

Homeland Security's Chertoff

No Friend of Immigrants

By Tom Barry | March 28, 2005

Michael Chertoff, who replaced Tom Ridge as the administration's new chief of the homeland security department, has been praised by the president as a "brilliant thinker" and a tough prosecutor.

But his record on immigration cases as an appeals court judge and head of the Justice Department's criminal division under Attorney General John Ashcroft shows an anti-immigrant bias that has many human rights advocates worried.

As Homeland Security director, Chertoff is now in charge of determining the color of the day's terror alert and overseeing what the administration has described as the "home front" in its war against terrorism.

Like other recent appointments, Chertoff's prime qualification for the job is that he has proved himself to be a Bush loyalist. Chertoff, who helped write the U.S. Patriot Act, has little to show in the way of actual achievements in directing criminal prosecutions against any of the many hundreds of suspected terrorists detained by the Justice Department. Nonetheless, following the pattern set by the promotions of Alberto Gonzales and Condoleezza Rice to attorney general and secretary of state, Chertoff has fallen upwards in the second Bush administration.

A Political Partisan and Legal Storm Trooper

Chertoff, a rabbi's son from northern New Jersey, is widely respected for his razor-sharp mind and fearsome courtroom demeanor. A political partisan, Chertoff became special counsel to the Whitewater Commission established in 1994 by the Republican-majority Congress to investigate the involvement of Bill and Hillary Clinton in real estate deals in Arkansas and other business deals. Now widely regarded as a political witch hunt spearheaded by Sen. Alfonse D'Amato (R-NY) and Independent Counselor Kenneth Starr, the Whitewater Commission spent \$40 million on the investigation that ultimately failed to find that the Clintons had done anything illegal.

Chertoff is a longtime member and activist in the Federalist Society. This national association of right-wing lawyers and judicial reform activists is dedicated to

realigning the country's legal system to reflect a more conservative interpretation of the constitution. The Federalist Society, which since its founding in 1982 has been closely linked to the neoconservative political camp, aims to rid the system of liberal judges and stamp out what it sees as overly egalitarian and secular impulses. Association members believe that the constitution and the country's laws should primarily serve to ensure order and social orthodoxy rather than democracy and human rights.

As U.S. Attorney General in New Jersey, appointed by President H.W. Bush in 1990, Chertoff gained the reputation as a political attack dog for the Republican Party. Leveraging his strong political base in New Jersey, Chertoff served as financial vice-chair of Bush's 2000 campaign in the Garden State.

Immigration and Homeland Security

Chertoff was Bush's second nominee to head Homeland Security, following the failed nomination of former New York City police chief Bernie Kerik, who admitted that he neglected to pay taxes for the "illegal immigrant" nanny he employed. But Chertoff also has a shady record on immigration issues.

During his short stint as federal appeals court judge in the 3rd Court District, Chertoff demonstrated his generally dismissive attitude toward asylum claims—ruling against immigrants in 14 of 18 immigration cases. In one case, he denied asylum to a Bangladeshi man who was imprisoned, severely beaten in jail, and forced to denounce his dissident political party. Although the applicant required 19 days of medical care after his release, Chertoff denied him asylum on the grounds that the injuries didn't constitute torture. Chertoff also overruled a lower-court immigration judge's decision to question the credibility of the asylum petition of a Chinese man who



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was seeking refuge because his wife was involuntarily sterilized.

Chertoff also wrote the appeal court's November 2004 decision ruling against a political asylum claim filed by a Jamaican gay man who had been "outed" by an inflammatory article in a Kingston newspaper and then assaulted by neighborhood gangs. After unsuccessfully trying to escape persecution by changing locations in Jamaica, the man fled to the United States, where an immigration judge granted him asylum. The Bush administration appealed that decision to the Board of Immigration Appeals, which reversed the judge's decision. Chertoff and the 3rd circuit federal appeals court ruled against the man's asylum petition, even though Amnesty International and other human rights groups describe the political and judicial system in Jamaica as being viciously homophobic.

In his legal column for New York's *Gay City News*, law professor Arthur Leonard concluded that the decision by Chertoff is "part of a larger trend under which homeland security has severely tightened up the asylum process" and created the "predisposition to keep refugees out of the United States."

Michelle Malkin, a crusader against immigrant rights and author of *Invasion: How America Welcomes Terrorists, Criminals, and Other Foreign Menaces to Our Shores* and *In Defense of Internment*, writes glowingly of Chertoff's qualifications: "A look at Chertoff's strong, aggressive record and statements on homeland security shows that Chertoff supports the kind of hard-headed, threat profiling measures and immigration enforcement opposed by the anti-profiling zealots."

But it is this "hard-headed" attitude that alarms civil libertarians and immigrant rights groups. "Judge Chertoff views immigration solely through the lens of national security and counterterrorism," said Kate Martin, director of the liberal Center for National Security Studies.

Bringing the "War on Terrorism" Home

Human rights advocates, civil libertarians, and immigrant rights activists sharply criticized the appointment of Chertoff for his abusive record as Ashcroft's chief counterterrorism prosecutor. As the architect of the post-September 11th initiatives on the domestic war on terror, Chertoff supervised the round-up of 750 Arabs and other Muslims on suspicion of immigration violations. Treated as suspected terrorist sympathizers or material witnesses, the "suspects" were held without bond for as long as three months, often in solitary confinement, despite having never been charged with any crime. Eventually, most were released or deported after secret tribunals.

In a 2003 report, the Justice Department's Inspector General criticized these draconian measures as "indiscriminate and haphazard." The report also concluded that Chertoff and other top government officials instituted a "hold until clear" policy for immigrant detainees even though immigration officials questioned the policy's legality. In his book *After*, author Steven Brill describes how Chertoff obstructed access by

the post-9/11 detainees to lawyers, reasoning that they "could be questioned without lawyers present because they were not being charged with any crime."

Not one of the almost exclusively Muslim "detainees" was ultimately indicted for terrorism-related crimes. Chertoff, who also coordinated the aggressive questioning of more than 5,000 Arab Americans immediately after the 9/11 attacks, remains unapologetic and continues to argue that the "war on terrorism" justifies the government's right to hold suspects indefinitely without counsel as possible "enemy combatants."

At the outset of his Senate confirmation hearings, the American Civil Liberties Union warned that Chertoff's record on immigration control and homeland security

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“suggests he sees the Bill of Rights as an obstacle to national security.” After his confirmation, the ACLU lamented that his appointment “marks the second promotion of a top Bush administration official with ties to the torture scandal. Pointing out that “both Chertoff and Attorney General Alberto Gonzales had a hand in crafting the Bush administration’s torture policies,” the ACLU called for independent counsel to investigate these policies since both new appointees are “too close to the issue to oversee any investigations.”

“Keep your eye on Michael Chertoff,” warned Elaine Cassel in June 2003 when Chertoff was appointed to the court of appeals. Cassel, an attorney who writes for *Civil Liberties Watch*, observed: “As bad for the law and Constitution as many of Bush’s judicial appointments are, Chertoff has been the architect of prosecutions in the ‘war on terror.’ And he may have big changes in mind for you, me, the courts, and the Constitution.”

No Regrets

Despite the mounting evidence that the administration authorized torture and detained immigrants without probable cause, Chertoff has consistently defended the constitutionality of the Bush administration’s counterterrorism operations at home. In November 2001, at the time when he was directing a national dragnet that targeted the immigrant Muslim population, Chertoff told Congress: “Nobody is being held incommunicado. Nobody is being denied the right to an attorney. Nobody is being denied due process.”

Writing in the *Weekly Standard* in December 2003, Chertoff defended himself and the Justice Department against charges that the Bush administration had gone beyond the historical precedents in its determination of what is permissible under the U.S. Constitution. According to Chertoff, President Bush has “avoided the kind of harsh measures common in previous wars.”

He argued that although the United States is engaged in a war with both domestic and international fronts, the president has not authorized “evacuation or preventive detention of American citizens based on ethnic heritage.” Nor has there been any “government suppression of dissent or criticism,” wrote Chertoff, adding that unlike such respected predecessors as John Adams or Woodrow Wilson, Bush “has not prosecuted those who argue against the administration, nor has the government seized newspapers or banned them from the mails, as Lincoln did.”

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Concerning the detention of “enemy combatants,” Chertoff maintained that the Bush administration followed “customary and well-accepted practice of incapacitating enemy soldiers overseas.” Regarding such matters as deciding “how long combatants can be held when we are fighting a war of extended or indefinite duration,” Chertoff said we must “think outside the box but not outside the Constitution.”

In a June 2004 op-ed in the *Wall Street Journal*, Chertoff wrote that we cannot win the war against terrorism if we “fight in a legal fog, constantly speculating and litigating piecemeal about what the law might be. A murky legal climate only obscures our options and hamstring our forces.”

What about the role of the U.S. military or the CIA in home front operations? Chertoff, writing as an appeals court judge, said: “Basic policy questions like this cannot be simply left to the judiciary.”

“Creative Legal Thinking” or a Rollback of the Constitution?

Chertoff believes that it is time for “the most creative legal thinking” about the role of the U.S. justice system in “fighting a war of extended duration.” According to Chertoff, “We are at a transition point in the evolution of legal doctrine to govern the armed conflict of terror.”

One concern of his critics is that Homeland Security Secretary Chertoff—with the strong backing of the president—will roll back civil liberties and institutionalize a more restrictive view of the U.S. Constitution during this transition period.

Another concern is that Chertoff and the Justice Department are unable to point to one identifiable success in prosecuting suspected terrorists. This is a sign that Chertoff's dragnet approach on the home front—an approach that subordinates many of the basic rights of immigrants—has been as unfocused as President Bush's own leadership in his "global war on terrorism."

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