1

Immigrants' Rights in the Aftermath of 9/11: Detention, Discrimination and Secrecy

LUCAS GUTTENTAG
American Civil Liberties Union

Let me start by stating the obvious: September 11th caused the world to stand still for all of us. The horrific attacks on the World Trade Center and Pentagon killed thousands of innocent people and caused untold damage to countless others. Like everyone, I want there to be an aggressive investigation, to punish the perpetrators and to prevent future attacks. We need better intelligence, better prevention and better enforcement. The question is, how do we do that?

The greatest challenge is to demonstrate to ourselves and to the world that security and human rights are not inconsistent; that security and civil liberties are not incompatible. As a nation, we can be both free and secure. I hope when we look back on this period a year from now, five years from now, twenty or a hundred years from now, we will do so with pride and

not with shame. This is our challenge, and the question we must all ask ourselves is: How do we achieve that goal?

Some of the statements made by President Bush and others—especially Mayor Giuliani—in the immediate days after September 11 were positive and helpful. The president said that this was a battle against terrorists, not a war on Muslims, Arabs or Middle Easterners. That was critically important. But, some of the actions of the Bush administration since those days have, in my view, not lived up to that promise. And it is those actions with which we are now grappling. I cannot touch on every issue, so I will focus on four main areas of concern to the civil rights and civil liberties community.

First is the ongoing detention of an unknown number of young Middle-Eastern and Muslim men who, as far as we can tell, have absolutely no connection whatsoever to terrorism or to the attacks of September 11.

Second is the sweeping secrecy shrouding the detention and deportation process of those detainees. The degree of secrecy imposed by the Justice Department goes far beyond what is necessary for the aggressive investigation that everyone supports. We are not seeking the disclosure of tips, of informants, or of investigative material that would help prevent future attacks or lead to the prosecution of anyone who intends us harm. But, there is some critical information that can—and, I believe must—be disclosed to give the American public confidence that this investigation is being conducted consistent with our fundamental constitutional values, in conformity with the principles of due process and with due regard for the protection of individual liberties.

Third is the singling-out of individuals based not on any suspicion of wrongdoing or connection to terrorism, but rather based on ethnicity, religion or nationality. The government's investigation is targeting Middle Easterners and men of Arab and Muslim descent for arrest, detention and deportation not because of allegations of wrongdoing but because of nationality, ethnicity or religion.

Finally, virtually every one of these initiatives and policies has been undertaken unilaterally by the Department of Justice and the attorney general through regulatory amendments, executive action or administrative fiat. The administration has minimized the involvement of Congress and the oversight of the courts. That diminishes the ability of the public to scrutinize and to judge our government's actions.

Let me try to expand on each of those points briefly.

Detention. In the immediate aftermath of September 11 and for the first two months, the attorney general and Justice Department spokespeople issued almost daily reports and generated a drumbeat of information about the number of people whom the department had arrested in the post-September 11 investigation. These numbers reached a maximum, according to press reports, with announcements in November that almost 1,200 individuals had been arrested or detained. There was no allegation that these were individuals who were actually involved with or had knowledge of terrorism or the 9/11 attacks. They were individual immigrants arrested based on what we have all since learned were minor noncriminal immigration violations. Of course, it is impossible to know with certainty what the government may allege about each of these detainees because that information has not been disclosed, but it does not appear that any had a connection with or information about the attacks.

The ACLU and a number of other groups filed a Freedom of Information Act (FOIA) request and had meetings with the FBI, INS and others to try to obtain some basic information. When the information was not forthcoming, we filed a lawsuit to compel disclosure by the government.[1] Based on the sporadic and piecemeal responses we then received, there are—at a minimum—300 to 400 people still in jail as of this date. It may be as high as 700; we do not know. As of January 4, 2002, the data show that out of approximately 380 detainees, more than 50 have been detained for six months or longer, 128 have been detained for five months, 144 have been detained for four months and another 50 have been detained for three months.

That lengthy detention of individuals charged with minor immigration violations is unprecedented. Normally, these kinds of charges do not result in detention at all. An immigrant charged with overstaying a visa, violating student status or working without authorization is not normally jailed. Instead, he or she is released on their "own recognizance," and is certainly not subjected to weeks or months of incarceration.

Although the INS does not seem to be explicitly relying on secret information to prosecute these individual immigration cases, the govern-

[1] *CNSS v. Department of Justice,* No. 01-CV-2500 (D.D.C. filed December 10, 2001). Subsequent to this presentation, the district court issued an order requiring the government to disclose the information. *See Center for National Security Studies v. U.S. Dept. of Justice,* 217 F. Supp. 2d 58 (D.D.C., 2002).

ment does appear to be jailing individuals based on evidence that is never actually submitted to an immigration judge. In cases we have documented, individuals who have completely finished the immigration process—either with a grant of voluntary departure or an order of deportation—nonetheless remained in jail for lengthy periods. The detention is not based on any ongoing immigration proceeding, because the case has ended. Rather, the detention continues because the FBI has not given the INS permission to release the person. The continued incarceration is dictated soled by the absence of an FBI "clearance."

That is not the normal process for permitting the jailing of anyone—citizen or noncitizen—in this country. The prosecuting agency or the investigating officers cannot simply dictate who remains detained. Yet that is the role the FBI appears to be playing. In the two instances in which the ACLU was able to bring legal challenges to this practice, the government immediately deported the individual (as the immigration judge had ordered) rather than defend its practice of ongoing detention.[2]

There have also been widespread reports of individuals having difficulty contacting their attorneys. As you know, a person in immigration proceedings does not have the right to appointed counsel. Therefore, unless a detainee has an opportunity to contact and retain an attorney—either directly or through family—and that lawyer has reasonable access to the detainee, an immigrant will not have legal counsel. To this day, we do not know how many of the detainees are without legal representation and how many have been unrepresented throughout their detention and deportation. Certainly, some individuals have had lawyers. But we do not know how many or what percentage. That is a critical piece of information to provide assurance that individuals have a means of protecting their rights.

Lastly, we do not know to what extent young men continue to be arrested but are simply not being counted by the Justice Department as part of the post-9/11 investigation. Yet, they may well be subjected to the same practices and polices as the initial group of detainees.

Secret Hearings. The secrecy surrounding the detentions is compounded by the order of the chief immigration judge dictating that all of the immigration proceedings conducted in any of these cases—people lumped into

[2] *See Moustapha v. Ashcroft,* No. 02-CV-598 (D. N.J. filed March 2002); *Saad v. Ashcroft,* No. 02-CV-01975 (D. N.J. filed April 26, 2002).

this group of post-9/11 detainees—shall be closed to the press and the public. Under this order, the so-called "Creppy Memorandum," the entire immigration proceeding is closed to the press, the public and to any family or friends of the detainee. In fact, the hearing is not even publicly docketed so that the very fact of the hearing is not disclosed.

To the extent that the government's rationale for this secrecy is—as we heard earlier this morning—to prevent disclosure of the identity of the detainees to the terrorists, it appears to make little sense. In many cases, the identity is known already, as for example, in Detroit where the ACLU is representing local newspapers and Representative John Conyers to compel access to the removal hearing of Rabih Haddad.[3] His arrest and detention has been widely reported in the press and plainly is well-known to any terrorist network that may have interest in that fact. Thus, the secrecy only serves to deprive the press and the public of knowing what is going on behind those closed doors.

There is a procedure required by the First Amendment that is routinely applied in criminal cases to enforce the public's right to know and to balance it with the need to keep certain matters confidential if their disclosure threatens national security or other compelling societal values.[4] That procedure allows a particular case or a portion of a case to be closed to the press and public under certain circumstances. But closure has to be decided on a case-by-case basis where the government has to make an actual showing that closure is necessary and that no alternative procedure will suffice to protect a compelling governmental interest.

We believe that these principles governing criminal or civil trials are equally applicable to an immigration hearing. If the government demonstrates a compelling reason for closure, so be it. But such closure cannot be imposed in an across-the-board fashion without any individualized showing through a unilateral order from the chief immigration judge or the attorney general.[5]

Another deeply troubling detention practice shrouded in secrecy is the use of the "material witness" statute to detain noncitizens for lengthy

[3] *See Detroit News v. Ashcroft,* No. 02-70340 (E.D. Mich. filed January 2002); *Detroit Free Press, Inc. v. Ashcroft,* No. 02-70339 (E.D. Mich. January 29, 2002). *See Detroit Free Press et al. v. Ashcroft et al.,* 195 F. Supp. 2d 937 (E.D. Mich. 2002).

[4] *See Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980).

[5] *See Detroit Free Press v. Ashcroft,* 303 F. 3d 681 (6th Cir. 2002); *North Jersey Media Group v. Ashcroft,* 303 F. 3d 198 (3rd Cir. 2002).

periods without public scrutiny. The statute is part of the federal criminal code and is a mechanism for temporarily detaining a person (if there are no other means for ensuring their presence) who has information relevant to a criminal trial until they testify or their testimony is preserved by means of a deposition.[6] It appears that this statute is now being used by the Justice Department to detain for lengthy periods individuals who have no involvement with terrorism but whom the government cannot charge with an immigration or criminal violation.

Given that a material witness warrant has to be approved by a federal court and the witness is entitled to appointed counsel, one would expect that the extent to which these warrants are being used would be well-known. But that is not the case because of a pernicious policy of secrecy. As far as anyone can discern, the lawyers appointed to represent material witnesses are subject to court orders or instructions that prohibit them from speaking about the case in any way. Not only are they prohibited from disclosing the identity of a material witness, they cannot reveal that they have such a case or even that they are subject to an order prohibiting them from talking. In other words, the very fact that they are "gagged" is itself secret.

Because of the scope of these orders, I cannot say categorically what restrictions the lawyers are subject to or how broad the orders are. But it appears indisputable—and the government has not denied—that such orders have been issued and that people are detained on material witness orders under circumstances where no one can disclose the fact of that detention or how long any individual has been jailed.

Selective Enforcement. The concerns relating to detention and secrecy are profoundly exacerbated because the Justice Department has targeted individuals of Middle-Eastern, Arab and Muslim origins. People have been subjected to questioning, arrest, detention and deportation not because of any allegations of involvement with terrorism and not based on any individualized information or suspicion, but because they share some of the ethnic, religious or nationality characteristics of the 9/11 terrorists.

The government's actions may seem like an understandable impulse to some, but it is not good law enforcement, and it is not fair to the individuals and communities who are the targets, and it constitutes a selective and discriminatory use of immigration and other laws. The government's

[6]The material witness statute is codified at 18 U.S.C. § 3144.

practices have been criticized by both local and national law enforcement officials. Singling-out individuals based on ethnic, religious or nationality characteristics alienates the very community whose confidence the INS and law enforcement most needs. That is especially crucial if we want to encourage individuals who may actually have information to come forward. The government cannot go to our Arab and Muslim communities asking for assistance and support while simultaneously arresting, detaining and deporting members of that community for immigration violations that have absolutely no connection to terrorism.

It is indisputable that there are people who are intent on doing us harm. No one doubts that. The question is how do we identify them? How do we capture them? And how do we further those goals without alienating an entire community or adopting discriminatory criteria that violate our fundamental values.

Checks and Balances. Lastly, I want to address the manner in which the Bush administration has implemented many of these policies. The ultimate safeguard of individual rights and liberties in this country is the system of checks and balances enshrined in our Constitution. When the administration proposed the USA Patriot Act to Congress, it asked for virtually unilateral detention authority and other powers. Congress debated those proposals. Some were enacted, some were rejected. The ACLU and other organizations have vigorously criticized the Patriot Act. But, notwithstanding that criticism, the law went through the legislative process of consultation with both houses of Congress, and, as a result of that dynamic, Congress made some important changes to the original administration proposal. For example, the Patriot Act contains an affirmative right for an individual who is "certified" for detention to challenge that designation in a *habeas corpus* action in federal court. And the Act now requires the Justice Department to report to Congress every six months on the number of individuals detained under the new detention authority. Even the truncated legislative process that culminated in the Act resulted in some small measure of checks and balances.

So what has become of the Patriot Act's detention authority? Ironically, or perhaps not so surprisingly, the administration is not using it. Instead the Justice Department's detention practices have been implemented though a series of changed regulations, unilateral policies and the cobbling together of various other provisions. As a result there is even less oversight and transparency than provided for in the Patriot Act.

Let me identify a few of these unilateral actions. One is the promulgation on September 20, 2001 of an amendment to INS regulations that expanded the time after arrest within which an individual must be charged with an immigration violation. The new rule extends the time from 24 hours to 48 hours or "an additional reasonable period of time" in the "event of an emergency or other extraordinary circumstance."[7] The FOIA documents we have received appear to show that many people were held for lengthy periods of time before they were charged with anything. Second, the attorney general promulgated a regulation authorizing the INS to obtain an automatic stay of an immigration judge's release order in virtually any immigration case. Under this regulation, if the INS sets a high initial bond, an immigration judge's order to release that individual (or to lower the bond) is automatically stayed if the INS files an appeal with the BIA. As a result, the immigration judge's independent role is virtually eliminated. Third, the attorney general announced an eavesdropping regulation that allows the Justice Department to monitor attorney-client conversations of prison inmates without any court order. The authority for such monitoring has always existed if authorized by a court. Under the new regulation, the Justice Department can impose monitoring without any judicial supervision. Fourth, as I've already discussed, the closing of immigration hearings was also adopted by administrative order. Finally, the attorney general has announced a "restructuring" of the BIA that can only be characterized as an evisceration of its role and that so diminishes administrative review as to reduce it almost to the point of non-existence.

Let me close by making an obvious observation. An informed public and robust debate is critical to the preservation of individual freedom. If the administration believes that it needs a form of *de facto* secret preventive detention selectively targeting one segment of the immigrant community, it should ask for that authority. Let the Congress decide whether to enact such a law and let the judiciary determine its constitutionality. These issues are too important to be adopted unilaterally and implemented in secret.

Thus, it is especially troubling that the attorney general has made comments that may be perceived as seeking to intimidate the government's critics. When he testified before the Senate in November, Attorney General Ashcroft said, and not so subtly, that dissent should be equated with disloyalty and criticism with conspiracy. He accused his critics of invoking "the phantoms of lost liberty" and saying "that those tactics only

[7] 66 Fed. 483352 (Sept. 20, 2001).

aid terrorists . . . and give ammunition to America's enemies and pause to America's friends."[8]

The intimations of the attorney general—that those who criticize his tactics, his policies or his initiatives are disloyal and are aiding terrorists—are, I want to suggest, fundamentally at odds with the values of an open society and with the traditions of our country.

I would say to the attorney general, "Defend your policies, do not attack the motives of your critics, and let us engage in an open and informed debate." I believe that security and civil liberties can both thrive if we are eternally vigilant and if we continue to respect and enforce the values and principles that are the foundation of our democracy.

[8]Testimony of Attorney General Ashcroft before Senate Judiciary Committee, 2001.