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CITIZENSHIP IN A TIME OF REPRESSION

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I am delighted to be here in Tampa and to pay my personal respects to my friend and American Law Institute colleague, Reece Smith, a Tampa lawyer and Stetson professor whose life is distinguished by devoted professional and civic service and leadership.

My talk today is titled *Citizenship in a Time of Repression* and addresses the responsibilities of citizens, including lawyers, 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.

The ideas and subjects I will discuss are basic: Language, Liberty, Truth, Secrecy, Openness, Repression, Citizenship, and Lawyers.

Today, the word “patriot” is used to name a statute that, in my opinion, stifles liberty.¹ The term “collateral damage” is used

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to describe the deaths of children and other innocent bystanders.² The phrases “weapons of mass destruction,”³ “immediate threat,” and “imminent threat”⁴ 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 international conventions,⁵ applicable statutory

1. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). Notwithstanding its repressive features, the statute contains some useful provisions for countering terrorism. See *infra* nn. 91–98 and accompanying text (discussing the major provisions of the PATRIOT Act). 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. Hon. James B. Comey, Speech, *Wednesday Luncheon Session of the American Law Institute* (D.C., May 19, 2004) (available at <http://www.ali.org/ali/r2604-04-Speakers.htm>); 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) (describing how the Act deprives citizens of their liberties); Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 Duq. L. Rev. 663, 685–723 (2004) (outlining how the Act combats terrorism).

2. See Charlie Clements, *The Faces of “Collateral Damage,”* 49 Friends J. 6, 7 (2003) (discussing the plight of Iraqi civilians caused by the United States’ bombing of that country); Ben Kiernan, *“Collateral Damage” from Cambodia to Iraq*, 35 Antipode 846, 847–848 (2003) (referencing historical accounts of war’s effect on civilians termed “collateral damage”).

3. See Mark Danner, *The Secret Way to War: The Downing Street Memo and the Iraq War’s Buried History* ix–xii, 3–28 (N.Y. Rev. Bks. 2006) (presenting journalists Frank Rich and Mark Danner’s analysis of the facts surrounding the search for weapons of mass destruction in Iraq, and arguing that the search was used as a way to ensure war, not avoid it); Ctr. for Strategic & Intl. Studs., *Intelligence, Iraq, and Weapons of Mass Destruction* 5 (2004) (available at http://www.csis.org/features/040126_WMDIntellLesAnnex.pdf) (“After some nine months of one of the most 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.”); CNN, *Kay: No Evidence Iraq Stockpiled WMD*, <http://www.cnn.com/2004/WORLD/meast/01/25/sprj.nirq.kay> (Jan. 26, 2004) (reporting that David Kay, the former top weapons inspector in Iraq for the George W. Bush Administration, had concluded that there were no stockpiles of weapons in Iraq).

4. See Moveon.org, *Censure Bush, the Administration’s Use of the Word “Imminent,”* <http://www.moveon.org/censure/imminent.htm> (last visited Mar. 28, 2005) (compiling examples of the frequent use of “imminent” by Bush Administration officials when discussing Iraq as a threat to United States interests).

5. See Memo. from William H. Taft, IV, Leg. Advisor, U.S. Dept. of State, to Alberto R. Gonzales, Counsel to the Pres., *Comments on Your Paper on the Geneva Convention* (Feb. 2, 2002) (reprinted in Mark Danner, *Torture and Truth, America, Abu Ghraib, and the War on Terror* 94–95 (N.Y. Rev. Bks. 2004)) (outlining United States violations of international law in its war on terrorism). 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* (Cambridge U. Press 2005). See also Seymour M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (HarperCollins 2004) (addressing

law,⁶ and established military doctrine,⁷ even the word “torture” was twisted and constricted in an indefensible opinion of the Office of Legal Counsel,⁸ which the United States Department of Justice (DOJ) has only recently withdrawn.⁹

the abuses of international law in the name of “terror”); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?* 90 Cornell L. Rev. 97 (2004) (analyzing the United States’ breaches of international law and the impact of those breaches on President Bush); Marcy Strauss, *Torture*, 48 N.Y. L. Sch. L. Rev. 201 (2004) (discussing how the United States’ use of torture violates international law).

6. 18 U.S.C.A. § 2340–2340A(a) (West 2000 & Supp. 2005) (defining “torture” as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering”).

7. See e.g. U.S. Marine Corps, *Enemy Prisoners of War and Civilian Internees* (available at http://www.tpub.com/content/USMC/mcr4118c/css/mcr4118c_14.htm) (prohibiting Marine Corps personnel from engaging in acts of torture); U.S. Army, *Intelligence Interrogation* (available at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/chapter1.html>) (banning Army personnel from committing acts of torture). Use of force and other abuses of captives are grounds for investigation as war crimes. See e.g. U.S. Marine Corps, *War Crimes Investigation* (available at http://www.tpub.com/content/USMC/mcr4118b/css/mcr4118b_14.htm) (listing conduct that can serve as grounds for war crime investigations).

8. Memo. from Jay S. Bybee, Asst. Atty. Gen., U.S. Dept. of Just., Off. of Leg. Counsel, to Alberto R. Gonzales, Counsel to the Pres. (Aug. 1, 2002) (reprinted in Danner, *supra* n. 5, at 115, 115–116); see also Memo. from Alberto R. Gonzales, Counsel to the Pres., to George W. Bush, U.S. Pres. (Jan. 25, 2002) (reprinted in Danner, *supra* n. 5, at 83–87) (providing an analysis of the legality of torture). President George W. Bush thereafter appointed Jay Bybee to the United States Court of Appeals for the Ninth Circuit, and appointed Alberto Gonzales to be the United States Attorney General. Philip Carter, *Loyal to a Fault?* <http://slate.msn.com/id/2109495/> (Nov. 11, 2004); Ninth Cir., *Senate Confirms Jay S. Bybee to Serve on Court of Appeals*, <http://www.ca9.uscourts.gov/> (Mar. 13, 2003).

9. See Memo. from the U.S. Dept. of Just., Off. of Leg. Counsel, to James B. Comey, Dep. Atty. Gen. (Dec. 30, 2004) (available at <http://www.usdoj.gov/olc/dagmemo.pdf>) (stating that the United States Department of Justice withdrew its opinion on torture); see also Danner, *supra* n. 5, at 94–95 (encouraging United States adherence to the Geneva Convention’s prohibitions on torture). 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.” For further criticism of the Bybee memorandum, see Greenberg & Dratel, *supra* note 5, at xiii (In the book’s Introduction, Anthony Lewis wrote that 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* (Sen. Jud. Comm., Jan. 6, 2005) available at 2005 WL 40553 (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,”

As an environmentalist, I am appalled to see a measure that would increase pollution falsely described as the “Clear Skies Initiative”¹⁰ and a measure that would deplete forests called the

and as “a stunning failure of lawyerly craft”); 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.”); G. Jan Lighthart & Robert S. Rivkin, *Reply by Mark Danner, Torture and Gonzales: An Exchange*, N.Y. Rev. of Bks. (Feb. 10, 2005) (available at http://www.infowars.com/articles/ps/torture_mark_danner.htm#exchange) (“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 that 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 and cruel, inhuman, and degrading treatment of captives, our government should be alert to preventing such abuse. See also *infra* n. 132 and accompanying text; Michael Stolleis, *The Law Under the Swastika: Studies in Legal History in Nazi Germany* (U. of Chi. Press 1998) (historical analysis of the Nazi Germany legal system); cf. Raul Hilberg, *The Destruction of the European Jews* 61–77 (3d ed., Yale U. Press 2003) (discussing “definition by decree”); Richard Lawrence Miller, *Nazi Justiz* 1–2 (Praeger Publishers 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.”).

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 “[t]he 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, U.S. Dept. of Just., *U.S. Charges Ex-WorldCom CEO Bernard Ebbers; Former WorldCom CFO Scott Sullivan Pleads Guilty*, <http://www.fbi.gov/dojpressrel/pressrel04/world030204.htm> (Mar. 24, 2004); see also Press Release, U.S. Dept. of Just., *Statement of Attorney General Alberto R. Gonzales on the Bernard Ebbers Conviction*, http://www.usdoj.gov/opa/pr/2005/March/05_ag_122.htm (Mar. 15, 2005) (“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.”).

10. Compare *Executive Summary—The Clear Skies Initiative*, <http://www.whitehouse.gov/news/releases/2002/02/clearskies.html> (Feb. 14, 2002) (touting President George Bush’s proposed environmental legislation as “the most significant step America has ever taken to cut emissions”) with Natl. Resources Def. Council, *Stop the Bush Air Pollution Plan*, <http://www.nrdc.org/clearskies/flash.asp?src=csk0306> (accessed Jan. 20, 2006) (stating that the Bush initiative actually would increase profits for power companies while allowing their factories to emit higher levels of pollution).

“Healthy Forests Restoration Act.”¹¹ Our government is blatantly misusing the English language. George Orwell’s prescient warnings against Newspeak and Doublethink¹² 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 215.¹³ This Section amends the provision of the Foreign Intelligence Surveillance Act that deals with government investigations and the power to obtain records secretly.¹⁴ Because members of 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

11. Pres. George Bush, Address, *President Bush Signs Healthy Forests Restoration Act into Law* (U.S. Dept. of Agric., Dec. 3, 2003) (available at <http://www.whitehouse.gov/news/releases/2003/12/20031203-4.html>) (touting the Act as “a major step forward in protecting America’s forests”).

12. George Orwell, *Nineteen Eighty-Four* 215–218, 303–306, 310 (reissue ed., Signet Publ. 1990); see also Nancy Snow, *Information War: American Propaganda, Free Speech and Opinion Control Since 9/11*, 18–19 (Hushion H. 2003) (discussing the Government’s use of propaganda to control opinion about its war on terror); Rick Gee, *Decoding Bush’s Newspeak*, <http://www.strike-the-root.com/columns/Gee/gee4.html> (Sept. 23, 2003) (analyzing quotations from President Bush to show his propagandistic use of language); Matthew Harwood, *Bush Administration Newspeak on Iraq*, <http://www.commondreams.org/scriptfiles/views03/1217-45.htm> (Dec. 17, 2003) (asserting that the Bush Administration engages in doubletalk); Scott D. O’Reilly, *Bushspeak: Bush and Orwell*, http://www.dissidentvoice.org/Articles7/OReilly_Bushspeak.htm (July 21, 2003) (same); Norman Solomon, *Orwellian Logic 101—A Few Simple Lessons*, <http://www.fair.org/index.php?page=2312> (Aug. 27, 1998) (discussing modern uses of Orwellian language); Keith Windschuttle, Address, *History, Truth and Tribalism* (Historical Socy., U. of Chi., Nov. 28, 2001) (available at <http://www.sydneyline.com/Killing.htm>).

13. 115 Stat. at 287–288; see also ACLU, *Section 215 FAQ*, <http://www.aclu.org/Privacy/spying/15423res20021024.html> (Oct. 24, 2004) (maintaining that Section 215 is unconstitutional); Ann Beeson & Jameel Jaffer, *Unpatriotic Acts, the FBI’s Power to Rifle through Your Records and Personal Belongings without Telling You* (ACLU 2003) (available at http://www.aclu.org/FilesPDFs/spies_reports.pdf) (analyzing some of the more controversial provisions of the USA PATRIOT Act); Charles Doyle, *The USA PATRIOT Act: A Legal Analysis*, Cong. Research Serv., Rep. No. RL31377 (Apr. 15, 2002) (available at <http://www.fas.org/irp/crs/RL31377.pdf>) (describing the controversy surrounding the PATRIOT Act).

14. 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 Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 615 (For. Intelligence Surveillance Ct. 2002) (modifying the Government’s proposal for surveillance). 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. *In re Sealed Case*, 310 F.3d 717, 719 (For. Intelligence Surveillance Ct. 2002).

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.¹⁵

If not repealed or renewed, Section 215 will sunset, with some qualifications, on December 31, 2005.¹⁶ Prior to the PATRIOT Act, the statute was limited to business records related only to common carriers, and public accommodation, physical storage, and vehicle rental facilities.¹⁷ It also required the Attorney General to 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.¹⁸

I will examine three aspects of this issue: first, what the DOJ and the Attorney General say 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 United States House of Representatives' Judiciary Committee.

The DOJ maintains a website reassuringly entitled *Preserving Life and Liberty*,¹⁹ where it posts the PATRIOT Act, speeches, and reports, including one called *Dispelling the Myths*.²⁰ Describ-

15. See Pl.'s Response to Def.'s Mot. to Dismiss at 16, *Muslim Community Assn. v. Ashcroft*, No. 03-72913 (E.D. Mich. Nov. 3, 2003) (available at <http://www.aclu.org/FilesPDFs/response.pdf>) (describing the chilling effect antiterrorism laws have placed on free speech and free exercise of religion); see also Nat Hentoff, *The State of Our Liberties*, Fed. Observer (Feb. 3, 2005) (available at <http://www.federalobserver.com/archive.php?aid=6451>) (discussing the lawsuits surrounding the PATRIOT Act).

16. See 18 U.S.C.A. § 2510 (West Supp. 2004) (describing the expiration of the wiretapping provisions after 2005); 50 U.S.C.A. § 1861 (outlining provisions for expiration of Act portions allowing access to business records); but see White House, *USA Patriot Act*, <http://www.whitehouse.gov/infocus/patriotact/> (noting that President Bush reauthorized the Act on March 9, 2006, by signing into law H.R. 3199, the USA Patriot Improvement and Reauthorization Act of 2005).

17. 50 U.S.C. §§ 1861–1862(b) (2000).

18. *Id.* at § 1862(a).

19. U.S. Dept. of Just., *Preserving Life and Liberty*, <http://www.lifeandliberty.gov> (accessed Jan. 22, 2006) [hereinafter *Life and Liberty*]; see also U.S. Dept. of Just., *Report from the Field: The USA PATRIOT Act at Work 1–2* (July 2004) (available at http://www.epic.org/privacy/terrorism/usaPATRIOT/doj_report.pdf) (discussing how the PATRIOT Act has been effective at deterring terrorism); Ctr. for Democracy & Tech., *Setting the Record Straight: An Analysis of the Justice Department's PATRIOT Act Website*, <http://www.cdt.org/security/usapatriot/031027cdt.shtml> (Oct. 27, 2003) (noting that where the DOJ "website does address controversial aspects of the law, it provides misleading, incomplete, and, in some cases, incorrect information").

20. U.S. Dept. of Just., *Dispelling the Myths*, http://www.lifeandliberty.gov/subs/add_myths.htm (accessed Jan. 20, 2006) [hereinafter *Dispelling the Myths*]; but see ACLU,

ing Section 215 as 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.”²¹ It describes as “reality” 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.”²²

The DOJ’s website asserts that

Section 215 has a narrow scope. It can only be used (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.²³

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 ac-

Seeking Truth from Justice: Patriot Propaganda, <http://www.aclu.org/FilesPDFs/seekingtruthfromjustice.pdf> (July 2003) (stating that government reports defending the PATRIOT Act were error and the Act is unconstitutional); ACLU, *ACLU Says Justice Dept.’s PATRIOT Act Website Creates New Myths about Controversial Law* (Aug. 26, 2003) (available at <http://www.aclu.org/SafeFree/patriot/16760prs20030826.html>) (discussing misconceptions promulgated by the Justice Department’s website). For additional critiques of the PATRIOT Act, see Richard A. Glenn, *Civil Liberties in an Age of Terrorism*, Trial 18 (ATLA 2004); Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 Geo. Wash. L. Rev. 1306 (2003–2004); and Laurie Thomas Lee, *The USA Patriot Act and Telecommunications: Privacy under Attack*, 29 Rutgers Computer & Tech. L.J. 371 (2003).

21. *Dispelling the Myths*, *supra* n. 20.

22. *Id.*; but see Anne Klinefelter, *The Role of Librarians in Challenges to the USA PATRIOT Act*, 5 N.C. J. L. & Tech. 219, 219–220 (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 L. Lib. J. 449, 461–468 (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, Mary Minow & Tomas Lipinski, *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.”).

23. *Dispelling the Myths*, *supra* n. 20.

tivities protected by the First Amendment to the Constitution of the United States.”²⁴

In other public statements, Ashcroft characterized the American Library Association’s concern about Section 215 as “hysteria.”²⁵ The 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,”²⁶ and as requiring a court order.²⁷

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 the testimony of the Attorney General.

The statute, however, broadly expands the definition of accessible records. It now extends to “tangible things (including books, records, papers, documents, and other items).”²⁸ It explicitly authorizes the Director of the FBI or his designee to conduct an investigation of a “United States person,”²⁹ a term that includes a United States citizen or lawful resident alien.³⁰ Although such an investigation cannot be “solely” on the basis of activities

24. *Id.*

25. John Ashcroft, Address, *The Proven Tactics in the Fight against Crime* (Natl. Rest. Assn., Sept. 15, 2003) (available at <http://www.usdoj.gov/archive/ag/speeches/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” (Natl. Pub. Radio Sept. 18, 2003) (radio broadcast, transcr. available in LEXIS, News library, National Public Radio file) (broadcasting an exchange between Mark Corallo, spokesman for the DOJ, and Ann Beeson of the ACLU); see also Ctr. for Democracy & Tech., *DOJ Says It Has Never Used Key PATRIOT Provision: CDT Analysis*, <http://www.cdt.org/security/usapatriot/030923cdt.shtml> (Sept. 23, 2003) (expressing disbelief at the DOJ’s assertion it has never used some of the more controversial provisions of the PATRIOT Act).

26. Barbara Comstock, *Statement of Barbara Comstock, Director of Public Affairs, Regarding Section 215 of the USA PATRIOT Act* (U.S. Dept. of Just., July 30, 2003) (press release) (available at http://www.usdoj.gov/opa/pr/2003/July/03_03_0426.htm).

27. Barbara Comstock, *Rhetoric vs. Reality: The Department of Justice Defends the Patriot Act*, <http://www.nationalreview.com/comment-comstock090303.asp> (Sept. 3, 2003).

28. 50 U.S.C.A. § 1861(a)(1).

29. *Id.*

30. 50 U.S.C.A. § 1801(i) (West 2004).

protected by the First Amendment, the term “solely” seriously limits the protection.³¹ Would you want to rely on the Government’s determination that you were “solely” engaged in a 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,³² without any safe harbor for such exercise. Moreover, the First Amendment limitation applies only to an investigation of a United States person.³³ A visiting uncle from a foreign country could be the subject of an investigation and, if he was staying at his nephew’s house in the United States, the investigation could extend to the nephew’s records.

Furthermore, under Section 215, the Government can apply to a designated federal judge or magistrate for an order.³⁴ The targets are not notified that their privacy has been compromised.³⁵ The Government’s application need only “specify that the records concerned are sought for an authorized investigation conducted” pursuant to the statute.³⁶ This standard is a most lenient one. The Government need not show probable cause or even reasonable grounds to believe that the target of the order is a criminal suspect or foreign agent.³⁷ 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.”³⁸ The statute gives the judge no authority or leeway to require evidence or to go beyond a determination that the Government’s application itself meets the statutory requirements.³⁹

Section 215 provides that the order “shall not disclose that it is issued for purposes of an investigation.”⁴⁰ The person who is the subject of the investigation may never know about it.⁴¹ Section

31. 50 U.S.C.A. § 1861(a)(1).

32. *Id.* at § 1861(a)(2)(B).

33. *Id.* at § 1861(a)(1).

34. *Id.* at § 1861(b)–(c).

35. *Id.* at § 1861(c)–(d).

36. *Id.* at § 1861(b)(2).

37. *Id.* at § 1861(c)(1).

38. *Id.*

39. *Id.*

40. *Id.* at § 1861(c)(2).

41. *Id.* at § 1861(d).

215 further contains a nondiscretionary gag requirement that “no person shall disclose to any other person” that the FBI sought or obtained tangible things.⁴²

In his testimony before the House Judiciary Committee on June 5, 2003, Ashcroft acknowledged that Section 215 had expanded the types of records that are accessible.⁴³ He agreed that the standard for seeking a court order was lower than probable cause.⁴⁴ He admitted that the FBI could ask for “book purchase records” or “a library book or computer records” and that “there are some education records that would be susceptible to demand.”⁴⁵ 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.⁴⁶

The DOJ similarly downplays the intrusive effect of other provisions of the PATRIOT Act, such as the “sneak and peek” provision that authorizes government agents to come to a private residence in secret, look around, take photographs, and even seize property without the owner’s knowledge.⁴⁷ Notice may be delayed

42. *Id.*

43. John Ashcroft, U.S. Atty. Gen., Test., *Testimony of Attorney General John Ashcroft U.S. House of Representatives Committee on the Judiciary* (H.R. Jud. Comm., June 5, 2003) (prepared remarks available 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 full, verbatim testimony at the hearing, see Lane County Bill of Rights Def. Comm., *House Judiciary Committee John Ashcroft Testimony*, <http://www.lanerights.org/ashcroft060503.htm> (June 5, 2003) [hereinafter *Ashcroft Testimony*]. The Attorney General’s guidelines that the FBI must follow “are classified at the Secret level.” Ltr. from Jamie E. Brown, Acting Asst. Atty. Gen., U.S. Dept. of Just., to Hon. F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Jud. (May 13, 2003) (available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotwcover051303final.pdf>). Section 215 “does not require that an application concerning a United States 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.

44. *Ashcroft Testimony*, *supra* n. 43.

45. *Id.*

46. *Id.*

47. 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, 429–431 (2002–2003) (discussing the unconstitutionality of the Act’s “sneak and peek” provisions); but see *Dispelling the Myths*, *supra* n. 20 (discussing Section 213); U.S. Dept. of Just., *Delayed Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime*, <http://www.usdoj.gov/dag/patriotact213report.pdf> 4 (Sept. 2004) (describing use of delayed notice search warrants by government agents); H.R., Subcomm. on the Const. of the Comm. of Jud.,

for “a reasonable period,” which “may thereafter be extended by the court for good cause shown.”⁴⁸

Likewise, the DOJ downplays the intrusive effect of National Security Act letters, that is, administrative subpoenas issued without a court order.⁴⁹ Such nonjudicial procedure does not afford the protections required for grand jury subpoenas.⁵⁰ At least one federal court has held that the statute authorizing nonjudicial administrative subpoenas is unconstitutional.⁵¹ Moreover, a prosecutor conducts the grand jury, and the subpoenas he obtains are subject to limitations of applicable rules and to judicial review, both restraints on excessiveness.⁵² The target has an opportunity to ask the federal court from which the subpoena issued to quash or modify the subpoena or to uphold claims of privilege, such as the attorney-client privilege.⁵³ 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.⁵⁴

In a democracy, the government is implicitly constrained by the informed consent of its citizens. When citizens visit the DOJ website, they are entitled to an objective description of the law, not an advocate’s brief or public relations statement that omits

Anti-Terrorism Investigations and the Fourth Amendment after September 11, 2001 (May 20, 2003) (available at http://commdocs.house.gov/committees/judiciary/hju87238.000/hju87238_of.htm) (explaining governmental use of the PATRIOT Act to investigate terror suspects).

48. 18 U.S.C. § 3103a(b)(3).

49. 18 U.S.C. § 2709. The PATRIOT Act amended Section 2709 of the United States Code to remove the “previous requirement that § 2709 inquiries 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).

50. See Fed. R. Crim. P. 17 (West 1986 & Supp. 2005) (requiring all subpoenas to be issued “under the seal of the court”); see also Charles Alan Wright, *Federal Practice and Procedure: Criminal*, vol. 2, §§ 271–279 (3d ed., West 2000 & Supp. 2005) (discussing the procedural safeguards relating to the issuance of subpoenas). The false analogy to grand jury subpoenas is repeatedly invoked at the highest levels of the current administration. E.g. ABA, *Another Close Call: George Bush and John Kerry Comment on Key Issues in the 2004 Presidential Election Race*, 90 ABA J. 50 (Oct. 2004) (referring to comments made by President George W. Bush analogizing grand jury subpoenas to secret court orders).

51. *Doe*, 334 F. Supp. 2d at 506.

52. Mark L. Wolf, Address, *One Judge’s Reflections on the Battle against Terror* (Carr Ctr. for Human Rights, Harv. U., Nov. 16, 2004) (transcript on file with Author).

53. Fed. R. Crim. P. 17(e); Wright, *supra* n. 50, at 275.

54. Fed. R. Crim. P. 6(e); Susan W. Brenner & Gregory G. Lockhart, *Federal Grand Jury Practice* § 8.3 (West 1996).

crucial points or distorts 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.⁵⁵

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 United States Congress and the country led to the infamous Tonkin Gulf Resolution of 1964,⁵⁶ to an expansion of the Vietnam War, and to more than one generation's distrust of government.
- 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.⁵⁷
- The Reagan Administration's deception of the United States Congress and the country led to investigations and prosecutions concerning selling arms to Iran and financing the Con-

55. Thucydides, *The History of the Peloponnesian War* 242 (Rex Warner trans., Penguin Bks. 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: Militarism, Secrecy, and the End of the Republic* 285 (Metropolitan Bks. 2004).

56. H.R. Jt. Res. 1145, 88th Cong. (Aug. 7, 1964) (available at <http://www.ourdocuments.gov/doc.php?flash=old&doc=98>); see also Eric Alterman, *When Presidents Lie: A History of Official Deception and Its Consequences* 160–237 (Penguin Group 2004) (reviewing the political history of the executive branch during the Vietnam War era). Eric Alterman quotes former Senator J. William Fulbright: "The biggest lesson I learned from Vietnam is not to trust government statements. I had no idea until then." *Id.* at 160.

57. Gerald R. Ford Lib. & Museum, *The Watergate Files: The Aftermath: May 1974–Sept. 1974*, <http://www.fordlibrarymuseum.gov/museum/exhibits/watergate.files/content.php?section=5&page=a> (accessed Oct. 3, 2005).

tra rebel forces in Nicaragua, and reinforced the public's distrust of government.⁵⁸

- President Bill Clinton's personal deception about the Monica Lewinsky affair led to his impeachment by the United States House of Representatives and a trial in the United States Senate, from which he emerged with history's asterisk attached to his name.⁵⁹

Today's governmental assault on truth is joined with an assault on liberty. The PATRIOT Act is not the only example. Other threats to our liberty include the Government's mass and long-term detention of prisoners at Guantanamo Bay;⁶⁰ its detention of American citizens without bail or access to a lawyer;⁶¹ its assertion of power to label citizens and others as "enemy combatants" and detain them indefinitely without judicial review or legal assistance;⁶² its corollary justification that allowing detainees a lawyer would impede investigations;⁶³ its torture and cruel, inhumane, and degrading treatment of prisoners at Abu Ghraib, Guantanamo, in Afghanistan, and elsewhere;⁶⁴ its notion that it

58. Alterman, *supra* n. 56, at 238–293; Lawrence E. Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-Up* (W.W. Norton & Co. 1997).

59. CNN, *Clinton's Crisis: Down in History*, <http://www.cnn.com/ALLPOLITICS/Time/1998/10/12/clinton.crisis.html> (Oct. 19, 1998).

60. See *In re Guantanamo Detainee Cases*, 2005 U.S. Dist. LEXIS 1236 (D.C. Cir. Jan. 31, 2005) (adjudicating eleven habeas cases brought by detainees held in Guantanamo Bay, Cuba).

61. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (adjudicating a habeas case filed by a United States citizen held as an enemy combatant); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (same).

62. See *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that federal courts have jurisdiction to determine the legality of the detention).

63. 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., Cent. Found. 2003). The hope of getting Padilla to talk was, in fact, cited by government lawyers to Judge Mukasey as a ground 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 United States 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. *Id.* (citing 372 U.S. 335 (1963)).

64. Ctr. for Pub. Integrity, *Article 15-6 Investigation of the 800th Military Police Brigade*, http://www.publicintegrity.org/docs/AbuGhraib/Taguba_Report.pdf (accessed Oct. 3, 2005); see also *The War on Our Freedoms: Civil Liberties in an Age of Terrorism* xiii–xvi (Richard C. Leone & Greg Anrig, Jr. eds., Cent. Found. 2003); Michael Traynor, *In Re-*

can try people in military tribunals without the process that even murderers, armed robbers, and traitors are due;⁶⁵ and its claim that even the Supreme Court of the United States cannot review its actions.⁶⁶ The Supreme Court has just begun to address some of these issues in recent cases.⁶⁷ 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 its 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.⁶⁸ Under his direc-

sponse: The Ticking Bomb Contention, Bull. Am. Acad. 41 (Winter 2005) (available at <http://www.amacad.org/publications/bulletin/winter2005/response.pdf>); Ltr. from Michael Traynor to Phillip B. Heymann, James Barr Ames Prof. of L., Harv. U. (Dec. 16, 2004) http://bcsia.ksg.harvard.edu/BCSIA_content/documents/Traynor_Letter.pdf.

65. See *Padilla*, 542 U.S. at 465 (Stevens, J., dissenting) (opining that "[u]nconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber"); *Rasul*, 542 U.S. at 485 ("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*, 542 U.S. at 516 ("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.").

66. Br. for the Respts. in Opposition, *Rasul v. Bush*, 542 U.S. 466 (2004) (available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/114/BriefForTheRespondents.pdf). For the respondents' brief that was filed after the United States Supreme Court granted certiorari, see Br. for the Respts., *Rasul v. Bush*, 542 U.S. 466 (2004) (available at 2004 WL 425739).

67. See *Padilla*, 542 U.S. at 426 (adjudicating a case involving a United States citizen detained at Guantanamo Bay, Cuba); *Rasul*, 542 U.S. at 466 (same); *Hamdi*, 542 U.S. at 507 (adjudicating a case involving a United States citizen held as an enemy combatant at a naval facility within the United States); see generally Harold H. Koh, Dean of Yale Law School, Address, *On Law and Globalization* (ALI 2006 Annual Meeting, May 17, 2006) (available at <http://www.ali.org>; select 2006 Annual Meeting) (commenting on the radical changes in international and United States domestic law caused by the global war on terror). On June 29, 2006, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, the Supreme Court rejected the President's contentions that it lacked jurisdiction to review the constitutionality of the military commissions he had established unilaterally and without Congressional approval to try Guantanamo detainees, and that such commissions were authorized by Congress' Authorization to Use Military Force, adopted immediately after September 11. The Court held instead that his actions violated the Geneva Conventions and the limitations that Congress had imposed in the Uniform Code of Military Justice.

68. Memo. from John Ashcroft, U.S. Atty. Gen., to Heads of All Fed. Depts. and Agen-

tion, the Government secretly arrested and deported hundreds of Muslim and Arab immigrants after closed deportation hearings.⁶⁹ The United States Court of Appeals for the Sixth Circuit held that secret deportation hearings are unconstitutional under the First Amendment.⁷⁰ 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.”⁷¹ The United States Court of Appeals for the Third Circuit held the opposite,⁷² despite a thoughtful dissent.⁷³ 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.⁷⁴

cies, *The Freedom of Information Act* (Oct. 12, 2001) (available at <http://www.us.doj.gov/04foia/011012.htm>); U.S. Dept. of Just., Off. of Info. & Priv., *New Attorney General FOIA Memorandum Issued*, <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm> (Oct. 15, 2001).

69. Anthony Lewis, *First They Came for the Muslims . . . The Justice Department's War on Immigrants*, 14 Am. Prospect 3 (Mar. 1, 2003) (available at <http://www.prospect.org/print/U14/3/lewis-a.html>).

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

71. *Id.* at 710–711; 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) (analyzing the *Detroit Free Press* decision).

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

73. *Id.* at 221–229 (Scirica, J., dissenting).

74. See Ltr. from William E. Moschella, Asst. Atty. Gen., to L. Ralph Mecham, Dir., Admin. Off. of the U.S. Courts 1 (Apr. 30, 2004) (available at http://www.epic.org/privacy/terrorism/fisa/2003_report.pdf) (stating that, in 2003, “1727 applications were made to the Foreign Intelligence Surveillance Court for electronic surveillance and physical search”); see also Ltr., *supra* n. 43 (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 ACLU and the Electronic Privacy Information Center have been active in seeking to retrieve and publish information. See e.g. ACLU, *ACLU Says that Patriot Act Has Been Misused, Extent Unknown Because of Government Stonewalling*, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15903&c=206> (June 7, 2004); ACLU, *Justice Department May Be Using Controversial Patriot Act Powers after All, Letter Reveals*, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15844&c=262> (May 20, 2004) (reporting that, in a related development, a federal court ordered the FBI to disclose PATRIOT Act records to the ACLU); ACLU, *New Records Show That FBI Invoked Controversial Surveillance Powers Weeks after Attorney General Declared That Power Had Never Been Used*, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15959&c=262> (June 17, 2004); U.S. Dept. of Just., *Business Record Order Requests Since 10/26/2001*, http://www.aclu.org/patriot_foia/2003/

The current repression is reminiscent of the 1950s and 1960s. In the early 1950s, although there were many pleasant days, the Berkeley campus of the University of California was in turmoil over a loyalty oath required by the University.⁷⁵ 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.⁷⁶ 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.⁷⁷ 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.⁷⁸ We now know from FBI records

sec215_fbi.pdf (Feb. 13, 2003) (indicating that the records are blacked out and marked "classified"); U.S. Dept. of Just., *Transactional Records NSLs Since 10/26/2001*, http://www.aclu.org/patriot_foia/FOIA/NSLlists.pdf (Aug. 6, 2003) (same); ACLU, *ACLU Reveals Secret Suit over FBI*, <http://www.parapolitics.info/phorum/read.php?f=27&I=61&t=61>.ACLU (Apr. 29, 2001); ACLU, *Patriot FOIA*, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15327&c=262> (accessed Mar. 28, 2005) (providing a list of, and links to, the records released by the DOJ in response to FOIA requests).

75. Clark Kerr, *The Gold and the Blue: A Personal Memoir of the University of California 1949-1967* vol. 1, 3-15 (U. of Calif. Press 2003); Robert Greenberg, *The Loyalty Oath and California: A Report on Events, 1949-1958*, http://www.fsm-a.org/stacks/AP_files/APLoyaltyOath.html (accessed Mar. 28, 2005); U. of Calif., Berkeley, *UC Loyalty Oath Remembered on 50th Anniversary*, <http://www.berkeley.edu/news/berkeleyan/1999/0929/loyalty.html> (last updated Sept. 29, 1999). 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. OAC, Collection No. BANC MSS 68/4c, <http://oac.cdlib.org/findaid/ark:/13030/tf9m3nb40f> (accessed Oct. 6, 2005).

76. *Tolman v. Underhill*, 249 P.2d 280, 283 (Cal. 1952); *Pockman v. Leonard*, 249 P.2d 267 (Cal. 1952), *appeal dismissed*, 345 U.S. 962 (1953).

77. Gregg Herken, *Brotherhood of the Bomb: The Tangled Lives and Loyalties of Robert Oppenheimer, Ernest Lawrence, and Edward Teller* 3, 279-280 (Henry Holt & Co. 2002). For expanded endnotes detailing the United States government's surveillance of J. Robert Oppenheimer, see *Brotherhood of the Bomb, Notes for Chapter Seventeen*, http://www.brotherhoodofthebomb.com/bhbmedia/notes_chap17.doc (accessed Oct. 8, 2005).

78. See Kerr, *supra* n. 75, at 157, 208-209, 226, 323, 382, 415 (detailing events at Berkeley from 1949 to 1967); see also David Maraniss, *They Marched into Sunlight: War and Peace, Vietnam and America, October 1967* (Simon & Schuster 2003) (describing similar events in Madison, Wisconsin). The hardships to the University of California at Berkeley also included "[t]he assaults on the university by Governor Ronald Reagan (and later

released under FOIA after many years of litigation with the government⁷⁹ that in 1969, the governor of California planned for “the destruction of disruptive elements on California campuses.”⁸⁰ FOIA documents show that then-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.⁸¹ 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 warfare⁸²—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.⁸³

The FBI’s scrutiny of the University even noted the following essay topic on a basic English examination: “What are the dangers to a democracy of a national police organization like the FBI which operates secretly and is unresponsive to public criticism?”⁸⁴ Although many things have changed, that English professor’s exam question is still relevant. Given today’s climate, and the

by Governor Jerry Brown) that were among the most severe by any governors on any universities in U.S. history.” Kerr, *supra* n. 75, at 415.

79. See e.g. *Rosenfeld v. U.S.*, 859 F.2d 717 (9th Cir. 1988) (adjudicating a lawsuit brought by a news reporter seeking FBI records under the Freedom of Information Act); *Rosenfeld v. U.S. Dept. of Just.*, 761 F. Supp. 1440 (N.D. Cal. 1991) (same).

80. See Seth Rosenfeld, *The Campus Files: The Governor’s Race*, S.F. Chron. F6 (June 9, 2002) (quoting Herbert E. Ellingwood, one of former California Governor Ronald Reagan’s top legal advisors).

81. Memo. from C.D. De Loach, to Clyde Tolson (July 17, 1969) (available at <http://sfgate.com/news/special/pages/2002/campusfiles/documents/6a1.shtml>); Rosenfeld, *supra* n. 80, at F6.

82. Memo., *supra* n. 81.

83. *Id.* Although the FBI had 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. John T. Elliff, *Aspects of Federal Civil Rights Enforcement: The Justice Department and the FBI, 1939–1964*, in *Law in American History* 605, 612 (Donald Fleming & Bernard Bailyn eds., Little, Brown & Co. Ltd. 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 Age* (Random H. 2004); Philip K. Howard, *Every Move You Make*, Wash. Post T10 (Apr. 4, 2004) (reviewing Jeffrey Rosen, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age* (Random H. 2004)).

84. Memo. from FBI Spec. Agent in Charge, Los Angeles, to J. Edgar Hoover, FBI Dir. (Feb. 1, 1960) (available at <http://sfgate.com/news/special/pages/2002/campusfiles/documents/2-1.shtml>).

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.⁸⁵ The values of truth, liberty, and openness that I speak about provide the very foundation for political 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 McCain⁸⁶ and the late Barry Goldwater,⁸⁷ no less than in those of Patrick Leahy⁸⁸ and Russell Feingold,⁸⁹ 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

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

86. *Id.*; see also Herman van Gunsteren, *A Theory of Citizenship: Organizing Plurality in Contemporary Democracies* 145 (Westview Press 1998) (stating that "freedom is the core of liberal politics and ethics, the axiom on which all arguments elaborate"); John McCain, *Senator McCain's Remarks at the Inter-Parliamentary Conference on Freedom and Human Rights in Central Asia*, http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=941 (May 1, 2003).

87. See Barry Goldwater, *The Coming Breakpoint* 14–25, 168–177 (Macmillan Publ. Co. 1976) (expounding upon the "spirit of freedom" underlying the formation and governance of the United States); Barry Goldwater, *The Conscience of a Conservative* 9–23 (Victor Publ. Co., Inc. 1960) (noting that his conservative philosophy aims to maximize, preserve, and extend freedom).

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

89. Russell Feingold, *Statement of U.S. Senator Russell Feingold on the Anti-Terrorism Bill from the Senate Floor*, www.senate.gov/feingold/statements/01/10/102501at.html (Oct. 25, 2001).

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 initiating smart and aggressive actions to gather, assess, and develop reliable intelligence,⁹⁰ but not engaging in demagoguery or fear mongering; reforming our intelligence-gathering processes and agencies, but not blaming our failures on bureaucracy; educating our citizens, but not assuming a color-coded “alert” system stands for true education; preventing terrorist attacks when we can, but not making enemies around the globe; developing effective crisis-management and first-response programs with the involvement of local and state police, fire, and emergency officials, and supporting citizen groups; engaging in constructive and respectful diplomacy; fostering international friendships and communications and cooperative actions, but not antagonistic unilateralism; increasing our knowledge of and international supervision over nuclear weapons; and even engaging 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 strengthening criminal penalties;⁹¹ lengthening or eliminating statutes of limitations for certain terrorist crimes;⁹² creating a new crime of willfully attacking a mass transportation system;⁹³ enhancing the Government’s ability to pay rewards to combat terrorism;⁹⁴ updating the law to apply to new technology such as cell phones, voice mail, and the Internet;⁹⁵ authorizing warrants from the federal judicial district to reach stored communications in another district;⁹⁶ improving

90. See Philip B. Heymann & Juliette N. Kayyem, *Long Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism*, http://bcsia.ksg.harvard.edu/BCSIA_Content/documents/LTLS_finalreport.pdf (accessed Mar. 28, 2005) (assessing how the United States has responded to terrorism since September 11).

91. 31 U.S.C.A. §§ 5321–5322 (West 2003).

92. 18 U.S.C.A. § 3286 (West Supp. 2005).

93. *Id.* at § 1993.

94. *Id.* at § 3071; 22 U.S.C.A. § 2708 (West Supp. 2005); 28 U.S.C.A. § 524 (West Supp. 2005).

95. 18 U.S.C.A. §§ 2510, 2703, 2711 (West Supp. 2005).

96. *Id.* at § 2703(d).

the benefits and related procedures for public safety officers;⁹⁷ and expediting the hiring of translators at the FBI.⁹⁸

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.⁹⁹ President Lincoln, in a special message to Congress, stated that Taney's order could "allow 'all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated.'"¹⁰⁰ Congress, which was not in session when President Lincoln acted, later approved the suspension.¹⁰¹ 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.¹⁰² 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."¹⁰³ There was far less calibration of emergency action and far less justification in other incidents, such as Attorney General A. Mitchell Palmer's raids during the Red Scare of the

97. 42 U.S.C.A. § 3796c-1 (West 2003).

98. 28 U.S.C.A. § 532 (West Supp. 2005).

99. *Ex parte Merryman*, 17 F. Cas. 144 (D. Md. 1861); William J. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 26 (Alfred A. Knopf 1998).

100. Rehnquist, *supra* n. 99, at 38 (quoting President Abraham Lincoln). In *A (FC) & Others (FC) v. Secretary of State for 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, and that "[t]he real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these." *Id.* at ¶¶ 86–97. The decision and the various individual opinions are available at <http://www.publication.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>.

101. Rehnquist, *supra* n. 99, at 37.

102. Daniel Farber, *Lincoln's Constitution* 194 (U. of Chi. Press 2003).

103. Sandra Day O'Connor, *The Majesty of the Law* 94 (Random H. 2003).

1920s,¹⁰⁴ and the government's forcible internment of persons of Japanese ancestry during World War II.¹⁰⁵

How shall we as citizens respond to deception, intrusion, and secrecy? The Constitution employs the word "citizen."¹⁰⁶ That term is a solemn one connoting active membership in the civil community.¹⁰⁷ 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."¹⁰⁸ When Justice Louis Brandeis issued his celebrated concurring opinion in the 1927 criminal syndicalism case of *Whitney v.*

104. *The Palmer Raids* (Robert W. Dunn ed., N.Y. Intl. Publishers 1948).

105. See *Korematsu v. U.S.*, 323 U.S. 214, 223 (1944) (upholding the internment of Japanese-Americans as a security measure prompted by "military urgency"). Another example involves President Franklin D. Roosevelt's invocation of military tribunals to try 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, 777–778 (1950) (German nationals captured by the United States Army in China had no right of habeas corpus to challenge their detention). Debate continues over the ramifications of the Supreme Court's decision to allow such trials to proceed, but it bears emphasis that the Court did so only after establishing its jurisdiction to review the president's action in a habeas corpus proceeding. *Id.* at 776 (noting that "[t]he standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied").

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

107. Peter Riesenberg, *Citizenship in the Western Tradition: Plato to Rousseau* 266 (U. of N.C. Press 1992); Alexander W. Astin, *What Higher Education Can Do in the Cause of Citizenship*, Chron. Higher Educ. B1 (Oct. 6, 1995). "[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 Euben, *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., Princeton U. Press 2001) (quoting Sheldon S. Wolin, *The Presence of the Past* 190 (Johns Hopkins U. Press 1989)); see also Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* 603–604 (2d ed., Princeton U. Press 2004) (discussing the role of citizenship at the local as well as national level); Richard A. Posner, *Law, Pragmatism, and Democracy* 130–157 (Harv. U. Press 2003) (stating his theory on "two concepts of democracy"); Cass R. Sunstein, *Designing Democracy: What Constitutions Do* 233 (Oxford U. Press 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 *Education, Culture and Values* vol. 6 (Mal Leicester et al. eds., Falmer Press 2000); Bernard Crick, Address, *Citizenship and Education* (1992) (reprinted in Bernard Crick, *Essays on Citizenship* 97–111 (Cromwell Press Ltd. 2000)); Andrew Delbanco, *The Endangered University*, 52 N.Y. Rev. of Bks. No. 5 at 19, 21–22 (Mar. 24, 2005).

108. Cass Sunstein, *Republic.com* 105, 201 (Princeton U. Press 2001).

California,¹⁰⁹ 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.”¹¹⁰

109. 274 U.S. 357 (1927); see also Sunstein, *supra* n. 107, at 47–48, 155–156, 183–184, 201 (discussing Justice Brandeis’ opinion in the modern context); 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., U. of Chi. Press 2002) (providing a phrase-by-phrase analysis of Brandeis’s concurring opinion in *Whitney*).

110. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring); Johnson, *supra* n. 55, at 298. Chalmers Johnson recently criticized the decision of the Foreign Intelligence Surveillance Court of Review granting Ashcroft additional authority at the expense of civil liberties stating:

The 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* n. 55, at 298; see also Wendell Berry, *Citizenship Papers* 10 (Shoemaker & Hoard 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 those 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 (Harv. U. Press 2002); see also Jane Mansbridge, *On the Idea That Participation Makes Better Citizens*, in *Citizen Competence and Democratic Institutions* 291 (Stephen L. Elkin & Karol Edward Soltan eds., Penn. St. U. Press 1999) (asserting that those who participate in democratic decisions tend to be better citizens). 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. . . . The 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, 415–416 (Theda Skocpol & Morris P. Fiorina eds., Brookings Instn. Press 1999). Professor Herman R. van Gunsteren has analyzed the subject of “politicians 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* n. 86, at 113, 115.

When Judge Learned Hand gave his famous speech, *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 save it; 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."¹¹¹

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,

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?¹¹²

It would be good to be able to count on judges who, like Justice Robert Jackson in *Second Flag Salute* case, held, "The 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."¹¹³ Suppose, however, the day comes when ordinarily cautious judges become timid and un-courageous ones, and we cannot count on either judges or legislators to protect our liberty.¹¹⁴ Surely it would be better to stand up

111. Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* 190 (3d ed., Alfred A. Knopf 1960); see also Gerald Gunther, *Learned Hand: The Man and the Judge* 547–552, 639–643 (Alfred A. Knopf 1994) (reviewing Hand's statements on liberty following World War II).

112. Roger J. Traynor, *Law and Social Change in a Democratic Society*, U. Ill. L. Forum 230, 241 (Summer 1956).

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

114. See N. Patrick Flanagan III, *Are the Courts in Jeopardy of Being Marginalized?* 11 Nev. Law. 6, 6–7 (2003) (discussing how an "ever-increasing workload" and diminished funding and power bestowed on courts have undermined the judiciary over the previous thirty-four years); Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Defer-*

to repression, to organize for the preservation of liberty now while there are still judges and legislators and conscientious executives who may listen.

Over 2,500 years ago, Heraclitus of Ephesus said that “the 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.”¹¹⁵ 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 are enforceable by courts.¹¹⁶ It says hardly anything, however, about the responsibilities of citizens. The Thirteenth Amendment prohibits slavery,¹¹⁷ but overall, the Constitution, including its amendments, is not structured to address the duties of citizens. 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.¹¹⁸ 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 others.

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 “happiness is the aim of life” and “the summum bonum is to be not pained in body,

ence: Judicial Responsibility in a Time of Crisis, 32 Hofstra L. Rev. 795 (2004) (discussing the impact of the war on terrorism on the role of courts); Wolf, *supra* n. 52.

115. Ruggero J. Aldisert, *The Judicial Process: Text, Materials and Cases* 9 (2d ed., West 1996) (quoting Heraclitus).

116. 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* (Harv. U. Press 1997).

117. U.S. Const. amend. XIII.

118. *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 190–191 (2004).

nor troubled in mind,"¹¹⁹ 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 our political community.¹²⁰

This "dichotomy between self-interest and altruism"¹²¹ continues in modern terms. Our freedom allows us the choice to go "bowling alone,"¹²² to pursue individual pleasures without any sense of citizenship, community, or responsibility, and just to take and not to 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."¹²³

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"?¹²⁴

119. Walter Nicgorski, *Cicero, Citizenship, and the Epicurean Temptation*, in *Cultivating Citizens* 3, 4–5 (Dwight D. Allman & Michael D. Beaty eds., Livingston Bks. 2002); see also Wolin, *supra* n. 107, at 70–75 (discussing "citizenship and disengagement").

120. Nicgorski, *supra* n. 119, at 5, 7–20; see Cicero, *De Officiis*, § I.7, at 23–24, § III.5, at 291–295, 311, 397–401 (Walter Miller trans., Harv. U. Press 1985).

121. Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* 88 (Princeton U. Press 1993). Other works on this subject include: *Citizen Competence and Democratic Institutions*, *supra* n. 110; *Citizens: Towards a Citizenship Culture* (Bernard Crick ed., Blackwell Publishers 2001); Nicgorski, *supra* n. 119; John Lachs, *Responsibility and the Individual in Modern Society* (Brighton 1981); *Politics, Education and Citizenship*, *supra* n. 107; Paul Rogat Loeb, *Soul of a Citizen: Living with Conviction in a Cynical Time* (St. Martin's Griffin 1999); *Reinventing Collective Action: From the Global to the Local* (Colin Crouch & David Marquand eds., Blackwell Publishers 1995); *The Role of Personal Responsibility in Balancing Individual Liberty and the Common Good* (Margaret Bohannon-Kaplan ed., 1999); and van Gusteren, *supra* n. 86.

122. Robert D. Putnam, *Bowling Alone* (Simon & Schuster 2001).

123. John F. Kennedy, Inaugural Address, *First Pres. Speech* (D.C., Jan. 20, 1961) (available at <http://www.bartleby.com/124/pres56.html>).

124. 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, *Quotations Database*, http://www.nonstopenglish.com/reading/quotations/k_Apathy.asp (accessed 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*, in *Beach House on the Moon* (Island Records 1999) (CD) (lyrics available at http://www.margaritaville.com/lyrics_beachhouse.php).

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 do not yet have to worry about being packed off to a detention camp, or compelled to talk about beliefs or friends before some hostile interrogator, or subjected to secret government surveillance of personal records and residences.¹²⁵ Why should Americans care if some misguided person, minority, 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

125. Since the date of this lecture, it has been reported that the Government has engaged in warrantless eavesdropping on Americans, evasion of the limits imposed by Congress in the Foreign Intelligence Surveillance Act, and disregard of the FISA procedures that authorize emergency surveillance followed by judicial review. Susan Page, *NSA Secret Database Report Triggers Fierce Debate in Washington*, USA Today (May 11, 2006) (available at http://www.usatoday.com/news/washington/2006-05-11-nsa-reax_x.htm); see Ctr. for Const. Rights, *CCR Files Suit over NSA Domestic Spying Program*, <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=IahVzRA3n9&Content=693> (accessed June 8, 2006) (discussing the lawsuit CCR filed in January 2006 against President George W. Bush and the head of the NSA, "challenging the NSA's surveillance of persons within the United States without judicial approval or statutory authorization"); Ctr. for Democracy & Tech., *NSA Domestic Warrantless Snooping*, <http://www.cdt.org/security/nsa/> (accessed June 8, 2006) (providing "resources and background materials on the NSA warrantless surveillance program"). To view government reports regarding the use of FISA and wiretaps in 2005, see Admin. Off. of the U.S. Courts, *Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications* (Apr. 2006) (available at http://www.epic.org/privacy/wiretap/2005_wiretap_report.pdf); U.S. Dept. of Just., *2005 FISA Report* (Apr. 28, 2006) (available at <http://www.fas.org/irp/agency/doj/fisa/2005rept.html>). For general information on FISA and the government's wiretapping practices, visit the website of the Electronic Privacy Information Center (EPIC), at <http://www.epic.org/> (accessed June 8, 2006).

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 the *Second Flag Salute* case,¹²⁶ the *Gideon* case,¹²⁷ the *Miranda* case,¹²⁸ and the recent *Lawrence* case,¹²⁹ to name just four of many. “[L]iberty [does not] defend itself.”¹³⁰ It requires individual defenders and advocates. Free Americans should not leave the defense of liberty just to those yearning to breathe free.¹³¹ 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.¹³²

Even the slightest unjustified intrusion on liberty requires a vigilant response.¹³³ The direction of the Constitution aims to-

126. *W. Va. St. Bd. of Educ.*, 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 [to] the Inquisition . . . down to the fast failing efforts of our present totalitarian enemies.”).

127. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

128. *Miranda v. Arizona*, 384 U.S. 436 (1966).

129. *Lawrence v. Texas*, 539 U.S. 558 (2004).

130. Nadine Strossen & Timothy H. Edgar, Test. before Sen. Comm. on the Jud., *America after 9/11: Freedom Preserved or Freedom Lost?* (D.C., Nov. 18, 2003) (available at http://judiciary.senate.gov/print_testimony.cfm?id=998&wit_id=2878).

131. 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) (available at <http://xroads.virginia.edu/~CAP/LIBERTY/lazaruspoem.html>).

132. See 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* (New Press 2005).

133. In *Abrams v. U.S.*, 250 U.S. 616, 624 (1919), the United States Supreme Court affirmed the conviction of five defendants for violating the Espionage Act. In his famous 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 immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.” *Id.* at 630 (Holmes, J., dissenting); see also Blasi, *supra* n. 109, at ix (discussing Holmes’s commitment to preserving freedom of speech). If Americans collectively view the threat to liberty as dangerous, perhaps they will be moved to act. “American politics have

ward greater 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:

In *Silverman v. United States*,¹³⁴ a 1961 opinion by Justice Stewart, the Supreme Court held that the actions of police officers in attaching an electronic device, a so-called "spike mike,"¹³⁵ to the heating duct of a house owned by the defendants, thereby turning the duct into a gigantic microphone running throughout the entire house, violated the Fourth Amendment.¹³⁶ Accordingly, the conversations overheard by the police officers were inadmissible in evidence.¹³⁷ The Court had to confront an earlier case, *Goldman v. United States*,¹³⁸ 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.¹³⁹ In distinguishing *Goldman* it noted,

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 occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch.¹⁴⁰

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 (Basic Bks. 1992). "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 336-337; see also Paul Berman, *Terror and Liberalism* 170 (W.W. Norton & Co. 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."). For one critique of a narrow theory of "national interest," see Condoleezza Rice, *Promoting the National Interest*, 79 *Foreign Aff.* 45 (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 (Alfred A. Knopf 2003).

134. 365 U.S. 505 (1961).

135. 365 U.S. at 506.

136. *Id.* at 511-512.

137. *Id.* at 512.

138. 316 U.S. 129 (1942).

139. 316 U.S. at 132-133.

140. *Silverman*, 365 U.S. at 512 (quoting *Boyd v. U.S.*, 116 U.S. 616, 635 (1886)).

The Court in later cases has adopted the same vigilant approach.¹⁴¹

In 2003, in *Lawrence v. Texas*,¹⁴² 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.¹⁴³ In his opinion for the Court, which also overruled contrary precedent, *Bowers v. Hardwick*,¹⁴⁴ Justice Anthony Kennedy stated that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”¹⁴⁵

Although there is an ebb and flow to citizen participation and citizen resistance, participation and resistance are quite different things that depend 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 opinion and debate, such as the Internet, thereby contributing one by one to a growing consensus in the country and in the world;¹⁴⁶
- Mobilize city councils and state legislatures to speak and act for liberty;

141. See e.g. *Kyllo v. U.S.*, 533 U.S. 27, 31 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); *Katz v. U.S.*, 389 U.S. 347, 356–357 (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, 44 (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”).

142. 539 U.S. 558.

143. 539 U.S. at 578.

144. 478 U.S. 186, 192 (1986) (holding that homosexuals have no fundamental right to practice “consensual sodomy”).

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

146. See Sunstein, *supra* n. 108, at 9, 27–39, 105–123, 191–202 (discussing the need for public discourse and its methods in the technological era).

- 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;
- Educate ourselves about threats and terrorists and how to deal with them;¹⁴⁷
- Train and enlist others to help people such as signing up in advance to be neighborhood watch captains, first-aid givers, or stretcher-bearers, 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,

147. For example, RAND and authors affiliated with RAND have published various recent reports that foster a better understanding of terrorism. *See e.g.* Nora Bensahel, *The Counterterror Coalitions: Cooperation with Europe, NATO, and the European Union* (RAND 2003); Kim Cragin & Peter Chalk, *Terrorism & Development: Using Social and Economic Development to Inhibit a Resurgence of Terrorism* (RAND 2003); Paul K. Davis & Brian Michael Jenkins, *Deterrence & Influence in Counterterrorism: A Component in the War on al Qaeda* (RAND 2002); Bruce Hoffman, *Inside Terrorism* (Colum. U. Press 1998); Brian Michael Jenkins, *Countering al Qaeda: An Appreciation of the Situation and Suggestions for Strategy* (RAND 2002); Theodore Karnsik, *Toxic Warfare* (RAND 2002); Ian O. Lesser et al., *Countering the New Terrorism* (RAND 1999); David Ochmanek, *Military Operations Against Terrorist Groups Abroad: Implications for the United States Air Force* (RAND 2004); *Sources of Conflict in the 21st Century: Regional Futures and U.S. Strategy* (Zalmay Khalilzad & Ian O. Lesser eds., RAND 1998); *see also* RAND, *RAND Terrorism and Homeland Security Research Area*, http://www.rand.org/research_areas/terrorism/ (last updated 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.

is not only unpatriotic and servile, but is morally treasonable to the American public”;¹⁴⁸

- 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 a temporary and carefully calibrated intrusion on civil liberties.¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹ We can challenge unconstitutional orders and unconstitutional provisions of the PATRIOT Act.¹⁵²

148. Theodore Roosevelt, *Editorial*, Kan. City Star (May 7, 1918) (available at <http://www.theodoreroosevelt.org/life/quotes.htm>); see also Cicero, *supra* n. 120, at § III.6, 299 (“We have no ties of fellowship with a tyrant, but rather the bitterest feud.”).

149. See Heymann & Kayyem, *supra* n. 90, at 1–21 (discussing the competitive concerns of democratic freedom and national security); Rehnquist, *supra* n. 99, at 218–225. There is widespread criticism of the current administration’s repression of our liberties. See e.g. Cole, *supra* n. 132; Nat Hentoff, *The War on the Bill of Rights—and the Gathering Resistance* (Seven Stories Press 2003); *Lost Liberties: Ashcroft and the Assault on Personal Freedom* (Cynthia Brown ed., New Press 2003); *The War on Our Freedoms: Civil Liberties in an Age of Terrorism* (Richard C. Leone & Greg Anrig, Jr. eds., Century Found. Bks. 2003); Anthony Lewis, *First They Came for the Muslims: The Justice Department’s War on Immigrants* (Am. Prospect 2003); Shirley M. Hufstedler, Address, *Remarks at All Saints Church* (Pasadena, Cal., Nov. 2, 2003) (transcript available at [http://www.allsaints-pas.org/archives/transcripts/\(11-2-03\)%20Shirley%20Hufstedler.pdf](http://www.allsaints-pas.org/archives/transcripts/(11-2-03)%20Shirley%20Hufstedler.pdf)).

150. See Traynor, *supra* n. 64, at 41 (criticizing the United States military’s use of “highly coercive interrogation” as “repugnant to people who cherish human rights”).

151. 5 U.S.C. § 552. In the United Kingdom, Lord Anthony Lester has commented that “abridging 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., Blackwell Publishers 1996).

152. In an essay entitled *Real Patriots Ask Questions*, Carl Sagan stated that “part of the duty of citizenship is not to be intimidated into conformity. I wish that the oath of

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 an attorney general who gave priority to secretive law enforcement instead of the guardianship of our Constitution. A key challenge is to define those areas that should be governed by principles akin to criminal law enforcement—with attendant significant involvement of judges—and those areas that should be governed by principles akin to military action, foreign relations, or national security¹⁵³—with less significant involvement of judges, but perhaps correspondingly more congressional oversight as well as executive oversight through inspectors general. 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,¹⁵⁴ working closely with Chesterfield Smith of Florida, then ABA President and one of the country's and our profession's great leaders.¹⁵⁵

As lawyers we can also help lead the way in persuading our government that torture and other highly coercive interrogation techniques that are cruel, inhumane, or degrading should never

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. (Sept. 8, 1991) (reprinted in Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark* 427 (Random H. 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.* (quoting *Am. Commun. Assn. v. Douds*, 339 U.S. 382, 442–443 (1950) (Jackson, J., concurring in part and dissenting in part)).

153. See generally David Cole & James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* 89 (Agency Lithograph & Prtg. 2002) (noting that security legislation proposed by former President Bill Clinton neglected to distinguish between criminal and political activities); Philip B. Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (MIT Press 2000); Philip B. Heymann, *Terrorism, Freedom, and Security: Winning without War* (MIT Press 2003); Heymann & Kayyem, *supra* n. 90 (assessing the United States response to terrorism since September 11, 2001).

154. 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 ABA President.

155. ABA, *An Interview with Chesterfield Smith*, <http://www.abanet.org/search/pages/searchResults.cfm?resultStart=1&searchArea=all> (accessed Oct. 15, 2005).

be used. That policy is reflected in international agreements,¹⁵⁶ in federal statutes,¹⁵⁷ and in well established military precedent.¹⁵⁸ Many people agree with this policy. I recently participated as an advisor to the long-term legal strategy project for preserving liberty in an age of terrorism, sponsored by the Memorial Institute for the Prevention of Terrorism (MIPT), based in Oklahoma City.¹⁵⁹ Although I agreed with the recommendations against torture, I dissented from the recommendations that would permit highly coercive interrogations under some circumstances.¹⁶⁰

The so-called “ticking bomb” scenario involving interrogation of a captured terrorist is a difficult theoretical one:

In the real world, the scenario posed is both artificial and unlikely—a straw man, invented to create fear and a panicked public endorsement of the shameful erosion of due process. More likely, large numbers of captured people will be swept up by troops. Such people will include individuals who are innocent and have no useful information, neighbors, relatives, or others who are innocent but might have marginally useful information, and a few terrorists [who are likely to have only fragments of information]. This is not the example the United States should set for its own citizens or for our allies or even our enemies. Moreover, highly coercive interrogation techniques are not demonstrably effective to elicit truthful information. . . . [Indeed, the ineffectiveness of highly coercive interrogation techniques is noted in the MIPT report itself.¹⁶¹] Techniques that by definition exceed constitutional limits on the interrogation of persons accused of crime are likely to be repugnant to people who cherish human rights [and are likely to] violate due process. They are likely to be ineffective against true terrorists and fanatic-

156. UN, *A Summary of United Nations Agreements on Human Rights*, <http://www.hrweb.org/legal/undocs.html> (accessed Oct. 15, 2005).

157. 18 U.S.C. §§ 241–242.

158. The War Crimes Act of 1996, 18 U.S.C. § 2441 (2000).

159. Natl. Meml. Inst. for the Prevention of Terrorism, <http://www.mipt.org> (last updated Sept. 30, 2005).

160. Traynor, *supra* n. 64, at 41. The full text of the dissent can be found at Ltr. from Michael Traynor to Phillip B. Heymann, *supra* n. 64, at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/Traynor_Letter.pdf. For a full report of the MIPT’s recommendations, see Mem. Inst. for Prevention of Terrorism (MIPT), *Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism*, <http://www.mipt.org> (accessed Oct. 15, 2005).

161. *MIPT*, *supra* n. 160, at 79–90.

ics trained to withstand them and prepared to die and injurious to innocent people subjected to them. Moreover, they are likely to provoke retaliation against our own troops and civilians who are captured, foster disrespect and resentment around the world, and corrode discipline in our own forces.¹⁶²

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 and sometimes calls 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.¹⁶³

162. Traynor, *supra* n. 64, at 41.

163. 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., Harv. U. Press 2001). Former University of California President Clark Kerr commented that

[t]he 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.

Id.

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 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.

Over the centuries, brave men and women have courageously defended liberty, risking their lives and careers. They are celebrated in ancient legends such as Antigone's struggle to give her dead brother a decent burial;¹⁶⁴ in the reports of battles our country has fought for our rights and freedoms; 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*.¹⁶⁵

By comparison, it seems little to ask that citizens stand up against the repression of truth, openness, and liberty today. President James Madison understood the "Constitution as the *people's* law, which was to be revered and not remolded by their servants."¹⁶⁶ 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.

164. Sophocles, *Antigone* (Ian Johnston trans., Malaspina U. College, Nanaimo 2005); 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 exactly like John Ashcroft.").

165. Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Abacus 1995).

166. Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 333 (Cornell U. Press 1998); see also James Madison, *The Federalist No. 10* (1787) (available at <http://www.constitution.org/fed/federal10.htm>) ("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.").