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TOM EAGLETON AND THE “CURSE TO OUR CONSTITUTION”

WILLIAM H. FREIVOGEL*

INTRODUCTION

If my friend Tom Eagleton had lived a few more months, I’m sure he would have been amazed—and amused in a Tom Eagleton sort of way—by the astonishing story of Alberto Gonzales’s late night visit to John Ashcroft’s hospital bed in 2004 to persuade the then Attorney General to reauthorize the President’s warrantless wiretapping program. No vignette better encapsulates President George W. Bush’s perversion of the rule of law.

Not since the Saturday Night Massacre during Watergate has there been a moment when a President’s insistence on having his way resulted in such chaos at the upper reaches of the Justice Department. James Comey, the Deputy Attorney General and a loyal Republican, told Congress in May 2007 how he raced to George Washington Hospital with “sirens blaring” to beat Gonzales to Ashcroft’s room.¹ Comey had telephoned FBI Director Robert S. Mueller to ask that he too come to the hospital to back up the Justice Department’s view that the President’s still secret program should not be reauthorized as it then operated; Ashcroft, Comey, and Mueller held firm in the face of intense pressure from White House Counsel Gonzales and Chief of Staff Andrew Card.² Before the episode was over, the three were on the verge of tendering their resignations if the White House ignored their objections; the

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1. Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST, May 16, 2007, at A1.

2. *See id.*

resignations were averted by some last-minute changes in the program—changes still not public.³

Before Eagleton's death, he and I had talked often about Bush and Ashcroft's overzealous leadership in the war on terrorism. Eagleton even took a parting shot at Ashcroft in his farewell statement handed out to friends after his funeral. After calling the Iraq war one of America's "greatest blunders," he added, "[i]t will be remembered, in part, as a curse to our Constitution when Attorney General John Ashcroft attempted to put a democratic face on torture."⁴ I doubt Eagleton would have changed a word of that critique, despite Ashcroft's sickbed conversion to civil liberties.

During my last days writing editorials for the *St. Louis Post-Dispatch* in late 2005, Eagleton served as a sounding board helping me formulate a series of editorials criticizing the way that President Bush had swept away fundamental notions of justice in pursuing the war on terrorism. This essay is based on those editorials, which I sent him shortly after I retired in early 2006. The editorials never ran in the newspaper, but Senator Eagleton read them and sent back his note of agreement, vowing to use a couple of "gems." The events that have transpired since, including Comey's account of the hospital arm-twisting, have only strengthened the conclusion of those editorials: in the war on behalf of preserving freedom, President Bush has shrunk freedom, perverted the rule of law and claimed kingly powers.

The war on terrorism is not a war that will be won by the fastest jet, the most elusive drone, or the smartest bomb. It will not be won by the strongest army, with the fastest tanks, or the most ambitious military strategy. It won't be won on the military battlefield at all. It will be won on the battlefield of ideas.

President Bush is rightly criticized for the way he has misused and weakened the mightiest fighting force in the history of the world. But he warrants a harsher judgment on the pages of history for the way he has weakened America on the battlefield of ideas.

The United States entered this war as the victim of aggression and the champion of freedom, self-determination, the rule of law, human rights, and modernism. We faced an aggressor who had murdered thousands of innocent civilians in the name of an extremist ideology based on religious fundamentalism, medieval values, and a disregard for individual liberty, women's rights, and democracy.

Yet President Bush has lost the high ground on this battlefield of ideas—snatching the mantle of the aggressor, undermining the rule of law, trading

3. *Id.* at A4.

4. 153 CONG. REC. S3265–3266 (daily ed. Mar. 19, 2007) (Thomas F. Eagleton's Farewell Address).

liberty for imagined security, and turning his back on a half century of international law that the United States led the world in creating.

I. SURRENDERING BASIC BELIEFS

In this country, we believe that the government should not snoop on our conversations unless it convinces an independent magistrate it has reasonable cause.

In this country, we don't believe in torturing people to extract confessions, whether they are street thugs or prisoners of war. We think it is uncivilized and inhumane and for many decades the United States led the international effort to banish these practices to the Dark Ages.

In this country, we think people who are locked away have a right to know what the government thinks they did wrong, to face their accusers in open court with the help of a lawyer, and to have the matter settled by a neutral judge.

In this country, we don't think it's fair to imprison a person for an act that wasn't a crime when it was committed.

In this country, we don't believe in locking up people for things they say, even if we find those things repugnant. Other nations, nations in the grip of dictatorships, do that.

These are beliefs that separate the United States from the world's petty tyrants. They are what we mean when we talk about freedom, due process, human rights, and the rule of law. Yet in his war to protect freedom from terrorism, President George W. Bush has diminished all of these cherished values.

He and his two Attorneys General, Ashcroft and Gonzales, have placed them at risk by:

- Zealously pursuing prosecutions of Muslims not directly connected to the September 11, 2001 terrorist attacks or to other plots aimed at the United States.⁵
- Claiming the President can act alone to authorize warrantless wiretaps of domestic telephone calls in the face of the requirements of the Constitution and the law.⁶

5. See, e.g., Neil A. Lewis, *Moussaoui Life Term Stuns Many in Court*, HOUS. CHRON., May 4, 2006, at A1.

6. See, e.g., David Jackson, *Gore Says Bush Overreaches Authority with Domestic Spying*, USA TODAY, Jan. 17, 2006, at 4A.

- Asserting the President can act alone to lock up detainees without the scrutiny of the independent judiciary because the President's war powers allow him to act as a rule of one when the nation is threatened.⁷
- Insisting that the President can decide by himself to sidestep the human rights protections of the Geneva Conventions and turn his back on a body of law that the United States proudly helped to create after World War II.⁸
- Claiming the President can authorize the abuse of prisoners in the war on terrorism, even when that action violates international norms and a law passed by an overwhelming bipartisan majority of the Senate, which insisted the United States stand four-square against torture.⁹

In short, too many of America's values have been compromised in a war on terrorism in which the President has made kingly assertions of possessing unchecked authority under the President's war powers. This assertion of vast authority has upset the checks and balances vital to our constitutional structure.

In their still frightened reactions to the September 11, 2001 attacks, many Americans have been too willing to overlook how many fundamental American values are being undermined—due process, open courts, free expression, fair trials, and human rights, including the belief that torture destroys the worth and dignity of torturer and victim alike.

These core beliefs—beliefs that the world admired before September 11, 2001—have been bartered away in the name of fighting terrorism. This war fought in the name of freedom is instead cheapening what it means to live in the freest nation in the world. If this war is a battle of ideas, as the Cold War was, then the President has done great damage to the cause he champions.

II. LOSING OUR FREEDOM TO SAVE IT

Conventional wisdom has it that liberty must give way to security in times of peril. Sometimes that is true. A suspect with knowledge of a ticking nuclear bomb in an American city wouldn't have the same rights as a traffic suspect. After all, as Justice Jackson once famously wrote, we must not "convert the constitutional Bill of Rights into a suicide pact."¹⁰

Any president—Republican or Democratic, liberal or conservative—would have concluded in the wake of 9/11 that the President's highest duty was to protect Americans from attack. That impulse—together with the Bush administration's belief that it needed to claim back presidential power lost in

7. See, e.g., Charles Lane, *High Court Rejects Detainee Tribunals*, WASH. POST, June 30, 2006, at A1.

8. E.g., Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

9. See, e.g., Josh White, *President Relent: Backs Torture Ban*, WASH. POST, Dec. 16, 2005, at A1.

10. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

the wake of Watergate and Vietnam—combined to form the contours of the Bush administration's law enforcement response.

But security can't always trump freedom. In a dictatorship, security is the option of first resort. It can't be that way in a free republic. The true test of our commitment to liberty is protecting freedom during times when people are afraid. It's easy to protect freedom when everyone feels safe.

Justice Sandra Day O'Connor made this point in rejecting the Government's argument that it could detain without trial an American citizen named Yaser Hamdi. "It is during our most challenging and uncertain moments," she wrote, "that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."¹¹

There are plenty of episodes in American history when great presidents sacrificed liberty for security. President Bush cites them as justifications for today's actions. But history looks back on them as mistakes, not precedents.

The Alien and Sedition Acts made it a crime to criticize President John Adams.¹² President Abraham Lincoln censored the press and suspended the writ of habeas corpus.¹³ The Espionage Act of World War I led to the imprisonment of critics of the draft.¹⁴ The Palmer Raids of 1919 locked up thousands of immigrants on the pretense that they were involved in anarchist bombings.¹⁵ President Franklin Roosevelt set up, and the Supreme Court permitted, concentration camps for innocent American citizens of Japanese descent during World War II.¹⁶ The government jailed Communist Party leaders as subversives during the 1940s and '50s.¹⁷ The FBI spied on civil rights and anti-war leaders in the 1960s.¹⁸

It's easy to see the injustice when looking back. Who watching *Good Night and Good Luck* could fail to see the demagoguery of Senator Joseph McCarthy (R.-Wisc.)? The challenge is to see the injustice in real time even as the President waves the bloody shirt to justify his assertion of power at the expense of freedom.

11. Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).

12. 50 U.S.C. § 21 (2000).

13. See, e.g., Proclamation No. 7 (May 10, 1861), reprinted in 12 Stat. 1260 (1863).

14. See 50 U.S.C. §§ 31–39 (1946).

15. See EDWIN P. HOYT, THE PALMER RAIDS (1969) (detailing the events leading up to the raids and their aftermath).

16. See MICHIE WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1976)

17. ROBERT K. CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 1945–1950, 1–18 (Octagon Books 1979) (1952).

18. MICHAEL FRIEDLY & DAVID GALLEN, MARTIN LUTHER KING, JR.: THE FBI FILE 33–43 (1993).

History can help us ask the right questions: how was Attorney General John Ashcroft's decision to round up 5,000 immigrants after 9/11 and to keep their identities secret different from Attorney General Mitchell Palmer's decision to lock up 4,000 alleged communists after his house was bombed in 1919? How is the life sentence for a northern Virginia imam, who urged young Muslims to join the "jihad," different from the conviction of members of the Communist Party for advocating the overthrow of the government in the frightened '50s? How is the government's use of more than a hundred thousand national security letters to obtain people's personal correspondence different from FBI spying during Vietnam? How is Mr. Bush's assumption of extraordinary power to authorize warrantless wiretaps, to order the abuse of prisoners, and to detain suspects without court supervision different from the powers that Richard M. Nixon assumed during his "imperial presidency?"

III. WARRANTLESS WIRETAPPING IN THE TWILIGHT ZONE OF PRESIDENTIAL AUTHORITY

Everyone agrees that President George W. Bush had broad constitutional power in the days and weeks after the September 11, 2001 terrorist attacks to pursue the terrorists who murdered 3,000 of our fellow citizens.

And everyone agrees that the National Security Agency should listen in on telephone conversations between al Qaeda operatives and people on U.S. soil.

Where Mr. Bush has exceeded his power is in claiming four, five, and six years after 9/11 that the President alone has the power to order these wiretaps without warrants, without a detached magistrate reviewing the government's case and without the explicit approval of Congress.¹⁹

In making this argument, Mr. Bush threatens to turn the rule of law into one-man rule.

It's happened before. During the Korean War, President Harry S. Truman seized the nation's steel mills claiming that a threatened nationwide strike would hurt the national defense.²⁰ Like Mr. Bush, he claimed that his power as Commander in Chief gave him the authority to act.²¹

Justice Jackson's concurring opinion rejecting Truman's steel seizure has been the touchstone of presidential power ever since. Justice Jackson said the President's power is at its maximum when he acts with express or implied congressional authorization.²² He said the President is in a "zone of twilight" when there was no authorization.²³ And the President's power is at its "lowest

19. See Jackson, *supra* note 6.

20. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952).

21. *Id.* at 582.

22. *Id.* at 635 (Jackson, J., concurring).

23. *Id.* at 637.

ebb" when he acts in the face of express or implied congressional disagreement.²⁴

The President claims that he acted at the zenith of his power because Congress passed the Authorization for Use of Military Force resolution three days after the 9/11 attack.²⁵ The resolution authorized the President to use "all necessary and appropriate force" to respond to the attacks.²⁶ This, Mr. Bush claims, was an express approval of his action to order warrantless wiretaps of conversations between al Qaeda suspects and persons on U.S. soil.²⁷ Signals intelligence has been important to war efforts all through U.S. history and warrantless wiretaps of foreign agents have been authorized since at least Franklin Roosevelt, the President says.²⁸

Critics say that instead of the President acting at the zenith of his powers—or even the twilight zone like Truman—he was at his lowest ebb because Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978 requiring warrants from a secret intelligence court for wiretaps of conversations between intelligence agents and people on U.S. soil.²⁹

The prevailing view among independent legal scholars is that the critics have the stronger argument.³⁰ The specific FISA law, which directly addresses wiretaps, trumps the more general war resolution which didn't specifically say anything about wiretaps.³¹ This is why a number of well-respected Republicans, such as Senator Arlen Specter of Pennsylvania and Lindsey Graham of South Carolina, have joined Democrats in disputing the legality of the wiretaps and calling for a congressional response.³² During 2006 hearings before the Senate Judiciary Committee, Republicans and Democrats said they had no idea they were approving the warrantless wiretapping when they voted for the war resolution.³³

24. *Id.*

25. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2a, 115 Stat. 224 (2001).

26. *Id.*

27. See Editorial, *War Doesn't Trump Constitution*, CINCINNATI ENQUIRER, Aug. 20, 2006, at 2E.

28. See *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 12–13 (2006) (statement of Alberto R. Gonzalez, Att'y Gen. of the United States).

29. 50 U.S.C. § 1801 (Supp. IV 2000).

30. See, e.g., Sarah M. Riley, *Constitutional Crisis of Deja Vu?: The War Power, The Bush Administration and the War on Terror*, 45 DUQ. L. REV. 701, 735 (2007); John C. Sims, *What NSA Is Doing and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105, 139 (2006).

31. Mariano-Florentino Cuéllar, *The Untold Story of al Qaeda's Administrative Law Dilemmas*, 91 MINN. L. REV. 1302, 1362 (2007).

32. Michael Isikoff et al., *Bush's Bad Connection*, NEWSWEEK, Feb. 20, 2006, at 30–32.

33. *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 641 (2006) (statement of Sen. Patrick Leahy, Ranking Member, S. Judiciary Comm.).

No one is arguing that wiretaps of suspected al Qaeda agents should not occur—just that there should be a detached review of the reasonableness of the wiretaps when they involve conversations on U.S. soil that might involve al Qaeda. The secret FISA court grants almost all warrants requested.³⁴ For the administration to argue that its opponents jeopardize national security is a scare tactic.

It is also a red herring for the President to claim that the disclosure of the secret wiretap program hurt national security.³⁵ The emptiness of that claim was apparent when Attorney General Gonzales was asked at Senate hearings if he thought al Qaeda had been unaware that its phones were tapped. The Attorney General lamely responded: “It is true that the enemy is presuming some kind of surveillance, but if they are not reminded of it in the newspapers, they sometimes forget.”³⁶

One of the President’s most dubious arguments is that he had to ignore the Foreign Intelligence Surveillance Act of 1978 because the law is outmoded and takes too much time and too much proof to get warrants.³⁷ “The FISA law was written in 1978,” the President said at a press conference. “We’re having this discussion in 2006. It’s a different world.”³⁸

If the FISA law is too slow, then the President should ask Congress to fix the problem. That’s the way democracies work. Presidents can’t just decide that thirty-year-old laws are outmoded and choose to ignore them.

Under the Fourth Amendment, which guarantees that people will be free from unreasonable searches, the decision to search is supposed to be made by a detached judge, not a government agent.³⁹ That either means that more judges will have to be made available to the NSA, or there will have to be improved oversight of the process to guard against abuses. As the program was set up by the President, it is too easy for a government agent to wiretap, without a warrant, conversations between a journalist or a professor, on the one hand, and a Hamas party official or an Islamic fundamentalist on the other—even when these Islamic fundamentalists are uninvolved in terrorism.

Before the *New York Times* published the NSA story, President Bush warned its top editors at a White House meeting that they would have blood on

34. David Johnston & Neil A. Lewis, *Defending Spy Program, Administration Cites Law*, N.Y. TIMES, Dec. 23, 2005, at A20.

35. George W. Bush, President’s Radio Address (Dec. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html>.

36. Tim Grieve, *Alberto Gonzales and the Forgetful Terrorists*, SALON, Feb. 7, 2006, available at http://www.salon.com/politics/war_room/2006/02/07/memories/index.html.

37. William Branigin, *Bush Opposes Release of Photos With Abramoff*, WASH. POST., Jan. 26, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/01/26/AR2006012601228_pf.html.

38. *Id.*

39. U.S. CONST. amend. IV.

their hands if they revealed the secret wiretapping program and there was another 9/11.⁴⁰ After publication, Attorney General Gonzales warned that the disclosure of this and another top-secret program about terrorist financing might violate the ninety-year-old Espionage Act⁴¹—even though the law never has been used against journalists.⁴²

But the administration has not presented convincing evidence of national security damage from this or any other leak. At a meeting of law professors in early 2007 where I was a participant, Kenneth L. Wainstein, Assistant Attorney General for the National Security Division, spoke of experiences he had in criminal cases in which leaks damaged a Justice Department investigation; but Wainstein's main examples did not involve national security cases.⁴³ Wainstein's national security examples included two old, well-publicized cases—the *Chicago Tribune's* 1942 disclosure that the United States had broken the Japanese code and the disclosure in the 1970s of CIA agents' names by former CIA employee Philip Agee. Nearly all journalists agree these kinds of disclosures are highly unethical. The one recent example cited by Wainstein was stories and telephone calls by *New York Times* reporters Judith Miller and Philip Shenon in 2001 that tipped off two Islamic charities that their assets might be frozen by the government.⁴⁴ No claim was made that lives were jeopardized.

Viewed with historical distance, the *New York Times's* NSA disclosures are paradigmatic examples of the press performing its watchdog function with resulting reforms. The administration announced a little more than a year after the *Times's* stories that it would change its secret program to bring it under the FISA court.⁴⁵ It remains unclear, however, whether the changes bring the program in total compliance with the law and the Constitution.⁴⁶

No one wants to open the door to another 9/11. Everyone wants the government to connect the dots. But the nation can achieve its security goals without giving up its cherished freedoms or handing the President monarchical power.

40. Philip Taubman, *Why We Publish Secrets*, Address Before the Paul Simon Public Policy Institute, Southern Illinois University at Carbondale, (Sept. 26, 2006).

41. Walter Pincus, *Prosecution of Journalists is Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A4.

42. Harold Edgar & Benno C. Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 938 (1973).

43. Kenneth L. Wainstein, Program of the National Security Law Section, Assoc. of American Law Schools Meeting (Jan. 4, 2007).

44. *Id.*

45. Dan Eggen, *Court Will Oversee Wiretap Program*, WASH. POST, Jan. 18, 2007, at A1.

46. *Id.* at A4.

IV. JAMES OTIS, MEET JOHN DOE

In 1761, James Otis laid the foundation of the right of privacy when he delivered a five-hour oration to a British colonial court attacking the detested “writs of assistance” that the British used to search the houses of Bostonians.⁴⁷

The writs allowed the British to search homes, shops, and ships at any time for any reason without a warrant.⁴⁸ Otis said this power threatened to “annihilate” “one of the most essential branches of English liberty . . . the freedom of one’s house.” Otis asserts, “It is a power that places the liberty of every man in the hands of every petty officer.”⁴⁹ When the new nation wrote a Bill of Rights, Otis’s sentiments were written into the Fourth Amendment, which protects people’s homes and papers from unreasonable government searches.⁵⁰

Yet today, individual agents of the FBI issue tens of thousands of National Security Letters every year for all manner of personal information about people’s private lives.⁵¹ No need for a judge. No need to show that a person might have done something wrong.

If James Otis were alive today he wouldn’t have as much freedom to contest National Security Letters in federal court as he had to contest writs of assistance in Britain’s colonial courts. The Patriot Act⁵² made it a crime for a person who receives a National Security Letter to publicly disclose it to anyone other than his lawyer.⁵³ It also gagged the recipient’s lawyer; Otis wouldn’t be able to say whom he represented. In fact, for a time after the passage of the Patriot Act, the recipient couldn’t have contacted a lawyer.⁵⁴

This extraordinary and un-American power was challenged by three Connecticut librarians, designated John Does in court papers.⁵⁵ One “John Doe” is George Christian, executive director of a consortium of libraries called the Library Connection.⁵⁶ Christian’s name became public because the Government failed to blot it out in court filings.⁵⁷ FBI agents handed Christian

47. National Humanities Institute, *James Otis Against Writs of Assistance, February 1761*, available at <http://www.nhinet.org/ccs/docs/writs.htm>.

48. *Id.*

49. *Id.*

50. U.S. CONST. amend. IV.

51. Barton Gellman, *The FBI’s Secret Scrutiny*, WASH. POST, Nov. 6, 2005, at A1.

52. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., 28 U.S.C., and 50 U.S.C.).

53. 18 U.S.C.S. § 2709(c) (Supp. 2007) (originally enacted as USA Patriot Act of Oct. 26, 2001, Pub. L. No. 107-56, 115 Stat. 272).

54. *Id.*

55. *Doe v. Gonzales*, 386 F. Supp. 2d 66, 68–69 (D. Conn. 2005), *dismissed as moot* by 449 F.3d 415 (2d Cir. 2006).

56. Gellman, *supra* note 51.

57. *Id.*

a National Security Letter demanding the names of all persons who used a particular library computer and warned him to never reveal the request to anyone.⁵⁸ Despite Christian's unveiling, the courts continued to uphold the fiction that his identity is a state secret.⁵⁹ The government claimed that national security would somehow be damaged if his name were revealed.⁶⁰

National Security Letters were an invention of the 1970s designed for espionage and terrorism investigations.⁶¹ They required the Government to show a specific link to a suspected foreign agent.⁶² But the Patriot Act, in breaking down the wall between intelligence investigations and criminal investigations, greatly expanded government authority to get private records about U.S. citizens without any specific link to a suspected terrorist.⁶³

Letters can be issued on the authority of an FBI supervisor without court supervision, giving the government access to records showing how a person earns money, whom she lives with, what he reads, whom she communicates with on the phone or by email, where he buys things online, where she travels, and how much he gambles and borrows.⁶⁴ Certain patterns could identify potential terrorists—or so the argument goes.

The problem is that much of the information concerns citizens who have no idea they are being scrutinized and have nothing to do with terrorism. Citizens have no way of knowing that their records have been sucked into the government's dragnet; the letters are issued to the businesses that hold the records, such as bookstores, internet service providers, and credit card companies. It is illegal for those businesses to tell people that their records are being sent to the FBI.⁶⁵ In addition, the records are retained indefinitely because Attorney General Ashcroft rescinded a 1995 guideline that had required the letters be destroyed if they proved irrelevant to the purpose for which they were collected.⁶⁶

National Security Letters violate American norms of justice in almost every conceivable way. There is no requirement for probable cause or even reasonable suspicion.⁶⁷ People do not know that the government is snooping on their private lives, and even if they did it is difficult to challenge a National

58. *Id.*

59. *Gonzales*, 386 F. Supp. 2d at 82–83.

60. *Id.*

61. Gellman, *supra* note 56.

62. *Id.* at A10.

63. *Id.*

64. *Id.*

65. 18 U.S.C. § 2709(c) (Supp. 2007).

66. Gellman, *supra* note 56, at A10.

67. *Id.*

Security Letter in court. Christian did not know if he could consult a lawyer or tell his board.⁶⁸

Until 2007, no one outside the government knew how many National Security Letters were issued by the FBI. The *Washington Post* reported in 2005 that the government is using 30,000 a year.⁶⁹ The Bush Justice Department responded to that disclosure by saying that number was “erroneous,” but refusing to release the right number.⁷⁰

The number did turn out to be erroneous—erroneously low. A study by the Justice Department Inspector General Glenn A. Fine found that the number of National Security Letters rose to 56,000 a year in 2004 from just 8,500 before passage of the Patriot Act.⁷¹ Fine also found “widespread and serious misuse” of the letters by the FBI.⁷²

The recent reauthorization of the Patriot Act fixed some of these problems by requiring a reasonable amount of evidence that records are relevant to an investigation and requiring a higher-up in the FBI to approve the letters.⁷³ One provision allows a recipient of a National Security Letter to contact a lawyer and to reveal its identity.⁷⁴ After the revisions, the government admitted that Christian could seek a lawyer and reveal his name.⁷⁵ Still, the person whose records are sought does not find out about the letters, nor have a chance to challenge the letter in court.

The compromise allows a person who receives a letter to challenge the gag that prohibits her from telling anyone except her lawyer.⁷⁶ Within the first year, a court may set aside the gag if it finds there is “no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere the diplomatic relations, or endanger the life or physical safety of any person.”⁷⁷ But, if the government asserts that disclosure would violate national security or interfere with diplomatic relations, then the court cannot set aside

68. *Id.* at A11.

69. *Id.* at A1.

70. Richard B. Schmitt, *The Nation: Was Focus of the Patriot Act Debate a Dodge?*, L.A. TIMES, Dec. 11, 2005, at A29.

71. *The FBI's Use of National Security Letters and Section 215 Requests for Business Records: Hearing Before the H. Judiciary Comm.*, 110th Cong. 5 (2007) (statement of Glenn A. Fine, Inspector General, U.S. Dep't of Justice), available at <http://www.usdoj.gov/oig/testimony/0703/final.pdf>.

72. *Id.* at 3.

73. USA PATRIOT and Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 196-97.

74. 18 U.S.C. § 2709(c) (2007).

75. *Doe v. Gonzales*, 449 F.3d 415, 420 (2d Cir. 2006).

76. 18 U.S.C.A. § 3511(b)(1) (2000 & Supp. 2007).

77. *Id.* § 3511(b)(2).

the gag unless it finds the government is acting in bad faith.⁷⁸ After one year, if the government recertifies the national security danger, that assertion is considered "conclusive."⁷⁹ Judges may not assess the claim's validity, but only whether it is made in "bad faith."⁸⁰

The compromise was supposed to exempt libraries from receiving National Security Letters, but the library exemption does not cover internet services at libraries, such as email.⁸¹ Most important, these improvements do not fix the basic flaw: the government does not have to prove a connection between the records sought and a terrorist.

Just as the custom house officers entered the colonists' homes on bare suspicion, FBI agents rummage through Americans' private information unmindful of the cherished liberty lost. As in Mr. Otis's day, the liberty of every man is in the hands of every petty officer.

V. SURRENDERING THE MORAL HIGH GROUND

Who would have thought that the day would come when the symbol of America in parts of the world was the image of a hooded prisoner with his arms hooked to electrical wires?

Who would have thought that America would run secret prison camps in Eastern Europe, shuttling nameless detainees through European capitals on "ghost flights" and using "extraordinary rendition" to send prisoners to countries notorious for torture?

Who would have thought that the President and the Vice President would fight a hero and former prisoner of war to preserve the prerogative to treat prisoners in cruel, inhuman, or degrading ways?

Who would have thought in the days after September 11, 2001 that the United States would surrender the moral high ground and wind up with the image of a human rights abuser?

Who would have thought that after a century leading the world's effort to bring civilized standards to the treatment of prisoners of war, the United States would turn its back on the proud accomplishments of Nuremberg and the Geneva Conventions?

Who would have thought the United States would be the aggressor and invade another country in a preemptive war that the Secretary General of the United Nations said was probably illegal?

Yet all of these developments have come to pass as President George W. Bush has pursued the war on terrorism heedless of history.

78. *Id.*

79. *Id.* § 3511(b)(3).

80. *Id.*

81. 18 U.S.C.A. § 2709(f) (2006).

The great invention of the Nuremberg war crimes trials was that the victors agreed to submit the fate of evil perpetrators of the Holocaust to the rule of law.

Robert H. Jackson, the chief prosecutor at Nuremberg, said the decision of “four great nations, flushed with victory and stung with injury [to] stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”⁸²

For half a century, the world built on this idea that law could punish war crimes. It was an idea behind the Geneva Conventions of 1949 and the Convention Against Torture in 1984.⁸³

But after 9/11, the Bush White House determined that this grand creation of international justice was “obsolete” in the face of the war on terrorism, and that Taliban captured in Afghanistan were not entitled to the protection of the Conventions.⁸⁴ For the first time in post-World War II history, the United States refused to extend the protections of the Geneva Conventions to its opponents on the battlefield, one of several arguments that Secretary of State Colin Powell made in a memo opposing Gonzales.⁸⁵ Powell wrote that Gonzales would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops.”⁸⁶ In the end, reason surrendered to power and President Bush adopted Gonzales’s position.⁸⁷

By denying Geneva protections to the Taliban and other prisoners, Bush hoped he could use rough interrogations to prevent another 9/11. Waterboarding—where a prisoner is tied to a board and made to think he is drowning—elicited information from 9/11 mastermind Khalid Sheikh Mohammed about possible future terrorist targets; in fact, Mohammed

82. ROBERT H. JACKSON, *THE NÜRNBERG CASE* 31 (1947).

83. See Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT’L L. REV. 9, 22–23 (2005); Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV. 221, 245 (1997).

84. Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, President of the United States, Decision Regarding Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 118–19 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*].

85. Memorandum from Colin L. Powell, Secretary of State, to Counsel to the President and Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 25, 2002), reprinted in *THE TORTURE PAPERS*, *supra* note 84, at 122–23.

86. *Id.* at 123.

87. *THE TORTURE PAPERS*, *supra* note 84, at xiv.

admitted to involvement in so many plots—thirty-one in all—that some experts on interrogations questioned whether he was giving reliable confessions.⁸⁸

Tortured confessions often are unreliable.⁸⁹ The Bush administration's pre-war claim that Iraq was helping al Qaeda make bombs of poisons and gases came from a Libyan prisoner handed over to Egypt for interrogation under a process called extraordinary rendition; the prisoner later said he made up the claim to avoid Egyptian torture.⁹⁰ But by that time, President Bush had used the information to justify invading Iraq.⁹¹

The unreliability of confessions induced by torture is one reason the British House of Lords ruled in 2005 that the government could not use that evidence in court.⁹² Lord Bingham wrote that the English common law had "set its face firmly against the use of torture" for more than 300 years: "[T]he common law was moved by the cruelty of the practice . . . by the inherent unreliability of confessions . . . and by the belief that it degraded all who lent themselves to [it]."⁹³

President Bush, when he made his initial decision to use brutal interrogation techniques, probably did not foresee that opening the dungeon door would lead inevitably to Abu Ghraib. But there is no excuse now for failing to recognize the cause-and-effect relationship he set in motion.

Yet, to this day, the President has refused to take responsibility for the mistreatment of prisoners at Guantanamo Bay and Abu Ghraib. He has blamed renegade military police while trotting out multiple Pentagon investigations to whitewash the responsibility of higher-ups for the Abu Ghraib scandal.⁹⁴

In fact, the responsibility lies squarely with President Bush, Vice President Dick Cheney, Alberto Gonzales, and former Defense Secretary Donald Rumsfeld. In the face of complaints from FBI agents and principled objections by top military lawyers,⁹⁵ administration hawks allied with the Vice President

88. Nick Gillespie, *Is Khalid Sheikh Mohammed a Bullshitter?*, REASON MAGAZINE, March 16, 2007 available at <http://www.reason.com/blog/printer/119157.html>.

89. Stephanos Bibas, *The Rehnquist Court's Fifth Amendment Incrementalism*, 74 GEO WASH. L. REV. 1078, 1083 (2006).

90. Douglas Jehl, *Qaeda-Iraq Link U.S. Cited Is Tied to Coercion Claim*, N.Y. TIMES, Dec. 9, 2005 at A1.

91. *Id.* at A14.

92. *A v. Sec'y of State for the Home Dep't*, [2005] UKHL 71 (appeal taken from Eng.) (U.K.).

93. *Id.* at 5–6.

94. Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1275–76 (2005).

95. Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32–33.

and Secretary Rumsfeld approved brutal interrogation techniques that were employed at Guantanamo Bay and that later migrated to Abu Ghraib.⁹⁶

The *New Yorker* recounted in 2006 the frustrating attempts of Alberto J. Mora, retired General Counsel of the Navy, to stop the brutality.⁹⁷

In December, 2002, Navy criminal investigators brought to Mora their concerns about abusive interrogations at Guantanamo.⁹⁸ Mora, a rock-ribbed Bush Republican, was shocked to discover that Rumsfeld had approved hooding to exploit phobias, stress positions, deprivation of light—all forbidden practices that could subject military interrogators to prosecution under the Uniform Code of Military Justice.⁹⁹

Pentagon and Justice Department lawyers had invented elaborate rationales to justify the practices. Pentagon lawyer, Lt. Col. Diane Beaver, suggested that interrogators could get immunity in advance from their superiors.¹⁰⁰ Justice Department lawyer John Yoo wrote an Office of Legal Counsel opinion that the President's war power permitted him to authorize "cruel, inhumane, and degrading treatment" of prisoners.¹⁰¹ Mora says that Yoo told him point blank that the President could authorize "torture."¹⁰²

Mora disagreed. He said the international conventions ratified by the Senate had the force of law that bound President and interrogator alike.¹⁰³

After this quiet, behind-the-scenes debate with internal critics, Bush and Cheney fought a loud, public battle with Senator John McCain, R.-Ariz., trying for months during 2005 to defeat his legislative ban on "cruel, inhuman or degrading" interrogations.¹⁰⁴

From the beginning of the war on terrorism, the Bush administration had taken the view that the President has sole authority to decide how enemy combatants in the war on terrorism would be interrogated. In a 2002 memo justifying abusive interrogation techniques, the Justice Department said, "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."¹⁰⁵ The memo went on to say, remarkably, that

96. *Id.* at 33, 40.

97. *Id.* at 32–33.

98. *Id.* at 35–36.

99. *Id.* at 35.

100. Mayer, *supra* note 95, at 35.

101. *Id.* at 38.

102. *Id.* at 39.

103. *Id.* at 41.

104. Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials: New Military Standards*, N.Y. TIMES, Nov. 2, 2005, at A1.

105. Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in THE TORTURE PAPERS, *supra* note 84, at 207.

"[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."¹⁰⁶

Senator McCain was tortured as a prisoner of war in Vietnam.¹⁰⁷ He recalled in a Senate speech that one inner belief that sustained him and other POWs was that "every one of us . . . knew and took great strength from the belief that we were different from our enemies. . . ."¹⁰⁸

When it became clear that the McCain anti-torture provision would pass, President Bush agreed to sign it.¹⁰⁹ But what he gave with the signing pen he took back with a signing statement.¹¹⁰ The statement said he would interpret the McCain ban "consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power."¹¹¹

In other words, the President could authorize any interrogation technique he thought was necessary, and there was nothing Congress or the courts could do about it.

Alberto Mora thinks that the decision of top officials to authorize abuse was as morally reprehensible as the actual torture at Abu Ghraib:

If cruelty is no longer declared unlawful, but instead is applied as a matter of policy, it alters the fundamental relationship of man to government. . . . The Constitution recognizes that man has an inherent right . . . to personal dignity, including the right to be free of cruelty. It applies to all human beings. . . .¹¹²

If we do not preserve this special relationship between man and government, if we do not preserve the unique quality that sustained John McCain in a Hanoi prison, then we will have lost that precious intangible that we are fighting the war on terrorism to preserve—our nation's belief that the rule of law protects the inherent worth and dignity of every person against abusive governments, maniacal dictators, murderous ideologies, and even democratically elected presidents of the freest country in the world.

Just as President Bush has claimed unlimited presidential power to order abusive interrogation techniques, he also has claimed it for the process, or lack thereof, available to those detained as enemy combatants. He asserted that he

106. *Id.* at 172.

107. Richard Simon, *Senate Bucks White House on Detainee Rules: McCain Invokes His Time as a POW to Help Pass a Measure that Would Set Standards on How Prisoners Should Be Interrogated*, L.A. TIMES, Oct. 6, 2005, at A12.

108. *Id.*

109. Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 104 (2007).

110. *Id.* at 104–05.

111. *Id.* at 104.

112. Mayer, *supra* note 95, at 35.

could create military tribunals to try the enemy combatants—tribunals that lack so many of the elements of due process that the U.S. Supreme Court ruled they did not comply with the Constitution.¹¹³ The tribunals do not allow the accused to confront key accusers or to know secret evidence against them; they also do not guarantee the right to a lawyer, do not allow lawyers full access to clients, and deny the Great Writ of habeas corpus.¹¹⁴ In *Hamdi*, Justice O'Connor rejected this assertion of presidential authority. The Court held that citizens held as enemy combatants must have a "fair opportunity to rebut" the government's claims.¹¹⁵

The U.S. Supreme Court also rejected President Bush's broad claim of executive power in the *Hamdan v. Rumsfeld* decision in 2006, ruling that the President could not, on his own, set up tribunals to try enemy combatants and could not ignore the Geneva Conventions when Congress said that international law applied to such tribunals.¹¹⁶ The President responded by asking Congress to pass the Military Commission Act, and a Congress of Republicans and cowed Democrats approved the law.¹¹⁷ The Democrats in Congress were especially timid because the bill came up in the late summer and early fall and appeared to be an attempt to make Democrats appear weak on terrorism as the 2006 congressional elections approached.¹¹⁸ The law overturned *Hamdan* and stripped the federal courts of jurisdiction to hear habeas corpus appeals from alien enemy combatants, whether they have been found by the Combat Status Review Tribunal to have been properly detained or whether they are awaiting that determination.¹¹⁹

This was an extraordinary law. As Berkeley Law Professor and constitutional expert Jesse Choper put it, except in isolated cases during the Civil War and World War II, "Congress had never engaged in clear removal of cases from the Supreme Court or the lower federal courts."¹²⁰

113. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–33 (2004) (plurality opinion).

114. *See id.* at 529–539.

115. *Id.* at 533.

116. *Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S. Ct. 2749, 2759–60 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2625.

117. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2625; Erwin Chemerinsky, *Presidential Powers Including Military Tribunals in the October 2005 Term*, 22 *TOURO L. REV.* 897, 909 (2007).

118. Editorial, *Profiles in Cowardice: On Prisoner Abuse and Detention. President Bush Finds Enablers in Both Parties*, *WASH. POST*, Oct. 1, 2006, at B6.

119. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2635 (stating in Section 7 that 28 U.S.C. § 2241 was amended by inserting a new subsection (e)).

120. Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 *CAL. L. REV.* ___ (forthcoming 2007), available at <http://ssrn.com/abstract=975315>.

It should never be possible for Congress to remove a whole category of cases from the jurisdiction of all federal courts, inferior and supreme. To allow such a law to stand would seriously undermine the checks and balances of the Constitution, already seriously eroded by Congress's failure to check the President's excessive assertions of authority.

A brave member of the Army Reserve who was involved in handling the cases of the detainees—Lt. Col. Stephen Abraham—has filed an affidavit with the U.S. Supreme Court that paints a highly damaging picture of the operation of the President's tribunals.¹²¹ He says that intelligence officials assembling the case against detainees would not assure him that they had provided any exculpatory evidence.¹²² More damaging, he told of serving on one of the review boards and concluding along with fellow board members that the government had not provided enough proof that one particular detainee was an enemy combatant.¹²³ When the board made that ruling, it was told to take another look.¹²⁴ It stood by its decision, but Abraham was never again put on one of the boards.¹²⁵

At the end of the Supreme Court's 2006–2007 term, it agreed to hear the case to decide if detainees have a right to challenge their detention in American courts.¹²⁶

VI. CHASING PHANTOMS

The First Amendment says that people generally cannot be put in prison for things they say.¹²⁷ But Ali al Timimi, an imam from northern Virginia, faces life in prison without parole for words spoken over dinner to followers who never attacked the United States.¹²⁸

The Fifth Amendment says every suspect has a right to remain silent.¹²⁹ But, the Bush administration outsourced the Fifth Amendment to Saudi Arabian security police who secured a confession from Ahmed Omar Abu Ali for plotting to kill the President.¹³⁰

121. Brief of Petitioners in Reply to Opposition to Petition for Rehearing at app. at i–viii, *Al Odah v. United States*, 127 S. Ct. 3067 (2007) (No. 06-1196).

122. *Id.* at iv.

123. *Id.* at vi–vii.

124. *Id.* at vii.

125. *Id.*

126. William Glaberson, *In Shift, Justices Agree to Review Detainees' Case: Guantánamo Challenge*, N.Y. TIMES, June 30, 2007, at A1.

127. U.S. CONST. amend. I.

128. James Dao, *Muslim Cleric Found Guilty in the "Virginia Jihad" Case*, N.Y. TIMES, Apr. 27, 2005, at A12.

129. U.S. CONST. amend. V.

130. *Contemporary Practice of the United States Relating to International Law*, 100 AM. J. INT'L L. 690, 723 (2006).

The American legal system insists that people are innocent until proven guilty.¹³¹ But under the Patriot Act, the Bush administration put Illinois charities out of business for alleged ties to al Qaeda, which were never proven in court.¹³²

The Constitution bans ex post facto laws because we do not believe that people can be sent to prison for acts that were not illegal when they occurred.¹³³ But the government prosecuted two former college professors for aiding Palestinian groups that were not considered terrorist organizations at the time of their assistance.¹³⁴

Perhaps, if the Bush-Ashcroft-Gonzales tactics had clearly made us safer from the people who murdered our brothers and sisters, mothers and fathers, sons and daughters on 9/11, their legal tactics might somehow be forgiven. But there is little evidence that the prosecutions have made us safer because few of those convicted were plotting to kill Americans.

The Justice Department says it foiled a number of possible attacks, including one involving Iyman Faris, an Ohio trucker, who pleaded guilty in 2003 to involvement in an al Qaeda plot to bring down the Brooklyn Bridge.¹³⁵ In recent cases, where cells of would-be terrorists have been rightfully arrested, those plotting attacks on soldiers at Fort Dix and fuel tanks at JFK airport in New York were far from having the means to carry out their evil intentions.¹³⁶

With Attorney General Alberto Gonzales flanking him, President Bush claimed in 2005 that “federal terrorism investigations have resulted in charges against more than 400 suspects, and more than half of those charged have been convicted.”¹³⁷

But a study by Syracuse University and an analysis by *The Washington Post* found that few “terrorism” cases actually were related to terrorism.¹³⁸

131. *Coffin v. United States*, 156 U.S. 432, 453 (1895); *see also*, U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1.

132. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 87 (2004) [hereinafter MONOGRAPH].

133. *See* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

134. *See* Viet D. Dinh & Wendy J. Keefer, *FISA and the PATRIOT Act: A Look Back and a Look Forward*, 35 GEO. L.J. ANN. REV. CRIM. PROC. xxv (2006).

135. Paul J. McNulty, Deputy Attorney General, Prepared Remarks at the American Enterprise Institute (May 24, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/dag_speech_060524.html.

136. Bruce Schneier, *Portrait of the Modern Terrorist as an Idiot*, WIRE, June 14, 2007, *available at* http://www.wired.com/politics/security/commentary/securitymatters/2007/06/securitymatters_0614.

137. George W. Bush, President of the United States, Remarks to the Ohio State Highway Patrol Academy (June 9, 2005) *available at* <http://www.whitehouse.gov/news/releases/2005/06/print/20050609-2.html>.

138. Dan Eggen, *Terrorism Prosecutions Drop: Analysis Shows a Spike After 9/11, Then a Steady Decline*, WASH. POST, Sept. 4, 2006, at A6; *Criminal Terrorism Enforcement in the*

The *Post* found that 39 people, not 200, had been convicted of crimes related to terrorism or national security.¹³⁹ Syracuse University, which provides the most reliable study of Justice Department statistics, found that the average sentence in "terrorism" cases after 9/11 was just twenty-eight days and that the median sentence was zero because most charges were dismissed.¹⁴⁰ Only one percent of the 6,500 terrorism or anti-terrorism criminal referrals resulted in sentences of twenty or more years.¹⁴¹ Nearly four out of five of these referrals were dropped before trial; of the nearly 1,400 sentenced, only 67 received sentences of five or more years.¹⁴² The Syracuse researchers also found that the initial surge of "terrorism" prosecutions immediately after 9/11 has ended and that the current level of prosecutions is closer to the pre-9/11 level.¹⁴³ The researchers point out that this raises questions about the post-9/11 surge because the threat of terrorism is not thought to have decreased since then.¹⁴⁴

A pattern has become disconcertingly familiar. The government makes alarming claims of terrorist plots. Then the facts fall short of the sensational claims. Attorney General Ashcroft warned of a dirty bomb plot by Jose Padilla, and the government held the U.S. citizen¹⁴⁵ in a Navy brig for three years before filing charges that had nothing to do with a dirty bomb plot.¹⁴⁶ The bait and switch left one of Bush's favorite judges, J. Michael Luttig, wondering whether the military detention was justified and led him to write that there had been a "substantial cost to the government's credibility" resulting in the government's long detention of Padilla for alleged terrorist plans it did not prove in court.¹⁴⁷

Ashcroft warned that an Oregon lawyer was connected to the Madrid terrorist bombing, but that was based on an FBI mistake.¹⁴⁸ He claimed that a Detroit cell endangered Americans, but a judge threw out the convictions of

United States During the Five Years Since the 9/11/01 Attacks, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Sept. 4, 2006), available at <http://trac.syr.edu/tracreports/terrorism/169/> [hereinafter *Criminal Terrorism Enforcement*].

139. Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1.

140. *Criminal Terrorism Enforcement*, *supra* note 138.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. William H. Freivogel, *Mr. Ashcroft Exits*, ST. LOUIS POST-DISPATCH, Nov. 11, 2004, at C10.

146. *Padilla v. Hanft*, 432 F.3d 582, 584 (4th Cir. 2005).

147. *Id.* at 587.

148. Freivogel, *supra* note 145, at C20.

two Muslim men because prosecutors ignored evidence that did not fit their theory.¹⁴⁹

Twenty of the Government's terrorism convictions are for Iraqi men who pleaded guilty in a Pennsylvania truck licensing scheme, but the scheme had nothing to do with terrorism.¹⁵⁰ Six Yemini men from Lackawanna, New York were convicted of providing material support to al Qaeda because they attended training camps overseas, but that was before 9/11 and the men never took steps toward a terrorist act.¹⁵¹

Even in its showcase prosecution of the so-called paintball jihadists of Northern Virginia where the government won eight convictions, the so-called terrorists never posed a threat to an American citizen here or abroad.¹⁵²

The imam at the center of the prosecution of the "Virginia jihadists" was Ali al Timimi, a Ph.D. cancer researcher who was an influential leader of young American Muslims at a store front mosque in Falls Church, Virginia.¹⁵³

One follower was Randall "Ismail" Royer, a graduate of Parkway South in affluent west St. Louis County.¹⁵⁴ He pleaded guilty to violating the seldom-enforced Neutrality Act of 1794¹⁵⁵ to support Lashkar e-Taiba, a militant Muslim group fighting for the independence of Kashmir from India.¹⁵⁶ The following account of the prosecution of al Timimi and other Muslims in America is largely based on excellent reporting by a former colleague of mine at the *Post-Dispatch*, Jon Sawyer, now director of the Pulitzer Center on Crisis Reporting; Sawyer, like Eagleton, served as a muse for the ill-fated editorials I wrote for the *Post-Dispatch*.

Royer and the other conspirators allegedly trained at a paintball course in the woods. He and three others went to a Lashkar camp in 2001, before December 2001 when the Lashkar group was declared a terrorist organization for attacking the Indian Parliament. Prosecutors maintained that training with the group amounted to an "attack" on India in violation of the Neutrality Act.¹⁵⁷

Two of the men who traveled to Pakistan after 9/11 got reduced sentences by pleading guilty and testifying against Timimi.¹⁵⁸ They testified that at a

149. *Id.*

150. Eggen & Tate, *supra* note 139, at A18.

151. *See* Freivogel, *supra* note 145.

152. *Id.*

153. *See* Dao, *supra* note 128.

154. Jon Sawyer, *Muslims and America: Ex-St. Louisan Caught in Post 9/11 Net* (pt. 4), ST. LOUIS POST-DISPATCH, Dec. 7, 2005, at A11.

155. 18 U.S.C. § 960 (2000); Sawyer, *supra* note 154.

156. Jon Sawyer, *Muslims and America: Mosque Feels the Pressure of Prosecutions* (pt. 3), ST. LOUIS POST-DISPATCH, Dec. 6, 2005, at A8 (hereinafter *Mosque Feels Pressure*).

157. Sawyer, *supra* note 154.

158. *Mosque Feels Pressure*, *supra* note 156.

private dinner five days after 9/11, Timimi had told them that it was their religious duty to fight for Islam abroad and that this included defending the Taliban against U.S. forces.¹⁵⁹ AL Timimi claims he told his followers to go abroad to guard against an anti-Muslim backlash in the United States.¹⁶⁰ In any event, none of the followers fought against the United States or U.S. allies.¹⁶¹

For his words—and his words alone—Timimi was convicted of inciting his followers to wage war against the United States.¹⁶² U.S. District Judge Leonie M. Brinkema called the life sentence she imposed “very draconian,” but said her hands were tied by federal sentencing rules involving gun crimes.¹⁶³

Speech alone can sometimes be illegal, but only when it incites a person to an imminent criminal act.¹⁶⁴ Based on the evidence, an attack on American troops or U.S. soil never was imminent or even planned. The U.S. Supreme Court should review al Timimi’s trial and “draconian” sentence.

The prosecutor in the case was U.S. Attorney Paul McNulty, who later became Deputy Attorney General with hardly a murmur of criticism from either Democrats or Republicans in the Congress.¹⁶⁵ He said Timimi deserved the life sentence because he was “a kingpin of hate against America and everything we stand for, especially our freedom.”¹⁶⁶

AL Timimi made an eloquent statement to the court, quoting from the Constitution and Socrates.¹⁶⁷ Previously, he had pointed out that he had “never owned or used a gun, never traveled to a military camp, never set foot in a country in which a war was taking place, never raised money for any violent organization.”¹⁶⁸ For his conviction to stand, he said:

159. Dao, *supra* note 128.

160. *Id.*

161. See *Mosque Feels Pressure*, *supra* note 156. However, two of the defendants received reduced sentences after pleading guilty to charges that included “contemplat[ing] fighting with the Taliban against U.S. forces.” *Id.*

162. See Debra Erdley & Betsy Hiel, *Islamic Cleric Gets Life in Prison*, TRIB.-REV., July 14, 2005, at A6.

163. See Jerry Markon, *Muslim Lecturer Sentenced to Life*, WASH. POST, July 14, 2005, at B1.

164. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

165. See Peter Hardin, *Capitol Update: Virginians in Washington*, RICHMOND TIMES-DISPATCH, Feb. 19, 2006, at A6 (McNulty “advanced easily through the Senate Judiciary Committee” with “kind words from several senior Democrats.”); Peter Hardin, *Close Scrutiny for Nominee*, RICHMOND TIMES-DISPATCH, Feb. 19, 2006, at B1.

166. Dao, *supra* note 128.

167. Erdley & Hiel, *supra* note 162.

168. Milton Viorst, *The Education of Ali Al-Timimi*, ATLANTIC MONTHLY, June 2006, at 78.

[T]wo hundred and thirty years of America's tradition of protecting the individual from the tyrannies and whims of the sovereign will have come to an end. And that which is exploited today to persecute a single member of a minority will most assuredly come back to haunt the majority tomorrow.¹⁶⁹

VII. OUTSOURCING THE FIFTH AMENDMENT

Ahmed Abu Ali—a pious twenty-four year old Muslim American who grew up in northern Virginia before studying in Saudi Arabia—was convicted late in 2005 of plotting to assassinate President George W. Bush and hijack commercial airliners.¹⁷⁰ The conviction was based almost entirely on a confession he made while in custody of the Mubahith, Saudi Arabia's state security service known for torturing prisoners.¹⁷¹

Prosecutor McNulty said the verdict “firmly established Abu Ali as a dangerous terrorist who posed a grave threat to our national security.”¹⁷² But the trial violated important standards of American justice. Again, this account is based on excellent stories by Sawyer, with additional information from original court documents.

The trial was conducted under the pretense that Americans had nothing to do with Abu Ali's detention in Saudi Arabia, even though Saudi officials told news organizations that they were holding him for U.S. convenience.¹⁷³ FBI agents on the scene fed questions to Saudi interrogators and watched behind one-way glass.¹⁷⁴

The judge, Gerald Bruce Lee, allowed the prosecution to introduce Abu Ali's confession as “voluntary,” despite Abu Ali's claim that Saudi interrogators “whipped” him, slapped him in the face, pulled his beard, ears and hair, kicked him in the stomach, and put him in a cell that was lit twenty-four hours a day.¹⁷⁵ A U.S. doctor confirmed ten linear scars on his back consistent with whipping.¹⁷⁶ The jury convicted Abu Ali without knowing that Saudi Arabia has a history of torturing prisoners.¹⁷⁷

169. Ross E. Getman, Esq., *The Faithful Spy: Amerithrax Spoiler Alert*, GLOBAL POLITICIAN, April 23, 2007, available at <http://www.globalpolitician.com>.

170. Jerry Markon, *Virginia Man Convicted in Plot to Kill Bush*, WASH. POST, Nov. 23, 2005, at A1.

171. See Jon Sawyer, *Abu Ali Case Shows U.S. Outsourcing Dirty Work, Some Say*, ST. LOUIS POST-DISPATCH, Dec. 4, 2005, at B4 [hereinafter *Abu Ali Case*] (discussing jurors' reliance on Abu Ali's videotaped confession in finding him guilty).

172. *Id.* at B1.

173. See *id.* at B4.

174. *Id.*

175. *U.S. v. Abu Ali*, 395 F. Supp. 2d 338, 343–44, 373 (E.D. Va. 2005).

176. *Id.* at 362.

177. See *Abu Ali Case*, *supra* note 171.

Ever since the Bill of Rights was written, it has stood for the principle that the federal government cannot force a suspect to be a witness against himself.¹⁷⁸ It is a principle that is essential to a government that respects the integrity and dignity of the individual over the demands of the state. If the conviction of Abu Ali stands, the Fifth Amendment has become a meaningless anachronism in the war on terrorism.

VIII. ABUSING THE PATRIOT ACT

Former Attorney General Ashcroft pointed to the prosecution of two former college professors as Patriot Act success stories.¹⁷⁹ The professors are Abdelhaleem Ashqar, a former Howard University professor, and Sami Al-Arian, a former computer professor at the University of South Florida at Tampa.¹⁸⁰

The Patriot Act opened up to prosecutors a trove of secret wiretaps collected by intelligence agents.¹⁸¹ But critics point out that charges against both men are based upon decade-old actions that were not illegal at the time.¹⁸²

Mr. Ashqar, who lives in northern Virginia, grew up on the West Bank.¹⁸³ His grandfather was jailed by the Ottoman Empire.¹⁸⁴ His father was jailed by the British Empire.¹⁸⁵ Mr. Ashqar himself was jailed by Israel.¹⁸⁶ Finally, he was brought to trial in America.¹⁸⁷ The government charged that in the early 1990s, as a student at the University of Mississippi, Mr. Ashqar helped launder one million dollars for Hamas.¹⁸⁸ The evidence came from FBI wiretaps and a break-in at his apartment.¹⁸⁹ The searches were conducted as intelligence operations without search warrants at a time when the United States did not consider Hamas a terrorist group.¹⁹⁰ In early 2007, a jury found Ashqar

178. See U.S. CONST. amend. V.

179. See *Mosque Feels Pressure*, *supra* note 156; Spencer S. Hsu, *Former Florida Professor to Be Deported*, WASH. POST, April 18, 2006, at A3.

180. *Mosque Feels Pressure*, *supra* note 156; Don Wycliff, *Another Hard Look at the Patriot Act*, CHI. TRIB., Dec. 11, 2003, at C27.

181. See Hsu, *supra* note 179.

182. See *e.g.*, Tim Padgett & Rochelle Renfor, *Fighting Words*, TIME, Feb. 4, 2002, at 56 (discussing how Al-Arian was investigated for several years but never charged with anything until the Patriot Act was passed); *Mosque Feels Pressure*, *supra* note 156 (stating that Ashqar's actions in support of Hamas "all took place before . . . Hamas was officially designated a terrorist group by the United States").

183. *Mosque Feels Pressure*, *supra* note 156, at A9.

184. *Id.*

185. *Id.*

186. *Id.*

187. Matt O'Connor, *Acquittal Just Latest Setback in Courts*, CHI. TRIB., Feb. 2, 2007, at 14.

188. *Mosque Feels Pressure*, *supra* note 156, at A8.

189. *Id.*

190. *Id.*

innocent of the most serious charge against him, racketeering, convicting him on lesser charges that should result in a shorter prison sentence.¹⁹¹ The government used the same approach in the al Arian case, and failed to convince a jury there too.¹⁹² Mr. al Arian was acquitted in December, 2005 of eight counts growing out of the Government claim that he conspired to commit terrorist murders in Israel as the U.S. boss of the Islamic Jihad.¹⁹³ The jury could not reach a verdict on nine other charges and al Arian subsequently agreed to a plea bargain and was deported.¹⁹⁴

The government had been investigating Mr. al Arian since shortly after he arrived at the university in 1986.¹⁹⁵ His fiery speeches called for “death to Israel.”¹⁹⁶ But he considered himself an “enlightened Islamist” and campaigned for George W. Bush in 2000.¹⁹⁷ He publicly condemned the 9/11 attacks.¹⁹⁸ *Time Magazine* reported that an FBI supervisor involved in the case was “in shock” when he received the “marching orders” from Mr. Ashcroft to build a case against Mr. al Arian.¹⁹⁹

Much of the evidence presented at trial involved fundraising from the early 1990s that was not illegal then.²⁰⁰ The judge insisted that the government prove that Mr. al Arian knew he was funding the terrorist activities of Islamic Jihad.²⁰¹ It could not.²⁰² Jurors said they acquitted Mr. al Arian because a jury instruction told them, “Our law does not criminalize beliefs or mere membership in an organization.”²⁰³

The government used another provision of the Patriot Act to destroy two Illinois charities by freezing their assets.²⁰⁴ The investigations of Global Relief and Benevolence International were based partly on an uncorroborated CIA tip in late 2001 that Global Relief was involved in a plot to attack the United States with weapons of mass destruction.²⁰⁵ The government entered the

191. See O'Connor, *supra* note 187.

192. Tim Padgett & Wendy Malloy, *When Terror Charges Just Won't Stick*, TIME, Dec. 19, 2005, at 46.

193. O'Connor, *supra* note 187; *Id.*

194. Hsu, *supra* note 179, at A3.

195. Padgett & Malloy, *supra* note 192, at 47.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. See Padgett & Malloy, *supra* note 192, at 47.

201. *Id.*

202. See *id.*

203. Meg Laughlin, *For Justice, Jurors Put Lives on Hold*, ST. PETERSBURG TIMES, Dec. 11, 2005, at A1.

204. See Laurie Cohen, *9/11 Panel Faults Probe of 2 Charities*, CHI. TRIB., Aug 24, 2004, at 1.

205. *Id.* at 12.

offices of Global Relief and Benevolence International around the world to swab for evidence of WMDs.²⁰⁶ Failing to find evidence, the government used its new Patriot Act powers to freeze the charities' assets while it tried to build criminal cases.²⁰⁷ The Justice Department did not file charges against Global Relief,²⁰⁸ but locked up a top Global fund-raiser, Rabih Haddad.²⁰⁹

Mr. Haddad was a respected moderate religious leader in Ann Arbor, Michigan.²¹⁰ He was placed in solitary confinement while awaiting a closed hearing,²¹¹ and was eventually deported for a minor visa violation.²¹² In a jailhouse letter to "Lady Liberty," Mr. Haddad said that America's vision of liberty had once "swept me up in a tornado of hope, dreams, and inspiration Little did I know that I will be persecuted in your name" ²¹³

U.S. Attorney Patrick Fitzgerald won an indictment of the director of Benevolence International, Enaam Arnaout.²¹⁴ Mr. Ashcroft personally traveled to Chicago to announce the indictment, stressing the organization's links to al Qaeda.²¹⁵ The 9/11 Commission concluded that "the indictment . . . contained almost no specific allegations that [the group] funded al Qaeda."²¹⁶ Eventually, Arnaout pled guilty to diverting charitable funds to Bosnian fighters—whom the United States supported—but the Government dropped all counts related to terrorism and al Qaeda.²¹⁷ The 9/11 Commission concluded that the Patriot Act powers wielded so powerfully by the government had "potentially dangerous applications when applied to domestic institutions."²¹⁸ Organizations can be shut down on a single official's say-so

206. See *id.* (noting that the in December of 2001 the government "orchestrated raids on foreign offices of both charities").

207. *Id.*

208. *Id.*

209. Soojung Chang, *Haddad Deported, A2 Rallies to His Support*, MICH. DAILY, July 21, 2003, at 1.

210. See Rob Goodspeed, *Officials Claim Haddad Group Tied to Terrorists*, MICH. DAILY, Mar. 29, 2002, at 1.

211. Jeremy Berkowitz, *Haddad Transferred Out of Solitary Confinement*, MICH. DAILY, Mar. 19, 2002, at 1.

212. Chang, *supra* note 209.

213. Rabih Haddad, Letter to the Editor, *An Open Letter to "Lady Liberty"*, ANN ARBOR NEWS, Jan. 13, 2002 at C6.

214. Cohen, *supra* note 204, at 12. ("Arnaout . . . later pleaded guilty to defrauding donors to the charity by diverting money to Islamic fighters in Bosnia and Chechnya, but the government dropped allegations that he aided terrorists.")

215. Wycliff, *supra* note 180.

216. MONOGRAPH, *supra* note 132, at 104.

217. Cohen, *supra* note 204, at 12.

218. MONOGRAPH, *supra* note 132, at 112.

based on a newspaper article, hearsay, or classified evidence that the group never sees.²¹⁹

It is a process that makes a mockery of due process. The criticism of the Bush administration's prosecutions of Arab-Americans has not gotten much attention. Most of us have trouble empathizing with radical Islamists. But American values, not Islamic values, are at stake when the government distorts the law to imprison people only vaguely tied to the war on terrorism. Only real and present threats to American lives and institutions justify restrictions on liberty or special procedures that bypass the protections of the legal system. When the government surrenders freedom in pursuit of phantom threats, it diverts resources from the real culprits and jeopardizes the core values that we are fighting this war to preserve.

CONCLUSION

Justice Jackson, more than any other American jurist, grasped the important issues of presidential power and the need to temper victors' justice with international law. He served as the chief prosecutor at Nuremberg and also wrote the Court's definitive opinion on presidential war power in the *Steel Seizure* case.²²⁰ To paraphrase Justice Jackson's words at Nuremberg—for a great and powerful nation to abide by the rule of law at a time when it is most tempted to abandon law is a victory of reason over power.²²¹ It is a victory of modernity over the Dark Ages. It is the victory of the pen and the word processor over the dungeon. It is the victory of civilization over barbarity.

This submission of power to the rule of law is what protects liberty of the individual. To abandon the law and surrender liberty to fear is to give the terrorists a victory on the battlefield that matters and on which this war will be decided—the battlefield of ideas.

George Bush, Dick Cheney, John Ashcroft, and Alberto Gonzales do not understand what important freedoms they are sacrificing by turning their backs on basic American values of justice. Tom Eagleton not only understood, but he lived a life and charted a political career anchored in the verities of American justice.

219. *Id.*

220. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

221. For a complete reading of Jackson's opening statement at Nuremberg, see ROBERT H. JACKSON, *THE NÜRNBERG CASE* 30–94 (1947).