

# LOSING LIBERTIES: APPLYING A FOREIGN INTELLIGENCE MODEL TO DOMESTIC LAW ENFORCEMENT

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*Since the tragedy of September 11, the federal government's actions have resulted in a serious erosion of liberties. In expanding authority for electronic eavesdropping and in claiming unprecedented authority to detain individuals without due process, the government has taken powers that previously have been limited to foreign intelligence gathering and activities in foreign countries and has sought to use them for domestic law enforcement. This is a troubling increase of powers for the federal government that threatens civil liberties, without any likelihood that it is necessary to make the country safer.*

INTRODUCTION .....	1619
I. THE PATRIOT ACT .....	1623
A. The Broad Definition of Terrorism .....	1623
B. The Expansion of the Powers of the Foreign Intelligence Surveillance Court .....	1624
C. Additional Government Powers .....	1627
II. DETENTIONS .....	1630
A. What Is Known and Not Known About the Detentions .....	1630
B. The Application of Foreign Powers in the United States .....	1637
CONCLUSION .....	1643

## INTRODUCTION

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

The legacy of suppression in times of crisis began early in American history. In 1798, in response to concerns about survival of the country, the

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U.S. Congress enacted the Alien and Sedition Act,<sup>1</sup> which made it a federal crime to falsely criticize the government or its officials. The law was used to persecute the government's critics and people were jailed for what today would be regarded as the mildest of statements. No court ever declared the law unconstitutional. Within a few years, after the election of 1800, Congress repealed the law, and President Thomas Jefferson pardoned those who had been convicted. The right to freedom of speech was compromised, and nothing was gained.

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

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

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

The McCarthy era saw enormous persecution of those suspected of being communists. Jobs were lost and lives were ruined on the flimsiest of

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1. Alien and Sedition Act of 1798, 5 Cong. Ch. 74, 1 Stat. 596 (expired 1801).

2. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

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

4. *Debs v. United States*, 249 U.S. 47 (1919).

5. See WILLIAM RAYMOND MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932-1972*, at 300 (1974).

6. *Korematsu v. United States*, 323 U.S. 214 (1944).

allegations. In the leading case during the era, *Dennis v. United States*,<sup>7</sup> the Court approved twenty-year prison sentences for individuals for the crime of “conspiracy to advocate the overthrow of the government” for teaching works by Marx and Lenin. Here, too, there is no reason whatsoever to believe that the country was made safer because people were imprisoned for their speech.

This brief recitation of history should give us pause when we consider efforts to take away civil liberties in this new time of crisis. Unfortunately, the Bush administration and the Ashcroft Justice Department have shown no such pause. They rushed through Congress a statute, the Patriot Act,<sup>8</sup> with no hearings in any committee of Congress. The Act contains many very troubling provisions. As evidence of this, over 150 cities and three states have passed resolutions criticizing the law.<sup>9</sup> Additionally, the Bush administration has claimed unprecedented authority to detain American citizens as enemy combatants<sup>10</sup> and has imposed unprecedented secrecy for government actions and proceedings.<sup>11</sup>

Many, of course, already have criticized these actions by the Bush administration and the Ashcroft Justice Department. But I think that what has been overlooked is that the recent actions all share a common characteristic: They all take government powers that existed for *foreign* operations and apply them to *domestic* actions by the government. Traditionally, there was a clear distinction between the government’s powers to act in foreign countries, especially in intelligence gathering, and the government’s authority to act within the United States. The former was largely unconstrained by the Constitution and the Bill of Rights; the latter was very much limited. Indeed, when President Nixon claimed the authority to engage in warrantless domestic wiretapping for the sake of national security, the United States Supreme Court unanimously rejected such a power.<sup>12</sup>

This bright line began to erode with the enactment of the Foreign Intelligence Security Act (FISA),<sup>13</sup> which gave the government much

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7. *Dennis v. United States*, 341 U.S. 494 (1951).

8. The Act is entitled: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter Patriot Act].

9. See Editorial, *Scoundrel Time*, BOSTON GLOBE, Aug. 24, 2003, at D10.

10. See *Rumsfeld v. Padilla*, 159 L. Ed. 2d 513, 525 nn.1–2 (2004); *Hamdi v. Rumsfeld*, 159 L. Ed. 2d 578, 591 (2004).

11. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); *N.J. Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); *Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

12. *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

13. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1811 (2000)) [hereinafter FISA]. For a discussion of

greater authority to engage in surveillance in the United States when "the purpose" was foreign intelligence gathering.<sup>14</sup> The result was that the prior dichotomy, between government actions outside the United States and actions within it, became three separate models: law enforcement in the United States, controlled by the traditional constitutional and statutory principles; foreign intelligence gathering in the United States, controlled by FISA; and actions in foreign countries, controlled by foreign law and what the United States government and its agents can get away with.

The Bush administration and the Ashcroft Justice Department have repeatedly taken powers that existed in foreign countries, or for foreign intelligence gathering, and have attempted to apply them to domestic law enforcement. In this Article, I focus on two examples of this: the Patriot Act and the claim of authority to detain individuals. The central problem is that the checks and balances built into the Constitution for domestic actions are lost when the foreign model, with few or no checks, is applied within the United States.

At the outset, I want to acknowledge that it is impossible to assess whether the Bush administration's actions have made the country any safer. The Attorney General has claimed that 255 individuals have been arrested and 515 have been deported for terrorist activity.<sup>15</sup> But a study by the General Accounting office found that 75 percent of the convictions that the Department classified as "international terrorism" were wrongly labeled.<sup>16</sup> Many dealt with minor offenses such as document forgery.<sup>17</sup> Nor is there any evidence that the government would have been unsuccessful in catching and prosecuting any dangerous individuals without the new authority contained in the Patriot Act. There is not a shred of evidence, other than the word of John Ashcroft, that the government could not have been equally successful even without its new powers.

At the same time, it is difficult to assess the magnitude of the infringement of liberties because of the unprecedented secrecy. To this date, it is still unknown how many individuals have been or are being

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the history of the Act, see Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793 (1989).

14. FISA requires that "the purpose" be foreign intelligence gathering. As discussed below, the Patriot Act changes this by requiring only that "a significant purpose" be foreign intelligence gathering.

15. The statistics are found in David Cole, *On the Road with Ashcroft*, THE NATION, Sept. 22, 2003, at 22.

16. See Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes From Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003, at A1.

17. See *id.*

detained by the Bush administration and the Ashcroft Justice Department. The Supreme Court's recent denial of certiorari in a case that would have provided this information<sup>18</sup> means that this will continue to be unknown for the foreseeable future.

The horrific events of September 11 took a terrible toll in terms of human lives, dollars, and our sense of security. Unfortunately, the leaders of the Bush administration, and especially Attorney General John Ashcroft, have used this as an excuse for eroding our most basic freedoms.

## I. THE PATRIOT ACT

The Patriot Act was adopted on October 26, 2001. It is 342 pages long and is difficult to read because it is filled with references to other provisions of the United States Code. Many of its provisions are innocuous. For example, section 219 amends Rule 41(a) of the Federal Rules of Criminal Procedure to allow magistrate judges to authorize nationwide search warrants wherever terrorist activities "may" have occurred (not limited to that judicial district).<sup>19</sup> The prior requirement that a warrant be issued in each district was unduly cumbersome, and this national procedure simplifies the process of conducting investigations.

On the other hand, several provisions of the Act are very troubling because they give the government powers for law enforcement that traditionally have only been used in foreign countries or for foreign intelligence gathering in the United States.

### A. The Broad Definition of Terrorism

The expansive definition of terrorism in the Act means that it will be applied by law enforcement broadly, including in cases that have nothing at all to do with terrorism as it is commonly understood. Section 802 of the Patriot Act provides a definition of "domestic terrorism," which is the predicate for the application of many provisions of the law. The term is defined as activities occurring primarily within the territorial jurisdiction of the United States and involving acts dangerous to human life that are a violation of the criminal laws of the United States or any state and that appear to be intended to either "intimidate or coerce a civilian population," "influence the policy of a

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18. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 123 S. Ct. 1041 (2004) (denying certiorari).

19. Patriot Act, Pub. L. No. 107-56, § 219, 115 Stat. 272, 291 (2001).

government by intimidation or coercion," or "affect the conduct of a government by mass destruction, assassination or kidnapping."<sup>20</sup>

This is an incredibly broad definition. Many lawful protests might be seen as trying to coerce or intimidate government or civilian populations. If they are large enough, they might even be seen as dangerous to human life. An antiwar protest rally where windows are intentionally broken in a federal building could be prosecuted as terrorist activity. Most crimes—from assault to robbery to rape to kidnapping to extortion—are intended to coerce.<sup>21</sup> The result is that the broad powers granted to the government by the Patriot Act are not limited to what common understanding would define as terrorism.

The experience with other broad statutes—such as the federal Racketeer Influenced and Corrupt Organizations Act law—is that they often are used in contexts far beyond what their drafters intended. Already it is apparent that the federal government is using its powers under the Patriot Act in contexts that have nothing to do with terrorism. For example, the government has used its provisions to gain evidence against suspects in a bribery case<sup>22</sup> and to prosecute a man for having a pipe bomb, even though he was not engaged in anything that could be even remotely called terrorism under its commonly accepted meaning.<sup>23</sup> It is, after all, terrorism under the statute's broad definition. Indeed, "[t]he government is using its expanded authority under the far-reaching law to investigate suspected drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies, and even corrupt foreign officials."<sup>24</sup>

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

In *United States v. United States District Court*,<sup>25</sup> the Supreme Court rejected the claims of the Nixon administration that it could engage in warrantless wiretapping for the sake of national security. The Supreme Court spoke of the "inherent vagueness of the domestic security concept . . . and the

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20. Patriot Act § 802.

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

22. See Steve Friess, *Critics Slam Use of Patriot Act in Nevada Bribery Case*, CHI. TRIB., Nov. 9, 2003, at C12.

23. See Mike Anton & Christine Hanley, *Making a Federal Case Out of an O.C. Pipe Bomb*, L.A. TIMES, June 19, 2003, at B3.

24. Lichtblau, *supra* note 16.

25. *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

temptation to utilize such surveillance to oversee political dissent.”<sup>26</sup> The Court concluded that “Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch.”<sup>27</sup>

This decision reaffirmed a basic model for electronic surveillance: The federal government could operate in foreign countries without the constraints of the Fourth Amendment,<sup>28</sup> but within the United States the government had to comply with the Constitution, even if it claimed a national security justification. This approach was codified in Title III of the Omnibus Crime Act of 1968,<sup>29</sup> which provides the statutory framework for electronic eavesdropping by the government. This model was substantially eroded with the enactment of FISA in 1978.<sup>30</sup> The Act applies only to “foreign powers” or their “agents” in order to obtain “foreign intelligence information.”<sup>31</sup> A key aspect of the law is that it relaxes the usual probable cause standard followed under the Fourth Amendment. The Act provides that an order can be issued if there is “probable cause to believe that the target of the [electronic] surveillance is a foreign power or an [agent] of a foreign power.”<sup>32</sup> If the target is a “United States person,” then there also must be a determination that it is not based on First Amendment activities of the individual.<sup>33</sup> FISA creates a new court, the Foreign Intelligence Surveillance Court, comprised of seven district court judges, appointed by the Chief Justice, and serving staggered seven-year terms.

FISA provides that individuals may not have access to information obtained under a FISA warrant. In response to a suppression motion, the judge makes an *in camera* and *ex parte* review to see if suppression is warranted. The defendant is not allowed to see the basis for the FISA warrant in making the suppression motion. As originally enacted, FISA applied only to electronic surveillance, but was amended in 1995 to include physical searches.<sup>34</sup>

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26. *Id.* at 320.

27. *Id.* at 316–17.

28. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

29. Pub. L. No. 90-351, 82 Stat. 197.

30. FISA, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801–1811 (2000)).

31. The definition of “foreign intelligence information” is in § 1801(e). The definition of “foreign power” is in § 1801(a). The definition of “agent of a foreign power” is in § 1801(b).

32. 50 U.S.C. § 1805(a)(3).

33. *Id.*

34. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807, 108 Stat. 3423, 3443.

One study found that between 1978 and 1999, the Foreign Intelligence Surveillance Court granted more than 11,883 warrants and denied none.<sup>35</sup> The U.S. courts of appeals have upheld the FISA procedures, finding them constitutional under the Fourth Amendment as a permissible balancing of privacy and national security interests.<sup>36</sup> The Ninth Circuit, for example, found that FISA creates a lower standard of probable cause, but that this is acceptable because the government's goal is gathering information for intelligence purposes and not for law enforcement.<sup>37</sup>

Thus, after FISA, there were three models for intelligence gathering: government activities in foreign countries that were unconstrained by the Fourth Amendment; government activities in the United States for purposes of foreign intelligence gathering governed by FISA; and law enforcement, which was governed by the Constitution and federal statutes limiting searches and electronic surveillance.

The Patriot Act marks a significant shift by expanding FISA to include domestic law enforcement so long as a purpose is also foreign intelligence gathering. Under section 218 of the Act, foreign intelligence gathering now only needs to be "a significant purpose," not "the purpose."<sup>38</sup> This is one of the most important provisions of the Act, substantially expanding the authority of the Foreign Intelligence Surveillance Court. This provision is key in taking powers that had been granted for foreign intelligence gathering and giving them to domestic law enforcement so long as the government says that it also has a significant purpose of foreign intelligence gathering. The distinction between foreign intelligence gathering and law enforcement, which the Ninth Circuit emphasized in *United States v. Cavanagh*,<sup>39</sup> is substantially eroded, if not eliminated in practice.

Because the FISA court operates entirely in secret, it is impossible to assess how these expanded powers have been used. Statistics, however, are available. The Justice Department has reported that in 2002, 1128 secret warrants were requested from the FISA court.<sup>40</sup> Of these requests, 1128 were

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

36. See, e.g., *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984).

37. *United States v. Cavanagh*, 807 F.2d 787, 788-89 (9th Cir. 1987).

38. The provision simply states that the provisions of the FISA Act "are each amended by striking 'the purpose' and inserting 'a significant purpose.'" Patriot Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001).

39. *United State v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987).

40. See Tanya Weinberg, *Patriot Act Initiatives Disturb Civil Libertarians*, FORT LAUDERDALE SUN-SENTINEL, May 11, 2003, at B1.



granted.<sup>41</sup> This suggests a court that is an automatic rubberstamp for all government requests.

### C. Additional Government Powers

The broad definition of terrorism and the government's power to use FISA for law enforcement is especially troubling because the Patriot Act gives the government significant new powers to gather information. Section 216 allows the use of pen/traps<sup>42</sup> to monitor internet activity (e-mail and web browsing) on a showing that the information "likely to be obtained" is "relevant to an ongoing criminal investigation."<sup>43</sup> This provision allows the government to monitor the e-mail addresses that a person sends to or receives from, as well as the web sites a person visits, by showing that it is "relevant to a criminal investigation." This standard is much easier to meet than "probable cause" or even "reasonable suspicion." The government already has this authority for telephones, but expanding it to electronic communications is troubling because a great deal of information can be learned about a person, some of it misleading, based on a list of web sites visited.

The Patriot Act also expands the authority for so-called "sneak and peek" warrants. A "sneak and peek" warrant allows agents to search without disclosing that they have done so. Section 213 allows the government to delay notification for a "reasonable period" that can be "extended for good cause shown" if disclosure would have an "adverse effect."<sup>44</sup>

Section 206 authorizes the FISA court to authorize intercepts on any phones or computers that the target may use. This authority for roving wiretaps means that the police no longer need to list the phone numbers to be tapped; the police can listen to any phone that a person might use. This means that the police can listen to all phones where a person works, or shops, or visits. In debates with FBI agents over this provision, they have stated that this even allows the tapping of pay phones that a person regularly walks past. There is, though, a requirement for "minimization" in that agents must stop listening when they learn that the conversation is not pertinent to the subject of their warrant. The argument for roving wiretaps is that suspected

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41. See *id.*

42. Pen/traps are devices for monitoring the location from which electronic communications are sent or received. On phones, they reveal the numbers called or calling.

43. Patriot Act § 216. If the government uses its own technology (for example, Carnivore), then an audit trail is required (report back to the court within thirty days of the termination of order). *Id.* § 216(b)(3)(A)–(B). The Court can issue an order for anywhere in the United States, not just that judicial district.

44. *Id.* § 213(b).

terrorists might repeatedly change cell phones. The problem with this argument is that the government, by definition, cannot listen to a phone until they know that it exists. Once they know, they could just add the new number to an existing warrant. In debates with FBI agents, the response always has been that it takes too long to add a new number to existing warrants. But this calls for a faster procedure to do so, not roving wiretaps.

One of the most troubling and controversial provisions of the Act is section 215, which provides the Director of the FBI broad authority to obtain records "to protect against international terrorism or clandestine intelligence activities."<sup>45</sup> This allows the FISA Court to issue orders for "production of any tangible things (including books, records, papers, documents, and other items)."<sup>46</sup> When such information is provided, "[n]o person shall disclose to any other person . . . that the [FBI] has sought or obtained tangible things under this section."<sup>47</sup> The provision also provides that "such investigation of a United States person" shall not be conducted "solely upon the basis of activities protected by the first amendment to the Constitution of the United States."<sup>48</sup>

Under this provision the government has broad access to records about a person. For example, the government can obtain from libraries a list of the books that a person has borrowed.<sup>49</sup> No probable cause or even reasonable suspicion is required. Nor must the government meet the usual Fourth Amendment requirement to list with specification what is sought; the Act authorizes orders for "production of any tangible thing."<sup>50</sup> A library, or other institution, ordered to produce the information cannot disclose to the person that the request has been made.

Sections 507 to 508 provide that upon written application to a court, the Attorney General may require an educational agency to collect educational records "relevant" to an authorized investigation of a listed terrorist offense or "domestic or international terrorist offense." The provision requires only that the information be "relevant" to a criminal investigation. This is a very relaxed standard and thus substantially undermines the privacy of educational records.

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45. *Id.* § 215(a)(1).

46. *Id.*

47. *Id.* § 215(c)(2)(d).

48. *Id.* § 215(a).

49. For a criticism of this aspect of the Patriot Act, see Kathryn Martin, Note, *The USA Patriot Act's Application to Library Patron Records*, 29 J. LEGIS. 283 (2003).

50. Patriot Act § 215.

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

One other aspect of the Patriot Act's expansion of law enforcement power must be emphasized: the government's much greater authority to detain noncitizens without following the procedures required by the Fourth Amendment. Under section 412 of the Act, the Immigration & Naturalization Service (INS) has seven days to place a person designated by the Attorney General as a suspected terrorist in removal or criminal proceedings or to release him.<sup>51</sup> The person may be detained during the seven-day period. The Attorney General may make such designation based on "reasonable grounds to believe" the person is involved in terrorism or that the activity poses a threat to national security.<sup>52</sup> If the person is ordered removed, but the Attorney General cannot remove the person, the Attorney General may detain the person for up to six months if release will threaten the national security or the safety of the community or any person.<sup>53</sup> The Attorney General may make such certification if there are "reasonable grounds to believe" the person is involved in terrorism or that the activity poses a threat to national security.<sup>54</sup> The Attorney General will perform a review every six months to determine if the certification should be revoked.<sup>55</sup> The person is entitled to habeas review.<sup>56</sup>

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

Also, the Act increases the basis for excluding individuals from the United States. Section 411 amends the grounds of inadmissibility to expand the definition of terrorist to include "a representative . . . of a political, social, or other similar group whose public endorsement or acts of terrorist activity

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51. *Id.* § 412(a)(5).

52. *Id.* § 412(a)(3).

53. *Id.* § 412(a)(6).

54. *Id.* § 412(a)(3).

55. *Id.* § 412(a)(7).

56. *Id.* § 412(b)(1).

the Secretary of State has determined undermines the United States efforts to reduce or eliminate terrorist activities.”<sup>57</sup> Persons “associated with terrorist organizations” are also inadmissible.<sup>58</sup> The Secretary of State may designate groups, foreign or domestic, as terrorist organizations. This allows individuals to be excluded from the United States solely for their speech or associational activities. No more than that is required, and the executive branch has broad authority to decide what is a terrorist organization and what is “public endorsement” of its activities.

## II. DETENTIONS

Among the most troubling actions by the Bush administration and the Ashcroft Justice Department since September 11 has been the claim of authority to detain individuals without complying with the Constitution and without any semblance of due process. Here, too, the government is taking a power that it has had in foreign countries—the power to detain without constitutional constraints—and applying it to domestic law enforcement. So far as is known, this has not been done pursuant to the provisions of the Patriot Act described above, but rather under other claims of authority, including the authority to detain “enemy combatants.”<sup>59</sup>

### A. What Is Known and Not Known About the Detentions

Media accounts consistently report that since September 11, 2001, federal officials have detained over 1200 non-U.S. citizens in connection with the war on terrorism.<sup>60</sup> That number is used because as of November 5, 2001, seven weeks into the investigation, the government announced that it had detained 1147 persons. As the Justice Department came under criticism for having detained so many yet having charged none with any terrorist crimes, it simply stopped issuing an official tally, and to this date has declined to provide any total number detained. Because detentions have undoubtedly continued in the almost two years since the last official tally was issued, seven weeks into the campaign, a conservative estimate would place the number of detentions at well over 2000.

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57. *Id.* § 411(a)(1)(A)(i).

58. *Id.* § 411(a)(2)(F).

59. See *Rumsfeld v. Padilla*, 159 L. Ed. 2d 513, 526 & n.5 (2004); *Hamdi v. Rumsfeld*, 159 L. Ed. 2d 578, 586 (2004).

60. See Steve Fainaru, *U.S. Deported 131 Pakistanis in Secret Airlift*, WASH. POST, July 10, 2002, at A1.

According to Immigration and Naturalization Spokesperson Russ Bergeron, the 1200 figure is a good faith estimate, performed during the latter part of 2001, to provide a national tally of how many individuals have been detained by federal and state law enforcement officials in connection with post-September 11 investigations. Mr. Bergeron contends that the government stopped issuing a running tally of detentions at that point in time because it determined that so many jurisdictional components were involved in these detentions, and the detention process was so fluid, that it was no longer feasible to provide ongoing national totals of the number of detainees.

Most importantly, it is unknown how many individuals have been detained and continue to be detained as material witnesses. The government consistently has refused to provide this information, claiming that disclosure is prohibited by the law requiring grand jury secrecy.<sup>61</sup>

Mr. Bergeron said that between September 11, 2001 and June 24, 2002, the INS arrested 752 individuals in connection with investigation of terrorist attacks. As of mid-July, eighty-one individuals remained in INS custody, thirty-eight of whom were being held while their final removal orders are appealed. The government's policy has been to refuse to release or deport aliens arrested in connection with the post-September 11 campaign until the FBI has affirmatively cleared them by finding that there is no evidence of criminal conduct, much less terrorist conduct. Thus, by the FBI's own account, the vast majority of those detained as "suspected terrorists" turned out to have nothing to do with terrorism. Nonetheless, the detention of individuals in connection with terrorism investigations remains a programmatic goal of the federal, state, and local governments that is highly likely to become a permanent feature of our nation's law enforcement structure.<sup>62</sup>

Noncitizens and citizens detained by the federal government have been arrested on criminal charges, immigration violations, and as material

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61. For example, Viet Dinh, a Deputy Assistant Attorney General, spoke at the Tenth Circuit Judicial Conference on June 27, 2002, and expressly said that the government would not disclose the number of individuals held as material witnesses because of the requirement for grand jury secrecy. Although grand jury secrecy may prevent the disclosure of the identity of a specific person being held as a grand jury witness, there is no reason why the total number of individuals being held cannot be disclosed. Revealing the aggregate number being detained as material witnesses would reveal nothing about the content of grand jury proceedings, which is all that is protected by Federal Rule of Criminal Procedure 6(e).

62. "We will redefine our law enforcement mission to focus on the prevention of all terrorist acts within the United States, whether international or domestic in origin. We will use all legal means—both traditional and non-traditional—to identify, halt, and where appropriate, prosecute terrorism in the United States." OFFICE OF HOMELAND SECURITY, *THE NATIONAL STRATEGY FOR HOMELAND SECURITY* 38, available at [http://www.whitehouse.gov/homeland/book/nat\\_strat\\_hls.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf).

witnesses under 18 U.S.C. § 3144. Many detained by the INS have been accused of minor immigration violations, such as failing to complete enough courses for their student visas or working while in the United States on tourist visas.<sup>63</sup> Other aliens have been arrested on state criminal charges. Of those criminal arrests publicly disclosed, most relate to the possession of false identification or other fraud.<sup>64</sup> Still others, apparently both citizens and noncitizens, have been detained as material witnesses; as explained above, the government has refused to provide information as to how many individuals are being detained for this reason.

About 600 aliens have been arrested and detained pursuant to the "Absconder Apprehension Initiative" (AAI), a program initiated in January 2002 to locate and detain about 1000 "priority absconders" out of the estimated 314,000 aliens living in the United States illegally though ordered deported.<sup>65</sup> Priority absconders are defined as aliens who officials "believe . . . have information that could assist our campaign against terrorism."<sup>66</sup> These individuals have been detained largely based on their country of origin. Of those who have already have been deported through this initiative, many lived in the United States for years and were married with children.<sup>67</sup>

As described below, the government has the authority to arrest and detain aliens pursuant to the Patriot Act. The Patriot Act authorizes the Attorney General to detain without a hearing aliens who he has reasonable grounds to believe fall within the "terrorism" provisions of the Act, which includes persons who have engaged in or supported no violence whatsoever, and people who are suspected of everyday violent crimes having nothing to do with terrorism, because terrorism is so broadly defined as to include use or threatened use of weapons against persons or property. To date, so far as is known, the government has not detained any alien pursuant to these statutory provisions.

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63. AMNESTY INT'L, AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE UNITED STATES, *available at* [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/AMR510442002ENGLISH/\\$File/AMR5104402.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510442002ENGLISH/$File/AMR5104402.pdf).

64. See List of Federal Complaints, *available at* <http://www.cnss.org/federalcomplaints011102.pdf> (information released by the Dep't of Justice with its Answer in *Ctr. for Nat'l Sec. Studies v. Dep't of Justice* (No. 01-2500)).

65. See Dan Eggen, *U.S. Search Finds 585 Deportee Absconders*, WASH. POST, May 30, 2002, at A7; see also Memorandum from the Deputy Attorney General, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), *available at* <http://news.findlaw.com/hdocs/docs/doj/absconder012502mem.pdf> [hereinafter Absconder Initiative Memo].

66. Absconder Initiative Memo, *supra* note 65, at 1.

67. See Eggen, *supra* note 65.

Contrary to constitutional rights and federal regulations, the INS also has held some aliens for extended periods without filing any charges against them.<sup>68</sup> INS regulations provide that “except in the event of an emergency or other extraordinary circumstances,” all persons taken into custody must be formally charged within forty-eight hours.<sup>69</sup> However, almost one-half of the aliens detained on immigration violations following September 11 were not charged within this period.<sup>70</sup> Thirty-six aliens were held for over twenty-eight days without being formally charged.<sup>71</sup>

In addition to aliens being held without charges, officials have kept many individuals in prolonged custody. According to a February 18, 2002 article in the *New York Times*, eighty-seven aliens remained in detention after they had received their final deportation orders. Many had been detained for over one hundred days and it was not known when they would be released. Bail hearings, which prior to September 11 would normally occur within two or three days of a request, have taken weeks or simply have not been granted in some cases.<sup>72</sup> Furthermore, bails have increased by five times or more from pre-September 11 levels for minor violations.<sup>73</sup>

The government has curtailed detained aliens’ right to access legal representation. The Immigration and Nationality Act of 1952<sup>74</sup> provides that detained aliens have the right to obtain counsel at no expense to the government. In many cases, however, that right has been effectively denied by the conditions of detention. In some cases, detainees have been denied access to a telephone to contact an attorney or family members.<sup>75</sup> Moreover, contrary to INS policy guidelines, officials at some detention facilities have refused to permit legal aid organizations from giving “Know

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68. See Dan Eggen, *Delays Cited in Charging Detainees*, WASH. POST, Jan. 15, 2002, at A1. (“Scores of immigrants detained after the September 11 terror attacks were jailed for weeks before they were charged with immigration violations, according to documents released by the Justice Department.”); see also AMNESTY INT’L, *supra* note 63, at 3 (“Data examined by [Amnesty International] reveals that scores of people picked up in the post 9.11 sweeps were held for more than 48 hours, and several for more than 50 days, before being charged with a violation.”).

69. 8 C.F.R. § 287.3(d) (2004).

70. See AMNESTY INT’L, *supra* note 63, at 11 (information contained in the Department of Justice response to FOIA request of Amnesty International); Dan Eggen, *Long Wait for Filing of Charges Common for Sept. 11 Detainees*, WASH. POST, Jan. 19, 2002, at A1 (“An analysis of the INS records this week by the Post found that about 40% of the immigrants were not charged within a week, and that some were held for seven weeks or more without charges.”)

71. See AMNESTY INT’L, *supra* note 63, at 12.

72. See Jim Edwards, *Attorneys Face Hidden Hurdles*, N.J. L.J., Dec. 3, 2001, at 12.

73. See *id.*

74. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 18 U.S.C. § 1362 (2000)).

75. See AMNESTY INT’L, *supra* note 63, at 18–21.

Your Rights" presentations at the facilities, effectively denying those detainees an opportunity to obtain low- or no-cost legal representation.<sup>76</sup>

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

How many individuals were arrested and detained by the federal government after September 11? How many individuals are now being detained? Who are the detainees and why are they being held? Astoundingly, the answers to these questions remain unknown. The Bush administration and the Ashcroft Justice Department have steadfastly refused to answer these basic inquiries, so that no one knows how many people have been held in custody and for what reasons. Unfortunately, on Monday, January 12, 2004, the Supreme Court denied certiorari in a case in which the government was sued under the federal Freedom of Information Act (FOIA)<sup>77</sup> and the First Amendment to force it to provide this information. The effect of the Court's denial of review in *Center for National Security Studies v. United States Department of Justice*<sup>78</sup> is that there is no way to learn the most basic information about the government's actions in the last two and a half years.

The lawsuit was brought by a coalition of public interest groups, including the Center for National Security Studies, the ACLU, People for the American Way, the Arab-American Antidiscrimination Committee, and Reporters Committee for Freedom of the Press. As the district court explained, the lawsuit resulted from the fact that "the Government refused to make public the number of people arrested, their names, their lawyers, the reasons for their detention, and other information relating to their whereabouts and circumstances."<sup>79</sup>

The plaintiffs sued seeking basic information, including: (1) the identities of those being held and the circumstances of their arrest, including the dates of any arrest and release and the nature of any charges filed against them; (2) the identities of lawyers representing any of these individuals; (3) the identity of any courts that have been requested to enter

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76. See *id.* at 18.

77. *Ctr. for Nat'l Sec. Studies v. Dept. of Justice*, 124 S. Ct. 1041 (2004) (denying certiorari).

78. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041.

79. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002).



any sealing orders with regard to proceedings against these individuals; and (4) all policy directives issued to government officials about these individuals and what may be said to the press about them.

The United States District Court for the District of Columbia largely ruled in favor of the plaintiffs based on the Freedom of Information Act. The district court ordered the Department of Justice to disclose the names of the detainees, the identity of counsel representing detainees, and any policy directives to government officials about making public statements or disclosures regarding the detainees.<sup>80</sup> The district court, however, held that the Department of Justice did not have to reveal the dates and locations of arrest, detention, and release.<sup>81</sup> The most significant effect of the district court's order is that we finally would know how many people are being detained and, by contacting them, why they were being held and how they were treated. Only through this information can it be learned if the government has significantly abused its power to arrest and detain individuals.

Unfortunately, the United States Court of Appeals for the District of Columbia Circuit reversed in a 2–1 decision.<sup>82</sup> The court of appeals decision repeatedly emphasized the need for great deference to the executive branch. For example, the court said that “the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security” and that the “need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.”<sup>83</sup>

The court of appeals rejected the argument that there is a First Amendment right to the information and concluded that the information is protected from disclosure under exemption 7(A) of the Freedom of Information Act, which exempts from disclosure information that “could reasonably be expected to interfere with enforcement proceedings.”<sup>84</sup> Specifically, the court accepted the government’s argument “that disclosure of the detainees’ names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it. . . . Moreover, disclosure would inform terrorists which of their members were compromised . . . and which were not.”<sup>85</sup> The court said that the names

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80. *Id.* at 113.

81. *Id.*

82. 331 F.3d 918.

83. *Id.* at 928.

84. *Id.* at 925–26.

85. *Id.* at 928.

of attorneys should not be disclosed because that could lead to learning the identity of those detained.<sup>86</sup>

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

Second, the court of appeals expressed a degree of almost complete deference to the executive that is inconsistent with the text and purpose of the Freedom of Information Act, which creates a strong presumption in favor of disclosing government records. As Judge David Tatel expressed in his dissent to the court of appeals decision: "[T]he court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies."<sup>87</sup> As Judge Tatel powerfully declared, "this court has converted deference into acquiescence."<sup>88</sup>

Third, the court of appeals erred by giving no weight to the strong public interest in learning how the government has used its power to arrest and detain individuals. The plaintiffs alleged that the government had abused its powers by wrongly detaining hundreds or thousands of individuals, many solely because of their religion or ethnicity. The government is preventing scrutiny of its conduct by invoking secrecy. As Judge Tatel expressed: "Just as the government has a compelling interest in securing citizens' safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail."<sup>89</sup>

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86. *Id.* at 932–33.

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

88. *Id.* at 940.

89. *Id.* at 938.

Last year, I debated Michael Chertoff, then the Assistant Attorney General for the Criminal Division and now a judge on the United States Court of Appeals for the Third Circuit. I asked him how many people are now or have been held, particularly as material witnesses. He said that he could not disclose the information because of national security. I asked how knowing the number being held, whether it is dozens or hundreds or thousands, could reveal anything that remotely could harm national security. There was no answer.

The Supreme Court should have granted certiorari in *Center for National Security Studies v. United States Department of Justice* to protect the right of the people to know under the First Amendment and the Freedom of Information Act. Secrecy of the sort claimed by the Bush administration and the Ashcroft Justice Department hides and encourages serious abuses of power. Again, the government has used its traditional powers for secrecy as to national security and applied it to domestic law enforcement.

## B. The Application of Foreign Powers in the United States

Perhaps the most extravagant claim of power by the Bush administration and the Ashcroft Justice Department has been its assertion of authority to hold American citizens, even those caught in the United States, as “enemy combatants” without any of the protections of the Constitution. In this way, the government is taking a power that has existed exclusively in foreign countries and using it for domestic law enforcement.

### 1. Jose Padilla

The most egregious case involves Jose Padilla, an American citizen arrested at Chicago O’Hare Airport for planning to build a “dirty bomb.”<sup>90</sup> Although Padilla was arrested on May 8, 2002, no charges have been filed against him. Instead, the administration says that he can be held forever as an “enemy combatant.” In December 2002, the United States District Court for the Southern District of New York upheld Padilla’s detention.<sup>91</sup> The court said that the government can detain a person as an “enemy combatant” so long as it shows “some evidence” in support of its action. In December 2003, the United States Court of Appeals for the Second Circuit ruled that the president lacks inherent authority as commander-in-chief to detain

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90. See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev’d*, 159 L. Ed. 2d 513 (2004).

91. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

American citizens on American soil outside a zone of combat.<sup>92</sup> As of this writing, the government's petition for certiorari is pending.

The claimed authority of the Bush administration is sweeping and enormously troubling. The administration says that it can hold an American citizen, for a crime in the United States, without complying with the provisions of the Bill of Rights. The framers of the Constitution were deeply distrustful of executive power and of the police. The Fourth Amendment provides that generally before a person is arrested, there must be approval by a neutral judge who finds probable cause for the seizure. The Fifth Amendment provides that before a person can be tried, an independent grand jury must indict the individual. The Sixth Amendment provides that before a person can be imprisoned, an impartial jury must convict.

The Bush administration says that none of these rights apply if it labels the person an "enemy combatant." There is no escape clause in the Fourth, Fifth, and Sixth Amendments which says that they don't apply when a person is called an "enemy combatant" rather than a criminal. Nor is there any provision in Article II of the Constitution, which defines presidential power, that gives the president the authority to suspend the Bill of Rights.

Nor is there any precedent for the Bush administration's claim of authority. No Supreme Court case, and for that matter no case of any court in the United States, ever has upheld the government's authority to detain a person indefinitely without complying with the Constitution by labeling the individual an "enemy combatant." In the government's briefs, it has cited to only one Supreme Court case as authority for its position: *Ex parte Quirin*.<sup>93</sup> In *Quirin*, the Supreme Court upheld the use of military tribunals for several individuals who were apprehended while entering the United States to commit acts of sabotage on behalf of Germany. The opinion, however, did not mention or discuss a power for the government to hold people without *any* trial. There is an enormous difference between trying a person in a military tribunal, as in *Quirin*, and holding the person without any trial, as is the case with Padilla.

The Bush administration's position has no stopping point. Could those who bombed the federal building in Oklahoma City been held without trial as "enemy combatants"? Could drug dealers with alleged ties to Columbia drug lords be held indefinitely as enemy combatants as part of the "war" on drugs? Under the Bush administration's approach, the executive branch has

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92. 352 F.3d at 718.

93. 317 U.S. 1 (1942).

virtually unlimited authority to hold people without constitutional protections by calling them “enemy combatants.”

The federal district court in Padilla’s case said that the government need only show “some evidence” to support its claim that an individual is an enemy combatant.<sup>94</sup> There is no basis in American law for a “some evidence” standard as a basis for denying a person’s liberty. “Some evidence” is not proof beyond a reasonable doubt or probable cause or even reasonable suspicion. “Some evidence” is a very flimsy basis for imprisoning a human being indefinitely.

The United States Court of Appeals for the Second Circuit ruled against the government, but on relatively narrow grounds. The Second Circuit emphasized that there was no statutory authority for the president to detain individuals such as Padilla as enemy combatants and that the president’s authority as commander-in-chief did not bestow this power. The court said that it “reject[ed] the government’s contention that the President has inherent power to detain Padilla” and concluded that no statute authorized the detention.<sup>95</sup> Although this decision is to be applauded, the Second Circuit avoided the crucial underlying question: even if there were statutory authority, can the government suspend the provisions of the Bill of Rights and hold a citizen arrested in the United States as an enemy combatant?

On June 28, 2004, the Supreme Court, in a 5–4 decision, with the majority opinion written by Chief Justice Rehnquist, concluded that the New York court lacked jurisdiction to hear Padilla’s habeas corpus petition.<sup>96</sup> The Court said that a person must bring a habeas petition where he or she is being detained against the person immediately responsible for the detention.<sup>97</sup> Padilla needed to file his habeas petition in South Carolina against the head of the military prison there.

Justice Stevens wrote for the four dissenters and lamented that Padilla, who already has been held for over two years, must begin all over again. But there seems no doubt that Padilla has five votes on the Supreme Court that it is illegal to hold him as an enemy combatant. In a footnote near the end of his dissenting opinion, Justice Stevens expressly stated that he agreed with the Second Circuit that there was no legal authority to detain Padilla as an enemy combatant.<sup>98</sup> Justice Scalia, who joined the majority opinion in Padilla’s case, was emphatic in his dissent in *Hamdi* that an

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94. 233 F. Supp. 2d at 608.

95. 352 F.3d at 718.

96. 159 L. Ed. 2d 513 (2004).

97. *Id.* at 535.

98. *Id.* at 546 n.8 (Stevens, J., dissenting).

American citizen cannot be held without trial as an enemy combatant unless Congress suspends the writ of habeas corpus.<sup>99</sup>

The bottom line, then, is that even though Padilla must begin his legal challenge all over again, there are at least five Justices who believe that an American citizen apprehended in the United States cannot be held as an enemy combatant. That is a strong rejection of the position taken by the Bush administration and an emphatic reaffirmation of the importance of the rule of law.

## 2. Yassir Hamdi

Yassir Hamdi is an American citizen who was apprehended in Afghanistan for allegedly fighting for the enemy. His situation is thus identical to that of John Walker Lindh. Like Lindh, Hamdi was brought to the United States and is being held in a military prison in South Carolina. Unlike Lindh, Hamdi has had no charges filed against him by the U.S. government, which claims that it can hold him forever as an enemy combatant.

The United States Court of Appeals for the Fourth Circuit reversed a district court decision and held that Hamdi did not have a right to consult with an attorney.<sup>100</sup> In January 2003, the Fourth Circuit reversed a district court order compelling the government to answer questions justifying the detention of Hamdi.<sup>101</sup> The court of appeals ruled that there is no basis for judicial review of detentions by the United States of Americans apprehended abroad and detained in the United States. The Fourth Circuit said that courts must defer to executive power in such instances.

There is no precedent for the Fourth Circuit's claim that an American citizen can be imprisoned in the United States without any access to the courts. Perhaps Hamdi is guilty of acting against the United States or perhaps he was apprehended by mistake. But the court's approval of unreviewable power to imprison a person is at odds with the most basic principles of the Bill of Rights.

On June 28, 2004, the Supreme Court issued a ruling in the *Hamdi* case. There were two issues before the Supreme Court. First, does the federal government have the authority to hold an American citizen apprehended in a foreign country as an enemy combatant? In a 5-4 ruling, the Court decided in favor of the government. Justice O'Connor wrote the plurality opinion,

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99. *Hamdi v. Rumsfeld*, 159 L. Ed. 2d 578, 615 (2004) (Scalia, J., dissenting)

100. *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), rev'g No. CA-02-348-2 (E.D. Va.).

101. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), rev'g 243 F. Supp. 2d 527 (2002).

which was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. Hamdi contended that his detention violated the Non-Detention Act, which states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>102</sup>

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

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

The second issue before the Court was what, if any, process must be accorded to Hamdi? The Court ruled 8-1, with only Justice Thomas dissenting, that Hamdi must be accorded due process. Justice O’Connor explained that Hamdi is entitled to have his habeas petition heard in federal court and that imprisoning a person is obviously the most basic form of deprivation of liberty. The Court said that due process is required and the procedures required are to be determined by applying the three-part balancing test under *Mathews v. Eldridge*,<sup>103</sup> which instructs courts to weigh the importance of the interest to the individual, the ability of additional procedures to reduce the risk of an erroneous deprivation, and the government’s interests.<sup>104</sup>

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

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102. 18 U.S.C. 4001(a) (2000).

103. 424 U.S. 319 (1976).

104. *Id.* at 335.

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

### 3. Applying Foreign Powers Within the United States

What is striking about the *Padilla* and *Hamdi* cases is that the government is taking a power that previously had existed only in foreign countries—the authority to hold enemy combatants—and applying it within the United States. *Padilla* and *Hamdi* are American citizens being held in the United States. Nonetheless, the Bush administration and the Ashcroft Justice Department are claiming that they need not comply with the Constitution.

There is no authority under the U.S. Constitution, federal statutes, or case law for the government to hold individuals indefinitely without charges or access to the courts. This allows the government to serve as prosecutor, judge, and jailor with no opportunity for judicial review. The framers of the Constitution were deeply distrustful of government power and wanted to make sure that a neutral judge approved the arrest of any person, that a grand jury approved detention and a trial, and that a jury convicted before imprisonment. The U.S. government is claiming that none of these rights applies, even to a U.S. citizen arrested for a planned crime in this country, if the individual is labeled an “unlawful combatant.”

No provision of the Constitution or any federal statute allows the government to suspend the Bill of Rights in this manner. Nor do the cases cited by the United States government support this authority. In *Ex parte Quirin*, eight individuals trained by Germany were caught entering the country to commit acts of sabotage.<sup>105</sup> The Supreme Court upheld the constitutionality of the use of military tribunals to try these individuals. Nothing in the decision, however, held or implied that individuals could be held without any charges, trial, or judicial review. The decision approved military tribunals under those circumstances, not the authority to detain “unlawful combatants” indefinitely.

Nor does *In re Territo*<sup>106</sup> provide authority for the government's detentions without access to the courts. In that case, a United States citizen was captured in Italy while serving in the Italian army and was held as a prisoner

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105. 317 U.S. 1 (1942).

106. 156 F.2d 142 (9th Cir. 1946).



of war in the United States.<sup>107</sup> There was no dispute that Territo was serving in the Italian army and that he was being held as a prisoner of war. Neither Hamdi nor Padilla is being held as a prisoner of war, and neither is being accorded the protections that international law accords to prisoners of war. In addition, unlike the Territo situation, there may well be a dispute as to whether Hamdi or Padilla were in fact fighting for the enemy. Unlike Territo, however, Hamdi and Padilla have been afforded no access to counsel, and therefore have no mechanism whatsoever to assert that they are not properly designated as “enemy combatants.”

Over a century ago, the U.S. Supreme Court expressly disapproved holding individuals without access to the courts, even in war situations. In *Ex parte Milligan*,<sup>108</sup> the Supreme Court held that a military commission lacked jurisdiction to try a U.S. citizen who was “not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service.”<sup>109</sup> The Court emphasized that the civilian “courts are open and their process unobstructed” and therefore must be used.<sup>110</sup>

The power of the government to hold a person indefinitely, with no access to the courts, simply by calling the person an “unlawful combatant” is at odds with the most basic precepts of the Constitution and international law. Under this authority, the government could arrest any person and avoid the judicial process by attaching the label “unlawful combatant.”

## CONCLUSION

Certainly, there may be times when it is necessary to give law enforcement greater powers. But basic civil rights, such as privacy and the right to be free from unjustified detentions, should be compromised only when truly necessary to make the country safer. What is so troubling about the actions of the Bush administration and the Ashcroft Justice Department is that they compromised fundamental freedoms without any likelihood of making the country safer.

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107. *Id.* at 142–43.

108. 71 U.S. (4 Wall.) 2 (1866).

109. *Id.* at 118.

110. *Id.* at 121.

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