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Patriotic Dissent

Susan N. Herman*

Shortly after September 11, Attorney General John Ashcroft charged that anyone who criticized the government's anti-terrorism policies was behaving unpatriotically. "[T]o those who scare peace-loving people with phantoms of lost liberty," he said, "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" ¹

In this issue of the *Washburn Law Journal*, Professor Erwin Chemerinsky argues that some of the measures the American government has taken in response to the events of September 11 have indeed compromised our prized civil liberties, without making us appreciably safer. ² He urges us to recall various eras in American history when, during time of war or other national crisis, fear got the better of our judgment and engendered limitations on liberty that, in hindsight, we sorely regretted. This national "Hall of Shame" includes such episodes as the passage of the Alien and Sedition Acts in the early Republic, Civil War detention practices, the World War I criminalization of anti-war leafleteers, the now infamous detentions of Japanese Americans during World War II, and the excesses of the McCarthy Era. Among the current practices Chemerinsky critiques are prolonged detentions of "enemy combatants" and others, a marked increase in government secrecy, and a proliferation of new techniques allowing more governmental surveillance with less judicial oversight.

These are not mere phantoms of lost liberty. There are people, including all Department of Justice spokespersons, who challenge Chemerinsky's contention that the very real liberty lost by detainees and by those subject to heightened government surveillance is not a necessary cost of keeping America safe. ³ There are others who would challenge Chemerinsky's thesis that we are indeed repeating the worst mistakes of our history. ⁴ For example, Chemerinsky criticizes the de-

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1. *Excerpts from Attorney General's Testimony Before Senate Judiciary Committee*, N.Y. TIMES, Dec. 7, 2001, at B6, available at 2001 WLNR 3393710.

2. Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1, 1 (2005).

3. See, e.g., Department of Justice, <http://www.lifeandliberty.gov> (last visited Oct. 7, 2005) (defending the Patriot Act via a special website).

4. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 221 (2000) (arguing that we have learned from our past mistakes); see also Mark V. Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 273 (2003) (arguing that we have learned from our past mistakes only not to repeat those precise mistakes, rather than more general lessons).

tion without criminal charges of American citizens Jose Padilla and Yaser Hamdi. Yet, Chemerinsky's opponents would argue that the government has not engaged in a program of lengthy detention of thousands of Muslim Americans resembling the World War II internment camps.⁵ Chemerinsky deplors the government's increasingly frequent decisions to withhold information about its actions from the public. Some courts have condoned the government's current tendency to secrecy,⁶ but others, in lawsuits brought by the American Civil Liberties Union (ACLU) and other groups under the Freedom of Information Act, have required the government to turn over thousands of documents about its investigative activities.⁷ And the controversial government surveillance procedures modified by the USA Patriot Act (Patriot Act) are, whatever their failings, still more protective of privacy than the procedures of an earlier era in our history when electronic surveillance was not considered to be a "search" or a "seizure" subject to the requirements of the Constitution.⁸

Both of these critical issues—whether we are giving away our constitutional birthright for a mess of pottage, and whether as a society we have learned from our past mistakes—deserve full, informed debate because our collective conclusions will define who we are going to be as a nation. I want to disclose promptly that I have been making my own contributions to the debates about the first of these questions (although I like to think that I would champion Chemerinsky's discussion of these issues even if I did not agree so wholeheartedly with his conclusions). As a law professor and as a member of the Board of Directors and General Counsel to the ACLU, I have argued that some of the provisions of the Patriot Act are excessive and unwise.⁹ More generally, I agree with Chemerinsky that the government's practices in all three of the areas he discusses—detentions, secrecy, and privacy—are, to various extents, misguided and make us all less free without making us appreciably safer.

I have not, however, expressed an opinion on the second question, about the extent to which we as a society have learned from past

5. Congress subsequently issued an apology for the internments and offered modest monetary reparations. See *Restitution for World War II Internment of Japanese-Americans and Aleuts*, 50 U.S.C. app. § 1989 (2000).

6. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003); see also Chemerinsky, *supra* note 2, at 12.

7. See, e.g., Eric Lichtblau, *Large Volume of F.B.I. Files Alarms U.S. Activist Groups*, N.Y. TIMES, July 18, 2005, at A12, available at 2005 WLNR 11228629.

8. See *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that electronic surveillance is not a search or seizure within the meaning of the Fourth Amendment, which prohibits only unreasonable "searches and seizures").

9. See, e.g., Susan N. Herman, *The USA Patriot Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. (forthcoming 2006); Susan N. Herman, *The USA Patriot Act and the U.S. Department of Justice: Losing Our Balances?*, THE JURIST, Dec. 3, 2001, <http://www.jurist.law.pitt.edu/forum/forumnew40.htm>.

mistakes. I find this question less compelling, because I am not comforted by the thought, even if true, that our present mistakes might be less drastic than those of earlier eras. What does comfort me is the very fact that Chemerinsky's arguments on both of these questions are appearing on the pages of the *Washburn Law Journal* and in other places the seemingly ubiquitous Professor Chemerinsky has visited.¹⁰ This offers some evidence that we as a society may finally be prepared to discuss and debate whether our government's practices are mistaken. Four years after fall 2001, we are less likely to be silenced by the spurious specter of unanimity and national resolve conjured by Attorney General Ashcroft.

In discussing the issues Chemerinsky raises, however, we need to monitor whether our discussions are still operating under any constraints and whether those constraints are imposed by government compulsion, government intimidation, or self-censorship. It is still important to ask to what extent the government has in fact tried to silence critics of its anti-terrorism policies (or other actions, including the war in Iraq). In his current book, *Perilous Times*, Geoffrey Stone chronicles the attempts of the United States government to suppress dissent during earlier periods of war and national crisis.¹¹ He concludes that the government's anti-speech efforts have become "both more subtle and less effective" over time.¹² During World War I, he observes, anti-war activists were subject to criminal prosecution for their unpopular speech; today's anti-war activists are not prosecuted for seditious speech, but merely insulted by the Attorney General. Stone argues that we have come a long way. But, recognizing that the government still has an unfortunate inclination to want to silence critics during times when emotions run high, he stops short of concluding that we have come far enough.¹³

Over the past few years, I have been reading e-mail complaints from around the country about the government imposing novel limitations on anti-war and anti-Bush demonstrations and about individuals, who have expressed dissenting viewpoints on a surprising variety of issues, finding federal agents on their doorsteps (and sometimes not finding federal agents who are covertly reviewing their activities).¹⁴ In

10. See, e.g., Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619 (2004); Erwin Chemerinsky, *Post 9/11 Civil Rights: Are Americans Sacrificing Freedom for Security?*, 81 DENV. U. L. REV. 759 (2004).

11. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

12. *Id.* at 549.

13. See *id.* at 550-57 (describing some of the recent government practices engendered by anti-terrorism activities as questionable).

14. See, e.g., ACLU, *FREEDOM UNDER FIRE: DISSENT IN POST 9/11 AMERICA* (2003), available at <http://www.aclu.org/Files/OpenFile.cfm?id=12580> [hereinafter *FREEDOM UNDER FIRE*] (describing a variety of such incidents and practices around the country); Press Release, ACLU, Secret Service Ordered Local Police to Restrict Anti-Bush Protestors at Rallies, ACLU Charges

one notorious incident, federal agents visited a Durham, North Carolina college student named A.J. Brown, whose apartment wall sported a poster criticizing George W. Bush's stance on capital punishment while he was Governor of Texas, because the agents heard that Brown had an "anti-American" poster. Secret Service agents terrified her with questions about her political views, her patriotism, and her support of terrorism.¹⁵ Equating any criticism of George W. Bush with anti-Americanism in this manner is certainly not the same as bringing a criminal prosecution for seditious speech, but it can also be an effective means of chilling dissent.

It is impossible to quantify how many such incidents have occurred or what their impact has been. It is even difficult to document or pin down some of the stories that have been circulating. The story of the school boy who was interrogated by federal officials because he checked out a library book on dams in connection with a report he was writing for class may be apocryphal. The story of graduate student Sami Omar al-Hussayen, who was prosecuted for running a website for a Muslim charity, however, is far more than a phantom. Al-Hussayen, a graduate student in computer sciences at the University of Idaho, offered his skills to a charity whose public message was geared toward peaceful religious teachings. The federal government alleged that buried deep in the website were links to messages—written by persons other than al-Hussayen—advocating attacks on the United States and soliciting donations to terrorist organizations. On that basis, the government prosecuted al-Hussayen for providing material support to terrorists. The government presented no evidence that the website recruited terrorists, that al-Hussayen intended to help recruit or finance terrorists, or that al-Hussayen even agreed with the messages posted. In fact, the defense argued that the buried link to the message the government found objectionable had been removed from the website before al-Hussayen became webmaster, so it was questionable whether al-Hussayen even knew of the messages.¹⁶ The government argued that under the broadened and vague definition of material support provided by the Patriot Act, criminalizing the provision of "expert advice and assistance" to terrorists,¹⁷ the mere fact

in Unprecedented Nationwide Lawsuit (Sept. 23, 2003), <http://www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13699&c=86> (describing allegations that the Secret Service discriminates against anti-government protesters).

15. See FREEDOM UNDER FIRE, *supra* note 14.

16. Maureen O'Hagan, *A Terrorism Case That Went Awry*, THE SEATTLE TIMES, Nov. 22, 2004, at A1, available at http://seattletimes.nwsources.com/html/localnews/2002097570_sami22m.html.

17. Under a Patriot Act expansion, provision of "expert advice or assistance," a term now defined in the statute as "advice or assistance derived from scientific, technical or other specialized knowledge," may constitute material support for terrorists. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b)(1), (3), 118 Stat. 3762 (2004) (defining "expert advice or assistance"); 18 U.S.C. §§ 2339A(a), 2339B(a) (2000) (defining "ma-

that al-Hussayen had used his skills as a webmaster and that someone else had posted a hateful message accessible through the website was sufficient to convict him of this serious federal offense. The jury, after absorbing a rapid education about the meaning of the First Amendment and freedom of speech, acquitted al-Hussayen, who nonetheless had spent over a year in prison before his acquittal.¹⁸ One juror was quoted as remarking that “not a word [was] spoken that indicated he supported terrorism.”¹⁹

The government argued that the prosecution of al-Hussayen had a beneficial effect even if it did not lead to a conviction because it may have disrupted a funding channel.²⁰ I argue that this prosecution may have done considerable damage to free speech, even if it did lead to an acquittal. It is impossible for an outsider to evaluate the government’s basis for being concerned about al-Hussayen himself and what al-Hussayen did or did not do or know. But this prosecution sends chilling messages. How many students, Internet users, and other people learning about this prosecution will be deterred from participating in any chat room in which someone expresses a point of view the government might find troubling, whether those views are about the nature and causes of terrorism or about then Governor Bush’s record on capital cases in Texas? In its effort to deter contributions to illicit funding channels, the government may well be deterring a range of entirely non-criminal and potentially productive speech. The jury in the al-Hussayen case discovered that the line between constitutionally protected free speech and criminal incitement of violence was not where the prosecution claimed it should be. Will people silence themselves rather than risk being arrested, prosecuted, or, if they are not citizens, deported, because the government charges them with being on the wrong side of that delicate line? As Chemerinsky points out, vague laws do damage, and the government’s promises that it will only use those vague laws to catch terrorists ring hollow. The statute under which al-Hussayen was prosecuted gives the government a very broad net to use, even if its intent is to catch only a narrow class of people. The very existence of these broad and vague prohibitions chills speech and conduct alike.

The jury in the al-Hussayen case learned about the scope of First Amendment protections because they had the benefit of a full adversarial presentation on this issue, with a defense attorney whose job was to explain the First Amendment to them. And the jurors under-

terial support”). Litigation continues about whether this section is unconstitutionally vague. See Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. 2004).

18. O’Hagan, *supra* note 16, at A1.

19. *Id.*

20. *Id.*

stood that it was their job to listen and learn. One juror said that he had been surprised to learn that in this country “people could say whatever they want . . . providing it would not cause imminent action.”²¹ In post-9/11 America, it has become less of a surprise that our cherished right to free speech cannot be taken for granted.

Whether the government is intentionally acting in ways that suppress speech does not really matter, as the al-Hussayen prosecution suggests, if the effect of the government’s actions is to silence or even to limit robust discussion on a range of issues including terrorism, jihad, and the government’s anti-terrorism policies. If we really want to evaluate how freely we are discussing these loaded issues, we need to go beyond asking whether the government is stifling dissent, purposely or not. Curbs on free discussion of such issues are not always traceable to government officials. During fall 2001, and for a significant period of time afterward, the government did not need to suppress criticism because we the people censored ourselves. Voices dissenting from the government’s policies were silenced by popular acclaim. Bill Maher lost a television show for being “Politically Incorrect” enough to suggest that the September 11 terrorists, whatever else might be said to condemn them, could not accurately be described as “cowards.”²² Susan Sontag was reviled for making a similar point in a *New Yorker* article,²³ and the Dixie Chicks saw their record sales drop when one of the Chicks opposed the war in Iraq.²⁴ My own mother-in-law expressed fear that the government would attempt to silence me, perhaps locking me up for my dissenting views like the Civil War dissidents and World War I leafleteers Chemerinsky describes. During fall 2001, where there was not antipathy to criticism and debate, there was stunned silence. One commentator noted that for a substantial period of time, the nation seemed to be holding its breath,²⁵ unprepared for any serious discussion or debate about the substantial changes occurring in our national policies, including ques-

21. Posting of Betsy Z. Russell to <http://www.spokesmanreview.com/boise/blog.asp?postID=17717> (June 10, 2004, 12:42 PST) (quoting juror John Steger as also saying, in explaining his own vote for acquittal, “[t]he part that surprised me was when I read the First Amendment instructions”).

22. Todd Leopold, *Bill Maher Wants YOU – to Think: Raising Hackles with New Book*, Dec. 4, 2002, <http://archives.cnn.com/2002/SHOWBIZ/books/12/04/bill.maher>.

23. Daniel Lazare, *The New Yorker Goes to War: How a Nice Magazine Talked Itself Into Backing Bush’s Jihad*, *THE NATION*, June 2, 2003, at 25, available at <http://www.thenation.com/doc.mhtml?i=20030602&s=lazare> (describing the September 24, 2001, *New Yorker* article and the reactions of the *New Yorker* editors to the firestorm surrounding Sontag’s comments).

24. *Dixie Chicks Singer Sounds Off on War: Natalie Maines: ‘People Were Misled,’* Nov. 25, 2003, <http://www.cnn.com/2003/SHOWBIZ/Music/11/24/dixiechicks.ap> (reporting that some radio stations banned Dixie Chicks music and that the country stars even received death threats after lead singer Natalie Maines said she was ashamed that President Bush was from Texas and that Americans had been misled about the war).

25. Richard C. Leone, *The Quiet Republic: The Missing Debate About Civil Liberties After 9/11*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 1 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

tionable detentions, government secrecy, and the revisions of the Patriot Act.²⁶

We may finally be emerging from that period of silence. Now we need information and discussion to flow freely. The jurors in the al-Hussayen case had a criminal defense attorney whose job was to educate them about the meaning and scope of our constitutional rights. That attorney's message was essentially the same as Chemerinsky's, although less eloquently put. As he said to a reporter, "There's this tendency that if we have something really serious, we can kind of relax the rules. When you do that, you get into trouble."²⁷ Non-members of the jury have Erwin Chemerinsky, and other patriots like him, to provide enough information and to frame enough questions for all of us to fulfill our responsibilities as citizens and residents. I take those responsibilities to be: (1) to consider whether we will in the future regret any of the actions now being taken in our names, and (2) to make our own voices heard if we have any concerns about present practices. What could be more patriotic than that?

26. The Patriot Act, comprising thousands of changes to previous law, was adopted on October 26, 2001, with very little debate within Congress, and with only one senator and a small number of representatives voting against the revisions. Beryl A. Howell has written a fascinating insider account of how some of the Act's compromises were reached. See Beryl A. Howell, *Seven Weeks: The Making of the USA Patriot Act*, 72 GEO. WASH. L. REV. 1145 (2004). Ms. Howell was General Counsel of the Senate Judiciary Committee for Senator Patrick Leahy at the time the Patriot Act was passed. *Id.* at 1145.

27. *Id.*

