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## The Post-9/11 Roundup of Innocents

By James Bovard

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Many Americans have been lulled into a false sense of security by the end of the George W. Bush administration. In reality, the government continues to pose grave perils to people's rights and liberties. And it could take only one shocking incident for the government to once again show its heavy-handed ways.

Prior to the September 11, 2001, attacks, the dark side of the Bush administration was barely evident. But within days after those attacks, the government seized almost any conceivable excuse to lock up anyone it chose to target. At a time when many people are lowering their guard against Leviathan, we should recall how quickly the government razed restraints on its power.

The Bush administration brought the same mentality to locking up suspects after 9/11 that the Soviet Union used for the potato harvest from collective farms. It didn't matter how many bushels of potatoes were rotten, or how many bushels were lost or pilfered along the way, or how many bushels never really existed except in the minds of the commissars who burnished the official reports. All that mattered was the total number. In the same way, the success of the immediate federal response to 9/11 was gauged largely by the number of people rounded up, regardless of their guilt or innocence.

Less than three months before the 9/11 attacks, the Supreme Court ruled that immigrants within the United States are protected by the Constitution "whether their presence here is lawful, unlawful, temporary or permanent." Justice Steven Breyer, who wrote the majority opinion, specified that "terrorism" might be one of the "special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."

The Bush administration responded to the Supreme Court decision by presuming that practically any alien could automatically be considered a terrorist suspect. After 9/11 the Bush administration quickly requested that Congress pass legislation to formally suspend all habeas corpus rights for aliens.

A petition for a writ of habeas corpus — Latin for “produce the body” — seeks to end unlawful detention of a person by requiring the government to bring the detained person before a judge to be either formally charged or released. Thomas Macaulay, in his *History of England*, proclaimed the Habeas Corpus Act of 1679 “the most stringent curb that ever legislation imposed on tyranny” and hailed it as a law that adds to “the security and happiness of every inhabitant of the realm.” The British legislation was part of the common-law heritage incorporated into American law at the time of the nation’s founding. The Supreme Court declared in 1969 that the writ of habeas corpus is “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”

### **Rule by decree**

Attorney General John Ashcroft did not wait for a green light from Congress before making himself Czar of All Aliens. The INS, at Ashcroft’s behest, issued a new emergency regulation on September 17 expanding the time from 24 hours to 48 hours that the agency was allowed to detain aliens while deciding whether to formally charge or deport them. The edict also provided for “an exception to the 48-hour general rule for any case arising during or in connection with an emergency or other extraordinary circumstance, in which case the Service must make the determinations as to custody or release ... within an additional *reasonable period* of time.” The official announcement of the new regulation repeatedly stressed that “this 24-hour period is not mandated by constitutional requirements.”

And since a 24-hour period is not mandated by the Constitution, the Justice Department was entitled to suspend habeas corpus for any immigrant it labeled a terrorist suspect — or a potential material witness — or who was caught with box-cutters.

The following day, Ashcroft characterized the new rules as “an administrative revision to the current INS regulations regarding the detention of aliens,” adding that “this rule change will apply to these 75 individuals who are currently detained by the INS on immigration violations that may also have information related to this investigation.” As immigration lawyer Michael Boyle later testified to Congress,

This exceptionally vague and open-ended provision allows detention without reason for virtually any period of time that the jailer chooses, with no recourse or explanation. It, in effect, allows an individual to be held for long periods for no better reason than that someone in government thinks they [sic] look suspicious.

The “reasonable period” edict illustrates how an innocuous phrase can create a gaping legal sinkhole that threatens to swallow the rights of 10 million people — the number of legal immigrants in the United States.

On September 21, Michael Creppy, the chief immigration judge of the INS, acting on Ashcroft’s command, ordered immigration judges to close all hearings of “special interest” detainees rounded up after 9/11 and to refuse to confirm or deny to anyone outside the courts

whether such hearings were scheduled. That made it very difficult, if not impossible, for relatives to keep track of locked-up husbands, sons, or brothers and also thwarted lawyers' efforts to keep in touch with clients.

In the days after the attacks, Attorney General Ashcroft told FBI Director Robert Mueller "that any male from eighteen to forty years old from Middle Eastern or North African countries who [sic] the FBI simply learned about was to be questioned and questioned hard. And anyone from those countries whose immigration papers were out of order — anyone — was to be turned over to the INS," *Newsweek* columnist Steven Brill reported in his book *After: How America Confronted the September 12 Era*. Brill noted that Ashcroft told FBI and INS agents that the goal "was to prevent more attacks, not prosecute anyone. And the best way to do that was to round up, question, and hold as many people as possible."

### **Detaining the innocent**

While detainees were portrayed as would-be terrorists, most of the actual cases mocked the Bush administration's ominous overtones:

□ A Moroccan teenager in Virginia was turned in to the feds by a high-school guidance counselor who discovered the boy's tourist visa had expired. (The teenager registered for high school near the time of the terrorist attacks.) The *New York Times* noted on February 3, 2002, "The youngster has been detained for four months." No evidence was found linking the boy to terrorist groups.

□ Nacer Fathi Mustafa, a 29-year-old American citizen, was traveling back to the United States with his Palestinian father on September 15 after purchasing leather jackets in Mexico for a Florida truck stop he manages. The Mustafas were arrested after a federal official claimed that their passports had "obviously been altered with the introduction of an additional clear sheet on top of the genuine laminate." The Mustafas' lawyer, Dan Gerson, later noted, "The agent attempted to cast the Mustafas in the worst light, stating that, when questioned, 'The Mustafas declined to offer any explanation,' when in fact they denied knowledge of any alterations." The elderly father was jailed briefly and then released on condition that he wear an electronic ankle bracelet. The son was held for 67 days before a government laboratory concluded the passport had not been altered. The Mustafas sued the government to get reimbursement of their legal fees (more than \$15,000), asserting that the feds had acted in bad faith. Assistant U.S. Attorney Andrew A. Bobb scorned their lawsuit: "Both defendants' passports revealed they had traveled to the Middle East, a factor that could be considered in light of the fact the terrorists who caused the Sept. 11 devastation had traveled from the Middle East into the United States."

□ On September 19 the FBI nabbed Mohammed Butt, a 55-year-old Pakistani living in a house with other aliens in Queens, New York. A priest had called the FBI to report local suspicions about the house's residents: they did not cut the grass and failed to say hello. And as one 63-year-old neighbor astutely noted, "They hang their laundry — even their underwear — on the fence. Who does that?" Butt had entered the United States a year earlier and had overstayed a six-month visa. The FBI quickly decided it had no use for Butt and turned him over to the INS. He was being held in the Hudson County jail when he died of a heart attack. Butt repeatedly filled out forms requesting medical assistance in the days before his death but was scorned by the jailers. Human Rights Watch filed a Freedom of Information Act request

to get information on Butt and his death but the INS refused to provide any information unless Human Rights Watch could provide Butt's "written consent" and "written signature" permitting the INS to release the information.

□ Two Moroccan men in their 20s living in Richmond, Virginia, were arrested by police during a September 13 traffic stop and handed over to the INS. The INS locked them up because they were working part-time at a pizza joint, in violation of their student visas. Their lawyer, Syed Hyder, declared, "I've been told no one has any evidence against these boys. But since the FBI had at one time expressed an interest in them, the INS had to hold them."

□ Raza Nasir Khan, a pizza cook, got swept up after he asked a state Fish and Wildlife agent for a map while he was hunting with his bow and arrows in Delaware on the morning of September 19. The agent suspected the Pakistani — who possessed a global-positioning-satellite device (as do many hunters) and was within a few miles of a nuclear power plant — and alerted the FBI. FBI agents descended upon his apartment the next night and discovered three firearms. Khan, an avid hunter, had applied to have his visa extended but because it had not yet been renewed, he was guilty of a felony. (Illegal aliens are prohibited from possessing firearms.) A few days later, federal Alcohol, Tobacco, and Firearms agents captured Khan on his way to the pizzeria. He was jailed and held without bond. Federal magistrate Mary Pat Thynghe conceded, "There is nothing here to suggest [and] there were no indications that this individual was a terrorist.... There is no indication to me that there is a terrorism circumstance here." Richard Andrews, a federal prosecutor in Wilmington, observed, "Mr. Khan was arrested because of Sept. 11 in the sense that [federal agents] would not have gone out to interview him but for Sept. 11."

Attempting to help the government investigate the terrorists landed at least two people in jail:

□ Mustafa Abujdai, a Palestinian living in Texas, was locked up after he voluntarily contacted the FBI after 9/11 to inform them "he had met with two men in Saudi pilot's uniforms at a restaurant in Dallas, Texas, and that they had attempted to recruit him for flight-training school," according to his lawyer, Karen Pennington. One of the Saudis was one of the 9/11 suicide pilots. Abujdai, who was married to an American, was interrogated for 15 hours, and then was jailed for more than two months for overstaying his visa. Abujdai claimed other jail inmates heavily abused him.

□ Eyad Mustafa Alrababah, a Palestinian living in Connecticut, was also locked up after he voluntarily went to the FBI office in Bridgeport to tell them that he recognized pictures of four of the hijackers and had driven them to Virginia in June. He was locked up as a material witness, held in solitary confinement for more than 120 days, and kept incommunicado for much of the time.

In the weeks after the 9/11 attacks, the Bush administration constantly misrepresented how much power it was seeking over aliens. In a September 25 speech to FBI agents, Bush declared, "We're asking Congress for the authority to hold suspected terrorists who are in the process of being deported until they're deported.... We believe it's a necessary tool to make America a safe place. This would, of course, be closely supervised by an immigration judge." But everything that Bush and Ashcroft subsequently did sought to minimize, if not obliterate, judicial supervision of their roundup.

On September 30, Attorney General John Ashcroft announced on CNN, “We’ve arrested and detained almost 500 people since the September 11 terrorist attacks.... We seek to hold them as *suspected terrorists*, while their cases are being processed on other grounds.”

But early on, it was obvious that many of the people being nabbed were innocuous. Human Rights Watch reported the following cases:

□ “Upon arriving at the Newark, New Jersey, train station on October 11, 2001, Osama Sewilam asked a policeman for directions to his immigration attorney’s office. The policeman asked him where he was from, and he replied, ‘Egypt.’ The policeman asked him if he had a visa. He said it had expired and that was why he was going to see his lawyer. The policeman took him to the police station and called the FBI. Sewilam was deported on March 15, 2002.”

□ “Ansar Mahmood, a twenty-four-year-old Pakistani who was a legal permanent resident in the United States, decided to have his picture taken on October 9, 2001, to send to his family, according to a newspaper report. After work, he drove to the highest point in Hudson, New York, a hilltop overlooking the Catskills Mountains, but the view also included the main water treatment plant for the town. Two guards had been posted there that day because of the anthrax scare. While one of the guards took Mahmood’s picture, the other called the police. The FBI’s investigation of Mahmood uncovered that he had helped an undocumented friend from Pakistan find an apartment and he was charged with harboring an illegal immigrant.”

Allegations began popping up that post-9/11 detainees were being beaten or prevented from contacting a lawyer. Ashcroft announced on October 16, “I would be happy to hear from individuals if there are any alleged abuses of individuals, because that is not the way we do business.” He promised that “we will respect the constitutional rights and we will respect the dignity of individuals.” But the fact that many detainees were held incommunicado made it tricky for them to personally contact the attorney general.

The FBI had a form affidavit it presented to judges to justify indefinite secret confinement of targeted aliens. In scores, if not hundreds, of cases, the FBI warned,

At the present stage of this vast investigation, the FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals that have been detained.... In the meantime, the FBI has been unable to rule out the possibility that [the detainee] is somehow linked to, or possesses knowledge of the terrorist attacks on the World Trade Center and the Pentagon. To protect the public, the FBI must exhaust all avenues of investigation while ensuring that critical information does not evaporate pending further investigation.

The FBI declared that “the business of counter-terrorism intelligence gathering in the United States is akin to the construction of a *mosaic*.... The FBI is gathering and processing thousands of bits and pieces of information, however, to see if it can be fit into a picture that will reveal how the unseen whole operates.”

The FBI implied that mere mortals could not even hope to grasp the meaning of the details agents were sniffing out: “What may seem trivial to some may appear of great moment to those within the FBI or the intelligence community.” The “mosaic” form affidavit pushed the hottest button to intimidate judges — the same tactic Ashcroft successfully used on Congress to railroad through the USA PATRIOT Act. The FBI’s constant invocation of the need to

build “mosaics” is ironic in light of a 2002 joint congressional investigation’s conclusions about the FBI’s analytical incompetence.

### **National security and power**

Ashcroft portrayed arbitrary power as the key to national survival. On October 25, he told the U.S. Conference of Mayors,

Today’s terrorists enjoy the benefits of our free society even as they commit themselves to our destruction.... If you violate a local law, you will be put in jail and kept in custody *as long as possible*. *We will use every available statute. We will seek every prosecutorial advantage.*

In Ashcroft’s view, any breach of any law or regulation automatically entitles the government to absolute power over the suspected violator. This “maximum prosecution mentality” is far more dangerous now than it was in earlier decades. There are far more levers for government to use against those it seeks to destroy.

The following day, Bush signed the PATRIOT Act, which gave Bush and Ashcroft almost everything they wanted — except for formally suspending habeas corpus. The law increased the length of time that an alien could be locked up without charges to seven days. If the attorney general certifies that he has “reasonable grounds to believe that the alien is engaged in any activity that endangers the national security of the United States,” the detention can be extended almost indefinitely. No evidence is required: the attorney general’s rote assertion is sufficient.

Shortly after the president signed the USA PATRIOT Act the Justice Department announced that it could henceforth eavesdrop on telephone calls and meetings between anyone detained in a terrorist investigation and his lawyers. A Federal Register notice stated that the monitoring would be carried out whenever the attorney general certified “that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to facilitate acts of terrorism.” Since it required no evidence for the feds to label someone a terrorist threat, it would presumably require scant suspicion to justify pervasive eavesdropping. Sen. Patrick Leahy, chairman of the Senate Judiciary Committee, complained in a letter to Ashcroft that there are “few safeguards to liberty that are more fundamental than the Sixth Amendment. When the detainee’s legal adversary — the government that seeks to deprive him of his liberty — listens in on his communications with his attorney, that fundamental right and the adversary process that depends upon it are profoundly compromised.”

### **Roundups and detentions**

The Bush administration sought to allay rumors of mass roundups of Muslim men. On November 5, 2001, White House spokesman Ari Fleischer announced, “Most of the people, the overwhelming number of the people, were detained, they were questioned, and then they’ve been released.” Fleischer added that President Bush “is fully satisfied that anybody who is continuing to be held is being held for a wise reason.” But a Justice Department

spokesman contradicted the White House, declaring on the same day that most of the people rounded up after 9/11 were still held by the government.

The Justice Department responded to the imbroglio by announcing it would cease disclosing the total number of people locked up in the 9/11 investigation. As *Time* noted, “Ashcroft spokeswoman Mindy Tucker said the department would no longer issue daily or even weekly updates [of the number of detainees], because the task of making and synchronizing lists was too labor intensive.” Assistant Attorney General Michael Chertoff later said that the feds ceased giving out updated totals of detainees because it “loses meaning.” The media widely reported statements by senior federal officials that 1,200 suspects had been detained in the 9/11 investigations.

At a November 27 Washington press conference Ashcroft announced, “We’re removing suspected terrorists ... from our streets to prevent further terrorist attacks.” He declared that, thanks in part to “arrests and detentions, we have avoided further major terrorist attacks, and we’ve avoided these further major terrorist attacks despite threats and videotape tauntings.” Videotape tauntings were, in Ashcroft’s mind, almost as dangerous as a hijacked jetliner.

Ashcroft derided suggestions to release the names of detainees: “I am not interested in providing, when we are at war, a list to Osama bin Laden, the al-Qaeda network, of the people that we have detained that would make in any way easier their effort to kill American citizens — innocent Americans.” He denied that any of detainees’ rights had been violated: “The Justice Department will not sacrifice the ultimate good to fight the immediate evil.”

Ashcroft proclaimed that it is “simply not true” that “detainees are not able to be represented by an attorney or to contact their families.” He sounded deeply hurt by the scurrilous attacks on the Justice Department: “I would hope that those who make allegations about something as serious as a violation of an individual’s civil rights would not do so lightly or without specificity or without facts. This does a disservice to our entire justice system.”

Ashcroft bragged at the press conference that 104 people had been charged with crimes as a result of the post-9/11 investigation. One of those honorees was François Guagani, a French citizen who was caught as he was crossing the border on a bus into Maine on September 12. Guagani was arrested because he was entering the United States after having been deported for previously violating his immigration status. Because he had box-cutters in his luggage (he worked as a carpenter), he was included on the list of people formally charged by the Justice Department in the terrorism investigation. (He was sentenced to 20 months in prison.)

None of the other criminal charges that Ashcroft invoked had any link to the 9/11 attacks. The charges were a smorgasbord of credit-card fraud, false statements to federal officials, immigration violations, theft, and so on.

On December 6, 2001, Ashcroft testified under oath to the Senate Judiciary Committee regarding his policies on people arrested in the United States as “suspected terrorists.” He denounced his critics:

Charges of “kangaroo courts” and “shredding the Constitution” give new meaning to the term “the fog of war.” Since lives and liberties depend upon clarity, not obfuscation, and reason, not hyperbole, let me take this opportunity today to be clear: Each action taken by the Department of Justice ... is carefully drawn to target a narrow class of individuals —

terrorists. Our legal powers are targeted at terrorists. Our investigation is focused on terrorists.

But the mass roundup within the United States after 9/11 never apprehended anyone subsequently officially linked to the 9/11 attacks. An Inspector General report later revealed that many of the detainees had indeed been blocked from contacting attorneys and that some of them had been beaten or otherwise physically abused by guards in federal prisons.

Unfortunately, the follies of the post-9/11 crackdown have been largely forgotten. Thus, there is little chance that “lessons learned” will prevent similar abuses if there is another significant terrorist attack within the United States.