

Assessing the **New Normal**

Liberty and Security
for the Post-September 11
United States



LAWYERS COMMITTEE
FOR HUMAN RIGHTS

ABOUT US

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INTRODUCTION

Therefore pass these Sirens by, and stop your men's ears with wax that none of them may hear; but if you like you can listen yourself, for you may get the men to bind you as you stand upright on a cross piece half way up the mast, and they must lash the rope's ends to the mast itself, that you may have the pleasure of listening. If you beg and pray the men to unloose you, then they must bind you faster.

Homer, *The Odyssey*

Legal scholars have often invoked the story of Ulysses and the Sirens to explain the Constitution's role in American life. Just as Ulysses had himself tied to the mast to save himself from the Sirens' song, so have we tied ourselves to the Constitution to keep short-term impulses from compromising a long-term commitment to a free society. The metaphor that describes the Constitution is equally apt for the rule of law more broadly. In a society bound by the rule of law, individuals are governed by publicly known regulations, applied equally in all cases, and enforced by fair and independent courts. The rule of law is a free society's method of ensuring that whatever crisis it faces, government remains bound by the constraints that keep society free.

This report, the third in a series, documents the continuing erosion of basic human rights protections under U.S. law and policy since September 11, 2001. The reports address changes in five major areas: government openness; personal privacy; immigration; security-related detention; and the effect of U.S. actions on human rights standards around the world. Changes in these arenas began occurring rapidly in the weeks following September 11, and have been largely sustained or expanded in the two years since. As Vice President Dick Cheney explained shortly after September 11: "Many of the steps we have now been forced to take will become permanent in American life," part of a "new normalcy" that reflects "an understanding of the world as it is." Indeed, today, two years after the terrorist attacks, it is no longer possible to view these changes as aberrant parts of a short-term emergency response. They have become part of a "new normal" in American life.

Some of the changes now part of this new normal are sensible and good. Al Qaeda continues to pose a profound threat to the American public, and the government has the right and duty to protect its people from attacks. A new national security strategy aimed at reducing this threat is essential. We thus welcome efforts to improve coordination among federal, state, and local agencies, and between law enforcement and intelligence officials. Equally welcome would be greater efforts to protect the nation's critical infrastructure supporting energy, transportation, food, and water; and efforts to strengthen the preparedness of our domestic "front-line" forces – police, fire, and emergency medical teams, as well as all those in public health. Many of these changes are past due.

But the new normal is also defined by dramatic changes in the relationship between the U.S. government and the people it serves – changes that have meant the loss of particular freedoms for some, and worse, a detachment from the rule of law as a whole. As this report details, the United States has become unbound from the principles that have long held it to the mast.

ABANDONING THE COURTS

Perhaps most marked of these changes, the new normal has brought a sharp departure from the rule-of-law principles guaranteeing that like cases will be treated alike, and that all will have recourse to fair and independent courts as a check on executive power. In the two years since September 11, the executive has established a set of extra-legal institutions that bypass the federal judiciary; most well known are the military commissions and the detention camp at the U.S. military base in Guantánamo Bay, Cuba. Individuals subject to military commission proceedings will have their fate decided by military personnel who report only to the president; there will be no appeal to any independent civilian court. And the administration maintains that those detained by the United States outside the U.S. borders – at Guantánamo and elsewhere – are beyond the jurisdictional reach of U.S. courts altogether.

At these facilities, there is no pretense that like cases need be treated alike. Thus, the Defense Department announced without explanation that six current detainees at the Guantánamo camp had become eligible for trial by military commission. Among the six were U.K. citizens Moazzam Begg and Feroz Abassi, and Australian citizen David Hicks (the identities of the other three are unknown). In the face of staunch protests from the United Kingdom and Australia, both close U.S. allies, the United States promised that the Australian and U.K. detainees – unlike the nationals of the other 40-some nations represented in Guantánamo – would not be subject to the death penalty, and would not be monitored in their conversations with counsel. Despite vigorous international opposition to the camp and military commission justice, the United States has thus far refused to afford similar protections to any other nation's detainees. The United States' obligation to adhere to the international laws to which it remains bound – including the Geneva Convention protections for prisoners of war – appears forgotten altogether.

In those cases that have come before the U.S. courts, the executive now consistently demands something less than independent judicial review. The Justice Department has continued to advance the argument that any U.S. citizen may be detained indefinitely without charges or access to counsel if the executive branch presents “some evidence” that he is an “enemy combatant,” a category it has yet properly to define. The Justice Department has argued that U.S. citizen José Padilla should not be allowed an opportunity to rebut the evidence that the government presents – an argument that the district court in the case refused to accept. Yet despite the federal court's order that the Justice Department allow Padilla access to his counsel – and in the face of briefs filed on Padilla's behalf by a coalition including both the Lawyers Committee and the Cato Institute – the Justice Department has refused to comply with the court's order. Neither Padilla's counsel nor any member of his family has seen or heard from him in 15 months.

And notwithstanding the fundamental rule-of-law principle that laws of general application will be equally applied to all, the executive has, without explanation, detained some terrorist suspects in military brigs as “enemy combatants,” while subjecting others to criminal prosecution in U.S. courts. Detainees in the former category are deprived of all due process rights; detainees in the latter category are entitled to the panoply of fairness protections the Constitution provides, including access to counsel and the right to have guilt established (or not) in court. As the Justice Department put it: “There’s no bright line” dividing the “enemy” detainees from the everyday criminal defendant. Indeed, the executive accused both John Walker Lindh and Yaser Hamdi of participating in hostilities against the United States in Afghanistan. Both are U.S. citizens, captured in Afghanistan in 2001, and handed over to U.S. forces shortly thereafter. Yet the executive brought charges against Lindh through the normal criminal justice system, affording Lindh all due process protections available under the Constitution. Hamdi, in contrast, has remained in incommunicado detention for 16 months. He has never seen a lawyer.

In any case, the executive designation that one is an “enemy combatant” and another a criminal suspect appears subject to change at any time. Some who have been subject to criminal prosecution for alleged terrorism-related activities now face the prospect that, should they begin to win their case, the government may take away the privilege of criminal procedure and subject them to the indeterminate “enemy combatant” status – a prospect now well known to all suspects not already in incommunicado detention. Criminal defendant Ali Saleh Kahlal al-Marri was designated an enemy combatant just weeks before his long-scheduled criminal trial. And the administration has suggested that if it loses certain procedural rulings in the prosecution of Zacarias Moussaoui, he too may lose the constitutional protections to which he is entitled.

PRIVACY AND ACCESS TO GOVERNMENT INFORMATION

As the breadth of these examples should suggest, the changes that have become part of the new normal are not limited to the role of the courts. The two years since September 11 have seen a shift away from the core U.S. presumption of access that is essential to democratic government – the presumption that government is largely open to public scrutiny, while the personal information of its people is largely protected from government intrusion. Today, the default in America has become just the opposite – the work of the executive branch increasingly is conducted in secret, but unfettered government access to personal information is becoming the norm.

For example, the administration continues vigorously to defend provisions of the USA PATRIOT Act that allow the FBI secretly to access Americans’ personal information (including library, medical, education, internet, telephone, and financial records) without having to show that the target has any involvement in espionage or terrorism. With little or no judicial oversight, commercial service providers may be compelled to produce these records solely on the basis of a declaration from the FBI that the information is for an investigation “to protect against international terrorism or clandestine intelligence activities.” And the PATRIOT Act makes it a crime to reveal that the FBI has searched such information. Thus, a librarian who speaks out about having to reveal a patron’s book selections can be subject to prosecution. Because of the secrecy of these surveillance operations, little is known about how many people have been

subject to such intrusions. But many have been outspoken about the potential these measures have to chill freedom of expression and inquiry. As one librarian put it, such measures “conflict[] with our code of ethics” because they force librarians to let the FBI “sweep up vast amounts of information about lots of people – without any indication that they’ve done anything wrong.”

At the same time, according to the National Archives and Records Administration, the number of classification actions by the executive branch rose 14 percent in 2002 over 2001 – and declassification activity fell to its lowest level in seven years. The Freedom of Information Act – for nearly four decades an essential public tool for learning about the inner workings of government – has been gravely damaged by an unprecedented use of exemptions and new statutory allowances for certain ‘security-related’ information, expansively defined. And a new executive order, issued this past spring, further eases the burden on government officials responsible for deciding what information to classify. As a result, being an informed, responsible citizen in U.S. society is measurably more difficult than it was before the September 11 attacks.

IMMIGRANTS AND REFUGEES

Citizens are far from alone in feeling the effects of these rapid changes in U.S. policy. The new normal is also marked by an important shift in the U.S. position toward immigrants and refugees. Far from viewing immigrants as a pillar of strength, U.S. policy now reflects an assumption that immigrants are a primary national threat. Beginning immediately after September 11, the Justice Department’s enforcement of immigration laws has ranged from “indiscriminate and haphazard” (as the Department’s independent Inspector General put it with respect to those rounded up in the aftermath of the September 11 attacks) to rigorously selective, targeting Arab, Muslim, and South Asian minorities to the exclusion of other groups. Through the expenditure of enormous resources, the civil immigration system has become a principal instrument to secure the detention of “suspicious” individuals when a government trawling for information can find no conduct that would justify their detention on any criminal charge. And through a series of nationality-specific information and detention sweeps – from special registration requirements to “voluntary” interviews to the detention of all those seeking asylum from a list of predominantly Muslim countries – the administration has acted on an assumption that all such individuals are of concern.

Despite the sustained focus on immigrants, there is growing evidence that the new normal in immigration has done little to improve Americans’ safety. By November 2001, FBI-led task force agents had arrested and detained almost 1,200 people in connection with the investigation of the September 11 attacks. Of those arrested during this period, 762 were detained solely on the basis of civil immigration violations. But as the Inspector General’s report now makes clear, many of those detainees did not receive core due process protections, and the decision to detain them was at times “extremely attenuated” from the focus of the September 11 investigation. Worse, the targeted registration and interview programs have seriously undermined relations between the Arab community and law enforcement personnel – relationships essential to developing the kinds of intelligence law enforcement has made clear it most needs. An April 2003 GAO report on one voluntary interview program is particularly telling. While finding that

most of the interviews were conducted in a “respectful and professional manner,” the report explained that many of the interviewees “did not feel the interviews were truly voluntary” and feared that they would face “repercussions” for declining to participate. As for the security gains realized, “information resulting from the interview project had not been analyzed as of March 2003,” and there were “no specific plans” to do so. Moreover, “None of [the] law enforcement officials with whom [the GAO] spoke could provide examples of investigative leads that resulted from the project.”

THE UNITED STATES IN THE WORLD

Finally, the United States’ detachment from its own rule-of-law principles is having a profound effect on human rights around the world. Counterterrorism has become the new rubric under which opportunistic governments seek to justify their actions, however offensive to human rights. Indeed, governments long criticized for human rights abuses have publicly applauded U.S. policies, which they now see as an endorsement of their own longstanding practices. Shortly after September 11, for example, Egypt’s President Hosni Mubarak declared that new U.S. policies proved “that we were right from the beginning in using all means, including military tribunals, to combat terrorism. . . . There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual.”

In addition to spurring a global proliferation of aggressive counterterrorism measures, the United States has at times actively undermined judicial authority in nations whose court systems are just beginning to mature. In one such instance, Bosnian authorities transferred six Algerian men into U.S. custody at the request of U.S. officials, in violation of that nation’s domestic law. The Bosnian police had arrested the men, five of whom also had Bosnian citizenship, in October 2001 on suspicion that they had links with Al Qaeda. In January 2002, the Bosnian Supreme Court ordered them released for lack of evidence. But instead of releasing them, Bosnian authorities handed them over to U.S. troops serving with NATO-led peacekeepers. Despite an injunction from the Human Rights Chamber of Bosnia and Herzegovina, expressly ordering that four of the men remain in the country for further proceedings, the men were shortly thereafter transported to the detention camp at Guantánamo. They remain there today.

As the report that follows demonstrates in greater detail, the U.S. government can no longer promise that individuals under its authority will be subject to a system bound by the rule of law. In a growing number of cases, legal safeguards are now observed only so far as they are consistent with the chosen ends of power. Yet too many of the policies that have led to this new normal not only fail to enhance U.S. security – as each of the following chapters discusses – but also exact an unnecessarily high price in liberty. For a government unbound by the rule of law presides over a society that is something less than free.

The Lawyers Committee for Human Rights
September 2003

EXECUTIVE SUMMARY & RECOMMENDATIONS

ASSESSING THE NEW NORMAL, the third in a series of reports, documents the continuing erosion of basic human rights protections under U.S. law and policy since September 11. Today, two years after the attacks, it is no longer possible to view these changes as aberrant parts of an emergency response. Rather, the expansion of executive power and abandonment of established civil and criminal procedures have become part of a “new normal” in American life. The new normal, defined in part by the loss of particular freedoms for some, is as troubling for its detachment from the rule of law as a whole. The U.S. government can no longer promise that individuals will be governed by known principles of conduct, applied equally in all cases, and administered by independent courts. As this report shows, in a growing number of cases, legal safeguards are now observed only insofar as they are consistent with the chosen ends of power.

PRINCIPAL FINDINGS

CHAPTER ONE: OPEN GOVERNMENT

- ❑ The administration continues efforts to roll back the Freedom of Information Act (FOIA), both by expanding the reach of existing statutory exemptions, and by adding a new “critical infrastructure” exemption. The new exemption could limit public access to important health, safety, and environmental information submitted by businesses to the government. Even if the information reveals that a firm is violating health, safety, or environmental laws, it cannot be used against the firm that submitted it in any civil action unless it was submitted in bad faith. At the same time, the administration has removed once-public information from government websites, including EPA risk management plans that provide important information about the dangers of chemical accidents and emergency response mechanisms. This move came despite the FBI’s express statement that the EPA information presented no unique terrorist threat.
- ❑ The administration has won several recent court victories further restricting FOIA’s reach. In *American Civil Liberties Union v. U.S. Department of Justice*, a federal district court denied the ACLU’s request for information concerning how often the Justice Department had used its expanded authority under the PATRIOT Act. In *Center for National Security Studies v. U.S. Department of Justice*, a divided three-judge panel of the U.S. Court of Appeals for the D.C. Circuit upheld the executive’s assertion of a FOIA exemption to withhold the names of those detained in investigations following September 11, as well as information about the place, time, and reason for their detention. Contrary to well-settled FOIA principles requiring the government to provide specific reasons for withholding information, the appeals court deferred to the executive’s broad assertion that disclosure of the information would interfere with law enforcement.

- ❑ Executive Order 13292 (E.O. 13292), issued by President Bush on March 28, 2003, also promotes greater government secrecy by allowing the executive to delay the release of government documents; giving the executive new powers to reclassify previously released information; broadening exceptions to declassification rules; and lowering the standard under which information may be withheld from release – from requiring that it “should” be expected to result in harm to that it “could” be expected to have that result. In addition, E.O. 13292 removes a provision from the previously operative rules mandating that “[i]f there is significant doubt about the need to classify information, it shall not be classified.” In essence, this deletion shifts the government’s “default” setting from “do not classify” under the previous rules to “classify” under E.O. 13292.
- ❑ The administration continues to clash with Congress over access to executive information. The Justice Department recently provided some limited responses to congressional questions about the implementation of the PATRIOT Act only after a senior Republican member of the House threatened to subpoena the requested documents. Indeed, the Justice Department now operates under a directive instructing Department employees to inform the Department’s Office of Legislative Affairs “of all potential briefings on Capitol Hill and significant, substantive conversations with staff and members on Capitol Hill” so that the office may “assist in determining the appropriateness of proceeding with potential briefings.” Controversy also erupted over the administration’s insistence on classifying key sections of a congressional report on the intelligence failures surrounding September 11. As of August 2003, 46 senators had signed a letter to the president requesting that he declassify additional portions of the report.
- ❑ Members of Congress from across the political spectrum are beginning to heed security experts’ warnings that too much secrecy may well result in *less* security. For example, Porter Goss (R-FL), Chair of the U.S. House of Representatives Permanent Select Committee on Intelligence, recently testified that “there’s a lot of gratuitous classification going on,” and that the “dysfunctional” classification system remains his committee’s greatest challenge. Others have emphasized that secrecy can breed increased distrust in governmental institutions. As Senator John McCain (R-AZ) has noted: “Excessive administration secrecy on issues related to the September 11 attacks feeds conspiracy theories and reduces the public’s confidence in government.”

CHAPTER TWO: PERSONAL PRIVACY

- ❑ The administration is vigorously defending sections 215 and 505 of the PATRIOT Act, which allow the FBI secretly to access personal information about U.S. citizens and lawful permanent residents (including library, medical, education, internet, telephone, and financial records) without demonstrating that the target has any involvement in espionage or terrorism. With little or no judicial oversight, commercial service providers may be compelled to produce these records solely on the basis of a written declaration from the FBI that the information is sought for an investigation “to protect against international terrorism or clandestine intelligence activities.” And the PATRIOT Act makes it a crime to reveal that the FBI has requested such information. Thus, a librarian

who speaks out about being forced to reveal a patron's book selections can be subject to prosecution. Many have spoken out about the potential these measures have to chill freedom of expression and inquiry. As one librarian put it, section 215 "conflicts with our code of ethics" because it forces librarians to let the FBI "sweep up vast amounts of information about lots of people – without any indication that they've done anything wrong." The president's proposed additions would broaden such powers even further, allowing the attorney general to issue administrative subpoenas (which do not require judicial approval) in the course of domestic as well as international terrorism investigations.

- ❑ The administration also continues efforts to resuscitate some version of the Total Information Awareness project (TIA) – an initiative announced in 2002 that would enable the government to search personal data, including religious and political contributions; driving records; high school transcripts; book purchases; medical records; passport applications; car rentals; and phone, e-mail, and internet logs in search of "patterns that are related to predicted terrorist activities." The initial TIA proposal raised widespread privacy concerns, and experts have strongly questioned the efficacy of the project. The U.S. Association for Computing Machinery – the nation's oldest computer technology association – recently warned that even under optimistic estimates, likely "false positives" could result in as many as 3 million citizens being wrongly identified as potential terrorists each year. To its credit, Congress has taken these warnings seriously and has begun efforts to rein in TIA-related work. The Senate recently adopted a provision eliminating funding for TIA research and development, and requiring congressional authorization for the deployment of any such program. The House also adopted a provision requiring congressional approval for TIA activities affecting U.S. citizens, but it did not cut off funds. In the meantime, TIA remains part of ongoing executive efforts.
- ❑ The Transportation Security Administration's (TSA) current system for preventing terrorist access to airplanes relies on watchlists compiled from a variety of government sources. TSA has refused to supply details of who is on the lists and why. But the rapid expansion of the lists has been matched by a growing number of errors: TSA receives an average of 30 calls per day from airlines regarding passengers erroneously flagged as potential terrorists. Even this may be an underestimate: TSA has no centralized system for monitoring errors, so it does not collect complete data on how many times this happens. The confusion stems from a range of sources – from outdated name-matching algorithms to inaccuracies in the data from intelligence services. Passengers have found it almost impossible to have even obvious errors corrected.
- ❑ TSA also continues to develop a new "passenger risk assessment" system – the Computer Assisted Passenger Pre-Screening System II (CAPPS II). As envisaged, CAPPS II would assign a security risk rating to every air traveler based on information from commercial data providers and government intelligence agencies. The new system would rely on the same intelligence data used for the existing watchlists, and would also be vulnerable to error introduced by reliance on commercial databases. CAPPS II would be exempt from existing legislation that requires agencies to provide individuals with the opportunity to

correct government records. And TSA has proposed that CAPPs II be exempted from a standard Privacy Act requirement that an agency maintain only such information about a person as is necessary to accomplish an authorized agency purpose.

- ❑ The past two years have seen a significant increase in the use of foreign intelligence surveillance orders (a type of search warrant whose availability was expanded by the PATRIOT Act). These so-called “FISA orders” may be issued with far fewer procedural checks than ordinary criminal search warrants. Requests for FISA orders are evaluated *ex parte* by a secret court in the Justice Department, and officials need not show probable cause of criminal activity to secure the order. Between 2001 and 2002, FISA orders increased by 31 percent, while the number of ordinary federal criminal search warrants dipped by nine percent. The number of FISA orders issued in 2002 is 21 percent greater than the largest number in the previous decade, and FISA orders now account for just over half of all federal wiretapping. In addition, since September 11, the FBI has obtained 170 *emergency* FISA orders – searches that may be carried out on the sole authority of the attorney general for 72 hours before being reviewed by any court. This is more than triple the number employed in the prior 23-year history of the FISA statute.

CHAPTER THREE: IMMIGRANTS, REFUGEES, AND MINORITIES

- ❑ The Justice Department has moved aggressively to increase state and local participation in the enforcement of federal immigration law. The Justice Department has argued that state and local officials have “inherent authority” to “arrest and detain persons who are in violation of immigration laws,” and whose names appear in a national crime database. The legal basis for this “inherent authority” is unclear. These moves have encountered strong resistance from local officials concerned that they will drain already scarce law enforcement resources and undermine already fragile community relations. As the chief of police in Arlington, Texas explained: “We can’t and won’t throw our scarce resources at quasi-political, vaguely criminal, constitutionally questionable, [or] any other evolving issues or unfunded mandates that aren’t high priorities with our citizenry.”
- ❑ During primary hostilities in Iraq, from March to April 2003, the Department of Homeland Security (DHS) operated a program of automatically detaining asylum seekers from a group of 33 nations and territories where Al Qaeda or other such groups were believed to operate. Under the program, arriving asylum seekers from the targeted countries were to be detained without parole for the duration of their asylum proceedings, even when they met the applicable parole criteria and presented no risk to the public. The program was terminated in April 2003 in the wake of a public outcry. The administration has not disclosed whether any of those detained under the program have yet been released from detention.
- ❑ While the administration has taken some steps to remedy the draconian policies that led to mass detentions of non-citizens in the weeks following September 11, the harsh effects of these now-discontinued round-ups have become clear. By the beginning of November 2001, FBI-led task force agents had detained almost 1,200 people in connection with the investigation of the September 11 attacks. Of these, 762 were detained solely on the

basis of civil immigration violations, such as overstaying their visas. As a 198-page report issued by the Justice Department Office of the Inspector General now verifies, the decision to detain was at times “extremely attenuated” from the focus of the investigation. Many detainees did not receive notice of the charges against them for weeks – some for more than a month after arrest – and were deprived of other core due process protections. Particularly harsh conditions prevailed at a Brooklyn detention center and at Passaic County Jail in Paterson, New Jersey. Of greatest ongoing concern, the expanded custody authority that was used to effect these extended detentions is still on the books. As a result, there is as yet little to prevent such widespread round-ups and detentions from occurring again.

- ❑ On April 17, 2003, Attorney General John Ashcroft issued a sweeping decision preventing an 18-year-old Haitian asylum seeker from being released from detention. In the decision (known as *In re D-J*), the attorney general concluded that the asylum seeker, David Joseph, was not entitled to an individualized assessment of the need for his detention based on “national security” concerns. There was no claim that Joseph himself presented a threat. The expansive wording of the decision raises concerns that the administration may seek to deny broader categories of immigration detainees any individualized assessment of whether their detention is necessary whenever the executive contends that national security interests are implicated.
- ❑ The effects of the temporary registration requirements imposed by the Justice Department’s “call-in” registration program – instituted last summer and concluded on April 25, 2003 – are now evident. Call-in registration required visiting males age 16 to 45 from 25 predominantly Arab and Muslim countries to appear in Immigration and Naturalization Service (INS) offices to be fingerprinted, photographed, and questioned under oath by INS officers. But misinformation about the program, including inaccurate, unclear, and conflicting notices distributed by the INS, led some men unintentionally to violate the program’s requirements – often resulting in their deportation. Attorneys reported that they were denied access to their clients during portions of the interviews, and some of the registrants inadvertently waived their right to a removal hearing. There were also troubling reports of mistreatment. In Los Angeles, for example, about 400 men and boys were detained during the first phase of the registration. Some were handcuffed and placed in shackles; others were hosed down with cold water; others were forced to sleep standing up because of overcrowding. In the end, 82,000 men complied with the call-in registration requirements.
- ❑ The U.S. program to resettle refugees has long been a model for states all over the world, a reminder of the country’s founding as a haven for the persecuted. But in the immediate aftermath of September 11, amid high security concerns, the program was shut down. Nearly two years later, the U.S. Refugee Resettlement Program is still struggling. Significant delays in the conduct of security checks, insufficient resources, and management failures are among the problems that bedevil the program. From an average of 90,000 refugees resettled annually before September 11, the United States anticipates 27,000 resettlements in 2003.

CHAPTER FOUR: UNCLASSIFIED DETAINEES

- ❑ A number of individuals – including two U.S. citizens – continue to be held by the United States in military detention without access to counsel or family, based solely on the president’s determination that they are “enemy combatants.” The executive’s decision to declare someone an “enemy combatant” – as opposed to a prisoner of war or criminal suspect – appears unconstrained by any set of guiding principles. José Padilla and James Ujaama are both U.S. citizens, arrested in the United States, and accused of plotting with Al Qaeda. While Ujaama was criminally indicted and then entered a plea agreement, Padilla has never been formally charged with any offense. He has been held in incommunicado military detention for 15 months. Likewise, the executive accused U.S. citizens John Walker Lindh and Yaser Hamdi of participating in hostilities against the United States in Afghanistan. Lindh was prosecuted through the civilian criminal justice system, enjoying all due process protections available under the Constitution. Hamdi, in contrast, has remained in incommunicado detention for sixteen months. He has never seen a lawyer. The reasons for the differing treatment are unclear.
- ❑ Advocates for the two U.S. citizens held as “enemy combatants” are actively challenging their detention in court – challenges the Justice Department has vigorously resisted. In briefs filed with the U.S. Court of Appeals for the Second Circuit this summer, a wide range of experts (including the Lawyers Committee and the Cato Institute) argued that the executive’s treatment of Padilla is illegal. They maintain that U.S. citizens are entitled to constitutional protections against arbitrary detention, including the right to counsel; the right to a jury trial; the right to be informed of the charges and confront witnesses against them. The Constitution identifies no “enemy combatant” exception to these rules. Further, 18 U.S.C. § 4001(a) makes clear that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The parties await a decision by the Second Circuit. In Hamdi’s case, the U.S. Court of Appeals for the Fourth Circuit ruled largely in the executive’s favor, but rejected the executive’s “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.”
- ❑ There are strong indications that the executive has threatened criminal defendants with designation as “enemy combatants” as a method of securing plea-bargained settlements in terrorism-related prosecutions. As defense counsel Patrick J. Brown explained with respect to a case involving six Arab-American U.S. citizens from Lackawanna, New York: “We had to worry about [them] being whisked out of the courtroom and declared enemy combatants if the case started going well for us. . . . So we just ran up the white flag and folded.” In a separate case, the president designated Ali Saleh Kahlah Al-Marri an “enemy combatant” less than a month before his criminal trial was set to begin, placing him in incommunicado detention, dismissing his criminal indictment, and cutting him off from his lawyers who had been vigorously defending his case. *The New York Times* quoted one “senior F.B.I. official” as explaining that “the Marri decision held clear implications for other terrorism suspects. ‘If I were in their shoes, I’d take a message from this.’” And executive officials have suggested that unfavorable procedural rulings

in the Zacarias Moussaoui prosecution may lead them to consider dropping the case in federal court to pursue military commission proceedings under the president's control.

- ❑ Since President Bush announced the creation of military commissions for non-citizens accused of committing “violations of the laws of war and other applicable laws,” the Defense Department has issued more detailed rules explaining commission procedures. Despite some improvements made by these rules, the commissions still provide markedly fewer safeguards than either U.S. criminal court or standard military court proceedings. The commissions allow for no appeal to any civilian court. The chargeable offenses expand military jurisdiction into areas never before considered subject to military justice. The government has broad discretion to close proceedings to outside scrutiny in the interest of “national security.” And defendants will be represented by assigned military lawyers – even if they do not want them. Defendants will also be entitled to civilian lawyers, but unless a defendant can provide financing, civilian lawyers will receive no fees and will have to cover their own personal and case-related expenses. Civilian lawyers can be denied access to information – including potential exculpatory evidence – if the government thinks it “necessary to protect the interests of the United States.” The Defense Department may (without notice) monitor attorney-client consultations; and lawyers will be subject to sanction if they fail to reveal information they “reasonably believe” necessary to prevent significant harm to “national security.”
- ❑ In early 2002, the U.S. military removed several hundred individuals from Afghanistan to the U.S. Naval Base in Guantánamo Bay, Cuba. About 660 detainees are now housed at Guantánamo – including nationals from at least 40 countries, speaking 17 different languages. Three are children, the youngest aged 13. Since the camp opened, about 70 detainees, mainly Afghans and Pakistanis, have been released. There have been 32 reported suicide attempts. While U.S. officials originally asserted the Guantánamo prisoners are “battlefield” detainees who were engaged in combat in Afghanistan, some now held at Guantánamo were arrested in places far from Afghanistan. For example, two Guantánamo prisoners are U.K. residents who were arrested in November 2002 during a business trip to Gambia in West Africa. The Gambian police kept the two men in incommunicado detention for a month while Gambian and U.S. officials interrogated them. In December 2002, U.S. agents took the men to the U.S. military base at Bagram, Afghanistan, and, in March 2003, transported them to Guantánamo, where they remain.
- ❑ On July 3, 2003, the Defense Department announced that six current detainees at Guantánamo had become eligible for trial by military commission. Among the six were two U.K. citizens and an Australian citizen. These designations sparked protests in the United Kingdom and Australia, close U.S. allies. The British advanced “strong reservations about the military commission,” and ultimately obtained some accommodations for the U.K. detainees, including U.S. promises not to seek the death penalty or to monitor their consultations with counsel, and to consider letting them serve any sentence in British prisons. These promises were also extended to the Australian detainee. Despite widespread international criticism, the United States has thus far not afforded the same protections to nationals from any of the other countries represented at Guantánamo.

CHAPTER FIVE: THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS

- ❑ In the two years since September 11, a growing number of foreign governments have passed aggressive new counterterrorism laws that undermine established norms of due process, including access to counsel and judicial review. On June 30, 2003, experts associated with the UN Commission on Human Rights issued a joint statement emphasizing their “profound concern at the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights—civil, cultural, economic, political and social.” They also drew attention to “the dangers inherent in the indiscriminate use of the term ‘terrorism,’ and the resulting new categories of discrimination.”
- ❑ The United States has been pressuring other governments to hand over Al Qaeda suspects, even when this violates the domestic law of those nations. In one such case, the government of Malawi secretly transferred five men to U.S. custody, in violation of a domestic court order. The men were held in unknown locations for five weeks before being released on July 30, 2003, reportedly cleared of any connection to Al Qaeda. In a separate incident, at the request of the U.S. government, Bosnian authorities transferred six Algerian men into U.S. custody, again in violation of that nation’s domestic law. The Bosnian police had arrested the men, five of whom had Bosnian citizenship, in October 2001 on suspicion that they had links with Al Qaeda. In January 2002, the Bosnian Supreme Court ordered them released for lack of evidence. But instead of releasing them, Bosnian authorities handed them over to U.S. troops serving with NATO-led peacekeepers. Despite an injunction from the Human Rights Chamber of Bosnia and Herzegovina, expressly ordering that four of the men remain in the country for further proceedings, the men were shortly thereafter transported to the U.S. detention camp at Guantánamo. They remain there today.
- ❑ During the past decade, there has been a steady erosion in states’ willingness to protect fleeing refugees. The events of September 11 added new momentum to this trend. States are reducing the rights of refugees who succeed in crossing their borders, increasingly returning refugees to their countries of origin to face persecution, and devising new ways to prevent refugees from arriving in their territory in the first place. Australia and Europe (led by the United Kingdom), for example, are considering extra-territorial processing and detention centers for refugees who seek asylum in Australia and the European Union, respectively.
- ❑ According to a series of press reports, the CIA has been covertly transferring terrorism suspects to other countries for interrogation – notably Jordan, Egypt, and Syria, which are known for employing coercive methods. Such transfers – known as “extraordinary renditions” – violate Article 3 of the UN Convention Against Torture, which prohibits signatory countries from sending anyone to another state when there are “substantial grounds for believing that he would be in danger of being subjected to torture.” Some detainees are said to have been rendered with lists of specific questions that U.S. interrogators want answered. In others, the CIA reportedly plays no role in directing the

interrogations, but subsequently receives any information that emerges. Although the number of such renditions remains unknown, U.S. diplomats and intelligence officials have repeatedly (but anonymously) confirmed that they do take place. There have also been reports that U.S. forces have been using so-called “stress and duress” techniques in their own interrogations of terrorism suspects. Concerns about U.S. interrogation techniques intensified in December 2002 when two Afghan detainees died in U.S. custody at the U.S. military base in Bagram, Afghanistan. Their deaths were officially classified as “homicides,” resulting in part from “blunt force trauma.” The U.S. military launched a criminal investigation into the deaths in March 2003. The military is also investigating the June 2003 death of a third Afghan man, who reportedly died of a heart attack while in a U.S. holding facility in Asadabad, Afghanistan.

RECOMMENDATIONS

CHAPTER ONE: OPEN GOVERNMENT

1. Congress should pass a “Restore FOIA” Act to remedy the effects of overly broad provisions in the Homeland Security Act of 2002, including by narrowing the “critical infrastructure information” exemption.
2. Congress should remove the blanket exemption granted to DHS advisory committees from the open meeting and related requirements of the Federal Advisory Committee Act.
3. Congress should convene oversight hearings to review the security and budgetary impact of post-September 11 changes in classification rules, including Executive Order 13292 provisions on initial classification decisions, and Homeland Security Act provisions on the protection of “sensitive but unclassified” information.
4. Congress should consider setting statutory guidelines for classifying national security information, including imposing a requirement that the executive show a “demonstrable need” to classify information in the name of national security.
5. The administration should modify the “Creppy Directive” to replace the blanket closure of “special interest” deportation hearings with a case-specific inquiry into the merits of closing a hearing.

CHAPTER TWO: PERSONAL PRIVACY

1. Congress should repeal section 215 of the PATRIOT Act to restore safeguards against abuse of the seizure of business records, including records from libraries, bookstores, and educational institutions, where the danger of chilling free expression is greatest. Congress should also amend section 505 of the PATRIOT Act to require the FBI to obtain judicial authorization before it may obtain information from telephone companies, internet service providers, or credit reporting agencies.

2. Congress should review changes to FBI guidelines that relax restrictions on surveillance of domestic religious and political organizations to ensure that there are adequate checks on executive authority in the domestic surveillance arena. The guidelines should be specifically amended to better protect against the use of counterterrorism surveillance tools for purely criminal investigations.
3. Congress should delay implementation of the Computer-Assisted Passenger Pre-Screening System II pending an independent expert assessment of the system's feasibility, potential impact on personal privacy, and mechanisms for error correction. Separately, Congress should immediately eliminate all funding for "Total [or Terrorism] Information Awareness" research and development.
4. The Terrorist Threat Integration Center should be housed within DHS where it may be subject to oversight by departmental and congressional officials – who can ensure investigation of possible abuses and enforcement of civil rights and civil liberties.
5. Congress should establish a senior position responsible for civil rights and civil liberties matters within the DHS Office of the Inspector General. This position would report directly to the Inspector General, and be charged with coordinating and investigating civil rights and civil liberties matters in DHS.

CHAPTER THREE: IMMIGRANTS, REFUGEES, AND MINORITIES

1. The Justice Department and DHS should continue cooperating with the Justice Department Office of the Inspector General (OIG) by implementing the remaining recommendations addressing the treatment of the September 11 detainees by the OIG's October 3, 2003 deadline. In addition, Congress should require the OIG to report semi-annually any complaints of alleged abuses of civil liberties by DHS employees and officials, including government efforts to address any such complaints.
2. The Justice Department should rescind the expanded custody procedures regulation that allows non-citizens to be detained for extended periods without notice of the charges against them, as well as the expanded regulation permitting automatic stays of immigration judge bond decisions.
3. The president should direct the attorney general to vacate his decision in *In re DJ* and restore prior law recognizing that immigration detainees are entitled to an individualized assessment of their eligibility for release from detention. Congress should enact a law making clear that arriving asylum seekers should have their eligibility for release assessed by an immigration judge.
4. The administration should fully revive its Refugee Resettlement Program and publicly affirm the United States' commitment to restoring resettlement numbers to pre-2001 levels (90,000 refugees each year). It should ensure that adequate resources are devoted to refugee security checks so that these procedures do not cause unnecessary delays.

5. The Justice Department should respect the judgment of local law enforcement officials and cease efforts to enlist local officials in the enforcement of federal immigration law.

CHAPTER FOUR: UNCLASSIFIED DETAINEES

1. The administration should provide U.S. citizens José Padilla and Yaser Hamdi immediate access to legal counsel. These individuals, and all those arrested in the United States and designated by the president as “enemy combatants,” should be afforded the constitutional protections due to defendants facing criminal prosecution in the United States.
2. The Justice Department should prohibit federal prosecutors from using, explicitly or implicitly, the threat of indefinite detention or military commission trials as leverage in criminal plea bargaining or in criminal prosecutions.
3. The U.S. government should carry out its obligations under the Third Geneva Convention and U.S. military regulations with regard to all those detained by the United States at Guantánamo and other such detention camps around the world. In particular, the administration should provide these detainees with an individualized hearing in which their status as civilians or prisoners of war may be determined. Detainees outside the United States as to whom a competent tribunal has found grounds for suspecting violations of the law of war should, without delay, be brought to trial by court martial under the U.S. Uniform Code of Military Justice. Those determined not to have participated directly in armed conflict should be released immediately or, if appropriate, criminally charged.
4. President Bush should rescind his November 13, 2001 Military Order establishing military commissions, and the procedural regulations issued thereunder.
5. The administration should affirm that U.S. law does not permit indefinite detention solely for purposes of investigation, and that suggestions to the contrary in the Declaration of Vice Admiral Lowell E. Jacoby (USN) do not reflect administration policy.

CHAPTER FIVE: THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS

1. The United States should publicly renounce efforts by other governments to use global counterterrorism efforts as a cover for repressive policies toward journalists, human rights activists, political opponents, or other domestic critics.
2. As a signal of its commitment to take human rights obligations seriously, the United States should submit a report to the UN 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.
3. The United States should affirm its obligation to not extradite, expel, or otherwise return any individual to a place where he faces a substantial likelihood of torture. All reported

violations of this obligation should be independently investigated. The United States should also independently investigate reports that U.S. officers have used “stress and duress” techniques in interrogating terrorism suspects, and it should make public the findings of the military investigations into the deaths of three Afghan detainees in U.S. custody.

4. The United States should respect the domestic laws of other countries, particularly the judgments of other nations’ courts and human rights tribunals enforcing international law.
5. The United States should encourage all countries to ensure that national security measures are compatible with the protections afforded refugees under international law.

CHAPTER ONE

OPEN GOVERNMENT

INTRODUCTION

A growing preoccupation with secrecy has affected all three branches of government in the two years since September 11. A series of legal and policy decisions has made it more difficult for Congress, the courts, and the American public to oversee the operations of the executive branch. Despite signs of increased concern about these changes by Congress in recent months, the normalization of secrecy shows little sign of abating.

This chapter examines how a framework of increased secrecy has developed – encompassing both specific initiatives and a more general pattern of less openness about the way important executive branch decisions are made. The chapter details both of these phenomena and illustrates the consequences of these changes for the values promoted by open government. Finally, it addresses the types of responses needed – particularly given that, in the absence of a formal declaration of war or a traditional, focused external threat, the current security climate may persist indefinitely.

LEGAL BACKGROUND

*A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both.*¹

James Madison

In the democracy envisioned by Madison, effective checks against arbitrary power flow from a government structure in which each branch of government shares information about its activities with the others, and in which the people themselves have access to information about the way government works. Government has always had vital interests in keeping some information secret – protecting intelligence sources and methods and ensuring the safety of military operations among them. But the past half century in particular has seen the creation of an elaborate system of rules designed to protect government’s most important secrets – a system that increasingly has encroached on Madison’s vision that the operations of the U.S. government would be open to its people.

Most of the rules of this secrecy system have been set forth in a series of executive orders, beginning with President Harry S. Truman in 1951 and continuing through President George W. Bush earlier this year.² Through these directives, the executive branch has established standards for how “national security information” should be classified, the different categories of information eligible for classification, and the general grounds on which government secrets should be established and maintained.

Not long after the first such executive order was issued, a special committee convened by President Eisenhower's Secretary of Defense warned that the classification system was already "so overloaded that proper protection of information which should be protected has suffered," and that "the mass of classified papers has inevitably resulted in a casual attitude toward classified information, at least on the part of many."³ Partly in response to such concerns,⁴ Congress passed the Freedom of Information Act (FOIA) in 1966 and strengthened it substantially in 1974.⁵ FOIA established a presumption that executive branch documents would be available to the public subject only to carefully defined exceptions, and that judicial review would be available as a check on agency decisions to withhold information. In signing FOIA into law on July 4, 1966, President Lyndon Johnson emphasized its chief objective: "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."⁶

THE NEW NORM OF GOVERNMENT SECRECY

*Much the same way the indiscriminate use of antibiotics reduces their effectiveness in combating infections, classifying either too much information or for too long can reduce the effectiveness of the classification system, which, more than anything else, is dependent upon the confidence of the people touched by it. While there is always a temptation to err on the side of caution, especially in times of war, the challenge for agencies is to similarly avoid damaging the nation's security by hoarding information.*⁷

J. William Leonard,

Director, Information Security Oversight Office
National Archives and Records Administration

There is some historical precedent for the expanded government secrecy of the past two years; the first and second World Wars and the early years of the Cold War all saw some level of expansion. But the scope of executive branch initiatives to restrict access to information since September 11 has been broader than in the past. More than during previous periods of heightened security concern, the post-September 11 executive has made secrecy – rather than disclosure – its default position.

According to data collected by the Information Security Oversight Office of the National Archives and Records Administration (ISOO), the number of classification actions by the executive branch rose 14 percent in 2002 over 2001 – and declassification activity fell to its lowest level in seven years.⁸ Both in limiting the disclosure of basic information and in denying the public access to executive decision-making processes, the new normal is a democracy with diminished ability to check the exercise of government power, and increased risk of missing information vital to security.

Restricting the Flow of Information

For nearly four decades, and especially since its enhancement in 1974, FOIA has played a central role in expanding public access to executive information, subject to a series of nine carefully delineated exceptions.¹³ Beginning before September 11 and accelerating in the two years since, the administration has sought to restrict FOIA both by (1) expanding the reach of existing statutory exemptions, and (2) adding a new “critical infrastructure” exemption. While the effects of the latter initiative remain unclear, recent court cases on the expansion of existing exemptions verify the extent of the threat to openness posed by the new restrictions.

The Ashcroft Directive

In October 2001, Attorney General John Ashcroft issued a new directive to the heads of executive agencies that announced two key changes in previous executive branch practice. First, it encouraged the presumptive refusal of any FOIA request over which departments and agencies could exercise discretion. Second, it reversed previous Justice Department policy to defend an agency’s refusal to release information only where release would result in “foreseeable harm”; instead, the department would now defend any refusal to release information as long as it had a “sound legal basis.”¹⁴

This was anything but a temporary, emergency approach limited to the immediate aftermath of September 11. Subsequent memoranda, including from White House Chief of Staff Andrew Card, further encouraged agencies to use FOIA exemptions to withhold “sensitive but non-classified” material – a loosely-defined category of information (discussed in more detail below) that could include information voluntarily submitted to the executive from the private sector. As one such memorandum explained:

All departments and agencies should ensure that in taking necessary and appropriate actions to safeguard sensitive but unclassified information related to America’s homeland security, they process any Freedom of Information Act request for records containing such information in accordance with the Attorney General’s FOIA Memorandum of October 12, 2001, by giving full and careful

THE FREEDOM OF INFORMATION ACT

As the U.S. Supreme Court explained in 1973, FOIA “seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”⁹ Under FOIA, “any person” may file an application for access to any document, file, or other record in the possession of an executive agency – without demonstrating any need for the information requested.¹⁰ An agency must release the information requested under FOIA unless it falls within one of the statutory exemptions. If the agency decides to withhold the information, the applicant can challenge that decision in court – where the agency bears the burden of showing that its refusal was legitimate.¹¹ Courts have generally shown some deference to an agency’s determination that a certain exception applies, but such determinations “must be clear, specific, and adequately detailed; they must describe the withheld information and the reason for nondisclosure in a factual and non-conclusory manner; and they must be submitted in good faith.”¹²

consideration to all applicable FOIA exemptions. . . . In the case of information that is voluntarily submitted to the Government from the private sector, such information may readily fall within the protection of Exemption 4 of the FOIA, 5 U.S.C. § 552 (b)(4).¹⁵

Recent court decisions have bolstered the administration's success in expanding the reach of FOIA exemptions. In *American Civil Liberties Union v. U.S. Department of Justice*, the district court denied the ACLU's request for information concerning how often the Justice Department had utilized its expanded surveillance and investigative authority under the PATRIOT Act.¹⁶ To prevent disclosure, the administration invoked FOIA Exemption 1, which permits the withholding of information specifically authorized by an executive order to be kept secret in the interests of national defense or foreign policy.¹⁷ While the court acknowledged the plaintiffs' arguments that the disclosure sought would not harm national security because it would not involve any particular records or other information on current surveillance,¹⁸ it determined that plaintiffs could not "overcome the agency's expert judgment that withholding the information is authorized . . . because it is reasonably connected to the protection of national security."¹⁹

Of perhaps greater significance is *Center for National Security Studies v. U.S. Department of Justice*, in which a divided three-judge panel of the U.S. Court of Appeals for the D.C. Circuit upheld the executive's assertion that FOIA Exemption 7(A) could be used to withhold the names of those detained in the course of investigations following September 11, as well as other information about the detainees, such as the locations, dates, and rationale for their detention.²⁰ In contrast to earlier rulings requiring that the executive's explanation for withholding information be reasonably specific,²¹ the majority broadly deferred to the executive branch in accepting its assertion that disclosure of the requested information could be expected to interfere with law enforcement proceedings – explaining simply "we owe deference to the government's judgments contained in its affidavits."²²

This change in approach greatly concerned dissenting Judge David Tatel, who warned that "the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information . . . eviscerates both FOIA and the principles of openness in government that FOIA embodies."²³ Judge Tatel acknowledged that some of the requested information without question should be exempt from disclosure, but added that the request should not be denied in its entirety:

This all-or-nothing approach runs directly counter to well-established principles governing FOIA requests . . . the government bears the burden of identifying functional categories of information that are exempt from disclosure, and disclosing any reasonably segregable, non-exempt portion of the requested materials.²⁴

Judge Tatel called for a more particularized approach to identifying – and explaining – how the information pending release could negatively affect national security. As Judge Tatel noted, requiring executive agencies to "make the detailed showing the FOIA requires is not second-guessing their judgment about matters within their expertise," but rather applying the law

as it was intended – and ensuring that the judicial branch retains a “meaningful role in reviewing FOIA exemption requests.”²⁵

“Critical Infrastructure” Exemption

In November 2002, Congress passed an expansive “critical infrastructure” exemption introduced by the administration as part of the Homeland Security Act of 2002.²⁶ The new exemption provides that all information submitted to the Department of Homeland Security (DHS) that is “not customarily in the public domain and related to the security or critical infrastructure or protected systems” is not subject to disclosure under FOIA.²⁷

While this new exemption has not yet been utilized to deny access to information under FOIA, and DHS has been slow to publish implementing regulations, it is potentially far-reaching and appears broad enough to withhold a wide range of both private and governmental information. Indeed, proposed regulations to implement the exemption broadly state the type of information that may be restricted and also fail to require that those providing the information substantiate their claim that it falls within the “critical infrastructure” category.²⁸

The administration has argued that the new exemption is necessary to facilitate information sharing; chemical and other firms had claimed that they would be reluctant to provide information to the government if they thought it would become public. However, FOIA already contains clear exemptions for confidential business information, as well as national security information.²⁹ Further, while the intention of the new exemption obviously is to enhance security, to the extent that it prevents disclosure of information showing wrongdoing or ineptitude by private parties it could weaken incentives for private entities to address ongoing or potential problems.

Finally, the new exemption could limit public access to critical health, safety, and environmental information submitted by businesses to the executive – for example, the status of a safety problem at a nuclear power plant, or a chemical facility producing toxic materials and located in a densely populated urban neighborhood.³⁰ This risk is particularly troubling because “critical infrastructure” information cannot be used against the submitting party in any civil action provided it was submitted in good faith. Even if the information reveals that a firm is violating health, safety, or environmental laws, DHS cannot bring a civil action based on that information.³¹

The potential danger posed by the still-unused “critical infrastructure” exemption has greatly concerned some members of Congress. Senator Patrick Leahy (D-VT), for example, warned that the exemption represented the “most severe weakening” of FOIA to date.³² To address such concerns, Senators Leahy, Carl Levin (D-MI), Joseph Lieberman (D-CT), James Jeffords (I-VT), and Robert Byrd (D-WV), and Representatives Barney Frank (D-MA) and Tom Udall (D-NM), introduced the Restoration of Freedom of Information Act of 2003 earlier this year.³³

The “Restore FOIA Act,” as its proponents have termed it, narrows the definition of “critical infrastructure” information to focus on records directly related to the vulnerabilities of

and threats to such infrastructure, and limits the exemption to include only information the government could not have obtained without voluntary submission by private firms.³⁴ It allows for disclosure of records an agency receives independently from DHS and requires that DHS make available any portion of an exempted record that can be segregated. It removes the exemption of communication of “critical infrastructure” information from open meeting requirements. Finally, it removes the prohibition on using “critical infrastructure” information against the submitter in a civil action.³⁵

In short, the new legislation is intended to address concerns such as those expressed by Mark Tapscott, the Director of the Heritage Foundation’s Center for Media and Public Policy, who noted that without such narrowing and clarification the provision “could be manipulated by clever corporate and government operators to hide endless varieties of potentially embarrassing and/or criminal information from public view.”³⁶

Classifying New Information: A Presumption of Secrecy

Executive Order 13292

Executive Order 13292 (E.O. 13292), issued by President Bush on March 28, 2003, represents another example of the expanding default to secrecy – easing the burden on executive officials responsible for deciding whether to classify in the first instance, and making it more difficult for the public to gain access to information.

The latest in a series of presidential orders dating back over half a century to govern the classification (and procedures for later declassification) of national security information,³⁷ E.O. 13292 modifies the order issued by the previous administration in 1995 in certain important respects.³⁸ While the new order preserves some important elements of its predecessor, including the interagency classification review panel that has prompted increased declassification of older documents,³⁹ it promotes greater secrecy by: (1) allowing the executive to delay the release of certain documents; (2) giving the executive new powers to reclassify previously released information;⁴⁰ (3) broadening exceptions to declassification; and (4) lowering the standard under which information is exempted from release – from requiring that it “should” be expected to result in harm to that it “could” be expected to have that result.⁴¹

Perhaps most important, E.O. 13292 removes a provision from the 1995 executive order mandating that “[i]f there is significant doubt about the need to classify information, it shall not be classified.”⁴² This seemingly minor deletion has the effect of changing the “default” setting from “do not classify” to “classify” – likely promoting the classification of more documents, with attendant costs for both government operations and public knowledge. As Thomas Blanton, Executive Director of the National Security Archive, notes, E.O. 13292 thus sends “one more signal . . . to the bureaucracy to slow down, stall, withhold, stonewall.”⁴³

Executive Order 13292 builds upon other efforts to make it easier to classify a wider range of information. In three separate executive orders, the current administration expanded the authority to classify documents to include the Secretary of Agriculture, Secretary of Health and Human Services, and Administrator of the Environmental Protection Agency (EPA).⁴⁴ While

those officials already had means of protecting information, they previously had not had the original classification authority typically vested in officials at departments and agencies engaged in core national security activities.

Homeland Security Information: “Sensitive but Unclassified”

*We’re talking about the safety and security of people who would be better protected by this report This is just bad public policy. If there’s something that needs to be redacted, take it out.*⁴⁵

David Heyman,
Center for Strategic and International Studies
(on the Defense Department’s decision to keep secret his report
on public preparation for bioterrorism attacks)

A little-noticed provision of the Homeland Security Act of 2002 may prove to be a significant barrier to congressional and public access to a wide range of information. Ironically, this provision, which requires the president to prescribe and implement procedures to “identify and safeguard homeland security information that is sensitive but unclassified,” is contained in the section of the act on “information sharing.”⁴⁶

This open-ended language, enacted with little debate or scrutiny, gives the executive branch wide discretion to withhold vast amounts of information even without the need to do so through formal classification. Most of the provision’s terms, including “sensitive but unclassified,” are not defined. And “homeland security information” is defined so broadly with respect to counterterrorism activities as to potentially encompass a wide range of information extending well beyond what traditionally has been classified under executive orders for national security purposes.⁴⁷

Moreover, unlike the “critical infrastructure” information provision of the act discussed above, there is no “savings clause” – a provision that would require information that falls within this potentially sweeping category to be revealed if another statute or regulation mandates such disclosure.⁴⁸ In other words, the sweeping language of the Homeland Security Act could trump disclosure provided for under a previously enacted law. Finally, the provision grants full control over managing and sharing such “homeland security information” to the president, who is required only to submit a report to Congress on the section’s implementation by November 25, 2003.⁴⁹

How the executive branch will implement this provision remains unclear. One recent example that might prove illustrative involves the Defense Department’s refusal over the past year to release an unclassified report on lessons learned from the anthrax attacks in late 2001. That report, the outgrowth of a December 2001 meeting organized by the Center for Strategic and International Studies and funded by the Department’s Defense Threat Reduction Agency, included recommendations for improving the nation’s preparation for future bioterrorism attacks.⁵⁰ However, the Defense Department determined that the report should be treated as “For

Official Use Only” (a category of restricting access to unclassified information analogous to “sensitive but unclassified”) and refused to release any portion of it to the public.

The “homeland security information” provision represents a sweeping new delegation of authority to expand secrecy well beyond formal classification procedures in a manner that is likely to further impair Congress’ oversight responsibilities. Whether Congress will step in to try to mitigate this potential remains uncertain.

Withdrawal of Information Previously Released

The administration also has removed information previously available to the public from government websites. The deletions have extended beyond highly sensitive materials that may have been posted inadvertently to also reach general program information. For example, the Federal Aviation Administration removed data from its website regarding enforcement actions against air carriers. And the EPA removed risk management plans that provide important information about the dangers of chemical accidents and emergency response mechanisms. These actions were taken despite the fact that such information may be important for those planning to fly and those living near chemical plants; in the case of the information withdrawn by the EPA, the FBI had explicitly stated that its availability presented no unique terrorist threat.⁵¹

Limiting Congressional Oversight

Open and transparent procedures for making government decisions are crucial for congressional and public oversight and, in turn, an understanding of the terms and consequences of the policy decisions that emerge. Just as the developments summarized above demonstrate a growing presumption of information secrecy, the increase in secrecy surrounding the processes of executive branch decision-making reveals a default instinct to remove such processes from public view. This has been evidenced in the past year by the secrecy surrounding consideration of provisions to expand the PATRIOT Act, efforts to withhold information in the congressional report on September 11 intelligence failures, and the denial of access to meetings of key DHS private sector advisors.

The PATRIOT Act and the Justice Department

*We want to make sure that what we pass in Congress works the way we wanted it to, and that the money is spent the way we intended. We need a maximum flow of information to make the separation of powers work.*⁵²

Senator Charles Grassley (R-IA)

The past year has been marked by several clashes between senior members of Congress and the administration over access to information on the implementation of the PATRIOT Act. Following denials by the Justice Department of information he considered relevant, House Judiciary Committee Chairman James Sensenbrenner (R-WI) threatened to subpoena documents relating to the act’s implementation – prompting the Justice Department to respond to some of

the committee's questions.⁵³ The Department initially answered 28 of the 50 questions from the committee, but indicated in most responses that the information was classified.⁵⁴ When Senator Patrick Leahy, ranking member on the Senate Judiciary Committee, then submitted 93 questions, including the 50 already posed by the House Judiciary Committee, the Justice Department responded to only 56 of them in a sequence of three letters – though it shared certain other information with the intelligence committees.

The Justice Department and the FBI had also repeatedly refused to provide Judiciary Committee members with a copy of the secret Foreign Intelligence Surveillance Act (FISA) Court's May 17, 2002 opinion rejecting the Department's proposed implementation of the PATRIOT Act's FISA amendments,⁵⁵ and criticizing aspects of the FBI's past performance on FISA warrants.⁵⁶ (FISA and its implementation are discussed in detail in Chapter 2.) In response, in February 2003, Senators Leahy, Grassley, and Arlen Specter (R-PA) introduced the Domestic Surveillance Oversight Act of 2003, intended as one means of reasserting a portion of Congress' oversight authority.⁵⁷ The bill modifies FISA by adding to its public reporting requirements. It directs the attorney general to include, in an annual public report on FISA, the aggregate number of U.S. persons targeted for any type of order under the act, as well as information about the total number of times FISA is used for criminal cases or law enforcement purposes.

Expressing the importance of greater oversight regarding the changes adopted in the PATRIOT Act more generally,⁵⁸ Senator Leahy explained:

Before we give the government more power to conduct surveillance on its own citizens, we must look at how it is using the power that it already has. We must answer two questions: Is that power being used effectively, so that our citizens not only *feel* safer, but *are in fact* safer? Is that power being used appropriately, so that our liberties are not sacrificed?⁵⁹

These remarks came in the context of a series of moves by the Justice Department to restrict Congress' access to information in its oversight capacity. For example, on March 27, 2003, the Department issued a directive telling its employees to inform the Department's Office of Legislative Affairs "of all potential briefings on Capitol Hill and significant, substantive conversations with staff and members on Capitol Hill. . . . We will assist in determining the appropriateness of proceeding with potential briefings."⁶⁰ Senator Grassley attacked the directive as "an attempt to control information."⁶¹ Senator Leahy noted that "the administration's overwhelming impulse has been to limit the flow of information, and that has made congressional oversight of this Justice Department a never-ending ordeal."⁶²

Indeed, the March directive came on the heels of controversy regarding the development and drafting of the "Domestic Security Enhancement Act of 2003," commonly known as "PATRIOT II."⁶³ Its provisions, including those expanding the authorization of secret arrests, the expedited loss of U.S. citizenship, and deportation powers, raise profound human rights and civil liberty concerns. Although rumors of a draft had circulated for months prior to its leak in early February 2003, Justice Department officials repeatedly had denied that they were preparing any new legislation. As late as February 3, just four days before the draft was leaked,

Department officials assured Senator Leahy's staff that the Justice Department was not drafting any such proposals. At a hearing before the Committee on March 4, 2003, Senator Leahy told Attorney General Ashcroft bluntly: "Somebody who reports directly to you lied . . . and I think that this is not a good way to do things. . . . I think it shows a secretive process in developing this."⁶⁴

Faced with strong reactions from other members of Congress and the press, Attorney General Ashcroft continued to deny that the administration had planned to present a "PATRIOT II" proposal to Congress – only acknowledging that the administration was continuing to "think expansively" about the relevant issues and not ruling out the prospect that certain proposals might be submitted to Congress at some future time. At the same time, he appeared to rule out the possibility of any advance consultation with the committees of jurisdiction, stating at a March 4 Senate Judiciary hearing: "Until I have something I think is appropriate, I don't know that I should engage in some sort of discussion."⁶⁵

The administration has not acknowledged the concerns about process – including whether given the substantial interest in the implementation of the PATRIOT Act there should have been consultation with Congress on the issues under consideration. Despite the controversial provisions being considered, the draft apparently was forwarded only to Vice President Cheney (in his capacity as President of the Senate) and Speaker of the House Dennis Hastert (R-IL).⁶⁶

House Judiciary Committee Chairman Sensenbrenner expressed concerns about the scope of the proposal and the lack of congressional consultation: "[A]s I stressed during legislative consideration of the PATRIOT Act, my support for this legislation is neither perpetual nor unconditional. I believe the Department and Congress must be vigilant."⁶⁷ Despite this, recent reports suggest that the Justice Department continues to work on a version of similar legislation behind closed doors⁶⁸ – consistent with calls by the president and attorney general for expanded powers to arrest, detain, and seek the death penalty.⁶⁹ While controversy over "PATRIOT II" may make it too difficult to submit the bill as a single integrated package, pieces of the leaked draft – coupled with other proposals – may be introduced separately in the coming months. Senator Orrin Hatch (R-UT) is expected to introduce one such bill, the VICTORY Act, in the fall of 2003.⁷⁰ One provision of this bill would grant the Justice Department the authority to seize private records in terrorism investigations through the use of administrative subpoenas, bypassing the federal courts (as discussed in Chapter 2).⁷¹ President Bush publicly endorsed this proposal in a speech at the FBI Academy on September 10, 2003, claiming that current law posed "unreasonable obstacles to investigating and prosecuting terrorism."⁷²

In August 2003, just after the draft of the VICTORY Act became public, Attorney General Ashcroft launched a campaign aimed at convincing the American people of the need for the Justice Department's expanded powers under the PATRIOT Act.⁷³ Ironically, that campaign has been closed to the public.⁷⁴ Although the attorney general has been traveling the country to shore up support for the PATRIOT Act, in nearly every city he has visited so far he addressed only a pre-screened group of law enforcement officers in closed sessions.⁷⁵ And following each speech, the attorney general has refused to take questions, even from newspaper journalists trying to report on what he said.⁷⁶

FACA and the Department of Homeland Security

An additional limit on oversight has been through the exemption of advisory committees constituted by DHS from the Federal Advisory Committee Act (FACA). Enacted in 1972, FACA is intended to limit the ability of interest groups to influence public policy by making Congress and the public aware of the composition and activities of advisory committees set up by the executive branch. Such advisory committees often serve as the primary instrument for outside input into executive branch decision-making. FACA mandates that such committees announce their meetings, hold them in public, provide for representation of differing viewpoints, and make their materials available. The act also provides exemptions on the basis of national security for shielding from disclosure certain information and activities.⁷⁷

Under Section 871 of the Homeland Security Act however, DHS advisory committees are exempt from FACA's requirements, and the committees thus may meet in secret.⁷⁸ As a result, their activities and reports will be shielded from scrutiny, regardless of the subject matter under review or the interests of the advisory committee members. This broad carve-out, which covers advisory committee engagement with components of DHS previously located in other departments where they were subject to FACA requirements, extends well beyond the focused exemptions that already existed in FACA and could have been utilized by DHS.

In an effort to address this carve-out, Senator Robert Byrd offered an amendment to require disclosure of the recommendations of DHS advisory committees, as well as information on the members of such committees. Senator Byrd expressed concern about the exemption from public disclosure in light of what he termed "the specter" of a "conflict of interest" – saying the amendment would help build greater public confidence in the security efforts of DHS. The amendment was rejected on a largely party-line vote of 50-46.

The September 11 Report and the Withholding of Selected Information

*My judgment is that 95 percent of that information could be declassified, become uncensored, so the American people would know.*⁷⁹

Richard Shelby (R-AL),
Former Senate Intelligence Committee Chairman

A highly publicized dispute over the classification of Congress' own work product further highlights the tension between the branches concerning restrictions on the release of information. Following the completion of a lengthy joint report of the House and Senate intelligence committees on the intelligence failures leading to the September 11 attacks, an administration working group coordinated by the CIA redacted more than two-thirds of the report's text – including some sections that had already been discussed publicly. Recognizing the implications for effective oversight and understanding of what had gone wrong prior to September 11, a bipartisan group of committee members protested the reach of the CIA's classification process and threatened to use for the first time an obscure, 26-year old Senate rule (Senate Resolution 400) to declassify the document themselves over administration objections.⁸⁰ Faced with this

bipartisan threat, the administration scaled back the scope of information that it insisted be redacted.⁸¹

Despite this, when the report finally was released in mid-July 2003, controversy erupted over key sections that remained classified. While acknowledging the importance of keeping certain information classified to protect intelligence sources and methods, members of Congress raised new concerns about the redaction of other parts of the report. Former Senate Intelligence Committee Chairman Richard Shelby stated that he thought certain sections had been classified for the wrong reasons, referring specifically to a 28-page section dealing with alleged foreign support for terrorism.⁸² House Minority Leader Nancy Pelosi (D-CA), also involved in the September 11 inquiry as a senior member of the House Intelligence Committee, emphasized the difficulty in disseminating its findings:

It took us nine months to do our entire investigation. . . . It took six and a half months to . . . get this declassified version out. . . . They do not want to reveal information that should be available to the public. . . . We need to protect the American people in the future. This secrecy does not serve that purpose.⁸³

As of August 2003, 46 senators had signed a letter to the president, circulated by Senators Charles Schumer (D-NY) and Sam Brownback (R-KS), requesting that the White House declassify additional portions of the report.⁸⁴ Senate Resolution 400 requires a majority vote to disclose such information over administration objections.⁸⁵ In early August, the Democratic members of the House Permanent Select Committee on Intelligence, led by Representative Jane Harman (D-CA), endorsed additional declassification of the portions of the report withheld, saying that “there is a compelling national interest” in doing so, and expanded declassification “will not compromise important intelligence activities.”⁸⁶ This left open the prospect for a battle between Congress and the executive – and possible unilateral legislative action to release portions of the still-classified sections if a compromise cannot be reached.

The Courts’ Deference to Secrecy

Among the most troubling examples of expanded secrecy has been the sustained effort of executive branch officials to close certain immigration proceedings that have traditionally been open – an effort that began immediately after September 11 and has continued in the two years since. Ten days after the September 11 attacks, Chief Immigration Judge Michael Creppy issued a directive requiring immigration judges to implement a full information blackout on any case deemed of “special interest” by the Justice Department.⁸⁷ The so-called “Creppy Directive” closes hearings involving such “special interest” detainees and also prohibits court administrators from listing the cases on dockets or confirming when hearings will be held. The restrictions prevent detainees’ families and members of the news media from attending the hearings.

In *North Jersey Media Group, Inc. v. Ashcroft*, the U.S. Court of Appeals for the Third Circuit, reversing the district court below, accepted the “credible, although somewhat speculative” national security concerns that the attorney general had used to justify this blanket directive.⁸⁸ The court acknowledged that it was “quite hesitant to conduct a judicial inquiry into the credibility of these security concerns,” given a tradition of “great deference to Executive

expertise.”⁸⁹ A dissenting judge accepted the general concept of deference in national security cases, but rejected the Creppy Directive’s blanket closure approach and called for reinstituting the authority of immigration judges to conduct a case-by-case analysis.

The U.S. Court of Appeals for the Sixth Circuit reached a very different conclusion in *Detroit Free Press v. Ashcroft*⁹⁰ – acknowledging the principle of deference to the executive on national security issues, and the interests asserted by the government for closure, but holding that there is a First Amendment right of access to deportation hearings and that a blanket closure of such hearings was impermissible. In its ruling, the court noted the important role that public access plays in ensuring that procedures are fair and government does not make mistakes.⁹¹

Despite this split of appellate authority, the U.S. Supreme Court has declined to review the decisions.⁹² As it stands, openness advocates may look to the Sixth Circuit in *Detroit Free Press*, and the dissent in *North Jersey Media Group*, both of which criticized the Creppy Directive for not requiring particularized decisions, narrowly tailored so as to restrict only information that would damage national security.

The Question of Security

*Law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public.*⁹³

Eleanor Hill,

Staff Director of the Joint U.S. House-Senate Intelligence Committee

While Congress has often yielded quickly to the executive’s insistence on secrecy since September 11, some members have begun efforts to recapture some of the access to information that existed prior to the terrorist attacks – giving cause to question whether the new norm of secrecy can be sustained. Some of this stepped-up legislative attention has arisen out of the recognition by members, including many who traditionally have deferred to the executive branch on matters of national security, of the rapid increase in the scope of secrecy and its consequences for their own oversight activities and capabilities.

One example is illustrative. In testimony in May 2003 before a commission investigating the events of September 11, Rep. Porter Goss (R-FL), Chair of the House Permanent Select Committee on Intelligence, testified that “we overclassify very badly . . . there’s a lot of gratuitous classification going on,” adding that the “dysfunctional” classification system remains his Committee’s greatest challenge.⁹⁴ Chairman Goss endorsed the efforts made in the 1990s by the late Senator Daniel Patrick Moynihan, who had chaired a two-year bipartisan commission investigating government secrecy that raised concerns about overclassification and issued recommendations to narrow the scope and duration of government secrets. While he had not previously identified himself with those efforts, Chairman Goss now suggested that perhaps they did not go far enough.⁹⁵

Members of Congress with strong security credentials are also recognizing that where secrecy is used to cover up procedural deficiencies within either the government or private sector, it can permit security vulnerabilities and other dangers to go unnoticed and unaddressed, in turn making it harder to correct any errors.⁹⁶ And they understand that secrecy can breed increased distrust in governmental institutions. As Senator John McCain (R-AZ) noted in testimony in May 2003: “Excessive administration secrecy on issues related to the September 11 attacks feeds conspiracy theories and reduces the public’s confidence in government.”⁹⁷

As many of these members are realizing, too much secrecy may well result in *less* security. A system that, in the words of the Director of the Information Security Oversight Office, is often “not perceived as being discerning” with respect to what should be secret in turn carries the risk of reduced accountability – and missed opportunities for needed information sharing both within the government and with the American people.⁹⁸

RECOMMENDATIONS

1. Congress should pass a “Restore FOIA” Act to remedy the effects of overly broad provisions in the Homeland Security Act of 2002, including by narrowing the “critical infrastructure” exemption.
2. Congress should remove the blanket exemption granted to DHS advisory committees from the open meeting and related requirements of the Federal Advisory Committee Act.
3. Congress should convene oversight hearings to review the security and budgetary impact of post-September 11 changes in classification rules, including Executive Order 13292 provisions on initial classification decisions, and Homeland Security Act provisions on the protection of “sensitive but unclassified” information.
4. Congress should consider setting statutory guidelines for classifying national security information, including imposing a requirement that the executive show a “demonstrable need” to classify information in the name of national security.
5. The administration should modify the “Creppy Directive” to replace the blanket closure of “special interest” deportation hearings with a case-specific inquiry into the merits of closing a hearing.

CHAPTER TWO

PERSONAL PRIVACY

INTRODUCTION

The past two years have seen growing bipartisan concern that Fourth Amendment safeguards against arbitrary governmental intrusion are being eroded in the name of national security. The law regulating the executive branch's authority to pry into Americans' private lives has changed dramatically since September 11. Attorney General John Ashcroft lifted restrictions that had limited FBI monitoring of domestic religious, civic, or political organizations. The PATRIOT Act lowered the standards for clandestine searches, electronic eavesdropping, and secret access to customer records and personal information. The executive has initiated a range of data-mining projects designed to search through vast amounts of personal information, looking for patterns of suspicious behavior. These changes have raised fears that bedrock principles of individualized suspicion and presumptive innocence have been replaced with a new normal of generalized suspicion and surveillance.

In the face of these initiatives, citizens, city councilors, librarians, and legislators from across the political spectrum have begun to challenge the expansion of federal surveillance powers. Bipartisan opposition put an end to the proposed neighbor-to-neighbor spying program Operation TIPS. Three states, as well as 162 towns, counties, and cities have passed resolutions affirming their commitment to civil liberties in the face of encroachments by the PATRIOT Act.⁹⁹ Librarians and booksellers have joined a bipartisan group of congressional representatives to press for legislation protecting library and bookstore records from governmental surveillance without judicial supervision. Congress has continued to assert its oversight authority in demanding additional explanation about the scope of the Terrorist (formerly Total) Information Awareness program. The U.S. House of Representatives also voted to roll back authorization for so-called "sneak and peek" warrants that allowed law enforcement to covertly search through private property and then further delay notification of the search.

The recent congressional engagement is encouraging. But more needs to be done to ensure that the tools entrusted to the executive to secure the nation from terrorist attack are consistent with Americans' expectations of privacy. The need for ongoing, stringent oversight of the executive's sweeping new information-gathering powers is starkly highlighted by the General Accounting Office's (GAO) June 2003 conclusion that, even without additional databases for tracking airline passengers and identifying patterns of terrorist activity, "the government cannot adequately assure the public that all legislated individual privacy rights are being protected."¹⁰⁰

LEGAL BACKGROUND

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*¹⁰¹

Fourth Amendment, U.S. Constitution

The Fourth Amendment protects our “persons, houses, papers, and effects” from arbitrary governmental intrusion by requiring authorities to demonstrate that a search is reasonable and based on probable cause to suspect criminal activity. As the U.S. Supreme Court has explained, Fourth Amendment limitations on the executive branch’s search and seizure powers are designed to “prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”¹⁰² It protects what is in essence, our “right to be let 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.”¹⁰³ The right to be let alone also protects the exercise of other fundamental rights, such as the freedom of speech and freedom of religion, which may be chilled by governmental monitoring.

The right to privacy is also protected by international law. Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, protects privacy rights in similar terms. Just as the right to free speech is protected by the First Amendment, freedom of expression is protected by Article 19 of the ICCPR. And Article 12 of the Universal Declaration of Human Rights provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.”¹⁰⁴

THE PATRIOT ACT

In post-PATRIOT America, the FBI no longer needs individualized evidence to suspect that a person is connected to terrorism in order to trawl through a person’s reading material, rental car records, school grades, and favorite internet sites, looking for signs of suspicious activity. The PATRIOT Act also allows law enforcement officials to direct the use of highly intrusive surveillance techniques, traditionally available exclusively for foreign intelligence gathering, for investigations that are primarily criminal in nature. This means that federal agents who lack probable cause to get a criminal wiretap may obtain the information they want simply by indicating the case has a purpose connected to foreign intelligence.

Access to Personal Records

*I think the Patriot Act was not really thought out . . . in our desire for security and our enthusiasm for pursuing supposed[] terrorists, . . . we might be on the verge of giving up the freedoms which we’re trying to protect . . . I don’t think it’s anybody’s business what I’m reading in the library.*¹⁰⁵

Representative Don Young (R-AK)

Sections 215 and 505 of the PATRIOT Act allow the FBI secretly to access information about U.S. persons (U.S. citizens and legal permanent residents), including library, medical, education, internet, television, and financial records, *without demonstrating any suspicion that the target is involved in espionage or terrorism*.¹⁰⁶ Prior to the PATRIOT Act, the personal records of U.S. persons could only be accessed by the FBI if there were “specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.”¹⁰⁷ The PATRIOT Act dropped this requirement of individualized suspicion.¹⁰⁸

Moreover, section 215 requests are considered only by the secret Foreign Intelligence Surveillance Court (FISC), which hears the government’s requests *ex parte* – in the absence of the target of the search and the target’s counsel. Prior to the PATRIOT Act, the FISC could issue orders only for the records held by a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility.¹⁰⁹ Bookstore, library, education, and medical records were not available through secret processes; any request for their production could be challenged in open court. The PATRIOT Act, however, expands the FISC’s reach to requests for “any tangible things (including books, records, papers, documents, and other items),” held by any business.¹¹⁰

THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

The FISC was established as part of the 1978 Foreign Intelligence Surveillance Act. The court was originally composed of seven federal judges, but the number was increased to eleven under the PATRIOT Act. The Chief Justice of the U.S. Supreme Court appoints judges to the FISC for staggered terms. Because the judges review the FBI’s surveillance applications *ex parte*, only the government can appeal the FISC’s decision to modify or deny an application. Appeals are heard by the Foreign Intelligence Court of Review, a secret court composed of three semi-retired federal judges.

Section 505 requests are not subject to any judicial oversight. These “National Security Letters” (NSLs) authorize the FBI to order a telephone company or internet service provider to disclose the target’s name, address, length of service, and local and long distance billing records. The FBI may also use NSLs to obtain financial records and information held by consumer credit reporting agencies (data highly prone to error).¹¹¹ With no judicial oversight, service providers are compelled to produce these records solely on the basis of a written declaration by the FBI director or his designee that the information is sought for an investigation “to protect against international terrorism or clandestine intelligence activities.”¹¹² Once again, the FBI need no longer demonstrate suspicion that the individual targeted is involved in terrorism. Finally, both section 215 and section 505 orders impose a gag on the provider of the records, making it a crime to reveal that the FBI has seized or searched customer information. Thus, a librarian who speaks out about being forced to reveal a patron’s book selections can be subject to prosecution.¹¹³

Because of the secrecy surrounding these surveillance operations, little is known about how many U.S. persons have been subject to such intrusions. To understand the scope of these new powers, House Judiciary Committee Chairman James Sensenbrenner (R-WI) inquired in July 2002 whether section 215 of the PATRIOT Act had been used to access library, bookstore, or newspaper records and, if so, how many times. The Justice Department refused to answer,

saying that such information is classified.¹¹⁴ In the meantime, a Freedom of Information Act (FOIA) request by the ACLU on the implementation of the PATRIOT Act garnered 350 pages of heavily redacted material.¹¹⁵ The FBI had issued enough NSLs to fill six blacked out pages.¹¹⁶ (Foreign Intelligence Surveillance Act orders by the secret court, discussed below, filled another blacked-out page.¹¹⁷)

Many have been outspoken about the potential these new surveillance measures have to chill freedom of expression and inquiry. As one librarian put it, section 215 of the PATRIOT Act “conflicts with our code of ethics” because it forces librarians to let the FBI “sweep up vast amounts of information about lots of people – without any indication that they’ve done anything wrong.”¹¹⁸ In June 2002, a coalition of librarians, booksellers, and others asked Congress to reinstate the pre-PATRIOT system of subpoenas subject to judicial review as the method of obtaining these records.¹¹⁹ Many of these groups also support a bill sponsored by Representative Bernard Sanders (I-VT) called the Freedom to Read Protection Act (FRPA) (H.R. 1157). The bill aims to raise judicial and congressional oversight of section 215 activity, and it would exempt bookstores and libraries from the new catch-all orders requiring the production of tangible things.¹²⁰ Law enforcement officials would still be able to obtain these records, but would have to get a subpoena to do so, subject to normal judicial scrutiny.¹²¹ FRPA now has a bipartisan group of 133 cosponsors in the House.¹²²

Electronic Surveillance

The Foreign Intelligence Surveillance Act (FISA)¹²³ was passed in 1978 in an effort to constrain federal wiretapping authority following revelations of widespread abuse in the 1970s.¹²⁴ Rather than allowing the executive unfettered discretion to conduct such searches, FISA authorized counterintelligence agents to wiretap U.S. persons under specific circumstances for the sole purpose of pursuing foreign intelligence information. Subject to fewer restrictions than wiretap searches aimed at criminal targets, FISA orders allowed targets to be: surveilled for 90 days (or up to a year if the target is a “foreign power”);¹²⁵ kept in the dark about the surveillance unless and until the FBI initiates a prosecution;¹²⁶ and deprived of the ability to see or challenge government affidavits against them whenever the attorney general maintained that disclosure would prejudice national security.¹²⁷ Most significant, whereas law enforcement officers conducting a criminal investigation had to convince a court that there was probable cause to suspect specific criminal activity to obtain a criminal wiretap warrant,¹²⁸ intelligence officials seeking a FISA order only needed to show the FISC that there was probable cause to believe that the target is a foreign power or an agent of a foreign power,¹²⁹ and (if a U.S. person) was conducting activities which “involve” or “may involve” a violation of U.S. criminal law.¹³⁰ Accordingly, FISA orders were available *only* for “the purpose of” gathering foreign intelligence information.¹³¹

THE ORIGINS OF FISA: THE 1976 CHURCH COMMITTEE REPORT

FISA was one of the reform measures adopted in response to a 1976 report by the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee).¹³² The report revealed that on the premise of “national security,” U.S. intelligence agencies had been carrying out illegal surveillance of domestic organizations, collecting “vast amounts of information about the intimate details of citizens’ lives and about their participation in legal and peaceful political activities.”¹³³ Although the targets of this surveillance were primarily anti-war protesters and civil rights activists (including Dr. Martin Luther King, Jr.), they spanned a broad spectrum of groups, including the Women’s Liberation Movement, the John Birch Society, and the American Christian Action Council.¹³⁴

The Church Committee determined that such abuses were an inevitable outgrowth of the executive branch’s “excessive” power over intelligence activities, which, until then, had been largely exempted from the normal system of checks and balances.¹³⁵ This problem had its roots in the mid-1930s, when President Franklin D. Roosevelt unilaterally authorized the FBI and other intelligence agencies to conduct domestic counterintelligence operations – a practice that grew substantially during the Cold War and during the civil unrest of the 1960s and 1970s. In the latter period, secret surveillance techniques that had been used against suspected Communist agents began to be applied against a wide range of domestic groups advocating for peaceful societal change – groups with no suspected connection to a foreign power.¹³⁶ The Church Committee warned that the “system for controlling intelligence must be brought back within the constitutional scheme,”¹³⁷ emphasizing that “unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature.”¹³⁸

Because FISA made the standards for foreign intelligence wiretaps lower than those constitutionally required for ordinary domestic criminal investigations, courts and the Justice Department erected a filter (often mischaracterized as a “wall”) between those conducting domestic law enforcement and foreign intelligence operations.¹³⁹ The filter did not prevent intelligence officials from sharing FISA wiretap information about imminent criminal activity. Indeed, prior to the PATRIOT Act, the FBI provided monthly briefings to law enforcement on all counterintelligence investigations in which there were “reasonable indications of significant federal crimes.”¹⁴⁰ The filter simply required that raw FISA intercepts be screened so that only the information which might be relevant to criminal activity was passed on to prosecutors.¹⁴¹ The Criminal Division of the Justice Department was explicitly permitted to “give guidance to the FBI aimed at preserving the option of criminal prosecution,”¹⁴² but the filter ensured that the decision on when to share information obtained with counterintelligence methods resided with intelligence officials. Thus, law enforcement could not use the intelligence division to collect information for a criminal case which it would otherwise be barred from collecting due to insufficient evidence to support a search warrant within the criminal justice system.

Section 218 of the PATRIOT Act altered the 1978 FISA. Whereas the 1978 Act limited FISA surveillance to use in investigations “for the purpose of” gathering foreign intelligence,¹⁴³ section 218 expanded FISA surveillance to investigations in which the collection of foreign intelligence is merely a “significant purpose” of the surveillance.¹⁴⁴ Thus, as Attorney General

Ashcroft explained in guidelines implementing the new law, FISA can now “be used primarily for a law enforcement purpose, so long as a significant foreign intelligence purpose remains.”¹⁴⁵ At the same time, the attorney general replaced existing Justice Department procedures prohibiting “the Criminal Division’s directing or controlling the [FISA] investigation toward law enforcement objectives”¹⁴⁶ with new procedures encouraging criminal prosecutors to advise FBI intelligence officials concerning “the initiation, operation, continuation, or expansion of FISA searches and surveillance.”¹⁴⁷ The filter no longer operates to prevent law enforcement officials from using FISA orders to avoid Fourth Amendment probable cause requirements.

REQUIREMENTS FOR CRIMINAL AND INTELLIGENCE ELECTRONIC SURVEILLANCE

TITLE III (CRIMINAL LAW)	FISA BEFORE PATRIOT	FISA AFTER PATRIOT
Warrant issued in ordinary federal court	Order issued by secret FISC	Order issued by secret FISC
Probable cause of specified crime	Probable cause that target is a “foreign power” or an “agent” thereof AND if U.S. person, involved in activities which “involve” or “may involve” a crime	Probable cause that target is a “foreign power” or an “agent” thereof AND if U.S. person, involved in activities which “involve” or “may involve” a crime
Available in criminal investigations	Available where collection of foreign intelligence is “the purpose” of the investigation	Available “primarily for a law enforcement purpose, so long as a significant foreign intelligence purpose remains”
Initiated and directed by law enforcement	Initiated and directed by intelligence. Law enforcement prohibited from “directing or controlling the [FISA] investigation toward law enforcement objectives”	Law enforcement may advise intelligence on “the initiation, operation, continuation, or expansion of FISA searches and surveillance”
Authorized for 30 days	Authorized for 1 year against foreign powers, 90 days against their agents	Authorized for 1 year against foreign powers, 90 days against their agents
Notice within 90 days of termination	No notice unless and until prosecution initiated; no right to see application	No notice unless and until prosecution initiated; no right to see application
Targets can pursue civil remedies for illegal wiretaps	Targets have no remedy against illegal wiretaps	Targets have no remedy against illegal wiretaps

Secret Courts Disagree On the Extent of FISA As Amended

*If direction of counterintelligence cases involving the use of highly intrusive FISA surveillances and searches by criminal prosecutors is necessary to obtain and produce foreign intelligence information, it is yet to be explained to the Court.*¹⁴⁸

Foreign Intelligence Surveillance Court (2002)

In March 2002, the new procedures authorizing prosecutors to direct FISA investigations came before the FISC. Although in its 25-year history the FISC has reportedly approved without modification all but five government applications,¹⁴⁹ the court roundly rejected the attorney general's new interpretation of the amended FISA and took the unprecedented step of publishing its decision. The FISC determined that allowing criminal prosecutors to direct the use of FISA surveillances is "designed to... enhance criminal investigation and prosecution... instead of being consistent with the need... to obtain, produce, and disseminate foreign intelligence information."¹⁵⁰

The executive appealed the decision to the Foreign Intelligence Surveillance Court of Review (Court of Review). Meeting for the first time in its 25-year history, the three-judge Court of Review overruled the FISC, holding that criminal prosecutors may direct FISA investigations. The only restriction on FISA powers imposed by the Court of Review is that the FISA process may not be used with the "sole objective of criminal prosecution."¹⁵¹ This standard is satisfied "[s]o long as the government entertains a realistic option of dealing with the [suspected foreign agent] other than through criminal prosecution."¹⁵²

Again, the secrecy surrounding FISA surveillance makes oversight difficult. Since the unprecedented release of the FISC and Court of Review opinions, the FISC rulings have remained secret, as before. And people monitored under FISA do not find out that the court has approved the investigations unless and until they are prosecuted. Nonetheless, there are some preliminary indications of the extent to which FISA has been used. The FISC itself has complained that executive branch agents, including the FBI Director, have repeatedly misled the court in order to circumvent the filter between criminal and intelligence operations.¹⁵³ The FISC recalled a litany of "misstatements and omissions of material facts" "in some 75 FISA applications related to major terrorist attacks directed against the United States."¹⁵⁴ Furthermore, government statistics show that between 2001 and 2002 the number of FISA orders increased by 31 percent while the number of ordinary criminal surveillance warrants dipped by 9 percent.¹⁵⁵ The number of FISA orders issued in 2002 is 21 percent greater than the largest number in the previous decade, and FISA orders now account for just over half of all federal wiretapping conducted.¹⁵⁶ The Justice Department has admitted that other provisions of the PATRIOT Act have been applied beyond the intended counterterrorism scope of the Act. For example, Sections 216, 220 and 319 have been exploited to track not only terrorist conspirators, but also "at least one major drug distributor... thieves who obtained victims' bank account information and stole the money... a fugitive who fled on the eve of trial... a hacker who stole a company's trade secrets... [and] a lawyer [who] had defrauded his clients."¹⁵⁷

In addition, the number of “emergency” FISA orders issued has exploded in the past year. Under current law, so-called “emergency” surveillance may be conducted on the authorization of the attorney general for 72 hours before it must be reviewed and approved by the FISC.¹⁵⁸ This emergency procedure does not require the executive to establish probable cause or seek any prior judicial approval.¹⁵⁹ According to FBI Director Robert Mueller, the FBI has “made full and very productive use of the emergency FISA process,” “including 170 emergency FISAs” which is more than triple the total number employed in the prior 23-year history of the FISA statute.¹⁶⁰

Proposals for Further Expanding FISA

In February 2003, the non-partisan government watchdog, the Center for Public Integrity, leaked a copy of proposed legislation drafted in secret by the Justice Department. The secret proposals were entitled the Domestic Security Enhancement Act of 2003, dubbed PATRIOT II after the leak.¹⁶¹ The draft act aimed to abolish three key protections from surveillance for U.S. persons by: (1) allowing foreign intelligence surveillance of individuals with no known links to any foreign government or to any group engaged in international terrorism, but suspected of plotting international terrorism individually;¹⁶² (2) dropping the requirement that surveillance of a U.S. person may only be conducted if the individual is engaging in activities that “involve” or “may involve” some violation of law;¹⁶³ and (3) allowing the attorney general to authorize the imposition of wiretaps for up to 15 days without judicial review in the event of a congressional authorization of military force or an attack on the United States “creating a national emergency” (under current law, the attorney general has this 15-day power only after a congressional declaration of war).¹⁶⁴

The public outcry following the leak of PATRIOT II appears to have dampened White House support for the bill as a comprehensive package of proposals.¹⁶⁵ The Justice Department, however, has not stopped pushing for more powers. A new vehicle for this expansion has been circulating among members of the Senate Judiciary Committee and is expected to be introduced in the fall of 2003.¹⁶⁶ The draft bill, the Vital Interdiction of Criminal Terrorist Organizations (VICTORY) Act,¹⁶⁷ contains provisions similar to PATRIOT II, allowing the attorney general to issue administrative subpoenas (which do not require judicial approval) in the course of domestic as well as international terrorism investigations.¹⁶⁸ These administrative subpoenas are issued at the discretion of the attorney general and require the production of “any records or other things relevant to the investigation,” including those held by providers of electronic communication services.¹⁶⁹ Such subpoenas are subject to fewer restrictions and less oversight than even NSLs, discussed above. NSLs may not be issued solely on the basis of First Amendment activities.¹⁷⁰ The FBI may disseminate information gained from an NSL only where it is clearly relevant to the statutory authority of the receiving agency.¹⁷¹ And all NSL requests must be reported on a semi-annual basis to various Senate and House committees.¹⁷² None of these restrictions applies to administrative subpoenas.¹⁷³ As discussed in Chapter 1, President Bush publicly requested that the Justice Department be given this new subpoena power in a speech at the FBI Academy on September 10, 2003. In addition, the VICTORY Act proposes to further insulate law enforcement from accountability for abuse of electronic surveillance, by prohibiting courts from suppressing evidence derived from a wiretap absent proof that law enforcement acted in “bad faith.”¹⁷⁴

REQUIREMENTS FOR ACCESSING PERSONAL RECORDS

PATRIOT § 215	PATRIOT § 505 (NSLS)	DRAFT VICTORY ACT § 503 (Administrative Subpoenas)
Issued by FISC after <i>ex parte</i> hearing	No judicial oversight; written declaration of FBI director or designee	No judicial oversight; written declaration of attorney general
Apply to “any tangible things” held by any business	Apply to telephone, internet, financial institution and credit reporting records	Apply to “any records or other things relevant to the investigation”
May not issue solely on the basis of First Amendment activities	May not issue solely on the basis of First Amendment activities	No protection for First Amendment activities
No restrictions on dissemination to other governmental agencies	Information gathered may be disseminated only where it is clearly relevant to the statutory authority of the receiving agency	No restrictions on dissemination to other governmental agencies
Semi-annual report on requests to House and Senate committees on the judiciary	Semi-annual report on requests to various House and Senate committees	No reporting requirement

KEEPING TABS ON DOMESTIC ACTIVITIES

I get very, very queasy when federal law enforcement is effectively . . . going back to the bad old days when the FBI was spying on people like Martin Luther King.¹⁷⁵

Representative F. James Sensenbrenner, Jr. (R-WI)

In May 2002, Attorney General Ashcroft unilaterally overturned regulations preventing FBI agents from monitoring domestic religious, political, and civic organizations without some suspicion of wrong-doing.¹⁷⁶ These protections had been adopted in 1976, in the wake of the Senate Church Committee’s findings on the abuses of the FBI and other intelligence agencies engaged in domestic spying. Under the attorney general’s new guidelines, FBI agents may attend public events such as political rallies and religious services, surf the internet, and mine commercial databases as part of a broad mission to prevent or detect terrorism. The Justice Department Inspector General has announced that he will be reviewing the implementation of the new guidelines,¹⁷⁷ but no information is available yet. In the meantime, domestic intelligence operations continue with little guidance as to how FBI agents decide when they are appropriate, and no mechanism for accountability or redress.

Airline Watchlists

The Transportation Security Administration (TSA) was created by the Aviation and Transportation Security Act of 2001,¹⁷⁸ and charged with overseeing the security of all modes of transportation. The TSA's current system for preventing terrorist access to airplanes relies on airline watchlists compiled from a variety of government sources. At least two types of watchlist are maintained: a "no-fly" list of terrorist suspects, and a "selectee" list targeting people who must be subjected to rigorous screening before they are allowed to fly.¹⁷⁹ The TSA has refused to supply details of who is on the lists and why. However, according to TSA documents obtained through a FOIA suit filed by the ACLU, the list of targeted people has been growing daily in response to requests from the intelligence community, DHS, and other agencies.¹⁸⁰

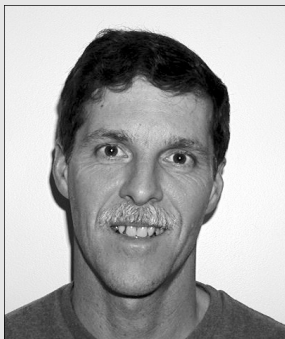
To comply with the Aviation and Transportation Security Act,¹⁸¹ TSA also continues to develop a new passenger screening system called the Computer Assisted Passenger Pre-Screening System II (CAPPS II).¹⁸² CAPPS II will eventually replace the current program (CAPPS I), while retaining the same primary mission of "ensur[ing] passenger and aviation security." TSA initially indicated that CAPPS II would be used only to identify individuals (including U.S. citizens) with potential ties to international terrorist organizations. In an Interim Privacy Notice issued on July 22, 2003, however, TSA made clear that CAPPS II's reach would be expanded to identify: (1) individuals with possible ties to domestic terrorism; (2) individuals with outstanding federal or state arrest warrants for violent crimes; and potentially (3) visa and immigration law violators.¹⁸³

THE STORY OF SISTER VIRGINE LAWINGER

"On April 19, 2002, I was supposed to fly from Milwaukee to D.C. for a weekend of peace-activism opposing military aid to Columbia and the infamous School of the Americas, a U.S. training camp for foreign militias in Ft. Benning, Georgia. Twenty of my group of 37 were refused boarding passes, questioned, and delayed for so long that we missed the plane. We were finally allowed to fly the next day, but we missed an entire day of our activities. Many of the group were high school and college students getting their first experience of participation in the democratic process. Instead they learned how easily the civil rights they take for granted can be usurped. I wanted to know why 20 peace activists including nuns and high-school students would be flagged as potential threats to airline security, so I started what turned out to be a really long process of getting information from the government via the Freedom of Information Act (FOIA). After months of dialogue with many different agencies, the TSA acknowledged that a file existed, but refused to release it on the grounds that it had been exempted from FOIA. The ACLU appealed this decision and finally got hold of the document – with all the pertinent information blacked out. After all this time and effort, I still can't find out why I was flagged or whether and how I ended up on a terrorist watch-list."

Sister Virgine Lawinger, Dominican nun (as told to the Lawyers Committee)

THE STORY OF RETIRED COAST GUARD OFFICER LARRY MUSARRA



“On July 31, 2002 my wife and I were taking our son by plane to attend a special needs school. Unfortunately, we weren’t able to check in on the Instant Ticket Machine and when the supervisor couldn’t fix the problem, they told us ‘I’m sorry Mr. Musarra but you are on an FBI watch list.’ I reminded them that I was a retired Coast Guard Officer, who had flown in and out of the Juneau Airport for seven years. We were finally allowed on the flight after extensive screening but no-one could explain why I would be on an FBI Watch List.

In the next year we made 10 round trip flights to visit our son and we endured the same problems every time: web check-in denied; e-ticket check-in denied; hour-long waits for boarding passes; special screening. The entire Juneau High School wrestling team was held up by extra screening on each of the seven occasions that they traveled with my middle son during that period. My eldest son nearly missed flights home from college on two occasions. It was very inconvenient to fly, our trips took longer to check in, and we lost the bonus miles Alaska Airlines was offering for web check-in.

When reporters started investigating my story the TSA blamed the airline, Alaska Airlines blamed TSA, and the FBI implied that maybe I was a terrorist. The TSA even told one reporter that her article was helping the other side! After rampant finger-pointing, a reporter from the *Wall Street Journal* finally got to the bottom of the story. Alaska Airlines was using an outdated name matching system that was developed decades ago for totally different purposes. I even received all my web check-in miles after another article that was printed in our local paper. The irony of the situation is that during this period, the TSA, which already employs a few of my fellow retired “Coasties,” offered me a job!”

Larry Musarra (as told to the Lawyers Committee)

As envisaged, CAPPS II would assign a security risk rating to every air traveler based on information from commercial data providers (such as the “credit header” information – name, address, telephone – held by companies affiliated to credit agencies), as well as from government intelligence. CAPPS II is intended “to avoid the kind of miscommunication and improper identification that has, on occasion, occurred under the systems currently in use.”¹⁸⁴ However, the new system will not only rely on the same intelligence information making up the watchlists, but will also be vulnerable to error introduced by reliance on commercial databases.¹⁸⁵

The first public information on the proposed new system generated enormous public concern.¹⁸⁶ TSA subsequently reached out to privacy organizations, industry groups and others to discuss the system, and DHS Secretary Tom Ridge suspended development of CAPPS II pending assessment of its privacy implications by the newly appointed DHS Chief Privacy Officer, Nuala O’Connor Kelly.¹⁸⁷ Based in part on these recommendations, a revised public notice was published on August 1, 2003 (the Interim Notice).¹⁸⁸ As set forth therein, CAPPS II will first seek to verify identity by checking name, address, telephone number, and date of birth against the “credit header” information – name, address, telephone – held by companies affiliated with

credit agencies. Passenger details will be transmitted to the commercial entity, which will return an authentication score reflecting the accuracy of the match between the data it holds and the data sent by TSA. CAPPS II will then generate a “numerical risk score,” setting the level of screening to which a passenger must be subjected. The score is calculated by checking the commercial identity information against “records obtained from other government agencies, including intelligence information, watch lists, and other data.”

The Interim Notice states that “DHS is currently developing a robust review and appeals process, to include the DHS privacy office.” Despite such promises, many remain concerned both about the high likelihood of error, and the inadequate mechanisms for challenging the system. For example, the algorithms used by credit reporting agencies to generate “credit header” information ignore minor differences that occur in identifiers, such as incorrect digits in a social security number, leading to the erroneous combination of information from different individuals into one file.¹⁸⁹ Further errors may be introduced by credit bureau reliance on information from public records that often lack unique identifiable information.¹⁹⁰ As the Electronic Privacy Information Center observed in Senate testimony, “[v]ictims of mixed files find it extremely difficult to correct this problem.”¹⁹¹

The broad category of “domestic terrorist organizations” also raises fears that those involved in peaceful protest or other groups will continue to be identified as potential security risks.¹⁹² And while the Interim Notice provides that “passengers can request a copy of most information contained about them in the system from the CAPPS II passenger advocate,” it also states that passengers may access and contest only the data that *they provided* to the system. CAPPS II would remain exempt from existing legislation that requires agencies to provide individuals with access to government records and the opportunity to correct them.¹⁹³ Compared to the access mechanism that would otherwise be provided for by statute, the CAPPS II proposal offers no opportunity for judicial review of any TSA decision to deny access to particular records.¹⁹⁴ Furthermore, TSA has proposed that CAPPS II be exempted from a standard Privacy Act requirement that an agency maintain only such information about a person as is necessary to accomplish an authorized agency purpose.¹⁹⁵

Terrorism Information Awareness

*The most pressing threat to liberty is a compulsory database encompassing everyone... like the TIA that would permit real-time monitoring of our whereabouts, movements and transactions. This is a Big Brother scenario, one of constant surveillance or harassment of citizens unrelated to addressing terrorist threats. You can't opt out.*¹⁹⁶

Clyde Wayne Crews, Jr., Director of Technology Studies, Cato Institute

In 2002, the Defense Department announced the development of the Total Information Awareness project (TIA). As envisaged by the Defense Advanced Research Projects Agency (DARPA), TIA would deploy government software to search a broad range of domestic and foreign, public and private commercial databases, “searching for patterns that are related to predicted terrorist activities.”¹⁹⁷ TIA was intended to enable the government to search personal data, including: religious and political contributions; driving records; high school transcripts;

book purchases; medical records; passport applications; car rentals; phone, e-mail, and internet search logs. These searches would not be confined to information regarding individuals with links to terrorist organizations, would not require prior judicial approval, and would not be subject to legal challenge by those whose data are searched.



The development of TIA began without public notice, a single congressional hearing, or a plan for oversight and accountability mechanisms. As the controversy surrounding TIA grew, information about the program started to disappear from the official TIA website.¹⁹⁸ Biographical information about the TIA development team appeared and then was removed from DARPA's Information Awareness Office website in November 2002; the TIA logo, a globe topped by an all-seeing eye on a pyramid with the slogan, "Knowledge is Power," was removed from the site; diagrams describing how TIA was to operate have been replaced by less detailed versions. In April 2003, DARPA renamed the project *Terrorism Information Awareness*, and in August the program's controversial director Admiral John Poindexter resigned from his position, after his promotion of a project for predicting terrorist attacks with an online futures market.¹⁹⁹ Although DARPA's original information to contractors stated that "the amounts of data that will need to be stored and accessed will be unprecedented, measured in petabytes,"²⁰⁰ DARPA later told Congress that "the TIA program is not attempting to create or access a centralized database that will store information gathered from various publicly or privately held databases... TIA would leave the underlying data where it is."²⁰¹

Members of Congress and non-governmental organizations from across the political spectrum expressed grave concerns about the privacy implications of the program,²⁰² and also its efficacy and cost. DARPA itself acknowledged that "TIA may raise significant and novel privacy and civil liberties policy issues."²⁰³ The Association for Computing Machinery's U.S. Public Policy Committee (USACM), representing 70,000 information technology professionals, expressed "significant doubts" that TIA could achieve its stated goal of prevention. Instead, according to USACM, TIA "would provide new targets for exploitation and attack by malicious computer users, criminals, and terrorists," "increase the risk of identity theft," and provide new opportunities for "harassment or blackmail by individuals who have inappropriately obtained access to an individual's information."²⁰⁴ DARPA's promise to "develop algorithms that prevent unauthorized access... and provide an immutable audit capability so investigators and analysts cannot misuse private data without being identified as the culprits,"²⁰⁵ is unlikely to allay expert fears, since both prevention of unauthorized access and creation of audit trails are challenging research problems in themselves. Indeed, "it is unlikely that sufficiently robust databases of the required size and complexity, whether centralized or distributed, can be constructed, financed, and effectively employed in a secure environment, *even with significant research advances*."²⁰⁶

Intelligence officials have also expressed doubts about TIA's effectiveness. Maureen Baginski, FBI executive assistant director for intelligence, and Alan Wade, CIA chief information officer, described the project as "unbounded" and said that "[t]he scope may be too big."²⁰⁷ USACM has said that even an optimistic estimate of likely "false positives... incorrectly

labeling someone as a potential terrorist” could result in “as many as 3 million citizens being wrongly identified each year.”²⁰⁸ The experience with errors in airline watchlists, detailed above, lends weight to USACM’s fears. Nonetheless, DARPA has disclaimed responsibility for inaccuracies in the commercial databases on which TIA would rely. It said that “TIA... [is] simply a tool for more efficiently inquiring about data in the hands of others.... [C]oncerns... about the quality and accuracy of databases that are in private hands... would exist regardless of the method chosen to query these databases and, thus, do not present a concern specific to TIA.”²⁰⁹

To its credit, Congress has taken public concern, expert warnings, and the deficiencies of DARPA’s report seriously, and has begun to move to rein in TIA. On July 14, 2003, the Senate adopted a provision eliminating funding for TIA research and development, and requiring specific congressional authorization for the deployment, implementation, or interdepartmental transfer of any component of the TIA program.²¹⁰ The House also adopted a provision requiring congressional authorization for TIA activities affecting U.S. citizens, but it did not cut off funding.²¹¹ The White House has announced its disapproval of these moves, “urg[ing] the Senate to remove the provision.”²¹² Despite the assertion of congressional oversight, TIA is still very much part of the executive’s efforts.

Terrorist Threat Integration Center (TTIC)

Although Congress has taken steps to prevent deployment of TIA without congressional authorization, a new initiative with a much lower profile, the Terrorist Threat Integration Center (TTIC), has the potential to achieve the same invasions of privacy without transgressing those new legislative restrictions. The TTIC initiative was announced by the White House on January 28, 2003, and has been described as “a multi-agency joint venture that integrates and analyzes terrorist-threat related information, collected domestically or abroad, and disseminates information and analysis to appropriate recipients.”²¹³ TTIC’s mission is to “serve as the central hub to provide and receive [counterterrorism] information.”²¹⁴ In order to achieve this goal, TTIC has the extraordinary power to task elements of all the federal intelligence and security agencies (including DHS, FBI, CIA, and the Defense Department) with the collection of information for analysis by TTIC.²¹⁵ As TTIC’s director has stated:

[A]nalysts assigned from the other TTIC partner organizations [Justice Department, FBI, DHS, Defense Department, State Department, and CIA] have exceptionally broad access to intelligence. Within TTIC, there is desktop access to all partner agency networks... result[ing] in unprecedented sharing of information... critical to... federal, state, local, and law enforcement entities.²¹⁶

Thus far, the executive has provided few details about the type of information that TTIC will task, receive, and analyze. This worries privacy advocates such as Lee Tien of the Electronic Frontier Foundation, who fears that TTIC may be an attempt to “duck all those [TIA-related] questions and go ahead with programs that don’t have any connection to Poindexter and get away from the swamp that TIA is in.”²¹⁷ Indeed, TTIC Director John Brennan has expressed enthusiasm for the TIA program and confidence in its privacy protections.²¹⁸ According to Mr. Brennan, discussions are already underway between TTIC and DARPA about making parts of

the TIA program work for TTIC.²¹⁹ Tien's concerns are shared by David Sobel, general counsel of the Electronic Privacy Information Center, who observed that TTIC is "potentially a huge repository of information concerning American citizens.... There's nothing in what has been made publicly available that would contain a limitation on such collection."²²⁰ TTIC will "[h]ave unfettered access to all intelligence information – from raw reports to finished analytic assessments – available to the U.S. government,"²²¹ and will "be able to reach back to its participating parent agencies' base resources as necessary to meet its extraordinary requirements."²²² This means that TTIC will "integrate information from the federal, state and local level as well as the private sector."²²³

TTIC raises further privacy concerns because it has been placed under the control of the Director of Central Intelligence (DCI).²²⁴ The DCI serves as the head of CIA and of the aggregate U.S. intelligence services. Although TTIC is not part of CIA,²²⁵ placing TTIC, and its ability to command collection of information by other agencies, under the control of the DCI may make available to CIA the "police, subpoena, or law enforcement powers or internal security functions" that are statutorily forbidden to it under the National Security Act.²²⁶ Further, while TTIC is under the control of the DCI rather than DHS, its authority will not be subject to the crucial oversight provisions of the Homeland Security Act of 2002. The Homeland Security Act assigned the task of coordinating and analyzing terrorism-threat information to DHS,²²⁷ which is subject to numerous statutory oversight procedures not applicable to TTIC. If TTIC were housed within DHS, TTIC's authority would be limited by DHS' statutory charter, and TTIC's power would be constrained by congressional budgetary control, as well as by DHS' civil rights and privacy officers.²²⁸ As structured, TTIC is subject to no such restraints. TTIC, in short, seems to assume duties that Congress explicitly allotted to DHS, without adopting the oversight controls that Congress provided for DHS.

RECOMMENDATIONS

1. Congress should repeal section 215 of the PATRIOT Act to restore safeguards against abuse of the seizure of business records, including records from libraries, bookstores, and educational institutions, where the danger of chilling free expression is greatest. Congress should also amend section 505 of the PATRIOT Act to require the FBI to obtain judicial authorization before it may obtain information from telephone companies, internet service providers, or credit reporting agencies.
2. Congress should review changes to FBI guidelines that relax restrictions on surveillance of domestic religious and political organizations to ensure that there are adequate checks on executive authority in the domestic surveillance arena. The guidelines should be specifically amended to better protect against the use of counterterrorism surveillance tools for purely criminal investigations.
3. Congress should delay implementation of the Computer-Assisted Passenger Pre-Screening System II pending an independent expert assessment of the system's feasibility, potential impact on personal privacy, and mechanisms for error correction. Separately, Congress should immediately eliminate all funding for "Total [or Terrorism] Information Awareness" research and development.

4. The Terrorist Threat Integration Center should be housed within DHS where it may be subject to oversight by departmental and congressional officials – who can investigate possible abuses of civil rights and civil liberties.
5. Congress should establish a senior position responsible for civil rights and civil liberties matters within the DHS Office of the Inspector General. This position would report directly to the Inspector General, and be charged with coordinating and investigating civil rights and civil liberties matters in DHS.

CHAPTER THREE

IMMIGRANTS, REFUGEES, AND MINORITIES

INTRODUCTION

Two years after September 11, a number of the most controversial initiatives that the executive branch directed against certain categories of non-citizens in the aftermath of the attacks have ended, or at least subsided. The mass round-ups of predominantly Arab and Muslim immigrants that occurred in the weeks and months following September 11 have ended, although immigration laws are still being enforced disproportionately against those communities. The Justice Department and Department of Homeland Security (DHS) have indicated that they will take steps to help ensure that the egregious mistakes made during these round-ups do not happen again. The Justice Department's temporary "call-in" registration program – a source of fear and confusion for non-citizens from the 25 predominantly Arab and Muslim nations targeted by the program – officially concluded in April 2003. The series of "voluntary" interviews initially conducted by the Justice Department of nationals from predominantly Arab and Muslim nations (and then of "Iraqi-born" individuals this past spring) do not appear to be currently occurring.

Despite these important recent changes, the nationality-based information and detention sweeps of the past two years have taken a serious toll on immigrant communities in the United States. Arab and Muslim organizations describe the "chilling effect" that these programs have had on community relations, relating feelings of anxiety, isolation, and ostracism – even among longtime, lawful permanent residents of the United States. From a security standpoint, these blanket immigration measures have alienated the very communities whose intelligence and cooperation is needed most. As one visiting Pakistani scholar put it: "A worse way of [improving security] could hardly be imagined.... Not only is it likely to fail in securing the homeland, it is creating more resentment against the United States. Does America need a policy that fails to differentiate between friend and foe?"²²⁹

At the same time, the administration continues to direct a set of ongoing initiatives that threaten to exacerbate this already troubling status quo. Foremost among these, the Justice Department is aggressively pursuing efforts to involve local police in the enforcement of federal immigration law. Local officials have cautioned that these efforts will overburden already scarce 'front-line' resources and undermine already fragile community relations. As one police chief put it: "To get into the enforcement of immigration laws would build wedges and walls that have taken a long time to break down."²³⁰ Separately, refugee resettlement levels, which plummeted following the September 11 attacks, have yet to rebound – due to a range of failures from funding shortfalls to ongoing mismanagement. And a recent Attorney General decision on Haitian refugees has raised concerns of a new "national security" exception to the procedures by which detained asylum seekers and other immigrants can seek release. In short, the "new normal" in immigration has left much repair work to be done.

LEGAL BACKGROUND

Walt Whitman's description of the United States as "a teeming nation of nations" remains apt.²³¹ The overwhelming majority of Americans are immigrants or descendants of immigrants. Indeed, for the first hundred years of its history, immigrants were at the forefront of building and settling a vast and undeveloped continent, and the United States absorbed almost everyone who arrived on its shores.²³²

But the United States has two distinct, often conflicting histories of immigration. These two histories – one of welcoming new immigrants and the other of xenophobia and restrictiveness – have competed with each other from the early days of the republic. The Alien and Sedition Acts of 1798 – a reaction to the social upheavals of the French Revolution – gave the president the authority to deport any non-citizen he considered dangerous to the welfare of the nation.²³³ Opposition to these statutes helped propel Thomas Jefferson to the presidency two years later. The 1850s witnessed the rise of the Know Nothing Party which sought to halt the immigration of Catholics and to deny naturalized citizens the vote.²³⁴ But the nation ultimately rejected the Know Nothings, and the party was disbanded. Beginning in the late nineteenth century, Congress passed a string of selective exclusion laws, directed primarily at a new wave of immigrants from Asia and from Southern and Eastern Europe.²³⁵ It was in a challenge to an 1888 statute refusing entrance to Chinese immigrants that the U.S. Supreme Court adopted the view that Congress had plenary power over immigration matters – upholding Congress' selective policies of exclusion.²³⁶ Four years later, the United States opened an immigration station at Ellis Island within view of the Statue of Liberty. Over the next twenty years, millions of new immigrants entered the United States through Ellis Island.²³⁷

Viewed against these conflicting histories, it is clearly during periods of war or national emergency that immigrants and non-citizens have been most vulnerable to high-profile federal crackdowns. During the "red scare" just after World War I, for example, then-U.S. Attorney General A. Mitchell Palmer responded to a set of bombings in eight U.S. cities by launching a series of raids against suspected Communists, detaining thousands of non-citizens without charge, and interrogating them without counsel.²³⁸ He claimed these were foreign agents who had come to America disguised as immigrants in order to overthrow the U.S. government.²³⁹ Twenty years later, in the wake of the Japanese attack on Pearl Harbor, President Roosevelt approved a military order mandating the forced removal and detention of Japanese immigrants and U.S. citizens of Japanese ancestry from numerous communities along the Pacific Coast.²⁴⁰ Between 1942 and 1946, more than 100,000 people were held in "relocation camps."²⁴¹ Both the Palmer raids and the World War II internment camps have since earned universal reprobation – and indeed, the U.S. government has formally apologized and granted reparations to the surviving victims of the World War II internment camps.²⁴² Nonetheless, these actions were widely supported at the time they were implemented.

Under U.S. law, as in the law of most nations, non-citizens are still not "entitled to enjoy all the advantages of citizenship," and a long list of statutes excludes them from many of the protections and benefits available to citizens.²⁴³ But the U.S. Supreme Court has made clear repeatedly that the U.S. Constitution protects citizens and non-citizens alike from deprivations of

life, liberty, or property without due process of law. As the Court has explained: “[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”²⁴⁴

The first international human rights standards protecting non-citizens emerged in the immediate aftermath of World War II with the Universal Declaration of Human Rights, followed by norms to protect those seeking refuge from persecution in their own countries. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol prohibit governments from returning a non-citizen to a country in which his or her “life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.”²⁴⁵ In 1980, Congress incorporated provisions of the 1951 UN Convention and its 1967 Protocol into domestic law. The 1980 Refugee Act embraced the Convention’s language concerning the obligation of states to protect refugees and reiterated the Convention’s prohibition against returning non-citizens to persecution.²⁴⁶

The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, provides that: “No one shall be subjected to arbitrary arrest or detention.”²⁴⁷ Article 9(4) of the ICCPR provides that: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”²⁴⁸ This provision applies to all detainees, including immigration detainees.²⁴⁹ The UN Human Rights Committee, in its decision in *Torres v. Finland*, has explained that Article 9(4) of the ICCPR “envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence.”²⁵⁰

ASSESSING THE IMPACT OF POLICIES PAST

A number of the policies that have been the source of greatest concern in the two years since September 11 have ended. The Justice Department Office of the Inspector General (OIG) – having issued a report strongly critical of the Department’s treatment of those detained in the round-ups immediately following the attacks – released a supplemental report on September 8, 2003, noting that DHS and the Justice Department are taking steps to address many of the concerns identified. And based on scores of interviews conducted by the Lawyers Committee with immigration practitioners, it appears that detainees are no longer generally being held for extended periods without charge as they were in the months following September 11.²⁵¹ Despite this, two important concerns remain. First, the policies described in the following pages appear to have caused lasting damage to the relationship between immigrant communities and the U.S. government. Second, the expansive new custody and detention regulations adopted in the wake of September 11 – the regulations that led to the abuses the OIG has described – remain on the books. Until these are removed, there is little to prevent such abuses from occurring again.

The September 11 Detainees

*Neither the fact that the department was operating under unprecedented trying conditions, nor the fact that 9/11 detainees were in our country illegally, justifies entirely the way in which some of the detainees were treated.*²⁵²

Senator Orrin Hatch (R-UT)

More than 1,200 people were detained in the two months following the September 11 attacks.²⁵³ The Justice Department classified 762 of them as “September 11 detainees,” defined as those detained on immigration violations purportedly in connection with the investigation of the attacks.²⁵⁴ A 198-page report issued by the OIG in June 2003 makes clear, however, that many of the detainees did not receive core due process protections, and the decision to detain them was at times “extremely attenuated” from the focus of the September 11 investigation.²⁵⁵

The OIG’s finding that the “vast majority” of the detainees were accused not of terrorism-related offenses, but of civil violations of federal immigration law,²⁵⁶ calls into serious question a recent decision of the U.S. Court of Appeals for the D.C. Circuit upholding the Justice Department’s decision to withhold the names of the September 11 detainees. The court’s opinion relied explicitly on its conclusion that “many of the detainees had links to terrorism,” and therefore that public access to any of their names could interfere with the government’s ongoing efforts to fight terrorism.²⁵⁷ The OIG’s conclusion that the designation of the detainees as of interest to the September 11 investigation was made in an “indiscriminate and haphazard manner,” catching “many aliens who had no connection to terrorism” in their net,²⁵⁸ seriously undermines the basis of the court of appeals’ holding.

Beyond this, the September 11 detainees were subject to a set of Justice Department policies that resulted in serious violations of their due process rights. First, the Justice Department implemented a “hold until cleared” policy – a policy under which all non-citizens in whom the FBI had an interest required clearance by the FBI of any connection to terrorism before they could be released.²⁵⁹ The Inspector General concluded that the clearance process was not conducted in a timely manner: it was understaffed and was not accorded sufficient priority.²⁶⁰ The OIG reported that “the average time from arrest to clearance was 80 days and less than 3 percent of the detainees were cleared within 3 weeks of arrest.”²⁶¹

Second, the Justice Department issued a regulation that increased from 24 to 48 hours the time that the Immigration and Naturalization Service (INS) could detain someone in custody without charge.²⁶² Detention without charge could continue beyond this for a “reasonable period of time” in the event of an “emergency or other extraordinary circumstance.”²⁶³ The terms “reasonable period of time,” “emergency” and “extraordinary circumstance” were not defined. The expanded authority applied even to detainees who were not charged with a crime or suspected of presenting a risk to the community. With the new regulations in place, many detainees did not receive notice of the charges against them for weeks, and some for more than a month after being arrested.²⁶⁴ Consistent with early data,²⁶⁵ the OIG reports that 192 detainees waited longer than 72 hours to be served with charges; 24 were held between 25-31 days before being served; 24 were held more than 31 days before being served; and five were held an

average of 168 days before being served.²⁶⁶ Further, because INS did not record when a charging decision was made, the OIG concluded that it was “impossible” to determine how often the INS took advantage of the “reasonable time” exception to the charging rule.²⁶⁷

Third, the lack of timely notice of the charges against them undermined the detainees’ ability to obtain legal representation, to request bond, and to understand why they were being detained.²⁶⁸ In addition, the Inspector General found that detainees had been prevented from contacting lawyers during a “communications blackout” at the Metropolitan Detention Center (MDC) in Brooklyn, New York, and detainees’ families and attorneys were unable to receive any information about them, including where they were held.²⁶⁹ In some cases, attorneys were told that their clients were not detained at MDC when in fact they were. According to the OIG report, the first legal call made by any September 11 detainee held at MDC was not until October 15, 2001.²⁷⁰ This “blackout,” in conjunction with access-to-counsel problems created by the charging delays and restrictive legal access policies like that at MDC, seriously impaired detainees’ ability to obtain counsel’s advice precisely when they needed it most.

LIFE AT THE BROOKLYN METROPOLITAN DETENTION CENTER

Conditions of confinement at MDC were often harsh for the September 11 detainees. Their cells were illuminated 24 hours a day; they wore hand-cuffs, leg irons, and heavy chains during non-contact visits with family and attorneys; and they were subject to 23-hour “lock-down” – a period of strict confinement to their cells. The OIG report identifies “a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees, particularly during the first months after the attacks.”²⁷¹ The physical abuse reports included the use of painfully tight handcuffs and allegations that MDC staff slammed detainees against the wall. Some detainees reported slurs and verbal abuse such as “Bin Laden Junior” and “you’re going to die here,”²⁷² as well as being told by MDC staff to “shut up” while they were praying.²⁷³ In addition, MDC Bureau of Prisons officials “adopted a practice” of permitting September 11 detainees no more than one phone call a week to any outside counsel. Based on examination of a sample of 19 detainees held at MDC, the Inspector General concluded that, “at best,” detainees were offered “far less than one legal call” per week.²⁷⁴ The weekly call was considered made in some cases when the detainee reached only voicemail, a busy signal, or a wrong number.²⁷⁵ The OIG report criticizes the practice as “unduly restrictive and inappropriate.”²⁷⁶

Fourth, the INS adopted a policy of denying bond in all cases related to the September 11 investigation.²⁷⁷ And INS attorneys were given unilateral authority to affect an “automatic stay” of any bond-release ruling an immigration judge might issue.²⁷⁸ The “no bond” policy immediately created an ethical dilemma for INS attorneys. As the INS Deputy General Counsel explained in a June 2002 memorandum, “[i]t was and continues to be a rare occasion when there is any evidence available for use in the immigration court to sustain a ‘no bond’ determination.”²⁷⁹ INS attorneys were thus placed in the position of arguing to immigration judges that individual detainees should not be released on bond even when there was no information to support such a position.²⁸⁰ Many INS attorneys addressed this dilemma by first seeking continuances of bond hearings. As early as October 2001 and as late as June 2002, INS attorneys, including the INS General Counsel, raised concerns with INS headquarters and with Justice Department officials about the lack of evidence justifying opposition of bond, and the lengthy delays in obtaining clearance for detainees from the FBI.²⁸¹ The OIG concluded that the

Justice Department should have reevaluated its decision to deny bond in all cases as the Justice Department learned more about these detainees, particularly the “many detainees” who “were not tied to terrorism.”²⁸²

The “automatic stay” authority was routinely invoked by government immigration attorneys to prevent the release of September 11 detainees in cases where an immigration judge had concluded that the detainee should be released from detention on bond.²⁸³ Government attorneys also used the threat of the “automatic stay” power to discourage immigration attorneys from requesting immigration judge bond hearings for their clients – explaining that if an immigration judge were to rule in favor of releasing the detainee on bond, the government immigration attorney would simply invoke the “automatic stay.” The detainee’s release would then be further delayed while the bond decision awaited review on appeal.²⁸⁴

On September 8, 2003, the OIG released a new report analyzing the written responses of the Justice Department and DHS to its June 2003 recommendations. The OIG made clear that both agencies are “taking the recommendations seriously and are taking steps to address many of the concerns” identified.²⁸⁵ DHS has implemented two of the recommendations, and both agencies have agreed in principle with most of the remaining 19.

But the OIG also made clear that “significant work” remained before its remaining recommendations would be fully implemented. With regard to its recommendation on the service of charges on immigrants, for example, the OIG emphasized the “serious deficiencies” outlined by its June 2003 report and asked for a copy of the agency’s new charging requirements by October 3, 2003. The OIG also requested further, more specific responses to the other recommendations by October 3, 2003, and reiterated the two recommendations that had been rejected as unnecessary by the Justice Department in its written responses. These two recommendations called on the Justice Department to set up formal internal processes for re-evaluating policies and resolving legal concerns during times of crisis.

While the steps taken by the Justice Department and DHS are welcome, there remains cause to be concerned that the broad new custody policies under which these detentions were effected are still on the books. Indeed, wholly independent of the September 11 detainees, INS and DHS have already used the automatic stay power to prevent the release of Haitian asylum seekers who arrived by boat in Florida in October 2002, even in cases where immigration judges had ruled that the asylum seekers were entitled to release on bond.²⁸⁶ And the Lawyers Committee has learned through interviews with immigration practitioners that the new stay power is still used on occasion by DHS immigration attorneys in order to discourage immigrants’ attorneys from requesting a bond hearing for their clients.²⁸⁷ Such ongoing use is an unsurprising effect of the availability of these new powers. But they make it all the more essential that the regulations be repealed.

Special Registration

*The 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.*²⁸⁸

Juliette Kayyem, former member of the National Commission on Terrorism and counterterrorism expert at Harvard's John F. Kennedy School of Government

On June 6, 2002, Attorney General Ashcroft announced the introduction of the National Security Exit-Entry Registration System (NSEERS) – popularly known as “special registration.”²⁹⁰ As part of this initiative, the Attorney General instituted a temporary “call-in” registration program that applied to males age 16 to age 45 from 25 predominantly Arab and Muslim countries who were residing in the United States on temporary visas. These individuals were required to report to INS offices during four specified phases to be fingerprinted, photographed, and questioned under oath by INS officers.²⁹¹ Failure to comply with special registration was made a deportable offense.²⁹²

Call-in registration officially ended on April 25, 2003. But the failures of the call-in registration program are now clear. First, the INS did not effectively distribute information about the program requirements to affected communities, instead announcing the program only through publication in the Federal Register, and later on the INS website.²⁹³ Misinformation about the program, including inaccurate, unclear and conflicting notices distributed by the INS, led some men to unintentionally violate the program's requirements.²⁹⁴ On several occasions flight attendants or travel agents gave registrants inaccurate information about departure rules, which required those subject to call-in registration to

notify the INS before leaving the United States if they ever wanted to return.²⁹⁵ Bill Strassberger, a spokesperson for the DHS Bureau of Immigration and Customs Enforcement, acknowledged that “[t]here have been problems in some locations” and that the Department

REPERCUSSIONS OF INS BACKLOGS

During special registration, INS and DHS representatives put many men and boys into deportation proceedings even when they had previously filed applications for immigration status which were still pending due to INS delays and backlogs. One eighteen-year-old high school student only avoided deportation after congressional intervention. A varsity basketball point guard at Jamaica High School in Queens, New York, Mohammad Sarfaraz Hussain was placed in removal proceedings when he tried to fulfill his call-in registration requirement. At the time, Hussain, who has four U.S. citizen siblings, already had a green card application pending which had been filed with the INS in April 2001, more than a year earlier. Hussain had come to the United States from Pakistan when he was eight years old, traveling with his mother who had come for cancer treatment. Hussain's mother died shortly after they arrived, and his father also passed away. It was only after the intervention of Representative Gary L. Ackerman (D-NY) that DHS agreed to stop pursuing Hussain's deportation.²⁸⁹

“need[ed] to look into” them. Ultimately, the inadequate information and confusion caused many men to be unnecessarily deported or barred from return.²⁹⁶

The story of Shahid Mahmood, a 38-year-old Pakistani doctor, provides a characteristic example. He was initially barred from returning to the United States – and the elderly and needy patients he served in Roxboro, North Carolina – because of the special registration program. Dr. Mahmood left the United States to visit his sick father in Lahore, Pakistan. He had previously registered under the call-in registration program at the Charlotte immigration office, but was unaware that he had to subsequently register at the airport if he intended to return to the United States. His travel agent had mistakenly confirmed that all he needed to do was to leave from one of the airports designated under the special registration program. Dr. Mahmood was only allowed to return to the United States after Senator Elizabeth Dole (R-NC), Senator John Edwards (D-NC), and Representative David Price (D-NC) intervened by writing letters to the U.S. embassy in Pakistan urging that the bar against Dr. Mahmood’s return be lifted.²⁹⁷

Call-in registration was also marked by harsh uses of detention. According to DHS officials, 82,000 men complied with the call-in registration requirement.²⁹⁸ As of March 18, 2003, the program had resulted in the detention of 1,854 people.²⁹⁹ In Los Angeles, for example, about 400 men and boys were detained during the first phase of call-in registration.³⁰⁰ Some were handcuffed and had their legs put in shackles; others were hosed down with cold water, or forced to sleep standing up because of overcrowding.³⁰¹ Attorneys reported that they were denied access to their clients during portions of the call-in registration interviews, and some of the registrants inadvertently waived their right to a removal hearing.³⁰²

Both human rights and security experts expressed deep concerns about the effect of such registration policies. Citing the special call-ins of Jews in Europe during the Holocaust era and expressing concern for programs that appear to target groups of migrants based on their ethnic or religious heritage, the Board of Directors of the Hebrew Immigrant Aid Society recommended a temporary suspension of the call-in program until a congressional review of the program could be conducted.³⁰³ In a January 9, 2003 letter to President Bush, the American Jewish Committee, the Anti-Defamation League, and other Jewish organizations expressed their concern that the implementation of the registration procedure appeared to have “resulted in mistreatment and violations of the rights of many of those required to undergo registration, including detentions without particularized suspicion that the registrants were flight risks.”³⁰⁴ Emira Habiby Browne, executive director of the Arab-American Family Support Center echoed the sentiment: “Families who came to the United States to realize the American dream who chose to abide by the law and to cooperate with the immigration authorities, have been singled out on the basis of their ethnicity and religion.”³⁰⁵

At the same time, security experts have found special registration to be ineffective. As Vincent Cannistraro, a former Director of Intelligence Programs at the National Security Council under President Reagan put it:

[W]hen we alienate the communities, particularly immigrant communities, we undermine the very basis of our intelligence collection abilities because we need to have the trust and cooperation of people in those communities. If someone

comes from the outside who is a stranger, comes into that community, the people who are long established in that community know it or are in a position to know it, and therefore to provide early warning information. But if the FBI conducts sensitive interviews with community leaders at the same time that that community has been rounded up by the INS, forced to report, and everyone who reports knows that if they are illegal, they are not a document holder, that they can and will be deported, you've really kind of eliminated the ability to get information that you really need.³⁰⁶

In the end, more than 13,000 of the men and boys who registered were found to be living illegally in the United States (often only because a pending application for adjustment of status was delayed due to INS backlogs) and were placed into deportation proceedings.³⁰⁷ Some have already been deported.³⁰⁸ The Justice Department claims that special registration resulted in the apprehension of 11 "suspected terrorists," but DHS officials have reported that none of the men or boys who registered has been charged with any terrorist activity.³⁰⁹

CHANGING COMMUNITIES

In Atlantic County, New Jersey, the Pakistani population has fallen to 1,000, from approximately 2,000.³¹⁰ In a Pakistani neighborhood in Brooklyn, New York, business is down in some stores by 40 percent; a local newspaper sells 60 percent fewer ads; and the mosque that used to be overcrowded for Friday prayers is one-third empty.³¹¹ Pakistani government officials estimate that 15,000 Pakistani residents of that Brooklyn neighborhood and the immediately surrounding area have left the United States to move to Canada, Europe, or back to Pakistan.³¹² Indeed, the exodus of Pakistani immigrants has reportedly stimulated a housing boom in Islamabad.³¹³ A comprehensive report prepared by the Migration Policy Institute explains the root of these fears: "Many have left countries that are governed by dictatorships, where the rule of law and the accountability of government are scarce commodities.... It is a mindset used to tales of disappearances and to government secrecy."³¹⁴ Osama Siblani, a spokesman of the Arab-American Political Action Committee, agrees:

"The dictator in the Middle East makes the law. Thus, mistrust of the government fits the Middle East mindset. Before September 11, there had been an evolving change in this mindset – they were gradually beginning to recognize that the [U.S.] government is here to respect their rights. All that was shattered by the events of September 11. Their rights are being violated by the government."³¹⁵

"The [United States] is beginning to have trappings of a police state," adds Dr. Maher Hathout, Founder of the Islamic Center of Southern California. "It reminds me of Egypt.... You cannot understand unless you're from a culture of fear.... [It] leaves people emotionally intimidated."³¹⁶

“Voluntary” Interviews

*Clearly it is very important and legitimate for the government to want to get as much information and cooperation as possible from the Iraqi community in this country. That’s what law enforcement does: gather information. But they need to create an atmosphere of safety. And that’s not something [DHS] seem[s] to grasp yet.*³¹⁷

Doris Meissner, Senior Fellow, Migration Policy
Institute and Former Commissioner, INS

On November 9, 2001, Attorney General Ashcroft issued a memorandum to federal prosecutors and members of Anti-Terrorism Task Forces (ATTFs), announcing that the FBI would conduct “voluntary” interviews of 5,000 male non-citizens from 15 countries between the ages of 18 and 33 who had entered the United States after January 1, 2000. The list of countries was not released, but was defined as those countries having an “Al Qaeda terrorist presence.”³¹⁸ On March 20, 2002, the attorney general announced a “second phase” of the project extending the list by an additional 3,000 men.³¹⁹ And on the eve of war with Iraq this year, DHS announced that the FBI had “identified a number of Iraqi-born individuals in the U.S. that may be invited to participate in voluntary interviews.”³²⁰ That the most recent plan applied to “Iraqi-born” individuals suggested that legal permanent residents and naturalized U.S. citizens would also be interviewed.³²¹

In the wake of the widespread arrests and detentions of Muslim and Arab men in the weeks following September 11, community leaders warned that the interviews would aggravate growing fears.³²² Indeed, immigration attorneys and advocates have found that voluntary interviews had a “chilling effect” on community relations.³²³ The American-Arab Anti-Discrimination Committee reported that the voluntary interviews “further drove a wedge of distrust between the Arab-American community and the government.... This dragnet profiling directed at Middle Eastern men appears to be based on the fallacy that ethnicity, age and country of origin alone merit an investigatory process.”³²⁴ Other advocates echoed this, saying that the community was “victimized” and interviewees “felt offended,”³²⁵ expressions consistent with a general Arab-American sense of “isolat[ion] and ostraci[sm] from the mainstream since 9/11.”³²⁶ As one community leader in Southfield, Michigan put it: “There’s a lot of apprehension and anxiety in the community about these visits. Most people are too scared to come out and complain about it.... But they’ll tell you in private that they are very intimidated.”³²⁷

Over time, several members of Congress have also expressed concerns about the interview programs. Representative John Conyers, Jr. (D-MI) wrote the attorney general in late 2001, explaining that “my constituents and others in the Detroit Metropolitan area have complained of intimidation by FBI agents seeking information from them at work and their places of worship... result[ing] in embarrassment, suspicion, and in some cases, termination.”³²⁸ On January 28, 2002, Representative Conyers was joined by Senator Russell Feingold (D-WI) in a letter to the U.S. General Accounting Office (GAO), the investigative arm of Congress, requesting an investigation into the conduct of the voluntary interviews.³²⁹

In April 2003, GAO released a report detailing its findings. The report found that most of the interviews were conducted in a “respectful and professional manner,” but that many of the interviewees “did not feel the interviews were truly voluntary.” They feared there could be “repercussions” for declining to participate. For example, as the GAO report notes, interviewees feared that “future requests for visa extensions or permanent residency would be denied if they did not agree to be interviewed.”³³⁰

Notably, GAO was unable to determine whether or not the interview project has actually helped in combating terrorism. It noted that “information resulting from the interview project had not been analyzed as of March 2003” and that according to Justice Department officials, there were “no specific plans” to do so.³³¹ In addition, “[n]one of [the] law enforcement officials with whom [GAO] spoke could provide examples of investigative leads that resulted from the project.”³³² As of February 2002, “fewer than 20” interviewees had been arrested – primarily on immigration charges. None of these cases appeared to have any connection to terrorism.³³³ Indeed, “more than half the law enforcement officers [the GAO] spoke with expressed concerns about the quality of the questions asked and the value of the responses obtained in the interview project.”³³⁴

While intelligence gains seem limited at best, a number of law enforcement officials believe that the voluntary interviews “had a negative effect on relations between the Arab community and law enforcement personnel.”³³⁵ As one INS field officer noted: “Most of the Attorney General’s initiative is a lot of make-work with few returns, but it gets good press. It hasn’t helped our community relations. It hurts because the FBI and the other agencies are making arrests using INS statutes.”³³⁶

Operation Liberty Shield

*We understand the legitimate role of the government to protect the security of U.S. citizens at this time of conflict. However, we need not adopt a blanket and discriminatory detention policy.*³³⁷

Bishop Thomas G. Wenski, Auxiliary Bishop of Miami Chairman,
U.S. Conference of Catholic Bishops’ Committee on Migration

On the eve of war with Iraq, DHS announced that as part of “Operation Liberty Shield,” it would detain asylum seekers from a group of 33 nations and territories where Al Qaeda or other such organizations were believed to operate. This was the first major DHS announcement on asylum since DHS took over INS functions on March 1, 2003. DHS Secretary Tom Ridge held a press conference on March 18, 2003, at which he described the purpose of the detention policy: “The detention of asylum seekers is basically predicated on one basic notion. We just want to make sure that those who are seeking asylum, number one, are who they say they are and, two, are legitimately seeking refuge in our country because of political repression at home, not because they choose to cause us harm or bring destruction to our shores.”³³⁸

DHS refused officially to disclose the list of effected nationalities, stating that the complete list was “law enforcement sensitive.” Written information released by DHS reflected

that Iraq was one of the countries. The Lawyers Committee learned that the list also included Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Thailand, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen, as well as Gaza and the West Bank.

DHS subsequently advised that the policy did not apply to so-called “affirmative” asylum applicants (*i.e.*, individuals who apply after entering the United States by filing an asylum application), but instead to arriving asylum seekers – a group that is already subject to mandatory detention under an expedited deportation law that was enacted in 1996.³³⁹ While these arriving asylum seekers are entitled to request release on parole after they successfully navigate the expedited procedure (by passing a screening interview), under Operation Liberty Shield, asylum seekers from the targeted countries were not to be released from detention *even* when they met the applicable parole criteria and presented no risk to the public. Instead, they were to be detained for the duration of their asylum proceedings. DHS estimated that the detentions would last on average six months, or longer if a case was appealed.³⁴⁰ In effect, Operation Liberty Shield deprived a class of asylum seekers, defined by nationality, of the opportunity to have the need for their detention individually assessed.

The automatic detention policy was deeply troubling to human rights, faith-based, and refugee advocacy organizations.³⁴¹ The U.S. Conference of Catholic Bishops, in a statement issued by Bishop Thomas G. Wenski, declared that the policy “harms individuals who are fleeing terror, is inappropriately discriminatory, violates accepted norms of international law, and undermines our tradition as a safe haven for the oppressed.”³⁴² Similarly, UN High Commissioner for Refugees Ruud Lubbers criticized the association of asylum seekers and refugees with terrorists as “a dangerous and erroneous one,” since asylum seekers “have themselves escaped acts of persecution and violence, including terrorism, and have proven time and again that they are the victims and not the perpetrators of these attacks.”³⁴³

In April 2003, following strong public criticism, DHS terminated Operation Liberty Shield.³⁴⁴ DHS did not report on the number of asylum seekers who were detained as a result of the policy. Given that parole practices for asylum seekers have become even more restrictive in the past two years, and because the executive branch has refused to release information on the detainees, there is no public information on whether any of those who were detained under the policy were released from detention.

AN ONGOING SET OF CONCERNS

Local Immigration Enforcement – Our New Federalism

Since September 11, the federal government has moved to increase local law enforcement’s participation in the implementation of federal immigration law. Where possible, the Justice Department has made use of existing law. Where no preexisting grant of authority was available, the Justice Department has unilaterally extended its own jurisdiction. In each instance, the federal government has encountered strong resistance from local officials and others

concerned both about the drain on scarce local law enforcement resources, and the danger of undermining already fragile community relations.

Existing law affords the Justice Department some authority to engage local assistance. The Immigration and Nationality Act (INA) has, since 1996, authorized the attorney general to enter into agreements with state and local officials to perform immigration enforcement tasks under the attorney general's direction and supervision.³⁴⁵ The Justice Department entered into such an agreement with the State of Florida in July 2002.³⁴⁶ South Carolina has entered into a similar agreement,³⁴⁷ and Alabama is close to completing one.³⁴⁸ No other states have yet followed suit. The INA also provides that the attorney general may authorize state and local law enforcement officials to perform federal immigration functions if the attorney general determines that such assistance is necessary during "an actual or imminent mass influx of aliens."³⁴⁹ Before September 11, this provision had been used only once.³⁵⁰ Since September 11, the Justice Department has standardized the process by which this assistance may function, adopting a new rule authorizing the attorney general to "waive normally required training requirements" if state or local law enforcement officers are unable to protect "public safety, public health, or national security" during a declared "mass influx of aliens."³⁵¹

The lynchpin of Justice Department efforts to increase state and local involvement is its newfound understanding of the source of state and local officials' authority to participate in the enforcement of federal immigration law. Rather than rely on any particular state or local law affording officials such power, the Justice Department asserts that state and local officials have "inherent authority" to "arrest and detain persons who are in violation of immigration laws and whose names have been placed in the National Crime Information Center (NCIC)."³⁵² The legal basis for the Justice Department's new position is unclear, and a coalition of advocacy groups has filed a suit under the Freedom of Information Act in the U.S. District Court for the Southern District of New York to compel the disclosure of the underlying legal analysis.³⁵³

The NCIC is a database containing millions of criminal records entered by the FBI, designed to be accessible to federal, state, and local authorities nationwide. Although Congress intended the NCIC to be used for the national dissemination of criminal records, the Justice Department has proposed expanding the categories of data entered into it to include immigration information on "high-risk aliens who fit a terrorist profile."³⁵⁴ The Justice Department has not stated what criteria it will use to determine who should be considered a "high risk alien" or who fits within the boundaries of a "terrorist profile." The Justice Department would also include in NCIC the names of some 355,000 non-citizens currently under final order of deportation or removal,³⁵⁵ as well as photographs, fingerprints, and general information about individuals who are out of compliance with the special registration program.³⁵⁶ The Justice Department has not indicated whether it will implement measures to ensure that NCIC information is correct or to make certain that incorrect information may be removed.³⁵⁷

Local officials nationwide have voiced their opposition to the federal government's efforts to have them enforce federal immigration law – opposition based on concerns that new responsibilities will compromise local officials' ability to ensure public safety, and concerns that immigration authority will compromise community relations critical to local policing.³⁵⁸ For example, the chief of police in Arlington, Texas, asserted: "We can't and won't throw our scarce

resources at quasi-political, vaguely criminal, constitutionally questionable, [nor] any other evolving issues or unfunded mandates that aren't high priorities with our citizenry."³⁵⁹ Chief Charles H. Ramsey of the Metropolitan Washington Police Department echoed this sentiment: "To begin in earnest checking immigration status, I can see where that could cause some tremendous strain. Unless there's some reasonable suspicion of a crime occurring, we need to be careful about the role we play."³⁶⁰

Raymond Flynn of Catholic Alliance, David Keene of the American Conservative Union, and Grover Norquist of Americans for Tax Reform, have together expressed their concern that the Justice Department's initiative will compromise effective policing techniques, "drain precious resources, [and] undermine the important relationships that these agencies have developed with the communities they serve."³⁶¹ And in Sacramento, California, Police Chief Arturo Venegas, Jr. also sounded a caution: "I don't think it's a good idea. We've made tremendous inroads into a lot of our immigrant communities. To get into the enforcement of immigration laws would build wedges and walls that have taken a long time to break down."³⁶²

In July 2003, Representative Charles Norwood (R-GA) introduced the "Clear Law Enforcement for Criminal Alien Removal Act of 2003" (CLEAR Act).³⁶³ If enacted, the CLEAR Act would establish authority for state and local police to enforce civil immigration laws, and would require the entry of civil immigration information into the NCIC. More than 100 organizations that work with immigrants expressed concern about the CLEAR Act in a recent letter to members of Congress, noting that "[p]olice attribute plummeting crime rates over the last decade or so to the 'community policing' philosophy," and that "the CLEAR Act would undermine the efforts—and successes—of local police" who have used community policing "to gain the trust and confidence of the residents they are charged with protecting."³⁶⁴

Dwindling Refugee Resettlements

*Our country can't seem to get its program back on track. The first year after September 11, everybody was willing to defer to the administration. By the middle of the second year, people had had it. If you want to give the management of the program a grade, it's a D-minus.*³⁶⁵

Leonard Glickman, Chairperson of Refugee Council USA and
President/CEO of the Hebrew Immigrant Aid Society

Nearly two years after September 11, the U.S. Refugee Resettlement Program appears destined to hit a record low for a second year in a row. The program continues to be hampered by lengthy delays in the conduct of new security checks and, as a bipartisan group of members of Congress stated, "a seeming chronic inability to meet the refugee admissions targets set in recent presidential determinations."³⁶⁶ Ironically, the U.S. refugee resettlement program – which serves as a lifeline to victims of human rights abuses – appears poised to become a permanent victim of the administration's new approach to immigration in the wake of September 11.

The United States' humanitarian program to bring refugees from around the world to safety in the U.S. has long been a source of pride for Americans and a reminder of the country's

founding as a haven for the persecuted. As several members of Congress emphasized in a July 2003 letter to President Bush, “Protecting refugees who have fled severe religious, political, or other forms of persecution has been a critical component of the United States’ strong commitment to freedom around the world.”³⁶⁷ 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 an anticipated 27,000 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 relating to new security procedures, meant that only 27,508 refugees came in last year.³⁶⁸ 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. Despite this projection, so far this year only 26,317 refugees had been resettled as of August 2003.³⁶⁹

The U.S. refugee resettlement program is currently being hampered by significant delays in the conduct of U.S. government security checks, a lack of sufficient resources, and a failure of management. Expressing concern for the plight of refugees, on April 9, 2003, members of the House of Representatives formed the “Bipartisan Congressional Refugee Caucus” which is dedicated to “affirming the United States’ leadership and commitment to protection, humanitarian needs and compassionate treatment to refugees and persons in refugee-like circumstances throughout the world.”³⁷⁰ In a July 2003 letter expressing concern about the state of U.S. refugee resettlement, Representatives Chris Smith (R-NJ) and Howard Berman (D-CA) together with Senators Sam Brownback (R-KS) and Ted Kennedy (D-MA) asked President Bush to “honor our nation’s longstanding tradition of providing a safe haven for refugees around the world” and urged that “the United States can and should do better.”

Extending National Security to Haiti

*Broad categories of foreigners who arrive in the United States illegally can be detained indefinitely without consideration of their individual circumstance if immigration officials say their release would endanger national security, according to a new ruling by Attorney General John Ashcroft. Previously, the government has jailed individuals or groups who arrived without visas and asked for asylum, but it had not asserted the right to indefinitely detain whole classes of illegal immigrants as security risks.*³⁷¹

Federation for American Immigration Reform

Citing national security and referring to the “current circumstances of a declared National Emergency,” Attorney General Ashcroft issued a sweeping decision on April 17, 2003, preventing an 18-year-old Haitian asylum seeker from being released from detention. In the

decision (known as *In re D-J*), the attorney general concluded that the asylum seeker, David Joseph, was not entitled to an individualized assessment of the need for his detention.³⁷²

There was no allegation that Joseph, who had arrived with about 200 other Haitians by boat in Biscayne Bay, Florida on October 29, 2002, presented any risk to the public. Instead, the attorney general's decision rested on two grounds. First, he concluded that if Joseph and others were released, their release "would come to the attention of others in Haiti," "encourag[ing] future surges in illegal migration by sea," and "injur[ing] national security by diverting valuable Coast Guard and [Defense Department] resources from counterterrorism and homeland security responsibilities."³⁷³ Second, the attorney general asserted that the U.S. government lacked the resources to screen the Haitians before releasing them, raising further risks to national security.

This latter concern, the attorney general explained, was fully supported by the State Department. He said that the State Department had "observed an increase in aliens from countries such as Pakistan using Haiti as a staging point for migration to the United States."³⁷⁴ Attorney General Ashcroft's remark, and particularly his use of the phrase "staging point," prompted an initial denial from the State Department. Stuart Pratt, a State Department spokesperson said, "We are all scratching our heads.... We are asking each other 'Where did they get that?'"³⁷⁵ Although it was eventually confirmed that the State Department had indeed made the assertion, U.S. Representative Kendrick Meek (D-FL) stated: "This is outright discrimination and racism by this Bush Administration. There is justice in America for everybody but the Haitians. Someone needs to call the president and let him know we are at war against the Taliban and Al Qaeda, and not the Haitian people."³⁷⁶

The expansive wording of the *In re D-J* decision raises concerns that the administration may seek to use it to justify the detention of broad categories of immigration detainees, beyond Haitian asylum seekers.³⁷⁷ The decision directs immigration judges to consider national security arguments "in all future bond proceedings involving aliens seeking to enter the United States illegally, where the INS attorney offers evidence from sources in the executive branch with relevant expertise establishing that significant national security interests are implicated."³⁷⁸ Further, the attorney general stated that even if Joseph were entitled to an individual hearing, such a hearing could be based on "general considerations applicable to a category of migrants" – an approach that would render any such hearing meaningless by disregarding the individual's specific circumstances.³⁷⁹ Taken together, these pronouncements could be read to suggest that whenever the executive contends that "significant national security interests are implicated," an immigrant may be denied an individual assessment of whether her detention is necessary.

RECOMMENDATIONS

1. The Justice Department and DHS should continue cooperating with the OIG by implementing the remaining recommendations addressing the treatment of the September 11 detainees by the OIG's October 3, 2003 deadline. In addition, Congress should require the OIG to report semi-annually any complaints of alleged abuses of civil liberties by DHS employees and officials, including government efforts to address any such complaints.

2. The Justice Department should rescind the expanded custody procedures regulation that allows non-citizens to be detained for extended periods without notice of the charges against them, as well as the expanded regulation permitting automatic stays of immigration judge bond decisions.
3. The president should direct the attorney general to vacate his decision in *In re DJ* and restore prior law recognizing that immigration detainees are entitled to an individualized assessment of their eligibility for release from detention. Congress should enact a law making clear that arriving asylum seekers should also have their eligibility for release assessed by an immigration judge.
4. The administration should fully revive its Refugee Resettlement Program and publicly affirm the United States' commitment to restoring resettlement numbers to pre-2001 levels (90,000 refugees each year). It should ensure that adequate resources are devoted to refugee security checks so that these procedures do not cause unnecessary delays.
5. The Justice Department should respect the judgment of local law enforcement officials and cease efforts to enlist local officials in the enforcement of federal immigration law.

CHAPTER 4

UNCLASSIFIED DETAINEES

INTRODUCTION

The federal government's efforts to address the threat posed by Al Qaeda have produced a complex and disorienting landscape of new law. Military jurisdiction is used to sidestep constitutional due process in the criminal justice system. Criminal labels are used to sidestep international laws protecting combatants held in preventive military detention. The executive's mix-and-match approach, which insists on an unprecedented level of deference from the federal courts, has seen bedrock principles of the rule of law transformed into little more than tactical options.

The new normal in punishment and prevention is characterized by the heavy use of extra-legal institutions and the propensity to treat like cases in different ways. Terrorist suspects outside the United States are detained in a new regime of closed detention and interrogation at Guantánamo Bay, in Afghanistan, and on the British island of Diego Garcia. And the administration has established military commissions, outside the existing military and civilian legal systems, to try suspected terrorists for a range of crimes, some of which have never before been subject to military justice.

Within the United States, citizens and others suspected of threatening national security are subject to a blended system of criminal law enforcement and military detention. And despite the successful use of the criminal justice system in multiple national security-related prosecutions, federal officials have warned that military tribunals remain an option if efforts to win criminal convictions in ongoing prosecutions appear to be turning against them. This chapter describes these developments and explores the effects of post-September 11 counterterrorism efforts on the rule of law.

LEGAL BACKGROUND

*The accumulation of all powers, legislative, executive and judiciary, in the same hands may justly be pronounced the very definition of tyranny.*³⁸⁰

James Madison, Federalist Papers No. 47

As Madison's famous warning makes clear, the framers' experience with the British Crown had given them abundant reason to fear unchecked executive power. The Declaration of Independence was leveled against the "absolute tyranny" of an executive – King George III and his colonial governors – which had "affected to render the Military independent of and superior to the Civil Power" and had "depriv[ed them], in many Cases, of the Benefits of Trial

by Jury.”³⁸¹ Writing against these practices, the framers put freedom from arbitrary detention by the executive “at the heart” of the liberty interests the U.S. Constitution protects.³⁸²

In the United States, the executive thus has a specific, limited set of legal tools under which to detain and prosecute those it suspects of participating in violent activities. First, Congress has enacted a long list of criminal statutes prohibiting certain conduct – from the possession of explosive materials to the provision of material support to a “terrorist” organization.³⁸³ There are likewise civil statutes providing for administrative detention in some circumstances (for certain violations of immigration laws,³⁸⁴ for example, or for reasons of mental incompetence³⁸⁵), and military statutes setting forth the rules of conduct for members of the U.S. armed forces.³⁸⁶

Anyone detained, whether for alleged violations of criminal law or for legitimate administrative purposes, is entitled to basic protections to ensure their detention is fair, including the due process guarantees of the Fifth Amendment.³⁸⁷ In all criminal prosecutions, defendants are also entitled under the Sixth Amendment to the assistance of counsel and to confront witnesses against them. Critically, anyone detained by the executive can seek independent review of the legality of the detention by petitioning for a writ of habeas corpus in federal court. The privilege of habeas corpus cannot be suspended “unless when in cases of rebellion or invasion the public safety may require it,”³⁸⁸ and even then only when Congress acts to do so.³⁸⁹

The executive’s power to detain – based on criminal, civil, or military law – is also constrained by international law. A number of international human rights treaties protect the right to independent judicial review of detention – including the International Covenant on Civil and Political Rights and the American Convention on Human Rights.³⁹⁰ These provisions apply even in cases involving terrorism. As the Inter-American Commission on Human Rights has emphasized:

[E]ven in emergency situations, the writ of habeas corpus may not be suspended or rendered ineffective.... To hold the contrary view... [would] be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems.³⁹¹

In the special context of international armed conflict, the United States must also abide by international humanitarian law – also known as the law of war. International humanitarian law establishes the basic rights that must be afforded any individual caught up in the conflict.³⁹² The primary instruments of humanitarian law are the four Geneva Conventions of 1949, which the United States has signed and ratified. The Geneva Conventions govern the treatment of wounded and sick soldiers (First Geneva Convention), sailors (Second Geneva Convention), prisoners of war (Third Geneva Convention), and civilians (Fourth Geneva Convention). Under this regime, “[e]very person in enemy hands must have some status under international law.”³⁹³ Specifically, one is “either a prisoner of war and, as such covered by the Third Convention, [or] a civilian covered by the Fourth Convention. *There is no intermediate status; nobody in enemy hands can be outside the law.*”³⁹⁴ The United States military has long

acknowledged this principle, explaining that those determined not to be prisoners of war are to be treated as “protected persons” under the Fourth Geneva Convention.³⁹⁵

Combatants and civilians are treated differently under humanitarian law. Combatants – defined principally as “members of the armed forces of a Party to a conflict” – may be held as prisoners of war until the end of the hostilities as a means of preventing them from returning to participate in the conflict.³⁹⁷ Although they may be interrogated, they are required to provide only bare information about their identity and may not be tortured or threatened in any way.

A prisoner of war may not be tried for using violence in the conduct of war (the so-called “combatants’ privilege”). He may be tried for war crimes or crimes against humanity, however, under the same justice system applicable to a member of the detaining state’s military. (In the United States, members of the military are subject to court martial under the Uniform Code of Military Justice, as described below.) Individuals who do not meet the definition of prisoners of war – including individuals linked exclusively to international terrorist groups – have traditionally been treated as civilians.³⁹⁸

Civilians who participate “directly” in hostilities may be criminally prosecuted for their conduct under the domestic criminal law of the captor.³⁹⁹ If there is “any doubt” as to a detainee’s status, Article 5 of the Third Geneva Convention requires that the detaining authority provide an individualized status hearing by a “competent tribunal.” Until the tribunal makes a determination in the detainee’s case, he or she must be regarded as a prisoner of war. The United States has long complied with these procedures,⁴⁰⁰ and thousands of such hearings were held in the Vietnam and Gulf Wars.⁴⁰¹

Finally, the United States has long maintained a separate body of substantive and procedural rules governing the prosecution and detention of members of the U.S. military and, consistent with the Geneva Conventions, prisoners of war. U.S. military courts, called courts martial, are established by Congress and governed by the Uniform Code of Military Justice (UCMJ).⁴⁰² Except for trial by jury, a court martial under the UCMJ has virtually every

WHAT IS A PRISONER OF WAR?

Prisoners of war are persons who fall into enemy hands and belong to one of the following categories:

- (1) Members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (a) They are commanded by a person responsible for his subordinates
 - (b) They have a fixed distinctive sign recognizable at a distance;
 - (c) They carry arms openly; and
 - (d) They conduct their operations in accordance with the laws and customs of war.

Third Geneva Convention (1949), Article 4³⁹⁶

protection provided to a civilian defendant prosecuted in the criminal justice system, including the right to appeal to an independent appellate court (with civilian judges) and the right to pursue a final appeal to the U.S. Supreme Court.⁴⁰³

EXTRA-LEGAL INSTITUTIONS

The broad contours of at least two of the novel post-September 11 structures are by now well known. First, the executive branch has established an off-shore military detention regime for the evaluation and disposition of international detainees. The detention camp at the U.S. Naval Base at Guantánamo Bay, Cuba is staffed by U.S. military personnel, and populated by some of the individuals seized by U.S. forces and their allies during the war in Afghanistan, as well as individuals seized by the United States in connection with separate counterterrorism operations in Bosnia, Gambia, and Pakistan.

In addition, the executive has established military commissions to try at least some of those held at Guantánamo and, potentially, non-citizen terrorism suspects in the United States.⁴⁰⁴ Each of these structures operates outside the substantive and procedural rules applicable in U.S. criminal courts or U.S. courts martial, and outside international law governing the detention of prisoners of war under the Geneva Conventions. The decision whether a detainee is to be held indefinitely in administrative detention or is to be tried in a military commission appears to rest entirely within the discretion of the executive branch.

Guantánamo Bay

In early 2002, the U.S. military removed several hundred individuals from Afghanistan to Guantánamo Bay. There were initial reports that these individuals suffered physical mistreatment, especially during the transfer from Afghanistan, when they were bound hand and foot and forced to wear goggles and ear blocks that deprived them of sight and hearing; many were also required to shave their beards.⁴⁰⁵ Since then, many additional detainees have been brought in from Afghanistan and other countries. About 660 detainees are now housed at Guantánamo – including nationals from at least 40 countries, speaking 17 different languages. Three are children, the youngest aged 13. Since the camp opened, about 70 detainees, mainly Afghans and Pakistanis, have been released.⁴⁰⁶ The executive has refused to release the names of the detainees and has permitted access only to the International Committee of the Red Cross and some foreign diplomatic officials.

The U.S. government has declined to term any of the Guantánamo detainees either combatants, entitled to prisoner-of-war protections under the Geneva Conventions, or criminal suspects, entitled to the protections of the U.S. criminal justice system. The uncertain legal basis for the Guantánamo camp, and the uncertain status of those held there, has become the subject of widespread international concern.



LIFE IN CAMP DELTA

Since April 28, 2002, the Guantánamo detainees have been kept in a newly built camp of wire mesh-sided cells called Camp Delta. The maximum security cells are approximately eight feet by seven feet, and the mesh walls permit communication among neighboring cells.⁴⁰⁷ The children are housed separately.⁴⁰⁸ The detainees have not been charged with any crimes, and they have no idea how long they will be held or if they

will eventually be tried. About 120 have reportedly been rewarded for cooperating with interrogators; they have been moved to a medium security wing, called Camp 4, where they live in groups of ten and are allowed more exercise time, books, and some other liberties. Non-cooperating detainees are allowed between one and four hours of exercise per week – although under the Geneva Conventions, even detainees in disciplinary confinement must be provided a minimum of two hours of exercise a day.⁴⁰⁹ Lights are kept on 24 hours.⁴¹⁰ There have been 32 reported suicide attempts.⁴¹¹

While U.S. officials have asserted that the Guantánamo prisoners are “battlefield” detainees who were engaged in combat when arrested,⁴¹² some were arrested in places far from Afghanistan. Soon after the camp opened, Guantánamo became home to six Algerians (five claiming naturalized Bosnian citizenship), forcibly transported by U.S. officials from Bosnia to Guantánamo. As discussed in more detail in Chapter 5, Bosnian officials arrested the men in October 2001 on charges of plotting to blow up the U.S. Embassy in Bosnia, and in January 2002 handed them over to the United States in defiance of two separate orders from the Bosnian courts.⁴¹³ Also in Guantánamo are two U.K. residents who were arrested in November 2002 during a business trip to Gambia – Bisher al-Rawi and Jamil al-Banna. Al-Rawi, an Iraqi, has lived in the United Kingdom for 19 years, having fled with his father from Saddam Hussein’s regime. The British government granted Al-Banna, a Jordanian, refugee status in 2000 based on a risk of persecution in his home country. The Gambian police kept the two men in incommunicado detention for a month, while Gambian and American officials interrogated them. In December 2002, U.S. agents took the men to the U.S. military base at Bagram, Afghanistan, and, in March 2003, transported them to Guantánamo, where they remain.⁴¹⁴ At least one other Guantánamo detainee is reported to have been arrested in Africa.⁴¹⁵

Of those Guantánamo detainees who were taken from Afghanistan, many were handed over to American forces after being picked up by Northern Alliance warlords or other third parties.⁴¹⁶ In many cases, U.S. officials’ certainty as to the detainees’ identity has depended on the accounts of Northern Alliance commanders or others who might have exploited U.S. eagerness to capture terrorists as a means of settling personal or factional scores, or harvesting a generous ransom. Indeed, U.S. forces had dropped leaflets promising “millions of dollars for helping... catch Al Qaeda and Taliban murderers... enough money to take care of your family,

your village, your tribe for the rest of your life.”⁴¹⁷ In the absence of individualized Article 5 hearings afforded battlefield detainees under the Third Geneva Convention – hearings that determine the status of those detained – there is genuine concern that noncombatants may have been caught up in the Guantánamo net. Many of the detainees’ families insist that their detained relatives were involved in legitimate humanitarian work or other activities unrelated to combat or terrorism.⁴¹⁸

INNOCENTS AT GUANTÁNAMO?

Though the administration had described the Guantánamo detainees collectively as “among the most dangerous, best trained vicious killers on the face of the earth,”⁴¹⁹ U.S. officials have now conceded that at least some are harmless enough to be set free. Four detainees were released in October 2002, for example, three Afghans and a Pakistani. Two of the Afghans appeared upwards of seventy years old. One of them, “Mohammed Sadiq, walked with a cane and claimed to be 90.” Another, “Mohammed Hagi Fiz, a toothless and frail man with a bushy white beard, claimed to be 105 years old... [and weighed] 123 pounds. Fiz said he was arrested by American forces eight months ago while being treated at a clinic in the central Afghan province of Uruzgan. Tied up and blindfolded, he was flown by helicopter to Kandahar and later by plane to Guantánamo.... ‘My family has no idea where I am...,’ Fiz said. ‘All they know is that I went to a doctor for treatment and disappeared.’”⁴²⁰

Having failed to provide Article 5 hearings, the administration has advanced various arguments to explain the basis for the Guantánamo detentions. With respect to Taliban fighters captured during the Afghanistan war, the administration has argued that while these fighters might be the official armed force of Afghanistan (a party to the Geneva Conventions), the Taliban army was a criminal force whose members did not distinguish themselves from civilians, and who made a practice of committing war crimes, in violation of Article 4(A)(2) of the Third Geneva Convention. On this basis, the administration argues that all Taliban soldiers are undeserving of Geneva Convention prisoner-of-war protections.⁴²¹

The blanket labeling as “unlawful” of an entire nation’s regular army because of a practice of even widespread war crimes is unprecedented.⁴²² The United States respected the prisoner-of-war status of German soldiers in World War II, the armed forces of North Korea in the Korean War, North Vietnamese forces (and the guerrilla National Liberation Front) in the Vietnam War, and Iraqi military in both Gulf wars.⁴²³ Further, while the Taliban army did not have uniforms of the type customary in Western armies, there are abundant reports of a trademark black turban worn by Taliban members.⁴²⁴ There is thus some question about whether the Taliban had a “fixed distinctive sign recognizable at a distance” – the Geneva Convention standard for identifying combatants.⁴²⁵

With respect to non-Taliban Al Qaeda fighters, the administration has argued that they have no right under international law to participate in hostilities because Al Qaeda is not the official armed force of a party to the Geneva Conventions. The administration also argues that Al Qaeda fails to meet the minimum standards for a lawful militia or other irregular armed force under Article 4(A) of the Third Geneva Convention because Al Qaeda members do not wear uniforms or otherwise distinguish themselves from the general population, and members

make a practice of attacking civilians in violation of the law of war. But whatever Al Qaeda's status, the United States remains bound to Geneva Convention requirements, which ensure that individuals who are not a part of an official armed force – even if they have “directly” engaged in combat⁴²⁶ – are subject to criminal prosecution, not indefinite detention without judicial review.⁴²⁷ In any case, battlefield reports from Afghanistan have indicated that the distinction between Taliban and Al Qaeda forces was not always clear. For example, at least one Taliban unit was an embedded Al Qaeda contingent, apparently “forming part of” the regular Taliban army.⁴²⁸ For this reason, an Article 5 hearing is essential.



Armed U.S. Forces are not always in uniform. This photograph, taken by the Associated Press, shows a U.S. Special Forces soldier talking to colleagues after an assassination attempt on President Hamid Karzai in Afghanistan on September 5, 2002.

Photo: Tom Gilbert, AP Wide World

As for the Bosnian detainees and others taken into custody far from the battlefield of an armed conflict, the law of war has no bearing; civilians detained by the U.S. government on suspicion of terrorist activities are entitled to the protections surrounding international extradition and criminal prosecution. At least one court has already made this clear. In September 2002, in a case brought by four of the six Bosnian men now held at Guantánamo, the Human Rights Chamber of Bosnia and Herzegovina found that the transfer of the men to U.S. custody without due process and in defiance of a court order was a violation of the European Convention on Human Rights and other applicable law. Bosnian officials had previously indicated that the six could be turned over to the United States if they were wanted on U.S. criminal warrants, but the U.S. Embassy had refused to say whether warrants had issued, and one senior U.S. official dismissed the matter of warrants as a “formality.”⁴²⁹

THE LEGAL STATUS OF GUANTÁNAMO: “SOVEREIGNTY” VERSUS “COMPLETE JURISDICTION AND CONTROL”

Some family members of the Guantánamo detainees have filed suit in U.S. federal court, asking the courts to review the legal basis for their relatives' detention. In March 2003, the U.S. Court of Appeals for the D.C. Circuit found that the detainees' families had no right to “invoke the jurisdiction of [U.S.] courts to test the constitutionality or the legality of restraints on [the detainees'] liberty,”⁴³⁰ because they were not being held on U.S. “sovereign” territory. The court based its decision on *Johnson v. Eisentrager*, a 1950 U.S. Supreme Court case involving 21 German nationals in U.S. custody. The Germans had been tried in a U.S. military commission and convicted of war crimes for assisting Japanese forces in China after the surrender of Germany during World War II.⁴³¹ In *Eisentrager*, the Supreme Court held that the Germans had no right to petition U.S. courts for habeas corpus because “the scenes of their offense, their capture, their trial, and their punishment” had all occurred outside the sovereign territory of the United States.⁴³² In the Guantánamo cases, the D.C. court of appeals dismissed as irrelevant the distinguishing fact that the Germans had been charged and tried under applicable law (the Guantánamo detainees have not).⁴³³ Rather, the court of appeals found that under the terms of the perpetual lease agreement signed by Cuba and the United States in 1903 (a lease that cannot be terminated without the consent of both parties),⁴³⁴ “ultimate sovereignty” of Guantánamo is reserved to Cuba. Despite the fact that the lease also gives the United States “complete jurisdiction and control” over the territory – authority that the United States has exercised for more than a century – the court held that the U.S. courts had no power to review the United States' current actions there.⁴³⁵

Military Commissions

*We all want to fight terrorism . . . [but] shredding the Constitution – which applies to all ‘persons,’ not just citizens – isn’t the way to do it.*⁴³⁶

Robert A. Levy, Cato Institute

President Bush triggered an avalanche of public debate when he issued an executive order on November 13, 2001, announcing the establishment of military commissions (the November Order).⁴³⁷ The November Order authorizes the creation of military commissions for trying non-citizens suspected of “violations of the laws of war and other applicable laws.”⁴³⁸ The order applies to a non-citizen if the president unilaterally finds “reason to believe that such individual... has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore,” that could harm the United States.⁴³⁹ The prosecutor and the adjudicating panel in such proceedings will be military officers answerable only to the president. The president will also be responsible for final review of any verdict.⁴⁴⁰ Under the order, proceedings may be conducted partly or entirely in secret, using secret evidence and witnesses (including hearsay evidence from unidentified informants).⁴⁴¹

The Defense Department subsequently issued more detailed procedural rules for the commissions in a March 21, 2002 Military Commission Order,⁴⁴² and an April 30, 2003 set of

Military Commission Instructions.⁴⁴³ Both sets of rules evidence some effort to address a number of concerns raised by bipartisan critics of the commissions. The rules affirm the presumption of innocence,⁴⁴⁴ require that guilt be proven beyond a reasonable doubt,⁴⁴⁵ provide for military defense counsel at government expense; and permit limited participation by civilian defense counsel at the defendants' expense.⁴⁴⁶ Despite these improvements, however, military commission proceedings provide markedly fewer fairness safeguards than either U.S. criminal or military court proceedings. First, the commission structure will be under the president's complete control, with no appeal to any civilian court. Second, despite White House assurances that military commissions would be used to try only "enemy war criminals" for "offenses against the international laws of war,"⁴⁴⁷ the chargeable offenses expand military jurisdiction into areas never before considered subject to military justice. This unprecedented jurisdictional reach is achieved by broadening the definition of "armed conflict"⁴⁴⁸ – the Geneva Convention term that establishes when "the law of war" is triggered – to include isolated "hostile acts" or unsuccessful attempts to commit such acts, including crimes such as "terrorism" or "hijacking" that traditionally fall within the ordinary purview of the federal courts.⁴⁴⁹ Third, the government has broad discretion to close proceedings to outside scrutiny in the interest of "national security."⁴⁵⁰

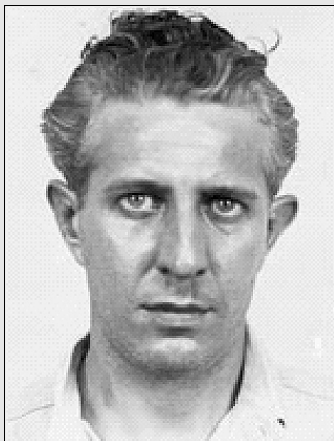
COMPARING FAIRNESS PROTECTIONS

RIGHTS	U.S. CRIMINAL COURT	U.S. COURT MARTIAL	MILITARY COMMISSION
Jury	Yes	No	No
Counsel of defendant's choice	Yes	Yes	No
Know all evidence against the defendant	Yes	Yes	No
Obtain all evidence in favor of the defense	Yes	Yes	No
Attorney-client confidentiality	Yes	Yes	No
Speedy trial	Yes	Yes	No
Appeal to an independent court	Yes	Yes	No
Remain silent	Yes	Yes	Yes
Proof beyond a reasonable doubt	Yes	Yes	Yes

Finally, the military commission rules impose substantial restrictions on the nature of legal representation to which defendants are entitled. Commission defendants will be represented by assigned military lawyers – even if they do not want them.⁴⁵¹ While defendants will also be entitled to (eligible) civilian lawyers, there are strong personal and professional disincentives for civilians to serve. Unless a defendant or his family or friends can provide

financing, civilian defense lawyers will receive no fees and will themselves have to cover all personal and case-related expenses.⁴⁵² Civilian defense lawyers must be U.S. citizens and eligible for access to information classified “secret.”⁴⁵³ During the trials, civilian lawyers may not leave the site without Defense Department approval; and they may not discuss the case with outside legal, academic, forensic, or other experts.⁴⁵⁴ Furthermore, civilian lawyers (as well as their clients) can be denied access to any information – including potential exculpatory evidence – to the extent the prosecution determines it “necessary to protect the interests of the United States.”⁴⁵⁵ The Defense Department may (without notice) monitor attorney-client consultations; and lawyers will be subject to sanction if they fail to reveal information they “reasonably believe” necessary to prevent significant harm to “national security.”⁴⁵⁶

The scope of these restrictions – and the extent to which they are inconsistent with well-settled rules of legal ethics – have provoked a troubled debate within the legal profession. The National Association of Criminal Defense Lawyers has taken the position that it is “unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.”⁴⁵⁷ In contrast, the National Institute of Military Justice has urged qualified civilian defense counsel to “give serious consideration” to participating, on the ground that the “highest service a lawyer can render in a free society is to provide qualified independent representation for those most disfavored by government.”⁴⁵⁸ The American Bar Association made no specific recommendation regarding civilian counsel participation, but adopted a resolution “call[ing] upon” Congress and the executive to ensure that defendants in military commission trials “have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and [to] oppos[e] any qualification requirements or rules that would restrict the full participation of CDC who have required security clearances.”⁴⁵⁹



THE PRECEDENT FOR MILITARY COMMISSIONS: *EX PARTE QUIRIN*

Photo: Richard Quirin

The executive branch has argued that military tribunals have an established history in the United States, and in particular that the “language of [the president’s November 2001] order is similar to the language of a military tribunal order issued by President Franklin Roosevelt.”⁴⁶⁰ In the World War II case that the current executive refers to, *Ex Parte Quirin*,⁴⁶¹ the U.S. Supreme Court upheld the jurisdiction of a military commission to try eight German army soldiers, including one U.S. citizen, for violations of the law of war. (All were found guilty, and six were executed.) But the circumstances of the *Quirin* defendants were quite different from those of the “enemy combatants” apparently subject to military prosecution today. The *Quirin* defendants surrendered to the FBI, admitting that they were members of the official armed force of a state with which the United States was in a declared war. They snuck “behind enemy lines,” landing from a military submarine. Two of the four crimes they were charged with – “relieving, harboring or corresponding with the enemy,” and “spying” – were specifically defined in the Articles of War passed by Congress; these Articles had authorized trial “either by court martial or military commission.”⁴⁶² Meanwhile, several U.S. civilians who had allegedly conspired with the Nazi saboteurs in *Quirin* were arrested and tried in U.S. criminal courts, not in military commissions.⁴⁶³ Today, Congress has neither declared general war, nor authorized the president’s planned military commissions. The “enemy combatants” so far designated do not appear to be members of any uniformed armed force, yet they are subject to military prosecution for offenses never before considered war crimes.⁴⁶⁴ They are not also entitled to confidential communications with their counsel; access to all relevant evidence; and review of the lawfulness of the proceedings in the U.S. Supreme Court – all of which were afforded to the *Quirin* defendants.

International Reaction

*[International cooperation in fighting terrorism would be] imperiled when foreign governments don’t trust us to respect the basic rights of the people we ask them to send us.*⁴⁶⁵

General James Orenstein, Former Associate Deputy Attorney

On July 3, 2003, the Defense Department announced that six current detainees at Guantánamo were eligible for trial by military commission. Among these six were U.K. citizens Moazzam Begg and Feroz Abassi, and Australian citizen David Hicks.⁴⁶⁶ Although the identities of the

other three have yet to be revealed, the U.S. government reportedly does not consider the six to be “important terrorist figures.”⁴⁶⁷ As American officials explained: “[T]he first group of people charged would be low-level suspects, who, in exchange for plea bargains, might be persuaded to divulge information.”⁴⁶⁸

The designation of citizens from two close U.S. allies sparked serious protests in both countries. The U.K. government advanced “strong reservations about the military commission,” which it vowed it would “continue to raise... with the U.S.”⁴⁶⁹ Some 200 Members of Parliament signed a petition calling for repatriation of the British detainees for trial in the United Kingdom.⁴⁷⁰ Feroz Abassi’s mother had earlier sought a court order directing the British Foreign and Commonwealth Office to intercede on her son’s behalf. Though a British appeals court declined to grant relief in November 2002, the three-judge panel strongly criticized U.S. policy: “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.” The court expressed the hope that the “anxiety we have expressed will be drawn to their attention.”⁴⁷¹

The United States had indicated that it would extradite the British detainees to the United Kingdom if “[t]hey can handle the prosecution,” but the U.K. government concluded it could not guarantee prosecution because of the difficulty in obtaining evidence admissible in a British court.⁴⁷² Ultimately, U.K. Attorney General Lord Goldsmith sought and obtained some concessions for the U.K detainees – most important, promises not to seek the death penalty or to monitor their consultations with counsel, and to consider letting them serve their sentences in U.K. prisons.⁴⁷³ The United States offered the same concessions to the Australian government regarding David Hicks.⁴⁷⁴

FALSE CONFESSIONS?

Before learning that his son was slated for a military commission trial, Azmat Begg, Moazzam Begg’s father, had described receiving an “ominous message” from his son, saying he was going to do “something drastic which was going to affect the whole family.” Begg’s father expressed fear that this “might mean that his son had made a false confession to secure better treatment, or at least a resolution to his long months of doing nothing and being charged with nothing at Guantánamo Bay.”⁴⁷⁵ According to his family, by July 2003, Begg had been held in a “windowless cell” in Bagram, Afghanistan, for a year, and in Guantánamo Bay for an additional five months.⁴⁷⁶ The possibility that prolonged detention and questioning might produce such a false confession is a familiar concern to law enforcement, sometimes referred to as the “wear down” process.⁴⁷⁷ One forensic psychologist has concluded, for example, that “an innocent suspect could be made to admit almost anything under the pressure of continuous questioning and suggestion.”⁴⁷⁸ By way of comparison, in the famous New York Central Park “Jogger Case,” five defendants were convicted based on their false confessions of rape. The boys, 14 to 16 years old, had been “in custody and interrogated on and off for 14 to 30 hours”⁴⁷⁹; law enforcement manuals generally caution against interrogations lasting longer than two hours.⁴⁸⁰

Soon after these offers were extended, on August 11, 2003, U.S. officials suggested that the three ‘allied’ detainees were “expected to plead guilty to war crimes... and to renounce terrorism and assist investigators in exchange for a firm release date.”⁴⁸¹

The perception of special treatment for the U.K. and Australian defendants has provoked resentment in other countries. An Egyptian commentator, for example, noted that exempting British and Australian suspects from the death penalty invites accusations of “selective justice,” and “risk[s] further condemnation on an already sensitive issue.”⁴⁸² Indeed, as noted by Khalid al-Odah, a former Kuwaiti air force pilot whose son Fawzi is at Guantánamo: “Now that the [Iraq] war has ended, the [Kuwaiti] government is becoming more active on this issue.... The fact that the British raised issues made the Kuwaitis push more.”⁴⁸³ On August 21, 2003, ten national law society and bar leaders from Sweden, Scotland, Northern Ireland, Australia, England and Wales, and Canada issued a public letter stating that “only two legally acceptable courses of action” were now open to the United States with regard to the Guantánamo detainees: trial in normal U.S. civilian courts or repatriation for trial in their home countries.⁴⁸⁴ “In our view it is not for the US government to ‘concede’ basic rights as a favour. All detainees are entitled to a fair and lawful trial as of right.”⁴⁸⁵

DIFFERENT TREATMENT OF LIKE CASES

*Indeed... any American citizen seized in a part of the world where American troops are present – e.g., the former Yugoslavia, the Philippines, or Korea – could be imprisoned indefinitely... if the Executive asserted that the area was a zone of active combat.*⁴⁸⁶

Hamdi v. Rumsfeld (Motz, J., dissenting)

A second feature of the new normal in punishment and prevention is the different treatment of individual cases with seemingly identical features. The choice to subject someone to military or criminal detention, to declare someone an “enemy combatant” or a prisoner of war, seems unconstrained by any guiding set of principles. As one Justice Department official put it: “There’s no bright line.”⁴⁸⁷

John Walker Lindh and Yaser Hamdi

The executive branch has accused both John Walker Lindh and Yaser Hamdi of supporting terrorism and participating in hostilities against the United States in Afghanistan. Both are U.S. citizens, captured in Afghanistan in late 2001 by Northern Alliance warlord Abdul Rashid Dostum, and handed over to U.S. forces shortly thereafter. Yet the executive brought criminal charges against Lindh through the normal civilian criminal justice system, affording Lindh all due process protections available under the Constitution, once he was brought to the United States. Hamdi, in contrast, has remained in indefinite incommunicado detention for 16 months. He has never seen a lawyer.

John Walker Lindh

Lindh traveled to Afghanistan in 2002, according to his plea bargain statement, with the purpose of “assist[ing] the Taliban government in opposing the warlords of the Northern Alliance.”⁴⁸⁸ He arrived at the front on September 6, 2001, five days before the September 11 attacks.⁴⁸⁹ Northern Alliance forces captured Lindh in November 2001, and turned him over to U.S. custody on December 1. Later that month he was returned to the United States. Federal prosecutors soon brought a ten-count criminal indictment against Lindh in federal district court in Virginia, charging him with conspiring with Al Qaeda to kill U.S. nationals, and other offenses.⁴⁹⁰ Lindh’s counsel immediately sought to suppress the government’s strongest evidence – confessions Lindh had purportedly made while shackled, cold, hungry, dehydrated and in feverish pain from an untreated leg wound, and after having requested access to a lawyer.⁴⁹¹ FBI agents persisted in interrogating Lindh even after learning that Lindh’s family had retained counsel for him, apparently ignoring repeated warnings from a Justice Department lawyer that evidence obtained by such questioning would likely be inadmissible in court.⁴⁹²

A VOICE FROM THE JUSTICE DEPARTMENT

In December 2001, Jesselyn Radack, a lawyer in the Justice Department’s Professional Responsibility Advisory Office, advised interrogators in Afghanistan by e-mail that continued FBI questioning of Lindh would “not [be] authorized by law,” because Lindh’s family had retained legal counsel for him. In March 2002, after federal district court Judge T.S. Ellis III requested copies of all Justice Department correspondence about the Lindh interrogations, Radack discovered that the Department had submitted only two of the dozen or more e-mails she had written. She later insisted that “[t]he e-mails were definitely relevant... [because t]hey undermined the public statements the Justice Department was making about how they didn’t think Lindh’s rights were violated.” Radack also charged that “[s]omeone deliberately purged the e-mails from the file. In violation of the rules of federal procedure, they were going to withhold these documents from the court.” Eventually, the Justice Department did provide the most important of the emails for submission to the judge. Soon after, Radack left the Justice Department to work at a private law firm. When the e-mails were anonymously leaked to Newsweek in June 2002, the Justice Department opened a criminal investigation of Radack.⁴⁹³

Having initially touted Lindh’s prosecution as a “major terrorist case,”⁴⁹⁴ the government began negotiating to settle the case. Lindh agreed to cooperate with government investigators and to plead guilty to “supplying services as a foot soldier for the Taliban against the Northern Alliance while carrying a rifle and two grenades.” All other charges were dismissed, including allegations that Lindh had taken up arms against the United States.⁴⁹⁵ Because the case did not go to trial, the evidence of Lindh’s ill-treatment after capture was never examined in court. He was sentenced to up to 20 years in prison.

Yaser Hamdi

Northern Alliance forces captured Yaser Hamdi, an American citizen raised in Saudi Arabia, in November 2001, and handed him over to U.S. custody soon after. In January 2002, U.S. officials brought Hamdi to Guantánamo, where his interrogators later discovered his U.S. citizenship. In April 2002, the military transported him from Guantánamo to a U.S. military base in Norfolk, Virginia. In contrast with its treatment of Lindh, however, the executive declined to bring criminal – or any specific – charges of misconduct. Instead, the president designated Hamdi an “enemy combatant.”⁴⁹⁶

On June 11, 2002, Hamdi’s father, Isam Fouad Hamdi, filed a habeas corpus petition on Hamdi’s behalf, as “next friend,” seeking review of the lawfulness of his son’s detention.⁴⁹⁷ To enable the petitioner to pursue his case, federal district court judge Robert G. Doumar ordered the government to allow a public defender to meet with Hamdi in private. The government appealed, and the U.S. Court of Appeals for the Fourth Circuit vacated the original order. It remanded the matter to the district court to reconsider the extent to which the court had jurisdiction to review Hamdi’s detention as a designated “enemy combatant.”⁴⁹⁸ On August, 16, 2002, Judge Doumar rejected the executive’s contention that only minimal judicial review of this designation was appropriate and ordered Justice Department attorneys to produce for the court’s private review the factual evidence underlying the “enemy combatant” determination. The court also demanded to know the “screening criteria utilized to determine [Hamdi’s] status,” as well as information regarding those who had made the determination.⁴⁹⁹ Judge Doumar told the government attorneys that he would not be a “rubber stamp”⁵⁰⁰ for the executive.

On appeal, the Fourth Circuit again vacated Judge Doumar’s order.⁵⁰¹ While ruling largely in the executive’s favor, the appeals court began by rejecting 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.”⁵⁰² Still, it found “sufficient” basis upon which to conclude that “Hamdi’s detention conforms with a legitimate exercise of the war powers given the executive by... the Constitution and... [is] consistent with the... laws of Congress,” based on the purportedly “undisputed” fact that “Hamdi was captured in a zone of active combat operations in a foreign country,” and has been “determine[ed] by the executive... [to be] allied with enemy forces.”⁵⁰³

Dissenting from the denial of Hamdi’s request for rehearing en banc (by the entire court), several Fourth Circuit judges harshly criticized the panel’s factual premise. As Judge Michael Luttig explained: “[I]t simply is not ‘undisputed’ that Hamdi was seized in a foreign combat zone... since Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.”⁵⁰⁴ Judge Diana Gribbon Motz pointed out the “chilling” ramifications of the panel’s ruling: “[A]ny of the ‘embedded’ American journalists, covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person as an ‘enemy combatant.’”⁵⁰⁵

Hamdi's lawyers anticipate seeking U.S. Supreme Court review in the fall. Hamdi remains at the military brig in Virginia, held in incommunicado detention. There is no information on his condition.

James Ujaama and José Padilla

José Padilla and James Ujaama are both U.S. citizens accused of plotting with Al Qaeda to prepare for terrorist operations in the United States. They were both arrested in the United States. Ujaama was indicted and then entered a plea agreement with prosecutors. Padilla, however, has never been formally charged with any offense. Instead, the president designated him an "enemy combatant," and the Defense Department took him into military custody.

James Ujaama

U.S. citizen James Ujaama was initially arrested and detained under the federal material witness statute on July 22, 2002.⁵¹⁰ On August 28, 2002, he was indicted on two counts of conspiracy to provide material support and resources to Al Qaeda in the form of training, facilities, computer services, safe houses, and personnel. The Justice Department alleged that he had planned with others to construct a firearms and military training camp in Oregon.⁵¹¹ On April 14, 2003, Ujaama entered a guilty plea to a charge of providing goods and services to the Taliban. He acknowledged that he had assisted a co-conspirator's travel to Afghanistan, that he had delivered currency to and installed software programs for Taliban officials in Afghanistan, and that he had participated in a website that raised money for Taliban programs. He will serve two years in prison, and has pledged to cooperate with law enforcement authorities.⁵¹²

PROVIDING MATERIAL SUPPORT OR RESOURCES TO A FOREIGN TERRORIST ORGANIZATION

Since September 11, 2001, federal prosecutors have charged a growing number of individuals with knowingly "providing material support or resources" to an organization the Secretary of State has designated as a "foreign terrorist organization." The material support ban was first established in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), and later amended by the USA PATRIOT Act.⁵⁰⁶ Although the statute was used only three times before September 11, the Ninth Circuit Court of Appeals held in 2000 that two components of AEDPA's lengthy definition of material support, the provision of "training" and "personnel," were unconstitutionally vague and could criminalize a wide range of First Amendment-protected speech.⁵⁰⁷ In amending AEDPA, however, the USA PATRIOT Act did not take out either of these terms, and instead added "expert advice or assistance" to the definition. David Cole, a professor at Georgetown Law School, has argued that the statute is now so vague "it would make it a crime for a Quaker to send a book on Gandhi's theory of nonviolence to the leader of a terrorist group."⁵⁰⁸ Questions about the constitutionality of the statute have arisen in the cases of those charged under the amended law—resulting in conflicting decisions in federal courts.⁵⁰⁹ The issue will likely be resolved only when cases involving the material support statute go before the U.S. Supreme Court.

The Ujaama prosecution is by no means the only national security-related case in which the executive has employed civilian criminal justice mechanisms to obtain convictions. A jury trial in Detroit of four non-citizens from Algeria and Morocco, for example, recently resulted in two defendants being

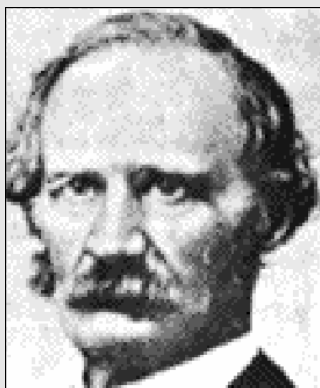
convicted of conspiracy to provide material support or resources to terrorist activities and other related charges. A third defendant was found guilty of conspiracy relating to fraud and misuse of visas, and the fourth man was acquitted of all charges. The federal prosecutor cited the case as proof that “with diligence and hard work, the FBI and Justice Department have the tools, the knowledge, the expertise and the will to stop terrorists before they inflict harm on our great nation and our allies.”⁵¹³

José Padilla

U.S. citizen José Padilla was arrested in May 2002, just two months before Ujaama’s arrest, at Chicago’s O’Hare Airport. After holding Padilla for a month under the same federal material witness statute, and providing him appointed criminal defense counsel, the government reversed course. On June 9, 2002, the president formally designated Padilla an “enemy combatant”⁵¹⁴ and ordered him transferred to a military brig in South Carolina. Attorney General John Ashcroft announced that Padilla had had contact with Al Qaeda members during his recent visit to Pakistan, and had returned to begin preparing a “dirty bomb” – a conventional explosive containing radioactive materials.⁵¹⁵ For more than a year, Padilla has had no contact with the outside world, including the lawyers appointed to represent him.

Padilla’s appointed attorneys filed a petition for habeas corpus in federal court; the government opposed.⁵¹⁶ As in Hamdi’s case, Justice Department lawyers argued, the designation of Padilla as an “enemy combatant” merits “great deference” by the court because the president was acting as commander-in-chief in making the determination.⁵¹⁷ At most, the court could conduct minimal review to confirm that the president had “some evidence” to support the designation.⁵¹⁸ The Justice Department also argued that the “Authorization for Use of Military Force” that Congress passed after the September 11 attacks authorized the president to make such determinations.⁵¹⁹

Against this, Padilla’s appointed counsel – together with former military lawyers, retired federal judges, and a wide political range of legal experts who filed briefs as friends of the court in the case (including the Lawyers Committee) – have maintained that the government’s treatment of Padilla is illegal.⁵²⁰ Their arguments are several. First, all U.S. citizens are entitled to protection under the Fifth and Sixth Amendments, including the right to counsel; the right to a speedy jury trial; the right to be informed of the specific charges against them; the right to confront witnesses against them; and the right to have compulsory process to call witnesses in their favor. The Constitution identifies no “enemy combatant” exception to these basic rules. Second, federal law 18 U.S.C. § 4001(a) makes clear that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁵²¹ Finally, while the post-September 11 “use of force” resolution was intended to authorize action against any one who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11,” the government has not accused Padilla of involvement in those attacks.⁵²²



EX PARTE MILLIGAN

Lamdin P. Milligan, a citizen of Indiana during the Civil War, was, like José Padilla, accused of plotting against the United States. Milligan was alleged to be a leader of a secret organization, the “Sons of Liberty,” that “conspire[ed] against the draft, and plott[ed] insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.”⁵²³ Yet the U.S. Supreme Court rejected the government’s effort to try Milligan by military tribunal: “It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past

twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility [*i.e.*, acts permitted to combatants under the law of war] against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?”⁵²⁴ On the contrary, the Court held, military trials for violations of the law of war “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”⁵²⁵ *Ex Parte Milligan* remains binding precedent today.

The first federal court to rule on the *Padilla* case issued a mixed opinion. Judge Michael Mukasey accepted the executive’s contention that Padilla could be designated an “enemy combatant.”⁵²⁶ He ruled that to hold Padilla under this designation, the executive only had to provide “some evidence” that he was “engaged in a mission against the United States on behalf of an enemy with whom the United States is at war.”⁵²⁷ But even this highly deferential “some evidence” standard required more than the conclusory assertions the government had thus far provided. A declaration submitted by a military official could not satisfy the executive’s burden unless Padilla were given the right to challenge the evidence presented, and for that, Padilla must be given access to counsel.⁵²⁸ Both sides have now appealed Judge Mukasey’s decision to the U.S. Court of Appeals for the Second Circuit.⁵²⁹

VOICES FROM THE DEFENSE DEPARTMENT

*The objective is to produce a relationship in which the subject perceives that he is reliant on his interrogators for his basic needs and desires. Achieving that objective can take a significant amount of time . . . ranging from months even to years.*⁵³⁰

Government's Motion for Reconsideration in Part (January 9, 2003)

Padilla v. Rumsfeld

In support of its request that the court reconsider granting citizen Padilla access to an attorney, the government offered the Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, who explained the government's concern.⁵³¹

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation... Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship... – even for a limited duration or for a specific purpose – can undo months of work and may permanently shut down the interrogation process.... Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla.⁵³²

Whether or not Vice Admiral Jacoby is right about its relative effectiveness, incommunicado detention violates Fifth Amendment due process protections and U.S. treaty obligations. The UN Human Rights Committee has said that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7” of the International Covenant on Civil and Political Rights, which prohibits “torture or... cruel, inhuman or degrading treatment or punishment.”⁵³³ Similarly, the Inter-American Court of Human Rights has said that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment... and a violation... of Article 5 of the [American] Convention [on Human Rights].”⁵³⁴ The concern that such treatment is cruel and inhuman is grounded in experience. As one recent study of New York State prisons found, those confined in isolated units ran eight times the risk of suicide as those in unsegregated cells.⁵³⁵ The Jacoby Declaration's defense of indefinite detention as an instrument of interrogation illustrates the extent of change in U.S. policy since 1999, when the U.S. State Department certified to the UN Committee Against Torture that “U.S. law does not permit ‘preventive detention’ solely for purposes of investigation.”⁵³⁶

Zacarias Moussaoui and Ali Saleh Kahlah al-Marri

The cases of Zacarias Moussaoui and Ali Saleh Kahlah al-Marri are also broadly similar: both of these non-citizens were resident in the United States at the time of their arrests, and both were subject to criminal prosecution for alleged terrorism-related activities. But with al-Marri's civilian criminal trial less than a month away, the president designated him an "enemy combatant," putting him into indefinite incommunicado detention, and cutting him off from his lawyers, who had been vigorously defending his case. Similarly, executive officials have suggested that if they receive unfavorable procedural rulings in the Moussaoui prosecution, they will consider removing the case from federal court in Virginia to a military commission under the president's control.⁵³⁷

Zacarias Moussaoui

Zacarias Moussaoui is the only individual in the United States who has been charged with involvement in the September 11 attacks. The decision to prosecute Moussaoui in a civilian criminal court was in some sense surprising, as it was announced less than a month after President Bush's November 2001 Order authorizing military commissions. According to Defense Department officials, the Pentagon was not involved in the decision to bring a criminal case.⁵³⁸ As Vice President Dick Cheney explained, it was the Justice Department's decision to proceed in federal court, "primarily based on an assessment of the case against Moussaoui, and that it can be handled through the normal criminal justice system without compromising sources or methods of intelligence. . . [and the view that] there's a good strong case against him."⁵³⁹ Michael Chertoff, until recently the assistant attorney general in charge of the Justice Department's Criminal Division, championed the use of civilian courts, and later during the proceedings, stressed to a federal appeals court that moving the case to a military commission could disrupt intelligence and law enforcement cooperation with foreign governments.⁵⁴⁰

Moussaoui, though acknowledging fealty to Osama bin Laden, has maintained that he had no role in the September 11 conspiracy. His insistence on representing himself⁵⁴¹ and his erratic, often inflammatory behavior in court initially led some to complain about the trial's "circus-like" atmosphere.⁵⁴² But the unanticipated apprehension in Pakistan, in September 2002, of senior Al Qaeda figure Ramzi Bin al-Shibh, changed the focus of the proceedings. Bin al-Shibh had allegedly sent Moussaoui significant sums of money and was named in the Moussaoui indictment as a key participant in the September 11 plot.⁵⁴³ But in interrogations conducted in an undisclosed site outside the United States, Bin al-Shibh reportedly told CIA interrogators that Moussaoui's Al Qaeda handlers had considered Moussaoui mentally unstable, and had not included him in the September 11 planning.⁵⁴⁴

Asserting Moussaoui's Sixth Amendment right "to have compulsory process for obtaining a witness in his favor," Moussaoui's stand-by counsel asked the court to let Moussaoui interview Bin al-Shibh. District Court Judge Leonie Brinkema found strong reason to believe that Bin al-Shibh might provide "material favorable testimony on the defendant's behalf – both as to guilt and potential punishment."⁵⁴⁵ On January 31, 2003, the court ordered

that the defendant be permitted to take the deposition of Bin al-Shibh, to be conducted by satellite video transmission, with a time-delay mechanism to permit classified or sensitive information to be deleted in real time during the deposition.⁵⁴⁶

Federal prosecutors sought review of the order in the U.S. Court of Appeals for the Fourth Circuit. They maintained that “aliens seized and detained overseas as enemy combatants” – such as Bin al-Shibh – “are beyond the authority of the federal courts.”⁵⁴⁷ They urged the court to refrain from “second-guessing quintessentially military and intelligence judgments about the detention of combatants overseas,”⁵⁴⁸ arguing that enforcing the Sixth Amendment right to confront witnesses would establish a precedent putting the military to a “Hobson’s choice between risking a constitutional violation that would scuttle a criminal prosecution back home or altering the conduct of warfare on a distant battlefield to preserve evidence or produce witnesses.”⁵⁴⁹ Assistant Attorney General Chertoff, arguing for the government, warned that granting Moussaoui’s request to depose Bin al-Shibh would cause “immediate and irreparable” harm to the United States by interrupting military interrogations.⁵⁵⁰

The court of appeals dismissed the government’s appeal on June 26, 2003, finding that the legal question was not yet ripe (as the government had not yet disobeyed the lower court’s order).⁵⁵¹ On July 14, 2003, following denial of motions for reconsideration by the court of appeals, the government formally notified the lower court that it would indeed defy its order because allowing “an admitted and unrepentant terrorist (the defendant) [to question] one of his al Qaeda confederates... would necessarily result in the unauthorized disclosure of classified information... a scenario... unacceptable to the Government.”⁵⁵² The lower court must now determine what, if any, sanction should be imposed following the government’s refusal. The court’s options range from dismissing the case entirely, to striking some of the charges, to preventing the prosecution from seeking the death penalty.⁵⁵³ As Judge Brinkema weighs the alternatives, the executive has sent mixed signals as to whether it will move the case to a military commission if it ultimately loses on the constitutional question in federal court.⁵⁵⁴

Ali Saleh Kahlah al-Marri

Ali Saleh Kahlah al-Marri, a Qatari engineering student, arrived in the United States on September 10, 2001, and was first arrested as a material witness in December 2001. Prosecutors believed al-Marri had visited an Al Qaeda training camp in Afghanistan, met with Osama bin Laden, and returned to Illinois intending, prosecutors claimed, to help “settle” Al Qaeda agents.⁵⁵⁵ Al-Marri was eventually indicted in federal district court in Illinois on seven terrorism-related charges involving credit card fraud, lying to the FBI, and related counts.⁵⁵⁶ The Qatari government retained a U.S. lawyer for al-Marri, and his criminal trial was set for July 21, 2003. With the assistance of counsel, al-Marri planned to argue that the charge of lying to the FBI was based on a misunderstanding.⁵⁵⁷ Al-Marri also sought to suppress “key evidence” based on the federal officers’ failure to advise him of his right both to remain silent and to secure the assistance of counsel, and based on officers’ warrantless search of al-Marri’s apartment.⁵⁵⁸ On June 20, the court ordered a hearing on the motion to suppress, scheduling it for July 2, 2003.⁵⁵⁹

On June 23, 2003, Defense Department officials took custody of al-Marri and transferred him from his Peoria County Jail cell to the Naval Consolidated Brig in Charleston, South Carolina. The same morning, prosecutors sought and obtained an order from the district court dismissing the charges with prejudice, based on the president's determination that the defendant is an "enemy combatant."⁵⁶⁰ Although al-Marri had been held in "solitary confinement" in the Peoria jail,⁵⁶¹ the president determined that al-Marri "represents a continuing, present, and grave danger to the national security of the United States."⁵⁶²

Administration officials attributed the sudden decision to pull al-Marri out of the criminal justice system "to recent credible information,"⁵⁶³ and insisted they were "confident" that they would have prevailed on the criminal charges.

THE THREAT OF INDEFINITE MILITARY DETENTION

*The defendants believed that if they didn't plead guilty, they'd end up in a black hole forever. [There is] little difference between beating someone over the head and making a threat like that.*⁵⁶⁴

Neal R. Sonnett,

Chairman of the American Bar Association
Task Force on Treatment of Enemy Combatants

In September 2002, six Arab-American U.S. citizens were arrested in Lackawanna, New York, and charged with conspiracy to provide material support and resources to a terrorist organization, mainly by training in an Al Qaeda camp in Afghanistan in the summer of 2001.⁵⁶⁵ While the FBI celebrated the apprehension of "the key players in western New York... [of an] an Al Qaeda-trained cell,"⁵⁶⁶ local community leaders saw them more as "knuckleheads [who] betrayed our trust."⁵⁶⁷ In April 2003, the *Wall Street Journal* reported "indications that the government's case wasn't as strong as officials in Washington had characterized it after the arrests," and the U.S. attorney "confirmed the government ha[d] found no evidence the defendants were involved in any violent plot."⁵⁶⁸ During the next five months, each of the six pled guilty to lesser charges and promised cooperation with ongoing investigations. The six were sentenced to prison terms ranging from six to nine years.⁵⁶⁹

That the Lackawanna defendants reached plea agreements with prosecutors was in itself unremarkable. Of greater concern, however, were reports that federal officials used threats of "enemy combatant" designation to induce the settlements. Lackawanna defense lawyer Patrick J. Brown explained the significance of the pleas: "We had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us.... So we just ran up the white flag and folded."⁵⁷⁰ Another Lackawanna defense attorney remarked: "As often is the case with federal plea negotiations, the government has some pretty potent weapons in its arsenal, but in this case those weapons were the prosecutors' version of nuclear warheads."⁵⁷¹ Indeed, by the time of the plea negotiations, the implications of the "enemy combatant" designation had been extensively reported in the press. The Lackawanna defendants knew that hundreds of detainees languished at Guantánamo, unable to challenge their indefinite detentions, and that José Padilla and Yaser Hamdi were being held under similar conditions. Though Justice Department officials have strongly denied using the

“enemy combatant” tactic in Lackawanna, defense lawyers have stuck to their claim.⁵⁷² And the *New York Times* has reported that one “senior F.B.I. official” explained that “the [al-]Marri decision held clear implications for other terrorism suspects. ‘If I were in their shoes, I’d take a message from this,’ the official said.”⁵⁷³

CITIZEN DERWISH

Though not among those indicted with the Lackawanna defendants, Kamal Derwish, another U.S. citizen, was named as a co-conspirator in the case. Indeed, investigators believed him to be the leader of the Lackawanna “Al Qaeda cell.”⁵⁷⁴ On November 3, 2002, approximately six weeks after the arrests, Derwish was killed in Yemen by a CIA-fired missile. He was one of five automobile passengers accompanying Yemeni Al Qaeda operative Qaed Salim Sinan al-Harethi, the intended target of the U.S. strike. Although the CIA was apparently unaware of Derwish’s presence in the automobile, U.S. officials made clear their view that they would have been fully within their rights to target him intentionally. National Security Advisor Condoleezza Rice explained: “[N]o constitutional questions are raised here. There are authorities that the president can give to officials.... He’s well within the balance of accepted practice and the letter of his constitutional authority.”⁵⁷⁵ A secret “finding” signed by the president after September 11 had authorized CIA covert attacks on Al Qaeda “anywhere in the world.” Officials have explained that “[t]he authority makes no exception for Americans, so permission to strike them is understood.”⁵⁷⁶ Taken together, these assertions imply that the president’s claimed authority to designate as an “enemy combatant” any individual, including a U.S. citizen within the United States, includes authority to carry out extrajudicial executions, within or outside the United States, of suspects so designated.

At least one additional case has been reported where the threat of “enemy combatant” status has been used to enhance prosecutors’ negotiating position in plea discussions. Authorities believe that Iyman Faris, a Columbus, Ohio truck driver and U.S. citizen, was involved in plots to derail passenger trains and blow up the Brooklyn Bridge.⁵⁷⁷ Reportedly tipped off by evidence seized with Al Qaeda operations planner Khalid Shaikh Mohammed,⁵⁷⁸ the FBI observed Faris for a period and then, in March 2003, recruited him to inform on his accomplices.⁵⁷⁹ On April 17, 2003, Faris reached a plea agreement with prosecutors, and on May 1, 2003, in a federal district court in Virginia, Faris pled guilty to providing material support to Al Qaeda and a related conspiracy charge.⁵⁸⁰ He could face a sentence of up to 20 years. Though little detail has been made public about the case, federal officials told the *Washington Post* that Faris “cooperated with the FBI because he sought to avoid being declared an enemy combatant.”⁵⁸¹ It appears that Faris was unrepresented by legal counsel until after the substance of the plea agreement was concluded.⁵⁸²

RECOMMENDATIONS

1. The administration should provide U.S. citizens José Padilla and Yaser Hamdi immediate access to legal counsel. These individuals, and all those arrested in the United States and designated by the president as “enemy combatants,” should be afforded the constitutional protections due to defendants facing criminal prosecution in the United States.

2. The Justice Department should prohibit federal prosecutors from using, explicitly or implicitly, the threat of indefinite detention or military commission trials as leverage in criminal plea bargaining or in criminal prosecutions.
3. The U.S. government should carry out its obligations under the Third Geneva Convention and U.S. military regulations with regard to all those detained by the United States at Guantánamo Bay, Cuba and other such detention camps around the world. In particular, the administration should provide these detainees with an individualized hearing in which their status as civilians or prisoners of war may be determined. Detainees outside the United States as to whom a competent tribunal has found grounds for suspecting violations of the law of war should, without delay, be brought to trial by court martial under the U.S. Uniform Code of Military Justice. Those determined not to have participated directly in armed conflict should be released immediately or, if appropriate, criminally charged.
4. President Bush should rescind his November 13, 2001 Military Order establishing military commissions, and the procedural regulations issued there-under.
5. The administration should affirm that U.S. law does not permit indefinite detention solely for purposes of investigation, and that suggestions to the contrary in the Declaration of Vice Admiral Lowell E. Jacoby (USN) do not reflect administration policy.

CHAPTER FIVE

THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS

INTRODUCTION

The erosion of human rights protections in the United States in the aftermath of September 11 has had a profound impact on human rights standards around the world. In the past two years, the United States has become identified with its selective observation of international human rights treaties to which it is bound – a pattern that has emboldened other governments to do the same. A growing number of countries have adopted sweeping counterterrorism measures into their domestic legal systems, at times significantly expanding on the substance of U.S. measures while explicitly invoking U.S. precedent. Opportunistic governments have been co-opting the U.S. “war on terrorism,” citing support for U.S. counterterrorism policies as a basis for internal repression of domestic opponents. In some instances, U.S. actions have encouraged other countries to disregard domestic and international law when such protections stand in the way of U.S. counterterrorism efforts. And political refugees are bearing the brunt of the new international climate. Countries from Australia to France are treating all immigrants, including refugees seeking asylum, primarily as security risks, turning a blind eye to personal circumstances and individual claims of hardship.

The administration deserves credit for recently reaffirming the United States’ commitment to the elimination of torture by all nations – and for stating determination to lead this effort by example. But in compromising its standards in the name of “national security,” the United States is losing the moral authority necessary to achieve this and other fundamental human rights goals. And by ignoring international rules by which it remains bound, the U.S. government risks undermining the international legal framework that has sustained the United States’ position in the world since World War II.

LEGAL BACKGROUND

The modern framework of international human rights law emerged as a response to the atrocities of World War II. Until 1945, human rights protections were considered a matter exclusively within the domestic sovereignty of individual states. Traditional deference to state sovereignty began to break down, however, as the world came to grips with the horrors of the Holocaust. With the landmark Nuremberg trials and the creation of the United Nations, the protection of human rights came to be regarded as an important area of international attention and concern.

Indeed, the development of international human rights law through the past fifty years has been premised on the notion that all nations have the obligation to respect the rights of individuals within their borders, and that the international community can and should play a role if a state does not meet this obligation. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, called on member states to recognize “the inherent dignity... and equal and inalienable rights of all members of the human family.”⁵⁸³ Subsequent human rights treaties protect individual citizens from abuses such as torture, arbitrary arrest, and summary conviction, while guaranteeing rights such as freedom of speech, freedom of religion, and the right to seek asylum from persecution.⁵⁸⁴ More than three quarters of the world’s countries (including the United States) are parties to humanitarian law treaties such as the 1949 Geneva Conventions and human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR); and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁸⁵ The International Committee of the Red Cross is the recognized “guardian” of the Geneva Conventions and as such, monitors for their application during periods of armed conflict.⁵⁸⁶ State compliance with the ICCPR and the Convention Against Torture is monitored by the UN Human Rights Committee and the UN Committee Against Torture, respectively.

FOLLOWING A NEW U.S. MODEL

Since the days of Eleanor Roosevelt – a principal drafter of the Universal Declaration of Human Rights – the United States has been justifiably proud of its leading role in promoting the development of international human rights law. Through the past half century, the United States has taken an active, and often leading role in enforcing human rights standards – a role it publicly embraces as central to American values. As Paula Dobriansky, the current Under Secretary of State for Global Affairs, emphasized to the Senate Foreign Relations Committee several months before the September 11 attacks: “Since the end of the Second World War, the United States has been without equal in articulating a vision of international human rights and having the grit to carry it out.... We shall continue to be the world’s leading advocate for democracy and human rights.”⁵⁸⁷

In the aftermath of September 11, a new model has begun to take hold. This model is perhaps best illustrated by an instruction issued in the U.S. Department of State’s guidelines for the 2002 “Country Reports on Human Rights Practices.” Since 1976, Congress has required the State Department to produce an annual report on human rights conditions in other countries to assist with congressional oversight of U.S. foreign relations. In preparation for its 2002 reports (issued in March 2003), the State Department distributed a new instruction for U.S. embassy officials around the world, providing: “Actions by governments taken at the request of the United States or with the expressed support of the United States should not be included in the report.”⁵⁸⁸ This instruction appears to discourage embassy officials who might otherwise have reported upon violations committed by allied governments as a part of a “war on terrorism.” The State Department has given assurances that this instruction will not appear in future guidelines, but its inclusion in the 2002 guidelines reinforced concerns that the United States is relaxing human rights standards for those who support U.S. actions.⁵⁸⁹

Trend Toward Harsh Emergency Laws

Seizing upon the dangers of September 11, a growing number of governments have passed aggressive new counterterrorism laws that undermine established norms of due process, including access to counsel and judicial review. On June 30, 2003, UN experts associated with the UN Commission on Human Rights issued a joint statement emphasizing their “profound concern at the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights – civil, cultural, economic, political and social.”⁵⁹⁰ They also drew attention to “the dangers inherent in the indiscriminate use of the term ‘terrorism,’ and the resulting new categories of discrimination.”⁵⁹¹

The United Kingdom, a close ally of the United States, passed the Anti-Terrorism Crime and Security Act of 2001 in direct response to the September 11 attacks.⁵⁹² This Act grants the government extended powers to arrest and detain foreign nationals when the Home Secretary certifies that they are a risk to national security or are suspected “international terrorists.”⁵⁹³ In passing the legislation, the United Kingdom was forced to derogate from its obligations under Article 5 of the European Convention on Human Rights, the article protecting fair trial rights.⁵⁹⁴ U.K. Attorney General Lord Goldsmith justified the derogation on the basis of the “exceptional situation of emergency constituted by the threat posed by Islamist international terrorism.”⁵⁹⁵ No other European country has derogated from the Convention under similar terms.⁵⁹⁶

The Pakistani government promulgated a new Anti-Terrorism Ordinance in November 2002. The ordinance allows the police to arrest terrorism suspects and detain them for up to a year without charge.⁵⁹⁷ Under previous law, authorities could detain suspects for three months.⁵⁹⁸ The new ordinance was approved by President Pervez Musharraf’s military-led cabinet, rather than by Pakistan’s newly elected legislature.⁵⁹⁹ Zia Ahmed Awan, president of the Karachi-based Lawyers for Human Rights and Legal Aid (LHRLA), said that the order “will only increase the victimization of ordinary people at the hands of the police and other law enforcement agencies.”⁶⁰⁰

In February 2003, the Egyptian government introduced a bill in the People’s Assembly to extend a controversial emergency law for another three years. The law, which has been in force since 1981, authorizes the government to detain people it considers a threat to national security for 45-day renewable periods without charge.⁶⁰¹ It also bans all public demonstrations and allows citizens to be tried before military tribunals.⁶⁰² The law had been set to expire on May 31, 2003.

The bill extending the law was introduced without prior notice and was rushed for passage the same day.⁶⁰³ Prime Minister Atif Ubyayd asked the Assembly to support the extension, calling it an “urgent necessity” in light of the “war on terrorism.”⁶⁰⁴ He emphasized that other countries, including the United States and Britain, had passed new security laws that “adopted the principles to which we have adhered in the Egyptian

emergency law.”⁶⁰⁵ But a February 24, 2003 statement by Phillip Reeker, a spokesperson for the U.S. State Department, revealed U.S. concern about being used as justification for the law:

We certainly understand and appreciate the Egyptian government’s commitment to combat terrorism and maintain stability. We have had serious concerns that we have often raised with the government of Egypt concerning the manner in which that law has been applied. For example, we have often expressed our concern regarding the practices of referral to the emergency courts of cases that do not appear to be linked to national security, and referral of civilians to military tribunals for non-violent offenses, and the indefinite renewal of administrative detentions.⁶⁰⁶

In Kenya, meanwhile, the government introduced the Suppression of Terrorism Bill in May 2003.⁶⁰⁷ The bill would allow the government to hold terrorism suspects in incommunicado detention for up to 36 hours. Police officers also would be authorized to search private property and carry out arrests without warrants. The bill also provides that no criminal or civil prosecution can be brought against a law enforcement officer who injures or kills a terrorism suspect.⁶⁰⁸ Njeru Githae, Assistant Minister for Justice and Constitutional Affairs, acknowledged that, “[t]he Bill may be taking away a few fundamental rights of Kenyans,” but claimed “this may be justified by the very nature of terrorism.”⁶⁰⁹

Many Kenyans think the bill is being imposed upon them by American and British interests.⁶¹⁰ Willy Mutunga, Director of the Kenyan Human Rights Commission, characterized the bill as a modified version of the PATRIOT Act and said it would “disrespect basic human rights” in Kenya.⁶¹¹ Reverend Timothy Njoya, a Presbyterian minister, declared: “The bill is borrowed from the same source as the American and British one.... If this bill is enacted the way it is, it will make Kenya a police state.”⁶¹² Although the bill was rejected by the parliamentary legal committee in July 2003, a vote still looms in the full Parliament, where the bill has many supporters.⁶¹³

In Israel, the Knesset passed the Incarceration of Unlawful Combatants Law in March 2002.⁶¹⁴ The law defines an unlawful combatant as “a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel.”⁶¹⁵ Similar to its current use by the United States, the term “unlawful combatant” is used to detain terrorism suspects indefinitely without judicial review, while simultaneously stripping them of the protections afforded by international human rights and humanitarian law. B’Tselem, a prominent Israeli human rights group, criticized the government for “making a mockery of the very existence of international law, whose main aim is to establish standards shared by all the countries of the world and prevent a situation where every country fights according to the rules it has made up for itself.”⁶¹⁶

Co-Opting the “War on Terrorism”

*Internationally, we are seeing an increasing use of what I call the “T-word” – terrorism – to demonize political opponents, to throttle freedom of speech and the press, and to delegitimize legitimate political grievances.*⁶¹⁷

UN Secretary General Kofi Annan

In the two years since September 11, counterterrorism has become the new rubric under which many governments seek to justify their actions, however offensive to human rights. The rhetoric of U.S. counterterrorism policy has exacted a heavy toll on longstanding American values, such as open political dissent, democratic advocacy, and freedom of the press. As the International Federation of Journalists emphasized on the first anniversary of the attacks: “From Australia to Zimbabwe... politicians have rushed to raise the standard of ‘anti-terrorism’ against their political opponents, and have tried to stifle free journalism along the way.”⁶¹⁸

Opportunistic governments have spoken publicly to applaud U.S. policies, which they now see as an endorsement of their own longstanding practices. As Egypt’s President Hosni Mubarak declared, the new U.S. policies proved “that we were right from the beginning in using all means, including military tribunals, to combat terrorism.... There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual.”⁶¹⁹

For the United States, these declarations of common cause often come from unwelcome quarters. In Liberia, for example, then-President Charles Taylor told the Liberian legislature shortly after September 11 that the challenge to his own grip on power was merely an extension of the global terrorist threat.⁶²⁰ Indeed, Taylor went so far as to apply the term “unlawful combatant” to Hassan Bility, an internationally respected journalist who had been critical of his policies.⁶²¹ Bility, the editor of the *Analyst*, was arrested in June 2002 and detained without access to a lawyer. He was tortured under interrogation.⁶²² Taylor claimed that as an “unlawful combatant,” Bility was being treated “in the same manner in which the U.S. treats terrorists.”⁶²³ Reginald Goodridge, the Liberian Information Minister, told an American journalist, “It was you guys [the U.S. government] who coined the phrase. We are using the phrase you coined.”⁶²⁴ After his release in December 2002, Bility concluded that the government had been grasping at straws: “The government did not really have anything to say, so it had to piece together some ill-chosen phrase to satisfy its desire to the international community.”⁶²⁵

In November 2001, Zimbabwean President Robert Mugabe claimed that foreign correspondents were “terrorist sympathizers” for reporting on political attacks against white Zimbabweans. Mugabe’s spokesperson insisted that it was an “open secret” that such reporters were “assisting terrorists” and “distorting the facts.”⁶²⁶ He then warned:

As for correspondents, we would like them to know that we agree with U.S. President Bush that anyone who in any way finances, harbors or defends terrorists is himself a terrorist. We, too, will not make any difference between terrorists and their friends and supporters.... This kind of media terrorism will not be tolerated.⁶²⁷

In Eritrea, the government has also drawn explicitly on the U.S. example. On September 18, 2001, Eritrean officials arrested 11 former high-ranking officials and has held them in incommunicado detention ever since.⁶²⁸ Those arrested were part of a dissident group of ruling party members that had publicly criticized President Issayas Afewerki and pushed for peaceful democratic reform.⁶²⁹ Spokesmen for the Eritrean government later suggested that the officials were agents of Osama Bin Laden.⁶³⁰

On the day of the arrests, the government suspended all independent and privately owned newspapers in Eritrea for “threatening state security” and “jeopardizing national unity.”⁶³¹ It later arrested ten prominent journalists who had formally protested the government’s actions. The journalists continue to be held in incommunicado detention without charge, almost two years after their arrests.⁶³² Girma Asmerom, Eritrea’s Ambassador to the United States, has insisted that locking up journalists is “perfectly consistent” with democratic practice.⁶³³ As proof of this, he cited “America’s roundup of material witnesses and suspected aliens” in the months after the September 11 attacks.⁶³⁴

The Chinese government has also exploited the rhetoric of counterterrorism to crack down on political dissent. On February 10, 2003, the Shenzhen People’s Court sentenced Wang Bingzhang, a prominent democracy activist, to life in prison for espionage and “violent terrorist activities,” which included “organizing and leading a terrorist group” in China.⁶³⁵ It was the first time that the Chinese government had brought terrorism charges against a democracy activist.⁶³⁶

Wang, a longtime U.S. permanent resident, is the founder of the Chinese Alliance for Democracy in New York and the dissident magazine *China Spring*.⁶³⁷ He and two others, known as the “Democracy 3,”⁶³⁸ disappeared without a trace in June 2002 after meeting with Chinese labor activists in Vietnam, near the northern border with China.⁶³⁹ They were missing for six months before the Chinese government acknowledged that they were being held in Chinese custody.⁶⁴⁰ Although his two companions were eventually released, Wang was convicted and sentenced after a one-day trial.⁶⁴¹ The sentence was affirmed on February 28, 2003.

That same day, the U.S. State Department expressed its “deep concern” over China’s treatment of Wang, stressing that “the war on terrorism must not be misused to repress legitimate political grievances or dissent.”⁶⁴² Richard Boucher, a spokesperson for the State Department, emphasized:

[M]any questions about Mr. Wang’s case remain unanswered, such as those involving the apparent detention by China of Mr. Wang for a six-month period, during which Chinese authorities denied knowing his whereabouts.... We also

note with deep concern that Mr. Wang's trial was conducted in secret, raising questions about the nature of the evidence against him and the lack of due process. We'd also note with particular concern the charge of terrorism in this case, given the apparent lack of evidence, and again, due process.⁶⁴³

The UN Working Group on Arbitrary Detention also questioned the lack of evidence against Wang; in July 2003, it concluded that his detention contravenes the Universal Declaration of Human Rights.⁶⁴⁴ Copies of the Working Group's decision were sent to Beijing, but Wang remains in Chinese custody.

The Russian government also has attempted to package a longstanding campaign against Chechen separatists inside the box of global counterterrorism efforts. On September 12, 2001, Russian President Vladimir Putin declared that America and Russia had a "common foe" because "Bin Laden's people are connected with the events currently taking place in our Chechnya."⁶⁴⁵ While the U.S. government has acknowledged Al Qaeda's connections in Chechnya (it added three Chechen groups to the U.S. list of foreign "terrorist organizations" in February 2003), it has also tried to challenge the extent of Russia's claims.⁶⁴⁶ In March 2002, the U.S. Senate passed a resolution declaring: "[T]he war on terrorism does not excuse, and is ultimately undermined by, abuses by Russian security forces against the civilian population in Chechnya."⁶⁴⁷ The State Department's 2002 Human Rights Report criticized the Russian government's "poor" human rights record in Chechnya and found that state abuses included "disappearances," extrajudicial killings, torture, and arbitrary detention.⁶⁴⁸

The European Parliament has also condemned the "appalling human rights situation in Chechnya." On July 3, 2002, it passed a resolution calling for the investigation of "persistent and recurring mass violations of humanitarian law and human rights committed against the civilian population by Russian forces, which constitute war crimes and crimes against humanity."⁶⁴⁹ In response, the Russian Duma declared that the resolution had "run counter to the spirit of partnership between the Russian Federation and the European Union in the fight against international terrorism."⁶⁵⁰ The Duma also criticized the European Parliament for "continuing to ignore human rights violations in the so-called traditional democracies," including the United States.⁶⁵¹ Russia characterized the situation as a "policy of double standards in the field of human rights."⁶⁵²

Russian officials have attacked human rights groups for criticizing its policies in Chechnya. It has even suggested that such human rights groups be investigated for links to international terrorism. On July 22, 2003, Abdul-Khakim Sultygov, Russia's Commissioner for Human Rights in Chechnya, declared:

Chechnya clearly demonstrates that terrorist activities go hand-in-hand with the psychological war, propaganda and moral terror conducted by human rights NGOs. There is a need to investigate the sources financing these organizations, including those with international status, for their potential ties to the international terrorist network.⁶⁵³

Russian media laws have already been amended to make it a crime to report statements made by “terrorists,” because such stories are said to “justify terrorism.”⁶⁵⁴

And in Indonesia, the government has been considering plans to build a Guantánamo-like island detention camp to house prisoners in its longstanding struggle against armed separatists in northern Sumatra. On May 19, 2003, Indonesian President Megawati Sukarnoputri signed a presidential decree authorizing a new military offensive against the separatists, known as the *Gerakan Aceh Merdeka* (GAM) or Free Aceh Movement. As part of this offensive, the Indonesian military announced that it would build an internment camp for prisoners on an island off Aceh. Although the United States has been pressuring Indonesia to end the Aceh offensive, the plan was immediately likened to the U.S. government’s own detention camp at Guantánamo Bay, Cuba.⁶⁵⁵

Lt. Gen. Djamari Chaniago, Chief of General Affairs for the Indonesian military, told journalists in June 2003 that he expected the detention center to be operational within two months and to eventually house 1,000 detainees.⁶⁵⁶ The detainees reportedly were to be provided with food for the first six months and were then expected to produce their own.⁶⁵⁷ Due to budget problems, however, the Indonesian military put construction plans on hold in July 2003.⁶⁵⁸

OUTSIDE THE LAW

*If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.*⁶⁵⁹

Unnamed U.S. intelligence official to *The Washington Post*

Extraordinary Rendition

In the past two years, the United States has shown itself increasingly ready to sacrifice human rights considerations when these considerations complicate counterterrorism efforts. There have been reports that U.S. intelligence agencies have used abusive interrogation techniques in interrogating terrorism suspects. The U.S. executive has also reportedly tolerated and even tacitly endorsed the interrogation methods of some of its less scrupulous allies when those methods may yield useful intelligence information.

According to a series of press reports, the Central Intelligence Agency (CIA) has been covertly transferring terrorism suspects to other countries for interrogation, a process known as “extraordinary rendition.”⁶⁶⁰ The practice consists of handing suspects to foreign intelligence services, notably those of Jordan, Egypt and Morocco, which are known for employing coercive interrogation methods.⁶⁶¹ Some detainees are said to have been transferred with lists of specific questions that their American interrogators want answered.⁶⁶² In other cases, CIA reportedly plays no role in directing the interrogations, but subsequently receives any information that emerges.⁶⁶³ It is not clear if U.S. officials are ever physically present at these sessions.⁶⁶⁴

Although the total number of “extraordinary renditions” by the United States remains unknown, U.S. diplomats and intelligence officials have repeatedly (but anonymously) confirmed that such transfers do take place.⁶⁶⁵ As one diplomat told *The Washington Post*: “After September 11, these movements have been occurring all the time. It allows us to get information from terrorists in a way we can’t do on U.S. soil.”⁶⁶⁶ In a separate interview, an intelligence official who had been personally involved in rendering captives explained: “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”⁶⁶⁷

Such renditions violate Article 3 of the UN Convention Against Torture, which prohibits signatory countries from sending anyone to another state when there are “substantial grounds for believing that he would be in danger of being subjected to torture.”⁶⁶⁸ They also send an unmistakable message of approval to the governments that actually conduct the proxy interrogations, and to all regimes that have been criticized for using torture. In reacting to reports that the United States had sent Al Qaeda suspects to Egypt for interrogation by Egyptian officials, Muhammad Zarei, an Egyptian lawyer, remarked: “In the past, the United States harshly criticized Egypt when there was human rights violations, but now, for America, it is security first – security, before human rights.”⁶⁶⁹

In response to questions about U.S. rendition policy, William Haynes, the General Counsel of the U.S. Defense Department, reaffirmed in June 2003 that “should an individual be transferred to another country to be held on behalf of the United States... United States policy is to obtain specific assurances from the receiving country that it will not torture” that individual.⁶⁷⁰ Haynes also stressed that the government would investigate credible allegations of torture and take “appropriate action” if there were reason to believe that such assurances were not being honored.⁶⁷¹ In addition, on the UN International Day in Support of Victims of Torture, June 26, 2003, President Bush pledged:

The United States is committed to the world-wide elimination of torture and we are leading this fight by example.... I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy.⁶⁷²

President Bush’s statement is an important reaffirmation of official U.S. policy. But the U.S. government must do much more if it wants to combat the perception that it has been quietly relaxing the prohibition against torture and other cruel, inhuman, and degrading treatment. Specifically, it needs to counter the concern, as expressed by the World Organization Against Torture, that “while the U.S. publicly denies any knowledge of the use of torture upon detainees that have been handed over to these countries, it is gathering and making use of the information that these interrogations produce.”⁶⁷³ Despite Haynes’ promise, there has been no indication that the U.S. government is taking adequate action to root out the problem – even in cases reported in detail in the press.

In one such case, for example, the CIA was allegedly involved in the extra-legal rendition of a suspected Al Qaeda recruiter, Mohammed Haydar Zammar, in June 2002.⁶⁷⁴ Zammar, a German citizen of Syrian origin, was arrested in Morocco and sent for

interrogation to Syria – a country fiercely criticized by the U.S. government for using torture methods such as pulling out fingernails, electric shocks, forcing objects up detainees' rectums, and hyper-extending their spines.⁶⁷⁵ In January 2003, Driss bin Lakoul, a Moroccan man who was held in the same military detention center as Zammar for several months, claimed that Zammar was being tortured by Syrian officials.⁶⁷⁶

Although Syria will not comment on Zammar's case, U.S. and German officials have confirmed that he is there.⁶⁷⁷ Both sets of officials have also indicated that Zammar is providing information about Al Qaeda activities.⁶⁷⁸ Indeed, Germany has admitted receiving intelligence information from U.S. investigators who had been permitted to question Zammar.⁶⁷⁹ According to an unnamed U.S. official interviewed in *The Washington Post*, U.S. interrogators have not personally questioned Zammar, but have instead submitted lists of questions, receiving answers back in return.⁶⁸⁰

In another case, the CIA secretly transferred Maher Arar, a dual citizen of Canada and Syria, first to Jordan and then to Syria. U.S. officials had arrested Arar on September 26, 2002 as he was changing planes at JFK airport in New York, en route home to Canada.⁶⁸¹ Although Arar was traveling on his Canadian passport, U.S. officials deported him to Syria without first informing the Canadian authorities, a move that evoked strong protest from Canada.⁶⁸² Arar arrived in Syria on October 10, 2002, reportedly after spending 11 days at a CIA interrogation center in Jordan.⁶⁸³ Syrian officials have indicated that he is being interrogated to determine whether he has ties to Al Qaeda.⁶⁸⁴ In August 2003, Amnesty International reported allegations that he has been subject to torture in Syria, including the use of electric shocks and beatings on the soles of his feet.⁶⁸⁵

Extralegal Transfers

The United States also has reportedly been pressuring other governments to hand Al Qaeda suspects over to U.S. interrogators, even when this violates the domestic law of those nations. In one such case, the government of Malawi secretly transferred five men to U.S. custody, in violation of a domestic court order.⁶⁸⁶ The five men, suspected of funneling money to Al Qaeda, were arrested in Blantyre on June 22, 2003 in a joint operation involving CIA and Malawi's National Intelligence Bureau.⁶⁸⁷ They were initially held at an undisclosed location inside Malawi without access to counsel.⁶⁸⁸ Their lawyers challenged their detention before the High Court of Blantyre, which issued an injunction blocking their transfer to U.S. custody.⁶⁸⁹ The court ordered Fahad Assani, Malawi's Director of Public Prosecution, to produce them within 48 hours, either to be released on bail or to be informed of the charges against them under Malawi or international law.⁶⁹⁰

On June 24, 2003, the day before the scheduled court hearing, the men were flown to Zimbabwe aboard a chartered flight in the company of U.S. officials.⁶⁹¹ The next day, a senior Malawian immigration official confirmed: "[The suspects] are not in the custody of Malawi, they are in American custody."⁶⁹² The Malawi Director of Public Prosecution, who had not been informed of the impending transfers, complained: "Who can I produce in court now? Their ghosts?"⁶⁹³ Bakili Muluzi, the president of Malawi, defended the renditions, saying they were in Malawi's best interests.⁶⁹⁴

TORTURE AND MISTREATMENT BY U.S. OFFICIALS?

In the past year, there have been numerous reports of U.S. military and CIA officials using “stress and duress” techniques in interrogating terrorism suspects. Detainees released from the U.S. facilities in Guantánamo Bay, Cuba and Bagram, Afghanistan have reported being stripped naked; made to stay in uncomfortable positions, or forced to stand or kneel, for long periods; subjected to prolonged hooding and shackling; and/or deprived of sleep through loud noises and constant light.⁶⁹⁵ Detainees in Iraq have complained of similar mistreatment.⁶⁹⁶

In December 2002, two Afghan detainees died in U.S. custody at Bagram Air Base. Both deaths were officially classified as homicides, resulting in part from “blunt force trauma.”⁶⁹⁷ The U.S. military launched a criminal investigation into the deaths in March 2003. The military is also investigating the June 2003 death of a third Afghan man, who reportedly died of a heart attack while in a U.S. holding facility in Asadabad, Afghanistan. The deaths have amplified existing concern about the U.S. treatment of detainees.

As described above, President Bush officially pledged in June 2003 that the United States is committed to the world-wide elimination of torture. And U.S. officials have denied the charges of abuse, insisting that interrogation practices are “humane and... follow all international laws and accords dealing with this type of subject.”⁶⁹⁸ But in March 2003, Colonel Roger King, the chief U.S. military spokesman in Bagram, confirmed that “[w]e do force people to stand for an extended period of time,” and that a “common technique” for interrogation was “either keeping light on constantly or waking inmates every 15 minutes to disorient them,” because “[d]isruption of sleep has been reported as an effective way of reducing people’s inhibition about talking.”⁶⁹⁹

Internationally, courts have condemned “stress and duress” techniques similar to those reported as torture or other cruel, inhuman or degrading treatment. In 1999, for example, the Supreme Court of Israel ruled that even in the face of the “harsh reality” of continual terror unleashed against Israeli civilians, interrogation methods such as cuffing, hooding, loud music, deprivation of sleep, and positional abuse are absolutely forbidden under international and Israeli law, particularly when used in combination.⁷⁰⁰ In 1978, the European Court of Human Rights similarly prohibited a set of techniques that had been used in Northern Ireland, involving protracted standing on tip-toes, hooding, loud noise, and deprivation of sleep, food and drink.⁷⁰¹

The men were held in unknown locations for five weeks before being released on July 30, 2003, reportedly cleared of any connection to Al Qaeda.⁷⁰² One of the suspects, Khalif Abdi Hussein, a teacher of Somali origin, said that their captors never told them why they were being held.⁷⁰³ The day before their release, two of the suspects’ wives revealed in a radio interview that President Muluzi had invited them to his private residence to apologize for the arrests.⁷⁰⁴ “The president was very apologetic,” said one of the women. “He said he was sorry; it was not the Malawi government, it was the Americans.”⁷⁰⁵ Lameck Masina, the chief reporter at the radio station, was fired the next day – reportedly for “shaming the president” and for violating the government’s order not to re-air the interview.⁷⁰⁶

A similar pattern emerged in Bosnia. At the request of the U.S. government, Bosnian authorities transferred six Algerian men into U.S. custody in January 2002, in clear violation of that nation's domestic law. The Bosnian police had arrested the men, five of whom had Bosnian citizenship, in October 2001 on suspicion that they had links with Al Qaeda.⁷¹⁵ In January 2002, the Bosnian Supreme Court ordered them released for lack of evidence.⁷¹⁶ Instead of releasing them, however, Bosnian authorities handed them over to U.S. troops serving with NATO-led peacekeepers.⁷¹⁷ U.S. Ambassador Clifford Bond remarked that the transfer had reflected U.S.-Bosnian cooperation and told local journalists: "We deeply appreciate their efforts both to protect our safety and to promote security in your country."⁷¹⁸

Shortly after arriving in U.S. custody, the men were transported to the U.S. Naval Base at Guantánamo Bay, Cuba (discussed in Chapter 4).⁷¹⁹ This was despite an injunction from the Human Rights Chamber of Bosnia and Herzegovina, which had explicitly ordered that four of the men remain in the country for further proceedings.⁷²⁰ The Human Rights Chamber, a creation of the U.S.-brokered Dayton Accords, was established to safeguard human rights.⁷²¹

The transfer ignited protests outside the U.S. Embassy and received angry coverage in the local press. One magazine, *Dani*, published a cover illustration of Uncle Sam urinating on the Bosnian Constitution, while Bosnian Prime Minister Zlatko Lagumdžija looked on.⁷²² "The Americans wanted the Algerians and got them," said Vlado Adamović, a judge on the Bosnian Supreme Court. "As a citizen, all I can say is it was an extra-legal procedure."⁷²³ An official at the Human Rights Chamber for

EXTRALEGAL TRANSFERS FROM PAKISTAN

In October 2001, Pakistani authorities secretly handed over Jamil Qasim Saeed Mohammed to U.S. officials, bypassing normal extradition and deportation proceedings.⁷⁰⁷ Mohammed, a Yemeni microbiology student enrolled at Karachi University, was suspected of involvement in Al Qaeda. According to multiple sources, Pakistani officials took Mohammed to the Karachi airport at 1 AM on October 23, 2001 and transferred him, shackled and blind-folded, into the custody of masked U.S. officers.⁷⁰⁸ These officers drove him to a remote tarmac and placed him on an unmarked U.S. plane.⁷⁰⁹ Mohammed's current location is unknown. In another case, Pakistani authorities covertly transferred Adil Al-Jazeeri, an Algerian national, to U.S. custody in July 2003. Al-Jazeeri, a suspected aide to Osama Bin Laden, had been captured in Peshawar approximately a month earlier, where Pakistani authorities allegedly held him in incommunicado detention and subjected him to "tough questioning."⁷¹⁰ Late in the night of July 13, 2003, he was placed on a U.S. plane in Peshawar – blind-folded and with his hands bound behind his back.⁷¹¹ Although his current location is unknown, he was reportedly flown from Peshawar to the U.S. Air Base in Bagram, Afghanistan.⁷¹² It is unclear how many people Pakistan has transferred to U.S. custody under similar circumstances. Remarking on Al-Jazeeri's case, one senior Pakistani intelligence official said: "We obtained all the information that was of interest to us before handing him to the Americans. That is the standard practice applied to all suspected Al-Qa'idah members who are caught."⁷¹³ Referring to Mohammed's case, another Pakistani official emphasized that "deportations of foreigners to the U.S. are not unusual."⁷¹⁴

Bosnia and Herzegovina emphasized: “Our decision was not merely a recommendation. It was binding. Irreparable harm has been done.”⁷²⁴

The 14-member Human Rights Chamber subsequently ruled that Bosnian authorities had violated the suspects’ rights by handing them over to the United States.⁷²⁵ The Chamber held that the government had violated the Bosnian Constitution and multiple articles of the European Human Rights Convention, including the prohibitions against expulsion and illegal detention. The tribunal also found that the authorities had violated the European Convention by failing to seek assurances from the United States that the suspects would not be executed. The Chamber ordered Bosnia to provide them with lawyers and to take all possible steps to prevent them from being sentenced to death.⁷²⁶

Concern about the transfers runs deep. “It’s dreadful,” said Madeleine Rees, who heads the Sarajevo office of the UN High Commissioner for Human Rights. “Protection of human rights is way down on the list of priorities. Credibility has been shot to pieces.”⁷²⁷ Sulejman Tihic, a prominent Muslim politician, commented: “9-11 gave wings to the forces who committed war crimes here. Now they’re acting as if they were forerunners in the war against terrorism.”⁷²⁸

Similar extra-legal transfers have occurred in the nation of Georgia. On February 6, 2003, Georgia’s ambassador to the United Nations confirmed reports that several Al Qaeda suspects had been transferred to U.S. custody. He stated: “During the search operation in Pankisi last fall, Georgian troops detained several suspected Al-Qaeda members and handed them over to the United States.”⁷²⁹ U.S. officials, refusing to comment, did not deny the reports.⁷³⁰ Georgia, meanwhile, has also turned over other terrorism suspects to Russia. On October 5, 2002, one day after Georgia transferred five Chechens to Russia without due process, Georgian President Shevardnadze remarked: “International human rights commitments might become pale in comparison with the importance of the counter-terrorist campaign.”⁷³¹

TREATING ASYLUM APPLICANTS AS SECURITY RISKS

Refugees have clear rights under international law, including the right to not be returned to a place where they have a well-founded fear of persecution.⁷³² During the past decade, however, there has been a steady erosion in states’ willingness to provide protection to refugees. The events of September 11 added new momentum to this trend. Refugees are increasingly characterized not only as challenges to identity, culture, and economic growth, but as critical threats to national security.

In the immediate aftermath of September 11, the UN Security Council linked refugees and asylum seekers with the “terrorist” threat in Resolution 1373, a resolution imposing binding obligations on UN member states to prevent and suppress terrorism.⁷³³ Within two weeks of the tragedy, the European Union pressed the European Commission to examine the relationship between “safeguarding internal security and complying with international protection obligations” with a view to revising asylum policy.⁷³⁴ As discussed in Chapter 3, the United States curtailed its refugee resettlement program immediately after September 11, leaving thousands of refugees, all of whom had already completed the rigorous selection

processes, stranded abroad.⁷³⁵ In the past two years, the United States has also at times detained whole categories of arriving asylum seekers, including Haitian refugees, on generalized national security grounds – without affording an individualized assessment of the need for detention in particular cases.

A new climate of restrictionism, fueled by heightened security concerns and resurgent xenophobia, now threads through policy debates on immigration and asylum world-wide. Not only are states reducing the rights of refugees who succeed in crossing their borders, particularly through increased use of detention,⁷³⁶ they are increasingly willing to send refugees back to their countries of origin to face persecution. They are also devising new ways of preventing refugees from arriving in their territory in the first place.

THE NAURU DETENTION FACILITIES

In July 2003, Australia's Democratic Senate Leader Andrew Bartlett visited one of the detention facilities in Nauru. Here is an excerpt from his account:

On arrival, I was immediately grabbed by the many young children – three, four and five-year-olds – gathered at the gate. They had all been confined to camps for nearly two years.... The showers and toilets were [] in demountables; they used brackish water that was available for six hours each day.... The medical staff find themselves dealing mostly with mental health issues, but there is nothing they can do to alleviate the causes. . . .

[T]he women and children in the camps... are deliberately being kept apart from husbands and fathers in Australia. Our Prime Minister... is telling these women they must return alone with their children to Iraq or Afghanistan, to circumstances where their husbands faced severe persecution. The husbands cannot leave Australia without losing their protection....

Despite the lives destroyed, the vast resources squandered and, above all, the inexcusable trauma forced on little children, the Government has the audacity to describe its Pacific solution as a success.⁷³⁷

In August 2001, a Norwegian cargo ship, the *Tampa* responded to a distress call and rescued over 400 Afghan migrants from a sinking Indonesian ship.⁷³⁸ The Australian government refused to let the *Tampa* dock in Australia, however, despite being informed of the serious medical problems on board.⁷³⁹ When conditions on the boat worsened, the *Tampa* entered Australian territorial waters and Australia's special forces commandeered the vessel. The Australian federal court ruled that the asylum seekers were being held "in detention without lawful authority," and ordered that they be allowed to enter Australia.⁷⁴⁰ Ignoring the ruling, the Australian government paid the South Pacific state of Nauru to allow the asylum seekers to be disembarked there.⁷⁴¹

In the fall of 2001, shortly after September 11, the Australian Parliament passed legislation mandating the forcible transfer of refugees attempting to enter Australia to detention in third states, such as Nauru, Papua New Guinea, and Indonesia. The legislation was specifically drafted to retrospectively validate "any action" taken with respect to the *Tampa*.⁷⁴² At the same time, another law "excised" offshore Australian territories from the zone where ordinary asylum processes applied.⁷⁴³ Australia also pursued bilateral

agreements, recruiting states such as Indonesia, Cambodia, and Thailand to help seek out and detain Australian-bound migrants.⁷⁴⁴

Australia justified this bundle of measures, known as the “Pacific Solution,” as consistent with the needs of the world-wide counterterrorism campaign. Australian Defense Minister Peter Reith declared: “It is irrefutable that part of your security posture is your ability to control your borders.... What it implies, as [U.S. Assistant Defense Secretary] Jim Kelly said, was if you’ve got people – I think the words he used were – ‘with strange identities’ – walking around, then that enhances your security concerns.”⁷⁴⁵ Without the plan, Reith suggested that a nation might “be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities.”⁷⁴⁶ Similar arguments were indeed being made in the United States with respect to the interdiction and detention of Haitian asylum seekers (as discussed in Chapter 3). In the two years since the “Pacific Solution” was implemented, thousands of unauthorized migrants who have attempted to reach Australia by boat have been detained, primarily outside Australian territory.⁷⁴⁷

Like Australia, Europe, led by the United Kingdom, has also considered creating extra-territorial processing and detention centers for refugees who seek asylum within the European Union (E.U.).⁷⁴⁸ Under the scheme, asylum seekers who arrive in the jurisdiction would be sent to transit centers located outside the E.U. Countries such as Albania and Croatia have been mentioned as possible locations, for example. In a leaked report, the United Kingdom invoked counterterrorism efforts to justify the proposal: “Returning asylum seekers to regional protection areas should have a deterrent effect on economic migrants and others, including potential terrorists, using the asylum system to enter the U.K.”⁷⁴⁹ In June 2003, the United Kingdom withdrew its proposal for European-wide adoption of the scheme,⁷⁵⁰ but there is still a possibility that it may pursue the policy unilaterally.⁷⁵¹ At the same time, other proposals aimed at keeping asylum seekers from European shores have remained on the E.U. agenda. Plans to create “zones of protection” for refugees outside Europe in the main regions from which refugees originate are still under examination.⁷⁵²

RECOMMENDATIONS

1. The United States should publicly renounce efforts by other governments to use global counterterrorism efforts as a cover for repressive policies toward journalists, human rights activists, political opponents, or other domestic critics.
2. As a signal of its commitment to take human rights obligations seriously, the United States should submit a report to the UN 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.
3. The United States should affirm its obligation to not extradite, expel, or otherwise return any individual to a place where he faces a substantial likelihood of torture. All reported violations of this obligation should be independently investigated. The United States should also independently investigate reports that U.S. officers have used “stress and

duress” techniques in interrogating terrorism suspects, and it should make public the findings of the military investigations into the deaths of three Afghan detainees in U.S. custody.

4. The United States should respect the domestic laws of other countries, particularly the judgments of other nations’ courts and human rights tribunals enforcing international law.
5. The United States should encourage all countries to ensure that national security measures are compatible with the protections afforded refugees under international law.

ENDNOTES

CHAPTER ONE: OPEN GOVERNMENT

¹ Letter from James Madison to W.T. Barry (August 4, 1822), reprinted in *James Madison's Writings*, Vol. 9, No. 103 (Gaillard Hunt ed., 1910), available at <http://press-pubs.uchicago.edu/founder5s/documents/v1ch18s35.html>, (accessed August 27, 2003).

² The statutory bases for government secrecy are limited to language in the Espionage Act of 1917, the protection of intelligence sources and methods in the National Security Act of 1947, and the separate system for safeguarding nuclear-related information under the Atomic Energy Acts of 1946 and 1954, as amended. Moreover, the Constitution itself includes only one explicit mention of secrecy, and it concerns the procedures of Congress, not the executive branch: Article I, section 5 provides that each House shall publish a "journal of its Proceedings . . . excepting such Parts as in their Judgment require Secrecy." See Commission on Protecting and Reducing Government Secrecy, "Secrecy, Report of the Commission on Protecting and Reducing Government Secrecy," 103rd Cong., S. Doc. 105-2, 1997, pp. 5-6, 21-24 and A-1, available at <http://www.access.gpo.gov/congress/commissions/secrecy> (accessed August 28, 2003).

³ Committee on Classified Information, Department of Defense, "Report to the Secretary of Defense by the Committee on Classified Information," November 8, 1956, p. 6.

⁴ This phenomenon was examined in detail by former Senator Daniel Patrick Moynihan, first in an appendix to a report of a commission he chaired, "Report of the Commission on Protecting and Reducing Government Secrecy," app. A (Secrecy: A Brief Account of the American Experience), and subsequently in his book, *Secrecy: The American Experience* (New Haven: Yale Univ. Press, 1998). For example, Moynihan notes that during the first years of the Cold War a "culture of secrecy" set in, through which what Senator Hubert H. Humphrey in January 1955 termed a "complex of Government security statutes, regulations, and procedures" more and more information came to be protected with little Congressional or public oversight. This was the impetus for the decade-long effort led by Representative John E. Moss to increase public access to government information that culminated in the passage of the FOIA in 1966. See "Report of the Commission on Protecting and Reducing Government Secrecy," app. A (Secrecy: A Brief Account of the American Experience), p. A-46 to A-61.

⁵ 5 U.S.C. §552 (1966).

⁶ Office of the White House Press Secretary, Press Release: "Statement of President Lyndon B. Johnson, Upon Signing S. 1160," July 4, 1966, available at <http://www.gwu.edu/~nsarchiv/nsa/foia/FOIARelease66.pdf> (accessed August 27, 2003). In his statement, President Johnson also noted the importance of ensuring access to information: "I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted." Ibid.

⁷ Information Security Oversight Office, "A Look to the Future of the Security Classification System in a Post 9/11 Environment," *Report to the President 2002*, p. 6, available at http://www.archives.gov/isoo/annual_reports/2002_annual_report.pdf (accessed August 27, 2003).

⁸ Ibid.; see also Federation of American Scientists Project on Government Secrecy, *Secrecy News*, July 24, 2003. Information Security Oversight Office (ISOO) is a small agency housed at the National Archives and Records Administration that is responsible for overseeing classification policies; among other responsibilities, ISOO tracks the amount of information kept secret by reviewing required reports from Executive Branch departments and agencies.

⁹ *EPA v. Mink*, 410 U.S. 73, 80 (1973).

¹⁰ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Forsham v. Califano*, 587 F.2d 1128, 1134 (D.C. Cir. 1978).

¹¹ 5 U.S.C. § 552(a)(4)(B) (1966).

¹² *Public Citizen Health Research Group v. FDA*, 997 F. Supp. 56, 60 (D.D.C. 1998); see also *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979).

¹³ 5 U.S.C. §552 (1966).

¹⁴ See Attorney General John Ashcroft, "Memorandum For All Heads of Federal Departments and Agencies," October 12, 2001, available at <http://www.doi.gov/foia/foia.pdf> (accessed July 14, 2003). The Ashcroft Directive stands in direct contrast to that issued in October 1993 by then-Attorney General Janet Reno, which called for the presumptive granting of FOIA requests, absent a reasonable expectation that harm would result from disclosure. See Attorney General Janet Reno, "Memorandum for Heads of Departments

and Agencies,” October 4, 1993, available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (accessed Aug. 13, 2003). “The Department will no longer defend an agency’s withholding of information merely because there is a ‘substantial legal basis’ for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.” *Ibid.*

¹⁵ See Andrew H. Card, Jr., “Memorandum for all Heads of Federal Departments and Agencies,” March 19, 2002 and Laura L. S. Kimberly, “Memorandum for Departments and Agencies,” March 19, 2002, available at <http://www.fas.org/sgp/bush/wh031902.html> (accessed August 27, 2003).

¹⁶ *ACLU v. DOJ*, 265 F. Supp. 2d 20 (D.D.C. 2003).

¹⁷ 5 U.S.C. §552(b) (1) (1966).

¹⁸ Plaintiffs argued that the aggregated information they sought was of the same character as what the Justice Department is required to disclose under the Foreign Intelligence Surveillance Act (FISA), as well as that information on law enforcement matters should not properly be restricted based on its treatment under Exemption 1 as classified national security information. See “Reply Memorandum in Support of Plaintiffs’ Cross-Motion for Summary Judgment” in *American Civil Liberties Union v. Department of Justice*, pp. 7, 30, 34-35 (D.D.C. 2003).

¹⁹ *ACLU v. DOJ*, 265 F. Supp. 2d 20, 29 (D.D.C. 2003).

²⁰ *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C. Cir. 2003).

²¹ See e.g., *Abbotts v. Nuclear Regulatory Commission*, 766 F.2d 604, 606 (D.C. Cir. 1985); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980).

²² *Center for National Security Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003).

Other recent cases also have evidenced broad judicial deference to the Administration’s expanded withholding under FOIA exemptions of a broad range of information in the name of combating terrorism. See, e.g., *Living Rivers, Inc. v. United States Bureau of Reclamation*, CV No. 2-02CV644 (D. Utah, March 25, 2003), holding that inundation maps showing potential flood areas were properly withheld under exemption 7(F) dealing with law enforcement records because their disclosure could “reasonably place at risk” the lives of local residents; and *Coastal Delivery Corp. v. United States Customs Service*, CV No. 02-3838 (C.D. Cal. March 17, 2003), holding that the number of Customs Service examinations conducted at the Los Angeles/Long Beach seaport could be withheld under two different FOIA exemptions.

²³ *Center for National Security Studies v. DOJ*, 331 F.3d 918, 937 (D.C. Cir. 2003).

Judge Tatel argued that the government needed to use a more particularized approach. Acknowledging that there are legitimate reasons not to disclose some of the information, he noted that there is no reason why the names of innocent detainees with no connection to terrorism could not be disclosed.

²⁴ *Ibid.*, p. 940.

²⁵ *Ibid.*, p. 939.

²⁶ See The Homeland Security Act of 2002, Title II, Subtitle B, § 214 (2002), available at www.dhs.gov/interweb/assetlibrary/hr_5005_enr.pdf (accessed August 27, 2003).

²⁷ *Ibid.*

²⁸ See Department of Homeland Security, “Procedures For Handling Critical Infrastructure Information; Proposed Rule,” 68 Federal Register 18525, April 15, 2003, available at http://www.citizen.org/documents/proposed_ciiregulations.pdf (accessed August 27, 2003); Public Citizen, Inc. and the Freedom of Information Clearinghouse, “Comments of Public Citizen, Inc. and the Freedom of Information Clearinghouse on the Department of Homeland Security’s Proposed Regulations Implementing The Critical Infrastructure Information Act of 2002,” June 16, 2003, available at http://www.citizen.org/documents/dhs_ciirule_pccomments.pdf (accessed August 27, 2003); for concerns about both the regulations and the delay in publishing comments on the proposed rules, see also OMB Watch, “Critical Infrastructure Information Docket,” July 14, 2003, available at <http://www.ombwatch.org/article/articleview/1649/> (accessed July 29, 2003); for a general analysis of the potential reach of the new exemption, see Brett Stohs, “Protecting the Homeland by Exemption: Why the Critical Infrastructure Information Act of 2002 Will Degrade the Freedom of Information Act,” 2002 *Duke Law and Technology Review* 0018, available at <http://www.law.duke.edu/journals/dltr/articles/2002dltr0018.html> (accessed July 21, 2003).

²⁹ 5 U.S.C. §552(b) (1966).

³⁰ This is in addition to the risk noted below in the discussion of expanded withholding of “sensitive but unclassified” information, that other existing FOIA exemptions may be utilized expansively to withhold information on health-related matters.

³¹ Homeland Security Act of 2002, Title II, Subtitle B, § 214 (2002).

³² See “Homeland Insecurity: Excessive Secrecy Protects No-One,” *Columbia Journalism Review*, January/February 2003.

³³ Restoration of Freedom of Information Act of 2003, H.R. 2526 and S. 609, 108th Cong., 1st Sess., 2003, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.02526> (accessed August 27, 2003). The bill was referred to the Senate Judiciary Committee, the House Committee on Government Reform and House Select Committee on Homeland Security.

³⁴ The limits the exemption to records pertaining to “the vulnerability of and threats to critical infrastructure (such as attacks, response, and recovery efforts)” as opposed to the Homeland Security Act which applies the exemption to the broader and more vague category of any critical infrastructure information, which could allow for information not directly related to vulnerabilities to be inappropriately protected.

³⁵ Restoration of Freedom of Information Act of 2003, H.R. 2526 and S. 609, 108th Cong., 1st Sess., 2003, available at <http://www.fas.org/sgp/congress/2003/hr2526.html> (accessed August 27, 2003).

³⁶ Mark Tapscott, “Too Many Secrets,” *Washington Post*, November 20, 2002, available at www.washingtonpost.com/ac2/wp-dyn/A12666-2002Nov19?language=printer&content=article, (accessed August 27, 2003).

³⁷ Exec. Order No. 13292, 68 Fed. Reg. 15315 (March 28, 2003).

³⁸ Exec. Order No. 12958, 60 Fed. Reg. 19825 (April 20, 1995).

³⁹ Stephen Aftergood, “The Bush Administration’s Suffocating Secrecy,” *Forward*, March 28, 2003, available at <http://www.forward.com/issues/2003/03.03.28/oped1.html> (accessed July 14, 2003).

⁴⁰ Exec. Order No. 13292, 68 Fed. Reg. 15315, 15318 § 1.7(c) (March 28, 2003).

⁴¹ Exec. Order No. 13292, 68 Fed. Reg. 15315, 15322 § 3.3 (March 28, 2003).

⁴² Exec. Order No. 12958, 60 Fed. Reg. 19825, 19826 § 1.2(b) (April 20, 1995).

⁴³ Dana Milbank and Mike Allen, “Release of Documents is Delayed: Classified Papers to be Reviewed,” *Washington Post*, March 26, 2003.

⁴⁴ See Designation Under Executive Order No. 12958, 67 Fed. Reg. 61463, September 30, 2002; Designation Under Executive Order No. 12958, 66 Fed. Reg. 64345, December, 12, 2001; Designation Under Executive Order No. 12958, 67 Fed. Reg. 31109, May 9, 2002.

⁴⁵ Federation of American Scientists Project on Government Secrecy, “Release of Anthrax Report Sought,” *Secrecy News*, Vol. 2003, No. 70, August 19, 2003. Heyman is a Senior Fellow and Director, Science and Security Initiatives, at the Center for Strategic and International Studies, and a former senior official at the Department of Energy and White House Office of Science and Technology Policy.

⁴⁶ See The Homeland Security Act of 2002, Title VIII, Subtitle I, § 892(a)(1)(B) (2002).

⁴⁷ “Homeland security information” is defined as “any information possessed by a federal, state or local agency that: (A) relates to the threat of terrorist activity; (B) relates to the ability to prevent, interdict, or disrupt terrorist activity; (C) would improve the identification or investigation of a suspected terrorist or terrorist organization; or (D) would improve the response to a terrorist act.” The Homeland Security Act of 2002, § 892(f) (2002).

⁴⁸ See OMB Watch, “Sensitive but Unclassified Provisions in the Homeland Security Act of 2002,” June 11, 2003, available at <http://www.cdt.org/security/usapatriot/030611omb.pdf> (accessed July 17, 2003).

⁴⁹ See The Homeland Security Act of 2002, § 893(a) (2002).

⁵⁰ David Heyman, “Lessons from the Anthrax Attacks: Implications for U.S. Bioterrorism Preparedness,” (2002). The report covers a range of issues relating to bioterrorism and means for developing a more integrated response, as well as crisis management issues.

⁵¹ See John Podesta, “Need to Know: Governing in Secret,” *The War on Our Freedom*, (Richard C. Leone and Greg Anrig, Jr., eds., The Century Foundation, 2003), p. 223; OMB Watch “Access to Government Information Post September 11,” May 3, 2002, available at <http://www.ombwatch.org/article/articleview/213/1/104/#agency> (accessed July 29, 2003).

⁵² See Nat Hentoff, “Hush-hush at the Justice Department,” *Washington Times*, May 5, 2003.

⁵³ See Steve Schultze, “Sensenbrenner Wants Answers on Act,” *Journal Sentinel*, August 19, 2002, available at <http://www.jsonline.com/news/nat/aug02/67685.asp> (accessed August, 28 2003); “Justice: From the Ashes of 9/11: Big Bad John,” *National Journal*, January 25, 2003.

⁵⁴ Letter from Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr. (July 26, 2002), enclosing “Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation,” available at <http://www.house.gov/judiciary/patriotresponses101702.pdf> (accessed July 18, 2003).

⁵⁵ As discussed in Chapter 2, FISA grants the FBI exceptional powers to monitor foreign powers and their suspected agents in counterintelligence operations in the United States, including through secret searches and

surveillance. Under FISA the FBI submits warrant applications to the Foreign Intelligence Surveillance Court, a secret court that hears the government's applications *ex parte*.

⁵⁶ Senators Patrick Leahy, Charles Grassley, and Arlen Specter, "Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures," February 2003, p. 13, available at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (accessed July 31, 2003).

⁵⁷ Domestic Surveillance Oversight Act of 2003, S. 436, 108th Cong., 1st Sess. The bill was introduced with an accompanying report on the Senate Judiciary Committee's Congressional oversight of the FBI and Justice Department's failure to implement FISA. See Office of Senator Patrick Leahy, Press Release: "Senators Release Report on FISA Implementation Failures and Introduce Sunshine Bill," February 25, 2003, available at <http://leahy.senate.gov/press/200302/022503.html> (accessed July 31, 2003).

⁵⁸ Senator Patrick Leahy, "Sectional Analysis of the Domestic Surveillance Oversight Act of 2003," available at <http://leahy.senate.gov/press/200302/022503bsectionbysection.html> (accessed July 18, 2003).

⁵⁹ See Office of Senator Patrick Leahy, Press Release: "Senators Release Report on FISA Implementation Failures and Introduce Sunshine Bill," February 25, 2003, available at <http://leahy.senate.gov/press/200302/022503.html> (accessed July 31, 2003).

⁶⁰ Adam Clymer, "Justice Department Tracking Staff's Contact with Congress," *New York Times*, April 25, 2003, available at <http://www.whistleblowers.org/Justice%20Department%20Tracking%20Staffs%20Contact%20With%20Congress.htm> (accessed July 17, 2003).

⁶¹ Nat Hentoff, "Hush-hush at the Justice Department," *Washington Times*, May 5, 2003.

⁶² Adam Clymer, "Justice Department Tracking Staff's Contact with Congress," *New York Times*, April 25, 2003, available at <http://www.whistleblowers.org/Justice%20Department%20Tracking%20Staffs%20Contact%20With%20Congress.htm> (accessed July 17, 2003).

⁶³ See Draft Domestic Security Enhancement Act of 2003, January 9, 2003, available at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (accessed July 15, 2003).

⁶⁴ *The War Against Terrorism: Working Together to Protect America: Hearing Before the Senate Committee on the Judiciary*, 108th Cong. (March 4, 2003) (testimony of Sen. Patrick Leahy).

⁶⁵ *The War Against Terrorism: Working Together to Protect America: Hearing Before the Senate Committee on the Judiciary*, 108th Cong. (March 4, 2003) (testimony of Attorney General John Ashcroft).

⁶⁶ Office of Legislative Affairs, Department of Justice, "Control Sheet," January 10, 2003, available at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_2.pdf (accessed July 31, 2003).

⁶⁷ *Oversight of the Justice Department: Hearing Before the House Judiciary Committee*, 108th Cong. (June 5, 2003) (testimony of Rep. James Sensenbrenner).

⁶⁸ Bill Straub, "Ashcroft Pushing PATRIOT II, Bush hesitating," *Scripps Howard News Service*, June 12, 2003.

⁶⁹ *Oversight of the Justice Department: Hearing Before the House Judiciary Committee*, 108th Cong. (June 5, 2003) (testimony of Attorney General John Ashcroft).

⁷⁰ Dan Eggen, "GOP Bill Would Add Anti-Terror Powers," *Washington Post*, August 21, 2003.

⁷¹ Vital Interdiction of Criminal Terrorist Organizations Act of 2003 (VICTORY Act), draft proposal, Section 503 (on file with LCHR).

⁷² The White House, Press Release: "President Bush Discusses Homeland Security at the FBI Academy," September 10, 2003, available at <http://www.whitehouse.gov/news/releases/2003/09/20030910-6.html> (accessed September 11, 2003).

⁷³ Dan Eggen, "GOP Bill Would Add Anti-Terror Powers," *Washington Post*, August 21, 2003.

⁷⁴ See, e.g., "Our View: Ashcroft Should Listen, Not Lecture Idahoans," *Idaho Statesman*, August 25, 2003.

⁷⁵ Rebecca Walsh, "Ashcroft Drawing Fire Even in Utah," *Salt Lake Tribune*, August 23, 2003 (noting that although the attorney general had addressed only law enforcement officers, the Justice Department acknowledged that the attorney general's tour was a political campaign to convince the American public of the urgency of their cause); Joe Hallett, "Stumping in Cleveland," *Columbus Dispatch*, August 21, 2003 (noting that Ashcroft addressed 150 law-enforcement officials).

⁷⁶ Rebecca Walsh, "Ashcroft Drawing Fire Even in Utah," *Salt Lake Tribune*, August 23, 2003; "Ashcroft Touts Patriot Act's Virtues," *Las Vegas Review-Journal*, August 27, 2003.

⁷⁷ See H.R. Rep. No. 107-609, p. 221 (2002) (noting that many agencies with similar mandates such as the DOJ and the FBI operate under FACA without difficulty).

⁷⁸ The committees are exempted from FACA and the Secretary must only publish the establishment of a committee, its purpose and its membership in the Federal Register. See The Homeland Security Act of 2002, § 871(a) (2002).

- ⁷⁹ Senator Richard Shelby, "Meet the Press," NBC News, July 27, 2003.
- ⁸⁰ S. Res. 400, Section 8, 94th Cong. (1976) (providing that "[t]he select committee may... disclose publicly any information in the possession of such committee after a determination by such committee that the public interest would be served by such disclosure").
- ⁸¹ David Welna, "Lawmakers: Declassify Portions of Sept. 11 Report," *Morning Edition*, National Public Radio, July 31, 2003; Kathy Kiely and John Diamond, "Congress, White House Clash over Declassifying 9/11 Report," *USA Today*, May 30, 2003.
- ⁸² Senator Richard Shelby, "Meet the Press," NBC News, July 27, 2003.
- ⁸³ Representative Nancy Pelosi, "Meet the Press," NBC News, July 27, 2003.
- ⁸⁴ Mark Preston and Damon Chappie, "Senators Seek Declassification; Move Challenges President", *Roll Call*, July 31, 2003.
- ⁸⁵ The provision permits the intelligence committee to disclose information in its possession after determining that this would serve the "public interest". If the information is classified, the committee must give the president five days' advance notice, and if he objects in writing, the full Senate must then approve the disclosure. A similar provision appears in a rule of the House, also never used to date. See S. Res. 400, Section 8, 94th Cong. (1976) available at http://www.fas.org/irp/congress/2003_cr/s022503.html#8 (accessed August 28, 2003).
- ⁸⁶ Federation of American Scientists Project on Government Secrecy, "HPSCI Democrats Call for Declass of 9/11 '28 Pages'," *Secrecy News*, Vol. 2003, No. 68, August 11, 2003.
- ⁸⁷ Michael Creppy, Internal Memorandum, Executive Office for Immigration Review: "Cases Requiring Special Procedure," September 21, 2001.
- ⁸⁸ *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).
- ⁸⁹ *Ibid.*, p. 219.
- ⁹⁰ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
- ⁹¹ *Ibid.*, p. 683.
- ⁹² *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003). The executive branch did not file a petition for certiorari in *Detroit Free Press v. Ashcroft*.
- ⁹³ Eleanor Hill, Staff Director, Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001, Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, 107th Cong., "Joint Inquiry Staff Statement" October 17, 2002, available at <http://intelligence.house.gov/PDF/hill101702.pdf> (accessed August 27, 2003). Hill's statement echoed a warning nearly half a century earlier by Dwight Eisenhower, who noted the importance of an "alert and knowledgeable citizenship" in addressing new threats. Information sharing may also be critical in the private sector; the increased classification by the Department of Homeland Security of studies on "agroterrorism" (potential terrorist threats to food supplies) may conceal certain vulnerabilities, but it also has made it much harder for the Food and Drug Administration to work with the U.S. food industry "to close the security gaps." See Michael Woods, "'Agroterrorism' Poses Devastating Threat," *Pittsburgh Post-Gazette*, May 23, 2003 (quoting Dr. Robert E. Brackett of the FDA).
- ⁹⁴ *Intelligence Oversight and the Joint Inquiry: Hearing Before the National Commission on Terrorist Attacks Upon The United States*, 108th Cong. (May 22, 2003) (testimony of Porter Goss, Chairman, House Select Committee on Intelligence), available at http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm (accessed July 15, 2003).
- ⁹⁵ Echoing those concerns while addressing the secrecy issue more generally, former House Government Reform Committee Chairman Dan Burton (R-IN) put the issue succinctly last year, saying: "There is a veil of secrecy that is descending around the administration..." See Jackie Judd, "Fighting for Executive Secrecy," ABC News, 22 February 2002, available at http://abcnews.go.com/sections/wnt/DailyNews/WNT_privilege020222.html (accessed July 14, 2003).
- ⁹⁶ On the issue of how impeded access to information has the potential to hide security vulnerabilities from the public, see generally Rena Steinzor, "Information Disclosures by Government: Data Quality and Security Concerns Symposium: 'Democracies Die Behind Closed Doors': The Homeland Security Act and Corporate Accountability," *Kansas Journal of Law & Public Policy*, Vol. 12, No. 641, pp. 664-65 (2003).
- ⁹⁷ *Intelligence Oversight and the Joint Inquiry: Hearing Before the National Commission on Terrorist Attacks Upon The United States*, 108th Cong. (May 22, 2003) (testimony of Senator John McCain), available at http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm (accessed September 15, 2003).
- ⁹⁸ Information Security Oversight Office, "A Look to the Future of the Security Classification System in a Post 9/11 Environment," *Report to the President 2002*, p. 6, available at http://www.archives.gov/isoo/annual_reports/2002_annual_report.pdf (accessed August 27, 2003).

CHAPTER TWO: PERSONAL PRIVACY

⁹⁹ See ACLU, “Safe and Free: List of Communities that have Passed Resolutions,” available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (accessed September 13, 2003).

¹⁰⁰ According to the GAO’s report, one third of the 2,400 government databases containing identifying personal information on U.S. persons fail to comply with the statutory requirement that “personal information should be complete, accurate, relevant, and timely before it is disclosed to a nonfederal organization.” GAO, Report to the U.S. Senate Committee on Governmental Affairs, “Privacy Act: OMB Leadership Needed to Improve Agency Compliance,” June 2003, available at <http://www.gao.gov/new.items/d03304.pdf> (accessed August 22, 2003).

¹⁰¹ United States Constitution, Amendment IV.

¹⁰² *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

¹⁰³ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹⁰⁴ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, Preamble pt. 1, U.N. Doc. A/810 (1948).

¹⁰⁵ See “Young wants changes in Patriot Act,” Associated Press, May 13, 2003, available at http://www.juneauempire.com/stories/051403/sta_legpatriotact.shtml (accessed August 22, 2003).

¹⁰⁶ USA PATRIOT Act of 2001 (H.R. 3162) § 215 (a) (1); §§ 505(a) (2)-(3), (b) (2), (c) (3) (B) (2001), available at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php (accessed August 22, 2003).

¹⁰⁷ 50 U.S.C. § 1862(b) (2) (B) (2000); 18 U.S.C. § 2709 (b) (1) (B) (2000), 12 U.S.C. § 3414(a) (5) (A) (2000); 15 U.S.C. § 1681u(c) (2000).

¹⁰⁸ USA PATRIOT Act of 2001 (H.R. 3162) § 215 (a) (1); §§ 505(a) (2)-(3), (b) (2), (c) (3) (B) (2001), available at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php (accessed August 22, 2003).

¹⁰⁹ 50 U.S.C. § 1862(a) (2000).

¹¹⁰ USA PATRIOT Act of 2001 (H.R. 3162) § 215 (a) (1) (2001), available at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php (accessed August 22, 2003).

¹¹¹ For an account of the errors that plague credit reporting data, see Letter from Electronic Privacy Information Center to the Senate Banking Committee: “RE: Senate Banking Committee Hearing on the Accuracy of Credit Report Information and the Fair Credit Reporting Act,” July 7, 2003, available at <http://www.epic.org/privacy/fcra/crainaccuracy7.10.03.html> (accessed August 22, 2003).

¹¹² 50 U.S.C. § 2709 (2000); 12 U.S.C. 3414(a) (5) (A) (2000); 15 U.S.C. 1681u (2000).

¹¹³ 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.” American Library Association, “The USA Patriot Act in the Library,” available at <http://www.ala.org/alaorg/oif/usapatriotlibrary.html> (accessed August 22, 2003).

¹¹⁴ See Letter from Assistant Attorney General Daniel Bryant to the Honorable F. James Sensenbrenner, “Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation,” Question 12, July 26, 2002, available at <http://www.house.gov/judiciary/patriotresponses101702.pdf> (accessed September 13, 2003).

¹¹⁵ See ACLU, “Unpatriotic Acts: The FBI’s Power to Rifle Through Your Records and Personal Belongings Without Telling You,” (Washington, D.C., 2003), p. 12, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13246&c=206> (accessed August 22, 2003).

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Becca Maclaren, “Sanders Introduces Freedom to Read Protection Act,” *Advocate*, March 14, 2003, available at <http://bernie.house.gov/documents/articles/20030319102732.asp> (accessed August 22, 2003) (quoting Trina Magi, a librarian from the University of Vermont and past president of the Vermont Library Association).

¹¹⁹ See Office of Representative Bernard Sanders, Press Release: “Sanders/Bipartisan Coalition Asks Committee to Take Testimony from Librarians and Booksellers on Federal Use of Patriot Act Powers,” June 4, 2003, available at http://bernie.house.gov/documents/Hearing_Request_re_Freedom-to-Read.pdf (accessed August 22, 2003).

¹²⁰ Becca Maclaren, “Sanders Introduces Freedom to Read Protection Act,” *Advocate*, March 14, 2003, available at <http://bernie.house.gov/documents/articles/20030319102732.asp> (accessed August 22, 2003).

¹²¹ See Freedom to Read Protection Act of 2003 (Introduced in the House), available at http://www.fas.org/irp/congress/2003_cr/hr1157.html (accessed August 22, 2003).

¹²² See List of Cosponsors, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01157:@@@P> (accessed August 22, 2003); In July 2003, Senator Feingold (D-WI) introduced a similar bill in the Senate to require the FBI to show how the information it is seeking relates to a suspected terrorist or spy before the information can be obtained. The Library, Bookseller, and Personal Records Privacy Act, CS.1507. See Office of Senator Russ Feingold, Press Release: “Feingold Introduces Legislation to Protect Personal Information,” July 31, 2003, available at <http://feingold.senate.gov/%7Efeingold/releases/03/07/2003731448.html> (accessed September 8, 2003).

¹²³ 50 U.S.C. § 1801-1811, 1821-1829, 1841-1846, 1861-1862 (1978).

¹²⁴ See Sen. Rep. No. 95-1267, October 3, 1978, pp. 8-9 (“This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused. . . . S. 1566 is designed, therefore, to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it”). As the House noted in 1978, FISA surveillance procedures were created “not primarily for the purpose of gathering evidence of a crime [but] to obtain foreign intelligence information, which when it concerns United States persons must be necessary to important national concerns.” H.R. Rep. No. 95-1283, p.36 (1978).

¹²⁵ 50 U.S.C. § 1805 (e) (1) (2002). Criminal surveillance may be carried out in secret for only 30 days. See 18 U.S.C. § 2518 (5) (2002).

¹²⁶ 50 U.S.C. § 1806 (c) (2002). The target of criminal surveillance must be informed that the surveillance has taken place as soon as the 30 day surveillance period has expired. See 18 U.S.C. § 2518 (8) (d) (2002).

¹²⁷ 50 U.S.C. § 1806 (f) (2002).

¹²⁸ 18 U.S.C. § 2518 (3) (a) (2002).

¹²⁹ 50 U.S.C. § 1805 (a) (3) (2002).

¹³⁰ 50 U.S.C. § 1801 (b) (2) (A) (2002).

¹³¹ 50 U.S.C. § 1804 (a) (7) (B) (2001).

¹³² See Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, “Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities,” Book II, S. Rep. No. 94-755, 94th Cong., 2d Session (1976), available at <http://www.aarclibrary.org/publib/church/reports/book2/contents.htm> (accessed September 8, 2003).

¹³³ Ibid., p. 7.

¹³⁴ Ibid., pp.7-8.

¹³⁵ Ibid., p. 292.

¹³⁶ Ibid., pp. 21-2.

¹³⁷ Ibid., p. 292.

¹³⁸ Ibid., p. 1.

¹³⁹ See Memorandum from Attorney General Janet Reno, to Assistant Attorney General Criminal Division and other senior Justice Department officials, “Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations,” July 19, 1995, para. A6, available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html> (accessed August 22, 2003); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991), cert. denied, 506 U.S. 816 (1992); *United States v. Badia*, 827 F.2d 1458 (11th Cir. 1987), cert. denied, 485 U.S. 937 (1988); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984).

¹⁴⁰ *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 619 (2002).

¹⁴¹ Ibid., p. 620.

¹⁴² Ibid., p. 619.

¹⁴³ 50 U.S.C. § 1804(a) (7) (B) (2001) (emphasis added).

¹⁴⁴ USA PATRIOT Act of 2001 (H.R. 3162) § 218 (2001), available at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php (accessed August 22, 2003).

¹⁴⁵ Memorandum from Attorney General John Ashcroft to the Director of the FBI and other senior Justice Department officials, “Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI,” March 6, 2002, available at <http://www.fas.org/irp/agency/doj/fisa/ag030602.html> (accessed August 22, 2003); see also, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 615 (2002).

¹⁴⁶ Memorandum from Attorney General Janet Reno to Assistant Attorney General, Criminal Division and other senior Justice Department officials, “Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations,” July 19, 1995, para. A6,

available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html> (accessed August 22, 2003); *see also*, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 622 (2002).

¹⁴⁷ *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 623 (2002).

¹⁴⁸ *Ibid.*

¹⁴⁹ Century Foundation, *The War on Our Freedoms* (Richard C. Leone & Greg Anrig, Jr., eds., Public Affairs, 2003), p.81.

¹⁵⁰ *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 624 (2002).

¹⁵¹ *In re: Sealed Case No. 02-001*, 310 F.3d 717, 735 (2002).

¹⁵² *Ibid.*

¹⁵³ *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 620 (2002).

¹⁵⁴ *Ibid.*

¹⁵⁵ See Reports submitted by the attorney general pursuant to the Foreign Intelligence Surveillance Act of 1978, available at <http://www.fas.org/irp/agency/doj/fisa/> (accessed August 22, 2003); U.S. Courts, "Wiretap Reports," available at <http://www.uscourts.gov/wiretap.html> (accessed August 22, 2003).

¹⁵⁶ *Ibid.*

¹⁵⁷ U.S. Department of Justice, "Response to Questions on the Implementation of the USA PATRIOT Act Submitted by the House Committee on the Judiciary," May 13, 2003, Answer 16A, pp. 23-25.

¹⁵⁸ 50 U.S.C. 1805(f).

¹⁵⁹ 50 U.S.C. 1805(f).

¹⁶⁰ *The War Against Terrorism: Working Together to Protect America: Hearing Before the Senate Committee on the Judiciary*, 108th Congress (2003) (testimony of Robert S. Mueller III, Director Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress03/mueller030403.htm> (accessed August 22, 2003).

¹⁶¹ The draft the Domestic Security Enhancement Act of 2003 has been made available on the web at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (accessed August 22, 2003).

¹⁶² See draft Domestic Security Enhancement Act of 2003, § 101, available at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (accessed August 22, 2003).

¹⁶³ *Ibid.*, § 102.

¹⁶⁴ *Ibid.*, § 103.

¹⁶⁵ See Bill Straub, "Ashcroft Pushing PATRIOT II, Bush Hesitating," Scripps Howard News Service, June 12, 2003, available at <http://www.knoxstudio.com/shns/story.cfm?pk=BUSH-ASHCROFT-06-12-03&cat=WW> (accessed August 22, 2003).

¹⁶⁶ See Dean Schabner, "Draft Bill Would Provide Broader Power," ABCNEWS.com, August 20, 2003, available at http://abcnews.go.com/sections/us/WorldNewsTonight/victory_act030820.html (accessed August 22, 2003).

¹⁶⁷ A copy of the draft VICTORY Act has been made available on the internet at <http://www.libertythink.com/VICTORYAct.pdf> (accessed August 22, 2003).

¹⁶⁸ The draft bill's section 503 expands the reach of the current administrative subpoena provision, 18 U.S.C. 3486 (2002), to any investigation under 18 U.S.C. chapter 113B (2002).

¹⁶⁹ 18 U.S.C. 3486 (2002).

¹⁷⁰ 18 U.S.C. § 2709 (b) (1) (2002), 12 U.S.C. 3414 (a) (5) (A) (2002), 15 U.S.C. 1681u (c) (2002).

¹⁷¹ 18 U.S.C. § 2709 (d) (2002), 12 U.S.C. 3414 (a) (5) (B) (2002), 15 U.S.C. 1681u (f) (2002).

¹⁷² 18 U.S.C. § 2709 (b) (2002), 12 U.S.C. 3414 (a) (5) (C) (2002), 15 U.S.C. 1681u (h) (2002).

¹⁷³ 18 U.S.C. § 3486 (2002).

¹⁷⁴ See leaked draft VICTORY Act, § 502, available at <http://www.libertythink.com/VICTORYAct.pdf> (accessed August 22, 2003).

¹⁷⁵ "Key Republican Blasts New FBI Guidelines," CNN.com, June 1, 2002, available at <http://www.cnn.com/2002/ALLPOLITICS/06/01/fbi.guidelines/> (accessed August 22, 2003).

¹⁷⁶ Attorney General John Ashcroft, "The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations," May 20, 2002, available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (accessed August 22, 2003).

¹⁷⁷ U.S. Department of Justice, Office of the Inspector General, "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," July 17, 2003, Section III.C.4, p. 16, available at <http://www.usdoj.gov/oig/special/03-07/final.pdf> (accessed September 8, 2003).

¹⁷⁸ Aviation and Transportation Security Act of 2001 (2001), available at <http://www.house.gov/transportation/aviation/issues/conference.pdf> (accessed August 22, 2003).

¹⁷⁹ David Kravets, "Feds Don't Track Airline 'No Fly' Lists," Associated Press, July 23, 2003, available at <http://archives.californiaaviation.org/airport/msg27072.html> (accessed August 22, 2003).

¹⁸⁰ Ibid.

¹⁸¹ Aviation and Transportation Security Act of 2001, (2001), available at <http://www.house.gov/transportation/aviation/issues/conference.pdf> (accessed August 22, 2003).

¹⁸² Transport Security Administration, Press Release: "TSA Selects Lockheed Martin Management and Systems to build TSA Passenger Pre-Screening System", February 28, 2003, available at <http://www.tsa.gov/public/display?content=248> (accessed August 22, 2003).

¹⁸³ Tom Ridge, "TSA: Notice of Status of System of Records; Interim Final Notice; Request for Further Comments;" No. DHS/TSA-2003-1, July 22, 2003, available at <http://www.cdt.org/security/usapatriot/030731cappsii.pdf> (accessed August 29, 2003).

¹⁸⁴ Department of Homeland Security, Transportation Security Administration, "Interim Final Notice of System of Records," 68 Federal Register 45265 (August 1, 2003), available at <http://www.cdt.org/security/usapatriot/030731cappsii.pdf> (accessed August 8, 2003).

¹⁸⁵ For an account of the errors that plague credit reporting data, see Letter from Electronic Privacy Information Center, to the Senate Banking Committee, "RE: Senate Banking Committee Hearing on the Accuracy of Credit Report Information and the Fair Credit Reporting Act," July 7, 2003, available at <http://www.epic.org/privacy/fcra/crainaccuracy7.10.03.html> (accessed August 22, 2003).

¹⁸⁶ Before the system could become effective, over 100 individuals and organizations had filed comments on the ASSR database, almost universally critical of the program. Ibid.

¹⁸⁷ See Bara Vaida, "Homeland Privacy Officer to Review Passenger-Screening System," *Government Executive*, April 9, 2003, available at <http://www.govexec.com/dailyfed/0403/040903td1.htm> (accessed August 22, 2003).

¹⁸⁸ Department of Homeland Security, Transportation Security Administration, "Interim Final Notice of System of Records," 68 Federal Register 45265 (August 1, 2003), available at <http://www.cdt.org/security/usapatriot/030731cappsii.pdf> (accessed August 8, 2003).

¹⁸⁹ Letter from Electronic Privacy Information Center, to the Senate Banking Committee, "RE: Senate Banking Committee Hearing on the Accuracy of Credit Report Information and the Fair Credit Reporting Act," July 7, 2003, available at <http://www.epic.org/privacy/fcra/crainaccuracy7.10.03.html> (accessed August 22, 2003).

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² For example, recently uncovered Denver police files revealed that Denver had labeled the Quaker American Friends Service Committee as a "criminal extremist" organization. See ACLU of Colorado, Press Release: "ACLU Calls for Denver Police to Stop Keeping Files on Peaceful Protesters," March 11, 2002, available at http://www.aclu-co.org/news/pressrelease/release_spyfiles.htm (accessed August 22, 2003).

¹⁹³ The Privacy Act of 1974, codified as amended at 5 U.S.C. § 552A.

¹⁹⁴ Congress has taken preliminary steps on this oversight issue. Both the House and the Senate have adopted amendments to the Homeland Security Department's 2004 spending bill which block funding for CAPPs II until privacy and civil-liberty concerns are reviewed by the General Accounting Office (GAO). See Audrey Hudson "House Panel Blocks 'No Fly' List," *Washington Times*, June 19, 2003, available at <http://washingtontimes.com/national/20030619-010106-3427r.htm> (accessed August 22, 2003); Judi Hasson "Senate Holds Up CAPPs Funding," *Federal Computer Week*, July 11, 2003, available at <http://www.fcw.com/fcw/articles/2003/0707/web-senate-07-11-03.asp> (accessed August 22, 2003).

¹⁹⁵ 5 U.S.C. § 552(a).

¹⁹⁶ Clyde Crews, Director of Technology, Cato Institute, "Put Controls on Emerging 'Surveillance State'", June 23, 2003 available at <http://www.cato.org/research/articles/crews-030623.html> (accessed August 22, 2003).

¹⁹⁷ DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, p. 14, available at http://www.darpa.mil/body/tia/tia_report_page.htm (accessed August 22, 2003).

¹⁹⁸ The current website is at <http://www.darpa.mil/iao/TIASystems.htm> (accessed August 22, 2003).

¹⁹⁹ Bradley Graham, "Poindexter Resigns But Defends Programs," *Washington Post*, p. A02, August 13, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn/A51578-2003Aug12?language=printer> (accessed August 22, 2003).

²⁰⁰ DARPA, "First Q&A for Solicitation BAA02-08," Answer 21, available at <http://www.darpa.mil/iao/BAA02-08Q&Afirst.pdf> (accessed August 22, 2003). A petabyte amounts to the electronic representation of 1,000,000,000,000,000 letters of the alphabet. The internet archive of the last five years of web pages consumes only one-tenth of a petabyte.

²⁰¹ DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, pp. 27, 32, available at http://www.darpa.mil/body/tia/tia_report_page.htm (accessed August 22, 2003).

- ²⁰² Including Senators Grassley (R-IA), Collins (R-ME), Feinstein (D-CA), Harkin (D-IA), Inouye (D-HI), Schumer (D-NY) and former Representatives Armey (R-TX), and Barr (R-GA) and CATO, ACLU, the Free Congress Foundation, and the Eagle Forum.
- ²⁰³ DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, p. 27, available at http://www.darpa.mil/body/tia/tia_report_page.htm (accessed August 22, 2003).
- ²⁰⁴ Letter from USACM to the Senate Committee on the Armed Services, January 20, 2003, available at http://www.acm.org/usacm/Letters/tia_final.html (accessed August 22, 2003).
- ²⁰⁵ DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, p. A-13, available at http://www.darpa.mil/body/tia/tia_report_page.htm (accessed August 22, 2003).
- ²⁰⁶ Letter from USACM to the Senate Committee on the Armed Services, January 20, 2003, available at http://www.acm.org/usacm/Letters/tia_final.html (accessed August 22, 2003) (emphasis added).
- ²⁰⁷ Dan Caterinicchia, "Intelligence officials: TIA is too broad," *Federal Computer Week*, July 22, 2003, available at <http://www.fcw.com/fcw/articles/2003/0721/web-tia-07-22-03.asp> (accessed August 22, 2003).
- ²⁰⁸ Letter from USACM to the Senate Committee on the Armed Services, January 20, 2003, available at http://www.acm.org/usacm/Letters/tia_final.html (accessed August 22, 2003).
- ²⁰⁹ DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, p. 32, available at http://www.darpa.mil/body/tia/tia_report_page.htm (accessed August 22, 2003).
- ²¹⁰ "Limitation on Use of Funds for Research and Development on Terrorism Information Awareness Program," Senate Amendment to the Department of Defense Appropriations Act of 2004 (H.R. 2658), § 8120, available at <http://www.fas.org/sfp/congress/2003/defapp-tia-sen.html> (accessed August 22, 2003).
- ²¹¹ "Limitation on Deployment of terrorism Information Awareness Program," House Amendment to the Department of Defense Appropriations Act of 2004 (H.R. 26 58), § 8124, available at <http://www.fas.org/sfp/congress/2003/defapp-tia.html> (accessed August 22, 2003).
- ²¹² Executive Office of the President, Office of Management and Budget, "Statement of Administration Policy, S.1382 – Department of Defense Appropriations Bill, FY 2004," July 14, 2003, available at <http://www.whitehouse.gov/omb/legislative/sap/108-1/s1382sap-s.pdf> (accessed August 22, 2003); see also Dan Caterinicchia, "Intelligence officials: TIA is too broad," July 22, 2003, *Federal Computer Week*, available at <http://www.fcw.com/fcw/articles/2003/0721/web-tia-07-22-03.asp> (accessed August 22, 2003).
- ²¹³ *The Terrorist Threat Integration Center and its Relationship with the Departments of Justice and Homeland Security: Hearing Before the House of Representatives Committee on the Judiciary & House of Representatives Select Committee on Homeland Security*, 108th Congress (2003) (statement for the record of John O. Brennan, Director, Terrorist Threat Integration Center), available at <http://homelandsecurity.house.gov/files/Testimony%20Brennan.doc> (accessed August 22, 2003).
- ²¹⁴ Paul Roberts, "Now Share This," July 2003, CSO Online, available at http://www.csoonline.com/read/070103/briefing_share.html (accessed August 22, 2003).
- ²¹⁵ See The White House, Fact Sheet: "Strengthening Intelligence to Better Protect America," January 28, 2003, available at <http://www.whitehouse.gov/news/releases/2003/02/20030214-1.html> (accessed August 22, 2003).
- ²¹⁶ *The Terrorist Threat Integration Center and its relationship with the Departments of Justice and Homeland Security: Hearing Before the House of Representatives Committee on the Judiciary & House of Representatives Select Committee on Homeland Security*, 108th Congress (2003) (statement for the record of John O. Brennan, Director, Terrorist Threat Integration Center), available at <http://homelandsecurity.house.gov/files/Testimony%20Brennan.doc> (accessed August 22, 2003).
- ²¹⁷ "Bush Backs Big Brother Database," CNET news, available at <http://www.globetechnology.com/servlet/ArticleNews/tech/RTGAM/20030130/gtbushs/Technology/techBN/> (accessed August 22, 2003).
- ²¹⁸ Dan Caterinicchia, "Intelligence officials: TIA is too broad," July 22, 2003, *Federal Computer Week*, available at <http://www.fcw.com/fcw/articles/2003/0721/web-tia-07-22-03.asp> (accessed August 22, 2003).
- ²¹⁹ Ibid.
- ²²⁰ "Bush Backs Big Brother Database," CNET news, available at <http://www.globetechnology.com/servlet/ArticleNews/tech/RTGAM/20030130/gtbushs/Technology/techBN/> (accessed August 22, 2003).
- ²²¹ *Consolidating Intelligence Analysis: A Review of the President's Proposal to Create a Terrorist Threat Integration Center: Hearing Before the Senate Governmental Affairs Committee*, 108th Congress (2003) (testimony of Winston P. Wiley, Chair, Senior Steering Group, Terrorist Threat Integration Center, and Associate Director of Central Intelligence for Homeland Security), available at http://www.odci.gov/cia/public_affairs/speeches/2003/wiley_speech_02262003.html (accessed July 20, 2003).
- ²²² Ibid.

²²³ Paul Roberts, “Now Share This,” CSO Online, July 2003, available at http://www.csoonline.com/read/070103/briefing_share.html (accessed August 22, 2003).

²²⁴ *The Terrorist Threat Integration Center (TTIC) and its Relationship with the Departments of Justice and Homeland Security: Hearing before the House Committee on the Judiciary and the House Select Committee on Homeland Security*, 108th Congress (2003) (statement of Jerry Berman, President of the Center for Democracy and Technology), available at <http://www.house.gov/judiciary/berman072203.pdf> (accessed August 22, 2003).

²²⁵ *See The Terrorist Threat Integration Center and its Relationship with the Departments of Justice and Homeland Security: Hearing Before the House of Representatives Committee on the Judiciary & House of Representatives Select Committee on Homeland Security*, 108th Congress (2003) (statement for the record of John O. Brennan, Director, Terrorist Threat Integration Center), available at <http://homelandsecurity.house.gov/files/Testimony%20Brennan.doc> (accessed August 22, 2003).

²²⁶ 50 U.S.C. § 403-3(d)(1) (2002) provides: “In the Director’s capacity as head of the Central Intelligence Agency, the Director shall - (1) collect intelligence through human sources and by other appropriate means, except that the Agency shall have no *police, subpoena, or law enforcement powers or internal security functions.*” (Emphasis in original).

²²⁷ 6 U.S.C. § 121(d) (1) (2003) or Homeland Security Act of 2002, §§ 201(d) (1), (d) (14), available at <http://www.whitehouse.gov/deptofhomeland/bill/index.html> (accessed August 22, 2003).

²²⁸ *See The Terrorist Threat Integration Center (TTIC) and its Relationship with the Departments of Justice and Homeland Security: Hearing before the House Committee on the Judiciary and the House Select Committee on Homeland Security*, 108th Congress (2003) (statement of Jerry Berman, President of the Center for Democracy and Technology), available at <http://www.house.gov/judiciary/berman072203.pdf> (accessed July 30, 2003).

CHAPTER THREE: IMMIGRANTS, REFUGEES, AND MINORITIES

²²⁹ Ejaz Haider, “Wrong Message to the Muslim World,” *Washington Post*, February 5, 2003. Ejaz Haider is a journalist and scholar from Pakistan. He is a visiting fellow at the Brookings Institution. Officials at the INS and the State Department misinformed him about the requirements of the National Security Entry-Exit Registration System. As a result, he was arrested and detained for missing a deadline that he was never informed about. *See* George Lardner, Jr., “Brookings Scholar is Detained by INS,” *Washington Post*, January 30, 2003.

²³⁰ “Administration Split on Local Role in Terror Fight,” *New York Times*, April 29, 2002.

²³¹ Walt Whitman, “As I Sat Alone by Blue Ontario Shore,” *Leaves of Grass* (Philadelphia: David McKay, c1900). He wrote in part: “These States are the amplest poem, Here is not merely a nation, but a teeming nation of nations.”

²³² *See* Peter H. Schuck, “The Transformation of Immigration Law,” *Columbia Law Review*, Vol. 84, No. 1, p. 2 (1984).

²³³ Robert Foss, “The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 29, No. 439, p. 440.

²³⁴ *Ibid.*

²³⁵ *See* Peter H. Schuck, “The Transformation of Immigration Law,” *Columbia Law Review*, Vol. 84, No. 1, p. 2 (1984).

²³⁶ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); As Justice Field’s opinion for the Court proclaimed: “[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”

²³⁷ “Story of Immigration in the U.S.,” *Brown Quarterly*, Vol. 4, No. 1 (Fall 2000), available at <http://brownvboard.org/brwnqurt/04-1/04-1a.htm> (accessed September 12, 2003).

²³⁸ David Cole, “The New McCarthyism: Repeating History in the War on Terrorism,” *Harvard Civil Rights, Civil Liberties Law Review*, Vol. 38, No. 1, p. 16 (2003); Jamin B. Raskin, “Legal Aliens, Local Citizens,” *University of Pennsylvania Law Review*, Vol. 141, No. 1391 (1993).

²³⁹ *See* Todd David Peterson, “Congressional Oversight of Open Criminal Investigations,” *Notre Dame Law Review*, Vol. 77, No. 1373, p. 1389 (2002).

²⁴⁰ William C. Banks and Alejandro D. Carrio, “Presidential Systems in Stress: Emergency Powers in Argentina and the United States,” *Michigan Journal of International Law*, Vol. 15, No. 1, p. 38 (1993).

²⁴¹ *Ibid.*

²⁴² Marco Simons, “The Emergence of a Norm Against Arbitrary Forced Relocation,” *Columbia Human Rights Law Review*, Vol. 34, No. 95, pp. 135-36 (2002).

²⁴³ See *Mathews v. Diaz*, 426 U.S. 67, 78-9 (1976).

²⁴⁴ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Mathews v. Diaz*, 426 U.S. 67, 77-8 (1976).

²⁴⁵ United Nations Convention Relating to the Status of Refugees, opened for signing July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, opened for signing January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

²⁴⁶ See *Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (“If one thing is clear from the legislative history of [the Refugee Act], it is that one of the Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 [Protocol].”)

²⁴⁷ International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The ICCPR, which has been ratified by 148 countries (see Status of Ratifications of the Principle International Human Rights Treaties, July 10, 2002, available at www.unhcr.ch/html/menu3/b/a_ccpr.htm), formally codifies a number of the rights set forth in the Universal Declaration of Human Rights. See also Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), article 9 (“everyone has the right to life, liberty and security of person,” and “no one shall be arbitrarily arrested, detained, or exiled”).

²⁴⁸ ICCPR, art. 9(4).

²⁴⁹ See Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994) (“the important guarantee laid down in paragraph 4 [of article 9], i.e. the right to court control of the legality of detention, applies to all persons deprived of their liberty by arrest or detention.”); United Nations Commission on Human Rights, resolution 1997/50, Commission on Human Rights, UN doc. E/CN.4/RES/1997/50, 15 April 1997 (requesting that Working Group on Arbitrary Detention “devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy”).

²⁵⁰ *Torres v. Finland*, U.N. Human Rights Committee, Communication No. 291/1988, 2 April 1990 (concluding that asylum seeker’s detention during period in which he was unable to appeal detention order to court violated ICCPR Article 9(4)).

²⁵¹ Between July 11, 2003 and August 29, 2003, LCHR representatives spoke to more than 75 immigration practitioners, community activists and immigration advocates about the DHS’s use of the expanded regulatory powers, including the regulation allowing detention without charge for 48 hours or a “reasonable time” in an emergency or extraordinary situation.

²⁵² *Oversight Hearing: Lessons Learned – The Inspector General’s Report On The 9/11 Detainees, Before the Senate Judiciary Committee*, 108th Cong. (June 25, 2003).

²⁵³ According to the OIG report, within 2 months of the September 11 attacks, over 1,200 non-citizens and citizens had been detained – some just for questioning but many others for longer. DOJ advised OIG that it “stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.” Office of the Inspector General, U.S. Department of Justice, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks,” June 2003, p. 1, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

²⁵⁴ *Ibid.*, p. 5.

²⁵⁵ *Ibid.*, p. 69.

²⁵⁶ Office of the Inspector General, U.S. Department of Justice, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks,” June 2003, p. 27, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

²⁵⁷ *Center for National Security Studies v. Ashcroft*, 331 F. 3d 918, 928-930 (DC Cir. 2003).

²⁵⁸ Office of the Inspector General, U.S. Department of Justice, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks,” June 2003, p. 70, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

²⁵⁹ *Ibid.*, p. 69.

²⁶⁰ *Ibid.*, p. 70.

²⁶¹ *Ibid.*, p. 70.

²⁶² Prior to amendment effective September 17, 2001, the custody procedure regulation, 8 C.F.R. § 287.3(d) read “Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 24 hours of the arrest whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.” 62 Fed. Reg. 10390 (1997); *see also* Letter from Lawyers Committee for Human Rights to Richard Sloan, Immigration and Naturalization Service (November 19, 2001), available at http://www.lchr.org/us_law/loss/comments.pdf (accessed April 29, 2003).

²⁶³ Disposition of cases of aliens arrested without warrant, 8 C.F.R. § 287.3(d) (2003).

²⁶⁴ Office of the Inspector General, U.S. Department of Justice, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks,” June 2003, p. 35, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

²⁶⁵ Documents released by the INS on January 11, 2002 in response to litigation under the Freedom of Information Act provide a window into the abuse that has flourished under such blanket detention authority. These statistics were among the limited information the government provided in response to litigation under the Freedom of Information Act led by the Center for National Security Studies. Records are available on their website at <http://www.cnss.gwu.edu/>. The documents provided information about 718 immigration detainees who were arrested and detained in connection with the September 11 investigation as of November 27, 2001. The data showed that 317 detainees waited longer than 48 hours to be served with charges; 36 were held for 28 days or more before being served; 13 were held for more than 40 days before being served; 9 were held for more than 50 days before being served; and one man from Saudi Arabia was held for 119 days before being served.

²⁶⁶ Office of the Inspector General, U.S. Department of Justice, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks,” June 2003, p. 30, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

²⁶⁷ *Ibid.*, p. 35.

²⁶⁸ *Ibid.*, p. 195.

²⁶⁹ Office of the Inspector General, U.S. Department of Justice, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks,” June 2003, p. 158, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

²⁷⁰ *Ibid.*, p. 132.

²⁷¹ *Ibid.*, p. 142.

²⁷² *Ibid.*, p. 143.

²⁷³ *Ibid.*, p. 147.

²⁷⁴ *Ibid.*, p. 133.

²⁷⁵ *Ibid.*, p. 134.

²⁷⁶ *Ibid.*, p. 161.

²⁷⁸ Custody/Bond, 8 C.F.R. § 1003.19(i)(2)(2003).

²⁷⁹ *Ibid.*, p. 78.

²⁸⁰ *Ibid.*, p. 88.

²⁸¹ Office of the Inspector General, U.S. Department of Justice, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks,” June 2003, pp. 78, 196, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

²⁸² *Ibid.*, p. 88.

²⁸³ *Ibid.*, p. 76.

²⁸⁴ The automatic stay authority impacted September 11 detainees whether it was explicitly invoked or even used as a threat. Lawyers for detainees told the Lawyers Committee that INS trial attorneys often informed them that if the detainee was granted bond by an Immigration Judge, the INS intended to appeal and the detention would be continued pending that appeal. Lawyers often chose to postpone the bond hearing instead of risking more lengthy detention for their client. Judges also reportedly refused bond if the INS indicated an intention to appeal.

²⁸⁵ U.S. Department of Justice Office of Inspector General, “Analysis of Responses by the Department of Justice and Department of Homeland Security to Recommendations in the OIG’s June 2003 Report on the Treatment of September 11 Detainees,” September 5, 2003, p. 2, available at <http://www.usdoj.gov/oig/special/03-06/analysis.htm> (accessed September 9, 2003).

²⁸⁶ See Lawyers Committee for Human Rights, Press Release: “Haitian Asylum Seekers Targeted by Detention and Interdiction Policies,” November 6, 2003, available at http://www.lchr.org/media/2002_alerts/1106.htm (accessed September 9, 2003); Lawyers Committee for Human Rights, Press Release: “INS Invoking Post 9-11 Regulation against Haitian Asylum Seekers,” November 7, 2003, available at http://www.lchr.org/media/2002_alerts/1107.htm (accessed September 9, 2003).

²⁸⁷ Interview with Sohail Mohammed July 22, 2003, July 29, 2003.

²⁸⁸ Dan Eggen and Nurith C. Aizenman, “Registration Stirs Panic, Worry,” *Washington Post*, January 19, 2003.

²⁸⁹ Corey Kilgannon, “All-American? U.S. Says No,” *New York Times*, April 19, 2003; Congressman Gary Ackerman, “Ackerman Helps Queens Teenager Avoid Undeserved Deportation,” Press Release, April 29, 2003, available at <http://www.house.gov/ackerman/press/hussainimm.htm> (accessed August 11, 2003). Honorable Gary L. Ackerman of New York in the House of Representatives, “Commending Edward J. McElroy of the Bureau of Immigration and Customs Enforcement,” Cong. Rec. p. E846 (2003).

²⁹⁰ On August 12, 2002, NSEERS was implemented. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 155, 52583-52593 (final rule) (2002). On November 6, 2002, the Department of Justice expanded the NSEERS program to include certain non-citizens from certain countries present in the US on non-immigrant visas, often referred to as “call in registration.” Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 215, 67766-67768 (2002).

²⁹¹ The call-in registration program was implemented in four “Groups,” each pertaining to a particular group of countries and having a specific deadline for compliance. The deadline for the final group was April 25, 2003. The full list of countries subject to the program is: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. See 67 Fed. Reg. 67766, 70526, 77642 (2002), 68 Fed. Reg. 2363, 2366, 8046 (2003), available at <http://www.immigration.gov/graphics/shared/lawenfor/specialreg/index.htm#callgroup1> (accessed September 5, 2003).

²⁹² Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 155, 52583-52593 (final rule) (2002).

²⁹³ *Civil Rights Issues and Post 9/11 Law Enforcement/Community Relations in New York, Before the New York State Advisory Committee to the U.S. Commission on Civil Rights* (May 21, 2003) (testimony of Karin Anderson, New York Immigration Coalition) (on file with LCHR).

²⁹⁴ An Arabic language notice published by the INS stated that only those entering AFTER September 30, 2002 were required to register when it should have read ON or BEFORE. AILA InfoNet, Doc. No. 03010944, January 9, 2003.

²⁹⁵ George Lardner, Jr., “Foreign Nationals Plagued by Travel Rules: Oversights, Misinformation Keeping Many in Limbo When Trying to Reenter the US,” *Washington Post*, June 8, 2003.

²⁹⁶ Ibid.; Nurith C. Aizenman and Edward Walsh “Immigrants Fear Deportation After Registration: Number of Mideast, Muslim Men Expelled Rises Sharply,” *Washington Post*, July 28, 2003; *Civil Rights Issues and Post 9/11 Law Enforcement/Community Relations in New York, Before the New York State Advisory Committee to the U.S. Commission on Civil Rights* (May 21, 2003) (testimony of Karin Anderson, New York Immigration Coalition) (on file with LCHR).

²⁹⁷ 8 CFR § 264.1(f)(8) states that if an alien fails to fulfill the departure control requirements upon leaving the U.S., he or she will thereafter be presumed ineligible for admission under section 212(a)(3)(a)(ii) of the Immigration and Nationality Act; see also Memo by the Department of State instructing consul officers about the requirements of NSEERS available at <http://www.immigration.com/newsletter1/nseersentryexit.html> (accessed July 16, 2003).

²⁹⁸ George Lardner Jr., Foreign Nationals Plagued by Travel Rules: Oversights, Misinformation Keeping Many in Limbo While Trying to Reenter the U.S., *Washington Post*, June 8, 2003.

²⁹⁹ Christopher Einholz and Luke Hall, American Immigration Law Foundation, *Inconsistencies, Confusion and Chaos: Experiences with Call-In Registration* (New York, 2003), available at http://www.aifl.org/lac/lac_sr_report_041503.pdf (accessed August 28, 2003).

³⁰⁰ Dan Eggen and Nurith C. Aizenman, “Registration Stirs Panic, Worry,” *Washington Post*, January 19, 2003.

³⁰¹ Letter from Susan Lee, Program Director of Americas Regional Program, Amnesty International to John Ashcroft, U.S. Attorney General (January 10, 2003), available at <http://www.amnestyusa.org/news/2003/usa01102003-3.html> (accessed on July 16, 2003).

³⁰² Attorneys were reportedly denied access when their clients were being “booked,” a process that included fingerprinting, photographing and questioning to provide “whatever other information is necessary.” See *Civil Rights Issues and Post 9/11 Law Enforcement/Community Relations in New York, Before the New York State*

Advisory Committee to the U.S. Commission on Civil Rights (May 21, 2003) (testimony of Karin Anderson, New York Immigration Coalition) (on file with LCHR).

³⁰³ A copy of the resolution is available at <http://www.hias.org/News/Docs/specialreg.pdf> (accessed on July 16, 2003); see also letter from prominent leaders in the Jewish Community to Senator Orrin Hatch (March 20, 2003) requesting congressional hearings on both the conceptualization and implementation of the Special registration program and urging a suspension of NSEERS until such hearings took place (the letter was also distributed to the House and Senate Judiciary Committee and Immigration Subcommittee Chairs and Ranking members) (on file with LCHR).

³⁰⁴ Letter from Jewish community organizations (including: American Jewish Committee, Anti-Defamation League, B'nai B'rith International, Hebrew Immigrant Aid Society, HIAS and Council Migration Services of Philadelphia, Jewish Council for Public Affairs, Jewish Federation of Los Angeles, Union of American Hebrew Congregations, UJA-Federation of New York, United Jewish Communities, United Synagogue of Conservative Judaism, The Workmen's Circle/Arbeter Ring) to United States President George Bush (January 9, 2003), available at <http://www.hias.org/Text/News/news.html> ("Advocates Voice Concern Over Special registration Process for Non-Immigrants") (accessed August 11, 2003).

³⁰⁵ Gary Younge, "Wish You Weren't Here," *Guardian*, July 14, 2003.

³⁰⁶ Comments of Vincent Cannistraro at the 26th National Legal Conference on Immigration & Refugee Policy, Center for Migration Studies and the Catholic Legal Immigration Network, Inc., April 3, 2003. Mr. Vincent Cannistraro is a former Chief of Operations and Analysis at the CIA's Counterterrorism Center from October 1988 to November 1990. Prior to this, he worked at the Department of Defense where he was Special Assistant for Intelligence in the Office of the Secretary of Defense; and from November 1984 to January 1987, he was Director of Intelligence Programs at the National Security Council under President Reagan. Mr. Cannistraro is also a consultant on intelligence and international security affairs for ABC World News with Peter Jennings.

³⁰⁷ Rachel L. Swarns, "More Than 13,000 May Face Deportation," *Washington Post*, June 7, 2003.

³⁰⁸ Ibid.

³⁰⁹ On April 25, 2003, Kris Kobach, Counsel to the U.S. Attorney General, stated at a presentation at the Migration Policy Institute in Washington, D.C. that the special registration program had resulted in the arrest of eleven "suspected terrorists." See Anthony Kujawa, Migration Policy Institute, Press Release: "Foreign Visitor Registration Program Called 'Great Success' But Scholars Debate Efficacy and Merits of NSEERS," April 25, 2003, available at http://www.migrationpolicy.org/events/042503_sum.html (accessed September 5, 2003). Yet, when asked about this information at a meeting of community-based organizations, Department of Homeland Security officials reported that none of the men and boys who registered was charged with terrorism. See also *War on Terrorism: Immigration Enforcement Since September 11 Hearing Before the Subcommittee on Immigration, Border Security and Claims, House Judiciary Committee*, 108th Cong. 47 (May 8, 2003) (testimony of Michael Dougherty, Director of Operations, Bureau of Immigration and Customs Enforcement, Department of Homeland Security).

³¹⁰ "Atlantic City's Pakistani Population Heading North," *Newsday*, August 18, 2003.

³¹¹ Michael Powell, "An Exodus Grows in Brooklyn," *Washington Post*, May 29, 2003; Saurav Sarkar, "Taking Pakistan out of Brooklyn," *The Next American City*, Issue No. 2, 2003, available at http://www.americancity.org/Archives/Issue2/sarkar_issue2.html (accessed August 8, 2003).

³¹² Ibid.

³¹³ Ibid.

³¹⁴ Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), p. 93.

³¹⁵ Ibid., p. 90.

³¹⁶ Ibid.

³¹⁷ Chris Axtman, "Interviews of U.S. Iraqis: Outreach or Overreach?" *Christian Science Monitor*, March 27, 2003.

³¹⁸ Memo from Kenneth L. Wainstein, Director of the Executive Office of United States Attorneys, "Final Report on Interview Project," February 26, 2002, p. 3.

³¹⁹ U.S. Justice Department, Speech: "Attorney General Transcript, Eastern District of Virginia, Interview Project Results Announcement," March 20, 2002, available at <http://www.usdoj.gov/ag/speeches/2002/032002agnewsconferenceedvainterviewprojectresultsannouncement.htm> (accessed August 8, 2003).

³²⁰ U.S. Department of Homeland Security, Press Kit: "Operation Liberty Shield," March 17, 2003, available at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml (accessed August 8, 2003).

³²¹ Ibid.

³²² Dan Eggen, “Missing Iraqis Sought,” *Washington Post*, January 27, 2003; Chisun Lee, “A Knock at the Door,” *Village Voice*, December 12-18, 2001; Anita Ramasastry, “Dragnet Law Enforcement That Won’t Work: Why “Voluntary” Police Interviews Of Middle-eastern Visitors Are Both Wrongful And Ineffective,” *FindLaw.com*, available at <http://writ.news.findlaw.com/ramasastry/20011217.html> (accessed August 22, 2003); American Arab Anti-Discrimination Committee, “Guidance on Voluntary Interviews,” November 30, 2001, available at <http://www.adc.org/action/2001/30november2001.htm> (accessed August 22, 2003).

³²³ GAO Report, p. 16; *see also* Dan Eggen, “Missing Iraqis Sought,” *Washington Post*, January 27, 2003.; Anita Ramasastry, “Operation Liberty Shield: A New Series of Interviews of Iraqi-Born Individuals in the U.S. Is The Latest Example of Dragnet Justice,” *FindLaw.com*, March 25, 2003, available at <http://writ.news.findlaw.com/ramasastry/20030325.html> (accessed August 22, 2003); Lorraine Ali, ““We Love This Country,”” *Newsweek*, April 7, 2003; David Ammons, “Iraqi-Americans in state get unannounced visits from FBI,” *Associated Press*, March 27, 2003.

³²⁴ American-Arab Anti-Discrimination Committee, *Report on Hate Crimes & Discrimination Against Arab Americans: The Post-September 11 Backlash, September 11, 2001 – October 11, 2002* (Washington, D.C., 2003), p. 36.

³²⁵ Migration Policy Institute, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), p. 89. Harris Ahmad, director of the Michigan Chapter of the Council on American Islamic Relations, said the program was “far from voluntary – FBI officials knocked on people’s door at midnight.... We may have negotiated a successful arrangement [with the FBI] in Michigan, but it still left the community victimized.” Noel Saleh, an attorney with the ACLU in Michigan said “respondents felt offended, but cooperated because they did not want any attention on them.”

³²⁶ Illinois Advisory Committee, *Fear Among Arabs and Muslims of the Chicago Region*, Chapter 6 (Remarks of William Haddad, Executive Director of the Arab American Bar Association), available at <http://www.usccb.gov/pubs/sac/il0503/ch6.htm> (accessed August 8, 2003).

³²⁷ Dan Eggen, “Missing Iraqis Sought,” *Washington Post*, January 27, 2003.

³²⁸ Letter from U.S. Representative John Conyers, Jr. to John Ashcroft, U.S. Attorney General (November 27, 2001).

³²⁹ Letter from U.S. Senator Russell Feingold and U.S. Representative John Conyers, Jr. to David M. Walker, Comptroller General of the United States, U.S. General Accounting Office (January 28, 2002), available at http://www.house.gov/judiciary_democrats/gaoantiterrorltr12802.pdf (accessed September 9, 2003).

³³⁰ U.S. General Accounting Office, *Homeland Security: Justice Department’s Project to Interview Aliens after September 11, 2001* (April 2003) GAO-03-459, p. 9.

³³¹ *Ibid.*, p. 6.

³³² *Ibid.*, p. 16.

³³³ *Ibid.*, p. 6.

³³⁴ *Ibid.*, p.10.

³³⁵ *Ibid.*, p. 6.

³³⁶ Migration Policy Institute, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), p. 90.

³³⁷ Bishop Thomas G. Wenski, Auxiliary Bishop of Miami, USCCB Committee on Migration, Press Release: “Statement on Operation Liberty Shield,” March 20, 2003, available at <http://www.usccb.org/comm/archives/2003/03-066.htm> (accessed September 23, 2003).

³³⁸ Secretary Tom Ridge, Press Briefing: “Operation Liberty Shield,” March 18, 2003, available at <http://www.dhs.gov/dhspublic/display?content=525> (accessed August 28, 2003).

³³⁹ Department of Homeland Security, Fact Sheet: “Detaining Certain Asylum Seekers,” March 18, 2003, (on file with LCHR); *see also* Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (1999). The expedited removal provisions empower INS inspectors—whose primary responsibility and training is in border enforcement rather than adjudication—to order the summary deportation of individuals arriving from abroad without valid documents. For more on expedited removal, *see* Lawyers Committee for Human Rights, *Is this America? The Denial of Due Process to Asylum Seekers in the United States* (New York, October 2000), available at http://www.lchr.org/refugees/reports/due_process/due_process.htm (accessed September 4, 2003).

³⁴⁰ Department of Homeland Security, Press Statement, Fact Sheet: “Detaining Certain Asylum Seekers,” March 18, 2003 (on file with LCHR).

³⁴¹ The policy has been criticized by Amnesty International USA, Catholic Legal Immigration Network, the Episcopal Migration Ministries, the Ethiopian Community Development Council, the Hebrew Immigrant Aid Society, Human Rights Watch, the Lawyers Committee for Human Rights, the Lutheran Immigration and

Refugee Service, the National Asian Pacific American Legal Consortium, the US Committee for Refugees, the US Conference of Catholic Bishops, and the Women's Commission for Refugee Women and Children.

³⁴² Bishop Thomas G. Wenski, Auxiliary Bishop of Miami, USCCB Committee on Migration, Press Release: "Statement on Operation Liberty Shield," March 20, 2003 (on file with LCHR); *see also* Catholic News Service, available at <http://www.catholicnews.com/data/briefs/cns/20030321.htm> (accessed August 28, 2003).

³⁴³ United Nations High Commissioner for Refugees, "UNHCR Appeals for Protection of Asylum-Seekers in the United States," March 20, 2003, available at www.unhcr.ch/cgi-bin/texis/vtx/home/+0wwBmvNe_6mwwwwwwwwwwwwFqnN0bItFqnDni5AFqnN0bIcFqOdpnGwBodDacoxnGBOa5roncmMzmwwwwwwwwwDzmxwwwwww/opendoc.htm (accessed August 28, 2003).

³⁴⁴ Secretary Tom Ridge, Speech: "Remarks by Secretary of Homeland Security Tom Ridge To the National Press Club," April 29, 2003; Under Secretary Asa Hutchinson, Speech: "Remarks Before the Association of American Chambers of Commerce in Latin America," May 7, 2003.

³⁴⁵ Immigration and Nationality Act (INA) section 287(g), 8 U.S.C. § 1357, as amended by Illegal Immigration Reform and Immigrant Responsibility Act of 1996 section 133, Pub L. 104-208, enacted on September 30, 1996.

³⁴⁶ Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), pp. 82-3.

³⁴⁷ Dan Eggen, "Rules on Detention Widened; FBI, Marshals Can Hold Foreigners," *Washington Post*, December 6, 2001.

³⁴⁸ "New Immigration Official Wants Local Help," Associated Press, July 24, 2003.

³⁴⁹ Immigration and Nationality Act (INA) section 287(g), 8 U.S.C. § 1102, 8 C.F.R. § 103(a)(8)(2002).

³⁵⁰ Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), p. 81.

³⁵¹ Abbreviation or Waiver Training for State or Local Law Enforcement Officers Authorized To Enforce Immigration Law During a Mass Influx of Aliens, 68 Federal Register 8820 (February 26, 2003)

³⁵² Letter from Alberto R. Gonzales, Counsel to the President, to Demetrious G. Papademetriou, Migration Policy Institute (October 24, 2002).

³⁵³ Complaint filed in *National Council of La Raza v. Department of Justice*, (S.D.N.Y. 2003).

³⁵⁴ Letter from Alberto R. Gonzales, Counsel to the President, to Demetrious G. Papademetriou, Migration Policy Institute (October 24, 2002).

³⁵⁵ Memorandum from Larry Thompson, Deputy Attorney General to Commissioner of the INS, Director of the Federal Bureau of Investigation, Director of the United States Marshals Service, and U.S. Attorneys, "Guidance for Absconder Apprehension Initiative," January 25, 2002.

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³⁵⁸ *See, e.g.*, National Immigration Forum, Press Release: "Law Enforcement, State and Local Officials, Community Leaders, Editorial Boards, and Opinion Writers Voice Opposition to Local Enforcement of Immigration Laws," April 2002.

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³⁶⁰ Cheryl W. Thompson, "INS Role for Police Considered," *Washington Post*, April 4, 2002.

³⁶¹ Letter from Raymond Flynn, David Keene and Grover Norquist to President George W. Bush (May 30, 2002).

³⁶² "Administration Split on Local Role in Terror Fight," *New York Times*, April 29, 2002.

³⁶³ Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act), H.R. 2671, 108th Cong. (2003).

³⁶⁴ Letter from more than 100 organizations (including American-Arab Anti-Discrimination Committee (ADC), American Immigration Lawyers Association, Amnesty International USA, Arab American Institute, Asian American Legal Defense and Education Fund, Catholic Legal Immigration Network, Inc. (CLINIC), Lawyers Committee for Human Rights, National Council of La Raza, and dozens of regional, state and local organizations) to Members of Congress (September 11, 2003) (on file with LCHR).

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³⁶⁶ Letter from Rep. Christopher H. Smith (R, NJ), Rep. Howard Berman (D-CA), Sen. Sam Brownback (R-KS) and Sen. Edward Kennedy (D-MA) to President George W. Bush (July 31, 2003) (on file with LCHR).

³⁶⁷ *Ibid.*

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CHAPTER FOUR: UNCLASSIFIED DETAINEES

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- ³⁸¹ Declaration of Independence, Paragraphs 14, 20 (U.S. 1776).
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- ³⁸³ *See, e.g.*, 18 U.S.C. § 2332b (criminalizing acts of terrorism transcending national boundaries); 18 U.S.C. § 32 (criminalizing destruction of aircraft or aircraft facilities); 18 U.S.C. § 844 (criminalizing certain manufacture and handling of explosive materials); 18 U.S.C. § 2339B (criminalizing conspiracy to provide material support and resources to terrorist organizations).
- ³⁸⁴ *See, e.g.*, 8 U.S.C. § 1226 (apprehension and detention of aliens), available at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=8&sec=1226 (accessed September 3, 2003).
- ³⁸⁵ These are generally state statutes. *See, e.g.*, N.Y. Mental Hygiene Law § 9.27 (Involuntary admission on medical certification), available at <http://assembly.state.ny.us/leg/?cl=62&a=5> (accessed September 3, 2003).
- ³⁸⁶ The Uniform Code of Military Justice (UCMJ) is a part of the U.S. federal code. 10 U.S.C. §§ 801 *et seq.*, available at <http://caselaw.lp.findlaw.com/cascode/uscodes/10/toc.html> (accessed September 2, 2003).
- ³⁸⁷ *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, p. 80 (1992) (explaining that “[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”); *Project Release v. Prevost*, 722 F.2d 960, p. 976 (2d Cir. 1983) (“A right to counsel in civil commitment proceedings may be gleaned from the Supreme Court’s recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection.”) (citing *Addington v. Texas*, 441 U.S. 418 (1979)); *Vitek v. Jones*, 445 U.S. 480, pp. 496-97 (1980) (plurality opinion) (due process requires appointment of counsel to indigent prisoners facing transfer hearings to mental health hospital because of “adverse social consequences” and “stigma” that can result from a finding of mental illness”).
- ³⁸⁸ U.S. Constitution, Article I, § 9, Clause 2.
- ³⁸⁹ *Ex Parte Merryman*, 17 F. Cas. 144 (No. 9,487) (CC Md. 1861).
- ³⁹⁰ *See* International Covenant on Civil and Political Rights (1976) (CCPR), Article 9(4); American Convention on Human Rights (1978) (ACHR), Article 7(6). The United States is a party to the CCPR. The United States has signed, but not ratified, the ACHR. The CCPR is available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (accessed August 12, 2003). The ACHR is available at <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed August 12, 2003).
- ³⁹¹ Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations* (Articles 27(2) and 7(6) of the American Convention on Human Rights), Inter-American Commission on Human Rights (Ser. A) No. 8, Paragraph 12 (January 30, 1987). *See also* UN Human Rights Committee, CCPR General Comment No. 29 (August 31,

2001), Paragraph 16. The Human Rights Committee is the official body charged with overseeing compliance with the CCPR.

³⁹² See, e.g., *The Prize Cases*, 67 U.S. 635, p. 667 (1863) (stating “the laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war”).

³⁹³ *ICRC Commentary to the IV Geneva Convention*, p. 51 (Jean S. Pictet ed., 1958), available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument> (accessed September 5, 2003).

³⁹⁴ *Ibid.* (emphasis added).

³⁹⁵ Department of the Army Field Manual FM 27-10, *The Law of Land Warfare* (1956) (“Army Field Manual”), ¶ 73 (“If a person is determined by a competent tribunal, acting in conformity with Article 5 [of the Third Geneva Convention]..., not to fall within any of the categories listed in Article 4..., he is not entitled to be treated as a prisoner of war. He is, however, a ‘protected person’ within the meaning of Article 4 [of the Fourth Geneva Convention].”)

³⁹⁶ Convention (III) relative to the Treatment of Prisoners of War. Geneva, August 12, 1949 (Third Geneva Convention), available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68?OpenDocument>, (accessed August 22, 2003). Article 4 also includes as “prisoners of war” other categories of individuals, such as civilian military employees and contractors, war correspondents, members of the merchant marine, etc.; as well as “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

³⁹⁷ Brief of Amici Curiae Experts on the Law of War (Judge Patricia Wald, et al.) in Support of Petitioner-Appellee/Cross-Appellant Jose Padilla and Partial Affirmance and Partial Reversal, p. 14, *Padilla v. Rumsfeld*, available at http://www.lchr.org/us_law/padilla_war_exp.pdf (accessed August 31, 2003).

³⁹⁸ *Ibid.*, p. 2.

³⁹⁹ *Ibid.*

⁴⁰⁰ The prescribed procedures for “competent tribunals”: for prisoners in U.S. custody are set forth in ¶ 1-6 of Army Regulation 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” Department of the Army (1997), available at http://www.usapa.army.mil/pdffiles/r190_8.pdf (accessed September 2, 2003). Though these “competent tribunals,” composed of three commissioned officers, are far less formal than a trial or other judicial proceeding, certain fundamental due process protections apply, including: preservation of a written record, public access to the proceedings (subject to security considerations); notice to the detainee of his rights, including the right to address the tribunal or to refrain from testifying; an interpreter; the right to call witnesses “if reasonably available”; and the right to question witnesses against him. The standard for determinations is by preponderance of the evidence. Each determination requires a written report, and adverse determinations are reviewed by a Judge Advocate.

⁴⁰¹ Written procedures for U.S. Article 5 hearings were first issued in 1966 for use in Vietnam. See Jennifer Elsea, “Treatment of ‘Battlefield Detainees’ in the War on Terrorism,” *Congressional Research Service Report for Congress*, RL31367, April 11, 2002, p. 29, available at <http://www.nimj.com/documents/BattlefieldDetainees.pdf> (accessed September 2, 2003).

⁴⁰² 10 U.S.C. §§ 801 *et seq.*

⁴⁰³ The UCMJ provides, among other things, the right to counsel (10 U.S.C. § 838); a prohibition against self-incrimination (10 U.S.C. § 831); protection against double jeopardy (10 U.S.C. § 844); the right to obtain witnesses and other evidence (10 U.S.C. § 846); the right of appeal to the United States Court of Appeals for the Armed Forces (10 U.S.C. § 867); and providing that Supreme Court review is available by writ of certiorari (10 U.S.C. § 867a). The Rules for Courts-Martial (RCM) and the Military Rules of Evidence (MRE), issued pursuant to the UCMJ, provide other basic rights such as the right to a speedy trial (RCM 707), exclusion of unlawfully obtained evidence and testimony (MRE 301 *et seq.*), and rules relating to hearsay (MRE 801 *et seq.*). The RCM and the MRE are included in the Manual for Courts-Martial (2002), available at <http://www.usapa.army.mil/pdffiles/mcm2002.pdf> (accessed August 29, 2003).

⁴⁰⁴ See discussion of the Zacarias Moussaoui case, below.

⁴⁰⁵ “Pentagon Defends Treatment of Detainees,” CNN.com, January 15, 2002, available at <http://edition.cnn.com/2002/WORLD/americas/01/14/cuba.detainees/?related> (accessed August 29, 2003).

⁴⁰⁶ Charles Savage, “For Detainees at Guantánamo, Daily Benefits – and Uncertainty,” *Miami Herald*, August 24, 2003, available at http://www.miami.com/mld/miamiherald/news/special_packages/focus/6601339.htm (accessed August 23, 2003).

⁴⁰⁷ See generally the official Joint Task Force Guantánamo website, <http://www.nsgtmo.navy.mil/JTFgtmo/mission.html> (accessed August 18, 2003).

⁴⁰⁸ Charles Savage, “For Detainees at Guantánamo, Daily Benefits – and Uncertainty,” *Miami Herald*, August 24, 2003, available at http://www.miami.com/mld/miamiherald/news/special_packages/focus/6601339.htm (accessed August 23, 2003); Ted Conover, “In the Land of Guantánamo,” *New York Times Magazine*, June 29, 2003).

⁴⁰⁹ Convention (III) relative to the Treatment of Prisoners of War, Geneva, August 12, 1949 (Third Geneva Convention), art. 98, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68?OpenDocument>, (accessed August 22, 2003).

⁴¹⁰ Charles Savage, “For Detainees at Guantánamo, Daily Benefits – and Uncertainty,” *Miami Herald*, August 24, 2003, available at http://www.miami.com/mld/miamiherald/news/special_packages/focus/6601339.htm (accessed August 23, 2003).

⁴¹¹ “Suicide Attempts at Guantánamo Reach 32,” Associated Press, August 26, 2003, available at http://www.kansascity.com/mld/kansascity/news/breaking_news/6624413.htm (accessed August 26, 2003).

⁴¹² See, e.g., DOD News Briefing on Military Commissions, DefenseLINK, March 21, 2002 (Department of Defense General Counsel William J. Haynes, describing the Guantánamo detainees as “enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies”), available at http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html (accessed August 24, 2003).

⁴¹³ Radio Free Europe concluded that the seizure “raises questions about Bosnia’s shaky sovereignty as much as the accompanying street protests raise questions about the activities in Sarajevo of Saudi Wahabi proselytizers.” Jolyon Naegle, “Transfer of Terrorist Suspects to U.S. Raises Many Questions,” Radio Free Europe/Radio Liberty, transcript available at <http://www.rferl.org/nca/features/2002/01/21012002092819.asp> (accessed August 5, 2003).

⁴¹⁴ See Vikram Dodd, “The UK Businessmen Trapped in Guantánamo,” *Guardian*, July 11, 2003, available at <http://www.guardian.co.uk/alqaida/story/0,12469,995989,00.html> (accessed August 18, 2003); Helen Barnes, “Family Fears for Life of Terror Suspect,” *Guardian*, July 18, 2003, available at <http://www.thisislondon.co.uk/news/business/display.var.394421.0.0.php> (accessed August 18, 2003).

⁴¹⁵ Mohamedou Ould Slahi, a Mauritanian national is alleged to have been a senior Al Qaeda operative who may have recruited several of the September 11 bombers while living in Hamburg, Germany. Slahi is believed to have been arrested in an African country, probably Mauritania. Michael Isikoff and Mark Hosenball, “America’s Secret Prisoners,” *Newsweek* Online, June 18, 2003, available at <http://www.msnbc.com/news/928428.asp> (accessed August 6, 2003).

⁴¹⁶ One U.S. intelligence officer, Capt. Kevin Parker, explained to the *New York Times* that “we haven’t managed in the least to understand the country [Afghanistan],” and described the “vicious rivalries among the country’s seemingly infinite subtribes, [and] how often the tips the Army receives are the attempts of one clan to spur the Americans against an ancient enemy.” Daniel Bergner, “Where the Enemy is Everywhere and Nowhere,” *New York Times Magazine*, July 20, 2003, available at <http://www.commondreams.org/headlines03/0720-07.htm> (accessed August 6, 2003). See also Joseph Lelyveld, “In Guantánamo,” *New York Review of Books*, November 7, 2002 (“It is also understood...that more than half of the detainees were turned over to the Americans by the Pakistanis, which suggests that some of them, at least, might never have made it to Afghanistan.”), available at <http://www.mafhoum.com/press4/115S61.htm> (accessed August 23, 2003).

⁴¹⁷ Stuart Taylor, Jr., “Guantánamo: A Betrayal of What American Stands For,” *National Review* Online/*National Journal*, July 26, 2003, available at <http://www.kuwaitidetainees.org/media/natlrev072503.htm> (accessed August 6, 2003); See also Complaint, pp. 8-9, *Al Odah, v. U.S.* (D. D.C. May 1, 2002) (No. 92-CV-828-(CKK)) (“The Family Members believe that the [12] Kuwaiti Detaineeswere seized against their will in Afghanistan or Pakistan after September 11, 2001, by local villagers seeking financial rewards from the United States, and that, subsequently, they were taken into custody by the United States.”); Greg Miller, “Many Held at Guantánamo Not Likely Terrorists,” *Los Angeles Times*, December 12, 2002; Bob Drogin, “No Leaders of Al Qaeda Found at Guantánamo,” *Los Angeles Times*, August 18, 2002; John Mintz, “Detainees at Base in Cuba Yield Little Valuable Information,” *Washington Post*, December 26, 2002.

⁴¹⁸ Complaint, pp. 8-9, *Al Odah, v. U.S.* (D. D.C. May 1, 2002) (No.02-CV-828 (CKK)) (“The Family Members believe that the [12] 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”). “Unlike many ‘suspected members of Al Qaeda,’ a lot is known about who [five of the Kuwaiti detainees in Guantánamo] were. We know their family backgrounds and their jobs. And we know

where they are today: half a world away in the U.S. naval base at Guantánamo Bay, Cuba. NEWSWEEK has traced their strange odyssey from their affluent homeland to their isolated cells on 'Gitmo.' The investigation shows [men]... who don't fit the standard profile of terrorists held at Guantánamo.... [T]he[se] five...at least, may be little more than volunteers for their society's versions of faith-based charities." Roy Gutman, Christopher Dickey and Sami Yousafzai, "Guantánamo Justice," *Newsweek*, July 8, 2003, available at <http://www.kuwaitidetainees.org/media/Guantánamo%20Justice.htm> (accessed August 6, 2003).

⁴¹⁹ U.S. Department of Defense, "Secretary Rumsfeld Media Availability en route to Guantánamo Bay, Cuba," January 27, 2002, transcript available at http://www.defenselink.mil/news/Jan2002/t01282002_t0127enr.html (accessed August 5, 2003).

⁴²⁰ "Former Guantánamo Detainees Describe Cages, Interrogation," *St. Petersburg Times*/AP, October 30, 2002, available at http://www.sptimes.com/2002/10/30/news_pf/Worldandnation/Former_Guantánamo_det.shtml (accessed August 6, 2003). The third of the Afghans, a 35-year-old man named Jan Mohammed, claimed to be a farmer conscripted into the Taliban army. The Pakistani, a 50-year-old named Mohammed Saghir, has announced plans to commence a lawsuit against the United States either in Pakistan or the United States or both, seeking ten million dollars. Junaid Bahadur, "Pakistani Seeks \$10M from U.S. for Detentions," *Dawn* Internet Edition (Pakistan), July 20, 2003, available at <http://www.dawn.com/2003/07/21/nat4.htm> (accessed August 18, 2003).

⁴²¹ "The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda." Statement by White House Press Secretary Ari Fleischer, February 7, 2002, available at <http://www.us-mission.ch/press2002/0802fleischerdetainees.htm> (accessed August 18, 2003). The United States has also received criticism on the issue of uniforms. For example, U.S. policy authorizes U.S. civil affairs and Special Forces personnel to wear civilian clothes (but carry arms) while carrying out "humanitarian" activities in the Afghan countryside. On April 2, 2002, sixteen major U.S. humanitarian groups, including Refugees International, CARE, Catholic Relief Services, Save the Children, and Oxfam America, wrote National Security Advisor Condoleezza Rice to express deep concern over this policy, which creates "confusion between military and [civilian] humanitarian personnel precisely where security risks to our international and local staff members often are most threatening." The text of the letter is at <http://www.reliefweb.int/w/rwb.nsf/480fa8736b88bbc3c12564f6004c8ad5/a5434df6dbd62ca485256b8f006c3bd6?OpenDocument> (accessed August 18, 2003). The next day, U.S. General Richard Myers, chairman of the Joint Chiefs of Staff, rejected the request to end the policy. "I think there are some legitimate things that our people do where they don't have to be in uniform," he explained. "No Change in Policy Allowing Military to Distribute Aid: Pentagon," AFP, April 3, 2002, available at <http://www.reliefweb.int/w/rwb.nsf/0/73421329e1797cce85256b90006fec0d?OpenDocument> (accessed August 19, 2003).

⁴²² The Army Field Manual notes in this regard, in ¶ 64(d), that the condition of "Compliance With Law of War" is "fulfilled if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime."

⁴²³ See Jennifer Elsea, "Treatment of 'Battlefield Detainees' in the War on Terrorism," Congressional Research Service Report for Congress, RL31367, April 11, 2002, p. 29, available at <http://www.nimj.org/documents/BattlefieldDetainees.pdf> (accessed August 17, 2003).

⁴²⁴ See, e.g., Tim Butcher, "Man with a Mission Brings Mohammed to the Mountain," *Telegraph* (September 21, 2001) (describing "one man in his late teens and dressed in the Taliban uniform of black turban, long shirt and baggy trousers"), available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/09/21/wpak121.xml> (accessed August 5, 2003); Susan Goldenberg, "The United States Wants to Kill a Whole Nation for One Man," *Guardian*, August 22, 1998 (describing an Afghan refugee in Pakistan, "a teacher wearing the black plumed turban of the Taliban militia"), available at <http://www.guardian.co.uk/alqaida/story/0,12469,798316,00.html> (accessed August 5, 2003); Evan Wright, "Not Much War but Plenty of Hell: On the Ground with a New Generation of American Warriors," *Rolling Stone* (July 3, 2002) (referring to a "man in a black turban, once the Taliban uniform"), available at <http://www.rollingstone.com/features/featuregen.asp?pid=907> (accessed August 5, 2003); Victor Mallet, "Taliban Supporters Return Home to Pakistan," *Financial Times* (December 14, 2001) (referring to a Pakistani fighter "who wears a Taliban-Style black turban"), available at http://insaf.net/pipermail/sacw_insaf.net/2001/001171.html (accessed September 15, 2003); "Fierce Battle in Kunduz Leaves 100 Dead," *Times of India*/AFP, November 26, 2001 (referring to captured Taliban soldiers as "black-turbaned warriors"), available at <http://www.911investigations.net/IMG/pdf/doc-910.pdf> (accessed August 5, 2003); Jean-Pierre Perrin (avec AFP, Reuters), "L'alliance, maitresse de tout le nord," *Libération*,

November 2, 2001 (referring to the surrender of “les guerriers au turban noir et leurs alliés, les volontaires islamistes aux ordres d’Oussama ben Laden”), available at <http://www.911investigations.net/IMG/pdf/doc-910.pdf> (accessed August 5, 2003). Some press reports indicate belated attempts in 2000 and 2001 to provide full uniforms for at least some units of the Taliban. See, e.g., “War-Battered Afghanistan Celebrates Independence Day,” *Portsmouth Herald/AP*, August 18, 2000 (describing Afghan independence day parade, in which “[m]any of the Taliban soldiers who participated...wore the Afghan national army’s green and brown uniforms.”), available at http://www.seacoastonline.com/2000news/8_18_w2.htm (accessed August 18, 2003); “Taliban Soldiers in Uniform,” *Dawn Internet Edition (Pakistan)*, June 29, 2001 (“For the first time the Taliban soldiers have appeared in regular military uniforms in the streets of Kabul in what officials describe as a move to improve security....[a] Taliban military official....said the Taliban government would make maximum efforts to distribute military uniforms to more military personnel for better law and order.”), available at www.dawn.com/2001/06/29/int6.htm (accessed August 18, 2003); Erik Kirschbaum, “U.S. Soldiers Watched massacre of Taliban – Filmmaker,” *Reuters*, December 19, 2002 (describing site of mass grave where Northern Alliance troops of General Abdul Rashid Dostum are alleged to have massacred hundreds of unarmed Taliban prisoners as containing “bones, army uniform fragments and bullet casings.”)

⁴²⁵ The Army Field Manual notes that “[a] helmet or headress which would make the silhouette of the individual readily distinguishable from that of an ordinary civilian would satisfy this requirement.” ¶ 64 (b).

⁴²⁶ See Article 51(3) of the Additional Protocol I to the Geneva Conventions (1977) (“Civilians shall also enjoy the protection afforded by [Article 51 of the Additional Protocol I, dealing with ‘Protection of the Civilian Population’], unless and for such time as they take a *direct* part in hostilities” (emphasis added)). The Additional Protocol I is available at

<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079?OpenDocument> (accessed August 28, 2003). The United States has not ratified the Additional Protocol I, but it has acknowledged that many of the Protocol’s provisions, including Article 51(3), are “either customary international law or acceptable practice though not legally binding.” See U.S. Army Judge Advocate General’s Legal Center and School, *Operational Law Handbook* (2002), Chapter 2, p. 11, available at <https://www.jagcnet.army.mil/tjagsa> (click on “Publications” on the home page) (accessed August 28, 2003).

⁴²⁷ See *ICRC Commentary to the IV Geneva Convention*, p. 48 (Jean S. Pictet ed., 1958), available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument> (accessed September 5, 2003) (“Members of resistance movements must fulfill certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfill those conditions, they must be considered to be protected persons within the meaning of the present [Fourth] Convention. That does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions [of the Fourth Convention].”), available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument> (accessed August 6, 2003).

⁴²⁸ Writing right before September 11, several international terrorism experts reported that “Al-Qaeda membership is estimated at between 3,000-5,000 men, most of whom fight alongside the Taliban against the Northern Alliance and are designated the 055 Brigade....In Afghanistan, Al-Qaeda forces fight alongside the Taliban.” Phil Hirshkorn, et al., “Blowback,” *Jane’s Intelligence Review*, Vol. 13, No. 8 (August 1, 2001), available at <http://www.mwarrior.com/alqaeda.htm> (accessed August 5, 2003).

⁴²⁹ “Bosnia Suspects Handed to U.S.,” *CNN.com*, January 18, 2002, available at <http://www.cnn.com/2002/WORLD/europe/01/18/inv.bosnia.cuba/> (accessed August 5, 2003). The Bosnian court opinion, *Boudella. v. Bosnia and Herzegovina* (Human Rights Chamber of Bosnia and Herzegovina September 3, 2002), is available at www.nimj.org (accessed August 5, 2003).

⁴³⁰ *Al Odah v. U.S.*, 321 F.3d 1124, 1134 (2003), available at <http://www.nimj.org> (accessed September 2, 2003) (under “Cases” on the left hand side of the home page).

⁴³¹ *Johnson v. Eisentrager*, 339 U.S. 763 (1950), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=339&invol=763> (accessed September 2, 2003).

⁴³² *Ibid.*, p. 778.

⁴³³ *Ibid.*, p. 1134 (stating that in *Eisentrager*, “it was not [the Germans’] convictions – which they contested – that rendered them ‘enemy aliens’....[but rather] their status as nationals of a country at war with the United States.”).

⁴³⁴ Under the 1903 Lease between the Republic of Cuba and the United States, as extended by a 1934 treaty, both parties must consent to any termination. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418, available at <http://www.gtmo.net/gazz/hisapxd.htm> (accessed September 11, 2003).

⁴³⁵ This “ultimate [Cuban] sovereignty” has not prevented federal courts in the past from exercising criminal jurisdiction over non-U.S. nationals who have committed crimes in Guantánamo – nor from assuring such defendants constitutional protections. *See, e.g., U.S. v. Lee*, 906 F.2d 117 (4th Cir. 1990) (reinstating criminal indictment of Jamaican national for alleged sexual abuse committed in Guantánamo).

⁴³⁶ Robert A. Levy, “Indefensible – The Case Against Military Tribunals,” *Wall Street Journal*, November 25, 2002; *see also* William Safire, “Voices of Negativism,” *New York Times*, December 6, 2001, available at http://www.truthout.org/docs_01/12.07C.Safire.Voices.htm (accessed August 5, 2003).

⁴³⁷ Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (November 16, 2001), available at <http://www.fas.org/sgp/news/2001/11/bush111301.html> (accessed August 4, 2003).

⁴³⁸ *Ibid.* § 1(e).

⁴³⁹ *Ibid.* § 2(a)(1).

⁴⁴⁰ *Ibid.* §§ 4(c)(8) and 7(b)(2).

⁴⁴¹ *Ibid.* § 4(c)(3) and (4).

⁴⁴² Department of Defense, Military Commission Order No.1 (March 21, 2002), available at <http://www.dod.gov/news/Mar2002/d20020321ord.pdf>, (accessed August 5, 2003).

⁴⁴³ The eight Military Commission Instructions are available at <http://www.dtic.mil/whs/directives/corres/mco.htm> (accessed August 5, 2003). On February 29, 2003, the Defense Department had issued a draft of one of these instructions, Military Commission Instruction No. 2, Elements of Crimes, which defined the specific offenses that would be “triable by military commission.” A number of groups, including the Lawyers Committee for Human Rights, submitted comments and suggestions, some of which were reflected in the final version issued in April. On July 1, 2003, the Defense Department issued a slightly revised version of Military Commission Instruction No. 5. This revision (which retains the “April 30, 2003” date) somewhat loosened restrictions on civilian defense counsel.

⁴⁴⁴ Military Commission Order No.1 (March 21, 2002), § 5(B).

⁴⁴⁵ *Ibid.* § 5(C).

⁴⁴⁶ *Ibid.* § 4(C)(3). The rules also recognized the privilege against defendants’ self-incrimination, and prescribed unanimous verdicts and seven-member commissions for any death sentence. *Ibid.* §§ 5(F), 6(F), and 6(G).

⁴⁴⁷ “The order only covers foreign enemy war criminals....people [who will] be tried by military commission....must be chargeable with offenses against the international laws of war.” Alberto R. Gonzales, Counsel to President Bush, “Martial Justice, Full and Fair,” *New York Times*, November 30, 2001, available at <http://usinfo.state.gov/topical/pol/terror/01120302.htm> (accessed August 8, 2003).

⁴⁴⁸ Section 5(C) of Military Commission Instruction No. 2 explains that the element of “armed conflict” “does not require a declaration of war, ongoing mutual hostilities, or a confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus [between ‘armed conflict’ and a particular offense] so long as its magnitude or severity rises to the level of an ‘armed attack’ or an ‘act of war,’ or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.”

⁴⁴⁹ *Ibid.* § 6(B)(1)-(2). This expanded notion of “armed conflict” can also transform quite ordinary common crimes into offenses “triable by military commission,” a particular concern in light of the administration’s tendency to label as “terrorism” cases charges not considered such by even the prosecutors involved. “In the first two months of [2003], the Justice Department filed charges against 56 people, labeling all the cases as ‘terrorism’.... [A]t least 41 of them had nothing to do with terrorism – a point that prosecutors of the cases themselves acknowledge.” Among the purported “terrorism” cases were “28 Latinos charged with working illegally at [an airport,] most of them using phony Social Security numbers”; “eight Puerto Ricans charged with trespassing on Navy property on the island of Vieques”; “a Middle Eastern man indicted...for allegedly passing bad checks who has the same name as a Hezbollah leader”; and a “Middle Eastern college student charged...with paying a stand-in to take his college English-proficiency tests.” Mark Fazlollah, “Reports of Terror Crimes Inflated,” *Philadelphia Inquirer*, May 15, 2003. *See also* Thomas Ginsberg, “The War on...Liberty?” *Philadelphia Inquirer*, June 15, 2003.

⁴⁵⁰ Military Commission Order No.1 (March 21, 2002), § 6(B)(3).

⁴⁵¹ Military Commission Instruction No. 4, § 3(E)(3)

⁴⁵² Military Commission Instruction No. 5, Appendix B (Affidavit and Agreement by Civilian Defense Counsel), § II(C).

⁴⁵³ Military Commission Instruction No. 5, § 3(A)(2)(d).

⁴⁵⁴ Military Commission Instruction No. 5, Appendix B (Affidavit and Agreement by Civilian Defense Counsel), § II(E) and (F).

⁴⁵⁵ Assigned military counsel must be provided any secret information used at trial; but even military lawyers may be denied access to potential exculpatory evidence not used at trial. Department of Defense, Military Commission Order No.1 (March 21, 2002), § 6(D)(5)(b).

⁴⁵⁶ Military Commission Instruction No. 5 Annex B (Affidavit and Agreement by Civilian Defense Counsel), § II(I) and (J).

⁴⁵⁷ National Association of Criminal Defense Lawyers (NACDL), Ethics Advisory Committee, Opinion 03-04, approved by the NACDL Board of Directors August 2, 2003, available at <http://www.nacdl.org/public.nsf/freeform/news&issues?OpenDocument> (accessed August 22, 2003).

⁴⁵⁸ National Institute of Military Justice, "Statement on Civilian Attorney Participation as Defense Counsel in Military Commissions," July 11, 2003, available at <http://www.nimj.org> (accessed September 3, 2003).

⁴⁵⁹ Resolution adopted by the American Bar Association House of Delegates 2003 Annual Meeting (August 12-13, 2003). The Resolution also included specific objections to provisions in the rules authorizing monitoring of attorney-client consultations, permitting withholding of evidence from civilian defense counsel, limiting attorney consultations with experts, and other matters. A detailed report on the military commission rules was presented along with the Resolution. The Resolution and the report are available at http://www.nimj.com/documents/ABA_CDC_Corrected_Fin_Rep_Rec_FULL_0803.pdf (accessed August 28, 2003).

⁴⁶⁰ Alberto R. Gonzales, Counsel to President Bush, "Martial Justice, Full and Fair," *New York Times*, November 30, 2001.

⁴⁶¹ *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 August 21, 2003).

⁴⁶² *Ibid.* pp. 27, 36. The specification described "enemies...acting for... a belligerent enemy nation" passing covertly in civilian dress behind military lines for the purpose of carrying out hostile acts. A third generic charge of "violation of the law of war" related to actions well established as traditional war crimes when committed by "enemies...acting for...a belligerent enemy nation." The fourth count was a conspiracy charge.

⁴⁶³ *See, e.g., Haupt v. United States*, 330 U.S. 631 (1947) (upholding treason conviction of naturalized citizen father of one of the saboteurs); and *Cramer v. United States*, 325 U.S. 1 (1945) (reversing treason conviction of naturalized citizen acquaintance of one of the saboteurs).

⁴⁶⁴ Section 1(e) of the November Order grants military commissions broad jurisdiction over "violations of the laws of war and other applicable laws" (emphasis added). Military Order of November 13, 2001.

⁴⁶⁵ James Orenstein, "Rooting Out Terrorists Just Became Harder," *New York Times*, December 6, 2001. *See also* William Safire, "Voices of Negativism," *New York Times*, December 6, 2001 ("At the State Department, word is coming in from Spain, Germany and Britain – where scores of Al Qaeda suspects have been arrested – that the UN human rights treaty pioneered by Eleanor Roosevelt prohibits the turning over of their prisoners to military tribunals that ignore such rights. That denies us valuable information about 'sleepers' in Osama bin Laden's cells who are in the U.S. planning future attacks."), available at http://www.truthout.org/docs_01/12.07C.Safire.Voices.htm (accessed August 5, 2003).

⁴⁶⁶ The three others, who have not been identified by name, are reportedly from Pakistan, Sudan and Yemen. Paisley Dodds, "Patriotism, Apple Pie and an Execution Chamber: Guantánamo Gears up for Military Commissions," Associated Press, July 24, 2003, available at <http://www.redding.com/news/apnational/past/20030724aptop121.shtml> (accessed August 23, 2003).

⁴⁶⁷ Sarah Lyall, "Threats and Responses: Guantánamo Tribunals," *New York Times*, July 5, 2003. *See also* John Mintz, "6 Could Be Facing Military Tribunals; U.S. Says Detainees Tied to Al Qaeda," *Washington Post*, July 4, 2003 ("The designation of this half-dozen as eligible for tribunals 'shouldn't suggest that there won't be more, or that these are the worst of the worst,' terrorists in U.S. detention, a military official said.... 'The government will want to show the other detainees that you can cooperate and be released when you're still a young man....' said one lawyer who has been in contact with U.S. officials").

⁴⁶⁸ Sarah Lyall, "Threats and Responses: Guantánamo Tribunals," *New York Times*, July 5, 2003.

⁴⁶⁹ Under-Secretary of State for Foreign and Commonwealth Affairs Chris Mullen in the House of Commons, July 7, 2003. Other MP's referred to "the Americans' proposals [as] wrong, potentially unjust and gravely damaging to their reputation" (Douglas Hogg), and inquired whether the United States "[s]hould not...listen very closely and heed the concern of a close ally....because the United States requires all the friends it can get" (David Winnick). Proceedings in the House of Commons, July 7, 2003. The tone in the House of Lords, the same day, was similar: "Will the Minister tell us whether, given what good allies we have been to the US, the Prime Minister will raise this matter at the highest level, with the President of the US?" (Baroness Williams of Crosby);

“My Lords, is it not true that the whole of the Guantánamo Bay issue brings the United States’ justice into disrepute.... This brings the whole of United States defence of democracy, defence of liberty and defence of justice into disrepute” (The Earl of Onslow). Minister of State for Foreign and Commonwealth Affairs Baroness Symons of Vernham Dean acknowledged, on behalf of the government, that she was “bound to say that our justice system would not allow us to engage in a trial such as is proposed for anybody suspected of much less serious crimes.” Proceedings in the House of Lords, July 7, 2003. The debates in both Houses are available at <http://www.nimj.org> (accessed August 5, 2003).

⁴⁷⁰ Andrew Sparrow, “Blair Prepares Ground for Trials in Guantánamo,” *Telegraph*, July 21, 2003, available at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/07/21/nguan21.xml&secureRefresh=true&_requestid=61484 (accessed August 23, 2003).

⁴⁷¹ *Abassi v. Secretary of State*, [2002] EWCA Civ. 1598 (Court of Appeals, November 6, 2002). The entire opinion is available at <http://www.nimj.org> (accessed August 5, 2003).

⁴⁷² David Bamber and Rajeev Syal, “Blair Tells Bush: We Don’t Want Guantánamo Britons,” *Telegraph*, August 3, 2003, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/08/03/nguan03.xml> (accessed August 23, 2003).

⁴⁷³ “Guantánamo Detainees: Statement by the Attorney General,” July 22, 2003, available at <http://www.nimj.org> (accessed August 5, 2003). The United States also agreed to allow British lawyers to serve as defense “consultants.”

⁴⁷⁴ Minister for Foreign Affairs, the Hon. Alexander Downer, MP, and Attorney-General, the Hon. Daryl Williams, AM QC MP, Joint Press Release: “Delegation Concludes Successful Talks on David Hicks,” Attorney-General’s Department (Australia), July 24, 2003, available at <http://nationalecurity.ag.gov.au/www/attorneygeneralHome.nsf/0/E4EDFF06CEA01AC5CA256D6D007C3563?OpenDocument> (accessed August 23, 2003).

⁴⁷⁵ Sarah Lyall, “Families of 2 British Terrorism Suspects Oppose Military Trials by the U.S.,” *New York Times*, July 5, 2003.

⁴⁷⁶ Sean O’Neill, “Moazzam Begg,” *Telegraph*, July 5, 2003, available at http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2003/07/05/nguan305.xml&secureRefresh=true&_requestid=12122 (accessed August 18, 2003).

⁴⁷⁷ Richard P. Conti, “The Psychology of False Confessions,” *Journal of Credibility Assessment and Witness Psychology*, Vol. 2, No. 1, p. 27 (1999), available at <http://truth.boisestate.edu/jcaawp/9901/9901.pdf> (accessed September 3, 2003).

⁴⁷⁸ Ibid.

⁴⁷⁹ Saul Kassin, “False Confessions and the Jogger Case,” *New York Times*, November 1, 2002, available at http://www.unb.ca/law/pennet/crimpro_fa/False%20Confessions%20and%20the%20Jogger%20Case.htm (accessed August 21, 2003).

⁴⁸⁰ Ibid. False confessions are not rare. Of the first 70 cases of men exonerated from Death Row by DNA challenges, 15 percent of those erroneous murder convictions were attributed to false confessions. See generally website of the “Innocence Project,” at <http://www.innocenceproject.org/> (accessed August 11, 2003).

⁴⁸¹ Jess Bravin, “Guilty Pleas Expected at Tribunals,” *Wall Street Journal*, August 11, 2003 (“Officials explained that though ‘initially...defiant,’ the three men had ‘all, shall we say, mellowed over time,’ and were now providing information to interrogators”).

⁴⁸² Nyier Abdou, “What’s Good for the Goose...,” *Al-Ahram Weekly Online*, July 31 – August 6, 2003, available at <http://weekly.ahram.org.eg/print/2003/649/in5.htm> (accessed August 5, 2003).

⁴⁸³ Frank Davies, “Kuwait Pressing U.S. on Guantánamo Prisoners,” *Miami Herald*, August 6, 2003.

⁴⁸⁴ Text of the letter is reprinted in “The Law and Camp Delta,” *Guardian*, August 21, 2003, available at <http://www.guardian.co.uk/Print/0,3858,4737551-103683,00.html> (accessed August 21, 2003).

⁴⁸⁵ Ibid.

⁴⁸⁶ Order, p. 64, *Hamdi v. Rumsfeld* (4th Cir. July 9, 2003) (No. 02-7338) (Judge Diana Gribbon Motz, dissenting), available at <http://www.nimj.org> (accessed August 10, 2003); see also Ibid., p. 43 (Judge Michael Luttig, dissenting).

⁴⁸⁷ Eric Lichtblau, “Bush Declares Student an Enemy Combatant,” *New York Times*, June 24, 2003 (quoting Alice Fisher, a deputy assistant attorney general in DOJ’s Criminal Division).

⁴⁸⁸ Prepared Statement of John Walker Lindh to the Court, *U.S. v. Lindh* (E.D. Va. October 4, 2002) (No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/lindh100402statment.html> (accessed August 5, 2003).

⁴⁸⁹ Ibid.

⁴⁹⁰ Indictment, *U.S. v. Lindh* (E.D. Va. February 5, 2002) (Cr. No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html> (accessed August 6, 2003).

⁴⁹¹ See generally Proffer of Facts in Support of Defendant's Suppression Motion, *U.S. v. Lindh* (E.D. Va. June 13, 2002) (No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh61302dstat.pdf> (accessed August 6, 2003). "Prosecutors have acknowledged that Lindh's [December 9-10, 2001] confessions to [FBI agent Christopher] Reimann, along with earlier ones to military interrogators, are the basis for their 10-count indictment charging Lindh with conspiring to kill U.S. nationals and aid the Taliban and Al Qaeda." Michael Isikoff, "The Lindh E-Mails," *Newsweek*, June 24, available at http://www.truthout.org/docs_02/06.19A.lindh.emails.htm (accessed August 6, 2003).

⁴⁹² Excerpts from the emails between the FBI interrogators in Afghanistan and Jesselyn Radack, the DOJ lawyer in Washington, D.C., were published by *Newsweek Online* on June 15, 2002, and are available at http://www.truthout.org/docs_02/06.19A.lindh.emails.htm (accessed August 6, 2003).

⁴⁹³ The investigation is reportedly ongoing. Radack's story is available in Jane Mayer, "Lost in the Jihad," *New Yorker*, March 10, 2003; and Douglas McCollam, "The Trials of Jesselyn Radack," *American Lawyer*, July 14, 2003.

⁴⁹⁴ Neil A. Lewis, "Ashcroft's Terrorism Policies Dismay Some Conservatives," *New York Times*, July 24, 2002 ("Mr. Ashcroft was also criticized by some in the administration for declaring early on that the case of John Walker Lindh was...a major terrorist case. Some officials in the Justice Department believed that the attorney general made needlessly harsh public comments about Mr. Lindh").

⁴⁹⁵ Defendant's Sentencing Memorandum, p. 4, *U.S. v. Lindh* (E.D. Va. September 19, 2002) (No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh92602dsenmem.pdf> (accessed August 5, 2003).

⁴⁹⁶ "U.S. National Detained During Afghan War is Flown to Virginia," *Agence France Presse*, April 6, 2002 (noting that "a Pentagon statement said Hamdi will be held for the time being as a 'captured enemy combatant in the control of the Department of Defense'").

⁴⁹⁷ Petition for Writ of Habeas Corpus, *Hamdi v. Rumsfeld* (E.D. Va. June 11, 2002) (No. 2: 02 CV 439), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums61102pet.pdf> (accessed August 23, 2003).

⁴⁹⁸ *Hamdi v. Rumsfeld* (4th Cir. July 12, 2002) (No. 02-6895), available at <http://laws.lp.findlaw.com/4th/026895P> (accessed August 21, 2003).

⁴⁹⁹ Order, pp. 9-11, 14, *Hamdi v. Rumsfeld* (E.D. Va. August 16, 2002) (No. 2: 02 CV 439), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums81602ord.pdf> (accessed August 21, 2003).

⁵⁰⁰ Katherine Q. Seelye, "Judge Questions Detention of American in War Case," *New York Times*, August 13, 2002.

⁵⁰¹ *Hamdi v. Rumsfeld* (4th Cir. January 8, 2003) (No. 02-7338), available at <http://www.nimj.org> (accessed August 5, 2003).

⁵⁰² *Ibid.*, pp. 18-19.

⁵⁰³ *Ibid.*, pp. 24, 45, and 51. The court concluded that "[t]he Constitution does not entitle him to a searching review of the factual determinations underlying his seizure." *Ibid.*, p. 50.

⁵⁰⁴ Order, pp. 41, 45, *Hamdi v. Rumsfeld* (4th Cir. July 9, 2003) (No. 02-7338) (Judge Michael Luttig, dissenting) (original emphasis), available at <http://www.nimj.org> (accessed August 10, 2003); *Ibid.*, p. 63 (Judge Diana Gribbon Motz, dissenting). 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 August 6, 2003).

⁵⁰⁵ Order, p. 64, *Hamdi v. Rumsfeld* (4th Cir. July 9, 2003) (No. 02-7338) (Judge Diana Gribbon Motz, dissenting), available at <http://www.nimu.org> (accessed August 10, 2003); see also *Ibid.*, p. 43 (Judge Michael Luttig, dissenting).

⁵⁰⁶ The statute defines "material support or resources" as "currency or other financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C.A. § 2339A(b), available at http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/i/chapters/113b/sections/section_2339a.html (accessed September 2, 2003), amended by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁵⁰⁷ *Humanitarian Law Project v. Reno*, 205 F.3d 1130, p. 1138 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001). See also Dan Eggen and Steve Fainaru, "For Prosecutors, 1996 Law is Key Part of Anti-Terror Strategy," *Washington Post*, October 15, 2002.

⁵⁰⁸ Dan Eggen and Steve Fainaru, "For Prosecutors, 1996 Law is Key Part of Anti-Terror Strategy," *Washington Post*, October 15, 2002.

⁵⁰⁹ The judge in the John Walker Lindh case, for example, upheld the constitutionality of the statute. *U.S. v. Lindh*, 212 F. Supp. 2d 541, pp. 574-575 (E.D. Va. 2002). The judge in the prosecution of defense attorney Lynne Stewart, however, found that the statute was unconstitutional as applied to her case. Opinion and Order, pp. 16-24, *U.S. v. Sattar* (S.D.N.Y. July 22, 2003) (02 Cr. 3951 (JGK)), available at <http://news.findlaw.com/hdocs/docs/terrorism/ussattar72203opn.pdf> (accessed September 3, 2003). See Edward Epstein, "Judge Rejects Lindh's Pleas to Drop Charges," *San Francisco Chronicle*, June 18, 2002; "Court Dismisses Two Counts of Supporting Terror Group Against Defense Lawyer Lynne Stewart," *New York Law Journal*, July 28, 2003.

⁵¹⁰ Mike Carter and David Heath, "Seattle Man's Arrest in Denver Tied to International Investigation," *Seattle Times*, July 25, 2002.

⁵¹¹ Indictment, *U.S. v. Ujaama* (W.D. Wa. August 28, 2002), (No. ____), available at <http://news.findlaw.com/hdocs/docs/terrorism/usujaama82802ind.pdf> (accessed August 22, 2003).

⁵¹² Department of Justice, Press Release: "Ernest James Ujaama Pleads Guilty to Conspiracy to Supply Goods and Services to the Taliban, Agrees to Cooperate with Terrorism Investigation," April 14, 2003, available at http://www.usdoj.gov/opa/pr/2003/April/03_crm_237.htm (accessed August 22, 2003).

⁵¹³ Statement of Jeffrey G. Collins, United States Attorney, Regarding the Case of *United States v. Koubriti, et al.*, available at <http://www.usdoj.gov/usao/mie/pr/koubriti.html> (accessed August 6, 2003). See also "2 Arab Immigrants Found Guilty of Conspiring to Aid Terrorists," *New York Times/AP*, June 3, 2003. The Second Superseding Indictment in the case, *U.S. v. Koubriti* (E.D. Mich. August 28, 2002) (No. 01-80778), is available at <http://news.findlaw.com/hdocs/docs/terrorism/uskoubriti82802ind.pdf>, (accessed August 6, 2003).

⁵¹⁴ The determination is available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf> (accessed August 21, 2003).

⁵¹⁵ Attorney General John Ashcroft, Speech: "Transcript of the Attorney General John Ashcroft Regarding the Transfer of Abdullah Al Muhajir (Born José Padilla) to the Department of Defense as an Enemy Combatant, June 10, 2002, available at <http://www.usdoj.gov/ag/speeches/2002/061002agtranscripts.htm> (accessed August 21, 2003).

⁵¹⁶ Amended Petition for Habeas Corpus, *Padilla v. Bush* (S.D.N.Y. June 19, 2002) (Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush61902apet.pdf> (accessed August 21, 2003); Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, p. 8, *Padilla v. Rumsfeld* (S.D.N.Y. August 27, 2002) (Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf> (accessed August 27, 2003).

⁵¹⁷ Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, p. 11, *Padilla v. Rumsfeld* (S.D.N.Y. August 27, 2002) (Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf> (accessed August 21, 2003).

⁵¹⁸ *Ibid.*, pp. 34-35.

⁵¹⁹ Senate Joint Resolution 23, Authorization for Use of Military Force, September 18, 2001, Pub. L. No. 107-40 115 U.S. Stat. 224 (2001), available at http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm (accessed August 6, 2003). The resolution authorized the president to use "all necessary...force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

⁵²⁰ Three amicus briefs filed in the Second Circuit Court of Appeals by diverse groups of individuals and organizations (including the Lawyers Committee for Human Rights) are available at http://www.lchr.org/us_law/us_law_12.htm (accessed August 21, 2003).

⁵²¹ 18 U.S.C. § 4001(a), available at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=4001 (accessed August 23, 2003).

⁵²² Moreover, Congress can not have believed that the "use of force" resolution had granted the executive complete discretion to detain without charge and indefinitely any U.S. citizen suspected of terrorism, or else it would not, six weeks later, have insisted on specific constraints on the executive's power to detain suspected non-citizen terrorists, in passing the USA PATRIOT Act, Pub. L. No 107-56, 115 Stat. 272 (October 26, 2001). Under that legislation, the executive must commence criminal or immigration removal proceedings against a non-citizen detained on suspicion of terrorism within seven days of the detention. If the individual's removal is "unlikely in the reasonably foreseeable future," the detention may continue, for periods of up to six months, subject to review by the Attorney General. Detention decisions under this statute are reviewable in federal habeas corpus proceedings. 8 U.S.C. § 1226a, available at http://caselaw.lp.findlaw.com/cascode/uscodes/8/chapters/12/subchapters/ii/parts/iv/sections/section_1226a.html (accessed August 25, 2003).

⁵²³ *Ex Parte Milligan*, 71 U.S. 2 (1866), p. 140, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=cas&court=us&vol=71&page=2> (accessed August 23, 2003).

⁵²⁴ *Ibid.*, p. 131. The only distinction between the *Milligan* facts and those in *Padilla* is Padilla's alleged travel to Pakistan, an important U.S. ally in the fight against terrorism, and an entirely lawful destination for Americans to visit. See Jennifer K. Elsea, "Presidential Authority to Detain 'Enemy Combatants,'" draft of an article to appear in *Presidential Studies Quarterly*, Vol. 33, No. 3 (September 2003), available at <http://www.nimj.org> (accessed August 5, 2003).

⁵²⁵ *Ex Parte Milligan*, 71 U.S. 2 (1866), p. 121, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=cas&court=us&vol=71&page=2> (accessed August 23, 2003).

⁵²⁶ *Padilla v. Bush* (S.D.N.Y. December 4, 2002) (No. 01 Civ. 4445 (MBM)), p. 74, available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush120402opn.pdf> (accessed August 5, 2003). Certain other documents relating to the case, are available at <http://www.findlaw.com/legalnews/us/terrorism/cases/index.html> (accessed August 5, 2003). Some other materials on the case, not available on the findlaw site, can be accessed through <http://www.nimj.org>. (accessed August 5, 2003).

⁵²⁷ *Padilla v. Bush* (S.D.N.Y. December 4, 2002) (No. 01 Civ. 4445 (MBM)), pp. 96-97, available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush120402opn.pdf> (accessed August 5, 2003).

⁵²⁸ *Ibid.*, p. 75. To satisfy its burden, the executive submitted a Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, dated August 27, 2002, which summarized the government's version of the story, based on Mobbs' "review of] government records and reports about José Padilla." The government also submitted a classified version of the same document. The six-page unclassified version is available at <http://news.findlaw.com/hdocs/docs/Padilla/Padillabush82702mobbs.pdf> (accessed August 22, 2003).

⁵²⁹ Padilla's appeal, Petitioner-Appellee-Cross-Appellant Brief (2d Cir. July 23, 2003) (No. 03-2235 and No. 03-2438), is available at http://www.nimj.com/documents/2d_Cir_brief_final_072403.doc (accessed August 23, 2003). The government also appeals on several technical grounds, including claims that Padilla's lawyer, Donna Newman, does not have sufficiently close ties to Padilla to constitute his "next friend," for purposes of the habeas corpus filing; and that since Padilla is no longer physically present in New York, the New York court no longer has jurisdiction to hear the matter.

⁵³⁰ Respondents' Motion for Reconsideration in Part, p. 6, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (No. 02 Civ. 4445 (MBM)), available at <http://www.state.de.us/cjc/Gov%20motion%20for%20Reconsideration.doc> (accessed August 21, 2003).

⁵³¹ Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (02 Civ. 4445 (MBM)) ("Jacoby Declaration"). The Jacoby Declaration was attached to the Respondents' Motion for Reconsideration in Part, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (No. 02 Civ. 4445 (MBM)), available at <http://www.state.de.us/cjc/Gov%20motion%20for%20Reconsideration.doc> (accessed August 21, 2003). The Jacoby Declaration is not, however, included in the version of this Motion available online. Substantial excerpts from the Jacoby Declaration are quoted by Judge Mukasey in his Opinion and Order, pp. 15-18, *Padilla v. Rumsfeld* (S.D.N.Y. March 11, 2003) (No. 02 Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums31103opn.pdf> (accessed August 21, 2003).

⁵³² Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, pp. 4-5, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (02 Civ. 4445 (MBM)); also quoted by Judge Mukasey in Opinion and Order, p. 15, *Padilla v. Rumsfeld* (S.D.N.Y. March 11, 2003) (No. 02 Civ. 4445 (MBM)); see also Respondents' Motion for Reconsideration in Part, p. 4, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (No. 02 Civ. 4445 (MBM)) ("The government's concern with the effect of requiring that Padilla be permitted to meet with counsel...is not merely that counsel would interfere with questioning. Instead...directly interposing counsel – for any purpose and for any duration – would threaten permanently to undermine the military's efforts to develop a relationship of trust and dependency that is essential to effective interrogation.") (emphasis added).

⁵³³ UN Human Rights Committee, CCPR General Comment No. 20 on Article 7 (1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+20.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+20.En?OpenDocument) (accessed August 12, 2003). The International Covenant on Civil and Political Rights (1976) (CCPR) is available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (accessed August 12, 2003). Ratified by the United States in 1992, the CCPR sets forth minimum human rights standards applicable to all individuals, in times of war as well as peace. Article 4 of the CCPR expressly prohibits suspension of the Article 7 prohibitions even "[i]n time of public emergency which threatens the life of the nation."

⁵³⁴ *Velasquez Rodriguez* case, Inter-American Court of Human Rights Judgment of July 29, 1988, Series C, No. 4, ¶ 156 Article 5(2) of the American Convention on Human Rights prohibits “torture or...cruel, inhuman, or degrading punishment or treatment....[and requires that a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” American Convention on Human Rights (1978), available at <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed August 21, 2003). The United States is a signatory to the American Convention, but has not ratified it.

⁵³⁵ Mary Beth Pfeiffer, “Box’ Cell Suicides Haunt Families,” *Poughkeepsie Journal*, April 14, 2002, available at <http://www.poughkeepsiejournal.com/projects/suicide/lo041402s2.shtml> (accessed August 21, 2003). Fifteen of 39 suicides in the three-year period occurred among prisoners confined in the special disciplinary cells – “the modern equivalent of solitary confinement.” Mary Beth Pfeiffer, “Suicides in Solitary are Abnormally High,” *Poughkeepsie Journal*, April 14, 2003, available at <http://www.poughkeepsiejournal.com/projects/suicide/lo041402s3.shtml> (accessed August 21, 2003).

⁵³⁶ U.S. Department of State, Initial Report of the United States of America to the UN Committee Against Torture, submitted October 15, 1999, Part II(A)(C), available at http://www.state.gov/www/global/human_rights/torture_index.html (accessed August 6, 2003).

⁵³⁷ See Jerry Markon, “Federal Court Dismisses Appeal in Moussaoui Case,” *Washington Post*, June 26, 2003 (“Government officials have said they will likely move the case to a military tribunal if they lose the appeal, which could imperil future prosecutions of other terrorism suspects in the civilian court system.”); see also Philip Shennon 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; 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 September 16, 2003).

⁵³⁸ Katharine Q. Seelye, “Justice Department Decision to Forego Tribunal Bypasses Pentagon,” *New York Times*, December 13, 2002, available at http://www.law.uchicago.edu/tribunals/nyt_121301.html (accessed August 5, 2003).

⁵³⁹ Joseph I. Lieberman, “No Excuse for Second-Class Justice,” *Washington Post*, January 2, 2002 (quoting Vice President Cheney), available at http://www.law.uchicago.edu/tribunals/wp_010202.html (accessed August 5, 2003).

⁵⁴⁰ Larry Margasak, “Government Argues Moussaoui Can’t Quiz Witness,” Associated Press, June 3, 2003, available at <http://www.fortwayne.com/mld/fortwayne/news/5998956.htm> (accessed August 21, 2003).

⁵⁴¹ The court has, over Moussaoui’s objections, appointed stand-by counsel to assist Moussaoui’s defense and act on his behalf. See Order, *U.S. v. Moussaoui* (E.D. Va. June 14, 2002) (No. 01-455-A) (dismissing court-appointed counsel, authorizing Moussaoui to represent himself (pro se), and mandating appointment of stand-by counsel), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss61402proseord.pdf> (accessed August 21, 2003); see also Order, *U.S. v. Moussaoui* (E.D. Va. September 26, 2002) (No. 01-455-A) (denying defendant Moussaoui’s Motion to Stop Dunham [sic] Playing the Superstar), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss92602ord.pdf> (accessed August 21, 2003).

⁵⁴² Toni Locy, “Some Fear Moussaoui-Trial Mockery,” *USA Today*, May 16, 2002 (“some legal experts and lawmakers say that... Ashcroft’s fears of a circus-like trial might be realized.... ‘If they don’t watch it, a man like that will use our courts to his advantage and make a mockery out of our rules and our jurisprudence,’ says Sen. Richard Shelby, R-Ala.”), available at <http://www.usatoday.com/news/washington/2002/05/17/moussaoui.htm> (accessed August 21, 2003); Jim Malone, “U.S. Prosecutors Prepare for Moussaoui Trial,” *VOANews.com*, December 14, 2001 (“the Moussaoui trial is certain to draw intense media attention, and some analysts fear that the proceedings could take on a circus-like atmosphere”), available at <http://www.help-for-you.com/news/Dec2001/Dec14/PRT14-17Article.html> (accessed August 21, 2003).

⁵⁴³ Superseding Indictment, pp. 6, 10-13, 17, *U.S. v. Moussaoui* (E.D. Va. July 16, 2002) (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss71602spind.pdf> (accessed August 21, 2003).

⁵⁴⁴ “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.

⁵⁴⁵ Philip Shenon, “Setback for Government in Bid for 9/11 Trial,” *New York Times*, June 3, 2003 (quoting Judge Brinkema).

⁵⁴⁶ See Brief for Petitioners-Appellants, p. 13, *U.S. v. Moussaoui* (4th Cir. March 14, 2003) (No. 03-4162). (The January 31, 2003 order itself has not been released publicly.)

⁵⁴⁷ *Ibid.*, p. 3.

⁵⁴⁸ *Ibid.*, p. 15.

⁵⁴⁹ Ibid., p. 31.

⁵⁵⁰ “U.S. Fears Damage From Moussaoui Witness,” Associated Press, June 4, 2003, available at <http://asia.news.yahoo.com/030603/ap/d7refao80.html> (accessed August 22, 2003).

⁵⁵¹ *U.S. v. Moussaoui* (4th Cir. June 26, 2003) (No. 03-4162), pp. 13-14, available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss62603opn.pdf> (accessed August 22, 2003).

⁵⁵² Government’s Position Regarding the Court-Ordered Deposition, p. 1, *U.S. v. Moussaoui* (E.D. Va. July 14, 2003) (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss71403pnodep.pdf> (accessed August 5, 2003).

⁵⁵³ Ibid. (“The Government recognizes that the Attorney General’s objection means that the deposition cannot go forward and obligates the Court now to dismiss the indictment unless the Court finds that the interests of justice can be served by another action.”) See also Jerry Markon, “Moussaoui Prosecutors Defy Judge,” *Washington Post*, July 15, 2003 (“The expected punishment is the dismissal of the charges, but [Judge] Brinkema could choose lesser consequences, such as removing the death penalty as an option, reducing the charges or striking all mentions of Binalshibh from the indictment”).

⁵⁵⁴ Philip Shenon, “Future of Terror Case Is In Judge’s Hands,” *New York Times*, July 16, 2003 (“Administration officials said that if the charges were dismissed, Mr. Moussaoui would almost certainly be moved to a military tribunal, ending the Justice Department’s involvement in the case and jeopardizing plans to prosecute other Qaeda suspects in civilian court”). But see William J. Haynes, General Counsel of DOD: “Mr. Moussaoui is in the Article III courts, and as far as I’m concerned that’s where he’ll remain. So I don’t want to speculate about what might happen to him.” American Enterprise Institute, Panel Transcript: “Prosecuting Terrorists, Civil or Military Courts?” August 8, 2003, available at <http://www.aei.org/events/eventID.556/transcript.asp> (accessed August 22, 2003). On August 29, 2003, Judge Brinkema ordered similar satellite depositions for two additional suspected terrorists in U.S. detention. On September 10, 2003, the government notified the court that it would refuse to comply with this order as well. Order, *U.S. v. Moussaoui* (E.D. Va. August 29, 2003) (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss82903ord.pdf> (accessed September 12, 2003); Government’s Position Regarding the Depositions Ordered August 29, 2003, *U.S. v. Moussaoui* (E.D. Va. September 10, 2003) (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss91003gopp.pdf> (accessed September 12, 2003).

⁵⁵⁵ Eric Lichtblau, “Bush Declares Student an Enemy Combatant,” *New York Times*, June 23, 2003.

⁵⁵⁶ Indictment, *U.S. v. Al-Marri* (C.D. Ill. May 16 2003) (No. 03-10044) available at <http://news.findlaw.com/hdocs/docs/almarri/usalmarri2003ind.pdf> (accessed August 23, 2003). Other documents in the case are available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index2.html> (accessed August 23, 2003).

⁵⁵⁷ Eric Lichtblau, “Bush Declares Student an Enemy Combatant,” *New York Times*, June 23, 2003.

⁵⁵⁸ Al-Marri’s filings alleged that the FBI searched his house and seized evidence without his consent and without a warrant on December 11, 2001. The same day, on which Al-Marri had been fasting in observance of Ramadan, he asserts that the FBI interrogated him at their office for six hours, without permitting him to eat until they finished questioning him at 10:00 p.m. Memorandum of Law in Support of Pretrial Motions, pp. 12, 18, *U.S. v. Al-Marri* (C.D. Ill. June 18, 2003) (No. 03-10044), available at <http://news.findlaw.com/hdocs/docs/almarri/usalmarri61803dmol.pdf> (accessed August 21, 2003). See also Michael Isikoff and Mark Hosenball, “Distorted Intelligence?,” *Newsweek* Online, June 25, 2003, available at <http://www.msnbc.com/news/931306.asp?0cv=KB10> (accessed August 6, 2003).

⁵⁵⁹ Petition for a Writ of Habeas Corpus, p. 9, *Al-Marri v. Bush* (C.D. Ill. July 7, 2003) (No. 03 CV 1220), available at <http://news.findlaw.com/hdocs/docs/almarri/almarribush70703pet.pdf> (accessed August 21, 2003). The facts and procedural history are recounted in pages 3-12 of the Petition.

⁵⁶⁰ Ibid., pp. 10-11. Copies of the motion to dismiss, the presidential determination, and the order dismissing the proceedings are at Exhibits 6 and 7 to the habeas corpus petition.

⁵⁶¹ Ibid., p. 8.

⁵⁶² Ibid., Exhibit 6.

⁵⁶³ Department of Defense, News Release: “Enemy Combatant Taken into Custody,” June 23, 2003, available at <http://www.globalsecurity.org/military/library/news/2003/06/mil-030623-dod01.htm> (accessed August 6, 2003). Officials implied that relevant information had been obtained from Khalid Shaikh Mohammed. “Qatar Man Named al-Qaeda Enemy Combatant,” *USA Today/AP*, June 23, 2003.

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CHAPTER FIVE: THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS

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