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ABSTRACT

This paper concerns the way the United States government has taken advantage of the situation after September 11, 2001, to increase surveillance over the activities of persons, both at the local and national level, to bring prosecutions where formerly people were left alone, to engage in round-ups of aliens and citizens, and to detain persons suspected of terrorism indefinitely and without trial or the assistance of counsel.

REPRESSION IN THE UNITED STATES AFTER THE SEPTEMBER 11 ATTACK*

Paul Chevigny



The attack on the World Trade Center in New York City two years ago was horrible, an atrocious event of unprecedented proportions. It was a devastating blow for people in the US, who have not experienced a major attack by foreign agents within their own country for literally generations.

All of this is beyond dispute. My point here is that the local and federal US authorities have taken advantage of the outrage and fear produced by the attacks to try to take over control of the people and even of the politics of the country. They treat complaints of the sort that I am making here as acts of disloyalty. Three months after the attacks, the US Attorney General stated: “To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They provide ammunition to America’s enemies and uncertainties to America’s friends”.¹

Although there have been many actions against aliens and foreign terrorists since September 11, I think the purpose to control the American people and advance a repressive domestic agenda is clear. It has been conducted through limitations on privacy and more generally on the rights of suspects, through massive discrimination against

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1. Testimony of John Ashcroft, December 6, 2001.

aliens of Arab and Muslim origin, through repressive prosecutions and through interference with habeas corpus. On the other hand, I do not want to exaggerate; fortunately, the scope of the repression has been limited because there has been some resistance by the public, in the courts and even within the government itself.

It is also clear that many of the tools for repression existed before September 11, and even before the present administration came into office. The tools were primed by laws against terrorism adopted during the Clinton administration; and also by old immigration laws, which have always been potentially repressive, as well as by laws about intelligence services concerning aliens. It is true that the Federal government has adopted new laws, e.g. USA Patriot Act, about which you may have heard, and about which I will speak in a moment, but such new legislation only introduces incremental changes. For the most part, the national and local governments have taken advantage of the repressive potential of existing laws; NGO's like the American Civil Liberties Union had been warning us for years about the dangers of those laws.

I know that you here in Brazil as well as visitors from other nations for the most part do not face such problems and are not directly affected by them; for you my presentation is foreign news, interesting, perhaps, but somewhat distant. As far as I am able to, I will therefore relate the problems the Latin American experiences. The contemporary acts of the US Government are not comparable to the legal and extra-legal repression which was current in the Southern Cone some twenty years ago. But some of them will nevertheless be chillingly familiar for many. These include the detention of hundreds of people who were held for long periods, their names unknown to the public. Another tactic that many of you will recognize has been the practice of removing suspects from criminal actions and, on the pretext of security, placing them under military custody, hindering them from being released by habeas corpus and subjecting them to ceaseless interrogation sessions.

You might be familiar with the response of some of the courts. In several cases, the judges have rejected repressive measures by the government. But in the majority of cases,

judges do their best to approve government action if they can, even if they privately might not agree. They hesitate to interfere with the acts of the executive because they are afraid that their orders will be disobeyed. They see no point in weakening their legitimacy by making orders that will be defied in the name of a war on terror.

In some cases the actions of the US government have been in conflict with international humanitarian law or human rights. Those standards are never mentioned by the government and rarely by anyone else in the country except experts in international law.

Intrusions in people's privacy

The high tide of public protest against government intrusions on privacy occurred at the end of the sixties and the beginning of the seventies in the last century. At that time, when the government claimed the power to tap the wires of radical groups in the country, the Supreme Court held that the Constitution required the government to get a judicial warrant based on a showing of probable cause to believe that a crime had been or would be committed.² It was clear at that time, however, that foreign intelligence, not to be used in a domestic criminal case, could be collected with fewer restrictions; the Constitution does not extend to foreigners who are not in the country. A special court was established to grant orders to collect foreign intelligence using a low standard, almost the simple request of the government. Thousands of such orders have been granted over the years.

At about the same time, in the seventies, limitations on police spying against political groups in the US were developed. A famous Senate report recounted the abuses of federal agents in provoking crimes, producing dissension in political groups and disseminating damaging information to outsiders.³ Similar practices were found in state and city police departments, including New York's. After much litigation, a compromise sort of "truce" was reached that generally recognized that the police should not be permitted to spy for political reasons alone, but only based on information that points toward a crime.

The federal and local governments have taken advantage

2. US v. US District Court, 407 US 297 (1972).

3. Final Report of the Select Committee to Study Gov'tl Operations with respect to Intelligence Activities, Sen. Rep. 94-755 (1976).

of the public fear after September 11 to permit greater intrusions by electronic means as well as by informers and infiltration, not just in foreign intelligence, but in domestic criminal cases and against domestic political activists.

Now it is permissible for the government to use orders from the foreign intelligence court in domestic criminal cases. A section of the USA Patriot Act, passed immediately after September 11, provides that the foreign intelligence court can order a wiretap if the investigation has a domestic as well as a foreign purpose; the provision was almost invisible in the law, requiring the change of only two words in the old law authorizing foreign intelligence wiretaps.⁴

The foreign intelligence court can also be used for more generalized political spying. The USA Patriot Act permits the foreign intelligence court to grant an order to produce documents in connection with an investigation. This seemingly innocent provision can be used, for example, to ask libraries to reveal what books have been taken out by readers, without being able to tell the readers that they are under investigation. After a storm of criticism, Attorney General Ashcroft announced in September of this year that the Department of Justice had never “used” the Act to force libraries to give up records, claiming that he wanted to counter “distortion and misinformation” concerning the Act.⁵ It may be literally true that the government has never gone to court to get an order to force a library to give information, but an earlier survey of libraries revealed that the FBI had sought information on hundreds of readers.⁶ When there is a law on the books permitting the authorities to coerce the information, it seems unlikely that a librarian would refuse a “voluntary” request. Do I need to add that librarians are both frightened and confused?

At the same time, the government is changing the standards for political surveillance and infiltration by the police, trying to roll back the changes made in the seventies. The Attorney General changed the guidelines for the FBI to open investigations of domestic groups, requiring only “reasonable indication” of criminal activity, or even less for a preliminary inquiry.

Efforts to weaken the protections against political spying have reached the local level in several cities, most recently in New York. In the seventies, a federal lawsuit was brought

4. USA Patriot Act sec. 218. Nancy Chang, “How Democracy Dies: The War on Our Civil Liberties”. In: Cynthia Brown (ed.), *Lost Liberties*. New York: New Press 2003, 43.

5. Eric Lichtblau, “US Says It Has Not Used New Library Records Law”. *New York Times*, September 19, 2003, A20.

6. USA Patriot Act sec. 215. Nancy Chang, *op. cit.*, 44.

against the New York City police, claiming that they had abused their investigative powers for political reasons; it was one of a number of cases that led to the “truce” I described above.⁷ In the eighties, the case was settled; the police agreed not to investigate any political or religious group unless they had information that the group was engaged in crime; such investigations were to be approved by an Authority made up of two police officers and one person from outside. The police agreed to limit dissemination of records about political activity. And – very important – the federal court stood ready to enforce the agreement, which we call in our law a “consent decree.” For seventeen years the court’s order prevailed and apparently worked quite well.

A year ago, in the fall of 2002, the police came back to the federal court to dissolve the settlement after all those years, claiming that in light of the threat of terrorism they could no longer operate with a requirement that investigations be based on specific information pointing toward crime, or with restrictions on dissemination. The plaintiffs lawyers, of which I am one, fought this, but the court approved guidelines for investigation like those of the FBI, and then stepped out of the way, not even incorporating the guidelines in its decision.

Then a small but significant scandal occurred. It turned out that the police had been arresting people at demonstrations in New York against war during the spring of this year, and had been asking them intimidating questions about their political affiliations. Nothing to do with terrorism, nothing to do with foreign influence, just citizens opposed to foreign policy. Peaceful demonstrators in New York were astounded and also frightened; many of them wanted to complain to the court. We went back to court, and the judge, very annoyed by the police tactics, incorporated the new guidelines for investigation into his decision, giving them the force of a court order.

All of these changes in the protections of privacy are significant – the weak warrant requirement for wiretaps in criminal cases and for information from libraries and other institutions, as well as the weakened protections against spying. The most important thing about them, however, the point I want to emphasize to you, is that the changes

7. Chevigny, “Politics and Law in the Control of Local Surveillance”. 69 *Cornell Law Review* 735-784 (1984) describes the situation as it was twenty years ago.

have not been principally directed against foreign terrorism. The foreign intelligence warrants can now be used in domestic matters. The FBI guidelines I discussed above that were changed are not used in investigations of foreign terrorism. The FBI has a special set of guidelines for those investigations that are secret and have been secret for years; I have no idea what they provide. The guidelines that were changed are those for domestic crime and other matters. As this is written, the New York Times reports that the new powers have been used extensively in domestic criminal matters.⁸ And the story I have told you about the changes in New York is an example of how the changes are intended to reach the people, the people in the US who do not agree with the government.

8. Eric Lichtblau, "US Uses Terror Law to Pursue Crimes from Drugs to Swindling". *New York Times*, September 28, 2003, A1.

Criminal cases after September 11

Prosecutions for crimes that have arisen from events since September 2001 are few, partly because the time has actually been short – only two years. Moreover the detentions by the government, which I will speak about in a moment, although they have involved hundreds of people, have revealed very little serious crime. It is because there are not many strong cases to prosecute, although the government would like to find them if it could, that the case I am about to describe has occurred. Or so I believe.

This case concerns a woman lawyer in New York City, Lynne Stewart, who was indicted with two others in 2002, charged with giving "material support" to a foreign terrorist organization and also with defrauding and lying to the US government. These are serious charges. The charge of giving material support to a foreign terrorist organization arises out of anti-terrorism laws passed during the Clinton administration which make it a crime to support any organization that the government has labelled a foreign terrorist organization. The crime does not require any actual aid to terrorists or any intention to aid terrorism. All it requires is that the accused have supported one of the forbidden organizations. Thus for example, if a Muslim charity supports organizations in Palestine, and some of them are violently against Israel, then the charity is going to be labelled a foreign terrorist organization and giving

money to it is going to be a crime. This has happened to a number of Muslim organizations.

One organization labelled terrorist under this law was called the Islamic Group, based in Egypt. Sheik Abdel-Rahman, a Muslim religious leader who was supposed to be active in the group, was a refugee from Egypt. In 1995, the sheik, together with a number of others, was convicted of plotting to bomb public places in New York City, including the World Trade Center. Part of his defense was that his preaching was all rhetoric – he worked in a mosque – and he did not actually plan any acts of violence; the jury did not believe that. He was sentenced to life plus a number of years. Lynne Stewart was one of his lawyers; she has a history of association with radical causes and she was sympathetic with the sheik.

While she was working on the sheik's appeal, in the year 2000, Lynne Stewart went with an Arabic translator to visit the sheik in prison. The visit was electronically recorded; so were Ms. Stewart's telephone conversations with the sheik's followers. Because the sheik was considered a politically dangerous prisoner, Ms. Stewart had to sign a "special administrative measure" of the prison that prevented the sheik from communicating with outsiders. During the visit, the sheik wrote a statement that Ms. Stewart released to the press. She is also accused of having talked loudly in English to cover a conversation in Arabic by the sheik and the translator (Stewart speaks no Arabic), which prevented the government from being able to overhear the conversation. The indictment also claims that she agreed over the telephone to permit a lie to be disseminated that the prison was not giving the sheik proper medical care. She is supposed to have told one of the sheik's followers that no one outside would know the truth.

The government's theory of the case was that Ms. Stewart's visit, including the press statement, together with the telephone call, were "material support" for the Islamic Group. The charge of lying to and defrauding the government grew out of her having signed the special administrative measure. The government claims that she never intended to abide by it, and that she therefore lied and committed fraud when she agreed to it.

Let us step back and look at the politics of the case. It is all based on laws that were in effect before the Bush

administration, but more important it is based on acts that occurred before the Bush administration. They occurred during the Clinton administration, but the government did not think they were important enough to prosecute. After September 11, the government found them important enough to bring them back and make a case out of them. Attorney General Ashcroft himself came to New York to announce the indictment in 2002.

I am sure I do not need to tell you that many criminal defense lawyers in the US were outraged by this prosecution. It is based on acts that are no doubt rash, but that many might have done for a client. Moreover, almost all the evidence is based on electronic listening to Ms. Stewart in the prison and on the telephone. The telephone taps were apparently authorized as foreign intelligence wiretaps of the sort that I mentioned earlier. The listening is probably technically permissible, then, but it illustrates a problem with such tactics. Most of us will say something in an unguarded moment, like, “probably no one on the outside will hear about it”, without supposing that we are going to be indicted for conspiracy. The listening makes it extremely difficult to work effectively as a lawyer, intimidates us all and puts us all constantly on guard against government spying. Attorney General Ashcroft hammered the point home by introducing a general regulation authorizing the government to monitor communications between prisoners and their lawyers in all cases, whether they involve terrorism or foreign relations or not.⁹ Once again, September 11 is being used as an excuse for a general limitation on the effectiveness of defense lawyers.

One of the best lawyers in the country agreed to defend Ms. Stewart, and he has persuaded the court to dismiss some of the charges. In August the trial court ruled that Ms. Stewart’s words and acts were not “material support” for an organization, similar to contributing funds. If the meaning of the words included acts like those of Ms. Stewart, he held, they would make the meaning of the law too vague to define a crime. This is no doubt a great relief to the defense bar; Stewart is, however, still charged with lying and fraud about the special administrative regulation. And we still don’t know what is the scope of the crime of “material support” for a foreign terrorist organization.

9. 28 Code of Fed. Regulations sec. 501. 3d. Chang, op. cit., 38.

While the Bush administration was getting the Stewart case ready, they also moved to expand the scope of the anti-terrorism laws. The USA Patriot Act defines “domestic terrorism” as criminal acts that are dangerous to life that “appear to be intended ... to influence government policy by coercion”.¹⁰ There have been no prosecutions for this crime so far, but it seems clear that the administration is trying to use the fear created by acts of international terrorism to extend to acts of violent domestic protest, like the riots in Seattle over international trade and finance.

10. USA Patriot Act sec 802;
18 US Code sec. 1331.

Detentions since September 11

Detentions have been much more widespread than criminal prosecutions. They are perhaps the largest sign of repression up to the present time, although it is too early to tell what the future will hold. Immediately after September 11, the government began rounding up hundreds of persons, mostly aliens, and virtually all of them, so far as we can tell, with Muslim or Arabic last names. For example, two US citizens who have Arabic-sounding names, were arrested returning from a trip to Mexico and detained, one of them for two months.¹¹

11. Kate Martin, “Secret Arrests and Preventive Detention”. In: Cynthia Brown, *op. cit.*, p. 77.

These hundreds were detained on several excuses: minor criminal charges, immigration violations; some were just detained on a vague claim that they were “material witnesses”, a phrase that permits a witness to be detained under American law. The truth is, however, that we do not know exactly how many were detained, what they were detained for, who they are, or what happened to them, because the government simply refused to give any information to the public. As individuals, if their families could find them, they could eventually communicate with them and get the services of a lawyer. The Attorney General increased the secrecy by decreeing that immigration proceedings in the cases were to be closed to the press and public.¹² Although there were many complaints from well-known human rights organizations, the government’s tactic was fairly successful, which would probably not have surprised a lawyer in Latin America; so long as government acts are secret, it is difficult for the public to focus on the actions. These hundreds of detainees received very little

12. *Id.* at 79-80.

sympathy from the public because they were just a vague group of unidentified people; it was supposed that most of them were aliens who had violated their immigration status and were going to be deported. Actually hundreds were finally released into the United States. The status of the persons was largely a pretext; it seems that the same secret tactics could have been used even if most of those detained had been citizens.

NGO's in the US, supported by the press, brought a case to force the government to give the names and the charges, and a judge ruled at first that the government would have to give the names. But the government appealed the order and the appeals court in Washington, DC held that the NGO's had no right to get the names. In making that decision, the court said, "It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role".¹³

13. Center for National Security Studies v. US Dept. of Justice, (D.C. Cir 2003) Case #02-5254, 02-5300.

The appeals court relied on recent cases from other courts that take a similar position that they cannot interfere with executive decisions. The result for the hundreds detained after September 11 was unfortunate. When the government keeps its acts from the public, when its acts are not transparent, there are likely to be hidden abuses against those in custody, as lawyers in Latin America know from experience. This was exactly what the press and the NGO's feared in the case of those detained, and it turned out they were right. Although by this time most of the detainees have been released – some were deported from the United States although hundreds were released into the United States – in the spring of this year the Inspector General of the Justice Department issued a report criticizing the way they had been treated.

It seems that the Inspector General undertook the detailed review, more than three hundred pages, partly because there was so little public information about the detentions. The abuses the inspector found were very much what we would expect under the circumstances. The grounds for suspicion were often next to nothing. The Inspector General gives the example of a Middle Eastern man who ordered a car from a dealer in September, 2001. He was

arrested when he failed to pick up the car, and was not released for six months. In another case, some Middle Eastern men who were construction workers at a school in New York City were stopped for a traffic violation and were arrested because, of course, they had plans for the school in the car. The government took the position that no one could be released until the suspicion of terrorism could be excluded, and as a result they were reluctant to release anyone at all. The detentions were extraordinarily long; the average was more than 80 days, which implies of course that in many cases it was much longer. The three agencies involved – the Federal Bureau of Investigation, the Central Intelligence Agency, and the immigration service – did not have enough staff to process such a large number of persons, and furthermore they were not accustomed to coordinating their work. Without public scrutiny, they had little incentive to expedite the cases.

In many cases, moreover, the inspector reports that the authorities treated those detained as though they had been convicted of terrorist acts, although most of them were not even accused of a crime. Many were detained in a maximum security section of the federal jail in Manhattan. The cells were small, lights and video cameras were on, and when prisoners were out of their cells they were shackled. During the first two weeks after September 11, those detained were unable to contact their families or lawyers at all – they were not permitted to telephone. Some detainees reported that the guards threatened them with phrases like “you are never going to get out of here”.¹⁴

In short, the Inspector General’s report is an extraordinary government document. The inspector recommended a number of changes in procedures for government agencies, but two months later reported that many of them were not being carried out.

The first group of hundreds of detentions, bad as it was, was not the end of the problems for aliens after September 11. The immigration service established a special registration system for men and boys from many countries, mostly Arab or Muslim. Thousands of men have been obliged to go to the authorities to register, and sometimes they are detained without warning. In Los Angeles in December of 2002, the immigration authorities detained 400 people, many of

14. US Dept. of Justice, Office of the Inspector General, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks” (Washington DC, April 2003).

15. Lawyers Comm for Human Rights, "Imbalance of Powers", 43 (2003).

whom were held under harsh and overcrowded conditions.¹⁵ Wholesale detentions of people just because of their Middle Eastern origins has produced panic and worry in the Muslim community throughout the US.

If the detentions in the US have affected thousands of people, the detentions of so-called enemy combatants have presented the most serious legal issues. In those cases the government has failed or refused to bring any charges, and has also refused to bring the persons before the courts.

In actions against terrorism outside the US, particularly in Afghanistan, the army and other agencies arrested hundreds of people, most of whom were taken to the enclave in Cuba that the United States has carved out at Guantanamo. Although the Cuban government is technically sovereign over Guantanamo, the US has had a lease for a military base there for a hundred years.

Some of the detainees at Guantanamo claim that they were captured virtually by accident, in roundups by local Afghani troops. But they have never been able to get any sort of a hearing in any court. The US has taken a number of positions which are not entirely consistent under international law, but have been generally successful in the American courts and public opinion. Those who were captured in war, it would seem, ought to be treated as prisoners of war under the Geneva Conventions of 1949. Under Article V of the Third Geneva Convention, those detainees whose status is questionable would be entitled to a hearing by a "competent tribunal" to determine their status. But the US has never accepted the title "prisoner of war" for any of the detainees. As you may be aware, a complaint was made on behalf of the detainees to the Inter-American Commission on Human Rights, and on March 12, 2002, the Commission adopted precautionary measures requesting the US "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal". So far as I can determine, the mass media as well as the government in the United States have ignored this important decision.

Rather than have the detainees' status determined by a tribunal, the US government has designated them "enemy combatants", a term with no exact meaning in international law. Some of the detainees sought a writ of habeas corpus

to determine their status, claiming that any person deprived of his liberty by US officials in a place controlled by the US was entitled to the writ. The government argued that Guantanamo was outside the jurisdiction of the United States, and since the detainees did not have the rights of citizens, there was no jurisdiction for a writ of habeas corpus. The Court of Appeals adopted the government's argument and dismissed the petition for habeas corpus.¹⁶

It appears that the government imprisoned people in Guantanamo so that it could claim that there was no jurisdiction in the US courts, and that has been a successful tactic. I believe that the courts are relieved that they can thus avoid reviewing the government's decisions about the reasons for the detentions. But it just leaves open the question what the government wants from the detainees, and about this the government has been clear: it wants intelligence about terrorism. It wants to be able to question the detainees until it is satisfied that it has all possible information; the government has released a few people who seem to have no information. It is clear also why the government is unwilling to call the detainees prisoners of war; if they were such prisoners, they would have no obligation to give information to their captors.

There are two cases of persons who are citizens detained in the United States and are labelled "enemy combatants". They have filed petitions for habeas corpus. Their cases cannot be so easily dismissed as the Guantanamo cases; they squarely present the issue of the powers of the executive. Although few, they are legally significant.

The first case, Hamdi, involves a US citizen who actually fought in Afghanistan on behalf of the Taliban. The President designated him an enemy combatant and sent him to a military detention center. His father brought a petition for habeas corpus to determine his status, and the appeals court issued a narrow opinion.¹⁷ The court held that, being a citizen, he was entitled to petition for a writ of habeas corpus. But the President has the power in time of war to declare him an enemy combatant, the court said, a determination which the courts cannot review; so the court could not grant the petition or help him in any way. Concerning the argument that Hamdi had a right to a hearing under the Geneva Convention, the court simply said that the US courts have

16. *Al Odah v. US* 321 F.2d 1134 (D.C. Cir. 2003).

17. *Hamdi v. Rumsfeld*, 316 F.2d 450 (4th Cir. 2003).

no jurisdiction to hear cases under the Convention. This case is perhaps less alarming because it appears that Hamdi participated in an enemy army.

The other case is much more disturbing. No one claims that Jose Padilla, a US citizen, participated in combat against the US in any recognized sense. He was first arrested as a witness because he was suspected of having knowledge about terrorism, and a lawyer was appointed to represent him. Not a very unusual case these days. Suddenly, because the government suspected him of having an important connection to terrorist plots, Padilla was declared an enemy combatant and sent to military custody. Neither his lawyer nor anyone else was allowed to contact him; he was and is incommunicado. His lawyer sought a writ of habeas corpus. Like the court in the Hamdi case, this new court held that Padilla had the right to file the petition, and that the President had the power to declare him an enemy combatant.¹⁸ But the court went on to say that Padilla had the right to question the basis for that determination, and he had to have access to his lawyer; he could not be held incommunicado. And there is the place where the conflict with the executive was joined.

18. Padilla ex. rel. Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

The government refused to comply with the order and tried to get the judge to change his mind. The judge at the first level of the federal courts was evidently frustrated and even infuriated. But the government has never permitted Padilla to see his lawyer, and the judge at the first level has given up and sent the case for a special appeal, not yet decided. In the course of trying to keep Padilla incommunicado, the government finally explained what its interrogators want. I quote here at length from the statement of an admiral in the Defense Intelligence Agency (DIA):

Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began. Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even

seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example – even if only for a limited duration or for a specific purpose – can undo months of work and may permanently shut down the interrogation process.

It is clear, I think, what this means. The authorities claim that the President has the power to take a person out of the court process and imprison him under military custody. They go on, in effect, to claim that they are not going to torture the man; they are going to question him until they get the answers they want. And if the court tells them they cannot do it as they please, they are going to disobey.

This position has echoes of the legal situation during the repressions in Latin America. The government claims that it can arrest people and put them in military custody at its discretion. While there, they will be incommunicado and will be subjected to questioning without limit. An application for relief in the form of habeas corpus or some similar remedy is technically available but useless; the petitioner can file the application, but if the court grants it, the government is going to defy the court. This puts the courts in an embarrassing position. They have no means of enforcing their orders without the aid of executive power, so if their order in response to a petition for habeas corpus is defied, they are in worse condition than if they never granted the order. They are likely to look for ways to avoid granting the petition.

The sad history of detentions during past periods of repression has led the Inter-American system of international human rights to establish a special place for habeas corpus. As you are probably aware, the Inter-American Court held in the eighties that habeas corpus is such an important, basic right that it cannot be suspended even in time of national emergency; it is not derogable.¹⁹ There is no doubt, I think, that the Court is trying to make it clear to governments in the Western hemisphere that the pattern of seizing and interrogating people, incommunicado and without legal recourse, is the essential tool of repression; if the power of the courts to grant habeas corpus petitions is recognized, the power of repression is vastly weakened. The International

19. Inter-American Court of Human Rights, Advisory Opinions 8/87 and 9/87.

Covenant on Civil and Political Rights has not been so definite; it appears that the protections of habeas corpus may be suspended in time of national emergency, but only if a full declaration of the emergency conditions is made to the Secretary-General of the United Nations.

The US has, of course, made no such declaration, and it is very unlikely that it will. The US Constitution provides that the right to habeas corpus cannot be suspended except “when in cases of rebellion or invasion the public safety may require it”.²⁰ The government has not taken any official position that habeas corpus, or any other right, is suspended; it would be very difficult politically for the government to take that position. Instead it has avoided confronting the problem by taking the position, in effect, that people called enemy combatants are not entitled to the benefits of the writ, even if they are citizens. No doubt the government would say that it is engaged in a war against terrorism and that Padilla has participated in that war; but that implies that any person who is alleged to be connected to foreign terrorism can be detained incommunicado without an effective remedy. It is an extraordinary and dangerous position.

What are the lessons of the parallels between the experiences in the two halves of the hemisphere? They suggest that the responses of governments to serious threats to national security are likely to be similar. The government will take advantage of the threat not only to act against its enemies, but also to control and discipline the mass of the population, citizens as well as aliens. In doing so, it will justify intrusions on privacy, politically motivated prosecutions and massive detentions. It will try to keep as much of its work secret as possible, so that there will be less public protest; and the secrecy itself will both conceal and encourage abuses. Perhaps most important, the government will make it clear to the courts that if they defy the executive, the executive is going to defy them. Even a thoroughly independent judiciary is likely to fear that it is ineffective under those circumstances.

On the other hand, I do not want to paint too bleak a picture. Certainly there are problems in the United States pointing toward repression. Invasions of privacy, increased political surveillance, interference with the work of lawyers,

20. US Constitution, Art. I, sec. 9, clause 2.

harassment of people because of their Arab or Muslim connections, government secrecy and detentions without recourse for purposes of unlimited interrogation are disturbing, indeed intimidating, to the judiciary as well as to the rest of us in the US.

There is an enormous amount of opposition, however, to the measures taken up to now. Thousands march to demonstrate against the government, and dozens like me prepare papers criticizing the government. So far, no serious action has been taken against us. Attorney General Ashcroft has been travelling around the country trying to counter the criticism, which means that it is beginning to worry the government. Some judges, particularly at the lower level, have rejected legal arguments by the government, although the success on appeal has not been good. Nevertheless the appeals process is not finished. And some government officials have gone on record against government abuses, as in the case of the Inspector General's criticism of the detention of aliens.

Although Congress did almost nothing to resist the USA Patriot Act in 2001, some efforts to introduce more repressive programs have been rejected by Congress in the past two years. Some of the intrusive surveillance provisions of the Act are due to expire in 2005.²¹

21. USA Patriot Act sec. 224.

Moreover, the USA Patriot Act has not proved to be a completely repressive measure. In order to allay the fears that were raised by the Act, Congress provided in one section that the Inspector General of the Justice Department was to receive complaints of violations of civil liberties and report on them;²² it is under those provisions that the Inspector General has conducted his investigations. The inspector could have ignored those provisions, or just have gone through the motions of investigation; very few would have noticed. Instead he took his job seriously. As long as there are vigilant citizens and responsible officials, the powers of repression may remain limited.

22. USA Patriot Act, sec 1001.