

Civil Liberties and the War on Terrorism

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I. INTRODUCTION

In the four years since September 11, 2001, one of the worst aspects of American history has been repeating itself. For over 200 years, repression has been the response to threats to security. In hindsight, every such instance was clearly a grave error that restricted our most precious freedoms for no apparent gain. I have no doubt that the actions of the Bush Administration will, in hindsight, be viewed in the same way.

The legacy of suppression in times of crisis began early in American history. In 1798, in response to concerns about survival of the country, Congress enacted the Alien and Sedition Acts, which made it a federal crime to make false criticisms of the government or its officials.¹ The Sedition Act was used to persecute the government's critics, and people were jailed for what today would be regarded as the mildest of statements. Within a few years, after the election of 1800, Congress repealed the law and President Thomas Jefferson pardoned those who had been convicted. The right to freedom of speech was lost and nothing was gained.

During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus. Additionally, dissidents were imprisoned for criticizing the way the government was fighting the war. There is no evidence that this aided the fighting of the Civil War in any way. Ultimately, the United States Supreme Court declared unconstitutional Lincoln's suspension of the writ of habeas corpus.²

During World War I, the government aggressively prosecuted critics of the war. One man went to jail for ten years for circulating a leaflet arguing that the draft was unconstitutional;³ another, Socialist leader Eugene Debs, was sentenced to prison for simply saying to his audience, "you are fit for something better than . . . cannon fodder."⁴ At about the same time, the successful Bolshevik revolution in Russia sparked great fear of communists here. The Attorney General, A. Mitchell Palmer, launched a massive effort to round up and deport aliens in the United States. Individuals were summarily deported and separated from their families without any semblance of due process.

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1. Sedition Act of 1798, ch. 73, 1 Stat. 596 (expired 1801).

2. *Ex parte Milligan*, 71 U.S. 2, 130-31 (1866).

3. *Schenck v. United States*, 249 U.S. 47, 48-49 (1919).

4. *Debs v. United States*, 249 U.S. 211, 214 (1919).

During World War II, 110,000 Japanese Americans were forcibly interned in what President Franklin Roosevelt called “concentration camps.”⁵ Adults and children, aliens and citizens, were uprooted from their lifelong homes and placed behind barbed wire. Not one Japanese American was ever charged with espionage, treason, or any crime that threatened security. There is not a shred of evidence that the unprecedented invasion of rights accomplished anything useful. Nonetheless, the Supreme Court, in *Korematsu v. United States*,⁶ expressed the need for deference to the executive in wartime and upheld the removal of Japanese Americans from the West Coast.⁷

The McCarthy era saw enormous persecution of those suspected of being communists. Jobs were lost and lives were ruined on the flimsiest of allegations. In the leading case of the era, *Dennis v. United States*,⁸ the Court approved twenty-year prison sentences for individuals for the crime of “conspiracy . . . to advocate the overthrow of the [g]overnment” for teaching works by Marx and Lenin.⁹

This brief recitation of history should give pause to any efforts to take away civil liberties in this new time of crisis. Unfortunately, the Bush Administration and the Ashcroft and Gonzales Justice Departments have shown no such pause. They rushed through Congress a statute, the USA Patriot Act (Patriot Act),¹⁰ which contains many very troubling provisions, with no hearings in any committee. Additionally, the Bush Administration has claimed unprecedented authority to detain American citizens as enemy combatants and has imposed unprecedented secrecy for government actions and proceedings.

In this paper, I focus on three key areas in which there has been a substantial loss of liberties since September 11: unprecedented claims of authority to detain American citizens, unprecedented secrecy, and unprecedented invasions of privacy. What is most striking about each of these areas is that there is no evidence that the government’s invasions of liberty have made us any safer. These are truly the worst aspects of American history repeating themselves.

II. DETENTIONS

Among the most troubling actions by the Bush Administration and the Justice Department since September 11 has been the claim of

5. 1 WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932-1972*, at 367 (1973).

6. 323 U.S. 214 (1944).

7. *Id.* at 217-18, 220, 223-24.

8. 341 U.S. 494 (1951).

9. *Id.* at 516-17.

10. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter Patriot Act] (codified as amended in several titles and scattered sections of U.S.C.).

authority to detain individuals without complying with the Constitution and without any semblance of due process. The Supreme Court decided three cases concerning these detentions on June 28, 2004.¹¹ Sadly, in two of the cases, the individuals still remain in custody and still have not been given due process more than a year after the Supreme Court's rulings.

A. *Rumsfeld v. Padilla*¹²

Jose Padilla is an American citizen who was apprehended at Chicago's O'Hare Airport in May 2002. He allegedly was planning to build and detonate a "dirty bomb" in the United States. Although he has been imprisoned for over three years, he was not indicted for any crime until November 2005. Instead, the government was holding him as an enemy combatant. Padilla's situation is different from Hamdi's, the detainee in one of the other two cases, because Padilla was arrested in the United States for a crime allegedly planned to occur in this country, whereas Hamdi was apprehended in Afghanistan for allegedly being an enemy combatant.¹³

After his arrest, Padilla was taken to New York. An attorney filed a petition in the Southern District of New York to meet with him. Shortly thereafter, Padilla was transferred to a military prison in South Carolina. But the litigation over his detention and rights remained in New York and ultimately in the Second Circuit. The Supreme Court, in a 5-4 decision, with the majority opinion written by Justice Antonin Scalia, concluded that the New York court lacked jurisdiction to hear Padilla's habeas corpus petition. The Court said that a person must bring a habeas petition where he is being detained against the person immediately responsible for the detention. Padilla needed to file his habeas petition in South Carolina against the head of the military prison there.

Justice John Paul Stevens wrote for the four dissenters and lamented that Padilla, who already has been held for over two years, must begin all over again. But there seems no doubt that Padilla has five votes on the Supreme Court that it is illegal to hold him as an enemy combatant. In a footnote near the end of his dissenting opinion, Justice Stevens declared, "Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act prohibits—and the Authorization for Use of Military Force Joint Resolution adopted on September 18, 2001, does not authorize—the protracted,

11. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (plurality opinion); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion).

12. 124 S. Ct. 2711 (2004).

13. *Hamdi*, 124 S. Ct. at 2634.

incommunicado detention of American citizens arrested in the United States.”¹⁴ Similarly, Justice Scalia was emphatic in his dissent in *Hamdi* that an American citizen cannot be held without trial as an enemy combatant unless Congress suspends the writ of habeas corpus.¹⁵

But Padilla remains in custody. The United States District Court for the District of South Carolina ruled in favor of Padilla, but on Friday, September 9, 2005, the United States Court of Appeals for the Fourth Circuit ruled against him and held that the United States may detain him indefinitely, without trial, as an enemy combatant.¹⁶ This just cannot be right. It cannot be that the president has the authority to detain American citizens apprehended in the United States for crimes committed in the United States without complying with the provisions of the Constitution. Inexplicably, the Fourth Circuit’s decision never mentioned that five Supreme Court Justices have clearly expressed the view that Padilla should be tried or released.

B. *Hamdi v. Rumsfeld*¹⁷

Yaser Hamdi is an American citizen who was apprehended in Afghanistan and brought to Guantánamo Bay. There it was discovered that he is an American citizen, and he was taken to a military prison in South Carolina. He was held as an enemy combatant and was never charged with any crime. His situation is identical to that of John Walker Lindh, except that Walker was indicted and pled guilty to crimes.

The Fourth Circuit agreed with the Government that an American citizen apprehended in a foreign country and held as an enemy combatant is not entitled to any form of due process or judicial review.¹⁸ The Supreme Court reversed without a majority opinion. There were two issues before the Supreme Court. First, whether the federal government has the authority to hold an American citizen apprehended in a foreign country as an enemy combatant. In a 5-4 ruling, the Court decided in favor of the Government. Justice Sandra Day O’Connor wrote the plurality opinion, which was joined by Chief Justice William Rehnquist and Justices Anthony Kennedy and Stephen Breyer.

Hamdi contended that his detention violated the Non-Detention Act, which states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Con-

14. *Padilla*, 124 S. Ct. at 2735 n.8 (Stevens, J., dissenting) (citations omitted).

15. *Hamdi*, 124 S. Ct. at 2660 (Scalia, J., dissenting).

16. *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005).

17. 124 S. Ct. 2633 (2004).

18. *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003).

gress.”¹⁹ The Non-Detention Act was adopted in 1971 “to repeal the Emergency Detention Act of 1950, which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage.”²⁰ Justice O’Connor explained that “Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II.”²¹

But the plurality concluded that Hamdi’s detention was authorized pursuant to an Act of Congress—the Authorization for Use of Military Force that was passed after September 11. Justice O’Connor stated that this constituted sufficient congressional authorization to meet the requirements of the Non-Detention Act and to permit detaining an American citizen apprehended in a foreign country as an enemy combatant. Justice Clarence Thomas was the fifth vote for the Government on this issue, and in a separate opinion he concluded that the president has inherent authority, pursuant to Article II of the Constitution, to hold Hamdi as an enemy combatant.

The other four Justices vehemently disagreed. In a powerful dissenting opinion, Justice Scalia, joined by Justice Stevens, argued that there is no authority to hold an American citizen in the United States as an enemy combatant without charges or trial, unless Congress expressly suspends the writ of habeas corpus. Justice David Souter, in an opinion joined by Justice Ruth Bader Ginsburg, concurring in the judgment in part and dissenting in part, contended that it violates the Non-Detention Act to hold an American citizen as an enemy combatant.

As to the second issue, the Court ruled 8-1 that Hamdi must be accorded due process, with only Justice Thomas dissenting. Justice O’Connor explained that Hamdi is entitled to have his habeas petition heard in federal court and that imprisoning a person is obviously the most basic form of deprivation of liberty. Thus, due process is required, and the procedures required are to be determined by applying the three-part balancing test under *Mathews v. Eldridge*,²² which instructs courts to weigh the importance of the interest to the individual, the ability of additional procedures to reduce the risk of an erroneous deprivation, and the government’s interests.

Although the Court did not specify the procedures that must be followed in Hamdi’s case, the Justices were explicit that Hamdi must be given a meaningful factual hearing. At a minimum, this includes notice of the charges, the right to respond, and the right to be repre-

19. 18 U.S.C. § 4001(a) (2000).

20. *Hamdi*, 124 S. Ct. at 2639.

21. *Id.*

22. 424 U.S. 319 (1976).

sented by an attorney. The Court, however, suggested that hearsay evidence might be admissible and the burden of proof could even be placed on Hamdi. Only Justice Thomas rejected this conclusion and accepted the Government's argument that the president could detain enemy combatants without any form of due process.

In one sense, the Bush Administration prevailed in *Hamdi*: the Court accepted its claim that American citizens apprehended in a foreign country could be held as enemy combatants. But in a more important way, the case was a significant victory for civil liberties because the Court held that even a citizen apprehended on a foreign battlefield must be given a meaningful factual hearing before being detained in the United States. Certainly, it was a victory for Hamdi. The Government negotiated a plea with Hamdi whereby he renounced his citizenship, agreed to leave the country and never take up arms, and was released from custody.

C. *Guantánamo Detainees*

Since January 2002, the United States government has held over 600 individuals as prisoners at a military facility in Guantánamo, Cuba. The case before the Supreme Court involved two habeas corpus petitions that were filed on behalf of the Guantánamo detainees.²³ *Rasul v. Bush*,²⁴ the title under which both cases were decided by the Supreme Court, was brought by "the father of an Australian detainee, the father of a British detainee, and the mother of another British detainee."²⁵ *Al Odah v. United States*²⁶ was brought by fathers and brothers of twelve individuals being held at Camp X-Ray in Guantánamo.

In both cases, the Government moved to dismiss contending that the federal courts lacked authority to hear habeas corpus petitions by those being held in Guantánamo. In March 2003, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the case for lack of jurisdiction and ruled that no court in the country could hear the petitions brought by the Guantánamo detainees.²⁷ The court of appeals based this conclusion on the Supreme Court's decision in *Johnson v. Eisentrager*.²⁸ In *Johnson*, twenty-one German nationals sought habeas corpus after they were arrested in China for working in Japan on behalf of the German government

23. *Rasul v. Bush*, 124 S. Ct. 2686, 2691 (2004).

24. 124 S. Ct. 2686 (2004).

25. *Al Odah v. United States*, 321 F.3d 1134, 1136 (D.C. Cir. 2003) (citing *Rasul*, 124 S. Ct. at 2686).

26. 321 F.3d 1134 (D.C. Cir. 2003).

27. *Id.* at 1145.

28. 339 U.S. 763 (1950).

before Germany surrendered in World War II. They were taken into custody by the United States Army and convicted by a United States Military Commission of violating laws of war by engaging in continued military activity in Japan after Germany's surrender, but before Japan had surrendered. After conviction, the defendants were "repatriated to Germany to serve their sentences"²⁹ in a prison whose custodian was an American army officer. The prisoners sought habeas corpus in federal court, and the Supreme Court found that no federal district had jurisdiction to hear the petition. The D.C. Circuit found that the Guantánamo detainees are like the petitioners in *Johnson* and thus held that the petition in this case be dismissed.³⁰

The Supreme Court, in a 6-3 decision, reversed the court of appeals, and held that a federal court may hear the habeas corpus petitions of those being held in Guantánamo.³¹ Justice Stevens wrote the opinion for the Court. He emphasized that *Johnson* is distinguishable in many important respects. In *Johnson*, those detained were accorded a trial in a military tribunal, while those being held in Guantánamo have never had any form of trial or due process. Also, the Court stressed that unlike the situation in *Johnson*, Guantánamo is functionally under the control and sovereignty of the United States government.

The Court in *Rasul v. Bush* did not address what type of hearing ultimately must be accorded to those in Guantánamo. Rather, the case was limited to the issue of whether a federal court could hear their habeas corpus petition. In all likelihood, the courts ultimately will say that some form of a meaningful factual hearing before a military tribunal is sufficient. But the case is enormously significant in according the Guantánamo prisoners a right to be heard in federal court and in giving the federal courts the role of prescribing the procedures that must be followed.

On remand, the Government moved to dismiss the detainees' claims for failing to state a claim upon which relief can be granted. Some of the cases were consolidated before District Judge Joyce Hens Green. She ruled against the Government and held that the detainees did state a cause of action.³² But Judge Richard Leon kept other Guantánamo cases that had been assigned to him and granted the Government's motion to dismiss.³³ Both cases were consolidated and heard on appeal in the D.C. Circuit on September 8, 2005. In the

29. *Id.* at 766.

30. *Al Odah*, 321 F.3d at 1140.

31. *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004).

32. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005).

33. *Id.* at 452 n.14.

meantime, the detainees remain in prison in Guantánamo—some now for over three years.

These cases demonstrate that there is no precedent—except perhaps for Lincoln’s actions in the Civil War—for the claim of authority to detain individuals without due process that has been put forth since September 11. It is hard to imagine government actions more inconsistent with the most basic aspects of the rule of law than detaining human beings indefinitely without due process.

III. SECRECY

How many individuals were arrested and detained by the federal government after September 11? How many individuals are now being detained? Who are the detainees, and why are they being held? Astoundingly, the answers to these questions remain unknown. The Bush Administration and the Justice Department have steadfastly refused to answer these basic inquiries, so that no one knows how many people have been held in custody and for what reasons.

Media accounts consistently report that since September 11, 2001, federal officials have detained over 1,200 non-U.S. citizens in connection with the war on terrorism.³⁴ That number is used because, as of November 5, 2001, seven weeks into the investigation, the government announced that it had detained 1,147 persons. As the Justice Department came under criticism for having detained so many, while charging none with any terrorist crimes, it simply stopped issuing an official tally and to this date has declined to provide any total number detained. Because detentions have undoubtedly continued in the almost two years since the last official tally was issued—seven weeks into the campaign—a conservative estimate would place the number of detentions at well over 2,000.

According to Immigration and Naturalization Spokesperson, Russ Bergeron, the 1,200 figure is a good faith estimate, provided during the latter part of 2001, to provide a national tally of how many individuals have been detained by federal and state law enforcement officials, in connection with post-September 11 investigations. Mr. Bergeron contends that the government stopped issuing a running tally of detentions at that point in time because it determined that so many jurisdictional components were involved in these detentions, and the detention process was so fluid, that it was no longer feasible to provide ongoing national totals of the number of detainees.

Even more important, it is unknown how many individuals have been detained and continue to be detained as material witnesses. The

34. Steve Fainaru, *U.S. Deported 131 Pakistanis in Secret Airlift; Diplomatic Issues Cited; No Terror Ties Found*, WASH. POST, July 10, 2002, at A1, available at LEXIS, News.

government has consistently refused to provide this information claiming that disclosure is prohibited by the law requiring grand jury secrecy.³⁵

Mr. Bergeron stated that between September 11, 2001, and June 24, 2002, the Immigration and Naturalization Service (INS) arrested 752 individuals in connection with investigation of terrorist attacks. As of mid-July, eighty-one individuals remained in INS custody, with thirty-eight of that number being held while their final removal orders are appealed. The government's policy has been to refuse to release or deport aliens arrested in connection with the post-September 11 campaign until the FBI has affirmatively cleared them by finding that there is no evidence of criminal conduct, much less terrorist conduct. Thus, by the FBI's own account, the vast majority of those detained as "suspected terrorists" turned out to have no involvement with terrorism. Nonetheless, the detention of individuals in connection with terrorism investigations remains a programmatic goal of the federal, state, and local governments that is highly likely to become a permanent feature of our nation's law enforcement structure.³⁶

In addition, non-citizens and citizens detained by the federal government have been arrested on criminal charges, immigration violations, and as material witnesses under 18 U.S.C. § 3144. Many detained by the INS have been accused of minor immigration violations, such as failing to complete enough courses for their student visas or working while in the United States on a tourist visa.³⁷ Other aliens have been arrested on state criminal charges. Of those criminal arrests publicly disclosed, most relate to the possession of false identification or other fraud.³⁸ Still others, apparently both citizens and non-citizens, have been detained as material witnesses. As explained

35. THE CONSTITUTION PROJECT, REPORT ON POST-9/11 DETENTIONS (2004), available at http://www.constitutionproject.org/lr/detention_report.pdf (discussing Deputy Assistant Attorney General Viet Dinh's remarks at the Tenth Circuit Judicial Conference on June 27, 2002). Viet Dinh

expressly said that the government would not disclose the number of individuals held as material witnesses because of the requirement for grand jury secrecy. Although grand jury secrecy may prevent the disclosure of the identity of a specific person being held as a grand jury witness, there is no reason why the total number of individuals being held cannot be disclosed. Revealing the aggregate number being detained as material witnesses would reveal nothing about the content of grand jury proceedings, which is all that is protected by Federal Rule of Criminal Procedure 6(e).

Id. at 3 n.7.

36. THE OFFICE OF HOMELAND SECURITY, THE NATIONAL STRATEGY FOR HOMELAND SECURITY (2002), available at http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf. "We will redefine our law enforcement mission to focus on the prevention of all terrorist acts within the United States, whether international or domestic in origin. We will use all legal means—both traditional and non-traditional—to identify, halt, and, where appropriate, prosecute terrorists in the United States." *Id.* at 26.

37. AMNESTY INT'L, AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST-SEPTEMBER 11 DETENTIONS IN THE USA 2, 11 (2002), available at [http://web.amnesty.org/library/pdf/AMR510442002ENGLISH/\\$File/AMR5104402.pdf](http://web.amnesty.org/library/pdf/AMR510442002ENGLISH/$File/AMR5104402.pdf).

38. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 921 (D.C. Cir. 2003).

above, the government has refused to provide information as to how many individuals are being detained for this reason.

Approximately another 600 aliens have been arrested and detained pursuant to the "Absconder Apprehension Initiative," (AAI) a program initiated in January 2002 to locate and detain about 1,000 "priority absconders" out of the estimated 314,000 aliens living in the United States illegally though ordered deported.³⁹ Priority absconders are defined as aliens who officials "believe . . . have information that could assist our campaign against terrorism."⁴⁰ These individuals have been detained largely based on their country of origin. Of those who already have been deported through this initiative, many have lived in the United States for years and were married with children.⁴¹

Finally, the government has the authority to arrest and detain alien individuals pursuant to the Patriot Act.⁴² The Act authorizes the Attorney General to detain without a hearing aliens whom he has reasonable grounds to believe fall within the "terrorism" provisions of the Act. People who have not engaged in or supported violence, and people who are suspected of everyday violent crimes having nothing to do with terrorism are included because terrorism is so broadly defined as to include the use or threat to use weapons against persons or property. To date, so far as is known, the government has not detained any alien pursuant to these statutory provisions.

Contrary to constitutional rights and federal regulations, the INS also has held some aliens for extended periods without filing any charges against them.⁴³ INS regulations provide that "except in the event of an emergency or other extraordinary circumstance," all persons taken into custody must be formally charged within forty-eight hours.⁴⁴ However, almost one-half of the aliens detained on immigration violations following September 11 were not charged within this

39. Dan Eggen, *U.S. Search Finds 585 Deportee "Absconders,"* WASH. POST, May 30, 2002, at A7; see also Memorandum from the Deputy Attorney General on Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf>.

40. Memorandum from the Deputy Attorney General, *supra* note 39, at 1.

41. Fainaru, *supra* note 34.

42. Patriot Act, *supra* note 10, § 412.

43. Dan Eggen, *Delays Cited in Charging Detainees,* WASH. POST, Jan. 15, 2002, at A1, available at LEXIS, News. "Scores of immigrants detained after the Sept. 11 terror attacks were jailed for weeks before they were charged with immigration violations, according to documents released by the Justice Department." *Id.*; see also AMNESTY INT'L, *supra* note 37, at 2 ("Data examined by [Amnesty International] reveals that scores of people picked up in the post 9.11 sweeps were held for more than 48 hours, and several for more than 50 days, before being charged with a violation.").

44. 8 C.F.R. § 287.3(d) (2005).

period.⁴⁵ Thirty-six aliens were held for over twenty-eight days without being formally charged.⁴⁶

In addition to aliens being held without charges, officials have kept many individuals in prolonged custody. According to an article in the *New York Times* on February 18, 2002, eighty-seven aliens remained in detention after they had received their final deportation orders. Many had been detained for over 100 days, and it was not known when they would be released. Bail hearings, which prior to September 11 would normally occur within two or three days of a request, have taken weeks or simply are not being granted in some cases.⁴⁷ Furthermore, bails have increased by five times or more from pre-September 11 levels for minor violations.⁴⁸

Notwithstanding the data discussed above, there is an overall significant lack of information about the government's actions in detaining individuals since September 11. The total number of detainees is unknown, especially because the government will not disclose the number who have been held or are being held as material witnesses. The reasons for many detentions are unknown, as are their lengths.

A federal district court ruled in favor of the plaintiffs in a lawsuit that would have provided much of this information,⁴⁹ but the court of appeals reversed.⁵⁰ On January 12, 2004, the Supreme Court denied certiorari. The effect of the Court's denial of review in *Center for National Security Studies v. United States Department of Justice*⁵¹ is to deny access to the most basic information about the government's actions in the last two and a half years.

The lawsuit was brought by a coalition of public interest groups, including the Center for National Security Studies, the American Civil Liberties Union, People for the American Way Foundation, the American-Arab Anti-Discrimination Committee, and Reporters Committee for Freedom of the Press. As the district court explained, the lawsuit resulted from the fact that "the Government refused to make public the number of people arrested, their names, their lawyers, the

45. AMNESTY INT'L, *supra* note 37, at 11 (discussing information contained in the Department of Justice's response to Amnesty International's FOIA request); Dan Eggen, *Long Wait for Filing of Charges Common for Sept. 11 Detainees*, WASH. POST, Jan. 19, 2002, at A12, available at LEXIS, News ("An analysis of the INS records this week by The Post found that about 40% of the immigrants were not charged within a week, and that some were held for seven weeks or more without charges.").

46. AMNESTY INT'L, *supra* note 37, at 11.

47. Jim Edwards, *Attorneys Face Hidden Hurdles in September 11 Detainee Cases*, 166 N.J. L.J. 789 (2001).

48. *Id.*

49. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 112-14 (D.D.C. 2002).

50. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

51. 540 U.S. 1104 (2004).

reasons for their detention, and other information relating to their whereabouts and circumstances.”⁵²

The plaintiffs sued seeking basic information, including (a) the identities of those being held and the circumstances of their arrest, such as the dates of any arrest and release and the nature of any charges filed against them; (b) the identities of lawyers representing any of these individuals; (c) the identity of any courts that have been requested to enter sealing orders with regard to proceedings against these individuals; and (d) all policy directives issued to government officials about these individuals and what may be said to the press about them.

The United States District Court for the District of Columbia largely ruled in favor of the plaintiffs based on the Freedom of Information Act (FOIA). The district court ordered the Department of Justice to disclose the names of the detainees, the identity of counsel representing the detainees, and any policy directives to government officials about making public statements or disclosures regarding the detainees. The district court, however, held that the Department of Justice did not have to reveal the dates and locations of arrest, detention, and release. The most significant effect of the district court’s order was that we finally would know how many people are being detained and, by contacting them, why they were being held and how they were treated. Only through this information can we learn if the government has significantly abused its power to arrest and detain individuals.

The D.C. Circuit reversed in a 2-1 decision.⁵³ The court of appeals’ decision repeatedly emphasized the need for great deference to the executive branch. For example, the court said that “the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security” and that “[t]he need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.”⁵⁴

Specifically, the court of appeals rejected the argument that there is a First Amendment right to the information and concluded that the information may be withheld under exemption 7(A) of FOIA, which exempts from disclosure information that “could reasonably be expected to interfere with enforcement proceedings.”⁵⁵ The court accepted the Government’s argument

52. *Ctr. for Nat’l Sec. Studies*, 215 F. Supp. 2d at 96.

53. *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 937.

54. *Id.* at 928.

55. 5 U.S.C. § 552(b)(7)(A) (2000).

that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it Moreover, disclosure would inform terrorists which of their members were compromised by the investigation, and which were not.⁵⁶

The court said that the names of attorneys should not be disclosed because that could lead to learning the identity of those detained.

The court of appeals' decision is clearly wrong as a matter of law and policy. It is therefore unfortunate that the Supreme Court denied review. First, there is no basis for believing that revealing the number held or their names would compromise investigations in any way. For example, there is no imaginable reason why the government will not disclose the number of people who have been held as material witnesses. Nor is the Government's argument against disclosing the names even logical. Terrorist organizations surely already know which of their members have been arrested, and it tells them nothing useful to provide names of people who have been arrested but have nothing to do with them. Nor is there any privacy interest in keeping the names secret. The identity of those arrested is usually a matter of public record.

Second, the court of appeals granted a near total deference to the executive that is inconsistent with the text and purpose of FOIA, which creates a strong presumption in favor of disclosing government records. As Judge David Tatel expressed in his dissent,

the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.⁵⁷

As Judge Tatel powerfully declared, "this court has converted deference into acquiescence."⁵⁸

Third, the court of appeals erred by giving no weight to the strong public interest in learning how the government has used its power to arrest and detain individuals. The plaintiffs alleged that the government had abused its powers by wrongly detaining hundreds or thousands of individuals, many solely because of their religion or ethnicity. The government is preventing scrutiny of its conduct by invoking secrecy. As Judge Tatel expressed, "Just as the government has a compelling interest in ensuring citizens' safety, so do citizens have a compelling interest in ensuring that their government does not,

56. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928.

57. *Id.* at 937 (Tatel, J., dissenting).

58. *Id.* at 940.

in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.”⁵⁹

A couple of years ago, I debated Michael Chertoff, then the Assistant Attorney General for the Criminal Division and now Director of the Department of Homeland Security. I asked him how many people were then or had previously been held, particularly as material witnesses. He stated that he could not disclose the information because of national security. I asked how could knowing the number being held, whether it is dozens or hundreds or thousands, reveal anything that remotely could harm national security. He refused to answer.

The Supreme Court should have granted certiorari in *Center for National Security Studies v. United States Department of Justice* to protect the right of the people to know under the First Amendment and FOIA. Secrecy of the sort claimed by the Bush Administration and the Justice Department hides and encourages serious abuses of power.

IV. PRIVACY

The Patriot Act was adopted on October 26, 2001.⁶⁰ It is 342 pages long and is difficult to read because it is filled with references to other provisions of the United States Code. Many of its provisions are innocuous. For example, section 219 amends Federal Rule of Criminal Procedure 41(a) to allow magistrate judges to authorize nationwide search warrants, not limited to that judicial district, wherever terrorist activities “may” have occurred. The requirement that a warrant be issued in each district was unduly cumbersome and this national procedure simplifies the ability to conduct investigations.

On the other hand, several provisions of the Act are very troubling because they give the government powers for law enforcement that traditionally have been used in foreign countries or for foreign intelligence gathering in the United States. Nonetheless, in the summer of 2005, Congress reenacted provisions of the Patriot Act, with minor changes, and made permanent the provisions that were set to expire.

A. *The Broad Definition of Terrorism*

The very expansive definition of terrorism in the Patriot Act will give rise to its broad application by law enforcement, including in cases that are not related to terrorism. Section 802 of the Patriot Act provides a definition of “domestic terrorism,” which is the predicate

59. *Id.* at 938.

60. Patriot Act, *supra* note 10.

for the application of many provisions of the law. The term includes activities occurring primarily within the territorial jurisdiction of the United States involving acts dangerous to human life that are a violation of the criminal laws of the United States or any state and appear to be intended “(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”⁶¹

This is an incredibly sweeping definition. Many lawful protests might be seen as trying to coerce or intimidate government or civilian populations. If they are large enough, they might even be seen as dangerous to human life. An anti-war protest rally in which windows are intentionally broken in a federal building could be prosecuted as terrorist activity. Most crimes—from assault to robbery to rape to kidnapping to extortion—are intended to coerce.⁶² The result is that the broad powers granted to the government by the Patriot Act are not limited to what common understanding would define as terrorism.

Other open-ended statutes—such as the federal RICO law—often are used in contexts far beyond what the drafters intended. Already it is apparent that the federal government is using its powers under the Patriot Act in contexts unrelated to terrorism. For example, the government has used its provisions to gain evidence against suspects in a bribery case⁶³ and to prosecute a man for having a pipe bomb, even though he was not engaged in anything that could remotely be called terrorism.⁶⁴ Indeed, “[t]he government is using its expanded authority under the far-reaching law to investigate suspected drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies and even corrupt foreign leaders.”⁶⁵

B. *The Expansion of the Powers of the Foreign Intelligence Surveillance Court*

In *United States v. United States District Court (Keith)*,⁶⁶ the Supreme Court rejected the claims of the Nixon Administration that it could engage in warrantless wiretapping for the sake of national se-

61. *Id.* § 802.

62. I am not suggesting that rape or assault could generally be prosecuted under the Patriot Act because the law also requires violation of a federal law. I am saying that virtually any crime is done to intimidate or coerce.

63. Steve Friess, *Critics Slam Use of Patriot Act in Bribery Case*, CHI. TRIB., NOV. 9, 2003, at 12.

64. Mike Anton & Christine Hanley, *Making a Federal Case Out of an O.C. Pipe Bomb*, L.A. TIMES, June 19, 2003, at 3.

65. Eric Lictblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003, at 1, available at LEXIS, News.

66. 407 U.S. 297 (1972).

curity.⁶⁷ The Supreme Court spoke of the “inherent vagueness of the domestic security concept . . . and the temptation to utilize such surveillance to oversee political dissent.”⁶⁸ The Court concluded that “Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch.”⁶⁹ To overturn this decision, Congress enacted the Foreign Intelligence Surveillance Act (FISA) in 1978. The Act applies only to “[f]oreign power[s]” or their “[a]gents” seeking “[f]oreign intelligence information.”⁷⁰

A key aspect of the law is that it relaxes the usual probable cause standard followed under the Fourth Amendment. The Act provides that an order can be issued if there is “probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power.”⁷¹ If the target is a “United States person,” then there also must be a determination that it is not based on First Amendment activities of the individual.⁷² FISA created a new court, the Foreign Intelligence Surveillance Court, comprised of seven district court judges, appointed by the Chief Justice, and serving staggered seven-year terms. FISA provides that individuals may not have access to information obtained under a FISA warrant. In response to a suppression motion, the judge makes an in camera and ex parte review to decide whether suppression is warranted. The defendant is not allowed to see the basis for the FISA warrant when making a suppression motion. As originally enacted, FISA applied only to electronic surveillance, but was amended in 1995 to include physical searches.⁷³

One study found that between 1978 and 1999, the Foreign Intelligence Surveillance Court granted more than 11,883 warrants and denied none.⁷⁴ The United States Courts of Appeals have upheld the FISA procedures as constitutional under the Fourth Amendment as a permissible balancing of privacy and national security interests.⁷⁵ The United States Court of Appeals for the Ninth Circuit, for example, found that FISA creates a lower standard of probable cause but that

67. *Id.* at 320.

68. *Id.*

69. *Id.* at 316-17.

70. 50 U.S.C. § 1801(a), (b), (e) (2000). The definition of foreign intelligence information is in § 1801(e). The definition of foreign power is in § 1801(a). The definition of “[a]gent of a foreign power” is defined in § 1801(b).

71. 50 U.S.C. § 1805(a)(3)(A).

72. *Id.*

73. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807, 108 Stat. 3423 (1994).

74. Lawrence D. Sloan, *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467, 1496 (2001).

75. *See, e.g.,* United States v. Duggan, 743 F.2d 59, 74 (7th Cir. 1984).

this is acceptable because the government's goal is gathering information for intelligence purposes and not for law enforcement.⁷⁶

The Patriot Act marks a dramatic shift by expanding FISA to include domestic law enforcement so long as a purpose is also foreign intelligence gathering. Under section 218 of the Act, foreign intelligence gathering now only needs to be "a significant purpose," not "the purpose."⁷⁷ This is one of the most important provisions of the Act, substantially expanding the authority of the Foreign Intelligence Surveillance Court. This provision is key in taking powers that had been given for foreign intelligence gathering and giving them to domestic law enforcement so long as the government says that it also has a significant purpose of foreign intelligence gathering. The distinction between foreign intelligence gathering and law enforcement, which the Ninth Circuit emphasized in *United States v. Cavanaugh*,⁷⁸ is substantially eroded, if not effectively eliminated.

Because the FISA court operates entirely in secret, it is impossible to assess how these expanded powers have been used. Statistics, however, are available. The Justice Department reported that in 2002, 1,128 secret warrants were requested from the FISA court.⁷⁹ Of these requests, 1,128 were granted.⁸⁰ This suggests the court is an automatic rubberstamp for all government requests.

C. *Additional Government Powers*

The broad definition of terrorism and the government's power to use FISA for law enforcement is especially troubling because the Patriot Act gives the government significant new powers to gather information. Section 216 allows pen/trap for internet (e-mail and web browsing) on a showing that the information "likely to be obtained" is "relevant to an ongoing criminal investigation."⁸¹ This provision allows the government to monitor the e-mail addresses that a person sends to or receives from, or the websites a person visits, by showing that it is "relevant" to a criminal investigation.⁸² This standard is much easier to meet than "probable cause" or even "reasonable suspicion." The government already has this authority for telephones, but expanding it to electronic communications is troubling because a great

76. *United States v. Cavanaugh*, 807 F.2d 787, 790-91 (9th Cir. 1987).

77. Patriot Act, *supra* note 10, § 218. The provision simply states that the provisions of the FISA Act "are each amended by striking 'the purpose' and inserting 'a significant purpose.'"

78. 807 F.2d 787 (9th Cir. 1987).

79. Tanya Weinberg, *Patriot Act, Initiatives Disturb Civil Libertarians*, SUN-SENTINEL (Fort Lauderdale, Fla.), May 11, 2003, at 1B, available at LEXIS, News.

80. *Id.*

81. Patriot Act, *supra* note 10, § 216(b)(1).

82. If the government uses its own technology (e.g., Carnivore), then an audit trail is required, and the government must report back to the court in thirty days. The FISA court can issue an order for anywhere in the United States, not just that judicial district.

deal can be learned about a person, much of it misleading, based on websites visited.

The Patriot Act also expands the authority for so-called “sneak and peek” warrants. Section 213 allows the government to delay notification for a “reasonable period” which can be “extended . . . for good cause shown” if disclosure would have an “adverse result.”⁸³

Section 206 authorizes the FISA court to authorize intercepts on any phones or computers that the target may use. This authority for roving wiretaps means that the police no longer need to list the phone numbers to be tapped; the police can listen to any phone that a person might use. This means that the police can listen to all phones where a person works, shops, or visits. In debates with FBI agents over this provision, they have stated that this even allows tapping pay phones that a person regularly walks past. There is, though, a requirement for “minimization” in that agents must stop listening when they learn that the conversation is not pertinent to the subject of their warrant. The argument for roving wiretaps is that suspected terrorists might repeatedly change cell phones. The problem with this argument is that government agents, by definition, cannot listen to a phone until they know that it exists. Once they know, they could just add the new number to an existing warrant. In debates with FBI agents, the response always has been that it takes too long to add a new number to existing warrants. But this problem calls for a faster procedure, not roving wiretaps.

All of these sections in the Patriot Act mean that the government has substantially greater authority for law enforcement surveillance and searches and for a broad category of crimes. Yet, it is unclear that any of this authority is necessary. For example, it is unclear how knowing which library books a person checked out will enhance national security. Even more important, it has never been demonstrated that following the usual procedures and rules required under the Fourth Amendment for law enforcement would not be sufficient.

One other aspect of the Patriot Act’s expansion of law enforcement power must be emphasized: the government’s much greater authority to detain non-citizens without following the procedures required by the Fourth Amendment. Under Section 412 of the Act, the INS has seven days to place a person designated by the Attorney General as a suspected terrorist in removal or criminal proceedings, or release him. The person may be detained during the seven-day period. The Attorney General may make such designation based on “reasonable grounds to believe” the person is involved in terrorism or

83. Patriot Act, *supra* note 10, § 213.

that the activity poses a threat to national security.⁸⁴ If the person is ordered removed, but the Attorney General cannot remove the person, the Attorney General may detain the person for “up to six months . . . if . . . release . . . will threaten the national security . . . or the safety of the community or any person.”⁸⁵ The Attorney General will do a review every six months to determine if the certification should be revoked. The person is entitled to habeas review.

Allowing detention—for seven days or for six months—based on “reasonable suspicion” has no precedent under the Constitution. The Fourth Amendment requires probable cause for arresting and detaining a person. Allowing this on “reasonable suspicion” is a substantial weakening of constitutional protections.

Also, the Patriot Act increases the basis for excluding individuals from the United States. Section 411 amends the grounds of inadmissibility to expand the definition of terrorist to include “a representative . . . of . . . a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities.”⁸⁶ Persons “associated with a terrorist organization” are also inadmissible.⁸⁷ The Secretary of State may designate groups, foreign or domestic, as terrorist organizations. This allows individuals to be excluded from the United States solely for their speech or associational activities. No more is required, and the executive branch has broad authority to decide what is a terrorist organization and what is “public endorsement” of its activities.

V. CONCLUSION

Throughout American history, the response to threats has been repression. The war on terrorism is now over four years old and shows no signs of abating. Some individuals have been imprisoned for almost that long without due process, and there is no indication that they will be released. The war on terrorism is now longer than World War I or World War II. The loss of freedom has been enormous, and worse, there is no reason to believe that the country has been made any safer from the loss of liberty. There is also no reason to believe that the government could not have fought terrorism just as effectively without ignoring the Constitution and the rule of law.

84. *Id.* § 412.

85. *Id.*

86. *Id.* § 411.

87. *Id.*

