National Security versus Civil Liberties

NANCY V. BAKER
New Mexico State University

Political, media, and academic observers have consistently noted the adverse impact of post-9/11 antiterrorism measures on civil liberties, yet Attorney General John Ashcroft and others in the administration insist that the measures are consistent with constitutional values. The national security versus civil liberties debate has special saliency during wartime, particularly an open-ended war against terrorism. Responding to the attacks as a war—instead of a crime against humanity—has led to two domestic developments for the presidency: first, the centralization of authority in the White House, and second, the securitization of the domestic sphere, specifically the administration’s view of civil liberties as a weakness in the system that can be exploited by terrorists. This study focuses on the second of these developments. It examines how the conception of liberties as points of vulnerability compels the administration to restrict individual rights while, at the same time, to deny that it is doing so.

Soon after the George W. Bush administration began crafting its response to the terrorist attacks of September 11, 2001, voices could be heard questioning the impact of its antiterrorism measures on civil liberty. The Patriot Act would give the FBI “a blank warrant,” warned the Village Voice (Hentoff 2001). When names of the detained were not released, one editorial asked “Why Not Disclose?” (Editorial 2001). The debate has not died down. In fact, according to the Washington Post, it has crystallized around opposing views of the nature of threat and the best way to confront it (Lane 2002a). Almost two years after the attacks, The New York Times discussed calculating the benefits and costs of the limits on liberty (Andrews 2003), and the The Economist (2003) posed “A question of freedom.” In the intervening months, publications ranging from The Christian Science Monitor (Kiefer 2002) to the Sunday newspaper insert Parade Magazine (Klein 2002) have covered the debate summarized as national security versus civil liberties.

The debate has special saliency during wartime, because the suggestion that there is another side than the government’s implies dissension and even subversion. This was the point raised by Attorney General John Ashcroft in Senate hearings in December 2001: “To those who scare peace-loving people with phantoms of lost liberty, my

---

Nancy V. Baker is associate professor in the Department of Government at New Mexico State University. She is the author of Conflicting Loyalties: Law and Politics in the Attorney General’s Office 1789-1990.

Presidential Studies Quarterly 33, no. 3 (September) 547 © 2003 Center for the Study of the Presidency
message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve . . ." (U.S. Senate 2001, 316). This grim warning is particularly disturbing in the context of a war against terrorism, because the war has no clear end or scope; it is not waged against a nation-state or even an ideology, but against age-old methods of violence and terror; it is bound neither by time, geography, nor specific adversaries. President Bush has noted the difference as well, commenting that, "We're at war in a different kind of war" (CNN 2003).

Defining the attacks as an act of war—instead of a domestic crime or a crime against humanity—has implications for the presidency as well as for the nation, opening up some policy avenues and foreclosing others. One important outcome has been the centralization of power within the Oval Office; presidents historically have been able to exercise greater authority in international than domestic matters, and in wartime than peacetime. In the current crisis environment, this administration has asserted unilateral authority in multiple arenas, including the claim that the other branches lack competence to review its "core executive" actions. At such moments of crisis, members of Congress and the judiciary are expected to defer to the president's definition of the national interest, and most have (Baker 2002).

Another product of wartime is that civil liberties are generally categorized as luxury items, like silk stockings during World War II, that divert valuable resources from the war effort. Historically, once war is over, those luxuries are again embraced. The White House, Congress, and the courts then reassert civil liberty values, perhaps even chiding themselves for their earlier restrictions. But a war on terrorism, bringing a securitization of domestic life, creates a different metaphor. Liberties are not luxuries to be sacrificed in the short term until we can afford them again. Liberties are gaping holes in the security fabric; they must be sealed off permanently if the nation is to be safe. The demands of a war on terrorism also undercut the likelihood that liberties can be reasserted, because a war without a clear end will never produce the peace of mind necessary to reflect on what we have lost.

"Firmly rooted in the Constitution." The administration characterizes its antiterrorism measures as fully consistent with civil liberties and denies that any of its actions constitute restrictions. A commitment to civil liberties extends up to the president, according to Ashcroft: "President Bush insists that our responses to evil respect the Constitution and value the freedoms of justice the Constitution guaranteed" (CNN 2003). The attorney general has been the most outspoken member of the administration on this theme. He told Senators this past spring, "The Department of Justice has acted thoughtfully, carefully, and within the Constitution of the United States, that framework for freedom" (U.S. Senate 2003). Throughout the past two years, he has made similar assurances in press releases and public statements when discussing antiterrorism measures. For example, he described the plan to end informational firewalls between federal prosecutors and intelligence officers as "rooted in our Constitutional liberties" (U.S. Senate 2002), and the post-9/11 interrogation of thousands of foreign nationals as exhibiting "full respect for the rights and dignity of the individuals being interviewed" (Attorney General Transcript 2002a). He called the revised guidelines permitting FBI agents to monitor public gatherings as a demonstration to the American
public that the agency would protect them from terrorism “with a scrupulous respect for civil rights and personal freedoms” (Attorney General Remarks 2002a). He reassured a conference of federal appellate judges that “our post-September 11 policies have been carefully crafted to prevent terrorist attacks while protecting the privacy and civil liberties of Americans” (Attorney General Remarks 2002b). In a similar vein, he told a conference of U.S. attorneys that “our actions are firmly rooted in the Constitution . . . and consistent with the laws passed by Congress” (Attorney General Remarks 2002c), using the same phrase a week later when addressing the International Association of Chiefs of Police (Attorney General Remarks 2002d). He said he tells his staff every day, “‘Think outside the box,’ but . . . ‘Think inside the Constitution’” (Anderson 2003a).

The attorney general’s continued references to civil liberties and the Constitution have not settled the debate. His steady insistence that liberties are not affected has not satisfied the critics, largely because it appears to be contradicted by the actual impact of some of the new policies and procedures. Furthermore, Ashcroft himself has framed civil liberties as a point of vulnerability from a national security perspective. Terrorists, he has argued, “exploit our openness—not randomly or haphazardly—but by deliberate, premeditated design.” Our freedoms, he has said, are being turned against us, as “means of freedom’s destruction” (Attorney General Remarks 2002d). He told senators in December 2001, “We are at war with an enemy who abuses individual rights as it abuses jet airliners: as weapons with which to kill Americans” (U.S. Senate 2001). In other words, a system of civil liberties makes the country more vulnerable to future attack; it is part of the terrorist arsenal.

Restrictions on Civil Liberties

John Ashcroft sees two broad areas of civil liberties as particular weaknesses waiting to be exploited by terrorists—free press and due process rights. He described a seized al Qaeda training manual where “terrorists are told how to use America’s freedom as a weapon against us. They are instructed to use the benefits of a free press—newspapers, magazines and broadcasts—to stalk and kill their victims. They are instructed to exploit our judicial process for the success of their operations” (U.S. Senate 2001). The logic is clear: to foil the terrorist plot, the administration must enact antiterrorism measures that ensure greater governmental control of information, fewer procedural protections for people linked to terrorism (as either suspects or material witnesses), and enhanced government surveillance. Not surprisingly, these are the civil liberty encroachments most lamented by policy critics.

Civil liberty concerns raised in federal courts have varied from free speech to discrimination to criminal procedural rights, as a report from the American Civil Liberties Union illustrates. Documenting its litigation activities from September 11, 2001 to March 14, 2003, as either a party or a friend of court, the ACLU chronicled thirty cases involving allegations of religious profiling, closed immigration hearings, government refusal to release names of detainees, misuse of material witness warrants, and unsuccessful efforts to obtain government documents through the Freedom of Information
Act. The organization has been involved in some of the higher profile challenges to the administration’s antiterrorism efforts, including enemy combatant cases, the gag order on the attorney of convicted shoe bomber Richard Reid, and the use of Foreign Intelligence Surveillance search warrants for criminal investigations (ACLU Report 2003).

Not all of the challenges occur in the courthouse. Groups representing both the political left and right have lobbied members of Congress on proposals that they see as particularly troubling. Congress has responded to a limited degree. For example, the Senate did authorize the Pentagon’s Total Information Awareness project to develop a database to track possible terrorists, but it also provided an advisory oversight committee (Clymer 2003). In addition, outside opposition is mounting to the Computer Assisted Passenger Pre-Screening System, designed to provide instant but potentially invasive background checks on all airline passengers (ACLU Press Release 2003b). Congress also appears wary at this point of the leaked Justice Department proposal named the Domestic Security Enhancement Act of 2003 (Anderson 2003b; U.S. Senate 2003). Referred to as Patriot II, the measure mobilized such opponents as the Center for Public Integrity and OMB Watch (Lewis and Mayle 2003; OMB Watch 2003).

Limiting the Flow of Information

Control of information has been a core component of the Bush administration’s antiterrorism agenda. However, even before September 11, 2001, the administration had sought to limit press and public access to some information, including refusing to release the Reagan administration papers in January 2001, as stipulated in the Presidential Records Act.¹ The White House from the start has been concerned with the erosion of confidentiality and executive privilege in previous administrations.

National security and the war against terrorism have heightened the administration’s determination to control the flow of information to an unprecedented degree. Government agencies stripped their web sites of reports, data, and maps. FBI agents visited government repositories and libraries to ensure that other sensitive material was destroyed (Cha 2002). All federal departments and agencies were instructed to safeguard “information that could be misused to harm the security of our Nation and the safety of our people,” including protecting from disclosure unclassified but sensitive information (White House Chief of Staff 2002). The attorney general has reportedly resisted providing Congress with information on the implementation of the Patriot Act and other antiterrorism measures (Bettelheim 2002; Koszczuk 2002).

A month following the 9/11 attacks, Ashcroft issued a new policy governing Freedom of Information requests, shifting the presumption away from disclosure by

1. The president stopped the pending release of the Ronald Reagan presidential papers three times, according to letters from White House Counsel Alberto R. Gonzales to John W. Carlin, Archivist of the United States (White House Counsel’s Office 2001). Gonzales relied on Section 2(b) of Executive Order 12667 (1989) that requires the archivist to extend the time for release at the instruction of the current president. After the terrorist attacks, Bush utilized the widespread concern with security to make the delay more permanent. He issued an executive order shifting the presumption away from release by requiring concurrence of both the current president and the appropriate former president before any documents can be released (Executive Order 13233, 2001).
promising department and agency heads that the Justice Department would defend their
decisions not to disclose unless that decision lacked “a sound legal basis” (U.S. Depart-
ment of Justice 2001a). Using this new interpretation of the statute, the Justice Depart-
ment then refused to release aggregated government data to the Transactional Records
Access Clearinghouse (TRAC) at Syracuse University, where it had been available since
1989 to researchers, members of the press, Congress, and others interested in gauging
how well the government was doing its job. The department cited a concern that the
data could “interfere with anti-terrorism investigations and endanger lives,” although
others suggested the action could be tied to the release of a TRAC study showing that
the FBI exaggerated the number of terrorism cases it referred (Grimaldi 2002). These
and other actions have led some critics, such as Larry Klayman of the conservative
Judicial Watch, to categorize the administration as “the most secretive of our lifetime,
even more secretive than the Nixon administration” (quoted in Elsner 2002). In terms
of free press and free expression since 9/11, detentions and immigration hearings have
triggered the most questions concerning secrecy.

Nondisclosure of Names of the Detained

Several free press cases involve due process and privacy questions as well. Such was
the case when the federal government refused to disclose the names, locations, and
charges against the approximately 1,200 people detained in the aftermath of the attacks.
The exact number of people held and other details about their cases are unknown,
because the government stopped issuing that information in November 2001 (Gold-
stein and Eggen 2001). Both the media and defense attorneys protested what they saw
as violations of the First and Sixth Amendments to the Constitution. At their annual
meeting, the American Bar Association condemned the secret detentions and denial of
counsel (Washington Post 2002). Reportedly, secrecy went even further in some cases,
where defense attorneys were not permitted to remove documents from court and were
placed under federal gag orders to bar public discussion about their clients (Goldstein
2001; Fainaru and Williams 2002).

Making an early challenge to this secrecy, nineteen organizations filed a Freedom
of Information Act request with the Justice Department to compel disclosure of the
names and locations of the detainees, the identities of their counsel, and any relevant
legal orders (Center for National Security Studies, et al., v. Department of Justice 2001). Refus-
ing the request, Ashcroft relied on his new policy governing the Freedom of Informa-
tion Act. A lawsuit was filed. The federal district judge, Gladys Kessler, ordered the
government to release the names of the detainees and their attorneys, but not the
other requested information. Then she issued a stay when the government announced
it would seek an expedited appeal to the DC Circuit Court. Oral arguments were held
in November 2002 and the decision is pending (Center for National Security Studies, et al.,
v. Department of Justice 2002).

Another challenge to the secrecy rule was raised by a New Jersey state judge who,
in March 2002, ordered Justice to release the names of those held in New Jersey county
jails on an INS contract. The state judge, finding that secret detentions violate state
laws, gave the department a deadline by which to comply, adding that “the federal gov-
ernment was still required to obey the law” (Edwards 2002a). Two weeks later, the judge shortened the length of time that the Justice Department had to comply (Edwards 2002b). At that point, the department issued an interim INS rule that barred state or other non-federal prison facilities from releasing any information relating to INS detainees held under a federal contract. Justice argued that “The courts . . . are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.” Furthermore, “application of state law in this area has the potential to threaten the Attorney General’s [national security] mission” (INS 2002a). When the rule became part of the Federal Register a few days later (INS 2002b), the state court of appeals reversed the state judge, and the New Jersey Supreme Court denied review (ACLU of N.J. v. County of Hudson).

The attorney general has provided a number of explanations for the decision to close hearings and keep confidential the names of people detained by the government. When asked initially, Ashcroft referred to legal constraints that tied his hands, but when asked by a reporter what law would be broken if the names were released, Ashcroft replied that no law compelled him to release the names and so he was upholding the law (Transcript 2001). He gave a slightly different explanation to the Senate Judiciary Committee, telling them, “All persons being detained have the right to contact their lawyers and their families. Out of respect for their privacy, and concern for saving lives, we will not publicize the names of those detained” (U.S. Senate 2001).

Closure of Immigration Hearings

Citing national security concerns, the Justice Department also has closed hundreds of immigration hearings of foreign nationals detained after 9/11. The “Creppy Directive,” issued by Chief Immigration Judge Michael Creppy ten days after the attacks, institutionalized new security precautions for immigration cases deemed to be of “special interest.” The new provisions were initiated by the attorney general and disseminated through Creppy to other immigration judges. Immigration judges are Justice Department employees and not part of the regular judiciary (Fainaru 2002). The Creppy Directive requires that hearings be closed to the public, judges not discuss these cases with anyone outside the Immigration Court, and judges involved in special interest cases have secret clearance because “some of these cases may ultimately involve classified evidence” (U.S. Department of Justice Memo 2001b). In July 2002, the Justice Department issued an interim operating policy and procedures memorandum authorizing immigration judges to issue protective orders and seal case records to shield information that is not classified “but whose disclosure could nonetheless jeopardize investigations” (U.S. Department of Justice OPPM 2002a). These measures have triggered a number of legal challenges.

Rabih Haddad, a Lebanese national living in Ann Arbor, Michigan, was facing deportation proceedings for overstaying his visa when, without prior notice to him or his attorney, his hearing was ordered closed to his family, the press, and the public, including Michigan Congressman John Conyers. He was detained and denied bail. Haddad, Conyers, and The Detroit Free Press and Detroit News sought an injunction to stop the government from closing his future hearings. Haddad claimed the blanket
closure not only violated statutory and administrative law, but also the Due Process Clause of the Fifth Amendment. The newspapers argued that the Creppy Directive, both on its face and as applied in Haddad’s case, violated their right of access under the First Amendment. Government attorneys—asserting that hearings are not criminal trials covered by the Sixth Amendment—argued “no constitutional rights are abridged by exclusion of the press and public from the hearings.” They added that, because immigration matters rest with the president and Congress, the U.S. District Court lacked jurisdiction; therefore, the court should dismiss the case or at least “apply a deferential level of scrutiny” (Haddad v. Ashcroft 2002, 3).

Judge Nancy Edmunds of the district court ruled that blanket closures of deportation hearings are unconstitutional, and she granted the injunction (Detroit Free Press, et al., v. Ashcroft 2002a). The government appealed the ruling to the Sixth Circuit, which affirmed the district court. Circuit Judge Damon Keith penned a now famous phrase, “Democracies die behind closed doors,” writing later in the opinion that, “Open proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy” (Detroit Free Press, et al., v. Ashcroft 2002b). Keith acknowledged that the “political branches” have plenary authority over substantive immigration laws and decisions, but that non-substantive laws and policies—ones that involve procedural questions—are subject to judicial review when they abridge constitutional rights. He noted, “The Government certainly has a compelling interest in preventing terrorism,” but the Creppy Directive and interim Protective Orders and Sealing of Records were both overbroad by closing all special interest cases without a case-by-case assessment, and underinclusive by permitting some disclosure of sensitive information. He concluded, “By the simple assertion of ‘national security,’ the Government seeks a process where it may, without review, designate certain classes of cases as ‘special interest cases’ and, behind closed doors, adjudicate the merits of these cases to deprive non-citizens of their fundamental liberty interests. This, we simply may not countenance” (Detroit Free Press, et al., v. Ashcroft 2002b). Later, in Haddad’s case, Judge Edmunds granted another preliminary injunction and denied the government’s motion to dismiss. Taking cognizance of the securitized environment, she noted that, in the “climate of fear” since 9/11, Haddad’s designation as a special interest case was likely to have “tainted the immigration judge’s decision” to continue to detain him. Because he had a right to due process and a fair hearing, the government had to either release him from detention within ten days or hold an open detention hearing with a new judge (Haddad v. Ashcroft 2002).

A similar ruling was issued in a New Jersey case (North Jersey Media Group v. Ashcroft 2002a), when District Court Judge John Bissell ruled that closures could only occur on a case-by-case basis. The Third Circuit subsequently refused the government’s request for a stay. In response, a Justice Department spokeswoman warned, “We are at war, facing a terrorist threat from unidentified foes who operate in covert ways and unknown places. . . . Opening sensitive immigration hearings could compromise the security of our nation and our ongoing investigations” (U.S. Department of Justice 2002d). The U.S. Supreme Court, without ruling on the merits, granted the government a stay pending the final disposition of its appeal of the injunction (North Jersey Media Group v. Ashcroft 2002b). Those arguments took place before the Third Circuit
on September 17, 2002; three weeks later, the court voted 2-1 that immigration hearings for people detained after 9/11 could be closed. The media plaintiffs requested a rehearing by the full court but it was denied 6-5 on December 4. They have filed a cert petition to the Supreme Court (ACLU Report 2003).

The Secrecy Rationale

The government insists that “the Constitution does not require immigration proceedings to be opened in a way that provides valuable information to terrorist organizations or others who wish to harm Americans” (U.S. Department of Justice Press Release 2002b). Elsewhere, it has argued that opening these hearings threatens American lives because terrorists would then be able to glean information about ongoing terrorist investigations (Schulhofer 2003). Ashcroft believes that such information has to be kept confidential lest it make the nation vulnerable to attack. “When the United States is at war,” he said, “I will not share valuable intelligence with our enemies” (Transcript 2001). In other words, law enforcement information—available in the past to the public—constitutes valuable intelligence during a war against terrorism.

These comments point to the Justice Department’s legal reasoning in support of government secrecy, the so-called mosaic theory. This theory, developed by the CIA, draws an analogy between building a mosaic and gathering bits of seemingly unimportant information (Goldstein 2001). Even facially inconsequential pieces could be critical to constructing the whole picture. For example, in Haddad’s case, the government warned that an open hearing could result in the disclosure of “bits and pieces of information that seem innocuous in isolation, but when pieced together with other bits and pieces, aid [terrorists] in creating a bigger picture of the Government’s anti-terrorism investigation” (Detroit Free Press, et al., v. Ashcroft 2002b). Such information, Justice warned, “allows terrorist organizations to alter their patterns of activity to [evade] detection” (U.S. Department of Justice 2002c). In fighting the New Jersey state judge’s order to release the names of detainees, the Justice Department defended the secrecy as necessary to ensure that seemingly innocuous but vital information not be communicated to terrorists on the outside (INS 2002a).

Supporting this view, William Barr, former attorney general in the first Bush administration, told the Senate Judiciary Committee, “Information about who is presently detained by the government, when and where they were arrested, their citizenship, and like information could be of great value to criminal associates who remain free” (quoted in Knickerbocker 2001). The mosaic theory has also been applied to justify deprivations of due process. The government has cited the theory to defend its incarceration of hundreds of people for relatively minor immigration violations. In some immigration cases, for example, a seven-page FBI affidavit outlining the mosaic theory has been used to argue that individuals accused of even minor violations should be denied bail, because the government might later find that they fit into the larger terrorist picture (Goldstein 2001). Even individuals innocent of any crime still might need to be detained as material witnesses because they could have some small piece of knowledge that could aid investigators in understanding the terrorist threat.
Limiting Rights to Due Process

Antiterrorism measures have raised multiple questions relating to due process, specifically the presumption of innocence, the writ of habeas corpus, and the rights to counsel, a speedy and public jury trial, confront witnesses, and search and arrest warrants based on probable cause. Many of these procedural rights are implicated in the president’s military order that “terrorists and those who support them” can be “detained and, when tried . . . tried for violations of the laws of war and other applicable laws by military tribunals” (Bush 2001).

Some administration officials agree with civil libertarians that the government’s aggressive legal response in pursuing suspected terrorists alters traditional law enforcement and court practice. According to one official, the process followed for suspected terrorists “is different than the criminal procedure system we all know and love. It’s a separate track for people we catch in the war” against terrorism (quoted in Lane 2002b, 30). Unlike ordinary crime, the government asserts, terrorism must be stopped in advance as well as prosecuted, and this compelling proactive mission necessitates different procedures.

But the national security mandate has not produced consistent procedures “or even understandable principles” in government prosecutions for terrorism, as Fisher noted after reviewing the cases of John Walker Lindh, Richard Reid, Zacarias Moussaoui, Yaser Esam Hamdi, and Jose Padilla (Fisher 2003). Padilla and Hamdi, U.S. citizens who have been designated enemy combatants by the president, appear to face indefinite detention in military custody without charges. Lindh, a U.S. citizen, and Reid, a British citizen, were tried in federal civilian courts, as is Moussaoui, a French citizen, although the administration hinted that it might transfer his case to a military tribunal because the district court granted a request by his attorneys to interview an al Qaeda leader in U.S. custody (Shenon 2003).

In effect, instead of following even a broad reading of due process, whatever that process is, executive decision making in this area has been characterized by an element of arbitrariness. Solicitor General Theodore Olson, who heads the government’s litigation work in the Justice Department, suggests that following established guidelines is incompatible with new security demands. He described the method of designating a person an enemy combatant this way: “There will be judgments and instincts and evaluations and implementations that have to be made by the executive that are probably going to be different from day to day, depending on the circumstances” (Lane 2002b, 30). Such subjective and changeable criteria undercut the very notion of due process.

This approach appears to differ from that followed by other nations, which promulgate rules in their emergency law. In contrast, writes the Economist (2003), “The Bush administration has tried a more piecemeal approach, with a bunch of legislated changes accompanied by the bald assertion of new powers by the government itself.” The administration’s reliance on executive discretion permits a high degree of speed, secrecy, and flexibility in crafting a response to terrorism. Even the legislated changes, particularly sections of the Patriot Act, have sufficient ambiguity to permit varying interpretations of the law by executive branch actors. But discretion and ambiguity further undermine
the operation of due process for those suspected of being affiliated with terrorism, as the following case studies illustrate.

**Presumption of Innocence**

A key feature of the American legal system is the presumption that a person is innocent until proven guilty by the state; in criminal cases, the state must prove its case beyond a reasonable doubt. However, since the attacks of 9/11, this presumption has been suspended as it applies to people—particularly younger men—who are Muslim and/or Middle Eastern.

The first due process issue to emerge in the immediate wake of the terror attacks concerned the detention of approximately 1,200 foreign nationals as part of the Justice Department’s “preventive campaign of arrest and detention” of people presumed to be national security threats or material witnesses of such threats. The foreign nationals were held on suspicion of minor crimes, but, according to Ashcroft’s chief policy adviser, Assistant Attorney General Viet Dinh, such detentions were “within our prosecutorial discretion. If we suspect you of terrorist activity, we will use our prosecutorial discretion to keep you off the streets” (Oliphant 2001, 1). Ashcroft has argued that this approach is an effective strategy to stop future terrorist attacks, the department’s new overarching mission. Consistent with this new mission, the detentions have been aimed less at investigating past attacks than at disrupting potential future attacks (Goldstein 2001; Attorney General Transcript 2002a). The USA Patriot Act, passed a month after 9/11, grants the attorney general broad authority to detain until deportation any foreign national whom he certifies to be a terrorist or “engaged in any other activity that endangers the national security of the United States.” Within seven days of their detention, people must be placed in deportation proceedings or charged with a criminal offense, unless—in the attorney general’s opinion—“removal is unlikely in the reasonably foreseeable future” and if release “will threaten the national security of the United States or the safety of the community or any person” (Patriot Act, Sec. 412).

Eight weeks following the terrorist attacks, the *Washington Post* identified 235 of the 1,147 people detained at that time, and found that three fifths were being held on immigration charges and 75 had been released. A small number were detained on material witness warrants and about ten were believed to have some link to al Qaeda or the hijackers. Despite the government’s formal position condemning profiling of Muslim or Arab Americans (see, for example, Patriot Act, Sec. 102), most of those detained were from Saudi Arabia, Egypt, and Pakistan, almost all men in their twenties and thirties. A few were U.S. citizens (Goldstein 2001). Those held specifically as material witnesses also were primarily from the Middle East, according to a December 2002 report (Fainaru and Williams 2002).

In addition to the detentions, the FBI sought in the months following the terrorist attacks to interview 5,000 foreign nationals in the U.S., most from Muslim and Arab states. Denying that the interviews were coercive or that they constituted profiling, Ashcroft said people were selected for interviews “because they fit criteria designed to identify persons who might have knowledge of foreign-based terrorists” (Attorney
General Transcript 2002a). Late in 2002, the government implemented another program targeting primarily Muslims and Arabs when it required tens of thousands to report to Immigration and Naturalization offices to be questioned, fingerprinted, and photographed. The first set of immigrants to report in California faced mass arrests, with estimates ranging from 250 by the INS to 1,000 by immigration lawyers (Loney 2003). When war with Iraq erupted in March 2003, the government issued an order to jail people from 33 mostly Muslim countries who seek asylum in the United States on the grounds of political persecution. The countries were selected because they have a terrorism presence. This new policy, according to Homeland Security Secretary Tom Ridge, provides time for U.S. officials to determine whether asylum seekers are genuinely in danger in their home states, or if they are seeking entry to the U.S. for other—perhaps criminal—reasons (Anderson 2003c; Mintz 2003).

These and other measures appear to target people on the basis of their ethnic or religious backgrounds instead of any particularized suspicion. As a result, says a spokesman for the Council on American-Islamic Relations, “All Muslims are now suspects” (Lichtblau and Liptak 2003). The burden of proof is on them to establish their innocence.

Material Witness Warrants

FBI agents used the Material Witness Statute of 1984 as the legal basis to arrest and jail persons suspected of knowing something in the investigation of terrorism. The statute was intended to apply to the reluctant witness whose testimony is material in a criminal trial; those held are entitled to counsel and a bond hearing. As of December 2002, the Washington Post was able to identify 44 people held as material witnesses, 20 of whom had never been called to testify before a grand jury. Detentions ranged from a few days to more than 400 days. Many people were held under maximum security conditions, such as solitary confinement and 24 hour lighting. Many had difficulty contacting family members or attorneys in their first weeks of incarceration. Most of the cases were under judicial sealing orders, which left some defense attorneys uncertain about what information they could disclose about their clients (Fainaru and Williams 2002).

In the case of a Jordanian student named Osama Awadallah, Federal District Judge Shira A. Scheindlin found that the government exceeded its statutory authority when the FBI arrested and detained him as a material witness. Designated a “high security inmate,” Awadallah was subjected to shackles, strip searches, solitary confinement, denial of family visits, and denial of telephone access to contact his attorney, conditions which the federal government conceded in the court record. Scheindlin found that the government acted improperly under the statute, first, because an FBI agent signed the affidavit seeking his detention as a material witness, and the agent was himself a witness before the grand jury; second, because the statute applies only “to those whose testimony is material” and at the pretrial—not at the grand jury—stage of the process; and third, because Awadallah’s testimony could have been taken by deposition. Scheindlin concluded that he had been unlawfully detained, writing that even if the detention had
been permissible under the statute, the government’s actions—“prolonged detention of a previously cooperative material witness for a grand jury—may have been so unreasonable as to have violated Awadallah’s Fourth Amendment rights” (U.S. v. Osama Awadallah 2002). The Material Witness Statute continues to be applied to other detainees, and this decision is being appealed.

Writ of Habeas Corpus

One of the most dramatic breaks from precedent is the president’s designation of two U.S. citizens as enemy combatants, thereby removing them from the regular criminal justice process and even stripping them of the right to petition for a writ of habeas corpus. The administration has placed the men, Yaser Esam Hamdi and Jose Padilla, in indefinite military detention without charge and without counsel. Hamdi was captured on the battlefield in Afghanistan; Padilla was arrested in Chicago in connection with a plan to make and detonate a “dirty bomb.” The Hamdi and Padilla cases illustrate how the securitized environment as framed by the administration is fundamentally altering the relationship between the citizen and the state. At issue is the writ of habeas corpus. Enshrined in the body of the Constitution itself, it is, in the words of habeas corpus scholar Eric Freedman, “perhaps the most cherished remedy in Anglo-American jurisprudence” (2000). A petition for a writ compels the government to produce a person it holds before a court, so that the court may determine whether the detention is lawful. In the enemy combatant cases, particularly those involving U.S. citizens, both the executive branch and some federal judges are treating the right as optional and even irrelevant in the face of the terrorist threat.

Some lawyers outside of government, such as Alan Dershowitz of Harvard Law School, defend the detentions as necessary in a time of national emergency. “No civilized nation confronting serious danger has ever relied exclusively on criminal convictions for past offenses,” Dershowitz writes, noting that every country has applied administrative or preventative detention to those “who are thought to be dangerous but who might not be convictable under conventional criminal law” (quoted in Taylor 2002). Dershowitz’s position accords with the administration’s contention that Hamdi and Padilla constitute security threats that are so severe that regular constitutional processes must be bypassed. For example, after inaccurately describing a dirty bomb as capable of causing “mass death and injury,” Ashcroft announced that “the safety of all Americans and the national security interests of the United States require that Abdullah Al Muhajir—Padilla’s Muslim name—be detained by the Defense Department as an enemy combatant” (Attorney General Transcript 2002b). President Bush determined that Padilla constituted “a continuing, present and grave danger to the national security of the United States” and that his detention “was necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other government personnel or citizens” (Mobbs Declaration on Padilla 2002, 5).

Yet the mere assertion that a person poses a threat, absent a meaningful judicial opportunity to challenge the basis of that assertion, guts the habeas corpus protection in the Constitution. The Mobbs Declaration poses this problem. The government insists
that it provides a sufficient factual basis for both Hamdi’s and Padilla’s designations as enemy combatants, although some federal judges have disagreed, finding instead that the record as established by Michael Mobbs is subject to challenge. Mobbs is the special advisor to the Undersecretary of Defense Policy, who handles national security and defense policy. Charged with heading the Detainee Policy Group, Mobbs drafted a declaration for the court for each man, laying out the evidence that led the president to make his determination. The courts were told not to second-guess that assessment. The declaration for Padilla, however, raises some questions of fact that Padilla, with counsel, might be able to challenge. For example, Mobbs notes in a footnote some problems with the two primary confidential sources on Padilla. One of the sources had recanted some of his testimony, their statements on Padilla were only partially corroborated independently, and one source was on drugs for a medical condition during the interview (Mobbs Declaration on Padilla 2002).

The federal district judges in both cases came to similar conclusions, that both men should have access to counsel, even if in a limited capacity to assist with a challenge to the factual record on which the designation was based. Judge Robert Doumar permitted Hamdi a private meeting with his federal public defenders, a decision that was immediately appealed by the Justice Department to the Fourth Circuit Court of Appeals (Amon 2002). In the government brief, the Justice Department asserted that civilian courts “may not second-guess the military’s enemy combatant determination,” because it constitutes a core executive power. The brief argued, “A court’s inquiry should come to an end once the military has shown in the return that it has determined that the detainee is an enemy combatant” (Brief 2002). While not conceding that federal courts have no role to play, Chief Judge Harvie Wilkinson for the Fourth Circuit gave government attorneys the decision they wanted, ruling that further judicial inquiry into Hamdi’s status would undermine “the efficiency and morale of American forces” (Hamdi v. Rumsfeld). Wilkinson cited the Mobbs Declaration as providing a legally valid basis on its face for Hamdi’s detention. Freedman compares the Fourth Circuit’s decision with the case of the five knights held in the Tower of London in 1627. When they applied for a writ of habeas corpus to the keeper of the tower and then the court, they were told that they were held by his “Majesty’s special command,” and the court was not competent to look into the king’s reasoning (Freedman 2003).

Wilkinson confined the ruling to the facts at hand, noting that Hamdi had been captured on an overseas battlefield. This limited the utility of the decision as a precedent for the government in Padilla’s case. Padilla had been held for a month on a material witness warrant when he was transferred to the custody of the Defense Department, which has held him since June 2002 in the brig at the naval station in Charleston, South Carolina, where Hamdi is also detained. Some observers speculate that the reason for his transfer may have less to do with national security than with other concerns, such as the weakness of the government’s evidence against him (Isikoff 2002), his refusal to testify before the grand jury investigation of al Qaeda, or the unwillingness of the government to bring into court the witnesses who had incriminated him (Mintz 2002). Once in military custody, Padilla lost all contact with his attorney, Donna Newman. On his behalf, she filed a habeas petition but the government argued that the petition was invalid.
because Padilla did not—and could not—sign it. Furthermore, Newman could not sign for him as a "next friend" because she could not show a "significant relationship" with him and that she was "truly dedicated to his best interests," according to the government (Padilla ex rel. Newman v. Bush 2002a). The motion to dismiss was not granted. In a mixed decision, the federal district judge, Michael Mukasey, ruled that the president does have the authority to designate a citizen arrested in the United States an enemy combatant as long as there is "some evidence" to support the president's view that he was in the country "on behalf of an enemy with whom the United States is at war." In addition, an enemy combatant has no general right to counsel. However, he does have a right to contest the evidence used by the government and, for this purpose, needs access to a lawyer (Padilla ex rel. Newman v. Bush 2002b). Although it prevailed on most of the issues, the government filed a motion for reconsideration to block even limited access to counsel; Mukasey affirmed his earlier ruling. Even under the "some evidence" standard, he wrote, "I cannot confirm that Padilla has not been arbitrarily detained without giving him an opportunity to respond to the government's allegations." Arbitrary detention, he added, violates the Constitution's Due Process Clause (Padilla v. Rumsfeld 2003, 26).

The government's position in the motion for reconsideration presents an interesting national security argument against access to counsel for those under interrogation. Filed with the motion were two declarations—one sealed—offered by Vice Admiral Lowell Jacoby, Director of the Defense Intelligence Agency. Jacoby argued that if Padilla saw an attorney, even for a limited time and purpose, he would be even more resistant to talk. Any access to an attorney would undermine and possibly destroy the "atmosphere of dependency and trust between the subject and the interrogator," a "delicate relationship" that could take months or even years to establish before it would yield valuable intelligence (Padilla v. Rumsfeld 2003). "The United States," Jacoby wrote, "has an urgent and critical national security need to determine what Padilla knows. . . . Providing Padilla access to counsel risks the loss of a critical intelligence resource" (Jacoby Declaration 2002, 9). Two weeks after Mukasey affirmed, the U.S. attorney notified the court that the government would seek an expedited appeal on the grounds that Padilla remained a national security threat (Weiser 2003). At the time of this writing, the case is on appeal. The conflicting rulings coming out of the Fourth and Sixth Circuits increase the likelihood that the U.S. Supreme Court will accept these cases for review. Meanwhile, a report has circulated that the administration is considering expanding the enemy combatant designation to other citizens who are identified as national security threats, perhaps through a review panel (Isikoff 2002).

Curtailing Privacy Expectations

Many of the privacy concerns triggered by the war against terrorism can be traced directly to the Patriot Act. Title II of the statute, entitled Enhanced Surveillance Procedures, expands the government's power to intercept wire, oral, and electronic communications; to engage in pen register and trap and trace searches; to get access to certain
business, library, and medical records; to utilize a single search warrant for nation-wide searches; to expand the scope of subpoenas for electronic communications; to block notification of the search to the person whose records have been searched; to limit the liability of persons who disclose required records to the government and thereby violate privacy laws; and to permit information sharing between law enforcement and intelligence-gathering agencies (Patriot Act 2001). Even in the rush of passage, legislators were concerned enough by privacy encroachments that they instituted a sunset clause of December 31, 2005 for many of these provisions (Patriot Act, Sec. 224).

Title II expands the application of the Foreign Intelligence Surveillance Act (FISA), which permits surveillance under a much lower standard (preponderance of evidence versus probable cause) and establishes a separate and secret court process to consider search warrant applications, the FISA court. When passed in 1978, the Foreign Intelligence Surveillance Act permitted an otherwise unconstitutional wiretap or search if the purpose was to monitor a suspected spy or agent of a foreign power. Evidence gathered would be for intelligence uses and not introduced in a criminal trial.

One of the fiercest battles in the Senate during the Patriot Act’s passage reportedly dealt with the phrasing of an amendment expanding FISA’s purpose. Ashcroft advocated broadening the language so that foreign intelligence was simply “a purpose” and not “the purpose” of a FISA warrant, thus making the FISA process generally available to law enforcement not engaged in foreign intelligence work. Concerned with the implications, some senators preferred that foreign intelligence remain the “primary purpose” of a FISA search. In the end, compromise language produced “a significant purpose” (Patriot Act, Sec. 218). According to Assistant Attorney General Michael Chertoff, this language still gives the administration the leeway it wanted to conduct electronic and physical searches under FISA (McGee 2001b). Guidelines issued on March 6, 2002 by the attorney general built on the Patriot Act to further institutionalize the sharing of intelligence information with federal criminal prosecutors (Eggen and Schmidt 2002).

Chertoff’s assessment appears to be confirmed by the new law’s application. For example, pursuant to a Freedom of Information Act request and a subsequent lawsuit to force compliance, the Justice Department released 200 pages of heavily redacted documents that seem to signal expanded government surveillance with little judicial oversight. The American Library Association, the ACLU, the Electronic Privacy Information Center, and the American Booksellers, among others, had sought the documents to evaluate implementation of expanded surveillance powers, particularly for bookstore and library records and hard drives. One of the attorneys explained, “We are asking only for aggregate statistical data and other policy-level information. The release of this information would not jeopardize ongoing investigations or undermine the government’s ability to respond to new threats” (ALA News Release 2002). The material released by Justice, while failing to provide the aggregate data requested, did provide the organizations some of the information they sought; the organizations simply tallied the number of redactions to conclude that government surveillance without regular judicial oversight has expanded dramatically (ACLU Press Release 2003a). As noted, with the Patriot Act’s amendments to FISA, the government has the authority to gather information
from banks, businesses, credit companies, Internet providers, and others about U.S. citizens without a showing of probable cause. Furthermore, those who are required to turn over documents to the FBI are barred from informing the subject of a search that a search has even been conducted (Patriot Act).

The expanded application of FISA to cover ordinary criminal investigations was challenged by the secret FISA court itself. Since it became operational in 1979, the court had denied only one government warrant application and approved approximately 1,000 warrant applications each year (Eggen and Schmidt 2002), including hundreds involving U.S. citizens suspected of espionage. However, in a memorandum opinion dated May 17, 2002, the court unanimously rejected the use of FISA warrants for any purpose other than “the collection of foreign intelligence information.” One of the court’s complaints was that the FBI, on its own admission in 2000, had misled the court regarding the “intelligence purpose” of an investigation on 75 FISA applications; the FBI then did so again in a series of applications in early 2001. These revelations led the FISA court to take “some supervisory actions” to ensure that the wall between criminal investigation and foreign intelligence was not breached. Against this background, the FISA court was not persuaded to accept the attorney general’s 2002 guidelines to further erode the wall. Instead, Presiding Judge Royce Lamberth instructed the government to modify its guidelines with this language:

Law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances. Additionally, the FBI and the Criminal Division shall ensure that law enforcement officials do not direct or control the use of FISA procedures to enhance criminal prosecution (U.S. Foreign Intelligence Surveillance Court 2002).

Solicitor General Theodore Olson, arguing for the government, appealed the decision to the U.S. Foreign Intelligence Surveillance Court of Review. Meeting for the first time, the three-judge panel convened in secret and heard only the government’s oral arguments. It unanimously reversed the lower court’s decision and accepted the attorney general’s 2002 guidelines without modification. The judges found that the 1978 statute did not limit the government’s use of foreign intelligence information, and that Ashcroft’s guidelines were consistent with congressional intent in amending FISA in the Patriot Act. They distinguished between ordinary crimes wholly unrelated to terrorism, when the FISA process cannot be employed, and ordinary crimes when it can be employed, such as bank robberies done for the purpose of financing terrorism. The court concluded that the Fourth Amendment concerns raised by the amicus curiae briefs filed by the ACLU and the National Association of Criminal Defense Lawyers were unfounded (U.S. Foreign Intelligence Surveillance Court of Review 2002).

The U.S. Senate is considering a bill to extend FISA provisions to individuals who are “non U.S. persons,” and not just those affiliated with terrorist groups or agents of foreign powers (S 113, 2003). The FISA warrants could then apply to individuals who might engage in “lone wolf” international terrorism, according to the bill’s author, Senator Jon Kyl of Arizona. The bill received a positive initial response from both Ashcroft and FBI Director Robert Mueller in March 2003 (U.S. Senate 2003). In light
of the decision of the Foreign Intelligence Surveillance Court of Review, this change to FISA could further alter the constitutional protections of individuals.

Conclusion

The terrorist strikes of two years ago, coupled with the ongoing threat of future attacks, have posed an enormous challenge to each level and branch of government, especially the national executive. President Bush and his administration could have pursued a number of possible courses of action. When Bush framed the crisis as a war against terrorism, the homefront became a battlefront, and the markers of an open society—a free press, individual protections in criminal proceedings, and privacy from government snooping—were conceptually transformed by the administration into opportunities for the enemy. That vision of 9/11 necessarily has led to greater restrictions on the flow of information about government, fewer due process protections, and less privacy from government surveillance, as documented in this study. The administration seems to see civil liberties as security problems that require strong executive action. Limits on civil liberties are not simply byproducts of security measures, as they often have been in previous national crises. Instead, limits on liberties are the point of many of the security measures.

Whereas a desire for security has motivated these antiterrorism policies, some of these measures may undermine the government’s ability to address the terrorist threat in the long run. For example, the Justice Department’s new mission of stopping a terrorist attack requires replacing the traditionally patient investigative approach of the FBI with a preemptive strategy to arrest suspected terrorists quickly, before informants can be developed, leads can be exhausted, or full criminal cases can been built (Locy and Johnson 2003). The policy of preemptive arrest and detentions has been criticized by several former high-ranking members of the FBI, including former FBI Director William H. Webster, who said that the approach may disrupt terrorist activities but will not eradicate the threat. Using a different approach, that is, long-term criminal investigations coupled with intelligence gathering, the FBI was able to prevent 131 terrorist attacks from 1981 to 2000, according to Webster and others. And the measures did not “jump all over people’s private lives,” he added (quoted in McGee 2001a, 8).

Regrettably, the national security versus civil liberties debate is difficult to engage at the national level, because many who serve in the Bush administration deny that rights are restricted in any way. This denial is not a misrepresentation from their point of view; rather, it can be understood as part of the larger security picture: an open debate on rights would be a sign of disunity that the national security interest as defined by this administration cannot allow.

References


Klein, Edward. 2002. We’re not destroying rights, we’re protecting rights. Parade Magazine, May 19.


Taylor, Stuart Jr. 2002. Let's not allow a fiat to undermine the Bill of Rights. The Atlantic online, July 23.


