A YEAR OF LOSS

A Chronology of the Government's Restrictions on Civil Liberties after September 11th
It is “under the pressing exigencies of crisis that there is the greatest
temptation to dispense with fundamental constitutional guarantees
which, it is feared, will inhibit governmental action.”


372 U.S. 144, 165 (1963)

“We have a choice. We can fight and win a just war against terrorism
and emerge with the greatness of the United States intact. Or, we can
win while running roughshod over the principles of fairness and due
process that we claim to cherish, thus shaming ourselves in the eyes of
the world and—eventually, when the smoke of fear and anger finally
dears—in our own eyes as well.”

Senator Orrin Hatch (R-UT) and other influential members of the Senate judiciary committee propose a floor amendment to a routine spending bill that would greatly expand the government’s power to intercept oral and electronic communications.

The amendment passed without significant debate.

The FBI announces that it has detained somewhere between 50 and 75 individuals for questioning relating to the attacks of September 11, the first time the Bureau would give a concrete figure on the number of those arrested within the United States.

By early November, over 1,100 people are being held in connection with the investigation.

September 18, 2001

Congress passes “Use of Force” authorization, granting President Bush power to use force against those “nations, organizations, or persons he determines” were responsible for the attacks of September 11.

The Bush Administration unveils draft of the “Anti-Terrorism Act of 2001,” an early version of what would eventually become the USA PATRIOT Act.

The draft bill would give the Attorney General the power to detain immigrants indefinitely, the ability to force universities to turn over personal information about foreign students, and the authority to secretly search people's homes.

September 19, 2001 (cont’d)

- At a meeting with lawmakers to introduce the Act, Attorney General Ashcroft is invited by Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, to appear before a hearing on September 25 in support of the bill.

- In a response indicative of the coming weeks, Ashcroft says, “I’d rather it be a signing ceremony.”

President Bush delivers joint address before Congress, outlining the “Axis of Evil,” and his plans for the “war on terror.”

The Department of Justice publishes a 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.

Chief Immigration Judge Michael Creppy mails a memorandum to all immigration judges advising them of new procedures to close removal proceedings to the public and the media under “special” (specifically terrorist-related) circumstances.

Source: George Lardner, Jr., *Democrats Blast Order on Tribunals; Senators Told Military Trials Fall Under President's Power*, Wash. Post, Nov. 29, 2001, at A22
President Bush declares national emergency with respect to “grave acts of terrorism and threats of terrorism committed by foreign terrorists ... and the immediate threat of further attacks on United States nationals or the United States.”

The Order, among other items, mandates that the executive agencies utilize all legal means to stem the flow of money supporting terrorist organizations throughout the world.

The FBI begins to use a template memorandum to oppose the availability of bail in all post-9/11 cases, arguing that:

"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..."

Source: Memo submitted to 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, Counterterrorism Division, FBI
President Bush signs into law the “Uniting And Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” (USA PATRIOT) Act, a comprehensive and controversial anti-terrorism bill moved through Congress quickly in the aftermath of September 11. The Act, passed over the vociferous opposition of a number of public-interest groups, includes provisions that would:
October 26, 2001 (cont’d)

- Permit the Attorney General to indefinitely incarcerate or detain non-citizens based on mere suspicion, and to deny re-admission to the United States of non-citizens (including lawful permanent residents) for engaging in speech protected by the First Amendment.

- Minimize judicial supervision of telephone and Internet surveillance by law enforcement authorities in anti-terrorism investigations and in routine criminal investigations unrelated to terrorism.

- Expand the ability of the government to conduct secret searches again in anti-terrorism investigations and in routine criminal investigations unrelated to terrorism.

- Give the Attorney General and the Secretary of State the power to designate domestic groups as terrorist organizations and block any non-citizen who belongs to them from entering the country; under this provision the payment of membership dues is a deportable offense.

- Grant the FBI broad access to sensitive medical, financial, mental health, and educational records about individuals without having to show evidence of a crime and without a court order.
Lead to large-scale investigations of American citizens for "intelligence" purposes and use of intelligence authorities to bypass probable cause requirements in criminal cases

Once more to allow the CIA and other intelligence agencies to spy on Americans by giving the Director of Central Intelligence the authority to identify priority targets for intelligence surveillance in the United States

Allow searches of highly personal financial records without notice and without judicial review based on a very low standard that does not require probable cause of a crime or even relevancy to an ongoing terrorism investigation

Allow student records to be searched based on a very low standard of relevancy to an investigation

Create a broad new definition of "domestic terrorism" that could sweep in people who engage in acts of political protest and subject them to wiretapping and enhanced penalties

October 31, 2001

Department of Justice issues a regulation providing for an automatic stay of all IJ bond decisions wherever an INS District Director has ordered no bond or a bond of $10,000 or more. The rule is made effective October 29, two days prior to publication.

The Justice Department issues a separate new regulation authorizing prison officials to monitor communications between lawyers and September 11 detainees without first obtaining a court order.

In the first such case to be publicly reported, a federal district judge in Arizona upholds the continued (and potentially indefinite) detention by the FBI of a foreign national who is being questioned about the September 11 attacks (without any charges pending), on the sole basis that the alien is a significant flight risk.

The Attorney General issues a memo directing interviews of a list of 5,000 men, ages 18-33, who entered the U.S. since January 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.

Source: Brian Donohue, Feds’ Inquiry Turns to Foreign Nationals in Jersey, The Star Ledger (Newark, N.J.), Nov. 20, 2001, at 4
Without advance notice to Congress, President Bush issues “Military Order” authorizing the creation of military tribunals and allowing the Secretary of Defense to take into custody anyone the President identifies as being subject to that order.

Specifically, the tribunals are intended to remove from civil courts the potential trials of non-citizen individuals suspected of being, aiding, or harboring a terrorist.

For precedent, the Administration invokes the so-called “Nazi Saboteurs” case from World War II (Ex Parte Quirin, 317 U.S. 1 (1942)).

Source: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001)
In the first round of one of the more litigious post-September 11 court cases to date, the government argues in Manhattan federal court that, under the Material Witness statute, they could hold potential suspects indefinitely and without bail if they suspected that the suspect lied in statements he made to the police and the grand jury.

The Manhattan court allows the defendant to apply for bail, pending disposition of the case.

Testifying before the Senate Judiciary Committee, which is questioning him about the names and status of post-September 11 detainees, Attorney General Ashcroft responds:

“To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies and pause to America’s friends. They encourage people of good will to remain silent in the face of evil.”

Source: Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing before the Senate Comm. on the Judiciary, 107th Cong. (2001) (statement of John Ashcroft, Attorney General of the United States)
January 11, 2002

- Approximately twenty suspected al Qaeda and/or Taliban prisoners previously detained at Kandahar Air Force Base in Afghanistan are transferred to a temporary detention facility at the United States Naval Station at Guantanamo Bay, Cuba.

- In the weeks and months that follow, fifteen subsequent airlifts will bring an additional six-hundred detainees to Guantanamo, where they would later be housed at “Camp Delta,” a permanent facility designed specifically for that purpose.

- Source: Various media reports
The Attorney General publishes new regulations proposing to restructure the Board of Immigration Appeals (BIA) to institute one-judge review, streamlined procedures, and a board half the size of the previous body.

The net effect of the restructuring would be to dramatically reduce the role of judicial review in deportation and removal proceedings.

Secretary of Defense Donald Rumsfeld issues guidelines and rules for the military tribunals initially authorized by President Bush’s military order of November 13. The rules address some initial criticisms, for example, by requiring unanimous verdict for punishment by death.

But the rules fail to meet basic fair trial requirements. They permit use of secret evidence and hearsay, allow for closed hearings, and deny appeal to an independent judicial authority outside the chain of command.

April 3, 2002

A federal judge in Michigan rules that new INS directives closing certain immigrant removal hearings to the public in “special” (terrorist-related) circumstances are unconstitutionally broad.

In response to FOIA lawsuits brought by the ACLU, Attorney General Ashcroft releases new Department of Justice regulation forbidding non-federal authorities from releasing information about immigration detainees held in state and local facilities.

The order, signed by INS Commissioner James W. Ziglar, seeks to undermine a March 27 decision by a New Jersey state court.

Concluding the Awadallah case, a federal judge in Manhattan rules that the material witness statute, 18 U.S.C. § 3144, does not allow the FBI to detain material witnesses solely in connection with a grand jury investigation. Instead, the detention has to be related to testimony in a pending criminal trial. Thus, the Court suppresses Awadallah’s grand jury testimony, the basis for the charges against him, and orders him released.

Jose Padilla, the so-called “dirty bomber,” is detained by the FBI outside Chicago’s O’Hare International Airport under a material witness warrant issued by the Southern District of New York. Padilla is transferred to New York.

Endorsing the precedent from the *Detroit Free Press* decision, a federal court in New Jersey issues a similar injunction barring INS officials within the state from enforcing the new directive for closed removal hearings when there are “special” circumstances.

The government appeals, and receives an unusual stay from the Supreme Court preventing the order from taking force.

June 9, 2002

- Two days before he is scheduled to appear before Chief Judge Mukasey in New York federal court, Padilla is declared to be an “enemy combatant” by the Administration, and is transferred from the Southern District of New York to military custody, where he is incarcerated at the Goose Creek, South Carolina Navy brig.

On the same day that Padilla files his habeas petition, Yasser Esam Hamdi, a U.S. citizen detained on the battlefield in Afghanistan, files a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Virginia to demand that the government, which is holding him at the Norfolk, Va. Navy brig, charge him or release him.
The government, in return, argues that President Bush has authority beyond judicial review as part of his war powers to declare Hamdi an enemy combatant, to detain him indefinitely, and to deny him access to counsel and the courts.

Calling it the biggest shakeup in the federal government in 50 years, President Bush sends proposed legislation to Congress that would create a new cabinet-level Department of Homeland Security. The Department would consolidate existing agencies such as the Customs Service, the Immigration and Naturalization Service, the Coast Guard, the Border Patrol, the Transportation Security Administration, and the Federal Emergency Management Agency, consolidating more than 170,000 federal employees.

Within a month, the bill is approved by an ad hoc House Select Committee on Homeland Security and later passes on the House floor by a 295-132 vote.

The proposal runs into controversy in the Senate, where Administration demands for exemption from certain civil service laws and federal worker rights protections are resisted by Democrats, who argue that the exemptions would deprive the 170,000 employees of the Department of Homeland Security of essential rights and would undermine core labor standards.
After a federal judge in the Eastern District of Virginia rules that Hamdi has a right to access to counsel, the Fourth Circuit reverses, arguing that the President should be afforded substantial deference in such sensitive matters of foreign policy and national security, and that Hamdi thus can be held without access to a lawyer.

In another round of the ongoing battle over the identity of post-September 11 detainees, a federal judge in Washington rules that the government must turn over the names of the detainees and their lawyers, but not the specifics concerning the date and location of their arrests, or the grounds under which they are being held.

Refusing to abide by an earlier ruling from the Eastern District of Virginia in the Hamdi case, the Justice Department ignores a judicial order requiring them to turn over documents supporting the government’s classification of Hamdi as an enemy combatant.
The Department, in a memo, justifies the refusal to abide with the judicial order by arguing that:

"An inspection of the requested materials would all but amount to a [new] review of the military's enemy combatant determination, and thus exceed the limited standard of review governing the Executive determination at issue."

On appeal of the Eastern District of Michigan’s decision in *Detroit Free Press v. Ashcroft*, the government argues that closing deportation hearings in cases with “special circumstances” is not an unconstitutional violation of the First Amendment.

Judge Damon Keith, in upholding the Michigan district court’s April decision, takes a cynical view of the government’s position, arguing that:

“The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately. … When [the] government begins closing doors, it selectively controls information rightfully belonging to the people.”

Source: *Id.*
“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

James Madison, The Federalist No. 47