

## The Rule of Law in Times of Stress

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A recent poll reported that support for the First Amendment has eroded significantly since the terrorist attacks of September 11, 2001.<sup>1</sup> The Department of Justice is actively considering a program under which everyone is encouraged to become an informant to the government against everyone else.<sup>2</sup> A Secret Service agent of Arabic descent was refused permission to board a commercial air flight, because the pilot thought that he was potentially dangerous.<sup>3</sup> And the courts are being asked to hold secret hearings, to sanction indefinite detentions of people whose identities are not revealed, and to draw sharp distinctions between the human rights to be accorded to U.S. citizens and to “aliens,” whether the latter are legally present in the country or not.<sup>4</sup>

Whatever may justify any or all of those attitudes, decisions, and policies, it is fair to say that they represent a departure from the norms to which Americans have become accustomed in the last fifty years. They call into question the balance between individual rights and executive decisions undertaken in the name of state security. More fun-

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<sup>1</sup> See Richard Morin and Claudia Deane, *The Ideas Industry*, Wash Post A15 (Sept 3, 2002) (The poll, released by the University of Connecticut’s Center for Survey Research and Analysis, showed that a whopping 49 percent of the public now thinks that the First Amendment “goes too far,” up from 39 percent in 2001 and 22 percent in 2000.).

<sup>2</sup> The Department of Justice introduced the idea for Operation TIPS (Terrorism Information and Prevention System) in January 2002 to “enlist the help of millions of American workers who, in the daily course of their work, are in a unique position to serve as extra eyes and ears for law enforcement.” *Citizen Corps: A Guide for Local Officials*, online at <http://www.citizencorps.gov/council.pdf> (visited Dec 2, 2002). In response to privacy concerns, the Department of Justice is reportedly no longer planning to extend the program to mail carriers, utility workers, and other workers who have access to people’s homes. See Dan Eggen, *Under Fire, Justice Shrinks TIPS Program*, Wash Post A1 (Aug 10, 2002).

<sup>3</sup> See Colbert I. King, *Something in the Air on Flight 363*, Wash Post A21 (Jan 5, 2002) (discussing an incident in which a seven-year veteran of the Secret Service was removed from an American Airlines flight, possibly because of his Arabic descent).

<sup>4</sup> See *President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, online at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (visited Dec 2, 2002) (detailing the executive order that set up military tribunals and submitted detention of aliens to the discretion of the Secretary of Defense); Linda Greenhouse, *Ideas & Trends: Executive Decisions; A Penchant for Secrecy*, NY Times § 4 at 1 (May 5, 2002) (noting litigation over the refusal to release names of detainees).

damentally, they call into question the extent to which any society can adhere to the rule of law when it perceives itself to be threatened by hostile powers or groups. To some eyes, the rule of law has begun to look like a luxury item that one buys in times of plenty, but that one cuts from the budget in times of want. To others, the rule of law takes on a heightened importance in times of stress, even if it is more costly to uphold, because to relinquish law is to lose our most precious legacies of freedom and democracy.<sup>5</sup>

This Essay offers some modest reflections on the nature of a society that respects the rule of law, the extent to which the United States has followed rule-of-law principles in earlier times of stress, and the tensions that we are experiencing at present. As the Executive Branch of the federal government uses the rhetoric of war to describe its efforts to root out and conquer terrorism, it has already waged one real war in Afghanistan, and it is urging a second real war against Iraq. While many more facts may become known to us as these efforts unfold, it will be important constantly to keep in mind what is at stake, what is (and is not) new in the world situation we now face, and what role each of our democratic institutions should play. The United States has always been a work-in-progress, and now more than ever it is vital that we live up to our commitments to the rule of law, and, in the words proclaimed above the doors of the U.S. Supreme Court, to Equal Justice Under Law.

## I. THE RULE OF LAW

Numerous scholars have discussed the idea of the “rule of law,” and it is far beyond the scope of this Essay to add anything original to the debate.<sup>6</sup> It will suffice to identify some common themes that appear to reflect a consensus view. Most people distinguish at the outset between the “rule of law” and the “rule of men.”<sup>7</sup> Professor Rosenfeld elaborates on that negative definition of the rule of law:

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<sup>5</sup> The existence of the latter group is illustrated by the fact that membership in the ACLU has increased significantly since the attacks of September 11, 2001; out of 330,000 dues-paying members, 50,000 joined after that date. See Ron Kampeas, *ACLU Sees Membership Surge after 9/11*, 2002 WL 103441808 (AP Online Dec 1, 2002).

<sup>6</sup> For a general discussion, see Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S Cal L Rev 1307 (2001) (examining the rule of law in an Anglo-American common law system); David Dyzenhaus, ed, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford 1999) (examining the law under stress, the reconception of the rule of law, and the limits of legal order); Robert S. Summers, *The Principles of the Rule of Law*, 74 Notre Dame L Rev 1691 (1999); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum L Rev 1 (1997).

<sup>7</sup> See Rosenfeld, 74 S Cal L Rev at 1313 n 25 (cited in note 6) (noting that even the Supreme Court in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), distinguishes between the “government of laws” and the “government of men”); Fallon, 97 Colum L Rev at 2–3 (cited in note 6) (stating that distinguishing between the two is necessary before a discussion of where the

In some cases, the “rule of men” (or, as we might say today, “the rule of individual persons”) generally connotes unrestrained and potentially arbitrary personal rule by an unconstrained and perhaps unpredictable ruler. For present purposes, however, even rule through law amounts to the “rule of men,” if the law can be changed unilaterally and arbitrarily, if it is largely ignored, or if the ruler and his or her associates consistently remain above the law.<sup>8</sup>

The same idea comes across in the list of principles suggested by Professor Summers that, in the aggregate, make up the rule of law: The law should be uniform, known in advance, and applicable to all.<sup>9</sup>

Offering a more positive definition, Professor Fallon sets forth a summary of five elements that most modern scholars agree make up the rule of law: (1) “capacity of legal rules, standards, or principles to guide people in the conduct of their affairs”; (2) efficacy; (3) stability; (4) supremacy of legal authority, even over government officials (including judges); and (5) instrumentalities of impartial justice (that is, courts that use fair procedures).<sup>10</sup> Professor Summers’s list of eighteen principles reflects the same basic concepts.<sup>11</sup> It is enough here, then, to assume that the rule of law has both a substantive and a procedural dimension; that there is no one in a society governed by law who is above the law or immune from some form of legal constraint; that neither laws nor the procedures used to create or implement them should be secret; and that the laws must not be arbitrary.

From its birth, the United States has been a country based on written law. The Constitution of 1787 established the framework for a rule-of-law society, through everything from the hortatory “republican form of government” clause,<sup>12</sup> to the structural separation of legislative, executive, and judicial powers,<sup>13</sup> to the specific individual protections of Article III, (trial by jury in criminal cases,<sup>14</sup> special rules for treason cases and prohibition of corruption of blood or forfeiture extending beyond the convicted person<sup>15</sup>), and Article IV (privileges and immunities).<sup>16</sup> The Bill of Rights quickly added what would now be called a set of recognized human rights, or individual rights, to the largely structural original Constitution. Those amendments, especially

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rule of law belongs in constitutional discourse).

<sup>8</sup> Rosenfeld, 74 S Cal L Rev at 1313 (cited in note 6).

<sup>9</sup> See Summers, 74 Notre Dame L Rev at 1693–95 (cited in note 6).

<sup>10</sup> Fallon, 97 Colum L Rev at 8–9 (cited in note 6).

<sup>11</sup> See Summers, 74 Notre Dame L Rev at 1693–95 (cited in note 6).

<sup>12</sup> US Const Art IV, § 4.

<sup>13</sup> US Const Arts I–III.

<sup>14</sup> US Const Art III, § 2, cl 3.

<sup>15</sup> US Const Art III, § 3.

<sup>16</sup> US Const Art IV, § 2, cl 1.

as supplemented by the Civil War amendments guaranteeing to all citizens freedom from involuntary servitude,<sup>17</sup> equal protection and due process,<sup>18</sup> and a racially nondiscriminatory franchise,<sup>19</sup> laid the legal foundation for the constitutional democracy that grew over the years. By the time of the Second World War, the United States rightly regarded itself as one of the champions of the rule of law, as it joined the Allies in the war against the totalitarian regimes that controlled Germany, Italy, and Japan.

After the War ended with the defeat of fascism and the exposure of the horrors of the Holocaust in Europe (as well as other horrors in Asia, such as the Rape of Nanking), it appeared that the international community as a whole was ready to adopt the rule of law for itself. Under the leadership of Eleanor Roosevelt, the new United Nations adopted the Universal Declaration of Human Rights.<sup>20</sup> While the Universal Declaration did not purport to impose legally binding obligations on signatories, later conventions took that next step, including most importantly, the International Covenant on Civil and Political Rights<sup>21</sup> and the International Covenant on Economic, Social, and Cultural Rights.<sup>22</sup> Other institutions were created to bring order into international economic affairs, including the World Bank, the General Agreement on Tariffs and Trade (which was eventually folded into the World Trade Organization in 1995), and the International Monetary Fund. Chapter VI of the UN Charter committed all parties to attempt to settle disputes through peaceful means, with the help if necessary of the UN Security Council.<sup>23</sup> Chapter VII places the responsibility for addressing “threat[s] to the peace, breach[es] of the peace, or act[s] of aggression”<sup>24</sup> in the hands of the Security Council, which can authorize the use of force to restore the peace.<sup>25</sup> The hope, however, of the countries that signed the Charter at San Francisco in 1945, was to “save succeeding generations from the scourge of war,” “reaffirm faith in fundamental human rights,” “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law [could] be maintained,” and “promote social progress and better standards of life in larger freedom.”<sup>26</sup>

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<sup>17</sup> US Const Amend XIII.

<sup>18</sup> US Const Amend XIV.

<sup>19</sup> US Const Amend XV.

<sup>20</sup> GA Res 217A(III), UN Doc A/810, 71 (1948).

<sup>21</sup> GA Res 2200A (XXI), 21 UN GAOR Supp No 16 at 52, UN Doc A/6316 (1966).

<sup>22</sup> GA Res 2200A (XXI), 21 UN GAOR Supp No 16 at 49, UN Doc A/6316 (1966). The United States has not ratified this convention.

<sup>23</sup> UN Charter, ch VI.

<sup>24</sup> UN Charter, ch VII, art 39.

<sup>25</sup> See UN Charter, ch VII, arts 39–42.

<sup>26</sup> UN Charter, preamble.

As everyone knows, those hopes were short-lived. Instead of a world free from the scourge of war, the second half of the twentieth century saw a world threatened by the Cold War and plagued with numerous “hot” wars. The United States was heavily involved in many of the “hot” wars (Korea, Vietnam, Somalia, and the Persian Gulf come readily to mind), and the Cold War raised the awful prospect of the annihilation of humanity from the first sign of the Soviet Union’s nuclear capacity in the early 1950s to the dissolution of the country and its replacement by Russia and the other newly independent states at the end of 1991. Today, despite the resolution of the long-standing open hostility between the former Soviet Union and the West, the world faces new threats; threats variously described as arising from competing civilizations,<sup>27</sup> competing cultures,<sup>28</sup> or the revival of ancient religious rivalries between Islam and Christianity.<sup>29</sup>

Where, if at all, does the rule of law fit into such a dangerous world? Is it possible to insist on adherence to law when terrorists brazenly exploit the openness of Western societies, deliberately kill thousands of innocent civilians, and make clear their intent to continue to strike at the heart of the free world? Although the risks should not be underestimated, I believe that the rule of law not only can, but must, continue to be the guiding star for the United States and all other freedom-loving countries. The record of the twentieth century, as well as the courageous example of other countries that have lived with terrorism longer than the United States, should give us reason for confidence. We have succeeded in the past in preserving our most precious individual rights and our balanced form of government, and we can continue to do so in the face of the current threats.

## II. STRAINS IN THE SYSTEM

The post-September 11, 2001, period is not the first time that conflicts have arisen in the United States between the ideals of civil lib-

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<sup>27</sup> See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* 207 (Simon & Schuster 1996) (“Civilizations are the ultimate human tribes, and the clash of civilizations is tribal conflict on a global scale.”).

<sup>28</sup> See Thomas L. Friedman, *The Lexus and the Olive Tree* 35 (Farrar, Straus & Giroux 1999) (“The challenge in this era of globalization—for countries and individuals—is to find a healthy balance between preserving a sense of identity, home and community and doing what it takes to survive within the globalization system.”); Benjamin R. Barber, *Jihad versus McWorld: How Globalism and Tribalism Are Reshaping the World* 11 (Ballantine 1996) (“The rising economic and communications interdependence of the world means that such nations, however unified internally, must nonetheless operate in an increasingly multicultural global environment . . . . Forced into incessant contact, postmodern nations cannot sequester their idiosyncracies.”).

<sup>29</sup> See Bernard Lewis, *What Went Wrong: Western Impact and Middle Eastern Response* 114–15 (Oxford 2002) (comparing Western and non-Western secularism and highlighting the historical “threat of Christendom” to the Islamic world).

erty and the perceived necessities of national security. The oft-cited example of Abraham Lincoln's decision to suspend the writ of habeas corpus during the Civil War shows one of our most respected presidents struggling with just such a conflict.<sup>30</sup> Jumping ahead fifty-five years, the courts during World War I condoned severe restrictions on freedom of expression, under the Espionage and Sedition Acts.<sup>31</sup> More than 2,200 people were prosecuted, and more than a thousand were convicted.<sup>32</sup> The Supreme Court itself sustained convictions under the Espionage Act in cases such as *Schenck v United States*,<sup>33</sup> *Frohwerk v United States*,<sup>34</sup> and *Debs v United States*.<sup>35</sup> In *Abrams v United States*, it expressly upheld the constitutionality of the Sedition Act of 1918.<sup>36</sup> Only after a few years had passed, and the urgency of the war had subsided, did the Court resume its solicitude for civil liberties.

Indeed, despite the fact that World War II is remembered as the time when Japanese-Americans were rounded up and herded into internment camps on the West Coast, and the infamous eight captured Nazi saboteurs were tried before military tribunals<sup>37</sup>—both of which (however justified) were hardly examples of evenhanded or open treatment of potentially dangerous persons—it is also a fact that the Court continued throughout World War II to protect more ordinary civil freedoms. Thus, it upheld the rights of fascist sympathizers<sup>38</sup> and

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<sup>30</sup> Lincoln initially suspended the writ by his own action, but Chief Justice Roger Taney, sitting on the Circuit Court for Maryland, in *Ex parte Merryman*, 17 F Cases 144, 148 (Cir Ct Md 1861), questioned the President's authority to do this without Congressional authorization. Shortly thereafter, Congress passed legislation authorizing the President's act. Act of Mar 3, 1863, 12 Stat 755. See also *Duncan v Kahanamoku*, 327 US 304, 307–08 (1946) (noting the Governor of Hawaii's post-Pearl Harbor decision to impose martial law and suspend the writ of habeas corpus, and President Roosevelt's immediate approval).

<sup>31</sup> Act of June 15, 1917, 40 Stat 217; Act of May 16, 1918, 40 Stat 553.

<sup>32</sup> Oxford Companion to the Supreme Court of the United States 942, entry for "World War I" (Oxford 1992) (Kermit Hall, ed).

<sup>33</sup> 249 US 47, 52–53 (1919) (upholding the defendants' conviction for printing and mailing circulars to men who had enlisted in the military, encouraging them to oppose the draft).

<sup>34</sup> 249 US 204, 209–10 (1919) (upholding the defendants' conviction for circulating a newspaper opposing the draft).

<sup>35</sup> 249 US 211, 216 (1919) (upholding a defendant's conviction for making public speeches against the draft).

<sup>36</sup> 250 US 616, 619 (1919) (stating that the claim that the "entire Espionage Act [was] unconstitutional because [it is] in conflict with [the First] Amendment . . . [was] sufficiently discussed and negated in *Schenck* . . . and *Frohwerk*").

<sup>37</sup> See *Ex parte Quirin*, 317 US 1, 28, 24 (1942) (finding that the use of a military trial was justified by a combination of the president's power as commander-in-chief and legislation authorizing military trials of those accused of committing offenses against the law of war; also upholding the right of the prisoners to judicial review).

<sup>38</sup> See *Hartzel v United States*, 322 US 680, 688 (1944) (overturning the Espionage Act conviction of a fascist sympathizer who was distributing literature urging German occupation of the United States because there was no evidence that he willfully intended to obstruct the recruiting or enlistment of the U.S. military).

Germans allegedly loyal to Adolf Hitler.<sup>39</sup> During the same period, the famous *West Virginia State Board of Education v Barnette*<sup>40</sup> decision was handed down, in which the Court recognized the right of Jehovah's Witnesses, under the First Amendment's free speech clause, to refuse to salute the flag.<sup>41</sup> Perhaps the most impressive in this line of decisions was the 5-4 ruling in *Cramer v United States*<sup>42</sup> overturning the treason conviction of Anthony Cramer, a naturalized citizen of German birth who had associated with two of the German saboteurs whose cases the Court had considered in *Ex parte Quirin*.<sup>43</sup> The proof showed that Cramer had actually met with Werner Thiel, one of the saboteurs, had conversed with him, and had agreed to hold a substantial sum of money for him. Thiel, as it turned out, was under surveillance at the time of those meetings, and together with Edward Kerling (the other saboteur) was arrested after the second meeting. Cramer too was arrested, charged with violating the treason statute, 18 USC § 1, and convicted, though he was not sentenced to death. Indeed, the trial judge commented that he thought the death penalty was inappropriate, because it did not appear that Cramer knew that Thiel and Kerling had explosives or planned to destroy property in the United States. After an exhaustive review of the law of treason, Justice Jackson concluded that the crime of treason consisted of two independent elements: "adherence to the enemy; and rendering him aid and comfort."<sup>44</sup> He rejected the idea that evidence of meetings alone would suffice to prove aid and comfort and thus concluded—over Justice Douglas's strong dissent—that the treason conviction had to be reversed. The Court had granted certiorari in 1942;<sup>45</sup> it first heard arguments on March 9, 1944;<sup>46</sup> the case was reargued on November 6, 1944; and the decision was handed down on April 23, 1945.<sup>47</sup>

There was obviously nothing ambiguous about the fact that the United States was formally at war throughout the time *Cramer* was before it, as well as when it decided *Barnette* and *Quirin*. What is impressive is the extent to which it was willing and able to uphold the

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<sup>39</sup> See *Baumgartner v United States*, 322 US 665, 673-74 (1944) (reversing denaturalization, and stating that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation").

<sup>40</sup> 319 US 624 (1943).

<sup>41</sup> *Id.* at 642 ("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.").

<sup>42</sup> 325 US 1, 5 (1945).

<sup>43</sup> 317 US 1 (1942).

<sup>44</sup> *Cramer*, 325 US at 29.

<sup>45</sup> *Cramer v United States*, 320 US 730 (1943).

<sup>46</sup> *Cramer*, 325 US at 1.

<sup>47</sup> *Id.*

procedural rights of even such a suspicious character as Cramer, or to recognize the free expression rights of others who espoused unpopular or unpatriotic views. This is not to say that the Court's (or the country's) record was unblemished during World War II from the standpoint of the rule of law. It was not. After the shock of the Japanese attack on Pearl Harbor, Congress passed a formal declaration of war against Japan (which was later extended to the other Axis powers), pursuant to its authority under Article I, Section 8, Clause 11 of the Constitution.<sup>48</sup> Shortly thereafter, the President issued an Executive Order authorizing the creation of "military areas," designated by the Secretary of War or his designee, from which anyone could be excluded.<sup>49</sup> The entire Pacific Coast was so designated, and that designation led to the infamous round-up of all persons of Japanese ancestry and various other aliens.<sup>50</sup> In *Hirabayashi v United States*<sup>51</sup> and *Korematsu v United States*,<sup>52</sup> the Supreme Court upheld these racially and ethnically based measures. In more recent years, most people have come to believe that these decisions represented a low point in the country's record of protecting human rights and respecting individual rights. Congress, for example, has passed resolutions providing for compensation for the Japanese who were placed in the camps,<sup>53</sup> and the Supreme Court has treated those decisions as aberrations at best.<sup>54</sup>

After World War II, fears of outright military conflict gave way to more subtle threats to the security of the United States. On the international front, there was the Cold War with the Soviet Union, a standoff between two nuclear powers, either of which was capable of annihilating the world. Communists in the United States were regarded as

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<sup>48</sup> J Res 116, 77th Cong, 1st Sess in 55 Stat 795 (Dec 8, 1941); S J Res 119, 77th Cong, 1st Sess in 55 Stat 796 (Dec 11, 1941); S J Res 120, 77th Cong, 1st Sess in 55 Stat 797 (Dec 11, 1941).

<sup>49</sup> Exec Ord No 9066, 7 Fed Reg 1407 (1942).

<sup>50</sup> See generally the account in *Hirabayashi v United States*, 320 US 81 (1943).

<sup>51</sup> *Id* at 93:

The war power of the national government is "the power to wage war successfully." It extends to every matter and activity so related to war as substantially to affect its conduct and progress. . . . [I]t is not for any court to sit in review of the wisdom of [presidential and congressional] action or substitute its judgment for theirs.

(citations omitted).

<sup>52</sup> 323 US 214, 222 (1944) (explicitly choosing not to consider the constitutionality and validity of the statute).

<sup>53</sup> See Civil Liberties Act of 1988, Pub L No 100-383, 102 Stat 903, amended by Civil Liberties Act Amendments of 1992, Pub L No 102-371, 106 Stat 1167, codified at 50 USC App § 1989b (2000). See also Wartime Relocation of Civilians, S Rep 100-202, 100th Cong, 2d Sess (Oct 20, 1987); Civil Liberties Act Amendments of 1992, S Rep 102-394, 102nd Cong, 2d Sess (Sept 8, 1992).

<sup>54</sup> See, for example, *Missouri v Jenkins*, 515 US 70, 121 (1995) (Thomas concurring) ("It is for this reason that we must subject all racial classifications to the strictest of scrutiny, which (aside from two decisions rendered in the midst of wartime, see *Hirabayashi* and *Korematsu*) has proven automatically fatal.") (citations omitted).



potential agents of the Soviet Union, and once again, the rule of law suffered but did not disappear. The relentless campaign waged by the House Committee on Un-American Activities, and the pursuit of suspected Communists by Senator Joseph R. McCarthy, is also remembered now as a shameful episode. The Supreme Court was not a reliable restraining force. To the contrary, in cases like *American Communications Association v Douds*,<sup>55</sup> and *Dennis v United States*,<sup>56</sup> the Court upheld governmental measures designed to root out Communists and prohibit individuals from either belonging to or supporting the Communist Party. On the other hand, even Communists did not always lose. In 1971, long before the Cold War was resolved, the Court decided *Baird v State Bar of Arizona*,<sup>57</sup> in which it decided that an applicant to the state bar who refused to answer the question whether she had ever been a member of the Communist Party or any organization that advocates the violent overthrow of the United States government could not be banned from bar membership for that reason. No one opinion commanded a majority of the Court, but the result marked an important step toward the protection of even the most unpopular viewpoints.

The Court wasted no time after World War II was over in signaling that it would not tolerate discrimination against the Japanese. Thus, in *Oyama v State of California*<sup>58</sup> it found that California could not require the escheat of certain agricultural property that a Japanese citizen had conveyed to his son, a U.S. citizen. Had the father been anything but Japanese, the property would have validly been transferred to the son.<sup>59</sup> Under those circumstances, the Court found, the son's equal protection rights had been violated. Similarly, in *Takahashi v Fish and Game Commission*,<sup>60</sup> the Court ruled that California could not deny a commercial fishing license to Japanese citizens.<sup>61</sup>

On the domestic front, the decades spanning the latter half of the twentieth century were relatively quiet, with one notable exception. Crime became a hot political issue, at least as early as the 1968 presidential campaign of Richard Nixon, who promised to restore "law and

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<sup>55</sup> 339 US 382, 388–89 (1950) (permitting regulations requiring labor union officials to sign an oath swearing that they are not members of the Communist Party and they do not believe in the overthrow of the United States government).

<sup>56</sup> 341 US 494, 501 (1951) ("reject[ing] any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy").

<sup>57</sup> 401 US 1 (1971). See also *In re Stolar*, 401 US 23 (1971); *id* at 10 (White dissenting from *Baird* and *Stolar*).

<sup>58</sup> 332 US 633 (1948).

<sup>59</sup> See *id* at 644.

<sup>60</sup> 334 US 410 (1948).

<sup>61</sup> See *id* at 419–21.

order” to the streets and appoint judges to the federal courts who would not coddle criminals by, for example, enforcing their rights under the Fourth, Fifth, and Sixth Amendments to the Constitution.<sup>62</sup> On the other hand, despite the external security threats posed by the Soviet Union and the internal problem of crime, the decades of the 1950s through the mid-1970s were the years when the Warren Court was expanding constitutional protections of all kinds, both in the area of civil rights and liberties and in the area of constitutional criminal procedure. The case names and holdings in both areas are in many instances just as familiar to laypersons as they are to lawyers: *Brown v Board of Education*,<sup>63</sup> *Miranda v Arizona*,<sup>64</sup> *Gideon v Wainwright*,<sup>65</sup> and *Roe v Wade*,<sup>66</sup> just to name the best-known of the group.

During the same period, the Berlin Wall was under construction; the Cuban Missile Crisis underscored the immediacy of the military threat that the Soviet Union was capable of presenting; American spy planes were being shot down in hostile territory; and the United States was scrambling to meet the Sputnik challenge. Notwithstanding those grave reminders of the threats the country faced from abroad, the Supreme Court was reinforcing and (many said) giving ever more vigorous content to constitutional civil rights. *Fay v Noia*<sup>67</sup> was argued only two months or so after the Cuban Missile Crisis; while that decision was eventually overruled in most of its particulars by the Supreme Court, it had expanded the rights of state prisoners to obtain federal habeas corpus relief for state convictions that had been obtained in violation of the procedural guarantees of the federal Constitution. *Gideon*, the famous decision that put teeth into the Sixth Amendment guarantee of the right to counsel by assuring that counsel would be available even for indigent defendants, was under advisement at exactly the same time. *Irvin v Dowd*,<sup>68</sup> another criminal proce-

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<sup>62</sup> See, for example, Nixon acceptance speech, delivered before the Republican National Convention, Aug 8, 1968, in NY Times A20 (Aug 9, 1968) (promising to restore “order and respect for law” since “courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country”).

<sup>63</sup> 347 US 483, 495 (1954) (extending constitutional protection to the right to equal education).

<sup>64</sup> 384 US 436, 467 (1966) (expanding the Fifth Amendment right against self-incrimination from criminal court proceedings to “protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves”).

<sup>65</sup> 372 US 335, 344 (1963) (asserting that the constitutional “procedural and substantive safeguards designed to assure fair trials . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him”).

<sup>66</sup> 410 US 113, 153 (1973) (anchoring the right to abortion in the “Fourteenth Amendment’s concept of personal liberty and restrictions upon state action”).

<sup>67</sup> 372 US 391, 398–99 (1963) (“Federal courts have *power* under the federal habeas statute to grant relief despite the applicant’s failure to have pursued a state remedy not available to him at the time he applies.”).

<sup>68</sup> 366 US 717, 728 (1961) (holding that petitioner’s trial by a jury, two-thirds of which had

dures case, overturned a capital conviction and sentence on the ground that it was tainted by grossly unfair pretrial publicity. And, somewhat closer to the subject of national security, in 1971 the Supreme Court decided the *Pentagon Papers*<sup>69</sup> case, which arose when the *New York Times* published the first installment of a major classified document about the development of the Vietnam War strategy. By a vote of six to three, the Court refused the government's request for an order permanently restraining the publication of the documents. It did so notwithstanding the Executive Branch's representation that publication would endanger lives, that it would impede the efforts to obtain the release of prisoners of war, and that it would stand in the way of the peace process. Despite the existence of a de facto state of war between the United States and Vietnam, the values of the First Amendment prevailed.

The lesson one can take from this history is that American institutions, and especially the courts, on balance stood firm during the Cold War and the Vietnam War periods, and continued to protect civil liberties. As *Pentagon Papers* illustrates best of all, courts did not blindly accept restrictions on constitutional rights justified only by broad allegations of harm to national security from the executive authorities. Instead, they entertained lawsuits, balanced constitutional rights against the claims of governmental needs, and decided each case on an individual basis. (This does not mean, of course, that the individual always won. In *Snepp v United States*,<sup>70</sup> for example, the Court turned aside a former CIA agent's effort to publish sensitive material and upheld a contractual requirement of the Central Intelligence Agency that its former employees submit proposed writings for the agency's prepublication review, and, presumably, censorship.) The key point, however, is that measures ensuring accountability were maintained in spite of the strains on the system. The question for today is whether the country is strong enough to continue to follow the precedents of the past that upheld the rule of law in the face of the most dire risks, or if the nature of the current threats is so different that more in the way of basic rights must be compromised.

### III. PRINCIPLES TO PROTECT

It would be far too much to assert that the United States has been transformed over the short space of one year into a totalitarian, lawless society. The question, rather, is whether any measures that

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already formed opinions as to petitioner's guilt before hearing any testimony, was unconstitutional).

<sup>69</sup> *New York Times Co v United States*, 403 US 713 (1971).

<sup>70</sup> 444 US 507, 515-16 (1980).

have been proposed or implemented since the horrific events of September 11, 2001, pose greater threats to the sound functioning of a society that respects the rule of law than (1) are warranted by the degree or immediacy of future threats to U.S. territory, U.S. citizens, or the world in general, or (2) are compatible with the fundamental idea of the rule of law. It is very difficult for individuals outside the restricted circle of people who are privy to the government's most secret information to make an informed judgment on the first of those points. All an informed citizenry can do is to assess the information that the authorities have chosen to make public, and that is otherwise in the public domain. The comments in this Essay must therefore be taken in that light, with one important qualification. In a democracy, those responsible for national security (principally, of course, the Executive Branch) must do more than say "trust us, we know best," when they are proposing significant intrusions on liberties protected by the Constitution, or when they are proposing to risk American lives for a particular cause. Such a response fails almost every part of the rule of law test, no matter whose version is being followed. The Supreme Court has repeatedly rejected such claims.<sup>71</sup> The public has also rejected them, as the world saw when the Vietnam War dragged on and the need for an American withdrawal became more apparent.<sup>72</sup>

A number of troubling propositions have been advanced as the United States has sought a proper response to international terrorism in all its manifestations. They include the following:

1. No aliens—whether lawfully admitted to the United States or not—enjoy the same procedural protections under U.S. law as citizens do.<sup>73</sup>
2. Even among U.S. citizens, racial or ethnic profiling is a legitimate law enforcement tool that must be used.<sup>74</sup>

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<sup>71</sup> See, for example, *Cole v Young*, 351 US 536, 556 (1955) (requiring that the discharge of a government employee for threat to national security be accompanied by a determination as to how the employee could affect national security).

<sup>72</sup> See, for example, Clark Clifford, *A Viet Nam Reappraisal*, 47 *Foreign Aff* 601, 601 (July 1969) (finding "growing impatience" and "increasing vehemence" among Americans following stalemate in the Vietnam conflict); Tom Wicker, *Vietcong's Attacks Shock Washington*, *NY Times A1* (Feb 2, 1968) (indicating that the Vietcong's Tet Offensive contradicted Johnson administration claims that the "war was being won").

<sup>73</sup> Anthony Lewis, *Abroad at Home; Right and Wrong*, *NY Times A27* (Nov 24, 2001) (calling the sweep of possible military tribunals "extraordinary" because they apply not only to non-resident aliens, but also to "millions of resident aliens in this country; people with green cards").

<sup>74</sup> Ann Coulter, *Bush Pays Homage to the Rituals of Liberalism*, *TownHall.com* (June 20, 2002), online at <http://www.townhall.com/columnists/anncoulter/ac20020620.shtml> (visited Dec 2, 2002) (asserting that "[FBI head] Mueller should be fired for demanding that FBI agents chastely ignore religion and nationality when investigating terrorism"). See also Jason L. Riley, *'Racial Profiling' and Terrorism*, *Wall St J A22* (Oct 24, 2001) (identifying racial profiling as a "patriotic endeavor"); Stephen J. Singer, *Racial Profiling Also Has a Good Side*, *Newsday A38* (Sept 25, 2001) (suggesting "profiling may not be the bogymen that it was so recently branded

3. Personal privacy, whether with respect to telephone calls, homes, conversations at a restaurant, or otherwise, is a luxury that must be sacrificed, so that intelligence-gathering activities can be conducted more efficiently.<sup>75</sup>

4. Public hearings and legal representation are no longer appropriate for arrestees suspected of terrorist activities, even though such devices may reduce risks of error.<sup>76</sup>

5. Institutions not under the control of the Executive Branch are inadequate for the adjudication of charges against suspected terrorists, particularly (but not exclusively) those not of U.S. citizenship.<sup>77</sup> These are powerful assertions, and each in its own way poses a significant threat to the continued observance of the rule of law. Let us return again to the list Professor Fallon offered, set out above.

The first point about the rule of law is that the law must have the capacity to guide people in their actions. Encompassed within this is the notion that law must be transparent (publicly available, knowable) and nonarbitrary. Secret rules, applied in secret, fail this criterion. There is no assurance that similar cases will be treated similarly, nor is there any way to know in advance what standards will be used. One crucial aspect of the kind of even-handedness we expect of law is that it refrain from discrimination on the basis of characteristics like race, sex, national origin, religion, and ethnicity. This norm has been at the heart of the American conception of the rule of law for a century and a half; it is reflected in the many international agreements on the subject of human rights to which the United States has adhered; and it should be sacrificed, if at all, only in the most controlled manner, and only for the most powerful of reasons.

The second criterion that the rule of law must reflect is efficacy. On that point, and on that point alone, one can make a reasonable argument that giving unfettered discretion to the Executive Branch is perfectly acceptable. If police can search any house they want, for whatever reason they want; if they can tap any telephone; if they can arrest and detain as many material witnesses for as long as it is convenient without being bothered by hearings before magistrates, anx-

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and can no longer be so easily dismissed as even racist”).

<sup>75</sup> Lisa Guernsey, *Living under an Electronic Eye*, NY Times G1 (Sept 27, 2001) (noting that people have often responded to national crises with willingness to reduce personal privacy, and now surveillance measures are expanding to include electronic media).

<sup>76</sup> Steve Strunsky, *Where Towers Cast Shadows, Another Loss*, NY Times § 14NJ at 1 (July 28, 2002) (highlighting the response of some parts of the public that although secret detention and trials of detainees lead to diminished rights, they still support the measures in light of 9/11).

<sup>77</sup> See David E. Sanger, *A Nation Challenged: Civil Liberties; President Defends Military Tribunals in Terrorist Cases*, NY Times A1 (Nov 30, 2001) (noting Bush's portrayal of the tribunals as “necessary byproducts of America's wartime footing”). See also *President Issues Military Order* (cited in note 4).

ious family members, public-interest lawyers, or other meddlers, then the system for gathering information would be unfettered by pesky rules. Sooner or later, useful information is likely to turn up, and perhaps it will help in preventing the next round of terrorist attacks. But who wants to live in a state like that? Such a world would squash the individual autonomy and freedom that has led to the creativity, flexibility, and confidence typical of Americans.

The only kind of stability (moving to the third characteristic of the rule of law) that would be fostered in such a regime is the stability of totalitarianism. To an impressive degree, the societies of Stalin, Tito, and Castro were or are quite stable, but few in the United States would describe them as rule-of-law societies. The kind of stability one wants, in short, does not come from the end of a police baton or a military rifle; it comes from the consent of the governed, freely given.

The fourth criterion—supremacy of the law above all individuals, from the President, to the Supreme Court, to others in government, to the rest of the population—is by definition not satisfied by a system that places executive power above all else. Despite the occasional aberration, this is not what the United States has done in the past. To the contrary, in two landmark rulings the Supreme Court has emphasized that even the President is not above the law: *United States v Nixon*<sup>78</sup> and *Clinton v Jones*.<sup>79</sup> And in its own turn, the Supreme Court is also subject to legal correction. When it construes a federal statute in a way that is inconsistent with congressional desires, the Congress can and does overrule the Court legislatively.<sup>80</sup> If the Court has rendered a constitutional decision, it is obviously much harder to overrule it, but even that has happened from the start, as the story of *Chisholm v Georgia*<sup>81</sup> and the Eleventh Amendment illustrates.<sup>82</sup> The old Latin

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<sup>78</sup> 418 US 683, 707 (1974) (enforcing the special prosecutor's subpoena to produce the White House tapes and rejecting the president's claim of absolute immunity, stemming in part from his responsibility for foreign affairs and national defense).

<sup>79</sup> 520 US 681, 705–06 (1997) (holding that presidential immunity does not create a categorical bar to litigation against a sitting president).

<sup>80</sup> The Civil Rights Act of 1991 is a good example. It was passed expressly to overrule the Court's decisions in *Ward's Cove Packing Co, Inc v Atonio*, 490 US 642, 651–52 (1989) (rejecting non-white cannery workers' claim for disparate impact of hiring and promotion practices based on a comparison of the racial composition of the skilled and unskilled workforce at a particular salmon cannery), and *Patterson v McLean Credit Union*, 491 US 164, 171 (1989) (holding that "racial harassment relating to the conditions of employment is not actionable under [42 USC] 1981").

<sup>81</sup> 2 US (2 Dall) 419 (1793).

<sup>82</sup> Briefly, the Court allowed a citizen of South Carolina to sue the State of Georgia in *Chisholm*. See id at 478. Congress immediately put before the states, and the states ratified, the Eleventh Amendment to the Constitution, which withdrew that branch of jurisdiction from Article III, and which has since been interpreted by the Supreme Court as a reflection of the fundamental sovereignty the States retained when they joined the Union. See, for example, *Seminole Tribe of Florida v Florida*, 517 US 44, 54 (1996) (asserting that the Eleventh Amendment "pre-

question “*quis custodiet illos custodians*” (who guards the guardians) implies the answer that must be given in a society that relies on law rather than on individuals: Someone must be guarding the guardians, or else ultimately there is nothing but the rule of men.<sup>83</sup>

Last is the need for impartial and independent courts that can serve as neutral arbiters of disputes both among private individuals and between individuals and their government. Secret tribunals with unknown procedural rules, staffed by persons with ultimate loyalty either to the military or to the chief executive, are in no way the equivalent of such independent tribunals. Indeed, in years past the United States itself has criticized other countries for using exactly such tribunals.<sup>84</sup> The great due process decisions from the Supreme Court, including notably *Joint Anti-Fascist Refugee Committee v McGrath*,<sup>85</sup> decided during the height of the frenzy over Communism in the early years of the Cold War (indeed, in the very year that Julius and Ethel Rosenberg were convicted of conspiring to violate the Espionage Act by giving secret information about the atomic bomb to the Soviet Union<sup>86</sup>), take quite a different tack. In *Joint Anti-Fascist Refugee Committee*, the Court held that the act of listing three organizations on the Attorney General’s list of “subversive organizations” without giving them a hearing violated their constitutional rights.<sup>87</sup> Later decisions, such as *Mathews v Eldridge*,<sup>88</sup> emphasize the role that due process protections play in reducing the risk of erroneous decisions and balancing the private interests of the individual against the public interests of the state.<sup>89</sup> Without open and impartial courts, none of that can take place.

## CONCLUSION

The message from history—and particularly the history of the United States from the end of World War II to the present—is that the rule of law can be upheld even during times of stress. Even though the

suppos[es] . . . that each State is a sovereign entity in our federal system,” and inherent in that sovereignty is immunity).

<sup>83</sup> Indeed, according to Justice Story, “[Q]uis custodiet custodes? The answer is found in the constitution.” *Briscoe v Bank of Kentucky*, 36 US (1 Pet) 257, 348 (1837).

<sup>84</sup> See for example Shaila K. Dewan, *New Yorker Imprisoned in Peru Gets New Trial in Treason Case*, NY Times A1 (Aug 29, 2000) (quoting a State Department spokesman on the department’s concerns that the secret military tribunal in Peru that convicted New Yorker Lori Berenson of treason did not accord her due process).

<sup>85</sup> 341 US 123 (1951).

<sup>86</sup> For a decision at the very end of the legal proceedings against the Rosenbergs, see *Rosenberg v United States*, 346 US 273 (1953).

<sup>87</sup> 341 US at 141–42.

<sup>88</sup> 424 US 319 (1976).

<sup>89</sup> *Id* at 334 (“Due process, unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances.”) (citations omitted).

Supreme Court and other governmental institutions did not always live up to society's highest aspirations, many of the lapses from the rule of law (such as the Japanese internments) are now widely regarded as shameful episodes that should never be repeated. Living under the rule of law may call for courage at times, as any citizen of Israel or Northern Ireland could affirm. Even in the United States this was necessary during the often-tense battle to ensure civil rights in the states of the old Confederacy. Jack Bass's account of the federal judges who upheld the Supreme Court's decisions forbidding discrimination on the basis of race is an inspiring tale of strong and committed patriots who were determined to live under rules of law rather than the rules of the street or lynch mob.<sup>90</sup> The same kind of courage will be necessary for all citizens now: postal workers, commuters on trains, airline pilots and their passengers, and people living their daily lives.

What they will be protecting, however, when they insist on continued adherence to the rule of law, is the very essence of the United States. The rule of law becomes more vital, not less so, when democracy is attacked. As President Franklin Delano Roosevelt said in his first Inaugural Address, "[t]he only thing we have to fear is fear itself." We do not need to fear the perceived shackles on government power that the rule of law imposes. They are not shackles at all; they are instead agreed constraints on the power of any particular officials or individuals, so that any measures that are necessary are seen to be, and are in fact, evenhanded, nondiscriminatory, subject to testing for accuracy, and transparent. Enemies—foreign and domestic—have been conquered effectively in the past without sacrificing everything that has made the United States a country with a strong record of exemplifying the rule of law. Those same enemies, in whatever guise they take in the future, can still be foiled in the same way.

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<sup>90</sup> See generally Jack Bass, *Unlikely Heroes* (Alabama 1990).