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## ENDNOTES

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### CHAPTER ONE: OPEN GOVERNMENT

<sup>1</sup> Letter from James Madison to W.T. Barry (August 4, 1822), reprinted in *James Madison's Writings*, Vol. 9, No. 103 (Gaillard Hunt ed., 1910), available at <http://press-pubs.uchicago.edu/founder5s/documents/v1ch18s35.html>, (accessed August 27, 2003).

<sup>2</sup> The statutory bases for government secrecy are limited to language in the Espionage Act of 1917, the protection of intelligence sources and methods in the National Security Act of 1947, and the separate system for safeguarding nuclear-related information under the Atomic Energy Acts of 1946 and 1954, as amended. Moreover, the Constitution itself includes only one explicit mention of secrecy, and it concerns the procedures of Congress, not the executive branch: Article I, section 5 provides that each House shall publish a "journal of its Proceedings . . . excepting such Parts as in their Judgment require Secrecy." See Commission on Protecting and Reducing Government Secrecy, "Secrecy, Report of the Commission on Protecting and Reducing Government Secrecy," 103<sup>rd</sup> Cong., S. Doc. 105-2, 1997, pp. 5-6, 21-24 and A-1, available at <http://www.access.gpo.gov/congress/commissions/secrecy> (accessed August 28, 2003).

<sup>3</sup> Committee on Classified Information, Department of Defense, "Report to the Secretary of Defense by the Committee on Classified Information," November 8, 1956, p. 6.

<sup>4</sup> This phenomenon was examined in detail by former Senator Daniel Patrick Moynihan, first in an appendix to a report of a commission he chaired, "Report of the Commission on Protecting and Reducing Government Secrecy," app. A (Secrecy: A Brief Account of the American Experience), and subsequently in his book, *Secrecy: The American Experience* (New Haven: Yale Univ. Press, 1998). For example, Moynihan notes that during the first years of the Cold War a "culture of secrecy" set in, through which what Senator Hubert H. Humphrey in January 1955 termed a "complex of Government security statutes, regulations, and procedures" more and more information came to be protected with little Congressional or public oversight. This was the impetus for the decade-long effort led by Representative John E. Moss to increase public access to government information that culminated in the passage of the FOIA in 1966. See "Report of the Commission on Protecting and Reducing Government Secrecy," app. A (Secrecy: A Brief Account of the American Experience), p. A-46 to A-61.

<sup>5</sup> 5 U.S.C. §552 (1966).

<sup>6</sup> Office of the White House Press Secretary, Press Release: "Statement of President Lyndon B. Johnson, Upon Signing S. 1160," July 4, 1966, available at <http://www.gwu.edu/~nsarchiv/nsa/foia/FOIARelease66.pdf> (accessed August 27, 2003). In his statement, President Johnson also noted the importance of ensuring access to information: "I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted." Ibid.

<sup>7</sup> Information Security Oversight Office, "A Look to the Future of the Security Classification System in a Post 9/11 Environment," *Report to the President 2002*, p. 6, available at [http://www.archives.gov/isoo/annual\\_reports/2002\\_annual\\_report.pdf](http://www.archives.gov/isoo/annual_reports/2002_annual_report.pdf) (accessed August 27, 2003).

<sup>8</sup> Ibid.; see also Federation of American Scientists Project on Government Secrecy, *Secrecy News*, July 24, 2003. Information Security Oversight Office (ISOO) is a small agency housed at the National Archives and Records Administration that is responsible for overseeing classification policies; among other responsibilities, ISOO tracks the amount of information kept secret by reviewing required reports from Executive Branch departments and agencies.

<sup>9</sup> *EPA v. Mink*, 410 U.S. 73, 80 (1973).

<sup>10</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Forsham v. Califano*, 587 F.2d 1128, 1134 (D.C. Cir. 1978).

<sup>11</sup> 5 U.S.C. § 552(a)(4)(B) (1966).

<sup>12</sup> *Public Citizen Health Research Group v. FDA*, 997 F. Supp. 56, 60 (D.D.C. 1998); see also *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979).

<sup>13</sup> 5 U.S.C. §552 (1966).

<sup>14</sup> See Attorney General John Ashcroft, "Memorandum For All Heads of Federal Departments and Agencies," October 12, 2001, available at <http://www.doi.gov/foia/foia.pdf> (accessed July 14, 2003). The Ashcroft Directive stands in direct contrast to that issued in October 1993 by then-Attorney General Janet Reno, which called for the presumptive granting of FOIA requests, absent a reasonable expectation that harm would result from disclosure. See Attorney General Janet Reno, "Memorandum for Heads of Departments

and Agencies,” October 4, 1993, available at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm) (accessed Aug. 13, 2003). “The Department will no longer defend an agency’s withholding of information merely because there is a ‘substantial legal basis’ for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.” *Ibid.*

<sup>15</sup> See Andrew H. Card, Jr., “Memorandum for all Heads of Federal Departments and Agencies,” March 19, 2002 and Laura L. S. Kimberly, “Memorandum for Departments and Agencies,” March 19, 2002, available at <http://www.fas.org/sgp/bush/wh031902.html> (accessed August 27, 2003).

<sup>16</sup> *ACLU v. DOJ*, 265 F. Supp. 2d 20 (D.D.C. 2003).

<sup>17</sup> 5 U.S.C. §552(b) (1) (1966).

<sup>18</sup> Plaintiffs argued that the aggregated information they sought was of the same character as what the Justice Department is required to disclose under the Foreign Intelligence Surveillance Act (FISA), as well as that information on law enforcement matters should not properly be restricted based on its treatment under Exemption 1 as classified national security information. See “Reply Memorandum in Support of Plaintiffs’ Cross-Motion for Summary Judgment” in *American Civil Liberties Union v. Department of Justice*, pp. 7, 30, 34-35 (D.D.C. 2003).

<sup>19</sup> *ACLU v. DOJ*, 265 F. Supp. 2d 20, 29 (D.D.C. 2003).

<sup>20</sup> *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C. Cir. 2003).

<sup>21</sup> See e.g., *Abbotts v. Nuclear Regulatory Commission*, 766 F.2d 604, 606 (D.C. Cir. 1985); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980).

<sup>22</sup> *Center for National Security Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003).

Other recent cases also have evidenced broad judicial deference to the Administration’s expanded withholding under FOIA exemptions of a broad range of information in the name of combating terrorism. See, e.g., *Living Rivers, Inc. v. United States Bureau of Reclamation*, CV No. 2-02CV644 (D. Utah, March 25, 2003), holding that inundation maps showing potential flood areas were properly withheld under exemption 7(F) dealing with law enforcement records because their disclosure could “reasonably place at risk” the lives of local residents; and *Coastal Delivery Corp. v. United States Customs Service*, CV No. 02-3838 (C.D. Cal. March 17, 2003), holding that the number of Customs Service examinations conducted at the Los Angeles/Long Beach seaport could be withheld under two different FOIA exemptions.

<sup>23</sup> *Center for National Security Studies v. DOJ*, 331 F.3d 918, 937 (D.C. Cir. 2003).

Judge Tatel argued that the government needed to use a more particularized approach. Acknowledging that there are legitimate reasons not to disclose some of the information, he noted that there is no reason why the names of innocent detainees with no connection to terrorism could not be disclosed.

<sup>24</sup> *Ibid.*, p. 940.

<sup>25</sup> *Ibid.*, p. 939.

<sup>26</sup> See The Homeland Security Act of 2002, Title II, Subtitle B, § 214 (2002), available at [www.dhs.gov/interweb/assetlibrary/hr\\_5005\\_enr.pdf](http://www.dhs.gov/interweb/assetlibrary/hr_5005_enr.pdf) (accessed August 27, 2003).

<sup>27</sup> *Ibid.*

<sup>28</sup> See Department of Homeland Security, “Procedures For Handling Critical Infrastructure Information; Proposed Rule,” 68 Federal Register 18525, April 15, 2003, available at [http://www.citizen.org/documents/proposed\\_ciiregulations.pdf](http://www.citizen.org/documents/proposed_ciiregulations.pdf) (accessed August 27, 2003); Public Citizen, Inc. and the Freedom of Information Clearinghouse, “Comments of Public Citizen, Inc. and the Freedom of Information Clearinghouse on the Department of Homeland Security’s Proposed Regulations Implementing The Critical Infrastructure Information Act of 2002,” June 16, 2003, available at [http://www.citizen.org/documents/dhs\\_ciirule\\_pccomments.pdf](http://www.citizen.org/documents/dhs_ciirule_pccomments.pdf) (accessed August 27, 2003); for concerns about both the regulations and the delay in publishing comments on the proposed rules, see also OMB Watch, “Critical Infrastructure Information Docket,” July 14, 2003, available at <http://www.ombwatch.org/article/articleview/1649/> (accessed July 29, 2003); for a general analysis of the potential reach of the new exemption, see Brett Stohs, “Protecting the Homeland by Exemption: Why the Critical Infrastructure Information Act of 2002 Will Degrade the Freedom of Information Act,” 2002 *Duke Law and Technology Review* 0018, available at <http://www.law.duke.edu/journals/dltr/articles/2002dltr0018.html> (accessed July 21, 2003).

<sup>29</sup> 5 U.S.C. §552(b) (1966).

<sup>30</sup> This is in addition to the risk noted below in the discussion of expanded withholding of “sensitive but unclassified” information, that other existing FOIA exemptions may be utilized expansively to withhold information on health-related matters.

<sup>31</sup> Homeland Security Act of 2002, Title II, Subtitle B, § 214 (2002).

<sup>32</sup> See “Homeland Insecurity: Excessive Secrecy Protects No-One,” *Columbia Journalism Review*, January/February 2003.

<sup>33</sup> Restoration of Freedom of Information Act of 2003, H.R. 2526 and S. 609, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., 2003, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.02526> (accessed August 27, 2003). The bill was referred to the Senate Judiciary Committee, the House Committee on Government Reform and House Select Committee on Homeland Security.

<sup>34</sup> The limits the exemption to records pertaining to “the vulnerability of and threats to critical infrastructure (such as attacks, response, and recovery efforts)” as opposed to the Homeland Security Act which applies the exemption to the broader and more vague category of any critical infrastructure information, which could allow for information not directly related to vulnerabilities to be inappropriately protected.

<sup>35</sup> Restoration of Freedom of Information Act of 2003, H.R. 2526 and S. 609, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., 2003, available at <http://www.fas.org/sgp/congress/2003/hr2526.html> (accessed August 27, 2003).

<sup>36</sup> Mark Tapscott, “Too Many Secrets,” *Washington Post*, November 20, 2002, available at [www.washingtonpost.com/ac2/wp-dyn/A12666-2002Nov19?language=printer&content=article](http://www.washingtonpost.com/ac2/wp-dyn/A12666-2002Nov19?language=printer&content=article), (accessed August 27, 2003).

<sup>37</sup> Exec. Order No. 13292, 68 Fed. Reg. 15315 (March 28, 2003).

<sup>38</sup> Exec. Order No. 12958, 60 Fed. Reg. 19825 (April 20, 1995).

<sup>39</sup> Stephen Aftergood, “The Bush Administration’s Suffocating Secrecy,” *Forward*, March 28, 2003, available at <http://www.forward.com/issues/2003/03.03.28/oped1.html> (accessed July 14, 2003).

<sup>40</sup> Exec. Order No. 13292, 68 Fed. Reg. 15315, 15318 § 1.7(c) (March 28, 2003).

<sup>41</sup> Exec. Order No. 13292, 68 Fed. Reg. 15315, 15322 § 3.3 (March 28, 2003).

<sup>42</sup> Exec. Order No. 12958, 60 Fed. Reg. 19825, 19826 § 1.2(b) (April 20, 1995).

<sup>43</sup> Dana Milbank and Mike Allen, “Release of Documents is Delayed: Classified Papers to be Reviewed,” *Washington Post*, March 26, 2003.

<sup>44</sup> See Designation Under Executive Order No. 12958, 67 Fed. Reg. 61463, September 30, 2002; Designation Under Executive Order No. 12958, 66 Fed. Reg. 64345, December, 12, 2001; Designation Under Executive Order No. 12958, 67 Fed. Reg. 31109, May 9, 2002.

<sup>45</sup> Federation of American Scientists Project on Government Secrecy, “Release of Anthrax Report Sought,” *Secrecy News*, Vol. 2003, No. 70, August 19, 2003. Heyman is a Senior Fellow and Director, Science and Security Initiatives, at the Center for Strategic and International Studies, and a former senior official at the Department of Energy and White House Office of Science and Technology Policy.

<sup>46</sup> See The Homeland Security Act of 2002, Title VIII, Subtitle I, § 892(a)(1)(B) (2002).

<sup>47</sup> “Homeland security information” is defined as “any information possessed by a federal, state or local agency that: (A) relates to the threat of terrorist activity; (B) relates to the ability to prevent, interdict, or disrupt terrorist activity; (C) would improve the identification or investigation of a suspected terrorist or terrorist organization; or (D) would improve the response to a terrorist act.” The Homeland Security Act of 2002, § 892(f) (2002).

<sup>48</sup> See OMB Watch, “Sensitive but Unclassified Provisions in the Homeland Security Act of 2002,” June 11, 2003, available at <http://www.cdt.org/security/usapatriot/030611omb.pdf> (accessed July 17, 2003).

<sup>49</sup> See The Homeland Security Act of 2002, § 893(a) (2002).

<sup>50</sup> David Heyman, “Lessons from the Anthrax Attacks: Implications for U.S. Bioterrorism Preparedness,” (2002). The report covers a range of issues relating to bioterrorism and means for developing a more integrated response, as well as crisis management issues.

<sup>51</sup> See John Podesta, “Need to Know: Governing in Secret,” *The War on Our Freedom*, (Richard C. Leone and Greg Anrig, Jr., eds., The Century Foundation, 2003), p. 223; OMB Watch “Access to Government Information Post September 11,” May 3, 2002, available at <http://www.ombwatch.org/article/articleview/213/1/104/#agency> (accessed July 29, 2003).

<sup>52</sup> See Nat Hentoff, “Hush-hush at the Justice Department,” *Washington Times*, May 5, 2003.

<sup>53</sup> See Steve Schultze, “Sensenbrenner Wants Answers on Act,” *Journal Sentinel*, August 19, 2002, available at <http://www.jsonline.com/news/nat/aug02/67685.asp> (accessed August, 28 2003); “Justice: From the Ashes of 9/11: Big Bad John,” *National Journal*, January 25, 2003.

<sup>54</sup> Letter from Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr. (July 26, 2002), enclosing “Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation,” available at <http://www.house.gov/judiciary/patriotresponses101702.pdf> (accessed July 18, 2003).

<sup>55</sup> As discussed in Chapter 2, FISA grants the FBI exceptional powers to monitor foreign powers and their suspected agents in counterintelligence operations in the United States, including through secret searches and

surveillance. Under FISA the FBI submits warrant applications to the Foreign Intelligence Surveillance Court, a secret court that hears the government's applications *ex parte*.

<sup>56</sup> Senators Patrick Leahy, Charles Grassley, and Arlen Specter, "Interim Report: FBI Oversight in the 107<sup>th</sup> Congress by the Senate Judiciary Committee: FISA Implementation Failures," February 2003, p. 13, available at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (accessed July 31, 2003).

<sup>57</sup> Domestic Surveillance Oversight Act of 2003, S. 436, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. The bill was introduced with an accompanying report on the Senate Judiciary Committee's Congressional oversight of the FBI and Justice Department's failure to implement FISA. See Office of Senator Patrick Leahy, Press Release: "Senators Release Report on FISA Implementation Failures and Introduce Sunshine Bill," February 25, 2003, available at <http://leahy.senate.gov/press/200302/022503.html> (accessed July 31, 2003).

<sup>58</sup> Senator Patrick Leahy, "Sectional Analysis of the Domestic Surveillance Oversight Act of 2003," available at <http://leahy.senate.gov/press/200302/022503bsectionbysection.html> (accessed July 18, 2003).

<sup>59</sup> See Office of Senator Patrick Leahy, Press Release: "Senators Release Report on FISA Implementation Failures and Introduce Sunshine Bill," February 25, 2003, available at <http://leahy.senate.gov/press/200302/022503.html> (accessed July 31, 2003).

<sup>60</sup> Adam Clymer, "Justice Department Tracking Staff's Contact with Congress," *New York Times*, April 25, 2003, available at <http://www.whistleblowers.org/Justice%20Department%20Tracking%20Staffs%20Contact%20With%20Congress.htm> (accessed July 17, 2003).

<sup>61</sup> Nat Hentoff, "Hush-hush at the Justice Department," *Washington Times*, May 5, 2003.

<sup>62</sup> Adam Clymer, "Justice Department Tracking Staff's Contact with Congress," *New York Times*, April 25, 2003, available at <http://www.whistleblowers.org/Justice%20Department%20Tracking%20Staffs%20Contact%20With%20Congress.htm> (accessed July 17, 2003).

<sup>63</sup> See Draft Domestic Security Enhancement Act of 2003, January 9, 2003, available at [http://www.publicintegrity.org/dtaweb/downloads/Story\\_01\\_020703\\_Doc\\_1.pdf](http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf) (accessed July 15, 2003).

<sup>64</sup> *The War Against Terrorism: Working Together to Protect America: Hearing Before the Senate Committee on the Judiciary*, 108<sup>th</sup> Cong. (March 4, 2003) (testimony of Sen. Patrick Leahy).

<sup>65</sup> *The War Against Terrorism: Working Together to Protect America: Hearing Before the Senate Committee on the Judiciary*, 108<sup>th</sup> Cong. (March 4, 2003) (testimony of Attorney General John Ashcroft).

<sup>66</sup> Office of Legislative Affairs, Department of Justice, "Control Sheet," January 10, 2003, available at [http://www.publicintegrity.org/dtaweb/downloads/Story\\_01\\_020703\\_Doc\\_2.pdf](http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_2.pdf) (accessed July 31, 2003).

<sup>67</sup> *Oversight of the Justice Department: Hearing Before the House Judiciary Committee*, 108<sup>th</sup> Cong. (June 5, 2003) (testimony of Rep. James Sensenbrenner).

<sup>68</sup> Bill Straub, "Ashcroft Pushing PATRIOT II, Bush hesitating," *Scripps Howard News Service*, June 12, 2003.

<sup>69</sup> *Oversight of the Justice Department: Hearing Before the House Judiciary Committee*, 108<sup>th</sup> Cong. (June 5, 2003) (testimony of Attorney General John Ashcroft).

<sup>70</sup> Dan Eggen, "GOP Bill Would Add Anti-Terror Powers," *Washington Post*, August 21, 2003.

<sup>71</sup> Vital Interdiction of Criminal Terrorist Organizations Act of 2003 (VICTORY Act), draft proposal, Section 503 (on file with LCHR).

<sup>72</sup> The White House, Press Release: "President Bush Discusses Homeland Security at the FBI Academy," September 10, 2003, available at <http://www.whitehouse.gov/news/releases/2003/09/20030910-6.html> (accessed September 11, 2003).

<sup>73</sup> Dan Eggen, "GOP Bill Would Add Anti-Terror Powers," *Washington Post*, August 21, 2003.

<sup>74</sup> See, e.g., "Our View: Ashcroft Should Listen, Not Lecture Idahoans," *Idaho Statesman*, August 25, 2003.

<sup>75</sup> Rebecca Walsh, "Ashcroft Drawing Fire Even in Utah," *Salt Lake Tribune*, August 23, 2003 (noting that although the attorney general had addressed only law enforcement officers, the Justice Department acknowledged that the attorney general's tour was a political campaign to convince the American public of the urgency of their cause); Joe Hallett, "Stumping in Cleveland," *Columbus Dispatch*, August 21, 2003 (noting that Ashcroft addressed 150 law-enforcement officials).

<sup>76</sup> Rebecca Walsh, "Ashcroft Drawing Fire Even in Utah," *Salt Lake Tribune*, August 23, 2003; "Ashcroft Touts Patriot Act's Virtues," *Las Vegas Review-Journal*, August 27, 2003.

<sup>77</sup> See H.R. Rep. No. 107-609, p. 221 (2002) (noting that many agencies with similar mandates such as the DOJ and the FBI operate under FACA without difficulty).

<sup>78</sup> The committees are exempted from FACA and the Secretary must only publish the establishment of a committee, its purpose and its membership in the Federal Register. See The Homeland Security Act of 2002, § 871(a) (2002).

- <sup>79</sup> Senator Richard Shelby, "Meet the Press," NBC News, July 27, 2003.
- <sup>80</sup> S. Res. 400, Section 8, 94<sup>th</sup> Cong. (1976) (providing that "[t]he select committee may... disclose publicly any information in the possession of such committee after a determination by such committee that the public interest would be served by such disclosure").
- <sup>81</sup> David Welna, "Lawmakers: Declassify Portions of Sept. 11 Report," *Morning Edition*, National Public Radio, July 31, 2003; Kathy Kiely and John Diamond, "Congress, White House Clash over Declassifying 9/11 Report," *USA Today*, May 30, 2003.
- <sup>82</sup> Senator Richard Shelby, "Meet the Press," NBC News, July 27, 2003.
- <sup>83</sup> Representative Nancy Pelosi, "Meet the Press," NBC News, July 27, 2003.
- <sup>84</sup> Mark Preston and Damon Chappie, "Senators Seek Declassification; Move Challenges President", *Roll Call*, July 31, 2003.
- <sup>85</sup> The provision permits the intelligence committee to disclose information in its possession after determining that this would serve the "public interest". If the information is classified, the committee must give the president five days' advance notice, and if he objects in writing, the full Senate must then approve the disclosure. A similar provision appears in a rule of the House, also never used to date. See S. Res. 400, Section 8, 94<sup>th</sup> Cong. (1976) available at [http://www.fas.org/irp/congress/2003\\_cr/s022503.html#8](http://www.fas.org/irp/congress/2003_cr/s022503.html#8) (accessed August 28, 2003).
- <sup>86</sup> Federation of American Scientists Project on Government Secrecy, "HPSCI Democrats Call for Declass of 9/11 '28 Pages'," *Secrecy News*, Vol. 2003, No. 68, August 11, 2003.
- <sup>87</sup> Michael Creppy, Internal Memorandum, Executive Office for Immigration Review: "Cases Requiring Special Procedure," September 21, 2001.
- <sup>88</sup> *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 123 S. Ct. 2215 (2003).
- <sup>89</sup> *Ibid.*, p. 219.
- <sup>90</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
- <sup>91</sup> *Ibid.*, p. 683.
- <sup>92</sup> *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 123 S. Ct. 2215 (2003). The executive branch did not file a petition for certiorari in *Detroit Free Press v. Ashcroft*.
- <sup>93</sup> Eleanor Hill, Staff Director, Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001, Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, 107<sup>th</sup> Cong., "Joint Inquiry Staff Statement" October 17, 2002, available at <http://intelligence.house.gov/PDF/hill101702.pdf> (accessed August 27, 2003). Hill's statement echoed a warning nearly half a century earlier by Dwight Eisenhower, who noted the importance of an "alert and knowledgeable citizenship" in addressing new threats. Information sharing may also be critical in the private sector; the increased classification by the Department of Homeland Security of studies on "agroterrorism" (potential terrorist threats to food supplies) may conceal certain vulnerabilities, but it also has made it much harder for the Food and Drug Administration to work with the U.S. food industry "to close the security gaps." See Michael Woods, "'Agroterrorism' Poses Devastating Threat," *Pittsburgh Post-Gazette*, May 23, 2003 (quoting Dr. Robert E. Brackett of the FDA).
- <sup>94</sup> *Intelligence Oversight and the Joint Inquiry: Hearing Before the National Commission on Terrorist Attacks Upon The United States*, 108<sup>th</sup> Cong. (May 22, 2003) (testimony of Porter Goss, Chairman, House Select Committee on Intelligence), available at [http://www.9-11commission.gov/archive/hearing2/9-11Commission\\_Hearing\\_2003-05-22.htm](http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm) (accessed July 15, 2003).
- <sup>95</sup> Echoing those concerns while addressing the secrecy issue more generally, former House Government Reform Committee Chairman Dan Burton (R-IN) put the issue succinctly last year, saying: "There is a veil of secrecy that is descending around the administration..." See Jackie Judd, "Fighting for Executive Secrecy," ABC News, 22 February 2002, available at [http://abcnews.go.com/sections/wnt/DailyNews/WNT\\_privilege020222.html](http://abcnews.go.com/sections/wnt/DailyNews/WNT_privilege020222.html) (accessed July 14, 2003).
- <sup>96</sup> On the issue of how impeded access to information has the potential to hide security vulnerabilities from the public, see generally Rena Steinzor, "Information Disclosures by Government: Data Quality and Security Concerns Symposium: 'Democracies Die Behind Closed Doors': The Homeland Security Act and Corporate Accountability," *Kansas Journal of Law & Public Policy*, Vol. 12, No. 641, pp. 664-65 (2003).
- <sup>97</sup> *Intelligence Oversight and the Joint Inquiry: Hearing Before the National Commission on Terrorist Attacks Upon The United States*, 108<sup>th</sup> Cong. (May 22, 2003) (testimony of Senator John McCain), available at [http://www.9-11commission.gov/archive/hearing2/9-11Commission\\_Hearing\\_2003-05-22.htm](http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm) (accessed September 15, 2003).
- <sup>98</sup> Information Security Oversight Office, "A Look to the Future of the Security Classification System in a Post 9/11 Environment," *Report to the President 2002*, p. 6, available at [http://www.archives.gov/isoo/annual\\_reports/2002\\_annual\\_report.pdf](http://www.archives.gov/isoo/annual_reports/2002_annual_report.pdf) (accessed August 27, 2003).

## CHAPTER TWO: PERSONAL PRIVACY

<sup>99</sup> See ACLU, “Safe and Free: List of Communities that have Passed Resolutions,” available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (accessed September 13, 2003).

<sup>100</sup> According to the GAO’s report, one third of the 2,400 government databases containing identifying personal information on U.S. persons fail to comply with the statutory requirement that “personal information should be complete, accurate, relevant, and timely before it is disclosed to a nonfederal organization.” GAO, Report to the U.S. Senate Committee on Governmental Affairs, “Privacy Act: OMB Leadership Needed to Improve Agency Compliance,” June 2003, available at <http://www.gao.gov/new.items/d03304.pdf> (accessed August 22, 2003).

<sup>101</sup> United States Constitution, Amendment IV.

<sup>102</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

<sup>103</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>104</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, Preamble pt. 1, U.N. Doc. A/810 (1948).

<sup>105</sup> See “Young wants changes in Patriot Act,” Associated Press, May 13, 2003, available at [http://www.juneauempire.com/stories/051403/sta\\_legpatriotact.shtml](http://www.juneauempire.com/stories/051403/sta_legpatriotact.shtml) (accessed August 22, 2003).

<sup>106</sup> USA PATRIOT Act of 2001 (H.R. 3162) § 215 (a) (1); §§ 505(a) (2)-(3), (b) (2), (c) (3) (B) (2001), available at [http://www.eff.org/Privacy/Surveillance/Terrorism\\_militias/hr3162.php](http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php) (accessed August 22, 2003).

<sup>107</sup> 50 U.S.C. § 1862(b) (2) (B) (2000); 18 U.S.C. § 2709 (b) (1) (B) (2000), 12 U.S.C. § 3414(a) (5) (A) (2000); 15 U.S.C. § 1681u(c) (2000).

<sup>108</sup> USA PATRIOT Act of 2001 (H.R. 3162) § 215 (a) (1); §§ 505(a) (2)-(3), (b) (2), (c) (3) (B) (2001), available at [http://www.eff.org/Privacy/Surveillance/Terrorism\\_militias/hr3162.php](http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php) (accessed August 22, 2003).

<sup>109</sup> 50 U.S.C. § 1862(a) (2000).

<sup>110</sup> USA PATRIOT Act of 2001 (H.R. 3162) § 215 (a) (1) (2001), available at [http://www.eff.org/Privacy/Surveillance/Terrorism\\_militias/hr3162.php](http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php) (accessed August 22, 2003).

<sup>111</sup> For an account of the errors that plague credit reporting data, see Letter from Electronic Privacy Information Center to the Senate Banking Committee: “RE: Senate Banking Committee Hearing on the Accuracy of Credit Report Information and the Fair Credit Reporting Act,” July 7, 2003, available at <http://www.epic.org/privacy/fcra/crainaccuracy7.10.03.html> (accessed August 22, 2003).

<sup>112</sup> 50 U.S.C. § 2709 (2000); 12 U.S.C. 3414(a) (5) (A) (2000); 15 U.S.C. 1681u (2000).

<sup>113</sup> The American Library Association puts this simply on its website: “Libraries or librarians served with a search warrant issued under FISA rules may not disclose, under of penalty of law, the existence of the warrant or the fact that records were produced as a result of the warrant. A patron cannot be told that his or her records were given to the FBI or that he or she is the subject of an FBI investigation.” American Library Association, “The USA Patriot Act in the Library,” available at <http://www.ala.org/alaorg/oif/usapatriotlibrary.html> (accessed August 22, 2003).

<sup>114</sup> See Letter from Assistant Attorney General Daniel Bryant to the Honorable F. James Sensenbrenner, “Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation,” Question 12, July 26, 2002, available at <http://www.house.gov/judiciary/patriotresponses101702.pdf> (accessed September 13, 2003).

<sup>115</sup> See ACLU, “Unpatriotic Acts: The FBI’s Power to Rifle Through Your Records and Personal Belongings Without Telling You,” (Washington, D.C., 2003), p. 12, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13246&c=206> (accessed August 22, 2003).

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Becca Maclaren, “Sanders Introduces Freedom to Read Protection Act,” *Advocate*, March 14, 2003, available at <http://bernie.house.gov/documents/articles/20030319102732.asp> (accessed August 22, 2003) (quoting Trina Magi, a librarian from the University of Vermont and past president of the Vermont Library Association).

<sup>119</sup> See Office of Representative Bernard Sanders, Press Release: “Sanders/Bipartisan Coalition Asks Committee to Take Testimony from Librarians and Booksellers on Federal Use of Patriot Act Powers,” June 4, 2003, available at [http://bernie.house.gov/documents/Hearing\\_Request\\_re\\_Freedom-to-Read.pdf](http://bernie.house.gov/documents/Hearing_Request_re_Freedom-to-Read.pdf) (accessed August 22, 2003).

<sup>120</sup> Becca Maclaren, “Sanders Introduces Freedom to Read Protection Act,” *Advocate*, March 14, 2003, available at <http://bernie.house.gov/documents/articles/20030319102732.asp> (accessed August 22, 2003).

<sup>121</sup> See Freedom to Read Protection Act of 2003 (Introduced in the House), available at [http://www.fas.org/irp/congress/2003\\_cr/hr1157.html](http://www.fas.org/irp/congress/2003_cr/hr1157.html) (accessed August 22, 2003).

<sup>122</sup> See List of Cosponsors, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01157:@@@P> (accessed August 22, 2003); In July 2003, Senator Feingold (D-WI) introduced a similar bill in the Senate to require the FBI to show how the information it is seeking relates to a suspected terrorist or spy before the information can be obtained. The Library, Bookseller, and Personal Records Privacy Act, CS.1507. See Office of Senator Russ Feingold, Press Release: “Feingold Introduces Legislation to Protect Personal Information,” July 31, 2003, available at <http://feingold.senate.gov/%7Efeingold/releases/03/07/2003731448.html> (accessed September 8, 2003).

<sup>123</sup> 50 U.S.C. § 1801-1811, 1821-1829, 1841-1846, 1861-1862 (1978).

<sup>124</sup> See Sen. Rep. No. 95-1267, October 3, 1978, pp. 8-9 (“This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused. . . . S. 1566 is designed, therefore, to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it”). As the House noted in 1978, FISA surveillance procedures were created “not primarily for the purpose of gathering evidence of a crime [but] to obtain foreign intelligence information, which when it concerns United States persons must be necessary to important national concerns.” H.R. Rep. No. 95-1283, p.36 (1978).

<sup>125</sup> 50 U.S.C. § 1805 (e) (1) (2002). Criminal surveillance may be carried out in secret for only 30 days. See 18 U.S.C. § 2518 (5) (2002).

<sup>126</sup> 50 U.S.C. § 1806 (c) (2002). The target of criminal surveillance must be informed that the surveillance has taken place as soon as the 30 day surveillance period has expired. See 18 U.S.C. § 2518 (8) (d) (2002).

<sup>127</sup> 50 U.S.C. § 1806 (f) (2002).

<sup>128</sup> 18 U.S.C. § 2518 (3) (a) (2002).

<sup>129</sup> 50 U.S.C. § 1805 (a) (3) (2002).

<sup>130</sup> 50 U.S.C. § 1801 (b) (2) (A) (2002).

<sup>131</sup> 50 U.S.C. § 1804 (a) (7) (B) (2001).

<sup>132</sup> See Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, “Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities,” Book II, S. Rep. No. 94-755, 94th Cong., 2d Session (1976), available at <http://www.aarclibrary.org/publib/church/reports/book2/contents.htm> (accessed September 8, 2003).

<sup>133</sup> *Ibid.*, p. 7.

<sup>134</sup> *Ibid.*, pp. 7-8.

<sup>135</sup> *Ibid.*, p. 292.

<sup>136</sup> *Ibid.*, pp. 21-2.

<sup>137</sup> *Ibid.*, p. 292.

<sup>138</sup> *Ibid.*, p. 1.

<sup>139</sup> See Memorandum from Attorney General Janet Reno, to Assistant Attorney General Criminal Division and other senior Justice Department officials, “Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations,” July 19, 1995, para. A6, available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html> (accessed August 22, 2003); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991), cert. denied, 506 U.S. 816 (1992); *United States v. Badia*, 827 F.2d 1458 (11th Cir. 1987), cert. denied, 485 U.S. 937 (1988); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984).

<sup>140</sup> *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 619 (2002).

<sup>141</sup> *Ibid.*, p. 620.

<sup>142</sup> *Ibid.*, p. 619.

<sup>143</sup> 50 U.S.C. § 1804(a) (7) (B) (2001) (emphasis added).

<sup>144</sup> USA PATRIOT Act of 2001 (H.R. 3162) § 218 (2001), available at [http://www.eff.org/Privacy/Surveillance/Terrorism\\_militias/hr3162.php](http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php) (accessed August 22, 2003).

<sup>145</sup> Memorandum from Attorney General John Ashcroft to the Director of the FBI and other senior Justice Department officials, “Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI,” March 6, 2002, available at <http://www.fas.org/irp/agency/doj/fisa/ag030602.html> (accessed August 22, 2003); see also, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 615 (2002).

<sup>146</sup> Memorandum from Attorney General Janet Reno to Assistant Attorney General, Criminal Division and other senior Justice Department officials, “Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations,” July 19, 1995, para. A6,

available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html> (accessed August 22, 2003); *see also*, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 622 (2002).

<sup>147</sup> *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 623 (2002).

<sup>148</sup> *Ibid.*

<sup>149</sup> Century Foundation, *The War on Our Freedoms* (Richard C. Leone & Greg Anrig, Jr., eds., Public Affairs, 2003), p.81.

<sup>150</sup> *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 624 (2002).

<sup>151</sup> *In re: Sealed Case No. 02-001*, 310 F.3d 717, 735 (2002).

<sup>152</sup> *Ibid.*

<sup>153</sup> *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 620 (2002).

<sup>154</sup> *Ibid.*

<sup>155</sup> See Reports submitted by the attorney general pursuant to the Foreign Intelligence Surveillance Act of 1978, available at <http://www.fas.org/irp/agency/doj/fisa/> (accessed August 22, 2003); U.S. Courts, "Wiretap Reports," available at <http://www.uscourts.gov/wiretap.html> (accessed August 22, 2003).

<sup>156</sup> *Ibid.*

<sup>157</sup> U.S. Department of Justice, "Response to Questions on the Implementation of the USA PATRIOT Act Submitted by the House Committee on the Judiciary," May 13, 2003, Answer 16A, pp. 23-25.

<sup>158</sup> 50 U.S.C. 1805(f).

<sup>159</sup> 50 U.S.C. 1805(f).

<sup>160</sup> *The War Against Terrorism: Working Together to Protect America: Hearing Before the Senate Committee on the Judiciary*, 108th Congress (2003) (testimony of Robert S. Mueller III, Director Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress03/mueller030403.htm> (accessed August 22, 2003).

<sup>161</sup> The draft the Domestic Security Enhancement Act of 2003 has been made available on the web at [http://www.publicintegrity.org/dtaweb/downloads/Story\\_01\\_020703\\_Doc\\_1.pdf](http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf) (accessed August 22, 2003).

<sup>162</sup> See draft Domestic Security Enhancement Act of 2003, § 101, available at [http://www.publicintegrity.org/dtaweb/downloads/Story\\_01\\_020703\\_Doc\\_1.pdf](http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf) (accessed August 22, 2003).

<sup>163</sup> *Ibid.*, § 102.

<sup>164</sup> *Ibid.*, § 103.

<sup>165</sup> See Bill Straub, "Ashcroft Pushing PATRIOT II, Bush Hesitating," Scripps Howard News Service, June 12, 2003, available at <http://www.knoxstudio.com/shns/story.cfm?pk=BUSH-ASHCROFT-06-12-03&cat=WW> (accessed August 22, 2003).

<sup>166</sup> See Dean Schabner, "Draft Bill Would Provide Broader Power," ABCNEWS.com, August 20, 2003, available at [http://abcnews.go.com/sections/us/WorldNewsTonight/victory\\_act030820.html](http://abcnews.go.com/sections/us/WorldNewsTonight/victory_act030820.html) (accessed August 22, 2003).

<sup>167</sup> A copy of the draft VICTORY Act has been made available on the internet at <http://www.libertythink.com/VICTORYAct.pdf> (accessed August 22, 2003).

<sup>168</sup> The draft bill's section 503 expands the reach of the current administrative subpoena provision, 18 U.S.C. 3486 (2002), to any investigation under 18 U.S.C. chapter 113B (2002).

<sup>169</sup> 18 U.S.C. 3486 (2002).

<sup>170</sup> 18 U.S.C. § 2709 (b) (1) (2002), 12 U.S.C. 3414 (a) (5) (A) (2002), 15 U.S.C. 1681u (c) (2002).

<sup>171</sup> 18 U.S.C. § 2709 (d) (2002), 12 U.S.C. 3414 (a) (5) (B) (2002), 15 U.S.C. 1681u (f) (2002).

<sup>172</sup> 18 U.S.C. § 2709 (b) (2002), 12 U.S.C. 3414 (a) (5) (C) (2002), 15 U.S.C. 1681u (h) (2002).

<sup>173</sup> 18 U.S.C. § 3486 (2002).

<sup>174</sup> See leaked draft VICTORY Act, § 502, available at <http://www.libertythink.com/VICTORYAct.pdf> (accessed August 22, 2003).

<sup>175</sup> "Key Republican Blasts New FBI Guidelines," CNN.com, June 1, 2002, available at <http://www.cnn.com/2002/ALLPOLITICS/06/01/fbi.guidelines/> (accessed August 22, 2003).

<sup>176</sup> Attorney General John Ashcroft, "The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations," May 20, 2002, available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (accessed August 22, 2003).

<sup>177</sup> U.S. Department of Justice, Office of the Inspector General, "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," July 17, 2003, Section III.C.4, p. 16, available at <http://www.usdoj.gov/oig/special/03-07/final.pdf> (accessed September 8, 2003).

<sup>178</sup> Aviation and Transportation Security Act of 2001 (2001), available at <http://www.house.gov/transportation/aviation/issues/conference.pdf> (accessed August 22, 2003).

<sup>179</sup> David Kravets, "Feds Don't Track Airline 'No Fly' Lists," Associated Press, July 23, 2003, available at <http://archives.californiaaviation.org/airport/msg27072.html> (accessed August 22, 2003).



- <sup>180</sup> Ibid.
- <sup>181</sup> Aviation and Transportation Security Act of 2001, (2001), available at <http://www.house.gov/transportation/aviation/issues/conference.pdf> (accessed August 22, 2003).
- <sup>182</sup> Transport Security Administration, Press Release: "TSA Selects Lockheed Martin Management and Systems to build TSA Passenger Pre-Screening System", February 28, 2003, available at <http://www.tsa.gov/public/display?content=248> (accessed August 22, 2003).
- <sup>183</sup> Tom Ridge, "TSA: Notice of Status of System of Records; Interim Final Notice; Request for Further Comments;" No. DHS/TSA-2003-1, July 22, 2003, available at <http://www.cdt.org/security/usapatriot/030731cappsii.pdf> (accessed August 29, 2003).
- <sup>184</sup> Department of Homeland Security, Transportation Security Administration, "Interim Final Notice of System of Records," 68 Federal Register 45265 (August 1, 2003), available at <http://www.cdt.org/security/usapatriot/030731cappsii.pdf> (accessed August 8, 2003).
- <sup>185</sup> For an account of the errors that plague credit reporting data, see Letter from Electronic Privacy Information Center, to the Senate Banking Committee, "RE: Senate Banking Committee Hearing on the Accuracy of Credit Report Information and the Fair Credit Reporting Act," July 7, 2003, available at <http://www.epic.org/privacy/fcra/crainaccuracy7.10.03.html> (accessed August 22, 2003).
- <sup>186</sup> Before the system could become effective, over 100 individuals and organizations had filed comments on the ASSR database, almost universally critical of the program. Ibid.
- <sup>187</sup> See Bara Vaida, "Homeland Privacy Officer to Review Passenger-Screening System," *Government Executive*, April 9, 2003, available at <http://www.govexec.com/dailyfed/0403/040903td1.htm> (accessed August 22, 2003).
- <sup>188</sup> Department of Homeland Security, Transportation Security Administration, "Interim Final Notice of System of Records," 68 Federal Register 45265 (August 1, 2003), available at <http://www.cdt.org/security/usapatriot/030731cappsii.pdf> (accessed August 8, 2003).
- <sup>189</sup> Letter from Electronic Privacy Information Center, to the Senate Banking Committee, "RE: Senate Banking Committee Hearing on the Accuracy of Credit Report Information and the Fair Credit Reporting Act," July 7, 2003, available at <http://www.epic.org/privacy/fcra/crainaccuracy7.10.03.html> (accessed August 22, 2003).
- <sup>190</sup> Ibid.
- <sup>191</sup> Ibid.
- <sup>192</sup> For example, recently uncovered Denver police files revealed that Denver had labeled the Quaker American Friends Service Committee as a "criminal extremist" organization. See ACLU of Colorado, Press Release: "ACLU Calls for Denver Police to Stop Keeping Files on Peaceful Protesters," March 11, 2002, available at [http://www.aclu-co.org/news/pressrelease/release\\_spyfiles.htm](http://www.aclu-co.org/news/pressrelease/release_spyfiles.htm) (accessed August 22, 2003).
- <sup>193</sup> The Privacy Act of 1974, codified as amended at 5 U.S.C. § 552A.
- <sup>194</sup> Congress has taken preliminary steps on this oversight issue. Both the House and the Senate have adopted amendments to the Homeland Security Department's 2004 spending bill which block funding for CAPPs II until privacy and civil-liberty concerns are reviewed by the General Accounting Office (GAO). See Audrey Hudson "House Panel Blocks 'No Fly' List," *Washington Times*, June 19, 2003, available at <http://washingtontimes.com/national/20030619-010106-3427r.htm> (accessed August 22, 2003); Judi Hasson "Senate Holds Up CAPPs Funding," *Federal Computer Week*, July 11, 2003, available at <http://www.fcw.com/fcw/articles/2003/0707/web-senate-07-11-03.asp> (accessed August 22, 2003).
- <sup>195</sup> 5 U.S.C. § 552(a).
- <sup>196</sup> Clyde Crews, Director of Technology, Cato Institute, "Put Controls on Emerging 'Surveillance State'", June 23, 2003 available at <http://www.cato.org/research/articles/crews-030623.html> (accessed August 22, 2003).
- <sup>197</sup> DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, p. 14, available at [http://www.darpa.mil/body/tia/tia\\_report\\_page.htm](http://www.darpa.mil/body/tia/tia_report_page.htm) (accessed August 22, 2003).
- <sup>198</sup> The current website is at <http://www.darpa.mil/iao/TIASystems.htm> (accessed August 22, 2003).
- <sup>199</sup> Bradley Graham, "Poindexter Resigns But Defends Programs," *Washington Post*, p. A02, August 13, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn/A51578-2003Aug12?language=printer> (accessed August 22, 2003).
- <sup>200</sup> DARPA, "First Q&A for Solicitation BAA02-08," Answer 21, available at <http://www.darpa.mil/iao/BAA02-08Q&Afirst.pdf> (accessed August 22, 2003). A petabyte amounts to the electronic representation of 1,000,000,000,000,000 letters of the alphabet. The internet archive of the last five years of web pages consumes only one-tenth of a petabyte.
- <sup>201</sup> DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, pp. 27, 32, available at [http://www.darpa.mil/body/tia/tia\\_report\\_page.htm](http://www.darpa.mil/body/tia/tia_report_page.htm) (accessed August 22, 2003).

- <sup>202</sup> Including Senators Grassley (R-IA), Collins (R-ME), Feinstein (D-CA), Harkin (D-IA), Inouye (D-HI), Schumer (D-NY) and former Representatives Armey (R-TX), and Barr (R-GA) and CATO, ACLU, the Free Congress Foundation, and the Eagle Forum.
- <sup>203</sup> DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, p. 27, available at [http://www.darpa.mil/body/tia/tia\\_report\\_page.htm](http://www.darpa.mil/body/tia/tia_report_page.htm) (accessed August 22, 2003).
- <sup>204</sup> Letter from USACM to the Senate Committee on the Armed Services, January 20, 2003, available at [http://www.acm.org/usacm/Letters/tia\\_final.html](http://www.acm.org/usacm/Letters/tia_final.html) (accessed August 22, 2003).
- <sup>205</sup> DARPA, "Report to Congress Regarding the Terrorism Information Awareness Program," May 20, 2003, p. A-13, available at [http://www.darpa.mil/body/tia/tia\\_report\\_page.htm](http://www.darpa.mil/body/tia/tia_report_page.htm) (accessed August 22, 2003).
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- <sup>211</sup> "Limitation on Deployment of terrorism Information Awareness Program," House Amendment to the Department of Defense Appropriations Act of 2004 (H.R. 2658), § 8124, available at <http://www.fas.org/sfp/congress/2003/defapp-tia.html> (accessed August 22, 2003).
- <sup>212</sup> Executive Office of the President, Office of Management and Budget, "Statement of Administration Policy, S.1382 – Department of Defense Appropriations Bill, FY 2004," July 14, 2003, available at <http://www.whitehouse.gov/omb/legislative/sap/108-1/s1382sap-s.pdf> (accessed August 22, 2003); see also Dan Caterinicchia, "Intelligence officials: TIA is too broad," July 22, 2003, *Federal Computer Week*, available at <http://www.fcw.com/fcw/articles/2003/0721/web-tia-07-22-03.asp> (accessed August 22, 2003).
- <sup>213</sup> *The Terrorist Threat Integration Center and its Relationship with the Departments of Justice and Homeland Security: Hearing Before the House of Representatives Committee on the Judiciary & House of Representatives Select Committee on Homeland Security*, 108th Congress (2003) (statement for the record of John O. Brennan, Director, Terrorist Threat Integration Center), available at <http://homelandsecurity.house.gov/files/Testimony%20Brennan.doc> (accessed August 22, 2003).
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- <sup>221</sup> *Consolidating Intelligence Analysis: A Review of the President's Proposal to Create a Terrorist Threat Integration Center: Hearing Before the Senate Governmental Affairs Committee*, 108th Congress (2003) (testimony of Winston P. Wiley, Chair, Senior Steering Group, Terrorist Threat Integration Center, and Associate Director of Central Intelligence for Homeland Security), available at [http://www.odci.gov/cia/public\\_affairs/speeches/2003/wiley\\_speech\\_02262003.html](http://www.odci.gov/cia/public_affairs/speeches/2003/wiley_speech_02262003.html) (accessed July 20, 2003).
- <sup>222</sup> Ibid.

<sup>223</sup> Paul Roberts, “Now Share This,” CSO Online, July 2003, available at [http://www.csoonline.com/read/070103/briefing\\_share.html](http://www.csoonline.com/read/070103/briefing_share.html) (accessed August 22, 2003).

<sup>224</sup> *The Terrorist Threat Integration Center (TTIC) and its Relationship with the Departments of Justice and Homeland Security: Hearing before the House Committee on the Judiciary and the House Select Committee on Homeland Security*, 108th Congress (2003) (statement of Jerry Berman, President of the Center for Democracy and Technology), available at <http://www.house.gov/judiciary/berman072203.pdf> (accessed August 22, 2003).

<sup>225</sup> *See The Terrorist Threat Integration Center and its Relationship with the Departments of Justice and Homeland Security: Hearing Before the House of Representatives Committee on the Judiciary & House of Representatives Select Committee on Homeland Security*, 108th Congress (2003) (statement for the record of John O. Brennan, Director, Terrorist Threat Integration Center), available at <http://homelandsecurity.house.gov/files/Testimony%20Brennan.doc> (accessed August 22, 2003).

<sup>226</sup> 50 U.S.C. § 403-3(d)(1) (2002) provides: “In the Director’s capacity as head of the Central Intelligence Agency, the Director shall - (1) collect intelligence through human sources and by other appropriate means, except that the Agency shall have no *police, subpoena, or law enforcement powers or internal security functions.*” (Emphasis in original).

<sup>227</sup> 6 U.S.C. § 121(d) (1) (2003) or Homeland Security Act of 2002, §§ 201(d) (1), (d) (14), available at <http://www.whitehouse.gov/deptofhomeland/bill/index.html> (accessed August 22, 2003).

<sup>228</sup> *See The Terrorist Threat Integration Center (TTIC) and its Relationship with the Departments of Justice and Homeland Security: Hearing before the House Committee on the Judiciary and the House Select Committee on Homeland Security*, 108th Congress (2003) (statement of Jerry Berman, President of the Center for Democracy and Technology), available at <http://www.house.gov/judiciary/berman072203.pdf> (accessed July 30, 2003).

## CHAPTER THREE: IMMIGRANTS, REFUGEES, AND MINORITIES

<sup>229</sup> Ejaz Haider, “Wrong Message to the Muslim World,” *Washington Post*, February 5, 2003. Ejaz Haider is a journalist and scholar from Pakistan. He is a visiting fellow at the Brookings Institution. Officials at the INS and the State Department misinformed him about the requirements of the National Security Entry-Exit Registration System. As a result, he was arrested and detained for missing a deadline that he was never informed about. *See* George Lardner, Jr., “Brookings Scholar is Detained by INS,” *Washington Post*, January 30, 2003.

<sup>230</sup> “Administration Split on Local Role in Terror Fight,” *New York Times*, April 29, 2002.

<sup>231</sup> Walt Whitman, “As I Sat Alone by Blue Ontario Shore,” *Leaves of Grass* (Philadelphia: David McKay, c1900). He wrote in part: “These States are the amplest poem, Here is not merely a nation, but a teeming nation of nations.”

<sup>232</sup> *See* Peter H. Schuck, “The Transformation of Immigration Law,” *Columbia Law Review*, Vol. 84, No. 1, p. 2 (1984).

<sup>233</sup> Robert Foss, “The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 29, No. 439, p. 440.

<sup>234</sup> *Ibid.*

<sup>235</sup> *See* Peter H. Schuck, “The Transformation of Immigration Law,” *Columbia Law Review*, Vol. 84, No. 1, p. 2 (1984).

<sup>236</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); As Justice Field’s opinion for the Court proclaimed: “[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”

<sup>237</sup> “Story of Immigration in the U.S.,” *Brown Quarterly*, Vol. 4, No. 1 (Fall 2000), available at <http://brownvboard.org/brwnqurt/04-1/04-1a.htm> (accessed September 12, 2003).

<sup>238</sup> David Cole, “The New McCarthyism: Repeating History in the War on Terrorism,” *Harvard Civil Rights, Civil Liberties Law Review*, Vol. 38, No. 1, p. 16 (2003); Jamin B. Raskin, “Legal Aliens, Local Citizens,” *University of Pennsylvania Law Review*, Vol. 141, No. 1391 (1993).

<sup>239</sup> *See* Todd David Peterson, “Congressional Oversight of Open Criminal Investigations,” *Notre Dame Law Review*, Vol. 77, No. 1373, p. 1389 (2002).

<sup>240</sup> William C. Banks and Alejandro D. Carrio, “Presidential Systems in Stress: Emergency Powers in Argentina and the United States,” *Michigan Journal of International Law*, Vol. 15, No. 1, p. 38 (1993).

<sup>241</sup> *Ibid.*

<sup>242</sup> Marco Simons, “The Emergence of a Norm Against Arbitrary Forced Relocation,” *Columbia Human Rights Law Review*, Vol. 34, No. 95, pp. 135-36 (2002).

<sup>243</sup> See *Mathews v. Diaz*, 426 U.S. 67, 78-9 (1976).

<sup>244</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Mathews v. Diaz*, 426 U.S. 67, 77-8 (1976).

<sup>245</sup> United Nations Convention Relating to the Status of Refugees, opened for signing July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, opened for signing January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

<sup>246</sup> See *Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (“If one thing is clear from the legislative history of [the Refugee Act], it is that one of the Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 [Protocol].”)

<sup>247</sup> International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The ICCPR, which has been ratified by 148 countries (see Status of Ratifications of the Principle International Human Rights Treaties, July 10, 2002, available at [www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm)), formally codifies a number of the rights set forth in the Universal Declaration of Human Rights. See also Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), article 9 (“everyone has the right to life, liberty and security of person,” and “no one shall be arbitrarily arrested, detained, or exiled”).

<sup>248</sup> ICCPR, art. 9(4).

<sup>249</sup> See Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994) (“the important guarantee laid down in paragraph 4 [of article 9], i.e. the right to court control of the legality of detention, applies to all persons deprived of their liberty by arrest or detention.”); United Nations Commission on Human Rights, resolution 1997/50, Commission on Human Rights, UN doc. E/CN.4/RES/1997/50, 15 April 1997 (requesting that Working Group on Arbitrary Detention “devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy ....”).

<sup>250</sup> *Torres v. Finland*, U.N. Human Rights Committee, Communication No. 291/1988, 2 April 1990 (concluding that asylum seeker’s detention during period in which he was unable to appeal detention order to court violated ICCPR Article 9(4)).

<sup>251</sup> Between July 11, 2003 and August 29, 2003, LCHR representatives spoke to more than 75 immigration practitioners, community activists and immigration advocates about the DHS’s use of the expanded regulatory powers, including the regulation allowing detention without charge for 48 hours or a “reasonable time” in an emergency or extraordinary situation.

<sup>252</sup> *Oversight Hearing: Lessons Learned – The Inspector General’s Report On The 9/11 Detainees, Before the Senate Judiciary Committee*, 108<sup>th</sup> Cong. (June 25, 2003).

<sup>253</sup> According to the OIG report, within 2 months of the September 11 attacks, over 1,200 non-citizens and citizens had been detained – some just for questioning but many others for longer. DOJ advised OIG that it “stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.” 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,” June 2003, p. 1, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

<sup>254</sup> *Ibid.*, p. 5.

<sup>255</sup> *Ibid.*, p. 69.

<sup>256</sup> 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,” June 2003, p. 27, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

<sup>257</sup> *Center for National Security Studies v. Ashcroft*, 331 F. 3d 918, 928-930 (DC Cir. 2003).

<sup>258</sup> 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,” June 2003, p. 70, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

<sup>259</sup> *Ibid.*, p. 69.

<sup>260</sup> *Ibid.*, p. 70.

<sup>261</sup> *Ibid.*, p. 70.

<sup>262</sup> Prior to amendment effective September 17, 2001, the custody procedure regulation, 8 C.F.R. § 287.3(d) read “Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 24 hours of the arrest whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.” 62 Fed. Reg. 10390 (1997); *see also* Letter from Lawyers Committee for Human Rights to Richard Sloan, Immigration and Naturalization Service (November 19, 2001), available at [http://www.lchr.org/us\\_law/loss/comments.pdf](http://www.lchr.org/us_law/loss/comments.pdf) (accessed April 29, 2003).

<sup>263</sup> Disposition of cases of aliens arrested without warrant, 8 C.F.R. § 287.3(d) (2003).

<sup>264</sup> 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,” June 2003, p. 35, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

<sup>265</sup> Documents released by the INS on January 11, 2002 in response to litigation under the Freedom of Information Act provide a window into the abuse that has flourished under such blanket detention authority. These statistics were among the limited information the government provided in response to litigation under the Freedom of Information Act led by the Center for National Security Studies. Records are available on their website at <http://www.cnss.gwu.edu/>. The documents provided information about 718 immigration detainees who were arrested and detained in connection with the September 11 investigation as of November 27, 2001. The data showed that 317 detainees waited longer than 48 hours to be served with charges; 36 were held for 28 days or more before being served; 13 were held for more than 40 days before being served; 9 were held for more than 50 days before being served; and one man from Saudi Arabia was held for 119 days before being served.

<sup>266</sup> 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,” June 2003, p. 30, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

<sup>267</sup> *Ibid.*, p. 35.

<sup>268</sup> *Ibid.*, p. 195.

<sup>269</sup> 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,” June 2003, p. 158, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

<sup>270</sup> *Ibid.*, p. 132.

<sup>271</sup> *Ibid.*, p. 142.

<sup>272</sup> *Ibid.*, p. 143.

<sup>273</sup> *Ibid.*, p. 147.

<sup>274</sup> *Ibid.*, p. 133.

<sup>275</sup> *Ibid.*, p. 134.

<sup>276</sup> *Ibid.*, p. 161.

<sup>278</sup> Custody/Bond, 8 C.F.R. § 1003.19(i)(2)(2003).

<sup>279</sup> *Ibid.*, p. 78.

<sup>280</sup> *Ibid.*, p. 88.

<sup>281</sup> 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,” June 2003, pp. 78. 196, available at <http://www.usdoj.gov/oig/special/03-06/index.htm> (accessed August 28, 2003).

<sup>282</sup> *Ibid.*, p. 88.

<sup>283</sup> *Ibid.*, p. 76.

<sup>284</sup> The automatic stay authority impacted September 11 detainees whether it was explicitly invoked or even used as a threat. Lawyers for detainees told the Lawyers Committee that INS trial attorneys often informed them that if the detainee was granted bond by an Immigration Judge, the INS intended to appeal and the detention would be continued pending that appeal. Lawyers often chose to postpone the bond hearing instead of risking more lengthy detention for their client. Judges also reportedly refused bond if the INS indicated an intention to appeal.

<sup>285</sup> U.S. Department of Justice Office of Inspector General, “Analysis of Responses by the Department of Justice and Department of Homeland Security to Recommendations in the OIG’s June 2003 Report on the Treatment of September 11 Detainees,” September 5, 2003, p. 2, available at <http://www.usdoj.gov/oig/special/03-06/analysis.htm> (accessed September 9, 2003).

<sup>286</sup> See Lawyers Committee for Human Rights, Press Release: “Haitian Asylum Seekers Targeted by Detention and Interdiction Policies,” November 6, 2003, available at [http://www.lchr.org/media/2002\\_alerts/1106.htm](http://www.lchr.org/media/2002_alerts/1106.htm) (accessed September 9, 2003); Lawyers Committee for Human Rights, Press Release: “INS Invoking Post 9-11 Regulation against Haitian Asylum Seekers,” November 7, 2003, available at [http://www.lchr.org/media/2002\\_alerts/1107.htm](http://www.lchr.org/media/2002_alerts/1107.htm) (accessed September 9, 2003).

<sup>287</sup> Interview with Sohail Mohammed July 22, 2003, July 29, 2003.

<sup>288</sup> Dan Eggen and Nurith C. Aizenman, “Registration Stirs Panic, Worry,” *Washington Post*, January 19, 2003.

<sup>289</sup> Corey Kilgannon, “All-American? U.S. Says No,” *New York Times*, April 19, 2003; Congressman Gary Ackerman, “Ackerman Helps Queens Teenager Avoid Undeserved Deportation,” Press Release, April 29, 2003, available at <http://www.house.gov/ackerman/press/hussainimm.htm> (accessed August 11, 2003). Honorable Gary L. Ackerman of New York in the House of Representatives, “Commending Edward J. McElroy of the Bureau of Immigration and Customs Enforcement,” Cong. Rec. p. E846 (2003).

<sup>290</sup> On August 12, 2002, NSEERS was implemented. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 155, 52583-52593 (final rule) (2002). On November 6, 2002, the Department of Justice expanded the NSEERS program to include certain non-citizens from certain countries present in the US on non-immigrant visas, often referred to as “call in registration.” Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 215, 67766-67768 (2002).

<sup>291</sup> The call-in registration program was implemented in four “Groups,” each pertaining to a particular group of countries and having a specific deadline for compliance. The deadline for the final group was April 25, 2003. The full list of countries subject to the program is: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. See 67 Fed. Reg. 67766, 70526, 77642 (2002), 68 Fed. Reg. 2363, 2366, 8046 (2003), available at <http://www.immigration.gov/graphics/shared/lawenfor/specialreg/index.htm#callgroup1> (accessed September 5, 2003).

<sup>292</sup> Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 155, 52583-52593 (final rule) (2002).

<sup>293</sup> *Civil Rights Issues and Post 9/11 Law Enforcement/Community Relations in New York, Before the New York State Advisory Committee to the U.S. Commission on Civil Rights* (May 21, 2003) (testimony of Karin Anderson, New York Immigration Coalition) (on file with LCHR).

<sup>294</sup> An Arabic language notice published by the INS stated that only those entering AFTER September 30, 2002 were required to register when it should have read ON or BEFORE. AILA InfoNet, Doc. No. 03010944, January 9, 2003.

<sup>295</sup> George Lardner, Jr., “Foreign Nationals Plagued by Travel Rules: Oversights, Misinformation Keeping Many in Limbo When Trying to Reenter the US,” *Washington Post*, June 8, 2003.

<sup>296</sup> Ibid.; Nurith C. Aizenman and Edward Walsh “Immigrants Fear Deportation After Registration: Number of Mideast, Muslim Men Expelled Rises Sharply,” *Washington Post*, July 28, 2003; *Civil Rights Issues and Post 9/11 Law Enforcement/Community Relations in New York, Before the New York State Advisory Committee to the U.S. Commission on Civil Rights* (May 21, 2003) (testimony of Karin Anderson, New York Immigration Coalition) (on file with LCHR).

<sup>297</sup> 8 CFR § 264.1(f)(8) states that if an alien fails to fulfill the departure control requirements upon leaving the U.S., he or she will thereafter be presumed ineligible for admission under section 212(a)(3)(a)(ii) of the Immigration and Nationality Act; see also Memo by the Department of State instructing consul officers about the requirements of NSEERS available at <http://www.immigration.com/newsletter1/nseersentryexit.html> (accessed July 16, 2003).

<sup>298</sup> George Lardner Jr., Foreign Nationals Plagued by Travel Rules: Oversights, Misinformation Keeping Many in Limbo While Trying to Reenter the U.S., *Washington Post*, June 8, 2003.

<sup>299</sup> Christopher Einholz and Luke Hall, American Immigration Law Foundation, *Inconsistencies, Confusion and Chaos: Experiences with Call-In Registration* (New York, 2003), available at [http://www.aillf.org/lac/lac\\_sr\\_report\\_041503.pdf](http://www.aillf.org/lac/lac_sr_report_041503.pdf) (accessed August 28, 2003).

<sup>300</sup> Dan Eggen and Nurith C. Aizenman, “Registration Stirs Panic, Worry,” *Washington Post*, January 19, 2003.

<sup>301</sup> Letter from Susan Lee, Program Director of Americas Regional Program, Amnesty International to John Ashcroft, U.S. Attorney General (January 10, 2003), available at <http://www.amnestyusa.org/news/2003/usa01102003-3.html> (accessed on July 16, 2003).

<sup>302</sup> Attorneys were reportedly denied access when their clients were being “booked,” a process that included fingerprinting, photographing and questioning to provide “whatever other information is necessary.” See *Civil Rights Issues and Post 9/11 Law Enforcement/Community Relations in New York, Before the New York State*

*Advisory Committee to the U.S. Commission on Civil Rights* (May 21, 2003) (testimony of Karin Anderson, New York Immigration Coalition) (on file with LCHR).

<sup>303</sup> A copy of the resolution is available at <http://www.hias.org/News/Docs/specialreg.pdf> (accessed on July 16, 2003); see also letter from prominent leaders in the Jewish Community to Senator Orrin Hatch (March 20, 2003) requesting congressional hearings on both the conceptualization and implementation of the Special registration program and urging a suspension of NSEERS until such hearings took place (the letter was also distributed to the House and Senate Judiciary Committee and Immigration Subcommittee Chairs and Ranking members) (on file with LCHR).

<sup>304</sup> Letter from Jewish community organizations (including: American Jewish Committee, Anti-Defamation League, B'nai B'rith International, Hebrew Immigrant Aid Society, HIAS and Council Migration Services of Philadelphia, Jewish Council for Public Affairs, Jewish Federation of Los Angeles, Union of American Hebrew Congregations, UJA-Federation of New York, United Jewish Communities, United Synagogue of Conservative Judaism, The Workmen's Circle/Arbeter Ring) to United States President George Bush (January 9, 2003), available at <http://www.hias.org/Text/News/news.html> ("Advocates Voice Concern Over Special registration Process for Non-Immigrants") (accessed August 11, 2003).

<sup>305</sup> Gary Younge, "Wish You Weren't Here," *Guardian*, July 14, 2003.

<sup>306</sup> Comments of Vincent Cannistraro at the 26<sup>th</sup> National Legal Conference on Immigration & Refugee Policy, Center for Migration Studies and the Catholic Legal Immigration Network, Inc., April 3, 2003. Mr. Vincent Cannistraro is a former Chief of Operations and Analysis at the CIA's Counterterrorism Center from October 1988 to November 1990. Prior to this, he worked at the Department of Defense where he was Special Assistant for Intelligence in the Office of the Secretary of Defense; and from November 1984 to January 1987, he was Director of Intelligence Programs at the National Security Council under President Reagan. Mr. Cannistraro is also a consultant on intelligence and international security affairs for ABC World News with Peter Jennings.

<sup>307</sup> Rachel L. Swarns, "More Than 13,000 May Face Deportation," *Washington Post*, June 7, 2003.

<sup>308</sup> Ibid.

<sup>309</sup> On April 25, 2003, Kris Kobach, Counsel to the U.S. Attorney General, stated at a presentation at the Migration Policy Institute in Washington, D.C. that the special registration program had resulted in the arrest of eleven "suspected terrorists." See Anthony Kujawa, Migration Policy Institute, Press Release: "Foreign Visitor Registration Program Called 'Great Success' But Scholars Debate Efficacy and Merits of NSEERS," April 25, 2003, available at [http://www.migrationpolicy.org/events/042503\\_sum.html](http://www.migrationpolicy.org/events/042503_sum.html) (accessed September 5, 2003). Yet, when asked about this information at a meeting of community-based organizations, Department of Homeland Security officials reported that none of the men and boys who registered was charged with terrorism. See also *War on Terrorism: Immigration Enforcement Since September 11 Hearing Before the Subcommittee on Immigration, Border Security and Claims, House Judiciary Committee*, 108<sup>th</sup> Cong. 47 (May 8, 2003) (testimony of Michael Dougherty, Director of Operations, Bureau of Immigration and Customs Enforcement, Department of Homeland Security).

<sup>310</sup> "Atlantic City's Pakistani Population Heading North," *Newsday*, August 18, 2003.

<sup>311</sup> Michael Powell, "An Exodus Grows in Brooklyn," *Washington Post*, May 29, 2003; Saurav Sarkar, "Taking Pakistan out of Brooklyn," *The Next American City*, Issue No. 2, 2003, available at [http://www.americancity.org/Archives/Issue2/sarkar\\_issue2.html](http://www.americancity.org/Archives/Issue2/sarkar_issue2.html) (accessed August 8, 2003).

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), p. 93.

<sup>315</sup> Ibid., p. 90.

<sup>316</sup> Ibid.

<sup>317</sup> Chris Axtman, "Interviews of U.S. Iraqis: Outreach or Overreach?" *Christian Science Monitor*, March 27, 2003.

<sup>318</sup> Memo from Kenneth L. Wainstein, Director of the Executive Office of United States Attorneys, "Final Report on Interview Project," February 26, 2002, p. 3.

<sup>319</sup> U.S. Justice Department, Speech: "Attorney General Transcript, Eastern District of Virginia, Interview Project Results Announcement," March 20, 2002, available at <http://www.usdoj.gov/ag/speeches/2002/032002agnewsconferenceedvainterviewprojectresultsannouncement.htm> (accessed August 8, 2003).

<sup>320</sup> U.S. Department of Homeland Security, Press Kit: "Operation Liberty Shield," March 17, 2003, available at [http://www.dhs.gov/dhspublic/interapp/press\\_release/press\\_release\\_0115.xml](http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml) (accessed August 8, 2003).

<sup>321</sup> Ibid.

<sup>322</sup> Dan Eggen, “Missing Iraqis Sought,” *Washington Post*, January 27, 2003; Chisun Lee, “A Knock at the Door,” *Village Voice*, December 12-18, 2001; Anita Ramasastry, “Dragnet Law Enforcement That Won’t Work: Why “Voluntary” Police Interviews Of Middle-eastern Visitors Are Both Wrongful And Ineffective,” *FindLaw.com*, available at <http://writ.news.findlaw.com/ramasastry/20011217.html> (accessed August 22, 2003); American Arab Anti-Discrimination Committee, “Guidance on Voluntary Interviews,” November 30, 2001, available at <http://www.adc.org/action/2001/30november2001.htm> (accessed August 22, 2003).

<sup>323</sup> GAO Report, p. 16; *see also* Dan Eggen, “Missing Iraqis Sought,” *Washington Post*, January 27, 2003.; Anita Ramasastry, “Operation Liberty Shield: A New Series of Interviews of Iraqi-Born Individuals in the U.S. Is The Latest Example of Dragnet Justice,” *FindLaw.com*, March 25, 2003, available at <http://writ.news.findlaw.com/ramasastry/20030325.html> (accessed August 22, 2003); Lorraine Ali, “We Love This Country,” *Newsweek*, April 7, 2003; David Ammons, “Iraqi-Americans in state get unannounced visits from FBI,” *Associated Press*, March 27, 2003.

<sup>324</sup> American-Arab Anti-Discrimination Committee, *Report on Hate Crimes & Discrimination Against Arab Americans: The Post-September 11 Backlash, September 11, 2001 – October 11, 2002* (Washington, D.C., 2003), p. 36.

<sup>325</sup> Migration Policy Institute, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), p. 89. Harris Ahmad, director of the Michigan Chapter of the Council on American Islamic Relations, said the program was “far from voluntary – FBI officials knocked on people’s door at midnight.... We may have negotiated a successful arrangement [with the FBI] in Michigan, but it still left the community victimized.” Noel Saleh, an attorney with the ACLU in Michigan said “respondents felt offended, but cooperated because they did not want any attention on them.”

<sup>326</sup> Illinois Advisory Committee, *Fear Among Arabs and Muslims of the Chicago Region*, Chapter 6 (Remarks of William Haddad, Executive Director of the Arab American Bar Association), available at <http://www.usccb.gov/pubs/sac/il0503/ch6.htm> (accessed August 8, 2003).

<sup>327</sup> Dan Eggen, “Missing Iraqis Sought,” *Washington Post*, January 27, 2003.

<sup>328</sup> Letter from U.S. Representative John Conyers, Jr. to John Ashcroft, U.S. Attorney General (November 27, 2001).

<sup>329</sup> Letter from U.S. Senator Russell Feingold and U.S. Representative John Conyers, Jr. to David M. Walker, Comptroller General of the United States, U.S. General Accounting Office (January 28, 2002), available at [http://www.house.gov/judiciary\\_democrats/gaoantiterrorltr12802.pdf](http://www.house.gov/judiciary_democrats/gaoantiterrorltr12802.pdf) (accessed September 9, 2003).

<sup>330</sup> U.S. General Accounting Office, *Homeland Security: Justice Department’s Project to Interview Aliens after September 11, 2001* (April 2003) GAO-03-459, p. 9.

<sup>331</sup> *Ibid.*, p. 6.

<sup>332</sup> *Ibid.*, p. 16.

<sup>333</sup> *Ibid.*, p. 6.

<sup>334</sup> *Ibid.*, p.10.

<sup>335</sup> *Ibid.*, p. 6.

<sup>336</sup> Migration Policy Institute, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), p. 90.

<sup>337</sup> Bishop Thomas G. Wenski, Auxiliary Bishop of Miami, USCCB Committee on Migration, Press Release: “Statement on Operation Liberty Shield,” March 20, 2003, available at <http://www.usccb.org/comm/archives/2003/03-066.htm> (accessed September 23, 2003).

<sup>338</sup> Secretary Tom Ridge, Press Briefing: “Operation Liberty Shield,” March 18, 2003, available at <http://www.dhs.gov/dhspublic/display?content=525> (accessed August 28, 2003).

<sup>339</sup> Department of Homeland Security, Fact Sheet: “Detaining Certain Asylum Seekers,” March 18, 2003, (on file with LCHR); *see also* Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (1999). The expedited removal provisions empower INS inspectors—whose primary responsibility and training is in border enforcement rather than adjudication—to order the summary deportation of individuals arriving from abroad without valid documents. For more on expedited removal, *see* Lawyers Committee for Human Rights, *Is this America? The Denial of Due Process to Asylum Seekers in the United States* (New York, October 2000), available at [http://www.lchr.org/refugees/reports/due\\_process/due\\_process.htm](http://www.lchr.org/refugees/reports/due_process/due_process.htm) (accessed September 4, 2003).

<sup>340</sup> Department of Homeland Security, Press Statement, Fact Sheet: “Detaining Certain Asylum Seekers,” March 18, 2003 (on file with LCHR).

<sup>341</sup> The policy has been criticized by Amnesty International USA, Catholic Legal Immigration Network, the Episcopal Migration Ministries, the Ethiopian Community Development Council, the Hebrew Immigrant Aid Society, Human Rights Watch, the Lawyers Committee for Human Rights, the Lutheran Immigration and



Refugee Service, the National Asian Pacific American Legal Consortium, the US Committee for Refugees, the US Conference of Catholic Bishops, and the Women's Commission for Refugee Women and Children.

<sup>342</sup> Bishop Thomas G. Wenski, Auxiliary Bishop of Miami, USCCB Committee on Migration, Press Release: "Statement on Operation Liberty Shield," March 20, 2003 (on file with LCHR); *see also* Catholic News Service, available at <http://www.catholicnews.com/data/briefs/cns/20030321.htm> (accessed August 28, 2003).

<sup>343</sup> United Nations High Commissioner for Refugees, "UNHCR Appeals for Protection of Asylum-Seekers in the United States," March 20, 2003, available at [www.unhcr.ch/cgi-bin/texis/vtx/home/+0wwBmvNe\\_6mwwwwwwwwwwwFqnN0bItFqnDni5AFqnN0bIcFqOdpnGwBodDacoxnGBOa5roncmMzmwwwwwwDzmxwwwwww/opendoc.htm](http://www.unhcr.ch/cgi-bin/texis/vtx/home/+0wwBmvNe_6mwwwwwwwwwwwFqnN0bItFqnDni5AFqnN0bIcFqOdpnGwBodDacoxnGBOa5roncmMzmwwwwwwDzmxwwwwww/opendoc.htm) (accessed August 28, 2003).

<sup>344</sup> Secretary Tom Ridge, Speech: "Remarks by Secretary of Homeland Security Tom Ridge To the National Press Club," April 29, 2003; Under Secretary Asa Hutchinson, Speech: "Remarks Before the Association of American Chambers of Commerce in Latin America," May 7, 2003.

<sup>345</sup> Immigration and Nationality Act (INA) section 287(g), 8 U.S.C. § 1357, as amended by Illegal Immigration Reform and Immigrant Responsibility Act of 1996 section 133, Pub L. 104-208, enacted on September 30, 1996.

<sup>346</sup> Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), pp. 82-3.

<sup>347</sup> Dan Eggen, "Rules on Detention Widened; FBI, Marshals Can Hold Foreigners," *Washington Post*, December 6, 2001.

<sup>348</sup> "New Immigration Official Wants Local Help," Associated Press, July 24, 2003.

<sup>349</sup> Immigration and Nationality Act (INA) section 287(g), 8 U.S.C. § 1102, 8 C.F.R. § 103(a)(8)(2002).

<sup>350</sup> Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C., 2003), p. 81.

<sup>351</sup> Abbreviation or Waiver Training for State or Local Law Enforcement Officers Authorized To Enforce Immigration Law During a Mass Influx of Aliens, 68 Federal Register 8820 (February 26, 2003)

<sup>352</sup> Letter from Alberto R. Gonzales, Counsel to the President, to Demetrious G. Papademetriou, Migration Policy Institute (October 24, 2002).

<sup>353</sup> Complaint filed in *National Council of La Raza v. Department of Justice*, (S.D.N.Y. 2003).

<sup>354</sup> Letter from Alberto R. Gonzales, Counsel to the President, to Demetrious G. Papademetriou, Migration Policy Institute (October 24, 2002).

<sup>355</sup> Memorandum from Larry Thompson, Deputy Attorney General to Commissioner of the INS, Director of the Federal Bureau of Investigation, Director of the United States Marshals Service, and U.S. Attorneys, "Guidance for Absconder Apprehension Initiative," January 25, 2002.

<sup>356</sup> U.S. Department of Justice, Speech: "Attorney General Prepared Remarks on the National Security Entry-Exit Registration System," June 6, 2002, available at [www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm](http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm) (accessed September 5, 2003).

<sup>357</sup> National Immigration Law Center, Press Release: "Policies To Permit Police To Enforce Immigration Law Could Undermine Public Safety, Violate Civil Rights," November 22, 2002.

<sup>358</sup> *See, e.g.*, National Immigration Forum, Press Release: "Law Enforcement, State and Local Officials, Community Leaders, Editorial Boards, and Opinion Writers Voice Opposition to Local Enforcement of Immigration Laws," April 2002.

<sup>359</sup> Jennifer Emily, "Two Cities Oppose Police Tie to Immigration Law," *Dallas Morning News*, April 5, 2002

<sup>360</sup> Cheryl W. Thompson, "INS Role for Police Considered," *Washington Post*, April 4, 2002.

<sup>361</sup> Letter from Raymond Flynn, David Keene and Grover Norquist to President George W. Bush (May 30, 2002).

<sup>362</sup> "Administration Split on Local Role in Terror Fight," *New York Times*, April 29, 2002.

<sup>363</sup> Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act), H.R. 2671, 108<sup>th</sup> Cong. (2003).

<sup>364</sup> Letter from more than 100 organizations (including American-Arab Anti-Discrimination Committee (ADC), American Immigration Lawyers Association, Amnesty International USA, Arab American Institute, Asian American Legal Defense and Education Fund, Catholic Legal Immigration Network, Inc. (CLINIC), Lawyers Committee for Human Rights, National Council of La Raza, and dozens of regional, state and local organizations) to Members of Congress (September 11, 2003) (on file with LCHR).

<sup>365</sup> *See* Ricardo Alonso-Zaldivar, "Refugees on Hold and at Risk", *Los Angeles Times*, July 7, 2003.

<sup>366</sup> Letter from Rep. Christopher H. Smith (R, NJ), Rep. Howard Berman (D-CA), Sen. Sam Brownback (R-KS) and Sen. Edward Kennedy (D-MA) to President George W. Bush (July 31, 2003) (on file with LCHR).

<sup>367</sup> *Ibid.*

- <sup>368</sup> Refugee Council USA, *U.S. Refugee Admissions Program for Fiscal Year 2004* (Washington, D.C., 2003), p. 1, available at <http://www.rcusa.org/rcusa2004doc.pdf> (accessed August 11, 2003).
- <sup>369</sup> Immigration Refugee Services of America, “2002 Statistical Issue,” *Refugee Reports*, Vol. 23, No. 9 (2002), p. 9, available at [http://www.refugees.org/downloads/rrdec\\_02.pdf](http://www.refugees.org/downloads/rrdec_02.pdf) (accessed September 10, 2003).
- <sup>370</sup> Refugee Council USA, Press Release: “Refugee Council USA Welcomes House Members’ Formation of Bipartisan Refugee Caucus,” April 9, 2003, available at [http://www.rcusa.org/caucus\\_pr\\_030409.pdf](http://www.rcusa.org/caucus_pr_030409.pdf) (accessed August 11, 2003).
- <sup>371</sup> Federation for American Immigration Reform, Press Release: “Ashcroft Says Mass Migration is National Security Threat,” June 2003, available at <http://www.fairus.org/html/6-7-03.htm> (accessed August 28, 2003).
- <sup>372</sup> *In re D-J-*, 23 I & N Dec. 572 (A.G. 2003).
- <sup>373</sup> *Ibid.*, p. 579.
- <sup>374</sup> *Ibid.*, p. 580.
- <sup>375</sup> Jacqueline Charles, “Diplomats Puzzled by Claim Migrants Use Haiti to Enter U.S.,” *Miami Herald*, April 25, 2003.
- <sup>376</sup> *Ibid.*
- <sup>377</sup> *In re D-J-*, 23 I & N Dec. 572, p. 582-83 (A.G. 2003).
- <sup>378</sup> *Ibid.*, p. 581.
- <sup>379</sup> *Ibid.*, p. 583.

## CHAPTER FOUR: UNCLASSIFIED DETAINEES

- <sup>380</sup> *The Federalist* No. 47 (U.S. 1788), available at [http://memory.loc.gov/const/fed/fed\\_47.html](http://memory.loc.gov/const/fed/fed_47.html) (accessed September 2, 2003).
- <sup>381</sup> Declaration of Independence, Paragraphs 14, 20 (U.S. 1776).
- <sup>382</sup> *Zadvydas v. Davis*, 533 U.S. 678, p. 690 (2001).
- <sup>383</sup> *See, e.g.*, 18 U.S.C. § 2332b (criminalizing acts of terrorism transcending national boundaries); 18 U.S.C. § 32 (criminalizing destruction of aircraft or aircraft facilities); 18 U.S.C. § 844 (criminalizing certain manufacture and handling of explosive materials); 18 U.S.C. § 2339B (criminalizing conspiracy to provide material support and resources to terrorist organizations).
- <sup>384</sup> *See, e.g.*, 8 U.S.C. § 1226 (apprehension and detention of aliens), available at [http://caselaw.lp.findlaw.com/scripts/ts\\_search.pl?title=8&sec=1226](http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=8&sec=1226) (accessed September 3, 2003).
- <sup>385</sup> These are generally state statutes. *See, e.g.*, N.Y. Mental Hygiene Law § 9.27 (Involuntary admission on medical certification), available at <http://assembly.state.ny.us/leg/?cl=62&a=5> (accessed September 3, 2003).
- <sup>386</sup> The Uniform Code of Military Justice (UCMJ) is a part of the U.S. federal code. 10 U.S.C. §§ 801 *et seq.*, available at <http://caselaw.lp.findlaw.com/cascode/uscodes/10/toc.html> (accessed September 2, 2003).
- <sup>387</sup> *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, p. 80 (1992) (explaining that “[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”); *Project Release v. Prevost*, 722 F.2d 960, p. 976 (2d Cir. 1983) (“A right to counsel in civil commitment proceedings may be gleaned from the Supreme Court’s recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection.”) (citing *Addington v. Texas*, 441 U.S. 418 (1979)); *Vitek v. Jones*, 445 U.S. 480, pp. 496-97 (1980) (plurality opinion) (due process requires appointment of counsel to indigent prisoners facing transfer hearings to mental health hospital because of “adverse social consequences” and “stigma” that can result from a finding of mental illness”).
- <sup>388</sup> U.S. Constitution, Article I, § 9, Clause 2.
- <sup>389</sup> *Ex Parte Merryman*, 17 F. Cas. 144 (No. 9,487) (CC Md. 1861).
- <sup>390</sup> *See* International Covenant on Civil and Political Rights (1976) (CCPR), Article 9(4); American Convention on Human Rights (1978) (ACHR), Article 7(6). The United States is a party to the CCPR. The United States has signed, but not ratified, the ACHR. The CCPR is available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (accessed August 12, 2003). The ACHR is available at <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed August 12, 2003).
- <sup>391</sup> Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations* (Articles 27(2) and 7(6) of the American Convention on Human Rights), Inter-American Commission on Human Rights (Ser. A) No. 8, Paragraph 12 (January 30, 1987). *See also* UN Human Rights Committee, CCPR General Comment No. 29 (August 31,

2001), Paragraph 16. The Human Rights Committee is the official body charged with overseeing compliance with the CCPR.

<sup>392</sup> See, e.g., *The Prize Cases*, 67 U.S. 635, p. 667 (1863) (stating “the laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war”).

<sup>393</sup> *ICRC Commentary to the IV Geneva Convention*, p. 51 (Jean S. Pictet ed., 1958), available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument> (accessed September 5, 2003).

<sup>394</sup> *Ibid.* (emphasis added).

<sup>395</sup> Department of the Army Field Manual FM 27-10, *The Law of Land Warfare* (1956) (“Army Field Manual”), ¶ 73 (“If a person is determined by a competent tribunal, acting in conformity with Article 5 [of the Third Geneva Convention]..., not to fall within any of the categories listed in Article 4..., he is not entitled to be treated as a prisoner of war. He is, however, a ‘protected person’ within the meaning of Article 4 [of the Fourth Geneva Convention].”)

<sup>396</sup> Convention (III) relative to the Treatment of Prisoners of War. Geneva, August 12, 1949 (Third Geneva Convention), available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68?OpenDocument>, (accessed August 22, 2003). Article 4 also includes as “prisoners of war” other categories of individuals, such as civilian military employees and contractors, war correspondents, members of the merchant marine, etc.; as well as “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

<sup>397</sup> Brief of Amici Curiae Experts on the Law of War (Judge Patricia Wald, et al.) in Support of Petitioner-Appellee/Cross-Appellant Jose Padilla and Partial Affirmance and Partial Reversal, p. 14, *Padilla v. Rumsfeld*, available at [http://www.lchr.org/us\\_law/padilla\\_war\\_exp.pdf](http://www.lchr.org/us_law/padilla_war_exp.pdf) (accessed August 31, 2003).

<sup>398</sup> *Ibid.*, p. 2.

<sup>399</sup> *Ibid.*

<sup>400</sup> The prescribed procedures for “competent tribunals”: for prisoners in U.S. custody are set forth in ¶ 1-6 of Army Regulation 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” Department of the Army (1997), available at [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf) (accessed September 2, 2003). Though these “competent tribunals,” composed of three commissioned officers, are far less formal than a trial or other judicial proceeding, certain fundamental due process protections apply, including: preservation of a written record, public access to the proceedings (subject to security considerations); notice to the detainee of his rights, including the right to address the tribunal or to refrain from testifying; an interpreter; the right to call witnesses “if reasonably available”; and the right to question witnesses against him. The standard for determinations is by preponderance of the evidence. Each determination requires a written report, and adverse determinations are reviewed by a Judge Advocate.

<sup>401</sup> Written procedures for U.S. Article 5 hearings were first issued in 1966 for use in Vietnam. See Jennifer Elsea, “Treatment of ‘Battlefield Detainees’ in the War on Terrorism,” *Congressional Research Service Report for Congress*, RL31367, April 11, 2002, p. 29, available at <http://www.nimj.com/documents/BattlefieldDetainees.pdf> (accessed September 2, 2003).

<sup>402</sup> 10 U.S.C. §§ 801 *et seq.*

<sup>403</sup> The UCMJ provides, among other things, the right to counsel (10 U.S.C. § 838); a prohibition against self-incrimination (10 U.S.C. § 831); protection against double jeopardy (10 U.S.C. § 844); the right to obtain witnesses and other evidence (10 U.S.C. § 846); the right of appeal to the United States Court of Appeals for the Armed Forces (10 U.S.C. § 867); and providing that Supreme Court review is available by writ of certiorari (10 U.S.C. § 867a). The Rules for Courts-Martial (RCM) and the Military Rules of Evidence (MRE), issued pursuant to the UCMJ, provide other basic rights such as the right to a speedy trial (RCM 707), exclusion of unlawfully obtained evidence and testimony (MRE 301 *et seq.*), and rules relating to hearsay (MRE 801 *et seq.*). The RCM and the MRE are included in the Manual for Courts-Martial (2002), available at <http://www.usapa.army.mil/pdffiles/mcm2002.pdf> (accessed August 29, 2003).

<sup>404</sup> See discussion of the Zacarias Moussaoui case, below.

<sup>405</sup> “Pentagon Defends Treatment of Detainees,” CNN.com, January 15, 2002, available at <http://edition.cnn.com/2002/WORLD/americas/01/14/cuba.detainees/?related> (accessed August 29, 2003).

<sup>406</sup> Charles Savage, “For Detainees at Guantánamo, Daily Benefits – and Uncertainty,” *Miami Herald*, August 24, 2003, available at [http://www.miami.com/mld/miamiherald/news/special\\_packages/focus/6601339.htm](http://www.miami.com/mld/miamiherald/news/special_packages/focus/6601339.htm) (accessed August 23, 2003).

<sup>407</sup> See generally the official Joint Task Force Guantánamo website, <http://www.nsgtmo.navy.mil/JTFgtmo/mission.html> (accessed August 18, 2003).

<sup>408</sup> Charles Savage, “For Detainees at Guantánamo, Daily Benefits – and Uncertainty,” *Miami Herald*, August 24, 2003, available at [http://www.miami.com/mld/miamiherald/news/special\\_packages/focus/6601339.htm](http://www.miami.com/mld/miamiherald/news/special_packages/focus/6601339.htm) (accessed August 23, 2003); Ted Conover, “In the Land of Guantánamo,” *New York Times Magazine*, June 29, 2003).

<sup>409</sup> Convention (III) relative to the Treatment of Prisoners of War, Geneva, August 12, 1949 (Third Geneva Convention), art. 98, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68?OpenDocument>, (accessed August 22, 2003).

<sup>410</sup> Charles Savage, “For Detainees at Guantánamo, Daily Benefits – and Uncertainty,” *Miami Herald*, August 24, 2003, available at [http://www.miami.com/mld/miamiherald/news/special\\_packages/focus/6601339.htm](http://www.miami.com/mld/miamiherald/news/special_packages/focus/6601339.htm) (accessed August 23, 2003).

<sup>411</sup> “Suicide Attempts at Guantánamo Reach 32,” Associated Press, August 26, 2003, available at [http://www.kansascity.com/mld/kansascity/news/breaking\\_news/6624413.htm](http://www.kansascity.com/mld/kansascity/news/breaking_news/6624413.htm) (accessed August 26, 2003).

<sup>412</sup> See, e.g., DOD News Briefing on Military Commissions, DefenseLINK, March 21, 2002 (Department of Defense General Counsel William J. Haynes, describing the Guantánamo detainees as “enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies”), available at [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html) (accessed August 24, 2003).

<sup>413</sup> Radio Free Europe concluded that the seizure “raises questions about Bosnia’s shaky sovereignty as much as the accompanying street protests raise questions about the activities in Sarajevo of Saudi Wahabi proselytizers.” Jolyon Naegle, “Transfer of Terrorist Suspects to U.S. Raises Many Questions,” Radio Free Europe/Radio Liberty, transcript available at <http://www.rferl.org/nca/features/2002/01/21012002092819.asp> (accessed August 5, 2003).

<sup>414</sup> See Vikram Dodd, “The UK Businessmen Trapped in Guantánamo,” *Guardian*, July 11, 2003, available at <http://www.guardian.co.uk/alqaida/story/0,12469,995989,00.html> (accessed August 18, 2003); Helen Barnes, “Family Fears for Life of Terror Suspect,” *Guardian*, July 18, 2003, available at <http://www.thisislondon.co.uk/news/business/display.var.394421.0.0.php> (accessed August 18, 2003).

<sup>415</sup> Mohamedou Ould Slahi, a Mauritanian national is alleged to have been a senior Al Qaeda operative who may have recruited several of the September 11 bombers while living in Hamburg, Germany. Slahi is believed to have been arrested in an African country, probably Mauritania. Michael Isikoff and Mark Hosenball, “America’s Secret Prisoners,” *Newsweek* Online, June 18, 2003, available at <http://www.msnbc.com/news/928428.asp> (accessed August 6, 2003).

<sup>416</sup> One U.S. intelligence officer, Capt. Kevin Parker, explained to the *New York Times* that “we haven’t managed in the least to understand the country [Afghanistan],” and described the “vicious rivalries among the country’s seemingly infinite subtribes, [and] how often the tips the Army receives are the attempts of one clan to spur the Americans against an ancient enemy.” Daniel Bergner, “Where the Enemy is Everywhere and Nowhere,” *New York Times Magazine*, July 20, 2003, available at <http://www.commondreams.org/headlines03/0720-07.htm> (accessed August 6, 2003). See also Joseph Lelyveld, “In Guantánamo,” *New York Review of Books*, November 7, 2002 (“It is also understood...that more than half of the detainees were turned over to the Americans by the Pakistanis, which suggests that some of them, at least, might never have made it to Afghanistan.”), available at <http://www.mafhoum.com/press4/115S61.htm> (accessed August 23, 2003).

<sup>417</sup> Stuart Taylor, Jr., “Guantánamo: A Betrayal of What American Stands For,” *National Review* Online/*National Journal*, July 26, 2003, available at <http://www.kuwaitidetainees.org/media/natlrev072503.htm> (accessed August 6, 2003); See also Complaint, pp. 8-9, *Al Odah, v. U.S.* (D. D.C. May 1, 2002) (No. 92-CV-828-(CKK)) (“The Family Members believe that the [12] Kuwaiti Detainees ....were seized against their will in Afghanistan or Pakistan after September 11, 2001, by local villagers seeking financial rewards from the United States, and that, subsequently, they were taken into custody by the United States.”); Greg Miller, “Many Held at Guantánamo Not Likely Terrorists,” *Los Angeles Times*, December 12, 2002; Bob Drogin, “No Leaders of Al Qaeda Found at Guantánamo,” *Los Angeles Times*, August 18, 2002; John Mintz, “Detainees at Base in Cuba Yield Little Valuable Information,” *Washington Post*, December 26, 2002.

<sup>418</sup> Complaint, pp. 8-9, *Al Odah, v. U.S.* (D. D.C. May 1, 2002) (No.02-CV-828 (CKK)) (“The Family Members believe that the [12] Kuwaiti Detainees were in Afghanistan or Pakistan, some before and some after September 11, 2001, as volunteers for charitable purposes to provide humanitarian aid to the people of those countries... [and] that none of the Kuwaiti Detainees is or ever has been a member or supporter of al Qaida or the Taliban, or of any terrorist organization”). “Unlike many ‘suspected members of Al Qaeda,’ a lot is known about who [five of the Kuwaiti detainees in Guantánamo] were. We know their family backgrounds and their jobs. And we know

where they are today: half a world away in the U.S. naval base at Guantánamo Bay, Cuba. NEWSWEEK has traced their strange odyssey from their affluent homeland to their isolated cells on 'Gitmo.' The investigation shows [men]... who don't fit the standard profile of terrorists held at Guantánamo.... [T]he[se] five...at least, may be little more than volunteers for their society's versions of faith-based charities." Roy Gutman, Christopher Dickey and Sami Yousafzai, "Guantánamo Justice," *Newsweek*, July 8, 2003, available at <http://www.kuwaitidetainees.org/media/Guantánamo%20Justice.htm> (accessed August 6, 2003).

<sup>419</sup> U.S. Department of Defense, "Secretary Rumsfeld Media Availability en route to Guantánamo Bay, Cuba," January 27, 2002, transcript available at [http://www.defenselink.mil/news/Jan2002/t01282002\\_t0127enr.html](http://www.defenselink.mil/news/Jan2002/t01282002_t0127enr.html) (accessed August 5, 2003).

<sup>420</sup> "Former Guantánamo Detainees Describe Cages, Interrogation," *St. Petersburg Times*/AP, October 30, 2002, available at [http://www.sptimes.com/2002/10/30/news\\_pf/Worldandnation/Former\\_Guantánamo\\_det.shtml](http://www.sptimes.com/2002/10/30/news_pf/Worldandnation/Former_Guantánamo_det.shtml) (accessed August 6, 2003). The third of the Afghans, a 35-year-old man named Jan Mohammed, claimed to be a farmer conscripted into the Taliban army. The Pakistani, a 50-year-old named Mohammed Saghir, has announced plans to commence a lawsuit against the United States either in Pakistan or the United States or both, seeking ten million dollars. Junaid Bahadur, "Pakistani Seeks \$10M from U.S. for Detentions," *Dawn* Internet Edition (Pakistan), July 20, 2003, available at <http://www.dawn.com/2003/07/21/nat4.htm> (accessed August 18, 2003).

<sup>421</sup> "The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda." Statement by White House Press Secretary Ari Fleischer, February 7, 2002, available at <http://www.us-mission.ch/press2002/0802fleischerdetainees.htm> (accessed August 18, 2003). The United States has also received criticism on the issue of uniforms. For example, U.S. policy authorizes U.S. civil affairs and Special Forces personnel to wear civilian clothes (but carry arms) while carrying out "humanitarian" activities in the Afghan countryside. On April 2, 2002, sixteen major U.S. humanitarian groups, including Refugees International, CARE, Catholic Relief Services, Save the Children, and Oxfam America, wrote National Security Advisor Condoleezza Rice to express deep concern over this policy, which creates "confusion between military and [civilian] humanitarian personnel precisely where security risks to our international and local staff members often are most threatening." The text of the letter is at <http://www.reliefweb.int/w/rwb.nsf/480fa8736b88bbc3c12564f6004c8ad5/a5434df6dbd62ca485256b8f006c3bd6?OpenDocument> (accessed August 18, 2003). The next day, U.S. General Richard Myers, chairman of the Joint Chiefs of Staff, rejected the request to end the policy. "I think there are some legitimate things that our people do where they don't have to be in uniform," he explained. "No Change in Policy Allowing Military to Distribute Aid: Pentagon," AFP, April 3, 2002, available at <http://www.reliefweb.int/w/rwb.nsf/0/73421329e1797cce85256b90006fec0d?OpenDocument> (accessed August 19, 2003).

<sup>422</sup> The Army Field Manual notes in this regard, in ¶ 64(d), that the condition of "Compliance With Law of War" is "fulfilled if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime."

<sup>423</sup> See Jennifer Elsea, "Treatment of 'Battlefield Detainees' in the War on Terrorism," Congressional Research Service Report for Congress, RL31367, April 11, 2002, p. 29, available at <http://www.nimj.org/documents/BattlefieldDetainees.pdf> (accessed August 17, 2003).

<sup>424</sup> See, e.g., Tim Butcher, "Man with a Mission Brings Mohammed to the Mountain," *Telegraph* (September 21, 2001) (describing "one man in his late teens and dressed in the Taliban uniform of black turban, long shirt and baggy trousers"), available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/09/21/wpak121.xml> (accessed August 5, 2003); Susan Goldenberg, "The United States Wants to Kill a Whole Nation for One Man," *Guardian*, August 22, 1998 (describing an Afghan refugee in Pakistan, "a teacher wearing the black plumed turban of the Taliban militia"), available at <http://www.guardian.co.uk/alqaida/story/0,12469,798316,00.html> (accessed August 5, 2003); Evan Wright, "Not Much War but Plenty of Hell: On the Ground with a New Generation of American Warriors," *Rolling Stone* (July 3, 2002) (referring to a "man in a black turban, once the Taliban uniform"), available at <http://www.rollingstone.com/features/featuregen.asp?pid=907> (accessed August 5, 2003); Victor Mallet, "Taliban Supporters Return Home to Pakistan," *Financial Times* (December 14, 2001) (referring to a Pakistani fighter "who wears a Taliban-Style black turban"), available at [http://insaf.net/pipermail/sacw\\_insaf.net/2001/001171.html](http://insaf.net/pipermail/sacw_insaf.net/2001/001171.html) (accessed September 15, 2003); "Fierce Battle in Kunduz Leaves 100 Dead," *Times of India*/AFP, November 26, 2001 (referring to captured Taliban soldiers as "black-turbaned warriors"), available at <http://www.911investigations.net/IMG/pdf/doc-910.pdf> (accessed August 5, 2003); Jean-Pierre Perrin (avec AFP, Reuters), "L'alliance, maitresse de tout le nord," *Libération*,

November 2, 2001 (referring to the surrender of “les guerriers au turban noir et leurs alliés, les volontaires islamistes aux ordres d’Oussama ben Laden”), available at <http://www.911investigations.net/IMG/pdf/doc-910.pdf> (accessed August 5, 2003). Some press reports indicate belated attempts in 2000 and 2001 to provide full uniforms for at least some units of the Taliban. See, e.g., “War-Battered Afghanistan Celebrates Independence Day,” *Portsmouth Herald/AP*, August 18, 2000 (describing Afghan independence day parade, in which “[m]any of the Taliban soldiers who participated...wore the Afghan national army’s green and brown uniforms.”), available at [http://www.seacoastonline.com/2000news/8\\_18\\_w2.htm](http://www.seacoastonline.com/2000news/8_18_w2.htm) (accessed August 18, 2003); “Taliban Soldiers in Uniform,” *Dawn Internet Edition (Pakistan)*, June 29, 2001 (“For the first time the Taliban soldiers have appeared in regular military uniforms in the streets of Kabul in what officials describe as a move to improve security....[a] Taliban military official....said the Taliban government would make maximum efforts to distribute military uniforms to more military personnel for better law and order.”), available at [www.dawn.com/2001/06/29/int6.htm](http://www.dawn.com/2001/06/29/int6.htm) (accessed August 18, 2003); Erik Kirschbaum, “U.S. Soldiers Watched massacre of Taliban – Filmmaker,” *Reuters*, December 19, 2002 (describing site of mass grave where Northern Alliance troops of General Abdul Rashid Dostum are alleged to have massacred hundreds of unarmed Taliban prisoners as containing “bones, army uniform fragments and bullet casings.”)

<sup>425</sup> The Army Field Manual notes that “[a] helmet or headress which would make the silhouette of the individual readily distinguishable from that of an ordinary civilian would satisfy this requirement.” ¶ 64 (b).

<sup>426</sup> See Article 51(3) of the Additional Protocol I to the Geneva Conventions (1977) (“Civilians shall also enjoy the protection afforded by [Article 51 of the Additional Protocol I, dealing with ‘Protection of the Civilian Population’], unless and for such time as they take a *direct* part in hostilities” (emphasis added)). The Additional Protocol I is available at

<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079?OpenDocument> (accessed August 28, 2003). The United States has not ratified the Additional Protocol I, but it has acknowledged that many of the Protocol’s provisions, including Article 51(3), are “either customary international law or acceptable practice though not legally binding.” See U.S. Army Judge Advocate General’s Legal Center and School, *Operational Law Handbook* (2002), Chapter 2, p. 11, available at

<https://www.jagcnet.army.mil/tjagsa> (click on “Publications” on the home page) (accessed August 28, 2003).  
<sup>427</sup> See *ICRC Commentary to the IV Geneva Convention*, p. 48 (Jean S. Pictet ed., 1958), available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument> (accessed September 5, 2003) (“Members of resistance movements must fulfill certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfill those conditions, they must be considered to be protected persons within the meaning of the present [Fourth] Convention. That does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions [of the Fourth Convention].”), available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument> (accessed August 6, 2003).

<sup>428</sup> Writing right before September 11, several international terrorism experts reported that “Al-Qaeda membership is estimated at between 3,000-5,000 men, most of whom fight alongside the Taliban against the Northern Alliance and are designated the 055 Brigade....In Afghanistan, Al-Qaeda forces fight alongside the Taliban.” Phil Hirshkorn, et al., “Blowback,” *Jane’s Intelligence Review*, Vol. 13, No. 8 (August 1, 2001), available at <http://www.mwarrior.com/alqaeda.htm> (accessed August 5, 2003).

<sup>429</sup> “Bosnia Suspects Handed to U.S.,” *CNN.com*, January 18, 2002, available at <http://www.cnn.com/2002/WORLD/europe/01/18/inv.bosnia.cuba/> (accessed August 5, 2003). The Bosnian court opinion, *Boudella. v. Bosnia and Herzegovina* (Human Rights Chamber of Bosnia and Herzegovina September 3, 2002), is available at [www.nimj.org](http://www.nimj.org) (accessed August 5, 2003).

<sup>430</sup> *Al Odah v. U.S.*, 321 F.3d 1124, 1134 (2003), available at <http://www.nimj.org> (accessed September 2, 2003) (under “Cases” on the left hand side of the home page).

<sup>431</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=339&invol=763> (accessed September 2, 2003).

<sup>432</sup> *Ibid.*, p. 778.

<sup>433</sup> *Ibid.*, p. 1134 (stating that in *Eisentrager*, “it was not [the Germans’] convictions – which they contested – that rendered them ‘enemy aliens’....[but rather] their status as nationals of a country at war with the United States.”).

<sup>434</sup> Under the 1903 Lease between the Republic of Cuba and the United States, as extended by a 1934 treaty, both parties must consent to any termination. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418, available at <http://www.gtmo.net/gazz/hisapxd.htm> (accessed September 11, 2003).

<sup>435</sup> This “ultimate [Cuban] sovereignty” has not prevented federal courts in the past from exercising criminal jurisdiction over non-U.S. nationals who have committed crimes in Guantánamo – nor from assuring such defendants constitutional protections. *See, e.g., U.S. v. Lee*, 906 F.2d 117 (4<sup>th</sup> Cir. 1990) (reinstating criminal indictment of Jamaican national for alleged sexual abuse committed in Guantánamo).

<sup>436</sup> Robert A. Levy, “Indefensible – The Case Against Military Tribunals,” *Wall Street Journal*, November 25, 2002; *see also* William Safire, “Voices of Negativism,” *New York Times*, December 6, 2001, available at [http://www.truthout.org/docs\\_01/12.07C.Safire.Voices.htm](http://www.truthout.org/docs_01/12.07C.Safire.Voices.htm) (accessed August 5, 2003).

<sup>437</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (November 16, 2001), available at <http://www.fas.org/sgp/news/2001/11/bush111301.html> (accessed August 4, 2003).

<sup>438</sup> *Ibid.* § 1(e).

<sup>439</sup> *Ibid.* § 2(a)(1).

<sup>440</sup> *Ibid.* §§ 4(c)(8) and 7(b)(2).

<sup>441</sup> *Ibid.* § 4(c)(3) and (4).

<sup>442</sup> Department of Defense, Military Commission Order No.1 (March 21, 2002), available at <http://www.dod.gov/news/Mar2002/d20020321ord.pdf>, (accessed August 5, 2003).

<sup>443</sup> The eight Military Commission Instructions are available at <http://www.dtic.mil/whs/directives/corres/mco.htm> (accessed August 5, 2003). On February 29, 2003, the Defense Department had issued a draft of one of these instructions, Military Commission Instruction No. 2, Elements of Crimes, which defined the specific offenses that would be “triable by military commission.” A number of groups, including the Lawyers Committee for Human Rights, submitted comments and suggestions, some of which were reflected in the final version issued in April. On July 1, 2003, the Defense Department issued a slightly revised version of Military Commission Instruction No. 5. This revision (which retains the “April 30, 2003” date) somewhat loosened restrictions on civilian defense counsel.

<sup>444</sup> Military Commission Order No.1 (March 21, 2002), § 5(B).

<sup>445</sup> *Ibid.* § 5(C).

<sup>446</sup> *Ibid.* § 4(C)(3). The rules also recognized the privilege against defendants’ self-incrimination, and prescribed unanimous verdicts and seven-member commissions for any death sentence. *Ibid.* §§ 5(F), 6(F), and 6(G).

<sup>447</sup> “The order only covers foreign enemy war criminals....people [who will] be tried by military commission....must be chargeable with offenses against the international laws of war.” Alberto R. Gonzales, Counsel to President Bush, “Martial Justice, Full and Fair,” *New York Times*, November 30, 2001, available at <http://usinfo.state.gov/topical/pol/terror/01120302.htm> (accessed August 8, 2003),

<sup>448</sup> Section 5(C) of Military Commission Instruction No. 2 explains that the element of “armed conflict” “does not require a declaration of war, ongoing mutual hostilities, or a confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus [between ‘armed conflict’ and a particular offense] so long as its magnitude or severity rises to the level of an ‘armed attack’ or an ‘act of war,’ or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.”

<sup>449</sup> *Ibid.* § 6(B)(1)-(2). This expanded notion of “armed conflict” can also transform quite ordinary common crimes into offenses “triable by military commission,” a particular concern in light of the administration’s tendency to label as “terrorism” cases charges not considered such by even the prosecutors involved. “In the first two months of [2003], the Justice Department filed charges against 56 people, labeling all the cases as ‘terrorism’.... [A]t least 41 of them had nothing to do with terrorism – a point that prosecutors of the cases themselves acknowledge.” Among the purported “terrorism” cases were “28 Latinos charged with working illegally at [an airport,] most of them using phony Social Security numbers”; “eight Puerto Ricans charged with trespassing on Navy property on the island of Vieques”; “a Middle Eastern man indicted...for allegedly passing bad checks who has the same name as a Hezbollah leader”; and a “Middle Eastern college student charged...with paying a stand-in to take his college English-proficiency tests.” Mark Fazlollah, “Reports of Terror Crimes Inflated,” *Philadelphia Inquirer*, May 15, 2003. *See also* Thomas Ginsberg, “The War on...Liberty?” *Philadelphia Inquirer*, June 15, 2003.

<sup>450</sup> Military Commission Order No.1 (March 21, 2002), § 6(B)(3).

<sup>451</sup> Military Commission Instruction No. 4, § 3(E)(3)

<sup>452</sup> Military Commission Instruction No. 5, Appendix B (Affidavit and Agreement by Civilian Defense Counsel), § II(C).

<sup>453</sup> Military Commission Instruction No. 5, § 3(A)(2)(d).

<sup>454</sup> Military Commission Instruction No. 5, Appendix B (Affidavit and Agreement by Civilian Defense Counsel), § II(E) and (F).

<sup>455</sup> Assigned military counsel must be provided any secret information used at trial; but even military lawyers may be denied access to potential exculpatory evidence not used at trial. Department of Defense, Military Commission Order No.1 (March 21, 2002), § 6(D)(5)(b).

<sup>456</sup> Military Commission Instruction No. 5 Annex B (Affidavit and Agreement by Civilian Defense Counsel), § II(I) and (J).

<sup>457</sup> National Association of Criminal Defense Lawyers (NACDL), Ethics Advisory Committee, Opinion 03-04, approved by the NACDL Board of Directors August 2, 2003, available at <http://www.nacdl.org/public.nsf/freeform/news&issues?OpenDocument> (accessed August 22, 2003).

<sup>458</sup> National Institute of Military Justice, "Statement on Civilian Attorney Participation as Defense Counsel in Military Commissions," July 11, 2003, available at <http://www.nimj.org> (accessed September 3, 2003).

<sup>459</sup> Resolution adopted by the American Bar Association House of Delegates 2003 Annual Meeting (August 12-13, 2003). The Resolution also included specific objections to provisions in the rules authorizing monitoring of attorney-client consultations, permitting withholding of evidence from civilian defense counsel, limiting attorney consultations with experts, and other matters. A detailed report on the military commission rules was presented along with the Resolution. The Resolution and the report are available at [http://www.nimj.com/documents/ABA\\_CDC\\_Corrected\\_Fin\\_Rep\\_Rec\\_FULL\\_0803.pdf](http://www.nimj.com/documents/ABA_CDC_Corrected_Fin_Rep_Rec_FULL_0803.pdf) (accessed August 28, 2003).

<sup>460</sup> Alberto R. Gonzales, Counsel to President Bush, "Martial Justice, Full and Fair," *New York Times*, November 30, 2001.

<sup>461</sup> *Ex Parte Quirin*, 317 U.S. 1 (1942), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=317&invol=1> (accessed August 21, 2003).

<sup>462</sup> *Ibid.* pp. 27, 36. The specification described "enemies...acting for... a belligerent enemy nation" passing covertly in civilian dress behind military lines for the purpose of carrying out hostile acts. A third generic charge of "violation of the law of war" related to actions well established as traditional war crimes when committed by "enemies...acting for...a belligerent enemy nation." The fourth count was a conspiracy charge.

<sup>463</sup> See, e.g., *Haupt v. United States*, 330 U.S. 631 (1947) (upholding treason conviction of naturalized citizen father of one of the saboteurs); and *Cramer v. United States*, 325 U.S. 1 (1945) (reversing treason conviction of naturalized citizen acquaintance of one of the saboteurs).

<sup>464</sup> Section 1(e) of the November Order grants military commissions broad jurisdiction over "violations of the laws of war and other applicable laws" (emphasis added). Military Order of November 13, 2001.

<sup>465</sup> James Orenstein, "Rooting Out Terrorists Just Became Harder," *New York Times*, December 6, 2001. See also William Safire, "Voices of Negativism," *New York Times*, December 6, 2001 ("At the State Department, word is coming in from Spain, Germany and Britain – where scores of Al Qaeda suspects have been arrested – that the UN human rights treaty pioneered by Eleanor Roosevelt prohibits the turning over of their prisoners to military tribunals that ignore such rights. That denies us valuable information about 'sleepers' in Osama bin Laden's cells who are in the U.S. planning future attacks."), available at [http://www.truthout.org/docs\\_01/12.07C.Safire.Voices.htm](http://www.truthout.org/docs_01/12.07C.Safire.Voices.htm) (accessed August 5, 2003).

<sup>466</sup> The three others, who have not been identified by name, are reportedly from Pakistan, Sudan and Yemen. Paisley Dodds, "Patriotism, Apple Pie and an Execution Chamber: Guantánamo Gears up for Military Commissions," Associated Press, July 24, 2003, available at <http://www.redding.com/news/apnational/past/20030724aptop121.shtml> (accessed August 23, 2003).

<sup>467</sup> Sarah Lyall, "Threats and Responses: Guantánamo Tribunals," *New York Times*, July 5, 2003. See also John Mintz, "6 Could Be Facing Military Tribunals; U.S. Says Detainees Tied to Al Qaeda," *Washington Post*, July 4, 2003 ("The designation of this half-dozen as eligible for tribunals 'shouldn't suggest that there won't be more, or that these are the worst of the worst,' terrorists in U.S. detention, a military official said.... 'The government will want to show the other detainees that you can cooperate and be released when you're still a young man....' said one lawyer who has been in contact with U.S. officials").

<sup>468</sup> Sarah Lyall, "Threats and Responses: Guantánamo Tribunals," *New York Times*, July 5, 2003.

<sup>469</sup> Under-Secretary of State for Foreign and Commonwealth Affairs Chris Mullin in the House of Commons, July 7, 2003. Other MP's referred to "the Americans' proposals [as] wrong, potentially unjust and gravely damaging to their reputation" (Douglas Hogg), and inquired whether the United States "[s]hould not...listen very closely and heed the concern of a close ally....because the United States requires all the friends it can get" (David Winnick). Proceedings in the House of Commons, July 7, 2003. The tone in the House of Lords, the same day, was similar: "Will the Minister tell us whether, given what good allies we have been to the US, the Prime Minister will raise this matter at the highest level, with the President of the US?" (Baroness Williams of Crosby);



“My Lords, is it not true that the whole of the Guantánamo Bay issue brings the United States’ justice into disrepute.... This brings the whole of United States defence of democracy, defence of liberty and defence of justice into disrepute” (The Earl of Onslow). Minister of State for Foreign and Commonwealth Affairs Baroness Symons of Vernham Dean acknowledged, on behalf of the government, that she was “bound to say that our justice system would not allow us to engage in a trial such as is proposed for anybody suspected of much less serious crimes.” Proceedings in the House of Lords, July 7, 2003. The debates in both Houses are available at <http://www.nimj.org> (accessed August 5, 2003).

<sup>470</sup> Andrew Sparrow, “Blair Prepares Ground for Trials in Guantánamo,” *Telegraph*, July 21, 2003, available at [http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/07/21/nguan21.xml&secureRefresh=true&\\_requestid=61484](http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/07/21/nguan21.xml&secureRefresh=true&_requestid=61484) (accessed August 23, 2003).

<sup>471</sup> *Abassi v. Secretary of State*, [2002] EWCA Civ. 1598 (Court of Appeals, November 6, 2002). The entire opinion is available at <http://www.nimj.org> (accessed August 5, 2003).

<sup>472</sup> David Bamber and Rajeev Syal, “Blair Tells Bush: We Don’t Want Guantánamo Britons,” *Telegraph*, August 3, 2003, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/08/03/nguan03.xml> (accessed August 23, 2003).

<sup>473</sup> “Guantánamo Detainees: Statement by the Attorney General,” July 22, 2003, available at <http://www.nimj.org> (accessed August 5, 2003). The United States also agreed to allow British lawyers to serve as defense “consultants.”

<sup>474</sup> Minister for Foreign Affairs, the Hon. Alexander Downer, MP, and Attorney-General, the Hon. Daryl Williams, AM QC MP, Joint Press Release: “Delegation Concludes Successful Talks on David Hicks,” Attorney-General’s Department (Australia), July 24, 2003, available at <http://nationalecurity.ag.gov.au/www/attorneygeneralHome.nsf/0/E4EDFF06CEA01AC5CA256D6D007C3563?OpenDocument> (accessed August 23, 2003).

<sup>475</sup> Sarah Lyall, “Families of 2 British Terrorism Suspects Oppose Military Trials by the U.S.,” *New York Times*, July 5, 2003.

<sup>476</sup> Sean O’Neill, “Moazzam Begg,” *Telegraph*, July 5, 2003, available at [http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2003/07/05/nguan305.xml&secureRefresh=true&\\_requestid=12122](http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2003/07/05/nguan305.xml&secureRefresh=true&_requestid=12122) (accessed August 18, 2003).

<sup>477</sup> Richard P. Conti, “The Psychology of False Confessions,” *Journal of Credibility Assessment and Witness Psychology*, Vol. 2, No. 1, p. 27 (1999), available at <http://truth.boisestate.edu/jcaawp/9901/9901.pdf> (accessed September 3, 2003).

<sup>478</sup> Ibid.

<sup>479</sup> Saul Kassin, “False Confessions and the Jogger Case,” *New York Times*, November 1, 2002, available at [http://www.unb.ca/law/pennet/crimpro\\_fa/False%20Confessions%20and%20the%20Jogger%20Case.htm](http://www.unb.ca/law/pennet/crimpro_fa/False%20Confessions%20and%20the%20Jogger%20Case.htm) (accessed August 21, 2003).

<sup>480</sup> Ibid. False confessions are not rare. Of the first 70 cases of men exonerated from Death Row by DNA challenges, 15 percent of those erroneous murder convictions were attributed to false confessions. See generally website of the “Innocence Project,” at <http://www.innocenceproject.org/> (accessed August 11, 2003).

<sup>481</sup> Jess Bravin, “Guilty Pleas Expected at Tribunals,” *Wall Street Journal*, August 11, 2003 (“Officials explained that though ‘initially...defiant,’ the three men had ‘all, shall we say, mellowed over time,’ and were now providing information to interrogators”).

<sup>482</sup> Nyier Abdou, “What’s Good for the Goose...,” *Al-Ahram Weekly Online*, July 31 – August 6, 2003, available at <http://weekly.ahram.org.eg/print/2003/649/in5.htm> (accessed August 5, 2003).

<sup>483</sup> Frank Davies, “Kuwait Pressing U.S. on Guantánamo Prisoners,” *Miami Herald*, August 6, 2003.

<sup>484</sup> Text of the letter is reprinted in “The Law and Camp Delta,” *Guardian*, August 21, 2003, available at <http://www.guardian.co.uk/Print/0,3858,4737551-103683,00.html> (accessed August 21, 2003).

<sup>485</sup> Ibid.

<sup>486</sup> Order, p. 64, *Hamdi v. Rumsfeld* (4<sup>th</sup> Cir. July 9, 2003) (No. 02-7338) (Judge Diana Gribbon Motz, dissenting), available at <http://www.nimj.org> (accessed August 10, 2003); see also Ibid., p. 43 (Judge Michael Luttig, dissenting).

<sup>487</sup> Eric Lichtblau, “Bush Declares Student an Enemy Combatant,” *New York Times*, June 24, 2003 (quoting Alice Fisher, a deputy assistant attorney general in DOJ’s Criminal Division).

<sup>488</sup> Prepared Statement of John Walker Lindh to the Court, *U.S. v. Lindh* (E.D. Va. October 4, 2002) (No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/lindh100402statment.html> (accessed August 5, 2003).

<sup>489</sup> Ibid.

<sup>490</sup> Indictment, *U.S. v. Lindh* (E.D. Va. February 5, 2002) (Cr. No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html> (accessed August 6, 2003).

<sup>491</sup> See generally Proffer of Facts in Support of Defendant's Suppression Motion, *U.S. v. Lindh* (E.D. Va. June 13, 2002) (No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh61302dstat.pdf> (accessed August 6, 2003). "Prosecutors have acknowledged that Lindh's [December 9-10, 2001] confessions to [FBI agent Christopher] Reimann, along with earlier ones to military interrogators, are the basis for their 10-count indictment charging Lindh with conspiring to kill U.S. nationals and aid the Taliban and Al Qaeda." Michael Isikoff, "The Lindh E-Mails," *Newsweek*, June 24, available at [http://www.truthout.org/docs\\_02/06.19A.lindh.emails.htm](http://www.truthout.org/docs_02/06.19A.lindh.emails.htm) (accessed August 6, 2003).

<sup>492</sup> Excerpts from the emails between the FBI interrogators in Afghanistan and Jesselyn Radack, the DOJ lawyer in Washington, D.C., were published by *Newsweek Online* on June 15, 2002, and are available at [http://www.truthout.org/docs\\_02/06.19A.lindh.emails.htm](http://www.truthout.org/docs_02/06.19A.lindh.emails.htm) (accessed August 6, 2003).

<sup>493</sup> The investigation is reportedly ongoing. Radack's story is available in Jane Mayer, "Lost in the Jihad," *New Yorker*, March 10, 2003; and Douglas McCollam, "The Trials of Jesselyn Radack," *American Lawyer*, July 14, 2003.

<sup>494</sup> Neil A. Lewis, "Ashcroft's Terrorism Policies Dismay Some Conservatives," *New York Times*, July 24, 2002 ("Mr. Ashcroft was also criticized by some in the administration for declaring early on that the case of John Walker Lindh was...a major terrorist case. Some officials in the Justice Department believed that the attorney general made needlessly harsh public comments about Mr. Lindh").

<sup>495</sup> Defendant's Sentencing Memorandum, p. 4, *U.S. v. Lindh* (E.D. Va. September 19, 2002) (No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh92602dsenmem.pdf> (accessed August 5, 2003).

<sup>496</sup> "U.S. National Detained During Afghan War is Flown to Virginia," *Agence France Presse*, April 6, 2002 (noting that "a Pentagon statement said Hamdi will be held for the time being as a 'captured enemy combatant in the control of the Department of Defense'").

<sup>497</sup> Petition for Writ of Habeas Corpus, *Hamdi v. Rumsfeld* (E.D. Va. June 11, 2002) (No. 2: 02 CV 439), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums61102pet.pdf> (accessed August 23, 2003).

<sup>498</sup> *Hamdi v. Rumsfeld* (4<sup>th</sup> Cir. July 12, 2002) (No. 02-6895), available at <http://laws.lp.findlaw.com/4th/026895P> (accessed August 21, 2003).

<sup>499</sup> Order, pp. 9-11, 14, *Hamdi v. Rumsfeld* (E.D. Va. August 16, 2002) (No. 2: 02 CV 439), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums81602ord.pdf> (accessed August 21, 2003).

<sup>500</sup> Katherine Q. Seelye, "Judge Questions Detention of American in War Case," *New York Times*, August 13, 2002.

<sup>501</sup> *Hamdi v. Rumsfeld* (4<sup>th</sup> Cir. January 8, 2003) (No. 02-7338), available at <http://www.nimj.org> (accessed August 5, 2003).

<sup>502</sup> *Ibid.*, pp. 18-19.

<sup>503</sup> *Ibid.*, pp. 24, 45, and 51. The court concluded that "[t]he Constitution does not entitle him to a searching review of the factual determinations underlying his seizure." *Ibid.*, p. 50.

<sup>504</sup> Order, pp. 41, 45, *Hamdi v. Rumsfeld* (4<sup>th</sup> Cir. July 9, 2003) (No. 02-7338) (Judge Michael Luttig, dissenting) (original emphasis), available at <http://www.nimj.org> (accessed August 10, 2003); *Ibid.*, p. 63 (Judge Diana Gribbon Motz, dissenting). Hamdi's lawyer, Frank Dunham, insists that "Nobody knows what his version of the facts might be." Nat Hentoff, "Liberty's Court of Last Resort," *Village Voice Online*, January 24, 2003, available at <http://www.villagevoice.com/issues/0305/hentoff.php> (accessed August 6, 2003).

<sup>505</sup> Order, p. 64, *Hamdi v. Rumsfeld* (4<sup>th</sup> Cir. July 9, 2003) (No. 02-7338) (Judge Diana Gribbon Motz, dissenting), available at <http://www.nimu.org> (accessed August 10, 2003); see also *Ibid.*, p. 43 (Judge Michael Luttig, dissenting).

<sup>506</sup> The statute defines "material support or resources" as "currency or other financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C.A. § 2339A(b), available at [http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/i/chapters/113b/sections/section\\_2339a.html](http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/i/chapters/113b/sections/section_2339a.html) (accessed September 2, 2003), amended by 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 (2001).

<sup>507</sup> *Humanitarian Law Project v. Reno*, 205 F.3d 1130, p. 1138 (9<sup>th</sup> Cir. 2000), cert. denied, 532 U.S. 904 (2001). See also Dan Eggen and Steve Fainaru, "For Prosecutors, 1996 Law is Key Part of Anti-Terror Strategy," *Washington Post*, October 15, 2002.

<sup>508</sup> Dan Eggen and Steve Fainaru, "For Prosecutors, 1996 Law is Key Part of Anti-Terror Strategy," *Washington Post*, October 15, 2002.

<sup>509</sup> The judge in the John Walker Lindh case, for example, upheld the constitutionality of the statute. *U.S. v. Lindh*, 212 F. Supp. 2d 541, pp. 574-575 (E.D. Va. 2002). The judge in the prosecution of defense attorney Lynne Stewart, however, found that the statute was unconstitutional as applied to her case. Opinion and Order, pp. 16-24, *U.S. v. Sattar* (S.D.N.Y. July 22, 2003) (02 Cr. 3951 (JGK)), available at <http://news.findlaw.com/hdocs/docs/terrorism/ussattar72203opn.pdf> (accessed September 3, 2003). See Edward Epstein, "Judge Rejects Lindh's Pleas to Drop Charges," *San Francisco Chronicle*, June 18, 2002; "Court Dismisses Two Counts of Supporting Terror Group Against Defense Lawyer Lynne Stewart," *New York Law Journal*, July 28, 2003.

<sup>510</sup> Mike Carter and David Heath, "Seattle Man's Arrest in Denver Tied to International Investigation," *Seattle Times*, July 25, 2002.

<sup>511</sup> Indictment, *U.S. v. Ujaama* (W.D. Wa. August 28, 2002), (No. \_\_\_\_), available at <http://news.findlaw.com/hdocs/docs/terrorism/usujaama82802ind.pdf> (accessed August 22, 2003).

<sup>512</sup> Department of Justice, Press Release: "Ernest James Ujaama Pleads Guilty to Conspiracy to Supply Goods and Services to the Taliban, Agrees to Cooperate with Terrorism Investigation," April 14, 2003, available at [http://www.usdoj.gov/opa/pr/2003/April/03\\_crm\\_237.htm](http://www.usdoj.gov/opa/pr/2003/April/03_crm_237.htm) (accessed August 22, 2003).

<sup>513</sup> Statement of Jeffrey G. Collins, United States Attorney, Regarding the Case of *United States v. Koubriti, et al.*, available at <http://www.usdoj.gov/usao/mie/pr/koubriti.html> (accessed August 6, 2003). See also "2 Arab Immigrants Found Guilty of Conspiring to Aid Terrorists," *New York Times/AP*, June 3, 2003. The Second Superseding Indictment in the case, *U.S. v. Koubriti* (E.D. Mich. August 28, 2002) (No. 01-80778), is available at <http://news.findlaw.com/hdocs/docs/terrorism/uskoubriti82802ind.pdf>, (accessed August 6, 2003).

<sup>514</sup> The determination is available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf> (accessed August 21, 2003).

<sup>515</sup> Attorney General John Ashcroft, Speech: "Transcript of the Attorney General John Ashcroft Regarding the Transfer of Abdullah Al Muhajir (Born José Padilla) to the Department of Defense as an Enemy Combatant, June 10, 2002, available at <http://www.usdoj.gov/ag/speeches/2002/061002agtranscripts.htm> (accessed August 21, 2003).

<sup>516</sup> Amended Petition for Habeas Corpus, *Padilla v. Bush* (S.D.N.Y. June 19, 2002) (Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush61902apet.pdf> (accessed August 21, 2003); Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, p. 8, *Padilla v. Rumsfeld* (S.D.N.Y. August 27, 2002) (Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf> (accessed August 27, 2003).

<sup>517</sup> Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, p. 11, *Padilla v. Rumsfeld* (S.D.N.Y. August 27, 2002) (Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf> (accessed August 21, 2003).

<sup>518</sup> *Ibid.*, pp. 34-35.

<sup>519</sup> Senate Joint Resolution 23, Authorization for Use of Military Force, September 18, 2001, Pub. L. No. 107-40 115 U.S. Stat. 224 (2001), available at [http://www.yale.edu/lawweb/avalon/sept\\_11/sjres23\\_eb.htm](http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm) (accessed August 6, 2003). The resolution authorized the president to use "all necessary...force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

<sup>520</sup> Three amicus briefs filed in the Second Circuit Court of Appeals by diverse groups of individuals and organizations (including the Lawyers Committee for Human Rights) are available at [http://www.lchr.org/us\\_law/us\\_law\\_12.htm](http://www.lchr.org/us_law/us_law_12.htm) (accessed August 21, 2003).

<sup>521</sup> 18 U.S.C. § 4001(a), available at [http://caselaw.lp.findlaw.com/scripts/ts\\_search.pl?title=18&sec=4001](http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=4001) (accessed August 23, 2003).

<sup>522</sup> Moreover, Congress can not have believed that the "use of force" resolution had granted the executive complete discretion to detain without charge and indefinitely any U.S. citizen suspected of terrorism, or else it would not, six weeks later, have insisted on specific constraints on the executive's power to detain suspected non-citizen terrorists, in passing the USA PATRIOT Act, Pub. L. No 107-56, 115 Stat. 272 (October 26, 2001). Under that legislation, the executive must commence criminal or immigration removal proceedings against a non-citizen detained on suspicion of terrorism within seven days of the detention. If the individual's removal is "unlikely in the reasonably foreseeable future," the detention may continue, for periods of up to six months, subject to review by the Attorney General. Detention decisions under this statute are reviewable in federal habeas corpus proceedings. 8 U.S.C. § 1226a, available at [http://caselaw.lp.findlaw.com/cascode/uscodes/8/chapters/12/subchapters/ii/parts/iv/sections/section\\_1226a.html](http://caselaw.lp.findlaw.com/cascode/uscodes/8/chapters/12/subchapters/ii/parts/iv/sections/section_1226a.html) (accessed August 25, 2003).

<sup>523</sup> *Ex Parte Milligan*, 71 U.S. 2 (1866), p. 140, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=cas&court=us&vol=71&page=2> (accessed August 23, 2003).

<sup>524</sup> *Ibid.*, p. 131. The only distinction between the *Milligan* facts and those in *Padilla* is Padilla's alleged travel to Pakistan, an important U.S. ally in the fight against terrorism, and an entirely lawful destination for Americans to visit. See Jennifer K. Elsea, "Presidential Authority to Detain 'Enemy Combatants,'" draft of an article to appear in *Presidential Studies Quarterly*, Vol. 33, No. 3 (September 2003), available at <http://www.nimj.org> (accessed August 5, 2003).

<sup>525</sup> *Ex Parte Milligan*, 71 U.S. 2 (1866), p. 121, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=cas&court=us&vol=71&page=2> (accessed August 23, 2003).

<sup>526</sup> *Padilla v. Bush* (S.D.N.Y. December 4, 2002) (No. 01 Civ. 4445 (MBM)), p. 74, available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush120402opn.pdf> (accessed August 5, 2003). Certain other documents relating to the case, are available at <http://www.findlaw.com/legalnews/us/terrorism/cases/index.html> (accessed August 5, 2003). Some other materials on the case, not available on the findlaw site, can be accessed through <http://www.nimj.org>. (accessed August 5, 2003).

<sup>527</sup> *Padilla v. Bush* (S.D.N.Y. December 4, 2002) (No. 01 Civ. 4445 (MBM)), pp. 96-97, available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush120402opn.pdf> (accessed August 5, 2003).

<sup>528</sup> *Ibid.*, p. 75. To satisfy its burden, the executive submitted a Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, dated August 27, 2002, which summarized the government's version of the story, based on Mobbs' "review of] government records and reports about José Padilla." The government also submitted a classified version of the same document. The six-page unclassified version is available at <http://news.findlaw.com/hdocs/docs/Padilla/Padillabush82702mobbs.pdf> (accessed August 22, 2003).

<sup>529</sup> Padilla's appeal, Petitioner-Appellee-Cross-Appellant Brief (2d Cir. July 23, 2003) (No. 03-2235 and No. 03-2438), is available at [http://www.nimj.com/documents/2d\\_Cir\\_brief\\_final\\_072403.doc](http://www.nimj.com/documents/2d_Cir_brief_final_072403.doc) (accessed August 23, 2003). The government also appeals on several technical grounds, including claims that Padilla's lawyer, Donna Newman, does not have sufficiently close ties to Padilla to constitute his "next friend," for purposes of the habeas corpus filing; and that since Padilla is no longer physically present in New York, the New York court no longer has jurisdiction to hear the matter.

<sup>530</sup> Respondents' Motion for Reconsideration in Part, p. 6, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (No. 02 Civ. 4445 (MBM)), available at <http://www.state.de.us/cjc/Gov%20motion%20for%20Reconsideration.doc> (accessed August 21, 2003).

<sup>531</sup> Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (02 Civ. 4445 (MBM)) ("Jacoby Declaration"). The Jacoby Declaration was attached to the Respondents' Motion for Reconsideration in Part, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (No. 02 Civ. 4445 (MBM)), available at <http://www.state.de.us/cjc/Gov%20motion%20for%20Reconsideration.doc> (accessed August 21, 2003). The Jacoby Declaration is not, however, included in the version of this Motion available online. Substantial excerpts from the Jacoby Declaration are quoted by Judge Mukasey in his Opinion and Order, pp. 15-18, *Padilla v. Rumsfeld* (S.D.N.Y. March 11, 2003) (No. 02 Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums31103opn.pdf> (accessed August 21, 2003).

<sup>532</sup> Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, pp. 4-5, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (02 Civ. 4445 (MBM)); also quoted by Judge Mukasey in Opinion and Order, p. 15, *Padilla v. Rumsfeld* (S.D.N.Y. March 11, 2003) (No. 02 Civ. 4445 (MBM)); see also Respondents' Motion for Reconsideration in Part, p. 4, *Padilla v. Rumsfeld* (S.D.N.Y. January 9, 2003) (No. 02 Civ. 4445 (MBM)) ("The government's concern with the effect of requiring that Padilla be permitted to meet with counsel...is not merely that counsel would interfere with questioning. Instead...directly interposing counsel – for any purpose and for any duration – would threaten permanently to undermine the military's efforts to develop a relationship of trust and dependency that is essential to effective interrogation.") (emphasis added).

<sup>533</sup> UN Human Rights Committee, CCPR General Comment No. 20 on Article 7 (1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+20.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+20.En?OpenDocument) (accessed August 12, 2003). The International Covenant on Civil and Political Rights (1976) (CCPR) is available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (accessed August 12, 2003). Ratified by the United States in 1992, the CCPR sets forth minimum human rights standards applicable to all individuals, in times of war as well as peace. Article 4 of the CCPR expressly prohibits suspension of the Article 7 prohibitions even "[i]n time of public emergency which threatens the life of the nation."

<sup>534</sup> *Velasquez Rodriguez* case, Inter-American Court of Human Rights Judgment of July 29, 1988, Series C, No. 4, ¶ 156 Article 5(2) of the American Convention on Human Rights prohibits “torture or...cruel, inhuman, or degrading punishment or treatment....[and requires that a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” American Convention on Human Rights (1978), available at <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed August 21, 2003). The United States is a signatory to the American Convention, but has not ratified it.

<sup>535</sup> Mary Beth Pfeiffer, “Box’ Cell Suicides Haunt Families,” *Poughkeepsie Journal*, April 14, 2002, available at <http://www.poughkeepsiejournal.com/projects/suicide/lo041402s2.shtml> (accessed August 21, 2003). Fifteen of 39 suicides in the three-year period occurred among prisoners confined in the special disciplinary cells – “the modern equivalent of solitary confinement.” Mary Beth Pfeiffer, “Suicides in Solitary are Abnormally High,” *Poughkeepsie Journal*, April 14, 2003, available at <http://www.poughkeepsiejournal.com/projects/suicide/lo041402s3.shtml> (accessed August 21, 2003).

<sup>536</sup> U.S. Department of State, Initial Report of the United States of America to the UN Committee Against Torture, submitted October 15, 1999, Part II(A)(C), available at [http://www.state.gov/www/global/human\\_rights/torture\\_index.html](http://www.state.gov/www/global/human_rights/torture_index.html) (accessed August 6, 2003).

<sup>537</sup> See Jerry Markon, “Federal Court Dismisses Appeal in Moussaoui Case,” *Washington Post*, June 26, 2003 (“Government officials have said they will likely move the case to a military tribunal if they lose the appeal, which could imperil future prosecutions of other terrorism suspects in the civilian court system.”); see also Philip Shannon and Eric Schmitt, “Threats and Responses: The 9/11 Suspect; White House Weighs Letting Military Tribunal Try Moussaoui, Officials Say,” *New York Times*, November 10, 2002; Andrew Cohen, “A Secret Trial for Moussaoui?,” *CBS News.com*, November 7, 2002, available at <http://www.cbsnews.com/stories/2002/11/07/news/opinion/courtwatch/main528515.shtml> (accessed September 16, 2003).

<sup>538</sup> Katharine Q. Seelye, “Justice Department Decision to Forego Tribunal Bypasses Pentagon,” *New York Times*, December 13, 2002, available at [http://www.law.uchicago.edu/tribunals/nyt\\_121301.html](http://www.law.uchicago.edu/tribunals/nyt_121301.html) (accessed August 5, 2003).

<sup>539</sup> Joseph I. Lieberman, “No Excuse for Second-Class Justice,” *Washington Post*, January 2, 2002 (quoting Vice President Cheney), available at [http://www.law.uchicago.edu/tribunals/wp\\_010202.html](http://www.law.uchicago.edu/tribunals/wp_010202.html) (accessed August 5, 2003).

<sup>540</sup> Larry Margasak, “Government Argues Moussaoui Can’t Quiz Witness,” Associated Press, June 3, 2003, available at <http://www.fortwayne.com/mld/fortwayne/news/5998956.htm> (accessed August 21, 2003).

<sup>541</sup> The court has, over Moussaoui’s objections, appointed stand-by counsel to assist Moussaoui’s defense and act on his behalf. See Order, *U.S. v. Moussaoui* (E.D. Va. June 14, 2002) (No. 01-455-A) (dismissing court-appointed counsel, authorizing Moussaoui to represent himself (pro se), and mandating appointment of stand-by counsel), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss61402proseord.pdf> (accessed August 21, 2003); see also Order, *U.S. v. Moussaoui* (E.D. Va. September 26, 2002) (No. 01-455-A) (denying defendant Moussaoui’s Motion to Stop Dunham [sic] Playing the Superstar), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss92602ord.pdf> (accessed August 21, 2003).

<sup>542</sup> Toni Locy, “Some Fear Moussaoui-Trial Mockery,” *USA Today*, May 16, 2002 (“some legal experts and lawmakers say that... Ashcroft’s fears of a circus-like trial might be realized.... ‘If they don’t watch it, a man like that will use our courts to his advantage and make a mockery out of our rules and our jurisprudence,’ says Sen. Richard Shelby, R-Ala.”), available at <http://www.usatoday.com/news/washington/2002/05/17/moussaoui.htm> (accessed August 21, 2003); Jim Malone, “U.S. Prosecutors Prepare for Moussaoui Trial,” *VOANews.com*, December 14, 2001 (“the Moussaoui trial is certain to draw intense media attention, and some analysts fear that the proceedings could take on a circus-like atmosphere”), available at <http://www.help-for-you.com/news/Dec2001/Dec14/PRT14-17Article.html> (accessed August 21, 2003).

<sup>543</sup> Superseding Indictment, pp. 6, 10-13, 17, *U.S. v. Moussaoui* (E.D. Va. July 16, 2002) (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss71602spind.pdf> (accessed August 21, 2003).

<sup>544</sup> “Under interrogation, Bin al-Shibh has reportedly given the CIA some valuable information, but also one highly unwelcome tidbit: Al Qaeda thinks Moussaoui is as crazy as we do.” Jonathan Turley, “Sanity and Justice Slipping Away,” *Los Angeles Times*, February 10, 2003.

<sup>545</sup> Philip Shenon, “Setback for Government in Bid for 9/11 Trial,” *New York Times*, June 3, 2003 (quoting Judge Brinkema).

<sup>546</sup> See Brief for Petitioners-Appellants, p. 13, *U.S. v. Moussaoui* (4<sup>th</sup> Cir. March 14, 2003) (No. 03-4162). (The January 31, 2003 order itself has not been released publicly.)

<sup>547</sup> *Ibid.*, p. 3.

<sup>548</sup> *Ibid.*, p. 15.

<sup>549</sup> Ibid., p. 31.

<sup>550</sup> “U.S. Fears Damage From Moussaoui Witness,” Associated Press, June 4, 2003, available at <http://asia.news.yahoo.com/030603/ap/d7refao80.html> (accessed August 22, 2003).

<sup>551</sup> *U.S. v. Moussaoui* (4<sup>th</sup> Cir. June 26, 2003) (No. 03-4162), pp. 13-14, available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss62603opn.pdf> (accessed August 22, 2003).

<sup>552</sup> Government’s Position Regarding the Court-Ordered Deposition, p. 1, *U.S. v. Moussaoui* (E.D. Va. July 14, 2003) (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss71403pnodep.pdf> (accessed August 5, 2003).

<sup>553</sup> Ibid. (“The Government recognizes that the Attorney General’s objection means that the deposition cannot go forward and obligates the Court now to dismiss the indictment unless the Court finds that the interests of justice can be served by another action.”) See also Jerry Markon, “Moussaoui Prosecutors Defy Judge,” *Washington Post*, July 15, 2003 (“The expected punishment is the dismissal of the charges, but [Judge] Brinkema could choose lesser consequences, such as removing the death penalty as an option, reducing the charges or striking all mentions of Binalshibh from the indictment”).

<sup>554</sup> Philip Shenon, “Future of Terror Case Is In Judge’s Hands,” *New York Times*, July 16, 2003 (“Administration officials said that if the charges were dismissed, Mr. Moussaoui would almost certainly be moved to a military tribunal, ending the Justice Department’s involvement in the case and jeopardizing plans to prosecute other Qaeda suspects in civilian court”). But see William J. Haynes, General Counsel of DOD: “Mr. Moussaoui is in the Article III courts, and as far as I’m concerned that’s where he’ll remain. So I don’t want to speculate about what might happen to him.” American Enterprise Institute, Panel Transcript: “Prosecuting Terrorists, Civil or Military Courts?” August 8, 2003, available at <http://www.aei.org/events/eventID.556/transcript.asp> (accessed August 22, 2003). On August 29, 2003, Judge Brinkema ordered similar satellite depositions for two additional suspected terrorists in U.S. detention. On September 10, 2003, the government notified the court that it would refuse to comply with this order as well. Order, *U.S. v. Moussaoui* (E.D. Va. August 29, 2003) (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss82903ord.pdf> (accessed September 12, 2003); Government’s Position Regarding the Depositions Ordered August 29, 2003, *U.S. v. Moussaoui* (E.D. Va. September 10, 2003) (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss91003gopp.pdf> (accessed September 12, 2003).

<sup>555</sup> Eric Lichtblau, “Bush Declares Student an Enemy Combatant,” *New York Times*, June 23, 2003.

<sup>556</sup> Indictment, *U.S. v. Al-Marri* (C.D. Ill. May 16 2003) (No. 03-10044) available at <http://news.findlaw.com/hdocs/docs/almarri/usalmarri2003ind.pdf> (accessed August 23, 2003). Other documents in the case are available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index2.html> (accessed August 23, 2003).

<sup>557</sup> Eric Lichtblau, “Bush Declares Student an Enemy Combatant,” *New York Times*, June 23, 2003.

<sup>558</sup> Al-Marri’s filings alleged that the FBI searched his house and seized evidence without his consent and without a warrant on December 11, 2001. The same day, on which Al-Marri had been fasting in observance of Ramadan, he asserts that the FBI interrogated him at their office for six hours, without permitting him to eat until they finished questioning him at 10:00 p.m. Memorandum of Law in Support of Pretrial Motions, pp. 12, 18, *U.S. v. Al-Marri* (C.D. Ill. June 18, 2003) (No. 03-10044), available at <http://news.findlaw.com/hdocs/docs/almarri/usalmarri61803dmol.pdf> (accessed August 21, 2003). See also Michael Isikoff and Mark Hosenball, “Distorted Intelligence?,” *Newsweek* Online, June 25, 2003, available at <http://www.msnbc.com/news/931306.asp?0cv=KB10> (accessed August 6, 2003).

<sup>559</sup> Petition for a Writ of Habeas Corpus, p. 9, *Al-Marri v. Bush* (C.D. Ill. July 7, 2003) (No. 03 CV 1220), available at <http://news.findlaw.com/hdocs/docs/almarri/almarribush70703pet.pdf> (accessed August 21, 2003). The facts and procedural history are recounted in pages 3-12 of the Petition.

<sup>560</sup> Ibid., pp. 10-11. Copies of the motion to dismiss, the presidential determination, and the order dismissing the proceedings are at Exhibits 6 and 7 to the habeas corpus petition.

<sup>561</sup> Ibid., p. 8.

<sup>562</sup> Ibid., Exhibit 6.

<sup>563</sup> Department of Defense, News Release: “Enemy Combatant Taken into Custody,” June 23, 2003, available at <http://www.globalsecurity.org/military/library/news/2003/06/mil-030623-dod01.htm> (accessed August 6, 2003). Officials implied that relevant information had been obtained from Khalid Shaikh Mohammed. “Qatar Man Named al-Qaeda Enemy Combatant,” *USA Today/AP*, June 23, 2003.

<sup>564</sup> Michael Powell, “No Choice but Guilty,” *Washington Post*, July 29, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A59245-2003Jul28&notFound=true> (accessed August 21, 2003).

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## CHAPTER FIVE: THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS

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- <sup>697</sup> Carlotta Gall, “U.S. Military Investigating Death of Afghan in Custody,” *New York Times*, March 4, 2003, *available at* <http://groups.yahoo.com/group/MewBkd/message/2465> (accessed August 31, 2003); “Prisoners ‘Killed’ at U.S. Base,” BBC News, March 6, 2003, *available at* [http://news.bbc.co.uk/2/hi/south\\_asia/2825575.stm](http://news.bbc.co.uk/2/hi/south_asia/2825575.stm) (accessed August 31, 2003).
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- <sup>700</sup> *Judgment on the Interrogation Methods Applied by the GSS*, (Supreme Court of Israel, sitting as the High Court of Justice, September 6, 1999), *available at* <http://www.derechos.org/human-rights/mena/doc/torture.html> (accessed August 31, 2003).
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- <sup>717</sup> “Bosnia Violated Rights of Terror Suspects Handed to U.S. Court,” Agence France Presse, April 4, 2003.
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- <sup>731</sup> Ibid.
- <sup>732</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S.. 150 available at [http://193.194.138.190/html/menu3/b/o\\_c\\_ref.htm](http://193.194.138.190/html/menu3/b/o_c_ref.htm) (accessed August 3, 2003). Article 33 prohibits returning an asylum seeker to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, a principle known as *nonrefoulement*.
- <sup>733</sup> See Security Council Resolution No. 1373 on threats to international peace and security caused by terrorist acts, UN doc. no. S/RES/1373 (2001), September 28, 2001 [hereinafter Resolution 1373].
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- <sup>742</sup> Border Protection (Validation and Enforcement Powers) Act 2001, Section 2.5 (Austl.).
- <sup>743</sup> The Migration Amendment (Excision for Migration Zone) Act 2001 (Austl.).
- <sup>744</sup> Of these three countries, only Cambodia has signed the 1951 Refugee Convention and Protocol.
- <sup>745</sup> The Hon. Peter Reith, MP, Minister for Defence, “Transcript of the Hon. Peter Reith, MP Television Interview – *Insiders*, ABC TV,” September 23, 2001, available at <http://www.minister.defence.gov.au/ReithSpeechtpl.cfm?CurrentId=1031> (accessed September 5, 2003).

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