

IMBALANCE OF POWERS

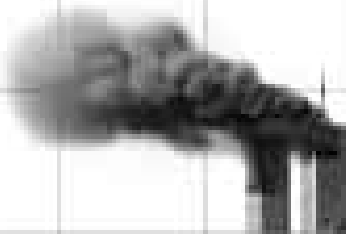
How Changes to U.S. Law & Policy Since
9/11 Erode Human Rights and Civil Liberties

September 2002 — March 2003



This report is a digest of a longer version of
Imbalance of Powers, available at www.lchr.org.

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



LAWYERS COMMITTEE
FOR HUMAN RIGHTS

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Introduction

This report is a digest of key information in “Imbalance of Powers,” a book-length report that examines a wide range of actions taken by the United States government in response to the September 11, 2001 attacks on the World Trade Center and the Pentagon.

This digest and the full report, “Imbalance of Powers” (available at www.lchr.org) cover the six-month period of September 2002 to March 2003, and update our report entitled “A Year of Loss” published in September 2002, on the first anniversary of the attacks.

GOVERNMENT’S RESPONSIBILITIES FOR SECURITY

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

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

ERODING BASIC RIGHTS ON MULTIPLE FRONTS: THE CHECKS ARE OUT OF BALANCE

At the same time, between September 2002 and March 2003, the U.S. government has continued to take actions that erode basic human rights protections in the United States, including fundamental guarantees central to our constitutional system.

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

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

RIGHTING THE BALANCE OF POWERS

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

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

As we review the sweeping changes taken over the last 18 months, we conclude that many of the extraordinary measures now require repeal or substantial refinement by the executive branch and, where necessary, by Congress. In other cases we conclude that more congressional oversight or more active judicial review of executive actions is needed.

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

- How permanent are these changes and when will recent amendments to U.S. laws and practices be repealed? Who will decide this and using what standard? What are the criteria, for example, in determining when detainees now being held in Guantanamo Bay, Cuba, should be permitted to return to their home countries? Who should make this decision?
- What is the appropriate role for the federal courts? Should the courts, for example, be able to review the factual basis for detention of individuals deemed by the executive branch to be “enemy combatants?”
- What is the proper role for Congress in overseeing the executive branch? For example, how closely should Congress monitor new domestic intelligence-gathering procedures and practices? At what stage should Congress begin evaluating informal legislative proposals being formulated in the executive branch like the draft PATRIOT II bill? How extensively should these proposals be publicly debated?
- How far should the government go in gathering information and intelligence? Should the government have the authority to monitor the medical records, credit histories, and personal and computer files of ordinary citizens?

Core U.S. values are being undermined by aggressive executive branch actions that are usurping the constitutional powers of the federal courts and Congress.

-
- Should the executive branch have the authority to take away the citizenship of Americans when it concludes that they are supporting “terrorist” activities?
 - How broad is the executive branch’s power in preventing future acts of terrorism? What are the limits of the prevention doctrine? Who sets those limits and based on what criteria?
 - What has been the effect of these new laws and policies on human rights situations in other countries? To what extent are efforts by the U.S. government to promote human rights around the world compromised by these changes in U.S. law and practices?

Chapter 1

CHALLENGES TO OPENNESS GOVERNMENT



INTRODUCTION

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

By fostering a culture of secrecy, the administration is turning its back on the very principles that make democracy flourish. As John Adams warned two centuries ago,

“liberty cannot be preserved without a general knowledge among the people.”

The Constitution relies on an informed electorate to provide the ultimate check against arbitrary government.

In the wake of

September 11, however, judges and legislators have too often yielded to executive demands, without safeguarding their own obligation to oversee executive actions and defend the right of the American people to know what their government is doing.

A mantle of secrecy continues to envelop the executive branch, largely with the acquiescence of Congress and the courts.

THE FREEDOM OF INFORMATION ACT

Public access to information under the Freedom of Information Act (FOIA) has declined steadily in the wake of September 11, 2001. On October 12, 2001, Attorney General Ashcroft issued a new FOIA directive to the heads of executive agencies, encouraging the presumptive refusal of requests. Previously, the Department of Justice (DOJ) would defend an agency's refusal to release information under FOIA only when it could be argued that releasing the information would result in "foreseeable harm."

In November 2002, Congress further undermined FOIA by acceding to an expansive new "critical infrastructure" exemption in the Homeland Security Act. Under Section 214 of the Act, "critical infrastructure information" voluntarily provided to the Department of Homeland Security (DHS) is not subject to disclosure under FOIA. The term "critical infrastructure" encompasses a broad sweep of private and governmental systems that include (but are not limited to) telecommunications, energy production, banking and finance, transportation, water systems and emergency services.

The administration has insisted that the "critical infrastructure" exemption is necessary to facilitate information-sharing with the government in the wake of September 11. Yet exempting such information from disclosure across the board seems counterproductive, weakening private-sector incentives to solve problems and implement reforms. For example, the wholesale suppression of information about environmental hazards could directly threaten community safety, while the extent of its contribution to national security remains questionable.

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

THE FEDERAL ADVISORY COMMITTEE ACT

Since 1972, the Federal Advisory Committee Act (FACA) has worked to limit the ability of special interest groups, acting through advisory committees, to influence public policy behind closed doors. FACA was enacted to ensure that Congress and the public were aware of the number, purpose, membership, and activities of advisory committees

set up by the executive branch. Under FACA, advisory committees must announce their meetings, hold them in public, provide for the representation of differing viewpoints, and make their materials available to the public. The Homeland Security Act authorizes the DHS to create advisory committees that are exempt from FACA. As a result, they will be able to meet in secret, and all of their activities and reports will be shielded from congressional and public scrutiny.

THE DRAFTING OF PATRIOT II

In recent months Justice Department officials have drafted a new legislative proposal to further expand the administration's USA PATRIOT powers. On February 7, 2002, the Center for Public Integrity released a leaked copy of the "Domestic Security Enhancement Act of 2003," which has been nicknamed PATRIOT II.

In expanding executive surveillance and detention powers, PATRIOT II would also enhance the administration's capacity to exercise those powers in secret. For example, the draft bill would require judges to consider *in camera* (alone in chambers) and *ex parte* (considering one side only) the government's applications to submit secret evidence at trial, when so requested by the government. Another provision would prevent grand jury witnesses from discussing their testimony publicly — even to contradict false information reported about them in the press. Most significantly, the draft bill explicitly authorizes secret arrests, overturning a federal court decision requiring the Justice Department to release the names of the hundreds of people detained in the United States in the post-September 11 sweeps.

**If enacted, the draft
Patriot II would sweep
away important
constitutional checks
on executive power.**

LAST-MINUTE INCLUSION OF PROTECTIONS FOR HOMELAND SECURITY WHISTLEBLOWERS

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

Senator Grassley's amendment to preserve whistleblower protections for all DHS employees was incorporated into the final version of Act. Congress made clear that the executive may not "waive, modify, or otherwise affect" the "protection of employees from reprisal for whistleblowing."



Chapter 2

RIGHT TO PRIVACY

INTRODUCTION

The right to privacy is protected by the Fourth Amendment to the Constitution, which limits the government's search and seizure powers to "prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." The Constitution protects our "right to be left alone," a right which U.S. Supreme Court Justice Louis Brandeis termed "the most comprehensive of rights, and the right most valued by civilized men."

In the wake of September 11, many longstanding prohibitions on government surveillance powers were revoked — with little public discussion or debate.

From September 2002 to March 2003, Congress and the courts have made some efforts to check new proposals to further expand the administration's surveillance powers and

its access to the personal data of U.S. citizens and others. In other instances, they have allowed further overreaching and secrecy by the executive branch.

One positive assertion of congressional concern about privacy issues involves Operation TIPS, a neighbor-to-neighbor spy program proposed by the Justice Department. It was designed to encourage citizens to report on the "suspicious activities" of people in their communities. Attorney General John Ashcroft pressed hard for the establishment of Operation TIPS, but Congress turned him down. The final bill establishing the Department of Homeland Security includes a provision banning Operation TIPS.

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ACCESS TO LIBRARY AND BUSINESS RECORDS

The government has achieved much of its data gathering by demanding that retailers, libraries, schools, internet service providers, and others turn over client information. Section 215 of the USA PATRIOT Act requires libraries, bookstores and other venues to turn over on demand business records, documents, and other items the FBI has declared necessary for an ongoing investigation related to international terrorism or clandestine intelligence activities. This invasion of privacy is exacerbated by a new law that makes it a crime to reveal that the FBI has seized customer records. This means, for example, that a librarian who speaks out about being forced to reveal a patron's book selections can be subject to prosecution.

Librarians and booksellers have been outspoken about the potentially chilling effect these new measures could have on freedom of expression and inquiry. The American Library Association's Freedom to Read Foundation (FTRF) and the American Booksellers Foundation for Free Expression (ABFFE) joined the ACLU and Electronic Privacy Information Center in an October 24, 2002 lawsuit brought to request information on subpoenas issued to bookstores and libraries under the USA PATRIOT Act.

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

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

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

USA PATRIOT ACT AMENDMENT

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

The Foreign Intelligence Surveillance Court did not agree with the administration's position. In May 2002, the secret FISA court issued its first ever public opinion, unanimously finding that the administration's interpretation of the amendment would turn the entire purpose of

FISA on its head. The Department of Justice appealed the decision to the Foreign Intelligence Surveillance Court of Review. On November 18, 2002, the Court of Review overruled the FISA court's decision, determining that

Congress had intended to relax the barriers between criminal law enforcement and foreign intelligence gathering when it passed the USA PATRIOT Act. It held that the government could now lawfully use its extraordinary FISA powers in criminal investigations, so long as those investigations had some purpose of gathering foreign intelligence information.

A librarian who speaks out about being forced to reveal a patron's book selections can be subject to prosecution.

THE ADMINISTRATION'S NEW PROPOSALS FOR EXPANDING FISA

The Department of Justice has drafted new proposals to expand its FISA powers still further. One proposal in the PATRIOT II draft would significantly increase the scope of FISA by altering the definition of a “foreign power” to cover individuals (including U.S. citizens and permanent residents) suspected of engaging in international terrorism, but who have no known links to any foreign government or to any group engaged in international terrorism. Another PATRIOT II proposal would allow the government to sidestep the FISA courts altogether in a greater range of circumstances, using its FISA powers without any judicial review.

THE TOTAL INFORMATION AWARENESS PROJECT (TIA)

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

Members of Congress from across the political spectrum expressed grave concerns about the program including Senators Grassley (R-IA), Collins (R-ME), Feinstein (D-CA), Harkin (D-IA), Inouye (D-HI), Schumer (D-NY) and former Representatives Arney (R-TX), and Barr (R-GA). Former House Majority Leader Dick Arney commented that TIA is the “only thing that is scary to me.” A broad range of groups, including CATO, ACLU, the Free Congress Foundation, and the Eagle Forum, have also raised questions about the privacy and constitutional implications of TIA. These groups concur with the columnist William Safire, who observed that “[TIA] is not some far-out Orwellian scenario. It is what will happen to your personal freedom in the next few weeks if John Poindexter gets the unprecedented power he seeks.”

In February 2003, Congress included in an omnibus spending bill a Senate-passed provision, sponsored by Senator Wyden (D-OR), that temporarily banned all funding for TIA until the program could be further explained and its impact on civil liberties assessed. Under this provision, TIA will receive no funds until the Attorney General, Director of Central Intelligence and Secretary of Defense provide a detailed report to Congress, within 60 days of passage of the bill, on the use of TIA.

PROPOSALS TO TERMINATE RESTRICTIONS ON SPYING BY LOCAL POLICE

Last year, Attorney General Ashcroft unilaterally lifted restrictions on domestic spying by the FBI. These restrictions were put in place following revelations that the government had conducted oppressive surveillance on Martin Luther King, Jr. and other civil rights leaders deemed “subversive.” Many state and local law enforcement agencies, some with disturbing histories of similar abuses, are party to court-supervised consent decrees

As envisioned, TIA would enable the federal government to collect comprehensive personal data on ordinary people.

arising out of legal challenges to these practices. These consent decrees prohibit illegal spying by police departments, and as such the Justice Department argues that they inhibit “effective cooperation” with the federal spying now permissible under the new guidelines.

The draft Domestic Security Enhancement Act of 2003 (PATRIOT II) would abolish virtually all of these consent decrees and effectively prevent future consent decrees to oversee prohibitions on spying by local police forces. Attorney General Ashcroft has said that the prohibitions against police spying are “a relic.” Yet when asked at a recent Senate Judiciary hearing whether he could provide a single example of an instance where such a consent decree interfered with a terrorism investigation, he said, “I cannot.”

CREATING A TERRORIST IDENTIFICATION DATABASE

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

Chapter 3

TREATMENT OF IMMIGRANTS, REFUGEES AND MINORITIES

INTRODUCTION

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

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

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

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DRAMATIC DECLINE IN REFUGEE RESETTLEMENT CONTINUES

The United States' humanitarian commitment to provide shelter for refugees from around the world who cannot return safely to their home countries has long been a source of pride for Americans. It serves as a reminder of the country's founding as a haven for the persecuted. Held up as a model for other countries, the program has provided a new life in safety and dignity for hundreds of thousands of refugees over the last two decades. Faith-based and other resettlement groups work with the U.S. government to welcome these refugees into the American community in a unique private-public partnership.

In the last 18 months, refugee admissions into the U.S. have dropped dramatically, from an average of 90,000 refugees resettled annually to an anticipated level of less than 15,000 this year. President Bush authorized the resettlement of 70,000 refugees from overseas during the last fiscal year (which ended September 30, 2002), but a three-month suspension of the program immediately after September 11 and continued delays due to new security procedures meant that only 27,058 refugees came into the country. In October 2002, the President authorized resettlement of 70,000 refugees for the current fiscal year. Instead of investing in the staff and infrastructure needed to reach this number, the administration announced that it actually intends to resettle only 50,000 refugees during this fiscal year.

So far, even that number seems optimistic. As of February 2003, refugee resettlement groups estimated that, if the refugee processing rate does not improve, only 13,000 refugees would be resettled this year — an historic low. In a September 2002 letter to President Bush a bi-partisan group of 40 members of Congress “urged the President to continue the United States’ long and proud tradition of being a safe haven for those fleeing persecution and tyranny.”

DISCRIMINATION AGAINST HAITIAN ASYLUM SEEKERS

In October 2001, the INS issued regulations granting its trial attorneys (the prosecutors in immigration proceedings) the power to overrule an immigration judge who decides, over INS objections, to order the release on bond of an INS detainee. The regulations, issued without notice or comment, were said by the Justice Department to be necessary in order “to prevent the release of aliens who may pose a threat to national security.”

This new power was not limited to cases in which a detainee was suspected of terrorist or criminal activity. It was applied to many Arab and Muslim non-citizens detained in the wake of September 11, leading to prolonged detention. This “national security” regulation is now being invoked, at the direction of the White House, to prevent the court-ordered release of Haitian asylum seekers. Following the December 2001 arrival in South Florida of a boat bearing nearly 200 Haitian men, women, and children, the INS instituted a blanket policy of detaining and denying parole to all Haitian asylum seekers.

In late October 2002, a second boat of Haitian asylum seekers arrived in Florida. Because this group made it to shore before encountering the INS, they were entitled to seek a bond hearing in front of an immigration judge. The INS invoked the October 2001 regulation to prevent the court-ordered release on bond of Haitians. In opposing their release, the INS argued that “the detention of these aliens has significant implications for national security.” In an extraordinary step, the U.S. Coast Guard, Department of State, and Department of Defense all submitted declarations in immigration court which reportedly claim that Haitian migration constitutes a threat to U.S. national security.

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PROTRACTED “CLEARANCE” PROCESS FOR THOSE WITH CREDIBLE ASYLUM CLAIMS LEADS TO LENGTHY DETENTIONS

Asylum seekers with credible claims for asylum, even those whose claims have been verified by the INS, are rarely released from detention. But under a new government policy, even those who have been found eligible for release by the INS or by immigration judges now face

lengthy and unnecessary detention, in some cases for months or even longer. The government has refused to provide the policy in writing, but it has an impact on asylum seekers and others from specific countries, including Somalia, Pakistan, Saudi Arabia, Iran, and Iraq. In effect, it seems to require that a presumed connection to terrorism be disproved before final release is approved. This policy, initiated after September 11, has left large numbers of people languishing in jail, including children, the sick and the elderly.

NEW RESTRICTIONS ON IMMIGRATION APPEALS

The Board of Immigration Appeals (BIA) was created in 1940 to be a watchdog over immigration courts. In September 2002, the Justice Department issued new regulations that drastically curtail the authority of the BIA. Under the new regulations, the majority of cases reviewed by the BIA now will be decided by a single board member, rather than by a three-judge panel. The regulation also expands the types of cases in which the BIA can issue a “summary affirmance,” a kind of rubber stamp ruling that upholds the immigration judge’s decision but does not provide any reasons for doing so. Finally, the rule also prohibits a *de novo* review of an immigration judge’s factual findings except where those findings are “clearly erroneous.” This feature of the new rules will severely limit the ability of the BIA to exercise its responsibilities as an appellate body.

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

INS IS FOLDED INTO THE NEW DEPARTMENT OF HOMELAND SECURITY

Effective March 1, 2003, the Immigration and Naturalization Service (INS) was dissolved, and its enforcement and services functions were transferred to the new Department of Homeland Security (DHS). The INS is one of 22 federal agencies and departments that will be folded into DHS, a department that provides frontline defense against terrorism in the United States. DHS is now the government agency that will issue work permits to immigrants, adjust their status to permanent res-

ident, naturalize them as citizens, and grant asylum to those seeking protection from persecution. Yet these functions are not mentioned in the legislation as part of the mission of the department. As one commentator suggested, “Placing all of INS’s functions into a department focused primarily on national security suggests that the United States no longer views immigrants as welcome contributors, but as potential threats viewed through a terrorist lens.”

Historically, efforts to ensure that asylum seekers were treated fairly often were undermined by the fact that the “enforcement” divisions of the INS, and some INS district officials, did not understand the special needs of asylum seekers. This problem will likely be exacerbated under the new structure.

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

Less than two weeks after the September 11 attacks, the Justice Department instituted a new policy of holding certain “special interest” deportation hearings in secret. The policy was set out in a September 21, 2001 Memorandum from Chief Immigration

Judge Michael Creppy, which instructed immigration judges to bar access by the public, the press, and family members to immigration courtrooms in cases of “special interest” to the Attorney General.

A new policy instructs immigration judges to bar access by the public, the press, and family members to immigration courtrooms in cases of “special interest” to the Attorney General.

This policy was challenged in federal court by media and other groups. A three-judge panel of the U.S. Court of Appeals for the Sixth Circuit, saying that “democracies die behind closed doors,” held that the blanket policy was unconstitutional. In a separate case challenging the

same policy, the Third Circuit Court of Appeals ruled 2-1 in favor of the government. The majority upheld the secret hearing policy because it found no constitutional right of access by the press to deportation hearings, especially in cases that implicate national security, as the government has alleged all so-called “special interest” cases do. These rulings create a conflict between the Third and Sixth Circuits. The issue is likely to end up at the U.S. Supreme Court. On behalf of newspapers challenging the closed hearings policy, the American Civil Liberties Union filed a petition for certiorari on March 3, 2003, requesting the U.S. Supreme Court to review the Third Circuit case.

HATE CRIMES, DISCRIMINATION, AND HARASSMENT

According to the federal government, hate crimes against Muslims and people of Middle Eastern ethnicity in 2001 increased dramatically over the previous year. The FBI’s Uniform Crime Reporting Program released its report in November 2002 documenting 481 hate crimes against Arabs and Muslims in the United States during 2001, up significantly from the 28 cases reported in 2000.

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

The Justice Department has brought federal criminal charges against a number of individuals in connection with hate crimes against Arab Americans, Muslim Americans, Sikh Americans, South-Asian Americans, and those perceived to be members of these communities. These are important initiatives, but they do not counteract other official government policies that target immigrants and help to create a climate of discrimination.

SPECIAL REGISTRATION

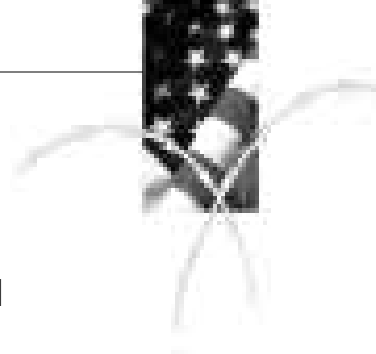
The “National Security Entry-Exit Registration System” (NSEERS), commonly known as “Special Registration,” has caused widespread concern within affected immigrant communities, primarily among Arabs and Muslims. Under this program, men and boys over 16 years of age from 25 countries must report to the INS where they will be photographed, fingerprinted, and interviewed under oath. Failure to comply with requirements of the program is a deportable offense.

The Special Registration program has two parts. The first part requires visitors from certain countries to be fingerprinted, photographed and interviewed upon arrival in the United States, at the airport or border. The second and more controversial part requires temporary visitors already in the United States to report to INS offices around the country for registration pursuant to “call-in” procedures designed by the Department of Justice. The program has resulted in the detention of nearly 1,200 people and has sparked new fears in Muslim communities that they are being targeted by the Justice Department. In December 2002, the INS in Los Angeles detained approximately 400 men and boys from Iraq, Iran, Libya, Sudan and Syria during the first phase of implementation of the “call-in” procedures.

Many people have questioned the efficacy of the Special Registration program. It creates a substantial new burden on government bureaucracy to accurately record and store data that is unlikely to contribute to combating terrorism. In light of the problems created by this program, and the lack of clear benefits, some members of Congress have requested that the Justice Department suspend the NSEERS program until Congress can review it. In January, the Senate voted to prohibit funding for NSEERS, but the provision was stripped out of the bill in the House-Senate conference committee.

Chapter 4

SECURITY DETAINEES AND THE CRIMINAL JUSTICE SYSTEM



INTRODUCTION

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

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

these prosecutions, balancing the requirements of security and justice. Yet administration officials have suggested that the fair trial standards of U.S. federal courts are too demanding for some high profile prosecutions to proceed without endangering security. While the law

Particularly troubling has been the government's inclusion of U.S. citizens within the category of "enemy combatants," while rejecting debate on the appropriateness of the term.

contemplates further measures to safeguard witnesses and evidence in sensitive trials to meet the needs of both security and justice, these options have not been vigorously pursued. To the contrary, administration sources have suggested that they may be “forced” to transfer these cases to special military commissions outside both the civil and the ordinary military justice systems.

On a parallel track, the Bush Administration continues to refine the structure of a proposed emergency military court system now being established pursuant to a “military order” issued by President Bush in November 2001. These special courts could try non-United States citizens, including those currently being held without charge or trial. At the same time administration spokesmen have suggested that detainees now being prosecuted before the federal criminal courts may be removed from these courts’ jurisdiction. In that case they would be given new trials before military commissions under procedures that would severely curtail fair trial guarantees.

“ENEMY COMBATANTS”

The largest category of individuals in detention comprises the so-called “enemy combatants.” These are individuals treated not as civilians, but as members of either al Qaeda or the Taliban, and as participants in an armed conflict against the United States. The administration has designated these men as “unlawful combatants,” or “enemy combatants,” rather than as “prisoners of war,” for the express purpose of denying them the rights that combatants normally receive. Under international humanitarian law, combatants in armed conflict who are captured by the enemy may be held in detention until the “cessation of active hostilities.” In this instance, the administration construes this term to mean the end of the “war against terrorism.”

Particularly troubling has been the government’s inclusion of U.S. citizens within the category of “enemy combatants,” while rejecting debate on the appropriateness of the term. By unilaterally imposing the “enemy combatant” label on citizens it suspects of terrorist activities, the executive branch is attempting to bypass all criminal procedures and constitutionally mandated protections. In these cases — unprecedented in U.S. legal history — the administration has reserved for itself the authority to deny those so labeled, regardless of citizenship, all legal rights and remedies, whether under international human rights or humanitarian law, U.S. criminal law, the Uniform Code of Military Justice, or the U.S. Constitution.

U.S. CITIZENS WITH ALLEGED LINKS TO AL QAEDA

JOSÉ PADILLA

José Padilla, a Brooklyn-born U.S. citizen, was arrested on May 8, 2002, at Chicago's O'Hare airport, on arrival from Pakistan. Administration spokesmen said the arrest was based on information obtained from the interrogation of Abu Zubaydah, a senior al Qaeda leader in U.S. custody. The administration asserts that Padilla had contact with al Qaeda in Pakistan and may have been part of a plot to bomb an unspecified target in the United States. Padilla was held for one month as a material witness, in connection with this alleged plot to create and detonate a conventional explosive containing radioactive materials in an urban area — a "dirty bomb." In June 2002 he was transferred to military custody based on a presidential determination that he was an "enemy combatant."

In June 2002, Padilla's lawyers filed a petition for habeas corpus, asserting their client's right to meet with his legal representatives. On December 4, 2002, Judge Michael Mukasey affirmed Padilla's right to

The administration has reserved for itself the authority to deny those labeled enemy combatants, regardless of citizenship, all legal rights and remedies.

consult with his attorneys. In response to the government's motion for reconsideration, Judge Mukasey reiterated his order on March 11, 2003, ordering the government to allow Padilla to meet with his lawyers.

Judge Mukasey has supported the government's assertion that the law does not bar Padilla's confinement. He also gave broad deference to the government's factual determinations. Judge Mukasey determined that the court's responsibility was to decide two things: 1) whether there was "some evidence" that the President was exercising his constitutional power in concluding that Padilla was engaged in a mission on behalf of an enemy with whom the United States is at war, and 2) whether subsequent events have mooted that evidence.

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

YASER HAMDİ

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

In May 2002, a public defender in Virginia filed a petition for habeas corpus on Hamdi's behalf. On August 16, 2002, federal Judge Robert Doumar ordered the government to produce the underlying factual evidence supporting its determination that Hamdi was an "unlawful enemy combatant." He also required the "screening criteria utilized to determine the status of Hamdi" and details of those who had made the determination.

Judge Doumar criticized the inadequacy of a two-page affidavit — the "Mobbs declaration" — that the government used to justify Hamdi's designation as an "enemy combatant." Declaring that he would not be a "rubber stamp" for the government, Judge Doumar ruled that the declaration's assertion that Hamdi was "affiliated with a Taliban military unit and received weapons training" was not sufficient to justify Hamdi's detention.

On January 8, 2003, the Fourth Circuit Court of Appeals vacated Judge Doumar's decision, rejecting the need for any meaningful review of the basis of Hamdi's continued detention. The court went even further than the administration's own lawyers, who had conceded that a court was probably entitled to require the government to provide "some evidence" to support its conclusion that a detained citizen was an "enemy combatant." Under the Fourth Circuit's ruling the government only has to show that the detainee was in the zone of combat.

In the war against terrorism, President Bush has stated that the enemy is global, the entire world is the battlefield, and the war will continue

until “international terrorism” has been defeated. Using this frame of reference, if the Fourth Circuit decision in the Hamdi case stands, there will be little room for the courts to review the basis for detentions made pursuant to this universal and near permanent state of war. Hamdi’s lawyer has said that he will seek review of this decision by the U.S. Supreme Court.

ARRESTS AND TRIALS OF NON-CITIZENS WITHIN THE UNITED STATES

ZACARIAS MOUSSAOUI

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

The Fourth Circuit Court of Appeals rejected the need for any meaningful review of the basis for Yaser Hamdi's continued detention.

On January 30, 2003, Judge Leonie Brinkema ordered the government to give Moussaoui access to alleged September 11 mastermind Ramzi bin al-Shibh. In the Moussaoui indictment, bin al-Shibh, a Yemeni national and senior leader of al Qaeda, is named as an unindicted co-conspirator. The government has appealed this order. They argue that making bin al-Shibh available to attorneys working with Moussaoui, let alone putting him on the witness stand, would upset the delicate dynamics of bin al-Shibh’s interrogation, and

risk revealing sensitive confidential information at trial. Trial proceedings have been stayed pending this appeal.

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

RICHARD REID

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

On January 30, 2003, Judge William G. Young sentenced Reid to life imprisonment. A defiant Reid "asserted his attempt to blow up a trans-Atlantic jetliner with explosives hidden in his shoes was the act of a soldier in a war against those who attack Islam." Judge Young responded: "You are not an enemy combatant — you are a terrorist. To give you that reference, to call you a soldier gives you far too much stature." He then concluded that "all this war talk is way out of line" in a court of law.

THE MILITARY COMMISSIONS

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

The new military commissions have yet to be convened. In February 2003, press reports indicated that the Defense Department was "working on final preparations for a system of military tribunals to

prosecute suspected terrorists”; and that Defense Department lawyers had fought to limit their scope to war crimes. At the end of February, an undated, 19-page Department of Defense draft was made available, entitled Military Commission Instruction, Subject: Crimes and Elements for Trials by Military Commission. The draft sets out crimes punishable under the laws and customs of war (war crimes), as well as crimes including Hijacking or Hazarding a Vessel or Aircraft, Terrorism, Murder by an Unprivileged Belligerent, Destruction of Property by an Unprivileged Belligerent, Spying, Perjury or False Testimony, and Obstruction of Justice Related to Military Commissions.

THE GUANTANAMO DETAINEES

The first prisoners from Afghanistan arrived at the U.S. naval base at Guantanamo Bay, Cuba on January 11, 2002. Today some 650 detainees from at least 43 countries are being held at Guantanamo. Most were captured in or near battlefields in Afghanistan. Some have come from other places, including six Algerians who were transferred from Bosnia in January 2002, after a local court there ordered their release for lack of evidence. Defense Department officials continue to say that many of the detainees held in Guantanamo can expect to be held there until the end of the war against terrorism, a war that shows no signs of ending.

President Bush has authorized military commissions that would side-step due process guarantees provided in the civilian courts as well as those of the U.S. military court system.

To date, there have been 20 suicide attempts by 16 detainees, mostly attempts to hang themselves with cloth. According to one prison mental health expert, these cases represent “an extraordinarily high number compared to other prison populations.” Two federal courts have ruled that they lack jurisdiction to examine challenges to the indefinite detentions at Guantanamo, which have been brought by the families of the detainees. The

most recent ruling was made by the U.S. Court of Appeals for the District of Columbia in the *Odah* case, decided on March 11, 2003.

ALLEGATIONS OF MISTREATMENT BY U.S. INTERROGATORS

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

In recent months, an increasing number of news articles in the *Wall Street Journal*, *Washington Post*, *Los Angeles Times*, and *New York Times* have described physical and psychological mistreatment of those who are being interrogated. If true, these reports contradict assurances by administration officials that all detainees are being treated humanely.

U.S. officials have described the use of “stress and duress” interrogation techniques to include keeping prisoners standing or kneeling for hours in black hoods; binding them in awkward, painful positions; depriving them of sleep with 24-hour lights; subjecting them to loud noises; “softening up” by beating; throwing them blindfolded into walls; and depriving wounded prisoners of adequate pain control medicines. These are practices the United States has regularly condemned when carried out by other governments.

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

In a related development, recent news reports also suggest that a number of detainees have been “rendered” — or transported for questioning — to foreign intelligence services, in countries where torture and other mistreatment are common police practices. Favored destinations include Jordan, Egypt and Morocco. In at least one case, U.S. operatives managed the apprehension and transfer of an al Qaeda suspect, who is a German citizen, to Syria (where he had been born), provoking strong protest from Germany. “Renderings” to countries known to engage in routine torture violate article 3 of the Torture Convention, which prohibits sending an individual to another state where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”

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

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

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

The United States has played a leading role in making torture a crime punishable under universal jurisdiction, beginning with the Nuremberg trials. President Bush's statement in his 2002

State of the Union

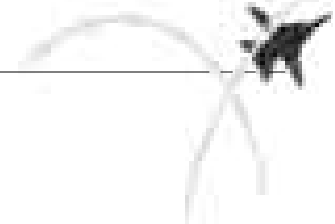
Address, that

"America will always stand firm for the non-negotiable demands of human dignity," was consistent with this tradition of support for the highest international standards.

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Today the universal standards the United States helped establish are at risk. U.S. officials send a message that human rights standards are flexible when U.S. forces boast about the use of "stress and duress" interrogation techniques. An open door to physical and psychological mistreatment of those being questioned can have a corrosive effect on the United States' military and police institutions, its judiciary, and the integrity of its political process. It can devastate its claim to moral authority at

home and abroad. Equally, it can set in motion a reversal of progress in halting torture and cruel, inhuman and degrading treatment of detainees around the world.



Chapter 5

THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS PROTECTION

INTRODUCTION

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

A number of governments have attempted to co-opt the war on terrorism, expressing support for U.S. measures while simultaneously labeling domestic opponents members of al Qaeda or similar terrorist groups.

PROSECUTING “NATIONAL SECURITY” CASES

Last summer, Liberian President Charles Taylor began to apply the term “unlawful combatants” to independent journalists and human rights activists who have been vocal critics of his policies. Hassan Bility, an internationally respected journalist, was arrested in Monrovia on June 24, 2002 and held as an “unlawful combatant.” Bility was held incommunicado in an undisclosed location, without access to a lawyer. He was tortured under

interrogation. On October 24, 2002, the Liberian Defense Department stated that a military tribunal set up by President Taylor had determined that Bility was a “prisoner of war.” On December 7, 2002, the Liberian government released Bility into the custody of U.S. officials on the strict condition that he be escorted immediately from the country.

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

In Uganda, meanwhile, the government raided the offices of the country’s main independent daily newspaper on October 10, 2002. The *Monitor* was shut down for a week. On October 15, 2002, three editors at the *Monitor* were charged with “publishing articles that are contrary to national security and that give comfort to the enemy.” The trial in their case is scheduled to begin on March 31, 2003.

In making these arrests, the Ugandan government relied on a new antiterrorism law that came into effect in May 2002. Under the act, terrorism is defined very broadly as the “use of violence or threat of violence with intent to promote or achieve political, religious, economic, and cultural or social ends in an unlawful manner, and includes the use or threat to use, violence to put the public in fear or alarm.” Under this law, publishing news “likely to promote terrorism” is punishable by death.

Independent journalists and human rights and pro-democracy activists have also come under attack in Eritrea. On September 18, 2001, the Eritrean government arrested 11 former high-ranking officials and held them in incommunicado detention. In the ensuing days, the government also arrested ten prominent journalists who had formally protested the government crackdown, including Yohannes Fesshaye, the noted Eritrean playwright.

In a recent interview with the *Washington Post*, Girma Asmerom, Eritrea’s Ambassador to the United States, insisted that locking up journalists like Fesshaye is “perfectly consistent” with democratic practice. As proof of this he “cited America’s roundup of material witnesses and suspected aliens.” In December 2002, Defense Secretary Donald Rumsfeld visited Eritrea for the first time to show appreciation for Eritrea’s cooperation

with U.S. anti-terrorism efforts. When asked about the detainees during a stop in Asmara, Rumsfeld responded that a “country is a sovereign nation and they arrange themselves and deal with their problems in ways that they feel are appropriate to them.”

REVISED STANDARDS FOR NEW ALLIES

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

Uzbekistan emerged as one of America’s most important new allies given its southern border with Afghanistan. On October 12, 2001, the United States and Uzbekistan

jointly announced that they “ha[d] decided to establish a qualitatively new relationship based on a long-term commitment to advance security and regional stability.”

Uzbekistan allowed the United States to use its military bases and deploy troops within its territory,

and in return, the United States tripled its aid to Uzbekistan, to a total of \$160 million a year. The Bush administration also encouraged the World Bank and the International Monetary Fund to increase assistance to the country.

Liberian President Charles Taylor has applied the term “unlawful combatants” to independent journalists and human rights activists who have been vocal critics of his policies.

The United States increased military and economic aid to Uzbekistan, notwithstanding its longstanding criticism of

the government's human rights record. The U.S. Department of State has been particularly critical of the use of torture in Uzbek prisons as well as the repression of its independent Muslim population. According to the State Department Country Report on Human Rights Practices, for example, "Both the police and the NSS [National Security Service] routinely tortured, beat, and otherwise mistreated detainees to obtain confessions, which they then used to incriminate the detainees. Police also used suffocation, electric shock, rape, and other sexual abuse."

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

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

GROWING TREND TOWARD DRACONIAN ANTI-TERRORISM LAWS

More and more countries are adopting harsh new emergency laws, with explicit reference to the current climate. In Tanzania, the parliament passed a sweeping new anti-terrorism law on November 5, 2002. The law gives the police and immigration officials the power to arrest suspected illegal immigrants or anyone thought to have links with terrorists, without first obtaining arrest warrants.

In Indonesia, President Megawati Sukarnoputri signed two anti-terrorism regulations on October 18, 2002. Under the new regulations, people suspected of terrorism can be detained without trial for up to

six months, and reports from intelligence agencies can be used as legal evidence.

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

Israel, meanwhile, has also adopted more stringent detention policies in the wake of September 11. On April 5, 2002, the Commander of the Israeli Army in the West Bank issued Military Order 1500. Under this order, “an IDF [Israeli Defense Force] officer of the rank of at least captain or a police officer of equivalent rank” could order a person to be held in incommunicado detention for up to 18 days, without access to an attorney or to a court. Seven human rights groups, including B’Tselem, Physicians for Human Rights, and Adalah, challenged the legality of Military Order 1500 in a petition to the Israeli High Court of Justice. After the petition was filed, the IDF reduced the maximum period of detention without access to a judge to 12 days, and changed the period without access to a lawyer to two days (with a possible 15-30 day extension). On February 6, 2003, the Israeli High Court upheld the clause preventing detainees from meeting with their lawyers, but found that the detainees could not lawfully be held for 12 days without access to a judge. The Court gave the IDF six months to adapt the order to the requirements of Israeli and international law.

In announcing the renewed aid, the U.S. government declared that “Washington has much to learn from Algeria on ways to fight terrorism.”

Pakistan has also adopted a more stringent detention policy. In November 2002, the government promulgated a new Anti-Terrorism Ordinance, which allows the police to arrest terrorism suspects and detain them for a year

without charge. Under the previous law, the authorities could detain suspects for up to three months. The new ordinance was approved by President Pervez Musharraf's military-led cabinet, rather than by Pakistan's newly elected legislature. The Pakistan People's Party, the party of former Prime Minister Benazir Bhutto, condemned the ordinance, expressing fears that it would be used to silence members of the political opposition. Zia Ahmed Awan, president of the Karachi-based Lawyers for Human Rights and Legal Aid (LHRLA), also criticized the ordinance. Awan said that the order "will only increase the victimization of ordinary people at the hands of the police and other law enforcement agencies."

Imbalance of Powers

RECOMMENDATIONS

CHAPTER 1: OPEN GOVERNMENT

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

CHAPTER 2: RIGHT TO PRIVACY

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

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

CHAPTER 3: TREATMENT OF IMMIGRANTS, REFUGEES AND MINORITIES

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

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

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

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

CHAPTER 4: SECURITY DETAINEES AND THE CRIMINAL JUSTICE SYSTEM

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

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

CHAPTER 5: THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS PROTECTION

1. The United States government should speak in a unified voice about the importance of upholding international human rights standards. The Department of Defense should not be allowed to undermine efforts by the Department of State to criticize human rights abuses in other countries, for example, no matter how strategically important those countries might be for the “war on terrorism.”
2. The United States should repeatedly and publicly condemn attempts by other governments to use the war on terrorism as a cover to repress independent journalists, human rights activists, or other domestic critics.
3. As a signal to the rest of the world that it takes its human rights obligations seriously, the United States should submit a report to the U.N. Human Rights Committee on the current state of U.S. compliance with the International Convention on Civil and Political Rights (ICCPR). The United States ratified the ICCPR in 1992, but has not reported to the Human Rights Committee since 1995.

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IMBALANCE OF POWERS

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

September 2002 — March 2003

This report is a digest of a longer version of *Imbalance of Powers*, available at www.lchr.org.

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

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



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