Is This a Dark Age for Fundamental Legal Protection?

by MICHAEL RATNER

Introduction

I am writing this article in unimaginable times. Since September 11 of last year, I have watched with shock and dismay as rights and legal protections embedded in the U.S. Constitution and in international law have been swept aside by a so-called “war on terrorism.” Fundamental legal protections that once limited arbitrary executive and government power to act against individuals have been discarded. Courts, which once stood as a safeguard against governmental lawlessness, have largely surrendered to new “anti-terrorist” measures. The laws of war themselves, fashioned over hundreds of years, have been disregarded. And people’s rights, struggled for and embodied in documents such as the Magna Carta, the French Declaration of the Rights of Man and of the Citizen, the Bill of Rights of the Constitution of the United States, and the International Covenant on Civil and Political Rights, are in jeopardy. We are truly entering a dark period.

I live a few blocks from the World Trade Center and saw firsthand the devastation and human suffering caused by the attacks of September 11. Like everyone in New York City, I would like to live once again in a safe city. We want those who attacked us arrested and punished, and we want the network that plotted to harm us eliminated so we will be safe from future attacks. But because safety at home has become such a paramount concern for those living in the United States, there appears to be broad popular support for the new
anti-terrorism measures—even those that curtail freedom and constitutional rights.

Unfortunately, as long as people feel unsafe and subject to attack, they will accept severe restrictions upon their liberties and those of others, hoping that limits on their rights will somehow keep them safe. But it is hard to argue that building a Fortress America will really prevent another terrorist attack. The United States has 7,500 miles of border with Canada and Mexico and thousands of miles of coastline, most of it not patrolled. There are more than 10,000 air flights a day in the United States. Eleven million trucks and over two million rail cars cross into the United States each year, as do millions of non-citizen visitors. Terrorists intent on harm can easily slip into the country. This is not to say that good law enforcement has no role, but, rather, that all the laws in the world will not really make the United States safe.

If the U.S. government truly wants its people to be safer and wants terrorist threats to diminish, fundamental changes in its foreign policies will be necessary. Although those changes are not discussed in this article, clearly the current role of the United States in the Middle East and elsewhere is a central issue. As the ancient Arab proverb declares: “He who plunders others always lives in terror.” The United States’ actions in the Middle East, particularly its unqualified support for Israel, its embargo of Iraq, its bombing of Afghanistan, and its actions in Saudi Arabia, continue to anger people and fertilize the ground where terrorists of the future will take root.

But there is very little room left in the United States for those who question the new anti-terror initiatives, or who identify problems with U.S. policies as central to stopping terror. At this moment, all such criticism is considered the equivalent of support for those who attacked the United States. In December 2001 John Ashcroft, the attorney general of the United States, testified to a congressional committee that “to those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists.”1 He went on to say that criticism of the administration “gives ammunition to America’s enemies and pause to America’s friends.”2 Similarly, White House spokesman Ari Fleischer warned “all Americans . . . to watch what they say [and] watch what they do.”

My own experience has borne out the degree to which the government’s message is being heard by citizens. Often, in media interviews since September 11, I have raised questions regarding the treatment of the Guantanamo detainees, the
 detention of non-citizens within the United States, the use of military tribunals, or the questioning by law enforcement officials of thousands of non-citizens. Typical of the hate mail I receive for expressing such sentiments is, “Why don’t you go over to Afghanistan and live with the murderers and try to protect them over there? You don’t belong in this country.”

Without basic alterations in U.S. policies, I believe there is little hope of ending the draconian curtailment of liberties in the United States and elsewhere. People will continue to live in fear and accept restrictions on their freedoms in the belief that it will make them safer. The struggle to regain lost liberty and that of creating a more just world abroad is really one struggle—and that is not just rhetoric. We and our children will not be safer and more free until the world is as well.

In the current climate it will obviously not be easy to substantially change the course the United States and its allies have embarked upon. Yet the situation is not utterly hopeless. The U.S. administration has been forced to modify certain of its more draconian proposals, such as its original refusal to apply any part of the Geneva Conventions to combatants captured in Afghanistan. It has lessened although not eliminated the unfairness of trials before military tribunals. Following a great uproar in the press, it has apparently closed the disinformation and propaganda office it had established at the Pentagon.

These changes in policy have come, in part, from dissent within the United States, and even from pragmatic voices within the U.S. armed forces. However, more importantly, it has been the countries of Europe, some of which still take the rule of law seriously, that have pressed these modifications upon the United States.

There have also been a number of lawsuits filed regarding the treatment of immigrants in the United States and of captured combatants. Some of these have been successful, although appeals are pending. On March 26, 2002, a judge in New Jersey gave civil rights organizations access to records of those detained in the United States after September 11, saying that secret arrests are “odious to a democracy.” On April 4, 2002, a federal judge in Michigan ordered public access to immigration hearings that had been closed in the wake of September 11, saying that government secrecy “only breeds suspicion.” And in a decision on March 13, 2002, the Inter American Human Rights Commission of the Organization of American States urged the United States to immediately provide court or tribunal hearings for those detained at Guantanamo Bay, Cuba. Such cases are an indication that there remain those willing to fight back and file suit to protect
basic rights, and that there are judges still courageous enough to uphold fundamental rights against a government bent on their elimination.

The sections of this article that follow will discuss some overall themes that characterize the current period, and analyze more closely some of the new “anti-terror” laws and restrictions, particularly those in the United States. I hope that voices around the world, particularly in Europe, can respond to these issues in ways that genuinely help change current U.S. policies into more just ones.

Overview of the Period

A. Permanent War Abroad

The first United States government reaction to September 11 was, and remains, to make war abroad: a war that may well continue without end. In order to fight this war, the U.S. Congress on September 14, 2001, in a resolution titled “Authorization for Use of United States Military Force,” gave the president unbridled power to go to war. He was authorized to attack any nation, organization, or person involved in any way in the September 11 attacks, whether directly or by harboring others involved in those attacks. No nation, organization, or person was named; the decision about who was guilty was left solely up to the president.

The link to the attacks of September 11, however, does not need to be objective or proved: the president could even fabricate it. If he declares war on Iraq, for example, he could justify his actions by claiming that someone allegedly from al-Qaeda allegedly met with an Iraqi official. Congress, basically, gave the president a blank check to make war upon whomever he wants anywhere in the world, even in the United States. The resolution has no time limit; the war may never be over.

This war has been conceptualized as a permanent war abroad. It is a war that the president has repeatedly stated will take many years; it is a war without end. Vice President Cheney said the United States may take military action against “forty to fifty countries” and that the war could last half a century or more.4

It can only be imagined what war on that scale means, and the dire consequences for people everywhere. A permanent war abroad means that even more
money will go to the military, an expansion of the U.S. military role everywhere, and the likelihood of more bombings and more killings. Within six months of September 11, active United States forces have involved themselves not only in Afghanistan and Pakistan, but also in Colombia, the Philippines, and potentially in Somalia and the Sudan. Future countries targeted include the countries of the so-called “axis of evil”: Iraq, Iran, and North Korea. The increase in military spending to pay for this permanent war is gigantic—fifty billion dollars—an amount larger then the military budget of any country in Europe. This will bring United States military spending to the astronomical number of 380 billion dollars.

A permanent war abroad also means permanent anger against the United States by those countries who will be devastated by U.S. military actions. Hate will increase, not lessen, and the terrible consequences of that hate will be used as justification for more restrictions on civil liberties in the United States. In the past, when wars ended, there was also an end to the worst deprivations of constitutional rights and civil liberties. In this war without end, we are facing a curtailment of our rights—without end.

B. Permanent War at Home

The second reaction of the U.S. government after September 11 was to launch a permanent war on terror at home by building a fortified surveillance and national security state. However, even on its own terms, the claimed necessity for this war at home is problematic. The legislation and other governmental actions to step up domestic surveillance are premised on the belief that intelligence agencies failed to stop the September 11 attack because they lacked the spying capability to find and arrest the conspirators. Yet recently it has come to light that nine of the hijackers fit profiles used by airport screeners, were asked for identification, and searched on September 11, and none were arrested—although two were on an FBI terrorist watch list. It was also revealed that an instructor at a Minnesota flight school had warned the FBI in August 2001 of his suspicion that a student, later identified as the so-called twentieth hijacker, might be planning to use a commercial airliner as a bomb. And six months after September 11, the U.S. Immigration and Naturalization Service approved the visas of two of the hijackers and sent the approvals to the flight school where they had been trained. These serious lapses in law enforcement strongly suggest that there are serious problems
in the system that will not be helped by the curtailment of civil liberties. While
the government has been willing to suspend rights in the name of stopping ter-
rorism, it has not been willing to look closely at its own intelligence failures.

Only now is Congress considering a limited, mostly secret investigation of
what went wrong, headed by a former CIA official. Thomas Powers, a respected
critic of the intelligence agencies, made the point of just how important such an
investigation is before any new intelligence powers are granted:

The bid for increased surveillance and intelligence gathering will become
a very big mistake if Congress grants the FBI and CIA more power but fails
to investigate what went wrong on September 11 . . . Everybody’s afraid.
They know they screwed up, and if you have an investigation people will find
out how. 5

But any investigation into intelligence failures must contend with the desires of
Attorney General John Ashcroft, a religious fundamentalist with an antediluvian
record on civil rights as a senator. Ashcroft clearly sees September 11 as an oppor-
tunity to lift restrictions that had been placed on the nation’s spy agencies in the
1970s, and as a chance to grant law enforcement agencies the additional powers
they have been wanting for years.

The current circumstances that have called forth the U.S. response at home and
abroad have rarely, if ever, occurred in the nation’s past. Both the war abroad and
the response at home have serious consequences for civil liberties and the rule of
law. Among the most pernicious tendencies I see at work are the pervasive cen-
sorship of information, the silencing of dissent, and widespread ethnic and reli-
gious profiling. The war has already created a climate of fear where neighbors live
in suspicion of one another and people are afraid to speak out.

Overall, the new anti-terrorist laws represent a tremendous expansion of execu-
tive power. The president can now make war on anyone without additional con-
gressional authority, can wiretap attorneys and their clients without a court
order, can jail non-citizens permanently on the word of the attorney general—
even if they have committed no crimes—and can set up military tribunals which
can mete out the death penalty without appeal. The United States’ system of
checks and balances, made up of the courts, Congress, and the executive branch,
and purportedly the pride of the U.S. constitutional system, is in jeopardy.
The new laws and restrictions also mean fundamental changes in the way the United States, historically a nation of immigrants, treats the twenty million non-citizens residing in the country. Since September 11, enforcement of the new laws against non-citizens, mostly from the Middle East, has included incommunicado detentions, the questioning of thousands by FBI agents, and widespread racial, ethnic, and religious profiling. The government's campaign against non-citizens, particularly Muslims, has at times flowered into explicit religious bigotry, as expressed in this remarkable quote from Attorney General Ashcroft:

Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.⁴

Some important religious leaders have also condemned Islam. Billy Graham's son, Franklin Graham, who gave the benediction at George W. Bush's inauguration, called the Islamic religion "wicked, violent, and not of the same God."⁵

An unprecedented strengthening of the U.S. intelligence and law enforcement apparatus; the erosion of the U.S. system of checks and balances; a new xenophobia and anti-immigrant sentiment—in general, these tendencies are deeply troubling.

Below, I will discuss some of the other consequences of the war on terrorism. Some include challenges to international justice, such as indefinite detention of battlefield detainees outside the standards of the Geneva Convention, the establishment of military tribunals to try suspected terrorists, and the possible use of torture to obtain information.

On the domestic front, I will discuss the creation of a special new cabinet office of Homeland Security, massive arrests and interrogation of immigrants, and the passage of legislation granting intelligence and law enforcement agencies much broader powers to intrude into the private lives of Americans.

Recent new initiatives—such as the wiretapping of attorney-client conversations, or the FBI’s new license to spy on domestic, religious, and political groups—add to the undermining of core constitutional protections. The entire situation, when coupled with the ideology of the Republicans currently in control of the executive branch of the government, portends the worst for international human rights and for constitutional rights.
The New “Legal” Regime

The government has established a wide-ranging series of measures in its efforts to eradicate terrorism. Below, I will look more closely at some of the key measures and analyze their implications.

I. The President’s Military Order

A. Military Commissions

On November 13, 2001, President Bush signed a military order establishing military commissions or tribunals to try suspected terrorists. Under this order, non-citizens, whether from the United States or elsewhere, who are accused of aiding international terrorism can be tried before one of these commissions at the discretion of the president. These commissions are not courts-martial, which provide far more protections for the accused.

The divergence from constitutional protections allowed by this executive order is breathtaking, notably Attorney General Ashcroft’s explicit statement that terrorists do not deserve constitutional protections. (By “terrorists,” Ashcroft means accused or suspected individuals, not those proved to have committed terrorist acts.) Accordingly, what have been set up are essentially “courts” of conviction and not of justice.

These new tribunals represent such a departure from fair and impartial courts that there was a broad outcry against their use both in the United States and Europe. Even conservative U.S. columnists such as William Safire were highly critical. This outcry was probably a factor in the government’s decision to have the so-called twentieth hijacker, Moussaoui, tried in a regular federal court in the United States. It certainly contributed to the reasons for the order being modified in March 2002.

Under the provisions of the military order establishing these commissions, the secretary of defense will appoint the judges, most likely military officers, who will decide both questions of law and fact. Unlike federal judges who are appointed for life, these officers will have little independence and every reason to decide in favor of the prosecution. Normal rules of evidence, which provide some assur-
ance of reliability, will not apply. Hearsay and even evidence obtained from torture will apparently be admissible. (This is particularly frightening in light of the intimations from U.S. officials that torture of suspects may be an option.

Under the original order, unanimity among the judges was not required, even to impose the death penalty. That has now been modified, in part, to require a unanimous verdict for a death sentence, but not for the finding of guilt for a crime carrying a potential of a death sentence. The original order did not give suspects a choice of counsel; that too has been modified, but only to the extent a suspect can pay an attorney and that the attorney passes security clearances from the U.S. government. Initially, the only appeal from a conviction was to the president or the secretary of defense; the modified order allows an appeal to a three-person military review panel that then gives a "recommendation" to the secretary of defense or the president as to the disposition of the case. Thus, there is still no review by a civilian court and the final decision remains in the hands of the president or secretary of defense.

Incredibly, the entire process, including execution, can be carried out in secret, although the modified order says the proceeding will be open unless the presiding officer determines otherwise. In other words, they can still be closed in the interests of "national security" and other similar reasons. The trials can be held anywhere the secretary of defense decides. (A trial might occur on an aircraft carrier, for example, with no press allowed, and the body of the executed disposed of at sea.)

Although military tribunals were used during and immediately subsequent to World War II, their use since that time does not comply with important international treaties. The International Covenant on Civil and Political Rights as well as the American Declaration of the Rights and Duties of Man require that persons be tried before courts previously established in accordance with preexisting laws. Clearly, the tribunals are not such courts. In addition, the Third Geneva Conventions of 1949 require that Prisoners of War (POWs) be tried under the same procedures that U.S. soldiers would be tried for similar crimes. U.S. soldiers are tried by courts-martial or civilian courts and not by military tribunals. This is probably one important reason the United States is refusing to classify the Guantanamo detainees as POWs; if they were POWs, the government would not be free to use tribunals.

Surprisingly, a number of prestigious law professors have accepted and even
argued in favor of these tribunals, saying that secrecy is necessary for security. The primary argument is that it might be necessary to disclose classified information in order to obtain convictions. But in fact, procedures for safely handling classified information in federal courts have been successfully employed, as in the trial of those convicted in the 1993 bombing of the World Trade Center. The 1993 trials also demonstrated that trials of suspected terrorists do not require special military tribunals, but can safely be held in federal courts.

Trials before military commissions will not be trusted in either the Muslim world or in Europe, where previous terrorism trials have not required the total suspension of the most basic principles of justice. The military commissions will be viewed as what they are: “kangaroo courts.” It would be much better to demonstrate to the world that the guilty have been apprehended and fairly convicted in front of impartial and regularly constituted courts. An even better solution would be for the United States to go to the United Nations and have the United Nations establish a special court for the trials, staffed by judges from the United States, Muslim countries, and other countries with civil law systems.

B. Indefinite Detention under the Military Order and the Guantanamo Prisoners

In addition to authorizing military tribunals, the same military order of November 13 requires the secretary of defense to detain anyone whom the president has reason to believe is an international terrorist, a member of al-Qaeda, or anyone who harbored such persons. There is no requirement that a detained individual ever be brought to trial. Detention without any charges and without any court review can last an entire lifetime.

Subsequent to the issuance of the Military Order, U.S. and Northern Alliance forces in Afghanistan captured thousands of prisoners. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-ray at the U.S. Naval Station in Guantanamo Bay, Cuba. As of April 2002, U.S authorities were detaining three hundred male prisoners representing thirty-three nationalities at the Guantanamo compound, and the number was expected to grow. It is these prisoners who may be indefinitely detained or tried by military tribunals to face the death penalty. Remarkably, Secretary Rumsfeld has stated that he reserves the right to continue detaining prisoners even if the tribunals acquit them.
There have been allegations of ill treatment of some prisoners in transit and at Guantanamo, including reports that they were shackled, hooded, and sedated during the twenty-five-hour flight from Afghanistan; that their beards and heads were forcibly shaved, and that upon arrival at Guantanamo they were housed in small cells that failed to protect them against the elements. While such treatment is never acceptable, more serious is the fact that these prisoners exist in a legal limbo, their identities secret and the charges against them unknown.

It is the official position of the United States government that none of these detainees are POWs. Instead, officials have repeatedly described the prisoners as “unlawful combatants.” This determination was made without the convening of a competent tribunal as required by Article 5 of the Third Geneva Convention, which mandates such a tribunal “should any doubt arise” as to a combatant’s status. In its most recent statement on the status of those detained at Guantanamo, the U.S. government announced that although it would apply the Geneva Conventions to those prisoners it decided were from the Taliban, it would not extend them to prisoners it believed were members of al-Qaeda. However, in no case were any of the detained to be considered POWs. The United States has repeatedly refused the entreaties of the international community to treat all the detainees under the procedures established under the Geneva Conventions.

The United States’ treatment of the Guantanamo detainees violates virtually every human rights norm relating to preventive detention. The United States has denied the detainees access to counsel, consular representatives, and family members; has failed to notify them of the charges they are facing; has refused to allow for judicial review of the detentions; and has expressed its intent to hold the detainees indefinitely. It continues to do so despite an important ruling from the Inter American Human Rights Commission that it immediately give the detainees some form of judicial process. In its ruling the commission requested that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.

II. The Office of Homeland Security

On September 20, 2001, President Bush announced the creation of the Homeland Security Office, charged with gathering intelligence, coordinating anti-ter-
rorism efforts, and taking precautions to prevent and respond to terrorism. It is not yet known how this office will function, but it will most likely try to centralize the powers of existing U.S. intelligence and law enforcement agencies—a difficult, if not impossible, job—and coordinate the work of some forty bickering agencies.

Those concerned with its establishment are worried that the Office of Homeland Security will become a super spy agency and, as its very name implies, that it will encourage the military to play a hitherto unprecedented role in domestic law enforcement. The recent appointment of a general who will be in charge of “defense of the homeland,” and the proposed repeal of a federal statute that prohibits the military from playing a domestic law enforcement role, are clear signals of what can be expected in the future.

III. FBI Arrests and Investigations

A. Arrests of Non-Citizens

The FBI has always done more than chase criminals; like the Central Intelligence Agency it has long considered itself the protector of U.S. ideology. Those who have opposed government policies—whether civil rights workers, anti-Vietnam War protesters, opponents of the covert Reagan-era wars, or cultural dissidents—have repeatedly been surveilled and had their legal activities disrupted by the FBI.

In the immediate aftermath of the September 11 attacks, Attorney General John Ashcroft focused FBI efforts on non-citizens, whether permanent residents, students, temporary workers, or tourists. Normally, an alien can only be held for forty-eight hours prior to the filing of charges. Ashcroft's new regulation allowed arrested aliens to be held without any charges for a “reasonable time,” presumably months or longer.

The FBI began massive detentions and investigations of individuals suspected of terrorist connections, almost all of them non-citizens of Middle Eastern descent; over 1,300 were arrested. In some cases, people were arrested merely for being from a country such as Pakistan and having expired student visas. Many were held for weeks and months without access to lawyers or knowledge of the charges against them; many are still in detention. None, as yet, have been proven
to have a connection with the September 11 attacks; as many as half remain in jail despite having been cleared.16

Stories of mistreatment of such detainees are not uncommon. Apparently, some of those arrested are not willing to talk to the FBI, although they have been offered shorter jail sentences, jobs, money, and new identities. Astonishingly, the FBI and the Department of Justice are discussing methods to force them to talk, which include “using drugs or pressure tactics such as those employed by the Israeli interrogators.”17 The accurate term to describe these tactics is torture.

There is resistance to this even from law enforcement officials. One former FBI chief of counterterrorism said in an October interview: “Torture goes against every grain in my body. Chances are you are going to get the wrong person and risk damage or killing them.”18 As torture is illegal in the United States and under international law, U.S. officials risk lawsuits by using such practices. For this reason, they have suggested having another country do their dirty work; they want to extradite the suspects to allied countries where security services regularly threaten family members and/or use torture. It would be difficult to imagine a more ominous signal of the repressive period we are facing.

In fact, with regard to a number of alleged Taliban or al-Qaeda members captured or arrested outside the United States, the U.S. has secretly sent them to other countries and not brought them to the U.S. or to Guantanamo. They have been taken to Egypt or Jordan where they can be tortured, in some cases with the involvement of the CIA.

B. Investigations of Middle-Eastern Men and of Dissenters

In late November 2001, Attorney General Ashcroft announced that the FBI or other law enforcement personnel would interview more than five thousand men, mostly from the Middle East, who were in the United States on temporary visas. None of these men were suspected of any crime. The interviews were supposedly voluntary. A number of civil liberties organizations, Muslim, and Arab-American groups objected that the investigations amounted to racial profiling and that interviews of immigrants who might be subject to deportation could hardly be called voluntary. A number of law enforcement officials, including a former head of the FBI, objected as well, saying that such questioning would harm the relationship of police departments with minority communities, that the practice
was illegal under some state laws, and that it was a clumsy and ineffective way to go about an investigation. A few local police departments refused to cooperate.

Although Ashcroft claimed the questioning was harmless, the proposed questions themselves made this assertion doubtful. The initial questions concerned the non-citizen’s status; if there was even the hint of a technical immigration violation, the person could well find himself in jail and deported. Information was requested regarding all of the friends and family members of the questioned person; in other words, the FBI wanted complete address books. Once the FBI had such information, it would open files and investigations on each of those named, even though no one was suspected of a crime.

Other questions concerned whether the person interviewed had any sympathy with any of the causes supposedly espoused by the attackers on September 11. Media reports in this country and elsewhere have suggested that the attackers were acting in the name of Palestinian rights. Whether or not this is the case, many Arab-Americans are sympathetic with the plight of the Palestinians, and would be put in a bind by FBI questioning about this topic. If the person questioned by the FBI admitted to such sympathy, he would immediately become a potential suspect; if he was sympathetic, but denied it, he would be lying to the FBI, which is a federal crime.

The FBI was also instructed to make informants of the persons it questioned, and to have them continue to report on and monitor the people they are in contact with. Oliver “Buck” Revel, a former FBI assistant executive director, has criticized this practice as “not effective” and as “really gut[ting] the values of our society, which you cannot allow the terrorists to do.”

In March 2002, Ashcroft announced that the Justice Department was launching a new investigation of three thousand more non-citizens, mostly young Arab men. This is despite the fact that only just over half of the initial group of five thousand could even be found for the interviews and that little, if any, information was learned. The American-Arab Anti-Discrimination Committee was sharply critical of this new effort and said it was an “ineffective method of law enforcement and constituted an unacceptable form of racial profiling.”

The FBI is also currently investigating political dissident groups it claims are linked to terrorism—among them pacifist groups such as the U.S. chapter of Women in Black, which holds peaceful vigils to protest violence in Israel and the Palestinian territories. The FBI has threatened to force members of Women in
Black to either talk about their group or go to jail. As one of the group's members said, "If the FBI cannot or will not distinguish between groups who collude in hatred and terrorism and peace activists who struggle in the full light of day against all forms of terrorism, we are in serious trouble."21

Unfortunately, the FBI does not make that distinction. We are facing not only the roundup of thousands on flimsy suspicions, but also an all-out investigation of dissent in the United States.

C. Renewed FBI Spying on Religious and Political Groups

According to a front page December 2001 New York Times story, Attorney General John Ashcroft is considering a plan that would authorize the FBI to spy upon and disrupt political groups.22 This spying and disruption would take place even without evidence that a group was involved in anything illegal. A person or group could become a target solely by expressing views different from those of the government or taking a position in support of, for example, Palestinian rights.

Ashcroft would authorize this by lifting FBI guidelines that were put into place in the 1970s after abuses of the agency, including the spying upon and efforts to disrupt the activities of such nonviolent leaders as Dr. Martin Luther King, Jr., were exposed. That earlier spying and disruption were done under a program called COINTELPRO, which stands for "Counterintelligence Program." It was a program to "misdirect, discredit, disrupt, and otherwise neutralize" specific individuals and groups. Probably the most notorious goal of COINTELPRO was the FBI's effort to prevent the rise of what it called a "Black Messiah." At one point, the FBI tried to induce Dr. King to commit suicide by threatening to expose his extramarital affairs to his wife. It is not known whether this proposed new version of COINTELPRO has been adopted.

IV. Violation of the Attorney-Client Relationship

A. Wiretapping of Attorney-Client Communications

At the heart of the effective assistance of counsel is the right of a criminal defendant to a lawyer with whom he or she can communicate candidly and freely with-
out fear that the government is overhearing confidential communications. This right is fundamental to the adversary system of justice in the United States. When the government overhears these conversations, a defendant's right to a defense is compromised. On October 30, 2001, with the stroke of a pen, Attorney General Ashcroft eliminated the attorney-client privilege and said he will wiretap communications when he thinks there is "reasonable suspicion to believe" that a detainee "may use communications with attorneys or their agents to further facilitate an act or acts of violence or terrorism." Ashcroft says that approximately one hundred such suspects and their attorneys may be subject to the order. He claims the legal authority to do so without court order; in other words, without the approval and finding by a neutral magistrate that attorney-client communications are facilitating criminal conduct. This is utter lawlessness by our country's top law enforcement officer and is flatly unconstitutional.

B. The Wiretapping and Indictment of a Lawyer: the Lynne Stewart Case

On April 9, 2002, Ashcroft flew to New York to announce the indictment of a well-known defense attorney, Lynne Stewart. Stewart had represented Sheikh Omar Abdel Rahman in his 1995 trial for conspiracy to bomb the World Trade Center for which he had been convicted and sentenced to life plus sixty-five years. She had continued to represent him in prison.

Stewart was arrested by the FBI and freed the same day on $500,000 bond. That same day the FBI raided her office, removed her hard drives from her computers, and took many of her legal files. Many of Stewart's clients are facing trials in federal courts; now the FBI and the Justice Department have possession of those confidential legal files. The damage that can be done to the constitutional rights of her clients is incalculable.

The indictment, for which she faces forty years in prison, primarily accuses Stewart of having given material support to a terrorist organization. It charges that she "facilitated and concealed communications" between the Sheik and members of an Egyptian terrorist organization, the Islamic Group. The essence of the claim is that on an occasion when Stewart visited her client in prison, the Arabic translator that accompanied her spoke to the Sheik regarding messages that the Sheik wanted transmitted to the terrorist group. In other words, the translator allegedly did not just translate for Stewart, but had his own agenda with
the Sheik. It is claimed that Stewart permitted and even facilitated those conversations. These communications, if they occurred, resulted in no terrorist incidents.

It seems highly improbable that Ashcroft will have sufficient evidence to support the charges against Stewart. As she does not speak or understand Arabic, she could not have known the content of the conversations that allegedly occurred between the translator and the Sheik. If she was unaware of the supposed illegal nature of the conversations, it is difficult to see how she could be accused of giving material aid to a terrorist organization. Moreover, the conversations occurred prior to Ashcroft's tenure, when Janet Reno was the attorney general. Apparently Reno did not believe that there was sufficient evidence to indict Steward.

That is by no means the only problem with the indictment. The claimed "evidence" was gathered through a wiretap; a wiretap obtained by Janet Reno that had been in effect for almost two years. This wiretap was not authorized by a warrant, nor did it meet the "probable cause" standard of the Fourth Amendment that is normally required in criminal investigations. Rather, a special secret court, the Foreign Intelligence Surveillance Court, authorized the wiretap without any showing of "probable cause." (The functioning of this court is explained below.) Such a wiretap raises serious legal questions, particularly as attorney-client conversations were monitored.

Interestingly, Ashcroft is now using this indictment of Stewart to justify his claim that there is a need to wiretap attorney-client conversations in terrorism cases. In addition, as has been explained, he claims the authority to do so without any court approval, even that of the Foreign Intelligence Surveillance Court. Immediately after the indictment he announced that his first use of this claimed power would be aimed at attorneys meeting or speaking with the Sheik. There is no reason for this bypassing of the Constitution; courts are the appropriate place to approve, or disapprove, any such requests for wiretapping. Hopefully, the court test of and rejection of this new reach for power will come swiftly and decisively.

It is difficult to divorce Stewart's indictment from the politics of John Ashcroft. This is the man who states that critics of claimed deprivations of constitutional rights are aiding terrorists and that "foreign terrorists who commit war crimes against the United States are not entitled to and do not deserve the protections of the American Constitution . . ."24 In this context, his indictment of
Stewart must be viewed with extreme skepticism. It seems more then likely that it was contrived, and that one of its main purposes was the intimidation of those who believe all persons, even those accused of terrorism, are entitled to constitutional protections, most importantly the right to a lawyer. Because of Ashcroft's action, it will be increasingly difficult to find defense lawyers willing to take these unpopular cases.

V. The New Anti-Terrorist Legislation

On October 26, 2001, Congress passed and President Bush signed sweeping new anti-terrorist legislation, the U.S.A.-Patriot Act ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism"), aimed at both aliens and citizens. The legislation met more opposition than one might expect in these difficult times. A National Coalition to Protect Political Freedom of over 120 groups ranging from the right to the left opposed the worst aspects of the proposed new law. They succeeded in making minor modifications, but the most troubling provisions remain, and are described below:

A. "Rights" of Aliens

Prior to this legislation, anti-terrorist laws passed in the wake of the 1996 bombing of the federal building in Oklahoma had already given the government wide powers to arrest, detain, and deport aliens based upon secret evidence—evidence that neither the alien nor his attorney could view or refute. The new legislation makes it even worse for aliens. First, the law would permit "mandatory detention" of aliens certified by the attorney general as "suspected terrorists." These could include aliens involved in barroom brawls or those who have provided only humanitarian assistance to organizations disfavored by the United States. Once certified in this way, an alien could be imprisoned indefinitely with no real opportunity for court challenge. Until now, such "preventive detention" was believed to be flatly unconstitutional.

Second, current law permits deportation of aliens who support terrorist activity; the proposed law would make aliens deportable for almost any association
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likely that

with a “terrorist organization.” Although this change seems to have a certain sur-
face plausibility, it represents a dangerous erosion of the constitutionally pro-
tected rights of association. “Terrorist organization” is a broad and open-ended
term that could, depending on the political climate or the inclinations of the attor-
general, include liberation groups such as the Irish Republican Army, the
African National Congress, or NGOs that have ever engaged in any destruction
of property, such as Greenpeace. An alien who gives only medical or humani-
tarian aid to similar groups, or simply supports their political message in a ma-
terial way, could also be jailed indefinitely.

B. More Powers to the FBI and CIA

A key element in the U.S.A.-Patriot Act is the wide expansion of wiretapping.
In the United States wiretapping is permitted, but generally only when there is
probable cause to believe a crime has been committed and a judge has signed a
special wiretapping order that specifies limited time periods, the numbers of the
telephones wiretapped, and the type of conversations that can be overheard.

In 1978 an exception was made to these strict requirements, permitting wire-
tapping to be carried out to gather intelligence information about foreign gov-
ernments and foreign terrorist organizations. A secret court, the Foreign
Intelligence Surveillance Court, was established that could approve such wire-
taps without requiring the government to show evidence of criminal conduct. In
doing so the constitutional protections necessary when investigating crimes could
be bypassed.

The secret court has been little more than a rubber stamp for wiretapping
requests by the spy agencies. It has authorized over 13,000 wiretaps in its twenty-
two-year existence, about one thousand last year alone, and has apparently never
denied a request for a wiretap. Under the new law, the same secret court will have
the power to authorize wiretaps and secret searches of homes in criminal cases—
not just to gather foreign intelligence. The FBI will be able to wiretap individu-
als or organizations without meeting the stringent requirements of the U.S.
Constitution, which requires a court order based upon probable cause that a per-
person is planning or has committed a crime. The new law will authorize the secret
court to permit roving wiretaps of any phones, computers, or cell phones that
might possibly be used by a suspect. Widespread reading of email will be allowed,
even before the recipient opens it. Thousands of conversations will be listened to or read that have nothing to do with any suspect or any crime.

The new legislation is filled with many other expansions of investigative and prosecutorial power, including wider use of undercover agents to infiltrate organizations, longer jail sentences, lifetime supervision for some who have served their sentences, more crimes that can receive the death penalty, and longer statutes of limitations for prosecuting crimes. Another provision of the new bill makes it a crime for a person to fail to notify the FBI if he or she has “reasonable grounds to believe” that someone is about to commit a terrorist offense. The language of this provision is so vague that anyone, however innocent, with any connection to someone even suspected of being a terrorist can be prosecuted.

C. The New Crime of Domestic Terrorism

The U.S.A.-Patriot Act creates a number of new crimes. One of the most threatening to dissent and to those who oppose government policies is the crime of “domestic terrorism.” It is loosely defined as acts that are dangerous to human life, violate criminal law, and “appear to be intended” to intimidate or coerce a civilian population” or “influence the policy of a government by intimidation of coercion.” Under this definition, a protest demonstration that blocked a street and prevented an ambulance from getting by could be deemed domestic terrorism. Likewise, the demonstrations in Seattle against the World Trade Organization in 2000 could fit within the definition. This was an unnecessary addition to the criminal code; there are already plenty of laws making such civil disobedience criminal without labeling protest as “terrorist” in order to impose harsh prison sentences.

Overall, the severe curtailment of legal rights, the disregard of established law, and the new repressive legislation represents one of the most sweeping assaults on liberties in the last fifty years. It is unlikely to make us more secure; it is certain to make us less free. It is common for governments to reach for draconian law enforcement solutions in times of war or national crisis. It has happened often in the United States and elsewhere. We should learn from historical example. Times of hysteria, of war, and of instability are not the times to rush to enact new laws that curtail our freedoms and grant more authority to the government and its intelligence and law enforcement agencies.
The U.S. government has conceptualized the war against terrorism as a permanent war, a war without boundaries. Terrorism is frightening to all of us, but it's equally chilling to think that in the name of anti-terrorism our government is willing to permanently suspend constitutional freedoms as well.

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ENDNOTES:
2. Ibid.
14. On February 8, the day after announcement of the United States’ position, Darcy Christen, a spokesperson for the ICRC, said of the detainees: “They were captured in combat [and] we consider them prisoners of war.” Richard Waddington, “Guantanamo Inmates Are POWs Despite Bush View—ICRC,” Reuters, Feb. 9, 2002.
15. These detentions are currently under challenge in United States courts and the author of this article is one of the attorneys in those cases. The court papers can be obtained at: www.campxray.net.
18. Ibid.
25. This 1996 legislation was aimed at aliens, although U.S. citizens living in the United States carried out the bombing of the federal building.