

Making Us Less Free: War on Terrorism or War on Liberty?

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Introduction

I am writing this a little more than six months since the September 11 attacks rearranged the world's legal and political landscape for all of us. In this brief, hyper-politicized period of time, basic legal protections embedded in the US Constitution and in international law have been swept aside by the Bush administration's "war on terrorism." Legal constraints on arbitrary executive and government power have been tossed away. Courts, which once stood as a safeguard of individual rights, have largely surrendered to new "anti-terrorist" measures. The very laws of war, fashioned over hundreds of years, have been subverted. Human rights, struggled for and embodied in documents such as the Magna Carta, the French Declaration of the Rights of Man and of the Citizen, the Bill of Rights of the Constitution of the United States, and the International Covenant on Civil and Political Rights, are in jeopardy. We have entered a dark period.

It has been more than six months since I witnessed, from just a few blocks away, the terrible devastation at the World Trade Center. The heart-wrenching human suffering of that day is still vivid to me, as it is to everyone in New York. Like everyone else who saw or was affected by the attacks, I yearn to live again in safety: I want those who attacked us arrested and punished, and the network that plotted to harm us eliminated. But my concern for safety at home is mixed with concern at what appears to be broad popular support for the new anti-terrorism measures--even those that curtail freedom and constitutional rights.

After all, it's hard to see how building a Fortress America can possibly prevent another terrorist attack. The United States has 7,500 miles of border with Canada and Mexico and thousands of miles of coastline, most of it not patrolled. There are more than 10,000 air flights a day in the United States. Eleven million trucks and more than two million rail cars cross into the United States each year, as do millions of non-citizen visitors. Terrorists intent on harm can easily slip into the country. Of course, good law enforcement has a role in protecting people; but all the laws in the world are not enough really make the United States safe.

If the US government truly wants its people to be safer and wants terrorist threats to diminish, it must make fundamental changes in its foreign policies. Without going into these questions in detail, the terrible events of April 2002 in Israel and Palestine should demonstrate the folly of repressive "anti-terrorist" measures as a way to insure peace. The United States' actions in the Middle East, particularly its unqualified support for Israel, and its embargo of Iraq, its bombing of Afghanistan and its actions in Saudi Arabia, continue to anger people throughout the region, and to fertilize the ground where terrorists of the future will take root.

But there is very little room left in the United States for those who question the new initiatives, or who challenge US foreign policies. Since September 11th, all such criticism has become painted as the equivalent of support for those who attacked the United States. As John Ashcroft, the Attorney General of the United States, testified at a congressional committee in December 2001, “To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists.”^{1[1]} He went on to say that criticism of the administration “gives ammunition to America’s enemies and pause to America’s friends.”^{2[2]} Similarly, White House spokesman Ari Fleischer warned “all Americans ... to watch what they say [and] watch what they do.”^{3[3]}

However, I believe it is more essential than ever to speak up. Without basic alterations in US policies, there is little hope of ending the draconian curtailment of liberties in the United States. The struggle to regain lost liberty and that of creating a more just world abroad is really one struggle—and that is not just rhetoric. We and our children will not be safer and more free until the world is as well.

In the current climate, it will obviously not be easy to substantially change the course that the United States and its allies have embarked upon. Yet the US administration has been forced to modify some of its more draconian proposals, such as its original refusal to apply any part of the Geneva Conventions to combatants captured in Afghanistan. It has been pressured into taking steps to make trials before military tribunals fairer. And following a great uproar in the press, it has apparently closed the disinformation-and-propaganda office that it had established at the Pentagon.

These changes in policy have come, in part, from dissent within the United States, and in some cases even from pragmatic voices within the US armed forces. But outcry from the countries of Europe, some of which still take the rule of law seriously, has greatly helped press these modifications upon the United States.

There have also been a number of lawsuits filed—some successful, most with appeals still pending—to improve the treatment of immigrants in the United States and of captured combatants. On March 26, 2002, a judge in New Jersey gave civil-rights organizations access to records of those detained in the United States after September 11, saying that secret arrests are “odious to a democracy.” On April 4, 2002, a federal judge in Michigan ordered public access to immigration hearings that had been closed in the wake of September 11, saying that government secrecy “only breeds suspicion.” And in a decision on March 13, 2002, the Inter-American Human Rights Commission of the Organization of American States urged the United States to immediately provide court or tribunal hearings for those detained at Guantanamo Bay, Cuba. On April 30, 2002, a federal

^{1[1]} Neil A. Lewis, *Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes*, New York Times (Dec. 7, 2001) at A-1.

^{2[2]} *Id.*

^{3[3]} Editorial, *Say What You Will*, The Oregonian, (Oct. 2, 2001) at B10.

judge, addressing the case of one of the post-September 11 detainees in the US, found that the government had no right to jail innocent people to insure their testimony before a grand jury. The judge found that, even in the aftermath of September 11, the innocent could not be imprisoned:

A proper respect for the laws that Congress does enact—as well as the inalienable right to liberty—prohibits this court from rewriting the law, no matter how exigent the circumstances.^{4[4]}

Clearly, these cases show that some judges are still courageous enough to uphold fundamental rights against a government bent on their elimination.

In the following sections, I'll discuss some of the overall themes of the post-September 11 period, and analyze in detail some of the new “anti-terror” laws and restrictions in the United States. I hope that voices around the world will respond to these issues so that justice can truly be served.

Overview

Permanent War Abroad

The immediate reaction to September 11 by the United States government was to make war abroad. On September 14, 2001, the US Congress, in its resolution entitled “Authorization for Use of United States Military Force,” gave the president unbridled power to go to war. He was authorized to attack any nation, organization or person involved directly or indirectly in the September 11 attacks. The resolution did not name any particular nation, organization or person, but left the designation of guilty parties to the president alone. Congress, basically, gave the president a blank check to make war upon whomever he wants, anywhere in the world, even inside the United States.

Under the language of the resolution, the president does not need to prove a link to the attacks of September 11 in order to wage war against another country or group. To declare war on Iraq, for example, the president could justify his actions merely by claiming that someone allegedly from Al Qaeda had allegedly met with an Iraqi official. With such broad powers, it is hard to see any check on the president's single-handed ability to declare and wage war.

This war has been conceptualized as a permanent war abroad. It is a war that the president has repeatedly stated will take many years; it is a war without end. Vice President Cheney said that the United States may take military action against “forty to fifty countries,” and that the war could last half a century or more.^{5[5]}

Within six months of September 11th, active United States forces have involved

^{4[4]} First Opinion and Order at 59 in U.S.A. v. Osama Awadallah, 01 Cr. 1026 (SAS) (Decided April 30,2002).

themselves not only in Afghanistan and Pakistan but also in Colombia, the Philippines and potentially in Somalia and the Sudan. Future countries targeted include the countries named by President Bush as the “axis of evil”: Iraq, Iran and North Korea.

A permanent war abroad means permanent anger against the United States by those countries and by people who will be devastated by US military actions. Hate will increase, not lessen, and the terrible consequences of that hate will be used, in turn, as justification for more restrictions on civil liberties in the United States.

Permanent War at Home

After September 11th, the United States also launched a permanent war on terror at home, by rapidly building a fortified surveillance and national security state. Attorney General John Ashcroft, a religious fundamentalist with an antediluvian record on civil rights, saw September 11th as an opportunity to lift restrictions that had been placed on the nation’s spy agencies in the 1970s, and as a chance to grant law-enforcement agencies the additional powers they have been wanting for years.

Among the most pernicious tendencies at work in Ashcroft’s new order are the pervasive censorship of information, the silencing of dissent, and widespread ethnic and religious profiling.

Overall, the new anti-terrorist laws represent a tremendous expansion of executive power. The president can now make war on anyone without additional congressional authority, can wiretap attorneys and their clients without a court order, can jail non-citizens permanently on the word of the attorney general--even if they have committed no crimes--and can set up military tribunals that can mete out the death penalty without appeal. The United States’ system of checks and balances, made up of the courts, Congress and the executive, and purportedly the pride of the US constitutional system, is in jeopardy.

The new laws and restrictions also mean fundamental changes in the way the United States, historically a nation of immigrants, treats the 20 million non-citizens residing in the country. Since September 11, enforcement of the new laws against non-citizens, mostly those from the Middle East, has included incommunicado detentions, the questioning of thousands by FBI agents, and widespread racial, ethnic and religious profiling. The government’s campaign against non-citizens, particularly Muslims, has at times flowered into explicit religious bigotry, as expressed in this remarkable quote from Attorney General Ashcroft:

Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.^[6]

^[5] John Pilger, *The Colder War*, www.counterpunch.org/pilgercold.html.

^[6] American-Arab Anti-Discrimination Committee, Action Alert, *Protest Ashcroft’s Anti-Islamic Statements*, (Feb, 11, 2002).

In general, the war at home is marked by an unprecedented strengthening of the US intelligence and law-enforcement apparatus; the erosion of the US system of checks and balances, a new xenophobia and anti-immigrant sentiment. These tendencies are deeply troubling.

In the next sections, I will discuss in more detail some aspects of the war on terrorism. Some include challenges to international justice, such as indefinite detention of battlefield detainees outside the standards of the Geneva Convention; the establishment of military tribunals to try suspected terrorists; and the possible use of torture to obtain information.

Others include domestic initiatives such as the creation of a special new Cabinet Office of Homeland Security; massive arrests and interrogation of immigrants; the passage of legislation granting intelligence and law-enforcement agencies much broader powers to intrude into the private lives of Americans; the wiretapping of attorney-client conversations; and the FBI's new license to spy on domestic religious and political groups.

Overall, I fear that the entire situation, when coupled with the ideology of the Republicans currently in control of the executive branch of the government, portends the worst for international human rights and for constitutional rights at home.

The New Legal Landscape

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

I. The President's Military Order: Detainees and Tribunals

On November 13, 2001, President Bush, as commander in chief, signed a military order establishing military commissions or tribunals to try suspected terrorists.^{7[7]} In addition to authorizing military tribunals, the same military order of November 13 requires the secretary of defense to detain anyone whom the president has reason to believe is an international terrorist, a member of Al Qaeda or anyone who harbored such persons. There is no requirement that a detained individual ever be brought to trial. Detention without any charges and without any court review can last an entire lifetime.

Subsequent to the issuance of the military order, US and Northern Alliance forces in Afghanistan captured thousands of prisoners. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray, at the US naval station in Guantanamo Bay, Cuba. As of April 2002, US authorities were detaining 300 male prisoners, representing 33 nationalities, at the Guantanamo

^{7[7]} Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>

compound, and the number was expected to grow. It is these prisoners who may be indefinitely detained or tried by military tribunals to face the death penalty.^{8[8]} Remarkably, Defense Secretary Donald Rumsfeld has stated that he reserves the right to continue detaining prisoners even if the tribunals acquit them.

There have been allegations of ill treatment of some prisoners in transit and at Guantanamo, including reports that they were shackled, hooded and sedated during the 25-hour flight from Afghanistan; that their beards and heads were forcibly shaved, and that upon arrival at Guantanamo they were housed in small cells that failed to protect against the elements.^{9[9]} While such treatment is never acceptable, more serious is the fact that these prisoners exist in a legal limbo, their identities secret and the charges against them unknown.

It is the official position of the United States government that none of these detainees are POWs. Instead, officials have repeatedly described the prisoners as “unlawful combatants.” This determination was made without the convening of a competent tribunal as required by Article 5 of the Third Geneva Convention, which mandates such a tribunal “should any doubt arise” as to a combatant’s status. In its most recent statement on the status of those detained at Guantanamo, the US government announced that although it would apply the Geneva Conventions to those prisoners it decided were from the Taliban, it would not extend them to prisoners it believed were members of Al Qaeda.^{10[10]} However, in no case were any of the detained to be considered POWs. The United States has repeatedly refused the entreaties of the international community to treat all the detainees under the procedures established under the Geneva Conventions.^{11[11]}

The United States’ treatment of the Guantanamo detainees violates virtually every human-rights norm relating to preventive detention. The United States has denied the detainees access to counsel, consular representatives and family members; has failed to notify them of the charges they are facing; has refused to allow for judicial review of the detentions; and has expressed its intent to hold the detainees indefinitely.^{12[12]} It continues to do so despite an important ruling from the Inter-American Human Rights

^{8[8]} See, e.g., Richard Sisk, *Airport Gun Battle Firefight Erupts as Prisoners Are Flown to Cuba*, New York Daily News (January 11, 2002) at 27.

^{9[9]} See, e.g., Amnesty International, USA: *AI calls on the USA to end legal limbo of Guantanamo prisoners*, AI Index: AMR 51/009/2002, issued 15/01/2002, at <http://web.amnesty.org/ai.nsf/Index/AMR510092002>.

^{10[10]} White House Press Release, <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

^{11[11]} On February 8, the day after announcement of the United States’ position, Darcy Christen, a spokesperson for the ICRC, said of the detainees: “They were captured in combat [and] we consider them prisoners of war.” Richard Waddington, *Guantanamo Inmates Are POWs Despite Bush View - ICRC*, Reuters (February 9, 2002).

^{12[12]} These detentions are currently under challenge in United States courts and the author of this article is one of the attorneys in those cases. The court papers can be obtained at: www.campxray.net.

Commission that it immediately give the detainees some form of judicial process. In its ruling, the commission requested that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.

The military order also provides for special commissions to try the captives now being held. Under this order, non-citizens, whether from the United States or elsewhere, who are accused of aiding international terrorism can be tried before one of these commissions at the discretion of the president. These commissions are not standard courts-martial, which provide far more protections for the accused.

The executive order was accompanied by Attorney General Ashcroft's explicit statement that terrorists do not deserve constitutional protections. (By "terrorists," Ashcroft means accused or suspected individuals, not those proved in a court to have committed terrorist acts.)

There was a broad outcry against the unfairness of such tribunals, both in the United States and in Europe, and even from conservatives. This outcry was probably a factor in the government's decision to have the so-called twentieth hijacker, Moussaoui, tried in a regular federal court in the United States. It certainly contributed to the reasons for the order being modified in March 2002.

The provisions of the military order that established these commissions call for the secretary of defense to appoint the judges, most likely military officers, who will decide questions of both law and fact. Unlike federal judges, who are appointed for life, these officers will have little independence and every reason to decide in favor of the prosecution. Normal rules of evidence, which provide some assurance of reliability, will not apply. Hearsay and even evidence obtained from torture will apparently be admissible.

Under the original order, unanimity among the judges was not required, even to impose the death penalty. That was modified in March 2002, to require a unanimous verdict for a death sentence, but not for the finding of guilt for a crime carrying a potential of a death sentence. The original order did not give suspects a choice of counsel; that, too, has been modified, but only to the extent that a suspect can pay an attorney and that the attorney passes security clearances from the US government. Initially, the only appeal from a conviction was to the president or to the secretary of defense; the modified order allows an appeal to a three-person military review panel, which then gives a "recommendation" to the secretary of defense or the president as to the disposition of the case. However, it is important to note that there is still no provision for review by a civilian court, and the final decision remains in the hands of the president or the secretary of defense.

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

Although military tribunals were used during and immediately subsequent to World War II, their use since that time does not comply with important international treaties. The International Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man require that persons be tried before courts previously established in accordance with pre-existing laws. Clearly, the tribunals are not such courts.

In addition, the Third Geneva Conventions, of 1949, require that prisoners of war (POWs) be tried under the same procedures that US soldiers would be tried for in similar crimes. US soldiers are tried by courts-martial or civilian courts and not by military tribunals.

Surprisingly, a number of prestigious law professors have accepted and even argued in favor of these tribunals, saying that secrecy is necessary for security.^{13[13]} The primary argument is that it might be necessary to disclose classified information in order to obtain convictions. But, in fact, procedures for safely handling classified information in federal courts have been successful, as in the trials of those convicted in the 1993 bombing of the World Trade Center. Those 1993 trials demonstrate that trials of suspected terrorists do not require special military tribunals, but can safely be held in federal courts.

Trials before military commissions will not be trusted in either the Muslim world or in Europe. The military commissions will be viewed as what they are: kangaroo courts. It would be much better to demonstrate to the world that the guilty have been apprehended and fairly convicted in front of impartial and regularly constituted courts.

An even better solution would be for the United States to go to the United Nations and have it establish a special court for the trials, staffed by judges from the United States, Muslim countries and other countries with civil law systems.

II. The Office of Homeland Security

On September 20, 2001, President Bush announced the creation of the Office of Homeland Security, charged with gathering intelligence, coordinating anti-terrorism efforts and taking precautions to prevent and respond to terrorism. It is not yet known how this office will function, but it will most likely try to centralize the powers of existing US intelligence and law-enforcement agencies—a difficult, if not impossible, job—and coordinate the work of some 40 bickering agencies.

Those concerned with its establishment are worried that the Office of Homeland Security will become a super spy agency and, as its very name implies, that it will encourage the military to play a hitherto unprecedented role in domestic law enforcement. The recent appointment of an Army general who will be in charge of “defense

^{13[13]} See, e.g. Remarks of Yale Professor Ruth Wedgewood, <http://www.justicetalking.org/shows/show195.asp>.

of the homeland” and the proposed repeal of a federal statute that prohibits the military from playing a domestic law-enforcement role are clear signals of what can be expected in the future.

III. FBI Arrests and Investigations

A. Arrests of Non-Citizens

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

In the immediate aftermath of the September 11 attacks, Attorney General John Ashcroft focused FBI efforts on non-citizens, whether permanent residents, students, temporary workers or tourists. Normally, an alien can only be held for 48 hours prior to the filing of charges. Ashcroft's new regulation allowed arrested aliens to be held without any charges for a “reasonable time,” presumably months or longer.

After September 11, the FBI began massive detentions and investigations of individuals suspected of terrorist connections, almost all of them non-citizens of Middle Eastern descent; more than 1,300 were arrested. In some cases, people were arrested merely for being from a country such as Pakistan and having expired student visas. Many were held for weeks and months without access to lawyers or knowledge of the charges against them; many are still in detention six months later. None, as yet, have been proved to have a connection with the September 11 attacks; as many as half remain in jail despite having been cleared.^{14[14]}

Stories of mistreatment of such detainees are not uncommon. Apparently, some of those arrested are not willing to talk to the FBI, although they have been offered shorter jail sentences, jobs, money and new identities. Astonishingly, the FBI and the Department of Justice are discussing methods to force them to talk, which include “using drugs or pressure tactics such as those employed by the Israeli interrogators.”^{15[15]} The accurate term to describe these tactics is torture.

There is resistance to this even from law-enforcement officials. One former FBI chief of counterterrorism said in an October interview, “Torture goes against every grain in my body. Chances are you are going to get the wrong person and risk damage or killing them.”^{16[16]} Since torture is illegal in the United States and under international law, US officials risk lawsuits by using such practices. For this reason, they have suggested having another country do their dirty work; they want to extradite the suspects to allied countries where security services

^{14[14]} Homeland Security director Tom Ridge said that there was no evidence yet than any of the more than 1,000 people detained was a terrorist. *U.S. Draws Up List of Over 5,000 Men It Wants Interviewed in Terrorism Probe*, Wall Street Journal (Nov. 14, 2001) at A6.

^{15[15]} Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, Washington Post (October 21, 2001) A6.

regularly threaten family members and/or use torture. It would be difficult to imagine a more ominous signal of the repressive period we are facing.

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

B. Investigations of Middle Eastern Men and of Dissenters

In late November 2001, Attorney General Ashcroft announced that the FBI or other law-enforcement personnel would interview more than 5,000 men, mostly from the Middle East, who were in the United States on temporary visas. None of these men were suspected of any crime. The interviews were supposedly voluntary. A number of civil-liberties organizations and Muslim and Arab-American groups objected that the investigations amounted to racial profiling and that interviews of immigrants who might be subject to deportation could hardly be called voluntary. A number of law-enforcement officials, including a former head of the FBI, objected as well, saying that such questioning would harm the relationship of police departments with minority communities, that the practice was illegal under some state laws and that it was a clumsy and ineffective way to go about an investigation. A few local police departments refused to cooperate.

Although Ashcroft claimed that the questioning was harmless, the proposed questions themselves made this assertion doubtful. The initial questions concerned the non-citizen's status; if there was even the hint of a technical immigration violation, the person could well find himself in jail and deported. Information was requested regarding all of the friends and family members of the questioned person; in other words, the FBI wanted complete address books. Once the FBI had such information, it would open files and investigations on each of those named, even though no one was suspected of a crime. The FBI was also instructed to make informants of the persons it questioned, and to have them continue to report on and monitor the people they are in contact with. Oliver "Buck" Revel, a former FBI assistant executive director, has criticized this practice as "not effective" and as "really gut[ting] the values of our society, which you cannot allow the terrorists to do."¹⁷¹⁷

In March 2002, Ashcroft announced that the Justice Department was launching a new investigation of 3,000 more non-citizens, mostly young Arab men. This is despite the fact that just over half of the initial group of 5,000 could even be found for the interviews and that little, if any, information was learned. The American-Arab Anti-Discrimination Committee was sharply critical of this new effort, and said it was an "ineffective method of law enforcement and constituted an unacceptable form of racial profiling."¹⁸¹⁸

¹⁶¹⁶ Id.

¹⁷¹⁷ Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism*, Washington Post (Nov. 28 2001) at A1.

¹⁸¹⁸ ADC *Reiterates Objections to Government Investigations Based on Racial Profiles* (March 20, 2002) www.adc.org/press/2002/20March2002.html.

The FBI is also currently investigating political dissident groups it claims are linked to terrorism—among them pacifist groups such as the US chapter of Women in Black, which holds peaceful vigils to protest violence in Israel and the Palestinian Territories. The FBI has threatened to force members of Women in Black to either talk about their group or go to jail. As one of the group's members said, “If the FBI cannot or will not distinguish between groups who collude in hatred and terrorism, and peace activists who struggle in the full light of day against all forms of terrorism, we are in serious trouble.”^{19[19]}

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

C. Renewed FBI Spying on Religious and Political Groups

According to a front page December 2001 *New York Times* story, Attorney General John Ashcroft was considering a plan that would authorize the FBI to spy on and disrupt political groups.^{20[20]} This spying and disruption would take place even without evidence that a group was involved in anything illegal. A person or group could become a target solely because of expressing views different from those of the government or taking a position in support of, for example, Palestinian rights.

Ashcroft would authorize this by lifting FBI guidelines that were put into place in the 1970s after abuses committed by the agency, including spying on and attempting to disrupt the activities of such nonviolent leaders as Dr. Martin Luther King, were exposed. That earlier spying and disruption was done under a program called Cointelpro, which stands for Counterintelligence Program. Three months after the first stories appeared about Ashcroft's interest in resurrecting Cointelpro, it remains unclear what elements of the plan have been approved.

IV. Violation of the Attorney-Client Relationship

A. Wiretapping of Attorney–Client Communications

At the heart of the effective assistance of counsel is the right of a criminal defendant to a lawyer with whom he or she can communicate candidly and freely without fear that the government is overhearing confidential communications. This right is fundamental to the adversary system of justice in the United States. When the government overhears these conversations, a defendant's right to a defense is compromised.

^{19[19]} Report by Ronnie Gilbert, FBI Investigation of Women in Black, October 4, 2001, at www.labournet.net/world/0110/wmnbkl1.html.

On October 30, 2001, with the stroke of a pen, Attorney General Ashcroft eliminated the attorney-client privilege and said he will wiretap privileged communications when he thinks there is “reasonable suspicion to believe” that a detainee “may use communications with attorneys or their agents to further facilitate an act or acts of violence or terrorism.”^{21[21]} Ashcroft said at the time that approximately 100 such suspects and their attorneys might be subject to the order. He claimed the legal authority to act without court order; in other words, without the approval and finding by a neutral magistrate that attorney-client communications are facilitating criminal conduct. This is utter lawlessness by our country’s top law-enforcement officer and is flatly unconstitutional.

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

On April 9, 2002, Ashcroft flew to New York to announce the indictment of a well-known defense attorney, Lynne Stewart. Stewart had represented Sheikh Omar Abdel Rahman in his 1995 trial for conspiracy to bomb the World Trade Center, for which he had been convicted and sentenced to life plus 65 years. She had continued to represent him in prison.

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

The indictment, for which she faces 40 years in prison, primarily accuses Stewart of having given material support to a terrorist organization. It charges that she “facilitated and concealed communications” between the sheikh and members of an Egyptian terrorist organization, the Islamic Group. The essence of the claim is that on an occasion when Stewart visited her client in prison, the Arabic translator that accompanied her spoke to the sheikh regarding messages that the sheikh wanted transmitted to the terrorist group. In other words, the translator allegedly did not just translate for Stewart but had his own agenda with the sheikh. It is claimed that Stewart permitted and even facilitated those conversations. Apparently, though, these alleged communications resulted in no terrorist incidents.

It seems highly improbable that Ashcroft will have sufficient evidence to support the charges against Stewart. As she does not speak or understand Arabic, she could not have known the content of the conversations that allegedly occurred between the translator and the sheikh. If she was unaware of the supposed illegal nature of the conversations, it is difficult to see how she could be accused of giving material aid to a terrorist organization.

The alleged conversations occurred prior to Ashcroft’s tenure, when Janet Reno was the attorney general. The claimed “evidence” was gathered through a wiretap, obtained by Reno, that has been in effect for almost two years. This wiretap was not authorized by a warrant, nor did it meet the “probable cause” standard of the Fourth

^{20[20]} David Johnston and Don Van Natta Jr., *Ashcroft Seeking to Free F.B.I. to Spy on Groups*, New York Times (Dec. 1, 2001) A1.

^{21[21]} National Security; Prevention of Terrorist Acts of Violence, 28 Code of Federal Regulations, Parts 500 and 501.

Amendment that is normally required in criminal investigations. Rather, a special secret court, the Foreign Intelligence Surveillance Court, authorized the wiretap without any showing of probable cause. Such a wiretap raises serious legal questions, particularly as attorney-client conversations were monitored.

Ashcroft is now using the indictment of Stewart to justify his claim that there is a need to wiretap attorney-client conversations in terrorism cases. In addition, he claims the authority to do so without the approval of any court, even the Foreign Intelligence Surveillance Court. There is no reason for this bypassing of the Constitution; courts are the appropriate place to approve, or disapprove, any such requests for wiretapping. Hopefully, the court test of and rejection of this new reach for power will come swiftly and decisively.

It is difficult to divorce Stewart's indictment from the politics of John Ashcroft. It seems more than likely that the indictment was contrived, and that one of its main purposes was the intimidation of those who believe that all persons, even those accused of terrorism, are entitled to constitutional protections, the most important being the right to a lawyer. Because of Ashcroft's action, it will be increasingly difficult to find defense lawyers willing to take these unpopular cases.

V. The New Anti-Terrorist Legislation

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

A. "Rights" of Aliens

Prior to this legislation, anti-terrorist laws passed in the wake of the 1996 bombing of the federal building in Oklahoma City had already given the government wide powers to arrest, detain and deport aliens based upon secret evidence—evidence that neither the alien nor his attorney could view or refute.^{22[22]} The new legislation makes it even worse for aliens. First, the law permits "mandatory detention" of aliens certified by the attorney general as "suspected terrorists." These could include aliens involved in barroom brawls or those who have provided only humanitarian assistance to organizations disfavored by the United States. Once certified in this way, an alien could be imprisoned indefinitely with no real opportunity for court challenge. Until now, such "preventive detention" was believed to be flatly unconstitutional.

^{22[22]} This 1996 legislation was aimed at aliens, although US citizens living in the United States carried out the bombing of the federal building.

Second, current law permits the deportation of aliens who support terrorist activity; the proposed law would make aliens deportable for almost any association with a “terrorist organization.” Although this change seems to have a certain surface plausibility, it represents a dangerous erosion of the constitutionally protected rights of association. “Terrorist organization” is a broad and open-ended term that could, depending on the political climate or the inclinations of the attorney general, include liberation groups such as the Irish Republican Army, the African National Congress or NGOs that have ever engaged in any destruction of property, such as Greenpeace. An alien who gives only medical or humanitarian aid to similar groups, or simply supports their political message in a material way, could also be jailed indefinitely.

B. More Powers to the FBI and the CIA

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

In 1978, an exception was made to these strict requirements, permitting wiretapping to be carried out to gather intelligence information about foreign governments and foreign terrorist organizations.^{23[23]} A secret court, the Foreign Intelligence Surveillance Court, was established that could approve such wiretaps without requiring the government to show evidence of criminal conduct. In doing so, the constitutional protections necessary when investigating crimes could be bypassed.

The secret court has been little more than a rubber stamp for wiretapping requests by the spy agencies. It has authorized more than 13,000 wiretaps in its 22-year existence, currently about 1,000 last year, and has apparently never denied a request for a wiretap. Under the new law, the same secret court will have the power to authorize wiretaps and secret searches of homes in criminal cases—not just to gather foreign intelligence. The FBI will be able to wiretap individuals or an organization without meeting the stringent requirements of the United States Constitution, which requires a court order based upon probable cause that a person is planning or has committed a crime. The new law will authorize the secret court to permit roving wiretaps of any phones, computers or cell phones that might possibly be used by a suspect. Widespread reading of e-mail will be allowed, even before the recipient opens it. Thousands of conversations will be listened to or read that have nothing to do with any suspect or any crime.

The new legislation is filled with many other expansions of investigative and prosecutorial power, including wider use of undercover agents to infiltrate organizations, longer jail sentences and lifetime supervision for people who have served their sentences, a longer list of crimes that can receive the death penalty and longer statutes of limitations for prosecuting crimes. Another provision of the new bill makes it a crime for a person to

fail to notify the FBI if he or she has “reasonable grounds to believe” that someone is about to commit a terrorist offense. The language of this provision is so vague that anyone, however innocent, with any connection to anyone even suspected of being a terrorist can be prosecuted.

C. The New Crime of Domestic Terrorism

The USA Patriot Act creates a number of new crimes. One of the most threatening to dissent and to those who oppose government policies is the crime of “domestic terrorism.” It is loosely defined as acts that are dangerous to human life, violate criminal law and “appear to be intended” to intimidate or coerce a civilian population or “influence the policy of a government by intimidation or coercion.” Under this definition, a protest demonstration that blocked a street and prevented an ambulance from getting by could be deemed domestic terrorism. Likewise, the demonstrations in Seattle against the World Trade Organization in 2000 could fit within the definition.

This was an unnecessary addition to the criminal code; there are already plenty of laws making such civil disobedience criminal without labeling protest as “terrorist” in order to impose severe prison sentences.

Conclusion

Overall, the severe curtailment of legal rights, the disregard of established law and the new repressive legislation represents one of the most sweeping assaults on liberties in the last 50 years. It is unlikely to make us more secure; it is certain to make us less free. It is common for governments to reach for draconian law-enforcement solutions in times of war or national crisis. It has happened often in the United States and elsewhere.

We should learn from historical example. Times of hysteria, of war and of instability are not the times to rush to enact new laws that curtail our freedoms and grant more authority to the government and its intelligence and law-enforcement agencies.

The US government has conceptualized the war against terrorism as a permanent war, a war without boundaries. Terrorism is frightening to all of us, but it is equally chilling to think that in the name of anti-terrorism our government is willing to permanently suspend constitutional freedoms permanently as well.

^{23[23]} Foreign Intelligence Surveillance Act (1978).