobil. The Department of State warned the court that the lawsuit against Exxon Mobil “would impact adversely on the interests of the United States,” economically and in the “war on terrorism.”<sup>220</sup> The consequences for Indonesia’s vulnerable human rights defenders and pro-democracy advocates have been serious. Columnist Thomas

Friedman reported on a conversation with a prominent Indonesian writer who remarked:

**We sometimes fear that America’s democratization agenda also got blown up with the World Trade Center... Since September 11 there have been so many free riders on this American antiterrorism campaign, countries that want to use it to suppress their media and press freedom and turn back the clock.**<sup>221</sup>

Friedman also interviewed Jusuf Wanandi, the head of a strategic studies center in Indonesia, who provided an alarming insight into the views of the Indonesian military. Wanandi told Friedman that he had just spoken to some senior Indonesian military leaders who asked, “Why doesn’t the government give up all this human rights stuff and leave [the problem] to us?” They also said that “the Americans should normalize relations again [with the Indonesian army] and we’ll do the job for them.”<sup>222</sup>

### **New “Anti-Terrorism” Legislation**

In many countries, new legislation has been introduced since September 11, with express references by national leaders to the new international climate of no-holds-barred antiterrorism. In Cuba, for example, President Fidel Castro presided over a December 2001 session of the Cuban legislature that passed a law extending capital punishment to crimes defined as terrorism – including the crime of using the Internet to incite political violence.<sup>223</sup>

In Belarus, the parliament approved the “Law of the Republic of Belarus on Fighting Terrorism” in December 2001, adding new restrictions on freedom of expression and offering virtual immunity to state agents for crimes committed in the defense of national security.<sup>224</sup> The law defines terrorism broadly as perpetrating actions “which create the danger of the loss of human life, bodily harm, cause widespread damage or the onset of other serious consequences with the aim of causing public panic or exerting influence on decision-making by

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government bodies or hindering political or other public activity, and also threatening to carry out such activity with the same aims.”<sup>225</sup>

In India, harsh government measures against separatist movements and insurgencies have long presented a grim backdrop to the world’s largest democracy. On October 24, 2001, the Indian president introduced a Prevention of Terrorism Ordinance (POTO) while parliament was out of session. POTO entered into force immediately, introducing emergency powers.<sup>226</sup> India’s Home Minister L.K. Advani explicitly tied POTO to the September attacks and a move by democracies the world over to enact more stringent laws.<sup>227</sup>

An act endorsing the ordinance as permanent legislation, transforming the ordinance to the Prevention of Terrorism Act (POTA), was passed in a special joint session of the Indian parliament on March 26, 2002. The new law provides draconian police powers to detain “terrorist suspects” for questioning for up to 30 days without being presented before a court, and 90 days without being charged with a crime. A special court can then extend detention without charge for a further 90 days. Acts of terrorism are defined as acts “with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people,” by explosives or weapons or “by any other means whatsoever,” in a manner that causes or is likely to cause harm to people or property or to disrupt government operations and services. The law also introduces broad new police powers and special rules of evidence.<sup>228</sup>

In December 2001, U.S. Congressman Frank Pallone, Jr. had expressed support for India’s anti-terrorism efforts, drawing a direct analogy between the USA PATRIOT Act and the Indian bill. Representative Pallone remarked, “Unusual circumstances in the U.S. called for these types of measures, and the same holds true for India. A true parallel can be drawn here for the two largest, most vibrant democracies in the world. Unfortunately, both of these countries are now combating terrorism.”<sup>229</sup>

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Furthermore, the prestigious Indian newspaper *The Hindu* reported on March 29, 2002 that the United States had given its stamp of approval to POTA, citing a press statement released by State Department Spokesman Richard Boucher the day before.<sup>230</sup> Boucher had endorsed POTA as being in line with U.S. support for government efforts “to strengthen their legal systems...within constitutional bounds, so that we all have more effective tools to use against the threat of terrorism.”<sup>231</sup>

#### **Undermining Safeguards against Persecution and Torture**

The global antiterrorism environment has also had repercussions on the protection of the non-citizen, particularly in relation to safeguarding the transfer of detainees under international human rights and refugee law. International law requires, for example, that refugees are not sent back to countries in which they face a justifiable fear of persecution. This fundamental principle is known as the principle of non-refoulement. Furthermore, provisions under the Convention against Torture and Other Cruel,

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Inhuman or Degrading Treatment or Punishment (the Torture Convention), a treaty to which the United States and most states are party, absolutely bars governments from expelling, returning, or extraditing a person to a country in which “there are substantial grounds for believing that he would be in danger of being subjected to torture.” Many states also oppose extradition to countries in which the individual sought may face the death penalty.

Enforcement of these international standards may be under threat as a result of the United States’ own practice, particularly to the extent that it provides a model for other nations. The reported return of foreign nationals detained in the United States after September 11 to their home countries, after months of detention, should have required consideration of their well-being upon return, particularly to countries in which a consistent pattern of torture has been reported. Detention by the United States in the context of the post-September 11 investigations may, even when no links to violent groups emerged, have branded some as suspect in the eyes of their own governments, placing them in extreme danger of persecution upon deportation. The reported transfer of some of the Guantanamo detainees to second countries, including Pakistan and Egypt, after initial interrogations may have breached U.S. obligations under the Torture Convention.

Fair treatment of immigrants and asylum seekers has also been undermined in Europe. On December 18, 2002, Sweden surprised other European Union members by forcibly returning two Egyptian asylum seekers, Ahmad Hussein Mustafa Kamil Agiza and Muhammad Sulaiman Ibrahim al-Zari, to Egypt, despite concerns that they would face immediate arrest and ill-treatment.<sup>232</sup> Sweden recognized that both men had a well founded fear of persecution but excluded them from protection in procedures of questionable fairness—on the basis of secret evidence alleging their connections to armed Islamic opposition groups. Amnesty International protested that “more than three

weeks after their forcible return their location is unknown and they have not had access to family or lawyers.”<sup>233</sup> Other Egyptian nationals were reportedly forcibly repatriated by Jordan, Canada, Bosnia, and Uruguay.<sup>234</sup>

## **THE RESPONSE OF THE UNITED NATIONS**

### **Security Council Resolution 1373**

The Security Council passed Resolution 1373 on September 28, 2001, imposing binding obligations on all U.N. member states to prevent and suppress terrorism, describing a broad range of activities that were to be combated. These included such measures as: (1) blocking the financing of terrorist offenses; (2) refraining from providing any support to terrorists (effective border controls, criminalization, etc.); (3) intensifying and accelerating international cooperation and information exchange; (4) taking appropriate measures to ensure that refugee and asylum status are not abused by terrorists; and (5) ensuring that claims of political motivation are not used as grounds for refusing requests for the extradition of alleged terrorists.

Resolution 1373 also created a Counter-Terrorism Committee (CTC), which is composed of all 15 members of the Security Council. Under the resolution, all member states were required to submit an initial report on implementation to the CTC no later than December 27, 2001. Future reports were to be submitted under a timeline developed by the CTC. The CTC began reviewing the first round of reports in January, 2002, writing to each government confidentially to offer comments on its report. Once they received comments, states were given three months to submit a second report. The CTC’s review of the second round of reports was to have begun on June 7, 2002. Apparently, the comments on the first set of reports mainly asked for clarification and additional information. The comments on the second set of reports were to be more direct, identifying potential gaps and requesting plans of action.

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## Resolution 1373 and Human Rights

Although Resolution 1373 does not expressly address human rights concerns,<sup>235</sup> U.K. Ambassador Jeremy Greenstock, the chair of the CTC, has indicated that the committee will at least consider the potential human rights consequences of the counter-terrorism measures reported. He has appointed a human rights specialist to the committee's advisors.<sup>236</sup> In June 2002, Ambassador Greenstock described the overlap of the CTC's work and human rights:

**[T]he CTC's processes will put pressure on governments to ensure, in the decisions they take both political and administrative, that they do not condone acts of indiscriminate violence against civilians, in any political context, nor use counter-terrorism as a pretext for political oppression. We have to develop an international collective conscience in this respect in which every government, without exception, is a participant.**

**The CTC is mandated to monitor the implementation of 1373. Monitoring performance against other international conventions, including human rights law, is outside the scope of the CTC's mandate. But as we go forward, the CTC will remain aware of the interaction of its work with human rights concerns, inter alia through the contact the CTC has developed with the OHCHR. And we welcome parallel monitoring of observance of human rights obligations.**

**The CTC is also operating transparently and openly so that NGOs with concerns can bring them to our attention or follow up with the established human rights machinery.<sup>237</sup>**

Although it is too early to judge the extent to which the CTC has assessed the human rights implications of reported measures and advised governments in this regard, the reports filed with the committee ("1373 Reports") provide a wealth of information on the shape of the global war against terrorism. The reports provide a picture of the anti-terrorism laws enacted – including the laws that states are trying to present in this mold.<sup>238</sup>

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## Response of the U.N. Human Rights Mechanisms

The U.N. human rights mechanisms, meanwhile, have responded promptly to the risk that human rights would be sidelined. On November 29, 2001, Mary Robinson, the U.N. High Commissioner for Human Rights, issued a joint statement with the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) to condemn all forms of terrorism, and to urge states "to ensure that any measures restricting human rights in response to terrorism strike a fair balance between legitimate national security concerns and fundamental freedoms that is fully consistent with their international law commitments."<sup>239</sup> In stressing that certain rights are non-derogable, the statement calls on all governments to refrain from any measures that would "violate fundamental freedoms and undermine legitimate dissent:"

**Such steps might particularly affect the presumption of innocence, the right to a fair trial, freedom from torture, privacy rights, freedom of expression and assembly, and the right to seek asylum. Anti-terrorism measures targeting specific ethnic or religious groups would also be contrary to human rights law and international commitments and would carry the risk of sparking a dangerous upsurge of discrimination and racism.<sup>240</sup>**

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In a Human Rights Day 2001 statement, 17 of the U.N.'s special rapporteurs on human rights expressed "deep concern over the adoption or contemplation of anti-terrorist and national security legislation and other measures that may infringe upon the enjoyment for all of human rights and fundamental freedoms." They expressed particular concern over the consequences for "human rights defenders, migrants, asylum-seekers and refugees, religious minorities, political activists and the media...."<sup>241</sup>

In early 2002, concerns were expressed that the Security Council resolution had already been misused by abusive governments. Bacre Waly Ndiaye, the New York representative of the U.N. High Commission for Human Rights, told the CTC that compliance "could lead to unwarranted infringement on civil liberties." He added, "There is evidence that some countries are now introducing measures that may erode core human rights safeguards." Although Ndiaye did not name specific countries, he warned that under the new measures "nonviolent activities have been considered as terrorism, and excessive measures have been taken to suppress or restrict individual rights, including the presumption of innocence, the right to a fair trial, freedom from torture, privacy rights, freedom of expression and assembly, and the right to seek asylum."<sup>242</sup>

In an address to the Security Council's session on counterterrorism on January 18, 2002, Secretary-General Kofi Annan called for governments to take into account the expertise of the U.N.'s specialized human rights bodies, and to make sure "that the measures you adopt do not unduly curtail human rights, or give others a pretext to do so." He emphasized the importance in both the short and the long-term of making human rights concerns integral to the counterterrorism effort:

**[W]e should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I**

**believe that in the long term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism.**

**Terrorism is a weapon for alienated, desperate people, and often a product of despair. If human beings everywhere are given real hope of achieving self-respect and a decent life by peaceful methods, terrorists will become much harder to recruit, and will receive far less sympathy and support from society at large.**

**Therefore, while we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities – such as human rights – in the process.<sup>243</sup>**

#### **U.S. UNILATERALISM AND THE INTERNATIONAL ARCHITECTURE OF HUMAN RIGHTS**

The unilateralism of U.S. antiterrorism measures has continued the trend of the United States going it alone in international affairs, even while demanding multilateral support on a multiplicity of other issues. But the consequences of going it alone for international human rights norms may be even more severe – and its impact on the international order dangerously unpredictable.

The message is two-fold. On the one hand, standards are represented as having no application in times of emergency – although it was precisely to provide minimum standards under the most extreme of emergencies, open war between nations, that the laws of war were agreed by all nations. And it was the horrors of World War II that provided the genesis for international human rights law, beginning with the Universal Declaration of Human Rights in 1948. On the other hand, the United States appears hypocritical, by promoting international legal standards which seemingly bind only other nations.

Measures to advance the implementation of international human rights law, in turn, have further put the United States to the test. U.S.

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opposition to the International Criminal Court (ICC), which predates the September attacks, was consistent with a deeper strain of U.S. policy to limit commitments which could expose the country to international enforcement measures of any kind. Although the new court is now coming into force and is supported by most U.S. allies, U.S. opposition has deepened and its diplomatic interventions have included bullying threats of sanctions, even against close allies.

The tenor of the September 11 response has also opened the way for U.S. opposition to advances on the implementation of other existing international standards, apart from those contained in the ICC statute. Historically, the United States has refused to participate in a range of international monitoring mechanisms on the grounds that U.S. law already provided sufficient safeguards against abuses at home. The new approach to such mechanisms, however, may now be rooted in a qualitatively different concern – a fear that the U.S. will find itself in violation of international law and subject to sanction.

In July 2002, as diplomats met in Geneva to finalize an optional protocol to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, U.S. representatives sought to undermine the optional protocol, which seeks to hasten the abolition of torture.<sup>244</sup> The optional protocol, which would allow the inspection of detention facilities of the governments that adopt the protocol, would have echoed the good example of the European Convention Against Torture. Under the European model, inspections have been carried out in approximately 40 nations – including the United Kingdom, Turkey, and Russia – in a constructive contribution to the fight against torture.

A test of the United States' evolving view of international standards will be the guidelines applied within the Department of State in the preparation of the next annual reports on human rights conditions around the world. Will past criticism of administrative detention with-

out judicial review be absent? What about past criticism of military courts that exercise jurisdiction over dissidents under harsh national security and antiterrorism laws? Will allies in the global operations against terrorism get a pass on torture, extrajudicial execution, and "disappearance" – or commentary so muted and qualified as to represent a shielding from criticism? When the Russian Foreign Ministry official complained that the 2001 country report examining Russia's conduct in Chechnya seemed to be a product of "working with old texts," it in a sense set down a challenge to the Department of State as it begins to prepare the next round of annual reports. The nature of the new texts will be a telling indicator of the standards to be applied at home and abroad in the post-September 11 world.



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# Recommendations

## CHAPTER 1

### Open Government

1. The Department of Justice should rescind its October 12, 2001 memo relating to Freedom of Information. If it fails to do so, Congress should review the Administration's new freedom of information policy with a view to restoring the public's right to know and its access to government information through legislation.
2. Congress should amend pending legislation creating the new Department of Homeland Security to ensure that the Whistleblowers Protection Act applies to the new agency.
3. Congress should also review whether a sunset provision should be added.
4. Congress should also use its oversight authority to review the implementation of amendments to the Foreign Intelligence Surveillance Act (FISA), with a view towards providing additional safeguards against abuse of Executive discretion under the amended law.
5. Congress should include both an Office of Internal Affairs and an Office of Civil Rights and Civil Liberties Accountability in the new Department of Homeland Security.

## CHAPTER 2

### The Right to Privacy

1. The Judiciary Committees of Congress should hold comprehensive oversight hearings in which they systematically examine each new law or expansion of Executive Branch power in the USA PATRIOT Act. They should undertake a cost/benefit analysis of each provision. Among the points they should consider are these:
  - 4 Is the law being used?
  - 4 If not, why not?
  - 4 Is it needed?
  - 4 If it is being used, have any abuses of this new authority come to light?
2. The Department of Justice should develop effective internal oversight safeguards governing searches without prior notice under Section 213 of the USA PATRIOT Act.
3. Congress should conduct regular oversight hearings to evaluate how Section 213 is being applied in practice, and to consider
6. When the President signs the law creating the Department of Homeland Security, he should stress the importance of protecting civil liberties and ensuring government accountability. He should spell out specific guidelines aimed at ensuring that these principles will be followed by this new department.
7. A recent decision by the Foreign Surveillance Intelligence Court imposes needed limits on Justice Department foreign intelligence searches on U.S. soil. Rather than appealing this decision, Attorney General Ashcroft should comply with the Court's judgment.
8. In addition, Congress should use its oversight authority to keep a careful eye on how foreign intelligence surveillance is carried out. We know from prior history, in this country and elsewhere, that there is grave potential for abuse in this area. Congress also should establish a Commission on Privacy, Personal Liberty and Homeland

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Security within the new Department of Homeland Security.

9. Congress should also review recent amendments to FISA which expanded government police powers with respect to personal records, powers which now extend even to the purchase of books or library use. Congress should conduct public hearings in which it solicits the views of librarians, booksellers and other members of the public with a direct interest in these matters.
10. Similarly, Congress should review changes to FBI guidelines, announced by Attorney General Ashcroft in May, which permit much greater surveillance of domestic religious and political organizations. Congress should consider whether legislation is needed to limit executive authority in this area.
11. The Administration should abandon pursuit of Operation TIPS (The Terrorism Information and Prevention System). Bipartisan criticism of this initiative makes clear the wide public opposition to this proposal. It should be dropped immediately.

### **CHAPTER 3**

#### **Treatment of Immigrants, Refugees, and Minorities**

1. The Department of Justice should release the names of all persons detained on immigration charges, provided those individuals consent to release of such information, to family, legal counsel or others with a legitimate interest. Information should include the date of arrest and place of detention.
2. The INS should permit legal service organizations access to visit detention facilities on a regular basis. Subject to reasonable security precautions, it should also allow independent monitoring groups access to visit these facilities.
3. The Department of Justice should provide all detainees with access to legal counsel of their choice and entitle them reasonable hours and secure locations in which to meet.
4. The Department of Justice should heed two federal District Court decisions (in Michigan and New Jersey) which held that immigration hearings should be open.
5. Congress should conduct a thorough review of provisions in the USA PATRIOT Act relating to detention of non-citizens. Given the Administration's rare use of this authority over the last year and the potential for abuse, we urge Congress to repeal these provisions when it reconvenes in January.
6. Under the USA PATRIOT Act, and in subsequent regulations, like the one authorizing eavesdropping on lawyer-client conversations, the role of the courts has been severely limited. Until judicial oversight is restored, the Department of Justice should set up an internal review process, chaired by the Attorney General and including the Assistant Attorney General for Civil Rights, to help ensure that these new powers, among them prolonged detention in national security cases, are used only in cases that necessitate them.
7. The INS regulations on custody procedures (8 C.F.R. Section 287.3) and automatic stay authority (8 C.F.R. Section 3.19) should be immediately rescinded. At a minimum, the Department of Justice should instruct the INS to issue detailed guidelines governing the use of these regulations in order to prevent abuse.
8. Domestically, the United States should renew its commitment to supporting a vigorous program of refugee resettlement (incorporating necessary security safeguards) and a national asylum system which accords with the highest international stan-

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dards. In particular, the exclusion clause in refugee law (designed to prevent those who have committed serious crimes from receiving asylum as refugees) must be applied in a way which recognizes its exceptional nature, ensures that genuine refugees and those requiring protection from torture are not endangered, and fosters accountability for serious crimes.

#### **CHAPTER 4**

### **The Security Detainees and the Criminal Justice System**

1. The almost 600 detainees now held at the U.S. Naval base in Guantanamo Bay, Cuba are presumed to be prisoners of war and should be afforded all of the protections of international humanitarian law (particularly, the Geneva Conventions).
  - a. Should there be any doubt as to the entitlement to prisoner of war status of individuals acknowledging their participation in the hostilities in Afghanistan, an individualized “competent tribunal” should make the determination, as provided by the Third Geneva Convention and applicable U.S. military regulations.
  - b. Any individual claiming to be a noncombatant should be allowed the opportunity to prove that claim before such a competent tribunal, as well.
  - c. If the tribunal determines there is probable cause to believe a prisoner of war may have committed war crimes or other serious violations of international law, that person should be tried before a court martial, as required by the Third Geneva Convention.
  - d. Any individual found by a competent tribunal not to be a prisoner of war is a civilian. Subject to the United States’ obligations under the Convention
- Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, all civilians should be repatriated unless the tribunal finds probable cause to believe that a civilian may have committed a war crime or other serious violation of international law. If the tribunal finds such probable cause, the individual should be brought to trial in either a regular civilian criminal court, a regular court martial, or in another tribunal which accords the defendant at least the minimum rights and protections mandated by article 146 of the Fourth Geneva Convention.
2. The administration should develop a set of criteria for determining when hostilities have ended and the prisoners of war may be released (unless there are or are contemplated to be criminal proceedings brought against them). The administration should consult closely with Congress in preparing these criteria, and should take guidance from the expertise of the International Committee of the Red Cross.
3. Arrest and detention without trial in the United States of U.S. citizens or other U.S. residents as “enemy combatants” is a violation of U.S. constitutional law. If these individuals have committed crimes, they should be prosecuted under U.S. law. U.S. citizens or others with close residential links to the United States who are apprehended within a war zone may be treated as prisoners of war, as described above, but must also be accorded the right to habeas corpus review of the lawfulness of their detention.
4. We commend the Department of Justice for its reliance on the criminal justice system in the recent indictments of five suspects in Detroit and Seattle in cases relating to national security. The administration should follow this approach as it pursues other similar cases.

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5. The Military Order authorizing military commissions should be rescinded. The administration has wisely declined to use this authority so far. But the Order creates standing authority for the creation of tribunals that do not satisfy fair trial standards and invites imitation by other governments.

## **CHAPTER 5**

### **The United States and International Human Rights Protection**

1. The State Department should ensure that its annual Country Reports on Human Rights Practices, which must be submitted to Congress in February, include a detailed and comprehensive analysis of the human rights situations in all countries, including those allied with the United States in its international struggle against al Qaeda. Congress intended the Country Reports to provide the unvarnished truth about human rights abuses around the world, and the State Department should resist any temptation to excuse or overlook human rights failings of allied governments.
2. The Administration should rebuke in the strongest terms governments – both allies and others – who seek to recast their repressive policies as efforts to support the global anti-terrorism effort. The Administration should use the opportunity of the next meeting of the U.N. Human Rights Commission in Geneva to make statements to this effect.
3. The Administration should issue a clear and unequivocal statement that it intends to comply with its obligations under the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and will not extradite, expel or otherwise return any individual to a place where there is a substantial likelihood of torture.
4. Internationally, the United States should encourage other States to ensure that refugee protection procedures and provisions for extradition, expulsion, and removal of non-citizens comply with both the principle of non-refoulement and the obligation to prosecute serious criminals domestically where possible. The United States should continue to emphasize that the effort to combat terrorism cannot be allowed to diminish the right of refugees to seek and enjoy protection from persecution.

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## ENDNOTES

### Chapter 1

<sup>1</sup> Letter from James Madison to W. T. Barry (August 4, 1882), reprinted in 9 JAMES MADISON'S WRITINGS 103 (Gaillard Hunt ed., 1910).

<sup>2</sup> John Adams, *A Dissertation on the Canon and Feudal Law* (1765), reprinted in 1 *Papers of John Adams* 120 (M.J. Kine ed., 1977).

<sup>3</sup> The importance of open government is also set out in international agreements, such as the Helsinki Final Act of 1975, which confirms "the right of the individual to know and act upon his rights...."

<sup>4</sup> Paul J. Nyden, "Byrd Challenges Bush's Ideas on War," *West Virginia Gazette*, June 29, 2002.

<sup>5</sup> Steve Chapman, "Excessive Secrecy in the War on Terror," *Chicago Tribune*, August 18, 2002.

<sup>6</sup> *Ibid.*

<sup>7</sup> Steve Schultze, "Sensenbrenner Wants Answers on Act," *Journal Sentinel*, August 19, 2002.

<sup>8</sup> "More Proof Needed on Taliban Fighter," BBC News, August 17, 2002.

<sup>9</sup> 5 U.S.C. § 552 (1966).

<sup>10</sup> 5 U.S.C. § 2303.

<sup>11</sup> 5 U.S.C. § 552(b).

<sup>12</sup> See Department of Justice, "Summary of Annual FOIA Reports for Fiscal Year 2000," available at <http://www.usdoj.gov/oip/foiapost/2002foiapost3.htm> (accessed August 29, 2002).

<sup>13</sup> Memorandum from U.S. Attorney General, John Ashcroft, "Memorandum for Heads of All Federal Departments and Agencies" (October 12, 2001),

available at <http://www.usdoj.gov/04foia/011012.htm>.

<sup>14</sup> Senator John Ashcroft, Written Responses to Questions During Confirmation Process, 2001.

<sup>15</sup> President George H. Bush, "Remarks on Signing the Whistleblower Protection Act of 1989," April 10, 1989, available at <http://bushlibrary.tamu.edu/papers/1989/89041001.html> (accessed August 30, 2002).

<sup>16</sup> For a discussion of this case, see "The Whistleblower Protection Act," Interview by *Issues of Democracy* with Thomas Devine, Legal Director of the Government Accountability Project, August 30, 2000, available at <http://usinfo.state.gov/journals/itdhr/0800/ijde/devine.htm> (accessed August 29, 2002).

<sup>17</sup> See "FBI Whistleblower Describes Roadblocks," CNN.com, June 6, 2002, available at <http://www.cnn.com/2002/ALLPOLITICS/06/06/terror.lapses> (accessed August 26, 2002); P. Mitchell Prothero, "FBI Agent Slams HQ Bureaucracy," *Washington Times*, June 6, 2002.

<sup>18</sup> See "Whistleblower Testifies," ABCNEWS.com, June 6, 2002, available at <http://abcnews.go.com/sections/us/DailyNews/senatehearing020606.html> (accessed September 3, 2002); Senator Chuck Grassley, "Grassley Conducts Oversight of FBI's Operations Prior to September 11," June 6, 2002, available at <http://grassley.senate.gov/releases/2002/p02r6-6a.htm> (accessed September 3, 2002).

<sup>19</sup> See Department of Justice, "Attorney General Ashcroft Announces Interagency Task Force to Review Ways to Combat Leaks of Classified Information," December 4, 2001, available at [http://www.usdoj.gov/opa/pr/2001/December/01ag\\_649.htm](http://www.usdoj.gov/opa/pr/2001/December/01ag_649.htm) (accessed August 29, 2002).

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## Chapter 2

<sup>20</sup> United States Constitution, Amendment IV.

<sup>21</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

<sup>22</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

<sup>23</sup> See Public Law 107-56.

<sup>24</sup> See "President Signs Anti-Terrorism Bill," White House Press Release, October 26, 2002, available at <http://www.whitehouse.gov/news/releases/2001/10/20011026-5.html> (accessed August 29, 2002).

<sup>25</sup> See *Wilson v. Arkansas*, 514 U.S. 927 (1995) (confirming that the knock and announce rule forms part of the Fourth Amendment's reasonableness inquiry).

<sup>26</sup> *Ibid.*

<sup>27</sup> See *Richards v. Wisconsin*, 520 U.S. 385 (1997).

<sup>28</sup> *Ibid.*

<sup>29</sup> See 50 U.S.C. § 1801-1811, 1821-1829, 1841-1846, 1861-1862. Under 50 U.S.C. § 1801(e)(1), foreign intelligence information is information that relates to the United States' ability to protect against: (1) possible hostile acts of a foreign power or an agent of a foreign power; (2) sabotage or terrorism by a foreign power or agent; and (3) clandestine intelligence activities by a foreign power or agent.

<sup>30</sup> See 50 U.S.C. § 1805(d)(1).

<sup>31</sup> For a discussion of the FBI's powers under FISA, see *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, pp. 9-11.

<sup>32</sup> See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002.

<sup>33</sup> Before the enactment of the USA PATRIOT Act, FISC was composed of seven judges. In amending FISA, however, Section 208 of the USA PATRIOT Act calls for the designation of 11 judges. At the time the decision was issued, the following federal judges sat on the court: (1) Honorable Royce C. Lamberth; (2) Honorable William H. Stafford, Jr.; (3) Honorable Stanley S. Brotman; (4) Honorable Harold A. Baker; (5) Honorable Michael J. Davis; (6) Honorable Claude M. Hilton; and (7) Honorable Nathaniel M. Gorton.

<sup>34</sup> See Electronic Frontier Foundation, "EFF Analysis of the USA PATRIOT Act," October 31, 2001, p. 8.

<sup>35</sup> *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, p. 22.

<sup>36</sup> *Ibid.*, p. 27.

<sup>37</sup> See American Library Association, "The USA PATRIOT ACT in the Library," available at <http://www.ala.org/alaorg/oif/usapatriotlibrary.html> (accessed September 3, 2002).

<sup>38</sup> See Bob Egelko, "FBI Checking Out Americans' Reading Habits; Bookstores, Libraries Can't Do Much to Fend Off Search Warrants," *San Francisco Chronicle*, June 23, 2002.

<sup>39</sup> See "FBI Checks Out Library Records of Terrorist Suspects," *USA Today*, June 25, 2002.

<sup>40</sup> These are officially known as the Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations.

<sup>41</sup> See S. REP. No. 94-755 (1976), p. 7.

<sup>42</sup> *Ibid.*, p. 5.

<sup>43</sup> *Ibid.*

<sup>44</sup> See The Electronic Privacy Information Center (EPIC), "The Attorney General's Guidelines," available

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at <http://www.epic.org/privacy/fbi/> (accessed August 26, 2002).

<sup>45</sup> See Jerry Berman and James X. Dempsey, Center for Democracy and Technology, "CDT's Guide to the FBI Guidelines: Impact on Civil Liberties and Security—The Need for Congressional Oversight," June 26, 2002, available at <http://www.cdt.org/wiretap/020626guidelines.shtml> (accessed July 25, 2002).

<sup>46</sup> "Key Republican Blasts New FBI Guidelines," CNN.com, June 1, 2002, available at <http://www.cnn.com/2002/ALLPOLITICS/06/01/fbi.guidelines/> (accessed August 25, 2002).

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> This is the official description given on the Citizens Corps Website, available at <http://www.citizencorps.gov/tips.html> (accessed September 3, 2002).

<sup>50</sup> Ibid.

<sup>51</sup> Commentary, "Tipping off the Government," *Christian Science Monitor*, July 25, 2002. See also Gene Healy, "Volunteer Voyeurs?," available at <http://www.cato.org/dailys/07-29-02.html> (accessed August 20, 2002).

<sup>52</sup> Editorial, "Ashcroft vs. Americans," *Boston Globe*, July 17, 2002.

<sup>53</sup> Cassio Furtado, "Controversial Operation TIPS Appears Dead," *Knight Ridder Newspapers*, July 27, 2002.

<sup>54</sup> Dan Eggan, "Ashcroft: TIPS Plan Won't Have Central Database," *Washington Post*, July 26, 2002.

<sup>55</sup> Ellen Sorokin, "Security Bill Loses ID Card, TIPS," *Washington Times*, July 19, 2002.

<sup>56</sup> Karen Branch Brioso, "Justice Department Forges Ahead with TIPS Despite Arney Ban," *St. Louis Post Dispatch*, July 21, 2002.

<sup>57</sup> David Westphal, "Civil Liberties Concerns Growing as Congress Considers Homeland Security," *McClatchy Newspapers*, August 5, 2002.

<sup>58</sup> John W. Whitehead, "Is Operation TIPS Part of a Program to Defend our Homeland or Destroy It?," *Rutherford Institute*, July 17, 2002, available at <http://64.227.78.173/news/commentary.asp#TIPS> (accessed September 10, 2002).

<sup>59</sup> "Operation TIPS Being Modified Following Criticism from Civil Liberties Groups," Foxnews, August 10, 2002, available at <http://www.foxnews.com/story/0,2933,60082,00.html> (accessed August 29, 2002).

<sup>60</sup> Citizen Corps, "Operation TIPS Fact Sheet," available at <http://www.citizencorps.gov/tips.html> (accessed September 4, 2002).

<sup>61</sup> Dave Lindorff, "New Life-line for Operation TIPS," *Salon*, August 30, 2002.

## Chapter 3

<sup>62</sup> For more details on the refugee resettlement program, see the Lawyers Committee for Human Rights Asylum & Refugee Newsletter, No. 4, "Refugee Resettlement Slowly Resumes," available at [http://www.lchr.org/asylum\\_refugee\\_newsletter/asylumnews4.htm](http://www.lchr.org/asylum_refugee_newsletter/asylumnews4.htm). Additional issues of the newsletter can be found at <http://www.lchr.org/refugee/refugee.htm>.

<sup>63</sup> Attorney General John Ashcroft, Prepared Remarks for the U.S. Mayors Conference, October 25, 2001, available at [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm).

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<sup>64</sup> Danny Hakim, "4 Men Charged With Being in Terrorist Cell in Detroit Area," *New York Times*, August 29, 2002. The four detainees were originally charged in September 2001 with possession of fraudulent identification documents under the criminal code. They were denied bond on the basis that they were a flight risk. These charges will be superceded by the new indictments.

<sup>65</sup> International Convention on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), entered into force March 23, 1976, article 9(1). The United States ratified the ICCPR in 1992. The full text of the ICCPR is available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

<sup>66</sup> Human Rights Clinic, Columbia Law School, *Background Paper for the U.N. Working Group on Arbitrary Detention Concerning the U.S. Detention of Arabs and South Asians Post-September 11*, April 1, 2002.

<sup>67</sup> Department of Justice, "Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force," October 31, 2001, available at [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10\\_31.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_31.htm).

<sup>68</sup> *Ibid.*

<sup>69</sup> Some of those whose detentions were justified on the grounds that they had overstayed their visas were in fact in the United States legally, as they had filed requests for visa extensions or other adjustments of status with the INS. See Human Rights Watch, *United States: Presumption of Guilt* (New York: Human Rights Watch, 2002), pp. 12-14.

<sup>70</sup> Dan Eggen and Susan Schmidt, "Count of Released Detainees is Hard to Pin Down," *Washington Post*, November 6, 2001; Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies," *Washington Post*, November 9, 2001.

<sup>71</sup> *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002).

<sup>72</sup> Letter from Daniel J. Bryant, Assistant Attorney General, U.S. Department of Justice, to Senator Carl Levin, Chairman of Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs (July 3, 2002).

<sup>73</sup> *Ibid.*

<sup>74</sup> A lawyer representing many of the post-September 11 detainees observed that "[w]hen the feds no longer have any justification to keep the detainees on immigration issues, they resort to criminal charges to keep them." Karim Fahim, "Endgame," *Village Voice*, March 6 - 12, 2002.

<sup>75</sup> *Ibid.*

<sup>76</sup> See 18 U.S.C. § 3144.

<sup>77</sup> *Ibid.*

<sup>78</sup> Material witnesses were reported to have had more limited access to phone calls and more restricted visitation privileges than other detainees. See Human Rights Watch, *United States: Presumption of Guilt*, pp. 61-67.

<sup>79</sup> Human Rights Watch, *United States: Presumption of Guilt*, p. 61.

<sup>80</sup> *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. April 2002).

<sup>81</sup> Human Rights Watch, *United States: Presumption of Guilt*, p. 66.

<sup>82</sup> *United States v. Awadallah*, 202 F. Supp. 2d at 59.

<sup>83</sup> *In re the Application of the United States for a Material Witness Warrant*, 2002 U.S. Dist. Lexis 13234 (S.D.N.Y. July 11, 2002). See also "Federal Material Witness Statute Applies to Grand Jury Proceedings," *Criminal Law Reporter*, Vol. 71, No. 16, July 24, 2002, available at <http://litigationcen->

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[ter.bna.com/PIC/litpic.nsf/138b81ff0d2075e685256ad4005f1851/31bd4ccfef700faf85256c010072cf\\_a6?OpenDocument](http://ter.bna.com/PIC/litpic.nsf/138b81ff0d2075e685256ad4005f1851/31bd4ccfef700faf85256c010072cf_a6?OpenDocument).

<sup>84</sup> This strategy was made clear by the Attorney General in an October speech to U.S. mayors: “Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.” Attorney General John Ashcroft, Prepared Remarks for the US Mayors Conference, October 25, 2001, available at [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm).

<sup>85</sup> Amnesty International, “Amnesty International’s Concerns Regarding Post September 11 Detentions in the USA,” March 14, 2002, p. 8, available at <http://www.amnestyusa.org/usacrisis/9.11.detentions2.pdf>.

<sup>86</sup> 8 C.F.R. § 287.3.

<sup>87</sup> These statistics were among the limited information the government provided in response to litigation under the Freedom of Information Act led by the Center for National Security Studies. Records are available on their website at <http://www.cnss.gwu.edu/>.

<sup>88</sup> The Lawyers Committee interviewed more than 30 attorneys, as well as community organizers in frequent contact with the populations most affected. The interview notes are on file with the Lawyers Committee.

<sup>89</sup> Review of Custody Determinations, 66 Fed. Reg. 54909 (2001) (to be codified at 8 C.F.R. pt. 3).

<sup>90</sup> The bond stay authority has impacted individuals in a variety of ways. Lawyers for detainees have told the Lawyers Committee that INS trial attorneys often inform them that the INS intends to appeal if the detainee is granted bond, and that the detention

will be continued pending that appeal. Lawyers often choose to postpone the bond hearing instead of risking more lengthy detention for their client. Judges have also refused to set bond if the INS has indicated its intention to appeal.

<sup>91</sup> *Ursula Altagracia Almonte-Vargas v. Kenneth Elwood*, 2002 U.S. District Court, Lexis 12387 (E.D. Penn. June 28, 2002).

<sup>92</sup> Detainees are to be given a site-specific detainee handbook that describes the rights of the detainees and the services available, including attorney and family visitation and telephone use. A list of *pro bono* resources for legal representation is required to be posted in all detainee housing areas and updated quarterly. INS Detention Standards, Detainee Handbook, available at <http://www.ins.usdoj.gov/graphics/lawsregs/handbk.pdf>. Since lack of access to direct calls can inhibit the ability to secure legal representation, INS standards also require that detention facilities permit detainees to place direct calls to legal service providers, as well as consular officials. INS Detention Standards, Telephone Access, available at <http://www.ins.usdoj.gov/graphics/lawsregs/teleacc.pdf>. Detainees are also entitled to reasonable hours to meet with their lawyers. The standards require detention facilities to permit legal visitation “seven days a week, including holiday. It shall permit legal visits for a minimum of eight hours per day on regular business days, and a minimum of four hours per day on weekends and holidays.” INS Detention Standards, Visitation, available at <http://www.ins.usdoj.gov/graphics/lawsregs/visit.pdf>.

<sup>93</sup> The Lawyers Committee interviewed more than 30 attorneys, as well as community organizers in frequent contact with the populations most affected. Interview notes are on file with the Lawyers Committee. At the Metropolitan Detention Center (MDC) in Brooklyn, for example, post-9/11 detainees held in the Special Housing Unit could meet with their counsel only through a set of bars covered with a thick glass window, through which lawyer and client were left to communicate through a little hole covered with a metal grille.

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<sup>94</sup> National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062 (2001) (to be codified at 28 C.F.R. pts. 500 and 501).

<sup>95</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>96</sup> ACLU Press Release, "ACLU of New Jersey Wins Access to Information on Post-September 11 Detainees," March 27, 2002, available at <http://www.aclu.org/news/2002/n032702a.html>.

<sup>97</sup> Release of Information Regarding INS Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 (2002) (to be codified at 8 C.F.R. pts 236 and 241).

<sup>98</sup> *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002).

<sup>99</sup> *Ibid.*

<sup>100</sup> Michael Creppy, "Cases Requiring Special Procedure," Internal Memorandum-Executive Office for Immigration Review (Creppy Memorandum), September 21, 2001.

<sup>101</sup> "Declaration of James S. Reynolds," submitted January 11, 2002, in *Center for National Security Studies v. U.S. Department of Justice*.

<sup>102</sup> *Detroit Free Press v. John Ashcroft*, 195 F. Supp. 2d 948 (April 3, 2002).

<sup>103</sup> *New Jersey Media Group v. John Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. May 28, 2002).

<sup>104</sup> Michael Creppy, "Protective Orders and the Sealing of Records," July 16, 2002.

<sup>105</sup> *Detroit Free Press v. Ashcroft*, 2002 FED App. 0291P (6th Cir. August 26, 2002) opinion available at <http://pacer.ca6.uscourts.gov/cgiin/getopn.pl?OPINION=02a0291p.06>.

<sup>106</sup> *Ibid.*

<sup>107</sup> Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (2002) (to be codified at 8 C.F.R. pt. 3).

<sup>108</sup> American Immigration Law Foundation News, Volume 4, Issue 3, March 2002, available at [www.aifl.org](http://www.aifl.org). See also Comments filed by Capitol Area Immigrants Rights Coalition (CAIR) and Comments filed by the Lawyers Committee for Human Rights (on file with the Lawyers Committee).

<sup>109</sup> "Joint Statement on Cooperation on Border Security and Regional Migration Issues" issued by the United States and Canada on December 3, 2001; DeNeen L. Brown, "U.S., Canada to Sign Border Accord," *Washington Post Foreign Service*, December 4, 2001.

<sup>110</sup> See Bill Frelick, "Whose On First? The Canada-U.S. Memorandum of Agreement on Asylum," 73 *Interpreter Releases* 217, February 26, 1996.

<sup>111</sup> Memorandum from Michael D. Cronin, INS Executive Associate Commissioner, "Deferred Inspection, Parole and Waivers of Documentary Requirements," November 14, 2001, reprinted in 79 *Interpreter Releases* 49, January 7, 2002.

<sup>112</sup> International Convention on the Elimination of Racial Discrimination (CERD), G.A. Res. 2106 (XX), U.N. GAOR, 20<sup>th</sup> Sess., Supp. (No. 14), U.N. Doc. A/RES/2106 (XX), entered into force January 4, 1969. The United States Ratified the CERD in 1994. Article 5 of the CERD calls on states to "guarantee the right of everyone without distinction as to race, colour, or nationality or ethnic origin, to equality before the law," including "equal treatment before the tribunal and all other organs administering justice."

<sup>113</sup> Memo from Kenneth L. Wainstein, Director of the Executive Office of United States Attorneys, "Final Report on Interview Project," February 26, 2002.

<sup>114</sup> See "Profiling with Respect," *Christian Science Monitor*, December 4, 2001; "In Sweeping Campus, U.S. Checks on Mideast Students," *New York Times*, November 12, 2001.

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<sup>115</sup> See Testimony of James Ziglar, Hearing before the Subcommittee on Immigration and Claims of the Committee on the Judiciary House of Representatives, *INS's March 2002 Notification of Approval of Change of Status for Pilot Training for Terrorist Hijackers Mohammed Atta and Marwan Al-Shehhi*, March 19, 2002.

<sup>116</sup> Powers of the Attorney General to Authorize State or Local Law Enforcement Officers To Exercise Federal Immigration Enforcement Authority During a Mass Influx of Aliens, 67 Fed. Reg. 48354 (2002) (to be codified at 8 C.F.R. pt. 65).

<sup>117</sup> Police Can Now Be Drafted to Enforce Immigration Law," *Christian Science Monitor*, August 19, 2002.

<sup>118</sup> Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 40581 (2002) (to be codified at 8 C.F.R. pts. 214 and 264).

<sup>119</sup> Registration and Monitoring of Certain Nonimmigrants; Final Rule, 67 Fed. Reg. 52584 (2002) (to be codified at 8 C.F.R. pts. 214 and 264).

<sup>120</sup> Address Notification to be Filed with Designated Applications, 67 Fed. Reg. 48818 (2002) (to be codified at 8 C.F.R. pts. 103).

<sup>121</sup> Fared Zakaria, "Delicate Balance: The Case for 'Smart Profiling' as a Weapon in the War on Terror" *Newsweek*, July 8, 2002.

<sup>122</sup> *Ibid.*

<sup>123</sup> Excerpt from Remarks of Attorney General John Ashcroft, September 13, 2001, available at <http://www.usdoj.gov/crt/legalinfo/dojstatements.html>.

<sup>124</sup> Remarks of President George W. Bush at the Islamic Center, September 17, 2001, available at <http://www.usdoj.gov/crt/legalinfo/bushremarks.html>.

<sup>125</sup> U.S. Department of Justice, Civil Rights Division, "Enforcement and Outreach Following the

September 11 Attacks," available at <http://www.usdoj.gov/crt/legalinfo/discrimupdate.htm>.

## Chapter 4

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> International Convention on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), entered into force March 23, 1976, article 2. The United States ratified the ICCPR in 1992. The full text of the ICCPR is available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (accessed August 27, 2002).

<sup>129</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (1984), entered into force June 26, 1987. The full text of the Convention Against Torture is available at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm) (accessed August 27, 2002).

<sup>130</sup> "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." Convention (III) Relative to the Treatment of Prisoners of War. Geneva, August 12, 1949, article 118, 75 UNTS 135 (Third Geneva Convention). The Convention is available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/5cd83e96981e1ee0c12563cd00427ee4?OpenDocument> (accessed August 27, 2001).

<sup>131</sup> Charles Lane, "Debate Crystallizes on War, Rights," *Washington Post*, September 2, 2002.

<sup>132</sup> Bob Drogin, "No Leaders of al Qaeda Found at Guantanamo," *Los Angeles Times*, August 18, 2002; See also John Mintz, "From Veil of Secrecy, Portraits of U.S. Prisoners Emerge," *Washington Post*, March 15, 2002.

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<sup>133</sup> “Bosnia Suspects Handed to U.S.,” *CNN.com*, January 18, 2002, available at <http://www.cnn.com/2002/WORLD/europe/01/18/inv.bosnia.cuba/> (accessed August 27, 2002).

<sup>134</sup> Steve Vogel, “Afghan Prisoners Going to Gray Area,” *Washington Post*, January 9, 2002.

<sup>135</sup> “We are within our rights...that we may hold enemy combatants for the duration of the conflict. And the conflict is still going and we don’t see an end in sight right now.” Defense Department General Counsel William J. Haynes, at Department of Defense News Briefing on Military Commissions, (March 21, 2002) (transcript available at DefenseLINK [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html))(accessed September 1, 2002).

<sup>136</sup> International Committee of the Red Cross, Commentary to article 4 of the Convention (IV) Relative to the Protection of Civilians Person in Time of War, Geneva, August 12, 1949. Commentary available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument> (accessed August 25,2002).

<sup>137</sup> The prescribed procedures for “competent tribunals” for prisoners in U.S. custody are set forth in Army Regulation 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” Department of the Army (1997), available at [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf) (accessed August 27, 2002). Though these “competent tribunals,” composed of three commissioned officers, are far less formal than a trial or other judicial proceeding, certain fundamental due process protections apply, including: preservation of a written record; public access to the proceedings (subject to security considerations); notice to the detainee of his rights, including right to address the tribunal or the right to refrain from testifying; an interpreter; the right to call witnesses “if reasonably available”; and the right to question witnesses against him. The standard for determinations is by preponderance of the evidence. Each determination requires a written report, and adverse determinations are reviewed by a Judge Advocate.

<sup>138</sup> Under the rules applied in Vietnam, “captured North Vietnamese Army and Vietcong fighters were accorded POW status upon capture. ‘Irregulars’ were divided into three groups: guerrillas, self-defense force, and secret self-defense force. Members of these groups could qualify for POW status if captured in regular combat, but were denied such status if caught in an act of ‘terrorism, sabotage or spying.’ Those not treated as POWs were treated as civil defendants, and were accorded the substantive and procedural protections of the [Fourth Geneva Convention]. This approach met with the approval of the ICRC.” Jennifer Elsea, “Treatment of ‘Battlefield Detainees’ in the War on Terrorism,” *Congressional Research Service Report for Congress*, RL31367, April 11, 2002, p. 29. Report available at <http://www.nimj.com/documents/BattlefieldDetainees.pdf> (accessed September 10, 2002).

<sup>139</sup> “A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power....” Third Geneva Convention, art. 102.

<sup>140</sup> Third Geneva Convention, art. 85.

<sup>141</sup> Third Geneva Convention, art. 118.

<sup>142</sup> See generally, Jennifer Elsea, “Treatment of ‘Battlefield Detainees’ in the War on Terrorism,” p.14.

<sup>143</sup> Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, art. 146 (Fourth Geneva Convention). Convention available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument> (accessed September 1, 2002).

<sup>144</sup> U.S. Department of Defense, “DoD News Briefing – Secretary Rumsfeld and Gen. Myers,” January 11, 2002 (transcript available at DefenseLINK, [http://www.defenselink.mil/news/Jan2002/t01112002\\_t0111sd.html](http://www.defenselink.mil/news/Jan2002/t01112002_t0111sd.html)) (accessed August 27,2002).

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<sup>145</sup> Richard Waddington, "Guantanamo Detainees are POWs Despite Bush View – ICRC," *Reuters*, February 8, 2002.

<sup>146</sup> U.S. Department of Defense, "DoD News Briefing – Secretary Rumsfeld and Gen. Myers" January 11, 2002.

<sup>147</sup> David E. Sanger, "Prisoners Straddle an Ideological Chasm," *New York Times*, January 27, 2002.

<sup>148</sup> Katherine Q. Seelye, "Powell Asks Bush to Review Stand on War Captives," *New York Times*, January 27, 2002.

<sup>149</sup> Katherine Q. Seelye, "Detainees are Not P.O.W.'s, Cheney and Rumsfeld Declare," *New York Times*, January 28, 2002.

<sup>150</sup> U.S. Department of State, International Information Programs, "Bush Says Geneva Convention Applies To Taliban, Not al-Qaida," February 7, 2002.

<sup>151</sup> U.S. Department of Defense, "DoD News Briefing – Secretary Rumsfeld and Gen. Myers," February 8, 2002 (transcript available at DefenseLINK, [http://www.defenselink.mil/news/Feb2002/t02082002\\_t0208sd.html](http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html)) (accessed August 27, 2002).

<sup>152</sup> Lawyers Committee for Human Rights, "Statement of Elisa Massimino, Director of the Washington Office of the Lawyers Committee for Human Rights," February 7, 2002. Statement available at [http://www.lchr.org/media/2002\\_alerts/0207.htm](http://www.lchr.org/media/2002_alerts/0207.htm) (accessed July 20, 2002).

<sup>153</sup> The U.S. government issued a muted response to recent reports of a mass grave found in territory under the control of U.S.-allied warlord Abdul Rashid Dostum in northern Afghanistan. Barak Dehghanpishen, John Barry and Roy Gutman, "The Death Convoy of Afghanistan," *Newsweek*, August 26, 2002. Though U.N. and NGO. investigators found strong evidence that as many as a thousand Taliban soldiers who surrendered to Dostum in

November 2001 appear to have suffered excruciating deaths after being intentionally locked into sealed shipping containers by their captors, the United States has limited its reaction essentially to "stress[ing] to Afghan authorities the importance of investigating allegations of human rights violations and war crimes...[and] engag[ing] Afghan authorities on this matter in order to help seek accountability for any violations that may have occurred." Philip T. Reeker, Deputy Spokesman, Department of State Daily Press Briefing, August 19, 2002 (transcript available at <http://www.state.gov/r/pa/prs/dpb/2002/12817.htm>) (accessed August 22, 2002). While this call for Afghan government action sounds positive, it is highly unlikely that the beleaguered, fragile and virtually penniless Afghan Transitional Government would be able to carry out any effective investigation in such a sensitive matter without firm U.S. leadership.

<sup>154</sup> Michael J. Jordan, "With or Against Us' War Irks Many U.N. Nations," *Christian Science Monitor*, November 14, 2001.

<sup>155</sup> Tim Morris, "Civil-Military Relations in Afghanistan," *Forced Migration Review* 13, June 2002.

<sup>156</sup> U.S. Department of Defense, "Secretary Rumsfeld Media Availability en route to Guantanamo Bay, Cuba," January 27, 2002 (transcript available at DefenseLINK, [http://www.defenselink.mil/news/Jan2002/t01282002\\_t0127enr.html](http://www.defenselink.mil/news/Jan2002/t01282002_t0127enr.html)) (accessed September 2, 2002).

<sup>157</sup> U.S. Department of Defense, DefenseLINK, "DoD News Briefing – Secretary Rumsfeld and Gen. Myers" January 11, 2002.

<sup>158</sup> U.S. Department of Defense, DefenseLINK, "Secretary Rumsfeld Media Availability en route to Camp X-Ray," January 27, 2002 (transcript available at [http://www.defenselink.mil/news/Jan2002/t01282002\\_t0127sd2.html](http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html)) (accessed August 27, 2002).

<sup>159</sup> Katherine Q. Seelye, "An Uneasy Routine at Cuba Prison Camp," *New York Times*, March 16, 2002.

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<sup>160</sup> Bob Drogin, "No Leaders of al Qaeda Found at Guantanamo," *Los Angeles Times*, August 18, 2002.

<sup>161</sup> See U.S. Naval Base, Guantanamo Bay, Cuba, "History of Guantanamo Bay: An Online Edition" (unofficial) (1964). Text available at <http://www.nsgtmo.navy.mil/history.htm> (accessed August 27, 2002).

<sup>162</sup> Jess Bravin, "Lawyers Question Holding Suspected Terrorists Without Offering Legal Case Against Them," *Wall Street Journal*, July 3, 2002.

<sup>163</sup> Memorandum Opinion in the consolidated cases of *Rasul, et al. v. George Walker Bush, et al.*, and *Odah, et al., v. United States of America, et al.* (D.C., July 31, 2002). See also Order Dismissing Petition for Writ of Habeas Corpus and First Amended Petition for Writ of Habeas Corpus in the case of *Coalition of Clergy, et al. v. George Herbert Walker Bush, et al.*, (C.D. Ca., February 21, 2002).

<sup>164</sup> Memorandum Opinion in the consolidated cases of *Rasul, et al. v. George Walker Bush, et al.*, and *Odah, et al., v. United States of America, et al.* (D.C., July 31, 2002).

<sup>165</sup> Bob Drogin, "No Leaders of al Qaeda Found at Guantanamo," *Los Angeles Times*, August 18, 2002. See also Faye Bowers and Philip Smucker, "U.S. Ships al Qaeda Suspects to Arab States," *Christian Science Monitor*, July 26, 2002 ("Egypt, Syria, and Jordan, among them – use torture, which, some officials suggest, extracts information much more quickly than more benign interrogation methods").

<sup>166</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3.

<sup>167</sup> Military Order of November 13, 2001, "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (2001). Order available at <http://www.white-house.gov/news/releases/2001/11/20011113-27.html> (accessed September 2, 2002).

<sup>168</sup> Lawyers Committee for Human Rights, "Military Order Contradicts Core U.S. and International Values Says Lawyers Committee for Human Rights," November 15, 2002. Statement available at [http://www.lchr.org/aftersept/mike\\_statement.htm](http://www.lchr.org/aftersept/mike_statement.htm) (accessed September 4, 2002).

<sup>169</sup> 317 U.S. 1 (1942). See, e.g., U.S. Department of Defense, "Prepared Statement: Senate Armed Services Committee 'Military Commissions,' Secretary of Defense Donald H. Rumsfeld and Deputy Secretary of Defense Paul Wolfowitz," December 12, 2001. Statement available at DefenseLINK <http://www.defenselink.mil/speeches/2001/s20011212-depsecdef2.html> (accessed September 2, 2002) (Rumsfeld : "Military commissions have been used in times of war since the Founding of this nation...When eight Nazi saboteurs landed on our coast...they were tried by military commissions ....[T]he Supreme Court upheld the constitutionality of military commissions...unanimously...").

<sup>170</sup> Louis Fisher, "Military Tribunals: The *Quirin* Precedent," *Congressional Research Service Report for Congress*, RL31340, March 26, 2002, p. 45. Report available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31340.pdf> (accessed September 3, 2002).

<sup>171</sup> Robert A. Levy, "Indefensible – The Case Against Military Tribunals," *Wall Street Journal*, November 25, 2002.

<sup>172</sup> William Safire, "Voices of Negativism," *New York Times*, December 6, 2001.

<sup>173</sup> James Orenstein, "Rooting Out Terrorists Just Became Harder," *New York Times*, December 6, 2001.

<sup>174</sup> "Warren Christopher and FBI/CIA Chief Webster on 9/11 Policies," *Associated Press*, July 17, 2002.

<sup>175</sup> "The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a *habeas corpus*

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proceeding in a federal court.” Alberto R. Gonzalez, “Martial Justice, Full and Fair,” *The New York Times*, November 30, 2001, Article available at <http://usinfo.state.gov/topical/pol/terror/01120302.htm> (accessed September 2, 2002).

<sup>176</sup> “If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but may not necessarily automatically be released.” U.S. Department of Defense General Counsel William J. Haynes, “DoD News Briefing on Military Commissions,” March 21, 2002 (transcript available at DefenseLINK [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html) (accessed September 1, 2002). See also Katharine Q. Seelye, “Pentagon Says Acquittals May Not Free Detainees,” *New York Times*, March 22, 2002.

<sup>177</sup> Nicholas D. Kristof, “Liberal Reality Check,” *New York Times*, May 31, 2002.

<sup>178</sup> Jerry Seper, “Agent Says FBI Ignored Threat of Moussaoui,” *Washington Times*, May 24, 2002; see also “Coleen Rowley’s Memo to FBI Director Robert Mueller,” *Time.com*, May 21, 2002, available at <http://www.time.com/time/nation/printout/0,8816,249997,00.html> (accessed September 1, 2002).

<sup>179</sup> Lawyers Committee for Human Rights “Statement from Elisa Massimino on the Indictment of Zacarias Moussaoui,” December 11, 2002, available at [http://www.lchr.org/aftersept/statement\\_on\\_zac.htm](http://www.lchr.org/aftersept/statement_on_zac.htm) (accessed September 4, 2002).

<sup>180</sup> “Who is Richard Reid?” *BBC online*, December 28, 2001, available at <http://news.bbc.co.uk/1/hi/uk/1731568.stm> (accessed September 1, 2002); “Judge Denies Bail to Accused Shoe Bomber,” *CNN.com/US*, December 28, 2001, available at <http://www.cnn.com/2001/US/12/28/inv.reid/> (accessed September 1, 2002).

<sup>181</sup> Danny Hakim, “4 Men Charged With Being in Terrorist Cell in Detroit Area,” *New York Times*, August 28, 2002.

<sup>182</sup> See, e.g., the Civil Liberties Act of 1988, “Restitution for World War II Internment of Japanese-

Americans and Aleuts,” Pub. L. No. 100-383 § 1, 102 Stat. 903 (1988) (codified at 50 U.S.C. § 1989), which “acknowledge[s] the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II; [and] apologize[s] on behalf of the people of the United States....”

<sup>183</sup> U.S. Congress, House Committee of Internal Security, “Hearings Relating to Various Bills to Repeal the Emergency Detention Act of 1950,” 1970, vi. Sudocs classification number: Y 4.In 8/i5:Em 3. Available from U.S. Government Information Division, Oklahoma Department of Libraries.

<sup>184</sup> 18 U.S.C. § 4001(a). See also Pub. L. No. 92-128, § 1(a), (b), 85 Stat. 347 (1971).

<sup>185</sup> H.R. Rep. No. 116, 92nd Cong., 1st Sess. 1971, 1971 U.S.C.C.A.N. 1435.

<sup>186</sup> Jess Bravin, “White House Seeks to Expand Indefinite Detentions in Brigs,” *Wall Street Journal*, August 8, 2002. “The White House is considering creating a high-level committee to decide which prisoners should be denied access to federal courts....Under one proposal, a committee of the attorney general, the defense secretary and the director of central intelligence would determine whether a U.S. citizen should go to military detention.”

<sup>187</sup> Respondents’ Memorandum in Support of Motion for Relief from This Court’s Production Order of July 31, 2002, in the case of *Yaser Hamdi, et al. v. Donald Rumsfeld, et al.*, (E.D. Va., August 5, 2002).

<sup>188</sup> Respondents’ Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, filed in the case of *Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et al.*, (E.D. Va., July 25, 2002).

<sup>189</sup> Order in the case of *Hamdi et al., v. Rumsfeld, et al.* (E.D. Va., August 16, 2002).

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<sup>190</sup> Katherine Q. Seelye, "Judge Questions Detention of American in War Case," *New York Times*, August 13, 2002.

<sup>191</sup> Order in the case of *Hamdi, et al., v. Rumsfeld, et al.* (E.D. Va., August 16, 2002).

<sup>192</sup> "U.S. Arrests Alleged Terrorist," Associated Press, June 10, 2002. See generally, Petitioners' Reply to Motion to Dismiss Petition for Writ of Habeas Corpus, filed in the case of *José Padilla, et al. v. George W. Bush, et al.*, (S.D.N.Y., July 11, 2002).

<sup>193</sup> Editorial, "The Dirty Bomb Plot," *St. Louis Post-Dispatch*, June 11, 2002.

<sup>194</sup> Editorial, "Bin Laden's Dirty Bomb," *Washington Times*, June 11, 2002.

<sup>195</sup> Timothy Lynch, "Breaking the Vicious Cycle, Preserving Our Liberties While Fighting Terrorism," *Cato Institute Policy Analysis* No. 443, June 26, 2002.

<sup>196</sup> This summary account is based on Proffer of Facts in Support of Defendant's Suppression Motions, in the case of *United States of America v. John Phillip Walker Lindh* (E.D. Va., June 13, 2002).

## Chapter 5

<sup>197</sup> See e.g., Katharine Q. Seelye, "Chilling Portrait of Lindh Drawn in Prosecutors' Pretrial Motions," *New York Times*, June 5, 2002; see also, Neil A. Lewis, "Ashcroft's Terrorism Policies Dismay Some Conservatives," *New York Times*, July 24, 2002. ("Mr. Ashcroft was also criticized by some in the administration for declaring early on that the case of John Walker Lindh...was a major terrorist case. Some officials in the Justice Department believed that the attorney general made needlessly harsh public comments about Mr. Lindh.")

<sup>198</sup> Mike Soraghan, "Detainee to Again Seek Release," *Denver Post*, August 20, 2002.

<sup>199</sup> These standards include international humanitarian law – in particular the Geneva Conventions of 1949. They also include the fundamental instruments of international human rights law, founded on the Universal Declaration of Human Rights (1948). The International Covenant on Civil and Political Rights (1966), for example, is an essential building block of treaty law to which most members of the United Nations, including the United States, have agreed to be bound. Other building blocks in this architecture of international standards include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the International Convention on the Elimination of All Forms of Racial Discrimination (1966). International refugee law provides further fundamental human rights protections, especially in the Convention Relating to the Status of Refugees (1951) and its 1967 Protocol. There are also parallel treaties adopted by the regional intergovernmental organizations of the United Nations which provide further strong safeguards for human rights.

<sup>200</sup> On the cost of unilateralism for the counterterrorism campaign, see Glenn Kessler, "Diplomatic Gap Between U.S., Its Allies Widens," *New York Times*, September 1, 2002.

<sup>201</sup> President Charles Ghankay Taylor, "Annual Message to the 51st Legislature of Liberia in the joint Chamber of the National Legislature at the Capitol Building in Monrovia," January 28, 2002, available at <http://www.allaboutliberia.com/document6.htm> (accessed August 25, 2002).

<sup>202</sup> United Nations, Office for the Coordination of Humanitarian Affairs (OCHA) Integrated Regional Information Network (IRIN), "LIBERIA: Journalist, Two Others to Face Military Court," July 8, 2002.

<sup>203</sup> Bill Orme, "U.N. Fears Abuses of Terror Mandate," *Los Angeles Times*, January 2, 2002.

<sup>204</sup> Cited in Human Rights Watch, "Opportunism in the Face of Tragedy; Repression in the Name of Anti-Terrorism," pp. 6-7, available at <http://www.hrw.org/campaigns/september11/oppoportunismwatch.htm> (accessed July 20, 2002).

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<sup>205</sup> Ibid., p. 5.

<sup>206</sup> See Council on Foreign Relations, "Terrorism: Questions & Answers/China," p. 2, available at <http://www.terrorismanswers.com/coalition/china.html> (accessed August 30, 2002).

<sup>207</sup> See Kari Haus, "Where China Fits in a 'War on Terrorism,'" MSNBC, available at <http://www.msnbc.com/news/697546.asp> (accessed August 30, 2002).

<sup>208</sup> See Council on Foreign Relations, "Terrorism: Questions & Answers/China," p. 2.

<sup>209</sup> Anna Nivat, "We Are the Lost Ones," *Washington Post*, August 21, 2002.

<sup>210</sup> White House Press Release, "President Bush and Russian President Putin Discuss Progress," October 21, 2001, available at <http://www.whitehouse.gov/news/releases/2001/10/20011021-3.html> (accessed July 22, 2002).

<sup>211</sup> Cited in Human Rights Watch, "Opportunism in the Face of Tragedy," p. 6.

<sup>212</sup> Philip Smucker, "For Egypt, a Feeling of Vindication on Crackdowns," *Christian Science Monitor*, September 18, 2001.

<sup>213</sup> Cited in Joe Stork, "The Human Rights Crisis in the Middle East in the Aftermath of September 11," Cairo Institute for Human Rights Studies, p. 6, available at [http://www.cihrs.org/conference/storkpaper\\_e.htm](http://www.cihrs.org/conference/storkpaper_e.htm) (accessed August 25, 2002). Joe Stork is the Advocacy Director of the Middle East and North Africa division of Human Rights Watch.

<sup>214</sup> Ibid.

<sup>215</sup> See U.S. Department of State, Bureau of Democracy, Human Rights and Labor, "2000 Country Reports on Human Rights Practices – Egypt," February 23, 2001.

<sup>216</sup> U.S. Department of State, International Information Programs, "Transcript: Powell and

Egyptian Foreign Minister Maher on Terrorism; U.S. and Egypt to Work Together in the Fight," September 26, 2001, available at <http://usinfo.state.gov/topical/pol/terror/01092610.htm> (accessed August 25, 2002).

<sup>217</sup> See Lawyers Committee for Human Rights, "Administration Opposes Increased Aid to Egypt," August 16, 2002, available at [http://www.lchr.org/defender/ibrahim/ibr\\_3.htm](http://www.lchr.org/defender/ibrahim/ibr_3.htm) (accessed August 25, 2002).

<sup>218</sup> See Peter Slevin, "Bush, in Shift on Egypt, Links New Aid to Rights" *Washington Post*, August 15, 2002.

<sup>219</sup> See Lawyers Committee for Human Rights, "Workers Rights in Indonesia," available at [http://www.lchr.org/workers\\_rights/wr\\_indonesia/wr\\_indonesia.htm](http://www.lchr.org/workers_rights/wr_indonesia/wr_indonesia.htm) (accessed August 25, 2002).

<sup>220</sup> Ibid.

<sup>221</sup> Thomas L. Friedman, "The War on What," *New York Times*, May 8, 2002.

<sup>222</sup> Ibid.

<sup>223</sup> See William Orme, "U.N. Fears Abuses of Terror Mandate," *Los Angeles Times*, January 2, 2002.

<sup>224</sup> See Article 19: The Global Campaign for Free Expression, "Law of the Republic of Belarus on the Fight Against Terrorism," available at <http://www.article19.by/laws/terroriste.html> (accessed July 20, 2002).

<sup>225</sup> Ibid., p. 2.

<sup>226</sup> United Nations, Security Council, Counter-Terrorism Committee, "Report of the Government of India," December 24, 2001, available at <http://www.un.org/Docs/sc/committees/1373/> (accessed August 25, 2002). The report describes the legal basis for ordinances to be issued by the presidency and to be in force pending enactment by the legislature.

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<sup>227</sup> See “Advani Defends Ordinance Against Terrorism,” *IndiaExpress Bureau*, November 1, 2001, available at <http://www.indiaexpress.com/news/national/20011101-6.html> (accessed August 31, 2002).

<sup>228</sup> The full text of the law is available on the website of the Institute for Conflict Management’s South Asia Terrorism Portal, available at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm> (accessed August 25, 2002).

<sup>229</sup> Representative Frank Pallone, Jr., “Special Order Prevention of Terrorism Ordinance,” December 5, 2001, available at [http://www.house.gov/apps/list/speech/nj06\\_pallone/st\\_Dec5Terrorism.html](http://www.house.gov/apps/list/speech/nj06_pallone/st_Dec5Terrorism.html) (accessed July 25, 2002).

<sup>230</sup> See Sridhar Krishnaswami, “U.S. Welcomes India’s Anti-Terrorism Law,” *Hindu*, March 29, 2002.

<sup>231</sup> *Ibid.*

<sup>232</sup> See Stork, “Human Rights Crisis in the Middle East,” p. 6.

<sup>233</sup> Amnesty International, *Amnesty International Report 2002*, available at <http://web.amnesty.org/web/ar2002.nsf/eur/sweden!Open> (accessed August 20, 2002); and Amnesty International, “Sweden: Deportations Leave Men at Risk of Torture in Egypt,” *AI Index EUR 42/003/2001 - News Service Nr. 226*, December 20, 2002.

<sup>234</sup> See Stork, “Human Rights Crisis in the Middle East,” p. 6; See also Jailan Halawi, “The Tip of an Iceberg,” *Al-Ahram Weekly Online*, February 7-13, 2002 (citing complaints of torture by one of the two men, both of whom were detained on charges of terrorism upon their return to Egypt).

<sup>235</sup> A key exception relates to 1373 measures which may have the effect of curtailing the right to seek asylum or to be protected from torture.

<sup>236</sup> See Orme, “U.N. Fears Abuses,” January 2, 2002.

<sup>237</sup> Jeremy Greenstock, “Presentation at the Symposium, ‘Combating International Terrorism: The Contribution of the United Nations,’” June 3, 2002.

<sup>238</sup> The CTC website is available at <http://www.un.org/Docs/sc/committees/1373/> (accessed August 25, 2002).

<sup>239</sup> Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights, “Human Rights and Terrorism,” November 29, 2001, available at [http://www.osce.org/press\\_rel/documents/2001-776-odihr.pdf](http://www.osce.org/press_rel/documents/2001-776-odihr.pdf) (accessed July 25, 2002).

<sup>240</sup> *Ibid.*

<sup>241</sup> Cited in Irene Khan, “Human Rights Challenges Following the Events of September 11 and Their Impact on Universality and the Human Rights Movement,” paper prepared for the conference hosted by the Cairo Institute for Human Rights Studies, “Terrorism and Human Rights,” January 26-28, 2001, Cairo, Egypt; available at [http://www.cihrs.org/conference/khanpaper\\_e.htm](http://www.cihrs.org/conference/khanpaper_e.htm) (accessed August 25, 2002). Irene Khan is the Secretary General of Amnesty International.

<sup>242</sup> Orme, “U.N. Fears Abuses,” January 2, 2002.

<sup>243</sup> United Nations Press Release, “Secretary-General, Addressing Council Meeting on Counter-Terrorism says United Nations ‘Stands Four-Square’ Against this Scourge,” January 18, 2002.

<sup>244</sup> See, e.g., Doug Cassel, “Do Unto Others...America Fights International Covenants Against Torture,” *Chicago Tribune*, September 1, 2002.

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*From the Introduction of A Year of Loss*

Over the last year the U.S. government has taken a series of actions that have gradually eroded basic human rights protections in the United States, fundamental guarantees that have been central to the U.S. constitutional system for more than 200 years.

Viewed separately, some of these changes may not seem extreme, especially when seen as a response to the September attacks. But when you connect the dots, a different picture emerges. The composite picture outlined by this report shows that too often the U.S. government's mode of operations since September 11 has been at odds with core American and international human rights principles.



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