UNITED STATES

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Six of nine Egyptian nationals arrested in Evansville, Indiana on October 11, 2001 in the wake of the September 11 investigation. Eight of the men were held as material witnesses, the other was held on immigration charges. The men alleged that they were interrogated by the FBI before being allowed to make a phone call, after which they could not talk to their attorneys for four days. None were charged in connection with the September 11 attacks.
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We were treated like criminals. We felt discriminated against and treated different from other detainees. Our requests were ignored; we were held in isolation and had no access to our lawyer for two weeks. Other prisoners did not face these conditions. We felt the treatment was degrading.

Testimony to Human Rights Watch

PRESUMPTION OF GUILT:
Human Rights Abuses of Post-September 11 Detainees

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I. SUMMARY AND RECOMMENDATIONS

For me America was the dreamland. I used to think that I was lucky to live in a liberal and democratic country. But the dreamland became hell for me after September 11.

Muffed Khan, a deported Pakistani.[1]

On September 11, 2001, hijackers turned four airplanes into instruments of terror. Their horrific crime left some 3,000 dead, devastated the lives of many thousands more, destroyed the World Trade Center, and created a sense of urgency about protecting the United States from future terrorists attacks. September 11 was not just an assault, however, on lives and buildings. It was also, as United States President George W. Bush pointed out, an attack on the fundamental freedoms on which the U.S. was founded.

Unfortunately, the fight against terrorism launched by the United States after September 11 did not include a vigorous affirmation of those freedoms. Instead, the country has witnessed a persistent, deliberate, and unwarranted erosion of basic rights against abusive governmental power that are guaranteed by the U.S. Constitution and international human rights law. Most of those directly affected have been non-U.S. citizens. Under Attorney General John Ashcroft, the Department of Justice has subjected them to arbitrary detention, violated due process in legal proceedings against them, and run roughshod over the presumption of innocence.

To many Americans, the failure to uphold rights may seem an abstract concern in the face of the very concrete threat posed by terrorist attacks. But the lives of many who came to the United States with high hopes for a better life have been harmed by the practices documented in this report. Their lives were turned upside down when their nationality and religion drew the government's attention although they were never charged with terrorism

Drawing on scores of interviews with current and former detainees and their attorneys, this report provides the most comprehensive analysis to date of the mistreatment of non-citizens swept up in the September 11 investigation. Separate chapters detail the unjustified secrecy of the government's practices, including the secret incarceration of post-September 11 detainees and immigration proceedings closed to the public; custodial interrogations without access to counsel; arbitrarily prolonged confinement, including detention without charge; and the deplorable conditions—including solitary confinement—as well as the physical abuse to which some detainees have been subjected.

Immediately after the September 11 attacks, the Department of Justice—through constituent agencies, the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service (INS)—began a process of questioning thousands of people who might have information about or connections to terrorist activity. The decision of whom to question often appeared to be haphazard, at times prompted by law enforcement agents' random encounters with foreign male Muslims or neighbors' suspicions. The questioning led to the arrest and incarceration of as many as 1,200 non-citizens, although the exact number remains uncertain. Of those arrested, 752 were charged with immigration violations.

By February 2002, the Department of Justice acknowledged that most of the persons detained in the course of the September 11 investigation and charged with immigration violations—what it terms "special interest" detainees—were of no interest to its anti-terrorist efforts. As of July 2002, none of the "special interest" detainees had been indicted for terrorist activity; most had been deported for visa violations. Nevertheless, their histories of arrest, interrogation, and detention reflected the department's unwarranted presumption of their guilt.

[1] "Pakistanis Tell of US Prison Horror," *BBC*, June 29, 2002.

Arresting persons of interest to the September 11 investigation on immigration charges, such as overstaying a visa, enabled the Department of Justice to keep them jailed while it continued investigating and interrogating them about possible criminal activities—a form of preventive detention not permissible under U.S. criminal law. Using immigration law violations as a basis for detention permitted the Department of Justice to avoid the greater safeguards in the criminal law—for example, the requirement of probable cause for arrest, the right to be brought before a judge within forty-eight hours of arrest, and the right to court-appointed counsel. While the alleged visa violations provided a lawful basis for seeking to deport these non-citizens, the Justice Department's actions constituted an end run around constitutional and international legal requirements governing criminal investigations.

In addition to using immigration law to circumvent its obligations under the criminal justice system, the Department of Justice has also created new immigration policies and procedures that weaken previously existing safeguards against arbitrary detention by the INS. While an immigration law violation may justify deportation, it does not in itself justify detention after arrest. The INS has the legal authority to keep a non-citizen confined pending conclusion of his or her deportation proceedings only if there is evidence of the individual's dangerousness or risk of flight. Whereas most persons accused of overstaying their visas, working on a tourist visa, or other common immigration law violations are routinely released from jail while their cases proceed, the Department of Justice has sought to keep "special interest" detainees confined in the absence of evidence that they were dangerous or a flight risk. Their release from jail has been contingent on government "clearance," that is a decision that they were not linked to nor had knowledge about terrorist activities. In effect, "special interest" detainees have been presumed guilty until law enforcement agents concluded otherwise.

The "clearance" process was not the only innovation in immigration practice instituted to expand government powers vis-a-vis INS detainees. The Department of Justice promulgated new rules and issued new policies that permit detainees to be held without charge in cases of an undefined "emergency"; that authorize blanket closure of immigration hearings to the public, including detainees' family and friends; and that allow the INS to keep detainees in jail despite immigration judges' orders that they be released on bond. All of these new rules and policies increased the agency's discretionary authority and weakened existing safeguards to protect non-citizens' rights to liberty and due process.

In some cases, the Department of Justice detained people of interest to the September 11 investigation by obtaining arrest warrants for them as material witnesses. The ostensible purpose of such warrants has been to ensure the appearance of witnesses before the grand juries investigating the September 11 attacks. After repeated interrogations—and isolated confinement under extremely restrictive conditions—some of those detained as material witnesses were eventually released, sometimes without ever having been brought before a grand jury, while others were charged with crimes or immigration law violations. The Department of Justice has refused to say how many persons have been arrested as material witnesses or how many remain in custody. Human Rights Watch's research has identified thirty-five individuals who were held as material witnesses.

Most of the "special interest" detainees are Muslim men who are not U.S. citizens. Given that the nineteen alleged hijackers were all men, citizens of Middle Eastern nations, and Muslim, it is not surprising that law enforcement has focused on male Muslim non-citizens from Middle Eastern and contiguous countries. But suspicion that other terrorists in the United States might have a similar profile to the alleged hijackers is no justification for abrogating the rights of the Muslim immigrant community. National origin, religion, and gender do not constitute evidence of unlawful conduct.

In a nation created and continually recreated by immigrants, it is particularly tragic to see the willingness of the U.S. government to sacrifice

the rights of non-citizens and to find the public largely mute in its response. One can only speculate whether the nature of the September 11 investigation would have been different if citizens had been the primary targets. But, as has been pointed out, "[b]ecause non-citizens have no vote, and thus no direct voice in the democratic process, they are a particularly vulnerable minority. And in the heat of the nationalistic and nativist fervor engendered by war, non-citizens' interests are even less likely to weigh in the balance" of freedom versus security.[2]

But it is not only the rights of non-citizens that have been ignored. In refusing to release the names of immigration detainees held in connection with the September 11 investigation and in closing their immigration hearings, the Department of Justice has trampled on basic free speech rights that include the public's right to know "what their government is up to," as the Supreme Court has stated.[3]

The Department of Justice has argued that withholding the names of the detainees from the public and denying the public access to deportation proceedings is essential to protect the national security and September 11 investigation. Its arguments are not persuasive. For example, it has claimed that revealing the names of "special interest" detainees would alert terrorist organizations to who has been detained. Yet it is not plausible that any such organizations would not know already if their members have been arrested, since most of the detainees have been held for long periods of time and they have been free to communicate their detention to whomever they chose. The government also asserts that if detainees' names are disclosed or if deportation hearings are held publicly, terrorists would be able to map the progress of the investigation. While there may be good reason in individual cases to keep the public from all or part of a deportation hearing to prevent the disclosure of sensitive information, the government has closed hundreds of immigration proceedings without making any individualized showing that such closure was necessary. Many of the government's arguments about possible harms that might flow from holding hearings in public and disclosing the identity of "special interest" detainees are predicated on the assumption that the detainees are linked to terrorist activities—yet none of them have been charged with terrorism-related offenses. Unsubstantiated speculations about potential damage to the government's investigation, however, should not be permitted to override the fundamental principle that arrests and hearings affecting a person's liberty should be public to ensure fairness and to prevent the abuse of power.

The veil of secrecy the Department of Justice has wrapped around the post-September 11 detainees reflects a stunning disregard for the democratic principles of public transparency and accountability. The Department of Justice has sought to shield itself from scrutiny by keeping from the public information that is indispensable to determining the extent to which its September 11 investigation has been conducted in accordance with U.S. law and international human rights law. It has also sought to silence criticism of its anti-terrorist efforts, most notably with Attorney General Ashcroft's infamous statement to Congress that those who raise questions about "lost liberty" are aiding the country's enemies.[4]

U.S. history shows how dangerous it is to allow government to claim unchecked power to protect national security. Following World War I during a period of social conflict that included several bombings (including the bombing of the attorney general's home), the government under-

[2] David Cole, "Enemy Aliens," *Stanford Law Review*, vol. 54:950, 2002, p. 955.

[3] *U.S. Department of Justice v. Reporters Committee*, 489 U.S. 749,773 (1989).

[4] Testimony of Attorney General John Ashcroft before a hearing of the Senate Judiciary Committee on "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 6, 2001. During that hearing, the attorney general said:

> 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 goodwill to remain silent in the face of evil.

took massive raids and seized thousands of suspected communists and anarchists without any regard for due process. During World War II, more than 110,000 people were detained in internment camps solely because of their Japanese ancestry. During the Cold War, countless persons were victims of the "Red Scare"—losing their jobs, being publicly humiliated, and some even being sent to prison for suspected or real association with the Communist Party. In each case, the government argued necessity. In each case, history vindicates the victims and condemns the government's conduct.

Human Rights Watch recognizes the critical importance of protecting lives from terrorist attacks and of bringing to justice those responsible for them. Law enforcement and information gathering should proceed effectively, intelligently, and efficiently. There is no evidence, however, that prior to September 11 federal agents lacked sufficient means to investigate and prosecute terrorist conspiracies and organizations or that their work was inappropriately hampered by safeguards for individual rights. In our judgment, the abridgment of those safeguards subsequent to September 11 was born not of necessity, but from insufficient recognition of the importance of the rights that are the foundation of American democracy. Indeed, rather than weakening national security, protection of civil liberties is a hallmark of strong, democratic polities. As Supreme Court Justice Louis D. Brandeis wrote in 1927, the framers of the U.S. Constitution knew that "fear breeds repression; that repression breeds hate; [and] that hate menaces stable government."[5]

Nations, like individuals, prove their mettle and the strength of their convictions during crises. Faced with the very real yet immeasurable danger of ongoing terrorist threats and the urgent need to find and hold accountable those responsible for September 11, the U.S. government has failed to hold high the fundamental principles on which the nation is premised—the very values that President Bush declared were under attack from terrorists.

We hope this report will encourage U.S. officials, legislators, and the public to insist that U.S. domestic anti-terrorism efforts be conducted with full respect for basic rights. Remedying the rights violations that have accompanied the post-September 11 detentions will require a series of steps, as recommended below. But the overarching goal must be two-fold: 1) bringing transparency and accountability to the government's treatment of detainees by rejecting the pervasive secrecy that has shrouded their detention and legal proceedings; and 2) protecting the integrity of the immigration and criminal justice systems by ending policies and practices that circumvent important rights safeguards.

Recommendations

The recommendations below are intended to address the human rights violations identified in this report. They are directed to the Department of Justice, including the Immigration and Naturalization Service and the Federal Bureau of Investigation, as well as to any new agency that carries out immigration functions. In some cases, acting on the recommendations will entail revision or rescission of administrative regulations or policies. In other cases, the Department of Justice must instruct and oversee its employees to ensure their practices are consistent with human rights requirements. We also urge Congress to exercise its legislative and oversight authority to ensure that the necessary changes in current policies and practices are made. The U.S. government must ensure that the investigation and detention of persons suspected of having links to terrorism are conducted with full regard for the rights of all persons in the United States to be free of discrimination, arbitrary detention, mistreatment in confinement, and violations of due process.

Arrests

1. Federal law enforcement agents should not target persons for investigation or arrest because of their national origin, race, religion, or gender. Either singly or together, these characteristics should not be the basis for suspicion of unlawful conduct.

2. Immigration laws should not be selectively enforced through discriminatory arrests made on

[5] *Whitney v. California*, 247 U.S. 357, 375 (1927) (Justice Brandeis concurring).

the basis of national origin, race, religion, or gender.

Secrecy

1. The Department of Justice should make promptly available the names of all persons detained on immigration charges, the date of each arrest, place(s) of detention, and name(s) of any attorney(s), to their family members, their counsel, and any other person having a legitimate interest in the information unless a wish to the contrary has been expressed by the persons concerned.

2. The INS should authorize state and local facilities holding INS detainees to make available the information described above.

3. Subject to reasonable security restrictions, the INS should permit independent monitoring groups as well as nongovernmental organizations offering legal, counseling, pastoral, or other services to have access to all facilities in which INS detainees are being held, and permit such groups to speak with detainees.

4. Immigration hearings should be presumptively open. If the government seeks to have an immigration hearing closed, it should present particularized justification that shows the need to conduct all or part of the proceedings in an individual case in secret for reasons of national security or to protect classified information. The final decision to close a hearing should be made by an immigration judge on a case-by-case basis. The INS should not assert detainee's privacy or other individual interests as a basis for closing a hearing to the public unless the detainee has requested the hearings be closed for that reason.

Access to Counsel and Protection of Legal Rights

1. Anyone held in custodial detention, including INS custody, should not be questioned about knowledge of or involvement with criminal activities, including terrorism, without being advised of his or her right to remain silent, to have an attorney present during questioning, and to have one provided through court appointment if he or she cannot afford one, i.e. be given "Miranda" warnings. Where a detainee does not demonstrate a strong command of English, written waiver forms should be in a language the person questioned can read and understand.

2. Anyone who requests to have an attorney present during a custodial interrogation about his or her knowledge of or involvement in criminal activities, including terrorism, should be permitted to secure the assistance of counsel before questioning continues. If a person cannot afford an attorney, one should be appointed. Law enforcement officials should not encourage a person to waive his or her right to counsel.

3. INS officials should inform all detainees, in a language they can understand, of their right to have counsel represent them, and provide them information in a language they can understand regarding how to obtain counsel. INS officials should not encourage detainees to proceed with their immigration cases without counsel.

4. INS detainees—whether in administrative segregation or in the general population—should have generous access to telephones to find attorneys to represent them. Telephone calls for purposes of securing counsel should not be limited to collect calls. Organizations offering free or low-cost legal services should have access to detention facilities to offer their assistance to detainees.

5. INS detainees should not be asked to sign legal documents in English, including descriptions of the rights they are entitled to or waivers of rights, without adequate assurances that they fully understands the content and significance of the document. To the extent possible, documents should be provided in the language of the detainee. In cases where such translation is not possible or where a detainee cannot read, documents must be fully and accurately explained in a language that the detainee can understand.

6. The INS should promptly respond to requests from attorneys and families regarding the location of detainees, including immediately after arrest and after any transfer. The INS should ensure that detainees have adequate phone access to inform their attorneys and family members of their places of detention.

7. In deciding whether to transfer a detainee to a different facility, the INS should take into account the location of a detainee's family, legal counsel, and community ties. Detainees should not be transferred to facilities that impede an existing attorney-client relationship or disrupt family or community ties, absent compelling reasons for the transfer.

Consular Rights

1. The United States should ensure that it meets its obligations under the Vienna Convention on Consular Relations to inform any detainee of his or her right to communicate with a consular officer from his or her country of citizenship or nationality upon his or her detention.

2. The U.S. government should promptly notify the consulate of the detainee's country of citizenship or nationality of his or her detention.

Arbitrary Detention

1. If a person is arrested on the basis of an immigration violation, the INS should only seek the person's continued detention based on individualized evidence of dangerousness or risk of flight.

2. The INS should inform all persons arrested by INS officials of the charges against them within forty-eight hours of arrest or it should release them. The rule promulgated by the INS that permits indefinite delay in charging detainees in "exceptional circumstances" should be rescinded. If the rule is not rescinded, detention without charge for more than forty-eight hours rule should be permitted only in narrowly tailored circumstances. Such exceptions must not allow delays in filing charges beyond seven days, the time limit authorized by Congress in the USA PATRIOT Act for individuals certified as terrorism suspects.

3. If a detainee is held for more than forty-eight hours without charge, the INS should automatically and immediately bring him or her before an immigration or federal court for a determination of the detention's legality.

4. INS detainees should be released on bond pending final adjudication of immigration proceedings unless a judge finds there is evidence of the individual detainee's dangerousness or risk of flight. Absent such evidence, the fact that the detainee was originally identified or questioned in connection with a terrorism investigation should not warrant refusal to authorize release on bond.

5. The INS should initially set or seek judicial bond orders at amounts no higher than that reasonably calculated to ensure detainees will appear for immigration proceedings. High amounts should not be used to force detainees to remain in custody in the absence of particularized evidence of dangerousness or risk of flight.

6. The INS should comply immediately with judicial orders to release detainees on bond. It should rescind its rule preventing release in cases where the INS sets high bond amounts.

7. The INS should comply promptly with orders of removal issued by immigration judges and with grants of voluntary departure, regardless of whether there is an ongoing law enforcement investigation into the detainee's conduct, knowledge, and associations. If Congress wishes to enact legislation authorizing the continued detention of INS detainees pending federal law enforcement "clearance," it should ensure such legislation adequately reflects constitutional due process requirements.

8. Persons ordered deported and held in detention must be removed within ninety days of the issuance of the removal order as required by law.

9. Federal law enforcement agents and prosecutors should not use material witness warrants to circumvent the basic due process requirement that persons may be detained only with probable cause of criminal conduct. In the absence of such probable cause, material witness warrants should not be used to keep possible criminal suspects in detention.

Conditions of Detention

1. INS detainees should not be held in segregated confinement unless there is individualized

reason for believing they are dangerous or poses a security risk. Conditions of segregated confinement should not be unnecessarily restrictive or punitive. Detainees held in segregated confinement for their own protection or other non-disciplinary reasons should be entitled to all the privileges and programs available to general population detainees.

2. The INS should fully implement, monitor, and enforce its own Detention Standards setting forth the basic conditions of detention for INS detainees. It should not place or maintain detainees in facilities that do not meet those standards.

3. INS detainees should not be confined with persons accused or convicted of criminal offenses.

4. The INS should investigate fully all complaints of abuse or mistreatment of detainees. It should remove all detainees from facilities where there are cases of abuse by staff or criminal inmates unless the facility undertakes prompt remedial action, including dismissal of abusive employees.

5. To the maximum extent practicable, jails and detention centers that hold immigration detainees should have staff members who speak the language of the people in custody and can act as translators, particularly in cases where there is a concentration of detainees who speak the same foreign language.

II. ARRESTS

Following the attacks of September 11, the Department of Justice launched an extensive effort aimed at "apprehending those responsible for the September 11 attacks and …detecting, disrupting, and dismantling terrorist organizations."[6] Thousands of Federal Bureau of Investigation (FBI) agents, working with other federal, state and local agencies, have been conducting an unprecedented investigation into terrorist activities in the U.S.

Determined to move swiftly given the urgency of the situation and public pressure to show results, the Department of Justice began a process of questioning thousands of people about whom there were "indications" they might have information about or links to terrorist activity.[7] Our research suggests that the "indications" that triggered questioning in many cases may have been little more than nationality, religion, and gender.[8] As of July 2002, the September 11 investigation had not yielded any criminal indictments for crimes connected to terrorist activity.[9]

Some 1,200 Muslim non-citizens questioned by federal agents in connection with the September 11 investigation were subsequently taken into custody. The vast majority was arrested by the Immigration and Naturalization Service (INS) for immigration law violations, e.g. working on a tourist visa, that had nothing to do with terrorism. Prior to September 11, such violations would not have warranted continued detention; persons arrested would have been quickly released on bail pending final decision on deportation. But immigration violations were the only possible legal basis (other than material witness warrants) for detaining persons identified as of interest to the September 11 investigation while the Department of Justice continued investigating whether they had information about or links to terrorist organizations. The criminal law in the U.S. rightfully does not permit preventive detentions for investigative purposes.[10] The Department of Justice turned to the immigration

[6] Declaration of Dale L. Watson submitted April 9, 2002, in *Detroit Free Press v. John Ashcroft*, 195 F. Supp. 2d 948 (April 3, 2002), p. 2.

[7] Ibid, p. 3.

[8] Human Rights Watch sought meetings with FBI and INS officials to discuss this and other issues raised in this report. The INS denied our request; the FBI never responded.

[9] The only person who has been indicted for crimes related to the September 11 attacks—Zacarias Moussaoui—was already in detention before September 11.

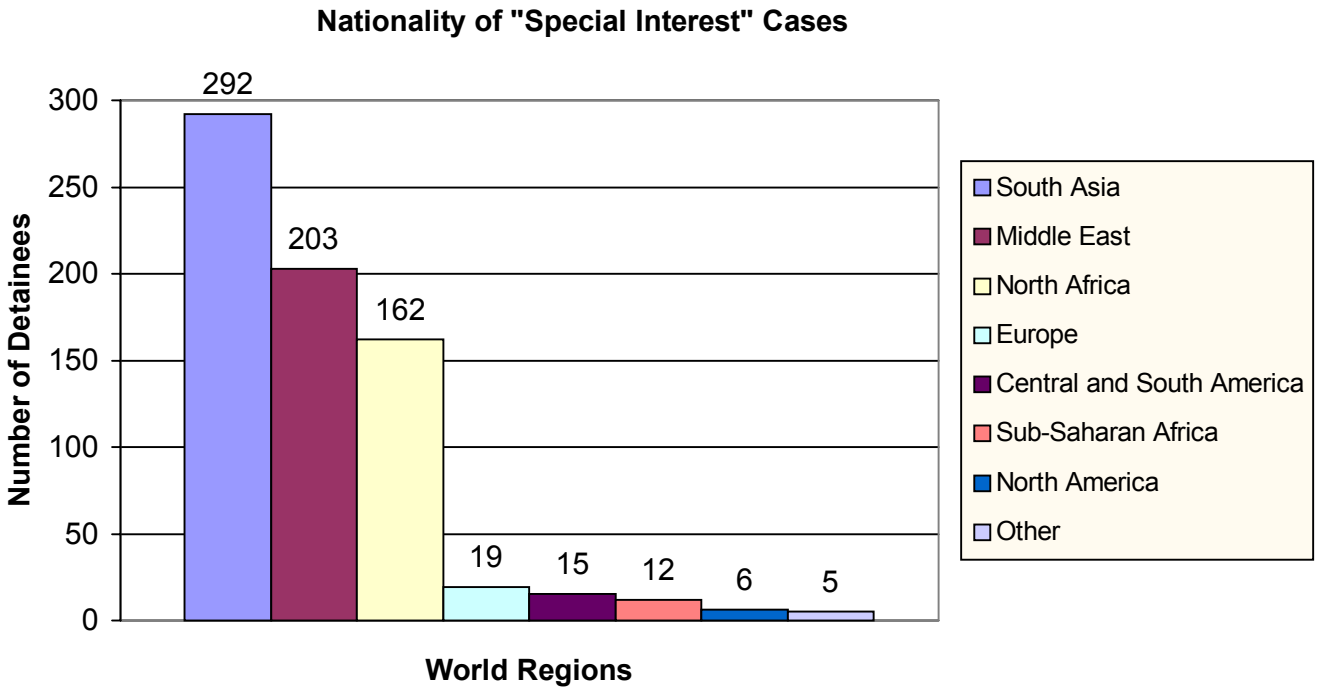
[10] Preventive detention is permissible only in highly limited situations not relevant here, e.g., for certain convicted sex offenders who have served their sentences but are still considered dangerous.

law system to conduct what has been called a "campaign of mass preventive detention."[11] Almost all of the post-September 11 immigration detainees—whom the government has called "special interest" detainees—were ultimately deported or released on bond—sometimes after months of detention—after the Department of Justice concluded they had no connection to terrorist activities or groups.

Who are the Detainees?

Almost all of the "special interest" detainees whose nationalities were revealed by the Department of Justice on January 11, 2002 came from countries in South Asia, the Middle East, and North Africa, as shown on the graph below. The largest group of detainees (248) was from Pakistan, followed by Egypt, 100, and Turkey, fifty-two. Some of the nationals of countries in North America and Europe who were classified as "special interest" cases were naturalized citizens and were in fact also born in South Asia, the Middle East, and North Africa. The Department of Justice has not released the nationalities of post-September 11 detainees charged with federal or state crimes or held on material witness warrants and they are therefore not included in the graph below.

[11] See David Cole, "Enemy Aliens," *Stanford Law Review*, vol. 54:950, 2002, p. 955.



Source: INS detainees defined as “special interest” cases on a list released by the Department of Justice on January 11, 2002.

It is not surprising that the vast majority of those detained in connection with the September 11 investigation are non-citizens from those geographic regions. The nineteen alleged hijackers were all Muslim men from Middle Eastern countries and the U.S. government asserts their attacks were orchestrated by al-Qaeda, a diffuse network of Sunni Islamist militants headed by Osama bin Laden that has heavily (although not exclusively) recruited operatives in or from Middle Eastern and South Asian countries. It would be reasonable for law enforcement agents to assume that other members of al-Qaeda or their allies in the United States might possess similar characteristics. But it is unreasonable to assume that nationality, religion, and gender should suffice to identify suspicious individuals.

The Department of Justice claims that the "special interest" detainees "were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity…. For example, they may have been questioned because they were identified as having interacted with the hijackers, or were believed to have information relating to other aspects of the investigation…. In the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances, also determined that they had links to other facets of the investigation."[12] Our research, press accounts, and research by other organizations suggests, however, that the "indications" that triggered questioning and subsequent arrest in many cases may have been little more than a form of profiling on the basis of nationality, religion, and gender. Being a male Muslim non-citizen from certain countries became a proxy for suspicious behavior. The cases suggest that where Muslim men from certain countries were involved, law enforcement agents presumed some sort of a connection with or knowledge of terrorism until investigations could subsequently prove otherwise.

[12] Declaration of Watson submitted in *Detroit Free Press v. Ashcroft*, p. 3.

Using nationality, religion, and gender as a proxy for suspicion is not only unfair to the millions of law-abiding Muslim immigrants from Middle Eastern and South Asian countries, it may also be an ineffective law enforcement technique. The U.S. government has not charged a single one of the thousand-plus individuals detained after September 11 for crimes related to terrorism. Such targeting has also antagonized the very immigrant and religious communities whose cooperation with law enforcement agencies could produce important leads for the investigation. Additionally, a series of cases in which there is more substantive evidence of links to acts of terror strongly suggests that a national origin terrorist profile is flawed. Zacarias Moussaoui, "the twentieth" hijacker, is a French citizen, Richard Reid, the "shoe bomber," is a British citizen, and José Padilla, aka Abdullah Al Muhajir, "the dirty bomber," is a U.S. citizen of Puerto Rican descent.[13]

Some of the "special interest" cases were originally identified for questioning and detention simply because spouses, neighbors, or members of the public said they were "suspicious" or accused them without any credible basis of being terrorists.

- On November 1, 2001, two FBI agents went to the workplace of a Palestinian civil engineer in New York City. They informed him that they had received an anonymous tip that he had a gun—which was not true. The engineer suspects that a contractor with a grudge against him sent the tip to the FBI. Five days later, INS agents came to his

[13] Zacarias Moussaoui, a French citizen of Moroccan descent, was arrested at a Minnesota flight school on August 17, 2001. He faces six conspiracy counts alleging that he conspired with Osama bin Laden and al-Qaeda to carry out the September 11 attacks. Richard Reid was arrested on December 22, 2001 after he allegedly tried to detonate a bomb concealed in his shoe aboard a Paris-Miami flight. He has been charged with attempted murder, attempted homicide, and attempted use of a weapon of mass destruction. José Padilla was arrested on May 8, 2002 on suspicions of participating in a plot to explode a bomb laden with radioactive material. He is now being detained without charges as an "enemy combatant."

workplace and arrested him for overstaying his visa. The man's visa had indeed expired but he had applied for an adjustment of status; he was therefore legally in the country. He received a visa extension from the INS office in Vermont while he was detained. He was incarcerated for twenty-two days before being released on bond.[14]

- On November 25, 2001, after a resident of Torrington, Connecticut, told police that he had heard two "Arabs" talking about anthrax, police officers followed two Pakistani men suspected of having had the conversation to a gas station. The officers arrested the two men and also Ayazuddin Sheerazi, an Indian businessman who was minding the station temporarily for his uncle, the owner, and another man from Pakistan who happened to be there at the time. According to Sheerazi's attorney, the police never offered any reason for arresting Sheerazi or suspecting him of wrongdoing. He told Human Rights Watch, "Torrington is a small place, so they arrested the Arabs in the community." Even though Sheerazi was legally in the country the INS kept him eighteen days in detention before he was released on bond. (The caller who made the complaint to the police later failed a voluntary polygraph test).[15]

- Ahmad Abdou El-Khier, an Egyptian national, was picked up on September 13, 2001 after a hotel clerk told police that he appeared "suspicious." El-Khier was initially charged with trespassing in the Maryland hotel where he was staying, then held as a material witness, and finally charged with violating the terms of his visa on a previous visit to the United States. He was deported on November 30, 2001.[16]

- Mohammed Asrar, a Pakistani convenience store owner in Dallas, Texas, was arrested on September 11, 2001, after a neighbor called the police to report that he was an "Arab" who possessed guns and might be a terrorist. Asrar was arrested by the FBI at his convenience store and interrogated without an attorney for hours. He was charged with "possession of ammunition while a prohibited person." The fact that he had overstayed his visa rendered him a person prohibited from possessing ammunition. "[The prosecutors] think he's a terrorist, but when I ask them why, they won't tell me," said his court-appointed attorney. The attorney told Human Rights Watch that he believed innocuous facts, such as that Asrar, who is an avid photographer, took pictures of the Atlanta skyline, were seen with suspicion because Asrar is South Asian. "There is no question in my mind that the prosecution of this case and the treatment of my client are unique because of his ethnicity," he said.[17]

- Two Somali men, Ismael Abdi Hassan and Ahmed Shueib Yusuf, stopped their rental

[14] Human Rights Watch interview with Palestinian civil engineer, Paterson, New Jersey, December 20, 2001. The detainee's name has been withheld upon request.

[15] Sheerazi, whose family owns a carpet plant in Bombay, was in the United States beginning in May 1, 2001 on business. He had entered the country legally and had applied for an extension of his visa before it expired. After his release he returned to India. Human Rights Watch telephone interview with attorney Neil Weinrib, New York, New York, January 28, 2002.

[16] Human Rights Watch telephone interview with Martin Stolar, Ahmed Abdou El-Khier's attorney, New York, New York, March 28, 2002. For newspaper accounts of this case see John Cloud, "Hitting the Wall," *Time Magazine*, November 5, 2001; vol. 158 no. 20. Patrick McDonnell, "Nation's Frantic Dragnet Entangles Many Lives Investigation: Some are jailed on tenuous 'evidence,' their opinion of America soured," *Los Angeles Times*, November 7, 2001; Jodi Wilgoren, "Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, 'Why?,'" *New York Times*, November 25, 2001; and Josh Gerstein, "Cases Closed: In Immigration Cases, Information on Hearings and Court Records Is Restricted," *ABCNews.com*, November 19, 2001.

[17] The attorney said that Asrar has been held in a maximum-security area of jail, and, if convicted, faces three to four years in prison for the charge of illegal possession of ammunition. Human Rights Watch telephone interview with Robert Carlin, Texas, March 15, 2002.

vehicle on November 26, 2001 to kneel in a parking lot and pray in Texas City, Texas. Responding to a call by a "nervous bystander" who reported "suspicious activity," Texas City police approached the men and subsequently arrested them after a search of their car uncovered a knife and a driver's license that appeared to have been altered.[18]

- Forty Mauritanians were arrested in Louisville, Kentucky apparently because someone had told the police that one of them was taking flying lessons, which turned out to be untrue, and another person said that one of the Mauritanians looked like one of the alleged hijackers. Bah Isselou told Human Rights Watch that he and others who were arrested at his home were not told the reason for the arrests or who was arresting them. They were driven to the INS office in Louisville, where they learned they had been arrested by the FBI and the INS. All but four of them were released the next day. On the third or fourth day after their arrest the four still in custody were informed they had been charged with overstaying their visas.[19]

Individuals from Muslim or Middle Eastern countries who encountered law enforcement randomly have been arrested and investigated in connection with the terrorist attacks:

- 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.[20]

- On September 21, 2001, Ahmed Alenany, an Egyptian physician, was approached by a police officer after he had stopped by the roadside in New York City to look at a map. According to Alenany, the police officer questioned why he had stopped in a no-parking zone, asked to see his visa, and discovered it had expired. The police officer also noted two pictures of the World Trade Center in Alenany's car. Alenany was subsequently charged with overstaying his visa even though he had filed for an extension before it expired, and thus, he was legally in the country. Without the advice of counsel, Alenany agreed to be deported because the judge suggested that pursuing his case would keep him in jail for many weeks. He was detained for more than five months while waiting to be removed from the country, during which time the government presented no evidence linking him to terrorism. He is now free but still faces possible removal from the country.[21]

[18] When the police searched Hassan and Yusuf's truck they found a knife with a blade measuring a quarter inch more than Texas law allows. Yusuf was charged with possession of an illegal weapon. Reportedly, Hassan gave the police officers a driver's license on which the photograph appeared to have been burned, and where the height and weight listed far exceeded his. Hassan, who later presented a valid Texas identification card, was charged with possessing an altered driver's license. They were reportedly released on bail the next day. Kevin Moran, "Praying Muslims find selves in jail: 2 face charges over license, knife," *Houston Chronicle*, November 29, 2001; and "Two Muslims Arrested for Suspicious Activity," Associated Press, November 29, 2001.

[19] The Mauritanians were detained on September 14, 2001. Isselou and the other three spent more than a month in jail before being released on bond while their deportation proceedings continued. Human Rights Watch telephone interviews with Bah Isselou, Florida, October 6, 2001; and with Dennis Clare, Bah Isselou's attorney, Louisville, Kentucky, October 23 and 31, 2001. For press reports on this case, see "Mauritanian in USA Recounts Arrest, Interrogation Over 11 September Attacks," *BBC*, September 29, 2001; David Firestone, "Federal Arrest Leaves Mauritanian Bitter," *New York Times*, December 9, 2001.

[20] Human Rights Watch interview with Osama Sewilam, Hudson County Correctional Center, Kearny, New Jersey, February 6, 2002; and his attorney Sohail Mohammed, Clifton, New Jersey, November 5 and November 19, 2001.

[21] Human Rights Watch interviews with Mohammed. For a press report of this case see Christopher Drew and Judith Miller, "Though not Linked to Terrorism,

- On October 11, 2001, Habib Soueidan, a Lebanese national, was selling pictures of the World Trade Center and U.S. flags on a New York City sidewalk when he was arrested for not possessing a vendor's license. He said police did not arrest three vendors of Chinese descent who were also there, even though he claimed that they did not have licenses either. Soueidan was charged with overstaying his visa and interrogated about the terrorist attacks.[22]

- Ali Alikhan, a citizen of Iran, was driving back to Colorado from vacation at Yellowstone National Park on September 15, 2001, when he was pulled over by a police officer for speeding. When the officer saw his name on the license, he asked Alikhan for his immigration documentation. The officer called the INS, who told him to arrest Alikhan for overstaying his visa. The officer arrested Alikhan and delivered him to the INS. Alikhan was interrogated several times about the September 11 attacks, always without an attorney. He was held in custody for 120 days, thirty-five of those in isolation, on the charge of overstaying his visa. He has been released on bond.[23]

Some Middle Easterners were arrested simply because they approached sensitive sites:

- 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.[24]

- Tiffanay Hughes, a U.S. citizen, and her husband, Ali Al-Maqtari, a Yemeni citizen, were searched and detained at an army base in Kentucky where she was a recruit on September 15, 2001, for no stated reason. She said that two days earlier, when she went to pick up her orders in Massachusetts, an officer told her repeatedly that she could not wear a *hejab*, a headdress used by many Muslim women. She protested and said it was a religious symbol. She said that the officer replied, "Don't let people know that you're Muslim. It's dangerous."[25] Hughes believed that her identification card photo, in which she was wearing the hejab and which was allegedly posted at the army base guardhouse when she arrived there, and her speaking a foreign language (French) with her husband may have raised suspicions. Hughes was followed by three officers everywhere she went for almost two weeks while at the army base. The army encouraged her to take an honorable discharge, and she did so on September 28. Her husband was detained for fifty-two days, mostly in solitary confinement. He was charged with

Many Detainees Cannot Go Home," *New York Times*, February 18, 2002.

[22] Soueidan said that he had arrived in the United States in 1999 and married an American citizen but never regularized his immigration status. He was ordered deported on October 31 but remained in custody as of February 6, 2002. He had no attorney. Human Rights Watch interview with Habib Soueidan, Passaic County Jail, Paterson, New Jersey, February 6, 2002.

[23] Human Rights Watch telephone interview with Ali Alikhan, Vail, Colorado, March 11, 2002.

[24] Hanna Rosin, "Snapshot of an Immigrant's Dream Fading," *Washington Post*, March 24, 2002.

[25] The U.S. military does not allow personnel to wear religious headdress when on duty and in uniform, as sanctioned by the Supreme Court in *Goldman v. Weinberger* 475 U.S. 503 (1986). Hughes was told she could not wear a hejab when she went to pick up her orders at the army's office in Massachusetts. At that moment she was not on duty; she was in fact not working for the military yet. Her starting day was a few days later, when she arrived at the army base in Kentucky, and on that day she was not wearing the hejab.

an immigration violation for ten days of "unlawful presence" in the United States while he changed from a visitor's visa to a visa sponsored by his wife. He had been released on bond.[26]

Some individuals may have been detained because their names resembled those of the alleged hijackers.[27] "The only thing a lot of these people are guilty of is having the Arabic version of Bob Jones for a name," said Bob Doguim, an FBI spokesman in Houston.[28]

The Department of Justice has detained men from the Middle East on immigration charges after they contacted the agency volunteering information about the alleged hijackers. For example, two days after the attacks, Mustafa Abu Jdai, a Jordanian of Palestinian descent, contacted the FBI and told investigators he had answered an advertisement for a job posted at a Dallas, Texas, mosque and met in the spring of 2001 with several Arabic-speaking men who offered to pay him to take flight lessons in Texas, Florida, or Oklahoma. The FBI showed him photographs and he recognized one of the men as Marwan Al-Shehhi, one of the alleged hijackers. Abu Jdai was subsequently charged with overstaying his visa and remained in detention three months later pending deportation.[29]

III. SECRECY

The requirement that arrest books be open to the public is to prevent any "secret arrests," a concept odious to a democratic society.

Morrow v. District of Columbia.[30]

Secrecy only breeds suspicions.

Detroit Free Press v. Ashcroft.[31]

James Madison, a framer of the U.S. Constitution and the fourth president of the United States, described openness as the bedrock of democracy: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both…. A people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[32] The principle of openness became one of the bulwarks of American democracy, offering crucial protections against governmental abuse of power. It is particularly important where the liberty of indi-

[26] Human Rights Watch telephone interviews with Ali Al-Maqtari and Tiffanay Hughes, November 29, 2001, and with attorney Michael Boyle, October 24, 2001.

[27] Men who may have been detained because of their last names include Abdulaziz Alomary, Al-Badr Al-Hazmi, Khalid S.S. Al Draibi, and Saeed Al Kahtani, according to press reports. Some were charged with immigration violations while others were eventually released. See Cloud, "Hitting the Wall"; Scot Paltrow and Laurie P. Cohen, "Government won't disclose reasons for detaining people in terror probe," *Wall Street Journal*, September 27, 2001; Robyn Blumner, "Abusing detention powers," *St. Petersburg Times*, October 15, 2001; Sydney P. Freedberg, "Terror sweep a battle of rights and safety," *St. Petersburg Times*, January 13, 2002; and Pete Yost, "3 Tunisians ordered out of U.S.," Associated Press, November 15, 2001.

[28] McDonnell, "Nation's Frantic Dragnet Entangles Many Lives Investigation…."

[29] Human Rights Watch interview with attorney Karen Pennington, Dallas, Texas, January 15, 2002; and Amy Goldstein et al., "A Deliberate Strategy of Disruption: Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror," *Washington Post*, November 4, 2001, p. A01. Cloud, "Hitting the Wall." See also the case of Eyad Mustafa Alrababah in the section, Misuse of Material Witness Warrants, in this report.
Some attorneys have said that cooperation with the FBI once in custody has not helped their clients. They complain that their clients have been kept in detention even after they were promised to be released if they took and passed polygraph tests, which they did.

[30] *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969).

[31] *Detroit Free Press v. John Ashcroft*, 195 F, Supp. 2d 948 (April 3, 2002), p. 10.

[32] Letter to W. T. Barry, August 4, 1822.

viduals is at stake—in the criminal justice system as well as in immigration proceedings.

U.S. law has long recognized that secrecy is inconsistent with justice and democratic principles of government accountability. The courts have ruled repeatedly that criminal and administrative proceedings should be subject to public scrutiny to protect the defendant's or detainee's right to a fair trial as well as to uphold "the public's right to know what goes on when men's lives and liberty are at stake."[33] Constitutional mandates for public trials are mirrored in international human rights law, which requires "public" hearings when an individual's rights and obligations will be determined by a court or tribunal.[34]

Since September 11, however, the U.S. Department of Justice has chosen to arrest, detain, and adjudicate the fate of over 1,000 people under a veil of secrecy. It has refused to release the names of most persons arrested in connection with its September 11 investigations, although the names of arrestees are traditionally public, and it has shut the public out of immigration proceedings against those individuals, although such proceedings have long been open.[35] Department of Justice officials have insisted such secrecy is vital to their campaign against terrorism, but their arguments for such unprecedented and widespread secrecy are not persuasive, as we discuss below. There may well be compelling reasons in particular cases why the name of an individual detainee or the proceedings against him should be kept closed to the public. But the Department of Justice's unilateral decision to keep the public in the dark about arrests and administrative proceedings against all non-citizens swept up in the September 11 investigation cannot be squared with principles of justice and democratic accountability.

Secrecy comes with a high price. It has bred questions about the legality of the detentions and the fairness of the treatment of non-citizens. By shielding its acts from public scrutiny, the U.S. government has cast a cloud of suspicion over the appropriateness of its actions and has exacerbated fears among the Middle Eastern and South Asian communities in the United States from which most of the post-September 11 detainees have come.[36]

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[33] *Pechter v. Lyons* 441 F. Supp. 115 (S.D.N.Y. 1977), p. 118.

[34] International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976, article 14(1). Proceedings may be closed to the public and media for all or part of a trial for reasons of "national security" or for other specified reasons. The United States ratified the ICCPR in 1992.

[35] The U.S. government has refused to disclose the names of September 11 detainees charged with immigration violations or held as material witnesses, while the regulations governing the U.S. criminal justice system have forced it to reveal the identities of 108 September 11 detainees charged with federal crimes unrelated to the attacks but arrested in connection with the investigation.
For brevity's sake, throughout this report we will use the term "post-September 11 detainees" to refer to persons arrested and held in detention in connection with the U.S. government's investigation into the September 11 terrorist attacks.

[36] Human Rights Watch tried for more than ten weeks to arrange a meeting with INS officials to discuss allegations of mistreatment and the findings contained in this report. On February 12, 2002, we wrote a letter requesting a meeting with INS Commissioner James Ziglar or his designate, which was followed by numerous phone calls. On April 26, 2002, the INS informed us that the new Executive Assistant Commissioner for Field Operations, Johnny Williams, was too busy to meet with us anytime in the foreseeable future. When Human Rights Watch asked if there would be anyone else with whom we could meet, we were told that Williams would be the only suitable person. We requested and received a letter recounting the INS's formal refusal to meet with us, which read, in part:

> At the present time, neither I nor Anthony Tangeman, the Deputy Executive Associate Commissioner for Detention and Removal Operations, are able to meet with you concerning the matters which you raised in your letter…. We would appreciate receiving copies of your report.

Letter from Executive Associate Commissioner Johnny Williams to Human Rights Watch, April 29, 2002.
On April 29, 2002, Human Rights Watch sent a letter to Dale Watson, executive assistant director for counterterrorism and counterintelligence, Federal Bureau

Refusal to Release Information about Detainees

Secret detentions are antithetical to U.S. tradition and fundamental principles of international human rights.[37] Yet the Department of Justice has refused to provide a complete accounting of the number of those detained during its investigation of the September 11 attacks, their names, and their places of detention.

On November 5, 2001, the Department of Justice of Justice stated that 1,182 individuals had been arrested in connection with the September 11 investigation and that most of them remained in custody at that time.[38] The government has never provided a clear explanation for the disparity between the figures it released in November and June, nor has it indicated the number of arrests since November.[39]

The total number of persons detained in connection with the September 11 investigation may never be known. The withholding of the identities of those charged with immigration violations in the context of the September 11 investigation—called "special interest" cases in government documents—makes it impossible to check the accuracy of the numbers released by the Department of Justice, but there are indications that more people have been arrested than the government has recognized. In addition, the Department of Justice has refused to say how many individuals have been held as material witnesses and has stated that it does not maintain records of those initially detained as part of the September 11 investigation and then held on state or local criminal charges.[40]

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of Investigation, requesting a meeting with him to discuss the findings of this report, but we never received a response.

[37] The Declaration on the Protection of All Persons from Enforced Disappearances, a non-binding resolution adopted by the U.N. General Assembly in 1992, provides that accurate information on the detention of persons and their places of detention, including transfers "shall be made promptly available to their family members, their counsel *or to any other persons having a legitimate interest in the information* unless a wish to the contrary has been manifested by the persons concerned." [Emphasis added.] G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (December 18, 1992), Art. 10(2). Furthermore, an official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention and steps shall be taken to maintain similar centralized registers, information in which shall be made available to the persons noted above. Ibid., article 10(3).

[38] Dan Eggen and Susan Schmidt, "Count of Released Detainees Is Hard to Pin Down," *Washington Post*, November 6, 2001; "Two Branches at Odds on Detainees' Status," *Philadelphia Inquirer*, November 6, 2001; and Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies," *Washington Post*, November 9, 2001.

[39] In testimony before the Senate Judiciary Committee, Michael Chertoff, assistant attorney general of the Criminal Division, was asked about the disparity between the Department of Justice's assertion that more than 1,100 people had been detained in the terrorism investigation until the beginning of November and its statement at the end of January that less than 600 had been charged with federal crimes or immigration violations. Chertoff said:

> I can't give you the number relating to material witnesses on grand jury because I am forbidden by law. I don't know the number of people being held in state and local custody because, frankly, we don't track that. And so without those two numbers, I cannot do the mathematics necessary to subtract from the 1,100.

Testimony of Michael Chertoff, assistant attorney general of the Criminal Division, before the Senate Judiciary Committee at its hearing on "DOJ Oversight: Preserving Freedoms While Defending Against Terrorism," November 28, 2001.

Regarding this issue, James Reynolds, chief of the Terrorism and Violent Crime Section in the Criminal Division of the Department of Justice, declared:

> While DOJ attempted at one time to keep and publicly release a count of all persons contacted by law enforcement in connection with the attacks, even if they were just briefly stopped, it became clear that this was impractical. Eventually, DOJ concluded that it was better to focus on the individuals who were formally taken into custody because they were believed to have violated federal criminal law or the immigration laws, or were believed to have information material to grand jury investigations emanating from the events of September 11.

Supplemental Declaration of James S. Reynolds submitted February 5, 2002, in *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002), p. 1.

[40] Ibid.

Initially, the Department of Justice refused to provide any details regarding the identity of those detained in connection with the September 11 investigation. After considerable public pressure, requests by members of Congress, and a Freedom of Information Act (FOIA) lawsuit filed by twenty-two Arab-American, Muslim, and rights organizations, including Human Rights Watch, on January 11, 2002, the U.S. government released a limited amount of information about the post-September 11 detainees.[41] The Department of Justice released two lists of selected information about 835 individuals detained in connection with the September 11 investigation. The department amended those lists three weeks later but has not publicly released any additional or updated lists since then.

One of the January 11 lists contained the names of individuals who had been charged with federal crimes.[42] Of the 108 people identified as having been criminally indicted, only one—Zacarias Moussaoui—was charged with crimes related to the September 11 attacks. (As of this writing, Moussaoui was being tried in federal district court in Virginia; prosecutors believe he would have been the twentieth hijacker had he not been arrested before the attacks.) Most of the others on the list were charged with relatively minor crimes, such as lying to government investigators, fraudulent acquisition of a driver's license, and theft of a truckload of cereal. In addition, the Department of Justice subsequently said there were nine sealed cases involving people charged with federal crimes, the nature of which it has not revealed.[43]

The list of those charged with crimes may be incomplete. Human Rights Watch has learned of the cases of six individuals who were arrested after September 11, interrogated by the FBI in connection with the terrorist attacks, and later charged with crimes, whose names do not appear on the January 11 list.[44] The Department of

[41] Requests made in an October 31, 2001 letter sent by seven lawmakers, including the chair of the Senate Judiciary Committee, to the Department of Justice seeking information about the detainees were only partially met and left the lawmakers unsatisfied. Senator Russell Feingold, who had initiated the requests, stated, "At a minimum, the department can and should produce a list of who is being held in connection with this investigation and why." Josh Gerstein, "DOJ won't identify Sept. 11 detainees," *ABCNews.com*, November 22, 2001.
The Freedom of Information Act (FOIA), which was passed by Congress in 1966 and amended in 1974, creates procedures whereby any member of the public may obtain certain records of the agencies of the U.S. federal government. The FOIA's primary objective is disclosure. *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 8 (2001).

[42] The list of persons charged with federal crimes released on January 11, 2002 included ninety-two names. On February 5, the Department of Justice amended the list with "the names and other information about sixteen individuals who were inadvertently omitted from the original" list. Robert McCallum, "Defendant's Notice of Filing of Amended and Supplemental Exhibits," submitted February 5, 2002, in *Center for National Security Studies v. U.S. Department of Justice*, p. 1. Sixty-two of the 108 appeared to remain in detention as of January 11, 2002.

[43] Supplemental Declaration of Reynolds submitted in *Center for National Security Studies v. U.S. Department of Justice*, p. 2.

[44] The six cases are below:
Qaiser Rafiq was charged with larceny and repeatedly interrogated about the September 11 attacks. For more details on this case see the section, Abusive Interrogations, in this report. Human Rights Watch telephone interview with Qaiser Rafiq, Corrigan-Radgowski Correctional Center, Uncasville, Connecticut, March 14, 15, and 18, 2002.
Wael Abdel Rahman Kishk was convicted of lying to federal officials about whether he planned to take flying lessons in this country, according to a newspaper article. The report states that for a time officials feared that he might have been part of a second wave of terrorism. William Glaberson, "Judge Rejects Long Prison Term for Arab Caught in Terror Sweep," *New York Times*, February 16, 2002.
Mohammed Asrar was arrested after a neighbor called the police to report he was an "Arab" who possessed guns and might be a terrorist. He was interrogated by the FBI for hours and was eventually charged with possession of ammunition while a "prohibited" person. Asrar was a "prohibited" person because he had overstayed his visa; otherwise, his possession of ammunition would have been legal. Human Rights Watch telephone interview with

Justice stated that the total number of individuals charged with federal criminal violations between September 11, 2001 and June 28, 2002 was 129.[45]

The second Department of Justice list contained limited information about 718 noncitizens arrested in connection with the investigation of the September 11 attacks and charged with immigration violations. The list did not provide their names or the locations of imprisonment, but simply indicated their nationalities, arrest dates, and the nature of the immigration charges, e.g. overstaying their visa. (The first page of the list is attached in Appendix A as a sample.)

The lists left many questions unanswered about the total number of individuals detained as part of the investigation of the September 11 attacks. As noted above, the lists refer to only 835 cases of the 1,182 detainees previously acknowledged by the Department of Justice. The Department of Justice has never clarified whether the 347 detainees not included in the January 11, 2002 lists continued in custody without charges ever being brought against them, were held on material witness warrants, or faced other, undisclosed charges.[46]

There are other problems with the January 11 lists. For example, according to statements by Department of Justice officials to the press, 460 of the 718 INS detainees on the list remained in custody on January 11.[47] Yet, according to press reports, on January 18, there were about 600 "special interest" cases in custody in three facilities alone: 346 individuals were held at the Passaic County Jail in New Jersey, fifty-two were held at the Krome Service Processing Center in Miami, Florida, and about 200 at the Hudson County Correctional Center in New Jersey.[48] Human Rights Watch also talked to "special interest" detainees who were held in facilities in other states at the time. The Department of Justice stated a total of 752 persons had been detained on immigration charges at some point between September 11, 2001 and June 24, 2002.[49]

The release of the January lists was the result of legal actions carried out by rights groups against the Department of Justice. As already indicated, a coalition of nongovernmental groups, including Human Rights Watch, filed a request for the disclosure of basic information about the post-September 11 detainees under

Robert Carlin, Mohammed Asrar's attorney, Dallas, Texas, March 15, 2002.

Javid Naghani was sentenced to two years and nine months in federal prison for interfering with a flight crew. Naghani allegedly threatened to "kill all Americans" after he was caught smoking on a plane, according to press reports. His comments caused the plane to be escorted by military jets back to its departure city. Naghani's attorney said that his client was intoxicated when on board and that the man, who has a thick accent, did not say "kill all Americans" but "Cleaning of America," the company he works for. David Rosenzweig, "Immigrant Gets Prison for Threats on Plane," *Los Angeles Times*, March 19, 2002; "Iranian Gests Prison for Flight Outburst," Copley News Service, March 19, 2002; and "Iranian Man Sentenced to 33 Months in Prison in Air Canada Incident," Associated Press, March 18, 2002.

According to a newspaper report, Viqar Ali and Waqar Ali Khan were indicted for possessing fraudulent passports. They were arrested on September 13 when authorities went to their home as they investigated their roommate, Iftikhar Ahmed, who was charged with fraud. "Roommate of immigration fraud suspect also charged," *newsobserver.com*, February 21, 2002. Ahmed's name is on the government list but Ali and Khan's names are not.

[45] Letter to Senator Carl Levin, chairman of the Senate's Permanent Subcommittee on Investigations, from Daniel J. Bryant, assistant attorney general, July 3, 2002.

[46] Both the 835 and the 1,182 numbers are of people arrested at some point in connection with the September 11 investigation, not of individuals held in custody at the time the Department of Justice released the numbers.

[47] Dan Eggen, "Delays Cited In Charging Detainees," *Washington Post*, January 15, 2002.

[48] See Jim Edwards, "'Special Case' INS Detainees Decline, But Not as Fast as Ashcroft Reckons," *New Jersey Law Journal,* January 18, 2002; Susannah Bryan, "Protesters Seek Muslims' Release, More than 50 Detainees Held at Krome Center," *South Florida Sun-Sentinel*, December 26, 2001; and Brian Donohue, "US Stirs Criticism on Number of Detainees," *Star-Ledger*, December 15, 2001.

[49] Letter to Levin from Bryant.

FOIA on October 29, 2001. After the Department of Justice turned it down,[50] the groups filed a lawsuit on December 5, 2001.

On August 2, 2002, a federal district court ordered the release of the identities of all those detained in connection with the September 11 investigation. The judge called secret arrests "a concept odious to a democratic society …and profoundly antithetical to the bedrock values that characterize a free and open one such as ours."[51] The court fully acknowledged the importance of protecting the nation's physical security in a time of crisis, but emphasized that "the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."[52]

The court rejected the government's rationale for keeping the names of the detainees secret. It found that the government failed to prove that disclosure of the names would hinder cooperation by the detainees in the investigation, and that it failed to prove that disclosure would provide a roadmap of the investigation to terrorist groups, or enable them to create false evidence. Indeed, the court noted that none of the INS detainees had been linked to terrorism, and therefore concluded that the government's recitation of harms regarding disclosure was "pure speculation."[53] In ordering the release of the names, the judge concluded: "Unquestionably, the public's interest in learning the identities of those arrested and detained is essential to verifying whether the government is operating within the bounds of the law."[54]

The court ordered the Department of Justice to disclose the names of the detainees, including material witnesses, and their attorneys within fifteen days of the ruling. The judge allowed the withholding of the identities of detainees who requested confidentiality in writing, and asked that the government submit any judicial sealing orders that bar the disclosure of detainees' names in specific cases for *in camera* (in judge's chambers) review or provide an additional affidavit describing the legal basis of any sealing orders. She said that the Department of Justice does not have to disclose the dates and locations of arrest, detention, and release.

In response, the Department of Justice stated that the "ruling impedes one of the most important federal law enforcement investigations in history, harms our efforts to bring to justice those responsible for the heinous attacks of September 11 and increases the risk of future terrorist threats to our nation."[55] The government is expected to appeal the decision and seek a stay of the order of disclosure.

The New Jersey chapter of the American Civil Liberties Union (ACLU) also filed a lawsuit against local authorities on January 22, 2002, seeking information on those held in New Jersey jails on immigration violations.[56] On

[50] The Department of Justice's denial of the FOIA request was hardly surprising. A memo issued on October 12, 2001 by Attorney General Ashcroft was an indication of the administration's drive to restrict access to information. The memo stated:

> Any discretionary decision by your agency to disclose information protected under the FOIA 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.... When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions.

John Ashcroft, "Memorandum for Heads of All Federal Departments and Agencies," October 12, 2001.

[51] *Center for National Security Studies v. U.S. Department of Justice*, p. 2.

[52] Ibid, p. 4.

[53] Ibid, p. 19.

[54] Ibid, p. 26.

[55] Statement by Assistant Attorney General Robert McCallum Jr. cited in Steve Fainaru and Dan Eggen, "Judge Rules U.S. Must Release Detainees' Names," *Washington Post*, August 3, 2002; and in Gina Holland, "Officials Oppose Naming Detainees," Associated Press, August 3, 2002.

[56] In 2001, 54 percent of all INS detainees were held in local jails because of inadequate space in federal facilities. INS Detention Standards Presentation to various NGOs by the INS's Detention and Removal Office, June 7, 2001. For information on the repercussions of INS's policy of holding individuals in its

March 26, 2002, a New Jersey Superior Court judge ruled that the government's refusal to release the names and other basic information on immigration detainees violated a state law that requires jail officials to publish a list of all inmates in their facilities and ordered that the names be made public.[57]

In response to the New Jersey decision, and in an effort to override state or local laws requiring the release of information about detainees, the Department of Justice issued a new interim rule that prohibits state and local employees from disclosing names and other information relating to immigration detainees.[58] The preamble to the rule expressly states that its aim is to supersede state or local law regarding the release of such information.[59] A New Jersey appeals court concluded that the rule, as federal law, must prevail over state law and, therefore, it overturned the March 26 order by the New Jersey Superior Court to release the names.[60] The ACLU has appealed this decision.

The new rule will not only frustrate efforts to determine how many post-September 11 detainees there are, and where they are held, but it will adversely affect the situation of all INS detainees, even those who have not been detained in connection with the September 11 investigation. INS detainees often have difficulty getting access to telephones to inform family, friends, and lawyers where they are held; the various INS offices often do not know who is detained where; and detainees are frequently moved without notice by the INS.[61] Contacting detention centers directly is thus often the best way to determine where a person is in fact held. However, the new rule prohibits jail staff from telling relatives, friends, and attorneys whether the detainee they are looking for is incarcerated at their facility. For instance, a lawyer in Florida was denied access to his client pursuant to the new rule. Salman Salman's attorney called the Orange County jail in early July 2002 to find out whether his client, a "special interest" detainee, was being held there. Jail officials reportedly told him that he was not incarcerated at the jail, which was not true.[62] In addition, the new rule may prevent nongovernmental organizations that provide pastoral care, legal advice, visitation, or other services to INS detainees from revealing any information about the detainees with whom they come in contact. This would hinder their ability to denounce human rights abuses, de-

custody in local jails, see Human Rights Watch, "Locked Away: Immigration detainees in jails in the United States," *A Human Rights Watch Report*, vol. 10, no. 1(G), September 1998.

[57] *American Civil Liberties Union v. County of Hudson*, Superior Court of New Jersey, Docket No. A-4100-01T7 (March 26, 2002).

[58] 8 CFR Parts 236 and 241, INS No. 2203-02. The rule states:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee.

8 CFR 236.6.

[59] According to the preamble to the rule, "It would make little sense for the release of potentially sensitive information concerning Service detainees to be subject to the vagaries of the laws of the various States within which those detainees are housed and maintained." "Supplementary Information," 8 CFR Parts 236 and 241, INS No. 2203-02, p. 6.

[60] *American Civil Liberties Union v. County of Hudson*, 2002 New Jersey Superior Court, Lexis 272 (June 12, 2002). In its ruling, the court drew from the federal pre-emption provision contained in article 6 of the U.S. Constitution, which declares that "the laws of the United States …shall be the supreme law of the land…anything in the constitution or laws of any State to the contrary notwithstanding." The appeals court found that the INS commissioner had the authority to issue the rule, and since the rule is federal law, it should prevail over state law.

[61] See Human Rights Watch, "Locked Away…."

[62] Henry Pierson Curtis, "Jail Cites INS Secrecy Rule in Denying Attorney Access," *Orlando Sentinel*, July 2, 2002. The attorney was able to see his client only a day after his phone call.

mand adequate detention conditions, and advocate on behalf of individual detainees.[63]

Denial of Access to Detention Facilities

Access to detention facilities by independent monitoring groups such as Human Rights Watch helps ensure that detainees are treated in a fair and humane manner. Such scrutiny is particularly important when dealing with foreigners who for reasons of language, lack of political clout, difficulty retaining counsel—immigration detainees do not have the right to free counsel—, and unfamiliarity with the U.S. justice system may be more vulnerable to violations of these rights.

Human Rights Watch and other rights groups have visited facilities holding INS detainees many times prior to September 11.[64] However, officials have denied access to most of the facilities that hold post-September 11 detainees, thus impeding independent monitoring of their treatment. The fact that these detainees were initially arrested on immigration charges in connection with the investigation of the September 11 attacks does not justify shutting the door to outside observers. On the contrary, independent monitoring is paramount because the connection of these particular detainees to the terrorist investigation has put some of them at risk of mistreatment by correctional officers and by other individuals in custody; this is especially true for those who share living quarters with accused or convicted criminals. In addition, the U.S. government has kept some of these detainees under particularly harsh detention conditions, as described in the chapter, Conditions of Detention, below.

Non-citizen detainees held in connection with the September 11 investigation have been held in federal as well as local facilities. Human Rights Watch was denied permission to visit two federal facilities reportedly holding many post-September 11 detainees, the Metropolitan Correctional Center (MCC) in Manhattan and the Metropolitan Detention Center (MDC) in Brooklyn, New York. We were given a limited tour of the Passaic County Jail in Paterson, New Jersey, and a more complete tour of the Hudson County Correctional Center in Kearny, New Jersey. Human Rights Watch's requests to visit the Denton County Jail in Texas, the Middlesex County Jail in New Jersey, and the Krome Service Processing Center in Florida have been pending for months.

The wardens of MCC and MDC rejected Human Rights Watch's requests for access with identical letters dated November 30, and December 5, 2001, respectively. Both letters stated that the events of September 11 required them to minimize "activities not critical to the day-to-day operations of the institution."[65] Two months later, the warden of the MDC denied a second Human Rights Watch request to tour the facility. Human Rights Watch made the second request after receiving allegations of poor conditions and ill-treatment at the facility that were impossible to confirm or deny without access to MDC's premises and its staff.[66] The warden also turned down similar requests by Amnesty

[63] The prohibition on disclosing information about the detainees may apply to these organizations if their relationship to the facility is deemed to be "official or contractual." See language of the rule in note 59 above.

[64] Human Rights Watch has monitored the treatment of INS detainees for almost fifteen years, visiting scores of detention facilities and jails. Some of our investigations into custodial conditions have resulted in publications, such as Human Rights Watch, "Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service," *A Human Rights Watch Report,* vol. 10, no. 4(G), December 1998; Human Rights Watch, "Locked Away…."; Human Rights Watch, *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service* (New York: Human Rights Watch, 1997); and Helsinki Watch, *Detained, Denied, Deported: Asylum Seekers in the United States* (New York: Human Rights Watch, June 1989).

[65] Dennis W. Hasty, warden, Metropolitan Detention Center, letters to Human Rights Watch, December 5, 2001; and Gregory L. Parks, warden, Metropolitan Correctional Center, letter to Human Rights Watch, November 30, 2001.

[66] See, for instance, Chisun Lee, "INS Detainee Hits, US Strikes Back," *Village Voice*, February 5, 2002.

International and by reporters who wanted to visit specific detainees at the facility.

The INS district director in Newark, New Jersey, denied Human Rights Watch access to the Hudson County Correctional Center in Kearny on November 30, 2001 and to the Passaic County Jail in Paterson on December 12, 2001, saying that interviewing detainees would not be feasible given the "extraordinary" circumstances. The INS district director subsequently changed her position and allowed Human Rights Watch and other groups to tour the two facilities on February 6, 2002.

INS and jail officials allowed a complete tour of the Hudson County Correctional Center. The tour of the jail in Passaic County was rushed and incomplete.[67] The INS district director in charge of the visit refused a Human Rights Watch request to view an occupied housing unit, citing privacy and security concerns, although officials had permitted the group to view an occupied housing unit at the Hudson County Correctional Center.[68] Detainees held at the Passaic County Jail at the time told Human Rights Watch that housing cells were cramped and that they were confined with accused or convicted criminals.

Immigration Proceedings Conducted in Secrecy

For almost fifty years INS regulations have mandated that deportation proceedings be presumptively open.[69] Immigration judges, however, can close individual court proceedings if necessary to protect sensitive information or vulnerable individuals, for example, in cases of asylum seekers and battered spouses.[70] The traditionally open nature of deportation proceedings is consistent with U.S. constitutional law. The U.S. Supreme Court has ruled that criminal and quasi-judicial administrative hearings should be open and public if such hearings have traditionally been open to the public and if a public hearing plays a significant role in the judicial process.[71]

The Department of Justice broke with this long-established practice of openness when it closed immigration proceedings for post-September 11 INS detainees. On September 21, 2001, pursuant to direction from the attorney general, Chief Immigration Judge Michael Creppy sent an internal memorandum to all immigration judges and court administrators detailing special, additional security procedures for certain cases.[72] Under these special procedures, immigration judges are required to close hearings to the public, including family, friends, and the media.[73] In addition, Creppy ordered that the special cases are not to be posted on court calendars outside the courtroom and are not to be included in information provided on the immigration courts' telephone information service. Courtroom personnel may not discuss the case with anyone and may not confirm or deny to anyone whether a case is on the docket or scheduled for a hearing.[74] The Creppy memorandum also prohibits the release of the "Record of Proceeding" (the official file containing documents relating to a non-citizen's case) to anyone except for the detainee's attorney "assuming the file does not contain classified information."[75] Neither detainees nor their attorneys, however, were precluded from publicly revealing information about the cases, including any evidence presented by the government during the hearings.

[67] The visiting groups were only allowed to view the processing area, the visiting areas, and an empty housing cell.
[68] Statements by Andrea Quarantillo, Newark district director, INS, to Human Rights Watch staff during a tour of Passaic County Jail, February 6, 2002.
[69] 8 CFR 3.27. See also, *Detroit Free Press v. Ashcroft*, p. 8.
[70] 8 CFR 3.27(b) and (c).
[71] *Globe Newspaper Co. v. Superior Court* (1982).
[72] Michael Creppy, "Cases Requiring Special Procedure," *Internal Memorandum-Executive Office for Immigration Review* (Creppy memorandum), September 21, 2001. Immigration judges are not part of the judicial branch under article 3 of the U.S. Constitution but are employees of the Department of Justice.
[73] Ibid, paras. 10 and 11.
[74] Ibid.
[75] Ibid.

The attorney general made the decision to order the blanket closure of immigration hearings without any public notice or debate. Since the Creppy directive was released, the Department of Justice has not publicly revealed its criteria to determine when a case should be closed, and there is no procedure for the review of the decision to close a hearing. For more than nine months, the Department of Justice refused to say how many cases had been conducted behind closed doors. In July, in response to a Congressional request for information, it stated that as of May 29, 2002, 611 individuals had been subject to secret hearings, and 419 of them had more than one secret hearing.[76] Some detainees have told Human Rights Watch that their hearings were initially closed but were opened later once they received "clearance" from the FBI, i.e. once the FBI determined they had no links to or knowledge of terror groups or the September 11 hijackers.[77]

Closing immigration proceedings implicates two distinct but interconnected constitutionally protected rights: the due process right of detainees to public trials when their liberty interests are being adjudicated, and the First Amendment right of access to quasi-judicial administrative proceedings by the public—including the press.[78] Several lawsuits have been filed challenging the closure of immigration hearings as a violation of those rights. In two cases decided as of this writing, federal district courts ruled the blanket closure of immigration proceedings unconstitutional. International human rights law also provides for open hearings in administrative cases.[79]

Rabih Haddad, a citizen of Lebanon, was arrested on December 14, 2001 and charged with overstaying his visa. His first hearing, on whether he should be released on bond pending final adjudication of the charges against him, was closed to the public pursuant to the Creppy memorandum.[80] Haddad sued the U.S. govern-

[76] Letter to Levin from Bryant.

[77] For instance, a Palestinian civil engineer held in INS custody said that his first hearing, which took place on November 28, was initially closed. The immigration judge asked an FBI agent who was attending the proceeding whether the detainee had received the agency's "clearance." When the agent responded yes, the immigration judge opened the hearing to the public. Human Rights Watch interview with a Palestinian civil engineer, Paterson, New Jersey, December 20, 2001. The detainee's name has been withheld upon request. Similarly, attorney Vicky Dobrin said that the initial immigration proceedings for two of her clients, Elyes Glaissia and his roommate, whose name has not been disclosed, were closed. Subsequent hearings have been held publicly. Human Rights Watch telephone interviews with attorney Vicky Dobrin, Seattle, Washington, November 20, 2001 and January 31, 2002.

[78] The due process clause of the Fifth Amendment to the U.S. Constitution applies to all persons, whether they are U.S. citizens or not. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 121 Ct. 2491 (2001).

[79] Article 14 of the ICCPR states that "[i]n the determination of …his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The Human Rights Committee has broadly interpreted the term "suit at law." See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 250. In *Y.L. v. Canada*, the committee stated that: "In the view of the Committee, the concept of a 'suit at law' …is based on the nature of the right in question rather than on the status of one of the parties (governmental; parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon." No. 112/1981. See also, *Casanovas v. France* (441/1990). Matters of rights in public law, such as administrative hearings, will come within article 14 particularly when such rights are subject to judicial review. For instance, in *V.M.R.B. v. Canada* (235/1987), the committee did not exclude the possibility that deportation proceedings may be "suits at law." See S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights* (Oxford: Oxford Univ. Press, 2000), p. 282. The only restrictions would be the narrow ones provided for in the ICCPR, namely that the media and public may be excluded from a hearing for reasons of "morals, public order (*ordre public*) or national security in a democratic society." Article 14.

[80] When a non-citizen is charged with a violation of his visa and proceedings are instituted to determine whether the detainee is to be removed from the U.S., a bond hearing is held to determine whether a de-

ment arguing that holding his deportation proceedings in secret violated his constitutionally protected due process rights. The ACLU, four Michigan newspapers, and U.S. Representative John Conyers, also filed lawsuits, claiming exclusion from Haddad's hearings violated their right of access under the First Amendment to the U.S. Constitution.[81] On April 3, 2002, a federal judge in Michigan concluded the blanket closure of removal hearings in "special interest" cases violated constitutional mandates.[82] The judge quoted from an earlier decision that pointed out**:**

> [I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizens shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administration regulation and to the maintenance of public confidence in the value and soundness of this important governmental process …when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.[83]

After reviewing the numerous cases affirming the right of access, the judge concluded:

> It is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights. Openness is necessary for the public to maintain confidence in the value and soundness of the Government's actions, as secrecy only breeds suspicions.[84]

The judge noted that the right of access is not unlimited. But the presumption of openness can only be overcome when closure directly serves a compelling interest and is narrowly tailored to achieve that interest. In light of the government's failure to articulate any specific reasons pertinent to Haddad's case for why his hearings must be closed, the judge ordered Haddad's hearings to be open and records of previous hearings to be released. The government appealed the court's ruling, but an appeals court forced it to release the transcripts and denied it an emergency stay to keep hearings closed pending appeal.[85]

Another federal district court judge in New Jersey ruled against the Department of Justice in a lawsuit challenging the closure of "special interest" case hearings brought by the New Jersey chapter of the ACLU and the New York-based Center for Constitutional Rights on behalf of three New Jersey publications. In declaring the blanket secrecy pursuant to the Creppy memorandum unlawful, the court in *North Jersey Media Group v. Ashcroft* noted the important public interests served by open judicial proceedings:

> Promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices

tainee may be released pending ultimate adjudication of the proceedings.

[81] See Cecil Angel, "Lawsuit by paper asks for access," *Detroit Free Press*, January 29, 2002; "ACLU Files First Post-Sept. 11 Challenge To Closed Immigration Hearings on Behalf of MI Congressman and Journalists," *ACLU Press Release*, January 29, 2002; and "Head of Closed Muslim Charity Files Suit," *Chicago Tribune*, February 15, 2002.

[82] *Detroit Free Press v. Ashcroft*, p. 3.

[83] Ibid, p. 9, quoting from *Fitzgerald v. Hampton*, 467 F. 2d 755 (D.C. Cir., 1972).

[84] Ibid, p. 10.

[85] Steve Fainaru, "Judge Orders Released Of Records of Closed Deportation Hearings," *Washington Post*, April 9, 2002.

> by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.[86]

In addition to noting the history of openness in deportation or removal proceedings, the court also found:

> [T]he ultimate individual stake in [deportation] proceedings is the same as or greater than in criminal or civil actions. Moreover, the proceedings have undeniable similarities to judicial proceedings…. The parallels in both the nature of the right at stake and the character of the proceedings lead to the conclusion that the same functional goals served by openness in the civil and criminal judicial contexts would be equally served in the context of deportation hearings.[87]

As in the Haddad case, the court gave short shrift to the government's position, finding that it had failed to show that the blanket closure policy was narrowly tailored to serve a compelling interest. The court pointed out that the government's asserted interests in preventing disclosure of, e.g. the name of the detainee and the place of his arrest, were vitiated by the fact that nothing prevented the detainee himself from releasing that information publicly. The court also suggested that *in camera* (in a judge's chambers) disclosure of sensitive or classified material in individual cases might serve the government's interests more narrowly than the blanket closure policy of the Creppy memorandum. The judge ordered that deportation proceedings be open to the public, unless the government is able to show a need for a closed hearing on a case-by-case basis. The Department of Justice appealed the decision and the Supreme Court stayed the judge's order pending an appellate ruling.[88]

By depriving immigration judges of the authority to determine the need to close hearings on a case-by-case basis, the Creppy directive circumvents the authority of immigration judges. Not surprisingly, the judges themselves have complained that this policy reinforces "the public perception that due process is not available before Immigration Courts."[89]

On May 28, 2002, perhaps in response to having lost two federal court cases that challenged the blanket secrecy policy, the Department of Justice issued a new interim rule authorizing immigration judges to issue protective orders and seal records relating to law enforcement or national security information in individual cases. The new rule also authorizes judges to issue orders that prohibit detainees or their attorneys from publicly divulging the protected information.[90] The new rule is "designed to work in tandem" with the measures announced in the Creppy directive and "in a limited sense, codify a portion of that authority by limiting what the respondent and his or her representatives may disclose about sensitive law enforcement and national security information outside the context of those hearings." [91]

On its face, granting immigration judges the authority to issue protective orders sealing sensitive information is not problematic; it is a power possessed by federal courts and it enables immi-

[86] *North Jersey Media Group v. Ashcroft*, 205F. Supp 2d 288 (D.N.J. May 28, 2002), quoting from *United States v. Smith*, 787 F2d. 111, 114 (3rd Cir. 1986).
[87] Ibid, p. 129.
[88] The case is now being reviewed by the Court of Appeals of the 3rd Circuit in Philadelphia.

[89] Dana Marks Keener and Denise Noonan Slavin, "An Independent Immigration Court: An Idea Whose Time Has Come," *National Association of Immigration Judges Position Paper,* January 2002. The National Association of Immigration Judges represents the country's 221 immigration judges.
Immigration Courts are an agency within the Department of Justice—called the Executive Office for Immigration Review (EOIR). They are administrative tribunals entrusted with the task of determining whether an individual is in the United States illegally, and if so, whether there is any status or benefit to which he is entitled under immigration laws. Immigration Courts are under the authority of the attorney general.
[90] 8 CFR Part 3, EOIR 133; AG Order No. 2585-2002, published at 67 Fed. Register 36799, May 28, 2002.
[91] Ibid.

gration courts to protect legitimate law enforcement or national security concerns while still protecting the due process interests of immigration detainees. What is troubling, however, is language in the new rule ordering the immigration judges to "give appropriate deference to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit in determining whether the disclosure of information will harm the national security or law enforcement interests of the United States."[92] The preamble to the rule points out that "innocuous" information can be sensitive in a broader intelligence context.[93] Given the sweeping, general statements of national security and law enforcement interests made to justify closure of immigration hearings and refusal to release information about "special interest" detainees and the requirement of "deference," it remains to be seen whether immigration judges will require government officials to provide particularized justification for protective orders in individual cases. Vague assertions of connections with or knowledge of terrorist or other criminal activity should not be enough to conduct closed hearings and issue gag orders.

Inadequate Justification for Secrecy

The U.S. government has relied on two arguments to justify keeping from the public the identity of INS detainees and closing the proceedings against them. It has asserted that the disclosure of such information would 1) hinder the September 11 investigation and 2) violate immigration detainees' privacy.

Protection of the Terrorism Investigation

The Department of Justice has argued that disclosing the names and other information about post-September 11 detainees held on immigration charges and opening their immigration hearings to the public could compromise its terrorism-related investigations.

According to the Department of Justice, revealing the names of detainees and the place of their arrest might:

1) Lead to public identification of individuals associated with them, other investigative sources, and potential witnesses, whom terrorist organizations might then intimidate or threaten to discourage them from supplying valuable information.
2) Deter detainees from cooperating with the Department of Justice once they are released;
3) Reveal the direction and progress of the investigations by identifying where the Department of Justice is focusing its efforts.[94]

The Department of Justice has also argued that if the identities of INS detainees are made public,

> … terrorists who learn that their associates or even people who know their associates have been detained [may] alter their plans in a way that presents an even greater threat to the United States. Official verification that a member has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the organization to find a substitute who can achieve its goals more effectively, thereby

[92] Ibid, section 3.46(d).

[93] The rule prescribes sanctions for violations of the protective order. It states that if a detainee or an attorney discloses information from a closed hearing, the lawyer may be barred from appearing in immigration court hearings and the detainee can be denied discretionary relief. According to the language of the rule, a detainee could be punished if the lawyer reveals information without the client's permission and vice versa. In addition, the rule allows only one side—the government—to ask that proceedings be sealed.
Federal authorities first requested that hearings be sealed pursuant to this rule in the case of Zakaria Soubra on June 10, 2002. A Lebanese national held on an immigration violation, Soubra was named in the "Phoenix Memo," which warned before September 11 of the danger that Middle Eastern aviation students could pose to the security of the United States. Dennis Wagner et al. "Feds Invoke Secrecy Rule in INS Case," *Arizona Republic*, June 11, 2002.

[94] Declaration of James S. Reynolds submitted January 11, 2002, in *Center for National Security Studies v. U.S. Department of Justice*, p. 3.

> thwarting the government's ability to frustrate ongoing conspiracies.[95]

The Department of Justice has offered similar arguments for closing the immigration hearings of "special interest" detainees. It maintains that public hearings would disclose information from which a terrorist organization could deduce patterns and methods of the investigation and thereby take steps to thwart it. According to Dale Watson, executive assistant director for Counterterrorism and Counterintelligence of the FBI, "[b]its and pieces of information that may appear innocuous in isolation can be fit into a bigger picture by terrorist groups."[96] Watson has speculated about the many ways terrorist organizations could use knowledge revealed in a hearing. For example, "putting entry information into the public realm regarding all 'special interest cases' would allow the terrorist organization to see patterns of entry, what works and what doesn't. It may allow them to have the information they need to alter methods of entry into the United States for terrorist members." He has argued that public hearings involving "evidence about terrorist links (or detainees where we are not even sure yet the extent of any terrorist links) could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence. Even more likely, the terrorist organizations may destroy or conceal evidence, tamper or threaten potential witnesses, or otherwise obstruct the ongoing investigations and pending prosecutions."[97]

The catalogue of adverse possibilities conjured by the government is impressive but unpersuasive. First, there are many cases, such as Haddad's, where the name of the detainee is already public. Moreover, nothing prevents the detainees, their families, or attorneys from revealing their detention—as many have done. As Michael Chertoff, assistant attorney general of the Criminal Division, pointed out in congressional testimony: "Everybody who is in detention …is absolutely free to publicize their name through their family or through their lawyers. There's nothing that stops them from saying, 'Hey, I'm being held in detention as part of this investigation.'"[98] If releasing the names of detainees could hamper the investigation, as the Department of Justice maintains, "self-identifying" would logically hinder it, as well. Yet any detainee who is in fact a member of a terrorist organization is readily able to alert an associate to his detention.

Second, it is difficult to square the Department of Justice's contention that terrorist organizations are extremely sophisticated and could put together bits and pieces of information from hundreds of hearings around the country, with the argument that official disclosure would alert such organizations to who has been detained. Sophisticated terrorist groups likely already know through their own networks whether any of their members or allies have been arrested.

Third, revealing who has been detained would not reveal who is being watched, who is being wiretapped, or who is a member of a group that has been infiltrated.[99] In other words, releasing the names of detainees would not reveal the full scope or pattern of the FBI's investigations, what the FBI knows or does not know.

Although the Department of Justice has repeatedly asserted that its terrorism investigation might be seriously harmed if the names of "special interest" detainees were publicly revealed, it nonetheless provided those names and place of detention, along with other information, to the embassies of the detainees' countries in fulfillment of its obligations under the Vienna Con-

[95] Ibid, p. 4.
[96] Declaration of Watson submitted in *Detroit Free Press v. Ashcroft*, p. 4.
[97] Ibid, p. 7.
[98] Testimony of Michael Chertoff, assistant attorney general of the Criminal Division, before the Senate Judiciary Committee at its hearing on "DOJ Oversight: Preserving Freedoms While Defending Against Terrorism," November 28, 2001.
[99] FBI Director Robert S. Mueller III has said that a "substantial" number of people suspected of ties to terror are under constant FBI surveillance within the United States. "FBI Chief: 9/11 Surveillance Taxing Bureau," *Washington Post*, June 6, 2002.

vention on Consular Relations.[100] To our knowledge, the U.S. placed no secrecy restrictions on the information it provided the embassies. Indeed, several of those embassies subsequently provided the names, dates of arrest, charges, and places of detention for 130 detainees to the ACLU in response to its request.[101] The embassies presumably have distributed the information to officials in their home countries, including Middle Eastern and South Asian countries, and it may have circulated widely.

The government's allegations of potential harm to the September 11 investigation might have more force if all or most of the INS detainees were involved in some way or had knowledge of terrorist organizations. Yet the Department of Justice has acknowledged that this is not the case. According to Department of Justice officials, the thousand-plus other "special interest" detainees, "were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States…. In the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws and *in some instances*, also determined that they had links to other facets of the investigation." (Emphasis added.)[102] That some detainees might have links to terrorism is scant justification for closing the immigration proceedings of all the "special interest" detainees. Indeed, in February 2002,—two months before the filing of the Watson affidavit, which purported to justify the need for the closed hearings policy—the government declared that about half of the post-September 11 detainees charged with immigration violations were no longer of any interest to the investigation.[103]

The government's justification for blanket secrecy for hundreds of immigration hearings also sweeps too broadly. Its rationale would justify closing trials in any large criminal investigation. The Department of Justice's arguments would, for example, justify closing arrest rosters and trials in organized crime cases where there would be a danger that accomplices and associates might learn details about the progress made by law enforcement, tamper with evidence, and threaten witnesses. The U.S. justice system has mechanisms to ensure reasonable openness while preventing harm to an ongoing investigation, but has never allowed blanket secrecy over hundreds of cases on the mere allegation that criminals might learn something about the investigation if the prosecution were conducted publicly.

Privacy Concerns

The government's second argument—that it does not release the names of INS detainees or conduct their hearings publicly to protect their privacy—also fails to withstand scrutiny. Attorney General Ashcroft originally contended at a hearing before the Senate Judiciary Committee on December 6, 2001, that federal legislation prohibited him from revealing the detainees' names and other information about them. During questioning, however, he was forced to concede that there was no such legislative prohibition.[104] That concession, however, did not result

[100] See discussion of the Vienna Convention in the chapter, Arbitrary Detention, in this report.

[101] Information provided to Human Rights Watch by Anthony Romero, executive director of the ACLU, June 19, 2002.

[102] Declaration of Watson submitted in *Detroit Free Press v. Ashcroft*, p. 3.

[103] The Department of Justice declared: "persons believed not to be of current interest regarding the investigations emanating from the September 11th attacks are placed in an 'inactive' status and may have been released from custody or deported." Supplemental Declaration of Reynolds submitted in *Center for National Security Studies v. U.S. Department of Justice*, p. 1. According to the documents it released on January 11, 2001, the cases of 355 individuals were classified as "inactive," and 363 as "active."

[104] Following is the relevant excerpt of Ashcroft's testimony before the Senate Judiciary Committee:

> Attorney General Ashcroft: I would cite privacy Act 5, U.S. Code 552(a)—that's paren (a), paren (2), as—and the FOIA 5 U.S. Code 552(b)(6), especially as the prohibition regarding naming legal permanent residents.
>
> Senator Feingold: You are citing this as a prohibition on disclosing any of the names of those in detention?
>
> Attorney General Ashcroft: Not any of the names of those in detention. As I indicated earlier,

in the department's release of the detainee information sought by Congress, the media, and rights groups.

> senator, I—there is a varying legal standard, depending on the status of the individual. The prevention is on a narrow group of individuals that are permanent residents. The authority not to disclose relates to those who are not permanent residents, but disclosure of which, in the judgment of law enforcement authorities would be ill advised as it relates to aiding the enemy or interfering with the prosecution.
>
> Senator Feingold: Well, Mr. Chairman, I would simply add that this confirms that there simply is no blanket prohibition in the law of disclosure, and I would just like that on the record.
>
> Attorney General Ashcroft: I—I can agree with the senator, and would stipulate to the fact that there is no blanket prohibition.

Testimony of Attorney General John Ashcroft before a hearing of the Senate Judiciary Committee on "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 6, 2001.

The two provisions that the attorney general said prevented him from releasing the identities of persons held in INS custody do not apply to the kinds of information sought regarding the detainees. The first provision states that the government should release final opinions in the adjudication of cases, statements of policy, staff manuals, and records already disclosed unless their release constitutes "a clearly unwarranted invasion of personal privacy" [5 USC Section 552a (2)]. The names of those detained by the INS do not fall in any of these categories. The second provision cited by the attorney general said that the release of information under FOIA requests does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" [5 USC Section 552(b)(6)]. Yet, the detainee information is neither personnel nor medical nor of a similarly private nature. Provision (d) of the same section states, "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress." Therefore, even if the Department of Justice were to argue successfully somehow that the privacy provision prohibited it from releasing information about these detainees to the public, it could not use it to justify its withholding of information from lawmakers. The Department of Justice has still refused to provide basic information to members of Congress. See note 42 above.

While arguing against revealing all the names, the Department of Justice has nonetheless chosen to release the identities of several people whom it said were involved with the terrorist attacks (some of whom were subsequently cleared of any wrongdoing). For example, authorities identified Ayub Ali Khan and Mohammed Jaweed Azmath, who were held on immigration violations, as two key suspects in the investigation.[105] A Chicago FBI agent said Nabil Al-Marabh, another INS detainee, was a terrorism suspect.[106] Law enforcement agents also identified Al-Badr Al-Hazmi, who was held as a material witness.[107]

In response to the Freedom of Information Act lawsuit described above, the Department of Justice has cited a provision contained in the act that exempts the disclosure of documents that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[108] But arrests in the United States as well as immigration charges are traditionally a matter of public record, which precludes a reasonable privacy interest on the part of detainees. In a case brought under the New Jersey Right to Know Act—the state's equivalent of the federal Freedom of Information Act—seeking release of the names of INS detainees held in New Jersey facilities, the judge noted that personal information of those charged with crimes is routinely made public. Rejecting the government's argument that greater protection of privacy was re-

[105] See "Two Amtrak passengers detained in Fort Worth," Associated Press, September 13, 2001; and "Men detained on immigration violations, interviewed by FBI," Associated Press, September 18, 2001.

[106] See Mike Robinson, "Middle Eastern man with name on FBI's list is captured near Chicago," Associated Press, September 20, 2001; and John Carreyrou et al., "Investigators Arrest a Suspect In Chicago," *Wall Street Journal*, September 21, 2001.

[107] See "Saudi Doctor Proclaims Innocence After Release," *Washington Post*, September 26, 2001; and Scot Paltrow and Laurie P. Cohen, "Government won't disclose reasons for detaining people in terror probe" *Wall Street Journal*, September 27, 2001.

[108] 5 USC 552 (b)(7)(C). Declaration of Reynolds submitted in *Center for National Security Studies v. U.S. Department of Justice*, p. 5.

quired for anyone arrested in connection with the September 11 investigation, the court stated that "INS inmates have no more expectation of privacy than do other inmates. The fact of their arrest in connection with September 11 events, however notorious, does not cloak them with privacy rights denied to others arrested for horrific events, including child rape and murder."[109]

While the Department of Justice has argued that keeping the detainees' names and places of detention secret protects them from embarrassment and even retaliation, it has ignored the ways such secrecy harms the detainees. For example, secrecy has made it harder for agencies willing to provide affordable or free legal counsel to locate the detainees and make their services available to them.[110] It has increased the isolation, fear, and helplessness felt by many detainees by making it harder for family and friends to find them—a difficulty compounded in some cases by limited access to telephones and frequent transfers from facility to facility experienced by some detainees.

The Department of Justice has also raised privacy arguments to justify closing to the public immigration hearings of September 11 INS detainees. The government has argued that detainees have a "substantial privacy interest" in keeping hearings closed because opening them "would forever connect [detainees] to the September 11 attacks. Given the nature of these investigations, the mere mention of their names in connection with these investigations could cause the detainees embarrassment and humiliation."[111] This is a curious argument to make to justify excluding family members and friends who are already aware of the detainee's arrest. Even more bizarrely, the government has refused to open hearings even when detainees have requested it.[112]

Without even acknowledging the irony of its position, the Department of Justice forcefully raised the privacy argument in the case of Rabih Haddad, discussed above, even though his arrest and detention had been amply covered in the press and it was Haddad himself who was challenging the closure of his immigration proceedings. None of the dozens of detainees and their lawyers whom Human Rights Watch interviewed indicated they wanted closed hearings; some of the lawyers told us they believed closed hearings were detrimental to their clients' interests. Detainees' lawyers have said that the secrecy surrounding closed hearings raised suspicions that their clients were somehow linked to terrorism, even though during the hearings the INS never produced any evidence of those links, let alone charged them with anything but violating immigration laws and regulations.

The Department of Justice has contended that the release of basic information about the detainees "would not contribute meaningfully to the public's understanding of the inner workings of the government."[113] According to the U.S. Supreme Court, the Freedom of Information Act's "basic policy of full agency disclosure …focuses on the citizens' right to be informed about what their government is up to. Official information that sheds light on an agency's performance of its statutory duties falls squarely

[109] *American Civil Liberties Union v. County of Hudson*, Superior Court of New Jersey, Docket No. A-4100-01T5 (March 26, 2002.)

[110] While immigration detainees have a right to counsel, they do not have a right to free-of-charge, court-appointed counsel if they lack the funds to retain one privately.

[111] Declaration of Watson submitted in *Detroit Free Press v. Ashcroft*, p. 8.

[112] For instance, an attorney for Maliek Zeidan, a Syrian man charged with an immigration violation whose case was ordered closed in New Jersey, filed a preliminary injunction to have the proceedings open to the public. He argued that closing a deportation hearing hurt his client's case because it prevented his client's cousin from attending and functioning as a witness and a translator. The attorney maintained that holding proceedings in secret violated his due process rights under the Fifth Amendment. Jim Edwards, "Federal Judge to Review Ban on Open Hearing for Muslim Detainee," *New Jersey Law Journal*, March 5, 2002.

[113] Declaration of Reynolds submitted in *Center for National Security Studies v. U.S. Department of Justice*, p. 5.

within that statutory purpose."[114] Knowledge about government's activities is particularly important when "men's lives and liberty are at stake."[115]

As the district court in *Center for National Securities Studies v. United States* noted, the identity of the detainees is essential to public assessment of the government's conduct of its September 11 investigation.[116] That assessment will include consideration of the effectiveness of the government's efforts as well as the extent to which it is abiding by U.S. and international human rights law. Moreover, as discussed below, the arrest and detention of INS detainees has been accompanied by persistent allegations of violations of detainees' rights—including arbitrary detention, lack of access to attorneys, physical mistreatment, and harsh detention conditions. Without access to the detainees' names and places of detention, the public has a truncated ability to determine how well its government has been upholding basic constitutional and human rights. Human Rights Watch's own efforts to verify the treatment of the detainees was substantially hampered by not having the names and places of detention of the detainees.

IV. DENIAL OF ACCESS TO COUNSEL

The right of any person—citizen or noncitizen—to be represented by legal counsel after being deprived of liberty for alleged criminal or immigration law violations is protected under U.S. as well as international human rights law.[117] U.S. constitutional law also affirms the right to counsel during custodial interrogations on criminal matters.[118] In the criminal context, but

[114] *U.S. Department of Justice v. Reporters Committee*, 489 U.S. 749,773 (1989).

[115] *Pechter v. Lyons* 441 F. Supp. 115 (S.D.N.Y. 1977), p. 118.

[116] *Center for National Security Studies v. U.S. Department of Justice*.

[117] The Sixth Amendment to the U.S. Constitution states: "In all criminal prosecutions, the accused shall enjoy the right …to have the assistance of counsel for his defense." The fifth and fourteenth amendments guarantee due process to any person. Under U.S. law, immigration detainees have the right to be represented by counsel. 8 CFR 240.3. Principle 11 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law." Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988). This principle is derived from article 9 of the ICCPR, which provides that any person deprived of her or his liberty must have an effective opportunity to challenge the lawfulness of their detention before a court. In its general comment no. 8, the U.N. Human Rights Committee interpreted ICCPR article 9 to include "all deprivations of liberty, whether in criminal cases or in other cases such as …immigration control." United Nations Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.4, February 7, 2000, p. 88, para. 1.

[118] In the landmark 1966 case *Miranda v. Arizona*, the Supreme Court ruled that anyone arrested in the course of a criminal investigation shall be afforded certain rights:

> The prosecution may not use statements… stemming from questioning initiated by law enforcement officers after a person has been taken into custody… unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination.
>
> The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he said will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.
>
> Where an interrogation is conducted without the presence of an attorney and a statement is taken, heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel.

Miranda v. Arizona, 384 U.S. 436 (1966).

On February 26, 2000, the U.S. Supreme Court reaffirmed suspects' Miranda rights in two decisions. In *U.S. v. Dickerson*, Chief Justice Rehnquist wrote for the majority that law enforcement officers must warn criminal suspects of their rights, including their right

not in immigration proceedings, the right to counsel includes the right to court-appointed counsel if the detainee cannot afford to hire one.

Legal representation is a crucial safeguard to enable detainees to effectively exercise other rights, including the right against criminal self-incrimination, the right to be charged promptly or released, the right to be brought before a judge to determine the legality of a detention, and the right to not be subjected to torture or other cruel, inhuman, or degrading treatment. Effective access to an attorney is particularly important for immigration detainees who may not know their rights or be familiar with complicated U.S. criminal or immigration law procedures. Unfortunately, many of the post-September 11 detainees were unable to exercise their right to counsel.

Custodial Interrogations without Access to Counsel

"Special interest" detainees were questioned in custody as part of a criminal investigation, even though they were subsequently charged with immigration violations. Our research indicates that many were originally questioned by teams of agents from both the FBI and the INS, or were first questioned by the FBI and then by the INS. The questions typically addressed criminal matters as well as the individual's immigration status.

In practice, the FBI has used administrative proceedings under the immigration law as a proxy to detain and interrogate terrorism suspects without affording them the rights and protections that the U.S. criminal system provides. Among those protections is the right to have an attorney present during custodial interrogations, including free legal counsel if necessary.[119] Even though immigration detainees do not have the right to free counsel in connection with immigration proceedings, they should be granted court-appointed representation when they are interrogated about matters related to a criminal investigation.

An example of the blurring of the distinction between criminal and administrative processes is the case of Ayub Ali Khan. Khan, a citizen of India, was arrested along with Mohammed Jaweed Azmath aboard an Amtrak train near Fort Worth, Texas, on September 12, 2001. Authorities found box cutters, hair dye, and $5,500 in cash in their possession, according to press reports.[120] Law enforcement agents told reporters that they were key suspects in the investigation of the September 11 attacks.[121] Despite apparently being a terrorism suspect, Khan was held in custody solely for overstaying his visa. As an INS detainee, he did not have the right to a court-appointed attorney and he remained unrepresented for fifty-seven days. During this time, he "signed all kinds of papers, and was questioned ad nauseum without an attorney," according to a public defender who was later assigned to him.[122] The lawyer said that his client was brought before an immigration judge only on November 8, 2001, almost two months

to remain silent. In *California Attorneys for Criminal Justice (CACJ) v. Butts*, the Supreme Court upheld a ruling by a federal court in Los Angeles that police interrogation after a suspect has requested an attorney or invoked his or her right to remain silent violates a person's rights under Miranda.

[119] Other differences between administrative and criminal cases are the deadlines for charging and court oversight. Under U.S. law, those detained for crimes have to be charged and brought before a judge within forty-eight hours of arrest. Those detained for immigration violations can be held without charges for an undefined "reasonable period of time" in the event of an "emergency," and may not be brought before an immigration judge for weeks after their arrest, depending on how full the docket in the district is.

[120] See "Two Men with Box Cutters Are Removed From Train In Texas," Associated Press, September 14, 2001; Ross E. Milloy with Michael Moss, "More Suspects Are Detained In Search for Attack Answers," *New York Times*, September 26, 2001; Dan Eggen, "Terrorist Hijacking Probe Slows in U.S.," *Washington Post*, October 19, 2001; and Laurie P. Cohen and Jesse Pesta, "U.S. denies accusations from jailed man that he had no counsel, access to phone," *Wall Street Journal*, November 5, 2001.

[121] Walter Pincus, "Silence of 4 Terror Probe Suspects Poses Dilemma for FBI," *Washington Post*, October 21, 2001.

[122] Human Rights Watch telephone interview with attorney Lawrence Feitell, New York, New York, May 14, 2002.

after his arrest. Khan has been held in restricted confinement at the Special Housing Unit at the Metropolitan Detention Center since September 2001. Both Khan and Azmath were indicted on credit card fraud charges in December 2001.

The constitutional right to counsel exists only during custodial criminal interrogations.[123] A person does not actually have to be held in a police station or arrested for the interrogation to be considered "custodial." U.S. courts have looked to the circumstances of the questioning to determine if a reasonable person would believe he or she had been effectively deprived of his or her freedom in a significant way and could not freely walk away from the law enforcement agents seeking information.[124] Many post-September 11 detainees were originally questioned in their homes or places of work and subsequently taken to FBI or INS offices for further questioning. We have no way of knowing whether many of them believed they had a choice about whether to answer the questions posed to them. We suspect that many did not realize that when the FBI came to their houses, including in the middle of the night, they could refuse to let them in or refuse to answer questions. We also suspect many would have believed they were not free to leave when they were taken to FBI or INS offices.

Our research indicates that the FBI frequently questioned persons in custody without informing them of their "Miranda rights," i.e. their right to remain silent, to have an attorney present during their questioning, and to have an attorney appointed for them if they cannot afford one. Human Rights Watch interviews with INS detainees and their attorneys indicated that in some instances detainees were informed of their right to a lawyer only after the FBI interrogated them. For instance, Bah Isselou and three other Mauritanians arrested in Louisville, Kentucky, were told they had the right to a lawyer and given access to a phone to try to find one four days after their arrest and after FBI questioning about the terrorist attacks. After that single phone call, they were held incommunicado and in isolation for two weeks and denied access to a telephone.[125]

Other times, detainees were given Miranda warnings but when they asked for an attorney, they were reportedly told that they would get one only after the interrogation. Some detainees said that they were pressured to answer "just a few questions" right away and not wait to obtain an attorney. For example, two FBI agents went to the workplace of a Palestinian civil engineer and said they wanted to ask him some questions. He declined to talk to them without a lawyer present. The agents told the man that if he insisted on having a lawyer, they would have to open a "full investigation." He was asked whether he possessed weapons and about the September 11 attacks. The man asked for a lawyer again. He said he was afraid he could be "misquoted" without an attorney present. The agents said, "[t]his is America. This would never happen." A few days later, FBI and INS agents went to the man's workplace again and arrested him for overstaying his visa. Even though the man was legally in the country at the time, he spent twenty-two days in prison.[126] None of the "special interest" detainees interviewed by Human Rights Watch had an attorney present dur-

[123] The Sixth Amendment to the U.S. Constitution says: "In all criminal prosecutions, the accused shall enjoy the right to …have the assistance of counsel." See next note for the Supreme Court's interpretation of this constitutional right.

[124] The Supreme Court has defined custodial interrogation as follows: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*.

[125] Human Rights Watch telephone interviews with Bah Isselou, Florida, November 6, 2001; and Dennis Clare, his attorney, Louisville, Kentucky, October 23 and 31, 2001. The three other Mauritanians were Sidi Mohammed Ould Bah, Sidi Mohammed Ould Abdou, and Cheikh Melainine Ould Belal. They were all arrested on September 12 and charged with immigration violations. They were released on bond, Isselou on October 10, and the others at the end of October.

[126] Human Rights Watch interview with Palestinian civil engineer, Paterson, New Jersey, December 20, 2001 and email communication with his attorney, Claudia Slovinsky, May 24, 2002. The detainee's name has been withheld upon request.

ing FBI or INS interrogations regarding the terrorist attacks.

A striking case of the FBI's refusal to respect the right to counsel is that of Osama Awadallah, a lawful permanent resident of the United States and a citizen of Jordan. An old phone number of Awadallah's was found in the car abandoned by Nawaf Al-Hazmi, one of the September 11 alleged hijackers, and the FBI subsequently began an investigation of Awadallah.[127] On September 20, 2001, a team of eight FBI agents and local police went to Awadallah's apartment in San Diego. When Awadallah returned home in the early afternoon, the agents told him they wanted to ask him a few questions at the FBI office. Awadallah asked if they could talk to him at his apartment but they insisted that he be interviewed at their offices and told him that they would drive him there. When Awadallah insisted he be allowed to go to his apartment to pray, he was permitted to go to the apartment followed by the agents; he was patted down and the agents made him keep the bathroom door open while he went to urinate and wash before praying. When he was taken to the FBI office around 3:00 p.m., Awadallah repeatedly expressed his concern that he not miss a computer class that began in a few hours. Two agents questioned Awadallah for about six hours and told him they believed he had information regarding the events of September 11. At one point when he asked about getting to his class, the agents told Awadallah that he would "have to stay" with them until the interview was finished. Although these circumstances clearly indicate a custodial interrogation, Awadallah was never advised of his right to an attorney.

When the interview ended at 11:00 that night, Awadallah agreed to take a lie detector test the following morning. The next morning, after he took the test, FBI agents accused him of lying on some of the questions and then told him that he was "one of the terrorists." Awadallah attempted to stand up, but the agents ordered him to "sit down and don't move." He then asked to call his lawyer, but the agents refused his request. They continued to question him, even though Awadallah repeated several times that he had to leave for Friday prayer. The agents told him he was going to miss Friday prayer and that they were going to fly him to New York. Awadallah again demanded to call a lawyer because it was his right, but the agents said, "[h]ere you don't have rights." The FBI subsequently secured a warrant for Awadallah's arrest as a material witness. Later he was charged with perjury for lying to a grand jury. He spent eight-three days in prison before being released on bail.[128]

In a subsequent court case, Awadallah claimed that he had been unlawfully seized by FBI agents. As the court pointed out, "a consensual encounter ripens into a seizure, whether an investigative detention or an arrest, when a reasonable person under all the circumstances would believe he was not free to walk away or otherwise ignore the police's presence."[129] Reviewing the facts, the court concluded Awadallah was "clearly not 'free to ignore' the FBI" and had in fact been "seized"—and, indeed, that the seizure was unlawful because the agents did not have probable cause or even reasonable suspicion to believe that Awadallah had committed a crime. Based on this and other findings of unlawful government conduct, the court dismissed the indictment against him. Although the question of Awadallah's right to an attorney was not raised in the case, the court's finding that he had been "seized" by the FBI when he was questioned indicates that he should have been told his rights and given access to an attorney.

Tiffanay Hughes and Ali Al-Maqtari were arrested on September 15, 2001 when they arrived at the Fort Campbell, Kentucky army base

[127] The phone number was that of a residence where Awadallah had lived briefly two years earlier. The FBI investigations subsequently established that Awadallah had no connections with or knowledge about the September 11 attacks or terrorist activities, but that he had met Al-Hazmi and another alleged hijacker at work and at the local mosque two years earlier when they lived in San Diego, California.

[128] Second Opinion and Order, *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002).

[129] Ibid., p. 38.

where Hughes was assigned. Without being told why, they were placed in locked, separated rooms at the base, Hughes for five and a half hours, and Al-Maqtari for about nine hours. Then they were interrogated separately for two to three hours without counsel present and without breaks until early in the morning. During their detention they were not given water or food, except for some cookies Al-Maqtari received during his interrogation. At the outset of the questioning, their interrogators—one INS, three FBI, and six or seven army officers—told them that they were not arrested. Al-Maqtari replied, "I wished." He told Human Rights Watch he did not feel free to leave. The interrogators did not inform Al-Maqtari or Hughes of their right to have an attorney present. Al-Maqtari described the interrogation in testimony presented to the Senate Judiciary Committee:

> The investigators said many, many times that our marriage was fake, and that Tiffanay must be married to me because I was abusing her. These accusations were totally false and very painful for me. They also made many negative remarks about Islam, things like Islam being the religion of beating and mistreating women. One acted out a fist hitting his hand, another said my wife had written a letter saying that I beat her, which I knew was false, and another insisted he would beat me all the way to my country because I mistreated my wife…. The interrogators were so angry and wild in their accusations that they made me very frightened for what might happen to me.[130]

Before being released on bond, Al-Maqtari was detained for fifty-two days, mostly in solitary confinement, charged with ten days of "unlawful presence" in the country. The army encouraged Hughes to take an honorable discharge, and she did so on September 28, 2001.[131]

[130] November 29, 2001 hearing before the Senate Judiciary Committee.

[131] Human Rights Watch telephone interviews with Ali Al-Maqtari and Tiffanay Hughes, New Haven, Connecticut, November 29, 2001, and with Michael Boyle, their attorney, New Haven, Connecticut, October 24, 2001.

Abusive Interrogations

One of the purposes of the right to have an attorney present during custodial interrogations is to help prevent coercive interrogations. In the cases described below, detainees were not only denied access to attorneys, but were subjected to abusive treatment in violation of U.S. constitutional[132] and international standards.[133]

[132] The U.S. Supreme Court has repeatedly upheld the rights of individuals not to be subjected to coercive interrogations. In *Haley v. Ohio*, a concurring opinion stated: "An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry." *Haley v. Ohio*, 332 U.S. 596 (1948). In *Stone v. Powell*, the Supreme Court said: "A confession produced after intimidating or coercive interrogation is inherently dubious. If a suspect's will has been overborne, a cloud hangs over his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability." *Stone v. Powell*.

[133] International standards prohibit law enforcement officials from conducting coercive interrogations. Principle 21 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment." Interrogators are banned from using torture to elicit information from people in their custody.

Article 7 of the ICCPR prohibits anyone from being subjected to torture or to cruel, inhuman, or degrading treatment or punishment. In 1994 the United States ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2 of the convention states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." The definition of torture contained in article 1 of the convention is broader than physical abuse, and includes "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person infor-

- Abdallah Higazy, a thirty-year-old Egyptian graduate student with a valid visa, was detained as a material witness on December 17, 2001. A pilot's radio had allegedly been found in the New York City hotel room where he had stayed on September 11. He was placed in solitary confinement at the Metropolitan Correctional Center in Manhattan.

  Higazy volunteered to take a polygraph test. "I wanted to show I was telling the truth," he told Human Rights Watch. On December 27, he was taken to an office in Manhattan and had a polygraph test administered. He was then questioned more for at total of four to five hours. The detainee stated that he was given no break, drink, or food. His lawyer waited outside and he was not allowed to be present during the questioning.

  Higazy claimed that the interrogating agent threatened him from the beginning: "We will make the Egyptian authorities give your family hell if you don't cooperate," he recalled the agent telling him. During the polygraph test he was asked about the September 11 attacks. The agent repeated, "tell me the truth" after each of his answers and he became increasingly anxious. When the agent described to him about what the radio device allegedly found in his room could do, he said he became nervous and almost fainted. He asked the agent to stop the polygraph test and take the cables off him, and so he did.

  The FBI agent continued the interrogation even though Higazy was not connected to the polygraph machine any more, and without his counsel present. According to Higazy, the following dialogue occurred:

  > "The results of the test are inconclusive," the agent said, "but this never happened to anyone who said the truth…. We can show ties between you and September 11. You are smart, you are an engineer, a pilot's radio was found in your room; it doesn't take a genius to figure it out."
  > "It's not my device, I don't know who put it there," Higazy replied.
  > "You know you have nothing to do with September 11, you were scared of the FBI and denied the radio was yours, but you can tell the truth," the agent persisted.

  Higazy told Human Rights Watch: "I thought I was in trouble, that I had lost the only chance to prove I was innocent." Faced with the FBI's pressure, he ultimately admitted the radio was his. "All I wanted to do is to keep away from September 11 and to keep my family away from them," the detainee told Human Rights Watch. After his admission, he asked for his lawyer. He felt very tired and asked that the rest of the test be postponed.

  Higazy offered to do a polygraph test again but requested that his lawyer be present. According the Higazy, the FBI refused, alleging that the attorney would be a disruption. Higazy refused to do the test again without a lawyer and it was never done. He said the interrogating agent denied in front of his lawyer that he had threatened his family.

  On January 11, 2002, Higazy was charged with lying to the FBI. However, three days later, the owner of the radio, an American pilot, went to the hotel to claim it. Higazy

mation or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Cruel and inhuman treatment includes acts that do not meet the essential elements of torture, such as more limited beating or the deprivation of medical treatment, and harsh conditions of detention. Degrading treatment concerns the humiliation of the victim, regardless of the physical suffering imposed. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, pp. 133-34.

was released in his cotton prison scrubs and given three dollars for subway fare on January 16. The charges against him were dropped.

Higazy told Human Rights Watch: "It was horrible, horrible. I always have the feeling of being accused of something I didn't do. I was crying each and every day five to seven times."

On May 31, 2002, Ronald Ferry, the former hotel security guard who produced the pilot's radio was sentenced to six months of weekends in prison for lying to the FBI. He admitted that he knew that the device was not in a safe belonging to Higazy. Ferry, who is a former police officer, said that he lied during a "time of patriotism, and I'm very, very sorry." The judge said that his conduct was "wrongly motivated by prejudicial stereotypes, misguided patriotism or false heroism."

A judge is considering whether to open an inquiry into the manner in which FBI agents obtained Higazy's confession.[134]

[134] Human Rights Watch telephone interview with Abdallah Higazy, New York, New York, February 1, 2002; and with his attorney, Robert Dunn, New York, New York, July 23, 2002.
For press articles about this case see Jane Fritsch, "Grateful Egyptian is Freed as U.S. Terror Case Fizzles," *New York Times*, January 18, 2002; "Egyptian Student Wants Apology and An Investigation," *Dow Jones International News*, January 21, 2002; Christine Haughney, "A Sept. 11 Casualty: 'Radio Man' Jailed for A Month, Then Freed; Egyptian Student Perplexed by Mistaken Arrest," *Washington Post*, March 11, 2002; Benjamin Weiser, "Worker Is Sentenced for Lie That Jailed Egyptian Student," *New York Times*, May 31, 2002; Mark Hamblett, "Guard Who Lied About Sept. 11 Sentenced," *New York Law Journal*, May 31, 2002; and Benjamin Weiser, "Judge Considers an Inquiry On Radio Case Confession," *New York Times*, June 29, 2002.
According to press reports, Higazy said that he did not hold a grudge against the FBI for pursuing charges against him the day he was released but he later asked for an apology for having been wrongly incarcerated. He is considering whether to file a civil lawsuit.

- On September 14, 2001, the FBI arrested Uzi Bohadana, a twenty-four-year-old Jewish Israeli, in Jackson, Mississippi. The INS charged him with an immigration violation for working while on a tourist visa.

  Bohadana said that on September 16 he was beaten by six accused or convicted criminals who were his cellmates at the Madison County Jail in Canton, Mississippi. He told Human Rights Watch that he was taken to a hospital after the attack, where he received stitches on his eye and lip, but he could not have surgery on his broken jaw because the hospital did not have the capabilities.

  The next day, he was taken to an INS office and interrogated by the FBI and the INS for one and a half hours while injured. Bohadana asserted that at the time of the interrogation he could hardly talk and was dizzy because of the painkillers he had been given. He said that he was informed of his right to contact a lawyer and the consulate of Israel, but he claimed that the agents told him that "if he talked it'd be quicker." He said he was in pain and agreed to talk without a lawyer. He was asked about the jail assault he had suffered and about the September 11 attacks.

  Bohadana was later transferred to Concordia Parish Jail in Ferriday, Louisiana where the FBI interrogated him twice and the INS once. He said that at the first FBI interrogation there he was "overwhelmed with drugs," and could not answer the questions. The agents stopped the interrogation after ten minutes. Bohadana said that the day of his second interrogation jail staff told him that the FBI had ordered that he not be given any medication until after the questioning, so he was in pain all morning. That interrogation lasted for about two hours, during which he was asked about the terrorist attacks. Bohadana said he was not told he had the right to a lawyer during the interrogations at this facility, and he did not ask for one. He told Human Rights Watch that he did not need an attorney because he was innocent and had nothing to hide.

nocent and had nothing to hide. Bohadana was released on bond on October 5, 2001.[135]

- Osama Salem was arrested in mid October 2001, after a former girlfriend of his told the FBI that he was a terrorist and an expert bomb-maker. Eight FBI, INS, and police officers went to his house in Jersey City, New Jersey and arrested him for entering the country with a false passport. Salem said the FBI had no search warrant but searched the house anyway, without asking him for permission.

  Salem said that he was taken to the FBI building in Newark where he was given Miranda warnings but was not told of his right to contact the consulate of Egypt. His request to make a phone call was denied. He asked for an attorney and was told that he would be given a public defender later. He stated that he was then interrogated by five men for seven or eight hours without breaks, not even to go to the bathroom, and he was given water but not food. The agents reportedly warned him, "If you don't answer questions, we'll charge you as a terrorist." He was asked whether he knew Osama bin Laden, if he had collaborated with Mohammed Atta (one of the alleged hijackers), if he went to the mosque, who he knew in the mosque, and if he had a pilot's license. He said that he was called, "Osama bin Laden" during the interrogation.

  He was sent to the INS building in Newark, where he was interrogated again by INS officers for three hours. Salem said he was asked the same questions. He was never assigned a court-appointed lawyer. He was ordered deported on January 18, 2002.[136]

- On his way to New York City, Qaiser Rafiq, a national of Pakistan and a legal permanent resident who has lived thirteen years in the United States, was pulled over by state police and undercover officers in nine vehicles in Colchester, Connecticut, on October 16, 2001. He said he was not given Miranda warnings or told why he was arrested. Rafiq said that while his car was being searched, an agent grabbed him by the hair and banged him on the hood of a car three times while he called him "son of a bitch" and asked him where his "terrorist friends" were. He was taken to his sister's house, six blocks away, which was searched without a warrant, according to Rafiq.

  Rafiq was then taken to a state police station in Hartford, Connecticut, where two FBI agents, "Bob Murphy" and "Frank McCarthy," interrogated him for three and a half hours. Rafiq said he asked for an attorney three or four times during the interrogation but was told by McCarthy, "you guys have no rights here, you better start telling us what we ask you or we'll put you in jail for the rest of your life." Then he was interrogated by six state police officers for about four or five hours. Rafiq said that one of them, "Detective Mellacis," grabbed him by the hair and slapped him repeatedly. During both interrogations, Rafiq was asked about Muslims he knew and about his job.[137]

[135] Human Rights Watch telephone interviews with Uzi Bohadana, Hollywood, Florida, November 13, 2001; and with his attorney, Patricia Ice, Jackson, Mississippi, November 5, 2001.

[136] Human Rights Watch interview with Osama Salem, Hudson County Correctional Center, Kearny, New Jersey, February 6, 2002.

[137] Rafiq was also asked if he recognized any of the alleged hijackers, about the entries in his address book, and why he left his Wall Street job at onenest.com in May 2001. He answered that he was fired after an argument with his boss. He said they told him that he had been seen with three Middle Eastern men in New Jersey on September 8, 2001, but he denied it.

Rafiq was also asked why he had a film permit to shoot on 25th Street in Manhattan starting on September 10. He said he worked part-time for a New York City company called Interactive Media Production Inc. and that they were going to record a television commercial for an insurance company. A March 6, 2002 letter written by Razaq Baloch, producer, Interactive Media Production, Inc., stated: "I would like to clarify that Mr. Rafiq time to time helped us in our television program production and also in covering

> Rafiq said he spent the night in a cell in the basement of the police station. He was not given a blanket despite being very cold. "I was shivering all night." In the morning, he said he was asked whether he wanted to make a statement admitting that he knew Middle Eastern men involved in terrorism. He said he would not sign any such statement and was taken to court, where the prosecutor said that the FBI was interested in questioning him further. The judge set a one million dollar bond. Rafiq would later be charged with larceny. He has been unable to pay the high bond and remains in detention as of this writing.[138]

Access to Counsel for INS Detainees

Although the Department of Justice has not commented on the ability of September 11 investigation suspects to have counsel present during interrogations, it has insisted that their right to counsel for the purposes of immigration proceedings has been respected. In testimony before the Senate on December 7, 2001, Michael Chertoff, assistant attorney general of the Criminal Division, said:

> Every one of [the detainees] has the right to counsel. Every person detained has the right to make phone calls to family and attorneys. Nobody is being held incommunicado…. We don't hold people in secret, you know cut off from lawyers, cut off from the public, cut off from their family and friends. They have the right to communicate with the outside world. We don't stop them from doing that.[139]

Russell Bergeron, a spokesman for the INS, also said: "I've yet to see a specific case involving a specific individual on a specific day, for example, where he was entitled to have access to a phone and call his attorney and was prevented. If such an allegation exists, we would like to hear about it."[140]

Human Rights Watch's research shows, however, that many post-September 11 detainees have not been able to exercise effectively their right to counsel. Detainees have not been informed of their right to counsel or were urged to waive their right; policies and practices of the facilities holding them have impeded their ability to find counsel; and the INS has failed to inform attorneys where their clients are or when

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the news for Pakistan Television…. It is very common in T.V. production that crewmembers keep a copy of the film permit with them for parking and permission purposes." Open Letter by Razaq Baloch, producer, Interactive Media Production, Inc., March 6, 2002.

Prosecutors reportedly asserted that Rafiq had drivers' licenses from multiple jurisdictions with different names, that a note saying "death to the infidels in Afghanistan" was found in his car, and that a car registered to Rafiq was apparently abandoned in Jersey City on September 8, 2002. Rafiq denied holding I.D.'s with different names. He said the note, written in Urdu, was from T.V. interviews and expressed support to the president of Pakistan's alliance with the United States in Afghanistan. He paraphrased the note as saying, "this war is not against Afghanis, this war is only against terrorism, and if there is someone who is going to be hurt it is terrorists." Rafiq said he gave the car found in New Jersey to a friend in 2000 instead of junking it.

In the aftermath of the September 11 attacks, Rafiq allegedly helped organize a couple of rallies condemning terrorism and supporting the decision of Pakistan's president to join the U.S. coalition against terrorism. A letter from the Pakistani embassy reads: "Mr. Rafiq has demonstrated openly his full support for the anti-terrorism efforts of the Pakistani government and has participated in World Trade Center aftermath activities organized by [the] Pakistani-American community." Open letter by Imran Ali, third secretary, Embassy of Pakistan in Washington, DC, February 20, 2002.

[138] Human Rights Watch telephone interviews with Qaiser Rafiq, Corrigan-Radgowski Correctional Center, Uncasville, Connecticut, March 14, 15, and 18, 2002. See also, Dave Altimari, "Enigmatic Suspect Raises Brows: Intriguing Clues Attract Investigators in Terrorism Probe," *Hartford Courant*, January 7, 2002; and Carole Bass, "Bloody Good Reading," *New Haven Advocate*, March 14, 2002.

[139] Testimony of Michael Chertoff, assistant attorney general of the Criminal Division, before the Senate Judiciary Committee at its hearing on "DOJ Oversight: Preserving Freedoms While Defending Against Terrorism," November 28, 2001.

[140] Quoted in Jim Edwards, "Attorneys Face Hidden Hurdles in September 11 Detainee Cases," *New Jersey Law Journal*, December 5, 2001.

their hearings are scheduled. Some of the problems of access to counsel by September 11 INS detainees are long-standing and common to all individuals held by the INS, while others are specific to the investigation of the September 11 terrorist attacks.[141]

Immigration detainees do not have the right to a court-appointed attorney under U.S. law, but the INS has the obligation to inform them of their right to be represented by an attorney.[142] Many immigration detainees are unfamiliar with U.S. laws and do not know the rights to which they are entitled. Of twenty-seven "special interest" INS detainees interviewed by Human Rights Watch, only ten said that they were informed of their right to an attorney. Seven detainees said that they were not told of this right, two were informed of their right only after undergoing custodial interrogations, and in eight cases the detainees did not remember or it was not clear.[143]

Some detainees said that they were informed of their right to an attorney but that law enforcement agents discouraged them from exercising that right, telling them that retaining counsel would hurt their cases or would result in lengthier detention. For example, Orin Behr said an agent told him and ten other Israelis arrested with him, "you don't need a lawyer. This is a very simple matter. One day or two and you'll be out." [144] Behr said: "We believed him, so nobody got a lawyer at the beginning." Behr remained four weeks in detention charged with working while on a tourist visa. Ali Saber, a Pakistani citizen, said that upon his arrest, INS agents told him, "If you are going to take a lawyer it is going to be a long process."[145] He had been held for two and a half months when Human Rights Watch interviewed him. He had been charged with overstaying his visa and was unrepresented by counsel.

In some cases, the INS frustrated attorneys' efforts to reach their clients, whether deliberately or because of bureaucratic chaos and confusion. Attorneys have said that it was hard for them to retrieve information about their clients, including the time and date of hearings.[146] For instance, Gerald Goldstein, the attorney for Al-Badr Al-Hazmi, a Saudi national detained in Texas by the INS, testified before the Senate Judiciary Committee that the INS did not let him talk to his client for five days, a period during which Al-Hazmi was interrogated several times.[147] Goldstein also testified about the difficulties in simply finding where his client was held: he talked to three different INS officials, sent four letters to the INS, and placed numerous calls that went unanswered. Five days after Al-Hazmi's arrest, the attorney learned that he had been transferred from Texas to New York.

The attorney of Ahmed Abdou El-Khier, a twenty-eight-year-old Egyptian citizen, told Human Rights Watch that INS officials refused

[141] See Human Rights Watch, "Locked Away: Immigration detainees in jails in the United States," *A Human Rights Watch Report*, vol. 10, no. 1(G), September 1998.

[142] 8 USC 1229(a)(E).

[143] Human Rights Watch also interviewed two detainees initially held as material witnesses and one charged with crimes. One of the material witnesses signed a document informing him of his rights, but he said he could not understand fully what it said; the other material witness said he was informed of his rights. The individual charged with crimes, which are unrelated to terrorism, said that he was not informed of his rights when he was arrested or thereafter.

[144] Human Rights Watch telephone interviews with Orin Behr, Maryland, December 12, 2001; and David Leopold, Orin Behr's attorney, Cleveland, Ohio, December 10, 2001. The eleven Israelis were arrested on the morning of October 31, 2001 by FBI agents and local police in Lima, Ohio.

[145] Human Rights Watch interview with Ali Saber, Passaic County Jail, Paterson, New Jersey, February 6, 2002. Saber was arrested on November 20, 2001, ordered deported on December 14, and was still in detention on February 6, 2002.

[146] Testimony of Michael Boyle, representative of the American Immigration Lawyers Association, before the Senate Judiciary Committee, December 4, 2001.

[147] Testimony of Gerald H. Goldstein, Esq., before the Senate Judiciary Committee, December 4, 2001. Al-Hazmi was arrested in San Antonio, Texas on September 12, 2001 and released on September 24, 2001. Al-Hazmi was held as a material witness for twelve days and was never charged with any crime or violation.

to tell him where his client was detained for two weeks, during which time El-Khier was transferred to several facilities. The attorney said that only after he filed a petition with federal court was he informed that his client was being held at the Passaic County Jail in New Jersey. The INS charged El-Khier with working while on a tourist visa. His attorney said that he called the INS daily for five days to find out when his client's deportation hearing might be held. On the fifth day, an official told him that the hearing had already taken place and that El-Khier had waived the right to an attorney and admitted he had worked for a total of three weeks during two previous trips to the United States. El-Khier was deported on November 30, 2001.[148]

Similarly, the lawyer of Fayez Khidir, a citizen of Sudan charged with overstaying his visa**,** said that she tried to locate her client for four weeks during which time the INS moved him to three detention centers in the New York/New Jersey area. She eventually threatened to contact the press if the INS did not tell her where Khidir was. An INS officer promised to call her back with the location within three business days, but the promise was not kept. She finally discovered that her client was being held at the Passaic County Jail in Paterson, New Jersey. The same attorney, who represented several other men held in connection with the September 11 investigation besides Khidir, went to a hearing for one client and found that another of her clients, a national of Turkey held for overstaying his visa, was also there for a hearing. She had not been informed of this hearing by the court.[149]

The aftermath of September 11 has exacerbated longstanding difficulties with access to counsel faced by INS detainees.[150] The INS's transfer policy is a common impediment to obtaining and keeping legal representation: the agency moves detainees frequently from one facility to another without regard to where detainees' attorneys are based or where their families live. Furthermore, the INS does not give advance notice to detainees, the detainees' families, or their lawyers of transfers. As a result, attorneys have been unable at times to locate their clients. As a practical matter, attorneys may not be able to continue to represent clients transferred to facilities in other states. A new rule prohibiting facilities from disclosing the identity of immigration detainees they hold will make it even more difficult for lawyers to track down their clients.[151]

Eighty percent of the immigration detainees that appeared before Immigration Courts in 2001 were not represented by counsel, according to data from the Executive Office for Immigration Review.[152] The inability to pay legal fees is perhaps the main obstacle INS detainees face in securing legal counsel as many have scant financial resources. Post-September 11 detainees face even greater legal expenses because their cases involve unique complications, such as being kept in detention pending FBI clearance. "These cases are a headache for a lawyer," said

[148] Human Rights Watch telephone interview with Martin Stolar, Ahmed Adbou El-Khier's attorney, New York, New York, March 28, 2002.

[149] Human Rights Watch telephone interviews with attorney Sandra Nichols, New York, New York, November 27 and December 17, 2001.

[150] See Human Rights Watch, "Locked Away…."

[151] 8 CFR Parts 236 and 241, INS No. 2203-02. See note 58 for a discussion of the rule.

[152] The INS has refused to disclose how many of the thousand-plus "special interest" cases were unrepresented. Forced by a court order, the Department of Justice declared on June 13, 2002, that only eighteen of the seventy-four "special interest" cases in custody at the time did not have counsel (about 25 percent). As the table below shows, the vast majority of non-citizens charged with immigration violations and detained in the United States are not represented by counsel, while most individuals charged with immigration violations but not detained are represented.

Unrepresented non-citizens before immigration judges in 2001		
	Detained	Not Detained
Immigration Courts	(59,734 individuals) 80%	(65,439individuals) 46%
Board of Immigration Appeals	(3,123 individuals) 53%	(6,784 individuals) 32%
Combined	(62,857 individuals) 78%	(72,223 individuals) 44%

Source: Executive Office for Immigration Review

Sohail Mohammed, who represented about a dozen "special interest" detainees. He added that some lawyers were not taking them because they required a lot of work.

The INS is required by law to hand out lists of attorneys and organizations that offer free legal representation to detainees, but in practice these lists may be of little help.[153] For instance, some post-September 11 detainees interviewed by Human Rights Watch at Passaic County and Hudson County jails in New Jersey said they had called all the legal assistance groups on the list provided by the INS, but none of the groups accepted collect calls, the only type of call the detainees were allowed to make. Even though U.S. law requires that this list be updated "not less often than quarterly," the list of pro-bono counsel provided to detainees held at the Metropolitan Detention Center (MDC) in New York was outdated by months.[154] INS facilities are supposed to progressively install phone systems that allow free calls to attorneys on the list handed out to detainees, local courts, and consulates; however, these systems are not operational in most facilities.

The difficulties in finding and in communicating with attorneys were especially severe for the many "special interest" detainees held in administrative segregation. Even though the INS's Detention Standards, which describe the proper treatment to be afforded to immigration detainees, state that individuals kept in segregation "will be permitted telephone access similar to that provided to detainees in the general population," communicating with the outside world was very restricted or outright prohibited for "special interest" detainees in segregation. For instance, attorneys representing detainees held in segregation at MDC said that for months after September 11 their clients could only make one phone call to their attorneys and another to their families per month.[155] "Access to the phone was so restricted that it was almost meaningless," said Brian Lonegan, a Legal Aid Society staff member who arranged legal representation for some detainees. Lonegan said that phone calls to attorneys were at times only allowed after 5:00 p.m. when it was unlikely that detainees would be able to find or reach an attorney.[156]

Difficulty understanding and communicating in English and lack of familiarity with the U.S. legal system are also substantial obstacles for some immigration detainees. Without interpreters or legal counsel, they are left to navigate complicated immigration laws on their own. Some post-September 11 detainees told Human Rights Watch that they signed documents in English given to them by the INS or FBI that they did not understand. By signing them, they unknowingly waived their right to retain counsel, to contact the consulate, or to have a hearing before being deported.[157] In some instances, detainees without representation agreed to be deported during hearings because they were told that they would be sent back to their home countries relatively quickly, while fighting removal would mean that they would remain in jail for many weeks. Nonetheless, in many cases, they were still kept in detention for months pending FBI clearance after agreeing to be deported.

[153] 8 USC 1229(b)(2).

[154] The phone number of one an agency that did accept collect phone calls, the Legal Aid Society, was wrong. A staff member said that the organization had to move because its offices were damaged by the terrorist attacks and it gave the immigration court its new contact information but the MDC did not update the referral list given to detainees. Human Rights Watch telephone interview with Brian Lonegan, Legal Aid Society, New York, New York, April 15, 2002.

[155] Human Rights Watch telephone interview with attorney Bill Goodman, Center for Constitutional Rights, New York, New York, March 25, 2002; and *Ibrahim Tukmen v. John Ashcroft*, "Class Action Complaint and Demand for Jury Trial," April 17, 2002, p. 15.

[156] Human Rights Watch interview with Lonegan.

[157] Imran Ali, an official with the Pakistani embassy in Washington, reportedly said that his embassy raised its concerns with U.S. officials regarding these issues: "We told them many detainees were illiterate and would not know the consequences of signing those documents. We said sometimes people might have been influenced that signing these papers would be in their interest." See Ann Davis, "Why Detainees Signed Waivers Forfeiting Right to Counsel," *Wall Street Journal*, February 8, 2002.

Access to legal documents would help detainees with a fair understanding of English to know their legal options and rights. However, legal libraries are often grossly inadequate for immigration detainees, especially those held in local jails. For instance, even though the Hudson County jail held hundreds of immigration detainees on February 6, 2002, when Human Rights Watch toured it, the immigration "section" in its law library consisted of a stack of about three books held behind a counter.[158] The staff could not produce Title 8 of the United States Code, which contains the U.S. immigration laws, said that they did not have "know-your-rights" materials, and a copy of the INS Detention Standards was stored in a computer that was not operational, according to the INS district director.[159] The INS Detention Standards mandate that all facilities holding INS detainees shall have a law library that contains thirty immigration-related texts, including the above-mentioned Title 8 and "self-help materials." Yet jail officials repeatedly said during our visit that the facility was in full compliance with all the Detention Standards except for one related to telephone access.[160]

V. VIOLATION OF CONSULAR RIGHTS

When the United States ratified the Vienna Convention on Consular Relations in 1969, it bound itself to inform any foreign national detained by U.S. law enforcement, without delay, of his or her right to seek consular assistance. It must also notify the consulate without delay if the detained foreign national so requests. In addition, "consular officers have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."[161]

The obligation of notification under the Vienna Convention does not hinge on whether a person is held on immigration or criminal charges; it applies to any foreign national of a member party that "is arrested or committed to prison or to custody pending trial or is detained in any other manner."[162] The U.S. obligations under the Vienna Convention are codified in an INS regulation, which states: "Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States."[163] The regulation goes further than the Vienna Convention obligations for nationals of certain countries by requiring "immediate communication with appropriate consular

[158] Library staff said they kept them there instead of on shelves like other legal texts because they only had one copy of each.

[159] Librarians at Hudson County jail did not know what the INS's Detention Standards were when Human Rights Watch asked them. The INS district director said the standards were in a computer recently donated by the INS that was not operational. This information came as a surprise to the librarian, who was unaware that the Detention Standards were available anywhere in the library.

[160] Hudson County jail officials said that the jail had not yet installed the preprogrammed telephone system that allows immigration detainees to call attorneys and agencies on the list of free legal service providers, local courts, and consulates free of charge, as required by the Detention Standards.

[161] Article 36(1)(c) of the Vienna Convention on Consular Relations. U.S. citizens must be granted the same rights when detained in a country that is a member party to the convention, and the United States has demanded strict compliance of other countries. The U.S. government's ability to protect its citizens abroad can be enhanced or diminished by its record of compliance with the Vienna Convention's obligations at home. In a case in which Virginia officials violated a detainee's rights under the Vienna Convention, Judge Buntzer, a judge on the U.S. Court of Appeals for the Fourth Circuit, said:

> United States citizens are scattered around the world—as missionaries, Peace Corps volunteers, doctors, teachers, and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example.

Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998). In spite of the violation, Angel Breard, a Paraguayan national, was executed on April 14, 1998.

[162] Article 36(1)(b) of the Vienna Convention on Consular Relations.

[163] 8 CFR 236.1(e)

or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf."[164]

The U.S. government has repeatedly stated that it has upheld its obligations under the Vienna Convention. For instance, in a November 16, 2001 letter to Senator Russell Feingold and six other lawmakers, the Department of Justice wrote:

> Every detained alien is also informed that he or she may communicate with consular or diplomatic officers of the country of his or her nationality in the United States. In addition, the INS affirmatively notifies the consulates of countries that are signatories to the Vienna Convention on Consular Notification within 72 hours of the arrest or detention of one of their nationals.[165]

Yet Human Rights Watch's research indicates that the Department of Justice has often failed to abide by its Vienna Convention obligations. Of the thirty detainees or former detainees interviewed by Human Rights Watch, twelve (40 percent) said they were not informed of their right to contact consular officials at the time of arrest or immediately after; six (20 percent) said that they were informed, and the remaining twelve (40 percent) either did not know or did not remember.

At least seven embassies have protested to the State Department about the U.S. government's failure to notify them of the detention of their nationals, according to press reports.[166] In the case of Muhammed Butt, a Pakistani citizen who died in custody thirty-four days after he was arrested by the INS, the consulate stated that it did not know that he was detained until journalists called to inquire about his death.[167] On the other hand, some embassies were notified and given lists of the detainees from their countries and places of detention.[168]

VI. ARBITRARY DETENTION

Physical liberty is a fundamental human right affirmed in international law and in the U.S. Constitution. Arbitrary detention is the antithesis of respect for that right. An individual who is arbitrarily detained is rendered defenseless by the coercive power of the state. While arbitrary detention is a hallmark of repressive regimes, democratic governments are not immune to the temptations of violating the right to liberty.

The right to liberty circumscribes the ability of a government to detain individuals for purposes of law enforcement—including protection of national security. While the right to liberty is not absolute, it is violated when persons are detained unlawfully or when they are "subjected to

[164] Those countries are: Albania, Antigua, Armenia, Azerbaijan, Bahamas, Barbados, Belarus, Belize, Brunei, Bulgaria, China (People's Republic of), Costa Rica, Cyprus, Czech Republic, The Dominican Republic, Fiji, Gambia, Georgia, Ghana, Grenada, Guyana, Hungary, Jamaica, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Malaysia, Malta, Mauritius, Moldova, Mongolia, Nigeria, Philippines, Poland, Romania, Russian Federation, St. Kitts/Nevis, St. Lucia, St. Vincent/Grenadines, Seychelles, Sierra Leone, Singapore, Slovak Republic, South Korea, Tajikistan, Tanzania, Tonga, Trinidad/Tobago, Turkmenistan, Tuvalu, Ukraine, United Kingdom, USSR (all USSR successor states are covered by this agreement; they are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan), and Zambia. Ibid.

[165] Daniel J. Bryant, assistant attorney general for the Office of Legislative Affairs, letter to Senator Russell D. Feingold, November 16, 2001.

[166] John Donnelly and Wayne Washington, "Diplomats Fault Lack of U.S. Notice on Many Detainees," *Boston Globe*, November 1, 2001; and David E. Sanger, "President Defends Secret Tribunals in Terrorist Cases," *New York Times*, November 30, 2001.

[167] Somini Sengupta, "Pakistani Man Dies in INS Custody," *New York Times*, October 25, 2001.

[168] In response to a request from the ACLU, embassies from a number of countries provided it with lists of detainees from their countries they had received from the U.S. government. See section, Protection of the Terrorism Investigation, in this report.

arbitrary arrest or detention."[169] A detention is unlawful under international human rights law if it is not conducted "on such grounds and in accordance with such procedure as are established by law."[170] A detention will also be arbitrary—even if conducted according to existing laws—if it is manifestly disproportional, unjust, or unreasonable.[171]

Under the U.S. Constitution, unlawful or arbitrary detentions are considered violations of the right to due process contained in the fifth and fourteenth amendments, which forbid the government from depriving any person of "life, liberty or property without due process of law." As the Supreme Court has stated, "freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."[172] The due process clause applies "to all 'persons' within the United States," including aliens, whether their presence is lawful or not.[173]

As explained below, various safeguards are required by international and U.S. constitutional law to protect individuals from arbitrary detention, including the obligation of authorities to inform a detainee promptly of the charges under which he or she is held; the obligation to permit a detainee to be released on bail absent strong countervailing reasons such as danger to the community or flight risk, pending termination of legal proceedings; and the obligation to provide a detainee with effective access to a court that can review the legality of the detention. In the case of many post-September 11 detainees, these safeguards were ignored and detainees were held arbitrarily for considerable periods of time.

All detention procedures are subject to occasional problems or delays that can lead to accidental violations of detainees' rights, and such problems might be understandably greater in the context of the confusion, urgency, and magnitude of the investigative effort that followed the September 11 attacks. Our research suggests, however, that the numerous violations of detainees' rights were not simply inadvertent. First, the Department of Justice developed new detention rules after September 11 that deliberately truncated protections that previously existed, extending the period during which detainees can be held without charge and permitting the INS to keep in custody detainees who immigration judges had ordered released on bond. Second, the pattern of the government's actions indicates a deliberate effort to use immigration detention as a form of preventive detention for criminal investigation purposes, even though immigration law does not authorize detention for that purpose. The Department of Justice has sought to hold immigration detainees for lengthy periods of time even though it lacked evidence that they were a flight risk or posed a danger to the com-

[169] International Covenant on Civil and Political Rights, Art. 9(1).

[170] Ibid.

[171] The Human Rights Committee, the international body that monitors compliance with the International Covenant on Civil and Political Rights, has determined that arrest and detention are arbitrary if not conducted in accordance with procedures established by law, or if the law itself and its enforcement are arbitrary. Therefore, a detention may be arbitrary even if it is "lawful." In a case involving a Cambodian asylum seeker, the Human Rights Committee noted that "'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice." See *A v. Australia* (Human Rights Committee, No. 560/1993), U.N. Doc. CCPR/C/59/D/560/1993; and *Van Alphen v. Netherlands* (Human Rights Committee, No. 305/1988), U.N. Doc. CCPR/C/39/D/305/1988. Manfred Nowak, a leading commentator on the ICCPR, has stated that the prohibition against arbitrariness should be understood broadly to include deprivations of liberty that are "manifestly unproportional, unjust or unpredictable." Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993.

[172] *Zadvydas v. Davis*, 533 U.S. 678, 121 Ct. 2491 (2001), citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Claims asserting arbitrary detention have also been made on other grounds, such as the right to counsel under the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to …have the assistance of counsel for his defense") and the excessive bail provision of the Eighth Amendment ("Excessive bail shall not be required").

[173] *Zadvydas v. Davis*, citing *Plyler v. Doe*, 457 U.S. 202 (1982); and *Mathews v. Diaz*, 426 U.S. 67 (1976).

munity—the only legitimate bases on which the INS can hold immigration detainees pending the termination of deportation proceedings.

Even after deportation orders were issued, the INS continued to hold some detainees not because it could not remove them from the United States, but because they had not received "clearance" from the FBI. In doing so, the INS overstepped the boundaries of its authority. There are no laws or regulations giving the INS authority to keep detainees in custody for such a reason; indeed, we know of no regulation that establishes such a "clearance" rationale for continued detention. In effect, immigration detainees from Middle Eastern, South Asian, and North African countries, detained for no more than technical visa violations, were presumed guilty of criminal conduct or knowledge thereof until proven innocent.

These policies and practices have significantly eroded non-citizens' legal rights, have seriously undermined judicial oversight over government actions, and, compounded with other due process irregularities such as lack of access to counsel, have resulted in arbitrary detentions under international and U.S. law.

Detaining Non-Citizens without Charge

A fundamental corollary of the right to liberty is the right not to be held without charge. Article 9 of the International Covenant on Civil and Political Rights states, "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." U.S. constitutional law similarly recognizes that detention without charge violates the right to liberty protected by the due process clause of the fifth and fourteenth amendments. Non-citizens detained for possible immigration law violations have the same right to be "promptly" informed of the charges against them as a citizen held in police custody. If charges are not filed, the detained person is entitled to release.

The right to liberty is also safeguarded by the requirement that detained persons be able to obtain judicial review of their detention, so that a court "may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[174]

In the aftermath of September 11, the Department of Justice sought legislation that would permit it to detain indefinitely, without charge and without judicial review, non-citizens certified by the attorney general as possible terrorists. Congress refused to grant the attorney general such unprecedented powers. In the USA PATRIOT Act, which became law on October 26, 2001, Congress instead granted the Department of Justice the power to keep certified suspected "terrorists" in custody for seven days without charge.[175] At the end of this period, the attorney general must charge the suspect with a crime, initiate immigration procedures for deportation or release him or her.[176] Six months after the USA PATRIOT Act was passed the Department of Justice declared that it had not certified any non-citizen as a terrorism suspect under the act.[177]

Non-citizens are instead being held without charge under the provisions of a new rule which the INS issued quietly and without a public comment period, on September 20, 2001.[178] Prior to the new rule, the INS had to charge a detained non-citizen within twenty-four hours of detention or release him or her; there was no exception for emergency situations.[179] The new rule extended the permissible period of detention without charge to forty-eight hours. A requirement of issuing charges within forty-eight hours is not inherently unreasonable. The Supreme Court has ruled that in criminal cases, the gov-

[174] International Covenant on Civil and Political Rights, Art. 9(4).
[175] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56.
[176] Ibid, sec. 412.
[177] The statement by the Department of Justice was one of the few periodic reports to Congress required by the USA PARTIOT Act. See Tom Brune, "U.S. Evades Curbs in Terror Law," *Newsday.com*, April 26, 2002.
[178] 8 CFR 287, INS No. 2171-01
[179] The original regulation is contained in 8 CFR 287.3(d).

ernment has to bring charges and a judge has to make a determination of probable cause within forty-eight hours of arrest.[180] But the new rule also contained a loophole by which the forty-eight hour limit could be ignored: "[I]n the event of an emergency or other extraordinary circumstance," the agency can hold non-citizens without charge for "an additional reasonable period of time."[181] The rule contains no criteria as to what constitutes an emergency or other extraordinary circumstance, nor does it set any limits on the period of time a non-citizen can be held without charge in such circumstances.

The preamble to the new rule explains that in emergencies the INS may require additional time beyond forty-eight hours before filing charges "to process cases, to arrange for additional personnel or resources, and to coordinate with other law enforcement agencies."[182] The rule does not require that the INS justify the delay in filing charges or even that it serve notice to the individual or to the immigration court of its intent to hold the detainee past forty-eight hours without charge. Immigration detainees who may not even be guilty of violating immigration law are thus subject to being held in jail for an undefined period of time simply because of the INS's inability to process cases promptly and coordinate efficiently with other government agencies. Although the preamble to the rule argues that immediate implementation of the rule without public comment was needed to react to the September 11 attack, the rule has no expiration date, and thus is now a permanent feature of U.S. immigration regulations.

In issuing the new rule, the Department of Justice gave itself extraordinary powers of detention that exceed the limitations subsequently mandated by Congress in the USA PATRIOT Act. Although the "special interest" immigration detainees are held in connection with a criminal investigation, the rule denies them the due process right criminal suspects have to be charged within forty-eight hours. Human Rights Watch believes that the rule permits arbitrary detentions in contravention of international and constitutional law.

Widespread Delays in Filing Charges

Many "special interest" detainees have been held without charge for longer than forty-eight hours. Using the information released by the Department of Justice in January 2002 and updated in February, we have compiled a graph summarizing the length of time 718 "special interest" detainees were held before charges were filed.[183] The Department of Justice has not

[180] In *County of Riverside v. McLaughlin*, the Supreme Court ruled:

> Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment…. We believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.
>
> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate [United States law] if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. *Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."* (Emphasis added.)

County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

[181] 8 CFR 287, INS No. 2171-01.

[182] "Supplementary Information" to 8 CFR 287, INS No. 2171-01.

[183] The Department of Justice also released a list of those charged with federal crimes. Although this list provided the date of charge it did not include the date of arrest; thus, it is impossible to know how much time elapsed from one to another.

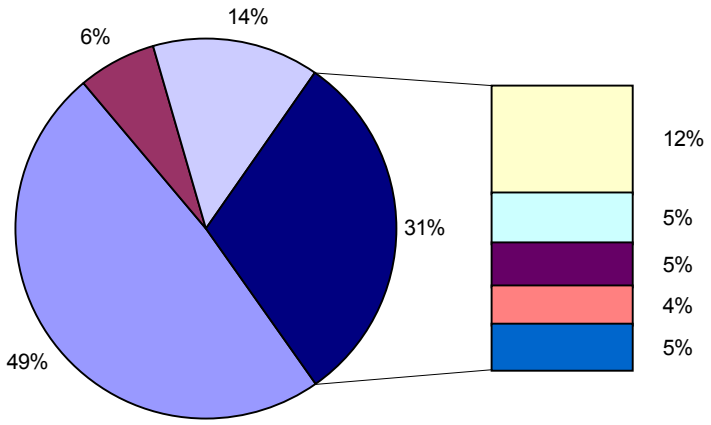
Besides the arrest date and the date when the charging document was served, the list of "special interest" cases included the detainees' nationality, the date when the charging document was filed with the immigration court, and the immigration charge. Other important information such as the detainees' names, arrest location, custody location, and whether they are of interest to the FBI, was redacted. Also redacted were: "JTTF Comments," "Counsel Comments," "DRO Comments," "Bond Info.," "SIOC FBI Interest," and a box under the heading "Legally Suffi-

released any subsequent updates to that information. In 49 percent of the cases, the INS served a charging document to the detainee before the arrest, the day of the arrest, or one day after. In 6 percent of the cases, charges were served two days after the arrest.[184] In 31 percent of the cases, charges were filed three days after the arrest or later. One-hundred and thirty-six non-citizens were held for more than a week without charge, sixty-four of these were charged only three weeks after their arrest or later, and thirty-five detainees were held from one to three months without charge. For instance, a Saudi Arabian was charged with falsely saying that he was a U.S. citizen only 120 days after his arrest and a Jordanian was held for 113 days without charge and finally accused of overstaying his visa.

cient." A press report asserts that JTTF may mean "Joint Terrorism Task Force" and SIOC may mean "Strategic Information and Operations Center" (an intelligence center). Jim Edwards, "Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees," *New Jersey Law Journal*, February 6, 2002. See Appendix A for the first page of this list.

[184] Depending on the time of day a person was detained and the charging document served, charging two days after the arrest may or may not be within forty-eight hours of the arrest.

Time Detainees Were Held Before Charged



The list released by the Department of Justice failed to provide the date charges were filed in 14 percent of the cases.[185] It may be that the government simply failed to keep updated information in the cases of 102 individuals detained as of January 2002 in the "largest, most comprehensive criminal investigation in world history," as the attorney general defined it.[186] But the lack of a charging date may also indicate these non-citizens had still not been charged by February 15, 2002, the date when the list was updated. The U.S. government has not provided information on dates of detention or charges for any "special interest" detainees detained after January 2002.

The following are some of the cases of prolonged detention without charge:

- On November 6, 2001, INS and FBI agents arrested a Palestinian civil engineer at his workplace in New York City. He was legally present in the U.S. even though his

[185] The first list released by the Department of Justice on January 4, 2002 lacked this information in more than 16 percent of the cases. The government subsequently disclosed a second list that contained "handwritten corrections to mistakes or omissions that were due to clerical error in the original [document]." "Defendant's Notice of Filing of Amended and Supplemental Exhibits," submitted February 5, 2002, in *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002). The amended list gave the date the charges were filed for a few but not all cases in which it was missing. The government did not give a reason for its failure to provide such basic information.

[186] Testimony of Attorney General John Ashcroft before a hearing of the Senate Judiciary Committee on "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 6, 2001.

visa had expired because he had applied for an extension and was waiting for a response from the U.S. government. The man's attorney filed a motion for a bond hearing and he first appeared before a judge on November 28, twenty-two days after his arrest. At that time, he had still not been charged with any violation.[187] He was released on bond in the minimum amount of $1,500 the next day. The man was informed of the charge against him—overstaying his visa—two weeks after he was released and five weeks after he was arrested.[188]

- Nabil Almarabh, a former Boston cab driver who is a Kuwaiti citizen, was incarcerated in isolation for eight months without charge and without seeing a judge, according to Adem Carroll, a staff member of the Islamic Circle of North America who talked to him on the phone several times and visited him once in detention. Almarabh told Carroll that he was arrested on September 18, 2001, but first stepped into a courtroom only on May 22, 2002, when he was charged with illegal re-entry into the United States, an immigration-related criminal charge for which he was assigned a court-appointed lawyer. Unnamed Department of Justice officials said in a *Washington Post* article that Almarabh had forfeited his right to see an immigration judge because he had violated a previous deportation order by returning to the United States.[189] Paradoxically, they also asserted that he had been brought before a judge at least three times—twice immediately after his arrest and once in May. The article also reported that Almarabh was held as a material witness before May. Material witnesses have the right to court-assigned counsel and Carroll said that Almarabh did not have an attorney before his May proceeding. He also stated that the detainee appeared not to have received any notification of being a material witness. Almarabh has been transferred to the Buffalo Federal Detention Center in Batavia, New York and is being held with the general population.[190]

- Afzal Kham, a forty-eight-year-old man who speaks no English, came to the United States on July 29, 2001 as a stowaway on a ship from Sweden. He said he came to work and send money to his six children in his native Pakistan. He was arrested in the Bronx on September 17, 2001. Four INS and FBI agents arrived at his home at 2:00 a.m. and asked him if he was legally in the country. He said no. The agents detained him and his three roommates. On February 6, 2002, 142 days after his arrest, he told Human Rights Watch that he had not been to court yet and had received no charging document or any other official document from the government.[191]

Delay in Access to Courts

The delay in filing charges also delays detainees' appearance before an immigration judge. Under INS procedures, immigration

[187] A detainee has the right to ask for a bond hearing even if he or she has not received a charging document. 8 CFR 3.14(a).

[188] Human Rights Watch interview with Palestinian civil engineer, Paterson, New Jersey, December 20, 2001; and email communication with his attorney, May 24, 2002. The detainee's name has been withheld upon request. An immigration judge terminated the proceedings against him on February 14, 2002 based on the fact that he was in legal status.

[189] Steve Fainuru, "Suspect held 8 Months Without Seeing Judge," *Washington Post*, June 12, 2002.

[190] Human Rights Watch telephone interview with Adem Carroll, 9/11 relief coordinator for the Islamic Circle of North America, New York, New York, June 13, 2002. Several newspaper reports linked Almarabah to the alleged hijackers and al-Qaeda. See, for instance, Dan Eggen, "Officials Winnow Suspect List: Most in Detention Being Cleared as Sept. 11 Probe Slows," *Washington Post*, December 14, 2001; Amy Goldstein, "A Deliberate Strategy of Disruption: Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror," *Washington Post*, November 4, 2001; and Shelley Murphy, and Stephen Kurkjian, "Lawyers KO Payment for Man in Probe," *Boston Globe*, September 28, 2001.

[191] Human Rights Watch interview with Afzal Kham, Passaic County Jail, Paterson, New Jersey, February 6, 2002. Human Rights Watch interviewed him with the assistance of a fellow detainee who translated for him.

judges do not automatically review whether there is probable cause for a detention. Hearings before immigration judges on the merits of the INS's case against a detainee are not scheduled until after charges have been filed. If a non-citizen is held in custody but not charged, he or she will not be scheduled automatically for a court hearing, regardless of how long he or she has been detained. An immigration detainee held without charges has two recourses to challenge continued detention. The detainee can request a hearing before an immigration judge to consider whether he or she should be released on bond or can file a habeas corpus petition in federal court.[192] Either of these procedures is a formidable obstacle for non-citizens who may not be familiar with the U.S. legal system and who may not have an attorney to counsel and represent them.[193]

Detainees Denied Release on Bond or Held on Extraordinarily High Bond

The right to liberty continues after a person has been accused of violating immigration laws, no less than criminal laws. While an allegation of an immigration violation, if proven, may justify deportation, it does not in itself justify detention. Under U.S. law, immigration detainees should not be kept in custody unless a judge concludes the individual's dangerousness or risk of flight warrant detention until the conclusion of the immigration hearings.[194] As one federal court has noted, "[d]ue process requires an adequate and proportionate justification for detention—a justification that cannot be established without an individualized inquiry into the reasons for detention."[195] Immigration judges sons for detention."[195] Immigration judges should not merely "rubber-stamp" the INS's request that an individual be kept in custody. "The process due even to excludable aliens requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight."[196]

The Department of Justice has sought to circumvent the requirement of an individualized determination of dangerousness or flight risk for "special interest" detainees. Rather than presenting particularized evidence to immigration judges that might justify the need to keep a "special interest" detainee under custody, it has suggested that any post-September 11 detainee of interest to the government's investigation should be kept in custody until it can rule out the detainee's involvement in or even useful knowledge about criminal activity.

The Department of Justice's argument is laid out in an affidavit written by Michael E. Rolince, section chief of the FBI Counterterrorism Division's International Terrorism Operations Section, which the government has filed in an unknown number of bond hearings in "special interest" cases. (The affidavit is attached as Appendix B to this report). The Rolince affidavit consists of a four-page description of the September 11 attacks and the ongoing federal investigation and a two-page section that offers general arguments for the continued detention of non-citizens under FBI scrutiny. It is modified in each case by the addition of a paragraph about the specific detainee in whose case the document is filed. The affidavit states:

> In the context of this terrorism investigation, the FBI identified individuals whose activities warranted further inquiry…. The FBI must consider the possibility that these aliens are somehow linked to, or may possess knowledge useful to the investigation of, the terrorist attacks on the World Trade Center and the Pentagon. The

[192] Regulation 8 CFR 3.14(a) says:

> Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to sec. 3.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings.

[193] The vast majority of INS detainees are unrepresented, as they do not have the right to free-of-charge, court-appointed counsel. See note 152 above.

[194] 8 USC 1231 (a)(6)

[195] *Patel v. Zemski*, 2001 F.3d, No. 01-2398.

[196] *Ngo v. INS*, 192 F.3d 390 (3d. Cir. 1999).

> and the Pentagon. The respondent [name] is one such individual.[197]

Then the paragraph on the individual follows. In the case of Ali Al-Maqtari, the affidavit stated:

> As a result of a search previously described to the court, the FBI continues to download the hard drive of a computer. (The computer was found in a car belonging to Al-Maqtari's wife.) When interviewed by the FBI, Al-Maqtari said he had not used the laptop but purchased it used for $250 from a customer at the convenience store where he works. Al-Maqtari said that the customer obtained the computer form a third party. At present, the download of the hard drive is still running. Once this process is completed, the FBI will need several days to review the information obtained.[198]

No information was provided to suggest why the government believed Al-Maqtari might be linked to the September 11 investigation or what the significance of the laptop might be, nor was any other information offered to the judge during the bond hearing to suggest that Al-Maqtari was dangerous or a flight risk.

In the case of Osama Elfar, the affidavit contended in general terms that the FBI had uncovered information indicating that he might have possible links to terrorist organizations and the 1993 World Trade Center bombing investigation, but it did not provide any facts to support such assertions.[199] According to the detainees and their attorneys, the Rolince affidavit constituted the sole evidence presented by the INS to the immigration judge. No evidence was presented of criminal activity by either detainee, merely FBI conclusory suspicions.[200]

The Rolince affidavit compares counterterrorism intelligence to the construction of a "mosaic," insisting that detainees should remain in custody because although their cases may not look suspicious in isolation, they may form part of a larger picture of terrorist activity when analyzed in a broader context. "What may seem trivial to some may appear of great moment to those within the FBI or the intelligence community," reads the document. The affidavit does not offer evidence of any link between the specific detainee in whose case the document was filed and any crimes or some other reason why he might be a danger to the community or a flight risk if released. It simply contends that the detainee should be kept in custody because "the FBI has been unable to rule out the possibility that respondent is somehow linked to, or possesses knowledge of, the terrorist attacks on the World Trade Center and the Pentagon."[201]

The "mosaic" theory turns the presumption of innocence on its head and eviscerates the right to liberty absent individualized evidence of a person's dangerousness or risk of flight. The Department of Justice is arguing that the U.S. government should be able to detain noncitizens while it investigates them, even if they have not been charged with any crime, simply because it cannot rule out the possibility of criminal conduct. Moreover, it argues that the mere possibility the detainee has "useful information" should warrant his detention. Human

[197] Affidavit by Michael E. Rolince, section chief of the FBI Counterterrorism Division's International Terrorism Operations Section, filed in the cases of Ali Abubakr Ali Al-Maqtari, October 11, 2001, and Osama Mohamed Bassiouny Elfar, October 4, 2001, para. 11.

[198] Affidavit by Rolince filed in the case of Al-Maqtari, para 12.

[199] Affidavit by Rolince filed in the case of Elfar, para. 11. Osama Elfar said that he arrived in the United States three years after the World Trade Center bombing in 1993. Human Rights Watch telephone interview with Osama Elfar, Mississippi County Jail, Missour, November 21, and 26, 2001.

[200] Human Rights Watch telephone interviews with Al-Maqtari and Tiffanay Hughes, New Haven, Connecticut, November 29, 2001; with Michael Boyle, their attorney, New Haven, Connecticut, October 24, 2001; with Elfar; and with his attorneys Dorothy Harper, October 22, and 24, 2001, and Justin Meehan, October 22, 23, and 24, 2001, and February 25, 2002.

[201] Affidavit by Rolince filed in the cases of Al-Maqtari, and Elfar, para. 13.

Rights Watch is aware of no legal basis for detaining non-citizens simply because they may have knowledge related to a crime.

As dubious as the Rolince affidavit's arguments are, they have worked. Prior to September 11, non-citizens accused of technical violations of their visas who did not have a criminal record were routinely released from custody pending deportation proceedings with no bond or a low bond—typically $500. Yet immigration judges have routinely denied bond or set extraordinarily high bonds for non-citizens charged with immigration violations who were arrested in connection with the terrorism investigation. Osama Elfar, for example, who was charged with overstaying his visa, was denied bond and spent eighty-one days in detention, some of them in solitary confinement. When the INS failed to remove him from the country by a deadline set by an immigration judge, his attorney petitioned for a writ of habeas corpus that forced the government to send Elfar back to his native Egypt.[202] The immigration judge initially set a bond of $50,000 in Al-Maqtari's case, but the INS motioned for a stay, so he remained in detention. The immigration judge gave the INS an additional period of time to present more substantial information to support the high bond, but the agency never produced further evidence beyond the Rolince affidavit. After the FBI issued a document stating it had terminated the investigation of Al-Maqtari, he was released on a $10,000 bond, which his attorney still considered very high for Al-Maqtari's alleged violation—ten days of "unlawful presence" in the country while he changed from a tourist to a spouse-sponsored visa.[203] Al-Maqtari spent fifty-two days in detention, mostly in solitary confinement.

Al-Maqtari's extremely high bond is not exceptional. For instance, Sidi Mohammed Ould Bah and Sidi Mohammed Ould Abdou, two Mauritanian men charged with overstaying their visas, were held on $10,000 bonds, which they could not pay. They were released after the immigration judge lowered the bond to $5,000 five weeks after their arrest. "Under normal circumstances my clients would have been released on a low bond from the beginning. They would have not been detained at all," said their attorney.[204] After talking to attorneys representing forty-nine clients, journalist Jim Edwards calculated that New Jersey immigration judges have approved bond amounts five times higher or more than before September 11 for those detained in connection with the terrorist investigation.[205]

Continued Detention Despite Release Order

On October 31, 2001, the INS issued a new "automatic stay" rule that allows it to keep a detainee in custody even after an immigration judge orders him or her released on bond if the initial bond was set at $10,000 or higher.[206] Since the INS determines the initial bond amount, this provision gives the INS the ability to keep a detainee in custody simply by setting the initial bond at $10,000. Detainees can appeal the stay of the judge's release order and their continued detention to the Board of Immigration Appeals (BIA), but even if the BIA upholds the release order, the INS can keep the detainee in custody by taking the case to the attorney general.[207] Hence, the rule gives extraordinary power to the INS to hold people for long periods of time as they try to pursue a complicated and delay-ridden appeal process.

[202] Human Rights Watch telephone interviews with Elfar; with Harper; and with Justin Meehan.

[203] Human Rights Watch telephone interviews with Al-Maqtari and Hughes; and with Boyle.

[204] Human Rights Watch telephone interviews with Dennis Clare, Louisville, Kentucky, October 23 and 31, 2001.

[205] Jim Edwards, "Attorneys Face Hidden Hurdles in September 11 Detainee Cases," *New Jersey Law Journal*, December 5, 2001. See also, Mae Cheng, "Questions Raised About Detainees," *Newsday*, December 17, 2001.

[206] 8 CFR Part 3, INS No. 272-01; and AG Order No. 2528-2001.

[207] The immigration courts are part of the Department of Justice but are independent from the Immigration and Naturalization Service. An attorney general's ruling on an immigration case brought to him can be challenged in federal court.

The automatic stay provision applies to non-citizens held for any kind of immigration offense, no matter how minor. The rule ultimately renders the outcome of bond hearings and immigration judges' review irrelevant. Non-citizens can be detained for months at the discretion of local deportation officers, who set the initial bond, regardless of the immigration judge's impartial assessment of whether the non-citizens present a risk of flight or a danger to the community.

Human Rights Watch does not know how frequently the INS has used the automatic stay provision. The INS does not release such information and, as discussed above, proceedings against "special interest" detainees are shrouded in secrecy. An example of its use, however, is in the case of two Israelis who were charged with working in Ohio while on tourist visas. After the government failed to produce evidence of links to terrorism against them, an immigration judge granted them voluntary departure and ordered each of them released on a $10,000 bond on November 12, 2001.[208] The INS used the automatic stay to keep them in detention. The two remained in jail until November 27, but were never told why. Once released, the INS prevented them from leaving the country by retaining their passports. The two men were finally allowed to leave the United States a month after their release from jail after their attorney filed a petition for a writ of habeas corpus with the federal court.[209] In another case, Atila Kula, a Turkish citizen, was held in a New Jersey jail for more than two weeks after a judge's order that he be released.[210] Kula was legally in the country when he was arrested.

On June 28, 2002, a district judge found continued detention under the automatic stay rule a violation of due process. In *Almonte-Vargas v. Kenneth Elwood*, the judge granted a writ of habeas corpus and ordered released a woman who had been held in detention for more than four months pursuant to the automatic stay rule after an immigration judge ordered her release on bond.[211] In his decision, the federal judge said that due process requires that non-citizens be afforded the opportunity for an individualized hearing addressing the necessity of detention, but "due process is not satisfied where the individualized custody determination afforded to Petitioner was effectively a charade. By pursuing an appeal of the Immigration Judge's bond determination and requesting that

[208] A person who leaves the United States under voluntary departure has a clean record and can apply for a visa in the future, whereas a person removed from the country under a deportation order is barred from re-entering the United States for ten years, unless he or she obtains a special waiver from the U.S. government. Non-citizens who are granted voluntary departure have to pay for their own plane transportation out of the country.

[209] Human Rights Watch telephone interviews with Orin Behr, Maryland, December 12; and David Leopold, Orin Behr's attorney, Cleveland, Ohio, December 10, 2001. For a press report on the case, see Tamara Audi, "Israelis detained, deported during sweep by immigration agency," *Detroit Free Press*, November 15, 2001.

[210] Kula finished classes at Baruch College, New York, on October 17, 2001, but he was legally in the country when he was arrested on November 20 because students are permitted to stay sixty days after classes end. Kula's wedding—which was to have been December 1—would have made him eligible for a work permit. In an interview with reporters, Russ Bergeron, an INS spokesman, said that detainee's rights were not abridged, and noted that Kula could get married in jail. Kula's fiancée asked for just such a ceremony but the local sheriff, who ran the facility where Kula was detained, denied her request. "Muslim behind bars, despite a judge's order," *US-News.com*, November 7, 2001; "No honeymoon," *U.S. News & World Report*, 17 December 2001; and Maki Becker, "Turkish Immigrant Held Despite Judge's Order," *New York Daily News,* December 9, 2001.

[211] *Ursula Altagracia Almonte-Vargas v. Kenneth Elwood*, 2002 U.S. Dist. E.D. Penn. Lexis 12387. The detainee was a woman and a citizen of the Dominican Republic and had not been arrested in connection with the terrorist investigation of the September 11 attacks. Her case is a reminder that the changes to immigration regulations issued by the Department of Justice in the months after September 11 apply to all non-citizens, not only those detained under suspicion of links to or knowledge about terrorism.

no action be taken on the appeal, the INS has nullified that decision."[212]

Immigration judges have also criticized the automatic stay rule. A paper by the National Association of Immigration Judges cites the automatic stay as an example of the immigration courts' "susceptibility to improper interference" by the Department of Justice.[213] The paper advocates the removal of immigration courts from the Department of Justice.

Refusal to Release Detainees for whom Bonds have been Posted

There is no provision of the Immigration and Naturalization Act, nor of regulations issued thereunder, which authorizes continued detention pending authorization from FBI or INS officials after a judge has already ordered release. Nevertheless, in some cases in which an immigration judge has ordered a detainee released on bond, the INS has simply refused to carry out the order until the detainee has received some sort of "clearance" from FBI or INS headquarters. For instance, the family of a man detained in New Jersey tried to pay his bond three times, but a month and a half after the judge ordered him released, he was still in jail, according to his attorney.[214] The INS also repeatedly refused for almost a week to accept the bond payment from the family of two Pakistani men, an uncle and a nephew, also detained in New Jersey.[215] His attorney called the INS and was told that "they needed a response from Washington before releasing him." Human Rights Watch research shows that at least five more detainees who were ordered to be freed on bond by immigration judges were not released by the INS when their families went to pay the bond.[216] In the case of Uzi Bohadana, the INS failed to release him even after his family paid the $2,500 bond that the local INS had set.[217] His attorney said that a local INS officer told her that Bohadana was on "a list" and, therefore, could not be freed. He was finally released three weeks after the bond was paid.

Continued Detention Despite Removal Order

Once an immigration judge has ordered that a non-citizen be removed from the United States, the INS is authorized to keep this individual in custody only as necessary to carry out the removal. The Immigration and Naturalization Act provides that the INS shall remove non-citizens from the United States within ninety days of the issuance of an order of deportation.[218] The act permits the removal period to be extended for an extra ninety days "if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal."[219] Detainees who are granted voluntary departure shall leave the United States within 120 days of the order.[220]

The INS has no authority to keep non-citizens in its custody who have been ordered

[212] Ibid., p. 5.

[213] Dana Marks Keener and Denise Noonan Slavin, "An Independent Immigration Court: An Idea Whose Time Has Come," *National Association of Immigration Judges Position Paper,* January 2002.

[214] Human Rights Watch telephone interview with attorney Regis Fernández, Newark, New Jersey, December 17, 2001.

[215] Human Rights Watch interviews with Sohail Mohammed, Clifton, New Jersey, November 5 and December 19, 2001.

[216] The men are an Egyptian national represented by Rifat Harb of New Jersey, an Egyptian and a Palestinian represented by John Crow of Tucson, Mahmood Abbasi, and Mehmet Aktas. Human Rights Watch telephone interview with attorney Rifat Harb, New York, October 30, 2001; Somini Sengupta and Christopher Drew, "Effort to Discover Terrorists Among Illegal Aliens Makes Glacial Progress, Critics Say," *New York Times*, November 12, 2001; and Brian Donohue, "Foreigners linger in jail despite order to leave," Newhouse News Service, November 16, 2001.

[217] Human Rights Watch telephone interviews with Uzi Bohadana, Hollywood, Florida, November 13, 2001; and with attorney Patricia Ice, Jackson, Mississippi, November 5, 2001.

[218] 241 (a)(1)(A).

[219] 241 (a)(1)(C).

[220] 8 USC 1229(a)(2). See note 208 above for the distinction between deportation and voluntary departure.

deported once it can remove them from the country. Nevertheless, since September 11 the INS has continued to hold individuals ordered deported or granted voluntary departure with safeguards not due to difficulties in arranging for their removal, such as absence of travel documents or lack of a country that would accept them, but because the detainees had not been "cleared" of links to or knowledge of terrorist activities.[221] The process effectively reverses the presumption of innocence: non-citizens detained for immigration law violations are kept jailed until the government concludes they have no links to criminal conduct. This "clearance" process has never been publicly described nor are there any laws or regulations authorizing it. Detainees who were never charged with terrorist offenses are nonetheless held until approval for their release or removal is authorized by several sections of the Department of Justice and the FBI.[222] This "clearance" process is not connected to the immigration charges against the detainee.

The number of non-citizens whose release was delayed pending "clearance" may never be known. According to a press report, eighty-seven detainees with final orders of removal were waiting for clearance as of February 18, 2002.[223] Some detainees who were granted voluntary departure with safeguards by an immigration judge waited in jail, ticket in hand, past the deadline set by the judge for departure until the FBI decided that they were of no use to the terrorism investigation. For instance, on October 15, 2001, an immigration judge granted voluntary departure with safeguards to Mohammed Munir Gondal, who had been charged with working without authorization, and ordered him removed from the country within a month. The deadline passed, however, and the INS did not send Gondal or his counsel notification of any extension of the judge's deadline; it simply refused to allow his departure. Gondal's attorney said that the INS officer in charge of the case told him that they could not let him go because "INS headquarters hasn't authorized it yet." The attorney was also told that the government continued to investigate his client. The government never produced any evidence that linked Gondal to terrorism or to any crime. Gondal was finally allowed to leave the country on February 7, 2002, 115 days after he was granted departure.[224]

Ibrahim Turkmen had a similar experience. A national of Turkey, he was charged with overstaying his visa and granted voluntary departure with safeguards on October 31, 2001. A friend of his bought a plane ticket to Turkey for him two days later and gave it to the INS. In January, an INS agent told Turkmen that he had been "cleared" by the FBI but still needed additional INS "clearance." He was allowed to leave the country four months after the voluntary departure order, on February 25, 2002. During this time he was confined in Passaic County Jail.[225]

Both Mohammed Riaz, a German citizen born in Pakistan, and Habib Soueidan, a Lebanese citizen, were charged with overstaying their visas and ordered deported at the end of October.[226] However, on February 6, 2002, when

[221] Under an order of voluntary departure with safeguards, the non-citizen must be kept in custody until the INS can carry out his or her removal from the country.

[222] Jim Edwards, "Attorneys Face Hidden Hurdles in September 11 Detainee Cases," *New Jersey Law Journal*, December 5, 2001.

[223] Christopher Drew and Judith Miller, "Though Not Linked to Terrorism, Many Detainees Cannot Go Home," *New York Times*, February 18, 2002.

[224] Human Rights Watch interview with Mohammed Munir Gondal, INS's Elizabeth Detention Center, January 27, 2002; and with attorney Michael Levitt, New York, New York, February 28, 2002.

[225] *Ibrahim Tukmen v. John Ashcroft*, "Class Action Complaint and Demand for Jury Trial," April 17, 2002.

[226] Human Rights Watch interviews with Habib Soueidan and Mohammed Riaz, Passaic County Jail, Paterson, New Jersey, February 6, 2002. Mohammed Riaz was detained at his home by INS and FBI agents. He was interrogated twice by the FBI but never told by any law enforcement agent that he had the right to an attorney or to contact the consular office of Germany. He was ordered deported on October 25, 2001. Habib Soueidan, a Lebanese citizen, was arrested on October 11, 2001 by New York City police for selling on the street without a license and handed over to the INS. He was ordered deported on October 31.

Human Rights Watch spoke to them, they were still being held. For Riaz it was 104 days after his final order of deportation, for Soueidan, ninety-eight days. Neither of them had an attorney. Asif-ur-Rehman Saffi, a Pakistan-born French citizen, was charged with working without authorization and ordered deported, but he was removed from the United States only four and a half months after the final order of deportation.[227] In the meantime, Saffi was housed in administrative segregation, where he was allegedly physically and verbally abused by correctional officers. It took the government almost three and a half months to deport Syed Amjad Ali Jaffri, a native of Pakistan, after an immigration judge ordered him removed from the country.[228] He had been charged with working without authorization. Amjad Baig, a Pakistani citizen charged with attempting to use a false passport, remains in custody at the Metropolitan Detention Center in New York as of this writing, even though he was ordered deported on March 18, 2002.[229]

Attorneys have filed petitions in federal courts to pursue redress for the excesses of the INS. For instance, Saffi and Jaffri are plaintiffs in a class action lawsuit brought against the U.S. government on April 17, 2002 that seeks to include all "special interest" detainees who received final orders of removal but were held beyond the period necessary to secure their removal from the United States.[230] The lawsuit seeks the repeal of abusive INS policies and compensatory and punitive damages.

In addition, at least six attorneys representing eight detainees have tried to force the Department of Justice to carry out immigration judges' orders of removal by petitioning for writs of habeas corpus in which they argued that the INS was acting illegally. As a result of the petitions, six detainees have been sent home. The government charged one of the detainees with a crime, illegal re-entry, and kept him in detention after the habeas corpus petition was filed.[231] The other case is still pending.[232]

While petitioning for writs of habeas corpus has provided relief in a number of cases, as a practical matter this approach is not available to every detainee. Lawyers expressed concern that filing a petition with federal court will prompt the government to bring minor immigration-related criminal charges against their clients, such as lying to a law enforcement agent, document fraud, or illegal re-entry, to keep them in detention. Moreover, it is very unlikely that non-citizens who lack counsel and in many cases have limited English language skills, would be able to file such petitions. The INS has refused to reveal how many "special interest" detainees have retained attorneys, but 80 percent of all INS detainees who appeared before immigration courts in 2001 lacked counsel.[233]

[227] *Tukmen v. Ashcroft*. Saffi was arrested on September 30, 2001, ordered deported on October 17, 2001 and removed from the United States on March 5, 2002.

[228] *Tukmen v. Ashcroft*. Jaffri was arrested on September 27, 2001, ordered deported on December 20, 2001, and removed from the country on April 1, 2002.

[229] Request filed before the Inter-American Commission on Human Rights, Organization of American States, by the International Human Rights Law Group, the Center for Constitutional Rights, and the Center for Justice and International Law for Precautionary Measures under article 25 of the commission's regulations, June 20, 2002.

[230] *Tukmen v. Ashcroft*.

[231] The detainee was Shakir Baloch and he was still in detention at this writing. Human Rights Watch interview with attorney Bill Goodman, New York, New York, March 25, 2002.

[232] Human Rights Watch telephone interview with attorney Justin Meehan and the following press reports: "Immigration Detainee Takes Fight for Freedom to Court," Herald News, January 9, 2002; "INS Detainee Hits, US Strikes Back," *Village Voice*, February 5, 2002; and Drew and Miller, "Though Not Linked to Terrorism, Many Detainees Cannot Go Home."

[233] See note 152 above.

Misuse of Material Witness Warrants

To the innocent even a momentary deprivation of liberty is intolerable…. Confinement of the plaintiff [as a material witness] among criminals and forcing him to wear prison garb added the grossest insult to injury.

Quince v. State, Rhode Island Supreme Court, 1962.[234]

Most of the persons placed in federal custody in connection with the government's investigation of the September 11 attacks have been arrested on immigration or federal criminal charges. The U.S. government has also detained a number of people as material witnesses. The Department of Justice has refused to say how many material witnesses have been arrested in connection with the September 11 investigation or to release their names and places of detention.[235] On August 2, a district judge declared: "The Government's treatment of material witness information is deeply troubling…. The public has no idea whether there are 40, 400, or possibly more people in detention on material witness warrants."[236] Human Rights Watch has been able to identify thirty-five individuals, two of them U.S. citizens, who have been held as material witnesses. The judge ordered the Department of Justice to release the identities of all material witnesses, except for those in whose cases a sealing order bars the disclosure. The judge asked the government to submit any such orders for *in camera* (in judge's chambers) review. The Department of Justice is expected to appeal the decision and seek a stay of the order.

Federal law authorizes the courts to issue warrants for the arrest of material witnesses in criminal proceedings in circumstances where securing their testimony might not otherwise be feasible.[237] Rarely used, material witness warrants have a limited but important purpose: to make sure important witnesses render their testimony where there is a real possibility the witnesses may flee to avoid testifying or might be assaulted by persons seeking to silence them, e.g. in mafia trials. The warrants are a singular exception to U.S. law's general prohibition on detaining individuals in the absence of probable cause of criminal conduct.

Our research, including interviews with attorneys and persons who have been held as material witnesses, suggests that the Department of Justice has deliberately used material witness warrants to detain possible criminal suspects who could not otherwise be held in custody on criminal charges and who apparently had not violated immigration laws.[238] Indeed, Department of Justice officials have acknowledged that detentions pursuant to material witness warrants were part of the department's strategy of "inca-

[234] *Quince v. State*, 179 A.2d 485, 487 (1962). The Rhode Island Supreme Court ruled in this case that a material witness had been unlawfully detained.

[235] At least in some, and perhaps all, material witness cases, the Department of Justice has obtained judicial orders sealing the proceedings.

[236] *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002), p. 28.

[237] 18 U.S.C. § 3144. The federal material witness statute provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person.... No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

[238] The government has used material witness warrants in the past to keep suspects in detention for long periods of time. Examples include Wen Ho Lee, a nuclear weapon scientist suspected of but never charged with leaking national security documents; James Nichols, the brother of Terry Nichols who was convicted in connection with the 1995 Oklahoma City bombing; and Abraham Ahmad, a Palestinian American arrested in the aftermath of the Oklahoma City bombing but never charged. Richard Serrano, "After the Attack," *Los Angeles Times*, September 26, 2001.

pacitating" terrorists.[239] For instance, the only person, to our knowledge, who has been charged with a crime connected to the terrorist attacks, Zacarias Moussaoui, the alleged twentieth hijacker, was originally held as a material witness. He was subsequently indicted with six conspiracy counts alleging that he conspired with Osama bin Laden and al-Qaeda to carry out the September 11 attacks. His trial began in July in Virginia. Another man described as a suspect who was initially held as a material witness is José Padilla, who was accused of participating in a plot to explode a radioactive bomb in the United States, but never charged with any crime. He is currently being held as an "enemy combatant" and has been denied access to the courts and an attorney.

The warrants were obtained to secure the presence of the witnesses before the grand juries investigating crimes connected to September 11. All of the material witnesses we interviewed, or whose cases have been described to us by their attorneys, were interrogated extensively about possible criminal conduct or connections to terrorism. A district court declared that at least eight and possible more material witnesses were never brought before a grand jury to testify, although that was the ostensible purpose of the warrants.[240] They were all confined in jail, treated no better than accused or convicted criminals; indeed, some were subjected to punitive conditions, held in solitary confinement, and subjected to security measures typically reserved for dangerous persons. Most were let out of their cells only one hour per day. Although material witnesses have a right to counsel, including court-appointed counsel if necessary, some in fact did not have access to counsel.

Some of the persons held on material witness warrants were ultimately released once the warrants were dismissed while others were charged with federal crimes or immigration violations unearthed during the investigation.

The following cases illustrate the misuse of material witness warrants to keep possible suspects in detention and the mistreatment of the material witnesses while they were confined:

- Jean-Tony Oulai was arrested by eleven FBI, INS, and airport security personnel at a Florida airport on September 14, 2001 after a random search of his luggage turned up a stun gun, flight manuals, and documents with notes in a language that airline workers mistook for Arabic. Oulai, who is a citizen of the Ivory Coast and is black and Roman Catholic, told Human Rights Watch that he was a licensed pilot and that he did not speak Arabic. Stun guns are permitted in checked luggage but have to be reported to the airline. Oulai said that the employee at the airline counter saw the stun gun but did not ask him to fill out any form.

  Oulai was charged with entering the country illegally. Even though he said he entered with a legal student visa, he acknowledged he overstayed his visa and decided to accept deportation instead of spending a long period of time incarcerated while pursuing his case. He was ordered deported on November 15. His embassy allegedly issued him a travel permit and wrote a letter guaranteeing that the Ivorian government would make sure Oulai would cooperate with U.S. law enforcement if his testimony were required in any proceeding in the United States.

  Instead of deporting him, the U.S. government kept him in detention as a material witness for three months. On February 14,

[239] Viet Dinh, assistant attorney general, Office of Legal Counsel, Department of Justice, wrote:

> Each of the detainees has been charged with a violation of either immigration law or criminal law, or is the subject of a material witness warrant issued by a court. The aim of the strategy is to reduce the risk of terrorist attacks on American soil, and the Department's detention policy already may have paid dividends. These detentions may have incapacitated an Al Qaeda sleeper cell that was planning to strike a target in Washington, DC—perhaps the Capitol building—soon after September 11.

Viet Dinh, "Freedom and Security after September 11," 25 *Harvard Journal of Law and Public Policy* 399, Spring 2002.

[240] *Center for National Security Studies v. U.S. Department of Justice*, p. 30.

2002, a judge dismissed the material witness warrant, reportedly after prosecutors admitted that they had no evidence that linked Oulai to terrorism. Still, Oulai was not released. U.S. attorneys in Florida accused him of lying to federal agents about whether he was living legally in the United States the day he was arrested, a crime that is rarely prosecuted. A magistrate set a $100,000 bond on the charge, which was paid by Oulai's brother, who is a physician. Oulai was still not released. The government contended that he was in INS custody because he was waiting to be deported. His attorneys argued that it was illegal for the INS to hold him because the statutory ninety-day deadline for removal after a final order of deportation had passed.

Prosecutors then told the attorneys that Oulai was in the custody of the Marshals Service and was being taken from Virginia to Florida. Reportedly, four federal officials repeatedly contradicted each other over whether the INS or the Marshals Service had custody of Oulai. In the meantime, for seven days neither Oulai's family nor his attorneys could find out where he was held. It turned out that he was being shifted through several states and detention facilities.

As of this writing, Oulai has been in detention for eight months, some of the time in solitary confinement. He alleged he was beaten by law enforcement agents at Baker County Detention Center in Florida.[241] (For more details see the section, Physical and Verbal Abuse, in this report.)

[241] Human Rights Watch interviews with Tony Oulai, Alexandria City Jail, Virginia, February 9, 2002; telephone interviews with his sister Leoncied Ouayouro, Fairfax, Virginia, February 1, 2002, and March 25, 2002; and with his attorney David Sontan, Virginia, February 1, 2002. See also, Amy Goldstein, "'I Want to Go Home': Detainee Tony Oulai Awaits End of 4-Month Legal Limbo," *Washington Post*, January 26, 2002; Amy Goldstein, No Longer Material Witness, West African Still Detained," *Washington Post*, February 15, 2002; and Amy Goldstein, "No Longer a Suspect, But Still a Detainee," *Washington Post*, May 27, 2002.

- When Human Rights Watch interviewed Eyad Mustafa Alrababah, a Palestinian with a Jordanian passport, he had difficulty remembering what had happened to him since his arrest on a material witness warrant, and said he could not see well. He had a bloodshot eye, appeared tired, and said he was depressed, but he had not seen a doctor. He had been held in solitary confinement for more than four months, the first two of them with the lights on twenty-four hours a day, during which time he said he could not sleep.

  On September 29, 2001, Alrababah went to the FBI office in Bridgeport, Connecticut because he had recognized four of the alleged hijackers whose pictures were shown on television. He told Human Rights Watch that he met them at a mosque in March 2001, hosted them at his home, and in June 2001 drove them from Virginia to Connecticut and after that he did not see them again. Alrababah was questioned by two FBI agents and then taken to the Hartford Correctional Center, where he was held for about twenty days. Alrababah was placed in isolation. He was strip and cavity-searched at least once a week. He was not allowed to make any phone calls from the detention center but did telephone his fiancée, a U.S. citizen, a few times from the FBI office where he was taken for interrogations.

  When he asked why he was detained, he was reportedly told, "you're a protected witness," but he said he was not given any document that detailed any charges against him or that stated that he was a material witness.

  In mid-October, six or seven FBI agents interrogated Alrababah for four or five hours. He said he was informed of his right to have an attorney present but he waived his right telling agents, "I'm innocent. I am sure about what I say." Alrababah said one of them, an agent named "Burkowski" threatened him. "He was yelling and screaming. He said 'disgusting Arabs,' and told me 'I'm going to throw you out of the window like

they do in your country.'" Alrababah was interrogated two or three more times, always without an attorney present.

Alrababah was moved to the Metropolitan Correctional Center in Manhattan at the end of October. There he spent about forty-five days in isolation with the lights constantly on. He was reportedly hardly allowed out of the cell. "If you're lucky, you get one hour [of outside time] a week," he told Human Rights Watch. He also said that communication with the outside was "horrible." Alrababah said that he could not call anyone and was only able to tell his fiancée that he was in detention through another detainee. "Nobody knows you are there," he said.

His fiancée confirmed that this detainee called her with Alrababah's message. She had found out from officials where Alrababah was held just a few days before; officials also told her that she could communicate with him only via mail.

From Manhattan, Alrababah was transferred to the Metropolitan Detention Center in Brooklyn in late November. He said that he was assigned an attorney the day he was supposed to appear before a grand jury, but he never testified. Alrababah said that he did not have an attorney during the first two months he was in detention. Despite being a material witness, he said he was not assigned a lawyer and he had tried to hire one but without success due to the difficulties of communicating with the outside from the detention centers.

Alrababah was moved to Alexandria City Jail, Virginia, in early December, where he appeared before a court for the first time since his arrest in September. He was charged with conspiracy and document fraud for signing a form falsely certifying that a New Jersey man was a Virginia resident, which allowed the man to obtain a Virginia driver's license. The man has not been linked to terrorism. Alrababah has not been charged with directly helping any of the the alleged hijackers obtain driver's licenses or with knowing their plans.

Alrababah was removed from solitary confinement and placed with the general prison population on February 21, 2002, after spending almost four months isolated in detention. He pleaded guilty to the document fraud charge and was sentenced to time served. He remains in detention pending deportation as of this writing.[242]

- Abdallah Higazy, whose case is described above, was detained as a material witness on December 17, 2001. He was held at the Metropolitan Correctional Center in Manhattan, New York, where he spent thirty days in solitary confinement.

  Higazy said he was only allowed out of the cell three times a week for showers, during which he was handcuffed. He said his cell was ten-by-eleven feet, had a toilet, a bed with a mattress, two sheets, and one blanket. He said the cell was very cold. After two weeks in detention Higazy saw that other detainees had two blankets, and asked for another one. The lights in his cell were kept on twenty-four hours a day. He complained about the lights once orally, but received no response. He said he was never told he could complain in writing.

  When Higazy learned later that he was supposed to be allowed outside time, he requested it seven times, until he was finally permitted to go outside once, the only time during his incarceration. The outside area that he was taken to on that occasion was indoors, though. The detainee said it was a big room (twenty-by-eleven feet) with nothing there (no television or radio). It was "like walking in a bigger cage," he told Human Rights Watch.

[242] Human Rights Watch interview with Eyad Mustafa Alrababah, Alexandria City Jail, Virginia, February 5, 2002; and telephone interview with Ardra Doherty, Eyad Mustafa Alrababah's fiancée, Nutley, New Jersey, January 15, 2002.

Higazy never testified before a grand jury. He was charged with lying to the FBI for denying that a pilot's radio allegedly found in his hotel room belonged to him. As described above, he was released when the owner of the radio, an American pilot, went to the hotel to claim it.[243]

- On October 11, law enforcement officials arrested nine Egyptian, one of whom was a naturalized U.S. citizen, in Evansville, Indiana.[244] Eight of the men were held as material witnesses and the ninth man, Mohammed Youssef, was held on immigration charges. Although the reason for their arrest is unknown, the wife of Fathy Saleh Abdelkhalek, one of the detainees, told a local newspaper that she had triggered the arrest when she called authorities and told them that her husband was suicidal and had threatened to die in a crash.[245] Friends of Abdelkhalek later said that he was not suicidal but that he and his wife had arguments about him sending most of his money home to his children in Egypt.

  The men were allegedly only allowed to make a phone call after they were questioned by the FBI and could not talk to their attorneys for four days after that. They were first held at the Henderson County Detention Center, Kentucky, and later transferred to the Chicago Metropolitan Correction Center. They said they were not allowed to call their families from the Chicago facility.

  Seven of the nine were released on October 18; Abdelkhalek was released on October 26, and Youssef remained in detention and faced deportation proceedings. Abdelkhalek returned to jail a few days later on immigration charges after his wife, who is a U.S. citizen, refused to sign documents that would allow him to stay in the United States.[246]

- Dr. Al-Badr Al-Hazmi, a Saudi national working as a doctor in San Antonio, Texas, was held as a material witness for thirteen days. He was taken first to a local jail, then flown to New York. Authorities allegedly questioned him about a flight he booked and about his credit cards. Al-Hazmi's name is similar to two of the alleged hijackers. He was described in the press by federal government sources as a key suspect who had provided funds for the hijackers. He was denied access to a lawyer for six days, during which he was interrogated repeatedly. He never testified before a grand jury and

[243] Human Rights Watch telephone interview with Abdallah Higazy, New York, New York, February 1, 2002. See also the chapter, Denial of Access to Counsel, in this report.

[244] The men are Fathey Saleh Abdelkhalek, thirty-four; Tarek Abdelhamid Albasti, twenty-nine, a naturalized U.S. citizen; Tarek Eid Omar, twenty-six; Khaled Salah Nassr, twenty-five; Yasser Shahin, twenty-four; Adel Ramadan Khalil, forty-six; Hesham Salem, twenty-eight; Ahmed Attia Hassan, twenty-six; and Mohammed Youssef, age unavailable. The men were former members of the Egyptian national rowing team. The FBI had visited Albasti twice prior to his arrest to inquire about his political beliefs and flying lessons he had taken. Albasti said that the lessons were a gift from his father-in-law, a lawyer and former United States diplomat who is a pilot.

[245] Dave Hosick, "'It Was My Responsibility to Tell,'" *Evansville Courier and Press*, October 22, 2001.

[246] "Federal authorities detain nine people in connection with terrorist activity," Associated Press, October 12, 2001; Terry Horne and Mike Ellis, "Feds detain 8 from Evansville in terror probe: All being held as material witnesses in FBI's investigation after Sept. 11 attacks," *Indianapolis Star*, October 13, 2001; Kimberly Hefling, "Men detained Sept. 11 hope their ordeal is finally over," Associated Press, October 28, 2001; Amy Goldstein et al., "A Deliberate Strategy of Disruption. Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror," *Washington Post*, November 4, 2001, p. A01; Pete Yost, "3 Tunisians ordered ou*t of U.S.,*" Associated Press, November 15, 2001; Don Van Natta, "Arrests have yielded little so far, investigators say," *New York Times*, October 21, 2001; Kim Baker, "Thread of a Threat Led to Wide Dragnet," *Chicago Tribune*, November 5, 2001; and Kimberly Hefling, "2 detainees in terror probe are now facing deportation: The Evansville men remain in jail, waiting for their month-old cases to be resolved," Associated Press, November 16, 2001.

was never charged with any crime or immigration violation.[247]

- Jose Padilla, a U.S. citizen who later used the name of Abdullah Al Mujahir, was arrested on May 8, 2002 on a material witness warrant when he arrived from Pakistan at Chicago's O'Hare International Airport. U.S. officials claimed he had met with al-Qaeda representatives overseas and had plotted to explode a "dirty bomb" on U.S. soil.[248] Padilla was transferred to the Metropolitan Correctional Center in New York, where he was held for a month and where he had access to an attorney.[249] On June 9, U.S. President George W. Bush signed an order designating Padilla as an "enemy combatant" and directing Defense Secretary Donald Rumsfeld to arrest and detain him indefinitely for interrogation. Padilla was transferred to the control of the U.S. military and moved to a Navy brig in South Carolina, where he is being held without charges or access to an attorney.[250]

The Department of Justice's use of material witness warrants to hold individuals in connection with the September 11 investigation has prompted two court decisions reaching opposite results on the lawfulness of such warrants. On April 30, 2002, a federal district judge in New York ruled that the use of material witness warrants to hold persons for future appearances before a grand jury was unlawful.[251] After an analysis of the material witness statute and constitutional considerations, the judge concluded that material witness warrants may only be issued after a criminal case has been filed, and not for a grand jury investigation. She wrote: "If the government has a probable cause to believe a person has committed a crime, it may arrest that person, …but since 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation."[252]

In July, in another case, a different federal district court judge in New York upheld the use of material witness warrants in the context of

[247] Testimony of Gerald H. Goldstein, Esq., before the Senate Judiciary Committee, December 4, 2001. Al-Hazmi was arrested in San Antonio, Texas on September 12, 2001 and released on September 24, 2001. See also, Scot Paltrow and Laurie P. Cohen, "Government won't disclose reasons for detaining people in terror probe," *Wall Street Journal*, September 27, 2001; Robyn Blumner, "Abusing detention powers," *St. Petersburg Times*, October 15, 2001; and "Saudi Doctor Proclaims Innocence After Release," *Washington Post*, September 26, 2001.

[248] The attorney general said: "In apprehending Al Muhajir as he sought entry into the United States, we have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb.'" A dirty bomb involves exploding a conventional bomb that not only kills victims in the immediate vicinity, but also spreads radioactive material that is highly toxic to humans and can cause mass death and injury. "Transcript of the Attorney General John Ashcroft Regarding the transfer of Abdullah Al Muhajir (Born Jose Padilla) to the Department of Defense as an Enemy Combatant," http://www.justice.gov/ag/speeches/2002/061002agtranscripts.htm, June 10, 2002.

[249] Al Muhajir appeared before a judge on May 15, 2002, who assigned him counsel.

[250] *José Padilla v. George Bush*, "Amended Petition for Writ of Habeas Corpus," United States District County for the Southern District of New York, June 19, 2002. Human Rights Watch questions the government's contention that international humanitarian law—or the laws of war—permits the president to unilaterally designate Padilla an "enemy combatant" who may be held by the military without charge or access to an attorney. International humanitarian law applies to the international armed conflict in Afghanistan, but it does not apply to any and all members of al-Qaeda regardless of their individual involvement with that conflict. If suspects are apprehended outside areas of armed conflict and have no direct connection to the conflict, international humanitarian law is inapplicable. Instead, the protections of international human rights law apply. In the case of a U.S. citizen detained in the United States, the protections of U.S. constitutional law apply as well. These protections include the rights to be formally charged and permitted access to counsel.

[251] *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. April, 2002).

[252] Ibid, p. 59

grand jury investigations.[253] The judge argued that Congress had intended the material witness statute to apply to grand jury proceedings as well as trials; that detaining witnesses for appearance before a grand jury did not violate the Fourth Amendment, and that courts for decades have routinely applied the statute on the assumption that it could be used to secure the testimony of material witnesses before a grand jury. [254]

The court's opinion in *United States v. Osama Awadallah* offers a detailed picture of how the Department of Justice used a material witness warrant in the case of Osama Awadallah, a lawful permanent resident of the United States and a citizen of Jordan, and how he was treated while detained. Awadallah was first held as a material witness and later charged with perjury for denying to federal investigators that he knew the name of one of the September 11 alleged hijackers, even though he admitted he had met him and another hijacker, whom he identified.[255] The judge ruled his detention illegal and suppressed his testimony not only because of the misuse of the material witness statute in the context of a grand jury investigation but because of an array of other violations committed by the U.S. government. The material witness statute provides that no individual may be detained if his or her testimony can adequately be secured by deposition.[256] In an earlier decision the same judge had concluded that despite being detained for twenty days as a material witness, "there was no indication that the government had attempted to take Awadallah's deposition or offered to explain why it would not have been feasible—even though Awadallah's counsel made the offer to have Awadallah deposed."[257] In addition, the judge determined that the arrest warrant against Awadallah was improperly issued due to "intentional misrepresentations and omissions" contained in the government affidavit, which exaggerated his flight risk and failed to say that he had fully cooperated with law enforcement agents.[258]

The proceedings in Awadallah's case also revealed a grim picture of the treatment that he and other material witnesses received while in custody. As the judge pointed out, Awadallah was held under conditions "more restrictive than that experienced by the general prison population."[259] Whenever he was transported he was placed in a "three-piece suit," consisting of leg shackles, a belly chain, and handcuffs looped through the belly chain so that the hands were restrained at his waist. He was held in solitary confinement, not allowed to have family visits, and unable to make telephone calls for the twenty days he was held as a material witness; his attorney was unable to locate him for four days. Awadallah was also denied showers for many days and strip-searched each time he was taken from and to his cell.

Awadallah and some other material witnesses were held in the maximum-security wing at the Metropolitan Correctional Center (MCC) in New York. Two material witnesses who had been incarcerated there independently told Human Rights Watch that they were held in isolation with the lights on twenty-four hours a day and could not make a single phone call during their stays there (forty-five days for one and thirty days for the other).[260] They also said that they were hardly ever allowed outside of their cells. Human Rights Watch requested but was

[253] *In re the Application of the United States for a Material Witness Warrant*, 2002 U.S. Dist. Lexis 13234 (S.D.N.Y. July 11, 2002).

[254] The Fourth Amendment to the U.S. Constitution states: "The right of people against …unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause."

[255] Osama Awadallah was a subject of the investigation because agents found a scrap of paper in a car abandoned by the alleged hijackers with the phone number of a residence where he briefly lived two years earlier. He was arrested September 20, 2001 and spent eighty-three days in prison before being released on bail. See discussion of this case in the chapter, Denial of Access to Counsel, in this report.

[256] See statute in note 237 above.

[257] *United States of America v. Awadallah*.

[258] Second Opinion and Order, *United States of America v. Awadallah*.

[259] First Opinion and Order, *United States of America v. Awadallah*.

[260] Human Rights Watch interview with Alrababah; and telephone interview with Higazy.

denied access to the Metropolitan Correctional Center.[261]

Government statements filed in the Awadallah proceedings confirmed a policy at MCC of prohibiting material witnesses from making phone calls.[262] The government acknowledged in an affidavit that "Awadallah and other inmates who were at the New York MCC in connection with the investigation into the September 11 terrorist attack were designated high-security inmates and handled in accordance with the procedures for such inmates."[263] According to another government affidavit: "The warden determined that until [the MCC] had any concrete evidence from the FBI or other folks, that there was not a terrorist association or anything of that nature, [the MCC] would have to keep [the material witnesses] separate" and special precautions would apply.[264] Prison officials recorded their movements with a hand-held camera, a policy that had been previously used with the "African Embassy bombers," the persons charged in the 1998 bombings of the U.S. embassies in Nairobi and Dar es Salaam.[265]

VII. CONDITIONS OF DETENTION

We were treated like criminals. We felt discriminated against and treated different from other detainees. Our requests were ignored; we were held in isolation and had no access to our lawyer for two weeks. Other prisoners did not face these conditions. We felt the treatment was degrading.

Bah Isselou, INS detainee,
October 6, 2001.[266]

Persons detained on immigration charges or on material witness warrants are not accused of criminal conduct, much less convicted of it. Nevertheless, detainees held in connection with the September 11 investigation have been treated as though they were convicted terrorists. They have been forced to spend weeks and even months enduring harsh detention conditions. Some have been held in solitary confinement, allowed out of their cells infrequently, subjected to extraordinary security measures, and often prevented communicating with the outside world, including with family and attorneys. Some have been victims of verbal and physical abuse, denied adequate medical attention, and housed with suspected or convicted criminals. Non-English-speaking detainees have been unable to communicate with officials due to lack of translators and bilingual jail staff. Finally, Muslim and Jewish detainees have had considerable difficulty meeting their religious obligations, including praying practices and special diets.

Such conditions are inconsistent with basic human rights protected by international standards. The International Covenant on Civil and Political Rights (ICCPR) establishes that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[267] The ICCPR also prohibits any "cruel, inhuman or degrading treatment or punishment."[268] The numerous alle-

[261] The warden of MCC denied Human Rights Watch's request in a November 30, 2001 letter that stated that the events of September 11 required the facility to minimize "activities not critical to the day-to-day operations of the institution." Gregory L. Parks, warden, Metropolitan Correctional Center. Letter to Human Rights Watch, November 30, 2001.

[262] First Opinion and Order, *United States of America v. Awadallah*.

[263] Government affidavit by U.S. Deputy Marshall Scott Shepard, cited in *United States of America v. Awadallah*, First Opinion and Order, p. 10.

[264] Government memorandum cited in *United States of America v. Awadallah*, First Opinion and Order, p. 10.

[265] Ibid, p. 11.

[266] Human Rights Watch telephone interview with Bah Isselou, Florida, October 6, 2001.

[267] International Covenant on Civil and Political Rights, Art. 10.

[268] Ibid., Art 7. The Human Rights Committee, in general comment no. 20, states that "prolonged solitary confinement" of the detained or imprisoned person may amount to acts of torture or cruel inhuman and degrading treatment in violation of article 7 of the ICCPR. This is especially true when it is accompanied by aggravating circumstances, such as lengthy

gations of abuse and inadequate detention conditions have prompted the Department of Justice's Office of the Inspector General to launch an investigation of the treatment of "special interest " detainees held at Passaic County Jail and the Metropolitan Detention Center.[269] Its report is scheduled to be released by October 2002.[270]

Some forms of mistreatment that many "special interest" detainees have endured are no different from those faced by other immigration detainees. A 1998 Human Rights Watch report concluded that many jails used by the INS to hold immigration detainees did not provide adequate detention conditions.[271] The report documented, among other findings, that INS detainees were held with and under the same punitive conditions as convicted criminals. Living quarters were often overcrowded; access to exercise was inadequate; food and clothing were sometimes limited; and medical and dental care was substandard. In addition, access to legal representatives, family, and friends was severely curtailed by strict jail rules that were inappropriate for administrative detainees. The report also documented the INS's failure to oversee appropriately the conditions under which the detainees lived.

One of the reasons for these inadequacies was the lack of national guidelines and standards for the treatment of immigration detainees. In part as a result of criticism by Human Rights Watch and other groups, the INS developed Detention Standards to be implemented in all facilities that house INS detainees to ensure minimum guarantees in their treatment. The precise timetable for the implementation of the Detention Standards is a mystery.[272] Our ongoing monitoring of the conditions under which INS detainees are confined indicates, however, that they continue to be held under inadequate conditions that fail to meet the Detention Standards. In addition, 54 percent of immigration detainees continue to be incarcerated in jails that are intended for accused or convicted criminal inmates, and often hold immigration detainees with those populations.[273]

duration, incommunicado, small cell, or little light. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 187. In the case of *Campos v. Peru* (HRC, 577/94, para. 8.7), the Human Rights Committee found that three years of continued solitary confinement was a breach of article 7. See also, *Marais v. Madagascar* (49/79); and *El-Megreisi v. Libyan Arab Jamahiriya* (440/90).

[269] "DOJ Initiates Detainee Civil Rights Review," Announcement by the Department of Justice, April 2, 2002.

[270] Human Rights Watch met on April 25, 2002 with staff from the Office of the Inspector General to discuss the treatment of September 11 detainees and some of the findings of this report. Their timeline for the release of the report is included in "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," U.S. Department of Justice—Office of the Inspector General, July 15, 2002.

[271] Human Rights Watch, "Locked Away: Immigration detainees in jails in the United States," *A Human Rights Watch Report*, vol. 10, no. 1(G), September 1998. Most non-citizen detainees are confined in local jails because of a shortage of space in federal facilities.

[272] The INS's website states that implementation of the Detention Standards will take place in two phases over a period of two years. The first phase will cover INS Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and the nine largest state and local government facilities (IGSA facilities) and the second phase will cover the remaining IGSA facilities. All phase-one and phase-two facilities must be in compliance with all INS Detention Standards, by December 31, 2002. (See http://www.ins.gov/graphics/lawsregs/guidance.htm). However, in our February 6, 2002 visit to the Hudson County Correctional Center in New Jersey, one of the nine largest IGSA's, jail officials said that they only had to be in compliance with the Detention Standards by the end of the year. Human Rights Watch repeatedly asked the INS through phone calls and in writing, individually and through a coalition of NGO's, during a three-month period in early 2002, when specific facilities must be in compliance with the Detention Standards, but it received no clear answer.

[273] INS Detention Standards Presentation to various NGOs by the INS's Detention and Removal Office, June 7, 2001. The reason the INS holds individuals in its custody in local jails is its lack of adequate space in federal facilities to house the exponentially-growing population of immigration detainees. In 2001, the INS had 22,000 people in custody on an average day, compared to 6,700 per day in 1995.

Administrative Segregation

Scores of non-citizens detained in connection with the investigation of the September 11 attacks and charged with administrative violations, minor crimes, or held as material witnesses have been incarcerated for weeks and even months in segregated housing units designed for inmates with records of extremely dangerous or high security risk behavior. Some facilities kept the detainees isolated in their cells twenty-four hours a day, with only brief breaks for exercise outside of the cells a few times a week. They had restricted or no access to telephones, limited visitation rights, and were denied access to libraries, radio, and television. In some cases, the lights were kept on in their cells twenty-four hours a day.

Such harsh and punitive conditions are typically used to punish jail or prison inmates for violating disciplinary rules or to segregate inmates with a history of dangerous conduct or who might be at risk from other inmates ("administrative segregation"). They are completely unjustified for persons detained on material witness warrants because they may have information useful to a criminal investigation and who have not violated jail rules while incarcerated. They are equally unjustified for persons detained on immigration charges. According to the INS's Detention Standards, administrative segregation should be a "non-punitive form of separation from the general population" under which detainees should "receive the same general privileges as detainees in the general population, consistent with available resources and security considerations." These privileges include interaction with other detainees, visitation and access to recreation, television, board games, the law library, and reading materials, and telephone access similar to that of detainees not held in segregation.[274]

In November and December 2001, fifty-four to fifty-six men, the majority or all of whom were "special interest" cases, were incarcerated in the Special Housing Unit (SHU) of the Metropolitan Detention Center in New York. Some were doubled-up in one-person cells while others were held alone, according to the Legal Aid Society of New York.[275] Lights were kept on twenty-four hours a day at the SHU and the windows in some cells were covered so no sunlight filtered through.[276] Attorneys said that their clients complained that they were woken up every day in the middle of the night for head counts. They also said that detainees were only allowed one hour of outdoor exercise per day. Since the exercise period was scheduled for 6:00 a.m. and the detainees were not given winter clothes, many declined to leave their cells. Detainees were shackled, cavity-searched, and videotaped whenever they were moved outside their cells, and they were videotaped even when

[274] See Special Management Unit (Administrative Segregation) Detention Standard at http://www.ins.gov/graphics/lawsregs/smu_adm.pdf.

[275] Human Rights Watch telephone interview with Brian Lonegan, Legal Aid Society, New York, New York, April 15, 2002.
The number of "special interest" cases kept at the SHU decreased to eighteen by the end of March 2002, fourteen by mid-May, and seven a month later, after some detainees who had been held there were deported, moved with the general population, or transferred to other facilities. Human Rights Watch telephone interviews with attorney Bill Goodman, New York, New York, March 25, 2002; with attorney Lawrence Feitell, New York, New York, May 14, 2002; and with Adem Carroll, Islamic Circle of North America, New York, New York, June 13, 2002.

[276] Covering windows so that no natural light enters the cells is a violation of international standards. Rule 11 of the U.N. Standard Minimum Rules for the Treatment of Prisoners states: "In all places where prisoners are required to live or work, the windows shall be large enough to enable the prisoners to read or work by natural light." "Standard Minimum Rules for the Treatment of Prisoners," adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, Annex I, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).
The Human Rights Committee has determined that a cell constantly illuminated by artificial light contributed to conditions of detention that were considered inhuman under article 10 of the ICCPR. See, e.g. *Massiotti and Baritussio v. Uruguay*, Communication No. R.6/25/1978; *Larrosa v. Uruguay*, Communication No. 88/1981.

they were talking to their attorneys. Lawyers told Human Rights Watch that they did not know for sure if the cameras recorded sound but their confidential conversations with their clients could certainly be lip-read. Attorneys have also alleged that some detainees held at the SHU were physically and verbally abused,[277] denied medical care,[278] allowed only very restricted access to telephones,[279] and deliberately prevented from observing certain mandatory religious practices.[280]

Detainees held in administrative segregation at other facilities endured similarly stringent conditions of detention. For instance, Uzi Bohadana said he was held seventeen days in solitary confinement at Concordia Jail in Ferriday, Louisiana, during which he could not make any phone calls or receive any visits. He said he was not allowed outside of his cell at all during this time. He said a nurse came to his cell regularly to treat the injuries he had received after being beaten by inmates at another facility. Bohadana said that sometimes correctional officers did not take him to the showers for a week. He had no radio, television, and no reading materials. When he protested the conditions of his detention, correctional officers said the FBI had ordered it.[281]

An undisclosed number of "special interest" cases were held in isolation at Denton County Jail in Texas. One of them was Ghassam Dahduli, a forty-one-year-old Palestinian man born in Saudi Arabia. Dahduli, who had lived in the United States since 1978, had been charged with an immigration violation before September 11 for taking a part-time job in network engineering when his visa allowed him to engage only in religious work.

Dahduli was free on bond while the case made its way through immigration courts. On September 22, 2001, fifteen to twenty FBI, police, and INS agents came to his house "with full media accompaniment," Dahduli said. The INS revoked his bail, arguing he was a flight risk and a danger to the community. Dahduli said that the officials told the media he had contacts with bin Laden, which he adamantly denied.

Dahduli was handcuffed, placed in belly chains and shackles, and transported to Denton County Jail, Texas, where he remained for sixty-six days in solitary confinement. He was held in a seven-by-ten-foot cell that had a shower and a toilet although it was "freezing." Dahduli was not given an additional blanket. He did not have access to television, radio, or newspapers; he received a Quran only two weeks before he was deported. Dahduli said he was only allowed out of his cell three times a week for an hour, when he was taken to an outdoor area where he stayed alone. He stated that he was usually let out at 6:30 or 7:00 a.m., when it was "freezing cold." He only had a short-sleeved shirt and was not permitted to take a blanket. When it was raining or had rained and the floor was wet he was not allowed outside.[282]

[277] Two plaintiffs in a class actions suit against the U.S. government—Asif-ur-Rehman Saffi and Syed Amjad Ali Jaffri—maintain they were physically abused by correctional officers at the MDC. *Ibrahim Tukmen v. John Ashcroft*, "Class Action Complaint and Demand for Jury Trial," April 17, 2002. See also the section, Physical and Verbal Abuse, in this report. The Legal Aid Society of New York said that they talked to two detainees who said they had been roughed up, spat on, pushed against the walls, and cursed by the correctional officers. Human Rights Watch telephone interview with Lonegan.

[278] Shakir Baloch was constipated for six to eight weeks and was not given any medication while being held at the SHU, according to his attorney. The attorney said that another of his clients incarcerated at the SHU was beaten by correctional officers and had his teeth chipped but received no dental care. Human Rights Watch interview with Goodman.

[279] See chapter, Denial of Access to Counsel, in this report.

[280] See section, Inability to Satisfy Religious Obligations, in this report.

[281] Human Rights Watch telephone interviews with Uzi Bohadana, Hollywood, Florida, November 13, 2001. Bohadana had been arrested on September 14, 2001 for working while on a tourist visa. He was released on bond on October 5.

[282] Human Rights Watch telephone interview with Ghassam Dahduli, Ammam, Jordan, December 19, 2001 and January 17, 2002.

Dahduli was deported on November 26, 2001. He was escorted to Jordan by an INS deportation and removal officer and by a Department of Justice investigator assigned to his case. Dahduli said that an FBI agent was waiting for him at the airport with Jordanian authorities. He was detained and placed in isolation in Jordan for fifteen days during which he was interrogated four times, but he said he was treated well while in custody. Dahduli has been released and he said he has not had any further contact with Jordanian or U.S. authorities.[283]

Some detainees from the Middle East, South Asia, or North Africa, who were in the custody of the INS before September 11 were moved to segregation after the terrorist attacks. For example, Mahtabuddin Ahmed, a citizen of Bangladesh, was placed in solitary confinement at the Central Virginia Regional Jail in Orange, Virginia, shortly after September 11 and only removed thirty-three days later in response to his lawyers' complaints. Ahmed said he had no hot water for a week and was not given access to cleaning products or a brush even though the toilets in his cell wing flooded repeatedly and the sewage stagnated in his cell. He was handcuffed and shackled when he was taken from his cell, one hour per day; the shackles were kept during his indoor recreational time and in the shower. He was not allowed outdoors at all. Ahmed said that he was told by the jail official in charge of inmate classification that he had placed him in administrative segregation for his own protection because of his last name. Ahmed said that there were other Muslims in the general population who were not placed in solitary confinement.[284]

[283] Dahduli also faced special restrictions on telephone use as a result of being in solitary confinement. He was allowed to make a phone call the day he was arrested but could not call for three days after that. Even though he had the right to three hours of phone use per day, he said that the correctional officers never brought the phone on time, and it had to be shared by ten detainees. Dahduli said that in reality he could only make a phone call once a day for about fifteen minutes.

Dahduli's case was shrouded in secrecy. He said he was never informed of his right to contact the Jordanian embassy. Proceedings were closed to the public and to his family. Hearings were conducted through videoconference so Dahduli did not leave the jail.

According to press reports, Dahduli's name appeared in an address book of an al-Qaeda member. Dahduli's attorney reportedly said that her client and the man belonged to the same mosque in the 1980s and had a brief encounter in 1998. Amy Bach, "Deported…Disappeared?" *The Nation*, December 24, 2001; Mary McKee, "Peers say arrest of Richardson man is a shock," *Fort Worth Star-Telegram*, September 26, 2001.

Dahduli also told Human Rights Watch that he had been confronted by two FBI agents in 2000. The agents allegedly threatened to take him away from his family, to deport him, and to call the Jordanian government and say that he was an informant unless he cooperated with them. His attorney at the time believed that they did not want any information but rather they wanted him to serve as their mole indefinitely. Dahduli did not agree to the FBI's demands.

"If I was a suspect, why wasn't I ever interrogated? I never saw an INS or an FBI officer while I was in jail," Dahduli told Human Rights Watch. His attorney said that Dahduli had not been interrogated since she was retained in January 2001.

Dahduli dropped the four applications he said he had with the INS to regularize his immigration status because he was told he would have to stay in jail during the process, which could take a year or more. He was deported to Jordan because he held a valid Jordanian passport, even though Dahduli was born in Saudi Arabia of Palestinian refugees. His Saudi Arabian travel documents expired when he was unable to travel there during the Gulf War, and he could not renew them after their expiration. Human Rights Watch telephones interview with Dahduli; and with attorney Karen Pennington, Dallas, Texas, January 15, 2002.

[284] Human Rights Watch telephone interview with Mahtabuddin Ahmed, Hanover, Virginia, on December 11, 2001; and letter from Mahtabuddin Ahmed's attorneys Thomas Elliot and Fabienne Chatain to INS Deportation Officer Sherryl Crenshaw, October 29, 2001. Ahmed, who is twenty-seven-years-old, came to the United States when he was four years old. He was convicted of drug possession with intention to distribute and served his sentence in 1998-99. On October 22, 1999, he was picked up by the INS, which initiated removal procedures against him, and moved him to Piedmond Regional Jail in Farmville, Virginia. Ahmed said he was ordered deported in November 2000, but he is still in detention because the INS is waiting for travel documents from the consulate of Bangladesh.

The criteria used to assign a detainee to administrative segregation are unclear. Many detainees were never told why they were subjected to such extreme conditions of detention.[285] When asked, some jail officials reportedly told detainees that they were kept in isolation for their own protection. While Human Rights Watch recognizes that some detainees may have needed protection from other inmates, such protection could be provided without depriving the detainees of access to phones, visits, reading material, radios, and the ability to interact with other non-criminal detainees.

The apparently arbitrary placement of some "special interest" detainees in segregated confinement is evidenced by the treatment of three pairs of "special interest" detainees at three different jails. In each case, the detainees were nationals of the same countries and were charged with the same immigration violations, but were nonetheless held under different detention conditions: One detainee kept in isolation and the other one held with the general prison population. One of the cases involves Osama Elfar, an Egyptian citizen, who was being held in solitary confinement for a week at Jennings Jail in Missouri, while another Egyptian citizen, Ibrahim Bayoumi, was not.[286] Both were charged with overstaying their visas. Elfar said that when he asked a correctional officer why he was held in isolation, he told him that the INS had ordered it for his own safety. However, this did not spare him from being harassed and verbally abused by inmates and correctional officers, who called him a terrorist and a member of Osama bin Laden's organization. Elfar was not allowed to take a shower for five days or leave his cell at all for several days. Even though he was told that visits were permitted two days a week, jail officials apparently told his father and some friends who had come to see him that the INS had ordered that Elfar not receive any visits.[287]

It appears that some "special interest" detainees were held in segregation not for their

[285] The INS's Detention Standards state that a copy of the Administrative Segregation Order, which details the reasons for placing a detainee under such a detention regime, shall be given to the detainee within twenty-four hours of placement in administrative segregation. Reviews shall be conducted seventy-two hours after the detainee was segregated, every week for the first month, and at least thirty days thereafter. The Detention Standards further state that a copy of the decision and justification for each review shall be given to the detainee. These procedures were not followed in the cases of the detainees interviewed by Human Rights Watch, none of whom received the detailed written communications the Detention Standards prescribe.

[286] Another case involves Elyes Glaissia and his roommate, both from Tunisia, who were incarcerated at the Seattle, Washington, INS Detention Center on charges of overstaying their visas. Glaissia was held in solitary confinement for ten days, while his roommate was held with the general population. Glaissia's cell had the lights on twenty-four hours a day and he was not allowed to go outdoors at all, according to his attorney. Glaissia reportedly was never told why he was kept under this regime. The men were arrested when another roommate accused Glaissia of making threatening comments against the United States, comments that Glaissia denied ever uttering. Human Rights Watch telephone interviews with attorney Vicky Dobrin, who represented the two men, Seattle, Washington, November 20, 2001 and January 31, 2002.

Similarly, two Saudi Arabian brothers were arrested at the Denver International Airport in Colorado and charged with immigration violations. They were held at the INS Detention Center in Denver, where the older brother was placed in solitary confinement for eight or nine days without being told why while the younger one was held with the general population, according to their attorney. Human Rights Watch telephone interview with Donna Lipinski, who represented the two brothers, Englewood, Colorado, October 23, 2001.

[287] Elfar was transferred to another jail only after his attorney complained about the conditions of his detention. An immigration judge granted Elfar voluntary departure with safeguards—meaning that he would leave the country straight from the detention facility—and gave an October 23 deadline to the INS for Elfar's removal. Elfar was only allowed to leave the country on December 4, 2001 after his attorney petitioned for an habeas corpus writ. He was arrested by Egyptian authorities upon his arrival to the North African country, and spent four or five days in their custody. Human Rights Watch telephone interviews with Osama Elfar, November 21, and 26, 2001, with his attorneys, Dorothy Harper, October 22, and October 24, and Justin Meehan, October 22, 23, 24, 2001, and February 25, 2002.

own protection or because there was any evidence that they were a danger to themselves or to others, but solely because they were under investigation in connection with the September 11 attacks. When Ali Alikhan protested being kept in isolation, a correctional officer reportedly told him, "they want to check if you are a bad person or not."[288] Alikhan's attorney said that he believed his client was placed in segregation for coercion and punishment.[289]

Extreme conditions of detention have taken their toll on detainees. A man interviewed by Human Rights Watch after being kept in solitary confinement for more than three months appeared to have memory problems, said he could not sleep for the first two months, and that he was depressed.[290] Another detainee said he was going "crazy" while in isolation.[291] These reactions to prolonged isolation are not uncommon. Psychiatrists say that some detainees who are held in solitary confinement for long periods may suffer from memory loss, severe anxiety, hallucinations, and delusions.[292]

Physical and Verbal Abuse

Several non-citizens detained in connection with the investigation of the September 11 attacks have alleged that law enforcement officials or correctional staff physically and verbally abused them while in custody. It is impossible to know, however, how prevalent the mistreatment of detainees has been due to lack of access to them and the secrecy that has shrouded the investigation. Human Rights Watch has documented two cases of physical abuse by public officials and three cases by criminal inmates where authorities failed to prevent the aggression or act to stop it. Three other detainees have alleged in two pending lawsuits filed against the U.S. government that officials beat them.[293] In addition, a third of the detainees interviewed by Human Rights Watch said that they had suffered verbal abuse from correctional officers and/or criminal inmates.

Cases of alleged physical abuse committed by law enforcement agents or jail staff include the following:

[288] Human Rights Watch telephone interview with Ali Alikhan, Vail, Colorado, March 11, 2002.

[289] Human Rights Watch interview with attorney Jim Salvator, Colorado, March 15, 2002.

[290] Human Rights Watch interview with Eyad Mustafa Alrababah, Alexandria City Jail, Virginia, February 5, 2002.

[291] Human Rights Watch telephone interview with Alikhan.

[292] A Human Rights Watch report on conditions at super-maximum security prisons concluded that prisoners subjected to prolonged isolation may experience depression, despair, anxiety, rage, claustrophobia, hallucinations, problems with impulse control, and/or an impaired ability to think, concentrate, or remember. The report also asserted that some inmates held in isolation develop clinical symptoms usually associated with psychosis or severe affective disorders. Human Rights Watch, "Out of Sight: Maximum Security Confinement in the United States," *A Human Rights Watch Report*, vol. 12, no. 1(G), February 2000, p. 2. See also, Human Rights Watch, *Cold Storage: Super-Maximum Security Confinement in Indiana*, (New York: Human Rights Watch, 1997), pp. 62-74.
For reports on this issue from other sources, see, for instance, Angie Hougas, "Psychological Death Row: Supermaximum Security Prisons, Sensory Deprivation and Effects of Solitary Confinement," October 2001, found at Amnesty International Chapter 139's website at
http://danenet.danenet.org/amnesty/supermax.html;
"Profile: Dispute over the effects of solitary confinement in Supermax prisons on inmates," *NPR's Weekly Edition*, January 8, 2000; James Patterson, "The Effects of Physical Isolation," *Indianapolis News*, January 16, 1999; and "Trend Toward Solitary Confinement Worries Experts," *CNN,* January 9, 1998.

[293] The U.S. press reported allegations of verbal and physical abuse in some other cases. See, for instance, the case of Mohammed Maddy, who sustained a bruise on his upper right arm allegedly inflicted by correctional officers at the Metropolitan Detention Center in Brooklyn. Graham Rayman, "Kennedy Ticket Agent Arrested," *Newsweek.com*, October 5, 2001; and Al-Badr Al-Hazmi, who claimed he was kicked on his back by a correctional officer at the Metropolitan Correctional Center, as reported by Deborah Sontag, "Who is This Kafka That People Keep Mentioning?" *New York Times Magazine*, October 21, 2001. See also, Anne-Marie Cusac, "Ill-Treatment on Our Shores," *The Progressive*, March 2002; and Richard A. Serrano, "Many Held in Terror Probe Report Rights Being Abused," *Los Angeles Times*, October 15, 2001.

- Tony Oulai, the citizen of the Ivory Coast, whose case is described above, told Human Rights Watch that interrogators beat him while he was detained in Baker County Detention Center, Florida. Oulai was alone in an unlit cell that had a bed but no sheets or blankets after midnight on September 17, 2001, when two men wearing jeans and t-shirts, and no identification or badges opened his cell. They put handcuffs and shackles on him, and took him to another cell for interrogation. They asked him if he was a Muslim and if he was from an Islamic country. He replied "no" to each question. Oulai said that one of the interrogators hit him from behind. He fell on the floor and curled up to protect himself. One of the men put a foot on Oulai's neck, while the other one hit him on the back and in the face repeatedly. "I was begging for my life," said Oulai. He estimated that the beating took less than an hour.

  Bleeding from his nose, mouth, and ears, Oulai was then taken by the two men to a cell where there was an Egyptian detainee. Oulai said he could not talk and he fell asleep. In the morning he gave his sister's name to the Egyptian man and asked him to call her. He complained to jail officers but said they told him, "They are going to take care of you where you're going." Oulai was then transferred to Bradenton Federal Detention Center in Manatee County. [294]

- A lawsuit against the government described instances of abuse Asif-ur-Rehman Saffi, a Pakistan-born French citizen, claimed he suffered at the Metropolitan Detention Center (MDC) in New York:

  > At MDC, Mr. Saffi was dragged roughly from the van into the building. On the way, his face was slammed into several walls … [Correctional officers] bent back his thumbs, stepped on his bare feet with their shoes, and pushed him into a wall so hard that he fainted. After Mr. Saffi fell to the floor, they kicked him in the face. The lieutenant in charge …called Mr. Saffi a terrorist, boasting that Mr. Saffi would be treated harshly because of his involvement in the September 11th terrorist attacks and threatening to punish him if he ever smiled … [Correctional officers] swore at him, belittled and insulted his religion, and degraded him. They called him a religious fanatic and a terrorist.[295]

- Another plaintiff in the same lawsuit, Syed Amjad Ali Jaffri, a citizen of Pakistan, also claimed he was physically and verbally abused by correctional officers at the Metropolitan Detention Center:

  > One [correctional officer], in the presence of [other officers], told [Jaffri]: "Whether you [participated in the September 11th terrorist attacks] or not, if the FBI arrested you, that's good enough for me. I'm going to do to you what you did." The [correctional officer] then slammed Mr. Jaffri's head into a wall, severely loosening his lower front teeth and causing him extreme pain. Mr. Jaffri felt pain and discomfort from that injury throughout his stay at MDC. He was never, however, allowed to see a dentist.[296]

[294] Human Rights Watch interview with Tony Oulai, Alexandria City Jail, Virginia, February 9, 2002. Oulai was arrested on September 14, 2001 and charged with overstaying his visa. Instead of being deported as an immigration judge had ordered, he was then held as a material witness, and when the material witness warrant was dismissed, he was charged with lying to federal agents the day of his arrest about whether he was living legally in the United States.

[295] *Tukmen v. Ashcroft*, pp. 23-24. The lawsuit was filed by the Center for Constitutional Rights as a class action suit on April 17, 2002 on behalf of Ibrahim Turkmen, Asif-ur-Rehman Saffi, and Syed Amjad Ali Jaffri, and other unnamed "special interest" detainees. Saffi was arrested on September 30, 2001 and charged with working without authorization. He was deported on March 5, 2002.

[296] Ibid, p. 28. Jaffri was arrested on September 17, 2001 and charged with working without authorization. He was deported on April 1, 2002.

- Osama Awadallah, a lawful permanent resident of the United States and a citizen of Jordan, maintained that he was mistreated at various detention facilities while he was being held as a material witness.[297] His allegations are included in a statement his attorney filed with the court on his behalf:

  > The guards [at the San Bernardino County jail, California] forced [Awadallah] to strip naked before a female officer. At one point, an officer twisted his arm, forced him to bow and pushed his face to the floor…. The government transferred Awadallah to a federal facility in Oklahoma City on September 28…. While in Oklahoma, a guard threw shoes at his head and face, cursed at him and made insulting remarks about his religion…
  >
  > On October 1, 2001, Awadallah was shackled in leg irons and flown to New York City.… At the New York airport, the United States marshals threatened to get his brother and cursed "the Arabs"…. The marshals then transported him to the Metropolitan Correctional Center in New York ("New York MCC") where he was placed in a room so cold that his body turned blue…. Awadallah was then taken to a doctor. After being examined, a guard caused his hand to bleed by pushing him into a door and a wall while he was handcuffed…. The same guard also kicked his leg shackles and pulled him by the hair to force him to face an American flag….
  >
  > The next day, October 2, 2001, the marshals transported Awadallah to [the] Court. With his hands cuffed behind his back and bound to his feet, the transporting marshals pinched his upper arms so hard that they were bruised… In the elevator, the marshals made his left foot bleed by kicking it and the supervising marshal threatened to kill him…[298] The U.S. government stated in an affidavit filed in court that "there is no dispute that Awadallah had bruises on his upper arms as of October 4, 2001."[299] A report by a Special Investigative Agent found that Awadallah had "multiple [bruises] on arms, right shoulder, [and] both ankles, a cut on his left hand, and an unspecified mark near his left eye."[300]
  >
  > Marvin Lee Owen, an attorney for the Metropolitan Correctional Center, testified at a hearing that he had seen photos of Awadallah's bruises and they were "consistent with being gripped firmly while being moved in and out of court," according to a press report.[301]

Detainees have also claimed they were verbally harassed and physically abused by jail inmates held on criminal charges. At least three have said they were beaten by inmates and that correctional officers failed to prevent the attacks or to act in a timely manner to stop them. Two of the detainees were held in Mississippi jails where immigration detainees were commingled with accused or convicted criminals.[302] In both cases, inmates somehow learned that the targeted detainees had been arrested in connection with the terrorist investigation. The Civil Rights Division of the FBI opened investigations in

[297] Awadallah was held as a material witness for twenty days and then charged with perjury for saying that he knew the name of one of the alleged hijackers but not of another one. He was released on bond eighty-three days after his September 20, 2001 arrest. Human Rights Watch telephone interview with attorney Jesse Berman, New York, New York, November 6, 2001.

[298] Cited in *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 17, (S.D.N.Y. 2002).

[299] Government memorandum cited in First Opinion and Order, *United States of America v. Awadallah*, p. 11. The court where this government affidavit was filed reached no findings of fact regarding Awadallah's alleged mistreatment.

[300] Ibid.

[301] Patricia Hurtado, "Feds Testify in Jordanian's Hearing," *Newsday*, February 18, 2002.

[302] More than 50 percent of all immigration detainees are held in local jails where they often share living spaces with accused or convicted criminals.

these two cases but decided not to prosecute any of the alleged aggressors. Local law enforcement has also taken no action. A third man, Qaiser Rafiq, who was held on criminal charges in Connecticut, allegedly asked jail officials for protection after a local newspaper published a story linking him to terrorism. Jail staff took no measures to protect him. He said inmates beat him repeatedly. He was transferred out of the facility only after the third assault.

Cases of alleged physical abuse committed against September 11 INS detainees by inmates include:

- Uzi Bohadana, a twenty-four-year-old Jewish Israeli, was arrested on September 14, 2001, on immigration charges. He was held at the Madison County Jail in Canton, Mississippi. He told Human Rights Watch that he did not have any problems in jail for two days until someone—Bohadana suspects it was jail staff—spread the word he was a terrorist. At around 6:30 p.m. on September 16, he was sleeping on the floor when six inmates kicked him in the face and punched him. He said he passed out and then woke up hearing an inmate saying, "Come on, stop, leave him alone." Someone also said, "let's finish him," and he was beaten again. During the beating he was called a "fucking terrorist." Bohadana said he shouted for help and kicked the cell door. Prior to the attack, a correctional officer had always been stationed at a post about two feet away from the cell, but there was nobody there during the beating. At 9:15 p.m., more than two and a half hours after the beating, Bohadana said that correctional officers came in and took him out of the cell. His injuries required stitches on his right eye and lip, and surgery to treat his broken jaw.

  The next day, INS and FBI agents questioned Bohadana about the incident. Bohadana said that he identified the six men who attacked him from pictures that the officials showed him.[303] On December 27, 2001, he received a letter from the Civil Rights Division of the FBI stating: "We can take no action at this time because there is insufficient evidence to prove beyond a reasonable doubt the identity of the person or persons responsible for this crime."[304]

- Hasnain Javed, a twenty-year-old Pakistani, was arrested on September 19, 2001 for overstaying his visa and taken to the Stone County Correctional Facility in Wiggins, Mississippi. He was placed in a cell with five other INS detainees and about five accused or convicted criminals. Javed said that as he was making a phone call, a criminal inmate attacked him. According to Javed, "He gave an extremely powerful punch on my face and continued punching me so ferociously that he broke my front tooth. A second man then joined him, and they beat me up together for over five minutes." He rang an intercom bell and asked for help from a woman who answered. He was crying and pleaded, "Please come and save me." A third man also beat him. The attackers were shouting and calling him a terrorist, saying he was not from the United States. An inmate told him, "hey, bin Laden, this is the first round. There are gonna be ten rounds." "I have nothing to do with this man," Javed replied. "Too bad, you're Pakistani, you're too close," the inmate said. "They kept banging my head fiercely against the bars of the cell, and my left ear began to bleed," Javed said.[305] "I thought I was going to die. I was crying and praying for an officer to show up," he told Human Rights Watch. Javed said he went to his bunk, but the attackers would not leave him alone. They took his clothes off and beat him again. Everyone was cheering and laughing, and they shouted, "Kill him!" A

[303] Human Rights Watch telephone interviews with Bohadana; and with attorney Patricia Ice, Jackson, Mississippi, November 5, 2001.
[304] Letter from Albert N. Moskowitz, chief of the Criminal Section of the Civil Rights Division of the FBI, to Uzi Bohadana, December 27, 2001.
[305] Ibid.

man held him down naked while another one smacked him with a shoe. After being beaten for twenty or twenty-five minutes, correctional officers arrived at the cell. Javed had a tooth broken, bruised ribs, a split lip, a punctured eardrum, and a lacerated, swollen tongue. According to his lawyer, who saw him two days later, he could hardly speak. She said that Javed had to undergo therapy to deal with the emotional trauma stemming from the attack.

Javed did not know how the inmates knew his nationality since, he told Human Rights Watch, he is "very fair-skinned" and speaks perfect American English. In statements to the press, Stone County Sheriff Mike Ballard said that Javed taunted other detainees by saying, "Fuck the United States. I'm glad they hit the World Trade Center," an allegation that Javed denies. Ballard further asserted that Javed had attacked other inmates with a broom handle, so they reacted in self-defense. The sheriff did not explain why Javed would assault others naked. Ballard said the correctional officers were watching the assault on video and got to the cell in two or three minutes.[306]

Two days after the assault, once Javed was released on bond, his attorney took him to the New Orleans office of the FBI, where officials took pictures of his injuries, and to the local hospital. The FBI opened an investigation on the incident but it did not ask Javed to identify the attackers and it did not conduct any follow-up interview with him. His lawyer said that she offered the medical records but the FBI did not ask for them. She also informed the FBI, the INS district director, and law enforcement officials in Mississippi in an October 3 letter that several immigration detainees witnessed the assault.[307] When Human Rights Watch talked to the FBI agent in charge of the investigation at the end of November, he asked us if we knew the identities of those witnesses.[308] Javed's attorney told Human Rights Watch that to her knowledge, the FBI never contacted or interviewed these individuals.

She said that an FBI agent told her that the agency believed that no federal law had been broken and, thus, they would not take any action. By June 14, 2002, eight months after the assault, she had not received an official notification of this decision.[309] Local authorities have taken no action on the case.[310]

- Qaiser Rafiq, a national of Pakistan and a legal permanent resident charged with larceny, claimed he was beaten three times by inmates while in detention and that officials did nothing to prevent the attacks despite his complaints.[311] He was arrested in Colchester, Connecticut, on October 16, 2001, and spent three months at the Walker Reception Center without having any incident with any detainee. However, on January 7, 2002, a local newspaper story reported law enforcement agents' suspicions that Rafiq was

[306] For the sheriff's statements, see Josh Tyrangiel, "A beating on the way back home," *Time*, December 10, 2001; and Cusac, "Ill-Treatment on Our Shores."

[307] Letter to Christine Davis, INS district director, Louisiana, from Mary Howell, Esq., October 3, 2001.

[308] Human Rights Watch telephone call to FBI agent Berry Kowalski, Department of Justice Civil Rights Division, Criminal Section, November 23, 2001.

[309] Human Rights Watch telephone interview with Hasnain Javed, Texas, November 6, 2001; and with attorney Mary Howell, New Orleans, Louisiana, October 31, November 29, 2001, and June 14, 2002. Javed was released on bond on September 21, 2001, granted voluntary departure, and left the United States in early 2002.

[310] In a January 16 letter to Hasnain Javed's attorney, the local U.S. attorney's office said that it would communicate to her any charging decisions on the case, but that at that moment the FBI had not yet concluded its investigation. Letter to Mary Howell from Christopher L. Schmidt, assistant district attorney, Second Circuit Court District of Mississippi, January 16, 2002.

[311] Human Rights Watch telephone interviews with Qaiser Rafiq, Uncasville, Connecticut, March 14, 15, and 18, 2002. See also, Dave Altimari, "Enigmatic Suspect Raises Brows: Intriguing Clues Attract Investigators in Terrorism Probe," *Hartford Courant*, January 7, 2002; and Carole Bass, "Bloody Good Reading," *New Haven Advocate*, March 14, 2002.

linked to the September 11 attacks.[312] Rafiq told Human Rights Watch that fellow inmates read the article and he was then harassed and called a terrorist. He said he told the captain who managed the C1 block where he was confined that he felt threatened. The official replied that the process for a transfer to another facility was very long.

Rafiq told Human Rights Watch that he was first assaulted on January 18, when in the outdoors recreation area four men punched him nine or ten times in the neck, stomach, and chest. He said that a correctional officer was nearby but "looked the other way." Rafiq stated that he complained to the captain and asked to see a judge, but the captain told him, "I can't call the court if you're not bleeding."

Rafiq was beaten again four days later. He was in the day room when two men hit him multiple times in his neck, stomach, and back for three or four minutes. He complained to the captain who apparently did nothing.

Rafiq said he was beaten for a third time on February 5. He was in his cell after lunch when three men beat him on the back of the head and on the face and tried to choke him. One of them said, "We've read in the newspaper that you are a terrorist, and we are going to kill you." Rafiq said that the attack occurred in front of two correctional officers but they did not help him. He said that he had bruises on the eye and that his lip was cut and bled copiously. He was taken to the medical office where they took pictures of him, but he claimed that he did not receive any medical treatment. He insisted on filing an incident report with state police despite being told that he would probably be targeted by the inmates that he accused of attacking him if he did so.

Rafiq was transferred the same day to the Raymond L. Corrigan Correctional Institute in Uncansville, Connecticut. Upon arrival there he was kept four hours in isolation. He described his treatment in a letter he sent to President Parvaiz Musharraf of Pakistan:

> During these four hours almost every correction officer felt his job to harass, curse and threaten me, they threatened to kill me, they made abusive racist comments about myself, Pakistan, Pakistanis and Islam. I was told by one of the officers that I am the only Pakistani Terrorist in their hands and I have to pay for Daniel Pearl [an American journalist who was murdered in Pakistan]. They also showed me the Hartford Courant article and told me that they are going to pass this to all C.O.'s [correctional officers] and inmates and they are sure that someone will take the revenge of Daniel Pearl and kill you.[313]

Additionally, several of the detainees have claimed they were harassed by correctional officers and/or criminal inmates. Six detainees told Human Rights Watch that they had been harassed by law enforcement agents, and five by inmates. Non-citizens arrested in connection with the September 11 investigation were called terrorists, "Osama bin Laden," and told to go back to their countries. When harassment came from inmates, sometimes the detainees complained to correctional officers but the detainees claimed that officials failed to investigate their complaints, to punish or warn the inmates, or to take precautionary measures to protect the detainees from possible aggression by inmates.

Inadequate Health Care

In 1998, Human Rights Watch documented inadequate health care for INS detainees held in local jails. The INS subsequently specified minimum health care to be afforded to INS detainees as part of its Detention Standards.[314]

[312] Altimari, "Enigmatic Suspect Raises Brows…." See also, Bass, "Bloody Good Reading."

[313] Letter to General Parvaiz Musharraf, president of Pakistan, from Qaiser Rafiq, February 9, 2002

[314] The INS's Detention Standards grant all detainees the right to have access to medical services that "promote detainee health and general well being." To be in compliance with the Detention Standards,

Nevertheless, many "special interest" detainees have complained about inadequate health care while in detention.

International standards require that people in custody receive adequate health care. The U.N. Standard Minimum Rules for the Treatment of Prisoners ("Minimum Rules"), which apply to all people in detention, provide that detainees be examined upon their arrival to a detention facility and thereafter as necessary and be transferred to hospitals if they require specialist treatment at any point during their detention.[315] The Minimum Rules also assert: "The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed."[316] The U.N. Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment declares that all detainees are entitled to medical care and treatment free of charge.[317]

The most striking example of denial of health care involved Muhammed Butt who was detained at Hudson County Correctional Center in New Jersey. Butt, a fifty-five-year-old Pakistani national held on immigration charges, died at the facility on October 23, 2001. According to press reports, a preliminary autopsy determined that he died from unspecified "heart problems." Press reports also stated that he was treated for a gum infection with antibiotics from October 1 to October 6. No other pre-existing ailments were reported.

Mohammed Munir Gondal, Butt's cellmate, told Human Rights Watch that since Butt did not speak English, he and other detainees helped Butt fill out five or six request forms to see medical personnel beginning about ten days before his death. Butt would file one and after a couple of days, when he received no answer, he would submit another one. Gondal states that Butt never saw a doctor pursuant to these requests.

On October 23, Gondal and Butt had breakfast at 4:00 a.m. and then went back to sleep. Gondal slept above Butt's bunk. At about 6:00 a.m., Butt said he felt "pain." According to Gondal, Butt knocked on the cell door for five or ten minutes in an unsuccessful attempt to get an officer's attention. Butt then went back to sleep. After 9:00 a.m., Gondal woke up and called Butt, but he did not answer. Gondal shook him, but there was no response. Gondal alerted the correctional officers, and they took Butt away.[318]

Six days after Butt's death, Human Rights Watch wrote to the INS, the FBI, and the Hudson County prosecutor's office, requesting the release of information regarding Butt's health, and the circumstances and cause of his death. The FBI did not provide any clarification about the death but told Human Rights Watch that it

facilities holding INS detainees must provide initial medical screening, primary medical care, and emergency care and employ, at a minimum, a medical staff large enough to perform basic exams and treatments for all detainees. The Detention Standards further state: "The OIC [Officer-in-Charge] will …arrange for specialized health care, mental heath care, and hospitalization within the local community."

[315] U.N. Standard Minimum Rules for the Treatment of Prisoners, rules 24 and 22.

[316] U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 25.

[317] U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 24.

[318] Human Rights Watch interview with Mohammed Munir Gondal, INS's Elizabeth Detention Center, January 27, 2002.

Before Butt was taken to the Hudson County Correctional Center, he spent at least one night at the offices of the INS in New York City on September 19, 2001, according to Mohammed Sid Ahmid, a Sudanese man, who told Human Rights Watch that he was held in a cell across from Butt's there. Ahmid said that Butt's seven-by-thirteen-feet (two-by-four-meter) cell did not have a bed and he slept on the floor. Ahmid also said that Butt could not speak English and only ate bread. Human Rights Watch interview with Mohammed Sid Ahmid, Hudson County Correctional Center, New Jersey, February 6, 2002.

Gondal told Human Rights Watch that on October 15, 2001, he and Butt had a hearing and they were both granted voluntary departure.

would consider opening an investigation into the death. No findings stemming from such an inquiry have been released, however. In a response in early December, the INS stated that it could not release any information on the case "due to laws relating to privacy" unless Human Rights Watch had Butt's "written consent" and "written signature" authorizing the disclosure of his file.[319]

In a subsequent letter, the INS acknowledged its mistake in requesting the signature of a dead man, but still insisted on withholding all information unless it received consent by "an authorized party representing Mr. Butt's interests."[320] Butt did not have an attorney when he died and all close family members live in Pakistan. Human Rights Watch has been unable to locate his family to obtain their consent. The organization filed a FOIA request for the release of government documents concerning Butt on February 28, 2002, which is still pending.

Human Rights Watch understands that there is a legitimate privacy concern not to disclose personal medical records of detainees without their consent or the consent of someone representing their interests. However, international standards are clear that an inquiry should be conducted whenever an individual dies in custody and its findings should be released.[321] Such an investigation is particularly needed in Butt's case because he was not an average INS detainee. As a "special interest" case he was part of a group of individuals about whom there have been many reports of mistreatment and abuse. In Butt's case, all that the U.S. government has said to date is that he died of undefined "heart problems," a blatantly insufficient explanation in light of possible inadequate medical care.

Mohammed Munir Gondal himself also reported serious medical problems in detention that were not properly attended to. On November 30, 2001, after the 4:00 a.m. breakfast, Gondal felt pain in his heart and he began sweating. He called the correctional officers and was taken to the medical office. A nurse there instructed him to come back at 8:00 a.m. because the doctor was not in yet. The doctor examined him later that morning, told him he had not had a heart attack, and gave him an ointment for muscle pain. Gondal stated that his pain worsened, and later that Friday afternoon he went to the medical office again. The same nurse told him to come back on Monday because the doctor had already left the facility and there would be no doctor available on the weekend. He refused and insisted on seeing a doctor. Another nurse examined him and he was taken to a medical center in Jersey City, New Jersey, arriving there that evening. He was informed that he had indeed suffered a heart attack and spent a week in the hospital. On December 27 he felt pain again. This time he was promptly sent to the hospital. He had angioplastic surgery at Beth Israel Hospital in Newark, New Jersey.[322]

Other INS detainees have reported inadequate medical care. For instance, Bah Isselou told Human Rights Watch he had complained about a long-standing kidney problem while at Wallen County Jail, Kentucky, and was given an aspirin. He said he did not see a doctor and was

[319] Letter from David Venturella, assistant deputy executive associate commissioner, Office of Detention and Removal Operations, INS, to Human Rights Watch, December 6, 2001.

[320] Letter from Venturella to Human Rights Watch, January 17, 2002.

[321] Principle 34 of the U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment states:

> Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. *The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.* (Emphasis added.)

[322] Human Rights Watch interview with Gondal.

not provided clean water.[323] Some detainees have also complained that even after succeeding in seeing medical staff, the medical care that they receive is inadequate. Mohammed Tariq, a forty-nine-year-old Pakistani citizen, told Human Rights Watch that he informed medical personnel at Passaic County Jail, New Jersey, that he had a liver problem because he was infected with hepatitis B, which had been treated previously at a Bronx hospital. He was not given the special diet that he required nor given any medication for his condition.[324] Some also complained that jail officials refused to arrange for the specialized medical treatment they required. For example, Ebrahim Ali Nesiredin, a citizen of Ethiopia, has requested specialized medical care for injuries in his eye and foot since February 2002. According to a complaint he filed at the Krome Service Processing Center, Florida, and a letter from his attorney, the injuries were X-rayed at the facility but not treated.[325] He was just given painkillers. He has since been moved to the Middlesex County Adult Corrections Center, New Jersey, but as of this writing has still not been examined by specialist doctors.[326]

Some detainees have told Human Rights Watch that they received incomplete medical examinations upon arrival at their detention facilities. In Human Rights Watch's February 2002 tour of Hudson County Correctional Center, medical personnel told us that each detainee is screened by a nurse who asks them about allergies, conducts a head-to-toe body examination, a dental examination, performs a tuberculosis test, and listens to his or her heart. However, several detainees, including Gondal, who later had a heart attack, said that medical staff did not listen to their hearts during this initial health screening. A detainee held at Passaic County Jail said that a nurse conducted the health exam and administered the tuberculosis test upon his arrival there. However, he was placed with the general population the same day, without waiting the forty-eight to seventy-two hours necessary to know the results of the test.[327] Half an hour after the nurse's injection, the man was taken to a cell with thirty-two INS detainees and criminal inmates. The INS's standard procedure is to keep detainees in segregation until the results are known. The rates of tuberculosis among U.S. prisoners range from three to eleven times higher than those of the general population.[328] Sharing overcrowded living spaces, the conditions under which detainees said that they were held at Passaic County Jail, facilitates the transmission of the disease.

In one medical case, the detainee was kept in a hospital bed in restraints for fifteen days. Osama Salem was arrested in mid October 2001 in Jersey City, New Jersey for entering the country with a false passport. He was taken to the Hudson County Correctional Center, where he went through a health screening at which he was administered a tuberculosis test. He was placed in a room alone for thirty-two hours pending the results of the test, during which he was allowed outside for only one hour. "I had never been in jail, I started crying," he told Human Rights

[323] Human Rights Watch telephone interviews with Isselou; and attorney Dennis Clare, Louisville, Kentucky, October 23 and 31, 2001.

[324] Human Rights Watch interview with Mohammed Tariq, Passaic County Jail, New Jersey, December 20, 2001.

[325] Medical Grievance Form filed by Ebrahim Nesiredin Ali with the Krome Service Processing Center, Florida, February 6, 2002, and Letter to Supervisor Mike Meade, Krome Service Processing Center, from Rhonda Gelfman, Esq., January 31, 2002.

[326] Human Rights Watch telephone interviews with Ebrahim Nesiredin Ali, Krome Service Center, Florida, February 8, 2002 and Middlesex County Adult Corrections Center, New Jersey, June 3, 2002. On June 6, 2002, Human Rights Watch sent a letter to New Jersey INS District Director Andrea Quarantillo urging her to arrange for the specialized care that Ali requires and is entitled to receive. In her June 18, 2002 response, Quarantillo said that she would "look into this matter" but she was unable "to release any information …regarding the matters you have written about" because the Privacy Act precludes her from doing so. We do not know if the detainee has received specialized health care.

[327] Human Rights Watch interview with Palestinian civil engineer, Paterson, New Jersey, December 20, 2001. The detainee's name has been withheld upon request.

[328] "Tuberculosis in Prisons," *Tuberculosis Epi Update*, vol. 2, no. 1, March 2001.

Watch. "I was crying; I was anxious; I felt so bad," he added. He said that doctors later told him that he had experienced "an attack of nerves." Salem told Human Rights Watch that he had had problems like that before but never as severely.

Salem was taken to a medical center in Jersey City on October 20, 2001, where he was treated for a nervous breakdown. Salem said that he spent fifteen days there lying in bed with his hands cuffed in the front and his feet shackled to the bed. He said he was only allowed out of bed to go to the bathroom. He was guarded by two police officers twenty-four hours a day. When he talked to Human Rights Watch on February 6, 2002, his right wrist had a scar that he said was produced by the continued use of handcuffs. A few weeks later he was charged with a rarely-prosecuted crime: misuse of entry documents. His attorney told reporters that the Department of Justice might be punishing him for speaking to human rights groups about the conditions of detention.[329]

Inability to Satisfy Religious Obligations

None of the Muslim and Jewish post-September 11 detainees interviewed by Human Rights Watch were able to comply fully with their religious obligations while in custody. Detention facilities did not provide meals that met their religious food restrictions and conditions made it difficult for some Muslim detainees to fulfill their daily prayer requirements.[330]

Muslims cannot eat pork and their meat has to be *halal*, i.e. prepared in accordance with certain religious requirements much like *kosher* food in Judaism. The vast majority of the 1,200-plus men detained in the investigation of the September 11 attacks were Muslim, but the facilities that held most of them for months—Passaic County, Hudson County, and Middlesex County jails in New Jersey, and the Metropolitan Correctional Center and the Metropolitan Detention Center in New York—did not offer halal meat on a regular basis.

Muslim detainees at the Hudson County Correctional Center were served pork without their knowledge at the beginning of the holy month of Ramadan, a particularly serious violation of their religious obligations, according to Sohail Mohammed, an attorney and community leader who toured the jail in December 2001. He told Human Rights Watch that when the detainees were told what they had eaten, they self-induced vomiting.[331] Unsure of the contents of the food being served, Muslim detainees stopped eating any meat. Muslim and Jewish detainees held in other facilities also said that they were given pork despite their complaints. For instance, four Muslim detainees from Mauritania did not eat for several days while being held at Wallen County Jail, Kentucky, because they were served pork, according to one of them.[332]

[329] From the medical center in Jersey City, Salem was taken to a South Carolina psychiatric hospital, where he spent two months and where he said he was treated well. He was then transferred back to Hudson County Correctional Center, where he was being held in a psychiatric unit when Human Rights Watch interviewed him. He was ordered deported on January 18, 2002 and was allegedly waiting for "clearance" to leave the country. He told Human Rights Watch he just wanted to go home. Human Rights Watch interview with Osama Salem, February 6, 2002. See also, Kareem Fahim, "Endgame," *Village Voice*, March 6-12, 2002.

[330] The INS Detention Standards provide guidance to what is required of facilities holding immigration detainees to accommodate their religious needs. Regarding religious practices, the Detention Standards state: "Detainees shall have the opportunity to engage in practices of their religious faith that are deemed essential by the faith's judicatory, consistent with the safety, security, and the orderly operation of the facility. No one may disparage the religious beliefs of a detainee." Concerning dietary needs, the INS Detention Standards state: "When a detainee's religion requires special food services, either daily or during particular periods that involve fasting, restricted diets, etc., staff will make all reasonable efforts to accommodate them. This will require, among other things, modifying menus to exclude certain foods or food combinations, providing meals at unusual hours, etc."

[331] Human Rights Watch interviews with attorney Sohail Mohammed, Clifton, New Jersey, November 5 and December 19, 2001.

[332] Human Rights Watch telephone interview with Isselou. The detainees were Bah Isselou, Sidi Mo-

Orin Behr and ten other Israelis did not eat any meat at Medina County Jail, Ohio, because they could not tell if the meat was pork.[333] Behr said that they were not given any extra vegetables and they went hungry every day during their two-to-three-week stay there. The Cleveland Jewish community offered to provide food for these detainees but officials turned down the offer.

During Human Rights Watch's tour of the Hudson County Correctional Center on February 6, 2001, jail officials said that they only served halal meat on certain religious holidays, while kosher food was available on a regular basis. Yet, on the same day, Abdul Karim, a forty-two-year-old Pakistani citizen who had been held there since his arrest on November 14, 2001, told Human Rights Watch that Muslim detainees were served neither kosher nor halal food.[334] Karim said that he had complained to the jail's social worker about the diet. He and about ten other detainees sent a letter of complaint to the director of the facility in early January, but had received no response a month later.

Detainees held at Passaic County Jail told Human Rights Watch that they went hungry during Ramadan when trying to observe their religious obligations. Officials reportedly told them that they would receive an extra tray of food at dinner if they chose to fast during the day, as their religion prescribes. The detainees told Human Rights Watch that they were only given half a cup of peanut butter, jelly, and chips as the extra meal.[335] Pakistani detainee Asif-Ur-Rehman Saffi alleged that jail staff refused to tell him the date while he was being held in isolation at the Metropolitan Detention Center, so he did not know when Ramadan began.[336]

Another common complaint by Muslim detainees was the difficulty in praying five times a day, a fundamental requirement of their faith.[337] Some Muslim detainees held at various facilities were not able to have watches; therefore, they had to ask correctional officers for the time so they would know when to pray. Several detainees told Human Rights Watch that some officers became upset about being asked the time so frequently and swore at the detainees or refused to tell them the time.[338] Some Muslim immigration detainees could only pray in the same spaces where other detainees or criminal inmates watched television, played games, or slept. This provoked frictions and some detainees reported being harassed and laughed at when trying to pray. Other detainees also complained that they had to pray in cells with open toilets and that they had to expose themselves to other detainees

hammed Ould Bah, Sidi Mohammed Ould Abdou, and Cheikh Melainine Ould Belal.

[333] Human Rights Watch telephone interviews with Orin Behr, Maryland, December 12, and attorney David Leopold, Cleveland, Ohio, December 10, 2001.

[334] Human Rights Watch interview with Abdul Karim, Hudson County Correctional Center, Kearny, New Jersey, February 6, 2002. Some of the same restrictions apply to the preparation of kosher and halal foods; thus, many Muslim detainees would prefer to eat a kosher diet to a regular diet if halal food were not available.

[335] Passaic County Jail officials did not talk about food during our tour of the facility on February 6, 2002, and they finished the visit without giving us the opportunity to ask them. Detainees held there said that they were not being given halal food. They also said that jail officials told them that the facility did not serve pork.

[336] *Tukmen v. Ashcroft*.

[337] The five daily ritual prayers, called *salah,* are one of the five "pillars" or basic requirements of Islam. The other pillars are: *shahadah*, the affirmation that "there is no god but God, and Muhammad is the Messenger of God"; *zakat*, the giving of alms; *sawm*, the dawn-to-sunset fast during the lunar month of Ramadan; and *hajj*, the pilgrimage to Mecca. *Columbia Encyclopedia*, Sixth Edition, 2000.

[338] Such problems apparently occurred at Denton County Jail in Texas, where Ghassam Dahduli and Mustafa Abu-Jdai were held. Human Rights Watch telephone interview with Dahduli; and with Pennington. At the Metropolitan Detention Center in Brooklyn, New York, correctional officers covered the windows of some of the cells in the Special Housing Unit, and detainees did not know the time when they should pray. Human Rights Watch telephone interview with Goodman. A correctional officer harassed detainees when they prayed at the Metropolitan Correctional Center in Manhattan, New York, according to a man held there. Human Rights Watch interviews with Alrababah.

when they went to the bathroom, actions prohibited by their religion.[339] Sohail Mohammed told Human Rights Watch that Muslim detainees held at Hudson County Correctional Center were not allowed to pray in congregation on the day celebrating the end of Ramadan, one of the two most important feasts in Islam.[340]

Commingling INS Detainees with Criminal Inmates

INS detainees often share living quarters with persons accused or convicted of criminal offenses, even though international standards require that people detained for civil or administrative reasons be kept separately from people imprisoned for criminal offenses.[341] "Special interest" cases have been no exception. The INS placed many of them in county and local jails where they are commingled with accused or convicted criminals, and a few have suffered assaults as a result, as detailed above. In those jails, "special interest" cases have been treated as criminals and bound by strict jail rules inappropriate for their administrative status as unaccused, non-criminal detainees.

Other Problems at Detention Facilities

Barriers to Communication with Families

The U.S. government has failed to meet international standards that grant detainees the right to notify family members promptly of the place of detention, receive visits from family members, and have an "adequate opportunity to communicate with the outside world."[342] Immigration detainees in general should be granted generous visitation and phone privileges that reflect their non-accused, non-criminal status.

Those held in incommunicado solitary confinement have suffered the greatest restrictions, but even detainees incarcerated with the general population have encountered difficulties in contacting their families and in accessing phones. Some people were denied access to phones upon their arrest and, thus, were unable to tell their loved ones where they were for many hours and, in some cases, days. For instance, Tahir Iqbal, a Pakistani national, said he was only allowed to telephone his family thirty hours after his arrest, despite his repeated requests.[343]

Some of the detainees' families lived abroad. The detainees were not able to communicate with them because the phones in some jails only allow domestic collect calls. For instance, when Human Rights Watch spoke with Afzal Kham, a detainee at Passaic County Jail,

[339] A Palestinian civil engineer said that he was held in a cell with an open toilet at the facility at 26 Federal Plaza in Manhattan, New York. He complained to correctional officers but had to spend the night there. Human Rights Watch interview with Palestinian civil engineer. Ali Al-Maqtari said that he was incarcerated for more than a month in a cell with an open toilet at West Tennessee Detention Facility in Mason, Tennessee, and he was allowed out only one hour per day. He told Human Rights Watch: "I covered the toilet with his towel and asked Allah for forgiveness." Al-Maqtari said that he was also kept in a cell with an open toilet at the jail in Franklin, Tennessee, for a week but there he was allowed outside to pray when he complained to the correctional officers. Human Rights Watch telephone interview with Ali Al-Maqtari, New Haven, Connecticut, November 29, 2001.

[340] Human Rights Watch interviews with Mohammed. The feast marking the end of Ramadan is called *Id al-Fitr*. The other crucial celebration in Islam is the *Eid*, which commemorates the end of the *hajj*, the yearly pilgrimage to Mecca. *Columbia Encyclopedia*, Sixth Edition, 2000.

[341] See rule 8(c) of the U.N. Standard Minimum Rules for the Treatment of Prisoners. Although the ICCPR does not specifically address commingling of administrative detainees, art. 10(2)(a) provides for the segregation, except in exceptional circumstances, of accused persons from convicted ones.

[342] Principle 19 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[343] Iqbal was arrested on October 26, 2001 at a gas station in Long Island, New York where he had worked "seven days a week," he said, for the past ten years. When he was arrested he asked to call his wife, but one of the four INS and FBI agents who detained him said, "No, we'll bring you back in an hour." He was still in detention on February 6, 2002, when Human Rights Watch spoke to him. Human Rights Watch interview with Tahir Iqbal, Passaic County Jail, New Jersey, February 6, 2002.

he had not spoken to his family in Pakistan once during his 142 days in detention because he was not allowed to make international calls.[344] Besides Human Rights Watch staff, the only person outside the jail that he had spoken to was a nephew who lived in the United States, whom he called collect once. He did not have an attorney.

These difficulties in communicating with the outside have caused anguish for detainees and their families. "From where they are coming from, if you don't hear from someone after they go to jail, it means they're dead," Sohail Mohammed, a community leader and immigration attorney, told Human Rights Watch.[345]

Some detainees and their family members also complained that their visitation rights were not observed. For instance, Leoncied Ouayouro drove from her home in Virginia to Batavia, New York, to see her brother Tony Oulai, who was being held on immigration charges at the Buffalo Federal Detention Center. She had called the facility in advance and officials told her that her brother had to put her name on his visitation list. Ouayouro said that Oulai told her over the telephone that he had done so. However, when she arrived at the facility on October 3, officials told her she was not on Oulai's list. The next day, Oulai's attorney called the facility to obtain permission for Ouayouro to visit her brother, to no avail. She returned to Virginia without seeing him.[346]

Jail Handbooks

International standards require that detainees be informed of the disciplinary rules at detention facilities and be allowed to make requests or complaints regarding treatment or detention conditions.[347] The INS Detention Standards provide that all detainees must be given a handbook that explains their rights and obligations at each facility where they are held.[348] The Department of Justice has claimed that it has complied with this regulation in the cases of those detained in connection with the September 11 investigation. Viet D. Dinh, assistant attorney general, Office of Legal Policy, said in a hearing before the Senate: "Once taken into custody, aliens are given a copy of the 'Detainee Handbook,' which details their rights and responsibilities, including their living conditions, clothing, visitation, and access to legal materials."[349]

During Human Rights Watch's tour of the Hudson County Correctional Center on February 6, 2002, jail officials said that all detainees were given a copy of the jail handbook, available in English and Spanish, upon their arrival. Yet the detainees interviewed by Human Rights Watch at various facilities for this report, including Hudson County jail, said that they had not received such a handbook. One detainee held at Passaic County Jail said that he had found one handbook in the dormitory-like cell where he was held.[350] The INS failed to produce copies of

[344] Human Rights Watch interview with Afzal Kham, Passaic County Jail, New Jersey, February 6, 2002.

[345] Human Rights Watch interviews with Mohammed.

[346] Human Rights Watch telephone interview with Leoncied Ouayouro, Fairfax, Virginia, February 1, 2002, and March 25, 2002.

[347] Principle 30 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that all detainees are entitled to the right to be informed of disciplinary rules prevailing in a given detention center, and to appeal any disciplinary action, and the right to make a request or complaint regarding treatment or detention conditions.

[348] The INS Detention Standards provide:

> Every OIC will develop a site-specific detainee handbook to serve as an overview of, and guide to, the detention policies, rules, and procedures in effect at the facility. The handbook will also describe the services, programs, and opportunities available through various sources, including the facility, INS, private organizations, etc. Every detainee will receive a copy of this handbook upon admission to the facility.
>
> Detainees are expected to behave in accordance with the rules set down in the handbook, and will be held accountable for violations.

[349] Testimony of Viet D. Dinh, assistant attorney general, Office of Legal Policy, before the Senate Judiciary Committee at a hearing on "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 4, 2001.

[350] The detainee who found the handbook told Human Rights Watch that after reading it he realized that he should have been given certain items, including sheets, a spoon, and a second clean towel. Human

the handbooks that are supposedly distributed at the Passaic and Hudson County jails despite several requests by Human Rights Watch.[351]

The INS and jail officials' failure to distribute jail handbooks to detainees is no small matter. The handbooks not only advise detainees about items or treatment to which they are entitled, but also inform them of the rules governing the facility. Detainees who do not know those rules are no less responsible for following them. As a result, those who lack language skills and those who are not informed of the rules are more likely to disobey them unintentionally, and then to be subjected to disciplinary punishment. For instance, Ossama Abdelall was speaking to his wife on the phone when the lights were switched off, which meant that the detainees were to finish their conversations.[352] He did not know this rule and continued talking. He was placed in solitary confinement for most of the day for breaking jail regulations. According to his attorney, Abdelall was not informed of the jail regulations beforehand. The failure to distribute jail handbooks also makes it unlikely that detainees will be able to resort to grievance procedures or file complaints.[353]

Recreation

The U.N. Standard Minimum Rules for the Treatment of Prisoners establishes that prisoners should be allowed at least one hour of outdoor exercise daily if the weather permits.[354] As administrative detainees, immigration detainees should enjoy more generous recreational rights. The INS Detention Standards, however, do not meet even the minimal international standard: "If outdoor recreation is available at the facility, each detainee shall have access for at least one hour daily, at a reasonable time of day, five days a week, weather permitting."[355]

Some of those held in solitary confinement have not been allowed out of their cells for days or even weeks.[356] Even those who were held with the general population had restricted access to recreational activities. While jail officials at Passaic County Jail said that detainees had access to a "day room" with games and to the roof gym daily, detainees told Human Rights Watch that they were kept in the same cell all of the time except for a couple of hours a week when they were allowed to go to the roof gym. Some detainees held at this and other facilities complained that they were allowed outside only

Rights Watch interview with Palestinian civil engineer.

[351] Human Rights Watch requested the handbooks during tours of the facilities and INS officials said it would provide them to us. We followed up with telephone calls and a fax sent on February 12, 2002 but never received the handbooks.

[352] Human Rights Watch telephone interview with attorney Audrey Carr, Place, Minneapolis, Minnesota, October 30, 2001.

[353] For instance, two detainees who independently described to Human Rights Watch an alleged physical assault of a fellow detainee by staff that they witnessed in their Passaic County Jail cell (cell 3G1) did not know they could file a complaint. They both said that they had not received the jail handbook. The men said that their cell held about sixty people, with a mix of accused or convicted criminals and immigration detainees. According to the two witnesses, a group of correctional officers came to the cell to conduct a search with dogs at 2:00 or 3:00 a.m. at the end of December 2001. The detainees were told to get up and stand against the wall. One detainee did not understand English and was slow to comply. An officer pushed the detainee's head against a wall. Another officer then twisted the detainee's arm and pushed his face onto a table. One of the witnesses claimed the officers also hit the detainee repeatedly with a food tray. After the incident, the man had a chipped tooth and complained of headaches. Before the correctional officers left, the detainee who suffered the attack asked for medical treatment through another detainee who translated for him. A correctional officer said there was no need for medical attention, and the detainee never saw a doctor. The detainees did not file a complaint. "Who would we complain to?" one of the witnesses told Human Rights Watch, "the guards? We didn't want more trouble." The detainee who was mistreated was deported twenty days after the incident occurred. The witnesses did not know his name. Human Rights Watch interview with Ali Saber, January 27, 2002 and February 6, 2002; and Mohammed Zaman, Passaic County Jail, New Jersey, January 27, 2002.

[354] U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 21(1).

[355] See Recreation Detention Standard at http://www.ins.gov/graphics/lawsregs/recreat.pdf.

[356] For more details see chapter, Conditions of Detention, in this report.

early in the morning or late in the evening, not "at a reasonable time of day," as the INS Detention Standards require. Some also said they were not provided with jackets to wear during cold weather.

Language Barriers

Officials at facilities holding INS detainees are often unable to communicate with detainees because jail staff lack relevant language skills. Even though the INS only detains non-citizens, it does not require that personnel at facilities that hold INS detainees speak the detainees' languages. At some jails and detention centers, there are staff members who speak a language other than English and may serve as ad-hoc translators, but they may not be available to detainees when they need their help. For instance, at the Hudson County Correctional Center jail officials said that there are "three or four" correctional officers who spoke Arabic, but no Urdu speakers. (The largest group of "special interest" detainees is from Pakistan and they speak Urdu). Hudson County jail officials said that they had a "translation phone" but that they rarely used it because "it was not needed." At Passaic County Jail, officials said they had Urdu speaking correctional officers, but detainees held there who spoke only Urdu told Human Rights Watch that no correctional officer spoke their language.

APPENDIX A

INS Special Interest List
Joint Terrorism Task Force Working Group

LIMITED OFFICIAL USE-----LAW ENFORCEMENT SENSITIVE

(b)(7)(A) (b)(7)(C)

A Number	Name	POB	Arrest Date	Arrest Location	Date Charging Document Served	Immigration Charge	Date filed w/EOIR	Custody Location	SIOC FBI Interest	Legally Sufficient
Federal Bureau of Investigation / Other Agencies 29										
[redacted]	[redacted]	Pakistan	9/22/2001	[redacted]	9/22/2001	237(a)(3)(D)	9/25/2001	[redacted]	[redacted]	[redacted]
JTTF Comments: [redacted]					Bond Info: [redacted]					
Counsel Comments:					DRO Comments [redacted]					
[redacted]	[redacted]	Jordan	9/28/2001	[redacted]	9/30/2001	237(a)(1)(B)	10/1/2001	[redacted]	[redacted]	[redacted]
JTTF Comments: [redacted]					Bond Info: [redacted]					
Counsel Comments:					DRO Comments: [redacted]					
[redacted]	[redacted]	India	9/13/2001	[redacted]	9/17/2001	241(a)(5)		[redacted]	[redacted]	[redacted]
JTTF Comments: [redacted]					Bond Info. [redacted]					
Counsel Comments:					DRO Comments: [redacted]					
[redacted]	[redacted]	Egypt	10/31/2001	[redacted]	12/6/2001	237(a)(1)(B)		[redacted]	[redacted]	[redacted]
JTTF Comments: [redacted]					Bond Info:					
Counsel Comments:					DRO Comments: [redacted]					

APPENDIX B

United States Department of Justice
Executive Office for Immigration Review
Immigration Court

In Bond Proceedings:
RE: ALI ABUBAKR ALI AL-MAQTARI

Pursuant to 28 U.S.C. § 1746, I, Michael E. Rolince, hereby declare as follows:

1. I have been employed by the Federal Bureau of Investigation (FBI) since September 1974 as a Special Agent, and since August 1998, I have been the Section Chief of the Counterterrorism Division's International Terrorism Operations Section (ITOS) at FBI Headquarters in Washington D.C.

2. My duties and responsibilities as the ITOS Section Chief include management oversight of international terrorism investigations conducted by any of the 96 offices of the FBI, which are located throughout the United States and around the world. As Section Chief, my responsibilities also include determining investigative priorities, monitoring manpower and resource requirements, and analyzing intelligence information, both classified and unclassified, which has been acquired by the FBI either through human or technical means.

3. As the ITOS Section Chief, I am personally involved in and have significant supervisory responsibilities for the nationwide FBI investigation initiated in response to a series of deadly terrorist attacks which occurred on September 11, 2001. As such, I am privy both to the broad scope of and to particular details from the investigation.

Attachment One

4. On the morning of Tuesday September 11, 2001, four commercial airplanes were hijacked, two after departing from Boston's Logan Airport, one after departing from Dulles Airport in northern Virginia, and one after departing from the Newark Airport in Newark, New Jersey. At 8:46 a.m., the first of the four hijacked airplanes crashed into the north tower of the World Trade Center in Manhattan's financial district. The second airplane struck the south tower of the World Trade Center, the third struck the Pentagon, and at 10:10 a.m., the attack ended with the crash of the fourth airplane in rural Pennsylvania. Both towers of the World Trade Center collapsed, and the Pentagon sustained heavy damage. A total of 266 passengers and flight crew members, including the hijackers, were also killed when the airplanes crashed. The confirmed death toll from the attack on the Pentagon is 189 and over 6,000 people are dead or missing from the attack on the World Trade Center.

5. The FBI has identified nineteen suspected hijackers, some of whose legal immigration status had expired. Based on a review of intelligence and other source information, the FBI has reason to believe that the hijackers were associated with al Qaeda, aka "the Base," an international network of terrorist cells controlled by Osama bin Laden, which has been formally designated by the Department of State as a foreign terrorist organization since October 8, 1999. Prior to the September 11, 2001 attacks, Osama bin Laden was being sought by the FBI in connection with the August 7, 1998 bombings of the United States embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya, which killed over 200 individuals.

6. At the direction of President George W. Bush and Attorney General John Ashcroft, the FBI has initiated a nationwide investigation to identify and apprehend individuals involved in the hijackings and to prevent future acts of terrorism within the United States. To date the FBI has received or generated more than 250,000 leads from its web site, special hot line, a toll-free WATTS line, and in the FBI field offices, and additional leads are coming in every day. The investigation has yielded over 300 searches, and more than 100 court orders and 3000 subpoenas. There is still a great deal of information to be collected before the FBI will be in a position to determine the full scope of the terrorist conspiracy and to determine the full extent of damage that the terrorists intended to cause.

7. The FBI has come to believe that associates of the hijackers with connections to foreign terrorist organizations may still be in the United States. The tips received and the leads developed in our field offices have enabled the FBI to identify individuals who may have information about these associates, or, in fact, be among the participants. As explained below, the number of people of interest to the FBI is constantly changing as leads are followed and more information is obtained.

8. Information available to the FBI indicates a potential for additional terrorist incidents. As a result, the FBI has requested that all law enforcement agencies nationwide be on heightened alert. When there is threat information about a specific target, the FBI shares that information with appropriate state and local authorities. Several city and state officials have been contacted over the last few weeks to alert them to potential threats.

9. On September 23, 2001, the FBI issued a nationwide alert based on information indicating the possibility of attacks using crop-dusting aircraft. The FBI assesses the uses of this type of aircraft to distribute chemical or biological weapons of mass destruction as potential threats to Americans. At this point, there is no clear indication of the intended time or place of any such attack. The FBI has confirmed that Muhammed Atta, one of the suspected hijackers, was acquiring knowledge of crop-dusting aircraft prior to the attacks on September 11th. At the request of the FBI, the Federal Aviation Administration grounded such aircraft. In addition to its own preventative measures, the FBI has strongly recommended that state, local and other federal law enforcement organizations take steps to identify crop-dusting aircraft in their jurisdictions and ensure that they are secured.

10. The investigation has also uncovered several individuals, including individuals who may have links to the hijackers, who fraudulently have obtained, or attempted to obtain, licenses to transport hazardous material.

11. In the context of this terrorism investigation, the FBI identified individuals whose activities warranted further inquiry. When such individuals were identified as aliens who were believed to have violated their immigration status, the FBI notified the Immigration and Naturalization Service (INS). The INS detained such aliens under the authority of the Immigration and Nationality Act. At this point, the FBI must consider the possibility that these aliens are somehow linked to, or may possess knowledge useful to the investigation of, the terrorist attacks on the World Trade Center and the Pentagon. The respondent,

Ali Abubakr Ali Al-Maqtari, (AL-MAQTARI) is one such individual.

12. As a result of a search previously described to the court, the FBI continues to download the hard drive of a computer. (The computer was found in a car belonging to Al-Maqtari's wife.) When interviewed by the FBI, Al-Maqtari said he had not used the laptop but purchased it used for $250 from a customer at the convenience store where he works. Al-Maqtari said that the customer obtained the computer from a third party. At present, the download of the hard drive is still running. Once this process is completed, the FBI will need several days to review the information obtained.

13. The FBI continues to actively pursue this investigation.

14. The business of counterterrorism intelligence gathering in the United States is akin to the construction of a mosaic. At this stage of the investigation, the FBI is gathering and processing thousands of bits and pieces of information that may seem innocuous at first glance. We must analyze all that information, however, to see if it can be fit into a picture that will reveal how the unseen whole operates. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to some may appear of great moment to those within the FBI or the intelligence community who have a broader context within which to consider a questioned item or isolated piece of information. 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. The Bureau is approaching that task with

unprecedented resources and a nationwide urgency. In the meantime, the FBI has been unable to rule out the possibility that respondent 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.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 11, 2001, in Washington, D.C.

Michael E. Rolince
Section Chief
International Terrorism Operations Section
Counterterrorism Division
Federal Bureau of Investigation

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This report was written by Cesar Muñoz Acebes, a Bloomberg fellow, based on research by Muñoz Acebes and Allyson Collins, associate director for the U.S. Program at Human Rights Watch. Jamie Fellner, U.S. program director edited the report. James Ross, senior legal advisor, provided legal review. Jonathan Horowitz and Alison Hughes provided research and production support.

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We enlist the public and the international community to support the cause of human rights for all.

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