

The Expansion of Preventive Detention of Immigrants in America's "War on Terror"

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Farouk Abdel-Muhti, a Palestinian rights activist based in New York, was arrested without a warrant in his home at 6:30 a.m. on 26 April 2002.¹ Officers demanded to enter the apartment to question him about matters relating the attacks of September 11th, alleging that they were in possession of information concerning the existence of weapons or explosives in the apartment. However, once Farouk was detained, he was not questioned about September 11th and the premises were not searched. As with thousands of other such arrests, government officials falsely invoked September 11th in order to detain one more man of Middle Eastern origin on an immigration pretext.² The practice of the mass arrest and detention of men of Arab or Muslim background on pretexts of immigration has become the basis for a new system of administrative detention that is rapidly developing into what one commentator has called "American Gulags."³

In the immediate aftermath of September 11th, the United States government cast a wide dragnet to detain as many men of Middle Eastern or Muslim appearance living in the United States as possible. These arrests were most egregious in the New York area, but occurred throughout the country. Starting in January 2002, additional initiatives were introduced – first a "voluntary" interview program, followed by the Absconder Apprehension Initiative, NSEERS /Special Registration, and others – each of which generated new waves of arrests. By the end of 2004, nearly 20,000 men had been detained or deported as a result of immigration-enforcement initiatives adopted in the

aftermath of September 11th. In all of these immigration-based arrests, the government brought a total of only four terrorism-related charges, all of which were dismissed in 2004.⁴ While the pace of immigration enforcement initiatives related to September 11th slowed after 2004, the infrastructure for mass immigration-based arrest and detention was put in place to be redeployed whenever the government might next deem it expedient to round-up immigrant men pretextually.

The massive expansion of the system of immigration detention in the United States following September 11th marked the initiation of a scheme of preventive detention designed to evade constitutional prohibitions and generate a shadow legal system stripped of the basic procedural protections required under the rule of law. Rather than meeting the criminal justice system's "probable cause" requirements for detentions, the Attorney General preferred to invoke the pretext of minor technical immigration violations, which would not have resulted in detention prior to September 11th.

The relationship between this system of preventive detention and the normal criminal justice system is complementary.⁵ Where the criminal justice system would require proof beyond a reasonable doubt for conviction, the immigration detention system requires a lower standard of "clear and convincing evidence." Where criminal detention requires an individualized showing before a judicial officer that someone poses a risk to justify pre-conviction detention, the immigration system provides broad discretion to detain. Where the criminal system prohibits detention without

charge beyond forty-eight hours, administrative immigration detention can be prolonged without charge at the discretion of the Attorney General. Effectively, administrative immigration detention enables the Attorney General to bypass the rights of detainees by avoiding both evidentiary and procedural standards. The expansion of detention powers using the immigration rather than the criminal justice system enabled the Attorney General to place these detentions outside the realm of judicial review and within the purview of his own department's administrative discretion.⁶

Administrative immigration detention provides the government with an alternative mechanism where regular channels of criminal justice – with such nuisances as the presumption of innocence and independent judicial review of detentions – prove too onerous for its purposes. Most of the post-September 11th detentions would have ended within forty-eight hours for lack of individualized evidence had they been brought under criminal law. Precisely to avoid this result, the Justice Department has misused immigration laws (and certain other laws, such as the material witness statute) to create a *de facto* preventive detention system where *de jure* preventive detention remains unconstitutional. The principal consequence has been an enhanced authority to detain individuals without affording a meaningful opportunity to challenge their detentions.

There are three complementary aspects of the post-September 11th policies adopted by the Bush administration: an expansion of the government's detention powers; a reduction in the rights and protections afforded to detainees; and a worsening of the conditions of detention. The first section of the article gives an overview of the expanded use of

powers of civil immigration detention and the construction of an administrative detention system holding an average of 22,000 people on any given day and over 200,000 people annually.⁷ The removal of basic procedural protections in the administrative detention system is considered in the following section. Next, the article turns to conditions of detention, and compares them to some of the scandals concerning American detention practices in Guantanamo Bay in Cuba, Iraq and Afghanistan. The striking similarity between standards at the extraterritorial detention centers that the United States has created since September 11th as part of its "global war on terror," and the detention conditions for the population of immigrant men detained within the United States suggests a deliberate policy of abusive practices rather than a coincidence of cruelty.

The principal focus of this article is the administrative detention system that has emerged in the United States since September 11th. The overview of that system in the first three sections also provides, however, a basis for comparison with the longer-standing use of administrative detention by Israel as a mechanism to control principally Palestinians from the Occupied Territory. An exhaustive comparison of the two systems is beyond the scope of this article. However, a summary comparison is sufficient to suggest the parallels in practices designed to circumvent the usual evidentiary standards, procedural protections and minimum detention standards afforded under the rule of law in democratic polities. While there are many significant differences between the American and Israeli uses and abuses of administrative detention, notably the context of belligerent occupation in the Israeli case, even a cursory comparison of the systems reveals the similarities in the policy ends served

by recourse to administrative detention, as discussed in the final section of this article.

Deprivations of Liberty ...

Within days of September 11th, the United States Department of Justice initiated a massive anti-terrorism offensive, which entailed sweeping arrests using ethnicity and religious identity as proxies for "suspicion"; neither terrorism-related information nor other criminal evidence formed a basis for detention. Rather, the majority of detentions were based on minor technical violations of immigration status. Within the first seven weeks after the attacks, over a thousand men had been caught up in this '9/11 dragnet.⁸ While this first wave of arrests was carried out ostensibly under the general auspices of the September 11th investigation, subsequent detention initiatives were more narrowly tailored to focus on particular categories of predominantly Muslim or Arab immigrants, particularly at times when national security concerns were heightened.⁹

This section provides a brief glossary of the various mechanisms established to expand governmental powers of administrative detention beginning in 2001,¹⁰ along with a description of the effects of each new initiative.

A. The Absconder Apprehension Initiative: By late 2001, with the initial dragnet beginning to come under the scrutiny of civil rights groups, the Justice Department introduced a program designed to prioritize the detention/deportation of 6,000 men from Arab and Muslim countries.¹¹ These men were singled out from among the over 300,000 immigrants with outstanding deportation orders believed to be in the United States and treated as especially "suspect" not for any individualized reason, but on the basis of their national origin. The initiative targeted these men on the

grounds that their countries were thought to have a significant Al-Qaeda presence. The result was the detention of over 1,100 additional Arab and Muslim men by May 2003,¹² including Farouk Abdel-Muhti, mentioned above. The government has not claimed that any of these detained men were found to have an actual link to terrorism, and, while no additional information on "absconder" detentions has been published since 2003, the program has not been suspended as of 2007.

B. Material Witness Warrants: At least 50 individuals have been detained by the Justice Department through the use of "material witness" warrants since September 11th, 2001. Under federal law, an individual may be detained as a material witness if he or she has information material to a criminal proceeding and it would not otherwise be possible to elicit their testimony.¹³ This law was designed primarily for mafia cases in which witnesses were afraid to appear at hearings, and was never intended to authorize the prolonged detention of individuals. In the post-September 11th context, the law was used to preventively detain individuals who were neither witness to a crime nor expected to be brought before a hearing to provide testimony, but for whom no other detention pretext could be found because they were legally present in the country.

Use of the material witness statute enabled the government to expand its administrative detention powers to citizens, as no immigration pretext was required to hold individuals under the statute. Material witnesses were denied basic protections afforded by law and held under the harshest of conditions, often including solitary confinement, being held for twenty-three hours a day in lockdown, exposure to twenty-four hours of artificial

lighting a day, and shackling and subjection to cavity searches each time they were moved or permitted to leave their cells. Moreover, material witnesses are held without public information being available on their detention, often unable to contact lawyers and with their counsel subject to gag orders in instances where individuals are able to obtain legal representation. Further, the absence of a limitation on the duration of detention under the statute leaves those detained as material witnesses facing the serious prospect of indefinite detention.

C. The FBI's Voluntary Interview Program: The government announced in December 2001 that it had identified 5,000 immigrant men for "voluntary interviews" with the FBI, and added another 3,000 men to the list in the following spring. It was not made clear whether the interviewees could be accompanied by legal counsel or what the consequences of declining a "voluntary interview" would be. The interviews involved questions ranging from personal finances, to religious affiliation, political beliefs and immigration status. The interviews were expanded in 2003 to cover Iraqi-born immigrants in the run-up to the American invasion and occupation of Iraq. The wartime interviews involved over 11,000 Iraqis with several dozen detained, but did not yield any terrorism-related information or arrests.¹⁴ The numbers of individuals detained and deported for their "voluntary" participation in the overall interview program is unknown.

D. NSEERS / Special Registration: During the summer of 2002, the Justice Department announced a program requiring foreign nationals from selected countries to undergo a process of registration, fingerprinting, photographing and interview in order to enter

or exit the United States. By the following spring, this initiative affected nationals from twenty-five countries, all of which (with the exception of North Korea) were Arab or predominantly Muslim.¹⁵ In addition to "registration" upon entering or exiting the country, nationals of these countries of sixteen years of age or above already present in the United States would have to register at immigration facilities. Failure to comply with this call-in registration requirement would result in immediate deportability. Immigrants' advocacy groups spent six months frantically trying to inform their communities of the new requirements and encourage compliance. Hundreds of arrests were made within the first weeks of the program. Ultimately, 13,000 of the over 80,000 men who complied found themselves facing deportation orders.¹⁶

E. Operations Tarmac, Flytrap and Gameday: In the fall of 2002, the government initiated three regionally-specific immigration enforcement operations, allegedly targeting prioritized illegal immigrants representing risks to national security. Operations Tarmac and Flytrap targeted illegal immigrants working in airports in Houston and Washington DC, and each yielded the detention of over 100 individuals, about whom no terrorism-related information was discovered. Operation Gameday involved a sweep of the San Diego area in advance of the 2003 American football Super Bowl championship and yielded dozens of detentions, again without terrorism-related leads or information.¹⁷

F. Operation Liberty Shield: Adopted just before the American attack on Iraq in March 2003, this operation was promoted as an initiative to "protect the homefront" during the war. It entailed the mandatory detention of all asylum-

seekers entering the United States,¹⁸ and another round of FBI interviews, targeting over 11,000 Iraqis and Iraqi-Americans,¹⁹ and leading to dozens of detentions.²⁰

With the escalation of tensions between the United States and Iran from 2005, reports periodically emerged that the United States may undertake another round of interviews, this time of individuals of Iranian origin living in the United States. While no official announcement of such a program has yet been made, reports have surfaced, particularly in California, which has the largest concentration of Iranians living in the United States, of isolated instances of requests for interviews. In light of heightened concerns over a confrontation between the United States and Iran, and given the many precedents of interview and detention initiatives over the last six years, particularly the wartime interviews of Iraqi-born immigrants discussed above, advocates of immigrants' rights are preparing for the possibility of a new wave of interviews and detentions.²¹

In total, the programs described briefly above have resulted in the administrative detention of thousands of Arab and Muslim immigrants in the United States since September 11th.²² The absence of any terrorism-related information, evidence, activities, or charges resulting from any of these initiatives notwithstanding, the government has sent a clear message to all Americans that its aggressive arrest and detention practices are designed to "secure the homeland." By virtue of the targeting of Arab and Muslim immigrants in almost all of these policies, the government also put the nation on notice that these groups pose a heightened risk to national security and are inherently suspect, reversing decades of progress in anti-discrimination laws prohibiting the use of ascriptive characteristics

like ethnicity, religion and national origin as a proxy for suspicion or guilt.

... Without Due Process of Law

The dizzying array of new initiatives designed to increase levels of immigration detention was exceeded by the acceleration of measures to restrict the rights of and reduce procedural protections for these detainees. Basic requirements of due process ranging from a presumption of innocence to the right to legal representation and hearings before an independent judiciary and the right to be released on bail would all potentially undermine the Justice Department's strategy of maximizing the numbers of Arab and Muslim men taken off the streets. As a result, Attorney General Ashcroft opted to engage in detentions under the supervision of administrative judges (who are part of the executive branch rather than an independent judiciary) and deny detainees the constitutional protections of due process provided by the criminal justice system. This section provides an overview of the various policies that were introduced to further restrict what little procedural protection might have been afforded to detainees in the immigration courts through regulatory changes made under the sole authority of the Attorney General.

An examination of the extent of the suspension of basic protections of due process in the post- September 11th system of administrative detention illustrates its role in supplementing criminal detention. The procedural protections afforded to criminal defendants under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States' Constitution include the rights to counsel; prompt access to trial by an independent court; a "probable cause" hearing within forty-eight hours of detention for judicial review of the

basis of the detention; a bond hearing; a public trial on the substantive charges; and to confront evidence. Those singled out for administrative detention are deprived of *all* of these constitutional protections by virtue of being detained outside the scope of the criminal justice system. Administrative detainees are also subjected to the uncertainty of prolonged, indefinite detention often under harsher conditions than those imposed on convicted criminals, even though they do not stand accused of any crime. Nor are these the collateral effects of the administrative detention system. Rather, the system appears to have been designed precisely for the purpose of supplementing the existing criminal justice system with the option of preventive detention affording few, if any, rights to detainees while imposing harsher conditions than those permitted under criminal law. The hallmarks of this system, reviewed below, include secrecy, obstruction of access to lawyers, a presumption of guilt, restrictions on administrative review of the basis for detention, and the possibility of deportation (or rendition) without due process of law.

Secrecy: Detentions, Evidence and Hearings

Perhaps the most striking hallmark of the Bush administration's conduct in its domestic "war on terror" was secrecy. In the case of immigration detention, this secrecy extended to conditions of detention, the evidence presented when (or if) detainees were brought before an administrative judge, and the conduct of the hearing itself. At each of these levels, the Bush administration undermined one of the key constitutional values on which the pre-September 11th American legal system was based: open and transparent governance under principles of democratic accountability.

As documented in a critical report released by the Department of Justice's own Inspector General on the treatment of the September 11th detainees, the government went to extraordinary lengths to limit information on the names of those detained, as well as the locations of their detention.²³ Although the identities of immigration detainees are traditionally a matter of public record, the Justice Department systematically refused to release the names of immigration detainees and material witnesses in the immediate aftermath of September 11th 2001. These measures exacerbated fears that the government was effectively "disappearing" individuals.²⁴

A new interim rule enabled the government to use secret evidence during immigration hearings in which no allegation of criminal or terrorist activity was involved.²⁵ In light of the absence of terrorism-related charges against any of the September 11th detainees, there is reason to believe that the use of secret evidence in immigration hearings is a sign that the government *did not* have sufficient evidence to charge individuals in an open hearing, rather than an indication of a national security-related basis for the secrecy.

Chief Immigration Judge Michael Creppy issued a memorandum in September 2001 allowing for certain immigration hearings to be held in secret for individuals deemed to be of "special interest" to the Attorney General.²⁶ The "special interest" designation, in turn, was often based on the nationality of the detainee, rather than any information particular to the detained individual. The arbitrariness of this designation is especially disturbing when juxtaposed against the serious implications of the designation – triggering both closure of hearings and the imposition of heightened clearance procedures, which amount to a presumption of guilt.

Obstruction of Access to Lawyers and Family Visits

The secrecy surrounding the September 11th detentions effectively served as an access barrier to detainees trying to alert their families to their whereabouts. For many detainees, the inability to communicate with their relatives often had the concomitant effect of the inability to find a lawyer. Technically detainees have the right to make telephone calls from detention facilities, both to contact their families and, crucially, to obtain legal representation. These rights were systematically violated in the case of the September 11th detainees. Without access to functioning telephones, provided with inaccurate lists of telephone numbers for *pro bono* legal services, and often permitted no more than one attempt at a telephone call per week, many detainees spent weeks, if not months, trying in vain to reach the outside world for legal assistance.

Presumption of Guilt: Detention without Charge, FBI "Hold" and "Clearance" Procedures

On 20 September 2001, the Attorney General issued an interim rule allowing immigrants to be detained without charge for an indefinite period of time in the event of an "emergency or other extraordinary circumstance."²⁷ The over 1,200 immigrants who were detained within three months of the attacks were subject to this interim rule. In his detailed report, the Inspector General found that there were serious delays in the charging of detainees.²⁸ The practice of detaining immigrants without charge remains in effect today, although the Department of Homeland Security issued guidelines in April 2004 to restrict to some degree the use of indefinite detention in response to criticism from the Office of the Inspector General.

The Attorney General's interim rule was

accompanied by another measure which, by design and effect, prolonged the detention of immigrants picked up after September 11th: "special interest" detainees were subjected to "FBI holds," whereby they could not be released from detention or deported until their record had been "cleared" of any link to terrorist activity by the FBI.²⁹ Since the basis for the "special interest" and "FBI hold" designations was often nothing more than national origin, these practices replaced the presumption of innocence for these detainees with a *presumption of guilt* until their records had been cleared. None of these FBI holds ultimately resulted in terrorism-related charges being filed.

The Absence of Meaningful Judicial Review

Another important element of the strategy of prolonged detention involved restricting the administrative review of the September 11th detentions. Firstly, the government adopted a policy of denying bond in all cases related to September 11th.³⁰ Secondly, it gave its own lawyers unilateral authority to override bond determinations made by immigration judges and to apply an "automatic stay" on the release of any September 11th detainee, thereby stripping immigration judges of the authority to release detainees being held without a basis.³¹ Thus, detentions that fall outside of the scope of independent judicial review and may only be reviewed by administrative courts, which are part of the executive branch (and hence under the authority of the Attorney General), are subjected to further procedural restrictions, with detainees denied a meaningful opportunity for administrative review of the basis of their detentions. These measures constitute clear violations of the substantive rights of immigrants to due process under the

Fifth Amendment, which extends its protection to all *persons* present in the United States (and is therefore not restricted to citizens). In a recently-issued decision, a federal court in California ruled that the "automatic stay" provisions created a serious risk of the erroneous deprivation of liberties, while impermissibly eliminating the discretionary authority of immigration judges.³² Whether or not this decision will withstand appellate review remains to be seen.

Renditions

Evidence is mounting that the United States has, under what it terms an "extraordinary rendition" program, abducted and detained individuals in foreign countries and "rendered" them to countries willing to interrogate and torture them. The fate of certain September 11th immigration detainees demonstrates the existence of a domestic analog to this system of extraordinary rendition.

Perhaps the most widely-reported rendition of an individual detained within the United States is that of Maher Arar, a Canadian citizen who was detained in the transit lounge at Kennedy International Airport in New York by immigration officials, despite holding a valid Canadian passport.³³ He was interrogated for over a week within the United States before being deported on around 7 October 2002 to Syria on a private flight, accompanied by American officials.³⁴ Arar has alleged that he was interrogated and tortured while being detained in Syria, before being ultimately released without charge on 6 October 2003, over a year after his initial detention in New York. Estimates of the numbers of individuals who have been subjected to "extraordinary rendition" put the figure at 150, without a breakdown of the numbers into those detained within the United States and those abducted

abroad.³⁵ It is known, however, that Arar was not the only individual detained within the United States to be "rendered" for torture abroad.³⁶

Conditions of Detention

Since the images filtered out of the Abu Ghraib prison in Iraq, it has become clear that the practices of torture used in Abu Ghraib were also systematically applied at other American detention facilities abroad.³⁷ What is perhaps less well known is the extent to which similar abuses have occurred to individuals being held in preventive administrative detention at facilities *within* the United States.

With 200,000 individuals held in immigration detention annually, administrative detention in the United States has become a sprawling system of immigration service processing centers, local jails, federal prisons and facilities owned and operated by private prison companies, operating at the margins of the law.³⁸ Minimum standards nominally exist for the conditions of immigration detention, but they have not been promulgated as regulations and so do not operate as enforceable law.³⁹ Administrative immigration detention occurs in a regulatory gray zone with respect to the conditions of detention. The broad discretion afforded to personnel operating detention facilities and the lack of meaningful mechanisms of accountability creates a permissive atmosphere for the abuse of detainees by their captors.

Some detention centers reportedly engage in a "beat and greet reception" for new detainees in order to establish "discipline" in the facility. In one detention facility in New Jersey, this routine involved:

[K]icking, punching ... plucking detainees' body hairs with pliers, forcing detainees to place their heads in toilet bowls, encouraging and ordering

detainees to perform sexual acts upon one another, forcing detainees to assume unusual and degrading positions while naked, and cursing at and verbally insulting the detainees.⁴⁰

As will be detailed in this section, practices such as the use of nudity and sexual humiliation as well as the use of dogs to threaten and even attack detainees have all been documented within the *domestic* administrative detention system operated by the American government in its own territory.

In his research, Mark Dow found instances of numerous abuses reminiscent of Abu Ghraib. In one facility in New Hampshire, female detainees were forced to shower in the full view of male correctional officers. The use of solitary confinement for disciplinary and non-disciplinary reasons was extremely common, as was the locking of detainees in storage units, toilets and shower stalls in lieu of units designed for solitary confinement. Dow also documents institutionalized anti-Arab bias in detention facilities, predating even the attack on the World Trade Center in 1993.⁴¹ The overall picture that emerges from the world of administrative detention which Dow describes is one in which widespread acts of brutality and humiliation designed as crude measures of discipline are inflicted by detention officers, who dehumanize detainees or captors, indulging their sadistic, voyeuristic and sexual impulses in an atmosphere of impunity.

When in June 2003, the Office of the Inspector General of the Department of Justice ("OIG") issued a report that was scathingly critical of the treatment of the September 11th detainees, it was the first suggestion that any official standards of accountability might pertain to the government's largely secret detention of thousands of men after September

11th. The OIG's finding that little effort was made to distinguish between immigrants with alleged ties to terrorism and individuals randomly swept up in the dragnet vindicated the claims of immigrant communities and advocates for immigrants' rights that most of the detentions served no purpose in terrorism-related investigations.⁴²

The most crucial contribution of the report, however, concerned the conditions of detention of the September 11th detainees. Specifically, the OIG's report documented the detention of regular immigration detainees in high security units, in which they were subjected to the most punitive conditions of detention in the American prison system. The report found that a "total communications blackout" was imposed on the September 11th detainees for several weeks after September 11th. Thereafter, special "witness security" procedures were applied, obstructing the ability of relatives and lawyers to locate the detainees and frustrating the detainees' ability to contact counsel. The report noted that some detainees were kept in "lockdown" for 23 hours a day, that the lights were kept on in their cells for 24 hours a day, and that they were shackled with leg irons, handcuffs and heavy chains whenever they were permitted to leave their cells. The report also cited a "pattern of physical and verbal abuse by some corrections officers" against September 11th detainees.⁴³ The abuses catalogued in the report include instances of detainees being slammed into walls, dragged by their arms, of the chains between ankle cuffs being stepped on by guards to force a fall, of their arms, hands, wrists and fingers being twisted to inflict pain, and the use of slurs and threats against them.

The initial report produced shockwaves throughout the country as the media decried the excesses of the September 11th

detentions.⁴⁴ The OIG issued a supplemental report in December 2003, collecting additional evidence specifically about the abusive conditions of detention.⁴⁵ In addition to providing further evidence of the kinds of physical and verbal abuse documented in the first report, the supplemental report exposed in particular the systematic use of strip searches, multiple invasive cavity searches and sleep-deprivation techniques on detainees. By viewing video documentary evidence, the report confirmed the following practices: Unnecessary strip searches conducted minutes after a prior thorough search with the detainee shackled and accompanied by an officer for the intervening period; strip searches performed or observed by officers laughing at detainees and verbally abusing them; strip searches conducted in multipurpose rooms clearly visible from the corridor or other cells in the facility; the filming of strip searches and of naked detainees; the use of strip searches as punishment; and the strip searching of male detainees in the presence of women.⁴⁶

The OIG reports have been complemented and corroborated by testimonies provided by September 11th detainees themselves in public statements made following their release or deportation. Most testimonials relate to conditions at one of four detention facilities: the Metropolitan Detention Center (MDC) (Brooklyn, New York), Passaic County Jail (New Jersey), Hudson County Jail (New Jersey) and the Metropolitan Correctional Center (MCC) (Manhattan, New York). For instance, beatings and the punitive use of solitary confinement were widely reported among detainees at Passaic.⁴⁷ Farouk Abdel-Muhti, the Palestinian detainee described at the beginning of this article, was held at the Passaic facility, where he reported being beaten by guards, despite his age and poor health.⁴⁸

He was also held in solitary confinement for over eight months as a result of his efforts to organize detainees to demand improved conditions.⁴⁹

Circumstances at the principal detention facilities which housed the September 11th detainees were extremely abusive, beyond the use of cavity searches. In the case of the Passaic County Jail, one of the more disturbing practices widely reported was the use of dogs to threaten detainees, as detailed in an investigative report aired on *National Public Radio*.⁵⁰ The report included official documents from Passaic and confidential medical records showing that "at least two prisoners have been taken to the hospital [in 2004] for treatment for dog bites."⁵¹ After widespread media attention to the use of dogs at the Passaic facility, *National Public Radio* reported that the Department of Homeland Security had directed Passaic and other detention facilities to stop using dogs around detainees.⁵² When public scrutiny falls on the largely secretive world of administrative detention, minor changes are adopted to address specific instances of abuse reported to the public. Unfortunately, however, adequate policies have not been adopted to address in a systematic manner the wider pattern of abuse to which Arab and Muslim men detained after September 11th have been subjected.

From the arbitrariness of the post-September 11th dragnets, to the specific forms of abuse to which the detainees were subjected – sexual humiliation, sleep deprivation, solitary confinement, the use of dogs and physical abuse – the parallels to recent revelations about conditions of detention in America's overseas detention facilities at Abu Ghraib and Guantanamo Bay are striking. The parallels also reveal that, in spite of the difference in scale, a similar strategy and tactic is being

employed in the domestic "war on terror" as that used in the conduct of operations abroad.

Administrative Detention in the United States and Israel

Some commentators have suggested an actual link between American administrative abuse of detainees and the tactics developed by the Israeli government to control Palestinian resistance to the Israeli occupation, insinuating an "Israelization" of American policies in the "war on terror."⁵³ Whether such a direct connection exists or not, there are significant similarities to the strategy of the United States in using administrative detention to hold large numbers of individuals without charge during periods of heightened national security alert.

The then President of Israel, Moshe Katsav, once remarked in reference to administrative detention that, "To protect democracy, sometimes undemocratic steps must be taken."⁵⁴ When democratic regimes resort to such means, they apparently do so in similar ways. Many of the practices documented in the American context in this article have an equivalent in Israel, including the forms of abuse detailed above.⁵⁵ A comparison of specific suspensions of basic protections of due process in the two countries – the presumption of guilt based on ethnicity and national origin, the use of incommunicado detention, the transferring of detainees between facilities in order to prolong detention, and abusive conditions of detention – suggests an alarming convergence in the violation of basic rights inflicted by both governments through the mechanism of administrative detention.⁵⁶

Israeli, Palestinian and international human rights organizations have extensively documented the use of administrative detention to hold large numbers of Palestinians in custody without charge and often without

timely hearings to review the grounds for their detention.⁵⁷ As in the case of immigration detention within the United States, these detentions are authorized by administrative rather than judicial order, and exact grave harm to the rights to due process of those detained.⁵⁸ While the Israeli authorities typically do not deport administrative detainees outside of the area in which it exerts effective control (including the Occupied Palestinian Territory), there have arisen instances in which the Israeli authorities have expelled or "transferred" prisoners without due process of law as a punitive measure.⁵⁹ This tactic is comparable to the deportations and renditions through which the United States has sought to expel large numbers of Arab and Muslim men from its territory.

During the period from September 1993 to May 1997, the Israeli human rights organization B'Tselem documented the detention of an estimated 800 Palestinians without charge and often for extended periods.⁶⁰ Beginning in 1998, B'Tselem noted a "gradual decline in the numbers of Palestinians held in administrative detention," with as few as twenty administrative detainees in the period from 1999 until October 2001.⁶¹ While the actual practice declined in this period, the legal infrastructure enabling the state to engage in widespread administrative detentions remained in place, and was reactivated at the beginning of the second *Intifada*. There were reportedly over 9,000 Palestinians incarcerated in Israeli prisons as of September 2006, 801 of whom were being held in administrative detention.⁶² While the Israeli government claims that these administrative detentions are only used when necessary as a security measure, human rights organizations have argued that administrative detention is in fact being used as an alternative

to criminal proceedings, for the detention of political opponents and to restrict the procedural protections afforded to individuals held on the basis of classified evidence. For instance, B'Tselem has argued in a report on administrative detention that, "The authorities use administrative detention as a quick and efficient alternative to criminal trial, primarily when they do not have sufficient evidence to charge the individual or when they do not want to reveal their evidence."⁶³

The deprivation of liberty for indefinite periods without charge, incommunicado detention and the denial of basic procedural protections – through the use of secret or classified evidence and the denial of meaningful appellate mechanisms to challenge detention – are obvious common features in the uses of administrative detention in Israel and the United States.⁶⁴ So, too, is the invocation of national security-related considerations to justify collective forms of administrative detention. The detention systems in both countries reverse one of the most basic procedural protections required by the rule of law, by adopting a presumption of guilt based on ascriptive characteristics, specifically ethnicity.⁶⁵ The failure to promptly charge an individual or indicate the grounds for their detention provides another parallel between the two systems.⁶⁶ There are also similarities in the methods of physical and psychological abuse associated with administrative detention in Israel and the United States. Israeli, Palestinian and international human rights organizations have reported that administrative detainees are routinely denied visits from relatives, access to lawyers, proper medical treatment, that they are transferred from one detention facility to another and from one status to another in order to prolong detention, and subjected to serious physical abuses,

including torture.⁶⁷ A final parallel between the American and Israeli systems is the evident use of administrative detention in both countries as an alternative to criminal prosecution where reduced evidentiary standards and a presumption of guilt expedite the governments' desire to keep "suspect" categories of individuals off the streets.⁶⁸

Administrative detention in both the United States and Israel has given rise to shadow legal systems which operate, for the most part, outside the scope of the regular judiciary, enabling the executive to suspend basic rights and protections with little recourse for detainees, and to use preventive detention as a substitute for criminal trials. The worrying trend towards the expansion of executive authority to detain, the contraction of the judicial review of detention powers, the weakening of procedural protections and the abrogation of rights all heralds a convergence in the erosion of the rule of law in the United States and Israel.

The Price of Scapegoating

This article began with the circumstances surrounding the arrest as an "absconder" of Farouk Abdel-Muhti. Farouk's case is depressingly representative of the harm wrought by the scapegoating of Arab and Muslim men after September 11th, as well as an eerie symbol of the parallels between American policies and tactics in the "war on terror" and Israeli strategies in enforcing the occupation of the Palestinian Territories. A Palestinian rights activist with deep roots in New York, Farouk was detained on an immigration pretext in a warrantless arrest. His detention was needlessly prolonged as he was shuffled between five different facilities during his two-year detention, often held in punitive conditions of solitary confinement to deter his

efforts to organize detainees to demand better conditions. He was beaten and deprived of proper medical care. When his case finally received the attention of an independent court, he was released.

However, Farouk was only able to enjoy the hard-won victory in his case for three months before the combined effects of poor health, two years of beatings and the lack of medical attention took their toll: he collapsed and died in July 2004, at the age of 56, after delivering a lecture on the rights of detainees in Pennsylvania.⁶⁹ The American civil liberties community lost an important champion of rights. That Farouk was a Palestinian activist, possibly singled out for detention as a result of his political advocacy, is a particularly resonant reminder of the parallels between the evolving administrative detention system in the United States and the established legal infrastructure of administrative detention in Israel. The dangers of engaging in arbitrary deprivations of liberty are acute in both societies. The suspension of liberties, particularly of those of vulnerable communities, in the name of security quickly degenerates into systematic patterns of violations of due process which undermine the rule of law. When the rationale of "prevention" takes the form of the suspension of basic rights, the correct balance between liberty and security has been lost.

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End Notes

- 1 Information about Farouk's arrest and case can be found at: Center for Constitutional Rights, "CCR Secures Release of Palestinian Activist Farouk Abdel-Muhti," available at: <http://www.ccr-ny.org/v2/legal/justice/justiceArticle.asp?ObjID=6JmiF5rIkY&Content=375>.
- 2 Farouk's arrest and detention might differ from the thousands of others due to his outspoken activism. He had begun working with left-leaning Pacifica radio station in March 2002 and within one month, officials began coming to his home in search of him. See: "Palestinian Freedom Fighter Farouk Abdel-Muhti: 1947-2004," Pacific Radio (Democracy Now), available at: <http://www.democracynow.org/static/farouk.shtml>.
- 3 Mark Dow, *American Gulag: Inside U.S. immigration prisons* (Berkeley: University of California Press, 2004).
- 4 The course of the few cases where terrorism charges were filed is instructive. The procedural protections of the criminal justice system resulted in the exposure of evidence to scrutiny, resulting in the collapse of the cases. See David Shepardson, "Feds Admit Errors, Ask to Toss Terror Verdicts," *Detroit News*, 1 September 2004. Others against whom terrorism charges have been filed in the investigation into the attacks of September 11th were not picked up through the immigration dragnet or any other immigration program; those cases all came to light through ordinary police work.
- 5 The "immigration detention" system in the United States, particularly as it has been applied since September 11th, is, in effect, a system of preventive administrative detention. Because of the elision in the United States between immigration, administrative and preventive detention, the terms will be used more or less interchangeably.
- 6 Indeed, even broader powers were made available to the Attorney General under the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (H.R. 3162, the "USA PATRIOT Act"), which permits the indefinite preventive detention of non-citizens under the sole discretion of the Attorney General (§412). There is no public record of this power having yet been invoked by the Attorney General, since the Justice Department was able to craft an extensive administrative detention system without resorting to the USA PATRIOT Act's provisions.
- 7 Dow, *supra* note 3, at 9 and Kareem Shora *et al.*, "Invitation to join DWN (Detention Watch

Network)," 7 February 2005 (on file with author).

- 8 The Justice Department held regular press conferences to announce the numbers of "suspected terrorists" who had been detained, until the numbers got large enough to trigger concerns over civil liberties. The last such public announcement, made in early November 2001, revealed that 1,182 individuals had been detained. See Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies," *Washington Post*, 9 November 2001, A16.
- 9 For detailed information about the programs described in the following overview, see David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York, NY: The New Press, 2003); Barbara Olshansky, Michael Ratner, Rachel Meeropol and Steven MacPherson Watt, *America's Disappeared: Secret Imprisonment Detainees and the "War on Terror"* (New York, NY: Seven Stories Press, 2005). For a more general overview of U.S. immigration detention, see, Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* (Berkeley, CA: University of California Press, 2004). For details on the use of administrative detention since September 11, see, Muzaffar Chishti, *et al.*, *America's Challenge: Domestic Security, Civil Liberties and National Unity After September 11* (Migration Policy Institute, 2003) ("MPI Report"); *A Year of Loss: Reexamining Civil Liberties Since September 11* (Lawyers Committee for Human Rights, 2002); *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties* (Lawyers Committee for Human Rights, 2003); *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (Human Rights Watch, 2002); *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (Lawyers Committee for Human Rights, 2003); and *Ending Secret Detentions* (Human Rights First [formerly the Lawyers Committee for Human Rights], 2004).
- 10 The majority of these measures were put into place between 2001 and 2005. The second term of the Bush administration saw a different emphasis in its orientation towards immigration, with the focus shifting away from the alleged terrorist threat posed by immigrants to illegal immigration from Mexico. This shift reflected the passage of time from the attacks of September 11th, the success with which the Bush administration had expanded the detention powers of the Executive and the replacement of John Ashcroft as Attorney General by Alberto Gonzalez. By 2005, the Bush administration had put in place the necessary administrative mechanisms to transform the nation's immigration system into a massive preventive detention facility exempt from judicial scrutiny, and could afford to turn its attention back to other, more mundane aspects of immigration reform. For an account of the immigration agenda of Bush's second term, see Julia

- Gelatt, "Bush Puts Immigration Reform Back on Agenda, Approves Funding for DHS," in *Migration Information Source* (Migration Policy Institute), 1 November 2005, available at: <http://www.migrationinformation.org/USfocus/display.cfm?id=346>.
- 11 Memorandum from Deputy Attorney General to the Commissioner of the Immigration and Naturalization Service (INS), Director of the Federal Bureau of Investigation, Director of the United States Marshal Service, and U.S. Attorneys, "Guidance for Absconder Apprehension Initiative," 25 January 2002.
- 12 Cole, *supra* note 9, at 25.
- 13 18 U.S.C. § 3144.
- 14 See, e.g., "Wartime Probes of Iraqis End, FBI Interviews 11000, Finds No Spies," *CBS News*, April 17, 2003, available at: <http://www.cbsnews.com/stories/2003/04/17/iraq/main549841.shtml>; see also, Maia Jachimowicz and Ramah McKay, "FBI, BICE Interview Iraqi-Born Immigrants," *Migration Information Source* (Migration Policy Institute), April 1, 2003, available at: <http://www.migrationinformation.org/USfocus/display.cfm?ID=111>.
- 15 The full list, published in four groups through announcements in the Federal Register between September 2002 and January 2003, included the following countries: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Syria, Sudan, Tunisia, the United Arab Emirates and Yemen.
- 16 Anastasia Hendrix, "Registration ends; suspicions linger," *San Francisco Chronicle*, 3 December 2003.
- 17 For details on all three of these operations, see Asli Ü. Bâli, "Changes in Immigration Law and Practice After September 11: A Practitioner's Perspective," 2 *Cardozo Public Law, Policy and Ethics Journal* 170 (2003).
- 18 Department of Homeland Security Press Release, "Operation Liberty Shield: Increased Security at Borders – Asylum Modifications," March 2002, available at: http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml.
- 19 These were the "priority" of 11,000 from a wider pool of 50,000 Iraqis in the United States originally compiled by the FBI. "FBI Interviewing Iraqis Living in the U.S.," CNN, 20 March 2003, available at: <http://www.cnn.com/2003/LAW/03/20/fbi.war.preps/>.
- 20 "FBI Manhunt Targets Al Qaeda Suspect," *CBS News*, 24 March 2003, available at: <http://www.cbsnews.com/stories/2003/03/24/attack/main545808.shtml>.
- 21 See, e.g., ACLU Campaign Against Racial Profiling, "Highlights in Arab, Muslim and South Asian News," 16 February 2005.
- 22 Combining the known figures of those detained in the first dragnet of arrests and in the particular operations described in this section, the minimum number of administrative detentions as a result of post-September 11th-related policies is over 5,000. This number is likely to underestimate the actual total, perhaps by as much as half, since all figures are based on the limited information made public by the Bush administration by May 2003.
- 23 U.S. Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003, released to public on 2 June 2003) ("OIG Report"), available at: <http://www.fas.org/irp/agency/doj/oig/detainees.pdf>.
- 24 A federal challenge to the government's refusal to release basic information about the detainees was brought by a coalition of civil liberties and media groups under the Freedom of Information Act. The federal court which initially heard the case held that, "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." *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94, 106 (D.D.C.2002). On appeal, the government won a reversal of the lower court's decision. *Center for National Security Studies v. United States Department of Justice*, 331 F. 3d 918 (D.D.C.2003), which remains in effect after the Supreme Court declined to review the case. *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *cert. denied*, (12 January 2004).
- 25 The interim rule authorizes immigration judges to issue protective orders and seal records where information related to national security might be at issue. Protective Orders in Immigration Administrative Proceedings, 67 *Federal Register* 36, 799 (21 May 2002).
- 26 Memorandum from Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (21 September 2001), available at: http://news.findlaw.com/hdocs/docs/aclu/creppy_092101memo.pdf.
- 27 *Custody Procedures*, 66 Fed. Reg. 48,334 (20 September 2001).
- 28 OIG Report, *supra* note 23, at 27-36.

- 29 See, OIG Report (Chapter 4), *supra* note 23, at 37-69.
- 30 For a detailed discussion of the "no bond" policy, see, OIG Report (Chapter 5), *supra* note 23, at 72-90.
- 31 Custody/Bond, 8 C.F.R. § 1003.19(i)(2) (2003).
- 32 *Zavala v. Ridge and Ashcroft*, No. C 04-00253 JSW (Order Granting Writ of Habeas Corpus) (ND CA) (1 March 2004).
- 33 Details about Arar's case are available through the Center for Constitutional Rights (CCR), a New York-based legal services non-profit organization providing pro bono legal services to Arar, available at: <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=NydViALyVC&Content=300>.
- 34 Jane Mayer, "Outsourcing Torture: The secret history of America's 'extraordinary rendition' program," *The New Yorker*, 14 February 2005, available at: http://www.newyorker.com/fact/content/050214fa_fact6.
- 35 This estimate is taken from the findings of a co-authored report: Committee on International Human Rights, the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University Law School, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions,'" December 2004, available at: [http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20\(PDF\).pdf](http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf).
- 36 For instance, Mark Dow documents the case of an Egyptian detainee, Nabil Soliman, deported to Egypt by U.S. authorities and transferred directly to Egyptian custody, with Amnesty International noting that he was held incommunicado for several weeks by Egyptian authorities before being moved to the Tora prison. Dow, *supra* note 3, at 225-226.
- 37 For a review of the memoranda and other official documents chronicling the shifting U.S. policy on the use of torture see, Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005); Mark Danner, *Torture and Truth: America, Abu Ghraib and the War on Terror*, 51(10) *New York Review of Books*, 10 June 2004; and ACLU, "Records released in response to torture FOIA request," available at: http://www.aclu.org/torturefoia/released/FBI_010505.html.
- 38 Dow *supra* note 3, at 9-10.
- 39 The standards cover attorney visitation, media interviews, law libraries, detainee grievance procedures and other aspects of prison life. The BICE detention standards are available at: <http://www.ice.gov/graphics/dro/opsmanual/index.htm>.
- 40 Dow *supra* note 3, at 143-44.
- 41 Dow *supra* note 3, at 227, 234-237 (on the New Hampshire facility); at 105, 115, 135, 157, 167, 182, 194, 203 and at 242 (on the use of solitary confinement); at 59 (testimony of Calejo on locking detainees in toilet units); and at 93 (on the use of a shower unit as a segregation cell); at 211 (on institutionalized anti-Arab bias).
- 42 OIG Report, *supra* note 23. The Report was prepared on the basis of interviews conducted with a sample of 762 of the September 11th detainees – a statistically significant proportion to which only the OIG had access.
- 43 OIG Report, *supra* note 23, at 186 (on the communications blackout); at 186 (on witness security procedures obstructing access to family and counsel); at 111-157 (Chapter 7) (on conditions of detention); and at 142 (on pattern of physical and verbal abuse).
- 44 See, e.g., "The Abusive Detentions of Sept. 11," *The New York Times*, 3 June 2003; "Troubling Truth: Search for terrorists steamrolled other people," *Dallas Morning News*, 6 June 2003; and "Sledgehammer justice," *Denver Post*, 5 June 2003.
- 45 OIG, "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York," U.S. Department of Justice (December 2003), ("OIG Supplemental Report") available at: <http://www.usdoj.gov/oig/special/0312/>.
- 46 All of these examples concern searches conducted on detainees held in the Special Housing Unit of the MDC facility. OIG Supplemental Report, *supra* note 45, at 33-34.
- 47 See, e.g., Irum Sheikh, "Abuse in American Prisons," 1 *Muslim World Journal of Human Rights* (2004) at 8-11; Michelle Goldberg, "The prison abuse scandal at home," *Salon.com*, 19 May 2004, available at: <http://dir.salon.com/story/news/feature/2004/05/19/maddy/index.html>.
- 48 "NJ officers assault detained Palestinian activist, confiscate 'anti-government' publications," Committee for the Release of Farouk Abdel-Muhti (Press Release), 24 November 2003.
- 49 Center for Constitutional Rights, "Case Synopsis: Farouk Abdel-Muhti," July 2004, available at:

- <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=MGvRXc7PZB&Content=422>.
- 50 Daniel Zwerdling, "Jailed Immigrants Allege Abuse: Immigrant Detainees Tell of Attack Dogs and Abuse," *National Public Radio* (All Things Considered), 18 November 2004, available at: <http://www.npr.org/templates/story/>.
- 51 Detainee Rosendo Lewis, age 29, says he was bitten by a dog and beaten during a confrontation with a group of guards." See, Zwerdling, supra note 50. Sheikh interviewed a detainee who alleged similar abuse in 2002 and published his testimony regarding the use of dogs and other abuses at Passaic. Sheikh, supra note 47, at 9-10 (see also, nn. 26-28) "Interview with 'Raheem' (pseudonym)." See also, Eva Sanchis (transl. by Chris Brandt), "Use of dogs in Passaic jail raises alarm," *El Diario*, 19 November 2004, available at: <http://www.indypressny.org/article.php3?ArticleID=1769>.
- 52 Daniel Zwerdling, "Government Halts Use of Dogs Around Detainees," *NPR*, 30 November 2004.
- 53 See, e.g., "Israeli interrogators in Iraq," *BBC*, 3 July 2004, available at: http://news.bbc.co.uk/2/hi/middle_east/3863235.stm; Wayne Madsen, "The Israeli Torture Template," *Counterpunch*, 10 May 2004, available at: <http://www.counterpunch.org/madsen05102004.html>; "Israeli interrogators in Iraq – An exclusive report," *Jane's Foreign Report*, 7 July 2004, available at: http://www.janes.com/security/international_security/news/fr/fr040707_1_n.shtml; and Lisa Hajjar, "Torture and the Future," *Middle East Report*, May 2004.
- 54 Cited in *Mideast Mirror* (Section A: Israel), 14 February 2005.
- 55 In suggesting this equivalence, there are two important points that should be emphasized. The first point relates to a disparity in the international legal status of the American and Israeli administrative detention systems. Israel invokes a state of emergency to justify its resort to administrative detention and the Palestinians detained under these conditions are neither citizens nor immigrants, but subjects under a system of belligerent occupation, which represents a significant distinction from the American case. To the extent that Israel is holding residents of the Occupied Palestinian Territory as administrative detainees it is doing so as a belligerent occupier, and its actions are subject to the Geneva Conventions. For instance, by transferring individuals detained in the Occupied Palestinian Territory into Israel for detention, Israel is acting in violation of Articles 49, 76 and 147 of the Fourth Geneva Convention. By contrast, the domestic administrative detention system developed in the United States using immigration regulations is not subject to the requirements of the Geneva Conventions. A second significant point relates to what the United States and Israel have in common with other democracies that have also developed a system of administrative detention in the context of a national security crisis. Indeed, Israel has more in common with these other democracies than the United States. Specifically, in responding to the challenge of political violence associated with Northern Irish separatism, the United Kingdom evolved an administrative detention system for members of the Irish Republican Army (IRA) as did the Spanish government in response to similar separatist claims by the Basque nationalist group Euskadi Ta Askatasuna (ETA). Unlike Israel, the United Kingdom and Spain, the United States is not in a militarized conflict involving a territorial dispute. Rather, the United States has developed its domestic administrative detention system by using ethnicity and religious background as a proxy for suspicion of involvement in an amorphous and generalized conflict under the rubric of the post-September 11th "global war on terror." Thus, the nature and potential scope of both the domestic and extraterritorial administrative detention systems developed by the government of the United States are in important ways distinct from the Israeli system, which, with the exception of a very small number of Israeli Jewish citizens who have also been held in administrative detention, is specifically targeted at Palestinians.
- 56 The principal focus of this article is to analyze the comparatively less well-known American administrative detention system. This analysis should provide a basis for a thorough comparison with the Israeli administrative detention system in subsequent research. While a preliminary comparison of the two is provided herein, a more complete consideration of Israeli administrative detention practices and an in-depth comparison of the two systems is beyond the scope of this article.
- 57 See, e.g., Amnesty International, "Administrative detention: despair, uncertainty and lack of due process" (Israel and the Occupied Territories) (1997); Amnesty International, "Administrative Detention," (2004), available at: <http://web.amnesty.org/pages/isr-action-detention>; Addameer, "Administrative Detention" (1999) available at: <http://www.addameer.org/administrative/>; B'Tselem, "Prisoners of Peace: Administrative Detention During the Oslo Process," (1997); and B'Tselem, "Barred from Contact: Violation of the Right to Visit Palestinians Held in Israeli Prisons," (September 2006), available at: http://www.btselem.org/Download/200609_Barred_from_contact_Eng.doc.
- 58 In one interesting instance, the Israeli Supreme Court did hear a case with respect to the legality of

administrative detention. The case involved Lebanese detainees who were being held in administrative detention after the completion of their sentences as "bargaining chips" to be exchanged at a later date with Lebanese groups holding Israelis. The Israeli Supreme Court ultimately held that detaining an individual solely as a "bargaining chip" was impermissible. While the decision did not lead to the immediate release of the detainees who were ultimately released in a subsequent bargain struck between the government of Israel and the Hezbollah militia, it demonstrated the willingness of the Israeli Supreme Court to permit recourse to an independent judiciary to challenge administrative detention. FCrA 7048/97, *Anonymous Persons v. Israeli Minister of Defense*, P.D. 54(1) 721 (12 April 2000) (majority opinion by Justice Aharon Barak). A case from 2002 in which the Israeli Supreme Court reviewed the conditions of detention at the Kziot detention facility in the Negev desert also stands for the proposition that some degree of review is available, although the petition was denied. See: H.C. 5591/02, *Halel Yassin et al. v. Commander of the Kziot Detention Facility and the Minister of Defense* P.D. 57(1) 403.

59 On the history of Israeli expulsions of Palestinian detainees, see, Al-Haq, "An Illusion of Legality: A Legal Analysis of Israel's Mass Deportation of Palestinians on 17 December 1992" (1993).

60 B'Tselem, "Prisoners of Peace," supra note 57.

61 B'Tselem, "Administrative Detention," available at: http://www.btselem.org/english/Administrative_Detention/.

62 B'Tselem, "Barred from Contact," supra note 57. The number of administrative detainees, 801, is as of January 2007, and is provided in the regularly updated statistics on administrative detainees on the B'Tselem website, available at: http://www.btselem.org/english/Administrative_Detention/Statistics.asp.

63 B'Tselem, supra note 61. Amnesty International reports that "Administrative detention has at times been used by Israeli authorities to detain prisoners of conscience, held for their non-violent exercise of the right to freedom of expression and association." Amnesty International, supra note 57.

64 For a detailed description of these features of the Israeli administrative detention system as employed against Palestinians of the Occupied Territories, see, Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley CA: University of California Press, 2005) at 3-5. On the parallels between U.S. and Israeli tactics in the post-September 11th period see, Hajjar, *Courting Conflict*, at 235-252.

65 On the presumption of guilt with respect to Palestinian detainees, see generally, Hajjar, supra note 64. On the application of a "double standard" by Israeli civil and military courts to actions by Israeli Jewish citizens and those of Palestinians of the Occupied Territories or Palestinians with Israeli citizenship, see, Martin Edelman, *Courts, Politics and Culture in Israel* (Charlottesville: University Press of Virginia, 1994) at 111-121.

66 See, e.g., B'Tselem, "Detained Without Trial: Administrative Detention in the Occupied Territories Since the Beginning of the Intifada," (1992) at 14-15.

67 B'Tselem has recently issued a detailed report documenting the techniques used to deny visitation to Palestinian detainees held in Israel. B'Tselem, "Barred from Contact," supra note 57. The report notes that from September 2000 to March 2003, family visits were systematically denied (at 3). Amnesty International, supra note 57; on the denial of family visitation, see: Case of Ahmad Qatamesh; on the denial of access to counsel see, Cases of 'Abdullatif Gheith and Burhan Khaled; on the denial of medical treatment, see: Case of Asma Muhammad Suleiman Saba'neh Abu al-Hija; and on subjection to serious physical abuse see, Cases of Tali Fahima, Daoud Dir'awi and 'Abd al-Salam 'Adwan. See also, Human Rights Watch, "Administrative Detention," available at: <http://www.geocities.com/onemansmind/jc/HRW01.html>. On the use of transfers to prolong detention, see, Addameer, supra note 69, "Section III: Transferring Administrative Detainees to Interrogation".

68 B'Tselem, "Detained Without Trial," supra note 66, at 12. See also, Edelman, supra note 65, at 100-118.

69 Center for Constitutional Rights, "CCR Mourns the Loss of Freedom Fighter Farouk Abdel-Muhti," July 2004, available at: <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=MGvRXc7PZB&Content=422>.