

US appeals court approves secret roundup of immigrants

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A panel of the US Court of Appeals for the District of Columbia Circuit has given another green light to the Bush administration's attacks on democratic rights. It voted 2-1 to reverse a lower court order compelling Attorney General John Ashcroft to identify hundreds of people from the Middle East rounded up by the government in the immediate aftermath of September 11. None of those imprisoned in the course of this dragnet has been charged with any crime relating to the attacks on the World Trade Center and the Pentagon.

The decision in *Center for National Security Studies v. United States Department of Justice* was handed down June 17. It is the latest in a series of rulings by right-wing judges who, like the Bush administration itself, are using the "war on terrorism" as a pretext to cloak the government in secrecy and dismantle the constitutional framework of checks and balances. Other court rulings have expanded government power to conduct secret surveillance, upheld secret immigration hearings, denied basic due process rights to detainees at Guantánamo Bay in Cuba, and granted Bush the power to deem US citizens "enemy combatants," who can then be held indefinitely on no charges and without access to a lawyer. The cumulative effect of these decisions is to create an executive branch with near-dictatorial powers.

The case decided June 17 arose after Ashcroft announced on October 25, 2001, that his "anti-terrorism offensive" had arrested or detained nearly 1,000 individuals as part of the September 11 investigation. Several public interest and media organizations quickly filed requests for details about the arrests pursuant to the Freedom of Information Act (FOIA). The FOIA is a Watergate-era law that compels federal agencies to respond to requests for information about their activities, unless they can establish that disclosure would fall within one of the FOIA's narrow exceptions. The law provides that anyone disagreeing with an agency decision to withhold information can file suit in a US district court and obtain judicial review.

When Ashcroft's Justice Department refused to provide requested information, the public interest groups filed suit to compel disclosure. In that litigation, the government acknowledged detaining 751 individuals on immigration violations over the course of its investigation, but by June 2002 most had been released, many having been cleared of

wrongdoing altogether and others having been deported for immigration violations or non-terrorism-related offenses.

While allowing many details of the investigations to be kept secret, US District Judge Gladys Kessler ordered the government to identify those detained as well as their lawyers. She rejected government claims that release of the information would threaten national security. "Unquestionably, the public's interest in learning the identity of those arrested and detained is essential to verifying whether the government is operating within the bounds of law," Kessler's disclosure order reads.

Kessler grounded her decision in what have been, at least until recently, generally accepted principles of a democratic society: "Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, 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."

The June 17 opinion overturning Kessler was written by Judge David B. Sentelle, a protégé of the arch-reactionary former North Carolina senator Jesse Helms. Sentelle was appointed to the DC Circuit—considered second only to the Supreme Court in influence—by Ronald Reagan in 1987.

Sentelle was on the appellate panel that in 1990 voided the felony convictions of Lt. Col. Oliver North and Reagan's national security adviser, retired admiral John Poindexter, who had directed the illegal arms trafficking operation that became known as the "Iran-Contra affair." Two years after Clinton's election, Chief Justice William Rehnquist chose Sentelle over 11 more senior judges to chair a three-judge "Special Division" charged with the responsibility of appointing, if requested by the Justice Department, an independent counsel to investigate allegations of presidential misconduct. His first order of business was to replace special prosecutor Robert Fiske, who had found no wrongdoing relating to the Whitewater affair, with Kenneth Starr, a right-wing Republican and office-holder in the first Bush administration. Starr turned the investigation into an open-ended legal witch-hunt, culminating in the Monica

Lewinsky scandal and impeachment of Clinton.

In his June 17 decision, Sentelle condemned Judge Kessler for not giving “deference” to the Bush administration’s determination that release of the information about the detainees would damage national security. “America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore,” Sentelle wrote.

Sentelle’s comparison of the Cold War—where the US for over 40 years faced a superpower armed with nuclear weapons—to the current “war” against scattered, stateless bands of religious fanatics is, on its face, absurd. However, if one were, for the sake of argument, to accept the judge’s analogy, it would only underscore the arbitrary and legally perverse character of his ruling.

Never, even at the height of the anti-communist hysteria of the late 1940s and 1950s, did the federal government claim such sweeping powers to detain and hold suspects without any judicial process and under conditions of total secrecy as does the current administration. As Sentelle well knows, any such claims would have met a generally hostile response in the federal courts throughout most of that period.

Indeed, in the late 1950s and 1960s the federal judiciary handed down rulings strengthening the enforcement of constitutionally mandated civil liberties, generally protecting the rights of the accused to due process, including the right to legal counsel, as well as the right of the public to scrutinize the actions of the government. The Freedom of Information Act itself was passed in 1975 precisely “to lift the veil of secrecy” and check government abuses.

Sentelle’s assertion that courts “lack the capacity...to explore” the legitimacy of governmental secrecy claims repudiates the constitutional powers of both the legislative and judicial branches of the federal government. The FOIA is an act of Congress that includes explicit provisions for strict judicial review of government agency denials. It expressly places the burden on the government to demonstrate that requested information falls within an exception to disclosure, rather than directing the courts to defer to agency determinations. Judicial review itself lies at the foundation of the American three-branch constitutional form of government, and the recognition of the public’s “right to know,” which animates the FOIA, is indispensable to the democratic process.

By disregarding both a law of Congress and the constitutional system of checks and balances, Sentelle’s decision gives lie to the claim that conservative judges are “strict constructionists” who apply constitutional provisions and statutes literally, while liberal jurists engage in “judicial activism.”

Another Republican-appointed judge, Karen LeCraft Henderson (also from North Carolina), joined Sentelle’s opinion. Judge David S. Tatel, appointed by Clinton, dissented, slamming the decision’s “uncritical deference to the government’s vague, poorly explained arguments for withholding broad categories of information about the

detainees.” The ruling “eviscerates both FOIA itself and the principles of openness in government that FOIA embodies,” Tatel wrote.

The dissent further declared that the ruling ignored “the public’s interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation—by, as the plaintiffs allege, detaining them mainly because of their religion or ethnicity, holding them in custody for extended periods without charge, or preventing them from seeking or communicating with legal counsel.”

Tatel added, “Just as the government has a compelling interest in ensuring citizens’ safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.” He concluded, “History, moreover, is full of examples of situations in which just these sorts of allegations led to the discovery of serious government wrongdoing—from Teapot Dome in the 1920s to the FBI’s COINTELPRO counterintelligence program in the 1960s to Watergate in the 1970s.”

The decision was issued within weeks of a report from the Justice Department’s inspector general that found “significant problems” in the way people were arrested and treated during the post-September 11 roundup. The report concluded that authorities made little effort to distinguish terrorist suspects from those who became ensnared by chance in the investigation. Many people were jailed for months, often without ever being formally charged or given access to a lawyer, and some were physically and verbally abused before they were cleared of any terrorist ties, the report said.

This reactionary ruling, like the others sanctioning the Bush administration’s constitutional abuses in the name of the “war on terrorism,” are bound up with the systematic stacking of the federal judiciary at the highest levels with political right-wingers, who contrive rulings in accordance with a partisan agenda that is deeply hostile to democratic rights, exhibiting barely concealed contempt for the Constitution, laws enacted by Congress to protect individual rights, and legal precedent. This process of transforming the federal courts into a bastion of reaction has been proceeding for more than two decades, in line with the general shift of the entire political establishment to the right and its ongoing assault on the social conditions and democratic rights of the working class.



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