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## SECRET TRIALS IN AMERICA?

### Administration's 'Alien Terrorist Removal' Plan Puts U.S. in Company of Repressive Regimes

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**"Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous view in the forum of public opinion is an effective restraint on possible abuse of judicial power."**

*-- Justice Hugo Black, writing in In Re Oliver, 1948*

#### INTRODUCTION

The Bush Administration has proposed legislation in Congress that would authorize secret proceedings for the deportation of foreign nationals accused of terrorism. If enacted, this proposal would depart from two centuries of history and law in the U.S. -- Justice Black observed in the opinion cited above that "we have been unable to find a single instance of a criminal trial conducted *in camera* in any federal, state or municipal court during the history of this country" -- and place the United States in bad international company, along with repressive regimes from China

to Syria. In fact, in seeking this radical change in U.S. law, the Administration proposes to adopt practices it has sharply criticized in other countries.

## **SUMMARY OF ALIEN TERRORIST REMOVAL AMENDMENT<sup>1</sup>**

The proposal to try foreign nationals suspected of "terrorism" on the basis of secret charges has to date attracted little public attention, perhaps because it is included in a massive comprehensive crime bill backed by the Administration, S. 635 in the Senate and H.R. 1400 in the House. The "Terrorism Death Penalty Act of 1991" (S. 265), sponsored by Senator Strom Thurmond, contains an identical proposal.

These bills would set up special courts to conduct largely secret trials to deport non-citizens -- even permanent resident aliens with relatives who are U.S. citizens, and who have lived here for many years -- without having been convicted of, or even charged with, any crime. "Terrorism" is defined very broadly, and may include arguably First Amendment-protected activities such as raising money for or recruiting members for an organization engaged in legitimate political activities, if, in the Administration's view, a branch of the organization also engaged in violent activities. Under such a definition, the Administration could arguably deport as an "alien terrorist" someone raising funds for the African National Congress or Kurdish or Salvadoran rebels. Charges may be kept secret, and could be based on unfounded allegations from the country from which the foreign national came.

The legislation applies to all foreign citizens in the U.S., regardless of their immigration status. It would work in the following manner:

- Secret proceedings could be initiated by the Attorney General, upon a charge that a non-citizen has "engaged in terrorist activities," by application to one of five judges designated by the Chief Justice of the Supreme Court to hear such cases.
- Upon filing of the application, the government can arrest and detain the person involved, without any need to make a showing that he or she is dangerous or might flee.
- The judge decides whether there is probable cause that the accused has engaged in terrorist activities, without any participation by the accused or his or her counsel.

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<sup>1</sup>This summary relies heavily on an analysis prepared by the American Civil Liberties Union and the Center for Constitutional Rights in a memorandum issued on May 20, 1991 and available from the ACLU Washington Office at 122 Maryland Avenue, NE, Washington, D.C. 20002.

- If the judge rules against the government, he or she must write an opinion, and the government is entitled to a secret, expedited, *ex parte* appeal. If the judge rules for government, the defendant may not appeal.

- The accused has no right to know the specific charges against him or her. When the judge authorizes a "special removal hearing," he or she reviews the secret evidence and decides what, if anything, can be disclosed. The accused receives either a written summary of "the general nature of the evidence" or a statement that no such summary can be provided.

- The special removal hearing is open to the public in form, but the evidence on which the charge is based is never revealed to the public, the accused, or his counsel. The government can present arguments about the secret evidence to the judge in private, without the participation of the opposing lawyer or the observation of the public.

- Upon a finding that the accused has engaged in "terrorist activity," the judge must order him or her deported, and may not decide on a less onerous penalty. Any part of the judge's opinion based on the secret evidence must itself be kept secret.

- The Executive Branch may refuse to deport the alien to the country of his or her choice if the Attorney General and the Secretary of State determine that it would "adversely affect the foreign policy of the United States." The alien may be sent to "any country willing to receive" him or her, including a country to which he or she cannot legally be extradited.

The government does not need these draconian and unprecedented measures. In fact, the U.S. has successfully prosecuted many espionage and terrorism cases where sensitive national security information is involved, without reliance on secret courts or evidence. Moreover, the Federal Bureau of Investigation has reported that incidents of terrorism in the U.S. have been on the decline during the past decade.

With respect to constitutional concerns, principles of due process governing adverse action against individuals should apply equally to citizens and foreign nationals. U.S. courts have traditionally held that because deportation is the most serious penalty an alien can face, he or she should be entitled to constitutionally fair procedures before expulsion may take place.<sup>2</sup>

## COMPARABLE PROVISIONS IN OTHER COUNTRIES

In addition to the requirements of its own constitution, the United States is on record on behalf of fair and public trials as a fundamental human right. The Department of State has often criticized other countries on these grounds. On March 25 of this year, for example, State Department spokesperson Margaret D. Tutwiler condemned Israel's deportations of four Palestinians, asserting that the U.S. "believes that charges of wrongdoing should be brought in a court of law based on evidence to be argued in a public trial."<sup>3</sup>

In its annual reports on the human rights records of other countries, the Department of State reviews each nation's law and practice with respect to "denial of a fair public trial." A typical passage appears in the section on Bahrain in the "Country Reports on Human Rights Practices for 1990." Asserting that "procedures in Bahrain's Security Court do not meet international standards for a fair trial," the report notes, among other due process deficiencies, that the court's "proceedings are held in secret."<sup>4</sup>

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<sup>2</sup>See, for example, *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), and *Rafeedie v. INS*, 880 F. 2d 506 (D.C. Cir. 1989).

<sup>3</sup>"U.S. Condemns Deportations in Gaza," *The New York Times*, March 26, 1991.

<sup>4</sup>Country Reports on Human Rights Practices for 1990, U.S. Department of State (hereafter, "State Department Report"),

We provide below a sampling of violations of this right by various countries, with excerpts from U.S. human rights reports in which the State Department has criticized other countries for practices comparable to those the Administration now seeks to enact into American law.

### **China**

In its 1990 Country Reports on Human Rights Practices, the Department of State noted that "details of cases involving `counterrevolutionary' charges have frequently been kept secret, even from relatives of the defendants..."<sup>5</sup> Asia Watch, which has closely monitored the cases of those arrested as a result of the 1989 pro-democracy movement, has reported that the trials of more than 30 of the movement's leaders were closed to foreign observers and in some cases, the defendants' immediate family members. A recent Asia Watch report states that "... the obsessive degree of secrecy shown by China's courts extends well beyond the mere physical exclusion of foreigners from courtrooms in sensitive cases," noting that Article 111 of Criminal Procedure Law of China provides: "The people's courts shall conduct adjudication of cases in the first instance in public. However, cases involving state secrets or the affairs of private individuals are not to be heard in public."<sup>6</sup>

### **Cuba**

The United States has long been critical of Cuba's judicial system. In this year's human rights report, the State Department wrote:

In 1990 the Government used the judicial system to discredit human rights activists by publicly associating them with certain foreign governments or with violent activities. In July Cuban media reported the July 17 closed trial of 11 persons said to be members of the Youth Association for Human Rights ... on charges of plotting the violent overthrow of the Cuban Government with the support of the U.S. government.

The report goes on to note that "the prosecution's line of questioning attempted to establish that the human rights activists were terrorists."<sup>7</sup>

Cuba's loose definition of "terrorism," which relies heavily on the accused's alleged connections with the U.S. government, has also been criticized by Americas Watch.<sup>8</sup>

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February 1991, p. 1380.

<sup>5</sup>State Department Report, 1991, p. 850.

<sup>6</sup>"The Beijing Trials: Secret Judicial Procedures and the Exclusion of Foreign Observers," *News From Asia Watch*, February 27, 1991.

<sup>7</sup>State Department Report, 1990, pp. 575-6.

<sup>8</sup>For example, an Americas Watch newsletter, "Attacks Against Independent Associations," (February 25, 1991), notes that Cuban Human Rights Party members were accused of "belonging to a counter-revolutionary organization ... [acting] in accordance with the interests of the United States Government."

## Guatemala

From July 1982 until September 1983, Guatemala operated a system of special "anti-subversion courts." In the 1983 human rights report, the U.S. commented that "since proceedings in these courts were secret, there was widespread concern about the possible absence of due process."<sup>9</sup>

In 1983 ruling, the Inter-American Commission on Human Rights condemned Guatemala's special "anti-subversion" courts for operating in secrecy. The commission held that "those procedures, carried out without respect for the minimal guarantees of due process, truly constituted a farce and regardless of where they might occur the practice of appointing unqualified judges, defenders who do not defend, a Public Ministry unconcerned with the prompt, fair and effective administration of justice and Law Courts that really are courts martial, devoid of independence and impartiality, that function in secret under military auspices, in fact impede rather than foster justice."<sup>10</sup>

Americas Watch also criticized the special courts on numerous grounds, and asserted that "every phase of these special courts' deliberations in all cases to date have been held in total secrecy."<sup>11</sup>

## Iraq

The 1990 human rights report is, not surprisingly, highly critical of Iraqi justice. It states:

...security cases are handled by the Revolutionary Courts, which usually hold closed trials. Security cases include espionage, treason, smuggling, currency exchange violations and drug trafficking. The right of defense in such courts is said to be severely restricted. The 'special courts' constituted by the RCC for specific incidents, such as the reported conspiracy against the regime in 1979, are also closed.<sup>12</sup>

Middle East Watch reported in 1990 that Article 20 of the Iraqi constitution "specifically provides for *in camera* trial and places no limit on this procedure," and that the Revolutionary Courts "appear to operate exclusively *in camera*."<sup>13</sup>

Facing international pressure to reform its draconian justice system, Iraq abolished the Revolutionary Courts in a decree issued on May 20, 1991.<sup>14</sup>

## Kuwait

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<sup>9</sup>State Department Report, 1983, p. 582.

<sup>10</sup>Inter-American Commission on Human Rights, Report on the Situation of Human Rights in the Republic of Guatemala, 89-90, October 5, 1983.

<sup>11</sup>"Human Rights in Guatemala: No Neutrals Allowed," *News From Americas Watch*, 1982.

<sup>12</sup>State Department Report, 1989, p. 1414.

<sup>13</sup>*Human Rights in Iraq*, Middle East Watch, Yale University Press, New Haven and London, 1990, p. 25.

<sup>14</sup>*al-Hayat*, May 22, 1991.

Commenting on the period before the Iraqi invasion, the U.S. was critical of Kuwait's judicial proceedings in security matters:

Trials before the State Security Court, which convened on an ad hoc basis to handle cases deemed of an internal security nature, did not meet international standards for fair trial. Composed of judges normally serving in other courts, this tribunal, with few exceptions, conducted its proceedings in closed sessions.<sup>15</sup>

The previous year's State Department human rights report observed that "in 1989 opening and closing trial sessions were open to the public, but most of the substantive court proceedings took place during closed sessions." According to the report, in one such trial 22 people were "charged with crimes ranging from the publication of literature advocating the overthrow of the government to the planning of bombings and assassinations," and that they received sentences of 5 to 15 years.<sup>16</sup>

The Human Rights Watch 1990 World Report also criticized Kuwait's pre-invasion human rights practices, writing that the "regime continued to permit secret trial of security cases by secret tribunals whose decisions were not subject to appeal."<sup>17</sup>

### **Nicaragua**

During the Sandinista regime, the United States was consistently critical, as was Americas Watch, of the People's Anti-Somocista Tribunals (TPAs) set up to try a variety of offenses including national security and foreign defense cases. In 1986, the State Department observed: "Despite the Sandinistas' claim that TPA proceedings are open to the public, the only people normally allowed into the TPA court building are defendants, their attorneys, and court personnel."<sup>18</sup>

More recently, in its 1990 human rights report, the State Department noted criticisms of Nicaragua's military courts, observing that "proceedings of the military courts are secret, but may be released to the public if the army authorities so choose."<sup>19</sup>

### **Syria**

The State Department's 1990 human rights report condemns Syria's handling of security trials:

Persons charged with security or political offenses fall under the jurisdiction of the State Security Court. Such persons have no say in the selection of a lawyer, who is chosen by the court. All court sessions are closed, and there are no official channels for obtaining information on the trial or sentencing, although

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<sup>15</sup>State Department Report, 1990, p. 1512.

<sup>16</sup>State Department Report, 1989, p.1457-8.

<sup>17</sup>*Human Rights Watch World Report 1990*, January 1991, Human Rights Watch, p. 487,

<sup>18</sup>"Human Rights in Nicaragua Under the Sandinistas: From Revolution to Repression," U.S. Department of State, December 1986, p. 12.

<sup>19</sup>State Department Report, 1990, p. 706.

relatives with influence in the Government ultimately may succeed in obtaining information and even affecting the release of the accused.<sup>20</sup>

In its 1990 report on Syria, Middle East Watch noted that, in such special courts, "proceedings are closed and decisions unappealable," and called for their abolition.<sup>21</sup>

## RECOMMENDATION

The Fund for Free Expression opposes the "Alien Terrorist Removal" plan as a violation of due process and freedom of association rights protected by the United State Constitution and by international human rights guarantees. We call upon Congress to reject this ill-considered, unnecessary and repressive proposal.

**For more information, contact:**  
Gara LaMarche, (212) 972-8400 (o)  
(718) 789-5808 (h)

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*This newsletter is a publication of the Fund for Free Expression, which was created in 1975 to monitor and combat censorship around the world and in the United States. The Chair is Roland Algrant; Vice Chairs, Aryeh Neier, Sophie C. Silberberg and Robert Wedgeworth; Executive Director, Gara LaMarche; Associate, Lydia Lobenthal. The members are Alice Arlen, Robert L. Bernstein, Tom A. Bernstein, Hortense Calisher, Geoffrey Cowan, Dorothy Cullman, Patricia Derian, Adrian DeWind, Irene Diamond, E.L. Doctorow, Norman Dorsen, Theodor S. Geisel, Jack Greenberg, Vartan Gregorian, S. Miller Harris, Alice H. Henkin, Pam Hill, Joseph Hofheimer, Lawrence Hughes, Anne M. Johnson, Mark Kaplan, Stephen Kass, William Koshland, Jeri Laber, Anthony Lewis, William Loverd, Wendy Luers, John Macrae, III, Michael Massing, Nancy Meiselas, Arthur Miller, The Rt. Rev. Paul Moore, Jr., Toni Morrison, Peter Osnos, Bruce Rabb, Geoffrey Cobb Ryan, John G. Ryden, Steven R. Shapiro, Jerome Shestack, Nadine Strossen, Rose Styron, Hector Timerman, Marietta Tree, John Updike, Luisa Valenzuela, Nicholas A. Veliotis, Kurt Vonnegut, Jr., Gregory Wallance and Roger Wilkins.*

*The Fund for Free Expression is a component of Human Rights Watch, which also includes Africa Watch, Americas Watch, Asia Watch, Helsinki Watch, Middle East Watch, and special projects on Prisoners' Rights and Women's Rights. The Chair is Robert L. Bernstein and the Vice Chair is Adrian W. DeWind. Aryeh Neier is Executive Director; Kenneth Roth, Deputy Director; Holly J. Burkhalter, Washington Director; Susan Osnos, Press Director.*

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<sup>20</sup>State Department Report, 1990, p. 1648.

<sup>21</sup>*Human Rights in Syria*, Middle East Watch, September 1990.

