Civil Liberties and the US Government Response to September 11

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I begin with the recognition that the Government and in particular the Justice Department, the Attorney General and the Federal Bureau of Investigation (FBI) have the crucial responsibility to prevent future terrorist attacks. At the same time, I reject the notion that there is some necessary trade-off between civil liberties, human rights, constitutional procedures and security. While some have cast the terrible situation we find ourselves in today as one in which we must decide what liberties we are willing to sacrifice for an increased measure of safety, I do not believe that is an accurate or helpful analysis. Before asking what trade-offs are constitutional, we must ask what gain in security is accomplished by restrictions on civil liberties. It is only by forcing the Government to articulate why and how particular restrictions will contribute to security that we can have assurance that the steps being taken will be effective against terrorism. Moreover, an important measure of how secure we are is the continuing vitality of constitutional guarantees, because in the long run, promotion of human rights and democratic values will be a necessary weapon in what is in the end a political struggle against intolerance, hatred and terrorism.

Outlined below are some of the measures adopted since September 11, in haste, without any analysis of their effectiveness in preventing terrorism or their implications for civil liberties. They have the effect of concentrating power in the hands of the executive branch of the Government, while diminishing its accountability to the legislature, the judiciary and the public.

I. *USA PATRIOT ACT*

Eight days after September 11, the Bush Administration sent a draft antiterrorism bill to the Congress that became the *USA Patriot Act*[1]. The bill was not drafted in response to the attacks, but contained many authorities the Government had long been seeking. Many of the provisions are unrelated to terrorism; nevertheless the Administration refused to separate out those authorities needed to counter the threat of further attacks so that Congress could consider the other authorities during the normal legislative process. Instead it demanded that Congress pass the entire bill immediately. A mere two weeks after the Administration made its proposal, the Attorney General and the Republican leadership in the Congress publicly warned that additional terrorist attacks were imminent and implied that if these new powers were not in place, those attacks would be the fault of Democrats in Congress who had not yet passed the bill. Congress would not withstand that political pressure and the *USA Patriot Act* was signed into law on October 26, 2001.

Among the authorities granted by the antiterrorism law called the *USA Patriot Act* are:

- a new authority to conduct secret searches to every criminal case;
- expanded telephone and internet surveillance authorities and minimized judicial supervision thereof;
- a broad authority to gain access to business, financial and educational records without probable cause—only on basis of being relevant to an intelligence investigation;
- an expanded definition of terrorism.

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[1] *USA Patriot Act,* Pub. L. No 107-56, 115 Stat. 272 (2001) [hereinafter *Patriot Act* or *Act*].

A. Expanded CIA Domestic Authorities and Blurring of the Line between Intelligence and Law Enforcement

The Act eroded the careful distinctions between law enforcement and foreign intelligence authorities to conduct searches and seizures and gather information on Americans, which had been developed in the 1970s to protect against the domestic political spying abuses of the past.

Specifically, the Act expanded the authorities to conduct secret national security surveillance under the *Foreign Intelligence Surveillance Act*[2]. Although some changes might have been reasonable to meet recent technological developments, the Patriot Act turned the premise of the FISA upside down and eliminated the constitutionally mandated requirement that these extraordinary powers be used only for foreign intelligence purposes, not when the Government is seeking to make a criminal case. It then put the Director of Central Intelligence in charge of identifying which Americans to target for these wiretaps and secret searches.

In addition, the Patriot Act requires the Attorney General to turn over to the Director of Central Intelligence all "foreign intelligence information" obtained in any criminal investigation, including grand jury information and wiretap intercepts. The need for law enforcement and intelligence agencies to cooperate and exchange information on terrorism is clear; however, this mandatory sharing is not limited to information related to international terrorism. Instead, the Act requires the Justice Department to give the CIA *all* information relating to any foreigner or to any American's contacts or activities involving any foreign Government or organization, without setting any standards or safeguards for using the information. During congressional consideration of the bill, there was no discussion of the existing authority outlined in detailed memoranda by the Department of Justice's (DOJ) Office of Legal Counsel, which already permitted sharing of grand jury information with the intelligence community in carefully defined circumstances where it is clearly needed. Finally, the Patriot Act simply expanded the definition of terrorism, instead of carefully defining those criminal acts of international terrorism, where the CIA could be usefully involved.

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[2] *Foreign Intelligence Surveillance Act,* Pub. L. No 95-111, 92 Stat. 1783 (1978) [hereinafter FISA].

B. Extended, Indefinite Detention of Immigrants

The original version of the bill would have granted the Attorney General virtually unchecked authority to detain indefinitely any non-citizen he certified as a threat to national security. Detentions were not limited in duration, and the bill specifically stated that the substantive basis for certification by the Attorney General was not subject to judicial review. Negotiations produced some safeguards in the final bill. The Attorney General's certification that a non-citizen is a threat to national security only excuses the filing of immigration charges against him for seven days. However, if an individual is cleared of those charges, he can then be held indefinitely upon the Attorney General's certification. However, certifications must be reviewed every six months and either renewed or revoked. And the substantive basis for certification is subject to judicial review in any federal district court nationwide.

However, these safeguards are limited, and the law still provides inadequate due process protection. The law does not provide standards the Attorney General must follow in making and reviewing the decision to certify an individual as a suspected terrorist. Nor does the law provide guidance to the courts on what evidence it should consider in assessing the justification of the Attorney General's decision or whether the detainees will have access to the evidence on which such decisions are based.

II. MONITORING ATTORNEY-CLIENT COMMUNICATIONS

Within days of the signing of the Patriot Act, the Attorney General issued an order authorizing the Justice Department to monitor conversations between individuals being detained by the Government and their lawyers if the Attorney General deemed them terrorists[3]. The order applies to all those in federal custody, including pre-trial detainees, and those held on only immigration charges or as material witnesses. While the number of detainees so far affected by the order may be small, the effect on those detainees is dramatic and damaging. The monitoring scheme authorized by this order radically undermines the confidential lawyer-client relationship of those affected, so much so that it violates the detainees' First Amendment right to access the courts and their Sixth

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[3] *National Security; Prevention of Acts of Violence and Terrorism,* 66 Fed. Reg. 55, 062 (2001).

Amendment right to effective assistance of counsel. The monitoring scheme lacks the strict procedural protections for the attorney-client relationship required by the common law and the Constitution. In addition, it violates federal wiretapping statutes and the Fourth Amendment.

III. SECRET DETENTIONS OF HUNDREDS OF INDIVIDUALS

In the first few days after the attacks, some 75 individuals were picked up and detained. While the Administration sought increased authority from the Congress to detain foreign individuals on the grounds of national security with no judicial oversight, it picked up hundreds more individuals. The Attorney General announced that 480 individuals had been detained as of September 28; 10 days later another 135 had been picked up and in one single week during October, some 150 individuals were arrested. As of November 5, the Justice Department announced that 1 147 people had been detained.

While trumpeting the numbers of arrests in an apparent effort to reassure the public, the Department refused to provide the most basic information about who had been arrested and on what basis. Those arrested included citizens, legal residents, and non-citizens charged with violations of the immigration laws. It has become increasingly clear through the Government's own admissions that it has no information linking the vast majority of individuals to terrorism in any way. Nevertheless, it has insisted on keeping the names of hundreds of those arrested a secret.

Only after congressional and public pressure did the Justice Department release the names of those who have been charged with federal crimes (only one person on conspiracy charges related to September 11). It has refused to give out the names of those held on immigration charges or as material witnesses and of the nine individuals charged with federal crimes for whom the Government has obtained secrecy orders sealing the proceedings.

The Center for National Security Studies along with other organizations have now filed suit under the *Freedom of Information Act*[4] to obtain the names of the jailed individuals and the language of the court orders sealing the nine criminal proceedings and the material witness

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[4] 5 U.S.C. § 552 [hereinafter FOIA].

proceedings. The Government has defended its refusal to release the names on the grounds, first, that to do so would harm its terrorism investigation, even though by its own admission, almost half of the detained individuals "are not of current interest to the investigation." It has also claimed that it is withholding the names out of concern for the detainees privacy.

In response the plaintiff organizations have pointed to numerous press reports, which if accurate, raise serious questions as to whether the rights of the detainees are being violated. We point out that public disclosure of the names of those arrested and the charges against them is essential to assure that individual rights are respected and to provide public oversight of the conduct and effectiveness of this crucial investigation. Public scrutiny of the criminal justice system is key to ensuring its lawful and effective operation. Democracies governed by the rule of law are distinguished from authoritarian societies because in a democracy the public is aware of those who have been arrested. There have been numerous credible reports of violations of the right to assistance of counsel, violation of the right to have the consulate of one's country notified when arrested, imprisonment without probable cause and in violation of the constitutional right to be free on bail prior to trial, and of beatings and other abuses by jail guards.

For example, there are many reports that the Government created multiple obstacles for immigration detainees, who wished to obtain counsel. Because immigration proceedings are deemed civil, not criminal, the Government need not provide individuals with counsel, but they have a due process right to obtain their own counsel. Reportedly, detainees were only allowed "one call a week." Detainees' lawyers have often had to chase all over the country after their clients as they were transferred from prison to prison. In one instance, a detainee had finally been able to set a meeting with his attorney, only to be transferred from that prison facility on the morning of the appointed date. In another example, a detainee was unaware that his family had retained an attorney for nearly one month after his arrest, despite repeated efforts by both family members and his lawyer to set up a meeting.

There is growing evidence that the Government has not only abandoned any effort to comply with the constitutional requirement that an individual may only be arrested when there is probable cause to believe he is engaged in criminal activity, but is now seeking to jail individuals it deems suspicious until the FBI announces they are cleared. The FBI is providing a form affidavit, which relies primarily on a recitation of the terrible facts of September 11, instead of containing any facts about the particular individual evidencing some connection to terrorism, much less constituting probable cause. The affidavit simply recites that the FBI wishes to make further inquiries.[5] In the meantime, the individual is held in jail.

All these circumstances raise serious questions about the effectiveness of the current effort. Is the FBI carrying out a focused investigation executing the work necessary to identify and detain actual terrorists, or is this simply a dragnet, which will only be successful by chance? The fact that 1,000 or even 5,000 individuals are arrested is no assurance that the truly dangerous ones are among them.[6]

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[5] While the FBI affidavits are difficult to find, one filed in a bail proceeding in immigration court appears to contain the general formula. It says:

> "In the context of this terrorism investigation, the FBI identified individuals whose activities warranted further inquiry. When such individuals were identified as aliens who were believed to have violated their immigration status, the FBI notified the INS. The INS detained such aliens under the authority of the Immigration and Nationality Act. At this point, the FBI must consider the possibility that these aliens are somehow linked to, or may posses knowledge useful to the investigation of the terrorist attacks on the World Trade Center and the Pentagon. The respondent, Osama Mohammed Bassiouny Elfar, is one such individual […].
>
> At the present stage of this vast investigation, the FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals that have been detained […]. In the meantime, the FBI had been unable to rule out the possibility that respondent is somehow linked to, or possesses the knowledge of the terrorist attacks on the World Trade Center and the Pentagon. To protect the public, the FBI must exhaust all avenues of investigation while ensuring that critical information does not evaporate pending further investigation."

[6] Following are some reported examples of rights violations. A father and son, both US citizens, were arrested as they returned from a business trip in Mexico because their passports looked suspicious. The father was released after ten days and sent home wearing a leg monitor, but the son spent two more months in jail until a federal judge determined that the plastic covering had split. The key factor in their arrest appears to be their Arabic sounding names. On October 11, Tarek Abdelhamid Albasti was

IV. OTHER MEASURES TARGETED AGAINST IMMIGRANTS

In his testimony before the Senate Judiciary Committee on November 28, 2001, Assistant Attorney General Michael Chertoff discussed the threats posed by sleeper Al-Qaeda agents, "[i]t is like looking for a needle in a haystack when the needle is disguised as a piece of hay." Since September 11, the Department of Justice has implemented a number of measures targeted against immigrants and non-citizens that raise serious questions about the existence of a deliberate policy of intimidation and disruption of the Arab and Muslim communities in the United States.

A. Closed Hearings in Immigration Courts

On September 21, at the direction of the Attorney General, the Chief Immigration Judge ordered all hearings and other proceedings automatically to be closed in the immigration cases of the individuals who had been secretly arrested in connection with the terrorism investigations. There appears to be 718 such cases as of this writing. Such hearings have been traditionally been public. The order, rather than requiring an individualized determination by the immigration judge that extraordinary circumstances, such as the disclosure of extremely sensitive information, exist to justify closure, instead requires closure even over the objection of the charged individual. This policy is now being challenged in two cases in federal court brought by the detainees themselves as a violation of their due process rights and by press and public representatives as a violation of the First Amendment right of access to court proceedings.

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arrested at the restaurant he owns in Evansville, Indiana, with his uncle and his wife. Born in Egypt, Albasti is now an American citizen with a 2-year-old daughter and a father-in-law who is a former US Foreign Service officer. FBI agents had shown up at his restaurant twice after the September 11 attacks, to inquire about his political beliefs and the flying lessons that he had been given as a birthday present. Mr. Albasti was arrested with his uncle and seven other Muslim men from Evansville and flown to Chicago in shackles. They were not charged, but were detained as material witnesses. After a week in jail, where they staged a hunger strike, Albasti, his uncle and six others were released (*Associated Press*, October 20, 2001, "Evansville Men Released from Custody in Terrorism Investigation"). Mr. Mohammad Mubeen, a 28-year-old Pakistani gas station attendant, was jailed because he got his driver's license renewed in Florida shortly after terrorist plot leader Mohamed Atta acquired a Florida driver's license at the same motor vehicles' branch (*The Washington Post*, November 4, 2001, "Deliberate Strategy of Disruption; Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror").

B. Automatic Stay of Bail Decisions

On October 29, the Justice Department implemented, without the standard period for public comment, a regulation that allows the Immigration and Naturalization Service to obtain an automatic stay of an immigration judge's order releasing immigration detainees from custody or granting them bond. The regulation stipulates that if the Government asks for bail to be set at $10,000 or higher, regardless of the immigration judge's ruling, the detainee will remain in custody pending appeal. The Government is no longer required to obtain a stay of the bond decision pending appeal from the immigration appeals court. It further erodes any judicial review of pre-trial detention on immigration charges.

C. 5,000 Interviews of Middle Eastern Men

The Department of Justice announced in November that it would be interviewing 5,000 Arab men between the ages of 18 and 33 who had recently entered the United States from countries where Al-Qaeda is active. Just last week, it announced another 3,000 interviews. While the Justice Department maintained that these individuals were not suspected of any crime, should not feel threatened, and should cooperate if they truly opposed the attacks of September 11, the public guidelines make it clear that the interviewers should look for immigration violations and gather information to construct an extensive database on each individual and all his associates.

The program has been objected to as a form of ethnic and religious profiling. It was pointed out that if the true purpose was merely to obtain information about terrorists, why was it limited to men and not women, or by age? For this reason, local officials in both Oregon and Michigan who had been asked for their help, refused to participate in the interviews.

V. PRESIDENT'S MILITARY ORDER ESTABLISHING MILITARY COMMISSIONS TO TRY TERRORISTS

On November 13, President Bush issued a military order authorizing the creation of military commissions to try non-citizens alleged to be involved in international terrorism against the United States or the Al-Qaeda network and authorizing indefinite military detention of non-citizens deemed terrorists by the President. The order was widely criticized by members of Congress, law professors, civil liberties groups and others on the grounds that it set up a system of secret military trials in violation of constitutional guarantees of due process and trial by jury and

in violation of the guarantee in the *International Covenant of Civil and Political Rights* of trial by an independent and impartial tribunal. It was also criticized as outside the President's constitutional authority and several members of Congress introduced legislation that would have authorized trials by military commissions in much more limited circumstances. The President's order directed the Secretary of Defense to issue regulations implementing the order.

After the public outcry however, the Government brought terrorism-related charges against two individuals in federal court rather than transferring them to military authorities. On December 11, 2001, the Justice Department indicted Zacarias Moussaoui for conspiracy in the September 11 attacks, describing him as the "20th hijacker." It similarly indicted the "shoe bomber", the individual arrested on a plane headed for Boston and charged with having explosives in his shoes. None of the individuals captured in Afghanistan and now detained at Guantanamo Bay have yet been charged with crimes either by military or civilian authorities.[7]

A. The President Lacks Constitutional Authority to Issue the Order

The President's order did not authorize trials of suspected terrorists by existing military courts martial, but instead set up military tribunals. Trials by military tribunals, like trials by civilian courts, involve the exercise of judicial power. The Constitution vests the judicial power "in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." A military tribunal, like other tribunals, must be authorized by either the Constitution or by Congress. Congress has established military tribunals (courts martial), but has limited their jurisdiction, primarily to offenses committed by members of the armed forces.

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[7] The American John Walker Lindh, who was captured with the Taliban in Afghanistan, has been charged with federal terrorism crimes, but is not subject to military trial under the President's order as he is a US citizen.

B. Scope of the Order

The broad scope of the order would authorize the President to direct that individuals currently held, even if not criminally charged, be immediately transferred to secret military custody, even overseas. It seems clear that the intent of the order is to authorize such transfers in secret and to impose both legal and practical obstacles to individuals obtaining any judicial review of such transfers.

In addition to military commissions for individuals captured overseas, the order authorizes detention of aliens inside the United States believed by the President to be involved in terrorism. This part of the Order is a deliberate end-run around the provisions of the *USA Patriot Act* concerning such detentions, which limits the conditions and time under which individuals may be detained. The President's Order attempts to authorize what the Congress rejected in the first administration draft of the antiterrorism bill. It is a deliberate end-run around the limits and restrictions agreed to by the administration in negotiating the detention provisions of the Patriot Act.

The Military Order violates many of the basic due process rights enshrined in our judicial system. Individuals subject to the commissions would not be presumed innocent. They could be found guilty even if reasonable doubt existed. The commissions could allow evidence that would be excluded in civilian courts. The Government would have broad authority to use secret evidence in some instances, it would not even be required to show such evidence to the judges. A defendant could be found guilty by only a majority vote, even in cases where the death penalty is applied. The order implies that each defendant will have counsel, but there is no guarantee of that, or that a defendant could have the counsel of his choice. The commissions will have a presumption of secrecy, only to be opened in extreme cases, the exact opposite of our constitutionally mandated open judiciary.

On December 11, 2001, the Department of Justice indicted Zacarias Moussaoui in federal District Court in Virginia for conspiracy in the September 11 attacks. The Government has sought to paint Moussaoui as the "20th hijacker." It would appear that Moussaoui would be the ideal candidate for trial by military commission. If not Moussaoui, it is confusing then exactly who the military commissions would apply to.

C. Commission Regulations

Later in December, *The Washington Post* and *The New York Times* reported that the Defense Department had drafted regulations for the military commissions that would go a long way towards satisfying some of the due process concerns created by the president's order. The draft regulations required that suspects subject to the commissions be presumed innocent until proven guilty beyond a reasonable doubt, would have the right to appeal, and death sentences could only be imposed if commission members voted unanimously. However, the draft regulations, if accurately reported, still left questions about the use of secret and probative evidence, the right of defendants to choose their own attorneys, and the openness of the proceedings.

On March 21, 2002, the Department of Defense released the regulations for the commissions that leave a large number of the concerns of the human rights and civil liberties community unanswered.

D. Guantanamo Bay Detainees

In direct opposition to its own directives on treatment of enemy soldiers captured in battle, the Department of Defense (DOD) has detained nearly 500 suspected Taliban and Al-Qaeda members on the US military base in Guantanamo Bay, Cuba, and denied them status as prisoners of war. In regulations promulgated in 1997 by the DOD[8], enemy soldiers taken into custody must be afforded the status of prisoners of war until a competent tribunal holds a hearing to determine their status. Neither the Secretary of Defense nor the president has the authority to determine the status of these detainees.

VI. THE DANGERS OF EXCESSIVE SECRECY

In times of crisis, even more than in times of peace, a commitment to robust public debate is especially important. This is true for two reasons. First, the executive branch is more likely to take actions that violate basic civil liberties and thus an alert and informed public is necessary to counteract that dangerous tendency. Second, the Government is more likely to make effective decisions if there is an informed and influential public.

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[8] *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation No 190-8 (1997).

The Government has the right, and indeed the obligation, to keep secret information whose disclosure would genuinely harm national security, interfere in an investigation, or invade the privacy of individuals. However, because public debate requires access to Government information, the executive branch also has an obligation to release as much information as possible and to avoid taking actions that would chill essential public debate on national policy issues. Regrettably, the Government has been seriously deficient on both accounts.

Almost as worrisome as the detentions of aliens since September 11 is the secrecy and veil of obfuscation that the Government has thrown around its actions in blatant disregard of its affirmative obligations to provide information especially about actions in the criminal justice system, its obligation to inform Congress of its actions, and the requirements of the *Freedom of Information Act*.

The Justice Department and the Attorney General have engaged in selective leaks of information about the detentions as part of their effort to calm the public and suggest that it is making progress in the investigation. At the same time, they have refused to provide the Congress and the public with the information to which they are entitled. Its response to FOIA requests about the detentions shows its cavalier disregard of the law.

More broadly, the Attorney General has sent the entire bureaucracy a clear signal by reversing the directive regarding discretionary release of information under FOIA as established by his predecessor. In a memo to other Government agencies on October 12, 2001, Ashcroft has directed that information be withheld whenever possible under the statute, regardless of whether disclosure would be harmful or violate the public's right to know. This policy was developed before September 11, and represents this administration's reflexive instinct towards secrecy.

Although the directive cites the September 11 attacks as justification, it covers all Government information, much of which has no national security or law enforcement connection whatsoever. It is clearly intended to send the message to the bureaucracy that instead of working with the public to share information that is rightfully theirs, the Government should take advantage of the ambiguities in the law to deny information. The result will surely be a less open and less accountable Government. In addition to the new FOIA directive, President Bush issued an Executive Order that limited the disclosure of past presidents'

records, and Vice President Cheney has engaged in a widely publicized battle with Congress's investigative arm, the Government Accounting Office, for records of his Energy Task Force.

CONCLUSION

In the darkest days of the Cold War we found ways to reconcile both the requirements for security and those of accountability and due process, by taking both interests seriously. No less is required if in the long run we expect to be successful in the fight against terrorists who care nothing for either human liberty or individual rights.

We need to look closely at how security interests can be served while respecting civil liberties and human rights. It is time to give serious consideration to whether promoting democracy, justice, and human rights will, in the long run, prove to be a powerful weapon against terrorism along with law enforcement and military strength. Current administration policies assign no weight to respecting civil liberties as useful in the fight against terrorism. Only when that is done, will we truly be effective in what has been acknowledged to be a long and difficult struggle.