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# CIVIL LIBERTIES AND THE WAR TERROR: SEVEN YEARS AFTER 9/11

## HISTORY REPEATING: DUE PROCESS, TORTURE AND PRIVACY DURING THE WAR ON TERROR\*

*Erwin Chemerinsky\*\**

### I. INTRODUCTION

SINCE September 11, 2001, some of the worst aspects of American history have been repeating themselves.<sup>1</sup> Throughout American history, the response to crisis, especially a foreign-based crisis, has been repression.<sup>2</sup> In hindsight, we come to realize that we were not made any safer from the loss of rights.

The best way to appraise what has happened since September 11 is to understand the context that occurred before it. The story could start early in American history when the survival of the Republic was still in doubt, when in 1798 Congress passed the Sedition Act.<sup>3</sup> That law made it a federal crime to falsely criticize the government and governmental officials.<sup>4</sup> The government convicted and imprisoned individuals under this law for speech that is tamer than what Jay Leno or David Letterman says on a nightly basis.<sup>5</sup> When Thomas Jefferson ran for President in 1800, he did so in part on a platform to have the Alien and Sedition Act be repealed.<sup>6</sup> Once elected, Jefferson pardoned all that were convicted under the law, and in 1801 the Sedition Act was repealed.<sup>7</sup> Although the consti-

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1. Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1, 1 (2005).

2. *Id.*

3. An Act for the Punishment of Certain Crimes against the United States (Sedition Act), ch. 74, 1 Stat. 596 (1798) (expired 1801).

4. *Id.*

5. Chemerinsky, *supra* note 1.

6. ALAN DERSHOWITZ, FINDING JEFFERSON: A LOST LETTER, A REMARKABLE DISCOVERY, AND THE FIRST AMENDMENT IN AN AGE OF TERRORISM 40 (2008).

7. *Id.*

tutionality of the Sedition Act was never tested, the Supreme Court later observed that the law was declared unconstitutional in the court of history.<sup>8</sup> That is a wonderful metaphor, but it does not change the reality. People were convicted and spent time in prison just for criticizing the government.

Unfortunately, the government's repression of basic civil liberties did not end in the early Republic. During the Civil War, for instance, it is often forgotten that Abraham Lincoln suspended the writ of habeas corpus.<sup>9</sup> At the time this sort of unilateral exercise of presidential authority was unprecedented.<sup>10</sup> And after the Civil War, the Supreme Court declared this presidential action unconstitutional.<sup>11</sup> It is also often forgotten that at least hundreds and maybe thousands of individuals were imprisoned for criticizing how the North was fighting the Civil War.<sup>12</sup> There is no indication that this altered the war effort in any measurable way or that it made the slightest difference in regard to the war effort, but people lost their rights just for criticizing the government.

World War I brought a similar repression of rights. First, in 1917 Congress passed the Espionage Act, which prohibited individuals from interfering with the success of the war effort and essentially made it a crime to openly express opinions that could be construed as helping the enemy.<sup>13</sup> This was followed by the Sedition Act of 1918, which made it a crime to use profane or disloyal language in reference to the War.<sup>14</sup> The combine effect of these laws was to virtually silence speech critical of the war effort.

In *Schenk v. United States*, the Supreme Court considered the constitutionality of the Espionage Act head on.<sup>15</sup> If you are in law school now and you have taken First Amendment Law recently, you might remember *Schenck*. Even if it has been a while since you were in law school, you might remember *Schenck*. It was the first major Supreme Court case dealing with the First Amendment. *Schenck* involved a man who circulated a leaflet and argued that the draft was both unconstitutional and a form of involuntary servitude.<sup>16</sup> There was not a shred of evidence that this leaflet had the slightest effect on military recruitment, but he was convicted under the 1917 statute and sentenced to ten years in prison.<sup>17</sup> The Supreme Court upheld his conviction and sentence.<sup>18</sup> According to

8. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

9. Chemerinsky, *supra* note 1.

10. *Ex Parte Milligan*, 71 U.S. 2, 114-15 (1866).

11. *Id.* at 130-31.

12. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 96-97 (2004).

13. Act of June 15, 1917, Pub. L. No. 65-25, tit. V, § 3, 40 Stat. 217, 219, *repealed by* Act of Mar. 3, 1921, ch. 138, 41 Stat. 1359.

14. Sedition Act of 1918, ch. 75, § 3, 40 Stat. 553, 553-54, *repealed by* Act of Mar. 3, 1921, ch. 138, 41 Stat. 1359.

15. *Schenk v. United States*, 249 U.S. 47, 48 (1919).

16. *Id.* at 51.

17. *See id.*

18. *Id.* at 53.

Justice Oliver Wendell Holmes, the First Amendment is not absolute.<sup>19</sup> Instead, “the character of every act depends on the circumstances in which it was done” and “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger” of harm.<sup>20</sup> Even the most stringent construction of the First Amendment cannot protect a man “falsely shouting fire in a theatre and causing panic.”<sup>21</sup> But, Schenck’s speech was the antithesis of a clear and present danger. There was no clear and present danger of an imminent threat of serious harm. His speech did not pose any threat whatsoever.

Just seven days after *Schenck* was decided, the Supreme Court considered another challenge to the 1917 Espionage Act.<sup>22</sup> In *Debs v. United States*, socialist leader Eugene Debs was charged under both the Espionage and Sedition Acts for a speech where he spoke out against the draft: “[Y]ou need to know that you are fit for something better than slavery and cannon fodder . . . Don’t worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves.”<sup>23</sup> For saying that, he was convicted and sentenced to ten years in prison. Applying the reasoning it had recently carved out in *Schenck*, the Supreme Court upheld his conviction and sentence.<sup>24</sup>

Skip ahead to World War II and there is evidence of similar violations of civil liberties. One hundred and ten thousand Japanese-Americans, both aliens and citizens, were uprooted from their lifelong homes and placed in prisons Franklin Roosevelt called “concentration camps.”<sup>25</sup> Of these one hundred and ten thousand, seventy thousand were United States citizens.<sup>26</sup> Adults and children, individuals with loved ones in the military, were all placed behind barbed wire. Race alone determined who was going to be free and who was incarcerated. There is absolutely no evidence that this did anything to make the country safer. Not one Japanese-American was ever accused, indicted, or convicted of espionage or any crime against national security, but the deprivation of rights was enormous.

But, perhaps the most infamous instance of the deprivation of civil liberties in the last century is the McCarthy era. It was the age of suspicion, where the mere suggestion of communist beliefs or ties was enough for a person to lose their job and sometimes their liberty. The famous Supreme Court case in the McCarthy era was *United States v. Dennis*.<sup>27</sup> *Dennis* involved a group of individuals who were convicted of teaching

19. *Id.* at 52.

20. *Id.*

21. *Id.*

22. *Debs v. United States*, 249 U.S. 211, 212 (1919).

23. *Id.* at 214.

24. *Id.* at 215, 217.

25. GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 56 (2001).

26. *See id.* at 127-28.

27. 341 U.S. 494 (1951).

several works by Marx, Engle, and Lenin.<sup>28</sup> For doing this, they were convicted under the Smith Act for conspiring “to advocate the overthrow of the United States government.”<sup>29</sup> Notice that the defendants in *Dennis* were not convicted of plotting to overthrow the United States government. They were not even convicted of advocating the overthrow of the United States government. Their only crime was *conspiracy* to advocate the overthrow of the United States government.<sup>30</sup> For this alleged conspiracy they were convicted and sentenced to twenty years in prison. In upholding the convictions and sentences, Chief Justice Vinson equated defendants’ conspiracy with an attempt to overthrow the government: “Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a ‘clear and present danger’ of an attempt to overthrow the Government by force and violence.”<sup>31</sup> Based on this analysis, the Court determined that the convictions were proper under the Smith Act.

## II. CIVIL LIBERTIES AFTER SEPTEMBER 11

When all of these events are considered in light of what has occurred since September 11, 2001, it would seem that the worst of American history is repeating itself. Today, as in the past, Americans suffer the loss of basic civil liberties. Although these infringements are aimed at increasing security, these measures have not made us any safer. This Essay will discuss three significant examples of the modern compromise between liberty and security: detentions, torture and privacy. As each of these instances indicates, the United States government continues to trade basic civil liberties for the false promise of security.

### A. DETENTIONS

How many people has the United States government detained since September 11? I am reasonably sure that no one is able to answer to that question, because the government will not release that information. Initially, the government announced the number of individuals held on immigration violations as a part of the war on terror. But since December 31, 2001 the government has declined to disclose that information. The government also refuses to disclose how many people have been held under material witness warrants or how many people are held in rendition camps around the world. These actions represent an unprecedented assertion of authority to detain individuals without complying with the Constitution and international law.

For the first time in American history, except perhaps for the Civil War, the government claims it can hold American citizens, people belong-

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28. *Id.* at 497-98.

29. *Id.* at 499.

30. *Id.* at 497.

31. *Id.* at 516-517.

ing in the United States, without complying with the Fourth, Fifth, and Sixth Amendments. The most famous case of this involves a man by the name of Jose Padilla.<sup>32</sup> You might remember that in May 2002, Padilla was apprehended in the Chicago O'Hare Airport. His alleged crime was plotting to build and detonate a dirty bomb on the United States.<sup>33</sup> No one questioned whether he was an American citizen. So we have an American citizen arrested in the United States for a crime allegedly committed in the United States. Nonetheless, the United States government held him as an enemy combatant for four and a half years.<sup>34</sup> They took the position that they could do so indefinitely and they did not provide any constitutional protections.<sup>35</sup>

Think about how enormous this assertion of power is. This is no less than a claim of authority than suspending the Fourth Amendment, which generally requires a warrant from a neutral judge before arrest; the Fifth Amendment, which requires a grand jury indictment before a person is held; and the Sixth Amendment, which requires proof beyond a reasonable doubt and trial by jury.<sup>36</sup> If Padilla can be held on this basis, then why can't terrorists like McVeigh and Nichols be held on this basis because of the Oklahoma City bombing? If the president's power is truly as broad as the government claimed in *Padilla*, then ostensibly any time an individual attacks Americans on American soil, the president could designate them an enemy combatant and hold them indefinitely.

There is another case that involves a person being held by the United States similar to *Padilla* that received a lot less media attention. It involves a man by the name of Ali al-Marri.<sup>37</sup> Al Marri was a resident alien, lawfully in the United States, studying at Bradley University in Illinois.<sup>38</sup> In 2002, he was apprehended and has been held as an enemy combatant ever since. Ali al-Marri has been in government custody for over six years, but he has never been charged with any crime and has never been convicted of any wrongdoing.<sup>39</sup> Finally, this summer the United States Court of Appeals for the Fourth Circuit considered the constitutionality of al-Marri's detention. According to the five to four en banc ruling, the mere act of engaging in unlawful behavior does not make an individual an enemy combatant.<sup>40</sup> Therefore the court determined al-Marri could not be detained and deprived due process simply because his conduct was on behalf of a terrorist organization.<sup>41</sup> At the time this Essay was written, the United States government was seeking review of that decision in the United States Supreme Court.

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32. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

33. *Id.* at 430-31.

34. *Id.* at 431-32.

35. *Id.*

36. See U.S. CONST. amends. IV, V, VI.

37. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008)

38. *Id.* at 219.

39. *Id.* at 220.

40. *Id.* at 235.

41. *Id.*

In addition to the detention of individuals on American soil, we can also discuss the individuals who are held in Guantánamo Bay, Cuba. I should disclose now that I have been representing a Guantánamo detainee since July of 2002, a man by the name of Salem Gherebi. He is about my height, approximately 5'7", perhaps a bit slimmer in build than I am; he has a long, gray beard; and he has three children. I can tell you in all honesty, I have no idea why he is being held. I recently visited him he says he has no idea why he is being held. I read the transcript of his Combatant Status Review Tribunal and it does not give a hint as to why he is being held. Now, I will readily concede that he may be a very dangerous person who deserves to be locked up, but I also know that he might be there by mistake. We now know to a certainty that many of the individuals who were brought to Guantánamo were taken there by mistake.<sup>42</sup> The United States paid warlords in Afghanistan to name those with ties in Al Qaeda.<sup>43</sup> Not surprisingly, some of those warlords named their rivals to get them out of the way; others named individuals simply to collect a bounty.<sup>44</sup> I do not know which category he represents, but how can we ever know without some form of due process? Rather than offer due process, the United States continues to assert that it can hold the individuals in Guantánamo indefinitely.<sup>45</sup>

The first step toward the resolution of these cases came in the spring of 2004 when the Supreme Court finally considered the constitutionality of the detention of American citizens as enemy combatants.<sup>46</sup> The Court's holding in *Hamdi v. Rumsfeld* was an extraordinary development. At oral arguments, Justice Ginsburg asked Paul Clement, then the Deputy Solicitor General of the United States, if it was the government's position that it could hold the Guantánamo detainees literally forever.<sup>47</sup> He said "yes."<sup>48</sup> Justice Ginsburg then asked: What if the government were to torture individuals, are you still saying that there would be no hearing by the federal court?<sup>49</sup> Mr. Clement said the United States military would never engage in torture.<sup>50</sup> That night, by some coincidence, the first reports of the torture that occurred at Abu Ghraib were reported on the national news. We will never know if the events at Abu Ghraib influenced what the Supreme Court did, but the justices ruled six to three that

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42. See Michiko Kakutani, *How Abu Ghraib Became the Anything-Goes Prison*, N.Y. TIMES, May 14, 2008, at E8.

43. Neil A. Lewis, *U.S. in Talks to Return Scores Held at Cuba Site*, N.Y. TIMES, December 1, 2003, at A7.

44. See *id.*

45. Subsequently, the United States granted certiorari, but on March 6, 2009, the United States announced that it was criminally indicting Al-Marri and thus that he was no longer being held as an enemy combatant. The case was then dismissed by the Supreme Court.

46. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

47. Transcript of Oral Argument at 26, *Hamdi*, 542 U.S. 507 (No. 03-6696).

48. *Id.*

49. *Id.*

50. *Id.*

those held in Guantánamo had access to the federal courts and the writ of habeas corpus.<sup>51</sup>

The case was remanded to federal district court, and the United States government moved to dismiss.<sup>52</sup> The D.C. District Court judges decided to consolidate all of the Guantánamo cases in front of one judge, rather than have each of the judges hear the same matter. They asked a senior judge, highly respected Judge Joyce Hens Green, to do it. Under the consolidation agreement, no judge had to relinquish his or her cases, and one judge, Richard Leon, refused to do so. About ten cases were before Judge Leon and about sixty cases before Judge Green. Judge Leon had most of the prisoner cases on his docket dismissed.<sup>53</sup> According to Judge Leon, no claim existed under the Constitution; therefore, the only appropriate resolution was to dismiss the cases.<sup>54</sup> Judge Green, on the other hand, denied the motion to dismiss, holding that the prisoners had a cause of action under the Constitution.<sup>55</sup> My client is part of Judge Green's detainee cases. One of the things that bothers me most is that none of the judges involved took any urgency to this. These are human beings held in small cells in solitary confinement that the government has not yet shown to be guilty, and yet the judges saw no need to expedite the proceedings.

In response to *Padilla*, *Hamdi*, and the public's growing outrage at the treatment of Guantánamo detainees, Congress passed the Detainee Treatment Act (DTA). The DTA was signed into law on December 30, 2005 and places restrictions on the treatment and interrogation of detainees in the custody of the United States government.<sup>56</sup> The Act also ensures that prisoners in Guantánamo have access to federal courts and the writ of habeas corpus.<sup>57</sup>

Another significant development came with the Supreme Court's holding in *Hamdan v. Rumsfeld*.<sup>58</sup> According to the Court, the military commission lacked the power to proceed in Hamdan's case. Although the Uniform Code of Military Justice permits the President to use military commissions in specific circumstances, the President is still required to follow the American common law of war and the rules and precepts of the law of nations.<sup>59</sup> The use of a military commission in Hamdan's case would violate these laws.<sup>60</sup>

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51. *Hamdi*, 542 U.S. at 535.

52. See *Hamdi v. Rumsfeld*, 378 F.3d 426, 426 (4th Cir. 2004).

53. See Human Rights First, In the Courts: Detentions at Guantánamo Bay, [http://www.humanrightsfirst.org/us\\_law/inthecourts/supreme\\_court\\_gitmo1.htm](http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_gitmo1.htm) (last visited Feb. 22, 2009).

54. *Id.*

55. *Id.*

56. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2739, 2739-40 (codified at 42 U.S.C. §2000dd (Supp. V. 2005)).

57. *Id.*

58. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

59. *Id.*

60. *Id.*



A few months later, in October 2006, Congress passed the Military Commissions Act (MCA) which limited access to federal courts.<sup>61</sup> Under the MCA, noncitizens held as enemy combatants are not permitted to access federal courts through habeas corpus or otherwise.<sup>62</sup> Instead, the only process available to noncitizen enemy combatants is military proceedings.<sup>63</sup> But in *Boumediene v. Bush*, the Supreme Court ruled five to four that the Guantánamo detainees do have a right to access the federal courts and habeas corpus.<sup>64</sup> The Court found the Military Commissions Act to be an unconstitutional suspension of the writ of habeas corpus.<sup>65</sup> Now, all of these cases are back in the federal district court and the proceedings still seem to drag on. The result is that individuals like Salem Gherebi—a man who has been held six and a half years without a charge—still have no meaningful due process.

## B. TORTURE

The second example that I want to give you is torture. A few years ago, the *Washington Post* ran a series of stories disclosing that the CIA had created rendition camps.<sup>66</sup> These rendition camps were places that the United States was taking suspected terrorists. They were located in some of the countries that have the worst record with regard to human rights. The United States government did not acknowledge the accuracy of these reports. Instead, they threatened to investigate the *Washington Post* for violating the Espionage Act by disclosing confidential information. Top Bush administration officials met with the press that week to condemn the *Washington Post's* reports. Thankfully, the *Washington Post* did not get indicted; instead it won the Pulitzer Prize for the stories.

It was ultimately President Bush who persuaded Congress to pass the Military Commissions Act to remove individuals from rendition camps.<sup>67</sup> You might remember when he said that the government was going to move some of the individuals from rendition camps to Guantánamo. The government never told us how many people have been taken from these rendition camps. Estimates are anywhere from a few hundred to a few thousand. But we now know to a certainty that individuals were taken there and tortured in the most brutal way.<sup>68</sup> We know that some of these individuals died as a result of this torture.<sup>69</sup>

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61. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

62. *Id.*

63. *Id.*

64. 128 S. Ct. 2229, 2240 (2008).

65. *Id.*

66. See, e.g., Dana Priest, *Covert CIA Program Withstands New Furor; Anti-Terror Effort Continues to Grow*, WASHINGTON POST, Dec. 30, 2005, at A1; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in 'Rendition'*, WASHINGTON POST, Dec. 4, 2005, at A1.

67. See *Restoring American Justice*, N.Y. TIMES, Sept. 17, 2007, at A18.

68. See generally JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO THE WAR ON AMERICAN IDEALS* 101-38 (2008).

69. *Id.*

Now, I think that the debate over torture in a public discourse has been unfortunately affected by the show “24.” I think when we think of torture, we imagine Jack Bauer engaging in brief torture to find out where the bomb is going off in New York City. As Jane Mayer details in her book *The Dark Side*, individuals were taken to these rendition camps, sometimes just by mistake.<sup>70</sup> A man by the name of El-Masri, for instance, was apprehended in Germany simply because of confusion over his name.<sup>71</sup> He was then taken to a rendition camp and tortured because a high level CIA specialist reported having suspicions about him.<sup>72</sup> According to El-Masri, who later brought suit in federal court, he was simply apprehended off the streets and taken to a rendition camp, tortured for several months, and then dropped off on the streets of Albania.<sup>73</sup> El-Masri’s account of his kidnapping and imprisonment is chilling, yet a district court in the Fourth Circuit dismissed the suit under the state secrets doctrine.<sup>74</sup> On appeal, the Fourth Circuit upheld the dismissal and the United States Supreme Court denied certiorari.<sup>75</sup>

What makes these accounts of torture even more shocking is our Nation’s long history of condemning such practices. Going back to the days of George Washington, the United States government has always prided itself on humane treatment of detainees and prisoners of war.<sup>76</sup> Even when the English army was treating American soldiers badly during the Revolutionary War, accounts of English soldiers indicate that George Washington ordered the American troops to use what we now regard as the basis of human rights.<sup>77</sup> This tradition of respect for human rights continued into the twentieth century. The United States was one of the architects of the treaties formulated at the Geneva Conventions, treaties designed to govern the treatment of non-combatants and prisoners of war. Never before has any administration claimed that it did not have to follow the Geneva Protocols.

But the so-called “torture memos,” written by Jay Bybee and John Yoo, expressly stated that the President was not obligated to follow these agreements.<sup>78</sup> Instead, the Bybee and Yoo Memos advised that compliance with treaties and federal statutes forbidding torture were merely op-

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70. *Id.*

71. *Id.* at 282.

72. *Id.*

73. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006).

74. *Id.* at 540-41.

75. *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

76. *MAYER*, *supra* note 68, at 8-9.

77. *Id.* at 83-84.

78. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *Bybee Memo*]; Memorandum from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def. (Jan. 9, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *Yoo Memo*].

tional for the President.<sup>79</sup> They also said that the President could literally change the definition of torture so methods that have been widely disapproved, including putting bamboo shoots under somebody's fingernails or inflicting pain directly to someone's genitals, would be supported under the memo. And I know this is a strong statement, but I believe that those responsible for the rendition camps and torture, especially Dick Cheney, David Addington, Jay Bybee, and John Yoo, are war criminals and that there should be an investigation and prosecution into their crimes. I do not choose that language lightly.

Again, you do not need to read Jane Mayer's book or others to see the extent to which the United States, for the first time in our history, has really betrayed basic principles of human rights. I have been surprised since September 11th, when I discuss Guantánamo, that those in the audience who most agree with me are those who served in the military, or those who have loved ones in the military. What they say to me again and again is: How could the United States of America expect foreign nations to follow international law when they have American prisoners if this country does not follow international law when we have foreign prisoners?

### C. PRIVACY

The third and final example that I want to talk about concerns privacy. Of course when government actions are shrouded in secrecy, the problem that arises is that we can lose our privacy and not even realize it. I want to discuss a couple examples of the losses of privacy that have occurred since September 11th. One is the tremendous expansion in the use of so-called national security letters. A national security letter is a type of administrative subpoena that allows the government to obtain information about an individual, even highly personal information, simply by sending a demand letter. The use of national security letters preceded the Patriot Act, but Section 215 of the Patriot Act defines the extent to which government agents can gain information by national security letter.<sup>80</sup> Under the Patriot Act, an FBI agent can send a letter to a bank, an educational institution, public library, and even a bookstore to request information about an individual.<sup>81</sup> The institution that receives this letter is bound to secrecy; it cannot tell the individual what information the letter seeks or the information that has been disclosed.<sup>82</sup> The University of Illinois Library said it has received hundreds of these so-called national security letters to find out what books people have checked out from the Univer-

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79. Bybee Memo, *supra* note 78; Yoo Memo, *supra* note 78, at 48.

80. See *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

81. *Id.*

82. *See id.*

sity of Illinois Library.<sup>83</sup>

The United States Department of Justice Inspector General issued a report about eighteen months ago documenting the extensive abuses of national security letters.<sup>84</sup> I think this source is important. It was not some liberal law professor; it was the Inspector General of the Justice Department where Alberto Gonzales was Attorney General. Reports described special agents in charge routinely signing national security letters without even knowing the reason they were signing.<sup>85</sup> The reports revealed that national security letters were being issued without any basis to them; and information was being requested with no justification at all.<sup>86</sup> The reports indicate that highly personal information, even medical information, was routinely being collected by the government.<sup>87</sup>

Warrantless electronic eavesdropping is another example of the loss of privacy. A couple of years ago, the *New York Times* revealed that President Bush signed an executive order that authorized the National Security Agency to engage in warrantless electronic eavesdropping of conversations regarding phone calls between those in foreign countries and also e-mail communication between those in foreign countries.<sup>88</sup> There is no doubt that this violates both the Fourth Amendment and federal statutes. The Fourth Amendment has long been interpreted to apply to searches and seizures of electronic communication and such electronic eavesdropping generally requires a warrant for probable cause.<sup>89</sup> Additionally, the Foreign Intelligence Surveillance Act<sup>90</sup> (FISA), adopted in 1978, and Title III of the Omnibus Crime Control Act of 1968, create a procedural framework for electronic surveillance.<sup>91</sup> Title III provides a basic procedure that any police, local, state or federal, must follow to engage in electronic surveillance. Under Title III, warrantless electronic surveillance is generally barred.<sup>92</sup> FISA's provisions supersede Title III with respect to foreign intelligence and create a procedure for warrantless electronic surveillance for foreign intelligence purposes.<sup>93</sup> Under FISA, the Foreign Intelligence Surveillance Court must hear applications for and grant orders approving electronic surveillance against suspected for-

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83. See *Refusing to Allow Pressure to Silence a Critical Voice*, CHI. TRIB., April 1, 2007, at C1.

84. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), available at [www.usdoj.gov/oig/special](http://www.usdoj.gov/oig/special).

85. *Id.* at 66.

86. *Id.* at 66-67.

87. *Id.*

88. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 15, 2005, at A1.

89. *Katz v. United States*, 389 U.S. 347, 353-57 (1967)

90. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

91. Pub. L. No. 90-351, §802, 82 Stat. 197, 213 (codified as amended at 18 U.S.C. §2511 (2000 & Supp. V 2005)).

92. *Id.*

93. FISA § 102.

eign intelligence agents inside the United States.<sup>94</sup> According to the statute, the federal agency applying for an electronic surveillance warrant must show that, among other things, the purpose of the surveillance is to obtain foreign intelligence information and that such information cannot be obtained by normal investigative techniques, and it must also provide a statement of how the surveillance will be conducted.<sup>95</sup> If the federal agency meets the requirements set forth in FISA, the judge must either issue an order granting the surveillance as requested or modify the order and grant the surveillance.<sup>96</sup> The Patriot Act expands the court created under FISA from seven to eleven judges, ostensibly creating an even broader power for the gathering of foreign intelligence information. Statistics show that the government prevails 99.5 percent of the time in the Foreign Intelligence Surveillance Court. Now, you might say that is because the court is highly presidential. You might say the government has a strong basis for the information it seeks. But what is so striking about the Bush executive order granting warrantless surveillance is that it bypassed all of these constitutional and statutory procedures; procedures that have traditionally favored requests for surveillance from federal agencies. The Bush Administration claimed the outright authority to engage in warrantless electronic surveillance; ignoring the Fourth Amendment, and ignoring federal law. But, of course, if the President can ignore the Fourth Amendment, why not the First Amendment? Why not any constitutional provision?

In *ACLU v. National Security Agency*, the ACLU brought suit over this practice.<sup>97</sup> A federal district court judge in Detroit ruled in favor of the ACLU.<sup>98</sup> Then a year and a half ago, the United States Court of Appeals for the Sixth Circuit ruled in a two to one decision that overturned the district court.<sup>99</sup> The Sixth Circuit said the plaintiffs did not have a standing because the state secrets doctrine prevented the introduction of evidence that their conversations had been intercepted.<sup>100</sup> The Supreme Court denied the appeal.

### III. CONCLUSION

Let me conclude with two quotes from late Supreme Court justices. One comes from the late Justice Robert Jackson; he said, "The Constitution is not a suicide pact."<sup>101</sup> And of course he is right. I do not want anything I am saying tonight to convey that I believe that the rights of the Constitution are absolute. I do believe that federal liberties sometimes might be compromised by national security. But I also believe that

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94. *Id.* § 103.

95. *Id.* § 104.

96. *See id.* § 105.

97. *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

98. *Id.* at 782.

99. *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

100. *Id.* at 656.

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

before basic liberties are infringed, this is truly necessary, there is no other way to safeguard national security. The other quote comes from late Justice Louis Brandeis, who said that the greatest threat to liberty was when people claimed to act for beneficial purposes.<sup>102</sup> He said: “Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers.”<sup>103</sup> Justice Brandeis also observed that “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>104</sup> Now Louis Brandeis never knew Alberto Gonzales, Dick Cheney or Donald Rumsfeld, but he could not have picked better words if he did.

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102. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting) (“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent.”).

103. *Id.*

104. *Id.*

