



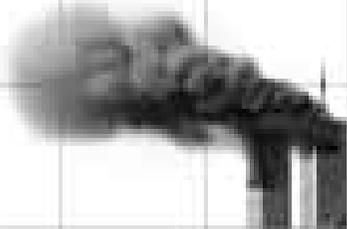
IMBALANCE OF POWERS

How Changes to U.S. Law & Policy Since
9/11 Erode Human Rights and Civil Liberties

September 2002 — March 2003



Imbalance of Powers is an
update to Lawyers Committee's
*A Year of Loss: Re-examining Civil Liberties
Since September 11*, which was published
in September 2002.



LAWYERS COMMITTEE
FOR HUMAN RIGHTS

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Since 1978, the Lawyers Committee for Human Rights has worked in the U.S. and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; promote fair economic practices by creating safeguards for workers' rights; and help build a strong international system of justice and accountability for the worst human rights crimes.

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Introduction

This report examines a wide range of actions taken by the United States government over the last six months in response to the September 11, 2001 attacks on the World Trade Center and the Pentagon. It updates our report entitled “A Year of Loss” published in September 2002, on the first anniversary of the attacks.¹

GOVERNMENT’S RESPONSIBILITIES FOR SECURITY

As we noted in our original report, we start from the premise that the U.S. government, like any government, has the right and obligation to protect its people from attacks. We recognize that the continued threat posed by al Qaeda and other such groups is grave. Given the open nature of U.S. society and its vast borders, the potential for future violent attacks in the United States continues to be extremely high. The risk of such attacks has not diminished, and may in fact be greater in the coming weeks and months.

Mindful of such risks, we support efforts by the government to take appropriate measures to enhance public security, to gather information about potential attacks, to bring perpetrators of these crimes to justice, and to take precautionary steps to prevent future attacks. The arrests of key al Qaeda suspects like Khalid Shaikh Mohammed are an important aspect of these law enforcement efforts. The continued efforts to bolster airport security, to enhance inspections of cargo coming by ship into the United States, and ongoing efforts to improve coordination and communications among law enforcement and intelligence gathering agencies are all reasonable and necessary measures. We see the need for continued attention and resources to support these and other similar efforts aimed at enhancing the protection of public security.

ERODING BASIC RIGHTS ON MULTIPLE FRONTS

At the same time, as this report outlines, over the last six months the U.S. government also has continued to take actions that erode basic human rights protections in the United States, including fundamental guarantees central to our constitutional system. The report outlines the broad scope of these changes in five major areas:

An analysis of challenges to the principle of **Open Government** covers increasing government secrecy and attempts to limit public debate. This includes withholding from Congress information on the implementation of the USA PATRIOT Act; obstructing investigations by the General Accounting Office, the investigative arm of Congress; and the secretive process with which new draft anti-terrorism legislation has been prepared by the Department of Justice. The new obstacles to wall off the federal government from public scrutiny — and increasingly to shield also private corporations — include broad new exemptions from the disclosure requirements of the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA).

The erosion of the **Right to Privacy** is illustrated by a series of initiatives by which federal powers of surveillance, search and seizure, and intelligence gathering have been vastly extended in ways that may affect everyone in the United States. They include the military's Total Information Awareness Program to create data profiles on citizens by tapping and "mining" public and private databases; the use of expanded search and seizure powers under the USA PATRIOT Act to seize library, bookstore, and other private records; increased powers to intercept telephone and internet communications; and the lifting of restrictions on the use of special foreign intelligence powers in ordinary criminal prosecutions. Federal proposals also would lift restrictions on monitoring and surveillance of the ordinary citizen by city and state police — by terminating at a stroke all court-supervised agreements entered into by police departments that prevent police spying on people under no suspicion of having committed a crime.

In assessing the **Treatment of Immigrants, Refugees, and Minorities**, this report addresses the way some immigrant communities have continued to bear the brunt of many of the Justice Department's anti-terrorism initiatives. It details the monitoring, registration, detention, and secret deportation of immigrants against whom no charges have been made; restrictions on visitors and immigrants alike from many parts of the world; and a reversal of the United States' traditional welcome to refugees fleeing persecution abroad.

A description of the situation of **Security Detainees and the Criminal Justice System** covers the increasing reliance on ad hoc measures the United States has created to deal with those suspected of ties to al Qaeda, including: the indefinite detention of U.S. citizens, the proposed use of military commissions, and the status of detainees held in Guantanamo Bay, Cuba. At issue also is the power of the presidency to identify any American citizen as an agent of an enemy and on that basis to strip that citizen of his or her liberty and other rights under

U.S. law. The administration maintains that neither the criminal courts nor the regular military courts have jurisdiction over detainees it designates “unlawful combatants.” While the criminal courts are trying some terrorism-related cases, administration sources have suggested that they may be “forced” to transfer these cases to special military commissions outside either the federal courts or the traditional military justice systems.

The final chapter of the report concerns the **United States and International Human Rights Protection** — the international repercussions of the changes in U.S. policy and practice. The examples presented show that some of the most draconian aspects of what the U.S. government has done in response to September 11 are being mimicked by repressive governments to justify human rights violations against peaceful advocates of democratic values. The desire by the United States to take some of these actions has affected its ability to be critical. In lowering its own human rights standards, the United States has encouraged other governments, though often inadvertently, to lower the standards of human rights around the world.

THE CHECKS ARE OUT OF BALANCE

Viewed individually, some of the changes outlined in *Imbalance of Powers* may not seem extreme, especially when seen as a response to the September 11 attacks. But when you connect the dots — as a report such as this allows — 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.

Central among those principles is the idea of checks and balances, where a separation of powers among the executive, judicial, and legislative branches of government provides important safeguards. Throughout this report, a pattern emerges in which core U.S. values are being undermined by aggressive executive branch actions that are usurping the constitutional powers of the federal courts and Congress.

FENCING OFF CONGRESS / CONGRESS ACQUIESCES

The USA PATRIOT Act is omnibus security legislation that was passed in six weeks with limited debate in October 2001. Since the law was adopted, Congress has failed to play an active role in monitoring its implementation. In particular, with respect to the new powers to detain

immigrants, this is because the executive branch has resisted providing Congress with sufficient information on who is being detained post-September 11, under what circumstances, and how these cases are being resolved.

These new detention powers were some of the most controversial provisions of the new law. In addition to the detention provisions in the USA PATRIOT Act, the administration has promulgated a series of federal regulations that further insulate the executive branch from judicial oversight. For example, one INS regulation, issued in October 2001, grants INS trial attorneys the power to overrule an immigration judge who orders an immigrant released on bond. The Justice Department justified these and similar new regulations as necessary to protect national security. These new powers have been applied to many Arab and Muslim non-citizens detained in the wake of September 11, and even to preclude the possibility of court-ordered release of 200 Haitian asylum seekers in Florida in the fall of 2002.

FENCING OFF THE COURTS / THE COURTS DEFER

The administration has succeeded in removing security detainees from the reach of the U.S. judicial system. For the most part, the courts have shown undue deference in acceding to these practices. These include: hundreds of men detained by the INS, whose names continue to be withheld; more than 650 men detained at Guantanamo Bay, Cuba, who have been provided no information on the duration of their detention or charges against them; and an unknown number of suspected security detainees who are being held secretly in other locations, including U.S. military bases in Afghanistan and Diego Garcia and elsewhere.

In addition to these cases, the government has created, though not yet used, an ad hoc military tribunal system that would try — and could execute — suspected terrorists with diminished legal safeguards, and no federal court review. The U.S. military also continues to hold two U.S. citizens in detention, calling them “enemy combatants.” The executive argues that they have no right to legal counsel, and that the courts have no authority to evaluate the basis for their detention.

The executive’s use of the designation “enemy combatants” — especially for U.S. citizens — exemplifies the tension in upholding traditional checks and balances. Today, U.S. courts face the test of challenging the administration’s view of virtually unlimited executive powers. Looking to the future, it is possible that this label of “enemy

combatant” will be applied broadly as the epithet “subversive” was in the cold war, but with vastly greater consequences for American law and justice.

MORE INFORMATION ON CITIZENS / LESS INFORMATION TO THEM

By design, the constitutional system of checks and balances was created to prevent the abuse of power by any one branch of government. Another constitutional safeguard is the U.S. system of open government, where the public has the information it needs to participate in the political process. Since September 11, the executive branch has created initiatives to collect more and more data on all Americans, while providing less and less information about what the government is doing.

Between September 2002 and March 2003, the executive branch has created initiatives to collect an unprecedented amount of information on Americans and non-citizens who are under no suspicion of having committed a crime. These include: the military’s proposed Total Information Awareness Program, which would create comprehensive data profiles of everyone; the use of expanded search and seizure powers under the USA PATRIOT Act to seize library, bookstore, and other records; the increased powers to intercept telephone and internet communications; and the lifting of restrictions on the use of special foreign intelligence powers in ordinary criminal prosecutions.

The administration has also pursued a policy of secrecy relating to its own operations that has served to limit vigorous public debate, including severe restrictions on the Freedom of Information Act. The recent drafting in secret of the Domestic Security Enhancement Act of 2003 legislation, dubbed Patriot II, is an especially troubling example of the administration’s penchant for limiting debate.

History has demonstrated that periods of national emergency pose the greatest challenge to preserving our constitutional order. In such times, judges and legislators are more apt to abdicate their traditional roles and more easily endorse executive violations of basic rights, actions that would be unimaginable in times of peace. But it is precisely at such moments that the legislature and judiciary must defend their constitutional authority. They must serve as guardians of democracy, ensuring through vigorous public debate that the proposed security measures are reasonable, constitutional, and will actually enhance public safety.

WHAT IS TO COME?

In early 2003, the public was afforded a window into the administration's vision of what is to come. In February, a draft legislative proposal was obtained by the Center for Public Integrity, a non-governmental watchdog group, and circulated widely. As outlined, Patriot II is a compilation of more than 100 new changes to the law, many of which would sweep away constitutional checks on executive power. The draft legislation seeks to insulate federal actions from judicial scrutiny in precisely those areas in which the courts have raised questions about the constitutionality of the administration's actions since September 11. Some of the draft bill's proposals would further exacerbate the erosion of constitutional checks and balances, including:

- **Proposal to “legislate away” a federal court decision on secrecy in detention cases.** Section 201 of the PATRIOT II proposal would explicitly authorize secret arrests, overturning a federal court decision requiring the Justice Department to release the names of the hundreds of people detained within the United States in the post September 11 sweeps. In so doing, Section 201 would deal a further blow to the Freedom of Information Act (FOIA), the open-government statute under which the administration was ordered to release the detainees' names. If the PATRIOT II proposal is introduced, the debate will be a new test for Congress.
- **Proposal to permit extradition — including of U.S. citizens — without treaty.** This proposal would upend a fundamental principle of liberty established virtually at the foundation of our democracy: that the executive may not deliver a person to prosecution by a foreign government except pursuant to treaty or explicit statutory authority. The administration proposes to bypass the treaty process, creating a situation in which even American citizens could be sent for trial to countries with which the United States does not have extradition treaties — countries that include Saudi Arabia, Syria, Libya, China, Yemen, and Indonesia.
- **Proposal to strip Americans of their citizenship.** The draft PATRIOT II would create a system where the attorney general would be able to strip an American of his or her citizenship as a form of punishment. This draconian power could be invoked in cases where the attorney general determines that a person gave “material support” to a group the government designates as “terrorist.” The draft bill defines “material support” to include “instruction or teaching designed to impart a specific skill.”

This latter proposal is perhaps the most extraordinary of the bill's measures. Citizenship is often considered one of the most fundamental safeguards of all rights: Chief Justice Earl Warren observed in a 1958 Supreme Court decision that nationality is effectively "the right to have rights."

On March 4, 2003, Attorney General Ashcroft testified before Congress that this draft proposal may not after all be sent to Congress in its present form. Nonetheless, he said that the administration is "thinking expansively" about these issues, and he did not rule out future submission of any of the specific provisions contained in PATRIOT II.

RIGHTING THE BALANCE OF POWER

The "right to have rights" is precious — and it is at risk in the United States today. Mindful as we are of the serious threats confronting the United States, we believe it is essential to review, discuss, and debate the range of measures outlined on the following pages — as well as others now being proposed and implemented — to make sure basic rights are protected. Some senior officials in the administration, including the attorney general, have sought to cut short a debate of these new laws and policies. They contend that such debates are irrelevant, unnecessary, harmful to the war against terrorism, or even disloyal. We strongly disagree.

The resolution of these matters will affect the fundamental nature of U.S. society, now and for years to come. As this new calculus of liberty and security is forged, a more robust national debate on the issues is essential.

As we review the sweeping changes taken since September 11, and in particular between September 2002 and March 2003, we conclude that many of the extraordinary measures now require repeal or substantial refinement by the executive branch, and where necessary by Congress. In other cases we conclude that more congressional oversight or more active judicial review of executive actions is needed.

At the end of this report, we provide a series of concrete recommendations aimed at all three branches of the federal government. With respect to the range of issues raised in this report, a more vigorous public debate is essential. Among the key questions that warrant greater public consideration are these:

- How permanent are these changes and when will recent amendments to U.S. laws and practices be repealed? Who will decide this

and using what standard? What are the criteria, for example, in determining when detainees now being held in Guantanamo Bay, Cuba, should be permitted to return to their home countries? And who should make this decision?

- What is the appropriate role for the federal courts? Should the courts, for example, be able to review the factual basis for detention of individuals deemed by the executive branch to be “enemy combatants?”
- What is the proper role for Congress in overseeing the executive branch? For example, how closely should Congress monitor new domestic intelligence-gathering procedures and practices? At what stage should Congress begin evaluating informal legislative proposals being formulated in the executive branch like the draft PATRIOT II bill? How extensively should these proposals be publicly debated?
- How far should the government go in gathering information and intelligence? Should the government have the authority to monitor the medical records, credit histories, and personal and computer files of ordinary citizens?
- Should the executive branch have the authority to take away the citizenship of Americans when it concludes that they are supporting “terrorist” activities?
- How broad is the executive branch’s power in preventing future acts of terrorism? What are the limits of the prevention doctrine? Who sets those limits and based on what criteria?
- What has been the effect of these new laws and policies on human rights situations in other countries? To what extent are efforts by the U.S. government to promote human rights around the world compromised by these changes in U.S. law and practices?

Chapter 1

OPEN GOVERNMENT



INTRODUCTION

A mantle of secrecy continues to envelop the executive branch, largely with the acquiescence of Congress and the courts. The administration's insistence on secrecy makes effective oversight impossible, upsetting the constitutional system of checks and balances at a time when the executive branch is accruing vast new powers. History has demonstrated that periods of national emergency pose the greatest threat to the constitutional order, as judges and legislators abdicate their traditional roles and more easily endorse executive violations of basic rights that would be unimaginable during times of peace. But it is precisely at such moments that the legislature and judiciary must defend their constitutional authority and serve as guardians of democracy, ensuring that the balance between liberty and security is properly struck.

The administration's insistence on secrecy makes effective oversight impossible, upsetting the constitutional system of checks and balances at a time when the executive branch is accruing vast new powers.

By fostering a culture of secrecy, the administration is turning its back on the very principles that make democracy flourish. As John Adams warned two centuries ago, "liberty cannot be preserved without a general knowledge among the people."² Neither the courts nor the legislature can fulfill their constitutional duties without information from the administration. And the Constitution relies on an informed electorate to provide the ultimate check against arbitrary government. In the wake of September 11, however, judges and legislators have too often yielded to executive demands, without safeguarding their own obligation to oversee executive actions and defend the right of the American people to know what their government is doing.

ERODING OPEN GOVERNMENT LAWS

Over the last eighteen months, the administration has spearheaded an unprecedented roll-back of federal open-government statutes. Most recently, Congress granted the administration broad exemptions from the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA) in the legislation establishing the Department of Homeland Security. As enacted in 1966, FOIA requires federal agencies to disclose documents requested by the public unless they fall within nine statutory exemptions.³ FACA was enacted in 1972 to limit the ability of special interest groups to secretly influence executive decision-making.⁴

THE FREEDOM OF INFORMATION ACT

Public access to information under FOIA has been declining steadily in the wake of September 11, 2001. Most dramatically, on October 12, 2001, Attorney General John Ashcroft issued a new FOIA directive to the heads of executive agencies, encouraging the presumptive refusal of requests.⁵ Previously, the Department of Justice (DOJ) would defend an agency's refusal to release information under FOIA only when it could be argued that releasing the information would result in "foreseeable harm."⁶ Under the new directive, however, Ashcroft urged agency employees to consider all potential reasons for non-disclosure, and announced that the DOJ would defend court challenges to decisions to withhold information as long as those decisions rested on "a sound legal basis," a much lower standard. Although the directive was issued shortly after September 11, 2001, the new policy had been planned well before the attacks.⁷

In November 2002, Congress further undermined FOIA by acceding to an expansive new "critical infrastructure" exemption in the Homeland Security Act.⁸ Under Section 214 of the Act, "critical infrastructure information" voluntarily provided to the Department of Homeland Security (DHS) is not subject to disclosure under FOIA. As defined in the Act, critical infrastructure information encompasses all "information not customarily in the public domain and related to the security of critical infrastructure or protected systems."⁹

Despite the dry, circular language, the exemption is extremely far-reaching. The term "critical infrastructure" encompasses a broad sweep of private and governmental systems that include (but are not limited to) telecommunications, energy production, banking and finance, transportation, water systems and emergency services.¹⁰ In the United States, more than 85 percent of "critical infrastructure" is

under private sector control.¹¹ Furthermore, although the exemption applies only to information submitted to the new DHS, the department itself is massive, amalgamating 22 separate federal agencies and more than 170,000 federal employees.

The administration has insisted that the “critical infrastructure” exemption is necessary to facilitate information-sharing with the government in the wake of September 11. Companies had claimed they would be reluctant to provide information if they thought it would become public.¹² FOIA already contained an exemption for confidential business information,¹³ however, as well as for national security information,¹⁴ and sensitive law enforcement information.¹⁵ Now, evidence of simple ineptness or wrong-doing may also be exempted from disclosure, without any confidential business justification. Exempting such information from disclosure across the board seems counterproductive, weakening private-sector incentives to solve problems and implement reforms. For example, the wholesale suppression of information about environmental hazards could directly threaten community safety, while the extent of its contribution to national security remains questionable.

The four Democratic Representatives on the House Select Committee on Homeland Security warned that the new exemption threatened the United States’ “strong tradition of open and accountable government” and “needlessly curtail[ed] the public’s right to health and safety information.”¹⁶ In order to highlight the practical implications of the new exemption, they cited the example of an energy company, which could now “hide information from the public about a leak at a nuclear facility by simply submitting their documents, unsolicited, to the DHS.”¹⁷ Other examples of exempted material might include information about the safety of drinking water or the dependability of transportation infrastructure such as railways, bridges, and tunnels.¹⁸

Senator Carl Levin (D-MI), the ranking Democrat on the Senate Armed Services Committee, also criticized the exemption for “unnecessarily limit[ing]” the public’s right to information.¹⁹ Senator Levin emphasized that the exemption effectively ties the DHS’ hands, preventing it from warning other government agencies (as well as the public at large) about known threats to public safety, without the written consent of the submitter.²⁰ Government employees who improperly disclose the information will not only lose their jobs, they will be subject to imprisonment and fines — even if their sole motivation is protecting the public.²¹

Under the new Act, moreover, any information accepted as “critical infrastructure information” cannot be used against the submitter in any civil action arising in federal or state court, providing it was sub-

mitted in good faith.²² The breadth of the new exemption has raised concerns that corporations will use it proactively, to shield themselves from civil liability. Even if the information reveals that the submitter is clearly violating federal health, safety, or environmental laws, for example, the DHS can not bring civil enforcement actions on the strength of that information.²³

Not surprisingly, many of the companies benefiting from the new exemption had been seeking these kinds of protections for years.²⁴ Senator Patrick Leahy (D-VT) called the exemption a “big-business wish list gussied up in security garb.”²⁵ He warned that it represented the “most severe weakening” of FOIA to date.²⁶

THE FEDERAL ADVISORY COMMITTEE ACT

The Homeland Security Act also authorizes the Department of Homeland Security to create advisory committees that are exempt from the Federal Advisory Committee Act (FACA).²⁷ Since 1972, FACA has worked to limit the ability of special interest groups, acting through advisory committees, to influence public policy behind closed doors. FACA was enacted to ensure that Congress and the public were aware of the number, purpose, membership, and activities of advisory committees set up by the executive branch.²⁸ Under FACA, advisory committees must announce their meetings, hold them in public, provide for the representation of differing viewpoints, and make their materials available to the public.²⁹

DHS advisory committees are now exempt from FACA's requirements under Section 871 of the Homeland Security Act. Although the Secretary of the DHS is still required to publish a notice in the Federal Register (announcing the establishment of such a committee and identifying its purpose and membership), the committees themselves can meet in secret. Their activities and reports will be shielded from congressional and public scrutiny. As FACA already contained exemptions for information relating to national security, it is not clear why its provisions could not have been applied in full to the new DHS.³⁰ As discussed in the next section, a recent dispute between members of Congress and the administration exemplifies the dangers of exempting the executive branch from FACA.

INVESTIGATIVE ARM OF CONGRESS ABANDONS SUIT FOR RECORDS

In April 2001, the General Accounting Office (GAO), the investigative arm of Congress, launched an investigation into an energy task force established by President Bush. The task force was created “to develop

a national energy policy” and was chaired by Vice President Dick Cheney. Claiming that all of the members of the task force were federal employees (and not private citizens), the task force did not abide by the requirements of FACA.³¹

The GAO was asked to investigate the energy task force in the wake of press reports that the task force had been secretly meeting with a group of insider lobbyists. According to these reports, the task group’s meetings had included members of conservative interest groups, as well as energy executives who had made large contributions to President Bush’s election campaign (including Enron officials). These lobbyists had reportedly been given secret, high-level access to the administration officials who were deciding the country’s energy policies — precisely the kind of scenario that FACA was designed to prevent.

Representatives Henry Waxman (D-CA) and John Dingell (D-MI), both ranking members of House committees, asked the GAO to investigate these reports.³² Specifically, the GAO was to provide Congress with the names of the people the task force had met with; information on when and where those meetings took place; and an account of the subject matter of issues discussed.³³ In May 2001, the GAO requested a list of documents from Cheney in order to provide Congress with the requested information and determine whether the task force had broken any laws.³⁴ Cheney refused to hand over many of the documents, however, saying that to do so would “unconstitutionally interfere with the functioning of the executive branch.”³⁵

The GAO eventually sued Cheney in federal district court in Washington, DC, the first time the GAO has ever filed suit against an executive official over the issue of access to information.³⁶ In the past, the executive branch has provided the information requested or has negotiated a compromise acceptable to all sides.³⁷ On February 22, 2002, the GAO released a statement explaining its decision to pursue disclosure of the documents through litigation:

We take this step reluctantly. Nevertheless, given [the] GAO’s responsibility to Congress and the American people, we have no other choice. Our repeated attempts to reach a reasonable accommodation on this matter have not been successful. Now that the matter has been submitted to the judicial branch, we are hopeful that the litigation will be resolved expeditiously.³⁸

The case was heard before Judge John Bates, a Bush appointee who had been confirmed a year earlier (and previously worked for Independent Counsel Kenneth Starr during the Whitewater investiga-

tion).³⁹ On December 9, 2002, Judge Bates dismissed the GAO's lawsuit out of hand, holding that David Walker, the Comptroller General of the United States (and head of the GAO), lacked standing to sue because he had not personally suffered a sufficiently concrete injury.⁴⁰ Judge Bates noted that the GAO's standing to sue derives from its status as an agent of Congress, and emphasized that no congressional committee had issued a subpoena for Cheney's records. Minority members cannot issue subpoenas, however, as they do not control congressional committees — and it has traditionally been members of the minority who rely on the independent GAO to conduct investigations, especially when the majority party controls both the executive and the legislature.⁴¹

On February 7, 2003, the U.S. Comptroller General announced that the GAO would not appeal the district court's decision.⁴² Walker emphasized that he strongly disagreed with the decision, but said that the GAO could not invest the resources necessary to launch an appeal.⁴³ Walker then made the following appeal to the administration:

Based on my extensive congressional outreach efforts, there is a broad and bi-partisan consensus that GAO should have received the limited and non-deliberative ... information that we were seeking without having to resort to litigation. While we have decided not to pursue this matter further in the courts, we hope the Administration will do the right thing and fulfill its obligations when it comes to disclosures to the GAO, the Congress, and the public, not only in connection with this matter but all matters in the future.⁴⁴

Faced with continuing executive resistance and an unfavorable district court decision, the GAO simply abandoned its suit and decided to rely on the administration's good faith. The GAO's decision exemplifies a new, post-September 11 dynamic: a Congress that strives to be deferential to the executive branch, and an administration that is not only distrustful of the legislature, but hostile to any attempts at oversight. That dynamic is explored in detail below in the context of the implementation of the USA PATRIOT Act and the secretive drafting of PATRIOT II.

SECRECY SURROUNDING POST-SEPTEMBER 11 EMERGENCY LAWS

IMPLEMENTATION OF THE USA PATRIOT ACT

At the urging of the administration, Congress enacted the USA PATRIOT Act less than six weeks after September 11.⁴⁵ Drafted primarily by the Department of Justice (DOJ), the Act grants unprecedented new surveillance and detention powers to law enforcement and intelligence agencies.⁴⁶ Despite the sweeping nature of the changes, it was passed with little opportunity for hearings or debate and many members of Congress did not even have time to read the final version of the bill before it came up for a vote.⁴⁷

When Congress attempted to oversee the administration's use of its new powers, the DOJ initially failed to respond to congressional requests for information. It was only after Republican Representative James Sensenbrenner, chair of the House Judiciary Committee, publicly threatened to "blow a fuse" and start subpoenaing executive documents that the DOJ provided any response at all to many of the congressional questions posed.⁴⁸ The House Judiciary Committee had submitted a list of 50 questions to the Department of Justice on June 13, 2002, and on July 25, 2002, the Senate Judiciary Committee expanded upon this list, adding 43 questions of its own. In a July 26, 2002 letter to Representative Sensenbrenner, the Department of Justice included responses to 28 of the original 50 questions, in most of these answers indicating that the required information was classified.⁴⁹ The Senate Judiciary Committee has revealed that although the Department of Justice sent follow-up letters in August and December 2002, 37 of the 93 congressional questions remained unanswered in February 2003.⁵⁰ In an interim report, the Senate committee complained of its "disappointment with the non-responsiveness" of the Department of Justice.⁵¹

Meanwhile, in August 2002, the American Civil Liberties Union (ACLU) had filed an expedited request under the Freedom of Information Act (FOIA), seeking information on USA PATRIOT implementation.⁵² The DOJ agreed that the FOIA request would be processed expeditiously, but it had not released any records by late October 2002. The ACLU was forced to file suit in Federal District Court, joined by the Electronic Privacy Information Center, the American Booksellers Foundation for Free Expression, and the American Library

Association's Freedom to Read Foundation (see chapter 2). The court ordered the DOJ to comply with the FOIA request by January 15, 2003. Although the government released more than 200 documents on January 15, the pages had been heavily redacted.⁵³ According to the ACLU, the documents are effectively "meaningless" and fail to address key civil liberties concerns such as the use of surveillance against U.S. citizens who are not suspected of criminal or terrorist activity.⁵⁴ The groups plan to return to court to seek more responsive disclosure.

The General Accounting Office (GAO) has been asked by Senator Russell Feingold (D-WI) and Representative John Conyers, Jr. (D-MI) to review various anti-terrorism measures and their potential impact on civil liberties. The GAO's investigation will examine the procedures proposed for military commissions, the use of authority to monitor attorney-client discussions, the criteria for and process of questioning non-citizens for information on terrorist activity, and the detention of non-citizens in connection with the Justice Department's post-September 11 investigation. The Lawyers Committee will continue to watch for developments in this investigation.⁵⁵

THE DRAFTING OF PATRIOT II

In recent months DOJ officials have drafted a new legislative proposal to further expand the administration's USA PATRIOT powers. On February 7, 2003, the Center for Public Integrity released a leaked copy of the "Domestic Security Enhancement Act of 2003," which has been nicknamed PATRIOT II.⁵⁶ The draft bill would sweep away important constitutional checks on executive power that are fundamental to American democracy. In particular, the bill would wall off from judicial oversight precisely those areas in which the courts have questioned the constitutionality of the administration's actions in the first 18 months after September 11.

Former Representative Bob Barr (R-GA) has said that he finds the draft of PATRIOT II deeply worrying. He emphasized that the DOJ's initial draft of the first USA PATRIOT Act had asked for "all sorts of powers far beyond what any normal person would deem necessary to fight terrorist acts," and in the end, "they got an awful lot of what they asked for."⁵⁷ He noted:

Now just a year and a half later — without the opportunity to even digest the enormous powers they got in the PATRIOT Act — apparently they're getting ready to draft another bill to get more powers that go far beyond what was in the PATRIOT Act.⁵⁸

The secrecy surrounding the drafting of PATRIOT II has deepened concerns about the accrual of executive power in the wake of September 11. Although rumors of the DOJ's plans had been circulating for months, the DOJ had repeatedly denied reports that it was preparing any such draft legislation.⁵⁹ As late as February 3, 2003, the DOJ had reassured the staff of Senator Patrick Leahy, the ranking Democrat on the Senate Judiciary Committee, that no such proposals were being drafted.⁶⁰ The concern has been that the DOJ was planning to introduce its proposals at a time of weakened congressional resistance — during a war in Iraq for example — in order to repeat the hasty passage of the USA PATRIOT Act.⁶¹

These concerns came to a head at a hearing before the Senate Judiciary Committee on March 4, 2003, where Attorney General Ashcroft was questioned about the PATRIOT II proposal. Senator Patrick Leahy emphasized to the attorney general that a member of his own staff had been told by a Justice Department official that no new proposal was being drafted less than a week before the leaked copy of PATRIOT II was made public. Senator Leahy told Attorney General Ashcroft, “Somebody who reports directly to you lied to [Leahy’s aid], and this is not a good thing. I think it shows a secretive process in developing this.”⁶²

Senator Russell Feingold questioned the attorney general about the administration’s plans for the PATRIOT II proposal. In response, Attorney General Ashcroft assured the Senator that neither he nor the administration was prepared to present a PATRIOT II proposal to Congress. He said that the administration was continuing to “think expansively” about these issues, and did not rule out the possibility that any of the proposals contained in the PATRIOT II draft might be submitted to Congress in the future. He concluded, “Until I have something I think is appropriate, I don’t know that I should engage in some sort of discussion.”⁶³ Given the administration’s pressure for quick passage of the USA PATRIOT Act, and the lack of congressional debate prior to its adoption, the current draft bill needs to be fully debated, and so we explore its content in detail throughout this report.

Among the most troubling of the changes the draft law would introduce are:

- **Authorizes Secret Arrests.** The PATRIOT II draft overturns a federal court decision requiring the Justice Department to turn over the names of the people it detained in post-September 11 sweeps, a ruling that the government has appealed. Although the Justice Department has argued on appeal that current law does not require the disclosure of these names, the draft hedges those bets by

explicitly authorizing the government to keep secret the names of those it arrests and jails without charge.

- **Authorizes Stripping Americans of their Citizenship for Engaging in Constitutionally Protected Conduct.** The proposal to allow the executive branch to strip American citizens of their nationality, reminiscent of Soviet practices at the height of the cold war, is among the most extraordinary of the bill's assaults on fundamental American rights and values. Citizenship is often described as the fundamental safeguard of all rights.

Current law reflects the sacrosanct nature of American citizenship by making it very difficult for the government to take it away from people. Only in rare cases, for example when a person serves in the armed forces of a state at war with the United States, can the government deprive an American of his or her citizenship. And even in those cases, the government must prove that there was a specific intention to relinquish American citizenship by engaging in that conduct.

In 1967, Supreme Court Justice Hugo Black wrote in *Afroyim v. Rusk* that “[t]he very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.”⁶⁴

The Justice Department's PATRIOT II draft takes a different approach to citizenship. It would create a system where the government can strip an American of citizenship as a form of punishment if, for example, the person gave “material support” to a group designated by the government as “terrorist.” The question of what constitutes “material support” has been challenged in the courts, because it is vague and appears to include political association and speech that is protected by the Constitution. The draft defines “material support” to include “instruction or teaching designed to impart a specific skill.”

- **Permits Extradition — including of U.S. Citizens — without Treaty.** The Justice Department proposes in the draft to upend a fundamental principle of liberty established virtually at the foundation of our democracy: that the executive may not deliver a person to prosecution by a foreign government except pursuant to treaty or explicit statutory authority. Extradition treaties between countries typically provide specific conditions for prosecution (for example, ensuring

a fair trial and protecting against a prosecution under unjust laws). The administration could, if it wanted to, negotiate extradition treaties to cover any gaps it finds. Instead, it proposes to bypass the treaty process, creating a situation in which even American citizens could be sent for trial to countries with which the United States does not have extradition treaties — countries that include Saudi Arabia, Syria, Libya, China, Yemen, and Indonesia.

- **Eliminates Court Orders Issued to Prevent Police Spying.** Last year, Attorney General Ashcroft unilaterally lifted restrictions on domestic spying by the FBI that had been put in place after revelations that the government had conducted oppressive surveillance on Martin Luther King, Jr. and other civil rights leaders deemed “subversive.” Many state and local law enforcement agencies, some with disturbing histories of similar abuses, are party to court-supervised consent decrees arising out of legal challenges to these practices. These consent decrees prohibit illegal spying by police departments, and as such the Justice Department argues that they inhibit “effective cooperation” with the federal spying now permissible under the new Ashcroft guidelines. The draft would address this problem by abolishing all of these consent decrees.

In the Senate Judiciary Committee hearing on March 4, 2003, Senator Feingold probed the need for the elimination of the consent decrees, asking Attorney General Ashcroft repeatedly whether actual investigations had been constrained by these safeguards:

FEINGOLD: Can you cite an example of a terrorist plot that went undetected because local police had their hands tied by a consent decree placing limits on their domestic spying capabilities?

ASHCROFT: I cannot.⁶⁵

- **Radically Expands Grounds on which Non-Citizens — Including Legal Permanent Residents — Can be Deported Without a Hearing and Further Limits Judicial Review of Attorney General Decisions.** The draft has a number of provisions that are simply unrelated to terrorism, including one that broadens the already overly-broad grounds on which non-citizens can be deported without a hearing, and another that applies those provisions to legal permanent residents, as well as other immigrants. What this means in practice is, for example, a long-time legal permanent resident who wrote a bad check in 1976 is now subject to mandatory deportation under “expedited

removal,” a form of administrative decision that skips the courts altogether. For whole categories of people, the proposal would eliminate the possibility of judicial review of the attorney general’s decision to deport them.

In expanding executive surveillance and detention powers, PATRIOT II would also enhance the administration’s capacity to exercise those powers in secret. Section 204 of the draft would require judges to consider *in camera* (alone in chambers) and *ex parte* (considering one side only) the government’s applications to submit secret evidence at trial, when so requested by the government.⁶⁶ Section 206 would gag grand jury witnesses in terrorism cases, preventing them from discussing their testimony publicly — even to contradict false information reported about them in the press.⁶⁷ Most significantly, as discussed above, Section 201 would explicitly authorize secret arrests, overturning a federal court decision requiring the DOJ to release the names of the hundreds of people detained within the United States in the post-September 11 sweeps. In so doing, Section 201 would deal a further blow to FOIA, the open-government statute under which the administration was ordered to release the detainees’ names. The eventual fate of PATRIOT II will be a new test of congressional autonomy.

In light of the speed with which the administration pushed the USA PATRIOT Act through Congress and the lack of substantive debate on its provisions, we believe that each and every one of the provisions of the PATRIOT II draft should receive a full public airing and debate. With that in mind, we examine a number of its specific provisions in greater detail elsewhere in this report.

LAST-MINUTE INCLUSION OF PROTECTIONS FOR HOMELAND SECURITY WHISTLEBLOWERS

One encouraging development was the congressional insistence on including whistleblower protection in the Homeland Security Act. The administration’s original draft of the Homeland Security Act effectively exempted DHS employees from the protections of the Whistleblower Protection Act (WPA). Senator Charles Grassley (R-IA), co-author of the WPA in 1989, led the fight to ensure that the final version of the Homeland Security Act included strong whistleblower protections.⁶⁸ In explaining why such protections are important, Senator Grassley emphasized:

Whistleblowers are the key to exposing a dysfunctional bureaucracy.... Government agencies too often want to cover up their mistakes, and the temptation is even greater when bureaucracies can use a potential security issue as an excuse. At the same time, the information whistleblowers provide is all the more important when public safety and security is at stake.⁶⁹

Senator Grassley cosponsored an amendment to preserve whistleblower protections for all DHS employees, and the amendment was incorporated into the final version of Act. In the end, Congress made clear that the executive may not “waive, modify, or otherwise affect” the “protection of employees from reprisal for whistleblowing.” DHS whistleblowers who believe they have been retaliated against may file complaints with the Office of Special Counsel and appeal their agency’s response to the Merit Systems Protection Board (MSPB).

Another example of congressional independence is the Senate Judiciary Committee’s review of the administration’s powers under the Foreign Intelligence Surveillance Act (FISA), a statute governing the FBI’s collection of foreign intelligence information (see chapter 2). In February 2003, the Senate Judiciary Committee released a preliminary report identifying serious problems in the FISA process, including the widespread misunderstanding of the governing law among FBI agents and a pervasive lack of accountability in implementing FISA procedure.⁷⁰ Following from this, the Senate committee noted that when the administration fails to use its FISA powers properly, “pressure is brought on the Congress to change the statute in ways that may not be at all necessary.”⁷¹ The committee then emphasized, “From a civil liberties perspective, the high-profile investigations and cases in which the FISA process appears to have broken down is too easily blamed on the state of the law rather than on inadequacies in the training of those responsible for implementing the law.”⁷²

The Senate Judiciary Committee’s oversight is laudatory. Yet this was the “first comprehensive review of the FBI in nearly two decades.”⁷³ Without ongoing oversight, Congress cannot adequately resist the outside pressure to enact new and unnecessary executive powers. Indeed, Congress has already expanded the administration’s FISA powers under the USA PATRIOT Act (as discussed extensively in chapter 2) — without the benefit of the information the Senate Judiciary Committee has uncovered in this review.

RECOMMENDATIONS

1. The attorney general should rescind the October 12, 2001 directive on the implementation of the Freedom of Information Act (FOIA), which encourages the presumptive refusal of requests. He should restore guidelines in keeping with the express intent of the law to promote open government.
2. Congress should hold hearings on the “critical infrastructure information” exemption to FOIA contained in Section 214 of the Homeland Security Act. Congress should amend the exemption to ensure that sufficient information is available under FOIA to help people protect themselves and to create safety incentives for the private companies that control most of the country’s “critical infrastructure.”
3. Congress should amend the Homeland Security Act, section 871, to remove exemptions of its advisory committees from the provisions of the Federal Advisory Committee Act.
4. Congress should reaffirm the mandate and independence of the General Accounting Office to act as its agent in seeking information from the executive.
5. Congress should hold oversight hearings into the implementation of the USA PATRIOT Act aimed at upholding the principle of open government.
6. Congress should hold hearings into any proposals to enhance executive prerogatives under USA PATRIOT and into the secretive drafting of the “Domestic Security Enhancement Act of 2003.”



Chapter 2

RIGHT TO PRIVACY

INTRODUCTION

The right to privacy is protected by the Fourth Amendment to the Constitution. The Fourth Amendment limits the government's search and seizure powers to "prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."⁷⁴ It protects 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."⁷⁵

In the wake of September 11, many longstanding prohibitions on government surveillance powers were revoked — with little public discussion or debate. In the last six months, Congress and the courts have made some efforts to check new proposals to further expand the administration's surveillance powers and its access to the personal data of U.S. citizens and others. In other instances, they have allowed further overreaching and secrecy by the executive branch.

One important aspect of the recent debate involves Operation TIPS, a neighbor-to-neighbor spy program proposed by the

Justice Department and designed to encourage citizens to report on the "suspicious activities" of people in their communities. There was a note of irony in Attorney General Ashcroft's advocacy of TIPS — as a senator he had criticized the previous administration's "paranoid and prurient interest in [monitoring] international e-mail" as "a wholly unhealthy precedent" — warning that the American people should not "hand Big Brother the keys to unlock our e-mail diaries, open our ATM records or

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translate our international communications.”⁷⁶ As attorney general, Ashcroft pressed hard for the establishment of Operation TIPS, but Congress turned him down. The final bill establishing the Department of Homeland Security includes a provision banning Operation TIPS.

Despite the strong public reaction against Operation TIPS, the Bush Administration is pursuing an even more invasive initiative: the Total Information Awareness (TIA) program. Total Information Awareness, as its name suggests, is a comprehensive data-mining project, powered by a computerized system that would tap into, integrate, and extrapolate data from thousands of public and private databases. The Pentagon-based project would link data from a wide variety of sources (such as private healthcare records, employment records, school records, library records, and information on purchases) with the monitoring of domestic and international e-mail traffic. As proposed, TIA then would develop a comprehensive data profile of citizens and non-citizens utilizing: biometric, financial, education, travel, medical, veterinary, country entry, transportation, housing, government, critical resources, and communications data.⁷⁷ Following a public outcry from many quarters, however, Congress passed a temporary ban on funding for TIA until it could assess its impact on civil liberties.

The administration has also drafted new legislative proposals that would further infringe on Fourth Amendment privacy rights by expanding law enforcement surveillance and intelligence gathering powers. The Domestic Security Enhancement Act of 2003 (known informally as PATRIOT II) would dramatically expand the scope of the Foreign Intelligence Surveillance Act, end consent decrees against illegal police spying, and establish a Terrorist Identification Database, a DNA database that would allow the government to collect genetic information on convicted terrorists as well as on those the government suspects of being involved in terrorist activity.

ACCESS TO LIBRARY AND BUSINESS RECORDS

The government has achieved much of its data gathering by demanding that retailers, libraries, schools, internet service providers, and others turn over client information. Section 215 of the USA PATRIOT Act requires libraries, bookstores and other venues to turn over business records, documents, and other items on demand if the FBI has declared that the items are being sought for an ongoing investigation related to international terrorism or clandestine intelligence activities. Many commercial establishments reportedly have turned over client information without objecting to the government’s requests.

This invasion of privacy regarding personal information is exacerbated by provisions that keep secret the fact that the government has accessed this information. Section 215 of the USA PATRIOT Act makes it a crime to reveal that the FBI has seized customer records. This means, for example, that a librarian who speaks out about being forced to reveal a patron's book selections can be subject to prosecution.⁷⁸ Even information on the general direction and scope of measures to seize consumer records has been suppressed. In July 2002, House Judiciary Committee Chairman James Sensenbrenner (R-WI) requested information about whether Section 215 of the USA PATRIOT Act had been used to access library, bookstore or newspaper records and, if so, how many times. But the Justice Department refused to answer, saying that such information is classified.⁷⁹

Librarians and booksellers have been outspoken about the potential these new measures have to chill freedom of expression and inquiry. In some parts of the United States, these groups have considered changing their record systems to limit the personal information they acquire from their clients.⁸⁰

The American Library Association (ALA) and other major library organizations have introduced new guidelines for dealing with federal warrants while discussing how to document intrusive measures without putting librarians in legal peril. In a December 11, 2002 consultation, these organizations, including the ALA, the American Association of Law Libraries, and the Special Libraries Association, recommended that "[l]ibrarians should document all investigative actions related to the USA PATRIOT Act."⁸¹

The American Library Association's Freedom to Read Foundation (FTRF) and the American Booksellers Foundation for Free Expression (ABFFE) joined the ACLU and the Electronic Privacy Information Center in an October 24, 2002 lawsuit brought to request information on subpoenas issued to bookstores and libraries under the USA PATRIOT Act.⁸² The lawsuit summarized the scope of Section 215:

[T]he new provision can be used to obtain circulation records from libraries, purchase records from bookstores, academic records from universities, medical records from hospitals, or e-mail records from internet service providers. The government need not show probable cause or any individualized suspicion of criminal activity; rather, it need only assert that its request is "for an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities.

To understand how the new law can result in a widespread invasion of privacy, it is instructive to examine what happened when the government became concerned that underwater diving skills might be used to perpetrate a terrorist attack. Based on this concern, the FBI attempted to acquire the records of everyone who had taken a scuba-diving course with a dive shop or at the local YMCA. Instead of investigating particular individuals about whom the government might have suspicions, the FBI sought to collect personal information on *all* scuba diving students in order to spot potential wrongdoers. The operation, which may have produced personal details on millions of Americans, came to light when a small dive shop in California — Reef Seekers Dive Company — refused to turn over records on clients, “even when officials came back with a subpoena asking for ‘any and all documents and other records relating to all noncertified divers and referrals from July 1, 1999, through July 16, 2002.’”⁸³ The subpoena was withdrawn when it was made clear that it would have to be defended in a court of law.⁸⁴

EXPANSION OF POWERS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

BACKGROUND TO FISA

Congress enacted the Foreign Intelligence Surveillance Act (FISA) in 1978 to create a separate legal regime for the gathering of foreign intelligence information, as opposed to domestic law enforcement information.⁸⁵ FISA grants the FBI exceptional powers to monitor foreign powers and their suspected agents in counterintelligence operations within the United States.⁸⁶ In using these powers, the FBI is exempt from the traditional Fourth Amendment requirements applicable to criminal investigations.

Under FISA, for example, the FBI submits warrant applications to the Foreign Intelligence Surveillance Court, a secret court that hears the government’s applications *ex parte* (hearing one side only). In order to obtain warrants under FISA, moreover, the government does not have to demonstrate probable cause of a crime.⁸⁷ Instead, the FBI must demonstrate only that there is probable cause to believe that the target of the surveillance is an agent of a foreign power.⁸⁸ In order to obtain FISA warrants against “U.S. persons” (i.e., U.S. citizens and legal permanent residents of the United States), however, the government also has to establish that the activities “involve” or “may involve” a violation of criminal statutes (a lower standard than applicable under ordinary criminal law).⁸⁹ For “non-U.S. persons,” on the other hand, the government

does not have to make any showing that the suspected foreign agent is doing, or is planning to do, anything illegal.⁹⁰

After obtaining a FISA warrant, the FBI can conduct surveillance and physical searches against a suspected foreign agent for a period of 90 days and against a foreign power for an entire year. The searches and surveillance are carried out surreptitiously, without any notice to the people being monitored unless and until they are prosecuted. Furthermore, even if the targets are prosecuted they are generally not permitted to challenge the substance of the government's FISA applications and affidavits, as FISA mandates an *in camera* (closed chambers), *ex parte* review of these materials "if the attorney general files an affidavit under oath that disclosure or an adversary hearing would harm the national security."⁹¹

Because of the extraordinary nature of these powers, Congress limited the circumstances under which they could be used. The FBI could only use its FISA powers for "the purpose of" gathering foreign intelligence information. The Foreign Intelligence Surveillance Court implemented procedures to enforce this line, trying to ensure that the information obtained through FISA searches and surveillance was not used *sub rosa* in criminal prosecutions.⁹²

USA PATRIOT ACT AMENDMENT

At the urging of the administration, however, Congress significantly expanded the government's FISA powers shortly after September 11, 2001. Under Section 218 of the USA PATRIOT Act, the FBI can now seek FISA warrants when the gathering of foreign intelligence is merely "a significant purpose" of the warrant — a slight change in wording that has far-reaching implications. The administration immediately argued that the FBI could now seek a FISA warrant when the government's "primary purpose" was the gathering of information for domestic criminal investigations.⁹³ This interpretation would mean that FISA, which was enacted to facilitate the gathering of foreign intelligence information, could now be used as a way to sidestep Fourth Amendment requirements in regular criminal investigations.

The Foreign Intelligence Surveillance Court did not agree with the administration's position. In May 2002, the secret FISA court issued its first ever public opinion, unanimously finding that the administration's interpretation of the amendment would turn the entire purpose of FISA on its head.⁹⁴ The court — composed of seven federal judges⁹⁵ — imposed restrictions on the administration's interpretation of its new powers, refusing to permit domestic law enforcement officials to "make

recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillance.”⁹⁶

The Department of Justice appealed the decision to the Foreign Intelligence Surveillance Court of Review (“the Court of Review”), a court composed of three semi-retired federal judges.⁹⁷ This court was created specifically to hear *ex parte* government appeals of FISA applications that have been denied by the Foreign Intelligence Surveillance Court (there is no mechanism for hearing appeals of successful FISA applications). The government had never before filed an appeal with the Court of Review, however, as the Foreign Intelligence Surveillance Court has never denied a FISA application out of the thousands of applications it has reviewed.⁹⁸ On September 9, 2002, the Court of Review convened for the first time in its 24 year history to consider the Department of Justice’s appeal in this case.

The Court of Review overruled the FISA court’s decision on November 18, 2002.⁹⁹ The court determined that Congress had intended to relax the barriers between criminal law enforcement and foreign intelligence gathering when it passed the USA PATRIOT Act.¹⁰⁰ It held that the government could now lawfully use its extraordinary FISA powers in criminal investigations, so long as those investigations had some purpose of gathering foreign intelligence information. This was true even when the government’s primary purpose was to prosecute a crime, provided that the crime, itself, was a “foreign intelligence crime” (such as espionage or terrorism).¹⁰¹ Under such circumstances, according to the court, criminal law enforcement officials could now directly influence the initiation and operation of searches and surveillance under FISA.¹⁰²

In so holding, the Court of Review did not accept all aspects of the administration’s expansive interpretation of its new FISA powers. Although the court held that the government’s primary purpose could now be the prosecution of a crime related to foreign intelligence,¹⁰³ it also held that “the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes.”¹⁰⁴ The court also noted, however, that ordinary crimes would sometimes be inextricably intertwined with foreign intelligence crimes. In these intertwined cases, the government will now be able to use FISA and bypass traditional criminal law standards, provided that its investigation also serves some counterintelligence purpose.¹⁰⁵

THE ADMINISTRATION'S NEW PROPOSALS FOR EXPANDING FISA

Not satisfied with the expansion of its FISA powers under the USA PATRIOT Act (as endorsed by the Court of Review), the Department of Justice has been drafting new proposals to further expand its FISA powers.¹⁰⁶ These measures, part of the draft PATRIOT II bill, would further weaken the already tenuous line separating counterintelligence operations from domestic criminal investigations.

One PATRIOT II proposal would significantly increase the scope of FISA by altering the definition of a “foreign power.” Currently, a foreign power under FISA is either a foreign government or a foreign organization (ranging from a foreign political organization to a group engaged in international terrorism). Section 101 of the draft bill would expand the definition of a foreign power to cover individuals (including U.S. citizens and permanent residents) suspected of engaging in international terrorism, but who have no known links to any foreign government or to any group engaged in international terrorism. By including unaffiliated individuals within the definition of a “foreign power,” the administration would weaken the already minimal due process protections applicable in FISA proceedings. Under the proposal, the administration could obtain a FISA warrant without even establishing that there is probable cause to believe that the target is an agent of a foreign power.¹⁰⁷

Another proposal in the PATRIOT II draft bill would break down the current distinction under FISA between “U.S. persons” and “non-U.S. persons.” As discussed above, in order to get a FISA warrant against a U.S. citizen or legal permanent resident, the administration currently has to show that the person is engaged in activities that “involve” or “may involve” some violation of law. For “non-U.S. persons,” (i.e., those who are neither U.S. citizens nor legal permanent residents) however, the administration does not have to make any such showing. Section 102 of the draft bill would eliminate this distinction and apply the lower non-U.S. person standard to U.S. citizens and permanent residents.¹⁰⁸

A third PATRIOT II proposal would expand the circumstances under which the government can sidestep the FISA courts altogether, using its FISA powers without any judicial review. The attorney general may currently authorize the use of FISA powers without a warrant, for example, for up to 15 days following a congressional declaration of war. Section 103 of the draft bill would expand the scope of the wartime exception, allowing it to be invoked after Congress authorizes the use of military force or after an attack on the United States “creating a national emergency.” Presumably, the administration would

unilaterally decide when such an attack had occurred and whether it had created a period of national emergency.¹⁰⁹

PRIVACY AND THE NEW HOMELAND SECURITY DEPARTMENT

As finally adopted, the Homeland Security Act enacted some important privacy protections, including a prohibition on the neighbor-to-neighbor spy initiative Operation TIPS and a ban on the development of a national ID card. The law also recognized the need for internal oversight by creating a Privacy Officer, a Civil Rights and Civil Liberties Officer, and an Inspector General in the Department of Homeland Security. In order to provide meaningful checks on Department action, however, these offices will need sufficient funding, and enhanced enforcement authority, as well as strong appointments. In particular, the Inspector General's office should have an official designated to receive complaints from the public regarding violations of civil rights.¹¹⁰

TOTAL INFORMATION AWARENESS (TIA)

The proposed Total Information Awareness Project (TIA), directed by retired Admiral John Poindexter at the Information Awareness Office (IAO) of the Defense Advanced Research Projects Agency (DARPA), is intended to allow the government to utilize data-mining to aggregate and analyze all public and private commercial database information to track potential terrorists and criminals.¹¹¹ The program aims to develop a comprehensive data profile of citizens and non-citizens alike, drawing on databases and public and private records of all kinds.¹¹² Many of the most intimate, personal details of the daily lives of all Americans would be subject to surveillance and cataloging by the federal government. As envisioned, TIA would enable the federal government to collect comprehensive personal data on ordinary people including driving records, high school transcripts, book purchases, medical records, phone conversations, e-mail, and logs of Internet searches.

The development of TIA began without public notice or a single congressional hearing. No oversight or accountability mechanisms were built into TIA or comparable data-mining efforts by the government. As the public began to learn about TIA and its designs, information about the program started to disappear from the official TIA website. Biographical information about the TIA development team appeared and then was removed from DARPA's Information Awareness Office website in November; next the TIA logo, a globe topped by an all-

seeing eye on a pyramid with the slogan, “Knowledge is Power,” were removed from the site; and finally diagrams describing how TIA was to operate have been replaced by less detailed versions.¹¹³

Members of Congress from across the political spectrum expressed grave concerns about the program, including Senators Grassley (R-IA), Collins (R-ME), Feinstein (D-CA), Harkin (D-IA), Inouye (D-HI), Schumer (D-NY) and former Representatives Armev (R-TX), and Barr (R-GA). A broad range of groups including CATO, ACLU, the Free Congress Foundation, and the Eagle Forum have also raised questions about the privacy and constitutional implications of TIA. Former House Majority Leader Dick Armev (R-TX) commented that TIA is the “only thing that is scary to me.”¹¹⁴

New Senate Governmental Affairs Committee Chairwoman Susan Collins (R-ME) also raised alarm regarding the danger that data-mining by the Department of Homeland Security poses to privacy, saying TIA presents “the specter of the government using massive databases to compile information on individuals [when] there are no allegations of wrongdoing,” and “raises extraordinary concerns about individual privacy.”¹¹⁵ Senator Feinstein (D-CA) expressed strong reservations about TIA stating, “This is a panoply, which isn’t carefully conscribed and controlled, for a George Orwell America. And I don’t think the American people are ready for that by a long shot.”¹¹⁶

Criticism of TIA was not limited to concerns about privacy. The program’s lack of oversight was also a concern of many critics. *New York Times* Columnist William Safire wrote, “This is not some far-out Orwellian scenario. It is what will happen to your personal freedom in the next few weeks if John Poindexter gets the unprecedented power he seeks.”¹¹⁷ Senator Grassley (R-IA) expressed concerns about TIA funding, specifically the spending of Department of Defense resources on research for domestic law enforcement.¹¹⁸

In February 2003, Congress included in an omnibus spending bill a Senate-passed provision, sponsored by Senator Wyden (D-OR), that temporarily banned all funding for TIA until the program could be further explained and its impact on civil liberties assessed.¹¹⁹ Under this provision, TIA will receive no funds until the Attorney General, Director of Central Intelligence and Secretary of Defense provide a detailed report to Congress, within 60 days of passage of the bill, on the use of TIA. The report requires: an assessment of TIA’s impact on civil liberties and privacy; a detailed explanation of the use of funds; any technology transfer to other agencies; and a schedule for research and development.¹²⁰

PROPOSALS TO TERMINATE RESTRICTIONS ON SPYING BY LOCAL POLICE

Last year, Attorney General Ashcroft unilaterally lifted restrictions on domestic spying by the FBI that had been put in place after revelations that the government had conducted oppressive surveillance on Martin Luther King, Jr. and other civil rights leaders deemed “subversive.” Many egregious violations of civil rights and civil liberties occurred during the 1950s and 1960s at the hands of local police departments, including the New York City Police Department’s Red Squad and the Bureau of Strategic Services (BOSS), which targeted individuals and groups for surveillance and harassment based on their political or religious beliefs and associations. Many state and local law enforcement agencies, some with disturbing histories of similar abuses, are party to court-supervised consent decrees arising out of legal challenges to these practices. These consent decrees prohibit illegal spying by police departments, and as such the Justice Department argues that they inhibit “effective cooperation” with the federal spying now permissible under the new Ashcroft guidelines.

The Domestic Security Enhancement Act of 2003 (Patriot II), the draft Justice Department legislative proposal, would address this problem by abolishing virtually all of these consent decrees and effectively preventing future consent decrees to oversee prohibitions on spying by local police forces.

Attorney General Ashcroft has said that the prohibitions against police spying are “a relic.” Yet just last year it was revealed that the police department of Denver was spying on many local individuals and organizations, including nuns and advocates for Native Americans. The Denver police had secretly labeled organizations like the Quaker group, the American Friends Service Committee, “criminal extremist” organizations.¹²¹ The *Portland Tribune* recently uncovered evidence of widespread police spying on “a food co-op, a bicycle repair collective, and a group that was setting up a shelter for abused women.”¹²²

Recently, New York City and Chicago have won legal battles to end consent decrees that prohibited their police from spying. But others question the efficacy of permitting police spying in the war against terrorism. Chicago authorities say the city police have yet to utilize the new spying powers and Los Angeles has not chosen to challenge its consent decree.¹²³

CREATING A TERRORIST IDENTIFICATION DATABASE

Another proposal contained in the Justice Department's draft PATRIOT II bill with far-reaching implications for privacy rights is the creation of a "Terrorist Identification Database." This proposal would authorize the administration to collect the DNA of anyone considered a suspect and of any non-citizens deemed to have any form of association with a "terrorist organization."¹²⁴ Even those merely suspected of terrorist involvement would be required to submit DNA samples for inclusion in the database. One could be labeled a suspected terrorist for association of any kind with a group designated as a terrorist organization. Non-compliance with requirements to surrender samples to the DNA database would be a crime punishable by up to one year in prison and a \$100,000 fine.¹²⁵

Requiring individuals who have not been convicted of any crime to turn over their DNA, without a court order and without strict safeguards on data security is a particularly egregious invasion of privacy. Providing genetic information is far more invasive than a fingerprint, and provides personal information that is particularly subject to abuse by either government agencies or the private sector. DNA may, for example, disclose a pre-disposition to certain physical or mental illnesses.¹²⁶ Requiring genetic information is troubling because it invades the privacy of not just individuals but entire families and their descendants.¹²⁷ The DNA database provision of PATRIOT II would put information that comprises the very essence of personal identity into unregulated government control.

RECOMMENDATIONS

1. Congress should amend the Homeland Security Act to give the agency's Privacy and Civil Rights Officers full access to information, enforcement authority and resources.
2. Congress should amend the Homeland Security Act to establish a designated official within the Inspector General's office to receive complaints regarding specific violations of civil rights.
3. Congress should amend article 215 of the USA PATRIOT Act to restore safeguards against abuse of the seizure of business records, and in particular the records of libraries, bookstores, and educational institutions where seizure poses a particular risk of endangering freedom of expression.

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4. Congress should require regular reports of the use by federal authorities of special powers to seize personal records, disaggregating data so that measures involving the records of libraries, bookstores, and schools are clear.
 5. Congress should hold hearings on the use of data-mining of personal information within the United States, by public and private agencies, and its implication on the right of privacy and on the data protection norms required to safeguard against abuse.
 6. Congress should prohibit the Department of Defense from pursuing its Total Information Awareness (TIA) data-mining program.
 7. Congress should enact legislation requiring any governmental or government contractor's use of data-mining techniques to be in accord with public guidelines based on the highest data protection and privacy standards, which are developed on the basis of broad consultations.
 8. Congress should hold detailed hearings on any proposals by the Executive Branch to increase its powers under the Foreign Intelligence Surveillance Act (FISA).
 9. Congress should amend Section 218 of the USA PATRIOT Act, giving the FBI authority to use its FISA powers only when foreign intelligence gathering is the "primary purpose" of the warrant application under FISA.

Chapter 3

TREATMENT OF IMMIGRANTS, REFUGEES AND MINORITIES



INTRODUCTION

The Bush Administration has repeatedly declared that the war on terrorism would not be a “war on immigrants,” but some immigrant communities have continued to bear the brunt of the Justice Department’s anti-terrorism initiatives. In these minority communities, citizens and non-citizens alike feel under siege and that their rights are at risk. A central feature of the administration’s domestic anti-terror campaign has been the monitoring, registration, and deportation of immigrants — although none of those deported have been shown to have any connections to terrorism. The minority communities most seriously affected by the new measures, principally Arab and Muslim communities, have increasingly been living in fear.

Meanwhile doors have been closed to visitors and immigrants alike from many parts of the world, and the United States’ traditional welcome to refugees fleeing perse-

cution has faltered. Asylum seekers face enormous new obstacles to finding safety in the United States, and even those refugees who were cleared for resettlement in the United States face indefinite delays in camps overseas.

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DIFFICULTIES FACING REFUGEES AND ASYLUM SEEKERS MULTIPLY

Refugees and asylum seekers who seek protection in the United States faced new hurdles after the September 11 attacks, which occurred after years of already severely restricted access to asylum in the United States. A 1996 immigration law imposed a one-year filing deadline on asylum claims and created a summary deportation process, called “expedited removal.” Asylum seekers subject to this expedited process face mandatory detention, and cannot appeal the decision to detain them to an independent authority. They are held in jails and detention facilities across the country.

Overlaying this legal labyrinth is a raft of new policies that make seeking refuge in America even harder today. These policies include new limits on the immigration appellate process, a “safe third country” agreement with Canada, the increased use of detention, and the transfer on March 1, 2003 of all immigration service and enforcement functions to a new Department of Homeland Security.

Because of blanket suspicion based on nationality, many asylum seekers who otherwise would be eligible for release from jail now face prolonged detention because of delays in security clearance procedures. Even Haitian boat refugees have been labeled a “threat to national security” in order to justify a new policy which targets them for lengthy detention and expedited removal.

At the same time, the drastic decline in U.S. refugee resettlement, which began with the suspension of all resettlement immediately after September 11, has continued, leaving thousands of refugees stranded and in danger. This slowdown has resulted in extreme hardship for refugees and their families, and weakening of the infrastructure of U.S. organizations whose mission is to care for and integrate refugees into American society.

DRAMATIC DECLINE IN REFUGEE RESETTLEMENT CONTINUES

The United States’ humanitarian program to bring in refugees from around the world who cannot return safely to their home countries has long been a source of pride for Americans and a reminder of the country’s founding as a haven for the persecuted. Held up as a model for other countries, the program has provided a new life in safety and dignity for hundreds of thousands of refugees over the last two decades. Faith-based and other resettlement groups work with the U.S.

government to welcome these refugees into the American community in a unique private-public partnership.

But since September 11, this humanitarian lifeline has frayed to a thread, dwindling from an average of 90,000 refugees resettled annually to around a tenth of that number who are expected this year. Although President Bush authorized the resettlement of 70,000 refugees from overseas during the last fiscal year (which ended September 30, 2002), a three-month suspension of the program immediately after September 11 and continued delays due to new security procedures, meant that only 27,058 refugees came in last year. In October 2002, the President again authorized resettlement of 70,000 refugees; but instead of investing in the staff and infrastructure needed to reach this number, the administration announced that it actually intended to resettle only 50,000 refugees during this fiscal year.

So far, even that number seems completely out of reach. As of early February 2003, refugee resettlement groups estimated that, if the refugee processing rate did not improve, only 13,000 refugees would be resettled this year. In November 2002, Senator Samuel Brownback (R-KS), noted that the decline was occurring even while many were “suffering terrible persecution.” “[W]e need to get those new refugees,” he said, “and we need to speak out for them and educate people about them.”¹²⁸ Representative Christopher H. Smith (R-NJ) also expressed concern over the low numbers of refugees admitted. Smith wrote President Bush in September 2002. The letter, signed by a bipartisan group of 40 members of the House and Senate, urged the President to continue the United States’ long and proud tradition of being a safe haven for those fleeing persecution and tyranny.¹²⁹

The current numbers mean that terribly vulnerable refugees, languishing in camps or in situations of great insecurity, are needlessly put at risk. Families are forced to endure prolonged separation; mothers who have waited years to reunite with their children are told they must continue to wait. And a noble humanitarian program, a lifeboat for those in danger, is dissipating to non-existence. The important work of faith-based and other resettlement organizations likewise is dissipating, as fewer refugee arrivals mean budget and staffing cuts, decimating the infrastructure and severely reducing their capacity to integrate refugees into host communities should the resettlement program be reinvigorated in the future.

In addition to the withering of the humanitarian resettlement program generally, there have been several instances in recent months when the administration has abruptly halted the admission of particular groups

of refugees, apparently because of security concerns. Most recently, on January 10, 2003, the State Department announced a blanket suspension of resettlement of Iraqi refugees. The refugees awaiting resettlement had already been determined by U.S. officials to have a well-founded fear of persecution and had already passed security clearance under enhanced post-September 11 procedures. The decision was later reversed, but the incident reinforced the sense that refugees, even those fleeing the repression of Saddam Hussein, are considered suspect and potential threats.¹³⁰

DISCRIMINATION AGAINST HAITIAN ASYLUM SEEKERS

In October 2001, the INS issued regulations granting its trial attorneys (the prosecutors in immigration proceedings) the power to overrule an immigration judge who decides, over INS objections, to order the release on bond of an INS detainee.¹³¹ The regulations, issued without notice and comment, were said by the Justice Department to be necessary in order “to prevent the release of aliens who may pose a threat to national security.” This new power was not limited to cases in which a detainee was suspected of terrorist or criminal activity. It was applied to many Arab and Muslim non-citizens detained in the wake of September 11, leading to prolonged detention. This “national security” regulation is now being invoked, at the direction of the White House, to prevent the court-ordered release of Haitian asylum seekers.

Political violence in Haiti began to rise in 2001. Following the arrival in South Florida in December 2001 of a boat bearing nearly 200 Haitian men, women, and children, the INS instituted a blanket policy of denying parole to all Haitian asylum seekers. Asylum claims filed by these Haitians were processed so quickly that many were unable to find legal representation. Haitian families were separated; women were held in a maximum security prison for eight months in poor conditions.¹³² The INS initially denied it had adopted a special Haitian detention policy, but was eventually forced to concede its existence after a federal lawsuit was filed by the Florida Immigrant Advocacy Center on behalf of the Haitians.¹³³

In late October 2002, a second boat of Haitian asylum seekers arrived in Florida. Because this group made it to shore before encountering the INS, they were entitled (unlike most detained asylum seekers, including the prior boatload of Haitians) to seek a bond hearing in front of an immigration judge. At that point, the INS began invoking the October 2001 regulation to prevent the court-ordered release on bond of Haitians.

In opposing the release of individual Haitian asylum seekers, the INS argued that “the detention of these aliens has significant implications for national security.” Furthermore, it said, “in the post-September 11 atmosphere of homeland security, there are serious concerns that the United States government needs to know more about the people who reach our borders, including our sea border.”¹³⁴ In an extraordinary step, the U.S. Coast Guard, Department of State, and Department of Defense all submitted declarations in immigration court which reportedly claim that Haitian migration constitutes a threat to U.S. national security. Among the justifications for this conclusion was the contention that a mass migration from Haiti would require the diversion of U.S. Coast Guard and military resources.¹³⁵

The harsh and discriminatory treatment of black Haitian asylum seekers, who seemed unlikely to have any connection to terrorism, prompted widespread protests in Florida¹³⁶ and expressions of concern from members of Congress.¹³⁷ In response, President Bush expressed his concern that “Haitians and everybody else ought to be treated the same way.”

But instead of improving treatment of Haitian asylum seekers, Attorney General Ashcroft took the discriminatory policy one step further. Having first implemented a blanket detention policy against the Haitians, and then ensuring continued detention even for those eligible for release on bond, the Justice Department then sought to prevent any future Haitian asylum seekers from being able even to seek release from detention by an immigration judge. On November 13, 2002, one week after the President’s expressions of concern about the treatment of Haitians, the Department of Justice and the INS issued a notice in the Federal Register authorizing for the first time the use of summary “expedited removal” procedures for Haitian and other migrants who arrive by sea — with the exception of Cubans.¹³⁸ Under this new policy, future sea arrivals will not only be ineligible to seek release on bond from an immigration judge, but will face an increased risk of mistaken deportation under the flawed expedited removal process.¹³⁹

In what has become a common refrain, the Justice Department relied on concern for “national security” to justify the move. Again, the department argued that “a surge in illegal migration by sea threatens national security by diverting valuable United States Coast Guard and other resources from counter-terrorism and homeland security responsibilities.”¹⁴⁰

In addition to the national security justification, the Justice Department offered a humanitarian argument for its Haitian policy:

universal detention would discourage other Haitian would-be refugees from embarking on a dangerous sea journey. Finally, and inexplicably, the Justice Department asserted that subjecting asylum seekers to expedited proceedings and extended detention would be “protecting the rights of the individuals affected.”¹⁴¹ In reality, the Bush Administration’s Haitian policy will violate the rights of asylum seekers by subjecting them to unfair procedures and prolonged detention.

INSCRUTABLE “CLEARANCE” PROCESS AND SECURITY CHECKS LEAD TO LENGTHY DETENTION OF ASYLUM SEEKERS AND OTHERS

Asylum seekers with credible claims for asylum, even those whose claims have been verified by the INS, are rarely released from detention. But under a new government policy, those who have been found eligible for release by the INS or by immigration judges now face lengthy and unnecessary detention, in some cases for months or even longer. The government has refused to provide the policy in writing, but it impacts asylum seekers and others from specific countries, including Somalia, Pakistan, Saudi Arabia, Iran, and Iraq. In effect, it seems to require that a presumed connection to terrorism be disproved before final release is approved. This policy, initiated after September 11, has resulted in children, sick people and the elderly, as well as many others, languishing in jail.

In one case, a 13-year-old Iraqi girl spent more than five months in detention before being released to the care of her older brother, who was a legal resident of the United States. Her release, and that of other members of her family, was prolonged because of delays in the new “clearance” procedures. The girl’s 62-year-old father, who was in poor health, was finally released in August 2002 — eight months after the family came to the United States to seek asylum.¹⁴²

This “clearance” policy was challenged by human rights organizations, including the International Human Rights Law Group and the Center for Constitutional Rights, in a request for “precautionary measures” before the Inter-American Commission on Human Rights (IACHR). The IACHR is a seven-member panel of the Organization for American States (OAS) that monitors human rights abuses in the Americas.¹⁴³ The groups argued that U.S. policy violated international prohibitions on prolonged and arbitrary detention in both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. They asked the IACHR to order the United States either to release or to justify the detention of dozens of INS detainees, and to provide details on detainee names, nationalities and places of detention.¹⁴⁴

On September 26, 2002, the IACHR granted this request and called on the United States to take urgent measures to protect the rights of detainees, including the right to personal liberty and security, the right to humane treatment and the right to resort to the courts for the protection of their rights.¹⁴⁵ In a letter to the U.S. government, the IACHR noted that “despite the Commission’s specific request for information concerning the present circumstances of these detainees, the United States has failed to clarify or otherwise contradict the Petitioners’ information” indicating violations of domestic and international law.¹⁴⁶ The U.S. government has ignored requests from the IACHR for information relating to the detainees and has not publicly revealed its position on the matter.

The United States Supreme Court heard oral arguments on January 15, 2003 in a case that, while not arising out of U.S. post-September 11 policies, will likely signal how willing the Court will be to place limits on the government’s detention policies. The case, *Kim v. Demore*, challenges the constitutionality of a provision of the “Illegal Immigration Reform and Immigrant Responsibility Act of 1996” (IIRIRA). The IIRIRA mandates the detention of any immigrant who is put in deportation proceedings based on a criminal conviction, including convictions for minor offenses (even for offenders not found to be a danger to the community or a flight risk). Many immigrants subject to this provision have been detained for months or years as they wait for their cases to be resolved. The ACLU, which represents the detainee, Mr. Kim, argued that detention must be based on an individualized finding that a person is either a danger to the community or a flight risk.¹⁴⁷ Unlike the Inter-American Commission order, the U.S. government is likely to be very attentive to the ruling in this case, as it likely will have important implications for the Justice Department’s authority to indefinitely detain immigrants and may set the tone for how the Court views the civil rights of non-citizens.

DOJ INSPECTOR GENERAL CONTINUES TO EXAMINE POSSIBLE ABUSE OF AUTHORITY IN CONNECTION WITH POST-SEPTEMBER 11 DETENTIONS

On April 2, 2002, the Office of Inspector General (OIG) of the Department of Justice announced it would investigate detentions at Passaic County Jail in Paterson, NJ (Passaic) and Metropolitan Detention Center (MDC) as well as the detentions of other specific individuals whose cases have been highlighted in the media. The OIG said the investigation will focus on three primary issues:

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- 1) issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general;
 - 2) the DOJ's efforts to oppose bond for all September 11 detainees and delay their deportations pending completion of the FBI's clearance investigation; and
 - 3) conditions of confinement experienced by detainees, including allegations of physical and verbal abuse made by detainees against prison staff; detainees' access to counsel; medical care; and lighting conditions in the detainees' high-security cellblock.¹⁴⁸

A report detailing the findings of the investigation is expected in early 2003.

The investigation is an outgrowth of the reporting requirements in the USA PATRIOT Act.¹⁴⁹ Section 1001 of the Act requires the OIG to issue semi-annual reports to Congress detailing any abuses of civil rights and civil liberties by employees and officials of the Justice Department in connection with the implementation of the Act.¹⁵⁰ This special investigation of the treatment of detainees reaches further than implementation of the USA PATRIOT provisions and is independent from the semi-annual reports required under USA PATRIOT.

During the months of September and October 2001, the Justice Department periodically reported the number of people detained in its investigation of the September 11 attacks. These numbers climbed to a total of 1,182 as of November 5, 2001.¹⁵¹ On November 8, 2001, however, the DOJ announced that it would no longer release an official running tally of the number of detainees.¹⁵² Nevertheless, over time, in response to press and congressional inquiries, additional information about the numbers of detainees has surfaced, and community groups, lawyers, and human rights and civil liberties organizations maintained close watch for information. Recent statements out of the Justice Department indicate that 765 individuals were detained on immigration violations "over the course" of the investigation. Yet, these numbers are inconclusive.

It is difficult to know what these numbers represent and what criteria are being used to classify individuals detained as part of the government's terrorism investigation. According to various DOJ sources, the number in INS custody over the course of the post-September 11 investigation rose from 718 in February 2002,¹⁵³ to 752 in July,¹⁵⁴ to 765 in December 2002.¹⁵⁵ But community-based organizations contin-

ue to report immigration sweeps and detentions in the Arab, South Asian and Muslim communities that suggest the numbers of those detained in this ongoing effort are much higher.

Important questions remain unanswered about who is being included in the official government count. For example, it is unclear whether the Justice Department considers individuals arrested as a result of its Absconder Apprehension Initiative (an effort to capture immigrants already ordered deported, starting with those from Arab and Muslim countries) or through its Special Registration Program (discussed in detail below) as part of these numbers. The government has not been willing to answer these questions.¹⁵⁶ Although the DOJ refuses to release it, information about the detainees continues to be sought in the courts.¹⁵⁷

THE IMPACT OF JUSTICE DEPARTMENT RESTRICTIONS ON IMMIGRATION APPEALS BEGINS

In September 2002, the Justice Department issued a final regulation that fundamentally alters the process by which asylum seekers and other immigrants can appeal the decisions of INS judges.¹⁵⁸ The Board of Immigration Appeals (BIA), which is part of the Department of Justice and remains so even after other immigration functions are folded into the Department of Homeland Security, is the only administrative appellate body with authority to review decisions by immigration judges across the country. The BIA was created in 1940 to be a watchdog over immigration courts. The new regulation drastically curtails the authority of the BIA, and its impact on the fundamental fairness of immigration decision-making is already apparent.

The new regulation directs that the majority of cases reviewed by the BIA will be decided by a single board member, rather than by a three-judge panel. What this means is that under the new rules, a single board member can *uphold* an immigration judge's decision, but cannot *reverse* that decision unless reversal is plainly consistent with or required by intervening changes in the law. The regulation also expands the types of cases in which the BIA can issue a "summary affirmance," a kind of rubber stamp ruling that upholds the immigration judge's decision but does not provide any reasons for doing so. This result is possible even in cases where the Board believes that the immigration judge was wrong on the law. Finally, the rule also prohibits *de novo* review of an immigration judge's factual findings except where those findings are "clearly erroneous." This feature of the new rules will severely limit the ability of the BIA to exercise its responsibilities as an appellate body.

In addition to minimizing the review process itself, the rule required the BIA to eliminate the current backlog of thousands of cases by March 2003, after which time the number of board members will be reduced from 23 to 11. Attorney General Ashcroft has intimated that “productivity” will be one of the factors he will consider in determining who keeps their positions on the board.¹⁵⁹ On February 28, five judges on the Board were told they would be relieved of their duties.¹⁶⁰

After these changes were announced in proposed rules in February 2002, the Lawyers Committee and other groups filed written comments with the Department of Justice detailing how, if finalized, the regulations would result in depriving asylum seekers and other immigrants of meaningful appellate review and fundamental due process.¹⁶¹

These concerns have since proven to be valid. In fact, the BIA, faced with the threat of “downsizing,” did not wait for the proposed rules to be made final. Immediately after Attorney General Ashcroft announced the proposed changes to the rules, judges began issuing one or two-sentence summary rulings, without explanation of their decisions. Recent press reports and available statistical information raise serious questions about the quality of judicial process under the new rules. Board members, for example, usually work in panels of three and rule after careful deliberation. A recent review conducted by the *Los Angeles Times* concluded that under the new rules, “board members are reviewing cases individually and are ruling within minutes, often issuing just two-line decisions,” and that “as the number of cases decided by the board has soared, so has the rate at which board members have ruled against foreigners facing deportation.” T. Alexander Aleinikoff, a former INS general counsel and professor of law at Georgetown University, said of the scaled back review process that “[m]any, many cases are decided at a speed that makes it impossible to believe they got the scrutiny a person who faces removal from the United States deserves.”¹⁶²

Statistics released under the Freedom of Information Act reveal a dramatic increase in the issuance of summary decisions, and a corresponding increase in denying immigrants’ appeals. As a baseline, it is instructive to look at statistics prior to March 2002 when the BIA first began to respond to the attorney general’s February 2002 announcement of the proposed changes. In the six months prior to March 2002, the board decided 14,285 cases. Of these, 1,157 (eight percent) were decided by summary decision, and 8,885 (62 percent) of the appeals were denied. Beginning in March, when the BIA began responding to the announcement, the number of cases decided by the board doubled (from 14,285 cases to 30,346), and the

number of appeals in which summary decisions were issued sky-rocketed (from 1,157 (eight percent of appeals) to 14,495 (48 percent of appeals)). The percentage of appeals that were granted dropped nearly 50 percent (from 38 percent to 20 percent). Cases receiving summary rulings rose from nine percent in February 2002 to 38 percent in March 2002.¹⁶³ The denial rate of immigration appeals has risen from 59 percent in October 2001 to 86 percent in October 2002.¹⁶⁴

The U.S. Court of Appeals for the First Circuit recently issued a decision declining, on the basis of the facts available to it, to find that the board's use of summary decisions without opinion violated due process. Notably, however, the court left open the possibility that it might reach a different conclusion if it were presented with evidence of systemic misuse of summary disposition procedures.¹⁶⁵ Several immigrants' rights groups have filed suit in federal district court in Washington as well, challenging the regulations as violations of the due process rights of immigrants. The attorney general, for his part, has stated in the preamble to the final regulations that, since most of the decisions appealed to the BIA are denials of asylum, relief that falls within the attorney general's discretion, the government need not comply with due process requirements in making those decisions.

THE NEW "SAFE THIRD COUNTRY" AGREEMENT

On December 5, 2002, the United States and Canada signed a new "safe third country" agreement. Modeled on similar arrangements between states in Europe, Canadian officials claimed to seek the agreement in order to foreclose a perceived problem of "forum shopping," whereby asylum seekers denied protection in one country then try again to gain asylum across the border. Thus, the agreement bars asylum seekers at the northern border from seeking refuge in Canada if they have transited through the United States, and likewise bars asylum seekers from seeking refuge in the United States if they have transited through Canada. There are some exceptions to this scheme, but they are extremely limited. The agreement will go into effect as soon as operating procedures are agreed and implementing regulations are issued in the United States.

The agreement is likely to increase the asylum caseload in the United States, since far more asylum seekers transit this country on their way to Canada than the other way around.¹⁶⁶ The agreement was opposed by refugee rights groups *and* anti-immigration groups in the United States.

The “safe third country” agreement is one item in a larger “smart border agreement” between the United States and Canada intended both to increase security and to streamline border crossings. Of the many problems with immigration at the border, the process of ensuring that refugees bound for Canada are able to get there to present their claims, and that those who are destined for the United States are able to pursue claims here was one that, prior to the agreement with Canada, worked quite well. The impact of the agreement will be to terminate this existing orderly border process. As a result, it likely will undermine security by leaving refugees vulnerable to exploitation by smugglers.

INS IS FOLDED INTO THE NEW DEPARTMENT OF HOMELAND SECURITY

Effective March 1, 2003, the Immigration and Naturalization Service (INS) was dissolved, and the enforcement and services functions of that troubled agency were transferred to the new Department of Homeland Security (DHS). Although the INS is only one of 22 federal agencies and departments that will be folded into DHS, the transfer of immigration functions to a department that provides frontline defense against terrorism in the United States likely will have profound implications for how the country views — and treats — immigrants. As one commentator suggested, “Placing all of INS’s functions into a department focused primarily on national security suggests that the United States no longer views immigrants as welcome contributors, but as potential threats viewed through a terrorist lens.”¹⁶⁷

The mission of DHS is set out in Section 101 of the Homeland Security Act and includes: preventing terrorist attacks in the United States, reducing the vulnerability of the United States to terrorism, and minimizing the damage from terrorist attacks. DHS is now the government agency that will issue work permits to immigrants, adjust their status to permanent residents, naturalize them as citizens, and grant asylum to those seeking protection from persecution. Yet these functions are not mentioned in the legislation as part of the mission of the department.

In the transition of the the INS to the DHS, the rights of refugees seeking asylum in the United States are perhaps more at risk (in the context of this transition) than any other group. Refugees have rights under U.S. and international law, but with its bifurcated enforcement and services functions, adjudicating who is entitled to asylum has never been an easy task for the INS. Under current DHS plans, immigration responsibilities relating to asylum seekers and refugees will be transferred to three new bureaus: the Bureau of Citizenship and

Immigration Services (which will handle asylum and refugee adjudications), the Bureau of Customs and Border Protection (which will handle secondary inspection), and the Bureau of Immigration and Customs Enforcement (which will have jurisdiction over detention).

Historically, the enforcement functions of the INS have been particularly ill-suited to respect the rights and accommodate the needs of refugees. Efforts to ensure that asylum seekers were treated fairly — for instance during secondary inspection and expedited removal or in connection with parole determinations — were at times undermined by the fact that the “enforcement” divisions of the INS, and in some cases local INS district officials, did not always fully understand the special needs of asylum seekers or the nature of United States obligations to this vulnerable population. This problem occurred even though the “enforcement” and “services” functions of the INS both reported to the INS Commissioner.

This problem will likely be exacerbated under the new structure. As currently envisioned, the immigration “enforcement” functions will be housed in two separate bureaus, both of which report to the head of the Border and Transportation Security Directorate; the immigration “services” functions are in a third bureau, with a completely separate reporting line, to Deputy Secretary Gordon England. If all asylum seekers fell only under the jurisdiction of this “service” bureau, the new structure would be a welcome development. But because many asylum seekers arrive at the border without documents and are subject to detention, they will also likely fall under the authority of the two “enforcement” bureaus of DHS as well. The separate reporting lines of these enforcement bureaus may make it even more difficult than in the past to ensure that the protection needs of refugees are respected when they first arrive in the United States. Commenting on this, former INS Commissioner James Ziglar wrote that INS asylum officers are now concerned that “the beacon of hope we have made shine so brightly will be dimmed because of inadequate attention and resources.”¹⁶⁸

The Homeland Security Act does include provisions for a civil rights officer as well as an ombudsman. These offices could serve as mechanisms of oversight and accountability. But to serve this function, the offices need to be strengthened with additional legislation clarifying their roles and enhancing their authority. These positions must also be ensured proper funding to carry out their responsibilities.

There is one group of immigrants that neither stays within the jurisdiction of the Justice Department nor is transferred to DHS: unaccompanied minor children. As has long been sought by refugee

rights groups, the care and placement of unaccompanied immigrant children will now be the responsibility of the Department of Health and Human Services (HHS). Although the Homeland Security Act failed to ensure that unaccompanied children will have legal counsel appointed for them, so they do not have to appear in court alone, moving jurisdiction for their oversight and care to HHS is certainly a welcome improvement.

JUSTICE DEPARTMENT POLICY OF CLOSING IMMIGRATION HEARINGS NOW RIPE FOR SUPREME COURT REVIEW

Less than two weeks after the September 11 attacks, the Justice Department instituted a new policy of holding certain “special interest” deportation hearings in secret. The policy was set out in a September 21, 2001 Memorandum from Chief Immigration Judge Michael Creppy, which instructed immigration judges to bar access by the public, the press, and family members to immigration courtrooms in cases of “special interest” to the attorney general.

This policy was challenged in federal court by media and other groups. A three-judge panel of the U.S. Court of Appeals for the Sixth Circuit, saying that “democracies die behind closed doors,”¹⁶⁹ held that the blanket policy was unconstitutional. In a separate case challenging the same policy, the U.S. Court of Appeals for the Third Circuit ruled 2-1 in favor of the government.¹⁷⁰ The majority upheld the secret hearing policy because it found no constitutional right of access by the press to deportation hearings, especially in cases that implicate national security, as the government has alleged all so-called “special interest” cases do.¹⁷¹ The courts did not address the issue, raised by plaintiffs in the case, of whether there were alternatives to the blanket closure policy that would adequately address the national security concerns. The dissenting opinion argued that a qualified right of access to deportation hearings, which have traditionally been public, is warranted, and cited the public good served by openness of such proceedings. The dissent recognized that national security concerns could be sufficiently safeguarded by the less intrusive practice of allowing immigration judges to decide on a case-by-case basis whether particular hearings needed to be closed.

This ruling creates a conflict between the Third and Sixth Circuits. The issue is likely to end up at the U.S. Supreme Court. On behalf of newspapers challenging the closed hearings policy, the American Civil

Liberties Union filed a petition for certiorari on March 3, 2003, requesting the U.S. Supreme Court to review the Third Circuit case.¹⁷²

TREATMENT OF DETAINEES CAUGHT UP IN INITIAL POST-SEPTEMBER 11 SWEEPS

Most people detained in the immediate aftermath of the attacks of September 11 were cleared by the FBI of involvement in terrorism, and then deported. Many questions remain about the initial justification for their detention by the United States, about their treatment while in detention, and about what has happened to them in the countries to which they were deported. In some countries, anyone with a perceived connection to the U.S. investigation into terrorist activity may be subject to suspicion and possible arrest or detention. And many of the countries to which the U.S. detainees were deported are known to engage in arbitrary detention and torture.¹⁷³ Asylum seekers who are denied refuge and sent back may be particularly vulnerable to retribution from their governments, which typically are implicated in asylum claims. It now in fact appears that some of these detainees were arrested and detained by their own governments upon their return.¹⁷⁴

The case of Maher Arar is an alarming example of the risks of U.S. policy in this regard. Arar is a Canadian citizen who was born in Syria. On September 26, 2002, traveling on his Canadian passport, Arar was detained at New York's JFK Airport while in transit from Tunisia to Montreal. According to reports, U.S. officials interrogated him for approximately nine hours, accused him of having links to terrorist organizations, and detained him in the United States for two weeks before forcibly deporting him to Syria. While he was in U.S. custody, Canadian government officials asked the United States whether it was detaining Arar. United States officials denied that they were holding him.

Now, more than five months later, Arar is in a Syrian jail at risk of torture. He has not been charged with a crime, and the Syrian government has not disclosed where Arar is being detained. Canadian officials were last permitted to meet with Arar, under restrictive conditions, on February 18, 2003.¹⁷⁵

International and U.S. laws prohibit the return of any person to a place where there is a substantial likelihood that they will be subjected to torture.¹⁷⁶ U.S. immigration regulations spell out procedures under which immigration detainees can challenge U.S. plans to deport them to a country where they fear being subjected to torture.¹⁷⁷ There is no evidence that Maher Arar was afforded access to this procedure.

HATE CRIMES, DISCRIMINATION, AND HARASSMENT

According to the federal government, hate crimes against Muslims and people of Middle Eastern ethnicity in 2001 increased by 1,600 percent over the previous year. The FBI's Uniform Crime Reporting Program released its annual Hate Crimes Statistics report on November 25, 2002.¹⁷⁸ The report documents 481 hate crimes against Arabs and Muslims in the United States during 2001, a massive increase from the 28 cases reported in 2000.¹⁷⁹

Reports from other groups, including the American Arab Anti-Discrimination Committee, the Council on American-Islamic Relations, and Human Rights Watch confirm the severity of the backlash suffered by Arabs and Muslims in the United States after September 11. Incidents included employment discrimination, airport profiling, verbal harassment, vandalism, physical assaults and at least three murders.¹⁸⁰

The Department of Justice has brought federal criminal charges against a number of individuals in connection with hate crimes against Arab Americans, Muslim Americans, Sikh Americans, South-Asian Americans, and those perceived to be members of these communities. In addition, the Department's Civil Rights Division directs a National Origin Working Group which conducts outreach to affected communities and offers information about DOJ resources for victims of discrimination and abuse.

These are important initiatives. But the issues most likely to be raised by affected communities in outreach meetings across the country are not the actions of individual purveyors of hate, but rather official government policies that target immigrants and help to create a climate of discrimination which enables hate crimes.

The government recently disclosed a new intelligence program under which Iraqi-Americans and Iraqi citizens in the United States may be electronically monitored, recruited as informants, and could be arrested and detained without charge if government authorities believe the person may be planning domestic terrorist operations. The details of this program are classified, including whether probable cause must be demonstrated before authorization is granted to monitor an individual. What little public information exists about the program has come from press reports citing unnamed government sources.¹⁸¹ Press reports indicate that the FBI is hoping to uncover people who may pose a threat to the United States or have violated immigration laws. In addition, the government hopes to identify people willing to support its campaign to oust Saddam Hussein from Iraq.¹⁸² Whatever the motive, rumors about

the program, combined with other, more official policies like the requirement for visiting Iraqis to be fingerprinted and photographed upon entry to the United States, have created a climate of fear and mistrust for Iraqis and Iraqi Americans living in the United States.

“SPECIAL REGISTRATION” PROGRAM

Of the many discriminatory and intrusive policies targeting immigrants that have come into force since September 11, the “National Security Entry-Exit Registration System” (NSEERS), commonly known as “Special Registration,” is arguably the one which has caused the most widespread concern within affected immigrant communities, primarily among Arabs and Muslims.¹⁸³ Under this program, men and boys over 16 years of age from 25 countries must report to the INS where they will be photographed, fingerprinted, and interviewed under oath.¹⁸⁴ Failure to comply with requirements of the program is a deportable offense.

The Special Registration program has two parts. The first part requires visitors from certain countries designated by the State Department to be fingerprinted, photographed and interviewed upon arrival in the United States. This registration happens at the airport or border. The second and more controversial part requires temporary visitors already in the United States to report to INS offices around the country for registration pursuant to “call-in” procedures designed by the Department of Justice.

The program has resulted in the detention of nearly 1,200 people and has sparked new fears in Muslim communities that they are being targeted by the Department of Justice.¹⁸⁵ In December 2002, the INS in Los Angeles detained approximately 400 men and boys from Iraq, Iran, Libya, Sudan and Syria, during the first phase of implementation of the “call-in” procedures.¹⁸⁶ After voluntarily appearing before the INS in compliance with the special registration program, many were detained on the grounds that their visas were not up to date — despite their having correctly filed applications for permanent residency that were pending due to INS backlogs.¹⁸⁷ Amnesty International reported harsh treatment of the detainees while in INS custody, including being placed in handcuffs and leg shackles and being hosed down with cold water. Detainees also reported being forced to sleep standing up because of overcrowding and being transferred to various facilities without a chance to call family members or obtain legal counsel.¹⁸⁸

Many people have questioned the efficacy of the Special Registration program. The program creates a substantial new burden on government bureaucracy to accurately record and store data that is unlikely to

contribute to combating terrorism. Juliette Kayyem, a terrorism expert at Harvard University, noted that

[t]he pure accumulation of massive amounts of data is not necessarily helpful, especially for an agency like the INS that already has problems keeping track of things. Basically, what this has become is an immigration sweep. The idea that this has anything to do with security, or is something the government can do to stop terrorism, is absurd.¹⁸⁹

The logic behind the Special Registration program remains unclear and unconvincing. There seems little doubt that terrorists intent on harming Americans will not come forward to register their presence with the government. The majority of those who present themselves for registration are simply trying to comply with the law and maintain their status as legitimate tourists, visitors, businessmen, students and applicants for permanent residence. But the government has done such a poor job of publicizing the registration requirements that many subject to the program do not understand what they must do in order to comply.

Governments of countries allied with the United States in the “war on terrorism” whose nationals are included on the Special Registration list have objected to the registration policy. Government officials from Bangladesh and Pakistan have complained that it is offensive for partners in the global effort against terrorism to have their nationals treated as suspect.¹⁹⁰ The Pakistani Foreign Minister has requested an exemption for Pakistani residents in the United States from the registration policy.¹⁹¹ The Indonesian government has advised its citizens to avoid travel to the United States, saying that the policy is arbitrary and confusing.¹⁹²

Because the United States considers both nationalities of dual nationals in deciding who is subject to Special Registration, the Canadian Ministry of Foreign Affairs has issued a travel advisory, warning Canadian citizens born in countries on the Special Registration list to reconsider travel to the United States. Tensions in U.S.-Canada relations on this issue have eased since the U.S. State Department and the Canadian Ministry of Foreign Affairs began negotiating an exemption for citizens of Canada.¹⁹³

In light of the problems created by the Special Registration program, and the lack of clear benefits, some members of Congress have requested that the Justice Department suspend the NSEERS program until Congress has a chance to review it and suggest alternatives.¹⁹⁴ In January, the

Senate voted to prohibit funding for NSEERS, but the provision was stripped out of the bill in the House-Senate conference committee.¹⁹⁵

RECOMMENDATIONS

1. The Bush Administration should take immediate steps to dramatically improve the pace of its refugee resettlement operations so that it will meet its promise of providing safe haven to at least 50,000 refugees. These steps should include the provision of the resources needed to ensure that refugee processing and all necessary security checks are conducted in an accurate and timely manner.
2. The administration should end its discriminatory treatment of Haitian asylum seekers in Florida. Specifically, it should abandon its policy of blanket detention of Haitian asylum seekers and its reliance on summary “expedited removal” procedures for Haitians and others arriving by sea. The administration should also take steps to ensure that all asylum seekers have access to fair and non-discriminatory release procedures, including the opportunity to have an independent authority (or an immigration judge) review the basis for their detention.
3. The U.S. government should ensure that security clearance procedures are conducted in a timely manner and should correct the problems that are currently causing excessive delays — delays which are leaving asylum seekers and other detainees who are otherwise eligible for release detained for months or longer. The administration should comply with the request by the Inter-American Commission on Human Rights calling for measures to protect the rights of asylum seekers and others in detention who have been found eligible for release.
4. The Office of the Inspector General of the Department of Justice is due to release a report on alleged abuse of authority in connection with post-September 11 detentions. Once the report is made public, the attorney general should act swiftly to address concerns raised by this report.
5. Recent federal regulations and downsizing of the Board of Immigration Appeals (BIA) have deprived asylum seekers of meaningful appellate review. These regulations should be rescinded, and the capacity of the BIA should be restored.

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6. Congress should review the Safe Third Country Agreement with Canada, with a view to restoring protections for refugees whose cases are affected by the agreement.
 7. The Department of Homeland Security should create specific mechanisms at high levels to ensure that the interests of asylum seekers and refugees — including those who are subject to the jurisdiction of the new immigration “enforcement” bureaus within DHS — are protected within the new Department.
 8. The attorney general should rescind the September 2001 memorandum from Chief Immigration Judge Michael Creppy which imposes a blanket ban on access to deportation hearings, which the government defines as “special interest” cases.
 9. Consistent with U.S. legal obligations, immigration authorities should refrain from returning any person to a place where there is a substantial likelihood that he or she will be subjected to torture.
 10. The administration should discontinue the National Security Entry-Exit Registration System (NSEERS), the so-called “special registration” program. This program is discriminatory in nature, ineffective and inefficient as a law enforcement strategy, and creates widespread ill-will in Arab-American and Muslim communities across the country.



Chapter 4

SECURITY DETAINEES AND THE CRIMINAL JUSTICE SYSTEM

INTRODUCTION

Prosecution of the war against terrorism in Afghanistan and elsewhere has resulted in the detention by the United States of citizens of at least 43 other countries. Approximately 650 of these people continue to be held at military detention facilities on the U.S. naval base at Guantanamo Bay, Cuba. At the same time U.S. law enforcement operations have led to the arrest and detention of others, including several American citizens. At least two Americans, José Padilla and Yaser Hamdi, are being held indefinitely, without charge or trial, as “enemy combatants.”

In a few cases, these security detainees have been taken before the ordinary criminal courts to face prosecution for criminal offenses. Federal prosecutors and courts generally have dealt

effectively with the challenges posed by these prosecutions, balancing the requirements of security and justice. Yet administration officials have suggested that the fair trial standards of U.S. federal courts are too demanding for some

high profile prosecutions to proceed without endangering security. While the law contemplates further measures to safeguard witnesses and evidence in sensitive trials to meet the needs of both security and justice, these options have not been vigorously pursued. To the contrary, administration sources have suggested that in these cases, they may be “forced” to transfer these cases to special military commissions outside both the civil and the ordinary military justice systems.

Administration officials have suggested that the fair trial standards of U.S. federal courts are too demanding for some high profile prosecutions to proceed without endangering security.

On a parallel track, the Bush Administration continues to refine the structure of a proposed emergency military court system now being established pursuant to a “military order” issued by President Bush in November 2001. While military commissions have yet to be convened, in late February 2003, the Department of Defense released a draft instruction setting out the crimes that could be tried by such commissions. These special courts could try non-United States citizens currently being held without charge or trial. At the same time, as noted, administration spokesmen have suggested that detainees now being prosecuted before the federal criminal courts may be removed from these courts’ jurisdiction — and given new trials before military commissions under procedures that would severely curtail fair trial guarantees. Meanwhile, an increasing number of alarming reports of mistreatment of detainees at the hands of U.S. interrogators are emanating from Bagram Airbase in Afghanistan and other detention facilities used by the U.S. to hold security detainees.

“ENEMY COMBATANTS”

The largest category of individuals in detention comprises the so-called “enemy combatants.” These are individuals being treated not as civilians (as in INS and criminal cases), but as members of a military force, either al Qaeda or the Taliban, and as participants in an armed conflict pitting those forces against the United States. The administration has designated these men as “unlawful combatants,” or “enemy combatants,”¹⁹⁶ rather than as “prisoners of war,” for the express purpose of denying them the rights that combatants normally receive. At the same time, by considering these detainees as “combatants,” the administration in effect asserts the right to detain them indefinitely and without trial. Under international humanitarian law, combatants in armed conflict who are captured by the enemy may be held in detention until the “cessation of active hostilities.”¹⁹⁷ In this instance, the administration construes this term to mean the end of the “war against terrorism.”

One of the principal rights the administration aims at denying the detainees, by using the term “unlawful combatants,” is their right to a hearing, an entitlement specified in Article 5 of the Third Geneva Convention. A competent tribunal could weigh, among other things, the merits of defendants’ claims that they are not combatants at all. Individuals designated as combatants may be in some cases only people caught in the wrong place at the wrong time, or victims of parties (such as bounty hunters) improperly motivated by personal, ethnic, or political rivalries unrelated to the conflict between the United States, and al Qaeda and the Taliban.¹⁹⁸

While many of these “enemy combatant” detainees were taken into custody in or near the battle zone in Afghanistan, others were apprehended in Pakistan; still others came from even further away, such as six Algerian detainees arrested and transported to Guantanamo from Bosnia, after a local court had ordered their release for lack of evidence.¹⁹⁹ The Guantanamo base is the best-known detention center for these men, but an unknown number are being held in other locations both in Afghanistan and elsewhere.

Particularly troubling has been the government’s inclusion of U.S. citizens within the category of “enemy combatants,” while rejecting debate on the appropriateness of the term. By unilaterally imposing the “enemy combatant” label on citizens whom it suspects of terrorist activities, the Executive Branch is attempting to bypass all criminal procedures and constitutionally mandated protections. U.S. citizens José Padilla and Yaser Hamdi are currently being detained in the United States as alleged enemy combatants.

These cases are unprecedented in U.S. legal history. In these cases, the administration in effect has reserved for itself the authority to deny those so labeled, regardless of citizenship, all legal rights and remedies, whether under international human rights or humanitarian law, U.S. criminal law, the Uniform Code of Military Justice, or the U.S. Constitution. The terminology of “unlawful” or “enemy combatants” improperly collapses the crucial distinction between, on the one hand, individuals captured while participating in an armed conflict (such as the armed conflict in Afghanistan between the United States and the Taliban government and its al Qaeda allies), and, on the other hand, those implicated in serious terrorist crimes plotted or executed outside a zone of conflict, that are properly handled within the criminal justice system.

THE COURTS AND “ENEMY COMBATANTS”

Since September 2002, there have been a number of important developments with respect to the treatment of those labeled “enemy combatants,” affecting both U.S. citizens and non-citizens.

Although public attention to the Guantanamo detainees has dwindled, approximately 650 people are still interned there, many for more than a year with no end in sight. In Afghanistan there are increasing reports in the news media that U.S. interrogators are using psychological and physical coercion. In some cases, moreover, prisoners have been transferred for interrogation to states known to use torture, such as Egypt, Jordan, Morocco, and Syria.

Finally, some reports have indicated that the Pentagon may be preparing to begin trying captives in military commissions. The military commissions have been designed to bypass both the U.S. criminal justice system and the military court system, which operates under the Uniform Code of Military Justice. There are indications that the government, unhappy with developments in the prosecution of Zacarias Moussaoui — the so-called “20th hijacker” — may remove his case from the civilian courts and try him instead in a military commission.

U.S. CITIZENS WITH ALLEGED LINKS TO AL QAEDA

JOSÉ PADILLA

José Padilla, a Brooklyn-born U.S. citizen, was arrested on May 8, 2002, at Chicago’s O’Hare airport, on arrival from Pakistan. Administration spokesmen said the arrest was based on information obtained from the interrogation of Abu Zubaydah, a senior al Qaeda leader in U.S. custody.

The administration asserts that Padilla had contact with al Qaeda in Pakistan and may have been part of a plot to bomb an unspecified target in the United States. Padilla was held for one month as a material witness, in connection with this alleged plot to create and detonate a conventional explosive containing radioactive materials in an urban area — a “dirty bomb.” In June 2002 he was transferred to military custody based on a presidential determination that he was an “enemy combatant.”²⁰⁰

Padilla’s transfer to military custody, and his designation as an “enemy combatant,” came promptly after Judge Michael Mukasey, of the United States District Court for the Southern District of New York, indicated Padilla would either have to be charged or released, thus ending his indefinite detention as a material witness. The administration invoked the designation “enemy combatant” to limit the role of courts in assessing the basis for Padilla’s detention.

In June 2002, Padilla’s lawyers filed a petition for habeas corpus, asserting their client’s right to meet with his legal representatives. Although Padilla had met with his public defenders when held as a material witness, since his transfer to military custody, he has been denied access to his attorneys. In their petition, his lawyers also challenged the factual basis of Padilla’s designation as an “enemy combatant” and urged the court to examine the facts leading to that designation.

At issue is the power of the Executive Branch to identify an American citizen as an agent of an enemy and on that basis to strip that citizen of his or her liberty and other rights under U.S. law. In such cases, the executive has argued that the federal courts must defer to the President's determination as to who is an "enemy combatant."

On December 4, 2002, Judge Mukasey issued a 102-page opinion in the Padilla case.²⁰¹ He affirmed Padilla's right to consult with his attorneys. Yet the government continued to resist the court's order. On January 9, 2003, the government filed a motion for reconsideration, insisting that allowing Padilla to talk with his lawyers could "set back his interrogation by months, if not derail the process permanently... [by interfering with] the military's efforts to develop a relationship of trust and dependency that is essential to effective interrogation."²⁰² A response was filed on January 13, and oral argument was held two days later. On March 12, 2003, Judge Mukasey rejected the Bush Administration's motion for reconsideration and reaffirmed his December ruling that Padilla, held without charge or trial in a U.S. military brig, had the right to meet with his defense lawyers — a decision that the government is now likely to appeal to the U.S. Court of Appeals for the Second Circuit.²⁰³

On a separate issue, Judge Mukasey's December ruling supported the government's assertion that the law does not bar Padilla's confinement. At issue in this ruling is a federal statute, 18 U.S.C. § 4001(a), which provides that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."²⁰⁴

While rejecting the government's view that this statute is not applicable to "enemy combatant" detentions, the court concluded that Senate Joint Resolution 23 ("Authorization for Use of Military Force") signed by President Bush on September 18, 2002, provides an adequate authorizing act of Congress. The Joint Resolution authorizes the President to "use all necessary and appropriate force against those...organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001...in order to prevent any future acts of international terrorism against the United States by such...organizations or persons."²⁰⁵

It is unclear whether Congress intended this resolution to give consent to the arrest and indefinite detention of U.S. citizens, particularly citizens arrested within the United States. This issue is likely to be addressed on appeal in the Padilla case.

Judge Mukasey also gave broad deference to the government's factual determinations. He held that it was outside the court's purview to decide "*de novo* whether Padilla is associated with al Qaeda and whether he should therefore be detained as an unlawful combatant." Rather, the court's responsibility:

runs only to deciding two things: (i) whether the controlling political authority — in this case the President — was in fact exercising a power vouchsafed to him by the Constitution and the laws; that determination in turn is to be made only by examining whether there is some evidence to support his conclusion that Padilla was, like the [World War II] German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and (ii) whether that evidence has not been entirely mooted by subsequent events.²⁰⁶

This "some evidence" standard Judge Mukasey refers to is lower than "probable cause" (*i.e.*, "more likely than not"), the normal burden in a *civil* lawsuit, and substantially less stringent than the "beyond a reasonable doubt" standard required in *criminal* cases.

Moreover, the invocation of *Quirin*²⁰⁷ is misleading. *Quirin* was a World War II case in which the Supreme Court upheld the conviction by military commission of eight German soldiers (at least one, a U.S. citizen) who landed from submarines onto shore in New York and Florida, with the intent to commit sabotage in the United States. In *Quirin*, there was *no factual dispute whatsoever* regarding either the "combatant" status of the German defendants or their preparations to commit sabotage within the United States. By contrast, the central issue in the Padilla case is the factual determination of his "enemy combatant" status. Moreover, there was never a claim in the *Quirin* case that the defendants were not entitled to a trial, and the *Quirin* defendants were tried by a military commission. Yet in the Padilla case, the government argues that it has discretion to detain Padilla indefinitely without charge.

On February 7, 2003, at the court's direction, Padilla's lawyers filed a Memorandum of Law contesting the appropriateness of the "some evidence" standard.²⁰⁸ The Memorandum highlights the fact that "[t]here has never been a case, in nearly a century of federal jurisdiction, in which the government has asked a court to find 'some evidence' based on a record in which the claimant had no right to participate." The Memorandum urged the court to employ a standard of review requiring the government to demonstrate Padilla's "enemy combatant" status by

“clear and convincing evidence,” a standard somewhere between “probable cause” and “beyond a reasonable doubt.”²⁰⁹

YASER HAMDI

Yaser Hamdi was among hundreds of men taken into U.S. custody in the course of the war in Afghanistan. He had been turned over to U.S. forces in Afghanistan after surrendering to Northern Alliance forces headed by warlord and alleged war criminal Abdul Rashid Dostum.²¹⁰ Once captured, he was transferred to the Guantanamo Naval Base. When U.S. authorities realized that Hamdi was a U.S. citizen, born in Louisiana, he was transferred to a U.S. military base in Virginia, where he continues to be held incommunicado. In April 2002, Hamdi was designated an “enemy combatant.”

In May 2002, a petition for habeas corpus was filed by a public defender, acting on Hamdi’s behalf. Federal District Court Judge Robert Doumar denied this petition on the grounds that the public defender had no standing to act on behalf of Hamdi. A second filing was made on June 11, 2002, on behalf of Hamdi’s father. This time the petition succeeded, and the court ordered the government to allow the public defender to meet with the detainee in private, as requested.

The government successfully appealed Judge Doumar’s order, and the Fourth Circuit Court of Appeals remanded the case to the District Court to reconsider whether it had jurisdiction to order a writ of habeas corpus on behalf of an “enemy combatant.” On July 25, 2002, the government filed a motion to dismiss the habeas petition. The administration argued 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.”

On August 16, 2002, Judge Doumar issued an opinion rejecting the government’s arguments. He ordered the government to produce the underlying factual evidence supporting its determination that Hamdi was an “unlawful enemy combatant,” for the court’s *in camera* review. He also required the “screening criteria utilized to determine the status of Hamdi” and details of those who had made the determination.²¹¹

Judge Doumar criticized the adequacy of a two-page affidavit — the “Mobbs declaration” — that the government submitted to him to justify the designation of Hamdi as an “enemy combatant.” Declaring that he would not be a “rubber stamp” for the government, he ruled that the Mobbs declaration’s assertion that Hamdi was “affiliated with

a Taliban military unit and received weapons training” did not suffice to justify Hamdi’s detention. Judge Doumar questioned the conclusory statements in the Mobbs declaration. He expressed 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 the nature and extent thereof. Indeed, a close inspection of the declaration reveals that [it] never claims that Hamdi was fighting for 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.²¹²

On August 19, 2002, the government appealed the decision. On January 8, 2003, the Fourth Circuit Court of Appeals issued its judgment, vacating Judge Doumar’s decision and upholding the government’s position.²¹³ One important aspect of the court’s decision was its strong rejection of Judge Doumar’s view that the District Court had an obligation to test the legal adequacy of the government’s unsupported two-page declaration that Hamdi was “affiliated” with the Taliban. (By labeling Hamdi an “enemy combatant,” the government asserted that it has the authority to deny him the right as a U.S. citizen, to challenge the basis for his detention, with the assistance of counsel. Consistent with that position, the government has resisted his lawyers’ efforts to persuade the court to look into the circumstances of his capture.)

In its opinion,²¹⁴ the Fourth Circuit acknowledges the “Bill of Rights’ historic guarantees” and the recognition by “our forebears...that the power to detain could easily become destructive if exerted without check or control by an unrestrained executive free to imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure” (internal quotes omitted).²¹⁵

But in practice, the court rejects the need for any meaningful review of the basis of Hamdi’s continued detention. Indeed, the court goes even further than the administration’s own lawyers, who had conceded that in considering a habeas corpus petition on behalf of a citizen, a

court was probably entitled to require the government to provide “some evidence” to support its conclusion that a detained citizen was an “enemy combatant.”²¹⁶

Under the *Hamdi* ruling the government only has to show that the detainee was in the zone of combat. The Fourth Circuit holds that any U.S. citizen (and, of course, any other individual regardless of citizenship) who is “captured in a zone of active combat operations in a foreign country” loses standing to challenge the factual determinations underlying his seizure and purportedly justifying his continuing detention. Logically, however, even if Hamdi was detained near the battlefield, that fact alone does not prove that Hamdi was a combatant, let alone whether he was an unlawful enemy combatant. (The fact that Hamdi surrendered to General Dostum’s Northern Alliance forces, and was not captured in combat by U.S. forces, raises further questions about the facts of his case.) While the court expresses support for the principle that “[t]he detention of United States citizens must be subject to judicial review,” its view of the scope of that review is so constricted as to be practically meaningless.

In overturning Judge Doumar’s decision, the Fourth Circuit points to what it characterizes as the “signal flaw” in the District Court’s reasoning: “We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive’s law enforcement powers. We are dealing with the executive’s assertion of its power to detain under the war powers of Article II [of the Constitution].” The Fourth Circuit acknowledges that, “[a]s an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime.” But the court insists, “Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war.”

The court’s opinion relies in part on *Ex Parte Quirin*,²¹⁷ in which the Supreme Court

stated in no uncertain terms that detentions “ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger” should not “be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.”²¹⁸

But in citing the *Quirin* decision, the Circuit Court omits the word “trial.” What the *Quirin* court affirmed was the “detention *and trial*” of

the Nazi saboteurs (emphasis added). The detainees in *Quirin* were given a full military trial under then-applicable law.

In describing the facts of *Quirin*, the Circuit Court presents the FBI's version of the arrests of the saboteurs, as crack police work: "All of [the saboteurs] were apprehended by FBI agents, who subsequently learned of their mission to destroy war industries and facilities in the United States." Yet in the *Quirin* case there was no factual dispute about who the saboteurs were, what they had done, and what they had been planning, all of which were conceded by the defendants themselves. By contrast, in the *Hamdi* case, the right to a proceeding for the reliable determination of the facts is precisely what is at issue.

The court goes out of its way to reject the "sweeping proposition...that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." However it then asserts that Hamdi is not just any American citizen, but rather "an American citizen captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces."²¹⁹

The court's analysis is based on the September 18, 2001 Congressional Resolution authorizing the President to use all necessary force against those he determines planned, authorized, committed or aided the September 11 attacks, or who harbored such organizations or persons. On this basis, the court finds the President has properly exercised his constitutional war powers, as Commander in Chief, and that "these powers include the authority to detain those captured in armed struggle."²²⁰

Though the government asserts that Hamdi has confirmed his belligerent activities under interrogation, Hamdi himself has not been allowed to provide his own story directly in any legal forum, and the lawyer representing Hamdi in the proceeding has never been allowed to speak with him.²²¹ If the government shows that Hamdi was physically in the war zone, the Fourth Circuit concluded, nothing more is required.

Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper.²²²

With an eye on the Padilla proceeding pending in New York, the Fourth Circuit does limit its reasoning in one respect:

Any broad or categorical holdings on enemy combatant designations would be especially inappropriate. We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding.²²³

Accordingly, the Court of Appeals stops short of expressly addressing questions as to the definition of the zone of combat operations, or the duration of the conflict. Yet it does comment: “The executive branch is...in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them.”²²⁴

In the war against terrorism, President Bush has stated that the enemy is global,²²⁵ the entire world is the battlefield, and the war will continue until “international terrorism” has been defeated. Using this frame of reference, if the *Hamdi* decision stands, there will be little room for the courts to review the basis for detentions made pursuant to this universal and near permanent state of war. If the executive chooses to call someone an “enemy combatant,” the Fourth Circuit’s approach is that the courts should be “satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure....”²²⁶

Hamdi’s lawyer has said that he will seek review of this decision by the U.S. Supreme Court.²²⁷

ARRESTS AND TRIALS OF NON-CITIZENS WITHIN THE UNITED STATES

ZACARIAS MOUSSAOUI

Zacarias Moussaoui was arrested on August 16, 2001 in Minnesota. Instructors at a flying school he attended were suspicious of him because he paid for his \$8,000 flight classes in cash and expressed “unusual interest” in flying big airplanes and the fact that a plane’s doors could not be opened during flight. He was initially held on immigration charges, and was in INS custody on September 11, 2001. On December 11, 2001, Moussaoui was indicted in Virginia on charges of conspiracy related to the September 11 attacks. Moussaoui acknowledges being a disciple of Osama bin Laden and a member of al Qaeda, but he denies any involvement in the September 11 plot. He faces the death penalty, if convicted.

Moussaoui has rejected court appointed lawyers and insisted upon representing himself. Some observers have complained of the circus-like atmosphere created by his demeanor and his use of the U.S. court system as a platform for inflammatory political statements. The case is being heard by District Court Judge Leonie Brinkema.

On January 30, 2003, Judge Brinkema ordered the government to give Moussaoui's lawyers access to alleged September 11 mastermind Ramzi bin al-Shibh. In the Moussaoui Indictment, bin al-Shibh, a Yemeni national and senior leader of al Qaeda, is named as an unindicted co-conspirator. In 1998 and 1999, bin al-Shibh allegedly lived in Hamburg, Germany with September 11 hijacker Mohammed Atta, and later spent time with Moussaoui in London. He is also alleged to have sent various amounts of money to Atta and others of the hijackers, as well as approximately \$14,000 to Moussaoui, shortly before Moussaoui registered for flight training in Minnesota.²²⁸ Though bin al-Shibh was still at large when the indictment was issued, he was captured in Pakistan in September 2002. Because of the central role accorded bin al-Shibh in the prosecution's account of the September 11 conspiracy, testimony from bin al-Shibh could be key to inculpat-ing, or — as Moussaoui insists — exonerating Moussaoui from involvement in the plot. Bin al-Shibh has been held in an undisclosed location since his capture. According to press reports he has admitted to sending money to Moussaoui. But he also reportedly told CIA inter-rogators "that no one trusted the unhinged Moussaoui for such an important mission [as the September 11 attacks] and that Moussaoui was never made part of the 9/11 conspiracy."²²⁹

As with the "enemy combatant" cases, the government maintains that making bin al-Shibh available to attorneys working with Moussaoui, let alone putting him on the witness stand, would upset the delicate dynamics of bin al-Shibh's interrogation, and risk revealing sensitive confidential information at trial.²³⁰

The prosecution has appealed Judge Brinkema's Order to the Fourth Circuit Court of Appeals, and, on February 12, 2003, the court granted the prosecution's request that the trial proceedings be stayed until the appeal is decided.²³¹

Recently some government officials have begun to signal that if this issue is not resolved in the government's favor, they might remove the case from the federal court and transfer it to a military commission. Under the rules of the proposed military commissions, Moussaoui's rights, among other things, to cross-examine witnesses, obtain access to "secret evidence," and to be tried in public could all be denied.

There are now strong indications that if the Fourth Circuit upholds Judge Brinkema's Order, the government will pursue the military commission option.²³²

RICHARD REID

On October 4, 2002, Richard Reid pleaded guilty in Federal District Court in Boston to all charges, including attempted murder and attempted use of a weapon of mass destruction. Reid had been arrested on December 22, 2001, after failing to ignite an explosive hidden in his shoe on a Miami-bound flight from Paris. In changing his previous not-guilty plea, he continued to boast of his allegiance to Osama bin Laden; and prosecutors stressed they had not entered into any agreements with Reid to induce the guilty plea.²³³

On January 30, 2003, Judge William G. Young sentenced Reid to life imprisonment. A defiant Reid "asserted his attempt to blow up a trans-Atlantic jetliner with explosives hidden in his shoes was the act of a soldier in a war against those who attack Islam." Judge Young responded: "You are not an enemy combatant — you are a terrorist." He added:

To give you that reference, to call you a soldier gives you far too much stature.... [W]e do not negotiate with terrorists. We hunt them down one by one and bring them to justice.²³⁴

Judge Young concluded that "all this war talk is way out of line" in a court of law.²³⁵

THE GUANTANAMO DETAINEES

The first prisoners from Afghanistan arrived at the U.S. naval base at Guantanamo Bay, Cuba on January 11, 2002. Today there are some 650 detainees being held at Guantanamo, from at least 43 countries. Most were captured in or near battlefields in Afghanistan. Some have come from other places, including six Algerians who were transferred from Bosnia in January 2002, after a local court there ordered their release for lack of evidence.

In late October 2002, the United States released four of the Guantanamo detainees, three Afghans and a Pakistani, explaining that the four no longer posed a threat to U.S. security. Though one of the men was 60 years old and two others upwards of 70 years old, the Defense Department insisted that "at the time of their detention, these enemy combatants posed a threat to U.S. security."²³⁶

Within days of the October releases, 30 new detainees were shipped to Guantanamo, bringing the total at that time to 625. On February 7, 2003, approximately 25 additional men were brought to Guantanamo, raising the total to about 650.²³⁷ Defense Department officials continue to say that many of the detainees held in Guantanamo can expect to be held there until the end of the war against terrorism, a war that shows no signs of ending. To date, there have been 20 suicide attempts by 16 detainees, mostly attempts to hang themselves with cloth. According to one prison mental health expert, these cases represent “an extraordinarily high number compared to other prison populations.”²³⁸ The names of the detainees continue to be withheld, although the International Committee of the Red Cross (ICRC) has been allowed to visit detainees at Guantanamo and to communicate with families. Lawyers representing some of the detainees held at Guantanamo have filed habeas corpus petitions, asking U.S. courts to assert jurisdiction over their cases. At least two federal courts have ruled that they lack such jurisdiction.²³⁹

THE RASUL AND ODAH CASES

On December 2, 2002, the U.S. Court of Appeals for the District of Columbia heard arguments from the government and attorneys representing the families of Australian, British, and Kuwaiti detainees on Guantanamo, who were apprehended in Afghanistan or Pakistan. The families maintain that the detainees were either innocent victims of bounty hunters or unfortunates mistakenly identified to U.S. forces as combatants. While conceding that the U.S. government was entitled to hold battlefield detainees in Guantanamo, the detainees’ lawyers insisted that there must be some kind of adjudicative proceeding, if not in a federal court, then at least in a “competent tribunal” as provided for in article 5 of the Third Geneva Convention.²⁴⁰

In cases brought by the families of Guantanamo detainees — *Odah, et al v. the United States* — the U.S. Court of Appeals for the District of Columbia held on March 11, 2003 that U.S. courts do not have jurisdiction to review the cases of those detained at the U.S. Naval Base in Guantanamo Bay, Cuba, because the U.S. base is outside the sovereign territory of the United States. The Court of Appeals decision upheld the earlier district court ruling.²⁴¹

THE ABASSI CASE

International concern about the indeterminate status of the detainees has continued to grow. A striking example of such concern was expressed in a November 6, 2002 British Court of Appeal opinion,

Abassi v. Secretary of State, a case respecting a British detainee at Guantanamo, Feroz Abassi. Though the three-judge panel declined to grant Abassi's mother the remedy she sought — an order to the British Foreign and Commonwealth Office to intercede on behalf of her son — the court used exceptionally blunt language to express its frustration at the “legal black hole” Abassi was in. In its opinion, the court said:

What appears to us to be objectionable is that Mr. Abassi is subject to indefinite detention in territory over which the United States has exclusive control, with no opportunity to challenge the legitimacy of his detention before any court or tribunal....It may be that the anxiety we have expressed will be drawn to their attention.²⁴²

INTERROGATIONS AT GUANTANAMO

There continues to be a debate about the treatment of the Guantanamo detainees. On October 9, 2002, the Pentagon removed the Guantanamo base commander, Brig. Gen. Rick Baccus. Neither Baccus nor the military would confirm press reports that Baccus was relieved of his command for “being too nice” to those in detention. But, according to press reports, Baccus had come under criticism for addressing the detainees with words such as “peace be with you,” and “may God be with you”; promising the prisoners they would be “treated humanely”; and authorizing placement in the camp of ICRC posters specifying certain rights that prisoners have under the Geneva Conventions.²⁴³

Some press reports also have speculated that most of the detainees in Guantanamo constitute neither significant intelligence sources nor material danger to the United States and its allies, one reason why the interrogations were producing so little intelligence information.²⁴⁴

As more information began to seep out of Guantanamo through press reports, news articles reported that “[a]t least 59 detainees — nearly 10% of the prison population at the ...base — ...were deemed to be of no intelligence value after repeated interrogations in Afghanistan. All were placed on ‘recommended for repatriation’ lists well before they were transferred to Guantanamo....” These “farmers, taxi drivers, cobblers and laborers,” a number of whom were low-level conscripts, were transferred to Guantanamo even though they did not meet the official screening criteria. There were so many “‘Mickey Mouse’ detainees” being ordered sent to Cuba by commanders far from the battlefield, in Kuwait or the United States, that interrogators in the field in Afghanistan became “dismayed” and began “circulating [to senior intelligence officers] lists of prisoners they believed were being

improperly placed on Guantanamo.” One officer summed up the problem: “No one wanted to be the guy who released the 21st hijacker.”²⁴⁵

ALLEGATIONS OF MISTREATMENT BY U.S. INTERROGATORS

U.S. military and intelligence services also continue to carry out interrogations outside of Guantanamo, including at the U.S. base at Bagram, Afghanistan, where, according to news sources, “[i]nterrogators...are sometimes able to use more aggressive and creative tactics in questioning detainees than their counterparts at Guantanamo Bay can employ.”²⁴⁶

In recent months, there have been an increasing number of news articles describing physical and psychological mistreatment of those who are being interrogated. If true, these reports raise serious questions about the administration’s assurances that, issues of technical legal status aside, all detainees are being treated humanely. In December 2002, a *Washington Post* report described direct involvement by United States forces in abusive practices:

In contrast to the detention center at Guantanamo Bay, where military lawyers, news reporters and the Red Cross received occasional access to monitor prisoner conditions and treatment, the CIA’s overseas interrogation facilities are off-limits to outsiders, and often even to other government agencies. In addition to Bagram [Afghanistan] and Diego Garcia [an Indian Ocean island leased by the United States from Britain], the CIA has other secret detention centers overseas, and often uses the facilities of foreign intelligence services. Free from the scrutiny of military lawyers steeped in the international laws of war, the CIA and its intelligence service allies have the leeway to exert physically and psychologically aggressive techniques, said national security officials and U.S. and European intelligence officers.²⁴⁷

“Stress and duress” techniques reportedly described by U.S. national security officers include keeping prisoners standing or kneeling for hours in black hoods; binding them in awkward, painful positions; depriving them of sleep with 24-hour lights; subjecting them to loud noises; “softening up” by beating; throwing them blindfolded into walls; and depriving wounded prisoners of adequate pain control medicines.²⁴⁸ These are practices the United States has regularly condemned when carried out by other governments, particularly if they have been continued for lengthy periods of time and/or combined with other abuses.²⁴⁹

Following the capture in Pakistan of alleged senior al Qaeda operations planner Khalid Shaikh Mohammed, at the end of February 2003, reporters asked White House spokesman Ari Fleischer about U.S. interrogation practices. He insisted that U.S. interrogations have been and would continue to be “humane and to follow all international laws and accords dealing with this type of subject.” Yet other unnamed U.S. officials have told reporters that “[t]here are a lot of ways short of torturing someone to get information from a subject,” and that they “expected the Central Intelligence Agency to use every means at its disposal short of what it considers outright torture, to try to crack [Mohammed].”²⁵⁰ U.S. officials told the *New York Times* that purportedly lawful techniques used in the past have included “depriv[ing] suspects of sleep and light, ke[eping] them in awkward physical positions for hours and us[ing] psychological intimidation or deception to confuse and disorient them.”²⁵¹

One U.S. law-enforcement official reportedly explained his understanding that as long as the pain and suffering are not “severe,” it is permissible to use physical force and to cause “discomfort.”²⁵²

The U.S. interrogation center at Bagram has come under increasing scrutiny. Military authorities are reportedly conducting a criminal investigation into the December 2002 deaths, in Bagram, of two Afghan detainees, deaths officially reported by a military pathologist as “homicide[s],” resulting in part from “blunt force trauma.”²⁵³

Lt. Gen. Daniel K. McNeill, the U.S. commander of the coalition forces in Afghanistan, acknowledged that prisoners at Bagram were being made to stand for long periods, though he denied accusations that prisoners had been chained to the ceiling or held in chains attached to the ceiling, and he insisted that prisoners are being properly treated in the center.²⁵⁴

In a related development, recent news reports also suggest that a number of detainees have been “rendered” — or transported for questioning — to foreign intelligence services, in countries where torture and other mistreatment are common police practices. One U.S. official explained to a reporter, “We don’t kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.”²⁵⁵ Favored destinations include Jordan, Egypt and Morocco.²⁵⁶ In at least one case, U.S. operatives managed the apprehension and transfer of a German citizen al Qaeda suspect to Syria (where he had been born), provoking strong protest from Germany.²⁵⁷

While “U.S. officials deny that they condone torture by allies in the campaign against terrorism,”²⁵⁸ the Pentagon has refused either to confirm or deny that any “renderings” from Guantanamo have occurred. On February 6, 2003, however, *Newsday* reported claims by Vincent Cannistraro, “former director of the CIA’s counterterrorism center,” that intelligence regarding possible links between Saddam Hussein and Islamic terrorism had been obtained “from a senior al-Qaida detainee who had been held in the U.S. base at Guantanamo, Cuba, and was ‘rendered’ to Egypt after refusing to cooperate. ‘They promptly tore his fingernails out and he started to tell things,’ [Cannistraro] said.”²⁵⁹

U.S. LAW PROHIBITS TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Any practice of torture or other cruel, inhuman or degrading treatment or punishment by United States officials violates international human rights standards to which the United States is a party. These include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), and the International Covenant on Civil and Political Rights.²⁶⁰

The use of torture also violates U.S. law. In 1994, Congress passed a new federal law which specifically provides for penalties including fines and up to 20 years’ imprisonment for acts of torture committed by American or other officials outside the United States. In cases where torture results in death of the victim, the sentence is life imprisonment or execution.²⁶¹

“Renderings” to countries known to engage in routine torture violate article 3 of the Torture Convention, which prohibits sending an individual to another state where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”²⁶² Such transfers, and even credible threats of such transfers, made to combatants detained in an armed conflict also violate article 17 of the Third Geneva Convention, which provides that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be *threatened*, insulted, or exposed to unpleasant or disadvantageous treatment of any kind” (emphasis added). Indeed, if committed against persons protected by the Geneva Conventions, “torture or inhuman treatment...[or] willfully causing great suffering or serious injury to body or health,” would all constitute “grave breaches” under the Geneva Conventions.²⁶³

Even if the practices alleged in the recent press reports do not constitute “torture,” article 16 of the Torture Convention obliges states not to commit “*other* acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” (emphasis added).²⁶⁴

When the U.S. Senate ratified this treaty, it construed this language as being consistent with U.S. domestic legal principles.²⁶⁵ This important international standard has been carefully interpreted by courts for the last 25 years.

In an important decision, *Judgment Concerning the Interrogation Methods Implied [sic] by the General Security Services*,²⁶⁶ in 1999, the Supreme Court of Israel ruled that even in the face of the “harsh reality” of continual terror unleashed against Israeli civilians, torture or cruel and inhuman treatment have no place in a democratic state, and must be prohibited. In a rigorous examination of the physically coercive interrogation practices employed by the Israeli General Security Services (GSS), the court insisted that two general principles must at all times be respected. These are:

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever....These prohibitions are ‘absolute.’ There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice.....

Second, a reasonable investigation is likely to cause discomfort. It may result in insufficient sleep. The conditions under which it is conducted risk being unpleasant. Indeed, it is possible to conduct an effective investigation without resorting to violence. Within the confines of the law, it is permitted to resort to various machinations and specific sophisticated activities which serve investigations today....In the end result, the legality of an investigation is deduced from the propriety of its purpose and from its methods. Thus, for instance, sleep deprivation for a prolonged period, or sleep deprivation at night when this is not necessary to the investigation time wise may be deemed a use of an investigation method which surpasses the least restrictive means.²⁶⁷

With these principles as a guide, the Israeli Supreme Court found a number of interrogation techniques to be absolutely forbidden under international and Israeli law, including: cuffing,²⁶⁸ hooding,²⁶⁹ loud music,²⁷⁰ deprivation of sleep,²⁷¹ and position abuse.²⁷²

The Israeli Supreme Court also emphasized that the effect of these individual treatments is enhanced when they are used together. When an interrogation position “includes all the outlined methods employed simultaneously....[t]heir combination, in and of itself gives rise to particular pain and suffering....particularly when it is employed for a prolonged period of time.”²⁷³

In 1978, the European Court of Human Rights dealt with a similar though not identical combination of interrogation methods, in that case examining the United Kingdom’s counter-terrorism efforts against the IRA. The five methods dealt with in *Ireland v. United Kingdom* were: protracted standing against the wall on the tip of one’s toes; covering the suspect’s head throughout the detention (except during the actual interrogation); exposing the suspect to powerfully loud noise for a prolonged period, and deprivation of sleep, and of food and drink.²⁷⁴

In *Ireland v. United Kingdom*, the European Court of Human Rights found that the combination of these five techniques

applied...for hours at a stretch...caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation....The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

Accordingly, the court held this conduct to be absolutely prohibited.²⁷⁵

A range of factors come into play in establishing whether a victim’s “pain or suffering” is so “severe” as to constitute “torture,” as distinct from other prohibited ill-treatment under the Torture Convention. As the European Court of Human Rights explained in 1999 in the case of *Selmouni v. France*, determining whether the treatment in a particular case constituted “torture” is “in the nature of things relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.”²⁷⁶

Recent European Court of Human Rights cases have stressed the fact that:

[T]he [European Convention on Human Rights] is a living instrument which must be interpreted in the light of present-day conditions....and that certain acts which were classified in the

past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in the future....[T]he increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.²⁷⁷

Courts that have been required to gauge the proper balance between the rights and dignity of the individual and the security of the nation have been highly sensitive to the dangers posed to civilized society by organized terrorist groups. As Israeli Supreme Court President Aharon Barak concluded in the *Judgment Concerning the Interrogation Methods Implied* [sic] *by the GSS*:

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual’s liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.²⁷⁸

The United States has played a leading role in making torture a crime punishable under universal jurisdiction, beginning with the Nuremberg trials. President Bush’s statement in his 2002 State of the Union Address, that “America will always stand firm for the non-negotiable demands of human dignity,” was consistent with this tradition of support for the highest international standards.

Today the universal standards the United States helped establish are at risk. When U.S. officials themselves boast that U.S. forces are using “stress and duress” interrogation techniques, this sends a message that human rights standards are flexible. An open door to physical and psychological mistreatment of those being questioned also can have a corrosive effect on the United States’ military and police institutions, its judiciary, and the integrity of its political process. It can devastate its claim to moral authority at home and abroad. Equally, it can set in motion a reversal of progress in halting torture and cruel, inhuman and degrading treatment of detainees around the world.

It is imperative now for senior U.S. officials to reaffirm the absolute prohibition of torture and other cruel, inhuman or degrading treatment everywhere. In cases where there are allegations of improper interrogation practices by U.S. forces, including recent reports of deaths in

custody, U.S. authorities must ensure prompt, thorough investigations leading to criminal prosecutions in cases where violations are discovered.

THE MILITARY COMMISSIONS

In a November 13, 2001 Military Order, President Bush authorized the trial of suspected (non-citizen) terrorists for “violations of the laws of war and other applicable laws” in military commissions, special tribunals that would side-step due process guarantees provided in the civilian courts as well as those of the United States military court system.²⁷⁹ The Order set out basic principles for these tribunals and requires the Secretary of Defense to develop the norms, regulations, and procedures under which they would operate — as well as appointing the officers to sit on them.

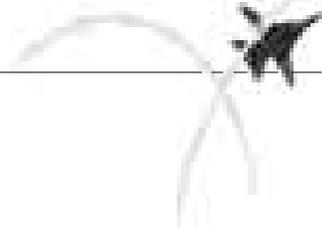
In issuing the order, President Bush cited his proclamation of a national emergency on September 14, 2001, as well as the war powers accorded him by Congress after the attacks.²⁸⁰ The special tribunals were said to be required to meet the demands of the emergency situation, although no provision was made for them to lapse at the conclusion of the emergency:

I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.²⁸¹

The new military commissions have yet to be convened. In February 2003, press reports indicated that the Defense Department was “working on final preparations for a system of military tribunals to prosecute suspected terrorists”; and that Defense Department lawyers had fought to limit their scope to war crimes.²⁸² At the end of February, an undated, 19-page Department of Defense draft was made available, entitled Military Commission Instruction, Subject: Crimes and Elements for Trials by Military Commission.²⁸³ The draft sets out crimes punishable under the laws and customs of war (war crimes), as well as crimes including Hijacking or Hazarding a Vessel or Aircraft, Terrorism, Murder by an Unprivileged Belligerent, Destruction of Property by an Unprivileged Belligerent, Spying, Perjury or False Testimony, and Obstruction of Justice Related to Military Commissions. The Department of Defense was allowing an unspecified but brief period for informal comments by the public, and reportedly intending to finalize and publish the instructions for the military commissions in March.

RECOMMENDATIONS

1. The administration should allow José Padilla and Yaser Hamdi access to legal counsel. These two U.S. citizens are now being held in military detention as “enemy combatants.”
2. The Department of Justice should work with the federal court in the case of Zacarias Moussaoui to develop appropriate procedures for reviewing relevant evidence, consistent with national security concerns.
3. With respect to those being held at Guantanamo, the administration has an affirmative obligation to develop and state publicly: 1) its criteria for holding such people in detention; and 2) a decision-making process and criteria for returning the detainees to their home countries. Many of these people have been held for a year or more. The U.S. government’s position that the detainees are “enemy combatants,” and that they may be held until the global war against terrorism is concluded, is untenable.
4. U.S. law prohibits U.S. military and law enforcement agents from resorting to physical or psychological mistreatment of detainees, even those held outside the United States. Senior administration officials should condemn such conduct unequivocally and make clear that violators will be punished.
5. The Department of Defense has commenced investigation of the December 2002 deaths of Mullah Habibullah and a man known by the single name Dilawar, two detainees held at the U.S. military base in Bagram, Afghanistan. If the investigation concludes that actions by U.S. agents contributed to their deaths, the responsible individuals should be prosecuted.



Chapter 5

THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS PROTECTION

INTRODUCTION

The response in the United States to the September 11 attacks has had profound implications for the promotion and implementation of human rights standards around the world. A significant number of governments have attempted to co-opt the war on terrorism, expressing support for U.S. measures while simultaneously labeling domestic opponents members of al Qaeda or similar terrorist groups. Leaders who were once criticized and marginalized in the global community for human rights abuses have been rehabilitated as key U.S. allies in the war against terrorism. In still other countries, repressive new laws and detention practices have been introduced, broadly justified by the new international climate.

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PROSECUTING “NATIONAL SECURITY” CASES

In the summer of 2002, Liberian President Charles Taylor began to apply the term “unlawful combatants” to independent journalists and human rights activists who have been vocal critics of his policies. Hassan Bility, an internationally respected journalist, was arrested in Monrovia on June 24, 2002 and held as an “unlawful combatant.”²⁸⁴ At the time of his arrest, he was the editor of the *Analyst*, an independent weekly newspaper that had published articles criticizing Taylor’s regime. As an “unlawful

combatant” Bility was held incommunicado in an undisclosed location, without access to a lawyer. He was tortured under interrogation.²⁸⁵

On October 24, 2002, the Liberian Defense Department stated that a military tribunal set up by President Taylor had determined that Bility was a “prisoner of war.”²⁸⁶ The Defense Department did not explain how the military tribunal had come to this decision. Then, on October 28, 2002, President Taylor announced that Bility would be released if he signed a statement “acknowledging” that he would be rearrested “in the event of violations.”²⁸⁷ Taylor did not specify what “violations” would trigger a rearrest, and the requirement was widely seen as an attempt to intimidate Bility from further criticizing the government.²⁸⁸

On December 7, 2002, the Liberian government released Bility into the custody of U.S. officials on the strict condition that he be escorted immediately from the country.²⁸⁹ According to John Blaney, the U.S. ambassador to Liberia, the United States considered “the removal of Hassan Bility’s case from the civilian system and the denial of due process as very worrisome for the future of the rule of law in Liberia.”²⁹⁰

Blaney’s comment was particularly noteworthy considering the Liberian government had explicitly invoked U.S. precedent to justify its treatment of Bility. During an interview with an American journalist, the Liberian Minister of Information, Reginald Goodridge, defended the “unlawful combatant” label, saying, “It was you guys [the U.S. government] who coined the phrase. We are using the phrase you coined.”²⁹¹ President Taylor also emphasized that Bility was being treated “in the same manner in which the U.S. treats terrorists.”²⁹²

Although Bility is now free, other journalists and human rights activists are still being held — including Sheikh K.M. Sackor, the Executive Director of Humanist Watch Liberia. Sackor was arrested in July 2002 and has been held in incommunicado detention without charge.²⁹³ In September 2002, a Liberian court held that Sackor could be tried in a military tribunal, which operates under the discretion of President Taylor.²⁹⁴

In Uganda, meanwhile, the government raided the offices of the country’s main independent daily newspaper on October 10, 2002. The *Monitor* was shut down for a week. According to security officials, the government launched the raid in response to an article reporting that the rebel Lord’s Resistance Army (LRA) had shot down an army helicopter in northern Uganda. The government denied the story and accused the *Monitor* of supporting “terrorists” by publishing “false news that alarmed the public.”²⁹⁵ On October 15, 2002, three editors at the *Monitor* were charged with “publishing articles that are contrary

to national security and that give comfort to the enemy.”²⁹⁶ The trial in their case is scheduled to begin on March 31, 2003.²⁹⁷

In making these arrests, the Ugandan government relied on a new antiterrorism law that came into effect in May 2002.²⁹⁸ Under the act, terrorism is defined very broadly as the “use of violence or threat of violence with intent to promote or achieve political, religious, economic, and cultural or social ends in an unlawful manner, and includes the use or threat to use, violence to put the public in fear or alarm.”²⁹⁹ Under this law, publishing news “likely to promote terrorism” is punishable by death.³⁰⁰

Since then, the Ugandan government has refused to back down. John Nagenda, the Presidential Advisor on the Media, insisted on November 15, 2002 that his government would offer no apologies for its response to the helicopter article.³⁰¹ “We shall get the people concerned, turn their places upside down and get the information — get where these lies come from...,” Nagenda said. “The laws will deal with people who give succor to the enemy fighting government during a war.”³⁰²

Independent journalists have also come under attack in Eritrea, along with human rights and democracy activists. On September 18, 2001, as world attention was diverted by the September 11 attacks, the Eritrean government arrested 11 former high-ranking officials and held them in incommunicado detention.³⁰³ Those arrested were part of a dissident group of ruling party members that had publicly criticized President Isaias Afewerki and pushed for peaceful democratic reform.³⁰⁴ The day of the arrests, the government also suspended all independent and privately owned newspapers in Eritrea for “threatening state security” and “jeopardizing national unity.”³⁰⁵

In the ensuing days, the government also arrested ten prominent journalists who had formally protested the government crackdown, including Yohannes Fesshaye, the noted Eritrean playwright. Fesshaye is the founding editor of the independent weekly *Setit*, which had been the largest-circulation newspaper in Eritrea before the suspensions were announced. The journalists continue to be held in incommunicado detention without charge, well over a year after their arrest. The government refuses to reveal the location or conditions of their detention.

In a recent interview with the *Washington Post*, Girma Asmerom, Eritrea’s Ambassador to the United States, insisted that locking up journalists like Fesshaye is “perfectly consistent” with democratic practice.³⁰⁶ As proof of this, according to the *Washington Post*, he “cited America’s roundup of material witnesses and suspected aliens.”³⁰⁷

Ambassador Asmerom has also claimed that the 11 former officials are being detained for “breaching national security,” and not for advocating democratic reforms.³⁰⁸ Spokesmen for the Eritrean government have suggested that the officials were agents of Osama Bin Laden.³⁰⁹

In the months following September 11, the U.S. administration kept its distance from Eritrea. This was in part because the Eritrean government had arrested two local employees of the U.S. Embassy in Asmara, hours after the U.S. Ambassador protested the government's actions.³¹⁰ In recent months, however, the Horn of Africa has assumed new importance in the war on terrorism, given its proximity to Yemen and Saudi Arabia. In December 2002, Defense Secretary Donald Rumsfeld visited Eritrea for the first time to show appreciation for Eritrea's cooperation with U.S. anti-terrorism efforts.³¹¹ When asked about the detainees during a stop in Asmara, Rumsfeld responded that a “country is a sovereign nation and they arrange themselves and deal with their problems in ways that they feel are appropriate to them.”³¹²

REVISED STANDARDS FOR NEW ALLIES

The “war on terrorism” has had far-ranging repercussions for U.S. foreign policy in many other areas around the globe. In the wake of September 11, the administration naturally had to rethink its strategic relationships with a variety of other countries. The nations surrounding Afghanistan soon assumed new significance, and the administration moved quickly to solidify existing relationships. American aid flowed into the region — to countries such as Pakistan, Uzbekistan, Kazakhstan, and Kyrgyzstan — despite widespread criticism of their individual human rights records.

Uzbekistan emerged as one of America's most important new allies given its southern border with Afghanistan. On October 12, 2001, the United States and Uzbekistan jointly announced that they “ha[d] decided to establish a qualitatively new relationship based on a long-term commitment to advance security and regional stability.”³¹³ Uzbekistan allowed the United States to use its military bases and deploy troops within its territory, and in return, the United States tripled its aid to Uzbekistan, to a total of \$160 million a year.³¹⁴ The Bush administration also encouraged the World Bank and the International Monetary Fund to increase assistance to the country.³¹⁵

The United States decided to increase military and economic aid to Uzbekistan, notwithstanding its longstanding criticism of the government's human rights record. The U.S. Department of State has been

particularly critical of the use of torture in Uzbek prisons as well as the repression of its independent Muslim population. According to the State Department's most recent Country Report on Human Rights Practices, for example, the government treats Islamic activity outside state-sponsored mosques as "an extremist security threat";³¹⁶ the arbitrary arrest and detention of Muslim believers remains common; and the security forces frequently plant "narcotics, weapons, or banned literature" on those arrested.³¹⁷ Furthermore, according to the State Department, "Both the police and the NSS [National Security Service] routinely tortured, beat, and otherwise mistreated detainees to obtain confessions, which they then used to incriminate the detainees. Police also used suffocation, electric shock, rape, and other sexual abuse."³¹⁸

Although U.S. officials have continued to emphasize the importance of reform (and Congress has required periodic updates on progress), the situation remains extremely precarious. Human rights activists in Uzbekistan have criticized the United States for failing to adequately pressure their government on human rights issues. Talib Yakubov, a member of the Human Rights Society of Uzbekistan, recently told a journalist, "The attitude of ... the whole U.S. administration shows that they have traded human rights in Uzbekistan for airfields."³¹⁹

The United States has also developed relationships with other countries newly-minted as "strategic" allies. In December 2002 U.S. Assistant Secretary of State William Burns announced that the United States would renew weapons sales and other security assistance to Algeria.³²⁰ Burns' announcement lifted a ban on U.S. aid that had been in effect since 1992, as a direct consequence of the government's abuse of human rights.³²¹ During much of this period, the Algerian government has been engaged in a violent conflict against militant Islamist groups, with atrocities committed on all sides. More than 100,000 people have been killed since the government cancelled the parliamentary elections in 1992.³²²

In announcing the renewed aid, Burns declared that "Washington has much to learn from Algeria on ways to fight terrorism."³²³ Over the last decade, Algeria has committed many egregious abuses in the name of fighting terrorism. Its security forces have been implicated in the systematic use of torture, forced "disappearances," arbitrary killings, and extrajudicial executions.³²⁴ Amnesty International has reported that Algeria's expansive anti-terrorism laws have led to the imprisonment of human rights lawyers who have been accused of "encouraging terrorist activities" when they represent clients with suspected links to armed groups.³²⁵

Long criticized for such abuses, the Algerian government is now trying to gloss over this history by heralding “an auspicious new era in international cooperation on counter-terrorism.”³²⁶ Indeed, in its first report to the Security Council’s Counter-Terrorism Committee in December 2001, Algeria welcomed the “present international team effort” as “corroborating its own consistently argued position on the nature of terrorism.”³²⁷ The government emphasized that Algeria had “long suffered the ravages of terrorism, often in the face of indifference and occasional complaisance” from the international community.³²⁸ It hoped that the new international climate would promise “clearer recognition and support” of its own anti-terrorism efforts.³²⁹

GROWING TREND TOWARD DRACONIAN ANTI-TERRORISM LAWS

More and more countries are adopting harsh new emergency laws, with explicit reference to the current climate of no-holds barred anti-terrorism. In Tanzania the parliament passed a sweeping new anti-terrorism law on November 5, 2002. The law gives the police and immigration officials the power to arrest suspected illegal immigrants or anyone thought to have links with terrorists, without first obtaining arrest warrants.³³⁰

In Indonesia, President Megawati Sukarnoputri signed two anti-terrorism regulations on October 18, 2002, in response to intense pressure from the United States and other countries.³³¹ Pressure on Indonesia had intensified after two car bombs exploded in Bali on October 12, 2002, killing nearly 200 people. Under the new regulations, people suspected of terrorism can be detained without trial for up to six months, and reports from intelligence agencies can be used as legal evidence.³³²

These kinds of security laws are especially controversial in Indonesia, given a history of abuses committed by the military and security services.³³³ The country is struggling to shore up its fledgling democracy after decades of authoritarian rule. Human rights activists have worried that the military might use the new climate as cover to reassert a more political role.³³⁴

Israel, meanwhile, has also adopted more stringent detention policies in the wake of September 11.³³⁵ On April 5, 2002, the Commander of the Israeli Army in the West Bank issued Military Order 1500.³³⁶ Under this order, “an IDF [Israeli Defense Force] officer of the rank of at least captain or a police officer of equivalent rank” could order a person to be held in incommunicado detention for up to 18 days, without access

to an attorney or to a court. The person could be detained in these conditions if “from the circumstances of his arrest arose a suspicion that he endangers or could potentially endanger the security of the region, of IDF forces, or of the public.”³³⁷ As of January 2003, the IDF was holding more than 1,000 Palestinians in administrative detention, up from 36 administrative detainees a year earlier.³³⁸

Seven human rights groups, including B’Tselem, Physicians for Human Rights, and Adalah, challenged the legality of Military Order 1500 in a petition to the Israeli High Court of Justice.³³⁹ After the petition was filed, the IDF reduced the maximum period of detention without access to a judge to 12 days, and changed the period without access to a lawyer to two days (with a possible 15-30 day extension).³⁴⁰ On February 6, 2003, the Israeli High Court upheld the clause preventing detainees from meeting with their lawyers, but found that the detainees could not lawfully be held for 12 days without access to a judge.³⁴¹ The Court gave the IDF six months to adapt the order to the requirements of Israeli and international law.³⁴²

Pakistan has also adopted a more stringent detention policy. In November 2002, the government promulgated a new Anti-Terrorism Ordinance, which allows the police to arrest terrorism suspects and detain them for a year without charge.³⁴³ Under the previous law, the authorities could detain suspects for up to three months.³⁴⁴ The new ordinance was approved by President Pervez Musharraf’s military-led cabinet, rather than by Pakistan’s newly elected legislature.³⁴⁵

The Pakistan People’s Party, the party of former Prime Minister Benazir Bhutto, condemned the ordinance, expressing fears that it would be used to silence members of the political opposition.³⁴⁶ Zia Ahmed Awan, president of the Karachi-based Lawyers for Human Rights and Legal Aid (LHRLA), also criticized the ordinance. Awan said that the order “will only increase the victimization of ordinary people at the hands of the police and other law enforcement agencies.”³⁴⁷

CONCLUSION

Nations around the world have had to grapple with difficult questions of national security in the wake of September 11. In determining how to respond, many governments have followed the U.S. lead, adopting expansive new anti-terrorism laws and practices. Other governments have seized upon the rhetoric of the “war on terrorism” to justify their own repressive policies — insisting that domestic opponents pose a similar terrorist threat.

The actions of the U.S. government are being closely followed and emulated by other governments around the world. The United States must address security concerns in a manner consistent with the fundamental principles of human rights. By turning its back on these principles, the United States forfeits the very values for which it claims to be fighting.

RECOMMENDATIONS

1. The United States government should speak in a unified voice about the importance of upholding international human rights standards. The Department of Defense should not be allowed to undermine efforts by the Department of State to criticize human rights abuses in other countries, for example, no matter how strategically important those countries might be for the “war on terrorism.”
2. The United States should repeatedly and publicly condemn attempts by other governments to use the war on terrorism as a cover to repress independent journalists, human rights activists, or other domestic critics.
3. As a signal to the rest of the world that it takes its human rights obligations seriously, the United States should submit a report to the U.N. Human Rights Committee on the current state of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR). The United States ratified the ICCPR in 1992, but has not reported to the Human Rights Committee since 1994.

Imbalance of Powers

RECOMMENDATIONS

CHAPTER 1: OPEN GOVERNMENT

1. The attorney general should rescind the October 12, 2001 directive on the implementation of the Freedom of Information Act (FOIA), which encourages the presumptive refusal of requests. He should restore guidelines in keeping with the express intent of the law to promote open government.
2. Congress should hold hearings on the “critical infrastructure information” exemption to FOIA contained in Section 214 of the Homeland Security Act. Congress should amend the exemption to ensure that sufficient information is available under FOIA to help people protect themselves and to create safety incentives for the private companies that control most of the country’s “critical infrastructure.”
3. Congress should amend the Homeland Security Act, section 871, to remove exemptions of its advisory committees from the provisions of the Federal Advisory Committee Act.
4. Congress should reaffirm the mandate and independence of the General Accounting Office to act as its agent in seeking information from the executive.
5. Congress should hold oversight hearings into the implementation of USA PATRIOT aimed at upholding the principle of open government.
6. Congress should hold hearings into any proposals to enhance executive prerogatives under USA PATRIOT and into the secretive drafting of the “Domestic Security Enhancement Act of 2003.”

CHAPTER 2: RIGHT TO PRIVACY

1. Congress should amend the Homeland Security Act to give the agency’s Privacy and Civil Rights Officers full access to information, enforcement authority and resources.

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2. Congress should amend the Homeland Security Act to establish a designated official within the Inspector General's office to receive complaints regarding specific violations of civil rights.
 3. Congress should amend article 215 of the USA PATRIOT Act to restore safeguards against abuse of the seizure of business records, and in particular the records of libraries, bookstores, and educational institutions where seizure poses a particular risk of endangering freedom of expression.
 4. Congress should require regular reports of the use by federal authorities of special powers to seize personal records, disaggregating data so that measures involving the records of libraries, bookstores, and schools are clear.
 5. Congress should hold hearings on the use of data-mining of personal information within the United States, by public and private agencies, and its implication on the right of privacy and on the data protection norms required to safeguard against abuse.
 6. Congress should prohibit the Department of Defense from pursuing its Total Information Awareness (TIA) data-mining program.
 7. Congress should enact legislation requiring any governmental or government contractor's use of data-mining techniques to be in accord with public guidelines based on the highest data protection and privacy standards, which are developed on the basis of broad consultations.
 8. Congress should hold detailed hearings on any proposals by the Executive Branch to increase its powers under the Foreign Intelligence Surveillance Act (FISA).
 9. Congress should amend Section 218 of the USA PATRIOT Act, giving the FBI authority to use its FISA powers only when foreign intelligence gathering is the "primary purpose" of the warrant application under FISA.

CHAPTER 3: TREATMENT OF IMMIGRANTS, REFUGEES AND MINORITIES

1. The Bush Administration should take immediate steps to dramatically improve the pace of its refugee resettlement operations so that it will meet its promise of providing safe haven to at least

50,000 refugees. These steps should include the provision of the resources needed to ensure that refugee processing and all necessary security checks are conducted in an accurate and timely manner.

2. The administration should end its discriminatory treatment of Haitian asylum seekers in Florida. Specifically, it should abandon its policy of blanket detention of Haitian asylum seekers and its reliance on summary “expedited removal” procedures for Haitians and others arriving by sea. The administration should also take steps to ensure that all asylum seekers have access to fair and non-discriminatory release procedures, including the opportunity to have an independent authority (or an immigration judge) review the basis for their detention.
3. The U.S. government should ensure that security clearance procedures are conducted in a timely manner and should correct the problems that are currently causing excessive delays — delays that are leaving asylum seekers and other detainees who are otherwise eligible for release detained for months or longer. The administration should comply with the request by the Inter-American Commission on Human Rights calling for measures to protect the rights of asylum seekers and others in detention who have been found eligible for release.
4. The Office of the Inspector General of the Department of Justice is due to release a report on alleged abuse of authority in connection with post-September 11 detentions. Once the report is made public, the attorney general should act expeditiously to address concerns raised by this report.
5. Recent federal regulations and downsizing of the Board of Immigration Appeals (BIA) have deprived asylum seekers of meaningful appellate review. These regulations should be rescinded, and the capacity of the BIA should be restored.
6. Congress should review the Safe Third Country Agreement with Canada, with a view to restoring protections for refugees whose cases are affected by the agreement.
7. The Department of Homeland Security should create specific mechanisms at high levels to ensure that the interests of asylum seekers and refugees — including those who are subject to the jurisdiction of the new immigration “enforcement” bureaus within DHS — are protected within the new Department.

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8. The attorney general should rescind the September 2001 memorandum from Chief Immigration Judge Michael Creppy which imposes a blanket ban on access to deportation hearings, which the government defines as “special interest” cases.
 9. Consistent with U.S. legal obligations, immigration authorities should refrain from returning any person to a place where there is a substantial likelihood that he or she will be subjected to torture.
 10. The administration should discontinue the National Security Entry-Exit Registration System (NSEERS), the so-called “special registration” program. This program is discriminatory in nature, ineffective and inefficient as a law enforcement strategy, and creates widespread ill-will in Arab-American and Muslim communities across the country.

CHAPTER 4: SECURITY DETAINEES AND THE CRIMINAL JUSTICE SYSTEM

1. The administration should allow José Padilla and Yaser Hamdi access to legal counsel. These two U.S. citizens are now being held in military detention as “enemy combatants.”
2. The Department of Justice should work with the federal court in the case of Zacarias Moussaoui to develop appropriate procedures for reviewing relevant evidence, consistent with national security concerns.
3. With respect to those being held at Guantanamo, the administration has an affirmative obligation to develop and state publicly: 1) its criteria for holding such people in detention; and 2) a decision-making process and criteria for returning the detainees to their home countries. Many of these people have been held for a year or more. The U.S. government’s position that the detainees are “enemy combatants,” and that they may be held until the global war against terrorism is concluded, is untenable.
4. U.S. law prohibits U.S. military and law enforcement agents from resorting to physical or psychological mistreatment of detainees, even those held outside the United States. Senior administration officials should condemn such conduct unequivocally and make clear that violators will be punished.

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5. The Department of Defense has commenced investigation of the December 2002 deaths of Mullah Habibullah and a man known by the single name Dilawar, two detainees held at the U.S. military base in Bagram, Afghanistan. If the investigation concludes that actions by U.S. agents contributed to their deaths, the responsible individuals should be prosecuted.

CHAPTER 5: THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS PROTECTION

1. The United States government should speak in a unified voice about the importance of upholding international human rights standards. The Department of Defense should not be allowed to undermine efforts by the Department of State to criticize human rights abuses in other countries, for example, no matter how strategically important those countries might be for the “war on terrorism.”
2. The United States should repeatedly and publicly condemn attempts by other governments to use the war on terrorism as a cover to repress independent journalists, human rights activists, or other domestic critics.
3. As a signal to the rest of the world that it takes its human rights obligations seriously, the United States should submit a report to the U.N. Human Rights Committee on the current state of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR). The United States ratified the ICCPR in 1992, but has not reported to the Human Rights Committee since 1994.

Endnotes

¹ *A Year of Loss: Reexamining Civil Liberties since September 11* is available at: http://www.lchr.org/us_law/loss/loss_main.htm.

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⁴ 5 U.S.C. Appendix 2.

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¹¹ See Dan Caterinicchia, "Sharing Seen as Critical for Security," *Federal Computer Week*, May 9, 2002.

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¹⁶ H.R. Rep. No. 107-609, p. 220 (2002).

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- ²⁷ See The Homeland Security Act of 2002, § 871.
- ²⁸ See 5 U.S.C. App. 2 (1972).
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⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ See, e.g., *Ibid.*; Jack Balkin, “A Dreadful Act II: Secret Proposals in Ashcroft’s Anti-Terror War Strike Yet Another Blow at Fundamental Rights,” *Los Angeles Times*, February 13, 2003.

⁶² Jesse H. Holland, “Ashcroft, Mueller, Ridge Talk to Senate Committee about Terrorism Battle,” Associated Press, March 4, 2003.

⁶³ *Ibid.*

⁶⁴ U.S. Supreme Court, *Afroyim v. Rusk*, 387 U.S. 253 (1967), BLACK, J., Opinion of the Court.

⁶⁵ Senate Judiciary Committee, Hearing on the War against Terrorism, March 4, 2003, testimony of U.S. Attorney General John Ashcroft, Homeland Security Secretary Tom Ridge, and Federal Bureau Of Investigation Director Robert Mueller, Federal News Service, March 4, 2003.

⁶⁶ Under current law, it is up to the judge to determine how much of the government's application to consider *in camera* and *ex parte*. See Timothy Edgar, "Interested Persons Memo: Section-by-Section Analysis of Justice Department draft 'Domestic Security Enhancement Act of 2003,' February 14, 2003, p. 10, available at <http://www.aclu.org/news/NewsPrint.cfm?ID=11835&c=206> (accessed March 10, 2003).

⁶⁷ *Ibid.* Rule 6(e) of the Federal Rules of Criminal Procedure requires attorneys and grand jurors to refrain from publicly commenting on "matters occurring before the grand jury." The current rule does not apply to grand jury witnesses.

⁶⁸ See Chuck Grassley, "Grassley Seeks Whistleblower Protections for New Federal Employees Senator Says Public Safety and Security at Stake," Press Release, June 26, 2002, available at <http://www.senate.gov/~grassley/releases/2002/p02r6-26b.htm> (accessed January 19, 2003).

⁶⁹ *Ibid.*

⁷⁰ Senators Patrick Leahy, Charles Grassley, and Arlen Specter, "Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures," pp. 5-6, February 2003, available at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (accessed March 5, 2003).

⁷¹ *Ibid.*, p. 32.

⁷² *Ibid.*

⁷³ *Ibid.*, p. 1.

⁷⁴ *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

⁷⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

⁷⁶ John Ashcroft, "Welcoming Big Brother," *Washington Times*, August 12, 1997. Mr. Ashcroft wrote this op-ed as a U.S. senator, in response to a request by the Clinton administration for increased authority to survey high-tech communications.

⁷⁷ Electronic Privacy Information Center, EPIC Briefing on Total Information Awareness, available at http://www.epic.org/events/tia_briefing/ (accessed December 9, 2002).

⁷⁸ The American Library Association puts this simply on its website: "Libraries or librarians served with a search warrant issued under FISA rules may not disclose, under of penalty of law, the existence of the warrant or the fact that records were produced as a result of the warrant. A patron cannot be told that his or her records were given to the FBI or that he or she is the subject of an FBI investigation." Available at <http://www.ala.org/alaorg/oif/usapatriotlibrary.html> (accessed February 20, 2003).

⁷⁹ "Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation," submitted with letter of Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr., July 26, 2002, question 12, available at <http://www.house.gov/judiciary/patriotresponses101702.pdf> (accessed February 20, 2003).

⁸⁰ Dana Hull, "Libraries Face Privacy Test," *Mercury News*, October 18, 2002; Eleanor J. Bader, "Thought Police: Big Brother May be Watching What You Read," *In These Times*, October 25, 2002.

⁸¹ Special Libraries Association, Press Release, January 9, 2003, “Report on the USA Patriot Act Videoconference,” available at <http://www.sla.org/content/memberservice/communication/pr/presrelease/2303.cfm> (accessed February 20, 2003).

⁸² American Booksellers Federation for Free Expression, “ABFFE Sues Justice Department for Data on Patriot Act Subpoenas,” available on <http://www.abffe.com/>. The full text of the lawsuit is available at http://www.epic.org/privacy/terrorism/patriot_foia_complaint.pdf (accessed February 24, 2003). The American Civil Liberties Union (ACLU) and the Electronic Privacy Information Center (EPIC) were also parties to the suit.

⁸³ “We’re just a small business trying to make a living, and I do not relish the idea of standing up against the F.B.I.,” said Ken Kurtis, one of the owners of Reef Seekers. “But I think somebody’s got to do it.” Michael Moss and Ford Fessenden, “New Tools for Domestic Spying, and Qualms,” *New York Times*, December 10, 2002.

⁸⁴ *Ibid.*

⁸⁵ See 50 U.S.C. § 1801-1811, 1821-1829, 1841-1846, 1861-62.

⁸⁶ See, e.g., Senators Patrick Leahy, Charles Grassley, and Arlen Specter, “Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures,” p. 5, February 2003, available at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (accessed March 5, 2003).

⁸⁷ In determining whether there is probable cause to issue a traditional criminal warrant, the issuing judge makes “a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

⁸⁸ See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, p. 5, available at <http://www.fas.org/irp/agency/doj/fisa/fisc051702.html> (accessed March 4, 2003).

⁸⁹ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review, November 18, 2002, p. 34, available at <http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf>. See also David Cole, “Secret Court Takes the Fourth,” *CounterPunch*, November 22, 2002 (noting that FISA does not require probable cause of a crime), available at <http://www.counterpunch.org/cole1122.html> (accessed March 5, 2003).

⁹⁰ Anita Ramasastry, “The Foreign Intelligence Surveillance Court of Review Creates a Potential End Run Around Traditional Fourth Amendment Protections for Certain Criminal Law Enforcement Wiretaps,” *FindLaw Legal Commentary*, November 26, 2002, available at <http://writ.news.findlaw.com/ramasastry/20021126.html> (accessed March 5, 2003).

⁹¹ 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. 5-6.

⁹² *Ibid.*, p. 9.

⁹³ See, e.g., Anita Ramasastry, “Why the Foreign Intelligence Surveillance Act Court Was Correct to Rebuke the Department of Justice,” *FindLaw Legal Commentary*, September 4, 2002, available at <http://writ.news.findlaw.com/ramasastry/20020904.html> (accessed March 3, 2003).

⁹⁴ See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002.

⁹⁵ Section 208 of the USA Patriot Act called for the appointment of 11 federal judges to the Foreign Intelligence Surveillance Court. At the time the decision was issued, however, only seven 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.

⁹⁶ See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, p. 14.

⁹⁷ The judges on the Foreign Intelligence Surveillance Court of Review are: (1) Honorable Ralph Guy; (2) Honorable Edward Leavy; and (3) Honorable Laurence Silberman.

⁹⁸ See David Cole, "Secret Court Takes the Fourth," November 22, 2002, available at <http://www.counterpunch.org/cole1122.html> (accessed March 4, 2003).

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¹⁰⁰ See *Ibid.*, pp. 24-27.

¹⁰¹ See *Ibid.*, pp. 28-30.

¹⁰² See, e.g., Ramasastry, "The Foreign Intelligence Surveillance Court of Review," *FindLaw Legal Commentary*, November 26, 2002, (explaining that criminal law enforcement can now "legally direct, or at least heavily influence, FBI investigations related to foreign intelligence").

¹⁰³ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review., pp. 29-30.

¹⁰⁴ *Ibid.*, p. 30. See also Charles Lane, "In Terror War, 2nd Track for Suspects," *Washington Post*, December 1, 2002.

¹⁰⁵ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review., pp. 28-30.

¹⁰⁶ See Draft Domestic Security Enhancement Act of 2003, January 9, 2003, available at http://www.pulicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (accessed March 5, 2003).

¹⁰⁷ See, e.g., Timothy Edgar, "Interested Persons Memo: Section-by-Section Analysis of Justice Department draft 'Domestic Security Enhancement Act of 2003,' February 14, 2003, p. 4, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206> (accessed March 5, 2003).

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¹²⁹ See “IRSA Applauds Congress’ Appeal to President Bush for Increased Refugee Admissions,” September 27, 2002, available at <http://www.refugees.org/news/crisis/resettlement/092702.cfm> (accessed March 6, 2003). In a December 31, 2002 letter to Special Assistant to the President Elliot Abrams, Representative Smith again called for action “to ensure that our nation maintains its role as a beacon of freedom through maintaining a strong refugee program.” Letter, Representative Christopher H. Smith to Special Assistant to the President Elliot Abrams, December 31, 2002, available at http://www.refugeesusa.org/preview/help_ref/abrams_admissions.pdf (accessed March 6, 2003).

¹³⁰ On January 16, 2003, the Hebrew Immigrant Aid Society, writing on behalf of the Refugee Council USA, a coalition of faith-based and non-sectarian agencies (which includes the Lawyers Committee), wrote to Secretary of State Colin Powell to express concern about the attempted freeze on the admission of Iraqi refugees: “America’s founding father, George Washington, wrote that the United States gives bigotry no sanction and persecution no assistance. Racial and ethnic-based policies such as outright bans on certain nationalities irrespective of the merit of their refugee claims demonstrate a failure to heed Washington’s words.”

¹³¹ See 66 Fed. Reg. 54909-54912. See also Lawyers Committee for Human Rights, “A Year of Loss: Reexamining Civil Liberties since September 11,” p. 18, available at http://www.lchr.org/us_law/loss/loss_ch3a.htm (accessed March 6, 2003).

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¹³⁴ Women’s Commission for Refugee Women & Children, *Refugee Policy Adrift: The United States and Dominican Republic Deny Haitians Protection*, January 2003, p. 31, n. 229 (citing INS brief in bond hearing).

¹³⁵ *Ibid.* p. 31, n.233 (citing Declarations of Captain Kenneth Ward, U.S. Coast Guard; Memorandum to Stephen E. Biegun, National Security Council, from Maura Harty, Department of State; Declaration of Joseph J. Collins, Department of State).

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¹⁴⁰ 67 Fed. Reg. at 68924.

¹⁴¹ *Ibid.*

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¹⁴⁴ *Ibid.*

¹⁴⁵ See Letter from the Inter-American Commission on Human Rights to Gay McDougall, International Human Rights Law Group, dated September 26, 2002, available at http://www.hrlawgroup.org/resources/content/IACHR_Award.pdf (accessed December 2, 2002).

¹⁴⁶ *Ibid.*

¹⁴⁷ See Warren Richey, “Court to Clarify the Rights of Noncitizens,” *Christian Science Monitor*, January 14, 2003.

¹⁴⁸ U.S. Department of Justice, Office of the Inspector General, “Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act,” January 22, 2003, available at http://www.usdoj.gov/oig/special/2003_01a/final.pdf (accessed March 5, 2003).

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¹⁵⁶ Adam Clymer, “Government Openness at Issue as Bush Holds Onto Records,” *New York Times*, January 3, 2003.

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¹⁸³ Congress authorized in 1996 the creation of an entry-exit system, as part of the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996," Immigration and Nationality Act, 110, 8 U.S.C. 1365a and the USA PATRIOT Act, 414. But the current registration program, as designed and implemented by the Justice Department, is dramatically flawed in carrying out this objective. Several members of Congress have objected to the manner in which their intent has been interpreted. See, e.g., Letter to Attorney General John Ashcroft from U.S. Senator Russell D. Feingold, U.S. Senator Edward M. Kennedy and U.S. Representative John Conyers, Jr., December 23, 2002, available at http://www.house.gov/judiciary_democrats/dojentryexittr122302.pdf (accessed January 23, 2003).

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- ¹⁹⁶ The administration has used the term "unlawful combatant" to stress that the detainees are not considered "prisoners of war." A basis for this claim is the supposed failure of al Qaeda and the Taliban to comply with the laws of war. For similar reasons, and with similar intent, the government has also used the term "enemy combatant" to describe these individuals. As used by the administration, the two terms are interchangeable.
- ¹⁹⁷ Article 118 of the Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (the Third Geneva Convention), provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The Third Geneva Convention is available at <http://www.icrc.org/ihl.nsf/WebCONVFULL/OpenView> (accessed February 10, 2003).
- ¹⁹⁸ See, e.g., Complaint in the case of *Odah, et al., v. United States of America, et al.* (D. D.C., May 1, 2002) ("The Family Members believe that the Kuwaiti Detainees were in Afghanistan or Pakistan, some before and some after September 11, 2001, as volunteers for charitable purposes to provide humanitarian aid to the people of those countries...[and] that none of the Kuwaiti Detainees is or ever has been a member or supporter of al Qaida or the Taliban, or of any terrorist organization.")
- ¹⁹⁹ "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 February 10, 2003).
- ²⁰⁰ The June 9, 2002 Order designating Padilla as an "enemy combatant" is available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush60902det.pdf> (accessed March 7, 2003).
- ²⁰¹ The entire opinion, *José Padilla v. George Bush, et al.*, and certain other documents relating to the case, are available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (accessed January 27, 2003). Some other materials on the case, not available on the findlaw site, can be accessed through the National Institution of Military Justice website, available at <http://www.nimj.com>.
- ²⁰² Benjamin Weiser, "Lawyers Renew Plea to Meet Terror Suspect in Navy Brig," *New York Times*, January 14, 2003.
- ²⁰³ Benjamin Weiser, "Judge Affirms Terror Suspect Must Meet With Lawyers," *New York Times*, March 12, 2003.
- ²⁰⁴ The text of the statute is available at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=4001 (accessed January 27, 2003).

²⁰⁵ P.L. No. 107-40, § 2(a)(2001), available at <http://jurist.law.pitt.edu/terrorism/sjres23.htm> (accessed January 27, 2003). Section 4001(a), passed in 1971 “amid mounting public pressure during the Vietnam War... represented a legislative response to the outrage over the executive interment of Japanese Americans during World War II, detentions carried out pursuant only to a presidential order.” Stephen I. Vladeck, “A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen ‘Enemy Combatants,’” 112 *Yale Law Journal* 961, January 2003.

²⁰⁶ *José Padilla v. George Bush, et al.*

²⁰⁷ *Ex Parte Quirin*, 317 U.S. 1 (1942), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=317&invol=1> (accessed February 12, 2003). Due to the rushed pace of the proceedings (less than nine weeks from landing to execution of six of the saboteurs), the *Quirin* case has received much criticism from commentators. It is often mentioned together with another much criticized World War II Supreme Court case, *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld President Roosevelt’s authority to order the internment of tens of thousands of citizens and non-citizens of Japanese extraction. *Korematsu* is available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=323&invol=214> (accessed February 12, 2003). A good analysis of the *Quirin* case is Louis Fisher, “Military Tribunals: The *Quirin* Precedent,” *Congressional Research Service Report for Congress*, RL31340, March 26, 2002, available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31340.pdf> (accessed February 13, 2003).

²⁰⁸ The Memorandum of Law is available through the website of the National Institute of Military Justice, <http://www.nimj.com> (accessed February 11, 2003).

²⁰⁹ The Memorandum argues for the “clear and convincing” standard by analogy to the Bail Reform Act, 18 U.S.C. § 3142, which permits (in paragraph (f)) pre-trial detention of criminal defendants who may pose a danger to the community only when the government shows “that no condition or combination of conditions will reasonably assure the safety of any other person and the community... by clear and convincing evidence.” The Bail Reform Act can be found at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=3142 (accessed February 11, 2003). The Act was upheld by the Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=481&page=739> (accessed February 11, 2003).

²¹⁰ *See, e.g.*, Barak Dehghanpishen, John Barry and Roy Gutman, “The Death Convoy of Afghanistan,” *Newsweek*, August 26, 2002, describing the gruesome “death by container” inflicted by Dostum’s forces in November 2001 on hundreds of unarmed surrendered Taliban soldiers. The soldiers were locked into sealed shipping containers and left to suffocate. *See also* Michael Griffin, “A Gruesome Record,” *Guardian*, November 16, 2001, describing the capture of Kabul in 1992 by mujahadin forces including “Dostum’s mounted militia... who... fell upon the civilian population, leaving many dead in their wake.”

²¹¹ Order in the case of *Hamdi, et al., v. Rumsfeld, et al.* (E.D. Va., August 16, 2002).

²¹² *Ibid.*

²¹³ The Fourth Circuit begins its analysis by rejecting in short order the relevance of 18 U.S.C. § 4001 (a), on substantially the same grounds as Judge Mukasey in the *Padilla* ruling.

²¹⁴ The opinion, *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003) is available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003). Other documents relating to the *Hamdi* case can be found at <http://news.findlaw.com/legalnews/us/terrorism/cases/> (accessed January 27, 2003). *See also* Neil A. Lewis, “Threats and Responses: The Courts; Detention Upheld in Combatant Case,” *New York Times*, January 9, 2003.

²¹⁵ *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).

²¹⁶ This is the standard that Judge Mukasey appears to be considering in the *Padilla* case, as described above.
²¹⁷ 317 U.S. 1 (1942).

²¹⁸ *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003) (quoting *Ex Parte Quirin*), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ Hamdi's lawyer, Frank Dunham, insists that "Nobody knows what his version of the facts might be." Nat Hentoff, "Liberty's Court of Last Resort," *Village Voice Online*, January 24, 2003, available at <http://www.villagevoice.com/issues/0305/hentoff.php> (accessed January 27, 2003).

²²² *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ See, e.g., David E. Sanger and Felicity Barringer, "President Readies U.S. for Prospect of Imminent War," *New York Times*, March 7, 2003: "Mr. Bush...said Sept. 11 'should say to the American people that we're now a battlefield.'" Earlier in its January 3 opinion, the Fourth Circuit quotes its own previous ruling in the same proceeding, noting that the "political branches are best positioned to comprehend this *global* war in its full context" (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (emphasis added)).

²²⁶ *Hamdi, et al., v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).

²²⁷ Henry Weinstein, "ABA Opposes Bush 'Enemy Combatants' Policy," *Los Angeles Times*, February 11, 2003.

²²⁸ See Attorney General Transcript News Conference regarding Zacarias Moussaoui, December 11, 2001, announcing the indictment of Moussaoui, available at http://www.fas.org/irp/world/para/docs/mous_indict.html (accessed February 12, 2003). The Transcript web page includes a link to the Indictment, issued that day. Other court documents in the Moussaoui case can be found at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (accessed February 12, 2003).

²²⁹ "Under interrogation, Bin al-Shibh has reportedly given the CIA some valuable information, but also one highly unwelcome tidbit: Al Qaeda thinks Moussaoui is as crazy as we do." Jonathan Turley, "Sanity and Justice Slipping Away," *Los Angeles Times*, February 10, 2003.

²³⁰ "Moussaoui Granted Access to Suspect," Reuters, February 1, 2003.

²³¹ Philip Shenon, "Judge Grants the Government a Delay of Moussaoui's Trial," *New York Times*, February 13, 2003. The original Order and the government's appeal have not been made public. The request for the stay is available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss20703pmt.pdf> (accessed February 12, 2003).

²³² See Philip Shenon and Eric Schmitt, "Threats and Responses: The 9/11 Suspect; White House Weighs Letting Military Tribunal Try Moussaoui, Officials Say," *New York Times*, November 10, 2002; See also Andrew Cohen, "A Secret Trial for Moussaoui?," *CBS News.com*, November 7, 2002, available at <http://www.cbsnews.com/stories/2002/11/07/news/opinion/courtwatch/main528515.shtml> (accessed January 27, 2003). See also Jonathan Turley, "Sanity and Justice Slipping Away," *Los Angeles Times*, February 10, 2003; "The Moussaoui Experiment," *Washington Post*, January 27, 2003.

²³³ See Greg Frost, "Shoe-Bomber Pleads Guilty, Admits Bin Laden Link," Reuters, October 4, 2002; Associated Press, "U.S. Prosecutors Submit Videos Simulating 'Shoe Bomb' Damage," *Wall Street Journal*, January 17, 2003.

²³⁴ "Shoe Bomber Leaves Behind A Legacy," CBS News.com, January 31, 2003, available at <http://www.cbsnews.com/stories/2002/10/04/attack/main524340.shtml> (accessed February 12, 2003).

²³⁵ Juliette Kayyem, "The Sentencing of 'Shoe Bomber' Richard Reid: Its Larger Significance for Terrorism Cases and the 'War on Terrorism' in General," Findlaw.com, available at http://writ.news.findlaw.com/commentary/20030203_kayyem.html (accessed February 12, 2003).

²³⁶ "Transfer of Detainees Completed," *Department of Defense News Release*, October 28, 2002, available at http://www.dod.mil/news/Oct2002/b10282002_bt550-02.html (accessed March 2, 2004); "Three Afghans Home from Guantanamo," Associated Press, October 28, 2002; Todd Pittman, "Former Detainees Recount Life at Guantanamo," Associated Press, October 29, 2002.

²³⁷ Paisley Dodds, "New Suspects Arrive at Guantanamo Bay," Associated Press, February 7, 2003; "U.S. Adds 30 Detainees to GITMO," Reuters, October 28, 2002.

²³⁸ Don van Natta Jr., "Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, March 9, 2003. Authorities will be opening a special ward for detainees with mental problems. "U.S. Plans Mental Ward for Detainees," Associated Press, March 7, 2003.

²³⁹ Neil A. Lewis, "Judge Rebuffs Detainees at Guantanamo," *New York Times*, August 1, 2002.

²⁴⁰ See Neil A. Lewis, "Guantanamo Prisoners Seek to See Families and Lawyers," *New York Times*, December 3, 2002.

²⁴¹ The cases are *Rasul, et al. v. George Walker Bush, et al.*, and *Odah, et al. v. United States of America, et al.* Some of the filings in the *Rasul* case are available at <http://www.campxray.net/page2.html> (accessed March 7, 2003). United States Court of Appeals, for the District of Columbia Circuit, Argued December 2, 2002, decided March 11, 2003, No. 02-5251, *Khaled A.F. Al Odah, et. al., v. United States of America, et al.*

²⁴² *Abassi v. Secretary of State*, entire opinion available on the website of the National Institute of Military Justice, <http://nimj.com> (accessed January 27, 2003). See Neil A. Lewis, "British Judges Criticize U.S. on the Prisoners Held at Guantanamo," *New York Times*, November 8, 2002.

²⁴³ See Bill Gertz and Rowan Scarborough, "Notes from the Pentagon: GITMO Dispute," *Washington Times*, October 4, 2002, available at <http://www.washtimes.com/national/20021004-92332157.htm> (accessed January 27, 2003); "GITMO Camp Commander Relieved," *Washington Post*, October 14, 2002. Article 41 of the Third Geneva Convention provides that "[i]n every [prisoner of war] camp the text of the [Third Geneva] Convention... shall be posted, in the prisoners' own language, in places where all may read them."

²⁴⁴ Greg Miller, "Many Held at Guantanamo Not likely Terrorists," *Los Angeles Times*, December 22, 2002; John Mintz, "Detainees at Base in Cuba Yield Little Valuable Information," *Washington Post*, October 29, 2002.

²⁴⁵ Greg Miller, "Many Held at Guantanamo Not Likely Terrorists," *Los Angeles Times*, December 22, 2002. As an example of the inflexibility of the screening procedures, Miller quotes one interrogator in Afghanistan describing a restaurant worker picked up near the Pakistani border who "had the mental capacity to put flatbread in an oven and that was the extent of the intellect....He never got trained on a rifle, never got pressed into service. But he was Arab by birth so he was picked up and sent away."

²⁴⁶ John Mintz, "Detainees at Base in Cuba Yield Little Valuable Information," *Washington Post*, October 29, 2002.

²⁴⁷ Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002.

²⁴⁸ Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002. One U.S. official told reporters "in a deadpan voice, that 'pain control [in wounded patients] is a very subjective thing.'" In March, 2003, U.S. officials acknowledged to a reporter manipulating access to pain medication while interrogating Abu Zubaydah, a senior al Qaeda leader who was shot in the chest, groin and thigh when he was captured in March 2002 in Pakistan. "American questioners teased him with occasional painkillers to try to cull information." Erich Lichtblau and Adam Liptak, "Questioning of Accused Expected to Be Humane, Legal and Aggressive," *New York Times*, March 4, 2003. "American Taliban" John Lindh has alleged that he was stripped naked, blindfolded and bound to a stretcher "with heavy duct tape wrapped tightly around his chest, upper arms, ankles and the stretcher itself," and kept in this condition in a windowless metal shipping container for two days. Lindh also asserted that after being handed over to U.S. custody, he was interrogated while wounded with a bullet in his leg, and denied surgery for two weeks despite repeated requests to the U.S. agents questioning him." See Proffer of Facts in Support of Defendant's Suppression Motions, in the case of *United States v. John Phillip Walker Lindh* (E.D. Va., June 13, 2002).

²⁴⁹ See Country Reports on Human Rights Practices — 2001, Released by the Bureau of Democracy, Human Rights, and Labor, Department of State, March 4, 2002 ("DOS Human Rights Report"), available at <http://www.state.gov/g/drl/hr/c1470.htm> (accessed January 27, 2003). The DOS Human Rights Report characterizes as "abuses" prolonged standing (Palestinian Authority); shackling in contorted positions (Israel; Palestinian Authority); sleep deprivation (Israel; Palestinian Authority); and beatings (Israel; Palestinian Authority). The report characterizes as "torture" prolonged standing (Turkey); sleep deprivation (Jordan; Turkey); loud music (Turkey); and beatings (Egypt; Syria; Turkey).

²⁵⁰ Eric Lichtblau and Adam Liptak, "Questioning of Accused Expected to Be Humane, Legal and Aggressive," *New York Times*, March 4, 2003.

²⁵¹ Ibid. Military interrogators told the *Wall Street Journal*: "Interrogators can also play on their prisoners' phobias, such as fear of rats or dogs, or disguise themselves as interrogators from a country known to use torture or threaten to send the prisoners to such a place. Prisoners can be stripped, forcibly shaved and deprived of religious items and toiletries." Jess Bravin and Gary Fields, "How do Interrogators Make A Captured Terrorist Talk?," *Wall Street Journal*, March 4, 2003.

²⁵² Jess Bravin and Gary Fields, "How do Interrogators Make A Captured Terrorist Talk?," *Wall Street Journal*, March 4, 2003. One U.S. intelligence officer told the *Journal*: "U.S. officials overseeing interrogations of captured al Qaeda forces at Bagram and Guantanamo Bay Naval Base in Cuba can even authorize 'a little bit of smack-face.'" Ibid.

²⁵³ Carlotta Gall, "U.S. Military Investigating Death of Afghan in Custody," *New York Times*, March 4, 2003; "Prisoners 'Killed' at US Base," BBC News World Edition (March 6, 2003), available at http://news.bbc.co.uk/2/hi/south_asia/2825575.stm (accessed March 6, 2003). A U.S. spokesman denied mistreatment at the camp, and attributed the "homicide" determinations to "a limited choice when filling the military death certificate." *Ibid.* Two other Afghan former prisoners told the *New York Times* that while they were held in Bagram they were:

[M]ade to stand hooded, their arms raised and chained to the ceiling, their feet shackled, unable to move for hours at a time, day and night. . . . The prisoners. . . were freed from their standing position only to eat, pray and go to the bathroom. [One of them] said he had spent 16 days in the upstairs rooms, standing for 10 of them until his legs became so swollen that the shackles around his ankles tightened and stopped the blood flow. He said he was naked the entire time and allowed to dress only when he was taken for interrogation or to the bathroom. [He] said the cold kept him awake, as did the American guards, who kicked and shouted at him to stop him from falling asleep.

²⁵⁴ Carlotta Gall, "U.S. Military Investigating Death of Afghan in Custody," *New York Times*, March 4, 2003.

²⁵⁵ John Mintz, "Detainees at Base in Cuba Yield Little Valuable Information," *Washington Post*, October 29, 2002; Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 25, 2002.

²⁵⁶ The DOS Human Rights Report recounts allegations of torture in Jordan, including "sleep deprivation, beatings on the soles of the feet, prolonged suspension with ropes in contorted positions, and extended solitary confinement." With regard to Egypt, the DOS Human Rights Report states that "there were numerous, credible reports that security forces tortured and mistreated citizens," with victims reporting such "methods of torture. . . [as] being stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor, beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water. . . . Some victims, male and female detainees, reported that they were sexually assaulted or threatened with the rape of themselves or family members." As for Morocco, while noting some improvement over the years, the DOS Human Rights Report relates that "some members of the security forces still tortured or otherwise abused detainees," and cited "concerns regarding the Government's commitment to resolving the problem." See also Eric Lichtblau and Adam Liptak, "Questioning of Accused Expected to Be Humane, Legal and Aggressive," *New York Times*, March 4, 2003, quoting a senior Moroccan intelligence official: "I am allowed to use all means in my possession [in interrogating a prisoner]. . . . You have to fight all his resistance at all levels and show him that he is wrong, that his ideology is wrong and is not connected to religion. We break them, yes. And when they are weakened, they realize that they are wrong."

²⁵⁷ Peter Finn, "Case of Al Qaeda Suspect Shows Underside of War on Terrorism," *Wall Street Journal*, January 30, 2003. See also Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002; Faye Bowers and Philip Smucker, "US Ships Al Qaeda Suspects to Arab States," *Christian Science Monitor*, July 26, 2002. The United States has long considered Syria one of the world leaders in human rights violations and support for terrorism. The DOS Human Rights Report reports "credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners and detainees report that torture methods

include administering electrical shocks; pulling out of fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine."

²⁵⁸ Knut Royce, "Mixed Reviews From Experts," *Newday*, February 6, 2003.

²⁵⁹ *Ibid.*

²⁶⁰ The International Covenant on Civil and Political Rights is available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (accessed January 27, 2003). The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is available at <http://www.hrweb.org/legal/cat.html> (accessed January 27, 2003). Article 1 of the Torture Convention defines "torture" as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

²⁶¹ 18 U.S.C. § 2340A, available at http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/i/chapters/113c/sections/section_2340a.html (accessed March 3, 2003). Section 2340 (available at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=2340 (accessed March 3, 2003)) provides the following definitions:

- (1) "Torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "Severe mental pain or suffering" means the prolonged mental harm caused by or resulting from —
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality....

²⁶² Similarly, General Comment 20 (October 3, 1992) of the U.N. Human Rights Committee, which is the official body charged with interpreting the International Covenant on Civil and Political Rights, has stated its view that the Covenant's article 7 prohibition against torture and cruel, inhuman or degrading

treatment or punishment includes the principle that “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.” General Comment 20 is available at [http://193.194.138.190/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+20.En?OpenDocument](http://193.194.138.190/tbs/doc.nsf/(symbol)/CCPR+General+comment+20.En?OpenDocument) (accessed January 27, 2003).

²⁶³ See article 130 of the Third Geneva Convention; and article 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument> (accessed February 10, 2003).

²⁶⁴ Article 16, Torture Convention (emphasis added). The European Court of Human Rights has stressed this point. “Even in the most difficult of circumstances, such as the fight against organized terrorism and crime, the [European Convention on Human Rights] prohibits in absolute terms torture *or* inhuman or degrading treatment or punishment” (emphasis added). *Aksoy v. Turkey*, Case No. 21987/93, Judgment of the European Court of Human Rights (December 18, 1996).

²⁶⁵ “[T]he United States considers itself bound by the obligation under article 16 to prevent cruel, inhuman or degrading treatment or punishment, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the ‘cruel, unusual and inhumane treatment or punishment’ prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” U.S. Reservations upon Ratification of the Torture Convention, available at: http://193.194.138.190/html/menu3/b/treaty12_asp.htm (accessed March 7, 2003).

²⁶⁶ Supreme Court of Israel, sitting as the High Court of Justice (September 6, 1999), available at <http://62.90.71.124/mishpat/html/en/system/index.html> (accessed March 5, 2003).

²⁶⁷ *Ibid.*

²⁶⁸ While accepting that the “suspect’s cuffing, for the purpose of preserving the investigators’ safety, is...within the investigator’s authority,” cuffing a person in a “distorted and unnatural position... [and] causing pain” is not required to preserve the investigators’ safety and is prohibited. *Ibid.*

²⁶⁹ Accepting the legitimacy of the security service’s asserted need to “prevent contact between the suspect under interrogation and other suspects and his investigators” (to preclude collusive communications among suspects, for example, or to safeguard the investigators’ security), the court nonetheless rejected the use of a “head covering...entirely opaque...reaching the suspect’s shoulders,” as outside the scope of lawful authority. “Less harmful means must be employed, such as letting the suspect wait in a detention cell...[for covering the suspect’s eyes] in a manner that does not cause him physical suffering.” *Ibid.*

²⁷⁰ The court was “prepared to assume that the authority to investigate an individual equally encompasses precluding him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation’s success.” But requiring the suspect to hear “powerfully loud music...causes the suspect suffering...[and so does not] fall within the scope of a fair and responsible interrogation.” *Ibid.*

²⁷¹ The court recognized that “[t]he interrogation of a person is likely to be lengthy...[and that t]he suspect...is at times exhausted...often [as] the inevitable result of an interrogation...part of the ‘discomfort’ inherent to an interrogation.” But the court insisted that the “situation is different [when]...sleep deprivation shifts from being a ‘side effect’...to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or ‘breaking’ him — it shall not fall within the scope of a fair and reasonable investigation,” and is absolutely prohibited. *Ibid.*

²⁷² The particular position examined by the court involved seating the suspect for long hours on a very low chair, tilted forward facing the ground and tied in a contorted position. The court was willing to “suppose that the seating of the suspect on a chair lower than that of his investigator can potentially serve a legitimate investigation objective (for instance, to establish the ‘rules of the game’ in the contest of wills between the parties, or to emphasize the investigator’s superiority over the suspect),” but it found no defensible grounds to justify seating the suspect “in a manner that causes him real pain and suffering.” *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ireland v. United Kingdom*, Case No. 5310/71, Judgment of the European Court of Human Rights (January 18, 1978).

²⁷⁵ *Ibid.* Though the court determined this conduct to be “inhuman and degrading treatment,” the court was not able to agree that it “occasion[ed] suffering of the particular intensity and cruelty implied by the word torture as so understood.” The distinction did not in any way lessen the absolutely prohibited status of the five techniques, however. In previously hearing the case, the European Commission on Human Rights had unanimously considered the combined use of the five methods to amount to torture, on the grounds that (1) the intensity of the stress caused by techniques creating sensory deprivation “directly affects the personality physically and mentally”; and (2) “the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages... a modern system of torture falling into the same category as those systems... applied in previous times as a means of obtaining information and confessions.” 19 Yearbook of the European Conventions on Human Rights (1976) (language of the Commission as quoted in Nigel S. Rodley, *The Treatment of Prisoners under International Law* (Oxford 2000), pp. 91-92). Many commentators have found the Commission’s view to be more persuasive than the Court’s. See generally Rodley’s discussion, pp. 90-95.

²⁷⁶ *Selmouni v. France*, Case No. 25803/94, Judgment of the European Court of Human rights (July 28, 1999).

²⁷⁷ *Ibid.*

²⁷⁸ Supreme Court of Israel, sitting as the High Court of Justice (September 6, 1999), available at <http://62.90.71.124/mishpat/html/en/system/index.html> (accessed March 5, 2003).

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²⁸⁰ Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks (September 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html> (accessed March 6, 2003); Authorization for Use of Military Force, P.L. No. 107-40, § 2(a)(2001) (September 18, 2002), available at <http://jurist.law.pitt.edu/terrorism/sjres23.htm> (accessed January 27, 2003).

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How Changes to U.S. Law & Policy Since
9/11 Erode Human Rights and Civil Liberties

September 2002 — March 2003

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IMBALANCE OF POWERS shows that since the September 11 attacks, the U.S. government's mode of operations has too often been at odds with core American and international human rights principles. Central among those principles is the idea of checks and balances, where a separation of powers among the executive, judicial, and legislative branches of government provides important safeguards. Throughout this report, a pattern emerges in which core U.S. values are being undermined by aggressive executive branch actions that are usurping the constitutional powers of the federal courts and Congress.



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