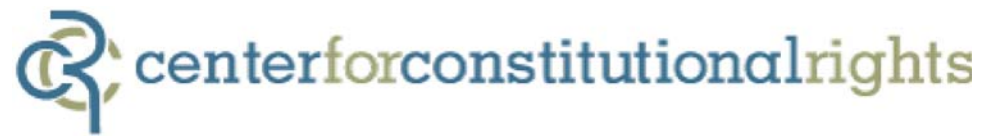


The 9/11 Decade and the Decline of U.S. Democracy



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In response to the terrorist attacks on September 11, 2001, George W. Bush shredded the U.S. Constitution, trampled on the Bill of Rights, discarded the Geneva Conventions, and heaped scorn on the domestic torture statute and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

As we mark the 10th anniversary of the terrible events of September 11, 2001, none of us has any desire to play down the horrors of that day, but two wrongs do not make a right, and, in response to the attacks, the Bush administration engineered and presided over the most sustained period of constitutional decay in our history.

Moreover, although George W. Bush entered the first decade of the 21st century by dismantling the rights

that are fundamental to the identity of the United States and the security of its people, Barack Obama ended the decade by failing to fully reinstate those rights. Through his own indecision, or through ferocious opposition in Congress, he has been unable to close the infamous prison at Guantánamo Bay, as promised, and has also refused to even contemplate holding anyone in the Bush administration accountable for their crimes.

As a result, the democratic principles which we hold dear have suffered a massive blow in the first ten years of the 21st century, although that is not the main problem. The deep erosion of our civil liberties is to be lamented, and should be resisted, however difficult the political climate, but the most painful truth about the last decade is that it marks an undoing of democracy so severe that without concerted and deliberate action by the people in this country — and, one hopes, by their elected leaders — the values which defined us, before the events of 9/11 allowed the Bush administration to reshape our perception of executive power, may never be regained.

This decade of constitutional decay didn't happen overnight, although much of it was hidden from view. We were kept largely in the dark about how the government took steps to dismantle our rights, which were undertaken in a fog of secrecy, subterfuge and, in some cases, outright lies.

A well functioning democracy in this country relies on the three branches of government — the executive, Congress and the judiciary — checking each other to prevent overreach or constitutional misdeeds.

In this system, which has prevailed throughout most of our history, the executive is responsible for executing (and therefore abiding by) the laws of the republic. Congress creates laws, which, in some circumstances, circumscribe the power of the executive branch, and when Congress doesn't approve of what the president is doing, it can change the laws, conduct inquiries and hearings, and in certain circumstances, investigate potential wrong doing. The judiciary reviews the laws and presidential actions to ensure that they comport with the Constitution and justice.

In this system, no one is above the law. Illegal action initiated by the president can be stopped by the courts and congress; unjust laws initiated by Congress can be stopped by the president and the courts; and the Constitution prohibits the courts from making new law or policies or otherwise undertaking the powers of "the political branches" — Congress and the executive. Thus, regardless of the threat, the checks and balances we've built into our democracy are supposed to uphold the power of the fourth branch of government — that made up of the people who live in this country.

However, as we now know, a decade into the 21st century, the system upon which we all stake our liberty and democratic power as people has operated more like a scientific hypothesis than a bedrock of democratic principles. And just like any hypothesis, its true test is determined by the way it functions under pressure, and not how it works in theory. One need look no further than the last ten years to understand that the constitutional hypothesis has failed under the last two administrations. Our constitutional and democratic principles collapsed as breathtakingly as those same principles rose in the context of North Africa earlier this year. The overarching development over the last ten years is that we have witnessed perhaps the single most demonstrable destruction of our democracy in U.S. history. The rights that used to belong solely to us as people living in this country have been severely curtailed. We have fewer rights — and the president more power — in September 2011 than in September 2001. And any diminution of our rights, regardless of the justification of the day, is an elimination of our ability to define the country that we want to live in and shape it around the values that are crucial to our survival as a society run by and accountable to the people.

The undoing of Democracy — The "War" Paradigm

Ask a high school freshman in the U.S. who the most powerful person in the world is and she will most likely say the president of the United States. That is not a change since 9/11, certainly. However, ask that same student who is more powerful in the U.S. government, the president, Congress or the Supreme Court, and she'll still say it's the president. That reflects a significant change in the American psyche over the last decade with respect to the balance of powers in our government as outlined by the United States Constitution, which will turn 224 on September 17, 2011.

Most people now recognize that President Bush claimed more power than any previous president. He claimed the power to kill, capture or detain anyone, anywhere in the world. The Justice Department, under George W. Bush, said that the law simply doesn't apply to the president when he's acting as commander in chief. So the lawyers gathered around him, and around Vice President Dick Cheney, counseled him that he could ignore the fact that Congress had passed a law saying that torture was illegal or that the government can't wiretap without a warrant.

Going further, the Bush administration claimed the power to send citizens to third countries to be tortured, to create secret "black sites" run by the CIA to detain and torture people, and of course, to detain men at Guantánamo Bay. Bush also claimed the authority to declare unilaterally that people it captured and placed in these prisons were neither subject to the Geneva Conventions nor the protections of the U.S. Constitution.

The Bush Administration created the "war on terror" paradigm not to protect us from future attack, although that was what they claimed, but rather to put in place a radical expansion of power that sought to place the president outside domestic and international law. According to a leaked Justice Department memo from December 2001, Guantánamo Bay was specifically chosen for the purpose of detaining the prisoners of the U.S. military because the Bush administration believed it would be beyond the reach of U.S. courts. Existing outside the law and in complete secrecy, it was an ideal place to conduct interrogations of a significant number of prisoners in isolation from all outside human contact. Its selection demonstrates that, from the very beginning, the Bush administration planned to engage in activities that are illegal under domestic law and in violation of international treaties. And that is precisely what they did.

The U.S. government and the highest levels of the Bush administration constructed a secret international network for arbitrary and extrajudicial detention for the purpose of using torture as an interrogation method, and engaged in a program of extraordinary rendition that outsourced torture when the U.S. didn't want to do it itself. The Bush administration set into place a framework that attempted to justify an unjustifiable act: torture. A high level Executive Branch group called the "Principals Committee," which included Vice President Dick Cheney, Attorney General John Ashcroft, Secretary of State Colin Powell, CIA Director George Tenet and national security advisor Condoleezza Rice, authorized the use of torture, including waterboarding. Secretary of Defense Donald Rumsfeld also signed off on similar techniques for use in Guantánamo in December 2002, which later migrated to Iraq, and to Abu Ghraib. Moreover, administration lawyers, such as David Addington, John Yoo, Alberto Gonzales and Jim Haynes, constructed fallacious legal rationales to support and justify the torture and abuse program.

Despite the rampant and brazen illegality put into place in the last 10 years, the courts have rarely called the administration to account for the crimes. The separation of powers concept used to function to circumscribe governmental power. In the last ten years, however, it has functioned to enable the amassing of presidential power. The courts have largely deferred to the president by uncritically accepting the wartime paradigm and giving him free rein to do as he sees fit — even though what he seeks to do is illegal. As a result, no torture victim has ever received a court ruling that the torture they suffered was illegal and most have been denied their day in court. Not one has received a dime in compensation for their injuries or even so much as an apology from either administration. To date, 171 men remain in Guantánamo and, after a decade of the "worst

of the worst” rhetoric, more detainees have *died* in that prison than have been charged with a crime.

On three occasions, in 2004, 2006 and 2008, the Supreme Court issued serious, but not mortal, blows to the overreach and illegality of the Bush administration. The rulings in 2004 and 2008 granted the Guantánamo prisoners habeas corpus rights; in other words, the right not to be held in a legal black hole, and to ask an impartial judge why they were being held, if, as many of them claimed, they had been seized by mistake. The 2006 ruling, *Hamdan v. Rumsfeld*, involved the Court not only ruling that the trials at Guantánamo (the military commissions) were illegal, but also telling the government that all its prisoners have the protection of Common Article 3 of the Geneva Conventions, which prohibits cruel treatment, torture, and humiliating and degrading treatment.

Sadly, Congress has also played a major part in allowing the president to do whatever he says is necessary, even if it is illegal. Congress passed the dangerously open-ended Authorization for Use of Military Force (AUMF) the week after the 9/11 attacks, which has been used by both Bush and Obama to justify the detention of “war on terror” prisoners, and to hold them neither as prisoners of war nor as criminal suspects, but as what the Bush administration called “enemy combatants.” Moreover, Congress pulled the rug out from under the landmark Supreme Court decisions, seeking to repeal the prisoners’ habeas corpus rights, and reviving the military commissions.

Under Obama, all three branches of government – the executive, Congress and the courts – have largely refused to tackle Bush’s dreadful legacy. Obama has dedicated himself to looking forward and not back when it comes to the accountability of Bush administration officials and lawyers for authorizing the use of torture, and courts throughout the land have endorsed his position, and he has also revived the military commissions, in the face of opposition to federal court trials for terrorists, despite the latter being the appropriate venue for terrorist trials. He has also endorsed indefinite detention for 46 of the 171 men still held at Guantánamo, and has, in some cases, expanded Bush’s programs, declaring, for example, that he has the right to assassinate U.S. citizens abroad, without any form of legal process.

In addition, the Supreme Court has failed to act as the court of appeals in Washington D.C. has undermined the Guantánamo prisoners’ habeas corpus rights, effectively gutting habeas of all meaning, and Congress has launched an all-out assault on the president’s ability to close Guantánamo, preventing him from bringing prisoners to the U.S. mainland, and interfering in his right to release prisoners as he sees fit.

Beyond pure policy and legal considerations, the results have been devastating for the victims and survivors of these practices and policies. The men in Guantánamo, and the “black sites” have endured a decade of arbitrary detention without charge or trial, and suffered torture, abuse and cruel, degrading treatment as alleged “enemy combatants.” The “black sites” may now be part of the past, along with Abu Ghraib, but the U.S. under Obama maintains prisons in Afghanistan, including Bagram, where there have been allegations of the use of secret prisons, and where, in addition, the Geneva Conventions have not been reinstated.

Moreover, those that have been released continue to face mental anguish, suspicion and stigma, as well as the loss, in some cases, of family ties. These social costs will continue to extend far beyond the immediate victims. They affect entire families, communities, societies and even nations that have been subjected to forced engagement with the effects of the “war on terror” paradigm.

Illegal Surveillance . . . Again

The government used to need a warrant before spying on us, but those days are long gone. Thirty years ago, President Nixon’s warrantless wiretapping scandalized the nation. And although that administration used “national security” as a justification for the illegal acts, Congress and the Supreme Court insisted that the law

had to govern all intelligence and counterintelligence gathering by the government, even when it was undertaken to protect against terrorism.

The Bush Administration discarded the U.S. Constitution, again using the war and national security paradigms as justification. Bush and his advisors simply ignored the rules and wiretapped Americans and others without warrants or judicial oversight. Restoring the constitutional protections against government spying, uncovering the full extent of illegal surveillance programs, ending immunity for telecommunications companies and prosecuting those responsible for violating the law are essential to reclaiming our democratic power — our rights to be free from unreasonable searches and seizures, and our expectation that the constitutional system will function to protect those rights, are essential elements of restoring democracy.

The Foreign Intelligence Surveillance Act (FISA) had been the fundamental tool to regulate government surveillance. It properly involved Congress and the courts in issues deemed to be of concern to national security and established accountability frameworks for surveillance programs. That all changed radically after September 11, 2001. Congress joined forces to pass new laws, justified on “national security” grounds, that granted more power to surveillance and intelligence agencies. The Bush administration, however, not only pushed for these laws, but made up its own secret plan, through an executive order to the NSA, for reviving the kinds of programs explicitly deemed unconstitutional by the Supreme Court (in a 1972 Center for constitutional Rights case) and prohibited by FISA. These Bush programs existed outside of the law and included wiretapping us and foreign individuals without a warrant from any court and subject to no judicial oversight. The details were largely kept secret from Congress and the public until exposed, years later, by whistleblowers and the press.

In 2001, when the Authorization for the Use of Military Force and the Patriot Act were passed, the Bush administration never asked Congress for expanded surveillance authority including the right to spy on attorney-client communications, or to amend FISA to accommodate wiretapping unchecked by the FISA Court. As Attorney General Alberto Gonzales would admit years later, the administration did not try to amend FISA to authorize the NSA spying program because “it was not something we could likely get.” Don’t ask, don’t tell.

In November 2001, following the Bush administration’s call for an all-out “war on terror,” the USA PATRIOT Act was passed by wide margins in both houses of Congress. The Patriot Act included unprecedented expansions of government surveillance powers, including spying and government involvement in political and associational activity. It made extensive changes to FISA, eliminating many of the safeguards against surveillance abuse, and ramped up existing legislation such as the 1996 Anti-terrorism and Effective Death Penalty Act, which created new “material support” laws that defined political activity as criminal.

Although the current program of warrantless wiretapping and surveillance of Americans’ telephone calls that blatantly violated FISA began in the Bush Administration, the Obama administration has not renounced the power that Bush claimed. Moreover, the Obama administration has fought relentlessly in court to preserve these abuses of power.

Repression of Dissent

“Terrorism” is a word that has been used by the executive branch repeatedly since 9/11 to provide rationale for going to war, maintaining those wars, and cracking down on protest and dissent domestically in violation of the Constitution and international law. In doing so, Bush and Obama have ushered in a new era of repression, enabling law enforcement agencies to abuse their powers by targeting, detaining and silencing political activists. While this type of repression is far from a new exercise for the government, given the capitulation of Congress and the courts to the president, the people of this country will once again find themselves nose to nose with government crackdown on their protest of unjust government action.

A key question for us to ask is what effect will U.S. war making foreign policy continue to have on our protest of that policy? Unless and until the United States stops its current policy of declaring war on anyone in the world in the name of combating terrorism, people will continue to organize themselves to oppose it. And as long as people oppose “war on terrorism” policies, the government will use its power to label the dissenters themselves as terrorists.

While the stakes for defending dissent couldn’t be higher today, the obstacles are more difficult and more complicated than they were even ten years ago. Much of the organizing these days occurs online and by mobile phone and computer. This makes organizing more effective for the activists, but it also makes it easier for law enforcement to spy on and disrupt the activists’ plans. For example, law enforcement has established “Joint Terrorism Task Forces,” which bring together federal, state and local law enforcement and other agencies into “fusion centers.” State governments are even contracting out their illegal surveillance to private companies, as was done recently in Pennsylvania, when state homeland security director, James Powers, hired a private company to research and distribute information about groups engaged in lawful activity.

The nature of whistleblowing has changed in the last decade as well. In the current digital age, evidence of government wrongdoing is likely to come in the form of data dumps which can be distributed widely and quickly as in the case of WikiLeaks. And when the government pushes corporations to shut down public access to that information, the counter activism can take the form of hacking, as with Anonymous. In addition, an enormous change has occurred in how whistleblowers are treated. Despite a move prior to 2001 to protect whistleblowers, the Obama administration has taken on the mantle of prosecuting them — as terrorists.

In the last decade, the truth has become either a state secret or treason. With respect to WikiLeaks and its founder, Julian Assange, Sarah Palin calls Assange an “anti-American operative with blood on his hands” and wants him hunted down like an Al-Qaeda chief, Rick Santorum and Peter King want him prosecuted as a “terrorist,” and Joe Lieberman suggests that the five news outlets that published the leaked State Department cables should be investigated for espionage. Exposing the facts — especially those concerning illegal government conduct and abuse — has become a serious crime.

Moreover, activists today run the very real risk of being arrested and prosecuted for their First Amendment activity. A ruling in a recent CCR case, *Holder v. Humanitarian Law Project (HLP)*, highlights why dissent must be defended at all costs, even while the Supreme Court turns the First Amendment and “material support for terrorism” on its head. CCR argued HLP in the Supreme Court and challenged the “material support” statutes, including a portion of the USA PATRIOT Act, which makes it a crime to provide support, including humanitarian aid, literature distribution and peaceful political advocacy, to any entity that the government has designated as a “terrorist” group. The Court ruled that human rights advocates, providing training and assistance in the nonviolent resolution of disputes, can be prosecuted as terrorists. As a result, the Court has criminalized speech and polished the hammer with which the Obama government can now prosecute peace activists and human rights organizations who engage with groups on the government’s terrorist list even to support lawful goals.

Endless War

Finally, it is unacceptable that George Bush marched us into Iraq and Afghanistan illegally and under false pretenses, while Barack Obama has almost tripled the number of wars we are fighting. Hundreds of thousands of civilians have been killed in Afghanistan, Iraq and Pakistan alone, and millions have been displaced. Over 6,000 U.S. military service members have been killed, and more than 50,000 wounded in wars that have cost the American people trillions of dollars.

It’s not just where these wars are happening, but it’s also how. We are conducting drone strikes in Pakistan,

Libya, and Yemen, countries on which Congress has not declared war. To the extent that Bush and his advisors ignored the law to justify torture, Obama and his advisors ignore the law to justify warfare. Currently, his advisors are going so far as argue that the President can bypass the War Powers Resolution's restrictions on unilateral, executive warmaking simply by using high-tech weaponry like drones, which don't require the presence of troops on the ground.

Conclusion – bringing power back to the people

Ten years on from the terrorist attacks of September 11, 2001, at the end of the distressing decade defined by those attacks, we find ourselves in a position where the president has claimed more power than ever and the people have conceded more power than ever. Ten years ago, federal trials were the norm for alleged criminal terroristic activity; now, the default method is military show trials that include the death penalty or indefinite or preventive detention. Ten years on from 9/11, more illegal wars are being fought today than under Bush, more laws are subverted in the name of national security, more people are being deported than at any point in our history, and the executive branch has seized or accrued more power than it has ever had.

In the end, the test of our democracy is to look at the actions that have been done in our name and under our watch – the wars, the repression, the extra-judicial detention and killings, the torture, the profiling – and ask ourselves: are we in a better position now to stop the acts that continue, to ensure that they don't happen in the future, to ensure that the officials are held accountable, and to put the presidency back in the constitutional box than we were 10 years ago?

The answer to that is yes, to the extent that we are able to demand that our government end the lawlessness, stop stockpiling constitutional power and move back towards a path of lawful, democratic action, but the restoration of the values that we hold dear requires concerted action by many people.

The 10th anniversary of the 9/11 attacks is a painful anniversary, but let us also make it the occasion when, en masse, we say to the government, "Enough is enough," and demand an end to the ongoing injustices, and the return of our values.

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