

January 2004

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### Recommended Citation

Erwin Chemerinsky, *Post 9/11 Civil Rights: Are Americans Sacrificing Freedom for Security*, 81 *Denv. U. L. Rev.* 759 (2004).

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## Post 9/11 Civil Rights: Are Americans Sacrificing Freedom for Security

## POST 9/11 CIVIL RIGHTS: ARE AMERICANS SACRIFICING FREEDOM FOR SECURITY?

ERWIN CHERMERINSKY<sup>†</sup>

I'd like to talk this afternoon about how the worst aspects of American history have been repeating themselves. Throughout American history, whenever the United States has faced a threat, especially a foreign-based threat, the response has been repression. In hindsight, however, we come to realize that we weren't made any safer from the loss of rights. I would like to begin by very quickly sketching this history, because I think you can only put what's occurred since September 11th in any context with this history in mind.

The history can start with the Alien Sedition Act of 1798.<sup>1</sup> In the early years of this country, when survival of the republic was still in doubt, Congress passed a law that made it a federal crime to falsely criticize the government or government officials. The incompetent administration of John Adams used this to prosecute and convict political opponents. People went to prison for speech – the type of speech Jay Leno and David Letterman use on a nightly basis.

Historians tell us that the country wasn't any safer for these prosecutions and convictions. Thomas Jefferson ran for president in 1800 partly on a platform that the Alien Sedition Act should be repealed, including some of those who were convicted under it. Jefferson did that – no court declared the Alien Sedition Act unconstitutional. In *New York Times v. Sullivan*,<sup>2</sup> in 1964, the Supreme Court declared the Alien Sedition Act unconstitutional for the first time in recorded history. It's a wonderful metaphor – we can't hide that people went to prison for this speech, and it didn't make the country any safer. During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus, even though the Constitution gives the president no such authority. Later, the Supreme Court in *Ex parte Milligan*<sup>3</sup> declared this unconstitutional.

What's often forgotten is that hundreds, if not thousands, of people were imprisoned in the Civil War just for their speech – criticizing the way the North was fighting the war. Civil War historians will tell us that the imprisonments did nothing to help the North win the Civil War; they didn't make the country any safer.

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<sup>†</sup> Alston & Bird Professor of Law, Duke Law School. This speech was originally presented at a symposium on March 5, 2004.

1. 1 Stat. 596 (1798).
2. 376 U.S. 254 (1964).
3. 71 U.S. 2 (1866).

In 1917 and 1918, during World War I, Congress adopted two statutes making criticism of the draft and the war effort illegal. Those of you who have studied First Amendment law have read *Schenck v. United States*.<sup>4</sup> In *Schenck*, a man circulated a leaflet that argued that the military draft was unconstitutional as a form of involuntary servitude. There wasn't a shred of evidence that his leaflet had the slightest backing. There wasn't any proof that even a single person failed to report for induction because of Schenck's leaflet. Nonetheless, he was convicted and sentenced to ten years in prison for circulating that leaflet, and the Supreme Court upheld the conviction and sentence.

If you've taken First Amendment law, you've also read the case concerning Eugene Debs, a socialist leader. In a speech to an audience he said, "you are good for more than cannon fire. There's more that I'd like to say but I can't for fear of imprisonment."<sup>5</sup> For saying that, Debs was sentenced to ten years in prison. He ran for president while in prison, and died soon after his release. Again, there's no evidence that this made the country any safer.

During World War II, 120,000 Japanese-Americans, aliens and citizens, and 70,000 war citizens were uprooted from their life-long homes and placed in what Franklin Roosevelt called "concentration camps."<sup>6</sup> Race alone determined who was free and who was put behind barbed wire. The invasion of civil rights was enormous. It didn't do anything to make the country safer. Not one Japanese-American was ever accused, indicted, or convicted of espionage or any crime implicating national security.

One more example: during the McCarthy era, many people lost their jobs, and even their liberty, based on suspicion of being a Communist. It truly was the age of suspicion. Professor Chen talked of this in terms of forced patriotism. The reality is that people went to prison simply for activities protected by the First Amendment.

Such is the case, again, those of you who study the First Amendment, in *Dennis v. United States*.<sup>7</sup> A group of people were prosecuted, convicted and sentenced for organizing groups to study the works of Marx, Lenin and Engels. Their crime under the Smith Act of 1940<sup>8</sup> was conspiracy to advocate overthrowing the United States government. They weren't being accused of conspiring to overthrow the government; they weren't even being convicted of advocating to overthrow the gov-

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4. 249 U.S. 47 (1919).

5. *Debs v. United States*, 249 U.S. 211, 214 (1919) ("you need to know that you are fit for something better than slavery and cannon fodder.").

6. See WILLIAM RAYMOND MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932-1972*, at 300 (1974).

7. 341 U.S. 494 (1951).

8. 18 U.S.C. §2385 (2004).

ernment. Their crime was conspiracy to advocate the overthrow of the government. There was no evidence whatsoever that their speech posed the slightest threat to national security, however, the Supreme Court upheld their 20-year prison sentences. Chief Justice Red Vincent wrote the opinion for the Court. He said, "when the evil is so great as to overthrow the United States government, there doesn't need to be any proof of increase in likelihood."<sup>9</sup> Again, there was no proof; no evidence, that there was any threat to national security. These individuals didn't pose any harm to the country, and yet the Court upheld their sentences.

All of these examples should give us great pause before we take away civil liberties in the name of national security. I am not the absolutist – I do believe that there are times that rights have to be compromised for security; but I believe before we take away liberties, we should be really certain that it's really going to make us safer.

What I believe has gone on since September 11th are unprecedented actions by the government to take away civil liberties, and not in ways that will make us any safer. I want to focus on three examples. The first is the unprecedented claim of authority to detain individuals without access to the courts. We'll start by talking about the Jose Padilla<sup>10</sup> case; it might be familiar to you. Jose Padilla was arrested in Chicago's O'Hare airport, now almost two years ago. He's an American citizen and his alleged crime was planning to build and detonate a dirty bomb in the United States. So as we talk about the Padilla case, it's important to remember that this was an American citizen arrested in the United States for a crime allegedly planned in the United States.

Even though Padilla was arrested almost two years ago, to this moment no judge has ever issued a warrant for his arrest. No grand jury has ever indicted him. No jury has ever convicted him. Instead, the Bush Administration and the Ashcroft Justice Department, by labeling him an enemy combatant, are holding Padilla indefinitely with no access to the courts.

The Bush Administration and the Ashcroft Justice Department are taking the position that the president has the authority to suspend the Fourth, the Fifth and the Sixth Amendments. Now, if the framers of the Constitution wanted to give such authority to the government to suspend provisions, they would have said so expressly. Article 1, Section 9, for example, says that Congress can suspend the writ of habeas corpus in times of rebellion and insurrection.<sup>11</sup> The Fifth Amendment says that the

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9. *Dennis*, 341 U.S. at 516-17 ("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.").

10. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

11. U.S. CONST. art. I, § 9, cl. 2.

right to grand jury indictment can be suspended in certain circumstances.<sup>12</sup> But there's no clause anywhere in the Fourth Amendment, in parts of the Fifth Amendment, or the Sixth Amendment that lets the administration simply say, "if we designate somebody an enemy combatant, we can hold that person forever."

I'm always skeptical of "framers' intent" arguments and it's very difficult to know what the framers wanted; usually each side can muster quotes from the framers to support their position. If there's any way the framers' intent is clear, it's in the distrust of the executive power; that is why the framers wanted to make sure that before somebody was arrested, they're generally before a magistrate. That is also why they wanted to make sure that there would be a grand jury indictment before somebody was held.

In Padilla's case, he didn't have a grand jury. That is why the framers wanted to make sure that a jury of one's peers had to have proof beyond a reasonable doubt before somebody went to prison. And yet, the Administration is taking the position that they can suspend all those provisions just by labeling somebody an enemy combatant. This is a stopping point to the Administration's argument. Why couldn't the prior administration with this philosophy have designated a day in court for those enemy combatants, and held them without trying them?

Now the argument is made that Padilla allegedly had ties to Al-Qaeda, a foreign power. Does that mean that an administration can take anybody who is accused in a drug case, say he allegedly has ties to Colombian drug lords and designate that person as a enemy combatant in the war on drugs? You should know the United States Court of Appeals for the Second Circuit, in December 2003, ruled against the Bush Administration, saying that he [the president] had no inherent power for the statutory authority to detain a citizen as an enemy combatant.<sup>13</sup> The Supreme Court, two weeks ago today, agreed to review the Padilla case and will issue a decision by the end of June.<sup>14</sup>

Another case of interest involved Yassir Hamdi. He's an American citizen who was apprehended in Afghanistan and then brought to Guantanamo. When it was discovered that he was a citizen, he was taken to a military prison in South Carolina; he too has been designated an enemy combatant.

These situations are identical to John Walker Lindh. John Walker Lindh is also an American citizen, also apprehended in Afghanistan, and also brought to Guantanamo, where it was known he was a citizen. The only difference is that John Walker Lindh was charged with a crime and

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12. U.S. CONST. amend. V.

13. *Padilla v. Rumsfeld*, 352 F.3d 695, 718 (2d Cir. 2003).

14. *Padilla*, 124 S. Ct. at 2721-22, 2727 (dismissing the case on procedural grounds).

pled guilty. In the case of Yassir Hamdi, however, the Bush Administration and the Ashcroft Justice Department are taking the position that they can hold him forever as an enemy combatant. I wish the Bush Administration and the Ashcroft Justice Department would explain why they chose to prosecute John Walker Lindh and why they chose to hold Yassir Hamdi as an enemy combatant, because the only apparent difference is that one is Anglo white and the other is of Arab descent. And of course, it would be very disturbing if that is the reason these two individuals are being treated differently.

[In Hamdi's case,] the United States Court of Appeals for the Fourth Circuit ruled that the government can detain a person indefinitely as an enemy combatant; there shall be no judicial review.<sup>15</sup> The Supreme Court however, granted a review of the decision; and a decision will be coming down by the end of June.<sup>16</sup>

One more example: since January of 2002, now about 26 months ago, over 600 human beings have been held in solitary confinement in Guantanamo. Until a week ago Tuesday, not one of them was ever charged with any crime, neither a crime against foreign nations nor a crime against the United States. There were two individuals who were told they would be tried in military tribunals. The Administration is taking the position that it can hold these individuals indefinitely as enemy combatants.

President Bush has said they can be held until the end of the war on terrorism, which will go beyond any of our lives. What the United States is doing here is a clear violation of an international law. The Third Geneva Convention requires a hearing in a competent tribunal to determine whether an individual is a prisoner of war and an enemy combatant.

The international covenants on civil and political rights say that all individuals held by a government must be given access to the courts. Even our staunchest allies, nations like Great Britain and Australia, are condemning what the United States is doing in Guantanamo. The government's position is there can be no judicial review in any court of those being held in Guantanamo. The United States Court of Appeals for the District of Columbia agreed with the Administration.<sup>17</sup> The United States Court of Appeals for the Ninth Circuit,<sup>18</sup> in a case where I was co-counsel, disagreed with the Administration's position, and now the Supreme Court is granting review of the DC Circuit decision to be decided

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15. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *rev'g* 243 F. Supp. 2d 527 (E.D. Va. 2002).

16. Hamdi v. Rumsfeld, 124 S. Ct. at 2642, 2650 (2004) (plurality opinion holding that Hamdi's detention was authorized under the Authorization of Use of Military Force Act passed after September 11th, and that even though his detention was authorized by law, Hamdi was still entitled to due process).

17. Al Odah v. U.S., 321 F.3d 1134 (D.C. Cir. 2003).

18. Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003).

again in June.<sup>19</sup> The argument is not that those held in Guantanamo have to have [an] Article III Federal Court [review] their claim, but it is to say that before a human being is imprisoned indefinitely, there has to be the opportunity for some review in some tribunal.

Dalia, a previous speaker, talked about many other individuals who are detained for uncertain, sometimes long, periods of time solely on the basis of their race. You know, in all of American history, no other president, no other attorney general, has claimed the authority to hold people as enemy combatants for indefinite periods of time. Even during World War II, when German saboteurs came into the United States, they were tried in military tribunals. It was never planned they be held indefinitely with no trial.

The second example that I wanted to point to is the unprecedented claims of secrecy asserted by the Bush Administration and the Ashcroft Justice Department. I have a simple question – and maybe Representative Mitchell will answer it – how many people are now being held by the federal government or have been held by the federal government since September 11th as part of the war on terrorism? I predict that no one in this room can answer that question, because the Administration refuses to tell us.

Immediately after September 11th, they told us that some categories of both are detained. In this moment in time, they've never told us how many individuals have been held, or are now being held, as material witnesses. I debated this issue a year ago against Assistant Attorney General Michael Chertoff. Now he's a judge on the United States Court of Appeals in the Third Circuit.<sup>20</sup> I asked this question: "It's really simple – tell us how many people you have held, or are now holding, as part of the war on terrorism?" He said, "I can't tell you – that's national security information." So, I'm really simple sometimes. I asked, "Can you explain to me how it jeopardizes national security to discuss whether it's 50, 500, 5,000, 50,000?" He said, "I just can't tell you that information."

I don't understand why the Administration won't tell us how many people have been or are now being held. The Center for National Security Studies brought a lawsuit seeking that information. The federal District Court in Washington DC decided that the Freedom of Information Act requires that the information should be disclosed – the names of those who are detained as well as the names of their lawyers. The United States Court of Appeals and the District of Columbia Circuit,<sup>21</sup> in a 2-1 decision, reversed explaining that in this time of crisis there has to be

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19. *Bush v. Gharebi*, 124 S. Ct. 2932 (2004) (remanding case back to the 9th Circuit Court of Appeals to be decided in light of *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004)).

20. In January 2005, President Bush nominated Michael Chertoff to be Secretary of Homeland Security.

21. *Cent. For Nat'l Security Studies v. U.S. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003).



great deference given to the administration. In January, the United States Supreme Court denied review of the case, so we still may not find out how many people are being held by the federal government.

Those being held as material witnesses are particularly troubling because the federal material witness statute requires that in order to hold somebody as a material witness, it has to be shown that they have essential testimony that can't be gained in any other way, without a substantial risk of life. It's apparent, from what we're learning, that many individuals are being held as material witnesses without meeting these requirements.

In terms of secrecy, there are many other aspects that are very disturbing. One thing that I have had the pleasure to do every spring is speak at the National Conference of Federal Public Defenders. When I was in Philadelphia two years ago, a federal public defender from Miami came and said, "I can't tell you very much about this, there's a gag order, but what we're seeing now in our federal courts are completely secret criminal prosecutions." And he says, "These are criminal prosecutions that appear on no docket sheet, no one is allowed in except for the lawyers; they're covered by a gag order that keeps them from discussing it with anyone, and then the appeals are held in secret in the Federal Court of Appeals."

I'm starting to hear about this from other people as well. In fact, the legal director of the American Civil Liberties Union, Steve Shapiro, sent a letter to the Chief Judge for the Southern District of New York, Judge [Michael B.] Mukasey, and said "we understand that these are secret criminal trials." Judge Mukasey responded, and I quote almost verbatim, "Unfortunately, or should I say fortunately, I cannot answer your question."

In November of 2003, this all came to light when a cert petition was filed in the United States Supreme Court in one of these cases. It was an individual whose cert petition alleged that he was tried and convicted in secret, his appeal was handled in secret and there's no record of it. He argued that this violated the Constitution. Much of this cert petition was redacted; that is, it was whited out, but there was still a good deal that you could read, just by going on Westlaw or the Internet. The United States filed its opposition to cert entirely under seal, so we can't see any of it, and the Supreme Court last month denied review of the case. The idea of totally secret proceedings is very chilling to me. There is no accountability when it is done entirely in secret. To me, totally secret proceedings are reminiscent of the Star Chambers in the middle ages.

Another example of secrecy is a memo that was issued in September 2001 by the [Chief United States] Immigration Judge, Michael J. Creppy; he called for blanket secrecy immigration pursuits. Now, this too was total secrecy. It was a situation where no one was allowed ac-

cess to the person, except for maybe a lawyer. All people present were covered by a gag order – and there is no mention on any docket sheet. A challenge was brought by the United States Court of Appeals for the Sixth Circuit in a case called *Detroit Free Press v. Ashcroft*,<sup>22</sup> and the Sixth Circuit ruled that blanket secrecy in these immigration proceedings violated the First Amendment. In an eloquent opinion, the court talked about how democracy dies in secret. Blanket secrecy is inimical of the principles of the First Amendment.

One more example of secrecy involves the fact that the federal government chose to house many detainees in state prisons. It turns out that many states have laws that forbid secret detentions. The federal government chose to house these detainees in New Jersey state prisons, but New Jersey has a law prohibiting secret arrests and detentions. Also, the Freedom of Information Act provides that information is accessible for anyone being held in a New Jersey prison. A Freedom of Information Act request was filed by the American Civil Liberties Union in New Jersey in order to get the identity of all of those who were being held as detainees in the New Jersey prisons.<sup>23</sup> A state trial court for New Jersey ruled the information could be released under the clear dictates of New Jersey law.

The federal government then adopted a regulation that said any state that holds federal detainees is prohibited from disclosing the identity of the detainees through their state law. The New Jersey Court of Appeals then said New Jersey law had been pre-empted by federal regulation, so the information couldn't be disclosed. Again, what's the interest in such blanket secrecy? As Judge Keith said to the Sixth Circuit, "if there's any need for secrecy in a particular case, let the government explain it, but blanket secrecy undermines any checks and balances, any accountability."<sup>24</sup>

The third example that I want to talk about is the unprecedented invasions of the right to privacy, and here I do want to talk about the Patriot Act.<sup>25</sup> As you might guess, I have a very different take on it than

22. 303 F.3d 681 (6th Cir. 2002).

23. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (holding that newspaper consortium did not have a First Amendment right to access to deportation hearings involving persons suspected of having connections to September 11th. The ruling overturned the District Court for New Jersey which initially granted the newspaper publisher's motion for preliminary injunction. *N. Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002).

24. *Detroit Free Press*, 303 F.3d at 683.

The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people.

*Id.*

25. Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

Representative Mitchell. We should talk a little bit about how the law was adopted, something that hasn't been mentioned here today.

Not long after September 11th, on a Monday, Attorney General Ashcroft went before the Senate Judiciary Committee and presented a long laundry list of proposals, almost all of which had been previously been advanced and rejected by Congress. Many of these provisions were imposed by the Clinton Administration in 1996 after the Oklahoma City bombing as part of what came to be called the "Anti-Terrorism Effective Death Penalty Act" of 1996.<sup>26</sup> It was rejected by the Republican Congress as too much of an invasion of privacy.

I think Representative Mitchell conceded this when he said that a lot of these provisions were law enforcement's desires to get more power and take advantage of September 11th. In fact, after Attorney General Ashcroft spoke to the Senate Judiciary Committee, the representatives of the American Civil Liberties Union and the National Rifle Association criticized many of the proposals. It's not that often that the ACLU and the NRA agree on things.

Two days later, Attorney General Ashcroft went before the House Judiciary Committee and asked for basically the same list of proposals. There were secret negotiations between representatives from the Congress and the White House. They were going to produce two versions of the Patriot Act. The Senate version passed with ninety-eight votes. The House version passed overwhelmingly. No hearing was held in any committee of Congress regarding the Patriot Act. I can't think of any other major piece of legislation that was passed without any hearing. When Senator Feingold objected on that basis, Senator Orrin Hatch of Utah said, "We're in a crisis, we don't have time to hold hearings." To me, the idea that we could adopt a law that has provisions that significantly affect us without even holding a hearing is quite disturbing.

Well, Representative Mitchell asked any of us to come up with provisions that we find disturbing, and I think the first thing to do is exactly that. The definition of terrorism under the Patriot Act has two parts – first, there must be a violation of a federal law, and it lists a long number of federal statutes, and second, the act has to be "an act to intimidate or coerce the government or civilian populations."<sup>27</sup> That's the exact language of the law – "intimidate or coerce the government or civilian populations." If you think about it, most crimes are about intimidating or coercing somebody – bank robbery certainly fits under that. Kidnapping certainly fits under that. In fact, an audience member gave the example of a protest. If somebody intentionally threw a rock through a window in a federal building, that would be a terrorist act under the Patriot Act be-

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26. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

27. Patriot Act § 802.

cause they've intentionally destroyed federal property – that's one of the federal crimes that's listed – and they did it as part of a protest to intimidate or coerce the government or civilian populations. It's an enormously broad definition. Representative Mitchell, you and I agree that the reality is that when giving law enforcement broad powers, they will use them.

Another example is a boy found in a car in Orange County, California, with a pipe bomb. He wasn't engaging in anything that we call terrorist activity, but the government used all of its powers under the Patriot Act. You might have read a little more than a month ago that the United States Attorney in Des Moines, Iowa, subpoenaed Drake University for records of those who participated in anti-war protests. Thankfully, the public outcry against this helped the attorney decide to dismiss those subpoenas.

Representative Mitchell is correct – the RICO Act<sup>28</sup> shows us that when government has broad powers, it will use them. Well, that's just one more set of powers that are disturbing. Traditionally, going back not that long ago in American history, there were two models in terms of surveillance. One is what the government could do in foreign countries and the other is what law enforcement could do in the United States. When the CIA operated in a foreign country it wasn't constrained by the Constitution, but when law enforcement operated in the United States, it was constrained by the Constitution. Law enforcement, for example, says you have to get a warrant, issued by a judge, before there would ever be electronic eavesdropping. In 1972, in a case called the *United States v. United States District Court*,<sup>29</sup> the Supreme Court unanimously rejected the contention of President Richard Nixon that he could engage in warrantless wiretapping for national security in the United States. The Supreme Court emphasized this distinction between law enforcement in the United States and what was going on in a foreign country.

In 1978, Congress created a third category, called the Foreign Intelligence Surveillance Act.<sup>30</sup> The Foreign Intelligence Surveillance Act provided that if the purpose of the federal government is gaining information about foreign intelligence, then it can meet a lower standard, not the probable cause standard or the reasonable suspicion standard. Under the Foreign Intelligence Surveillance Act, courts can grant warrants for wiretapping on much less evidence than usual.

The United States Supreme Court has never considered whether it is constitutional, but the Ninth Circuit, like several other circuits, say it is

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28. 18 U.S.C. § 1961 (2003).

29. 407 U.S. 297 (1972).

30. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801-1811 (2000)).

constitutional because the information would not be used for law enforcement purposes; it would just be used for intelligence purposes.

Indeed, it was often said that the 1968 Omnibus Crime Control Act<sup>31</sup> that regulates wiretapping under the Fourth Amendment was a high wall between intelligence and law enforcement. What the Patriot Act does is obliterate that wall. The Patriot Act says that so long as the purpose is intelligence gathering, even though the real primary purpose is law enforcement, the government can take advantage of all the additional powers that it gets under the Patriot Act and under the Foreign Intelligence Surveillance Act. In other words, so long as the government can say, goal "A" is intelligence gathering, but goal "B" is domestic law enforcement, they could not get a warrant based on this lesser standard of reasonable suspicion. They can take advantage of all the additional powers in the Foreign Intelligence Surveillance Act.

So now, no longer do we have two or three models. Now, basically, law enforcement can circumvent the Fourth Amendment, circumvent statutory restrictions, and go to the Foreign Intelligence Surveillance Act court. Studies have shown that the Foreign Intelligence Surveillance Act court grants the government's request for warrants in 99.99% of all the cases; there's basically no check of the government at all.

For example, under the Patriot Act, the government is allowed to find what email addresses a person writes to or receives from, what websites a person visits by showing that it is relevant to a criminal investigation. That is enough probable cause. Not even a reasonable suspicion – it's just relevant to a criminal investigation, and it doesn't have to be a criminal investigation even of that person.

The defense that is offered, as Representative Mitchell presents it, is that the government has already had this power to find out what phone numbers a person dials and receives from, under traps and traces. I would object to that – and even granting that, there's a real difference here. A trap or trace tells you the phone number; it doesn't tell you content. Finding out what websites a person is visiting does tell you content. The reality of it is, you can often learn about a person by finding out what websites a person is visiting. Think about health information, because people go on the web to learn about medical conditions. Sometimes you find inaccurate things as you stumble on the websites that we've been to visit; I'm sure we've all had that experience.

Another example of a very disturbing provision of the Patriot Act is the authority for so-called "roving wiretaps." Representative Mitchell said it used to be, as long as wiretaps existed, that the government would have to list the numbers that it wanted to tap. With roving wiretaps, they

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31. 18 U.S.C. § 2515 (2004).

can listen to any phone that the suspect reasonably might use. That means that for a roving wiretap for Erwin Chemerinsky, they could listen to all of the phones in the building where I work, all of the phones in the stores where I shop, all of the phones at my friends' houses that I visit, and here today, all of the phones in this building.

Last year when I debated an FBI agent, he said, "Yeah, with a roving wiretap we can listen to pay phones that you walk in front of on a daily basis." The question is do we need to do this to make everything safer? The threat to our privacy is potentially enormous here. With enough roving wiretaps, the government could listen to any phone anytime they want. Well, the Attorney General's argument, as Representative Mitchell presented it today, is that terrorists quickly change cell phones. The problem with that argument is that the police can't listen to a new cell phone until they know that it exists. By definition, if a terrorist has a new cell phone, the police can't tap it, even under a roving wiretap, until they know that it's there. And once they know that it exists, they can then just add it to the existing warrant. When I raised this in debate after debate, the response always was "Well, it takes too long to add new numbers to existing warrants." But of course, all that calls for is a more expeditious procedure for adding new numbers to existing warrants; it doesn't justify roving wiretap warrants.

In January 2002, California Attorney General Bill Lockyer went before the California legislature and said they needed roving wiretap authority for the state and local police. I was thrilled when the District Attorney in Los Angeles County, a Republican, not by any means a liberal, said, "just create a procedure where we can quickly add a new number to an existing warrant." And the California legislature went in that direction.

Another provision of the Patriot Act is Section 215 that allows a court to order a subpoena from any records about a person, including library records, bookstore records, creditor records. One thing that wasn't mentioned by Representative Mitchell is that under such an order the institution disclosing to the government cannot reveal to the individual that disclosure was made. So if the government requests my library records, the library is prohibited by law to tell me. The standard here is not probable cause; it's not even reasonable suspicion. The standard is relevant to a criminal investigation.

Here, I profoundly disagree with Representative Mitchell. I think that people will be cautious in the books that they read, the books they buy or check out from the library, because they're afraid that the government's going to be monitoring them. Representative Mitchell says, "We speak even though our speech might be used against us, so why would that change what we read, if that can be used against us?" Well, I assume that when I'm having a private conversation that it's not going to be monitored by anybody else. And in fact, if the government wants to

monitor my private conversation by wiretapping, they better get a warrant based on probable cause, unless they fit under the new provisions of the Patriot Act.

But the government is allowed to find out what books I'm reading just because it's relevant to some criminal investigation. As I mentioned, a university did a survey of libraries in this country – and concluded that there were 150 libraries that had their records subpoenaed pursuant to the provisions of the Patriot Act. I'm skeptical as to how much it helps law enforcement to know what books a person is reading. But I'm not at all skeptical that it's going to be the effect of knowing what really is a form of personal activity.

Another provision of the Patriot Act that is troubling is a clause that says that the government can detain a non-citizen for seven days if there's reasonable grounds to believe that the individual is assisting in terrorist activity. That is not probable cause; that is an arrest for seven days based on reasonable suspicion. This directly conflicts with Supreme Court precedence in two ways: first, the Supreme Court has never upheld arrests on less than probable cause. And second, the Supreme Court has said that a person has to be arraigned within 48 hours; this is seven days. Another provision of the Patriot Act allows indefinite detentions in certain circumstances, even though the United States Supreme Court in *Zadvydas v. Davis*<sup>32</sup> said that indefinite detention of non-political aliens isn't permissible.

Another provision of the Patriot Act makes it a federal crime to assist terrorist activity. Well, the provision specifically says "it's a federal crime to give expert assistance to terrorist activity." Remember how broad the definition of terrorism is? A Federal District Court in Los Angeles in January declared that it is unconstitutional on the grounds of overbreadth and vagueness.

The government is taking the position that it doesn't have to prove that a person knew that it was a terrorist organization to have criminal liability. The government says that all they have to prove is the person knowingly gave to the organization, and if the government can prove that it's a terrorist organization, that's enough for a conviction. So somebody gave to what they thought was a humanitarian organization, not knowing the government had designated it as a terrorist organization – that would be a sufficient basis for a conviction. The United States Court of Appeals for the Ninth Circuit has declared that government position unconstitutional, and for obvious reasons.

Again, I think that there are instances where the government needs additional powers. I have no objection, for instance, to the government

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32. 533 U.S. 678 (2001).

doing more careful screening through the airports, even though there's a lessening of privacy. But my problem with the provisions of the Patriot Act is that they don't make us any safer. That's why that at this point, over 250 cities have adopted resolutions criticizing the Patriot Act. A week ago yesterday, the Dallas City Council adopted a resolution criticizing the Patriot Act. Now, I don't know a lot about the politics in Dallas – my guess is it's not a particularly liberal body. This is a form of grassroots activism that you haven't seen in a long time in American history, and I hope it will have some effect on the worst provisions of the Patriot Act, which will subsequently expire in December 2005 and, hopefully, not be renewed.

I was not planning on talking about racial profiling, but I wanted to say a word in response to what Representative Mitchell said. Now, what he leaves out are the consequences for using race. We can certainly debate whether the screening of somebody's luggage, using race as a reason, is appropriate. I'm very disturbed by that for reasons that I'll explain – I don't think it's effective law enforcement and it's certainly over- and under-inclusive. It's enormously humiliating to those who are subjected to it. Individuals were being arrested and detained solely because of race, and that it is truly unconscionable for the government to do so.

Now as I said a moment ago, one reason I object to racial profiling is because I think it's terribly ineffective as a law enforcement tool. It is so under-inclusive and so over-inclusive. It's under-inclusive because the reality is many can pose as a terrorist who don't fit any profile. For example, think in terms of McVeigh/Nichols – I remember after the Oklahoma City bombing one of the first groups people suspected were middle-Eastern terrorists. Of course, we now know the bombing was by a militia group in the United States. On the other hand, racial profiling is horribly over-inclusive. Think of all of the individuals of Arab-Middle Eastern descent who will be harassed, detained, solely because of race, and pose no threat whatsoever. Race alone can never be the basis for law enforcement action; it was George W. Bush, as a candidate in one of the presidential debates, who said exactly that in the fall of 2000.

I conclude with two quotes from late Supreme Court Justices. One came from Robert Jackson, who said, "The Constitution is not a suicide pact."<sup>33</sup> Of course, he's right. If there is a need to lessen liberties, we need to be sure that it is really going to make us safer.

The other quote came from the late Justice Louis Brandeis. He said, "The greatest threat to liberty will come from people who claim to be

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33. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is a danger that, if the court does not temper its doctrinaric logic with a little practical wisdom, it will convert the Bill of Rights into a suicide pact.")



acting for beneficial purposes.”<sup>34</sup> He said that “people born to freedom know to resist the tyranny of despots,” [and that] “The insidious threat to liberty will come from well-meaning people with zeal, with little understanding of what the Constitution is about.”<sup>35</sup> No, Louis Brandeis never knew John Ashcroft, but if he had, he couldn’t have picked better words to describe him.

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34. *Olmstead v. U.S.*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

[E]xperience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

*Id.*

35. *Id.* (Brandeis, J., dissenting).

