Above the Law: Executive Power after September 11 in the United States

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Justice today, injustice tomorrow. That is not good government.

- Asante proverb, Ghana

Good Government Under Law

In fourteenth century Italy, Ambrogio Lorenzetti painted frescoes in Siena's city hall depicting good and bad government through allegorical figures. Rendered in shades of gold, cobalt blue, red, and ochre, the fresco of good government depicts Justitia twice, reflecting her cardinal importance. In one classic image, she sits balancing the scales held by wisdom. The fresco of bad government presents the enthroned figure of Tyrannia, who sits above a vanquished Justitia, pieces of broken scales at her side. Lorenzetti's message, drawing on a revolution in political thought, was clear: justice is central to good government. In bad government, the ruling power places himself above a defeated and supine Justitia. Justice no longer protects the individual—the executive acts above the law and without restraint.

In Renaissance Siena, as elsewhere in Western Europe, officials who were part and parcel of the ruling power meted out justice. Modern governments have tried to ensure justice by creating an independent and impartial judiciary, capable of holding the government as well as the governed accountable for breaking the law. Certainly, the separation of the courts from the executive branch and the ability of the courts to scrutinize the constitutionality of executive actions has been a crucial feature of the legal framework in the United States. Indeed, it has been the lynchpin for the rule of law and the protection of human rights in that country.

Nevertheless, since taking office, U.S. President George W. Bush has governed as though he had received an overwhelming mandate for policies that emphasize strong executive powers and a distrust—if not outright depreciation—of the role of the judiciary. The Bush administration has frequently taken the position that federal judges too often endorse individual rights at the expense of policies chosen by the executive or legislative branches of government, and it has looked to nominate judges who closely

share its political philosophy. But the concern is more fundamental than specific judges or decisions. Rather, the administration seems intent on shielding executive actions deemed to promote national security from any serious judicial scrutiny, demanding instead deference from the courts on even the most cherished of rights, the right to liberty.

Much of the U.S. public's concern about post-September 11 policies has focused on the government's new surveillance powers, including the ability to peruse business records, library files, and other data of individuals against whom there may not even be any specific suspicion of complicity with terrorism. These policies potentially affect far more U.S. citizens than, for example, the designation of "enemy combatants," or the decision to hold individuals for months in prison on routine visa charges. But the latter efforts to diminish the right to liberty and to curtail or circumvent the courts' protection of that right may be far more dangerous to the U.S. polity as a whole. Critics of the administration's anti-terrorism efforts have raised concerns that civil liberties are being sacrificed for little benefit in national security. But those critiques have generally failed to grapple with more fundamental questions: who should decide how much protection should be afforded individual rights and who should determine what justice requires—the executive or the judiciary? And who should determine how much the public is entitled to know about domestic anti-terrorist policies that infringe on individual rights?

Many of the Bush administration's post-September 11 domestic strategies directly challenge the role of federal and administrative courts in restraining executive action, particularly action that affects basic human rights. Following September 11, the Bush administration detained over one thousand people presumed guilty of links to or to have knowledge of terrorist activities and it impeded meaningful judicial scrutiny of most of those detentions. It has insisted on its right to withhold from the public most of the names of those arrested in connection with its anti-terrorism efforts. It has designated persons arrested in the United States as "enemy combatants" and claims authority to hold them incommunicado in military prisons, without charges or access to counsel. It insists on its sole authority to keep imprisoned indefinitely and virtually incommunicado hundreds of men at its military base at Guantánamo Bay, Cuba, most of whom were taken into custody during the U.S. war in Afghanistan. It has authorized military trials of foreign detainees under rules that eschew a meaningful right of defense and civilian appellate review.

In all of these actions, the Bush administration has put the ancient right to habeas corpus under threat, perhaps unsurprisingly since habeas "has through the ages been

jealously maintained by courts of law as a check upon the illegal usurpation of power by the executive."[1] Habeas corpus, foreshadowed in 1215 in the *Magna Carta* and enshrined in the U.S. Constitution after centuries of use in England, guarantees every person deprived of his or her liberty a quick and efficacious check by the courts against "all manner of illegal confinement."[2]

The Bush administration argues that national security—the need to wage an all out "war against terrorism"—justifies its conduct. Of course, there is hardly a government that has not invoked national security as a justification for arbitrary or unlawful arrests and detentions. And there is hardly a government that has not resisted judicial or public scrutiny of such actions. But the administration's actions are particularly troubling and the damage to the rule of law in the United States may be more lasting because it is hard to foresee an endpoint to the terrorist danger that the administration insists warrants its actions. It is unlikely that global terrorism will be defeated in the foreseeable future. Does the U.S. government intend to hold untried detainees for the rest of their lives? Does it intend to keep the public from knowing who has been arrested until the last terrorist is behind bars?

U.S. anti-terrorism policies not only contradict principles woven into the country's political and legal structure, they also contradict international human rights principles. The diverse governmental obligations provided for in human rights treaties can be understood as obligations to treat people justly. The imperative of justice is most explicitly delineated with regard to rights that are particularly vulnerable to the coercive or penal powers of government, such as the right to liberty of person. Human rights law recognizes that individual freedom should not be left to the unfettered whim of rulers. To ensure restraints on the arbitrary or wrongful use of a state's power to detain, the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, requires that the courts—not the executive branch—decide the legality of detention.[3] The ICCPR also establishes specific requirements for court proceedings where a person's liberty is at stake, including that the proceedings be public. Even if

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[1] *Sec'y of State for Home Affairs v. O'Brien*, 1923 A.C. 603, 609.

[2] Sir William Blackstone, *Commentaries on the Laws of England*, 1765-1769, Book III, Ch. 8, p. 131.

[3] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, articles 9 and 14.

there were to be a formally declared state of emergency, restrictions on the right to liberty must be "limited to the extent strictly required by the exigencies of the situation."[4]

Justice cannot exist without respect for human rights. As stated in the preamble of the Universal Declaration of Human Rights, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The Bush administration's rhetoric acknowledges human rights and insists that the fight against terrorism is a fight to preserve "the non-negotiable demands of human dignity, the rule of law, limits on the power of the state…and equal justice," as President Bush told the graduating class of the West Point military academy in June 2002. But the Bush administration's actions contradict such fine words. Taken together, the Bush administration's anti-terrorism practices represent a stunning assault on basic principles of justice, government accountability, and the role of the courts.

It is as yet unclear whether the courts will permit the executive branch to succeed. Faced with the government's incantation of dangers to national security if it is not allowed to do as it chooses, a number of courts have been all too ready to abdicate their obligation to scrutinize the government's actions and to uphold the right to liberty. During previous times of national crisis the U.S. courts have also shamefully failed to protect individual rights—the internment of Japanese Americans during World War II, which received the Supreme Court's seal of approval, being one notorious example. As new cases arising from the government's actions make their way through the judicial process, one must hope the courts will recognize the unprecedented dangers for human rights and justice posed by the Bush administration's assertion of unilateral power over the lives and liberty of citizens and non-citizens alike.

Arbitrary Detentions of Visa Violators

In a speech shortly after the September 11 attacks, U.S. Attorney General John Ashcroft said, "Let the terrorists among us be warned. If you overstay your visa, even by one day,

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[4] The U.N. Human Rights Committee, the body that monitors compliance with the International Covenant on Civil and Political Rights, states in its commentary to article 4 on states of emergency, that limitations to derogation "relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.… [T]he obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers." Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 4.

we will arrest you. If you violate a local law, you will be put in jail and kept in custody for as long as possible."[5] The Attorney General carried out his threat, using a variety of strategies to secure the detention of more than 1,200 non-citizens in a few months. We do not know how many, if any, terrorists were in fact included among these detainees. Only a handful was charged with terrorism-related crimes. But we do know that the haphazard and indiscriminate process by which the government swept Arabs and Muslims into custody resulted in hundreds of detentions that could not be effectively reviewed or challenged because the executive weakened or ignored the usual checks in the immigration system that guard against arbitrary detention.

The right to liberty circumscribes the ability of a government to detain individuals for purposes of law enforcement—including protection of national security. While the right is not absolute, it is violated by arbitrary detentions, i.e., detentions that are either not in accordance with the procedures established by law or which are manifestly disproportional, unjust, unpredictable, or unreasonable. International and U.S. constitutional law mandate various safeguards to protect individuals from arbitrary detention, including the obligations of authorities to inform detainees promptly of the charges against them; the obligation to permit detainees to be released on bail pending conclusion of legal proceedings absent strong countervailing reasons such as the individual's danger to the community or flight risk; and the obligation to provide a detainee with effective access to a court to review the legality of the detention. In the case of hundreds of post-September 11 detainees in the United States, the government chose as a matter of policy and practice to ignore or weaken these safeguards.

It did so because one of its key post-September 11 strategies domestically was to detain anyone who it guessed might have some connection to past or future terrorist activities, and to keep them incarcerated as long as necessary to complete its investigations into those possible connections. U.S. criminal law prohibits detention solely for the purpose of investigation, i.e., to determine whether the detained individual knows anything about or is involved in criminal activities. The law also prohibits "preventive" detentions, incarceration designed to prevent the possibility of future crimes. Detention must be predicated on probable cause to believe the suspect committed, attempted, or conspired to commit a crime. Judges—not the executive branch—have the ultimate say, based on evidence presented to them, as to whether such probable cause exists. The Bush administration avoided these legal strictures against investigative or preventive detentions through the use of arrests for immigration law violations and "material

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[5] Attorney General John Ashcroft, *Prepared Remarks to the U.S. Mayors Conference*, Washington, D.C., October 25, 2001.

witness" warrants. At the same time it avoided or limited the ability of detainees to avail themselves of protections against arbitrary detention, including through meaningful judicial review.

Immediately after the September 11 attacks, the Department of Justice began a hit or miss process of questioning thousands of non-citizens, primarily foreign-born Muslim men, who it thought or guessed might have information about or connections to terrorist activity. At least 1,200 non-citizens were subsequently arrested and incarcerated, 752 of whom were charged with immigration violations.[6] These so-called "special interest" immigration detainees were presumed guilty of links to terrorism and incarcerated for months until the government "cleared" them of such connections. By February 2002 the Department of Justice acknowledged that most of the original "special interest" detainees were no longer of interest to its anti-terrorist efforts, and none were indicted for crimes related to the September 11 attacks. Most were deported for visa violations.

In effect, the Department of Justice used administrative proceedings under the immigration law as a proxy to detain and interrogate terrorism suspects without affording them the rights and protections that the U.S. criminal system provides. The safeguards for immigration detainees are considerably fewer than for criminal suspects, and the Bush administration worked to weaken the safeguards that do exist. Human Rights Watch and other groups have documented the various ways the administration ran roughshod over the rights of these special interest detainees.[7] In June 2003, the Department of Justice's Office of the Inspector General released a comprehensive report on the treatment of the September 11 detainees that confirmed a pattern of abuses and delays for the "detainees, who were denied bond and the opportunity to leave the country…. For many detainees, this resulted in their continued detention in harsh conditions of confinement."[8]

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[6] Because the government announced the number of persons arrested as "special interest" detainees only in November 2001, the total number eventually held as such has never been made public.

[7] *See* U.S. Department of Justice, Office of the Inspector General (OIG), *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*, April 2003 (hereinafter OIG 9/11 Report). *See also* Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, Vol. 14, No. 4 (G), August 2002; Migration Policy Institute, *America's Challenge, Domestic Security, Civil Liberties, and National Unity After September 11*, June 26, 2003.

[8] OIG 9/11 Report, p. 71.

For example, unlike criminal suspects, immigration detainees have no right to court-appointed counsel although they do have a right to seek private counsel at their own expense. But in the case of the September 11 detainees, public officials placed numerous obstacles in the way of obtaining legal representation.[9] Detainees were not informed of their right to counsel or were discouraged from exercising that right. The Immigration and Naturalization Service (INS), a division of the U.S. Department of Justice,[10] failed to inform attorneys where their clients were confined or when hearings were scheduled. Detainees in some facilities were permitted one weekly phone call, even to find or speak to an attorney; a call that did not go through nonetheless counted as the one permissible call. Not having prompt access to lawyers, these "special interest" detainees were unable to protest violations of immigration rules to which they were subjected, including being held for weeks without charges (some detainees were held for months before charges were filed). The government never revealed the alleged links to terrorism that prompted their arrest, leaving them unable to prove their innocence. The government also took advantage of the lack of counsel to conduct interrogations that typically addressed criminal as well as immigration matters (under criminal law, suspects have the right to have an attorney present during custodial interrogations, including free legal counsel if necessary).

In most immigration proceedings where non-citizens have violated the provisions of their visa, their detention is short. They will have a bond hearing relatively quickly after charges have been filed, and unless there is reason to believe the detainee is a danger to the community or will abscond, immigration judges will permit the detainee to be released on bond. With regard to the special interest detainees, however, the Department of Justice adopted several policies and practices to ensure they were denied release until it cleared them of terrorism links. For example, under immigration procedure, immigration judges do not automatically review whether there is probable cause for detention; hearings are not scheduled until after charges have been filed. The government's delay of weeks, and in some cases months, in filing charges had the practical effect of creating long delays in judicial review of the detentions. Additionally,

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[9] OIG 9/11 Report, p. 130 (stating that "[w]e found that the BOP's [Bureau of Prisons] decision to house September 11 detainees in the most restrictive confinement conditions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel.")

[10] Until November 2002, the Immigration and Naturalization Service (INS) was a part of the United States Department of Justice. However, most of the former INS functions since have been divided into the Bureau of Citizenship and Immigration Services (BCIS), handling immigration processing and citizenship services; and the Bureau of Immigration and Customs Enforcement (BICE) of the Directorate of Border and Transportation, handling border control and immigration enforcement. Both Bureaus are under the direction of the Department of Homeland Security (DHS), which is a department of the federal government of the United States, and was created partially in response to the September 11 attacks. The new department was established on November 25, 2002 and officially began operations on January 24, 2003.

the government urged immigration judges to either set absurdly high bonds that the detainee could never pay or simply to deny bond, arguing that the detainee should remain in custody until the government was able to rule out the possibility of links to or knowledge of the September 11 attacks.

The INS also issued a new rule that permitted it to keep a detainee in custody if the initial bond was more than $10,000, even if an immigration judge ordered him released; since the INS sets the initial bond amount, this rule gave the Department of Justice the means to ensure detainees would be kept in custody. In addition, there were cases in which the Department of Justice refused to release a special interest detainee even if a judge ordered the release because the detainee had not yet been "cleared" of connections to terrorism. Indeed, the INS continued to hold some detainees even after they had been ordered deported because of lack of "clearance" even though the INS is required to remove non-citizens expeditiously, and in any event within 90 days of a deportation order as required by statute. In short, through these and other mechanisms, the immigration process to which the special interest detainees were subjected effectively reversed the presumption of innocence—non-citizens detained for immigration law violations were kept jailed until the government concluded they had no ties to criminal terrorist activities. As a result, special interest detainees remained in detention for an average of eighty days, and in some cases up to eight months, while they waited for the Federal Bureau of Investigation (FBI) to clear them of links to terrorism.

The long delays were endured by non-citizens who were picked up accidentally by the FBI or INS as well as those the government actually had reason to believe might have a link to terrorism. Once a person was labeled of "special interest," there were no procedures by which those who in fact were of no interest could be processed more quickly. As the Office of the Inspector General noted, the lengthy investigations "had enormous ramifications," since detainees "languished" in prison while waiting for their names to be cleared.[11]

Despite the Inspector General's scathing criticism of the government's treatment of the detainees, the Department of Justice was unrepentant, issuing a public statement that it makes "no apologies for finding every legal way possible to protect the American public from further terrorist attacks.… The consequences of not doing so could mean life or

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[11] OIG 9/11 Report, p.71.

death."[12] As of October 2003, the executive branch had adopted only two of the Inspector General's twenty-one recommendations designed to prevent a repetition of the problems documented.

Secret Arrests and Hearings of Special Interest Detainees

History leaves little doubt that when government deprives persons of their liberty in secret, human rights and justice are threatened. In the United States, detentions for violations of immigration laws are traditionally public. Nevertheless, of the 1,200 people reported arrested in connection with the post-September 11 investigations in the United States, approximately one thousand were detained in secret.[13] The government released the names of some one hundred detained on criminal charges, but it has refused to release the names, location of detention, lawyers' names, and other important information about those held on immigration charges. Even now, it refuses to release the names of men who have long since been deported.

The public secrecy surrounding the detentions had a very real and negative impact on detainees' ability to defend themselves. It made it difficult for family members and lawyers to track the location of the detainees—who were frequently moved; it prevented legal services organizations from contacting detainees who might need representation; and it prevented organizations such as Human Rights Watch from getting in touch with detainees directly and talking to them about how they were treated during their arrests and detentions.

On October 29, 2001, Human Rights Watch and other groups sought the names of the detainees, their lawyers' names, and their places of detention under the U.S. Freedom of Information Act (FOIA)—legislation that mandates government disclosure of information subject to certain narrowly defined exceptions. The Department of Justice denied the request. When Human Rights Watch and the other groups went to court to

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[12] Department of Justice, *Statement of Barbara Comstock, Director of Public Affairs, Regarding the Inspector General's Report on 9/11 Detainees*, June 2, 2003.

[13] In November 2001, the U.S. government announced that 1,200 individuals were detained in connection with September 11. Of this number, some one hundred plus had their names revealed when they were criminally charged. Most were charged with relatively minor crimes, such as lying to FBI investigators. Only a handful of the one hundred plus were charged with terrorism-related crimes and none have been charged with involvement in the September 11 attacks. The government provided no further information regarding the number of additional persons detained. Given the public information disclosed on the persons criminally charged, Human Rights Watch estimates that at least one thousand were detained in secret.

challenge the government's denial, the government insisted that release of the names would threaten national security, speculating about possible scenarios of harm that could flow if the names were public. For example, it asserted that revealing the names would provide terrorists a road map to the government's anti-terrorism efforts. This argument appeared particularly specious since it was unlikely that a sophisticated terrorist organization would fail to know that its members were in the custody of the United States government, especially since detainees were free to contact whomever they wished.

A federal district court rejected the government's arguments for secrecy in August 2002 and ordered the release of the identities of all those detained in connection with the September 11 investigation. The judge called the secret arrests "odious to a democratic society…and profoundly antithetical to the bedrock values that characterize a free and open one such as ours."[14] However, in June 2003 the court of appeals reversed that decision. In a passionate dissent, one appellate judge noted:

> Congress…chose…to require meaningful judicial review of all government [FOIA] exemption claims…. For all its concern about the separation-of-powers principles at issue in this case, the court violates those principles by essentially abdicating its responsibility to apply the law as Congress wrote it.[15]

In October 2003, Human Rights Watch and twenty-one other organizations asked the U.S. Supreme Court to overturn the appellate decision and to compel the Department of Justice to release the names.

Meanwhile, the Department of Justice imposed blanket secrecy over every minute of 600 immigration hearings involving special interest detainees so that even immediate family members were denied access to the hearings. The policy of secrecy extended even to notice of the hearing itself: courts were ordered not to give out any information about

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[14] *Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp. 2d 94, 96 (D.C. Dist. 2002) (quoting *Morrow v. District of Columbia*, 417 F.2d 728, 741-742 (D.C. Cir. 1969)).

[15] *Center for National Security Studies, et al v. U.S. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (Tatel, J., dissenting).

whether a case was on the docket or scheduled for a hearing.[16] The Justice Department has never presented a cogent rationale for this closure policy, particularly since deportation proceedings are typically limited to the simple inquiry of whether the individual is lawfully present or has any legal reason to remain in the United States, an inquiry that should not require disclosure of any classified information. Moreover, if the Justice Department sought to present classified information during a hearing, simply closing those portions of the proceedings where such material was presented could have protected national security.

Newspapers brought two lawsuits challenging the secret hearings, alleging the blanket closure policy violated the public's constitutional right to know "what their government is up to." In one case in August 2002, an appellate court struck down the policy. The court minced no words in explaining just what was threatened by the government's insistence on secrecy, stating that:

> The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people.[17]

The government declined to appeal this decision to the Supreme Court.

In the second case, a federal appeals court upheld the closures, finding that the need for national security was greater than the right of access to deportation hearings. The Supreme Court declined to review that decision in May 2003. Significantly, in its brief filed in opposition to the Supreme Court hearing the case, the U.S. government distanced itself from the blanket closure policy, stating that it was not conducting any more secret hearings and that its policies relating to secret hearings were under review and would "likely" be changed.

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[16] *See Memorandum from Chief Immigration Judge Michael Creppy to all Immigration Judges and Court Administrators*, September 21, 2001 (outlining "additional security procedures" to be immediately applied in certain deportation cases designated by the Attorney General as special interest cases).

[17] *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

Material Witness Warrants

In addition to immigration charges, the Bush administration has used so-called material witness warrants to subject individuals of interest to its terrorism investigation to "preventive detention" and to minimize judicial scrutiny of these detentions. U.S. law permits detention of a witness when his or her testimony is material to a criminal proceeding, and when the witness presents a risk of absconding before testifying. According to the Department of Justice, the government has used the material witness law to secure the detention of less than fifty people (it has refused to release the exact number) in connection with the September 11 investigations.[18]

The U.S. government has obtained judicial arrest warrants for material witnesses by arguing that they have information to present to the grand juries investigating the crimes of September 11. The available information on these cases suggests that the government was misusing the material witness warrants to secure the detention of people it believed might have knowledge about September 11—but who could not be held on immigration charges and against whom there was insufficient evidence to bring criminal charges. In many of the cases, the witnesses were in fact never presented to a grand jury but were detained for weeks or months—under punitive prison conditions—while the government interrogated them and continued its investigations.[19] For example, Eyad Mustafa Alrabah was detained as a material witness for more than two months after he voluntarily went to an FBI office to report that he had briefly met four of the alleged hijackers at his mosque in March 2001. During his detention, he was routinely strip and cavity searched and held in isolation with the light constantly on in his cell. Alrabah, however, never testified in front of a grand jury.

The *Washington Post* reported in November 2002 that of the forty-four men it identified as being detained as material witnesses since September 11, 2001, nearly half had never been called to testify in front of a grand jury. In at least several cases, men originally held as material witnesses were ultimately charged with crimes—strengthening the suspicion that the government was using the material witness designation as a pretext until it had time to accumulate the evidence necessary to bring criminal charges. A number of the witnesses languished in jail for months or were eventually deported based

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[18] *See* Letter from Jamie E. Brown, *Acting Assistant Attorney General, Office of Legislative Affairs, to Rep. F. James Sensenbrenner, Jr., chairman, House Judiciary Committee,* May 13, 2003.

[19] *See* Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, Vol. 14, No. 4 (G), August 2002

on criminal and immigration charges unrelated to September 11 that were supported by evidence the government gathered while detaining them as material witnesses.

Material witness warrants are supposed to ensure the presentation of testimony in a criminal proceeding where the witness cannot otherwise be subpoenaed to testify and where there is a serious risk that the witness will abscond rather than testify. In September 11 cases, at least some courts have accepted with little scrutiny the government's allegations that these requirements are satisfied. At the insistence of the government, the courts have also agreed to restrict access by the detainees' lawyers to the government's evidence, making it difficult if not impossible for the lawyers to object to the necessity of detention. For example, in some cases lawyers were only able to review the evidence supporting the request for the warrant quickly in court and they were unable to go over the information carefully with their clients before the hearing started. In addition, the government has argued in at least some cases that the mostly male Arab and Muslim witnesses were flight risks simply because they are non-citizens (even though some are lawful permanent residents), and have family abroad. The government's argument amounted to no more than an astonishing assumption that millions of non-citizens living in the United States with family living abroad cannot be counted on to comply with U.S. law and to testify under a subpoena.

The Bush administration has held the material witnesses in jail for extended periods of time, in some cases for months, and subjected them to the same conditions of confinement as given to accused or convicted criminals. Indeed, some have been held in solitary confinement and subjected to security measures typically reserved for extremely dangerous persons.

The Department of Justice has argued that it must keep all information pertaining to material witnesses confidential because "disclosing such specific information would be detrimental to the war on terror and the investigation of the September 11 attacks," and that U.S. law requires that all information related to grand jury proceedings to be kept under seal.[20] It has refused to identify which information must specifically be kept secret because of its relevance to grand jury proceedings and national security interests; instead it has not only kept witnesses' identities secret, but has also refused to reveal the actual number of them, the grounds on which they were detained, and the length and location of their detention. To shroud the circumstances of detention of innocent

[20] Ibid.

witnesses in secrecy raises serious concerns. As one court recently stated: "To withhold that information could create public perception that an unindicted member of the community has been arrested and secretly imprisoned by the government."[21]

Presidential exercise of wartime powers

Since September 11 the Bush administration has maintained that the president's wartime power as commander-in-chief enables him to detain indefinitely and without charges anyone he designates as an "enemy combatant" in the "war against terrorism." On this basis the government is currently holding three men incommunicado in military brigs in the United States and some 660 non-citizens at Guantánamo Bay in Cuba. With regard to the three in the United States, the administration has argued strenuously that U.S. courts must defer to its decision to hold them as "enemy combatants." With regard to the Guantánamo detainees, the administration contends that no regular U.S. court has jurisdiction to review their detention. It has also authorized the creation of military tribunals to try non-U.S. citizens alleged to be responsible for acts of terrorism; as proposed, the tribunals evade important fair trial requirements, including a full opportunity to present a defense and the right to independent judicial review. The administration's actions display a perilous belief that, in the fight against terrorism, the executive is above the law.

Enemy Combatants Held in the United States

President Bush has seized upon his military powers as commander-in-chief during war as a justification for circumventing the requirements of U.S. criminal law. Alleged terrorism suspects need not be treated as criminals, the government argues, because they are enemies in the war against terror. In the months and years since the detention of these suspects in the United States, the executive branch has not sought to bring them to trial. Instead, it claims the authority to subject these suspects to indefinite and potentially lifelong confinement in military brigs based on the president's decision that they are enemy combatants. Although there is no ongoing war in any traditional sense in the United States and the judicial system is fully functioning, the Bush administration claims that the attacks of September 11 render all of the United States a battlefield in which it may exercise its military prerogative to detain enemy combatants.

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[21] See In Re Grand Jury Material Witness Detention, (U.S. Dist. Ore. Apr. 7, 2003).

To date, the U.S. government has designated as enemy combatants in the United States two U.S. citizens and one non-citizen residing in the United States on a student visa. One of the U.S. citizens, Yaser Esam Hamdi, was allegedly captured during the fighting in Afghanistan and was transferred to the United States after the military learned he was a U.S. citizen. The other two, Jose Padilla, who is a U.S. citizen, and Ali Saleh Kahlah al-Marri, a student from Qatar, were arrested in the United States; Padilla was getting off a plane in Chicago after traveling abroad, and al-Marri was sleeping in his home.

The Bush administration initially claimed these enemy combatants had no right to challenge their detention in court, even though they are U.S. citizens and/or reside in the United States. The Department of Justice eventually conceded they had a constitutional right to habeas review, but it has fought strenuously to deny them the ability to confer with counsel to defend themselves in the court proceedings—much less to be present at the hearings—and has insisted that the courts should essentially rubber stamp its declaration that they are enemy combatants not entitled to the protections of the criminal justice system.

In the case of U.S. citizen Jose Padilla,[22] on December 4, 2002, a federal district court upheld the government's authority to order citizens held without trial as enemy combatants. The court also accepted the government's "some evidence" standard for reviewing the president's conclusion that Padilla was "engaged in a mission against the United States on behalf of an enemy with whom the United States is at war." But Padilla's lawyers succeeded in convincing the court that Padilla's right to habeas corpus includes the right to be able to confer with counsel. The government has appealed that decision and the case is pending before the Second Circuit Court of Appeals.

Ali Saleh Kahlah al-Marri, a Qatari national who entered the United States on a student visa, was arrested and charged by a federal grand jury for allegedly lying to investigators, credit card fraud, and other fraudulent acts.[23] However, after the indictment, the executive branch decided to re-designate him an enemy combatant and transferred him

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[22] Padilla was taken into custody by federal law enforcement agents on May 8, 2002 at an airport in Chicago and held pursuant to a material witness warrant. On June 9, two days before he was to be brought to court for his first scheduled hearing, President Bush designated Padilla as an enemy combatant. He was transferred from the criminal justice system to a naval brig in South Carolina. The government claims he was an al-Qaeda operative involved in a plot to explode a radioactive ("dirty bomb") in the United States.

[23] Al-Marri was originally arrested on a material witness warrant in December 2001 because of several phone calls that he allegedly made to an individual in the United Arab Emirates who is suspected of sending funds to some of the September 11 hijackers for flight training.

to a Navy facility in South Carolina on June 23, 2003. The government explained that it determined al-Marri was an enemy combatant because of information gleaned from interrogations of an accused al-Qaeda official.[24] Legal challenges to his detention have so far been held up by a threshold jurisdictional dispute between al-Marri's lawyers and the government over which court can hear his habeas petition.[25]

Two years since the fall of the Taliban government, Yaser Esam Hamdi, a U.S. citizen, remains in military custody without charges. According to the U.S. government, Hamdi was "affiliated" with a Taliban unit in the Afghan war. The unit surrendered to Afghan Northern Alliance forces in November 2001 and Hamdi was then turned over to the U.S. military.[26] In habeas proceedings, a federal district court noted "this case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States, without charges, without any findings by a military tribunal, and without access to a lawyer."[27] However, the district court and an appellate court agreed that the president had the constitutional authority to designate persons as enemy combatants. In addition, a district court ruled that Hamdi had a right to confer with his counsel, but an appellate court reversed that decision.[28]

To support its contention that Hamdi was properly designated an enemy combatant, the government submitted a vague nine-paragraph declaration by a U.S. Department of Defense official named Michael Mobbs. The government argued that the "Mobbs declaration" constituted "some evidence" that Hamdi was an enemy combatant, and

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[24] One newspaper account at the time of al-Marri's designation as an enemy combatant alleged that the government's actual reason for the change in status was to pressure him to cooperate. The story quoted an unnamed Department of Justice official as saying, "If the guy says 'Even if you give me 30 years in jail, I'll never help you,'" the official said. "Then you can always threaten him with indefinite custody incommunicado from his family or attorneys." *See* P. Mitchell Prothero, "New DOJ Tactics in al-Marri Case," *United Press International*, June 24, 2003.

[25] See, *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (holding that al-Marri could not have his habeas petition heard in Illinois, and implying that he should file in South Carolina since "[h]is immediate custodian is there, and the Court has been assured by the Assistant Solicitor General of the United States and the U.S. Attorney for this district that Commander Marr [in charge of the Navy brig] would obey any court order directed to her for execution.")

[26] Hamdi was first sent to Guantánamo Bay, Cuba, until it emerged in April 2002 that he was a U.S. citizen, at which point the government moved him to a Naval Station Brig in Virginia.

[27] *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

[28] See, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

"some evidence" was enough. After several hearings,[29] an appeals court accepted the enemy combatant designation since the court lacked a "clear conviction" that Hamdi's detention as an enemy combatant was "in conflict with the Constitution or laws of Congress."[30]

Although the appellate court said that the facts of Hamdi's involvement in the fighting in Afghanistan were uncontested, it did not address how Hamdi could contest those facts if he was never given access to the declaration, nor permitted to confer with his attorney, nor able to speak directly to the court. On October 1, 2003 his lawyers filed briefs seeking Supreme Court review of his case. Before the Supreme Court decided whether they would take the case, on December 3, 2003, Defense Department officials reversed their position again, stating that Hamdi would be allowed to see a lawyer for the first time in two years. But the government took the position that Hamdi would be allowed access to counsel "as a matter of discretion and military policy; such access is not required by domestic or international law and should not be treated as a precedent."[31] While allowing Hamdi access to an attorney resolved one question before the U.S. Supreme Court, several other issues remain.

If the U.S. Supreme Court upholds the "some evidence" standard, the right to habeas review will be seriously weakened. In the Padilla case, for example, the government's Mobbs declaration refers to intelligence reports from confidential sources whose corroboration goes unspecified. Moreover, the declaration even acknowledges grounds for concern about the informants' reliability.

The U.S. government asserts that its treatment of Padilla, Hamdi, and al-Marri is sanctioned by the laws of war (also known as international humanitarian law). During an international armed conflict, the laws of war permit the detention of captured enemy soldiers until the end of the war; it is not necessary to bring charges or hold trials. But

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[29] The declaration was provided by a special adviser to the undersecretary of defense for policy, but the district court judge felt that the declaration was insufficient basis for a ruling and sought more evidence. The government argued that "some evidence" was enough to support the designation. On appeal, the fourth circuit court of appeals accepted the government's view that courts should not closely examine military decisions. It ruled that while some scrutiny of the detention of a so-called enemy combatant designation was required because of the right to habeas corpus possessed by all citizens and all non-citizens detained in the United States, such scrutiny was satisfied by the nine paragraphs submitted by government.

[30] *Hamdi v. Rumsfeld*, 316 F.3d 450, 474 (4th Cir. 2003).

[31] U.S. Department of Defense News Release No. 908-03, "DoD Announces Detainee Allowed Access to Lawyer," December 2, 2003.

the U.S. government is seeking to make the entire world a battlefield in the amorphous, ill-defined and most likely never-ending "war against terrorism." By its logic, any individual believed to be affiliated in any way with terrorists can be imprisoned indefinitely without any showing of evidence, and providing no opportunity to the detainee to argue his or her innocence. The laws of war were never intended to undermine the basic rights of persons, whether combatants or civilians, but the administration's re-reading of the law does just that.

Detainees at Guantánamo

For two years, the U.S. government has imprisoned a total of more than seven hundred individuals, most of whom were captured during or immediately after the war in Afghanistan, at a U.S. naval base at Guantánamo Bay, Cuba. The United States has asserted its authority to exercise absolute power over the fate of individuals confined in what the Bush administration has tried to make a legal no man's land.

The detainees were held first in makeshift cages, later in cells in prefabricated buildings. They have been held virtually incommunicado. Apart from U.S. government officials as well as embassy and security officials from detainees' home countries, only the International Committee of the Red Cross (ICRC) has been allowed to visit the detainees, but the ICRC's confidential operating methods prevent it from reporting publicly on conditions of detention. Even so, in October the ICRC said that it has noted "a worrying deterioration in the psychological health of a large number" of the detainees attributed to the uncertainty of their fate. Thirty-two detainees have attempted suicide.[32] The Bush administration has not allowed family members, attorneys, or human rights groups, including Human Rights Watch, to visit the base, much less with the detainees. While allowed to visit the base and talk to officials, the media have not been allowed to speak with the detainees and have been kept so far away that they can only see detainees' dark silhouettes cast by the sun against their cell walls. The detainees have been able to communicate sporadically with their families through censored letters.

The Bush administration has claimed all those sent to Guantánamo are hardened fighters and terrorists, the "worst of the worst." Yet, U.S. officials have told journalists that at least some of those sent to Guantánamo had little or no connection to the U.S. war in Afghanistan or against terror. The Guantánamo detainees have included very old men

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[32] John Mintz, "Clashes Led to Probe of Cleric," *Washington Post*, October 24, 2003.

and minors, including three children between thirteen and fifteen who are being held in separate facilities. The U.S. government acknowledges that there are also some sixteen and seventeen-year-olds at the base being detained with adults, but—without explanation—it refuses to say exactly how many of them there are. Some sixty detainees have been released because the United States decided it had no further interest in them.

According to the Bush administration, the detainees at Guantánamo have no right to any judicial review of their detention, including by a military tribunal. The administration insists that the laws of war give it unfettered authority to hold combatants as long as the war continues—and the administration argues that the relevant "war" is that against terrorism, not the long since concluded international armed conflict in Afghanistan during which most of the Guantánamo detainees were picked up.[33]

The Bush administration has ignored the Geneva Conventions and longstanding U.S. military practice which provides that captured combatants be treated as prisoners of war unless and until a "competent tribunal" determines otherwise. Instead of making individual determinations through such tribunals as the Geneva Conventions require, the Bush administration made a blanket determination that no person apprehended in Afghanistan was entitled to prisoner-of-war status. The United States is thus improperly holding without charges or trial Taliban soldiers and hapless civilians mistakenly detained, as well as terrorist suspects arrested outside of Afghanistan who should be prosecuted by civilian courts.

The Bush administration, in its determination to carve out a place in the world that is beyond the reach of law, has repeatedly ignored protests from the detainee's governments and intergovernmental institutions such as the Inter-American Commission on Human Rights, the U.N. Special Rapporteur on the independence of judges and lawyers, the U.N. Working Group on Arbitrary Detention, and the U.N. High Commissioner for Human Rights. Without ever laying out a detailed argument as to why its actions are lawful under either the laws of war or international human rights law, the U.S. government has simply insisted that national security permits the indefinite imprisonment of the Guantánamo detainees without charges or judicial review.

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[33] Under the Geneva Conventions, the ongoing fighting in Afghanistan is considered a non-international armed conflict.

Thus far the U.S. government has been able to block judicial oversight of the detentions in Guantánamo. In two cases, federal district and appellate courts have agreed with the Department of Justice that they lack jurisdiction to hear habeas corpus petitions because the detainees are being held outside of U.S. sovereign territory.[34] The ruling that the courts lack jurisdiction is based on a legal fiction that Guantánamo remains under the legal authority of Cuba. The United States has a perpetual lease to the land it occupies in Cuba, which grants it full power and control over the base unless both countries agree to its revocation.

Under international law, a state is legally responsible for the human rights of persons in all areas where it exercises "effective control." Protection of rights requires that persons whose rights are violated have an effective remedy, including adjudication before an appropriate and competent state authority.[35] This makes the Bush administration's efforts to block review by U.S. courts and frustrate press and public scrutiny all the more troubling. No government should be able to create a prison where it can exercise unchecked absolute power over those within the prison's walls.

On November 11, 2003, the Supreme Court decided to review the lower court decisions rejecting jurisdiction over the detainees' habeas petitions. Amicus briefs had been filed by groups of former American prisoners of war, diplomats, federal judges, and military officers, non-governmental organizations, and even Fred Korematsu, a Japanese-American interned by the United States during World War II. Until the court renders its decision in June or July 2004, the detainees will remain in legal limbo, without a court to go to challenge their detention.

Military Tribunals

Fair trials before impartial and independent courts are indispensable to justice and required by international human rights and humanitarian law. Nevertheless, the U.S. government plans to try at least some persons accused of involvement with terrorism before special military commissions that risk parodying the norms of justice.

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[34] *See Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003); *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2002); *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Ca. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.C. Dist. 2002).

[35] ICCPR, article 3.

Authorized by President Bush in November 2001 for the trial of terrorist suspects who are not U.S. citizens, the military commissions will include certain procedural protections—including the presumption of innocence, ostensibly public proceedings, and the rights to defense counsel and to cross-examine witnesses. However, due process protections have little meaning unless the procedures in their entirety protect a defendant's basic rights. The Pentagon's rules for the military commissions fail miserably in this regard.

Perhaps most disturbing is the absence of any independent judicial review of decisions made by the commissions, including the final verdicts. Any review will be by the executive branch, effectively making the Bush administration the prosecutor, judge, jury and, because of the death penalty, possible executioner. There is no right to appeal to an independent and impartial civilian court, in contrast to the right by the U.S. military justice system to appeal a court-martial verdict to a civilian appellate court and, ultimately, to the Supreme Court. The fairness of the proceedings is also made suspect by Pentagon gag orders that prohibit defense lawyers from speaking publicly about the court proceedings without prior military approval—even to raise due process issues unrelated to security concerns—and that prohibit them from ever commenting on anything to do with any closed portions of the trials.

The right to counsel is compromised because defendants before the commissions will be required to retain a military defense attorney, although they may also hire civilian lawyers at their own expense. The commission rules permit the monitoring of attorney-client conversations by U.S. officials for security or intelligence purposes, destroying the attorney-client privilege of confidentiality that encourages clients to communicate fully and openly with their attorneys in the preparation of their defense.

The commission rules call for the proceedings to be presumptively open, but the commissions will have wide leeway to close the proceedings as they see fit. The commission's presiding officer can close portions or even all of the proceedings when classified information is involved and bar civilian counsel even with the necessary security clearance from access to the protected information, no matter how crucial it is to the accused's case. This would place the defendant and his civilian attorney in the untenable position of having to defend against unexamined and secret evidence.

In July 2003, President Bush designated six Guantánamo detainees as eligible for trial by military commission. The U.S. government has put the prosecutions on hold in three of these cases involving two U.K. nationals and one Australian citizen in response to

concerns raised by the British and Australian governments about due process and fair trial in the military commissions. Decisions have been reached that the United States would not subject these three men to the death penalty or listen in on their conversations with their defense lawyers, but the governments continue to negotiate over other issues. There is no indication thus far that the bilateral negotiations address such shortcomings as the lack of independent appellate review. Moreover, the Bush administration has not suggested that any modifications to the procedures for British or Australian detainees would be applied to all detainees at Guantánamo, regardless of nationality. The negotiations thus raise the prospect of some detainees receiving slightly fairer trials, while the rest remain consigned to proceedings in which justice takes a backseat to expediency.

Shock and Awe Tactics

Protecting the nation's security is a primary function of any government. However, the United States has long understood "that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability . . . . our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused."[36]

Despite this admonition, since September 11 the Bush administration has used the words "national security" as a shock and awe tactic, blunting the public's willingness to question governmental actions. But even those who have asked questions have rarely found an answer. The government has by and large been successful in ensuring little is known publicly about who it has detained and why. It has kept the public in the dark about deportation proceedings against September 11 detainees and the military commission rules certainly leave open the possibility of proceedings that are closed to the public in great part. So long as the secrecy is maintained, doubts about the justice of these policies will remain and any wrongs will be more difficult to right.

The Bush administration's disregard for judicial review, its reliance on executive fiat, and its penchant for secrecy limit its accountability. That loss of accountability harms democratic governance and the legal traditions upon which human rights depend. Scrutiny by the judiciary—as well as Congress and the public at large—are crucial to

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[36] *Korematsu v. United States*, 584 F. Supp. 1406, 1442 (N.D. Ca 1984).

prevent the executive branch from warping fundamental rights beyond recognition. A few courts have asserted their independence and have closely examined government actions against constitutional requirements. But other courts have abdicated their responsibility to perform as guarantors of justice. Some courts have failed to apply a simple teaching at the heart of the Magna Carta: "in brief. . .that the king is and shall be *below* the law."[37] For its part, Congress is only now beginning to question seriously the legality and necessity of the Bush administration's post-September 11 detentions.

Confronted with a difficult and complex battle against international terrorism, the United States must not relinquish its traditions of justice and public accountability. The United States has long held itself up as the embodiment of good government. But it is precisely good governance—and its protection of human rights—that the Bush administration is currently jeopardizing with its post-September 11 anti-terrorist policies.

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[37] *Regina v. Sec'y of State for Foreign and Commonwealth Affairs,* Q.B. 1067, 1095 (2001) (citing Pollock & Maitland, *The History of English Law* (1923) (emphasis added).