Operation Enduring Freedoms
The Strange Case of the First Amendment During the War on Terror
A Tale of Survival

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Part I: Sedition

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.

-Learned Hand, *The Spirit of Liberty*[1]

December 14, 2003, Grand Rapids, Iowa: Excited liberals squeeze their way into the high school gymnasium. The crowd is an unusual mix of college students, union members, and senior citizens (still calling themselves New Deal Democrats). The scent from last night's wrestling match lingers, but it is a smell with which Iowans are comfortable. The floor is becoming dangerously slippery as the snow from umbrellas, boots, and jackets begins to melt.

Senator Tom Harkin makes his way through the crow and up to the podium. The crowd goes wild; Harkin is an Iowa legend and has personally met most of the people in the crowd. He speaks about the growing divide between rich and poor; the lack of adequate health care in the United States; and most important, he says, the misguided war in Iraq.

"And now," Senator Harkin shouts after his ten minute speech, "it is my honor to introduce the next President of the United States, and our Party's next nominee; representing the Democratic Wing of the Democratic Party, Howard Dean!"

The high-school gymnasium sounds as if it has been converted into concert hall. Governor Dean makes his way to the stage. As he grabs the microphone from Senator Harkin, however, a team of uniformed F.B.I. agents storm the gymnasium. Governor Dean is arrested for sedition.

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April 28, 2004, New York City: Famed newsman Dan Rather sits in his Black Rock (CBS Headquarters) Office. Tonight, *60 Minutes II* will broadcast what may be the biggest story of Rather's long and storied career. This should be a great day for Rather, but something is weighing down on his conscience.

Two weeks ago, CBS News obtained photographs and reports documenting the systematic abuse of prisoners at the Abu Ghraib prison in Iraq. Among other things, the photographs captured American soldiers posing next to naked Iraqis as they lay stacked in a human pyramid. *60 Minutes II* made a report, but withheld the story for two weeks at the request of the Department of Defense. News had come that Seymour Hersh was preparing to release a report for the *New Yorker*, so Rather and the CBS executives

[1] In Dillard, 1974: 189-90.

decided to run their story. Rather knows that he has a professional and moral obligation to report the story, but the decision bothers him nevertheless. Rather is a patriot, and he knows that this scandal will reverberate throughout the Arab world and that it could put the lives of American soldiers in greater danger. But duty calls.

The phone rings. Rather picks up. It is the Attorney General; he tells Rather that the story cannot air. The President has decided that the risk to national security is too great. Flabbergasted, somewhat dumbfounded, and desperately conflicted, Rather thinks back to a time earlier in his career: the Vietnam War.

Then, Attorney General John Mitchell had ordered the *New York Times* to cease publication of reports on the Pentagon Papers. The *Times* ran a front page story titled, "Mitchell Seeks to Halt Series on Vietnam But *Times* Refuses." Rather remembers how famed *Times* editor A.M. Rosenthal had once wondered what "it would have meant in our history and in the history of the newspaper business if the headline had been 'Justice Department Asks End to Vietnam Series and *Times* concedes." Rather, like Rosenthal, is unwilling to see that ending. That night, CBS runs the story. The next morning, Dan Rather is arrested.

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It never happened, of course. Howard Dean lost the Iowa Caucuses, but not because he was imprisoned. Shortly after Iowa, he lost in New Hampshire and Wisconsin. But again, it was not because he was charged with sedition (as popular belief has it, it was because he embarrassingly yelped "byaah!") Dan Rather is now working with HDNet, and his departure from CBS News, while unfriendly, was not caused by his being charged with espionage.

The above is fiction. But should it be? Would it not have made a great deal of sense if – given the history of the First Amendment in the United States during wartime – Dan Rather and Howard Dean were indeed arrested for dissent? [2] [3]

Part II: Introduction

I began my research for this paper hoping to document the abuses of the First Amendment during George W. Bush's War on Terror (a war that, for the sake of this paper, lasts from September 11, 2001 through the end of the Bush presidency). This will be easy, I thought. After all, George W. Bush and his administration, in my opinion, had little to no respect for the Constitution and basic civil liberties. During their time, they

[2] While the two opening scenes are fiction, they are based largely on fact. The first scene, which discusses Howard Dean, was first conceived in Stone, 2004: 511, where a parallel to Eugene Debs' arrest is discussed. The rally is fictional, but Tom Harkin was traveling around Iowa with Governor Dean before the Iowa Caucuses.

[3] All details about Dan Rathers' feelings and office are fictional. CBS News' decision to air the Abu Ghraib story was indeed spurred by news the Seymour Hersh was publishing a piece on it for the *New Yorker.* For information on this, see Toobin, 2007: 271. The Rosenthal quote comes from Stone, 2004: 504.

abused prisoners – and then covered it up; they illegally withheld information from Congress and the American people; they denied basic *habeas corpus* rights to suspected terrorists; they spied on Americans without warrants; and they not-so-secretly and unapologetically tortured detainees.[4] In an attempt to avoid congressional oversight, they went so far as to claim that the Vice President is not part of the executive branch.[5]

And I did find abuses – I found a lot, in fact. I found religious discrimination; I found suppression of the press; and I found viewpoint discrimination violating the freedom of speech. But still, I was underwhelmed. I knew my history, and I was well aware of the sad history of the First Amendment during wartime. I recalled the Alien and Sedition Acts passed under John Adams . . . and the jailing of an anti-war congressman during the Civil War . . . and the awful suppression of dissent during World War I . . . and the guilt-by-association of the Cold War . . . and the police brutality of the Vietnam War. With these eras serving as context, I determined that relative to other times of war in American history, the First Amendment stayed safe during Bush's War on Terror.

I had a new task: find out why. Why – and how – did the First Amendment (that is, the freedom of religion, of speech, of association, of assembly, of petition and of the press) stay safe during a time when the federal government was metaphorically trampling upon the rest of the Constitution? When the Bill of Rights was denigrated, during a time of war, secrecy, and abuse, how did the rights of speech, worship, and the media remain (relatively) in tact? And when they were abused, how and why was it so?

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An Explanation:

The purpose of this paper is therefore two-fold. First, it will document the abuses of the First Amendment during the War on Terror. It will cover how the government violated the First Amendment in law, in practice, and in spirit. More than that, it is also the story of those whose rights were abused – real people whose liberties were taken from them in the name of a war purportedly waged for freedom. Second, it will attempt to explain why, given the historical record of the First Amendment during wartime, the abuses were not more numerous and more severe.

Before proceeding, two disclaimers: First, and most important, I am not a reporter and I have no "anonymous sources" or informants. My information has not been gathered from a series of anonymous Woodwardian interviews with Administration officials and I am not privy to information outside the public record. My findings are therefore based on a combination of evidence and logic. It may be that we never find out why the Bush Administration showed more deference to First Amendment than to Fourth, Fifth, Sixth,

[4] For detailed information on the civil liberties abuse of the Bush Administration, see Mayer, 2008. For just one example of prisoner abuse – and the subsequent cover up – see Hersh, 2004. For information on domestic spying and secrecy, see Gellman 2008. For information on torture, see government documents, including Bradbury, 30 May 2005.

[5] Meyer, 2007.

Seventh, and Eighth. Perhaps the Administration, and President Bush, in particular, genuinely felt that the First Amendment was sacrosanct while other amendments were not. Or perhaps they felt that the homeland could not be kept secure while preserving *all* of the rights enumerated in the Constitution, but that the First Amendment could stay. These explanations are, of course, unverifiable and unsatisfactory. It is my hope that my theories will help shed some much needed light on the era.

Second, this paper is not congratulatory to the Bush Administration for preserving the First Amendment relative to other times of war. On the contrary, it painstakingly documents the often egregious offenses that were made, and makes clear that such abuses are categorically wrong. Furthermore, the survival of the First Amendment during Bush's years does not make up for the fact that his administration may be the most lawless, liberty-trampling administration of all-time.

With those disclaimers, I intend to prove the following:

I. Besides establishing a religion and obstructing the right of petition, the federal government violated every aspect of the First Amendment during the War on Terror. This paper will document various abuses of the free exercise of religion, the freedom of speech, the freedom of press, and the freedom of assembly.
II. The First Amendment was abused less during the War on Terror than during other long wars for three key reasons:

    (1) **The Supreme Court:** The War on Terror was the first long-sustained conflict fought under the combination of Supreme Court precedents established during the Cold War and the Vietnam War. Equally important, the justices who sat on the Court during the War on Terror did not seem inclined to acquiesce to severe abuses of the First Amendment
    (2) **The People:** By the time of the War on Terror, and with 200 years of history behind them, the American people had finally settled on the idea that the First Amendment must always be protected, even during war time.
    (3) **Evolutionary Suppression**: The Bush Administration did not severely abuse the First Amendment during the War on Terror because doing so was of little utility. Rather than punish dissent and censor the press, they worked within the First Amendment institutions to manipulate free speech, discourse, and the media.

The paper has four remaining sections. Part III provides a brief history of the First Amendment during wartime. From there comes an introduction to the War on Terror and the Bush Administration's actions in prosecuting it. Part IV details the First Amendment liberties that were lost or abused during the War on Terror. It discusses laws, government actions, and affected people. Part V describes the First Amendment liberties *not lost* during the War on Terror and explains why the stayed safe. Finally, Part VI discusses the First Amendment in the age of Obama and the implications for the future.

Part III: How did we get here?

It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security.

-Justice Robert Jackson, *Security and Liberty under Law*[6]

The United States has a long and unfortunate history of overreacting to the perceived dangers of wartime. Time and time again, Americans have allowed fear and fury to get the better of them. Time and time again, Americans have suppressed dissent, imprisoned and deported dissenters, and then – later – regretted their actions.

-Geoffrey R. Stone, *Perilous Times*[7]

Before diving into this section, we must answer two questions. First, why is it necessary to know the history of the First Amendment during wartime? There are, of course, a multitude of reasons why knowing history of any sort is good and important. Specifically, knowing *this* history is of particular importance for this paper for three reasons: First, the extremes of First Amendment suppression during wartime provide necessary context to understand recent government action during the War on Terror. In other words, it puts everything in perspective. Second, the history shows the evolution of popular sentiment and legal precedent. Third, the history shows what was not lost during the War on Terror by showing what *was lost* during other times of conflict. That is, it shows why the arrests of Dan Rather and Howard Dean would not have been out of sync with the whole of U.S. history.

The second question: why does the health of the First Amendment matter during wartime? Is not victory the nation's sole concern? Volumes have been, and will continue to be written about the value of basic civil liberties. The legal, moral, and philosophical worth of the rights enumerated in the First Amendment are well outside the purview of this paper. But, the specific utility of the First Amendment during times of war is worth at least considering.

In his 2003 book, *Why Societies Need Dissent*, the American legal scholar and current Obama Administration official, Cass Sunstein explains how the benefits of dissent and of a robust marketplace of ideas are especially important during times of war. During World War II, for instance, much of the success of the allies came because of "the greater abilities of citizens in democracies to scrutinize and dissent and hence improve past and proposed courses of actions."[8] This was not unique to the Second World War, and, indeed, it can be credited, at least in part, to the fact that "democracies generally fare better than dictatorships in long wars."[9] And while the philosophic importance of the First Amendment during wartime is, as noted, outside the purview of this paper, one thing is glaringly obvious: The United States tends to fight wars under the guise of freedom; it is a sad irony indeed when those wars cause an erosion of freedom at home.

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[6] 1951.
[7] 2004: 5.
[8] Sunstein, 2003: 8.
[9] Stone, 2004: 532.

A Brief and Incomplete History of the First Amendment during Wartime:

In his magisterial 2004 tome, *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism*, Geoffrey Stone, a former dean at the University of Chicago Law School, masterfully documents the history of free speech (and the First Amendment) throughout American history. Stone convincingly argues that there have only been six periods in which the United States government has actively punished dissent: The "Quasi-War" with France in 1798, the Civil War, the First and Second World Wars, the Cold War, and the Vietnam War. Stone's work is without rival, and most of the information in this section comes from *Perilous Times*.

During the buildup to and the prosecution of the "Quasi-War" with France, President John Adams and his Federalist allies in Congress demonstrated that they had higher priorities than the preservation of free speech. Proponents of war with France created an environment of exaggerated fear eerily reminiscent to the buildup to the invasion of Iraq. In a predecessor to claims of "mushroom clouds," Representative "Long" John Allen, a Federalist from Connecticut, warned that once France had defeated England, the United States was surely next. Therefore, he argued, the United States should prepare for war, or face "nothing but bloodshed, slaughter, pillage, and complete subjection from France."[10] The existence of such an environment has been – prior to the War on Terror – a surefire indicator the suppression is on the horizon.

And indeed it was. As the Federalists blurred "the line between dissent and treason . . . and accused Republicans of disloyalty," they moved to suppress dissent.[11] They passed through the Congress the Sedition Act, which prohibited "any false, scandalous and malicious writing" against the government, or any of her officials that had "the intent to defame, or bring them contempt or disrepute; or to excite against them hatred of the good people of the United States."[12] Under this law, Matthew Lyon, a Democratic congressman from Vermont; Thomas Cooper, a newspaper editor from Pennsylvania; and James Callender, a journalist from Virginia were all sent to prison for sedition, which was nothing more than speech.[13]

A little less than four score and seven years later - during the Civil War - President Lincoln proved to be much more conscientious of protecting free speech rights (though he notably suspended *habeas corpus* rights at points in the war) than were the Federalists. Nevertheless, his concern did not prevent the jailing of Congressman Clement Vallandigham, an anti-war Democrat from Ohio, for dissent.[14]

Woodrow Wilson did not even pretend to have concern for civil liberties. "Unlike Lincoln," Stone notes, "Woodrow Wilson was a man with little tolerance for criticism. In seeking a declaration of war, he cautioned that 'if there should be disloyalty, it will be

[10] Qtd. in Stone, 2004: 27.
[11] Ibid, 28.
[12] An Act for the Punishment of Certain Crimes against the United States; ch. 74, 1 Stat. 596.
[13] Stone, 2004: 17-20, 54-63.
[14] Ibid: 120-130.

dealt with a firm hand of stern repression'" and that "disloyal individuals 'had sacrificed their right to civil liberties."[15]

The legislative hallmarks of this era were the Espionage Act of 1917[16] and the Sedition Act of 1918.[17] The Espionage Act made it illegal for any person to "make or convey false reports or false statements with intent to interfere" with the success of the United States or to "promote the success of its enemies." It also criminalized anything that would "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military . . . [or to] willfully obstruct the recruiting or enlistment of the United States." Violators were subject to twenty years in prison. The Sedition Act, which Stone calls "the most repressive legislation in American history,"[18] went further. It made it a crime to:

> Willfully utter, print, write, or publish any disloyal profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States. . . [Or] To use any language intended to bring the form of government . . . into contempt, scorn, contumely or disrepute.

It is prosecutions under the Espionage Act from which the fictional prosecution of Howard Dean derives its relevance. Under the act, Eugene V. Debs was imprisoned. Debs was the leader of the American Socialist Party. As a candidate for President in 1912, he had earned almost one million votes.[19] He was also an adamant, vocal, and eloquent opponent of American involvement in the First World War. For this, Debs was arrested, tried, and convicted for obstructing the recruiting by and enlistment into the military of the United States. The Supreme Court upheld the conviction.[20] Related, World War I was the first time that the Supreme Court truly wrestled with the national implications of the First Amendment.[21] While the Court did precious little to uphold First Amendment freedoms, Justices Brandeis and Holmes' dissent in *Abrams v. United States* (1919) has since served as the linchpin of philosophical and jurisprudential thought for advocates of free speech.

The Cold War was a time of great fear and real dangers. It was also a time of great suppression. American society was dominated by anti-Communist paranoia, which brought into conflict neighbor against neighbor. The House Committee on Un-American Activities (HUAC) ravaged the Congress and Senator Joe McCarthy held hearings for which this nation will be forever ashamed.[22] Additionally, President Truman established by executive order loyalty programs for civilian government employees, under which

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[15] 137
[16] 40 Stat 217, 219.
[17] Amendment to 40 Stat 217, 219, section 3 (1918).
[18] 2004: 185.
[19] Ibid: 141.
[20] *Debs v. United States*, 249 US 211 (1919).
[21] See: *Schenck v. United States*, 249 US 47 (1919) and *Abrams v. United States*, 250 US 616 (1919).
[22] For more, see Stone, 2004: 352-367; 374-393.

employees could be fired for association or *suspected* association with communists.[23] Additionally, the McCarran Internal Security Act passed in 1950, which, among other things, required all communist affiliates to register with the Attorney General.[24] Worse still, President Eisenhower signed the Communist Control Act of 1954, which outlawed the Communist Party and declared that members are "not entitled to any . . . rights, privileges and immunities."[25]

The Vietnam War followed a similar, albeit less extreme path. Perhaps the most egregious violations of the First Amendment during the era came from the brutal repression of protest, most notably the beatings and killings at Kent State University and the 1968 Democratic National Convention in Chicago.[26] There was still domestic surveillance on dissenters, police brutality on a mass scale, and prosecutions for dissent.[27]

While times of great repression, it was also during the Cold War and Vietnam War eras that the Supreme Court moved to establish much stronger First Amendment protections for dissenters. The Supreme Court recognized stronger First Amendment protections in *Yates v. United States,*[28] and later *Scales v. United States.*[29] Our modern day protections were first fully recognized in *Brandenburg v. Ohio* (1969)[30] and *New York Times Co. v. United States* (1971)[31]

What lessons can be learned from this history? First, that as Justice Robert Jackson noted, "It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security."[32] Second, "we know that in every one of these episodes the nation came after the fact to regret its actions and to understand them, in part, as excessive responses to war fever and/or government manipulation."[33]

Looking past the Vietnam War, Stone notes that since America's victory over fascism in World War II, and as progress has been made toward greater freedom at home, specifically on racial issues:

> Americans have embraced an almost romantic vision of what makes this nation unique . . . the *aspiration* of Americans to be fair, tolerant of others, and respectful of constitutional liberties may be more deeply embedded in American culture today than at any time in the nation's history.[34]

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[23] Ibid: 326-7.
[24] 50 USCA sec 781 et seq.
[25] Pub L 637, 68 Stat 775, 776 (1954).
[26] Stone, 2007: 106-113.
[27] For more, see Stone, 2004: 427-527.
[28] 354 US 298 (1957).
[29] 367 US 203 (1961).
[30] 395 US 444 (1969).
[31] 403 US 713 (1971).
[32] 1951.
[33] Stone, 2004: 528.
[34] 2004: 536.

After the Vietnam War, free speech, free religion, and a free press were, for the first time in American history, held to be unequivocally free. Always.

An Introduction to Bush's War on Terror and the Patriot Act:

[We need] ***something*** *to jump-start the stalled investigation of the greatest crime in American history.*

-Liberal columnist Jonathan Alter, "Time to Think About Torture."[35]

After the terrorist attacks on September 11, 2001, much of the country acted as if they were ready to give up cherished liberties. The "left" was just as acquiescent as the right. As noted, *Newsweek*'s Jonathan Alter, a purported liberal, openly suggested the need for torture. Worse still, Alan Dershowitz – a man who, without any sense of irony, calls himself a civil libertarian – argued that the federal government should be able to obtain "torture warrants."[36]

In this environment, the Bush Administration launched one of the greatest assaults on civil liberties in American history. Shortly after September 11, they passed the Patriot Act,[37] which, among other things, increased government spying power, recriminalized guilt by association, and allowed the law enforcement to break into citizens' houses without informing the homeowner. (Only one senator, Russ Feingold, opposed the measure. On the Senate floor, Feingold gave a brief lecture on the history of civil liberties during wartimes and cautioned that "We must not allow these pieces of our past to become prologue.")[38] In the weeks and years after September 11, the Bush administration would launch two wars; one under false pretenses. They would illegally torture, illegally spy, and illegally imprison. Put simply, the Administration did its best to let neither the Constitution nor morality get in its way.

Part IV: Liberties Lost

Free Exercise of Religion

All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.

-Justice William Francis Murphy, in dissent, *Korematsu v. United States*[39]

It started well. In the weeks after September 11, President Bush met with Muslim-American leaders from across the country in an effort to mitigate discrimination

[35] 2001. Emphasis in original.
[36] 2002: 477.
[37] Pub. L. 107-56 (2001).
[38] 2001.
[39] 323 US 214 (1944).

against followers of Islam.[40] In an address to a joint session of Congress and the American people, Bush declared that "The terrorists practice a fringe form of Islamic extremism that has been rejected by Muslim scholars and the vast majority of Muslim clerics – a fringe movement that perverts the peaceful teachings of Islam."[41] And the President does indeed deserve credit for these actions; in fact, the relatively low violence against Muslim-Americans in the wake of September 11 ought to be at least partially attributed to the President's words and deeds. Geoffrey Stone suggests that, given our history, "this is a good example of lessons learned."[42]

If only that were the end of the story. Following September 11, the United States government (and citizens) embarked on a long-sustained mission of racial and religious profiling and discrimination. It has become so bad that the United States has been condemned by Amnesty International.[43]

The United States has a history of discrimination based on ethnic origin during wartime. Most notable are the purges and discrimination against German-Americans during World War I and the internment of nearly 120,000 Japanese-Americans during World War II. That such discrimination is unconstitutional is a fact virtually unchallenged in modern legal thought. However, the claims of unconstitutionality have always rested on the fact that such actions violate the Equal Protection Clause of the Fourteenth Amendment and Due Process Clause of the Eighth and Fourteenth Amendments. While there is no doubt that the discrimination against Muslims during the War on Terror too violates the Equal Protection Clause, precious few scholars have noted that it also violates the Free Exercise Clause of the First Amendment. The logic is at once clear and undeniable: To discriminate against Muslims infringes upon free exercise of Islam. Taking that logic even further: The vast majority of Arabs is Muslim and are – and this part is important – identified as *being Muslim*. The systematic discrimination against Arabs is also an attempted systematic discrimination against Muslims, and is therefore a violation of the Free Exercise Clause of the First Amendment, in addition to the Equal Protection Clause.

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Profiling

One social issue on which the American people were making great progress toward the end of the Twentieth Century was racial and religious profiling. On the eve of the new millennium, nearly 80% of Americans opposed racial profiling.[44] Politicians took notice. Shortly before September 11, the Republican governor of New Jersey, Christine Todd Whitman famously fired the New Jersey Highway Patrol Chief for racial profiling.[45] Bill Clinton deemed racial profiling "morally indefensible."[46] Neither

[40] "Threats and Responses," *New York Times*, 2002.
[41] Bush, 2001.
[42] 2004: 551.
[43] "Threat and Humiliation: Racial Profiling, National Security, and Human Rights in the United States."
[44] Gallup, "Racial profiling is seen as widespread," 1999. And Roper Center, 1999.
[45] Coke, 2003: 93.
[46] Ibid.

President Bush nor his Attorney General was ambiguous in their opposition to racial profiling. In June 2001, President Bush declared that "racial profiling is wrong in America, and we should get rid of it."[47] Ashcroft had already made his opposition clear in March.[48]

But, as civil rights advocate Tanya Coke notes, September 11 "changed all that." And whereas before September 11, the problem was "Driving While Black," the new problem was "Flying While Brown."[49] To be clear: The increase in racial profiling was not caused by government action, alone. September 11 caused a massive turnaround in public opinion towards racial and religious profiling. As a direct consequence of the attacks, a vast majority of Americans supported the profiling of Arabs or Muslims. (The polls after September 11 are all over the map. According to one poll, 80% of citizens favored extra scrutiny and special identification cards for Arabs and Muslims.[50] According two other less dramatic but still disturbing studies, fully 60% of the public favored ethnic profiling, so long as it was directed at only Arabs or Muslims).[51]

There are different theories on why the public, which seemed so resolutely opposed to profiling before September 11, shifted so dramatically. The most convincing explanation is that the justification for profiling had changed. Before September 11, profiling was mostly done to catch petty criminals and drug runners. After the attacks, by contrast, profiling was a seen as an effective means by which the government could make the "never again" mantra to terrorism a reality.[52]

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So what did the new era of profiling look like and how did it affect American citizens? Here are some examples indicative of the climate of fear in the wake of September 11 (a climate, it should be noted, that has not completely dissipated).

In perhaps the most notable example of Arab profiling in 2001, Congressman Darrell Issa (R-CA), a Lebanese-American, was prevented from boarding his flight for mysterious – dubious, it seems – reasons. Issa complained, of course, and sought an investigation into the matter. However, he was never provided with clear answers and it seems obvious that his Lebanese heritage was the reason for his delay.[53]

More important than the delay of a congressman, however, is the fact that ordinary Americans across the country were discriminated against because of their heritage, birthplace, and/or religion. In late September 2001, the crew of an American Airlines flight faced an uprising. The vast majority of passengers were flat-out refusing to board the plane, so long as they had to do so with three "suspicious" men. The men, of course,

[47] Remarks to the National Organization of Black Law Enforcement Executives, 2001.
[48] "National News Brief: Attorney General Seeks End to Racial Profiling," *New York Times*, 2001.
[49] 2003: 94.
[50] Gallup-CNN-USA Today, 2001.
[51] Verhovek, 2001 and Krupa, 2002.
[52] Taylor, 2001.
[53] Carmen, 2008: 92.

were young Arab-Americans. How did American Airlines respond? Did a tough flight attendant tell the paranoid, Islamaphobes to "get used to the airport"? Of course not: The three Arab men – American citizens – were kicked off the flight.[54]

Around the same time, a "nervous bus driver" in Trenton, New Jersey called the police when two "suspicious men" speaking "little English" boarded his bus. Instead of being necessarily skeptical of the purported danger based solely on looks and language, police rushed to the scene and held the two men down at gun-point.[55]

In 2001, in Michigan, a group of Arab-American Muslim teenage Boy Scouts and their troop leader were preparing to go camping. They were properly dressed in fatigues and walking around with camping gear. Frightened neighbors called the police. The boys and their troop leader were taken in to the station. Subsequently, the FBI was brought in; they questioned the boys for hours.[56]

A rather extreme incident occurred in September 2002. A Georgia woman reported hearing a "suspicious conversation" among three young Muslim men while at a Georgia restaurant. When police caught up to the car, they were in Florida. The authorities shut down 20 miles of highway and detained the men for seventeen hours. It turned out that the men were traveling to begin their medical school residency. What should have been a serious inconvenience for the men turned tragic when the hospital – hearing of their supposed suspicious activities – withdrew their admittance. Appallingly, both Senator Bob Graham (D-FL) and Governor Bush applauded the police's actions.[57]

Arguably the most puzzling example dealt yet again with American Airlines (who, to be sure, were *not* the only airline guilty of discrimination). The Secret Service was preparing for President Bush's Christmas visit to his Crawford Ranch in Texas. One of the members of the presidential detail – arguably the single most secure unit of law enforcement on Earth – needed to fly to Crawford to perform advance work. The agent, an Arab-American, was armed in compliance with his professional responsibilities. Prior to boarding the flight, he presented documentation to the airline so that he could carry his weapon with him. The pilot reviewed the papers, and prohibited the agent from boarding the plane, claiming to be uncomfortable with the situation. The agent had to take a later flight. To reiterate, the federal government was comfortable enough to let this man guard the life of the President of the United States, but American Airlines would not allow him to be armed on a commercial flight.[58]

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[54] Begley et al, 2001.
[55] Ibid.
[56] Carmen, 2008: 92.
[57] Coke, 2003: 97.
[58] Ibid: 93.

For Arab, Middle Eastern, and Muslim Americans, life changed after September 11. Neither flying, nor driving, nor eating at the mall would ever be the same.[59] It is crucial to note that these actions and policies were not just immoral; they were illegal and unconstitutional. Both airlines and airports are heavily regulated and assisted by the Federal Aviation Administration. Their discrimination against Arab and Muslim Americans is at once a violation of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, and the Free Exercise Clause of the First Amendment. The same is true for discrimination by police, FBI agents, and bus drivers in Trenton, Michigan, and Florida.

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Spy, Question, Deport

Arguably more serious than the governmental profiling of Muslims in airports, neighborhoods, and public transportation is the fact that as a response to September 11, the federal government initiated a series of actions leading to the surveillance, questioning, and deportation of thousands of Muslim-Americans with no connection to terrorism.

As the War on Terror began, the federal government maintained that it was opposed to ethnic or religious profiling of any kind. To many, considering George Bush's warm rhetoric towards the Muslim community after the attacks, this seemed plausible. In secret, however, the federal government began "the most extensive nationwide campaign of ethnic profiling since World War II."[60]

To begin, the FBI eliminated the long-standing requirement that investigations effecting political and religious activities be handled with special care and scrutiny. Instead, the FBI determined that religious groups would be treated as if they were like any other sort of group – a seriously misguided proposition, considering the fact that other groups (save the press) are not given special and specific protection in the Bill of Rights. The effect of this order was to expose religious organizations to extensive FBI monitoring, even if no objective grounds for suspicion existed. What is worse, all supervisory control over surveillance on religious groups was eliminated.[61]

And so the government surveillance program on Muslims began. Almost immediately after its inception, the newly established Department of Homeland Security – run by former Pennsylvania governor Tom Ridge – called in 80,000 people for "special registration" with the government. The reason? They were foreign nationals from Arab and Muslim countries. "Registration" required that they be fingerprinted, interviewed, and photographed. Of the original 80,000 men, a total of 3,000 were detained. None was charged with a crime. Meanwhile, as Homeland Security was conducting this operation, the FBI sought to interview another 8,000 men. The reason was the same: they came

[59] Amnesty International, 2004.
[60] Cole and Dempsey, 2006: 220.
[61] Stone, 2004: 556.

from Arab and Muslim countries. The government called the totality of these actions the "Absconder Apprehension Initiative." Crucially, they did not target *all* immigration absconders – Mexican immigrants, for instance, were largely unaffected. They targeted Muslim immigration absconders. Combined with other government programs, nearly 5,000 foreign nationals were subjected to antiterrorism preventive detentions after September 11. Nearly all of them were Muslim. None was convicted of terrorism.[62]

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How did it come to this? And from there, where did we go? What follows is a timeline of government actions that discriminated against Muslims during the early stages of the War on Terror. Most of the information comes from the invaluable work of Tanya Coke.

On September 20, 2001, John Ashcroft's Department of Justice published an interim regulation that allowed for detention without charges for forty-eight hours or "an additional reasonable period over time" in the event of "extraordinary circumstances." None of this was subject to the review of a judge or judicial figure, and so the determination of "extraordinary circumstances" was solely dependent on the relevant civil servant.[63]

On November 9, 2001, the FBI set out to interview 5,000 men from countries in which al-Qaeda was active and who had entered the country after December 1999. While the interviews were deemed optional, the FBI reserved the right to maintain files on those who do refuse questioning. Nearly all of the men were Muslim. Later, in February 2002, the Department of Justice announced that the questioning resulted in very few charges being filed. Of the charges that were filed, none had to do with terrorism.[64] In March 2002, the Department of Justice announced another set of 3,000 interviews of Muslim men.[65] Again, the result was zero charges of terrorism being filed.

Between November 2001 and November 2002, the Department of Justice, through the Immigration and Naturalization Services, initiated various security checks on "men of certain countries" who wished to enter the United States. In some cases, the Department of Justice refused to specify on what countries they focused, but all evidence and all logic pointed towards the countries being predominantly Muslim. Other times, they admitted what countries received special scrutiny, and they – Yemen, Iran, Libya, Sudan, and Syria – were all Muslim.[66]

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[62] Ibid.
[63] Coke, 2003: 95.
[64] Ibid.
[65] Wainstein Memo, 2002.
[66] Coke, 2003: 96.

It should be recorded for history that if there was a "hero" inside the Administration when it came to race and religious based profiling, it was the Secretary of Transportation, Norman Mineta. Of all the members of the Bush Administration, Mineta most "vociferously resisted race-based profiling." Perhaps this was because, more than anyone, Norman Mineta knew the lessons in history. A Japanese-American, Mineta and his family were interned during the Second World War.[67] He therefore understood more than most the lessons of Justice Robert Jackson, as expressed in his dissent in *Korematsu v. United States* that once racism is authorized:

> The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.[68]

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By now the unconstitutionality of the Government's actions should be clear. In systematically and blatantly singling out and discriminating against Muslims, the Administration was violating – in addition to other constitutional rights – Muslim Americans' rights to freely exercise their religion.

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Associational Freedom:

Guilt by association is a philosophy alien to the traditions of a free society.
-Justice William O. Douglas, *NAACP v. Overstreet*[69]

Freedom of association is the only right discussed at length in this paper that is not specifically enumerated in the text of the First Amendment. It is included, and merits its own section for two reasons. First, the Supreme Court has consistently held that freedom of association is guaranteed by the First Amendment.[70] Second, associational rights are a hybrid of the enumerated rights of assembly, free exercise of religion, and free speech. For the sake of clarity, therefore, free association has been given its own section.

The vast, vast majority of violations of the freedom of association come from the Patriot Act and its offshoots. Most important, is the evolution of the doctrine of "material support." An explanation: In the aftermath of the Oklahoma City Bombing, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996. Therein, "material

[67] Ibid: 98.
[68] 323 US 214 (1944).
[69] 384 US 118 (1966).
[70] *NAACP v. Alabama*, 357 US 449 (1958).

support" of terrorism was made into a federal crime punishable by jail and/or deportation.[71]

The definition of "material support" is incredibly vague – possibly to the point of rendering it unconstitutional. The Patriot Act did not help to clarify, and "material support" is defined to include providing "physical assets," "personnel," "training," or "expert advice and assistance" to terrorist groups. This raises a number of concerns.

First, how do we define a terrorist or terrorist group? Rather than a statutorily neutral definition, the discretion is solely that of the Secretary of State. That is, whatever groups the Secretary of State designates as being terrorist groups are, by law, terrorist groups. There is no mechanism by which to challenge the designation.

Second, the definition provided in the Patriot Act requires no connection to the organization's violent activity. To show how troubling this is, let us use a real life example: Hamas. Hamas is currently designated a terrorist organization by the State Department, but it is also a bonafide political movement and a provider of crucial social services in the West Bank and Gaza Strip.[72] Imagine that a Palestinian-American sends coloring books to Hamas, with the hope that the books will be put to better use by Hamas than the bumbling and corrupt Palestinian Authority. Even if she can prove that the coloring books were indeed used by three years olds, she can still be deported.[73] The same logic can also be extended to prohibiting citizens from supporting a group in the interest of countering terrorism. That is, if an immigrant offers his services in peace negotiating to the IRA in the hope of furthering the peace process, such a person could be deported if the IRA was designated a terrorist organization by the Secretary of State.[74]

The Bush Administration contended that the doctrine of "material support" does not violate the established precedent of associational freedom because it does not criminalize membership in specific groups *per se*, but instead punishes various activities inherent in membership, such as the payment of dues.[75] Their logic was fallacious at best and disingenuous at worst. These groups cannot exist without the material support of their members. The punishment of activity necessary to keep the groups afloat, therefore, is a punishment of membership. More to the point, the doctrine is unconstitutional because it does not even pretend to be content-neutral. Remember, the designation of "terrorist group" is left to the discretion of the Secretary of State.

The Patriot Act is similarly unconstitutional in that it expands the federal government's ability to designate *domestic* groups as terrorists. Such designation requires no notice to Congress and cannot be challenged. In one particularly upsetting example of government

[71] Pub. L. No. 104-132, 110 Stat 1214.
[72] Kilstein, 2008.
[73] The basis of this example comes from Cole and Dempsey, 2006: 198, but it has been significantly altered.
[74] Ibid.
[75] For the Administration's argument, see *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *cert denied*, 532 U.S. 904 (2001). Cited in Cole, 2003: 18.

overreach, the Administration used this provision to deport two men for distributing Palestinian magazines in Los Angeles in the Eighties.[76]

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Freedom of the Press:

To say that we are closer to victory today is to believe, in the face of the evidence, the optimists who have been wrong in the past. To suggest we are on the edge of defeat is to yield to unreasonable pessimism. To say that we are mired in stalemate seems the only realistic, yet unsatisfactory, conclusion . . . But it is increasingly clear to this reporter that the only rational way out then will be to negotiate, not as victors, but as an honorable people who lived up to their pledge to defend democracy, and did the best they could.

-Walter Cronkite on leaving Vietnam, *CBS News*[77]

If I've lost Cronkite, I've lost Middle America.

-President Lyndon Johnson, weeks before announcing he would not seek reelection[78]

The importance of a free press should be clear to any reader. Our Founding Fathers knew of it, as have countless generations of Americans. Anyone who has read history knows that the press has the power to help start and stop wars, to shape public opinion, and determine elections. There will be a detailed discussion in Part V about how the Bush Administration often chose to manipulate the press, rather than suppress it. What follows is a discussion of the tragic consequences of when the Administration did choose to suppress and/or cover-up.

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Death

In 2007, two Reuters journalists – Namir Noor-Eldeen, 22 and Saeed Chmagh, 40 – were carrying cameras and walking with a group of Iraqi men in Baghdad. Mistaking the group for insurgents, an American helicopter opened fire, killing the two journalists. Reuters has been apparently unable to fully investigate the incident because the Pentagon is still withholding key records of the event. This was not an isolated incident. According to the Committee to Protect Journalists, the Reuters journalists were the fifteenth and sixteenth journalists killed by the U.S. military since the invasion of Iraq began.

Trying to figure out what happened, Reuters put in a request under the Freedom of Information Act for documents and materials relevant to the incident. Of the eight documents requested, two were withheld while the other six were heavily redacted. "It's

[76] Cole and Dempsey, 2006: 199.
[77] 1968.
[78] From Wicker, 1997.

difficult to understand whether the investigation is coming to sound conclusions without actually seeing the evidence" said a Reuters chief counsel, Thomas Kim, "It is hard to make heads or tails out of [it]."[79]

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Jail

On December 15, 2001 Sami al-Hajj was working as a cameraman for Al-Jazeera. He was on his way from a small town in Pakistan to the Afghan border, where he planned to cover an American military operation. At the border, however, he was curiously detained by Pakistani intelligence. He was brought to an underground prison in Kabul, wherein he was transferred to the Americans, under whose custody he was brutalized. Sami remained in Afghanistan for six months, and was then transferred to Guantanamo Bay. While in Guantanamo Bay, his lawyer claims, he was interrogated 130 times. Of those sessions, 125 focused on Al-Jazeera's operations, and not terrorism. Reporting for the *Columbia Journalism Review*, Rachel Morris had sources confirm the claim's plausibility.[80]

Little was known about al-Hajj's arrest until he was given access to counsel in 2005. It was following that that Nicholas Kristof, writing for the *New York Times*, published a column titled "Sami's Shame, and Ours" wherein he noted that "there is no public evidence that Sami al-Hajj committed any crime other than journalism for a television network that the Bush administration doesn't like."[81]

Sami al-Hajj was in American custody from 2001-2008. He was released without charge.

Kristof concluded his column: "With the jailing of Mr. Hajj and of four journalists in Iraq, the U.S. ranked No. 6 in the world in the number of journalists it imprisoned last year, just behind Uzbekistan and tied with Burma."

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Until five months ago, Bilal Hussein was part of a team of Associated Press Photographers that had won a Pulitzer Prize for photos documenting the fighting and carnage in Iraq.

Now he's a prisoner, having been seized by the U.S. government.

You might ask: What's he been charged with?

The answer: Nothing.[82]

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[79] Tyson, 2009.
[80] 2005: 23-28.
[81] 2006.
[82] 2005.

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In 2005, the *New York Times*' James Risen and Eric Lichtblau won a Pulitzer Prize for their coverage of the Bush Administration's unprecedented and wholly unconstitutional program of warrantless surveillance.[83] For reporting it, members of the Bush Administration wanted them arrested.[84] In 2006, the *Washington Post* reported:

> Attorney General Alberto R. Gonzales raised the possibility yesterday that New York Times journalists could be prosecuted for publishing classified information based on the outcome of the criminal investigation underway into leaks to the Times of data about the National Security Agency's surveillance of terrorist related calls between the United States and abroad.[85]

***

What does this means? Did the United States military murder two Reuters journalists? Who knows? What matters is that the press never had to opportunity to prove or disprove that claim.

Was the United States imprisoning journalists in order to send a message to opposition press? Maybe. Maybe not. It sure is fishy, though, that they were imprisoned and tortured without charge for years on end.

What is clear, as evidenced by the arrest of Bilal Hussein and the Administration's desire to arrest James Risen and Eric Lichtblau, is that under the Bush Administration, not even a Pulitzer Prize could guarantee freedom.

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Freedom of Speech and Freedom of Assembly:

Communism in the world scene is no bogeyman; but Communism as a political faction or part in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free Speech has destroyed it.

-Justice William O. Douglas, in dissent, *Dennis v. United States*[86]

Americans must decide whether they will . . . tolerate the search for truth . . . If they will not, then . . . we can blow out the light and fight it out in the dark, for when the voice of reason is silenced, the rattle of machine guns begins.

-Robert Maynard Hutchins[87]

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[83] "Bush Lets U.S. Spy on Callers without Courts," 2005.
[84] For a detailed description of events, see: Gellman, 2008: 287-308.
[85] Pincus, 2006.
[86] 341 US 494 (1951).
[87] Qtd. in Stone, 2004: 317. From Hutchins, 1935. Excerpted from McNeill, 1991: 65

Free speech might be a friend of change and revolution. But . . . it is also the deadliest enemy of tyranny.

-Justice Hugo Lafayette Back[88]

Freedom of Speech is perhaps the most cherished of all American civil liberties. It is certainly the most well-known. In 2005, when asked what rights are guaranteed by the First Amendment, 63% of American adults named freedom of speech. The next most cited liberty, according to one poll, was freedom of religion. Only 20% of Americans could cite it.[89] How did it hold up during Bush's War on Terror? An examination of free speech in the age of Bush shows that there *was indeed* suppression of free speech, and that the suppression looked an awful lot like past times of war. What is different is that the suppression happened much less often and usually not as part of a planned effort by the federal government. Except, that is, for the suppression of free speech contained inside the Patriot Act.

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The Patriot Act and Free Speech

The Patriot Act is disconcerting to advocates of free speech for three key reasons. The first goes back to the doctrine of "material support." While this has already been discussed at length, there is a particular aspect to material support, as defined in the Patriot Act, which violates freedom of speech. Providing "expert advice and assistance" to terrorist groups is considered material support.[90] The vagueness of such a statute seriously puts its constitutionality into question. Moreover, it is a direct prohibition on literal speech. Would serving as a legal advisor be considered providing expert advice? What about teaching a lesson on media strategy? The questions have never been answered, and until they are, this part of the statute should be regarded as a violation of freedom of speech.

The second concern relates to discrimination against immigrants or possible immigrants based on pure speech. Georgetown law professor David Cole notes that the Patriot Act "violated core constitutional principles" by "rendering immigrants deportable . . . for pure speech" and making prospective immigrants inadmissible for pure speech.[91] It does so by granting the government power to exclude aliens who "endorse or espouse terrorist activity" or who "persuade others to support terrorist activity or a terrorist organization" if the Secretary of State determines that such speech sufficiently undermines America's efforts to combat terrorism.[92]

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[88] Qtd. in "Reflections on Justice Black and Freedom of Speech," 1971: 322.
[89] CNN/Gallup/USA Today, "Rights adults believe are guaranteed by the First Amendment. **Source**: CNN/ USA Today/ Gallup Poll," 2005.
[90] Patriot Act, Sec 805, amending 19 USC 2339A(b).
[91] Cole and Dempsey, 2006: 197.
[92] Ibid: 199.

It is clear that the federal government did not shirk in using this power to deny entry to people with whom it disagreed. In 2004, the administration reportedly relied on these powers to revoke a visa that had previously been granted to Tariq Ramadan. Ramadan, a Swiss Islamic scholar, had been hired for a prestigious chair at Notre Dame University's Institute for International Peace Studies. Ramadan is one of the world's foremost scholars on Islam, and is no extremist. On September 13, he called on Muslims to condemn the attacks. He advocates for Islam to be modernized. Yet he was denied entry without a hearing or government justification.[93]

Finally, there is the issue of privacy at libraries, bookstores, and other places of public accommodation. Section 215 of the Patriot Act authorizes government officials to demand records about private individuals from businesses, hospitals, universities, libraries and other organizations with showing *any* probable cause and without *any* oversight. The agent simply needs to claim that he or she is investigating terrorism.[94] The implications for free speech and a free exchange of ideas are frightening. As Geoffrey Stone notes:

> If FBI agents can create an investigative file on you because you buy or borrow a book about terrorist practices or the history of terrorism, and you know that file might turn up sometime in the future when you apply for a government job, you might think twice before purchasing such a book or checking it out of your library.[95]

To put it another way, imagine how much worse the Cold War witch-hunts would have been if Senator Joe McCarthy had access to library records.

In 2005, things got worse. In the REAL ID Act of 2005, Congress amended immigration law to make foreign nationals residing in the United States deportable for speech and association.[96] Now, for non-citizens, endorsement of terrorist activity or terrorist organizations, *regardless of context or setting*, can lead to deportation. In other words, foreign nationals can be deported for pure speech.[97] This is among the clearest violations of "Congress shall make no law . . . abridging the freedom of speech" from the War on Terror. One example illustrates perfectly just how extreme the measure is: In 2005, the Department of Homeland Security invoked this law to deport Khader Hamide and Michel Shehadeh based on their supposed association with the Palestinian Liberation Organization in the Eighties.[98]

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[93] Ibid: 204.
[94] Michaels, 2002: 282.
[95] Stone, 2007: 143.
[96] Pub. L. 109-13 (2005).
[97] Cole and Dempsey, 2006: 205.
[98] Ibid.

In the weeks and months following September 11, the American people were understandably averse to certain offensive speech. It seems that local and state governments were not immune to the sentiment of the time.

In late September, for instance, officials at the Baltimore Museum of Art removed a painting titled *Terrorist* from its exhibition; they did so "out of respect for visitors." Around the same time, the Pennsylvania House of Representatives voted 200 to 1 to require that the state's public schools begin every day with a recitation of the Pledge of Allegiance and singing of the Star Spangled Banner.[99] Such actions were certainly outside the *spirit* of the First Amendment, but they were not necessarily outside of the law. The government, it has been found time and time again, has a legitimate civic interest in requiring schools (but, importantly, they not individual students) to encourage recitation Pledge of Allegiance. Similarly, the Museum of Art, while funded in part by taxpayer dollars, has discretion over the art it displays.

More egregious were the criminal charges made for pure speech after the attacks. Thankfully, there were very few. One man was arrested for standing on 42nd St. in Manhattan and screaming as passersby that more firefighters and others should have been killed in the attacks. He was prosecuted for attempting to incite a riot.[100] Similarly, another man was charged for displaying a picture of Osama bin Laden outside Ground Zero. The charges were dropped.[101] Again, such incidents were few and far between, but on the issue of violating free speech, there must be zero tolerance.

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The Most Hated Family in America

For all of the divisions that emerged in America during the War on Terror – red state versus blue state; pro-war versus antiwar; left versus right – there was at least one issue on which all Americans could agree: Fred Phelps is a sonofabitch.

An explanation: Fred Phelps is the leader of the Westboro Baptist Church in Topeka, Kansas. Members of the Church travel across the country picketing, among other events, military funerals (church membership, it should be noted, is mostly members of the extremely large Phelps family). They celebrate the military deaths, waving signs saying such things as "God hates fags" and "thank God he's dead." They do this because the United States protects homosexuals, and the United States military protects the United States, and therefore the United States military protects homosexuals, and anyone who protects homosexuals is a fag-lover, and therefore, "thank God he's dead." It is for these activities that the Phelps' have been deemed "the most hated family in America."[102]

[99] Lapham, 2004: 8.
[100] *People v. Upshaw*, 741 NYS2d (2002).
[101] Stone, 2004: 551.
[102] Theroux, 2007.

But even the most hated family in America is entitled to First Amendment rights. Actually, the most hated family is *especially* entitled to First Amendment rights. For some time, it seemed the Phelps' were denied theirs. In 2007, a jury issued a $10.9 million verdict against Mr. Phelps and his church for offensive picketing 1,000 yards from a military funeral. The award was based off a tort called intentional infliction of emotional distress. The tort allows for damages when the defendant engages in "outrageous speech of conduct that . . . causes severe emotional distress" and through which "the defendant intends to cause such distress, or is aware of a high probability that the speech or conduct will cause such distress." Libertarian leaning legal scholar Eugene Volokh accurately questions the constitutionality of such a tort, arguing that "It seems . . . that this tort, as applied to speech, is unconstitutionally vague and overbroad."[103]

(To be clear, it seems that there are constitutional ways to stop Phelps and his cohorts, but any legislation would have to be content-neutral. Volokh suggests that an alternative to criminalizing "outrageous" behavior at funerals is a narrow ban on *all* picketing within a certain distance of funerals.[104] This would pass constitutional muster because the ban is content-neutral.)

We all, I would assume, wish a certain level of harm – in this world or the next – on Fred Phelps, but he is not what matters. For *anyone* to pay damages based simply on the "outrageousness" of his or her speech should concern us all, as such precedent could lead free speech down a slippery slope. Begrudging applause, therefore, should be given to the judges on the Fourth Circuit Court of Appeals. In 2009, they reversed the lower court's award of damages, and concluded that Phelps' protests amount to pure speech, protected so long as the "statements [are] matters of public concern . . . [and] fail to contain a 'provably false factual connotation.'"[105] Volokh notes (referring to a famous controversy over an offensive cartoon that depicted the Prophet Mohammed):

> I think the court was quite right . . . In particular, the decision helps forestall similar liability for other allegedly outrageously offensive speech, such as display of the Mohammed cartoons (or other restrictions on such speech, such as campus speech codes' being applied to punish the display of the cartoons).[106]

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The Bereaved Substitute Teacher

In early 2003, Sue Niederer was a substitute teacher for the Hopewell Valley School District in New Jersey. War with Iraq seemed more inevitable and unstoppable by the day. She wanted to discuss the pros and cons of the upcoming war with her class. "This stuff is important," she told the class, "it is a matter of life and death." I was a student in that class.

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[103] Volokh, "The Intentional Infliction of Emotional Distress Tort and the Freedom of Speech," 2007.
[104] Volokh, "Residential Picketing and Funeral Picketing," 2007.
[105] *Snyder v. Phelps*, No. 08-1026 (4th Cir. 2009).
[106] Volokh, 2009.

Mrs. Niederer was tragically correct: the war, for her, was indeed a matter of life and death. In 2004, her son, Seth Dvorin was killed in combat. Niederer became involved in anti-war activism almost immediately. During the 2004 Presidential Election, Niederer attended a Laura Bush rally in Hamilton, New Jersey. While there, she began to scream at the First Lady, asking when her daughters were going to head off to war. Police subsequently ejected her.[107]

Most Americans are unsympathetic to hecklers and would not disagree with the police's actions toward Niederer. The problem, however, arises because Niederer had a ticket to the event.[108] She certainly was not the only person screaming at the event. Rather, government authorities ejected her because of the *content* of her screams. The constitutionality of such actions is questionable at best, for government officials were discriminating based on the content of speech.

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The Old Hippy

Brett Bursey was arrested for the first time while protesting Richard Milhous Nixon's war.[109] In 2002, he was arrested for protesting Bush's.[110] On October 24, Bursey was arrested at a Bush rally because, according to prosecutors, he illegally protested outside a designated "free-speech zone" that had been setup half a mile from the hangar where Bush was set to speak. When told that he was being arrested for protesting outside the "free-speech zone," Bursey snapped back, "I was under the impression that the whole of America was a free-speech zone."[111]

The United States Attorney for the region, Strom Thurmond, Jr. (son of Senator Strom Thurmond) charged Bursey thus:

> [Bursey] knowingly and willfully did enter and remain in and on grounds located at or near Airport Boulevard and Lexington Ave, West Columbia, South Carolina, which was then a posted, cordoned off and restricted area where the President of the United States was temporarily visiting, in violation of the regulations governing ingress and egress thereto.[112]

Here is what went down: In October 2002, Bursey was attending a Bush rally at Columbia Metropolitan Airport. As a protestor, he was sent to a designated "free-speech" zone, which was located three-quarters of a mile away from the President, well out of earshot and camera-shot. Bursey attempted to get closer to the President, and took

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[107] Vries, 2004.
[108] Ibid.
[109] *Economist*, 2003.
[110] Katz, 2004.
[111] *Economist*, 200.
[112] Bursey was charged with violating 18 USC Sec. 1752(a)(1)(ii). Charges come from Thurmond, 2003.

his "No War for Oil" t-shirt with him. For this, he was arrested.[113] The Fourth Circuit Court of Appeals upheld the charges and Bursey was fined $500.[114]

There were several problems with the Fourth Circuit's ruling. First, the law with which Bursey was charged was never designed to keep protestors away from the President. Rather, it was designed to protect the presidents from assassination and to allow Secret Service to block off areas for security purposes. It seems clear that the law was being misused. Second, the boundaries of the "free-speech zone", in this case, were never clearly marked, and cars were routinely driving through the zone. Finally, the judges involved in Bursey's case repeatedly conflated dissent with security threats. In the initial ruling against Bursey, the trial judge noted that in an age of suicide bombers, there exists an extra need to protect the security of the President. As *Slate*'s Jonathan Katz accurately points out, Bursey's only weapon was a t-shirt reading "No More War for Oil." On January 17, 2006, the Supreme Court declined to hear Bursey's appeal.[115]

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Protest

Alexander Pincus' girlfriend was sick. Pincus, an ever dutiful boyfriend, wondered how best to handle the situation. The solution? Matzo-ball soup. With that in mind, Pincus departed his house with a mission. For his trouble, he was arrested, forced to kneel on the cement for an hour, and kept in lockup for 28 hours (for 25 of these hours, he was denied access to counsel). It turns out that Pincus was picked up as part of a police sweep designed to keep the protests outside the 2004 Republican National Convention under control.[116]

Pincus' story was no anomaly. In fact, he was but one of 1,821 people arrested in the police sweeps associated with that year's Convention, the largest number of arrests at a major party convention in American history. During the convention, officers would seal off streets with orange netting as they used motor scooters and horses to sweep up hundred of protestors at a time. Many of the protestors – or in Pincus' case, bystanders – broke no laws. The *Washington Post* noted just one example:

> A video provided by the New York Civil Liberties Union shows police commanders laying out the ground rules: As long as protesters did not block traffic, they would not get arrested during the walk north. (No permit is required for a march on a sidewalk as long as protesters leave space for other pedestrians to pass.) Within a block or two, however, the video shows marchers lined up on the sidewalk, far from an intersection, as a police officer announces on a bullhorn: 'You're under arrest.'[117]

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[113] Katz, 2004.
[114] *United States v. Bursey*, 04-4832 (4th Cir. 2005).
[115] Katz, 2004.
[116] Powell and Garcia, 2004.
[117] Ibid.

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The government also continued its time-honored tradition of spying on antiwar groups.[118] Again, Stone:

> Such surveillance, whether open or surreptitious, can have a deadly effect on First Amendment freedoms . . . An essential reality about free speech is that individuals know that their own participation in the public debate is unlikely to have an appreciable impact on national policy. Thus, if they fear that marching in a demonstration or signing a petition might land them in a government file, they may decide that the better part of wisdom is *not* to express their views. If many individuals independently make this decision, the *overall* effect might be seriously to distort the thought process of the community. Indeed it is because of our concern with this "chilling" effect that we traditionally use secret ballots for voting.[119]

Part V: Liberties Saved

Preserving our freedom is one of the main reasons that we are now engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people.

> -Senator Russ Feingold, speaking on the Senate Floor in opposition to the Patriot Act[120]

Hopefully by now it is clear that while there were serious abuses of the First Amendment during the War on Terror, those abuses cannot really compare to times past. There has not been a single person explicitly prosecuted for dissent, as was the case in the "Quasi-War" with France, the Civil War, and World War I. Hollywood has not had to come testify before a House Committee on Un-American Activities, as was the case in the Cold War. And while the arrests at the 2004 Republican National Convention were disheartening, there were no major battles bordering on war between protestors and police, as was the case in Chicago in 1968.

More to the point, Howard Dean was not arrested for sedition and Dan Rather did not have the government prevent the release of the Abu Ghraib Prison story. This section seeks to explain why. As stated earlier, the preservation of the First Amendment during the War on Terror came from the Supreme Court, the public sentiment, and the Administration's calculations.

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[118] Johnston and Van Natta, 2001.
[119] 2007: 141, emphasis in original.
[120] 2001.

The Supreme Court:

We cannot – by availing ourselves of the calm perspective of hindsight – now say that these actions were unjustified.

> -Justice Hugo Black, affirming the constitutionality of the internment of 120,000 Japanese-Americans, *Korematsu v. United States*[121]

A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.

> -Justice Sandra Day O'Connor, writing for an 8 person majority, *Hamdi v. Rumsfeld*[122]

In discussing the jurisprudential history of the First Amendment David Cole notes that "The Supreme Court, to its credit – although largely after the fact – has developed constitutional doctrines that make these particular mistakes difficult to repeat."[123] And indeed, this seems to be inarguably true. A quick overview:

The First Amendment has had strident support since its passage. That said, it was really Justices Brandeis and Holmes' dissents in *Abrams v. United States* (1919) that set off the spark that lit the fire that has not yet been put out.[124] While Holmes and Brandeis failed to carry the day, their dissent still influences modern First Amendment thought. In it, Justice Holmes famously wrote:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition in the market and that truth is the only ground up which their wishes safely can be carried out . . . [And] I think that we should be eternally vigilant against attempts to check the expression of opinions 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.

Since Brandeis and Holmes fired the opening shots in *Abrams* the movement of the Court has been up towards greater First Amendment freedom. There have been bumps in the road, of course, but the course was set.

The next great movement towards more protected free speech during wartime came during the Cold War. In *Yates v. United States*[125] the Court for the first time drew a line

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[121] 323 US 214 (1944)
[122] 542 US 536 (2004).
[123] 2003: 16.
[124] 250 US 616 (1919).
[125] 354 US 298 (1957).

between abstract advocacy and true advocacy of illegal conduct. This effectively ended the prosecution of Communists based on guilt by association (the assumption behind the prosecutions before *Yates* was that membership in the Communist Party was a signal of future lawlessness). The Court took this even further in *Scales v. United States*,[126] wherein the Court ruled that the Smith Act required proof that an individual specifically intended to help the Communist Party commit crimes.

The next colossal step in First Amendment jurisprudence was in *Brandenburg v. Ohio*.[127] Here, the Court ruled that individual speech can be punished if and only if said speech would lead to imminent lawlessness. In other words, the Court required an actual criminal conspiracy, or something very close to one.[128] Finally, in *New York Times Co. v. United States* aka *The Pentagon Papers Case*,[129] the Court ruled that the Nixon Administration had no authority to issue a prior restraint against the *New York Times*' publication of the Pentagon Papers.

Additionally, while freedom of religion has never been as threatened as freedom of speech or of the press, there were times when in the name of patriotism, citizens were compelled to violate tenets of their faith. For instance, in West Virginia during World War II, Jehovah's Witnesses were forced to recite the Pledge of Allegiance in school, despite the fact that such an act violated their religious beliefs. After first upholding such a ban in *Minersville School District v. Gobitis*,[130] three years later the Court reversed course. Speaking for the Court in *West Virginia v. Barnette*, Justice Jackson famously and eloquently declared that:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[131]

So, by the end of the Vietnam War, and after 52 years of wrestling with the issue, the Supreme Court had finally settled. The First Amendment remains in full force during wartime.

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Even with established precedents seemingly etched into stone, why would the Bush Administration not simply appeal to the current justices' human feelings of fear and nationalism? It worked for past generations and past administrations. Surely most legal scholars would have said in 1935 that the internment of an entire race of peoples was unconstitutional. But after the attacks on Pearl Harbor and amid the carnage of the

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[126] 367 US 203 (1961).
[127] 395 US 444 (1969).
[128] Cole, 2003: 16.
[129] 403 US 717 (1971).
[130] 310 US 586 (1940).
[131] 319 US 624 (1943).

Second World War, a majority of the Supreme Court – led by one of history's great advocates for liberty, Hugo Black – held otherwise.

Perhaps the Bush Administration thought at one point that this would have been possible. However, the nine Justices who sat on the bench during Bush's war (the makeup of that nine having changed twice) seemed wholly unwilling to acquiesce. In many ways, they seemed cognizant of the lessons of history.

This first became clear during the oral arguments for *Hamdi v. Rumsfeld*,[132] a case dealing with the rights of detainees. As Jeffrey Toobin recollects in his masterful work, *The Nine*:

> The Bush legal team, led by Ted Olson, the solicitor general, brought the same moral certainty to the Supreme Court that the Republican political operation put forth to voters. The issues were straightforward, the choices binary: the United States or the terrorists, right or wrong. Olson laid the same kind of choice before the Court. 'Mr. Chief Justice, and may it please the Court: The United States is at war,' Olson began with heavy portent . . .
>
> But if this kind of talk was intended to intimidate the justices, as it cowed so many others, the tactic did not work. Indeed, it backfired . . . 'The existence of the war is really irrelevant to the legal issue,' Stevens said.[133]

A majority of the Court was equally forceful. Writing for the Court in *Hamdi,* Justice O'Connor was unequivocal:

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad . . . We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the Nation's citizens.

Eight of the nine justices signed on to O'Connor's opinion. As Toobin notes, "If there was any doubt what O'Connor meant [in her decision], she waved the bloody shirt of one of the worst moments in the Court's history – by citing *Korematsu* itself – to drive home her point."[134]

An even more thorough rebuke to the Administration, and even greater proof of an independent Court, came in *Hamdan v. Rumsfeld*,[135] which was another detention case. Here, the Supreme Court ruled that the Defense Department could not unilaterally write procedures for military commissions, and that they had to seek and receive congressional

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[132] 542 US 536 (2004).
[133] Toobin, 2007: 269. (Quotes from oral argument in *Hamdi*).
[134] Ibid: 275.
[135] 548 US 557 (2006).

approval. In other words, the Court concluded that "the Administration would have to start complying with the Constitution right away."[136]

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The life of the law has not been logic, it has been experience.
-Oliver Wendell Holmes, Jr.[137]

The rule of 5
-Justice William Brennan, speaking on the most important rule of the Supreme Court[138]

Arguably more important than the evolution of Supreme Court and jurisprudential precedent regarding the First Amendment during wartime is the specific makeup of the Supreme Court. The Supreme Court is a judicial body of nine humans – they are men and women subject to human foible and folly, but also capable of greatness. Their decisions always stem from who they are, rather than pure logic or wisdom. So it was during the War on Terror. The personal qualities and experience of the nine justices were more important than established precedent. With that, why should we assume that this Court would have been so willing to buck the Bush Administration on the First Amendment?

Let us start with Justice Stevens. It was Stevens, more than anyone else, who led the Court in standing up to the lawlessness of the Bush Administration. Throughout Stevens' entire career he has proven independent and idiosyncratic. More important, he has proven brave. Specifically, he was unwilling to be bullied by the Administration on matters of war:

> John Paul Stevens was especially ready to stand up to the Administration. Stevens served in the Pacific theatre of World War II for four years and won a bronze star. He did intelligence work, helping to break Japanese codes . . .
>
> Stevens did not presume that his own service as an intelligence officer in World War II gave him the wisdom to second-guess the Bush officials' conduct of intelligence operations at Guantanamo. But, his military experience – combined with his quiet self-confidence – made him harder to intimidate on the subject of military necessity. Many of the darkest moments in the history of the Court took place when the justices deferred too much to the purported expertise of the executive branch on matters of national security. During and after World War I, the Court upheld several dubious prosecutions of political dissidents on the ground that their advocacy put the nation in danger . . .
>
> Stevens knew that history [of *Korematsu*] and was determined not to replay it.[139]

[136] Toobin: 373.
[137] 1882: 1.
[138] "The Judgment on Justice Souter," 2009.

Led by Stevens, Toobin reports that the other left-leaning jurists – Souter, Breyer, and Ginsburg – refused to be cowed by the Administration. The two "moderates" were almost equally steadfast, but for different reasons. O'Connor has become a fierce advocate for judicial independence, and since it was she who handed Bush the presidency in *Bush v. Gore*[140], she was particularly offended by the excesses of the Bush Administration. Kennedy, it seems, was deeply influenced by international law and international jurisprudence. Like O'Connor, he too was offended by the Bush Administration.[141]

William Brennan is often noted as saying that the most important rule of the Supreme Court is the rule of 5. That is, what matters is what can garner five votes. Above, we have six votes that seem almost certain to serve as staunch guardians of the First Amendment during wartime. There is one more justice worth noting: Conservative icon Antonin Scalia.

There are two reasons Scalia should be seen as a justice likely to protect free speech in wartime. First, Scalia is a First Amendment absolutist who has consistently voted to strike down laws limiting free speech.[142] Second, and equally important, Scalia proved willing to stand up to the Bush Administration during wartime. In *Hamdi*, for instance, Scalia dissented because he did not feel O'Connor went *far enough* in rebuking the Administration. Scalia (joined by Stevens) argued that the Bush Administration's entire framework for detention of 'enemy combatants' was wholly unconstitutional. Scalia went on:

> Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.[143]

Two things should now be clear. First, unlike previous times of conflict, the Supreme Court had fully established First Amendment protections during wartime by the beginning of the War on Terror. Second, the Supreme Court appeared to have had *at least* seven individuals willing to buck the Administration and protect free speech. And only five are needed.

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[139] Toobin, 2007: 274.
[140] 531 U.S. 98 (2000).
[141] Toobin, 2007.
[142] For one example, see *R.A.V. v. St. Paul* 505 U.S. 377 (1992), wherein Scalia struck down a law prohibiting cross burning.
[143] 542 US 536 (2004).

The People's Liberty:

The First Amendment had no hold on people's minds.
-Zechariah Chafee, Jr. on the First Amendment during World War I[144]

[The First Amendment] speaks to the kind of people we are and the kind of people we aspire to be.
-Steven H. Shiffrin[145]

It took over 200 years, but by the end of the Twentieth Century there can be no doubt that the First Amendment was fully engrained in American culture. Popular sentiment towards the First Amendment during the War on Terror is – like the precedents and makeup of Supreme Court – unique to other long-sustained American wars. In 1991, around the time of Operation Desert Storm, only *six percent* of Americans believed that anti-war demonstrations were not protected by the First Amendment.[146] Similarly, almost 70% of the public felt that the protections enumerated in the Bill of Rights remained in-tact during wartime.[147] In August 2001, a majority of Americans said we needed to do *more* to protect free speech.[148]

Predictably, the horror of September 11 significantly altered these numbers. But it is important to put the change in context: The United States had just suffered the most horrendous, tragic, and shocking attack in its history. While sentiment toward free speech diminished, what is amazing is how it still stayed relatively strong.

Only a couple months after the attacks, a poll was released on the topic of free speech on college campuses. In spite of the attacks, a sizable majority of Americans still felt that people who express views sympathetic to terrorists should be allowed to speak at a college. What is more, a full 38% said that someone who expresses *support* for terrorists should still be allowed to speak at a college campus. Indeed, 13% of Americans took a view so protective of free speech that even I cannot support it: They said people who express support for terrorists should be allowed to teach at public schools. Most important, a full 61% of Americans said that the government should not be able to review and censor news stories that criticize how the President is conducting military operations.[149]

In 2002, after the passage of the Patriot Act, 80% of the American public indicated that the War on Terror had had no impact whatsoever on their civil liberties.[150] We have already established that First Amendment rights remained important to the public, even as a war was being waged. And, as was shown in the previous section, while some

[144] 1952: 4.
[145] 1990: 159.
[146] American Bar Association, 1991.
[147] Ibid.
[148] Belden, Russonello & Stewart, August 2001.
[149] National Public Radio/Kaiser Family Foundation/Harvard University Kennedy School, November 2001.
[150] ABC News, Oct. 1 2002.

Americans' rights were abused, *most* Americans were not having their First Amendment rights infringed upon in any knowable way. Imagine, then, what the backlash would have been if the Bush Administration cracked down harder on First Amendment rights. Clearly, such a decision would not have been in their best interest, and it would have hurt the political viability of other dubious programs: Spying, torturing, etc.
Further, a survey of the polls throughout the Bush years consistently shows that most Americans did *not* feel that their civil liberties were being abused. This makes sense. After all, how many people were directly and personally impacted by the Abu Ghraib scandal? However, imagine if their daily newspaper was censored, or if their candidate for President was arrested, or if their child was beaten at a protest. The civil-liberties uprising would have been tremendous.

It should have been clear, therefore, to any rational observer inside the Bush Administration that any major effort to silence dissent would have had severe debilitating consequences.

(Note: This section is significantly shorter than many others in the paper. This is in no way indicative of the importance of the people's popular sentiment and devotion to First Amendment rights. Making the case that the people were devoted to the First Amendment is a relatively cut-and-dry process and my conclusion ought to be clearly evident to any observer of public opinion).

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Manipulation and Sterilization:

To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists - for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.
-Attorney General John Ashcroft, December 2001[151]

So we now know that the Bush Administration did not establish a massive censorship program, nor did they punish individuals for dissent, nor did they systematically disrupt protests (aside from setting up "free-speech zones"), nor did they shut down media operations based on content.[152] So what did they do? Rather than block free speech and the free press, they instead worked inside the institutions of media and public debate to manipulate public opinion to comport with its agenda. And for a significant portion of the world on terror, this strategy worked. British journalist Michael Tomasky noted in 2003 that while "there have been occasional and notable exceptions to

[151] "Prepared Remarks for Testimony before the Senate Committee on the Judiciary," 6 December 2001.
[152] Though, as already noted, they did *consider* prosecuting reporters for the *New York Times* for reporting on the NSA surveillance program.

this trend . . . by and large, the U.S. press has followed the government's agenda since 9/11 in away that hasn't been the case for decades."[153]

Why did the Administration use this strategy? Two main reasons. The first is a practical calculation: As noted in the previous section, neither the Supreme Court nor the American public would have stood for the censorship of dissent. Tomasky notes:

> Official censorship is, of course, something to be vigilant about, something that must be monitored at all times. But no political movement or presidential administration will ever get very far in this country with official censorship. The First Amendment is too deeply ingrained in the culture; it's something that any news outfit, from *The Nation* to the Fox News Channel, will defend.[154]

Rather than censoring, they manipulated. Among other things, they tried to move the standards of "serious" establishment-thought rightward. By inserting previously extreme views – the efficacy of torture and the morality of a preventive war, for instance – the middle ground shifted right. Again, Tomasky:

> But if the center-point of the national discourse is pushed further and further to the right, if the chummy echo-chamber of the national media becomes less able (or willing) to withstand the brickbats of the conservative pressure groups . . . well, at that point, who even *needs* censorship? The press will be – in important ways, already is – censoring itself.[155]

And as will later be discussed, they used existing institutions to spread their propaganda.

The second reason is that the Administration was comporting with a seemingly unstoppable historical trend away from suppression and into manipulation. Each generation, it seems, has repudiated the suppression of the generation before it. New governments, therefore, have to find replacement tools of manipulation and control. David Cole captures this evolution:

> In the beginning, we targeted words. In World War I, Congress made it a crime to utter 'any disloyal, profane, scurrilous, or abusive language . . . as regards the form of government of the United States, or the Constitution, or the flag' . . . by the Cold War, however . . . we had largely repudiated criminal censorship. In its place arose guilt by association.[156]

In other words, during World War I we punished speech. After that strategy lost political viability, governments moved to punish association. Indeed, by the 1950s scholars remarked that:

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[153] Tomasky, 2003: 157.
[154] Ibid.
[155] Ibid: 158.
[156] Cole, 2003: 15.

> [Censorship,] a traditional device for curbing dangerous speech . . . is worthy of mention chiefly because, in the political sphere, the times have passed it by . . . the decline of conventional censorship has been more than offset by a new development, censorship of the speaker rather than speech.[157]

The evolution continues. Each time one method of suppression falls out of style, governments find new methods and strategies – strategies that have not yet become taboo. David Cole issues a warning in 2003:

> Pundits repeatedly remind us that the administration has avoided the mistakes of the past: it has not locked up people for merely speaking out against the war as we did during World War I; it has not interned people solely for their racial identity, as the military did during World War II; and it has not punished people for membership in proscribed groups, as we did during the Cold War . . . As a nation, we should be careful about too quickly congratulating ourselves . . .
>
> The Bush administration has adapted the mistakes of the past, substituting new forms of political repression for old ones . . . the government has offset the decline of traditional forms of repression by developing new forms of repression.

It would be beyond the scope of this paper to document all the ways in which the Bush Administration manipulated public opinion and suppressed dissent through non-legal means. And, to be sure, there have been and will continue to be a great number of works on the topic. So instead, we will focus on three case studies: (1) The Iraq War, (2) the Pentagon propaganda program, and (3) the torture debate.

It should also be noted that it was clear within the first weeks of the War on Terror that the forces of dissent and debate would not be at full strength. As has been previously mentioned, only one member of the World's Greatest Deliberative Body voted against one of the most repressive pieces of legislation in American history, and Russ Feingold cannot protect American freedom by himself.

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The Iraq War

The United States invaded Iraq to destroy nonexistent weapons of mass destruction. They did this in the face of thorough reporting in national newspapers proving the basis for war was dubious at best;[158] they did this in spite of the fact that two of the three most senior members of the United States Senate were wholly unconvinced

[157] Brown, 1958: 14-15. Qtd. in Cole, 2003.

[158] See Landay, 2002. McClatchy Newspapers, one of the largest national services, got virtually everything right leading up to the Iraq War. Unfortunately, the reporting of the *New York Times* and *Washington Post* had more influence.

by the claims;[159] and they did so with Great Britain and a rag tag "coalition of the willing, but in spite of opposition from most of the industrialized world.

The Bush Administration made this decision with the full throated support of the American public.[160]

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We all remember the fear-mongering of the time. The claims of smoking guns and mushroom clouds. We know of the attacks of the right-wing media; the claims by Bill O'Reilly, for instance that he would "call anyone who publicly criticizes America in a time of military crisis, which this is, 'bad Americans.'"[161] And we ought to know that the Administration knowingly lied in order to make the case for war. What is less known is how the Administration used protected First Amendment institutions, most notably the establishment media, to make the case and manipulate the American public.

Nowhere is this case better made than in the masterful Bill Moyers documentary *Buying the War*.[162] For anyone seeking a comprehensive narrative about the Administration's case for war, it is highly recommended. For our purposes, we will only examine one method of Administration manipulation, for it is wholly indicative of their overall strategy.

The Administration brilliantly played the television and print media by taking advantage of the symbiotic relationship between the establishment media and government; a relationship in which the Administration wants their stories covered 'correctly' and the press gets 'scoops.'

The most glaring example of this relationship came in early September 2002, when Vice President Cheney appeared on NBC's *Meet the Press*. That very morning, *The New York Times*' Judith Miller had reported a story detailing Saddam Hussein's supposed efforts to gain the capacity to make centrifuges necessary for nuclear weapons. The information was deemed classified and came to Miller from a "senior administration official."[163] Making the case for war that same morning on *Meet the Press*, Cheney was able to make claims about centrifuges <u>without violating confidentiality</u> because he was citing the *Times* and not government reports. To reiterate: Cheney was able to cite confidendtial information because it came from the *Times* and not the government. It was easy to put the pieces together. When asked about his reactions to it by Bill Moyers, veteran newsman and Middle East expert Bob Simon responded, "I thought it was remarkable . . . **You leak a story and then you quote the story**. I mean that's a remarkable thing to

[159] See Kennedy's and Byrd's votes: http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00237
[160] 80% of the public supported the invasion. See: ABC/Washington Post Poll. December 12, 2002.
[161] O'Reilly, "I made a mistake . . ." 2003.
[162] Moyers, 2007.
[163] Miller and Gordon, 2002.

do."[164] Tim Russert, the moderator of *Meet the Press*, did not push Cheney on this. Few did.

Plotted leaks, media bombardments, and fear mongering were common place before and after the invasion of Iraq. Rather than censor the press, and therefore make it even more adversarial and hostile, the Administration offered them carrots. In exchange, "The press surrendered its independence and skepticism to join with the government as they marched to war."[165] We are still paying their price.[166]

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The Pentagon Talking Heads Program

In the summer of 2005, the Bush Administration was facing heavy criticism over the existence of and conditions at the prison facility at Guantanamo Bay. Amnesty International had just released a report calling the facility the "Gulag of our times"[167] and human rights experts at the United Nations were calling for its closure. The Administration's media strategy was as swift as it was savvy. (It was also illegal – more on that later). Very soon after these reports, a number of "independent military analysts" – retired colonels, generals, etc. – reported on various media outlets that the conditions at Guantanamo Bay were perfectly fine, humane and in compliance with the law. It was, we very later discovered, a ruse.

Some background: After September 11, the Administration moved to gain influence over what they called "key influentials" in the public debate. According to the Pulitzer Prize winning *New York Times* reports, "military officials were seen as the ultimate key influentials. They had served their country with honor and possess the gravitas of the United States military."[168] And so, the Pentagon gained influence with a group of retired military officials who served as purportedly independent analysts for various media outlets. What the public did not know, however, was that most of the analysts had ties to military contractors. The contractors, of course, had very specific interests in the war policies that the analysts were being asked to assess. Behind the scenes (emphasis added):

> The Bush administration has used its control over access and information in an effort to transform the analysts into a kind of media Trojan horse — an instrument intended to shape terrorism coverage from inside the major TV and radio networks . . .
>
> Representing the companies, **they are given special access to the Bush Administration – Stephen Hadley, Dick Cheney and Alberto Gonzalez. In**

[164] Moyers 2007.
[165] Ibid.
[166] Kilstein, April 2008.
[167] Norton Taylor, 2005.
[168] Barstow, 2008.

> **exchange, they echo Administration talking points**, even when they suspect that the information is false or inflated.[169]

As the key influentials became more experienced, the Administration's confidence in their ability to shape the public debate grew. For instance, the Pentagon paid for the analysts to visit Iraq. Upon their return, the Administration was happy to see the retired officials echo Administration talking points on television and in newspapers. In a January 2005 memo from the Pentagon's Director of Press Operations to high-ranking Defense Department officials, including a top aide to Secretary Rumsfeld, Captain Roxie Merritt observed:

> One of the most interesting things coming from this trip to Iraq with the media analysts has been learning how their jobs have been undergoing a metamorphosis . . . The key issue here is that more and more, media analysts are having a greater impact on the television media coverage of the military issues. They have become the go to guys not only for breaking stories, but they influence the views on issues. They also have a huge among of influence on what stories the network decides to cover proactively with regards to the military.

Merritt then went on to make recommendations (emphasis added):

> I recommend we develop a core group from within our media analyst list of **those that we can count on to carry our water** . . . We can also do more proactive engagement with this list and give them tips on what stories to focus on and give them heads up on issues as they are developing . . . [We can also] weed out the less reliable analysts.[170]

Merritt was right. Former constitutional lawyer and writer for *Salon.com*, Glenn Greenwald discovered something unbelievable in the memos: Dan Senor, a Fox News analyst, would literally ask Larry Di Rita, a top aide to Rumsfeld, what he should say on television. Additionally, whenever Senor would submit articles for print (almost always, Greenwald points out, about how great the war was going), he would first submit it to Di Rita, who then provided editing directions (which Senor always followed.)[171]

To help defuse the Guantanamo problem, the Pentagon – and the White House – resolved to counter human rights reports on Guantanamo Bay in the media. This was a mission tailor-made for the key influentials; after all, the American people have a great respect for the military (and a deservedly greater respect for individual soldiers), and there is a presumption that high-ranking military men are men of honor.

So the Pentagon flew the military officials out for what amounted to a three hour visit; it was clearly not a real investigative trip, but the Administration knew the analysts cared more about their access with the Administration than with the truth. The plan worked.

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[169] Ibid.
[170] Merritt, 2005.
[171] Greenwald, 10 May 2008.

Take retired general Don Shepperd, for example. In an unusual bit of honesty, Shepperd, a key influential, CNN analyst, asked on television, "Did we drink the Government Kool-Aid?" Answering himself he responded, "of course, and that was the purpose of the trip . . . a one day visit does not an expert make . . . the government was obviously going to put its best foot forward to get out its message . . . [and] former military visitors are more likely to agree with government than a more appropriately skeptical press." And yet – amazingly (or not), and in testament to the power of the Pentagon's influence – Shepperd became a fierce advocate for the Administration:

> The impressions that you're getting from the media and from the various pronouncements being made by people who have not been here, in my opinion, are totally false . . . And people being very, very well-treated . . . I have been in prisons and I have been in jails in the United States, and this is by far the most professionally-run and dedicated force I've ever seen in any correctional institution anywhere.

Finally, when asked whether there was any abuse at Guantanamo, despite his own admittance that he was no "expert" and despite the fact that the "investigative" trip only amounted to three hours, Shepperd was unequivocal: "absolutely not."[172] Keeping track of the program, Pentagon officials "tracked every word uttered by their 'surrogates.'" The former officials spread out across the cable news outlets and the networks, and they all proclaimed "Gitmo to be the very model of human rights and sterling respect for detainees."[173]

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Facilities like Guantanamo Bay are unique to this era in American history. With the exception of Japanese internment camps, we have never created such single purpose (and unconstitutional) internment facilities. That said, it seems reasonable to assume that, had the Wilson or Adams administrations had comparable facilities – facilities of torture and indefinite detention – they would have done their best to suppress media reports. That is, they would have used statutes, sedition and espionage acts, for instance, to prevent reporting on the issue. The Bush Administration took a different, arguably more effective route. They worked within the confines of the free press to propagandize by appealing to those who inherently had the public's trust: military officials. Is this a violation of the First Amendment? Almost surely no. Is it outside the *spirit* of free speech and a free press? Definitely.

One last note on the program: While it was not unconstitutional, it was almost certainly illegal. Since 1951, Congress has included the following restriction on all appropriations bills: "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by

[172] Transcript available: http://www.cnn.com/2005/US/06/24/shepperd.gitmo/index.html. First found at Greenwald, 9 May 2008, who first made the ellipses.
[173] Greenwald, 9 May 2008.

the Congress."[174] In order to determine whether the program broke this law, we must answer two questions.

First, was this program "propaganda" being used within the United States? So let us define propaganda: According to the Government Accountability Office, illegal propaganda is public relations activity that:

(1) Involves "self-aggrandizement" or "puffery" of the agency, its personnel, or activities;
(2) Is "purely partisan in nature" (i.e., it is "designed to aid a political party or candidate"); or
(3) Is "covert propaganda" (i.e., the communication does not reveal that government appropriations were expended to produce it).[175]

It seems clear that the Pentagon talking heads program involved "puffery" of the agency. It can be argued that the propaganda was purely partisan in nature, insofar as it was designed to aid the Bush Administration and to attack its primarily democratic political opposition. And it was clearly communication that did not reveal that government appropriations were expended to produce it. Only one of these conditions needs to be satisfied in order for the activity to deemed propaganda; the Pentagon program satisfies all three. The second question is much easier: were appropriated funds being used towards the propaganda? Clearly the answer is yes. The government paid for the analysts' trips, for one. And we may never know what government funds were allocated to contracting firms in exchange for the analysts' services.

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Torture?

The United States tortured. This is simply a fact. Waterboarding is torture. This too is a fact. If there is any confusion on this issue, Stephen Bradbury of the Bush Administration's Department of Justice Office of Legal Counsel makes the case in a memo to the CIA Senior Deputy General Counsel (Bradbury has since become famous for his 'torture memos,' which gave legal advice justifying torture:

> The United States condemns coercive techniques and other practices employed by other countries. Certain techniques the United States has condemned appear to bear some resemblance to some of the CIA interrogation techniques." In their discussion of Indonesia, for instance, the State Department "reports list as 'psychological torture" conduct that involves 'food and sleep deprivation' . . . In their discussion of Egypt, the report lists as 'methods of torture' 'stripping and blindfolding victims . . . and dousing victims with cold water." They also cite State Department reports on Algeria, for which "placing a rag drenched in dirty

[174] Farsetta, 2008.
[175] Kosar, 2008.

> water in someone's mouth" was considered torture, and Iran, which counted "sleep deprivation as either torture or severe prisoner abuse.[176]

After the release of the 'torture memos,' it was discovered that the United States engaged in all of these activities – food and sleep deprivation, dousing victims with cold water, etc. – which the American government had previously declared torture.

This is why the Bush Administration's success in contesting whether or not we tortured is so remarkable. Rather than suppress discussion of torture, the Bush Administration managed to convince "serious" media outlets that whether or not they tortured was a matter of *opinion* and not fact.

Members of various establishment media organizations wrestled with the vocabulary: Is it "harsh," or "brutal"? Is it "torture" or "interrogations"?[177] Perhaps the most telling example was National Public Radio (NPR). In an online article, their ombudsman, Alicia Shepard defended NPR's nonuse of the word "torture" thus:

> The problem is that the word torture is loaded with political and social implications for several reasons, including the fact that torture is illegal under U.S. law and international treaties the United States has signed.
>
> Both Presidents Bush and Obama have insisted that the United States does not use torture. Officials during the Bush administration acknowledged the use of what they called "enhanced interrogation techniques.[178]

Glenn Greenwald caught the fallacy in Shepard's logic. Responding to this article (emphasis in original):

> So what? How does the fact that torture is illegal mean that NPR shouldn't describe as "torture" tactics which – when used **against** Americans – the U.S. government has long condemned as "torture"? Her objection . . . is a total non-sequitur. How does the criminality of torture serve as an argument against [calling torture torture]? It doesn't.[179]

What effect did this have on the public debate? While we can never know for sure, it seems clear that the impact was huge. Torture, after all, is illegal. Ronald Reagan himself made clear that torture is against American values when he pushed for ratification on the United Nations Convention on Torture: "Ratification of the . . . will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today." Equally important, he made clear that torturers must be punished: "Each State Party is required either to prosecute torturers who are found in

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[176] Bradbury 2005.
[177] See the Public Editor of the *New York Times*, for example: Hoyt, 2009.
[178] Shepard, 2009.
[179] Greenwald, 22 June 2009.

its territory or to extradite them to other countries for prosecution."[180] While polls (disappointingly) showed that many Americans supported tactics freely identified as "torture," the fact that what constituted "torture" allowed for a certain amount of moral ambiguity.

Again, rather than choosing to suppress discussion about the torture program, the Bush Administration used the First Amendment institutions to shift the public debate. They turned the *fact* that waterboarding (and other means of interrogation) is torture into a debatable proposition. The result was that a morally and legally indefensible set of actions became a matter for partisan debate, left v. right. It is almost certain that this yielded a better result (for the Administration) than suppression.

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Two last things. First, it should be noted that the Bush Administration is rivaled only by the Nixon Administration for its levels of secrecy. The White House refused to let officials testify, destroyed documents, lied about, and failed to disclose countless pieces of information. Speaking on the Senate Floor regarding the Administration's invocation of the "state secrets" doctrine, Russ Feingold argued in 2008:

> When the executive branch invokes the state secrets privilege to shut down lawsuits, hides its programs behind secret OLC opinions, over-classifies information to avoid public disclosure, and interprets the Freedom of Information Act as an information withholding statute, it shuts down all of the means to detect and respond to its abuses of the rule of law – whether those abuses involve torture, domestic spying, or the firing of U.S. Attorneys for partisan gain.[181]

Such levels of secrecy certainly act against the spirit of the First Amendment. As the late Senator Daniel Patrick Moynihan once argued, "secrecy is the ultimate form of regulation because the people don't even know they are being regulated."[182]

Second: Protest during wartime has always been a key, if not *the* key means of dissent. And while there have been protests that were woefully underreported by the mainstream media,[183] the fact that the protest movement was relatively weak during the age of Bush is an indisputable truth.

There are, of course, many possible explanations for what Brian Tamanaha calls "the sterilization of public protest."[184] The most convincing seems to be the absence of a military draft in conjunction with the fact that so few Americans had to bear the brunt of the War on Terror. What is undeniable is that, as Timothy Zick argues in his book

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[180] Qtd. in Sullivan, 2009.
[181] 25 September 2008.
[182] Qtd. in Stone, 2004: 556.
[183] There were 100,000 protestors against the war at the National Mall, and the story was relegated to the "Metro" section of *The Washington Post*. See "Body of War" on *Democracy Now!*, March 2008.
[184] Tamanaha, 2009.

Speech Out of Doors, free speech – and public protest, in particular – seems to have had lost its soul and its spirit during the war one terror.[185]

For this apathy, we can blame the manipulation, polarization, and fear-mongering of the Bush Administration. But in the end, if we are honest in our search for blame, we must only look into a mirror. The First Amendment is the people's liberty, but it is up to the people to make use of it. It is up to the people to challenge government when its rights are suppressed and it is up to the people to stand up to unjust policies.

Part VI: First Amendment in the Age of Obama and Beyond

The condition upon which God hath given liberty to man is eternal vigilance.
-John Phillip Curran[186]

We lose ourselves when we compromise the very ideals that we fight to defend
-President Barack Obama accepting the Nobel Peace Prize[187]

George Bush has left office. In his place now sits his antithesis. Barack Obama is thoughtful where Bush was crass; learned where Bush was ignorant; and eloquent where Bush was clumsy. Whereas Bush never attended law school and was genuinely ignorant of constitutional theory, Obama was a legal academic and is a former editor of the *Harvard Law Review*. He was written and spoken beautiful odes to constitutional civil liberties. Should we therefore rest easy? No, for we must always remember that that condition upon which God hath given us liberty.

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Obama's civil liberties record at the point of writing is decidedly mixed and, considering the fact that he ran on a platform of restoring civil liberties, it can only be seen as disappointing. While he has ended torture; set a trial date for terrorists like Khalid Sheikh Mohammed; and promised to close the prison at Guantanamo Bay, he has also advocated an Orwellian plan of indefinite detention for those suspected terrorists who cannot be convicted but are too dangerous to be released; maintained a Guantanamo-like prison facility at the Bagram Air-Force Base; and gone back on many of his promises of transparency.[188] Regarding the First Amendment specifically, while he does not look as if he will be prosecuting dissent any time soon, he has continued some of the Bush Administration's nasty habits.

Congress has been trying for some time to pass a "shield law," protecting reporters from having to reveal their sources. Such a law is a well-reasoned, thoughtful way to help ensure freedom of the press. In September, Obama – who supported such a law as both a

[185] 2009.
[186] Qtd. in Feingold, 2001.
[187] Remarks on Accepting the Nobel Peace Prize. 2009.
[188] For remarks on indefinite detention, see: Obama, 2009. For information on Bagram, see: Rubin, 2009. For more on state secrets, see: "The Cover-Up Continues," October 2009.

Senator and a candidate for President – sought to weaken the bill.[189] In October, his Administration got even tougher in their attempt to weaken the bill.[190] Current reports have it that the Administration has softened its stance, but it is disheartening to know that they fought a good bill that sought to protect the free press.

Similarly, in October, a *New York Times* editorial lamented Obama's new and unexpectedly radical claims of state secrets, arguing that Obama was retreating from his "passionate campaign promises to make a break with Mr. Bush's abuses of power."[191] Anthony Romero, the head of the American Civil Liberties Union was blunt in expressing his disappointment (emphasis added):

> This is not change. This is definitely more of the same. Candidate Obama ran on a platform that would reform abuse of state secrets, but President Obama's Justice Department has disappointingly reneged on that important civil liberties issue. **If this is a harbinger of things to come, it will be a long and arduous road to give us back an America we can be proud of again.**[192]

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Meanwhile, it seems that many in the establishment media have not learned the lessons of the War on Terror. Despite the fact that the press remained "free," they were nevertheless manipulated and helped lead the nation into a tragic and unnecessary war based on false claims. The lesson, therefore is to be eternally vigilant. For many, this is a lesson not learned.

Glenn Greenwald urged in October that "Anyone who believes the establishment media in the U.S. learned even a single lesson from what happened with Iraq should immediately read" the Joby Warrick news article in the *Washington Post* titled "Iranian Site Prompts U.S. to Rethink Assessment."[193] Why does Greenwald encourage his readers to look at the article? Because it was the same shoddy journalism that helped bring us to war with Iraq.

Warrick writes that Iran's Qom facility "was intended explicitly for making highly enriched uranium for nuclear weapons." This is a hugely important claim; the type of claim that was once used to justify war in Iraq. The problem is that the article, as Greenwald ably points out, is based solely upon the word of anonymous unnamed officials. Worse still, Warrick:

> Does not include a *single expert or named source to dispute these claims*. It's a purely one-sided, unquestioning and entirely anonymous series of dubious,

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[189] Savage, 2009.
[190] Pincus, 2009.
[191] "The Cover-Up Continues," October 2009.
[192] Qtd. in Schwartz, 2009.
[193] Greenwald, 24 October 2009; Warrick 24 October 2009.

> unverified, feat-mongering assertions that can have no purpose other than to create the most sinister picture of the 'Iranian threat' possible.
>
> In other words, it's the exact pattern used to lead the country to attack Iraq. Beltway reporters like Warwick have learned nothing and establishment media institutions are just as devoted as ever to beating war drums on command. What else could possibly explain a shoddy, trashy article like this making it past a team of editors? And just imagine how much worse it would get if the U.S. government actually wanted to bomb Iran. All of this is happening while, at least from all appearances, the White House wants to avoid that outcome.[194]

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Oh, and remember those corrupt military analysts? They are still on TV regularly and the networks do not provide disclosure about their "other" interests.[195]

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When he spoke in opposition to the Patriot Act, Senator Feingold warned that we must not let past become prologue. So too now.

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How now must the American people act to protect their civil liberties? What, for instance, would be the reaction if terrorists detonated a nuclear bomb inside the United States tomorrow? Perhaps the most important thing to remember is that while Congress, the Court, and the public have *underprotected* the First Amendment during wartime, never once has it been *overprotected*.[196]

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He must teach himself that basest of all things is to be afraid . . . Until he does so, he labors under a curse.

-William Faulkner[197]

In many ways, I wrote this paper as a quasi-sequel to Geoffrey Stone's *Perilous Times*; a more complete documentation of the First Amendment during our latest war. It is fitting, therefore, that I mention how Stone ends his book.

Stone concludes that "Freedom can endanger security, but it is also the fundamental source of American strength."[198] He then quotes Justice Louis Brandies: "Those who

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[194] Greenwald, 24 October 2009, emphasis in original.
[195] Bassett, 2009.
[196] Stone, 2004: 544.
[197] 1950.
[198] Ibid: 557.

won our independence . . . knew that . . . fear breeds repression" and that "courage is the secret of liberty."[199]

Brandeis was right, of course. Knowing that courage is the secret of liberty, we must remember Ronald Reagan's words: "The future doesn't belong to the fainthearted; it belongs to the brave."[200] And so it does. Let us protect the liberty inside our hearts. Let us be brave.

[199] Qtd. in Stone, 2004: 557.
[200] 1986.

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