

The National Security State - Michael E. Tigar

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On March 11, 2014, Senator Dianne Feinstein went to the U.S. Senate floor to announce that the CIA had sought to sabotage a Senate Intelligence Committee investigation of torture and unlawful detention. She set out in detail the ways in which the national security apparatus had frustrated meaningful oversight by the legislative branch of government.¹

Already, government lawyers had convinced courts that there should be no *judicial* review of torture and unlawful detention. Such review, it was argued, was beyond the competence of judges, and the executive branch of government needed unfettered discretion to deal with national security threats.

The net result is that the CIA, the NSA, and all the other executive branch agencies engaged in surveillance, detention, torture, rendition of suspects, and even targeted killings by drone strike have claimed immunity from accountability by either of the two other branches—legislative and judicial. What they have done, why they have done it, and why their actions are or are not lawful—all of this has retreated behind a wall of secrecy. The claim made by government lawyers that there has been and will be legislative oversight turns out to be false.

In the November 2006 *Monthly Review*, I wrote an introduction to Jean-Claude Paye's article "A Permanent State of Emergency." It begins:

"The law is a mask that the state puts on when it wants to commit some indecency upon the oppressed." I put these words into the mouth of a character in my play "Haymarket: Whose Name the Few Still Say With Tears." ...In theory, the bourgeois democratic state, as defined in the American constitution, was to operate under two basic principles. The first of these was separation of powers. Legislative and executive action would be held to a standard of legality by the action of unelected and therefore presumably independent judges. The second principle, elaborated more fully in the Bill of Rights, is that certain invasions of individual personal liberty are forbidden, and that the judges will provide a remedy against those who commit such invasions.²

It is time to revisit these issues, and to see more fully the ways in which fundamental principles about restraints on state power are being and have been undermined. In this brief article, I can hope only to identify the questions that must be asked.³

Original Understanding—the First Promise

The first promise was that executive power could be curbed by the other branches of government. In Federalist No. 68, James Madison spoke of the ways in which executive power would be controlled in the new U.S. Constitution: "unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation...essential to a free government can never in practice be duly maintained."⁴

Patrick Henry, speaking against ratification of the U.S. Constitution, was pessimistic. He warned:

If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him, and it will be the subject of long meditation with

him to seize the first auspicious moment to accomplish his design, and, sir, will the American spirit solely relieve you when this happens? I would rather infinitely—and I am sure most of this Convention are of the same opinion—have a king, lords, and commons, than a government so replete with such insupportable evils. If we make a king we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the president, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke. I can not with patience think of this idea. If ever he violate the laws, one of two things will happen: he will come at the head of the army to carry everything before him, or he will give bail, or do what Mr. Chief Justice will order him.⁵

His words contain not only a warning but also a capsule version of 150 years of English history.⁶ Those who disagreed with Patrick Henry did not doubt that the dangers of which he spoke were real. Rather, they believed that the Constitution they had drafted contained safeguards sufficient to prevent the harm of which he spoke.

The principle of separation of powers embodied in the Constitution—what is colloquially referred to as the system of “checks and balances”—was established by a series of revolutionary events in the seventeenth century. In 1627, King Charles I needed funds to prosecute a war with France, and those who resisted financial impositions were both jailed by royal order, and denied judicial review of their detention. This led to debates in Parliament over the extent of unreviewable royal power, and specifically royal power with respect to national security and military matters. It was here that Lord Coke made his famous statement on limits to executive power: “God send me never to live under the law of conveniency or discretion.... Shall the soldier and the justice sit on one bench, the trumpet will not let the crier speak.... Where the common law can determine a thing, the martial law cannot.”

The struggle between Charles I and Parliament led eventually to the English Civil War. Charles surrendered in 1645, and was tried and executed for treason in 1649. In 1660, the monarchy was restored. Charles II became king, succeeded by his brother James II in 1685. James II apparently had not heeded the lessons of his father’s beheading, and was forced to abdicate in 1688. His abdication, and the installation of the Hanoverian monarch William III, has become referred to as “The Glorious Revolution.” Early in 1689, Parliament fixed the terms on which the monarchy was to survive, including the principle of separation of power and judicial review. In 1700, Parliament provided that judges were to be appointed for life, subject to removal only by consent of both houses of Parliament.

The U.S. Declaration of Independence, and the struggles that led to it, were in great measure based on the denial to the colonies of governance principles won by the seventeenth-century revolutionary struggles in England. Patrick Henry was wondering whether the new constitution would prove secure against a revival of claims to unreviewable power that Charles I had made.

Original Understanding—The Second Promise

The Constitution’s second promise was that government would not use secrecy as a weapon against the governed. James Madison wrote: “Knowledge will forever govern ignorance. And a people who mean to be their own governor must arm themselves with the power that knowledge gives. A popular government without popular information or the means for acquiring it is but a prologue to a farce or tragedy or perhaps both.”⁷ Lest we mistake his meaning, Madison also called out the “impious doctrine of the Old World that people were made for Kings and not Kings for people.”⁸

John Adams wrote: “And liberty can not be preserved without a general knowledge. But besides this they have a right, an undisputable, unalienable, indefeasible divine right to the most dreaded and most envied kind of knowledge, I mean of the characters and conduct of their rulers.”⁹

Those who wrote the Constitution provided that authors could enjoy copyright protection of their works. But they did not give government the power to use copyright to shield governmental information from public view.¹⁰ That is, the government could not impose a form of literary or intellectual property on information in its possession, and by this means limit access to such information.¹¹

These clues to original understanding of the Constitution permit an inference that governmental secrecy was to be narrowly defined in principle and sharply limited in practice. Thus, the second promise.

In the Presidential election of 1800, Thomas Jefferson defeated John Adams. Adams's Federalist Party supporters viewed Jefferson and his allies as dangerous radicals, in part because of Jefferson's known sympathy to the French Revolution. In order to maintain Federalist control of the federal judiciary, the lame-duck, Federalist-controlled Congress created new federal judicial posts. On March 3, 1801 (which, at this time, was the day before newly elected Presidents were inaugurated), Adams named William Marbury to a judgeship in the District of Columbia. Jefferson was sworn in the next day, and his Secretary of State, James Madison, refused to give Marbury the commission of office that Adams had signed.

Marbury sued Madison by filing an original action in the U.S. Supreme Court.¹² The Court issued an order that Madison should show cause why he should not be ordered—by a writ of mandamus—to deliver Marbury's commission. The case attracted much attention, in part because Chief Justice Marshall had been appointed by Adams in January 1801, thus frustrating Jefferson's intention to appoint his ally Spencer Roane to be Chief Justice.

Marshall's opinion for the Court made three points. First, Marshall held that Marbury was entitled to receive his commission. Once the President had signed the commission, it became effective and no later act by the executive branch could undo what Adams had done.

Second, Marshall wrote of the right to redress:

The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.... The government of the United States has been emphatically termed a government of law and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right.... If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar nature of this case.

Marshall noted that there might be cases not subject to judicial review, in a passage that has later been read more broadly than Marshall no doubt meant:

Is the act of delivering or withholding a commission to be considered a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive.... By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character.

These two statements of judicial duty and its limits are the first Supreme Court treatment of the separation of powers doctrine. Access to judicial review of a wrong suffered at the hands of government is a fundamental principle. There is an exception, for acts that the Constitution itself confides to Presidential power, and for which the President is nonetheless "accountable." This accountability is in the President's political capacity, that is by the force of public opinion, legislative control, and electoral politics. As we shall see, the national security state attacks both the idea of judicial review and that of popular limits on Presidential power.

The third point of Marshall's opinion is the one for which *Marbury v. Madison* is most-often cited. Marshall held that the federal courts have the power to review acts of Congress and to declare them unconstitutional. Because the Constitution gives the Supreme Court an extensive power to decide appeals and a very limited power to hear original cases, the Judiciary Act provision giving the Court power to hear original petitions for mandamus was unconstitutional. If Marbury wanted his commission, he would have to bring suit in a lower court.

Jefferson was angered by the Court's decision. Since the Court held it had no power to order the commission delivered, Jefferson thought Marshall should not have considered whether Marbury had been wronged. Jefferson also rebuked the Court for claiming the power to nullify Acts of Congress.

Marshall's remark about unreviewable Presidential power was tested in three important judicial decisions during the next decade. In 1807, Jefferson ordered the U.S. Attorney for the District of Columbia to arrest Errick Bollman and Samuel Swartwout for treason, based on an Army general's conclusion that the two men were plotting with Aaron Burr. Bollman and Swartwout sought habeas corpus. The circuit court for the District of Columbia rejected their petition, over the dissent of Chief Judge Cranch:

The Constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.... In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this Court is bound by the law and the Constitution in all events.¹³

On appeal, in an opinion by Marshall, the Supreme Court upheld Cranch's position and ordered Bollman and Swartwout released.¹⁴

The second case was the treason prosecution of Aaron Burr.¹⁵ Jefferson had orchestrated the case against Burr. At that time, Supreme Court Justices sat "on circuit" as trial judges; Marshall was the judge before whom Burr was tried in Virginia. The partisans of Jefferson and of Burr railed against one another. Jefferson and his allies attacked Marshall's handling of the case. In this political turmoil, which left Burr acquitted but nonetheless dishonored, Marshall's observations on issues in the case remain relevant.

Marshall discussed the attacks on his own conduct, and the careless use of the "treason" label for political purposes. As Robert Ferguson relates: he had not enjoyed finding himself "in a disagreeable situation." What person would? "No man is desirous of becoming the object of calumny," he reminded those who had abused him, including the President of the United States. "No man, might he let the bitter cup pass from him without self reproach, would drain it to the bottom."¹⁶

This observation on his own situation led Marshall to reflect on the meaning of treason: "As this is the most atrocious offence which can be committed against the political body, so it is the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending powers struggling for power." Marshall noted that the Framers had "refused to trust the national legislature with the definition," fixing it instead in the body of the Constitution.¹⁷

Marshall's second memorable ruling was directly relevant to separation of powers. Burr sought to compel Jefferson to produce a letter that General Wilkinson had written to him in 1806. The prosecution resisted. Marshall held that the letter must be produced. He held that the President was subject to judicial process.¹⁸ "The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not the character of the person who holds it," he wrote. Indeed, the President might be compelled to appear personally, unless he could show that his duties interfered with his attending.

A third important separation of powers ruling was *Gilchrist v. Collector of Charleston*.¹⁹ In 1807, Congress—seeking to retaliate against British and French interests—authorized an embargo on foreign seaborne commerce. In 1808, amending legislation authorized the customs collector at any port to detain any vessel suspected of engaging in foreign commerce. The customs collector at Charleston, South Carolina—a federal official—denied a ship belonging to Adam Gilchrist clearance to leave the port, suspecting that Gilchrist was not engaged in coastwise domestic shipping but rather foreign travel.

Justice William Johnson, sitting as circuit judge, heard evidence and ordered the collector to let Gilchrist's ship leave the port. Johnson held that despite the broad statutory language, federal courts had the power to control actions of the executive branch. Jefferson, who had appointed Johnson to the Supreme Court, was enraged at the decision. He directed Attorney General Caesar Rodney to write a public letter attacking Johnson's ruling. Johnson responded to the letter in a second published opinion. Johnson said he was reluctant to be drawn into public controversy, but felt

compelled to do so: “But when a bias is attempted to be given to public opinion by the overbearing influence of high office, and the reputation of ability and information, the ground is changed; and to be silent could only result from being borne down by weight of reasoning or awed by power.”²⁰

Johnson went on to repeat his insistence on judicial power to control executive action.

The Promises Constrained

No one could sensibly claim that these principles of transparency and accountability were uniformly applied in the decades after they were first formulated. These were promises that the new regime made to the people generally. As promises, they were hedged about with limitations and conditions at the outset, and then in practice proved to be difficult to enforce. These were promises fashioned as instruments of bourgeois state power, setting out an idea that the state would stand as neutral guardian of principle, when in fact it was prepared to act as an instrument of social control.

But while the promises could never be wholly realized, keeping them gave state power its perceived legitimacy. That, in general terms, is the way of parliamentary democracy. Organs of state power remain open to influence; a set of declared rights is more or less guaranteed.

It is not, therefore, surprising that Chief Justice Marshall himself wrote the Supreme Court opinions that denied judicial review to Native Americans and African slaves. After all, the Constitution itself accepted the institution of slavery and provided that: “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”²¹

That is, a slave was three-fifths of a person for the purpose of allocating Congressional seats, though without a vote or any of the political rights defined in the Constitution. Native Americans did not exist for purposes of taxes and representation, although the Congress would certainly legislate as to their status. In the early nineteenth century, Native Americans sought to assert their rights. As I wrote in *Law & the Rise of Capitalism*:

The Cherokee Nation of Georgia adopted a written constitution and asserted sovereignty over its land. The Georgia legislature responded by declaring Cherokee laws and customs void and opening Cherokee land to settlement. The federal Congress, at the urging of President Andrew Jackson, passed legislation seeking to compel Native Americans to give up and move westward. Georgia authorities arrested, tried, and hanged a Cherokee for an offense allegedly committed on Cherokee territory.

The Cherokee Nation sought relief in the courts. They were, after all, a nation. They sought to restrain the enforcement of Georgia laws which “go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.” The Cherokees’ lawyer invoked the Supreme Court’s power, saying that the lawsuit was between a foreign nation—the Cherokee—and the state of Georgia. Under the United States Constitution, the Supreme Court could exercise its original jurisdiction over such a lawsuit without waiting for lower courts to decide it and then hearing the case on appeal.

Chief Justice Marshall looked to the constitutional grant to Congress of the power to regulate commerce with “foreign nations, and among the several states, and with the Indian tribes.” He found the Cherokee to be “a domestic, dependent nation” that was “in a state of pupilage,” like “that of a ward to his guardian.” It was not, he said, for the Court a true “foreign nation.” Thus, the Cherokee Nation had no legal existence. It could not even come to a federal court to vindicate its treaty rights.

The Supreme Court decided *Cherokee Nation v. Georgia* in 1830, over the dissents of Justices Story and Thompson. Two years later, in *Worcester v. Georgia*, Chief Justice Marshall retreated a bit, and held that Georgia did not have the

right to regulate activities on the Cherokee lands. He did not reach this result by recognizing the position of the Cherokee Nation, but by denying the right of a state such as Georgia to interfere in matters that are essentially federal. That is, the national government had the constitutional power to deal with Native Americans and the states had only a limited role to play.²²

Marshall spoke for the Supreme Court on the issue of slavery in an 1825 case, *The Antelope*.²³ The Constitution had forbidden Congress to regulate importation of “persons” until 1808. In a statute that took effect January 1, 1808, the Congress prohibited importation of slaves. Nonetheless, the slave trade continued, and in 1820, a U.S. coast guard vessel boarded and seized a ship, *The Antelope*, that was carrying 225 African slaves. *The Antelope* was taken into port on suspicion that the slaves were destined to be imported into the United States.

Here was a chance for Marshall, who acknowledged that slavery was “contrary to the laws of nature,” to translate this sense of injustice into a judicial command. However, he noted that “Christian and civilized” nations still engaged in the slave trade and that it could not therefore be said to be unlawful; the slaves were not to be set free but rather returned to their owners. Marshall’s failure to find controlling international law is the more surprising because the United States had agreed in the 1814 Treaty of Ghent to seek an end to the international slave trade.²⁴

For Marshall and his colleagues on the Supreme Court, Native Americans did not exist as holders or bearers of rights, and the status of slavery was not an issue that the law could address. To complete the story, one must note the Court’s 1841 decision in *The Amistad*.²⁵ Between 1825 and 1841, treaties and customary international law had shifted the legal landscape. *The Amistad* was a Spanish ship carrying forty-nine slaves. The slaves took command of the ship, which eventually anchored off Long Island. The legal proceedings eventually reached the Supreme Court. The Spanish and British governments tried to exercise influence on the case: the British said that the capture of the slaves in Africa violated a treaty between Britain and Spain. Spain said the slaves were property and should be returned. The Supreme Court argument, led by John Quincy Adams, stressed that judicial review and not executive branch concerns should be the guiding principle of decision.

On March 9, 1841, Justice Story delivered the Supreme Court’s opinion holding that the slaves must be freed.

Any hope that was kindled by the *Amistad* decision was extinguished by the *Dred Scott* decision in 1857.²⁶ The Supreme Court’s decision that Dred Scott was not entitled to freedom from slavery despite having been taken into free territory was based upon an assertion that echoed the rationale of *Cherokee Nation v. Georgia*. African slaves and their descendants could not be “citizens” of any state and were therefore not entitled to be heard in federal court. They were, the Court said, “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect.” That is, it was not only the political institution of slavery that forbade judicial review, but a theory that those of African descent were inferior beings destined to be ruled without voice as to their condition.

Chief Justice Taney, who wrote the majority opinion, and President James Buchanan, who was given advance notice of what the Court would do, thought that the *Dred Scott* decision would end the controversy about slavery. Of course, it did nothing of the kind, but rather made a military solution inevitable.

Thus, in 1857, for white male citizens, judicial review of governmental action was presumptively available. However, judicial review stopped short when a litigant challenged a system of social relations. The conquest and subjugation of Native Americans was a fundamental tenet of British, French, Spanish, and then U.S. occupation of the Eastern seaboard and then of Westward expansion. By definition Native Americans were not to be considered as bearers of rights that could be enforced against the state. And Taney’s statement came at the end of a long pseudo-historical analysis that justified the institution of slavery as a part of the social fabric.

The Separation of Powers After 1857

The Civil War amendments to the Constitution abolished slavery and provided for equal protection of the laws. It would be nearly a century before the promise of those amendments began to be fulfilled by the Supreme Court. For

African-Americans, the Court's ruling in *Brown v. Board of Education* recognized the promise that the 14th Amendment equal protection clause indisputably made.²⁷

The *Marbury-Gilchrist-Burr* model, as limited in *Cherokee Nation* and *Dred Scott*, posits a right of access to review of governmental action. Presumptively, the courts will provide review. In a narrow class of cases, that review must be obtained through a political process. Nobody can rationally claim that either of these avenues of redress is efficient. Most of the significant cases about "rights" have been brought and litigated by labor, civil rights, and civil liberties organizations—the cost of what passes for justice is too great for most people. Of course, those who wind up in court testing their rights as criminal defendants will have counsel provided but the deficiencies of that system are well-known. The electoral political process is dominated by money, and is in many ways impossibly corrupt.

The point, however, is that the state has assiduously maintained the fiction that both of these avenues of redress are in fact viable. In order for this fiction to have any semblance of credibility, the institutions of redress must be seen to have some utility. The lawyer for the oppressed points to the promises and principles in the legal ideology of the dominant class, and argues for their application in ways that may contradict the interests of that class. Significant victories have been won for workers, women, people of color, political dissidents, and gay and lesbian people—in the judicial, executive, and legislative arenas. The courtroom battles for these rights produced significant victories in the 1950s, '60s, and '70s, and helped to empower movements for social change.

In the midst of these battles, there were disturbing signs that Patrick Henry's forebodings—a President at the head of an army, and therefore indisposed to heed the commands of a Chief Justice—would be realized. And what if a President's refusal to "do what Mr. Chief Justice will order him" was a problem compounded by Mr. Chief Justice's timidity and moral obliquity? That is, what if Mr. Chief Justice—in the pattern of Marshall in *Cherokee Nation* or Taney in *Dred Scott*—were to acquiesce in declaring a "no law" zone because of the character of a claim or of the claimant? In such a case, the structure of separation of powers might crumble, not by conquest—but by surrender.

By way of example, the Supreme Court upheld the internment of Japanese-Americans during the Second World War, yielding to an exercise of Presidential power that was later held to have been improper and based upon false assumptions.²⁸ Some of the Court's decisions on freedom of expression and association during the Cold War period failed to respect freedoms of speech and association. Yet, there were bright spots, as when the Supreme Court upheld the academic freedom of *Monthly Review* editor Paul Sweezy.²⁹

The years since September 11, 2001, have witnessed a significant shift in the role of the executive and judicial branches. In the militarized national security state, the dismantling of the constitutional separation of powers has largely come to pass. We can see how this has happened, as a matter of state power and legal ideology.

Two legal devices have been deployed to shut off accountability for governmental wrongdoing. The first of these is a judicially created doctrine of non-decision—the "political question doctrine." The second is the state secrets privilege, the invocation of which forestalls all accountability because the rationale and details of government conduct are hidden from public view. Let us examine these in turn.

Political Question

The political question doctrine is a device by which a federal court decides that it cannot hear and decide a matter because it lacks subject matter jurisdiction—jurisdiction *ratione materiae*—to give a decision. The matter is said to lie outside the bounds of "cases" and "controversy" over which Article 3 of the Constitution bestows judicial power. In a 1962 decision, the Supreme Court—in an opinion by Justice William Brennan—gave a broad reading to the doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning

adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁰

In setting out this general view, Justice Brennan referred to cases arising in times of domestic and foreign conflict, and to Marshall's opinion for the Court in *Cherokee Nation*. This passage is remarkable for its generality. Although it reflects analysis of the Court's precedents, it can easily be invoked as a free-wheeling, unprincipled, and utterly discretionary refusal to decide. Constitutional scholars soon began to point out this danger. During the Vietnam War, lawyers and legal scholars—with the concurrence of some political figures—attacked the war as a violation of domestic and international law. Some who refused to serve in the military invoked these legal principles in defense of defiance. The government pleaded the political question doctrine and courts refused to confront the issue.³¹ One might say, in defense of these decisions, that review of the decisions to commit troops in Vietnam would indeed involve the courts in a set of factual and legal inquiries that could plausibly be termed outside judicial competence.

Today, however, the political question doctrine is deployed in situations where that defense of its use cannot plausibly be advanced. Take the case of Jose Padilla. Padilla was arrested in Chicago on May 8, 2002. He is a U.S. citizen, but had been designated an enemy combatant by the Bush administration under the national security legislation enacted in the wake of September 11, 2001. The government then transferred Padilla to a military prison where he was tortured. His mother, Estela Lebron, sued federal officials for damages and to forbid Padilla's future treatment as an enemy combatant. The federal court of appeals held that the law did not provide a remedy for the wrongs done to Padilla.³²

The court of appeals began by noting that Congress had authorized the use of military force against Al-Qaeda, and that successive administrations have said that the United States "continue[s] to fight a war of self-defense against an enemy that attacked us." With this beginning, the court reviewed the precedents on political questions and held that it would not recognize Padilla's legal claim for the injury done to him.

The court's analysis is constitutional nonsense. "War" and "declaration of war" are concepts with a settled meaning in international law. Congress did not declare a war. It authorized the use of military force under certain circumstances. It did so in haste, and to see its action as an open-ended authorization to engage in military action wherever in the world the President might decide ignores the constitutional limits on Presidential and Congressional power. Even if this view of the matter is utterly wrong, and even if one believes that the ongoing U.S. military presence in over a hundred countries is consistent with constitutional governance, and that classification of "enemy combatants" is proper, Padilla's treatment raises an issue on which courts are not only competent but uniquely situated to make a decision.

Padilla presented a simple claim: Was he the victim of torture? Torture is always and in every circumstance unlawful. It is forbidden by treaty, customary international law, and federal statute. The backdrop against which torture occurs, and the motives of those who do it and authorize it, are irrelevant. Thus, the court's entire disquisition on the war-making power is irrelevant. The court's syllogism is (a) we are at war with Al-Qaeda, (b) Padilla is a member of Al-Qaeda, (c) therefore he has no enforceable right not to be tortured. This is the syllogism of *Cherokee Nation* and *Dred Scott*. It identifies a group or class of people excluded from judicial review. The court's analysis goes even further, for it places this no-law zone in the midst of an entire sphere of governmental activity that is held to be unexaminable and unreviewable.

Indeed, the Supreme Court long ago recognized that a violation of international law, even by military forces in an arena of conflict, is subject to judicial examination. In a 1900 case, *The Paquete Habana*, the Court held that two fishing vessels that the Navy had seized during the Spanish-American war were exempt from seizure under international law and should be returned to their owners.³³ The Court reaffirmed that customary international law was part of the Constitution, laws and treaties mentioned in articles 3 and 6 of the constitution. This customary law, the Court said, would be determined by consulting the recognized sources of international law, which include state practice and the opinion of jurists.

Consider then, another case involving a U.S. citizen, Anwar al-Aulaqi. He was born in the United States to Yemeni parents, spent most of his formative years in Yemen, and returned to the United States to go to college, staying in the country for over a decade, until 2002. He then returned to Yemen and was active in what has been termed an “anti-Western jihadist movement.” He wrote and spoke against U.S. policies and actions, and supported the use of violence. In 2010, the CIA had listed al-Aulaqi as the potential target of a lethal drone strike—that is, the U.S. government had decided to use lethal force against a U.S. citizen without a judicial trial.

Anwar al-Aulaqi’s father brought a suit to enjoin the government from killing his son. It hardly requires analysis of all the reasons for U.S. military activity to decide this issue. Yet, the federal court held that the case presented a political question and was not justiciable.³⁴ That decision was issued December 7, 2010. On September 30, 2011, a U.S. drone strike killed Anwar al-Aulaqi. On October 11, 2011, another drone strike killed Aulqi’s sixteen-year-old son Abdulrahman and five other civilians. Attorney General Holder admitted that Abdulrahman had not been “specifically targeted,” which is as close to admitting that his killing was an error as the government is likely to get.³⁵ After the killings, families of the victims sued U.S. government officials, and a federal judge dismissed that suit as well.³⁶

In another case, the family of Chilean General Rene Schneider sued Henry Kissinger and other officials for their complicity in the 1970 kidnapping and assassination of General Schneider. The kidnappers’ goal, shared by the United States, was to destabilize the government of Salvador Allende. The court of appeals held that the case was barred by the political question doctrine.³⁷ In the Schneider case, there had not been any Congressional authorization, or even official Presidential pronouncement, authorizing invading the Chilean territory to kill one of its officials. Thus, there could not be any constitutional commitment of a decision to the executive branch. There was hardly any factual complexity, as State Department cable traffic that had been released under the Freedom of Information Act amply revealed Kissinger’s role, and witnesses to events had been interviewed. Rather, “political question” was simply a label for another no-law zone in the U.S. empire.

These cases illustrate the national security state pushing to create and enlarge no-law zones based on the existence of military action, and/or the character of the person who claims that his or her rights have been invaded. The first of these justifications reminds us of what Patrick Henry said. The second recalls Cherokee Nation and Dred Scott.

A judicial decision from 1980 presents an interesting parallel. On September 21, 1976, agents of the Pinochet regime assassinated Orlando Letelier and Ronni Moffitt in Washington, D.C., with a car bomb. Letelier had been an official of the Salvador Allende government in Chile, and—in exile after the 1973 military coup—was a forceful and effective opponent of the Pinochet junta. My law firm sued the Chilean junta on behalf of the Letelier and Moffitt families. The junta claimed to be immune from suit, and that the killings were a discretionary political act. The judge rejected this claim: “Whatever policy options may exist for a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.”³⁸

For U.S. policymakers, therefore, the rule of law is that *other* countries are not free to violate sovereignty and territorial integrity to kill and maim.

Perhaps open spaces remain within the legal ideology of the national security state. The U.S. Court of Appeals for the District of Columbia Circuit has held that there is judicial power to review the conditions of confinement at Guantanamo, though the administration is challenging that ruling.³⁹ A federal district judge has held the NSA surveillance program unlawful; that decision is disagreed with by another federal court and is also being appealed.⁴⁰ The revelations about NSA surveillance recall another separation of powers concern that is reflected in the Constitution. I wrote in *Thinking About Terrorism* :

During the colonial period, tax evasion was a popular pastime. The Boston Tea Party was only one dramatic example. In order to enforce taxes, the British authorities employed writs of assistance, which were orders obtained from complaisant judges authorizing customs and revenue officers to enter premises where goods were stored and search at large and at will.

Colonial resistance to the writs of assistance was widespread. The most famous challenges were those mounted by Massachusetts lawyers led by John Adams and James Otis. On the Boston Common in 1761, James Otis delivered a famous denunciation of the writs. Of that speech John Adams later wrote “then and there the child Independence was born.”

In England at about the same time arose two cases involving the English radical John Wilkes. Lord Halifax, then Secretary of State, issued a paper authorizing royal officers to search Wilkes’ premises and papers for evidence of crime, including sedition—which was simply speech criticizing the Crown. Wilkes was arrested and thrown into the Tower of London—and expelled from Parliament. He sued and won. Two cases, *Wilkes v. Wood* in 1763, and *Entick v. Carrington* in 1765, decided that the executive branch of government had no authority to issue warrants and that Halifax should pay damages. Every lawyer who participated in writing the Constitution and its Bill of Rights was familiar with the writs of assistance struggle and with *Entick* and *Wilkes*. They wrote the fourth amendment with those cases in mind.⁴¹

Yet, today the national security state conducts surveillance of billions of people, intercepting their emails, telephone calls, and correspondence, all without judicial approval.⁴² When Edward Snowden revealed this illegal activity, government officials were quick to denounce him as a “traitor,” bringing to mind Marshall’s statement that the careless application of this label contradicts the constitutional text.

Hypocrisy

The United States has supported, or at least acquiesced in, creation of international criminal courts for Yugoslavia, Rwanda, Cambodia, and Sierra Leone. These courts have tried hundreds of defendants—including heads of state and other government officials—for torture, kidnapping, unlawful detention and homicide. It could not plausibly be argued, and the United States has not argued, that trying these cases presents political questions that are beyond the institutional competence of courts, nor that the inevitably political character of these cases, nor the political motivations of the accused, makes the cases inappropriate for judicial resolution. The concept of “justiciability” around which the political question issue is debated in U.S. federal courts, is not some uniquely fragile idea of judging found only in the U.S. Constitution. This concept was meant by the Framers to carry the full weight of judicial responsibility that the seventeenth-century English history had shown to be necessary and appropriate. That robust idea of judicial duty was, indeed, the intellectual and ideological foundation of the Nuremberg tribunals, source of much law and learning.

One must also note in this connection that while the United States participated in the discussions leading to the creation of the International Criminal Court, it has not ratified the resulting treaty. Rather, the United States has taken strong steps to make sure that no U.S. national will be tried in that court. The American Service-Members Protection Act, passed in 2002, endorses the U.S. refusal to join the International Criminal Court, authorizes use of force to free any United States “or allied” person from the control of the International Criminal Court, prohibits state and local governments from cooperating with the Court, and forbids military aid to any country that are parties to the treaty establishing the Court.⁴³ This last prohibition has been modified to allow continued aid to NATO allies and other significant military partners such as Taiwan. In short, the United States takes the position that judicial review of its actions cannot take place in any tribunal anywhere.

I am not, by this reference, uncritically endorsing the procedures of the international criminal tribunals. They were, as Diane Johnstone has written of the Yugoslavia tribunal, “set up by the Great Powers, using the UN Security Council, in order to judge the citizens of smaller, weaker countries which were excluded from making the rules or interpreting them.”⁴⁴ My point, rather, is that the inconsistency of position shown by U.S. action with respect to these courts underscores the hypocrisy of political question arguments advanced by lawyers for the United States in the U.S. Court system. More seriously, these arguments represent a claim of imperial power. The United States announces, devises, and enforces rules, invoking the rhetoric of human rights and humanitarian law. It does not acknowledge a duty to obey rules.

State Secrets

United States v. Reynolds was a suit brought by the widows of three civilian observers aboard an Air Force plane that crashed in 1948.⁴⁵ The U.S. government resisted the suit, saying that inquiry into the reasons for the crash would require disclosure of state secrets. The Supreme Court agreed that such disclosure might require dismissal of the suit but cautioned that “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”

Sixty years later, the flight records were unsealed, revealing that the crash was caused by a routine maintenance failure and that the government’s invocation of “secrecy” was baseless and mendacious.⁴⁶

Senator Feinstein’s speech on March 11, 2014, tells a tale of executive officer caprice. One is reminded of Justice Frankfurter’s characterization of a similar charade, when he observed that a theory of privilege that immunized an executive officer from accountability reflected “a fox-hunting theory of justice that ought to make Bentham’s skeleton rattle.”⁴⁷ Feinstein began by noting that the Senate was investigating torture and unlawful renditions, a subject on which the CIA itself had expressed concern and conducted an internal inquiry. The Senate Intelligence Committee, which conducts much of its oversight work in secret, began its investigation by seeking documents. The CIA hedged and demanded that the relevant documents not be delivered to Congressional premises, but to an offsite secure facility in effect controlled by the CIA. The Senate agreed. The CIA delivered 6.2 million pages of badly indexed documents—a “document dump,” as Senator Feinstein termed it. Senate staff members were forced to look, first, for the haystacks in this field of material, and then for the needles they might contain.

Throughout this process the CIA interfered with access to the documents, removed relevant materials from the review process, and then threatened Senate staff members with criminal prosecution for allegedly handling the documents in ways that compromised national security. As Senator Feinstein pointed out, the criminal referral was made by a lawyer who had himself been responsible for the illegal actions the Committee was investigating, and was therefore an effort to invoke secrecy for his own protection from accountability.

The Feinstein revelations are just one example of the way that secrecy is invoked by the national security state. Of course, there are reasons why some governmental activity is shielded from view. A grand jury meets in secret, in some measure to protect the reputations of people, and legitimately to preserve law enforcement information. However, the state secrets privilege invoked by the national security state sweeps far broader and bespeaks a particular rationale.

Many evidentiary privileges are designed to protect personal autonomy. The right to consult a lawyer, a doctor, or a religious advisor in private is an essential part of personal liberty. The rights to live, sleep, talk, write, join an organization, or have sexual encounters without government intrusion are also protected to different extents and in different ways by the Constitution.

The state secrets privilege is different because it erects a barrier between the state and the governed. It blocks the governed from access to information about the decisions that affect their lives. The privilege as invoked by the national security state is qualitatively different from the law enforcement privilege that attaches to grand jury proceedings. That privilege shields information about particular events and persons, and does not draw the curtain of secrecy over an entire governmental process. The mode by which grand jurors are selected, and the legal rules that control their activities, remain open to examination. The grand jury’s procedures can be challenged by someone subject to subpoena, and an indictment that the grand jury returns may be dismissed if the grand jury has been used in an improper way.⁴⁸

The privilege as viewed by the national security state blocks access to entire sets of government decisions, and to the justifications for those decisions. That is, government claims the right to hide what it does and the reasons for what it does.

Consider this case. The *New York Times* and others asked the Department of Justice for documents relating to drone

strikes. They were seeking material that would reflect government consideration of the legality or illegality of targeted killings. That is, they wanted to know the policy reasons, if any, for these actions. One evident purpose of their inquiry was to foster public discussion of the drone program, that is, accountability of the President in his political capacity. The Department of Justice refused to produce responsive documents. The *Times* and other requesters brought suit in federal court.

Judge McMahon began by noting that her published opinion would not disclose the entire basis of her ruling. That is, the review of secrecy would be done, at least in part, in secrecy. She wrote:

This opinion will deal only with matters that have been disclosed on the public record. The Government has submitted material to the Court *ex parte* and for *in camera* review. It is necessary to discuss certain issues relating to this classified material in order to complete the reasoning that underlies this opinion. That discussion is the subject of a separate, classified Appendix to this opinion, which is being filed under seal and is not available to Plaintiffs' counsel. In crafting that Appendix, the Court has done its best to anticipate the arguments that Plaintiffs would have made in response to the Government's classified arguments.⁴⁹

Judge McMahon then summarized her rationale for denying disclosure of the documents, even as she wrote at length about the slender justifications for targeted killings:

The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men. The Administration has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions. More fulsome disclosure of the legal reasoning on which the Administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable "hot" field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated. It might also help the public understand the scope of the ill-defined yet vast and seemingly ever-growing exercise in which we have been engaged for well over a decade, at great cost in lives, treasure, and (at least in the minds of some) personal liberty.

However, this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret. But under the law as I understand it to have developed, the Government's motion for summary judgment must be granted, and the cross-motions by the ACLU and the *Times* denied, except in one limited respect.

These are paragraphs that conjure Patrick Henry's forebodings and Chief Justice Marshall's reassuring words. The "American chief" has arrived, not at the head of his army but in command of missiles that kill persons identified in secret by secret procedures and secret principles. Mr. Chief Justice is represented by his surrogate, an Article 3 judge. The judge quotes the constitutional idea that the Constitution and laws are supreme, and then holds herself to be without power even to ask the President what he is doing and why—let alone to see if it is lawful.⁵⁰ Only the courage of "leakers" who are then calumniated and targeted for prosecution has given us what we know about what the national security state is doing.

On April 21, 2014, the United States Court of Appeals for the Second Circuit reversed this decision, and held that the government must release some information about the use of drone strikes to kill Anwar Al-Aulaqi and others.⁵¹ The court of appeals decision remains in conflict with other decisions by other courts, so the issue is not yet resolved.⁵² Indeed, the rationale of decisions compelling disclosure may well create more problems than it solves. The court of

appeals held that documents containing legal justification for drone strikes must be released because government officials had made public statements revealing the alleged legal basis for such strikes. So the message is not that government conduct just be open to inquiry, but rather that government officials must maintain absolute secrecy from the outset in order to avoid disclosure.

This is a testing time for federal judges. There are dozens of lawsuits raising the issues of transparency, accountability, and legality.⁵³

Even if the official memoranda sought in the *New York Times* suit are eventually revealed, the larger issue remains. On Sunday, May 11, 2014, Senator Rand Paul wrote in the *New York Times* that the Obama administration has refused to release the entire collection of documents concerning the alleged legality of drone strikes. Paul and others had requested release in order to assess the nomination of Harvard Law professor David Barron to the U.S. Court of Appeals for the First Circuit. While at the Justice Department, Barron had advised the administration that the drone killing of U.S. citizens was lawful. As Paul noted: “I believe that killing an American citizen without a trial is an extraordinary concept and deserves serious debate. I can’t imagine appointing someone to the federal bench, one level below the Supreme Court, without fully understanding that person’s views concerning the extrajudicial killing of American citizens. But President Obama is seeking to do just that.”⁵⁴

Historical Context

As the Second World War came to an end, U.S. military, diplomatic, and intelligence officials were already planning for the next conflict. General Leslie Groves, the military head of the Manhattan Project that built the atomic bomb, testified that the bomb project “was conducted on [the] basis” that “Russia was our enemy.”⁵⁵ After the war, the United States enforced its sphere of influence by building military bases and creating military alliances.⁵⁶ It intervened—openly and covertly—to destabilize and overthrow governments it regarded as hostile or dangerous to its policies of control.⁵⁷

The United States created a set of institutions devoted to violence, invasion of sovereign countries, secrecy, and deceit. These institutions receive billions of dollars in secret funding. They carry out policy objectives of imperial domination. The design and nature of these institutions moves them to escape accountability. As Byron wrote:

The thorns which I have reap’d are of the tree
I planted; they have torn me, and I bleed.
I should have known what fruit would spring from such a seed.⁵⁸

(Or, more pithily, in the Spanish proverb *Cría cuervos y te sacarán los ojos*—“If you raise a crow it will pluck out your eyes.”)

Where and how will we find resistance to and accountability for torture, detention, and killing? One paradigm may be found in the struggle to end the Vietnam War. In the United States, the anti-war movement focused largely on the domestic consequences of the conflict—the sacrifice of young men’s lives and the liberties of all of us. The anti-imperialist rhetoric of this movement was more muted, it seemed. But at the same time, international resistance to U.S. military power and tactics grew in strength, until the Vietnamese achieved victory. By similar token, there is resistance today to the exercise of U.S. power.

This resistance is not solely, and perhaps not even principally, of a military character. Despite the U.S. refusal to make its own courts and international tribunals available to victims, courts of other countries are opening inquiries into these issues. The theories of accountability and judicial power in these cases are controversial, but to the extent that they are being used in the service of a progressive agenda they hold some promise. That is, these efforts derive their validity as elements of struggle from the support of movements for meaningful change.

For example, the courts of Argentina have opened to victims of the U.S.-supported Franco regime in Spain, because Spain has closed the doors of its courts to such inquiry. At this writing, a magistrate in France is looking into the torture of three French citizens at Guantanamo. The path to accountability charted in these cases is based on the U.S. refusal to acknowledge universal norms of conduct, and on the general recognition that violation of such norms can be

addressed by any sovereign with a plausible connection to the harm caused by the violation.⁵⁹

Notes

1. ↪ [“Statement on Intel Committee’s CIA Detention, Interrogation Report,”](#) press release, March 11, 2014, <http://feinstein.senate.gov>. Former CIA director, General Michael Hayden, went on television to denounce Senator Feinstein’s comments as “emotional” and not “objective,” as though the only rational response to torture is acquiescence. Ruth Marcus quickly denounced Hayden’s comments as sexist nonsense; see [“The Emotional Double Standard Applied to Sen. Feinstein,”](#) *Washington Post* opinions, April 8, 2014 <http://washingtonpost.com/opinions>.
2. ↪ Michael E. Tigar, [“The Twilight of Personal Liberty: Introduction to ‘A Permanent State of Emergency’,”](#) *Monthly Review* 58, no. 6 (November 2006): 24–28. Jean-Claude Paye’s four *Monthly Review* articles are a valuable background to this discussion: [“Guantánamo and the New Legal Order,”](#) *Monthly Review* 57, no. 1 (May 2005): 45–55; [“The End of Habeas Corpus in Great Britain,”](#) *Monthly Review* 57, no.6 (November 2005): 34–43; [“A Permanent State of Emergency,”](#) *Monthly Review* 58, no.6 (November 2006): 29–37; [“‘Enemy Combatant’ or Enemy of the Government?,”](#) *Monthly Review* 59, no.4 (September 2007):1–10.
3. ↪ My thanks to John Mage for fostering the basic idea behind this article and the *MR* issue of which it is a part. I thank Lord Justice Stephen Sedley for helpful thoughts about separation of powers; he has shared with me the text of his 2014 Oxford Lectures, in which he notes that the concerns discussed in this article have also arisen in the United Kingdom. More complete discussion of the issues may be found in some of my earlier work: on legal history [Law and the Rise of Capitalism](#), second edition (New York: Monthly Review Press, 2000); *Judicial Power, the “Political Question Doctrine,” and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135 (1970), reprinted in Richard Falk, ed., *The Vietnam War and International Law*, vol. 3 (Princeton: Princeton University Press, 1972) (hereinafter “Political Question”); *Thinking About Terrorism: The Threat to Civil Liberties in Times of National Emergency* (Chicago: American Bar Association, 2007), *The Right of Property and the Law of Theft*, 62 Tex. L. Rev. 1443 (1984) (hereinafter “Theft Law”). I continue to post entries on the subject of this article at tigabyte.blogspot.com.
4. ↪ Federalist No. 68.
5. ↪ Quoted in Political Question, 1172 n158; Henry Steele Commager, ed., *Documents of American History*, vol. 1 (New York: F.S. Crofts, 1944), 147.
6. ↪ See generally Christopher Hill, *Reformation to Industrial Revolution* (New York: Pantheon Books, 1967). For the precise text and source of Lord Coke’s remarks, as well as many insights into the struggles over separation of powers, see Stephen Sedley, “The Separation of Powers,” Oxford Lectures 2013 (fifth lecture), in *The Lion Beneath the Throne* (forthcoming).
7. ↪ [James Madison to W.T. Barry, letter of August 4, 1882](#), <http://press-pubs.uchicago.edu>. This often-quoted statement was made in the context of the need for institutions of education. Some have said that Madison was not talking about citizen access to governmental information. This is an unduly constricted meaning. Madison believed—and said—that without knowledge of all kinds, citizens could not exercise meaningful control of government.
8. ↪ Federalist No. 45.
9. ↪ John Adams, [“A Dissertation on the Canon and Feudal Law,”](#) <http://digitalhistory.uh.edu>.
10. ↪ In England, the institution of “Crown copyright” persists to this day.
11. ↪ For an extended discussion of this issue, see Theft Law.
12. ↪ *Marbury v. Madison*, 5 U.S. 137 (1803).⁶

13. ↪ The story of this case is told in Bloch & Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 Georgetown Law Journal 549 (2002). This article discusses many examples of judicial control of executive action.
14. ↪ *Ex parte Bollman*, 8 U.S. 75 (1807).
15. ↪ See Doug Linder, *The Treason Trial of Aaron Burr*, 2001, <http://law2.umkc.edu>; Robert A. Ferguson, "Treason, Aaron Burr & the National Imagination," in Michael Tigar and Angela Davis, eds., *Trial Stories* (New York: Foundation Press, 2008), 47–81. See also Gore Vidal's 1973 novel, *Burr* (New York: Random House, 1973).
16. ↪ Ferguson, in Tigar and Davis, eds., *Trial Stories*, 111–12.
17. ↪ *Ibid.*
18. ↪ *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807).
19. ↪ 10 Fed. Cas. 355 (No. 5,420)(C.C.D.S.C. 1808).
20. ↪ Discussed in Tigar, *Thinking About Terrorism*, 167–70.
21. ↪ U.S. Const., art. 1, §2, abrogated by the 14th amendment.
22. ↪ Tigar, *Law and the Rise of Capitalism*, 291–325 (see especially 309–10).
23. ↪ 23 U.S. 6 (1825).
24. ↪ "Transcript of Treaty of Ghent (1814)," <http://ourdocuments.gov>.
25. ↪ 40 U.S. 518 (1841).
26. ↪ *Scott v. Sandford*, 60 U.S. 393 (1857).
27. ↪ 347 U.S. 483 (1954).
28. ↪ See Peter Irons, *Justice At War* (Berkeley: University of California Press, 1993); see also Neal Katyal, "Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases," May 20, 2011 <http://blogs.justice.gov>, for the story of the original 1940s Supreme Court cases and of Judge Marilyn Hall Patel's courageous decision forty years later finding that the government had presented false evidence in support of its legal claims, and setting aside the judgment as to Fred Korematsu. The history of racial bias against Japanese and Chinese immigrants and their descendants is brilliantly told in Jacobus TenBroek, Edward Norton Barnhart, and Floyd W. Matson, *Prejudice, War and the Constitution: Causes and Consequences of the Evacuation of Japanese Americans in World War II* (Berkeley: University of California Press, 1954); Eric Muller, *American Inquisition: The Hunt for Japanese American Disloyalty in World War II* (Chapel Hill: University of North Carolina Press, 2007). The internment, and the denial of meaningful judicial review to its victims, prefigured many of the issues now being raised in the national security state.
29. ↪ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).
30. ↪ *Baker v. Carr*, 369 U.S. 186, 217 (1962), discussed in Political Question.
31. ↪ See, e.g., dissent by Justices Stewart and Douglas from denial of certiorari in *Mora v. McNamara*, 389 U.S. 934 (1967). The Court refused to hear a case brought by draftees seeking to challenge the legality of the Vietnam War. The dissent points up the serious and justiciable issues arising from the prosecution of that war.
32. ↪ *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012).
33. ↪ 175 U.S. 677 (1900), discussed in Tigar, *Thinking About Terrorism*, 167.
34. ↪ *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (2010).

35. ↪ See Nasser al-Awlaki, "[The Drone that Killed My Grandson](#)," *New York Times*, July 17, 2013, <http://nytimes.com>. Drone strike killings are said to focus on persons identified by intelligence reports as "enemies," but the government also concedes that 10–20 percent of those killed are innocent of alleged wrongdoing.
36. ↪ *Al-Aloqi v. Panetta*, — F. Supp. 2d —, 2014 WL 1352452 (D.D.C. 2014).
37. ↪ *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1768 (2006), discussed in Tigar, *Thinking About Terrorism*, 31–36.
38. ↪ *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).
39. ↪ *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).
40. ↪ *Klayman v. Obama*, 957 F.Supp.2d 1 (D.D.C. 2013) (finding surveillance violates the constitution); *ACLU v. Clapper*, 959 F.Supp.2d 724 (S.D.N.Y. 2013) (finding that surveillance is "lawful"). The *Clapper* decision begins by noting that the NSA's program is designed to be virtually limitless in scope, and acknowledges that "such a program, if unchecked, imperils the civil liberties of every citizen." However, the court says that any "checks" should come from the "other two coordinate branches of government."
41. ↪ Tigar, *Thinking About Terrorism*, 150–51. For citations to the cases and relevant history, see *Boyd v. United States*, 116 U.S. 616 (1886). Some of the *Boyd* holding has been undermined in later cases, but the Court's essential analysis of the fourth amendment and the judicial duty to control searches remains valid.
42. ↪ Some small part of this surveillance is approved by a Foreign Intelligence Surveillance Court, established in 1978. That "court" meets in secret, hears only the government's arguments and issues secret rulings. Not surprisingly it has not chosen to limit the scope of government intrusion. See "[Foreign Intelligence Surveillance Court \(FISC\)](#)," <http://epic.org>.
43. ↪ [22 U.S.C. §§ 7421-7433](#), <http://law.cornell.edu>.
44. ↪ Diana Johnstone, *Fool's Crusade: Yugoslavia, NATO, and Western Delusions* (New York: Monthly Review Press, 2002), Jean Bricmont, *Humanitarian Imperialism: Using Human Rights to Sell War* (New York: Monthly Review Press, 2006). See also Michael Bohlander, Roman Boed, and Richard J Wilson, *Defense in International Criminal Proceedings: Cases, Materials and Commentary* (Ardsley, NY: Transnational Publishers, 2006).
45. ↪ 345 U.S. 1 (1953).
46. ↪ Tigar, *Thinking About Terrorism*, 175.
47. ↪ Frankfurter, J., concurring in *U.S. ex rel. Tuohy v. Ragen*, 340 U.S. 462, 473 (1951).
48. ↪ The reference is only for purposes of comparison. The review of grand jury proceedings is far from perfect, and grand jury abuse in the name of "national security" and crime-fighting has been widespread. For an overview of the relevant law, see Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Principles of Criminal Procedure: Investigation*, 4th edition (St. Paul, MN : Thomson/West2004), chapter 15.
49. ↪ *New York Times Co. v. Department of Justice*, 915 F.Supp.2d 508 (S.D.N.Y. 2013).
50. ↪ Seekers of information on government surveillance have also been frustrated. See, e.g., *Electronic Frontier Foundation v. Department of Justice*, 739 F.3d 1 (2014).
51. ↪ — F.3d —, 2014 WL 1569514 (No. 13-422-cv).
52. ↪ See, e.g., *First Amendment Coalition v. U.S. Dep't of Justice*, 2014 WL 1411333 (N.D. Calif. 2014). See also *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013).
53. ↪ The tally of suits and their status is set out in 82 U.S. Law Week 1409 (March 25, 2014).
54. ↪ Rand Paul, "[Show Us the Drone Memos](#)," *New York Times*, May 11, 2014, <http://nytimes.com>.

55. ↪ U.S. Atomic Energy Commission, In the Matter of J. Robert Oppenheimer: Transcript of Hearing Before Personnel Security Board 173 (1954). This was the hearing at which General Groves, Edward Teller and others attacked Oppenheimer's "loyalty" and revealed much about U.S. Cold War strategy. Indeed, the atomic bombs were dropped on Hiroshima and Nagasaki to prevent the USSR from having any role in the post-war events in the Far East; see P.M.S. Blackett, *The Military and Political Consequences of Atomic Energy* (London: Turnstile, Press, 1948), and Gar Alperowitz, et. al., *The Decision to Use the Atomic Bomb and the Architecture of an American Myth* (New York: Knopf, 1995). I reached and documented this conclusion in my senior thesis "Atomic Science and Social Responsibility" (University of California, Berkeley, History Dept., 1962).
56. ↪ See elsewhere in this issue David Vine, "'We're Profiteers': How Military Contractors Reap Billions from U.S. Military Bases Overseas," *Monthly Review* 66, no.3 (July-August 2014): 82—102.
57. ↪ See William Blum, *Killing Hope* (Monroe, ME: Common Courage Press, 2000).
58. ↪ Childe Harold's Pilgrimage, Canto iv. Stanza 10.
59. ↪ For the Argentina case, see Jim Yardley, "[Facing His Torturer as Spain Confronts Its Past](#)," *New York Times*, April 6, 2014. The French case and related matters are discussed at "[Universal Jurisdiction: Accountability for U.S. Torture](#)," <http://ccrjustice.org>. An important caveat: the fact that judicial forums distant from the place of harm may be available does not mean that all such forums are legitimate, or that exercises of their power are proper. For example, the International Court of Justice (ICJ) in 2002 wisely held that Belgium could not proceed against a government official of the Democratic Republic of Congo for alleged human rights abuses in the Congo. See Christian J. Tams and James Sloan, eds., *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 120 et. seq. The court explicitly denied an exception for war crimes and crimes against humanity to existing international law standards of personal immunity. While the ICJ opinion was a sharp reassertion of traditional standards of personal immunity, it is also possible to read the opinion as influenced by the idea that Belgium giving human rights lessons to the Congo was ludicrously inappropriate. This was brilliantly set out in the Separate Opinion of ad hoc Judge Sayeman Bula-Bula ("[Opinion Individuelle de M. Bula-Bula](#)," <http://icj.cij.org>) which persuasively insists on the placing of so-called "universal jurisdiction" in the context of history, and the power of the predominant imperialist jurisdictions. He concludes that the ICJ opinion, properly understood, "should call for greater modesty from the new fundamentalist crusaders on behalf of humanitarianism 'skilled at presenting problems in a false light in order to justify damaging solutions' including a certain trend of legal militancy. "