REPORT ON POST-9/11 DETENTIONS

Released by the

LIBERTY AND SECURITY INITIATIVE OF THE CONSTITUTION PROJECT

June 2, 2004

*INTRODUCTION**

In the wake of the terrorist attacks of September 11, 2001, the United States government detained a large number of individuals for varying lengths of time, for differing reasons, and in many locations. Some were held for immigration or criminal law violations, some as material witnesses, and some as "enemy combatants."[1]

In this report, the Liberty and Security Initiative of the Constitution Project sets out some basic principles regarding the legal basis for detentions and the legal rights of detainees. This report is not intended to be exhaustive, and does not provide a full summary of the law in this area. Instead, this report is meant to provide an overview of the relevant issues and set out the conclusions of the Initiative on those issues.

INDIVIDUALS DETAINED IN THE AFTERMATH OF SEPTEMBER 11, 2001

On November 5, 2001, the government announced that it had detained 1,182 persons in connection with the September 11th investigation.[2] After that date, the Justice Department stopped issuing an official tally. To this date, it has declined to provide a complete figure of

*Work on this report was enormously aided by Professor Erwin Chemerinsky of the University of Southern California Law School and the law firm of Arnold & Porter. In addition, work on this report was supported by generous grants from the Open Society Institute, the Community Foundation, and Public Welfare Foundation.

[1] Enemy combatant detainees also include those captured in Afghanistan and other countries who are now being held in prison camps in Guantanamo Bay, Cuba and other locations. This report does not discuss such detainees because their detention raises different issues under American and international law.

[2] Dan Eggen & Susan Schmidt, *Count of Released Detainees is Hard to Pin Down,* WASH. POST, Nov. 6, 2001, at A10 (citing U.S. Department of Justice official); *see also* LAWYERS COMMITTEE FOR HUMAN RIGHTS, IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES: SEPTEMBER 2002 - MARCH 2003 34 (2003).

those detained.[3]

The June 2003 report of the Office of the Inspector General at the Department of Justice examined the treatment of individuals held on immigration charges in the immediate aftermath of September 11th.[4] The report stated that the Department had detained 762 aliens on immigration charges in connection with its September 11th investigation between September 2001 and August 2002.[5] Community-based organizations reported immigration raids in Arab, Muslim, and South Asian communities in cities across the nation after August 2002, but the number of individuals detained in these raids is not known.[6]

The number of individuals who have been, and continue to be, detained as material witnesses is unclear. The government initially refused to provide any information about material witnesses, claiming that the law requiring grand jury secrecy prohibits disclosure.[7] However, in a May 2003 report to Congress, the Department of Justice stated that as of January 2003, the total number of material witnesses detained in relation to the September 11th investigation was

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[3] The Justice Department has stated that it has not relied upon the authority provided by the USA Patriot Act to arrest and detain alien individuals. Section 412 of the Patriot Act authorizes the Attorney General to detain aliens he has reasonable grounds to believe fall within the "terrorism" provisions of the Act for seven days before charging them with a criminal or immigration violation.

[4] OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 5 (2003). The report was broadly critical of Justice Department methods in carrying out arrests and detentions and of the restrictive policies regarding access to legal counsel.

[5] *Id*. at 2.

[6] LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 34-35.

[7] For example, then-Deputy Assistant Attorney General Viet Dinh 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 reveals nothing about the content of grand jury proceedings, which is all that is protected by Federal Rule of Criminal Procedure 6(e).

fewer than 50.[8]

As of May 2003, some 1,100 foreign nationals have been arrested and detained pursuant to the "Absconder Apprehension Initiative (AAI)," a program initiated in January 2002 to locate and deport the 6,000 Arabs and Muslims among the more than 300,000 foreign nationals living in the United States with outstanding deportation orders.[9] Of those who have already been deported through this initiative, many had lived in the United States for years and were married with U.S. citizen children.[10] As of May 2003, another 2,747 non-citizens had been detained in connection with a Special Registration program (NSEERS) also directed at Arab and Muslim non-citizens.[11]

In addition, two American citizens (Jose Padilla and Yaser Esam Hamdi) and one resident alien (Ali al-Marri) are currently being detained in military custody in the United States as "enemy combatants."[12] The U.S. government treats these individuals as members of a military force instead of as civilians, but not as prisoners of war. Thus, these persons are afforded neither the protections one would receive in our civilian court system, nor the protections combatants usually receive under international humanitarian law.

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[8] Letter from Jamie E. Brown, Acting Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs to U.S. Representative F. James Sensenbrener, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives 50 (May 13, 2003) (response to U.S. House of Representatives Judiciary Committee request for information). The Department of Justice also stated that approximately 90% of the material witnesses were detained for 90 days or less, approximately 80% for 60 days or less, and approximately 50% for 30 days or less. *Id*.

[9] DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 25 (2003); *see also* Kate Martin, *Secret Arrests and Preventive Detention*, in LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM (Cynthia Brown ed., 2003).

[10] Dan Eggen, *U.S. Search Finds 585 Deportee Absconders*, WASH. POST, May 30, 2002, at A7.

[11] Cole, *supra* note 9, at 25.

[12] Enemy combatant detainees also include those captured in Afghanistan, Iraq, and other countries who are now being held in prison camps in Guantanamo Bay, Cuba, and other overseas locations. This report does not discuss such detainees because their detention raises different issues under American and international law.

CONDITIONS OF DETENTION

Most persons detained by the Immigration and Naturalization Service (INS)[13] have been accused of minor immigration violations, such as failing to complete enough courses for their student visas or working while in the United States on a tourist visa.[14] Some aliens have been arrested on criminal charges. Of those criminal arrests publicly disclosed, most relate to the possession of false identification or other fraud.[15]

The INS held some aliens for extended periods without filing any charges against them.[16] Prior to September 11th, a federal regulation required the INS to decide within 24 hours whether or not to charge a detained alien with violating federal immigration law.[17] Shortly after September 11th, however, the INS decided that the 24-hour timeline was unreasonable, given the

[13] On March 1, 2003, most services formerly provided by the Immigration and Naturalization Service were transitioned into the Department of Homeland Security. At the new department, the INS has been split into three separate agencies: the Bureau of Citizenship & Immigration Services, the Bureau of Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection. Additional immigration functions will remain in, or transfer to, the Department of Justice, the Department of State, and the Office of Refugee Resettlement.

[14] *See* OFFICE OF INSPECTOR GENERAL REPORT, *supra* note 4, at 5, which noted that nearly all of the 762 detainees "violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation"; *see also* AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA (2002).

[15] List of Federal Complaints, Information Released by the Department of Justice, Answer, *Center for National Security Studies v. Department of Justice* (No. 01-2500).

[16] OFFICE OF INSPECTOR GENERAL REPORT, *supra* note 4 at 29-36; s*ee also* 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."), AMNESTY INTERNATIONAL REPORT, *supra* note 12, at 2 ("Data examined by [Amnesty International] reveals that scores of people picked up in the post 9.11 sweeps were held for more than 48 hours, and several for more than 50 days, before being charged with a violation").

[17] OFFICE OF INSPECTOR GENERAL REPORT, *supra* note 4, at 28.

number of individuals that had been arrested and were likely to be arrested in the future.[18] Thus, the Department issued a new regulation, which extended the time to make the charging determination to 48 hours and provided that, in the event of an emergency or extraordinary circumstances, the charging decision could be made within a reasonable period of time.[19] The regulation does not define what constitutes "extraordinary circumstances" or a "reasonable period of time."[20] Almost one-half of the aliens detained on immigration violations following September 11th were not charged within the 48-hour period. [21]

In the months following the September 11th attacks, the government's policy was to oppose bond for aliens arrested in connection with the post-September 11th campaign until the FBI had affirmatively found that there was no evidence of terrorist or criminal conduct in their cases.[22] This policy was adopted even though INS officials did not believe there was evidence supporting the detention of most immigrants arrested post-September 11th.[23] A Department of Justice policy change in February 2002 discontinued the "hold until cleared" practice, allowing those being detained only for lack of FBI clearance to be released or removed.[24]

The Immigration and Nationality Act provides for a 90-day window to deport aliens who

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[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id.* at 30; *see also* AMNESTY INTERNATIONAL REPORT, *supra* note 14, at 11; Dan Eggen, *Long Wait for Filing of Charges Common for Sept. 11 Detainees*, WASH. POST, Jan. 19, 2002, at A12 ("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").

[22] OFFICE OF INSPECTOR GENERAL REPORT, *supra* note 4, at 88.

[23] *Id*. at 78.

[24] *Id*. at 104.

have been ordered removed, and permits their detention in aid of removal.[25] The law provides, however, that detention can continue beyond this removal period only when deportation is not possible (due to the alien's country of origin being unwilling to accept him, for example), when an alien has been charged with certain types of immigration violations, and when the Attorney General determines that the alien in question is a flight risk or a risk to the community.[26] The Office of the Inspector General found that for several months, post-September 11th detainees were being held beyond 90 days, despite their willingness to leave the country.[27] After initial disagreement within the Department of Justice regarding the legality of continuing to detain aliens after they received final orders of removal or voluntary departure orders, the Office of Legal Counsel of the Department of Justice ultimately concluded that the INS had the right to hold these detainees beyond the 90-day period in order to effectuate immigration laws and policy.[28] This issue is currently being litigated in *Turkmen v. Ashcroft*, 02-civ-2307 (E.D.N.Y. filed April 17, 2002).[29]

Many detainees on immigration charges have been subject to harsh conditions, inconsistent with basic human rights standards. Some have been held in solitary confinement, subjected to physical and verbal abuse, housed with convicted criminals, or denied reasonable medical attention.[30] There are also reports of detainees being routinely shackled around the legs

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[25] 8 U.S.C. § 1231.

[26] OFFICE OF INSPECTOR GENERAL REPORT, *supra* note 4, at 91 (citing 8 U.S.C. § 1231 (a)(6)).

[27] *Id*. at 108.

[28] *Id*.

[29] *Id*.

[30] OFFICE OF THE INSPECTOR GENERAL, U.S DEPARTMENT OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 8-28 (2003); *see also* HUMAN RIGHTS WATCH: PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST- SEPTEMBER

and stomach, with no regard as to whether the individuals in question had violent records or were flight risks.[31]

The government has also severely curtailed alien detainees' right to access legal representation post-September 11th. The Immigration and Nationality Act of 1952 provides that detained aliens have the right to obtain counsel at no expense to the government.[32] In many cases, however, that right has been effectively denied. In some cases, detainees were denied access to a telephone to contact an attorney or family members.[33] Contrary to INS policy guidelines, officials at some detention facilities refused to permit legal aid organizations to give "Know Your Rights" presentations at the facilities, effectively denying those detainees an opportunity to obtain low- or no-cost legal representation.[34]

Furthermore, the Department of Justice has refused to release the names of immigrants it detained post-September 11th. The District Court held that the government was required to release the names under the Freedom of Information Act,[35] but this holding was reversed by a 2 to 1 vote of the U.S. Court of Appeals for the District of Columbia Circuit.[36]

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11 DETAINEES (2002).

[31] OFFICE OF THE INSPECTOR GENERAL SUPPLEMENTAL REPORT, *supra* note 30, at 22-23.

[32] 8 U.S.C. § 1362.

[33] OFFICE OF THE INSPECTOR GENERAL REPORT, *supra* note 4, at 130-135; *see also* AMNESTY INTERNATIONAL REPORT, *supra* note 14, at 17-19.

[34] AMNESTY INTERNATIONAL REPORT, *supra* note 14, at 17-19.

[35] *Center for Nat'l Security Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002).

[36] *Center for Nat'l Security Studies v. United States Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied* 124 S.Ct. 1041 (Mem.) (2004).

LEGAL AUTHORITY

The Right to be Free from Arbitrary Detention

A crucial aspect of liberty is freedom from restraint. Detention of a person is obviously a significant loss of freedom, and one of the most awesome government powers that can be used against an individual. Therefore, it is essential that any detention by the government be strictly in accordance with relevant law and sufficiently justified. The government may arrest and detain a person for preventive purposes only under narrowly tailored circumstances expressly authorized by law. With narrow exceptions, the government must justify a preventive detention on an individualized basis, in a fair proceeding, and explain why the detention is necessary to serve an important government interest.

The right to be free from arbitrary detention is a fundamental protection of due process of law under the Fifth Amendment of the U.S. Constitution. Additionally, Article 9 of the International Covenant of Civil and Political Rights, ratified by the United States in 1992, states that "[n]o one shall be subjected to arbitrary arrest or detention."[37] The United States approved that provision without reservation.[38]

Resident aliens, as well as citizens, have a right to be free from arbitrary and unjustified detention. In this respect, the Supreme Court has drawn a distinction between non-citizens who have entered the country and those who have not. The Court explained: "Once an alien enters the country . . . the Due Process Clause applies to all persons within the United States . . . whether their presence is lawful, unlawful, temporary, or permanent . . . . It is well established

[37] Art. 9, 999 U.N.T.S. 171 (1976).

[38] UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645 (January 10, 1992).

that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[39]

Thus, the Supreme Court has recognized that the indefinite detention of aliens finally ordered deported, but who cannot be expatriated, violates federal statutes.[40] The Court reasoned that such detention would raise serious constitutional concerns and therefore interpreted immigration law to preclude indefinite detention. It has also held that aliens outside the country who are deemed "excludable" can be detained in connection with an adjudication of their request for admission. The Court said that aliens outside the United States and seeking entry are requesting a privilege, and therefore due process affords them no procedural protection beyond the procedure explicitly authorized by Congress, nor any substantive right to be free from immigration detention.[41] At the same time, it insisted that aliens residing here are entitled to due process in connection with deportation or exclusion proceedings.[42]

The law generally draws a distinction between punitive and regulatory detention. Due process requires that a person not be detained punitively unless adjudicated guilty.[43] The government has more latitude to engage in regulatory detention, including ensuring that persons

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[39] *Zadvydas v. Davis*, 533 U.S. 678, 679-80, 693 (2001); *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Jean v. Nelson*, 727 F.2d 957, 967-68 (11th Cir. 1984) (en banc); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1386 (10th Cir. 1981).

[40] In *Zadvydas*, the Court held that interpreting federal statutes to allow indefinite detention of non-deportable aliens who had lawfully entered the country would raise serious constitutional questions. To avoid "constitutional doubts," the Court interpreted federal immigration statutes as not allowing indefinite detentions. The Court expressly said it was not considering those accused of acts of terrorism. *Zadvydas v. Davis*, 553 U.S. 678 (2001).

[41] *Shaughnessy*, 345 U.S. at 212.

[42] *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

[43] *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

accused of crimes are available for trial,[44] protecting the community from a dangerous individual,[45] protecting a mentally ill individual,[46] facilitating "exclusion" under immigration laws,[47] and holding as enemy aliens citizens of a country with which we are in a declared war.[48]

Absent evidence that a foreign national poses a risk of flight or a danger to the community, preventive detention is arbitrary and violates due process. cNeither immigration authorities nor any other law enforcement agencies have any authority to detain purely for "investigation." An individual in removal proceedings may be detained without bond if he poses a flight risk or a danger to the community. But any such detention requires a fair adjudication of whether the individual poses such a threat.[49] In addition, once removal can be effectuated, there is no longer any legitimate immigration purpose served by continuing to detain an alien. Thus, if an alien is detained for purposes of removal, and agrees to leave the country, he should be allowed to leave or removed as soon as practicable, and may not be detained for "investigative purposes."

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[44] *Id*. at 534.

[45] *United States v. Salerno*, 481 U.S. 739 (1987).

[46] *Addington v. Texas*, 441 U.S. 418, 425-431 (1979).

[47] *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

[48] *Ludecke v. Watkins*, 335 U.S. 160 (1948).

[49] In *Demore v. Kim*, 123 S. Ct. 1708 (2003), the Supreme Court, by a five to four vote, upheld a statute mandating detention during deportation proceedings of foreign nationals charged with certain criminal offenses without an individualized assessment of risk of flight or danger to the community. In this case, however, the Court stressed that the Congress had substantial empirical evidence that such foreign nationals posed a high risk of flight and recidivism.

Access to the Courts

A basic aspect of due process of law is the right of access to the courts for all who claim they are being detained in violation of their rights. Indeed, Article 9 of the International Covenant of Civil and Political Rights states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention . . . . "[50]

The Supreme Court has emphasized the importance of access to the courts and thus has often gone out of its way to interpret statutes, including immigration laws, that appear to preclude all judicial review to allow a federal court to hear legal claims, especially claims associated with indefinite detention. For example, in *McNary v. Haitian Refugee Center, Inc.*,[51] the Court interpreted a law that appeared to preclude judicial review of dispositions of applications for amnesty. The Court said that there is a "well-settled presumption favoring interpretation of statutes [to] allow judicial review" and that "it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review."[52]

Most recently, and most importantly, in *Immigration and Naturalization Service v. Enrico St. Cyr*, the Supreme Court interpreted the immigration and habeas corpus statute to allow those facing deportation to have habeas corpus access to the American courts, even though the

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[50] Art. 9, 999 U.N.T.S. 171 (1976).

[51] 498 U.S. 479 (1991).

[52] *Id*. at 496; *see also United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Johnson v. Robison*, 415 U.S. 361, 367-73 (1974) (narrowly interpreting statutes that appeared to preclude jurisdiction so as to allow jurisdiction to review certain legal claims).

language of the immigration statute appeared to preclude all judicial review.[53] The Court said that to interpret the immigration statute to preclude any review of the detention and deportation of criminal aliens in any court would raise serious constitutional issues.[54] The Court thus interpreted the law, despite its language to the contrary, to allow those facing deportation to have access to habeas corpus.

Individuals Detained as Enemy Combatants

In the course of the war on terrorism, the United States government has detained more than 600 persons as enemy combatants at Guantanamo Bay, Cuba and other locations.[55] As mentioned above, this report does not address the legality of such detentions.

Three enemy combatants are currently being held in military custody in the United States. Yasser Esam Hamdi was captured in 2001 while allegedly fighting for Taliban forces in Afghanistan, and is currently being held in Norfolk, Virginia. Jose Padilla was arrested in May 2002 at O'Hare Airport in Chicago. He had been traveling in the Middle East and allegedly was plotting with al Qaeda members to detonate a radioactive bomb in the United States. Padilla was held for a month in civilian custody as a material witness before being transferred to military custody in Charleston, South Carolina. Ali al-Marri, a citizen of Qatar, was designated as an enemy combatant in June 2003. He had previously been held as a material witness and was under indictment in Illinois for a variety of federal offenses when he was transferred to military custody.

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[53] 533 U.S. 289 (2001).

[54] *Id.*

[55] LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 49.

The U.S. government has said that as enemy combatants, Hamdi, Padilla, and al-Marri need not be charged with any offense or provided access to counsel, any hearing, or judicial review. The U.S. Court of Appeals for the Fourth Circuit has agreed with the government's position in Hamdi's case and ruled that he does not have a right to consult with an attorney,[56] or to a hearing under Article V of the Third Geneva Convention to determine his status as an enemy combatant.[57] The court concluded that the President has broad power, as Commander-in-Chief, to detain as enemy combatants those, including U.S. citizens, apprehended in a foreign country during battle. The case was argued before the U.S. Supreme Court in April, and a decision is expected this Term.

In Padilla's case, the U.S. Court of Appeals for the Second Circuit ruled that the government does not have authority to hold an American citizen arrested in the United States as an enemy combatant and ordered that Padilla be released from military custody.[58] The government appealed to the Supreme Court, which recently heard the case. A decision in the matter is expected this Term.

Al-Marri appealed his detention to a federal district court in Illinois, which ruled that the case should properly be brought in the U.S. District Court for the District of South Carolina, because that is where al-Marri is currently in custody.[59] The U.S. Court of Appeals for the Seventh Circuit has affirmed that decision.[60]

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[56] *Hamdi v. Rumsfeld*, 296 F.3d 278, 282-85 (4th Cir. 2002).

[57] *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-69 (4th Cir. 2003).

[58] *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003).

[59] *Al-Marri v. Bush*, 274 F. Supp. 2d 1003, 1008-1010 (C.D. Ill. 2003).

[60] *Al-Marri v Rumsfeld*, 360 F.3d 707 (7th Cir. 2004).

There is no authority under the U.S. Constitution, federal statutes, or case law for the government to hold individuals arrested in the U.S. indefinitely without charges or access to the courts. Such detentions allow 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 certain 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 these rights do not apply, even to a United States citizen arrested for a planned crime in this country, if the individual is labeled an enemy combatant.

No provision of the Constitution or any federal statute allows the government to suspend the Bill of Rights in this manner. The government has suggested in its briefs that its actions are authorized by the law of war under our constitutional system. However, the law of war cannot be used to justify the military detentions of civilians.[61]

The cases cited by the government do not support its position. In *Ex parte Quirin*, eight members of the German armed forces were caught entering the country to commit acts of sabotage.[62] The Supreme Court upheld the constitutionality of the use of military tribunals to try these individuals, one of whom was a U.S citizen. Nothing in the decision, however, held that individuals, particularly civilians, could be held without any charges, trial, or judicial review. The decision approved military tribunals for enemy soldiers, not the authority to detain civilians indefinitely.

Nor does *In re Territo* provide authority for the government's detentions without access

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[61] *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).

[62] 317 U.S. 1 (1942).

to the courts.[63] In this case, a United States citizen was captured in Italy while serving in the Italian army and held as a prisoner of war in the United States. 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 are being held as prisoners of war, and neither are being accorded the protections that international law grants to prisoners of war. Unlike Territo, Hamdi was held incommunicado for more than two years before being allowed to speak with a lawyer, and Padilla (after he was designated an enemy combatant) has been afforded no access to counsel. Thus, these individuals have had no meaningful opportunity to assert that they are not properly designated as enemy combatants.

Over a century ago, the U.S. Supreme Court expressly disapproved holding civilians without access to the courts, even in war situations. In *Ex parte Milligan*, the Supreme Court held that a military commission lacked jurisdiction to try a United States 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 . . . ."[64] The Court emphasized that the civilian "courts are open and their process unobstructed" and therefore must be used.[65]

The executive branch cannot on its own decide that a civilian like Padilla should be treated as a soldier in the "war on terror." Under our constitutional system, such an extrapolation from existing domestic and international law can only accomplished through an Act of Congress. The Executive's actions constitute a violation of both separation of powers and due process of law.

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[63] 156 F.2d 142 (9th Cir. 1946).

[64] 71 U.S. (4 Wall) 2, 118 (1866).

[65] *Id.* at 121.

Individuals Detained as Material Witnesses

Approximately 50 individuals have been detained since September 11th as "material witnesses." Federal law sets both substantive and procedural requirements for holding an individual as a material witness. The federal material witness law, 18 U.S.C. § 3144, permits the government to arrest a material witness if there exists probable cause both that (a) the person has information material to a criminal proceeding, and (b) at trial "it may become impracticable to secure the presence of the person by subpoena." Once arrested as a material witness, an individual is entitled to a hearing under 18 U.S.C. § 3142 to determine whether any circumstance or combination of circumstances can assure the witness's appearance at trial. Section 3142 requires a balancing of (a) the nature and circumstances of the offense; (b) the evidence, history, and characteristics of the person being detained (including employment, ties to the community, and criminal history); and (c) any danger to the community which could accompany the person's release. Finally, pursuant to § 3144, "[n]o material witness may be detained . . . if the testimony of such witness can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice."

A *Washington Post* article was able to identify 44 material witnesses, and asserted that almost half of them had never testified before a grand jury.[66] This suggests that, in some instances, the material witness statute was used to preventively detain individuals who were never expected to be witnesses.

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[66] Steve Fainaru & Margot Williams, *Material Witness Law has Many in Limbo; Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1.

Attorney-Client Privilege

An important issue that has arisen concerning the treatment of detainees is the power of the government to monitor attorney-client communications. New regulations have been adopted by the Bureau of Prisons that allow for attorney-client communications to be monitored if a "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism . . . ."[67] The rule requires the Director of the Bureau of Prisons to provide written notice to the inmate and the attorney that: (1) "all communications between the inmate and attorney may be monitored, to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism," and (2) "[t]hat communications between the inmate and attorneys or their agents are not protected by the attorney-client privilege if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice."[68] The regulation requires the designation of a "privilege team" comprising individuals not involved in the underlying investigation to monitor communications.[69]

Law enforcement has the authority, apart from these new powers, to obtain a warrant to eavesdrop on any communications, including attorney-client communications, if "there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense . . . ."[70] In exercising this authority, the government must "minimize the

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[67] 28 C.F.R. § 501.3(d).

[68] *Id*. at § 501.3(d)(2)(i-ii).

[69] *Id*. at § 501.3(d)(3).

[70] 18 U.S.C. § 2518(3)(a).

interception of communications" subject to the privilege.[71] Under the applicable statute, only if law enforcement determines that an attorney-client communication is not covered by the privilege or is subject to the crime/fraud exception may the government record and use the evidence. Communications that are in furtherance of the client's ongoing or contemplated illegal acts are not protected.[72] However, the new regulations provide for interception of attorney-client communications based on a unilateral determination and a "reasonable suspicion" standard, without prior judicial approval. This poses a serious risk to the sanctity of attorney-client communications, even with the procedural safeguards that notice of the monitoring is provided and that those monitoring the communications are not involved in the underlying investigation.

Counsel for Indigent Detainees

Immigration detainees who are indigent are not provided counsel by the government even if they face a prolonged detention of weeks, months, or years. By contrast, indigent criminal defendants are provided counsel by the government if they face any term of imprisonment.[73] This disparity may be justified as a constitutional matter by the fact that the Sixth Amendment only requires that assistance of counsel be available in criminal prosecutions. But as a matter of logic and fairness, there is no justification for denying immigration detainees assistance of counsel if they face a significant deprivation of liberty. Congress should establish a legal

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[71] 18 U.S.C. § 2518(5). *See United States v. Gotti*, 771 F. Supp. 535, 544 (E.D.N.Y. 1991).

[72] *Clark v. United States*, 289 U.S. 1, 15 (1933); *see also Georgia v. McCollum*, 505 U.S. 42, 58 (1992); *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975) ("It is beyond dispute that the attorney-client privilege does not extent to communications regarding an intended crime").

[73] *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

assistance program for indigent aliens charged with immigration violations and facing detention of more than 48 hours.

Initiative Principles

Based on the preceding discussion, the Initiative endorses the following principles:

- Any detention of a citizen or non-citizen in the United States must be expressly authorized by congressional statute or by the law of war.
- In accordance with the law of war, no persons arrested in the United States should be designated as enemy combatants unless they are enemy soldiers.
- No persons arrested in the United States other than enemy combatants (as defined above) or aliens from an enemy country after a declaration of war should remain in detention unless there is a showing to the appropriate tribunal that there is probable cause the individual has committed a crime or, in non-criminal cases (*e.g.* under immigration law in aid of removal), that there is a constitutionally appropriate individualized basis for the detention.
- All persons in the United States are entitled to pre-trial or pre-hearing release unless the government demonstrates to the appropriate tribunal that the individual is likely to flee or poses a danger to the community.
- The courts of the United States must be available to hear claims of detainees that they are being held or treated in violation of the law.
- All persons detained by the federal government should be accorded the right to retain counsel, and indigent detainees charged with immigration violations should be provided counsel.

- The names of all persons detained in criminal and immigration proceedings should be made public except when the government can demonstrate, in accordance with First Amendment jurisprudence, that it has a compelling state interest in keeping such identities secret.
- An individual should be held as a material witness only if the person has information material to a criminal proceeding and it would be impracticable to secure the presence of the person by subpoena. The material witness statute should not be used as a pretext to hold individuals the government wishes to detain for reasons other than ensuring their presence to testify at a criminal proceeding.
- The government must treat all detainees in a manner that is in accordance with the law and consistent with basic principles of human rights.
- Those being detained have the right to the attorney-client privilege, although this privilege does not extend to protect communications regarding an intended crime. Any interception of attorney-client communications should require prior judicial approval.

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