

ADDRESS

CITIZENSHIP IN A TIME OF REPRESSION

MICHAEL TRAYNOR*

*The Sixteenth Thomas E. Fairchild Lecture
University of Wisconsin Law School
April 23, 2004*

I am delighted to be here in Madison and to honor Judge Thomas E. Fairchild, a magnificent citizen of Wisconsin who has devoted his life to distinguished public and judicial service.¹ I am grateful to be in your friendly company, and grateful to Dean Kenneth Davis, Jr. for his generous introduction.

The last time I visited Madison was in 1996 to see Shirley Abrahamson, when she was sworn in as Chief Justice of the Wisconsin Supreme Court by the Chief Justice of the United States, William Rehnquist. Chief Justice Abrahamson's Fairchild lecture is a brilliant analysis and portrait of the American Law Institute.²

It is a special pleasure to be here at the University of Wisconsin Law School. The University of Wisconsin Law School has identified as one of its key strategic missions the strengthening of its commitment to public service, including the concept of citizenship, which emerged as critical in the university's self study.³

* Senior Counsel, Cooley Godward LLP, San Francisco, California; President, The American Law Institute; J.D., Harvard Law School, 1960; B.A., University of California at Berkeley, 1955. I acknowledge with appreciation the careful reading and constructive editing of this text by Elizabeth T. Fowler. The views stated in this Address are personal.

1. For illustrations of the esteem in which Judge Thomas E. Fairchild is held, see, for example, Shirley Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1, 2; Justice John Paul Stevens, *A Judge's Use of History—Thomas E. Fairchild Inaugural Lecture*, 1989 WIS. L. REV. 223, 223. For biographical information on Judge Fairchild, see Wis. Court Sys., Supreme Court Justices, Thomas E. Fairchild, at <http://www.wicourts.gov/about/judges/supreme/retired/fairchild2.htm> (last modified Aug. 26, 2004). See also Fed. Judicial Ctr., Judges of the United States Courts, Thomas Edward Fairchild, at <http://air.fjc.gov/public/home.nsf/hisj> (last visited Mar. 28, 2005).

2. Abrahamson, *supra* note 1, at 1; see also Roswell B. Perkins & Michael Traynor, *Shirley S. Abrahamson: An Exemplar of the American Law Institute*, 67 ALB. L. REV. 651, 651–52 (2004).

3. See Univ. of Wis. Law Sch., Law in Action, The Dean's View, at <http://www.law.wisc.edu/Davislawinactionessay.htm> (last updated Apr. 27, 2004).

I salute the many contributors to the positive spirit of Wisconsin citizenship, including U.S. Senator Russell Feingold, who had the courage to cast the sole dissenting vote in the U.S. Senate against the so-called PATRIOT Act,⁴ to which I will later refer.

This remarkable group also includes Governor Jim Doyle; former Senator Gaylord Nelson; former Governor Tommy Thompson; the late Judge and State Senator Robert W. Warren; U.S. District Judge Barbara Crabb; John Frank, my dear late friend and ALI colleague; and John Skilton, our prized cochair of the Lawyers Committee for Civil Rights Under Law.

Two years ago, here in Madison, Tony Lewis gave the Robert W. Kastenmeier Lecture, entitled *Civil Liberties in a Time of Terror*.⁵ My talk today is entitled *Citizenship in a Time of Repression*, and addresses the responsibilities of citizens in safeguarding civil liberties. I considered whether to select a blander, less provocative title, but decided that I could not do so, for I feel in my heart that our rights as citizens to the truth and to basic liberties, are being repressed by our own government, and that we have to stand up against this erosion of our liberties.

As an idealistic ten-year-old, I observed the formation of the United Nations in San Francisco. Gathered on the stage at the Opera House, world leaders worked diligently for an international structure promising a beleaguered world security and peace, as well as human rights. As a teenager, I began to develop what has become a dual and lifelong commitment to our environment and to liberty. I believe that the preservation of each is important for the other, and that governmental oppression of our environment is likely to be joined by governmental repression of human rights.⁶

In 1950, when I was fifteen, I spent the entire summer hiking in the Sierras in California and appreciating the freedom of being one with the mountains, lakes, and streams. The next year, I was fortunate to be a

4. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C. and 50 U.S.C. (2000)); see Senator Russell Feingold, On Opposing the U.S.A. Patriot Act, Address to the Associated Press Managing Editors Conference (Oct. 12, 2001), at <http://www.archipelago.org/vol6-2/feingold.htm>.

5. Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257 [hereinafter Lewis, *Civil Liberties in a Time of Terror*]; see also Anthony Lewis, *First They Came for the Muslims . . .*, AM. PROSPECT, Mar. 2003, at A12 [hereinafter Lewis, *First They Came for the Muslims*].

6. See Michael Traynor, *On Environmental Law*, 132 DAEDALUS 116, 116-17 (2003). For materials on the relationship between human rights and the environment, see, for example, the United Nations High Commissioner for Human Rights, at <http://www.unhchr.ch/environment/index.html>; and Earthjustice, at <http://www.earthjustice.org/regional/international/index.html>.

freshman at the University of California at Berkeley and to begin classes with one of those remarkable teachers who influence one's entire life. Professor Jacobus tenBroek, a constitutional lawyer and scholar,⁷ introduced us to principles of liberty and equality, to the Socratic method, and to issues of freedom of expression. We also studied *Hirabayashi v. United States*, which upheld a military curfew against persons of Japanese ancestry,⁸ and *Korematsu v. United States*, which upheld their forced relocation during World War II.⁹ Both cases were early examples of governmental overreaction to perceived threats.

Today, the word "patriot" is used to name a statute that, in my opinion, stifles liberty.¹⁰ The term "collateral damage" is used to describe the deaths of children and other innocent bystanders.¹¹ The phrases "weapons of mass destruction,"¹² "immediate threat," and

7. See, e.g., JACOBUS TENBROEK ET AL., PREJUDICE, WAR, AND THE CONSTITUTION (1954); Jacobus tenBroek, The Individual's Role in a Democracy, Remarks at East Contra Costa College (Dec. 1962), at <http://www.nfb.org/bm/bm02/bm0204/bm020403.htm>. Various speeches delivered by Professor Jacobus tenBroek can be accessed at the National Federation of the Blind, at <http://www.nfb.org/tenbroek.htm> (last updated May 12, 2003).

8. 320 U.S. 81, 105 (1943). In 1987, the U.S. Court of Appeals for the Ninth Circuit, in a decision by Judge Mary Schroeder, ordered the convictions vacated in a proceeding for a writ of *coram nobis*. *Hirabayashi v. United States*, 828 F.2d 591, 608 (9th Cir. 1987).

9. 323 U.S. 214, 223–24 (1944). In 1984, the U.S. District Court for the Northern District of California, in a decision by Judge Marilyn Patel, ordered the conviction vacated in a proceeding for a writ of *coram nobis*. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); see also *Children of the Camps*, at <http://www.children-of-the-camps.org/resources/books.html> (last visited Mar. 28, 2005) (listing books on the World War II internment experience of Japanese Americans); Virtual Museum of the City of San Francisco, *Chronology of 1942 San Francisco War Events*, at <http://www.sfmuseum.org/war/42.html> (last visited Mar. 28, 2005). Fred Korematsu died on March 30, 2005. For a brief description of his life and his role in the case, see Press Release, Asian Law Caucus, *The Passing of a Constitutional Law Legend* (Mar. 31, 2005) (on file with author).

10. See PATRIOT Act, 115 Stat. 272. The statute is not entirely bad and contains some useful provisions for countering terrorism. See *infra* notes 100–07 and accompanying text. Although I do not share all his conclusions, Deputy Attorney General James Comey gave a reasoned and spirited argument in support of the Patriot Act at the 2004 Annual Meeting of the American Law Institute. The Hon. James B. Comey, Address at the Wednesday Luncheon Session of the American Law Institute (May 19, 2004), in AM. LAW INST., REMARKS AND ADDRESSES AT THE 81ST ANNUAL MEETING, MAY 17–19, 2004, at 69, 69–96 (2004); see also Jeff Breinholt, *How About A Little Perspective: The USA PATRIOT Act and the Uses and Abuses of History*, 9 TEX. REV. L. & POL. 17 (2004); Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 685–723 (2004).

11. See Charlie Clements, *The Faces of "Collateral Damage"*, 49 FRIENDS J. 6, 7 (2003); Ben Kiernan, *"Collateral Damage" from Cambodia to Iraq*, 35 ANTIPODE 846, 847–48 (2003).

12. See CTR. FOR STRATEGIC & INT'L STUDIES, INTELLIGENCE, IRAQ, AND WEAPONS OF MASS DESTRUCTION 5 (2004) ("After some nine months of one of the most

“imminent threat”¹³ were used by our government to justify a war—phrases that have prompted disturbing and unresolved questions about the evidence upon which the government acted as well as about knowledge and intent. To justify unprecedented violations of the Geneva Conventions,¹⁴ applicable statutory law,¹⁵ and established military doctrine,¹⁶ even the word “torture” was twisted and constricted in an indefensible opinion of the Office of Legal Counsel,¹⁷ which the

massive search efforts in history, the U.S. . . . found no evidence of an active weapons program, or that Iraq had any capability to use weapons of mass destruction against the invading coalition forces.”), at http://www.csis.org/features/040126_WMDIntellLesAnnex.pdf; Kay: *No Evidence Iraq Stockpiled WMD*, CNN.COM, (Jan. 26, 2004), at <http://www.cnn.com/2004/WORLD/meast/01/25/sprj.nirq.kay> (quoting David Kay, the former top weapons inspector in Iraq for the George W. Bush Administration, as stating it “is very unlikely [we’ll] find large stockpiles of weapons. . . . I don’t think they exist”).

13. See Moveon.org, *Censure Bush, The Administration’s Use of the Word “Imminent”*, at <http://www.moveon.org/censure/imminent.htm> (last visited Mar. 28, 2005); see also Excerpt of Donald Rumsfeld on *Face the Nation*, available at <http://www.moveon.org/censure/eaughtonvideo> (last visited Mar. 28, 2005).

14. See Memorandum from William H. Taft IV, Legal Advisor, U.S. Department of State, to the Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002) [hereinafter Taft Memo], reprinted in MARK DANNER, *TORTURE AND TRUTH, AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 94–95 (2004). Although William H. Taft’s considered view of the Geneva Conventions was rejected, his memorandum is invoked here as an example of statesmanlike opposition to violations of the Geneva Conventions. For a comprehensive collection of pertinent documents, see KAREN L. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (2005) [hereinafter *THE TORTURE PAPERS*]. See also SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201 (2004).

15. See 18 U.S.C. §§ 2340–2340A(a) (2000 & Supp. 2003).

16. See, e.g., U.S. MARINE CORPS, MCRP 4-11.8C, *ENEMY PRISONERS OF WAR AND CIVILIAN INTERNEES* 27–30 (1998), available at <https://www.doctrine.usmc.mil/aspweb/main.asp>; U.S. ARMY, FM 34-52, *INTELLIGENCE INTERROGATION* 2 (1987), at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/index.html>. Use of force and other abuses of captives are grounds for investigation as war crimes. See, e.g., U.S. MARINE CORPS, MCRP 4-11.8B, *WAR CRIMES INVESTIGATION* 13–19 (1998), at <http://www.doctrine.quantico.usmc.mil/signpubs/r4118b.pdf>.

17. Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in DANNER, *supra* note 14, at 115, 115–66; see also Memorandum from Alberto R. Gonzales, Counsel to the President, to U.S. President George W. Bush (Jan. 25, 2002), reprinted in DANNER, *supra* note 14, at 83, 83–87. President George W. Bush thereafter appointed Jay Bybee to the U.S. Court of Appeals for the Ninth Circuit, and appointed Alberto Gonzales to be the U.S. Attorney General. Philip Carter, *Loyal to a Fault?*, SLATE (Nov. 11, 2004), at <http://slate.msn.com/id/2109495/>; Press Release, U.S. Court of Appeals for the Ninth Circuit, Senate Confirms Jay S. Bybee to Serve on Court of Appeals (Mar. 13, 2003), at <http://www.ce9.uscourts.gov/>.

U.S. Department of Justice (DOJ) has only recently withdrawn.¹⁸

18. See Memorandum from the U.S. Department of Justice, Office of Legal Counsel, to James B. Comey, Deputy Attorney General (Dec. 30, 2004), at <http://www.usdoj.gov/olc/dagmemo.pdf>; see also Taft Memo, *supra* note 14, at 94–95.

The Bybee memorandum, which the government took two years to repudiate, remains a key document in the annals of torture as well as a textbook example of dismal lawyering at the highest levels of government: it manifests disregard for careful and countervailing legal analysis and applicable treaties and conventions, international law, and military precedent; subservience to a powerful client; indifference to defenseless victims; and a willingness to manufacture clever pretextual defenses for torturers and their principals. In short, it is a “tinsel of legal form.” See Anthony Lewis, *Introduction* to THE TORTURE PAPERS, *supra* note 14, at xiii, xiii (the papers “provide a painful insight into how the skills of the lawyer—skills that have done so much to protect Americans in this most legalized of countries—can be misused in the cause of evil”); Harold Honju Koh, Dean Yale Law School, Statement on the Nomination of the Honorable Alberto R. Gonzales, Judiciary Committee, U.S. Senate (Jan. 6, 2005) (describing the Bybee memorandum, as “perhaps the most clearly erroneous legal opinion I have ever read,” as undermining “the very underpinnings of individual criminal responsibility” that “were set forth in the landmark judgments at Nuremberg,” as “a stain upon our law and our national reputation,” as offering “a definition of torture so narrow that it would have exculpated Saddam Hussein,” and as “a stunning failure of lawyerly craft”), available at 2005 WL 40553; see also Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 660 (1958) (“To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system.”); Robert S. Rivkin, *Torture and Gonzales: An Exchange*, N.Y. REVIEW OF BOOKS, Feb. 10, 2005, at 43 (“What is the difference between the Gestapo lawyer’s comment about the police force carrying out the ‘will of the country’s leadership—to justify torture, and Mr. Bybee’s comment about the president’s power to order any measure pursuant to his ‘core authority’ as commander in chief—to justify torture?”). Although currently there is no adequate reckoning of the extent of human suffering the implementation of the Bybee memorandum has fostered, its belated repudiation should at least prevent it from causing further suffering and from becoming a precedent for further governmental misuse of legal opinions for unlawful and immoral purposes.

Instead of soliciting justifications for torture, cruel, inhuman, and degrading treatment of captives, our government should be alert to preventing such abuse. See also *infra* note 141; cf. 1 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS, 61–77 (3d ed. 2003) (discussing “definition by decree”); RICHARD LAWRENCE MILLER, NAZI JUSTIZ 1–2 (1995).

Nazis were fastidious about following legal requirements. . . . Nazis argued that law is neutral, a tool that can be used for any purpose. Nuremberg prosecutors countered that law cannot exist apart from its protection of individuals against excess by ruthless private and public agents. Defendants accused of crimes against humanity coolly produced decrees and permits in triplicate, and were generally shocked when prosecutors dismissed all those documents.

MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES IN LEGAL HISTORY IN NAZI GERMANY 2, 12–14, 87–101 (1998). By contrast, in the context of corporate fraud, for example, when the government indicted the former CEO of WorldCom, Inc., Attorney General John Ashcroft stated that “The charges filed today are another example of the Department of Justice’s commitment to thoroughly investigating and prosecuting perpetrators of corporate fraud to the highest levels of management.” Press Release,

As an environmentalist, I am appalled to see a measure that would increase pollution falsely described as the “Clear Skies Initiative,”¹⁹ and a measure that would deplete forests called the “Healthy Forests Restoration Act.”²⁰ Our government is blatantly misusing the English language. George Orwell’s prescient warnings against Newspeak and Doublethink²¹ are as apt today as they were over fifty years ago.

Truth, liberty, and openness are related, as I will demonstrate, by examining one of the most controversial provisions of the PATRIOT Act, section 215.²² This section amends the provision of the Foreign Intelligence Surveillance Act that deals with government investigations and the power to obtain records secretly.²³ Because members of

U.S. Department of Justice, U.S. Charges Ex-WorldCom CEO Bernard Ebbers; Former WorldCom CFO Scott Sullivan Pleads Guilty (Mar. 24, 2004), *available at* <http://www.fbi.gov/dojpressrel/pressrel04/world030204.htm>; *see also* Press Release, U.S. Department of Justice, Statement of Attorney General Alberto R. Gonzales on the Bernard Ebbers Conviction (Mar. 15, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/March/05_ag_122.htm. (“Today’s verdict is a triumph of our legal system and the application of our nation’s laws against those who breach them. We are satisfied the jury saw what we did in this case: that fraud at WorldCom extended from the middle-management levels of this company, all the way to its top executive.”).

19. *Compare* Executive Summary—The Clear Skies Initiative (Feb. 14, 2002), *at* <http://www.whitehouse.gov/news/releases/2002/02/clearskies.html>, *with* Nat’l Res. Def. Council, *Stop the Bush Air Pollution Plan*, *at* <http://www.nrdcaction.org/clearskies/flash.asp?src=csk0306> (last visited Mar. 28, 2005).

20. *See* Press Release, The White House, President Bush Signs Healthy Forests Restoration Act into Law (Dec. 3, 2003), *at* <http://www.whitehouse.gov/news/releases/2003/12/20031203-4.html>.

21. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR 215–18, 303–06, 310 (1949); *see also* NANCY SNOW, INFORMATION WAR: AMERICAN PROPAGANDA, FREE SPEECH AND OPINION CONTROL SINCE 9/11, at 19 (2003); Rick Gee, *Decoding Bush’s Newspeak* (Sept. 23, 2003), *at* <http://www.strike-the-root.com/columns/Gee/gee4.html>; Matthew Harwood, *Bush Administration Newspeak on Iraq* (Dec. 17, 2003), *at* <http://www.commondreams.org/scriptfiles/views03/1217-45.htm>; Scott D. O’Reilly, *Bushspeak: Bush and Orwell* (July 21, 2003), *at* http://www.dissidentvoice.org/Articles7/OReilly_Bushspeak.htm; Norman Solomon, *Orwellian Logic 101—A Few Simple Lessons*, *at* <http://www.fair.org/media-beat/980827.html> (last visited Mar. 28, 2005); Keith Windschuttle, History, Truth and Tribalism, Address at the Historical Society at University of Chicago (Nov. 28, 2001), *at* <http://www.sydneyline.com/Killing.htm>.

22. 115 Stat. at 287–88; *see also* Am. Civil Liberties Union, Section 215 FAQ (Oct. 24, 2004), *at* <http://www.aclu.org/Privacy/Privacy.cfm?ID=11054&c=130>; Ann Beeson & Jameel Jaffer, *Unpatriotic Acts, The FBI’s Power to Rifle Through Your Records and Personal Belongings Without Telling You* (July 2003), *at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13246&c=206>; CHARLES DOYLE, THE USA PATRIOT ACT: A LEGAL ANALYSIS (Cong. Research Serv., Report No. RL31377, 2002), *available at* <http://www.fas.org/irp/crs/RL31377.pdf>.

23. 50 U.S.C.A. § 1861 (West Supp. 2003). Under various provisions of the Foreign Intelligence Surveillance Act, in the last twenty-five years, a special federal court has secretly granted approximately 15,000 surveillance orders and modified or denied them in only a handful of cases. *See In re* All Matters Submitted to the Foreign

religious groups know that the Federal Bureau of Investigations (FBI) can now demand their personal records even if they have done nothing wrong, some are already declining to attend mosques, make charitable contributions, speak about controversial issues, visit websites, or engage in other activity that may become the subject of a record.²⁴

If not repealed or renewed, section 215 will sunset, with some qualifications, on December 31, 2005.²⁵ Prior to the PATRIOT Act, the statute was limited to business records related only to common carriers, public accommodation, physical storage, and vehicle rental facilities.²⁶ It also required that the U.S. Attorney General certify to a court that the records sought were relevant to the investigation, and that there was reason to believe that the target was a foreign power or an agent of a foreign power.²⁷

I will examine three aspects of this issue: first, what the DOJ and Attorney General John Ashcroft said about section 215 in public relations statements on their official website and elsewhere; second, what the statute actually authorizes; and, third, what Ashcroft admitted in sworn testimony before the U.S. House of Representatives' Judiciary Committee.

The DOJ maintains a website reassuringly entitled *Preserving Life and Liberty*.²⁸ There, it posts the PATRIOT Act, speeches, and reports, including one called *Dispelling the Myths*.²⁹ Describing section 215 as

Intelligence Surveillance Court, 218 F. Supp. 2d 611, 615 (Foreign Intel. Surv. Ct. 2002). The government recently appealed a rare modification of its request and obtained a reversal from a special court of review, the first one ever convened. *See In re Sealed Case*, 310 F.3d 717, 719 (Foreign Intel. Surv. Ct. 2002); *In re Foreign Intelligence*, 218 F. Supp. 2d at 615-18, 621, 623-25.

24. *See* Plaintiff's Response to Defendant's Motion to Dismiss at 16, Muslim Cmty. Ass'n v. Ashcroft (E.D. Mich. filed Nov. 3, 2003) (No. 03-72 913), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14306&c=262>; *see also* Nat Hentoff, *The State of Our Liberties*, FED. OBSERVER (Feb. 3, 2005), at <http://www.federalobserver.com/archive.php?aid=6451>.

25. *See* 50 U.S.C.A. § 1861; 18 U.S.C.A. § 2510 (West Supp. 2004).

26. 50 U.S.C. §§ 1861-1862(b) (2000).

27. *Id.* § 1862(a).

28. U.S. Dep't of Justice, *Preserving Life and Liberty*, at <http://www.lifeandliberty.gov/> (last visited Mar. 28, 2005) [hereinafter *Life and Liberty*]; *see also* U.S. DEP'T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 1-2 (2004); Center for Democracy and Technology, *Setting the Record Straight: An Analysis of the Justice Department's PATRIOT Act Website* (Oct. 27, 2003) at <http://www.cdt.org/security/usapatriot/031027edt.shtml> (where the DOJ "website does address controversial aspects of the law, it provides misleading, incomplete, and, in some cases, incorrect information").

29. *See* DOYLE, *supra* note 22; U.S. Dep't of Justice, *Dispelling the Myths*, at http://www.lifeandliberty.gov/subs/add_myths.htm (last visited Mar. 28, 2005) [hereinafter *Dispelling the Myths*]. *But see* AM. CIVIL LIBERTIES UNION, SEEKING TRUTH FROM JUSTICE: PATRIOT PROPAGANDA (2003), at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13099&c=207>; Press Release, American Civil

addressing “[a]ccess to business records and other items under the Foreign Intelligence Surveillance Act,” that report describes as a “myth” the statement that “[m]any [people] are unaware that their library habits could become the target of government surveillance.”³⁰ It describes as “[r]eality” that “[t]he library habits of ordinary Americans are of *no interest* to those conducting terrorism investigations”; and that “[o]btaining business records is a long-standing law enforcement tactic.”³¹

The DOJ’s website asserts that “[s]ection 215 has a *narrow scope*.”³² It can be used only (1) “‘to obtain foreign intelligence information not concerning a United States person,’ or (2) ‘to protect against international terrorism or clandestine intelligence activities.’ *It cannot be used to investigate ordinary crimes, or even domestic terrorism.*”³³ The website emphasizes that section 215 “preserves *First Amendment rights*. It expressly provides that the FBI cannot conduct investigations ‘of a United States person solely on the basis of activities protected by the First Amendment to the Constitution of the United States.’”³⁴

In other public statements, Ashcroft characterized the American Library Association’s concern about section 215 as “hysteria.”³⁵ The

Liberties Union, ACLU Says Justice Dept.’s PATRIOT Act Website Creates New Myths About Controversial Law (Aug. 26, 2003), at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13371&c=262>. For the American Civil Liberties Union’s (ACLU) website on the PATRIOT Act, see Am. Civil Liberties Union, USA PATRIOT Act, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12126&c=207>. For additional critiques of the PATRIOT Act, see Laurie Thomas Lee, *The USA Patriot Act and Telecommunications: Privacy Under Attack*, 29 RUTGERS COMPUTER & TECH. L.J. 371 (2003); Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306 (2004); and Richard A. Glenn, *Civil Liberties in an Age of Terrorism*, TRIAL, Apr. 2004, at 18.

30. *Dispelling the Myths*, *supra* note 29.

31. *Id.* But see Anne Klinefelter, *The Role of Librarians in Challenges to the USA PATRIOT Act*, 5 N.C. J.L. & TECH. 219, 219–20 (2004) (“Librarians continue to assert that the threat of government surveillance creates a chilling effect on library use.”); Susan Nevelow Mart, *Protecting the Lady from Toledo: Post-USA PATRIOT Act Electronic Surveillance at the Library*, 96 LAW LIBR. J. 449, 461–68 (2004) (“The USA PATRIOT Act has expanded and simplified the ability of the government to compel the disclosure of patrons’ reading habits.”); Lee S. Strickland et al., *Patriot in the Library: Management Approaches when Demands for Information Are Received from Law Enforcement and Intelligence Agents*, 30 J.C. & U.L. 363, 365 (2004) (“Of concern to the library community are the surveillance and search provisions of the USA PATRIOT Act and the impact such provisions may have on the principles of intellectual freedom.”).

32. *Dispelling the Myths*, *supra* note 29.

33. *Id.*

34. *Id.*

35. John Ashcroft, Remarks at National Restaurant Association’s Annual Public Affairs Conference (Sept. 15, 2003), at <http://www.usdoj.gov/ag/speeches/>

DOJ's director of public affairs describes section 215 as having only a "narrow scope," as going "to great lengths to preserve . . . First Amendment rights,"³⁶ and as requiring a court order.³⁷

A trusting reader of such public statements might understandably conclude that section 215 is aimed primarily at business records, not at library or personal records, and at foreign terrorists, not American citizens; that it affirmatively preserves First Amendment rights; and that its application will be subjected to serious judicial review. Most readers and websurfers will likely not review the actual statutory language or Ashcroft's testimony before the House Judiciary Committee.

The statute, however, broadly expands the definition of accessible records. It now extends to "tangible things (including books, records, papers, documents, and other items)."³⁸ It explicitly authorizes the director of the FBI or his designee to conduct an investigation of a U.S. person,³⁹ a term that includes a U.S. citizen or lawful resident alien.⁴⁰ Although such an investigation cannot be "solely" on the basis of activities protected by the First Amendment, the term "solely" seriously limits the protection.⁴¹ Would you want to rely on the government's determination that you were "solely" engaged in protected activity and not in anything else? The statute plainly suggests that the FBI can investigate United States persons based in part on their exercise of First Amendment rights,⁴² without any safe harbor for such exercise.⁴³ Moreover, the First Amendment limitation applies only to an investigation of a U.S. person.⁴⁴ A visiting uncle from a foreign country could be the subject of an investigation and, while staying at his nephew's house in the United States, the investigation could extend to the nephew's records.

2003/091503nationalrestaurant.htm; see also *All Things Considered: Growing Distrust Between Library and Civil Liberties Groups and the Justice Department over a Provision in the USA Patriot Act* (National Public Radio broadcast, Sept. 18, 2003) (broadcasting an exchange between Mark Corallo, spokesman for the U.S. Department of Justice (DOJ), and Ann Beeson of the ACLU). See also Center for Democracy and Technology, *DOJ Says It Has Never Used Key PATRIOT Provision: CDT Analysis* (Sept. 23, 2003) at <http://www.cdt.org/security/usapatriot/030923cdt.shtml>.

36. Press Release, U.S. Department of Justice, Statement of Barbara Comstock, Director of Public Affairs, Regarding Section 215 of the USA PATRIOT Act (Jul. 30, 2003), at <http://www.fas.org/irp/news/2003/07/index.html>.

37. Barbara Comstock, *Rhetoric vs. Reality: The Department of Justice Defends the Patriot Act*, NAT'L REV. ONLINE (Sept. 3, 2003), at <http://www.nationalreview.com>.

38. 50 U.S.C.A. § 1861(a)(1) (West Supp. 2003).

39. *Id.*

40. *Id.*

41. *Id.*

42. See *id.* § 1861(a)(1), (2)(B).

43. See *id.*

44. See *id.* § 1861(a)(1).

Furthermore, under section 215, the government can secretly apply to a designated federal judge or magistrate for an order.⁴⁵ The targets are not notified that their privacy has been compromised.⁴⁶ The government's application need only "specify that the records concerned are sought for an authorized investigation conducted" pursuant to the statute.⁴⁷ This standard is a most lenient one. The government need not have probable cause, or even reasonable grounds, to believe that the target of the order is a criminal suspect or foreign agent.⁴⁸ The statute requires that "the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section."⁴⁹ The statute gives the judge no authority or leeway to require evidence or go beyond a determination that the government's application itself meets the statutory requirements.⁵⁰

Section 215 provides that the order "shall not disclose that it is issued for purposes of an investigation."⁵¹ The person who is the subject of the investigation may never know about it.⁵² Section 215 further contains a nondiscretionary gag requirement that "[n]o person shall disclose to any other person" that the FBI sought or obtained tangible things.⁵³

In his testimony before the House Judiciary Committee on June 5, 2003, Ashcroft, in response to questions from U.S. Representative Tammy Baldwin of Wisconsin, acknowledged that section 215 had expanded the records accessible.⁵⁴ Ashcroft agreed that the standard for

45. *See id.* § 1861(b)-(c).

46. *See* § 1861(c)-(d).

47. *Id.* § 1861(b)(2).

48. *See id.* § 1861(c)(1).

49. *Id.*

50. *See id.*

51. *Id.* § 1861(c)(2).

52. *See id.* § 1861(d).

53. *Id.* § 1861(c)(2).

54. Testimony of Attorney General John Ashcroft, U.S. House of Representatives, Committee on the Judiciary (June 5, 2003), at <http://www.usdoj.gov/ag/testimony/2003/060503aghouseremarks.htm>. The prepared statement does not contain Attorney General John Ashcroft's answers to Representative Tammy Baldwin's questions or any other questions. It does, however, state: "Note: The Attorney General often deviates from prepared remarks." *Id.* For his testimony at the hearing, see Lane County Bill of Rights Defense Committee, House Judiciary Committee, John Ashcroft Testimony (June 5, 2003) [hereinafter Ashcroft Testimony], at <http://www.lanerights.org/ashcroft060503.htm>. The Attorney General's guidelines that the Federal Bureau of Investigations (FBI) must follow "are classified at the Secret level." Letter from Jamie E. Brown, Acting Assistant Attorney General, U.S. Department of Justice, to the Honorable F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives 2 (May 13, 2003), at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotwcover051303final.pdf>. Section

seeking a court order was lower than probable cause.⁵⁵ He admitted that the FBI could ask for “book purchase records,” “a library book or computer records,” and that “there are some education records that would be susceptible to demand.”⁵⁶ He conceded that “probably the FBI could get genetic information,” such as “a little DNA” left on a glass of water by someone who had committed a crime.⁵⁷

Similarly, the DOJ downplays the intrusive effect of other provisions of the PATRIOT Act, for example, the “sneak and peek” provision that authorizes government agents to come to a private residence in secret, to look around, to take photographs, and even to seize property without the owner’s knowledge.⁵⁸ Notice may be delayed for “a reasonable period,” which “may thereafter be extended by the court for good cause shown.”⁵⁹

Likewise, the DOJ downplays the intrusive effect of National Security Act letters, that is, administrative subpoenas issued without court order.⁶⁰ Such nonjudicial procedure does not afford the protections required for grand jury subpoenas.⁶¹ At least one federal court has held that the statute authorizing nonjudicial administrative subpoenas is unconstitutional.⁶² Moreover, a prosecutor conducts the

215 “does not require that an application concerning a U.S. person make an explicit certification that the investigation is not being conducted solely on the basis of activities protected by the First Amendment.” *Id.* at 3.

55. Ashcroft Testimony, *supra* note 54.

56. *Id.*

57. *Id.*

58. 18 U.S.C. § 3103a(b) (2000); *see also* Rita Shulman, *USA Patriot Act: Granting the U.S. Government the Unprecedented Power to Circumvent American Civil Liberties in the Name of National Security*, 80 U. DET. MERCY L. REV. 427, 429–31 (2003). *But see Dispelling the Myths, supra* note 29 (discussing section 213); U.S. Dep’t of Justice, *Delayed Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime* (Sept. 2004), *available at* <http://www.usdoj.gov/dag/patriotact213report.pdf>; House Committee on the Judiciary, Subcommittee on the Constitution, *Anti-Terrorism Investigations and the Fourth Amendment After September 11, 2001* (May 20, 2003), *at* http://commdocs.house.gov/committees/judiciary/hju87238.000/hju87238_of.htm.

59. 18 U.S.C. § 3103a(b)(3).

60. 18 U.S.C. § 2709. The PATRIOT Act amended section 2709 of the U.S. Code to remove the “previous requirement that § 2709 inquiries to have a nexus to a foreign power, replacing that prerequisite with a broad standard of relevance to investigations of terrorism or clandestine intelligence activities.” *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 483 (S.D.N.Y. 2004) (citing the PATRIOT Act).

61. *See* FED. R. CRIM. P. 17; *see also* 2 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* 3D §§ 271–279 (2000 & West Supp. 2004). The false analogy to grand jury subpoenas is repeatedly invoked at the highest levels of the current administration. *See, e.g., Another Close Call: George Bush and John Kerry Comment on Key Issues in the 2004 Presidential Election Race*, 90 A.B.A. J. 50 (2004) (referring to comments made by President George W. Bush analogizing grand jury subpoenas to secret court orders).

62. *See Doe*, 334 F. Supp. 2d at 506.

grand jury, and the subpoenas he obtains are subject to limitations in applicable rules and to judicial review, both restraints on excessiveness.⁶³ The target has an opportunity to ask the federal court from which the subpoena was issued to quash or modify the subpoena or to uphold claims of privilege such as the attorney-client privilege.⁶⁴ The person, if he testifies, is not subject to a statutory gag order, and may speak about the subpoena and his testimony unless specifically restrained by a court for good reason in a particular case.⁶⁵

In a democracy, the government is implicitly constrained by the informed consent of its citizens. When citizens visit the website of the DOJ, they are entitled to an objective description of the law, not an advocate's brief or public relations statements, which omit crucial points or distort the language and meaning of the statute. We should remember the wisdom of Thucydides who related the loss of clear meanings of words to the subsequent degradation and decline of Athens.⁶⁶

The truth comes first. In the last few decades, our country has experienced several deplorable sequences of governmental deception:

- The Johnson Administration's deception of the U.S. Congress and the country led to the infamous Tonkin Gulf Resolution of 1964,⁶⁷ an expansion of the Vietnam War, and more than one generation's distrust of government.

63. Mark L. Wolf, *One Judge's Reflections on the Battle Against Terror*, Speech to Carr Center for Human Rights at Harvard University (Nov. 16, 2004) (on file with author).

64. See FED. R. CRIM. P. 17; 2 WRIGHT, *supra* note 61, § 275.

65. FED. R. CRIM. P. 6(e); SUSAN W. BRENNER & GREGORY G. LOCKHART, *FEDERAL GRAND JURY PRACTICE* § 8.3 (1996).

66. THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 242 (Rex Warner trans., 1954). We should recognize the importance of accurate words in fairly conducting ourselves with each other and the dangers of substituting propaganda and disinformation for truth. As Chalmers Johnson has likewise written:

If present trends continue, four sorrows, it seems to me, are certain to be visited on the United States. . . . First, there will be a state of perpetual war, leading to more terrorism against Americans . . . and a growing reliance on weapons of mass destruction by smaller nations Second, there will be a loss of democracy and constitutional rights Third, an already well-shredded principle of truthfulness will increasingly be replaced by a system of propaganda, disinformation, and glorification of war, power, and the military legions. Lastly, there will be bankruptcy"

CHALMERS JOHNSON, *THE SORROWS OF EMPIRE* 284 (2004).

67. H.R.J. Res. 1145, 88th Cong. (1964), *available at* <http://www.ourdocuments.gov/doc.php?flash=old&doc=98>; also ERIC ALTERMAN, *WHEN PRESIDENTS LIE: A HISTORY OF OFFICIAL DECEPTION AND ITS CONSEQUENCES* 160-237 (2004). Eric Alterman quotes former Senator J. William Fulbright as stating: "The biggest lesson I learned from Vietnam is not to trust government statements. I had no idea until then." ALTERMAN, *supra*, at 237.

- The Nixon Administration's deception of Congress and the country in the Watergate affair led to demands for the truth from many quarters, including notably from members of President Richard Nixon's own political party, and eventually to his resignation.
- The Reagan Administration's deception of Congress and the country led to investigations and prosecutions concerning selling arms to Iran and financing the Contras in Nicaragua, and reinforced the public's distrust of government.⁶⁸
- President Bill Clinton's personal deception about the Monica Lewinsky affair led to his impeachment by the U.S. House of Representatives and a trial in the U.S. Senate, from which he emerged with history's asterisk attached to his name.

Today's governmental assault on truth is joined with its assault on liberty. The PATRIOT Act is not the only example. The government's mass and long-term detention of prisoners at Guantanamo Bay;⁶⁹ its detention of American citizens without bail or access to a lawyer;⁷⁰ its assertion of power to label citizens and others as "enemy combatants" and detain them indefinitely without judicial review or legal assistance;⁷¹ its corollary justification that allowing detainees a lawyer would impede investigations;⁷² its torture and cruel, inhumane, and degrading treatment of prisoners at Abu Ghraib, Guantanamo, in Afghanistan, and

68. See generally ALTERMAN, *supra* note 67, at 238-93; LAWRENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP* (1997).

69. See *In re Guantanamo Detainee Cases*, Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV01227 (RBW), 04-CV-1254 (HHK), 2005 U.S. Dist. LEXIS 1236 (D.C. Cir. Jan. 31, 2005).

70. See *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

71. See *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

72. See Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM*, 47, 54-55 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

The hope of getting Padilla to talk was, in fact, cited by government lawyers to Judge Mukasey as grounds for barring his access to counsel. With considerable candor, their briefs said any consultation with a lawyer would interfere with the continuing questioning of Padilla. Of course, there is an irony in that. One of the very reasons the U.S. Constitution guarantees all criminal defendants the right to counsel, and the Supreme Court in the case of *Gideon v. Wainwright* in 1963 held that poor defendants must be given counsel by the state, is that defendants on their own may be overborne by police and prosecutors.

elsewhere;⁷³ its notion that it can try people in military tribunals without the process that even murderers, armed robbers, and traitors are due;⁷⁴ and its claim that even the U.S. Supreme Court cannot review its actions⁷⁵ are all threats to our liberty. The Supreme Court has just begun to address some of these issues in recent cases.⁷⁶ If these usurpations are not stopped, it seems only likely that the government's appetite for intrusion will grow. So far, however, the government has met little effective resistance.

The government's assault on truth and liberty is joined with a government assault on openness and an insistence on secrecy. After the September 11th attacks, Ashcroft issued a memorandum to federal agencies reversing the previous presumption of openness under the Freedom of Information Act (FOIA), and pledged the DOJ's support for the denial of FOIA requests.⁷⁷ Under his direction, the government secretly arrested and deported hundreds of Muslim and Arab immigrants after closed deportation hearings.⁷⁸ The U.S. Court of Appeals for the Sixth Circuit held that secret deportation hearings are unconstitutional

73. See, e.g., ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, available at http://www.publicintegrity.org/docs/AbuGhraib/Taguba_Report.pdf; see also Lewis, *supra* note 18, at xiii-xvi; Michael Traynor, *In Response: The Ticking Bomb Contention*, BULL. AM. ACAD., Winter 2005, at 41 [hereinafter Traynor, *The Ticking Bomb Contention*], available at <http://www.amacad.org/publications/bulletin/winter2005/response.pdf>; Letter from Michael Traynor, to Phillip B. Heymann, James Barr Ames Professor of Law, Harvard University (Dec. 16, 2004), available at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/Traynor_Letter.pdf.

74. See *Padilla*, 124 S. Ct. at 2735 ("Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber."); *Rasul*, 124 S. Ct. at 2699 ("What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."); *Hamdi*, 124 S. Ct. at 2639 ("The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain [enemy combatants] pursuant to Article II of the Constitution.").

75. In the key case of *Rasul v. Bush*, see Brief for the Respondent in Opposition to the Petitioner for Certiorari, *Rasul* (Nos. 03-334, 03-343), available at http://www.jenner.com/files/tbl_s69NewsDocumcntOrder/FileUpload500/114/BriefForTheRespondents.pdf. For the respondents' brief that was filed after the U.S. Supreme Court granted certiorari, see Brief for the Respondent, *Rasul* (Nos. 03-334, 03-343), available at 2004 WL 425739.

76. See *Padilla*, 124 S. Ct. at 2715; *Rasul*, 124 S. Ct. at 2690; *Hamdi*, 124 S. Ct. at 2639.

77. Memorandum from John Ashcroft, U.S. Attorney General, to Heads of All Federal Departments and Agencies (Oct. 12, 2001), at <http://www.us.doj.gov/04foia/011012.htm>; U.S. Dep't of Justice, Office of Information and Privacy, New Attorney General FOIA Memorandum Issued (Oct. 15, 2001), at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

78. See Lewis, *First They Came for the Muslims*, *supra* note 5.

under the First Amendment.⁷⁹ The court stated that “[a] government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution,” and that “[o]pen proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.”⁸⁰ The U.S. Court of Appeals for the Third Circuit held the opposite,⁸¹ despite a thoughtful dissent.⁸² Notwithstanding growing concerns about secrecy, the government readily makes use of secret orders combined with gag orders, a dangerous problem exacerbated by the PATRIOT Act.⁸³

79. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002).

80. *Id.* at 710–11. See generally Shirley C. Rivadeneira, *The Closure of Removal Proceedings of September 11th Detainees: An Analysis of Detroit Free Press, North Jersey Media Group and the Creppy Directive*, 55 ADMIN. L. REV. 843 (2003).

81. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002) (Scirica, J., dissenting).

82. *Id.* at 221–29 (Scirica, J., dissenting).

83. See Letter from William E. Mosehella, Assistant Attorney General, to L. Ralph Meecham, Director, Administrative Office of the United States Courts 1 (Apr. 30, 2004) (stating that, in 2003, “1727 applicants were made to the Foreign Intelligence Surveillance Court for electronic surveillance and physical search”), available at http://www.epic.org/privacy/terrorism/fisa/2003_report.pdf; see also Letter from Jamie E. Brown, Acting Associate Attorney General to F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives (May 13, 2003) (detailing responses to a question on the increased use of national security letters, and a question on delayed notice of the execution of a search warrant, which was the forty-seventh request as of April 1, 2003). The reports by the DOJ about its use of secret orders and gag orders can be cryptic as well as classified. Both the American Civil Liberties Union (ACLU) and the Electronic Privacy Information Center have been active in seeking to retrieve and publish information. See, e.g., Press Release, American Civil Liberties Union, ACLU Says that Patriot Act Has Been Misused, Extent Unknown Because of Government Stonewalling (June 7, 2004), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15903&c=206>; Press Release, American Civil Liberties Union, Justice Department May Be Using Controversial Patriot Act Powers After All, Letter Reveals (May 20, 2004) (reporting that, in a related development, a federal court ordered the FBI to disclose Patriot Act records to the ACLU), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15844&c=262>; Press Release, American Civil Liberties Union, New Records Show that FBI Invoked Controversial Surveillance Powers Weeks After Attorney General Declared that Power Had Never Been Used (June 17, 2004), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15959&c=262>; U.S. Department of Justice, Business Record Order Requests Since 10/26/2001 (Feb. 13, 2003) (indicating that the records are blacked out and marked “classified”), available at http://www.aclu.org/patriot_foia/2003/sec215_fbi.pdf; U.S. Department of Justice, Transactional Records NSLs Since 10/26/2001 (Aug. 6, 2003) (indicating that the records are blacked out and marked “classified”), at http://www.aclu.org/patriot_foia/FOIA/NSLlists.pdf; ACLU Reveals Secret Suit over FBI (Apr. 29, 2001), at <http://www.parapolitics.info/phorum/rcad/php?f=27&I=61&t=61>. ACLU; Am. Civil Liberties Union, *Patriot FOIA* (providing a list of, and links to, the records released by the DOJ in response to FOIA requests), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15327&c=262> (last visited Mar. 28, 2005).

The current repression is reminiscent of the 1950s and 1960s. In the early 1950s, although there were many pleasant days, the Berkeley campus was in turmoil over a loyalty oath required by the university.⁸⁴ Brave, able, and patriotic teachers lost their jobs when they refused to sign the oath, which the Supreme Court of California eventually held to be invalid.⁸⁵ The controversy cast a pall on academic freedom at Berkeley for decades. During that time, the FBI was also spying on J. Robert Oppenheimer and other nuclear physicists, even to the extent of listening in on conversations between Oppenheimer and his lawyer.⁸⁶ Students in the ROTC, in which I was enrolled, were apprehensive about spending time in the area of Sather Gate, the campus entrance, where both soapbox speakers and surveillance cameras were located, lest they jeopardize their future military commissions.

The repression at Berkeley did not end with a sudden burst of freedom in the 1960s, despite the notoriety of the flower children and the Free Speech Movement.⁸⁷ We now know from FBI records released under FOIA after many years of litigation with the government⁸⁸ that in 1969, the governor of California planned for “the destruction of

84. 1 CLARK KERR, *THE GOLD AND THE BLUE: A PERSONAL MEMOIR OF THE UNIVERSITY OF CALIFORNIA 1949–1967*, at 3–15 (2001); Robert Greenberg, *The Loyalty Oath and California: A Report on Events, 1949–1958*, at http://www.fsm-a.org/stacks/AP_files/APLoyaltyPath.html (last visited Mar. 28, 2005); UC Loyalty Oath Remembered on 50th Anniversary (Sept. 29, 1999), at <http://www.berkeley.edu/news/berkeleyan/1999/0929/loyalty.html>. The Bancroft Library at the University of California at Berkeley has an inventory of the letters received protesting against the loyalty oath and Professor Jacob Loewenberg’s dismissal. Collection No. BANC MSS 68/4c, <http://www.oac.cdlib.org/cgi/f/findaid/findaid-idx?type=boolean;c=tranoacX;view=text;subview=fulltext;drgn=item;id=ark%3A%2F13030%2Ftf9m3nb40f>.

85. Tolman v. Underhill, 249 P.2d 280, 283 (Cal. 1952); see also Pockman v. Leonard, 249 P.2d 267 (1952), *appeal dismissed*, 345 U.S. 963 (1953).

86. See generally GREGG HERKEN, *BROTHERHOOD OF THE BOMB* 3, 279–80 (2002). For expanded endnotes detailing the U.S. government’s surveillance of J. Robert Oppenheimer, see GREGG HERKEN, *BROTHERHOOD OF THE BOMB: THE TANGLED LIVES AND LOYALTIES OF ROBERT OPPENHEIMER, ERNEST LAWRENCE, AND EDWARD TELLER*, available at http://www.brotherhoodofthebomb.com/bhbmedia/notes_chap17.doc.

87. See 1 KERR, *supra* note 84, at 157, 208–09, 226, 323, 382, 415; *Berkeley Action: Free Speech Movement (FSM)/People’s Park*, at http://students.berkeley.edu/resource/r_html/r10_3.html; see also DAVID MARANISS, *THEY MARCHED INTO SUNLIGHT* (2003) (describing similar events in Madison, Wisconsin). The hardships to the University of California at Berkeley also included “the assaults on the university by Governor Ronald Reagan (and later by Governor Jerry Brown) that were among the most severe by any governors on any universities in U.S. history.” 1 KERR, *supra* note 84, at 415.

88. See, e.g., Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988); Rosenfeld v. U.S. Dep’t of Justice, 761 F. Supp. 1440 (N.D. Cal. 1991).

disruptive elements on college campuses.’”⁸⁹ FOIA documents show that Governor Ronald Reagan’s legal affairs secretary met with the FBI to review plans to “hound” protest groups, and to seek FBI approval of these plans.⁹⁰ This lawyer, whom I remember as a seemingly mild and unassuming person, told the FBI that Reagan’s administration planned to bring building code violations against them, audit their taxes, and engage in psychological warfare⁹¹—beware the smiling face of repression. FBI Director J. Edgar Hoover placed his initials and wrote “O.K.” at the bottom of his agent’s memorandum summarizing the nefarious plans.⁹²

The FBI’s scrutiny of the university even noted the following essay topic on a basic English examination: “[w]hat are the dangers to a democracy of a national police organization like the FBI which operates secretly and is unresponsive to public criticism?”⁹³ Although many things have changed, that English professor’s exam question is still relevant. Given today’s climate, and the current administration’s interest in establishing secret police powers, one might expect that it would still elicit government scrutiny.

My background and interest in free, honest, and open expression and liberty make me skeptical of what I believe is our government’s repression of truth and liberty in an overreaction to terror. Like many Americans, I believe that our country’s essential values and interests as a free country are inextricably linked.⁹⁴ The values of truth, liberty, and openness that I speak about provide the very foundation for political

89. See Seth Rosenfeld, *The Campus Files/The Governor’s Race*, S.F. CHRON., June 9, 2002, at F6 (quoting Herbert E. Ellingwood, one of California Governor Ronald Reagan’s top legal advisers).

90. Memorandum from C.D. De Coach, to Mr. Tolson (July 17, 1969), at <http://sfgate.com/news/special/pages/2002/campusfiles/documents/6b1.shtml>; Rosenfeld, *supra* note 89, at F6.

91. Memorandum from C.D. De Coach, to Mr. Tolson, *supra* note 90.

92. *Id.* Although the FBI has engaged in civil rights investigation and enforcement, during this period, FBI Director J. Edgar Hoover took a restrictive view of his authority and, despite some achievements, there was a constant intradepartmental struggle between the FBI and the lawyers who wanted to intensify civil rights enforcement. See John T. Elliff, *Aspects of Federal Civil Rights Enforcement: The Justice Department and the FBI, 1939–1964*, in 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 605, 612 (Donald Fleming & Bernard Bailyn eds., 1971). For the risks of electronic profiling and government use of modern technology, see JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS USE* (2004); and Philip K. Howard, *Every Move You Make*, WASH. POST., Apr. 4, 2004, at P10 (reviewing ROSEN, *supra*).

93. See Memorandum from SAC, Los Angeles, to FBI Director 1–3 (Feb. 1, 1960), at <http://sfgate.com/news/special/pages/2002/campusfiles/documents/2-1.shtml>.

94. See John McCain, The Landon Lecture Address to Kansas State University (Mar. 15, 1999), at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=805.

debate, robust differences of view, and varied and competing ideas about how international, national, regional, and local challenges can be met. These values are common ground in the writings and speeches of such Senators as John McCain⁹⁵ and the late Barry Goldwater,⁹⁶ no less than in those of Patrick Leahy⁹⁷ and Russell Feingold,⁹⁸ all extraordinary citizens who otherwise may differ mightily on many issues of social policy. It is on that common and nonpartisan ground that I speak today.

I have no illusions about the very real threat of terrorism. We have experienced the September 11th terrorist attacks, Spain has experienced the March 11th terrorist attacks, and at any time, in some part of the world, including our own country, the bloody hounds of terror again may kill and maim innocent civilians and try to demonstrate their fanatical commitment and prowess and our corresponding vulnerability. Circumstances have changed materially since September 11th.

The appropriate responses to terrorism in my view include: smart and aggressive actions to gather, assess, and develop reliable intelligence,⁹⁹ but not to engage in demagoguery or fear mongering; to reform our intelligence gathering processes and agencies, but not to blame our failures on bureaucracy; to educate our citizens, but not to assume a color coded "alert" system stands for true education; to prevent terrorist attacks when we can, but not to make enemies around the globe; to develop effective crisis management and first-response programs with the involvement of local and state police, fire, and emergency officials, and supporting citizen groups; to engage in constructive and respectful diplomacy; to foster international friendships and communications and cooperative actions, but not antagonistic unilateralism; to increase our knowledge of and international supervision

95. *Id.*; see also HERMAN VAN GUNSTEREN, A THEORY OF CITIZENSHIP: ORGANIZING PLURALITY IN CONTEMPORARY DEMOCRACIES 145 (1998) (stating that "freedom is the core of liberal politics and ethics, the axiom on which all arguments elaborate"); John McCain, Remarks at the Inter-Parliamentary Conference on Freedom and Human Rights in Central Asia (May 1, 2003), at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=941.

96. See BARRY GOLDWATER, THE COMING BREAKPOINT 14-25, 168-77 (1976); BARRY GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 9-23 (1960).

97. See Patrick Leahy, Statement on the Introduction of the Leahy-Craig-Sununu-Durbin-Reid Patriot Oversight Restoration Act of 2003 (Oct. 1, 2003), at <http://leahy.senate.gov/press/200310/100103g.html>.

98. See Russell Feingold, Statement of U.S. Senator Russell Feingold on the Anti-Terrorism Bill (Oct. 25, 2001), at www.senate.gov/~feingold/statements/01/10/102501at.html.

99. See PHILIP B. HEYMANN & JULIETTE N. KAYYEM, LONG TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM, at http://bcsia.ksg.harvard.edu/BCSIA_Content/documents/LTLS_finalreport.pdf (last visited Mar. 28, 2005).

over nuclear weapons; and even to engage in military actions on limited occasions approved by Congress or by the United Nations.

The appropriate responses include *some* of the provisions in the PATRIOT Act itself, including, for example, strengthening criminal penalties,¹⁰⁰ lengthening or eliminating statutes of limitation for certain terrorist crimes,¹⁰¹ creating a new crime of willfully attacking a mass transportation system,¹⁰² enhancing the government's ability to pay rewards to combat terrorism,¹⁰³ updating the law to apply to new technology such as cell phones, voice mail, and the Internet,¹⁰⁴ authorizing warrants from the federal judicial district to reach stored communications in another district,¹⁰⁵ improving the benefits and related procedures for public safety officers,¹⁰⁶ and expediting the hiring of translators at the FBI.¹⁰⁷

Our history provides some lessons about responding to violence and threats. Those lessons include trying to limit the response to the emergency and not overreacting based on broad classifications—political, religious, or racial. In the Civil War, when the Union was threatened, President Abraham Lincoln, among other acts, suspended the writ of habeas corpus in an effort to restore order, and disregarded Chief Justice Roger Taney's order to release John Merryman, who had been arrested by Union troops for helping to destroy railroad bridges.¹⁰⁸ President Lincoln, in a special message to Congress, asked his famous question: are “‘all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated’”?¹⁰⁹ Congress, which was not in session when President Lincoln acted, later approved

100. See 31 U.S.C.A. §§ 5321–5322 (West Supp. 2003).

101. See 18 U.S.C.A. § 3286.

102. See *id.* § 1993.

103. See *id.* § 3071; 22 U.S.C.A. § 2708; 28 U.S.C.A. § 524.

104. See 18 U.S.C.A. §§ 2510, 2703, 2711.

105. See *id.* § 2703(d).

106. See 42 U.S.C.A. § 3796c-1.

107. See 28 U.S.C.A. § 532.

108. See *Ex parte Merryman*, 17 F. Cas. 144, 114–45 (D. Md. 1861); see also WILLIAM J. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 26 (1998).

109. See REHNQUIST, *supra* note 108, at 28 (quoting President Abraham Lincoln). In *A (FC) & Others (FC) v. Secretary of State of the Home Department*, [2004] UKHL 56 (Dec. 16, 2004), the Appellate Committee of the House of Lords held indefinite detention unlawful. In supporting this result, Lord Hoffman, in an eloquent opinion, stated that the test for justifying such an invasion of the fundamental right of liberty should be whether the invasion is necessary to prevent a threat to the life of the nation, *id.* ¶¶ 86–97, and that “[t]he real threat to the life of the nation, in the sense of a person living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these,” *id.* ¶ 97. The decision and the various individual opinions are at <http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>.

the suspension.¹¹⁰ A careful reading of history suggests that President Lincoln took what he viewed as emergency actions trusting that Congress would ratify them and believing that he was acting consistently with his oath of office.¹¹¹ Justice Sandra Day O'Connor has recently written that President Lincoln did not use his power "selfishly or arbitrarily" and "tried to err on the side of free speech."¹¹² In other incidents, there was far less calibration of emergency action and far less justification, for example, Attorney General A. Mitchell Palmer's raids during the Red Scare of the 1920s,¹¹³ and the government's forcible expulsion into internment camps of persons of Japanese ancestry during World War II.¹¹⁴

How shall we, as citizens, respond to deception, intrusion, and secrecy? The Constitution employs the word "citizen."¹¹⁵ That term is a solemn one connoting active membership in the civil community.¹¹⁶

110. REHNQUIST, *supra* note 108, at 37.

111. DANIEL FARBER, *LINCOLN'S CONSTITUTION* 194 (2003).

112. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* 94 (2003).

113. *See generally* THE PALMER RAIDS (Robert W. Dunn ed., 1948).

114. *See Korematsu*, 323 U.S. at 214. Another example involves President Franklin D. Roosevelt's invocation of military tribunals to try the Nazi saboteurs captured after they landed in the United States. *Ex parte Quirin*, 317 U.S. 1 (1942); *see also* *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Debate continues over the ramifications of the Supreme Court's decision to allow such trials to proceed, but it bears emphasis that it did so only after establishing its jurisdiction to review the president's action in a habeas corpus proceeding. *See Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) ("The standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied.").

115. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 1; *id.* art. IV, § 2; *id.* amend. XIV, § 1; *id.* amend. XV, § 1.

116. *See* PETER RIESENBERG, *CITIZENSHIP IN THE WESTERN TRADITION* 266 (1992); Alexander W. Astin, *The Cause of Citizenship*, CHRON. HIGHER EDUC., Oct. 6, 1995, at B1. "[A] citizen of the modern state must be, in Wolin's phrase, a 'multiple civil self' . . . not only participating in multiple venues—state, neighborhood, nation, civil society, social movements, voluntary associations—but participating in different ways, directly through representatives, or in more complexly mediated ways." J. Peter Eugen, *The Polis, Globalization, and the Politics of Place*, in *DEMOCRACY AND VISION: SHELDON WOLIN AND THE VICISSITUDES OF THE POLITICAL* 283 (Aryeh Botwinick & William F. Connelly eds., 2001) (quoting Sheldon S. Wolin, *Democracy Without the Citizen*, in *WOLIN, THE PRESENCE OF THE PAST* 180–91 (1989)); *see also* SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 603–04 (2d ed. 2004); Richard A. Posner, *LAW, PRAGMATISM, AND DEMOCRACY* 130–57 (2003) (stating his theory on "two concepts of democracy"); Cass R. Sunstein, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 233 (2001) ("[P]eople who live in desperate conditions cannot live good lives . . . [and] are also unable to enjoy the status of citizenship."). On the important relationship between education and citizenship, *see Politics, Education and Citizenship*, in 6 *EDUCATION, CULTURE AND VALUES* (Mal Leicester et al. eds., 2000); Bernard Crick, *Citizenship and Education*, Address to the Twenty-Fifth Annual Conference of the Politics Association (1992), *reprinted in* BERNARD CRICK, *ESSAYS ON CITIZENSHIP* 97–111 (2000); Andrew Delbanco,

When the Constitution was formed, and Benjamin Franklin was asked upon leaving Independence Hall what the framers had created, he answered “[a] Republic, if you can keep it.”¹¹⁷ When Justice Louis Brandeis issued his celebrated concurring opinion in the 1927 criminal syndicalism case *Whitney v. California*,¹¹⁸ he said that “[t]hose who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”¹¹⁹

The Endangered University, 52 N.Y. REVIEW OF BOOKS No. 5 at 19, 21–22 (Mar. 24, 2005); *supra* note 3 and accompanying text.

117. See CASS SUNSTEIN, *REPUBLIC.COM* 105, 201 (2001).

118. *Whitney v. California*, 274 U.S. 357, 372 (1927); see also SUNSTEIN, *supra* note 117, at 47–48, 155–56, 183–84, 201; Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 73–83 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter *ETERNALLY VIGILANT*].

119. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring); see also JOHNSON, *supra* note 66, at 298. Johnson recently commented on the detentions and the Foreign Intelligence Surveillance Court of Review’s decision, and stated,

[t]he conclusion is unavoidable: a year and a half after September 11, 2001, at least two articles of the Bill of Rights, the fourth and the sixth, were dead letters, and the second half of Thomas Jefferson’s old warning “that when the government fears the people, there is liberty; when the people fear the government, there is tyranny” clearly applied.

JOHNSON, *supra* note 66, at 298; see also Wendell Berry, *A Citizen’s Response to “The National Security Strategy of the United States of America”*, in *CITIZENSHIP PAPERS* 9, 10 (2003) (“If constitutional guarantees of rights and immunities cannot be maintained in unfavorable circumstances, what is their point or value? Their value in fact originates in the acknowledgement of their usefulness in the times of greatest difficulty and to those in greatest need, as does the value of international law.”). Amartya Sen likewise stated:

Freedom is valuable for at least two distinct reasons. First, more freedom gives us more *opportunity* to achieve these things that we value, and have reason to value. . . . Second, the *process* through which things happen may also be of importance in assessing freedom. For example . . . the procedure of free decision . . . is an important requirement of freedom.

AMARTYA SEN, *RATIONALITY AND FREEDOM* 585 (2002); see also Jane Mansbridge, *On the Idea that Participation Makes Better Citizens*, in STEPHEN L. ELKIN AND KAROL EDWARD SOLTAN, *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 291 (1999). Professor Morris Fiorina, however, has taken a different view:

It is time to abandon the notion of political participation as part of human nature. It is not; it is an unnatural act. . . . Contrary to the suggestions of pundits and philosophers, there is nothing wrong with those who do not participate; rather, there is something unusual about those who do. . . .

[T]he kinds of demands on time and energy required to participate politically are sufficiently severe that those willing to pay the costs come disproportionately from the ranks of those with intensely held extreme views.

Morris P. Fiorina, *Extreme Voices: A Dark Side of Civic Engagement*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 395, 415–16 (Theda Skocpol & Morris P. Fiorina eds., 1999). Professor Herman R. van Gunsteren has analyzed the subject of

When Judge Learned Hand gave his famous speech entitled *The Spirit of Liberty* to new citizens in 1944, he said: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."¹²⁰

Almost fifty years ago, in 1956, when I was in my first year of military service, and when our country was emerging from the McCarthy Era, we faced the real and imagined threats of communism and a Soviet regime that had executed millions of people and enslaved millions of others in hard labor. With reference to Judge Hand's haunting words, my father then remarked as follows:

The judges whose job it is to apply [the Constitution] must carry liberty in their hearts even when other men have ceased to. Who is to say that liberty is dead in the hearts of men who are silent? Liberty is not lost suddenly, catastrophically; it is lost imperceptibly, by erosion. Who is to say it is irretrievably lost until it has died in the hearts of those whose job it was to care that it lived in the hearts of others?¹²¹

It would be good to be able to count on judges who, like Justice Robert Jackson in *West Virginia Board of Education v. Barnette* (the "Second Flag Salute" case) held: "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."¹²² Suppose, however, the day comes when ordinarily cautious judges become timid and uncourageous ones and we cannot count on either judges or legislators to protect our liberty.¹²³ Surely it would be better to stand up to repression, to organize for the preservation of liberty now

"[p]oliticians moralizing about civic responsibility" and suggested they are engaging in three separate "speech acts": "1. They drew inspiration from the past. 2. They misapprehended contemporary plurality. 3. They spoke to the responsible citizens, who were present, about the calculating citizens, who were absent." van Gunsteren, *supra* note 95, at 113, 115.

120. LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 144 (2d ed. 1953); see also GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 547-52, 639-43 (1994).

121. Roger J. Traynor, *Law and Social Change in a Democratic Society*, U. ILL. L.F. 230, 241 (1956).

122. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

123. See N. Patrick Flanagan III, *Are the Courts in Jeopardy of Being Marginalized*, 11 NEV. LAW. 6, 6-7 (2003); Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795 (2004); Wolf, *supra* note 63.

while there are still judges and legislators and conscientious executives who may listen.

Over 2500 years ago, Heraclitus of Ephesus said that “[t]he major problem of human society is to combine that degree of liberty without which law is tyranny, with that degree of law without which liberty becomes license.”¹²⁴ We should ask ourselves what responsibility we, as citizens, have to preserve that balance if our courts, legislators, and executives do not do so.

In considering the responsibilities of citizenship, the starting point is our Constitution. It balances legislative, executive, and judicial power, allocates authority between the national government and state governments, reserves unallocated power to the people, and establishes rights of liberty and equality that are unparalleled in the world, and in large measure are enforceable by courts.¹²⁵ It says hardly anything, however, about the responsibilities of citizens. The Thirteenth Amendment prohibits slavery, but overall, the Constitution, including its amendments, is not structured to address the duties of citizens.¹²⁶ Even such a basic issue as whether individuals must identify themselves in response to a request from a police officer was not decided by the Supreme Court until 2004, in favor of disclosure.¹²⁷ Under various statutes that Congress or the states have passed, and under the common law, individuals may have certain duties, ranging, for example, from serving in the military to stopping at a red light or being subject to liability for negligently causing personal injury to another.

The debate over whether a citizen has political responsibility, however, is ancient. It is a debate between Epicurus, on the one hand, who, as summarized by Jefferson, said “[h]appiness is the aim of life” and “[t]he *summum bonum* is to be not pained in body, nor troubled in mind,”¹²⁸ and on the other Cicero, who reminded us that we are not born simply for ourselves but share a responsibility to others, including participation and leadership in one’s political community.¹²⁹

124. RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES* 9 (2d ed. 1996) (quoting Heraclitus).

125. See U.S. CONST. arts. I–III. For an indispensable analysis of the task of separating power flowing from the people, and a careful review of primary sources in our constitutional history as well as secondary sources, see GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* (1997).

126. U.S. CONST. amend. XIII.

127. *Hiibel v. Sixth Judicial Dist. Court*, 124 S. Ct. 2451, 2461 (2004).

128. Walter Niegorski, *Cicero, Citizenship, and the Epicurean Temptation*, in *CULTIVATING CITIZENS* 3, 4–5 (Dwight D. Allman & Michael D. Beaty eds., 2002); see also SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 70–75* (2d ed. 2004) (discussing “citizenship and disengagement”).

129. Niegorski, *supra* note 128, at 5, 7–20; see *CICERO DE OFFICIIS*, I.7, at 23–24, III.5, at 291–95, 311, 397–401 (Walter Miller trans., 1913).

This “dichotomy between self-interest and altruism”¹³⁰ continues in modern terms. Our freedom allows us the choice to go “bowling alone,”¹³¹ to pursue individual pleasures without any sense of citizenship, community, or responsibility, and to just take and not give. It also allows us the choice to heed President John F. Kennedy’s eloquent plea in his inaugural address, “Ask not what your country can do for you—ask what you can do for your country.”¹³²

Do Americans want to be informed and involved? Or, do they want to be like the person who, when asked if he knew the difference between ignorance and apathy, responded: “I don’t know, and I don’t care”?¹³³

This debate reflects varied, important, and sincerely held beliefs about what life should mean and what government’s role in the lives of citizens should be. This country could not even have this debate or confront or appreciate our differences, however, if it did not have the rock of liberty upon which the freedom to differ is founded.

Is there really cause for concern? Why not just be complacent, passive, and phlegmatic? Many Americans are not likely to be taken in by government duplicity and secrecy. Many still feel relatively secure in their jobs and homes, and are law-abiding. Many should not yet have to worry about being packed off to a detention camp, or compelled to talk about beliefs or friends before a hostile interrogator, or subjected to secret government surveillance of personal records and residences.

130. ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 88 (1993). Other works on this subject include: *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* (Stephen L. Elkin & Karol Edward Soltan eds., 1999); *CITIZENS: TOWARDS A CITIZENSHIP CULTURE* (Bernard Crick ed., 2001); *CULTIVATING CITIZENS*, *supra* note 128; JOHN LACHS, *RESPONSIBILITY AND THE INDIVIDUAL IN MODERN SOCIETY* (1981); MAL LEICESTER ET AL., 6 *POLITICS, EDUCATION AND CITIZENSHIP* (2000); PAUL ROGAT LOEB, *SOUL OF A CITIZEN* (1999); *REINVENTING COLLECTIVE ACTION: FROM THE GLOBAL TO THE LOCAL* (Colin Crouch & David Marquand eds., 1995); *THE ROLE OF PERSONAL RESPONSIBILITY IN BALANCING INDIVIDUAL LIBERTY AND THE COMMON GOOD* (Margaret Bohannon-Kaplan ed., 1999); and HERMAN R. VAN GUSTEREN, *A THEORY OF CITIZENSHIP: ORGANIZING PLURALITY IN CONTEMPORARY DEMOCRACIES* (1998).

131. ROBERT D. PUTNAM, *BOWLING ALONE* (2001).

132. John F. Kennedy, Inaugural Address (Jan. 20, 1961), at <http://www.bartleby.com/124/pres56.html>.

133. Journalist William Safire has been quoted as stating: “Is sloppiness in speech caused by ignorance or apathy? I don’t know and I don’t care.” Nonstopenglish.com Quotations Database, at http://www.nonstopenglish.com/reading/quotations/k_Apathy.asp (last visited Mar. 28, 2005). Jimmy Buffett likewise sang:

Is it ignorance or apathy?
I forget these lessons taught to me
Some say life isn’t fair
Hey I don’t know and I don’t care.

Jimmy Buffett, *I Don’t Know and I Don’t Care*, on *BEACH HOUSE ON THE MOGN* (Island Records 1999).

Why should Americans care if some misguided person or minority or radical or alien gets caught up in a secret investigation of clandestine activity or detained indefinitely in some offshore prison? To me, however, it is all the more insidious that the repression occurring now is mainly felt by aliens, those on the fringe of society, citizens with radical views, victims of invidious discrimination, and people who may not be so law-abiding. Government will aim first at the weakest. It will target those who lack public support and against whom there may be a majority of opinion. It will not aim first at the strong or those whom the public supports.

Ironically, it has often been the outsiders and the weak who have been the champions in Supreme Court cases that now stand as beacons of liberty for all of us, such as *West Virginia Board of Education v. Barnette*,¹³⁴ *Gideon v. Wainwright*,¹³⁵ *Miranda v. Arizona*,¹³⁶ and the recent case of *Lawrence v. Texas*,¹³⁷ to name just four of many. "Liberty does not defend itself."¹³⁸ It requires individual defenders and advocates. Free Americans should not leave the defense of liberty just to those yearning to breathe free.¹³⁹ In defending the rights of aliens, because they are fellow human beings even though they are not citizens or entitled to the full range of constitutional and statutory protections, Americans can also discover and express our own humanity.¹⁴⁰

Even the slightest unjustified intrusion on liberty requires a vigilant response.¹⁴¹ The direction of the Constitution aims toward greater

134. 319 U.S. at 641 ("Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity . . . the Inquisition . . . down to the fast failing efforts of our present totalitarian enemies.")

135. 372 U.S. 335 (1963).

136. 384 U.S. 436 (1966).

137. 539 U.S. 558 (2004).

138. Nadine Strossen, Testimony Before U.S. Senate Committee on the Judiciary (Nov. 18, 2003), at http://judiciary.senate.gov/testimony.cfm?id=998&wit_id=2878.

139. See the inscription on the Statue of Liberty that was taken from Emma Lazarus's poem, *The New Colossus*:

"Give me your tired, your poor,

Your huddled masses yearning to breathe free,

The wretched refuse of your teeming shore,

Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!"

EMMA LAZARUS, *THE NEW COLOSSUS* (1883), at <http://xroads.virginia.edu/~CAP/LIBERTY/lazaruspoem.html>.

140. *Jeremiah* 7:6 cmt. 6 (Soncino Books of the Bible 1985) ("The alien was to be protected, not because he was a member of one's family, class, religious community; but because he was a human being. In the alien, therefore, man discovered the idea of humanity."); See also DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2004).

141. In *Abrams v. United States*, 250 U.S. 616 (1919), the Supreme Court affirmed the conviction of the defendants for violating the Espionage Act. In his famous

liberty, not less. These two points are clear in the Supreme Court's jurisprudence, and particularly well-illustrated in two cases spanning over forty years.

The first case is that of *Silverman v. United States*, in which the Court, in an opinion by Justice Potter Stewart, held that the actions of police officers in attaching an electronic device, a so-called "spike mike,"¹⁴² to the heating duct of a house owned by the defendants, thereby turning the duct into a gigantic microphone ruming throughout the entire house, violated the Fourth Amendment.¹⁴³ Accordingly, the conversations overheard by the police officers were inadmissible in court.¹⁴⁴ The Court had to confront an earlier case, *Goldman v. United States*, which held that placement of a detectaphone against an office wall in order to listen to conversations taking place in the office next door did not violate the Fourth Amendment.¹⁴⁵ In distinguishing *Goldman*, the *Silverman* Court said:

What the Court said long ago bears repeating now: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." We find no

dissent, Justice Oliver Wendell Holmes stated that "we should be eternally vigilant against attempts to check the expression of opinion that we loathe and believe to be fraught with death, unless they so imminently threaten interference with the lawful and pressing purposes of the laws that an immediate check is required to save the country." *Id.* at 630 (Holmes, J., dissenting); see also ETERNALLY VIGILANT, *supra* note 118, at ix. If Americans collectively view the threat to liberty as dangerous, perhaps they will be moved to act. "American politics have always been organized to block precipitous action, but the inertia seems to have grown along with the problems we face." JAMES A. MONROE, *THE DEMOCRATIC WISH* 328 (1990). "For two centuries, variations of an ancient, core spirit have provoked the American imagination. . . . The communal impulse never found a permanent place within our political institutions. Yet the call to community has recurred, again and again, beckoning the American democrat." *Id.* at 336-37; see also PAUL BERMAN, *TERROR AND LIBERALISM* 170 (2003). "What do the citizens of a proper liberal society feel in their hearts? A passion for solidarity and self-government. What do those citizens do? They devote themselves to those principles, unto the last measure, if necessary." BERMAN, *supra*, at 170. For a critique of a narrow theory of "national interest," see, for example, Condoleezza Rice, *Promoting the National Interest*, *FOREIGN AFF.*, JAN.-FEB. 2000, at 45, 79 (2000). For the view that the United States should pursue humanitarian interests "by promoting the principles of liberal democracy, not only as a means to greater security, but as an end in itself," see ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 152, 155 (2004).

142. 365 U.S. 505, 506 (1961).

143. *Id.* at 511-12.

144. *Id.* at 512.

145. 316 U.S. 129, 132-33 (1942).

occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch.¹⁴⁶

The Court in later cases has adopted the same vigilant approach.¹⁴⁷ In 2003, in *Lawrence v. Texas*, the Court held unconstitutional a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct, as it applied to adult males who had engaged in the consensual act of sodomy in the privacy of their home.¹⁴⁸ In his opinion for the Court, which also overruled a contrary precedent, *Bowers v. Hardwick*,¹⁴⁹ Justice Anthony M. Kennedy stated that, “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”¹⁵⁰

Although there is an ebb and flow to citizen participation and citizen resistance, quite different things depending on the times, in times of repression in particular, there are many things citizens can do to resist deception, intrusion, and secrecy, as well as contribute to the debate over values and how best to combat terrorism:

- Become informed and vigilant.
- Participate in various venues of community of opinion and debate, such as the Internet, thereby contributing one by one to a growing consensus in the country and in the world.¹⁵¹
- Mobilize city councils and state legislatures to speak and act for liberty.
- Serve on local boards and commissions and in nonprofit organizations, and help recruit good people for government and civic service.
- Vote, and urge neighbors, friends, relatives, and coworkers to register and vote.

146. *Silverman*, 365 U.S. at 512 (citation omitted) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

147. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); *Katz v. United States*, 389 U.S. 347, 356 (1967) (“[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.”); *Berger v. New York*, 388 U.S. 41 (1967) (holding that the language of a New York evidence statute was “too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area”).

148. 539 U.S. at 578.

149. 478 U.S. 186, 192 (1986) (holding that homosexuals have no fundamental right to practice “consensual sodomy”).

150. *Lawrence*, 539 U.S. at 579.

151. *See* SUNSTEIN, *supra* note 117, at 9, 27–39, 105–23, 191–202.

- Educate ourselves about threats and terrorists and how to deal with them.¹⁵²
- Train and enlist to help others, such as signing up in advance to be a neighborhood watch captain, a first-aid provider, or a stretcher-bearer, for example.
- Ask our press and other media to be inquiring and perseverant, not lazy in their reporting.
- Demand due process for both citizens and resident aliens, and at the very least rudimentary fairness for nonresident aliens.
- Demand that our senators and representatives repeal the pernicious provisions of the PATRIOT Act.
- Tell the president that he is wrong to demand renewal of the PATRIOT Act. As President Theodore Roosevelt said during World War I, “it is absolutely necessary that there should be full liberty to tell the truth” about the President’s acts, and that the notion that “there must be no criticism of the President, or that we are to stand by the President, right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American public.”¹⁵³
- Protest the government’s unjustified invasion of our liberties even when—especially when—that invasion is just a fraction of an inch. In a time of terror, Americans may have to suffer some temporary and

152. For example, RAND and authors affiliated with RAND have published various recent reports that foster a better understanding of terrorism. See, e.g., NORA BENSARHEL, *THE COUNTERTERROR COALITIONS: COOPERATION WITH EUROPE, NATO, AND THE EUROPEAN UNION* (2003); KIM CRAGIN & PETER CHALK, *TERRORISM & DEVELOPMENT: USING SOCIAL AND ECONOMIC DEVELOPMENT TO INHIBIT A RESURGENCE OF TERRORISM* (2003); PAUL K. DAVIS & BRIAN MICHAEL JENKINS, *DETERRENCE & INFLUENCE IN COUNTERTERRORISM: A COMPONENT IN THE WAR ON AL QAEDA* (2002); BRUCE HOFFMAN, *INSIDE TERRORISM* (1998); BRIAN MICHAEL JENKINS, *COUNTERING AL QAEDA* (2002); THEODORE KARNSIK, *TOXIC WARFARE* (2002); IAN O. LESSER ET AL., *COUNTERING THE NEW TERRORISM* (1999); DAVID OCHMANEK, *MILITARY OPERATIONS AGAINST TERRORIST GROUPS ABROAD: IMPLICATIONS FOR THE UNITED STATES AIR FORCE* (2003); *SOURCES OF CONFLICT IN THE 21ST CENTURY: REGIONAL FUTURES AND U.S. STRATEGY* (Zalmay Khalilzad & Ian O. Lesser eds., 1998); see also RAND Terrorism and Homeland Security Research Area, at http://www.rand.org/research_areas/terrorism/ (last modified Jan. 26, 2005) (listing numerous publications about terrorism and homeland security). The author and his firm have served and presently serve along with others as counsel for RAND.

153. Theodore Roosevelt, *Editorial*, KAN. CITY STAR, May 7, 1918, available at <http://www.theodoreroosevelt.org/life/quotes.htm>; see also CICERO, *supra* note 129, III.6, at 299 (“[W]e have no ties of fellowship with a tyrant, but rather the bitterest feud.”).

carefully calibrated intrusion on civil liberties.¹⁵⁴ No intrusion, however, should be permitted unless there is a true emergency, and then it should be under the watchful supervision of a court or Congress and be limited in time.¹⁵⁵

Americans are a self-reliant and resilient people. We do not need to be coddled or protected by the government from unpleasant information. In emergencies, our natural instinct is to reach out to help others. Americans can be told the truth about what the government knows and does not know in a forthright way that does not compromise secret intelligence or military operations. We can demand government information under FOIA.¹⁵⁶ We can challenge unconstitutional orders and unconstitutional provisions of the PATRIOT Act.¹⁵⁷

The lawyers and scholars among us, in particular, can help sort through the legal issues of liberty and security, and pick up the slack left by Ashcroft who gave priority to secretive law enforcement instead of to the guardianship of our Constitution. A key challenge is to define those areas that should be governed by principles akin to criminal law

154. See HEYMAN & KAYEM, *supra* note 99, at 1–21; REHNQUIST, *supra* note 108, at 218–25;. There is widespread criticism of the current administration's repression of our liberties. See, e.g., COLE, *supra* note 140; NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS—AND THE GATHERING RESISTANCE* (2004); *LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* (Cynthia Brown ed., 2003); *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* (Richard C. Leone & Greg Anrig, Jr. eds., 2003); Lewis, *Civil Liberties in a Time of Terror*, *supra* note 5; Lewis, *First They Came for the Muslims*, *supra* note 5; Hon. Shirley M. Hufstедler, Remarks at All Saints Church (Nov. 2, 2003), at [http://www.allsaints-pas.org/archives/transcripts/\(11-2-03\)%20Shirley%20Hufstедler.pdf](http://www.allsaints-pas.org/archives/transcripts/(11-2-03)%20Shirley%20Hufstедler.pdf).

155. See Traynor, *The Ticking Bomb Contention*, *supra* note 73; see also *supra* note 154.

156. 5 U.S.C. § 552 (2000). In the United Kingdom, Lord Anthony Lester has commented that “[a]bridging the Executive’s prerogative powers, and creating a right of access to official information, would transform the peoples of the United Kingdom from British subjects of the Crown into fully informed citizens with civil and political rights and duties desired from our citizenship.” Anthony Lester, *Can We Achieve a New Constitutional Settlement?*, in *REINVENTING COLLECTIVE ACTION: FROM THE GLOBAL TO THE LOCAL* 123, 125 (Colin Crouch & David Marquand eds., 1995).

157. In an essay entitled *Real Patriots Ask Questions*, Carl Sagan stated that “[p]art of the duty of citizenship is not to be intimidated into conformity. I wish that the oath of citizenship taken by recent immigrants, and the pledge that students routinely recite, included something like ‘I promise to question everything my leaders tell me.’” Carl Sagan & Ann Druyan, *Real Patriots Ask Questions*, *PARADE MAG.*, Sep. 8, 1991, reprinted in CARL SAGAN, *THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK* 427 (1996). Sagan also quoted Justice Robert H. Jackson’s statement that “[i]t is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.” *Id.* at 422; see *Am. Communications Ass’n v. Douds*, 339 U.S. 382, 442–43 (1950) (Jackson, J., concurring and dissenting).

enforcement, with attendant significant involvement of judges, and those areas that should be governed by principles akin to military action, foreign relations, or national security,¹⁵⁸ with less significant involvement of judges, but perhaps correspondingly more congressional oversight as well as executive oversight through inspector generals. Lawyers and scholars can help provide the rationale as well for determining who, including judges, decides which principles apply. Bar associations around the country can call on our president to speak the truth, as the Bar Association of San Francisco and many others did in 1973 during the Watergate affair.¹⁵⁹

I call such expressions and actions, literally and figuratively, the footsteps of Americans. When representatives hear those footsteps, not just once or twice, or here and there, but every day, pounding in a crescendo of strong beats, then, maybe, they will begin to do what is right.

Doing what is right usually calls for balance, sometimes also for neutrality. I have spoken today primarily about repression and overreaction by our government. Assaults on truth, liberty, and openness do not necessarily come exclusively from one part of the political spectrum. The words "Freedom Now" can ring hollow in the mouths of zealots from the right or the left who would overturn our system.¹⁶⁰

158. See generally DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 89 (2002); PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* (1998); PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* (2003); HEYMANN & KAYYEM, *supra* note 99.

159. While serving as the president of the Bar Association of San Francisco in 1973, I personally worked with leaders of other bar associations, including, and particularly, one of our country's great lawyers, Chesterfield Smith, who was then president of the American Bar Association.

160. See Roger J. Traynor, *Blasted Are the Meek, When Bullies Are Blessed*, 75 DICK. L. REV. 551 (1970); cf. CLARK KERR, *THE USES OF THE UNIVERSITY* 111 (5th ed. 2001). In a chapter in *The Uses of the University* entitled "Reconsiderations After the Revolts of the 1960's," former University of California President Clark Kerr commented that:

The transition from being quoted as a respected critic to being charged as a kept-apologist was quite abrupt. The same persons leapt from one position to the other as it suited their purposes, and not just students did this. Attitudes changed quickly from agreement to condemnation as external factors intervened.

KERR, *supra*, at 111.

In 1969, I had a chance to experience the strength of neutrality and a tempered response to the clashes that sometimes occur between the forces of repression and the forces of anarchy. The People's Park controversy erupted on the Berkeley campus over the university's plans to develop an area that had been used as a place for various expressive activities. Responding to a student leader's cry, "Let's go down and take the park," a demonstration ensued. It became violent. Police officers and deputy sheriffs

Efforts to obtain truth, protect liberty, or obtain government information often fail, as I can attest with an illustration from my own practice. A scholar who was studying the forced repatriation of anticommunist Russians to the Soviet Union, after Yalta and the end of World War II, invoked FOIA to request an old but still classified U.S. Army file entitled, aptly enough, "Operation Keelhaul."¹⁶¹ On his appeal from the trial court's denial of his claim to see the file, we urged that a court should review the challenged classification.¹⁶² The court, however, upheld the government's claim of secrecy,¹⁶³ and, shortly thereafter, the Supreme Court itself rejected a similar claim in another case.¹⁶⁴ It is important to recognize that not every citizen's effort will succeed; many will fail or be thwarted.¹⁶⁵ In my view, however, that is all the more reason to continue trying; despite disappointments, some good efforts will succeed.

Earlier, I mentioned a few of Wisconsin's many great citizens. I would like to mention five examples of other citizens who are contributing to liberty in important ways in this time. Each person finds a way to make a difference and to make his footsteps heard.

1. First, the police officers, firefighters, military troops, medical caregivers, and others who are called on to respond to acts of terrorism, as in Oklahoma City, at the Pentagon, in rural Pennsylvania, and at the World Trade Center.
2. Second, my law school classmate and study mate, Senator Paul Sarbanes, who recently has contributed immeasurably

were mobilized to respond, some not intelligently. More than 400 demonstrators were arrested *en masse* and carted off to Santa Rita jail. There were charges of brutality and misconduct on both sides. A friend and I were enjoying a beer together at the end of the day and saw the televised reports of violence and mass arrests. We quickly adjourned to Boalt Hall and its library, which, like any self-respecting law school, was open until midnight. Within three days, we had assembled a task force of volunteer lawyers to act as neutral observers at the jail and obtained a federal court order appointing them in aid of the civil rights jurisdiction of the court. One of the precedents we invoked was an old New York case that had upheld the use of the court's equity power to order a receiver for a horse being transported to California. *Madden v. Rosseter*, 187 N.Y.S. 462 (1921). We argued that if equity could appoint a receiver for a horse, surely it could appoint neutral observers for human beings.

161. *Epstein v. Resor*, 421 F.2d 930, 931 (9th Cir. 1970).

162. *Id.* at 932.

163. *Id.* at 933; *see also* JULIUS EPSTEIN, *OPERATION KEELHAUL: THE STORY OF FORCED REPATRIATION FROM 1944 TO THE PRESENT* (1973).

164. *See* *Env'tl. Prot. Agency v. Mink*, 410 U.S. 73 (1973).

165. *See, e.g.,* *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003); *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20 (D.D.C. 2003); *Am. Civil Liberties Union, FOIA Lawsuit on How the FBI is Using the USA Patriot Act*, at <http://www.aclu.org/news/NewsPrint.cfm?ID=12302&c=207> (last visited Mar. 28, 2005).

to improving corporate behavior through the Sarbanes-Oxley Act.¹⁶⁶ He has strived, so far unsuccessfully, to restore adequate funding for firefighters, who are among our first responders.¹⁶⁷ As a young member of the House Judiciary Committee, he was selected to present the first article of impeachment of President Nixon during the Watergate affair.¹⁶⁸ Paul is Greek and has remarked that in Athens, “those who lived only in private life were falling short. They were called ‘idiotes,’ from which our word ‘idiot’ is derived today.”¹⁶⁹

3. Third, my fellow environmentalist, Edwin Matthews, a business lawyer in New York, who served as lead counsel for 175 members of both houses of the Parliament of the United Kingdom of Great Britain and Ireland in a historic and unprecedented amicus curiae brief to the Supreme Court in the Guantanamo Bay case, *Rasul v. Bush*.¹⁷⁰ The members of Parliament urged that the detainees’ cases presented disputes that could be determined only by an impartial and independent court, and that indefinite executive detention without judicial review is inimical to the rule of law.¹⁷¹ The House of Lords has recently confirmed that principle.¹⁷²

166. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); see also Biography of United States Senator Paul S. Sarbanes, at http://sarbans.senate.gov/pages/biography_2004.html [hereinafter Biography of Senator Sarbanes].

167. Senator Paul Sarbanes, Statement in Support of Additional Funding for Firefighters and First Responders (Jul. 24, 2003), at http://sarbans.senate.gov/pages/press/072403_fire_grant_funding_increase_crime.html; *Senate Defeats Sarbanes Amendment to Restore Funding for Firefighters* (Mar. 11, 2004), at http://sarbans.senate.gov/pages/press/031104_firefighters_ammendment_crime.html; see also *Sarbanes’ Votes Reflect Concern for Homeland Security Needs* (Aug. 1, 2003), at http://sarbans.senate.gov/pages/press/080303_homeland_security_crime.html.

168. See Biography of Senator Sarbanes, *supra* note 166.

169. See *id.*

170. Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners, *Rasul* (Nos. 03-343, -334).

171. *Id.* at 16-28.

172. See *A & Others*, [2004] UKHL 56. By contrast, it bears noting, however, that one of the architects of the torture papers argues that “the more effective constitutional framework would allow the political branches to shape war decisions without any interference from the federal judiciary.” John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 794 (2004); see Memorandum from John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 14, at 218-22.

4. Fourth, the growing band of present and former conservative leaders in Congress who are expressing their disquiet concerning the PATRIOT Act and seeking to rein it in.¹⁷³ They may not go as far as others in their statements, but they are spokespersons in a long tradition that includes then freshman Senator Margaret Chase Smith, who delivered her Declaration of Conscience against McCarthyism on June 1, 1950, at a time when such a statement was a rare act of great political courage.¹⁷⁴ She was joined by only six colleagues.¹⁷⁵
5. Fifth, I would like to compliment Madison, Wisconsin, and the now over 350 cities in the United States that have condemned the provisions of the PATRIOT Act that threaten civil liberties.¹⁷⁶ As a visitor here, I am the beneficiary of the action the citizens of Madison have taken through their city council.

Over centuries, brave men and women have courageously defended liberty, risking their lives and careers. They are celebrated in ancient

173. See Am. Civil Liberties Union, *Conservative Voices Against the USA Patriot Act*, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12632&c=206> (last visited Mar. 28, 2005) (collecting various comments and documenting source, date, and publications); Statement of Hon. F. James Sensenbrenner, Jr. Before the Subcommittee on Rules of the Select Committee on Homeland Security at the Oversight Hearing on Homeland Security Jurisdiction (Mar. 24, 2004), at <http://judiciary.house.gov/newcenter.aspx?A=401>; John W. Whitehead, *American Cities Show Spirit of Resistance to U.S.A. Patriot Act* (Jul. 28, 2003), at http://www.rutherford.org/articles_db/commentary.asp?record_id=235; Eric Lichtblau, *Coalition Forms to Oppose Parts of Antiterrorism Law*, N.Y. TIMES, Mar. 23, 2005, at A10.

174. Statement of Senator Margaret Chase Smith, *Declaration of Conscience* (June 1, 1950), at <http://www.mcslibrary.org/program/library/declaration.htm>; see also BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* 208 (1999) (“Statements of alarm by newscasters and glorification of wannabe experts are two telltale tricks of the fear mongers’ trade.”); TED MORGAN, *REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA* (2003); Geoffrey Wheatcroft, *Point of Order*, NY TIMES BOOK REV., Jan. 4, 2004, at 9 (reviewing MORGAN, *supra*).

175. Senator Margaret Chase Smith’s six colleagues were Senators George Aiken of Vermont, Charles Tobey of New Hampshire, Wayne Morse of Oregon, Irving Ives of New York, Edward Thye of Minnesota, and Robert Hendrickson of New Jersey. McCarthy described Smith and her colleagues as “Snow White and her Six Dwarfs.” Morgan, *supra* note 174, at 394.

176. See Madison City Council, Amend. Sub. Res. 59878 to Defend the Bill of Rights and Civil Liberties, at <http://www.ci.madison.wi.us/council/proceedings/archived/pr101502.htm>. Other cities and states are linked at Bill of Rights Defense Committee, at <http://www.bordc.org/index.html>. See also Kim Zetter, *Cities Say No to Patriot Act*, WIRED NEWS (June 7, 2004), at <http://www.wired.com/news/print/0,1294,63702,00.html>.

legends such as Antigone's struggle to give her dead brother a decent burial;¹⁷⁷ in the reports of battles our country has fought for right and freedom; in modern accounts of resistance fighters, combat veterans, and champions of civil rights; and in Nelson Mandela's life story, his *Long Walk to Freedom*.¹⁷⁸

Judge Fairchild has shown that courage throughout his life, including his challenge to Joe McCarthy in 1952 for the Senate of the United States.¹⁷⁹ His life and career are inspiring.

By comparison, it seems little to ask that citizens stand up against the repression of truth, openness, and liberty today. President James Madison, for whom this city is named, understood the "Constitution as the *people's* law, which was to be revered and not remolded by their servants."¹⁸⁰ It also seems little to ask that "We the People" stand up for our law, our Constitution.

The appropriate responses to terrorism do not include deceiving the American people, needlessly invading their liberty, or enlarging a government of secrecy. They do not include passivity on the part of citizens. If we as vigilant citizens so choose, the spirit of liberty that is in our hearts will also become the voice of liberty in our country.

177. SOPHOCLES, *ANTIGONE* (Richard Emil Braun trans., Oxford 1973); cf. Robert Bethune, *Staging an Idea*, ART TIMES (Nov. 2003), available at <http://www.arttimesjournal.com/theater/idea.htm> ("I indulge myself in the conceit of making Creon look just like John Ashcroft.").

178. NELSON MANDELA, *LONG WALK TO FREEDOM* (1995).

179. See RICHARD ROVERE, *SENATOR JOE MCCARTHY* 184, 185 (1959) ("His opponent was a gifted young man, Thomas Fairchild, with an admirable record in Wisconsin's public service—a strong contrast not only with McCarthy's lying and bullying in national politics, but also with his unsavory financial dealings, which, though not widely publicized elsewhere, were well known in Wisconsin.").

180. LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 333, 352, 368, 372 (1995); see also THE FEDERALIST NO. 10 (James Madison) ("The federal Constitution forms a happy combination . . . the great and aggregate interests being referred to the national, the local and particular to the State legislatures."); Tess Mulrooney et al., *The Madison in Madison: How the City Got Its Name* (2001), at <http://danenet.wicip.org/hmi/html/FNames/JMadison.htm>.