

# WHITE (HOUSE) LIES: WHY THE PUBLIC MUST COMPEL THE COURTS TO HOLD THE PRESIDENT ACCOUNTABLE FOR NATIONAL SECURITY ABUSES

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History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons would impermissibly compromise the independence of the judiciary and open the door to possible abuse.<sup>1</sup>

## I

### INTRODUCTION

"Mission Accomplished," said the huge aircraft carrier banner behind President Bush in May 2003 when he announced the United States' victory in Iraq. Six months later, amid intensifying criticism over the rising numbers of American deaths and organizational disarray in Iraq, President Bush publicly disclaimed that he had ever conveyed that message, saying that the ship's crew had hoisted the banner unbeknownst to the administration. The President's people, of course, helped make the banner and approved its placement in the news camera's eye to communicate worldwide the very message the President later disclaimed.<sup>2</sup>

The President told a White (House) lie.

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1. *In re Washington Post Co.*, 807 F.2d 383, 391-92 (4th Cir. 1986).

2. The President's News Conference, 39 WEEKLY COMP. PRES. DOC. 1473 (Oct. 28, 2003). President Bush explained that "the 'Mission Accomplished' sign, of course, was put up by the members of the USS Abraham Lincoln, saying that their mission was accomplished. I know it was attributed some how to some ingenious advance man from my staff." *Id.* at 1476; see Elisabeth Bumiller, *Keepers of Bush Image Lift Stagecraft to New Heights*, N.Y. TIMES, May 16, 2003, at A1 (discussing the Bush administration's "use of the powers of television and technology to promote a presidency" through choreographed events); see also Dana Bash, *White House Pressed on "Mission Accomplished" Sign: Navy suggested it, White House made it, both sides say*, CNN, Oct. 29, 2003, available at <http://www.cnn.com/2003/ALLPOLITICS/10/28/mission.accomplished/> (last visited Sept. 30, 2004) (on file with Law & Contemporary Problems).

And he did so to minimize mounting political embarrassment over an emerging truth of great consequence: his administration clearly lacked a realistic, coherent plan for the security and governance of "post-war" Iraq, and many Americans and Iraqis were dying as a result.<sup>3</sup>

A year later, in an unscripted moment, President Bush conveyed an alarming message about what an American is: white in skin color. He startled listeners with his comment that some Iraq reconstruction critics "don't believe that people whose *skin color* may not be the *same as ours* can be free and self-govern."<sup>4</sup> Leaving aside the self-governance issue, what emerges is a significant racial revelation. Conservative commentator George Will observed that the President "seemed to be saying that white is, and brown is not, the color of Americans' skin."<sup>5</sup> The President removed any doubt with his follow-up remark, equating "ours" with "white": "I believe that people whose skins . . . are a *different color from white* can self-govern."<sup>6</sup>

These are loaded statements by the commander-in-chief of the war on terror, a leader charged by critics with unfair racial profiling at home and human rights abuses abroad.<sup>7</sup> So the President's press secretary Scott McClellan, doing damage control, later explained that the President meant only that, according to critics, "the people in those Middle Eastern countries cannot be free."<sup>8</sup> McClellan's "clarification," however, ignored the President's actual words and changed what he clearly meant, obscuring the deep racial implications of his war on terror.<sup>9</sup>

The President's man told another White (House) lie.

Many have documented this administration's penchant for deliberate misrepresentations on national security—in blunt terms, for lying to the

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3. See, Adam Nagourney & Janet Elder, *Bush's Rating Falls to its Lowest Point*, *New Survey Finds*, N.Y. TIMES, June 29, 2004, at A1.

4. George F. Will, *Time for Bush to See The Realities of Iraq*, WASH. POST, May 3, 2004, at A25 (emphasis added).

5. *Id.* at A25.

6. *Id.* at A25 (emphasis added).

7. See, e.g., Natsu Taylor Saito, *For "Our" Security: Who is an "American" and What is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23, 40 (2004) (critiquing post-9/11 administration anti-terrorism policies, including racial targeting in immigration and domestic investigations).

8. Will, *supra* note 4, at A25.

9. See Susan M. Akram and Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 302 (2002) (analyzing the pre-September 11 "demonization" of Arab and Muslims, and the post-September 11 investigating of Arab and Muslim noncitizens, "with little concern for their civil rights or for the potential long-term impacts of that response"); Paul M. Sherer, IMMIG. POL'Y CENTER OF THE AM. IMMIG. L. FOUND., TARGETS OF SUSPICION: THE IMPACT OF POST-9/11 POLICIES ON MUSLIMS, ARABS AND SOUTH ASIANS IN THE U.S., (2004), at <http://www.ilw.com/lawyers/articles/2004,0721-sherer.shtm> (last visited Sept. 30, 2004) (on file with Law & Contemporary Problems); see also Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN L.J. 1 (2001) (discussing "the 'racing' of Arab Americans as 'terrorists' and the use of secret evidence and indefinite detention to deport non-citizens with political views or associations the government dislikes" before September 11).

American people about threats at home and abroad.<sup>10</sup> Some have written about other administrations, Democrat and Republican, that have misled the public about threats to the nation's safety.<sup>11</sup> Fewer have written about *who* is to hold the executive accountable for this dissembling and *how* this is to be done.

And what almost no one has closely examined in both jurisprudential and Realpolitik terms is this: If the task of holding the executive accountable to constitutional standards ultimately falls on the courts, how does the American public hold the judiciary accountable—how do we assure that the courts actually scrutinize, rather than blindly accept, the executive's proffered justification for ostensible national security restrictions of our most basic freedoms? This under-explored question is the focus of this essay, and it opens discussion about the strategic need for critical legal advocacy and the significance of constructive public pressure on the courts.

To stimulate that discussion this essay draws a broad "strategic blueprint" for building the political coalitions and cultural momentum needed to impel close judicial scrutiny of executive national security claims. The price for failing to build those coalitions and that momentum is, I suggest, a weak judiciary, unfettered presidential power, and civil liberties disasters in waiting. The proposed blueprint delineates the "who" (a wide array of public advocates tasked with pressuring judges, and the legal process itself, to assure executive accountability); the "how" (critical legal advocacy coupled with organized media and grass roots politicking); and the "what" (judicial acknowledgment that law as interpreted and applied is not neutral or objective in controversial cases, and that, in a genuine democracy, it is the court's role to carefully scrutinize executive national security actions that curtail fundamental liberties).

## II

### EXECUTIVE ABUSES OF CIVIL LIBERTIES: A "STRATEGIC BLUEPRINT" FOR "NATIONAL SECURITY" ACCOUNTABILITY

#### A. *Korematsu* Revisited: The "Loaded Weapon" in Post 9/11 United States

During World War II Fred Korematsu challenged the constitutionality of the Japanese American internment and lost. The Supreme Court then blindly

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10. See *infra* notes 29-40 and accompanying text; see also MINORITY STAFF OF THE HOUSE OF REPRESENTATIVES COMM. ON GOVERNMENT REFORM, 108th CONG., IRAQ ON THE RECORD: THE BUSH ADMINISTRATION'S PUBLIC STATEMENTS ON IRAQ i-ii (Comm. Print 2004) available at [http://democrats.reform.house.gov/IraqOnTheRecord/pdf\\_admin\\_iraq\\_on\\_the\\_record\\_rep.pdf](http://democrats.reform.house.gov/IraqOnTheRecord/pdf_admin_iraq_on_the_record_rep.pdf) (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems) (documenting 237 "specific "misleading statements" made President George Bush, Vice President Richard Cheney, Defense Secretary Donald Rumsfeld, Secretary of State Colin Powell, and National Security Advisor Condoleezza Rice).

11. See ERIC K. YAMAMOTO, MARGARET CHON, CAROL IZUMI, JERRY KANG & FRANK WU, RACE, RIGHTS, AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT (Aspen Publishing Inc. 2001) (showing deliberate misrepresentations by President Roosevelt's Justice and War Departments to the Supreme Court about the military necessity basis for the Japanese American internment).

accepted the Justice and War Departments' false assertion of "military necessity." As was later learned, the executive and military knew then that there had been no national security necessity for the mass racial incarceration and had lied about it to the public and the courts.<sup>12</sup> Justice Jackson, in his ringing dissent in *Korematsu's* case, warned that by deferring to the executive, "the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting U.S. citizens. The principle lies about like a *loaded weapon* ready for the hand of any authority that can bring forward a plausible claim of urgent need."<sup>13</sup>

The Executive Branch has worked hard to protect U.S. people and institutions. It also has a long, dark history of dissembling to the American people about national security in order to justify what might otherwise be unjustifiable. Some of this dissembling, more than white lies, has had harsh and far-reaching consequences—witness the incarceration of 120,000 innocent Japanese Americans during World War II, the government's destruction of citizens' reputations and lives during the McCarthy communist witch-hunt era,<sup>14</sup> the tens of thousands of American (and Vietnamese) deaths after the government's fabrication of low fatality counts to maintain public support for the Vietnam war,<sup>15</sup> and the politically popular smearing and incarcerating of U.S. citizen Wen Ho Lee on trumped-up nuclear espionage claims.<sup>16</sup>

And now President Bush and his administration have brought forward many "plausible," yet largely false, "claims of urgent need" to justify aggressive actions. The two instances of White House dissembling about national security described in the Introduction are the tip of proverbial iceberg—much of the danger lies unseen just beneath the surface. Consider, for example, the apparently falsely stated grounds for the post-9/11 indefinite detention of U.S. citizen "enemy combatants" Jose Padilla and Yasser Hamdi without charges or hearing or access to counsel; the false branding as "terrorists" of all detainees in Guantanamo as grounds for indefinite incarceration without charges, access to counsel or judicial review; and the government news leaks of falsified claims of espionage against Muslim U.S. Military Chaplain James Yee, who ministered to the Guantanamo Bay detainees.<sup>17</sup>

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12. *Korematsu v. United States*, 323 U.S. 214 (1944); see Eric K. Yamamoto, Susan K. Serrano and Michelle N. Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1274 (2003).

13. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting) (emphasis added).

14. See Mari J. Matsuda, *McCarthyism, the Internment and the Contradictions of Power*, 40 BOST. COLL. L. REV. 1, 9 (1998) (discussing the operation and consequences of the repressive power manifest in both the Japanese internment and McCarthyism).

15. See Steven S. Neff, *The United States Military vs. the Media: Constitutional Friction*, 46 MERCER L. REV. 977 (1995) (citing government fabrication of body counts to maintain public support for wars and describing the military's use of the media as an offensive weapon).

16. See *infra* notes 89-95 and accompanying text.

17. After first holding him in solitary confinement for seventy-six days, in November 2002 the U.S. incarcerated U.S. Captain James Yee in its Guantanamo Bay detention facility for an extended period. The government informed the media that Yee, a Chinese American and West Point graduate, was guilty of espionage, spying and aiding terrorist enemies. Oliver Burkeman, *He is Not Guilty and He is*

Consider also the President's unequivocal statements about Iraq's readily available weapons of mass destruction as the justification for the U.S. "pre-emptive" war against Iraq, and the executive foot-dragging in identifying the high White House or Cabinet officials who leaked CIA operative Valerie Plame's identity as payback for former Ambassador Joseph Wilson's criticism of the President's false statement about Iraq's nuclear threat.<sup>18</sup>

The Executive Branch needs broad power to defend the country—an extraordinarily difficult and demanding task. At the same time, in a constitutional democracy, with a bill of rights, the president's national security power cannot encompass the scapegoating and vilification of unpopular groups or lying to the public and Congress to legitimate aggression against innocent people at home or abroad. National security abuses of this kind destroy human lives and threaten the very fabric of U.S. democracy. And yet history has shown that, unless checked, a president facing a fearful public will find it initially politically advantageous to denigrate the civil liberties of those characterized as "outsiders" in the U.S.<sup>19</sup>

#### B. Checking the White House: The Judiciary's Complex Role

The initial question then is *who* will check the President and his or her people? During a time of national fear, who will hold the Executive accountable for its national security abuses or, perhaps more important, prevent them from occurring? More particularly, who will hold the President accountable for lies aimed at legitimating or covering up abuses of power?

There are two quick answers, found in most civics books. The first is the electorate—it can vote out the President at the next election. But that often is years later, and only if it is the President's first term and if executive dissembling is publicly revealed and constantly criticized. The second quick answer is the Judiciary. It is the role of the courts to hold the Executive to constitutional dictates.<sup>20</sup>

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*Not Innocent*, THE GUARDIAN (London), Mar. 30, 2004, at 2. A Muslim chaplain, Yee had been ministering to the Muslim detainees in the war on terror. News reports trumpeted the government's capture of a terrorist collaborator. Yee maintained complete innocence. After destroying Yee's reputation, the government later charged him only with adultery, lying to investigators and downloading pornography—charges dismissed on appeal. The government produced no evidence of espionage or disloyalty. Yee resigned from the Army, citing his inability to "defend myself against this pattern of unfairness" based on false charges "leaked to the media." Letter from Eugene R. Fidell, Attorney for Yee, (Aug. 2, 2004), at [http://www.captainyee.org/Press\\_Release\\_2\\_Aug\\_04.pdf](http://www.captainyee.org/Press_Release_2_Aug_04.pdf) (last visited Feb. 23, 2005) (on file with Law & Contemporary Problems). Commenting on the politically advantageous (yet misleading) targeting of Yee, Republican and former Georgia Congressman Robert Barr observed, "What we're seeing in Guantanamo, and perhaps in [Yee's] case, is what happens when you've removed any judicial oversight over what the government is doing." Laura Parker, *The Ordeal of Chaplain Yee*, USA TODAY, May 16, 2004, at A1.

18. See *infra* notes 83-86 and accompanying text.

19. See *infra* notes 108-10, 159-60, 239 and accompanying text.

20. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the role of the judiciary as the ultimate arbiter of the Constitution).

But what is the reality? The simplistic answer, that the judiciary checks the executive, is rooted in a widely-held fallacy—that as a separate co-equal branch of government it is politically independent and that its judgments are necessarily neutral and objective. *Bush v. Gore*<sup>21</sup> and *Korematsu v. U.S.*<sup>22</sup> are just two of many cases that starkly reveal that fallacy by exposing the political underpinnings of judicial decisionmaking in controversial cases. It is not that nine black-robed men and women simply vote their personal and political preferences. The legal method imposes decisional constraints. To maintain public legitimacy judges have to speak in the language of statutes, rules, and case precedents. As many commentators have observed about *Bush v. Gore*, however, the moorings of the legal method are a weak tether in hot political cases.<sup>23</sup> The intricacies of stare decisis and the complexities of the three-tier standard of equal protection review, for instance, are manipulable by sophisticated, politically attuned judges.<sup>24</sup>

Indeed, across the arc of U.S. legal history, as Justice Jackson's loaded weapon warning highlights, the judiciary has exhibited the inclination to twist the Bill of Rights and to turn a blind eye to popular executive civil liberties abuses during times of national fear, deferring to the executive's unproven claims that "national security" justifies its actions.<sup>25</sup> But not always. Sometimes courts have fulfilled their role of "watchful care" over fundamental liberties.<sup>26</sup> And at other times, in the very same case opinion, the Supreme Court has pronounced the need for heightened judicial scrutiny and then pulled back in its actual analysis—as it did in the 2003 "enemy combatant" case, *Hamdi v. Rumsfeld*.<sup>27</sup> Why the judicial dissonance?

The judiciary's historic ambivalence toward executive national security dissembling is explained in part by the philosophical precept of the "noble lie,"<sup>28</sup> which, for the Bush administration, seemingly justifies elite policymaker lies to the public "for its own good." It is also explained by the dynamics of public advocacy and judicial decisionmaking.

### C. The Significance of Public Pressure and Critical Legal Advocacy

So the Realpolitik question is, what impels the courts in controversial cases to carry out their constitutional duties—to hold the executive accountable for

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21. *Bush v. Gore*, 531 U.S. 98 (2000).

22. *Korematsu v. United States*, 323 U.S. 214 (1944).

23. See Aviam Soifer, *Courting Anarchy*, 82 BOST. U. L. REV. 699 (2002) (discussing influence of politics on judicial decisions).

24. *Id.*

25. See WILLIAM REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (Vintage 1998) (describing throughout American history the tendency of the courts to defer to the president during times of war); Eric L. Muller, *All the Themes But One*, 66 U. CHI. L. REV. 1395 (1999) (critiquing Chief Justice Rehnquist's book and its historical and jurisprudential omissions); see also Section VI *infra*.

26. See *infra* notes 226-27 and accompanying text.

27. 124 S. Ct. 2633 (2004).

28. See Section III, *infra*.

oftentimes politically popular excesses? More particularly, what impels courts ruling on national security and civil liberties challenges sometimes to choose "heightened scrutiny" of the executive's national security claim, thereby requiring the government to seriously account for its actions, rather than (as is more often the case) "minimal scrutiny," thereby largely deferring to the government's explanation without real proof?

The crucial judicial choice between heightened or minimal scrutiny—an ostensibly neutral aspect of the legal process—is influenced in two related ways. First, the choice is partly influenced by established legal methods—case precedents and the language of legislative acts.<sup>29</sup> Second—and the focus here—in endeavoring to choose the appropriate level of judicial scrutiny, courts will often find that the traditional legal method offers considerable "play in the joints"—that it does not clearly dictate the "correct" level of scrutiny in controversial cases.<sup>30</sup> Rather, critical legal advocacy and public pressure about the necessity for executive accountability in courts of law, in light of the particular controversy, often provide the tipping point.

As illuminated by the *Hamdi* and *Padilla* "enemy combatant" cases and the prosecution of Dr. Wen Ho Lee,<sup>31</sup> public advocacy emerges in two realms. The first realm is critical legal argument by lawyers and civil and human rights organizations aimed at shaping judges' threshold selections of the level of judicial scrutiny, and ultimately the judges' responses to the specific legal challenges to executive actions. As a complement to usually narrow traditional legal arguments, this kind of critical legal advocacy aims to reveal what is really at stake, who benefits and who is harmed (in the short and long term), who wields the behind-the-scenes power, which social values are supported and which are subverted, how political concerns frame the legal questions, and how

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29. As developed by case law interpreting the Constitution, the traditional legal method provides a multi-tiered framework of judicial scrutiny. If the rights allegedly violated by government are "fundamental" (for example, voting, jury trial), or if the government classification targets a "suspect group" (one deemed to be a "discreet and insular minority") then the court undertakes "strict scrutiny" to determine if the government can show a compelling interest supporting its action and that its chosen means are narrowly tailored. If the rights are important (for example, gender equality) then the court undertakes "intermediate scrutiny" to determine if the government can show an important government interest in its regulation. If other rights are involved (for example, economic or property rights) then the court undertakes minimalist "rational basis" review—which validates government action as long as it has some rational basis. See YAMAMOTO ET AL., *supra* note 11, at 18-20 (describing traditional three-tiered standard of judicial review).

30. The scholarship of the original legal realists and, more recently, critical legal scholars have demonstrated persuasively that, in controversial cases, the traditional legal method is not value-free or objective. See KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (Oceana Publications 1960) (1930) (describing the importance and limits of the traditional legal method in understanding judicial decisionmaking); Joseph Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988) (describing legal realists critiques of the traditional legal method and offering a critical theory insights into court decisionmaking). See also Soifer, *supra* note 23.

31. See Sections IV and V, *infra*.

societal institutions and differing segments of the populace will be affected by the court's decision.<sup>32</sup>

The second realm of advocacy is a species of public education: journalist essays, pundit commentaries, public letters to the editor, clergy sermons, scholars' op-ed pieces, community workshops and school forums, all critically analyzing and advocating the need for the courts to carefully scrutinize the Executive's national security actions. The goal is to create in the public culture a compelling sense that it must be the courts that exercise "watchful care" over our constitutional liberties<sup>33</sup>—that the Executive is charged with protecting our people and institutions from threats from without, and in turn that our courts are charged with protecting our liberties from threats from our own institutions.

The timing of both kinds of public advocacy is crucial. Advocacy of accountability is imperative at the "front end" and at the "back end" of apparent national security abuses:

The real bulwark against governmental excess and lax judicial scrutiny, then, is political education and mobilization, both at the front end when the laws are passed and enforced and at the back end when they are challenged in the courts . . .

In today's climate of fear and anger, our first task in protecting both people and key democratic values is to be pro-active at the front end—to prevent post-modern forms of the internment. We need to organize and speak out to assure that the expansive new national security regime does not overwhelm the civil liberties of vulnerable groups and move the country toward a police state. We need to mobilize and raise challenges to prevent . . . secret incarcerations, particularly en masse. Through political analysis, education and activism, our job is to compel powerful institutions, particularly the courts, to be vigilant, to "protect all."

Our second task is to be assertive at the back end—to call out injustice when it occurs, to spell out the damage it does to real people in our midst and to our constitutional democracy, and to demand accountability to principles of equality and due process.<sup>34</sup>

#### D. Learning from *Korematsu*: Four Tasks of Judicial Vigilance

In 1983, aided by a major "back-end" grass-roots political education effort and a Congressional study commission, Fred Korematsu reopened his 1944 case on the basis of newly discovered World War II documents unequivocally showing that the government had lied to the public and the courts about the military necessity for the internment.<sup>35</sup> A huge struggle among lawyers in the

32. See, e.g., Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties "When Fears and Prejudices Are Aroused,"* 2 SEATTLE J. SOC. JUST. 129, 134 (2004) (critically examining the political and legal underpinnings of the Bush administration's enemy combatant designations). See generally JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (West 2000).

33. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (describing the judiciary's role during national crisis as one of "watchful care" over fundamental liberties).

34. Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 27 AMERASIA J. 51, 60 (2001)

35. See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings Of Redress and Reparations*, 20 DEN. J. INT'L. L. & POL'Y. 223, 229 (1992). The *Korematsu coram nobis* litigation revealed three extraordinary facts. "[F]irst, before the internment, all involved government intelligence services unequivocally informed the highest officials of the military and the War and Justice Departments that the West Coast Japanese

Justice Department had erupted over whether to tell the Supreme Court the truth that there had been no military necessity, or instead to be party to the deliberate "suppression of evidence."<sup>36</sup> High officials in the Attorney General's office chose suppression.

In ruling on Korematsu's *coram nobis* petition in 1984, federal judge Marilyn Hall Patel declared the original *Korematsu v. U.S.* case a "manifest injustice." In her ruling, Judge Patel echoed Justice Jackson's "loaded weapon" warning forty years earlier about government accountability. The *Korematsu* injustice

stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of . . . national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms, our institutions, legislative, executive and judicial, must . . . protect all citizens from the petty fears and prejudices that are so easily aroused.<sup>37</sup>

With these cautions in mind for post-September 11 America, the essence of Justice Jackson's warning resonates today: How will the courts prevent bald Executive claims of "national security" from lying about like a loaded weapon aimed at our cherished liberties?

The complex jurisprudential and Realpolitik approach advanced in this essay—organized political pressure coupled with critical legal advocacy—does not aim to pressure courts to reach a particular legal result. Rather, it aims to pressure courts to undertake four "process" tasks. The first is to employ tools of critical legal inquiry to unearth and then explain what is really going on in the controversy and to articulate what is at stake politically and socially. The second task is for courts to acknowledge that sometimes a presidential administration distorts information and even lies to unduly expand its power and shield national security abuses from public view. The third task is for courts to recognize that traditional legal analysis, often largely devoid of context and visible value judgments, does not itself dictate a politics-free, neutral result. Social value judgments, philosophical commitments, political concerns, as well as perceptions of the government's role during hard times, all play important parts. In this light, the final task is for courts to carefully and openly scrutinize executive actions with dual goals in mind: to afford the Executive broad leeway in its efforts to protect the nation's people, and simultaneously to call the Executive to account publicly for apparent

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as a group posed no serious danger, and that there existed no justification for mass internment; second, the key west coast military commander based his internment decisions on invidious racial stereotypes about the inscrutable, inherently disloyal Japanese American; and third, the military, War and Justice Departments concealed and destroyed evidence and deliberately misled the Supreme Court in 1944 when it was considering the *Korematsu* case and asserted military necessity justification for the internment."

36. See *Korematsu v. United States*, 584 F. Supp 1406, 1410 (N.D. Cal. 1984).

37. *Id.* at 1420.

transgressions of civil liberties and human rights under the possibly false mantle of national security.

Only then can the democratic United States genuinely say, "Mission Accomplished."

### III THE NOBLE LIE

"White House lies" drive the Bush administration. Recent books are unsparing in advancing this general proposition. Those books include *The Book on Bush: How George W. (Mis)Leads America*;<sup>38</sup> *The Lies of George W. Bush: Mastering the Politics of Deception*;<sup>39</sup> and *Fraud: The Strategy Behind the Bush Lies and Why the Media Didn't Tell You*.<sup>40</sup> Other major works specifically critique the Bush administration's dissembling on the war against Iraq and the war on terror, including *The Five Biggest Lies Bush Told Us About Iraq*;<sup>41</sup> *Hood Winked: The Documents That Reveal How Bush Sold Us a War*;<sup>42</sup> and *The Exception to the Rulers: Exposing Oily Politicians, War Profiteers and the Media That Love Them*.<sup>43</sup>

Special congressional investigative reports also chronicle the administration's misrepresentations about national security and its penchant for secrecy and denying public access to information. Specifically, the 2004 report of the House Committee on Government Reform (Special Investigations Division, Minority Staff) found that "the five Administration officials most responsible for providing public information and shaping public opinion on Iraq"<sup>44</sup> made "237 misleading statements about the threat posed by Iraq."<sup>45</sup> Another 2004 congressional investigative committee report documented "a consistent pattern in the Administration's undermining of laws . . . designed to promote public access to information" and expanding laws "that authorized the government to withhold information or to operate in secret."<sup>46</sup>

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38. ERIC ALTERMAN & ERIC GREEN, *THE BOOK ON BUSH: HOW GEORGE W. (MIS)LEADS AMERICA* (2004).

39. DAVID CORN, *THE LIES OF GEORGE W. BUSH: MASTERING THE POLITICS OF DECEPTION* (2003).

40. PAUL WALDMAN, *FRAUD: THE STRATEGY BEHIND THE BUSH LIES AND WHY THE MEDIA DIDN'T TELL YOU* (2004).

41. CHRISTOPHER SCHEER ET AL., *THE FIVE BIGGEST LIES BUSH TOLD US ABOUT IRAQ* (2004).

42. JOHN PRADOS, *HOOD WINKED: THE DOCUMENTS THAT REVEAL HOW BUSH SOLD US A WAR* (2004).

43. AMY GOODWIN ET AL., *THE EXCEPTION TO THE RULERS: EXPOSING OILY POLITICIANS, WAR PROFITEERS, AND THE MEDIA THAT LOVE THEM* (2004).

44. MINORITY STAFF OF THE HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM, *IRAQ ON THE RECORD: THE BUSH ADMINISTRATION'S PUBLIC STATEMENTS ON IRAQ*, *supra* note 10, at i-ii.

45. *Id.*

46. MINORITY STAFF OF THE HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM, 108th CONG, *SECURITY IN THE BUSH ADMINISTRATION* iii (2004), *available at* [http://democrats.reform.house.gov/features/secrecy\\_report/pdf/pdf\\_secrecy\\_report.pdf](http://democrats.reform.house.gov/features/secrecy_report/pdf/pdf_secrecy_report.pdf) (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems).

According to these and many journalists' accounts,<sup>47</sup> White House dissembling ranges from white lies, to the apparent fabrication of "facts" so as to label people "terrorists" and thus justify either criminal prosecutions or indefinite incarcerations,<sup>48</sup> to the denials of racial profiling in terror investigations<sup>49</sup> and post-9/11 immigration policy,<sup>50</sup> to misrepresenting terror information to a fearful public to maintain support for flagging national security policies,<sup>51</sup> and to disinformation about weapons of mass destruction in order to legitimate what can no longer be called a "pre-emptive" attack on Iraq.<sup>52</sup> White House communications on national security matters often convey useful and accurate information. Yet, at the same time, Bush administration misrepresentations on security matters appear to be so numerous and wide-ranging that their quantity and breadth signal a decided political strategy.

#### A. The "Ignoble Lie"

A key element of the Bush administration's apparent strategy of dissembling is philosophical—a belief system that not only legitimates but encourages lying to the public "for its own good."<sup>53</sup> At the heart of this

47. See *infra* notes 23-45 and accompanying text.

48. Prior to the Supreme Court's decision in *Padilla v. U.S.*, the FBI announced detailed, personal information about Jose Padilla to a hungry press corps. At the same time, the Justice Department admitted that most of its original charges were probably not prosecutable. See *Transcript of News Conference on Jose Padilla* (June 1, 2004), at <http://www.cnn.com/2004/LAW/06/01/comey.padilla.transcript/index.html> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems).

49. On October 16, 2001, Attorney General John Ashcroft assured Arab and Muslim leaders that their communities would not be discriminated against. See Terry Frieden, *Ashcroft Meets with Muslim, Arab Leaders* (Oct. 16, 2001), at <http://www.cnn.com/2001/US/10/16/ashcroft.arab.meet/index.html> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems). Yet, the National Special Entry and Exit Registration System (NSEERS), whose purpose was to weed out foreigners who posed potential national security concerns listed twenty-four Arab or Muslim countries out of twenty-five total countries. See Attorney General John Ashcroft, Attorney General Remarks on the National Security Entry-Exit Registration System (June 6, 2002), available at <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems).

50. See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 40581 (proposed June 13, 2002) (to be codified at 8 C.F.R. pts. 214 & 264) (applying post-9/11 registration and monitoring rules only to nonimmigrant aliens of selected countries).

51. For example, the State Department acknowledged that data in its *Patterns of Global Terrorism in 2003* report was "incomplete and in some cases incorrect" and that it "did not check and verify the data sufficiently." The Department admitted that "the figures for the number of attacks and casualties will be up sharply from what was published." Press Statement, State Department, Corrections to Patterns of Global Terrorism Will Be Issued (June 10, 2004), at <http://www.state.gov/r/pa/prs/ps/2004/33433.htm> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems).

52. CIA investigator Joseph Wilson reported that it was highly unlikely that any uranium transaction had taken place. See Associated Press, *Reports Bolster Bush Iraq-Uranium Claim* (July 18, 2004), at <http://www.msnbc.msn.com/id/5458642/> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems). Yet, the President asserted that Saddam Hussein was negotiating to procure an African uranium source. See Address Before a Joint Session of Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC 109 (Jan. 28, 2003).

53. Michael Lind observes, "The neocons took advantage of Bush's ignorance and inexperience." Michael Lind, *How Neoconservatives Conquered Washington—and Launched a War* (April 10, 2003), at [www.antiwar.com/orig/lind1.html](http://www.antiwar.com/orig/lind1.html) (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems). Although it is unclear to what extent the neoconservatives control the administration, their

philosophy, reportedly embraced by key neoconservatives in the Bush administration, is the "noble lie."<sup>54</sup> Journalist Earl Shorris links the thinking of philosopher Leo Strauss to the Bush administration and its "philosophy of mass deception."<sup>55</sup> He observes that Strauss and his disciples provided the Bush regime with "a philosophy of the noble lie, the conviction that lies, far from being simply a regrettable necessity of political life, are instead virtuous and noble instruments of wise policy."<sup>56</sup>

The virtuousness of the lie "depends on who is doing the lying."<sup>57</sup> The underlying tenet is that the elite in society are the "wise," that "the wise should rule," and that Machiavellian deception is an instrument of wise policy. The "noble lie" philosophy thus produces two sets of truth-telling rules—one for those at the top rung of political power and another for the rest of the public. By definition, then, lies by "wise" elite rulers for the benefit of the public (as well as the rulers) are not open to criticism. The rulers know best. Indeed, criticism of public lies damages their ability to rule wisely. Those at the top suffer damage to their legitimacy when lies are exposed because much of the American public, Republicans and Democrats, bolstered by the core of the First Amendment, still wants to believe that its government speaks truthfully.

Hence, the conundrum of the noble lie: How can America's leaders at the highest levels dissemble to garner and maintain support for their larger political agenda without being held publicly accountable for doing so? In light of this conundrum, noble lies—the "virtuous instruments of wise policy"—gain legitimacy only through an ineffectual mainstream media that soft-pedals contemporaneous investigation and reporting.

## B. Media Maladies

Therefore, a second key element of the White House's dissembling strategy is media complicity—or at least the "media's lack of democratic accountability."<sup>58</sup> Conservative daily news sources, like the news stations controlled by Rupert Murdoch's News Corporation (notably Fox News), and periodicals and journals on current legal affairs, like the *Weekly Standard*, *National Review* and the *Harvard Journal of Law and Public Policy* have been slow to seriously investigate and critique executive national security pronouncements that now appear to have been misleading if not deliberately

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influence is substantial. See Paul Richter, *The Nation; A Tough Time for "Neocons,"* L.A. TIMES, June 10, 2004, at A1 (noting that the President's speeches are "no less neocon than ever").

54. The "noble lies" discussion draws on Dina Shek's research and writing.

55. Earl Shorris, *Ignoble Liars: Leo Strauss, George Bush, and the Philosophy of Mass Deception*, HARPER'S MAG., June 1, 2004, at 65.

56. *Id.* at 68.

57. *Id.*

58. Eric Alterman, *Think Again: Boston 2004: The Media's Missed Opportunity* (Aug. 5, 2004), 'at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=135223> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems).

false.<sup>59</sup> At times journalists from some of these organizations sound more like government public relations spinners than independent commentators. At a minimum, as conservative New York Times columnist David Brooks acknowledges, the conservative media have "cohered to form a dazzlingly efficient ideology delivery system that swamps liberal efforts to get their ideas out."<sup>60</sup>

The mainstream media, too, has largely failed in timely investigating and reporting on apparent government national security lies. Unlike the Vietnam War era, when reporting by established journalists "on the ground" eventually countered much of the government's war propaganda, today we have government-chosen "embedded" journalists and national news anchors proclaiming full deference to the President.<sup>61</sup> Many formerly independent media outlets are now controlled by mega-media corporations,<sup>62</sup> and other established news reporting powers appear initially reluctant to levy even modest criticism of the President's national security actions.<sup>63</sup> Indeed, more than a year after the war against Iraq began, the *New York Times* published a *mea culpa*—effectively apologizing for its loose and uncritical reporting of the Bush administration's apparently false factual claims in support of the war.<sup>64</sup>

59. See generally DAVID BROCK, *THE REPUBLICAN NOISE MACHINE: RIGHT-WING MEDIA AND HOW IT CORRUPTS DEMOCRACY* (Crown Publishers 2004) (former conservative "attack dog" turned critic of the right-wing's use of the media to distort information presented to the public).

60. *Id.* at 9 (quoting David Brooks on the conservative media).

61. CBS news anchor Dan Rather publicly stated on September 17, 2001: "George Bush is the president. He makes the decisions, and, . . . wherever he wants me to line up, just tell me where. And he'll make the call." See Peter Hart & Seth Ackerman, *Patriotism & Censorship* (Dec. 2001), at <http://www.fair.org/extra/0111/patriotism-and-censorship.html> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems). In response to criticism, some news outlets later undertook critical examination of the President's national security actions. CBS in September 2004 reported military documents showing President Bush evaded active military service. See Marc Ash, Editorial, *Bush v. Rather et. al.* (Sept. 20, 2004) (discussing and the impact and merit of the reported documents), at <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/25/6356> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems). Shortly thereafter, however, CBS acknowledged that key documents were falsified. See Amity Shlaes, *How Iraq Has Put a New Spin on the Vietnam War*, CHI. TRIB., Sept. 21, 2004, at C25 (contrasting the falsified documents to the use by the media of John Kerry's Vietnam war record).

62. In 2003 the Federal Communications Commission relaxed its rules enabling more "cross-ownership" of media outlets in a single market. See PBS, NOW with Bill Moyers, *Media Ownership Rule Changes* (June 6, 2003), at <http://www.pbs.org/now/politics/fccchanges.html> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems). Mass media conglomerate Clear Channel, which owns 1,200 radio stations, funded and organized pro-war rallies after the Bush administration's retaliatory actions. See Oliver Burkeman, *Bush Backer Sponsoring Pro-War Rallies*, GUARDIAN UNLIMITED (Mar. 26, 2003), at <http://www.guardian.co.uk/Iraq/Story/0,2763,922040,00.html> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems). On April 20, 2004, media conglomerate Sinclair Broadcast Group censored ABC's Nightline broadcast of reading the names of all the U.S. soldiers killed in Iraq. Bill Carter, *Some Stations to Block "Nightline" War Tribute*, N.Y. TIMES, April 30, 2004, at A13.

63. See generally BROCK, *supra* notes 59-60. There is a rise of alternative media outlets including truthout.org, and radio shows like Democracy Now and Air America Radio. *Id.*; see Brock, *supra* note 59.

64. See Editorial, *A Pause for Hindsight*, N.Y. TIMES, July 16, 2004, at A1 ("Over the last few months, this page has repeatedly demanded that President Bush acknowledge the mistakes his administration made when it came to the war in Iraq, particularly its role in misleading the American

According to media observer Eric Alterman, this skewing of the informational picture transmitted to the public undermines American democracy.<sup>65</sup> For Alterman, even worse than simply failing to take its responsibility to democracy seriously, the mainstream media has facilitated the distortion of public information.

This media's ["three major television networks"] lack of democratic accountability adds an element of hearsay and abstraction to the political process that is funneled down through the fabric of our society, distorting the message and creating a confused political climate in which voters are left with the spin, but without the facts.<sup>66</sup>

The Bush administration's "ignoble lying" about national security, buttressed by a sometimes complicit media, takes many forms, including specific government misrepresentations and distortions in the cases of Padilla, Hamdi, and Wen Ho Lee, and the corresponding need for careful judicial scrutiny (examined below in Sections IV and V). Other aspects of the administration's national security dissembling warrant general mention here. Those aspects fall roughly into three categories, "Misleading Americans to Maintain Support for Failing or Abusive National Security Actions," "Dissembling to Create a Culture of Fear," and "Stifling Dissent." All three raise the looming issue of executive accountability during times of national fear.

### C. Misleading Americans in Order to Maintain Support for Failing or Abusive National Security Actions

Neoconservative author Michael Ledeen describes the "noble lie" philosophy. His book *Machiavelli on Modern Leadership*,<sup>67</sup> distributed "to Members of Congress attending a political strategy meeting,"<sup>68</sup> cites the necessity and virtue of public lies. Ledeen's work observes that "[I]ying is central to the survival of nations and to the success of great enterprises, because if our enemies can count on the reliability of everything you say, your vulnerability is enormously increased."<sup>69</sup> In addition to misleading the American public about "weapons of mass destruction" to gain support for the

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people about Saddam Hussein's weapons of mass destruction and links with Al Qaeda. If we want Mr. Bush to be candid about his mistakes, we should be equally open about our own. . . . [E]ven though this page came down against the invasion, we regret now that we didn't do more to challenge the president's assumptions.").

65. See Alterman *supra* note 58 ("A healthy and functioning democracy must rely on the free flow of information between citizens in the public sphere, and our representative system can only truly fulfill its promise when the media takes seriously its responsibility as the primary facilitator of this exchange.")

66. *Id.*

67. MICHAEL A. LEDEEN, *MACHIAVELLI ON MODERN LEADERSHIP: WHY MACHIAVELLI'S IRON RULES ARE AS TIMELY AND IMPORTANT TODAY AS FIVE CENTURIES AGO* (St. Martin Press 1999).

68. Congressman Ron Paul, *Neo-CONNED!*, (July 10, 2003) (noting distribution of Ledeen's book to Congressional members) at <http://www.house.gov/paul/congrec/congrec2003/cr071003.htm> (last visited Feb. 10, 2005) (on file with Law & Contemporary Problems); see LEDEEN, *supra* note 67.

69. LEDEEN, *supra* note 67.

war against Iraq, the "noble lie" supports dissembling to soldiers to induce them to go to war because

[d]ying for one's country doesn't come naturally. Modern armies, raised from the populace, must be inspired, motivated, indoctrinated. Religion is central to the military enterprise, for men are more likely to risk their lives if they believe they will be rewarded forever after for serving their country.<sup>70</sup>

The pressure to distort factual information in order to support the administration's national security policies also reaches deep into executive intelligence-gathering and analysis. Robert Dreyfuss and Jason Vest's article *The Lie Factory* reports on a "shadow agency" that subverts much of the CIA's intelligence to President Bush. According to State Department intelligence analysts, pressure by administration intermediaries "was being put on them to shape intelligence to fit policy."<sup>71</sup> According to Dreyfuss and Vest, neoconservative scholar Edward Luttwak goes further and

says flatly that the Bush administration [before the 2003 attack on Iraq] lied about the intelligence it had because it was afraid to go to the American people and say that the war was simply about getting rid of Saddam Hussein. Instead, says Luttwak, the White House was groping for a rationale to satisfy the United Nations' criteria for war.<sup>72</sup>

In 2004, seven weeks before the presidential election, former military leaders and military experts charged the Bush administration with deliberately misleading the American public *after the Iraq invasion* by stating that the United States was winning the post-war. More specifically, those former generals and military observers sharply criticized the administration's downplaying of the accelerating Iraqi insurgency that was destabilizing Iraq's political and economic structure and threatening to scuttle January elections, ignoring the real possibility of an Iraqi civil war, dismissing the reality that America's continuing presence in Iraq is intensifying danger to the United States by breeding many new anti-American insurgents, and denying the real likely future costs to Americans in dollars and lives. At bottom, the critics observed that the administration was deliberately painting a misleading picture of post-war Iraq, a picture unrelated to what had been actually happening "on the ground."<sup>73</sup>

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70. *Id.*

71. Robert Dreyfuss & Jason Vest, *The Lie Factory*, MOTHER JONES, Jan., 2004, (referring to State Department Intelligence officials Greg Thielmann and Christian Westermann), available at [http://www.motherjones.com/news/feature/2004/01/12\\_405.html](http://www.motherjones.com/news/feature/2004/01/12_405.html) (on file with Law & Contemporary Problems).

72. *Id.*

73. Sidney Blumenthal, *Far Graver than Vietnam: Most Senior US Military Officers Now Believe the War on Iraq Has Turned into a Disaster on an Unprecedented Scale*, GUARDIAN UNLIMITED (Sept. 16, 2004) (quoting military former military leaders and experts), at <http://www.guardian.co.uk/comment/story/0,3604,1305360,00.html> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems).

#### D. Disassembling to Maintain a Culture of Fear

More than any other administration in recent memory, the Bush administration has strategically employed the noble lie to sustain a politics of fear. The administration has done this to keep raw the public's fear of another 9/11 to garner support for its national security actions. Jack M. Balkin observes that the Bush administration "justifies its actions not by giving us freedom from fear but *by spreading fear*."<sup>74</sup> Balkin asserts that the administration, to avoid accountability, "raises the specter of grave dangers to our national security, from which it will save us if only we submit ourselves willingly to *its greater wisdom*."<sup>75</sup>

As much as to forewarn and prepare the public, key administration statements appear to be calculated to maintain a fearful public.<sup>76</sup> One form of these efforts is the press conference that warns of imminent domestic attacks but cites no specific threats or new intelligence on terror. Two vague yet nevertheless anxiety-inducing government press conferences in mid-2004 are illustrative:

On May 26, 2004, U.S. Attorney General Ashcroft and FBI Director Muller held a press conference to inform the public that intelligence from multiple sources indicated that Al Qaeda intended to attack the United States in the coming months.<sup>77</sup> At the press conference they "revealed" the identities of seven of the terrorists involved. It turns out that six of the men had been identified one month earlier without fanfare by the Justice Department. The press conference also lacked attack specifics—"how," "where" or "when." The press conference's tone nevertheless implied that attacks were imminent. Belying immediacy, though, the Homeland Security Department's medium color-threat-level remained unchanged.

At first glance, the timing, substance and tone of the warning seemed peculiar. Its underlying and apparently diversionary purpose emerged in the light of the political setting. The vague terror attack warning to Americans came amid intensifying international criticism of American human rights abuses in Abu Ghraib prison.<sup>78</sup>

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74. Jack Balkin, Editorial, *Who's Next?*, THE HARTFORD COURANT, June 20, 2002, at A9 (emphasis added).

75. *Id.* (emphasis added); see also Shorris, *supra* note 58, at 68.

76. President Bush stated, "In order to secure the country, we must do everything in our power to find these killers and bring them to justice before they hurt us again. I'm afraid they want to hurt us again. They're still there." The President's News Conference, 40 WEEKLY COMP. PRES. DOC. 580 (Apr.13, 2004). Justice Department Spokesman Mark Corallo warned, "This country has become a battlefield, and (terrorists) *will kill us* anywhere they can." Rick Montgomery, *Judges Beginning to Balk on Terror*, (Dec. 29, 2003) (emphasis added), available at [www.philly.com/mld/philly/news/nation/7585416.htm](http://www.philly.com/mld/philly/news/nation/7585416.htm) (on file with Law & Contemporary Problems).

77. *Transcript: Ashcroft, Muller News Conference* (May 26, 2004), at <http://www.cnn.com/2004/US/05/26/terror.threat.transcript/index.html> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems).

78. See, e.g., Rupert Cornwell, *Iraq in Crisis: US Military Iraq Torture Pictures Spark Outrage Across the World*, THE INDEPENDENT, May 1, 2004, at 4 (London); Russell Thirgood, *Iraqi Atrocities a Blight on Our Values*, COURIER MAIL, June 14, 2004, at 13 (Queensland, Australia).

Similarly, in July 2004, Homeland Security Secretary Ridge announced that Al Qaeda was planning to attack targets in the United States, including Citicorp Plaza. The intelligence Secretary Ridge relied on, however, dated back to 2000, prior to the 9/11 attacks. When challenged about the staleness of the intelligence and the timing of Ridge's new fear-inducing warning—days before the Democratic National Convention—members of the Bush administration dismissed the questions as nonsense<sup>79</sup>

For Professor Harold Hongju Koh, the administration's fear-based approach to national security has not only unnecessarily damaged the American psyche, it has also "placed startling pressure on the structure of human-rights and international law."<sup>80</sup> Koh recalls President Roosevelt's post-World War II framework for human rights that embraced four fundamental freedoms: freedom of speech, freedom of religion, freedom from want, and freedom from fear. Koh suggests that the "emerging Bush doctrine" has reprioritized "freedom from fear" to make it the freedom most in need of preservation. The result of this change is not only a more fearful public but also government human rights policy with five oppressive faces: the closing of government and the invasion of privacy, the scapegoating of immigrants and refugees, the creation of extra-legal zones (where government can operate without legal accountability), the creation of extra-legal persons (who have no judicial recourse), and the reduced American human rights presence abroad.<sup>81</sup>

### E. Stifling Dissent

In addition to profiting from a culture of fear, another Machiavellian aspect of the noble lie is the ruler's need—and right—to squelch open criticism as a way of avoiding public accountability.<sup>82</sup> A poignant illustration is the White House's punitive "outing" of undercover CIA agent Valerie Plame in retaliation for her spouse's sharp criticism of the President. Plame's husband, former U.S. Ambassador to Iraq Joseph Wilson, had criticized the President for wrongly stating in his State of the Union address that Saddam Hussein was in the process of obtaining nuclear-weapons grade uranium from Niger.<sup>83</sup>

In apparent retaliation, two "high officials" from the Bush administration leaked to conservative columnist Robert Novak that Plame was an undercover CIA agent and that she had recommended Wilson for the Niger investigation.<sup>84</sup> Rather than refute Wilson's statement, those administration officials tried to

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79. Treasury Secretary John Snow said "suggestions that terror alerts were manipulated were 'pure, unadulterated nonsense.'" Vice President Dick Cheney "lashed out at those who have implied that the terror alerts were at all politically motivated." *Administration Decries Suggestion Terror Alert Was Issued For Political Purposes*, U.S. NEWS & WORLD REP. (Aug. 5, 2004), at <http://www.usnews.com/usnews/politics/bulletin/archive/bull040805i.htm> (last visited on Oct. 1, 2004).

80. Harold Hongju Koh, *Rights to Remember*, THE ECONOMIST, Nov. 1, 2003, at 7.

81. *Id.*

82. Shorris, *supra* note 58, at 70.

83. *See supra* note 52 and accompanying text.

84. Robert Novak, Editorial, CHI. SUN-TIMES, July 14, 2003, at 31.

discredit Wilson with a charge of cronyism. More important, they destroyed Plame's capacity to function as an undercover CIA agent. And through what was apparently an illegal "outing," they placed her and her operatives in potentially life-threatening danger. President Bush, Attorney General Ashcroft and others in the administration then stalled the ensuing criminal investigation.<sup>85</sup> In this way, when called to account for an "ignoble lie," the administration powerfully conveyed its counter-message to government insiders: Do not accuse the President of misleading the public on national security, or else.<sup>86</sup>

#### F. Summary

Much of the national security information conveyed by the President's administration to the public is accurate. Much of it, however, is not. Indeed, some of that information, on important matters, is deliberately misleading. And that dissembling does not flow from inadvertence or honest mistake. Rather, it appears to emerge from a deliberate strategy. The "noble lie," when backed by a complicit mainstream media, has real consequences. It allows an administration "in good conscience" to mislead Americans to maintain support for failing or abusive national security actions, to dissemble to sustain a culture of fear to garner support for controversial government plans, and to stifle dissent challenging the Executive's national security claims.

The next two sections examine in depth three national security–civil liberties cases (before and after September 11) that illuminate the dynamic of Executive dissembling at both the law enforcement and policy-making levels. The stark circumstances of those cases and the government's machinations to avoid accountability highlight the need for critical legal advocacy and organized public pressure in calling for heightened judicial scrutiny. They also reveal why executive accountability for "ignoble lies" during times of national stress is simultaneously imperative and illusive.

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85. See JOHN DEAN, *WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH* 173 (Little, Brown and Co. 2004) ("A much-rumored source of the leak has been Karl Rove, who was a consultant to Ashcroft during one or more of his political campaigns and the person many believe secured Ashcroft his post as Attorney General. For this reason, as soon as the investigation commenced, there were demands that Ashcroft either appoint a special counsel or recuse himself. He stalled as long as possible before finally giving way, sending more signals that he did not want this investigation to get out of hand."). The President stated early on that an investigation might not uncover the truth. See Peter Brownfield, *Leak Investigations Rarely Successful* (Oct. 16, 2003), at <http://www.foxnews.com/story/0,2933,100403,00.html> (last visited on Oct. 1, 2004) (on file with Law & Contemporary Problems).

86. John Dean suggests the administration may yet be called to account for its retaliatory actions: "The federal law of conspiracy, along with the federal laws dealing with the obstruction of justice, are among the most far-reaching of the federal criminal laws. Whether they know it or not, the Bush II White House—given this active and ongoing criminal activity—has dangers it has never dreamed possible by not ending this matter itself." DEAN, *supra* note 85, at 176.

## IV

THE WEN HO LEE PROSECUTION:  
INDEPENDENT JUDICIARY, OR AN OPEN DOOR FOR ABUSE

The Wen Ho Lee prosecution offers both exemplary and cautionary examples of judicial scrutiny in national security controversies—especially those infused with racial fears. Dr. Lee's case falls within a long line of prosecutions in which the Executive Branch dissembles and then demands that the courts defer to Executive's claim of national security.<sup>87</sup> Dr. Lee's prosecution also illuminates the strategic importance of critical legal advocacy and organized public pressure in compelling judges to call the executive to account for apparent national security abuses of civil liberties. Anthony Lewis aptly describes the stakes in this executive-courts-public drama: "The [administration's] attempt to avoid any meaningful review by the courts is especially alarming. Judges are the last line of defense for citizens against abuse of government power."<sup>88</sup>

## A. The Prosecution (Persecution) of Wen Ho Lee

In December 1999 the Federal Bureau of Investigation arrested Dr. Wen Ho Lee after nearly a year of intrusive interrogations, private harassment and a disparaging public media campaign fueled by FBI and Justice Department leaks. The Department charged Dr. Lee with fifty-nine felony counts, including violations of the Atomic Energy Act and the Federal Espionage Act.<sup>89</sup> It accused Dr. Lee, an employee of the government's Los Alamos Lab, of stealing the "crown jewels" of America's nuclear secrets—the design of America's W-88 miniaturized nuclear warhead—and delivering those secrets to China's scientists. The sixty-five-year-old Lee suffered nine months of solitary confinement, without needed medications, often with wrists and ankles shackled.

Earlier, in 1999, the Albuquerque FBI had sought to close its five-year investigation of Dr. Lee, informing Washington D.C. headquarters that Dr. Lee

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87. See *infra* notes 194-201, 215.

88. Anthony Lewis, *One Liberty at a Time*, MOTHER JONES, May, 2004, (commenting on the then-pending enemy combatant detention cases), available at [http://www.motherjones.com/news/feature/2004/05/04\\_403.html](http://www.motherjones.com/news/feature/2004/05/04_403.html) (on file with Law & Contemporary Problems).

89. In Dr. Lee's own words:

Even though I was not being charged with espionage, all the charges were wrapped up in the insinuation that I had acted in a nefarious, deceptive, and sinister manner—like a spy. The government told reporters that they so far had found no evidence that I gave the tapes to a foreign country, . . . [Yet] [o]ne unnamed official even told the *Wall Street Journal* that espionage "is the only logical reason why that quantity of information [would] be downloaded."

WEN HO LEE & HELEN ZIA, MY COUNTRY VERSUS ME: THE FIRST-HAND ACCOUNT BY THE LOS ALAMOS SCIENTIST WHO WAS FALSELY ACCUSED 205-06 (Hyperion 2001). Dina Shek's research and writing contributed substantially to the Wen Ho Lee analysis.

was no longer an espionage suspect.<sup>90</sup> How could the Justice Department justify its prosecution in 2000?

The Clinton administration did so by telling a series of lies to Dr. Lee, the courts, and the public. For instance, the FBI lied about Dr. Lee's failing polygraph tests, the Justice Department dissembled about the classified status of materials downloaded by Dr. Lee on his computer, and CIA former counterintelligence chief Paul Redmond claimed, without evidence, that "[t]his was far more damaging to the national security than Aldrich Ames."<sup>91</sup> The government leaked to a hungry media false stories of Lee's theft of the U.S. nuclear weapons program "crown jewels." "Alarmist" media stories then played to popular racial fears to portray Dr. Lee as an "evil Chinese spy."<sup>92</sup> The leaked public lies enabled a Democratic administration, which was the target of conservative attacks for its "softness" in foreign affairs, to project itself as "tough on Communist China" and national security.<sup>93</sup>

From jail, Dr. Lee sought not only to defend against the substantive charges, but he also asked the court to compel the government to disclose evidence relating to selective racial prosecution. After careful consideration, Federal District Judge Parker ordered the Justice Department to produce documents relating to Lee's charge.

Two days before the deadline for government compliance with the judge's disclosure order, the Justice Department capitulated. Dr. Lee pled guilty to a single felony count of unauthorized possession of documents relating to national defense. The government agreed to drop the remaining fifty-eight charges. Dr. Lee pled guilty to actions no worse than those committed by hundreds of other white American government employees (who were never prosecuted), including then CIA Director John Deutch, who admitted to

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90. On January 23, 1999, after intense and intimidating FBI interrogations, the Albuquerque FBI sent a memo to Washington, D.C. headquarters saying that Dr. Lee was not a spy and recommending the FBI close its investigation. *Id.* at 46.

91. James Risen & Jeff Gerth, *Breach at Los Alamos: A Special Report.; China Stole Nuclear Secrets For Bombs, U.S. Aides Say*, N.Y. TIMES, Mar. 6, 1999, at A1. In 1994, Aldrich Ames, a CIA counterintelligence official, pled guilty and was sentenced to life imprisonment for spying for the Soviet Union from 1985 to 1994. According to a *Guardian* article, "He is blamed for the deaths of at least nine U.S. agents in the Soviet Union, and for disclosing U.S. counterintelligence techniques." *Spy Cases in the United States*, GUARDIAN UNLIMITED (England & Wales), Aug. 28, 2004.

92. Dr. Lee's neighbors recount stories that "the news media stalked the neighborhood, looking for people who would tell them 'Wen Ho Lee, evil spy' stories" while refusing to listen when they spoke of "Wen Ho Lee, good neighbor and family man." LEE, *supra* note 89, at 146.

93. The public exposure and persecution of Dr. Lee began on the heels of nearly two years of the Clinton/Gore administration's "campaign finance scandal." This Republican-led attack employed accusations including over-reaching attempts to link Chinese American campaign fundraisers to Chinese espionage. See James Risen, *Nuclear Secrets: Links; Fund-Raising Figure Had Spy Case Role*, N.Y. TIMES, May 26, 1999, at A1. Rather than criticize the racist overtones of the Republican accusations, Democratic legislators and the Clinton administration capitalized on the convenient target of "the Chinese spy case" to both deflect attention from the campaign finance scandal and to appear tough on China. Bill Mesler, *The Spy Who Wasn't: National Insecurity State; Allegations That Wen Ho Lee Was a Spy Are Not Likely To Be Proven*, THE NATION, Aug. 9, 1999, at 13.

downloading unsecure files onto his home computer.<sup>94</sup> Dr. Lee spent nine months in solitary confinement tagged as an evil spy. By contrast, Deutch faced only a misdemeanor charge, was never prosecuted and, in the end, received a full pardon.

Even a cursory look at the case timeline shows that the threatened exposure of racial profiling pressured the government to plea-bargain the case. Early on the racial profiling charges by advocates and journalists stirred little response.<sup>95</sup> The eve-of-disclosure timing of Dr. Lee's unconditional release—after two years of government portrayals as the worst spy since the Rosenbergs—indicated that the Justice Department and the FBI, particularly, had something to hide.<sup>96</sup>

Former Chief Counterintelligence Officer of Los Alamos National Labs (LANL) Robert Vrooman, who initially headed the Lee investigation, declared in a court filing that FBI spokesperson Messemer "regularly distorts" and "deliberately mischaracterize[s]" information. More important, Vrooman stated that "[d]ozens of individuals who share those characteristics were not chosen for investigation. . . . It is my opinion that the failure to look at the rest of the population is because Lee is ethnic Chinese."<sup>97</sup> He directly challenged any government argument for racial profiling by saying, "I am unaware of any empirical data that would support any inference that an American citizen born in Taiwan would be more likely [to spy for China] than any other American citizen." Former Acting Director of Counterintelligence at the U.S. Department of Energy Charles E. Washington similarly stated, "I believe that [investigator] Mr. Trulock improperly targeted Dr. Lee due to Dr. Lee's race

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94. YAMAMOTO ET AL., *supra* note 11, at 465.

95. See Mesler, *supra* note 93, at 13; Editorial, *The weak case against Wen Ho Lee*, THE BOSTON GLOBE, August 4, 1999, at A22; Angela E. Oh, Editorial, *Spy Charges Fueled Search for Scapegoats; Asian Americans: The Coverage of the Cox Report on Chinese Espionage Has Unfairly Tainted The Image of All*, LA TIMES, June 21, 1999, at B5; Brief of Amici Curiae in Support of Defendant's Motion for Discovery of Materials Related to Selective Prosecution, filed by Asian Law Caucus, U.S. v. Wen Ho Lee, No. 99-1417-JC (D.N.M. Aug. 8, 2000), available at <http://wenholee.org/Amicus.doc> (on file with Law & Contemporary Problems).

96. On August 25, 2000, Judge Parker granted Dr. Lee's motion for discovery of materials related to selective prosecution. The Judge set a deadline of September 15 when the government was to produce numerous significant documents. These crucial documents included DOE reports on racial profiling, FBI training videos, and transcripts and statements by Notra Trulock and other key DOJ, DOE, and FBI officials relating to Dr. Lee and the Kindred Spirit investigation. U.S. v. Wen Ho Lee, No. 99-1417-JC (D.N.M. Aug. 25, 2000) (order related to Defendant's "Motion for Discovery of Materials Related to Selective Prosecution"), available at <http://www.wenholee.org> (on file with Law & Contemporary Problems). For the first time during his case, the prosecution entered into earnest negotiations. Between August 25 and September 12, prosecutors and defense attorneys met three times. Finally, on September 13—just two days before the government was to produce documents related to selective prosecution—Dr. Lee pleaded guilty to a single count of "unauthorized possession of and control over documents and writings relating to the national defense" and walked out of the courthouse a free man. LEE, *supra* note 89, at 314.

97. Declaration of Robert Vrooman, U.S. v. Wen Ho Lee, No. 99-1417-JC (D.N.M. Aug. 10, 2000), available at <http://www.fas.org/irp/ops/ci/vrooman.html> (on file with Law & Contemporary Problems).

and national origin."<sup>98</sup> Like Vrooman, Washington offered, "I am unaware of any empirical data that would support a claim that Chinese-Americans are more likely to commit espionage than other Americans."

Indeed, Harry Brandon, former FBI head of counterintelligence, conceded that "critics say our government is racist because the government is targeting Chinese-Americans because they are Chinese. . . . And the answer is, [y]es, we are targeting them, because they are targets (of Beijing)"<sup>99</sup>—which made little sense in Dr. Lee's case since Taiwan (his country and origin) and China are bitter foes. Paul Moore, Deputy Director of the FBI acknowledged more generally that, "there is racial profiling based on ethnic background, asserting that "[t]he FBI applies a profile[;] . . . so do other agencies who do counter intelligence investigations."<sup>100</sup> Collectively, these tantalizing public statements suggested incriminating documentary evidence of racial prosecution in the government's files.

In September 2000 Judge Parker, a Reagan appointee, accepted Dr. Lee's plea and released him from jail. In an extraordinary gesture, Judge Parker apologized to Dr. Lee from the bench, expressing distress at being misled by the Justice Department, including the FBI and U.S. Attorney.

I am truly sorry that I was led by our Executive Branch of government to order your detention last December. Dr. Lee, I tell you with great sadness that I feel *I was led astray last December by the Executive Branch of our government through its Department of Justice, by its Federal Bureau of Investigation and by its United States Attorney for the District of New Mexico . . .*<sup>101</sup>

Based on government leaks and early frenetic media reporting, and without a court hearing, the public had presumed Dr. Lee's guilt. Dr. Lee's legal counter-charge of selective racial prosecution and, over time, strong public commentary by civil rights, scientific and ethnic communities across the country helped remake public perceptions. The *New York Times*, for example, shifted its rhetoric from "the worst spy case since the Rosenbergs" to an admission of its own flaws and an apology for the "alarmist" tone of its reporting.<sup>102</sup>

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98. Declaration of Charles E. Washington, U.S. v. Wen Ho Lee, No. 99-1417-JC (D.N.M. Aug. 11, 2000), available at <http://www.fas.org/irp/ops/ci/washington.html> (on file with Law & Contemporary Problems).

99. Jeff Stein, *Espionage Without Evidence*, August 26, 1999 at <http://www.salon.com/news/feature/1999/08/26/china/index.html> (last visited Sept. 30, 2004) (on file with Law & Contemporary Problems).

100. Theodore Hsien Wang and Frank H. Wu, *Singled Out, Based on Race*, WASH. POST, Aug. 30, 2000, at A25 ("Moore justified this practice on grounds that foreign countries tend to target ethnic Americans with ancestry ties. When confronted with Moore's statements in court, Lee's prosecutors have continued to argue that federal law enforcement agencies should be allowed to consider race as a factor in identifying espionage suspects. Their rationale for this targeting is that China seeks to recruit spies from among Chinese Americans."); see also Brief of Amici Curiae in Support of Defendant's Motion for Discovery, U.S. v. Wen Ho Lee, No. 99-1417-JC (D.N.M. Aug. 25, 2000), available at [http://archive.aclu.org/court/wenholee\\_amicus.html](http://archive.aclu.org/court/wenholee_amicus.html).

101. Transcript of Proceedings, United States v. Lee, No. 99-1417-JC (D.N.M. Sept. 13, 2000) (emphasis added), available at <http://www.nytimes.com/2000/09/14/national/14LTEX.html?ex=1106888400&en=ef3b7dd76ad925bf&ei=5070&oref=login> (on file with Law & Contemporary Problems)

102. *From the Editors: The Times and Wen Ho Lee*, N.Y. TIMES, Sept. 26, 2000, at A2 (apologizing

Dr. Lee's victory was tempered, however, by the reality that the case settled without government accountability. The Justice Department denied wrongdoing in Lee's prosecution while continuing to shield evidence that might have revealed the government's race-based selective prosecution. No one from the Department acknowledged the national security lies or the harm they caused Dr. Lee and Chinese Americans generally.

#### B. Administration Attempts to Avoid Close Court Scrutiny

Dr. Lee's prosecution embodied a classic tension between the Judiciary and the Executive. The government first tried to avoid close judicial scrutiny of its espionage claims and of Dr. Lee's counter-charge of selective prosecution by maintaining that "the world's strategic balance" was at stake.<sup>103</sup> In terms reminiscent of the government's attempt to justify Japanese American internment during World War II, FBI agent Messemer testified at a pre-trial hearing that it was important to continue Lee's incarceration, even without evidence of disloyalty, because, if he were actually innocent, he might now try to exact revenge on the United States for his persecution.<sup>104</sup> For nine months, the court accepted the government's national security assertions.

The government also sought to avoid accountability by vigorously opposing Dr. Lee's motion for disclosure of prosecution documents. Its position amounted to more than ordinary legal argument. It reflected a Justice Department effort to keep probative documents from public view—to use the court's "sealing" process apparently to hide government wrongdoing.<sup>105</sup> Indeed, Judge Parker's extraordinary apology to Dr. Lee from the bench hinted at this. He intimated that the Justice Department had lied to Dr. Lee and the court, that the government might have engaged in racial profiling, and that because of the quick plea bargain the public might never know the "real reasons why the Executive Branch has done all of this."

I find it most perplexing, although appropriate, that the Executive Branch today has suddenly agreed to your release without any significant conditions or restrictions whatsoever on your activities. *I note that this has occurred shortly before the Executive Branch was to have produced, for my review in camera, a large volume of information that I previously ordered it to produce.*

What I believe remains unanswered is the question: What was the government's motive in insisting on your being jailed pretrial under extraordinarily onerous

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for inaccurate facts and their "alarmist tone").

103. Testimony of Dr. Paul Robinson, director of Sandia National Laboratories, cited at LEE, *supra* note 89, at 231.

104. *Id.* at 233. This is similar to DeWitt's Final Report statement: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

105. For example, the government provided false evidence and testimony, withheld possibly exonerating documents, and held Dr. Lee in solitary confinement under extremely harsh conditions. Robert Scheer, *The Spy Who Wasn't: Wen Ho Lee*, THE NATION, Oct. 2, 2000, at 4; *see also* Bob Drogin, *Appeals Court Delays Release of Wen Ho Lee*, L.A. TIMES, Sept. 2, 2000, at A1 (describing the Tenth Circuit's sua sponte stay of Lee's release order, Lee's confinement, and the various charges levied against him).

conditions of confinement until today, when the Executive Branch agrees that you may be set free essentially unrestricted?<sup>106</sup>

Why did the Justice Department pursue this dissonant course? Prosecutors admitted to racial profiling while claiming neutrality and fairness in its actions. Simultaneously, government investigators vigorously denied racial profiling.<sup>107</sup> The emerging answer is that the administration sought to benefit politically from its new "tough on China" image and that the "noble lie" legitimated national security dissembling to the court and public—until Dr. Lee's advocates persuaded the court to take a close look at what was actually going on.

### C. Critical Legal Advocacy and Grassroots Organizing

Judge Parker's decision responded in part to organized advocacy. Just as the government effectively used the media to leak fabricated stories and create a public perception of Dr. Lee as foreign spy, Lee's defenders applied counter-pressure.

The legal community, through amicus briefs and op-ed pieces, made explicit what had only been implied—that Dr. Lee was targeted because of race, not because of his actions. A consortium of Asian American advocacy organizations<sup>108</sup> filed an amicus curiae brief urging the "Court to rise above the racial stereotyping of Asian-Pacific Americans and to continue our judicial system's protection of the rights of minorities."<sup>109</sup> In the brief, the Asian American legal advocates analyzed the government's failure even to follow its own (albeit flawed) matrix in targeting Dr. Lee in the "Kindred Spirit" investigation.<sup>110</sup> The brief further showed that "there is no question that similarly situated individuals could have been prosecuted, but were not."<sup>111</sup>

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106. Transcript of Proceedings, *United States v. Lee*, No. 99-1417-JC (D.N.M. Sept. 13, 2000) (emphasis added), available at <http://www.nytimes.com/2000/09/14/national/14LTEX.html?ex=1106888400&en=ef3b7dd76ad925bf&ei=5070&oref=login> (on file with Law & Contemporary Problems). Judge Parker also expressed being "sad and troubled" by the administration's actions.

I am also sad and troubled because I do not know the real reasons why the Executive Branch has done all of this. We will not learn why because the plea agreement shields the Executive Branch from disclosing a lot of information that it was under order to produce that might have supplied the answer. *Id.*

107. Annie Nakao, *Wen Ho Lee papers shed light on case; Rights group gets documents unsealed*, S.F. CHRON., Oct. 22, 2001, at A9. (Notra Trulock's attorney in the defamation suit he brought against Vrooman, Washington, and Lee (which was dismissed), declared that "[h]e [Trulock] didn't racially profile anybody.").

108. The brief was authored by Asian American Legal Defense and Education Fund, Chinese for Affirmative Action, Committee of 100, Japanese American Citizens League, National Asian Pacific American Bar Association, National Asian Pacific American Legal Consortium, National Lawyers Guild, and Organization of Chinese Americans. See Brief of Amici Curiae in Support of Defendant's Motion for Discovery of Materials Related to Selective Prosecution, filed by Asian Law Caucus, *U.S. v. Wen Ho Lee*, No. 99-1417-JC (D.N.M. Aug. 8, 2000), Aug. 8, 2000 available at <http://wenholee.org/Amicus.doc> (on file with Law & Contemporary Problems).

109. *Id.* at 24.

110. *Id.* at 12. The amicus brief also pointed out that even the title "Kindred Spirit" indicates the government's inappropriate focus on Chinese Americans as the targets of its investigation. See *id.* at 20.

111. *Id.* at 15.

Grassroots organizing efforts also reiterated the message that Dr. Lee was a victim of racism and government abuse. Guided in large part by Dr. Lee's daughter Alberta,<sup>112</sup> Asian American communities, college campuses, and social justice groups rallied around his case.<sup>113</sup>

Prominent science organizations added pressure with statements protesting Dr. Lee's treatment. Scientists openly criticized the basis of the government's charges by showing that most of the material Dr. Lee was accused of mishandling was non-classified and readily available in public reports. They also questioned the prosecution of Dr. Lee for actions that were typical of many Los Alamos Lab scientists. The presidents of the National Academy of Sciences, the National Academy of Engineering, and the National Institute of Medicine wrote an open letter to Attorney General Janet Reno, stating that Dr. Lee appeared to be "a victim of unjust treatment" that "reflects poorly on the U.S. justice system."<sup>114</sup> This action marked "the first time that the three congressionally chartered academies ever intervened on behalf of an American scientist."<sup>115</sup>

#### D. Media Image of Dr. Lee Shifts from "Foreign Spy" to "Victim of Government Racial Prosecution"

These events and counter-messages garnered national press. Belatedly, the mainstream media responded with new images and opinions. Writers who had contributed significantly to the public vilification of Dr. Lee now became critical of his treatment and even advocated for his release.<sup>116</sup> On August 22 and 23, 2000—during the crucial days when Judge Parker was considering the defense's key motions for bail, discovery, and evidence—editorials and

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112. See LEE *supra* note 89, at 298-303. Alberta Lee, self-described as formerly apathetic, played a crucial role in re-shaping Dr. Lee's public image by passionately defending her father at numerous rallies across the country, and by presenting an all-American image that countered the government's racist portrayal of the evil and foreign spy. See James Sterngold, *Headstrong Rebel Who Became Her Father's Defender*, N.Y. TIMES, Aug. 19, 2000, at A8 (describing Alberta's past and energetic advocacy of her father's cause).

113. For example, the Coalition Against Racial and Ethnic Scapegoating (CARES) coordinated a "National Day of Outrage" on June 8, 2000 in Albuquerque, Detroit, Dallas, Houston, Irvine, California, Los Angeles, Miami, New York City, Salt Lake City, San Francisco, and Seattle. CARES is comprised of the Asian Law Caucus, Chinese for Affirmative Action, Organization of Chinese Americans, Japanese American Citizens League, and others. CARES organized the protest action with the Association of Asian American Studies, Chinese American Citizens Alliance, Filipino Civil Rights Advocates, National Lawyers Guild, National Baptist Convention and others. Protests also took place at the Republican National Convention and Democratic National Convention in June and July 2000, respectively.

114. LEE *supra* note 89, at 307.

115. *Id.* Dr. Lee's legal team also obtained statements from prominent nuclear physicists Harold Agnew and Walter Goad, the latter who wrote: "From the perspective of my experience and expertise, these assertions [against Dr. Lee] represent unbridled exaggeration. The result is not a measured judgment of risk, but incitement of apprehension, even paranoia, that can override fairness and justice." *Id.* at 295. Statements of support also came from the Federation of American Scientists, American Association for the Advancement of Science, and others. *Id.* at 296-97.

116. *From the Editors: The Times and Wen Ho Lee*, N.Y. TIMES, Sept. 26, 2000, at A2 (apologizing for inaccurate facts and their "alarmist tone").

headlines in major newspapers declared: "Wen Ho Lee Deserves Bail and Fair Treatment" (*San Francisco Chronicle*); "Is Lee Guilty Until Proven Innocent?" (*Chicago Tribune*); "Free Wen Ho Lee" (*St. Louis Post-Dispatch*); "Wrong One Is on Trial in Lee Case" (*Los Angeles Times*); and "Bail for Wen Ho Lee" (*New York Times*).<sup>117</sup>

Organizers also employed an effective strategy of public education through print ads in major newspapers. For example, on August 7, 2000, Chinese for Affirmative Action organized a full-page ad in the *New York Times* demanding "Drop all charges. Free Dr. Wen Ho Lee now." The ad was titled, "Wen Ho Lee & The Nuclear Witch Hunt" and focused on being "charged with being ethnic Chinese." The ad presented Dr. Lee in a different light than *New York Times* readers had become accustomed to seeing. Instead of the stereotypical foreign spy, Dr. Lee was presented as an "American scientist" separated from his wife and two children for eight months, countering the usual media image of Dr. Lee in shackles.

Op-ed pieces also countered the executive lies and stereotypes. Attorneys Theodore Wang and Victor Hwang published an opinion piece titled, "Charged With Being Ethnic Chinese."<sup>118</sup> In it they exposed the racial profiling and challenged the premise on which the government based its racist actions. They correctly framed the issue as "not only for Lee but for all Americans concerned about whether the government should be able to launch criminal investigations based on the race of a suspect." They also argued that "[b]y focusing only on Asian Americans, a real spy may have escaped the scrutiny of the federal government altogether."<sup>119</sup> This and other op-ed pieces strategically framed the issue of racial profiling as one for "all Americans" and publicly questioned the effects of allowing the government to continue such practices without accountability.<sup>120</sup>

Critical legal advocacy and organized pressure helped reframe for the public, and for Judge Parker, the real issues—selective racial prosecution Executive lies and the need for accountability. This new sense in the public culture of what was really going on and what was really at stake provided the backdrop for courtroom decisions. Amid intensifying demands to free Dr. Lee and put the Justice Department on trial instead, Judge Parker ordered the government to disclose documents on racial profiling and negotiate a release agreement with Dr. Lee.<sup>121</sup>

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117. For a comprehensive list of over 1,400 press articles from December 20, 1999 through June 9, 2004 relating to the case of Dr. Wen Ho Lee, see <http://www.wenholee.org> (list also on file with author).

118. Theodore Hsien Wang & Victor Hwang, *Charged With Being Ethnic Chinese*, PACIFIC NEWS SERVICE, Aug. 18, 2000, available at <http://www.pacificnews.org/jinn/stories/6.16/000818-charged.html> (on file with Law & Contemporary Problems).

119. *Id.*

120. See Wang et al., *supra* note 100.

121. Some have cautioned that Judge Parker's important role in the release of Dr. Lee must be balanced with his role in keeping him behind bars for those long months. Law professor Thomas Joo

With the ensuing plea-bargained "settlement," however, the Justice Department's documents—and the administration's accountability for apparent national security lies—once again lay beyond public reach.<sup>122</sup>

## V

### "ENEMY COMBATANTS" AND THE ADMINISTRATION'S ATTEMPTS TO EVADE JUDICIAL SCRUTINY

#### A. An "Alternative Legal System"

Shortly after September 11, President Bush's administration shaped the broad outlines of an "alternative legal system."<sup>123</sup> Described by observers as embracing a "shadow Constitution,"<sup>124</sup> the system vastly expanded the Executive's national security powers. Most extraordinarily, the system also aimed to shield the executive from legal accountability for abuses of those broad powers by blocking meaningful judicial review.<sup>125</sup>

The administration-sponsored PATRIOT Act, for instance, allows secret Justice Department "national security letters" (instead of court-issued subpoenas) to force a wide range of private and public institutions to disclose confidential information on members of the public. The Act then bars the institutions from ever revealing what they did.<sup>126</sup> In September 2004 Federal District Judge Marreo declared this part of the Patriot Act unconstitutional

warns, "The judge seemed to imply that he had no choice but to approve the conditions of confinement because the government had invoked national security. He did not question—much less apologize for—his own initial failure to scrutinize the government's unsupportable accusations." Thomas Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 26 (2002). Also, Judge Parker himself may have been responding to the politics of the day. As a Reagan-appointed conservative judge, his actions can be seen as a reaction against the wrongs of the Clinton Justice Department. Although his statement and apology to Dr. Lee was a ringing endorsement of judicial scrutiny and carried the weight of exoneration, more analysis is needed concerning the role of partisan politics in those actions.

122. For further efforts by Dr. Lee's supporters to use the courts and media to hold the government accountable, see Section VI, *infra*.

123. Unsigned Editorial, *The Limits of Trust (Cont'd)*, THE WASH. POST, Aug. 26, 2002, at A14; see also Unsigned Editorial, *Chipping Away at Liberty*, THE WASH. POST, Nov. 19, 2002, at A24 (describing the "alternative legal system" as "a system that lets Americans be investigated and locked up without any of the normal protections of the justice system").

124. Nat Hentoff, *Our Designated Killers—Where is the Outrage?*, THE VILLAGE VOICE, Feb. 14, 2003 ("The disciplined Bush administration strives continually to keep out of the news those of its security operations that are creating what *The Washington Post* accurately and ominously describes as an 'alternative legal system.' Or, as I call it, 'a shadow Constitution.'"), available at [http://www.villagevoice.com/news/0308\\_hentoff,41940,6.html](http://www.villagevoice.com/news/0308_hentoff,41940,6.html) (on file with Law & Contemporary Problems)

125. Balkin, *supra* note 74; see also Harvey A. Silverglate & Carl Takei, *Crossing the Threshold*, THE BOSTON PHOENIX, Mar. 5-11, 2004 (describing the executive's usurpation of power under the USA PATRIOT Act and the assertion that the administration possessed unilateral authority "to choose between a regular trial and a military tribunal; to lock up a suspect, if a non-citizen, in secret; or to hold a suspect—citizen or non-citizen—indeinitely and without judicial review after designating him an 'enemy combatant'").

126. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

because it "effectively bars or substantially deters any judicial challenge to the propriety of an NSL request. In the Court's view, ready availability of judicial process to pursue such a challenge is necessary to vindicate important rights guaranteed by the Constitution or by statute."<sup>127</sup>

### *1. Designating and Detaining "Enemy Combatants" While Avoiding Judicial Scrutiny*

From the outset of the U.S. attack on the Taliban in Afghanistan, the Bush administration asserted that "the capture and detention of enemy combatants is an inherent part of waging war, and the President's decision whether to detain a person as an enemy combatant is a basic exercise of his discretion to determine the level of force needed to prosecute the conflict."<sup>128</sup>

Simply put, the administration declared that it had the power to unilaterally designate citizens and non-citizens "enemy combatants,"<sup>129</sup> and that a person so designated would not be criminally charged or tried, would have no access to family, would have no access to counsel, could be held in solitary confinement indefinitely, and, most important, would lack any right to contest whether the designation was proper in the first place.<sup>130</sup> The administration further maintained that "the best interests of the Nation in wartime" shielded the President's designation and detention of enemy combatants from searching judicial inquiry because "judges have little or no background in the delicate business of intelligence gathering."<sup>131</sup>

### *2. Guantanamo Bay (Rasul v. Bush)*

In 2001 the administration announced that "enemy combatants" captured in Afghanistan and incarcerated in the U.S. prison in Guantanamo Bay, Cuba did not have the rights of prisoners of war and indeed had no right to challenge

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127. Doe v. Ashcroft, 334 F. Supp. 471, 475 (S.D.N.Y. 2004).

128. Reply Brief of Petitioner at \*13, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027), 2004 WL 871163. ("[T]he courts may set aside the President's actions as exceeding the authority conferred by Congress only in exceptional circumstances."); see also Kathleen Clark and Julie Mertus, *Torturing the Law; The Justice Department's Legal Contortions on Interrogation*, THE WASH. POST, June 20, 2004, at B03 (quoting Memorandum of Office of Legal Counsel's Alberto R. Gonzales to the President, Aug. 1, 2002, "The president enjoys complete discretion in the exercise of his commander in chief authority. . . . Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.").

129. Lori Baker contributed substantially to the research and writing on the enemy combatant cases.

130. Cruz, *supra* note 32, at 134; see also Oral Argument before USSCT, at 29, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004)). (No. 03-6696) (explaining that government was allowing Hamdi limited access to counsel, not as a matter of right but because military intelligence experts determined that counsel would no longer interfere with intelligence gathering). But see Nat Hentoff, *Is Bush the Law?*, THE VILLAGE VOICE, May 7, 2004, at 5 (suggesting that the Justice Department really allowed Hamdi limited access to counsel only to try to soften some justice's opposition to the government's hardline position), available at <http://www.villagevoice.com/news/0419,hentoff,53338,6.html> (on file with Law & Contemporary Problems).

131. Petition for Writ of Certiorari at 19, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027), 2004 WL 113598 (internal citations omitted).

their indefinite detentions in the federal courts.<sup>132</sup> The administration argued that because Guantanamo Bay is outside the territorial jurisdiction of the United States, no U.S. court could hear their challenges. The detainees could only challenge their enemy combatant designation *if and when* the President chose to allow them a limited hearing before a military tribunal.<sup>133</sup> The President declined to hold military tribunal hearings until belatedly compelled to do so by the Supreme Court. Even those hearings offered very limited due process protections.<sup>134</sup> Vice President Cheney explained that those detainees "*don't deserve* the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."<sup>135</sup>

### 3. *Lindh, Hamdi, and Padilla*

Cheney's statement implied that the administration intended to recognize that U.S. citizens possessed due process "guarantees and safeguards." But subsequent administration actions revealed that only certain citizen enemy combatants would be afforded legal protections.

White American John Walker Lindh, from a middle class California family, tightly fit the government's enemy combatant description—"an individual who surrenders with enemy forces in an active theater of combat while armed with a military assault weapon is an *archetypal enemy combatant*."<sup>136</sup> The President, however, declined to designate Lindh an enemy combatant. After his transfer to the United States from an Afghan battlefield, the government immediately lodged criminal charges against Lindh in open court. Lindh received full access to a first-class lawyer and to family members. Because he admitted fighting for the Taliban against the U.S., his lawyer plea-bargained a lengthy prison term in exchange for elimination of the death penalty.<sup>137</sup>

By contrast, the government denied Yaser Hamdi all legal protections. A U.S. citizen born in Louisiana, of Saudi Arabian family heritage, he, like Lindh, was taken into custody in Afghanistan in 2001. Unlike Lindh, Hamdi maintained that he was not fighting for the Taliban or Al Qaeda and that he

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132. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 222 (Nov. 13, 2001) (presidential documents at 57831-57836).

133. *Id.*

134. Jess Bravin, *U.S. to Unveil Review System for Guantanamo Detainees*, WALL ST. J., June 21, 2004, at B1. According to Bravin, "The review boards could consider . . . hearsay, rumors and comments from intelligence agencies and foreign governments; the prisoner won't be told about classified evidence or offered the chance to rebut it. Officers assigned to help prisoners prepare for their hearings would be required to tell superiors anything incriminating prisoners might say." *Id.* The officers and those assigned to advise the board for the secret proceedings *cannot* be lawyers or chaplains.

135. Peter Slevin and George Lardner Jr., *Bush Plan for Terrorism Trials Defended—Military Tribunals Appropriate in War, Ashcroft says; Critics Cite Constitution*, THE WASH. POST, Nov. 15, 2001, at A28.

136. Brief of Respondents in Opposition at 19, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), 2003 WL 23189498 (emphasis added).

137. Koh, *supra* note 80, at 9.

was in Afghanistan to do humanitarian relief work. Yet, after three years, the government still declined to bring charges or allow him to establish innocence. Instead, it held him indefinitely in solitary confinement as an enemy combatant in a military brig with no family contact and no access to a lawyer (until litigation belatedly procured limited legal access).<sup>138</sup>

The administration designated Jose Padilla, a Puerto Rican American, an enemy combatant even though he did not fit the "archetypal enemy combatant" description. The government initially detained Padilla at the Chicago Airport pursuant to a material witness warrant. He possessed no weapons and was clearly outside any zone of combat. Padilla, a former gang member with a murder conviction, had met with Al-Qaeda members in Afghanistan. One month after his arrest in the U.S., and two days before a federal district court was expected to rule on the lawfulness of his material witness detention, the President designated Padilla an enemy combatant.<sup>139</sup>

The Attorney General and other administration officials vilified Hamdi and Padilla as terrorists acting to destroy America. As detailed below, those statements, made to justify their indefinite detention without charges or trial, appear to have been knowing misrepresentations.

The administration's refusal to explain its enemy combatant designation process generally, its apparent public dissembling about the threat posed by detainees, and its differential treatment of white and non-white citizens together raised the red flag of potential Executive abuse of power. Perhaps for this very reason, the administration staunchly resisted close judicial review of its actions. Initially, the administration advocated for *no judicial review at all*, arguing that the "courts may not second-guess the military's determination that an individual is an enemy combatant."<sup>140</sup> But in light of lower federal courts' reluctance to acquiesce entirely to the executive,<sup>141</sup> the administration softened its stance and conceded that its determination could be subject to minimal (or less than minimal) judicial review. More particularly, the administration maintained in Hamdi's and Padilla's cases that a bare hearsay-laden declaration (the "Mobbs Declaration") by an unknown official without personal knowledge of the particulars, setting forth conclusory statements about their capture, should be sufficient to defeat a detainee's habeas corpus challenge.<sup>142</sup>

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138. *Id.*

139. Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39, 40 (2003/2004).

140. *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) ("The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word.").

141. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 535 (E.D. Va 2002); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

142. See Brief of Respondants at 29, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 724020; *Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2d Cir. 2003); see also Newman, *supra* note 137, at 43. According to Newman, Padilla's counsel, Michael H. Mobbs, the Defense Department employee who signed the declarations, had no personal knowledge of the facts surrounding Padilla's capture and detention, but rather relied on "two anonymous and uncorroborated intelligence sources." One of

#### 4. *Exaggerations, Distortions, and Lies to Justify the Detention of "Enemy Combatants"*

The administration's argument for no—or at most attenuated—judicial scrutiny thus amounted to "the government is on a war footing[;] . . . you have to *trust the executive*."<sup>143</sup> As described generally in the first three sections and developed here, however, the Bush administration's dissembling on national security belied that trust.

For example, the administration publicly celebrated detaining over six hundred "enemy combatants" in Guantanamo Bay because "locked within the steel-mesh cells of the military prison . . . are some of the most dangerous terrorists on Earth."<sup>144</sup> The administration knew early on, however, that none of the detainees ranked "as leaders or senior operatives of al-Qaida" and "only a relative handful . . . [were] sworn al-Qaida members or other high-value militants able to elucidate the organization's inner workings."<sup>145</sup> The administration later conceded that many of the detainees, who were barred from demonstrating their innocence, were never dangerous—some were young teenagers and others were taken by mistake or by unscrupulous bounty hunters.<sup>146</sup>

Exaggerations and factual distortions also influenced the administrations' portrayal of Padilla, the "dirty-bomber." In announcing Padilla's arrest, Attorney General Ashcroft announced that the government had "disrupted an *unfolding terrorist plot*" to attack the United States with a radioactive "dirty bomb."<sup>147</sup> Shortly thereafter, Deputy Secretary of Defense Wolfowitz explained

these sources subsequently recanted and the other "has a history of intentionally providing false information to investigators in order to mislead them." *Id.*

143. Oral Argument before USSCT, at \*19, *Padilla v. Rumsfeld*, 124 S. Ct. 2711 (2004) (No. 03-1027), 2004 WL 1066129 (emphasis added) (Deputy Solicitor General Paul D. Clement's responding to whether there is "any judicial check" on the executive.); *see also* Paul Krugman, *Just Trust Us*, N.Y. TIMES, May 11, 2004, at A32 ("No administration since Nixon has been so insistent that it has the right to operate without oversight or accountability, and no administration since Nixon has shown itself to be so little deserving of that trust.").

144. *Detainee Value in Question*, HONOLULU STAR BULLETIN, June 21, 2004, at A8.

145. *Id.* at A8 (describing a September 2002 top-secret CIA study that revealed many of the detainees to be only low-level recruits.)

146. *Two Years After 9/11, Guantanamo Prisoners Remain in Legal Limbo*, ABCNEWS.com, June 25, 2004 (quoting Defense Department employee Mark Jacobsen, "Some people were simply in the wrong place at the wrong time. . . . A lot of them were the flotsam and jetsam of the battlefield."). John Mintz, *U.S. Releases 3 Teens from Guantanamo*, THE WASH. POST, Jan. 30, 2004, at A01 (describing the tension between human rights groups' contention that imprisoning children is "inhumane" and the Defense Department's insistence that "age is not a determining factor in detention"). [http://web2.westlaw.com/result/documenttext.aspx?RS=WLW4.06&VR=2.0&SV=Split&FN=\\_top&MT=LawSchool&RP=%2fresult%2fdocumenttext.aspx&DB=WP&Method=TNC&Query=GUANTANAMO+%26+%22JUVENILE+ENEMY+COMBATANTS%22&RLTDB=CLID\\_DB85207&Rlt=CLID\\_QRYRLT3147207&Cnt=DOC&DocSample=False&n=1&Cxt=RL&SCxt=WL&SS=CNT&Service=Search&FCL=False&EQ=search&CFID=1&bLinkedCiteList=False&Dups=False&origin=Search-I#I](http://web2.westlaw.com/result/documenttext.aspx?RS=WLW4.06&VR=2.0&SV=Split&FN=_top&MT=LawSchool&RP=%2fresult%2fdocumenttext.aspx&DB=WP&Method=TNC&Query=GUANTANAMO+%26+%22JUVENILE+ENEMY+COMBATANTS%22&RLTDB=CLID_DB85207&Rlt=CLID_QRYRLT3147207&Cnt=DOC&DocSample=False&n=1&Cxt=RL&SCxt=WL&SS=CNT&Service=Search&FCL=False&EQ=search&CFID=1&bLinkedCiteList=False&Dups=False&origin=Search-I#I)

147. Associated Press, *Atty. Gen. Ashcroft's Announcement*, June 10, 2002, 2002 WL 22578099 (emphasis added).

that there was "no actual plan" and no "unfolding terrorist plot." At most, a plot was "still in the *initial planning stages*."<sup>148</sup>

Several months later, the administration submitted the Mobbs Declaration to justify Padilla's continued indefinite detention as an enemy combatant. The declaration stated that Padilla had discussed plans with a senior lieutenant for Al-Qaeda "to build and detonate a radiological dispersal device (also known as a 'dirty bomb') within the United States"<sup>149</sup> and indicated that the plans were on-going. Declassified Pentagon papers, however, indicated that the administration overstated if not misrepresented its case.<sup>150</sup> A Pentagon report suggested that top Al-Qaeda officials were never on board with Padilla's dirty-bomb plot.<sup>151</sup> In the report's footnotes were Padilla's statements to interrogators that he never swore allegiance to Al-Qaeda and that he had doubts about his involvement with the organization.<sup>152</sup> The administration failed to submit this relevant, potentially exculpatory, information to the courts. Instead it constructed an at least partially false picture of Padilla's threat to national security and then argued that the courts should "trust the executive."

Recently, additional signs of administrative dissembling emerged after two years of fierce litigation in Hamdi's case. From the start, the Bush administration publicly justified its indefinite and unchallengeable detention of Hamdi by saying that he posed an ongoing terrorist threat—releasing Hamdi would allow him to "rejoin the enemy and renew [his] belligerency against" American forces.<sup>153</sup> The government's recent handling of Hamdi's case, however, suggests that Hamdi may never have been a significant threat. After three years of his incommunicado imprisonment, the administration decided to free Hamdi in another country rather than to continue his detention under the limited due process parameters set out by the Supreme Court's June 2004 *Hamdi* decision.<sup>154</sup> This turnaround—releasing a supposedly dangerous anti-

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148. Paul Wolfowitz, *Justice Department Briefing*, June 10, 2002, 2002 WL 1272427 (emphasis added).

149. Declaration of Michael H. Mobbs, Special Adviser to the Under Secretary of Defense for Policy (Aug. 27, 2002), at <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbspadilla.html> (last visited Feb. 24, 2005) (on file with Law & Contemporary Problems)

150. See Deputy Attorney General James Comey, Remarks of Deputy Attorney General James Comey Regarding Jose Padilla, (June 1, 2004) (presenting recently declassified information about Padilla that shows the government overstated its case), available at <http://www.usdoj.gov/dag/speech/2004/dag6104.htm> (on file with Law & Contemporary Problems).

151. Michael Isikoff and Mark Hosenball, *Facing Defeat?*, NEWSWEEK, June 29, 2004, available at 2004 WL 72544158.

152. Nat Hentoff, *DOJ and Padilla; A "Hail Mary" pass to the Supreme Court*, THE WASH. TIMES, June 14, 2004, at A19.

153. See Brief of Respondants at \*20-21, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 724020 (arguing that because "American troops are still engaged in active combat against al Qaeda and Taliban in Afghanistan[,] . . . [t]he President's authority to use military force . . . must include the authority to detain those enemy combatants who are captured during the conflict; otherwise, such combatants could rejoin the enemy and renew their belligerency against our forces").

154. See Andrew Cohen, *Crying Wolf in the War Against Terror*, L.A. TIMES, Aug. 16, 2004, at B11 ("Nothing the Supreme Court declared in the Hamdi case . . . requires the government to take the action it took.").

American Al-Qaeda terrorist or Taliban fighter—triggered deep suspicion that the administration was dissembling all along in an attempt to justify its unilateral and indefinite detention of all persons it designates as enemy combatants—regardless of their danger. As one commentator aptly observed, "If Hamdi is such a minor threat today that he can go back to the Middle East without a trial or any other proceeding, it's hard not to wonder whether the government has been crying wolf all these years."<sup>155</sup>

## B. Critical Legal Advocacy and Public Pressure

### 1. *Legislative Undersight*

With mounting evidence of White House abuses of its national security powers, hundreds of cities and several states passed resolutions rejecting the administration's disregard for civil liberties.<sup>156</sup> Congressional Republicans and Democrats also submitted bills to roll back the overreaching sections of the PATRIOT Act.<sup>157</sup> Yet, despite recent signs of legislative resistance, Congress has done little to rein in the Executive's expansive national security powers.<sup>158</sup> With an ineffectual Congress and an administration claiming near absolute authority in matters of national security, executive accountability has devolved to the third branch of government—the courts—and an informed public.

### 2. *Critical Legal Advocacy*

Contrary to conventional teachings, courts "are responsive in varying ways to political will" and will exercise vigilance in protecting constitutional guarantees in controversial cases, "but only when pushed to do so by the coordinated efforts of frontline community and political organizations, scholars, journalists and politicians."<sup>159</sup> Critical legal advocacy is one integral element of that push. In addition to traditional legal arguments based narrowly on past case texts, critical legal advocacy aims to reveal what is really at stake, who benefits and who is harmed (in the short and long terms), who wields the behind-the-scenes power, which social values are supported and which are subverted, how political concerns are framing the legal questions, and how societal institutions and differing segments of the populace will be affected by the court's decision.<sup>160</sup>

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155. *Id.*

156. See Bill of Rights Defense Committee, at <http://www.bordc.org>. (website documenting state and city resolutions protecting civil liberties challenged by the PATRIOT Act).

157. Nat Hentoff, *Declarations of Independence*, THE VILLAGE VOICE, June 14, 2004, available at <http://villagevoice.com/news/0424,hentoff,54304,6.html> (on file with Law & Contemporary Problems).

158. Benjamin Wittes, *Enemy Americans*, THE ATLANTIC MONTHLY, July/Aug. 2004, at 135 (describing the lack of attention to a bill introduced by Democratic congressman Adam Schiff that would require the Pentagon to formulate rules for citizen enemy combatants).

159. Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 27 AMERASIA J. 51, 60 (2001).

160. For scholarship by critical legal scholars, particularly critical race theorists, examining these aspects of the administration's war on terror, see Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U.

An array of powerful amicus briefs reflected this kind of legal advocacy. In the *Hamdi*, *Padilla*, and *Rasul* detention cases, retired federal judges, government officials, legal experts, and civil, social, and political organizations challenged the Bush administration's attack on fundamental civil liberties. From across the political spectrum these groups filed briefs urging the courts to hold the administration accountable for national security abuses. A common theme emanated from this effort: *The Bush administration transgressed the principles of the separation of powers and must be held in check by the courts.*

In one unlikely alliance, the libertarian Cato Institute, the conservative Rutherford Institute, and the liberal People for the American Way joined in an amicus brief in the Second Circuit *Padilla* case "to support the traditional understanding of the separation of powers between the Legislature and Executive Branches."<sup>161</sup> They also argued that Congress's Authorization for Use of Military Force Act did not authorize the executive to detain American citizens on American soil.

Heavy pressure on the courts also came from a group of former federal judges and attorneys who shared "an abiding interest in the independence of the judiciary as a check on the actions of the Executive Branch."<sup>162</sup> This group submitted amicus briefs to the Supreme Court in *Hamdi* and *Padilla* that criticized the Second and Fourth Circuits for abdicating this crucial judicial responsibility. Specifically, the amici asserted that the Fourth Circuit violated the separation of powers doctrine when it immunized "executive actions from judicial scrutiny"<sup>163</sup> by affording "conclusive effect to the two-page hearsay Mobbs Declaration."<sup>164</sup>

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ANNUAL SURVEY AM. L. 295 (2002); Saito, *supra* note 9; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002); Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195 (2002); Cruz, *supra* note 32, at 139; see YAMAMOTO ET. AL., *supra* note 11.

161. Consented-to brief of Amici Curiae the Cato Institute, the Center for National Security Studies, The Constitution Project, The Lawyers Committee for Human Rights, People for the American Way and The Rutherford Institute in Support of Petitioner-Appellee Jose Padilla and Partial Affirmance and Partial Reversal at ix, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (No. 03-2235), available at [http://www.humanrightsfirst.org/us\\_law/padilla\\_no\\_authority.pdf](http://www.humanrightsfirst.org/us_law/padilla_no_authority.pdf) (on file with Law & Contemporary Problems). See Non-Detention Act, 18 U.S.C.A. § 4001(a) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

162. Brief of Amici Curiae Hon Shirley M. Hufstedler, Hon. Nathaniel R. Jones, Hon. William A. Norris, Hon. H. Lee Sarokin, Hon. Herbert J. Stern, Hon. Harold R. Tyler, Jr., R. Scott Greathead, Robert M. Pennoyer, Barbara Paul Robinson, and William D. Zabel in Support of Respondents at \*2, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027), 2004 WL 792210. "The government's position reflects not so much a compelling security interest in detaining "enemy combatants" as it does a desire to detain *anyone* whom it says is an enemy combatant without permitting *any* inquiry into whether the allegation is true. It is a claim reminiscent of the now-discredited World War II decisions that led to thousands of loyal American citizens being deprived of their liberty without opportunity to contest the assumptions that underlay their detention." *Id.* at \*12 (emphasis added).

163. Brief of Amici Curiae Hon. Nathaniel R. Jones, Hon. Abner J. Mikva, Hon. William A. Norris, Hon. H. Lee Sarokin, Hon. Herbert J. Stern, Hon. Harold R. Tyler, Jr., Scott Greathead, Robert M. Pennoyer, and Barbara Paul Robinson in Support of Petitioners at \*8-10, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) 2004 WL 371007 (criticizing the Second Circuit's use of the "some evidence" standard, which "would undermine the unique role of the federal courts and the writ of habeas corpus as the ultimate legal protection against Executive overreaching," *id.* at \*28).

164. *Id.* at 4.

Even more unlikely support came from the military's own lawyers, the Judge Advocate General's Corps, who criticized the government for politically tainted prosecutions and violations of international law. In seeming defiance of an administration that has proclaimed that "you are either with us or you are against us,"<sup>165</sup> five JAG attorneys assigned to defend Guantanamo detainees before the administration's proposed military tribunals filed an amicus brief with the Court.<sup>166</sup> The JAG lawyers characterized "the tribunals as inherently unfair, contrary to international law and susceptible to political influence."<sup>167</sup>

In another extraordinary move, members of the British Parliament echoed this view in their amicus brief to the Supreme Court. The brief, in support of the Guantanamo detainees, recounted the shared historical commitment of the United States and the United Kingdom to a "tripartite separation of powers and a truly independent judiciary."<sup>168</sup> The brief warned that judicial acquiescence to the administration's claim of absolute power over the detainees would legitimate the existence of "a prison for indefinite detention functioning in total secret, under the unchallenged exclusive control of the Executive Branch of the U.S. government."<sup>169</sup>

Most poignantly, an amicus brief filed by Fred Korematsu reminded the Court that "the Government's position is part of a *pattern* whereby the Executive Branch curtails civil liberties much more than necessary during wartime and seeks to insulate the basis for its actions from any judicial scrutiny."<sup>170</sup> The brief recounted six instances in U.S. history in which the Executive reacted "too harshly in circumstances of felt necessity and underestimate[ed] the damage to civil liberties," only to have its actions legitimated by courts employing an uncritical standard of judicial review.<sup>171</sup> Fred Korematsu challenged the Court to learn from the lessons of history and "to protect constitutional liberties when they matter most, rather than belatedly, years after the fact."<sup>172</sup>

165. Remarks Following Discussions With President Jacques Chirac of France and an Exchange With Reporters, 2 PUB. PAPERS 1352 (Nov. 6, 2001).

166. Military Commissions as Amicus Curiae in Support of Neither Party, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334), 2004 WL 96765.

167. *Id.* at 2.

168. Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners at \*16, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334), 2004 WL 96766.

169. *Id.* at 21; *see also* Brief of Janet Reno, et al., Amici Curiae in Support Respondents, *Rumsfeld v. Newman*, 124 S. Ct. 2711 (2004) (No. 03-1027), 2004 WL 782374 (describing the government's broad existing powers to gather intelligence, apprehend terrorists, and secure classified information before calling upon the Court to carefully scrutinize the executive's actions).

170. Brief of Amicus Curiae Fred Korematsu in support of Petitioners at \*2, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334), 2004 WL 103832 (emphasis added).

171. *Id.* at \*4 (describing six examples to "illustrate the nature and magnitude of the challenge: the Alien and Sedition Acts of 1798, the suspension of habeas corpus during the Civil War, the prosecution of dissenters during World War I, the Red Scare of 1919-1920, the internment of 120,000 individuals of Japanese descent during World War II, and the era of loyalty oaths and McCarthyism during the Cold War.")

172. *Id.* at \*4.

### 3. *Public Pressure*

The amicus briefs, along with the writings of critical race scholars, sought directly to influence the courts and the reporting media. Legal and social commentators also sought indirectly to influence the courts by exposing to the public the threats to civil liberties posed by the Bush administration's national security policies. These commentators, providing intellectual grist for community group protests and street marches,<sup>173</sup> employed a variety of media to voice their concerns about administration excesses and its penchant for dissembling about national security, including op-ed essays, articles, books, and internet messages.<sup>174</sup>

For instance, three books by authors from varying political perspectives "share a chilling view of the Bush administration's war on civil liberties."<sup>175</sup> According to reviewer Michael Stern, Nat Hentoff<sup>176</sup> is a "staunch lefty," Philip Heymann<sup>177</sup> a centrist and James Bovard<sup>178</sup> a libertarian.<sup>179</sup> Despite philosophical differences, their "sobering conclusions about the impact of the 'war on terror' on U.S. democracy have three core elements in common."<sup>180</sup> First, all three worry that the administration's realignment of power in the Executive Branch has significantly weakened America's system of checks and balances. Second, each author expresses deep skepticism about the administration's "declaration of a permanent state of emergency."<sup>181</sup> Last, all three object to the administration's persistent efforts to undermine fundamental "democratic values and traditions."<sup>182</sup>

173. See, e.g., Lynette Clemetson, *Threats and Responses: Rally; Thousands Converge in Capital to Protest Plans for War*, N.Y.TIMES, Jan. 19, 2003, at A12.

174. See, e.g., Anita Ramasastry, *Patriot II: The Sequel Why It's Even Scariier Than the First Patriot Act*, FINDLAW'S WRIT, Feb. 17, 2003, at <http://writ.news.findlaw.com/ramasastry/20030217.html> (on file with Law & Contemporary Problems); Anita Ramasastry, *Do Hamdi and Padilla Need Company: Why Attorney General Ashcroft's Plan To Create Internment Camps For Supposed Citizen Combatants Is Shocking And Wrong*, FINDLAW'S WRIT, Aug. 21, 2002, at <http://writ.news.findlaw.com/ramasastry/20020821.html> (on file with Law & Contemporary Problems); John Dean, *Missing Weapons Of Mass Destruction: Is Lying About The Reason For War An Impeachable Offense?*, FINDLAW'S WRIT, Jun. 06, 2003, at <http://writ.news.findlaw.com/dean/20030606.html> (on file with Law & Contemporary Problems).

175. Michael Stern, *Attacked from All Sides*, 2/2004 Am. Law. 59 (2004).

176. NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE* (Seven Stories Press 2003).

177. PHILIP B. HEYMANN, *TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR* (MIT Press 2003).

178. JAMES BOVARD, *TERRORISM AND TYRANNY: TRAMPLING FREEDOM, JUSTICE, AND PEACE TO RID THE WORLD OF EVIL* (Palgrave Macmillan 2003).

179. Stern, *supra* note 175.

180. *Id.*

181. *Id.* (Heymann concludes that the Administration has "carefully exploited the right to use selective enforcement of rarely used statutes and powers to act against a group or activity for purposes largely unconnected with the purposes of the Congress in passing the statute").

182. *Id.*; see also Robert A. Levy, *Citizen Padilla: Dangerous Precedents*, National Review Online, June 6, 2002 available at <http://www.nationalreview.com/comment/comment-levy062402.asp> (on file with Law & Contemporary Problems) (as a senior fellow at the libertarian Cato Institute, warning that legitimating the excesses of the Bush administration will, in effect, empower future and perhaps less well-intentioned administrations with the same overreaching authority).

Perhaps most compelling, John Dean, Republican and former White House counsel, whose truthful testimony broke open the Nixon White House's Watergate cover-up, authored a series of biting critiques. In particular, two of his influential essays revealed the depth and breadth of Bush White House dissembling in justifying the war against Iraq and in outing CIA undercover operative Valerie Plame in retaliation for her spouse's criticism of the President's "Iraq nuclear threat" misrepresentation in his 2003 State of the Union address.<sup>183</sup> Dean characterized the Bush administration's exaggerations and fabrications as exceeding those of the paranoid Nixon administration—all of whose top officials were imprisoned for their Watergate lies. Dean also characterized the Bush administration's dissembling and retaliation on matters of grave national importance "an impeachable offense"—especially when compared to the "sex lies" grounds for the Republican impeachment of then-President Clinton.<sup>184</sup>

### C. The Politics of Judicial Scrutiny of Executive National Security Actions

#### 1. *Lower Courts and the Political Underpinnings of Judicial Decisionmaking*

In the face of wide-ranging challenges to the Bush administration's national security actions, the federal judiciary responded erratically. Most reviewing courts expressed deep skepticism of the administration's early argument advocating for no judicial review at all. These lower federal courts, however, disagreed about the appropriate level—or intensity—of judicial scrutiny and therefore how active the courts should be in holding the administration accountable for its apparent national security abuses.

Federal district court Judge Doumar, a Reagan appointee, articulated a heightened standard of judicial review for enemy combatant cases. As the trial judge in *Hamdi*, Doumar announced that *at a minimum* meaningful judicial review must "determine if the government's classification was determined pursuant to appropriate authority, the screening criteria used to make and maintain that classification is consistent with due process, and the basis of the continued detention serves national security."<sup>185</sup> Doumar concluded that the Mobbs Declaration was insufficient to justify Hamdi's enemy combatant designation and ongoing detention. In particular, the declaration failed "to address the nature and authority of Mr. Mobbs to review and to make declarations on behalf of the Executive regarding Hamdi's classification,"<sup>186</sup> and

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183. DEAN, *supra* note 85; John W. Dean, *Why A Special Prosecutor's Investigation Is Needed To Sort Out the Niger Uranium And Related WMDs Mess*, FINDLAW'S WRIT, July 18, 2003, at <http://writ.news.findlaw.com/dean/20030718.html> (on file with Law & Contemporary Problems); <http://writ.news.findlaw.com/dean/20030718.html>; John W. Dean, *The Bush Administration Adopts a Worse-than-Nixonian Tactic: The Deadly Serious Crime Of Naming CIA Operatives*, FINDLAW'S WRIT, Aug. 15, 2003, at <http://writ.news.findlaw.com/dean/20030815.html> (on file with Law & Contemporary Problems).

184. Dean, *supra* note 174.

185. Cruz, *supra* note 32, at 139 (quoting Judge Doumar's analysis).

186. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 533 (E.D. Va. 2002).

omitted "the screening criteria actually used by the government in its classification decision."<sup>187</sup> Rejecting the deferential judicial role advocated by the administration, Judge Doumar concluded:

The Mobbs Declaration is little more than the government's "say-so" regarding the validity of Hamdi's classification. . . . If the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi in the present circumstances, then it would be abdicating any semblance of the most minimal level of judicial review. If effect, this Court would be acting as little more than a rubber-stamp.<sup>188</sup>

Judge Doumar's approach to heightened scrutiny of the administration's national security claim offers insight into the feasibility and importance of the "four key process tasks" in the "Strategic Blueprint"<sup>189</sup> for "watchful judicial care"—in particular, the judge's critical examination of what was at stake politically and socially in the controversy beyond the narrow legal claims, his careful assessment of the role of the executive during national crisis and the corresponding role of the courts in actually reviewing and not "rubber-stamping" executive actions that appeared to curtail liberties of Americans, and his call for governmental production of bona fide evidence of danger posed by those targeted for indefinite government incarceration.

By contrast, other courts' enemy combatant decisions more closely tracked the administration's "no meaningful review" posture. For example, in *Padilla v. Rumsfeld*, District Judge Mukasey, another Reagan appointee, granted Padilla the right to present facts through counsel to challenge his enemy combatant designation.<sup>190</sup> But, Judge Mukasey then sharply limited Padilla's ability to advocate. Based on the All Writs Act, rather than on the Constitution, Mukasey's ruling "excluded Padilla from using counsel to conduct discovery, cross-examine witnesses, and meaningfully rebut the executive's testimony." Equally important, Mukasey adopted the highly deferential "some evidence standard" of judicial review advanced by the administration. That standard, which observers characterize as "masquerading" for meaningful review,<sup>191</sup> directs the court effectively to ignore facts presented by the detainee and to focus entirely on the government's evidence (for example, the entirely hearsay-based Mobb's Declaration) to determine simply "whether "there is some evidence of Padilla's hostile status" and "whether that evidence has not been entirely mooted by subsequent events."<sup>192</sup>

The politically conservative Fourth Circuit Court of Appeals<sup>193</sup> in *Hamdi* embraced a similar hands-off approach and chastised Judge Doumar for

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187. *Id.* at 534.

188. *Id.* at 535.

189. See Section II, *supra*.

190. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

191. Cruz, *supra* note 32, at 146-47.

192. *Padilla*, 233 F. Supp. 2d at 608.

193. See Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, at 40 (noting that there are twice as many Republicans than Democrats in the Fourth Circuit and that the court has been characterized as "not only conservative but also bold and muscular in its conservatism")

requiring the Bush administration to substantiate the hearsay-based statements in the Mobbs Declaration. To do so, the court observed, "would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review."<sup>194</sup> And although "the privilege of citizenship" entitled Hamdi to judicial review, *no* factual inquiry was needed in the case because "it [was] *undisputed* that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the Executive Branch."<sup>195</sup> Notably, the Fourth Circuit's Judge Motz, in dissent, rejected the majority's determination that hearsay could justify an enemy combatant designation and criticized the court for merely rubberstamping "the Executive's unsupported designation."<sup>196</sup>

The District of Columbia Circuit Court of Appeals also vindicated the administration's enemy combatant policy. Embracing the administration's stance in its entirety in *Al Odah v. United States*, the court held that the detainees could not seek redress in the courts because Guantanamo Bay falls outside the territorial jurisdiction of the United States.<sup>197</sup> "They cannot seek release based on violations of the Constitution *or* treaties *or* federal law" because "the courts *are not open to them*."<sup>198</sup>

In late 2003 the tide changed for the Bush administration when two separate appellate courts, often characterized as liberal-leaning, rebuked the administration's attempts to evade judicial scrutiny. In *Gherebi v. Bush*, the Ninth Circuit's "outspoken liberal," Judge Stephen Reinhardt, observed that "[e]ven in times of national emergency . . . it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike."<sup>199</sup> In stark contrast with the D.C. Circuit's earlier ruling, the Ninth Circuit held that federal courts have jurisdiction over the U.S. naval base in Guantanamo Bay.<sup>200</sup>

The next rebuke came when the Second Circuit held that President Bush had neither inherent constitutional authority nor the Congressional authorization required by the Non-Detention Act of 1971 to detain American Padilla on American soil outside a zone of combat.<sup>201</sup> Rejecting the administration's assertion that the judiciary should refrain from second-guessing military decisions, the court emphasized that "separation of powers are *heightened* when the Commander-in-Chief's powers are exercised in the

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194. *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003).

195. *Id.* at 473.

196. *Hamdi v. Rumsfeld*, 337 F.3d 335, 373 (4th Cir. 2003) (Motz, J., dissenting).

197. *Al Odah, v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

198. *Id.* at 1145 (emphasis added).

199. *Gherebi v. Bush*, 352 F.3d 1278, 1283 (9th Cir. 2003).

200. *Id.*

201. *Padilla v. Rumsfeld*, 352 F.3d 695, n.5 (2d Cir. 2003) (acknowledging the helpfulness of the twelve amicus briefs submitted in support of Padilla and one in support of the administration).

domestic sphere."<sup>202</sup> Although it conceded that "grave national emergencies" may necessitate the curtailment of citizens' liberties, the court reminded the administration that Congress must act in concert with the President to do so.<sup>203</sup> Drawing from amici, the court affirmed the "fundamental role for the courts" in carefully scrutinizing executive actions "where the exercise of Commander-in-Chief powers . . . is challenged on the ground that it collides with the powers assigned by the Constitution to Congress."<sup>204</sup>

## 2. *Supreme Court Declares Commitment to "Meaningful Review" and Then Backs Down*

The lower courts' dissension focused public scrutiny and political organizing on the Supreme Court, including the plethora of amicus briefs calling on the Court to scrutinize the administration's unprecedented enemy combatant policy. Also, legal, social, and political commentators critical of the administration's curtailment of civil liberties intensified their efforts to educate the public in journals, op-ed pieces, and newspaper editorials; several of the lower courts' "conservative" decisions gave critics a reason to redouble their efforts. In response, administration backers mounted a fierce public education campaign directed at the Court's conservative majority to support the administration's actions and its position on "no judicial review."

## 3. *Padilla*

In June 2004, the Court sidestepped Padilla's constitutional claims, which had been viewed as "the most compelling challenge to the Bush administration's aggressive tactics."<sup>205</sup> The Court avoided ruling on the merits by finding Secretary of Defense Rumsfeld an improper respondent and the Southern District of New York the wrong jurisdiction.<sup>206</sup>

## 4. *Hamdi*

The Court's *Hamdi* decision reflected colliding political currents. At the outset of the majority opinion, Justice O'Connor highlighted the importance of Hamdi's "meaningful opportunity to challenge the facts."

[A]lthough Congress authorized the detention of combatants in the narrow circumstances alleged here, *due process demands* that a citizen held in the United States as an enemy combatant be given a *meaningful opportunity to contest the factual basis for that detention* before a neutral decision maker.<sup>207</sup>

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202. *Id.* at 713 (emphasis added).

203. *Id.* at 714.

204. *Id.* at 713 (clarifying its determination by stating that "when the executive acts, *even in the conduct of war*, in the face of apparent congressional disapproval, challenges to his authority must be examined and resolved by the Article III courts").

205. John Riley, *Why Did the Court Duck "Enemy Combatant" Padilla's Case?*, SEATTLE TIMES, July 6, 2004, at A3.

206. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

207. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2634 (2004) (emphasis added).

Consistent with this declaration, O'Connor expressed the Court's commitment to resolving the dispute only after "a careful examination both of the writ of habeas corpus . . . and of the Due Process Clause."<sup>208</sup> After careful examination the majority rejected the administration's argument that the circumstances of Hamdi's capture were "undisputed."

The majority next considered the President's argument in favor of the highly deferential "some evidence" standard.<sup>209</sup> The majority first expressed its agreement with numerous amici who asserted that "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real." The Court acknowledged the lessons of "history and common sense," namely "that an unchecked system of detention carries the potential to become a means for oppression and abuse."<sup>210</sup> Most significantly, the majority opinion indicated that the Court, unlike the Fourth Circuit, would not embrace the administration's claims of unfettered authority.

It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.<sup>211</sup>

In the end, however, and in stark contrast to the tone of most of O'Connor's opinion, the Court backed down. Although acknowledging Hamdi's right to challenge the "facts" in the Mobbs Declaration, the majority then announced that "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."<sup>212</sup> Sharply undermining the majority's express commitment to "meaningful review," Justice O'Connor offered a glimpse of what the "tailored" procedure for enemy combatants might look like: acceptance of unreliable hearsay and a presumption in favor of the government's evidence.

Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.<sup>213</sup>

O'Connor also opened the door for "appropriately authorized and properly constituted military tribunal(s)" to serve as the "neutral decision-maker"<sup>214</sup>—notwithstanding the protestation of the detainees' military lawyers that those

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208. *Id.* at 2644.

209. *See id.* at 2645 (concluding that "[u]nder this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one").

210. *Id.* at 2647.

211. *Id.* at 2648.

212. *Hamdi v. Rumsfeld*, 124 S. Ct. at 2649.

213. *Id.*

214. *Id.* at 2651.

tribunals would be inherently unfair and politically-influenced. In effect, despite its earlier rhetoric about careful scrutiny, the Court's opinion appeared to set the stage for largely deferential review.

### 5. Rasul

In *Rasul v. Bush*, the Court rejected the administration's "no judicial review at all" position—"federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."<sup>215</sup> The Court thus affirmed the importance of judicial scrutiny of alleged executive abuse of national security powers. The Court left unstated, however, the judicial standards for reviewing administration actions. That silence spoke volumes—at least to the administration.

On remand in *Rasul*, in light of Justice O'Connor's language in *Hamdi* limiting the government's burden of proof and citing the possibility of military tribunals, the Department of Defense quickly established "Combatant Status Review Tribunals" as the forum for detainees.<sup>216</sup> These tribunals implement the limited review procedures established before the Court's decision—a process harshly criticized by human rights groups because the hearings are held in secret and the detainees are forbidden access to their own counsel and have no right to a neutral judge.<sup>217</sup> Rather, detainees are to be helped by government-selected "personal representatives," who are not lawyers and who will not be bound by confidentiality precepts. Moreover, the detainees can use only unclassified information in defense and will be judged by three military officers.<sup>218</sup> Critics charged that this administration's review policy for Guantanamo detainees was "just another attempt to keep Guantanamo a lawless enclave."

### 6. In Sum

At first glance, the Court's apparent back-stepping on judicial review echoes its approach sixty years ago in *Korematsu*—first pronouncing heightened judicial scrutiny of government restrictions of fundamental liberties and then, in application, signaling deference to the government's unsupported, or possibly

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215. *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004).

216. *Reporters Offered Look Inside Combatant Status Review Tribunals*, Department of Defense Documents, 2004 WL 65724220, Aug. 29, 2004.

217. Vanessa Blum, *The Other Guantanamo Terror Hearings—Thanks to the Supreme Court, Hundreds of Detainees Have Chance to Contest Captivity*, LEGAL TIMES Vol. 27, No. 36, Sept. 2, 2004, at 1 (citing Michael Ratner of the Center of Constitutional Rights as describing the process as "nasty and dishonest"); see also Adam Liptak, *Tribunals Rule 4 Rightly Detained; Guantanamo Camp Hearings Criticized*, PITTSBURGH POST GAZETTE, Aug. 14, 2004, at A5 (describing the Combat Status Review Tribunals and the constitutional issues they create); John Hendren, *Court Ruling Spurs Review of Detainees; The Pentagon Seeks to Ensure Due Process for Prisoners at Guantanamo Bay*, GRAND RAPIDS PRESS, July 8, 2004, at A4 (citing concerns raised by Amnesty International and the Center for Constitutional Rights).

218. See *supra* note 216.

even falsified, claim of national security.<sup>219</sup> Of course, the setting now differs markedly from the circumstances of the legal challenges to the Japanese American internment. The indefinite detention of two citizens and 600 "aliens" ostensibly apprehended in Afghanistan's battlefields can be compared only mildly to the forced dislocation of 120,000 mostly American citizens from their homes on the West Coast and their indefinite incarceration in desolate in-land internment prisons. And today, many civil liberties groups are organized and active. The vehement and widespread public outcry against the administration's excesses, and against racial discrimination, distinguishes today's national security setting.

Equally important, the United States now has the original *Korematsu* case—its own national security "civil liberties disaster"—and the *Korematsu coram nobis* case revelations of executive national security lies to learn from. Indeed, much of the present-day critical legal advocacy draws on those lessons and on Justice Jackson's "loaded weapon" warning.

Deeper examination, though, reveals four salient common points, then and now. The first commonality is that both specific legal disputes (internment then, enemy combatant detentions now) are part of a much larger picture of government and public vilification of unpopular groups (systematic hostile discrimination against Asian Americans then, harsh treatment of Arabs and Muslims in America now)<sup>220</sup> during times of national fear (World War II, War on Terror). The second is the tendency of the executive to deliberately dissemble to the courts about its national security abuses, particularly when those abuses involve the rights of members of unpopular groups. The third common point is the courts' inclination to defer to the executive during times of national stress unless the public culture demands heightened judicial scrutiny to hold the administration accountable. The final commonality is the threat to democracy and the Constitution posed by the combination of Executive national security lies and deferential courts. The salience of this threat, the imperative and illusive nature of this public demand for accountability, and the courts' responses, form the heart of a discussion of a rough "strategic blueprint for national security accountability."

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219. See Eric K. Yamamoto, *Korematsu Revisited: Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review—Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

220. See YAMAMOTO ET AL, *supra* note 11, at 32-40 (describing the public and legal vilification of Asian Americans as the "yellow peril" from the late 1800s through World War II).

## VI

EXECUTIVE DISSEMBLING, THE COURTS,  
AND A PROPOSED "BLUEPRINT FOR STRATEGIC ACTION"

## A. National Security Lies and the Case For Heightened Judicial Scrutiny

Sixty years ago, after fierce internal skirmishing, the U.S. Justice Department lied to the Supreme Court about the military necessity basis for the Japanese American internment. As revealed by the *Korematsu* and *Hirabayashi coram nobis* litigation, officials at the highest levels of the War and Justice Departments collaborated to deliberately mislead the Court about the "facts" of national security.<sup>221</sup>

As the Supreme Court entertained the *Korematsu* appeal in 1943, the Justice Department prepared to ask the high court to take "judicial notice" of General DeWitt's Final Report<sup>222</sup> as the sole factual basis of the government's case on necessity.<sup>223</sup> The Final Report stated that disloyal West Coast Japanese Americans had committed espionage and sabotage, that there had been insufficient time to sort out the loyal from the disloyal, and that therefore all Japanese Americans had to be incarcerated indefinitely (without charges, hearing or access to counsel).<sup>224</sup> Significantly, the Final Report had not been submitted to the trial court and DeWitt had not been subjected to cross-examination.<sup>225</sup> According to evidence rules, the Supreme Court could only take judicial notice of the Final Report on appeal if its "facts" were "beyond dispute." In essence, by requesting judicial notice of the Final Report, the Justice Department was asking the Court to "just trust the executive." And the Court did.

But, as the *coram nobis* litigation revealed, General DeWitt, who issued the internment orders, fabricated key factual portions of his report and, at the demand of the Justice Department, altered other sections to completely hide the racist underpinnings of the internment and instead to support the government's planned argument of military urgency.<sup>226</sup> Contrary to the Final Report's accounts, there had been no espionage or sabotage by Japanese Americans. DeWitt had been informed of this unequivocally by the FBI, FCC and Office of Naval Intelligence (ONI).<sup>227</sup>

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221. *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591, 603-04 (9th Cir. 1987).

222. Office of the Commanding General Presidio of San Francisco, Final Report: Japanese Evacuation From the West Coast, 1942, available at [http://www.wwiihistoryclass.com/civilrights/text/government\\_internment\\_docs/1942\\_pro-evacuation.pdf](http://www.wwiihistoryclass.com/civilrights/text/government_internment_docs/1942_pro-evacuation.pdf) (on file with Law & Contemporary Problems).

223. See Yamamoto, *supra* note 219, at 18.

224. See *Id.* at 10.

225. *Id.*

226. *Hirabayashi v. United States*, 828 F.2d 591, 598 (9th Cir. 1987).

227. *Korematsu v. United States*, 584 F. Supp. 1406, 1419 (N.D. Cal. 1984). Burling wrote to Solicitor General Fahy adamantly stating that General DeWitt knew his Final Report recited key factual falsehoods. "[T]he most important statements of fact advanced by General DeWitt to justify the evacuation and detention were incorrect, and furthermore that General DeWitt had cause to know,

In addition to these "intentional falsehoods"—so characterized by the Justice Department attorney responsible for drafting the Department's brief to the Court in *Korematsu*<sup>228</sup>—DeWitt also altered the most important section of the original version of his Final Report concerning the internment's rationale. The first completed and bound version of DeWitt's Final Report stated that the internment was necessary not because "there was insufficient time" to hold individual loyalty hearings. It was necessary because racial affinities and cultural traits meant that no one could discern the loyal Japanese Americans from the disloyal—"it was impossible to separate the sheep from the goats."<sup>229</sup>

Recognizing that DeWitt's actual racist rationale would definitively undermine the government's legal position, the Justice Department fought DeWitt to get him to change his completed report.<sup>230</sup> Under protest, DeWitt relented. The War Department recalled all the distributed copies of the original Final Report. DeWitt then altered it dramatically to support the government's argument that espionage combined with "insufficiency of time" justified the mass incarceration—turning inside out DeWitt's actual rationale.<sup>231</sup> (DeWitt then, as ordered, destroyed the original versions of his Final Report—except one, and related correspondence, which formed part of the foundation for the *coram nobis* cases).

Equally important, the Justice Department suppressed vehement protestations by the FBI's J. Edgar Hoover and FCC head James Fly that the Final Report's statements about Japanese American espionage and sabotage were false and that DeWitt knew them to be false at the time of his internment orders and at the time he signed his report.<sup>232</sup> The Justice Department also hid from Supreme Court view the official report of the Office and Naval Intelligence. Designated by President Roosevelt as the lead intelligence agency on the West Coast "Japanese Problem," the ONI's two-year study concluded in early 1942 that there were no grounds for a mass racial internment and that there was no reason to treat Japanese Americans differently from German or Italian Americans. DeWitt ignored the ONI's report in ordering the internment and omitted reference to it in his Final Report.<sup>233</sup>

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and in all probability did know, that they were incorrect at the time he embodied them in his final report." Memorandum from Burling to Fahy, April 13, 1944, *reprinted in* PETER IRONS, *JUSTICE AT WAR* 285 (1993).

228. *Korematsu*, 584 F. Supp. at 1418.

229. *Hirabayashi*, 828 F.2d at 598. *See also* IRONS, *supra* note 227, at 208.

230. *Hirabayashi*, 828 F.2d at 598.

231. *Id.* at 598. *See also* IRONS, *supra* note 227, at 210.

232. *See* Yamamoto, *supra* note 219, at 15-16.

233. *Id.* at 16. Indeed, in 1983, after a thorough two-year investigation, the congressionally established Commission on Wartime Relocation and Internment of Civilians determined that there had no military necessity and that the causes of the internment were "race prejudice, war hysteria and a failure of political leadership." COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* 18 (1982).

Because of these pivotal "intentional falsehoods,"<sup>234</sup> the two Justice Department attorneys drafting the *Korematsu* brief launched an internal war to prevent the Justice Department from submitting the Final Report to the Court or to alert the Court to DeWitt's dissembling on crucial facts. Through a slew of memoranda the attorneys reached the Department's top echelons, including the Attorney General and Solicitor General, arguing that it was unethical to lie to the Court and wrong to continue the racial incarceration of 100,000 innocent people.<sup>235</sup>

Politics intervened. Abandoning the DeWitt Final Report would mean no "factual" basis to support the government's claim of necessity—a political disaster. After intense in-fighting, high level Justice Department attorneys prevailed. Without acknowledging the Report's fabrications, the Department submitted DeWitt's altered Final Report to the Court. During oral argument Justice Jackson asked the Solicitor General about rumors of key falsehoods in the DeWitt Report—whether the "facts" recited in it were contested and therefore not subject to judicial notice by the Court. The Solicitor General replied that the Report proved the basis for the internment and that "no

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234. In her book *In Defense of Internment: The Case for "Racial Profiling" in World War II and the War on Terror*, Michelle Malkin does not explain these extraordinary falsehoods advocated by the government, nor the long dark history of anti-Asian public sentiment and "yellow peril" discriminatory laws on the West Coast that laid the foundation for the internment as a "popular" political act. Instead, she defends the internment by referring to a handful (among thousands) of Japanese intelligence "Magic" cables that neither General DeWitt nor the War or Justice Departments thought were significant enough to cite to the Supreme Court in making the legal case for the internment. The "Magic cables" were intercepted messages sent from Japanese diplomats to the Japanese consulate in America. Few out of thousands of messages indicated Japan's intent to recruit Japanese Americans as part of an espionage network. None indicated success at that recruitment. See MICHELLE MALKIN, *IN DEFENSE OF INTERNMENT: THE CASE FOR RACIAL PROFILING IN WORLD WAR II AND THE WAR ON TERROR* (2004). Malkin nevertheless argues what neither the military nor the Justice Department argued, and what no extant government legal documents advocated—that these few and ambiguous cables justified the internment of an entire race of Americans on the West Coast. Michelle Malkin, *Rethinking the Wisdom of Japanese-American Internment*, HONOLULU STAR-BULLETIN, Aug. 9, 2004, at A11 available at <http://starbulletin.com/2004/08/09/editorial/commentary.html> (on file with Law & Contemporary Problems).

Malkin's purpose in attempting to validate the World War II internment appears to be to legitimate racial profiling of Arabs and Muslims in America today. She advocates profiling on the basis of race, ethnicity, religion or nationality, arguing that "inconvenience" to those detained is preferable to second terrorist attack. Michelle Malkin, *Racial Profiling: A Matter of Survival*, USATODAY, Aug. 17, 2004, at A13.

The Ninth Circuit considered and soundly rejected the Magic cables argument in the *Hirabayashi coram nobis* case. See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). Critics also point out that Malkin's arguments are based on a distortion of history. She ignores "the disparate treatment" between demonstrably disloyal European descendants who "received individual hearings," and Japanese Americans who were interned "without due process of law." See David Forman, *Rethinking the Wisdom of Japanese American Internment*, HONOLULU STAR-BULLETIN, Aug. 9, 2004, at A11, available at <http://starbulletin.com/2004/08/09/editorial/commentary.html> (on file with Law & Contemporary Problems). Most important, according to Fred Korematsu, Malkin's version fails to address the reality and "dangers of racial and ethnic scapegoating" during times of national fear. Fred Korematsu, *Do We Really Need to Relearn the Lessons of Japanese American Internment?*, S.F. CHRON., Sept. 16, 2004, at B9.

235. *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984). *Hirabayashi v. United States*, 828 F.2d 591, 602 (9th Cir. 1987).

responsible person in government had ever taken a contrary position"<sup>236</sup>—an outright national security lie by the highest ranking attorney for the United States.

In light of the falsified DeWitt "evidence" and the swirling rumors about Justice Department dissembling, the Supreme Court could have exercised "watchful care" over constitutional liberties and called the executive to account—that is, to come forward with bona fide evidence of necessity. Instead, despite the *Korematsu* opinion's language of strict scrutiny, the Court chose to defer to the administration. Evincing extreme deference, cast in a double negative, the Court declared that it "could not reject as unfounded" the government's national security claim.<sup>237</sup>

As a prelude to his "loaded weapon" warning, Justice Jackson excoriated the majority for its blind acceptance of what turned out to be executive lies:

How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. . . . So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.<sup>238</sup>

The national security-civil liberties internment debacle stands amid a history of other "civil liberties disasters" during times of national stress.<sup>239</sup> That long and deep history makes a compelling case for heightened judicial scrutiny whenever

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236. See Yamamoto, *supra* note 219, at 16.

237. *Korematsu v. U.S.*, 323 U.S. 214, 218 (1944).

238. *Id.* at 245 (Jackson, J., dissenting).

239. See generally Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571 (2002). The Alien and Sedition Acts drafted in 1798 empowered the President to deport any non-citizen he judged to be dangerous to the peace and safety of the United States. See JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NATION IN CRISIS* (Yale Univ. Press 1993). The Act accorded individuals detained no right to a hearing, no right to present evidence and no right to judicial review.

During the Civil War, Lincoln suspended the writ of *habeas corpus* on eight separate occasions. The country was at war with itself, and security in the north was perceivably necessary. A year after the war ended, the Supreme Court held, in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that Lincoln overstepped his constitutional authority and could not suspend the writ of *habeas corpus* even during a time of war. The Court dismissed the Government's argument that during times of war, the Executive Branch has a right to act as the, "supreme legislator, supreme judge, and supreme executive." *Id.* at 14.

The Espionage Act of 1917 was enacted by the Congress and molded by prosecutors and federal judges to prohibit subversive opposition. The nation experienced widespread opposition and dissention regarding World War I and the draft. President Wilson had no tolerance for what he called disloyalty and believed that those disloyal "had sacrificed their right to civil liberties." PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 53 (1979). The government prosecuted more than 2,000 dissenters who opposed the war and the draft. The non-tolerance for dissenters led to the creation of the Sedition Act of 1918. The Act declared it unlawful for anyone to circulate material intended to create disdain for the government's policies. See *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919) (all upholding convictions stemming from the Sedition Act). The Congress ultimately repealed the Sedition Act of 1918. The Supreme Court, during the next few decades and long after the detention, reversed every one of its decisions.

the government claims "national security" as the justification for curtailing fundamental liberties.<sup>240</sup>

### B. "Strategic Blueprint" Revisited

In light of the *Korematsu* history of White House dissembling on national security matters, and with illumination from the pre-9/11 Wen Ho Lee prosecution and the post-9/11 enemy combatant detention cases, this essay returns to its larger theme: What impels the courts in controversial cases to carry out their constitutional duties—to hold the executive accountable for oftentimes politically popular excesses? More particularly, what impels courts ruling on a national security-civil liberties challenges sometimes to choose "heightened scrutiny" of the executive's national security claim, thereby requiring the government to seriously account for its actions, rather than to choose (as is more often the case) "minimal scrutiny," thereby deferring to the government's explanation without real proof?

As revealed by the enemy combatant cases, and contrary to conventional teaching, the crucial judicial choice between heightened or minimal scrutiny is not a neutral, politics-free aspect of the legal process. As mentioned at the outset, that choice is influenced only in part by traditional yet malleable legal methods. Often the tipping point in a court's selection of heightened scrutiny in a controversial case comes from the dynamic mix of critical legal advocacy and organized public pressure. That critical advocacy and public pressure are influential when they combine to create in the public culture a compelling sense that it must be the courts that exercise "watchful care" over our liberties during times of national distress.

More specifically, this "compelling sense in the public culture" aims to press the court handling a controversial national security case to exercise vigilance by undertaking four process tasks—tasks separate from rendering judgment on the specific legal claims in the case. The first is for the court to employ tools of critical legal inquiry to unearth and then explain what is really going on in the controversy and to articulate what is at stake politically and socially. The second and related task is for the court to acknowledge that sometimes a presidential administration distorts information and even lies to unduly expand its power and to shield national security abuses from public view. The third task is for the court to recognize that traditional legal analysis, often largely devoid of context and visible value judgments, does not itself dictate a politics-

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240. I advanced this argument and proposed a method of judicial implementation shortly after the *coram nobis* cases in 1986. See Yamamoto, *supra* note 219, at 41-43 (proposing that, "[e]xcept as to actions under civilly[ ]declared martial law, the standard of judicial review of government restrictions of civil liberties of Americans is not altered or attenuated by the government's contention that 'military necessity' or 'national security' justifies the challenged restrictions.") I also predicted then that during the next national security crisis the government would again tell national security lies and simultaneously pressure the courts to defer and "just trust the executive." The remainder of this essay does not replay the jurisprudential argument for heightened judicial scrutiny. Rather, it addresses the corollary Realpolitik question of implementation.

free, neutral result. The court must examine and illuminate social value judgments, philosophical commitments, political concerns, as well as perceptions of the government's role in the immediate controversy.

In this light, the fourth task is for the court to carefully and openly scrutinize executive actions with dual goals in mind: to afford the executive broad leeway in most of its effort to protect the nation's people, and simultaneously to call the executive to account publicly for apparent transgressions. And, as Judge Doumars observed in *Hamdi* and as the Second Circuit echoed in *Padilla*, when those transgressions curtail fundamental liberties under the possibly false mantle of national security, the call for an accounting requires the executive to proffer bona fide evidence of the danger posed by those targeted and the appropriateness of the government's restrictions. Genuine secrets, of course, can be handled discreetly—for example, through in-camera review and under seal. But an executive's bald claims of "confidentiality" or "security risk" should not trigger a hands-off judicial posture.

### C. Wen Ho Lee: Post-Release Civil Suit to Unseal Records on Racial Prosecution

The Wen Ho Lee case sheds light on the salutary impact of public pressure—particularly in the form of critical legal advocacy and grassroots efforts—on the courts' willingness to call the executive to account for apparent national security lies. At the same time, the case reveals that when the public spotlight dims the courts might be less willing or able to hold an administration's feet to the fire and might instead retreat into the realm of judicial deference. The post-plea bargain civil suit to unseal government records in Dr. Lee's case in light of his selective racial prosecution charge is illustrative of this latter dynamic.

After Dr. Lee's release and Judge Parker's apology, Chinese for Affirmative Action (CAA)<sup>241</sup> demanded the "truth" about Justice Department racial profiling. It filed an unusual civil suit asking the federal court to unseal prosecution records, arguing that "CAA and the public have a constitutional and common law right of access to pretrial documents filed in a criminal case." The CAA aptly framed the importance of public access in terms of judicial accountability.

Public access promotes trustworthiness in the judicial process, helps curb abuses, and provides the public with a more complete understanding of the judicial system, including a better perception of its fairness. . . . Public access is especially important

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241. CAA is an Asian American civil rights service organization committed to multiracial democracy. Memorandum Brief In Support Of Motion To Intervene And Unseal, Or, In The Alternative, Petition for Writ of Mandamus Compelling Unsealing of Court Records at 2, June 18, 2001, (No. CR 99-1417 JP) available at [http://www.caasf.org/WHL/w\\_motion.pdf](http://www.caasf.org/WHL/w_motion.pdf) (on file with Law & Contemporary Problems). Dina Shek contributed substantially to the research and writing on the CAA suit.

here where secrecy and unaccountability caused the Court itself to be "led astray" by the Executive Branch.<sup>242</sup>

The Justice Department responded that national security would be threatened by unsealing the documents. To maintain the judicial sealing, the CAA countered, a court must "find that there is a substantial probability that national security will in fact be harmed absent sealing."<sup>243</sup> The CAA argued that this standard for sealing was especially appropriate because Judge Parker already had indicated that the Justice Department "led him astray" and because "the Executive Branch continues to exploit its near-total control over the information about Dr. Lee's case."<sup>244</sup> The CAA also emphasized the danger of extreme judicial deference to the Executive in times of national crisis: "History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions."<sup>245</sup>

Op-ed pieces supported the CAA, calling for a public investigation of the Justice Department through the court's power to call the government to account.<sup>246</sup> In an extraordinary move, Judge Parker in the civil suit ordered the government to produce documents relating to Dr. Lee's selective racial prosecution charge—a victory for Dr. Lee and the CAA, a victory for those pushing for administration accountability and a judiciary exercising "watchful care" over citizens' liberties; but a Pyrrhic victory, nevertheless. Under the court's order, the Justice Department selected the documents to be disclosed. It also determined which portions of disclosed documents would be redacted. Might the Justice Department have had an incentive and the cultural space to withhold crucial government documents showing a lack of "necessity"—just as the Justice Department lawyers did sixty years ago in the Supreme Court appeal in *Korematsu*? And if they did, how would Dr. Lee, or the court, know? As revealed by the *Korematsu* and *Hirabayashi coram nobis* litigation in the 1980s, it took forty years to discover the government documents showing that General DeWitt, who issued the internment orders, and the Justice Department had deliberately falsified the facts of "necessity" to the Supreme Court.

In the CAA suit, the Justice Department eventually selected and produced 771 pages of documents. The documents included former head investigator Vrooman's previously disclosed declaration charging unwarranted ethnic profiling in the Lee investigation. None of the other documents were the

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242. *Id.* at 5.

243. *Id.* at 16.

244. Reply To Government's Response to Motion to Intervene and Unseal Or, In The Alternative, Petition for Writ of Mandamus Compelling Unsealing of Court Records, at 5, August 17, 2001, (No. CR 99-1417 JP) available at [http://www.caasf.org/WHL/w\\_motion-reply.pdf](http://www.caasf.org/WHL/w_motion-reply.pdf) (on file with Law & Contemporary Problems).

245. CAA Memorandum Brief In Support Of Motion To Intervene And Unseal, Or, In The Alternative, Petition for Writ of Mandamus Compelling Unsealing of Court Records, *supra* note 241, at 13, June 18, 2001, (No. CR 99-1417 JP) (citing *In re* Washington Post, 807 F.2d 383, 391 (4th Cir. 1986)) available at [http://www.caasf.org/WHL/w\\_motion.pdf](http://www.caasf.org/WHL/w_motion.pdf) (on file with Law & Contemporary Problems)

246. See Thomas W. Joo, *What, If Not Race, Tagged Lee?*, L.A. TIMES, Aug. 15, 2001, at B13; Thomas W. Joo, *A Vanishing Security Case*, N.Y. TIMES, Sept. 12, 2000, at A26.

smoking gun on racial profiling that the CAA was searching for. The Justice Department maintained that it complied with the judge's order. Neither the CAA nor Judge Parker had enough information to challenge that assertion. Both ultimately deferred. By this time public organizing and media attention waned, and the public steam for pressing forward evaporated. If any smoking gun documents were buried in the government's files, as there had been in *Korematsu* and *Hirabayashi*, they remained hidden.

Both the CAA and the government spun the document disclosure as victories. Dr. Lee's supporters continued to celebrate his release and turned efforts toward obtaining a presidential pardon. The government continued to imply Dr. Lee's guilt and to deny improper racial profiling.<sup>247</sup> In the end, Dr. Lee won his freedom and a degree of public vindication. But with diminishing media and public interest, administration accountability for its national security dissembling sank below the public radar. And despite whistle-blowing by former insiders Vrooman and Washington and Judge Parker's disclosure order, government investigators and lawyers stood firm and avoided a full public accounting.

#### D. *Hamdi* and *Padilla* and the Role of the Media in Judicial Accountability

##### 1. *Nonpartisan Challenges and Internal White House Dissent*

The complex mix of advocacy, media, and the courts also played out at varying points in the enemy combatant cases.<sup>248</sup> The mainstream media did report on the Patriot Act and the enemy combatant cases. But, its coverage focused far less on exposing what was really going on than on articulating the Bush administration's positions on its war on terror. Significantly, the media initially failed to articulate the political and social implications of the administration's policies.<sup>249</sup>

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247. See Washington Post, *Report Absolves Government of Racism in Lee Case*, S.F. CHRON., Aug. 8, 2001, at A3; Robert Scheer, *The Persecution of Wen Ho Lee, Redux*, THE NATION, (Aug. 7, 2000), available at <http://www.thenation.com/doc.mhtml?i=20010806&s=20010807> (on file with Law & Contemporary Problems); see also CAA Statement Regarding U.S. Department of Justice, "Bellows Report," at [www.caasf.org/WHL/pr\\_whlbells081301.html](http://www.caasf.org/WHL/pr_whlbells081301.html) (on file with Law & Contemporary Problems). The Justice Department leaked the Bellows Report in August, 2001. The internal Justice Department report was completed in May of 2000, while Dr. Lee's prosecution continued. The report concluded that there was "no evidence of racial bias." That conclusion is highly suspect. The Bellows Report ignored the crucial testimony of Vrooman and Washington, and its conclusions were drawn months before Judge Parker's order compelling government disclosure of materials related to selective prosecution.

248. See Section V, *supra*, in which several others are discussed.

249. See Jacques Steinberg, *Washington Post Rethinks Its Coverage of War Debate*, N.Y. TIMES, Aug. 13, 2004, at A5. The article discusses the reassessment by *The Washington Post*, *The New York Times*, and *The New Republic* of their coverage of the Iraq war, noting that in May 2004, the *New York Times*' "editors acknowledged that in the run-up to war they had not been skeptical enough about articles that depended 'at least in part on information from a circle of Iraqi informants, defectors and exiles bent on 'regime change' in Iraq whose credibility has come under increasing public debate.'" Lori Baker contributed significantly to this section's research and writing on the role of the media. *Id.*

The mainstream media also failed to investigate and expose "in the months after 9/11 [that] there were fierce debates—and even shouting matches—*inside the White House* over the treatment of Americans with suspected al Qaeda ties."<sup>250</sup> The face-off pitted administration hardliners such as Vice President Cheney, Defense Secretary Rumsfeld, Cheney's chief counsel David Addington, and deputy White House Counsel Flanagan against Attorney General Ashcroft, Solicitor General Olson, and other senior administration lawyers. The former argued that in wartime the President's power to detain enemy combatants to protect the country was virtually limitless. The latter took a more pragmatic approach, urging the President to consider public opinion and the policy's likelihood of withstanding judicial review.<sup>251</sup>

In light of the Bush administration's efforts to market itself as resolute and united, this internal dissonance should have been big news. Alternative media reported on the controversy.<sup>252</sup> The mainstream media laid low. And a fearful public remained generally supportive of the administration's policy without crucial information—an example of what David Brock, former neoconservative journalist, terms the established media's "censoring of the news" in shaping national political understandings.<sup>253</sup>

## 2. *Media Coverage of the War on Terror Seeps Into the Courtroom*

Media reporting and commentary affects public political perceptions. But does media reporting, along with critical legal advocacy, help shape a public culture that affects judicial scrutiny of a controversy? Carefully crafted media events during the heat of Supreme Court consideration of the enemy combatant cases suggest this is so—or at least that political decisionmakers and lawyers believe it to be so. In particular, as also suggested by the "Strategic Blueprint," these events support the perception that courts are at times influenced by media coverage of the war on terror.

After oral argument in the enemy combatant cases appeared to go poorly for the Justice Department, and days before the Court's anticipated ruling, the administration suddenly declassified ostensibly incriminating statements made

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250. Michael Isikoff and Daniel Klaidman, *The Road to the Brig*, NEWSWEEK, April 26, 2004, at 26 (emphasis added).

251. *Id.* Also skeptical of the hardliners' approach were two former top Justice Department officials. Viet Dinh, former head of the department's Office of Legal Policy and a chief architect of the USA Patriot Act, and Michael Chertoff, former head of the department's criminal division, criticized the administration's ad hoc approach to designating enemy combatants. Both warned that the administration's approach would be "unsustainable" unless a framework was established for "determining when, why and for how long someone may be detained as an enemy combatant, and what judicial review should be available." Richard B. Schmitt, *Patriot Act Author Has Concerns; Detaining citizens as "enemy combatants"—a policy not spelled out in the act—is flawed, the legal scholar says.*, L.A. TIMES, Nov. 30, 2003, at A1.

252. See, e.g., THE NATION (reported extensively on the controversy).

253. BROCK, *supra* note 60, at 12 (describing generally the mainstream media's "censoring of the news" to shape national conversations).

by Padilla—statements not part of the court record subject to formal rebuttal.<sup>254</sup> A fusillade of criticism followed.<sup>255</sup>

Deputy Attorney General James Comey adamantly denied that the administration was trying to influence Supreme Court deliberations.<sup>256</sup> Legal commentators thought otherwise, indicating that this denial was another White House lie.<sup>257</sup> Most important in terms of the "Strategic Blueprint," those commentators' statements implicitly recognized that the judges pay attention to media reports and that the legal community believes that judges in controversial cases can be subtly influenced by trials in the court of public opinion.

The government disclosures this week were not compelled by any court, statute or deadline. It was purely a political decision that the president would benefit by selectively releasing incriminating statements allegedly made by a citizen held incommunicado.<sup>258</sup>

This Hail Mary press conference was directed . . . particularly to Associate Justice Sandra Day O'Connor who, during oral arguments, was the most conflicted of the justices in the closely divided court.<sup>259</sup>

This was a shameful effort to sway the Supreme Court.<sup>260</sup>

The justices don't live in solitary confinement, and this will certainly have an impact on them. . . .<sup>261</sup>

While the Supreme Court heard oral argument in the enemy combatant cases, stories of American forces abusing Iraqi prisoners saturated the worldwide media. Notably, during argument, Justices' questions linked the torture scandal to the central issue in the enemy combatant cases—who is to hold the Executive Branch accountable for abuses. They queried the government's lawyers about what "would be a check against torture."<sup>262</sup>

254. See Isikoff et al., *supra* note 151 ("A newly declassified Pentagon report on Padilla—released by Deputy Attorney General James Comey—was in part intended to influence public thinking about his case and establish more clearly that Padilla was a dangerous Al Qaeda operative who intended to inflict harm on innocent civilians.")

255. See Jonathan Turley, *You Have Rights—If Bush Says You Do*, L.A. TIMES, June, 3, 2004, at B11; Hentoff, *supra* note 152; Frank Davies, *Prisoner Abuse May Influence Judges' Ruling on Detainees*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, May 14, 2004 (citing Eugene Fidell, director of the non-partisan National Institute of Military Justice); see also Isikoff et al., *supra* note 151.

256. See Jess Bravin and Avery Johnson, *Bush Discloses Data Aimed At Justifying Holding Padilla*, WALL ST. J., June 2, 2004, at B8. ("Mr. Comey said the timing of the announcement, near the pending Supreme Court ruling, was a coincidence.")

257. See Turley, *supra* note 255; Editorial, *Skirting the Constitution*, ST. LOUIS POST DISPATCH, June 6, 2004, available at 2004 WL 81884856.

258. Turley, *supra* note 255.

259. Hentoff, *supra* note 152.

260. *Id.* (quoting statements made by Fox News senior judicial analyst, Judge Andrew Napolitano to Bill O'Reilly).

261. Davies, *supra* note 255 (citing Eugene Fidell, director of the non-partisan National Institute of Military Justice).

262. Transcript of Hearing before Supreme Court, April 28, 2004, at 18, *Padilla v. Rumsfeld*, 124 S. Ct. 2711 (2004). In another exchange, at the *Hamdi* oral argument, Justice Stevens asked Deputy Solicitor General Paul Clement, "do you think there is anything in the law that curtails the method of interrogation that may be employed?" Clement responded, "Well . . . I think that the United States is signatory to conventions that prohibit torture and that sort of thing. And the United States is going to

Deputy Solicitor General Clement assured the Court that the administration was bound by international treaties prohibiting torture. In early June, while the Court was still deliberating, the media disclosed internal administration memos showing that the Departments of Defense and Justice had determined before oral argument that the United States would not be bound by treaty obligations.<sup>263</sup> Were the Deputy Solicitor's assurances another White House lie?

Legal observers anticipated that this "outside the record" revelation about administration dissembling, like the untimely declassification of Padilla documents, would likely affect the Court's deliberations. *Newsweek* reported that "[t]he conventional wisdom among former Supreme Court clerks" was that "recent disclosures of the Abu Ghraib prison scandal and internal administration memos disavowing compliance with international treaties involving treatment of prisoners" would seriously undermine the administration's arguments before the Court and would turn "two key swing justices—Sandra Day O'Connor and Anthony Kennedy—against it."<sup>264</sup>

The actual effect of these media revelations on the Court is unknown. What is known is that the opening of Justice O'Connor's *Hamdi* opinion resonates with the calls of critical legal advocates, scholars, social justice groups, and media pundits for the judiciary to draw on the teachings of history and not to hand the executive a "blank check."

#### E. Concluding Thoughts

The "Strategic Blueprint for National Security Accountability" proposed in Section II is just that, a proposal. It draws its contours and content from a limited universe: the reported advocacy, organizing, media handling, cultural setting, and judicial decisionmaking in the *Korematsu*, *Wen Ho Lee*, *Hamdi*, *Padilla*, and *Rasul* cases; and personal experience.<sup>265</sup> The proposal is offered to stimulate further jurisprudential and Realpolitik inquiry into the impact of critical legal advocacy and public pressure on the crucial threshold judicial task of selecting the appropriate level of scrutiny of executive actions. It is also offered as a rough guide for building coalitions and mapping strategy. Does the blueprint serve as an apt guide? Empirical study awaits. Can and should it be sharpened and improved or revised? Definitely.

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honor its treaty obligations." Oral Argument before the Supreme Court (Apr. 28, 2004), at Arg. 40-41, *Hamdi v. Rumsfeld* 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 1066082.

263. Press Release, White House, Press Briefing by White House Counsel Judge Alberto Gonzales, DOD General Counsel William Haynes, DOD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander (June 22, 2004), available at 2004 WL 61638808.

264. Iskoff et al., *supra* note 151.

265. I have served as co-counsel in several civil and human rights cases, including the *Korematsu coram nobis* case and *Ka'ai'ai v. Drake*, a Native Hawaiian homelands reparations case. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 895 (1997) (describing critical legal theory and public organizing in the media and community handling of the Native Hawaiian homelands litigation).

Even in its preliminary form the blueprint may be especially valuable for those concerned about presidential dissembling and civil liberties because it partially unravels the dynamics of the Japanese American internment challenges within a post-9/11 national security setting and then teases out precepts for strategic action. The blueprint does this by challenging conventional wisdom on several points worthy of summary: The law and legal process are not inherently neutral or objective; traditional narrow legal arguments are important but often fail to convey what is really going on and what is at stake for people and institutions, and that is why judges in controversial cases are at times influenced by political currents and off-the-record general information; public organizing combined with critical legal advocacy in instances can shape a cultural milieu that helps impel courts to step up and assume the role of "watchful care." It is by critically re-examining analytical precepts and by reframing strategic paths that we learn lessons from the internment.<sup>266</sup>

One often stated lesson is that "America should prevent a present-day internment." A more important and rarely stated lesson, with far broader applicability, is this: Diverse segments of the public must organize, critically analyze and speak out to hold the courts accountable for holding the President accountable for abuses—both at the "front end" and at the "back end" of national security-civil liberties controversies. Only when the "public" (a wide array of individuals, organizations, institutions, and media) is organized and critically attuned will courts be impelled both to afford the Executive branch broad leeway in most efforts to protect the nation's people and, simultaneously, to call the executive branch to account publicly for transgressions of civil liberties and human rights under the possibly false mantle of national security.

Only then can the United States, a democracy marked by its Bill of Rights, genuinely say "Mission Accomplished."

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266. See generally Eric L. Muller, *Reflections on the Criminal Justice System after September 11, 2001: Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103 (2003).