Preventive Detention of Immigrants and Non-Citizens in the United States since September 11th

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Abstract

The attacks of September 11, 2002, have dramatically altered the policy andscape in Washington, but it is important to reject the notion that there is a necessary trade-off between security and civil liberties. One of the most serious threats to civil liberties has been the adoption of a policy of preventive detention that has resulted in the secret jailing of hundreds of Arabs and Muslims when there is no evidence linking them to terrorist activity. This has been done, not by using the limited new authorities granted the government in the post-September 11 terrorism legislation, but by improperly using pre-existing criminal and immigration authorities. Secret arrests are antithetical to a democratic society. A targeted investigation that focuses on actual terrorist activity and respects the legitimate political and religious activity of citizens and non-citizens would be more effective than a dragnet approach that has resulted in the secret arrests of hundreds of individuals.

Résumé

Les attentats du 11 septembre ont changé de façon dramatique le paysage politique à Washington. Néanmoins, il importe de rejeter la notion que pour obtenir la sécurité, il faut nécessairement sacrifier les libertés civiles en échange. Ainsi, une des atteintes les plus sérieuses contre les libertés civiles a été l'adoption d'une politique de détention préventive, qui a permis la détention au secret de centaines de ressortissants Arabes et de musulmans malgré qu'il n'existe aucune preuve les liant aux activités terroristes. Ceci a été accompli non pas en appliquant les pouvoirs limités donnés au gouvernement par les lois anti-terroristes adoptées après le 11 septembre, mais en évoquant, à tort, des pouvoirs préexistants dans le domaine du criminel et de l'immigration. Les arrestations secrètes constituent l'antithèse même d'une société démocratique. Par contre, une enquête ciblée se concentrant sur des activités terroristes réelles et menée dans le respect des activités religieuses et politiques des citoyens et des non citoyens, serait bien plus efficace que l'approche d'une drague ratissant large et qui a abouti à l'arrestation secrète de centaines d'individus.

I begin this paper by noting that since September 11 there has been a fundamental change in perspective in Washington, D.C. It is now considered a real possibility that a small nuclear device will be set off in some American city and that possibility underlies the discussions about the difficult problems of what do we do now. If a small nuclear device were to be set off, the pressure to suspend the Bill of Rights would be overwhelming. We civil libertarians could argue that it would be not only an inappropriate, but an ineffective and irrelevant, response to that event; but I have little confidence that we could prevent it if there were a nuclear attack or explosion somewhere in the United States.

I begin also with the recognition that there is a crucial responsibility on the part of the United States government to prevent terrorist attacks. At the same time, I reject the notion that there is some necessary trade-off between civil liberties, human rights and constitutional procedures on the one hand, and security on the other.

While many in the United States 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 believe that is neither an accurate nor a 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 how each particular restriction will contribute to security that we can have any assurance that the steps being taken will in fact be effective against terrorism. Unfortunately, this has not been the approach of the U.S. government to date.

Rather than outline all of the domestic measures taken by the United States government since September 11 that have raised questions about threats to civil liberties, I will concentrate on a subject that is of interest from a comparative perspective looking at Canada and the United States: the government's use of preventive detention in the fight against terrorism.

Since September 11 we have witnessed an extraordinary shift in rhetoric by the Attorney General. The Attorney General, although the chief law enforcement officer in the United States, no longer speaks of the activities of the Department of Justice in terms of law enforcement; that is, investigating planned or committed crimes with the objective of prosecuting individuals for criminal activity and the secondary objective of preventing crime. Attorney General Ashcroft now speaks almost exclusively about prevention and disruption of terrorism.[1]

Before September 11 there was an unquestioned and virtually universal understanding in the United States that individuals could be jailed prior to being convicted of a crime or prior to being found deportable in violation of the immigration laws only upon an individualized showing before some judicial officer that he or she posed either a risk of flight or a danger to the community if released on bond. That understanding was based in the constitutional guarantees in the Bill of Rights, including the Sixth Amendment's prohibition against excessive bail; the protections against imprisonment without probable cause of criminal activity, found in the Fourth Amendment's prohibition of unreasonable seizures; and the Fifth Amendment's prohibition of deprivations of liberty without due process of law. In the Patriot Act and since September 11 there has been a dramatic erosion of that basic principle.

The USA Patriot Act

Eight days after September 11, the Bush Administration sent a draft anti-terrorism bill to Congress that became the USA Patriot Act. Unlike what happened in Canada, the anti-terrorism bill was not drafted in response to the attacks, but instead contained many individual amendments to many different statutes giving the government new authorities it had long been seeking. Many of the provisions are in fact unrelated to terrorism; for example, the Act authorizes secret executions of search warrants in all criminal cases.[2]

In the week following September 11, the administration urged the Congress to pass the bill immediately and without making any changes. Many civil liberties groups, and some courageous members of Congress, urged the administration to separate out those authorities it needed immediately to fight terrorism and to consider the rest of the authorities in the usual legislative process. The administration refused to do so and repeated its earlier demands to pass the entire bill. When Congress had not passed the bill within two weeks, the Attorney General and the Republican leadership in the Congress publicly warned that further terrorist attacks were imminent and implied that, if these new powers were not authorized, those attacks would be the fault of the Democrats in Congress.[3] Congress could not withstand that political pressure and both houses of Congress passed the bill by October 12. It was signed into law on October 26, 2001.

In the Patriot Act, the administration specifically sought the authority for indefinite preventive detention of non-citizens on the sole say-so of the Attorney General. The initial administration bill provided that non-citizens could be detained simply on the certification of the Attorney General that he believed an individual *might* be a terrorist. It contained no limits on the how long an individual could be detained and specifically stated that the substantive basis for the Attorney General's certification that an individual was a terrorist would not be subject to judicial review. That proposal applied only to non-citizens and was the subject of the greatest public controversy during consideration of the bill. Negotiations with the administration did produce some safeguards in the final law.

The final law provided that the Attorney General's certification that a non-citizen is a threat to national security can only justify detention without charges initially for seven days.[4] At the end of those seven days, the non-citizen must either be charged under the criminal law or immigration proceedings must be initiated against that individual and his continued detention would presumably have to be on the basis of such charges. However, at the far end of the adjudicative process, the new law contains no protections. Even if one is found not deportable under the immigration laws and has the right to remain in the United States, the Attorney General at that point can certify the individual as a threat to national security and detain him in jail indefinitely subject to recertification every six months.[5] That provision arguably conflicts with the recent Supreme Court ruling that aliens who have been found deportable, but

whom no country is willing to accept, may *not* be jailed indefinitely.[6]

The President's Military Order Authorizing Detentions and Military Trials

On November 13, the President issued a military order authorizing the creation of military commissions to try suspected terrorists. The order also claimed unilateral authority to detain indefinitely non-citizens deemed terrorists by the President.[7] The order applied to any non-citizens found either within the United States or abroad. The President directed the Secretary of Defense to issue regulations implementing the order.

The authorization in the order for detaining aliens inside the United States believed by the President to be involved in terrorism was an end-run around the provisions of the USA Patriot Act concerning such detentions. The Act had limited the conditions under and period for which individuals may be detained, but then the President's order purported to authorize what the Congress had rejected in the first administration draft of the anti-terrorism bill. It was criticized as a deliberate end-run around the limits and restrictions agreed to by the administration in negotiating the detention provisions of the Patriot Act.

Indeed, all parts of the order were widely criticized by members of Congress, law professors, civil liberties groups, and others on the grounds that it set up an unconstitutional system of secret military trials and illegal detention. Since the public outcry, the authority has not been used. 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 "twentieth hijacker." It similarly indicted the "shoe bomber," the individual arrested on a plane headed for Boston and charged with having explosives in his shoes.

On March 21, 2002, the Department of Defense finally issued regulations implementing the President's military order. While the regulations set up procedures for trials by military commissions, they make no reference to the authority to detain individuals under the order.[8] It is not clear whether the government's current view is that the detention authority claimed in the President's order applies only to authorize pretrial detention of individuals who are to be tried by military tribunals, or to anyone the government wants to detain as a suspected terrorist.

Secret Detentions

While the administration demanded and received new powers in the USA Patriot Act to detain non-citizens indefinitely on the grounds that such authority was urgently needed to counter an imminent terrorist threat, those new statutory powers have not been used since then.[9] Nevertheless, the government has embarked on a policy of massive preventive detention using pre-existing authorities in questionable and unconstitutional ways to jail hundreds of people for months.

In the first few days after the attacks some seventy-five individuals were detained. While the administration was seeking increased authority from the Congress to detain non-citizens, it picked up hundreds more individuals. On November 5, the Department of Justice announced that 1,182 people had been detained as part of its investigation into the September 11th attacks. In the face of increased public questioning, the Department has refused to give out any more information about the numbers since then.[10]

While trumpeting the number of arrests in an apparent effort to reassure the public, the Department of Justice refused to provide the most basic information about who had been arrested and on what basis. It refused to give the names of any individuals who were arrested or to provide the charges that were brought against them. The exact details of this policy of preventive detention are not yet clear, because even as of today, the names of those arrested are secret. In the face of congressional and public pressure, the Department of Justice has released the names of some one hundred people who were detained as part of its September 11 investigation and then charged with federal criminal offenses. Only one of them was charged with conspiracy related to the September 11 attacks.[11]

In addition, the government released a list of 718 non-citizens who had been detained by the government on immigration violations as of January 11, 2002. Their names are blacked out, as are the locations where they were arrested and are being held.[12] The government announced that as of April 30, 104 of those individuals are still in custody.[13]

This limited information was released in response to a lawsuit brought by the Center for National Security Studies and twenty other organizations challenging the secrecy of the detentions.[14] They are suing under the Freedom of Information Act, common law, and the First Amendment to obtain the names of the jailed individuals, where they are being held, and on what basis.[15]

There is no existing legal authority for keeping arrests secret. 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.[16] The government's papers fail to ex-

plain how releasing the names of those it has jailed will harm its terrorism investigation, as it is clear that it has no evidence linking the vast majority of those individuals with terrorism in any way.

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. 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 knows who has been arrested. Here, there have been numerous credible reports of violation 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 beatings and other abuses by jail guards. It is ironic that the government's claim to respect the privacy of the detainees apparently is shielding violations of their rights.

In addition to keeping secret the names of those whom it has jailed, the government has adopted a blanket policy closing the immigration hearings to the press, the public, and even the families of all of those individuals picked up on immigration violations in the terrorism investigation. Instead of providing for individualized determinations as to the necessity for a particular hearing to be closed or for particular evidence to be heard in a closed hearing, the policy simply commanded that all hearings would be closed, even over the objections of the detainees who wished to have their hearings pubic, without consideration of the nature of the charges or the evidence to be offered at the hearing. The policy was announced by the Chief Immigration Judge at the direction of the Attorney General.[17] It was not adopted pursuant to any new authority contained in the Patriot Act, or pursuant to any pre-existing statutory authority. Rather, it was defended as an exercise of plenary executive power in the immigration field.

That policy has now been challenged by newspapers and others on the grounds that it violates the First Amendment right of access to court and administrative proceedings.[18] In one particular case, the trial court granted a preliminary injunction and ordered the deportation proceedings to be open, on the grounds that there is a likelihood of success on their claim that the blanket closure of deportation hearings is unconstitutional. The government appealed, and the appeals court refused to grant the government a stay of the order opening the one case, on the grounds that the government failed to demonstrate a likelihood of success on the merits.[19]

Unconstitutional Preventive Detention

There is growing evidence that the government has abandoned any effort to comply with the constitutional requirement that an individual may only be arrested when there is probable cause to believe that he is engaged in criminal activity or is in violation of the immigration statutes. What we know about the individuals who are in jail is limited, but we have every reason to believe that only a mere handful of them have been linked in any way to terrorism or to any of the hijackers. Indeed the government itself has filed papers admitting that it has "cleared" more than half of those individuals of any connection to terrorism. Its own affidavits in the lawsuits notably fail to allege that any of the detained individuals are involved in terrorism. On the other hand, it appears that virtually all the detainees are either Arabs or Muslims, or believed by the government to be such.

The government has turned the presumption of innocence on its head and is now seeking to jail individuals it deems suspicious until the FBI can clear them. The FBI has been providing a form affidavit to the immigration judges seeking to keep these individuals in jail that relies primarily on a recitation of the terrible facts of September 11 instead of containing any facts about the particular individual evidencing any connection to terrorism, much less constituting probable cause.[20] The affidavit simply recites that the FBI cannot, at this time, exclude the possibility that the detainee may have some information that could be relevant to the investigation. In the meantime, the individual is held in jail.

In carrying out this policy, the government is relying on legal authorities on the books before September 11 but not used in this way. First, it has brought minor criminal charges, such as document fraud or credit card fraud, against some individuals. The Assistant Attorney General admitted that these charges would usually not even be prosecuted under prosecutorial guidelines.[21] Even if they were, being charged with such crimes would not have resulted in pretrial detention for a period of time that sometimes exceeds the sentence that would be imposed upon conviction.

The second basis used for jailing people is the suspicion that they are in violation of the immigration laws. While the government's refusal to reveal the identities of these individuals makes it difficult to know exactly what is going on, the government did release a list of the charges brought against more than seven hundred people. Fewer than five of those charges relate to terrorism; the majority appear to

be technical immigration violations, for which individuals would not have been jailed prior to September 11.

In the immigration context, the Executive Branch has also claimed new powers unilaterally to hold persons in jail pretrial on immigration charges. On October 29, without going through the legislative process and quite apart from the Patriot Act, the Department of Justice announced a new regulation that gave it the authority to automatically stay any bail decision issued in an immigration court.[22] The new rule decreed that when an immigration judge ruled that an individual should be released on bail, the government could automatically stay that decision and keep the individual in jail pending appeal. The government would no longer be required to persuade an appeals court that it should enter a stay while the government brought its appeal. It is not known at this time how often the government has invoked this authority to keep individuals detained in connection with its September 11 investigation.

The third basis used for detentions is a pre-existing law allowing the detention of individuals who have material information concerning a criminal proceeding.[23] Before September 11 it was a little-used statute that allowed the government to jail someone who is a material witness in a criminal case in order to secure his or her testimony at trial. It specifically requires that before detaining someone, the government must make every effort to secure his or her testimony in some other way, for example, by deposition. The use of the material witness statute since September 11 has been shrouded in secrecy. The government admits that it has people jailed under that statute; it refuses to say how many; it has refused to identify which courts have issued material witness warrants, so that the press and public can go to those courts to challenge the secrecy orders; and it has refused to release even the language of the secrecy orders on which it relies in refusing to release the identities of the courts that have entered such orders. Instead it has claimed only that individuals have been jailed as material witnesses in grand jury proceedings and therefore grand jury secrecy rules prohibit the release of any information about them. The identities of those being held as material witnesses and the basis for holding them are being sought in the Freedom of Information Act case seeking the names of the jailed individuals.[24]

The use of the material witness statute in this way has also been challenged by an individual who was jailed as a material witness and then indicted for lying to the grand jury. The federal district court in New York threw out perjury charges against Osama Awadallah, who had been held as a material witness in the post-September 11 investigation, on the ground that his detention was unlawful because, since 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation.[25] The government is likely to appeal.

All of these circumstances raise serious questions about the effectiveness of the current effort. Are the Justice Department and the FBI carrying out a focused investigation with the difficult work necessary to identify and detain actual terrorists, or is this simply a dragnet, which will only be successful by chance? The fact that one thousand or even five thousand individuals in a country with eight million undocumented immigrants are arrested is no assurance that the truly dangerous ones are among them.

A final comment: this is not such an easy question politically. It is not a question of balancing the rights of terrorists versus the security of the rest of us. That would be easy. Rather, it is a question of balancing the violations of the rights of others – foreigners, religious and ethnic minorities – to make the majority feel safer, and that politically is a much more difficult problem to deal with. It is an essential problem to deal with so that we do not sacrifice rights for some illusory notion of security.

Conclusion

In the darkest days of the Cold War we found ways to reconcile the requirements for security with 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 U.S. government policy assigns no weight to respecting civil liberties as useful in the fight against terrorism. But protecting civil liberties is necessary if we are to be truly effective in what is likely to be a long and difficult struggle.

Notes

1. Department of Justice, *Transcript: Attorney General John Ashcroft Announces Reorganization and Mobilization of Nation's Justice and Law Enforcement Resources: 8 November 2001, Department of Justice Office of Public Affairs*, online: <http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_08 .htm>.
2. *USA Patriot Act*, Pub. L. 107–56, Sec. 213.
3. *Transcript: Press Conference with Attorney General John Ashcroft, Senate Minority Leader Trent Lott (R-MS), Senate Judici-*

ary Committee Vice Chairman Orrin Hatch (R-UT), Senate Intelligence Committee Ranking Member Richard Shelby (R-AL), 2 October 2001, The U.S. Capitol (available from the Federal News Service).

4. *USA Patriot Act*, Pub. L. 107–56, Sec. 412.
5. *Ibid.*
6. *Zadvydas* v. *Davis*, U.S. Supreme Court, June 28, 2001.
7. 66 Federal Register 57833, 16 November 2001.
8. Department of Defense Military Commission Order No. 1, 21 March 2002, online: <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> .
9. Tom Brune, "U.S. Evades Curbs in Terror Law," *Newsday*, 26 April 2002.
10. Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies; Justice Dept. to Share Number in Federal Custody, INS Arrests," *The Washington Post*, 9 November 2001.
11. List of Federally Charged Defendants, filed by the Department of Justice in *Center for National Security Studies* v. *Department of Justice* (U.S. District Court for the District of Columbia) No. 01-2500, (*CNSS* v. *DOJ*), online: <www.cnss.gwu.edu/~cnss/cnssvdoj.htm>.
12. INS Special Interest List, Joint Terrorism Task Force, filed by the Department of Justice in *CNSS* v. *DOJ*, online: <www.cnss.gwu.edu/~cnss/cnssvdoj.htm>.
13. Steve Fainaru and Amy Goldstein, "Judge Rejects Jailing of Material Witnesses; Ruling Imperils Tool in Sept. 11 Probe," *The Washington Post*, 1 May 2002.
14. *Center for National Security Studies* v. *Department of Justice* (U.S. District Court for the District of Columbia) No. 01-2500.
15. A second lawsuit has also been filed seeking the names of those being held in New Jersey jails, under New Jersey right-to-know law. The U.S. government intervened in that case, but the New Jersey Superior Court ruled that the county jails must release the names of the individuals being held there on immigration charges. The case is on appeal as of this writing. *ACLU of New Jersey* v. *County of Hudson*, No. L-463-02, slip op. (N.J. Super. Ct. Law Div. Apr. 12, 2002), online: <http://www.judiciary.state.nj.us/ditalia/aclu.htm>.
16. Memorandum in Support of Motion for Summary Judgment, filed by the Department of Justice in *CNSS* v. *DOJ*, online: <www.cnss.gwu.edu/~cnss/cnssvdoj.htm>.
17. Memorandum from Chief Immigration Judge Michael Creppy, 21 September 2001.
18. See *Detroit Free Press* v. *Ashcroft*, No. 02-70339, 2002 U.S. Dist. LEXIS 5839 (E.D. Mich. Apr. 3, 2002).
19. See *Detroit Free Press* v. *Ashcroft*, No. 02-1437 (6th Cir. Apr. 18, 2002).
20. 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. . . .
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    > 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.

21. C-SPAN, *Transcript: C-SPAN Washington Journal Featuring Assistant Attorney General Viet Dinh, 11 December 2001.*
22. 66 Federal Register 54909-54912, 31 October 2001.
23. U. S. C. sec. 3144.
24. See *CNSS* v. *DOJ*, note 13 supra.
25. *United States* v. *Awadallah*, No. 01-Cr-1026, slip op. at 59 (S.D.N.Y. Apr. 30, 2002), online: <http://www/nysd.uscourts.gov/courtweb/Default.htm>.

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