

CIVIL LIBERTIES ISSUE PACKET

Since September 11, 2001, the Administration has initiated a host of policies and practices that have unfairly targeted immigrants and undermined our commitment to the trinity of civil liberties: freedom, equality, and due process of law. Many of these initiatives, while being of questionable worth in enhancing our security, have undermined our Constitutional guarantees and protections. Issued without Congressional consultation or approval, these new measures include regulations that increase secrecy, limit accountability, and erode (or threaten to erode) important principles that set our nation apart from other countries. While effective steps must be taken to protect the American public from further terrorist acts, our government must not trample on the Constitution and on those basic rights and protections that make American democracy so unique and so strong. Doing so will damage our liberty here and our credibility in the world.

Please urge your Members of Congress to address these concerns through increased oversight and pro-civil liberties legislative initiatives. Included in this packet is information that will give you and your clients the necessary tools to advocate effectively on these critical issues.

TABLE OF CONTENTS

1. Issue Paper
2. Talking Points for Messaging Purposes
3. Model Op-ed
4. Request for Case Examples from AILA Members
5. List of Troubling Executive Branch Actions Since 9/11
6. AILA Press Release Addressing the DOJ Inspector General Report on Post-9/11 Detentions
7. Select Recent Media Coverage

AILA Issue Papers

American Immigration Lawyers Association

EXECUTIVE ACTIONS THREATEN FUNDAMENTAL FREEDOMS

THE ISSUE: The Administration, since September 11, 2001, has initiated new policies and practices that roll back fundamental protections and jeopardize basic freedoms. Many of these initiatives, while being of questionable worth in enhancing our security, erode our constitutional guarantees and protections. Issued without Congressional consultation or approval, these new measures include regulations that increase secrecy, limit accountability, and erode (or threaten to erode) important principles that set our nation apart from other countries. While effective steps must be taken to protect the American public from further terrorist acts, our government also must not trample on the Constitution and on those basic rights and protections that make American democracy so unique and so strong. Doing so will damage our liberty here and our credibility in the world.

BACKGROUND: Since September 11, the Administration has unilaterally expanded the power of government. Under the guise of combating terrorism, the new regulations and programs initiated by the Administration have undermined law enforcement officials' ability to perform their duties, have done little to gather worthwhile intelligence, have granted the executive branch broad powers to act in secret, and have made it very difficult for foreign visitors to maintain their legal status. These actions waste law enforcement's valuable resources by focusing on people who pose no threat to our national security, and they violate fundamental principles of our judicial system. *AILA is deeply troubled by many of the Bush Administration's actions including:*

- **The refusal to share information with Congress, the courts, and the public:** The Administration has shown an increasing disregard for the importance of openness to our democratic government and for our constitutional system of checks and balances. The Department of Justice (DOJ) has refused repeated bipartisan requests from House and Senate oversight committees for information regarding recent administration measures, and has refused to provide the federal judiciary with information or evidence authorizing the detention of certain individuals. The Administration has been even more aggressive in its efforts to insulate itself from public scrutiny. On October 12, 2001, Attorney General John Ashcroft sent a memorandum to the heads of all federal departments and agencies establishing a new policy on Freedom of Information Act (FOIA) requests. The memorandum actively encourages federal agencies to fully consider all potential reasons for non-disclosure, and sanctions the presumptive refusal of requests through a restrictive interpretation of FOIA. The memo states, "you can be assured that the Department of Justice will defend your decisions [to withhold records] unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." The "sound legal basis" test is a much lower standard than DOJ's previous policy of only defending an agency's refusal to release information when it could be argued that releasing the information would result in "foreseeable harm."
- **"Special registration" policy:** The "special registration call-in" program requires all males 16 years of age or older, who are citizens or nationals of one of twenty five designated countries, and who entered the U.S. as nonimmigrants before certain designated dates, to register to be fingerprinted and photographed. The call-in registration program offers little protection because it targets people based on national origin, race and religion, rather than on intelligence information, and it alienates the very communities whose cooperation we need. Furthermore, the registration process is being implemented in a misguided and haphazard fashion. Instead of identifying terrorists, the INS in some local offices has used the special registration procedure to identify and detain people who are on the path to permanent residence, but who are "out of status" -- sometimes through no fault of their own. To make matters worse, the DOJ has failed to fully publicize the Special Registration program requirements, and has not given INS the staff, resources, or guidance necessary to do the job. The call-in registration program does little to seek out and identify those in the U.S. who might

be intending to harm us, diverts law enforcement resources from initiatives that effectively enhance our security, and punishes law abiding immigrants who pose no harm to their soon-to-be adopted country.

- **Holding people in jail without charges:** DOJ issued regulations on September 20, 2001 authorizing the INS to hold any noncitizen in custody for 48 hours or an unspecified “additional reasonable period of time” before charging the person with an offense. Congress subsequently weighed in on this subject in the USA PATRIOT Act when it authorized detention of up to 7 days before charges must be brought *in the case of certified suspected terrorists*. DOJ, however, has never invoked that USA PATRIOT Act rule and has relied instead on its own open-ended regulation as the operating detention standard. The DOJ rule is unlimited in its application, and can be applied to any noncitizen regardless of the circumstances surrounding his or her arrest. A DOJ Inspector General Report (April 2003) on post-9/11 detainees documents how INS has used this regulation to detain non-citizens for weeks, and in some cases more than a month, before charging them with immigration violations. Tellingly, none of the detainees ever was charged with a terrorism-related offense. As amply manifest in its implementation, this rule violates a fundamental principle in our constitutional system—that no person should be subject to arrest and imprisonment without reason, explanation, and due process of law. It also demonstrates that DOJ willfully circumvented Congress’s conclusions about what delays in charging might be reasonable; if 7 days is the maximum period of detention without charges for suspected terrorists, far less – e.g. 48 hours - must be the outer limit for other non-citizens.
- **Closing immigration hearings and refusing to disclose basic information on the detainees:** Without providing any rationale or justification, the DOJ has ordered immigration judges to conduct certain hearings separately from all other cases and to exclude visitors, family, and the press. Even though these cases involve no classified evidence, the record of these proceedings will not be released and court officials may not confirm or deny whether such a case is on the docket or scheduled for a hearing. On September 21, 2001, the DOJ, through what is now known as the “Creppy memo,” also has refused to disclose basic information about the more than 1,200 people detained after September 11. Such silence, months after the initial arrests and despite repeated inquiries, is unacceptable. The immigration process should be open to the public unless a judge has determined that there is a compelling reason to keep out the public or withhold information in a particular case. Secret hearings are the practice of repressive regimes, not open and democratic societies.
- **Monitoring conversations between detainees and their lawyers:** Beginning on October 30, 2001, the DOJ has been able to monitor mail and other communications between lawyers and clients who are in federal custody, including people who have been detained but not charged with any crime. Based solely on the suspicions of the Attorney General, the monitoring can be conducted without a court order for up to one year, and is not subject to judicial review. The new regulations also expand the definition of “inmate” to cover anyone “held as witnesses, detainees or otherwise” by INS agents, U.S. marshals or other federal authorities. Eavesdropping on protected attorney-client communications without a court order violates fundamental protections provided by the Constitution regarding the right to counsel. This measure compromises lawyers’ ability to provide effective counsel and limits the rights of detainees to confer with their lawyers in confidence.
- **Holding people in custody even after an immigration judge has found them eligible for release:** The Attorney General issued regulations on October 31, 2001 that require people in immigration proceedings to remain in custody even though an immigration judge has found them eligible for bond. In its rationale for the regulation, the DOJ has not asserted that immigration judges or the Board of Immigration Appeals (BIA) were abusing their power or unnecessarily denying motions to stay a bond redetermination. Rather, the DOJ, by arguing that the new regulation will “avoid the necessity for a case-by-case determination of whether a stay should be granted in particular cases,” completely eviscerates the longstanding role of an immigration judge in making bond determinations and the BIA in reviewing those decisions. When important liberty interests are at stake, a case-by-case review is exactly what the principles of our judicial system demand.

Making the INS the chief prosecutor and the chief judge on the issue of releasing people from jail is a violation of fundamental principles of due process.

- **Revising a legal opinion so that state and local law enforcement have the “inherent authority” to enforce civil and criminal violations of federal immigration law:** The DOJ has revised a legal opinion and taken the position that states and localities, as sovereign entities, have the “inherent authority” to enforce federal immigration laws, including civil violations of immigration law. Such an opinion conflicts with the long-standing legal tradition that immigration is a federal matter. The reversal of this opinion suggests that state and local law enforcement officials, with little or no training and stretched resources, can and should be responsible for enforcing all aspects of federal immigration laws. This policy reversal will undermine arduously developed community relationships that help law enforcement do their jobs, drain these agencies of scarce dollars and limited resources, and ultimately result in the conscripting of local police officers to act as agents of the federal government.
- **Draft DOJ legislation, “PATRIOT Act II”:** New legislation drafted by the DOJ, the “Domestic Security Enhancement Act of 2003” (DSEA), contains a number of provisions that would diminish significantly the already compromised due process rights of lawful permanent residents and other non-citizens. The DSEA proposes to broaden the executive branch’s law enforcement and intelligence gathering powers by further marginalizing the due process rights of non-citizens while circumscribing judicial checks on executive branch activities. Under the pretext of fighting terrorism and enhancing homeland security, the legislation proposes, among other things, to: expand significantly the Immigration and Nationality Act’s expedited removal provisions; enhance criminal penalties for minor immigration violations; expand the AG’s practically unreviewable discretionary authority to bar and remove non-citizens (including lawful permanent residents) whom the AG “has reason to believe” pose a threat to national security interests; authorize removal of aliens even to countries whose governments are not recognized by the United States; and expatriate U.S. citizens for providing material support to a terrorist organization as designated by the AG even when the support is for lawful activities of the organization.
- **Mandatory Detention of Asylum Seekers, Matter of D-J and Operation Liberty Shield:** In Matter of D-J, the Attorney General reversed a Board of Immigration Appeals decision upholding bond to a detained asylum seeker from Haiti. The AG’s precedent decision argued that releasing the individual on bond would trigger a wave of sea-going migrations from Haiti and would divert Coast Guard resources from the fight against terrorism. He then concluded, on that specious basis, that national security interests necessitated the mandatory detention of all similarly situated asylum applicants during the pendency of their proceedings. This harsh and inappropriate policy towards refugees was reinforced by DHS’s Operation Liberty Shield initiative, pursuant to which all asylum seekers from thirty-plus unspecified countries were subject to mandatory detention. Unilateral executive branch decisions to mandatorily detain whole classes of individuals contravene important due process principles and individual liberty interests. Every person held in custody by the government should be entitled to an individualized bond determination based on whether they constitute a flight risk or danger to society.

AILA’S POSITION: AILA strongly supports those policies undertaken since 9/11 which truly protect the public from further terrorist acts (like the Enhanced Border Security and Visa Entry Reform Act, P.L. 107-173). However, the initiatives noted above do little to enhance our security, while eroding our constitutionally protected civil liberties. AILA calls on the Bush Administration to clearly demonstrate its stated commitment to upholding fundamental constitutional protections and basic freedoms by reversing the questionable practices noted in this issue paper.

IMMIGRATION, SECURITY, AND CIVIL LIBERTIES

While effective steps must be taken to enhance our security, our government also must not trample on the Constitution and on those basic rights and protections that make American democracy so unique and so strong. Doing so will damage our liberty here and our credibility in the world.

As we enhance our security by reforming our immigration laws, we need to ensure that we maintain our freedoms.

- We need an effective security system that puts our resources to good use. False solutions that target individuals on the basis of race, nationality, and religion or limit our freedoms do not make us safer. Rather, they waste resources and contribute to a climate of fear and a sense of injustice.
- Effective, efficient, and fair services and enforcement are essential to our national security so we know who is here and keep out those who mean to harm us.
- Experts agree that measures like the Border Security and Visa Entry Reform Act will make us safer. This Act seeks to strengthen our security by enhancing our intelligence capacity and improving our ability to keep out those who would harm us, while allowing entry to those who come, as immigrants have come throughout our history, to build America.

Shortsighted policies represent false solutions to real problems. They do not enhance our security.

- The USA PATRIOT Act, passed shortly after the 9/11 attacks, severely curtailed immigrants' basic due process rights and civil liberties. The passage of time has confirmed the need to review and repeal many provisions of the Act. Moreover, the Department of Justice (DOJ) has not provided basic information even after repeated congressional inquiries about how the Act has impacted immigrants.
- The DOJ Inspector General report on post 9/11 detentions of noncitizens confirms our darkest suspicions: that the government instituted a policy of mass preventive detentions of Arabs and Muslims with minor immigration violations. Tellingly, none of those detained were ever charged with terrorism-related activities.
- Since 9/11, DOJ has instituted many initiatives that leave immigrants feeling besieged and isolated.
- Experts agree that selective measures like mass detention of immigrants based on racial, ethnic, and religious profiling will NOT make our country safer. They alienate the very communities that law enforcement authorities need cooperation from to improve our security.
- In the name of security, DOJ continues to move against civil liberties with the drafting of new legislation, the so-called "Patriot II" Act, which would further restrict the basic rights of immigrants and citizens alike.

We need balanced immigration measures that enhance our security and safeguard our values and economy.

- We must balance security efforts with this nation of immigrants' values of due process and human and civil rights. We cannot sacrifice one for the other. In fact, meaningful reform of our immigration laws will improve security by bringing undocumented immigrants out of the shadows and legalize future flows.
- We need to enhance our security without harming the cross-border flow of goods and people upon which our economy undeniably depends.
- Our immigration agency spends too much time and too many resources deporting people for minor immigration violations, people who are here to meet our labor market needs or to reunify with their families. The Department of Homeland Security now must focus its resources on identifying those who would harm us rather than tearing asunder families and communities.

Sample Op-Ed – Civil Liberties and Due Process for Immigrants Are In Doubt

“Target Terrorists, Not Immigrants”

By, **INSERT NAME**

Like thousands of other immigrants, many of my clients now seriously doubt that they can receive fair treatment from the U.S. government. Based on their experience with the post-9/11 policies and practices of the Department of Justice and the former INS (now subsumed into the Department of Homeland Security), many have concluded that due process is dead for immigrants.

[INSERT CASE EXAMPLE(S) HERE IF YOU HAVE ONE]

In its war on terror, the government has targeted immigrant communities for investigation using racial, ethnic, and religious profiles as proxies for bona fide intelligence. These actions waste our precious resources, do not make us any safer, and violate fundamental due process principles. The government’s categorical detention of non-citizens based on minor immigration violations circumvents the significant substantive and procedural protections guaranteed under our Constitution. Such actions do a disservice to our Constitution and to our heritage as a nation of immigrants.

The recent DOJ Inspector General (IG) report on post-9/11 detentions poignantly substantiates claims that have become all too commonplace among my clients; that the government has treated them like terrorists simply because of their race, religion, or ethnicity. This discriminatory targeting by the government has traumatized countless innocent families and created a climate of fear and distrust in many immigrant communities. Among numerous troubling conclusions, the IG report found that: detained non-citizens arrested in New York were held for more than two weeks on average before being charged with any immigration violation; all detainees were held without the possibility of bond even though none was ever charged with terrorist related activities; detainees were denied meaningful access to counsel and family; and detainees in some facilities were exposed to prolonged verbal and physical abuse.

For people like **[CLIENT NAME(S)]**, the American promise of “Justice for All” rings profoundly hollow. It is time to renew our commitment to that promise and heed our constitutional guarantee that all “persons” be accorded due process of law.

American Immigration Lawyers Association

CIVIL LIBERTIES CASE EXAMPLES REQUEST

We need your help documenting for Congress how post-9/11 executive branch policies and practices have unfairly targeted immigrants and undermined our commitment to the trinity of civil liberties: freedom, equality, and due process of law. Through our immigration practices, we have seen how racial, religious, and ethnic profiling has created a climate of fear and distrust in our immigrant communities without appreciably improving our national security. We are seeking case examples to document to Congress the real-life impact that these policies are having on innocent families in this country.

Please answer the questionnaire below. It is optional to provide the name and address of the client. If you do so, please be assured that we will not reveal this information without your client's explicit permission. If you or your client would prefer to include only partial data, please at a minimum provide us with sufficient information to determine the appropriate congressional district/state where the problems occurred.

Please use a separate form for each case example. We may follow up with you if we need more information. Please return this form to the AILA Advocacy Table (located within AILA Central in the Exhibit Hall) or fax back this form by July 1 to the Advocacy Department in the AILA National Office at (202) 783-7853.

Your Name: _____

Phone: _____

Fax: _____

Client Name (optional): _____

Client Address (optional) - at a minimum please city and state or zip code

Description of client problem - please include as much detail as possible, including current status of case, strategies used to resolve situation, hardship experienced by family members, etc. (use separate sheet if necessary):

Additional information:

PLEASE RETURN THIS FORM TO THE AILA ADVOCACY TABLE (LOCATED WITHIN AILA CENTRAL IN THE EXHIBIT HALL) -OR- FAX BACK THIS FORM BY JULY 1ST TO THE ADVOCACY DEPARTMENT IN THE AILA NATIONAL OFFICE (202) 783-7853.

American Immigration Lawyers Association

Executive Branch Actions Since September 11, 2001

The following are administrative actions taken by the Executive Branch since September 11, 2001 listed in reverse chronological order. These actions:

- curb rights and due process
- undermine fundamental constitutional protections
- profile certain communities based on race, religion, and ethnicity and target them for heightened measures
- respond to various actions by the INS that have drawn criticism

- **April 24, 2003: Matter of D-J**

In a far-reaching precedent decision, the Attorney General denied undocumented immigrants recourse to an individualized bond hearing if immigration officials say their release would endanger national security interests. The national security interest identified by the Attorney General in this decision was the prevention of “further surges of mass migration...with attendant strains on national and homeland security resources.”

The Attorney General issued this ruling in the case of an 18-year-old Haitian who arrived in the U.S. on October 29 with more than 200 other refugees and subsequently applied for asylum. The Attorney General’s ruling overturns the decisions of both the Immigration Judge (IJ) and the Bureau of Immigration Appeals (BIA) to release the individual on bond pending the outcome of his asylum proceedings. Both the IJ and the BIA concluded that the individual did not present a flight risk or a danger to the community. By eliminating the possibility of release on bond for whole classes of people, this decision represents a significant departure from the well-established due process principle that every individual deserves a hearing to determine whether his or her liberty interest outweighs the government’s interest in preventing flight and danger to society.

- **March 17, 2003: Operation Liberty Shield**

Secretary Ridge issued a fact statement and press release discussing a new DHS initiative called Operation Liberty Shield. One component of this initiative requires that asylum applicants be detained for the duration of their processing period if they come from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated.

- **February 19, 2003: Additional Exit Ports Designated**

DOJ published a Notice in the Federal Register providing the public with an expanded list of ports through which nonimmigrant aliens who have been specially registered may depart from the United States. There are now 99 authorized ports of departure for special registrants.

- **February 19, 2003: Special Registration Deadlines Extended for Groups 3 & 4**

DOJ published a Notice in the Federal Register extending the registration deadline for two groups of affected foreign nationals. Nonimmigrant aliens of Pakistan or Saudi Arabia who

are required to register were given until March 21, 2003 to do so. Nonimmigrant aliens from Bangladesh, Egypt, Indonesia, Jordan, or Kuwait who are required to register are permitted to do so before April 25, 2003. [68 FR 8046, 2-19-03,-Notice]

- **January 16, 2003: Call-In Special Registration Expanded**

DOJ published a Notice in the Federal Register expanding the special registration program to foreign nationals from five additional countries. The Notice requires all nonimmigrant males aged 16 or over who are citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan or Kuwait, and who entered on or before September 30, 2002, to appear for call-in registration between February 24, 2003 and March 28, 2003. [68FR 2363, 1-16-03, Notice]

- **January 16, 2003: Special Registration Deadlines Extended for Groups 1 & 2**

DOJ published a Notice in the Federal Register reopening the registration periods to permit citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq Lebanon, Libya, Morocco, North Korea, Oman, Qatar, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, or Yemen who were required to register previously but did not do so, to appear and register with the INS between January 27, 2003, and February 7, 2003. The Notice indicates that registration during this extension period would be considered timely under the original notices.

- **December 18, 2002: Call-In Special Registration Expanded**

DOJ published a Notice in the Federal Register expanding the special registration program to foreign nationals from two additional countries. The Notice requires all nonimmigrant males aged 16 or over who are citizens or nationals of Saudi Arabia or Pakistan and who entered on or before September 30, 2002, to appear for call-in registration between January 13, 2003 and February 21, 2003. This Notice also rescinds a December 16, 2002 Notice which erroneously included Armenia on the list of affected countries. [67 FR 77642, 12-18-02,-Notice]

- **December 18, 2002: Attorney General Secret Order Delegating Authority to FBI to Exercise the Powers and Duties of Immigration Officers**

The Attorney General issued an order authorizing the FBI Director and his delegates to perform the functions of immigration officers. Specifically, the order authorizes the FBI to investigate and detain aliens suspected of violating any immigration law or regulation and to enforce all immigration provisions, including those related to special registration. The actual text of this order has not been released by the Attorney General although its contents have been leaked to the press.

- **November 22, 2002: Call-In Special Registration Expanded**

DOJ published a Notice in the Federal Register expanding the special registration call-in program to foreign nationals from 13 additional countries. The Notice requires all nonimmigrant males aged 16 or over who are citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen and who entered on or before September 30, 2002, to appear for call-in registration between January 13, 2003 and February 21, 2003.

- **November 13, 2002: Expansion of Expedited Removal**

DOJ published a Notice in the Federal Register authorizing INS to place in expedited removal proceedings certain aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility. *[67 FR 68924 11/13/02]*

- **November 6, 2002: Call-In Special Registration Implemented**

DOJ published a Notice in the Federal Register requiring certain nonimmigrants from five countries -

Iran, Iraq, Libya, Sudan, or Syria – who are already in the U.S. to appear for fingerprinting and photographing, answer questions, present documentation, and register before an immigration officer.

The Notice requires all nonimmigrant males aged 16 or over who are citizens or nationals of one of the five countries and who entered the U.S. on or before September 10, 2002, to appear for call-in registration on or before December 16, 2002.

The Notice advises that a willful failure to comply with the call-in special registration requirements constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Immigration and Nationality Act, rendering the individual removable unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful. It further advises that if an alien subject to the registration requirements fails to comply with the requirement that the alien report to an inspecting immigration officer when departing the U.S., the alien shall thereafter be presumed to be inadmissible under section 212(a)(3)(A)(ii) of the Act.

- **September 30, 2002: 26 Exit Ports Designated**

DOJ published a Notice in the Federal Register advising the public of the list of ports through which nonimmigrants who have been specially registered must depart from the United States. The list includes 26 land and air ports of entry/exit. *[67 FR 61352, 9-30-02, Notice]*

- **September 24, 2002: Special Registration Expanded**

A special memo from INS Executive Associate Commissioner, Office of Field Operations, was leaked to the press and published by WorldNetDaily.com. The memo indicates that nationals of five countries—Iraq, Iran, Sudan, Syria and Libya—are subject to special registration as of September 11, 2002. The memo further indicates that as of October 1, 2002, national from Pakistan, Saudi Arabia and Yemen who are males between 16 and 45 will also be subject to “registration”. The memo also instructs inspecting officers to order “registration” based on 7 criteria, including previous visa overstays, “demeanor”, and unexplained travel.

- **August 26, 2002: BIA “Reforms”**

The Attorney General published a final rule that is substantially the same as the proposed regulation published in February. The new regulation will restructure the Board of Immigration Appeals. The BIA “reform” will institute one-judge review, streamlined procedures, and will reduce the Board itself to 11 members (from the current complement of 21 positions.) Effective September 26, 2002. *[67 FR 165 at 54877, 8-26-02]*

- **August 13, 2002: “St. Cyr” Relief Regulation**

The Attorney General published a proposed rule, purportedly implementing the Supreme Court decision in the *St. Cyr* case, which makes certain immigrants with criminal convictions eligible to apply for a waiver of deportation. The rule fails to make provisions for those who were deported from the country while the litigation resulting in the Supreme Court case was pending. On August 22, 2002, the Attorney General published a technical correction to the proposed rule. Comments are due October 15, 2002. *[67 FR 156 at 52627, 8-13-02; 67 FR 163 54360, 8-22-2002]*

- **August 12, 2002: Registration and Monitoring of Certain Nonimmigrants** [Final Rule]

Attorney General John Ashcroft announced that the first phase of the National Security Entry-Exit Registration System (NSEERS) will be implemented by the Immigration and Naturalization Service (INS) at selected ports of entry throughout the United States on September 11, 2002. After an initial 20-day period for testing and evaluating the system at selected ports of entry, all remaining ports of entry -- including land, air and sea -- will have the new system in place on October 1, 2002. The final rule adopted the proposed rule "without substantial change".

The registration requirements may be applied to certain named nation groups already within the United States whenever the Attorney General so orders. The new registration requirements will first apply to nationals from Syria, Libya, Iraq, Iran and Sudan. The list is contemplated to expand to all 26 countries now subject to heightened security checks at visa posts (Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen.) [67 FR 155 at 52584, 8-12-2002]

- **July 26, 2002: Address Notification to be Filed with Designated Applications**

The Attorney General proposed a rule clarifying the alien's obligation to provide an address to the Service, including a change of address within 10 days. The rule will require every alien to acknowledge having received notice that he or she is obliged to provide a valid address to the Service. The rules clarify that a "willful" failure to register with the INS, or a failure to give written notice of a change in address, is a criminal violation. This proposed regulation is accompanied by a statement by DOJ.

The proposed regulations will allow the Service to mail a "Notice to Appear" to the most recent address reported by the alien. Upon such mailing, the Service will have met its burden of the "advanced notice" an alien must receive before an Immigration Judge issues an *in absentia* order of removal. See, Matter of G-Y-R. This expanded definition of "notice" increases the likelihood for *in absentia* orders to be issued against non-criminal aliens who fail to report an address change.

The stated intent of this rule is to provide clear notice to aliens of their obligation to report their address, and to punish those who fail to do so. [67 FR 144 at 48818, 7-26-02]

- **July 24, 2002: Powers of State or Local Law Enforcement Officers To Exercise Federal Immigration Enforcement** [Final Rule]

DOJ issued a final rule which implements INA 103(a)(8), which allows the Attorney General to authorize any state or local law enforcement officer, with the consent of the head of the department whose geographic boundary the officer is serving, to exercise and enforce immigration laws during the period of a declared "mass influx of aliens."

The rules authorize the Attorney General to consider the definitions of "immigration emergency" and "other circumstances" under 28 C.F.R. 65.81 when making a declaration of "mass influx of aliens". The rules purport that civil liberties and civil rights will be protected with officer training, and a complaint reporting procedure. The final rule is effective August 23, 2002. [67 FR 142 at 48354, 07-24-02]

- **July 2, 2002: DOJ and State of Florida sign MOU**

DOJ and the State of Florida executed a Memorandum of Understanding authorizing 35 state and local law enforcement officers working specifically as part of the State of Florida's Regional Domestic Security Task Forces (RDSTFs) to perform certain immigration officer enforcement functions. It gives such officers the power to interrogate any person believed to be an alien as to his right to be in the United States and to arrest those believed to be in violation of the law.

- **June 13, 2002: Registration and Monitoring of Certain Nonimmigrants**

The Attorney General issued a proposed rule requiring certain yet-to-be-designated aliens to register (fingerprints and photographs and other information) at entry, at 30 days after entry, at one-year intervals thereafter, and at exit, which must be through designated exit points. The registration requirements may be applied to certain named nation groups already within the United States whenever the Attorney General so orders.

Failure to satisfy any of the required reporting results in criminal penalties, and in the entering of the person's name in the NCIC database. The regulation is accompanied by a statement by the Attorney General indicating that local law enforcement officers will be requested to check the names of any persons they encounter against the NCIC data base, and arrest and detain not only those who have violated the registration requirement, but also those who have overstayed a visa whose names will also be entered into the database.

The power of local law enforcement to arrest people for mere civil violations of immigration laws is stated to derive from a new DOJ Office of Legal Counsel opinion which has not been made public, which states that local law enforcement officers have "inherent authority" to enforce not only criminal violations of immigration law, but civil violations as well. [67 FR 114 at 40581, 6-13-02]

- **May 28, 2002: Immigration Judges Given Authority to Seal Records and Issue Protective Orders**

The Attorney General issued an interim regulation authorizing immigration judges to issue protective orders and seal records relating to law enforcement or national security information. The rule applies in all immigration proceedings before EOIR. The rule is made effective as of May 21, 2002, *a week prior to publication*. Comments due 7-29-02. [67 FR 102 at 36799, 5-28-02]

- **May 16, 2002: Student Reporting Required**

The Attorney General issued a proposed regulation that implements a new student reporting system, SEVIS. The system will become voluntary on July 1, 2002, and mandatory for all covered school on 1-30-03. The new SEVIS system will require reporting of student enrollment, start date of next term, failure to enroll, dropping below full course load, disciplinary action by school, early graduation, etc. Comments due 6-17-02. [67 FR 95 at 34862, 5-16-02]

- **May 10, 2002: New Security Checks Required**

The INS issued a memo requiring District Offices and Service Centers to run IBIS (Interagency Border Inspection System) security checks for *all* applications and petitions, including naturalization. The checks are to be run not only on foreign nationals, but also on every name on the application, including US citizen petitioners and attorneys. IBIS includes information on "suspect" individuals and can also be used to access NCIC records. It is used by INS, Customs, and 20 other federal agencies (FBI, Interpol,

DEA, ATF, IRS, Coast Guard, FAA, Secret Service, etc.) *[INS Memorandum from William Yates to Regional Directors, Service Center Directors, and District Directors, 5-10-02]*

- **May 9, 2002: Aliens Ordered to Surrender within 30 days**

The Attorney General issued a proposed regulation that requires that aliens subject to final orders of removal surrender to INS within 30 days of the final order or be barred forever from any discretionary relief from deportation, including asylum relief, while he/she remains in the U.S. or for 10 years after departing from the U.S. Comments due 6-10-02. *[67 FR 90 at 31157, 5-9-02]*

- **April 22, 2002: States Forbidden to Release Detainee Information**

The Attorney General issued an interim regulation that forbids any state or county jail from releasing information about INS detainees housed in their facilities. This regulation flies in the face of a New Jersey state court decision ordering the release of information regarding detainees in New Jersey facilities. The rule is made effective 4-17-02, *a week prior to publication*. Comments due 6-21-02. *[67 FR 19508, 4-22-02]*

- **April 12, 2002: New Limitations on Student Change of Status**

INS issued an interim rule prohibiting a visitor from attending school while an application for a change to student status is pending. The rule is made effective 4-12-02. Comments due 6-11-02. *[67 FR 71 at 18062, 4-12-02]*

- **April 12, 2002: New Limitations on Visitors/Students**

INS issued a proposed regulation establishing a presumptive limitation on visitors to the US of 30 days, or a “fair and reasonable period” to accomplish the purpose of the visit. The regulation also prohibits a change of status from visitor to student, unless student intent is declared at time of initial entry. Comments due 5-13-02. *[67 FR 71 at 18065, 4-12-02]*

- **April 10, 2002: Local Law Enforcement Powers**

News of a new DOJ legal opinion that states that local law enforcement personnel have “inherent” power to enforce the nation’s immigration laws is leaked to the press. *[Various news reports]*

- **March 19, 2002: Additional Interviews**

DOJ announced another round of interviews of 3000 Arab/Muslim men. *Memorandum from U.S. Department of Justice, Executive Office for U.S. Attorneys, TO: All US Attorneys, from Kenneth L. Wainstein, Director, entitled “Interview Report”, dated 3-19-02.*

- **February 26, 2002: Interview Report**

DOJ issued a final report on its project of interviewing the 5,000 Arab/Muslim men. The Report states that approximately half (2261) of those on the list were actually interviewed and that fewer than twenty interview subjects were taken into custody. Most of these were charged with immigration violations; only three were arrested on criminal charges. *[Report from U.S. Department of Justice, Executive Office for U.S. Attorneys, Memorandum for the Attorney General, from Kenneth L. Wainstein, Director, entitled “Final Report on Interview Project, dated 2-26-02]*

- **February 19, 2002: BIA “Reforms”**

The Attorney General published a new regulation proposing to restructure the Board of Immigration Appeals. The BIA “reform” would institute one-judge review, streamlined procedures, and would reduce the Board itself to 11 members (from the current complement of 21 positions.) Comment due 3-21-02. [67 FR 33 at 7309, 2-19-02]

- **January 25, 2002: “Absconder Initiative”**

The Deputy Attorney General issued a memo of instructions for the “Absconder Apprehension Initiative”, announced by INS Commissioner Ziglar in December, to locate 314,000 people who have a final deportation or removal order against them. 6,000 men from “al Qaeda-harboring countries will be first to be entered in the National Crime Information Center (NCIC) database. DOJ uses country, age, and gender criteria to prioritize this selective enforcement list. [Office of Deputy Attorney General, Subject: Guidance for Absconder Apprehension Initiative, dated 1-25-02]

- **December 4, 2001: Senate Hearings**

Senator Feingold held hearings on the status of 9-11 detainees. The Attorney General stated that those who question his policies are “aiding and abetting terrorism.” (http://www.lexis.com/research/retrieve/frames?_m=d88b568e87c195aeca968445f816c1f&csvc=bl&cf orm=bool&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVlb-1S11B&_md5=cdbb097ca85216c342e7a33a47c91389)

- **November 29, 2001: “Snitch Visas”**

The Attorney General issued a memo announcing the use of S visas for those who provide information relating to terrorists. [Attorney General Directive on Cooperators Program, 10-29-01]

- **November 26, 2001: Interviews to be “voluntary”**

US Attorneys in Detroit issued a letter stating that the interviews are voluntary, but that “we need to hear from you by December 4.” [Letter from U.S. Attorney, Eastern District of Michigan, signed by Jeffrey Collins and Robert Cares, dated 11-26-01]

- **November 23, 2001: INS Actions re Interviewees**

INS issued memo stating that “officers conducting these interviews may discover information which leads them to suspect that specific aliens on the list are unlawfully present or in violation of their immigration status.” The memo directs INS to provide agents to respond to requests from state and local officers involved in the interviews. [Memorandum for Regional directors, from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, dated 10-23-01]

- **November 16, 2001: Secrecy re INS Detainees**

DOJ issued a letter to Senator Feingold asserting that identities/locations of 9-11 detainees will not be disclosed. [U.S. Department of Justice, Office of Legislative Affairs, to Senator Russell D. Feingold, dated 11-16-01]

- **November 15, 2001: New 20-Day Wait for Certain Visa Applicants**

The State Department imposed new security checks on visa applicants from unnamed countries. The State Department refuses to confirm the new requirement, but the following message appears when individuals born in certain countries attempt to make a visa appointment through the on-line Visa Appointment Reservation System:

"Effective immediately, the State Department has introduced a 20-day waiting period for men from certain countries, ages 16-45, applying for visas into the United States."

The following countries of birth are among those for whom this message appears: Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen.

- **November 13, 2001: Military Tribunals**

President Bush issued an Executive Order authorizing creation of military tribunals to try non-citizens alleged to be involved in international terrorism (<http://www.whitehouse.gov/news/orders/>).

- **November 9, 2001: Interviews of Arab/Muslim Men**

The Attorney General issued a memo directing interviews of a list of 5000 men, ages 18-33, who entered US since Jan. 2000 and who came from countries where Al Qaeda has a "terrorist presence or activity". The interviews are to be "voluntary" but immigration status questions may be asked (see Pearson memo, Nov. 23).

- **November 7, 2001: Creation of Foreign Terrorist Tracking Task Force**

The President announced the first formal meeting of the full Homeland Security Council, and the creation of a "Foreign Terrorist Tracking Task Force" which will deny entry, locate, detain, prosecute and deport anyone suspected of terrorist activity. The Task Force includes DOS, FBI, INS, Secret Service, Customs and the intelligence community. The Task Force is charged with a mandate to perform a thorough review of student visa policies. [*White House Announcement, 11-07-01*]

- **October 31, 2001: New Terrorist Groups Designated**

The Attorney General issued a letter requesting that the Secretary of State designate 46 new groups as terrorist organizations, per powers authorized by USA Patriot Act (9 groups identified in President's Executive Order of 9-23-02; 6 groups identified in joint State-Treasury designation of 10-12-02, and 31 groups designated by DOS Patterns of Global Terrorism Report, published April 2001). [*Letter from Attorney General to Colin L. Powell with attachment*]

- **October 31, 2001: Eavesdropping on Attorney/Client Conversations**

DOJ issued a Bureau of Prisons interim regulation that allows eavesdropping on attorney/client conversations wherever there is "reasonable suspicion...to believe that a particular inmate may use communications with attorneys to further or facilitate acts of terrorism"; the regulation requires written notice to the inmate and attorney, "except in the case of prior court authorization". The rule is made effective 10-31-01. Comments due 12-31-01. [*66 FR 211, at 55062, 10-31-01*]

- **October 31, 2001: Automatic Stays of Bond Decisions**

DOJ issued an interim regulation that provides an automatic stay of IJ bond decisions wherever DD has ordered no bond or has set a bond of \$10K or more. The rule is made effective 10-29-02, two days *prior to publication*. Comments due 12-31-01. [66 FR 211, at 54909, 10-31-01]

- **October 12, 2001: Attorney General FOIA Memorandum**

The Attorney General issued a memorandum to the heads of all federal departments and agencies encouraging them to carefully consider protecting legal privileges before releasing information pursuant to a FOIA request. The memo states that the decision to disclose information that could be protected “should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” Moreover, the memo advised that in making a decision to withhold records, “you can be assured that the [DOJ] will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

- **October 4, 2001: FBI “mosaic” Memo, Opposing Bond**

The FBI began to use a boilerplate memo to oppose bond in all post-9-11 cases. The memo states:

“The FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals who have been detained...the FBI has been unable to rule out the possibility that respondent is somehow linked to, or possesses knowledge of, the terrorist attacks...” [Memo submitted to United States Department of Justice, Executive Office for Immigration Review, Immigration Court, “In Bond Proceedings”, “Exhibit A”, signed by Michael E. Rolince, Section Chief, International Terrorism Operations Section, Counter terrorism Division, Federal Bureau of Investigation]

- **September 21, 2001: Closed Hearings**

Chief Immigration Judge Michael Creppy issued a memo stating: “the Attorney General has implemented additional security procedures for certain cases in the Immigration Court”. Creppy further states that these procedures “require” IJs to “close the hearing to the public...”. [Creppy Memo, 9-21-01, 12:20 PM]

- **September 20, 2001: Detention without Charges**

The Department of Justice (DOJ) published an interim regulation allowing detention without charges for 48 hours or "an additional reasonable period of time" in the event of an “emergency or other extraordinary circumstance”. The rule is made effective 9-17-02, *three days prior to publication*. Comments due 11-19-01. [66 FR 183 at 48334, 9-20-01]

1RE2002C

American Immigration Lawyers Association

FOR IMMEDIATE RELEASE
June 2, 2003

Contact: Judith Golub
jgolub@aila.org (202) 216-2403

The Department of Justice Must Uphold the Rule of Law, Not Ignore It

Washington, DC – A recently released, highly critical oversight report on the Department of Justice’s (DOJ’s) detention practices since September 11, 2001, underscores what immigration advocates have long charged: the DOJ has confused immigrants with terrorists, and in the process has ignored our laws, invented its own, and wasted our precious resources. The Inspector General’s (IG’s) 239-page report provides many details: immigrants were held without being charged for long periods of time, denied bond, prevented from obtaining counsel, and physically and verbally abused.

“Instead of focusing our resources on terrorists, the DOJ’s detention policies have harmed innocent people,” said Jeanne Butterfield, Executive Director of the American Immigration Lawyers Association (AILA).

The report highlights that the DOJ, in its quest to find terrorists, did not distinguish between persons who were part of an investigation and any other individuals encountered ‘incidentally.’ Thus, innocent persons were incarcerated for lengthy periods of time, with no access to counsel, to family members, or to representatives of their country of origin. In fact, the IG’s report notes that, even when presented with information that detainees were not terrorists but, rather, immigrants who either were undocumented or had technical violations, the DOJ still denied them bond, keeping many locked up for months in federal prisons.

“America is a nation of laws for a reason: to ensure that the passions of the moment do not overrun the rights and freedoms that are the bedrock of our nation. This report’s findings reaffirm the need for the rule of law. The IG’s report concludes that even taking into consideration the events of September 11th, the actions taken by the DOJ cannot be fully explained,” noted Butterfield.

“The DOJ needs to stand up, explain what it did, and take responsibility. The agency’s actions threaten our fundamental Constitutional guarantees and protections that set our nation apart from others. Our government must not trample on the Constitution and on those basic rights and protections that make American democracy so unique,” asserts Butterfield.

“The disregard for the rule of law shown by DOJ leadership is reprehensible. These are our nation’s top lawyers. Their job is to ensure that the law is followed. Yet the incarceration of individuals not implicated in the terrorist attacks directly violates the law. AILA calls upon the Bush Administration to ensure that the agency entrusted with making sure the law is followed, itself follows the law,” concludes Butterfield.

43pr3003

###

Founded in 1946, AILA is a nonpartisan, nonprofit organization that provides its Members with continuing legal education, information, and professional services. AILA advocates before Congress and the Administration and provides liaison with the INS and other government agencies. AILA is an Affiliated Organization of the American Bar Association.

American Immigration Lawyers Association
918 F Street NW, Washington, DC, 20009
Phone (202) 216-2400; Fax (202) 783-7853
www.aila.org

We've Aimed, Detained and Missed Before

Washington Post

By David Cole

Sunday, June 8, 2003

In October 2001, Attorney General John Ashcroft announced that just as former attorney general Robert F. Kennedy would arrest a mobster for spitting on the sidewalk, so Ashcroft would use all available laws, especially immigration law, to lock up suspected terrorists and thereby "prevent terrorist attacks." Last Monday, the Justice Department's inspector general reported on the results of this initiative in unsparing detail. More than 730 foreign nationals were locked up after Sept. 11, 2001, on immigration charges and labeled "of interest" to the Sept. 11 investigation. In the end, not a single one was charged with the crimes of that day or any other terrorist crime. The FBI ultimately cleared nearly all of them of any connection to terrorism whatsoever.

The inspector general's report paints a stark picture of practices previously kept secret. Though innocent of terrorism, the detainees were all treated as terrorists. They were held in secret and tried in secret on routine immigration charges. To this day, the government refuses to disclose their names. Many were held in 23-hour-a-day lockdown. (One hour was, in theory, for exercise.) They were initially barred from communicating with each other and the outside world, including lawyers.

Many were physically and verbally abused, the report concluded. They were held without bond, without regard to any actual evidence that they were dangerous, a flight risk or tied to terrorism. Even detainees whose immigration cases were fully resolved and who were ready and willing to leave the country were kept locked up simply because the FBI had not "cleared" them, a process that took an average of 80 days, and as long as 244 days, to complete. They were presumed guilty until proven innocent.

The inspector general's report illustrates what happens when the government adopts a "preventive" law enforcement strategy, as Ashcroft has so proudly done since the terrorist attacks. The justice system is generally backward-looking. The presumption of innocence and due process require objective evidence that an individual has actually done something wrong before he can be stuck in a prison cell. Authorities need not wait until the bomb goes off; conspiracy laws permit punishment for crimes discovered in the planning stage. But even conspiracy convictions require proof that an individual has taken some specific acts toward the conspired end.

Ashcroft wants to do more than capture and prosecute individuals who commit or conspire to commit terrorist acts. Understandably, he seeks to prevent the next atrocity from occurring. But the inspector general's report reveals the dangers of Ashcroft's approach. People were picked up on anonymous tips that "too many" Muslims worked in a convenience store, or that a Muslim neighbor kept odd hours, or simply because they were in a place the FBI visited during the investigation into Sept. 11. In the end, the attorney general was shooting in the dark, and virtually every shot missed.

What's worse, the inspector general's report provides only a partial snapshot of the preventive detention campaign. It covers only those suspects picked up between September 2001 and August 2002, even though the campaign continues to this day. And it addresses only a fraction of those detained. Seven weeks into the Sept. 11 investigation, the Justice Department announced it had detained 1,182 persons, but the report focuses only on those detained on immigration violations, not those held on criminal

charges or as material witnesses. It also does not address the more than 1,100 persons the Justice Department has detained in connection with the Absconder Apprehension Initiative, or the 2,747 persons it detained when they showed up for Special Registration, two other antiterrorism initiatives targeted at Arab and Muslim foreign nationals. Together, that makes somewhere between 4,000 and 5,000 preventive detentions. To this date only one of those detainees has been convicted on a terrorism criminal charge -- Karim Koubriti, who was convicted last Tuesday in Detroit of conspiracy to support terrorism. (A second person convicted in that trial had not been subject to preventive detention.) The targeting of Arabs and Muslims has been a total failure, and it has so alienated the targeted communities that we have almost certainly lost opportunities for gathering information that might help us find real terrorists.

Because preventive law enforcement is directed at future crimes, law enforcement authorities often run up against legal protections and safeguards. Ashcroft did an end run around these protections. In the criminal justice system, individuals cannot be arrested and tried in secret. Using immigration law, Ashcroft did just that with hundreds of Sept. 11 detainees. In the criminal justice system, a person must be brought before a magistrate on criminal charges within 48 hours of his arrest. So Ashcroft turned to immigration law again to arrest people on no charges at all, and to hold them for many weeks before they were charged and given any hearing before a judge. (Even then, the hearing was before an administrative judge ultimately answerable to Ashcroft himself.) In the criminal justice system, a judge's order to release an individual must be carried out unless overturned by a higher judge; Ashcroft empowered his immigration prosecutors to hold foreign nationals in detention even after immigration judges had ruled that they should be released.

Preventive law enforcement also typically targets the most vulnerable. The American public would not stand for such measures if they were applied broadly. Had Ashcroft locked up hundreds of U.S. citizens unconnected to terrorism under similar conditions, the political and legal reaction would have been swift and sharp. But foreign nationals do not vote. And by targeting foreigners, the government reassures the citizenry that "our" rights need not be sacrificed in the name of national security; it is enough to sacrifice "their" rights. In times of crisis, when the public is prone to draw lines between "us" and "them," this is an especially tempting -- though ultimately illegitimate -- way to strike the balance between liberty and security.

This, of course, is not the first time that federal authorities have adopted such preventive measures in response to threats to security. In 1919, the United States was rocked by a series of terrorist bombings. Mail bombs were found addressed to 18 prominent people, including Supreme Court Justice Oliver Wendell Holmes, Attorney General A. Mitchell Palmer, two U.S. senators, and business leaders John D. Rockefeller and J.P. Morgan. A month later a bomber blew off the front of Palmer's home in Georgetown.

Then, as now, the government went into "preventive" mode, and exploited immigration law to sweep broadly and blindly. In a series of coordinated raids, officials arrested thousands of foreign nationals, not for their involvement in the bombings, but for pretextual immigration offenses and political associations. Like the Sept. 11 detainees, they were held and interrogated incommunicado, denied release on bond and refused access to lawyers. Hundreds were deported. No bombers were found. And like Ashcroft's sweep, the Palmer Raids targeted the most vulnerable -- foreign nationals. As Louis Post, assistant secretary of labor during the Palmer Raids, wrote, "The force of the delirium turned in the

direction of a deportation crusade with the spontaneity of water flowing along the course of least resistance."

The Palmer Raids are now viewed as a tragic mistake, another in a long line of government overreactions in times of crisis. But it was not always so. The Washington Post editorial writers responded to the initial raids by insisting that "[t]here is no time to waste on hairsplitting over infringement of liberty." The tide turned when an influential blue-ribbon panel -- including Harvard Law School Dean Roscoe Pound and professor Felix Frankfurter -- issued a blistering report condemning the raids' abuses.

It remains to be seen whether the inspector general's report will bring about a similar response. Early signs are not encouraging. Justice Department spokeswoman Barbara Comstock said: "We make no apologies for finding every legal way possible to protect the American public from further terrorist attacks." She did not explain how locking up hundreds (and now thousands) of people unconnected to terrorism has protected the American public. Ashcroft himself expressed no regrets in testimony before Congress on Thursday, and had the nerve to ask for even broader preventive detention powers, this time extending to citizens. Ashcroft's response recalls Palmer's retort to criticism of his raids: When you are "trying to protect the community against moral rats you sometimes get to thinking more of your trap's effectiveness than of its lawful construction."

In the end, it's not clear what we learned from the Palmer Raids. While they are now condemned, their architect -- not Palmer but a young J. Edgar Hoover, then head of the Justice Department's "Alien Radical" Division -- spent the rest of his career seeking to wield against U.S. citizens the questionable preventive tactics of guilt by association, political spying and administrative shortcuts on due process that he had employed against foreign nationals in his first job. In the McCarthy era, he succeeded. Perhaps he, not Robert Kennedy, is Ashcroft's actual role model.

**The War Comes Back Home;
Can Attorney General John Ashcroft fight terrorism on our shores without injuring our freedoms?**

Time Magazine

May 12, 2003

By: Richard Lacayo, Reported by Matthew Cooper and Viveca Novak/Washington, Rita Healy/Denver, Kathie Klarreich/Miami and Jeffery Ressler/Los Angeles

Standing on the deck of the U.S.S. Abraham Lincoln last week, George W. Bush declared the Iraq war largely over. It was a majestic occasion even if you knew that its majesty had been carefully stage-managed. Bush, who had just the right windswept-but-presidential look, had apparently even taken the controls for part of the flight from San Diego to the Lincoln. The White House could hardly have done more to ensure a big audience; the speech interrupted that hallowed American tradition called Friends. The central purpose of all the pageantry was to soothe us: We're winning the war on terrorism, the worst is over, let's get back to work.

But on the very day that Bush was declaring provisional victory over Baghdad, a notable skirmish in another war was quietly under way in Washington. This is a war without daily briefings by self-assured Bush men and women. It's the war over how to make America safer without turning it into a police state--how to mediate the difficult conflict between security and liberty. And this war is far from over.

On Thursday, Democrats on the Senate Intelligence Committee defeated a White House attempt to give the CIA and the Pentagon new and unusual authority to investigate U.S. citizens. It would have been the first time in U.S. history that these two institutions were openly authorized to probe into the lives of Americans. In a closed-door meeting of the Intelligence Committee, Democrats rejected a measure that would have allowed the CIA and the Pentagon to issue "national security letters" requiring Internet providers, credit-card companies and other institutions to cough up the personal and financial records of their customers. Says a U.S. intelligence official: "Periodically since 9/11, the folks on the Hill have asked, 'Geez, what kind of authorities would make your job easier?' And so that proposal was proposed."

The war on terrorism may be launching a legal revolution in America. The changes pose these questions: How necessary are some of the reforms? Have John Ashcroft and the Justice Department unraveled constitutional protections in trying to ensure our safety? "There is a significant civil-liberties price to be paid as we adopt various national-security initiatives," says Mary Jo White, a former U.S. Attorney in the Southern District of New York, whose office pursued some of the biggest terrorism cases of the 1990s. "For the most part, I think that price is necessary. But what I worry about is government officials who find the answers too easy in this arena."

None of the answers are simple. Who wouldn't have authorized an extra wiretap or a longer detention if it could have prevented 9/11, but who knows how far to go? As the demands of security bump up against the safeguards of personal liberty, clashes have been breaking out around the country over where to draw the line. Librarians are alerting visitors that their Internet surfing or book borrowing may be monitored by the government. Nearly 100 towns and counties, plus the state of Hawaii, have passed resolutions condemning the USA Patriot Act, the post-9/11 law that greatly expanded federal powers to conduct the war on terrorism.

The town of Arcata (pop. 16,000), Calif., has gone further, passing an ordinance that requires city officials to decline to assist in investigations carried out under the powers of the act. David Meserve, the city council member who drafted the ordinance, says it was a pre-emptive strike in case the feds, using the Patriot Act as their legal authority, ever ask local police to serve a search warrant or order town record keepers to hand over tax records. "My oath of office is to uphold the Constitution," says Meserve. "The Patriot Act is unconstitutional."

Not so fast, says Assistant Attorney General Viet Dinh, who had a large part in shaping the USA Patriot Act. "Security is the means by which we achieve our fundamental freedoms." Dinh rejects the idea that the Justice Department is doing a balancing act because, he says, the department is making sure that no civil liberties are violated. "It is especially in this war, where our enemies are attacking the very foundations of our liberties," he says, "that we must be particularly vigilant about protecting those liberties."

Here are some of the questions that are testing that vigilance:

--WHAT RIGHTS FOR ALIENS?

In the days right after 9/11, the Immigration and Naturalization Service rounded up about 750 foreign nationals and detained them on immigration charges. Most have been released, but more than 100 remain in federal custody. On March 1, immigration control was transferred to the new Department of Homeland Security. One of the department's first steps was to announce that henceforth anyone arriving from one of 33 mostly Muslim nations and seeking asylum in the U.S. would be automatically jailed while the asylum application was pending. (Asylum is a form of protection that allows foreigners to remain here, provided they meet the definition of a refugee.) The government could point to a few terrorists who had entered the U.S. under the guise of asylum seeker, notably Abdel Rahman, now in prison for plotting attacks on the United Nations and other targets. But asylum applications usually take six months or more to process, and incarceration is a fate previously reserved for applicants who might be a risk to the community or might disappear.

Three weeks ago, Ashcroft made an even more sweeping decision in a case involving David Joseph, 18, a Haitian who arrived in the U.S. illegally last October. He and 215 other undocumented immigrants from Haiti and the Dominican Republic scrambled ashore in Biscayne Bay, Fla. On arrival, Joseph petitioned for asylum as a political refugee. An immigration judge okayed his request, and an appeals board supported the judge, ruling that Joseph was neither a danger to the community nor a flight risk. But Ashcroft, who has the final say in all immigration cases, stepped in to demand that Joseph be kept in prison until his immigration status is settled, a process that can take months or years.

Ashcroft did not argue that Joseph was in any way linked to terrorism. Instead, Ashcroft insisted that granting Joseph bond "would tend to encourage further surges of mass migration from Haiti by sea, with attendant strains on national and homeland-security resources." In other words, patrolling the U.S. coastline to keep out illegal aliens diverts Coast Guard and immigration officials from other duties. Ashcroft also argued that Haiti was a route through which Pakistanis and Palestinians might try to enter the U.S. illegally.

--WHO DESERVES A LAWYER?

Time and again, people rounded up after 9/11 have not been permitted to talk to lawyers. Civil libertarians are especially uneasy about the legal no man's land at the U.S. naval base at Guantanamo Bay, Cuba, where more than 600 captives from the war in Afghanistan are still being held and have not been accorded prisoner-of-war status. The government justifies this on the grounds that it needs to question them, but most of the interrogations are over. And it recently emerged that among the detainees are three boys from ages 13 to 15. The rules governing military tribunals allow the detainees at Guantanamo to have a free military lawyer or a civilian lawyer as long as the government doesn't have to pay for representation. But civilian lawyers willing to work for the detainees for free complain that the Pentagon has not allowed them to contact potential clients.

Detainees in the U.S. who were rounded up shortly after 9/11 on immigration charges also have no right to court-appointed counsel, but they are allowed to hire their own. In their case, one problem has been that some of the detainees were transferred from place to place, making representation difficult. "We had attorneys trying to track their clients all over the country as they were moved around," said Marshall Fitz of the American Immigration Lawyers Association. "Access to attorneys was extremely limited."

Government prosecutors say they are worried that lawyers could become intermediaries who help communicate messages from their clients to other terrorists. Yale University law professor Akhil Amar says concern is understandable, "but the government should come up with its own honors list of lawyers who could meet security clearances." The military model, by which lawyers are picked from a slate of officers, "could be easily adapted to all these situations," Amar says.

--WHAT IF THE ACCUSER IS HIDDEN?

In the vast majority of terrorism cases, judges have sided with the government against the objections of prisoners or their counsel. But there are some notable exceptions, including one case that could undercut some of the government's central legal aims. In March two men, Irfan Kamran, 32, and Sajjad Nasser, 28, were held in prison, charged with harboring an illegal immigrant, while the FBI tried to determine whether they had links to al-Qaeda. Kamran, a naturalized American citizen, and Nasser, a Pakistani, are cousins who had been living legally in the U.S. for years but returned occasionally to their native country. The government contends that in the summer of 2001 Nasser attended a training camp in Pakistan run by the Army of Muhammad, a group the U.S. believes is linked to al-Qaeda. Nasser's lawyer admits that he spent several days there but says he left after he realized it was too strenuous. He also insists that the Army of Muhammad is not aimed at the U.S. but is a militia devoted to ousting India from Kashmir, territory that Pakistan also claims.

As for Kamran, prosecutors say he told a "confidential source" that he planned to join al-Qaeda and fight the U.S. Kamran's lawyer denies that, saying the FBI claim rests upon a witness it refuses to identify. On April 8, Federal Judge Lewis T. Babcock ordered Kamran's and Nasser's release, ruling that the government had failed to show that they were dangerous. At that point, prosecutors successfully moved to detain Nasser again by hitting him with another immigration charge.

A trial is expected next month. It might help answer the question of whether the government can use secret testimony in cases of national security or whether such a tactic is too great a danger to

constitutional protections.

--WHEN CITIZENS ARE BRANDED THE ENEMY

The post-9/11 episode that worries civil libertarians the most involves dirty-bomb suspect Jose Padilla, an American citizen who allegedly met with senior al-Qaeda operatives in a plot to detonate a radiological device somewhere in the U.S. Arrested last year at Chicago's O'Hare International Airport, Padilla was classified as an enemy combatant and sent to a naval prison in South Carolina, where he has been denied access to a lawyer. According to government filings, Padilla has been undergoing months of interrogation that could be compromised if lawyers were allowed into the process.

A federal judge in Manhattan has ruled that Padilla must be allowed to meet with his lawyers in order to challenge his enemy-combatant status. But the government maintains that no court has the authority to review that classification. Federal prosecutors have taken a similar position in the case of Yaser Esam Hamdi, a Louisiana-born man who came into U.S. custody after he was captured in Afghanistan, allegedly fighting for the Taliban. He has been declared an enemy combatant as well, held in a Navy prison in Virginia and prevented from seeing attorneys.

Either of those cases could wind up in the Supreme Court. "To say that the Executive Branch on its own determination can pick somebody up and hold them indefinitely without any procedure or access to a court or to counsel or the press is an absolutely staggering thought," says Stephen Schulhofer, a law professor at New York University and the author of *The Enemy Within*, a book produced for the Century Foundation, that examines post-9/11 questions of civil liberty. The Attorney General insists that misses the larger point. "There are no civil liberties that are more important than the right to be uninjured and to be able to live in freedom," Ashcroft recently told TIME.

The dilemma is that reasonable people can agree with both arguments. But no one knows whether such changes will make us safer or undermine constitutional protections--or both. On the deck of the U.S.S. Abraham Lincoln last week, when the President said the war on terrorism would be a fight that lasts years, he should have added that some of its most pitched battles will be fought in our courts. And in our own divided hearts and minds. --Reported by Matthew Cooper and Viveca Novak/Washington, Rita Healy/Denver, Kathie Klarreich/Miami and Jeffery Ressler/Los Angeles

Officials: Stereotypes help feed FBI probes Report Shows How Vague Suspicions After Sept. 11 Lead To Arrests

By Matthai Chakko Kuruvila
San Jose Mercury News
June 9, 2003

The stereotypes and vague suspicions from the public that helped fuel the roundup of hundreds of undocumented immigrants in the wake of the Sept. 11 terrorist attacks continue to help drive investigations in the Bay Area, local FBI officials say.

An internal Justice Department report released last week detailed for the first time how the Federal Bureau of Investigation systematically used unsupported tips as a justification to launch criminal investigations to ensnare people who had overstayed their visas or had other immigration violations. More than 730 illegal immigrants were detained nationwide after Sept. 11, with more than 500 of those deported and none charged as terrorists.

The practice, immigrant advocates say, can give one tipster's prejudice incredible potency and can lead to selective enforcement of immigration law. But FBI investigators say the public -- regardless of people's personal views -- is essential to doing their job.

“We look at the public as a way to expand the eyes and ears of the FBI,” said LaRae Quy, special agent and spokeswoman for the FBI's San Francisco office. “We try to give everybody the benefit of the doubt, the person accused and the caller. We're not going to launch a full-scale investigation against him simply because a neighbor doesn't like the way he looks.”

Checking out tips

The agency doesn't keep track of the number of tips from the public, but agents will check out every one, Quy said. And in their investigations, FBI agents will inquire about the immigration status of those they encounter, according to the report. So if they stumble upon an immigration violation, they will pass on the information to immigration officials, who will often seek a detention.

Some of the terrorist-related tips outlined in the report, however, reveal the tenuous circumstances under which people were investigated and detained. One person called to report that a grocery market run by “Middle Eastern men” seemed to have “too many people to run a small store.” Another called to say “two Arabs” rented a truck from his business for a one-way trip but then returned the truck soon after. When told they would not get a refund, the “extremely nervous” men did not argue, according to the report.

“This situation creates a breeding ground for racist profiling and stereotyping,” said Marshall Fitz, associate director of advocacy for the American Immigration Lawyers Association. “Since these people don't have the same rights as citizens, they really end up bearing the brunt of this categorical racism.”

Stereotypes don't start all tips. Some tips offer detailed “facts” of a crime, but even those can be false.

Last month, federal law enforcement officials arrested a woman, Hoda ElSaigy, for making a bogus tip alleging her husband was part of a terrorist “sleeper cell” that she said was planning to target a government facility in Monterey. But the investigation nevertheless resulted in the arrest of her husband, Hany El Nady, for having a fake green card, court records show.

Azmy Elghazaly, a former Salinas resident, believes he was arrested on immigration charges a month after the Sept. 11, 2001, terrorist attacks as a result of a tip from someone he knows. He declined to elaborate, but he points out that he has never been charged with a terrorism crime.

Elghazaly, who now lives in Bakersfield, also was charged with owning a gun, which undocumented immigrants are prohibited from having, even if they legally register the guns, as Elghazaly says he did.

The Palestinian refugee is fighting his deportation because his disabled daughter needs advanced medical care found in the United States. Law enforcement and immigration officials, he said, were only doing their job.

“They did what they are supposed to do,” he said. “That’s the problem. . . . I’m willing to cooperate with them.”

Immigrants cooperate

Such cooperation may be more common among immigrants who come from nations with police states and who fear harsh punishment, such as torture, said Dan Mayfield, a San Jose criminal attorney who has represented several people questioned by the FBI. So some illegal immigrants may needlessly waive their rights against self-incrimination and can end up in jail because of their status, he said.

Sometimes the stereotypes that have led to the detention of immigrants have come from law enforcement officials, immigrant advocates say.

Santa Clara resident Farooq Bhatti believes suspicion over his Muslim faith and Pakistani heritage were the main reasons he and his friends were detained after making a wrong turn near the Golden Gate Bridge on Oct. 6, 2001. A white man not with Bhatti’s group also was briefly held at the scene, Bhatti said. But he was allowed to leave while Bhatti and his friends were interrogated and then detained.

Enforcement worries

“They let that guy go because he was not Middle Eastern,” said Bhatti, who was released the next day because he held a valid H-1B visa. But his friend Arsalan Saeed, whose H-1B had expired because he didn’t have a job, was detained for five weeks before being deported to Pakistan.

“In cases of other nationalities, this was not implemented with the same force. That’s unfair,” said Bhatti, who nonetheless appreciates that legal immigrants like him were let go.

That a reliance on stereotypes or suspicions might lead to selective immigration arrests isn’t the fault of the FBI, agents say. Immigration laws need to be enforced.

“Based on what the public is made aware of through the media, that’s what they’re going to make their suspicions on,” said Tamara Nieman, special agent and spokeswoman for the FBI’s San Jose office. “The tips that you’re talking about come from the public. We’re not out there profiling.”

Ashcroft Wants Stronger Patriot Act; Expanded Death Penalty and Bond Changes Sought
Washington Post
June 06, 2003
By Susan Schmidt

Attorney General John D. Ashcroft told Congress yesterday that he would like to strengthen the USA Patriot Act to allow capital punishment for all terrorist acts that result in fatalities and to prevent

suspects accused of terrorism from being released on bond.

Three days after the Justice Department's inspector general suggested that law enforcement agencies had mistreated hundreds of immigrant detainees taken into custody after the Sept. 11, 2001, attacks, Ashcroft asked Congress to tighten several Patriot Act provisions, calling them "weaknesses which terrorists could exploit."

Ashcroft testified before the House Judiciary Committee, where Republicans lauded his efforts and Democrats expressed tempered concerns about whether civil liberties were being trampled in the name of national security under the 19-month-old Patriot Act, which gave Justice far-reaching new powers to gather information and crack down on terrorists.

Ashcroft acknowledged that authorities had subjected some illegal immigrants detained after the attacks on the World Trade Center and Pentagon to harsh jail conditions for long periods of time before the FBI cleared them of links to terrorism. That was a central finding of the critical report issued Monday by the Justice Department's inspector general, Glenn A. Fine.

Ashcroft said he had "some sympathy" for the criticisms leveled by Fine, who found there were "significant problems" in the detention, on charges of immigration violations, of many of the 762 foreign nationals after the Sept. 11 attacks. While none has been publicly charged with terrorism, they spent an average of 80 days in jail before the FBI completed its investigation, and many went weeks before being charged with immigration violations or seeing attorneys. About 515 were eventually deported.

Yesterday, Ashcroft said without elaboration that the department has obtained plea agreements, "many under seal," from individuals cooperating in terror investigations. Six of those plea agreements were reached with a group of Yemeni American men in Buffalo who admitted training at al Qaeda camps in Afghanistan.

Ashcroft said the Justice Department policy, "for which we do not apologize," is to fully investigate the illegal immigrants who came to the attention of authorities investigating the attacks before deporting them.

"If we, God forbid, if we ever have to do this again, we hope we can clear people more quickly," he told the panel. "There is no interest whatsoever that the United States of America has in holding innocent people -- absolutely none."

He said the department's civil rights division is investigating four instances of alleged abuse of detainees identified by the inspector general. For 14 of 18 incidents noted by the IG, evidence has been deemed insufficient to bring criminal charges, he said, adding, "we do not stand for abuse."

Some Democrats, including Reps. Maxine Waters and Howard L. Berman of California, said they were troubled by the FBI's information-gathering powers. Said Rep. William D. Delahunt (D-Mass.): "It appears that the American people feel that the government is intent on prying into every nook and cranny of people's private lives, while at the same time doing all it can to block access to government information that would inform the American people about what is being done in their name."

But Committee Chairman F. James Sensenbrenner Jr. (R-Wis.) said that with the aid of the Patriot Act, the Justice Department and the FBI have made "impressive gains" in obtaining "critical knowledge of the intentions of foreign-based terrorists, while preempting gathering terrorist threats at home." He stressed, though, that his support for the law's provisions -- which are scheduled for legislative sunset in 2005 -- "is neither perpetual nor unconditional."

The Patriot Act permits unprecedented information-sharing between law enforcement and intelligence agencies. The failure of U.S. authorities to learn of the Sept. 11 plot in advance has been blamed in part on real and perceived legal barriers at the time to the sharing of such information.

The changes under the Patriot Act have resulted in numerous criminal investigations, department officials have said, and at least one significant terrorism-related prosecution -- that of Florida professor Sami al-Arian, who is accused of aiding Palestinian suicide bombers.

One of the changes Ashcroft requested would increase penalties for certain acts of terrorism. If a terrorist caused loss of life by sabotaging a nuclear or defense facility, for example, current statutes do not carry the potential for the death penalty, department officials said. The maximum penalty now is life imprisonment.

Ashcroft also said he wants adjustments that will make it "crystal clear that those who train for and fight with a designated terrorist organization" can be charged under the statute that prohibits providing "material support" for terrorist organizations. While the department has prosecuted men in Lackawanna, N.Y., and Detroit using the material support statute, the U.S. Court of Appeals for the 9th Circuit, which covers California and other Western states, has found the statute vague, and officials are concerned about bringing prosecutions there.

In addition, Ashcroft said, terrorism offenses should be added to the list of crimes for which defendants are presumed ineligible for pretrial release, along with weapons violations, organized crime and drug dealing.

Sensenbrenner complained that Ashcroft had not consulted with Congress last year when he revised the attorney general's guidelines on FBI investigations. The previous guidelines, adopted in the 1970s to curtail bureau spying on political organizations, were widely interpreted as barring agents from gathering information in public, political or religious settings, or even surfing the Internet. The new rules allow agents to go where the public can go, including into churches and mosques, even if there is no ongoing investigation.

Ashcroft said information from such visits "cannot be retained unless it relates to potential criminal or terrorist activity."

**13,000 Muslims face deportation;
Registration drive finds few threats**
New York Times

June 7, 2003

By Rachel L. Swarns,

More than 13,000 of the Arab and Muslim men who came forward earlier this year to register with immigration authorities--roughly 16 percent of the total--may now face deportation, government officials say.

Only a handful of the men have been linked to terrorism. But of the 82,000 who registered, more than 13,000 have been found to be living in this country illegally, officials say.

Many had hoped to win leniency by registering and demonstrating their willingness to cooperate with the government's campaign against terror. The men were not promised special treatment, however, and officials believe most of them will be expelled in what is likely to be the largest wave of deportations in the wake of the Sept. 11 terrorist attacks.

The government has initiated deportation proceedings, and in immigrant communities across the nation, an exodus has already begun. Still, the effect of the registrations is being felt more broadly, and with far more nuance, than that stark statistic--13,000 men over the age of 16--can express.

Quietly, the fabric of their neighborhoods is thinning. Families are packing up, and some are splitting up. Rather than come forward and risk deportation, some immigrants have burrowed deeper underground. Others have simply left--for Canada or for home.

The deportations are a striking example of how the Bush administration is increasingly using the nation's immigration system as a weapon in the battle against terrorism.

For decades, illegal immigrants have often flourished in plain view because officials lacked the staff, resources and political will to deport them. But since the attacks on the World Trade Center and the Pentagon, the government has been aggressively detaining and deporting illegal immigrants from countries considered breeding grounds for terrorism.

"There has been a major shift in our priorities," said Jim Chaparro, acting director for interior enforcement at the Homeland Security Department, the agency that has subsumed the old immigration service.

"We need to focus our enforcement efforts on the biggest threats," he added. "People may not like that strategy, but that is what we need to do. If a loophole can be exploited by an immigrant, it can also be exploited by a terrorist."

Advocates for immigrants warn that that strategy--indeed, the administration's sweeping reorientation of law enforcement toward terrorism prevention--can be abused by overzealous government officials. The advocates also have accused officials of practicing selective enforcement by targeting illegal immigrants from Arab and Muslim countries.

"The identical violation committed by, say, a Mexican immigrant is not enforced in the same way," said Lucas Guttentag, director of the immigrants' rights project at the American Civil Liberties Union.

Some of the men facing deportation have been waiting months and years for overburdened officials to process applications to legalize their status. Immigration lawyers say they believe that a substantial number of these men may avoid deportation.

Officials acknowledge that most of the immigrants swept up in counterterrorism sweeps have no ties to terrorist groups. Of the 82,000 men who showed up at immigration offices, and tens of thousands more screened at airports and border crossings over the past six months, 11 have had links to terrorism, officials say.

But officials say they can no longer afford to ignore illegal immigrants from countries that pose security risks.