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## Trading Civil Liberties for Apparent Security is a Bad Deal

*Marjorie Cohn\**

Framing the discussion as a tradeoff between civil liberties and security creates a false distinction. This discourse is not new in the United States. Benjamin Franklin warned, “[t]hey who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”<sup>1</sup> Throughout our history, we have grappled with this apparent tension.

Unfortunately, all too often, we have lost our liberties—with no tangible benefit. It has been primarily the executive branch that has overreached beyond the lines that separate our three branches of government. Under the guise of his “Global War on Terror,”<sup>2</sup> former president George W. Bush arrogated to himself a level of presidential authority that violated the Constitution and made us less safe.

As U.S. military leaders said, the two things that have posed the biggest threat to our soldiers in Iraq are Abu Ghraib and Guantánamo, which have served as recruitment tools<sup>3</sup> and have become the symbols of American cruelty and hypocrisy.

### I. LINCOLN’S SUSPENSION OF CIVIL LIBERTIES

President Abraham Lincoln also put civil liberties on hold in an effort to preserve the Union when he suspended the writ of habeas corpus without Congressional approval after anti-Union

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<sup>1</sup> BENJAMIN FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 270 (1818).

<sup>2</sup> Mr. Bush’s “war on terror,” widely accepted as a real war, is a misnomer. Although there are terrorists who seek to do us harm, terrorism is a tactic, not an enemy; one cannot declare war on a tactic.

<sup>3</sup> Think Progress, *Mora: Abu Ghraib and Guantanamo are first and second identifiable causes of U.S. combat deaths in Iraq*, June 17, 2008, <http://thinkprogress.org/2008/06/17/mora-abu-ghraib-and-guantanamo-are-first-and-second-identifiable-causes-of-us-combat-deaths-in-iraq/>.

riots occurred in Baltimore.<sup>4</sup> But then, as now, suspension of the Great Writ was used as a tool to suppress dissent.

Lincoln ignored court orders and Congressional laws that sought to limit his power to incarcerate citizens without giving them access to courts.<sup>5</sup> People were arrested not for what they had done, but “for what probably would be done.”<sup>6</sup> Lincoln said arrestees would include the “man who stands by and says nothing when the peril of his Government is discussed,” or one who “talks ambiguously—talks for his country with ‘buts’ and ‘ifs’ and ‘ands.’”<sup>7</sup>

Lincoln also imposed martial law and used military force in areas of the North where there was strong Confederate sympathy.<sup>8</sup> In violation of Congressional legislation, Lincoln authorized military trials, convictions and punishment of civilians who were accused of aiding the South.<sup>9</sup> Tens of thousands were arrested by military authorities and several thousand were tried by military commissions even though civil courts were functioning.<sup>10</sup> In *Ex parte Milligan*, the Supreme Court declared military trials of civilians, where civil courts were available, to be unconstitutional.<sup>11</sup>

Many Northerners suspected of treason were tortured and some were handcuffed and suspended by their wrists.<sup>12</sup> Water torture was routinely used and people were doused with strong streams of water until their skin broke.<sup>13</sup>

As historian James G. Randall said, “No president has carried the power of presidential edict and executive order (independently of Congress) so far as [Lincoln] did . . . It would

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<sup>4</sup> See Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 716 (2009) (discussing Lincoln’s suspension of habeas corpus); see generally Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal For Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 57 (2008) (further discussing Congressional reaction to Lincoln’s suspension of habeas corpus following pro-secession riots in Baltimore).

<sup>5</sup> Michael Kent Curtis, *Lincoln, the Constitution of Necessity, and the Necessity of Constitutions: A Reply to Professor Paulsen*, 59 ME. L. REV. 1, 3 (2007).

<sup>6</sup> Cf. Abraham Lincoln, To Erastus Corning and Others, in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859–1865 458 (1989).

<sup>7</sup> *Id.*

<sup>8</sup> Norman W. Spaulding, *The Discourse of Law in the Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2054 (2005).

<sup>9</sup> Curtis, *supra* note 5, at 12.

<sup>10</sup> NPR *All Things Considered: Analysis: Suspension of civil liberties during wartime*, (NPR News radio broadcast, Nov. 16, 2001).

<sup>11</sup> *Ex parte Milligan*, 71 U.S. 107 (1866).

<sup>12</sup> ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 442 (David S. Heidler & Jeanne T. Heidler, eds., 2000).

<sup>13</sup> *Id.* at 442–43.

not be easy to state what Lincoln conceived to be the limit of his powers.”<sup>14</sup>

But while Lincoln rationalized his usurpation of power as a temporary remedy, expecting an early end to the conflict—he called it medicine prescribed during an illness—Bush’s “war on terror,”<sup>15</sup> on the other hand, is slated to last for years, perhaps forever.

The danger of presidential overreaching was anticipated by the Founding Fathers. James Madison, in *The Federalist* No. 27, wrote: “[t]he accumulation of all powers legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>16</sup>

Former Attorney General John Ashcroft painted the defenders of civil liberties as anti-American fear-mongers when he said on December 6, 2001, “[t]o those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists - for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends.”<sup>17</sup>

## II. THE U.S. GOVERNMENT’S HISTORY OF SUPPRESSION OF CRITICISM

But surveillance in this country has historically been aimed at slaves, immigrants, political radicals, suspected lawbreakers, the poor, workers, and anyone with a credit card or a computer. It has frequently been used by the government to stifle criticism of its policies.

In 1798, capitalizing on the fear of war, the Federalist-led Congress passed the four Alien and Sedition Acts to suppress dissent against the Federalist Party’s political agenda.<sup>18</sup> The Naturalization Act extended the time necessary for immigrants to reside in the United States because most immigrants sympathized with the Republicans.<sup>19</sup> The Alien Enemies Act provided for the arrest, detention and deportation of citizens of any foreign nation at war with the United States.<sup>20</sup> Many of the 25,000 French citizens living in the U.S. could have been expelled had France and America gone to war, but this law was never

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<sup>14</sup> J. G. RANDALL, *LINCOLN THE LIBERAL STATESMAN* 123 (1947).

<sup>15</sup> Curtis, *supra* note 5, at 8.

<sup>16</sup> *THE FEDERALIST* NO. 47, at 261 (James Madison) (J.R. Pole ed., 2005).

<sup>17</sup> *Anti-Terrorism Policy Review: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2001) (testimony of Attorney General John Ashcroft).

<sup>18</sup> Curtis, *supra* note 5, at 15, 27.

<sup>19</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 30 (2004).

<sup>20</sup> *Id.* at 30.

used. The Alien Friends Act authorized the deportation of any non-citizen suspected of endangering the security of the U.S. government;<sup>21</sup> the law lasted only two years and no one was deported under it.<sup>22</sup>

The Sedition Act carried criminal penalties for any person who spoke, wrote, printed or published anything “false, scandalous and malicious” with the intent to hold the government in “contempt or disrepute.”<sup>23</sup> The Federalists claimed it was necessary to suppress criticism of the government in wartime.<sup>24</sup> The Republicans objected that the Sedition Act violated the First Amendment, which had become part of the Constitution seven years earlier.<sup>25</sup> The Act was employed exclusively against Republicans.<sup>26</sup> It was used to target newspaper editors and congressmen who criticized President John Adams.<sup>27</sup> One Federalist leader wrote that the tensions with France could provide “a glorious opportunity to destroy faction,” that is, the Jeffersonian party.<sup>28</sup>

According to Professor Michael Kurt Curtis, “[m]ilitary suppression of reactionary, anti-war speech during the Civil War may well have paved the way for civil suppression of socialist and other anti-war speech during World War I.”<sup>29</sup>

Subsequent examples of repressive legislation passed and actions taken as a result of fear-mongering during periods of xenophobia are the Espionage Act of 1917,<sup>30</sup> the Sedition Act of 1918,<sup>31</sup> the Red Scare following World War I,<sup>32</sup> the forcible internment of people of Japanese descent during World War II,<sup>33</sup> and the Alien Registration Act of 1940 (the Smith Act).<sup>34</sup>

During the McCarthy period of the 1950s, in an effort to eradicate the perceived threat of communism, the government engaged in widespread illegal surveillance to threaten and

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<sup>21</sup> *Id.* at 30–31.

<sup>22</sup> *Id.* at 33; Alien Friends Act, 1 Stat. 570, 572 (1798).

<sup>23</sup> STONE, *supra* note 19, at 36.

<sup>24</sup> *Id.* at 37.

<sup>25</sup> *Id.* at 39.

<sup>26</sup> *Id.* at 46–48.

<sup>27</sup> *Id.*

<sup>28</sup> Curtis, *supra* note 5, at 27.

<sup>29</sup> Curtis, *supra* note 5, at 30.

<sup>30</sup> Espionage Act, ch. 30, 40 Stat. 217 (1917); STONE, *supra* note 19, at 12.

<sup>31</sup> STONE, *supra* note 19, at 12.

<sup>32</sup> *Id.* at 220–26.

<sup>33</sup> *Id.* at 286–87.

<sup>34</sup> Alien Registration (Smith) Act, ch. 439, 54 Stat. 670 (1940); STONE, *supra* note 19, at 251–52.

silence anyone who had an unorthodox political viewpoint.<sup>35</sup> Many people were jailed, blacklisted and lost their jobs.<sup>36</sup> Thousands of lives were shattered as the FBI engaged in “red-baiting.”<sup>37</sup>

COINTELPRO (counter-intelligence program) was designed to “expose, disrupt and otherwise neutralize” activist and political groups.<sup>38</sup> In the 1960s, the FBI targeted Dr. Martin Luther King Jr. in a program called “Racial Matters.”<sup>39</sup> King’s campaign to register African-American voters in the South raised the hackles of FBI director J. Edgar Hoover, who disingenuously said King’s organization was being infiltrated by communists.<sup>40</sup> In fact, the FBI was really concerned that King’s civil rights and anti-Vietnam War campaigns “represented a clear threat to the established order of the U.S.”<sup>41</sup> The FBI wiretapped King’s telephones, securing personal information which it used to try to discredit him and drive him to divorce and suicide.<sup>42</sup>

In response to the excesses of COINTELPRO, a congressional committee chaired by Senator Frank Church conducted an investigation of activities of the domestic intelligence agencies.<sup>43</sup> The Church Committee concluded that “intelligence activities have undermined the constitutional rights of citizens and . . . they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied.”<sup>44</sup> The committee added, “[i]n an era where the technological capability of Government relentlessly increases, we must be wary about the drift toward ‘big brother government’ . . . . Here, there is no sovereign who stands above the law. Each of us, from presidents to the most disadvantaged citizen, must obey the law.”<sup>45</sup> The

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<sup>35</sup> ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 208 (1998).

<sup>36</sup> *Id.* at 211.

<sup>37</sup> See Earl C. Dudley, Jr., *Terry v. Ohio, The Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective*, 72 ST. JOHN’S L. REV. 891, 893 (1998) (referring to the “red-baiting fever of the 1950s”).

<sup>38</sup> STONE, *supra* note 19, at 494; see generally *id.* at 491–97 (for a broad overview of COINTELPRO).

<sup>39</sup> KENNETH O’REILLY, *RACIAL MATTERS: THE FBI’S SECRET FILE ON BLACK AMERICA 1960–1972*, at 125–26 (1991).

<sup>40</sup> *Id.* at 127–28.

<sup>41</sup> Dorothy Ehrlich, *Taking Liberties: The Growing Scope of Government Power*, L.A. DAILY J., Feb. 26, 2002.

<sup>42</sup> O’REILLY, *supra* note 39, at 136.

<sup>43</sup> STONE, *supra* note 19, at 495–96.

<sup>44</sup> Intelligence Activities and the Rights of Americans, Final Report of the Senate Committee to Study Governmental Operations with respect to Intelligence Activities, Book II (1976), <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIId.htm>.

<sup>45</sup> *Id.*

committee stressed that the “advocacy of political ideas is not to be the basis for governmental surveillance.”<sup>46</sup>

### III. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Congress established guidelines to govern intelligence-gathering by the FBI.<sup>47</sup> Reacting against President Richard Nixon’s assertion of unchecked presidential power, Congress enacted the Foreign Intelligence Surveillance Act (FISA) in 1978 to regulate electronic surveillance while protecting national security.<sup>48</sup>

FISA established a secret court to consider applications by the government for wiretap orders.<sup>49</sup> It specifically created only one exception for the President to conduct electronic surveillance without a warrant.<sup>50</sup> For that exception to apply, the Attorney General must certify under oath that the communications to be monitored will be exclusively between foreign powers, and that there is no substantial likelihood that a United States person will be overheard.<sup>51</sup>

The FISA court rarely denied a wiretap request by the executive.<sup>52</sup> But in 2002, in direct violation of FISA and the Fourth Amendment, Bush signed an executive order establishing his Terrorist Surveillance Program.<sup>53</sup> It authorized the National Security Agency to wiretap people within the United States with no judicial review.<sup>54</sup> The NSA has eavesdropped on untold numbers of private conversations.<sup>55</sup> It has combed through large volumes of telephone and Internet communications flowing into and out of the United States, collecting vast personal information that has nothing to do with national security.<sup>56</sup> Whistleblower Russell Tice, a former U.S. intelligence analyst, recently said

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<sup>46</sup> *Id.*

<sup>47</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–63 (2006)).

<sup>48</sup> *Id.*

<sup>49</sup> 50 U.S.C. § 1803.

<sup>50</sup> 50 U.S.C. § 1802.

<sup>51</sup> *Id.*

<sup>52</sup> Electronic Privacy Information Center, Foreign Intelligence Surveillance Orders 1979-2007, *available at* [http://epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://epic.org/privacy/wiretap/stats/fisa_stats.html); Protect America Act of 2007 (Terrorist Surveillance Program), Pub. L. No. 110-55, 121 Stat. 552 (2007).

<sup>53</sup> Exec. Order No. 13260, 67 Fed. Reg. 55 (March 19, 2002).

<sup>54</sup> ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION I (2006), <http://www.fas.org/sgp/crs/intel/m010506.pdf>. *See generally* STONE, *supra* note 19, at 552, for examples of the Bush administration’s surveillance tactics.

<sup>55</sup> *See* BAZAN & ELSEA, *supra* note 54, at 2.

<sup>56</sup> STONE, *supra* note 19, at 552.

that most journalists in the U.S. have been subjected to surveillance.<sup>57</sup>

Electronic surveillance was first used during the Holocaust when IBM worked for the Nazi government organizing and analyzing its census data.<sup>58</sup> Death camp barcodes—linked to computerized records—were tattooed onto prisoners' forearms.<sup>59</sup>

The advent of digital technology has raised surveillance to a new level. Social Security numbers, credit cards, gym memberships, library cards, health insurance records, bar codes, GSM chips in cell phones, toll booths, hidden cameras, workplace identification badges, and the Internet all provide the government with effective tools to keep track of our finances, our politics, our personal habits, and our whereabouts through data mining.<sup>60</sup> The Privacy Foundation determined in a 2001 survey that one-third of all American workers who use the Internet or email on the job are under "constant surveillance" by employers.<sup>61</sup>

#### IV. CIVIL LIBERTIES SUPPRESSION AFTER 9/11

One month after the terrorist attacks of September 11, 2001, Ashcroft rushed the USA Patriot Act through a timid Congress.<sup>62</sup> The Act lowered the standards for government surveillance of telephone and computer communications, and placed in effect, "an FBI agent behind every mailbox."<sup>63</sup> It created a crime of domestic terrorism targeting political activists who protest government policies, which was so broadly defined as to include even environmental and animal rights groups.<sup>64</sup>

After September 11, 2001, hundreds of people of color, particularly those of Middle Eastern descent, were detained in U.S. prisons.<sup>65</sup> Most were suspected of no crime or connection to the events of 9/11; yet they were held incommunicado, in

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<sup>57</sup> Kim Zetter, *Whistleblower: NSA Targeted Journalists, Snoopers on All U.S. Communications*, WIRED BLOG NETWORK, <http://www.wired.com/threatlevel/2009/01/nsa-whistleblow-2/>.

<sup>58</sup> EDWIN BLACK, *IBM AND THE HOLOCAUST*, 46–47 (2001).

<sup>59</sup> *Id.* at 352.

<sup>60</sup> AMERICAN CIVIL LIBERTIES UNION, *AMERICA'S SURVEILLANCE SOCIETY* (2008) <http://www.aclu.org/safefree/spying/37802res20081118.html>.

<sup>61</sup> Editorial, *Closely Watched Judges: Judicial Spat Highlights Workplace Privacy*, SACRAMENTO BEE, Sept. 11, 2001, at B6.

<sup>62</sup> STONE, *supra* note 19, at 552–53; *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>63</sup> Marjorie Cohn, *Bush's War on Democracy*, TRUTHOUT, Aug. 31, 2004, <http://www.uncle-scam.com/Breaking/aug-04/to-8-31.pdf> [hereinafter Cohn, *Bush's War*].

<sup>64</sup> *Id.*

<sup>65</sup> *News in Brief*, N.Y.L.J., Mar. 2, 2006, at 1.

indefinite, preventive detention, many subjected to abusive treatment, in violation of the Constitution.<sup>66</sup>

Rabih Haddad, a Lebanese immigrant, described the conditions of his confinement.<sup>67</sup> Strangely reminiscent of the prisoners in Guantánamo, he described his 6' by 9' solitary cell, the camera permanently fixed on him, his lack of exercise, and "waves of cockroaches" in his cell at night.<sup>68</sup>

These roundups were evocative of our government's excesses during World War II, when it interned thousands of Japanese-Americans, in a shameful and racist overreaction.<sup>69</sup> In 1944, the Supreme Court upheld the legality of the Japanese internment in *Korematsu v. United States*.<sup>70</sup> But Justice Robert Jackson warned in his dissent that the ruling would "lie about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>71</sup>

That day came with the decision of a New York federal judge, dismissing a case that challenged the detention of hundreds of Arab and Muslim foreign nationals shortly after 9/11.<sup>72</sup> None was convicted of any crime involving terrorism.<sup>73</sup> U.S. District Judge John Gleeson ruled in *Turkmen v. Ashcroft* that the round-up and indefinite detention of foreign nationals on immigration charges based only on their race, religion or national origin did not violate equal protection or due process.<sup>74</sup> This is not surprising in light of the anti-immigrant hysteria sweeping our country today.<sup>75</sup>

Three developments on Bush's watch had a chilling effect on protected First Amendment activity: 1) the shift from reactive to preemptive law enforcement; 2) the enactment of domestic anti-terrorism laws; and 3) the relaxation of FBI guidelines on surveillance of Americans.<sup>76</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> Letter from Rabih Haddad to Mr. Thayer (Jan. 27, 2002), <http://www.aila.org/content/default.aspx?docid=2051>.

<sup>68</sup> *Id.*

<sup>69</sup> Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, 10 *ASIAN L.J.* 37 (2003).

<sup>70</sup> *Korematsu v. United States*, 323 U.S. 214 (1944); *see also* Serrano & Minami, *supra* note 69, at 37.

<sup>71</sup> *Korematsu*, 323 U.S. at 246.

<sup>72</sup> *Turkmen v. Ashcroft*, WL 1662663, at \*1 (E.D. N.Y. 2006).

<sup>73</sup> *See id.*

<sup>74</sup> *Id.*

<sup>75</sup> Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 *ALA. L. REV.* 377 (2006).

<sup>76</sup> Cohn, *Bush's War*, *supra* note 63.

Like Bush's "preemptive" or "preventive" war strategy, which led us into Iraq in violation of the United Nations Charter, law enforcement in the United States moved from reaction to "preemption," in violation of the Constitution.<sup>77</sup>

Collective preemptive punishment against those who seek to exercise their First Amendment rights has taken several forms: content-based permits, where permission to protest is screened for political correctness; pretextual arrests in anticipation of actions that haven't yet occurred (like Lincoln); the setting of huge bails of up to \$1 million for misdemeanors; the use of chemical weapons; and the employment of less lethal rounds fired without provocation into crowds. Protestors were painted by the government and the mainstream media as violent lawbreakers.<sup>78</sup>

In his 1928 dissent in *Olmstead v. United States*, Justice Louis Brandeis cautioned, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."<sup>79</sup> Seventy-three years later, former White House spokesman Ari Fleischer warned Americans that "they need to watch what they say, watch what they do."<sup>80</sup>

Milton Mayer and a colleague discussed the escalation of surveillance that accompanied the rise of German fascism:

what happened here was the gradual habituation of the people, little by little, to being governed by surprise; to receiving decisions deliberated in secret; to believing that the situation was so complicated that the government had to act on information which the people could not understand, or so dangerous that, even if people could understand it, it could not be released because of national security.<sup>81</sup>

## V. A POLICY OF TORTURE

For more than seven years, pursuant to Bush's "war on terror," the U.S. government has held up to 800 foreign-born men and boys prisoner at Guantánamo Bay, Cuba.<sup>82</sup> No charges have been filed against most of them, and, until the Supreme Court

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

<sup>80</sup> Lisa de Moraes, *WJLA Pulls a "PI" a Second Time*, WASH. POST, Sept. 28, 2001, at C7.

<sup>81</sup> MILTON MAYER, *THEY THOUGHT THEY WERE FREE, THE GERMANS, 1933–1945*, at 166 (1966).

<sup>82</sup> National Public Radio, *Q&A About Guantanamo Bay and the Detainees*, <http://www.npr.org/templates/story/story.php?storyId=4715916>.

decided *Boumediene v. Bush*,<sup>83</sup> all had been denied access to any court to challenge their confinement.<sup>84</sup>

Prisoners released from Guantánamo report being tortured.<sup>85</sup> They describe assaults, prolonged shackling in uncomfortable positions and sexual abuse.<sup>86</sup> There are reports of prisoners being pepper-sprayed in the face until they vomited, fingers being poked into their eyes, and their heads being forced into the toilet pan and flushed.<sup>87</sup> Prisoners who engaged in hunger strikes were brutally force-fed, a practice the United Nations Human Rights Commissions called “torture.”<sup>88</sup> Dozens of videotapes of American guards brutally attacking prisoners are reportedly catalogued and stored at the Guantánamo prison.<sup>89</sup> Thirty-two attempted suicides took place in an 18-month period.<sup>90</sup>

As evidence of torture leaked out of Abu Ghraib prison, a Guantánamo-Iraq torture connection was revealed.<sup>91</sup> General Geoffrey Miller, implicated in setting torture policies in Iraq, had been transferred from Guantánamo to Abu Ghraib specifically to institute the same harsh interrogation procedures he had put in place at Guantánamo.<sup>92</sup>

The interrogation policy that permitted torture and abuse came from the top. Former Vice-President Dick Cheney recently admitted that he authorized waterboarding.<sup>93</sup> It is well-established that waterboarding constitutes torture.<sup>94</sup> Torture is considered a war crime under the U.S. War Crimes Act.<sup>95</sup> Bush’s National Security Council’s Principals Committee, consisting of

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<sup>83</sup> *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

<sup>84</sup> *Id.* at 2240–45.

<sup>85</sup> Jessica Azulay, *Guantanamo Abuses Caught on Tape, Report Details*, Feb. 2, 2005, <http://newstandardnews.net/content/index.cfm/items/1430>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Marjorie Cohn, *US Force-feeding Prisoners in Torture Camp*, Feb. 19, 2006, <http://marjoriecohn.com/2006/02/us-force-feeding-prisoners-in-torture.html>.

<sup>89</sup> David Rose, *They Tied Me Up Like A Beast And Began Kicking Me*, THE OBSERVER, May 16, 2004, <http://guardian.co.uk/world/2004/may/16/terrorism.guantanamo>; *British Prisoner Alleges Torture At Guantanamo*, QUEENSLAND COURIER-MAIL, May 17, 2004, at 4.

<sup>90</sup> John Mintz, *Clashes Led to Probe of Cleric; Flare-Ups Over Muslim Prisoners’ Treatment in Cuba Are Cited*, WASH. POST, Oct. 24, 2003, at A9.

<sup>91</sup> Rose, *supra* note 89.

<sup>92</sup> Biography of Major General Geoffrey Miller, Torturing Democracy, [http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/geoffrey\\_miller.html](http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/geoffrey_miller.html).

<sup>93</sup> ABC News: Cheney Defense Hard Line Tactics (ABC Television broadcast, Dec. 16, 2008, transcript available at <http://abcnews.go.com/Politics/Story?id=6464697&page=1>).

<sup>94</sup> Christopher Hitchens, *Believe Me, It’s Torture*, VANITY FAIR, August 2008, available at <http://www.vanityfair.com/politics/features/2008/08/hitchens200808>.

<sup>95</sup> 18 U.S.C. § 2441 (2006).

Vice-President Cheney, National Security Adviser Condoleezza Rice, CIA Director George Tenet, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, and Secretary of State Colin Powell, participated in the sanctioning of “enhanced interrogation techniques”; Bush admitted that he approved.<sup>96</sup> Lawyers from the Department of Justice’s Office of Legal Counsel rewrote our laws on torture to facilitate the commission of war crimes and immunize Team Bush from prosecution.<sup>97</sup>

Those who carried out the torture and abuse did so in secret, accountable to no court or public scrutiny.<sup>98</sup> Guantánamo was, according to a spokeswoman from the International Committee of the Red Cross, “a legal black hole.”<sup>99</sup>

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a treaty the United States has ratified which makes it U.S. law under the Constitution’s Supremacy Clause, declares, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>100</sup> Its language is unequivocal. Furthermore, torture doesn’t work. The person being tortured will say anything to make the torture stop; his information is unreliable.<sup>101</sup>

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<sup>96</sup> Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Bush Aware of Advisers’ Interrogation Talks. President Says He Knew His Senior Advisers Discussed Tough Interrogation Methods*, ABC NEWS, Apr. 11, 2008, available at <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175>. At one meeting, Ashcroft asked aloud, “Why are we talking about this in the White House? History will not judge this kindly.” *Id.*

<sup>97</sup> Memorandum from the U.S. Dep’t of Justice, Office of the Assistant Attorney General to Alberto R. Gonzales (August 1, 2002) (<http://f11.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>); Memorandum from the U.S. Dep’t of Justice, Office of the Deputy Assistant Attorney General to William J. Haynes II, General Counsel of the Dep’t of Defense (March 14, 2003) ([http://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf)). See also *Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110<sup>th</sup> Cong., 2d sess., 64–65 (2008) (statement of Marjorie Cohn).

<sup>98</sup> Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantanamo*, 5 CARDOZO PUB. L., POL’Y AND ETHICS J. 127, 129–36 (2006) (discussing the secrecy surrounding the detentions at Guantanamo).

<sup>99</sup> Scott Higham, *No Welcome in Guantanamo as Rights Groups Land*, WASH. POST, Aug. 24, 2004, at A5.

<sup>100</sup> G.A. Res. 39/46, U.N. Doc. A/RES/39/46, Art. 2(2) (Dec. 10, 1984).

<sup>101</sup> See Donald P. Gregg, *Speaking With The Enemy*, N.Y. TIMES, Feb. 8, 2009, at WK11.

## VI. THE SLIPPERY SLOPE OF RENDITION

Maher Arar, a Canadian born in Syria, was apprehended by U.S. authorities in New York on September 26, 2002, and transported to Syria, where he was brutally tortured for months.<sup>102</sup> Arar used an Arabic expression to describe the pain he experienced: “you forget the milk that you have been fed from the breast of your mother.”<sup>103</sup> The Canadian government later exonerated Arar of any terrorist ties.<sup>104</sup> Arar was a victim of *extraordinary rendition*, where a person is transferred to a country where he will be tortured.

President Barack Obama signed Executive Order 13491, which established a special task force to:

study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.<sup>105</sup>

Obama’s order prohibits extraordinary rendition.<sup>106</sup> The order also ensures humane treatment of persons in U.S. custody or control.<sup>107</sup> But it does not specifically guarantee that prisoners the United States renders to other countries will be free from cruel, inhuman or degrading treatment that does not amount to torture. It does, however, aim to ensure that our government’s practice of transferring people to other countries complies with U.S. laws and policies, including our obligations under international law.

One of those laws is the International Covenant on Civil and Political Rights (ICCPR),<sup>108</sup> a treaty the United States ratified in 1992.<sup>109</sup> Article 7 of the ICCPR prohibits the States Parties from subjecting persons “to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>110</sup> The Human Rights Committee,

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<sup>102</sup> See Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005, at 106.

<sup>103</sup> *Id.*

<sup>104</sup> See Ian Austen, *Canadians Fault U.S. for Its Role in Torture Case*, N.Y. TIMES, Sept. 19, 2006, at A1.

<sup>105</sup> Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

<sup>106</sup> *See id.*

<sup>107</sup> *Id.*

<sup>108</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 52, U.N. GAOR Supp., No. 16, U.N. Doc. A/6316 (1966).

<sup>109</sup> Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 488–89 (2009).

<sup>110</sup> G.A. Res. 2200A, *supra* note 108, at 53.

which is the body that monitors the ICCPR, has interpreted that prohibition to forbid States Parties from exposing “individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.”<sup>111</sup>

Executive Order 13491 also mandates, “The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.”<sup>112</sup> The order does not define “expeditiously,” however, and the definitional section of the order says that the terms “detention facilities” and “detention facility” “do not refer to facilities used only to hold people on a short-term, transitory basis.”<sup>113</sup> Once again, “short term” and “transitory” are not defined.

In his confirmation hearing, Attorney General Eric Holder categorically stated that the United States should not turn over an individual to a country where we have reason to believe he will be tortured.<sup>114</sup> Leon Panetta, nominee for CIA director, went further and interpreted Executive Order 13491 as forbidding “that kind of extraordinary rendition, where we send someone for the purposes of torture or for actions by another country that violate our human values.”<sup>115</sup>

But alarmingly, Panetta appeared to champion the same standard used by the Bush administration, which reportedly engaged in extraordinary rendition 100 to 150 times as of March 2005.<sup>116</sup> After September 11, 2001, President Bush issued a classified directive that expanded the CIA’s authority to render terrorist suspects to other States.<sup>117</sup> Former Attorney General Alberto Gonzales said the CIA and the State Department received assurances that prisoners would be treated humanely.<sup>118</sup>

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<sup>111</sup> Human Rights Committee, General Comment 20, Article 7, UN Doc. A/47/40 (1992) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 31 (1994) (emphasis added).

<sup>112</sup> Exec. Order No. 13491, *supra* note 105, at 4894.

<sup>113</sup> *Id.* at 4893.

<sup>114</sup> Transcript of Senate Confirmation Hearings of Eric Holder, Day One, Jan. 16, 2009, <http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html>.

<sup>115</sup> See Randall Mikkelsen, *Obama CIA Pick Backtracks on “Torture” Charge*, NEWS DAILY, Feb. 6, 2009, <http://www.newsdaily.com/stories/tre5147ta-us-obama-cia-panetta/>.

<sup>116</sup> See Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 14.

<sup>117</sup> *Id.*

<sup>118</sup> See Human Rights Watch, *Developments Regarding Diplomatic Assurances Since April 2004*, (April 14, 2005), <http://hrw.org/reports/2005/eca0405/5.htm>. The Committee against Torture, which administers the Convention against Torture and Other Cruel,

“I will seek the same kinds of assurances that they will not be treated inhumanely,” Panetta told the senators at his confirmation hearing.<sup>119</sup>

Gonzales had admitted, however, “[w]e can’t fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us [sic] . . . . If you’re asking me, ‘Does a country always comply?’ I don’t have an answer to that.”<sup>120</sup>

The answer to that question is no. Maher Arar’s case is apparently the tip of the iceberg. Thirteen CIA operatives were arrested in Italy for kidnapping an Egyptian, Abu Omar, in Milan and transporting him to Cairo where he was tortured.<sup>121</sup> Binyam Mohamed, an Ethiopian residing in Britain, said he was tortured after being rendered to Morocco by the U.S. government.<sup>122</sup> In Mohamed’s case, two British justices accused the Bush administration of pressuring the British government to “block the release of evidence that was relevant to allegations of torture” of Mohamed.<sup>123</sup> The Obama White House issued a statement in which it “thanked the UK government for its continued commitment to protect sensitive national security information.”<sup>124</sup>

Panetta made clear that the CIA will continue to engage in rendition to detain and interrogate terrorism suspects and transfer them to other countries.<sup>125</sup> “If we capture a high-value prisoner,” he said, “I believe we have the right to hold that

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Inhuman and Degrading Treatment or Punishment, which the United States has ratified, recommended to the United States in 2006 that it:

[S]hould only rely on ‘diplomatic assurances’ in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.

*Conclusions and Recommendations of the Committee Against Torture*, (July 25, 2006), [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf).

<sup>119</sup> See Greg Miller, *Panetta May Consider Some Harsh Methods*, L.A. TIMES, Feb. 7, 2009.

<sup>120</sup> Human Rights Watch, *supra* note 118.

<sup>121</sup> See Tracy Wilkinson, *Italy Orders Arrest of 13 CIA Operatives*, L.A. TIMES, June 25, 2005, at A1.

<sup>122</sup> See Julie Sell, *U.S. Stand on Guantanamo Documents Angers British*, MCLATCHY NEWSPAPERS, Feb. 5, 2009, <http://www.mcclatchydc.com/homepage/story/61625.html>.

<sup>123</sup> *Id.*

<sup>124</sup> *No Torture Pressure—Miliband*, BBC NEWS, Feb. 5, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/7870896.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7870896.stm).

<sup>125</sup> See Greg Miller, *Panetta Says Waterboarding is Torture*, L.A. TIMES, Feb. 6, 2009, at A12.

individual temporarily to be able to debrief that individual and make sure that individual is properly incarcerated[.]”<sup>126</sup> He provided no clarification of how long “temporarily” is or what “debrief” would mean.

When Senator Christopher Bond (R-Mo.) asked about the Clinton administration’s use of the CIA to transfer prisoners to countries where they were later executed, Panetta replied, “I think that is an appropriate use of rendition.”<sup>127</sup> Jane Mayer, columnist for the *New Yorker*, has documented numerous instances of extraordinary rendition during the Clinton administration, including cases in which suspects were executed in the country to which the United States had rendered them.<sup>128</sup> Once, when Richard Clarke, President Clinton’s chief counterterrorism adviser on the National Security Council, “proposed a snatch,” Vice-President Al Gore said, “[t]hat’s a no-brainer. Of course it’s a violation of international law, that’s why it’s a covert action. The guy is a terrorist. Go grab his ass.”<sup>129</sup>

There is a slippery slope between ordinary rendition and extraordinary rendition. “Rendition has to end,” Michael Ratner, president of the Center for Constitutional Rights, told Amy Goodman on *Democracy Now!*<sup>130</sup> “Rendition is a violation of sovereignty. It’s a kidnapping. It’s force and violence.”<sup>131</sup> Ratner queried whether Cuba could enter the United States and take Luis Posada, the man responsible for blowing up a commercial Cuban airliner in 1976 and killing seventy-three people,<sup>132</sup> or whether the United States could go down to Cuba and kidnap Assata Shakur, who escaped a murder charge in New Jersey.<sup>133</sup>

Moreover, “renditions for the most part weren’t very productive,” a former CIA official told the *Los Angeles Times*.<sup>134</sup> After a prisoner was turned over to authorities in Egypt, Jordan or another country, the CIA had very little influence over how prisoners were treated and whether they were ultimately released.<sup>135</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Mayer, *supra* note 102, at 109–10.

<sup>129</sup> RICHARD A. CLARKE, *AGAINST ALL ENEMIES INSIDE AMERICA’S WAR ON TERROR* 144 (2004).

<sup>130</sup> Transcript of Debate, *Despite Celebrated Orders Closing Gitmo and Banning Torture, Has Obama Kept Rendition Intact?* DEMOCRACYNOW!, Feb. 5, 2009, [http://www.democracynow.org/2009/2/5/despite\\_celebrated\\_orders\\_closing\\_gitmo\\_and](http://www.democracynow.org/2009/2/5/despite_celebrated_orders_closing_gitmo_and).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Greg Miller, *CIA Retains Power to Abduct*, L.A. TIMES, Feb. 1, 2009, at A19.

<sup>135</sup> *Id.*

## VII. THE SUPREME COURT CHECKS THE EXECUTIVE

During the Bush administration, Congress did little to check the president's usurpation of governmental power.<sup>136</sup> The USA Patriot Act, the authorization for Operation Iraqi Freedom, and the Military Commissions Act received very little pushback from the legislative branch.<sup>137</sup> It was the judicial branch that fulfilled its constitutional role to check and balance the executive.

In *Hamdi v. Rumsfeld*, the Supreme Court ruled that due process demands a U.S. citizen held in the United States as an enemy combatant is entitled to a meaningful opportunity to contest the factual basis for his detention before a neutral decision maker.<sup>138</sup>

Hamdi's father, who filed the lawsuit on his son's behalf, said his 20-year-old son was traveling on his own for the first time, and because of his lack of experience, he became trapped in Afghanistan once the U.S. military campaign began.<sup>139</sup> Hamdi, who, according to his father, went to Afghanistan to do relief work, was there less than two months before September 11, 2001.<sup>140</sup> The government filed a document filled with vague generalities to support Bush's designation of Hamdi as an enemy combatant.<sup>141</sup>

Justice O'Connor wrote for the *Hamdi* Court: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."<sup>142</sup> O'Connor noted, "even the war power [of the President] does not remove constitutional limitations safeguarding essential liberties."<sup>143</sup> O'Connor echoed a theme she has raised in prior Court decisions, which is particularly relevant today: "It is during our most challenging and uncertain moments 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."<sup>144</sup>

Instead of holding that a president cannot detain an American citizen indefinitely, the Court set forth a balancing test

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<sup>136</sup> Charlie Savage, *Three Democrats Slam President Over Defying Statutes*, BOSTON GLOBE, May 2, 2006, at A2.

<sup>137</sup> See John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 823 (2007).

<sup>138</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

<sup>139</sup> *Id.* at 511-12.

<sup>140</sup> *Id.* at 511.

<sup>141</sup> *Id.* at 512-13.

<sup>142</sup> *Id.* at 536.

<sup>143</sup> *Id.* (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426(1934)).

<sup>144</sup> *Id.* at 532.

for determining whether a president's designation as an enemy combatant will be upheld.<sup>145</sup> Henceforth, a court reviewing a claim will weigh the private interest of the detained citizen against the governmental interest in determining whether to sustain an enemy combatant designation.<sup>146</sup>

O'Connor made clear that detentions of U.S. citizens must be limited to the Afghanistan context; they are not authorized for the broader "war on terrorism."<sup>147</sup> She acknowledged that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."<sup>148</sup>

Justice Souter wrote a concurring opinion, noting that the USA Patriot Act authorizes the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings.<sup>149</sup> Congress, therefore, would require the government to clearly justify its detention of an American citizen held on home soil incommunicado.<sup>150</sup>

Interestingly, Justice Scalia, in his dissenting opinion joined by Justice Stevens, would not permit the indefinite detention of an American citizen in Hamdi's situation.<sup>151</sup> They would require the government to press criminal charges or release the individual, unless Congress were to suspend the writ of habeas corpus.<sup>152</sup> "The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal," according to Scalia.<sup>153</sup>

Only Justice Thomas held out for blind deference to the President: "This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."<sup>154</sup>

In *Hamdan v. Rumsfeld*, the Supreme Court struck down the military commissions that Bush and Rumsfeld had established because they violated the Uniform Code of Military Justice and

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<sup>145</sup> *Id.* at 528–29.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 520–21.

<sup>148</sup> *Id.* at 530.

<sup>149</sup> *Id.* at 551 (Souter, J., concurring).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 554–55 (Scalia, J., dissenting).

<sup>152</sup> *Id.* at 554.

<sup>153</sup> *Id.* at 568.

<sup>154</sup> *Id.* at 579 (Thomas, J., dissenting).

the Geneva Conventions.<sup>155</sup> The Court affirmed that there are no gaps in the Geneva Conventions<sup>156</sup>—everyone must be given due process and treated humanely.

In 2008, the Supreme Court decided *Boumediene v. Bush*, upholding habeas corpus rights for the Guantánamo detainees.<sup>157</sup> In a 5-4 ruling, the Court held that they have a constitutional right to habeas corpus, and that the scheme for reviewing ‘enemy combatant’ designations under the Combatant Status Review Tribunals is an inadequate substitute for habeas corpus.<sup>158</sup>

Article 1, Section 9, Clause 2 of the Constitution is known as the Suspension Clause. It reads, “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>159</sup> In section 7(a) of the Military Commissions Act of 2006, Congress purported to strip habeas rights from the Guantánamo detainees by amending the habeas corpus statute.<sup>160</sup> In *Boumediene*, the Court held that section of the Act to be unconstitutional, declaring that the detainees still retained the constitutional right to habeas corpus.<sup>161</sup>

Justice Kennedy, writing for the majority, reiterated the Court’s finding in *Rasul v. Bush*,<sup>162</sup> that although Cuba retains technical sovereignty over Guantánamo, the United States exercises complete jurisdiction and control over its naval base and thus the Constitution protects the detainees there.<sup>163</sup> Kennedy rejected “the necessary implication” of Bush’s position that the political branches could “govern without legal constraint” by locating a U.S. military base in a country that retained formal sovereignty over the area.<sup>164</sup> In his dissent, Chief Justice Roberts flippantly characterized Guantánamo as a “jurisdictionally quirky outpost.”<sup>165</sup>

Kennedy worried that the political branches could “have the power to switch the Constitution on or off at will” which would

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<sup>155</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006) (amending 28 U.S.C. § 2241).

<sup>156</sup> *Hamdan*, 548 U.S. at 628-33.

<sup>157</sup> *Boumediene v. Bush*, 128 S.Ct. 2229, 2262 (2008).

<sup>158</sup> *Id.* at 2275.

<sup>159</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>160</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (2006) (amending 28 U.S.C. § 2241).

<sup>161</sup> *Boumediene*, 128 S.Ct. at 2275.

<sup>162</sup> *Rasul v. Bush*, 542 U.S. 466, 480-84 (2004).

<sup>163</sup> *Boumediene*, 128 S.Ct. 2251-53.

<sup>164</sup> *Id.* at 2258-59.

<sup>165</sup> *Id.* at 2293 (Roberts, J., dissenting).

“lead to a regime in which Congress and the President, not this Court, say ‘what the law is.’”<sup>166</sup> “Even when the United States acts outside its borders,” Kennedy wrote, “its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.’”<sup>167</sup>

Thus, Kennedy observed, “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”<sup>168</sup> Indeed, habeas corpus was one of the few individual rights the Founding Fathers wrote into the original Constitution, years before they enacted the Bill of Rights.<sup>169</sup>

“The test for determining the scope of [the habeas corpus] provision,” Kennedy wrote, “must not be subject to manipulation by those whose power it is designed to restrain.”<sup>170</sup> It was a Republican-controlled Congress, working hand-in-glove with Bush, that tried to strip habeas corpus rights from the Guantánamo detainees in the Military Commissions Act.<sup>171</sup> The Supreme Court has determined that effort to be unconstitutional. Fulfilling its constitutional duty to check and balance the other two branches, the Court has carried out its mandate to interpret the Constitution and say “what the law is.”<sup>172</sup>

Finding that the Guantánamo detainees retained the constitutional right to habeas corpus, the Court turned to the issue of whether there was an adequate substitute for habeas review.<sup>173</sup> The Department of Defense established Combatant Status Review Tribunals (“CSRTs”) to determine whether a detainee is an “enemy combatant.”<sup>174</sup> These kangaroo courts provide no right to counsel, only a “personal representative,” who owes no duty of confidentiality to his client and often does not

<sup>166</sup> *Id.* at 2259 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch 137, 177), 2 L.Ed. 60 (1803)).

<sup>167</sup> *Id.* (citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

<sup>168</sup> *Id.*

<sup>169</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>170</sup> *Boumediene*, 128 S.Ct. at 2259.

<sup>171</sup> Elizabeth M. Iglesias, *Article II: The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181, 190–91 (2008) (“[t]hrough the MCA, the Republican-controlled Congress, to a significant degree, ratified the procedures established unilaterally by the President’s Military Order.”); Note, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 706–07 (2007) (“[t]he Bush administration and a Republican-controlled Congress reacted quickly to the decision [in *Hamdan*] by passing a bill that established a system of military commissions . . . on October 17, 2006, the President signed into law the Military Commissions Act of 2006.”); David G. Savage, *The Reach of the Writ*, 93 A.B.A. J. 24 (2007).

<sup>172</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch 137, 177), 2 L.Ed. 60 (1803).

<sup>173</sup> *Boumediene*, 128 S.Ct. at 2262.

<sup>174</sup> *Id.* at 2241.

even advocate on behalf of the detainee.<sup>175</sup> Some personal representatives have even argued the government's case.<sup>176</sup> The detainee does not have the right to see much of the evidence against him and is very limited in the evidence he can present.<sup>177</sup>

The CSRTs have been criticized by military participants in the process.<sup>178</sup> Lt. Col. Stephen Abraham, a veteran of U.S. intelligence, said they often relied on "generic" evidence and were set up to rubber-stamp the "enemy combatant" designation.<sup>179</sup> When he sat as a judge in one of the tribunals, Abraham and the other two judges—a colonel and a major in the Air Force—"found the information presented to lack substance" and noted that statements presented as factual "lacked even the most fundamental earmarks of objectively credible evidence."<sup>180</sup> After they determined there was "no factual basis" to conclude the detainee was an enemy combatant, the government pressured them to change their conclusion but they refused.<sup>181</sup> Abraham was never assigned to another CSRT panel.<sup>182</sup> Many believe that Abraham's testimony regarding the shortcomings of the CSRT's in *Boumediene's* companion case prompted the Supreme Court to issue a rare reversal of its denial of certiorari and agree to review *Boumediene*.<sup>183</sup>

While the Court declined to decide whether the CSRTs satisfied due process standards, it concluded that "even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact."<sup>184</sup> The Court then had to determine whether the procedure for judicial review of the CSRTs' "enemy combatant"

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<sup>175</sup> See David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315, 335–36 (2007); Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings – CSRT: the Modern Habeas Corpus?* 3 (Seton Hall Public Law Research Paper No. 951245), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=951245#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951245#).

<sup>176</sup> See Denbeaux & Denbeaux, *supra* note 175, at 3, 16.

<sup>177</sup> See Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., U.S. Dep't of Def. on Order Establishing Combatant Status Review Tribunal to the Sec'y of the Navy 1–3 (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; *Boumediene*, 128 S.Ct. at 2260.

<sup>178</sup> Reply to Opposition of Petition for Rehearing at 4, *Al Odah v. United States*, 128 S.Ct. 1923 (2008) (No. 06-1196).

<sup>179</sup> *Id.* at Appendix i–iii, vii.

<sup>180</sup> *Id.* at Appendix vi.

<sup>181</sup> *Id.* at Appendix vii.

<sup>182</sup> *Id.*

<sup>183</sup> Marjorie Cohn, *Supreme Court Checks and Balances in Boumediene*, June 16, 2008, <http://www.truthout.org/article/supreme-court-checks-and-balances-boumediene> [hereinafter Cohn, *Checks and Balances*].

<sup>184</sup> *Boumediene v. Bush*, 128 S.Ct. 2229, 2270 (2008).

designations constituted an adequate substitute for habeas corpus review.<sup>185</sup> Kennedy wrote:

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.<sup>186</sup>

But in the Detainee Treatment Act of 2005 ("DTA"),<sup>187</sup> Congress limited appellate review of the CSRT determinations to whether the CSRT complied with its own procedures.<sup>188</sup> The United States Court of Appeals for the District of Columbia Circuit had no authority to hear newly discovered evidence or make a finding that the detainee was improperly designated as an enemy combatant.<sup>189</sup>

The *Boumediene* Court noted that "when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."<sup>190</sup> Since the DTA's scheme for reviewing determinations of the CSRTs did not afford this authority, the Court held that the review of CSRTs was not an adequate substitute for habeas corpus and thus section 7 of the Military Commissions Act functioned as "an unconstitutional suspension of the writ."<sup>191</sup>

In his dissent, Justice Scalia sounded the alarm that the *Boumediene* decision "will almost certainly cause more Americans to be killed."<sup>192</sup> Likewise, the *Wall St. Journal* editorialized, "[w]e can say with confident horror that more Americans are likely to die as a result."<sup>193</sup> Their predictions, however, are not based in fact.<sup>194</sup>

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

<sup>188</sup> Detainee Treatment Act § 1005(e)(2)(c)(i).

<sup>189</sup> Cohn, *Checks and Balances*, *supra* note 183.

<sup>190</sup> *Boumediene*, 128 S.Ct. at 2271.

<sup>191</sup> *Id.* at 2274.

<sup>192</sup> *Id.* at 2294 (Scalia, J., dissenting).

<sup>193</sup> Editorial, *President Kennedy*, WALL ST. J., June 13, 2008, at A14.

<sup>194</sup> See Marjorie Cohn, *Scalia Cites False Information in Habeas Corpus Dissent*, (June 20, 2008) <http://marjoriecohn.com/2008/06/scalia-cites-false-information-in.html>.

Lakhdar Boumediene and five other Algerian detainees from Bosnia were accused of threatening to blow up an American embassy in Bosnia.<sup>195</sup> The Supreme Court of Bosnia and Herzegovina concluded there was no evidence to continue to detain them and ordered them released.<sup>196</sup> The Bosnian officials turned them over to the United States and they were transported to Guantánamo, where they languished for six years until the Supreme Court decided their case.<sup>197</sup>

Many of the men and boys at Guantánamo were sold as bounty to the U.S. military by the Northern Alliance or warlords for \$5,000 a head.<sup>198</sup> Indeed, Brig. Gen. Jay Hood, the former commander at Guantánamo, admitted to the *Wall St. Journal*, “[s]ometimes we just didn’t get the right folks,” but innocent men remain detained there because “[n]obody wants to be the one to sign the release papers . . . [t]here is no muscle in the system.”<sup>199</sup>

In *Boumediene*, Kennedy quoted Alexander Hamilton, who wrote in Federalist No. 84 that “arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.”<sup>200</sup>

“The laws and Constitution are designed to survive, and remain in force, in extraordinary times,” Kennedy wrote.<sup>201</sup> “Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”<sup>202</sup> Kennedy further elaborated:

Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers . . . . Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.<sup>203</sup>

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<sup>195</sup> Editorial, *Their Day in Court: Guantanamo Lawyers Make the Case for a Tenet of American Law*, WASH. POST, Dec. 5, 2007, at A28.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Gene Lyons, Editorial, *Leaving Office Shouldn’t Give Bush a Free Pass*, NEWARK STAR-LEDGER, Jan. 13, 2009, at 13.

<sup>199</sup> Christopher Cooper, *Detention Plan*, WALL ST. J., Jan. 26, 2005, at A1, A10.

<sup>200</sup> *Boumediene v. Bush*, 128 S.Ct. 2229, 2247 (quoting THE FEDERALIST NO. 84, at 512 (Clinton Rossiter, ed., 1961)).

<sup>201</sup> *Id.* at 2277.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

The Supreme Court acted as a check on the some of the worst excesses of the executive branch during the Bush administration. President Obama has begun to reverse some of the most egregious policies of his predecessor.<sup>204</sup> But he will be tested by the hysteria of those like Berkeley law professor John Yoo, who wrote in the January 29, 2009 *Wall Street Journal* that Obama should keep Guantánamo open, continue to hold prisoners, and even authorize waterboarding.<sup>205</sup>

#### VIII. CITIZENS' DUTY TO RESIST GOVERNMENT LAWBREAKING

Reichmarshall Hermann Goering of the Third Reich once said: "the people can always be brought to the bidding of the leaders. That is easy. All you have to do is to tell them they are being attacked, and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same in any country."<sup>206</sup>

The Bush administration capitalized on the 9/11 attacks to try to maintain members of Congress and the American people in a state of fear; this enabled the White House to enact several repressive measures which did not make us safer.<sup>207</sup> Bush's Defense Department claimed that as many as sixty-one ex-detainees from Guantánamo had returned to the battlefield of terror.<sup>208</sup> That claim, however, was roundly debunked by reports from Seton Hall School of Law.<sup>209</sup>

It is our duty as citizens in a democracy to speak out when our government fails to live up to our principles and follow the law. We must refuse to trade our liberties for vague promises that it will protect our democracy and make us safer. The Obama administration should bring those to justice who have committed crimes; nobody is above the law. This includes the former Department of Justice lawyers such as John Yoo and Jay Bybee, who gave the Bush officials "legal" cover to commit their

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<sup>204</sup> Ceci Connolly & R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Actions*, WASH. POST, Nov. 9, 2008, at A16.

<sup>205</sup> John Yoo, *Obama Made a Rash Decision on Gitmo*, WALL ST. J., Jan. 29, 2009, at A15.

<sup>206</sup> Cal Thomas, *Nonpartisan Patriotism*, BALTIMORE SUN, July 4, 2007, at 13A.

<sup>207</sup> Marjorie Cohn, *Spinning Fear*, Feb. 13, 2006, <http://marjoriecohn.com/2006/02/spinning-fear.html>.

<sup>208</sup> Daphne Eviatar, *Those 61 Gitmo Recidivists Keep Popping Back Up...*, WASH. INDEP., Jan. 23, 2009, <http://washingtonindependent.com/26969/those-61-gitmo-recidivists-keep-popping-back-up>.

<sup>209</sup> *Id.*; Mark Denbeaux et al., *Justice Scalia, the Department of Defense, and the Perpetuation of an Urban Legend: The Truth about the Alleged Recidivism of Released Guantánamo Detainees*, [http://law.shu.edu/publications/guantanamoReports/urban\\_legend\\_final\\_63008.pdf](http://law.shu.edu/publications/guantanamoReports/urban_legend_final_63008.pdf).

crimes.<sup>210</sup> The U.S. government should disclose the identities, current whereabouts and fate of all persons detained by the CIA or rendered to foreign custody by the CIA since 2001. Those who ordered renditions should be prosecuted. And the special task force should recommend, and Obama should agree to, end all renditions.

We cannot gain civil rights by sacrificing civil liberties—they are not mutually exclusive. Our best bet is to uphold the rule of law.

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<sup>210</sup> See Marjorie Cohn, *National Lawyers Guild Calls on Boalt Hall to Dismiss Law Professor John Yoo, Whose Torture Memos Led to Commission of War Crimes*, Apr. 9, 2008, <http://marjoriecohn.com/2008/04/national-lawyers-guild-calls-on-boalt.html>.