

Week of 9.4.09

Transcript: After Guantanamo

BRANCACCIO: Maybe you don't see yourself as a crusading civil libertarian...but is there any one of us who would be comfortable living in a country where the government could lock you up without you getting to know if there's evidence against you? Eight years after 9/11 this issue is front and center as President Obama considers a new approach to terror detainees that could drop many of the legal protections you thought were in the constitution. Could what's called "preventive detention" be coming to a place near you? Alexandra Dean produced our report. Part of a collaboration with our colleagues at the nonprofit, investigative unit called Propublica.

Guantanamo stubbornly remains the international symbol of injustice - after all, almost all of its prisoners are still being held without charge. That's why the president has promised to shut it down by January. But what will he do with the detainees who might be dangerous, but he doesn't want to try in court?

OBAMA: We are not going to release anyone if it would endanger our national security.

BRANCACCIO: Makes sense, right? But wait, when President Obama made this speech, he slipped in a bold proposal.

OBAMA: There may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted.

BRANCACCIO: It was subtle, but at the heart of his speech, the president was saying this: the United States might lock up people on American soil without traditional charges or a trial. That is, preventive detention. It's not what they taught you in civics class, or in law school, President Obama calls it "prolonged detention", and critics say it's Un-American, you know the constitution, the bill of rights, and all that...so what would "prolonged detention" look like? Turns out, Great Britain has done this before. In the 70s, during the conflict in Northern Ireland, and then again after 9/11.

SANDS: Well, immediate reaction for anyone who's familiar with the British scene is we've been there, and we've done that.

BRANCACCIO: Philippe Sands is an expert on international law, and the treatment of detainees at Guantanamo. He says he has strongly advised the Obama administration it should look at other detention systems around the world before designing one for America.

SANDS: Just last week, I was with the folks from the Defense Department and I said precisely this to them, and the response was, "That's a terrific idea. We hadn't thought about that." And from that, I gleaned that there isn't that conversation taking place. That just as with Guantanamo, where there was action, knee jerk action, of going off and setting this thing up without talking to people who've been here before, we're on the cusp of doing the same thing again. So, pause. Find out what works, find out what doesn't work, and then decide how to go ahead.

BRANCACCIO: Since the United Kingdom has a long history of dealing with terrorism. We've come here to find out what's worked and what hasn't worked, before the decision is made about how to proceed in the United States. Britain used to have a system of preventive detention in high security prisons, similar to the one the president's considering for America. But in late 2004 that was deemed a violation of human rights, and struck down. It was replaced with a form of house arrest, known as "control orders." Today about thirty men are held under them...we came to east London to meet one of the men...Hussein Al-Samamra. He's been locked up in a government house for a year. You're seeing him with his daughter on one of the few times he's allowed outside. He's a Palestinian from Jordan, who came to the United Kingdom seeking political asylum 8 years ago. He started a business as a used car dealer. For 5 years he lived in Birmingham, making repeated appeals for legal status as a refugee. Then, in 2006, the authorities imprisoned him. They seized his car and the rest of his an assets. After 2 years they put him under control order here in London. No visitors are allowed inside his apartment without special clearance, but we can talk in the apartment's shared hallway. I wanted to know why he is being detained.

AL-SAMAMRA: Why? I don't know. I'm not allowed to know. Even my lawyer, she's not allowed to—to know which evidence they have against me.

BRANCACCIO: As we're talking, you still don't know—

AL-SAMAMRA: I still—

BRANCACCIO: What the complaint is.

AL-SAMAMRA: —don't know nothing. I still challenge them. I have done nothing wrong to be punished for.

BRANCACCIO: Is it possible he's guilty of some crime? Maybe, maybe not...we just don't know. Most of the charges and evidence against him are secret. What Hussein can tell us is what it's like to live under a control order.

AL-SAMAMRA: I am only allowed to go outside—two hours in the morning, from 10:00 till 12:00. And—two hours in the afternoon, from 1:00 till 3:00.

BRANCACCIO: He has to wear an electronic tag, and he has to call a monitoring company when he leaves the house and when he comes back. Oh, I see. It's like a wristwatch.

AL-SAMAMRA: It's like a wristwatch, yes. They can track me anywhere I go.

BRANCACCIO: One thing he wants us to understand is that there's no privacy for anyone in his house. He believes even his conversations with his wife are recorded.

AL-SAMAMRA: This house is bugged, fully bugged.

BRANCACCIO: You think that thing's bugged?

AL-SAMAMRA: Definitely. I call it the big brother house.

BRANCACCIO: A big brother house.

HUSSEIN: Yes.

BRANCACCIO: it's worse to be in prison. I mean, at least here, you can play with your daughter.

AL-SAMAMRA: Now with them, is—is—is worse. Because when I was in the prison at least they have like a bit of freedom. They used to go out anytime they want.

BRANCACCIO: His family also has to live under some restrictions. They are isolated, and their communications are limited.

AL-SAMAMRA: Because of what happened now, I mean, because of this conditions I'm in, even my wife, and my daughter, was punished, too. For nothing they have done.

BRANCACCIO: And where is his wife now? She's heavily pregnant, and she's in the hospital...on suicide watch.

AL-SAMAMRA: About two months ago, she—she was gonna throw herself through the window. She wanted to kill herself.

BRANCACCIO: Hussein takes his daughter Shayma to see her mom whenever her visiting hours coincide with his two hours allowed outside the house.

AL-SAMAMRA: My wife's friends used to come and visit her, time to time. Bring their kids. Play with Shayma. But now, I mean, these things... can't be happening anymore.

BRANCACCIO: It's clear that preventive detention can create a lot of collateral damage. Consider this... hundreds of detainees at Guantanamo have been released, some innocent bystanders who were handed over to American soldiers in exchange for bounty.

SANDS: The great majority of people who had been brought into Guantanamo were totally useless.

BRANCACCIO: Were totally useless cases?

SANDS: Were totally useless cases. I mean, you know, a 90-year-old man who was on his way to his dentist somewhere in Afghanistan, who obviously didn't pose a threat to anyone somehow gets hauled off—by plane to Guantanamo and spends months, if not years, in Guantanamo.

BRANCACCIO: Today most of those quote "mistakes" have been released, but...Gitmo still holds 230 prisoners and independent reports have identified as many as 90 "hard cases" that could be detained indefinitely in American prisons. "Hard cases" are people the government wants to keep an eye on, or who can't be tried, because the evidence against them is too sensitive to reveal in court, or was tainted by torture. We couldn't find anyone in the Obama administration willing to talk about their plans for a system of prolonged or preventive detention, but you should know that the idea has some vocal supporters. Harvard law professor Jack Goldsmith was one of the first to propose such a system he served in the Justice Department during the Bush administration.

BRANCACCIO: You have, in the past, advocated some system for preventive detention in this country. Why do we need a system like that?

GOLDSMITH: Well, first of all, I prefer to call it military detention, because I think it puts it in the right context. In every war in which the United States has fought, the United States has—has asserted the power to detain members of the enemy. Not every member of the enemy—who we capture are we able to—try and convict. And that doesn't mean that there's not a legitimate basis to hold them.

BRANCACCIO: If we're gonna set up some preventive detention, for instance question number one—should it be a system that applies to people from abroad? Or might it also apply to U.S. citizens?

GOLDSMITH: There's no reason to think that the terrorist problem is limited to non-U.S. citizens. My own view is that we should design a system that could

potentially include American citizens as well. You're more likely if you're designing a system for U.S. citizens to design a genuinely fair system.

BRANCACCIO: So what if Americans could be arrested and put away without trial? After all, in Britain, control orders apply to British citizens and foreigners alike. Cerie Bullivant was among the first Britons to be put under house arrest. He grew up here, in east London, in a close-knit family with his mother Christine, and his stepfather Philip. He'd been working towards a diploma in teaching English.

CERIE BULLIVANT: English to non-native speakers.

BRANCACCIO: How did a young man like him end up under house arrest for being a possible terrorist? A few years ago, Cerie was hanging out with a fast crowd and working at a nightclub...just when he thought his life was getting out of control, a school friend introduced him to Islam, and a more sober life. What drew you to Islam? What does it do for you?

CERIE BULLIVANT: Islam gave me—it allowed me to unlock the strength within myself, to be the person I should be and to be the best person I can be.

BRANCACCIO: Several times a week, he comes to a local mosque to say his prayers...he says he has a moderate view of Islam. But in 2006, when he decided to fly to Syria, the British authorities were alerted he might be dangerous. At the airport he was stopped and questioned. Cerie says he was going to the middle east to learn Arabic and do some humanitarian work. But it turns out he was traveling with a friend who had a troubling connection. His friend had an older brother who was on trial for terrorism.

Did you know that this guy had this—shady brother?

CERIE BULLIVANT: No. I've met—the guy who I was traveling with—at a game of football. We—we—we—we'd—we'd hit it off, he was—he was a funny guy. And to say that because their brother was convicted of something, that they had the same ideas and the same things, is guilt by association.

BRANCACCIO: The guy's older brother was really involved in some bad stuff. I mean, guilt by association doesn't sound good on its face, but maybe it's an indicator of the kind of family you're dealing with

CERIE BULLIVANT: If one person in the family did do something wrong, and he still proclaims his innocence on that, then that shouldn't besmirch a whole family.

BRANCACCIO: Not long after getting questioned at Heathrow airport, Cerie was placed under a control order. When his mother, Christine, found out, she was

outraged.

CHRISTINE BULLIVANT: I was being told he's on his way to Iraq, or he's on his way to Afghanistan. He's gonna fight against our boys. He's joining the insurgency.

BRANCACCIO: Did you think that was likely?

CHRISTINE BULLIVANT: No. No. I guess you'd have to know Cerie. But Cerie is completely nonviolent.

BRANCACCIO: The control order meant that every morning Cerie had to travel miles to register at a police station. And he says he grew increasingly frustrated not knowing the evidence against him.

CERIE BULLIVANT: Often I would ask the police do you even know why you're—you're here doing this to me?" And the police would be like, "No, but we're reliably informed that the evidence against you is strong and—very, very—credible." And that in itself plays in your mind, because you're like, "I know I haven't done anything wrong so what is it? What—what is it that they're—they're saying, strong, credible evidence?"

BRANCACCIO: By the end of his first year in detention, Cerie's life was falling apart.

CERIE BULLIVANT: Most of my friends in the community didn't wanna know me, because they didn't wanna be linked, guilt by association, to someone who was—a terrorist.

BRANCACCIO: He was married, and lived with his wife and her family. But his wife couldn't withstand the pressures of his control order. Including frequent police raids at his house.

CERIE BULLIVANT: The stresses of having the police charging in whenever they wanted, let themselves in, and go charging off in the bedrooms, while they're still in their nightclothes, and nightdresses, and things. What could I say to them? As a husband, as a man, there was nothing I could do.

BRANCACCIO: Cerie's wife left him. Weeks later, despite his control order, he simply ran away.

If you're so innocent, why did you take off and run? I mean, abscond—you—you took off one night, and nobody knew where the heck you were for five long weeks.

CERIE BULLIVANT: Yeah, yeah. In hindsight, probably not my best move, to be honest. It was killing me seeing people that I cared a lot about hurt, through no fault of their own, and because of something that was happening to me, and that I had no control over to—to stop.

BRANCACCIO: After 5 weeks on the run, Cerie turned himself in. The reaction from the police was surprisingly laid back

CHRISTINE BULLIVANT: They were like "oh well he can come in on Monday morning", this is one of the 10 most wanted people...Saturday afternoon,"oh, it's ok he can come in on Monday morning and hand himself in."

CERIE BULLIVANT: I had to go up to Belgravia police station and knock on the window and say "hello, my name is Cerie Bullivant, I'd like to hand myself in please".

BRANCACCIO: When his appeal finally came before a judge, he was allowed to see some of the evidence against him for the first time.

CERIE BULLIVANT: This is the problem with not telling people what your evidence is. You don't know what their explanation is, either.

BRANCACCIO: It turns out that Cerie's detention was partly based on something that he and his family had known about for ages, but completely dismissed. Cerie told us how one of his mother's friends got spooked by the idea that he was going to Syria and had contacted Scotland Yard.

CERIE BULLIVANT: My mom's friend, in—in a drunken state one night, decided that—it's entirely—entirely likely that I might've been brainwashed, and I'm a vulnerable young adult, and why would I become a Muslim anyway? She phoned my mom up the next morning, apologizing, 'cause she'd done it while she was completely blind drunk. And I mean, this was the evidence that they used to—and I—I—I mean this when I say, completely dismantle my life. They destroyed everything for that two years.

BRANCACCIO: The judge at Cerie's hearing had access to all the secret evidence against him. And what was his verdict? Cerie was completely exonerated. The judge said: "Reasonable grounds for suspicion do not now exist. It follows that the control order cannot be upheld."

CERIE BULLIVANT: There was absolutely no basis to saying that I was a terrorist, or that I'd ever been involved in terrorism. And to finally have my name cleared and vindicated like that was incredible.

BRANCACCIO: For Cerie Bullivant and his family the scars of the control order

remain.

You didn't even know they had this kind of mechanism of preventive detention. But, as you learn more about it—it must have come as—as a surprise.

CHRISTINE BULLIVANT: I think shock. Shock. It's not surprise. It's shock. Absolute outrage. Secret evidence. What the hell is that? You know, who—who said that was okay? In what society can you tell a person they're guilty of something, or hold them as guilty of something, but not tell them what it is? How would you feel?

BRANCACCIO: In fact Cerie feels that control orders like his have sparked deep anger and resentment in the Muslim community.

CERIE BULLIVANT: They're making the situation worse by encouraging radicalization. One of the things that worries me, is that there might be somebody out there who goes up to the young people in the mosque and says, "Look, this is an English person, look at what they did to him. They did this, they did this, they did this. And it was not because of his race, because he's of their race, he's not—it's not because of anything but —his religion. Yeah? And you need—you need to stand up for your religion and fight this oppression." And then you've got the first steps of radicalization, there.

BRANCACCIO: Since his control order was lifted, Cerie Bullivant has reconnected with old friends and old hobbies like going dirt biking on the weekend. He's trying to get his life back to normal. The British government has never apologized for wrongly detaining him. His mother, Christine, has some cautionary words.

CHRISTINE BULLIVANT: I would say, to the American people, be really careful. Be really careful about what you sanction your government to introduce. Because, once it's there, very difficult, you know, it's like the nuclear bomb. We can't unlearn the nuclear bomb once it's there. It's very difficult to undo it later.

BRANCACCIO: Earlier this summer, the U.K.'s highest court ruled that detainees under control order must be able to see at least some of the charges against them.

Legal expert Philippe Sands says the United States can learn from Britain's mistakes.

SANDS: If you go into something that goes beyond what control orders do, imagine what the consequence is going to be. We have enough difficulties with control orders, which is on a very small number of people, and which nevertheless raises the most serious passions in a country that is committed to

the idea of individual liberty like the United States.

BRANCACCIO: It's just hard for many Americans to swallow this notion that people in power, with access to evidence they haven't fully shared, think someone is a problem. It seems like a reversal of the basic presumption of innocent until proven guilty.

GOLDSMITH: Well, I hope that's not what the system will look like. I hope it's a system where the government is forced to go and present evidence to independent parties, to make sure, he has done what we think he has done, in a way that makes him a member of a group that needs to be detained.

BRANCACCIO: But what will the prolonged detention that President Obama has proposed actually look like? Will it resemble the control orders practiced in Britain right now? Well, it's still being worked out. Might there, for instance, be some kind of trial or hearing? We asked Professor Goldsmith to sketch out his vision of what would happen to someone detained in the United States.

Will they be able to see much or all of the evidence against them?

GOLDSMITH: It's basically in the process of being worked out now by courts. And it doesn't sound like it will be terribly, terribly different from what the Bush administration has been doing for the last seven or eight years, with the possible very large difference that they'll get Congress on board.

BRANCACCIO: It's certainly a flawed system. I mean, there have been Supreme Court cases. People are wrestling with this.

GOLDSMITH: No. There—there's no doubt that—that it's a system that's still not perfect.

BRANCACCIO: What's the downside of regular court?

GOLDSMITH: Most of it has to do with the very high procedural rights that we give to defendants, the very high burden of proof we give to defendants when we're convicting them of ordinary trials in a peacetime context.

BRANCACCIO: Goldsmith is also concerned that a regular trial might not bring about the right result.

GOLDSMITH: Another reason why you might not want to use the trial system. Because the trial system, to be legitimate, has to be able to have the possibility of acquitting someone of the crime.

BRANCACCIO: There's thought within the Obama administration that they might

have to have a—a way of—if someone is found not guilty, no, they'll still hold them?

GOLDSMITH: Under the military detention rationale. On the one hand if someone is acquitted and you don't release them then the legitimacy of the entire trial is brought into question. On the other hand if someone is acquitted, but there's plenty of information, that a person is dangerous it's extremely difficult to release that person.

BRANCACCIO: So let's be clear, what Goldsmith is talking about is the possibility of establishing a system where some people, would have no real possibility of release. And Philippe Sands says that is the most dangerous element of preventive detention.

SANDS: The U.S. has a unique position around the world. There is no country that is more closely associated with the rule of law. That is given the United States, for good and for bad, a tremendous moral authority around the world. If the U.S. loses that moral authority, it will become that much more difficult for the United States to persuade others. And it needs others in order to protect itself.

BRANCACCIO: Today, President Obama has 3 task forces looking at what to do with Guantanamo and the detainees. The one that deals with preventive detention is supposed to report back in January. Keep a close eye on their recommendations... whether trials or hearings will be open to the public, how secret evidence will be handled, and, well, if there will be trials at all. Back in Britain, Hussein Al-Samamra has appealed his case, but because his immigration status is in limbo, he still can't see all evidence against him. In July, his wife gave birth to a baby son. But she's still suffering psychological problems. The conditions of the control order mean before the clock strikes noon, Hussein has to take the baby back to her in the hospital.

You've said that your wife has felt this despair because of the situation. And what about you? Do you—do you feel this way?

AL-SAMAMRA: I'm thinking every day. To—to—to just put an end for my life. But the only thing that's holding me, my—my daughter and my wife. And I—I am trying really hard to show them that I'm strong. I'm here for them. But inside of me, I'm—I'm burning.

SANDS: The lot of a democracy is to fight with one hand tied behind its back, hostage to its own values. But the democracy is still stronger than those who face us down. And I think we need to keep our eye on the ball. We've got keep our eye on our system of values. That no man or woman is deprived of liberty without due process, if that is gone, we become like those who seek to do us harm. And we don't make ourselves safer.

BRANCACCIO: Some more of the issues at the intersection of terrorism, justice and democracy are playing out right now, in the story of a government prosecutor's efforts to convict an alleged 9/11 conspirator and the surprising decision he made after gaining access to the evidence. It's an insider's story of torture and American morality. Don't miss it on our website. You can go to pbs.org now to watch it. And that's it for NOW. From New York, I'm David Brancaccio. We'll see you next week.