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THE WAR ON TERRORISM

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**Bush Writes Off Congress, Takes Reins in War; Law: Some Question the
Constitutionality of the President's Decision to Fight Terrorism on U.S. Soil His
Way, Without Lawmakers' Approval.**

Los Angeles Times

December 10, 2001

David G. Savage

The message from the Senate Democrats to the Bush White House last week was: Let's be partners in the war against terrorism.

"That's how the founders and our Constitution intended it. Under our system, none of us has a monopoly on authority," Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) told Atty. Gen. John Ashcroft.

The American people will have greater confidence if the rules for this new war are "undertaken by partners in our country's effort against a common and terrible enemy," said Leahy, the Democrats' point man.

The Bush team responded with a clear but polite "No, thank you."

"The constitutional founders didn't expect us to have a war conducted by committee," Ashcroft told his former Judiciary Committee colleagues. "The Constitution vests the president with the extraordinary and sole authority, as commander in chief, to lead our nation in times of war."

The back-and-forth exchange at a committee hearing Thursday illustrated the growing power struggle playing out in Washington over a war whose boundaries are yet to be drawn.

No one has questioned the president's authority to send U.S. troops into battle in Afghanistan. But controversy has arisen

over a series of orders issued by President Bush and his attorney general that expand the government's power to fight terrorism at home--from detaining hundreds of foreigners to holding military tribunals to prosecute noncitizens.

Truman's Action in 1952 Was Overruled

On the question of presidential authority, the Republicans' favorite role model is Democratic President Franklin D. Roosevelt. During World War II, Roosevelt ordered the detention of Japanese Americans on the West Coast and a secret military trial for eight Nazi saboteurs who had landed on the Atlantic beaches.

The wartime experience of FDR's successor, however, and the legal precedent it set for a foreign-domestic delineation of presidential power, is often forgotten.

In 1952, with U.S. troops fighting in Korea, President Harry S. Truman seized control of the nation's steel mills when unions went on strike and ordered military troops to keep the mills operating. The president cited his powers as commander in chief, but the Supreme Court ruled he had gone too far.

Justice Robert H. Jackson, who had served under FDR, said the president's wartime power is limited on the home front, especially when he acts on his own. Truman had not asked for congressional approval before seizing the mills.

"We should not use this occasion to circumscribe, much less contract, the lawful role of the President as Commander in Chief," Jackson wrote. "I should indulge [him] the widest latitude . . . to command the [military], at least when turned against the outside world for the security of our society. But when it is turned inward, it should have no such indulgence. His command power is not such an absolute, . . . but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress."

Nevertheless, Bush and his advisors are determined to fight terrorism on their own terms and without interference by Congress.

And so long as the public strongly supports the president's efforts, Congress is unlikely to stand in the way, or even demand a voice in making policy. Concern for civil liberties aside, the political risk of appearing to side with the terrorists could be too high.

On Sept. 14, just three days after the terrorist attacks, Congress passed a broadly worded resolution authorizing Bush to "use all necessary and appropriate force" to retaliate and to "prevent any future acts" of international terrorism.

Since then, the government has detained more than 1,200 suspects and refused to say who they are and why they are being held. New rules allow federal agents to listen in on some jailhouse conversations between these suspects and their lawyers. Ashcroft has increased FBI surveillance of groups that might have links to terrorists. And the White House has said it may use military tribunals to prosecute some noncitizens charged with terrorism offenses.

Grudgingly, Ashcroft negotiated with Leahy to win congressional approval of

counter-terrorism legislation. But on other efforts--including the military trials--the administration has said that it can proceed without the approval of Congress.

"We're fighting a war," Bush said last week about the military tribunals. "I need to have that extraordinary option at my fingertips."

The Senate Democrats say they can see a need for this "extraordinary option" but do not see why it should not be established--and restricted--by law.

On Capitol Hill, this dispute is partisan and personal.

The Senate Judiciary Committee has been the scene of bitter battles between liberals and conservatives and, as the GOP senator from Missouri, Ashcroft was one of its most aggressively conservative members.

When Bush chose him as attorney general, all but one of Ashcroft's former Democratic colleagues voted against him. Wisconsin's Sen. Russell D. Feingold said he knew Ashcroft personally and did not think he would be the firebrand that critics had conjured up.

Since Sept. 11, however, Feingold has emerged as Ashcroft's sharpest critic in the Senate, and during Thursday's hearing, they engaged in several frosty exchanges.

Ashcroft also has a testy relationship with Leahy. During the Clinton years, Leahy chafed at the moves by Ashcroft and other conservative Republicans to block the president's nominees to the federal courts. This year, the two have switched sides, and Leahy and the Democrats are blocking a series of Bush nominees.

Many Disapprove of Military Tribunals

In general, the senators have mastered the art of smiling through clenched teeth. But on the historic and controversial questions surrounding the nation's response to the

Sept. 11 attacks, Bush administration officials have generated animosity by making clear that they are not interested in collaborating with Congress.

White House lawyers have been determined to assert the president's legal power. They wrote the Nov. 13 order authorizing military trials and gave it an unusually broad reach.

It allows the president to detain and try in military court noncitizens if they have "engaged in, aided or abetted, or conspired to commit" acts of terrorism. The order also appeared to close the courthouse door to any appeals. "Military tribunals shall have exclusive jurisdiction" over these individuals, and they may not "seek any remedy or maintain any proceeding . . . in any court of the United States."

More recently, Ashcroft and other administration officials have said that they plan to use military trials for "war crimes" only, and probably only for terrorists captured abroad.

During Thursday's hearing, Leahy announced that he had drafted legislation to allow limited use of the military trials. Sens. Dianne Feinstein (D-Calif.) and Charles E. Schumer (D-N.Y.) also said they were interested in pressing a bill that would authorize the military trials.

"We should pass an authorizing resolution that really gives you, as the executive branch, the authority to do what you need and also states some things like the standard of proof, like whether it's open or partially closed [and] the right to counsel," Feinstein said.

But the administration's lawyers said privately that they were not interested in help from the Democrats.

"They have decided they are not going to stand in the road and block the way" on

tribunals, but "now they want to get in the front seat and drive," one administration official said after the hearing.

Dispute Over Power in Wartime Not New

This clash also reflects a profound and recurring constitutional dispute over who has the power to set the rules in wartime.

The Constitution seems to give authority to Congress. It says, "Congress shall have the power to declare war . . . and to make rules concerning captures on land and water." Congress also has the power "to define and punish . . . offenses against the law of nations . . . [and] to constitute tribunals inferior to the United States."

In contrast to these broad rule-making powers of Congress, the president is described as the executive who carries out the rules. "The President shall be the commander in chief of the Army and Navy," the Constitution says, and "he shall take care that the laws be faithfully executed."

But over two centuries of American history, the balance of power has shifted toward the president. After World War II and the advent of nuclear weapons, it was commonly said that the president needed the power to go to war instantly, without waiting for congressional approval.

And, despite much debate and hand wringing, Congress has not moved aggressively to assert its own authority.

This fall, when the White House took up the idea of military trials, the president and his advisors did not even bother to tell members of Congress, let alone ask for their approval or input.

In this instance, the president's conservative lawyers, who usually are devoted to the Constitution's "original meaning," are believers in the evolving Constitution. Regardless of what was

originally intended, they say the president has the "sole authority" to lead in wartime, as Ashcroft put it.

Siding with the White House, Senate Republicans say they see no need for legislation.

"We're at war," Sen. Orrin G. Hatch (R-Utah) advised his Democratic colleagues Thursday. "I would hope that in this time of crisis we would all check our egos."

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**Ashcroft Defends Anti-Terrorism Steps;
Civil Liberties Groups' Attacks 'Only Aid Terrorists,' Senate Panel Told**

The Washington Post

December 7, 2001

Dan Eggen

Attorney General John D. Ashcroft resolutely defended the Justice Department's anti-terrorism tactics yesterday, telling a Senate committee the measures are necessary to prevent future attacks and suggesting that criticism of them aids the terrorist cause.

Peppered by congressional skepticism but bolstered by overwhelming public support in recent weeks, Ashcroft appeared before the Senate Judiciary Committee to champion Bush administration strategies since the Sept. 11 attacks. The methods include the detention of hundreds of foreign nationals and plans to try alleged terrorists and their accomplices before military tribunals.

Ashcroft accused unidentified critics of exaggerating or mischaracterizing administration policies, saying the Justice Department "has sought to prevent terrorism with reason, careful balance and excruciating attention to detail."

"We need honest, reasoned debate, not fear-mongering," Ashcroft said. "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to . . . enemies and pause to . . . friends."

Ashcroft's bold language prompted protest from interest groups, who, along with some in Congress, have criticized government tactics as civil liberties infringements. But Judiciary Committee

members were circumspect in comparison, confining most questions to specific policy issues and appearing reticent to pick a public fight with an attorney general leading a popular anti-terror campaign. The most spirited debate centered not on terrorism but on gun policy, as several Democratic senators criticized Ashcroft for preventing the FBI from checking whether some of the hundreds of people detained in the post-Sept. 11 investigation had sought to purchase guns in the United States.

Committee Chairman Patrick J. Leahy (D-Vt.), who has complained about a lack of Senate input into the anti-terror program, said he planned to continue offering congressional guidelines for conducting military tribunals, despite little apparent support for the idea among Senate and House leaders.

"This is not a question of whether you are for or against terrorists," Leahy said after the hearing. "Everyone is against terrorists. This is about whether we are adequately protecting civil liberties."

Civil liberties advocates were similarly unhappy with Ashcroft's suggestions that skepticism about the anti-terror plan is unwarranted while the nation is at war.

"It is sad that the attorney general treats honest criticism as un-American and unpatriotic," said Georgetown University law professor Samuel Dash, a Democrat who served as the Senate Watergate Committee's chief counsel. "These are

fear tactics that chill debate. President Nixon also treated critics as enemies."

Committee Republicans rallied around their former colleague. Sen. Orrin G. Hatch (Utah), the ranking GOP member who helped Ashcroft win his contentious confirmation last January, praised Ashcroft's performance since Sept. 11 and decried the "hysterical concerns" of some detractors.

"Certainly the American people are not watching us quibble about whether we should provide more rights than the Constitution requires to the criminals and terrorists who are devoted to killing our people," Hatch said. "They are interested in making sure that we protect our country against terrorist attacks."

Ashcroft, a conservative former U.S. senator whose appointment as attorney general was bitterly opposed by Leahy and most other Senate Democrats, has emerged as one of the key figures in the Bush administration's war on terrorism.

He pushed Congress to quickly approve legislation in October that expanded the ability of law enforcement and intelligence agencies to tap phones, monitor Internet traffic and conduct other forms of surveillance in pursuit of terrorists.

Ashcroft has also issued administrative rules allowing the monitoring of privileged communications between attorneys and detainees who are suspected terrorists; ordered prosecutors to seek interviews with more than 5,000 young, mostly Middle Eastern men visiting the United States; and has presided over a broad national effort to detain hundreds of foreign nationals accused of immigration violations or minor crimes -- but has refused to identify most of them or reveal information about many of their cases.

The government also has threatened to deport or jail illegal immigrants who

decline to cooperate with authorities, while offering visas and potential citizenship to those who provide information on terrorist networks.

The measures have proven popular with the public, which, polls show, overwhelmingly favors military tribunals and aggressive detention policies. But the effort has prompted rising condemnation from civil liberties groups, Arab American organizations and a vocal minority in the House and Senate. Yesterday's appearance before Leahy's panel was the latest in a string of public appearances and interviews in which Ashcroft responded to the criticism.

In his testimony, Ashcroft said the monitoring of attorney-client communications, which applies to just 16 federal prisoners, requires the government to notify the targets beforehand and prohibits use of the information by prosecutors or law enforcement agents except to forestall an imminent terrorist attack.

Ashcroft also rejected complaints that some detainees do not have adequate legal representation or have been prevented from seeking counsel. One man detained for nearly two months, Yemeni citizen Ali Maqtari, testified earlier this week that he was allowed minimal contact with his attorney and family, and was threatened by investigators while in custody. Authorities say he is innocent. But Ashcroft, holding a "terrorist manual" allegedly used by Osama bin Laden's al Qaeda network, warned that terrorists are instructed to concoct stories of mistreatment and otherwise use the nation's open society to their advantage in planning and staging attacks. "In this manual, al Qaeda terrorists are now told how to use America's freedom as a weapon against us," Ashcroft said. "We are at war with an enemy that abuses

individual rights as it abuses jetliners. It abuses those rights to make weapons of them with which to kill Americans." Ashcroft strongly defended Bush's order allowing military tribunals, though he referred specific questions about how the courts would be run to Defense Secretary Donald H. Rumsfeld, who would oversee the system.

In offering a promise of "full and fair proceedings," Ashcroft joined administration officials who have sought to reassure lawmakers that the tribunals would be used in narrow circumstances involving alleged war criminals. But Ashcroft also acknowledged that the order can be applied to any noncitizen, allows proceedings to be held in secret and provides for indefinite detention of alleged war criminals. Nonetheless, criticism of the plan is overblown, Ashcroft said, and "charges of kangaroo courts and shredding the Constitution

give new meaning to the term 'the fog of war.' "

But while several Democratic senators, including Russell Feingold (Wis.) and Edward M. Kennedy (Mass.), expressed misgivings about some the anti-terror tactics, there were relatively few heated exchanges between them and Ashcroft. In response to his suggestion that criticism might aid terrorists, Feingold asked Ashcroft for "assurance that you do not consider the hearings that we have been holding . . . as . . . somehow aiding the terrorists by eroding national unity."

Ashcroft responded: "I did indicate that we need reasoned discourse as opposed to fear mongering. And I think that's fair. This is the place where reasoning and discourse take place."

Staff writer Jim McGee contributed to this report.

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Liberty and the Pursuit of Terrorists

The Washington Post

November 25, 2001

Charles Lane

If civil libertarians of the left and right agree on anything, it is this: In its war against terrorism, the Bush administration is about to trample the Constitution, and with it, our personal freedoms. The Justice Department's plan to eavesdrop on selected conversations between federal detainees and their attorneys is "terrifying," says Laura Murphy of the liberally oriented American Civil Liberties Union. President Bush's potentially secret anti-terrorism military tribunals are Stalinist, says William Safire, the conservatively inclined New York Times columnist.

Sincere as it may be, this criticism is overblown. There's no need, or reason, to discuss the threat to liberty posed by the U.S. government in the same breath as the threat posed by terrorism itself.

Viewed strictly in legal and constitutional terms, the Bush approach does raise troubling questions. If the administration makes aggressive use of the new wiretapping, detention and intelligence-gathering powers granted to it by Congress, as Attorney General John Ashcroft has pledged, more people would likely be prosecuted and punished than would have been the case under pre-Sept. 11 laws. And they may be jailed or otherwise deprived of their rights with less due process than before.

But viewed as the latest chapter in the long-running American story about how to balance security and liberty in wartime — a story that dates back to the early days of the republic -- today's anti-terror

crackdown seems quite defensible, even moderate. Moreover, if the past is any guide, the long-term consequence of a U.S. victory in the current war could well be more freedom and tolerance, both here and abroad.

There are no certain templates when it comes to managing the trade-off between safety and freedom. The Constitution has been a consideration for past war presidents, but not necessarily a more important one than the perceived gravity of the threat the country faced. Without an act of Congress, President Abraham Lincoln suspended the right to seek habeas corpus (an ancient judicial writ designed to free the wrongly imprisoned) during the Civil War, and authorized military trials for alleged draft resisters or Southern sympathizers. Lincoln believed he had to go above and beyond the Constitution to preserve the Republic, without which the Constitution itself would be a dead letter. "Are all the laws but one to go unexecuted," he asked his critics in the dark days of 1861, "and the government itself to go to pieces, lest that one be violated?"

Twentieth-century presidents embraced Lincoln's logic. Woodrow Wilson let Socialist Party leader Eugene V. Debs be prosecuted and jailed for publicly opposing the World War I draft; Wilson's postmaster general drove antiwar newspapers out of business by denying them access to the mails. Following Japan's attack on Pearl Harbor, Franklin D. Roosevelt ordered the internment of

120,000 people of Japanese ancestry, most of them U.S. citizens.

Historians still debate the legitimacy of these decisions. Lincoln's have generally been vindicated; Wilson's and FDR's have not. What's striking today, though, is that nothing like these measures is even contemplated. Bush's response is comparatively well-tailored to a clearly urgent threat. The Justice Department has held hundreds of suspects from Muslim countries in secret detention and has ordered the questioning of 5,000 other recent arrivals. This has a whiff of ethnic profiling about it. But the government has a plausible legal claim -- a visa violation, usually -- for holding most of the detainees. And the president, joined by political leaders of all parties and regions, has gone out of his way to urge tolerance.

Lincoln's military tribunals tried U.S. citizens, sometimes for little more than antiwar speech. By contrast, the military trials Bush authorized two weeks ago are aimed at non-citizens directly involved in terrorism, or who may be captured in battle. Bush made that decision after the failure of more legalistic pre-Sept. 11 approaches to terrorism. The Clinton administration emphasized prosecution in civilian courts; former national security adviser Sandy Berger has said that he could not accept a 1996 offer by Sudan to hand over Osama bin Laden because FBI officials believed there wasn't enough evidence to indict him in federal court. U.S. juries did eventually convict several bin Laden underlings, but only after long trials in which delicate government information had to be disclosed -- much of it undoubtedly of use to bin Laden's terrorist planners.

The precedent for Bush's secret tribunals for persons who he has "reason to believe" are involved in terrorism -- is an obscure (until recently) 1942 Supreme

Court case, *Ex Parte Quirin*. In that case, eight German soldiers were arrested in the United States while on a covert campaign of sabotage aimed at stores, bridges and utilities. To keep them out of civilian courts, Roosevelt ordered them charged with violating the laws of war and had them tried in secret by a panel of military officers, which sentenced them to death, subject to FDR's approval. The Supreme Court consented, saying that constitutional guarantees did not apply to foreign combatants charged with war crimes within the United States. In so doing, the court carved out a new distinction between military justice for noncitizens and Lincoln-style military tribunals for U.S. citizens, which have been barred since an 1866 decision known as *Ex Parte Milligan*.

As a case study in what happens to due process when the president acts as prosecutor and judge as well as commander in chief, *Quirin* is not reassuring. The trial was held in secret not only to protect legitimate intelligence sources and methods, but also to conceal the embarrassing fact that J. Edgar Hoover's FBI had failed to uncover the plot until one of the Germans came to Washington and offered a detailed confession. (FDR commuted the sentences of that saboteur and another; they were later freed and sent back to Germany after the war by President Harry S. Truman). Supreme Court justices had serious misgivings, but were swayed by pressure from the administration and an emotional private appeal from Justice Felix Frankfurter, who argued that anything but a unanimous verdict in favor of the president would undermine U.S. military morale.

Then again, the saboteurs were fighting for Hitler. If they had been seen sneaking around a U.S. base in Europe, they would have been shot on the spot. Morally, if

not legally, it's hard to understand why they should have enjoyed extra protection simply because they were sneaking around within the United States. The last thing Roosevelt wanted to do in democracy's life-and-death struggle with Nazism was to give the enemy a perverse incentive to infiltrate the country and engage in terrorism. The same can be said of bin Laden and his clandestine army. The real lesson of Quirin is that the big stick of a military tribunal should be coupled with the carrot of amnesty for those terrorists (not including al Qaeda's top leaders) who lay down their arms and cooperate with U.S. intelligence.

Certainly, liberated people all over the world are glad that Roosevelt waged all-out war on Nazism and Japanese imperialism, whatever terrible mistakes he made on the home front. Among the grateful are millions of African Americans and women, whose rights expanded in the postwar years, in part because they could cite the anti-racist nature of the war against Germany. Similarly, Lincoln may have traduced habeas corpus, but the Union eventually freed the slaves and saved the world's greatest experiment in self-government.

America's wars -- including World War I, during which the government's violations of civil liberty seemed least justifiable, either then or now -- are part of a larger narrative of national growth and integration in which freedom and individual rights have, over time, ascended. This has by no means been a smooth process. The Civil War gave way to the Ku Klux Klan; World War I segued into the Palmer Raids, a sweeping round-up of suspected anarchists and

communists after a series of bombings; and World War II gave way to the anti-communist excesses of the 1950s. But Americans today enjoy far greater legal rights of all kinds, and our society is more inclusive than it was in 1863.

Throughout history, civil libertarians have played a vital role in defending the wrongly accused and making the case for the smallest feasible governmental intrusions on constitutional liberty. They are playing that honorable role now. Yet it is precisely through such intense political debate and struggle, and not only through lawsuits, that enduring gains for individual rights have been achieved. If Bush has not gone even further in cracking down on terrorism it is because he is constrained by a legal and political culture far more favorable toward civil liberties than anything Lincoln, Wilson or FDR could have imagined.

And don't underestimate the net increase in freedom abroad that could yet result from American victory now. (Witness the dawn of liberty, however tentative, for women in Kabul.) The United States confronts not only a criminal menace to its people and institutions, but also an armed campaign to impose a quasi-totalitarian political ideology, masquerading as religion, on a vast region of the earth. Our government needs to proceed with maximal respect for fundamental human rights as it goes about winning this war. One of the terrorists' goals is to provoke an authoritarian overreaction by the United States and other democracies. But it's way too early to worry that they've succeeded.

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Ideas & Trends: Executive Decisions; A Penchant for Secrecy

The New York Times

May 5, 2002

Linda Greenhouse

A FEDERAL judge's decision last week that the Justice Department's detention of a Jordanian student was a misuse of the material witness statute served as a reminder that nearly eight months after Sept. 11, the balance between individual liberty and national security remains highly unstable.

It was never in doubt that the terrorist attacks would alter the balance between these two values. American history is filled with examples of how domestic and foreign threats, perceived or -- as today -- real, provoked shifts in power away from the rights of the individual and toward the promise of safety and order.

Even against that background, the Bush administration's pursuit of the domestic war on terrorism into uncharted and ambiguous legal territory is striking. Many of its choices reveal the same instinct for secrecy and penchant for unilateral executive-branch action that the administration has displayed on political fields of battle unrelated to terrorism.

In fact, long after judges have ruled on challenges to the prolonged detentions, closed immigration hearings and other policies that Attorney General John Ashcroft is defending in courts around the country, the legacy of this chapter of the perennial effort to calibrate the balance between liberty and security may lie in whatever verdict the political as well as the legal system renders on the value of transparency in government.

Secrecy is at the heart of an escalating battle over the identities of hundreds of detainees, mostly Muslim men from Arab and Asian countries, being held for the federal government in New Jersey county jails. Responding to a suit by the American Civil Liberties Union, a state court applied New Jersey's right-to-know law and ordered the names made public. The secret detentions were "odious to a democratic society," ruled Judge Arthur N. D'Italia of Superior Court.

The Justice Department not only appealed, but last month issued a regulation that bars state and local governments from making the names public. The order, which did not involve Congress, injected complex questions of federal pre-emption and separation of powers into the mix. Ronald K. Chen, associate dean of Rutgers School of Law-Newark, who is handling the case for the A.C.L.U., said that by issuing the new regulation, the administration was "using the continued latitude the public is willing to give in order to push back the frontiers of what the government can keep secret."

The sense that the administration is using the war on terrorism to accomplish long-held policy goals is not limited to liberals. "They are taking language off the shelf that's been ready to go into any vehicle," said Roger Pilon, vice president for legal affairs at the Cato Institute, the libertarian research group. He was particularly critical of a provision the administration inserted into the U.S.A. Patriot Act that enhanced

the government's ability to seize assets through forfeiture.

The Cato Institute has been critical of forfeiture for years, but Mr. Pilon had a broader criticism: "Government grows each time there's a crisis," he said, "and this is an executive branch that thinks it's a law unto itself. Your guard has to be up."

ONE surprising development was the recent indictment of a criminal defense lawyer, Lynne F. Stewart, charged with providing material aid for her client, an Egyptian sheik, now serving a life sentence for an earlier plot to destroy the World Trade Center and other New York landmarks. Whatever the merits of the unusual charges, the Justice Department's decision to turn its prosecutorial attention to the defense bar fit with a view widely held in some Republican circles that lawyers are the problem, whether defending tort plaintiffs, poor people or terrorists.

In 1996, for example, Congress barred Legal Services Corporation lawyers from making specific arguments on behalf of welfare recipients, restrictions the Supreme Court overturned last year as violating the First Amendment. In going after the pugnacious Ms. Stewart, who has also represented Weather Underground radicals, Mafia defendants and other unpopular clients, the department picked a target unlikely to evoke widespread sympathy. She denies the charges.

The indictment left many lawyers troubled but uncertain how to respond in the absence of much explanation. "I really hope they've got some evidence," Professor Chen said. "Otherwise it's a very dangerous precedent for the adversarial process."

More troubling to some is a Justice Department policy issued last fall that

authorizes monitoring of conversations between defense lawyers and their imprisoned but not necessarily convicted clients. The fact that lawyers will be notified, and privileged information about defense strategy will supposedly not be forwarded to prosecutors, has not allayed concerns of the Association of the Bar of the City of New York, among others. Its committee on professional responsibility issued a critical statement last month, saying, "even in the war on terrorism, the basic principles on which our system of justice is balanced ought not to be tampered with."

Robert J. Anello, the chairman of the bar association committee, said the major flaw was that the attorney general, rather than a magistrate or judge, will select the lawyers to be monitored. A garden-variety search warrant requires judicial approval, Mr. Anello said. "Getting a search warrant is not terribly difficult," he said, adding that if the attorney general has enough information to decide to eavesdrop on a specific lawyer, "that should be enough to convince a magistrate."

ANY attorney general needs the layer of neutrality a judge provides, Mr. Anello said. "You need to check someone's predisposition," he said. "Ashcroft's is to root out crime at all costs, but like all well-intentioned people, he needs to be checked."

Ronald D. Rotunda, a law professor at the University of Illinois and a former consultant to Kenneth W. Starr's independent counsel investigation, said that while it was "fair to raise questions," the administration's critics were too quick to assume the worst. "What amazes me is how careful the government has been," he said, adding that there were plausible legal arguments for the monitoring program.

However, Professor Rotunda said the administration had hurt itself by not

making its case publicly. "I've heard better arguments than they're giving," he said. "I hope they give better explanations in the future."

When criticism has been impossible to ignore, as happened with the executive order creating military tribunals to try suspected terrorists, the administration's response has been to tack slightly and recharacterize the criticism's target as a work in progress rather than a final product. The Pentagon turned down requests from legal groups to circulate the regulations for public comment before issuing them in late March, four months after the bare-bones executive order had raised many questions about how the tribunals would work.

The regulations addressed some of the questions but left many critics unsatisfied. Any military tribunal established by executive order rather than by legislation is "flatly unconstitutional," Prof. Neal K. Katyal of the Georgetown Law Center and Prof. Laurence H. Tribe of Harvard Law School argue in an article in the current Yale Law Journal. Their target is not tribunals as such but rather the "exceptional unilateralism" that the president's order exemplified.

"Our position is that the Constitution sets up a structure whereby the concurrence of all three branches is normally needed in order to authorize a decisive departure

from the legal status quo," the two professors write, adding: "Under the order, the executive branch acts as lawmaker, law-enforcer and judge." It is the kind of "accumulation of all powers," they say, that James Madison described in the Federalist Papers as "the very definition of tyranny."

Others reject such dire views. "We've been reasonably true to our values and constitutional structure," said Douglas W. Kmiec, an assistant attorney general in the Reagan administration who is now law school dean at the Catholic University of America. "We have never confronted a problem of this magnitude, and we're trying to adjust laws and procedures in a responsible way, a responsibly aggressive way. An equally robust defense bar will push the envelope back in the opposite direction. That usually brings us to the right place."

Whether such optimism is warranted -- and past experience suggests it may not always be -- will not be evident until the wavering balance between liberty and security, sunlight and shadow, finds its new equilibrium. For now, it is enough to suggest that history will judge this challenging period in part by where the balance finally comes to rest.

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Historically, Laws Bend in Time of War, Rehnquist Says; Courts: Chief Justice
Contends Judges Are Inclined to Back the Government in Crises.
Lincoln's Suspension of Habeas Corpus Is Cited.

Los Angeles Times

June 15, 2002

David G. Savage

Chief Justice William H. Rehnquist, reviewing the history of civil liberties during wartime, said Friday that the courts are inclined to bend the law in the government's favor during a time of hostilities.

"One is reminded of the Latin maxim, *inter arma silent leges*. In time of war, the laws are silent," Rehnquist said in a speech to federal judges meeting in Williamsburg, Va.

He cited as examples President Lincoln's suspension of the right to habeas corpus during the Civil War and the Supreme Court's willingness to uphold the internment of Japanese Americans and the secret military trial of eight Nazi saboteurs during World War II.

After the Civil War, the Supreme Court unanimously overruled the Union's use of a military trial to condemn several Confederate sympathizers in Indiana. And Congress later apologized for the Japanese internment, but long after the war was over.

"These cases suggest that, while the laws are surely not silent in time of war, courts may interpret them differently than in time of peace," Rehnquist said.

He stressed he was offering "only a historical perspective," not a prediction on how the high court will handle civil liberties complaints that arise from the Bush administration's war on terrorism, which has not formally been declared.

Nonetheless, the chief justice has made it clear he believes it is unrealistic to expect judges to boldly challenge the government's action at a time when a threat to the nation's security is real.

This is not a new topic for Rehnquist. A history buff, he wrote a 1998 book on civil liberties in wartime, titled "All the Laws but One."

He recounted the infringements on civil liberties during the Civil War and the two world wars, and concluded that the nation's respect for civil liberties has grown steadily. Still, it is true that the demands of war have outweighed the commitment to civil liberties, at least while the conflict is underway, he wrote.

On Friday, Rehnquist cited Hawaii's imposition of martial law after the attack on Pearl Harbor. Even though the bars and restaurants reopened shortly afterward, the civilian courts remained closed by military order through most of the war, he said.

Lloyd Duncan, a civilian shipyard worker, was arrested and tried before a military court after getting into a fight with two guards at the Pearl Harbor base. Harry White, a stockbroker, was also convicted in a military court for embezzling funds from a client.

Both men filed writs of habeas corpus challenging their convictions. The Supreme Court took up their appeals, and in the case of Duncan vs. Kahanamoku,

ruled that Hawaii's military trials for civilians were unconstitutional.

"The good news for the defendants, and perhaps for the people of Hawaii, was that martial law was illegal there at the time these defendants were tried in 1943," Rehnquist said. "The bad news was that they did not find out about it until February 1946, a half year after the end of the war with Japan."

A lawyer for Jose Padilla, the accused "dirty" bomb plotter, is expected to file a writ of habeas corpus challenging his

detention in a military brig in Charleston, S.C.

The writ claims that Padilla, a U.S. citizen, is being held unconstitutionally, and it asks a federal judge to grant the writ and release the detainee.

Such a writ can be acted upon immediately by a judge. If the writ is rejected, lawyers for Padilla could send an appeal up through the court system. Similarly, if the writ is granted, Bush administration lawyers would appeal immediately.

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**National Security State
(Antiterrorism Act of 2001, Civil Liberties, and Government Investigations of
Terrorism)**

The Nation

December 17, 2001

David Cole

It is already a cliché that the attacks of September 11 "changed everything." One thing they do seem to have changed is liberals. Harvard law professor Laurence Tribe, a stalwart defender of civil rights and civil liberties, has condoned the use of military tribunals and the detention of more than 1,200 people, even though not a single detainee has been charged in connection with the attacks. His colleague Alan Dershowitz has suggested that torture may sometimes be justified, as long as it is authorized by a warrant. And George Washington law professor Jeff Rosen has argued that "the real story after September 11 is that America hasn't yet come close to abandoning any immutable principles of its national identity."

I cite these scholars not to single them out for criticism--all are important and courageous liberal voices--but as illustrations of a larger trend. Even liberals these days seem reluctant to criticize the government's response to the new threat of terrorism.

But a brief overview of what we've done so far in the interest of "homeland security" makes clear that we have already abandoned several of our "immutable principles" and have already begun to repeat the mistakes of the past.

Consider first the USA Patriot Act, an omnibus law of 342 pages enacted under in terrorem threats from Attorney General John Ashcroft, who suggested that if another terrorist incident occurred before

Congress passed it, the blame would rest on Congress. The nuts and bolts of the law were worked out in a couple of all-night sessions and approved by large majorities the day they were introduced, even though members could not possibly have read the bill before casting their votes.

The Patriot Act imposes guilt by association on immigrants, rendering them deportable for wholly innocent nonviolent associational activity on behalf of any organization blacklisted as terrorist by the Secretary of State. Any group of two or more that has used or threatened to use force can be designated as terrorist. This provision in effect resurrects the philosophy of McCarthyism, simply substituting "terrorist" for "communist." Perhaps not realizing the pun, the Supreme Court has condemned guilt by association as "alien to the traditions of a free society and the First Amendment itself." Yet it is now the rule for aliens in our free society.

The Patriot Act also authorizes the Attorney General to lock up aliens, potentially indefinitely, on mere suspicion, without any hearing and without any obligation to establish to a court that the detention is necessary to forestall flight or danger to the community. Moreover, most of the more than 1,200 detentions already effected have not relied upon this authority; the detainees are instead held on pretextual criminal charges, as material witnesses and under pre-Patriot Act

immigration authority. The government claims that about ten to fifteen of the detained may be linked to Al Qaeda, but what about the other 1,185? We can't know the answer to that question, because the Justice Department refuses to disclose even the most basic information about most of the detainees, such as who they are, what they are being held for or where they're imprisoned. On November 27 Ashcroft reluctantly identified about fifty people in custody on federal criminal charges but refused to identify more than 500 held on immigration charges, or even to put a number on those held as material witnesses or on state charges. Never in our history has the government engaged in such a blanket practice of secret incarceration.

Secrecy has become the order of the day. Criminal proceedings are governed by gag orders--themselves secret--preventing defendants or their lawyers from saying anything to the public about their predicament. The INS has conducted secret immigration proceedings, closed to the public and even to family members. The Patriot Act authorizes never-disclosed wiretaps and secret searches in criminal investigations without probable cause of a crime, the bedrock constitutional predicate for any search. And in a federal court of appeals in Miami in November, the government renewed its defense of the use of secret evidence in immigration proceedings, arguing that it needs the authority more than ever after September 11 to detain aliens by using evidence they cannot confront or rebut.

We can look forward to more secrecy still. A major impetus behind George W. Bush's presidential order authorizing the trial of suspected terrorists in military tribunals was the desire to avoid the constitutional necessity of disclosing classified evidence to the defendant in an ordinary criminal trial. In military

tribunals, defendants have no right to a public trial, no right to trial by jury, no right to confront the evidence or to object to illegally obtained evidence and no right to appeal to an independent court. The military acts as prosecutor, judge, jury and executioner, and a death sentence can be imposed by a two-thirds vote of the military officers presiding.

We have used military tribunals to try our enemies in times of war before. There has been no declared war here, but perhaps that can be excused as a technicality. What cannot be excused is the extension of the tribunals to US residents who have no connection to Al Qaeda whatsoever but who are merely charged with "international terrorism," a wholly undefined offense, or of harboring someone so charged. Military tribunals have always been limited to the trial of belligerents--those fighting for the enemy, as the Supreme Court ruled in *Ex Parte Milligan* during the Civil War. Bush's order, however, allows the President to dispense with a criminal trial for any noncitizen accused of terrorism.

In one setting -- attorney-client-communications -- secrecy will no longer be the rule. At the end of October, Ashcroft asserted the authority to listen in on such highly privileged discussions without a warrant.

Finally, we have succumbed to ethnic profiling. The Justice Department has instructed law enforcement agents across the country to "interview" more than 5,000 immigrants based not on any evidence that they are connected to Al Qaeda or the events of September 11 but solely on their age, gender and country of origin. The list looks suspiciously like what an enterprising lawyer would come up with if instructed to make a list of immigrant Arab men but to make it look like it wasn't based on ethnicity.

After facing some initial, albeit muted, opposition to its first antiterrorism legislative proposal to Congress, the Administration has chosen since then to bypass Congress altogether. It has also bypassed the public, instead instituting radical changes through rule-makings that go into effect the moment they are published and without notice or comment.

The Administration has made no case that its pre-existing authorities were insufficient. We have successfully tried serious terrorist crimes in open court with all the protections that customarily apply, without regard to whether the defendants were citizens or aliens. Before the Patriot Act, we could deport aliens who supported terrorist activity in any way and could detain aliens who posed a threat to national security or posed a risk of flight. And we had authority to conduct wiretaps and searches in foreign intelligence investigations without probable cause of a crime, as long as that authority was not used as an end-run around the constitutional rules that govern criminal investigations. The government has not even tried to show that the absence of any of its newfound powers contributed to its failure to identify and thwart the September 11 attacks.

Rather, what the Administration has said, time and time again, is that we are "at war." Apparently this statement renders any further argument unnecessary. Thus, Ashcroft tells us that because we are at war, "foreign terrorists who commit war crimes against the United States...are not entitled to and do not deserve the protections of the American Constitution." But putting aside whether we are "at war" without a declaration of war, the bigger problem is that we can't know whether someone is a "foreign terrorist" until those charges are proven in a fair proceeding. The military tribunals

eliminate virtually every procedural check designed to protect the innocent and accurately identify the guilty.

These initiatives have sparked opposition from unlikely quarters. Police officers in Portland, Oregon, have refused to take part in the interviews of the 5,000 immigrant men, citing local laws against racial profiling. Spain has said it will not extradite eight men charged with complicity in the September 11 attacks unless we promise not to try them in military tribunals. Even William Safire has called the military tribunals "kangaroo courts." And on Capitol Hill, Republican Orrin Hatch has joined Democrat Patrick Leahy in calling on Ashcroft to answer questions before the Judiciary Committee about his recent executive initiatives.

So why are so many liberals satisfied with the government's response? Why hasn't there been a louder outcry about the measures adopted? Why hasn't the Administration been asked to justify its newfound authorities on a power-by-power basis? For one thing, we are afraid, and in times of fear we crave security above all. For another, in the face of an attack we naturally and properly seek to stick together, to show a united front. But in times of fear and crisis we also panic. And panic causes us to abandon our principles.

So have we abandoned any "immutable principles," as Jeff Rosen calls them? Well, political freedom has given way to guilt by association. Due process has given way to detention on the Attorney General's say-so. Public scrutiny has given way to secret detentions and secret trials. Equal protection under law has given way to ethnic profiling. And we're only three months into this. We can't afford to let liberal vigilance give way to complacency.

David Cole, a professor at Georgetown University Law Center, is legal affairs correspondent for The Nation.

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Security Versus Civil Liberties

The Atlantic Monthly

December 2001

Richard A. Posner

In the wake of the September 11 terrorist attacks have come many proposals for tightening security; some measures to that end have already been taken. Civil libertarians are troubled. They fear that concerns about national security will lead to an erosion of civil liberties. They offer historical examples of supposed overreactions to threats to national security. They treat our existing civil liberties—freedom of the press, protections of privacy and of the rights of criminal suspects, and the rest—as sacrosanct, insisting that the battle against international terrorism accommodate itself to them.

I consider this a profoundly mistaken approach to the question of balancing liberty and security. The basic mistake is the prioritizing of liberty. It is a mistake about law and a mistake about history. Let me begin with law. What we take to be our civil liberties—for example, immunity from arrest except upon probable cause to believe we've committed a crime, and from prosecution for violating a criminal statute enacted after we committed the act that violates it—were made legal rights by the Constitution and other enactments. The other enactments can be changed relatively easily, by amendatory legislation. Amending the Constitution is much more difficult. In recognition of this the Framers left most of the constitutional provisions that confer rights pretty vague. The courts have made them definite.

Concretely, the scope of these rights has been determined, through an interaction

of constitutional text and subsequent judicial interpretation, by a weighing of competing interests. I'll call them the public-safety interest and the liberty interest. Neither, in my view, has priority. They are both important, and their relative importance changes from time to time and from situation to situation. The safer the nation feels, the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation's safety, the stronger will the grounds seem for seeking to repress that activity even at some cost to liberty. This fluid approach is only common sense. Supreme Court Justice Robert Jackson gave it vivid expression many years ago when he said, in dissenting from a free-speech decision he thought doctrinaire, that the Bill of Rights should not be made into a suicide pact. It was not intended to be such, and the present contours of the rights that it confers, having been shaped far more by judicial interpretation than by the literal text (which doesn't define such critical terms as "due process of law" and "unreasonable" arrests and searches), are alterable in response to changing threats to national security.

If it is true, therefore, as it appears to be at this writing, that the events of September 11 have revealed the United States to be in much greater jeopardy from international terrorism than had previously been believed—have revealed it to be threatened by a diffuse, shadowy enemy that must be fought with police measures as well as military force—it stands

to reason that our civil liberties will be curtailed. They should be curtailed, to the extent that the benefits in greater security outweigh the costs in reduced liberty. All that can reasonably be asked of the responsible legislative and judicial officials is that they weigh the costs as carefully as the benefits.

It will be argued that the lesson of history is that officials habitually exaggerate dangers to the nation's security. But the lesson of history is the opposite. It is because officials have repeatedly and disastrously underestimated these dangers that our history is as violent as it is. Consider such underestimated dangers as that of secession, which led to the Civil War; of a Japanese attack on the United States, which led to the disaster at Pearl Harbor; of Soviet espionage in the 1940s, which accelerated the Soviet Union's acquisition of nuclear weapons and emboldened Stalin to encourage North Korea's invasion of South Korea; of the installation of Soviet missiles in Cuba, which precipitated the Cuban missile crisis; of political assassinations and outbreaks of urban violence in the 1960s; of the Tet Offensive of 1968; of the Iranian revolution of 1979 and the subsequent taking of American diplomats as hostages; and, for that matter, of the events of September 11.

It is true that when we are surprised and hurt, we tend to overreact-but only with the benefit of hindsight can a reaction be separated into its proper and excess layers. In hindsight we know that interning Japanese-Americans did not shorten World War II. But was this known at the time? If not, shouldn't the Army have erred on the side of caution, as it did? Even today we cannot say with any assurance that Abraham Lincoln was wrong to suspend habeas corpus during the Civil War, as he did on several occasions, even though the Constitution is

clear that only Congress can suspend this right. (Another of Lincoln's wartime measures, the Emancipation Proclamation, may also have been unconstitutional.) But Lincoln would have been wrong to cancel the 1864 presidential election, as some urged: by November of 1864 the North was close to victory, and canceling the election would have created a more dangerous precedent than the wartime suspension of habeas corpus. This last example shows that civil liberties remain part of the balance even in the most dangerous of times, and even though their relative weight must then be less.

Lincoln's unconstitutional acts during the Civil War show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation. I want to emphasize something else, however: the malleability of law, its pragmatic rather than dogmatic character. The law is not absolute, and the slogan "Fiat iustitia rat caelum" ("Let justice be done though the heavens fall") is dangerous nonsense. The law is a human creation rather than a divine gift, a tool of government rather than a mandarin mystery. It is an instrument for promoting social welfare, and as the conditions essential to that welfare change, so must it change.

Civil libertarians today are missing something else-the opportunity to challenge other public-safety concerns that impair civil liberties. I have particularly in mind the war on drugs. The sale of illegal drugs is a "victimless" crime in the special but important sense that it is a consensual activity. Usually there is no complaining witness, so in order to bring the criminals to justice the police have to rely heavily on paid informants (often highly paid and often highly unsavory), undercover agents, wiretaps and other forms of electronic surveillance, elaborate

sting operations, the infiltration of suspect organizations, random searches, the monitoring of airports and highways, the "profiling" of likely suspects on the basis of ethnic or racial identity or national origin, compulsory drug tests, and other intrusive methods that put pressure on civil liberties. The war on drugs has been a big flop; moreover, in light of what September 11 has taught us about the gravity of the terrorist threat to the United States, it becomes hard to take entirely seriously the threat to the nation that drug use is said to pose. Perhaps it is time to redirect law-enforcement resources from

the investigation and apprehension of drug dealers to the investigation and apprehension of international terrorists. By doing so we may be able to minimize the net decrease in our civil liberties that the events of September 11 have made inevitable.

[Richard A. Posner is a judge on the Court of Appeals for the Seventh Circuit.]

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War on Terror Makes for Odd Twists in Justice System

The New York Times

June 23, 2002

Katharine Q. Seelye

In one of the strange turns in the war on terrorism, two Americans are being held in military brigs without access to lawyers, while two foreigners accused of terrorist activities are being tried in federal court with the full range of protections usually accorded to Americans.

This patchwork approach has revealed a flexibility in the justice system but also what critics call an overly broad assertion of presidential authority.

The government contends it can detain people until the hostilities are over -- whenever that is -- without charging them or giving them access to lawyers. The dispute is likely to end up before the Supreme Court.

The Americans in prison are Yasser Esam Hamdi, born in Louisiana and raised in Saudi Arabia, and Jose Padilla, born in Brooklyn and raised in Chicago. A third American, John Walker Lindh, born in the District of Columbia and raised in California, is facing a trial.

Mr. Lindh has a high-powered legal team defending him in federal court in Alexandria, Va., against 10 counts, including conspiring to kill Americans and supporting terrorist organizations.

Mr. Hamdi, picked up on the battlefield in Afghanistan in November, was sent to Guantanamo Bay in Cuba then moved to a brig in Norfolk, Va., on April 22 when the authorities confirmed he had been born in America. He has not been charged.

The government moved Mr. Hamdi from Cuba to the mainland because he was American, meaning that he had more rights than other Guantanamo detainees. But now it argues that his citizenship is irrelevant, that he is an enemy combatant and does not deserve the legal protections most Americans enjoy. The government is also blocking him from speaking with his court-appointed lawyer.

Government officials said Mr. Hamdi has not been charged because he is being held for the protection of the country, not for prosecution.

Mr. Padilla was arrested on May 8 and has been in a brig near Charleston, S.C., since June 10. He was taken into custody in connection with what officials said was a plot to build and detonate a "dirty bomb." Mr. Padilla has also not been charged and has not had access to a lawyer.

The two foreigners jailed on terrorism charges are Zacarias Moussaoui, a French citizen, and Richard C. Reid, a Briton. Mr. Moussaoui, accused as the "20th hijacker," has had hearings in federal court in Alexandria, Va., where he is representing himself. Mr. Reid's case is pending in federal court in Boston.

Some legal experts say the variety of approaches underscores the judicial system's elasticity. "There is a learning process," said Eugene R. Fidell, president of the National Institute of Military Justice. "The fact is, there seems to be an unusual range of options available."

David Cole, a Georgetown University law professor, said that the evidence, or lack of it, might explain the inconsistencies in treatment. "Where they feel they can win a criminal case, they'll go the criminal route," Professor Cole said. "Where they feel they can't, where they don't have the evidence," officials put the prisoner in a military brig, he said.

He also suggested that the Lindh case was demonstrating to the government that public trials for some of these suspects can be tricky. For example, the government has suggested that Mr. Hamdi, as well as some prisoners in Guantanamo, may have information that clears Mr. Lindh. The judge in Mr. Lindh's case, T. S. Ellis III, has told the defense lawyers that they can talk to Mr. Hamdi if Mr. Hamdi's lawyer agrees, but the government is not agreeing that Mr. Hamdi even has a lawyer.

Judge Ellis said denying Mr. Lindh access to a witness who could clear him would violate his rights. He also told government prosecutors that at some point, they would have to decide whether to go ahead and prosecute Mr. Lindh, which would mean giving him access to Mr. Hamdi, or whether the need to keep Mr. Hamdi isolated was so overwhelming that they would drop their case against Mr. Lindh.

Others say the multiple approaches have exposed an overreaching of presidential authority. Michael Posner, executive director of the Lawyers Committee for Human Rights, said that the government's stance in the Hamdi case showed "that Americans now have less protection under the law than several of the noncitizens accused of taking action against the U.S."

Administration officials said their treatment of the Americans in captivity was proper. "We've been very careful about each one of these guys under the

circumstances and feel very comfortable about the legality of what we're doing," one senior official said.

He emphasized that the purpose of detaining Mr. Hamdi and Mr. Padilla was not to prosecute them but to keep them from rejoining any anti-American forces.

"This is not a punitive action, it's self-protection," he said.

In papers filed on Wednesday in the Hamdi case in the United States Court of Appeals for the Fourth Circuit in Richmond, Va., the government argued that anyone detained in connection with the war on terrorism was an enemy combatant and had no right to a lawyer.

Mr. Hamdi's lawyer, Frank W. Dunham Jr., argued that the government presented no evidence that Mr. Hamdi was an enemy combatant.

The executive branch, Mr. Dunham said, "does not have the authority to detain an American citizen incommunicado and to unilaterally withdraw from the courts the power to inquire into the propriety of his detention."

The government's arguments in the Hamdi case startled legal experts and stirred critics who had quieted down after a confrontation about military tribunals.

"The route they have created in this ad hoc way is devoid of any constraint on the president's power," Mr. Cole said. "The notion that he can pick people up off the street, label them and lock them up for the rest of their lives without a hearing is a remarkable one."

It also prompted some, like Douglas W. Kmiec, dean of the law school at Catholic University and a professor of constitutional law, to suggest that perhaps President Bush should amend the Nov. 13 order that set up the military tribunals.

President Bush issued the order before the government knew it would find Americans suspected of involvement with foreign terrorists; the order specifically exempted Americans from a tribunal's jurisdiction.

That exemption was a concession to make the tribunals politically palatable to critics in Congress.

But Mr. Kmiec said that including Americans in the tribunal system would give the prisoners a legal forum and would deflect criticism that the United States was undermining a basic tenet of its judicial system.

"Everyone is legitimately concerned when a U.S. citizen can be detained without charge and without access to counsel," Mr. Kmiec said. "It perplexes federal judges."

Mr. Kmiec, who led the office of legal counsel in the Reagan administration and the first Bush administration, said he had broached the idea with current administration officials.

"They know there is an anomaly in the process about how different people are being treated, and they are worried there will be more," he said.

Senior administration officials, however, said no amendment of the order was being considered.

No tribunals have been held, and do not seem imminent, in part, officials said, because the government is trying to get information from the prisoners, not punish them.

"We're not in the criminal justice business, we're in the national defense business," said a top administration official. "First things first."

Mr. Dunham, Mr. Hamdi's lawyer, remains concerned about what he calls the "uneven" treatment. He said that Mr. Lindh seemed to be better off than his client because at least Mr. Lindh was accused of something and could defend himself.

"Our client hasn't been charged with any crime, and the government says that since they haven't charged him with a crime, they can hold him forever," he said. "It seems to be a little strange. A guy is worse off if he's not charged with a crime."

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Traces of Terror: The Detainees;
Lawyers Argue Over Rights of a Citizen Seized on Enemy Land

The New York Times

June 26, 2002

Katharine Q. Seelye

An appellate judge hearing one of the most closely watched cases pitting civil liberties against national security seemed favorable today toward the government argument that an American citizen can be held indefinitely without being charged with anything or represented by a lawyer.

The case involves Yaser Esam Hamdi, 21, who was born in Louisiana, reared in Saudi Arabia and captured on the battlefield in Afghanistan. Mr. Hamdi was sent to Guantanamo Bay, Cuba, until officials discovered he had been born in the United States, and then moved him to the naval brig in Norfolk, Va. He has been held there since April 5, not charged with any crime or allowed to see a lawyer, although a district court has appointed a public defender to represent him.

In oral arguments here before the United States Court of Appeals for the Fourth Circuit, J. Harvie Wilkinson III, the chief judge, appeared incredulous today at Mr. Hamdi's lawyer's assertion that his client -- captured during battle and designated an enemy combatant -- had any constitutional rights.

"What is unconstitutional about the government detaining that person and getting from that individual all the intelligence that might later save American lives?" Judge Wilkinson asked Jeremy Kamens, an assistant federal public defender helping to represent Mr. Hamdi.

Mr. Kamens said the Constitution prohibited the indefinite detention of an

American citizen, and Judge Wilkinson was quick to interrupt.

Was he suggesting that the government could not detain a citizen "who has taken up arms against America?" Judge Wilkinson asked in a voice that suggested he could not believe his ears.

Mr. Kamens argued that there was no evidence that Mr. Hamdi was actually an enemy combatant, but the judge came back at him.

Suppose an inquiry established that Mr. Hamdi was an enemy combatant and fought on the side of the Taliban and Al Qaeda against American forces, Judge Wilkinson said. "What is unconstitutional about the detention of that individual and trying to get intelligence from that individual over a period of time, during the course of hostilities, that would save American lives?"

The judge added that he knew of no previous cases that said it was wrong to interrogate an enemy combatant who had been captured on the battlefield.

"This has been done in every war that I know of," he said.

The sharp exchange seemed a preview of an argument likely to reach the Supreme Court in an escalating battle between the rights of American citizens and the power of the president to detain and interrogate enemy combatants while hostilities are continuing.

Judge Wilkinson and two colleagues were hearing an appeal by the government of a lower court ruling that ordered the Navy to give Mr. Hamdi unfettered access to the public defender. The hearing was conducted by teleconference, because the judges were dispersed. It was piped through speakers into the federal courthouse here, where reporters listened in.

The Fourth Circuit, one of the most conservative appellate courts in the country, could issue its opinion any time.

The government argued in papers filed last week that the lower court judge, Robert G. Doumar of Federal District Court, was trying to usurp the president's authority in a time of war and had acted improperly in providing Mr. Hamdi a lawyer before allowing the government to make its case.

The government's case was argued today by Paul Clement, deputy solicitor general, who said the courts should not second-guess the president's decision to hold Mr. Hamdi as an enemy combatant. The judiciary "can answer legal questions," Mr. Clement said, but further interference would not be "terribly helpful."

Judge Wilkinson, who asked to see the president's determination of Mr. Hamdi's status, which has not been made public, said the case posed serious separation-of-powers issues. But he was far more emphatic in his questioning of and declarations to the public defender.

Today's vigorous argument "underscores one of my basic problems with this case," Judge Wilkinson said. which is that it poses a number of difficult questions and the lower court appears not to have given them proper attention.

"How in the world could the district court have proceeded to decide all these questions and potentially pre-empt them by appointing counsel without even giving the government a chance to be heard?" he asked. "That's what I don't understand."

Mr. Kamens said the district court's appointment of a lawyer had nothing to do with the legality of Mr. Hamdi's detention, but Judge Wilkinson replied that the appointment of counsel was significant.

"If counsel is appointed," he said, "we are deciding, for starters, that someone who may well be an enemy combatant has a right to counsel, No. 1. That's a major issue.

"I don't know, for example, how counsel can be separated from access or indeed from the other rights in the criminal justice system. I don't know how you can appoint counsel without throwing into jeopardy the government's intelligence-gathering operation."

The government said, and Judge Wilkinson agreed, that intelligence-gathering could be disrupted because the introduction of a third party could break the atmosphere of trust that the government was trying to establish with the prisoner, particularly if the lawyer urged the prisoner to assert his rights against compelled self-incrimination.

Judge Wilkinson said the district judge's appointment of counsel had already "decided four or five mega issues without even giving the other side the chance to present its case."

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Holding Pattern; Why Congress Must Stop Ashcroft's Alien Detentions

The New Republic

December 10, 2001

Jeffrey Rosen

Of all the new security measures adopted by the Bush administration since September 11, the most draconian involve the detention and interrogation of aliens. In his dragnet effort to uncover evidence of terrorism, Attorney General John Ashcroft has authorized the detention of some 1,100 noncitizens. Some have been held for months and--thanks to recently passed legislation--may be held indefinitely. Critics call the Ashcroft detentions unconstitutional. "We have violated core constitutional principles," says David Cole of Georgetown University Law Center, pointing to new laws and regulations that allow the government to detain aliens without bail; deport or exclude them because of their political associations; and eavesdrop on their conversations with their attorneys.

Some of these measures may indeed violate principles of procedural fairness, free speech, and privacy. But they don't violate the Constitution. Over the last 50 years the Supreme Court has imposed few constitutional restraints on the ability of Congress and the president to detain, exclude, and deport aliens in ways that would be grossly unconstitutional if applied to citizens. As a result, Ashcroft has virtually unlimited legal discretion in his treatment of aliens. But that doesn't mean he shouldn't be stopped; only that judges aren't the people to stop him. Although it may be difficult in the current environment, our elected representatives in Congress are the only officials authorized to determine the fate and defend the interests of mistreated aliens.

It's a role Congress has been reluctant to play in the past. But Congress may be the only hope we've got.

The most sweeping of the laws and regulations passed in the wake of September 11 are those that authorize the indefinite detention of aliens whom Ashcroft designates as suspected terrorists. Most significantly, on November 14, the Immigration and Naturalization Service adopted a regulation allowing the detention of aliens whom the government wants to deport but no other country will admit. If the attorney general, in consultation with the State Department, believes that their cases raise significant "national security or terrorism concerns," the aliens can be locked up indefinitely.

The regulation is an attempt to respond to the *Zadvydas* case, decided by the Supreme Court last June. Before then, the Court had repeatedly held that Congress has virtually unlimited power to deport, exclude, or detain immigrants at the border. In *Zadvydas*, however, Justice Stephen Breyer, writing for the 5-4 majority, held that in the 1996 immigration reform act, Congress hadn't intended to authorize the indefinite detention of aliens who couldn't be deported because their home countries wouldn't allow them back. (In fact, Congress probably had intended to authorize the detentions; Breyer stretched the language of the law to avoid a constitutional conflict.) But even though Breyer intervened on behalf of aliens' rights, his opinion included an important

loophole: It stressed that Congress and the president might have more leeway to detain aliens indefinitely in cases involving "terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security."

The new INS regulations exploit this loophole for all it's worth. They allow John Ashcroft and Colin Powell unilaterally to detain any deportable alien whose release would have "serious adverse foreign policy consequences," in the government's opinion. And although the regulations give the government tremendous discretion to define a foreign policy crisis, it's hard to imagine that the Supreme Court would raise constitutional objections. This is particularly true in light of the USA Patriot Act, passed in October, in which Congress explicitly authorized the attorney general to detain "suspected terrorists" indefinitely in special circumstances. This time, there's no ambiguity about congressional intent.

Another element of the USA Patriot Act allows the deportation not only of convicted terrorists, but of any alien who provides financial support to a "terrorist organization," broadly defined as a group of people who threaten to use weapons. "I would guess that somebody who writes a check to the organizations that raise money for the IRA might be brought within this," says Peter Schuck of Yale Law School. "That's troubling, but it's hard to see how it could be more precisely defined." Schuck suggests that judges might interpret the law to say that the IRA contributor can't be convicted as a terrorist unless he knows more about how the IRA operates than it takes to write a check. But once again, it's a mistake to rely on the courts: In the past, the Supreme Court has been extremely

deferential to Congress in cases involving the deportation of unpopular aliens.

In the 1950s, for example, Congress passed the McCarran-Walter Act, which allowed the government to exclude and deport aliens who advocated communism. The Supreme Court upheld the attorney general's right to deport aliens who were members of the Communist Party, suggesting that Congress has the right to treat aliens in ways that would violate the First Amendment if applied to citizens. The Court held that an alien couldn't use his lack of knowledge about the Communist Party's goals as a defense. It also held that aliens could be detained without bail while the government decided what to do with them. These cold war precedents may doom any legal challenges to a regulation issued by the INS in October allowing the Justice Department to lock up aliens while appealing an immigration judge's decision to release them on bail.

The Patriot Act also authorizes Congress to exclude from the United States any aliens who "endorse or espouse terrorist activity" or who "persuade others to support terrorist activity or a terrorist organization." In 1953 the Supreme Court upheld similar exclusions. In a famous case, a Romanian alien named Mezei, who had lived in the United States for 25 years, went home to visit his dying mother; when he tried to return, he was detained on Ellis Island for almost two years on grounds that his admission would be "prejudicial to the public interest." The Supreme Court held that he wasn't even entitled to judicial review of the decision not to release him on bail. Harry Kalven, the great First Amendment scholar at the University of Chicago, summed up the Court's attitude toward exclusion and deportation of suspected Communists this way: "The rule was that there were absolutely no limits on the power of

Congress to exclude aliens. Neither inhibitions against gross racial discrimination, against interference with freedom of speech and association, against breaking up the family, nor restraints dictated by notions of basic procedural fairness could stay the hand of the government."

All this would be easier to swallow if the government had to prove that the aliens it was indefinitely locking up really did threaten national security. Unfortunately, because deportation hearings are considered civil-not criminal-proceedings, immigrants have none of the rights available in criminal trials: to appointed counsel, to the exclusion of illegally seized evidence, to have the government prove their dangerousness beyond reasonable doubt.

A detained alien does have the right to a lawyer--if he can afford one. But in his most appalling decision of all, Ashcroft has undermined this right as well. On October 30 the attorney general approved a rule allowing federal agents to eavesdrop on conversations between federal inmates and their lawyers whenever "reasonable suspicion exists to believe that an inmate may use the communications with attorneys ... to facilitate acts of terrorism." Even though an inmate's conversation with his lawyer can't be used against him by a criminal prosecutor, the presence of federal monitors will severely inhibit the ability of detainees--innocent as well as guilty--to speak candidly with their lawyers and receive necessary legal advice.

The Ashcroft rule isn't only an egregious incursion on privacy--it will also bring little in the way of increased security. After all, lawyers already can't help their clients commit new crimes, and they have an ethical obligation to report threats of terrorism or violence. Under the so-called "crime/fraud exception" to the attorney-

client privilege, if the government has probable cause to believe that a client is using a lawyer to advance an illegal scheme, it can get a court order or even set up a sting operation. Moreover, as Akhil Reed Amar of Yale Law School suggests, there are less-intrusive ways of ensuring that the most dangerous suspects don't use their lawyers to further terrorist schemes: Lawyer-client conversations could be videotaped and reviewed by impartial judges, for example, rather than by partisan government lawyers.

But although the Ashcroft eavesdropping scheme is unnecessary and indefensible, it doesn't violate the right to counsel. The Sixth Amendment protects the attorney-client privilege only in a criminal prosecution, while most of the aliens who will have their conversations spied on by John Ashcroft will never be charged with a crime.

If the courts won't protect aliens from John Ashcroft, who can? The answer, for better or worse, is Congress. The Bush administration has shown little restraint in the domestic war against terrorism. And like any risk-averse federal agency, the INS is resorting to dragnets to protect itself against the charges of negligence that will inevitably follow if more aliens commit terrorist acts. As Schuck suggests, Congress should carefully oversee the Justice Department's enforcement of the new laws and regulations authorizing the detention of aliens. The Constitution, after all, gives Congress, rather than the president, plenary authority over immigration. One of the many unfortunate features of Ashcroft's decision to permit eavesdropping on attorney-client conversations is that it was announced without consulting Congress. Vermont Senator Pat Leahy is sufficiently exercised by Ashcroft's failure to consult Congress on a range of issues, including the establishment of military courts, that

he has scheduled oversight hearings. If Congress remains jealous of its prerogatives to determine the fate of aliens, perhaps its oversight will restrain an administration unwilling to restrain itself.

Unfortunately, history does not offer much cause for optimism. "The communist deportation cases supply almost experiment evidence of how little Congress itself is disciplined by the traditions of political tolerance," wrote Harry Kalven. "They suggest that Congress, when freed from constitutional restraints, will pursue the logic of security relentlessly."

In an even more famous abdication, Congress failed to object to the detention

of Japanese-Americans during World War II. It took 43 years for Congress to recognize its error. The Civil Liberties Act of 1988 issued an apology and \$20,000 to each of the Japanese-American citizens and resident aliens interned during World War II. "We know we're going to regret this," says Alex Aleinikoff, a former general counsel of the INS under President Clinton. "Probably now is the time we should be saying to the detained aliens, 'We know we're taking something from you and we should pay you later.'" Better yet, of course, would be not to detain them unreasonably in the first place.

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Ashcroft Is Right to Detain Suspects in Terror Probe

The Wall Street Journal

December 17, 2001

Griffin Bell

The horrific videotape of Osama bin Laden chuckling over the killing of thousands of people shows his insane hatred of America. In addition to hatred, though, he has financial resources, technical education, experience and an international network of fellow conspirators. One response by the Justice Department to the serious threat we face from bin Laden and other terrorists has been to jail several hundred people either on suspicion that they are terrorists or as material witnesses to terrorist crimes. I think the Justice Department's campaign is consistent with the Constitution and the laws, and for the Justice Department to have done less would have been irresponsible.

The most fundamental safeguard against arbitrary imprisonment is habeas corpus. This old Latin term means that a court may order the government to produce any prisoner in court and justify its detention of that person. The Constitution prohibits the suspension of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it." President Lincoln, without congressional approval, suspended habeas corpus nationwide several times, and he often suspended it locally. Any person held in jail -- citizen or not -- is entitled to petition the courts for habeas corpus. During World War II the Supreme Court heard the appeals of both German saboteurs and Japanese General Yamashita through habeas corpus petitions.

In one sense, the arrests and detentions carried out in the wake of September 11 have not been "preventive" at all. The Justice Department has valid independent reasons for detaining all of these individuals, who fall into three categories: those in violation of their immigration status, those wanted for crimes, and those whose testimony is deemed material to the terrorism investigation. The Constitution and federal law gave the Justice Department the authority to arrest or detain these groups of individuals long before September 11.

The Justice Department, for example, may, pending removal proceedings, hold aliens who have violated the terms of their entry into the United States. Obviously, it may arrest individuals suspected of committing crimes. And it is permitted -- if a federal court approves -- to detain individuals who are material witnesses in an ongoing criminal proceeding, provided their availability cannot otherwise be guaranteed. That the government also seeks information about the September attacks from these individuals does not invalidate the reasons for their detention.

At the same time, the Justice Department's recent actions are undeniably preventive, in that detentions, while legally valid, are being used in unprecedented numbers to thwart further terrorist attacks. In directing these actions, Attorney General John Ashcroft is assisting President Bush in fulfilling his constitutional duty to faithfully execute the laws and to provide for the nation's

defense. The Supreme Court has permitted law enforcement to detain individuals for relatively minor violations in the course of investigating more significant crimes. Even under normal circumstances, the Justice Department -- if a federal court approves -- may detain without bond criminal defendants who are a flight risk or who pose a danger to the community.

These tools are even more vital as the government pursues the war on terror. This June, in *Zadvydas v. Davis*, the Supreme Court acknowledged that terrorism constituted a special circumstance, "where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." The new provisions of the Immigration and Nationality Act, which permit the indefinite detention of suspected terrorists pending criminal or removal proceedings, are consistent with the discretion afforded the administration in fighting this unique threat.

Even in this area, however, the Justice Department's actions, and their effects on civil liberties, are subject to judicial review. All individuals arrested or detained, whether for immigration violations, criminal offenses, or as material witnesses, must be brought before a judicial officer after being taken into custody.

Individuals arrested on criminal charges or as material witnesses also have the right to appointed counsel. And although individuals held on immigration violations are not entitled to counsel at taxpayer's expense, they certainly have a right to be represented by a lawyer. The Justice

Department has provided these detainees with written information about how to obtain assistance from aid organizations that can provide representation. Once counsel is secured, individuals can institute habeas corpus proceedings to challenge the legality of their detention.

Last week's indictment of Zacarias Moussaoui by a federal grand jury provides ample proof that preventive detentions are a vital aspect of the government's battle against terrorism. Federal agents arrested Mr. Moussaoui in August for suspected immigration violations after the Minnesota flight school where Mr. Moussaoui was a student became concerned because he had no interest in learning to take off or land. As a result, Mr. Moussaoui -- who may have intended to be the 20th hijacker on Sept. 11 -- was in federal custody at the time of the attacks.

Sixty years ago, Franklin Roosevelt spoke of a world founded upon four essential human freedoms. Chief among these was freedom from fear. Terrorists now pose a dire threat to this freedom. No one can dispute the Justice Department's right -- indeed, its obligation -- to use every legitimate means at its disposal to prevent further terrorist attacks. Provided the individuals detained have access to counsel, and are treated fairly and with respect, "preventive detentions" are a legitimate part of the administration's efforts to preserve America's freedom from fear.

Mr. Bell was U.S. attorney general under President Carter.

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**Judge: U.S. May Jail Material Witnesses;
N.Y. Ruling Conflicts with Decision in Prior Case in Same Federal District**

The Washington Post

July 12, 2002

Steve Fainaru

The government may forcibly detain witnesses to gather evidence in its nationwide terrorism investigation, a federal judge ruled today, rejecting as "flawed" a previous federal ruling that the tactic is unconstitutional.

The judge, Michael B. Mukasey, ruled that the Justice Department has legally imprisoned as "material witnesses" dozens of men authorities believe may be able to provide important information to grand juries investigating terrorism. He refused to grant the deportation of an unnamed immigrant who argued he had been illegally jailed.

On April 30, Shira A. Scheindlin, who like Mukasey presides in New York's Southern District, dismissed perjury charges against a Jordanian college student who had been "unlawfully detained," ruling that "since 1789, no Congress has granted the government the authority to imprison an innocent person" to testify before a grand jury.

In a 37-page opinion, Mukasey rejected Scheindlin's ruling, saying that her interpretation that material witnesses should be excluded from grand jury proceedings is "to perceive something that is not there."

The government has appealed Scheindlin's ruling to the 2nd Circuit Court of Appeals. Neil S. Cartusciello, who represented the "John Doe" material witness before Mukasey, said tonight that he was "disappointed in the outcome" but

needed to read the decision and consult with his client before deciding whether to appeal.

Legal experts said the constitutionality of the government's use of the material witness statute is likely to be decided in the higher courts. "It's not surprising on an issue like this -- which in Judge Scheindlin's case was a very new and different kind of an issue -- that there would be a difference of interpretations," said Neal R. Sonnett, a former assistant U.S. attorney now in private practice in Miami.

The government's use of the material witness statute has been perhaps the most controversial tactic to detain suspects in the terrorism investigation. The statute was last updated by Congress in 1984. It is designed to allow authorities to detain an individual believed to hold information critical to a "criminal proceeding" if the person cannot be compelled to testify in any other way.

Before the Sept. 11 terrorist attacks, the statute had been invoked rarely, usually in cases where a person presented a flight risk. However, the government appears to have detained as material witnesses people it believes may be terrorism suspects or who may be able to appear before a grand jury to testify about evidence critical to the investigation.

Osama Awadallah, the Jordanian student covered by Scheindlin's ruling, was arrested as a material witness after

authorities discovered his old phone number on a slip of paper in a car left by some of the Sept. 11 hijackers at Dulles International Airport. Awadallah attorney Randall B. Hamud said he was not surprised that Mukasey, who signed Awadallah's arrest warrant, "is singing the government's song."

However, he said it was unlikely to affect Awadallah's case.
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Judge Orders U.S. to Release Names of 9/11 Detainees

The New York Times

August 3, 2002

Neil A. Lewis

A federal judge ruled today that the Bush administration had no right to conceal the identities of hundreds of people arrested after the Sept. 11 terror attacks, and she ordered that most of their names be released within 15 days.

The ruling by Judge Gladys Kessler of Federal District Court dealt a significant setback to the government's policy of secret detentions, mostly of immigrants, in connection with the Sept. 11 investigation. Judge Kessler rejected the Justice Department's arguments that disclosure of the names would impede its investigation of terrorists. She said that while it was the obligation of the executive branch to ensure the physical security of American citizens, "the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."

"Unquestionably," she added, "the public's interest in learning the identity of those arrested and detained is essential to verifying whether the government is operating within the bounds of law."

Judge Kessler's opinion in the case, which had been brought by a broad coalition of groups, including some civil liberties organizations, was the latest ruling issued in the handful of cases now making their way up the federal court system challenging some of the government's policies put in place after the Sept. 11 attacks.

In some cases, the courts have been receptive to the government's arguments, but in several others judges have resisted claims of broad executive authority.

In one case, both a district court and an appeals court panel ruled against the government in Michigan, saying the Justice Department could not close deportation proceedings to the public and the news media.

The government gained a victory elsewhere in the courts this week when a federal judge ruled that the more than 560 prisoners detained at the Guantanamo Naval Base in Cuba were beyond the reach of United States courts.

Justice Department officials will probably ask a federal appeals court to delay Judge Kessler's ruling from taking effect while it appeals, but officials there said today that they had not yet decided to do so. Nevertheless, Robert McCallum, the assistant attorney general for the civil division, had harsh words for Judge Kessler's ruling.

"The Department of Justice believes today's ruling impedes one of the most important federal law enforcement investigations in history, harms our efforts to bring to justice those responsible for the heinous attacks of Sept. 11, and increases the risk of future terrorist threats to our nation," Mr. McCallum said.

He said the F.B.I. and the department's criminal division "firmly believe that the

information sought by the plaintiffs, if released, could jeopardize the investigation and provide valuable information to terrorists seeking to cause even greater harm to the safety of the American people."

The opinion noted that the government said on Nov. 5 that it had detained 1,182 people in connection with the Sept. 11 investigation. But Judge Kessler suggested that the numbers were confusing and that the Justice Department has never given a full accounting of who had been arrested.

"As of this moment," she said, "the public does not know how many persons the government has arrested and detained as part of its Sept. 11 investigation, nor does it know who most of them are, where they are and whether they are represented by counsel."

Amid the uncertainty, the judge noted that the Justice Department had provided some numbers, notably that 751 people were arrested for immigration violations. As of June 13, only 74 remained in custody, the rest having been released or deported.

That is the category most directly affected by Judge Kessler's order. If her ruling stands, the government would have to release the names of at least those 751, even those who have left the country.

The government has also said that it arrested and charged 129 people on federal criminal charges and that it has already released those names.

The last category encompasses people arrested as material witnesses. The government has never disclosed the number or identities of those people but it has been estimated to be about two dozen, most of whom have been released.

Judge Kessler asked the government to provide further evidence why the names of material witnesses should not be released.

The suit asking for disclosure of the immigration detainees' names was brought by 22 advocacy groups, including the Center for National Security Studies, the American Civil Liberties Union, the Reporters Committee for Freedom of the Press, the American-Arab Anti-Discrimination Committee and People for the American Way Foundation.

Kate Martin, of the Center for National Security Studies and the lead lawyer for those challenging the government's policy, called the ruling "a vindication of our basic liberties and a demonstration that the courts are there to stop government abuses."

Ms. Martin said it showed that the events of Sept 11 "may not be used as an excuse to suspend basic rights."

Although most of the people who would be affected are no longer in custody, she said, the ruling still has great value.

"It will prevent the government from doing this again," she said. "Moreover, it will give us the information to evaluate how these people were treated and whether this was a random roundup of Arabs and Muslims or a legitimate targeted investigation of terrorism as the government has claimed."

The Justice Department had argued that the disclosure of the names of those arrested for immigration violations would hinder the investigation. It would, they said, reduce the inclination of detainees to help authorities because the terrorist groups would intimidate or cut off contact with them once their names were known.

Judge Kessler said that argument was unpersuasive since the terrorist groups must already know who was arrested as those in custody have always been free to disclose their situation to the public.

Judge Kessler dismissed as too speculative the government's argument that the release of the names would allow terrorist groups to track the progress of its investigation. The government put forward a so-called "mosaic theory" of the investigation, arguing that there are bits of information like the names of the detainees that may seem useless by themselves but can form part of a larger, revealing picture.

Attorney General John Ashcroft has been the most vocal defender of the government's refusal to identify everyone who had been arrested. He has repeatedly said he was prevented from disclosing the names because it would violate the privacy of those arrested.

Judge Kessler said that the government might ask detainees if any wanted their name excluded from the list and that if any asked for confidentiality, it would be respected.

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Military Tribunals: Swift Judgments in Dire Times

USA Today

November 15, 2001

Joan Biskupic and Richard Willing

President Bush's order allowing military tribunals to try accused terrorists sets the stage for something not seen since World War II: an emergency legal system designed to bring swift judgment, using rules that make convictions easier but deeply worry civil libertarians.

With the Taliban on the run in Afghanistan and investigators here continuing to seek possible associates of the Sept. 11 hijackers, Bush's order is a signal that the next battlefield in the war on terrorism will be the courtroom.

The Bush administration defended its extraordinary order Wednesday, saying that the shadowy nature of al-Qa'eda terrorists, who dress as civilians and attack a nation from within, demands a special system of justice that recognizes the needs of national security and the unusual threats that terrorists pose. For example, military tribunals can use secretly collected wiretap evidence and other confidential information not admitted in ordinary trials; secret testimony from informants, and hearsay evidence.

The foreign terrorists who could be subjected to such tribunals "don't deserve to be treated as prisoners of war," Vice President Cheney said. "They don't deserve the same guarantees and safeguards we use for an American citizen."

It was unclear Wednesday when, or even if, the Bush administration plans to empanel a military court, or specifically whom it might try. Military panels could

be created by Defense Secretary Donald Rumsfeld to try suspected terrorists wherever they are captured, whether in Afghanistan, the United States or elsewhere.

They also could be used to try suspects already in custody, including at least two Muslim extremists who authorities say had contact with the 19 hijackers in the months leading up to the attacks on the World Trade Center and the Pentagon.

Any tribunal could face a legal challenge from defendants demanding a jury trial in a public court. But legal precedent is on Bush's side.

White House counsel Alberto Gonzales says that Bush's decision to permit the panels was driven by two considerations:

- * The need to conduct trials where terrorists are captured, especially when returning them to the United States could pose security risks.

- * The need for special trial rules to allow confidential information gathered by U.S. intelligence to be used against terrorists without having the information revealed in open court.

Because they permit secret testimony, military tribunals or commissions, as they also are called, allow prosecutors to withhold sensitive information that they would be required to disclose during an ordinary criminal trial.

Muslim extremists charged with trying to blow up the World Trade Center in 1993 were tried in federal criminal court. Trial

records included structural details of the twin towers, which prosecutors say may have been used by the Sept. 11 hijackers to determine the type of jet needed to knock down the twin towers.

"The best evidence against a person might be classified, and to get a conviction we might need to disclose it," Gonzales says.

Military tribunals are rarely used but are deeply rooted in U.S. history. They have withstood federal court challenges in the 19th and 20th centuries, and were approved unanimously by the Supreme Court when they last were used during World War II.

Besides protecting U.S. intelligence networks, the military tribunals' advantages include speed. Six German saboteurs who sneaked into the USA during World War II were caught, tried and executed, with time out for a Supreme Court appeal, during a 7-week period in 1942.

Another advantage, as Cheney indicated, is that trying terrorists in military court sends a clear signal that they are international outlaws, not entitled to even the rudimentary rights afforded ordinary prisoners of war.

"This is the answer for what we're dealing with: unlawful belligerents who do not come within our constitutional structure," says Catholic University law dean Douglas Kmiec, who supports the use of military tribunals. "The president's order is not extraordinary when one places it in the context of historic military campaigns."

But some members of Congress are critical of Bush's move. U.S. Rep. John Conyers, D-Mich., the ranking Democrat on the House Judiciary Committee, says military commissions are based on the "thinnest legal precedents" and could "antagonize our allies." Senate Judiciary Chairman Patrick Leahy, D-Vt., says he

was left with more questions than answers by Bush's directive. "We need to understand the international implications of the President's order, which sends a message to the world that it is acceptable to hold secret trials and summary executions," Leahy said. Harvard University law professor Anne-Marie Slaughter, who has studied tribunals, said: "President Bush has said this is a war to bring terrorists to justice. So the real question is, what's justice? That requires a fair trial and proof beyond a reasonable doubt, and that is not the aim of a military tribunal." A better option, she says, would be convening an international war crimes tribunal.

Bush's order Tuesday was the latest in a series of administration moves that have infuriated civil libertarians. It came on the same day the Justice Department announced it would try to question more than 5,000 men who have entered the country since January 2000 from nations linked to the al-Qa'eda terrorist network.

A week ago, the administration made clear that it would wiretap prisoners' conversations with their lawyers if officials believe the prisoners might be passing on terrorist information.

"There is a natural temptation to hunker down whenever we are in crisis," says New York University law professor Joshua Rosenkranz. "But there is a danger that this hysteria-driven effort to protect to ourselves is weakening the foundations of our democracy."

Military as judge and jury

Military commissions essentially set their own rules.

Under Bush's order, the tribunals could sit at any time and any place. Military officers would serve as judge and jury, deciding both the law to be applied and resolving

disputes over facts that usually are the domain of a jury.

Instead of a unanimous verdict, the votes of only two-thirds of the members of a military panel would be needed to convict and sentence a defendant, and even impose the death penalty.

Bush would decide who would be subject to the tribunal, based on his belief that an individual is a member of al-Qa'eda or has committed or helped commit international terrorism.

The order gives Rumsfeld the power to detain anyone Bush targets, but also requires that the suspect be "treated humanely, without any adverse distinction based on race, color, religion," and be "allowed the free exercise of religion."

The president would have the option to review a verdict and make any final decision in the case. But any death sentence would lead to calls for a Supreme Court review.

Bush dodged one potential legal obstacle by declaring that the tribunals would not be used to try U.S. citizens. Two of the Nazi saboteurs tried during World War II held American citizenship, and their trials were complicated by their claims that their cases should have been handled by a standard federal court.

Tribunals have precedents

The case involving the Nazi saboteurs had some parallels with the hijackings. Eight Germans were dropped off by U-boats on beaches near Amagansett, N.Y., and Jacksonville, Fla. The men, all of whom previously had lived and worked in the USA, spoke fluent English, wore American-style clothes and carried blasting caps and other sabotage tools. Their instructions, written in invisible ink on pocket-handkerchiefs, identified industrial targets in Chicago, Detroit and

New York as well as a network of backers in the USA.

But the plan began to unravel immediately, when a Coast Guardsman on beach patrol encountered some of the terrorists and heard them speaking German. The men escaped to New York City. Fearful that they would be caught, two of the Germans contacted the FBI and betrayed the other six.

A week after the arrests, President Franklin Roosevelt signed an executive order authorizing a military commission to try the men. The men turned to the Supreme Court, citing an 1866 case that forbade the military trial of any American civilian while ordinary courts were open. But the court said the Germans were "unlawful belligerents" who had entered the country clandestinely and thus had no rights to a public trial or a trial by jury.

The men were tried in secret before a military panel and convicted. The two who cooperated received prison sentences and the other six were executed, 7 weeks after they were captured.

Military trials were common during the Civil War, when 13,000 soldiers and civilians were tried before about 5,000 commissions. The most memorable occurred at the war's end, when eight civilians with Confederate ties were tried in May and June 1865 for helping John Wilkes Booth carry out the assassination of President Lincoln.

That panel was created by President Andrew Johnson, Lincoln's successor, who like President Bush signed an order based on his law department's recommendation. Johnson's attorney general, James Speed, argued that the assassination was an act of war because under the Constitution. Lincoln was commander-in-chief.

Edward Steers, author of *Blood on the Moon*, a history of the assassination, says Johnson had a more pragmatic reason for a military trial: avoiding a jury of Confederate sympathizers who lived in Washington, which despite being the U.S. capital essentially was a Southern city.

After a 50-day trial, all eight were found guilty by a panel of seven generals and two colonels. By a two-thirds vote, four defendants were sentenced to hang, and four others received long prison sentences. It took less than 3 months from the time of the assassination for the sentences to be carried out.

"That's the beauty of the thing . . . from the government's perspective," says James Hall, co-author of *Come Retribution*, a study of Civil War terrorism. "Things move quickly, and from a legal standpoint it's all self-contained."

The Lincoln case also is similar in several respects to the current situation. Historians note that Booth and his co-conspirators intended to kill not just Lincoln but Vice President Johnson and Secretary of State William Seward, who was next in line for the presidency. Had Johnson and Seward also been killed, the Constitution as then written made no provision for choosing a new president.

"It was a formula for civic chaos or confusion with parallels" to the Sept. 11 attacks, says Michael Maione, historian at Ford's Theatre, where Lincoln was shot.

As the U.S. government has done in the hijacking probe, authorities rounded up and detained large numbers of potential suspects. About 200 were arrested and held, author Michael Kauffman estimates, in a nation whose population was about one-ninth what it is now. Federal investigators have detained and questioned more than 1,200 in the investigation of the terrorist attacks.

Little dissent in Congress

To this point, Congress has been largely mute in response to Bush's plan. Many members want more details about the tribunals. Sen. Carl Levin, D-Mich., chairman of the Armed Services Committee, said he had concerns about the order, especially the extent to which the trials can be kept secret. But the influential Democrats stopped short of criticizing the president.

In Washington, investigators pursuing the hijacking inquiry said the possibility of military trials gives them one more tool to persuade persons with knowledge of how the hijackings were done to talk to authorities.

The possibility that a potential defendant may have to face a military panel, said one veteran investigator, could be a potential "mind-focuser."

Investigators say at least two men currently in custody were linked to the Sept. 11 hijackings but that their involvement would be difficult to prove "beyond a reasonable doubt," the standard of an ordinary criminal court.

Zacarias Moussaoui, a French citizen with ties to radical Muslim groups, was arrested on immigration charges nearly a month before the Sept. 11 attacks. He has been linked to some of the hijackers through phone intercepts.

A second suspect, pilot Lotfi Raissi, is believed to have coached the hijackers on flying techniques before the attacks. He is being held in London and is fighting extradition to the United States.

Attorney General John Ashcroft said Wednesday that Bush's plan recognizes the potential difficulty in trying terrorism suspects.

"The United States is in a state of war," he said. "It's important to give the president

of the United States the maximum flexibility consistent with his authority."

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U.S. Adds Legal Rights in Tribunals; New Rules Also Allow Leeway on Evidence

The Washington Post

March 21, 2002

John Mintz

The Bush administration has settled on a complex set of military tribunal regulations more advantageous to al Qaeda and Taliban defendants than the guidelines President Bush originally issued in November, knowledgeable sources said yesterday.

The new rules would require a unanimous vote of judges to impose the death penalty on convicted terrorists -- not the two-thirds vote Bush had suggested in his Nov. 13 executive order establishing the tribunals. And while the president's original order barred appeals after conviction, the new regulations allow military officers to review a tribunal's decision on appeal.

Yet the new rules, scheduled to be announced today, also give prosecutors more leeway than they would have in criminal courts. Hearsay or secondhand evidence could be used in the new tribunals, for example, although it is barred in ordinary criminal trials and courts-martial.

Bush's original order brought a barrage of criticism from human rights groups and European officials who said it could violate the rights of suspects brought to trial by the United States. In the four months since, experts from the White House, the Defense Department and the Justice Department have been slowly working out the details of what could become one of the most controversial aspects of the U.S. war on terrorism.

Despite the furor, many U.S. officials have concluded that there may be little use for the tribunals because the great majority of the 300 prisoners being held at the U.S. naval base at Guantanamo Bay, Cuba, are low-ranking foot soldiers, sources said. The tribunals are planned only for relatively high-ranking al Qaeda and Taliban operatives against whom there is persuasive evidence of terrorism or war crimes.

"The world now will begin to see what we meant by a fair system that will enable us to bring people to justice [but] at the same time protect citizenry," Bush told reporters yesterday.

Administration officials have other plans for many of the relatively junior captives now at Guantanamo Bay: indefinite detention without trial. U.S. officials would take this action with prisoners they fear could pose a danger of terrorism even if they have little evidence of past crimes.

Human rights groups expressed differing opinions about the new tribunal rules. All contended that some provisions still violate the rights of prisoners, but some expressed relief that the regulations had been softened since Bush announced them.

The tribunals, sometimes called "commissions," will resemble military courts-martial in composition. They will have three to seven members.

In cases where the death penalty is not a possibility, defendants can be convicted by a two-thirds vote. Those convicted in

tribunals will be allowed to ask a review panel appointed by the president -- consisting of three people, one of whom will be a military judge -- to reconsider their cases. Defendants will not be allowed to appeal to the federal courts.

The rules of evidence governing cases before the tribunals will be considerably looser than they are in U.S. criminal courts. In ordinary criminal cases, a witness cannot offer hearsay evidence -- information based on what someone else has said. But hearsay testimony will be allowed before military tribunals, sources said, because the government must show only that the evidence has "probative value to a reasonable person."

In criminal trials, prosecutors must establish a "chain of custody" for evidence, such as documents or fingerprints, to prove that police handled it properly after obtaining it.

But in terrorism cases brought before tribunals, which may involve papers or computer disks retrieved by U.S. soldiers from rubble-strewn al Qaeda hide-outs in Afghanistan, prosecutors need not establish chain of custody. "It's not like we have a crime scene where a bloody glove got left behind," said one source knowledgeable about the government's deliberations.

The trials will be open to the public, and the defendants will be able to hear the evidence against them. But the hearings can be closed -- even to the defendants -- if classified information is used or the discussion could endanger national security. In such cases, defense lawyers with security clearances could still be present, but would not be allowed to reveal the secrets to their clients.

Any alleged terrorists whom the president ultimately brings before the new tribunals likely would face charges of violating the

laws of war, such as conducting hostilities while posing as a civilian, or committing crimes against civilians, sources said. Bush also likely would file conspiracy charges against such suspects, allowing prosecutors to use evidence involving one member of al Qaeda against others.

The human rights group Amnesty International said the new regulations violate suspects' rights in many ways. The worst provision, the group said, is that convictions could be appealed only to higher panels also named by the president, rather than independent judicial bodies -- a practice it said was "deeply troubling."

Human Rights Watch expressed misgivings about the same provision. "In America, we've never let our political leaders decide who is guilty," said the group's Washington representative, Tom Malinowski. "That's been a fundamental principle since 1789."

Even so, he added that the milder rules "go a long way to meet the concerns of human rights groups. . . . It will help the Bush administration climb out of the deep hole it dug for itself . . . last fall."

Ruth Wedgwood, an international law expert at Yale University who supports Bush's plan, said administration officials have been judicious and concerned with the nation's security throughout the process.

"The time [government attorneys] have taken on this shows the seriousness with which they were taking on the criticism," she said. "This was clearly very carefully done."

In general, sources said, there will be four categories of prisoners: those deemed innocent and released; those repatriated to their countries for trial; those tried before military tribunals; and those detained without charge. Human rights groups

have expressed concerns about the last group.

U.S. officials will rely in part on decisions by European human rights courts that allowed British authorities to detain Irish Catholic and Protestant militants for long periods of time if they were deemed dangerous but not necessarily guilty of a crime, sources said. Those courts allowed the detentions as long as British officials periodically reviewed the cases.

International law allows for such indefinite detention only in cases of national emergency, and administration attorneys view the current situation -- with a danger of clandestine terrorists possibly

wielding weapons of mass destruction -- as exactly that, legal sources said.

Another legal precedent for this type of detention without criminal charge is the practice of involuntary hospitalization of mentally ill people who pose a danger to themselves and others, legal sources said.

"In a state of real emergency, various liberties can be suspended," said one attorney who advised the administration on the rules.

Staff writer Juliet Eilperin contributed to this report.

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Having Their Day in (a Military) Court

National Review

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Robert H. Bork

AT WAR

How best to prosecute terrorists

THE debate over the president's order creating military tribunals to try suspected terrorists consists largely of warring slogans and overripe rhetoric: "shredding our Constitution," "seizing dictatorial power," etc., on the one hand, and some version of "the bastards don't deserve any better" on the other. Analysis is in short supply. The issue of the balance between security and civil liberties will be with us, in various guises, for a long time to come. The reality we face means that no resolution of such issues will be wholly satisfactory.

When the issue is trying terrorists, there appear to be only four options: trial in a federal court; trial before an international tribunal; trial before a military tribunal; or setting the captives free. Nobody this side of a psychiatric ward will choose the last option. But the first and second don't win any prizes either.

Trials in federal courts have features that make them totally inappropriate for the trial of terrorists. Jurors often respond to emotional appeals, and, in any event, would have good reason to fear for their and their families' safety if they convicted. Criminal trials have been adorned by judges with a full panoply of procedural hurdles that guarantee a trial of many months. Appeals and petitions for habeas corpus can take years, and should the death sentence be given, the ACLU has shown how to delay execution for ten

years or more through appeals followed by one habeas corpus petition after another. An open trial and proceedings of that length, covered by television, would be an ideal stage for an Osama bin Laden to spread his propaganda to all the Muslims in the world. Many Islamic governments would likely find that aroused mobs make it impossible to continue cooperating with the U.S.

The conclusive argument, however, is that in open trials our government would inevitably have to reveal much of our intelligence information, and about the means by which it is gathered. Charles Krauthammer notes that in the trial of the bombers of our embassies in Africa, the prosecution had to reveal that American intelligence intercepted bin Laden's satellite phone calls: "As soon as that testimony was published, Osama stopped using the satellite system and went silent. We lost him. Until Sept. 11." Disclosures in open court would inform not only Middle Eastern terrorists but all the intelligence services of the world of our methods and sources.

Trials before an international tribunal would have all of these defects and more. Picking the members of the court would itself be a diplomatic nightmare. It would be politically impossible to keep judges from Islamic countries off the court. In the past, moreover, international courts have often shown a pronounced anti-American bias. Our prosecutor would be helpless to avoid a propaganda circus and the disclosure of our intelligence capabilities and methods. In the end,

convictions would be highly uncertain, but, if obtained, impassioned dissents and the martyrdom of the terrorists would be certain. We should be wary of international tribunals in any event since their establishment seems part of a more general move to erode U.S. sovereignty by subjecting our actions to control by other nations.

Military tribunals avoid or at least mitigate these problems. Propaganda by televised speeches would be impossible and any required disclosure of intelligence methods and successes would be secret. Since trials could move far more efficiently and appeals are cut off by the president's order, punishment of the guilty would be prompt. One of the prices we pay for an all-volunteer military is that for most Americans their armed forces are an unknown world about which it is possible to imagine all sorts of evils; but military tribunals are not, as they have been called, "kangaroo courts" or "drumhead tribunals." Much of the public is probably frightened by visions of defendants convicted out of hand and hustled off to firing squads.

During the Korean War, the officers in my battalion took turns prosecuting and defending. (I had a notable lack of success in both roles.) I sat on the court, and never saw an innocent man convicted but did see a guilty man acquitted. (I prosecuted that one and it still rankles.) Even then, before the widespread reform of the military justice system, military courts manned by officers, in my opinion and that of many others, were superior to the run of civilian courts, more scrupulous in examining the evidence and following the plain import of the law. If I were guilty, I would prefer a civilian jury; if innocent, a military court.

These virtues would be irrelevant if military tribunals were of dubious

constitutionality. They are not. The constitutional issue reached the Supreme Court in *Ex parte Quirin* (1942). German saboteurs had entered the United States illegally to destroy war industries and facilities. Arrested by the FBI before they could act, they sought to file for writs of habeas corpus, contending they had a right to trial before regular courts rather than a military commission. The presidential proclamation establishing the commission denied them access to those courts.

The Court denied the petition, judging it irrelevant that one of the defendants might be an American citizen. In its decision, the Court made clear the separate constitutional tracks of the two forms of justice: "Presentment by a grand jury and trial by a jury ... were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals which are not courts in the sense of the judiciary Articles" of the Constitution. Consistent with that understanding, military tribunals have been used by several presidents in time of war. In the Revolutionary War, before there was a Constitution, George Washington employed such tribunals freely, as did Abraham Lincoln in the Civil War, and Franklin Roosevelt in World War II. We remember the Nuremberg trial, with many of the trappings of a civilian court, as an attempt (failed in my view) to establish an international rule of law in open proceedings. That trial is not a model for the problem we face now. There were, of course, no problems of intelligence disclosures, but, more important, the open trial was not regarded by the allies as the only, or in all cases the preferred, method of proceeding. According to Mark Martins, a respected scholar and military lawyer, "German

regular army soldiers were also defendants in many of the thousands of military courts and commissions convened by the Allies after the war in different zones of occupation."

If there is a problem with Bush's order, it is the exemption of U.S. citizens from trials before military tribunals. Quirin held that Americans can be tried there, and it is clear that they should. The trial of American terrorists in criminal court would pose all the problems of trying foreign terrorists there: The prosecution would have to choose between safeguarding our intelligence capacity and

trying the terrorist. The terrorists could well go free.

Contrary to some heated reactions, military tribunals are well within our tradition. They are needed now more than ever.

Mr. Bork, an NR contributing editor, has been a Marine, lawyer, law professor, solicitor general, acting attorney general, and judge.

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Justice Can't Be Done in Secret: Why Public and Press Have a Right to Witness Proceedings of Military Tribunals.

The Nation

June 10, 2002

Edward J. Klaris

On March 21, the Defense Department issued its long-awaited regulations governing the trials of alleged terrorists in military tribunals. The regulations answer some of the criticisms raised against the preliminary order issued by the Bush Administration in November. The government will, for example, permit defendants to have court-appointed military lawyers, defendants will be presumed innocent until proven guilty and death-penalty sentences must now be unanimous. On the key question of whether trials will be held in secret, however, the government answered its critics somewhat misleadingly. The regulations do state that trials should be open, but they also give the judges complete discretion to close the proceedings to the press and public for just about any reason. The regulations also stress that "no provision in this Order shall be construed to be a requirement of the United States Constitution."

President George W. Bush is determined to use military tribunals rather than federal courts to try noncitizen terrorists either in this country or abroad. According to recent reports, one reason to favor military tribunals is that the government is hoping to obtain convictions without having specific evidence that the defendants engaged in war crimes, something a federal court would require. But even if military tribunals are used to avoid certain evidentiary requirements against noncitizen defendants, there is no good reason for the President to abandon

the delicate balance federal courts have struck between the First Amendment right of the press and public to observe criminal trials and the government's desire to protect classified information.

Military tribunals have been used periodically throughout US history, and the Supreme Court during the Civil War and World War II was asked to decide whether the President had the power to create these tribunals under his constitutional authority during times of war. Those Supreme Court cases--some of which upheld the wartime powers of Presidents to create tribunals and one that held after the Civil War that President Lincoln had exceeded his powers--have looked at the impact on the constitutional rights of the defendants. No court has ever considered the constitutional rights of the press and public to attend and report on proceedings in military tribunals.

Public criminal trials are so commonplace in our society that few think twice about the rights underlying this openness. When they do, the criminal defendant's Sixth Amendment right to a public trial usually comes to mind. However, it is now beyond dispute that a separate right of access to attend trials also arises from the First Amendment. That right to attend criminal proceedings--which belongs to the press and public, not to the defendants--mandates that trials be open, absent compelling and clearly articulated reasons for closing them. This independent constitutional right of access

was first recognized by the Supreme Court in 1980 in *Richmond Newspapers v. Virginia*. In that case, the Court held that an order closing the courtroom for the trial was unconstitutional, noting the public policy reasons behind the rule: "When a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." In describing the need for open criminal proceedings, Professor Laurence Tribe of Harvard Law School wrote: "The courthouse is a 'theatre of justice,' wherein a vital social drama is staged; if its doors are locked, the public can only wonder whether the solemn ritual of communal condemnation has been properly performed."

The United States Court of Military Appeals has also recognized the constitutional right of access, mandating the same test for closure in courts-martial as applied by federal courts: "where the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." In both federal courts and courts-martial it is now clear that these rights belong to the public, not to the government or the defendant, and are fundamentally necessary for the effective functioning of our criminal justice system. Neither the defendant nor the government nor both jointly can shield a proceeding from public view without meeting the stringent constitutional test.

Military tribunals are the functional equivalent of federal courts and courts-martial in terms of the press and public's right of access. The tribunals will act as a "theatre of justice" where those who

allegedly sought to terrorize and undermine the United States will be tried. While the defendants may not have constitutional rights because they are noncitizens captured abroad, the press and public do not give up their rights based solely on the forum chosen by the President. The right of access, though, is not absolute. There are many rules federal judges follow that balance the right of access against the need for closure--for example, when national security information might be revealed in court. If the typical First Amendment guidelines are applied in the military tribunals, classified information will be shielded from improper disclosure and appropriate access will be provided the press and public.

Terrorists, hijackers, spies, mobsters, drug dealers and others have all been tried in open federal court, where the First Amendment applies, in cases involving serious national security concerns, without classified information being leaked. Federal judges routinely close the proceedings for a limited time when classified information is introduced into evidence. The Classified Information Procedure Act permits prosecutors to keep from defendants and the public certain sensitive information, and federal judges must defer to the government's reasonable concerns about national security.

The most recent federal prosecution of terrorists is an example of how a court effectively handled national security information while balancing the press and public's First Amendment rights of access. In early 2001 Judge Leonard Sand in New York presided over a trial of four members of Al Qaeda, who were jointly charged with Osama bin Laden in a far-reaching conspiracy that spanned at least ten years. The conspiracy culminated in the truck-bombing of the United States

embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998, when 224 people, including twelve Americans, were killed and more than 4,500 others injured.

Once the trial began, Judge Sand balanced the need for secrecy with the First Amendment requirement that the trial must, except in extraordinary circumstances, be open to the public. Jury selection, for example, was closed, based on the court's determination that openness would discourage prospective jurors from being candid about their views of capital punishment. Judge Sand also ruled that for their own protection the identity of the jurors would not be released. Similarly, when an FBI informant took the witness stand, the judge ordered the courtroom artists not to sketch him. Judge Sand closed the courtroom so that two secret plea agreements could be reached; he sealed documents and heard secret testimony about the jail conditions of the Al Qaeda defendants. As a result, no classified information was leaked.

The press, which inserted itself into the case by filing motions with Judge Sand for access, criticized even these restrictions on First Amendment grounds. In a trial that involved four months of testimony, ninety-two witnesses called by the prosecution and more than 1,300 exhibits, the actual limitations on access were minimal. The constitutional balance between access and protection of national security information was maintained.

Several other federal trials have handled similar secrecy concerns. The 1991-92 trial of former Panama dictator Gen. Manuel Antonio Noriega involved undercover government agents, secret investigative techniques and other classified information. The judge occasionally sealed evidence, did not permit evidence to be

introduced and sometimes ruled that evidence should come into open court. Despite the intricacy and sensitivity of the underlying issues, the trial was open and the public was able "to participate in and serve as a check upon the judicial process," wrote the trial court in its opinion. Acknowledging the importance of an open trial in a "controversial" case such as this one, the judge wrote that he had specifically "sought to make public all aspects of these proceedings to the extent legally permissible."

Similarly, Oklahoma City bomber Timothy McVeigh was tried and convicted in open federal court with classified information shielded from improper disclosure. From the outset, publicity was pervasive and intense. Massive amounts of secret government materials were introduced as evidence, including more than 10,000 FBI interview reports. The news media sought access to a variety of documents that had been filed under seal. Balancing the interests of secrecy and openness, Judge Richard Matsch condemned the "routine practice of sealing documents without adequate recognition of the public interest," and he granted access to some of the documents sought. The trial itself was open to the public. To protect the jury, the judge had a custom-built wall erected between them and spectators. He scrambled juror numbers so that the public could not match individual jurors with the answers given to questions during voir dire and kept the identity of individual jurors confidential. Each of these actions was challenged by a coalition of seventy press representatives at the time, but citing juror safety and privacy, the judge refused to budge.

The 1993 World Trade Center bombing cases also raised serious national security concerns that had to be weighed against the public and press's rights of access.

Once again, the federal judge was able to strike that balance without any leak of national security information.

All of these examples of successful federal court prosecutions should reassure the Bush Administration that it too can apply the First Amendment right of access to its military tribunals without threatening national security. By issuing regulations that give the tribunals more discretion than the First Amendment permits and by specifically stating that the Constitution does not apply in the tribunals, the President may repeat some of the mistakes of his predecessors in the use of such tribunals. During the Civil War, for example, secret military tribunals, rather than civilian courts, were used as part of a broader campaign of the Lincoln Administration to quash public dissent and to try to punish civilians who criticized the federal government or the war.

A military tribunal was used again in 1942 by President Franklin Roosevelt to try eight German saboteurs who plotted terrorist attacks strikingly similar to Al Qaeda's in 2001. The Nazis planned to destroy key railroad installations, aluminum factories, power plants, bridges and canal locks, plus targets such as Jewish-owned department stores. That case more than any other points up how secrecy breeds corruption and contempt of justice. All of the saboteurs were found guilty; six were executed and two were sentenced to life in prison.

J. Edgar Hoover, the head of the FBI, was heralded for his swift capture of the Germans. The military proceedings were kept so secret that prior to the start of the trial officials would confirm neither the exact location nor the start date of the trial. Once it began there were only terse statements after each day's proceedings and a single visit by the press to the

courtroom when the trial was suspended. There was a great deal of speculation in the press about the trial. But because it was closed, no informed opinions about the strength of the government's case could be formed.

After the war, when Harry Truman was President, his Attorney General, Tom Clark, decided to open the files of the secret trial. It turned out that the two saboteurs who were given lengthy sentences, George Dasch and Ernst Burger, hated the Nazi regime and had left Germany expressly determined to expose the plot. Soon after they landed on the beach in Amagansett, Long Island, Dasch and Burger phoned the FBI in New York. They went to Hoover's Washington office, revealed the plot in full and explained how and why they had led the real saboteurs into the trap.

William Turner, one of Hoover's veteran FBI agents, later wrote: "Ironically, [Dasch] is most probably an authentic American war hero, responsible for saving many lives. But fate had made him a threat to the FBI's public image." As Lloyd Cutler, former White House counsel under Bill Clinton and a junior member of the prosecution team, explained it to the Atlanta Journal-Constitution in 1980, "I think the major reason the trial was kept secret, was the fact that it wasn't the FBI that had done the real work in capturing the Nazis." Had the trial been open, the military officials who presided over the tribunal would have been hard pressed to convict Dasch and Burger. But it was not, and the damage to these two men was devastating.

According to a series of articles published in 1980 by the Journal-Constitution, two years after Dasch and Burger arrived in prison, there was a riot because the prisoners objected to being housed with Nazis and Dasch was almost thrown off

the roof of the penitentiary. Dasch was then transferred to solitary confinement at Leavenworth, Kansas, forbidden to have even a pencil. In April 1948 both Dasch and Burger were granted executive clemency and deported. Dasch, forced to return to Germany, was branded both a Nazi criminal and a traitor to the fatherland in the magazine *Der Stern*. His hometown paper, in a front-page article, dubbed him "The Judas of Speyer." Dasch tried to return to the United States many times during his lifetime but was never permitted to. He died in Germany in 1991.

History shows that giving unfettered discretion to the executive branch to capture, prosecute and try defendants without public scrutiny is likely to yield results that will be questioned for years to come and set a precedent for further incursions on individual liberties. Whether the Administration or the officers presiding over the military tribunals will comply with First Amendment requirements affirmed by the Supreme Court remains an open question, but so far the message the President has sent is that he does not have to. Since September 11, the Bush Administration has pursued a secretive legal strategy. The Immigration and Naturalization Service continues to detain secretly hundreds of aliens rounded up after September 11 whose links to the terrorist plot, if any, have not been explained. Without public announcement, for example, on September 21, 2001, the country's chief immigration judge, Michael Creppy, who is appointed by the Attorney General and comes under the executive branch of government, issued a memorandum ordering that immigration hearings designated by the Justice Department be kept secret, with court

officials forbidden even from confirming that cases exist.

Since September 11, civil rights groups and news organizations have sued the federal government for blocking press and public access to immigration proceedings and detentions. In one case, decided on April 3, in which the *Detroit Free Press* and *Ann Arbor News* filed suit seeking access to deportation proceedings of a Detroit-area Muslim leader, the court held that the government had violated the First Amendment by excluding the press and public. On March 6 another suit was brought by the New Jersey Civil Liberties Union, the Center for Constitutional Rights and other legal groups challenging the government's closed immigration hearings; and in late February a federal judge in California declined to permit civil rights groups to obtain a list of Afghan detainees being held at Guantanamo Bay, Cuba.

The State Department has repeatedly criticized secret military tribunals in other countries, and with good reason. The public policy rationale the Supreme Court has used in expanding the First Amendment right of access is that just results come from openness. Secrecy does little more than cloak potential corruption, foment distrust and prevent the community from seeing justice done. The President, even in a time of war, may not alter that equation by simply changing the forum in which defendants are tried from courts to tribunals. If asked, the Supreme Court should find that the public and press have a First Amendment right of access to military tribunals as well.

Edward J. Klaris is general counsel of *The New Yorker*.

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Supreme Court Blocks Limit on Secret Hearings

The Boston Globe

June 29, 2002

Lyle Denniston

The Supreme Court took its first action in the war on terrorism yesterday, showing a reluctance to restrict the Bush administration's wide-ranging use of government authority to deal with the individuals detained since the Sept. 11 attacks.

In a brief order without explanation, the justices blocked temporarily a month-old order by a federal judge in Newark that had kept the government from holding secret immigration hearings for hundreds of detainees.

The Justice Department has set up "special interest" hearings for those held on immigration charges and being detained for investigation of terrorism. But it has not said who among those being held fall within that category and its scope. It has identified no one being held, and has not said when or where any hearings have been or would be held. Civil rights groups have said that more than 700 detainees may be affected.

All such hearings are closed, and no information about them is to be disclosed publicly, under a Justice Department order issued by the chief immigration judge, Michael Creppy. "No visitors, no family, and no press" could be admitted, the order said.

After New Jersey news media were barred from some of those hearings, they obtained an order May 28 from Chief US District Judge John W. Bissell in Newark that narrowed the government's authority to proceed in secret. His order did not

require public hearings in any given case, but nor did it allow the automatic closing of every such hearing.

Instead, Bissell ruled that the news media and the public have a right to attend those hearings, but could be excluded if the hearing officer makes findings, one case at a time, that a secret hearing is necessary in a particular case to serve the government's need to continue investigating terrorism.

The judge refused to postpone his order to give the Justice Department time to appeal. The department then asked the US Court of Appeals for the Third Circuit, in Philadelphia, to block Bissell's order until the appeals court could review it. The appeals court also refused.

Administration lawyers, using urgent claims of a threat to the terrorist investigation, then asked the Supreme Court to put Bissell's order on hold until department challenges can be heard on appeal, first in the appeals court and perhaps the Supreme Court.

It is rare for the Supreme Court to step in and block a lower court order when a similar request has been turned down by all the lower court judges involved. But yesterday the Supreme Court set aside Bissell's order until the appeals court in Philadelphia has issued a final ruling on the government challenge. There apparently was no dissent.

The Supreme Court has been prepared to act quickly on the variety of challenges to the Bush administration's response to the terrorist attacks. In the immigration

hearings case, the justices acted two days after all of the legal papers on that issue had been filed.

Besides issuing the order delaying the prospect of any public immigration hearings in the terrorist probe, the court yesterday granted review of another immigration dispute that apparently has nothing to do with the war on terror.

That case involves a South Korean who has been permanently admitted to the United States but faces deportation after being convicted in California of burglary

and theft. The issue in his case is the constitutionality of a federal law that bars the release on bond of a convicted individual until after their deportation proceeding is completed.

A federal appeals court ruled that it is unconstitutional to deny release of a permanent resident alien. The Justice Department then appealed that ruling to the Supreme Court. A final ruling is expected next spring.

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Ruling Favors Limited Access to 9/11 Data

The New York Times

July 13, 2002

Benjamin Weiser

A federal judge, acknowledging national security concerns, ruled yesterday that the government should have a say in what is turned over to the families that have sued airlines, security firms, and others in the aftermath of the Sept. 11 terror attacks.

The judge, Alvin K. Hellerstein of Federal District Court in Manhattan, ordered a temporary halt to the progress of the lawsuits until the government and lawyers for the families come up with a way to screen information and satisfy the government's concerns that sensitive material is not disclosed.

In their suits, the families' lawyers have been seeking records involving airline security and other information that could expose the vulnerabilities or failures of the airlines, airports, and government agencies.

Government officials had cited "grave national security concerns" that information might be disclosed in the pretrial stages of the suits that could compromise security and public safety. They said that commercial air carriers and their contractors possessed information about anti-terrorist measures that would remain effective only if the measures were closely held, and disclosing them could "endanger the traveling public."

In court yesterday, Judge Hellerstein agreed, saying the government "has a very important voice" that should be heard in the case. "It's very clear to me that intervention is appropriate," he said.

He also advised plaintiffs' lawyers to begin obtaining government security clearances, which would allow them to see highly sensitive data. "They'll want access to information you won't be happy to give out," the judge told Daniel S. Alter, a lawyer for the government.

Mr. Alter, an assistant United States attorney in Manhattan who said he was representing the Transportation Security Administration, cautioned that there might be materials that were "so sensitive" that they "can't be released."

Security clearances for lawyers are unusual but not unprecedented in sensitive court matters. Such clearances were required, for example, for defense lawyers in last year's embassy bombings trial in New York.

After yesterday's hearing, one plaintiff's lawyer, John A. Greaves, said he was satisfied that the process ordered by the judge would not allow the government to make a unilateral decision on what information could be kept from plaintiffs.

"Our big concern was we don't want them to have carte blanche," Mr. Greaves said.

He added that decisions would be made on a case-by-case basis as to what could be disclosed. But even with a system in place, he said, he would not hesitate to go to the judge if he felt the government was being too restrictive.

Before the hearing, Ellen Mariani, whose husband, Louis, also known as Neil, was on the flight that crashed into the south

tower of the World Trade Center, said, "I want the truth."

She continued, "I don't feel that anybody should be sifting portions out of my court lawsuit. If they have nothing to hide, bring it out into the open."

But reached by phone at her New Hampshire home last night, she said she had left court with a much better feeling.

"I think he's going to be very fair," she said of the judge. "I watched him. I looked at his eyes. I came out with a much better feeling."

She added, "He laid down the rules, the ground rules, and I didn't think it was unfair at all."

The prospect that the parties might soon begin to exchange information before trial, a process known as discovery, prompted lawyers for families who have not yet decided whether to sue to ask that the pace be slowed somewhat.

The lawyers told the judge that in many cases their clients had not yet decided whether to sue or to take part in the federal Victim Compensation Fund, which was established as an alternative to litigation.

Through the fund, families may be eligible for payments of more than \$1 million without the usual delays, costs, or challenges of proving a legal case. But people who sue could theoretically win higher damages, while facing the typical risk of long court battles, or winning nothing.

In a separate matter, Judge Hellerstein said that two plaintiffs who were suing under pseudonyms should use their actual names.

Their lawyer cited privacy reasons, saying the two had received constant calls from the news media. But the judge said he viewed a lawsuit as a "public event."

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